In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **CHRISTOPHER HENRIQUEZ,** **Defendant and Appellant.**	**CAPITAL CASE** Case No. S089311

Contra Costa County Superior Court
Case No. 961902-4
The Honorable Peter L. Spinetta, Judge

RESPONDENT'S BRIEF

EDMUND G. BROWN JR.
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
GERALD A. ENGLER
Senior Assistant Attorney General
NANETTE WINAKER
Deputy Attorney General
MARGO I. YU
Deputy Attorney General
State Bar No. 105085
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 703-5872
Fax: (415) 703-1234
Email: Margo.Yu@doj.ca.gov
Attorneys for Respondent

TABLE OF CONTENTS

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)

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page

CASES

STATUTES

CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

STATEMENT OF THE CASE

On October 10, 1996, the Grand Jury of Contra Costa County filed an indictment accusing appellant of two counts of premeditated murder (Pen. Code, § 187; counts I & II)[1] and one count of murder of a fetus (§ 187; count III). As to counts I and II, the indictment alleged that appellant personally used deadly and dangerous weapons; a knife and plastic bags and a claw hammer, respectively (§ 12022, subd. (b)). As amended, the indictment also alleged a multiple murder special circumstance (§ 190.2, subd. (a)(3)), one prior strike (§ 1170.12, subds. (b) and (c)), and a prior serious felony conviction (§ 667, subd. (a)). (1 CT 132-134, 136; 18 RT 4696.)

On October 16, 1996, appellant pleaded not guilty and denied the enhancements and special circumstance allegation. (1 CT 140.) On November 20, 1998, appellant moved to quash the jury master list and jury venire. (2 CT 360-567.) On June 2, 1999, Judge Thomas Reardon denied the motion. (2 CT 739-740.)

On October 22, 1999, appellant moved for the court to empanel a separate penalty jury and implement certain jury selection procedures. (3 CT 767-786.) On November 1, 1999, the court held a hearing on appellant's motion and on November 10, 1999, it denied the motion. (3 CT 817, 871.)

On November 15, 1999, appellant's guilty-phase jury trial began. (3 CT 874.) On December 14, 1999, the jury found appellant guilty as charged and found true the attendant allegations and enhancements and special circumstance allegations. (3 CT 954, 4 CT 1423-1424; 14 RT 3342;

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[1] All subsequent references will be to the Penal Code unless otherwise indicated.

18 RT 4696-4697.) On January 21, 2000, appellant's penalty-phase trial began. (4 CT 1236.)

On February 2, 2000, appellant moved for a mistrial; the trial court denied appellant's motion. (4 CT 1243.) On February 7, 2000, the jury sentenced appellant to death. (4 CT 1312, 1314.) On March 29, 2000, appellant moved for a new trial. (4 CT 1322-1323, see also 4 CT 1395-1397.) On April 12, 2000, the trial court denied the motion. (4CT 1410.)

On June 2, 2000, the trial court denied appellant's motion to modify the verdict to life in prison without parole. (4 CT 1423.) On that same date, the trial court sentenced appellant to death. (4 CT 1423-1424; 18 RT 4695-4697.) Appeal is automatic.

STATEMENT OF FACTS

A. Guilt Phase

1. Introduction

Appellant admitted to the police, his mother, and his uncle that on August 12, 1996, he killed his wife Carmen Henriquez, who was eight months pregnant, and their two-year old daughter, Zuri, at their apartment in Antioch, California. Appellant attempted to smother Zuri with a pillow and, when that failed, he retrieved a hammer and struck her head until she died. Appellant cut Carmen[2] with a knife, kicked her in the face and head, tied her ankles together and hands behind her back, tied a plastic bag over her head in an attempt to suffocate her and, when that failed, strangled her to death with his hands. The next day, appellant fled to New York where he was apprehended by police.

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[2] Because many of the witnesses and family members share the same last name, for clarity, respondent refers to most witnesses by their first names.

Appellant admitted to police that he robbed two banks shortly before killing Carmen and Zuri, and that he committed a second degree robbery in 1994, where he badly beat his victim. The defense was that appellant killed Carmen, Zuri, and the fetus in an impulsive act of intimate rage because appellant was afraid that Carmen was going to leave him. The prosecution's theory was that the killings were premeditated and deliberated; that appellant killed Carmen to stop her from talking to friends and family about his bank robberies, and to avoid being sent back to prison.

2. Prosecution case

a. Before the murders

In July 1992, appellant lived in San Francisco and married Carmen. (9 RT 2159; 10 RT 2350.) Sometime after, appellant left Carmen and went to Bronx, New York, where he had grown up. (9 RT 2157, 2160, 2389.) Shortly after, Carmen gave birth to their daughter Zuri. (10 RT 2388-2389.)

In July 1995, appellant moved back to California and reconciled with Carmen. (9 RT 2160; 10 RT 2389.) He, Carmen, and Zuri lived in San Francisco where Carmen worked as a dental assistant. (10 RT 2390.)

In the summer of 1996, Carmen was pregnant with their second child. Appellant, Carmen, and Zuri moved to an apartment in Antioch, California, where Carmen's best friend Angelique Foster lived. (9 RT 2161; 10 RT 2390, 2394.) Angelique introduced appellant to Gregory Morton, who also lived in the same apartment complex, hoping that Morton could help appellant find a job. (9 RT 2195; 10 RT 2391.)

In mid-July 1996, appellant confided in Angelique that his marriage was very difficult, and that Carmen was demanding at times. (10 RT 2393.) A few nights later, appellant called Angelique; he was angry and irritated, and asked if she knew Carmen's whereabouts. (10 RT 2395.) Appellant

told Angelique that Carmen was telling people that he was planning to rob banks. (10 RT 2395.)

From July 19 to 22, 1996, Carmen and Zuri stayed with Carmen's cousin Trenice White. (9 RT 2126-2128.) Carmen seemed abnormal, withdrawn, and stressed. (9 RT 2127.) Carmen told Trenice that appellant was into "heavy stuff." (9 RT 2127-2128.) From about July 22, 1996, to the end of July 1996, Carmen and Zuri stayed with Carmen's father Harold Jones and her stepmother Mona Lisa in Gilroy. (8 RT 1964-1965, 1969-1970.) Jones found out about appellant's plans to rob banks and called appellant at his Antioch apartment; he warned appellant of the consequences to his family. (8 RT 1965-1966.) Appellant was defensive and boisterous and said it was his "business." (8 RT 1966.)

On July 26, 1996, appellant and Morton robbed a California Federal Bank in San Francisco and stole $9,054. (12 RT 2739, 2790.) On July 31, 1996, appellant and Morton robbed a Bank of America on Diamond Heights Boulevard in San Francisco and stole $179,397. (12 RT 2739, 2790.)

Sometime after the robberies, appellant went to his mother's house at 120 Rainbow Court in Vallejo. (9 RT 2158, 2163.) He claimed he had a boxing contract and that his manager had given him an advance. (9 RT 2163-2164.) He told his mother, Deborah Henriquez, that he had told Carmen about the boxing contract, but she did not believe him and thought he stole the money. (9 RT 2167.) His mother asked if it was true; appellant said "no." (9 RT 2167.)

The first weekend of August, 1996, Angelique visited Carmen and Zuri at their apartment and spent the night; appellant was not home. (10 RT 2396-2397.) There was new furniture, a new television, and a new playhouse for Zuri. (10 RT 2397.) The next day, Angelique went to Morton's apartment. (10 RT 2397-2398; 12 RT 2788.) Although she

suspected that Morton and appellant had committed bank robberies, Angelique assured Morton that she was not talking to anyone about "his business." (10 RT 2398.) That evening, appellant called Angelique. (10 RT 2398.) Appellant asked why his name had been mentioned in her conversation with Morton. (10 RT 2399.) He demanded to know what was going on and what Carmen told her. (10 RT 2399.) Angelique told him nothing. (10 RT 2399.)

On or about August 7, 1996, appellant took Carmen, Zuri, his mother, sister, brothers, and a family friend to Disneyland for four days. (9 RT 2131-2132, 2147, 2165, 2168-2169.) They returned to the Oakland airport on August 11, 1996; that night appellant gave his mother $5,000 wrapped in rubber bands and told her that he might be going to New York. (9 RT 2166, 2170.)

On Monday, August 12th, between 11:00 a.m. and 1:00 p.m., Heidi Jones, Carmen's sister-in-law, called Carmen.[3] (8 RT 1960.) Carmen told her, "Heidi, things are very bad right now." (8 RT 1960.) Heidi heard appellant yelling in the background; she spoke to two-year-old Zuri, and then Carmen got back on the phone. (8 RT 1961-1962.) While appellant yelled, Carmen reassured Heidi, "Zuri is okay. I'll take care of it." (8 RT 1961.) Carmen then said, "I better get off the phone," and hung up. (8 RT 1961-1962.) Heidi told Valen that the situation between appellant and Carmen was very bad. (8 RT 1962.) That was the last time Heidi talked to Carmen. (8 RT 1962.) That same day Carmen called Angelique and they spoke briefly; it was the last time Angelique heard from Carmen. (10 RT 2399-2400.)

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[3] Heidi was married to Carmen's brother Valen. (8RT 1960.)

b. After the murders

On the evening of August 12, 1996, appellant's mother talked to appellant on the phone; he sounded troubled. (9 RT 2171.) When she asked him what the problem was, appellant said he could not talk about it over the phone. (9 RT 2171.) Appellant went to his mother's house carrying the same small bag he had carried at Disneyland. (9 RT 2132-2133.) He looked a "bit dazed" and "kind of sick." He was "bobbing" and drunk. (9 RT 2132, 2142, 2147-2148, 2172.) Appellant's mother, his sister Vanessa and younger brothers Francisco and Edwin were home. (9 RT 2174.) Mrs. Henriquez asked what was wrong and asked about Ca[illegible] whereabouts. (9 RT 2173.) Appellant told her that Carmen had taken the baby to Carmen's mother's house. (9 RT 2174.) Appellant threw up and mumbled, "She just doesn't listen. She just doesn't listen." (9 RT 2174.) When appellant cried and called for Zuri, his mother asked, "Where is Zuri?" He answered, "Where is my Zuri at?" (9 RT 2174.) Appellant said over and over, "She didn't listen." (9 RT 2175-2176.) Mrs. Henriquez asked, "Well, what do you mean, she didn't listen?" (9 RT 2176.) Appellant did not answer and complained that his head hurt. (9 RT 2176.) Mrs. Henriquez suggested he lay down and rest; appellant went upstairs to Ms. Henriquez's bedroom and called "Gregory." (9 RT 2176-2177.) After learning that Morton was not home, appellant went into his brothers' room and slept on the floor. (9 RT 2177.)

Early the next morning, appellant asked his mother, "[C]ould you just stay home?" Mrs. Henriquez said she needed to go to work. (9 RT 2177.) Appellant asked, "[w]ell, could – could you just stay – stay home?" and "[c]an you just be here for me?" Mrs. Henriquez replied, " I'm always here." (9 RT 2177.) At 6:00 a.m., appellant took a taxi home. (9 RT 2134-2135, 2178.)

Sometime before 8:00 a.m., appellant called his mother who was still home. (9 RT 2178.) Mrs. Henriquez told him to meet her at her workplace to have lunch and talk. (9 RT 2178-2179.) At her 9:30 morning break, she called home and instructed Edwin to tell appellant that she would be home at 4:00 p.m. and they could talk then. (9 RT 2179.) Edwin replied that appellant was there at home with him; appellant got on the phone. (9 RT 2180.) He sounded urgent. (9 RT 2180.) Mrs. Henriquez asked, "Well, what did you do? Did you cheat on your wife or something?" Appellant said "No." (9 RT 2180.) Mrs. Henriquez replied, "Well, if it's not that, then what more horrible thing could it be that you need to talk to me about?" (9 RT 2180-2181.) When she asked about Carmen, appellant was very quiet. (9 RT 2181.) Mrs. Henriquez said, "Well, you know, I called," but Carmen was not there. (9 RT 2181.) Appellant said, "Well, she's not going to return your call." (9 RT 2181.) Mrs. Henriquez asked, "Why? Is she still with her mother?" (9 RT 2181.) Appellant said, "No." Mrs. Henriquez asked, "Why isn't she going to?" He answered, "Well, because she can't." (9 RT 2181.) Mrs. Henriquez inquired, "Well, what?" Appellant answered, "Because you know, Carmen is dead. I killed Carmen." (9 RT 2181.) Mrs. Henriquez asked, "where is Zuri?" Appellant said he killed Zuri too. (9 RT 2181.) Mrs. Henriquez said she would come right home. (9 RT 2181.)

Mrs. Henriquez, in a state of disbelief, first went to her sister Chryisse Stewart's house to think. (9 RT 2182.) She told Chryisse what had happened, and asked her to call Chryisse's husband Daniel. (9 RT 2182; 10 RT 2348, 2351.) Daniel immediately left work and went home; when he arrived, Mrs. Henriquez told him what had happened. (9 RT 2183; 10 RT 2352.) The two went to Mrs. Henriquez's house, but appellant was not there. (9 RT 2183; 10 RT 2352.) Daniel went to look for appellant, and found him walking back to the house. (10 RT 2352-2363.) Daniel waved

for him to get into the car. (10 RT 2353.) Appellant was "quite cocky" and said, "What's up?" Daniel answered, "I'm here to support you." (10 RT 2352-2353.) Daniel drove appellant back to his mother's house. (10 RT 2354.)

Mrs. Henriquez asked appellant what had happened. (9 RT 2184; 10 RT 2354.) Appellant explained that he and Carmen argued. (9 RT 2185.) He said, "She just wouldn't stop – she talked too much. (9 RT 2185.) She wouldn't stop talking. She wouldn't listen." (9 RT 2185.) Mrs. Henriquez said, "Wait. What happened?" (9 RT 2185.) Appellant explained that the evening they came home from Disneyland, the couple had argued. (9 RT 2185.) Mrs. Henriquez said, "But everything seemed to be okay between the two of you. What happened?" He answered, "It was all an act. It never was okay." (9 RT 2185.) He said the next day, Monday, he woke up and heard Carmen talking on the telephone. (9 RT 2185.) He said, "She just, you know, didn't listen. She just didn't know how to stop talking about things." (9 RT 2185.) He said they constantly argued, and he was angry because she was talking about their business. (9 RT 2185.) Appellant said that at 3:00 in the afternoon, he started choking Carmen and Zuri woke up. (9 RT 2185-2186.) Appellant then changed his story and said, "[n]o, I hit Carmen with the hammer, and while I was hitting her, Zuri got in the way." (9 RT 2186.) Mrs. Henriquez thought appellant was confused and did not know what he was saying. (9 RT 2187.) She said, "You need to go to the police. In fact, I will go with you to the police. Because, you know, this is terrible. So, I will go with you. You don't have to worry. I will go with you and, you know, you can tell them what you have done." (9 RT 2187.) Appellant refused. (9 RT 2187-2188.) Mrs. Henriquez asked where Carmen and Zuri were; appellant said they were in the apartment. Mrs. Henriquez felt sick. (9 RT 2188.)

Mrs. Henriquez went outside for air; Daniel followed and the two sat on the front steps. (9 RT 2188; 10 RT 2355.) She said, "[appellant] is not going to turn himself in. He is not going to do that." (9 RT 2188.) Appellant came outside and joined them. (9 RT 2188; 10 RT 2355.) Appellant said he would not turn himself in because he was on parole and, if he did, his life would be over. (9 RT 2188-2189.) He repeatedly complained that Carmen would not listen. (9 RT 2189.) He stated that he did everything for her, that he was tired of struggling and working hard and not getting anywhere. (9 RT 2189; 10 RT 2355.) Daniel encouraged appellant to do the right thing and turn himself in. (10 RT 2355, 2361-2362.) Appellant stated that he would never be in a cage again and would fight so he would not be taken in. (10 RT 2355-2356.) Appellant cried and said he felt bad about what happened. (9 RT 2189.) He said he missed Zuri and wanted his little girl. (9 RT 2189.) He laid back and then sat back up and said, "oh, by the way, I robbed a bank." (9 RT 2189.) Daniel started crying. (9 RT 2189.) Mrs. Henriquez said, "I can't stay here any longer. I have to go. Because you know what, I feel like I'm going to pass out. I don't believe what I'm hearing from my ears. I can't believe this. I can't believe this, Christopher. This is just too much." (9 RT 2189-2190.) Concerned for Mrs. Henriquez, Daniel told appellant, "Don't say anymore." (10 RT 2356.)

After Mrs. Henriquez went down the street to her girlfriend's house, Daniel and appellant continued talking. (9 RT 2190;10 RT 2356.) Appellant said he told Carmen he was going to rob a bank. (10 RT 2359.) Carmen, upset, told her parents, who called appellant on the phone and cursed at him. (10 RT 2359.) Appellant said that when the family returned from Disneyland, Carmen continued talking about his business to her friends, which made him furious. (10 RT 2360.) Appellant said he could not believe he killed his own daughter. (10 RT 2357.) He blamed Carmen

because she "wouldn't stop blabbing her mouth." (10 RT 2357.) Daniel told appellant they could not just leave Carmen and Zuri's bodies at the apartment. (10 RT 2357.) Appellant responded, "Why not? They are dead." (10 RT 2357, 2359-2361.) Daniel stood up and said, "We have to go to the authorities. I will go find your mother so that you can say good-bye to her, and then we have to go." (10 RT 2370.) Appellant refused. (10 RT 2370.) Appellant argued that if Daniel spent a few minutes in appellant's place, he might have more empathy. (10 RT 2371.) Daniel left and went to get Mrs. Henriquez; when the two returned to Mrs. Henriquez's house, appellant and his bags were gone. (9 RT 2191; 10 RT 2371-2372.) Mrs. Henriquez went upstairs to her bedroom; spread across her bed were pictures of her granddaughter, Zuri. (9 RT 2191.)

Close to noon, on August 13, 1996, taxi cab driver Niranjan Dhaliwal picked up appellant on Rainbow Court in Vallejo. (8 RT 1955; 10 RT 2386; 10 RT 2449.) Mr. Dhaliwal drove appellant to the United Airlines terminal at the Oakland airport. (8 RT 1955-1956.)

c. The police investigation

Pursuant to Mrs. Henriquez's notification of the murders, at 2:15 p.m., on August 13, 1996, Antioch police officers, Orman and Welch, and two other officers drove to appellant's apartment at 1000 Claudia Court, number 67. (10 RT 2420-2422.)

Detective Orman banged on the front door and announced that they were police officers; nobody answered. (10 RT 2422, 2489.) Ultimately, Detective Orman kicked in the door. (10 RT 2422, 2490.) In the west bedroom, wrapped in a blanket, the police found Carmen laying face down; her ankles were bound and her hands were tied behind her back. (8 RT 1924; 10 RT 2422-2423, 2489.) Sergeant Welch saw a large box with a small hand sticking out; he pulled back a blanket and confirmed it was a little girl, Zuri, who was dead. (8 RT 1903; 10 RT 2423-2424.)

Later that afternoon, Mrs. Henriquez told police she thought appellant was going to New York. (9 RT 2193; 10 RT 2372, 2425-2426.) Mrs. Henriquez also gave police pictures of Zuri and $4,900 cash, which appellant had given her. (10 RT 2427.)

Appellant's younger brother Francisco told police that about a month before the murders, appellant told him that if Carmen "didn't stop talking," he was going to kill her, and that Carmen "doesn't know when to keep her mouth shut." (9 RT 2144-2147.)

When police processed appellant's apartment for evidence, they found the following: in the living area, there was a knife and a bottle of carpet cleaner on the counter. (9 RT 2029.) There were blood stains on the air conditioner grate and underneath on the wall, which smelled like the carpet cleaner. (9 RT 2030, 2048-2051, 2078-2079.) There were blood smears and bloody prints on the sofa, a large blood stain on the carpet and pooled blood consistent with where a person's injured head had lain. (9 RT 2031, 2050, 2102-2103.) There was no blood spatter on the ceiling or on the wall above six feet, indicating that the victim was close to the ground when struck. (9 RT 2032, 2102-2103.)

In the west bedroom, wrapped in a bed cover was Carmen's dead body. (9 RT 2034, 2047-2048, 2093) The right side of Carmen's face was swollen and bloody and a plastic bag was near her mouth. (9 RT 2050-2051.) Under Carmen's head, there was a pool of blood and blood stains on the carpet. (9 RT 2034, 2099.)

On top of a mattress which was on the floor, was a large box containing Zuri's body; there was also a pair of child's underpants, a plastic bag, a plastic playhouse, and a child's table turned upside down. (9 RT 2034, 2047, 2051-2053, 2077, 2098-2099.) The playhouse and mattress were blood- stained. (9 RT 2034-2035, 2053.) On the west wall there was blood spatter, mostly near the floor, and consistent with a victim lying on

the mattress when struck. (9 RT 2034, 2043-2045, 2053, 2078-2079, 2096-2098.) On the lower part of the north wall, there were blood stains. (9 RT 2034, 2044-2045, 2079.) On the east wall, near the bedroom door, there were indentations in the sheetrock about five feet above the floor, consistent with a striking hammer. (9 RT 2052-2053.) Blood dots on the same wall were consistent with a raised bloodied instrument or fist. (9 RT 2098.) Appellant and Carmen's marriage certificate was in the bathroom garbage can. (9 RT 2062.)

At the victims' autopsies, Corporal Barakos collected the telephone cord that bound Carmen's wrists (9 RT 2063), two blue shoelaces that bound her ankles (9 RT 2064), a knotted plastic bag that was next to Carmen's face (9 RT 2064-2065), a bloodied hammer that was inside the box with Zuri's body (9 RT 2066-2067), and three boxes of bloodied clothes, toiletries and shoes (9 RT 2067).

d. Appellant's admissions

On August 13, 1996, at 11:40 p.m., Port Authority police detective John Trotter and five other officers went to the United Airlines terminal at La Guardia airport in New York. (10 RT 2430-2431.) At the jet way, Detective Trotter approached appellant and took him into custody. (10 RT 2432-2434.) Detective Trotter and another officer advised appellant of his *Miranda*[4] rights. (10 RT 2434-2435.) Detective Trotter asked appellant for consent to search his backpack, black suitcase, and black nylon bag. (10 RT 2437-2438.) Appellant signed a written consent form. (10 RT 2439.)

Detective Trotter informed appellant that they arrested him because they were investigating the murder of his daughter and wife in California. (10 RT 2440-2442.) While the police were waiting for appellant's luggage, appellant admitted that he had argued with his wife, and then killed her and

[4] *Miranda v. Arizona* (1966) 384 U.S. 436.

their daughter. (10 RT 2440-2441.) Appellant said that his wife went to the bank and he went into his daughter's bedroom and suffocated her with a pillow. (10 RT 2441.)

At 2:15 a.m., Detective Trotter, in the presence of Detective Loesch, re-advised appellant of his *Miranda* rights at a nearby police precinct. (10 RT 2444.) Appellant gave the following signed written statement. (10 RT 2441-2442, 2444-2446.)

> On Thursday, [] July 31st, 1996, at between 11:00 a.m. and 12:00 p.m. at the location of around Glen Park, San Francisco, I entered a bank. I acted alone. I used my wife's Ford Escort, maroon.
>
> I told my wife Carmen [] about the bank robbery plan. She got mad at me and left and went to her mother's house. I talked to my wife at length about the robbery. After a few days, I asked my wife if she wanted to take a trip. We did. We went to Disneyland. We spent about six days there.
>
> I gave my mother $15,000. I spent about $50,000 in jewelry. At Disney I spent around five or $6,000. I took my mom, a friend of hers, Janelle, my two younger brothers, Edwin and Francisco, to Disneyworld [*sic*]. My mother thought I got the money from boxing. We returned from Disneyworld [*sic*] on or about August 11th, 1996, at about 11:00 p.m.
>
> I laid low for about five days prior to leaving for Disneyland.
>
> On or about August 12th, 1996, I started arguing with my wife. She left the house to cash a check. After my wife left, I suffocated my daughter Zuri, who had been playing. I brought her over to her bed and put the pillow over her face until she was not breathing anymore. I covered Zuri with a sheet completely, and left her there.
>
> [W]hen my wife returned, I took the money from her and just started beating her. She is seven months pregnant. I put a plastic bag over her face and kept it there until she was dead. I dragged her body into my daughter's room. I left the body of my wife on the floor and covered her with a quilt.

I was going to put my daughter's body in an . . . old cardboard box to get rid of it. But I decided not to.

After I killed my daughter and wife, I went to my mother's house and stayed there until 7:30 a.m. Tuesday, when I left.

I went back to my house. Both bodies were still there. Not moved. I picked up my duffel bag and all my clothes, called a taxi, and I went back to my mother's house on Tuesday, August 13th, 1996, at around 9:30 a.m.

I called my mother at work, and told her what I had did. She got really excited and said she would be right there. She arrived with her sister's husband named Daniel. Both of them were talking to me. My mother was very upset. My mother kissed me and walked away. Daniel told me to turn myself in.

About 11:00 a.m. on August 13th, 1996, I called the cab and went to Oakland Airport and purchased a one-way . . . ticket to New York.

I came here [New York] to see guys I knew from jail. I purchased a United ticket with a changeover in Chicago.

After I killed my wife and daughter, I wrapped a cord around them. I tied her hands and legs. I don't know why I tied her up. I only tied my wife up, and not my daughter.

(10 RT 2447-2449.)

Early that afternoon, Detective Trotter and Sergeant Welch re-advised appellant of his *Miranda* rights and interviewed him a second time. (10 RT 2449-2451.) Detective Trotter told appellant that his accomplice in California admitted to the police that he and appellant committed two bank robberies together. (10 RT 2452.) Thereafter, appellant admitted that he robbed another bank in San Francisco two to four weeks before the July 31st bank robbery he had already admitted, and that Morton was his accomplice in both bank robberies. (10 RT 2452.)

Appellant also told police that he killed his daughter by striking her multiple times in the face and head with a hammer. (10 RT 2453.) He threw the hammer and his daughter's body into a box in her bedroom. (10 RT 2453.) Appellant stated that when his wife returned home, he immediately beat her, but did not recall striking her with a hammer. (10 RT 2453.) After he killed his wife, he wrapped her body in a quilt. (10 RT 2453.) Then he tied up her hands and feet. (10 RT 2453.) He planned to move the bodies. (10 RT 2453.) Police asked why he killed his wife. (10 RT 2453.) Appellant said he was sick and tired of always finding out about things after his wife. (10 RT 2453.)

Detective Trotter saw no injuries on appellant. (10 RT 2454.) Inside appellant's backpack Detective Trotter found $49,574.75 in cash. (10 RT 2456-2457, 2468.) Detective Trotter also found a pair of lady's tan shoes, appellant's three Social Security cards, his boarding passes and airline tickets, and a Bank of America credit card. (10 RT 2455-2456, 2467.) Appellant also had three chains, three pairs of earrings, one ring with white stones, a Rolex watch, a Mickey Mouse watch, and a bracelet. (10 RT 2457-2458, 2467-2468.) According to Detective Trotter, appellant was very calm during both interviews; he did not cry or show any outward emotion. (10 RT 2466.)

Detective Orman and Sergeant Welch flew from California and met appellant at the jail in New York City. (10 RT 2429, 2492.) Detective Orman read appellant his *Miranda* rights, which appellant waived, and conducted a taped interview. (10 RT 2429, 2492-2496; 4 Supp.CT of Exhibits pp. 937-976.)[5]

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[5] "4Supp.CT" references the "Clerk's Supplemental Transcript On Capital Appeal Photocopies Of Exhibits Requested By Appellate Counsel."

Appellant acknowledged that he confessed to robbing two San Francisco banks in July with Gregory Morton. (4 Supp.CT 939.) Appellant stated that he told Carmen he was going to commit robbery and that she told him not to. (10 RT 2521-2522.) Carmen told her mother and father, other family members and friends. (4 Supp.CT 939.) Appellant said he was concerned that Carmen also told them that he was abusing her. He was worried his parole officer would find out or someone would "snitch him out" to the police. (10 RT 2509-2510, 2517-2518; 4 Supp.CT 940.) Morton also was concerned that Carmen would implicate him (Morton). (4 Supp.CT 940.) After the first bank robbery, Morton told appellant to "try to keep your wife's mouth shut." (4 Supp.CT 940-941.)

Appellant stated that on Monday morning, August 12, 1996, he woke up mad and confused. (4 Supp.CT 937.) He and Carmen argued "about some stuff," including her telling people about the bank robberies. (4 Supp.CT 938-939, 960-963.) Appellant indicated he knew he was going to do something to his daughter and that he first had to separate Carmen and Zuri. (4 Supp.CT 971-972.) Appellant sent Carmen to the bank to cash her disability check. (4 Supp.CT 946, 949-950, 967.) Five minutes after Carmen left, he went into Zuri's room and started suffocating her. (4 Supp.CT 946-949.) The "baby started crying" so he knew she was still conscious. (4 Supp.CT 947.) Appellant went to his room and retrieved a hammer he kept under his bed. (4 Supp.CT 946-951.) Ten seconds later, appellant returned to Zuri's room. (4 Supp.CT 947.) Zuri was lying on her back and appellant could see her eyes. (4 Supp.CT 948.) He struck Zuri with the hammer; he did not know how many times. (4 Supp.CT 947-949.) Appellant thought it took a couple of minutes to kill Zuri. (4 Supp.CT 949.) Appellant covered the child and shut the bedroom door. (4 Supp.CT 950.)

Almost immediately, Carmen returned. (4 Supp. CT 950-951.) Appellant stood at the door and stopped her, and took her to the living room.

(4 Supp.CT 951.) When he realized what he had done to Zuri, he ran into his bedroom and looked out the window for police, but did not see them. (4 Supp.CT 954, 957.) He returned to Carmen; when she looked into appellant's eyes and saw blood on him, she screamed and tried to run out the sliding door. (4 Supp.CT 954-955.) Holding a sharp kitchen knife, appellant pulled Carmen away from the sliding door and tried to stab her in the neck and slice her face. (4 Supp.CT 952-957.) Carmen raised her arms to protect her face and appellant cut her arms instead. (4 Supp.CT 956-957.) Appellant told Carmen he had killed Zuri. (4 Supp.CT 952-953, 957.)

Appellant knocked Carmen down and pulled her over to the sofa, telling her to calm down, and everything would be fine. (4 Supp.CT 955, 958.) Appellant kicked Carmen in the face and head, causing her face to swell. (4 Supp.CT 958-959.) Appellant told Carmen he loved her and wished that she talked to him about her thoughts. (4 Supp.CT 959.) Carmen told appellant she knew he was going to kill her and asked him to do it quickly. (10 RT 2518.) Appellant went into the bedroom and brought back a shoelace and telephone cord, which he used to tie Carmen's hands and feet so she could not escape. (10 RT 2518-2519.) Appellant debated whether to kill her, and then decided that since he had already killed his daughter, he would kill his wife. (10 RT 2519.)

Appellant went to the kitchen and retrieved plastic shopping bags. (10 RT 2520.) He put a bag over Carmen's head and wrapped it tightly around her neck. (10 RT 2520.) He waited for some time. (10 RT 2520.) The bag did not seem to work, so he stood over Carmen, grabbed her neck and made a tight seal with the bag, and choked her until she stopped moving. (10 RT 2520.) He wrapped Carmen in a blanket and moved her into the bedroom with Zuri. (10 RT 2520.) He removed the plastic bag from Carmen's head, hoped she was breathing, but she was not. (10 RT 2520.)

Next, appellant tried to clean the apartment; he threw towels and blankets over the blood, and used cleaner and tried to wipe blood off the wall. (10 RT 2522-2523.) He knew what he did was wrong and felt bad; when he killed Carmen, he thought the fetus might survive, but deep down, he knew he was killing his unborn child. (10 RT 2523-2524.) He thought about torching the apartment. (4 Supp.CT 943.)

About 20 minutes later, he went to Morton's apartment and told Morton what he did. (10 RT 2512; 4 Supp.CT 943.) Morton told appellant to run. (10 RT 2512; 4 Supp.CT 943.) Appellant and Morton went to appellant's apartment. (10 RT 2512; 4 Supp.CT 943.) Appellant thought Morton did not see, but smelled the bodies. (10 RT 2513.)

e. The autopsies

On August 14, 1996, forensic pathologist Dr. Arnold Josselson, conducted three autopsies at the Martinez coroner's office. (8 RT 1900, 1902.) Inside a large cardboard box, Dr. Josselson found a child identified as Zuri Henriquez. (8 RT 1903, 1906.) She wore no clothes and was wrapped in two sheets; one was a Pocahontas bed sheet with bloodstains and darker stains resembling stool. (8 RT 1904-1095.) Also inside the box were a claw hammer [with a claw and a blunt face on opposite ends], white material with dark stains resembling stool, and more bedding. All items were blood stained. (8 RT 1903-1905, 1915.)

Zuri had suffered a "great deal" of hemorrhaging to her eyes and eyelids consistent with blunt force blows to the head, or death by strangulation or smothering. (8 RT 1907-1908.) There was also blood around her nose, mouth, and in each ear. (8 RT 1908.)

Zuri's skull, upper face bone, and upper jaw bone were fractured. (8 RT 1914-1916, 1919.) Dr. Josselson posited that the fractures were the result of a "considerable amount of force" such as a blow of a hammer, and

that the blows to the skull caused brain damage and were lethal. (8 RT 1908-1909, 1916.)

There also were non-lethal bruises, scratches, and lacerations consistent with being struck with both the claw and blunt ends of the hammer. (8 RT 1914-1916.) Zuri suffered abrasions and lacerations on the right temple, on both cheeks, above both eyebrows, on the forehead, and on the nose and lower lip, and skin tears on the right corner of the mouth and on the lower lip. (8 RT 1914-1919.)

Two small bruises on the front of Zuri's neck were consistent with fingers pressing her neck in an attempt to suffocate or strangle her. (8 RT 1913.) A bruise on her chest was consistent with fingers or a hand applying pressure to smother or suffocate her. (8 RT 1913, 1919.) Dr. Josselson observed scratches up to two inches long on her upper chest, left collar bone, back left hand, and front left wrist, consistent with blows from the claw end of the hammer. (8 RT 1919.) Dr. Josselson testified that the hemorrhaging to Zuri's eyes and the fingerprint marks on her throat and chest were consistent with the statement "I started to suffocate her. (8 RT 1938-1939.)

Pursuant to an internal examination of Zuri's body, Dr. Josselson found a large area of bleeding on both sides of the scalp, and multiple skull fractures underneath the scalp. (8 RT 1920.) There was "profuse blood over the entire surface of the brain from the blunt force injury," as well as blood in the cavities of the brain. (8 RT 1920.) The cause of Zuri's death was blunt force injury to her head. (8 RT 1921.)

Pursuant to his autopsy on Carmen, Dr. Josselson noted that Carmen was "obviously" pregnant. (8 RT 1924.) Her clothing was bloodstained; her hands were tied behind her back with a white cord connected to a telephone jack, and her feet and ankles were bound with two black and green shoelaces. (8 RT 1922-1924.) Dr. Josselson opined that her wrists

were bound before death based on bruising around the wrists which indicated that her heart was pumping blood when she was bound. (8 RT 1932.)

There was hemorrhaging on Carmen's eyelids and eyes, consistent with manual strangulation. (8 RT 1924.) There were also bruises on the inside of her lips, hemorrhaging on her gums, bruises beneath her right eyelid, and on her nose, and above her right eyebrow. (8 RT 1925-1926.) Her facial injuries were consistent with blunt force trauma from fists or feet, but were not lethal. (8 RT 1931-1933.) Based on the hemorrhaging, Dr. Josselson stated that the blows to the head most likely occurred before death. (8 RT 1934-1935.) There were multiple linear scratches on the back of her upper and lower arms, consistent with defense wounds possibly made with the tip of a knife. (8 RT 1926-1928.)

Pursuant to an internal examination of Carmen's body, Dr. Josselson noted two large, non-lethal bruises on both sides of the scalp, and hemorrhaging on the neck muscles indicative of manual strangulation. (8 RT 1928-1929.) Dr. Josselson opined that Carmen died from manual strangulation. (8 RT 1931.)

Inside Carmen's reproductive system was a male fetus in its eight-month gestation, weighing four pounds. (8 RT 1930-1931.) The fetus was completely normal. (8 RT 1930.) The cause of death to the fetus was lack of oxygen due to his mother's death. (8 RT 1931.)

3. Defense case

The defense argued that the murders were intimate impulsive "rage" killings, and were not deliberate or premeditated. Psychologist Dr. Donald Dutton, a domestic violence expert, testified. (12 RT 2792-2796.) Dr. Dutton testified that based on his studies, there are salient features of an impulsive rage killing, which constitutes the majority of spousal homicides. (12 RT 2798.) The characteristics include a history of domestic violence; a

history of separations and reconciliations; and "overkill," which is a "sort of clumsiness" and "number of strikes or blows that are more than sufficient to kill a person" "driven largely by an explosion of rage" by the perpetrator. (12 RT 2798-2799.) Dr. Dutton explained that the rage is related to the man's ego deficiencies developed early in life due to being raised in a dysfunctional family. (12 RT 2799-2800.) The man develops a personality flaw where he establishes an unnatural dependency on his partner, and masks the dependency by controlling his partner's space and time. (12 RT 2807-2808.) When his spouse leaves the relationship, the man is incapable of withstanding the separation; the overwhelming impact generates into a high incident of the impulsive rage-type spousal homicide. (12 RT 2808.) Dr. Dutton testified that the spousal killer's behavior in public has no relationship to his behavior in an intimate relationship. (12 RT 2800-2801.)

Dr. Dutton testified that prior to an impulsive rage-type spousal homicide, there is a tension buildup where the man is convinced that his spouse is to blame for his emotional turmoil and the man becomes withdrawn and irritable. (12 RT 2801-2802.) Dr. Dutton testified that just prior to or during the homicidal act, the man has a spotty recollection or complete amnesia as to the transpiring events. (12 RT 2802-2804.) Dr. Dutton stated that in the post-homicidal state, the man is stunned and completely confused. (12 RT 2804.) The risk rate for spousal homicide is six times more likely where the man fears his spouse's departure or a marriage breakup. (12 RT 2806-2807.)

The cyclical impulsive batterer, who blows up, tends to be violent predominantly within the home, tends not to have a history of violent criminal behavior and has a negative attitude toward violence. (12 RT 2823-2824.) He typically does not have the wherewithal to sit and plan methodically. (12 RT 2825.) In contrast, the instrumental batterer has a

goal-directed act. (12 RT 2827.) He tends to be violent both inside and outside the home, and has a history of antisocial behavior, such as car theft, burglary or violence. (12 RT 2823.) He believes it is acceptable to use violence to get what he wants, and associates with other criminals. (12 RT 2824.) He also receives pleasure from hurting other people, either physically or emotionally. (12 RT 2825.) These characteristics are important factors for Dr. Dutton to consider in his studies to determine a type of spousal killer. (12 RT 2825-2826.) Dr. Dutton explained there are some overlaps in the characteristics. (12 RT 2826.)

Dr. Dutton added that he considers whether the spousal homicide is planned, if strategy is used, and if the killer expresses beforehand that he wanted to kill his spouse. (12 RT 2827-2828.) Dr. Dutton analyzes the method of killing, such as whether there was "overkill." (12 RT 2828-2829.) Dr. Dutton also considers the batterer's past conduct, such as whether he has a history of violent behavior, if the violence is centered predominantly within or outside the relationship, and if he has a history of other antisocial behavior. (12 RT 2833.) Dr. Dutton takes into account the batterer's relationship with his spouse, who the batterer associates with, his interests, and statements made by close family members and friends of the victim. (12 RT 2831, 2834.)

Psychiatrist Dr. Michael Gamble admitted Carmen Jones into Alta Bates Herrick Hospital on July 27, 1996. (12 RT 2935-2936.) He treated Carmen and discharged her on July 30, 1996. (12 RT 2936.) Dr. Gamble instructed Carmen with options for follow-up treatment including contact numbers for Kaiser and the Battered Women's Alternatives. (12 RT 2937-2940.)

B. Penalty Phase

1. Prosecution case

a. Other-crimes evidence

(1) July 31, 1996—bank robbery

On Wednesday, July 31, 1996, at about 11:00 a.m., a Loomis armored car made its routine large delivery of cash into the vault compartments at the Diamond Heights branch of the Bank of America in San Francisco. (14 RT 3534-3535.) The ATM bag contained $160,000 in twenty dollar bills. (14 RT 3535.)

Ten minutes later, appellant and Morton, both wearing sweatshirts, jeans, and knit ski masks, came "barreling in, yelling." They ordered everyone to lie down on the floor. (10 RT 2452; 14 RT 3536, 3538, 3572; 14 RT 3586-3601; 15 RT 3692-3693.) Appellant jumped over the tellers counter and ordered teller Mary Chan to lay on the floor, which she did. (14 RT 3572-3573.) He grabbed another teller, Natalie, by the arm and threw her onto the floor, and then grabbed Ms. Chan's left arm and pushed her and ordered her to get "big money" from Natalie's drawer. (14 RT 3573-3576.) Ms. Chan took the "big money" from the bottom drawer and put it into his bag. (14 RT 3576.) Appellant pulled Ms. Chan to her own station and again to Natalie's station. (14 RT 3572-3578.) He then ordered Ms. Chan to lay down on the floor, which she did. (14 RT 3579-3580.)

Meanwhile, Morton, holding a gun, approached Loretta Fraser, the acting branch manager, and ordered her, another employee Christian, and a customer to crawl into the center lobby and lay face down with the rest of the customers. (14 RT 3536-3537, 3539, 3541.) Morton yelled, "Branch manager, open the vault." (14 RT 3541.) He then yelled, "[h]urry up. You are stalling. I'm going to start shooting your employees. Don't mess with me, lady." (14 RT 3542.) Ms. Fraser answered, "The keys are in my desk.

I'm just going to get the keys." (14 RT 3542.) Ms. Fraser went to her desk drawer and took out the keys. (14 RT 3542, 3578.) Frightened, she walked in the wrong direction. (14 RT 3543.) Morton yelled and appellant, still holding a gun, redirected and followed Ms. Fraser to the vault. (14 RT 3542, 3545.) Ms. Fraser explained, "[i]t takes two keys to open the vault. I need Christian's keys." (14 RT 3544.) The robber answered, "[y]ou're stalling, lady. I'm going to start shooting people." (14 RT 3544.) Ms. Fraser yelled, "Christian, I need your keys. Get them. Bring them here." Once Ms. Fraser got the keys, she opened the vault and gave a bag of money to appellant. (14 RT 3544.) He took the bag and ordered everyone back onto the floor (14 RT 3544); the men yelled "[n]obody move" and left. (14 RT 3545.)

(2) July 26, 1996 – bank robbery

On Friday, July 26, 1996, at 10:20 a.m., appellant jumped over the counter at the California Federal Bank at 2600 Ocean Avenue in San Francisco, wearing a black ski mask. (10 RT 2452; 12 RT 2739, 2790; 14 RT 3491-3492, 3512-3513, 3515, 3525, 3582, 3586-3601.) He shouted, "get down on the floor. Get down on the floor." (14 RT 3493, 3500, 3515.) Tellers Amanda Woo and Elsa, and acting manager Patricia Hulting laid face down on the floor behind the counter. In the lobby, employee Tanya Ho crawled under her desk. (14 RT 3493, 3500, 3512-3513, 3523, 3525.)

Gregory Morton, also wearing a mask, stood at the front door. (14 RT 3494.) He repeatedly yelled, "[g]et down. 30 seconds before I start shooting. More money. Large bills." (14 RT 3494-3495, 3501, 3518, 3525-3526.)

Appellant stood behind the counter, and holding an object that looked like a gun, demanded that Ms. Woo "[g]et up." (14 RT 3493.) He ordered her to take the money out of the drawer, but specifically instructed her not to include bait money. (14 RT 3493-3499, 3516-3517, 3519.) Ms. Woo

nervously threw the money into appellant's bag. (14 RT 3494, 3496, 3498.) When appellant grabbed the bait money out of the drawer, Ms. Woo warned him, but he ignored her. (14 RT 3496-3497.) He wanted "more money" and demanded that she take all the money from the other tellers' drawers. (14 RT 3497-3498, 3517.)

Appellant hit Ms. Hulting's arm and said he wanted big bills and keys to the vault. (14 RT 3500-3502.) He pushed Ms. Woo to the vault. (14 RT 3502, 3503, 3517.) Ms. Woo unlocked and opened the gate and her drawer inside the vault, but she did not have keys to the other drawers. (14 RT 3503-3504.) She removed money from her drawer and put it into his bag. (14 RT 3505.) Appellant repeatedly demanded, "big bills. Big bills, where are they?" Ms. Woo said, "I don't have anymore." (14 RT 3506-3507, 3509.) He told Ms. Woo to "get down," and she complied. (14 RT 3507-3508.) Morton, who was at the front door, yelled, "[t]ime's up." The two men ran out of the bank. (14 RT 3508, 3520.)

(3) 1994 robbery of Frank Pecoraro

On January 9, 1994, Frank Pecoraro lived at 28th Street and Third Avenue in New York City. (14 RT 3611.) At 4:00 a.m., Pecoraro walked back from the corner grocery store toward his apartment. (14 RT 3611.) On the way, appellant approached from behind. (14 RT 3612, 3615-3618.) He asked if the bar on the corner was still open; before Pecoraro could answer, appellant punched him in the face and knocked him down a flight of metal stairs into a basement area. (14 RT 3613-3614.) He stood over Pecoraro, punched him in the face, kicked him in the body, and repeatedly said, "[g]ive it up. Just give it up." (14 RT 3614.) Appellant then took Mr. Pecoraro's wallet and fled when another tenant intervened. (14 RT 3615.) As a result of the robbery, Mr. Pecoraro suffered two black eyes. (14 RT 3614-3615, 3617.)

(4) 1994 robbery-murder of Jerome Bryant

On January 2, 1994, at about 2:00 a.m., New York City Police Officer John Reilly was in his patrol car in the South Bronx. (15 RT 3679.) Officer Reilly was stopped by pedestrians who claimed that someone had been thrown off a bridge. (15 RT 3679, 3743, 3745.) Officer Reilly followed them to the McCoombs Dam Bridge. (15 RT 3679, 3745, 3755.) The bridge was about three stories high. (15 RT 3680.) Under the bridge, Officer Reilly saw a black male covered in blood and a blue hat. (15 RT 3683-3684, 3745.) The man could not move or speak, but was still breathing. (15 RT 3680.) Officer Reilly could not find the man's wallet or identification. (15 RT 3680.) An ambulance drove the man to the hospital where he died. (15 RT 3680.) One of the pedestrians described two young Hispanic males in dark clothing struggling with the victim on top of the bridge. (15 RT 3689-3690, 3746, 3756.)

The pathologist who conducted the autopsy on Bryant opined that the cause of death was multiple blunt impact injuries to the head and torso resulting in hemorrhagic shock, loss of blood, and neurogenic shock injuries to the brain; the manner of death was homicide. (15 RT 3675-3676.)

(5) Appellant's admissions to the 1996 bank robberies and the 1994 robbery-murder

On August 14, 1996, at 2:15 a.m. at the Kennedy Airport precinct, Port Authority detective Trotter arrested appellant for the homicides of Carmen and Zuri Henriquez. (15 RT 3691-3692, 3694-3695.) Detective Trotter read appellant his *Miranda* rights, which he waived. (15 RT 3692.) Appellant admitted committing a bank robbery in San Francisco on July 31, 1996. Appellant stated:

I entered a Bank of New York and yelled for everyone to get on the floor. I jump behind tellers and collected money from about three or four drawers. I acted alone and was in the bank for only about a minute, minute-and-a half. I got the manager to get in to go [*sic*] into the vault. I took a money bag from the safe, put it into a bag and ran outside the bank. I used my wife's Ford Escort maroon, which was parked by the back entrance of the bank. I planned this robbery about one week [*sic*]. I acted as if I had a gun, but I did not. After I robbed the bank, I drove home. Once home, I watched TV to see if it made the news. I counted the money and saw it was close to $200,000.

(15 RT 3692-3693.)

Appellant also admitted:

On October [*sic*] December of 1993, my brother Timothy and I robbed a guy, a male black 6', in his 40s, at 155th Street, a bridge by Yankee Stadium. My brother and a friend threw this guy from the bridge down to me on the street below. The guy was dead and had nothing on him, so we all left there – we all left him there.

(15 RT 3693.)

Appellant signed the following statement. (15 RT 3704-3705.)

It was me and my brother, Timothy Henriquez, and Pete. We were sitting across the street from the bank. Chemical Bank or Apple Bank near the court house on the Grand Concourse. We saw him coming out from the bank. He was black, over 40. He was dressed in dark clothing with, I think, a blue hat. We followed him towards the bridge on 161st Street, before 161st Street bridge over Yankee Stadium parking lot to rob him. My brother Timothy and Pete walked together at the bridge. My brother said something to him. My brother threw him off from the bridge. He hit the floor. I was below the bridge. He hit the floor. I search him. I search. There was nothing on [*sic*] the wallet. I throw them on the floor. I threw it on the floor. We ran towards the Concourse. My brother Michael called me the next day, early in the morning, and said, "Look at the news." Michael knew we did it. We laid low for a while.

(15 RT 3705.)

On August 16, 1996, appellant admitted orally and in writing that he and Morton, the latter armed with a gun, committed both bank robberies. (14 RT 3586-3601.)

b. Victim impact witnesses

(1) Harold Jones

Harold Jones testified that he had two children; his daughter Carmen, and his son Valen. (14 RT 3624, 3626.) Mr. Jones stated that Carmen enjoyed spending time with her child Zuri and "liked to spread joy with everyone that she touched." (14 RT 3625.) At the age of 13, Carmen became very involved with the Jehovah's Witnesses church. (14 RT 3625.) Mr. Jones stated that Carmen was "everything" to him, his "hope" and "heroine." (14 RT 3625.) She was law abiding, "never even got a speeding ticket," and never used profanity. She was respectful and loyal. (14 RT 3625.) Mr. Jones frequently talked on the phone with and visited Carmen and Zuri; the three were very close. (14 RT 3625.) Zuri was his first grandchild and he wanted to help raise her and do things that grandparents do for their grandchild. (14 RT 3626.) He recalled that when he and his wife were in bed, Zuri would crawl in and lay between them. (14 RT 3626.)

Mr. Jones heard about Carmen's death through Valen. Mr. Jones "blank[ed]" and was in disbelief. (14 RT 3626.) He struggles with the everyday "emptiness," the pain of loss, and constantly thinks about whether he could have prevented the murders. (14 RT 3627.) Mr. Jones is now even more protective of his son Valen and his remaining grandchildren. (14 RT 3627.)

(2) Angelique Foster

Angelique Foster testified that in September 1993, Carmen lived with her while pregnant. (14 RT 3629.) That month, Angelique went to the hospital with Carmen and coached her delivery of Zuri. (14 RT 3629.)

Angelique took care of Zuri at her day care for almost two years; during that time, Carmen and Zuri often spent the night at Angelique's. (14 RT 3629-3631.) Carmen and Zuri were very close; in the evenings, Zuri would not let go of her mother. (14 RT 3630.) Zuri enjoyed playing, singing, and dancing, and was very affectionate. (14 RT 3630.) Angelique loved Zuri as though she were her daughter. (14 RT 3631.)

After Carmen and Zuri's deaths, Angelique had difficulty sleeping and doing daily activities. (14 RT 3633.) She thinks of Zuri everyday. (14 RT 3633.) Everytime she sees a child at her daycare she thinks of Zuri, a happy child who brightened everybody's day. (14 RT 3633.) Angelique identified a photo of Carmen and Zuri taken a week before they were killed, and a photo of Zuri taken in the spring of 1996. (14 RT 3633-3634.)

(3) Heidi Jones

Heidi Jones, Carmen's sister-in-law, testified that she and Carmen were like sisters. (14 RT 3636.) Carmen stayed with Heidi and Valen in 1993, and when Zuri was about nine months old, Carmen and Zuri moved in with them. (14 RT 3636.) Zuri was intelligent and listened to and respected Valen as a father figure. (14 RT 3637.) Heidi and Valen spent a lot of time with Zuri and Heidi thought of Zuri as her own daughter. (14 RT 3637.)

Heidi described Zuri as happy and kind: she enjoyed singing and dancing, and was very smart. (14 RT 3637.) At the age of two, Zuri could recite the alphabet. (14 RT 3640.) After working all day, Carmen brought Zuri home and spent every evening with her. (14 RT 3637.) Even though Carmen was exhausted, Carmen and Zuri would eat together, talk, and play. (14 RT 3637-3638.) Carmen rarely went out with friends but, when she did, she brought Zuri, and included Zuri in everything she did. (14 RT 3638.)

According to Heidi, Carmen was very smart, good at her job, and spent time in study and prayer and at the ministry. (14 RT 3638.) At the

time Carmen was killed, Heidi and Carmen were both pregnant, with their babies due a day apart. (14 RT 3639.) Heidi and Valen had previously moved away on a mission, but moved back to California because they wanted their children to grow up together. (14 RT 3638-3639.) Heidi and Carmen talked on the phone at least three times a week, and Heidi always talked to Zuri. (14 RT 3640.)

Heidi was horrified when she learned of Carmen's death; her first concern was Zuri. (14 RT 3641.) Thinking Zuri was still alive, Heidi thought she and Valen could adopt and care for Zuri. (14 RT 3641-3642.) Heidi also hoped the unborn fetus survived. (14 RT 3642.) After learning that Zuri and the fetus were dead, Heidi went into premature labor; her daughter was born a month early. (14 RT 3642.) Afterwards, Heidi felt guilty and constantly thought about Carmen, Zuri, and Carmen's unborn baby. (14 RT 3642.) Heidi named her daughter Sienna Carmen Jones. (14 RT 3643.) Heidi testified that she thinks of Carmen and Zuri all of the time, that their pictures are everywhere in their home, and that she and Valen tell their children about their memories of Carmen and Zuri. (14 RT 3644.)

(4) Valen Jones

Valen Jones described Carmen as playful and smart, but naïve. The two grew up with the Jehovah's Witnesses faith and started learning the Bible at about six years old. (14 RT 3646.) They have a lot of close friends that are Jehovah's Witnesses and forged a real sense of community and family in their congregation. (14 RT 3647.) Valen and Carmen were taught that it is important to develop a strong relationship with God and that committing bad or immoral acts would hurt God. They tried to act according to their faith. (14 RT 3647.)

Valen stated that he had a close father-daughter type relationship with Zuri. (14 RT 3648.) He recalled going to the hospital when Zuri was born and thinking that Zuri was the next generation. (14 RT 3648.) The

moment was very special because Carmen was his sister and a very close friend. (14 RT 3648.)

Valen testified that there are no words to express the devastating loss Carmen and Zuri are to the Jones family. (14 RT 3648.) The family was looking forward to the birth of Carmen's baby boy. (14 RT 3648.) Her murder remains a difficult subject for the family. (14 RT 3648-3649.)

Valen cried when his and Heidi's baby was born. He had felt that Carmen and Zuri were his responsibility. He worried how he could protect his newborn daughter from such a horrible fate. (14 RT 3643-3644.)

2. Defense case

a. Appellant's background

Defense Investigator Sandra Coke testified that appellant's paternal grandfather had been committed to a mental institution for seven years, and that appellant's paternal aunt had also been committed to an institution. (15 RT 3766.) Appellant's father, Edward, was placed in foster care as a child. (15 RT 3767.) Throughout much of appellant's life, Edward was partially disabled and unemployed. (15 RT 3769-3770.) During that time appellant's family received welfare and other aid payments. (15 RT 3768.)

Investigator Coke testified that appellant's brother, Michael, was placed in a social service setting by the Jewish Child Care Association when he was eight. (15 RT 3767.) Appellant's brother Edwin has mental and learning disabilities which entitle him to S.S.I. disability payments. (15 RT 3770.) Investigator Coke discussed prison records for appellant's father, and appellant's brothers Michael and Timothy. (15 RT 3772-3774).[6]

[6] Appellant's brother Michael was convicted in 1994 for shooting his girlfriend. (15RT 3774.)

b. Expert witnesses

(1) Dr. Donald Dutton

Domestic violence expert, Dr. Donald Dutton, testified again at the penalty trial. (12 RT 2791-2869; 15 RT 3811-3900.) Given his expertise, and his review of police and psychiatric reports, and transcripts of various interviews in this case, Dr. Dutton opined that appellant had the common characteristics of a spousal batterer. (15 RT 3812, 3814.) Dr. Dutton pointed to one characteristic, e.g., extreme physical abuse in appellant's family of origin, and noted that appellant's father shamed appellant's brother by forcing him to wear a sign in public reading that he had run away from home. (15 RT 3817.) Dr. Dutton noted that rage is almost a "knee-jerk response" to hide the feeling of shame. (15 RT 3817.)

Dr. Dutton testified that another characteristic of a spousal batterer is the lack of a secure attachment base in the family. (15 RT 3818.) According to Dr. Dutton, appellant's father was an emotionally unstable heroin addict, and was physically violent. (15 RT 3826.) Appellant's mother lacked maternal warmth and was physically abusive. (15 RT 3818, 3823, 3825-3826.)

Dr. Dutton further testified that appellant's family lived in a very violent community with routine drug dealings. (15 RT 3819.) Appellant's background led to the anger and rage that he felt in an intimate relationship. (15 RT 3820-3822.) Dr. Dutton opined that appellant fit the profile of the spousal batterer who kills his wife in an "unexpected episode of violent, impulsive, acting out behavior, which is not well thought out, for no obvious purpose or personal advantage." (15 RT 3827- 3828.)

According to Dr. Dutton, the impulsive rage-type batterer's private personality is independent of his public personality. (15 RT 3820-3823.) Appellant is capable of private, intimate-rage violence as a result of his

family abuse, him being shamed, and him having no secure attachment base. (15 RT 3820-3823.) Appellant also is capable of public violence sociologically learned from his father and the neighborhood in which he grew up. (15 RT 3821.) Dr. Dutton opined that the violent acts appellant committed against Carmen and Zuri were intimate estrangement killings committed because appellant was afraid that Carmen would abandon him, and that the killings were not instrumental and goal-directed. (15 RT 3830-3831.)

(2) Dr. Leonti Thompson

Based on his review of police reports, transcripts, interviews, and a handwritten statement by appellant, and his interviews of appellant in jail, Dr. Thompson, a psychiatrist, testified that the most noticeable feature of appellant's mental reaction was his "continued expressions of remorse. [Appellant's] disbelief that he had done what he had done. His concerns about his religious affiliation." (16 RT 3945, 3950-3951, 3962-3963.) Dr. Thompson testified that at each interview, appellant expressed in "a quite genuine fashion . . . . [¶] . . . his remorse over having lost self-control." (16 RT 3953-3954.) Appellant indicated that he always had prided himself for being able to control his temper with his wife who "pushed him" about his inability to hold a job and support the family. (16 RT 3954.)

(3) Dr. Jonathan Mueller

Dr. Jonathan Mueller, a medical doctor trained in psychiatry and neurology, opined that based on his review of psychiatric and police reports, interviews and letters written by appellant and his brothers, inter alia, the following factors influenced appellant's development: a clear history of psychiatric disorders and mental illness on both sides of appellant's family, and a strong history of violence appellant was exposed to from his family and neighborhood. (16 RT 3990-3994, 4025, 4043.) Dr. Mueller testified

that appellant chose his mother, a devoted Jehovah's Witness, as his role model, and that he struggled to conduct himself in a manner that would please her. (16 RT 3995.)

According to Dr. Mueller, at age 15 or 16, appellant experienced his first auditory hallucination. (16 RT 3998.) Then, when appellant was 16 years old, his father died, and he became depressed and confused. (16 RT 3999.) Nevertheless, according to Dr. Mueller, up until the age of 20 years old, appellant had a very "saint-like," "squeaky clean," "sort of unbelievable life." (16 RT 3999.)

Dr. Mueller opined that the root of appellant's inability to control his emotions, particularly his anger, stems from a violent, explosive, brutal, and intimidating father, and from a mother who had episodes of anger and punished her children. (16 RT 4002, 4005, 4008-4009.) Dr. Mueller opined that appellant lived with great fear of not pleasing his mother and the possibility that she would abandon him. (16 RT 4004-4005.)

Dr. Mueller also opined that appellant resembles someone with Intermittent Explosive Disorder, based on the discrete episodes of him becoming violent, and because the violence seems to be out of proportion to the provocation. (16 RT 4068-4069.) Dr. Mueller opined that appellant fits most closely to the Borderline Personality Disorder which makes it very difficult to maintain intimate relationships. (16 RT 4070.) The hallmarks of the disorder are intense fear of abandonment, extreme reaction to perceived abandonment, rejection or criticism, great difficulty controlling anger, and emotional swings. (16 RT 4069.) Dr. Mueller did not view appellant as a typical Antisocial Personality Disorder. (16 RT 4070.)

Dr. Mueller believed that appellant was full of remorse, full of shame, and repeatedly tried "to pull himself out" by turning to the Jehovah's Witnesses faith. (16 RT 4075-4076.)

c. Character evidence

(1) Mrs. Deborah Henriquez

Appellant's mother, Deborah Henriquez, testified that when appellant's father died in 1988, appellant became withdrawn, but at the same time he helped her run errands and look after his siblings. (16 RT 3920-3922.) His siblings loved and looked up to him; appellant was caring, sensitive and responsible. (16 RT 3920-3922.) In his teens, appellant was an active participant in the Jehovah's Witnesses church. (16 RT 3923.)

(2) Edwin Henriquez

Appellant's younger brother Edwin Henriquez testified that appellant was his role model. (16 RT 4079.) Appellant played basketball with Edwin, and helped him graduate from high school while his brothers Michael and Timothy teased him. (16 RT 4079-4080.)

(3) Renee Dunn, Charles Dunn, Viola Goldenberg, and Kenneth Henley

Renee and Charles Dunn, Viola Goldenberg, and Kenneth Henley knew appellant in New York when he was growing up; they were all members of Jehovah Witnesses congregations and the community. They described appellant as an exemplary teenager, very devoted to his faith, and someone who was respected by the youth in the congregation. (16 RT 4094, 4095-4097, 4112-4117, 4126-4127, 4134-4135, 4137, 4143.) They testified that appellant was respectful and helpful to the elders in the community, and that he helped his mother watch his siblings after his father passed away. (16 RT 4128, 4136, 4138.)

(4) Modesto Henriquez

Modesto Henriquez, appellant's paternal uncle, testified that he and appellant's father lived together in a foster home for five years. (17 RT 4238-4240.) Their foster parents were God-fearing, religious, and very

strict. They often physically punished Modesto and Edward. (17 RT 4240.) Edward was considered disobedient and left. (17 RT 4241.) When Modesto turned 16, he joined Edward and they lived on the streets. (17 RT 4241.) According to Modesto, Edward's " purpose was for himself," and what he could not talk out of you "he physically took . . . from you." (17 RT 4242.) Edward was exceptionally good at stealing; he could "smile in their face, and when they turned their back he would have them down so he could get a hold of their money." (17 RT 4242.)

Modesto and Edward started drinking heavily in their teens. (17 RT 4242.) Edward started using drugs, and they ventured into prostitution to make money. (17 RT 4243.) Edward was verbal and charming until he needed drugs or alcohol. (17 RT 4243.) He had a violent temper and would beat someone for saying the wrong thing and argue over a few dollars worth of drugs. (17 RT 4243.)

Edward went into the service, where he became more dependent on drugs. (17 RT 4244.) After the service, Edward was in and out of prison and while on parole, he married Deborah. (17 RT 4244-4245.) The ten times or so that Modesto saw Edward and Deborah, their family was hectic and chaotic. (17 RT 4246.) Modesto testified that when Edward was on drugs he was placid and easy going. (17 RT 4246.) But when he needed drugs and alcohol he was verbally abusive, short tempered, loud, and could be violent. (17 RT 4246-4247.) Edward was not a nice person and stole from Modesto when Modesto tried to help him. (17 RT 4247-4250.)

Modesto testified that Edward and their sisters were alcoholics and/or mentally ill. (17 RT 4251.)

3. Prosecution rebuttal case

Concord police officer Tom Lawrence testified that on August 23, 1998, he was assigned to the D Module, the administrative segregation unit and disciplinary housing unit, at the county jail. (17 RT 4254-4255.) That

day, at 4:00 p.m., Officer Lawrence saw appellant in the recreation area of the D Module. (17 RT 4256.) At that time, the officer monitored a conversation between appellant and inmate Joshua Puckett. (17 RT 4257.) Puckett talked about an earlier escape attempt that he and another inmate had attempted. (17 RT 4257.) Appellant said that he also had tried to escape by kicking out a window in the cell. (17 RT 4257.) The two talked about the layout of the jail facility and discussed the best escape route, ultimately deciding that it was in the recreation area, through a steel grate covering the open air ceiling. (17 RT 4257-4258.) They mentioned that the method had been used successfully in the past. (17 RT 4258.) Appellant and Puckett discussed how the morning and afternoon shifts were covered e.g., one deputy is stationed in the control booth and one deputy works the floor. (17 RT 4258.) They also noted that at night, there was only one deputy stationed in the booth and that the deputy left the booth unarmed to perform the floor duties. (17 RT 4259.) Appellant stated that he thought it would be easy for him to kill the deputy during the night watch and escape unnoticed. (17 RT 4259.) Puckett said that the night deputy has a special emergency function key on his radio so he can call for help, and that appellant's idea of assaulting the deputy would probably be unsuccessful. (17 RT 4260.) Appellant was insistent that it was worth the risk to try and kill the deputy if it would lead to his escape. Officer Lawrence immediately recorded the conversation in writing. (17 RT 4260.)

ARGUMENT

I. APPELLANT FAILED TO MAKE A PRIMA FACIE SHOWING THAT THE JURY SELECTION SYSTEM IN CONTRA COSTA COUNTY UNCONSTITUTIONALLY UNDERREPRESENTS AFRICAN-AMERICANS

Appellant contends that African-Americans are routinely underrepresented in the Contra Costa County jury venires. He asserts that

county officials are responsible for the systematic exclusion of African-Americans from his jury venire, thus violating his federal and state constitutional rights to a jury drawn from a representative cross-section of the community. (AOB 16-47.) The trial court properly denied appellant's motion to quash the jury venire.

A. Applicable Legal Principles

A criminal defendant has both a state and federal constitutional right to a jury drawn from a representative cross-section of the community. (*Duren v. Missouri* (1979) 439 U.S. 357, 367; *People v. Ramos* (1997) 15 Cal.4th 1133, 1154; *People v. Jackson* (1996) 13 Cal.4th 1164, 1194; *People v. Horton* (1995) 11 Cal.4th 1068, 1087; *People v Breaux* (1991) 1 Cal.4th 281, 297.) That guarantee mandates that venires, or pools from which juries are drawn, "'must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof.' [Citation.]" (*People v. Mattson* (1990) 50 Cal.3d 826, 842.) The relevant community for the purpose of determining whether the cross-section requirement has been met is the judicial district in which the case was tried. (*Williams v. Superior Court* (1989) 49 Cal.3d 736, 744-746; accord, *People v. Horton*, *supra*, at p. 1089.)

When a fair-cross-section challenge to the jury selection procedure is made, the defendant bears the burden of establishing a prima facie violation of the fair cross-section requirement. (*People v. Massie* (1998) 19 Cal.4th 550, 580; *People v. Horton*, *supra*, 11 Cal.4th at p. 1088.) In order to establish a prima facie violation of the fair-cross-section requirement, the defendant must show (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this

underrepresentation is due to systematic exclusion of the group in the jury-selection process. (*Duren v. Missouri*, *supra*, 439 U.S. at p. 364.)

"Resolution of defendant's claim on appeal presents a mixed question: Application of the constitutional standard is a question of law on which this court rules de novo." (*People v. Ramos*, *supra*, 15 Cal.4th at p. 1154.) "With respect to the factual predicates, however, we defer to the trial court's findings to the extent they are supported by substantial evidence. (See *People v. Breaux*, *supra*, 1 Cal.4th at p. 297.)" (*People v. Ramos*, *supra*, at p. 1154.)

B. Relevant Proceedings

On November 20, 1998, appellant moved to quash the jury master list and jury venire. (2 CT 360-373.) Appellant claimed there was consistent underrepresentation of African-American jurors from the Bay and Delta Areas in Contra Costa County. (2 CT 360-373, 739-740; March 29, 1999 RT; May 17, 1999 RT; June 12, 1999 RT.) Appellant argued that under the three prong test set forth in *Duren v. Missouri*, *supra*, 439 U.S. at p. 364, he established a prima facie violation of a fair cross-section requirement. (2 CT 367.)

As to *Duren*'s second prong, appellant argued that the representation of African-Americans in venires from which juries are drawn is not fair and reasonable in relation to the number of African-Americans in Contra Costa County. Appellant, relying on the "County Population by Race (age 18 and older) and Geographic Area," prepared by the Contra Costa County Jury Commissioner's Office, asserted that "the African-American jury-eligible population in Contra Costa County totals 8.1% of the general jury-eligible population. [Fn. omitted.]" (2 CT 362.) Appellant also asserted that "[i]n a [public defender's] survey of 42 Contra Costa County Superior Court jury panels, beginning in February, 1996, and ending in July, 1997, the number of African-Americans who appeared for jury duty represented only 4.8%—

a comparative disparity of 40%, and an absolute disparity of 3.3% of their numbers in the eligible county population. [Fn. omitted.]"[7] (2 CT 362.) Appellant noted:

> A survey conducted by Dr. Robert S. Ross, an expert in areas of survey design, implementation and analysis almost identically duplicated these findings. Dr. Ross' survey, [], found that African Americans comprised 4.6% of the venire jurors, while they represent 8.4% of the county's population. This results in an absolute disparity of 3.8 percentage points and a comparative disparity of 45.2%.

(2 CT 362-363.)

On May 17, 1999, the trial court received into evidence the transcripts considered in *People v. Currie* (2001) 87 Cal.App.4th 225[8] and the exhibits received and considered by the trial court in that case. (May 17, 1999 RT 29-30, 45, 75; 1 Supp.CT (*Currie*); 2 Supp.CT (*Currie*), 3 Supp.CT

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[7] The "absolute disparity" test "measures representativeness by the difference between the proportion of the population in the underrepresented category and the proportion of those persons in the [jury pool] in the underrepresented category. The "comparative disparity" standard is more complex, and the disparity is obtained by using the formula:

(A-B) / A x 100

A represents the percentage of the community that makes up the cognizable group, and B represents the percentage of the jury venire which is composed of the cognizable group. [Citations omitted.]

(*People v. Breaux*, *supra*, 1 Cal.4th at p. 297, fn. 3.)

[8] In *Currie*, the First District Court of Appeal rejected the defendant's claim that the underrepresentation of African-Americans in the Contra Costa County jury venire was due to the systematic exclusion of this group in the jury-selection process. (*People v. Currie*, *supra*, 87 Cal.App.4th at p. 238.)

(*Currie*).)[9] Assistant Jury Commissioner Sherry Dorfman testified as an expert in jury summoning procedures, statistics, jury population sampling and methods for determining jury representativeness. (May 17, 1999 RT 118, 175, 182, 187, 190, 191.) Based on a study done in 1999, Ms. Dorfman testified that the "absolute difference between the percentage of African-Americans appearing in the Contra Costa jury venire" (7.24% based on the preliminary report), as compared to the 1997 population estimates for that population, age 18 and older (8.34% based on the U.S. Census Bureau estimates), was 1.1 percent. (May 17, 1999 RT 192-193.) Ms. Dorfman testified that the comparative disparity for African-Americans, using the 1997 population census estimate, was 27.24. (June 1, 1999 RT 476.) Ms. Dorfman also testified that the absolute disparity between the percentages of African-Americans appearing in the Contra Costa jury venire as compared to the 1997 population estimates by the U.S. Census Bureau for the African-American population age 18 and over that are citizens is 2.71 percent. (June 1, 1999 RT 433, 437.)

Ms. Dorfman expressed concerns about the method used in Dr. Ross's study, which showed a significantly higher underrepresentation in the *Currie* case. (May 17, 1999 RT 203.) She pointed out that Dr. Ross's survey was conducted by telephone and that the surveyors attempted to "reconnect with jurors who had previously appeared." Ms. Dorfman noted that persons from the minority community tend to fall into the lower income level making it more likely they are not available by phone, and tend to change addresses more frequently. (May 17, 1999 RT 203-204.)

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[9] "1 Supp.CT (*Currie*); 2Supp.CT (*Currie*); 3 Supp.CT (*Currie*)" references "Clerk's Supplemental Transcript of the Record of Proceedings held in the *Currie* Case."

On Monday, May 24, 1999, Dr. Michael J. Sullivan filed a declaration in opposition to appellant's motion to quash the jury master list and jury venire. (2 CT 690-734.) Dr. Sullivan, specializing in the application of statistical surveying to business, engineering and public policy decision making, declared he designed, pre-tested and implemented the survey of the members of jury venires used to conduct the Jury Commissioner's survey on which Ms. Dorfman based her opinion. He declared that "[t]he survey of jury venires complied with the measurements protocols currently used by the United States Census for measuring population race and ethnicity. . . to ensure measurements from the venire survey and the United States Census for Contra Costa County are comparable." (2 CT 691.) He declared that "[a]s an expert in the field of population surveys," he opined that "the procedure used in the 1999 Contra Costa County juror census . . . exceeds the acceptable standards for ensuring the Contra Costa County juror racial and ethnic demographics and the results are the type of information that would be reasonably relied upon for policy and planning purposes." He also explained the basis for his opinion. (2 CT 692 -695.)

Dr. Sullivan criticized the Public Defender's survey offered in the *Currie* case, which was based on observations by Public Defenders in the Richmond/Bay Judicial District, as having "none of the measurement protocols nor methodological controls that are necessary to obtain an accurate estimate of the racial composition of the groups under study."[10] (2 CT 695.) Dr. Sullivan also criticized Dr. Ross's telephone survey

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[10] This Public Defender's survey consisted of deputy public defenders's observations of the racial composition of 42 superior court jury panels from February 1996 to July 1997. (See *People v. Currie*, *supra*, 87 Cal.App.4th at p. 234, fn. 3; see 2 Supp.CT pp. 710-796 (*Currie*) [Clerk's Supplemental Transcript of the Record of Proceedings Held in the *Currie* Case].)

sampled jurors were ever interviewed, the team was unable to find 40% of the people they were seeking to interview, and another 15% refused to be interviewed once they were found. Dr. Sullivan opined that Dr. Ross's sample had a significant potential for "non-response bias." (2 CT 696.)

Dr. Peter Sperlich, a defense expert in statistical analysis of jury selection issues who had qualified as an expert in the *Currie* case, testified that he did not consider Ms. Dorfman's study to be an adequate survey of the potential jurors in the superior courts in Contra Costa County. (June 1, 1999 RT 547-548.) Dr. Sperlich posited that Ms. Dorfman's drawn sample for two and one-half months did not account for seasonal fluctuation of attendance for a full year census. (June 1, 1999 RT 547-550.) Dr. Sperlich expressed concern about the general methodology of Ms. Dorfman's study, such as the design of the questionnaire and the possibility of key punch error. (June 1, 1999 RT 555- 566; June 2, 1999 RT 588-590.) Dr. Sperlich could not offer his opinion regarding Dr. Ross's survey because he was not familiar with the details of that study. (June 2, 1999 RT 601-602.)

The trial court opined Dr. Ross's study was the most reliable study submitted to date. (June 2, 1999 RT 626.)

The trial court, in addressing the second *Duren* prong, stated its preference for the comparative disparity test over the absolute disparity test. The court stated there was an "underrepresentation" of African-Americans and that it "seems statistically significant." (June 2, 1999 RT 704-705.) The court, however, questioned, "is it of such a degree that it rises to a constitutional level?" (June 2, 1999 RT 704.)

The court conflated its analysis of the second and third prongs and continued to discuss in-depth the third prong, regarding whether there was an underrepresentation due to systematic exclusion in the jury selection process. (June 2, 1999 RT 706-712.) The court commented:

> . . . . Apparently according to *Bell*, it doesn't mean an ongoing statistical underrepresentation. That apparently is not enough to satisfy those two prongs. But what would satisfy those two prongs? What would be the probable cause of the disparity, and something that's constitutionally impermissible? . . . .

(June 2, 1999 RT 713.)

As to *Duren*'s third prong, appellant argued that there was "systematic exclusion" because: (1) "the source lists used to prepare the juror list from which venires are drawn do not fairly represent the African-American jury eligible population of Contra Costa County"; (2) of the failure to purge duplicate names; (3) of the failure to adequately follow-up on potential jurors summoned who do not respond; (4) of the "historical pattern of residential and employment segregation of the county's African-American population in the East and West ends of the county," and "the lack of viable public transportation from East and West county" to the Superior Court in Martinez; and (5) the "overwhelmingly all-white workforce" in the Martinez courthouse "furthers a[] historic perception of minorities in East and West county that they are not welcome, and will be treated poorly if they travel to Martinez in central county to serve as jurors." (2 CT 363, 368-372; March 29, 1999 RT 38-39.)

As to defense counsel's argument that all capital cases involving African-American defendants should be tried in Richmond, instead of at the Martinez Superior Court (June 2, 1999 RT 635-636), the trial court stated[11]:

> The Jury Commissioner's year-end reports show that the residents of the Bay District, Richmond, at least in 1998, that's what I am looking at right now, 43 percent of those who got a jury summons in that judicial district didn't show up, or failed to

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[11] Defense counsel argued that the demographics, geographics, and distance between the locations where the highest number of African-Americans reside, and the Martinez Superior Court results in systematic exclusion. (June 2, 1999 RT 675, 680.)

appear, which is the highest of the four judicial districts. The Delta District, which is Pittsburg, was 30 percent, approximately. Mt. Diablo 20 percent, and Walnut Creek 15 percent. So the highest rate of not showing up for the summons is folks living in the Bay Judicial District, getting a summons and coming here. They also, residents of that district, also have the highest rate of failing to appear, according to this Jury Commissioner's report, in the court house in their own district. [¶]. . . . [¶] In Bay. Getting a summons in Bay and then going down to the Richmond court house it's 42.5 percent, according to their report, which is the highest of the four districts. And at least in the 1998 report the failure-to-appear rates are comparable, that is the rate of Bay residents coming here, or not coming here, is about the same as going to their own court. Same in Walnut Creek. The rate at which Walnut Creek residents come to Martinez is about the same as they show up to their own court house. . . .

(June 2, 1999 RT 646-647.)

The trial court later explained:

> The statistics would tell us it's not geography and transportation. Appears that, as I pointed out during the arguments of Counsel, that the failure-to-appear rate is the same for Bay residents, roughly the same for Bay residents, when they are summoned to come to Martinez as when they are summoned to come to Richmond. And that's going back to about 1993. It's roughly the same. And it's quite high.

(June 2, 1999 RT 706.)

> . . . . So it's not clear on the evidence before me what is causing the folks from the Richmond [D]istrict, the Bay District, excuse me, to fail to appear in such a high rate here in Martinez, or even in their own home court, so to speak. Statistics before me suggest it's not transportation. . . . But if the burden is for the defense to demonstrate that transportation is the issue I don't think that they have done that. I don't think they have carried the day there.

(June 2, 1999 RT 708.)

As to defense counsel's claim that the county's failure to conduct "more assertive or aggressive follow up" resulted in systematic exclusion (June 1, 1999 RT 640-641), the court commented:

> . . . . [I]t seems to me that if this additional follow up is to be done or is the crux of the problem that it would, just off the top of my head, would need to be concentrated in the Richmond-the Bay District.

(June 2, 1999 RT 661.)

Rejecting defense counsel's suggestion that the source list was the cause of underrepresentation of African-Americans on the jury panels in Contra Costa County (June 2,1999 RT 666), the trial court noted:

> I have to say I really can't say that there was any particular evidence that source list in, as you said, in this county was underrepresentative. There was an opinion that, by Dr. Fukurai, as I recall, that – apologize, I'm not sure whether it was to both the DMV and Registrar of Voters, or just one, but suggesting that minorities are underrepresented on Department of Motor Vehicle lists and/or Registrar of Voter lists. But really I have to say I don't think that's enough for me to find that there is a source list problem in this county, that the original lists used is somehow problematic.
>
> And I say that conscious of what I think is really the ultimate turning point in this case, which is the burden of proof, and who has it. And who has to establish what. And it seems that that's where *Morales* and *Bell* have taken us. The California Supreme Court cases that have seemed quite clearly to suggest that most of the burden, the labor in these cases, seems to be with the defense. So then having said that I don't see that there's any issue in regard to the source list.

(June 2, 1999 RT 696.)

The court later commented:

> And I know attorneys have expressed reservations about telephone lists, PG&E lists, or Pac Bell lists, or even PG&E lists, that sort of thing, that they too present their own problems.

(June 2, 1999 RT 711-712.)

The trial court concluded that "as set forth by the Supreme Court of this state, which I'm bound to follow, the defense has not met their burden" to demonstrate a violation of the fair cross-section requirement. (June 2, 1999 RT 714; 2CT 739-740.)

C. Appellant Has Failed To Establish a Prima Facie Violation of the Fair-Cross-Section Requirement

Given that African-Americans are a cognizable group within the community for purposes of representative cross-section analysis, appellant has satisfied the first prong of *Duren*. (*People v. Ramos*, *supra*, 15 Cal.4th at p. 1154; *People v. Breaux*, *supra*, 1 Cal.4th at p. 298; *Williams v. Superior Court*, *supra*, 49 Cal.3d at p. 742.) Appellant fails, however, to satisfy the second and third prongs of the *Duren* test.

To establish a prima facie violation of the fair cross-section requirement, "[t]he second prong 'requires a constitutionally significant difference between the number of members of the cognizable group appearing for jury duty and the number in the relevant community.' (*People v. Ramos* (1997) 15 Cal.4th 1133, 1155.)" (*People v. Burgener* (2003) 29 Cal.4th 833, 859.) In this case, as in *Currie*, the trial court relied upon Dr. Ross's survey which indicates that about 4.6 percent of the residents who appeared for jury service identified themselves as African American. (June 2, 1999 RT 698-700; 705-706.) The court relied on a "low eight percent" figure for Contra Costa County residents who identified themselves as African-American or African-American and some other race and are over the age of 18, as did the court in *Currie* (utilizing 8.1 percent see *Currie* p. 234, fn. 2), thus, resulting in an absolute disparity of 3.5 percent.

Courts have held that numbers much higher than those in this case were insufficient to show disparity. In *People v. Bell* (1989) 49 Cal.3d 502, the defendant alleged that there was an underrepresentation of African-

Americans in Contra Costa County. There, this Court used the absolute disparity test in analyzing whether the second prong of *Duren* was satisfied. The evidence showed that African-Americans constituted about 8 percent of the adult population and this distinctive group constituted only about 3 percent of the prospective jurors in the county. (*Id.* at p. 527.) Thus, the record showed an absolute disparity of 5 percent. Although its ultimate ruling did not turn on this issue, this Court stated "it does not appear that a disparity of this degree renders the representation of Blacks on jury venires less than fair and reasonable in relation to their numbers in the general population of Contra Costa County." (*Id.* at p. 527.) That recognition is persuasive authority that such a disparity is insufficient to satisfy the second prong of *Duren*. (See also *People v. Ramos*, *supra*, 15 Cal.4th at p. 1156 ["a range of absolute disparity between 2.7 and 4.3 percent and of comparative disparity between 23.5 and 37.4 percent [is]. . . "generally within the tolerance accepted"], citing *United States v. Pepe* (11th Cir. 1984) 747 F.2d 632, 649 [7.6 percent absolute disparity insufficient], *United States ex rel. Barksdale v. Blackburn* (5th Cir. 1981) 639 F.2d 1115, 1126-1127 [absolute disparity ranging from 4.5 percent to 11.5 percent insufficient], *United States v. Maskeny* (5th Cir. 1980) 609 F.2d 183, 190 [less than 10 percent absolute disparity insufficient], *Swain v. Alabama* (1965) 380 U.S. 202, 208-209 [10 percent absolute disparity found inadequate]. Based on this authority, appellant has failed to establish *Duren*'s second prong.

Not surprisingly, appellant eschews the 3.5 percent absolute disparity in favor of a comparative disparity of 43 percent. (AOB 37.) Appellant asserts "[w]here, as here, the cognizable group comprises less than 10% of the population, absolute disparity cannot be controlling." (AOB 38-39.) The cases cited by appellant are not helpful to defense. (*United States v. Maskeny*, *supra*, 609 F.2d at p. 190 [court declined to focus on comparative

or standard deviation disparity and found the absolute disparities shown do not show a constitutional violation]; *United States v. Chanthadara* (10th Cir. 2000) 230 F.3d 1237, 1256 [recognized limitations of both absolute and comparative disparities]; *Jefferson v. Terry* (N.D. Ga. 2007) 490 F.Supp.2d 1261, 1284 [same]; see also *United States v. Rogers* (8th Cir. 1996) 73 F.3d 774, 776-777 [same]; *People v. Bell*, *supra*, 49 Cal.3d at p. 528, fn. 15 ["it is far from clear" that a 5 percent absolute disparity (50 percent comparative disparity) is sufficient, and no jurisdiction has so held].

In *People v. Bell*, *supra*, 49 Cal.3d at p. 527, fn. 14, this Court acknowledged that "we have in the past declined to adopt any one statistical methodology to the exclusion of the others. [Citation]." This Court, however, stated:

> The Supreme Court used an absolute disparity statistical analysis in *Duren*. (439 U.S. at p. 367 [].) Many federal courts have approved the absolute disparity test as the statistical method of choice by which to make out a prima facie fair cross-section violation. (See, e.g., *United States v. Cecil* (4th Cir. 1988) 836 F.2d 1431; *United States ex. rel. Barksdale v. Blackburn* (5th Cir. 1981) 639 F.2d 1115, 1121-1122.)
>
> Use of more complex tests than the absolute disparity method – e.g., the "statistical significance" test or the "comparative disparity" test – has been criticized as distorting the proportional representation when the group allegedly excluded is very small. (See *United States v. Hafen* (1st Cir. 1984) 726 F.2d 21, 24; *United States v. Musto* (D.N.J. 1982) 540 F. Supp. 346, 355-356; see also *Kairys*, *supra*, 65 Cal. L. Rev. at p. 795, fn. 103.) . . . .

(See also *United States v. Hafen* (1st Cir. 1984) 726 F.2d 21, 24; *United States v. Musto* (D.N.J. 1982) 540 F.Supp. 346, 355-356 [minorities constituting 13 percent and 5.3 percent of eligible population; comparative disparity test rejected]; see also *Kairys*, *Jury Representativeness* (1977) 65 Cal.L.Rev. 776, 795, fn. 103.)

In any case, statistical disparity alone is insufficient to establish systematic exclusion. Appellant must also show that the disparity is the result of a constitutionally impermissible feature of the jury selection process. (*People v. Burgener*, *supra*, 29 Cal.4th at p. 857; *People v. Bell*, *supra*, 49 Cal.3d at p. 529; *People v. Howard* (1992) 1 Cal.4th 1132, 1160.) The trial court here found that the criteria applied by the jury commissioner on its face was racially neutral and that the manner in which the criteria was applied is not the probable cause of the disparity and is not constitutionally impermissible. (June 2, 1999 RT 712-714.) When, as here, a county's jury selection criteria is neutral with respect to race, ethnicity, sex, and religion, more is required to shift the burden to the People. A defendant cannot carry this burden with just statistical evidence of a disparity. (*People v. Burgener*, *supra*, 29 Cal.4th at p. 857.) The defendant must identify some aspect of the manner in which those criteria are being applied that is the probable cause of the disparity and that it is constitutionally impermissible. (*People v. Massie*, *supra*, 19 Cal.4th at pp. 580-581; *People v. Howard*, *supra*, 1 Cal.4th atp. 1160; *People v. Sanders* (1990) 51 Cal.3d 471, 492; *People v. Bell*, *supra*, 49 Cal.3d at p. 524.) Therefore, evidence that race/class neutral jury selection processes may nonetheless operate to permit the de facto exclusion of a higher percentage of a particular class of jurors than would result from a random draw is insufficient to make out a prima facie case. (*People v. Breaux*, *supra*, 1 Cal.4th at p. 298; *People v. Sanders*, *supra*, 51 Cal.3d at pp. 492-493.)

Appellant recites some of the same arguments as the cause of the underrepresentation that appear in *Currie* (AOB 42-46), where the court relies upon *Bell*. The trial court here determined that it was bound by the holding of this Court in *Bell*, that "defense has not met their burden." (June 2, 1999 RT 714.)

The court in *Currie* rejected appellant's argument that all felony trials occur in Richmond in order to satisfy the fair cross-section requirement:

> The failure-to-appear rate for Richmond jurors remains constant, whether jurors are summoned to appear at the local Richmond courthouse or at the superior court in Martinez. In fact, to obtain sufficient jurors to operate the local Richmond courts, the county has been required to increase the frequency of summoning local Richmond residents for service. Appellant paradoxically assails the county for doing so, suggesting that local Richmond residents, who are likely to be African-Americans, would be less willing to serve given the greater frequency upon which they are summoned. Appellant however presents no evidence to support such speculation. Even if he were correct, such a phenomenon would not demonstrate the constitutionally impermissible "'systematic exclusion'" of African-Americans allegedly caused by the county's jury selection process. (*Bell, supra*, 49 Cal.3d at p. 530.)

(*Currie, supra*, 87 Cal.App.4th at p. 237.)

The court in *Currie* also rejected appellant's argument that public transportation be provided for African-Americans to commute from the east and west county to the Martinez Superior Court. (AOB 43.)

> For example, appellant suggests Contra Costa County might reduce the high failure-to-appear rate among African-American jurors by instituting such affirmative measures as "insuring direct transportation" from the west county to the site for the trial of the case in Martinez. Even the majority opinion in *People v. Buford* (1982) 132 Cal.App.3d 288 [], the only appellate decision crediting a defendant with making out a prima facie case as to Contra Costa County venires, rejected a similar suggestion. (See *Buford, supra*, at p. 299 ["And we certainly do not suggest that a county should engage in race conscious selection procedures in order to assure representative juries."].)
>
> Contra Costa County is not constitutionally required—and may not even be constitutionally permitted—to implement racially disparate practices such as affirmative action quotas, busing, or other race-based programs in order to correct any underrepresentation caused by factors unrelated to exclusionary features of the jury selection process: "The Sixth Amendment

> forbids the exclusion of members of a cognizable class of jurors, but it does not require that venires created by a neutral selection procedure be supplemented to achieve the goal of selection from a representative cross-section of the population. (*United States v. Cecil* [(4th Cir. 1998)] 836 F.2d 1431, 1447-1449.)" (*Bell, supra*, 49 Cal.3d at p. 530, italics omitted.)

(*People v. Currie, supra*, 87 Cal.App.4th at pp. 236-237.)[12]

The court in *Currie* further dismissed appellant's argument that a more aggressive follow-up is required to resolve the underrepresentation of African-Americans on the jury panels in Contra Costa County:

> . . . [T]here is no merit in appellant's suggestion that the county was required to conduct more extensive follow-up of African-American jurors who do not appear, in order to coerce their attendance. The county currently takes reasonable steps to follow up and urge attendance for all jurors. A more coercive and harassing approach, which singles out African-American jurors, would seemingly raise serious questions of fairness and discrimination.

(*Currie, supra*, 87 Cal.App.4th p. 237, fn. 5.)

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[12] In *People v. Buford* (1982) 132 Cal.App.3d 288, the appellate court reversed the defendant's burglary conviction, holding that he had established a prima facie case of systematic exclusion in the jury-selection process. (*Id.* at p. 290.) Defense counsel had presented statistical disparities and suggested "a plausible systematic explanation for some degree of disparity, i.e., the informal procedure by which Contra Costa County goes about excusing prospective jurors from service," to establish a prima facie case under *Duren*. (*Id.* at p. 298.) The burden then shifted to the prosecution to provide "evidence of explanation and justification, so as to enable the court to determine whether the county is doing all that can reasonably be expected to achieve the constitutional goal mandated by *Wheeler*." (*Id.* at p. 299.) As shown above, appellant did not present evidence of "a plausible systematic explanation for the disparity subject to control by the county." (*Id.* at p. 299, fn. 5.) Instead, appellant basically raises arguments that already have been rejected by this Court in *Currie* and *Burgener*. Therefore, *Buford* is distinguishable.

Appellant in this case also argues that the use of two source lists from the DMV and voter's registration was an improper practice of systematic exclusion. (AOB 43-45; June 1, 1999 RT 488-490; June 6, 1999 RT 666, 696, 711-712.) This Court has found, however, that use of voter registration lists and DMV records, "'shall be considered inclusive of a representative cross-section of the population, where it is properly nonduplicative.' [Citation.]" (*People v. Burgener*, *supra*, 29 Cal.4th at p. 857.) Assistant Jury Commissioner Dorfman specifically testified that the source lists are purged to eliminate duplicity of names. (June 1, 1999 RT 488-490.)

In the final analysis, appellant has established nothing more than statistical evidence of disparity; he has not associated the underrepresentation of African-Americans with any constitutionally impermissible feature of the Contra Costa County jury selection process. The procedures employed by the county to summon and select persons for jury service are, according to the undisputed evidence, entirely race-neutral. "Statistical underrepresentation of minority groups resulting from race-neutral . . . practices does not amount to 'systematic exclusion' necessary to support a representative cross-section claim. [Citations.]" (*People v. Currie*, *supra*, 87 Cal.App.4th at p. 237; see also *People v. Ochoa* (2001) 26 Cal.4th 398, 427-428, disapproved on another ground in *People v. Prieto* (2003) 30 Cal.4th 226, 263, fn. 14.) Appellant has failed to satisfy *Duren*'s third prong. Accordingly, he has failed to make a prima facie showing that the jury selection system in Contra Costa County unconstitutionally underrepresents African-Americans.

II. THE TRIAL COURT PROPERLY RULED THAT THE PROSECUTOR COULD CROSS-EXAMINE/REBUT APPELLANT'S EXPERT WITNESS WITH HIS UNCHARGED ROBBERY-MURDER

Appellant contends that the trial court erred by ruling that the prosecutor could introduce his uncharged 1994 robbery-murder to cross-examine or rebut the defense witness's testimony that appellant killed Carmen and Zuri in an impulsive act of intimate rage. (AOB 48.) Appellant claims that the trial court's ruling precluded him from "putting on critical evidence in his own defense." (AOB 48.)

A. Relevant Proceedings

1. Appellant's in limine motion to exclude evidence of the 1994 robbery-murder of Jerome Bryant

On September 10, 1999, the prosecutor stated that she did not intend to introduce the 1994 New York robbery-murder of Jerome Bryant in her case-in-chief, but "depending on which path the defense travels in the guilt phase," she might introduce it in rebuttal. (2 RT 499-501.)

On October 21, 1999, defense counsel moved to exclude evidence of the 1994 robbery-murder. Counsel argued that the evidence was inadmissible character evidence under Evidence Code section 1101, subdivision (a), substantially more prejudicial than probative under Evidence Code section 352, and violated his right to a fair trial under the federal and California Constitutions. (3CT 760-766; see also 3CT 790.) On October 28, 1999, the prosecutor explained that the defense had not yet provided discovery regarding his expert witness, Dr. Donald Dutton, so she could not determine if the witness would "open[] the door" for her to cross-examine/rebut the witness with the 1994 robbery-murder. (3CT 792.)

On December 7, 1999, defense counsel requested an ex parte hearing regarding Dr. Dutton's anticipated testimony. Counsel indicated that he did

not want to present Dr. Dutton as a witness if the prosecution intended to impeach him with the 1994 robbery-murder. (11 RT 2544-2545; 3CT 929.)

Defense counsel offered that Dr. Dutton was an expert on the subject of domestic violence, the personality of male batterers, and the causes for wife assault and femicide. (11 RT 2546-2547.) Dr. Dutton would testify that he reviewed appellant's statements, his background and development, and pertinent police reports, and would offer his expert opinion regarding appellant's mental condition and how it affected his conduct on the day he killed Carmen and Zuri. (11 RT 2550.) Counsel argued that Dr. Dutton's opinion would help the jury reach their own conclusion regarding appellant's mental state; e.g., whether he premeditated and deliberated Carmen's and Zuri's killing. (11 RT 2550.)

2. 402 Hearing

That same day, the trial court held an Evidence Code section 402 hearing on the matter. Dr. Dutton testified that the prominent characteristics of spousal homicide for cyclical, impulsive-type personalities are a history of domestic violence, and a series of separations and reconciliations. Also prominent is "overkill" where so much tension and rage builds up in the intimate relationship that the man releases more violence than is required to kill his spouse, and after the killing is in a "disassociated state," confused, and has a "spotty" memory and sometimes complete amnesia. (11 RT 2561-2562.) The man's intimate rage relates to "early-occurring factors that transpire between [him] and [his] parents," his upbringing, his learning how to deal with marital conflict, and his ability to control impulsive events, such as his impulse triggered by a perception that his spouse is leaving him. (11 RT 2560, 2572.)

Dr. Dutton testified that abandonment, where the woman plans to leave or does leave the relationship, is highly related to intimate rage and spousal homicide. (11 RT 2571-2572.) This is due to an ego deficit that

makes it absolutely essential for the man to have his spouse in place, making her the cornerstone of his identity. When he perceives that his spouse is leaving him, his perception "creates a state of terror that translates instantly into rage." (11 RT 2572-2573.)

Based on his review of material relevant to this case, and his work and expertise, Dr. Dutton opined that appellant's killing of Carmen and Zuri had the characteristics of intimate rage arising out of appellant's fear that Carmen was leaving him. (11 RT 2565-2566, 2569, 2600.) Dr. Dutton explained that his opinion was consistent with the disorganized crime scene, the use of every-day household items for weapons, appellant's confusion and shifting ability to recall elements of the crime scene, his difficulty with the "temporal relationships of the crime scene," the amount of violence and "overkill," and appellant's feelings about Carmen and Zuri before and after the homicides. (11 RT 2566-2569.) Dr. Dutton noted that appellant and Carmen's relationship was highly conflictual, with physical and verbal abuse, and that the couple had separated numerous times and later reconciled. (11 RT 2570-2671.) Dr. Dutton testified that the history of abuse and Carman's plan to leave the relationship[13] were two "hallmark characteristics" of a spousal estrangement homicide. (11 RT 2570-2671.) Dr. Dutton also considered the fact that appellant's brother, Michael, was incarcerated for spousal homicide, as part of appellant's family background and developmental factors and "the fact that they were raised in a family that I would say was kind of a breeding ground for violence." (11 RT 2582-2583.)

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[13] Dr. Dutton noted that in her diary, Carmen described the problems and abuse in their relationship; in the kitchen drawer, there were notes in Carmen's handwriting of an escape plan and the number of the battered women's shelter. (11 RT 2570-2571.)

Dr. Dutton indicated the important factors to consider to determine whether a spousal killer is an impulsive-rage killer is whether there is a history of violence between the couple, whether the man has a pattern of violent behavior, the type of people he associates with, if the violence came predominantly from inside or outside the relationship, and if there is a history of any other antisocial behavior. (11 RT 2591-2592.) Dr. Dutton acknowledged that a man's antisocial behavior, specifically his commission of crimes, especially violent ones, may bear on the doctor's opinion as to whether the homicide was driven by rage or was goal-directed.

Dr. Dutton testified that he focuses most of his work on impulsive rage killers; where a person blows up because of built-up tension and kills his partner with no logical explanation. (11 RT 2601-2602.) As to the 1994 robbery-murder of Jerome Bryant, "it wasn't crystal clear to me whether it was necessarily a murderous act or not" on appellant's part, but was aware that appellant had an antisocial criminal career. (11 RT 2577.) Dr. Dutton added that even assuming that appellant participated in the murder of Bryant, it still would not affect his opinion. (11 RT 2578.) Dr. Dutton stated that "things that occurred on the outside would be tangentially related to that set of facts [occurring within appellant's intimate relationship]," but was not "completely irrelevant." (11 RT 2578.)

Dr. Dutton admitted that he did not review the following material which show incidents of appellant using violence to achieve his goal: reports from the Martinez Detention Facility about appellant's attempted escape and subsequent plans to escape and kill a guard; the underlying facts of the 1994 New York robbery of Frank Pecoraro where appellant brutally beat Mr. Pecoraro; FBI reports detailing the San Francisco bank robberies where appellant and Gregory Morton, the latter armed with a .357 magnum, physically assaulted and threatened to shoot and kill bank employees and customers; letters appellant wrote shortly before the bank robberies asking

for a gun; and Detective Castaneda's interview of appellant's sister, Vanessa Henriquez, where she described an act of violence by appellant upon a homeless man. (11 RT 2588-2590, 2600.)

Dr. Dutton considered appellant's antisocial behavior outside the home and concluded that it did not play a role in the killing of Carmen and Zuri. (11 RT 2603-2604.) Dr. Dutton indicated that Michael Henriquez's spousal homicide and the 1994 robbery-murder of Bryant by Timothy Henriquez and appellant show that appellant has a "rageful family." (11 RT 2605-2606.) Dr. Dutton, however, opined that the 1994 robbery-murder of Bryant was goal-driven, to rob, although with some elements of rage since appellant and Timothy did not need to throw Bryant over the bridge and kill him in order to take his wallet. (11 RT 2606.)

The prosecutor argued that the 1994 robbery-murder was relevant to show that Dr. Dutton's opinion was biased. (11 RT 2609.) Appellant, outside the relationship, used violence to commit bank robberies, and urged throwing a man off of a bridge in order to rob him. Appellant also threatened to kill a jail guard to effectuate his jail escape, and committed another robbery where appellant pushed a man up against a wall, held a knife to his throat, and demanded money. (11 RT 2609-2610.) In this case, appellant violently killed his spouse and child, showing that his persona outside and inside his intimate relationship was consistent; that he is violent, and that he uses violence to get what he wants. (11 RT 2609.)

The prosecutor pointed out that in the 1994 Bryant robbery-murder, although appellant and his accomplices did not have weapons, they used violence to effectuate their goal, which was to rob the man. Similarly, in this case, appellant did not have a conventional "weapon," but used ordinary household items and his hands to violently kill Carmen and Zuri to effectuate his goal, which was to stop Carmen from talking to friends and

family about him robbing banks and about him abusing her so he would not be sent back to prison. (11 RT 2609-2611.)

The prosecutor explained that she intended to cross-examine Dr. Dutton about why the 1994 Bryant robbery-murder did not change his opinion, since he stated that antisocial behavior is an important factor in his determination. The prosecutor also intended to ask Dr. Dutton if there are other cases where he considered antisocial behavior and concluded that the man was an instrumental spousal killer, and whether he was aware that appellant had previously used a knife in committing a robbery, threatened to kill a guard, and used violence in the bank robberies, all goal-type exercises in violence and all indicative of an antisocial personality disorder of an instrumental batterer, and not of a borderline personality of an impulsive batterer. (11 RT 2625-2626.) The prosecutor explained her theory as one in which appellant killed Carmen and Zuri in an instrumental and goal-directed act, to punish Carmen for talking to others about his criminal activities and to stop her from continuing to do so, in an attempt to avoid prison. (11 RT 2621.) The court summarized the prosecutor's argument as follows: "the doctor may have rejected it [the Bryant robbery-murder], but you [the jury] should give it more value than the doctor did. And if one did, then reject [the doctor's] opinion." (11 RT 2621.)

Defense counsel countered that Dr. Dutton is "not saying that [appellant] does not have the capacity to premeditate or plan." (11 RT 2622.) According to defense counsel, the prosecution could effectively cross-examine Dr. Dutton about his studies and literature without raising the prejudicial matter of appellant's mental state in the 1994 Bryant robbery- murder to impeach Dr. Dutton. (11 RT 2623-2624.)

3. The trial court's ruling

In denying appellant's motion, the trial court noted that Dr. Dutton considered the 1994 robbery-murder because it showed antisocial behavior,

a factor Dr. Dutton stated should be considered when determining if a spousal killing is an impulsive or instrumental act. The court noted that despite appellant's use of violence to rob his victim in the 1994 robbery-murder, Dr. Dutton concluded the domestic violence killing in this case was impulsive and due to rage. (11 RT 2611- 2613.) The court stated that Dr. Dutton "locks on. . . to the concept. . . that antisocial behavior. . . or other crimes is [*sic*] relevant to the issue about whether any specific incident of domestic violence was impulsive or instrumental," and that such material is worthy of consideration with respect to the issue. (11 RT 2614.) Dr. Dutton "basically has said to us . . . this is [] information that is reliable. . . . [t]he kind of information that experts in this field look at in trying to make a determination of the kind that he is giving his opinion on." (11 RT 2614-2615.)

The trial court ruled that if Dr. Dutton testified that appellant killed Carmen and Zuri in an impulsive act of intimate rage, the prosecution could introduce evidence of appellant's participation in the 1994 Bryant robbery-murder, his use of violence in the robbery of Mr. Pecoraro, his use of violence or threats of violence in his commission of two bank robberies, and perhaps his threat to kill a guard to effectuate his jail escape. (11 RT 2713-2715.)

Relying on *People v. Hendricks* (1988) 44 Cal.3d 635, the court stated:

> In that case, an expert by the name of Dr. Carson was going to be called by the defense as a defense psychologist to testify that the murders in those cases were committed as impulsively as homosexual rage.
>
> The People put the defendants on notice that if the defense called this expert, then they intended to introduce three other uncharged murders which the defendant had allegedly committed, in order to dispel – in order to allow the jury to properly evaluate the psychologist's testimony that this was an impulsive act of homosexual rage.

It went up to the Supreme Court. When the People said this, the defense asked that this evidence be excluded. The Court conducted a hearing not unlike what we did today. The Court concluded it should come in for impeachment purposes.

Thereupon, the defense rested without putting on any evidence at all. And it went up to the Supreme Court. The Supreme Court said other evidence may be used to impeach the testimony of an expert witness, because an expert witness may be cross-examined more extensively and searchingly than a lay witness.

The Court has broad discretion to admit such evidence for impeachment. No abuse of discretion appears here, because Dr. Carson's opinion that this was an impulsive act of homosexual rage was at odds with the evidence introduced by the prosecution. The prosecutor was entitled, therefore, to attempt to discredit it.

Defendant seeks to avoid this conclusion by arguing on the basis of *People vs. Coleman*, citation, "The use of the uncharged homicides should have been barred as unduly prejudicial." But the evidence here appears to be both probative and less prejudicial than the woman's, quote, "accusatory statements from the grave" which were at issue in *Coleman*.

And the court finds that this evidence would have highly probative value for a jury to properly evaluate the doctor's testimony, and would not be substantially outweighed by the prejudicial value.

Therefore, if the defense calls Dr. Dutton, and he does testify to this effect, that this was an impulsive crime of intimate rage, then the People would have an opportunity to introduce evidence of the kind that I indicated, including the Bryant killing and all the other things that I've mentioned.

And that would be not just cross-examined on it, but to introduce evidence about it.

(11 RT 2715-2717.)

The trial court also expressly rejected appellant's claim that under Evidence Code section 352, the proffered evidence was unduly prejudicial.

"[T]he acts of violence by the People was [*sic*] very probative on the question of the weight to be given to the doctor's testimony, and [] was [*sic*] extremely important because it [*sic*] is related to the real key issue in this case, whether there was premeditation or deliberation." (12 RT 2761.)

Subsequently, defense counsel proposed that to prevent cross-examination of Dr. Dutton about appellant's participation in the 1994 Bryant robbery-murder, counsel would not elicit Dr. Dutton's opinions expressly concerning appellant's mental state at the time he killed Carmen and Zuri. Instead, counsel would limit direct examination of Dr. Dutton to general expert knowledge based on his studies regarding spousal homicide. (12 RT 2733, 2747-2749, 2753.) The trial court concluded that since Dr. Dutton would no longer offer his opinion as to whether appellant killing Carmen and Zuri was impulsive or instrumental, evidence of appellant's other acts of violence would not go to the credibility or the weight of Dr. Duttons' testimony. (12 RT 2761.) However, the prosecutor could still cross-examine Dr. Dutton as to how antisocial behavior in general is relevant to whether a spousal homicide is an impulsive or instrumental act. Counsel agreed that such inquiry was relevant. (12 RT 2749-2750.)

4. Dr. Dutton's testimony during guilt phase

After the People rested, defense expert witness Dr. Dutton testified. His testimony was similar to that at the 402 hearing, excluding references to information relating to appellant and this case, and excluding his opinion that appellant killed Carmen and Zuri in an impulsive act of intimate rage because he feared that Carmen was leaving him. (12 RT 2792-2869.)

B. Applicable Legal Principles

Evidence Code section 1101, subdivision (c), reads "[n]othing in this section affects the admissibility of evidence offered to support or attack the credibility of a witness." (See also *People v. Kennedy* (2005) 36 Cal.4th

595, 634.) Moreover, "[o]ther-crimes evidence may be used to impeach the testimony of an expert witness. (*People v. Nye* (1969) 71 Cal.2d 356, 373-376 []; *People v. Jones* (1964) 225 Cal.App.2d 598, 610-613 [].)" (*People v. Hendricks*, *supra*, 44 Cal.3d 635, 642; see also *People v. Kennedy*, *supra*, 36 Cal.4th at p. 634.)

Evidence Code section 721 provides, in relevant part:

> (a) . . . [A] witness testifying as an expert may be cross-examined to the same extent as any other witness and, in addition, may be fully cross-examined as to (1) his or her qualifications, (2) the subject to which his or her expert testimony relates, and (3) the matter upon which his or her opinion is based and the reasons for his or her opinion.

Similarly, a prosecution's rebuttal evidence is properly admitted to attack the basis of an expert witnesses's testimony. (*People v. Doolin* (2009) 45 Cal.4th 390, 438, citing Evid. Code, §§ 721, subd. (a), 790.)

The court in *People v. Jones*, *supra*, 225 Cal.App.2d at p. 611, explained:

> The general rules regarding expert testimony and the scope of cross-examination of experts have been frequently stated. "A medical expert is entitled to express his opinion on a medical question presented in issue and then he may support that opinion by giving the reasons assigned in support of it. [Citation.] Expert evidence is really an argument of an expert to the court, and is valuable only in regard to the proof of the facts and the validity of the reasons advanced for the conclusions. [Citation.] The weight to be given to the opinion of an expert depends on the reasons he assigns to support that opinion. [Citations.]" (*People v. Martin* (1948) 87 Cal.App.2d 581, 584 [].)

(*Id.* at p. 611.)

"Once an expert offers his opinion, [] he exposes himself to the kind of inquiry which ordinarily would have no place in the cross-examination of a factual witness." (*Hope v. Arrowhead & Puritas Waters, Inc.* (1959) 174 Cal.App.2d 222, 230.)

> The expert invites investigation into the extent of his knowledge, the reasons for his opinion, including facts and other matters upon which it is based [citation], and which he took into consideration; and he may be "subjected to the most rigid cross-examination" concerning his qualifications, and his opinion and its sources [citation].

(*Ibid.*; see also Evid. Code, § 721, subd. (a).)

It is for this reason that expert witnesses are subject to far broader cross-examination than are other factual witnesses. (Evid. Code, § 721, subd. (a); *People v. Hendricks*, *supra*, 44 Cal.3d 635, 642; *People v. Nye*, *supra*, 71 Cal.2d at pp. 374-375; *People v. Jones*, *supra*, 225 Cal.App.2d at pp. 610-613.) The weight accorded an expert's opinion is a matter for the jury to determine. (§ 1127, subd. (b); Evid. Code, § 720; CALJIC No. 2.80.) Because an expert witness may be cross-examined "more extensively and searchingly than a lay witness," the trial court has broad discretion to admit such evidence for impeachment. (*People v. Dennis* (1998) 17 Cal.4th 468, 519.) The trial court's ruling is reviewed for abuse of discretion. (*People v. Hughes* (2002) 27 Cal.4th 287, 335.)

Additionally, Evidence Code section 352 provides that all relevant evidence which has not been excluded by statue is admissible, unless the trial court, in its discretion, finds that 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." "The 'prejudice' referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against defendant as an individual and which has very little effect on the issues. In applying section 352, 'prejudicial' is not synonymous with 'damaging.'" (*People v. Yu* (1983) 143 Cal.App.3d 358, 377.) "On appeal, the ruling is reviewed for abuse of discretion." (*People v. Cudjo* (1993) 6 Cal.4th 585, 609.) "Where . . . a discretionary

power is inherently or by express statute vested in the trial judge, his or her exercise of that wide discretion must not be disturbed on appeal *except* on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice." (*People v. Jordan* (1986) 42 Cal.3d 308, 316; italics in original.)

C. The Trial Court's Ruling To Admit Evidence of the 1994 Robbery-Murder for Impeachment Was Not an Abuse Of Discretion

Appellant claims the 1994 robbery-murder was inadmissible under Evidence Code section 1101 because it shows that he has a propensity for violence. (AOB 58-59.) Appellant's contention is misplaced.

The prosecutor here did not offer this evidence under Evidence Code section 1101, subdivision (a), nor did the trial court admit it on this basis. Instead, the prosecutor planned to rely on the robbery-murder to cross-examine Dr. Dutton as to his bias; specifically, on the basis of his opinion that appellant killed Carmen and Zuri in an impulsive act of intimate rage. (11 RT 2608-2621.)

At the 402 hearing, Dr. Dutton testified that a man's antisocial or criminal history is an important factor to consider in determining whether he is an impulsive or instrumental type killer. (11RT 2591-2592.) Dr. Dutton opined that the 1994 robbery-murder was an instrumental killing, with the objective to rob, with "some elements of rage" since appellant and his brother Timothy and friend used excessive means. (11RT 2606.) Dr. Dutton indicated that this robbery-murder was the type of antisocial behavior that should be considered to determine if a spousal homicide was an impulsive rage or instrumental type killing. (11RT 2603-2604.) In fact, Dr. Dutton stated that he considered this robbery-murder, but did not rely on it or give it any weight in rendering his opinion that appellant killed

Carmen and Zuri in an act of impulsive rage due to estrangement. (11RT 2576-2578.)

The weight of Dr. Dutton's testimony clearly depended upon the basis for his opinions, especially his opinion that appellant killed his victims as a result of him losing control and erupting in a rage, rather than because he had violent tendencies. As such, the prosecutor was entitled to impeach and cross-examine Dr. Dutton with/about appellant's 1994 robbery-murder as a means of highlighting the inconsistencies in his testimony, and testing his credibility. "[A]ny possibility the jury might have misunderstood the purpose of this evidence [would have been] obviated by [a] limiting instruction, which we presume the jury [would have] understood and followed." (*People v. Panah* (2005) 35 Cal.4th 395, 491; see CALJIC No. 2.50, 3 CT 1022-1023; 13 RT 3227.)

Appellant's claim that the challenged evidence was more prejudicial than probative under Evidence Code section 352 likewise fails.

The 1994 robbery-murder involved killing a stranger for money, facts much less inflammatory than those of the instant offense which were extremely brutal. Here, appellant suffocated his two-year old daughter with a pillow and then struck her with the claw and blunt end of a hammer until she died. Appellant then tortured and killed his pregnant wife by binding her arms and legs, beating and kicking her in the face, cutting her with a knife, tying a plastic bag around her head, and strangling her. (4 Supp.CT 883-885, 889-890, 892-896; 9 RT 2063-2065; 10 RT 2441, 2448-2449, 2453, 2513-2514, 2516, 2518-2520.) The trial court's ruling that the challenged evidence was not unduly prejudicial was not an abuse of discretion.

Appellant's claim that the trial court's ruling effectively prevented him from presenting a defense, e.g., that appellant killed his victims in a fit of rage fueled by his relationship with his wife and his family history (see

AOB 50-51), is misplaced. While "[a] defendant has the general right to offer a defense through the testimony of his or her witnesses [citation], . . . a state court's application of ordinary rules of evidence . . . generally does not infringe upon this right [citations]." (*People v. Cornwell* (2005) 37 Cal.4th 50, 82.) Regardless, even assuming error, the admission of the challenged evidence was harmless.

D. Even Assuming Arguendo the Trial Court's Ruling Was an Abuse of Discretion, Any Error In Ruling To Admit the Challenged Evidence Was Harmless

The trial court ruled that evidence of the 1994 robbery-murder, in addition to other acts where appellant used violence to attain his goals, would be admissible in the event Dr. Dutton opined that appellant killed Carmen and Zuri in an impulsive act of intimate rage.[14] In each of the other acts of violence, the evidence showed that appellant personally committed violent acts; thus, even without evidence of the 1994 robbery-murder, the jury would have heard evidence of appellant's violent tendencies.

Additionally, the evidence introduced at the guilt trial was overwhelming that appellant had motive to kill, and that he premeditated and deliberated killing Carmen and Zuri. First, there was no doubt that appellant knew and was angry that Carmen was talking to friends and family about him robbing banks and abusing her, that he wanted her to stop, and that he was concerned that someone would "snitch him out" and he would be sent back to prison. (See 8 RT 1960-1970; 9 RT 2126-2128,

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[14] Appellant does not challenge the trial court's ruling as to these other violent acts. (e.g. 11 RT 2713-2715; see 14 RT 3613-3614 [evidence presented that in 1994 appellant robbed and beat Frank Pecoraro]; 11 RT 2713-2715; see 14 RT 3506, 3509 [evidence that appellant and accomplice used violence and threatened to shoot and kill employees and customers to effectuate two bank robberies]).

2190, 2195-2196; 10 RT 2357, 2359-2361, 2395, 2398-2399, 2509-2510, 2517-2518; 4 Supp.CT 877, 899-900.)[15]

Before the murders, appellant told his mother that Gregory Morton, his accomplice in the bank robberies, told him to teach his wife not to talk so much because he (Morton) had no intention of going back to prison. (9 RT 2195-2196.) Carmen's friend, Angelique Foster, testified that appellant called her before the murders and angrily said Carmen was going crazy and was telling others that he planned to rob banks. (19 RT 2395.)

Second, appellant's statements to others showed that he planned to kill Carmen and Zuri to stop Carmen from talking, and to avoid being sent back to prison. (See e.g., 9 RT 2144-2147 [appellant's brother testified that appellant told him that if Carmen "didn't stop talking" appellant was going to "kill her" and that Carmen "doesn't know when to keep her mouth shut."]; (9 RT 2174-2176 [appellant explained to his mother that Carmen "just doesn't listen. She just doesn't listen."]; see also 9 RT 2185 [appellant told his mother that "She just wouldn't stop – she talked too much. She wouldn't stop talking. She wouldn't listen." "She just, you know, didn't listen. She just didn't know how to stop talking about things."])

Third, the physical evidence from the autopsies (8 RT 1900-1931), in addition to appellant's admissions to the police (4 Supp.CT 874-913; 10 RT 2441, 2446-2449, 2453, 2495, 2508-2524), showed that appellant planned the murders. For instance, in his interview with police, appellant indicated that he woke up the morning of the murders and knew he was going to kill Carmen and Zuri, but first had to separate the two. (4 Supp.CT 908-909.)

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[15] "4 Supp.CT" references volume four of the "Clerk's Supplemental Transcript of Capital Appeal Photocopies of Exhibits Requested By Appellate Counsel."

Appellant then detailed his plan; he sent Carmen to the bank to cash her pregnancy disability check, knowing that he could not do so after he killed her. (4 Supp.CT 883, 887, 908.) Right after Carmen left the apartment, appellant went into Zuri's room where she was napping on the floor mattress, and put a pillow over her face and tried to suffocate her. When he was unsuccessful he went to his bedroom, retrieved a hammer, and went back to Zuri's room where he struck her until she was dead. (4 Supp.CT 883-885; 10 RT 2441, 2448, 2453, 2513-2514.)

Appellant then waited until Carmen returned. When she did, he first tried to slash her with a knife, then kicked her in the face and mouth, and next went into a bedroom and retrieved shoe laces and a phone cord, with which he tied Carmen's ankles together and her hands behind her back. (4 Supp.CT 889-890, 892-896; 9 RT 2063-2065; 10 RT 2449, 2516, 2518-2519.) He then went into the kitchen and retrieved plastic grocery bags, one of which he used to put over Carmen's head, stopping to tie a knot at her neck. When appellant realized that Carmen still was not dead, he grabbed her neck, and tightened the plastic bag around her neck until she died. (9 RT 2064-2065; 10 RT 2448, 2520.)

The evidence further shows that appellant planned his escape before the murders. For instance, his mother testified that the night before the murders, appellant told her he was "thinking" about going to New York, which is exactly where he fled after he murdered Carmen and Zuri. (9 RT 2170, 2193.)

In sum, appellant made at least two separate conscious acts to kill each of his victims. He attempted to suffocate Zuri with a pillow. When that failed, he retrieved a hammer and fatally struck her in the head. Later, after methodically torturing Carmen, appellant attempted to suffocate her by tying a plastic bag over her head. When that failed, he strangled her to death with his hands. This, in addition to appellant planning in advance to

separate Carmen and Zuri to facilitate the murders, and to flee to New York afterwards, is ample evidence that appellant premeditated and deliberated killing Carmen and Zuri. It is not reasonably probable appellant's verdict would have been more favorable even without the admission of evidence of the 1994 robbery-murder of Jerome Bryant. (*People v. Watson* (1956) 46 Cal.2d 818, 836; see also *People v. Welch* (1999) 20 Cal.4th 701, 749-750.)

III. THE TRIAL COURT PROPERLY ALLOWED THE PROSECUTOR TO INTRODUCE EVIDENCE OF APPELLANT'S ATTEMPTED JAIL ESCAPE TO SHOW CONSCIOUSNESS OF GUILT

Appellant contends that the trial court erred in admitting into evidence his attempted jail escape as "other crimes" evidence or to show consciousness of guilt. (AOB 65.) Appellant claims that the error violated his right to due process and reliable adjudication at all stages of a death penalty case under the Eighth and Fourteenth Amendment of the federal Constitution. (AOB 67.) Appellant's contention is without merit.

A. Relevant Proceedings

On October 22, 1999, defense counsel moved in limine to exclude prejudicial "other crimes" evidence. (3 CT 789-790.) On November 2, 1999, the prosecutor filed an opposition to defense's motion (3 CT 828-829) and stated her intent to introduce evidence of appellant's attempt to escape from jail. (3 CT 818-829.)[16] In a written motion, the prosecutor described the facts of the attempted escape, based on a police report, as follows:

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[16] The prosecutor stated her intent to introduce two incidents of appellant attempting to escape jail while awaiting trial. First, on August 5, 1998, appellant and four inmates attempted to escape from jail. Three weeks later, appellant planned a second escape and threatened to kill the jail guard. (11 RT 2713.) The prosecutor ultimately withdrew her motion to introduce the latter planned escape. (12 RT 2734.) Therefore, it is the August 5, 1998, attempted jail escape that appellant challenges here.

> On August 5, 1998, Defendant and four other inmates on "C" Module were interviewed by deputies after a confidential informant/inmate advised that they were involved in an attempt to break out of the jail. Specifically, a window in room 33 had suffered damage. A metal screen covering the interior side of the window had been pried back and bent. A glass portion of the window was broken out, and there were chipped pieces of concrete that surround[ed] the window. Numerous sheets from one of the beds were tied together in a "rope" fashion. The confidential informant told Sergeant John Cox that he saw Defendant Henriquez and another inmate, Jerry White, ramming a metal piece against the concrete, trying to chip it away from the window. When questioned by the deputies, Defendant admitted that he was "fully responsible," and added that "nobody else" was involved.

(3 CT 823; see also 3 RT 614.)

At oral argument on the motion, the prosecutor explained that appellant's escape attempt was probative to show consciousness of guilt and an attempt to avoid the death penalty. (3 RT 597-598, 615.) The trial court noted that appellant's actions were a "form of fleeing." (3 RT 615.)

Defense counsel argued that appellant's escape attempt was inadmissible since the defense was not contesting any elements of the murder charges and was not disputing the identity of the killer in the charged homicides, but was focusing only on appellant's degree of guilt. Thus, "consciousness of guilt" was irrelevant to this determination, i.e., whether appellant was guilty of first or second degree murder, and whether the crimes were premeditated. Defense counsel also argued that even if relevant, evidence of the escape attempt should be excluded under Evidence Code section 352 as cumulative and weaker than other "consciousness of guilt" evidence, and because it would create "a substantial danger of undue

prejudice and misleading the jury." (3 CT 836-841;[17] 3 RT 694-696.)

The trial court held that the escape attempt was admissible to show consciousness of guilt for different types of criminal conduct, such as premeditated first degree murder, second degree murder, and manslaughter:

> We're presented with somewhat different issues when we get to the attempted jail break from cell 33 on August 5th, 1998 . . . .
>
> Now, Ms. Levine [defense counsel], I've read your papers carefully, and the authorities. And it seems to me that close reading of *Romero* and *Terry* indicates as follows: That where you have a situation that multiple inferences can be drawn from a set of facts – for example in this case we have an escape – the question is, what does that reflect? Guilt. Guilt of what? Guilt of first degree murder? Guilt of second degree murder? Guilt of manslaughter? Violating parole and going back to prison for the battery? What? It's consistent with any one of those things.
>
> It seems to me that a fact is no less admissible because it permits []multiple inferences. That's the lesson in *Romero* and *Terry* – and especially in *Romero*. That's the one where he escapes. And in a case where he's being tried for a crime in Alameda County, he says "you can't allow evidence of that escape in, because I also committed the crime in Contra Costa and I may have been trying to escape to avoid prosecution of the Contra Costa crime."
>
> And the escape, in and of itself, was consistent with guilt of either of those two crimes – the one that was involved in his trial and another one in another county that wasn't involved in the trial.
>
> And the Court said that goes to the weight. It's for the jury to decide, based upon all the evidence in the case, whether the specific act of escape showed consciousness of guilt of the

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[17] The prosecutor countered appellant's Evidence Code section 352 argument in part by noting that the only evidence to be presented would be appellant's confession to jail authorities. (3 CT 867-869.)

Alameda crime or showed consciousness of guilt for the Contra Costa crime.

And in this case similarly it seems to me that the escape is consistent with a number of things, or crimes committed in this case, whether premeditated or second degree or manslaughter, and consistent with other types of criminal conduct that aren't charged in this case. It's consistent with all those things. It's for the jury to decide, in considering the totality of all the evidence, whether it shows consciousness of guilt of any of those. And if so, which one or ones.

And so based upon *People vs. Romero* and like cases in that, it seems to me that's a jury issue. And People will be allowed to establish escape from the jail on August 5, 1998 . . . .

[¶] . . . . [¶] And there's some cases right on point of that that clearly show that that goes to the weight. In order to fully evaluate the consciousness of guilt aspect of that, you should allow that in so they can understand the full measure of action that the defendant was prepared to undertake in order to avoid the conviction or the penalty, depending upon the situation. . . .

(3 RT 727-730.)

The court continued:

Remember, the inferences to be drawn from the escape don't have to be made based upon the escape isolated from all the other evidence. It should be made, in fact, by a consideration of the escape in the context of all the other evidence that they hear at the trial. And then the question is, if they do that, is it a logical and reasonable inference from this that the escape reflects consciousness of guilt of premeditated murder or some other crime.

And if it permits that kind of inference, the fact that it permits other inferences doesn't necessarily exclude it – although the jury couldn't find guilt simply based upon consciousness of guilt. But they'll be so instructed, in any event.

(3 RT 730-731.)

The court added:

> To me, that's the ultimate issue that's raised. If it allows for a reasonable and logical inference, if it's supported by substantial evidence unless outweighed by prejudicial value, then it seems to me it should come in. . . . [¶] If it's probative, it outweighs the prejudicial value. No, I don't believe that the question is identity – only identity. I don't believe that. I understand your argument in that respect. I don't believe that that's the case. The question is relevancy on any material issue. And you read these cases to confine materiality to identity issues. And I see nothing in logic that would so constrain it. . . .

(3 RT 735-736.)

Appellant ultimately stipulated to the August 5, 1998, escape attempt. On December 2, 1999, the trial court read the following to the jury:

> It is stipulated between the parties that on August 5th, 1998, five inmates, including Christopher Henriquez, using part of a cell bunk attempted to pry open a cell window to escape from the custody of the Main Detention Facility of Contra Costa County where they were housed awaiting trial.

(10 RT 2418 -2420.)

After all evidence was presented, the trial court instructed the jury on murder in the first degree, murder in the second degree, and voluntary manslaughter. (13 RT 3233-3244.) The court also instructed the jury with a modified version of CALJIC No. 2.04, [attempted escape from jail] as it relates to consciousness of guilt. (13 RT 3223; 3CT 1012; see also Arg. V, *infra*.)

B. The Trial Court Properly Allowed Evidence of Appellant's Escape Attempt

Appellant claims that "[t]he escape attempt was not admissible as other crimes evidence" pursuant to Evidence Code section 1101. (AOB 65.) Because the prosecution here did not offer evidence of appellant's attempted jail escape to establish criminal propensity, appellant's claim fails. (See *People v. Farnam* (2002) 28 Cal.4th 107, 154 [when defendant claimed inter alia that "bad act" testimony had "no basis for admission"

under Evid. Code, § 1101, this Court rejected defendant's claim, noting that challenged evidence was not offered by the prosecution to show criminal propensity under this section].) In any event, a defendant's attempted jail escape may be properly admitted to prove a defendant's consciousness of guilt. (See *People v. Arias* (1996) 13 Cal.4th 92, 127-128; *People v. Neely* (1993) 6 Cal.4th 877, 896-897; *People v. Terry* (1970) 2 Cal.3d 362, 395.)

Here, appellant's escape attempt was relevant and admissible because it tended to show his consciousness of guilt of the charged murders. Appellant knew he had been charged with premeditated murders and was aware he could be sentenced to life in prison or death; it was a reasonable inference that he attempted escape to avoid the severe consequences. (See *People v. Terry, supra,* 2 Cal.3d at p. 395 [it is probable that "one who expects his guilt to be proved at trial will attempt an escape and that an innocent man will stay for trial in order to clear his name and win lawful liberty"].)

Appellant also claims that the trial court erred in allowing the prosecutor to introduce evidence of his escape attempt to show consciousness of guilt since he did not contest the killings, so that identity was not an issue, but only the degree of the offenses. (AOB 65.) Appellant's claim fails.

First, as note *ante*, evidence of escape is admissible to show consciousness of guilt. (*People v. Odle* (1988) 45 Cal.3d 386, 402-403; *People v. Holt* (1984) 37 Cal.3d 436, 455, fn. 11.) "Instructions on consciousness of guilt are proper not only when identity is at issue, but also when 'the accused admits some or all of the charged conduct, merely disputing its criminal implications.' [Citation.]" (*People v. Thornton* (2007) 41 Cal.4th 391, 438.) It is not error to give flight instructions when the primary issue in dispute is not identity, but whether the defendant

"premeditated and deliberated his crimes." (*People v. Moon* (2005) 37 Cal.4th 1, 27-28, see also *People v. Smithey* (1999) 20 Cal.4th 936, 983.)

Although appellant characterizes the question before the jury as that of the degree of his crime, rather than his guilt, "the fact remain[s] that defendant did not plead guilty to any of the charges and the jury had before it the issue of guilt on all charges." (*People v. Breaux*, *supra*, 1 Cal.4th at p. 304.) "Although defendant's theory of the case was that he was guilty of only second degree murder, he pleaded not guilty to the charges, thereby putting in issue 'all of the elements of the offenses.' (*People v. Steele* (2002) 27 Cal.4th 1230, 1243 [1]." (*People v. Moon*, *supra*, 37 Cal.4th at p. 28.) Thus, "[e]ven if he conceded at trial his guilt of some form of criminal homicide, 'the prosecution [was] still entitled to prove his case and especially to prove a fact so central to the basic question of guilt as intent [of whether he premeditated and deliberated his crimes].' [Citation.]" (*Ibid.*)

In *People v. Hall* (1926) 199 Cal. 451, 459-460, this Court held that a person's flight after the commission of a crime—while not in itself sufficient to establish guilt—is a circumstance to be considered by the jury in connection with all other facts and circumstances tending to prove a consciousness of guilt. (*Id.* at p. 460.)

> "It is elementary that the flight of a person after the commission of a crime, while not of itself sufficient to establish guilt or to raise a presumption of guilt, is a circumstance to be considered by the jury in connection with all the other facts and circumstances in the case as tending in some degree to prove the consciousness of guilt, and evidence thereof is admissible, not as part of the res gestae, but as indicative of a guilty mind. It is permissible, in proof of the fact of flight, to show all of the facts and circumstances attending the flight either to increase or decrease, as the case may be, the probative force of the fact of flight. In other words, when testimony as to flight is resorted to, it is proper to show the extent of the flight and the circumstances

thereof, including the acts and doings of the defendant, which tend to characterize and increase its significance."

(*People v. Hall*, *supra*, 199 Cal. at p. 460.)

The evidence that appellant attempted to escape from jail was undisputed. As the trial court pointed out, the indictment specifically charged appellant with the premeditated murders of his wife and daughter. The likely inference is that appellant was aware of his guilt of the most serious of crimes and feared the profound consequences of life in prison or death. The probative force of the escape was increased by the facts attending the escape. Appellant admitted he killed his pregnant wife and his two-year old daughter. There is no doubt that appellant knew that by attempting to escape from custody, he risked resistance by armed guards and the likelihood that the guards would attempt to shoot an accused triple murderer to stop him. Yet, appellant willingly took that risk and the risk of perpetrating additional serious crimes in the event the guards or his accomplices were injured or killed. Thus, the evidence of appellant's flight in this case was relevant to appellant's consciousness of guilt and to the prosecutor's theory that appellant's post-offense conduct was consistent with his awareness that he committed the most serious of crimes and faced the ultimate penalty. The huge risk to life and limb appellant took in attempting to escape showed not merely his awareness that he committed some wrong, but his awareness he was guilty of an extraordinarily serious crime and faced the ultimate penalty.

C. Evidence of Appellant's Escape Attempt Was Not Unduly Prejudicial

Evidence Code section 351 provides, "Except as otherwise provided by statute, all relevant evidence is admissible." 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."

As discussed above, evidence that appellant attempted to escape from jail while awaiting trial in this case was highly probative to show his consciousness of guilt, and that he premeditated and deliberated his crimes. Any risk of undue prejudice was slight. The escape attempt, where appellant and four other inmates attempted to pry open a window and screens and tied sheets together, was not particularly severe or inflammatory since it did not involve any overt violence. (See *People v. Kipp* (2001) 26 Cal.4th 1100, 1126 [where defendant, charged with capital offense claimed that attempted escape was unduly prejudicial, this Court noted that because attempted involved no overt violence, risk of undue prejudice slight].) Moreover, the attempted escape paled in comparison to the heinous murders of appellant's pregnant wife, and two year-old daughter.

The admission of the challenged evidence as not unduly prejudicial was not an abuse of discretion. (See *People v. Williams* (1997) 16 Cal.4th 153, 213 [appellate court reviews rulings under Evid. Code, § 352 for abuse of discretion.])

Appellant suggests that his escape attempt lacked probative value because it "occurred two years after the charged offense." (AOB 63, 67.) The claim that the probative value of such evidence is necessarily diminished by the passage of time has been consistently rejected. (*People v. Terry, supra,* 2 Cal.3d at p. 395; *People v. Ellis* (1922) 188 Cal. 682, 693; See also *People v. Kostal* (1958) 159 Cal.App.2d 444, 451.) "[T]he question of time of escape goes to the weight, not to its admissibility." (*People v. Terry, supra,* at p. 395.) Evidence of escape—even violent escape—is properly admitted though substantial time elapses between the

crime and flight from custody. (See e.g., *People v. Remiro* (1979) 89 Cal.App.3d 809, 845 [16 months.].)

D. Even Assuming Arguendo That Admission of Evidence of Appellant's Escape Attempt Was Erroneous, Any Error Was Harmless

Even assuming arguendo that the trial court erroneously admitted evidence of appellant's escape attempt to show consciousness of guilt, it is not reasonably probable appellant's verdict would have been more favorable without the evidence. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836.) The evidence showed that appellant admitted killing his family to the police on several occasions, and also told some of his family members that he committed the crimes. (4 Supp.CT 937-959; 9 RT 2181; 10 RT 2357, 2443, 2447-2449, 2453, 2518-2520.) Moreover, as noted *ante*, (see Arg. II), there was overwhelming evidence presented of appellant's guilt. For these reasons, appellant's claim of error under the federal Constitution (see AOB 67) must also be rejected. (See *Chapman v. California* (1967) 386 U.S. 18, 24.)

IV. THE TRIAL COURT PROPERLY ALLOWED INTO EVIDENCE CARMEN'S OUT-OF-COURT STATEMENT

Appellant contends that the trial court erred by allowing Trenice White, Carmen's cousin, to testify that three weeks before Carmen's death, Carmen told her that appellant was into "heavy stuff." (AOB 68.) Appellant claims that Carmen's statement was inadmissible hearsay and violated his rights under the federal and state Constitutions and state law. (AOB 69.) Appellant's contention is without merit.

A. Relevant Proceedings

On November 24, 1999, defense counsel filed a motion to exclude hearsay evidence, including statements made by Carmen, claiming such

evidence would violate his federal and state rights to due process and a fair trial. (3CT 882-889.)

On November 29, 1999, the prosecutor noted her intent to introduce out-of-court statements made by Carmen. (7 RT 1697-1706.) Defense counsel expressed concern that Trenice White would testify about statements Carmen made when she stayed at Trenice's apartment. The prosecutor stated she did not intend for Trenice to testify about what Carmen said, but about Trenice's observations that Carmen was very withdrawn, scared and said little. (7 RT 1762.) The prosecutor explained that Trenice's observations that Carmen was scared and upset were relevant to show that appellant had a motive to kill Carmen. "She's scared because of these robberies; she's telling him not to do it, . . . she's going around telling people," and that gives appellant a motive to kill her. (7 RT 1762-1764.)

Defense counsel read to the jury from a police report as follows:

> Carmen told White, Trenice White, that she would talk to her, White, about it later. That Chris was into heavy stuff. Carmen appeared to be tired and afraid and was crying. Carmen stayed with White at White's apartment from July 19th to July 21st , etc., etc. White also heard that Christopher had threatened to kill Carmen if she told about the robberies.

(7 RT 1765.)

Defense counsel argued that Trenice's testimony that Carmen was afraid was inadmissible hearsay, inadmissible evidence of Carmen's state of mind, and inadmissible opinion testimony. (7 RT 1765-1766, see also 7 RT 1774-1775.)

On December 1, 1999, the prosecutor was prepared to call Trenice White to the stand. Defense counsel challenged the admission of Trenice's proposed testimony that "Carmen comes over and she is just saying he's into a lot. That's all she says. That's it." The prosecutor offered Carmen's

out-of-court statement as a spontaneous statement, an exception to the hearsay rule. (9 RT 2114; see also Evid. Code, § 1240.) The prosecutor reiterated that she was offering it as "a spontaneous statement" made under stress. "[A]nd that's it. She wouldn't say anything more." (9 RT 2115-2116.) The prosecutor argued that Trenice's proposed testimony was that Carmen acted very differently, was very upset, and blurted out that appellant was into heavy stuff. (9 RT 2116.)

The trial court allowed into evidence Carmen's out-of-court statement, explaining its ruling as follows:

> I guess your argument is that it qualifies under Penal Code section [*sic*] 1240 as a spontaneous statement in that it's a statement that describes something she perceived, to wit, that he is into some heavy stuff, meaning the bank robberies, and that it was made under stress or excitement caused by that.

(9 RT 2116.)

The court explained "the stress is an ongoing thing, has been with [Carmen] and she made a statement under that stress and that the statement was caused by the perception [that appellant was going to rob banks]. [¶] . . .[¶] . . . In fact, she was very upset. . . . [¶] I will allow it under [Evidence Code sec.] 1240. . . . [¶] It does seem to qualify." (9 RT 2117-2118.)

> The Court finds that the statement constitutes description of what the witness – what the declarant perceived and that it was made – it appears in the totality of her testimony considered, to have been made under stress caused by the very fact that she perceived, the fact that her husband was involved in heavy stuff or, more specifically, bank robberies.
>
> "So, I will allow that in. . . .
>
> . . . . . .

(9 RT 2118-2119.)

As to defense counsel's claim that the statement characterized Carmen's state of mind, the court noted that in the event the statement was not hearsay, it was relevant to show that Carmen was upset because she knew appellant was planning to rob banks. (9 RT 2119-2120.)

The court discussed:

> If it were offered for the truth of the matter asserted that he was into heavy stuff, I believe there is enough here to indicate it's a spontaneous statement, falls within the exception of the hearsay rule.
>
> However, my principle ruling is that it is based on the fact that in my view it is not hearsay, it is being offered to establish that Carmen had knowledge of the bank robberies and was talking about them in this form of defendant being into heavy stuff to third parties. And went on – and when considered for those purposes, it's not even hearsay. It's simply – it's not even hearsay, it's state of mind of Carmen and communication of that state of mind to a third party, which my view are relevant to the overall motive contentions of the People in this case.

(9 RT 2124-2125.)

At trial, Trenice White testified during the prosecution's case-in-chief that when Carmen and Zuri stayed with her in July 1996, Carmen was abnormal, withdrawn, said little, and appeared stressed. Carmen told her that appellant was into "heavy stuff," but did not elaborate. (9 RT 2127.) After Carmen left, Trenice tried to contact her, but Carmen left to stay with her father in Gilroy. Defense counsel did not cross-examine Trenice. (9 RT 2128.)

Later, outside the jury's presence, the trial court reaffirmed its ruling that Carmen's statement, that appellant was into "heavy stuff," was admissible. The court, however, revised the basis for its ruling and clarified that Carmen's state of mind was not relevant to the issues in this case. (10 RT 2342-2343.)

On December 13, 1999, after the court excused the jury for deliberation, the court explained:

> One, I'll make briefly, and it simply relates to my admission into evidence with respect to that statement, that testimony by Ms. White about Carmen having told her at one point that defendant was into heavy stuff. I admitted that over defendant's objection.
>
> I have reviewed that in my mind several times. Finally concluded that I think the ruling is correct on two grounds.
>
> One, insofar as it's being offered into evidence for the truth of the matter asserted – that is, that defendant was into heavy stuff - that it did constitute a spontaneous statement, a statement made under stress about what was being perceived.
>
> I found that to be a close question. And I read a lot of cases that had to do with whether something can qualify as a spontaneous statement when there is a substantial amount of time that passes from the occurrence of the matter that's perceived that causes the stress.
>
> And it really always boils to, in all the cases, a question of whether the statement was made while still acting under the stress of the excitement.
>
> In this case, we don't really have too much – we don't have any evidence or any evidence as to precisely when Carmen learned about the defendant being into heavy stuff or committing the bank robberies.
>
> And so it's hard to tell how that relates to how much time passed between her finding that out and passing on the information to Ms. White that was testified to. But it could have been a very short time.
>
> And what was controlling to me is the fact that Ms. White emphasized that this Carmen she saw was a different Carmen she had ever seen before. And she was very stressed.
>
> So the statement appears to have been made during a period of time while the stress occasioned by defendant – her

having learned that defendant was in heavy stress was still governing. [*sic*]

A close issue. But I found, all things considered, that it would be admitted under the spontaneous exception to the hearsay rule.

But, as I indicated, it also comes in for nonhearsay purposes. And when we ruled at the trial, we talked about state of mind of Carmen.

It's unfortunate that I talked about it in those terms. And I think I raised that. It's not really so much state of mind. What it is is it's evidence of a communication made by Carmen to a friend.

And to that extent, it corroborates all the other evidence, including a statement made by Francisco that defendant's brother – that defendant had complained to him about Carmen talking to her friends.

The evidence will show that fits that description of a friend, Carmen's statement to White fits the description of talking about the bank robberies to a friend, and therefore tends to corroborate that defendant was concerned about that.

I just wanted to state that for the record. I'm sorry, I started talking about it in terms of state of mind of Carmen. That created some problems. It's really not state of mind; it's simply evidence of communication.

(13 RT 3257-3260.)

B. The Trial Court Properly Admitted Evidence of Carmen's Statement As a Spontaneous Statement

The trial court here properly admitted evidence of Carmen's statement as a spontaneous statement, a well-established exception to the hearsay rule.

Evidence Code section 1240 provides that 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.

(See also *People v. Morrison* (2004) 34 Cal.4th 698, 718.)

> "To render [statements] admissible [under the spontaneous statement 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.]

(*People v. Trimble* (1992) 5 Cal.App.4th 1225, 1233, quoting *People v. Poggi* (1988) 45 Cal.3d 306, 318.)

This Court, in *People v. Farmer* explained:

> [I]n the stress of nervous excitement the [declarant's] reflective faculties may be stilled and the utterance may become the instinctive and uninhibited expression of the speaker's actual impressions and belief.
>
> The crucial element in determining whether a declaration is sufficiently reliable to be admissible under this exception to the hearsay rule is thus not the nature of the statement but the mental state of the speaker. The nature of the utterance—how long it was made after the starling incident and whether the speaker blurted it out, for example—may be important, but solely as an indicator of the mental state of the declarant.

(*People v. Farmer* (1989) 47 Cal.3d 888, 903-904.)

Accordingly, a statement is "spontaneous" if it is made without deliberation or reflection (*People v. Morrison*, *supra*, 34 Cal.4th at p. 718), that is, it is reasonable to conclude the person was under the influence of the stress of excitement at the time he or she made the statement. (*People v. Brown* (2003) 31 Cal.4th 518, 541; *People v. Farmer*, *supra*, 47 Cal.3d at p. 903; *People v. Pensinger* (1991) 52 Cal.3d 1210, 1266.) A trial court's ruling that a statement was made under sufficient stress to qualify for

admissibility under Evidence Code section 1240 is reviewed for abuse of discretion. (*People v. Roldon* (2005) 35 Cal.4th 646, 714; *People v. Phillips* (2000) 22 Cal.4th 226, 236; *People v. Poggi, supra*, 45 Cal.3d at pp. 318-319.)

According to Trenice White, Carmen was not acting like herself when she made the challenged statement. Carmen was withdrawn and scared, and was crying. (7 RT 1765; 9 RT 2127.) Thus, the record shows that Carmen was in a mental state of extreme stress and excitement when she blurted out that appellant was into "heavy stuff." There is no doubt that the knowledge that appellant was going to rob a bank was shocking and upsetting to Carmen; Carmen was eight months pregnant, on pregnancy disability, and supporting herself, an unemployed husband, and a two-year old child. Upon seeing her best friend, Carmen could not contain herself and unsolicited, blurted out that "appellant was into heavy stuff," and then recovered enough to stop herself from saying anything else that would reveal appellant's criminal activities. The trial court's admission of Carmen's out-of-court statement as a spontaneous declaration under Evidence Code section 1240 was proper.

Appellant argues that assuming "heavy stuff" related to bank robberies, there was no evidence as to when Carmen heard about the "heavy stuff." Appellant asserts that "while a brief period of time may elapse without precluding application of the spontaneous utterance hearsay exception (see, e.g. *People v. Raley* (1992) 2 Cal.4th 870, 893-894; [18 hours]; *In re Emilye A.* (1992) 9 Cal.App.4th 1695, 1713 [one to two days]), there was no way of knowing how many hours, days or weeks had elapsed in this case." (AOB 72.)

The record, however, shows that appellant told Carmen he was planning to rob a bank near the time Carmen visited Trenice. Trenice testified that Carmen stayed with her from July 19 through July 21, 1996.

(9 RT 2126-2127.) The parties stipulated that appellant committed the first San Francisco bank robbery on July 26, 1996, and the second one on July 31, 1996. (12 RT 2790.) The record also shows that appellant and Morton planned the first bank robbery sometime between July 15-20, 1996. (3 Supp.CT 759-767.[18]) Moreover, appellant admitted to police that he told Carmen he was going to rob a bank before the fact. (3 Supp.CT 767.) The likely (and most reasonable) inference to be drawn from this evidence is that appellant told Carmen about the planned robbery on or about July 19, 1996, which means that she learned about it just before she went to stay with Trenice.

In any case, "[t]he lapse of time between the described event and the statement, although a factor in determining spontaneity, is not determinative." (*People v. Trimble*, *supra*, 5 Cal.App.4th at p. 1234 .) "Neither lapse of time between the event and the declarations nor the fact that the declarations were elicited by questioning deprives the statements of spontaneity *if it nevertheless appears that they were made under the stress of excitement and while the reflective powers were still in abeyance.*" [*People v. Poggi*, *supra*, 45 Cal.3d 306, 319 [].]" (*People v. Trimble*, *supra*, 5 Cal.App.4th at pp. 1234-1235; internal quotes omitted, italics in original.)

C. The Trial Court Properly Admitted the Statement As Circumstantial Evidence of Appellant's Motive To Kill

Appellant also challenges the trial court's admission of Carmen's statement that appellant was into "heavy stuff" as corroborative evidence establishing appellant's motive to kill; "that appellant killed his wife because she was talking about the robberies to others." (AOB 73.) Appellant argues that "the robberies had not taken place at the time Carmen

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[18] "3 Supp.CT" references volume three of the "Clerk's Supplemental Transcript of Capital Appeal Photocopies of Exhibits Requested by Appellate Counsel."

talked to White" and there was no "evidence that showed that appellant was aware of the comment Carmen made to White." (AOB 73-74.) According to appellant, the challenged "statement was irrelevant hearsay that was far more prejudicial than probative." (AOB 74.)

The record shows, however, that appellant knew that Carmen was telling others about his activities. (See 10 RT 2395 [Angelique Foster testified that appellant complained Carmen was going crazy and telling people he was robbing banks]; 9 RT 2144-2147 [Francisco Henriquez testified appellant told him that Carmen talked too much and he wanted to kill her]; 9 RT 2195-2196 [Deborah Henriquez testified that appellant said Gregory Morton warned appellant to teach his wife not to talk so much because he did not want to go back to prison]; 9 RT 2174-2176, 2185 [Deborah Henriquez testified that after murders, appellant complained that Carmen would not stop talking about his business]; 10 RT 2509-2510, 2517-2518; 4 Supp.CT 940 [appellant told police he was angry at Carmen for talking to friends and family about his committing robberies].

In *People v. Mendoza* (2007) 42 Cal.4th 686, a capital murder case, the trial court admitted into evidence the defendant's wife's testimony that the defendant's stepdaughter, Sandra, said that defendant was abusing her, and that she [defendant's wife] confronted the defendant with Sandra's accusations. (*Id.* at p. 697.) This Court held that the trial court properly admitted Sandra's statement for a non hearsay purpose:

> The trial court concluded the prosecutor was not offering Sandra's [the stepdaughter's] statements to prove defendant actually molested her, but rather to prove defendant was aware of the accusations and to explain defendant's motive for killing Sandra. Accordingly, the evidence did not constitute hearsay. We agree.
>
> Sandra's accusations were properly admitted to explain defendant's state of mind, motive, and conduct. (*People v. Hill* (1992) 3 Cal.4th 959, 987 []; *People v. Duran* (1976) 16 Cal.3d

> 282, 295 [].) Rocio [defendant's wife] testified that, after Sandra told her about defendant's abuse, she had numerous conversations with defendant during which she confronted him with the details of Sandra's accusations. There is no dispute defendant was aware of the accusations before he went to Landers[, California].

(*Id.* at p. 697.)

Similarly, in this case, Carmen's statement that "appellant was into heavy stuff" to Trenice was properly admitted as circumstantial evidence that appellant had a motive to kill Carmen. It did not matter for this purpose if the statement was true. What mattered was that Carmen was telling her friends and family that appellant was committing robberies which explained appellant's motive to kill her – that is to silence Carmen and avoid going back to prison.

Based on the foregoing, the trial court's admission of evidence of Carmen's statement to Trenice to corroborate other evidence of appellant's motive, was not an abuse of discretion.

D. Any Alleged Error Was Harmless

Even assuming Trenice's testimony was erroneously admitted, the error was harmless under both state and federal standards. The jury learned about appellant's bank robberies or the "heavy stuff" (he was involved in) through various other sources, including appellant himself through his admissions to police. Moreover, the jury heard overwhelming evidence of appellant's guilt, including that he suffocated and bludgeoned his young daughter to death, and laid in wait for his pregnant wife before torturing and killing her. (See Arg. II, *ante.*) Last, appellant's admissions to police, included multiple statements indicating his motive to kill his wife. (10 RT 2509-2510, 2517-2518; 4 Supp.CT 940.)

Appellant's reliance on *People v. Coleman* (1985) 38 Cal.3d 69, 81-82, that evidence of a defendant's past or future conduct is unduly

prejudicial (see AOB 74-75) is misplaced. In *Coleman*, the trial judge permitted introduction of three letters written by the defendant's wife (one of his victims) who stated that on numerous occasions he threatened to kill the family and also recounted her fear of future violence. The letters also contained descriptions of certain events, including past acts of violent behavior by the defendant. The trial court allowed the evidence to be admitted for two limited nonhearsay purposes and allowed the cross-examination of a psychiatrist concerning the hearsay contents of the letters. This Court held that the potential for prejudice from this evidence was great, and the probative value little, based on the inflammatory nature of the hearsay and the fact the opinions of the expert could only be effectively undermined if the allegations were true. Thus, the trial judge abused its discretion under Evidence Code section 352 by permitting extensive quotation from the letters and the reading of them. (*Id.* at p. 81, 85, 93.) In contrast, here, Carmen's sole outburst and isolated comment that appellant was into "heavy stuff" was incomparable to the prejudicial hearsay statements admitted into evidence in *Coleman.*

Appellant also complains that the prosecutor here "urged" the jury to consider Carmen's statement as evidence that she knew that appellant planned to rob banks, to corroborate Angelique Foster's testimony that Carmen was "going crazy" and telling people he was going to rob banks, and to establish appellant's motive to kill Carmen, and of his premeditation and deliberation. (AOB 74-75.) Trenice's statement, however, was not pivotal in establishing that appellant had a motive and premeditated and deliberated the murders. As shown *ante,* in Argument II, there was substantial independent evidence, apart from Trenice's testimony to show that appellant premeditated and deliberated the murders; there was also independent evidence of appellant's motive contained in his admission to police. (10 RT 2509-2510, 2517-2518; 4 Supp.CT 940.)

The trial court's admission of Carmen's out-of-court statement was properly admitted for the reasons detailed above. In any event, even assuming error, its admission was harmless.

V. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY THAT IT COULD INFER CONSCIOUSNESS OF GUILT IF IT FOUND THAT THE DEFENDANT MADE FALSE STATEMENTS, ATTEMPTED TO ESCAPE FROM JAIL, OR FLED THE CRIME SCENE

Appellant contends that the trial court improperly gave the jury pinpoint instructions based on CALJIC Nos. 2.03 [Consciousness of Guilt-Falsehood], 2.04 [Attempted Escape From Jail], and 2.52 [Flight After Crime]. (AOB 76-77.) He is mistaken. All of the instructions were germane to evidence admitted at trial, none of them were pinpoint instructions, and each instruction has been repeatedly upheld by this Court.

A. The Challenged Instructions Were Properly Given And Did Not Duplicate Other Instructions on the Use of Circumstantial Evidence

Appellant claims the challenged instructions merely reiterate what was included in CALJIC Nos. 2.00 and 2.01.[19] (AOB 78-79.)

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[19] The trial court instructed the jury with CALJIC Nos. 2.00 and 2.01, as follows:

> Evidence consists of testimony[] of witnesses, writings, material objects, or anything presented to the senses and offered to prove the existence or the nonexistence of a fact. Evidence is either direct or circumstantial.
>
> Direct evidence is evidence that directly proves a fact. It is evidence which, by itself, if found to be true, establishes that fact.
>
> Circumstantial evidence, on the other hand, is evidence that if found to be true, proves a fact from which an inference of the existence of yet another fact may be drawn.

(continued...)

(...continued)

An inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts established by the evidence.

It is not necessary that facts be proved by direct evidence. They may also be proved by circumstantial evidence or by a combination of direct evidence and circumstantial evidence. Both direct evidence and circumstantial evidence are acceptable as means of proof, and neither is entitled to any greater weight than the other.

(13RT 3220-3221; CALJIC No. 2.00.)

However, a finding of guilt as to any crime may not be based on circumstantial evidence, unless the proved circumstances are not only:

One, consistent with the theory that the defendant is guilty of the crime;

But two, cannot be reconciled with any other rational conclusion.

Further, each fact which is essential to complete a set of circumstances necessary to establish the defendant's guilt must be proved beyond a reasonable doubt.

In other words, before an inference essential to establish guilt may be found to have been proved beyond a reasonable doubt, each fact or circumstance upon which the inference necessarily rests must be proved beyond a reasonable doubt.

Also, if the circumstantial evidence as to any particular count permits two reasonable interpretations, one of which points to defendant's guilt and the other to a finding of not guilty, you must adopt that interpretation that points to the finding of not guilty, and reject the interpretation that points to defendant's guilt.

If, on the other hand, one interpretation of this evidence appears to you to be

(continued...)

First, appellant did not claim the challenged instructions were duplicative or cumulative below; he therefore has waived this claim on appeal. "[T]he failure to object to an instruction in the trial court waives any claim of error unless the claimed error affected the substantial rights of the defendant, i.e., resulted in a miscarriage of justice, making it reasonably probable the defendant would have obtained a more favorable result in the absence of error. [Citations.]." (*People v. Andersen* (1994) 26 Cal.App.4th1241, 1249.) In this case, none of the instructions affected appellant's substantial rights. Instructions on how to evaluate evidence of flight, false statements by appellant, and an attempted jail escape are not on a par with instructions that describe the elements of a crime, explain the presumption of innocence, or require the jury to find guilt beyond a reasonable doubt. (See, e.g., *People v. Hillhouse* (2002) 27 Cal.4th 469, 503 ["Instructions regarding the elements of the crime affect the substantial rights of the defendant, thus requiring no objection for appellate review"].)

In any case, appellant's claim fails on the merits. First, evidence presented at trial warranted the giving of each of the challenged instructions. As to CALJIC No. 2.03, making willfully false statements, the prosecutor presented evidence that after the killings, appellant told his mother "I hit Carmen with the hammer, and while I was hitting her, Zuri got in the way," implying that he killed Zuri accidentally. (9 RT 2185-2186.) Additionally, appellant told police that he sought advice from Morton, who told appellant to run, implying that he had no plans to flee to New York but did so at Morton's instruction. (10 RT 2512; 4 Supp.CT 943.) As to CALJIC No.

(...continued)

> unreasonable, you must accept the reasonable interpretation and reject the unreasonable.

(13 RT 3221 -3222; CALJIC No. 2.01.)

2.04, it was stipulated that on August 5, 1998, appellant attempted to escape from jail while awaiting trial. (10 RT 2418-2419.) As to CALJIC No. 2.52, the evidence showed that after appellant killed Carmen and Zuri, he fled to New York. (10 RT 2430-2433, 2449; see also § 1127c, which mandates that the trial court instruct jury where evidence of flight is relied on to show guilt; *People v. Howard* (2008) 42 Cal.4th 1000, 1020 [same].)

As to appellant's claim that CALJIC Nos. 2.00 and 2.01, by themselves, constituted sufficient instruction on the matter, appellant's claim is misplaced. These instructions on circumstantial evidence focused on the facts of the crimes and the mental state of the defendant while committing the crime. (13 RT 3220-3222; 3CT 1008-1009.) The challenged instructions, on the other hand, concerned the defendant's state of mind *after* committing the crimes and whether it reflected the defendant's own belief that he had done something wrong. Not only did the challenged instructions concern a different matter, they were more specific than the general instructions on circumstantial evidence.

Also, CALJIC Nos. 2.00 and 2.01 specifically told the jury that it could convict the defendants based solely on circumstantial evidence. The challenged instructions told the jury that evidence of consciousness of guilt was insufficient to prove guilt. Accordingly, the challenged instructions were not duplicative of the general instructions on circumstantial evidence.

The trial court further instructed the jury, "[i]f any rule, direction, or idea is repeated or stated in different ways in these instructions, no emphasis is intended and you must not draw any inference because of its repetition." (13 RT 3218.) Thus, even if the challenged instructions were repetitive, the jury was told not to infer any significance to that fact. (*People v. Pinholster* (1992) 1 Cal.4th 865, 919 [appellate courts presume the jury followed the instructions it was given].)

B. The Instructions Were Not Unfairly Partisan Or Argumentative

Appellant next claims that the three challenged instructions were impermissibly argumentative pinpoint instructions. (AOB 79-80.) This Court has repeatedly rejected this claim. (See *People v. McWhorter* (2009) 47 Cal.4th 318, 377; *People v. Barnwell* (2007) 41 Cal.4th 1038, 1057, *People v. Nakahara* (2003) 30 Cal.4th 705, 713; *People v. Bacigalupo* (1991) 1 Cal.4th 103, 128; see also *People v. Holloway* (2004) 33 Cal.4th 96, 142.)

Appellant asks this Court to reconsider these and other cases, claiming that such instructions only benefit the prosecution. (AOB 81-82.) Appellant is mistaken. Such instructions are necessary to the jury's understanding of the law. The jury is entitled to know that consciousness-of-guilt evidence tends to impeach a defendant's credibility and denial of guilt. Wigmore summed up the law as follows:

> The commission of a crime leaves usually upon the consciousness a moral impression that is characteristic. The innocent man is without it; the guilty man usually has it. Its evidential value has never been doubted. The inference from consciousness of guilt to "guilty" is always available in evidence. It is a most powerful one, because the only other hypothesis conceivable is the rare one that the person's consciousness is caused by a delusion, and not by the actual doing of the act. The difficulty in connection with this evidence is not its own relevancy to show the doing of the act – that is universally conceded – but the mode of proving this consciousness of guilt in its turn by other evidence. There are two processes or inferences involved – from conduct to consciousness of guilt, and then from consciousness of guilt to the guilty deed.

(1A Wigmore, Evidence in Trials at Common Law (Tillers rev. 1983) § 173, p. 1840.)

This Court has long held that conduct of defendants evidencing their own awareness of criminal culpability is circumstantial evidence of their

guilt. (See generally, e.g., *People v. Ellis* (1966) 65 Cal.2d 529, 537-538.) In contending that these consciousness-of-guilt instructions are erroneous, appellant relies upon *People v. Mincey* (1992) 2 Cal.4th 408, where he claims this Court rejected as impermissibly argumentative, an instruction like CALJIC Nos. 2.03, 2.04, and 2.52. (AOB 81.) In *Mincey*, a capital case, the defendant asked the trial court to give the following pinpoint instruction: "'[i]f you find that the beatings were a misguided, irrational and totally unjustified attempt at discipline rather than torture as defined above, you may find that they were not in a criminal sense willful, deliberate, or premeditated.'" (*People v. Mincey, supra*, 2 Cal.4th at p. 437, fn. 5.) This Court held:

> In asking the trial court to emphasize to the jury the possibility that the beatings were a "misguided, irrational, and totally unjustifiable attempt at discipline rather than torture," defendant sought to have the court invite the jury to infer the existence of his version of the facts, rather than his theory of defense. Because of the argumentative nature of the proposed instructions, the trial court properly refused to give them.

(*Id.* at p. 437.)

In appellant's view, both the rejected argumentative instruction in *Mincey* and the approved CALJIC Nos. 2.03, 2.04 and 2.52 "tell the jury, '[i]f you find certain facts (escape attempt, making willfully false statements and flight in this case, and a misguided and unjustified attempt at discipline in *Mincey*) then 'you may' consider that evidence for a specific purpose (showing consciousness of guilt in this case and concluding that the murder was not premeditated in *Mincey*.)" (AOB 80-81.) Appellant asserts "there is no discernible difference between the instructions this Court has upheld (see, e.g., *People v. Nakahara*, *supra*, 30 Cal.4th at p. 713; *People v. Bacigalupo*, *supra*, 1 Cal.4th at p. 123 [CALJIC Nos. 2.03 'properly advised the jury of inferences that could rationally be drawn from the evidence']) and a defense instruction held to be argumentative because

it 'improperly implies certain conclusions from specified evidence.' (*People v. Wright, supra*, 45 Cal.3d at p. 1137.)" (AOB 82.) Appellant is wrong.

CALJIC Nos. 2.03, 2.04, and 2.52, do not invite the jury to infer the existence of the prosecution's version of the facts, but inform the jury of the law concerning consciousness-of-guilt evidence. And, besides noting the evidence the jury may consider, CALJIC Nos. 2.03, 2.04, and 2.52 tell the jury that the evidence it may consider is not sufficient by itself to prove guilt. The instruction rejected in *Mincey* lacked this element of neutrality. (*People v. Mincey, supra,* 2 Cal.4th at p. 437, fn. 5.) Indeed, the instructions here were thus favorable to appellant in that they prevented a finding of guilt on very incriminating evidence.

The trial court here did not err in instructing the jury with CALJIC Nos. 2.03, 2.04, and 2.52.

C. The Challenged Instructions Did Not Permit the Jury To Draw Irrational Permissive Inferences about Appellant's Guilt

Appellant claims that the consciousness-of-guilt instructions "embody improper permissive inferences" that "permitted the jury to use the consciousness-of-guilt evidence to infer not only that appellant committed the murders, but that he had done so with premeditation and deliberation." (AOB 82, 84.) This Court has repeatedly rejected arguments that pattern jury instructions on consciousness of guilt permit "the jury to draw irrational inferences about a defendant's mental state during the commission of the charged offenses." (*People v. Jurado* (2006) 38 Cal.4th 72, 125; see also *People v. Guerra* (2006) 37 Cal.4th 1067, 1137; *People v. Nakahara, supra*, 30 Cal.4th at p. 713.) The instructions were neither irrelevant nor misleading as to whether appellant harbored the requisite mental state for first degree murder.

The extent and degree of flight, false statements, and escape may bear on the severity of the crime appellant is conscious of committing. "One conscious of his innocence is less liable to use a lethal weapon to avoid detention or to facilitate his escape from the scene of a tragedy than is one who fears the consequences of his guilty act." (*People v. Anderson* (1922) 57 Cal.App. 721, 728.)

Additionally, the court instructed the jury on three different forms of homicide: first degree murder, second degree murder and voluntary manslaughter. "[A] reasonable jury would understand [consciousness of guilt] to mean only 'consciousness of some wrongdoing,' not consciousness of each and every element of the charged offense." (*People v. Arias*, *supra*, 13 Cal.4th at p. 142.)

> The instructions advise the jury to determine what significance, if any, should be given to evidence of consciousness of guilt, and caution that such evidence is not sufficient to establish guilt, thereby clearly implying that the evidence is not the equivalent of a confession and is to be evaluated with reason and common sense. The instructions do not address the defendant's mental state at the time of the offense and do not direct or compel the drawing of impermissible inferences in regard thereto.

(*People v. Crandell* (1988) 46 Cal.3d 833, 871; see also *People v. Carrington* (2009) 47 Cal.4th 145, 189 [this Court rejected defendant's complaint that CALJIC No. 2.03 did not limit the jury's use of the evidence and allowed jury to infer the defendant was conscious of committing crimes with particular mental state, i.e., deliberation and premeditation]; *People v. Smithey*, *supra*, 20 Cal.4th at pp. 982-983 [this Court rejected appellant's claim that "CALJIC No. 2.52 should be given only when the identity of the perpetrator is disputed, and not when the principal disputed issue is the defendant's mental state at the time of crime"; *People v. Bolin* (1998) 18 Cal.4th 297, 326-327; *People v. Jackson*, *supra*, 13 Cal.4th at p. 1224.)

Finally, although appellant asserts the jury instructions given were unnecessary since he conceded that he committed the killings (AOB 84), the prosecution was entitled to instructions informing the jury how to evaluate evidence of consciousness of guilt since defendant's not guilty plea placed on the prosecution the burden of proving every element of the charged offenses. (*People v. Breaux*, *supra*, 1 Cal.4th at p. 304.)

D. Even Assuming Arguendo the Challenged Instructions Were Erroneously Given, Any Error Was Harmless

Appellant claims the error in the giving of the consciousness-of-guilt instructions was not harmless under the federal Constitution. (See *Chapman v. California, supra,* 386 U.S. p. 24.) (AOB 86.) As a threshold matter, the proper standard of review for claims of instructional error are reviewed under *People v. Watson, supra,* 46 Cal.2d at p. 836. (See *People v. Flood* (1998) 18 Cal.4th 470, 489-490; *People v. Wims* (1995) 10 Cal.4th 293, 314-315.) Under this standard any error in giving the challenged instructions was harmless.

First, the prosecution presented overwhelming evidence of appellant's guilt. (See Arg. II, *ante.*) Second, the jury naturally would have drawn inferences about appellant's consciousness of guilt even without the challenged instructions. For instance, there was evidence that appellant fled to New York after the killings, a stipulation that he attempted to escape from the jail after being charged with the crimes, and his lies after he killed Carmen and Zuri, thus, any prejudicial effect from the challenged instructions would have been minor. Pursuant to CALJIC Nos. 17.30 and 17.31, the trial court instructed the jury:

> Now, I've not intended by anything that I may have said or done, or by any questions that I may have asked during the course of this trial, or by any ruling that I may have made during the course of this trial, to intimate or suggest what you should find to be the facts, or that I believe or disbelieve any witness.

> If anything I have said or done has seemed to you to so indicate, please ignore it. In fact, I order you to ignore it and form your own conclusion.
>
> The purpose of the Court's instructions is to provide you with the applicable law so that you may arrive at a just and lawful verdict.
>
> Whether some instructions will apply will depend upon what you find to be the facts. Disregard any instruction which applies to facts determined by you not to exist. Do not conclude that because an instruction has been given, that I am expressing an opinion as to the facts.

(13 RT 3248-3249; 3 CT 1073-1074.)

It is presumed that the jury followed the trial court's instructions and, thus, that it did not use the challenged instructions unless it first found the predicate facts were true. (See *People v. Mooc* (2001) 26 Cal.4th 1216, 1234.)

In sum, even if the jury had not been instructed with CALJIC Nos. 2.03, 2.04, and 2.52, it is not reasonably probable appellant's verdict would have been more favorable. (*People v. Watson, supra,* 46 Cal.2d at p. 836.)

VI. CALJIC NO. 2.51 DOES NOT PERMIT THE JURY TO FIND GUILT BASED UPON MOTIVE ALONE OR SHIFT THE BURDEN OF PROOF ONTO APPELLANT TO PROVE INNOCENCE

Appellant contends that the trial court erred in giving standard jury instruction CALJIC No. 2.51. Appellant claims "[t]his instruction improperly allowed the jury to determine guilt based upon the presence of an alleged motive and shifted the burden of proof to appellant to show an absence of motive to establish innocence, thereby lessening the prosecution's burden of proof." Appellant asserts that the instruction thereby violated his constitutional rights to a fair jury trial, due process, and a reliable verdict in a capital case. (AOB 87.) Appellant's contention is without merit.

The trial court instructed the jury at the guilt trial with CALJIC No. 2.51 as follows:

> Now, motive is not an element of the crime charged, and need not be shown. However, you may consider motive, or lack of motive, as a circumstance in this case. Presence of motive may tend to establish the defendant is guilty. Absence of motive may tend to show the defendant is not guilty.

(13 RT 3227; 3 CT 1024.)

This Court in *People v. Snow* (2003) 30 Cal.4th 43, 97-98, and *People v. Prieto*, *supra*, 30 Cal.4th at p. 254, approved the language of CALJIC No. 2.51. In *Snow*, this Court held that CALJIC No. 2.51 does not impermissibly suggest that motive alone is sufficient to establish guilt. (*People v. Snow*, *supra*, at pp. 97-98.) This Court noted that CALJIC No. 2.51 explicitly instructs that motive is not an element of the crime, and therefore reasoned that it is highly unlikely that a jury would conclude that motive could establish all the elements of the crime. (*Ibid.*) Furthermore, this Court stated that when CALJIC No. 2.51 is given with CALJIC No. 3.31 on the concurrence of act and intent, and with the instructions detailing the specific elements of the charged crime, as the court did here (13 RT 3233-3242, 3247-3248), it is even more unlikely that a jury would interpret CALJIC No. 2.51 as allowing motive alone to establish guilt. (*People v. Snow, supra,* at p. 98.)

This Court in *People v. Prieto*, *supra*, 30 Cal.4th 226, rejected the argument that CALJIC No. 2.51 shifts the burden of proof from the prosecution to the defendant. (*Id.*, at p. 254.)[20]

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[20] The trial court in *Prieto* instructed the jury with an older version of CALJIC No. 2.51, than the one used here, "which stated in relevant part that: 'Presence of motive may tend to establish guilt. Absence of motive may tend to establish innocence.'" (*People v. Prieto*, *supra*, 30 Cal.4th at p. 254.) This change does not alter our analysis.

> "CALJIC No. 2.51 [does] not concern the standard of proof . . . but merely one circumstance in the proof puzzle—motive." [Citation.] "[T]he instruction merely uses innocence as a direction signal or compass. It does not tell the jurors they must find innocence as a direction signal or compass. It does not tell the jurors they must find innocence, nor does it lighten the prosecution's burden of proof, upon which the jury received full and complete instructions." [Citation.] Thus, no reasonable juror would misconstrue CALJIC No. 2.51 as a "standard of proof instruction apart from the reasonable doubt standard set forth clearly in CALJIC No. 2.90. [Citation.]"

(*People v. Prieto*, *supra*, 30 Cal.4th at p. 254; see also 13 RT 3232.)

Appellant argues that other instructions addressing an individual circumstance, such as CALJIC No. 2.52 [flight after crime]; CALJIC No. 2.03 [consciousness of guilt-falsehood]; and CALJIC No. 2.04 [attempted jail escape], contained admonitions that a particular circumstance alone was not sufficient to establish guilt. Appellant asserts that CALJIC No. 2.51 is so "obviously aberrant" because it is missing such an admonition, that the jury was led to believe it could properly use motive alone to establish appellant's guilt. (AOB 88.) As shown above, the court also instructed the jury on CALJIC No. 3.31 and instructions on the specific elements of the charged crimes. Correctness of jury instructions is determined from the entire charge to the jury. (*People v. Castillo* (1997) 16 Cal.4th 1009, 1016.) We presume the jury followed the instructions and obeyed the law. (*People v. Adcox* (1988) 47 Cal.3d 207, 253.)

This Court has rejected appellant's challenge to CALJIC No. 2.51. Appellant offers no persuasive reason why the result should differ in this case.

VII. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING APPELLANT'S MOTIONS FOR SEPARATE GUILT AND PENALTY JURIES AND FOR SEQUESTERED VOIR DIRE

Appellant contends that "the trial court's denial of [his] requests for separate guilt and penalty juries and for sequestered voir dire" on death qualification deprived him of his Fifth, Sixth, Eighth, and Fourteenth Amendment rights under the United States Constitution, the California Constitution and statutory law. (AOB 90, 92.) Appellant's contention is without merit.

On October 21, 1999, appellant made a pre-trial motion to empanel a separate penalty jury if a penalty phase was reached, or in the alternative to empanel dual juries. (3CT 767-786.) Appellant also requested that "only the penalty-phase jury be death qualified," and "voir dire regarding any death qualification be conducted on an individual, sequestered basis." (3CT 768.) Appellant argued that good cause existed for the above procedures pursuant to section 190.4, subdivision (c)[21] because voir diring the guilt-phase jury about appellant's uncharged robbery-murder would be prejudicial and infringe upon his right to a fair trial. (3CT 769.) The prosecutor opposed the motion. (3CT 795- 803.) After an extensive hearing, the trial court denied appellant's motion for a separate penalty jury as well as his motion for individual sequestered voir dire on death qualification. (3 RT 697-715.)

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[21] Section 190.4, subdivision (c) provides, in relevant part:
If the trier of fact which convicted the defendant of a crime for which he may be subject to the death penalty was a jury, the same jury shall consider . . . the penalty to be applied, unless for good cause shown the court discharges that jury in which case a new jury shall be drawn. The court shall state facts in support of the finding of good cause upon the record and cause them to be entered into the minutes.

A. The Trial Court Did Not Abuse Its Discretion In Denying Appellant's Motion for Separate Guilt And Penalty Juries

First, appellant claims that the trial court erroneously denied his motion for separate juries to determine guilt and penalty. He argues that as a result, he "was effectively deprived of his ability to question prospective jurors on a critical issue [;]" specifically, on the uncharged 1994 robbery-murder of Jerome Bryant. This resulted in his inability to determine whether prospective jurors held beliefs regarding the death penalty which would make them unable to impartially follow the court's instructions and evaluate the evidence. (AOB 93-94.)

A capital defendant is not denied due process or the right to an impartial jury under either the state or federal constitution by impaneling a single jury to determine both guilt and penalty verdicts. (*Lockhart v. McCree* (1986) 476 U.S. 162, 182-183; *People v. Rich* (1988) 45 Cal.3d 1036, 1103-1104; *People v. Miranda* (1987) 44 Cal.3d 57, 79.)

In *People v. Fields* (1983) 35 Cal.3d 329, this Court noted the "long established legislative preference for a single jury qualified to try both phases of the trial," and additional valid considerations favoring one jury:

> Since the penalty jury must take into account "[t]he circumstances of the crime of which the defendant was convicted . . . and the existence of any special circumstances found to be true" (former Pen. Code, § 190.3, subd. (a)), the case would have to be retried in major part before the new jury. If on the other hand both juries were impaneled at the onset of the guilt trial, the state would incur the delay of double voir dire and the expense of maintaining two juries in all capital cases, even though many cases terminate before reaching the penalty phase.

(*Id.* at p. 352.)

The defendant in *People v. Rowland* (1992) 4 Cal.4th 238, made the same claim made by appellant:

> As relevant here, defendant's argument [for separate juries at the guilt and penalty phases] was effectively bottomed on the desire of counsel to examine prospective jurors in one way for the guilt phase and in a different way for the penalty phase. Counsel expressed a belief that "other crimes" evidence might not be presented in the former but would be presented in the latter. They wished to voir dire prospective penalty phase jurors on such evidence but not prospective guilt phase jurors.

(*Id.* at p. 267.)

This Court rejected the claim as follows:

> The appropriate standard of review is abuse of discretion. [Citation]. [¶] No abuse appears. In *People v. Nicolaus* (1991) 54 Cal.3d 551 [286 Cal. Rptr. 628, 817 P.2d 893], we recognized that Penal Code section 190.4, subdivision (c), "expresses a clear legislative intent that both the guilt and penalty phases of a capital trial be tried by the same jury." (54 Cal.3d at p. 572.) There, we held that the "mere desire" of defense counsel "to voir dire in one way for the guilt phase and a different way for the penalty phase" does not constitute 'good cause' for deviating from the clear legislative mandate . . . ." (*Id.* at pp. 573-574.) Here, such a [] desire existed – and substantially nothing more. We understand counsel's wishes in this regard. But we cannot deem them sufficient.

(*People v. Rowland, supra,* 4 Cal.4th at p. 268.)

Given this Court's holdings in *Nicolaus* and *Rowland*, appellant's claim that the trial court abused its discretion in denying his motion for separate juries must be rejected.

To the extent appellant relies upon *People v. Cash* (2002) 28 Cal.4th 703 (see AOB 94-95) to support his claim, his reliance is misplaced. In *Cash*, a prosecution for murder and attempted murder, this Court reversed the death judgment, ruling that the trial court erred by prohibiting defense counsel from asking prospective jurors on voir dire whether they would automatically impose the death penalty if they learned that defendant had committed prior murders (the murders of his grandparents which were

introduced during the penalty phase). (*Id.* at pp. 721-723.) The trial court in this case committed no such error.

Here, the trial court never ruled that defense counsel was prohibited from questioning prospective jurors as to whether they would automatically impose the death penalty if appellant had an uncharged prior robbery-murder. As the trial court noted, "[defense counsel] would want to conduct voir dire with respect to the 1994 murder incident, in order to determine who would be the appropriate jurors on the penalty phase, but he doesn't want to conduct that voir dire if we have one jury because it might serve to alert them of evidence of another crime." (3 RT 620.) It was a tactical decision whether defense counsel voir dired the unitary jury on the prior violent act. In fact, the trial court specifically asked defense counsel how many questions he proposed to ask the unitary jury regarding the uncharged robbery murder. (3 RT 538.) Defense counsel was adamant that his choice was not to question the prospective jurors in this regard. (3 RT 539-540.)

This Court in *People v. Ray* (1996) 13 Cal.4th 313, rejected the claim made here:

> The claim fails for reasons we have previously explained. "In almost every capital trial, regardless of the special circumstances alleged, there will be evidence introduced [in aggravation] at the penalty phase . . . which would otherwise be irrelevant or inadmissible in the determination of guilt. Defense counsel are routinely faced with difficult tactical decisions in having to fashion voir dire inquiries that probe for possible penalty phase biases regarding such evidence, while stopping short of revealing information otherwise prejudicial and excludable in the guilt phase. Certainly such will almost always be the case where the special circumstance alleged is a prior murder or murders." (*People v. Nicolaus, supra*, 54 Cal.3d 551, 573.) Defendant cites no authority for the proposition that a death penalty scheme is constitutionally invalid unless it presents the defense with no difficult tactical choices in conducting voir dire or persuading jurors to reject a death sentence. (See *People v. Pride* (1992) 3 Cal.4th 195, 252

> [separate juries not required to prevent jury from "blam[ing] the defense for withholding" evidence of prior convictions and other violent crimes at guilt phase]; *People v. Taylor*, *supra*, 52 Cal.3d 719, 737-738 [separate juries not required to prevent penalty jury from questioning "credibility" of mental defense where defendant presented no evidence at guilt phase].) As before, we decline to invalidate the scheme simply because it establishes a single-jury procedure that was followed here.

(*Id.* at pp. 322-323.)

In any case, "[e]rror in restricting death-qualification voir dire does not invariably require reversal of a judgment of death. (*People v. Cunningham* (2001) 25 Cal.4th 926, 974 [].)" (*People v. Cash*, *supra*, 28 Cal.4th at p. 722.) The trial court here went to great lengths to work with the defense to structure voir dire to elicit information defense sought and to "minimize the impact of making inquiry into other crimes." (3 RT 713, see also 3 RT 534, 536, 711-715.) For example, the court revised question no. 111 of the written questionnaire which originally read "Do you believe the death penalty should also be imposed on one, who murders a human being; two, commits multiple murders *on the same occasion*; and three, murders his spouse and\or child," by striking the italicized phrase "on the same occasion," thereby encompassing a prior murder such as appellant's uncharged Bryant robbery-murder. (4 RT 780-781; italics added.) Hence, any alleged error was harmless in this case.

B. The Trial Court Did Not Abuse Its Discretion in Denying Appellant's Motion for Individual Death Qualifying Voir Dire

Appellant next argues that the trial court erred by failing to permit sequestered voir dire for the death-qualifying questions. (AOB 96-99.)

In *People v. Waidla* (2000) 22 Cal.4th 690, this Court explained the relevant legal principles:

> Section 223 of the Code of Civil Procedure provides, among other things, that, "[i]n a criminal case," the trial court

has "discretion in the manner in which" it conducts the voir dire of prospective jurors. (Code Civ. Proc., § 223.) But it also provides that, in all such cases, including those involving the death penalty, the trial court must conduct the voir dire of "any prospective jurors . . ., where practicable, . . . in the presence of the other" prospective "jurors . . . ." (*Ibid.*) In doing so, it "abrogates" (*Covarrubias v. Superior Court* (1998) 60 Cal.App.4th 1168, 1171) the holding of *Hovey v. Superior Court* (1980) 28 Cal.3d 1[], wherein we "declare[d], pursuant to [our] supervisory authority over California criminal procedure, that in future capital cases that portion of the voir dire of each prospective juror which deals with" his views on the death penalty "should be done individually and in sequestration" (*id.* at p. 80, fn. omitted).

. . . .

An appellate court applies the abuse of discretion standard of review to a trial court's granting or denial of a motion on the conduct of the voir dire of prospective jurors. (See Code Civ. Proc., § 223.) A trial court abuses its discretion when its ruling "fall[s] 'outside the bounds of reason.'" (*People v. Ochoa* (1998) 19 Cal.4th 353, 408, quoting *People v. DeSantis* (1992) 2 Cal.4th 1198, 1226.)

(*Id.* at pp. 713-714.)

This Court recently reaffirmed its decision in *Waidla* in *People v. Hoyos* (2007) 41 Cal.4th 872:

Defendant claims the trial court erred in denying his motion for individual and sequestered juror voir dire, and thus violated his right to trial by an impartial jury and to due process of law under the Sixth and Fourteenth amendments to the United States Constitution. . . . [¶]

Defendant's claim fails on the merits, however, because, as defendant concedes, Code of Civil Procedure section 223, enacted as part of Proposition 115, abrogated the former individual voir dire procedure directed by *Hovey v. Superior Court* (1980) 28 Cal.3d 1, 80.

(*Id.* at pp. 898-899.)

The trial court's ruling here clearly indicates that the court understood its discretion under the law and reasonably chose to conduct voir dire as proscribed by Code of Civil Procedure section 223.[22] The court stated:

> . . . defendant moves for individual sequestered voir dire. And this too is denied. The defense contends that group questioning would hinder the effective eliciting of information. But remember[,] most of this information is being elicited by form of a written questionnaire, which [prospective jurors] will be answering at home, number one.

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[22] Code of Civil Procedure section 223 provides:

> In a criminal case, the court shall conduct an initial examination of prospective jurors. The court may submit to the prospective jurors additional questions requested by the parties as it deems proper. Upon completion of the court's initial examination, counsel for each party shall have the right to examine, by oral and direct questioning, any or all of the prospective jurors. The court may, in the exercise of its discretion, limit the oral and direct questioning of prospective jurors by counsel. The court may specify the maximum amount of time that counsel for each party may question an individual juror, or may specify an aggregate amount of time for each party, which can then be allocated among the prospective jurors by counsel. Voir dire of any prospective juror shall, where practicable, occur in the presence of the other jurors in all criminal cases, including death penalty cases.
>
> Examination of prospective jurors shall be conducted only in aid of the exercise of challenges for cause.
>
> The trial court's exercise of its discretion in the manner in which voir dire is conducted, including any limitation on the time which will be allowed for direct questioning of prospective jurors by counsel and any determination that a question is not in aid of the exercise of challenges for cause, shall not cause any conviction to be reversed unless the exercise of that discretion has resulted in a miscarriage of justice, as specified in Section 13 of Article VI of the California Constitution.

> Number two, it will be made clear to the jurors that if they want to ask any question outside the presence of the other jurors, they're entirely welcome to that. I'll honor their request. We'll meet – if they feel they can speak more freely about any subject matter by simply meeting with us, Counsel, defendant and myself, outside the presence of the jury, I will honor that request. And I'm going to remind them it's important that they speak openly about all these matters. And if it will help them to speak to us in confidence, then I will accommodate them.
>
> Thirdly, there's an argument here that a non-sequestered voir dire would produce conviction-prone juries. I find that to be speculative. More importantly, any bias that's inherent in that process I think would be easily corrected by appropriate admonishments.

(3 RT 714-715.)

Relying on *Hovey v. Superior Court* (1980) 28 Cal.3d 1, appellant argues that "group voir dire contributes to the 'tendency of a death-qualified jury to presume guilt and expect conviction.'" (AOB 96.) As appellant acknowledges, however, the *Hovey* rule for individual sequestered voir dire on death qualifying issues was abrogated by Code of Civil Procedure section 223. (AOB 96.)

Appellant also argues that because the trial court "questioned jurors about their views in front of all the other prospective jurors, the jurors actually impaneled were repeatedly focused upon the death penalty in advance of any determination as to appellant's culpability." (AOB 98.) This claim ignores the letter of the law. Code of Civil Procedure 223 mandates that "[v]oir dire of any prospective juror shall, where practicable, occur in the presence of the other jurors in all criminal cases, including death penalty cases." Appellant's claim also ignores defense counsel's ability to address this concern with prospective jurors. For example, after the court voir-dired each group of potential jurors, the attorneys were given

the opportunity to ask additional questions. Following the first group, defense counsel took advantage of this opportunity as follows:

> Do you understand that we have spent – you have spent with the Judge, you have spent in the privacy of your home, thinking about what your approach about the death penalty would be? So, therefore, it is—seems, I believe, that this is a trial about whether or not Mr. Henriquez is going to get the death penalty. And so, I think that your natural tendency would be to—to focus on that and say that counsel believes or that the judge believes that this is going to be about the death penalty. . . [¶] . . . But I'm worried, and Ms. Levine – we are worried that because there's so much focus on this, that you think and have an assumption. And I wanted to tell you the issue in this case is whether you will ever get to that – a second phase.

(5 RT 1167-1168.)

Defense counsel continued:

> My question to all of you: Has the process that you have gone through here, the focus, the thinking about the death penalty, made you think that that is – it's inevitable or quite likely or quite probable that we are ever going to get to that?

(5 RT 1168-1169.)

Potential Juror Orlando answered:

> At least in my view, that's the end result. What we are talking about right here is the end result. It's like a staircase, and the being at the end of the hall. So, there's a whole lot in between before we can even get to that. So, there's no sense me even thinking about that right now.

(5 RT 1169.)

Defense counsel further stated:

> I'm worried about the focus on it then gives it a natural momentum. And I'm asking you whether now, in summary, because I see the clock expiring[,] let's put both of those concepts together, okay?
>
> Aside from the question of whether or not there might ever be a second phase beyond this culpability phase, what is your attitude? Can you assure Mr. Henriquez, can you assure

the People, that you can be fair on the issues that the Judge has raised through the questionnaire and his questions that you can be fair, given the fact that the defense in this case strongly will be contesting whether Mr. Henriquez is guilty of premeditated murder?

Do you understand that?

And we are acknowledging that he killed – I mean, I don't have enough time to say that I can't tell you how profoundly sad we all are to be here. . . [¶] . . . My question is: Do you, will you allow either of these two factors that exist now, to impact you in terms of your approach to the decision in the culpability phase about guilt on that question of premeditation?

That's my question.

(5 RT 1169-1170.)

Where upon each of the eight potential jurors answered no. (5 RT 1170.) Although given the opportunity to repeat this line of questioning with the other prospective jurors, defense counsel declined to do so. (See 6 RT 1410-1425; 1544-1555; 1646-1655.)

Appellant also argues that "several jurors indicated on their questionnaires that they would automatically vote to impose the death penalty in certain situations." (AOB 97.) Appellant complains that "[i]n response, the court merely asked these jurors leading questions without ensuring that the jurors truly understood that the death penalty was not automatic." (AOB 97 citing 5 RT 1103, 1120-1121, 1126-1127; 6 RT 1386-1389, 1401-1402, 1408-1409, 1522.) The record shows otherwise. Throughout voir dire, the trial court repeatedly admonished the potential jurors who indicated that the death penalty should be imposed in certain situations, that the death penalty was not automatic. (5 RT 1078-1079, 1091-1093, 1103, 1120-1121, 1126-1127, 1137, 1143, 1183, 1239, 1248-1249, 1274; 6 RT 1385, 1401-1402, 1409, 1522, 1531, 1543-1544, 1609-1612, 1640, 1644, 1671, 1676.) The trial court also repeatedly asked those

potential jurors if they could follow the law as instructed despite their beliefs. (5 RT 1077-1079, 1091, 1093, 1103, 1105, 1121, 1127, 1129-1130, 1137, 1144, 1183, 1239, 1241, 1249, 1274; 6 RT 1385, 1402, 1409, 1522, 1531, 1544, 1612, 1640-1641, 1645, 1671, 1676.)

Appellant counters that "those [potential jurors] who expressed doubts about the death penalty were similarly asked questions that essentially tracked the [written] questionnaire, without permitting any efforts at rehabilitating them." (AOB 97.) Not so. The trial court admonished those jurors who expressed doubts about the death penalty that the law required them to consider the aggravating and mitigating factors presented in this case to determine the appropriate penalty, and further asked whether they could follow the law or whether their beliefs were so strong that they prohibited them from doing so. (5 RT 1094-1096; 6 RT 1337-1341, 1362-1365, 1402-1406, 1453 -1456, 1504-1509, 1513-1515; 8 RT 1600-1602, 1630-1633.)

Contrary to appellant's claim then (AOB 97-98), the trial court adequately voir dired all potential jurors to determine if their beliefs regarding the death penalty would prevent them from fairly considering this case.

Additionally, the trial court repeatedly noted that it was the court's responsibility to ensure that the panel was comprised of jurors who could follow the law. At one point the trial court addressed the potential jurors before it:

> So you understand – and I hope all of you understand – there's not really any particular situation where the law requires the imposition of the death penalty. It's more complicated than that, you understand that.
>
> No one of these situations, the state of the law in California never requires that the death penalty be imposed for murdering a human being. It never requires that the death penalty be imposed simply for the commission of multiple

murders. It never requires that a person who murders his spouse and/or child be put to death.

You all understand that.

What the law is, is that there are certain types of murders that when accompanied by so-called special circumstances, can make you eligible for imposition of death or life without possibility of parole.

But even if you commit one of these murders, and it's accompanied by one of these special circumstances such that you are eligible for one or the other of these punishments, that, in and of itself, does not require you to impose the death penalty, or, alternatively, does not require you to impose life without possibility of parole.

You have to hear the aggravating factors and the mitigating factors, and arrive at your decision after that. [¶]. . . [¶] We'll go into great length about what aggravating and mitigating factors are at the appropriate time, but I read you a general description about what these factors are about earlier, and you'd have to consider and weigh all of those before you can reach a decision as to the appropriate punishment.

You understand that?. . . [¶] . . . [¶] I hope it's clear to everybody, the law in California does not require the automatic imposition of the death penalty in any type of case.

Is that understood? [¶] . . .[¶] Does anybody have any problem with that?

(5 RT 1222-1223.)

The court continued:

For example, there was a question here, "Are there types of factual circumstances for which you feel the death penalty should always be imposed?" And you [potential juror Marcel Hetu] said yes.

Now, I want to make clear. You can have a view that it should always be imposed. You can have a view that there are certain situations where it should always be imposed.

> Any one of you can have a view that there are certain situations where it should always be imposed or situations where it never should be imposed.
>
> But what's important to me is you understand and that what you're willing to do is irrespective of your particular view, are you willing to comply with the law, which does not provide for the death penalty in any circumstance. [¶] Do you understand that? . . [¶] . . .[¶] If people have trouble with that, please raise your hand and let me know.
>
> Again, we're not here as legislators, where we decide what the law should be. We're here as jurors. And in the State of California, the jurors must follow the law, whether you agree with the law or not.
>
> So we might have views that are inconsistent with what the law is, but as long as we are willing to subjugate our views to the law and follow the law and whether we agree with it or not, then you can serve as a juror.
>
> If, however, we feel that our views take precedence over the law, such that we can't render a decision in accordance with the law, then we shouldn't be serving as jurors.

(5 RT 1224-1225.)

Later, to a group of potential jurors, the court stressed the point as follows:

> [I]t really pinpoints what I'm principally concerned with. I recognize we all have different views. And having different views would be particularly important if we were sitting here as a legislature.
>
> But we're not. We're sitting here as potential jurors. And as jurors, the key question is: Irrespective of what your views are, can you follow the law? Can you abide by the law? Are you willing to listen to the law in this matter and apply the law to the facts, as you determine those facts to be, and in that way arrive at your decision?
>
> I wanted to begin our session this morning by referencing them, because I think it will better help you understand some of the questions I'm going to propose.

(6 RT 1313-1314.)

The law requires that the trial court voir dire prospective jurors in the presence of other prospective jurors. (Code of Civ. Proc. § 223.) Based on the foregoing, appellant has failed to show that the decision of the trial court not to conduct sequestered voir dire was an abuse of discretion.

C. The Trial Court's Denial of Defense Counsel's Request To Conduct Voir Dire a Second Time Before the Penalty Phase Was Not an Abuse of Discretion

Appellant claims that after the guilt phase, the trial court erred by not permitting defense to voir dire the jury again before the penalty phase. (AOB 99-101.)

On January 14, 2000, the prosecutor indicated it intended to introduce evidence about the uncharged 1994 Bryant robbery-murder during the penalty phase of trial. (14 RT 3345.) The trial court stated that it usually conducted all jury voir dire before the guilt phase of trial, but asked both parties to prepare argument as to whether the defense should be allowed to conduct additional jury voir dire about the uncharged robbery-murder prior to the penalty phase. (14 RT 3346.) The prosecutor objected. (14 RT 3347.)

On January 24, 2000, defense proposed four questions for the court to ask prior to the commencement of the penalty phase. [23] (14 RT 3378-3379.)

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[23] The four questions proposed by defense counsel were as follows:

1. Having heard all of the evidence that was presented to you at the culpability phase (and having found Mr. Henriquez guilty of two counts of first-degree murder, one count of second-degree murder, and certain enhancements) have you formed an opinion as to the appropriate penalty in this case?

2. At the penalty phase of a capital case, the prosecutor is entitled to introduce evidence of other crimes committed by a defendant during his lifetime. Based on the evidence that

(continued...)

Defense counsel argued that there was good cause for additional voir dire because evidence of appellant's uncharged robbery-murder would be introduced during the penalty phase, possibly warranting a new penalty jury. (14 RT 3432-3433.) The prosecutor objected to the reopening of voir dire after the trial court's initial ruling regarding a unitary jury and defense counsel's decision not to question the jury on the uncharged robbery-murder at the beginning of trial. (14 RT 3379, 3433-3435; 4CT 1204-1210.)

(...continued)

you have already heard and the findings that you have already made in the culpability phase, do you have any assumptions about whether Mr. Henriquez may have committed other crimes not yet brought to your attention?

3. The judge will instruct you that, in determining the appropriate penalty in this case, you are not allowed to consider evidence of any other crime unless you first find that the prosecutor has proven to you, beyond a reasonable doubt, that the defendant committed that other crime. Given that you have already heard much evidence against Mr. Henriquez and have already found him guilty of a number of crimes, do you think you can begin now with the presumption that Mr. Henriquez is not guilty of any other crime, and discard that presumption if and only if the prosecution proves to you beyond a reasonable doubt each and every element of any other "crimes"?

4. Together with the evidence that you have already heard in the culpability phase, if you were to hear additional evidence that the defendant had participated in a robbery where the victim had been killed, would you automatically vote for imposition of the death penalty?

(AOB 99-100 citing 14RT 3432.)

The trial court, relying on *People v. Taylor* (1990) 52 Cal.3d 719, 737-738, concluded that defense did not demonstrate good cause to conduct a second voir dire:

> Bottom line, is that this jury was voir dired at the beginning of this trial extensively with respect to a number of subject matters as a result of which the Court concluded it had a jury that was prepared, willing and able to make the decisions in this case in a fair and impartial manner and, in particular, in accordance with the law, regardless of the views, the perspectives, the sentiments, and so forth.
>
> The Court was satisfied that we had a jury that was willing to follow the law on these subject matters. Nothing has been brought to my attention that would call into question either their ability or their willingness to do this. And the fact that they have now sat through the culpability phase does nothing and of itself provide any good cause to re-examine them. But the cases are pretty clear on that. *People* [*v.*] *Taylor*, *People* [*v.*] *Malone*, in particular. If they did provide good cause, then there would be a duty to re-examine after every culpability phase. And surely, that's not contemplated by the law and seems inconsistent with 190.4 (c).
>
> No specific showing persuasive to the Court of good cause having been made, the request to voir dire the jury in the manner requested by defendant is denied.

(14 RT 3468-3469.)

Appellant argues that as a result of the trial court's ruling, counsel was effectively precluded from inquiring about the impact of the uncharged Bryant robbery-murder that was introduced by the prosecution as an aggravating factor during the penalty phase. (AOB 99-102.) "Voir dire is not to be reopened on speculation that good cause to impanel a new jury may thereby be discovered; rather, a showing of good cause is a prerequisite to reopening." (*People v. Fauber* (1992) 2 Cal.4th 792, 846; see also *People v. Kipp* (1998) 18 Cal.4th 349, 368.) "Good cause is established only by facts which 'appear in the record as a demonstrable

reality,' and defendant cites none." (*People v. Williams*, *supra*, 16 Cal.4th at p. 229.) As argued above, the desire to voir dire jurors in a different way is not good cause for separate juries. (*People v. Catlin* (2001) 26 Cal.4th 81, 113-114; *People v. Rowland, supra,* 4 Cal.4th at pp. 267-269; see also *People v. Kraft* (2000) 23 Cal.4th 978, 1069 [expert testimony by a psychologist that guilt-phase jurors would be less able to give defendant a fair penalty trial than a newly selected jury was generally applicable to any capital case involving proof of other crimes in the penalty phase; thus, was insufficient to demonstrate prejudice].)

Appellant fails to sustain his burden of showing good cause to empanel a second jury for the penalty phase, or to justify the reopening of voir dire. Appellant ignores the trial court's repeated instructions admonishing the jury to follow the law. He also ignores the trial court's voir dire of each potential juror about his or her belief as to whether the death penalty should be imposed on a defendant who commits multiple murders, thereby encompassing his or her belief about the uncharged robbery-murder. Appellant "has raised only speculation that some jurors may have entertained some hidden bias regarding the testimony [concerning the uncharged robbery-murder] or that they may have prejudged the issue of penalty. He fails to establish error, constitutional or otherwise." (*People v. Fauber, supra,* 2 Cal.4th at p. 846.)

VIII. THE TRIAL COURT PROPERLY ADMITTED VICTIM IMPACT EVIDENCE AT THE PENALTY PHASE; THE PROSECUTOR DID NOT COMMIT MISCONDUCT BY ARGUING VENGEANCE

Appellant contends that the trial court erred by allowing the prosecutor to present victim impact evidence at the penalty trial, and that the prosecutor committed misconduct by arguing for vengeance on behalf of the family in closing argument. (AOB 102.) Appellant's claims are without basis.

A. The Admission of Victim Impact Evidence Was Not an Abuse Of Discretion

1. Relevant proceedings

On January 14, 2000, defense counsel expressed concern about the breadth of victim impact testimony that the prosecutor intended to present at the penalty phase. (14 RT 3357-3358.) On January 19, 2000, defense counsel filed motions to exclude "victim impact" evidence, for discovery, and to preview the People's proposed victim impact evidence. (4 CT 1157-1170.) Counsel argued that victim impact evidence must stay "within the confines of PC sec. 190.3(a)",[24] and that "[c]haracterizations or opinions concerning the crime, the defendant, or the appropriate sentence by the victim's family members are highly prejudicial and must be excluded under the Eighth and Fourteenth Amendments to the United States Constitution." (4 CT 1170.)

The trial court agreed with defense counsel that the victims' family members should not characterize and/or give opinions about the crime. (14 RT 3407.) The court indicated it would admonish the witnesses to this end prior to their testimony. (14 RT 3408.)

Defense counsel requested that the prosecutor provide counsel with the victim impact evidence she planned to present and objected to victim impact testimony by non-family members. (14 RT 3413-3415.) The prosecutor indicated that Angelique Foster, a friend of Carmen's, would

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[24] Section 190.3, subdivision (a) provides:

> In determining the penalty, the trier of fact shall take into account any of the following factors if relevant:
>
> (a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to Section 190.1.

testify about Zuri, "not about the impact so much on her (Foster), but the impact on the child victim and the mother victim." (14 RT 3416.)[25] The court summarized:

> There are two aspects here. First of all, it appears that Ms. Foster is the only non family member that will testify as to so-called victim impact evidence. And it appears that the People are going to use her not to testify about the impact on her, but the impact on the victims, Zuri and mother. In so far as her testimony relates to the impact the crime had on—on the child, Zuri and the mother, it is in my view clearly admissible. In so far as the People want to develop the impact it had on Ms. Foster, before going into it, I want you to put me on notice of that, that you would like to do that or intend to do that.
>
> But, my general view is that under certain circumstances, victim impact evidence can relate to impact on non family members and, my further feeling is that in this situation the relationship of Ms. Foster is – to – to the victims in this case is such that impact on her is probably admissible. But I want – but that's just my tentative conclusion and, before you go into that, I want to be apprised of that.

(14 RT 3419-3420.)

The court continued:

> I mean if you paint a picture of Zuri playing with her toys, a happy, healthy child playing with the toys, and so forth, and paint that kind of a picture, and what the child is doing on a daily basis and the kind of things she observed herself taking care of the child, the jury will get a greater sense of how – of what kind of crime this was. It's one thing to kill a child of whatever – however painted by this witness, as opposed to one who may have been infirm already, physically ill, limited mentally and/or physically. These are things that a jury can take into account. If you snuff out of existence a precious flower, it's one thing. If you put to death someone who is an incapacitated

[25] The prosecutor explained that Angelique Foster would paint a fuller picture of Zuri and Carmen so the jury could understand the mother-child relationship and the effect on Carmen when she learned Zuri was dead. (14 RT 3421.)

child, it's another thing, in terms of what kind of a moral judgment is to be passed on that kind of an act.

(14 RT 3421-3422.)

Defense counsel also objected to multiple witnesses testifying about each victims' individuality. (14 RT 3422.) The court responded:

> But there is no suggestion here that the People intend to introduce redundant testimony where it might raise such concerns and, as a general observation, which I think both of you appreciate, you know – I see nothing wrong with different people testifying about their particular experiences with the child or one of the other victims. Though it all deals with the child, people experience it in different ways, different perspectives, and sheds light. If it's simply repetitive, then we have another problem. But that will become quite apparent. If there was some suggestion here that the People were going to go in that direction, simply inundating us with redundant testimony, then I would say: Okay[,] I want to hear in more detail.
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> There's nothing to lead [the court] to believe the People intend to do that. They may introduce a lot of evidence about Zuri, but I think each of them would present different perspectives.

(14 RT 3422-3423.)

Defense counsel further argued that the victim impact witnesses should be limited to "what the defendant knew, because that goes to what his blameworthiness is in this incident." (14 RT 3424-3425.) The court countered that the argument had been argued and rejected by numerous courts. (14 RT 3425.)

The court tentatively ruled:

> First, the defendant's motion for discovery and preview of People's proposed victim impact evidence is denied. Requiring the People to preview all the impact evidence is unnecessary in the circumstances of the case and discovery has been appropriately provided by the People in accordance with the law. I might say, that notice of aggravating factors in this

matter has also been given, given in a reasonable and timely fashion.

Defendant's motion to exclude victim impact evidence is denied, except as I have indicated that Ms. Georgiou, if you are going to have Ms. Foster talk about the impact on her, as opposed to the impact on the victims, I want to receive prior notice so that I can see exactly what she is going to testify to and make a determine – make a more specific ruling on that matter, okay?

(14 RT 3426.)

Before the prosecution's victim impact witnesses testified, the court admonished the witnesses as follows:

And I believe all of you are in the courtroom. From my recollection from the culpability phase, there are a couple of remarks that I want to make.

You're going to be called, folks, what are called victim impact witnesses. Miss Georgiou is going to call you to the stand and ask you questions about Carmen and about Zuri and about the impact of their absence on you. Those are all proper areas for her to get into and for you to answer.

There are certain areas where you can't go into as witnesses. One would be to characterize the crimes in this case or characterize the defendant. Those are conclusions for the jury to come to hearing all the evidence they're hearing, as you know, during this penalty phase. It's also called aggravating circumstances and also mitigating circumstances, all bad things relating – that the law allows the People to introduce relating to the defendant and his record, character and the circumstances related to the offense and then all good things that the defense want to bring to the attention of the jury relating to Mr. Henriquez. Then the jury is going to draw its conclusions about Mr. Henriquez in connection with what penalty to impose and not impose, and it would not be proper for you to volunteer your opinions as to Mr. Henriquez or as to the crimes.

What you can testify to and what you're going to be asked about is how the crimes of this case impacted you and

impacted the immediate victims, the crimes to your daughter and granddaughter and sister and friend.

And so listen to the question that Miss Georgiou asks of you and restrict your answers, if you would, to the specific questions.

(14 RT 3620-3621.)

The court continued:

But they are going to be able to testify as to the impact upon them as to the crimes and the impact about their daughter. The thing is we talk about what it means to you and what effect it's had on your family and obviously what effect it had on your daughter and grandchild as opposed to mentioning opinions or characterizations about the crime.

For example, just to give you an illustration. It's for the jury to decide how gruesome or heinous this crime was. You don't have to tell the jury it's – it was a heinous crime. They're going to reach their conclusions about what the crime was all about after they hear evidence about the circumstances of the crime, which they – and a good part which they've already heard and once they heard about what impact this has had on all of you. Let them draw their conclusions about how heinous or gruesome or whatever feelings you may have of the crime as opposed to your telling them.

Similarly, they're going to draw their own conclusions about Mr. Henriquez. It would be improper for you to tell them your feelings about Mr. Henriquez.

(14 RT 3621-3622.)

After the witnesses testified, defense counsel made a motion to strike certain portions of Angelique Foster's testimony. (14 RT 3655-3656.) Counsel argued that the prosecutor's questions to Ms. Foster about "how do you feel" and "what has this done to you?" exceeded the trial court's ruling. (14 RT 3656.) The court found the prosecutor's questioning of Ms. Foster appropriate. (14 RT 3663-3664.)

Defense counsel also argued that the prosecutor's questions to Ms. Foster and Heidi Jones about their responses to the circumstances of the crime (i.e., murder vs. accident) constituted an improper "characterization of the crime." (14 RT 3657.) The court disagreed: (14 RT 3657.)

> I took those to be questions directed towards the impact of this particular crime on them, the impact that the crime had on them, the nature of the crime, the nature of what it is that took the lives of these people impacted them in a certain way.
>
> There was no prohibition – I don't think there was a prohibition on going and making inquiry about that kind of subject matter. Quite the contrary. I think that's a legitimate area of inquiry, the fact that it was a murder has an impact on you and to be able to develop that in front of the jury I think is appropriate. It's – it relates to impact on the victims of the crime. [¶] . . . [¶] . . . . [M]y feeling again is it was proper inquiry with regards to the impact that the crime had on the [the victim, family, and friends].

(14 RT 3657-3658.)

The court summarized:

> There were two issues. One was the issue about evidence could be presented about impact of these murders on a non family member. And that's one issue. And with respect to that, you did indicate you didn't intend to develop that. We had some discussion, and I said it would depend upon the particular circumstances a person could have, in my view, that a person could be in such a relationship to the victims that you could have testimony about that. But that's separate and apart from the issue that Mr. Coleman [defense counsel] has referred to now.
>
> What he's referred to now and what he objects to was you're asking questions of the witnesses that had to do with the impact on them because of the type of – cause of the death, and he felt that that was asking them to characterize – to characterize the crime. And I didn't think that was being developed for that purpose. I thought it was being developed and it was certainly admitted for the purpose that that has impacted them. In other words, the type of crime it was had a particular impact on them.

(14 RT 3664-3665.)

On January 31, 2000, appellant filed a motion for mistrial on the grounds that the testimony elicited from the victim impact witnesses "contradicted the prosecutor's representations" and "exceeded what is constitutionally and statutorily permitted and what this court had expressly authorized[,]" and that the prejudice caused "cannot be cured by a court's instruction or admonition" to the jury. (4 CT 1231, 1234.) Specifically, defense counsel objected to the prosecutor's asking 1) Angelique Foster about the impact of the killings on Ms. Foster herself because the question exceeded the trial court's ruling; 2) "what they [Ms. Foster and Heidi Jones] were feeling" when they learned how the victims died in comparison to how they would feel if the victims were killed in a car accident because "[s]uch questioning implicitly asks the witness to characterize the crime and/or the defendant". . . . ; and 3) Heidi Jones if the killings impacted her (Heidi's) pregnancy. (4 CT 1231-1233.)[26]

On February 2, 2000, the trial court held a hearing and denied the motion for mistrial. (17 RT 4207- 4217.) As to the prosecutor exceeding the trial court's ruling by asking Foster about the impact of the killings on her, the court stated:

> Second, the second type of conduct complained about has to do with the relevancy of impact evidence, impact of the crimes on – that are at issue in this case on Ms. Foster. I do think that Ms. Georgiou intentionally or unintentionally – for the moment, I will leave it at that, won't characterize it as either intentional or unintentional though at some later point we may have to get into that – I do think she acted in contravention of the Court's instruction that she not develop victim impact evidence with respect to Ms. Foster, without first approaching the bench and giving both Court and counsel for the defense an opportunity to address the issue.

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[26] In response to the latter question, Heidi testified that she went into premature labor. (14 RT 3642.)

I – I agree with her, however, that had – in effect, that had that issue been presented to the Court, the Court would have ruled, as I suggested earlier that I was inclined to do, that that evidence of the impact on Ms. Foster is admissible as part of the circumstances of the crime under 190.3 (a). When one reads the rationale which led to the Supreme Court expanding impact evidence beyond impact upon the defendant to impact on the family, the rationale is equally applicable to people who are not as strictly speaking or technically speaking, family members.

Especially, it seems to me, that circumstances of the crime, certainly includes impact upon people who, like Ms. Foster, stand in a familial relationship to the victims in this case. As I pointed out to you during the course of the trial, remember her testimony was that she considered herself and – as mother to Zuri, and the testimony was given that the nature and extent of her child care indeed put her in a position of in loco parentis.

In my view, without getting into – without making a decision of how far we can examine impact to beyond the family, whether we have to go – whether we can consider impact on the community at large, or other people, certainly in this case, given the relationship of Foster to the children and to the mother involved, impact evidence of impact on her is properly admitted, would be proper under 190.3(a).

So, there's certainly no prejudice by Ms. Georgiou's conduct, intentional or unintentional, of failing to give the Court and counsel an opportunity to address the issue further, before – before going into it.

(17 RT 4213-4214.)

As to the prosecutor asking Foster and Heidi Jones about their feelings upon learning of the nature of the crimes the trial court continued:

The third kind of conduct that was complained of were questions asked of Ms. Foster and of family members about forms of impact evidence on them, but . . . require them in some sense to characterize or involve characterizations . . . of the defendant's conduct. And I had instructed all family members – I don't remember if Ms. Foster was among them. But I had instructed them – and I had instructed Ms. Georgiou not to ask

questions that would call upon them to characterize defendant or the crimes in this case.

I was thinking when I so instructed her of situations such as we had during the culpability phase where I believe mother referred to the crime as heinous, and maybe Mr. Stewart also characterized the crime. I can't remember that, specifically. But it was that sort of thing I was seeking to avoid. Seeking to avoid counsel for the prosecution soliciting witnesses testifying in a manner that would characterize defendant as evil, as the crimes – characterizing the crimes as heinous, or otherwise.

I don't think the questions that were asked of these people, specifically the question of: How did you feel, learning that the victims had died and the way they actually did in this case, as opposed to say if they had died in a car accident? I don't believe that that was the kind of question that I intended to exclude, even though indirectly the responses to those makes – may involve characterization of the crime.

In so far as the family members are concerned, that's clearly impact evidence, and because they were – and Ms. Foster, for purposes of this discussion, I will characterize as a family member, as well. The impact on her and on the family members of this particular kind of crime, and the nature of the crime, is something that Ms. Foster – that I believe the government can get into, illustrating that this crime had a particular impact on them that's distinguishable from the kind of impact that the deaths of these people may have had if the agency of their death was something other than the – from some criminal conduct involved in this matter.

(17 RT 4215-4216.)

There was no discussion regarding counsel's objection to the prosecutor asking Heidi Jones about how the killings impacted her pregnancy.

2. Applicable legal principles

"In a capital trial, evidence showing the direct impact of the defendant's acts on the victims' friends and family is not barred by the Eighth or Fourteenth Amendments to the federal Constitution." (*People v.*

Pollock (2004) 32 Cal.4th 1153, 1180; see also *Payne v. Tennessee* (1991) 501 U.S. 808, 825-827.) "[A] state may properly conclude that for the jury to assess meaningfully the defendant's moral culpability and blameworthiness, it should have before it at the sentencing phase evidence of the specific harm caused by the defendant. '[T]he state has a legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in, by reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family.' [Citation.]" (*Payne v. Tennessee, supra,* at p. 825.)

Under California law, victim impact evidence is admissible at the penalty phase under section 190.3, factor (a), as a circumstance of the crime. (*People v. Boyette* (2002) 29 Cal.4th 381, 444; *People v. Edwards* (1991) 54 Cal.3d 787, 835-836.) "The jury, in making a normative decision whether the defendant should live or die, is entitled to hear how the defendant's crime has harmed the survivors. [Citation.]" (*People v. Brown, supra,* 31 Cal.4th at p. 573.) Admission of victim impact evidence is subject to the trial court's discretion. (See *People v. Raley, supra,* 2 Cal.4th at p. 916.)

3. Argument

Appellant argues that the trial court exceeded the permitted scope for victim impact evidence by allowing into evidence: 1) victim impact testimony by a non-family member; 2) evidence beyond the defendant's knowledge at the time of the crime; 3) cumulative testimony by several witnesses, and 4) evidence about how the family members learned about the crime. (AOB 108-109.) Appellant acknowledges that these claims have been rejected by this Court, but raises them "for purposes of preservation." (AOB 109.)

First, appellant complains the trial court erroneously allowed into evidence victim impact testimony from a non-relative. (AOB 108.) This Court has "reject[ed] the suggestion that victim impact evidence in a capital trial is or should be limited to blood relatives." (*People v. Brown*, *supra*, 31 Cal.4th at p. 573; see also *People v. Marks* (2003) 31 Cal.4th 197, 235-236; *People v. Pollock*, *supra*, 32 Cal.4th at p. 1183.) Here, the trial court properly admitted the testimony of Angelique Foster; as the court noted, Angelique had a relationship with the victims and was in a position of "in loco parentis" to Zuri. (14 RT 3629-3631; 17 RT 4214.)

Second, appellant complains the trial court permitted "evidence beyond the defendant's knowledge at the time of the crime." (AOB 108.) This Court has rejected the argument that the defendant must anticipate the consequences of his acts. "We have approved victim impact testimony from multiple witnesses who were not present at the murder scene and who described circumstances and victim characteristics unknown to the defendant." (*People v. Pollock*, *supra*, 32 Cal.4th at p. 1183, see also *People v. Bramit* (2009) 46 Cal.4th 1221, 1240; *People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1057; *People v. Boyette, supra,* 29 Cal.4th at pp. 440-441, 443-445.)

Third, appellant complains that testimony by four victim impact witnesses was cumulative. (AOB 108.) This Court repeatedly has upheld admission of multiple victim impact witnesses at the penalty phase of a capital trial. (See, e.g., *People v. Pollock*, *supra*, 32 Cal.4th at pp. 1166, 1183 [five witnesses for the two married victims]; *People v. Boyette*, *supra*, 29 Cal.4th at pp. 440-441, 444 [three witnesses for one victim; five witnesses for another].)

In this case, the trial court expressly noted that there was nothing that led it to believe that the prosecutor intended to inundate the jury with redundant testimony by the victim impact witnesses. Rather, the court

believed testimony by the four victim impact witnesses would "present different prospectives." (14 RT 3423.) The court was correct. Each of the victim impact witnesses had close but different relationships with Carmen and Zuri: Harold Jones was Carmen's father and Zuri's grandfather. (14 RT 3624-3626.) Heidi Jones was Carmen's sister-in- law; their babies were due around the same time and the two planned to raise their children together. (14 RT 3636, 3639.) Valen Jones was Carmen's brother, and Angelique Foster was Carmen's close friend and Zuri's day care provider. (14 RT 3629-3630, 3645.) Each had a different relationship with the victims and offered a different perspective of Carmen and Zuri's personalities and relationship, and how their deaths impacted their families' and friend's lives. (14 RT 3624-3649.)

Appellant claims that this Court in *People v. Robinson* (2005) 37 Cal.4th 592, "recently suggested that there are outer limits to the sheer volume of victim impact evidence allowable before due process is violated." (AOB 109.) Appellant points out that in *Robinson*, the four victim impact witnesses "filled 37 pages of reporter's transcript and focused on the attributes of each victim and the effects of the murders on the witnesses and their families. The prosecutor also introduced 22 photographs of the victims in life." (AOB 109.) As appellant acknowledges, this Court in *Robinson* declined to address the merits of the issue since the defendant failed to object to the testimony and photographs when offered at the penalty proceedings and therefore waived the issue on appeal. (*People v. Robinson, supra,* 37 Cal.4th at p. 652.) In any case, the volumes of victim impact evidence in *Robinson* are markedly greater than similar evidence in this case. Here, four impact witnesses testified. Their testimony was contained in 25 pages of reporter's transcripts, 32% less than in *Robinson*. Moreover, the prosecutor only introduced 2 photographs of

the victims in life (14 RT 3633-3644), 99% less than the number of photos shown in *Robinson*. Thus, *Robinson* is distinguishable.

Appellant also references *Salazar v. State* (Tex. Crim. App. 2002) 90 S.W.3d 330, cited by this Court in *Robinson*. (AOB 109.) However, this Court in *Robinson* cites the *Salazar* case as an "extreme example of . . . a due process infirmity," . . . where "the court admitted a 17-minute 'video montage' tribute to the murder victim-approximately 140 photographs set to emotional music, including 'My Heart Will Go On,' sung by Celine Dion and featured prominently in the film Titanic (20th Century Fox 1997). [Citation.]" (*People v. Robinson, supra*, 37 Cal.4th at p. 652.) The victim impact evidence here, 25 pages of transcript and two simple photographs, is deminimus compared to the evidence introduced in *Salazar*.

Fourth, appellant objects to victim impact "evidence as to how family members learned about the crime." (AOB 108.) In *People v. Pollock, supra,* 32 Cal.4th at p. 1182, this Court found victim impact evidence admissible, where in "response to a question asking how [a witness] had learned of the [victims] deaths and how the news affected her, [a witness] testified that someone had told her that [the victims] 'had been brutally murdered, that their throats had been slit,' and that this was 'a terrible, terrible shock.'" (*Id.* at p. 1182.) In contrast here, the witnesses simply responded that they had learned of Carmen and Zuri's death from their son, husband, or police. (14 RT 3626, 3631-3632, 3641.) These responses are far less prejudicial than the response elicited in *Pollock*. Therefore, appellant's claim fails. (See e.g., *People v. Zamudio* (2008) 43 Cal.4th 327, 364-365.)

This Court has rejected the claims raised by appellant. Appellant offers no persuasive reasons for this Court to reconsider its conclusions.

Additionally, appellant suggests that victim witness Heidi Jones testimony was speculative and remote; specifically, her testimony that "she

went into premature labor when she heard of the deaths[.]" (AOB 110.) "'The purpose of victim impact evidence is to demonstrate the immediate harm caused by the defendant's criminal conduct.' (*People v. Pollock*, *supra*, 32 Cal.4th at p. 1183.)" (*People v. Davis* (2009) 46 Cal.4th 539, 618.) Heidi testified that she was eight months pregnant when she learned of Carmen's, Zuri's and the fetus' death. (14 RT 3641-3642.) Soon after, Heidi went into premature labor; her daughter was born a month early. (14 RT 3641-3642.) It is a reasonable and a logical inference that Heidi's premature labor was due to the shock, stress, and worry from hearing about the death of her pregnant sister-in-law and two-year-old niece. This risk of danger to Heidi and her fetus demonstrates the immediate harm of appellant's crimes. (See *People v. Davis*, *supra*, 46 Cal.4th 539, 618-619 [admission of photograph and testimony showing appearance of victim's mother and young sister just after victim's kidnapping proper where they captured immediate harm of defendant's crimes].) Heidi's victim impact testimony was not speculative or remote.

Appellant further suggests that the court should have precluded "the witnesses [from] testifying that they were far more devastated because the victims died by murder as opposed to an accident." (AOB 110.) In the trial court, appellant argued such testimony was improper characterization of the crime. (14 RT 3657.) Here, where Angelique Foster and Heidi Jones compared Carmen and Zuri's death by murder to death caused by accident, their responses referenced the type or class of crime and its impact on them, and not their *personal views* of the nature of the crime; thus, as the trial court noted, their testimony did not improperly characterize the crime as appellant suggests. (14 RT 3652-3658, 3664-3665, see also 14 RT 3621-3622, 3631-3632, 3641-3642; 17 RT 4215-4216.)

Last, appellant suggests that the "poignant photographs of the victims – a mother and child" that were introduced were inflammatory. (AOB 110-

111.) The trial court limited the prosecution to only two live pictures of Carmen and Zuri. One picture showed Carmen and Zuri at Disneyland just days before they were killed and the other was a portrait taken of Zuri before she died. (14 RT 3633-3634.) Photos of victims while alive constitute a "circumstance of the offense" which portrays the victims as defendant saw them at the time of the killing. (*People v. Anderson* (2001) 25 Cal.4th 543, 594; *People v. Lucero* (2000) 23 Cal.4th 692, 714; *People v. Cox* (1991) 53 Cal.3d 618, 688.) Admission of photographs is discretionary. (*People v. Wharton* (1991) 53 Cal.3d 522, 590-591; *People v. Wright* (1990) 52 Cal.3d 367, 434.)

The two photographs, admitted into evidence, were relevant to show how Carmen and Zuri appeared to appellant before he killed them. (14 RT 3633-3635.) Here, appellant baldly claims that the challenged photographs were inflammatory without pointing to anything in the photographs to support his claim. The trial court's admission of two live photographs of the victims was not an abuse of discretion.

In any case, the admission of the two photos into evidence did not prejudice appellant. The two photos were "quickly shown" to Angelique Foster during her testimony. Ms. Foster simply indicated that one picture showed Carmen and Zuri about a week before they were killed (14 RT 3633, 3635), and the other was of Zuri taken in the spring of 1996 (14 RT 3634-3635). There was no other reference to these pictures before the jury.

B. The Prosecutor Did Not Commit Misconduct by Arguing For Vengeance on Behalf Of the Family

Appellant argues that the prosecutor improperly utilized the victim impact evidence as a platform to argue for vengeance on behalf of the family. (AOB 102, 111, 112.)

A prosecutor's conduct constitutes misconduct "if it amounts to 'the use of deceptive or reprehensible methods to attempt to persuade the jury'

[citations] or 'is so egregious that it infects the trial with a degree of unfairness that makes the conviction a denial of due process.' [Citation.]" (*People v. Silva* (2001) 25 Cal.4th 345, 373.) It is settled that "a prosecutor is given wide latitude during argument. The argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom. [Citations.]" (*People v. Hill* (1998) 17 Cal.4th 800, 819; internal quotation marks omitted; see also *People v. Beivelman* (1968) 70 Cal.2d 60, 76-77.)

In closing argument, the prosecutor argued in relevant part:

> One other thing I want to talk about is vengeance. Some of you may think: Well, gee, I was raised to believe that that wasn't very good. But, you know, vengeance is appropriate. It has a legitimate role in our society. When I stand up here before you and I'm asking you to impose the just verdict in this case based on all the evidence you have, all these factors, the knowledge you have of these crimes, the knowledge of the defendant's background as a child, as an adult, that this man's life should be taken in retribution, and yes, I mean retribution, in punishment for the lives he took. The bottom line is that: Yes, there is a lot of vengeance involved.

(17 RT 4348-4349.)

The prosecutor later argued:

> Sometimes, compassion is deserved and, as members of a civilized race, we show compassion. We impose a system of justice which fairly and systematically justifies private wrongs. Compassion is saying: No, we are not going to leave the defendant out to be lynched or stoned by the family members. We are going to bring a trial here and have his rights safeguarded. We are not allowing the Jones family or any family, any victim's family to take personal vengeance on a defendant, because they are law abiding.
>
> In return, they, the victim's family are entitled to vengeance, plain and simple, from the state because they are not allowed to get it themselves.
>
> That would be called vigilantism and that is not allowed.

> And the state owes the victim's families something in return, doesn't it? It owes them what they are not entitled to get on their own.

(17 RT 4354.)

At this point defense counsel objected to the prosecutor's argument as improper because "[i]t suggests that there are views of victims' family. There is no evidence of any views of the victims' family." (17 RT 4354.) The court admonished the jury, "in so far as it does suggest that, the objection is sustained," and advised the prosecutor to "[c]omport [herself] accordingly." (17 RT 4354.)

The prosecutor continued: "The death penalty is here so that victims, in a sense, have a voice. What is justice in this case?" (17 RT 4355.)

"Isolated, brief references to retribution or community vengeance . . ., although potentially inflammatory, do not constitute misconduct so long as such arguments do not form the principal basis for advocating the imposition of the death penalty. [Citation.]" (*People v. Ghent* (1987) 43 Cal.3d 739, 771.)

In *People v. Zambrano* (2007) 41 Cal.4th 1082, 421, this Court addressed the portion of the prosecutor's penalty phase argument where he briefly argued about the "philosophy" of capital punishment. (*Id.* at p. 1177.)

> In this regard, the prosecutor indicated that the purpose of the death penalty is collective vengeance, defined simply as punishment or retribution for a wrong. He urged that such vengeance is a vital expression of the community's outrage, and that the vigor of society's values is nourished by use of the criminal justice system to impose punishments that reflect the community's "controlled indignation." He asserted that a society incapable of imposing such punishment where warranted is decadent and emasculated, and that the jury serves as the community's conscience in implementing this sanction.

> The prosecutor also invoked John Locke's concept of the social contract, whereby each individual surrenders the personal right of vengeance in favor of state-controlled retribution. The jury's failure to implement the death penalty, he argued, would violate this contract, for if society were unable or unwilling to impose even the most drastic punishment in appropriate cases, individuals, having lost faith in state justice and protection, might return to vigilantism and personal vengeance.

(*Id.* at p. 1177.)

> This Court rejected the defendant's claim of misconduct.
>
> The prosecutor never invited the jurors to abrogate their personal responsibility to determine the appropriate punishment. Nor did he commit misconduct merely by describing the jurors, accurately [citation], as the conscience of the community [citations] or by noting the jury's important role in the criminal justice system [citation].
>
> Furthermore, the prosecutor did not err by devoting some remarks to a reasoned argument that the death penalty, where imposed in deserving cases, is a valid form of community retribution or vengeance – i.e., punishment – exacted by the state, under controlled circumstances, and on behalf of all of its members, in lieu of the right of personal retaliation. Retribution on behalf of the community *is* an important purpose of all society's punishments, including the death penalty. [Citations.]
>
> . . . .
>
> Here, the prosecutor's comments were not brief or isolated, but neither did they form the principal basis of his argument. Moreover, his remarks were not inflammatory. They did not seek to invoke untethered passions, or to dissuade jurors from making individual decision, but only to assert that the community, acting on behalf of those injured, has the right to express its values by imposing the severest punishment for the most aggravated crimes. This case, the prosecutor was at pains to suggest, was one of those that deserved such severe punishment. No misconduct occurred.

(*People v. Zambrano, supra,* 41 Cal.4th at pp. 1178-1179.)

Unlike the prosecutor in *Zambrano,* the challenged comments by the prosecutor here were brief and isolated. Moreover, they did not constitute the principal basis of his argument favoring the death penalty. Thus under the authority of this Court's ruling in *Zambrano,* appellant's claim of prosecutorial misconduct must be rejected.

Appellant's reliance on several out-of-state cases is misplaced. (See *State v. Middlebrooks* (1999) 995 S.W.2d 550, 558 [court found improper the prosecutor's statement, "'his family asks you to impose the death penalty'"]; *State v. Bigbee* (Tenn. 1994) 885 S.W.2d 797, 812 [court found improper the prosecutor's "thinly veiled appeal to vengeance, reminding the jury that there had been no one there to ask for mercy for the victims of the killings . . . and encouraging the jury to give the defendant the same consideration" he gave his victims].) Appellant also relies upon *Lesko v. Lehman* (3d Cir. 1991) 925 F.2d 1527, 1540-1541 [court found improper the prosecutor's argument, "Exhibit the same sympathy that was exhibited by these men on January 3rd, 1980. No more. No more. [¶] We have a death penalty for a reason. Right now, the score is John Lesko and Michael Travaglia two, society nothing. When will it stop? When is it going to stop? Who is going to make it stop? That's your duty."].

First, these cases are not controlling here. (See *Moradi-Shalal v. Fireman's Fund Ins. Companies* (1998) 46 Cal.3d 287, 298.) Second, unlike the facts in *Middlebrooks*, the prosecutor here did not argue that the victim's family asked the jurors to impose the death penalty. Additionally, in *Bigbee* and *Lesko,* where the court found reversible error, it was only in combination with other instances of error at trial. (See *State v. Pindale* (1991) 249 N.J.Super. 266, 286-287.) Moreover, here, as noted *ante,* the challenged comments did not constitute misconduct in the first instance. Further, as noted *ante* and *post,* there were no other instances of misconduct or error on which to predicate a finding of reversible error.

Finally, as to appellant's claim of federal constitutional error, for the reasons discussed above, the victim impact evidence and/or prosecutorial argument was not "so unduly prejudicial" as to render the trial "fundamentally unfair" in violation of the federal Constitution. (*Payne v. Tennessee*, *supra*, 501 U.S. at p. 825.)

IX. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION AT THE PENALTY PHASE BY ADMITTING INTO EVIDENCE TWO PHOTOGRAPHS OF THE VICTIMS IN DEATH

Appellant contends that the trial court erred by permitting the prosecutor to introduce at the penalty phase trial, two "gruesome photographs of the victims after the killings occurred." (AOB 118.) He claims the photographs were irrelevant and any probative value they had was outweighed by their prejudicial effect. (AOB 121.)

A. Relevant Proceedings

1. The guilt trial

Defense counsel filed an in limine motion to exclude "photographs of victims' corpses" under Evidence Code section 352, arguing that their admission violated his right to fair trial, due process, and heightened evidentiary reliability guaranteed by the Fourth, Fifth, Sixth, Eighth, and Fourteenth amendments of the United States Constitution and the California Constitution. (3CT 890-896.)

At the proceeding for in limine motions, the trial court asked the prosecutor to provide photographs of the victims that she planned to introduce into evidence, along with her arguments regarding the probative value of the photographs with respect to premeditation and deliberation (the vital issue of the case), and whether the photographs were unduly prejudicial. (7 RT 1783-1786.)

The prosecutor identified four photos of the victims in death taken from a police photo log: a photo of Zuri's right side with a ruler placed on

her head, a photo of Zuri's left side, a photo of Carmen's right side, and a photo of Carmen's left side. (7 RT 1804-1806, 1810.) She argued the photos were probative to show that appellant premeditated and deliberated killing Zuri and Carmen. (7 RT 1805-1807.) For instance, the photos of Zuri corroborated the coroner's testimony that appellant struck Zuri with both the blunt and claw ends of the hammer head. (7 RT 1807-1808.) They also corroborated appellant's statement to Detective Orman that he initially tried to suffocate Zuri, but when he was unsuccessful, he retrieved a hammer from under his bed, returned to Zuri's room, and repeatedly struck her with the hammer until she was dead. The prosecutor argued that the coroner's sketch "doesn't do justice to the actual tearing laceration the defendant had to have seen when he committed this crime. Otherwise, all you get is laceration." (7 RT 1808-1809.)

As to the photos of Carmen, the prosecutor argued that they corroborated appellant's statements to police; e.g., that he slashed Carmen's arms with a sharp knife, kicked and beat her in the living room, and then repeatedly kicked her in the face and mouth, causing her face to swell. (7 RT 1810-1812.) The prosecutor explained that the pictures showed what appellant saw when he killed Zuri and Carmen and that he had time to reflect on whether and how to kill each of them. (7 RT 1812-1813, 1817.)

Defense counsel argued that the photographs had no value "except to make the conduct gruesome." (7 RT 1818.) Defense counsel argued that the pictures were "inherently emotionally evocative," and would detract from [the jury's] ability to consider appellant's defense. (7 RT 1824.)

The trial court ruled that the photos were highly probative as to the unlawfulness of the killing, the intent to kill, and malice aforethought, and that their prejudicial value did not substantially outweigh their probative value. (8 RT 1837.) The court indicated, however, that if the defense

stipulated to the elements of second degree murder-that the killing was unlawful, committed with malice aforethought, and was willful, the court would preclude the prosecutor from introducing the four photographs into evidence. The court reasoned that if the only issue remaining was whether the killings were premeditated and deliberate, the probative value of the pictures was not as substantial given other witness testimony describing Zuri's death by suffocation and beating, and Carmen's prolonged torturous death.

The court clarified:

> I hope you all understand, I'm not talking about penalty. If we get to the penalty phase in this case, my view is completely different. The People have a right to show the circumstance of the crime. And showing the pictures at that time seems to me—and we haven't discussed it. But tentatively, it seems to me that those come in at that stage, if we get to that stage.
>
> But on the culpability phase, which we're discussing, the prejudicial and inflammatory value outweighs the probative value of those photographs. Assuming that, in effect, defendant admits all the elements of second-degree murder. . . [¶] . . . [¶] If he does not, then it seems to me the photos have high probative value on the issue of this being an unlawful killing, on this having been perpetrated with malice aforethought, and this having been done willfully. And I would allow it in.
>
> So that's where we stand with respect to the issue. I'm talking about those photographs we identified earlier.

(8 RT 1841-1842.)

Appellant ultimately stipulated that the killings of Carmen, Zuri, and the fetus were unlawful, committed with malice aforethought, and were wilful. (8 RT 1976-1978, 1980-1983.) Despite the prosecutor's refusal to accept this stipulation, the trial court precluded admission of the four photos of the victims in death at the guilt phase trial. (8 RT 1983-1989; 9 RT 2001-2007.)

2. The penalty trial

Before the penalty phase trial, defense counsel filed a motion to exclude the four photographs under Evidence Code section 352, on the grounds that the photos were irrelevant, "unduly inflammatory, cumulative, and at least partially inaccurate." (4 CT 1223-1227.) The defense also adopted the arguments it had asserted at the guilt phase trial. (4 CT 1224, fn. 1.) The trial court ruled that the prosecutor could introduce one picture each of Zuri and Carmen in death. (14 RT 3441-3442, 3451-3458.)[27] The court explained:

> The purpose for admitting these photographs that I have referred to already is because they – the probative – their probative value exceeds any undue prejudicial value that they may have. Their probative value lies in they pointedly show the physical – the gruesome physical consequences of the murders here in question. [¶] The photographs of the mother and child after the killings were relatively – were taken relatively a short time after, within at most a day-and-a half, two days of that of the killings and, collectively together, they show as I say the gruesome physical consequences of the act in this case.
>
> The reason why I'm only allowing you to present one of the mother and one of the child is because I think there really is—in order to show the gruesome consequences, there really is no need on the part of the People to show both, and showing both is just cumulative.

(14 RT 3454-3455.)

Defense counsel asked the court to consider whether the photographs add any significant probative value to evidence already being introduced. (14 RT 3555.) The court responded:

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[27] The court also admitted a photo showing Carmen and Zuri alive together at Disneyland taken a few days before they were murdered (14RT 3451-3454), and another portrait of Zuri taken two to three months before her death. (14RT 3554-3557.)

I understand. I understand your position.

And by the way, so the that [*sic*] the record is perfectly clear, I not only understand—well, I do understand very clearly that the matter's discretionary with me. I don't feel I'm obligated to let these in. I have to have a balancing under 352 with respect to that. It is, however, a totally different context in which I exercise that discretion now that we're in the penalty phase than it was in the culpability phase. . . [¶] . . . [¶] [I]n the penalty phase, as I indicated earlier, pictures of the victims just before their death and how they appeared and how they appeared after their death tell in ways that words could never do, the gruesome consequences of the unlawful acts that were perpetrated by the defendant, and are something that are properly to be considered by the jury in determining what the appropriate penalty is.

Now, with respect to being – that all being said, so that everybody knows, I think I understand what I'm obligated to do. I found with respect to the photographs previously mentioned, with the exceptions noted, that the probative value exceeds any undue prejudicial value and – prejudicial value. . . .

And all things considered, I believe the probative value exceeds any undue prejudicial value. Certainly, the undue prejudicial value does not substantially outweigh the probative value. And I'm going to [mark them] in[to] evidence.

(14 RT 3556-3557.)

At trial, Detective Orman testified and identified People's Exhibits Nos. 22 and 23 as photos of Zuri and Carmen after they were killed. (15 RT 3731.)

Subsequently, at a motion for new trial, the court reiterated its reason for admitting these photographs at the penalty trial:

The reason it was admitted, as I stated so strenuously or so emphatically on the record, is because photographs showed the gruesomeness of the crime. And that's exactly why the sort of – that's exactly the sort of thing that juries have to consider in determining whether a death penalty is warranted or not. How gruesome is this thing? [¶] . . . [¶] That's the kind of things it comes in for. [*sic*] The reason I excluded it in the culpability

> phase is that People could not show me how the gruesomeness related to any issue in the culpability phase. It does relate to an issue in the penalty phase.

(18 RT 4556.)

B. Applicable Legal Principles

"This Court is often asked to rule on the propriety of the admission of allegedly gruesome photographs." (*People v. Gurule* (2002) 28 Cal.4th 557, 624.) "[T]he applicable rule is simply one of relevance, and the trial court has broad discretion in determining such relevance." (*Ibid.*) "Relevant" evidence is that evidence, "including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, §§ 210, 350.) A trial court has discretion to exclude even relevant evidence, of course, if the probative value of the evidence "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." (Evid. Code, § 352.) This Court "reviews the trial court's ruling under Evidence Code section 352 for abuse of discretion. . . ." (*People v. Watson* (2008) 43 Cal.4th 652, 684.)

However, a trial court

> has *narrower* discretion under Evidence Code section 352 to *exclude* photographic evidence of the capital crimes from *the penalty trial* than from the guilt trial. This is so for two reasons. On the one hand, because the 'circumstances of the [capital] crime' are a statutorily relevant factor in the normative decision whether death is the appropriate penalty (Pen. Code, § 190.3, factor (a)), the prosecution is entitled at the penalty phase to show such circumstances in a bad moral light, including their viciousness and brutality. On the other hand, because the defendant has already been found guilty of the capital crime, the potential for prejudice on the issue of guilt is not present.

(*People v. Anderson, supra*, 25 Cal.4th 543, 591-592, original italics.)

C. The Admission of the Challenged Photographs Was Not an Abuse of Discretion

Appellant argues that the trial court abused its discretion by admitting the two photographs of Zuri and Carmen in death because they were irrelevant. (AOB 121-122.) Appellant's argument is without merit.

To support his argument, appellant asserts that "even the trial court recognized, the photographs would be unduly inflammatory at the guilt phase." (AOB 123.) "'[V]ictim photographs and other graphic items of evidence in murder cases always are disturbing. (Citation.)' (Citations.)" (*People v. Scheid* (1997) 16 Cal.4th 1, 19.) However, this Court "draw[s] a distinction between photographic evidence at the guilt and penalty phases of a capital trial." (*People v. Moon, supra*, 37 Cal.4th at p. 35.) "'During the guilt phase, there is a legitimate concern that crime scene photographs . . . can produce a visceral response that unfairly tempts jurors to find the defendant guilty of the charged crimes.'" (*Ibid.*)

> "Such concerns are greatly diminished at the penalty phase because the defendant has been found guilty of the charged crimes, and the jury's discretion is focused on the circumstances of those crimes solely to determine the defendant's sentence."

(*Ibid.*)

"'Indeed, the sentencer is *expected* to subjectively weigh the evidence, and the prosecution is entitled to place the capital offense and the offender in a morally bad light' (*People v. Box* (2000) 23 Cal.4th 1153, 1201 [], first italics added.)" (*People v. Moon, supra,* 37 Cal.4th at p. 35.) "Guilt having been established, the jury was left with the decision whether defendant deserved to live or die for his crimes." (*Ibid.*)

"At the penalty trial, the evidence was [] relevant to the issues of aggravation and penalty." (*People v. Raley, supra*, 2 Cal.4th at p. 914; *People v. Wash* (1993) 6 Cal.4th 215, 266.) The photos "demonstrated

graphically the circumstances of the crime and therefore was relevant to a determination of the appropriateness of the death penalty. [Citations.]" (*People v. Raley*, *supra*, 2 Cal.4th at p. 914.)

Here, the challenged photos fairly depict Carmen and Zuri's vicious and brutal injuries, and made clear to the jury the consequences of appellant's crimes. (*People v. Anderson*, *supra*, 25 Cal.4th at p. 592.) Such facts certainly qualify as "circumstances of the crime" in a bad moral light (§ 190.3, factor (a)), that the prosecution was entitled to show at the penalty phase.

The photographs also provided corroboration of several witnesses' testimony. First, they corroborated Dr. Arnold Josselson's testimony given at the culpability phase, which the jury considered during the penalty phase, as to the types and extent of the injuries upon Zuri and Carmen. (8 RT 1903-1931.) Photographs of a victim may properly be admitted to corroborate testimony of an expert witness. (*People v. Stanley* (1995) 10 Cal.4th 764, 838; *People v. Wharton, supra*, 53 Cal.3d at p. 591; *People v. Kaurish* (1990) 52 Cal.3d 648, 684.)

Second, they corroborated appellant's statements to the police regarding the circumstances of the crime. Detective Orman testified that when he interviewed appellant in August 1996, appellant described how he attempted to suffocate Zuri, but failed, and then bludgeoned her to death with a hammer. (15 RT 3728-3731; 4 Supp.CT 946-949.) Appellant then described how he slowly tortured Carmen to death; first by letting her know that Zuri was dead, next by slashing Carmen with a knife, tying her hands and ankles, putting a plastic bag over her head and tying it at her neck, and then strangling her to death with his hands. (10 RT 2518-2520; 15 RT 3728-3731; 4 Supp.CT 950-959.) Photographs of the victim are often properly admitted to corroborate the testimony of a witness. (*People v. Scheid*, *supra*, 16 Cal.4th at pp. 14-15, and cases cited therein.) The court

did not abuse its discretion in ruling that the two photographs were relevant nor was this evidence unduly prejudicial.

Appellant argues that the prejudicial effect of the photographs substantially outweighed their probative value. (AOB 121.) "'"A trial court's decision to admit photographs under Evidence Code section 352 will be upheld on appeal unless the prejudicial effect of such photographs clearly outweighs their probative value."' (Citation.)" (*People v. Moon*, *supra*, 37 Cal.4th at p. 34.)

Appellant essentially argues that the probative value of the photos was limited because they were duplicative of the testimony heard during the guilt trial regarding how the killings occurred and the injuries the victims suffered. (AOB 122-123.) Appellant argues that the graphic photographs, particularly of mother and child together, would likely create a strong reaction causing a juror to minimize or ignore other evidence presented on the issue of whether to impose death or a life prison sentence. (AOB 123.)

As to the relevance of the photographs, the trial court stated, "[t]heir probative value lies in [that] they pointedly show . . . the gruesome physical consequences of the murder here in question." (14 RT 3454.) The court later reiterated, "pictures of the victims . . . how they appeared after their death tell in ways that words could never do, the gruesome consequences of the unlawful acts that were perpetrated by the defendant, and are something that are properly to be considered by the jury in determining what the appropriate penalty is." (14 RT 3556-3557.)

In *People v. Thompson* (1990) 50 Cal.3d 134, 182, this Court stated:

> The photographs were also highly relevant to another circumstance of the crime: the extreme callousness and cruelty with which the innocent and defenseless 12-year-old victim was treated and killed. It is difficult to imagine evidence going more directly to the ultimate question a jury must answer in a death penalty trial—whether death or life imprisonment without possibility of parole is the appropriate punishment. This is

> especially true in a case like this in which the manner in which the victim was hog-tied was simply indescribable in mere words. Thus, it has often been held that "[photographs] which disclose the manner in which a victim was wounded are 'relevant on the issues of malice [citations] and aggravation of the crime and the penalty [citations].'" [Citations.]

As in *Thompson*, the victims here, an eight-month pregnant Carmen and two-year old Zuri, were vulnerable and defenseless. The manner in which appellant killed both were "indescribable in mere words."

Therefore, the photographs were "highly probative of issues both material and disputed, [] the circumstances of the crime and therefore the appropriateness of death." (*People v. Benson* (1990) 52 Cal.3d 754, 786.) Moreover, the photographs were not duplicative of the testimony heard at trial. To the contrary, they complemented this evidence by showing how the victims died "in ways that words could never do[.]" (See 14 RT 3557.)

In any case, "[e]ven somewhat cumulative photographic evidence may be admitted if relevant." (*People v. Thompson* (1988) 45 Cal.3d 86, 115.) "The fact that there is other evidence on the point goes to the probative value of the photographs." (*Id.* at pp. 115-116.) "'"[W]e have often rejected the argument that photographs of a murder victim should be excluded as cumulative if the facts for which the photographs are offered have been established by testimony."' (Citations.)" (*People v. Scheid*, *supra*, 16 Cal.4th at p. 19.)

Moreover, the prosecutor stated that she chose the smaller pictures of the victims' corpses that were not as gruesome as other pictures available. (7 RT 1806.) The prosecutor also stated that she rejected showing a picture of the injuries on Carmen's arms that were slashed with a knife because the photos showed decomposition of the skin. (7 RT 1810.) (Cf. *People v. Cavanaugh* (1955) 44 Cal.2d 252, 266-268.) The prosecutor specifically stated "I'm not going to traumatize these family members by showing them

autopsy photos. I think that would be more than just distasteful, it would be reprehensible." (14 RT 3457.) "The fact that there were other more gruesome photographs that the prosecution did not offer into evidence lends credence to the prosecutor's comment and to the court's determination that the photographs were, in fact, helpful to illustrate the coroner's testimony," and appellant's statements to police, and to show the gruesomeness of the crime allowed under section 190.3, subdivision (a). (*People v. Allen* (1986) 42 Cal.3d 1222, 1258.)

The trial court also noted that the pictures of the victims' corpses were taken "a short time after, within at most a day-and-a half, two days" after the victims were killed. (14 RT 3454.) Thus the bodies would not be badly decomposed or grossly disfigured from the autopsy.

D. Any Alleged Error Was Harmless

Last, even if the trial court erred under Evidence Code section 352 in permitting the two photographs into evidence, any error was harmless. There is no reasonable probability that absent those photos the jury would have returned a verdict of life without the possibility of parole, rather than death. (*People v. Watson, supra,* 46 Cal.2d at p. 836; see also *People v. Scheid, supra,* 16 Cal.4th at p. 21.)[28]

The circumstances in aggravation presented at the penalty phase far outweighed the circumstances in mitigation. As mitigating factors, appellant essentially relied on his dysfunctional family, his abusive drug

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[28] To the extent appellant relies on the *Chapman* standard of prejudice, his reliance is misplaced. The admissibility of evidence is generally a state law error only, except in the rare instances when the error is so grievous as to infect the entire trial with fundamental unfairness and thereby create a violation of due process. (*Estelle v. McGuire* (1991) 502 U.S. 62, 72.) "[A] 'mere error of state law' is not a denial of due process;" otherwise, "'every erroneous decision by a state court'" would become a federal question. (*Engle v. Isaac* (1982) 456 U.S. 107, 121, fn. 21 [].)

addict father and his cold and unemotional mother, and the fact that he grew up in a high-crime neighborhood and had family members who committed crimes. (15 RT 3760-3775, 3817-3823, 3825-3828, 3830-3831; 16 RT 3993-3994, 3999-4009; 17 RT 4238-4251.) Appellant also relied on his remorse and religious affiliation to mitigate the instant crimes. (16 RT 3923, 3950-3951, 3953-3954, 3995-3996, 4075-4076, 4097-4102, 4116-4117, 4127-4129, 4131, 4135-4136, 4140-4143 .) In contrast, the aggravating factors showed that appellant had a history of committing violent crimes against persons for monetary gain. Shortly before killing Carmen and Zuri, appellant committed two bank robberies, in which he and his accomplice wore ski masks and terrorized the bank employees and customers with a gun and threatened to kill them. (14 RT 3491-3600.) In 1994, appellant committed a robbery in New York catching a man off guard, and then punching him in the face, knocking him down a metal staircase, and then continuing to punch and kick him in the face and body, before talking his wallet. (14 RT 3611-3617.) That same year, appellant participated in a robbery-murder in New York by urging his brother to throw a man over a bridge and then rummaging through the man's clothing and taking his wallet. (15 RT 3679-3688, 3693, 3701, 3705, 3750-3754.) Finally, on August 23, 1998, while in local custody awaiting trial, for the killing of Carmen, Zuri, and the fetus, appellant discussed with another inmate his (appellant's) plans to kill the deputy on guard so he could escape. (17 RT 4254-4260.)

Additionally, the inflammatory nature of the two photographs was slight in comparison to the heinous nature of the current crimes where appellant premeditated and deliberated the brutal killing of his eight-month pregnant wife and two-year old child so he could enjoy the stolen money and would not have to go back to prison. (See *People v. Allen*, *supra*, 42 Cal.3d at p. 1258 [inflammatory nature of nine photographs relatively slight

in comparison with heinous nature of crime presented to jury through testimony of witnesses].

Moreover, the prosecutor introduced only two photographs, one of each deceased victim. The photos were introduced briefly and quickly identified by Detective Orman as showing the deceased victims. (15 RT 3731.) No other reference was made to these photographs.

X. EVIDENCE THAT APPELLANT WOULD KILL A GUARD TO ESCAPE JAIL WAS PROPERLY ADMITTED IN REBUTTAL

Appellant contends that the trial court erred by allowing the prosecutor to present rebuttal evidence during the penalty trial. (AOB 125.) He specifically objects to testimony by Tom Lawrence, a deputy at the Martinez Detention Facility, who overheard "appellant say to another inmate that he would kill a guard in order to escape." (AOB 125.) Appellant's contention is without merit.

The trial court ruled that evidence that appellant threatened to kill a guard to escape jail was admissible under Evidence Code section 1102, subdivision (b). The court explained:

> [T]he experts have testified that the defendant, in effect – although they haven't used these words – in effect have testified that [appellant] suffers from some sort of mental or emotional condition that arises from his growing up in what one of them described as a very dysfunctional family, that causes him to act in an emotional and sometimes rageful manner, and have expressly and\or implicitly indicated that he so acted in committing the crimes for which he has been convicted.
>
> The evidence that People seek to introduce now, in my view, tends to show that he is, instead, not a person who acts emotionally out after an emotional or mental disturbance, but that he acts in a goal oriented, instrumental way. It's true that – that the defense does not deny that on some occasions he may have done that, but they are not the ones that should limit the prosecution in – in what regards the prosecution is going to prove this character trait to the jury. And if – if it tends to show a character and a character trait that's different than the ones that

> the defense experts have shown here, it's appropriate rebuttal evidence pursuant to 1102(b) on rebuttal evidence that contradicts or goes contrary to the evidence that the defense presented, clearly to argue mitigating factors pursuant to involved in the circumstances of the crime, that is 190.3(a), and also which the defense introduced, one has to believe is a mitigating factor under 190.3(d), which is defendant acting in these crimes subject to an emotional or mental disturbance.
>
> [¶] . . . . [¶] In my view, it is relevant to the issues of the character trait which have been put at issue by the defense. The evidence will be allowed.

(17 RT 4233-4234.)

At appellant's motion for a new trial, the trial court stated that its prior ruling pursuant to Evidence Code section 1102, subdivision (b) was incorrect, "[b]ecause 11[]02(b) expressly on its face is limited to opinion and reputation evidence. This was evidence of specific conduct." (18 RT 4531-4532.)[29] The court pointed out, though, that the evidence was relevant to rebut Drs. Dutton and Mueller's testimony at the penalty phase that appellant killed Carmen and Zuri out of a sense of rage and abandonment. (18 RT 4544.)

During rebuttal, Tom Lawrence, testified that on August 23, 1998, he was assigned to the administrative segregation and disciplinary housing units at the county jail. (17 RT 4254-4255.) Appellant and inmate Joshua Puckett were in the recreation area. (17 RT 4257.) Through the internal PA system, Deputy Lawrence monitored their conversation and heard them

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[29] Under Evidence Code section 1102, "evidence of the defendant's character or a trait of his character in the form of an opinion or evidence of his reputation" may be admitted as an exception to the general rule as provided under Evidence Code section 1101. As the trial court recognized, the exception does not extend to specific instances of the defendant's conduct, as here, appellant's threat to kill the guard. (*People v. Honig* (1996) 48 Cal.App.4th 289, 348.)

discuss their prior attempts to escape jail. (17 RT 4256-4257.) They next discussed the layout of the jail facility and the best escape route. (17 RT 4257-4258.) Appellant stated it would be easy for him to kill the one deputy assigned to night watch and escape unnoticed. (17 RT 4259.) Puckett warned appellant that the deputy has a special emergency function key on his radio to call for help and he thought appellant's idea to assault the guard would not work. (17 RT 4260.) Appellant insisted it was worth the risk to try and kill the deputy if it would lead to his escape. (17 RT 4260.)

In closing argument, the prosecutor argued that appellant's threat to kill a guard rebuts the defense's theory that appellant killed Carmen and Zuri out of an impulsive act of rage, and rebuts Drs. Thompson and Mueller's testimony that appellant was remorseful:

> And you get Dr. Thompson in, who is a nice man, but he is the Because I Said So doctor. He's the one – the only one of the bunch that interviews [appellant], but in his report he says [appellant] shows remorse, but he never details how by any quotes. There's no tape recorded statement. Nothing we can look at and say: How does he express remorse?

(17 RT 4343.)

The prosecutor continued:

> Remorse may or may not be present in this case. If you find there's remorse, you use that as a mitigating factor under [Penal Code sec. 190.3] (k)[ ] . . . . Everything that falls into here that you think could be extenuating. You may believe he has remorse.
>
> I submit to you that if remorse means genuine grief and acknowledgment of wrong, a desire to modify one's behavior, then you don't have genuine remorse here. You don't have true remorse when he is continually blaming Carmen for her death. "She made me do it."

> You don't have true remorse when he is blaming his mother for his situation, telling her two weeks ago, "You created this."
>
> You don't have true remorse when he chooses to go on a plane to New York to save himself and keep his money, rather than turn himself in.
>
> You don't have true remorse when he tosses Zuri's body into a box, leaves it there. And then, when he is asked by his uncle to go back, they have got to get the bodies out of there, he says, "Why? They're dead."
>
> These are aren't strangers to him. They are his family members
>
> Do you have remorse with him – what does he tell Dr. Thompson a month after this, or two months afterwards? "I don't like being here in prison because I have to sit and think about these crimes, and it's too depressing."
>
> But Dr. Thompson said there was no outward sign of depression or psychosis or any other emotion. He is saying what he thinks the therapist wants him to say. But, does he truly feel it?
>
> If remorse means really modifying your behavior, if the doctors, the psychobabble is really correct and he kills because of the impulsivity, lack of control, then you look at that evidence about how he is acting when he is saying: I will do anything to get out of jail, even kill a deputy. That's not an aggravating factor. That's to rebut the doctor coming in and telling you: No, he is just an impulsive, anger controlled kind of guy, but he kills out of a sense of abandonment, a sense of loss, maternal loss.

(17 RT 4349-4350.)

When a defendant places his character at issue during the penalty phase, the prosecution is entitled to respond with character evidence of its own. "The theory for permitting such rebuttal evidence and argument is not that it proves a statutory aggravating factor, but that it *undermines* defendant's claim that his *good* character weighs in favor of mercy."

(*People v. Rodriguez* (1986) 42 Cal.3d 730, 791 (*Rodriguez*); italics in original.) Once the defendant's "general character [is] in issue, the prosecutor [is] entitled to rebut with evidence or argument suggesting a more balanced picture of his personality." (*Ibid.*) The scope of proper rebuttal is determined by the breadth and generality of the direct evidence. (*People v. Loker* (2008) 44 Cal.4th 691, 709.)

> The decision to admit rebuttal evidence rests largely within the discretion of the trial court and will not be disturbed on appeal in the absence of demonstrated abuse of that discretion. [Citations.] . . . . "[P]roper rebuttal evidence does not include a material part of the case in the prosecution's possession that tends to establish the defendant's commission of the crime. It is restricted to evidence made necessary by the defendant's case in the sense that he has introduced new evidence or made assertions that were not implicit in his denial of guilt." Restrictions are imposed on rebuttal evidence (1) to ensure the presentation of evidence is orderly and avoids confusion of the jury; (2) to prevent the prosecution from unduly emphasizing the importance of certain evidence by introducing it at the end of the trial; and (3) to avoid "unfair surprise" to the defendant from confrontation with crucial evidence late in the trial.

(*People v. Young* (2005) 34 Cal.4th 1149, 1199.)

"The court's decision in this regard will not be disturbed on appeal in the absence of 'palpable abuse.'" (*People v. Hart* (1999) 20 Cal.4th 546, 653.) Even when challenged evidence is only marginally relevant to the penalty issue in a capital trial, it is not an abuse of the trial court's broad discretion to permit such evidence in rebuttal. (*People v. Martinez* (2003) 31 Cal.4th 673, 695-696.)

Appellant argues that evidence that he threatened to kill a jail guard in order to escape was not proper rebuttal evidence. (AOB 129.) Appellant claims he "did not put his character in issue," he did not "introduce evidence of potential good conduct in prison," and, "the rebuttal evidence

was not relevant to any of the evidence presented by the defense." (AOB 130-131.)[30] The record shows otherwise.

At the penalty phase, Dr. Donald Dutton, an expert in the study of spousal batterers, opined that appellant had the common characteristics of a spousal batterer which stemmed from him growing up in a dysfunctional family and a high crime neighborhood. (15 RT 3812, 3814, 3819, 3828.) Dr. Dutton explained that there was extreme physical abuse in appellant's family and that the family lacked the necessary secure attachment base which makes a child feel safe. (15 RT 3817-3818, 3823, 3826-3828.) Dr. Dutton opined that appellant fit the profile of the spousal batterer that kills his wife in an "'unexpected episode of violent, impulsive, acting-out behavior, which is not well thought out, for no obvious purpose or personal advantage.'" (15 RT 3828.)

Similarly, Dr. Jonathan Mueller, a psychiatrist/neurologist, testified that appellant had a family history of psychiatric disorders and mental illness, and that appellant was exposed to strong violence from his family and neighborhood. (16 RT 3993-3994.) Dr. Mueller testified that these and other circumstances led in part to appellant having problems controlling his rage. (16 RT 3999-4002.) Dr. Mueller opined that the root to appellant's problems in controlling his emotions, particularly his anger, stemmed from a violent, explosive, brutal and intimidating father, and from a mother who had episodes of anger and punished her children. (16 RT 4002, 4005, 4008-4009.) Dr. Mueller also opined that appellant fit closely

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[30] To the extent appellant contests the admission of the challenged evidence under Evidence Code section 1102, subdivision (b) (see AOB 131-132), appellant's claim ignores that at the new trial motion, the trial court revised its earlier ruling and expressly noted it was not admitting the challenged evidence under this statute.

into the Borderline Personality Disorder rubric; one who suffers from this disorder has great difficulty controlling anger and emotional swings, inter alia. (16 RT 4069.) Dr. Mueller did not consider appellant to be a typical Antisocial Personality Disorder, whose characteristics would be more instrumental and goal-directed. (16 RT 4070.)

Thus, the prosecutor's evidence that appellant threatened to kill a guard so he could escape from jail was relevant to show that appellant was not an out-of-control rage killer, but a man who acted with a purpose in mind, and for his own personal advantage; e.g., to escape punishment for his crimes. The evidence that appellant threatened to kill a guard to escape from jail thus goes to his character as an instrumental, goal-oriented killer, and was necessary to rebut the experts' testimony that appellant killed because he was mentally disturbed.

Appellant asserts that "none of [the medical experts] testified that appellant's violent conduct was never the result of planning." (AOB 132-133.) As the trial court noted, this did not preclude the prosecution from refuting expert testimony that appellant deviated from his usual antisocial behavior (i.e., instrumental and goal- directed) outside the home, when he committed this violent, out-of-control rage killing of Carmen and Zuri on this one occasion inside the home. As the court pointed out, the record shows that "[t]here were a number of other instances of violent behavior engaged in by the defendant that appeared . . . to be[] . . . goal oriented. . . . [I]t's not an unreasonable inference for the jury to conclude from the fact that the defendant engaged in a number of violent behaviors [that are goal oriented], that this act of violent behavior [killing Carmen and Zuri] was also committed with that [same] certain state of mind." (18 RT 4546-4547.) The court added "[t]he fact that there was this additional incident, especially after the crime is committed, supported the proposition that the leopard has not changed his spots. . . ." (18 RT 4547.) Thus, the fact that

defense did not introduce evidence that appellant was not capable of planning or acting with purpose did not preclude the prosecution from introducing such evidence to imply that he acted the same when he killed Carmen and Zuri. (18 RT 4545-4547.)

Finally, appellant argues that "a conversation between two inmates about a hypothetical escape attempt in which appellant boasts about killing a hypothetical guard is too vague, inconclusive, and too remote[.]" (AOB 134.) To support his argument, appellant relies upon *People v. Martinez*, *supra*, 31 Cal.4th at pp. 694-695, where this Court found that "inconclusive and speculative testimony of the defendant's involvement in a shooting was improperly admitted as rebuttal evidence at penalty phase." (AOB 135.) *Martinez*, however, involved an incident about which the testifying witness knew virtually nothing. (See *People v. Martinez, supra,* at p. 695.)

Here, in contrast, Deputy Lawrence's testimony was not based on assumption and speculation. Deputy Lawrence heard first-hand appellant and inmate Puckett's discussion about the best route to escape from the jail and appellant's insistence that he would kill the jail guard to effectuate his escape. (17 RT 4256-4260.)

In any case, appellant's threat to kill a guard to escape from jail was properly admitted to rebut Drs. Thompson and Mueller's testimony that appellant was remorseful. Defense counsel explained that Dr. Thompson would testify about appellant's mental state at the time of his interview and that "it relates to remorse." (16 RT 3943, 4199.) Consistent with counsel's offer, Dr. Thompson testified to this effect at the penalty phase. (16 RT 3950-3951, 3953-3954, 3968-3969, 3983;[31] see also 17 RT 4226-4227

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[31] In closing argument, defense counsel indicated that Dr. Thompson's observations that appellant showed remorse was substantiated (continued...)

[defense counsel acknowledging that Dr. Thompson's testimony has "a great deal . . . to do with the issue of remorse."].) Hence, appellant's threat to kill the guard only two years after he killed Carmen and Zuri, was relevant to show that he was not remorseful nor had he changed his criminal ways.

As this Court recently observed, the prosecutor was "entitled to rebut with evidence or argument suggesting a more balanced picture of his personality. [Citation.]" (*People v. Loker*, *supra*, 44 Cal.4th at p. 709.) The challenged evidence was properly admitted to rebut evidence that appellant was out-of-control, mentally disturbed, and remorseful. The admission of this evidence was not an abuse of discretion.

Even assuming arguendo the challenged evidence was erroneously admitted, any error was harmless. Appellant argues that the evidence was prejudicial since evidence of his threat to kill a jail guard, along with the prosecutors argument, "suggest[ed] to the jury that 'the death penalty is the only means of protecting the public from a defendant who poses a significant escape risk' (citations.)" (AOB 136.)

The prosecutor here did not argue, however, that appellant would remain a danger to others if not put to death. Instead, her argument was that life without parole was not sufficient punishment for appellant's crimes, and that if the jury granted appellant life without parole, he would continue to live in a society, albeit in a prison community, but still have hopes and dream. (17 RT 4351-4353.)

In addition, the nature of the evidence against appellant was compelling (See Args. II and IX harmless error args., *supra*); thus, even

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(...continued)
by Dr. Thompson's 30 to 40 years of working in forensic psychiatry. (17 RT 4388-4389.)

without evidence that appellant threatened to kill a guard to escape jail, it is not reasonably probable that a result more favorable to appellant would have been reached. (*People v. Watson, supra,* 46 Cal.2d at p. 836.) For the reasons discussed above, appellant's federal constitutional rights were not violated by the admission of the challenged evidence.

XI. THE TRIAL COURT PROPERLY REJECTED APPELLANT'S REQUEST TO INSTRUCT THE JURY THAT IT COULD CONSIDER MERCY IN DECIDING WHETHER TO IMPOSE A LIFE SENTENCE

Appellant contends that the trial court erred by denying his request to instruct "the jury that it could consider mercy, among other things, as a factor to justify a life sentence" (AOB 137), and by "preclud[ing] the defense from informing the jury in argument that they could take mercy into account in determining the appropriate penalty." (AOB 142.) Appellant's contention is without basis.

On February 1, 2000, the trial court discussed proposed instructions for the penalty phase of trial. (16 RT 4160-4161.) The court's proposed instruction no. 25 reads:

> A mitigating circumstance does not have to be proved beyond a reasonable doubt; nor do any of the aggravating circumstances, excepting that set forth in [Pen. Code, § 190.3] paragraph (b), above.
>
> A juror may find that a mitigating circumstance exists if there is any evidence to support it, no matter how weak the evidence is. Again, this is true of aggravating circumstances too, excepting that set forth in paragraph (b).
>
> Any mitigating circumstance may outweigh any or all the aggravating factors; and vice versa.
>
> A juror is permitted to use sympathy, compassion, or pity for the defendant, or any similar sentiment, in deciding what

weight to give to any of the factors listed in paragraphs a through k.[32]

A juror may also, in this regard take a lenient or tolerant view of the defendant and/or his conduct, if he or she – that is, the juror -- chooses to do so.

(17 RT 4453; 4 CT 1297; 17 RT 4430-4431.)

Defense proposed that the following instruction, no. 11, be given:

A mitigating circumstance or factor does not constitute a legal justification or excuse that lessens factual guilt for the offenses in question. A mitigating circumstance or factor is something about Christopher Henriquez, or about the offenses, which in fairness, sympathy, compassion or mercy, may be considered in extenuating or reducing the defendant's degree of moral culpability or which justifies a sentence of less than death.

(4CT 1267.)

Relying on this Court's decision in *People v. Benson*, *supra*, 52 Cal.3d 754, the trial court rejected appellant's proffer. (16 RT 4163-4167.)[33] The court noted, however, that it would instruct, and that counsel could argue, that the jury can be compassionate, "use pity, and other adjectives. . . . that expresses a sentiment." (16 RT 4169-4170.)

The trial court's ruling was sound. The trial court has no duty to instruct the jury that it can consider mercy for a defendant. (*People v.*

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[32] Penal Code section 190.3, in pertinent part, reads:

In determining the penalty, the trier of fact shall take into account any of the following factors if relevant:

. . . . . .

(k) Any other circumstance which extenuates the gravity of the crime even through it is not a legal excuse for the crime.

[33] In *Benson*, this Court rejected the defendant's claim that the trial court's refusal to instruct the jury on mercy in deciding the appropriate penalty violated either statutory law or the Constitution. (*People v. Benson*, *supra*, 52 Cal.3d at pp. 808-809.)

Clark (1992) 3 Cal.4th 41, 163-164; *People v. Nicolaus*, *supra*, 54 Cal.3d at p. 588; *People v. Benson, supra,* 52 Cal.3d at pp. 808-809; *People v. Caro* (1988) 46 Cal.3d 1035, 1067,; see also *People v. Wader* (1993) 5 Cal.4th 610, 663 [no error in failing to give proffered "mercy" instruction where court instructed jury to consider any sympathetic factors defendant offered for sentence less than death and prosecutor did not argue that jury should not consider sympathy or mercy]; see also *California v. Brown* (1987) 479 U.S. 538, 541-543 [giving of standard anti-sympathy instruction not to be swayed by mere sentiment, conjecture, sympathy, etc. did not violate federal Constitution].)

Directly on point, is *People v. Griffin* (2004) 33 Cal.4th 536, a capital case, in which this Court held that the trial court's refusal to instruct on mercy—in addition to the sympathy instruction given—was not error. (*Id.* at p. 591-592.) In *Griffin*, the trial court, at the penalty phase, instructed the jury

> that "[i]n determining which penalty is to be imposed on the defendant, you shall consider all of the evidence . . . [and] shall consider, take into account and be guided by . . . [specified penalty] factors" including, as pertinent here, "[a]ny sympathetic or other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death."

(*Id.* at p. 590.) "The trial court also instructed the jury that '[y]ou 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.'" (*Ibid.*) The trial court denied defendant's request to instruct the jury that it "could exercise mercy based on the evidence, in part because some of these requested instructions were duplicative of those quoted above." (*Id.* at p. 590-591.) This Court held:

> Defendant contends that the trial court's denial of his request to instruct the jury that it could exercise mercy based on the evidence was error. We have rejected substantially similar

claims in the past (see, e.g., *People v. Smith* (2003) 30 Cal.4th 581, 638 []; *People v. Hughes* (2002) 27 Cal.4th 287, 403 []; *People v. Lewis* (2001) 26 Cal.4th 334, 393 []), and we reject the present claim as well. A trial court, of course, may refuse an instruction that is duplicative. (E.g. *People v. Sanders* (1995) 11 Cal.4th 475, 560 []; *People v. Mickey* (1991) 54 Cal.3d 612, 697 []; see e.g., *People v. Benson*, *supra*, 52 Cal.3d at p. 805, fn. 12.) The question of the appropriate standard of review applicable to a determination of duplicativeness need not be resolved (see *People v. Berryman* (1993) 6 Cal.4th 1048, 1079 []), because even when scrutinized independently, the trial court's decision was sound. The instructions requested were clearly duplicative of the instructions given, which informed the jury that it had to "consider all of the evidence" and could "consider, take into account and be guided by" any factor, including "[a]ny sympathetic or other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death," and that the jury was "free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider." (See, e.g. *People v. Smith*, *supra*, 30 Cal.4th at p. 638; *People v. Hughes*, *supra*, 27 Cal.4th at p. 403; *People v. Lewis*, *supra*, 26 Cal.4th at p. 393.)

Defendant argues that without the instructions he requested, a reasonable likelihood exists (see *People v. Clair*, *supra*, 2 Cal.4th at p. 663) that the jury was misled into believing it was precluded from considering and giving effect to at least some of the evidence that he presented in mitigation in violation of the cruel and unusual punishment clause of the Eight Amendment to the United States Constitution and the due process clause of the Fourteenth Amendment. But having received an instruction expressly declaring that it had to "consider all of the evidence" and counsel "consider, take into account and be guided by" any factor including "[a]ny . . . aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death," the jury adequately

was advised that it could consider and give effect to *all* of the evidence presented by defendant in mitigation.[34]

(*People v. Griffin, supra*, 33 Cal.4th at pp. 591-592; italics in original.)

In *People v. McPeters* (1992) 2 Cal.4th 1148, the Court rejected defendant's request for a pure mercy instruction for the reason that the

> instruction is misleading in that it fails to make reference to statutory factors and implies an unguided or arbitrary discretion in the jury to render a greater or lesser penalty at its whim . . . the unadorned use of the word 'mercy' implies an arbitrary or capricious exercise of power rather than reasoned discretion based on particular facts and circumstances. Defendant was not entitled to a pure 'mercy' instruction.

(*Id.* at p. 1195.)

This Court noted that unlike the pure mercy instruction, "the given instruction focusing on sympathy and compassion in relation to the circumstances more precisely and adequately cover the area." (*Ibid.*)

In this case the trial court instructed the jury:

> You're guided by those previous instructions given in the culpability or guilt phase of the trial in this case which are applicable and pertinent to the determination of penalty.
>
> However, you are to completely disregard any instructions given in the guilt trial which prohibit you from considering pity or sympathy for the defendant.
>
> In determining penalty, the jury shall take into consideration, among other things, pity and sympathy for defendant, insofar as you find that it is warranted by the evidence.

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[34] "To the extent defendant claims the jury could exercise mercy *apart from the evidence*, and should have been instructed accordingly, the contention lacks merit. A jury may not exercise mercy in this fashion, and therefore should not be instructed that it could. (*People v. Benson, supra*, 52 Cal.3d at pp. 808-809.)" (*People v. Griffin, supra,* 33 Cal.4th at p. 592, fn. 26; italics in original.)

(17 RT 4443-4444.)

The trial court added:

> In determining which penalty is to be imposed on defendant, you shall consider, for the purposes for which it was admitted, all of the evidence which has been received during any part of the trial of this case.
>
> Further, in determining which penalty is to be imposed, you shall consider, take into account, weigh, and be guided by the following factors [a through k], if applicable.

(17 RT 4444.)

The trial court further instructed:

> Any mitigating circumstance may outweigh any or all of the aggravating factors, and vice versa.
>
> A juror is permitted to use sympathy, compassion, or pity for the defendant, or any such similar sentiment, in deciding what weight to give any of the factors listed in Paragraphs A through K.
>
> A juror may also, in this regard, take a lenient or tolerant view of the defendant and/or his conduct, if he or she – that is, the juror – chooses to do so.
>
> With regard to factors in mitigation or aggravation, each juror must make his or her own individual assessment of the weight to be given to such evidence.
>
> There is not a requirement that all jurors unanimously agree on any matter offered in mitigation or aggravation. Each juror makes an individual evaluation of each fact or circumstance offered in mitigation or aggravation of the penalty. Each juror should weigh and consider such matters, regardless of whether or not they are accepted by the other jurors.

(17 RT 4453-4454.)

> The weighing of aggravating or mitigating circumstances does not mean a mere mechanical counting of the factors on each side of an imaginary scale, or the arbitrary assignment of weights to any of them.

> You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider.

(17 RT 4454.)

Further, the prosecutor, in closing, discussed section 190.3, subdivision (k), and expressly argued:

> So, essentially factor (k) says if you can grasp any sympathy from this defense evidence, you can use that as sufficiently mitigating evidence and spare his life.

(17 RT 4345.)

> One final note. More than any other potential factor in mitigation, should you allow your pity for the defendant or any other sympathetic emotion to give him a sentence of LWOP or life without parole. . . .

(17 RT 4350.)

> Sometimes, compassion is deserved and, as members of a civilized race, we show compassion. We impose a system of justice which fairly and systematically justifies private wrongs. Compassion is saying: No, we are not going to leave that defendant out to be lynched or stoned by the family members. We are going to bring a trial here and have his rights safeguarded.

(17 RT 4354.)

Interestingly, defense counsel did not expressly argue in his closing argument for the jury to consider sympathy, pity, or compassion, but instead argued that appellant "should get a just verdict of life without possibility of parole because he earned it himself," by the exemplary life he led when he was younger. (17 RT 4365-4408.)

Given the foregoing authority, the trial court here was not required to instruct the jury that it could consider mercy in deciding whether to impose a life sentence. Appellant's contrary claim should be rejected. Moreover, even assuming the trial court erred in refusing the instruction, any error was

harmless under any standard, given the trial court's repeated instruction to the jury that it could consider sympathy, compassion, and pity for appellant; the prosecutor's argument to that effect; and defense counsel's acknowledgment in the lower court that the term "mercy," as defined by defense counsel and the court, is synonymous with the definitions of the terms "sympathy" and "pity." (See 16 RT 4170, 4172, 4345, 4350, 4354, 4443-4444, 4453-4454.)

To the extent appellant relies on several cases to support his claim of federal constitutional error, appellant's reliance is misplaced. (AOB 139.) (See *Roberts v. Louisiana* (1976) 428 U.S. 325, 331, 334-335 [Court held unconstitutional Louisiana law mandating death penalty for certain crimes regardless of "[a]ny qualification or recommendation which a jury might add to its verdict . . . such as a recommendation of mercy." Court found law created risk that juror reluctant to impose capital punishment on particular defendant *might* rely on arbitrary considerations so as not to convict defendant of capital crime]; *Gregg v. Georgia* (1976) 428 U.S. 153, 203 [Court held capital punishment constitutional under Georgia law where jury can afford mercy under system that does not create a substantial risk of arbitrariness or caprice]; *People v. Jurado*, *supra*, 38 Cal.4th at p. 131 [Court held trial court did not abuse discretion by admitting evidence that murder victim was pregnant, since evidence "to sway the jury to show mercy or to impose the ultimate sanction" is admissible if not irrelevant or inflammatory]; see also *People v. DePriest* (2007) 42 Cal.4th 1, 57; *People v. Zambrano*, *supra*, 41 Cal.4th at p. 1176; and *People v. Demetrulias* (2006) 39 Cal.4th 1, 31.)

The cases cited by appellant do not address whether a court's refusal to instruct on mercy is erroneous. Nor do these cases discuss the multiple definitions of the term "mercy." These cases appear to use the term "mercy" as connoting sympathy, compassion, or pity, and not to accord a

defendant "a punishment other than the one that he or she is entitled to under the law." (16 RT 4168-4169.) Hence, these cases are distinguishable.

In *People v. Benson, supra*, 52 Cal.3d 754, this Court stated:

> To be sure, "Nothing in any of [the] cases [of the United States Supreme Court] suggests that the decision to afford an individual defendant mercy violates the Constitution.' But *nothing in any of those cases suggests that such a decision is in fact authorized by the Constitution. . . . At its root, the Eighth amendment is simply prohibitory: it bars imposition of punishment that is unduly severe. It does not grant power, and hence does not authorize imposition of punishment that is unduly lenient.*"

(*Id.* at p. 808, italics added, citations omitted, brackets in original.)

Appellant also argues that "[i]f the jury is not told that it has the power to consider mercy, in the same way that it must consider all statutory mitigation offered by the defendant, it may falsely believe that the sentencing process involves merely a calculated weighing of factors, leaving them no means of effecting a moral response to evidence falling outside the enumerated factors." (AOB 142.) This claim ignores that the trial court expressly instructed the jury that it was not to mechanically weigh the factors. (See 17 RT 4454-4455; CALJIC No. 8.88.)

Appellant further claims that "mercy is a concept separate and distinct from sympathy. (AOB 144.) As noted above, defense counsel specifically argued that "I, for the life of me, don't see how there's a substantial or any distinction between urging pity, urging compassion for, and urging mercy." (16 RT 4170.) Defense counsel further stated that the common sense understanding of the word "mercy" was more synonymous with the concept of incorporating compassion and pity into one's decision. (16 RT 4170.) For appellant to claim here that the terms have meanings that are separate and distinct is disingenuous.

XII. THE TRIAL COURT DID NOT MISLEAD THE JURY REGARDING THE NATURE OF THEIR SENTENCING DETERMIANTION

Appellant contends that the trial court's voir dire and comments to counsel, by itself or together with the trial court's instructions to the jury based on CALJIC No. 8.88, erroneously permitted the jury to impose "a sentence of death if aggravation outweighed mitigation even if the juror[s] d[id] not personally believe death [was] the appropriate sentence under all the circumstances." (AOB 152-153.) Appellant's contention is without merit.

The trial court instructed the jury at the penalty phase with CALJIC No. 8.88 as follows:

> An aggravating factor is a 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 a 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 or life without possibility of parole.

(17 RT 4447; 4 CT 1281.)

The court continued with the same instruction:

> It's now your duty to determine which of these two penalties, death or confinement in the state prison for life without possibility of parole, shall be imposed on the defendant.
>
> After having heard all of the evidence, and after having heard and considered the arguments of the attorneys, you shall now consider and take into account and weigh and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed.
>
> The weighing of aggravating or mitigating circumstances does not mean a mere mechanical counting of the factors on

each side of an imaginary scale, or the arbitrary assignment of weights to any of them.

You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider.

In weighing the various circumstances, you determine, under the relevant evidence, which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances.

To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstance, that it warrants death instead of life without possibility of parole.

(17 RT 4454-4455; 4 CT 1300; italics added.)

This Court has repeatedly rejected appellant's claim that the italicized language above is misleading.

> By advising that a death verdict should be returned only if aggravation is "so substantial in comparison with" mitigation that death is "warranted," the instruction clearly admonishes the jury to determine whether the balance of aggravation and mitigation makes death the appropriate penalty.

(*People v. Arias*, *supra,* 13 Cal.4th at p. 171; see also *People v. Moon*, *supra*, 37 Cal.4th at p. 43 [CALJIC No. 8.88 "[i]s not unconstitutional for failing to inform the jury that death must be the appropriate penalty, not just a warranted penalty"].)

In *People v. Davenport* (1985) 41 Cal.3d 247, 282, 285, this Court stated:

> In *People v. Brown*, *supra*, 40 Cal.3d 512, this court upheld the validity of 190.3. . . . [¶] . . . The *Brown* court then determined that the statutory reference to "weighing" and the use of the word "shall" "need not be interpreted to limit impermissibly the scope of the jury's ultimate discretion. In this context, the word 'weighing' is a metaphor for a process which by nature is incapable of precise description. The word connotes

> a mental balancing process, but certainly not one which calls for a mere mechanical counting of factors on each side of the imaginary 'scale,' or the arbitrary assignment of 'weights' to any of them. Each juror is free to assign whatever moral or sympathetic value he deems appropriate to each and all of the various factors he is permitted to consider, including factor 'k' as we have interpreted it. By directing that the jury 'shall' impose the death penalty if it finds that aggravating factors 'outweigh' mitigating, the statute should not be understood to require any juror to vote for the death penalty unless upon completion of the 'weighing' process, he decides that death is the appropriate penalty under all of the circumstances. Thus, the jury, by weighing the various factors, simply determines under the relevant evidence which penalty is appropriate in the particular case." (*Brown, supra*, at p. 542.)

This Court in *People v. Brown* (1985) 40 Cal.3d 512, nevertheless, "noted that instruction in the terms of the statute had the potential to confuse jurors" and thus suggested the adoption of an instruction where "[t]he instruction given informed the jurors that to return a verdict of death they must be persuaded that the 'aggravating evidence is so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole,'" and that weighing is not a mechanical process. (*People v. Duncan* (1991) 53 Cal.3d 955, 978.)

Here, the court instructed the jury with CALJIC No. 8.88, which eliminates the "shall" language that is potentially misleading (see *People v. Taylor, supra*, 52 Cal.3d at p. 845), and adopted the "so substantial in comparison" and "warrant" language as suggested in *Brown*. Additionally, the court here instructed and repeatedly admonished the jurors during voir dire that the weighing was not a mechanical process, but one where each juror is free to assign whatever moral or sympathetic value he or she deemed appropriate to each factor. In so doing, the jury was told that it could not impose a death sentence unless it believed that death was the appropriate sentence under all the relevant circumstances.

Appellant also claims that the trial court erred in its "comments during voir dire—and to counsel in guiding their closing arguments—that the jury must vote for death if they find that aggravation outweighs mitigation, and can only vote for life without parole if mitigation outweighs aggravation." (AOB 153-154.) To support his claim, appellant points to statements by the trial court, in isolation, so they appear to suggest that the jury weigh factors in aggravation and mitigation simply by applying a mechanical weighing process to determine penalty. (AOB 147-150.) Reading these statements, in context, however, the record shows otherwise. For instance, in addition to instructing the jury with CALJIC No. 8.88, the court voir dired potential juror Thomas Jennings as follows:

> You remember now, the culpability phase is one thing. Culpability phase is you have to determine whether the defendant is guilty of the charges. And in that connection, you cannot find him guilty of any of the charges, or any lesser included offense, unless you find beyond a reasonable doubt that he committed that offense.
>
> The death penalty phase of a trial is a different proposition. We don't get involved in burden of proof concepts such as beyond a reasonable doubt.
>
> What you have to do in the death penalty phase is you have to weigh – and weigh is not a mechanical process. When we use the word "weigh," we think of a scale and loading up things on one side and loading up on another side.
>
> It's not really what the law envisions in this regard. What it envisions is a normative judgmental thing where basically it's a qualitative decision, if you will, as opposed to a quantitative decision.
>
> But you weigh all the factors in that sense, qualitatively. All the factors being the aggravated factors and the mitigating factors, specific ones that I'll define for you in greater detail.
>
> But after you do that, if you conclude that the aggravating factors outweigh the mitigating, the law provides it, the death

> penalty should be imposed [*sic*]. And if you conclude in this qualitative way that the mitigating factors outweigh the aggravating factors, then it provides for the imposition of life without possibility of parole.

(6 RT 1337-1338; see also 6 RT 1492-1493 [court voir diring prospective juror number 78]; 6 RT 1506-1507 [same with prospective juror Lea Zywickie]; 7 RT 1609-1611 [same with prospective alternate juror Barry Soares]; 7 RT 1631 [same with prospective alternate juror number 107].)

The court repeated:

> So if we get to the death penalty phase, assuming you would have found that defendant is guilty of premeditated murder, and the special circumstance allegations of multiple murders is true, what I'm trying to get at is:
>
> Notwithstanding your philosophical views about death being an extreme penalty, are you prepared to listen to the aggravating and mitigating factors, and make this a decision at some point, this qualitative decision that the law calls upon you to make, as to what the appropriate punishment would be?

(6 RT 1340.)

Moreover, contrary to appellant's claim, the trial court's comments to counsel in guiding their penalty phase closing arguments did not "dispute the notion that the jury could reach a life verdict if it determined that death was not the appropriate penalty even if it found aggravation outweighed mitigation." (AOB 149.) The court, in its discussion with counsel, stated:

> That language that the authors of CALJIC have picked, is subject to a lot of debate. When they're saying "it's so substantial," what they really mean is—those words are being used in the sense of: It's substantial enough when compared with the mitigating circumstances as to warrant the imposition of death.
>
> So if you find that the aggravating circumstances are of such a nature and of such a substance, when compared with the mitigating circumstances, that you feel they warrant death in a normative sense, then impose death.

> If you feel that the mitigating circumstances, when compared with the aggravating circumstances, are of a type that warrant life without possibility of parole, then impose life without possibility of parole.
>
> That's really what that language means. . . .[¶] It does not mean that the aggravating circumstances must be so weighty when compared with the mitigating circumstances, in the sense of there must be substantially more in some quantitative sense.
>
> For, indeed, that's what we're getting away from. We're getting away from this mechanical concept of suggesting that it's some sort of a weighing process like you might weigh flour. It's a normative process.
>
> So basically what you're saying is you consider the aggravating circumstances, and you consider the mitigating circumstances, and then you make a value judgment as to whether the aggravating circumstances, when compared with the mitigating circumstances, warrant death or vice versa.

(16 RT 4174 -4175.)

The court continued:

> The only reason I went into [this] at some length is I don't want the defense to argue to the jury that, "Look, 'so substantial' means it's got to outweigh it. There's got to be so many aggravating factors as against a mitigating factor, that it's substantially greater. That the aggravating factors substantially outweigh." Because that can be misleading, as well.
>
> So you have to be careful when you argue that, is what I'm telling you. . . .

(16 RT 4176 -4177.)

Hence, the court was correctly advising counsel not to imply to the jury that the weighing process is a mechanical process, since it is a normative one.

Nor, as appellant claims, did the prosecutor's closing argument "exploit[] the court's erroneous comments," so that "it cannot be established that the errors described above were harmless beyond a

reasonable doubt." (AOB 155.) As shown above, the court's comments were not erroneous. In any case, the prosecutor argued that "[t]he Judge is going to tell you there are various factors in determining the appropriate penalty," and discussed relevant subdivisions (a) through (k) as set forth in Penal Code section 190.3. (17 RT 4306, 4308.)

> But the Judge will tell you it is not an automatic weighing process. You don't stand up and say for example in a hypothetical situation: gee, okay. We have factors (d), (e), (g) and (i), but on the prosecution's side they just have factor (a), therefore four against one, we have to vote for LWOP, life without parole.

(17 RT 4309.)

The prosecutor also discussed the aggravating circumstances (17 RT 4309-4309) and any possible mitigating factors. (17 RT 4329-4345.) The prosecutor acknowledged that under factor (k), the jury could rely on sympathy, appellant's remorse, pity, or compassion to sentence him to life without parole. (17 RT 4345, 4349-4351, 4354.) The prosecutor stated "[i]f you feel that the aggravating factors (a) and (b) does [*sic*] not outweigh the mitigation, in other words, that is that there's some mitigating factor that you find that prevents you from imposing the death penalty, then you would not feel good about giving the death penalty and you should not do it. . . ." (17 RT 4360.) Likewise, defense counsel argued that "[a]s the judge has told you, it's about a moral and a normative decision." (17 RT 4371.) Defense counsel told the jury that the law says "to impose the death penalty when you feel that the aggravating evidence is so substantial that it outweighs any mitigating evidence." (17 RT 4379.) Defense counsel advised the jury to consult the language of the instructions to apply the law correctly. (17 RT 4379.) Defense counsel argued:

> You can weigh the aggravation. You can weigh the mitigation. I want to talk to you about the mitigation. I want to challenge you to think about something.

> If you're making a normative judgment, that's a comparison, there's no absolutes. It has to be comparative. You're being asked to make a judgment about someone whose shoes you've never walked in. That's what this process is all about.

(17 RT 4385.)

Defense counsel discussed, at length, the earlier life appellant led as a Jehovah's witness and that each good deed, good conduct, or good choice by appellant is a "brick," and "[e]very one of those bricks that he put there to help build this building is mitigation. . ." Defense counsel did not use a mechanical weighing process, but argued that appellant "should get a just verdict of life without possibility of parole because he earned it himself." (17 RT 4394, 4407.)

Subsequently, at the conclusion of the penalty phase, the court instructed the jury, in relevant part, as follows:

> A mitigating circumstance does not have to be proved beyond a reasonable doubt, nor do any of the aggravating circumstances have to be proved beyond a reasonable doubt, excepting that set forth in [Penal Code section 190.3] Paragraph B.
>
> A juror may find that a mitigating circumstance exists if there is any evidence to support it, no matter how weak the evidence is. And again, this is true of aggravating circumstances, as well, excepting the factors set forth in [Penal Code section 190.3] Paragraph B.
>
> Any mitigating circumstance may outweigh any or all of the aggravating factors, and vice versa.
>
> A jury is permitted to use sympathy, compassion, or pity for the defendant, or any such similar sentiment, in deciding what weight to give any of the factors listed in [Penal Code section 190.3] Paragraphs A through K.
>
> A jury may also, in this regard, take a lenient or tolerant view of the defendant and/or his conduct, if he or she – that is, the juror - chooses to do so.

> With regard to factors in mitigation or aggravation, each juror must make his or her own individual assessment of the weight to be given to such evidence.
>
> There is not a requirement that all jurors unanimously agree on any matter offered in mitigation or aggravation. Each juror makes an individual evaluation of each fact or circumstance offered in mitigation or aggravation of the penalty. Each juror should weigh and consider such matters, regardless of whether or not they are accepted by the other jurors.
>
> While the existence of factors in aggravation and mitigation depend on the evidence, their proper evaluation requires a normative or a moral judgment as to which penalty, death or life without possibility of parole, should be imposed.

(17 RT 4453-4454.)

The court then instructed the jury in accordance with CALJIC No. 8.88. (17 RT 4454-4455.)

The court added:

> In considering, taking into account, weighing, and being guided by the aggravating and mitigating circumstances, you must not decide the evidence of such circumstance by the simple process of counting the number of circumstances on each side.
>
> The particular weight of such opposing circumstances is not to be determined by their relative number, but by their relative convincing force on the ultimate question of punishment.

(17 RT 4455-4456.)

The trial court did not mislead the jury to vote for the death penalty without deciding that death is the appropriate penalty under all the circumstances.

XIII. THIS COURT HAS PREVIOUSLY REJECTED ALL OF APPELLANT'S ATTACKS ON THE CONSTITUTIONALITY OF CALIFORNIA'S DEATH PENALTY LAW

Appellant contends that many features of California's capital sentencing scheme, alone or in combination with each other, violate the

federal Constitution. (AOB 156-172.) Appellant acknowledges that this Court has consistently rejected the arguments he makes here, however, he makes these claims in order to preserve them for federal review.

A. The Death Penalty Statute Adequately Narrows the Class of Murderers Eligible for the Death Penalty

This Court has repeatedly rejected appellant's contention that California's death penalty law fails to adequately narrow the class of murderers for which the death penalty can be imposed. (AOB 157; *People v. Kennedy*, *supra*, 36 Cal.4th at p. 640; *People v. Crew* (2003) 31 Cal.4th 822, 860; *People v. Bolden* (2002) 29 Cal.4th 515, 566; *People v. Barnett* (1998) 17 Cal.4th 1044, 1179; *People v. Arias*, *supra*, 13 Cal.4th at p. 187; *People v. Stanley*, *supra*, 10 Cal.4th at pp. 842-843; *People v. Wader*, *supra*, 5 Cal.4th at p. 669.)

B. Penal Code Section 190.3 Properly Requires Juries To Consider The Circumstances Of The Crime When Considering Whether To Impose The Death Penalty; It Did Not Violate Appellant's Rights Under The Fifth, Sixth, Eighth, Or Fourteenth Amendments

This Court has repeatedly rejected appellant's contention that section 190.3, subdivision (a) ("circumstances of the crime") has no limitations and thus permits arbitrary and capricious imposition of the death penalty. (AOB 157-159; *People v. Dykes* (2009) 46 Cal.4th 731, 813; *People v. Harris* (2008) 43 Cal.4th 1269, 1322; *People v. Vieira* (2005) 35 Cal.4th 264, 299; *People v. Osband* (1996) 13 Cal.4th 622, 703; *People v. Medina* (1995) 11 Cal.4th 694, 780; *People v. Sanders* (1995) 11 Cal.4th 475, 563; *People v. Turner* (1994) 8 Cal.4th 137, 208.)

C. The Death Penalty Statute And Corresponding Jury Instructions Properly Set Forth the Appropriate Burden of Proof And Did Not Violate Appellant's Rights under the Sixth, Eight, And Fourteenth Amendments

1. Aggravating factors need not be found true beyond a reasonable doubt

Contrary to appellant's view (AOB 160-161), even after *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*), *Ring v. Arizona* (2002) 536 U.S. 584 (*Ring*), *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*), and *Cunningham v. California* (2007) 549 U.S. 270 (*Cunningham*), there is no constitutional requirement that aggravating factors (other than prior criminality per section 190.3, subd. (b)), be proven beyond a reasonable doubt, that aggravating factors be proven to outweigh mitigating factors beyond a reasonable doubt, or that death is the appropriate penalty beyond a reasonable doubt. (*People v. Loker*, *supra*, 44 Cal.4th at p. 755; *People v. Cornwell*, *supra*, 37 Cal.4th at pp.103-104; *People v. Ward* (2005) 36 Cal.4th 186, 221-222; *People v. Bolden*, *supra*, 29 Cal.4th at p. 566; *People v. Ochoa*, *supra*, 26 Cal.4th at pp. 453-454; *People v. Barnett*, *supra*, 17 Cal.4th at p. 1178.)

2. The trial court properly abstained from instructing the jury that the state bore the burden of persuasion regarding the aggravated circumstances and on the burden of proof regarding how to weigh aggravating and mitigating factors

Contrary to appellant's view, the prosecution is not required under the federal Constitution to bear the burden of proof and/or the burden "of persuasion at the penalty phase." (*People v. Sapp* (2003) 31 Cal.4th 240, 317; see also *People v. Bemore* (2000) 22 Cal.4th 809, 859; *People v. Hayes* (1990) 52 Cal.3d 577, 643; AOB 162.) Nor are CALJIC Nos. 8.85

and 8.88, as given in the present case, constitutionally vague for failing to "provide the jury with the guidance legally required for administration of the death penalty." (AOB 162.) (See generally *People v. Moon*, *supra*, 37 Cal.4th at pp. 41-44 [upholding CALJIC Nos. 8.85, 8.88].)

Contrary to appellant's view (AOB 162-163), there also is no constitutional requirement that the trial court instruct the jury that there is no burden of proof at the penalty phase. Indeed, because the California death penalty statute does not specify any burden of proof, except for prior-crimes evidence, the trial court should not instruct at all on the burden of proving mitigating or aggravating circumstances. (*People v. Harris*, *supra*, 43 Cal.4th at p. 1322; *People v. Vieira*, *supra*, 35 Cal.4th at p. 303; *People v. Holt* (1997) 15 Cal.4th 619, 682-684; *People v. Carpenter* (1997) 15 Cal.4th 312, 417-418.)

3. Appellant had no right to a unanimous jury finding on the fact of prior unadjudicated activity, nor on the aggravated circumstances that justified the death penalty

Contrary to appellant's view (AOB 163-165), California's death penalty law is not unconstitutional because it permits the jury to consider unadjudicated offenses as aggravating evidence (*People v. Loker*, *supra*, 44 Cal.4th at p. 756; *People v. Harris*, *supra*, 43 Cal.4th at p. 1323; *People v. Ward*, *supra*, 36 Cal.4th at pp. 221-222; *People v. Bolin*, *supra*, 18 Cal.4th at p. 335; *People v. Samayoa* (1997) 15 Cal.4th 795, 863), and does not require that the existence of an aggravating factor be found true by a unanimous jury. (*People v. Harris*, *supra*, 43 Cal.4th at p. 1323; *People v. Blair* (2005) 36 Cal.4th 686, 753; *People v. Ward*, *supra*, 36 Cal.4th at pp. 221-222; *People v. Carpenter* (1999) 21 Cal.4th 1016, 1061; *People v. Hart*, *supra*, 20 Cal.4th at p. 649; *People v. Johnson* (1992) 3 Cal.4th 1183, 1245.) This is so even after *Apprendi*, *Ring*, *Blakely*, and *Cunningham*. (*People v. Loker*, *supra*, 44 Cal.4th at p. 755.)

4. The trial court properly instructed the jury that it could impose the death penalty if the aggravating circumstances substantially outweighed the mitigating circumstances

Contrary to appellant's view (AOB 165-166), CALJIC No. 8.88 is not unconstitutionally vague in requiring that aggravating circumstances must be "so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (CALJIC No. 8.88; *People v. Breaux*, *supra*, 1 Cal.4th at p. 315-316 & fn. 14; see also *People v. Loker*, *supra*, 44 Cal.4th at p. 755; *People v. Harris*, *supra*, 43 Cal.4th at pp. 1321-1322.)

5. The trial court properly instructed the jury to determine whether death was the appropriate punishment

Contrary to appellant's view (AOB 166-167), there is no need to inform the jury that it must decide whether death is the appropriate punishment. That conclusion is inherent in the jury's determination that aggravating factors substantially outweigh mitigating factors. (CALJIC No. 8.88; see also *People v. Loker*, *supra*, 44 Cal.4th at p. 755; *People v. Cook* (2007) 40 Cal.4th 1334, 1367; *People v. Arias*, *supra*, 13 Cal.4th at p. 171; *People v. Breaux*, *supra*, 1 Cal.4th at pp. 315-316.)

6. The trial court properly instructed the jury that it could impose death only if aggravating factors outweighed mitigating factors

Contrary to appellant's view (AOB 167-168), it is not necessary to instruct the jury that it must return a verdict of life without parole if mitigating factors outweigh aggravating factors. That is implicit in the instruction that a death verdict can only be imposed if aggravating factors outweigh mitigating factors. (*People v. Cook*, *supra*, 40 Cal.4th at p. 1367;

People v. Vieira, supra, 35 Cal.4th at p. 303; *People v. Coffman* (2004) 34 Cal.4th 1, 124; *People v. Duncan, supra*, 53 Cal.3d at p. 978.)

7. The trial court properly refrained from instructing the jury on a burden of proof and unanimity regarding mitigating circumstances

Contrary to appellant's view (AOB 162, 168-169), there is no burden of persuasion in the penalty phase of a criminal trial, and trial courts have no duty to instruct the jury that mitigating factors need not be proven by the defendant, nor unanimously agreed upon by the jury. "There is no reasonable likelihood the trial court's instruction requiring a unanimous *verdict* would confuse the jury regarding each juror's duty individually to evaluate and weigh the aggravating and mitigating evidence in arriving at a decision regarding the appropriate penalty. [Citation.]" (*People v. Riggs* (2008) 44 Cal.4th 248, 328, italics in original; see also *People v. Geier* (2007) 41 Cal.4th 555, 619; *People v. Blair, supra*, 36 Cal.4th at p. 753; *People v. Ward, supra*, 36 Cal.4th at pp. 221-222; *People v. Carpenter, supra*, 21 Cal.4th at p. 1061; *People v. Hart, supra*, 20 Cal.4th at p. 649; *People v. Johnson, supra*, 3 Cal.4th at p. 1245.)

8. The trial court properly refrained from instructing the penalty jury that it should presume that life was the proper sentence

Contrary to appellant's view (AOB 169-170), he was not entitled to an instruction on the presumption that life without parole was the presumptive sentence. (*People v. Parson* (2008) 44 Cal.4th 332, 371; *People v. Abilez* (2007) 41 Cal.4th 472, 532; *People v. Arias, supra*, 13 Cal.4th at p. 190.)

D. The Lack Of Written Findings by the Jury Did Not Deprive Appellant of Meaningful Appellate Review

Contrary to appellant's view (AOB 170), California's death penalty law is not unconstitutional because it fails to require that the jury base a

death sentence on written findings regarding aggravating factors. (*People v. Valencia* (2008) 43 Cal.4th 268, 311; *People v. Harris*, *supra*, 43 Cal.4th at p. 1322; *People v. Vieira*, *supra*, 35 Cal.4th at p. 303; *People v. Fauber*, *supra*, 2 Cal.4th at p. 859; *People v. Belmontes* (1988) 45 Cal.3d 744, 805; *People v. Jackson* (1980) 28 Cal.3d 264, 316-317; *People v. Frierson* (1979) 25 Cal.3d 142, 178-180; see also *Clemons v. Mississippi* (1990) 494 U.S. 738, 750; *Harris v. Pulley* (9th Cir. 1982) 692 F.2d 1189, 1195-1196, vacated and remanded on other grounds, *Pulley v. Harris* (1984) 465 U.S. 37.)

E. Appellant Had No Right To Inter-Case Proportionality Review To Determine Whether His Planning And Execution of Three Murders Warranted Imposition of the Death Penalty

Contrary to appellant's view (AOB 170-171), California's death penalty law is not unconstitutional because this Court does not require inter-case proportionality review. (*People v. Loker*, *supra*, 44 Cal.4th at pp. 755-756; *People v. Harris*, *supra*, 43 Cal.4th at pp. 1322-1323; *People v. Vieira*, *supra*, 35 Cal.4th at p. 303; *People v. Bolden*, *supra*, 29 Cal.4th at p. 566; *People v. Barnett*, *supra*, 17 Cal.4th at p. 1182; *People v. Crittenden* (1994) 9 Cal.4th 83, 156; *People v. Mincey*, *supra*, 2 Cal.4th at p. 476; *People v. Hayes*, *supra*, 52 Cal.3d at p. 645.)

F. The California Death Penalty Law Does Not Violate the Equal Protection Clause

This Court has repeatedly rejected appellant's contention (AOB 171) that California's death penalty law deprives capital defendants of equal protection because it does not guarantee the same safeguards on the jury's enhancement determination as is afforded noncapital defendants. Capital defendants are not similarly situated with noncapital defendants, and as this Court has held, the first prerequisite to a successful equal protection claim "is a showing that the 'state has adopted a classification that affects two or

more similarly situated groups in an unequal manner.'" (*People v. Andrews* (1989) 49 Cal.3d 200, 223; see also *People v. Boyette*, *supra*, 29 Cal.4th at p. 466, fn. 22; *People v. Keenan* (1988) 46 Cal.3d 478, 545; *People v. Allen*, *supra*, 42 Cal.3d at pp. 1286-1288.)

G. California's Use of the Death Penalty Does Not Violate Any Controlling International Laws Or Agreements

Appellant's final contention is that "California's use of the death penalty as a regular form of punishment falls short of international norms," and also violates the Eighth and Fourteenth Amendments. (AOB 172.) As this Court stated in *People v. Hillhouse*, *supra*, 27 Cal.4th at p. 511, however,

> had defendant shown prejudicial error under domestic law, we would have set aside the judgment on that basis, without recourse to international law. . . . [¶] . . . International law does not prohibit a sentence of death rendered in accordance with state and federal constitutional and statutory requirements.

(See also *People v. Loker*, *supra*, 44 Cal.4th at p. 756; *People v. Harris*, *supra*, 43 Cal.4th at p. 1323; *People v. Vieira*, *supra*, 35 Cal.4th at p. 305; *People v. Jenkins* (2000) 22 Cal.4th 900, 1055; *People v. Ghent*, *supra*, 43 Cal.3d at pp. 778-779 (maj. opn.); *id.* at pp. 780-781 (conc. opn. of Mosk, J.).)

As noted by the foregoing, the various claims raised by appellant have been considered and rejected by this Court. Appellant offers no persuasive reason why the result should be different in this case.

XIV. APPELLANT CANNOT DEMONSTRATE ANY ENTITLEMENT TO RELIEF FOR "CUMULATIVE" ERROR

Appellant seeks reversal of both the guilt and death judgments on "cumulative" error grounds. (AOB 172-174.)

As we have demonstrated, no "serious flaw" appears in either the guilt or penalty phase. (See *People v. Millwee* (1998) 18 Cal.4th 96, 168.)

Moreover, overwhelming evidence established appellant's guilt on all charges and the truth of the special circumstances and enhancements. As we have also explained, appellant's attacks on the penalty judgment are unavailing as well.

Accordingly, appellant's various challenges, alone or in combination, furnish no basis for relief. (See *Fuller v. Roe* (9th Cir. 1999) 182 F.3d 699, 704 ["where no single error is sufficiently prejudicial to warrant reversal, nothing can accumulate to the level of a constitutional violation"].)

CONCLUSION

Accordingly, for all the foregoing reasons, the People respectfully ask this Court to affirm the judgment.

Dated: November 23, 2009

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
GERALD A. ENGLER
Senior Assistant Attorney General
NANETTE WINAKER
Deputy Attorney General

MARGO J. YU
Deputy Attorney General
Attorneys for 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 55,935 words.

Dated: November 23, 2009

EDMUND G. BROWN JR.
Attorney General of California

MARGO J. YU
Deputy Attorney General
Attorneys for Respondent

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Henriquez**
No.: **S089311**

I declare:

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

On November 25, 2009, I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

Lynne S. Coffin
Attorney at Law
1030 W. Edgeware Rd.
Los Angeles, CA 90026
(two copies)

The Honorable Robert J. Kochly
District Attorney
Contra Costa County District Attorney's Office
P.O. Box 670
Martinez, CA 94553

County of Contra Costa
Main Courthouse
Superior Court of California
P.O. Box 911
Martinez, CA 94553

California Appellate Project
101 Second Street, Suite 600
San Francisco, CA 94105-3672

Habeas Corpus Resource Center
303 Second Street, Suite 400 South
San Francisco, CA 94107

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on November 25, 2009, at San Francisco, California.

B. Wong
Declarant

B. W
Signature

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