In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. JUSTIN JAMES MERRIMAN, Defendant and Appellant.	CAPITAL CASE Case No. S097363

Ventura County Superior Court Case No. CR45651
The Honorable Vincent J. O'Neill, Jr., Judge

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

A Ventura County indictment charged appellant with: murder of Katrina Montgomery (Pen. Code, § 187, subd. (a); count 1);[1] forcible rape of Katrina Montgomery, Robyn G., and Billie B. (§ 261, subd. (a)(2); counts 2, 4, 7-9); forcible oral copulation of Katrina Montgomery and Robyn G. (§ 288a, subd. (c); counts 3, 5); forcible genital penetration by foreign object of Robyn G. (§ 289, subd. (a); count 6); attempted forcible oral copulation of Billie B. (§§ 664/288a, subd. (c); count 10); resisting an executive officer (§ 69; counts 11, 14); exhibiting a deadly weapon to police officer to resist arrest (§ 417.8; counts 12, 15); assault on a peace officer (§ 245, subd. (c); count 13); vandalism with $5,000 or more of damage (§ 594, subd. (b)(2); count 16); possession of a firearm by a narcotic addict (§ 12021, subd. (a)(1); count 17); possession of a firearm by a felon (§ 12021, subd. (a)(1); count 18); being under the influence of a controlled substance (Health & Saf. Code, § 11550, subd. (a); counts 19-21, 23-24); and resisting a peace officer (§ 148, subd. (a); counts 22, 25). As to count 1, it was alleged appellant personally used a deadly weapon (§ 12022, subd. (b)) and committed the murder while engaged in the commission of a rape (§ 190.2, subd. (a)(17)(iii)) and oral copulation (§ 190.2, subd. (a)(17)(vi)). As to count 11, it was alleged appellant personally used a firearm (§ 12022.5, subd. (a)(1)). As to count 14, it was alleged appellant personally used a deadly weapon (§ 12022, subd. (b)). (1CT 1-8.)

Appellant pled not guilty and denied the special allegations. (1CT 43.) The prosecution filed a motion to consolidate indictments. (3CT 843-846.) Appellant filed a motion to sever the Montgomery counts from the remaining counts of the indictment. (5CT 1235-1250, 1303-1307.) The

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[1] All statutory references are to the Penal Code, unless otherwise stated.

prosecution opposed the severance motion. (5CT 1286-1295, 1308-1314.) The trial court granted the prosecution's consolidation motion and also granted appellant's severance motion as to counts 17, 18, and 20 through 25 of the original indictment. (5CT 1319-1320.) The trial court granted the prosecution's motion to dismiss counts 2 and 3 of the indictment under section 1385. (6CT 1507-1509, 1512.)

The consolidated indictment charged appellant with: murder of Katrina Montgomery (§ 187, subd. (a); count 1); forcible rape of Robyn G. and Billie B. (§ 261, subd. (a)(2); counts 2, 5-7); forcible oral copulation of Robyn G. (§ 288a, subd. (c); count 3); forcible genital penetration by foreign object of Robyn G. (§ 289, subd. (a); count 4); attempted forcible oral copulation of Billie B. (§§ 664/288a, subd. (c); count 8); resisting an executive officer (§ 69; counts 9, 12); exhibiting a deadly weapon to police officer to resist arrest (§ 417.8; counts 10, 13); assault on a peace officer (§ 245, subd. (c); count 11); vandalism with $5,000 or more of damage (§ 594, subd. (b)(2); count 14); being under the influence of a controlled substance (Health & Saf. Code, § 11550, subd. (a); counts 15, 23, 24, 26, 27); conspiracy to dissuade a witness by force or threat (§ 182, subd. (a)(1); count 16); solicitation to commit the crime of dissuading a witness by force or threat (§ 653f, subd. (a); count 17); dissuading a witness by force or threat (§ 136.1, subd. (c)(1); counts 18-20); possession of a firearm by a narcotic addict (§ 12021, subd. (a)(1); count 21); possession of a firearm by a felon (§ 12021, subd. (a)(1); count 22); and resisting a peace officer (§ 148, subd. (a); counts 25, 28). As to count 1, it was alleged appellant personally used a deadly weapon (§ 12022, subd. (b)) and committed the murder while engaged in the commission of a rape (§ 190.2, subd. (a)(17)(iii)) and oral copulation (§ 190.2, subd. (a)(17)(vi)). As to count 9, it was alleged appellant personally used a firearm (§ 12022.5, subd. (a)(1)). As to count 12, it was alleged appellant personally used a deadly weapon

(§ 12022, subd. (b)). As to count 16, it was alleged appellant committed the offense for the benefit of, at the direction of, and in association with a criminal street gang (§ 186.22, subd. (b)(1)).[2] (6CT 1514-1526.)

Appellant again pled not guilty and denied the special allegations. (6CT 1512.) At the guilt phase, the jury found appellant guilty of first degree murder and found true the weapon and special circumstance allegations in count 1. With the exception of count 6 in which appellant was found not guilty, the jury found appellant guilty as charged in counts 2-20 and also found the special allegations to be true. (7CT 2061-2063; SCT 87-133.) At the penalty phase, the jury found death was the appropriate punishment for appellant. (8CT 2228E; SCT 135.) The trial court denied appellant's motions for new trial and for modification of the penalty from death to life without parole. (8CT 2302-2303.) The prosecution moved to dismiss counts 21 through 28 of the consolidated indictment. (2d SCT 1.)

The trial court imposed a sentence of death as to count 1 and an aggregate prison term of 64 years as to the remaining counts. Appellant was given 1,365 days of presentence custody credit and was ordered to pay restitution, fines, and fees. (8CT 2306-2315.) A notice of automatic appeal was filed. (8CT 2316.)

STATEMENT OF FACTS

Around 1989, Katrina Montgomery ("Katrina") met appellant, a member of a violent White supremacist gang based in Ventura, while dating another member of the gang. Appellant developed a sexual or romantic interest in Katrina and sent her letters of increasing lewdness during his time in prison from 1990 to 1992. Katrina replied to his letters and visited him in prison, but never expressed an interest in being

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[2] The consolidated indictment included the severed counts (counts 21-28) for later disposition. (21RT 3530; 22RT 3732.)

appellant's girlfriend. Around March 1992, Katrina visited the recently-released appellant at his home and ended up running away from his uninvited sexual advances. Months later, appellant assaulted Katrina, who had visited him to straighten things out.

On the night of November 27, 1992, Katrina went to a skinhead party in Oxnard and later ended up at appellant's Ventura home against the advice of her friends. Appellant had two fellow skinhead gang members sharing his room that night. Katrina got in bed with appellant but did not consent to any sexual activity. Nevertheless, appellant forced her to orally copulate him and then raped her in front of the two gang members, who were too cowardly to help Katrina. Once the sexual assault ended and Katrina was getting dressed, appellant stabbed her in the throat. As Katrina curled up on the ground and cried for help, appellant threw a blanket over her and smashed her head with a large wrench. Since Katrina was still breathing, appellant cut her throat with the knife. With the help of the two gang members, appellant removed Katrina's body from his home and hid the body in an undeveloped area around Sylmar. Katrina's body was never found.

Although appellant was a suspect in Katrina's disappearance from the very beginning, most witnesses were very reluctant or too scared to cooperate with the investigation. In the meantime, appellant continued sexually and physically abusing other young women who had misguidedly associated with his gang and trusted him. He even threatened to cut one of his victim's throats, just as he had done to Katrina. It was 1997 when witnesses finally provided significant information to the investigators connecting appellant to Katrina's murder. By the end of 1997, appellant's home had been searched, and there were Grand Jury proceedings under way. A very nervous appellant was trying to avoid apprehension. Yet, he told two acquaintances that he had killed Katrina.

On January 30, 1998, police officers attempted to stop appellant for riding a bicycle at night without lights. Believing the officers were trying to arrest him for Katrina's murder, he refused to stop, engaged the officers in a long pursuit, threatened to kill himself with a gun, and barricaded himself in the Ventura home of an acquaintance for many hours. It took a SWAT team and the use of numerous gas rounds to get appellant out of the house. Appellant then assaulted SWAT officers with a steak knife and had to be subdued by several officers. Once in custody, appellant attempted to intimidate several witnesses with the help of his mother, fellow gang members, and gang groupies. Not surprisingly, even the mental health experts hired by his defense team concluded appellant had an antisocial personality and was a very dangerous individual.

A. Prosecution's Guilt Phase Evidence

1. Skin Head Dogs

Scott Porcho (a.k.a. "Wizard" and "Pork Chop") was one of the founding members of the Skin Head Dogs ("SHD") gang.[3] (39RT 6996-6997, 7013.) Mitchell Sutton, Michael Wozny (a.k.a. "Spanky" and "Polack"), and Mark Runzer were other original members of SHD. Appellant (a.k.a. "Mumbles" and "Knucklehead") also became a member and was part of a second generation. (39RT 6998, 7013-7014, 7022; 43RT 7661-7662, 7690; 48RT 8588-8589.) Some younger SHD members considered appellant a leader, just as Porcho and Wozny. (39RT 7021-7022.) Ian Morrow (a.k.a. "Bones"), Gene Ebright (a.k.a. "Bolt Head"), Salvador Sponza (a.k.a. "Klepto"), Mitchell Buley (a.k.a. "Mitchell Joyce" and "Peewee"), Mike Bridgeford (a.k.a. "Demon"), Brandon Sprout (a.k.a.

[3] Porcho was not given any leniency in his criminal cases in exchange for his testimony in this case. (39RT 7000-7001.)

"Flex"), Jed Malmquist (a.k.a. "Irish"), and Greg Balazzo were other SHD members. (39RT 7006-7007, 7013-7015, 7047; 48RT 8586-8588.)

Mark Volpei, an investigator with the prosecution, educated himself about SHD by obtaining criminal intelligence from the Ventura Police Department, interviewing many SHD members as well as rival gang members, and reviewing criminal records. (48RT 8575-8576.) According to criminal records, Ebright had a 1991 attempted murder conviction, Buley had a 1991 conviction for intimidating and dissuading a witness, Bridgeford, Porcho, Wozny, and Jeff Newton had 1994 convictions for gang-related assault with a deadly weapon, Sponza had a 1996 conviction for gang-related assault with a deadly weapon, and Morrow, Malmquist, and John Reeder had 1998 convictions for gang-related assault with a deadly weapon. SHD associates Samantha Medina, Jennifer Wepplo, and appellant's mother Beverlee Sue Merriman ("Beverlee") had 1999 convictions for intimidating witnesses and conspiring to intimidate witnesses. (48RT 8576-8581.) As other gangs, SHD had identifying symbols, hats, clothing, and hand signs. (48RT 8583-8584.)

The vast majority of the SHD members had racist or "White Power" beliefs. (39RT 7000; 48RT 8585.) SHD members were like brothers, who would do anything for each other even when it was wrong to do so. (39RT 7002-7003, 7015; 48RT 8584.) Violence was a means to discipline or educate SHD members into the gang rules. (39RT 7003-7004.) Cooperating with law enforcement was a "big no-no" that could get a SHD member assaulted and ostracized by the gang. (39RT 7004-7005; 43RT 7663; 48RT 8590.) Since 1997, SHD had become more violent due to the influence of prison culture on the gang. (48RT 8584.)

Women were not allowed to be SHD members. (39RT 7002; 40RT 7096; 43RT 7672.) But women had a clique or group called "The Lasses." Porcho's wife Apryl Bronley and Bridgette Callahan were members of the

clique. (39RT 7017-7018; 40RT 7174.) These "lasses" were not treated well by SHD members. (40RT 7175.) Porcho was abusive toward his wife but had a great relationship with his fellow gang members. (40RT 7102-7103.) However, it was not considered honorable within SHD to rape or kill a woman. (40RT 7298-7299.)

2. Katrina Montgomery's relationship with appellant

Katrina was born in 1972. She lived in Ventura with her family from 1980 to 1990. (37RT 6530.) Around 1989, Katrina started dating Sutton. (37RT 6530-6531, 6536, 6570.) Sutton introduced Katrina to other SHD members, including Porcho and appellant. (37RT 6570-6573; 39RT 7019.) Katrina and Bronley became close friends. (40RT 7098.) According to her mother, Katrina's personality and conduct toward her family and her grades became negative when she started to socialize with Sutton's friends, including Bronley and Porcho. (37RT 6537-6538.) Sutton saw Katrina drinking alcohol but never saw her using drugs. (37RT 6579.)

At some point in 1989, Sutton enlisted in the Army and was stationed in Germany. Katrina went to live with Sutton in Germany for about eight months. (37RT 6573.) Upon her return from Germany, Katrina started behaving in a more positive way toward her family. (37RT 6541.) Sometime after his return from Germany, Sutton was "jumped out" (i.e., expulsed) of SHD. (37RT 6573-6574; 39RT 7020-7021.) Nevertheless, he was still friends with appellant. (37RT 6574.)

On January 5, 1990, appellant sent a letter from prison to Katrina. (37RT 6585-6586; Peo. Exh. 24B.) In the letter, appellant mentioned that he had received her letter, that the prison staff had told him to stop writing "gang and racial bullshit" in his letters, that he was annoyed by women acting "dumb and cocky" after he had trained them to get "used to the

rules," and that he wanted to get photographs of her. He signed the letter with "Love, Justin." (37RT 6587-6592.)

On March 19, 1990, appellant sent another letter to Katrina from prison. He mentioned that he had received her photograph, that he wanted to receive more photographs of her, that she should "stick with Mitch Sutton and quit being a groupie," and that Katrina's coworkers were going to learn to fear him. He asked Katrina to write him soon and signed his last name after the word "Love." (37RT 6592-6595; Peo. Exh. 24D.) On March 29, appellant wrote to Katrina to compliment her on her "poon picture." He stated that she was "gonna have me going nuts in here," that he wanted more photographs, and that Sutton was a "lucky bastard." (37RT 6595-6596; Peo. Exh. 24D.) On March 29, appellant wrote another letter to Katrina. It started with "Dear Trina" and ended with "Love, Justin." Appellant was happy to get her letter but chastised her for calling Porcho a "sorry ass" and for writing about being part of "that ERA shit." Nevertheless, he "enjoyed reading the dominant male part" and pointed out she was "well trained" by Sutton about the "mighty male rules." He also mentioned, "Most of you females are too weak-minded to do a lot of things." Appellant also made references to a letter, in which Katrina had said she would "work something out" as far as getting him a woman when he left prison, and asked Katrina not to play "some fucked up game." (37RT 6597-6603; Peo. Exh. 24E.)

On August 20 and 21, 1990, appellant wrote a letter to Katrina in which he apologized for taking two months to reply to her letter. He made references to Katrina not being able to be friends with Sutton, moving to Los Angeles, and getting a truck. He was interested in knowing who her new boyfriend was and in getting her new address. He pointed out that, since Katrina and Sutton had "kind of called it quits," he could start writing her "obscene type shit." Mentioning her photograph, he asked whether she

would consider letting him "play with the toys you must have under that buttercup suit." (37RT 6603-6607; Peo. Exh. 24I.)

On June 25, 1991, appellant wrote to Katrina about their telephone conversations, which made him feel as if he were "in some erotic true sexual confessions working the lines and helping some poor sexually deprived redhead." Appellant "loved and enjoyed every bit of it." He also noted, "Only thing is your getting a little tease and my hungry ass doesn't even got that coming." He further mentioned that he was looking at her photograph, that they deserved each other but that she was "much too good for" him. (37RT 6608-6612; Peo. Exh. 24Q.) On July 24, 1991, appellant sent another letter with a photograph of himself and asked Katrina to send him photographs. He fantasized about Katrina wanting to touch his "massive chest." He asked Katrina to send his compliments to "Lee" about her large breasts. He also complimented Katrina about filling "out real healthy" since the last time he saw her in a bathing suit at somebody's pool. Appellant thanked Katrina for the pictures, stamps, birthday card, and visit and promised not to let her down and to be her friend until the end. (37RT 6612-6617; Peo. Exh. 24S.)

On October 2, 1991, appellant wrote to Katrina about a telephone conversation they just had. He mentioned his frustration and anger over Katrina telling him that she could never be with him. But he also pointed out his displeasure at his "homies" calling her a "slut." He signed, "Long love, respect, your homeboy Justin." (37RT 6620-6623; Peo. Exh. 24V.)

On January 1, 1992, appellant started his letter as follows, "Uno, Trina, baby, this is your big, letter writing pimp daddy coming your ways with a few lines of love as usual." He fantasized about having sex with Katrina and asked her whether she was "down with the sex in the mail trip?" He was looking forward to a "sweet" visit from Katrina "to play nasty for three whole hours and then some." But he assured Katrina that he

would behave like a gentleman in public. He hoped to be paroled in a few months and asked Katrina for photographs "to drool over and think about touching up one great day." He did not want Katrina to be scared by his letter. (37RT 6623-6629; Peo. Exh. 24Z.)

On March 4, 1992, appellant wrote a letter to Katrina about her recent visit and apologized for his "crude and rude but lewd sexual gestures" and for tossing her "around like one of them blowup sex dolls." As usual, the letter was filled with lewd and crude sexual fantasies of appellant having sexual contact with Katrina. He believed Katrina was interested in him but thought she was better than he was. Appellant did not want to be used as a "tool" and wanted to know what Katrina was after. (38RT 6635-6641; Peo. Exh. 24CC.) In another letter dated March 4, 1992, appellant discussed Katrina's current situation with Sutton. He also mentioned Katrina did not want him because she was "way out disgusted, sick to [her] guts with even swapping spit with" him. He repeatedly asked Katrina what she wanted from him and clarified, "That shit about you need me for a friend just doesn't cut the mustard anymore" as he "did a little testing and tampering with [her] on that fine day." Appellant wondered if Katrina was stringing him along or waiting "to make some kind of move." (38RT 6641-6650; Peo. Exh. 24BB.)

In 1992, Katrina was living with her mother Kathryn, with whom she had a "very close relationship," and other members of her family in the Westchester area of Los Angeles. (37RT 6483, 6528.) Katrina was going to Santa Monica City College and also worked at Jerry's Deli. (37RT 6491, 6545.) She did not spend much time with the "skinheads" from Ventura but still kept in touch with them, especially Apryl, because it was hard to walk away from them in a sudden manner. (37RT 6542.)

Sometime in 1992, Sutton and Katrina went to visit appellant in prison. (37RT 6574-6575.) At the time, Sutton and Katrina were just

friends, but Katrina wanted to get back together with him. (37RT 6575.) Kathryn found out that Katrina was communicating with appellant, who was in prison, because they started to receive collect calls at home from him. Kathryn had heard appellant was a friend of Sutton. (37RT 6484-6485, 6539.) Kathryn also noticed that Katrina was receiving prison letters from appellant. (37RT 6539.) Kathryn told Katrina to stop accepting appellant's calls, and Katrina was fine with her mother's request. (37RT 6485.) Kathryn had also told Katrina that she disapproved of Katrina's friendship with Bronley and Porcho. (37RT 6493-6494.)

One morning around March 1992, Katrina was distraught, followed her mother around the house, and told her mother that she needed to talk to her. Katrina was still in a state of disbelief or shock and became emotional as she began to talk to Kathryn. (37RT 6485-6486.) Katrina stated that she had visited appellant's home, which he shared with Beverlee, and that Beverlee had suggested Katrina stay overnight so that she would not have to drive home at night. Katrina took the offer.[4] (37RT 6486.) Katrina went to sleep alone in one of the rooms but was later awoken by appellant, who had climbed in bed with her and was making sexual advances toward her. Katrina told appellant to stop. When he failed to stop, Katrina stated that she felt sick and needed to use the bathroom. (37RT 6487-6488.) She was allowed to use the bathroom. Instead, she ran out of the house, jumped into her car, and left. She saw appellant running after her and yelling angrily. (37RT 6488.) It was Kathryn's impression the above events occurred the night before their conversation. (37RT 6528.) Katrina also told her best friend Lee Jensen about the incident with appellant and

[4] Appellant's sister recalled Katrina having dinner with them on one occasion. (42RT 7614.)

mentioned she did not want to have sex with appellant. (37RT 6565-6566.) Katrina mentioned the assault to Sutton. (37RT 6575-6576.)

Around the summer of 1992, Katrina and Shawna Torres drove to appellant's house because Katrina wanted to "straighten out a couple of things" with appellant. (37RT 6548-6549.) Katrina went into the house, while Torres stayed in Katrina's truck. When Katrina returned to the truck, she was visibly upset and said appellant "got mad" and "attacked" her in front of his mother. Katrina had red marks on her neck. (37RT 6550, 6556.) Katrina was angry at appellant and his mother, who had done nothing about the attack. (37RT 6551.) Katrina and Torres drove to Sutton's home after this incident. (37RT 6557.)

Porcho was aware that appellant wanted to have a relationship with Katrina after he was released from prison. This relationship did not happen. (39RT 7026; 40RT 7240; 42RT 7415.) The "gossip" was that appellant was upset that Katrina had not returned his affections. (39RT 7028.) Appellant showed Porcho a photo album that included a photograph of Katrina in a wet T-shirt. (40RT 7240; 42RT 7415.) Appellant also mentioned to Porcho that, based on his exchange of letters with Katrina while he was in prison, he thought Katrina was going to be his girlfriend. (42RT 7415-7416.) Katrina never told Porcho that she liked appellant. (40RT 7241.) Appellant told Bronley that he was interested in Katrina. Bronley knew Katrina was not interested in appellant. (40RT 7108, 7153.)

Wozny had a sexual relationship with Katrina in 1990 or 1991. (43RT 7719.) Wozny was not aware of any kind of dating relationship between Katrina and Larry Nicassio. He never knew Katrina to be close to Nicassio in any way. (43RT 7665-7666.) Nicassio had met Katrina through SHD members but never had a conversation with her. (45RT 8036; 46RT 8264.) Nicassio found Katrina attractive but never asked her

out, because she was dating Wozny, was older than Nicassio, and "kind of seemed more out of [his] league." (45RT 8037.)

3. Katrina's murder (count 1)

Around November 1992, Katrina and Bronley, whose friendship was not as active as it used to be before Katrina moved to Los Angeles County, started speaking again. (40RT 7101.) Bronley or Porcho called Katrina and invited her to a party at their house on the Thanksgiving weekend of 1992. (40RT 7101-7102.) Bronley expected Katrina to come to the party and to stay the night at their North Oxnard home. (40RT 7102-7104.)

On November 26, Katrina worked her regular shift as a waitress at Jerry's Deli and participated in her family's Thanksgiving activities. (37RT 6489-6490, 6545.) Katrina agreed to join her family in Santa Barbara on November 28 for additional festivities. (37RT 6490.) With respect to November 27, Katrina told her mother that she was going to work at Jerry's Deli and that she was going to hang out with Keith Leatherwood after work. She also left a note for her mother, stating she was going to call Kathryn at "Aunt Liz's" Santa Barbara home the following day. (37RT 6490-6491, 6493.) As far as Kathryn knew, Katrina was still planning to show up in Santa Barbara on November 28. (37RT 6492.) On November 26, at 2:22 p.m., there was a 17-minute phone call from the Montgomery residence to the Porcho residence. (38RT 6660.)

On November 27, Katrina did not go to work at Jerry's Deli.[5] (37RT 6545.) At 4:40 p.m., there was a seven-minute phone call from the Montgomery residence to the Porcho residence. (38RT 6660.)

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[5] In fact, Katrina never went back to work or college after November 26, 1992. (37RT 6545.) In addition, she never used her bank account and did not engage in any financial activity after November 26, 1992. (37RT 6545-6546.) Torres and Jensen, who were very close friends of Katrina,

(continued...)

As planned, Porcho had a party at his North Oxnard house. At the time, Porcho was living in the house with Bronley and two roommates, John Cundiff and Dimas Diaz (a.k.a. "Juneau"). (39RT 7022-7023; 40RT 7104.) Porcho invited skinhead gang members from SHD and The Sylmar Peckerwood Family ("Sylmar Family"), as well as other friends. The two skinhead gangs were on very friendly terms, and their members were loyal to each other. (39RT 7023.) Appellant, Wozny, Katrina, Bronley, and others were present at the party. (39RT 7025; 43RT 7666-7667.) Wozny drove his girlfriend Brooke Klein and appellant to the party. (39RT 7045-7046; 43RT 7666-7667.) Nicassio, Ryan Bush, Robert Bush ("Robert"), Roman Dobratz, Wayne Gibson, and other Sylmar Family members were at the party. (39RT 7028; 40RT 7182, 7184-7185; 43RT 7673; 44RT 7839; 45RT 8040; 50RT 9013.) Nicassio was only 16 years old and was considered a "youngster" in the gang. (39RT 7029; 40RT 7307; 45RT 8027, 8050; 50RT 9015.) Bush was a little older and had earned his "stripes" in the gang. (39RT 7029.) At the time, Gibson, Nicassio, Bush, Dobratz, and Robert Chadwick lived together at a "crash pad" in Sylmar. (44RT 7837-7838; 45RT 8026-8027; 50RT 9013.)

According to Porcho, Katrina was already drunk or intoxicated at the time she arrived at the party. (39RT 7030, 7044-7045.) To Bronley, Katrina did not appear to be drunk and was happy. (40RT 7105.) Katrina arrived around dusk by herself in her truck and was one of the first guests to arrive. Katrina had an overnight bag and her purse and was planning to stay at Porcho's house that night. (39RT 7043-7044; 40RT 7106.)

(...continued)
never heard from her again after November 26 and believed she was dead. (37RT 6551, 6568.)

There were "lots of drinking" and "a lot of LSD going around" at the party. (39RT 7047-7048; 43RT 7667-7668; 45RT 8044.) Porcho drank about 18 beers, smoked marijuana, and took LSD during the party. (40RT 7267-7268.) Nicassio had some acid but it had little effect on him. (45RT 8046; 46RT 8266.) At some point that night, there was an altercation in the kitchen in which appellant hit Dobratz and advised him, "You don't do that in my homeboy's house." Dobratz had been messing around with Porcho's CDs and reptiles and was spraying beer around the kitchen. So, appellant had to "educate him" for showing disrespect. Dobratz apologized. Later, Dobratz left the party with Gibson and Gibson's brother. (39RT 7049-7050; 40RT 7186-7189, 7199; 44RT 7841-7842; 45RT 8055; 50RT 9018-9019.) They went back to their flophouse in Sylmar. (40RT 7190; 44RT 7842.) Since the other Sylmar Family members left, Bush told Nicassio that they could sleep at appellant's house that night. (45RT 8057.)

At some point, appellant told Porcho, "No matter what, keep Trina away from me." (39RT 7051-7052.) Porcho saw Katrina talking to appellant and putting her arm around him at different times that night. As requested by appellant, Porcho twice escorted Katrina away from appellant. (39RT 7052-7053; 50RT 9020.) Bronley did not see Katrina hanging all over appellant or otherwise showing any desire to be with him physically. (40RT 7107.) Porcho, Wozny, Nicassio, and Bush thought Katrina was intoxicated. (39RT 7055-7056; 43RT 7674; 45RT 8049; 50RT 9018.) According to Wozny, Katrina was a "little feisty, little angry" during the party. (43RT 7674-7675.) Nicassio noticed that, at first, appellant and Katrina were interacting with each other in a normal way. But later, they did not appear to be getting along. (45RT 8049-8050.) Bush was drunk and thought appellant was also drunk. (50RT 9018.) At some point, Bush grabbed Katrina's butt, and she slapped him in the face. (51RT 9132.)

Later that night, in a bedroom, Bush saw appellant on top of Katrina. At first, they appeared to be wrestling around in a playful manner. But then, appellant tried to kill her, and Katrina told appellant to get off her. Appellant did not stop, and Katrina became angrier and started to yell. (50RT 9023.) Porcho and Bronley heard Katrina scream. (39RT 7053.) Bronley went into the bedroom and saw somebody (appellant, Nicassio, or Bush) holding Katrina down on a bed. Bronley broke up the fight. (40RT 7112-7114.) Porcho came into the bedroom and saw Katrina lying on a bed and holding her stomach as if she had just been hit there. Appellant and other men (possibly Nicassio, Bush, and others from Sylmar) were standing in a semicircle around her. (39RT 7053-7054; 40RT 7115; 42RT 7413, 7426-7427.) Porcho asked appellant what was going on, and appellant replied, "Nothing's going on," several times. (39RT 7054-7055; 42RT 7427.) Bronley took Katrina out of the bedroom and talked to her. Katrina was showing the effects of alcohol drinking. Bronley took Katrina's keys away from her and hid them. (40RT 7115-7116.)

Appellant told Nicassio that he wanted to "get" Katrina. Nicassio thought appellant was joking. Appellant then handed Nicassio a steak knife and said, "We're gonna get that bitch." Nicassio did not take appellant seriously and left the knife on a counter or table. Appellant later came back with the knife, gave it to Nicassio, and said, "We're gonna get that bitch, you're gonna do it." Nicassio again thought appellant was joking and put the knife down. (45RT 8051-8052; 46RT 8288-8289.) For a third time, appellant approached Nicassio and handed him the knife. Appellant said, "Here, take this. This is the last one I'm giving you. You're gonna do it and this is the last one I'm giving ya." Nicassio held the knife above Katrina's head and did a "Psycho" imitation. (45RT 8053-8054.)

Around 2:00 a.m. (39RT 7056-7057), appellant announced he was going to do something to Katrina. Porcho told appellant not to touch

Katrina and hit him over the head with a beer bottle.[6] (45RT 8062-8066; 50RT 9026-9027.) Appellant suffered a cut on his forehead or the top of his head, which was bleeding a lot. (39RT 7062-7063; 40RT 7286; 50RT 9027.) Nevertheless, he started fighting with Porcho. (39RT 7064-7067; 42RT 7440.) The fight ended when Porcho almost knocked down his snake tank and both of them stopped the tank from falling down. (39RT 7067; 42RT 7419-7420.) Katrina cleaned most of appellant's blood in a bathroom. (39RT 7069-7071; 42RT 7441; 45RT 8065; 50RT 9028.) Appellant was not bleeding anymore and only had a "superficial cut." (39RT 7072; 40RT 7167.) Even as Katrina cleaned his wound, appellant was mouthing to Nicassio to "do it now." Nicassio thought appellant was still joking around with him. (45RT 8068.) Later, in the backyard, appellant told Bush, "I'm gonna get that bitch." (50RT 9029.)

Bronley arrived home from giving a ride to a partygoer, noticed the bloody mess, and wanted appellant, Nicassio, and Bush out of the house immediately. (39RT 7070; 40RT 7111-7112, 7116-7118.) Bronley drove them to appellant's home. (39RT 7076; 40RT 7118; 45RT 8068-8069; 50RT 9031-9032.) Appellant did not bleed in Bronley's car during the ride. (39RT 7077; 40RT 7119; 45RT 8069; 50RT 9031.) Before Bronley returned home, appellant called the Porcho residence and asked for Katrina. Porcho did not let appellant talk to Katrina. Porcho thought appellant could be a threat to Katrina. (39RT 7081-7082; 42RT 7420-7422, 7436.)

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[6] According to Porcho, he noticed that Nicassio was choking Katrina, who was up against a wall in the hallway. Bush and appellant were standing next to them. Nicassio pulled out a steak knife. Bush slid a knife partially out of his pocket and showed it to Porcho with a smile on his face. Porcho jumped up from his chair, punched and kicked Nicassio and Bush, and then broke his beer bottle on appellant's head. (39RT 7057-7060, 7063-7064; 40RT 7241-7242; 42RT 7417-7418, 7429-7431, 7439.)

Bronley arrived home and noticed Katrina had taken a shower and was wearing a white T-shirt, denim overalls, and white sneakers. (39RT 7080; 40RT 7120.) Katrina was speaking on the phone with appellant. Bronley picked up the phone and told appellant to go to sleep. Appellant called again and asked for Katrina. Bronley hung up the phone on him. (40RT 7120-7121.) Katrina, who had "sobered up a bit," demanded her keys and started screaming at Bronley. (39RT 7080; 40RT 7121-7122; 42RT 7435.) Katrina was unhappy with Porcho and Bronley, because they were trying to control her life and would not let her leave to see appellant. (39RT 7081-7082, 7085; 40RT 7121-7123; 42RT 7423.) The argument escalated, with Katrina and Bronley yelling at each other. Around 5:00 a.m., Katrina demanded her car keys and said she did not want anything to do with them anymore. Bronley threw the keys at Katrina, and Katrina left. Porcho and Bronley never saw or heard from Katrina again. (39RT 7083-7085; 40RT 7123, 7170-7171; 42RT 7436-7437.)

In the meantime, appellant gave Bush and Nicassio blankets or sleeping bags for them to sleep on the floor of his bedroom. (45RT 8072-8073; 50RT 9035.) Nicassio overheard appellant talking on the phone with Porcho and asking him to put Katrina on the phone. (45RT 8073.) Nicassio also overheard appellant telling Katrina to come over and stay at his house. (45RT 8073-8074.) Appellant then told Nicassio and Bush that Katrina was coming over. (45RT 8074.) Nicassio did not notice anything wrong with appellant's demeanor at the time. (45RT 8075.)

Around 5:00 a.m., Katrina arrived at appellant's home. She was wearing light blue overalls, a shirt, and white Converse shoes. She had sobered up and was acting normally. (45RT 8076; 50RT 9038.) Katrina had an overnight bag and changed into a T-shirt and sweat shorts in the bathroom. (45RT 8077-8078; 50RT 9038.) She put her bag down and got into appellant's bed next to him. (45RT 8078; 50RT 9038.) After hearing

appellant and Katrina talking, Nicassio looked up and noticed appellant on top of Katrina with his knees on her shoulders. (45RT 8079-8080.) Appellant said, "Come on, just do it." Katrina replied, "No, not with them in the room." Appellant "smacked" her face and said, 'Do it now, bitch." (45RT 8080; 50RT 9039.) Nicassio then heard the sounds of oral copulation. Nicassio and Bush later saw appellant raping Katrina. (45RT 8081-8083; 50RT 9041-9042.) Nicassio and Bush also heard Katrina whimpering and telling appellant that he was hurting her and pleading for him to stop. Nicassio and Bush did nothing to help Katrina. (45RT 8083-8084; 50RT 9040.) Nicassio had seen appellant hurt other people and was afraid of him. (45RT 8085.) Bush was a "coward" and was scared of the "whole situation." (50RT 9040-9042.)

Appellant got up, retrieved a lotion bottle, and put lotion on Katrina's genital areas. (45RT 8084.) He then started having sexual intercourse with her again. Katrina was crying and telling appellant to stop because she did not want to get pregnant. Eventually, appellant stopped, got off Katrina, and said, "There, you're pregnant." (45RT 8085.) Appellant then made her orally copulate him again. (45RT 8085-8086.) Katrina told appellant that her mouth was sore and hurting and that she wanted to stop. Appellant asked Bush and Nicassio, "Hey, do you guys want some of this?" Bush declined, and Nicassio just looked away. (45RT 8086; 50RT 9042-9043.) Katrina asked appellant if she could use the bathroom. He refused, told her to use a trash can, and placed a trash can on the ground next to her. Nicassio and Bush told appellant to let her use the restroom. Appellant agreed. (45RT 8087; 50RT 9043.)

Katrina started to get dressed in the room. (45RT 8088.) As Katrina was kneeling down and tying her shoes, appellant approached her, swung a knife, and stabbed her in the throat. Katrina grabbed her throat, yelled out, fell over on her side, curled up into a ball, and told appellant not to hurt her.

(45RT 8089; 50RT 9044-9045.) Nicassio and Bush did not aid her because they were afraid. (45RT 8089-8090; 50RT 9045.) Appellant threw a blanket over her, retrieved a "big crescent wrench" out of a drawer, kneeled down next to Katrina, and hit her on the head with the wrench. Nicassio heard a loud thud and felt the floor shake under his feet. (45RT 8090; 50RT 9046-9047, 9050.) He suggested they call an ambulance for Katrina because she would be afraid to say anything. Appellant replied, "No, she'll rat on me." Instead, appellant called the Porcho home and asked for Katrina, so that Porcho and Bronley would think Katrina never showed up at his place. (39RT 7084; 45RT 8113.) Since Katrina was still breathing, appellant held her by the hair, asked where the jugular was, and cut her throat with a knife. (45RT 8091, 8114.) Nicassio did not hear Katrina breathing anymore. (46RT 8226.) Appellant then rolled Katrina into blankets and sleeping bags. (45RT 8092.) Nicassio noticed blood splattered on the dresser and the carpet. (45RT 8094.)

Appellant told Bush and Nicassio, "We gotta make a plan to cover this up." Nicassio just wanted to leave and promised not to say anything. Still holding a knife, appellant replied, "No, you're not fuckin' going anywhere," and told Nicassio to help cover up the crimes. (45RT 8092; 50RT 9052-9053.) Appellant also told him that they "would all go down" if caught. Nicassio believed appellant and thought he was responsible for the crimes because he had not helped Katrina. (45RT 8100-8101.) Bush suggested disposing of the body in Sylmar. (50RT 9053.) Appellant placed Katrina's belongings, the knife, and the wrench in a plastic bag. After Nicassio refused to carry Katrina's body out of the room, appellant ordered him to get Katrina's truck. (45RT 8093-8094; 50RT 9055.) Fearing retaliation, Nicassio complied and drove Katrina's blue truck to the front door. (45RT 8095-8096.) Appellant and Bush came out of the townhouse carrying Katrina's body wrapped in blankets and placed the

body into the back of the truck. (45RT 8096; 50RT 9055-9056.) Blood was soaking through the blankets. (50RT 9054.) Bush was panicking about Beverlee seeing them, but appellant assured him not to worry because she would not say anything. Nicassio then drove the truck with appellant and Bush in the cab with him. (45RT 8097; 50RT 9054, 9057.) They drove to the Sylmar flophouse. (45RT 8098; 50RT 9060.) The ride took about 45 minutes. (45RT 8101.)

Around 8:00 or 9:00 a.m., upon their arrival at the Sylmar flophouse, Bush asked to borrow Gibson's truck. Gibson agreed. (44RT 7843; 50RT 9060-9061.) Bush also obtained rags and a can of paint thinner, which he put inside Gibson's truck. Bush drove next to Katrina's truck and signaled Nicassio and appellant to follow him. (45RT 8104; 50RT 9061-9062.) First, they drove to the Sylmar Wash area. Since it was too crowded, they then drove to a rural area called Sunset Farms. (45RT 8106-8107; 50RT 9062-9063.) They stopped near a ravine. Appellant and Bush dragged Katrina's body into a drainage pipe and covered it with debris to disguise it. (45RT 8108; 50RT 9063-9064.) Then, they drove the trucks to a gas station in the Santa Clarita Valley, put gas in Katrina's truck, and left towards the Angeles National Forest. (45RT 8110.) At a turnout on Little Tujunga Road, they stopped the trucks and wiped the inside of Katrina's truck with paint thinner to destroy fingerprints. (45RT 8110-8111, 8115; 50RT 9064.) Bush attempted to drive the truck off a cliff but part of it became stuck in a berm. (45RT 8116-8117; 50RT 9064-9065.)

Then, they drove in Gibson's truck to a restaurant and discussed what to do next. (45RT 8117-8118; 50RT 9065.) It was decided that Nicassio and Bush would take appellant back home and that Nicassio and Bush would go back and bury Katrina's body. They also agreed to tell the story that they never saw Katrina and that Gibson had picked Nicassio and Bush at appellant's home that morning. (45RT 8118-8119; 50RT 9065-9066.)

On the way back home from dropping appellant, Nicassio and Bush dumped Katrina's bag and the murder weapons into a dumpster in an industrial area in Chatsworth or Northridge. (45RT 8122-8123; 50RT 9068-9069; 51RT 9190-9191.) Bush kept Katrina's purse to burn it, so that nobody could find it. (50RT 9069-9070.)

Appellant's sister, Ember Wyman, woke up in the morning and saw her mother cleaning blood. (42RT 7591-7592, 7603.) Beverlee was on her hands and knees cleaning blood on the upper portion of the stairwell of the townhouse. Beverlee had a pot and rags with her. Wyman helped her mother clean the blood. (42RT 7592.) They were able to clean all the blood. (42RT 7605.) Wyman later saw appellant and Bush together. There could have been somebody else with them. (42RT 7603-7604.)

About two nights later, Nicassio and Bush returned with two shovels to the drainage area where they had left Katrina's body. (45RT 8128; 50RT 9072-9073.) Bush dug the hole and buried Katrina about five feet away from the pipe, as Nicassio acted as a lookout. (45RT 8129; 50RT 9073.) They went back to the Sylmar flophouse, and Bush told his brother what had happened with Katrina. (50RT 9073-9074.)

4. Attempts to find Katrina, and pre-arrest investigation into her murder

Around 10:30 a.m., on November 28, 1992, Wozny returned to Porcho's house to pick up Bush and Nicassio and take them back to the San Fernando Valley, as they had previously planned. (43RT 7678-7679.) Nicassio and Bush were not present. Porcho told Wozny that Bush and Nicassio had gone to appellant's home. (43RT 7679.) Porcho also told Wozny about the fight at the party and about Katrina leaving the house on bad terms. (43RT 7682, 7731.) Wozny called appellant's home and spoke to Wyman. Wozny asked for Nicassio, Bush, and appellant. Wyman, who sounded worried, said they were not there. (43RT 7679-7682.)

On November 28, Jeff Kyle was asked to tow Katrina's blue Toyota truck from the Little Tujunga Canyon in the Angeles Crest National Forest. The truck was about 15 or 20 feet down the side of a dirt turnout over a "dirt berm." As Kyle put cables on the back of the truck, he noticed dried-up blood in the bed and tailgate of the truck and notified a park ranger about it. (39RT 6906-6908.) The sheriff's department responded and instructed Kyle to tow the truck to his tow yard. (39RT 6908.) Kenneth Lane, who worked at the tow yard, noticed a lot of blood on the outside of the tailgate and the inside of the truck bed. (39RT 6910-6911.) There was also some fiber material on the tailgate area. (39RT 6917.) Lane further noticed a "sticky substance all over the steering wheel" and inside the driver's side door panel. (39RT 6911-6912.) It was stipulated at trial that the blood found in the truck belonged to the biological child of Michael and Kathryn Montgomery, that the fibers collected from the tailgate were a pink fluff ball, and that the purse found inside the cab of the truck belonged to Katrina. (39RT 6918.)

On November 28, Kathryn ended up staying home in Los Angeles because she was sick. (37RT 6494.) Around 2:00 p.m., Kathryn was surprised to receive a telephone call from Bronley. (37RT 6494-6495; 38RT 6660.) Bronley asked Kathryn if Katrina was home. Kathryn told Bronley that Katrina was in Santa Barbara with her grandparents. (37RT 6495; 40RT 7126.) Around 3:00 or 4:00 p.m., Kathryn received a call from the Los Angeles County Sheriff's Department and was told Katrina's truck had been abandoned over an embankment in the Angeles Crest National Forest area. (37RT 6495-6496.) Concerned about her daughter's whereabouts, Kathryn called her family in Santa Barbara and found out that they had not heard or seen Katrina. (37RT 6497.) Kathryn then called many of Katrina's friends and relatives, but nobody knew where she was.

(37RT 6498, 6500.) Kathryn and her sister Barbara decided to take notes about all their telephone calls. (37RT 6500-6501.)

Around 6:00 p.m., at Bronley's request, Porcho called Kathryn and asked if Katrina was home. (37RT 6498; 38RT 6660; 40RT 7127-7128.) Kathryn told Porcho about the disturbing call she had received from the sheriff's department and asked him if he knew where she was. To protect appellant, Nicassio, and Bush, Porcho lied that he had not seen Katrina or heard from her for several months. (37RT 6499; 39RT 7087-7089.) Subsequently, Porcho called appellant and talked to him. Porcho then told Bronley to say that Katrina had not gone to appellant's home and that the San Fernando Valley people were never at the party. (40RT 7130-7131.)

At 7:35 p.m., Kathryn called the Porcho house and asked Bronley if she had seen Katrina. As instructed by Porcho and afraid Porcho would hurt her, Bronley lied that she had not seen Katrina for several months. (37RT 6501; 38RT 6661; 40RT 7128-7130.) Leatherwood told Kathryn there was a possibility Katrina was at the Porcho house. (37RT 6502.) So, at 9:43 p.m., Kathryn called the Porchos again. (37RT 6502-6503; 38RT 6661.) Kathryn confronted Bronley with information that Katrina had planned to stop by her home. Bronley replied she had spoken to Katrina earlier in the week but Katrina had not stopped by her home. (37RT 6503.)

Around 10:40 p.m., Kathryn and her husband called appellant's house. They were unable to speak to appellant. (37RT 6504; 38RT 6661.) At 12:30 a.m., Kathryn was able to reach appellant and ask him if he had seen Katrina. (37RT 6504-6505; 38RT 6661.) Appellant, who sounded intoxicated, acknowledged seeing Katrina the night after Thanksgiving at the Porchos' home in Oxnard. Appellant failed to provide additional information. (37RT 6505-6507.)

Around 1:30 a.m., Porcho called Wozny and told him that Katrina's truck was found abandoned. Porcho believed Katrina was dead and further

believed Nicassio and Bush were responsible. Porcho avoided mentioning appellant as being responsible because he was a "homeboy." (43RT 7682-7683, 7734.) Wozny then called an anonymous tip hotline and mentioned appellant, Nicassio, and Bush might be responsible for Katrina's disappearance. Wozny did not go to the police because, as a gang member, he feared retaliation. (43RT 7683-7684.)

In light of the information obtained from Leatherwood and appellant, Kathryn called the Porcho residence again around 2:30 a.m. (37RT 6507-6509; 38RT 6661.) Kathryn confronted Bronley with Leatherwood's information that Katrina intended to go to the Porchos and appellant's statement about seeing Katrina at the Porchos' home. (37RT 6510.) Bronley noted that she was tired and needed to wash her face. She put the phone down for about two minutes. (37RT 6510-6511.) Bronley eventually admitted Katrina had been at her house and stated she had lied, "Because we didn't want you to think we did anything bad to her." (37RT 6521-6522; 40RT 7131-7132.)

Kathryn and her family continued searching for Katrina. They organized search parties in the area where her truck was found as well as the Ventura/Oxnard area. They also placed fliers with reward money, established a telephone line for tips, and appeared on television interviews. Kathryn searched Katrina's room, found numerous letters written by appellant, and gave them to the police. (37RT 6523-6525; Peo. Exh. 24.)

On November 29, 1992, Detectives William Heim and John Sotelo from the Los Angeles Police Department ("LAPD") interviewed Bronley and Porcho. (40RT 7132; 41RT 7370-7373.) Bronley lied about the Sylmar gang members not being present at the party and about driving appellant home by himself. Porcho and appellant had come up with this lie, and Porcho had instructed Bronley how to lie to the police. (40RT 7132-7135, 7202-7203; 21CT 6353-6376; Peo. Exhs. 49, 49A.) Bronley knew

that appellant and Porcho were going to corroborate her lies. (40RT 7135.) Detective Heim had noticed blood on the floor of the kitchen, on a mop, and in a pail of water. (41RT 7371.) So, he asked Bronley about it, and she replied the blood came from a fight over appellant slapping Katrina at the party. (41RT 7377.) As planned, Porcho lied that he had a fight with appellant over a poker game and that the Sylmar people were not at the party. (40RT 7202, 7204-7205; 41RT 7371; 42RT 7443; Peo. Exhs. 49A, 50.) But Porcho later confirmed to Detective Heim that he had intervened when appellant slapped Katrina. When asked by the detective to whom he should speak if something bad happened to Katrina, Porcho responded, "I'd talk to Justin Merriman. That's all I'm gonna say." (41RT 7377.)

Detectives Heim and Sotelo then went to appellant's townhouse. There, the detectives noticed a carpet cleaner who appeared to be finishing up his job. (41RT 7378.) The carpet cleaner, Judson Mashburn, told the detectives that he had been called to the townhouse because of a coffee spill.[7] (41RT 7379.) The detectives then spoke to Beverlee and told her that they were investigating a missing person report. (41RT 7379, 7382.) She reacted nervously and asked the detectives if they had a warrant to go into her home. Detective Heim told her that he did not need a search warrant, and Beverlee told him, "I don't want to talk anymore." The detective pressed Beverlee for more information, and she mentioned appellant had come home earlier with a couple of boys. (41RT 7382-7383.) She did not mention Katrina being at her home. (41RT 7383.)

Wyman became aware of Katrina's disappearance and of appellant being a possible suspect. She asked appellant whether he had anything to

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[7] At trial, Mashburn failed to recall any details of the pertinent events or his interviews with law enforcement. (39RT 6946-6960.) The trial court found his "don't remember" testimony incredible. (39RT 6972.)

do with the disappearance. (42RT 7593-7594.) Appellant replied, "We don't need to talk about that." (42RT 7594.) Wyman's fiancé, Jeremy Rice, stopped by and noticed Wyman seemed nervous and scared. (45RT 8006.) Wyman told Rice that she thought something bad had happened at her house the previous night and that she and her mother had cleaned blood off the stairs. The blood was in shoeprints going down the stairs. (45RT 8007-8008.) A few days later, as Wyman and Rice discussed the blood again, Beverlee overheard the conversations and told them not to talk about it anymore. (45RT 8010.) At a subsequent conversation, Wyman mentioned that she had talked to appellant about the blood and that appellant noted he was "going to hell for sure for the things he had done." (45RT 8019, 8024-8025.)

Wyman later told Lisa Nichols that she was scared about whose blood she had helped clean up on November 28, that there was a lot of blood on the white carpet, that the blood was tracked down the stairs, and that appellant had gone on a long car ride with Bush. (42RT 7596-7597; 43RT 7632-7634.) Wyman also told Nichols that, when she confronted her brother about the blood, appellant noted that Wyman did not want to know what had happened and that he "was going to hell for what he had done." (43RT 7633.) Wyman subsequently failed to tell law enforcement or the first grand jury about the blood to protect her brother, mother, and herself. (42RT 7597-7600.)

On December 1, 1992, while Porcho was incarcerated in the Ventura County Jail for a parole violation, he was visited by LAPD Detective James Harper. (40RT 7214, 7217, 7275; 41RT 7390.) Porcho again lied to protect appellant. (40RT 7214-7215; 41RT 7392.) After the detectives showed Porcho a photograph of Ryan Bush, he told the detectives that he had been lying to them. (40RT 7215-7216; 41RT 7393; 42RT 7444.) Porcho told the detectives about Nicassio choking Katrina, the brandishing

of knives by Bush and Nicassio, the ensuing fight with those two and appellant, appellant going home with Nicassio and Bush after the party, not letting Katrina take appellant's phone call, Katrina arguing with Bronley, and Katrina leaving in her truck around 5:00 a.m. (40RT 7216, 7218-7222; 41RT 7393-7396, 7407-7408.) Porcho had not told appellant that he was going to change his account of the events. (40RT 7216-7217.)

On December 1, Detective Harper also visited appellant at the Ventura County Jail. He took a photograph of appellant, who had a small cut over his right eye. (41RT 7400-7401.) The detective did a parole search of appellant's bedroom, which was very clean and had been recently vacuumed and dusted. (41RT 7403-7404.)

Porcho told Bronley that she could tell the truth about who was present at the party because the police already knew about it. But she was still not allowed by Porcho to be completely honest about the pertinent events. (40RT 7137-7140.) On December 2, 1992, Detective Harper interviewed Bronley, who stated that she had taken appellant home with Nicassio and Bush around 4:00 a.m., that Katrina had spoken to appellant on the phone, and that Katrina left the home after arguing with her. (41RT 7397-7399.) After Porcho's incarceration, other SHD gang members stopped by Bronley's home to make sure she did not cooperate with law enforcement. (40RT 7156-7157.) Even after divorcing Porcho and moving out of state, Bronley was afraid to talk to law enforcement officers and tell them the whole truth because she was concerned Porcho or other SHD members could hurt her family in Ventura. (40RT 7140, 7143.)

When first interviewed by LAPD officers, Gibson lied about picking Bush and Nicassio up in Ventura on November 28. (44RT 7844-7845.) Bush and Nicassio had previously asked Gibson to lie for them. (44RT 7845.) At the time, Gibson did not know the police were investigating Katrina's disappearance. (44RT 7846.) Later, LAPD officers contacted

Gibson again and told him they were investigating a murder. Gibson decided to tell the truth. (44RT 7847-7848.)

Brandi ("Exposito") Hanchett was Nicassio's girlfriend and hung out with other members of the Sylmar Family. Exposito saw Nicassio socialized with SHD members, such as Porcho, Wozny, and appellant. Nicassio was younger than these SHD members were, looked up to them, and tried to please them but also seemed scared of them. (44RT 7855-7856, 7865; 45RT 8031-8032.) In December 1992, Nicassio mentioned to Exposito that he had gone to Porcho's party in Ventura, that he had choked Katrina, that appellant had indicated an intent to kill Katrina, that he left the party with appellant and Bush and went to appellant's home, that Katrina came over, that he and Bush were watching TV, that appellant had sex with Katrina and then cut her throat, and that he helped Bush bury Katrina's body. (44RT 7857-7860; 45RT 8131.) Nicassio felt ashamed and cried as he recalled the above events. (44RT 7871; 45RT 8130.) Exposito asked Nicassio whether Katrina was raped, and Nicassio denied it. (44RT 7869-7870.) Nicassio did not want to tell Exposito that he had witnessed a rape and had done nothing about it. (46RT 8227.) When interviewed by the prosecution and at the grand jury, Exposito lied about Nicassio not making the above statements. (44RT 7860-7861.) Exposito was scared about cooperating. (44RT 7861.)

About a month after the murder, appellant saw Nicassio at a party and mentioned that his mother had cleaned up the blood in his bedroom. Appellant asked whether they had taken care of Katrina's body, and Nicassio agreed. Appellant suggested they put lye over the burial site to help decompose the evidence. But they did not go back to do so. (45RT 8133-8134.)

In 1995, the LAPD turned over the whole case to the Ventura County District Attorney's Office. Investigators Dennis Fitzgerald and John Bunch

were originally assigned to the case. (42RT 7568-7569.) From 1995 to 1998, the investigation into Katrina's murder was very slow and difficult. Many of the witnesses were reluctant or scared to talk about the matter. (42RT 7571-7572.)

On December 7, 1995, Fitzgerald interviewed Mashburn at the Ventura County Jail Honor Farm. Mashburn stated he had met Beverlee through appellant. He also stated that November 29, 1992, was the last time he had cleaned the Merrimans' carpets and that, on that last occasion, he had cleaned all the carpeting in the house.[8] (42RT 7561-7562.) Mashburn was nervous and reluctant to cooperate. (42RT 7564.)

In November 1996, Bunch and an another investigator, Matt Hardy, visited Porcho at Avenal State Prison. (40RT 7223-7224.) Porcho made a conscious effort to tell the truth but did not want to get into many details because of where he was imprisoned. (40RT 7225-7226.) In early 1997, Porcho refused to talk to another investigator. (40RT 7226.) In July 1997, the prosecutor and Fitzgerald met Porcho at Avenal State Prison. (40RT 7226-7227.) After a long conversation, Porcho decided to talk about what happened at the party. (40RT 7228.) Porcho's account of the knife incident and fight differed from his trial testimony as to who was hit first (Nicassio) and last (appellant) by Porcho. (40RT 7229-7230; 42RT 7559.) The prosecutor told Porcho that there could be some benefit to him in exchange for his cooperation. (40RT 7231.)

In July 1997, the prosecutor and Fitzgerald met with Bronley on the East Coast. (40RT 7143, 7146-7147.) Bronley decided to tell the truth, after her fiancé and her attorney assured her that she did not need to worry

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[8] A checkbook registry seized from Beverlee showed that, on March 5, 1993, she made a check payable to Mashburn for carpet cleaning. (50RT 8962; Peo. Exh. 155.)

about anything. Bronley also knew that other people had spoken to law enforcement about Katrina's disappearance. (40RT 7144.) Among other things, Bronley explained that Porcho had told her to lie about appellant not going home with Bush and Nicassio because Porcho was on parole and could have been violated for having gang members at his home. (40RT 7145-7146.) Bronley also stated that appellant had called Katrina to ask her to come over to his house after the party and that her argument with Katrina was over Katrina wanting to go to appellant's home. (40RT 7146-7147.) Bronley was concerned about Katrina being with appellant. Bronley also mentioned appellant had acknowledged to her that Katrina went to his home after the party. (40RT 7149-7150.)

On November 21, 1997, Nicassio, Bush, and Exposito were arrested. (43RT 7780; 44RT 7862; 45RT 8140.) Exposito decided to talk to the prosecutor and Volpei. She believed that Nicassio and Bush were not guilty of murder, that they were stuck in a situation from which they could not get out, and that telling the truth could help them. Exposito told the prosecution what she knew and then was asked to talk to Nicassio and convince him to cooperate. (44RT 7862-7863.) After being placed together in a monitored room, Exposito told Nicassio that she had told the prosecution everything she knew. Nicassio became upset and told her that she had ruined his chances of reaching an agreement with the prosecution. (44RT 7863-7864; 45RT 8142.) Based on appellant's comments, Nicassio thought that he was guilty of murder and that he would spend the rest of his life in prison. (45RT 8142-8143.) Exposito persisted and tried to persuade Nicassio to tell the prosecution where Katrina was buried. Nicassio wanted to speak first to a lawyer. (44RT 7865; 45RT 8141.)

After his arrest, Bush lied to the prosecution and told Nicassio not to make any deals with the prosecution. (45RT 8144; 50RT 9082.) The murder charges against Bush were dropped, but he was prosecuted for

methamphetamine possession and later for assaulting a police officer. He was sent to Salinas State Prison. (50RT 9082-9083.) Bush did not know Nicassio was cooperating with the prosecution. (50RT 9084.)

On November 23, 1997, Volpei participated in the search of appellant's home. (37RT 6580-6582.) Volpei collected numerous letters written to and by appellant. None of the letters were written by Katrina. (37RT 6584.) Volpei also obtained the letters that appellant had written to Katrina. (37RT 6583-6585; Peo. Exh. 24.) An "Application for Companionship" was found in appellant's home. It was a sexually-explicit document typically sent out by prisoners to women, which appellant had sent to Katrina on July 24, 1991. In this document, appellant had written "Trina M." at the top and Katrina had filed out the application with information about her and about sexual activities and signed it. This was the only document found in appellant's home with Katrina's handwriting on it. (38RT 6650-6656; Peo. Exh. 27.)

Volpei saw several knives in appellant's bedroom. He also seized a small Polaroid photograph of appellant and Buley that was taken in appellant's bedroom. Buley and appellant were making the initial "V" with their hands, and Buley was holding a two-edged knife. There was a hacksaw behind appellant. (50RT 9003; Peo. Exh. 159.) Another Polaroid photograph depicted Buley holding the hacksaw against appellant's head and a dagger stretching from appellant's neck with the point of the blade resting on his bed. Appellant was holding a small knife. (52RT 9258-9259; Peo. Exh. 169.) Volpie found hundreds of pornographic magazines in the room. Two of them were shown at trial: one was a comic magazine, and the other showed women in bondage and vulnerable positions. (50RT 9003-9004; Peo. Exh. 160.)

On November 25, a criminalist with the prosecution conducted Luminol testing in appellant's bedroom. There were indications of blood

splattered on the wall in various places. Those areas of the wall were cut out for further testing. (51RT 9211.)

Sometime in November or December 1997, John Crecelius had a conversation with appellant at Sam Patterson's home in Ventura. (42RT 7449.) At the time, appellant appeared nervous. He mentioned that he had just found out his "crime partner" or "buddy" "got arrested for rape and murder" of "a girl that he cut five years ago." (42RT 7450-7451, 7466.) Appellant felt the police would be coming after him "real soon because he had a good feeling that Larry was gonna tell on him." (42RT 7466.) He also mentioned that he wanted "some drugs to calm his nerves." (42RT 7468.) After using drugs, appellant left. (42RT 7467.)

Wozny decided to testify truthfully at the grand jury because he "couldn't live with it anymore," wanted out of the gang lifestyle, and wanted everything to be made okay as to Katrina. (43RT 7685-7688.) As later requested by the prosecution, Wozny also agreed to take appellant for a ride in a "bait car" that was set up with video and audio recording devices.[9] (43RT 7688, 7692-7693, 7757-7758.)

On December 18, 1997, as planned, Wozny got in the bait car, contacted appellant, and met him at a park. At the time, appellant was acting nervously. The two separated for a period of time. When they got together again, appellant appeared to be under the influence of a narcotic. (43RT 7697-7699.) In their first meeting, appellant asked Wozny for help holding Cundiff while appellant stabbed him. Appellant believed Cundiff had "ratted" on him. (43RT 7699, 7702, 7710-7711.) Appellant also

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[9] As part of the agreement, the prosecution would try to help Wozny as to the six or seven months left of his prison term. (43RT 7693-7694; Peo. Exh. 60.) Eventually, a court deemed Wozny had already served his prison sentence and ordered his release. He did not receive any other benefit for his cooperation. (43RT 7717.)

mentioned he was not going to do "any more time behind this," when discussing the Katrina investigation with Wozny. (43RT 7711.)

Later that day, Wozny was talking to Volpei when appellant called him. Appellant might have overheard part of Wozny's conversation with Volpei, due to Wozny's difficulties using the phone. (43RT 7713-7714.) Nevertheless, the prosecution and Wozny proceeded with the operation, in which Wozny was going to meet appellant that night. When Wozny arrived at the house where appellant was, appellant was waiting for Wozny at the door. Appellant was "edgy" or "wired up." (43RT 7714.) Appellant told Wozny that "he was tripping on" Wozny and patted him down to determine whether Wozny had a recording wire. Appellant had a box cutter in his hand. Wozny decided it was best to end the operation and left. (43RT 7715.)

In December 1997, after being arrested for jumping bail on a residential burglary case, Christopher Bowen was asked if he knew about any murders. (38RT 6819-6820, 6842.) Bowen replied that he knew appellant had killed Katrina. (38RT 6820.) Back in December 1996, appellant had visited Billie B.'s home when Bowen was alone in the apartment. Bowen and appellant talked about their backgrounds and criminal histories. (38RT 6816-6818.) Appellant asked Bowen if he had ever killed anybody. Bowen said no. Appellant then told Bowen that he had killed "Trina."[10] (38RT 6818.) On December 31, Bowen told Fitzgerald about his December 1996 conversation with appellant and about appellant's admission that he had killed Katrina. (38RT 6847-6848; 42RT

[10] About six months after his conversation with appellant, Bowen saw a big photograph of Katrina in Sutton's tattoo shop. Sutton told Bowen that "Trina" was the person in the photograph. (38RT 6855-6856.)

7564-7565.) Bowen was not offered anything in return for his statement about appellant's admission. (42RT 7586-7587.)

5. Sexual offenses against Robyn G. (counts 2-4)

Robyn G. went out with Ian Morrow, who was friends with appellant. Robyn and appellant became friends.[11] They used drugs (heroin and methamphetamine) and hung out together. (42RT 7485, 7509.) Appellant and Robyn also ended up having a sexual relationship. (42RT 7510.)

Between 1994 and 1995, Robyn lived in a 40-foot boat that was used as a party place. (42RT 7486.) Sometime between November 1994 and January 1995, appellant came over to Robyn's boat to use drugs with her. Susan V., Kristin S., and Jack Garcia were in the boat at the time. (42RT 7488-7489, 7513-7514; 44RT 7893; 56RT 9838.) Robyn willingly ended up alone with appellant in a bedroom in the lower level of the boat. (42RT 7489-7490.) The bedroom had a full-size bed. (42RT 7490.) Robyn was planning to use drugs with appellant but did not anticipate having sex with him. (42RT 7490-7491.) After using drugs, Robyn and appellant kissed. (42RT 7491.) As appellant became more "aggressive," Robyn started to feel uncomfortable. She also felt uncomfortable by the presence of pornographic magazines. Robyn told appellant that she wanted to leave the room. Appellant told Robyn to "sit [her] ass down" on the bed. She was

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[11] At the time Robyn was first interviewed by the prosecution, she was in custody for a parole violation (i.e., failed drug test). Volpei wrote a letter to Robyn's parole agent to let the agent know he was talking to Robyn. His goal was to keep Robyn in Ventura, instead of prison, due to the upcoming Grand Jury proceedings. (42RT 7525-7526, 7528; 44RT 7812-7813.) Volpie believed Robyn would be more willing to cooperate if she were out of custody due to her safety concerns. (44RT 7829.) But Robyn did not know whether giving information about appellant would help her at her parole hearing. (42RT 7529.)

afraid to leave the room, since she was intimidated by appellant's conduct. (42RT 7491-7493; 44RT 7810, 7833.)

Appellant then ordered Robyn to perform oral sex on him. She did not want to do so but complied out of fear of what appellant would do to her. (42RT 7493-7494, 7547.) As Robyn orally copulated appellant and later masturbated him, he flipped through the pages of the pornographic magazines. When she tried to leave, appellant called her a "bitch" and other derogatory names and physically kept her on the bed. (42RT 7494, 7499-7500.) Even though she wanted to leave the room and told him to stop, appellant had vaginal sex with her. (42RT 7495.) After a "few hours," Robyn was physically sore and told appellant so. Appellant replied that it did not matter to him and kept telling Robyn to get into different positions for sexual intercourse. (42RT 7496-7497.) He was unable to ejaculate after hours of trying. (42RT 7501.) Appellant also put a gun inside Robyn's vagina, which scared her even more. (42RT 7497-7498, 7531; 44RT 7811.)

Robyn did not believe she could make appellant stop. (42RT 7499.) In addition, Robyn did not yell for help because she knew nobody was going to do anything about it. (42RT 7498.) In fact, at one point, one of appellant's friends opened the bedroom door and saw appellant having sex with Robyn and looking at pornographic magazines. Appellant talked to this friend as if nothing was happening. Robyn did not feel comfortable asking appellant's friend for help. (42RT 7498-7499.) Eventually, the assault ended. (42RT 7500.) Kristin saw Robyn after Robyn had spent a few hours with appellant and noticed Robyn was "kind of weirded out, just not talking." (44RT 7893-7894.)

Robyn did not seek medical treatment, believed it was her fault for putting herself in the above situation, and only told Elaine Byrd about it, because she felt embarrassed and ashamed. (42RT 7501-7502; 44RT

7832.) At the time Robyn mentioned the above incident in Byrd's presence, she was still traumatized and was crying about what appellant did to her and to her boat. (43RT 7642, 7659-7660.) Robyn recalled that appellant had shoved a gun inside her vagina. (43RT 7648; 44RT 7806.) Robyn never had sex with appellant again but they used drugs together on subsequent occasions. (42RT 7503-7504.) At trial, Robyn clarified that, at the beginning, it was consensual and that she was willing to have consensual sex with appellant "before it turned out the way it did." (42RT 7530, 7541.) In other words, Robyn submitted to the sexual offenses because she was "afraid he was gonna go off" on her. (42RT 7547.)

6. Sexual offenses against Billie B. (counts 5-8)

Billie B. met appellant in 1988 at a party at Porcho's house. Eventually, Billie started to associate with Porcho, appellant, and other SHD gang members. (38RT 6683.) Billie's boyfriend, Mitchell Buley, became a SHD gang member. (38RT 6684.) Between 1988 and 1989, Billie and Buley socialized with appellant at Susan V.'s home. (38RT 6752-6753.) Appellant initially was a good friend to Billie, and there was nothing sexual about their relationship. (38RT 6685, 6754.) Billie met Katrina at SHD parties but they were not friends. (38RT 6689.)

In March 1992, shortly after appellant was released from prison, he started to develop a sexual relationship with Billie, who had broken up with Buley. At the time, Buley was in prison. (38RT 6686, 6759.) Billie did not tell Buley about her relationship with appellant, who gave Billie directions about what to tell Buley. Appellant threatened to hit Billie or "choke [her] out" if she told Buley about them. (38RT 6687.) At the beginning, Billie had consensual sex with appellant and enjoyed her relationship with him. (38RT 6687-6688.)

In the fall of 1992, Billie was still communicating with Buley, who was in prison. From October through November 1992, Billie visited Buley

at Soledad State Prison several times so that he could see his daughter. (38RT 6688, 6760.) Appellant was not happy about the visits but did not try to stop them. He just told Billie not to tell Buley about their relationship. (38RT 6689.) On November 27, Billie visited Buley and returned to Ventura the following night. She found out about Katrina's disappearance. (38RT 6690-6691.) At the time, Billie was living with Wozny and Klein. (38RT 6690; 43RT 7677.) Billie and her roommates had agreed not to answer the door if appellant came over, and Wozny had told appellant not to call their home anymore. (38RT 6691-6692; 43RT 7685.) On November 29, appellant came over, but Billie did not speak to him. (38RT 6692.) A couple of days later, appellant called Billie from Ventura County Jail. He was mad that Porcho "had changed his complete story while they were both inside." (38RT 6692-6693.)

In early 1993, after appellant was released from jail, his relationship with Billie started to deteriorate, as he started using methamphetamines and became verbally and physically abusive. (38RT 6693-6694, 6766-6767.) On one occasion, appellant was sleeping over at Billie's apartment when he became enrage and started screaming at Billie because her young daughter was crying. (38RT 6694-6695.) After Billie told appellant to stop screaming and that she would take care of getting her daughter quiet, appellant hit her in the face several times. Appellant gave her a bloody nose and two bloody lips. Billie told appellant to leave but he just laughed at her, said she looked "stupid" all beaten up and crying, and threatened to "choke [her] out" if she called the police. Billie was afraid appellant's gang would retaliate against her if she contacted the police and was also afraid appellant would choke her. (38RT 6695-6698.)

On another occasion, appellant became angry with Billie because he found out that she had kissed Ryan Bush. Billie had met Bush at parties and concerts, was friends with him, and knew he was a Sylmar Family gang

member. Appellant said Billie was "a whore, a stupid bitch" and "deserved to get choked out." Appellant came over to Billie's apartment about 3:30 a.m. with Bush. In order not to be alone with them, Billie invited over to her apartment people who were at a party in her building. After the partygoers left and Bush passed out in the couch, Billie went to take a shower to avoid appellant. (38RT 6699-6702.) After Billie came out of the shower, appellant followed her to her bedroom, took her towel away, and made sexual advances at her. Billie told him that she did not want to have sex and, instead, wanted to sleep. (38RT 6702.) Appellant said she would get all the sleep she wanted after "he's done and gone." Appellant made some gesture that terrified Billie, who dropped to the ground. (38RT 6703.) Bush woke up and told appellant to leave Billie alone and that they should leave. Appellant and Bush left. (38RT 6704.)

Between August 1994 and January 1995, Billie lived in another apartment complex with Shawna Kelly. (38RT 6705.) During this period of time, appellant became sexually assaultive toward Billie. He frequently went into Billie's apartment, even uninvited. (38RT 6706-6707.) When appellant was high on drugs, he was violent and also destructive toward Billie's belongings. She sometimes used methamphetamines with him. (38RT 6708, 6779.) On one occasion, Billie and appellant were in her apartment, when appellant was high. (38RT 6709.) After Wozny knocked on the front door, appellant shut all the inside doors, trapped Billie in the hallway, and did not let Wozny inside the home. (38RT 6710.) Appellant then forced Billie to orally copulate him by wrapping her hair around his finger and pushing her head down. He also grabbed Billie's hands and forced her to masturbate him for hours. He physically overpowered her any time she attempted to stop and leave. (38RT 6711-6713, 6793.)

One day in appellant's bedroom, Billie and appellant initially had consensual sex. But after hours of sex, Billie started feeling pain in her

vagina and wanted to stop. Appellant told her to "quit whining and to shut up" and kept going. Billie ended up bleeding from her vagina. Appellant became mad because she bled on his new bed sheets. He dragged Billie by the hair downstairs, insulted her, and forced her to stay with him while he cleaned the sheets. (38RT 6729-6732.) Wyman passed by, and appellant told her about the dirty sheets and asked her whether she would ever go to somebody's house and do that. Wyman laughed and said, "Oh, you silly guy." (38RT 6732.)

There were other occasions in which appellant forced Billie to have sex with him, including rape, masturbation and oral copulation. These sexual assaults could last up to 10 hours. The more Billie tried to resist the assaults, the angrier appellant would become. Billie was afraid of appellant and submitted out of fear to his sexual assaults. Appellant also used his body weight and strength to force Billie into complying. Appellant did not take no for an answer. He sometimes insulted her and told her "she liked it." On some occasions, the sex was consensual. Billie did not tell anybody about the sexual assaults because she was scared and humiliated, did not think anybody would believe her, and was afraid of retaliation by appellant and other SHD gang members. (38RT 6714-6722, 6792, 6808.) When the sexual assaults lasted hours and where committed in his home, appellant would look at pornographic magazines and other items with photographs of women. (38RT 6739.) If Billie asked appellant to leave her place, he would get mad and "rip apart" her home. (38RT 6794.)

In the fall of 1995, appellant, who had just been released from county jail, went over to Billie's work place at an Acapulco's restaurant near the Ventura courthouse and appellant's home. He asked the manager about her work schedules and to tell Billie that he had stopped by. Afraid that appellant would start coming over to her home, Billie went to visit appellant. (38RT 6722-6724, 6784.) Beverlee let her in, and Billie went to

appellant's room. Appellant wanted sex and to be masturbated, "the usual stuff." Billie tried to leave but appellant tackled her onto the floor. (38RT 6725-6727, 6786.) Appellant then laughed, called Billie stupid, and said, "You know you want it; you know how good it feels." Appellant ripped her pantyhose off and raped her. (38RT 6727-6728, 6788.)

In December 1995, Billie told Buley about appellant's sexual assaults without giving him the details. Buley was upset about appellant's conduct, and Billie was afraid Buley would confront appellant about it. (38RT 6734-6735.) Billie also told Christopher Bowen, with whom she was married for a few months and was the father of her second daughter, that she was afraid of appellant and that appellant had forced her to do certain things. She did not provide any details about the assaults. (38RT 6815.) Bowen fixed Billie's sliding glass door, which had been forced open many times by appellant. (38RT 6811-6812, 6815-6816.)

In February 1998, Volpei contacted Billie to talk about her sexual history with appellant. She did not tell him the entire account of the sexual assaults until after several conversations, because she was embarrassed about it and did not like discussing the subject openly with anybody. (38RT 6769-6771, 6801-6802.) She was still confused and in denial about being raped by appellant when she spoke to Volpei and, thus, told him that she did not consider the incidents to be rapes. But Billie finally wanted the truth to be heard about appellant's physical and sexual abuse of women. (38RT 6771-6772, 6797.) By the time of trial, Billie clearly understood that she had been sexually assaulted by appellant. (38RT 6797.)

7. Appellant's uncharged offenses against Susan V., Corie G., and Kristin S.

Susan V. met appellant when she was 14 years old. She also met other people associated with SHD. (39RT 6866-6868.) Susan was good friends with Cundiff, who was living with the Porchos in November 1992.

(39RT 6869-6870.) In 1994 or 1995, Susan had a conversation with Cundiff about Katrina's disappearance. (39RT 6870, 6882.) About one week after this conversation, Susan visited appellant. (39RT 6870-6871.) Appellant met Susan outside his apartment. As they walked into a courtyard, appellant started punching Susan's face with great force. (39RT 6872-6873.) Susan ran back to her car, but appellant persuaded her to exit her car and follow him to the courtyard. (39RT 6873-6874.) There, appellant beat her up again. (39RT 6874-6875.) Appellant then took Susan by the arm all the way to his bedroom. Beverlee saw them and told appellant not to hurt Susan. (39RT 6875.) Inside his bedroom, appellant asked Susan what she had talked about with Cundiff. (39RT 6876-6877.) Susan did not admit they had talked about Katrina's disappearance because she was afraid appellant would hurt Cundiff. Susan eventually left the room and never saw appellant again.[12] (39RT 6877.) During this incident, Susan was sober. (39RT 6892.) In 1998, Susan told law enforcement about the above incident. (39RT 6900.)

Corie G. (who was 30 years old at the time of trial) was about 16 or 17 years old when she had a sexual relationship with appellant for about one year. Appellant was 15 years old at the time. (41RT 7316-7318.) Corie partied with SHD members and their female friends, such as Billie, Callahan, and Maureen O'Sullivan. (41RT 7332-7334.) Appellant was already a SHD member and spent time in custody. Upon his release, appellant, Corie, and Clint Williams went to Ojai in Williams' pickup truck, which had a camper shell. Appellant and Corie rode to Ojai in the bed of the truck. (41RT 7319-7321.) Once in Ojai, appellant did not let

[12] Once appellant called Billie and told her that he had hit Susan at his house and that he need to talk to Jason Stein, who was staying at Billie's apartment. (38RT 6740.)

Corie leave the truck. (41RT 7321.) Appellant held Corie's arms and let her know with his actions that he wanted to have sex. Corie attempted to resist but was too small to do so. She yelled out to appellant's friends for help but nobody came. Afraid that "it would have gotten bad" due to appellant's violent tendencies, Corie "became willing" and submitted to sexual intercourse with appellant in the camper shell of the truck. (41RT 7322-7325, 7342.) Corie did not report the rape to the police but later told Wozny about it. (41RT 7326.) At the time of the rape, Corie was afraid of appellant and his friends. (41RT 7326-7327.) She terminated her relationship with appellant after this incident and then left Ventura within a couple of years. (41RT 7327.)

Around 1994 or 1995, Kristin met appellant at a party in which they were doing drugs. (44RT 7874.) One night, appellant invited Kristin to ride with him. They went to a couple of houses, used methamphetamine, and then drove to his home. (44RT 7875-7876.) They went into his room, which was "pretty big." (44RT 7877-7878.) After kissing, appellant "started getting really weird" and physically forced her to touch him in places that she did not want to touch, such as his penis and anus. He grabbed her hand and made her masturbate him as he looked at a pornographic magazine. (44RT 7878-7880.) Appellant then asked her to orally copulate him as he continued looking at pornographic magazines. (44RT 7880.) Kristin wanted to leave but stayed, as she did not know what to do. (44RT 7880-7881.) The sexual activities lasted for hours but appellant failed to ejaculate. Appellant did not let Kristin use the bathroom the first couple of times she asked. He then walked her to the bathroom and stood in the doorway while she used the bathroom. Kristin was scared of appellant's behavior and demeanor. (44RT 7881-7882.) Appellant kept Kristin in his room for two days making her masturbate and orally copulate him (as he stared at pornographic magazines) and without feeding her.

(44RT 7883-7884.) Kristin did not tell the police or anybody else, because she felt it was her fault, she did not understand what he did to her was wrong, and nobody would believe her. (44RT 7886, 7979.)

Kristin saw appellant again when she was getting a "White Power" tattoo that was designed by him. At the time, Kristin was still hanging out with skinheads and followed their racist beliefs. (44RT 7886-7888.) Appellant started hitting Kristin in the area where she got the tattoo (her right butt cheek) and said it was to set the ink. It hurt a lot. He then told her to go into the bathroom with him. (44RT 7888.) Appellant ordered Kristin to sit on the toilet and started "shooting dope into his arms." (44RT 7889.) Kristin wanted to leave but could not get around appellant. He then started squirting blood in her face from the syringe and telling her to shut up and to touch his penis. He also told Kristin "to shut up or he'll slit [her] throat like Trina." Kristin did not know who "Trina" was. (44RT 7890, 7981.) Kristin was afraid to yell for help. Eventually, appellant let her go. (44RT 7891.) Kristin did.not contact the police because she was afraid of being branded a "rat." (44RT 7891-7892.) She also continued socializing with appellant but did not have sex with him. (44RT 7892-7893.)

8. Appellant's arrest (counts 9-15)

On January 30, 1998, Jennifer Bowkley was staying with Janette Trembley-Rail and her family at 228 ½ Kellogg Street in Ventura. (37RT 6449-6450.) In the early afternoon, appellant came over to Trembley-Rail's house to talk to Annette Berryhill, who knew Trembley-Rail's daughter Aja and was visiting the house. (37RT 6450-6451, 6463-6464.) According to Trembley-Rail, appellant was acting "extremely agitated, angry." (37RT 6463.) Trembley-Rail told appellant to leave her home because he was upsetting her and her granddaughter Lucette. Appellant left. (37RT 6464.) Between 20 and 45 minutes later, appellant returned to Trembley-Rail's home with a companion. Since appellant engaged in

"more of the same sort of discourse" with Berryhill, Trembley-Rail told him to leave or she would call the police. Appellant and his companion left. (37RT 6465.)

Ventura County Sheriff's Sergeants Jesse Howe and John Miller were patrolling the high-crime Ventura Avenue area of Ventura, as part of a crime suppression unit. They were in an unmarked police car and were wearing "raid" jackets with the Sheriff's name and star. (36RT 6272-6274, 6309-6310.) Ventura County Sheriff's Deputies Louis Beery and Kevin Clancy were part of the same unit that night. They were wearing similar black "tactical" jackets as the sergeants. (36RT 6355-6356.)

Around 9:00 p.m., near Ramona Street, the sergeants noticed a man and a woman on bicycles outside a closed business. As the sergeants turned around and entered the driveway of the business, the two bikers started to ride northbound on the sidewalk. (36RT 6274-6275, 6311-6312.) Sergeant Howe was able to get a "good look" at the face of the male biker and identified him as appellant at trial. (36RT 6276-6277.)

Since the bicycles did not have lights in violation of the Vehicle Code, the sergeants pulled alongside the bikers and told them to stop. Appellant turned right into a gas station, and the female biker continued riding northbound. The sergeants followed appellant into the station and again told him to stop. Instead, he accelerated toward an alleyway and turned north in the alleyway. The sergeants pulled in front of appellant, identified themselves as part of the sheriff's department, and told him to stop. Appellant said, "Leave me alone, fuck you," and started pedaling away very quickly. Sergeant Howe exited his car and started chasing appellant on foot. Appellant turned east on Ramona Street. Deputies Beery and Clancy, who were conducting a traffic stop nearby, joined the chase at Sergeant Howe's request. (36RT 6275-6278, 6313, 6356.)

Sergeant Miller drove to Ramona Street and saw appellant riding his bike eastbound as fast as he could. Sergeant Miller caught up to appellant and cut off his path with the car. Appellant stopped and jumped off the bike. (36RT 6315, 6357.) As appellant attempted to run past the officer, Sergeant Miller grabbed appellant's jacket. (36RT 6317, 6357.) Sergeant Miller was able to look at appellant's face and recognized him at trial (despite appellant's considerable change of appearance). (36RT 6318.) Appellant was able to pull out of the sergeant's grasp and started running away. (36RT 6318-6319, 6357-6358.) By then, Deputies Clancy and Beery were parked behind Sergeant Miller's car. Deputy Beery took off on foot after appellant. (36RT 6358.)

Deputy Beery chased appellant through a vacant lot and yelled, "Sheriff's Department, stop." (36RT 6358.) As Deputy Beery gained ground on appellant, the latter stopped, reached into the front of his waistband, and pulled out a large revolver. Appellant's holster fell to the ground. Deputy Beery yelled, "Gun," drew his service revolver, and told appellant to drop the gun. (36RT 6359.) Sergeant Miller heard Deputy Beery's warning and noticed that appellant was holding a blue steel revolver to his head.[13] (36RT 6319.) Appellant threatened to shoot himself if the deputies came any closer. He began to walk off into an area out of the range of Deputy Beery's powerful flashlight. (36RT 6320, 6360-6362.) The deputies cautiously followed appellant into the dark and ended up in the area of Cedar and Kellogg Streets, where eyewitnesses had seen a

[13] Hours later, Sergeant Miller returned to the vacant lot where he lost sight of appellant and found a revolver holster. (36RT 6333, 6346.) Appellant's revolver was the same kind as a Smith and Wesson .357 magnum barrel revolver owned by Deputy Beery's father, which fitted perfectly inside the holster found in the vacant lot. (36RT 6334-6335, 6360-6361, 6378-6379; Peo. Exhs. 8, 10.)

gunman. (36RT 6321-6324, 6363-6367.) The deputies noticed a police helicopter and found out from the Ventura Police Department that the suspect was in a house on the corner of Cedar and Kellogg Streets. (36RT 6324, 6367-6368.)

In the meantime, Sergeant Howe encountered Ventura Police Officer Ross Nideffer at the corner of Ramona and Cedar Streets, told him about the attempt to stop appellant, and described appellant to the officer. (36RT 6288-6289, 6385.) Officer Nideffer drove toward Kellogg Street and heard a man banging on a door and yelling, "Let me in, you gotta let me in, there's cops all over the place, you gotta let me in, there's cops out here." (36RT 6385-6386.) Appellant entered the residence, and Officer Nideffer called other units for assistance. (36RT 6386-6387.)

As appellant was pounding on the door and screaming that the police were chasing him and that he wanted to be let in, Berryhill opened the door to Trembley-Rail's home but left the chain lock on. Appellant pushed the door open and went inside. Trembley-Rail, Bowkley, and Lucette were also present in the home. (37RT 6452-6453, 6465-6466.) Appellant continued screaming and ran into Trembley-Rail's bedroom. (37RT 6454.) Trembley-Rail told appellant to leave her home but he just yelled at her to do what he said. Appellant was angry, agitated, hostile, sweating, and out of breath. (37RT 6455, 6467-6468.) He was holding an object, with a triangular shape, under a kitchen dish towel. (37RT 6469-6470.) Bowkley was frightened by appellant's conduct. (37RT 6459.)

Sergeants Howe and Miller, as well as other members of their team, met in front of a house at 228 1/2 Kellogg Street. (36RT 6289, 6325, 6368.) Sergeant Miller looked through a kitchen window of the house and saw inside a person who appeared to be appellant. (36RT 6325-6326.) Ventura Police took over the situation but Sergeant Howe's team stayed to assist the local police. (36RT 6290, 6392.) Ventura Police Sergeant

Thomas Taylor, who was in charge of the Ventura Police officers, made sure all of appellant's exit points were covered. (36RT 6391-6392.) Using a loudspeaker, the police asked the occupants of the house to come out. Nobody did. (36RT 6393; 37RT 6469.) Instead, Sergeant Taylor heard what sounded like someone was moving furniture around and barricading the front door of the residence. (36RT 6394.) From his position, Ventura Police Officer Thomas Mendez could hear somebody barricading windows, screaming, and breaking things. (37RT 6434.)

Within one hour of the standoff, Bowkley, Trembley-Rail, and Lucette exited the house, even though appellant ordered them not to leave. Trembley-Rail made the decision to leave after appellant threatened to kill Lucette if she did not stop crying. Later, Berryhill came out of the house through a window. She was very scared and excited. (36RT 6394; 37RT 6435-6437, 6456, 6470-6472.) The people who came out of the house told Sergeant Taylor that appellant was the suspect inside the house. (36RT 6395-6396.) Berryhill told Officer Mendez that appellant was inside the house and was her boyfriend. According to Berryhill, appellant was acting irrationally, wanted to make a bomb with Drano, and was "gonna go out with a bang." (37RT 6441-6442.)

Sergeant Taylor then called for a SWAT team because appellant was barricaded inside the house. (36RT 6395.) Upon the SWAT team's arrival, Sergeant Taylor explained the situation to the team members and positioned them in the perimeter of the house. (36RT 6396-6397.) The SWAT team delivered a "throw phone" to appellant through a window so that he could communicate with the police negotiator. (36RT 6398-6399.) But no communication was established with appellant. (36RT 6399-6400.) After a seven-hour standoff, Sergeant Taylor decided to use tear gas to get appellant to exit the house. (36RT 6400.) The officers fired six or seven rounds of tear gas into the house. (36RT 6401-6402.)

Sergeant Taylor and Officer Brock Avery then walked within two or three feet of the house's front door. (36RT 6403.) Other officers also approached the house, carrying weapons that shot rubber bullets. (36RT 6404.) Sergeant Taylor could hear appellant moving furniture and pounding on the walls. So, the officers threw tear gas canisters, which were more powerful than the prior tear gas rounds, into the house. (36RT 6404-6405.) Appellant started coughing, opened the front door, stuck his head out, tried to breath, and then slammed the door shut. He did the same about 15 seconds later. (36RT 6405-6406.)

About 10 or 15 seconds later, appellant opened the door and crawled out of the house "on all fours." He had a steak knife in his right hand. (36RT 6406-6407.) Sergeant Taylor warned other officers that appellant was armed with a knife. The officers backed off. Apparently, appellant could not see but slashed out with his knife in the direction of any noise he heard. He slashed in the direction of any officer who moved toward him. Sergeant Taylor ordered another officer to shoot appellant twice with rubber bullets. Appellant just flinched, crawled back into the house, and slammed the door on the officers. (36RT 6407-6410.) Appellant again came out crawling and holding a knife. The officers yelled at appellant to drop the knife. Sergeant Taylor unsuccessfully attempted to kick the knife off appellant, who went back into the house. (36RT 6411-6412.) At the time, a lot of gas was pouring out of the house. (36RT 6412-6413.)

Shortly thereafter, appellant exited the house for a third time. He did not have a knife in his hand but reached into his jacket as though he was retrieving a weapon. Sergeant Taylor raised his rifle and placed his finger in the trigger well. Appellant did not retrieve anything from his jacket or waistband. So, Sergeant Taylor did not shoot him and, instead, ordered him to lie down on the ground. Appellant did not comply but was grabbed by other officers from behind and dragged to the ground. (36RT 6413-6415.)

A struggle ensued as the officers attempted to arrest appellant. It took six officers to subdue appellant. Even after appellant was handcuffed, he continued resisting and kicking the SWAT officers. (36RT 6415-6417.)

The SWAT team went inside the house to search for people. The interior of the house was trashed, the furniture was upside down, and items were broken. (36RT 6417-6419.) Sergeant Taylor saw appellant's knife next to the front door and asked Officer Mendez to retrieve it. (36RT 6420; 37RT 6444.) Officer Mendez also searched the house for a gun but was unable to find one. It was hard to conduct the search because of the tear gas and all the broken items inside the house. (37RT 6445-6446.)

Around 3:55 a.m., Ventura Police Officer Samuel Arroyo transported appellant to the Ventura County Medical Center, so that his injuries could be examined before he was booked at the local jail. (36RT 6293; 38RT 6664.) Based on his training and experience and on appellant's erratic behavior, Officer Arroyo suspected appellant was under the influence of a controlled substance such as methamphetamine or cocaine. He conducted his own investigation into appellant's intoxicated state, such as determining that his heart rate was too elevated at a rest state and his pupils were enlarged. Officer Arroyo asked a nurse to take a blood sample from appellant. The officer obtained the sample from the nurse and booked it with the Ventura County Crime Lab. (38RT 6665-6671.) Appellant's blood sample tested positive for amphetamine and methamphetamine and negative for cocaine and opiates. (38RT 6675-6679.)

At the hospital, Sergeants Howe and Miller and Deputy Beery approached appellant in the emergency room and recognized him as the biker who had refused to stop that night and had displayed a handgun. (36RT 6293-6294, 6326, 6381.) Later, Sergeant Miller identified appellant from a photographic lineup, at a preliminary hearing, and at the grand jury. (36RT 6339-6341, 6347; Peo. Exh. 13.) At trial, Sergeants Howe and

Miller, as well as Deputy Beery, identified the plaid jacket appellant was wearing at the time of his arrest as similar to the one worn by the gunman/cyclist. (36RT 6292, 6351, 6380-6381, 6419; Peo. Exh. 3.)

The next morning, Trembley-Rail returned to her home and saw Berryhill and Beverlee talking to Aja. (37RT 6473-6474, 6479-6480.) Beverlee told Aja that, if Aja did not talk to the police, she would take care of Aja and Trembley-Rail as if nothing ever happened at their house. (37RT 6480.) Later, Trembley-Rail was able to inspect the inside of her home, most of which was destroyed. She was able to salvage just a few possessions. Trembley-Rail suffered property damage in excess of $55,000. (37RT 6474-6475.)

9. Post-arrest investigation and appellant's admissions

In January 1998, Roy Miller, who was a skinhead but not a SHD gang member, was staying with Tori Szot, when Szot started getting collect calls from appellant.[14] (39RT 6921-6922.) Miller was aware of appellant's arrest following a standoff. Miller had been hanging out and getting high with appellant on the morning of appellant's arrest. (39RT 6923.) In a telephone conversation after the arrest, appellant told Miller, "If I would have known it was for a headlight, I wouldn't have ran like that." (39RT 6923-6924.) Appellant thought he was getting picked up for a murder. (39RT 6926.) Miller was not intoxicated at the time of the telephone conversation. (39RT 6937.)

In exchange for leniency in his case, Bowen agreed to help the prosecution in eliciting incriminating statements from appellant. Bowen was placed in appellant's jail cell, which was bugged so that everything that

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[14] Miller did not receive any benefit in return for his testimony. (39RT 6928.)

was said would be recorded. (38RT 6821-6823, 6848-6849; 43RT 7758-7759.) Appellant acted "really paranoid" and avoided any discussion of the Katrina murder, pointing to the speaker in the ceiling and telling Bowen to be quiet. (38RT 6824.) Appellant also became confrontational when Bowen asked him whether he had raped Billie. Appellant pointed out those were "Five-0" questions, meaning police questions. (38RT 6825.)

In March 1998, the prosecution placed Bowen in a holding cell with appellant and wired him to record any conversations. (38RT 6826-6829.) Bowen told appellant that the prosecution had brought Porcho down from prison to talk to them. Appellant said, "Tell him to stop talking to the motherfuckers." (38RT 6827.) The prosecution also obtained Bowen's cooperation in trying to determine whether Porcho was providing them accurate information.[15] (38RT 6829-6830; 43RT 7763.) Bowen found out Porcho had lied about wanting to help the prosecution obtain admissions from appellant and Bush and conveyed this information to Volpei. (38RT 6830; 40RT 7233; 43RT 7764.) Porcho had also tipped off appellant, Bush, and Nicassio that the prosecution wanted him to wear a wire and had told Bush not to trust anybody in a "kite" or note. (40RT 7235-7236, 7296; 41RT 7366; 42RT 7566-7568; 43RT 7772; Peo. Exhs. 46, 47.) Porcho was trying to "look really good" with his friends for self-protection reasons. (40RT 7294-7295.) While in the visiting area of the jail together, appellant told Nicassio not to talk to law enforcement. (45RT 8165.)

In early 1998, Crecelius contacted the prosecution and offered to cooperate in the Katrina investigation in exchange for leniency in his

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[15] Bowen entered into a written agreement with the prosecution. As a result, he was given a sentence of five years four months in exchange for his cooperation. He was facing a maximum sentence of 15 years. (38RT 6830-6834; Peo. Exh. 32.) However, Bowen started cooperating before he was certain he would get any benefit from the prosecution. (38RT 6862.)

pending drug case. (42RT 7451-7454, 7469-7470.) He told Volpei about appellant's incriminating statement. (43RT 7775-7776.) Crecelius later agreed to testify truthfully and to wear a wire in the holding cells of the courthouse, even though he was placing his life in danger.[16] Crecelius was instructed not to discuss with appellant anything about his pending case but to solicit statements about Katrina's murder. (42RT 7455-7457; 43RT 7777-7780.) On April 20, 1998, while in the holding cell, Crecelius told appellant that Nicassio, who was Crecelius's cellmate in the county jail, was going to tell on appellant. Appellant told Crecelius to take care of Nicassio by beating him up, so that Nicassio would be placed in protective custody. (42RT 7458-7459; Peo. Exhs. 63, 63A.) Appellant believed that Nicassio should take the "rap" for the murder because he was the youngest. (42RT 7459.) Appellant mentioned that Bowen was a "rat." (44RT 7801.) Crecelius and appellant spoke about Harlan Romines (a.k.a. "Loadie"), who was a member of the prison gang Nazi Lowriders. (44RT 7803.)

Nicassio's attorney told him that he was negotiating a deal with the prosecution. His attorney explained that Nicassio was only guilty as an accessory after the fact, that the deal was for a manslaughter conviction, that this conviction was a legal formality, and that Nicassio would only serve a sentence for being an accessory. (45RT 8145-8146.) On March 30, 1998, Nicassio entered into an agreement with the prosecution to cooperate fully with the investigation, including showing the location of Katrina's body, assisting in the investigation, and testifying in court, in exchange for a voluntary manslaughter conviction. The prosecution told Nicassio that it

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[16] Crecelius was given a one-year jail term and probation in exchange for further cooperation but not for proving information about appellant's admission. (42RT 7459, 7479; 43RT 7776.) Crecelius was told that he would not be helped in any future cases and did not receive any further benefit from the prosecution. (42RT 7460.)

would be asking for a maximum sentence for his conviction.[17] (45RT 8147-8148.) Then, they spend hours talking about the pertinent events. (45RT 8148-8149.) Nicassio also directed the prosecution team to the location of Katrina's burial. The location had been developed, and they were unable to find the burial site. (45RT 8149-8151.)

Nicassio agreed to wear recording devices for the prosecution.[18] The first operation occurred in the court holding tanks on April 22, 1998. Nicassio was given an altered version of his probation report that falsely stated he had not cooperated with the prosecution. (45RT 8168-8170; 52RT 9279.) Appellant read the probation report, noticed that it stated Katrina had been raped, pointed out "they don't just come up with that," and wondered who had told the prosecution about it. Appellant also read about Porcho's statements in the probation report. Appellant disapproved of Nicassio telling everything to his own attorney but agreed to help pay for Nicassio's legal bills, told Nicassio not to cooperate, asked him whether Bush was going to cooperate, mentioned he had beaten up Cundiff as he slept on a couch, and stated that he was arranging for the two of them to meet again in the visiting area of the jail. (45RT 8170-8174; 52RT 9274-9276; 22CT 6502-6554; Peo. Exhs. 170, 171.)

On March 12, 1998, Kristin told Volpei that, in December 1997, appellant had showed up at her home and told her the police were looking for him. Appellant was afraid he was going to jail and would never get out.

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[17] Eventually, Nicassio pled guilty to being an accessory after the fact for attempting to convince Tara Tamaizzo to lie to the Grand Jury. He received a three-year sentence and served the entire term in county jail because he would have been killed in prison for being an informant. (46RT 8239-8241.)

[18] Nicassio knew that, if he told the prosecution something that was not on the tapes, his agreement would be nullified and he would be facing the charges by himself. (43RT 7790; 45RT 8169-8170.)

(52RT 9267-9268.) The following month, as requested by the prosecution, Kristin exchanged letters with appellant.[19] (44RT 7907-7909.) In his letter, appellant asked Kristin to meet with his mother, who would give her the "rundown." (44RT 7910-7911.) On May 19, as part of an undercover operation, Kristin met with Beverlee at a Starbucks. Kristin was wearing a recording device. (43RT 7788-7789; 44RT 7916-7917.) Beverlee requested Kristin to meet her at the jail the following day. (43RT 7791.)

On May 20, Kristin met Beverlee in the visiting area of the jail. Kristin was wearing a recording device. Beverlee told Kristin to request a visit with Nicassio, and Beverlee requested a visit with appellant. So, as planned by Beverlee, appellant and Nicassio were placed in the same visiting area. Nicassio was also wearing a recording device at the time. (43RT 7789-7790; 44RT 7917, 7919-7920; 45RT 8176-8178.) But Nicassio and Kristin did not know each other or that the other one was cooperating with the prosecution. (43RT 7790; 44RT 7917, 7919, 7922.) During this meeting, Nicassio asked appellant what would happen if Katrina's body were found. Appellant said, "If that shit comes out of the ground, we'll both be going to L.A. County." Appellant was upset Nicassio had told his attorney everything but offered to help pay Nicassio's legal fees. He wanted Nicassio's attorney to obtain "some paperwork" and give it to his attorney. (45RT 8178-8179; 46RT 8206-8208.)

Beverlee arranged with Kristin for other jail visits, in which Nicassio and appellant were similarly called to the visiting area. (44RT 7922-7923.) During one of these visits, appellant told Nicassio not to worry about the blood found on the stairs of his house because they were going to say it

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[19] Kristin did not receive any benefit and decided to cooperate because she hated him for what he did to her and because Katrina was not able to leave his room alive. (43RT 7789; 44RT 7933.)

came from appellant's forehead wound. As to the blood in his room, appellant planned to say it came from the use of needles to inject drugs. (45RT 8180-8181; 46RT 8206.) As to the blood found in the back of Katrina's truck, appellant said, "Me and her could have had sex in the back of the truck for all they know." (46RT 8209.) During their meetings in the visiting room, appellant usually told Nicassio to lower his voice and pointed to the speakers in the ceiling of the room. (46RT 8210-8211.)

Aside from their meetings in the visiting area, appellant also contacted Nicassio in the roof recreation area of the jail. During these meetings, appellant seemed anxious to talk to Nicassio and find out what was going on with the case. As instructed by the prosecution, Nicassio tried to avoid discussing the case with appellant when they were not being monitored. (46RT 8204-8205.) In addition, appellant and Nicassio exchanged several "kites" while they were in jail. In one of them, appellant complained about Kristin not arranging visits for appellant and Nicassio to meet at the visiting room, instructed Nicassio not to use names in their kites, and wanted to know if there were bad news coming out of Los Angeles. (45RT 8183-8186; Peo. Exh. 73.) In response to Nicassio's kite that falsely stated Katrina's body had been found, appellant referred to the news as "repulsive." (45RT 8186-8187; Peo. Exh. 74.) In a kite dated April 21, 1998, appellant told Nicassio not to trust anyone. (46RT 8213-8215; Peo. Exh. 78.) The purpose of this exchange of kites and the meetings in jail was for Nicassio to gain appellant's trust and then to confront appellant about the crimes. (45RT 8189-8190.) Appellant arranged to have money deposited in Nicassio's jail account. (46RT 8212-8213.)

In August 1998, the prosecution instructed Nicassio to write a letter to Kristin, which enclosed a fake letter that appeared to be from his attorney. The letter stated that Katrina's body had been found, that Nicassio's case was going to be moved to Los Angeles County, and that Nicassio's counsel

needed more money to continue working on the case. Nicassio asked Kristin to give the letter to Beverlee. So, at the direction of Volpei, Kristin arranged a meeting with Beverlee. (44RT 7926; 45RT 8187-8190; Peo. Exhs. 67, 68.) At the meeting, Kristin gave the letter to Beverlee, who then wanted to visit Nicassio and appellant and tell Nicassio what he was supposed to say. (44RT 7927.)

On September 11, 1998 (46RT 8201), Beverlee and Kristin went to the jail and asked for Nicassio and appellant to be brought to the visiting area. Kristin and Nicassio still did not know each of them was working with the prosecution. (44RT 7929-7930; 45RT 8193.) During the visit, Nicassio told appellant that Katrina's body was found and that he might have to state Katrina came over to appellant's place and had sex with appellant if appellant's semen were found in the body. As to the semen, appellant stated, "There's not going to be none of that." Appellant told Nicassio not to believe the "trick" about the body even if it came from his attorney. Appellant repeatedly instructed Nicassio not to tell his attorney or to testify at trial that Katrina had been to appellant's place and had sex with appellant. Appellant was very upset and paranoid when telling Nicassio not to make a statement. (21CT 6419-6421, 6439-6446; 45RT 8190-8191, 8194; 46RT 8201-8202, 8357; Peo. Exhs. 76, 77.) Appellant was so upset that, after briefly walking away from Nicassio, he walked quickly toward him with the fists clenched as if he were going to hit Nicassio. But appellant then turned around, walked away, and terminated their conversation. (46RT 8202-8203; 21CT 6453.)

In November 1998, prior to Wyman's Grand Jury testimony, Nichols agreed to visit Wyman at the request of the prosecution. This conversation was monitored. (42RT 7600; 43RT 7635-7636.) During the conversation, Wyman confirmed what she had told Nichols back in January 1993. (43RT 7636.) Subsequently, Wyman had an interview with the prosecutor and

Volpei. Wyman told them that she wanted immunity before she made a statement. She was afraid to be prosecuted for cleaning the blood. (42RT 7601-7602.) The prosecutor explained to Wyman that the statute of limitations had run on that crime but that she could be prosecuted for perjury. Wyman and the prosecutor then entered into an agreement. (42RT 7602.) Wyman and appellant later exchanged letters in which he expressed his displeasure about her cooperating with the prosecution and she complained about appellant putting her in this position. (42RT 7607.)

In November 1998, Danny Miller, a senior investigator with the Ventura County District Attorney's Office, interviewed Mashburn. (39RT 6975.) Mashburn told Miller that the last date he cleaned the carpets of appellant's home was the date he was contacted by the LAPD in 1992. On that date, he cleaned all the carpets throughout the home, including appellant's bedroom. (39RT 6977, 6982, 6985, 6989.)

On December 9, 1998, in the jail visiting area, Nicassio mentioned to appellant that Wyman had been subpoena to testify at appellant's grand jury. Appellant said not to worry because of their story that the blood came from his forehead. Nevertheless, appellant was worried about his mother being "dragged into this" and did not want Nicassio to implicate his mother even if Nicassio cooperated with the police. So, if anything were ever said, appellant instructed Nicassio to state Katrina's body went over the catwalk leading to appellant's room and not through the house. Appellant referred to Katrina as "that shit." Nicassio told appellant that he was not responsible and did not want to go to prison. Appellant became very nervous and upset, told Nicassio not to say that anymore, and threatened to hurt him if he again said that he was innocent. Appellant reminded Nicassio, "You fuckin' hauled that shit, you know what I mean?" (21CT 6468-6473, 6485; 46RT 8217-8223; Peo. Exhs. 79, 80.)

In early 1999, Bush gave a true statement to law enforcement for the very first time about the pertinent events in Katrina's murder. He was "just fed up" and did not want to "live a lie" anymore. The prosecution only promised Bush that his statement would not be used against him at a later date. Bush also showed the prosecution the location where Katrina was buried. (50RT 9086-9087, 9100.) In exchange for his testimony, Bush was allowed to serve the remaining portion of his sentence in the Ventura County Jail. But he was not given any other benefit. (50RT 9087.)

10. Witness dissuasion (counts 16-20)

Correctional Officer Wesley Harris was a gang investigator at Wasco State Prison. Ventura inmates were first sent to the reception center at Wasco before they were sent to other prisons. Officer Harris read inmates' incoming mail to gather information about gang communications within the prison system. He also determined the identity of inmates who could be targeted by gangs due to cooperation with law enforcement. Usually, "shot callers" within the prison population determined whether to retaliate against informants (i.e., "cheese eaters" or "rats") based on information or "paperwork" about them, and Ventura County inmates would take care to retaliate against their own. Inmates could also be hurt for committing rape and, thus, avoided mentioning rape convictions or charges. Since inmates were aware the mail was monitored, their mail usually was not written in plain English. Gang inmates also mailed letters to third-parties in prison, who would then resend the letter to the intended person, to avoid monitoring. Aryan Brotherhood and Nazi Lowriders were the White prison gangs. Based on his experience and training, Officer Harris opined SHD had adopted the prison gang ideology and was recruiting new members in prison. (47RT 8407-8429, 8465-8466.)

In 1998, Ebright contacted the prosecution and offered to cooperate in appellant's case in exchange for letting him serve the last few months of his

prison term in the county jail. He was brought down to the jail in July 1998 and wrote letters to appellant at the request of the prosecution. (49RT 8895-8900.) In August 1998, appellant wrote Ebright two letters and asked him for favors once Ebright was out of custody, such as contacting Berryhill and intimidating Beverlee's boyfriend. (49RT 8900-8907; Peo. Exhs. 134, 135.) Later, appellant asked Ebright to visit him. (49RT 8908; Peo. Exh. 136.) In October 1998, Ebright and Berryhill went to visit appellant together. Appellant spelled out the word "rat" on the glass when talking about Porcho. As a fellow gang member, Ebright would have been required to deal with Porcho and do whatever was necessary to silence Porcho. (49RT 8909-8910, 8924.) In a December 1998 visit, appellant told Ebright that he had paperwork on Porcho and that he wanted Ebright to visit Porcho and persuade him to change his statement. Ebright thought appellant wanted him to kill Porcho. (49RT 8912-8913, 8924-8925.)

Appellant was indicted on January 6, 1999. (48RT 8591.) After appellant was indicted for murder, he asked Miller in a collect call, if Miller knew anybody who "could take care of some business." (39RT 6924.) Appellant wanted Miller to find out who was wearing wires or otherwise helping law enforcement in his case. Appellant believed that, without the people wearing wires, the prosecution did not have a case against him. (39RT 6925-6926.)

A few weeks into January 1999, an envelope addressed to "Mom McBee" was sent from the Ventura County Jail to Beverlee's address. The envelope contained two letters from appellant, one addressed to "Mama" and the other to Sprout. Appellant asked Beverlee to send the other letter to Sprout, who was about to be released from custody. In the letter, appellant asked Sprout for help as a fellow gang member. Appellant attempted to disguise his identity as the writer of the letter by referring to himself in the third person. The letter mentioned the rape charges involving Billie and the

suspicion that somebody had made a deal with the prosecution about the murder case. (47RT 8429-8434; 48RT 8591-8593; Peo. Exh. 83.) After reading these letters, Volpei had the envelope resealed and sent to Beverlee to determine whether she would go through with appellant's plan. Volpei also instructed Corcoran State Prison to seize any letter from Beverlee to Sprout. Volpei was never told that the letter was seized. (48RT 8594.) Nevertheless, in March 1999, Volpei visited Sprout at Corcoran and advised him that he would be dealt severely if he approached any witness. In the cell, Volpei found an envelope addressed to Sprout from Beverlee with a postmark date of February 11, 1999. (48RT 8594-8596.)

After appellant's January letters were found and for the protection of witnesses and victims in this case, Volpei asked the jail to monitor the mail out of the section where appellant was housed. He also asked officers in different prisons, including Officer Harris, to search the cells of SHD members for material relevant to the witness intimidation in this case and to send the material to him. (48RT 8597; 49RT 8790-8792.)

Appellant sent another envelope to Beverlee using a return address from "Ryan Fleishcer." The envelope contained a letter to Beverlee, one to Harlan Romines, who was a validated Nazi Lowriders member, and one to Michael Gawlik, who was a sentenced prisoner.[20] In the letter to Romines, appellant noted that his mail was being monitored, that he was facing the death penalty, that he had read transcripts from the grand jury, and that Bowen, Crecelius, and Nicassio had informed on him. Appellant described Nicassio and asked that the informants' names be passed along to Todd Gledhill (a.k.a. "Fuzzy"). In the letter to his mother, appellant instructed Beverlee on how to address his letters to other inmates and mentioned that

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[20] Romines refused to take the witness oath and was held in direct contempt of court. (47RT 8568-8569.)

he was reading the grand jury transcript. In the letter to Gawlik, appellant told him to pass along the names of the informants (i.e., Bowen, Nicassio, Crecelius) to other Ventura County skinheads in prison, including Gledhill. (47RT 8434-8438; 49RT 8789-8799; Peo. Exh. 84.)

Officer Harris reviewed a letter sent to Bridgeford at Wasco State Prison by Berryhill on February 13, 1999. The envelope also contained a letter from appellant to Bridgeford, mentioning he had "paperwork" that Wozny had driven him in a "wired cop car" to gather evidence. Appellant also identified Nicassio, Bowen, and Crecelius as informants. He further complained about the "little sawed-off pasty-faced troll" bringing up rape charges. Officer Harris opined appellant was mentioning informants' names so that they could be assaulted. (47RT 8439-8445; 49RT 8805-8811; Peo. Exh. 85.) On February 24, Bridgeford wrote back to appellant and mentioned his surprise at Wozny's cooperation with law enforcement. (49RT 8812-8815; Peo. Exh. 125.)

Officer Harris recovered a letter with a hit list of ordered assaults in the cell of Greg Scroggins (a.k.a. "Nazi"), a SHD member from Kern County. The letter was written by David Zeismer, who was a SHD member and a Nazi Lowriders associate. (47RT 8446, 8465, 8469-8470.)

In February 1999, appellant called Ebright and asked him to get "paperwork" from Beverlee and Berryhill. In March, Beverlee agreed to meet Ebright with a private investigator present because she was afraid of people wearing wires on her. She knew appellant wanted Ebright to have the paperwork but she wanted further confirmation. (49RT 8914-8917, 8920, 8924.)

Kara Allen was friends with appellant since elementary school. (47RT 8486-8487.) She exchanged letters with appellant after his murder indictment in this case. In a letter, appellant asked Allen to mail an enclosed letter to Robert Imes and mentioned that Crecelius and Bowen had

informed on him. In the enclosed letter, appellant asked Imes to contact Spencer Arnold about Kristin and to pass along the message to Kenneth Barber. (47RT 8488-8489, 8499-8502; 48RT 8817-8820; Peo. Exhs. 88, 89.) Allen also dropped in the jail mailbox a letter written by appellant for Victor Challoner. The letter mentioned informants, including Kristin. (49RT 8815-8816; Peo. Exh. 87.)

Appellant also asked Allen to visit him at the jail with Samantha Medina. During the visit, appellant asked Medina to contact Arnold and tell him that his girlfriend Kristin was a rat because she had worn recording wires on appellant and Beverlee. (47RT 8489-8490, 8513; 48RT 8620; 50RT 8957.) Later, appellant gave Arnold's phone number to Allen, who then passed the number along to Medina. (47RT 8513.) Subsequently, Medina contacted Kristin to admonish her that she should not be telling on people and that "Rats get hurt." (48RT 8627-8628; 50RT 8958.) Medina believed informants should be killed. (50RT 8958.)

Tori Szot (a.k.a. "Precious") knew appellant since 1997, hung out with other SHD members (i.e., Buley), and believed in their White Power views. (48RT 8633-8640.) In a letter, appellant asked Szot to obtain a phone number for "Robert" from his grandmother under false pretenses. He also thanked her for providing Buley's address because he wanted Buley to know "what's popping with" Billie, whom appellant called a "little sawed-off pasty-face troll." Appellant also wanted Szot to tell Buley about Robyn. (48RT 8639-8645; Peo. Exh. 98.) As requested by appellant, Szot mailed a letter written by appellant to Buley, who was at Chino State Prison. In the letter, appellant mentioned how Wozny, Crecelius, Bowen, Billie, Robyn, Byrd, and Nicassio were cooperating with the prosecution. Appellant wanted Buley to send him phone numbers for the San Fernando Valley gang members. (48RT 8647-8648; 49RT 8843-8849; Peo. Exh. 102.) Buley wrote Szot back and instructed her to mail an enclosed letter to

appellant. Szot complied. In his letter, Buley told appellant to contact Malmquist about the contact information for the San Fernando Valley people. (48RT 8651-8655; 49RT 8850-8852; Peo. Exhs. 100, 103.) In telephone conversations, appellant told Szot about people with whom he was upset because they had informed on him. (48RT 8655.)

Jasmine Guinn knew appellant since 1996 and hung out with some of his friends, including Buley and B.J. Davis. (48RT 8673-8675, 8685.) Appellant wrote to Guinn with a fake return address from "Adolfo Ponce." He mentioned the charges against him and complained about Byrd "running her young mouth at my Grand Jury hearing." He also provided a list of informants' names, such as Diaz, Cundiff, Kristin, Crecelius, and Bowen, provided details of their actions, and told Guinn to tell others about these informants. Appellant enclosed a letter that he described as "undercover letter spy talk." (48RT 8678-8684; Peo. Exh. 106.) Guinn shared the information about the "rats" with others. (48RT 8685-8687.)

After appellant was indicted for murder, Jennifer Wepplo (a.k.a. "Prong") communicated with him. Appellant told her about people who had worn "wires" on him, including Nicassio and Kristin. In turn, Wepplo mentioned the informants to other SHD members, such as Reeder, so that they could be assaulted. (48RT 8699-8702, 8709-8711.) On February 18, 1999, Reeder wrote back to Wepplo and pointed out that he only knew Nicassio among the informants, that Nicassio was in custody, and that "someone's got to get him from in there." (48RT 8702-8704; Peo. Exh. 107.) Appellant also wrote to Wepplo using a fake return address from "Daley" in the jail. He complained about "all these pieces of poo-poo in my paperwork" and specifically mentioned that Kristin, Robyn, and Billie were cooperating with the prosecution. He enclosed a letter for Morrow and asked Wepplo to mail it to him. (48RT 8704-8709; Peo. Exh. 108.)

In March 1999, appellant wrote to his sister and enclosed a letter that he wanted mailed to Sponza. Appellant wrote to Sponza that the prosecution was seeking the death penalty against him and that Wozny, Bowen, Crecelius, Nicassio, and Kristin had made deals and cooperated with the prosecution. Appellant also mentioned that Sponza might have already heard from Wepplo about the women bringing rape charges against him. (49RT 8825-8834; Peo. Exh. 126.)

In March 1999, Wepplo mailed appellant's letter to Morrow at Norco State Prison. (48RT 8723; Peo. Exh. 111.) Also in March 1999, Wepplo wrote two letters to Malmquist to let him know about the informants in appellant's case, including Bowen, Nicassio, Robyn, Billie, Crecelius, Kristin, and Wozny. She specifically asked Malmquist to hurt Bowen, as they were in the same prison. (48RT 8726-8733; 49RT 8863-8865; Peo. Exhs. 112, 113.) Later in March, Malmquist wrote back to Wepplo, mentioned Bowen was in "another yard," and complained about Billie, Robyn, and Wozny. (48RT 8733-8734; Peo. Exh. 114.) In April, Wepplo wrote to Malmquist and asked him to tell inmates in Bowen's yard about his dealing with the prosecution. (48RT 8735-8737; Peo. Exh. 115.) Malmquist wrote Wepplo back and mentioned that Bowen was being transferred to another prison and that nothing could be done to him but that he got the word out. (48RT 8737-8738; 49RT 8870-8871; Peo. Exh. 116.)

Stacey Warnock knew appellant since 1995 or 1996, considered him a friend, knew he was a SHD member, hung out with other SHD members, and was Morrow's girlfriend. (48RT 8746-8751, 8755.) After his indictment, appellant wrote letters to Warnock. He told her about his indictment and how Bowen, Wozny, and Billie had informed on him. (48RT 8758-8759; 49RT 8800-8804; Peo. Exh. 124.) In March 1999, Warnock wrote back to appellant, let him know that she was going to mail his letter to Malmquist, mentioned that she and Bridgeford had contacted

Wozny and Billie (whom she described as a "bitch with a big mouth"), and provided appellant with an address for Morrow's brother Jim. Warnock forgot to send appellant's letter to Malmquist, and the letter was later seized by law enforcement. (48RT 8759-8770; Peo. Exh. 122.) In his letter, appellant complained about Malmquist not writing him back, mentioned Bowen had informed on him and was in the same prison as Malmquist, and advised him to use somebody else's name on the return address. (48RT 8771-8772; Peo. Exh. 123.) Warnock told SHD members about the informants in appellant's case. (48RT 8773-8775.)

In March 1999, Barber called Arnold and told him that there was "paperwork" on Kristin in appellant's case, that appellant was mad at Kristin for wearing a wire on his mother, and that Kristin was a "rat." (49RT 8886-8888, 8890.) Appellant also called Arnold and told him to get the paperwork from appellant's "people." (49RT 8888, 8891.) Arnold also received a call from Medina. Medina mentioned there was paperwork on Kristin and that Kristin was a rat. Arnold told Barber, appellant, and Medina that he "wasn't with [them] and stuff." (49RT 8889.)

On March 23, 1999, based on his conversation with Arnold, Volpei searched Barber's jail cell and found a note with Arnold's phone number on it.[21] The note was written by appellant. (49RT 8820-8823; Peo. Exh. 127.) Volpei also found in Barber's cell a piece of paper with Kristin's name and phone number on it. (49RT 8824; Peo. Exh. 129.) Another sheet of paper had Arnold's name and address on it and was written by appellant. (49RT 8824; Peo. Exh. 130.)

Volpei also served a search warrant on Beverlee's house on March 23, 1999. Volpei recovered an envelope and a letter addressed from Sprout to

[21] Barber refused to testify and was found in contempt of court. (48RT 8697.)

appellant at a P.O. box used by Beverlee. (48RT 8598-8600; Peo. Exhs. 96, 97.) Volpie also found a note that stated, "Art, Check with Sal, Chris Bowen." At the time, Sponza was imprisoned at Tehachapi State Prison, and Bowen could have been moved there. Art Hernandez was a defense investigator. (49RT 8927; 50RT 9001.) Volpei also recovered a board with Ebright's name and phone number on it, a money order made out to Sprout, letters from Sponza, a sketch of the interior of part of the jail, the fake letter from Nicassio's attorney (Peo. Exh. 68), sealed Grand Jury transcripts (volume I was taken apart), and a newspaper clipping about appellant's indictment. (49RT 8927-8933.)

Also on March 23, Volpei searched appellant's cell with the assistance of a special master. The special master actually searched the cell and determined which documents were not privileged and could be read by the prosecution. Inside appellant's mattress, they found two pieces of paper with the names, phone numbers, and addresses of victims and witnesses. (49RT 8934; Peo. Exh. 147.) There were also several pages of volume I of the Grand Jury transcripts in the cell. (49RT 8936-8937; Peo. Exhs. 148, 149.) Appellant's Bible contained the names and phone numbers of people who were close to Bush and Nicassio, as well as a phone number for Ebright. (49RT 8937-8938; 52RT 9282.)

In March 1999, John Hernandez, a Ventura Avenue Gangsters member, was housed next to appellant in jail.[22] They knew each other from the Ventura Avenue neighborhood. Appellant discussed his case with Hernandez and gave him Grand Jury transcripts to read. Appellant wanted

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[22] In exchange for his cooperation in another pending case, Hernandez had a year taken off his sentence and was able to serve his 16-month term in jail, as opposed to prison. (47RT 8547-8548, 8551-8552, 8555.) But he did not receive any benefit for his cooperation in this case. (47RT 8557-8558.)

Hernandez to read about the people who had informed on appellant and to let Hernandez's friends know the identity of the informants. Appellant wanted Hernandez's fellow gang members to know Crecelius was ratting on him, so that he would be assaulted by other inmates. (47RT 8523-8527.) Appellant gave Hernandez a list of people who had cooperated with the prosecution against appellant. Appellant wanted Hernandez to disseminate the names among his "homeboys" and his "people around the jail" for the purpose of having them assaulted. (47RT 8529-8530; 50RT 8951; Peo. Exh. 82.) Appellant also asked Hernandez to contact Porcho and try to convince Porcho to stop cooperating with the prosecution. (47RT 8527-8528.) Hernandez talked to Porcho, who refused to help and said appellant was "a piece of shit murderer and rapist." (47RT 8528.)

Nicassio received from another inmate, Henry Johnson, a piece of paper with names of informants in this case, including Nicassio, Crecelius, Bowen, Wozny, and Kristin. Johnson told Nicassio that another inmate, John Hernandez, had given the list to him. The list was in appellant's handwriting. (46RT 8231-8233; 47RT 8530-8531; 49RT 8834-8835; Peo. Exh. 82.) At the time, Nicassio was afraid that Gledhill, who was a large-size inmate and was affiliated with the Hells Angels, would find out about his cooperation with the prosecution. (46RT 8233, 8237.) After testifying at the grand jury as to the witness dissuasion offenses, Nicassio was threatened by Romines, who told Nicassio that he had "spread the paperwork on the case to every prison in California through the Nazi Lowriders prison gang" and that Nicassio would be killed in any prison yard for being a "rat." (46RT 8237-8238.)

From March through the summer of 1998, Kermit Lucas was housed in a cell next to appellant's cell in an isolation unit of the jail. Lucas already knew appellant from selling him drugs. Appellant offered Lucas money in exchange for having his "homies" contact Berryhill and ask her to

visit him. He later asked Lucas to have Berryhill and Miller's girl (Szot) intimidated into keeping their mouths shut. Beverlee put about $1,000 in Lucas's jail account. (50RT 8967-8973, 8982-8985.)

On May 28, 1999, Wepplo wrote a letter to Clayton Jessup (Malmquist's brother) asking him to dispose of any mail that mentioned appellant and the informants and not to send mail to her P.O. box, as she and others had received Grand Jury subpoenas to testify about the witness intimidation. (48RT 8740-8741; Peo. Exh. 117.) The same day, Wepplo also wrote a letter to Jonathan Cheshire (a.k.a. "China") telling him to get rid of any mail or documents about appellant's case due to the pending Grand Jury proceedings. (48RT 8741-8742; Peo. Exh. 118.) These two letters were seized by law enforcement before Wepplo was able to mail them. (48RT 8742-8743.) During the May 28 search, law enforcement also seized envelopes addressed to Malmquist, Morrow, and Jessup that enclosed a newspaper article about appellant's attempts to intimidate witnesses. (48RT 8743-8744; Peo. Exhs. 119-121.)

In May 1999, a court order was issued barring appellant from making any telephone calls and from sending or receiving any unmonitored mail that was not from his attorneys or investigators. (49RT 8923.)

In August 1999, Volpei arranged to have Beverlee's jail visits with appellant videotaped. (48RT 8778-8781.) At the time, appellant and Beverlee had already been indicted for conspiring to dissuade witnesses.[23] (49RT 8787.) In the five visits that were monitored, appellant and Beverlee engaged in a lot of nonverbal conduct to communicate and to avoid any recording. For example, during the August 10 visit, appellant made the letter "R" on the window, and Beverlee wrote the letter "B" on the glass

[23] In April 2000, during her trial, Beverlee pled guilty to conspiring to dissuade witnesses and attempting to dissuade Nicassio. (49RT 8787.)

and stated that she needed to talk to her. In the August 31 visit, appellant wrote the names "Fred" and "Gene" on the glass, and Beverlee mouthed the word "witness" numerous times. They also made hand gestures about books and money. (48RT 8782-8784; 49RT 8788-8789; 51RT 9202, 9205-9206; Peo. Exhs. 104, 164.) During the September 7 visit, appellant made negative references to Berryhill and Wyman for talking to Volpei. Appellant also wrote the initials "JD" on the glass, which referred to SHD member J.D. Bowman. Referring to Crecelius, appellant said, "I messed up." In addition, appellant mentioned Shawna Weston in connection with Billie. As to Nicassio, appellant said, "Just tell him before L gets outta here." (52RT 9250-9258; Peo. Exh. 168.)

Volpei took "extraordinary efforts" to protect witnesses, such as Wozny, Bowen, Crecelius, Nicassio, and Bush, from retaliation by other inmates. For example, Bowen was relocated after authorities found a letter that was received by Malmquist, who was in the same prison as Bowen. Wozny was incarcerated under a different name, and he was placed in a facility separate from the main jail. Nicassio was kept in jail, as opposed to prison. (48RT 8610-8612.) Volpie also had to help witnesses get ready for trial. All of the witnesses were "completely horrified" about having to testify. (48RT 8612.) In addition, Volpei and the prosecutor contacted Buley, Malmquist, and Morrow, told them not to contact any witnesses or victims in this case, and threatened to charge them if they contacted the witnesses or victims. (49RT 8922.)

B. Appellant's Guilt Phase Defense

It was stipulated that, on March 23, 1993, Detective Sotelo interviewed Porcho about the night of November 27, 1992. During the interview, Porcho stated that he hit appellant on the head with a bottle, that Nicassio was holding a knife to Katrina's throat, that Bush produced a knife and then put it away, that he fought with Nicassio and Bush, that Katrina

assisted appellant with his cut in a bathroom, that Bronley took appellant, Nicassio, and Bush to appellant's home around 4:00 a.m., that Bronley and Katrina had an argument, and that Katrina left their house around 5:00 a.m. (52RT 9307-9308.)

On January 6, 1999, defense counsel hired Fred DeFazio, a private investigator, to assist him in this case. A different investigator, Art Hernandez, had been assisting appellant and his prior counsel with the charges arising from his arrest. Defense counsel also retained Hernandez to assist with all the charges. (52RT 9283-9285, 9292.) It took two or three weeks for the defense team to obtain the Grand Jury transcripts because they were sealed. (52RT 9285-9286, 9292.) Defense counsel and DeFazio told Beverlee that they would provide her copies of the Grand Jury transcripts so she could assist them in determining how to investigate the case. (52RT 9287-9288.) In February, Beverlee was given a complete and bound copy of the transcripts. (52RT 9288-9291, 9299.) Her copy did not contain any notes in handwriting. (54RT 9631.)

DeFazio had "zero" cooperation from people in investigating the case. He and the rest of the defense team also had trouble locating addresses and telephone numbers and, pursuant to a court order, had to arrange with the prosecution to have witnesses interviewed. (52RT 9293, 9297-9298.) There was no cooperation from the witnesses whom the defense team asked the prosecution to make available. (52RT 9302-9303.) For example, the prosecution made Billie available for an interview, but she refused to talk to them. (52RT 9294.) Nevertheless, the defense team was provided with 25,000 pages of discovery and had the opportunity to view all the exhibits and evidence at the prosecution's office. (52RT 9304-9305.)

Beverlee testified on appellant's behalf. In November 1992, appellant was 20 years old and was living at home with Beverlee and Wyman. (52RT 9311, 9315; 54RT 9581.) On the early morning hours of the

Saturday after Thanksgiving, Beverlee was awaken by male voices in her house and was relieved that appellant was home. (52RT 9316.) Later, Beverlee was awaken again by the sound of water, looked out a window, and saw a "boy" urinating down into the patio from the bridge that led to appellant's room. (52RT 9318-9319.) She had not heard any yelling or any other commotion in appellant's room that night. (52RT 9319.) She did not hear any voices or other noises on the bridge prior to getting up at 7:00 a.m. (52RT 9320.)

After getting up, Beverlee noticed small blood spots on the carpeting of the stairwell. The spots got lighter on the way up. She poured water on the spots and started to clean them. (52RT 9322-9323.) Wyman got up at 7:30 a.m. and helped Beverlee clean the stairs. Around 8:00 a.m., they stopped. Beverlee was not satisfied with how clean the carpeting was because there were smudges. (52RT 9326.) As Beverlee was making breakfast, she heard appellant coming across the bridge. She went up and asked him, "Who got hurt?" Appellant replied that he did and showed his forehead to Beverlee. She told him that he needed stitches. Appellant told Beverlee, "Don't baby me" and declined to have breakfast because he wanted to "sleep it off." (52RT 9333-9334, 9338.) Beverlee spilled coffee in the dining room and was not able to clean the stain well enough. (52RT 9339.) She decided to call Mashburn to clean the blood and coffee stains, as well as appellant's room that smelled like beer. (52RT 9341-9344.) Beverlee did not see Nicassio or Bush at her home that morning. Around 1:30 p.m., just before leaving her house, Beverlee yelled up at appellant, who had not left the house that morning, from the kitchen and asked him if he wanted a sandwich. He declined. (52RT 9338.)

Beverlee returned home between 5:00 and 5:30 p.m. (52RT 9346.) Appellant was home in his pajamas and a robe. They had dinner together, and Beverlee gave appellant a pill for his hangover. Appellant went to bed

around 7:00 or 8:00 p.m. (52RT 9347.) Later, Katrina's father called asking for appellant. Beverlee told him that appellant had taken medicine for a headache and was in bed. Beverlee told him to call the next day, and he agreed. (52RT 9348.) Beverlee had never seen Katrina and did not know who she was. (52RT 9348.) Shortly thereafter, Katrina's mother called and, in a hysterical way, told Beverlee that Katrina was missing and that she wanted to speak to appellant. Beverlee told appellant to take the phone call. He did. (52RT 9349.) Appellant yelled down the stairwell that Kathryn wanted to talk to Beverlee again. Kathryn was hysterical and saying that appellant was lying. Beverlee told her to call back after Beverlee found out something about the situation. (52RT 9350.)

On Sunday morning, Mashburn came over to clean the carpets. (52RT 9352.) Mashburn cleaned the dining and living rooms, the stairwell, and appellant's room. (52RT 9352-9353.) Later that morning, two detectives stopped by, mentioned they were investigating Katrina's disappearance, and asked to speak to appellant. Beverlee told them that appellant was not home. Since Beverlee was aware that the detectives could search appellant's room as a condition of his parole, she invited them to look through her house. The detectives followed Beverlee up the stairs, looked around, but did not search the place. She never told the detectives that they should have a search warrant. (52RT 9353-9355.)

After his home was searched in November 1997, appellant started living in motels and hotels in different parts of town. Beverlee continued supporting him financially. (52RT 9421.) After appellant's January 1998 arrest, Beverlee hired James Farley to represent appellant. Art Hernandez was Farley's investigator in the case. (52RT 9357.) In 1999, trial counsel was appointed by the court to represent appellant. He told Beverlee that, since he did not know anything about the case, the two of them could look at the Grand Jury transcripts and have an intelligent conversation about the

case. Counsel provided the transcripts to Beverlee for the sole purpose of assisting him investigate the case. (52RT 9362-9366.) Beverlee never took apart the transcripts to copy pages, but Berryhill had a key to Beverlee's home and had access to the transcripts. (52RT 9366-9368, 9370.)

Beverlee denied offering any money to Aja Rail if she did not cooperate with the police. (52RT 9422-9423.) Despite pleading guilty to witness dissuasion, Beverlee testified it was Kristin's idea (as part of the prosecution's plan) to visit the jail numerous times and have appellant and Nicassio brought down together to the visiting room. Beverlee did not think it was a good idea for Kristin to talk to Nicassio. Beverlee also denied keeping the fake letter from Nicassio's attorney, despite the fact that it was found during a search of her home. (52RT 9400-9408.) Beverlee never intended to give Ebright the Grand Jury transcripts. (52RT 9410-9413.) She pled guilty because her attorneys told her to do so. (52RT 9432; 54RT 9598-9599.) She denied conspiring with appellant to dissuade Nicassio or anybody else. (52RT 9548-9549.)

It was stipulated that, on January 26, 2000, Alexander Houston told LAPD Officer John Chulak that John Winkler, Nicassio, and Bush hit and kicked him outside the Roxy bar on Sunset Boulevard in Los Angeles. Bush and Nicassio denied any involvement in the incident to Officer Chulak. Investigators for the defense and the prosecution were unable to locate Houston, who did not respond to subpoenas and whose whereabouts were unknown. (54RT 9612.)

C. Prosecution's Guilt Phase Rebuttal

It was stipulated that, on September 6, 1988, Beverlee was interviewed by Probation Officer Mary Martin regarding appellant's disposition in a juvenile matter and told Martin that appellant had a marijuana problem since he was 11 years old and was involved with skinheads for the past three or four months. (54RT 9634.)

On January 9, 1996, Fitzgerald interviewed Beverlee in the presence of Nestor Valdez. Beverlee mentioned Mashburn had cleaned the carpets on November 29 as part of a previously arranged schedule. Beverlee also mentioned that she had heard noise in appellant's room after he returned from the party with others. She did not see anybody with appellant that morning. Beverlee did not consider appellant's forehead injury "anything serious." Referring to the stains on the carpet, she mentioned it was coffee. Beverlee stated that she knew Bush and Nicassio. (54RT 9653-9663.)

On November 26, 1997, Beverlee testified as follows at the grand jury. Appellant told her that he had suffered the forehead cut from Porcho hitting him with a beer bottle. Beverlee knew about SHD but refused to say appellant was a SHD member. Beverlee never saw anybody with appellant on the morning of November 28, 1992. Beverlee did not recall calling Mashburn on November 28 to clean the carpets, and the cleaning might have been already scheduled for November 29. (54RT 9642-9653.)

It was stipulated that, on May 19, 1998, following her meeting with Beverlee, Kristin told Volpei that Beverlee had mentioned overhearing Nicassio tell another man that the prosecution wanted him to wear a wire and record statements from appellant. Beverlee also mentioned that she had told appellant about Nicassio's statement and that appellant wanted to confront Nicassio about it. As requested by appellant, Beverlee asked Kristin to come with her to the jail and ask for a visit with Nicassio, so that appellant and Nicassio could talk in the visiting area. Beverlee mentioned that her telephones were tapped and that Kristin should not discuss appellant's case over the phone. (54RT 9636-9637.) On September 3, 1998, Kristin and Beverlee met at a coffee shop, and Kristin gave a letter (Peo. Exh. 68) to Beverlee and asked her to keep it. Beverlee mentioned that Katrina had alleged, prior to her disappearance, appellant had done something to her, that appellant had denied it and said Katrina was lying,

and that she would never testify against her son. Beverlee further mentioned that, if Katrina's body were found, they all would be indicted. Beverlee made arrangements for another jail visit, so that appellant could reassure Nicassio everything was going to be okay. (54RT 9637-9639.)

During the ride to the jail on September 11, 1998, Beverlee instructed Kristin on what to tell Nicassio and to convince him to contact appellant's attorney. (22CT 6561-6567; 54RT 9677, 9681; Peo. Exhs. 197, 198.) In the ride back home from the jail, Kristin debriefed Beverlee as to her conversation with Nicassio. Beverlee thanked Kristin for helping and mentioned that appellant was concerned about the discovery of Katrina's body. Beverlee also told Kristin not to get involved in or to be a part of appellant's case. (22CT 6569-6576; 54RT 9682; Peo. Exhs. 199, 200.)

It was stipulated that, on November 19, 1998, Wyman met with Nichols. The conversation was recorded. Wyman told Nichols that she had obtained an attorney and was planning on talking to the prosecutor. When Wyman told her mother about her plan, Beverlee "got really scared" and acknowledged she was "living a lie." (54RT 9634-9635.) On November 23, Wyman was interviewed by the prosecution team in the presence of her attorney. Wyman stated that Beverlee was afraid she had perjured herself at the grand jury. (54RT 9635.) On September 2, 1999, Berryhill told Volpei that Beverlee had mentioned she was probably going to be arrested for perjury following her Grand Jury testimony. (54RT 9635-9636.)

At her trial, on April 26, 2000, Beverlee had an outburst in court after reading a transcript of appellant's December 9, 1998, conversation with Nicassio. Beverlee faced the prosecutor and Volpei and said, "I didn't know. I am sorry." She then turned back and told Kathryn, "I'm sorry. I'm sorry. I didn't know." (54RT 9666-9670.) The following day, Beverlee voluntarily pled guilty. (54RT 9674.) On May 9, appellant sent

Beverlee a letter, in which he expressed his surprise and displeasure about her outburst in court. (54RT 9672-9673; Peo. Exh. 195.)

It was stipulated that, on May 15, 2000, Beverlee spoke to Probation Officer Michelle Hawkins regarding sentencing in her case. Beverlee mentioned that she did not see appellant leave the home between 8:00 a.m. and 1:30 p.m. on November 28, 1992, but he could have left the home. Beverlee denied appellant was a gang member and stated Kristin arranged the jail visits with Nicassio. (54RT 9639-9641.)

D. Prosecution's Penalty Phase Case-in-Chief

1. Victim impact evidence

Katrina's family members, including grandmother Opal, brother Michael, sister Laurie, father Michael, and mother Kathryn, testified about Katrina's life and how they missed her. Michael and Kathryn recalled how Katrina had "turned the corner" in her life after spending six months in Germany, following her tumultuous high school years, and was going to college and working at the time of her murder. Losing Katrina shattered Kathryn's life, as they were spending a lot of time together in the last couple of years of Katrina's life. (59RT 10506-10526.)

2. Appellant's additional crimes

On July 3, 1989, appellant and Jeff Ashby drove to Carla Ellison's house in Ojai. Ashby was romantically interested in Ellison, who was dating her neighbor Scott Davis. There, Davis and Ashby had a verbal confrontation over Ellison. Ellison went to get help from Davis's mother Patricia. After Patricia arrived, appellant approached Davis with a 32-inch club, pushed the club into Davis's face, and told Davis, "You're causing my friend pain, and when he's in pain, I'm in pain, and the only way I can relieve the pain is to beat the crap outta you." Appellant told Davis to get Patricia out of there and to bring Ellison back to Ashby. Appellant

appeared to be "strung out on something" and was acting bizarrely. Davis, Patricia, and Ellison left and called the police. Appellant was arrested for battery and exhibiting a deadly weapon. (59RT 10526-10529.)

Ronald Jenkins was a high school teacher at the California Youth Authority ("CYA") in Paso Robles. On June 8, 1990, Jenkins was teaching an orientation class for new arrivals at the institution. Appellant entered the small classroom, as he was having a racial argument with a Black ward named Murphy. Jenkins told them to be quiet and sit down. After everybody was sitting down, appellant stood up, walked towards Murphy, picked up a chair, and struck the back of Murphy's neck and shoulder blades with the chair. A fight ensued between appellant and Murphy, who was aided by another Black ward. Security arrived and took them away. (59RT 10530-10539.)

On July 3, 1990, Youth Correctional Officer Paul Jones was escorting appellant and other CYA wards to the showers. When appellant came out of his cell, he struck Officer Jones multiple times on the head and body with closed fists. Officer Tim Brown came to Officer Jones's assistance, and the two attempted to wrestle appellant to the ground. Appellant continued swinging his arms and kicking, and struck Officer Jones in the thigh and stomach. Officer Ed Burr also helped subdue appellant. After a brief struggle, the officers were able to handcuff and control appellant. Officers Jones and Brown suffered injuries. Appellant pled guilty to resisting or deterring an executive officer, a felony, and was sentenced to two years in prison. (59RT 10543-10545.)

On October 31, 1992, at 1:00 a.m., Ventura County Sheriff's Deputy Van Davis responded to a "loud party" call in Fillmore. There, he heard a commotion and the sound of punches being landed. He saw appellant and Ethan Boyle getting off Richard Kutback, who was lying on the ground motionless, had bumps and bruises on his head, and was bleeding heavily

from a large and deep laceration in his lip. Appellant, who had blood on his hands and clothing, was arrested and later was convicted of misdemeanor battery. (59RT 10545-10548.)

June Marsh, a Ventura County Sheriff's service technician at the main jail, had a view of each housing area or quad and the visiting areas. On June 26, 1994, Marsh observed appellant and two other inmates, Waterloo and Harris, leave the visiting area and return to their quad. Senior Deputy Steven Cargile ordered the inmates to put their hands behind their backs and to go back without talking. When the quad door opened, appellant turned around and punched Waterloo in the face. Waterloo fell down. Appellant kneeled down and hit Waterloo again in the face. Appellant then moved away. Waterloo noted, "That was a sucker punch, a real P.C. [protective custody] move." Appellant responded, "I got you, though, didn't I?" Deputy Cargile separated the inmates. Waterloo suffered a laceration on his right eyelid. (59RT 10568-10576, 10582-10586.)

On the evening of April 16, 1996, appellant and Porcho were at a nightclub in Santa Barbara. Brett Wittman, a student at U.C.S.B., was also at the nightclub with friends. Wittman was dancing in a "mosh pit" when he was attacked by skinheads. His friends and the nightclub security escorted Wittman to the lobby area. There, appellant approached Wittman, who was drunk, and punched him in the nose. Wittman fell to the floor and was kicked two or three times in the head by Porcho. Appellant and Porcho fled on foot. Wittman suffered a broken nose, had his right eye swollen shut, and received 13 stitches. Appellant pled guilty to misdemeanor battery causing serious bodily injury. (59RT 10548-10549.)

On January 12, 1998, appellant was pulled over while driving a car in the Ventura Avenue area by Ventura Police Officer Eric Jenson. During the search of appellant's person, Officer Jenson found a small knife in a plastic sheath concealed in his front left pants pocket. (59RT 10550.)

On November 8, 1998, an argument ensued between Robert Imes, a White inmate, and William Nolan, a Black inmate. During the argument, appellant intervened and punched Nolan in the face with a closed fist from behind. Paul Folse, another Black inmate, told appellant to stay out of it. After Imes and Nolan started fighting, appellant became angry and slammed Folse against the jail cell door. Deputy Rompal arrived to stop the fight, grabbed appellant's left arm, and attempted to put him in a control hold. When the deputy attempted to handcuff appellant, the latter pulled away and attempted to kick Folse, who was lying on the ground. Deputies King and Rompal eventually took control over appellant. No criminal charges were filed against appellant. (59RT 10587-10588.)

E. Appellant's Penalty Phase Case

Appellant's grandmother, Beverlee Waterhouse, testified about appellant's life. He was born "Carson Justin James Robison" in Ojai. His biological father, Carson Robison, and Beverlee divorced when appellant was about two years old, and Waterhouse was primarily responsible for raising appellant. Beverlee remarried to Dean Merriman ("Dean"), who adopted appellant. Appellant always showed respect and love for Waterhouse, who loved him and did not believe appellant committed the instant murder. (60RT 10615-10619.) Dean refused to cooperate with Fred DeFazio, the defense investigator. For example, he was absent from their appointment and refused to sign a consent form for the use of some documents. (60RT 10621-10623.)

In 1989, Dr. Leonard Diamond, a forensic psychologist, was appointed by the court to evaluate appellant, who was in juvenile hall at the time, and offer some recommendations about his future. (61RT 10896-10897.) Dr. Diamond conducted a "very intensive interview" and tested for intelligence, brain pathology, and mental status. (61RT 10897.) Dr. Diamond found that appellant had no insight whatsoever into his actions or

social judgment and that appellant did not have the intellectual capacity or motivation to restructure his personality. (61RT 10897-10898.) Although there was no evidence of any specific pathology, appellant was in the "dull-normal" range of intellectual capacity. (61RT 10898.) He did not have a psychotic disturbance in thought but had a "characterological disturbance" that interfered with his planning ability, social judgment skills, and ability to function within his environment in an appropriate manner. Appellant operated on impulse level and took no responsibility for his actions. (61RT 10899-10900.) Dr. Diamond believed that appellant needed a structured environment (i.e., CYA), that people required protection from appellant's excessive aggression and impulsive outbursts, and that appellant was headed for "some serious trouble." (61RT 10900-10901.)

In 2000, defense counsel asked Dr. Diamond to reevaluate appellant, did not impose any limitations on the evaluation or the testing, and did not suggest any results. (61RT 10904, 10918.) Dr. Diamond saw appellant for about 12 to 13 hours and utilized numerous tests. (61RT 10905.) Appellant had changed "very little" over 12 years, did not have the ability to malinger, and was still functioning in the dull-normal range of intellectual awareness, unable to deal with his environment and to plan, impulsive, lacking insight into his behavior, resistant to treatment, and exhibiting poor judgment and very poor social skills. There was no evidence of brain pathology, psychosis, or memory problems. Instead, he had a long-standing characterological disorder. (61RT 10906-10917, 10922-10923.) Appellant viewed women as objects and toys, lacked empathy, and was vengeful. (61RT 10920.) Dr. Diamond believed appellant was an extremely dangerous man and was going to run afoul of the law throughout the remainder of his life due to his antisocial personality disorder. (61RT 10909, 10918, 10920. 10922.)

Dr. Patrick Barker was a clinical and forensic psychologist. (60RT 10727-10728.) In 1999, defense counsel asked Dr. Barker to conduct a confidential psychological evaluation of appellant, to provide a general psychological profile, and to advise counsel about any psychological aspects that might be relevant to counsel's work. (60RT 10729.) Counsel did not give Dr. Barker any information about the case, so that Dr. Barker could evaluate appellant in a clean slate. (60RT 10730.)

Dr. Barker obtained biographical information from appellant, his mother, and his adoptive father. (60RT 10732.) According to them, appellant's biological father was severely alcoholic, abused drugs, divorced from Beverlee when appellant was two years old, and only saw appellant a few times after the divorce. Beverlee married Dean when appellant was five years old. Their home life was "badly dysfunctional" due to Dean's drinking and fighting. Dean physically abused Beverlee in appellant's presence. Dean frequently belittled appellant in the presence of others. Appellant had significant school problems, including learning difficulties and behavior and attendance problems. He attended numerous schools and did not finish high school. Appellant started using "speed" when he was 11 years old. He was sexually molested by a female neighbor in his early teens. He had a reputation for being a good fighter since his early teens, and it became a point of pride for him to stand up to bigger kids. In his middle teens, appellant began associating with skinheads and White supremacists. At the age of 15 years, appellant was arrested for vandalism and other crimes and sent to a juvenile facility. He spent most of the following 10 years in custody. Most of his parole violations were drug related. Appellant described himself as seriously addicted to heroin and as an abuser of other drugs and alcohol. (60RT 10732-10736.) Dr. Barker reviewed appellant's school records a week before his testimony and found

corroboration for appellant's drug use and his behavior and attendance problems. (60RT 10737-10739, 10762-10763.)

Dr. Barker gave appellant numerous psychological tests and took steps to make sure appellant was not distorting test results or malingering. Dr. Barker did not believe appellant was trying to "look crazy." (60RT 10739-10742.) Appellant had a full-scale I.Q. of 88, which was low average. But he understood verbal concepts fairly well, had an average ability to deal with abstract concepts but was slow to process information. (60RT 10743, 10746.) His personality profile was similar to those of individuals who were unreliable, self-centered in their contempt for social conventions, deeply resentful, and ruthlessly indifferent to the welfare of other people, and lacked empathy and tolerance. Appellant had poor adjustment to society and alcoholic and addictive tendencies. (60RT 10743.) The test results also matched a profile type that was thought to be among the most difficult of the criminal offenders, who were viewed as distrustful, cold, irresponsible and unstable, had antisocial, aggressive, and hostile attitudes towards others, and engaged in violent crimes against others. (60RT 10743-10744.) In addition, appellant had very poor control over his impulses, and his drug and alcohol abuse made him even more impulsive and unpredictable. (60RT 10744-10745.) His planning and judgment tended to be short-term, selfish, and lacking respect for the rights of others. (60RT 10745-10746.) It was highly probable appellant would reoffend if released from custody. (60RT 10765.) It was also "quite likely" appellant would commit crimes against others in prison. (60RT 10766-10767.) Not surprisingly, Dr. Barker diagnosed appellant with antisocial personality disorder. (60RT 10749.)

Dr. Barker suggested defense counsel to obtain a neuropsychological assessment, in light of appellant's learning difficulties, head injuries, and substance abuse. He recommended Dr. Jordan Witt for the assessment.

(60RT 10747-10748.) Dr. Witt was a clinical psychologist with special training in clinical neuropsychology. (60RT 10624-10625.) Defense counsel asked Dr. Witt to evaluate appellant, placed no limitations on the scope of the evaluation, and did not suggest any results. (60RT 10625-10626, 10650, 10721.) Dr. Witt was not given information about this case. (60RT 10650.) He was not provided with appellant's medical or school records. (60RT 10654-10655.) Nevertheless, Dr. Witt performed a "complete neuropsychological evaluation" and believed the independence of his opinions was partly bolstered by having his tests done without the bias of other information. He did not find evidence of malingering on appellant's part. (60RT 10626-10630, 10670, 10716-10719.) Dr. Witt performed 14 different tests. (60RT 10721.)

According to Dr. Witt, appellant's developmental history was consistent with individuals who were highly hyperactive, impulsive, impatient, and restless, and needed special education. In fact, appellant was placed in special education. Dr. Witt further opined this developmental history was consistent with appellant's brain being "created differently" than the general population. (60RT 10631-10632.) Dr. Witt identified appellant's extensive substance abuse and dependence as another risk factor to his neurological functioning. Appellant was addicted to alcohol, heroin, and methamphetamine. This addiction was "potentially damaging" to the brain, as appellant had experienced multiple blackouts and an extended seizure. (60RT 10632-10634.) The third risk factor involved appellant's multiple head injuries with loss of consciousness. (60RT 10634.)

Dr. Witt found that appellant had several significant or severe problems in how he managed, processed, worked with and reacted to information. First, appellant had a very limited span of concentration. Second, appellant had marked difficulties in his learning and memory. Third, appellant was extremely slow in executing motor and thinking tasks.

(60RT 10635-10637.) As a result of the restrictions in his brain functioning, appellant did not have much capacity to retrieve or recall information and to anticipate and plan for the future and, instead, existed in a "living present." Appellant was at the whim of his impulses, emotions, and desires to base his actions and judgments. (60RT 10638.) Dr. Witt believed appellant had brain damage based on the test results and the information provided by appellant. (60RT 10641-10642, 10708.) But appellant was not grossly or across the board retarded. (60RT 10639.) In addition, appellant was not insane, as he had the ability to distinguish right from wrong. (60RT 10640.) Dr. Witt diagnosed appellant with antisocial personality disorder, as well as attention deficit hyperactivity disorder, cognitive disorder, learning disability, and polysubstance dependence. (60RT 10703-10707, 10720.)

Dr. Joseph Wu was a psychiatrist and an associate professor of the medical school at U.C. Irvine and specialized in brain imaging, including the use of PET scans to obtain a picture of brain function. (61RT 10774-10781.) Providing expert witness testimony for criminal defendants was part of Dr. Wu's practice. (61RT 10835-10836.) According to Dr. Wu, the advent of functional brain imaging had given brain doctors the ability to identify what parts of the brain are involved with certain functions. For example, the frontal lobe seems to be involved with judgment, planning, and insight. The occipital lobe seems to be involved with visual information processing. The temporal lobe involves emotions and listening. (60RT 10781-10782.)

In August 2000, at defense counsel's request, Dr. Wu arranged for a PET scan of appellant's brain to determine brain injury. Another doctor performed an EEG to measure electrical activity in appellant's brain. (61RT 10783, 10786, 10817, 10832.) The EEG results showed an abnormal set of activities in the frontal and temporal lobes and were

consistent with a possible disorder called complex partial seizures, which affected certain kinds of emotions and movements. (61RT 10786-10787.) Appellant's PET scan results were compared to the average of a 56-person control group. (61RT 10793-10795.) The results showed that appellant had abnormally high activity in the occipital lobe and that his brain was "hypofrontal" because his frontal lobe should have been more active in general. His brain scan was consistent with some type of brain abnormality, including possible brain injury or disease. (61RT 10795-10798, 10805-10809, 10890-10893.) The abnormality finding was based on a "combination of both visual pattern recognition and statistical assessment." (61RT 10868.) Dr. Wu added that people with frontal lobe injuries were more likely to become aggressive than people who did not have some type of hypofrontal pattern.[24] (61RT 10809-10810.) Dr. Wu had no opinion as to when the possible brain injury occurred. (61RT 10880.)

Appellant testified in his own behalf, against the advice of his counsel. (64RT 11405.) In a statement read to the jury, appellant first offered his "deepest condolences" to Katrina's family and friends. He then proceeded to blame his attorneys for not investigating and presenting a defense that he was innocent, despite giving them names of people. He claimed to be innocent of the crimes, never told his attorneys otherwise, and was shocked by his counsel's closing argument. He also complained about the trial court not appointing a new attorney and not giving him a new trial. He further claimed the tape recordings were incomplete. (64RT

[24] Dr. Wu clarified that a diagnosis could not be made from a PET scan alone and that a PET scan is more of a "corroborative measure." (61RT 10874.)

11406-11411.) Appellant refused to answer the prosecutor's questions. (64RT 11414-11417.)

F. Prosecution's Penalty Phase Rebuttal

Dr. Ari Kalechstein, a neuropsychologist and an assistant professor at the psychiatry department of the UCLA School of Medicine (62RT 10972-10973), was familiar with the usual procedure for evaluating criminal defendants. (62RT 10974.) First, Dr. Kalechstein would talk to the attorney to understand the question needed to be answered. He then would ask for educational and treatment records pertinent to the question, i.e., collateral sources of information, to corroborate the defendant's self-report and to determine whether the defendant was malingering. (62RT 10975-10977.) Dr. Kalechstein used standardized tests to conduct neuropsychological evaluations and then compared the test results with "normative data." (62RT 10978-10981.) It would be significant to Dr. Kalechstein that a person had been in solitary confinement for many months prior to his interview, that the person had significant health issues, or that the person was taking medications. (62RT 11009-11011.)

The prosecutor provided Dr. Kalechstein with his trial brief, the evaluations and raw data collected by Drs. Witt, Barker, and Diamond, and appellant's medical and school records. The prosecutor then asked Dr. Kalechstein to double-check Dr. Witt's work. (62RT 10981-10982.) Dr. Kalechstein first opined Dr. Witt did not take all the necessary steps to discount the possibility of appellant malingering, such as reviewing other sources of information and performing malingering tests. (62RT 10982-10984.) Dr. Kalechstein was concerned about appellant's veracity, in light of some inconsistent answers in the MMPI tests provided by Drs. Witt and Barker, some patently false answers in the tests, and other inconsistencies between his self-report and other sources of information. (62RT 10985-10988.) Dr. Kalechstein also opined Dr. Witt incorrectly scored or

misinterpreted some of the tests, such as the Stroop, Control Word, and Wisconsin Card Sort tests in which appellant actually fell within the average, low average, and above average ranges, respectively. (62RT 10988-11009.) Dr. Kalechstein further opined Dr. Witt did not have sufficient information to conclude appellant had brain injury. (62RT 11012-11014.)

Dr. Helen Mayberg, a neurologist and a professor at the University of Toronto in Canada, had done extensive research in PET scanning and the relationship between the brain and a person's behavior and had qualified as an expert on brain PET scanning or imaging. (63RT 11295-11302.) Dr. Mayberg explained how brain PET scans worked, how they should be conducted, how to assemble a control group, and how drug use affected a PET scan. (63RT 11302-11313.) Dr. Mayberg clarified a diagnosis could not be made on the basis of a PET, which showed how the brain looked and how it was working but not the reasons for any medical problem. Additional information was necessary to make a diagnosis. (63RT 11324-11325.) The purpose of a PET scan was to provide useful information to the referring doctor. (63RT 11331.) In contrast, a PET scan is not helpful to rule out "brain abnormality" because of the many variables affecting the images in the scan. (63RT 11332.)

Dr. Mayberg obtained the prosecutor's trial brief, appellant's PET scan and jail medical records, reports from Drs. Barker, Witt, Diamond and Wu, two letters written by appellant, Nicassio's statement, and Dr. Wu's trial testimony. (63RT 11314-11315.) Dr. Mayberg noticed deficiencies in Dr. Wu's control group (i.e., some of the brains did not look normal, young college students comprised a large percentage of the control group) and the comparison between brains in the control group and appellant's brain (i.e., differences in brain sizes and shapes, the image of appellant's brain was scalped really tight in the front). (63RT 11316-11331.) She stated

appellant's use of major tranquilizers and prednisone could have suppressed brain metabolism in the frontal lobe. Dr. Wu's drug screen did not cover some of the drugs prescribed to appellant. (63RT 11335-11338.) Dr. Mayberg pointed out that there was no diagnosis in appellant's PET scan referral and that Dr. Wu's reason for conducting a PET scan of appellant's brain -- ruling out brain abnormality – was not a valid reason. (63RT 11332-11333.) Dr. Mayberg noted, "You don't shotgun approach all the tests and then figure out if there's something there." (63RT 11335.)

Assuming Dr. Wu's control group contained normal brains and looking at Dr. Wu's statistics, Dr. Mayberg found anatomical differences between appellant's brain and the control group that explained why his brain was more active in some areas. For example, some of the more active spots in appellant's brain were in areas still in his cortex, while those areas were at a slightly different level in the control group. A very small area of lower activity in the frontal lobe could be explained by an "unevenness, infolding of the brain right at that spot." (63RT 11338-11342.) Dr. Mayberg explained that spots of the brain did not function independently from its neighbors, so that abnormalities in particular spots were not a matter of medical concern. (63RT 11342-11343.) Dr. Mayberg did not see any pattern of variations in appellant's brain that matched to any known disease or problem or that could be defined as brain abnormality. (63RT 11343-11345.) Dr. Mayberg also noticed problems with Dr. Wu's videotape displaying 3-D images of appellant's brain and another brain. Aside from using different color scales than the scan images, there were inconsistencies between the 3-D and 2-D images of the same brain areas, and the scale was mislabeled in a way that gave the appearance of a problem that was not there. (63RT 11349-11357; Def. Exh. V.) Just based on her visual inspection of appellant's brain, Dr. Mayberg saw nothing odd

or wrong with its metabolism. (63RT 11358-11359.) But she was not testifying appellant in fact had no brain disease. (63RT 11370-11371.)

ARGUMENT

I. THERE WAS NO PREJUDICIAL JURY MISCONDUCT

Appellant contends he was denied his federal constitutional rights and was not tried by 12 impartial jurors, as a result of prejudicial misconduct by Juror 1 in two separate instances. First, Juror 1 allegedly withheld material information in her questionnaire and voir dire about her relationship with Ventura County Sheriff's Senior Deputy Kathleen Baker. Second, Juror 1 allegedly decided the case (guilt and penalty) prior to deliberations in the guilt phase. In support of this contention, appellant asserts that Juror 1 told Deputy Baker, who was not a disinterested person, that the jury wanted to "fry" appellant and that appellant would be "put away." Based on Juror 1's alleged misconduct and contradictory statements about the misconduct, appellant claims the juror was dishonest and actually biased against him. According to appellant, Juror 1's bias was a structural error that is not subject to harmless error analysis. In the alternative, he argues the juror's misconduct, lies, and "utter disregard of the court's admonitions" established actual prejudice. Appellant adds that, even if the alleged misconduct did not require reversal of the guilt phase verdicts and even though Juror 1 was dismissed prior to the penalty phase deliberations, Juror 1's mere presence during the penalty phase was constitutionally unacceptable. He also speculates some jurors had discussed the penalty prior to deliberations. (AOB 94-120.) As found by the trial court and as explained below, the appellate record refutes appellant's claims of actual bias and prejudicial misconduct by Juror 1.

A. Factual Background

In her written questionnaire, Juror 1 pointed out that she had relatives or close friends in law enforcement and listed a guard at the Tehachapi prison. (10CT 2922, QQ 32-32a.) Juror 1 considered herself a fair person and would consider all the facts before reaching a conclusion. (10CT 2933.) During her death penalty voir dire, Juror 1 stated she had not left anything out from her questionnaire. (29RT 5094.) She also stated that she had not prejudged the case, that she could be "very fair," and that she would be fair as to the penalty decision. (29RT 5095, 5098-5099.) There were no questions about her knowing somebody in law enforcement. (29RT 5094-5102.) During jury selection, Juror 1 was not individually questioned about anything, aside from whether she had changed her views about the death penalty. (34RT 6035-6036.)

The guilt phase testimony ended on February 2, 2001. (54RT 9689.) Jury deliberations started on February 8 and ended on February 13. (SCT 134; 57RT 10230; 58RT 10312.) The guilty verdict form for the murder count was signed on February 13, while the other guilty verdicts were signed on February 8 or 9. (SCT 87-88, 90, 92, 94, 96, 104; 63RT 11175.)

On the morning of March 5, during the penalty phase of trial, the trial court informed counsel that Juror 1 had called the court and indicated that she could not make it because she needed to attend to her daughter, who had serious surgery. (62RT 10935.) The court also mentioned to counsel that a deputy assigned to the courtroom had just reported that another deputy (Deputy Baker) was acquainted with a juror, had lunch with the juror at an undisclosed date, and had discussed the case with the juror at the lunch. The court proposed bringing the jurors in and asking them whether they knew Deputy Baker. Counsel had no objection. (62RT 10935-10936.) When questioned, none of the jurors (with the exception of Juror 1 who was

not present) knew Deputy Baker. The court reminded the jury not to discuss the case with anybody. (62RT 10936-10938.)

At a subsequent hearing, Ventura County Sheriff's Deputy David Kadosono was examined about his encounter with Deputy Baker the previous day at a store. Deputy Baker told him that she had lunch with a juror, who had mentioned she was on a murder trial for the past two months, and that "they were gonna fry him." (62RT 10942.) The court and the prosecutor agreed to call Juror 1 and talk to her about both issues. (62RT 10943.)

During the phone call, Juror 1 first explained that her adult daughter needed to recuperate from her March 1surgery to remove a tumor from the pituitary gland and that she could not be at trial that week. (62RT 10944-10946.) Juror 1 then acknowledged Deputy Baker was her daughter's sister-in-law but denied having lunch or any other meetings with Deputy Baker. Instead, Juror 1 talked on the telephone with Deputy Baker about meeting for lunch on two occasions, and they ultimately agreed it was better to meet after the trial was over. (62RT 10947-10950.)

Juror 1 thought the first telephone conversation had occurred about two or three weeks before the second call. Juror 1 decided to call Deputy Baker, after Juror 1's daughter had told her that Deputy Baker worked at the courthouse. In the first call, Juror 1 mentioned she was a juror in the courthouse, suggested they could have lunch, and mostly talked about Juror 1's daughter and Deputy Baker's brother. During this call, Deputy Baker ascertained Juror 1 was serving in appellant's case. But Juror 1 did not recall saying anything else about the case. (62RT 10956-10959, 10964-10965.) Juror 1 thought her second conversation with Deputy Baker occurred on the day of the guilt phase verdicts (February 13), during a break after jury deliberations had concluded and unanimous votes had been taken on all counts but before the verdicts were announced. (62RT 10949,

10951, 10955, 10959.) Juror 1 denied telling Deputy Baker, "We're gonna fry him," or saying anything else about the verdicts. (62RT 10949, 10951, 10959-10960.) After her telephone conversation with Deputy Baker, Juror 1 might have mentioned to one or more jurors that she had spoken to Deputy Baker about having lunch. (62RT 10953-10954.) Juror 1 stated that she had abided by the court's instructions not to discuss the case outside the jury room. (62RT 10960.)

Defense counsel suggested that Juror 1 be removed from trial due to her unavailability, that an alternate be seated, that the trial continue, and that a hearing on the possible misconduct be held later that afternoon. The prosecutor agreed Juror 1 should be excused. The trial court concurred. (62RT 10961-10963.) The court told Juror 1 that she was excused because of her daughter's situation and that she could be contacted in the future about the issue involving her conversation with Deputy Baker. The court admonished Juror 1 not to discuss the case with anyone. Juror 1 agreed to follow the admonition. (62RT 10965-10966.) Alternate Juror 2 was chosen to substitute Juror 1 in the panel. (62RT 10970.)

At an afternoon hearing on March 5, 2001, Deputy Baker testified as follows. (62RT 11080-11081.) She worked in the building next to the courthouse. Juror 1's daughter was married to one of Deputy Baker's brothers. In the last three months, Deputy Baker's only contact with Juror 1 was a phone call. (62RT 11081-11082.) About three or four weeks ago, Juror 1 left a message on Deputy Baker's answering machine, mentioned she was going to be at the Ventura courthouse for jury duty, and wanted to meet for lunch. (62RT 11082, 11087.) A few days later, Deputy Baker called Juror 1's home, had a conversation with Juror 1 about family matters, and asked Juror 1 whether she was picked for a jury. Juror 1 mentioned she had been on a jury for the last two months. Deputy Baker asked what case, and Juror 1 said, "The Merriman trial." Deputy Baker

asked how she liked being a juror, and Juror 1 mentioned that she liked the experience and that everybody involved was well prepared. Juror 1 might have blurted out, "we all want to fry him." (62RT 11083, 11087-11089, 11094-11095.) Deputy Baker believed the above conversation occurred on a Sunday (February 11). (62RT 11093, 11096-11097.)

Deputy Baker was unsure whether Juror 1 actually made the "fry" comment or whether she just interpreted Juror 1's comments that way. (62RT 11090-11091.) Deputy Baker was certain Juror 1 did not discuss her jury deliberations with her or her thoughts about the case. (62RT 11092.) At the end of their phone conversation, Deputy Baker agreed to call Juror 1 again to set up a date for lunch. Deputy Baker talked to her supervisor, who said she could not have lunch with a juror. When Juror 1 called her back, Deputy Baker stated that she could not have lunch until after the trial was over. Deputy Baker was not sure of the exact date of the above phone calls. (62RT 11084-11086, 11097-11098.) There was nothing spoken about the trial in the last phone call. (62RT 11098.) Deputy Baker did not know anything about appellant's case and was not following it on the news. (62RT 11085-11086.) Nevertheless, Deputy Baker did not believe Juror 1 had done anything improper and, consequently, did not contact the court about her conversation with Juror 1. (62RT 11092.)

After Deputy Baker's testimony, the parties agreed that Juror 1 should come in for a hearing as soon as possible. (62RT 11099.) The trial court concurred there was a need for a more complete record on the issue. (62RT 11100.) Defense counsel stated that it might be premature to move for a mistrial without all the necessary information. (62RT 11101.) Both parties also mentioned the possibility that other jurors might need to be questioned on the issue. (62RT 11101-11102.) Juror 1 was contacted and stated that the soonest she could be in court was March 6 at 6:00 p.m. The court made a court appointment with her for that time. (62RT 11102-11103.)

At a March 6, 2001 hearing, Ventura County Sheriff's Sergeant Richard Barber and Captain Gordon Hansen testified as follows. (63RT 11150-11151, 11159.) In the presence of Sergeant Barber and Captain Hansen, Deputy Baker brought up that she was going to have lunch with a juror from appellant's case. Sergeant Barber told Deputy Baker not to have lunch with the juror, and Deputy Baker mentioned the juror had said the jurors were going, or were looking forward, to "fry him." (63RT 11151, 11156, 11160, 11163.) Deputy Baker did not mention when she had spoken to the juror. (63RT 11165.) Captain Hansen admonished Deputy Baker not to say another word about talking to the juror. (63RT 11161-11162.) This conversation took place before February 16. It could have occurred on February 15. However, Sergeant Barber was not sure of the pertinent dates. (63RT 11152-11153.) Captain Hansen thought the conversation occurred on the late morning of February 13, because he recalled reading the next morning that appellant had been convicted. (63RT 11161, 11163-11164.)

Ventura County Sheriff's Deputy Michael Baker ("Michael") also testified at the March 6 hearing. He was married to Deputy Baker and considered Juror 1 an acquaintance of the family. (63RT 11166.) Sometime in February, Juror 1 called Michael's residence twice, reminded Michael of who she was, and asked to speak to Deputy Baker. Since Deputy Baker was not home, he took the message. Later, Deputy Baker mentioned to Michael that she had spoken on the telephone with Juror 1 and that Juror 1 wanted to have lunch with her. At a subsequent conversation, Deputy Baker noted that Juror 1 was in the courthouse for jury duty and that her supervisor had told her not to meet Juror 1 for lunch. (63RT 11167, 11169, 11173.) Juror 1 had also left a message in their answering machine, asking Deputy Baker to call her back. (63RT 11169-

11170.) Deputy Baker never told Michael that Juror 1 had made any statement about going to "fry" appellant. (63RT 11167-11168, 11174.)

Deputy Kadosono was the next witness at the March 6 hearing. On March 4, he had a conversation with Deputy Baker at a bookstore. Deputy Kadosono mentioned that he was assigned to appellant's trial. Deputy Baker then stated that she was planning to have lunch with a friend of hers who had ended being a juror on appellant's trial and that the juror had stated, "they were looking forward to frying him." (63RT 11178-11179.)

Later on March 6, Juror 1 was called as a witness at the hearing. Since her phone call with the court, Juror 1 had been trying to recall the pertinent events and had taken notes about them. (63RT 11196.) At the time of the court's call, she had not given any thought to her conversation with Deputy Baker. One of Juror 1's daughters had suggested to Juror 1 that she call Deputy Baker about having lunch together. (63RT 11202.) When Juror 1 first called Deputy Baker, Michael answered the phone and agreed to have Deputy Baker call Juror 1 back. Deputy Baker failed to call back right away. Eventually, she called back. (63RT 11197.) In this call, they discussed family matters, Deputy Baker's job in the property room, and made tentative plans to have lunch together. (63RT 11199.)

Juror 1 also testified that, when appellant's case was mentioned in their call, Deputy Baker said, "I hope you put him away," and Juror 1 replied, "He will be put away." (63RT 11200.) Juror 1 did not know when this conversation took place. (63RT 11208, 11213-11217.) She speculated that it could have been before jury deliberations took place but it could also have been on February 11. (63RT 11203-11207, 11210.) She did not share this brief exchange about appellant's case with anybody. (63RT 11205, 11209.) Juror 1 did not recall saying, "We're gonna fry him." (63RT 11212-11213, 11215.) It was not her typical way of talking. (63RT 11216.) On February 13, during the break between the deliberations and

the announcement of the verdicts, Juror 1 called Deputy Baker to tell her that she was free for lunch. Deputy Baker said they had better not have lunch. (63RT 11197-11198.) Juror 1 "absolutely" denied mentioning anything about appellant's case to Deputy Baker on February 13. (63RT 11199.) Juror 1 did not recall any other phone calls. (63RT 11198.)

Juror 1 made the statement about putting appellant away because she thought the evidence was "so overwhelming." (63RT 11204.) She was only mentioning her own opinion and could not speak for other jurors. (63RT 11219.) Although Juror 1 believed there was overwhelming evidence of appellant's guilt before jury deliberations, she clarified that she was open-minded during the deliberations, that she listened to everything the other jurors had to say, and that the jury deliberated "very conscientiously" and corroborated all the evidence. (63RT 11211-11212, 11219, 11226-11227.) Juror 1 further clarified that her vote was based on the jury's evaluation of the evidence as to each count and that she did not vote until then. (63RT 11226-11227.) When questioned in more detail about her state of mind at the time of her conversation with Deputy Baker, Juror 1 again noted that the evidence was overwhelming but that she had not actually made up her mind at that point in time. Instead, she evaluated the evidence as to each count with other jurors during deliberations and before voting on each count. (63RT 11233.) The issue of penalty was not discussed during the guilt phase deliberations or at any other time. (63RT 11219-11220.) While some juror might have made a comment about penalty outside the deliberations, Juror 1 did not remember any specific comment. (63RT 11225.) At the end of the hearing, the court admonished Juror 1 not to discuss the case or the special proceedings with anybody. (63RT 11237.)

The following day, the trial court questioned all the jurors and the alternate juror about any possible comments among themselves or others

concerning the issue of penalty. None of the jurors was aware of any discussions involving jurors about what the penalty should be or was likely to be in this case. Except for Juror 4, none of the jurors had participated in or overheard any discussion about penalty with anybody else, including other jurors and non-jurors. (63RT 11249-11262.) Juror 4 stated that, the past Saturday, she had mentioned to an acquaintance that she was a juror in a penalty phase, that the jury had a choice between two penalties, and that it was interesting to listen to the psychologists' testimony. Juror 4 pointed out that she was open-minded on the issue of penalty and that she planned to participate fully in the deliberations and follow the court's instructions. (63RT 11253-11255.)

On March 7, defense counsel filed a motion for mistrial. (63RT 11248; 8CT 2172-2179.) Counsel orally argued that Juror 1 had prejudged appellant's guilt and penalty prior to jury deliberations (as demonstrated by the "fry" comment), that Deputy Baker was credible, that the subject conversation took place before February 13, that Juror 1's statements about having an open-mind were self-serving, that Juror 1 committed misconduct, that appellant was denied his right to 12 impartial jurors as to the guilt phase verdicts, that Juror 1 concealed Deputy Baker in the questionnaire, and that Juror 1 might have been peremptorily challenged if she had mentioned Deputy Baker. (63RT 11263-11271, 11284-11288.)

The prosecutor argued that Deputy Baker believed the subject conversation took place on February 11, that Juror 1 was not sure when the conversation took place, that Juror 1's testimony about the substance of her conversation with Deputy Baker was credible, that Deputy Baker's version about Juror 1 blurting out the "fry" comment made no sense, that Deputy Baker acknowledged the "fry" comment could have been her own interpretation of Juror 1's remark, that Deputy Baker could be trying to blame Juror 1 for her own lack of judgment in the matter, that the jurors

had not discussed the penalty ahead of time, that Juror 1's statement to Deputy Baker had no effect on the jury, that Juror 1's opinion about appellant's guilt was based on the evidence presented in court, that Juror 1 and other jurors kept an open mind during deliberations and evaluated each count separately, that it was pathetic to argue Juror 1 perjured herself in the questionnaire, that Juror 1's excusal took care of any claim that she could not be fair as to punishment, that Juror 1 was allowed to have an opinion about appellant's guilt on February 11, and that there was no prejudice from the alleged misconduct. (63RT 11271-11284, 11288-11291.) The prosecutor also filed a written opposition. (63RT 11281; 8CT 2158-2171.)

The trial court denied the mistrial or new trial motion and made the following factual findings. The guilt phase deliberations began late on February 8, a Thursday, and continued for roughly a full day on February 9. The jury reached verdicts on all the counts, except for the murder count, on February 9, based on the dates on the verdict forms. There was a three-day recess, since Monday (February 12) was a court holiday. During this recess, Juror 1 spoke with Deputy Baker, with whom she had infrequent contact. Juror 1 wanted to have lunch. Deputy Baker became aware Juror 1 was serving in appellant's trial, a case she did not know much about. Deputy Baker said something to the effect she hoped the jury put appellant away. Juror 1 responded with a statement to the effect that appellant would be put away one way or another. Juror 1 was aware of the two possible penalties, and it was highly likely she indicated her expectation that the death penalty might be imposed, i.e., the "fry" comment. Juror 1 made the off-the-cuff comment in response to a provocative statement by Deputy Baker and did not discuss the substance of appellant's case.[25] Juror 1's

[25] The trial court believed the "fry" comment was made during the conversation but could not determine who made it. (63RT 11387-11388.)

prediction was not the result of improper discussion of penalty by jurors in or out of deliberations. There was no indication of any other impropriety by Juror 1 in relation to her views of the case aside from her conversation with Deputy Baker. On February 13, the jury returned at 9:00 a.m. and, at 10:00 a.m., informed the bailiff that it had reached verdicts on all counts. On that day, Juror 1 remained open-minded and able to vote on count 1 and its special allegations. Between 10:00 a.m. and 1:30 p.m., Juror 1 and Deputy Baker spoke on the telephone, and Deputy Baker declined the lunch invitation on the advice of her supervisors. The verdicts were read at 1:30 p.m. Based on the brevity of deliberations, the jury found overwhelming evidence as to the murder count. Based on the bailiff's notes, the jury deliberated a total of 8 hours and 35 minutes, with only one hour of deliberations on February 13. (63RT 11375-11379.)

The trial court determined there were four possible jury misconduct issues herein. First, the court found no misconduct with respect to Juror 1's failure to mention her relationship with Deputy Baker in the questionnaire. The court was convinced beyond a reasonable doubt that the failure was inadvertent and understandable in light of their distant relationship and infrequent contacts. It was through discussion with other family members that Juror 1 thought about having lunch with Deputy Baker. The omission said nothing about Juror 1's attitude toward this case. Certainly, there was no hint of bias or desire to get on the jury by not mentioning the deputy. (63RT 11379-11380.)

Second, the court found there was misconduct in Deputy Baker raising the issue about the case and the penalty in the conversation. Third, the court also found Juror 1 committed misconduct in responding to Deputy Baker's question. (63RT 11380-11381.) Fourth, the issue as to whether Juror 1 prejudged the penalty became moot by her discharge from the jury due to her family emergency. (63RT 11381-11382.) The court found Juror

1 did not prejudge appellant's guilt. At the time of her comment, the jury was already in deliberations and judging the case. There was no indication Juror 1 was reacting to any sort of bias or prejudice in forming her opinions, as opposed to reacting to the evidence presented in the case. (63RT 11382, 11384.) The court noted it was human nature to form preliminary opinions and general impressions of every witness as the trial went on. The court further noted that Juror 1 was put on the spot by Deputy Baker's unfortunate question and gave an answer "best interpreted as in a hypothetical sense." (63RT 11383.)

Finally, the trial court concluded that any presumption of prejudice arising from the conversation between Juror 1 and Deputy Baker, which the court deemed misconduct, had been rebutted. In other words, it was not reasonably likely the guilt phase verdicts were prejudiced by the conversation. The court found that the conversation was brief and was not prompted by the juror or anything the juror had been anxious to discuss, that nothing about the conversation was shared with other jurors, that the conversation was not prominent in Juror 1's mind, that the conversation occurred during deliberations (when it was proper for jurors to form opinions), that the verdicts were based on the evidence and not on any preexisting bias of any sort, and that other jurors were not involved or subjected to any misconduct. (63RT 11384-11385.) The court further found the misconduct did not affect Juror 1's votes. Here, the court credited Juror 1's testimony that she remained open-minded during deliberations and pointed out that the evidence of guilt was overwhelming and that the brevity of deliberations suggested there was jury unanimity as to the strength of the evidence. (63RT 11385-11386.) Even if the conversation occurred prior to deliberations and even if Juror 1's testimony about being open-minded were disregarded, the court would still find no prejudicial misconduct. (63RT 11386.)

B. Appellant Was Not Prejudiced by Jury Misconduct

A juror may commit misconduct by consciously receiving outside information or by discussing the case with nonjurors. (*People v. Tafoya* (2007) 42 Cal.4th 147, 192.) This misconduct raises a presumption of prejudice that may be rebutted by a showing that no prejudice actually occurred or if a review of the entire record shows no substantial likelihood of juror bias. Ultimately, a verdict may be reversed only if the reviewing court finds: (1) the extraneous material is so prejudicial that it is inherently and substantially likely to have influenced the juror's verdict (so that it was based on an improper outside influence rather than the evidence and the instructions) or (2) it is substantially likely under the totality of the circumstances that the juror was actually biased against the defendant. On appeal, the reviewing court makes an independent determination on the issue of prejudice but must accept the trial court's credibility determinations and factual findings when they are supported by substantial evidence. (*People v. Bennett* (2009) 45 Cal.4th 577, 626-627; *Tafoya*, *supra*, at p. 192; *People v. Williams* (2006) 40 Cal.4th 287, 333-334; accord *Smith v. Phillips* (1982) 455 U.S. 209, 215 ["the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias"].)

As this Court has confirmed, the decision to set aside a unanimous jury verdict may not be taken lightly and must be supported by a finding of a *substantial* likelihood of bias. (*In re Carpenter* (1995) 9 Cal.4th 634, 654.) The *Carpenter* Court further noted,

> the criminal justice system must not be rendered impotent in quest of an ever-elusive perfection. The system is fundamentally human, which is both a strength and a weakness. [Citation omitted]. Jurors are not automatons. They are imbued with human frailties as well as virtues. If the system is to function at all, we must tolerate a certain amount of imperfection

> short of actual bias. To demand theoretical perfection from every juror during the course of a trial is unrealistic.

(*Id.* at pp. 654-655; *People v. Danks* (2004) 32 Cal.4th 269, 304.) The high court agrees that it is not enough that the juror was "placed in a potentially compromising situation," for then "few trials would be constitutionally acceptable." (*Smith, supra*, 455 U.S. at p. 217.) Ultimately, a defendant is entitled to a juror who is "capable and willing to decide the case solely on the evidence" presented at trial. (*Ibid.*)

In defiance of the well-established deference owed to the trial court's credibility determinations, appellant repeatedly asks this Court to second-guess the lower court's finding that Juror 1 was credible and to reach its own independent determination that Juror 1 was dishonest and actually biased due to inconsistencies in her statements. (AOB 110-111.) Having listened to the live testimony, the trial court was in the best position to evaluate conflicting testimony and to determine Juror 1 was a credible witness. (See, e.g., *People v. Miranda* (1987) 44 Cal.4th 57, 117; see also *People v. Carasi* (2008) 44 Cal.4th 1263, 1290-1291 ["where assessment of the juror's state of mind depends upon the resolution of any conflicting or ambiguous statements and upon a credibility determination, we defer to the findings of the trial court"]; *People v. Harris* (2008) 43 Cal.4th 1269, 1304 [courts entitled to rely on a juror's repeated and unequivocal statement about his ability to deliberate impartially]; accord *United States v. Armstrong* (9th Cir. 1990) 909 F.2d 1238, 1244.) Appellant also ignores that any inconsistencies between Juror 1's statements during the initial phone call with the court and her testimony at the evidentiary hearing could be easily explained by the fact that Juror 1 had the opportunity to recall the pertinent events following the initial phone call, which mostly dealt with a family medical emergency. (63RT 11196, 11202.) Needless to say, Juror 1's testimony at the evidentiary hearing was very candid and believable

and, for the most part, was consistent with Deputy Baker's testimony. (63RT 11195-11233.) Moreover, as explained below, all of the trial court's factual findings and legal conclusions are well supported by the record.

First, the trial court properly found Juror 1 did not commit misconduct in failing to list Deputy Baker in the written questionnaire when asked about relatives and friends in law enforcement. The court was convinced beyond a reasonable doubt that the omission was inadvertent and understandable in light of the distant relationship between Juror 1 and Deputy Baker. (63RT 11379-11380.) The court correctly noted that Deputy Baker was the sister of Juror 1's son-in-law, that there was infrequent contact between Deputy Baker and Juror 1, and that Juror 1 had thought about Deputy Baker after talking with other family members. (63RT 11376, 11379-11380.) The court aptly found that Juror 1's omission said nothing about her attitude toward the case and did not reflect any bias against appellant or a desire to get on the jury by not mentioning her relationship with Deputy Baker. (63RT 11380.)

In support of the court's findings, the record shows Juror 1 was not intentionally attempting to conceal her connections with law enforcement, as she revealed she had friends or family in law enforcement and specifically listed a prison guard in the questionnaire. (10CT 2922, QQ 32-32a.) However, Juror 1 was never asked during voir dire whether she knew anybody in law enforcement. (29RT 5094-5102.) When asked by the trial court on March 5, Juror 1 readily acknowledged that Deputy Baker was her daughter's sister-in-law and that she had spoken on the phone with her about having lunch. (62RT 10947-10948.) Further, it was only after Juror 1's selection to the jury that her daughter mentioned Deputy Baker worked at the courthouse. (62RT 10957; 63RT 11202.) Deputy Baker testified that she had contact with Juror 1 about once a year and that Juror 1 used to live in Northern California. (62RT 11081.) Deputy Baker's husband testified

that, at the time of the first call, Juror 1 had to remind him who she was and that they only had a few contacts with Juror 1 in the past. (63RT 11167, 11169.) The distant or tenuous nature of the relationship between Juror 1 and Deputy Baker is further demonstrated by the substance of the February 11 telephone call, during which Deputy Baker told Juror 1 about her job in the property room and about "her boys getting bigger." (63RT 11199.)

As reasonably found by the trial court and as shown by the above record, the infrequent contacts and the distant relationship between Juror 1 and Deputy Baker explained why Juror 1 inadvertently failed to mention Deputy Baker in the questionnaire. Juror 1 simply forgot about Deputy Baker's existence until she had a conversation with her daughter sometime after Juror 1 was already serving as a juror, and well after she had completed the questionnaire. She did not conceal her contacts with Deputy Baker when first questioned by the court. No evidence was presented below that Juror 1 was biased against appellant simply because of her relationship with Deputy Baker (who had no personal connection to appellant's case) and that she consciously or purposely omitted Deputy Baker's name to conceal this bias. Accordingly, there was no misconduct or evidence of actual bias in this context. (See, e.g., *In re Hamilton* (1999) 20 Cal.4th 273, 299-301 ["an honest mistake on voir dire cannot disturb a judgment in the absence of proof that the juror's wrong or incomplete answer hid the juror's actual bias"]; cf. *In re Hitchings* (1993) 6 Cal.4th 97, 115-116 [juror intentionally concealed knowledge about petitioner's case, which was a material issue for the defense during voir dire].)

Second, it was improper for Juror 1 and Deputy Baker to talk about appellant's case in their telephone conversation. Nevertheless, as found by the trial court (63RT 11384-11386), appellant was not prejudiced by their brief exchange. Here, the court made the following factual findings. After the jury had reached verdicts on all counts except count 1 and during the

long weekend recess in deliberations, Deputy Baker and Juror 1 had a telephone conversation about getting together for lunch. During the conversation, Deputy Baker said something to the effect that she hoped appellant would be put away, and Juror 1 responded appellant would be put away one way or another. (63RT 11376-11377.) The conversation was brief, was not prompted by Juror 1's desire to discuss the case, and was not mentioned to other jurors. (63RT 11384-11385.) Juror 1 did not mention anything else about the substance of appellant's case to Deputy Baker. Juror 1 remained open-minded and able to vote either way on count 1 and its related findings. (63RT 11378, 11385.) In light of the brevity of deliberations on February 13, the jury shared Juror 1's belief that the evidence overwhelmingly supported count 1. (63RT 11379, 11386.) The verdicts, including Juror 1's votes, were based on the evidence and not on any preexisting bias of any sort. (63RT 11385.) Therefore, the court found no "reasonable chance" the alleged misconduct affected Juror 1's guilt votes. (63RT 11385-11386.)

In support of the above findings, the record shows that the jury started deliberations on February 8, 2001, that most verdicts were signed by February 9 (Friday), and that the murder verdict was signed on February 13 (Tuesday) after one hour of deliberations. (SCT 87-88, 90, 92, 94, 96, 104, 134; 57RT 10230; 58RT 10312; 63RT 11175.) Deputy Baker believed the pertinent conversation occurred on February 11. (62RT 11086, 11093, 11096-11097.) Juror 1 thought the conversation was before February 8 but did not truly know when it took place. (63RT 11208-11217.) Juror 1 made the comment that appellant would be "put away" or "fry" in response to Deputy Baker's remark that she hoped appellant was put away. (63RT 11200.) According to both Juror 1 and Deputy Baker, they did not discuss the case beyond the "fry" comment. (62RT 11092.) Deputy Baker did not know anything about appellant's case and was not following it on the news.

(62RT 11085-11086.) Juror 1 did not mention the conversation to other jurors. (63RT 11205, 11209.) During voir dire, Juror 1 stated that she had not prejudged the case and that she could be "very fair." (29RT 5095, 5098-5099.) Juror 1 later testified she made the "put away" or "fry" comment because she personally thought the evidence was "so overwhelming." (63RT 11204, 11219.) Juror 1 further testified that, despite believing the evidence of guilt was overwhelming, she kept an open mind during deliberations, that she had not made up her mind at the time of the subject conversation, and that her votes were cast after the jury evaluated the evidence as to each count. (63RT 11211-11212, 11219, 11226-11227, 11233.)

As found by the trial court and as shown by the evidence, appellant was not prejudiced by any misconduct arising from Juror 1's brief conversation with Deputy Baker. Juror 1 did not receive any outside information about the case from Deputy Baker, who had no particular interest in the case, never professed to have any inside information about the case, and was not even following the case in the news. Deputy Baker's fleeting remark that she hoped appellant would be put away was not inherently and substantially likely to influence Juror 1, who had already listened to all the guilt phase evidence, was instructed to decide the case based on the evidence presented at trial, had already voted in favor of guilty verdicts on all the counts decided by the jury, and personally believed the evidence of appellant's guilt as to the murder was overwhelming. That Juror 1 told a nonjuror her prediction of the case could not itself have prejudiced appellant. (See, e.g., *People v. Lewis* (2009) 46 Cal.4th 1255, 1306-1309 [juror told her husband, an investigator with the prosecution, about the deliberations]; *People v. Jefflo* (1998) 63 Cal.App.4th 1314, 1322 [juror told nonjuror that jury was hung].) Contrary to appellant's position (AOB 115-117), the trial court's ruling that the exchange between Juror 1

and Deputy Baker was not inherently prejudicial is further supported by the overwhelming evidence of guilt (see Statement of Facts, *ante*). (See, e.g., *Danks*, *supra*, 32 Cal.4th at pp. 307, 309 [gratuitous personal view of appropriate penalty by jurors' pastor was not inherently and substantially likely to influence jurors in light of compelling penalty phase evidence]; see *Tafoya*, *supra*, 42 Cal.4th at p. 192 ["In general, when the evidence of guilt is overwhelming, the risk that exposure to extraneous information will prejudicially influence a juror is minimized"]; *In re Carpenter*, *supra*, 9 Cal.4th at p. 655 ["if the evidence was truly overwhelming, the extraneous information cannot be considered 'inherently' prejudicial"]; accord, *Szuchon v. Lehman* (3d Cir. 2001) 273 F.3d 299, 313.)

Similarly, in light of the insignificant nature of the misconduct and the surrounding circumstances, it is not substantially likely Juror 1 was actually biased and, thus, incapable or unwilling to decide the case solely on the evidence presented at trial. The conversation was brief and dealt mostly with family matters. Juror 1's misconduct involved a single off-the-cuff remark that was based on her own personal opinion about the evidence already presented at trial. Juror 1 did not engage in any deliberative-type communication with Deputy Baker about the case and did not seek her advice or opinion about the verdicts. The conversation occurred at a time in which Juror 1 was entitled to form an opinion about the case. (*Bormann v. Chevron USA, Inc.* (1997) 56 Cal.App.4th 260, 262, 265; § 1122, subd. (b).) Juror 1 did not mention her conversation to other jurors. She remained open-minded during deliberations and did not vote on count 1 until after the jury had discussed the pertinent evidence. In other words, Juror 1 arguably displayed some human frailties but was capable and willing to decide the case solely on the evidence presented at trial. Under the totality of circumstances, the presumption of prejudice was rebutted and there was no inherent or actual juror bias. (See, e.g., *Tafoya*, *supra*, 42

Cal.4th at p. 193 [juror spoke to priest about death penalty prior to guilt phase verdicts]; *Danks*, *supra*, 32 Cal.4th at pp. 309-310 [juror, who had already voted for the death penalty during ongoing deliberations, told her pastor she had made up her mind about penalty; pastor opined death penalty was appropriate in the case].)

Third, Juror 1 did not prejudge the case. The trial court reasonably found Juror 1 made the subject remark after verdicts on most counts had been arrived and, thus, at a time in which jurors were entitled to have opinions about appellant's guilt. The court credited Juror 1's testimony that her remark was based on the overwhelming evidence of guilt presented at trial, as opposed to any bias or prejudice. The court also credited Juror 1's testimony that she remained open-minded during the deliberations. (63RT 11382, 11385.) As demonstrated above, the trial court's factual findings and credibility determinations are substantially supported by the record and, thus, are entitled to deference on appeal. (*Carasi*, *supra*, 44 Cal.4th at pp. 1290-1291; *Harris*, *supra*, 43 Cal.4th at p. 1304.) In turn, as found by the trial court (63RT 11382-11385), the record shows Juror 1's votes (as well as the jury's guilty verdicts) were based on the overwhelming evidence of guilt presented at trial, as opposed to any bias against appellant or an outside influence, and that Juror 1 did not reach her final decision on the murder count until February 13. (See, e.g., *People v. Green* (1995) 31 Cal.App.4th 1001, 1012-1014; *United States v. Klee* (9th Cir. 1974) 494 F.2d 394, 395-396.)

Appellant's reliance on *In re Hitchings*, *supra*, 6 Cal.4th 97, is misplaced, as the instant case involves a very distinct factual scenario. In *Hitchings*, the juror in question intentionally concealed the depth of her knowledge about the case when questioned during voir dire. This Court found the juror's intentional suppression of material information created an inference that she had prejudged the case very early in the proceedings.

The juror then discussed the case with a coworker weeks before it was decided and commented the defendant should be horribly mutilated for his crimes. The juror later lied about her concealment and her midtrial discussions at an evidentiary hearing. Based on the above evidence, this Court rejected the referee's finding that the juror had not prejudged the case and found the prosecution had not rebutted the presumption of prejudice arising from the juror's misconduct. (*Id.* at pp. 119-123.)

As shown herein and unlike the juror in *Hitchings*, Juror 1 did not intentionally conceal any knowledge about the case in her questionnaire or on voir dire. Instead, she inadvertently failed to list a deputy sheriff, with whom she had infrequent communications and who had no personal connection to the case.[26] Since Juror 1 had already acknowledged she had family or friends in law enforcement and had specifically listed another law enforcement officer in her questionnaire, and since she was not questioned at all during voir dire about her law enforcement connections, her tenuous relationship with Deputy Baker would not have been a material issue during voir dire and would not have disqualified her from jury service.[27] Certainly, her inadvertent failure to list Deputy Baker did not raise any inference that she had prejudged the case prior to trial or that she could be potentially biased against appellant. Unlike the lengthier and opinionated statements made midtrial by the juror in *Hitchings*, Juror 1's exchange with

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[26] Deputy Baker was a property room deputy of a law enforcement agency that was not involved in the investigation of Katrina's murder.

[27] In this context, federal courts have held a defendant is not entitled to a new trial unless he can show the juror failed to answer honestly a material question on voir dire and an honest answer would have provided a valid basis to challenge the juror for cause. (*McDonough Power Equip., Inc. v. Greenwood* (1984) 464 U.S. 548, 556; *Estrada v. Scribner* (9th Cir. 2008) 512 F.3d 1227, 1240; *Gardner v. Ozmint* (4th Cir. 2007) 511 F.3d 420, 424.)

Deputy Baker involved a single remark about the case, merely expressed Juror 1's prediction about the outcome of the case based on the overwhelming evidence already presented at trial, and occurred at a time when Juror 1 was entitled to have an opinion about appellant's guilt and had already voted guilty on all the counts decided. Unlike the juror in *Hitchings*, Juror 1 did not attempt to conceal the alleged misconduct at the evidentiary hearing and candidly and remorsefully testified about the subject exchange and the surrounding circumstances. (63RT 11195-11233.) Thus, there is no evidentiary support for a finding that Juror 1 prejudged the case.

Fourth, appellant is not entitled to a reversal of the penalty phase verdict. As noted by the trial court (63RT 11381-11382), the dismissal of Juror 1 for an unrelated reason rendered moot the issue of whether she had prejudged the penalty. As also found by the trial court, Juror 1's prediction that appellant would be put away did not result from any penalty discussion with other jurors. (63RT 11377.) Instead, her remark to Deputy Baker was based on her own personal opinion about the evidence. (63RT 11219.) According to Juror 1, the issue of penalty was not discussed during the guilt phase deliberations or at any other time. (63RT 11219-11220.) When questioned by the court, the remaining jurors corroborated they had not discussed the penalty among themselves. At most, one of the jurors had mentioned the penalty issue to a third party. (63RT 11249-11262.) Thus, as found by the court (63RT 11385-11386), none of the remaining jurors were involved in any misconduct.[28] Consequently, there was no prejudicial

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[28] Appellant improperly asks this Court to assume or speculate that "at least some jurors had discussed the penalty during the guilt phase." (AOB 120.) This assertion is clearly contrary to the trial record. And this Court may "not presume greater misconduct than the evidence shows." (*In re Carpenter*, *supra*, 9 Cal.4th at p. 657.)

misconduct as to the penalty phase verdict. (See, e.g., *Tafoya*, *supra*, 42 Cal.4th at p. 193 [juror, who spoke to priest about Catholic Church's position on death penalty and mentioned the conversation to other jurors, was removed from jury during penalty phase deliberations]; *Anderson v. Calderon* (9th Cir. 2000) 232 F.3d 1053, 1098-1099.)

In sum, appellant is not entitled to any appellate relief as a result of the alleged misconduct by Juror 1, who was capable and willing to (and did) decide appellant's guilt based on the overwhelming evidence presented at trial. (See, e.g., *Tafoya*, *supra*, 42 Cal.4th at p. 193; *Danks*, *supra*, 32 Cal.4th at pp. 304-310; *Green*, *supra*, 31 Cal.App.4th at pp. 1012-1014; *Fields v. Brown* (9th Cir. 2007) 503 F.3d 755, 773-776.)

II. THE TRIAL COURT PROPERLY REFUSED TO SEVER THE MURDER COUNT

Appellant next contends the trial court erred under state law in failing to sever the murder count from the balance of the indictment. As to counts 9-15, he asserts that there was no cross-admissibility, that it was rank speculation his flight showed consciousness of guilt as to the murder, and that the "vast majority of the evidence of counts 9-15 served no other purpose than to prejudice" him. He similarly maintains there was no cross-admissibility between the rape counts (counts 2-8) and the murder count, because these offenses were not similar enough to the offenses against Katrina and were only joined to inflame the jury. He further asserts that Evidence Code section 1108 was inapplicable to the special circumstance of rape (despite this Court's ruling to the contrary). As to the witness dissuasion counts (counts 16-20), he claims the limited cross-admissibility of the evidence was insufficient to dispel the inference of prejudice caused by evidence about his gang, his obscene and racist letters, and his "Mansonesque" or "psychosexual power" over gang groupies. In addition, appellant maintains that the joinder did not save court time or resources,

that the presence of a capital offense favored severance, that evidence of the non-murder counts was inflammatory and convinced the jury that he was a "very dangerous criminal capable of virtually any type of violent crime," that it would be difficult for the jury not to view all the evidence cumulatively, and that he suffered substantial prejudice even if the court did not abuse its discretion in failing to sever the counts.[29] (AOB 124-172.) As explained below, the trial court acted well within its discretion in refusing to sever the counts, and appellant was not substantially prejudiced by the court's ruling.

A. Applicable Law

The consolidation or joinder of charged offenses is the course of action preferred by the law because it ordinarily promotes efficiency. (*People v. Soper* (2009) 45 Cal.4th 759, 771-772; *Alcala v. Superior Court* (2008) 43 Cal.4th 1205, 1220; *People v. Smith* (2007) 40 Cal.4th 483, 510.) Consistent with this mandate, section 954 allows the charging of different offenses connected together in their commission or of different offenses of the same class of crimes. (*Smith*, *supra*, at p. 510.) In the instant case, it is undisputed the section 954 statutory requirements for joinder or consolidation were met, because all the counts involved crimes of the same class of assaultive or forceful behavior and because the murder count was

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[29] Appellant also suggests two juries could have been used, with the death qualified jury hearing evidence of the remaining counts only in the penalty phase. (AOB 147-148.) He never suggested this approach below and, thus, has forfeited any claim of error as to the trial court's failure to consider the unrequested two-jury approach. (See *People v. Ramirez* (2006) 39 Cal.4th 398, 438-439 [defendant is limited on appeal to arguing the trial court erred in failing to sever the charges as he requested at trial].) In any event, as explained below, the trial court acted within its discretion and authority in allowing all the counts to be tried together. Furthermore, there is a statutory preference for a single jury to decide both guilt and penalty. (*People v. Davis* (2009) 46 Cal.4th 539, 626; § 190.4, subd. (c).)

substantially linked to the resisting arrest and witness intimidation crimes in that appellant attempted to avoid arrest and prosecution for the murder by committing those crimes. (*Soper*, *supra*, at p. 771; *People v. Geier* (2007) 41 Cal.4th 555, 574-575; *People v. Stitely* (2005) 35 Cal.4th 514, 531; *People v. Alvarez* (1996) 14 Cal.4th 155, 188.)

Since the consolidation or joinder of the counts herein was statutorily authorized, the trial court's ruling in favor of consolidating the counts must be affirmed unless appellant clearly established below that there was a "substantial danger of prejudice requiring that the charges be separately tried." (*Soper*, *supra*, 45 Cal.4th at pp. 773-774; *Smith*, *supra*, 40 Cal.4th at p. 510; *People v. Marshall* (1997) 15 Cal.4th 1, 27.) Pertinent factors on the issue of prejudice include whether: (1) evidence on the crimes jointly tried would not have been cross-admissible in separate trials; (2) certain of the charges were unusually likely to inflame the jury against the defendant; (3) a "weak" case was joined with a "strong" case, so that the "spillover" effect of aggregate evidence on several charges might well have altered the outcome of some or all; and (4) one of the charges is a capital offense, or joinder of them turns the matter into a capital case. (*Soper*, *supra*, at pp. 774-775; *Smith*, *supra*, at pp. 510-511; *Marshall*, *supra*, at pp. 27-28.) This Court has clarified that, in the context of properly joined offenses, the defendant "must make a *stronger* showing of potential prejudice than would be necessary to exclude other-crimes evidence in a severed trial." (*Soper*, *supra*, at p. 774, emphasis in original and internal quotation marks omitted.) The trial court's ruling is reviewed for abuse of discretion "'in light of the showings then made and the facts then known.'" (*Marshall*, *supra*, at p. 27, quoting *People v. Balderas* (1985) 41 Cal.3d 144, 171; see also *Alcala*, *supra*, 43 Cal.4th at p. 1220.)

When the evidence underlying the charges would be cross-admissible in hypothetical separate trials of other charges, the trial court is usually

justified in refusing to sever the charges as any potential prejudice is dispelled. (*People v. Lynch* (2010) 50 Cal.4th 693, 736; *Soper*, *supra*, 45 Cal.4th at pp. 774-775; *Stitely*, *supra*, 35 Cal.4th at pp. 531-532.) The cross-admissibility need not be complete or "two-way," as it is sufficient the evidence as to count "A" would admissible in the trial of count "B" but not vice versa. (*Alcala*, *supra*, 43 Cal.4th at p. 1221.) In determining the cross-admissibility of evidence under Evidence Code section 1101, subdivision (a), the least degree of similarity is required in order to prove intent. The evidence just has to be sufficiently similar to support an inference that the defendant probably harbored the same intent in each instance. (*Id.* at pp. 1222-1223; *Lynch*, *supra*, at p. 736.) Similarity between the offenses is also a pertinent factor as to whether Evidence Code section 1108 propensity evidence passes the balancing test of Evidence Code section 352. (*People v. Falsetta* (1999) 21 Cal.4th 903, 917.)

B. Counts 2-8

The prosecution argued below that, aside from being crimes of the same class as count 1, evidence of the forcible sexual offenses against Robyn and Billie was cross-admissible under Evidence Code sections 1108 and 1101, subdivision (b), and was relevant to corroborate the testimony of Nicassio and Bush that appellant sexually assaulted Katrina. According to the prosecution, there was a pattern of sexual assault by appellant that included counts 2-8 and the uncharged offenses, as well as the sexual offenses against Katrina. (5CT 1309-1310; 21RT 3514-3518, 3528; 32RT 5666-5668.) The trial court found the evidence cross-admissible, denied the severance motion, but left the door open to further discussion on the cross-admissibility issue. (21RT 3528-3529.) The court later confirmed the evidence was cross-admissible under Evidence Code sections 352, 1101, and 1108, due to the significant similarities between the offenses and the policies behind these statutes. (33RT 5844, 5846-5848.)

First, as this Court has held, appellant was accused in count 1 of a "sexual offense" as defined by Evidence Code section 1108 because he was charged with murder committed in the perpetration of rape and/or oral copulation. (*Lewis*, *supra*, 46 Cal.4th at p. 1288; *People v. Story* (2009) 45 Cal.4th 1282, 1285, 1291; see also *People v. Dominguez* (2006) 39 Cal.4th 1141, 1158 [the mental state required for a felony murder conviction is the specific intent to commit the underlying felony].) In turn, as shown herein, the trial court acted well within its discretion in finding that the evidence supporting counts 2-8 was cross-admissible as to count 1 under both Evidence Code section 1108, to show propensity to sexually assault female friends, and Evidence Code section 1101, to show that appellant acted with the requisite intent to rape and to commit oral copulation and that Katrina did not consent. Moreover, in light of the strong probative value of the evidence and the lack of substantial prejudicial effect, the trial court also acted well within its discretion in finding the evidence was cross-admissible under Evidence Code section 352.

As proffered by the prosecution and as later proved at trial (see Statement of Facts, *ante*), appellant followed a very similar pattern of sexual abuse against all of his victims. For example, he targeted young women who were "skinhead groupies," were his friends, had alcohol and/or drug abuse problems, and were not inclined to seek law enforcement help against appellant due to fear of or loyalty to SHD. Katrina, Robyn, and Billie all made bad or tragic decisions to be with appellant under circumstances that rendered them vulnerable to his sexual assaults. He forced them to engage in multiple sex acts (usually rape and oral copulation) for a prolonged time (probably due to his failure to ejaculate), even if they complained about vaginal or mouth pain. The victims did not fight him back but, instead, submitted out of fear. Appellant treated the women as objects that belonged to SHD. During the sexual assaults,

appellant was not inhibited by the presence of third parties, whom he deemed loyal due to their gang affiliations. Appellant ended up killing Katrina because he believed that she, unlike the other victims, would have ratted on him.

The similarities in the type of victims targeted by appellant, in the surrounding circumstances, and in the type of sexual misconduct engaged by appellant against his victims raised reasonable inferences that appellant sexually assaulted all three victims, that none of the three victims consented to the sexual assaults, and that he raped and forced Katrina to orally copulate him before killing her. (See, e.g., *Stitely*, *supra*, 35 Cal.4th at p. 532 [cross-admissibility under Evidence Code section 1101, subdivision (b)].) In other words, the evidence of appellant's sexual misconduct against Robyn and Billie corroborated each other's testimony, as well as the testimony of Nicassio and Bush that appellant sexually assaulted Katrina. Certainly, appellant was not entitled to have the jury determine whether he sexually assaulted Katrina, Robyn, or Billie in a vacuum and be ignorant of the pervasive way in which he sexually abused young female friends or groupies who were willing to engage in some intimate or sexual activity with him. In light of the cross-admissibility of appellant's sexual offenses against Robyn and Billie to count 1, any claim of prejudice herein is clearly dispelled. (*Marshall*, *supra*, 15 Cal.4th at p. 28 ["A determination that the evidence was cross-admissible ordinarily dispels any inference of prejudice"].)

In any event, cross-admissibility "is not the sine qua non of joint trials." (*Geier*, *supra*, 41 Cal.4th at p. 575; *People v. Sandoval* (1992) 4 Cal.4th 155, 173; see also § 954.1.) The absence of cross-admissibility, by itself, does not suffice to demonstrate prejudice, since certain additional factors favor joinder and the trial court's discretion under section 954 to consolidate the counts and deny severance is broader than its discretion to

admit evidence of uncharged crimes under Evidence Code sections 1101 and 1108. (*Soper*, *supra*, 45 Cal.4th at pp. 772-774, 779-780; *Alcala*, *supra*, 43 Cal.4th at p. 1221; *Geier*, *supra*, at p. 575.) Similarly, severance is not required "merely because properly joined charges might make it more difficult for a defendant to avoid conviction compared with his or her chances were the charges to be separately tried." (*Soper*, *supra*, at p. 781.)

Here, appellant did not show a real danger of any "spillover" effect.[30] First, the evidence supporting the sex counts was not significantly stronger than the evidence supporting the murder count. (See, e.g., *Stitely*, *supra*, 35 Cal.4th at p. 533; *People v. Ochoa* (2001) 26 Cal.4th 398, 424-425; *Marshall*, *supra*, 15 Cal.4th at p. 28.) All three sets of counts were supported by direct evidence (i.e., the compelling testimony of victims or eyewitnesses). In fact, the evidence as to the murder count was the strongest as the eyewitness testimony was corroborated by a wealth of circumstantial evidence (i.e., appellant's letters, admissions, intimidation of witnesses, etc.). But a "mere imbalance in the evidence, however, will not indicate a risk of prejudicial 'spillover effect,' mitigating against the benefits of joinder and warranting severance of properly joined charges." (*Soper*, *supra*, 45 Cal.4th at p. 781.) Second, when compared to testimony about the despicable manner in which appellant sexually abused Katrina, methodically slit her throat and killed her, and disposed of her body, the evidence supporting counts 2-8 was not unusually likely to inflame the jury against him. (See, e.g., *Stitely*, *supra*, 35 Cal.4th at p. 533.) Third, there was no risk of jury confusion as counts 2-8 involved separate incidents

[30] If this Court finds the evidence to be cross-admissible, then any "spillover" effect would have been entirely proper. (*People v. Ruiz* (1988) 44 Cal.3d 589, 606-607.)

from count 1 and were supported by the testimony of the victims. (See, e.g., *Webber v. Scott* (10th Cir. 2004) 390 F.3d 1169, 1178.)

In addition, the capital charges did not result from the joinder of the separate incidents. (See, e.g., *People v. Mendoza* (2000) 24 Cal.4th 130, 162; *Sandoval, supra*, 4 Cal.4th at p. 173.) The fact that count 1 was a capital charge did not itself establish prejudice. (See, e.g., *Marshall, supra*, 15 Cal.4th at p. 28; *People v. Poggi* (1988) 45 Cal.3d 306, 321.) To the extent the trial court was required to exercise a higher degree of scrutiny because count 1 was a capital offense, the court heard extensive argument by counsel on the issue and scrutinized the evidence and the legal issues very closely. As explained above, the trial court acted within its discretion in denying the motion to sever based on the applicable factors and the evidence. (See, e.g., *People v. Bradford* (1997) 15 Cal.4th 1229, 1318.)

Finally, there is no dispute the conservation of judicial resources and public funds was significant as to both the trial and the instant appeal. The trial herein required a single courtroom, judge, and jury panel. There was no need for separate discovery, pretrial motions, and hearings. Similarly, the consolidation of charges eliminated the need for multiple appellate records, as well as separate appellate and habeas proceedings. (See, e.g., *Soper, supra*, 45 Cal.4th at p. 782; *People v. Mason* (1991) 52 Cal.3d 909, 935.) The consolidation of charges also eliminated the need to have witnesses, such as the prosecution's investigators, Bowen, Wozny, Billie, and Kristin, testify at two separate trials. It similarly obviated the need to present evidence of the crimes against Billie and Robyn as aggravating circumstances at the penalty phase. (See, e.g., *Mason, supra*, at p. 935; *Balderas, supra*, 41 Cal.3d at p. 174.) And the public was further served by the reduced delay on disposition of criminal charges both at trial and through the appellate process. (See, e.g., *Soper, supra*, at p. 782; *People v. Burnell* (2005) 132 Cal.App.4th 938, 947.)

Therefore, the trial court acted well within its discretion in denying appellant's motion to sever the counts. (See, e.g., *Geier*, *supra*, 41 Cal.4th at pp. 575-578; *Stitely*, *supra*, 35 Cal.4th at pp. 532-533.)

C. Counts 9-15

In its written opposition to the severance motion, the prosecution asserted that it intended to present evidence that appellant attempted to evade the police because he thought he was being arrested for Katrina's murder. Thus, evidence as to counts 9-15 was cross-admissible as to count 1 in that his flight and subsequent conduct were evidence of consciousness of guilt. The prosecution further noted the crimes involved the same class of crimes under section 954. (5CT 1290, 1292, 1310-1311; 21RT 3472-3475, 3484-3489.) The trial court found that, since the evidence was cross-admissible, there was no substantial prejudice to the defense having the counts tried together. (21RT 3494-3495, 3504.)

Consistent with the prosecution's offer of proof, the record shows that, on January 30, 1998, appellant knew law enforcement was actively investigating him as a suspect in Katrina's death and feared the police officers were trying to arrest him for this murder. For example, appellant certainly was aware his home had been searched on November 23, 1997. (37RT 6580-6582.) In November or December 1997, a nervous appellant mentioned to Crecelius that his "crime partner" was arrested for Katrina's rape and murder. Appellant feared the police would be coming for him because Nicassio was going to tell on him. (42RT 7450-7451, 7466.) In December 1997, appellant told Wozny that he suspected Cundiff had ratted on him about Katrina's murder. (43RT 7699, 7702, 7710-7711.) At the time he barracked himself in Trembley-Rail's home, appellant told Berryhill that he was "gonna go out with bang," which reflected his desire to be killed by police rather than to be held responsible for Katrina's rape and murder. (37RT 6441-6442.) Shortly after his arrest, appellant told

Miller that he thought the police were after him for a murder and that if he had known the police were trying to stop him for a bicycle light violation, he "wouldn't have ran like that." (39RT 6923-6924, 6926.)

Thus, contrary to appellant's claim, it was hardly "rank speculation" that his flight showed consciousness of guilt as to the murder. Evidence as to appellant's specific desire to flee apprehension for the Katrina crimes, of which he unquestionably knew he was suspected, logically supported an inference of consciousness of guilt in the Katrina matter. In addition, the commission of the Katrina murder provided the motive for appellant's commission of the crimes charged in counts 9-15. (See, e.g., *People v. Valdez* (2004) 32 Cal.4th 73, 120 ["evidence that defendant escaped would have been admissible in his separate murder trial as evidence indicating consciousness of guilt . . ., while the murder charge would have been admissible in his escape trial as the underlying felony charge pending when he fled"]; *People v. Arias* (1996) 13 Cal.4th 92, 127-128 [earlier robbery and murder of one victim supplied evidence of motive for the robbery of another victim (i.e., need for money and transportation to escape apprehension for the earlier crimes), which in turn indicated consciousness of guilt in the earlier matter].) This full cross-admissibility dispels any potential prejudice from the joinder of charges and defeats any claim that the trial court abused its discretion herein. (*Ibid.*)

Furthermore, none of the other pertinent factors supported appellant's burden to show substantial prejudicial effect. Evidence that appellant attempted to evade arrest, assaulted police officers, barracked himself, and vandalized a home was hardly more inflammatory than the evidence as to how he sexually assaulted and killed Katrina. Needless to say, the jury would have been well aware of appellant's violent tendencies and antisocial behavior even if counts 9-15 had been severed from his murder trial. As already noted above, the prosecution did not have a "weak" case against

appellant with respect to any set of counts. (See, e.g., *Arias*, *supra*, 13 Cal.4th at pp. 128-129.) There was no risk of jury confusion, since counts 9-15 were all based on the incidents of January 30, 1998. Finally, as also explained above, there were obvious benefits in trying the two sets of counts together in terms of judicial resources and the convenience of witnesses, such as Crecelius, Wozny, and Miller.

Therefore, the trial court acted well within its discretion in refusing to sever counts 9-15 from the murder trial.

D. Counts 16-20

In its consolidation motion, the prosecution argued the witness intimidation counts involved the same class of crimes as the other counts, i.e., assaultive or forceful conduct. (3CT 844-845.) The prosecution further argued that the victims of the intimidation counts were witnesses as to the other counts and that the witness intimidation evidence was relevant to the other counts as evidence of consciousness of guilt. (3CT 845; see also 5CT 1291.) Defense counsel conceded the evidence was cross-admissible but asked for a severance based on the "interests of justice." (21RT 3470-3471.) The court consolidated the counts. (21RT 3471.)

As conceded by defense counsel at trial, the evidence supporting counts 16-20 was cross-admissible as to counts 1-8, and vice versa. Evidence that appellant attempted to intimidate witnesses who were cooperating with law enforcement as to Katrina's murder and as to his sexual assaults on Billie and Robyn was very probative circumstantial evidence that appellant considered himself guilty of those offenses and wanted to avoid prosecution by all means available to him. Similarly, the commission of the Katrina murder and the sexual assaults on Billie and Robyn provided the motive for appellant's commission of the crimes charged in counts 16-20. (*People v. Williams* (1997) 16 Cal.4th 153, 200-

201; *People v. Garcia* (2008) 168 Cal.App.4th 261, 286-288; see CALJIC No. 2.06.) This full cross-admissibility dispelled any potential prejudice.

In any event, none of the other factors supported the requisite showing of substantial prejudice. Evidence that appellant attempted to intimidate witnesses, manipulated young women into helping him, wrote crude letters, and was a member of a skinhead gang was hardly more inflammatory than the evidence presented to support count 1. Even if counts 16-20 had been severed, the jury would still have known about appellant's affiliation to a violent skinhead gang, would have known the contents of appellant's crude letters to Katrina, and would have known about appellant's physical and sexual abuse of young female groupies of his gang. In addition, the prosecution did not have a "weak" case against appellant with respect to any set of counts. (See Statement of Facts, *ante*.) As also explained above, there were obvious benefits in trying the two sets of counts together in terms of judicial resources and the convenience of numerous witnesses, such as Nicassio, Kristin, Miller, and Volpei.

Furthermore, the trial court cured any potential prejudice that could have resulted from jury confusion or the misuse of the witness intimidation or gang activity evidence. Prior to the testimony of the first witness concerning counts 16-20, the trial court summarized to the jury the allegations in those counts and the alleged overt acts and reminded the jurors that it would be up to them to determine whether the allegations were proven beyond a reasonable doubt. (47RT 8399-8406.) The jury was admonished the evidence of gang activity could not be considered as evidence of appellant's guilt with respect to the murder and sexual offenses but could be considered only as it related to the gang allegation attached to count 16. (48RT 8616.) The jury was later instructed that appellant's efforts to fabricate or suppress evidence by themselves were not sufficient to prove his guilt in other counts. (57RT 10139-10140.)

Accordingly, the trial court acted well within its discretion in refusing to sever counts 16-20 from the murder trial.

E. Appellant Was Not Prejudiced

Ultimately, appellant has not met his burden of showing that it is reasonably probable the joinder affected the jury's verdicts or that the joinder actually resulted in gross unfairness amounting to a denial of due process. (*People v. Avila* (2006) 38 Cal.4th 491, 575; *Valdez*, *supra*, 32 Cal.4th at p. 120.) First of all, the cross-admissibility of the evidence defeats any claim of prejudice. As already explained above, evidence about appellant's sexual offenses against Billie and Robyn and about his attempts to avoid arrest and dissuade witnesses from testifying against him would have been admissible at a separate trial on count 1, even if the counts had been tried separately. In other words, the alleged error did not result in the admission of irrelevant and prejudicial evidence as to count 1.

While the sets of counts involved factually-separable offenses in terms of time and place (see Statement of Facts, *ante*), the jury was given the elements of each charge, was told that evidence of appellant's attempts to suppress incriminating evidence was not sufficient by itself to prove guilt as to other crimes (57RT 10140), and was instructed to decide each count separately (57RT 10220). This Court must assume the jury understood and followed these instructions. (See, e.g., *Balderas*, *supra*, 41 Cal.3d at p. 176; see *People v. Frank* (1990) 51 Cal.3d 718, 728.) There is no showing the joinder or consolidation resulted in prejudicial jury confusion about the duty to decide each count separately. In fact, the verdicts were not reached all on the same day. (SCT 87-132.)

As already explained above, the trial evidence further shows that none of the set of counts involved inflammatory evidence when compared to each other. Certainly, none of the other charges was more inflammatory than count 1. (See, e.g., *Stitely*, *supra*, 35 Cal.4th at p. 533; *Marshall*,

supra, 15 Cal.4th at p. 28; *Mason*, *supra*, 52 Cal.3d at pp. 935-936.) Moreover, there was no improper spillover effect. None of the set of counts was much stronger than the other set, as all were supported by compelling eyewitness testimony and substantial evidence of guilty conscience. (See Statement of Facts, *ante*.) Based on the strong evidence supporting each of the convictions, it is not reasonably probable appellant would have obtained a more favorable outcome had separate trials been held.[31] (See, e.g., *Marshall*, *supra*, 15 Cal.4th at p. 28; *People v. Mattson* (190) 50 Cal.3d 826, 876.) Finally, there is no showing the joinder forced appellant to present inconsistent defenses or to forgo any rights or defenses. Instead, appellant's main defense was that he did not rape anybody, that Robyn, Billie and Katrina consented to any sex with him, that he was at most guilty of second degree murder, that the prosecution witnesses were lying in exchange for leniency in their criminal cases, and that no physical evidence supported the murder and rape charges. (See 57RT 10052-10101 [appellant's closing statement].)

Accordingly, appellant was not prejudiced or deprived of a fair trial as a result of the trial court's consolidation or severance rulings. (See, e.g., *Soper*, *supra*, 45 Cal.4th at pp. 783-784; *Marshall*, *supra*, 15 Cal.4th at p. 28; *Mattson*, *supra*, 50 Cal.3d at pp. 876-877.)

III. THE JOINDER OF COUNTS DID NOT VIOLATE APPELLANT'S DUE PROCESS RIGHTS

Appellant makes the related contention that the allegedly improper joinder of counts violated his federal due process rights and that the error was not harmless beyond a reasonable doubt. According to appellant, the jury could not have compartmentalized the evidence, as the prosecutor's

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[31] In his closing argument, defense counsel conceded the prosecution had proved beyond a reasonable doubt appellant's guilt as to counts 9-20. (57RT 10049-10052.)

closing argument urged the jury to do the exact opposite. He further asserts Evidence Code section 1108 violates due process. (AOB 172-176.) Appellant's contention lacks merit.

Under federal constitutional law, appellant is not entitled to reversal unless he shows the joinder "actually resulted in 'gross unfairness' amounting to a denial of due process" or rendered the trial fundamentally unfair. (*Soper*, *supra*, 45 Cal.4th at p. 783; *People v. Rogers* (2006) 39 Cal.4th 826, 851-853; accord, *United States v. Lane* (1986) 474 U.S. 438, 446, fn. 8; *Davis v. Woodford* (9th Cir. 2004) 384 F.3d 628, 638.) He cannot meet this high burden. As already explained above (see Arg. II, *ante*), there was no prejudicial error in denying appellant's severance motion and trying the counts together, as the evidence was cross-admissible, there was no improper spillover effect or jury confusion, the evidence of each crime was simple and distinct, all the convictions were supported by strong evidence, and the jury was instructed to consider each charge separately. (See, e.g., *Lane*, *supra*, at p. 450; *Soper*, *supra*, at p. 784; *Webber*, *supra*, 390 F.3d at p. 1178; *Davis*, *supra*, at pp. 638-639; *Sandoval v. Calderon* (9th Cir. 2001) 241 F.3d 765, 772-773.)

Contrary to appellant's assertion (AOB 175, citing 56RT 9880), the prosecutor's closing argument did not improperly encourage the jury to consider the charges in concert. Instead, consistent with the trial court's finding that the sex crimes evidence was cross-admissible, the prosecutor correctly told the jury to consider appellant's history of similar sexually predatory behavior against multiple victims as evidence corroborating the testimony of each of his victims. (See *Geier*, *supra*, 41 Cal.4th at pp. 578-579 [under Evidence Code section 1101, the jury may consider evidence relevant to one of the charged counts as it considered the other charged

count].) Not surprisingly, there was no objection to these remarks.[32] (56RT 9879-9880.) Moreover, throughout his closing argument, the prosecutor accurately explained the elements of each count and the evidence supporting each count. (See, e.g., 56RT 9847-9871, 9894-9912, 9951-9978, 9981-9985, 9988-10012.) The prosecutor also told the jury to apply the law as given by the trial court. (56RT 9844.)

Subsequently, the jury was instructed that, if the attorneys' arguments on the law conflicted with the court's instructions, the jury had to follow the court's instructions and that nothing the attorneys said in their arguments was evidence. (7CT 1900, 1903; 57RT 10132-10134.) The jury was further instructed on the prosecution's burden to prove each element of each crime and was told to decide each count separately. (57RT 10220.) These instructions, which the jury presumably understood and followed (*Frank*, *supra*, 51 Cal.3d at p. 728), mitigated the risk of any prejudicial

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[32] On appeal, appellant now asserts the jury was required to "compartmentalize" the evidence, so that evidence of one crime could not taint the jury's consideration of another crime. (AOB 174-175.) This assertion is based on Ninth Circuit jurisprudence that is not binding on this Court. (*People v. Gray* (2005) 37 Cal.4th 168, 226; *People v. Avena* (1996) 13 Cal.4th 394, 431.) The United States Supreme Court has never held that the federal due process clause requires juries to "compartmentalize" evidence in these circumstances. In any event, the compartmentalization issue comes into play, if at all, when the evidence is not cross-admissible or when a strong evidentiary case is joined with a weaker one. (*Sandoval*, *supra*, 241 F.3d at p. 772; *Bean v. Calderon* (9th Cir. 1998) 163 F.3d 1073, 1084-1085; *United States v. Lewis* (9th Cir. 1986) 787 F.2d 1318, 1321-1323.) In other words, the Ninth Circuit requires the jury to compartmentalize the evidence only when evidence admissible only as to one count might "spillover" into the jury's consideration of another count. Here, as explained above, the evidence was cross-admissible and there was no improper spillover effect. Therefore, the jury was not required to avoid the consideration of allegedly irrelevant and damaging evidence in deciding each count.

spillover. (See, e.g., *Soper*, *supra*, 45 Cal.4th at p. 784; *Geier*, *supra*, 41 Cal.4th at pp. 578-579.)

Appellant's due process challenge to Evidence Code section 1108 has already been rejected by this Court in *Falsetta*, *supra*, 21 Cal.4th at pages 916-922, and does not merit any reconsideration. (See, e.g., *Lewis*, *supra*, 46 Cal.4th at pp. 1288-1289; *People v. Wilson* (2008) 44 Cal.4th 758, 797; accord, *United States v. LeMay* (9th Cir. 2001) 260 F.3d 1018, 1025-1031 [upholding constitutionality of analogous federal rule allowing admission of uncharged sexual offenses].)

Accordingly, appellant's due process contention is clearly meritless.

IV. THE TRIAL COURT PROPERLY ADMITTED EVIDENCE OF APPELLANT'S UNCHARGED OFFENSES

Appellant next contends the admission of evidence about his uncharged offenses against Kristin S., Corie G., and Susan V. violated his constitutional rights to a fair trial and due process. He asserts this evidence should have been excluded for the same reasons given in support of his contention against the joinder of counts. As to the offenses against Kristin, he argues that the prosecution did not show that any non-consensual act occurred, that it merely created "an aura of evil around him," and that Kristin could have testified about his admission that he cut Katrina's throat without mentioning the surrounding incident. As to Corie, appellant claims the offenses were not similar and were remote in time. As to Susan, appellant characterizes her testimony as "yet another tawdry, repulsive, violent and unreliable story told by yet another hanger-on who led the gang life." Appellant concedes Susan's testimony about his concern over her conversation with Cundiff was admissible. (AOB 176-189.) As explained below, the trial court acted well within its discretion in admitting the challenged evidence. In any event, appellant was not prejudiced herein.

A. There Was No Abuse of Discretion

With respect to Corie and Kristin, as argued by the prosecution (5CT 1488-1498; 32RT 5666-5668) and found by the trial court (33RT 5842-5844), the evidence of uncharged sex offenses against these women was admissible under Evidence Code section 1108. Appellant's sex offenses against Katrina, Billie, and Robyn were committed in the privacy and secrecy of an enclosed location; and his defense was mostly based on undermining the victims' credibility, as well as the credibility of those who witnessed the sexual assault on Katrina, to show that all sexual activity was consensual (see 32RT 5669). This is the exact scenario that led our Legislature to enact Evidence Code section 1108, as evidence of appellant's propensity to sexually abuse women with whom he had a some type of relationship was critical given the serious and secretive nature of sex crimes and the often resulting credibility contest at trial. Thus, the challenged evidence was relevant, at the very least, to appellant's propensity to commit sexual offenses against his female friends or gang groupies. (*Story*, *supra*, 45 Cal.4th at p. 1293 ["To help determine what happened in Vickers's home the night defendant strangled her, it was particularly probative for the jury to learn of defendant's history of sexual assaults"]; *Falsetta*, *supra*, 21 Cal.4th at p. 911 ["the Legislature enacted section 1108 to expand the admissibility of disposition or propensity evidence in sex offense cases"]; *People v. Cabrera* (2007) 152 Cal.App.4th 695, 706; *People v. Garcia* (2001) 89 Cal.App.4th 1321, 1335 ["Evidence Code sections 1108 and 1109 are legislative decisions that evidence of other acts of sexual abuse or domestic violence are highly relevant"]; *People v. Yovanov* (1999) 69 Cal.App.4th 392, 405 [evidence of uncharged sex offenses is presumed admissible in sex crimes prosecutions].)

Instead, appellant primarily claims the propensity evidence was inadmissible under Evidence Code section 352, because its probative value

was substantially outweighed by its prejudicial effect. (See generally *Story*, *supra*, 45 Cal.4th at pp. 1294-1295; *People v. Kelly* (2007) 42 Cal.4th 763, 783.) A trial court enjoys broad discretion under Evidence Code section 352 in assessing whether the probative value of prior crimes evidence is outweighed by concerns of undue prejudice, confusion, or consumption of time. (*Lewis*, *supra*, 46 Cal.4th at p. 1286; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.) In this context, "prejudicial is not synonymous with damaging, but refers instead to evidence that uniquely tends to evoke an emotional bias against defendant without regard to its relevance on material issues." (*People v. Kipp* (1998) 18 Cal.4th 349, 1121, internal quotation marks omitted.) The court may consider the nature, relevance, and possible remoteness of the evidence, the degree of certainty of its commission, the likelihood of confusing, misleading, or distracting the jurors from their main inquiry, the burden on the defendant in defending against uncharged offenses, and the possibility of admitting some but not all of the defendant's other uncharged offenses. (*Story*, *supra*, at p. 1295; *Falsetta*, *supra*, 21 Cal.4th at p. 917.)

In the instant case, the trial court acted well within its discretion in admitting the subject evidence. Evidence of the sex offenses against Corie and Kristin was critical to provide the jury with an accurate picture of how appellant behaved with young female groupies of his gang and of his propensity to sexually abuse them after he had befriended them. More specifically, evidence that appellant had a long history of sexually, mentally, and physically abusing young female groupies of his gang, such as Corie and Kristin, tended to show that he acted according to this disposition at the time of the charged offenses and that Billie, Robyn, Nicassio, and Bush were telling the truth about appellant's sexual offenses. Clearly, appellant was not entitled to shield the jury from his long history or pattern of sexual abuse toward these young women, whom he befriended

through his gang, or to have the jury decide the charged offenses based on a false or incomplete portrayal of his attitude and conduct toward these young women. (See, e.g., *Story*, *supra*, 45 Cal.4th at pp. 1293-1295; *Cabrera*, *supra*, 152 Cal.App.4th at p. 706; *People v. Poplar* (1999) 70 Cal.App.4th 1129, 1139; see also *People v. Branch* (2001) 91 Cal.App.4th 274, 282-283 ["evidence of a 'prior sexual offense is indisputably relevant in a prosecution for another sexual offense'"].)

Furthermore, the uncharged sexual offenses against Corie and Kristin were sufficiently similar to the charged offenses that they were highly probative not only to the issue of propensity but also to prove the requisite sexual intent of the offenses or special allegations charged in counts 1-8. (*Lewis*, *supra*, 46 Cal.4th at p. 1285 [degree of similarity relevant to prejudice evaluation under Evidence Code section 1108].) As summarized in the Statement of Facts, *ante*, and in the prosecution's written motion (5CT 1434-1447) and as found by the trial court (33RT 5846-5848), Corie and Kristin, just as Katrina, Robyn, and Billie, were "skinhead groupies" who had befriended appellant and would not have been inclined to seek law enforcement help against appellant due to fear of or loyalty to SHD. Corie and Kristin, just as the other victims, made bad or tragic decisions to be with appellant under circumstances that rendered them vulnerable to his sexual assaults. They also failed to fight back but, instead, submitted to appellant's sexual assaults out of fear. As described by the prosecution (5CT 1496), appellant was a "bully rapist" or "rapist of opportunity." Just as with Katrina, Robyn, and Billie, appellant forced Kristin to engage in multiple sex acts (rape, oral copulation, and/or masturbation) for a prolonged time (probably due to his inability to ejaculate). Just as he had done with Billie and Robyn, he forced Kristin to orally copulate or masturbate him, as he flipped through the pages of his pornographic magazines. Since Katrina had escaped his sexual assault by asking to use

the bathroom, appellant did not let Robyn, Billie, or Kristin use the bathroom without his supervision or leave the room.

Arguably, appellant's sexual assault on Corie, which occurred about five years before sexually assaulting and killing Katrina, was not as similar to the other assaults in terms of duration or location. Nevertheless, as noted above, Corie was the type of victim targeted by appellant, i.e., a young female groupie of SHD who was willing to engage in some intimate activities with appellant. As usual, appellant showed no inhibition or remorse at using Corie to satisfy his sexual or perverse desires, even if he had a prior relationship with her. Just as the other victims, Corie ultimately submitted to the sexual assault out of fear of appellant's violent tendencies. Thus, evidence of Corie's rape, just as the sexual assault on Kristin, was the type of propensity evidence deemed relevant under Evidence Code section 1108 and was similar enough to pass the balancing test of Evidence Code section 352. (See, e.g., *People v. Hollie* (2010) 180 Cal.App.4th 1262, 1273-1277.)

Concerning the tattoo parlor incident, appellant concedes his admission about slitting Katrina's throat was admissible but claims the jury should not have known the factual context in which it was made. (AOB 181-182.) The evidence showed that Kristin was getting a tattoo designed by appellant, that appellant took Kristin into a bathroom and asked her to touch his penis, and that appellant threatened to slit Kristin's throat, just as he had done to Katrina, if Kristin did not keep quiet and follow his orders. (44RT 7889-7890, 7981.) As argued by the prosecutor (32RT 5681-5683), the details of the incident were pertinent to place appellant's admission into its proper factual context (i.e., appellant was not joking but, instead, wanted Kristin to know that she could be killed, just like Katrina, for defying him) and thereby support the credibility of Kristin's testimony about this admission. The trial court agreed with the prosecutor's argument and found

the probative value of the evidence was not substantially outweighed by potential prejudice. (32RT 5683.) The court acted well within its discretion. (See, e.g., *People v. Robinson* (2000) 85 Cal.App.4th 434, 444-446 [a defendant's admission relevant to a completed crime, which is made in part in the form of a threat, need not be independently admissible as proof of identity under Evidence Code section 1101, subdivision (b); and the circumstances under which the admission was made are also admissible to place the statement in context]; see *People v. Harris* (2005) 37 Cal.4th 310, 335 ["the jury is entitled to know the context in which the statements on direct examination were made"].)

The prosecution offered appellant's physical assault on Susan as evidence of consciousness of guilt, since appellant pummeled the victim for talking to Cundiff about Katrina. (32RT 5688; 39RT 6870-6877.) The trial court properly found that the incident should not be sanitized to take appellant's consciousness of guilt out of context and that the probative value of the evidence was not outweighed by potential prejudice. (32RT 5692.) The jury was entitled to know exactly how violently appellant reacted to his suspicion that Susan and Cundiff had talked about Katrina. The true extent of appellant's violent reaction showed both his deep fear about getting caught for killing Katrina and his lack of inhibition about using violence (even against female friends) to suppress incriminating evidence. This use of violence not only showed a consciousness of guilt as to count 1 but also was pertinent to appellant's intent as to the witness intimidation counts. (See, e.g., *Robinson*, *supra*, 85 Cal.App.4th at p. 445 [statement showing consciousness of guilt and its surrounding circumstances need not meet the standard for admissibility of uncharged misconduct under Evidence Code section 1101]; see also *Williams*, *supra*, 16 Cal.4th at pp. 200-201; *Garcia*, *supra*, 168 Cal.App.4th at pp. 286-288; *People v. Daly* (1992) 8 Cal.App.4th 47, 55-56.)

While the substantial probative value of appellant's long history of sexually and physically abusing "skinhead groupies" more than justified the trial court's ruling under Evidence Code section 352, the challenged evidence did not pose a significant risk of prejudice, jury confusion, or any other problem at trial. For example, the details of appellant's sexual or physical assaults of Corie, Kristin, and Susan could not be characterized as more "inflammatory" than his similarly abusive conduct toward Katrina, Billie, or Robyn. (See, e.g., *Lewis*, *supra*, 46 Cal.4th at p. 1287; *Branch*, *supra*, 91 Cal.App.4th at pp. 283-284.) In addition, none of the uncharged offenses could be considered "remote" or "stale" because these uncharged offenses were part of a continuous pattern of conduct that did not end until appellant's incarceration in the instant case. Appellant was also incarcerated for a significant portion of the five-year gap between raping Corie and killing Katrina. (See, e.g., *Lewis*, *supra*, at p. 1287 [sexual assaults occurred four years apart, but defendant was incarcerated for most of the intervening time]; *Wilson*, *supra*, 44 Cal.4th at p. 797 [five-year gap between uncharged and charged rapes]; see *People v. Harris* (1998) 60 Cal.App.4th 727, 739 ["'staleness' of an offense is generally relevant if and only if the defendant has led a blameless life in the interim"].)

There was no showing that the challenged evidence imposed an undue burden on the defense or that presenting the evidence unduly extended the trial. (See, e.g., *Wilson*, *supra*, 44 Cal.4th at pp. 797-798.) To the contrary, the testimony about the uncharged offenses took a very short portion of the lengthy trial and did not involve the need for additional prosecution witness to corroborate the victims or defense witnesses to impeach them. (See Statement of Facts, *ante*.) Also, the record provides no indication that the jury was confused by the introduction of the challenged evidence or that jurors wished to convict appellant for his uncharged offenses. (See, e.g., *Branch*, *supra*, 91 Cal.App.4th at p. 284.) In fact, appellant's counsel

emphasized at trial the fact that the victims did not even report the assaults, for the apparent reason of persuading the jury that the prior victims were not credible and that the uncharged offenses did not happen. Ultimately, the "prejudice" presented by the challenged evidence, which showed appellant's disposition toward the physical and sexual abuse of his young female friends or groupies, "is the type inherent in all propensity evidence and does not render the evidence inadmissible." (*People v. Soto* (1998) 64 Cal.App.4th 966, 992.)

Therefore, appellant has failed to show that the trial court exercised its discretion under Evidence Code sections 352, 1101, and 1108 in an arbitrary, capricious, or patently absurd manner. (See, e.g., *Lewis*, *supra*, 46 Cal.4th at pp. 1287-1288 [two sexual assaults shared many similarities]; *Story*, *supra*, 45 Cal.4th at pp. 1288, 1295 [four other sexual offenses against female acquaintances]; *Soto*, *supra*, 64 Cal.App.4th at pp. 990-992 [pattern of sexually molesting young female relatives].) And since the challenged evidence raised permissible inferences under state law, appellant's conclusory claim of a due process violation similarly lacks merit. (See *Williams v. Stewart* (9th Cir. 2006) 441 F.3d 1030, 1040; *Windham v. Merkle* (9th Cir. 1998) 163 F.3d 1092, 1103.)

B. The Alleged Error Was Harmless

In the alternative, any error herein was clearly harmless and did not result in injustice. Generally, a trial court's discretionary ruling must not be disturbed on appeal unless the defendant can show that the court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice. (*Rodrigues*, *supra*, 8 Cal.4th at p. 1124.) In turn, a miscarriage of justice should be declared only if, in light of the entire record, it is reasonably probable that a result more favorable to the defendant would have been reached in the absence of the

alleged evidentiary error of the trial court. (Cal. Const., art. VI, § 13; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

As explained above, the prior crimes evidence was highly probative, was not inflammatory in comparison to the charged offenses, and was not unduly prejudicial. The evidence supporting the convictions was so overwhelming that appellant's counsel conceded in his closing argument that appellant was guilty of murder in count 1 and was guilty as charged in counts 9-20. (57RT 10049-10052, 10073, 10100-10101.) Moreover, the jury knew appellant was presumed innocent (7CT 1933; 57RT 10153-10154), was thoroughly instructed on how to consider and weigh the challenged evidence, and was specifically told evidence of the uncharged offenses was not sufficient to prove the charged sex offenses and could not be considered as proof that appellant had a disposition to commit murder (7CT 1920-1922; 57RT 10145-10148). This Court must presume the jury understood the instructions and followed them, and there is nothing in the record showing otherwise. (See, e.g., *People v. Guerra* (2006) 37 Cal.4th 1067, 1115; *People v. Mullens* (2004) 119 Cal.App.4th 648, 658-659.)

Accordingly, appellant's contention lacks merit.

V. THE TRIAL COURT PROPERLY ADMITTED KATRINA'S STATEMENTS

Appellant also contends the trial court violated state law and his federal constitutional rights in admitting Katrina's hearsay statements to Shawna Torres, Kathryn Montgomery, and Lee Jansen. According to appellant, Katrina's statements were innately unreliable due to her "dual life" and her relationship with appellant and other White supremacists. Appellant also asserts Katrina's statements to her mother and Jensen were not made until a substantial amount of time had elapsed. As to the statement to Jensen, appellant adds that Kathryn's credibility was not an issue and the statement should not have been admitted to corroborate

Kathryn's credibility. Urging prejudice, appellant claims the statements improperly told the jury that he had been violent toward Katrina in the past. In conclusory fashion, he alleges the error violated his confrontation rights, reduced the prosecution's burden of proof, and was not harmless beyond a reasonable doubt. (AOB 189-201.) As explained below, the trial court acted well within its discretion in permitting the prosecution to present evidence of appellant's violent conduct toward Katrina. In any event, any error herein was harmless.

A. Factual Background

1. The Shawna Torres testimony

Prior to trial, the prosecution offered Torres's testimony about Katrina's statement following appellant's assault under the spontaneous statement exception to the hearsay rule. Defense objected that the statement was unreliable and prejudicial. (32RT 5562-5564, 5567; 33RT 5786-5788.) The court found the probative value was "extremely high or astronomical." (32RT 5563.) The prosecutor argued Katrina's statement was spontaneous and was reliable, because it was made moments after a traumatic event and Torres saw red marks on Katrina's neck. (32RT 5565; 33RT 5785-5786.) The court tentatively found the statement qualified as an spontaneous statement but granted the defense an evidentiary hearing on the matter. (32RT 5568.)

At the evidentiary hearing, Torres testified that Katrina came out of appellant's house "emotional," "frazzled and really mad," and "upset." (33RT 5773, 5783-5784.) In her emotionally upset state, Katrina told Torres that appellant had attacked or "choked" her, that appellant would not let her go, that she screamed, and that appellant's mother was present and did nothing. (33RT 5774-5775, 5779-5780, 5783.) Torres noticed red marks on Katrina's neck. (33RT 5774.) The trial court found the statement

was trustworthy and admissible under Evidence Code sections 1240 and 1250 (as to the portion concerning Katrina's reason for going to appellant's house). (33RT 5789-5790.)

2. The Kathryn Montgomery testimony

At the evidentiary hearing, Kathryn testified that, in the spring or summer of 1992, Katrina told her that the previous night appellant had made sexual advances toward her, that she fled from appellant's house after telling him that she was just using the bathroom, and that appellant angrily yelled at her as she drove away. At the time, Katrina was "a little bit tearful," "emotional, agitated, [and] afraid" and was "shocked at her own vulnerability." (33RT 5792-5797, 5800.) The prosecutor offered this testimony under the spontaneous statement exception to the hearsay rule, noting that Katrina was still under the excitement of a traumatic experience that had occurred within the last 24 hours, that the statement was reliable, and that Katrina had made a similar statement to Lee Jensen. (33RT 5815-5819, 5822-5823.) The prosecutor further noted the evidence was relevant to show appellant's sexual motives toward Katrina as well as Katrina's lack of consent. (33RT 5824.) Defense counsel argued Katrina had the opportunity to reflect and was no longer under the stress of the event before making the statement. (33RT 5819-5821.)

3. The Lee Jensen testimony

At the hearing, Lee Jensen testified that Katrina was her best friend and that, around May 1992, Katrina called her twice. In the first call, Katrina sounded "strange" and noted, "Lee, I just want you to know that we're not invincible." (33RT 5825-5828.) Katrina called back about 15 minutes later and described an event in which appellant attempted to rape her in his bedroom and she was able to flee after telling appellant that she needed to use the bathroom. During this phone call, Katrina was crying

and upset. (33RT 5829.) The assault had occurred within one or two days of the phone call. (33RT 5830.) There was nothing in Katrina's voice that indicated she had recently used drugs. (33RT 5833.) Defense counsel objected the statement was not under the stress of the incident. (33RT 5838-5839.) The prosecutor argued the statement was reliable because Katrina had a similar conversation with her mother. (33RT 5839.) The court tentatively ruled Katrina's statement to her mother fell within the spontaneous statement exception but not the one to Jensen. (33RT 5841.)

4. The trial court's rulings

The court ruled Katrina's statement to her mother as to what happened in appellant's residence was admissible under Evidence Code section 1240. The statement was trustworthy, as Katrina was still under the stress of the traumatic incident and would have no reason to give her mother an inaccurate version of the events. (33RT 5900-5902.) As to Evidence Code section 352, the court found that the evidence was not inflammatory when compared to other evidence the jury was going to hear and that any potential prejudice did not substantially outweigh the probative value of the evidence. The court also noted that, under Evidence Code sections 1101 and 1108, the prosecutor could argue to the jury that appellant's attempted rape of Katrina was relevant evidence of intent and propensity to rape. (33RT 5902.)

At trial, Kathryn testified that, on a morning around March 1992, Katrina was distraught and in a state of disbelief or shock and became emotional as she began to talk to Kathryn. (37RT 6485-6486.) Katrina told her mother that she had visited appellant's home and that appellant's mother had suggested Katrina stayed overnight so that she would not have to drive home at night. Katrina took the offer. (37RT 6486.) Katrina went to sleep alone in one of the rooms but was later awoken by appellant, who had climbed in bed with her and was making sexual advances toward her.

(37RT 6487.) Katrina told appellant to stop. When he failed to stop, Katrina stated that she felt sick and needed to use the bathroom. (37RT 6487-6488.) She was allowed to use the bathroom. Instead, she ran out of the house, jumped into her car, and left. She saw appellant running after her and yelling angrily. (37RT 6488.)

At trial, Torres testified that, around the summer of 1992, she and Katrina drove to appellant's house because Katrina wanted to "straighten out a couple of things" with appellant. (37RT 6548-6549.) Katrina went into the house, while Torres stayed in Katrina's truck. When Katrina returned to the truck, she was visibly upset and said appellant "got mad" and "attacked" her in front of his mother. Katrina had red marks on her neck. (37RT 6550, 6556.) Katrina was angry at both appellant and his mother, who had done nothing about the attack. (37RT 6551.)

During trial, the prosecutor offered Jensen's testimony about appellant's sexual assault against Katrina not for the truth of Katrina's statement but as circumstantial evidence of Katrina's state of mind at the time of the murder, i.e., the testimony tended to show Katrina would not have consented to having sex with appellant. The prosecutor also noted Jensen's testimony would corroborate Kathryn's testimony about the incident. Defense counsel objected that the evidence was hearsay and did not involve a spontaneous statement, that it was cumulative of Kathryn's testimony about the same incident, that Katrina's statement had already been admitted for the truth of the matter asserted, and that the evidence was not probative. (37RT 6518-6519, 6561-6562.) The court allowed the prosecutor to present Jensen's testimony that Katrina mentioned the incident but barred any reference to the details of the incident. (37RT 6562-6563.)

At trial, Jensen testified that Katrina had told her about an incident she had in appellant's house and that Katrina had further mentioned that she did

not want to have sex with appellant. (37RT 6566.) Immediately after this testimony, the trial court admonished the jury as follows,

> The last testimony appears to be in reference to something that you heard from Mrs. Montgomery as well, an incident, and to the extent this witness has referred to it, the out-of-court statements by Katrina Montgomery that this witness has referred to are not offered for their truth, that is, not offered and not to be considered by you to prove this incident happened but for whatever light they may or may not shed about Katrina Montgomery's state of mind in relation to the defendant at the time in question. [¶] As opposed to this limiting instruction, the previous testimony by Mrs. Montgomery about Katrina Montgomery relating the details of an incident that took place when she allegedly fled the defendant's house, that evidence can be considered by you for the truth of the matter, that is, evidence that what was said did happen, if you accept it. [¶] Of course, it's up to you whether to do that or not, as it is as to all factual issues.

(37RT 6567.)

B. There Was No Error or Prejudice

Under Evidence Code section 1240, a hearsay statement is admissible "if it describes an act witnessed by the declarant and 'was made spontaneously while the declarant was under the stress of excitement caused by' witnessing the event." (*People v. Gutierrez* (2009) 45 Cal.4th 789, 809, quoting Evid. Code, § 1240.) This Court has identified the following three requirements for a statement to be admissible under this hearsay exception: (1) the event must be startling enough to produce a nervous excitement and render the utterance spontaneous and unreflecting; (2) the statement was uttered before there has been time to contrive and misrepresent; and (3) the statement must relate to the circumstance of the occurrence preceding it. (*Id.* at pp. 809-810; *Lynch*, *supra*, 50 Cal.4th at p. 751-752.) As to the second requirement, the crucial issue is the declarant's mental state, and the timing and manner of the statement are just

indicators of this mental state. (*Gutierrez*, *supra*, at p. 811; *People v. Brown* (2003) 31 Cal.4th 518, 541.) Whether these three requirements are met is largely a question of fact that falls within the trial court's discretion. (*Lynch*, *supra*, at p. 752 [trial court's discretion is broadest as to the second requirement]; *Gutierrez*, *supra*, at p. 810.) The trial court's factual determinations and decision to admit the evidence must be upheld on appeal if supported by substantial evidence. (*Lynch*, *supra*, at p. 752; *People v. Ledesma* (2006) 39 Cal.4th 641, 708; *Brown*, *supra*, at pp. 540-541.)

As to Torres's testimony, Katrina's hearsay statement about appellant choking her clearly satisfied the above admissibility requirements. First, the event was startling enough, as Katrina was choked and kept against her will by appellant. Torres noticed that Katrina had red marks on her neck because of the assault. Second, Katrina volunteered the statement immediately after exiting appellant's home and joining Torres inside the vehicle. Katrina was very emotional, upset, and mad, and had insufficient time to contrive or misrepresent the events. Third, Katrina's statement related to the circumstances of the event preceding it. It is also pertinent to the trustworthiness of Katrina's statement that it was made to a close friend and that Katrina had no reason whatsoever to lie to Torres or to falsely accuse appellant of any wrongdoing. Under these circumstances, the trial court acted well within its discretion in finding the statement admissible under Evidence Code section 1240. (See, e.g., *People v. Rincon* (2005) 129 Cal.App.4th 738, 751-754.)

Katrina's statement to her mother was also admissible as an spontaneous utterance. First, the event was sufficiently startling. Katrina was awakened by appellant climbing into her bed uninvited and making sexual advances toward her. She was able to avoid appellant's sexual assault by lying about needing to use the bathroom. Katrina then drove

away, as appellant angrily yelled at her. Second, even though Katrina uttered her statement the morning after the above event, it was her first opportunity to outpour her previously withheld emotions and utterances. She was still visibly distraught, agitated, afraid, tearful, and emotional. She detailed the event without any questioning on her mother's part. Moreover, Katrina was confiding in a trustworthy person and had no reason to misrepresent the facts to her own mother or to falsely accuse appellant of any wrongdoing. Certainly, there was nothing about Katrina's relationship with appellant or other skinheads or her "dual life" that rendered any of her statements innately unreliable or untrustworthy. Third, the statement related the circumstances of the event preceding it. Under these circumstances, the trial court acted well within its discretion in admitting the statement under Evidence Code section 1240. (See, e.g., *Brown*, *supra*, 31 Cal.4th at p. 541 [delay of two-and-one-half hours between event and utterance]; *People v. Smith* (2006) 135 Cal.App.4th 914, 923-924 [delay of three to six hours]; *People v. Trimble* (1992) 5 Cal.App.4th 1225, 1234-1235 [delay of nearly two days].)

With respect to Jensen's testimony, Katrina's act of telling Jensen about the incident was not admitted for its truth or to corroborate Kathryn's testimony but as circumstantial evidence of Katrina's state of mind toward appellant. (*People v. Dennis* (1998) 17 Cal.4th 468, 528.) Katrina's statement that she did not want to have sex with appellant fell within the state-of-mind exception to the hearsay rule. (Evid. Code, § 1250.) Testimony concerning "a statement of a declarant's state of mind, when offered to prove or explain the declarant's conduct, is admissible, as long as the statement was made under circumstances indicating its trustworthiness." (*Guerra*, *supra*, 37 Cal.4th at p. 1114.) Katrina's statement was trustworthy, as she had no reason whatsoever to lie to a close friend, such as Jensen, about appellant's sexual advances and about her lack

of desire to have sex with him. In turn, evidence that Katrina had already rejected appellant's sexual advances and did not want to have sex with him was "clearly probative of her lack of consent to sexual intercourse" with him, was unquestionably relevant to prove the felony murder and the felony-murder special circumstance allegation in count 1, and fell under the state-of-mind exception of Evidence Code section 1250. (*Ibid.*; *People v. Kipp* (2001) 26 Cal.4th 1100, 1123-1124 ["In a prosecution for forcible rape, evidence is relevant if it establishes any circumstance making the victim's consent to sexual intercourse less plausible"].) There was nothing inflammatory about Jensen's brief testimony, which did not include details about the incident. (See, e.g., *Guerra*, *supra*, at pp. 1114-1115.) And this Court must presume the jury followed the limiting instruction about Jensen's testimony. (*Id.* at p. 1115.)

Aside from being admissible hearsay, evidence of appellant's uncharged violent or sexual conduct toward Katrina was relevant and admissible under Evidence Code sections 1101, subdivision (b), and 1108. The choking incident was circumstantial evidence of appellant's preexisting violent anger toward Katrina and, thus, was particularly probative of his mental state at the time of Katrina's murder. (See, e.g., *People v. Whisenhunt* (2008) 44 Cal.4th 174, 209 ["Defendant's prior acts of violence against the victim are indisputably relevant to showing intention and absence of accident"]; *People v. Bunyard* (1988) 45 Cal.3d 1189, 1207 ["Where the 'other crimes' evidence relates to the very same victim, it has been held admissible even when there is no issue of identity and no ambiguity about the proof of defendant's intent to show a defendant's 'common design or plan' towards that victim"]; *Rufo v. Simpson* (2001) 86 Cal.App.4th 573, 584-587; *People v. McCray* (1997) 58 Cal.App.4th 159, 171-173.) The attempted rape incident was not only admissible propensity evidence under section 1108 but was also extremely probative of both

appellant's intent to rape Katrina and Katrina's lack of consent to the sexual intercourse, which were pertinent to count 1. (See, e.g., *Lewis*, *supra*, 46 Cal.4th at p. 1285; *People v. Garcia* (2001) 89 Cal.App.4th 1321, 1335-1336; *People v. Escobar* (1995) 38 Cal.App.4th 377, 391.)

Appellant has forfeited his conclusory claim that his constitutional rights were violated. He did not raise any constitutional objections to the evidence below and, thus, has not preserved them for appellate purposes. (See, e.g., *Brown*, *supra*, 31 Cal.4th at p. 542; *Kipp*, *supra*, 26 Cal.4th at p. 1125; *Dennis*, *supra*, 17 Cal.4th at p. 529.) In any event, appellant does not argue herein there were constitutional standards of admissibility more exacting than the statutory standards imposed by our Evidence Code. (See, e.g., *Kipp*, *supra*, at p. 1125.) In fact, the hearsay exception for spontaneous declarations is a "firmly rooted" exception that carries sufficient indicia of reliability to satisfy the federal confrontation clause. (*Brown*, *supra*, at p. 542; *Dennis*, *supra*, at p. 529; accord, *White v. Illinois* (1992) 502 U.S. 346, 355, fn. 8.) Furthermore, the challenged evidence did not constitute "testimonial hearsay" and, thus, did not violate appellant's confrontation rights under *Crawford v. Washington* (2004) 541 U.S. 36. (See, e.g., *Gutierrez*, *supra*, 45 Cal.4th at pp. 812-813 [child's hearsay statement to aunt]; *Rincon*, *supra*, 129 Cal.App.4th at pp. 754-757 [witness's spontaneous statement to acquaintance].) Appellant has also failed to show the statements' alleged lack of trustworthiness or any other error herein violated his due process rights. (See, e.g., *Gutierrez*, *supra*, at p. 813; *People v. Prince* (2007) 40 Cal.4th 1179, 1229 ["application of the ordinary rules of evidence generally does not impermissibly infringe on a capital defendant's constitutional rights"].)

Accordingly, the trial court acted well within its discretion in admitting the challenged testimony about appellant's prior bad acts toward Katrina. (See, e.g., *Brown*, *supra*, 31 Cal.4th at pp. 540-542.)

Even if there was error herein, appellant cannot show a miscarriage of justice from the admission of the challenged testimony. (Cal. Const., art. VI, § 13; *Gutierrez*, *supra*, 45 Cal.4th at p. 813; *Watson*, *supra*, 46 Cal.2d at p. 836.) As demonstrated above, neither one of the two events was inflammatory, especially when compared to the charged offenses. The testimony about these events was very brief, involved distinct events from the charged offenses, and could not have led to any jury confusion. The challenged evidence was not a significant part of the prosecution's case and was, at most, corroborative or cumulative of other evidence presented at trial about appellant's sexual interest in Katrina and his propensity to abuse young female friends and gang groupies sexually and physically. Appellant had the opportunity to cross-examine the witnesses about Katrina's statements. The jury was instructed on how to consider and evaluate the evidence. As also shown above, the evidence supporting the convictions was overwhelming. (See Statement of Facts, *ante*.) In sum, it is not reasonably probable appellant would have obtained more favorable verdicts but for the admission of Katrina's hearsay statements.

VI. THE TRIAL COURT ACTED WITHIN ITS DISCRETION IN ADMITTING EVIDENCE THAT APPELLANT POSSESSED A STOLEN CAR

Appellant also contends the trial court violated his federal constitutional rights in allowing irrelevant and prejudicial evidence that he possessed a stolen car. According to appellant, the fact that he possessed a stolen car in the morning had no relevance to the fact that he was riding a bike that same evening. He adds the evidence was unduly prejudicial because it branded him as a criminal. (AOB 202-204.) There was no error or prejudice herein.

A trial court has broad discretion in determining the relevancy and admissibility of evidence, including such questions as probative value and

undue prejudice. (*People v. Michaels* (2002) 28 Cal.4th 486, 532; *People v. Rodriguez* (1999) 20 Cal.4th 1, 9.) Relevant evidence is defined in Evidence Code section 210 as evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." Evidence Code section 352 allows a trial court to exclude evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time or create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. But in this context, "prejudicial" is not synonymous with "damaging." (*People v. Coddington* (2000) 23 Cal.4th 529, 588, overruled on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.) Instead, "undue prejudice" involves the admission of "evidence which uniquely tends to evoke an emotional bias against the defendant as an individual *and which has very little effect on the issues*." (*People v. Gionis* (1995) 9 Cal.4th 1196, 1214, quoting *People v. Karis* (1988) 46 Cal.3d 612, 638; emphasis in original.)

The record herein shows defense counsel elicited from Roy Miller that he had seen appellant leaving Bridgette Callahan's house in a car on the morning of his arrest. (39RT 6940.) The prosecutor then questioned Miller about appellant asking Miller to drive the car down to somebody's house. The prosecutor next asked whether appellant told Miller where he had obtained the car. Defense counsel objected on relevance grounds. At sidebar, the prosecutor stated the car was stolen and appellant was planning to sell it. The prosecutor explained the evidence was relevant to rebut the inference that appellant had a car, was driving it that day, and, thus, was not the cyclist with the gun. (39RT 6941.) Defense counsel protested that he had not opened the door about appellant stealing the car. But counsel could

not assure the court that he was not going to raise the defense that appellant was driving (as opposed to biking) on the day of his arrest.[33] As a result, the court allowed the questioning. Defense counsel declined the court's suggestion to give the jury an admonition not to consider the testimony as evidence of bad character. (39RT 6942-6943.) Miller then testified appellant had told him the car was "hot" and had asked him to drive it down to somebody's house to get rid of it. (39RT 6943-6944.)

As the above record reflects, the challenged evidence was relevant to rebut a possible defense to charges related to appellant's arrest. At trial, appellant elicited evidence that he was driving a car on the morning of January 30, 1998, for the obvious purpose of raising an inference that he was misidentified as the biker chased by the police around 9:00 p.m. on the same day. Miller's testimony that appellant had acknowledged the car was stolen and that he needed to get rid of it raised a reasonable inference that, by 9:00 p.m., appellant had already disposed of the stolen car and, instead, was riding a bicycle. The fact that the car was stolen was an integral part of the inference, as it was more likely appellant would not want to drive it and would have quickly disposed of the car if it was stolen. In turn, the probative value of the evidence on the issue of identity as to some of the charges was not significantly outweighed by any potential prejudice or jury confusion. The mere fact that appellant possessed a stolen car was hardly prejudicial or inflammatory when compared to other evidence presented at trial concerning his long history of violent or sexual offenses or the despicable nature of his crimes against Katrina. Thus, the trial court acted within its discretion in admitting the subject testimony about the stolen car.

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[33] In a pretrial motion, appellant had made an offer of proof that, on January 29, 1998, he was driving a Ford Escort as evidence he was not the person pursued by police officers. (5CT 1303-1304; see also 21RT 3532.)

(See, e.g., *People v. Letner* (2010) 50 Cal.4th 99, 157-160 [prosecutor allowed to question witness about property stolen by defendant].)

In any event, a trial court's discretionary ruling on evidentiary matters should not be disturbed on appeal except upon a showing that the court "exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a miscarriage of justice." (*Rodriguez*, *supra*, 20 Cal.4th at pp. 9-10.) In turn, a "miscarriage of justice" should be declared only when the reviewing court, after an examination of the entire record, is of the opinion that it is reasonably probable that a result more favorable to the defendant would have been reached in the absence of the alleged error. (Cal. Const., art. VI, § 13; Evid. Code, § 353, subd. (b); *People v. Earp* (1999) 20 Cal.4th 826, 878; *Watson*, *supra*, 46 Cal.2d at p. 836.)

Here, appellant could not possibly show he would have obtained more favorable verdicts but for the alleged error. As already noted above, appellant's possession of a stolen car was a very insignificant crime in his long history of violent or sexual offenses and was hardly damaging or inflammatory when compared to his crimes against Katrina or his other female victims. Also, the stolen car evidence played a very small part in the prosecution's overwhelming case against appellant and was not even mentioned in the prosecutor's lengthy closing arguments. Certainly, there is no showing the jury considered the challenged evidence in any improper way or found appellant guilty on the basis of his possession of a stolen vehicle. Ultimately, appellant conceded his guilt as to the counts for which the stolen car evidence was admitted. Under these circumstances, appellant could not possibly show the requisite prejudice.

Appellant has forfeited his conclusory claim that his constitutional rights were violated. He only raised a relevance objection below to the evidence, which did not preserve any constitutional objection for appellate purposes. (See, e.g., *Brown*, *supra*, 31 Cal.4th at p. 542; *Kipp*, *supra*, 26

Cal.4th at p. 1125.) In any event, the relevance of the challenged evidence defeats these belated constitutional objections. (*People v. Monterroso* (2004) 34 Cal.4th 743, 773.) Also, appellant does not argue herein there were constitutional standards of admissibility more exacting than the statutory standards imposed by our Evidence Code. And he does not otherwise show the admission of this insignificant evidence, at a trial involving a despicable murder and numerous sexual offenses, rendered his trial fundamentally unfair or deprived him of due process. (See, e.g., *Kipp*, *supra*, at p. 1125.)

Accordingly, the trial court acted within its discretion in admitting Miller's testimony about the car, and any error herein was harmless.

VII. The Trial Court Acted Within Its Discretion in Admitting Evidence That Appellant Asked His Mother to Engage in Illegal Activities for Him

Appellant next contends the trial court violated state law and his federal constitutional rights in allowing the prosecutor to cross-examine his mother about illegal activities appellant had asked his mother to do for him. According to appellant, this evidence had nothing to do with the murder charge, distracted jurors from their task to determine his guilt, and merely added a "new page" to his criminal history resume. (AOB 205-207.) Respondent disagrees, as the record shows no abuse of discretion or prejudice in this context.

As previously noted, a trial court has broad discretion in determining the relevancy and admissibility of evidence, including such questions as probative value and undue prejudice. (*Michaels*, *supra*, 28 Cal.4th at p. 532; *Rodriguez*, *supra*, 20 Cal.4th at p. 9.) Evidence is relevant if it affects the credibility of any witness or has "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) Under Evidence Code

section 352, a trial court has discretion to exclude evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time or create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. (*Coddington*, *supra*, 23 Cal.4th at p. 588.) Evidence is prejudicial only if it "uniquely tends to evoke an emotional bias against the defendant as an individual *and . . . has very little effect on the issues*." (*Gionis*, *supra*, 9 Cal.4th at p. 1214.)

The restrictions on "other crimes" evidence set forth in Evidence Code section 1101 are inapplicable to evidence offered to attack a witness's credibility. (Evid. Code, § 1101, subd. (c); *People v. Kennedy* (2005) 36 Cal.4th 595, 620, disapproved on another ground in *People v. Williams* (2010) 49 Cal.4th 405, 459.) In *Kennedy*, this Court upheld the admissibility of evidence that a witness had been arrested with the defendant in a car containing guns. This evidence impeached the witness's testimony that he had never seen the defendant carrying a gun. This Court also upheld the prosecutor's cross-examination of an alibi witness about her prior involvement in criminal activity with the defendant. This Court found this evidence cast doubt in the witness's alibi testimony. (*Ibid.*; see also *People v. Freeman* (1994) 8 Cal.4th 450, 494 [evidence that the alibi witness and defendant previously were crime partners was admissible on the question of credibility, as it tended to show the witness might be willing to perjure himself to aid defendant].)

The record herein shows that, during her cross-examination, Beverlee denied conspiring with appellant to dissuade witnesses and further denied she had changed her position that she was guilty of dissuading witnesses just to please her son. (52RT 9552, 9555-9556.) The prosecutor then questioned Beverlee about her willingness to do anything to make appellant happy. He asked whether she had agreed to perform illegal acts requested

by appellant. Defense counsel objected on "1101, 352" grounds. (52RT 9556.) At the sidebar conference, the prosecutor offered evidence that appellant had asked Beverlee to pick up a gun for him and to engage in disability fraud. Defense counsel stated the incidents did not involve crimes. The trial court found the evidence relevant and permitted a brief inquiry into these events "to illustrate the point that is being made here on cross." (52RT 9557-9559.) During the ensuing cross-examination, the prosecution introduced correspondence between Beverlee and appellant, in which Beverlee agreed to pick up a firearm as requested by appellant and later agreed to help appellant fraudulently obtain disability payments. (52RT 9559-9567.) On redirect examination, Beverlee testified that the gun belonged to her and that she never picked it up. (54RT 9596-9597.)

Just as in *Kennedy* and *Freeman*, the prosecutor was allowed to cross-examine Beverlee about her willingness to engage in different types of criminal or questionable activities to help or please her son. The evidence was relevant to show that Beverlee was willing to perjure herself at trial to aid appellant and that, consequently, she had lied about not seeing or hearing Katrina at her home on the night of her murder, about the amount of blood on her carpet, and about appellant's conduct and whereabouts the morning following Katrina's murder. The challenged evidence also tended to show that, contrary to her trial testimony, Beverlee had knowingly cleaned the blood in her condo to cover up the murder and had conspired with appellant to intimidate witnesses. Against the obvious probative value of the challenged evidence, appellant did not (and could not) show any undue prejudice or potential jury confusion. The challenged evidence could not have inflamed the jury's passions or bias against appellant, when compared to the charged crimes, and could not have been confused with the charged crimes by the jury. Therefore, the trial court acted within its

discretion in allowing the subject cross-examination. (See, e.g., *Kennedy*, *supra*, 36 Cal.4th at p. 620; *Freeman*, *supra*, 8 Cal.4th at pp. 494-495.)

In any event, a trial court's discretionary ruling on evidentiary matters should not be disturbed on appeal except upon a showing that the court "exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a miscarriage of justice." (*Rodriguez*, *supra*, 20 Cal.4th at pp. 9-10.) In turn, a "miscarriage of justice" should be declared only when the reviewing court, after an examination of the entire record, is of the opinion that it is reasonably probable that a result more favorable to the defendant would have been reached in the absence of the alleged error. (Cal. Const., art. VI, § 13; Evid. Code, § 353, subd. (b); *Watson*, *supra*, 46 Cal.2d at p. 836.)

Here, appellant could not possibly show he would have obtained more favorable verdicts but for the alleged error. Appellant's alleged involvement in disability fraud or firearm possession was a very trivial chapter in his long history of violent or sexual offenses and was hardly damaging or inflammatory when compared to his crimes against Katrina or his other female victims. Also, the challenged evidence played a minimal part in the prosecution's overwhelming case. In fact, it took a small portion of Beverlee's lengthy cross-examination (52RT 9370-9432; 54RT 9532-9583, 9602-9611), and the prosecutor did not even mention the above gun and fraud incidents during his unrelentingly attack of Beverlee's credibility in closing arguments (see, e.g., 56RT 10015-10029; 57RT 10031-10040). There is no showing the jury considered the challenged evidence in any improper way or found appellant guilty on the basis of the challenged evidence. Under these circumstances, appellant could not possibly show the requisite prejudice.

Appellant has forfeited his conclusory claim that his constitutional rights were violated. His objection below under Evidence Code sections

352 and 1101 did not preserve any constitutional objection for appellate purposes.[34] (See, e.g., *Kennedy*, *supra*, 36 Cal.4th at p. 612 ["The appellate court's review of the trial court's admission of evidence is then limited to the stated ground for the objection"]; *Kipp*, *supra*, 26 Cal.4th at p. 1125.) In any event, the admissibility of the challenged evidence under state law defeats these belated constitutional objections. (*Monterroso*, *supra*, 34 Cal.4th at p. 773.) Also, appellant does not argue herein there were constitutional standards of admissibility more exacting than the statutory standards imposed by our Evidence Code. And he does not otherwise show the admission of insignificant evidence about possible disability fraud or a handgun, at a trial involving a despicable murder and numerous sexual offenses, rendered his trial fundamentally unfair or deprived him of due process. (See, e.g., *Kipp*, *supra*, at p. 1125.)

Accordingly, the trial court acted within its discretion in allowing the prosecutor to cross-examine Beverlee about her willingness to help or please appellant even if it involved criminal or otherwise questionable

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[34] In *People v. Partida* (2005) 37 Cal.4th 428, 433-438, this Court redefined the forfeiture doctrine. Consistent with prior decisions, it stated that, if the defendant only objected to the evidence under Evidence Code section 352 at trial, the defendant may not argue on appeal that due process required exclusion of the evidence for reasons other than those articulated in his section 352 argument. This Court added, however, the defendant may make a "very narrow due process argument" on appeal, i.e., the asserted error in admitting the evidence over his section 352 objection had the "additional legal consequence of violating due process." (*Id.* at p. 435.) Even if *Partida* arguably allows appellant to make a "very narrow due process argument" that the alleged error had "the additional legal consequence of violating due process," *Partida* does not allow appellant to raise new constitutional claims based on the alleged violation of other constitutional rights. (See, e.g., *People v. Huggins* (2006) 38 Cal.4th 175, 240-241 & fn. 18 [objection to evidence on grounds of Sixth, Eighth and Fourteenth Amendments did not preserve objection under Fifth Amendment, citing *Partida*].)

activities, and any error herein was harmless. (See, e.g., *Kennedy*, *supra*, 36 Cal.4th at p. 620; *Freeman*, *supra*, 8 Cal.4th at pp. 494-495.)

VIII. THE TRIAL COURT DID NOT ERR IN ADMITTING EVIDENCE OF APPELLANT'S PORNOGRAPHIC MAGAZINES AND PHOTOS OF KNIVES

Appellant also contends the trial court violated his federal constitutional rights in admitting into evidence his pornographic magazines and two photographs depicting knives. According to appellant, the presence of pornographic magazines in his room was relevant but it was not necessary for the jury to see the contents of the magazines, which portrayed violent acts against women, scenes of bondage and degradation, and the general humiliation of women. As to the photographs, appellant asserts it was irrelevant whether he had access to knives and a hacksaw. Urging prejudice, appellant maintains the evidence merely ascribed "more anti-social behavior" to him. (AOB 207-210.) There was no evidentiary error or prejudice herein.

A. Factual Background

The record herein shows the prosecution offered as evidence two of the one hundred pornographic magazines found in appellant's bedroom on November 23, 1997. The prosecutor explained the magazines corroborated the victims' testimony about appellant's propensity to view pornographic magazines while forcing them to engage in sexual acts. The prosecutor also offered two photographs of appellant and others holding knives. One of the photographs was taken in appellant's bedroom and showed a hacksaw in the background. These photographs were relevant to show appellant kept tools and knives in his bedroom. The prosecutor further argued the magazines and photographs also contradicted the good character evidence presented by the defense. (50RT 8990-8992, 8995-8997.) Defense counsel objected that the photographs of appellant and others play

acting with knives were prejudicial. (50RT 8992-8994.) As to the magazines, defense counsel noted that they were irrelevant to the good character issue, that there was no dispute appellant had pornography, and that they were prejudicial because the content was disgusting. (50RT 8995-8998.) The trial court excluded the photograph of appellant and Clint Williams with knives under Evidence Code section 352. (50RT 8994-8995.) The court admitted the magazines and the hacksaw photograph for the reasons given by the prosecutor. (50RT 8998-8999.)

Following Bush's cross-examination, the prosecutor asked the trial court to reconsider its ruling about the photograph depicting appellant and Williams with knives. According to the prosecutor, the cross-examination tried to create the impression that it was ludicrous for appellant to have in his bedroom a knife like the one Bush described. The photograph showed appellant in his bedroom with the type of knife described by Bush. Defense counsel disagreed with the prosecutor's characterization of what his cross-examination attempted to show. He objected the photograph was very prejudicial. The court noted that, in light of Bush's cross-examination, the knife issue had become more prominent and that the admissibility of the photograph was a "very close issue at this point." Nevertheless, the court declined to admit the photograph because of the uncertainty as to when the photograph was taken. (52RT 9227-9234.) The court allowed testimony that knives were found in appellant's bedroom during the November 1997 search. (51RT 9234-9235.)

At a subsequent hearing, the prosecutor informed the trial court that his investigator had found another photograph of appellant holding a knife in his bedroom. In the Polaroid photograph, Buley was holding a hacksaw in kind of a mock threat to appellant's head and appellant had a knife pointed toward the camera. (52RT 9242.) Defense counsel objected the photograph was more prejudicial than probative and noted there was no

argument that appellant did not have access to knives. (52RT 9242-9243.) The prosecutor explained that, unlike the excluded photograph, this one did not depict appellant putting a knife to somebody else's neck, which reduced the prejudicial effect. The knife or dagger, which was seized from appellant's bedroom, was the same one depicted in the photograph that was already admitted. (52RT 9244-9245.) Defense counsel said he had no objection to the prosecution showing the actual knife in court but again objected to the photograph as prejudicial. (52RT 9245.) The court found the photograph was "much less prejudicial," since appellant was not threatening anybody with the knife. The court also found the probative value of the photograph outweighed the prejudicial effect and allowed the prosecution to use it. The photograph was marked as Exhibit 169. (52RT 9245-9246.)

B. There Was No Error or Prejudice

A trial court has broad discretion in determining the relevancy and admissibility of evidence, including photographs or other illustrative evidence. (*Michaels*, *supra*, 28 Cal.4th at p. 532; *Rodriguez*, *supra*, 20 Cal.4th at p. 9; *Scheid*, *supra*, 16 Cal.4th at p. 14.) "The concept of relevance is very broad [citation omitted], encompassing evidence depicting the crime scene and injuries inflicted [citation omitted], and that bearing on the defendant's account of events and state of mind." (*People v. Salcido* (2008) 44 Cal.4th 93, 147.) A prosecutor need not stipulate to proof in place of photographs "if the effect would be to deprive the state's case of its effectiveness and thoroughness," nor is a prosecutor "obligated to present its case in the sanitized fashion suggested by the defense." (*Ibid.*; *People v. Mills* (2010) 48 Cal.4th 158, 191 ["That the challenged photographs may not have been strictly necessary to prove the People's case does not require that we find the trial court abused its discretion in admitting them"].)

Evidence Code section 352 allows a trial court to exclude evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time or create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. But in applying section 352, "prejudicial" is not synonymous with "damaging." (*Coddington*, *supra*, 23 Cal.4th at p. 588.) Instead, it involves the admission of "evidence which uniquely tends to evoke an emotional bias against the defendant as an individual *and which has very little effect on the issues*." (*Gionis*, *supra*, 9 Cal.4th at p. 1214.) Ultimately, the court's exercise of discretion should not be disturbed on appeal unless the prejudicial effect of the photographs and magazines clearly outweighs their probative value. (*People v. Heard* (2003) 31 Cal.4th 946, 976; *People v. Price* (1991) 1 Cal.4th 324, 441.)

Here, as explained by the prosecution and found by the trial court, the challenged evidence corroborated the testimony of numerous prosecution witnesses and was admissible even if appellant conceded below his possession of pornographic magazines and knives in his bedroom. (*Salcido*, *supra*, 44 Cal.4th at p. 147 ["prosecutor need not stipulate to proof in place of photographic evidence"]; *Heard*, *supra*, 31 Cal.4th at p. 975 [photographs were not cumulative, irrelevant, or otherwise inadmissible simply because they illustrated other evidence presented at trial or because defendant did not dispute the pertinent issue].) First, the prosecutor was entitled to provide the jury with physical proof in the form of actual magazines (as opposed to sanitized testimony or a stipulation) that appellant had a large collection of clearly pornographic magazines, which in turn corroborated the testimony of several of his victims that he perused over pornographic magazines during the sexual assaults. Second, the two knife photographs illustrated to the jury that appellant knowingly kept knives and tools in his bedroom. The availability of knives and tools in

appellant's bedroom unquestionably corroborated Nicassio's and Bush's testimony about the manner in which appellant killed Katrina with a knife and a tool he retrieved from his room.

Nevertheless, the trial court carefully exercised its discretion herein in admitting only two pornographic magazines that were representative of appellant's large collection and in precluding the prosecution from presenting additional (and arguably more prejudicial) photographs of appellant with knives. Ultimately, the trial court closely examined the challenged evidence and properly concluded the probative value of the challenged evidence was not substantially outweighed by its potential prejudice, as the evidence was corroborative of testimony already presented at trial and was not inflammatory in comparison to the evidence detailing appellant's charged crimes. (See, e.g., *Mills*, *supra*, 48 Cal.4th at p. 192; *Salcido*, *supra*, 44 Cal.4th at p. 148.)

Accordingly, the trial court acted well within its discretion in admitting the challenged evidence. (See, e.g., *Prince*, *supra*, 40 Cal.4th at pp. 1247-1249 [knives did not simply constitute bad character evidence, even if knives were not actual murder weapons]; *Heard*, *supra*, 31 Cal.4th at pp. 973-978 [photographs illustrated and corroborated testimony of prosecution witnesses about crime scene]; *People v. Memro* (1995) 11 Cal.4th 786, 865 [sexually explicit photographs of young boys, even if disturbing, were admissible as probative of defendant's intent].)

In any event, the alleged error warrants reversal of a conviction only if this Court concludes that it is reasonably probable the jury would have reached a different result had the evidence been excluded. (*People v. Carter* (2005) 36 Cal.4th 1114, 1170-1171; *Scheid*, *supra*, 16 Cal.4th at p. 21; see also Cal. Const., art. VI, § 13; Evid. Code, § 353, subd. (b); *Watson*, *supra*, 46 Cal.2d at p. 836; see, e.g., *Heard*, *supra*, 31 Cal.4th at p. 978.) Appellant cannot meet this burden as to the knife photographs or

the pornographic magazines. The challenged evidence did not disclose to the jury any information that was not already presented in detail through the testimony of witnesses. The two knife photographs were not gruesome, disturbing, or otherwise inflammatory. The pornographic magazines might have been disgusting, but not more than properly admitted evidence about appellant's sexually abusive conduct toward female acquaintances. During the short deliberations, it is doubtful jurors went through the pages of appellant's trashy magazines. Furthermore, the challenged evidence was hardly a significant part of the prosecution's case and was not even mentioned in closing arguments. Ultimately, overwhelming evidence supported appellant's convictions, and the challenged evidence had no effect whatsoever in the jury's verdicts. (See, e.g., *People v. Page* (2008) 44 Cal.4th 1, 45-46 [admission of pornographic magazines was not prejudicial].)

Just as in his previous contentions, appellant has forfeited his conclusory claim that his constitutional rights were violated. His objections below under Evidence Code section 352 did not preserve any constitutional objection for appellate purposes. (See, e.g., *Kennedy*, *supra*, 36 Cal.4th at p. 612 ["The appellate court's review of the trial court's admission of evidence is then limited to the stated ground for the objection"]; *Kipp*, *supra*, 26 Cal.4th at p. 1125; but see *Partida*, *supra*, 37 Cal.4th at pp. 435-439 [appellant may argue the asserted error in admitting the evidence over his Evidence Code section 352 objection had the additional legal consequence of violating due process].) In any event, the relevance and admissibility of the challenged evidence under state law defeats these belated constitutional objections. (See, e.g., *Prince*, *supra*, 40 Cal.4th at p. 1249; *Monterroso*, *supra*, 34 Cal.4th at p. 773.) Also, appellant does not argue herein there were constitutional standards of admissibility more exacting than the statutory standards imposed by our Evidence Code. And

he does not otherwise show the admission of fairly insignificant and mostly cumulative evidence about knives and pornographic magazines, at a trial involving a despicable murder and numerous sexual offenses, rendered his trial fundamentally unfair or deprived him of due process. (See, e.g., *Kipp*, *supra*, at p. 1125.)

In sum, appellant has not shown an abuse of discretion by the court or any prejudice as a result of the alleged error. (See, e.g., *Carter*, *supra*, 36 Cal.4th at p. 1171 ["Although the photographic and testimonial evidence may have been unpleasant for the jury to confront, it was not unusually disturbing or unduly gruesome, and was no more inflammatory than the testimony provided by other witnesses for the prosecution"].)

IX. THE TRIAL COURT PROPERLY ADMITTED EVIDENCE ABOUT THE RELUCTANCE OF WITNESSES TO TESTIFY

Appellant next contends his due process rights were violated by the admission of prejudicial evidence as to the reluctance of witnesses to testify. He complains the prosecutor was allowed to question seven witnesses (Bowkley, Billie B., Susan V., Corie G., Robyn G., Byrd, and Kristin S.) how they "felt" about testifying and to elicit that these witnesses were reluctant to testify. According to appellant, the questioning served no relevant purpose, and the prosecutor was improperly attempting to insinuate appellant was still a risk to the safety of these witnesses. (AOB 212-216.) Respondent disagrees.

A. Factual Background

The prosecutor initiated Bowkley's direct examination by asking her, "How are you feeling this morning?" The witness replied, "I'm nervous, scare." The prosecutor asked, "Why are you scared." (37RT 6448.) Bowkley explained that she wanted to forget the night of January 30, 1998, and that she did not want to be in court. At this point, defense counsel objected on relevancy grounds, and the court overruled the objection.

Bowkley then testified that she did not want to testify despite being subpoenaed to do so. (37RT 6449.)

The prosecutor initially asked Billie B. how she was feeling about having to testify at trial. (38RT 6681-6682.) Billie felt "not good" about having to talk about the sexual offenses in front of people and had not told anybody about it until she spoke to Volpei. (38RT 6682.) Billie later added she was still afraid for her and her family's safety for coming forward with her accusations against appellant due to his gang affiliation. (38RT 6808-6809.)

The prosecutor started his direct examination of Susan V. by asking her how she was feeling. She replied, "Very nervous." (39RT 6866.)

Early in Corie's direct examination, the prosecutor asked her whether it was "uncomfortable" for her to talk about the truck incident in public. She agreed. The prosecutor also asked her whether it was harder to testify at trial than at the grand jury about the incident. Defense counsel objected as irrelevant, and the court overruled the objection. (41RT 7318.) Corie answered it was more difficult because appellant was present at trial. (41RT 7319.) Later, Corie noted it was "hard" to testify about the incident. (41RT 7321.)

At the beginning of Robyn's direct examination, the prosecutor told Robyn to move up close to the microphone and asked her whether she was nervous. Robyn agreed. She also agreed that the topics of her testimony made her uncomfortable and that it was hard talking about it in front of people. (42RT 7484.) She later had a hard time testifying about the details of the sexual assault. (See, e.g., 42RT 7495.) But she was more nervous at the grand jury because she feared retaliation and was afraid to be labeled a "rat." (42RT 7547-7549, 7552.)

The prosecutor started Byrd's direct examination asking her, "How are you feeling this morning?" Byrd replied, "Nervous." The prosecutor

then instructed the witness to answer loudly with words, for the benefit of the court reporter. (43RT 7640.)

After asking Kristin whether she knew appellant and whether she saw him in court, the prosecutor asked her whether she was doing okay. Kristin agreed but denied that was the feeling all right. She agreed her testimony involved issues as to which she was not comfortable talking about in public. (44RT 7873.)

B. Appellant Has Forfeited His Contention; in Any Event, There Was No Error or Prejudice

First of all, the above record plainly shows appellant posed only a relevancy objection to Bowkley's testimony, did not object to the other witnesses' testimony, and never raised any due process or prejudice objections. Consequently, he has forfeited his due process claim, which is the only one raised on appeal. (See, e.g., *People v. Valencia* (2008) 43 Cal.4th 268, 301; *Kennedy*, *supra*, 36 Cal.4th at p. 612 ["The appellate court's review of the trial court's admission of evidence is then limited to the stated ground for the objection"]; *Kipp*, *supra*, 26 Cal.4th at p. 1125.) In any event, as show below, the relevancy and admissibility of the challenged evidence under state law defeats his belated constitutional objection. (See, e.g., *Prince*, *supra*, 40 Cal.4th at p. 1249; *Monterroso*, *supra*, 34 Cal.4th at p. 773.) Also, appellant does not argue herein there were constitutional standards of admissibility more exacting than the statutory standards imposed by our Evidence Code. And he does not otherwise show the admission of brief testimony about the witnesses' reluctance to testify, at a trial involving a despicable murder and numerous sexual offenses, rendered his trial fundamentally unfair or deprived him of due process. (See, e.g., *Kipp*, *supra*, at p. 1125.)

Under Evidence Code 780, the jury may consider "any matter that has a tendency in reason to prove or disprove the truthfulness of" a witness's

testimony at trial, including the witness's demeanor while testifying, the manner in which the witness testifies, the existence of any bias, or the witness's attitude toward the action or toward the giving of testimony. For example, the prosecutor may elicit from prosecution witnesses that they are afraid to testify or fear retaliation for testifying, regardless of whether the defendant have threatened them or is directly linked to the fear of retaliation. (*Guerra, supra*, 37 Cal.4th at pp. 1141-1142 [witnesses feared retaliation from defendant's family]; *People v. Navarette* (2003) 30 Cal.4th 458, 506-507 [presence of defendant's girlfriend in courtroom made witness afraid].) An explanation of the basis for the witness's fear is also relevant to the witness's credibility. (*People v. Burgener* (2003) 29 Cal.4th 833, 869.) The trial court has ample discretion in determining the admissibility of this credibility evidence. (*Ibid.*; *Guerra, supra*, at p. 1142.)

In the instant case, the challenged evidence was clearly admissible under Evidence Code section 780, as it pertained to the witnesses' demeanor, bias, and attitude toward the case and toward the giving of testimony. (Evid. Code, § 780, subds. (a), (f), (j).) In a very brief manner, the prosecutor elicited that these witnesses were reluctant and/or uncomfortable to testify about the details of the sexual assaults. Some of them feared retaliation, while most of them were embarrassed by the incidents and did not want to relive them again in a public setting and in front of strangers. This evidence was very probative to the witnesses' credibility, as it explained their reluctance to contact law enforcement after the sexual assaults, similarly explained any hesitancy in their trial testimony, tended to show the witnesses were not falsely accusing appellant, and demonstrated how they were still intimidated by appellant's presence. Nevertheless, the prosecutor did not elicit or attempt to elicit from any of these women that their fear or reluctance was the result of recent threats by appellant. (See, e.g., *Navarette, supra*, 30 Cal.4th at

p. 507.) Although the probative value of the challenged evidence was significant, appellant made no showing below of any potential prejudice or possible jury confusion. Accordingly, the court acted within its discretion in admitting the evidence.

In any event, as already noted, a trial court's discretionary ruling on evidentiary matters should not be disturbed on appeal except upon a showing that the court "exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a miscarriage of justice." (*Rodriguez*, *supra*, 20 Cal.4th at pp. 9-10.) In turn, a "miscarriage of justice" should be declared only when the reviewing court, after an examination of the entire record, is of the opinion that it is reasonably probable that a result more favorable to the defendant would have been reached in the absence of the alleged error. (Cal. Const., art. VI, § 13; Evid. Code, § 353, subd. (b); *Watson*, *supra*, 46 Cal.2d at p. 836.) Here, appellant could not possibly show he would have obtained more favorable verdicts but for the alleged error. First of all, the challenged evidence did not involve any inflammatory or otherwise damaging information. Second, the witnesses' demeanor, reluctance, fear, or attitude would have been obvious to the jury from seeing and listening to the witnesses on the stand, regardless of the challenged testimony. Third, the prosecutor never invited the jury to make any improper inferences from the challenged testimony. Fourth, the jury was properly instructed on how to evaluate witness credibility. Fifth, the convictions were supported by overwhelming evidence. (See Statement of Facts, *ante*.)

In sum, appellant's contention has not been preserved for appellate purposes and, in any event, lacks merit.

X. APPELLANT IS NOT ENTITLED TO RELIEF ON THE GROUND OF CUMULATIVE ERROR

Appellant contends the cumulative effect of the alleged due process violations in the guilt phase requires reversal of the judgment, because they had a "substantial and injurious effect or influence on the jury's verdict." (AOB 216-218.) As explained above, there were no errors herein. Even if there were any errors, they did not, either singly or together, result in any substantial detriment to the fairness or reliability of the guilt trial. This is especially true in light of the overwhelming evidence of guilt supporting all the counts. (See, e.g., *Salcido*, *supra*, 44 Cal.4th at p. 156; *People v. Sanders* (1995) 11 Cal.4th 475, 537.)

XI. THE TRIAL COURT PROPERLY EXCLUDED TWO POTENTIAL JURORS FOR CAUSE

In his first penalty phase contention, appellant claims the trial court committed fundamental constitutional error in excluding two qualified potential jurors, Shannon Billic and Bill Tallakson. According to appellant, Billic did not have any "generalized moral compulsion against administering the death penalty" and affirmed that she could return a death verdict if appropriate under the facts. Appellant asserts Billic's general reluctance to impose the death penalty in a single-victim case was not a proper basis for her excusal. As to Tallakson, appellant maintains the juror's personal opposition to the death penalty did not disqualify him, because he was willing to set aside his personal beliefs and follow the law in deciding the penalty. Appellant asks this Court to vacate the penalty, regardless of any showing of prejudice. (AOB 218-244.) The record refutes appellant's position and amply supports the trial court's rulings.

A. Applicable Law

A prospective juror may be excused in a capital case if the juror's views on the death penalty "'would prevent or substantially impair the

performance of his duties as a juror in accordance with his instructions and his oath.'" (*People v. Gray* (2005) 37 Cal.4th 168, 192, quoting *Wainwright v. Witt* (1985) 469 U.S. 412, 424; see also *Lynch*, *supra*, 50 Cal.4th at p. 733.) The prospective juror's bias against the death penalty need not be proven with "'unmistakable clarity'"; instead, an excusal may be warranted if the trial court "'is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law.'" (*Gray*, *supra*, at p. 192, quoting *People v. Jones* (2003) 29 Cal.4th 1229, 1246-1247; *People v. Martinez* (2009) 47 Cal.4th 399, 425; accord, *Witt*, *supra*, at pp. 424-426.)

A juror's general opposition to the death penalty is not a sufficient ground on its own to disqualify the juror from serving on a capital jury. For example, jurors who firmly believe the death penalty law is unjust may serve as jurors in a capital case, as long as "'they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law.'" (*Martinez*, *supra*, 47 Cal.4th at p. 427, quoting *Lockhart v. McCree* (1986) 476 U.S. 162, 176; *Avila*, *supra*, 38 Cal.4th at p. 529.) Jurors must be able to do more than simply consider imposing the death penalty at trial; they must be able to consider conscientiously imposing the death penalty as a "reasonable possibility." (*People v. Schmeck* (2005) 37 Cal.4th 240, 262, citing *People v. Ashmus* (1991) 54 Cal.3d 932, 963.)

The trial court has broad discretion to assess the prospective juror's qualifications, and its resolution of factual matters about the juror's impartiality is binding on the reviewing court if supported by substantial evidence. Where a prospective juror gives equivocal or conflicting responses about his ability to impose the death penalty, the trial court's determination about the juror's true state of mind is binding on the appellate court. (*Lynch*, *supra*, 50 Cal.4th at pp. 733, 735; *People v. Solomon* (2010) 49 Cal.4th 792, 830; *Gray*, *supra*, 37 Cal.4th at p. 193;

accord, *Uttecht v. Brown* (2007) 551 U.S. 1, 7-9.) An error in this context does not require reversal of the guilt phase verdicts. (*People v. Tate* (2010) 49 Cal.4th 635, 666; accord, *Gray v. Mississippi* (1987) 481 U.S. 648, 668.)

B. Prospective Juror Billic

In her written questionnaire, Billic stated that, if a person killed someone, he could receive the death penalty or a life sentence. (21CT 6185, QQ 37, 39a.) She believed the death penalty was sought "too often." (21CT 6185, Q 39.) In a scale of 1-10 concerning whether there should be a death penalty law at all in California, Billic circled the number 9.[35] (21CT 6186, Q 41.) Billic also believed that the death penalty served the purpose of stopping killers from killing again and that the punishment of life without the possibility of parole ("LWOP") was a worse punishment than death, because killers "have to deal with this for the rest of their life." (21CT 6187, QQ 48-49a.) She promised to keep an open mind as to which penalty should be imposed, if the case reached the penalty phase. (21CT 6188, Q 50.)

In court, Billic clarified she was "not really for [the death penalty] unless they're a serial murderer or something, but if it's just one murder, I think they should go . . . life without parole." (28RT 4768.) She also stated she would automatically vote for LWOP if the defendant were convicted of only one murder. The prosecutor challenged her. (28RT 4769.)

In response to defense counsel's questions, Billic again noted that LWOP would be enough for a person convicted of one murder but that she "might listen" to the evidence and "see what's going on" at the penalty phase. (28RT 4770.) Billic stated that her opinion could be different if the victim was a child or if the killer was brutal and bragged about the crime.

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[35] 10 was strong favor for the death penalty law, and 1 was strong opposition to the law. (21CT 6186, Q 41.)

(28RT 4771.) She also thought she would consider both penalties depending on the circumstances. (28RT 4772-4773.) She was willing to listen to the case before reaching a penalty decision. (28RT 4773-4774.)

When questioned by the prosecutor, Billic acknowledged that, after reading the factual description of the case in the questionnaire, she wanted the court to know that the instant case was not one in which she could vote for the death penalty. (28RT 4774-4776, 4780-4781, 4786.) Billic agreed that this case did not qualify for her serial murderer standard and that there was a potential she could not be fair as to the death penalty issue. (28RT 4776, 4780-4781.) Billic stated that, if the defendant was convicted of one murder, she could consider the death penalty but did not know if she "would do it." (28RT 4777-4778.) She also stated that she could vote for the death penalty but could not look over at appellant and tell him so. (28RT 4779.) As in her written questionnaire, Billic thought LWOP would be the worse punishment and would vote for LWOP if she thought the defendant deserved the harshest punishment. (28RT 4781.) She agreed there was a "good chance in a case like this that [she] probably won't be fair in a penalty stage." (28RT 4781-4782.)

When questioned again by defense counsel, Billic agreed that she could return a death verdict if she were convinced the appropriate penalty was death based on the evidence. She also agreed it would be fair to listen to both sides in the same manner and to weigh the evidence according to the rules given by the judge. (28RT 4783-4784.)

In response to the prosecutor's questioning, Billic thought she could be fair despite her views about the death penalty and LWOP. (28RT 4787.) But she agreed that, in a case with only one victim, it would be "very unlikely" for her to return a death verdict even if she listened to the evidence. That was what she meant by not being fair. Neither counsel had additional questions for this prospective juror. (28RT 4788.)

The trial court pointed out it was leaning toward excusing Billic. (28RT 4789.) Defense counsel argued that Billic was unsophisticated about this issue but would not vote automatically against the death penalty in a single victim case. (28RT 4789-4791, 4793.) The prosecutor agreed that Billic was unsophisticated, not very articulate, and easily manipulated by questioning. The prosecutor noted that, in contrast to the juror's answers to leading questions by either side, the best indication of Billic's true feelings and her inability to be fair to the prosecution was her answer (i.e., death penalty only for serial murderers) to the court's open-ended question. (28RT 4791-4793.) The court granted the challenge, as follows:

> I think under the standard -- she was difficult to read because she just swayed with the wind here, but we did have the advantage of her coming in with a comment that was very revealing. [¶] And I just think that under the current standard, the duty she would have as a potential capital juror would be impaired by her reluctance to impose the death penalty in single-victim cases. I read into it, generally speaking, a general reluctance to do it. That's how I see it. [¶] It's a close one but she did not inspire confidence in me that what she says today will apply in January, let alone ten minutes from now. So for that reason I'm going to excuse her.

(28RT 4793-4794.)

As shown by Billic's extensive voir dire and as found by the lower court, Billic's unequivocal view that the death penalty should be reserved for serial killers (and possibly for child killers) would have prevented or substantially impaired the performance of her duties as a juror in the instant penalty phase trial. Billic volunteered in clear terms that she would automatically vote against the death penalty in one-murder cases, such as the instant case. The trial court was entitled to credit this statement and find it more probative than her equivocal or inconsistent answers to the attorneys' questions. Moreover, Billic did not clearly state that she could impose the death penalty in this case if warranted by the evidence. Her

answers tended to be inconsistent and equivocal but, for the most part, reflected her inability to impose the death penalty in a single murder case. For example, she promised to keep an open mind and to listen to the evidence. But she acknowledged that it was "very unlikely" she could vote for death and that she might not be fair as to the penalty because appellant was not a serial killer. Billic further conceded that she would have been unable to tell appellant in court that she had voted for the death penalty.

Accordingly, there was substantial evidence supporting the trial court's ruling. Billic's strongest and more reliable statements showed she would be unable to consider imposing the death penalty in single murder cases, such as the instant case, as a reasonable possibility. (See, e.g., *Tate*, *supra*, 49 Cal.4th at pp. 678-679 [juror's equivocal answers suggested she would not consider death penalty in a burglary-murder case but could do so in more deserving cases]; *People v. Friend* (2009) 47 Cal.4th 1, 61 [juror could only consider imposing death penalty against serial murderers]; *People v. Hawthorne* (2009) 46 Cal.4th 67, 84 [because case did not involve "an extreme mass murder," juror could not return a death verdict]; *Schmeck*, *supra*, 37 Cal.4th at pp. 261-262 [juror would not consider death penalty in felony murder case but could consider it for mass murderers]; *People v. Wash* (1993) 6 Cal.4th 215, 255 [juror would consider death penalty only if defendant had long history of prior violence].) To the extent Billic's conflicting and equivocal answers left any doubt about her inability to determine impartially the appropriate penalty in this single murder case, this Court must defer to the trial court's resolution of that uncertainty as to the juror's true state of mind. (See, e.g., *Lynch*, *supra*, 50 Cal.4th at pp. 728-733; *People v. Riggs* (2008) 44 Cal.4th 248, 284-285.)

C. Prospective Juror Tallakson

In his written questionnaire, Tallakson stated that he opposed the death penalty and was in favor of a sentence of LWOP. (15CT 4372, QQ

37, 38, 39a.) In the scale of 1-10, he rated the death penalty law as a 1, which meant that he was strongly against having a death penalty law. (15CT 4373, Q 41.) In addition, he responded "yes" to the question of whether he had feelings against the death penalty which were so strong that he would always vote against the death penalty regardless of the evidence presented. He explained that the death penalty promoted a "culture of state sanctioned killing," that it was "irreversible," and that mistakes were made. (15CT 4374, QQ 46-46a.) He did not think the death penalty served any good purpose. (15CT 4374, Q 48a.) If the case reached the penalty phase, Tallakson could not keep an open mind as to which penalty should be imposed because he opposed the death penalty. (15CT 4375, QQ 50-50a.) He ended the questionnaire by pointed out that he dreaded "the thought of having to vote on the death penalty as a juror." (15CT 4383, Q 82.)

In court, Tallakson corroborated that he dreaded "the thought of ever having to vote on the death penalty" and that he would vote against the law at an election, because he did not like the death penalty. (25RT 4230-4231.) He could not tell the court how he would consider voting on the death penalty in this case. He was just sure that he opposed the death penalty. But he reluctantly noted that he would try to follow the law. (25RT 4231.) Tallakson could not mention a particular type of crime in which he could vote for the death penalty. The prosecutor challenged Tallakson. (25RT 4232.)

In response to defense counsel's questioning, Tallakson stated that he "would always follow the law" but did not know if he could vote for the death penalty. (25RT 4233-4234.) Although Tallakson agreed that he would not favor a death penalty decision, he believed that he could give both sides an equal amount of consideration as a juror and that his mind was not foreclosed to the possibility of deciding on death as a penalty. (25RT 4235.) The trial court stated it was inclined to grant the

prosecution's challenge and asked defense counsel whether he wanted to be heard. Defense counsel just submitted. The court then excused Tallakson. There was no defense objection. (25RT 4236.)

The above record provides substantial evidence that Tallakson's strongly-held views against the death penalty would have prevented him from performing his duties as a juror at the instant penalty phase. In his written answers, Tallakson unequivocally stated his unconditional opposition to the death penalty law and his inability to keep an open mind or vote in favor of the death penalty under any circumstances. During voir dire, Tallakson promised to follow the law but confirmed his predisposition against the death penalty law, dreaded having to vote on the death penalty at trial, and could not mention a crime for which he would vote for the death penalty. (See, e.g., *People v. Moon* (2005) 37 Cal.4th 1, 15.) In a few of his oral answers, Tallakson appeared willing to consider the possibility of voting for the death penalty. But these answers showed a strong reluctance and were equivocal and conflicting, in light of other statements in which Tallakson clearly demonstrated his inability to impose the death penalty regardless of the facts. Tallakson never stated in clear terms that he was willing to set aside temporarily his fundamental opposition to the death penalty in deciding appellant's penalty. (See, e.g., *Martinez*, *supra*, 47 Cal.4th at p. 431.) It is telling herein that defense counsel did not object to Tallakson's dismissal, which suggests counsel concurred in the assessment that this prospective juror was excusable. (See, e.g., *Lynch*, *supra*, 50 Cal.4th at pp. 733-734; *Schmeck*, *supra*, 37 Cal.4th at p. 262.)

Accordingly, the trial court's determination of Tallakson's state of mind is binding on this Court as Tallakson equivocated with respect to his ability to follow the death penalty law. Ultimately, Tallakson's brief, reluctant, and equivocal answers about possibly considering a death verdict

did not detract from his strongest and more honest statements against the imposition of the death penalty in any case. (See, e.g., *Solomon*, *supra*, 49 Cal.4th at p. 832 [juror was fundamentally opposed to death penalty and found it unlikely she could consider voting for death, regardless of the evidence]; *Tate*, *supra*, 49 Cal.4th at pp. 677-678 [juror's expressions of confusion over voting for death did not significantly detract from his stronger statement that LWOP was an "insurmountable" choice]; *Martinez*, *supra*, 47 Cal.4th at pp. 427-433 ["the mere theoretical possibility that a prospective juror might be able to reach a verdict of death in some case does not necessarily render the dismissal of the juror an abuse of discretion"]; *Moon*, *supra*, 37 Cal.4th at pp. 15-16 [juror opposed death penalty, promised to follow law, but could not think of any case in which she could vote for death penalty]; *Wash*, *supra*, 6 Cal.4th at p. 255 [jurors did not know whether they were capable of voting for death].)

XII. THE JURY PROPERLY CONSIDERED APPELLANT'S CHARGED AND UNCHARGED OFFENSES AS AGGRAVATING EVIDENCE

Appellant next contends his constitutional rights were violated by the trial court's admission of evidence of non-statutory aggravation in the penalty phase. He claims that most of the improperly admitted evidence in the guilt phase (see Args. II-VIII, *ante*) fell outside the statutory definition of factors that could be considered by the jury in the penalty phase. Appellant specifically complains the jury should not have learned about his neo-Nazi beliefs, misogynistic attitudes, twisted sexual proclivities, drug use, bizarre relationship with his mother, willingness to corrupt young girls, and gang affiliation. He claims the error was not harmless beyond a reasonable doubt because the evidence was "manifestly prejudicial." He asserts the jury instruction against the consideration of evidence about his "lifestyle and background" was "completely inadequate" to cure the error. (AOB 245-251.) Appellant has forfeited this contention, which lacks merit.

First of all, appellant never argued below that it was a violation of his constitutional rights or section 190.3 for the jury to consider at the penalty phase evidence already presented at the guilt phase about his charged and uncharged offenses, sexual perversion, Nazi beliefs, gang affiliation, or relationship with his mother. At a hearing prior to the penalty phase, defense counsel did not argue the jury could not consider evidence of the uncharged and charged offenses already presented at the guilt phase. Instead, defense counsel objected to the introduction of additional evidence about this misconduct at the penalty phase. As to the charged offenses, counsel merely raised a meritless objection on notice grounds. Counsel specifically objected that the prior uncharged incidents in which appellant choked Katrina and in which appellant jumped on Cundiff had not been proved beyond a reasonable doubt. Counsel also objected to the prosecutor referring to appellant as a "serial rapist" but had no objection to the jury considering the evidence already presented about appellant's charged and uncharged sexual assaults. (58RT 10330-10367; 59RT 10438-10446, 10481.) Under these circumstances, appellant has not preserved any portion of his contention for appellate purposes. (See, e.g., *People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1052, 1054; *People v. Riel* (2000) 22 Cal.4th 1153, 1207; *People v. Quartermain* (1997) 16 Cal.4th 600, 630; *Avena*, *supra*, 13 Cal.4th at p. 426.)

Second, appellant's contention is partly based on the faulty premise that inadmissible evidence was presented during the guilt phase of trial. As explained above (Args. II-IX, *ante*), no inadmissible evidence was presented at the guilt phase of trial. Thus, there were no guilt phase errors rendering the penalty phase unreliable. (See, e.g., *Ramirez*, *supra*, 39 Cal.4th at p. 475; *Riel*, *supra*, 22 Cal.4th at p. 1208.)

On the merits, a jury is allowed to consider the circumstances of the charged offenses, as well as evidence of the defendant's uncharged criminal

activity that involved the use or attempted use of force or express or implied threats to use force or violence. (*People v. Russell* (2010) 50 Cal.4th 1228, 1271; *People v. Bacon* (2010) 50 Cal.4th 1082, 1127; § 190.3, factors (a)-(b).) But a juror may consider uncharged criminal activity independently as aggravating evidence only if the juror is first satisfied beyond a reasonable doubt that the defendant committed the acts. (*Wilson*, *supra*, 44 Cal.4th at p. 799; *Lewis and Oliver*, *supra*, 39 Cal.4th at p. 1052.) The "violent 'criminal activity' presented in aggravation may be shown in context, so that the jury has full opportunity, in deciding the appropriate penalty, to determine its seriousness." (*People v. Welch* (1999) 20 Cal.4th 701, 759, quoting *People v. Melton* (1988) 44 Cal.3d 713, 757.) The trial court lacks discretion to exclude all factor (a) or (b) evidence on the ground it is inflammatory or lacking in probative value, but it retains its traditional discretion to exclude specific evidence if it is misleading, cumulative, or unduly prejudicial. (*People v. Booker* (2011) 51 Cal.4th 141, 187-188; *People v. Wallace* (2008) 44 Cal.4th 1032, 1079; see also *Moon*, *supra*, 37 Cal.4th at p. 35 ["'The trial court's discretion at the penalty phase to exclude circumstances-of-the-crime evidence as unduly prejudicial is more circumscribed than at the guilt phase. . . . and the prosecution is entitled to place the capital offense and the offender in a morally bad light.'"].)

In this case, the jury was correctly instructed that, aside from the circumstances of the murder, it could consider the circumstances of other crimes for which appellant was convicted, as well as other criminal activity by appellant, as long as the crimes involved the use or attempted use of force or violence or the express or implied threats to use force or violence against a person. (8CT 2201; 64RT 11534-11535.) As to the uncharged criminal activity, the jury was instructed that, before a juror could consider the criminal acts as an aggravating circumstance, the juror must first be

satisfied beyond a reasonable doubt that appellant did in fact commit the criminal acts. (8CT 2207; 64RT 11539-11540.) The jury was also instructed that evidence about appellant's "life style or background" could not be considered as an aggravating factor. (8CT 2205; 64RT 11538.)

Consistent with the applicable law and the penalty phase instructions, the jury herein was allowed to consider as aggravating circumstances appellant's sexual offenses against Katrina, Robyn, Billie, Corie, and Kristin, his use of force or violence against Katrina, Cundiff, Susan, Kristin, and others, his attempts to resist arrest, and his attempts to intimidate witnesses. Most of these crimes were charged and found true beyond a reasonable doubt by the jury at the guilt phase, and the uncharged crimes were similarly proved beyond a reasonable doubt at the guilt phase. There is no claim to the contrary on appeal. Furthermore, all of the charged and uncharged offenses involved the use or attempted use of force or violence or the express or implied threats to use force or violence against a person. (See Statement of Facts, *ante*.) Accordingly, there was no statutory or constitutional impediment to the jury's consideration of the evidence presented at the guilt phase as long as it pertained to appellant's charged or uncharged offenses. (See, e.g., *Wallace*, *supra*, 44 Cal.4th at p. 1081[defendant's uncharged act of resisting arrest and surrounding circumstances]; *Tafoya*, *supra*, 42 Cal.4th at pp. 186-187 [prior rape was proper factor (b) evidence]; *People v. Thornton* (2007) 41 Cal.4th 391, 463-464 [defendant's battery, attempt to escape, and struggle with law enforcement fell within the scope of factor (b)]; *People v. Carpenter* (1999) 21 Cal.4th 1016, 1059-1060.)

As appellant points out, evidence as to his gang affiliation, White supremacist beliefs, drug use, sexual perversion, use and abuse of gang groupies, and relationship with his mother was presented at the guilt phase. But this evidence was not mere "bad character" or "lifestyle" evidence;

instead, it was an intrinsic part of appellant's violent criminal activity and also was relevant to prove the elements of the charged offenses and the special allegations. (See Statement of Facts and Arguments II-VIII, *ante*.) Consequently, the jury was entitled to consider this evidence at the penalty phase as part of the circumstances of appellant's charged offenses and other instances of violent criminal activity under factors (a) and (b) of section 190.3.[36] (See, e.g., *People v. Richardson* (2008) 43 Cal.4th 959, 1030 [defendant's membership in White supremacist gang was relevant to unadjudicated crimes]; *People v. Gurule* (2002) 28 Cal.4th 557, 653-654 [defendant's gang membership properly considered by the jury as part of his prior instances of violent criminal activity]; *Quartermain*, *supra*, 16 Cal.4th at p. 630 [defendant's racial beliefs were pertinent to circumstances of crime]; see also *Dawson v. Delaware* (1992) 503 U.S. 159, 165 [evidence concerning one's beliefs, including evidence of racial intolerance, is admissible at the penalty phase if it is relevant].)

Nevertheless, it was never suggested to the jury that it could decide appellant's penalty on evidence other than his violent criminal activity. For example, the prosecutor's opening statement did not ask the jury to consider any inadmissible evidence and did not mention appellant's gang affiliation, Nazi beliefs, sexually perverse views and practices, corruption of young women, or relationship with his mother. Instead, the prosecutor properly asked the jury to consider evidence of appellant's sexual offenses,

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[36] As noted by appellant (AOB 246-247), *People v. Boyd* (1985) 38 Cal.3d 762 "prevents the prosecution from introducing, in its case-in-chief, aggravating evidence not contained in the various factors listed in section 190.3." (*Id.* at p. 774.) But the *Boyd* rule does not apply to evidence presented at the guilt phase or to evidence that is relevant to the circumstances of the factor (a) crimes. (*People v. Smith* (2005) 35 Cal.4th 334, 354; *People v. Clark* (1992) 3 Cal.4th 41, 156.) Thus, *Boyd* does not support appellant's contention.

violent conduct, and threats of violence already presented at the guilt phase. (59RT 10484-10505.) In his closing argument, the prosecutor once again omitted any reference to appellant's lifestyle, gang affiliation, or any inadmissible evidence. Instead, the prosecutor focused on the evidence about appellant's criminal offenses and violent conduct and argued appellant's rape and murder of Katrina was the greatest factor in aggravation. (64RT 11425-11482.) In his closing argument, defense counsel told the jury that it was going to be instructed not to consider evidence of appellant's lifestyle and background, including his gang affiliation, as an aggravating factor. (64RT 11509.) As noted above, this limiting instruction was given to the jury. (64RT 11538.)

Under the above circumstances, there is no factual support whatsoever for appellant's contention that the jury considered inadmissible evidence of aggravation. (See, e.g., *Quartermain*, *supra*, 16 Cal.4th at p. 630; *Clark*, *supra*, 3 Cal.4th at p. 156.) As noted above, all the evidence presented at the guilt phase was pertinent to the charged or uncharged crimes and, thus, relevant to the penalty determination under factors (a) and (b). Even if some of the evidence of appellant's lifestyle and background could be deemed outside the scope of factors (a) and (b), it must be presumed the jury followed the court's instructions and did not consider any inadmissible evidence at the penalty phase. (*People v. Brady* (2010) 50 Cal.4th 547, 582; *Monterroso*, *supra*, 34 Cal.4th at p. 771.) Moreover, the prosecution presented very compelling circumstances in aggravation, such as appellant's long and uninterrupted history of violent crimes, the despicable and cruel way in which he raped and murdered Katrina, and his unrelenting sexual and physical abuse of numerous female acquaintances. In contrast, appellant was unable to present any truly mitigating evidence, as his own mental health experts aptly conceded he had antisocial personality, was ruthlessly indifferent to the welfare of others, viewed women as toys,

abused drugs, and was excessively aggressive toward others. (See Statement of Facts, *ante*.) Under the totality of circumstances, it can be said beyond a reasonable doubt that the penalty phase verdict was not affected by the jury's consideration of any inadmissible evidence.

Appellant's conclusory claim that his federal constitutional rights were violated due to the admission of aggravating evidence not listed in section 190.3 is equally unavailing. First, the jury did not consider evidence inadmissible under state law. Second, appellant has not asserted a cognizable claim under the federal Constitution. The high court has clarified that a trial court's noncompliance with state law in considering nonstatutory factors in support of a death sentence does not constitute a violation of federal law and, consequently, does not provide grounds for any relief in federal court. (*Wilson v. Corcoran* (2010) 131 S.Ct. 13, 16-17; *Zant v. Stephens* (1983) 462 U.S. 862, 878-879 [the federal Constitution does not require the jury to ignore other possible, unlisted aggravating factors in the process of selecting, from among the class of persons eligible for the death penalty, those defendants who will actually be sentenced to death].) And as the prosecution in *Wilson*, respondent does not concede the existence of a federal right to be sentenced in accordance with state death penalty law. (*Wilson*, *supra*, at p. 17.)

Accordingly, aside from being forfeited for appellate purposes, appellant's claim lacks any merit. (See, e.g., *Thornton*, *supra*, 41 Cal.4th at pp. 463-464 ["Because the evidence was properly introduced under factor (b), there was no violation of defendant's right to a reliable penalty determination under the Eighth and Fourteenth Amendments to the federal Constitution"]; *Quartermain*, *supra*, 16 Cal.4th at pp. 630-631; *Clark*, *supra*, 3 Cal.4th at p. 156.)

XIII. PENAL CODE SECTION 190.2 IS NOT IMPERMISSIBLY BROAD

Appellant also contends his death sentence is invalid because section 190.2 is impermissibly broad and does not perform the constitutionally required narrowing function. According to appellant, almost every murderer is eligible for the death penalty. He adds that, as applied to felony murder, the death penalty scheme "sweeps in a broad and arbitrary fashion." Appellant criticizes this Court's precedent as providing "very little discussion" on this narrowing function issue and asks this Court to reevaluate the issue. (AOB 253-260.)

As acknowledged by appellant, this Court has repeatedly rejected his contention and found section 190.2 "'does not contain so many special circumstances that it fails to perform the constitutionally mandated narrowing function.'" (*Bennett*, *supra*, 45 Cal.4th at p. 630, quoting *People v. San Nicolas* (2004) 34 Cal.4th 614, 677; accord, *Pulley v. Harris* (1984) 465 U.S. 37, 53 [California's requirement of a special circumstance finding adequately "limits the death sentence to a small sub-class of capital-eligible cases"].) Appellant has not provided any valid reasons for this Court to reconsider its previous holdings. Accordingly, this contention should be rejected again. (*Bacon*, *supra*, 50 Cal.4th at p. 1129; *People v. Beames* (2007) 40 Cal.4th 907, 933; *Smith*, *supra*, 35 Cal.4th at pp. 373-374.)

XIV. PENAL CODE SECTION 190.3, SUBDIVISION (A), DOES NOT ALLOW ARBITRARY AND CAPRICIOUS IMPOSITION OF DEATH

Appellant contends section 190.3, subdivision (a), violates his federal constitutional rights because "it has been applied in such a wanton and freakish manner that almost all features of every murder, even features squarely at odds with features deemed supportive of death sentences in other cases, have been characterized by prosecutors as 'aggravating' within the statute's meaning." Appellant complains this Court has never applied a limiting construction to the "circumstances of the crime" factor, which

allegedly "licenses indiscriminate imposition of the death penalty upon no basis other than" the particular set of facts surrounding the murder. (AOB 260-267.)

This Court already rejected the very same contention in *Bennett*, *supra*, 45 Cal.4th at pages 630-631. As found by this Court and the United States Supreme Court, "section 190.3, factor (a) 'instructs the jury to consider a relevant subject matter and does so in understandable terms.'" (*Id.* at p. 631, quoting *Tuilaepa v. California* (1994) 512 U.S. 967, 976 ["The circumstances of the crime are a traditional subject for consideration by the sentencer, and an instruction to consider the circumstances is neither vague nor otherwise improper under our Eighth Amendment jurisprudence"]; see also *Lynch*, *supra*, 50 Cal.4th at p. 766; *People v. Jackson* (2009) 45 Cal.4th 662, 699-700.) There is no valid basis for this Court to reconsider its previous holding. Thus, the contention should be rejected once again. (See, e.g., *Russell*, *supra*, 50 Cal.4th at p. 1274; *People v. Jennings* (2010) 50 Cal.4th 616, 688-689; *Williams*, *supra*, 49 Cal.4th at p. 470.)

XV. California's Death Penalty Statute Satisfies the United States Constitution

Appellant next contends our death penalty statute does not contain safeguards common to other death penalty sentencing schemes to guard against the arbitrary imposition of death, such as written findings, unanimity as to aggravating circumstances, proof beyond a reasonable doubt, and intercase proportionality review. (AOB 268-321.) As stated below, this Court has repeatedly rejected appellant's laundry-list of alleged problems with our death penalty law, and appellant has not provided any new and valid reasons for this Court to revisit any of these claims.

A. Beyond Reasonable Doubt Proof

Relying on the death penalty schemes of other states, appellant asserts California prosecutors should be required to prove beyond a reasonable doubt: (1) the factors relied upon to impose a death sentence; (2) aggravating factors outweigh mitigating factors; and (3) death is the appropriate sentence. He criticizes this Court's reasoning that penalty phase determinations are moral and not factual functions and, thus, are not susceptible to a burden-of-proof quantification. He further criticizes this Court's ruling that *Ring v. Arizona* (2002) 536 U.S. 584 does not apply to our death penalty determination. According to appellant, California jurors are required to engage in fact-finding as to aggravating factors in the penalty phase, this fact-finding is part of the eligibility phase, and these factual determinations should be made unanimously and beyond a reasonable doubt under *Ring*. (AOB 269-283.) Appellant's contention has been repeatedly rejected by this Court, and he provides no valid reasons for this Court to reconsider its prior holdings. Therefore, the contention must be rejected again. (*Russell*, *supra*, 50 Cal.4th at pp. 1271-1272; *Jennings*, *supra*, 50 Cal.4th at p. 689; *Bennett*, *supra*, 45 Cal.4th at p. 631; *Williams*, *supra*, 40 Cal.4th at pp. 337-338.)

B. Proof by a Preponderance of Evidence

In the alternative, appellant claims a burden of proof of at least a preponderance of evidence should be required as to the jury's penalty phase findings. He complains that non-capital defendants have greater protections as to sentencing decisions and that this Court has failed to consider the applicability of Evidence Code section 520 to a death penalty determination. (AOB 283-286.) Appellant's contention has been repeatedly rejected by this Court, and he provides no valid reasons for this Court to reconsider its prior holdings. Certainly, Evidence Code section

520, which solely refers to the burden to prove guilt, is inapplicable herein. Accordingly, the contention must be rejected again. (*Lynch*, *supra*, 50 Cal.4th at p. 766; *Brady*, *supra*, 50 Cal.4th at p. 590; *Smith*, *supra*, 35 Cal.4th at p. 374.)

C. Jury Instruction on Burden of Proof

Appellant maintains that the jury should have been instructed on a burden of proof when deciding the appropriate penalty, that the instruction was necessary to insure the death penalty was imposed with reasonable consistency, and that the error was reversible per se. (AOB 286-289.) This contention has been repeatedly rejected by this Court and must be rejected again, as appellant provides no valid reasons for this Court to revisit its prior holdings. (*Russell*, *supra*, 50 Cal.4th at p. 1272; *Jennings*, *supra*, 50 Cal.4th at p. 689 ["Unlike the guilt determination, the sentencing function is inherently moral and normative, not factual . . . and hence, not susceptible to a burden-of-proof quantification"; internal quotation marks omitted]; *Salcido*, *supra*, 44 Cal.4th at p. 167 [*Apprendi v. New Jersey* (2000) 530 U.S. 466 and its progeny do not justify reconsideration of prior rulings]; *Smith*, *supra*, 35 Cal.4th at p. 374 ["Because no burden of proof is required at the penalty phase . . ., the law is not invalid for failing to require an instruction on burden of proof"]; accord, *Tuilaepa*, *supra*, 512 U.S. at p. 979 ["A capital sentencer need not be instructed how to weigh any particular fact in the capital sentencing decision"].)

D. Unanimous Jury Agreement as to Aggravating Factors

Appellant also claims California law violates the United States Constitution by failing to require unanimous jury agreement on aggravating factors. He again cites to *Ring*, as well as *Cunningham v. California* (2007) 549 U.S. 270 and *Brown v. Sanders* (2006) 546 U.S. 212, as requiring this Court to reexamine its precedent to the contrary. (AOB 290-306.) This

contention has been repeatedly rejected by this Court, and he provides no new and valid reasons for this Court to revisit its prior holdings. Therefore, the contention must be rejected again. (*Bacon*, *supra*, 50 Cal.4th at p. 1129; *People v. Dykes* (2009) 46 Cal.4th 731, 799-800 [*Apprendi*, *Ring*, and *Cunningham* do not require juries to enter unanimous findings concerning aggravating factors]; *Williams*, *supra*, 40 Cal.4th at p. 338 [*Ring* does not mandate jury unanimity as to aggravating factors].)

E. Written Findings

Appellant further claims the failure to require written or other specific findings by the jury regarding aggravating factors deprived him of his federal due process and Eight Amendment rights to meaningful appellate review. He asserts an equal protection violation on the ground that non-capital defendants are provided greater protections in this context. (AOB 306-310.) Appellant's contention has been repeatedly rejected by this Court, and he provides no valid reasons for this Court to revisit its prior holdings. Thus, the contention must be rejected again. (*Russell*, *supra*, 50 Cal.4th at p. 1274; *Bennett*, *supra*, 45 Cal.4th at p. 632; *People v. Loker* (2008) 44 Cal.4th 691, 755; *Williams*, *supra*, 40 Cal.4th at p. 337.)

F. Intercase Proportionality Review

According to appellant, intercase proportionality review is required due to the lack of other checks on arbitrariness and the "greatly expanded" list of special circumstances. (AOB 310-316.) Appellant's contention has been repeatedly rejected by this Court, and he provides no new and valid reasons for this Court to revisit its prior holdings. So, the contention must be rejected again. (*Russell*, *supra*, 50 Cal.4th at p. 1274; *Loker*, *supra*, 44 Cal.4th at pp. 755-756; *Williams*, *supra*, 40 Cal.4th at p. 338; accord, *Pulley*, *supra*, 465 U.S. at pp. 50-51 [federal Constitution does not require intercase proportionality review].)

G. Unadjudicated Criminal Activity

Appellant maintains that any use of unadjudicated criminal activity by the jury during the penalty phase violates his constitutional rights, because the jury was not required to make unanimous findings beyond a reasonable doubt as to aggravating factors. (AOB 316-317.) Appellant's contention has been repeatedly rejected by this Court, and he provides no new and valid reasons for this Court to revisit its prior holdings. Therefore, the contention must be rejected again. (*People v. Nelson* (2011) 51 Cal.4th 198, 226; *Lynch*, *supra*, 50 Cal.4th at p. 766; *Loker*, *supra*, 44 Cal.4th at p. 756; *Smith*, *supra*, 35 Cal.4th at p. 374.)

H. Mitigating Factors List

In conclusory fashion, appellant claims the inclusion of the adjectives "extreme" and "substantial" in the list of potential mitigating factors acted as barriers to the consideration of mitigation, in violation of his federal constitutional rights.[37] (AOB 317.) Appellant's contention has been repeatedly rejected by this Court, and he provides no new and persuasive reasons for this Court to revisit its prior holdings. Accordingly, the contention must be rejected again. (*Russell*, *supra*, 50 Cal.4th at p. 1274; *Williams*, *supra*, 40 Cal.4th at p. 338; *Smith*, *supra*, 35 Cal.4th at p. 374.)

I. Instruction on Mitigating Factors

Appellant asserts the jury should have been instructed which of the listed sentencing factors were aggravating, which were mitigating, or which could be either mitigating or aggravating depending upon the jury's

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[37] CALJIC No. 8.85 told the jury to consider, among other factors, whether the murder was committed while appellant was under the influence of "extreme" mental or emotional disturbance and whether appellant committed the murder under "extreme" duress or under the "substantial" domination of another person. (8CT 2201-2202; 64RT 11535-11536.)

appraisal of the evidence. He speculates the jury could have aggravated his sentence based on non-aggravating factors. (AOB 318-320.) Appellant's contention has been repeatedly rejected by this Court, and he provides no persuasive reasons for this Court to revisit its prior holdings. Accordingly, the contention must be rejected again. (*Booker*, *supra*, 51 Cal.4th at pp. 196-197; *Russell*, *supra*, 50 Cal.4th at p. 1274; *Jennings*, *supra*, 50 Cal.4th at p. 690; *Brady*, *supra*, 50 Cal.4th at p. 590; accord, *Tuilaepa*, *supra*, 512 U.S. at p. 979.)

J. Prosecutorial Discretion

Appellant complains that the "arbitrary and wanton prosecutorial discretion" in deciding whether to seek the death penalty compounds the "disastrous effects of vagueness and arbitrariness inherent on the face of the California statutory scheme." (AOB 320-321.) Appellant's contention has been repeatedly rejected by this Court, and he provides no new and valid reasons for this Court to revisit its prior holdings. In addition, appellant has not even attempted to show the prosecution herein abused its discretion in seeking the death penalty against him, especially in light of appellant's cruel and despicable raping and killing of Katrina and his long history of sexual and violent crimes. Accordingly, the contention must be rejected. (*Jennings*, *supra*, 50 Cal.4th at p. 691; *Bacon*, *supra*, 50 Cal.4th at p. 589; *Williams*, *supra*, 40 Cal.4th at p. 339.)

XVI. The Trial Court Properly Instructed the Jury on Circumstantial Evidence

Pursuant to the standard version of CALJIC No. 2.01, the trial court instructed the jury as follows,

> a finding of guilt as to any crime may not be based on circumstantial evidence unless the proved circumstances are not only (1) consistent with the theory that the defendant is guilty of the crime, but (2) cannot be reconciled with any other rational conclusion. [¶] Further, each fact which is essential to complete

> a set of circumstances necessary to establish the defendant's guilt must be proved beyond a reasonable doubt. In other words, before an inference essential to establish guilt may be found to have been proved beyond a reasonable doubt, each fact or circumstance on which the inference necessarily rests must be proved beyond a reasonable doubt. [¶] Also, if the circumstantial evidence as to any particular count, permits two reasonable interpretations, one of which points to the defendant's guilt and the other to his innocence, you must adopt that interpretation that points to the defendant's innocence, and reject that interpretation that points to his guilt. [¶] If, on the other hand, one interpretation of this evidence appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable.

(7CT 1906; 57RT 10137-10138.) A similar instruction (CALJIC No. 8.83) was given with respect to the special circumstance allegations. (7CT 1962; 57RT 10177-10179.)

Reading the last paragraph of CALJIC No. 2.01 in isolation, appellant contends the instructions on the consideration of circumstantial evidence were contrary to the requirement that he may be convicted only if guilt is proved beyond a reasonable doubt. According to appellant, the "problem lies in the fact that the instructions required the jury to accept an interpretation of the evidence that was incriminatory, but only 'appeared' to be reasonable." He claims the "instructions operated as an impermissible mandatory, conclusive presumption of guilt upon a finding that a guilty interpretation of the evidence 'appears to be reasonable.'" Appellant maintains the error was reversible per se. (AOB 321-324.) As previously held by this Court, this contention lacks merit.

In rejecting the very same mischaracterization of CALJIC 2.01 as appellant's, this Court found:

> Examination of the full instructions shows defendant's concern to be groundless. Two of the instructions defendant complains of (CALJIC Nos. 2.01, 8.83) explicitly told the jury that every

> fact necessary to circumstantial proof of an offense or a special circumstance must be shown beyond a reasonable doubt. All the instructions complained of explicitly told the jury that if two possible inferences, both reasonable, could be drawn from the circumstantial evidence, the jury was required to reject the inference pointing to guilt or the presence of a required mental state and accept only the inference pointing to innocence or the lack of a required mental state. The instructions told the jurors they must accept a reasonable inference pointing to guilt only where any other inference that could be drawn from the evidence was *unreasonable*. That direction is entirely consistent with the rule of proof beyond a reasonable doubt, because an *unreasonable* inference pointing to innocence is, by definition, not grounds for a *reasonable* doubt. The circumstantial evidence instructions are thus correct.

(*People v. Brasure* (2008) 42 Cal.4th 1037, 1058, italics in original; see also *People v. Romero* (2008) 44 Cal.4th 386, 415-416; *People v. Samuels* (2005) 36 Cal.4th 96, 131; *People v. Crittenden* (1994) 9 Cal.4th 83, 144; *People v. Wilson* (1992) 3 Cal.4th 926, 942-943 ["a reasonable juror would understand that, taken in context, the relevant language of CALJIC No. 2.01 . . . must be considered in conjunction with the 'reasonable doubt' standard. Thus, the jury properly can find the prosecution's theory as to the interpretation of the circumstantial evidence 'reasonable' and alternate theories favorable to the defense 'unreasonable,' within the meaning of these instructions, only if the jury is convinced beyond a reasonable doubt of the accuracy of the prosecution's theory"].)

Appellant has not provided any new and valid reasons requiring this Court to reconsider its prior holdings. Therefore, this contention must be rejected once again. (See, e.g., *Bacon*, *supra*, 50 Cal.4th at p. 1114; *People v. Verdugo* (2010) 50 Cal.4th 263, 295-296; *People v. Hartsch* (2010) 49 Cal.4th 472, 506; *People v. Parson* (2008) 44 Cal.4th 332, 358; *People v. Williams* (2008) 43 Cal.4th 584, 641-642.)

XVII. California's Death Penalty Scheme Does Not Violate the Equal Protection of the Laws

Appellant next contends the denial of the "safeguards" set forth in Argument XV (i.e., proof beyond a reasonable doubt) violated the constitutional guarantee of equal protection of the laws. According to appellant, California provides "significantly fewer procedural perfections for persons facing a death sentence than are afforded persons charged with non-capital crimes." (AOB 324-326.)

This Court has consistently held our death penalty does not violate the equal protection rights of capital defendants because it provides a different method of determining the sentence than is used in noncapital cases. (*Bennett*, *supra*, 45 Cal.4th at p. 632; *Smith*, *supra*, 35 Cal.4th at pp. 374-375.) This Court has specifically found that "capital and noncapital defendants are not similarly situated and therefore may be treated differently without violating constitutional guarantees of equal protection of the laws or due process of law." (*People v. Manriquez* (2005) 37 Cal.4th 547, 590; see also *Lynch*, *supra*, 50 Cal.4th at p. 767; *Loker*, *supra*, 44 Cal.4th at p. 756.) As in his other challenges to California's death penalty law, appellant asserts arguments that have been soundly and repeatedly rejected by this Court and does not provide any new or valid reasons for this Court to revisit its prior holdings. Thus, the contention must be rejected once again. (See, e.g., *Jennings*, *supra*, 50 Cal.4th at p. 690; *Brady*, *supra*, 50 Cal.4th at p. 590.)

XVIII. California's Use of the Death Penalty Does Not Violate any International Norms of Humanity and Decency

Appellant contends California's use of the death penalty as a regular form of punishment falls short of international norms of humanity and decency and violates the Eighth and Fourteenth Amendments. Although

appellant acknowledges this Court is not bound by the laws of other countries, he asks this Court to consider the customs and practices of other countries with respect to the use of the death penalty and points out that most nations of the "Western world" no longer accept the death penalty as a regular punishment for a substantial number of crimes. (AOB 326-330.)

This Court has already rejected the contention that, because our death penalty allegedly violates international norms of humanity and decency, it also violates the Eight and Fourteenth Amendments. (*Jennings*, *supra*, 50 Cal.4th at pp. 690-691; *Bennett*, *supra*, 45 Cal.4th at p. 632; *People v. Mungia* (2008) 44 Cal.4th 1101, 1143 ["California's status as being in the minority of jurisdictions worldwide that impose capital punishment, especially in contrast with the nations of Western Europe, does not violate the Eighth Amendment]; *Kelly*, *supra*, 42 Cal.4th at p. 801 ["a sentence of death that complies with state and federal constitutional and statutory requirements does not violate international law"]; *People v. Cook* (2006) 39 Cal.4th 566, 619-620 ["international law does not bar imposing a death sentence that was rendered in accord with state and federal constitutional and statutory requirements"]; *Moon*, *supra*, 37 Cal.4th at p. 48 ["Although defendant would have us consider that the nations of Western Europe no longer have capital punishment, those nations largely had already abolished it officially or in practice by the time the United States Supreme Court, in the mid-1970's, upheld capital punishment against an Eighth Amendment challenge"].) Appellant raises arguments that have been soundly rejected by this Court in the past and does not provide any valid reason for this Court to revisit its prior holdings. Thus, the contention must be rejected once again. (See, e.g., *Russell*, *supra*, 50 Cal.4th at p. 1275; *Brady*, *supra*, 50 Cal.4th at pp. 590-591; *Loker*, *supra*, 44 Cal.4th at p. 756.)

XIX. APPELLANT IS NOT ENTITLED TO RELIEF AS A RESULT OF THE CUMULATIVE EFFECT OF THE ALLEGED ERRORS

In his final contention, appellant claims that he was prejudiced as a result of the guilt and penalty phase errors alleged herein. (AOB 330-331.) As explained above, there were no errors in this case and, thus, appellant is not entitled to any relief as a result of the cumulative effect of any inexistent errors. (See, e.g., *Russell*, *supra*, 50 Cal.4th at p. 1274; *Bacon*, *supra*, 50 Cal.4th at p. 1129; *Lynch*, *supra*, 50 Cal.4th at p. 767; *Loker*, *supra*, 44 Cal.4th at pp. 756-757; *Gray*, *supra*, 37 Cal.4th at p. 238.)

CONCLUSION

Accordingly, respondent respectfully requests that the judgment be affirmed.

Dated: May 25, 2011

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 59,237 words.

Dated: May 25, 2011

KAMALA D. HARRIS
Attorney General of California

JAIME L. FUSTER
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DECLARATION OF SERVICE

Case Name: People v. Merriman Case No.: S097363

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the Bar of this Court at which member's direction this service is made. I am 18 years of age or older and not a party to the within entitled cause; 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 MAY 26 2011, I placed two (2) copies of the attached

RESPONDENT'S BRIEF

in the internal mail collection system at the Office of the Attorney General, 300 S. Spring Street, Los Angeles, California, 90013, for deposit in the United States Postal Service that same day in the ordinary course of business, in a sealed envelope, postage thereon fully prepaid, addressed as follows:

Glen Niemy
Attorney at Law
P.O. Box 764
Bridgton, ME 04009

In addition, I placed one (1) copy in this Office's internal mail collection system, to be mailed to California Appellate Project (CAP) in San Francisco, addressed as follows:

California Appellate Project
Attention: Michael Millman
101 Second Street, Suite 600
San Francisco, CA 94105-3672

That I caused a copy of the above document to be deposited with the Clerk of the Court from which the appeal was taken, to be by said Clerk delivered to the Judge who presided at the trial of the cause in the lower court; and that I also caused a copy to be delivered to the appropriate District Attorney.

I declare under penalty of perjury the foregoing is true and correct and that this declaration was executed on MAY 26 2011, at Los Angeles, California.

L. Luna L. Luna
Signature

JLF:ll
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