In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **DONALD L. BROOKS,** **Defendant and Appellant.**	**CAPITAL CASE** Case No. S099274

Los Angeles County Superior Court Case No. PA032918
The Honorable Warren G. Green, Judge

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

The Los Angeles County District Attorney filed an information charging appellant with the murder of Lisa Kerr (Pen. Code,[1] § 187, subd. (a); count 1), stalking (§646.9, subd. (a); count 2), and arson causing great bodily injury (§ 451, subd. (a); count 3). As to count 1, it was further alleged that: appellant intentionally killed Kerr by means of lying-in-wait (§ 190.2, subd. (a)(15)); appellant committed the murder while engaged in the commission of a kidnapping (§ 190.2, subd. (a)(17)); and the murder was intentional and involved the infliction of torture (§ 190.2, subd. (a)(18)). (2CT 315-317.)

Appellant pleaded not guilty and denied the special allegations. (2CT 319.)

Trial was by jury. (16CT 3722.) The jury found appellant guilty on all three counts. The jury found the murder to be first degree. The jury found true the kidnapping and torture special circumstance allegations, but found not true the lying-in-wait special circumstance allegation. (16CT 3886-3888.)

At the penalty phase, the same jury returned a verdict of death. (16CT 3934.) After denying appellant's motion to reduce the penalty to life imprisonment without the possibility of parole, the trial court sentenced appellant to death. (16CT 3961-3963, 3972.) The trial court imposed consecutive sentences of eight months (one-third of the middle term) on count 2 and the upper term of nine years on count 3. (16CT 3963-3964, 3973.) The trial court imposed a $10,000 restitution fine and a parole

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[1] Unless otherwise indicated, all further statutory references will be to the Penal Code.

revocation fine in the same amount. (16CT 3964, 3974.) Appellant received a total of 725 days of custody credit. (16CT 3961, 3974.)

The appeal is automatic. (§ 1239, subd. (b).)

STATEMENT OF FACTS

A. Guilt Phase -- Prosecution Evidence

1. Overview

On March 24, 1999, at 4:17 a.m., firefighters responded to an embankment near the Roscoe off-ramp of the southbound 170 Freeway where they extinguished a fire burning in the interior of a white Ford Probe. (14RT 1481-1482, 1484, 1486-1489.) After the fire was extinguished, Lisa Kerr's charred remains were discovered inside of the car on the floorboard behind the front seats. (14RT 1490-1492; 18RT 1973-1974.) The presence of soot in Kerr's airways showed that Kerr was alive during the fire. (18RT 1978-1980, 1983-1984, 1987, 1992.) The evidence presented at trial established that appellant, Kerr's former boyfriend, had incapacitated Kerr by strangling her (18RT 1995-1997, 2098; 20RT 2235-2238, 2250-2251) and then had burned her to death by setting her car on fire with her inside of it (14RT 1538, 1560-1561; 18RT 2096, 2098).

2. Appellant Stalks Lisa Kerr: September 1, 1998, Through March 22, 1999

Lisa Kerr married Casey Kerr ("Casey") on or about August 1995. (18RT 2040.) They had a son, T. (17RT 1946.) Kerr and Casey separated at some point, but never divorced. (17RT 1862; 18RT 2040.)

Mark Harvey knew both appellant and Kerr.[2] (15RT 1690, 1706.) Harvey met appellant either in the late 1980's or in the early 1990's through the organization Alcoholics Anonymous (A.A.). (15RT 1706; 17RT 1849-1850, 1868.) On or about August 1998, in a face-to-face conversation with Harvey, appellant revealed that he had been having an affair with Kerr for several months. (17RT 1850-1851, 1856-1857, 1862-1867, 1869.) During the conversation with Harvey, appellant appeared upset and frustrated. (17RT 1864-1866.) Appellant told Harvey that he had first met Kerr at an A.A. dance in October 1997. (17RT 1869.) Appellant stated that he was in love with Kerr and he believed that his relationship with Kerr was perfect. He also mentioned that Kerr had moved into his house. However, appellant became upset when Kerr decided to leave appellant and reconcile with her husband for the sake of their son. (17RT 1857, 1863-1864, 1866-1867.) Appellant also indicated that he wanted to stab Kerr's husband Casey and to get him "out of the picture." (17RT 1857.)

On a day in late September 1998, Kerr and her friend Lynda Farnand[3] had five or six telephone conversations. (17RT 1915-1916, 1923.) In the last three conversations, Kerr told Farnand that she was afraid of appellant. (17RT 1923.) Kerr had spoken very quickly and she had sounded upset and scared. (17RT 1924.) Later that same day, Farnand met Kerr at the West Valley Police Station where Kerr sought assistance related to her fear of

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[2] Several witnesses knew appellant as "Louie." (See 15RT 1705-1706; 16RT 1824; 17RT 1915, 1958-1959; 18RT 2017-2018, 2072.) Appellant's middle name is Lewis. (See 2CT 315.)

[3] Farnand was Harvey's girlfriend and the mother of his two children. (15RT 1689; 17RT 1914.)

appellant. (17RT 1924-1925, 1947.) Kerr and Farnand were at the police station for approximately 30 or 45 minutes. (17RT 1925.)

On a separate date in September 1998, Kerr telephoned Farnand at work and stated that she was concerned about some messages that appellant had left in Kerr's voicemail. Farnand then drove to Kerr's home on Hart Street, where she listened to three messages. (17RT 1934-1937, 1948-1949.) The first message only contained music.[4] (17RT 1937.) The second message began with music, but ended with appellant stating that Kerr was a slut and a whore. (17RT 1937.) In the third and final message, appellant stated that if he could not have Kerr, no one else could. (17RT 1938.) Farnand had known appellant since the summer of 1995 (17RT 1915) and recognized his voice in the messages (17RT 1937). Appellant's tone of voice in the messages was agitated and angry. (17RT 1938.) Kerr was very upset about the messages. (17RT 1938.)

In October and November 1998, Dwayne Kari and appellant had three face-to-face conversations that occurred on separate dates. (20RT 2288-2289.) Kari had known appellant for about seven or eights years (20RT 2280) and had known Kerr for over 10 years (20RT 2279). Kari was also friends with Kerr's husband Casey. (20RT 2281-2282, 2292-2293.) In the first conversation, which occurred in either October or November 1998, appellant stated that he had feelings for Kerr and had lived with her. Appellant was initially reluctant to reveal Kerr's identity because Kari and Casey were friends. (20RT 2280-2282.) In the second conversation, appellant stated that he was being "messed around and . . . led on." Appellant also expressed hostility toward Casey. (20RT 2282.) In the third conversation, which occurred in November 1998, at about 8:00 a.m., Kari

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[4] On several occasions, appellant used his cell phone to send music to Kerr's voicemail. (18RT 2105-2106.)

happened to see appellant driving his van on Vanowen Street. Kari followed appellant toward Kerr and Casey's home on Hart Street. (20RT 2283-2285, 2290.) Appellant drove away from the area with Kari in pursuit. (20RT 2285.) Kari eventually caught up to appellant quite a distance away. Appellant complied with Kari's request to exit his car. (20RT 2285, 2290-2291.) When Kari confronted appellant as to why he was stalking Kerr, appellant denied doing so. (20RT 2286.) Kari believed that appellant was stalking Kerr and told appellant that he needed to stop. (20RT 2286, 2297-2299.) Appellant stated that Kerr was "screwing him around" and then removed some items from his van. (20RT 2286.) In response to Kari's questions, "Did you say that you were going to kill Casey," and "Did you say you would stab Casey," appellant said yes. (20RT 2288, 2294.) Appellant stated that he was going to stab Casey on that very day. (20RT 2299-2300.) From a hand-held recorder, appellant played a message in which Kerr stated, "All I can say about last night was yummy." (20RT 2286-2287.) Kari informed appellant that he was crazy. (20RT 2286.) Appellant next showed Kari a piece of paper with "Lisa Brooks" written on it. (20RT 2286-2287.) Appellant threatened to present the recorded message and paper to Kerr's husband, stating, "I'll show Casey. If [Kerr] doesn't leave him, I'll show Casey." (20RT 2287-2288.) Kari told appellant that it was wrong to threaten Kerr with those items. (20RT 2288, 2298-2299.)

In a telephone conversation in December 1998, Kerr told her friend Cheryl Zornes that she was afraid of appellant because he had been following her to her home and place of work. (17RT 1952-1953, 1958-1959.) Kerr stated that she and Casey were going to split up because she had to tell Casey about her relationship with appellant before appellant did. (17RT 1960-1961.) Kerr also described appellant's birthday gift to her: he had hired an airplane to fly over her house with a birthday banner.

Regarding that gift, Kerr told Zornes, "look what [appellant] is willing to do for me." (17RT 1962-1964.) Kerr seemed scared and confused during the conversation with Zornes. (17RT 1964.)

A "couple of months" before Kerr's death on March 24, 1999, appellant drove to Kerr and Casey's house located on Hart Street in Canoga Park, but he did not enter the house. (18RT 2072-2074; 19RT 2139.) Appellant was accompanied by his friend and employee David Heiserman.[5] (18RT 2069, 2072-2073, 2093, 2104.) Appellant's purpose of driving to the house was "to see what was going on." (18RT 2073.) Appellant parked his car about a block away from the house and then walked there. (18RT 2074.) Appellant returned to his parked car 25 minutes later. (18RT 2074.)

In January 1999, Kerr moved into her own apartment located on the 5900 block of Woodman Avenue. (15RT 1627; 17RT 1945; 18RT 2050.) The parties stipulated that on January 8, 1999, appellant signed a rental agreement in the name of "Donald Brooks and Lisa Brooks" for an apartment located at 5923 Woodman Avenue. (20RT 2304.) Appellant, accompanied by Heiserman, had followed Kerr five or six times, including to the Woodman Avenue apartment. (18RT 2075-2078; 19RT 2139-2140.)

About a week or two before Kerr's murder on March 24, 1999, appellant received a parcel containing a listening device. (19RT 2131.) Appellant told Heiserman that he had ordered the device in order to listen to activity inside of Kerr's home because she was "fucking around on him." Appellant admitted that he had planted the device somewhere in Kerr's home. If appellant was within a mile radius of Kerr's house, appellant explained, he was able to hear activity inside of her home through an A.M. channel. (18RT 2078-2080; 19RT 2131-2132, 2138-2139.) Before and

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[5] Appellant was a plumber. (18RT 2069; 19RT 2104.)

after appellant had "bugged" her home, Kerr told appellant that he was too possessive. (19RT 2140.)

A "couple of weeks" to a month before Kerr's death on March 24, 1999, appellant spoke to Heiserman about killing Kerr. (18RT 2080-2081; 19RT 2137.) During that time period, appellant had talked about killing Kerr on several separate occasions. (18RT 2081; 19RT 2135-2138.) Specifically, appellant told Heiserman that he was tormented by thoughts of Kerr. Appellant expressed a desire to kill Kerr in two ways: one, by blowing up her car, stating, "I could just blow up her car"; and second, by acting as a sniper and shooting her. (18RT 2070, 2082-2085; 19RT 2138, 2147-2148.) Appellant was upset with Kerr because she wanted to go back to her husband and also because she was "running around" on appellant. (18RT 2085-2086.) Appellant suspected that Kerr was having a sexual relationship with Harvey. (19RT 2145.) Appellant also stated that he had a plan to act as a sniper on a rooftop to kill Casey. (18RT 2081-2082.)

Heiserman stopped working for appellant about one or two weeks before Kerr's death (19RT 2138) because, in Heiserman's opinion, appellant was "insane" and "out of control" (19RT 2125-2126). Specifically, Heiserman described appellant's appearance as "insane" or similar to Jack Nicholson's character in the motion picture, The Shining, where in one scene, Nicholson sweated profusely, had messy hair, and was "stressed to the gills" with "no way back." (19RT 2144.) Appellant stated, "I can't . . . I don't know how to get [Kerr] off my mind. I'm going to go crazy." (19RT 2125.) Appellant was "out of control" during that time as he did not go to work and he did not want to do anything. (19RT 2125, 2144-2145.) Appellant's condition built up about a month before Kerr's death (19RT 2125) and continued until at least three days before she died (19RT 2127). According to Heiserman, appellant was obsessed with Kerr during the entirety of their relationship. (19RT 2146.) Kerr had told

appellant that he was too possessive. (19RT 2113-2114.) However, appellant appeared even more obsessed with Kerr shortly before her death. (19RT 2146.) Appellant stated that if Kerr did not leave her family for him, he would not be able to live with that decision or to see her. (19RT 2146-2147.)

Kimberlee Hyer had known Kerr for about 10 years. (18RT 2007, 2048.) During the months of January through March, 1999, Hyer traveled from Phoenix, Arizona, to Los Angeles nearly every two weeks on weekends and included visits with Kerr.[6] (18RT 2007, 2029.) Hyer was also acquainted with appellant. (18RT 2017-2018.) Hyer knew that in the previous summer and fall, Kerr had been having an affair, but at that time Hyer was unaware of appellant's involvement. Kerr had indicated that she wished Casey would treat her as she was being treated in her other relationship. In 1999, Kerr told Hyer that she broke off the affair when she was put in the position of either telling Casey about the affair herself, which she ultimately did, or alternatively, of appellant informing Casey about it. The disclosure of the affair to Casey led to Kerr's separation from him as well as moving to her own apartment. It was Hyer's understanding that appellant told Kerr that, for all the pain and trauma he had caused her, he would help Kerr "get on her feet" due to the fact that Kerr did not have a job before she and Casey separated. With Hyer's help, Kerr was hired to work at a retail store, but she could only get work for two days a week, which was insufficient to support herself and her son. Appellant told Kerr that he owed her, that he never meant to put her in that position, and offered to help her financially. (18RT 2056-2057, 2059.) Kerr told Hyer that the

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[6] Hyer was traveling to the Los Angeles area to care for her ailing 99-year-old grandfather. (18RT 2059.)

only reason appellant was in her life was "for the money."[7] (18RT 2046-2047.)

Although Hyer had seen Kerr in appellant's company (18RT 2017), Hyer never saw Kerr and appellant together in January 1999 (18RT 2019). Hyer saw appellant on several occasions in February, 1999, but never saw Kerr and appellant together during that month. (18RT 2019, 2030-2031.)

However, Hyer and Kerr unwittingly came into contact with appellant on a Sunday morning in February, 1999, when Kerr, her son, and Hyer went to the Norm's Restaurant located on Sherman Way and Woodman Avenue. (18RT 2007, 2019-2021.) As they entered the restaurant, they unexpectedly saw appellant and his daughter eating breakfast. (18RT 2021-2022.) Kerr became very agitated and upset when she saw appellant. (18RT 2022-2024.) Kerr and appellant briefly exchanged some words while Hyer and Kerr's son sat at a separate table. Appellant and his daughter left the restaurant without joining Kerr and Hyer, who remained there for about one hour. (18RT 2022, 2024.) When Kerr and Hyer walked outside to Kerr's car, a white Probe, Hyer noticed several gifts on the car -- Mylar balloons, a bunch of roses, boxes of chocolate, and a large house plant. (18RT 2024-2028.) At Hyer's suggestion, Kerr and her son returned to the restaurant. Hyer took Kerr's car keys and told Kerr that she would honk when she reached the front of the restaurant. (18RT 2024-2025.) While Kerr was inside of the restaurant, Hyer gave all of the gifts that had been left on Kerr's car to two teenage girls who were walking through the parking lot. (18RT 2026-2027.) Thereafter, Hyer picked up Kerr and her son at the front of the restaurant and drove them back to Kerr's apartment.

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[7] Kerr's statement occurred closer to the end of March, 1999 than December, 1998. (18RT 2056.) Heiserman also testified that appellant had helped Kerr financially. (19RT 2113-2115.)

(18RT 2028.) When Hyer parked in Kerr's parking space, Hyer noticed a clear white plastic bag hanging from a nearby fence. (18RT 2028-2029.) Upon inspection, the bag contained about three dozen Hot Wheels toy cars. (18RT 2029.) Hyer did not see appellant for the remainder of the day. (18RT 2029.)

On a separate date in February, 1999, Hyer called Kerr from an A.A. meeting and asked her to bring money that she had left in her pants pocket at Kerr's house to the meeting. (18RT 2030-2031.) Appellant later appeared at the meeting with the money. (18RT 2031.)

Based on a conversation with Kerr, Hyer provided several monetary gifts to Kerr during March, 1999. Kerr told Hyer that she had to pay bills, she did not have money, and had to ask appellant for money. (18RT 2057-2058.) In a personal check dated March 6, 1999, Hyer paid Kerr's Pacific Bell bill. (18RT 2037.) Hyer paid Kerr's Gas Company bill with a second check also dated March 6, 1999. (18RT 2038.) In a third check dated March 6, 1999, Hyer paid Kerr's pager bill. (18RT 2038.) In a personal check dated March 7, 1999, Hyer gave Kerr $150 because Kerr needed the money. (18RT 2033-2037.) Finally, in a personal check dated March 7, 1999, Hyer paid $100 for Kerr's son's school and daycare bill. (18RT 2038-2039.) Hyer told Kerr that she never had to ask appellant for money again as Hyer offered to financially help her. Kerr had also gotten a second job at a doctor's office. Hyer also offered to help Kerr move away from appellant into a safer and less expensive apartment. (18RT 2057-2058.)

The last time Hyer saw Kerr was 10 days before her death. (18RT 2008.) Kerr, who was seeing Hyer off at the airport, seemed scared and nervous. (18RT 2008-2009.) Kerr made Hyer promise that if anything terrible happened to Kerr, Hyer would take care of Kerr's son. Kerr repeated the request four times and would not let Hyer leave until she

promised. Hyer told Kerr not to worry because nothing was going to happen. (18RT 2013-2014, 2050.)

On March 22, 1999, at about 6:00 p.m., Kerr went to Harvey's house.[8] (17RT 1899, 1901-1902.) Prior to his trial testimony, Harvey had not told anyone about that visit. (17RT 1902.) Harvey and Kerr had no sexual contact on that day or any other day. (17RT 1899, 1903-1904.)

3. The Events Of March 23, 1999

The parties stipulated that if Scott Schiffman was called and duly sworn as a witness, he would have testified that: he was the owner of a business known as Beehive Beauty Supply, located at 14510 Ventura Boulevard in Los Angeles; he employed Kerr at his business; and on March 23, 1999, Kerr had worked at that location, leaving work at 6:05 p.m. that day. (20RT 2303.)

On March 23, 1999, Kerr drove her white Ford Probe to Harvey's residence located at 19017 Arminta Street in Reseda, arriving at 7:00 p.m. to babysit Harvey's eight-month-old daughter. (15RT 1688-1692; 17RT 1898.) Kerr also discussed renting a room in Harvey's residence because she was living in a more expensive apartment that she had rented under someone else's name. (15RT 1690; 17RT 1902.) Harvey and his two-year-old daughter left the residence at 8:00 p.m. to go to an A.A. meeting. (15RT 1691-1692.) When Harvey and his daughter returned to the residence at 10:00 p.m., he saw, at the edge of the fence and driveway near some bushes, the silhouette of a body and the glow of a cigarette at about knee- or thigh- level. Harvey could not see who the person was. (15RT 1692-1696.) While removing his daughter from his car, Harvey heard dogs barking from the back of his neighbor's property. (15RT 1696.) Harvey

[8] Harvey's testimony about Kerr's visit on March 22, 1999, was elicited on cross-examination. (17RT 1899.)

intended to turn on a floodlight in his backyard, but forgot to do so when his daughter complained of being cold. Instead, Harvey went through the front door of his residence. (15RT 1696.) Kerr was asleep on the couch in the living room and Harvey's younger daughter was asleep in her crib. (15RT 1696-1697.) Harvey prepared his older daughter for bed and stayed with her until she fell asleep at about 11:15 p.m. (15RT 1698.) Kerr woke up when Harvey began picking up toys from the living room floor. (15RT 1698.) Kerr went outside the residence to smoke a cigarette. (15RT 1701-1702.)

A couple of minutes later, Kerr returned inside the residence. Kerr was shaking and appeared nervous. (15RT 1702; 16RT 1823.) When Harvey asked Kerr what was wrong, she stated that it was not a good idea to rent a room from Harvey because appellant had threatened her. (15RT 1702, 1705; 16RT 1823-1824.) Kerr indicated that appellant had threatened to kill Harvey and his children if he had to in order to get to Kerr. (16RT 1824.) Kerr then picked up her purse and walked to the threshold of the front door to leave. (17RT 1839-1840.) Harvey walked directly behind Kerr. (17RT 1840.) At the front door, Kerr turned around, put her hand on Harvey's chest and stated, "Okay, we need to talk." (17RT 1840.) Kerr guided Harvey into the living room where they sat on separate couches. (17RT 1840.) Kerr sat on a couch located directly next to a floor heater vent. (17RT 1841-1842.) Harvey sat about six to eight feet from that vent. (17RT 1841.)

Kerr and Harvey then had a conversation for two hours, from 11:15 p.m. to 1:15 a.m., during which time appellant was mentioned. (17RT 1840-1843, 1871.) Kerr expressed concern over appellant as well as her emotions or feelings regarding that concern. (17RT 1843.) Kerr stated that she was afraid of appellant because he had threatened to kill her. (17RT 1845-1847.) Kerr also stated that appellant had been following her to

various places including her work, tanning salons, and to A.A. meetings. Appellant's actions caused Kerr fear. (17RT 1848.) As she spoke to Harvey, Kerr appeared very upset. (17RT 1849.) Although Kerr and Harvey had also talked about the pros and cons of engaging in a physical or romantic relationship (17RT 1872, 1887-1891), they never had that type of relationship (17RT 1849). Kerr told Harvey that she was frustrated with her relationships with her husband and appellant because Casey was obsessed with making money and appellant was overwhelmingly emotional. Kerr stated that she adored Harvey because he represented a balance between the other two men. (17RT 1872, 1891-1893.) Ultimately, Kerr and Harvey agreed not to have a physical relationship. (17RT 1891.) No sexual act occurred between Harvey and Kerr that night or on any other day. (17RT 1895, 1903-1904.) However, at one point, Harvey had massaged Kerr's shoulders for a minute. (17RT 1895-1896.)

4. March 24, 1999: Appellant Murders Kerr

At 1:15 a.m. on March 24, 1999, Kerr and Harvey finished their conversation. (17RT 1858.) Kerr and Harvey walked outside the house. Harvey hugged Kerr goodbye on the front lawn. (17RT 1858.) Kerr cautioned Harvey, "Be careful, 'Squirrel Boy' might be watching us." (17RT 1860.) Kerr had referred to appellant as "Squirrel Boy" more than once during her conversation that night with Harvey. (17RT 1861-1862, 1900) Harvey asked Kerr to call him when she arrived at her home. (17RT 1861.) Kerr then drove away in her car. (17RT 1861.) Kerr never called Harvey that night. (17RT 1861.)

At 4:17 a.m., firefighters responded to an embankment near the Roscoe off-ramp of the southbound 170 Freeway where they extinguished a fire burning in the interior of Kerr's car. (14RT 1481-1482, 1484, 1486-1489.) After the fire was extinguished, Kerr's charred body was discovered

inside of the car on the floorboard behind the front seats. (14RT 1490-1492; 18RT 1973-1974.)

5. March 24, 1999: Appellant's Statements To Heiserman

At about 8:00 a.m. on March 24, 1999, Heiserman learned that Kerr had died while watching a morning news show that had broadcast a report of Kerr's burnt car on the freeway off-ramp. (18RT 2092-2093.) Heiserman called appellant's cell and home phones and paged him, but received no response. (18RT 2094.) Appellant telephoned Heiserman at 11:30 a.m. (18RT 2093-2096.) Appellant did not respond to Heiserman's question as to his whereabouts. (18RT 2096.) Rather, appellant asked Heiserman, "Is she okay?" Heiserman responded, "Is who okay?" Appellant replied, "Come one, Smiley. Is she okay?" Heiserman asked, "Is who okay? What's going on?" Appellant then asked, "Is she dead?" After Heiserman answered, "Yes," appellant began to cry and then stated, "I got to go." (18RT 2096.) Appellant later telephoned Heiserman again at about 7:00 p.m. and told him to tell appellant's daughter that he loved her. (18RT 2096.) Appellant also told Heiserman that he could have appellant's truck and all the tools in it. (18RT 2097.) Appellant made subsequent telephone calls to Heiserman. Every time that Heiserman heard from appellant, Heiserman asked appellant what happened and assured him, "It's going to be okay, [appellant]." Appellant replied, "No, no, no, it's not. It's not going to be okay." Heiserman insisted, "It's going to be okay. You just got to deal with whatever you did. It's going to be okay." Appellant responded, "I can't. I can't." (18RT 2097.)

6. The Investigation

a. The Scene Of The Car Fire

Tim Traurig, an engineer with the Los Angeles City Fire Department, along with several firefighters from engine company number 81 were the first responders at the car fire scene. (14RT 1481-1482, 1486.) Traurig observed that Kerr's car was at an angle in an embankment located at the bottom of a 30- or 40- foot slope off the paved section of the Roscoe off-ramp. (14RT 1487-1488.) A chain-link fence was at the base of the slope. (14RT 1488.) Kerr's car had not hit the fence. (14RT 1488.) There was no indication that Kerr's car had been involved in a collision with another car. (14RT 1486.)

Kerr's car was "fully involved," which meant that there was a large and intense amount of fire engulfing a majority of the vehicle. (14RT 1488.) Traurig observed that the majority of the fire came from the driver and rear passenger window areas of the car's interior and that the fire had pushed out through the windows. (14RT 1484, 1486, 1488-1489.) It did not appear as if the engine compartment of the car was on fire. (14RT 1489.) After the car fire was extinguished with water within two to three minutes, Traurig observed Kerr's body inside of the car. (14RT 1490, 1502, 1507-1508.) Kerr's body was on its side on the floorboard area behind the front seats. (14RT 1491-1492.)

Traurig determined that an arson investigator should be notified given the suspicious nature of car fire: Kerr's body was discovered on the floorboard, and not in the driver's or front passenger's seat; the car never struck the chain-link fence, which would have occurred if the car had been speeding; and the fire appeared to have originated in the passenger compartment of the car. (14RT 1494-1500.)

At 4:50 a.m., arson investigator Michael Camello arrived at the car fire scene. (14RT 1527-1528, 1531.) Based on his investigation, Camello

concluded that the car fire was incendiary (an intentional fire) where a flammable liquid had been poured into the vehicle and on Kerr's body, and ignited with an open flame. (14RT 1561.)

Camello eliminated accident as the cause of the fire. Camello opined that there was no chance that the fire originated in the engine compartment of Kerr's car given that it had sustained only minimal fire damage. (14RT 1534, 1536, 1561.) Rather, the fire had originated in the car's passenger compartment and the radiated heat from that fire had extended into the engine compartment. (14RT 1536-1537.) The windows of the car doors had been completely burned away, which confirmed that the fire had generated an intense amount of heat in that area. (14RT 1537.) The car's interior was completely burned out. (14RT 1574.) The fire was a "rapid burning fire" and had created an "intense heat." (14RT 1537-1539.) Based on the amount of damage to the car and the burn patterns, Camello opined that a flammable liquid was most probably used as an accelerant to set the fire. (14RT 1537-1538.) For example, the fact that a majority of the floorboard carpeting was burned away indicated that some type of accelerant had been used because the fire was very hot and spread out in a low area. In contrast, fires started without accelerants burn in an upward and outward manner with heat rising and extending at a higher level. (14RT 1540, 1542-1545.) Camello concluded there was no chance the fire was caused by electrical means given the burn patterns that were consistent with flammable liquid being used on the floorboard as well as on the seats. (14RT 1548, 1561.) The car fire was consistent with the use of a flammable liquid, Camello determined, because it was an intense, fast-burning fire. Conversely, accidental fires burn for a longer period of time. (14RT 1551-1552.)

Kerr's body was on the floorboard between the front and back seats of the car. (14RT 1549.) Kerr was on her right side with her head facing

towards the rear of the car, her body was over the differential tunnel (the hump on the floor behind the front seats), and her lower extremities down to her knees were wedged behind the passenger seat. (14RT 1556-1557.) Because Kerr was positioned over a differential tunnel, there were two areas of "open space" below her body where the fire had burned away the carpeting. (14RT 1549-1550.) Camello opined this indicated that a flammable liquid had been poured over Kerr's body, which drained into those open spaces and thus caused the carpeting as well as Kerr's hands and lower extremities (the lower portion of her legs and her feet) to burn away. (14RT 1550-1551, 1559-1560, 1574.) Moreover, Camello opined that Kerr had been in the position in which she was discovered when the fire originated based on the depth of the burning to her body: portions of her face, neck and shoulder that were compressed against her purse on the floorboard were not burned. (14RT 1557-1558, 1564.)

The underside of the floorboard area of the front seat area sustained an extensive amount of heat, which was also consistent with a very intense heat associated with the use of a flammable liquid. (14RT 1560-1561.) A piece of rolled-up paper was on the car's driver's seat. (14RT 1552-1553.) Camello opined that the paper may have been lighted and thrown into the car to ignite the flammable liquid because volatile flammable liquids, such as gasoline, may flash or burn a person in close proximity when ignited. (14RT 1553, 1567-1568.)

The gas tank cap was not present at the car fire scene. (14RT 1555.) Stuffed into the filler neck of the gas tank were the remnants of a cloth that had been ignited and burned. (14RT 1554, 1566.) Camello opined that this represented a failed attempt to blow up the car. (14RT 1555-1556, 1567.) Attempting to ignite a fire in that manner was not effective given the presence of the flapper valve which prevents oxygen from entering the gas tank. (14RT 1555, 1567.)

At about 4:30 a.m., California Highway Patrol Officer Raul Campos responded to the car fire scene. (15RT 1582-1583, 1586.) Kerr's car had no collision damage. (15RT 1594.) Officer Campos also searched the area of the off-ramp and found no evidence of a collision involving Kerr's car. (15RT 1587-1589.) The "pop-up" headlights of Kerr's car were not in the open position. (15RT 1590-1591.) Those types of headlights would not close if the car was involved in a collision. (15RT 1591.) Officer Campos concluded that the car's location was not consistent with a traffic collision. (15RT 1591.) The car was almost at a right angle (almost 90 degrees) from the off-ramp. The angle was significant because if the car had been driven over the side of the off-ramp, it would have come to rest at a 45-degree angle and possibly gone through the chain-link fence in the embankment. (15RT 1592-1593, 1602.) Officer Campos opined that the car could have been pushed or driven at a very low speed to the location where it was discovered. (15RT 1609.) Moreover, the presence of Kerr's body on the floorboard wedged behind the front seats of the car was inconsistent with a person involved in a traffic collision. (15RT 1594.) Also inconsistent with a collision was the lack of damage to the underside of the car's fuel tank. (15RT 1594-1595.) Officer Campos concluded that Kerr's car had not been involved in a collision and that foul play was involved. (15RT 1595-1596, 1609.)

At 7:50 a.m. on March 24, 1999, Los Angeles Police Detective Lindy Gligorijevic responded to the scene of the car fire. (15RT 1610-1611, 1613.) By that time, arson investigators and other law enforcement officers were already at the scene. (15RT 1613-1614.)

Inside of the car, Kerr's body was behind the driver's seat area with her face facing towards the rear. (15RT 1617.) Kerr's head lay on her purse. (15RT 1616-1617.) There were very few physical remains of Kerr's body present. (15RT 1616.) Kerr's hands and feet had burned away.

(15RT 1618-1619.) However, the side of Kerr's face and some of her hair were partly intact. (15RT 1616.) Detective Gligorijevic and a deputy coroner removed Kerr's body from the back seat area of the car and onto a sheet outside. (15RT 1615.) The removal of Kerr's body caused much of her hair and skin to be left behind on her purse. (15RT 1616.)

Kerr's purse, which was still smoldering when Kerr's body was removed from the car, contained Kerr's driver's license and wallet. (15RT 1617-1618, 1631.) The car keys were on the floorboard directly below the steering wheel and appeared to be either broken or melted. (14RT 1572; 15RT 1619.) Kerr's car had a front license plate, but no rear plate. (15RT 1595, 1620-1621.) Records from the Department of Motor Vehicles showed that the car was registered to Kerr or her husband. (15RT 1621, 1626-1627, 1632-1633.)

b. K-9 Search Of Kerr's Car

Frank Oglesby was a K-9 handler assigned to the arson investigation section of the Los Angeles City Fire Department. (16RT 1744-1745.) Oglesby's partner was Flower, a Labrador Retriever certified and trained to detect the odor of flammable liquids commonly used to accelerate fires. (16RT 1750-1754, 1759, 1762-1763.) On March 29, 1999, Oglesby and Flower conducted a search of Kerr's car at a tow yard. (16RT 1763.) Flower detected the odor of a flammable liquid from the following items removed from the car: (1) fire debris, carpet, and padding from the left front interior (16RT 1767-1770); (2) debris from the right front interior (16RT 1770-1771); (3) carpet and padding from the left front interior (16RT 1771-1772); (4) debris of human hair from the left rear (16RT 1774-1775); (5) fire debris from the left rear (16RT 1775-1777); (6) fire debris from the right rear (16RT 1775, 1777); and (7) additional fire debris from the right rear (16RT 1776-1777). Based on his training and experience, his

own observations of the car, and his observations of Flower's behaviors, Oglesby opined that an ignitable liquid was distributed in the car to accelerate the fire. (16RT 1778, 1814-1816.) Oglesby concluded that the fire was set intentionally. (16RT 1778.)

c. Analysis Of Fire Debris

Criminalist Collin Yamauchi analyzed the fire debris from Kerr's car that had been collected by Oglesby. (20RT 2256-2260, 2271-2272.) Yamauchi opined that no recognizable ignitable liquid pattern could be detected by analysis with the gas chromatograph with mass selector detector (GCMS). Thus, it was inconclusive whether or not an ignitable liquid was or was not initially present in the debris. (20RT 2260-2261, 2272, 2276.) Yamauchi explained there were two reasons why GCMS analysis would not be able to detect an ignitable liquid in the fire debris: (1) the level of ignitable liquid was too low for detection; or (2) the ignitable liquid could have volatilized during the time that it was collected and stored. (20RT 2262.)

There were a number of components consistent with, or found in, gasoline in two debris samples from the right rear passenger side of the car, but there was insufficient data to conclude it was gasoline. (20RT 2263-2264, 2273; 21RT 2312.) Yamauchi also obtained a control sample by burning and testing the carpet and seat material from a car similar in make and model to Kerr's car. The trace substance found in the two samples with insufficient data was not present in the control sample. (20RT 2264-2265.)

d. Autopsy Results

Deputy Medical Examiner Raffi Djabourian performed Kerr's autopsy on March 25, 1999. (18RT 1969, 1972-1973.) Dr. Djabourian opined that the cause of Kerr's death was smoke inhalation, thermal injuries (any injury

resulting from heat, fire, or flame), and other "unevaluable" factors. (18RT 1988-1989.)

An internal examination revealed the presence of soot (a product of the combustion of fire) in Kerr's airway, larynx (the voice box), trachea (the windpipe), and bronchi (extensions of the windpipe leading to the lungs). Soot was also present in portions of Kerr's mouth. (18RT 1977-1980.) The soot in the larynx was within the lumen, or outer membrane. (18RT 1978.) "Active inspiration" or breathing is the only way in which soot could reach the airway if a person is exposed to fire. There is no post-mortem reflex that could have caused both the amount of soot and its distribution in Kerr's airway. (18RT 1983-1984, 1987.) Thus, Kerr was alive at least at the beginning of the fire. (18RT 1987, 1992.) Dr. Djabourian believed that Kerr was probably unconscious at the time of death based on the fact that she was alive in the car, but made no attempt escape from the fire. (18RT 1995-1997, 2003-2004.) There was no evidence that Kerr was intoxicated or physically restrained. (18RT 1990, 2002-2006.)

Kerr's toxicology results showed the same level of carbon monoxide in her blood as a person who had been unexposed to smoke: less than 10 percent. That result meant that there was not enough time for carbon monoxide to reach her bloodstream because the fire was very rapid. (18RT 1990-1991.) Based on his review of law enforcement agency reports and the autopsy findings, Dr. Djabourian concluded that the presence of low carbon monoxide in Kerr's blood was consistent with a very rapid or "flash fire." Thus, an accelerant may have been used in this case. (18RT 1977, 1991-1993.)

The extent of Kerr's injuries was consistent with a flash fire. (18RT 1992.) Kerr sustained traumatic injury in the form of thermal injury, which in this case consisted of extensive charring of her body. (18RT 1973-1974,

1988-1989.) Charring is equivalent to fourth degree burns where the entire skin and below into the muscle is burned, darkened, and blackened. (18RT 1974.) Kerr's hands and the area just below her knees to her feet were not intact. (18RT 2002-2003.) Thus, based on the extensive charring of Kerr's body, Dr. Djabourian concluded that an accelerant most likely had been used. (18RT 1999.)

Due to the extensive charring, Dr. Djabourian was unable to evaluate whether bruises or cuts were present on the external parts of Kerr's body. Similarly, Dr. Djabourian was unable to evaluate whether there was evidence of asphyxiation, such as red hemorrhages around the eyes. Those "unevaluable" factors may have had some role in Kerr's death. (18RT 1989, 1993-1995.) However, the "unevaluable" factors did not affect Dr. Djabourian's opinion regarding the primary cause of death. (18RT 1989.)

Only a small area of Kerr's hair and face was not burned. (18RT 1975, 1995.) Dr. Djabourian opined that the unburned area could have been protected from thermal injury if Kerr had lain on something, or if an accelerant was not placed on that area. (18RT 1975.)

External mechanisms from the fire could not have caused the soot to reach Kerr's respiratory system. (18RT 1985, 2000-2001.) Specifically, squirting water into Kerr's car could not account for the manner and amount of soot in the lumen of the larynx or the presence of soot in the trachea. (18RT 1987, 2000-2001.)

e. Appellant's Cell Phone Records

Appellant's cell phone records from Verizon Wireless (formerly Air Touch Cellular) were obtained with a search warrant. (15RT 1642-1644; 19RT 2151-2154, 2165.) Christian Olson, a Verizon investigator, provided testimony about activity on appellant's cell phone on several dates. (19RT 2148-2150.) Appellant's cell phone number was in service beginning on

September 27, 1997. (21RT 2155.) When a call is made or received, a signal from the cell phone is sent to the geographically closest cell site or tower. (19RT 2158-2159, 2174-2175.) A coverage map indicating the extent of a particular cell site's radio frequency was admitted at trial. (19RT 2161; 21RT 2317-2318.)

On March 23, 1999, appellant's cell phone made or received the following calls: (1) four calls between 4:25 p.m. and 5:07 p.m. transmitted near the Valley Cell Site or tower (19RT 2166-2168); (2) calls at 5:25 p.m. and 5:26 p.m. transmitted near the Oaks Cell Site (19RT 2168-2169); (3) seven calls between 5:27 p.m. and 6:03 p.m. transmitted near the Fashion Square Cell Site (19RT 2169-2171); (4) one call at 6:16 p.m. transmitted near the Oaks Cell Site (19RT 2171); (5) three calls between 6:32 p.m. and 6:33 p.m. transmitted near the Fulton Cell Site, the last two calls of which were outgoing calls to Kerr's pager number (17RT 1935-1936; 19RT 2171); (6) one call at 6:38 p.m. transmitted near the Valley Cell Site (19RT 2171-2172); (7) two outgoing calls to Kerr's pager number at 7:05 p.m. and 7:18 p.m. transmitted near the Canoga Park Cell Site (17RT 1936; 19RT 2172-2173). There were no further calls to Kerr's pager number after 7:18 p.m. on March 23, 1999. (19RT 2173.) The Fashion Square Cell Site was closest to Kerr's place of work. (19RT 2176.) The Fulton Cell Site was closest to Kerr's residence. (19RT 2176-2177, 2199.) The Canoga Park Cell Site was closest to Harvey's residence. (19RT 2177.) In the early morning hours, it would take about 20 minutes to drive the distance between Harvey's residence and Kerr's residence. (19RT 2205.)

On March 24, 1999, appellant's cell phone made or received the following calls: (1) one call at 3:19 a.m. transmitted near the Oaks Cell Site (19RT 2173); (2) one call at 4:23 a.m. transmitted near the North Hollywood Cell Site (19RT 2173-2174, 2196-2197); (3) two calls at 5:00 a.m. and 5:01 a.m. transmitted from the Fulton Cell Site (19RT 2174); and

(4) one call at 7:10 p.m. in Phoenix, Arizona (19RT 2174, 2177-2178). The North Hollywood Cell Site was closest to the car fire scene. (19RT 2177.) In the early morning hours, it would take about five to ten minutes to drive the distance between that location and Kerr's residence. (19RT 2205-2206.) It would take about 15 to 20 minutes to drive the distance between the car fire scene and Harvey's residence. (19RT 2206.)

On March 25, 1999, appellant's cell phone placed seven calls from Tucson, Arizona, from 12:16 p.m. and 1:47 p.m. and then placed calls from Sierra Vista, Arizona. (19RT 2178.) On March 29, 1999, appellant made a call from Albuquerque, New Mexico. (19RT 2178.) On March 30 and 31, 1999, and April 1 and 3, 1999, appellant made calls from Denver, Colorado. (19RT 2178, 2186.)

7. Appellant Assumes New Identity In Colorado

After Kerr's death, appellant lived with several people, including David Jayne, at a residence located at 1204 Cheyenne Meadows Road in Colorado Springs, Colorado. (20RT 2232-2234.) Jayne lived with appellant for about two or three months in 1999. (20RT 2234.) Jayne met appellant at a plumbing supply store and later worked with him for a few months. (20RT 2234.) When Jayne first met appellant, appellant drove a small blue car. (20RT 2254.) Appellant later also had a white van. (20RT 2255.) Appellant told Jayne that he had to return to California to retrieve the van because his tools were in it and he needed the vehicle for plumbing jobs. (20RT 2255.)

Jayne knew appellant as "Don Blanton." (20RT 2233-2234.) In June 1999, appellant told Jayne that he had lost his identification or that he was looking for new identification because he had gotten in trouble in California. (20RT 2234-2235.) About three weeks before July 29, 1999, appellant later told Jayne that he was in trouble because he had strangled

his girlfriend, Lisa. (20RT 2235-2236.) Appellant explained that he had followed her to another man's house, he went underneath the crawl space of the house, and listened to their conversation. (20RT 2236, 2251-2253.) Appellant said that he suspected his girlfriend was cheating on him and had followed her on previous occasions. (20RT 2253-2254.) While in the house's crawl space, appellant stated that he heard his girlfriend talking about or "putting down" his father, which made appellant angry. (20RT 2236-2238, 2241.) Appellant also told Jayne that he heard her and the other man having sex. (20RT 2241-2243.) After the conversation, appellant followed his girlfriend to her apartment where he strangled her. (20RT 2236-2237, 2250-2251.) To illustrate this act, appellant had held his hands in a strangling motion and said, "Well, I'm going to go to jail for assault anyway, so I might as well kill her." (20RT 2237-2238.) Appellant stated that he had killed his girlfriend in anger and that he was mad about it. (20RT 2244.) Appellant appeared calm as he recounted his actions on the night of Kerr's murder. (20RT 2238.)

8. July 29, 1999: Appellant Arrested In Colorado

On July 29, 1999, Colorado Springs Police Detective Derek Graham arrested appellant at the Cheyenne Road residence. (20RT 2209-2213.) Appellant was subsequently advised of and waived his constitutional rights. (20RT 2213-2214, 2226.) Appellant made the following statements to Detective Graham. At 1:30 a.m. on March 24, 1999, appellant argued with Kerr at her apartment for 10 minutes. Kerr was very angry and left the apartment driving her white Ford Probe. The car's license plate number was "KERUPDT." (20RT 2215, 2222, 2229.) Appellant then went to his home where he argued with his father. (20RT 2215.) In the early morning hours, appellant later saw Kerr's car on fire as he was driving on the

freeway. At that time, appellant saw the rear license plate of the car and the presence of the fire department at the scene. (20RT 2216.)

Appellant suspected that Kerr was having a sexual relationship with Harvey based on the way the two had made eye contact and because they were spending a lot of time together. (20RT 2223-2225, 2228-2229.) Appellant stated that he formed his suspicion before the night that Kerr died. (20RT 2228.) Appellant felt that Kerr was betraying him as he was paying for her apartment. (20RT 2227.) Appellant stated that he was very angry with Kerr's actions before she died and not simply on the night that she was killed. (20RT 2229.)

Appellant also told Detective Graham that he had purchased a blue Subaru, which had a California license plate, from someone "off the street" for $580. (20RT 2218-2219.) Appellant stated that he had driven the Subaru to Colorado. (20RT 2219.)

Appellant had a Colorado driver's license in the name of "Steven Daniel Blanton" on his person. (20RT 2219, 2221.) Appellant admitted that he was using the name Donald Blanton while he was in Colorado. (20RT 2221.) The parties stipulated that Detective Graham and another detective recovered a United Video contract in the name of Steven Blanton, which had a photocopy of a driver's license on the other side. (20RT 2302.)

9. Appellant's Post-Extradition Statements

Following his extradition to California, appellant made several statements to Heiserman at the Foothill Station of the Los Angeles Police Department. Appellant stated that he had followed Kerr to Harvey's house, he went under the house, and he heard Kerr and Harvey talking "shit" about him. Appellant stated that he "couldn't take it." Appellant later hid out and confronted Kerr at her car. Appellant strangled her; after she was "out," he put her in the back seat. Appellant did not indicate what he had done after

that, but Heiserman testified that appellant did not have to as Heiserman knew what appellant had done. (18RT 2097-2098.)

B. Guilt Phase -- Defense Evidence

Appellant did not testify at the guilt phase. (22RT 2483-2484.) He presented testimony from several witnesses to show that Kerr did not fear him. Sheila Peet was part-owner of a plumbing business that employed appellant. Peet had known appellant for about five years. (21RT 2378-2379.) During 1998 and the early part of 1999, appellant had several girlfriends, one of whom was named "Lisa." (21RT 2379.) Lisa came into Peet's plumbing shop three times, once in October and twice in November of possibly 1998. (21RT 2385.) Lisa talked about her relationship with appellant. (21RT 2379-2380.) According to Peet, Lisa did not appear to be afraid of appellant. (21RT 2383.) Rather, Lisa seemed very happy with appellant and talked about appellant getting her both a place to live and an attorney. (21RT 2383-2384.) Peet did not approve of Lisa's attire and believed that Lisa was dressed "a little risqué," revealing too much of her body when she was with appellant. (21RT 2384-2386.)

Yreneo Joseph Lujano had many contacts with appellant in 1998 and the early part of 1999. (21RT 2319-2320.) During that time period, Lujano met appellant's girlfriend "Lisa" only once but never spoke to her. (21RT 2321, 2328-2330.) On two or three occasions, appellant played tapes of a girl speaking for Lujano. (21RT 2321, 2325.) Lujano had no idea when or where those tapes were made. (21RT 2325, 2329.) Lujano initially testified that he did not recognize the voice on the tapes because he had never spoken to Lisa. (21RT 2328-2329.) However, he later testified that when he was introduced to Lisa, he heard her speak, and that the voice on the tapes was consistent with Lisa's. (21RT 2336.) In the first tape appellant played, a female stated, "I love you, I miss you." (21RT 2325-

2326.) In another tape appellant played, a female stated, "Thank you for helping me with my lawyer." (21RT 2326-2327.) Appellant also showed Lujano a card, possibly in February of an unknown year, that stated, "I love" and things of that nature. (21RT 2327-2328.)

The last time Lujano saw appellant was about two weeks before Lisa's death on March 24, 1999. Lujano noticed that appellant's behavior had changed dramatically. (21RT 2331, 2334.) Appellant told Lujano that he was in love with Lisa, and she with him, but they had problems with her husband. (21RT 2332.) Appellant's behavior changed because he failed to take care of his plumbing customers properly and he left jobs. (21RT 2332.) Instead of doing his job, appellant obsessed about Lisa. (21RT 2332.) Lujano next heard about appellant when he was found in Colorado. (21RT 2334.)

In 1998 and 1999, Jody Wheeler was a bartender at Charlie O's Saloon on Victory Boulevard in Van Nuys. (21RT 2338-2339, 2342.) Wheeler met appellant there in December 1998. (21RT 2339-2340, 2350.) Soon thereafter, possibly a "couple of months" later, appellant introduced Kerr to Wheeler. (21RT 2340-2341.) It was at that time that Kerr was hired as a bartender trainee. (21RT 2341-2342.) Kerr only trained one day at the bar. (21RT 2345, 2359.) Wheeler had recommended that Kerr not be hired because employees were not allowed to have boyfriends in the bar: appellant was at the bar during Kerr's training and remained there until her shift ended. (21RT 2342, 2345-2346, 2359.) On the one day that she had worked at the bar, Kerr did not say anything about appellant's presence there. (21RT 2343.) Subsequently, and up until her death, Kerr called the bar "all the time" during the daytime asking to speak with appellant. (21RT 2343-2346, 2357.) According to Wheeler, Kerr would call the bar up to 10 times a day. (21RT 2344, 2354-2355.) Appellant was occasionally present

at the bar at the time of some of the calls, but was not "much of a day person." (21RT 2345.)

The day before Kerr's death, appellant told Wheeler that he drove by Kerr's home "all the time" to see if her car was there. (21RT 2350-2351.) Wheeler told appellant to stay away from Kerr because she was using him. (21RT 2351.)

Defense investigator John Wolff testified that he interviewed Heiserman on February 15, 2000. (21RT 2361-2363, 2367.) Heiserman was reluctant to speak to Wolff. (21RT 2370.) However, Heiserman told Wolff that appellant had admitted to killing Kerr. (21RT 2370, 2373-2375.) Appellant also had told Heiserman the following: appellant was very mentally distressed; he "flipped out" and followed Kerr to Harvey's residence because appellant suspected they were having an affair. Appellant overheard Kerr "trashing" him, i.e., stating that appellant was a jerk, which incensed appellant. Appellant waited until Kerr left Harvey's residence, confronted her, and killed her by strangling her. (21RT 2375-2376.)

C. Penalty Phase -- Prosecution Evidence

1. The Impact Of Kerr's Death On Her Family

Kerr's grandmother, Helen Sorena, testified about the impact of Kerr's death on her and Kerr's son, T. (25RT 2745-2753.) Sorena and Kerr had been close from the day of Kerr's birth until her death. (25RT 2746.) Sorena and Kerr had always lived close to one another and they spoke to each other often. (25RT 2747-2748.) Sorena recalled her panic and grief upon learning of Kerr's death. (25RT 2750.) Sorena had discovered that Kerr had been in a burning car from watching, on television, the coroner's department transport of Kerr's body. (25RT 2750.)

Kerr's son, T., was nine years old at the time of the penalty phase trial. (25RT 2751.) When T. was told that Kerr would never be coming home again, Sorena testified that "the screams from that little boy would make anybody wish death on the person that killed [her]." (25RT 2751.) T. did not know the true circumstances of his mother's death and it was Sorena's hope that he never learned that Kerr was murdered, particularly because T. knew appellant. (25RT 2750-2751.) T. told Sorena several times that he missed his mother. (25RT 2751.) T. sent notes to his mother in heaven by attaching them to a helium balloon. (25RT 2752.) On Mother's Day, T. gave a card to his father stating, "My dad is my mother too, and I love my dad." (25RT 2752.) Sorena saw T. often when Kerr was alive and they had a very good relationship. However, after Kerr's death, it became difficult for T. to visit Sorena, which terribly affected her. (25RT 2748.)

The stress and strain of Kerr's death caused Sorena to experience extremely high blood pressure and a light heart attack, and a stent to be placed in her heart. (25RT 2749.) Sorena testified that the loss of Kerr also affected Kerr's mother, who had been under a doctor's care since Kerr's death and was unable to attend the trial. (25RT 2749.)

Travis Johnson testified that he and Kerr, his older sister, were like best friends. (25RT 2756-2757.) Johnson walked Kerr down the aisle at her wedding. (25RT 2761.) Johnson expressed sorrow that his daughter, who was seven months old when Kerr died, would never know her only aunt. (25RT 2759.) Johnson recalled that he felt completely empty and was in disbelief when he learned of Kerr's death. (25RT 2761-2762.) Although Johnson had tried to deal with the circumstances of Kerr's death, he was "still not anywhere near comprehending that she's gone." (25RT 2761.) Kerr's death also had impacted her mother's health. At the time of the penalty phase trial, Kerr's mother weighed less than 100 pounds and

was "going through really hard times" as a result of dealing with Kerr's death. (25RT 2762.)

Hyer testified that she and Kerr were best friends. (25RT 2764.) After Kerr's death, Hyer maintained regular contact with T. (25RT 2765.) As a Mother's Day tribute to Kerr, T. painted a pot and planted a flower in it, made Kerr a card, and then asked Hyer how he would send those gifts to Kerr. With Hyer's help, T. attached the card to a bundle of helium balloons, including a large, heart-shaped Mother's Day balloon with "To Mommy, love [T.]" written on it, and released it into the sky in order to "send it to heaven." (25RT 2765-2766.) Hyer recounted that T. was different after Kerr's death. T. became angry, was afraid of being abandoned, and was more guarded. (25RT 2767-2768.) Hyer provided a great deal of emotional support to T. because she had promised Kerr "that no matter what happened, [Hyer] would make sure that [T.] was okay." (25RT 2768.) Hyer herself felt that Kerr's death was like having a limb amputated. (25RT 2769.)

2. Prior Acts Of Violence (§ 190.3, Subd. (b))

Mary Christian married appellant in 1986. They separated near the end of 1989 and divorced shortly thereafter. (25RT 2780-2782, 2788.) They had two children together. (25RT 2782.) During their relationship, appellant physically assaulted Christian. In 1987, when Christian was pregnant with her son, who was 14 years old at the time of the penalty phase trial, appellant grabbed the back of her hair and pushed her face into a bathtub filled with scalding water. (25RT 2782-2783.)

In June 1989, when Christian was eight months pregnant with her daughter, appellant loaded a 12-gauge shotgun with buckshot, pointed the gun at Christian's stomach, laughed, and said, "Do you want to die?" Christian responded, "Pull the fucking trigger. I'm tired of talking about

it." (25RT 2787-2788, 2798-2799.) Around the time that incident occurred, appellant was heavily using cocaine. (25RT 2798-2799.)

In 1989, Christian discovered a group of strangers doing drugs in her Pomona home. Christian's daughter, who was three or four months old at that time, was sitting in a stranger's lap. When Christian asked the group, "Who the hell are all you people and where is Donny," they replied that appellant had left for "a couple of hours." (25RT 2783-2784.) The next day, Christian and appellant argued about that incident. Appellant grabbed the sides of a chair that Christian was sitting on, picked up and jerked the chair, and acted as if he was going to push her back into a lit fireplace. (25RT 2784-2785, 2796.) Christian kicked appellant in self-defense and ran off. (25RT 2785, 2796-2797.) Appellant was heavily using cocaine around the time that incident occurred. (25RT 2799-2800.)

During the period when their divorce was pending, Christian obtained a restraining order against appellant. Appellant went to South Carolina and told Christian that he would return to California "a changed man." When he returned to their Pomona home, appellant told Christian, "I should frame [the restraining order] so that I can always remember what you've put me through." Christian probably told appellant to "stick it up his ass" because he caused her to get the restraining order. (25RT 2785-2786.) Appellant and Christian then had a "huge fight." Appellant picked up their daughter, he grabbed a set of keys, and told Christian that he was leaving with their children. Christian replied, "No, you're not." When she tried to call 911, appellant ripped the phone out of the wall. Christian "smacked" appellant and ran outside to a neighbor's house. Appellant ran after Christian, put her in a "headlock," and dragged her back to their house. The police later arrived. (25RT 2786-2787.)

Christian described other incidents of domestic violence in which appellant had punched her in the head, grabbed the back of her hair and

pulled her head back, and hit her arm so hard that it caused a painful black bruise. (25RT 2788.) Christian had not been the aggressor in any incident in which appellant had physically assaulted her. (26RT 2821-2822.)

D. Penalty Phase -- Defense Evidence

Appellant did not testify at the penalty phase trial. (26RT 2909-2910.) He presented five witnesses on his behalf.

Lindsay Peet knew appellant fairly well over a period of "a few years." Appellant was a subcontractor for Mr. Peet's plumbing contracting business. (26RT 2826-2828.) In Mr. Peet's opinion, appellant did a "terrible thing," but he was a good man because, for example, he helped young men fresh out of jail or prison by hiring them for his plumbing business. (26RT 2829, 2832, 2834-2835.) Another positive aspect of appellant's character, according to Mr. Peet, was appellant's kindness to Mr. Peet's dog. (26RT 2829, 2833-2835.) Appellant was also devoted to his daughter, foregoing subcontracting work when he had visitation of her. (26RT 2829-2830.) Appellant had a business reputation of being knowledgeable, helpful, and caring. (26RT 2830.) In his personal life, appellant was "confused about some things," namely about, "some issues with a couple of women." (26RT 2828.)

Guilt-phase witness Sheila Peet[9] testified at the penalty phase that appellant was very kind, loving, and naïve or far too trusting a person. (26RT 2865-2866, 2868.) Mrs. Peet opined that appellant and Kerr "were a bad match from day one" because of appellant's naiveté. (26RT 2868-2869.) According to Mrs. Peet, appellant "always thought everybody was good, that no one would hurt him." (26RT 2869.) As a result of his relationship with Kerr, Mrs. Peet observed that appellant was constantly on

[9] Sheila Peet was married to Lindsay Peet. (26RT 2866.)

a "roller coaster," euphoric one minute and tortured the next. (26RT 2869-2870.) In Mrs. Peet's opinion, Kerr manipulated appellant and tortured his emotions. (26RT 2872.) Mrs. Peet formed her opinion based on speaking with Kerr on three occasions and on Kerr's attire. (26RT 2873-2874.) During "a couple months' span," appellant began dating other people because he and Kerr had broken-up. (26RT 2870.) Appellant was very involved with A.A. and everything that he did was usually connected to that organization. (26RT 2871.) Appellant brought people into the A.A. program and offered to sponsor Mrs. Peet's brother. (26RT 2871.) Mrs. Peet's opinion of appellant was unchanged, despite his conviction for murder in this case. According to Mrs. Peet, appellant had loved and worshipped Kerr. (26RT 2872, 2874-2876.)

Appellant was a subcontractor for Susan Baker's ex-husband. Baker knew appellant for eight or nine years. (26RT 2835-2838.) Based on her contact with appellant, Baker testified that appellant was a very caring person who would "give anybody the shirt off his back." (26RT 2838.) For example, appellant did not keep a job appointment because he helped a friend who needed to be in court. Appellant also took a day off from another job because he had promised to take his daughter to Disneyland. (26RT 2838-2839.) Appellant was very active in A.A., sponsoring many people there. (26RT 2840.) On one occasion, he helped Baker's mother with a plumbing problem even though he had been on his way to a black-tie event. (26RT 2840-2841.) Appellant cared a lot about his children. He used to bring his youngest child with him to job sites when he could not obtain child care. (26RT 2839.)

Although Baker knew that appellant had been convicted of murder, Baker's opinion of appellant as a caring person remained unchanged. (26RT 2839-2841.) After his arrest in this case, Baker visited appellant every other week at jail, talked to him on the telephone at least once a

week, sent him books, and purchased clothes for him to wear to court. (26RT 2840.)

Sherri Baysden was appellant's older half-sister. (26RT 2842-2843.) Their mother had been married to appellant's father, who was her fifth husband. (28RT 2844-2845.) When Baysden was 12 years old, she began living with her mother, appellant's father, and appellant, who was four years old. (26RT 2845-2846.) According to Baysden, appellant "was your typical, all-American young boy" who excelled at athletics. Appellant was always happy with a smile on his face. (26RT 2846-2847.)

Appellant's father was an alcoholic. (26RT 2848-2850.) Baysden testified that appellant witnessed domestic violence between his father and mother. Appellant heard his parents arguing and saw silhouettes of his parents engaged in a physical altercation behind a drawn curtain. (26RT 2847-2848.) Appellant's father and mother later divorced. (26RT 2850.)

Appellant's mother remarried to another alcoholic, Edwin Rawl. Baysden testified that appellant also witnessed Rawl commit domestic violence against his mother. In one incident, Rawl chased appellant's mother inside their house and shot a rifle as she was running from him. (26RT 2851-2852.) In another incident, when appellant was nine years old, Rawl shot appellant's mother with an M-1 rifle during a drunken rage. (26RT 2852-2856.) Appellant's mother remained with Rawl, who continued to abuse alcohol and to physically abuse her. (26RT 2857.) They divorced "years down the road" after she was shot. (26RT 2857.)

Baysden described appellant as a loving, caring, and intelligent person. (26RT 2858.) Baysden asked the jury to spare appellant's life because he loved Kerr, who had "yanked [him] around emotionally." (26RT 2860.) Appellant also loved his children and put them before himself. (26RT 2860-2861.) Appellant was compassionate, as he was supportive of Baysden's sobriety from alcoholism. (26RT 2862.)

Appellant's mother, June Brewton, also testified that appellant witnessed his stepfather Rawl engage in violent behavior against her. (26RT 2881-2882.) Appellant stopped Rawl from setting Brewton's bed on fire. (26RT 2882.) On another occasion, Rawl poured gasoline over the house in an attempt to burn it. (26RT 2882.) Brewton recounted the events before Rawl shot her in the back in 1978. (26RT 2883-2885.) From age eight until he graduated from high school, appellant intervened when Rawl was drunk and attempted to beat Brewton. (26RT 2882-2883.)

Brewton described appellant as "a person [who] likes to see people happy. He likes to do things for people that make him happy." (26RT 2886.) Appellant, according to Brewton, helped many people by giving them jobs. (26RT 2891.) Appellant learned sign language to communicate with a fellow junior high student who was deaf. (26RT 2881.) She also testified that appellant was proud of himself for quitting drug use. (26RT 2886-2887.) Brewton testified that appellant was a devoted father to his three children. (26RT 2888-2890.) Appellant did not deserve a death sentence, Brewton stated, because he loved Kerr, he did not intend to kill Kerr, he panicked when he realized what he had done, and then he ran. (26RT 2892-2893.)

ARGUMENT

I. THE TRIAL COURT PROPERLY STRUCK APPELLANT'S SUPPRESSION MOTION TESTIMONY

Appellant contends the trial court erroneously struck his testimony offered at the suppression motion hearing in violation of his state and federal constitutional rights. (AOB 35-57.) Respondent disagrees.

A. Relevant Facts

Appellant filed a motion to suppress his statements to police. (2CT 321-329.) The following four statements were at issue: (1) appellant's

statement to Colorado Springs Detective Derek Graham on July 21, 1999; (2) appellant's videotaped statement to Los Angeles Police detectives made at the Colorado Springs Police Station on July 22, 1999;[10] (3) appellant's statements to Los Angeles Police detectives during their car ride to the airport on June 26, 1999; and (4) appellant's statement to Los Angeles Police detectives on their flight to Los Angeles on June 26, 1999. (2RT 63-64.)

1. Suppression Motion Hearing On Statements Two, Three, And Four

a. Detective Gligorijevic

On April 26, 2001, the trial court held a suppression motion hearing on statements two, three, and four.[11] (4RT 265-367.) Los Angeles Police Detective Lindy Gligorijevic testified that on June 22, 1999, prior to having contact with appellant, Colorado Springs Detective Derek Graham informed her that appellant had been advised of and waived his constitutional or "*Miranda*" rights. (4RT 278-286.) At the beginning of her formal interview of appellant, Detective Gligorijevic reminded appellant of his *Miranda* rights by referencing appellant's earlier waiver to Detective Graham. (4RT 289; see 2CT 333.) The interview then proceeded, but was stopped after "a couple of hours" when appellant invoked his right to counsel. (4RT 289-290.)

Statement number three occurred four days later on June 26, 1999, while Detective Gligorijevic was driving appellant to the airport in order to return to Los Angeles. Appellant had initiated a dialogue by asking Detective Gligorijevic if she and her partner, Detective Gonzalez, were

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[10] This statement was transcribed. (2CT 331-481.)

[11] The trial court deferred hearing on statement one due to scheduling reasons. (See 1RT 54-58; 4RT 257-258; 6RT 489-490.)

wearing "wires" and asked if any statement he made in the car could be used against him. Detective Gligorijevic told appellant that his statements in the car would not be used in that manner. Appellant then stated that the reason he had not confessed earlier was because he was afraid of the death penalty. (4RT 290-295, 297-298, 300-302.) Appellant also stated that he was concerned about the lying-in-wait special circumstance because he had listened to Kerr and Harvey while underneath Harvey's house the evening of Kerr's death. (4RT 295, 297.)

Statement number four occurred later on the flight to Los Angeles. (4RT 303.) Without any prompting from detectives, appellant made several incriminating statements. Specifically, appellant stated that he confronted Kerr in her apartment and pushed her to the floor, where he pressed down on her neck. Appellant stated that he did not believe he had killed Kerr, but only badly injured her to the extent that she had urinated on herself. Appellant stated that he then put Kerr in her car and eventually drove the car over an embankment. He placed a burning piece of paper into the car because he thought that someone would rescue her. (4RT 303-308.)

b. Appellant's Direct Examination Testimony

After the conclusion of Detective Gligorijevic's testimony, appellant testified at the suppression motion hearing. (4RT 332-350.) Before testifying on direct examination, the trial court stated that appellant's suppression motion hearing testimony could only be used at trial for impeachment purposes if appellant chose to testify. (4RT 333.)

Appellant testified that, before he entered the interrogation room, he told Detective Gligorijevic and her partner that he previously had asked Detective Graham "about a lawyer." (4RT 337.) As he approached the interrogation room, appellant "asked out loud and verbally voiced [he] would like a public defender, someone who would be there for [him] to

represent [him]." At that point, appellant testified, that Detective Gligorijevic sarcastically replied, "It's not our job to get you a lawyer." (4RT 338.) Appellant inquired, "So how do I get a defense for me, then?" As they were about to enter the interrogation room, Detective Gligorijevic stated, "It's the public defender's office's job to know that you have been arrested and provide someone for you." (4RT 339.)

Inside the interrogation room, appellant asked detectives why no one was seated in a chair beside him, stating "how come there's nobody sitting here? Isn't this chair supposed to be for somebody that's supposed to provide, you know -- supposed to help me?" (4RT 339.) Appellant testified that he asked Detective Gonzalez, "Isn't there supposed to be someone here for me," "[o]ver and over, at least five times." (4RT 340.) Appellant then began drinking and eating. (4RT 340.) Appellant testified that he ate food before Detective Gligorijevic stated, as shown on videotape, that "When [Detective Graham] brought [appellant] in here, he read your *Miranda* rights." (4RT 340.) Several times during the interrogation, appellant told detectives that he wanted to leave the room. (4RT 341-342.) Specifically, appellant told detectives, "I just want to leave this room," "There's no one sitting there for me," "[Absolutely] no one. Why is it so hard for you to understand that when I tell you that I'm uncomfortable in this room [to talk to you]," "I just don't like this room," "'Cause there's no one sitting here to, like, [here for me]." (4RT 342-344; see 2CT 432, 439-440, 450.)

Appellant also testified about the events surrounding his arrest in Colorado Springs. Appellant testified that Detective Graham was not present at the time of his arrest. (4RT 345.) Appellant had asked the arresting officer, "What about a defense person for me? How do I speak to a lawyer and when do I get my phone call?" (4RT 346-348.) Appellant signed a waiver permitting the police to search his residence. (4RT 348.)

After appellant sat in a holding cell for about 25 minutes, Detective Graham and his partner took appellant into a coffee room at the police station where appellant asked, "What about a lawyer and a phone call?" According to appellant, the detectives' response was "Well, you know, nobody's heard your side of the story yet. So, you know, we can help you. You know, if you tell us things, we can go out to California and we can help you because no one's heard your side of the story. So if you talk to us, you know, we'll be on your side." (4RT 348.) Appellant testified that he later signed a waiver of his *Miranda* rights after he had twice asked for a lawyer "[b]ecause they were leading me to believe that they would help me. Because a couple of questions would come up about certain aspects of the crime, and so I made the statement of, well, . . . there was a Black lady that seen me that can specifically place me at the time. . . ." (4RT 349-350.)

c. Trial Court Strikes Appellant's Hearing Testimony

On cross-examination, the prosecutor asked appellant whether he told detectives that he killed Kerr. (4RT 351-352.) Defense counsel objected on the grounds that the question was beyond the scope of direct examination and was "irrelevant to whether or not he had been earlier told that anything he said could not be held against him." (4RT 352.) Counsel stated that he had allowed the prosecutor "to go into the statement itself when he was questioning the detective," but counsel did not broach the statement itself on direct examination. Thus, counsel argued that the "question exceeds the scope of the direct examination." (4RT 352.) The trial court responded, "Doesn't your motion to suppress put all of the subject matter of these statements in controversy? You client has chosen to take the stand to testify in that regard. It seems to me it's fair game." (4RT 352-353.) The prosecutor agreed and stated that because appellant was testifying contrary to Detective Gligorijevic, appellant's credibility was at

issue. (4RT 353.) Moreover, counsel had introduced appellant's state of mind on direct examination. (4RT 353.) The trial court overruled the defense objection and ordered appellant to answer the question. (4RT 353.) At appellant's request, the trial court permitted appellant to confer with defense counsel. (4RT 353.)

After conferring with appellant, counsel informed the trial court:

> Here's our position, your honor. Our position is, with all due respect, we disagree, of course, with the court's ruling in requiring [appellant] to answer the question. [¶] I understand that if [appellant] declines to answer the question, that the district attorney will want to strike his direct examination, which the court probably will do. I am at this point inclined to [not answer the question].

(4RT 354.) The trial court granted counsel a five-minute recess to further discuss the matter with appellant. (4RT 354.) When the hearing resumed, the following colloquy occurred:

> [Defense counsel]: Yes, your honor. Motion for reconsideration, and I'd just like to point out one thing. [¶] [Appellant's] testimony on direct examination went up to and stopped on July 22nd. There was no testimony whatsoever. I purposely didn't get into the testimony on the airplane for the simple reason that I believe -- I mean it's going to be my position that, based on the testimony of the detective, the court should suppress those statements because [appellant] was told that he -- anything he said would not be held against him. [¶] So I decided not to go into the airplane at all because I feel, for right or wrong, that I've already made my case on the airplane. So I stopped his testimony on July 22nd. The first question out of the district attorney's cross-examination is what happened on July 26th, on the airplane. [¶] So, in all due respect, your honor, I'd ask your honor to reconsider the ruling.
>
> I have instructed [appellant] not to answer any questions about the airplane. He's more than willing to answer all the questions asked by the district attorney during the time period covered on -- during direct examination, which is basically the 21st of July and the 22nd of July.

The Court: Well, what you would do is ask me to rigidly follow the rule that the scope of cross-examination may not exceed the scope of direct examination. However, you have to look at what is the context of this matter, and the context of it is that you have brought a motion to suppress four different statements.

Now, you've inquired of your client only regarding two of those statements, but there's been significant testimony regarding the other two statements, and the district attorney -- your client having taken the stand, your client having filed this motion to suppress all of them -- I believe is entitled to inquire about all four of them.

On that basis, I've overruled your objection, and my ruling stands. Your motion for reconsideration is denied for the stated reasons. [¶] Now, in light of that, is your client -- are you instructing your client not to answer the question as posed by the district attorney?

[Defense counsel]: That question, yes.

The Court: All right. [¶] I'm ordering you, sir, to answer the question. Are you going to follow your attorney's instructions and not answer it?

[Appellant]: Yes.

The Court: All right. On that basis, what relief, if any, is sought by the People? Or you may ask your next question.

[The Prosecutor]: Motion to strike all testimony.

The Court: Well, my view of this is that [appellant] can't pick and choose what questions he's going to answer. If I deemed it a valid question and he chooses not to answer the question on cross-examination, then the balance of his testimony should not be permitted to stand. The motion to strike the direct examination of [appellant] is granted. [¶] That finishes your cross-examination because there's nothing else to cross-examine on.

(4RT 355-357.)

d. The Trial Court's Ruling

The trial court heard argument from the parties regarding statements two, three, and four. Regarding statement number two, defense counsel argued that the interrogation should have stopped after appellant's statement, "I just want to leave this room," because soon thereafter, appellant began asking for a lawyer. (4RT 358; see 2CT 432.) Counsel further argued that the interrogation should have ceased when appellant spoke about a public defender. (4RT 358; 2CT 452.) Statements three and four should be suppressed, counsel argued, because Detective Gligorijevic told appellant, in the car ride to the airport, that anything he said would not be used against him. (4RT 358-359.)

The prosecutor argued that appellant was properly advised of, and waived, his rights, and that he failed to unequivocally request a lawyer. Thus, statement number two was admissible. (4RT 359-360.) Regarding statement number three, the prosecutor argued that appellant's statements made before Detective Gligorijevic promised not to use them against him were spontaneous and admissible. However, the prosecutor indicated that any statements made after appellant elicited the detective's promise would not be offered at trial. (4RT 360-361.) Finally, the prosecutor argued that statement number four was admissible because it was spontaneous. (4RT 361-362.)

The trial court stated that it was "not deciding any issue regarding statement no. 1 now. We're waiting for Detective Graham's testimony to provide additional information in regard to that statement." (4RT 362.)

As to statement number two, the trial court found that it was not until well into the interrogation that appellant unequivocally and unambiguously requested a lawyer by stating, "I do [want an attorney], but never once have I been told that from the beginning, I'd like to have one. Can I have one? But you think anybody has gotten me one? No, there hasn't been nobody

here." (4RT 362-363; 2CT 455.) Thus, the court suppressed the portion of statement number two after appellant had requested counsel, but ruled admissible the preceding portion. (4RT 363; 2CT 455-456.)

The court suppressed statements three and four based on Detective Gligorijevic's assurance to appellant, in the car ride to the airport, that his statements would not be used against him. (4RT 363-367.)

During the guilt phase trial, the prosecution did not introduce any portion of statement number two that the trial court had ruled admissible. (See 15RT 1610-1664; 21RT 2311-2316.)

2. Suppression Motion Hearing On Statement Number One

On May 1, 2001, Detective Graham testified at a hearing on appellant's statement made on July 21, 1999, at the Colorado Springs Police Station. (6RT 489-518.) Specifically, Detective Graham testified that he was present at appellant's arrest. (6RT 496.) Later at the police station, appellant was advised of and waived his constitutional rights on a written form and agreed to speak with Detective Graham. (6RT 492-495.) Because appellant was afraid of Kerr's husband, Detective Graham had discussed with appellant, for about 30 minutes, his constitutional rights and his voluntary consent to waive those rights. (6RT 504-507.) Appellant never requested counsel during the time he was advised of his rights (6RT 496, 508-509), nor during the course of the subsequent three-hour interview (6RT 501-502, 512-513, 515-517). Appellant volunteered a significant amount of information during the interview. (6RT 502.)

The trial court then heard argument from the parties. Defense counsel "[s]ubmitted on the points and authorities and on the arguments that [he had] made [at the prior suppression hearing] that the court should [not] have stricken the testimony of [appellant]." (6RT 519.) Counsel further disagreed with the court's decision to strike appellant's hearing testimony

but declined to renew his motion for reconsideration made at the first suppression hearing. (6RT 519.)

The trial court ruled admissible the statements made after appellant signed a written waiver form and suppressed any statement that occurred before the waiver. (6RT 522-523.)

B. Any Error Was Harmless Beyond A Reasonable Doubt

Appellant contends the trial court erroneously struck his suppression hearing testimony because whether he told Detective Gligorijevic, on the airplane, that he killed Kerr was irrelevant and collateral to the issue of invoking his right to an attorney at the beginning of the earlier interrogations. (AOB 45-47.)

Regardless of whether the trial court's ruling was proper, appellant's claim should be rejected at the outset because he was not prejudiced by the ruling. (*Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705]; *People v. Davis* (2009) 46 Cal.4th 539, 598; *People v. Neal* (2003) 31 Cal.4th 63, 86.) Statements two, three and four were never admitted at trial so his stricken testimony could not have affected the outcome, and any error in the ruling was clearly harmless beyond a reasonable doubt as to those three statements. As to statement one, appellant signed a written waiver and the statement was cumulative and tangentially relevant to other evidence establishing guilt that was introduced at trial. (*People v. Houston* (2005) 130 Cal.App.4th 279, 296, citing *People v. Jenkins* (2000) 22 Cal.4th 900, 1015-1016.)

Appellant did not confess to killing Kerr in statement number one. Rather, the prosecution introduced evidence that appellant made the following statements to Detective Graham: (1) appellant argued with Kerr at her apartment at about 1:30 a.m. on March 24, 1999 (20RT 2215, 2222, 2229); (2) Kerr left driving her car (20RT 2215); he later saw Kerr's car on

fire in the early morning hours as he was driving on the freeway (20RT 2216); (3) he saw the rear license plate of the car and the presence of the fire department at the scene (20RT 2216); (4) he suspected that Kerr was having a sexual relationship with Harvey based on the way the two had made eye contact and because they had been spending a lot of time together (20RT 2223-2225, 2228-2229); (5) he formed his suspicion before the night that Kerr died (20RT 2228); (6) he felt that Kerr was betraying him as he was paying for her apartment (20RT 2227); (7) he was very angry with Kerr's actions before she died and not simply on the night that she was killed (20RT 2229); (8) he purchased a blue Subaru, which had a California license plate, from someone "off the street" for $580 (20RT 2218-2219); (9) he had driven the Subaru to Colorado (20RT 2219); and (10) he used the name Donald Blanton while living in Colorado (20RT 2221).

Appellant's statements to Detective Graham were cumulative of and tangential to other unchallenged evidence of appellant's guilt admitted at trial. Appellant's friend David Heiserman testified that, after his extradition to California, appellant admitted that he followed Kerr to Harvey's house, he listened to their conversation, he later confronted Kerr, strangled her, and put her in the back seat of her car. (18RT 2097-2098.) Heiserman had also testified that appellant had expressed a desire to kill Kerr by blowing up her car (18RT 2070, 2082-2085; 19RT 2085-2086) and appellant had suspected Kerr was having a sexual relationship with Harvey (18RT 2085-2086; 19RT 2145). Heiserman's testimony was corroborated by David Jayne, who testified that appellant admitted to strangling his girlfriend (20RT 2235-2238, 2244, 2250-2251) and stated that he suspected she was cheating on him (20RT 2253).

Thus, statement number one was cumulative of and tangential to other evidence establishing appellant's guilt. (See *People v. Houston, supra*, 130 Cal.App.4th at pp. 296-300.) Moreover, appellant did not challenge

evidence that he killed Kerr. His only defense was that he killed Kerr in the heat of passion.[12] (See *People v. Coffman* (2004) 34 Cal.4th 1, 59-60 [assuming use of statements was fundamentally unfair, there was abundant other evidence of defendant's guilt, defendant did not challenge evidence he robbed, kidnapped, and killed victim as his only defense was lack of intent to kill].)

C. In Any Event, The Trial Court Did Not Abuse Its Discretion In Striking Appellant's Testimony

In a criminal case, the rights to confront and cross-examine witnesses and to call witnesses have long been recognized as essential to due process. (*Chambers v. Mississippi* (1973) 410 U.S. 284, 294 [93 S.Ct. 1038, 35 L.Ed.2d 297].) Generally, a defendant is "not entitled to place his testimony before the [trier of fact] free from any threat of impeachment" by the prosecution, even if the witness has a valid Fifth Amendment privilege. (*People v. Seminoff* (2008) 159 Cal.App.4th 518, 527 [citing *People v. Hecker* (1990) 219 Cal.App.3d 1238, 1246-1249].) "There are . . . exceptionally few caveats to the proposition that the right to introduce evidence necessarily implicates the responsibility to permit it to be fairly tested. As the Supreme Court has said, a criminal defendant '"has no right to set forth to the jury all the facts which tend in his favor without laying himself open to cross-examination upon those facts."'" (*Fost v. Superior*

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[12] During the guilt phase closing argument, defense counsel informed the jury:

> Let me say one thing at the outset, okay? Something very important. This is not a complicated case, okay? It's a very, very simple case, and there's a very, very simple issue in the case, and the issue is whether or not [appellant] killed Mrs. Kerr in the heat of passion. It's that simple.

(23RT 2578.)

Court (2000) 80 Cal.App.4th 724, 736, fn. omitted, quoting *Brown v. United States* (1958) 356 U.S. 148, 155 [78 S.Ct. 622, 2 L.Ed.2d 589].)

If a witness refuses to answer some or all of the questions during cross-examination, the court may strike all or part of the witness's testimony. (*People v. Price* (1991) 1 Cal.4th 324, 421, superseded by statute on other grounds as stated in *People v. Hinks* (1997) 58 Cal.App.4th 1157, 1161-1165; *People v. Seminoff, supra*, 159 Cal.App.4th at p. 525; see also *People v. Miller* (1990) 50 Cal.3d 954, 999 [where defendant testified at penalty phase and then refused to submit to any cross-examination, prosecution could have moved to strike all or part of the direct exam or requested an instruction that the refusal could be considered on credibility].) In determining whether to strike a witness's testimony for refusal to answer questions on cross-examination, the trial court should consider the motive of the witness and the materiality of the answer. (*People v. Seminoff, supra*, 159 Cal.App.4th at pp. 525-526.) Before striking all of the witness's testimony, the court should also consider less drastic means such as striking a portion of the witness's testimony. (*Ibid.*) The decision to strike all, part, or none of a witness's testimony due to the witness's refusal to answer questions is reviewed for abuse of discretion. (*People v. Price, supra*, 1 Cal.4th at p. 421; *People v. Reynolds* (1984) 152 Cal.App.3d 42, 47.)

Here, the trial court properly determined that appellant's credibility was a central issue in the suppression hearing. Because appellant claimed that both Detectives Graham and Gligorijevic had ignored him when he invoked his right to an attorney, whereas both detectives had given contrary testimony, appellant's credibility was implicated directly. (*People v. Boyette* (2002) 29 Cal.4th 381, 414.) Whether appellant had confessed to killing Kerr "directly touched upon [his] interest in the case and were therefore crucial to assessing [his] credibility." (*People v. Seminoff, supra*,

159 Cal.App.4th at p. 526.) Admitting that he had confessed to killing Kerr would undoubtedly have been a motive for appellant to ardently maintain that he had invoked the right to counsel before making the inculpatory statement in hopes of suppressing it. "There can be little doubt . . . that the right of cross-examination takes on added significance where the witness's credibility is of special significance to the proceedings." (*Id.* at pp. 526-527.)

Although the trial court did not indicate on the record that it had considered any less severe remedies before striking appellant's entire suppression hearing testimony (4RT 351-357), on appeal, appellant contends that the trial court "could have allowed the prosecutor to continue his cross-examination, with the exception of the question to which the defense counsel objected, and then assessed at the conclusion of appellant's testimony whether his testimony should have been stricken. It could also have considered appellant's refusal to answer the question in determining his credibility, but without the drastic sanction of striking his testimony." (AOB 50.) However, appellant never proposed these alternatives in the trial court, and thus, this contention is forfeited. (See *People v. Rundle* (2008) 43 Cal.4th 76, 126, disapproved on another point by *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; see also *People v. Seminoff, supra*, 159 Cal.App.4th at p. 527; cf. *People v. Thompson* (2010) 49 Cal.4th 79, 129-130 [claim that trial court should have stricken witness's testimony forfeited by failure to make that request].) In any event, the trial court "could have refused to strike the testimony but then completely discounted its credibility because [the witness] refused cross-examination: Different sanction, same result." (*People v. Seminoff, supra*, 159 Cal.App.4th at p. 528.)

Therefore, the trial court did not abuse its discretion in striking appellant's suppression hearing testimony because it "was a legitimate

response to [his] refusal to answer the prosecutor's question[ ]." (*People v. Seminoff, supra*, 159 Cal.App.4th at p. 528; see also *People v. Sanders* (2010) 189 Cal.App.4th 543, 554 ["when the party testifying on his or her own behalf unjustifiably refuses to answer questions necessary to complete the cross-examination[,] 1 McCormick on Evidence (6th ed. 2006) Cross-examination, section 19, page 110, states that in such cases the consensus is that the direct testimony must be stricken."].)

II. INSTRUCTIONAL ERROR ON THE ASPORTATION ELEMENT OF SIMPLE KIDNAPPING WAS HARMLESS BEYOND A REASONABLE DOUBT

Appellant contends the judgment of death and the special circumstance finding that he committed murder in the commission of kidnapping should be reversed because the trial court instructed the jury with an erroneous definition of asportation in violation of his state and federal constitutional rights to due process, a jury trial, and the prohibition against cruel and unusual punishment. (AOB 58-81.) Respondent agrees that the trial court should not have given the 1999 version of CALJIC No. 9.50. However, any error was harmless beyond a reasonable doubt.

A. Trial Court Proceedings

During the conference on jury instructions, the defense had no objection to the instruction on kidnapping, as set forth in 1999 revision of CALJIC No. 9.50.[13] (See 22RT 2475; 16CT 3862-3863.)

As relevant here, the trial court instructed the jury with the 1999 versions of CALJIC Nos. 8.81.17.1 (special circumstances murder in

[13] Pages 2409 through 2483 of the 22nd volume of the reporter's transcript and pages 2490 through 2496 of the 23rd volume of the reporter's transcript contain the discussion of the guilt phase instructions.

commission of kidnapping with intent to kill) and 9.50 (kidnapping) as follows:

CALJIC No. 8.81.17.1

To find that the special circumstance referred to in these instructions as murder in the commission of kidnapping is true, it must be proved:

1. The murder was committed while the defendant was engaged in the commission or attempted commission of kidnapping in violation of section 207 of the Penal Code;

2. The defendant had the specific intent to kill.

(23RT 2538; 16CT 3861.)

CALJIC No. 9.50

Every person who unlawfully and with physical force or by any other means of instilling fear steals or takes or holds, detains, or arrests another person and carries that person without her consent and -- or compels any other person without her consent and because of a reasonable apprehension of harm, to move for a distance that is substantial in character, is guilty of the crime of kidnapping in violation of Penal Code section 207, subsection (a).

A movement that is only for a slight or trivial distance is not substantial in character. in determining whether a distance that is more than slight or trivial is substantial in character, you should consider the totality of the circumstances attending the movement, including, but not limited to, the actual distance moved or whether the movement increased the risk of harm above that which existed prior to the movement or decreased the likelihood of detection or increased both the danger inherent in a victim's foreseeable attempt to escape and the attacker's enhanced opportunity to commit additional crimes.

If an associated crime is involved, the movement must be more than that which is incidental to the commission of the other crime.

In order to prove this crime, each of the following elements must be proved:

A person was unlawfully moved by the use of physical force or by any other means of instilling fear;

A person was unlawfully compelled by another person to move because of a reasonable apprehension of harm;

The movement of the other person was without her consent; and

3. The movement of the other person in distance was substantial in character (sic).

(23RT 2538-2540; 16CT 3862-3863.)

B. Relevant Law

Section 207, subdivision (a), which defines simple kidnapping, provides in pertinent part, "Every person who forcibly . . . steals or takes, or holds, detains, or arrests any person in this state, and carries the person . . . into another part of the same county, is guilty of kidnapping." Although the statute does not mention movement of a specific or exact distance, courts have held consistently that the movement or asportation must be "substantial in character," rather than slight or trivial. (*People v. Stanworth* (1974) 11 Cal.3d 588, 601.)

In *People v. Caudillo* (1978) 21 Cal.3d 562, this Court held that whether an asportation was substantial in character was solely dependent on the actual distance involved. (*Id.* at pp. 572-573.)

However, in *People v. Martinez* (1999) 20 Cal.4th 225, this Court expressly overruled Caudillo to the extent that case prohibited consideration of factors other than actual distance. (*Id.* at pp. 237, fn. 6, 239.) *Martinez* held that factors other than distance may be considered:

> [I]n determining whether the movement is "'substantial in character'" [citation], the jury should consider the totality of the circumstances. Thus, in a case where the evidence permitted, the jury might properly consider not only the actual distance the victim is moved, but also such factors as whether that movement increased the risk of harm above that which existed prior to the asportation, decreased the likelihood of detection, and increased both the danger inherent in a victim's foreseeable attempts to

escape and the attacker's enhanced opportunity to commit additional crimes.

(*Id.* at p. 237, fn. omitted.)

Martinez emphasized that nothing in the language of section 207 limits the asportation element solely to actual distance. "Section 207(a) proscribes kidnapping or forcible movement, not forcible movement for a specified number of feet or yards. Our apparent limitation to actual distance in *Caudillo* adds language to the statute that is simply not there. Indeed, as we have historically recognized for both aggravated and simple kidnapping, limiting a trier of fact's consideration to a particular distance is rigid and arbitrary, and ultimately unworkable." (*People v. Martinez, supra*, 20 Cal.4th at p. 236.)

Notwithstanding its statement that the jury "should consider the totality of the circumstances," *Martinez* made it clear that jury need not consider factors other than distance where the distance traveled is great enough to establish substantiality by itself: "While the jury may consider a victim's increased risk of harm, it may convict of simple kidnapping without finding an increase in harm, or any other contextual factors. Instead, as before, the jury need only find that the victim was moved a distance that was 'substantial in character.' [Citations.]" (*People v. Martinez, supra*, 20 Cal.4th at p. 237.)

Conversely, *Martinez* stressed that in some cases the movement is simply too slight to permit a finding of asportation regardless of what contextual factors may exist: "At the same time, we emphasize that contextual factors, whether singly or in combination, will not suffice to establish asportation if the movement is only a very short distance." (*People v. Martinez, supra*, 20 Cal.4th at p. 237.)

At the time *Martinez* was decided, the CALJIC instruction for simple kidnapping merely provided that the movement must have been "for a

substantial distance, that is, a distance more than slight or trivial." (CALJIC No. 9.50 (6th ed. 1996) p. 650.) Because the holding in *Martinez* was an enlargement of the kidnapping statute, this Court refused to apply its holding retroactively. (*People v. Martinez, supra*, 20 Cal.4th at pp. 238-241; see, e.g., *People v. Billa* (2003) 31 Cal.4th 1064, 1073 ['an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates in the same manner as an ex post facto law"]; *People v. Crew* (2003) 31 Cal.4th 822, 853 ["The due process clause, not the ex post facto clause, bars retroactive application of a judicial construction of a criminal statute that is unexpected and indefensible by reference to the law expressed before the conduct in issue"], citing *People v. Martinez, supra*, 20 Cal.4th at p. 238; *People v. Ledesma* (2006) 39 Cal.4th 641, 655 [stating that because defendant's offenses took place in August and September of 1978, his case was governed by death penalty law adopted by the Legislature in 1977, which was subsequently replaced by an initiative measure approved by voters on November 7, 1978].) The Use Note to the 1999 revision of CALJIC No. 9.50 states, in relevant part: "This 1999 revision cannot be applied retroactively. The decision [in *Martinez*] was announced April 8, 1999."

C. Instructional Error Regarding The Asportation Element Was Harmless Beyond A Reasonable Doubt

Here, Kerr's murder occurred on March 24, 1999. Thus, the pre-*Martinez* version of CALJIC No. 9.50 applied to the instant case. The trial court erred by giving the 1999 version of the instruction. (See *People v. Martinez, supra*, 20 Cal.4th at pp. 240-241.)

Appellant contends that giving the jury with an erroneous kidnapping instruction violated his constitutional rights. (AOB 65-67.) Citing *Chapman v. California, supra*, 386 U.S. 18, he also argues the error was not harmless. (AOB 67-72.) Appellant's claim must be rejected. Based on

the record and cases discussing the asportation element of simple kidnapping decided before *Martinez*, the trial court's failure to instruct the jury with the pre-*Martinez* asportation standard was harmless beyond a reasonable doubt.

An instruction that misdescribes an element of an offense is "harmless only if 'it appears "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained."' [Citations]. 'To say that an error did not contribute to the verdict is . . . to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record.' [Citation.]" (*People v. Mayfield* (1997) 14 Cal.4th 668, 774; see also *Pope v. Illinois* (1987) 481 U.S. 497, 501-504 [107 S.Ct. 1918, 95 L.Ed.2d 439] [harmless error standard applied to instruction misstating an element of the offense].) "As the United States Supreme Court has emphasized, '"[t]he harmless-error doctrine recognizes the principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence [citation], and promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error. [Citations]."'" (*People v. Flood* (1998) 18 Cal.4th 470, 507.)

Factors such as whether the misdescribed element was conceded or admitted by the defendant, whether the theories advanced by the prosecution and defense counsel compounded the error, and whether the evidence proving the misdescribed element was so overwhelming that a reasonable juror could not have failed to make the required factual finding are applicable to the determination of harmless error. (*People v. Flood*, *supra*, 18 Cal.4th at pp. 504-505; see also *People v. Lee* (1987) 43 Cal.3d 666, 677 [reviewing court also considers the entire record including the parties' closing arguments to the jury].)

Because the holding in *Martinez* was prospective, this Court had to determine whether, under the previous actual distance standard, the distance the defendant forcibly moved the victim -- 40 or 50 feet -- was enough by itself to qualify the movement as substantial. This Court concluded the movement would not have been sufficient to support a conviction for simple kidnapping under prior case law. (*People v. Martinez, supra*, 20 Cal.4th at p. 239.) In those earlier cases, distances of 75 and 90 feet were found insufficient to establish substantial movement, while a distance of 200 feet was sufficient. (*Id.* at pp. 233-234, 239-240, citing *People v. Brown* (1974) 11 Cal.3d 784, 788-789 [movement of approximately 75 feet insufficient], *People v. Green* (1980) 27 Cal.3d 1, 67 [90 feet insufficient], and *People v. Stender* (1975) 47 Cal.App.3d 413, 421-423 [movement of 200 feet sufficient].)

Here, the actual distance appellant moved Kerr exceeds the minimum distance established by pre-*Martinez* case law and was thus sufficient, by itself, to constitute substantial movement. Although the record does not indicate the exact distance Kerr was transported, a map of the area where the crimes were committed and the location where Kerr's body was burned provides sufficient evidence that appellant moved Kerr a "substantial" or significant distance of much more than 200 feet or of at least several miles. (See *People v. Burney* (2009) 47 Cal.4th 203, 233, fn.8.)

During opening statement, the prosecutor informed the jury that the evidence would show that in the early morning hours before the murder, appellant drove from Harvey's house to Kerr's residence, where he choked her, put her in the back of her car, "drove around a couple of hours, and then lit the car on fire" at the embankment near the Roscoe off-ramp of the 170 Freeway. (14RT 1461.)

The evidence at trial included an enlarged map of the area bordered by the 101, 118, and 5 Freeways. (15RT 1626 [People's Ex. 12].) The

location of Kerr's body at the embankment near the Roscoe off-ramp of the 170 Freeway and her residence were labeled and marked on the map. (15RT 1626 ["victim found"], 1626-1627 ["victim's residence"].) Detective Rick Gonzalez testified that it took about five to ten minutes to drive between those two locations in the early morning hours. (19RT 2205-2206.) Moreover, a coverage map indicating the extent of a particular cell site's radio frequency was also admitted at trial (19RT 2161; 21RT 2317-2318) and the evidence showed that two different cell sites governed the two locations (19RT 2176-2177, 2199).

Harvey testified that Kerr drove away from his house at approximately 1:15 a.m. (17RT 1858.) After appellant assumed a new identity in Colorado, he told Jayne that he followed Kerr to her apartment after eavesdropping on her conversation with Harvey and strangled her. (20RT 2236-2237, 2250-2251.) Several hours later, the car fire was reported at 4:11 a.m. (14RT 1482, 1484) and firefighters responded to the scene at 4:17 a.m.[14] (14RT 1484).

The evidence discussed above thus showed that appellant moved Kerr a substantial distance of at least several miles between her residence and the Roscoe off-ramp.[15] This distance was substantially greater than the 200 feet found to be sufficient asportation in *People v. Stender, supra*, 47 Cal.App.3d at pages 421 through 423, which was cited with approval in both *Martinez* and *Caudillo*. (See *People v. Martinez, supra*, 20 Cal.4th at p. 240; *People v. Caudillo, supra*, 21 Cal.3d at p. 574; see also *People v.*

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[14] The autopsy showed the victim was alive at the time of the car fire. (18RT 1987, 1992.)

[15] Mapquest.com shows that the distance between the 5900 block of Woodman Avenue in Van Nuys and Roscoe Boulevard at California 170 as approximately four miles.

Stanworth, supra, 11 Cal.3d at pp. 601-603 [pre-*Martinez* case finding distance of one-quarter of a mile was not "slight" or "insubstantial" asportation for purposes of simple kidnapping]; *People v. Magana* (1991) 230 Cal.App.3d 1117, 1121 [pre-*Martinez* case finding distance of at least one-half of a mile to be sufficient asportation for purposes of simple kidnapping].)

Martinez emphasized that a substantial distance is sufficient on its own, regardless of the contextual factors. (*People v. Martinez, supra*, 20 Cal.4th at p. 237.) Here, the actual distance between Kerr's residence and the Roscoe off-ramp of the 170 Freeway alone established substantial asportation, and thus, it is clear "beyond a reasonable doubt" that the instruction on kidnapping, as given to the jury, did "not contribute to the verdict obtained." (*People v. Mayfield, supra*, 14 Cal.4th at p. 774.)

Although appellant asserts that "[t]he prosecutor, during his closing and rebuttal arguments, stressed the increased risk of harm from Ms. Kerr's movement to convince the jury to find true the kidnapping allegation" (AOB 69), the record shows that the prosecutor only briefly referenced the kidnapping charge. (See 23RT 2564-2565, 2573; 24RT 2638, 2659-2660.) Although the prosecutor did argue that the car fire scene was an isolated area, he also did so in the context of arguing that the location was evidence of planning or premeditation: "A choice, a very conscious choice, for a very rational reason, and that rational reason, to get done with what I'm planning to do and to avoid detection. As cold and calculated and deliberate a method . . . a choice one can make." (23RT 2556-2557.)

In any event, the evidence on the distances between the relevant locations was undisputed. No argument was presented by the defense that the distance between the location of Kerr's residence and the car fire scene was insubstantial. Rather, defense counsel argued that appellant killed Kerr in the heat of passion and thus, the jury should convict him of voluntary

manslaughter and not murder. (See 23RT 2578.) Counsel did not mention the crime of kidnapping at all during closing argument. (See 23RT 2578-2602; 24RT 2605-2633.) To the extent, if any, counsel addressed the asportation element, it was in the context of arguing that Kerr was already dead at the time appellant placed her into the car before "driving around for [three] hours with a body in the back seat and finally gets to the Roscoe off-ramp of the freeway" because appellant had strangled her to death in the heat of passion. (See 23RT 2584-2586, 2599; see also 24RT 2608 [counsel argued Kerr was in car "for several hours while [appellant] was riding around"].) Counsel informed the jury that once they found appellant guilty of voluntary manslaughter, "there will be no issues in this case about kidnapping . . . [or] about the so-called special circumstances" because they all required a finding of murder. (24RT 2632.)

"'Although a defendant's tactical decision not to 'contest' an essential element of the offense does not dispense with the requirement that the jury consider whether the prosecution has proved every element of the crime' [citation], in Flood, this Court found that defendant's failure to contest was tantamount to a concession of the element at issue." (*People v. Miller* (1999) 69 Cal.App.4th 190, 209 citing *People v. Flood, supra*, 18 Cal.4th at p. 505.) Similarly here, appellant arguably conceded that the distance traversed was substantial in character. (See *Neder v. United States* (1999) 527 U.S. 1, 17-18 [119 S.Ct. 1827, 144 L.Ed.2d 35] [holding that erroneous instruction is properly found to be harmless where reviewing court concludes beyond reasonable doubt that omitted element of offense was uncontested and supported by overwhelming evidence, such that jury verdict would have been same absent the error]; *People v. Ryan* (1999) 76 Cal.App.4th 1304, 1320-1321 [trial court's failure to give instruction defining "abandonment" of a child, for purposes of right of custody element of child abduction, where evidence conclusively established that husband

abandoned his child under any definition of the term was harmless error]; *People v. Miller, supra*, 69 Cal.App.4th at pp. 209-210 [failure to instruct jury on statutory definition of "dangerous fireworks" was harmless error where defendant effectively conceded that fireworks were dangerous and evidence clearly established that fireworks were dangerous, statute provided that firecrackers and Roman candles were dangerous fireworks, police sergeant offered undisputed testimony that Roman candle bottle-rockets and thousands of firecrackers were found, and defense attorney did not respond to prosecutor's closing argument that fireworks were dangerous].)

The prosecution's theory of guilt on the kidnapping special circumstance presented to the jury was predicated on Kerr's strangulation at her residence, which was a substantial driving distance from the location where her remains were discovered after she was burned alive. The jury's guilty verdict necessarily meant that they rejected appellant's defense that he had killed in the heat of passion and found that he incapacitated Kerr at her home and then moved her, against her will, a substantial distance to the location near the embankment of the Roscoe off-ramp of the 170 Freeway. (Cf. *People v. Cudjo* (1993) 6 Cal.4th 585, 630 [trial court's error in failing to instruct jury on intent to kill as element of felony-murder special circumstance in capital murder prosecution was non-prejudicial beyond reasonable doubt, in that systematic and prolonged assault with manifestly deadly force on helpless victim, as established by evidence, was consistent only with intent to kill, and defendant, relying on alibi defense, presented no evidence that killing was other than intentional]; *People v. Garrison* (1989) 47 Cal.3d 746, 776-777 [aider and abettor instruction which failed to require proof of intent was harmless beyond a reasonable doubt where there was no evidence from which jury could have found that capital murder defendant aided in commission of robbery and burglary other than

intentionally inasmuch as defendant's alibi defense was rejected by the jury].)

Viewing the record as a whole, it is clear beyond a reasonable doubt the instructional error did not contribute to the verdict obtained and that it was unimportant in relation to everything else the jury considered on the issue of kidnapping. Therefore, appellant's instructional error claim must be rejected.[16]

III. THE TRIAL COURT PROPERLY DENIED THE REQUEST FOR A MISTAKE OF FACT INSTRUCTION

Appellant contends the true finding on the kidnapping special circumstance must be reversed because the trial court erred by refusing to give a mistake of fact instruction in violation of his state and federal constitutional rights. (AOB 82-93.) Respondent disagrees.

A. Relevant Proceedings

During the conference on guilt phase jury instructions, defense counsel requested giving the jury CALJIC No. 4.35 (ignorance or mistake of fact) as to the intent to kill instruction.[17] (22RT 2455.) The trial court

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[16] Even if the kidnapping special circumstance was invalid, reversal of the death penalty is not appropriate because the jury was allowed to consider all the *Martinez* factors as facts or circumstances of the underlying murder under section 190.3, subdivision (a).

[17] The requested instruction provides:

> An act committed or an omission made in ignorance or by reason of a mistake of fact which disproves any criminal intent is not a crime.
>
> Thus a person is not guilty of a crime if he commits an act or omits to act under an honest belief in the existence of certain facts and circumstances which, if true, would make such act or omission lawful.

(continued...)

noted that the instruction applied to the situation where "an act committed or an omission made in ignorance or by reason of a mistake of fact which disproves any criminal intent is not a crime." The trial court observed that the Use Note of the instruction stated, "This instruction should be given if requested in a homicide prosecution where the defendant's sole defense is that he or she did not know the gun was loaded." (22RT 2455.)

Defense counsel argued that giving the instruction was warranted because "[i]f [Kerr] was in the car and alive and [appellant] mistakenly thought that she was dead and set the car on fire to burn up the car and the corpse, the evidence, whether the court gives the instruction or not -- that disproves an intent to kill. [Appellant] thought she was already dead. [¶] So the court's only saying that that's correct, if there was no intent to kill because of the mistake of fact, then there wasn't a murder at that time." (22RT 2455-2456.)

The prosecutor objected to giving CALJIC No. 4.35 because: (1) "assuming arguendo the fact that you light a car on fire not knowing whether someone is alive or not, it's not -- that's still criminal intent[to commit an arson]. You're still causing -- there's still a crime. There is for that claim of right"; and (2) "the circumstance of I decide to arson a car or a building and someone dies inside. A whole other theory of murder, another road we go down, that this flies directly in the face of. So two different theories." (22RT 2456.)

Defense counsel did not dispute that felony-murder was a separate theory. However, counsel argued that assuming the prosecutor argued that appellant "knowingly murdered [Kerr] by burning," "[t]here's no question

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(...continued)
(16RT 3791.)

that if he was mistaken about her being alive, then there would not be a murder." (22RT 2456- 2457.)

The trial court declined to give the instruction, but stated that it would reconsider its ruling if, at the conclusion of argument and requested by counsel, it was convinced counsel's argument justified giving the instruction. (22RT 2457.) The prosecutor had no objection, but pointed out that "[e]ven under the best theory he has, there's no way [the act would be] lawful." (22RT 2457.)

After the conclusion of closing arguments, counsel asked the court to reconsider its ruling on CALJIC No. 4.35. (24RT 2672.) The court reread the instruction and stated, "Well, you [counsel] haven't argued in any case here that there was a mistake of fact made by the defendant that would have made -- if he had been correct and not mistaken, that would have made his act legal[.]" (24RT 2672-2673.) Counsel acknowledged that the instruction would not apply to the prosecution's theory of felony-murder. However, counsel argued that the instruction was warranted because there was "evidence that he strangled her and killed her and testimony that she was still breathing, which would indicate that he . . . thought she was dead, but she was really alive, maybe in some state." Counsel represented that although he "didn't give it a lot of time" in his closing argument, he had argued that "if [appellant] was mistaken about her being alive in the car, then he couldn't have had an intent to kill her, because you can't intend to kill someone who you don't know is alive." (24RT 2673-2674; see 24RT 2612, 2632.)

The prosecutor argued that the instruction was unsupported by the evidence or arguments and would mislead the jury. (24RT 2674.)

The court observed "in looking at [CALJIC No.] 4.35, that the mistake you have to make is a mistake of fact which disproves any criminal intent. Thus, if you were not mistaken, the act or the omission to act would

be lawful." The court then gave the example of a defendant who claimed the defense of unknowingly firing a loaded gun: "If you fired a gun that you thought was unloaded, there's no law against pulling the trigger on an unloaded gun. That would be lawful were it not for the fact that you made a mistake and a bullet came out and hit someone and killed someone." The court concluded, "Here there is no allegation that any mistake made by the defendant would have made the conduct lawful. If Lisa Kerr mistakenly was thought to be dead at the time the car was set on fire, it's still arson of property, even though it may not be arson causing great bodily injury." (24RT 2675.) Rather, if appellant drove around in the mistaken belief Kerr was dead, "that's an issue about whether or not it would be kidnapping at that point in time because, presumably, you can't kidnap a dead person." (24RT 2675.)

The court heard additional argument from the parties (24RT 2675-2677) and then made the following ruling:

> I agree with you, [prosecutor], that -- the defense argument in this case is that they freely admit that the defendant strangled Lisa Kerr and he thought he killed her and, indeed, if he didn't kill her, he was operating under a mistake of fact. But that mistake of fact would not have made any of the conduct undertaken after he strangled her lawful.
>
> If it were -- even if she's dead, he had -- it would have been unlawful to set the car on fire. It's arson of property. If she's dead, and even though he's not charged separately with a separate crime of kidnapping, it is a felony murder theory for first degree murder.
>
> The fact of the matter is he's driving around with this body, and he's driving around and he ultimately sets it on fire. There's nothing lawful about that.
>
> I'm not going to give this -- I believe it would unnecessarily confuse the jury. I declined to do so earlier, saying I would wait to hear after the argument and then make a decision.

> I really don't feel this applies or operates under the facts of this case. There's nothing -- there's no mistake that is alleged to have been made by [appellant] that would have made his conduct lawful. So for that reason, I'm declining to give it.

(24RT 2677-2678.)

B. This Claim Is Forfeited

Appellant claims that he requested the mistake of fact instruction on the kidnapping special circumstance (AOB 82, citing 22RT 2455), but the record shows that the instruction was being requested on intent to kill and not the kidnapping special circumstance. Thus, because he never advanced this theory for the instruction, the current claim is forfeited. (Cf. *People v. Castillo* (1997) 16 Cal.4th 1009, 1014 [defendant must request instructions on voluntary intoxication; they "are not required to be given sua sponte"]; *People v. Wharton* (1991) 53 Cal.3d 522, 570 [defendant has right to instruction tying evidence of intoxication to disputed element of the crime only upon request]; *People v. Cordero* (1989) 216 Cal.App.3d 275, 280 [it is duty of defense counsel to request clarifying instructions on claim of imperfect self-defense].) Even assuming this claim has been preserved for appellate purposes, it lacks merits as discussed below.

C. The Trial Court Properly Refused The Mistake Of Fact Instruction

Appellant contends that a mistake of fact instruction was warranted because "[t]he crime of kidnapping requires the movement of a live person," and his "admissions before and after his arrest showed he believed he had killed Ms. Kerr when he strangled her, and then transported her body to the location where the vehicle was set on fire." (AOB 82.) The trial court properly refused to instruct the jury on mistake of fact because there was no substantial evidence supporting such an instruction.

Mistake of fact is an affirmative defense. When a person commits an act based on a mistake of fact, his guilt or innocence is determined as if the facts were as he perceived them. (*People v. Beardslee* (1991) 53 Cal.3d 68, 87.) The defendant therefore has the burden of producing evidence that he had a bona fide and reasonable belief in the mistaken fact. (*People v. Mayberry* (1975) 15 Cal.3d 143, 157.)

"Kidnapping in general . . .requires a live victim. . . . If one kills, then moves the body, the crimes committed do not include kidnapping. The statutory references to a "person" (§ 207, subd. (a)) or an "individual" (§ 209, subd. (b)), as the kidnapping victim, clearly contemplate someone alive. Indeed, no further harm can befall someone already dead; asportation of a corpse cannot increase the risk of harm." (*People v. Hillhouse* (2002) 27 Cal.4th 469, 498)

"It is well settled that a defendant has a right to have a trial court, on its own initiative, give a jury instruction on any affirmative defense for which the record contains substantial evidence [citation] - evidence sufficient for a reasonable jury to find in favor of the defendant [citation] - unless the defense is inconsistent with the defendant's theory of the case [citation]. In determining whether the evidence is sufficient to warrant a jury instruction, the trial court does not determine the credibility of the defense evidence, but only whether 'there was evidence which, if believed by the jury, was sufficient to raise a reasonable doubt.'" (*People v. Salas* (2006) 37 Cal.4th 967, 982.) There is no duty to instruct a jury on a defense if the evidence supporting the defense is minimal or insubstantial. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1145.) Evidence is substantial when, if believed by the trier of fact, it would be sufficient to raise a reasonable doubt about the defendant's guilt. (*People v. Salas, supra*, 37 Cal.4th at p. 982.) In other words, "a trial court must give a requested instruction only when the defense is supported by . . . evidence sufficient to

'deserve consideration by the jury,' not 'whenever any evidence is presented, no matter how weak.'" (*People v. Williams* (1992) 4 Cal.4th 354, 361.)

Here, there was insubstantial evidence to support a mistake of fact defense. At the guilt phase, Heiserman testified that, after appellant's extradition to California, appellant stated that he strangled Kerr at the time she went to her car parked at Harvey's residence. (18RT 2097-2098.) After appellant fled to Colorado and assumed a false identity, Jayne testified that appellant stated that he strangled and killed Kerr at her apartment (20RT 2236-2237, 2250-2251) and that he killed her in anger (20RT 2244). According to Jayne, appellant stated, "Well, I'm going to go to jail for assault anyway, so I might as well kill her." (20RT 2237-2238.) During closing argument, defense counsel informed the jury that Heiserman's account of appellant's strangulation of Kerr at her car parked at Harvey's house was unreasonable, but that Jayne's testimony was correct. (24RT 2627.)

Appellant's statement to Jayne did not constitute substantial evidence that he believed Kerr was dead at the time he set fire to her car. That statement only revealed that he had strangled or assaulted Kerr at her apartment, not that appellant believed he had killed her by strangling her. Moreover, Heiserman's testimony concerning appellant's other statements established that appellant knew that Kerr was alive at the time he set her and her car on fire. Specifically, Heiserman testified that, a few hours after appellant had set Kerr and her car on fire, appellant asked him if Kerr was dead. After Heiserman replied, "Yes," appellant began to cry. (18RT 2096.) Thus, lacking a sufficient evidentiary predicate for an instruction on mistake of fact, the trial court did not err in failing to give it.

Even assuming the trial court had erred, any error was not prejudicial. This Court has noted it had not decided which standard of prejudice applies

when a trial court errs by not instructing sua sponte on a defense. (*People v. Salas, supra*, 37 Cal.4th at p. 984 ["We have not yet determined what test of prejudice applies to the failure to instruct on an affirmative defense"].) However, the Sixth Appellate District has stated: "Error in failing to instruct on the mistake-of-fact defense is subject to the harmless error test set forth in *People v. Watson* (1956) 46 Cal.2d 818, 836." (*People v. Russell* (2006) 144 Cal.App.4th 1415, 1431; *People v. Zamani* (2010) 183 Cal.App.4th 854, 866 [accord].) Further, in cases involving other types of defenses, this Court has applied the *Watson* standard. (See, e.g., *People v. Randle* (2005) 35 Cal.4th 987, 1003, disapproved on another point in *People v. Chun* (2009) 45 Cal.4th 1172, 1201 [imperfect defense of others]; *People v. Blakeley* (2000) 23 Cal.4th 82, 93 [unreasonable self defense].) The *Watson* standard "requires a reasonable probability, not a mere theoretical possibility, that the instructional error affected the outcome of the trial." (*People v. Blakeley, supra*, 23 Cal.4th at p. 94.)

Under the legal standards set forth in *Watson* or *Chapman*, any error in failing to instruct on a mistake of fact defense was harmless. "[I]n some circumstances it is possible to determine that although an instruction [a trial court is required to give] was erroneously omitted, the factual question posed by the omitted instruction was necessarily resolved adversely to the defendant under other, properly given instructions. In such cases the issue should not be deemed to have been removed from the jury's consideration since it has been resolved in another context, and there can be no prejudice to the defendant since the evidence that would support [such] a finding . . . has been rejected by the jury." (*People v. Sedeno* (1974) 10 Cal.3d 703, 721, overruled on another ground in *People v. Flannel* (1979) 25 Cal.3d 668, 684-685, fn. 12, and in *People v. Breverman* (1998) 19 Cal.4th 142, 165.)

Here, in addition to being given an instruction on the kidnapping special circumstance (CALJIC No. 8.81.17.1) the jury was given the version of the torture-murder special circumstance (CALJIC No. 8.81.18) as follows:

> To find that the special circumstance, referred to in these instructions as murder involving infliction of torture, is true, each of the following facts must be proved: [¶] 1. The murder was intentional; and [¶] 2. The defendant intended to inflict extreme cruel physical pain and suffering upon a living human being for the purpose of revenge, extortion, persuasion or for any sadistic purpose; and [¶] 3. The defendant did in fact inflict extreme cruel physical pain and suffering upon a living human being no matter how long its duration. [¶] Awareness of pain by the deceased is not a necessary element of torture.

(16CT 3864; 23RT 2540.)

"Proof of a murder committed under the torture-murder special circumstance requires (1) proof of first degree murder, (2) proof that the defendant intended to kill and torture the victim, and (3) proof of the infliction of an extremely painful act upon a *living victim*. (*People v. Davenport* (1985) 41 Cal.3d 247, 271.) The torture-murder special circumstance thus is distinguished from first degree murder by torture in that it requires defendant to have acted with the intent to kill and applies where the death involved the infliction of torture, regardless of whether the acts constituting the torture were the cause of death. (See § 190.2, subd. (a)(18); *People v. Bemore* (2000) 22 Cal.4th 809, 842-843[.])" (*People v. Jennings* (2010) 50 Cal.4th 616, 647 [emphasis added]; see also *People v. Franc* (1990) 218 Cal.App.3d 588, 595 ["Without a living victim, no torture can occur"].)

Both the kidnapping and torture-murder special circumstance allegations found true by the jury in this case were predicated on the prosecution theory that appellant knew Kerr was alive when he set fire to the car. The jury necessarily rejected the factual predicate of the omitted

mistake of fact defense -- that appellant believed Kerr was dead when he set the car on fire. Had the jury found appellant's mistake of fact defense to be persuasive, it could not have found true the torture-murder special circumstance allegation. Because "the factual question posed by the omitted instruction was necessarily resolved adversely to [appellant] under other, properly given instructions," any instructional error was not prejudicial. (*People v. Sedeno, supra*, 10 Cal.3d at p. 721.) Moreover, defense counsel's argument to the jury sufficiently covered the mistake of fact defense. (24RT 2612, 2632; see *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1144.)

Accordingly, any error in the absence of a mistake of fact instruction was harmless under any applicable standard.

IV. SUBSTANTIAL EVIDENCE SUPPORTS THE FIRST DEGREE MURDER CONVICTION BASED ON THE THEORY OF TORTURE-MURDER AND TORTURE-MURDER SPECIAL CIRCUMSTANCE FINDING

Appellant contends there was insufficient evidence that he tortured Kerr and thus, the true finding on the torture-murder special circumstance and the first degree murder conviction based on murder by torture must be reversed. (AOB 94-104.) Specifically, he argues "[t]he prosecution evidence failed to prove the torture-murder special circumstance allegation beyond a reasonable doubt because: (1) there was insufficient evidence appellant intended to cause cruel and extreme pain and suffering; (2) there was insufficient evidence appellant lit the car on fire for the purpose of revenge, extortion, persuasion, or for any other sadistic purpose; and (3) the undisputed evidence established that the victim did not feel any pain when she died of her thermal injuries." (AOB 96-97.) Respondent disagrees.

A. Standard Of Review

In reviewing a challenge of the sufficiency of the evidence, this Court:

> review[s] the whole record to determine whether any rational trier of fact could have found the essential elements of the crime or special circumstances beyond a reasonable doubt. [Citation.] The record must disclose substantial evidence to support the verdict - i.e., evidence that is reasonable, credible, and of solid value - such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] In applying this test, [this Court] review[s] the evidence in the light most favorable to the prosecution and presume[s] in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. [Citation.] Conflicts and even testimony [that] is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] [This Court] resolve[s] neither credibility issues nor evidentiary conflicts; [this Court] look[s] for substantial evidence. [Citation.]

(*People v. Zamudio* (2008) 43 Cal.4th 327, 357 [internal citations and quotation marks omitted].)

Reversal for lack of substantial evidence is warranted only if "'upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].'" (*People v. Bolin* (1998) 18 Cal.4th 297, 331; accord *People v. Zamudio, supra*, 43 Cal.4th at p. 357.) "'Circumstantial evidence may be sufficient to connect a defendant with the crime and to prove his guilt beyond a reasonable doubt. [Citations.]'" (*People v. Thomas* (1992) 2 Cal.4th 489, 514.) Although "mere speculation cannot support a conviction" (*People v. Marshall* (1997) 15 Cal.4th 1, 34), this Court "'must accept logical inferences that the jury might have drawn from the circumstantial evidence'" (*People v. Zamudio, supra*, 43 Cal.4th at p. 357). "'[I]t is the jury, not the appellate court that must be convinced of the defendant's guilt beyond a reasonable doubt.'" (*Id.* at pp. 357-358.) "Where the circumstances reasonably justify the trier of fact's findings, a reviewing court's conclusion the circumstances might also reasonably be

reconciled with a contrary finding does not warrant the judgment's reversal." (*Id.* at p. 358.) The test used to determine the sufficiency of the evidence for a special circumstance allegation is the same as that for the substantive crime. (*People v. Mayfield, supra*, 14 Cal.4th at pp. 790-791.)

B. There Was Substantial Evidence Of Torture

The prosecution offered four theories of first degree murder: premeditated and deliberate murder, felony-murder committed during a kidnapping and/or arson, murder by torture, and murder by lying-in-wait.[18] Appellant claims insufficient evidence supported the murder by torture theory and the torture special circumstance finding. (AOB 96-103.) Substantial evidence supported the jury's findings.

"[F]irst degree murder is punishable by death or life in prison if the murder 'was intentional and involved the infliction of torture.' (§ 190.2, subd. (a)(18).)" (*People v. Jennings, supra*, 50 Cal.4th at p. 647.) "Proof of a murder committed under the torture-murder special circumstance requires (1) proof of first degree murder, (2) proof that the defendant intended to kill and torture the victim, and (3) proof of the infliction of an extremely painful act upon a living victim." (*Ibid.*) "Required is 'an intent to cause cruel or extreme pain and suffering for the purpose of revenge, extortion, persuasion, or for any other sadistic purpose.'" (*People v. Mungia* (2008) 44 Cal.4th 1101, 1136, citation omitted.) "There is no requirement that the victim be aware of the pain." (*People v. Cole* (2004) 33 Cal.4th 1158, 1207.)

As previously noted, appellant argues insufficient evidence supported the torture-murder special circumstance because there was insufficient evidence he intended to cause pain and suffering and caused the fire for

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[18] The jury apparently rejected the murder by lying-in-wait theory, finding not true the related special circumstance allegation. (16CT 3886.)

revenge and because the victim did not feel any pain. (AOB 96-97.) Based on the alleged insufficient evidence, appellant also asserts, "the first degree murder conviction cannot stand based on the theory that appellant committed murder by torture in violation of section 189." (AOB 97.) The jury was not required to accept, and was justified in rejecting, evidence supporting appellant's current claim.

1. Intent To Inflict Extreme Pain

Appellant argues that there was insufficient evidence of an intent to cause extreme pain based on Dr. Djabourian's testimony that Kerr was likely unconscious when her car was set on fire resulting in her death and based on appellant's belief, as established through Jayne's testimony, that Kerr was dead or at least unconscious when he set her car on fire. (AOB 97-98.) There was substantial evidence from which a rational jury could have found beyond a reasonable doubt that appellant had the requisite intent to inflict extreme pain.

"[T]he intent to inflict extreme pain 'may be inferred from the circumstances of the crime, the nature of the killing, and the condition of the victim's body.'" (*People v. Cole, supra*, 33 Cal.4th at pp. 1213-1214.) In this case, the totality of circumstances of the crime amply demonstrates appellant's intent to torture Kerr. Appellant incapacitated Kerr by strangulation and drove her, in the early morning hours, to an isolated location, an embankment near the Roscoe off-ramp of the 170 Freeway. (*People v. Whisenhunt* (2008) 44 Cal.4th 174, 201 [evidence of victim's wounds supported first degree murder by torture where she was brutally kicked or punched and after she was incapacitated, defendant poured hot cooking oil onto various portions of her body to inflict numerous burns]; *People v. Proctor* (1992) 4 Cal.4th 499, 531-532 [intent to torture

established in part where victim was isolated and prevented from resisting or escaping].)

There was evidence that appellant poured a flammable liquid over Kerr's body, which caused her hands and lower extremities to burn away. (14RT 1550-1551, 1559-1560, 1574.) "[F]ire has historically been used as an instrument of torture and is generally known to cause extreme pain." (*People v. Cole, supra*, 33 Cal.4th at p. 1203.) Thus, appellant "must have known that using fire to kill [the victim] was calculated to cause her extreme pain." (*People v. Cole, supra*, 33 Cal.4th at p. 1203.)

Moreover, the jury reasonably could infer from the evidence that appellant knew that Kerr was alive when doing so because he later asked Heiserman if Kerr had died. (18RT 2096.) This signaled that appellant did not believe he had killed her when he strangled her. Asking Heiserman if she was alive amounted to appellant asking if Kerr had survived after he set her on fire. If appellant believed she was already dead when he started the fire, he would not have asked the question. This evidence therefore raised a strong inference that appellant knew Kerr was alive and intended to burn her alive.

Further, a "couple of weeks" to a month before Kerr's death, appellant talked about killing Kerr. (18RT 2080-2081; 19RT 2137.) Appellant expressed a desire to kill Kerr by blowing up her car, stating, "I could just blow up her car." (18RT 2082-2085, 2138, 2147-2148.)

Accordingly, substantial evidence established appellant's intent to inflict extreme pain on a living victim. (*People v. Cole, supra*, 33 Cal.4th at p. 1214 [torture-murder special circumstance included evidence that defendant was jealous and possessive of victim, who planned to leave him; defendant poured a flammable liquid on two distinct places, including her body; the resulting condition of her body; and defendant's statement that he hoped she burned in hell].)

2. Intent To Torture For The Purpose Of Revenge

Appellant also contends there was insufficient evidence he acted with the intent to torture "for the purpose of revenge, extortion, persuasion, or for any other sadistic purpose." He again reasons that if he believed Kerr was unconscious or dead, he could not have been acting for revenge or any other sadistic purpose but instead burned the car to destroy evidence. (AOB 98.) Contrary to appellant's suggestion, the jury had more than ample support for its conclusion that appellant had the intent to inflict extreme pain for a sadistic purpose, namely revenge.

The evidence showed that appellant was jealous and possessive of Kerr. Several months before Kerr's death, appellant left voice mail messages for Kerr stating she was a slut and a whore and if he could not have her, no one else could. (17RT 1937-1938.)

Appellant believed Kerr was cheating on him, even though their relationship had ended. As a result, he planted a listening device inside of her home. (18RT 2078-2080; 19RT 2131-2132, 2138-2139.) Appellant also followed Kerr, including to her work and home. (17RT 1848, 1952-1953, 1958-1959; 18RT 2072-2074; 19RT 2139.) Before and after appellant had "bugged" her home, Kerr had told appellant that he was too possessive. (19RT 2113-2114, 2140.) Heiserman testified that appellant was obsessed with Kerr during the entirety of their relationship. (19RT 2146.) Appellant seemed even more obsessed with Kerr shortly before her death. (19RT 2146.) Appellant stated that if Kerr did not leave her family for him, he would not be able to live with it or to see her. (19RT 2146-2147.)

As discussed above, appellant talked about killing Kerr by blowing up her car shortly before he set it on fire. (18RT 2080-2081; 19RT 2137.) Appellant was also upset with Kerr because she wanted to go back to her husband and also because he believed that she was having a sexual

relationship with Harvey. (17RT 1857, 1863-1864, 1866-1867; 18RT 2085-2086; 19RT 2145.) Moreover, appellant's financial assistance to Kerr during their relationship and her subsequent rejection of him supported the inference that he felt Kerr had used him for mercenary reasons. (18RT 2057-2059, 2046-2047; 19RT 2113-2115.)

Finally, there was evidence that on the day of Kerr's death, appellant went into the crawl space of Harvey's home (20RT 2236, 2251-2253) and overheard Kerr refer to him as "Squirrel Boy" (17RT 1861-1862, 1900) and heard Kerr talking about or "putting down" appellant's father, which angered him (20RT 2236-2238, 2241).

Considering the totality of these facts, there was substantial evidence from which a rational jury could have found beyond a reasonable doubt that appellant was angry and vengeful and thus had the requisite intent to inflict extreme pain for a sadistic purpose. (*People v. Cole, supra*, 33 Cal.4th at p. 1214 [evidence defendant was verbally abusive to and jealous and possessive of victim, who planned to move out of their residence without him, defendant's belief victim was cheating on him, and the manner in which defendant poured gasoline on victim's body, set her on fire, and the resulting condition of her body, and his subsequent statements that he was angry at her and wanted to kill her supported inference that defendant intended to inflict extreme pain].)

3. Victim's Pain

Appellant asserts that "the undisputed evidence established that the victim did not feel any pain when she died of her thermal injuries" because she was likely unconscious at the time. (AOB 97.)

Proposition 115 deleted the requirement of proof from section 190.2, subdivision (a)(18), that a defendant inflict extreme physical pain on the victim. (*People v. Crittenden* (1994) 9 Cal.4th 83, 140, fn.14.) Appellant

acknowledges "[t]here is no requirement that the victim be aware of the pain." (*People v. Cole, supra*, 33 Cal.4th at p. 1207; see AOB 97 ["The crime of torture does not require the victim to feel pain."].) However, it is his "position . . . that the crime of torture should require the victim to experience pain." (AOB 97, fn. 1.) Although appellant stated that he intended to address this argument later (ibid.), Respondent has not found any further explanation or discussion by appellant in support of this argument. (See AOB 97-104.)

For the foregoing reasons, appellant's challenge to the sufficiency of the evidence of intent to torture must be rejected.

V. THE TORTURE-MURDER SPECIAL CIRCUMSTANCE IS NOT UNCONSTITUTIONALLY VAGUE

Appellant contends the true finding of the torture-murder special circumstance, the first degree murder conviction based on the theory of murder by torture, and the judgment of death must be reversed because the definition of torture was vague in violation of his federal and state constitutional rights to due process and the prohibition against cruel and unusual punishment. (AOB 105-112.)

Appellant acknowledges that this Court has already rejected the argument that the torture statute is unconstitutionally vague. (AOB 105, citing *People v. Chatman* (2006) 38 Cal.4th 344, 394.) The argument set forth by appellant is not new, nor are the concerns appellant raises concerning the torture-murder statute unique or necessarily implicated by reference to the specific facts or particular circumstances of the instant case. Appellant has offered no legal or factual basis that would dictate that this Court's opinion in *Chatman* does not resolve this claim against him, nor has appellant set forth facts or an argument which would dictate or suggest the issue should be revisited and reconsidered.

This claim is forfeited, and in any event, giving the jury with the torture-murder special circumstance instruction was not error. Respondent adopts herein by reference the reasoning expressed by this Court in *People v. Chatman, supra*, 38 Cal.4th at page 394 through 395. (See also *People v. Cole, supra*, 33 Cal.4th at p. 1234 [rejecting vagueness challenge to torture-murder special circumstance]; *People v. Mincey* (1992) 2 Cal.4th 408, 454 [same]; *People v. Davenport, supra*, 41 Cal.3d at pp. 265-271 [same]; *People v. Wade* (1988) 44 Cal.3d 975, 993-995 [same].)

Accordingly, the vagueness challenge to the torture-murder special circumstance must be rejected.

VI. THE JURY WAS FULLY INSTRUCTED ON FELONY-MURDER BECAUSE THE TRIAL COURT INSTRUCTED ON THE ELEMENTS OF KIDNAPPING AND ARSON

Appellant contends the trial court erred by failing to instruct the jury that the definitions of kidnapping and arson applied to the felony-murder charge in violation of his state and federal constitutional rights to due process, his right to jury, and the prohibition against cruel and unusual punishment. (AOB 113-120.) The trial court told the jury that felony-murder consisted of the killing of a human being during the commission of kidnapping or arson. Although the trial court later defined kidnapping and arson, the jury was not expressly instructed that the definitions applied to felony-murder. Appellant thus claims "there was nothing in the wording of the special circumstance instruction for kidnaping which suggested to the jury that the definition applied to the felony murder charge" and "[b]ecause the arson instruction made no cross-reference to the felony murder instruction, the jury had no way of knowing that the instruction also applied to felony murder." (AOB 115-116.)

This claim is forfeited because appellant failed to request a clarification at trial. In any event, the contention lacks merit.

A. This Claim Is Forfeited

The instant claim is not cognizable on appeal. During the jury instruction conference, defense counsel never requested a clarification regarding the application of the instructions defining kidnapping and arson to felony-murder. (See 22RT 2409-2483; 23RT 2490-2496.) The actual instructions correctly stated "the law, . . . and if defendant favored further clarification, he needed to request it. His failure to do so waives this claim." (*People v. Kelly* (2007) 42 Cal.4th 763, 790, quoting *People v. Marks* (2003) 31 Cal.4th 197, 237.)

B. Even Assuming The Claim Was Preserved For Appellate Purposes, There Was No Error

"The trial court used the specific terms for the [underlying felonies] consistently in discussing both the felony-murder rule and the special circumstance allegations. [See 23RT 2519, 2522-2523.] It later defined those terms. [See 23RT 2538-2540, 2545-2547.] It never suggested those terms had different meanings depending on whether they referred to the felony-murder rule or the special circumstance allegations. Reviewing the entire charge of the court, it is not reasonably likely the jury would believe that the definitions it received of [the underlying felonies] concerned only the special circumstance allegations and that some different, unspecified, definitions adhered to the felony-murder rule." (*People v. Kelly, supra*, 42 Cal.4th at p. 790, citing *People v. Young* (2005) 34 Cal.4th 1149, 1202, and *People v. Kelly* (1992) 1 Cal.4th 495, 525-526 & fn. 7.)

Finally, "[i]f the jury had thought that some different definitions might apply to the felony-murder rule, surely it would have asked for clarification." (*People v. Kelly, supra*, 42 Cal.4th at p. 790.) This Court "must assume that jurors are intelligent persons and capable of understanding and correlating all jury instructions which are given.

[Citations.]" (*People v. Mills* (1991) 1 Cal.App.4th 898, 918.) Here, there is no indication that the jury was confused with any guilt-phase instruction. (See 24RT 2692-2695, 2704.)

Accordingly, the instant contention must be rejected.

VII. THE TRIAL COURT HAD NO DUTY TO INSTRUCT ON ASSAULT BY MEANS OF FORCE LIKELY TO PRODUCE GREAT BODILY INJURY AS A LESSER INCLUDED OFFENSE OF THE TORTURE-MURDER SPECIAL CIRCUMSTANCE ALLEGATION

Appellant contends the true finding to the torture-murder special circumstance, the first degree murder conviction based on murder by torture, and the judgment of death must be reversed because the trial court failed to instruct the jury on the lesser included offense of felony assault in violation of his state and federal constitutional rights. (AOB 121-142.) Respondent disagrees.

A. Special Circumstance Allegations Are Not Considered In Determining Lesser Included Offenses

Even though appellant was not charged with torture (§ 206), he contends that the trial court should have instructed, sua sponte, on assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(1)) because the jury was instructed on the torture-murder special circumstance. As appellant himself acknowledges, this Court has rejected the argument that trial courts have a sua sponte duty to instruct the jury on lesser included offenses when the greater offense is alleged as a special circumstance allegation but not separately charged as a felony. (AOB 127, citing *People v. Valdez* (2004) 32 Cal.4th 73, 110-111; *People v. Combs* (2004) 34 Cal.4th 821, 856; *People v. Cash* (2002) 28 Cal.4th 703, 737; *People v. Silva* (2001) 25 Cal.4th 345, 371.) Appellant has not advanced any persuasive argument to undermine this Court's well-reasoned precedents,

and this Court should decline appellant's invitation to reconsider this settled issue.

In any event, there could be no instructional error since assault by means of force likely to produce great bodily injury is not a lesser included offense to torture.

B. The Crime Of Assault By Means Of Force Likely To Produce Great Bodily Injury Is Not A Lesser Included Offense To The Crime Of Torture

A trial court must instruct sua sponte on "lesser included offenses if the evidence 'raises a question as to whether all of the elements of the charged offense are present and there is evidence that would justify a conviction of such a lesser offense.'" (*People v. Lopez* (1998) 19 Cal.4th 282, 287-288.)

> To determine whether a lesser offense is necessarily included in the charged offense, one of two tests (called the "elements" test and the "accusatory pleading" test) must be met. The elements test is satisfied when all the legal ingredients of the corpus delicti of the lesser offense [are] included in the elements of the greater offense. [Citation.] [Citations.] Stated differently, if a crime cannot be committed without also necessarily committing a lesser offense, the latter is a lesser included offense within the former. [Citations.] [¶] Under the accusatory pleading test, a lesser offense is included within the greater charged offense if the charging allegations of the accusatory pleading include language describing the offense in such a way that if committed as specified the lesser offense is necessarily committed.

(*Id.* at pp. 288-289 [internal quotation marks omitted].) Here, because the crime of torture (§ 206) was not alleged in the information (2CT 315-317), the statutory elements test would apply.

The crime of torture is defined in section 206 as follows: "Every person who, with the intent to cause cruel or extreme pain and suffering for the purpose of revenge, extortion, persuasion, or for any sadistic purpose, inflicts great bodily injury as defined in Section 12022.7 upon the person of

another, is guilty of torture. [¶] The crime of torture does not require any proof that the victim suffered pain."

Section 245, subdivision (a)(1), defines the crime of aggravated assault as the commission of "an assault upon the person of another . . . by any means of force likely to produce great bodily injury." An assault "is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." (§ 240.)

From these definitions it is apparent that the statutory elements of torture do not include all the elements of an aggravated assault. Assault by means of force likely to produce great bodily injury is not a lesser included offense of torture under the elements test because:

> Torture requires actual infliction of great bodily injury, but it does not require that the injury be inflicted by any means of force, let alone by means of force likely to produce great bodily injury. For example, a caretaker would be guilty of torturing an immobile person in his care if the caretaker, acting with the intent to cause extreme suffering for a sadistic purpose, deprived that person of food and water for an extended period of time, resulting in great bodily injury to the person. In such a circumstance, the caretaker would have inflicted great bodily injury without using any force and thus would not be guilty of committing assault by means of force likely to produce great bodily injury. Because the use of force is not a necessary element of the crime of torture, assault by means of force likely to produce great bodily injury is not a lesser included offense of torture.

(*People v. Hamlin* (2009) 170 Cal.App.4th 1412, 1456.)

Appellant's reliance on *People v. Martinez* (2005) 125 Cal.App.4th 1035, is unavailing. (AOB 125.) In *Martinez*, the court held that assault with a deadly weapon is not a lesser included offense of torture. (*Id.* at pp. 1038-1039, 1041-1045.) In noting that section 245, subdivision (a)(1), identifies two different ways of committing aggravated assault, the court stated in dicta: "[W]hile an assault by means of force likely to produce

great bodily injury is arguably an included offense within the crime of torture, assault with a deadly weapon is not." (*Id.* at p. 1043.)

As *People v. Hamlin* established, aggravated assault, defined as assault by means of force likely to produce great bodily injury, does not constitute a lesser included offense of torture. *Martinez* did not conduct any analysis in this regard, but rather merely indicated that its holding was limited to the crime of assault with a deadly weapon. "A case is not authority for propositions not considered. [Citation.]" (*Jones v. First American Title Ins. Co.* (2003) 107 Cal.App.4th 381, 390.)

Accordingly, appellant's lesser included instructional error claim must be rejected.

VIII. THE ADMISSION OF KERR'S STATEMENTS PURSUANT TO EVIDENCE CODE SECTION 1250 DID NOT VIOLATE APPELLANT'S CONSTITUTIONAL RIGHTS AND WAS NOT PREJUDICIAL

Appellant contends the judgment of guilt must be reversed because the trial court erred in admitting Kerr's hearsay statements pursuant to Evidence Code section 1250[19] over defense objection in violation of his

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[19] Evidence Code section 1250, subdivision (a), states in pertinent part:

> Subject to Section 1252, evidence of a statement of the declarant's then existing state of mind, emotion, or physical sensation (including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health) is not made inadmissible by the hearsay rule when:
>
> (1) The evidence is offered to prove the declarant's state of mind, emotion, or physical sensation at that time or at any other time when it is itself an issue in the action; or
>
> (2) The evidence is offered to prove or explain acts or conduct of the declarant.

(continued...)

federal and state constitutional rights to due process, to confront and cross-examine witnesses, his right to a jury trial, and against cruel and unusual punishment. (AOB 143-172.) Specifically, appellant argues that "[t]he trial court committed error by admitting Ms. Kerr's hearsay statements because it was inevitable the jury would use those statements to conclude appellant intentionally and with premeditation killed Ms. Kerr rather than killing her in the heat of passion" (AOB 143) and the penal consequences for stalking are less than for murder; and prejudice from jury using it to prove premeditated murder was substantial (AOB 150). Respondent disagrees.

A. Relevant Facts

During the guilt phase direct examination of prosecution witness Mark Harvey on May 18, 2001, the prosecutor sought to introduce evidence of Kerr's statements expressing her fear of appellant in order to prove the fear element of the stalking count (§ 649.9, subd. (a); count 2). The defense objected and the following discussion occurred at sidebar:

> The Court: Now, I can see the whole conversation coming in under this rubric that it's being offered not to prove the truth of what occurred or what happened or what was said but, rather, is being allowed in for purposes of proving what effect it had on the listener to those remarks.
>
> Of course, we've got one of the two participants in that conversation on the witness stand. I suspect that [the prosecutor] will seek to adduce for state-of-mind purposes both sides of the conversation, and at the end of the day, this whole conversation will have come in for state-of-mind purposes.
>
> Is that where you're going with this?

(...continued)

Evidence Code section 1252 in turn provides, "Evidence of a statement is inadmissible under this article if the statement was made under circumstances such as to indicate its lack of trustworthiness."

[The Prosecutor]: Not quite. I certainly see what the court is saying. That's not where it's going. The conversation is coming in relevant -- for two purposes. One, what the People would suspect is going to -- offer is going to occur is that the victim, Ms. Kerr, is going to begin to describe her fear of the defendant. Now, one of the counts that is alleged is 646.9 of the Penal Code, of which the victim's fear and her state of mind is a specific element of the offense. So this conversation is being offered specifically as to that.

Secondarily, the second part of the conversation is as to whether she was going to live there or not, and not to get into that -- it comes in as to -- what counsel has indicated, to indicate what the relationship was between the parties; but the statements with regard to her fear of the defendant, what he was doing to her, why she was afraid, is coming in specifically and clearly for 646.9 purposes.

The Court: [Defense counsel]?

[Defense counsel]: We object. It's hearsay. It's offered for the truth of the matter asserted, and it doesn't qualify as state of mind exception.

The Court: All right. Your objection is overruled. I think that [the prosecutor] makes a very good point, that he has to prove the state of mind of the victim on a stalking charge, and that fear, to the extent she stated it, would be an expression of her state of mind. I think it could be received, it's relevant, and I'll allow it.

(15RT 1703-1704.)

The court later overruled another defense objection and informed counsel, "to the extent that you have other objections on the same basis, it will be considered a continuing objection to this line of questioning, and my ruling will be considered the same." (15RT 1707.)

After counsel objected to evidence that Kerr told Harvey about appellant's threat to her, the following colloquy occurred at sidebar:

The Court: Your objection is based on what?

[Defense counsel]: Your honor, under [Evidence Code section] 1250, she's allowed to testify -- you can elicit evidence what she said about her present state of mind, so you can offer evidence that she was scared or she said she was scared or she said she was concerned.

[Evidence Code section] 1250 doesn't authorize her to say -- for him to testify that "she said that defendant said that he was going to kill me." There's no authorization for that under the evidence code. That's -- first of all, it's double hearsay.

Her being -- her present state of mind, "I'm scared," I admit or I accept -- I understand the court's ruling on that, that that comes in under [section] 1250 as a statement of her present state of mind, but for her -- counsel's now asking why was she scared, and then she says, "because the [appellant] said he was going to kill me," because the [appellant] said this, because the [appellant] said that. Those statements -- that's not a statement of her present state of mind.

(15RT 1707-1709.)

The court then informed the parties that it wanted to discuss the matter in chambers because it wanted to consult with the Evidence Code. The following proceedings were held in chambers:

[Prosecutor]: Your honor, first of all, before we get to [Evidence Code section] 1250, I think that what's significant is that when a statement -- or when this kind of evidence is being offered in regard to [section] 646.9, it is not an exception to the hearsay rule. It is coming in with independent legal significance.

The elements that one has to show for [section] 646.9 are, A, the victim was feeling fear; B, that a credible threat had occurred to the victim and what that threat was; that, objectively and subjectively, that -- the threat and the state of mind was such that this person actually was in fear, and that subjectively it was the kind of thing that would make anyone subjected to the same thing fearful; that it was over the period of time of the alleged stalking, so it's not just that time. It's anytime within that constructive period; and that it was a threat to safety -- the victim's safety.

The Court: Let me ask you this: [¶] [Defense counsel], if someone were not able to report a threat made by the defendant in open court, how would evidence of that threat, an essential element of a stalking charge, ever be admissible and received?

[Defense counsel]: An admission by the defendant is one way, the fact that the threat was overheard is another way, and there's other ways.

The thing is, the elements -- just because the legislature enacts a crime that has certain elements, that in no way changes the Evidence Code.

The Court: I absolutely agree with that.

[Defense counsel]: Yes. And that's not -- [¶] I disagree. That's not an argument for its admission that counsel made.

The Court: It's an argument for its relevance.

[Defense counsel]: That's not the objection.

The Court: Right. The objection is that it's hearsay.

[Defense counsel]: Right.

[The Prosecutor]: But it's coming in for nonhearsay purposes, in the sense that this -- [section] 646.9 puts her state of mind, very specific state of mind, into issue, and what it puts into issue -- this is why I articulated the relevance to the court -- is not only that she was afraid, but what she was afraid of and that that was reasonable.

I think if we look at the annotated code -- and I certainly can pull the cases for the court -- there are cases that say this is specifically admissible. How else does one measure how frightened a victim is, what she is afraid of, and how reasonable it was for her to be afraid.

[Defense counsel]: [Evidence Code section] 352, then, would kick in, because the jury could never disregard evidence that the defendant said, "I'm going to kill you."

Also, I call your honor's attention to [Evidence Code section] 1250(b). This section does not make admissible evidence of a statement of memory or belief to prove the fact remembered or believed. [Section] 1250 is limited to statement of the declarant's then existing state of mind.

What the defendant allegedly --

The Court: It's limited to evidence of a statement of the declarant's then existing state of mind. Now, she's saying, "I'm frightened," then she goes on to say, "I'm frightened because I've been threatened," or "I've been" -- you know, "[appellant] has threatened to kill me."

Now, clearly there are two levels of hearsay. There's what she is saying out of court, and I've indicated that what she's saying out of court, to the extent it's being offered for a nonhearsay purpose -- namely, her state of mind -- that it would be admissible.

Now, to the extent that it is something said by [appellant] to her, that has to also fall within an exception to the hearsay rule, and it's clearly an admission of a party opponent.

[Defense counsel]: But you can't -- I don't think you can -- that doesn't make -- it's either admissible under [Evidence Code section] 1250 as evidence of a statement of her state of mind, I submit, or it's not. You can't -- you can't say, ah, but the statement by [appellant] is also an exception to the hearsay rule. That doesn't make it admissible.

What would make it admissible would be a finding by the court, which we ask the court not to make, that it's included within the exceptions spelled out in [section] 1250. But I submit it's not. Evidence of a statement of the declarant's then existing state of mind, et cetera, is not made admissible by the hearsay rule when offered to prove the declarant's state of mind.

Gee, she says, "I'm scared." You know, for the record, I objected as hearsay, and I -- but I understand the court's ruling. I'm almost tempted to say the court ruled correctly -- okay? -- when it says -- I don't think I should say that, but I -- you know, I'll submit it. I think the court gets my drift. I understand the court's ruling.

"I'm scared," even though I'd like the record to keep my objection, it seems to come within [section] 1250(a), to be extremely candid. Why not be candid?

But then to go on to say -- the question, really, essentially, is, "and why are you scared?" "Well, I'm scared because" -- and, really, if you -- "because four days ago, when we were in the apartment that he rents for me, he said to me, 'I'll kill you if you go and live with Mark Harvey.'"

That is, I submit, not included within the exception carved out by section 1250 as evidence of the declarant's present state of mind. It's going far beyond 1250, and it raises a serious confrontation issue. I - can't cross-examine Mrs. Kerr.

The Court: Well, no, that's right. Neither can [the prosecutor] call her to have her testify.

[Defense counsel]: Right.

The Court: She's as unavailable as they get.

[Defense counsel]: Right. And there's a constitutional issue of confrontation in addition to -- I don't think we even have to reach that. I mention it, but we have a -- the court here has to make a -- has to construe Evidence Code [section] 1250 to see if 1250 embraces that. I don't think it does.

[Prosecutor]: These arguments have come up in these cases for a long time. It's specifically why [Evidence Code section] 1370 was written -- you know, was written into the Evidence Code, and 1370 was contemplated in the notion -- in a domestic violence or other kind of case when there was no stalking conduct present.

[Defense counsel]: And [section] 1370 doesn't allow this.

[Prosecutor]: [Section] 1370, with the exception of -- it's about as close to 1370 as you get. But I think there's one element of [section] 1370, in that the statement had to go directly to a law enforcement, paramedic, or hospital official.

[Defense counsel]: Yeah.

[Prosecutor]: Here's the flaw or the fallacy to buttress up what counsel was just arguing. A moment ago, counsel was arguing, hey, I'm going to put up a heat-of-passion defense. What I'm going to do is show what words occurred between these people that provoked my guy and what these words were and why they provoked; in other words, why it put him to a certain state of mind, and the court ruled this comes in as part of his defense.

For stalking, it's the same thing. It is one of the elements. You have to show that the defendant harassed, followed, tormented the victim and specifically -- in People v. Ewing and many other cases -- go specifically to the victim's state of mind.

And, in fact, one of the common forms of proof in these cases to show that a person was affected by stalking and to show the effect that it had on them -- because, it's funny, it's the only -- the only two sections in that code where you've got to show the effect of threats or the effect of a defendant's word upon a victim are [sections] 422 and 646. And one of the common things shown is who has this person told this conduct to and how have they reacted to it. How else do you show a victim, especially a dead victim -- but any victim's fear?

[Defense counsel]: You show it by admissions. You show it by people overhearing the statement and other ways.

Your honor, I would ask that -- I'm aware of no case that widens [Evidence Code section] 1250 to allow -- allow in the reason for the declarant's -- the evidence of the -- you know, the declarant's declaration of her present state of mind.

(15RT 1709-1715.)

The court allowed the parties to file legal briefs on the issue and reconvened on the next day. (15RT 1715.) The prosecution filed a motion to introduce evidence of statements made by Kerr of appellant's threats to establish the fear element of the stalking charge. (16CT 3769-3774.) The following colloquy occurred:

The Court: Now, as far as the evidentiary issue is concerned, I have a brief here. [¶] Do you have something that you wish me to look at?

[Defense counsel]: Not really. My position is going to be that this brief is irrelevant because it deals with the relevancy of the offer, and I admit that the offer is extremely relevant. The issue is the admissibility, not relevancy.

[Prosecutor]: The two are linked.

[Defense counsel]: I don't see how. I haven't seen a case that somehow -- I read the brief carefully, and counsel doesn't cite any case that somehow holds that Evidence Code section 1250 could not only include the witness's statement, "I'm afraid of the defendant," but also part two of the statement, "because he told me that if I move here, he'll kill me."

That's the offer, your honor, because if -- Harvey would testify she said, part one, "I'm afraid of the defendant," and then -- the problem here is part two -- "because defendant told me if I move in with you, he'll kill me."

[The Prosecutor]: That's -- actually, all those cases are square on point.

[Defense counsel]: Let me finish for a second. I admit that that is extremely relevant, it's relevant to the charge of stalking, it's relevant to everything. The issue is not relevancy, and this brief deals with relevancy.

I meanwhile -- just let me round this out. I've searched every case. I've looked at several cases under section 1250, and I can't find a case that authorizes such a wide interpretation of 1250 to allow part 2 of the statement in. That's my position.

[The Prosecutor]: Actually, the reason why I began with relevance is that if you look at the ruling and the cases tracked, and there's even a law review article that I cite -- and I have all the cases if the court wants them, and the law review article -- what they actually indicate, and why relevance is so important, is that pursuant to both the precedent and the statute, that these statements come in that are [section] 1250 when relevance can be established and, specifically, when the victim's state of mind becomes relevant to the case.

And looking at Merkouris, which is the first case, which is overruled by Hamilton, which is then overruled by Ortiz, with the evidence coming in -- and all the subsequent cases are just

exactly on point. And even under the more conservative rule under Hamilton, this would come in.

So the reason why relevancy is so important is that the door that all of these cases talk about for this information coming in is the victim's state of mind being put in issue, or them becoming relevant by some other reason, which, I would submit, is here too. So that's why it's there.

(16RT 1722-1724.)

After a short recess, the court gave the following tentative ruling:

I have already allowed Mr. Harvey to testify regarding what Lisa Kerr said about her then-existing state of mind on March 23, 1999, and I certainly feel that that evidence is very relevant and, as it falls within the declaration of the declarant's then-existing mental or physical state, an exception to the hearsay rule.

It is admissible because, among other things, there is a charge of stalking in this case, and the state of mind of the victim is very much an issue in stalking cases. There must be proof that the victim was placed in fear of physical harm.

The statement, however, must be made under circumstances that indicate -- must not have been made under circumstances that indicate its lack of trustworthiness. That's in Evidence Code section 1252.

So what we have here is an issue under Evidence Code section 1250(a)(i), and it concerns can the prosecutor now introduce through Mr. Harvey what Lisa Kerr said to him -- or what Lisa Kerr says was said to her by [appellant], and that is, "I'm going to kill you," or words to that effect. Now, the defendant objects, saying that this is well outside the scope of Evidence Code section 1250.

I have reviewed the brief filed by [the prosecutor]. I think that we need to also look at how this fits within the hearsay rule. It's one thing for Ms. Kerr -- for Mr. Harvey to testify what Ms. Kerr said about her then-existing physical -- or mental state. That is an express exception to the hearsay rule.

Now, what might have been said to Ms. Kerr by the defendant, which then she would be able to relay to Mr. Harvey, on a physical or emotional or mental state exception -- clearly the People are offering to introduce what was said by the

defendant, and that's another level of hearsay that would appear to be an admission of a party opponent.

So if you go through the various elements of it, provided that it is admissible, it appears to this court to be, one, relevant and, two, an applicable exception to the hearsay rule that, arguably, covers each level of hearsay.

The question is, is it so prejudicial under a[n] [Evidence Code section] 352 analysis that it should be excluded? I think the defense would freely admit that it's relevant. This is -- on its face, it just -- it's relevant. but the question becomes, in this court's opinion, if I allow Mr. Harvey to testify that Lisa Kerr said that -- said to him, Mr. Harvey, that [appellant] had told her he was going to kill her, is that going to be so prejudicial as to what -- you know, not only prove the victim's mental state for purposes of stalking but, I mean, one could see that that could all of a sudden be used as evidence to prove intent to kill under the murder charge.

So my preliminary thinking in all of this is as follows: that its probative value probably outweighs its prejudicial impact, but that there must be a limiting instruction, and the limiting instruction would be that the evidence may be considered only for purposes of proving the victim's state of mind insofar as the stalking count is concerned.

That's my tentative. That's after reviewing the brief filed by [the prosecutor], the cases cited by him, and by my own independent research Friday evening and over the weekend.

(16RT 1728-1730.)

The court allowed both parties to give additional argument in support of their positions. (16RT 1730.) Defense counsel first agreed with the court's analysis. (16RT 1730-1731.) Counsel then argued that the jury would not be able to follow the court's limiting instruction on the stalking count, which he described as a "minor charge in the information," and thus requested that the evidence be excluded pursuant to Evidence Code section 352. (16RT 1731-1733.) The prosecutor agreed with the court's analysis, stating that the evidence was highly relevant, especially in light of the fact that the defense itself introduced evidence of Kerr's other statements,

during opening statement. (16RT 1734-1735; see 14RT 1468-1469 [defense opening statement].) The prosecutor rejected defense counsel's offer to stipulate that Kerr told Harvey she was afraid of appellant. (16RT 1736-1741.)

The court gave its final ruling as follows:

> [Defense counsel], I would be absolutely delighted, overjoyed if Lisa Kerr were here for you to cross-examine. That is not the case. She is, obviously, unavailable.
>
> I've determined that her statements of her then-existing mental or physical state are relevant to the issues of the fear factor or elements associated with the stalking charge.
>
> When I consider the 352 analysis and the weighing that must take place and whether or not I should allow this jury to hear a statement to the effect that "if you move in with him, I will kill you," a statement attributed to [appellant] by the victim and relayed to Mr. Harvey by the victim, I find that its probative value far outweighs any prejudicial impact, although the prejudicial impact is considerable.
>
> In order to alleviate that prejudicial impact, I am going to tell the jury that it may consider the evidence only for the purpose -- concerning whether or not the fear element is established -- in the stalking charge has been proved. It may not be used, however, for any purpose other than that, including deciding what was the intent of [appellant] in connection with the allegations that he murdered Lisa Kerr.
>
> Now, if later the People are going to ask that this evidence be received for some larger purpose, then I'll consider it, but right now I'm going to issue that limiting instruction, but I am going to allow Mr. Harvey to testify.

(16RT 1741-1742.)

The court granted defense counsel's request for a limiting instruction during Harvey's testimony, and not at the end of the case. (16RT 1742-1744.)

The court subsequently admitted evidence of Kerr's statements to Farnand, Zornes, and Hyer for the limited purpose of proving the fear

element of the stalking count. When the statements were introduced, the court admonished the jury that the testimony was being admitted for the limited purpose of proof of an element in the stalking charge -- the victim's fear. (See 16RT 1824-1825; 17RT 1847, 1923, 1925-1926, 1938, 1956-1957; 18RT 2014, 2041-2046, 2047-2048.)

At the conclusion of the guilty phase testimony, the jury again was instructed concerning the limited purpose of this testimony. (CALJIC No. 2.09; 16CT 3817; 23RT 2508-2509.)

B. The Admission Of Kerr's Statements Under Evidence Code Section 1250 For The Limited Purpose Of Proving The Fear Element In The Stalking Count Did Not Violate Appellant's Constitutional Rights, Nor Was It Prejudicial

Appellant argues, "[a]ssuming that Ms. Kerr's hearsay statements were relevant to prove the fear element of stalking, the trial court nevertheless violated appellant's right to due process of law, and abused its discretion, by admitting . . . those statements because: (1) a limiting instruction was not adequate to prevent the jury from using the evidence as proof of premeditation for murder; (2) the penal consequence of a stalking conviction was minor compared to [the] consequence of a murder conviction; and (3) the prejudice from the jury using the hearsay statements to prove appellant committed a premeditated murder was substantial." (AOB 150.) These claims must be rejected.

Evidence Code section 1250 creates an exception to the hearsay rule for evidence of a declarant's statements regarding his or her then-existing state of mind (1) when the declarant's state of mind is at issue or (2) when the evidence is offered to prove or explain the declarant's acts or conduct. (*People v. Hernandez* (2003) 30 Cal.4th 835, 872; *People v. Cox* (2003) 30 Cal.4th 916, 962; *People v. Ruiz* (1988) 44 Cal.3d 589, 608; *People v. Ortiz* (1995) 38 Cal.App.4th 377, 389.) "A prerequisite to this exception to the

hearsay rule is that the declarant's mental state or conduct be factually relevant." (*People v. Hernandez, supra*, at p. 872; accord, *People v. Guerra* (2006) 37 Cal.4th 1067, 1114.)

Circumstantial evidence of a victim's fear also may be admissible as nonhearsay evidence of the victim's state of mind.

> [A] statement which does not directly declare a mental state, but is merely circumstantial evidence of that state of mind, is not hearsay. It is not received for the truth of the matter stated, but rather whether the statement is true or not, the fact such statement was made is relevant to a determination of the declarant's state of mind. [Citation.] Again, such evidence must be relevant to be admissible-the declarant's state of mind must be in issue. ([Evid. Code,] § 210.)

(*People v. Ortiz, supra*, 38 Cal.App.4th at p. 389; see *People v. Garcia* (1986) 178 Cal.App.3d 814, 822 ["Statements by a victim concerning the defendant's prior conduct such as threats made to him tend to establish the victim's state of mind towards the defendant, namely, fear of him, and may be admitted where that state of mind is in issue."].)

"A murder victim's fear of the alleged killer may be in issue . . . when, according to the defendant, the victim behaved in a manner inconsistent with that fear." (*People v. Hernandez, supra*, 30 Cal.4th p. 872; see, e.g., *People v. Guerra, supra*, 37 Cal.4th at p. 1114 [murder victim's statement that she feared defendant was "clearly probative of her lack of consent to sexual intercourse in the attempted rape"]; *People v. Crew, supra*, 31 Cal.4th at p. 840 [murder victim's statement to friend, "If you don't hear from me in two weeks, send the police," made prior to leaving on trip from which she never returned, was properly admitted to rebut defense theory that victim was a troubled person who had disappeared of her own accord]; *People v. Lew* (1968) 68 Cal.2d 774, 778-780 [murder victim's fear of defendant relevant to disprove defendant's claim that the decedent was sitting on his lap when his gun accidentally discharged]; see

also *People v. Griffin* (2004) 33 Cal.4th 536, 578 [twelve-year-old victim's statement that she intended to confront the defendant if he continued to fondle her, made on day she was killed, was admissible under section 1250 to prove that she confronted him in accordance with her statement of intent]; cf. *People v. Jablonski* (2006) 37 Cal.4th 774, 820-821 ["the victims' statements were inadmissible under section 1250 because the state of mind of the victims was not relevant to any dispute issue; however, evidence that defendant knew one of the victims "was afraid of him had some bearing on his mental state in going to visit the women . . . and how he planned to approach the victims (by stealth as opposed to open confrontation) both of which, in turn, were relevant to premeditation"]; *People v. Noguera* (1992) 4 Cal.4th 599, 621-622 [because there was no dispute as to decedent victim's state of mind or behavior in conformity, victim's statements of fear were inadmissible].)

"[A] victim's prior statements of fear are not admissible to prove the *defendant's* conduct or motive (state of mind)[]" because "[i]f the rule were otherwise, such statements of prior fear or friction could be routinely admitted to show that the defendant had a motive to injure or kill." (*People v. Ruiz, supra*, 44 Cal.3d at 609, emphasis in original.) But, *where there is a disputed issue as to the victim's state of mind*, evidence that tends to show how the victim was feeling about the defendant is admissible because it "tend[s] to explain [the victim's] conduct" toward the defendant, and that evidence may "in turn logically tend[] to show [the defendant's] motive to murder [the victim]." (*Rufo v. Simpson* (2001) 86 Cal.App.4th 573, 594; see also *id.* at pp. 598-599 ["When the declarant's state of mind is relevant and the statements of threats or brutal conduct are circumstantial evidence of that state of mind, the evidence is admissible so far as a hearsay objection is concerned."].)

Such was the case here. *Rufo v. Simpson, supra*, 86 Cal.App.4th 573 – the civil action where the jury found that O.J. Simpson had killed his ex-wife Nicole and Ronald Goldman – persuasively resolves this issue. There, the trial court admitted evidence of Nicole's telephone call to a battered women's shelter relating, among other things, that Simpson had stalked her, she feared him, and she had decided to not to move back in with him. (*Id.* at pp. 588-590.) The Court of Appeal ruled that Nicole's statements – both as statements of fear under Evidence Code 1250 and as circumstantial nonhearsay permitting a state-of-mind inference – regarding her relationship with Simpson were admissible to show her state of mind and explain her conduct in terminating the relationship, "which in turn was alleged to have provoked Simpson to murder." (*Id.* at pp. 591-592.)

The Court of Appeal rejected Simpson's argument that Nicole's state of mind was irrelevant, concluding that her state of mind was at issue given the parties' contrasting views of the relationship. (*Rufo v. Simpson, supra*, 86 Cal.App.4th at pp. 594-595.) "According to the plaintiffs' theory of the case, Nicole, after a long stormy sometimes violent relationship with Simpson and efforts to reconcile, decided in May of 1994 finally to end the relationship; the final few weeks were tense; Simpson reacted negatively; finally, on the night of the killings, when Simpson was excluded from the family gathering he flew into a rage and killed Nicole, along with Ronald, an unanticipated bystander." (*Id.* at p. 594.) Simpson, by contrast, contended that "'the relationship was a loving relationship and that [he] had no basis in that relationship which would cause him to commit the acts resulting in the deaths of the decedents.'" (*Ibid.*) As the Court of Appeal explained, Nicole's state of mind was relevant and the evidence explained "how Nicole was feeling about Simpson, tended to explain her conduct in rebuffing Simpson, and this in turn logically tended to show Simpson's motive to murder her." (*Ibid.*)

As in *Rufo v. Simpson*, Kerr's statements of fear – both as express statements of fear under Evidence Code section 1250 and as circumstantial nonhearsay permitting an inference of her fear – were admissible as evidence of her state of mind and were offered to explain Kerr's conduct in ending her relationship with appellant and rejecting him. (See *Rufo v. Simpson, supra*, 86 Cal.App.4th at p. 591.) In turn, this state-of-mind evidence, and her conforming conduct, was alleged to have provoked appellant to assault and ultimately murder her. (See *ibid.*)

Similarly, as in *Rufo v. Simpson*, Kerr's state of mind was a disputed issue given the parties' conflicting views of the relationship. (See *Rufo v. Simpson, supra*, 86 Cal.App.4th at p. 594 [decedent's state of mind at issue where plaintiffs' theory was that Simpson killed Nicole after she finally terminated the stormy and violent relationship versus the defense contention that the relationship was a loving one].) In his opening statement, the trial prosecutor told the jury that the evidence, including appellant's actions toward Kerr, Kerr's attempt to obtain a restraining order, and appellant's cell phone records, showed "a picture of pursuit, of stalking, of planning, and of lying in wait." (14RT 1455, 1457-1458.) During the defense opening statement, counsel disputed this characterization of appellant's relationship with Kerr stating that appellant did not stalk Kerr. (14RT 1469.) During the defense guilt phase case, evidence that Lujano heard tape recordings which purportedly contained Kerr's statements of affection to appellant was admitted to challenge the prosecution's evidence that appellant was stalking Kerr and to show that Kerr was unafraid of him. (21RT 2321-2323.)

Moreover, even assuming that appellant did nothing to put at issue Kerr's state of mind, the prosecution was "entitled to present evidence tending to establish motive. Without persuasive evidence from plaintiffs regarding motive, the jurors might believe there was nothing in the

relationship between [defendant] and [victim] which would precipitate a murder. (See *People v. Zack*[(1986)] . . . 184 Cal.App.3d 409, 415. . . [prior assaults on wife admissible, husband "was not entitled to have the jury determine his guilt or innocence on a false presentation that his and the victim's relationship and their parting were peaceful and friendly"]; *People v. Linkenauger*[(1995)] . . . 32 Cal.App.4th 1603, 1615. . . [same].)" (*Rufo v. Simpson, supra*, 86 Cal.App.4th at pp. 594-595; see *People v. Smithey* (1999) 20 Cal.4th 936, 971-972 [murder victim's statements to acquaintance that she thought defendant previously had stolen from her was admissible "for the nonhearsay purpose of showing [murder victim's] state of mind concerning defendant" and to impeach defendant's testimony about the prior theft; that defendant did not testify until after the statements were admitted through the victim's acquaintance's testimony "does not change the conclusion on appeal that [the acquaintance's] statements regarding [the murder victim's] state of mind were admissible"].) Thus, here, evidence of Kerr's fearful mind was highly relevant to showing appellant's motive for murdering her.

Moreover, not only was the trial court's contemporaneous admonitions to the jury unambiguous and easy to follow, but the trial court instructed the jury, at the end of the trial, pursuant to CALJIC No. 2.09 that "[c]ertain evidence was admitted for a limited purpose. [¶] At the time this evidence was admitted you were instructed that it could not be considered by you for any purpose other than the limited purpose for which it was admitted. [¶] Do not consider this evidence for any purpose except the limited purpose for which it was admitted." (16CT 3817; 23RT 2508-2509.) "'[It is] the almost invariable assumption of the law that jurors follow their instructions.' [Citation.] '[We] presume that jurors, conscious of the gravity of their task, attend closely the particular language of the trial court's instructions in a criminal case and strive to understand, make sense

of, and follow the instructions given them.' [Citations.]" (*United States v. Olano* (1993) 507 U.S. 725, 740; *People v. Romo* (1975) 14 Cal.3d 189, 195; *People v. Sisneros* (2009) 174 Cal.App.4th 142, 152-153.)

None of the exceptions to the rule that the jury is presumed to follow the law applies here. (See, e.g., *People v. Seiterle* (1963) 59 Cal.2d 703, 710 ["exceptional cases in which the improper subject matter is of such a character that its effect on the minds of the jurors cannot be removed by the court's admonitions"]; *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1374 [co-defendant's confession that implicates non-testifying defendant overcame presumption].) Appellant has provided no evidence to rebut the presumption that the jury followed the court's instructions in this case. (See, e.g., *People v. Alfaro* (2007) 41 Cal.4th 1277, 1326; *People v. Guerra*, *supra*, 37 Cal.4th at p. 1115; *People v. Waidla* (2000) 22 Cal.4th 690, 725.) Moreover, the assumption that jurors will follow the trial court's instructions fully applies when rights guaranteed by the Confrontation Clause are at issue. (See *Tennessee v. Street* (1985) 471 U.S. 409, 414 [105 S.Ct. 2078, 85 L.Ed.2d 425]; *Frazier v. Cupp* (1969) 394 U.S. 731, 735 [89 S.Ct. 1420, 22 L.Ed.2d 684].)

Furthermore, the United States Supreme Court's decision in *Crawford v. Washington* (2004) 541 U.S. 36 [124 S.Ct. 1354, 158 L.Ed.2d 177] (see AOB 168-169), does not affect the present case "because the out-of-court statement here at issue . . . is not 'testimonial hearsay' within the meaning of *Crawford*. (See 541 U.S. at pp. 50-54.)" (*People v. Griffin*, *supra*, 33 Cal.4th at p. 579, fn. 19.)

Finally, even assuming any error occurred, it was harmless under any standard in light of the admission of appellant's own inculpatory statements supporting the elements of intent to kill and premeditation. (See *People v. Jablonski*, *supra*, 37 Cal.4th at p. 821.) Appellant directly told Heiserman (18RT 2069, 2072-2074, 2078-2080, 2097-2098, 2104; 19RT 2131-2132,

2138-2140, 2146) and Jayne (20RT 2235-2238, 2241-2244, 2250-2254) about the stalking and murder, and also made admissions to Detective Graham (20RT 2223-2225, 2215-2216, 2222, 2227-2229).

Accordingly, appellant's challenge to the admission of Kerr's statements pursuant to Evidence Code section 1250 must be rejected.

IX. VARIOUS RULINGS BY THE TRIAL COURT DID NOT CONSTITUTE AN ABUSE OF DISCRETION, NOR VIOLATE APPELLANT'S CONSTITUTIONAL RIGHTS

Appellant contends the judgment of guilt must be reversed because the trial court made six erroneous rulings which individually and cumulatively deprived him, under the federal and state constitutions, of a fair trial, to a jury determination of the facts, the right of confrontation, and the right to be free from cruel and unusual punishment. (AOB 173-192.) Respondent disagrees.

A. Relevant Law

A trial court's ruling excluding and admitting evidence is reviewed for abuse of discretion. A trial court's exercise of discretion in admitting or excluding evidence "will not be disturbed except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice [citation]." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10.)

Appellant's claims that the trial court's exclusion of proffered evidence violated his federal constitutional right to present a defense[20] must be rejected because, "[a]s a general matter, the ordinary rules of evidence do not impermissibly infringe on the accused's [state or federal]

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[20] Of the six rulings appellant is challenging in this argument, all but one resulted in the exclusion of evidence offered by the defense, as discussed later in this argument.

constitutional right to present a defense." (*People v. Robinson* (2005) 37 Cal.4th 592, 626-627, quoting *People v. Hall* (1986) 41 Cal.3d 826, 834; see also *Holmes v. South Carolina* (2006) 547 U.S. 319, 326 [126 S.Ct. 1727, 164 L.Ed.2d 503].) "Where a 'trial court's ruling did not constitute a refusal to allow defendant to present a defense, but merely rejected certain evidence concerning the defense,' the ruling does not constitute a violation of due process and the appropriate standard of review is whether it is reasonably probable that the admission of the evidence would have resulted in a verdict more favorable to defendant." (*People v. Bradford* (1997) 15 Cal.4th 1229, 1325.)

B. Appellant Has Forfeited His Constitutional Claims

Appellant contends that the trial court erred under state law and acted unconstitutionally by ruling against him on several occasions in which he sought to introduce evidence. "He did not invoke constitutional guaranties at trial and has forfeited his constitutional claims (*People v. Partida* [(2005)] 37 Cal.4th 428, 435) on appeal, except for his due process claim (*id.* at pp. 433-439)." (*People v. Thornton* (2007) 41 Cal.4th 391, 444.)

C. The Trial Court's Rulings Did Not Constitute An Abuse Of Discretion

Appellant faults the following trial court rulings: (1) the exclusion of evidence regarding Harvey's sexual conduct (AOB 174-175, 180-183); (2) the admission of appellant's statement, to Harvey, that he wanted to get rid of Kerr's husband Casey, or to stab him, and to get him out of the picture (AOB 175, 183-184); (3) sustaining the prosecution's hearsay objection to evidence that Kerr referred to herself as "Lisa Brooks" (AOB 175, 184, 188-189); (4) the exclusion of evidence that appellant received a pair of panties in the mail from Kerr (AOB 175-177, 184-185); (5) the exclusion of evidence that Casey had beaten Kerr (AOB 177, 185-188); and (6) the

exclusion of Kerr's prior conviction to impeach her credibility (AOB 177-178, 188-189).

As discussed below, the trial court's rulings were proper and did not violate appellant's constitutional rights. Even assuming the trial court erred, any state-law error would be harmless under the "reasonable probability" test of *People v. Watson, supra*, 46 Cal.2d at page 836, and, any federal constitutional error, if not forfeited, would be harmless under the "beyond a reasonable doubt" test of *Chapman v. California, supra*, 386 U.S. at pages 23 through 24.

1. Harvey's Past Romantic Relationships

During his guilty phase opening statement, defense counsel stated that appellant believed Kerr and Harvey were involved in a sexual relationship. Counsel described Harvey as a "very nice-looking guy," who "spends a lot of time at the Alcoholics Anonymous club, dating women that are trying to recover from their problems with their alcohol and drugs." (14RT 1467-1468.) Counsel also stated that Kerr became "furious and jealous" because Harvey was "hitting on" Hyer and suspected that Harvey and Hyer were having an affair. (14RT 1468.)

Outside the jury's presence, the trial court held a hearing pursuant to Evidence Code section 402 regarding the defense motion to impeach Harvey with a prior 1983 misdemeanor theft conviction[21] and the prosecution's objection to irrelevant and improper character evidence, as referenced in defense counsel's opening statement. (15RT 1666-1668.)

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[21] Because appellant does not challenge the trial court's ruling related to his request to impeach Harvey with a prior misdemeanor (see AOB 174- 175, 180-183), respondent omits a recitation of the proceedings related to that ruling.

The prosecution and the defense declined to ask Harvey questions about meeting women through A.A. meetings. (15RT 1673.) The trial court asked Harvey a series of questions about his experience with A.A. and his relationships with women that he had met there. (15RT 1673-1675.) Harvey testified that he had attended A.A. meetings for roughly 20 years. Harvey's father was a recovering alcoholic who began taking Harvey to meetings when Harvey was 17 years old. (15RT 1674.) Harvey did not meet his wife at a meeting, but she eventually attended meetings with him. (15RT 1674.) Harvey met probably four women at meetings with whom he eventually had a romantic relationship. (15RT 1675.) Kerr was not one of the four women. (15RT 1675.)

Defense counsel then reopened questioning of Harvey. (15RT 1675-1676.) Harvey denied that one of the four women he had relationships with included Hyer. (15RT 1675.) The court sustained the prosecutor's relevance objection to the question, "Well, you had sex with -- you've had sex with Kim Hyer," on the ground that it exceeded the scope of the hearing. (15RT 1675.) The court also sustained the prosecutor's relevance objections to counsel's next two questions, "Who were the four women," and "These are four women that you had a sexual relationship with; is that correct," because it "unnecessarily invade[d] the witness's privacy interests." (15RT 1675-1676.) Counsel asked no further questions.

To the prosecutor's sole question, Harvey testified that he and Kerr never had a romantic relationship. (15RT 1676-1677.)

The court then heard argument from the parties. The suggestion Harvey used A.A. meetings to meet women and then had romantic relationships with them, the prosecutor argued, was irrelevant, highly prejudicial, and inflammatory. The prosecutor also argued that the defense had made no offer of proof regarding a romantic relationship between Kerr and Harvey. (15RT 1678-1679.)

The court noted that the fact that Harvey had been involved with A.A. was "of no great moment" because "[a]t these meetings, one is very open and tells very personal things to the group." The court continued to state, "It would appear to me that when you do that, it wouldn't be at all unusual you'd meet someone there who might have heard what you've had to say or been impressed with your presentation or that you were impressed with theirs. So it doesn't surprise me at all that there might be some sort of romantic relationships growing out of these meetings." (15RT 1679.) The court concluded, "That to prove this case, it doesn't do anything to prove that there was some relationship between Lisa Kerr and Mr. Harvey to show that he had relationships with four other people unrelated to the case. I mean, it doesn't prove anything." (15RT 1679-1680.)

Counsel proffered that he could show, through appellant's testimony, appellant knew that Harvey "hit on" girls at the A.A. club. Defense investigator Wolff, counsel proffered, had spoken with the club manager, who was quoted as stating that Harvey, "Screws everything that walks in the club." (15RT 1680.)

The court rejected counsel's argument stating, "[Harvey's] sexual conduct with other women other than Lisa Kerr is totally irrelevant," and excluded, pursuant to Evidence Code section 352, any evidence of Harvey's alleged relationships with other women at A.A. meetings that he may have had. However, the court permitted the defense to elicit evidence that Harvey had a "some sort of relationship with Lisa Kerr" as well as evidence that he had a relationship with Hyer because it was relevant to the defense of provocation. (15RT 1680-1682, 1684-1685.)

Appellant now contends that "[e]vidence that Mr. Harvey had engaged in sexual relationship[s] with women he met at A.A. meetings was fundamental to appellant's defense. It directly bolstered appellant's argument that he acted with sufficient provocation to establish his guilt of

voluntary manslaughter rather than murder. It was relevant to the reasonableness of appellant's belief that Mr. Harvey and Ms. Kerr were engaged in a sexual relationship." (AOB 181.) Appellant never raised these grounds of admissibility in the trial court. Thus, this claim has not been preserved for appellate purposes. (See, e.g., *People v. Guerra, supra*, 37 Cal.4th at p. 1117; *People v. Morrison* (2004) 34 Cal.4th 698, 711-712.)

In any event, the trial court acted within its discretion in concluding that Harvey's sexual conduct with women other than Kerr was totally irrelevant. "The trial court has broad discretion in determining the relevance of evidence [citations] but lacks discretion to admit irrelevant evidence." (*People v. Thornton, supra*, 41 Cal.4th at p. 444, quoting *People v. Carter* (2005) 36 Cal.4th 1114, 1166-1167.) Evidence is relevant if it 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.)

Here, evidence that Harvey met four women at A.A. meetings with whom he eventually had a romantic relationship did not have any tendency in reason to prove Harvey had a romantic relationship with Kerr or Hyer. (See *People v. Boyette, supra*, 29 Cal.4th at p. 428.) Evidence is irrelevant if it gives rise only to speculative inferences. (*People v. Morrison, supra*, 34 Cal.4th at p. 711.) "Excluding irrelevant evidence did not deprive [appellant] of his right to present a defense." (*People v. Thornton, supra*, 41 Cal.4th at p. 445.) Accordingly, the trial court did not abuse its discretion in sustaining the prosecution's irrelevance objection to the introduction of evidence related to Harvey's relationships with four women whom he met through A.A. meetings.

Moreover, the character of Harvey's relationships with four women other than Kerr before the charged offenses had no tendency in reason to establish appellant's state of mind, or the nature and extent of the provocation, at the time of the murder was committed. It was Kerr's

interest in Harvey that was relevant. (See *In re Thomas C.* (1986) 183 Cal.App.3d 786, 798 [provocation must come from victim]; *People v. Spurlin* (1984) 156 Cal.App.3d 119, 125-126 [same].)

Appellant was adequately allowed to explore the nature of the relationship between Harvey and Kerr in an attempt to establish heat of passion. Insofar as that relationship was relevant to explain appellant's state of mind and conduct, direct evidence was admitted through the testimony of Detective Graham that appellant stated he thought Kerr was having an affair with Harvey because of the way the two had made eye contact and because they were spending a lot of time together. (20RT 2223-2225, 2228-2229.) Accordingly, even assuming the trial court erred in excluding evidence of Harvey's four relationships with women other than Kerr, appellant was not prejudiced.

2. Appellant's Threats Against Casey

Outside the presence of the jury during the guilt phase direct examination of Harvey, the trial court held a hearing pursuant to Evidence Code section 402. Harvey testified that he had a conversation with appellant, who had stated that he had a problem because, "he was in love with somebody [who] . . . was in love with someone else." (17RT 1853.) During that conversation, appellant also threatened Kerr's husband, Casey, by stating: "he just wanted to get rid of the guy or stab him, just get him out of the picture." (17RT 1854.)

Defense counsel asked no question at the hearing, but "object[ed] to the alleged statement by [appellant] that he just wanted to stab or get rid of Casey Kerr, Mr. Kerr." (17RT 1855.)

The prosecutor responded as follows:

> This is a conversation some seven to -- approximately seven months before, where [appellant] is expressing his concern about the relationship, frustration with the relationship,

> and can't go back with her, and at that time there is a notion of homicidal ideation with regard to this relationship as to the issue of premeditation.
>
> As it goes, I think it's relevant that some seven months before, [appellant] is contemplating the notion of homicide and violence with regard to this relationship, and those things standing in the way. I think that becomes extremely relevant as to his intent and ideation, especially since the issue proffered by [defense counsel], as phrased, is that this is an explosive rage and manslaughter.

(17RT 1855.)

The court observed, "Of course, [defense counsel] will argue that under a[n] [Evidence Code section] 352 analysis, this is a threat -- a homicidal threat directed to someone other than the victim and that, as a result, its prejudicial impact far outweighs its relevant, probative value," and then asked counsel, "Is that how you would argue?" Counsel replied, "That's better than me." (17RT 1855.)

The court countered, "All right. But I don't think it's a winning argument." The court observed that appellant's statement was made months in advance of Kerr's death during a conversation in which he discussed his relationship with Kerr and expressed a desire to kill her husband. The court concluded that appellant's threat against Casey was relevant and that its probative value outweighed its prejudicial impact pursuant to Evidence Code section 352. (17RT 1856.)

In the instant appeal, appellant contends the trial court erred in admitting evidence appellant threatened Casey because: (a) it was irrelevant to whether appellant made a spur of the moment decision to kill Kerr as the result of anger; (b) the threat was remote in time, as it occurred seven months before Kerr's death; (c) the evidence was inflammatory because death was threatened; (d) the threat unnecessarily inflamed the passions of the jury against appellant; and (e) the jury most likely

concluded appellant would have killed other people if necessary to get to Kerr, which was an unfair inference because Kerr was the sole victim. (AOB 183.)

Defense counsel's objection, as adopted from the trial court, that "a homicidal threat directed to someone other than the victim and that, as a result, its prejudicial impact far outweighs its relevant, probative value" (17RT 1855) did not preserve for appeal appellant's current contentions regarding the threat. Thus, this claim was forfeited. (See *People v. Guerra, supra*, 37 Cal.4th at p. 1117.)

In any event, the trial court did not abuse its discretion in admitting evidence of appellant's threat against Kerr's husband Casey. "While threats against the deceased are admissible in evidence to show malice, threats against another person are only admitted under circumstances *which show some connection with the injury inflicted on the deceased.*' (The italics are ours.) Where a sufficient connection is shown such threats are clearly admissible.'" (*People v. Merkouris* (1956) 46 Cal.2d 540, 557 [in prosecution for murder of defendant's former wife, letters written by defendant to deceased's second husband, allegedly killed by defendant, telling him not to worry about his wife's sexual degeneracy because he would not be around long, was properly admitted as a relevant threat].)

Here, appellant's threat against Kerr's husband was evidence of a consuming and irrational jealousy. The threat on Casey's life suggested his jealousy, frustration, and anger was escalating to include thoughts of getting rid of someone standing between appellant and Kerr. This evidence provided a logical connection between appellant and Kerr.

Indeed, the evidence virtually compelled such a conclusion. Appellant told Harvey that he was in love with Kerr and that his relationship with her was perfect; however, appellant became upset when Kerr decided to leave appellant and reconcile with her husband. (17RT

1857, 1863-1864, 1866-1867.) Thus, appellant stated that he wanted to stab Casey or to get him "out of the picture." (17RT 1857.)

Even if the trial court erred in admitting the threat evidence through Harvey's testimony, the ruling did not prejudice appellant because there was evidence that he made similar statements to other witnesses. Farnand testified that appellant stated, in voicemail messages to Kerr, that Kerr was a slut and a whore (17RT 1937), and that if he could not have Kerr, no one else could (17RT 1938). Kari similarly testified that appellant's feelings of animosity toward Kerr were intertwined with expressions of hostility toward Casey as appellant felt that he was being "messed around and . . . led on" by Kerr (20RT 2282) and that Kerr was "screwing him around" (20RT 2286). Appellant admitted, to Kari, that he threatened to kill and stab Casey. (20RT 2288, 2294, 2299-2300.)

Heiserman further testified that appellant was upset with Kerr because she wanted to go back to her husband and also because she was "running around" on appellant. (18RT 2085-2086.) Appellant stated that he planned to act as a sniper on a rooftop to kill Casey. (18RT 2081-2082.) Thus, appellant's threats against Casey supported the logical inference that he wanted to kill Casey because he interfered with appellant's relationship with Kerr.

The trial court properly determined that appellant's threats against Casey, made to Harvey months in advance of Kerr's death, were relevant and that the probative value of the evidence outweighed its prejudicial impact pursuant to Evidence Code section 352 and appellant was not prejudiced by the ruling in view of similar statements he made to other witnesses. (17RT 1856.)

3. Kerr's Alleged Reference To Herself As "Lisa Brooks"

The court sustained the prosecutor's relevance and hearsay objection, during the guilt phase cross-examination of Harvey, to counsel's question, "Do you have any knowledge of her referring to herself as Lisa Brooks, as opposed to Lisa Kerr?" Counsel did not make an offer of proof regarding the question. (17RT 1900-1901.)

Appellant now contends, "The fact that Ms. Kerr referred to herself as appellant's wife suggested she did not fear appellant and wanted to be with him," and the evidence "was being offered to show her state of mind and to rebut the prosecution evidence that Ms. Kerr feared appellant." (AOB 184.) Appellant's failure to make an offer of proof in the trial court forfeited this claim on appeal. (*People v. Morrison, supra*, 34 Cal.4th at pp. 711-712.)

In any event, any error was harmless as the parties stipulated that on January 8, 1999, appellant signed a rental agreement in the name of "Donald Brooks and Lisa Brooks" for an apartment located at 5923 Woodman Avenue (20RT 2304), and that Kerr had moved into that apartment (15RT 1627; 17RT 1945; 18RT 2050). Kari testified that appellant had a piece of paper with "Lisa Brooks" written on it. (20RT 2286-2287.) During the defense case in the guilt phase trial, Sheila Peet testified that Kerr did not appear to be afraid of appellant (21RT 2383), and that she seemed very happy with him and talked about him getting her both a place to live and an attorney (21RT 2383-2386). Lujano (21RT 2325-2328) and Wheeler (21RT 2343-2346, 2354-2355, 2357) also provided evidence in support of appellant's defense that Kerr did not fear him.

4. Appellant's Alleged Receipt Of Panties In The Mail

During the guilt phase testimony of defense witness Lujano, the defense sought to introduce evidence of tape recordings containing statements made by Kerr. (21RT 2321.) The prosecutor objected to the line of questioning as calling for hearsay. (21RT 2321.) At sidebar, defense counsel explained that Kerr's statements were "being offered to show that [appellant] was not stalking her, that she was not afraid of him" under the present state of mind exception to the rule against hearsay. (21RT 2321-2322.) As an offer of proof, counsel stated that Lujano "heard [Kerr] say on the tapes, 'I love you, honey,' 'thank you for everything,' 'thank you for the lawyer.'" (21RT 2322.) Counsel also proffered evidence that appellant had shown Lujano love letters written by Kerr and evidence Lujano saw appellant get a pair of underwear panties in the mail from Kerr. The proffered evidence, counsel argued, contradicted the contention and evidence, offered by the prosecution, that Kerr was afraid of appellant. (21RT 2322.)

The prosecutor objected to the evidence of the mailed panties on the grounds of lack of foundation and prejudicial impact pursuant to Evidence Code section 352. The court observed, "there's no way of knowing who mailed it, there's no way of authenticating the act, if you will. And as a result, I'm not sure that it could be accepted as reasonable proof of what her then state of mind was. So to that extent, I am going to exclude, or not permit, you to put on evidence of what he may have heard or seen was mailed to [appellant] in the mail, because there's just not a sufficient showing of authenticity or who the sender was to be certain." (21RT 2322-2323.)

Regarding evidence of Kerr's statements on the tape recordings, the court overruled the prosecutor's objection and allowed the defense to

introduce it to show Kerr's then state of mind. The court stated that it would inform the jury that the evidence would be limited to the issue of the stalking count and whether or not Kerr was afraid. (21RT 2323.)

With the court's permission, counsel made further argument regarding evidence of the mailed panties. Counsel believed that Lujano could testify "that he was standing there and a package came and the [appellant] opened the package and there were panties in it." Counsel continued to state, "that alone, there's an inference maybe that can be drawn that they came from her, without any other further evidence. But what about a statement -- then he testifies, [appellant] said these are from Lisa." (21RT 2323-2324.)

The court would not permit the introduction of appellant's statement, "these [panties] are from Lisa," during Lujano's testimony. The court reasoned that Lujano could not testify to appellant's statement because "we're not certain who sent it in the mail, it all becomes very speculative. It lacks sufficient foundation and authentication that is required for appropriate evidence in a courtroom." However, the court noted that "if [appellant] wants to get up there and testify, that's a different situation, and I'm not ruling on his authenticating it, like he saw it was a package, he recognized Ms. Kerr's writing on it, or anything like that. I'm not ruling on that. You may seek to reintroduce it if that should be the case." (21RT 2324.)

Appellant contends on appeal the trial court erred in concluding that there was insufficient foundation to admit the evidence because the undisputed fact that appellant had carried on a sexual relationship with Kerr, "combined with appellant's receipt of the panties in a package mailed to him, was sufficient to allow the jury to infer the panties came from Ms. Kerr." (AOB 184.) This claim lacks merit.

"When the relevance of proffered evidence depends on the existence of a preliminary fact, the proponent of the evidence has the burden of

producing evidence as to the existence of that preliminary fact. (Evid. Code§ 403, subd. (a)(1).) The proffered evidence is inadmissible unless the trial court finds sufficient evidence to sustain a finding of the existence of the preliminary fact. [Citations.]" (*People v. Bacon* (2010) 50 Cal.4th 1082, 1102.) "The decision whether the foundational evidence is sufficiently substantial is a matter within the court's discretion." (*People v. Lucas* (1995) 12 Cal.4th 415, 466.)

Here, the preliminary fact for which appellant had the burden of producing evidence was that Kerr was the source of the package containing panties. The defense produced no evidence adequately supporting an inference that Kerr was the source of the package. Rather, defense counsel only proffered that Lujano saw appellant get a pair of underwear panties in the mail from Kerr. (21RT 2322.) As the trial court observed, Lujano could not testify to appellant's statement, "these [panties] are from Lisa," because "we're not certain who sent it in the mail, it all becomes very speculative. It lacks sufficient foundation and authentication that is required for appropriate evidence in a courtroom." (21RT 2324.) The trial court therefore acted within its discretion in finding appellant's showing for this preliminary fact too weak to meet his burden under Evidence Code section 403. (*People v. Bacon, supra*, 50 Cal.4th at p. 1103.)

Even assuming the trial court erred in excluding evidence of the panties, it was harmless. Appellant's stated purpose in admitting the evidence was to establish that Kerr was not afraid of him. As discussed above, appellant introduced other evidence that Kerr did not fear him, including a tape-recorded message of Kerr stating, "All I can say about last night was yummy." (20RT 2286-2287.) Accordingly, any error in excluding evidence of the panties was not prejudicial.

5. Alleged Evidence That Casey Beat Kerr

During defense witness Sheila Peet's guilt phase direct examination, defense counsel pursued a line of questioning regarding Kerr's statements to Peet. (21RT 2380.)

At sidebar, counsel agreed with the court's assumption that the defense was attempting to introduce Kerr's hearsay statements "on the same basis as before, that it is a statement of her state of mind at the time, at least insofar as the question of whether or not the victim was afraid of [appellant]." Counsel represented that Peet would be the final witness presenting evidence of Kerr's state of mind. (21RT 2380.)

The prosecutor objected to the proposed evidence, which he understood were Kerr's alleged statements to Mr. and Mrs. Peet that Casey "was trying to kill her, her husband was very violent and would try to beat her, that is why Lisa left her husband." (21RT 2380-2381.) Counsel acknowledged that he wanted to elicit that testimony. (21RT 2381.)

The court sustained the prosecutor's objection as follows:

> Counsel, it's one thing for you to put on evidence of statements made by Lisa Kerr that bear on whether or not she's in fear of [appellant] . . . in the context of the stalking count, and I've allowed those statements under a state of mind exception that, as I have said before, has perhaps been elongated or enlarged significantly. But I've allowed it, and I will consistently stay with that ruling through the conclusion of this case. I think to do otherwise would be unfair.
>
> However, now, if I understand what you're saying, is that you want to put on evidence of what Lisa Kerr said to this witness about her husband, Casey Kerr, and why she felt that she wanted to leave him and the like.
>
> That does not go to the issue of fear of the defendant, the stalking count. It's just -- it's dirty-up-the-victim time, it's, you know, let's put in anything we can on a hearsay basis about what Lisa Kerr said about her husband. I'm not going to allow that.

(21RT 2381-2382.)

As an offer of proof, counsel argued that the proposed evidence "would explain the fact that rather than being afraid of [appellant], Lisa had motivation to be with him." (21RT 2382.) The court responded, "Then find another way to present the evidence, because I'm not going to allow that -- [¶] . . . [¶] on the hearsay exception basis." (21RT 2382.)

Counsel stated he understood the court's ruling and that he would withdraw the question and instead ask Peet whether Kerr "ever appear[ed] to be afraid of [appellant]." (21RT 2382.) The court also granted counsel's unopposed request to introduce evidence that appellant retained an attorney to help Kerr in her divorce in order, which tended to disprove that Kerr was afraid of appellant. (21RT 2383.)

Appellant now contends, for the first time on appeal, that the trial court's conclusion that the evidence was being offered to "dirty up the victim" was erroneous because the evidence would have portrayed Casey, not Kerr, in a negative light, and that the evidence should have been admitted pursuant to Evidence Code section 356. (AOB 185-188.) This claim is forfeited because appellant did not make this proffer in the trial court. (*People v. Morrison, supra*, 34 Cal.4th at pp. 711-712.)

In any event, the trial court reasonably concluded the proposed evidence "[did] not go to the issue of fear of [appellant]," but merely "dirt[ied]-up the victim." (21RT 2381-2382.) In other words, there was no inherent logical connection between Kerr's alleged fear of her husband and Kerr's desire to be with appellant. (See *People v. Rundle, supra*, 43 Cal.4th at p. 131 ["there is no inherent logical connection between being a victim of incest and later engaging in incest with one's own children"].) Finally, as previously discussed, appellant was not prejudiced by the court's ruling because he was able to put before the jury other evidence that Kerr did not fear him.

6. Kerr's Alleged Prior Conviction

At the conclusion of the defense guilt phase case, and outside the presence of the jury, defense counsel proposed to admit Kerr's felony conviction of welfare fraud in 1998 because the court had put Kerr's credibility in issue by admitting her statements to Harvey as proof of the fear element for the stalking count. (21RT 2386-2387.) Counsel argued that if Kerr was alive and had testified she was afraid of appellant, counsel could have impeached her with a recent welfare fraud conviction. (21RT 2388.)

The prosecutor objected to admitting the prior conviction because it was yet another defense attempt to "trash this victim up." The prosecutor also argued that there was no legal basis for introducing felony conviction impeachment of a decedent, and even if there was, the prejudicial effect of the evidence outweighed any probative value pursuant to Evidence Code section 352. (21RT 2388-2389.)

The court noted that Kerr's statements were admitted at trial for limited purposes. The court excluded the prior conviction evidence, stating "this case should not turn on, you know, what the victim did before she died, in the form of whether or not she committed welfare fraud. In other words, . . . it's not relevant to this case. It's just prejudicial information thrown out there that sort of is offered to stick on the ceiling and maybe influence in some way the jury's consideration of the evidence, and I don't find it has any relevance, because I have appropriately limited the purpose for which the hearsay statements could be used." The court concluded, "As a result, I'm sustaining the objection. I'm also finding on a[n] [Evidence Code section] 352 analysis that its prejudicial impact outweighs its probative value. In fact, I don't find any probative value to this as far as this case is concerned, where she's never testified and she's the dead victim." (21RT 2389-2390.)

Appellant now argues that since the prosecutor put Kerr's credibility at issue by offering her out of court statements to prove she feared appellant, appellant was entitled to attack her credibility. (AOB 188-189.)

Evidence Code section 1202 provides, in relevant part: "Any other evidence offered to attack or support the credibility of the declarant is admissible if it would have been admissible had the declarant been a witness at the hearing." A prior felony conviction can be used to attack the credibility of the declarant who is not available for trial. (See *People v. Jacobs* (2000) 78 Cal.App.4th 1444, 1449-1453; *People v. Stevenson* (1978) 79 Cal.App.3d 976, 989-990.)

Article I, section 28, subdivisions (d) and (f) of the California Constitution (known as Proposition 8 or the Victims' Bill of Rights) provides that relevant evidence shall not excluded from criminal proceedings, and "[a]ny prior felony conviction of any person in any criminal proceeding . . . shall subsequently be used without limitation for purposes of impeachment . . . in any criminal proceeding." (Cal. Const., art. I, § 28, subd. (f); see also Evid. Code§ 788.) Despite its breadth, Proposition 8 did not affect the broad discretion of trial courts to determine whether to exclude evidence pursuant to Evidence Code section 352. (*People v. Castro* (1985) 38 Cal.3d 301, 312-313, 317; *People v. Collins* (1986) 42 Cal.3d 378, 389; Cal. Const., art. I, § 28, subd. (d).)

Here, the trial court did not abuse its discretion in excluding evidence of Kerr's prior conviction for welfare fraud. "'The court is not required to admit evidence that merely makes the victim of a crime look bad.' (*People v. Kelly* (1992) 1 Cal.4th 495, 523.) Thus, the trial court did not abuse its broad discretion in concluding that the evidence lacked probative value." (*People v. Stitely* (2005) 35 Cal.4th 514, 548; *People v. Loker* (2008) 44 Cal.4th 691, 736 [accord].)

In any case, appellant was not prejudiced by any error in excluding evidence of Kerr's prior conviction. There was testimony by Sheila Peet, Lujano, Wheeler that more directly impeached Kerr's statements that she feared appellant. This evidence included testimony that in 1998, Kerr did not appear to be afraid of appellant, she seemed very happy with him, and she had talked about appellant getting her both a place to live and an attorney (21RT 2383-2384); tape recordings purportedly of Kerr telling appellant, "I love you, I miss you," "Thank you for helping me with my lawyer (21RT 2325-2327), and Kerr's phone calls to the bar looking for appellant (21RT 2343-2346, 2357). Moreover, there was overwhelming evidence, including appellant's own statements, that appellant murdered Kerr because she did not want to continue a romantic relationship with him and/or he was angry that she had made disparaging remarks about him and his father. Accordingly the challenged ruling could not have affected the verdict. (*People v. Stitely, supra*, 35 Cal.4th at p. 550.)

X. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY TO VIEW APPELLANT'S ADMISSIONS WITH CAUTION

Appellant contends the judgment of guilt must be reversed because the trial court refused the defense request to omit the "viewed with caution" language from CALJIC No. 2.71 in violation of his right federal and state constitutional rights. (AOB 193-200.) Respondent disagrees.

A. Relevant Facts

At the time of appellant's trial, CALJIC No. 2.71 (Admission defined) provided:

> An admission is a statement made by the defendant which does not by itself acknowledge his guilt of the crimes for which the defendant is on trial, but which statement tends to prove his guilt when considered with the rest of the evidence.

> You are the exclusive judges as to whether the defendant made an admission, and if so, whether that statement is true in whole or in part.
>
> Evidence of an oral admission of the defendant not made in court should be viewed with caution.

(16CT 3830; 23RT 2514-2515.)

During the conference on guilt phase jury instructions, defense counsel objected the last bracketed language in the standard instruction, which counsel noted "is specifically there to help the defendant," but declared the defense "would waive any right we have to it." (22RT 2442.) The prosecutor argued that the challenged language was extremely applicable to the case. (22RT 2442.)

The trial court clarified: "The language at issue is in CALJIC [No.] 2.71 that concerns admissions, and it defines them, and the last language, which is in brackets, indicating it's optional, is 'evidence of an oral admission of the defendant not made in court should be viewed with caution.'" (22RT 2443.)

Counsel made the argument in support of deleting the sentence, "Evidence of an oral admission of the defendant not made in court should be viewed with caution" as follows:

> Well, here's our position. The district attorney offered into evidence statements made by [appellant], or allegedly made by [appellant], such as "I heard the conversation above the floor," that help [appellant], because, obviously, our tactic here is to have the jury convict [appellant] of voluntary manslaughter.
>
> Now, that is really a nonadmission where the objection by the prosecution was waived. In other words, if during the course of the trial the prosecution -- the prosecution might have argued that's not an admission and, therefore, it shouldn't be admitted. Well, that's been waived, and it was admitted for the truth of the matter asserted.
>
> I don't really -- I'm not criticizing [the prosecutor], really, because what he was presented with in presenting this case was

> two statements by [appellant] that make a fairly good case of voluntary manslaughter. There really wasn't a lot of choice on the part of the prosecution, because without those statements to Heiserman and Jayne, there arguably would have been an argument there isn't proof beyond a reasonable doubt that [appellant] killed Lisa Kerr.
>
> So now we're in the position where the -- where we have evidence before the jury, where it's in, and any objection has been waived by the prosecution, and the prosecution now is saying view it with caution.
>
> Well, I disagree. I don't think it's applicable. I think that's a good reason why it's bracketed, and we would object to it.

(22RT 2443-2444.)

The prosecutor argued that appellant's statements were relevant for the reasons that counsel mentioned and for the purpose of showing presence at the scene and premeditation. The challenged language in CALJIC No. 2.71, the prosecutor argued, was appropriate and did not contemplate the introduction of statements for a particular purpose. (22RT 2444.)

The trial court overruled the defense objection to the bracketed language. (22RT 2444.) At the conclusion of the guilt phase, the trial court instructed the jury with CALJIC No. 2.71, which included the objected-to-language that "[e]vidence of an oral admission of the defendant not made in court should be viewed with caution." (23RT 2514-2515.)

B. The Trial Court Properly Instructed The Jury To View Appellant's Admissions With Caution

Although acknowledging that "[t]his Court has approved of the "view with caution" language in CALJIC No. 2.71 in a number of opinions," appellant argues that "the facts of this case are distinguishable from the cases approving that language in the instruction over defense objection." (AOB 195.) Specifically, he asserts that "[his] case presents the unusual

situation in which an admission - a statement which tended to show his guilt - was also exculpatory because it showed appellant's guilt of manslaughter rather than murder." (AOB 196.)

It is well settled that the trial court has a sua sponte duty to instruct the jury that it should view with caution evidence of an admission - an inculpatory statement - made by the defendant. (*People v. Beagle* (1972) 6 Cal.3d 441, 455.) The purpose of this cautionary instruction "is to assist the jury in determining if the statement was in fact made." (*Id.* at p. 456.) Thus, it has also been long established that the cautionary instruction, "should not be given if the oral admission was tape-recorded and the tape recording was played for the jury." (*People v. Slaughter* (2002) 27 Cal.4th 1187, 1200; *People v. Mayfield, supra*, 14 Cal.4th at p. 776.) Nor should it be given if the only statements in evidence are exculpatory, rather than inculpatory. (*People v. Slaughter, supra*, 27 Cal.4th at pp. 1199-1200.)

The version of CALJIC No. 2.71 given in this case made this distinction clear because it instructed jurors to view appellant's admissions with caution, and it defined an admission as a statement "which tends to prove guilt when considered with the rest of the evidence. . . ." (23RT 2514; see *People v. Slaughter, supra*, 27 Cal.4th at pp. 1199-1200.) Thus, this Court in *Slaughter* concluded it was harmless error to instruct the jury in terms of CALJIC No. 2.71 where there was evidence that the defendant made both inculpatory and exculpatory statements. "'Juries understand that this instruction by its terms applies only to statements tending to prove guilt, not to exculpatory ones. To the extent a statement is exculpatory it is not an admission to be viewed with caution. [Citation.]' [Citation.]" (*People v. Slaughter, supra*, 27 Cal.4th at p. 1200.)

In *People v. Williams* (2008) 43 Cal.4th 584, the defendant made "'both inculpatory admissions, exculpatory statements, and admissions of culpability that mitigated the extent of [defendant's] involvement in the

crime.'" This Court rejected the defendant's attempt to distinguish the holding in *Slaughter* on the basis that "his own statements comprised a mosaic of inculpatory, exculpatory, and explanatory material." (*Id.* at p. 640.) This Court observed, "Neither our reasoning nor our conclusion in the Slaughter decision turned on the proportion of the defendant's statements that was exculpatory. . . ." (*Id.* at p. 640.) Thus, this Court concluded, "we are confident the jury would have understood the instruction did not apply to the exculpatory aspects of defendant's statements. . . ." (*Id.* at p. 640.)

Here, as in *Williams*, appellant "advances no persuasive reason for this [C]ourt to reach a different result in the present case, nor does his reference to his right to due process of law or a fair trial aid his position." (*People v. Williams, supra*, 43 Cal.4th at p. 641.) Moreover, the instruction was not prejudicial because appellant's admissions, including his admission that he killed Kerr, were both inculpatory and exculpatory to the extent they might have supported his guilt of the lesser included offense of heat of passion manslaughter. In such a case, the challenged language at issue here would be more helpful than harmful if the entire testimony was viewed with caution. (*People v. Frye* (1998) 18 Cal.4th 894, 959, overruled on other grounds by *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; *People v. Howard* (2010) 51 Cal.4th 15, 36.)

Accordingly, this Court should reject appellant's attempt to distinguish his case from this Court's prior holding in *Slaughter* and *Williams*.

XI. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY WITH CALJIC NO. 8.75

Appellant contends the judgment of guilt must be reversed because the trial court erroneously instructed the jury with CALJIC No. 8.75 over

defense objection and in violation of his state and federal constitutional rights. (AOB 201-210.) Respondent disagrees.

A. Relevant Facts

During the conference on the guilt phase jury instructions, defense counsel objected to CALJIC No. 8.75 on the grounds that it was unnecessary, "very long and confusing," and covered by the other instructions. Counsel asserted that the jurors would know, from the other instructions, "that they can find him guilty of murder in the first degree or they can find him guilty of murder in the second degree or they can find him not guilty of murder and guilty of voluntary manslaughter." However, counsel argued that "to line up second degree murder and voluntary manslaughter as both lessers is -- I think will confuse the jury. I don't want them to view second degree murder as a lesser the same as they view voluntary manslaughter." (23RT 2495-2496.)

The prosecutor noted that the use note to CALJIC No. 8.75 indicated that the trial court had a sua sponte duty to give the instruction. (23RT 2496.) The court concurred with the prosecution. (23RT 2496.) As given, CALJIC No. 8.75 read:

> If you are not satisfied beyond a reasonable doubt that the defendant is guilty of the crime of first degree murder as charged in Count 1 and you unanimously so find, you may convict him of any lesser crime provided you are satisfied beyond a reasonable doubt that he is guilty of the lesser crime.
>
> You have been provided with guilty and not guilty verdict forms as to Count 1 for the crime of murder in the first degree and lesser crimes thereto. Murder in the second degree is a lesser crime to that of murder in the first degree. Voluntary manslaughter is lesser to that of murder in the second degree.
>
> Thus, you are to determine whether the defendant is guilty or not guilty of murder in the first degree or of any lesser crime thereto. In doing so, you have discretion to choose the order in which you evaluate each crime and consider the evidence pertaining to it. You may find it to be productive to consider

and reach tentative conclusions on all charged and lesser crimes before reaching any final verdicts.

Before you return any final or formal verdicts, you must be guided by the following:

1. If you unanimously find a defendant guilty of first degree murder, as to Count 1, your foreperson should sign and date the corresponding guilty verdict form. All other verdict forms as to Count 1 should be left unsigned.

2. If you are unable to reach a unanimous verdict as to the charge in Count 1 of first degree murder, do not sign any verdict forms as to that Count, and report your disagreement to the court.

3. The court cannot accept a verdict of guilty of second degree murder unless the jury also unanimously finds and returns a signed verdict form of not guilty as to murder of the first degree in the same Count.

4. If you find a defendant not guilty of murder in the first degree as to Count 1 but cannot reach a unanimous agreement as to murder of the second degree, your foreperson should sign and date the not guilty of murder in the first degree form, and should report your disagreement to the court. Do not sign any other verdict forms.

5. If you unanimously find a defendant not guilty of first degree murder, but guilty of second degree murder, your foreperson should sign and date the corresponding verdict forms. Do not sign any other verdict forms as to that Count.

6. The court cannot accept a verdict of guilty of voluntary manslaughter unless the jury also unanimously finds and returns a signed not guilty verdict form as to both murder of the first degree and murder of the second degree.

7. If you unanimously find a defendant not guilty of murder in the first degree, and not guilty of, murder in the second degree, but are unable to unanimously agree as to the crime of voluntary manslaughter, your foreperson should sign and date the not guilty verdict form for first and second degree murder, and you should report your disagreement to the court.

(16RT 3856-3857; 23RT 2528-2531.)

B. The Trial Court Properly Gave The "Acquittal First" Instruction Of CALJIC No. 8.75

"Under the acquittal-first rule, a trial court may direct the order in which jury verdicts are returned by requiring an express acquittal on the charged crime before a verdict may be returned on a lesser included offense. (*People v. Fields* (1996) 13 Cal.4th 289, 303-304.) Although the jurors must record their findings on the verdict forms in this order, CALJIC No. 8.75 informs the jurors: "[Y]ou have discretion to choose the order in which you evaluate each crime and consider the evidence pertaining to it" and advises that it "may . . . be productive to consider and reach tentative conclusions *on all charged and lesser crimes* before reaching any final verdicts." . . . These advisements are designed to prevent the jury from applying a strict acquittal-first rule, under which the jury would have to acquit of the greater offense before even considering lesser included offenses. (See *People v. Kurtzman* (1988) 46 Cal.3d 322, 329-331.) Here, CALJIC No. 8.75, as given, included these advisements." (*People v. Bacon, supra,* 50 Cal.4th at p. 1110 [original italics].)

Since *Fields*, this Court has "repeatedly rejected arguments similar to those raised by [appellant] that the 'acquittal first' rule 'precludes full jury consideration of lesser included offenses' and encourages 'false unanimity' and 'coerced verdicts.'" (*People v. Whisenhunt* (2008) 44 Cal.4th 174, 222-223, citing *People v. Nakahara* (2003) 30 Cal.4th 705, 715, and *People v. Riel* (2000) 22 Cal.4th 1153, 1200-1201; see also *People v. Jurado* (2006) 38 Cal.4th 72, 125.)

Accordingly, this Court should decline appellant's invitation to reconsider these decisions since he has not provided any persuasive reason to do so. (*People v. Nakahara, supra,* 30 Cal.4th at p. 715.)

XII. THE TRIAL COURT PROPERLY ADMITTED CRIME SCENE AND AUTOPSY PHOTOGRAPHS OF THE VICTIM

Appellant contends the trial court admitted inflammatory photographs (People's Exhibits 5 and 27) of the victim over defense objection in violation of his state and federal constitutional rights to due process, rights against cruel and unusual punishment, and in contravention to Evidence Code section 352. (AOB 211-215.) Respondent disagrees.

A. Relevant Facts

During the guilt phase testimony of fire engineer Tim Traurig, the prosecution marked for identification a photo board of six photos of the victim's body as People's Exhibit 5A-5F. (14RT 1492.) Traurig testified that some of the photos in People's Exhibit 5 were consistent with his observation of Kerr's body in her car after the fire was extinguished. (14RT 1493.) Detective Gligorijevic testified that People's Exhibit 5C depicted Kerr's back, the unburned side of her face, and her hair after her body was removed from the car. (15RT 1616-1617.) Arson investigator Camello testified that People's Exhibit 5E depicted a close-up view of Kerr's face as well as a small portion of her neck and shoulder and People's Exhibit 5B depicted Kerr's purse, which was located directly under her head or neck on the floorboard of the car. (14RT 1559.)

Deputy medical examiner Raffi Djabourian testified that People's Exhibit 5C depicted the thermal injuries, or extensive charring of the body, that Kerr sustained, and also showed the area of her hair and face that were not burned. (18RT 1974-1975.) Dr. Djabourian opined that Kerr's position during the fire may have protected part of her hair and face from burning. The absence of accelerant on that part of the body may also have accounted for the lack of burning in that area. (18RT 1975.)

At sidebar during Dr. Djabourian's testimony, defense counsel objected to "the offered evidence, pictures A and B, which are being shown to the court" pursuant to Evidence Code section 352 "because they're gory," i.e. "[t]hey show the windpipe and other internal organs and soot." (18RT 1981.) Counsel also objected "to all the other pictures that have been shown under 352 -- or the continuing showing of those pictures, as too gory for the jury." (18RT 1981.)

The prosecutor argued that the photographs were relevant to the issues in the case, namely whether the victim was alive at the time she was burned, appellant's intent, specifically regarding the torture allegation, whether water from the fire department hoses could have forced soot to enter Kerr's mouth. (18RT 1981-1982.)

The court overruled the defense objection. (18RT 1982.) The court then ensured that Kerr's family members in the courtroom were prepared to view the photographs. (18RT 1982.)

Thereafter, in the presence of the jury, the prosecution marked for identification as People's Exhibit 27 two autopsy photographs. (18RT 1985-1986.) Dr. Djabourian testified that People's Exhibit 27A depicted the "upside down" of the larynx, including the upper neck organ, trachea, and bronchi, and specifically depicted soot, shown as black discoloration, in the trachea. (18RT 1986.) People's Exhibit 27B depicted a "low-power" view of the trachea with soot, shown as black discoloration, the bones of the larynx, and soot in the larynx and trachea. (18RT 1986-1987.) Dr. Djabourian opined that the distribution of soot signified that Kerr was alive at least at the beginning of the fire. (18RT 1987.)

B. The Constitutional Claims Have Been Forfeited

Appellant contends that the trial court erred under state law and acted unconstitutionally by admitting the photographs, People's Exhibits 5 and

27. "He did not invoke constitutional guaranties at trial and has forfeited his constitutional claims (*People v. Partida* [(2005)] 37 Cal.4th 428, 435) on appeal, except for his due process claim (*id.* at pp. 433-439)." (*People v. Thornton, supra*, 41 Cal.4th at p. 444.)

C. The Trial Court Did Not Abuse Its Discretion In Admitting The Photographs

A trial court's decision to admit victim photographs is a discretionary matter that will not be disturbed on appeal unless the prejudicial effect of the photographs clearly outweighs their probative value. (*People v. Rogers* (2009) 46 Cal.4th 1136, 1164.)

The probative value of the photographs here clearly outweighed any prejudicial effect because they "illustrated the testimony of various prosecution witnesses who encountered the victim and viewed the crime scene." (*People v. Heard* (2003) 31 Cal.4th 946, 973 [citations omitted].) Moreover, "the photographs were relevant because they established the means by which [appellant] accomplished the fatal assault." (*Id.* at 974 [citations omitted].) The photographs were probative to the issues of whether Kerr was alive at the time she was burned, and thus, appellant's intent, specifically regarding the torture allegation, and disputed the defense suggestion that water from the fire department hoses could have forced soot to enter Kerr's mouth, and were thus relevant to the ultimate determination of guilt. (*People v. Rogers, supra*, 46 Cal.4th at p. 1165.)

"'[T]he jury was entitled to see the physical details of the crime scene and the injuries [appellant] inflicted on his victim[ ].'" (*People v. Heard, supra*, 31 Cal.4th at p. 975.) "Although it is true that the prosecution could have relied upon other evidence to establish the matter at issue, 'it is immaterial for purposes of determining the relevance of evidence that other evidence may establish the same point.'" (*Id.* at p. 975 [citations omitted]; see also *People v. D'Arcy* (2010) 48 Cal.4th 257, 299 ["[W]e have often

rejected the argument that photographs of a murder victim should be excluded as cumulative to other evidence in the case"]; *People v. Rogers*, *supra*, 46 Cal.4th at p. 1165 ["although the photographs largely served to corroborate testimonial evidence, that circumstance alone did not compel their rejection"].) Thus, the trial court did not abuse its discretion in admitting the challenged photographs. Moreover, the trial court instructed the jury not to be influenced by sentiment, conjecture, sympathy, passion, or prejudice. (16CT 3804-3805; 23RT 2502.)

Accordingly, the admission of People's Exhibits 5 and 27 was not an abuse of discretion and did not violate appellant's constitutional rights.

In any event, any error in admitting the photographs was harmless. The photographs are not unduly gruesome or horrific considering appellant admitted setting Kerr on fire and the jury was familiar with the facts surrounding victim's death through other testimony. (See *People v. Medina* (1995) 11 Cal.4th 694, 775, citing *People v. Hardy* (1992) 2 Cal.4th 86, 199.) Thus, it is not reasonably probable there would have been any different result at the guilt phase, and there was no due process violation.[22]

XIII. SUBSTANTIAL EVIDENCE SUPPORTS THE KIDNAPPING SPECIAL CIRCUMSTANCE

In *People v. Green* (1980) 27 Cal.3d 1, 61-62,[23] this Court "held that the felony-murder special circumstance is 'inapplicable to cases in which the defendant intended to commit murder and only incidentally committed

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[22] Furthermore, any error was harmless as to the penalty phase because even if photographs should have been excluded at guilt phase, they could have been admitted at penalty phase. (See *People v. Medina, supra*, 11 Cal.4th at p. 775 [photos relevant to penalty since they graphically demonstrated circumstances of the crime].)

[23] *Green* was overruled on other points by *People v. Hall* (1986) 41 Cal.3d 826, 834, fn.3, and *People v. Martinez, supra*, 20 Cal.4th at p. 241.

one of the specified felonies while doing so.'" (*People v. Raley* (1992) 2 Cal.4th 870, 902.)

Appellant contends the kidnapping of Kerr was incidental to her murder and had no felonious purpose independent of his intent to kill, so that the kidnapping-murder special circumstance must be reversed under *People v. Green, supra*, 27 Cal.3d 1. (AOB 216-225.) Respondent disagrees.

"[W]here an accused's primary goal was not to kidnap but to kill, and where a kidnapping was merely incidental to a murder but not committed to advance an independent felonious purpose, a kidnapping-felony-murder special circumstance finding cannot be sustained." (*People v. Riel, supra*, 22 Cal.4th at p. 1201, quoting *People v. Weidert* (1985) 39 Cal.3d 836, 842.) This Court "must examine the evidence in the light most favorable to the prosecution and decide whether a rational trier of fact could find beyond a reasonable doubt that defendant had a purpose for the kidnapping apart from murder." (*People v. Riel, supra*, 22 Cal.4th at p. 1201, quoting *People v. Raley, supra*, 2 Cal.4th at p. 902.)

In *People v. Riel*, the defendants forced the victim, a truck stop worker, into the back seat of their car and began to drive. While driving, one of the defendants demanded the victim's wallet, and after finding only $13, said, "Thirteen bucks. I'm going to kill you now." (*People v. Riel, supra*, 22 Cal.4th at pp. 1173, 1201.) This Court held the evidence demonstrated the victim was robbed after his asportation, and that it warranted a finding that the defendant did not always intend to kill the victim, but that he "decided to kill only after the kidnapping, perhaps due to the small amount of money in [the victim's] wallet. Defendant 'may have been undecided as to [the victim's] fate' when the kidnapping began. [Citation.]" (*Id.* at p. 1201, quoting *People v. Raley, supra*, 2 Cal.4th at p. 903.)

Similarly here, the jury could have reasonably found that appellant, knowing Kerr was alive after he strangled her into incapacitation at her apartment, loaded Kerr in her car without making a final decision as to Kerr's fate at the time of the asportation. (*People v. Riel, supra*, 22 Cal.4th at p. 1201; *People v. Barnett, supra*, 17 Cal.4th at p. 1158; *People v. Raley, supra*, 2 Cal.4th at p. 903.) The jury could infer appellant's knowledge from his statement to Heiserman, shortly after Kerr's burned body and car were discovered, "Is she okay?" (18RT 2096.) The presence of soot in Kerr's airway conclusively showed that Kerr was alive at least at the beginning of the fire. (18RT 1987, 1992.) Moreover, the gap between the last time Kerr was seen at 1:15 a.m. (17RT 1858) and the car fire report at 4:11 a.m. (14RT 1482, 1484) supported the inference that appellant had been driving with Kerr in the backseat of the car and contemplating her fate. From this evidence, "[t]he jury could reasonably infer 'that [appellant] formed the intent to kill after the asportation,' making the kidnapping not merely incidental to the murder. [Citation.]" (*People v. Riel, supra*, 22 Cal.4th at p. 1202.)

The jury was not bound to find that appellant's sole intent from the beginning of the incident was to kill Kerr, or that appellant believed Kerr was already dead. Moreover, even a concurrent intent to kill and to commit an independent felony will support a felony-murder special circumstance. (*People v. Raley, supra*, 2 Cal.4th at p. 903.)

Accordingly, substantial evidence supports the jury's verdict on the kidnapping-murder special circumstance.

XIV. THE CHALLENGE TO THE ADMISSION OF A PHOTOGRAPH OF KERR WHILE ALIVE IS FORFEITED; IN ANY EVENT, IT WAS NOT PREJUDICIAL

Appellant contends the trial court erred by admitting, over defense objection, a photograph of Kerr (People's Exhibit 13) while she was still alive in violation of his state and federal constitutional rights, thus warranting reversal of the judgment of guilt. (AOB 226-232.) Respondent disagrees.

A. This Claim Is Forfeited

Appellant asserts that defense counsel objected to People's Exhibit 13 during the guilt phase redirect examination of Detective Gligorijevic. (AOB 226-228.) The record does not support appellant's assertion.

At a sidebar before the guilt phase opening statements, the prosecutor informed the trial court that he would be using boards containing photographs during his opening statement, he and counsel had discussed them, and counsel had seen the photographs. Counsel stated, "There won't be an objection." (14RT 1444-1445.)

During a break of counsel's guilt phase opening statement, and outside the presence of the jury, the courtroom bailiff informed the trial court of a juror's request to see the photograph of the victim displayed during the prosecution's opening statement because the juror was unable to see it "at the time it was put up." (14RT 1472.) The court asked counsel, "Have you any objection to that picture being published to the jury?" Counsel replied, "The only thing is I don't like it there -- no, I have no objection to him seeing it." (14RT 1472.)

Subsequently, in the presence of the jury, the trial court stated, "Now, at the lunch break one of the jurors had indicated that he had not had an opportunity to see clearly the picture of the victim, Ms. Kerr. So at this

time I'm going to allow [the prosecutor] to publish the picture, which means that each of you may look at it and then pass it around." The prosecutor indicated that he handed the photograph to juror number one. After a pause in the proceedings, the court stated, "The record will reflect that all jurors have now had an opportunity to see and examine the picture of the victim, Ms. Kerr. That document, of course, has not yet been marked as an exhibit. It was only referred to during opening statement." (14RT 1476.)

During the guilt phase redirect examination of Detective Gligorijevic, the prosecutor marked the photograph of Kerr as People's Exhibit 13. (15RT 1635-1636.) The following colloquy occurred:

By [the prosecutor]:

Q Ma'am, I show you what's been marked as People' s 13. Do you recognize this?

A Yes.

Q What is that, ma'am?

A This is a picture of Lisa Kerr.

Q Did you obtain this photograph during the course of your investigation?

A Yes.

Q From where?

A A girlfriend of hers, I believe --

[Defense counsel]: Objection, your honor, relevancy and hearsay. Hearsay.

The Court: Overruled on hearsay grounds. Overruled on relevancy grounds as well.

By [the prosecutor]:

Q Where did you obtain it, ma'am?

[Defense counsel]: Also, one other ground. Lack of personal knowledge.

[The Prosecutor]: Of where she obtained it?

The Court: Ma'am, did you personally obtain this picture?

The Witness: Yes.

The Court: Overruled.

By [the prosecutor]:

Q Where did you obtain it, ma'am?

A I believe it's Cheryl Zornes, a girlfriend of Lisa's.

[Defense counsel]: Move to strike the answer as conjecture.

The Court: Well, ma'am, detective, can you tell me where was it that you obtained this picture?

The Witness: This picture was given to my partner from Cheryl Zornes, and he gave it to me and I put it in the murder book.

[Defense counsel]: Lack of personal knowledge is the basis for the objection.

The Court: Well, are we expecting Detective Gonzales to testify in the course --

[The prosecutor]: We'll have him here.

The Court: I'm sustaining the objection because it appears that it was collected by her partner, not by Detective Gligorijevic.

(15RT 1636-1637.)[24]

As the proceedings at the beginning of the guilt phase and the above colloquy demonstrate, counsel never objected to the admission of People's Exhibit 13, the photograph of Kerr when she was alive. Counsel had no objection to the prosecution's use of the photograph during opening statement, and did not object to publishing it to the jury. (1444-1445, 1472, 1476.) Counsel only objected to the question of where Detective Gligorijevic had obtained the photograph, and not to the photograph itself. (15RT 1636-1637.) Moreover, counsel did not object to the photograph on the state and federal constitutional grounds that appellant now asserts on appeal.

Accordingly, the complete failure to object to People's Exhibit 13 forfeits the instant claim on appeal. (*People v. Cowan* (2010) 50 Cal.4th 401, 476-477.) Even assuming this claim has not been forfeited for appellate purposes, it lacks merit.

B. The Admission Of People's Exhibit 13 Was Not Prejudicial

The standards related to admitting photographs of murder victims while alive is well-established:

> Courts should be cautious in the guilt phase about admitting photographs of murder victims while alive, given the risk that the photograph will merely generate sympathy for the victims. (*People v. Osband* (1996) 13 Cal.4th 622, 677.) But the possibility that a photograph will generate sympathy does not compel its exclusion if it is otherwise relevant. (*People v. DeSantis* (1992) 2 Cal.4th 1198, 1230.) The decision to admit

[24] Zornes later testified, without objection, that she had given People's Exhibit 13 to Detective Gonzalez and that the exhibit depicted Kerr. (17RT 1952.) The prosecutor moved to admit the prosecution's marked exhibits into evidence at the conclusion of the guilt phase case. Counsel submitted on any objections made during the trial. The court received all the exhibits into evidence. (21RT 2317-2318.)

> victim photographs falls within the trial court's discretion, and an appellate court will not disturb its ruling unless the prejudicial effect of the photographs clearly outweigh their probative value. (*People v. Navarette* (2003) 30 Cal.4th 458, 495.)

(*People v. Harris* (2005) 37 Cal.4th 310, 331-332.)

Here, the photograph of Kerr while she was alive (People's Exhibit 13) was not unduly prejudicial. The photograph was relevant because witnesses identified Kerr based upon that photograph. (*People v. Martinez* (2003) 31 Cal.4th 673, 692.) Zornes (17RT 1952), Hyer (18RT 2007), Kari (20RT 2279), and Harvey (15RT 1689-1690) all identified Kerr based on People's Exhibit 13. Moreover, nothing in the record suggests that the photograph was "particularly calculated to elicit sympathy. . . . [It] was . . . simply a picture of the victim alive." (*People v. Smithey* (1999) 20 Cal.4th 936, quoting *People v. Thompson* (1988) 45 Cal.3d 86, 115, and citing *People v. Hovey* (1988) 44 Cal.3d 543, 571 ["ordinary head and shoulders portrait" of the victim before her death was not likely to have a prejudicial impact].) Appellant does not suggest otherwise. (See AOB 227-228.) Indeed, defense counsel did not object to publishing the photograph to the jury during opening statement. (14RT 1444-1445, 1472, 1476.) Accordingly, the admission of a photograph of Kerr while she was alive was not prejudicial.

Even assuming error, it was harmless under any standard. There was overwhelming evidence that appellant murdered Kerr. Thus, the admission of the photograph had no effect on the guilt verdicts. (*People v. Cowan*, *supra*, 50 Cal.4th at p. 477 [finding any error in admitting photograph of victim while alive harmless].)

XV. APPELLANT RECEIVED A FAIR TRIAL; TO THE EXTENT ANY ERROR OCCURRED, THE EFFECT WAS HARMLESS

Appellant contends the judgment of guilt should be reversed because the cumulative effect of the trial court's erroneous rulings during the guilt phase deprived him of a fair trial in violation of his state and federal right to due process and his right to a jury determination of the facts. (AOB 233-237.) Respondent disagrees.

A defendant is entitled only to a fair trial, not a perfect one, even where he has been exposed to substantial penalties. (See *People v. Marshall* (1990) 50 Cal.3d 907, 945; see also *United States v. Hasting* (1983) 461 U.S. 499, 508-509 [103 S.Ct. 1974, 76 L.Ed.2d 96].) When a defendant invokes the cumulative error doctrine, the litmus test is whether the defendant received due process and a fair trial. (*People v. Kronmeyer* (1987) 189 Cal.App.3d 314, 349.) Therefore, any claim based on cumulative errors must be assessed "to see if it is reasonably probable the jury would have reached a result more favorable to defendant in their absence." (*Ibid.*; see *People v. Carrera* (1989) 49 Cal.3d 291, 332 [accord]; *People v. Williams* (2009) 170 Cal.App.4th 587, 646 [accord].)

For the reasons articulated in Arguments I through XIV, *ante*, respondent submits that either no errors occurred or that any alleged error either considered individually or together was harmless. (See *People v. Rogers* (2006) 39 Cal.4th 826, 911; *People v. Cunningham* (2001) 25 Cal.4th 926, 1009.)

Appellant received a fair trial, in which the evidence of his guilt was overwhelming. Accordingly, his claim of cumulative error must be rejected.

XVI. THE TRIAL COURT HAD NO DUTY TO INSTRUCT THAT JURORS MUST AGREE UNANIMOUSLY ON THE THEORY OF FIRST DEGREE MURDER

Appellant contends the judgment of guilt on count 1 and the judgment of death must be reversed because the trial court failed to instruct the jury that it must unanimously agree whether he was guilty of first degree murder based on felony murder or based on premeditation in violation of his state and federal constitutional rights. (AOB 238-251.) As appellant himself acknowledges, this Court has repeatedly rejected identical arguments. (AOB 238-239, 242.) Appellant "cites nothing in the United States Supreme Court's decisions creating new notice or unanimity requirements for alternative theories of a substantive offense such as first degree murder. [Citations.]" (*People v. Moore* (2011) 51 Cal.4th 386, __ [2011 WL 285186 at p. *18]; see also *People v. Taylor* (2010) 48 Cal.4th 574, 626; *People v. Loker*, *supra*, 44 Cal.4th at pp. 707-708; *People v. Valencia* (2008) 43 Cal.4th 268, 289; *People v. Morgan* (2007) 42 Cal.4th 593, 617; *People v. Nakahara*, *supra*, 30 Cal.4th at p. 712.)

Accordingly, this Court should decline appellant's invitation to reconsider this settled issue.

XVII. SUBSTANTIAL EVIDENCE SUPPORTS THE VERDICTS AND ANY INSTRUCTIONAL ERROR WAS HARMLESS

Appellant contends his conviction for murder (count 1) must be reversed because the evidence was insufficient as a matter of law to prove that offense and the trial court committed numerous prejudicial instructional errors related to that count. (AOB 252-277.) Respondent disagrees. The prosecution offered four theories of first degree murder: premeditated and deliberate murder, felony-murder committed during a

kidnapping and/or arson, murder by torture, and murder by lying-in-wait.[25] For the reasons discussed below, appellant's murder conviction should be affirmed.

A. Substantial Evidence Supports The Conviction For First Degree Premeditated Murder

Appellant contends his first degree murder conviction must be reversed because there was insufficient evidence of premeditation. (AOB 253-258.) This contention should be rejected for two reasons. First, regardless of premeditation, the jury plainly reached unanimous agreement on a felony-murder theory to reach its verdict on the charge of first degree murder. Second, the evidence of premeditation was substantial.

Completely undermining appellant's argument is that the jury sustained both the kidnapping and torture special-circumstance allegations. "From these verdicts, it is apparent the jury necessarily found - unanimously and beyond a reasonable doubt - that '[t]he murder was committed while [appellant] was engaged in . . . the commission of . . . or the immediate flight after committing'" (*People v. Hovarter* (2008) 44 Cal.4th 983, 1018-1019) the underlying felonies, which in this case were kidnapping and torture. As explained in parts IV and XIII, *ante*, substantial evidence supports both the kidnapping and torture convictions. "Accordingly, [this Court] can deduce from the special circumstance verdicts that the jury relied unanimously on a legally valid felony-murder theory of first degree murder, rendering any alleged deficiency in the evidence of premeditation and deliberation superfluous. [Citation.]" (*Id.* at p. 1019.) For the same reasons, appellant's related claim of the

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[25] The jury apparently rejected the murder by lying-in-wait theory, finding not true the related special circumstance allegation. (16CT 3886.)

impossibility to determine whether the jury found appellant guilty based on a valid legal theory (AOB 267-274) must be rejected.

In any event, substantial evidence supports a finding of premeditation and deliberation. The relevant standard of review is set forth in part IV.A, ante. A murder that is willful, deliberate, and premeditated is murder in the first degree. (§ 189.) "'A verdict of deliberate and premeditated first degree murder requires more than a showing of intent to kill. [Citation.] "Deliberation" refers to careful weighing of considerations in forming a course of action; "premeditation" means thought over in advance. [Citations.] "The process of premeditation does not require any extended period of time. 'The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly. . . .' [Citations.]"' [Citation.]" (*People v. Harris* (2008) 43 Cal.4th 1269, 1286-1287; accord, *People v. Booker* (2011) 51 Cal.4th 141, 172.)

"'Generally, there are three categories of evidence that are sufficient to sustain a premeditated and deliberate murder: evidence of planning, motive, and method. [Citations.] . . . But these categories of evidence, borrowed from *People v. Anderson* (1968) 70 Cal.2d 15, 26-27, "are descriptive, not normative." [Citation.] They are simply an "aid [for] reviewing courts in assessing whether the evidence is supportive of an inference that the killing was the result of preexisting reflection and weighing of considerations rather than mere unconsidered or rash impulse." [Citation.]' [Citation.]" (*People v. Elliot* (2005) 37 Cal.4th 453, 470-471[.]) "These three categories are merely a framework for appellate review; they need not be present in some special combination or afforded special weight, nor are they exhaustive. (*People v. Booker, supra*, 51 Cal.4th at p. 173, citing *People v. Brady* (2010) 50 Cal.4th 547, 562.)

In the present case, there is ample evidence supporting the inference that each of the killings """occurred as the result of preexisting reflection rather than unconsidered or rash impulse."""" (*People v. Hughes* (2002) 27 Cal.4th 287, 370.)

1. Preexisting Motive

Here, the evidence of preexisting motive clearly supports a finding of premeditation and deliberation. (*People v. Jennings*, *supra*, 50 Cal.4th at p. 646.) As discussed in part IV.B.2, *ante*, the evidence showed that appellant was jealous and possessive of Kerr. Several months before Kerr's death, appellant left voice mail messages for Kerr stating she was a slut and a whore and if he could not have her, no one else could. (17RT 1937-1938.)

Appellant believed Kerr was cheating on him, even though their relationship had ended. As a result, he planted a listening device inside of her home. (18RT 2078-2080; 19RT 2131-2132, 2138-2139.) Appellant also followed Kerr, including to her work and home. (17RT 1848, 1952-1953, 1958-1959; 18RT 2072-2074; 19RT 2139.) Before and after appellant had "bugged" her home, Kerr had told appellant that he was too possessive. (19RT 2113-2114, 2140.) Heiserman testified that appellant was obsessed with Kerr during the entirety of their relationship. (19RT 2146.) Appellant seemed even more obsessed with Kerr shortly before her death. (19RT 2146.) Appellant stated that if Kerr did not leave her family for him, he would not be able to live with it or to see her. (19RT 2146-2147.)

Appellant was also upset with Kerr because she wanted to go back to her husband and also because she was having a sexual relationship with Harvey. (17RT 1857, 1863-1864, 1866-1867; 18RT 2085-2086; 19RT 2145.) Moreover, appellant's financial assistance to Kerr during their relationship and her subsequent rejection of him supported the inference

that he felt Kerr used him for mercenary reasons. (18RT 2057-2059, 2046-2047; 19RT 2113-2115.)

Further, there was evidence that on the day of Kerr's death, appellant went into the crawl space of Harvey's home (20RT 2236, 2251-2253) and overheard Kerr refer to him as "Squirrel Boy" (17RT 1861-1862, 1900) and heard Kerr talking about or "putting down" appellant's father, which angered him (20RT 2236-2238, 2241).

Accordingly, there was substantial evidence of motive. (*People v. Welch* (1999) 20 Cal.4th 701, 758.)

2. Planning

The evidence of planning also supports a finding of premeditation and deliberation. A short as a "couple of weeks" to a month before Kerr's death, appellant talked about killing Kerr. (18RT 2080-2081; 19RT 2137.) Appellant expressed a desire to kill Kerr by blowing up her car shortly before he set it on fire. (18RT 2082-2085, 2138, 2147-2148.) Appellant caused the car to go over an embankment (14RT 1487-1488), he used an accelerant that he had poured over Kerr's body (14RT 1550-1551, 1559-1560, 1574), and then set the car alight to cause an intense, rapid burning (14RT 1537-1539).

The jury could have reasonably found that appellant, knowing Kerr was alive after he strangled her into incapacitation at her apartment, loaded Kerr in her car and drove for more than one hour contemplating her fate, giving him ample time to consider and plan his crime of burning her alive before going to the isolated area of the Roscoe off-ramp of the 170 Freeway in the early morning hours. (See *People v. Solomon* (2010) 49 Cal.4th 792, 817 [evidence of premeditation included defendant's statement, several months before the murder, "I'm going to kill that bitch"]; *People v. Hovarter, supra*, 44 Cal.4th at p. 1019 ["Defendant's choice . . . of

committing his crimes in isolated or secluded settings further suggests a premeditated plan designed to avoid detection"]; *People v. Prince* (2007) 40 Cal.4th 1179, 1253 [jury could infer defendant noticed victim sunbathing up to two hours before the murder, "giving him ample time to consider and plan his crime prior to his return to the scene"].)

Appellant argues, as he did at trial, that he "suddenly confronted Ms. Kerr after hearing her denigrate him to the man he thought was her new lover" and strangled her "spontaneously." (AOB 254-257.) "Appellant's arguments fail because they misapprehend [this Court's] role in assessing the sufficiency of the evidence supporting the verdicts. "'[I]f the circumstances reasonably justify the jury's findings, the judgment may not be reversed simply because the circumstances might also reasonably be reconciled with a contrary finding.' [Citation.]" ([*People v. Guerra, supra*, 37 Cal.4th at p. 1129.])" (*People v. Solomon, supra*, 49 Cal.4th at p. 816.)

3. Method

Finally, the manner of killing supports the conclusion that Kerr's death was the result of preexisting thought and reflection rather than unconsidered or rash impulse. The jury could reasonably infer that appellant intended to kill Kerr by putting her body on the floorboard of the backseat of her car (14RT 1549), pouring a flammable liquid over Kerr's body and igniting a fire (14RT 1550-1551, 1559-1560, 1574), thus causing her death by smoke inhalation and thermal injuries (18RT 1988-1989). "[Appellant's] conduct [was] entirely consistent with a preconceived design to kill, and the jury was not required to accept [his] claims to the contrary." (*People v. Jennings, supra*, 50 Cal.4th at p. 646.)

"In sum, because the jury necessarily relied on a valid felony-murder theory, [this] Court need not decide whether the evidence of premeditation

and deliberation was sufficient, but in any event the evidence was clearly sufficient." (*People v. Hovarter, supra*, 44 Cal.4th at p. 1020.)

B. Substantial Evidence Supports First Degree Murder Based On The Felony-Murder Theory Of Kidnapping

Appellant argues that the first degree murder conviction based on the felony-murder theory of kidnapping cannot stand because the kidnapping was incidental to the murder. (AOB 258-260.)

For the same reasons discussed in part XIII, *ante*, substantial evidence supports the jury's verdict on the kidnapping-murder special circumstance. The jury could have reasonably found that appellant, knowing Kerr was alive after he strangled her into incapacitation at her apartment, loaded Kerr in her car without making a final decision as to Kerr's fate at the time of the asportation. (*People v. Riel, supra*, 22 Cal.4th at p. 1201; *People v. Barnett, supra*, 17 Cal.4th at p. 1158; *People v. Raley, supra*, 2 Cal.4th at p. 903.) The jury could infer appellant's knowledge from his statement to Heiserman, shortly after Kerr's burned body and car were discovered, "Is she okay?" (18RT 2096.) The presence of soot in Kerr's airway conclusively showed that Kerr was alive at least at the beginning of the fire. (18RT 1987, 1992.) Moreover, the gap between the last time Kerr was seen at 1:15 a.m. (17RT 1858) and the car fire report at 4:11 a.m. (14RT 1482, 1484) supported the inference that appellant had been driving with Kerr in the backseat of the car and contemplating her fate. From this evidence, "[t]he jury could reasonably infer 'that [appellant] formed the intent to kill after the asportation,' making the kidnapping not merely incidental to the murder. [Citation.]" (*People v. Riel, supra*, 22 Cal.4th at p. 1202.)

The jury was not bound to find that appellant's sole intent from the beginning of the incident was to kill Kerr, or that appellant believed Kerr was already dead. Moreover, even a concurrent intent to kill and to commit

an independent felony will support a felony-murder special circumstance. (*People v. Raley, supra*, 2 Cal.4th at p. 903.)

Accordingly, substantial evidence supports appellant's first degree murder conviction based on the felony-murder theory of kidnapping.

C. Any Instructional Error Regarding Kidnapping Does Not Require Reversal

Appellant contends that his conviction of first degree murder based on the felony-murder theory of kidnapping cannot stand because of instructional error as set forth in this Court's decision in *People v. Martinez, supra*, 20 Cal.4th 225. He also asserts that the failure to give the requested mistake of fact instruction for the kidnapping allegation warrants reversal of his murder conviction. (AOB 260-261.)

For the reasons set forth in parts II and III, ante, appellant's claims must be rejected. Regarding the instructional error on the kidnapping instruction, the actual distance appellant moved Kerr exceeds the minimum distance established by pre-*Martinez* case law and was thus sufficient, by itself, to constitute substantial movement. As explained in part II.C, *ante*, the evidence showed that appellant moved Kerr a substantial distance of at least several miles. Moreover, the evidence on the distances between the relevant locations was undisputed. Thus, viewing the record as a whole, it is clear beyond a reasonable doubt the instructional error did not contribute to the verdict obtained and that it was unimportant in relation to everything else the jury considered on the issue of kidnapping.

Furthermore, the trial court properly refused to give a mistake of fact instruction because there was insubstantial evidence to support it. Even assuming otherwise, any error was harmless because "the factual question posed by the omitted instruction," here, whether appellant believed Kerr was dead when he set fire to her inside the car, "was necessarily resolved adversely to [appellant] under other properly given instructions," namely,

the torture-murder special circumstance, any instructional error was not prejudicial. (*People v. Sedeno, supra*, 10 Cal.3d at p. 721.)

D. Substantial Evidence Supports The Murder Conviction Based On The Theory Of Torture

Appellant contends his murder conviction cannot stand based on a theory of murder by torture because there was insufficient evidence of torture, and even if the facts showed that torture occurred, it was incidental to the murder. (AOB 261-263.) As discussed in part IV. B., *ante*, there is substantial evidence supporting the murder by torture theory and the torture special circumstance finding. There was evidence appellant knew that Kerr was alive when he set her on fire because he later asked Heiserman if she had died. (18RT 2096.) Appellant had talked about killing Kerr by blowing up her car up to a month before setting it on fire. (18RT 2082-2085, 2138, 2147-2148.) Finally, there was evidence he acted with the intent to torture for the purpose of revenge as he was extremely distraught over their breakup and was jealous over her reuniting with her husband at one point as well as her perceived sexual relationship with Harvey. (17RT 1857, 1863-1864, 1866-1867; 18RT 2085-2086; 19RT 2145.) Thus, substantial evidence supported the jury's findings. (*People v. Cole, supra*, 33 Cal.4th at p. 1214.)

E. The Torture Instruction Is Not Unconstitutionally Vague

Appellant contends that his conviction of first degree murder cannot stand based on the theory of murder by torture because the murder by torture instruction was unconstitutionally vague. (AOB 263-265.) For the same reasons discussed in part V., ante, this claim must be rejected. This Court has repeatedly rejected the argument that the torture statute is

unconstitutionally vague, and appellant does not present any new facts or argument warranting reconsideration of this issue.

F. The Arson Was Not Incidental To The Murder

Appellant contends his first degree murder conviction cannot stand based on the theory of the commission of a murder committed during an arson because the arson was incidental to the murder. (AOB 265-266.) Specifically, he argues that the burning of the car was incidental to Kerr's death for two reasons: (1) "Appellant's burning of the car was not for the purpose of causing her death"; and (2) "the burning of the car was for the purpose of concealing her identity and destroying evidence connecting him to the crime." (AOB 266.)

For the same reasons discussed above in parts XVII.A through E., *ante*, appellant's claim must be rejected. In essence, appellant is asking this Court to reevaluate the credibility of witnesses or resolve factual conflicts. On review, however, this Court presumes the existence of every fact in support of the verdict that reasonably could be inferred from the evidence. Under that standard, the evidence supports the finding that the arson was not incidental to the murder. (*People v. Brady*, *supra*, 50 Cal.4th at p. 564.) Moreover, appellant burned Kerr alive in her own car. Thus, murdering Kerr in her own car would not have concealed her identity.

G. Reversal Of The Judgment Of Death Is Not Required[26]

Citing *Brown v. Sanders* (2006) 546 U.S. 212 [126 S.Ct. 884, 163 L.Ed.2d 723], appellant contends reversal of the judgment is required "[b]ecause the special circumstance allegations must be reversed, [as] there

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[26] As previously discussed, no guilt phase reversal is required since it is clear the jury unanimously and properly found appellant guilty of first degree felony murder, as well as premeditated murder. (*People v. Farley* (2009) 46 Cal.4th 1053, 1116, fn.22.)

are no other sentencing factors, which enabled the jury to give weight to the felony-murder findings of murder by kidnapping and murder by torture." (AOB 276.) *Brown v. Sanders* states that an "invalidated special circumstance produces constitutional error only when the jury could not have given aggravating weight to the same facts and circumstances under the rubric of some other, valid sentencing factor." (*People v. Halvorsen* (2007) 42 Cal.4th at 379, 422.)

As previously discussed in Argument IV, *ante*, substantial evidence supports the torture-murder special circumstance. Because there was at least one valid special circumstance found by the jury in this case, evidence relating to the kidnapping special circumstance was validly considered by the jury at the penalty phase since it amounted to facts and circumstances surrounding the murder. (*Brown v. Sanders, supra*, 546 U.S. at pp. 220-221.) Therefore, no reversal of the death judgment is required because the evidence underlying any invalid special circumstance was properly considered on the question of penalty. (*Ibid.*)

XVIII. THE TRIAL COURT HAD NO SUA SPONTE DUTY TO APPOINT SECOND COUNSEL

Appellant contends the trial court's failure to sua sponte appoint a second attorney to represent him violated his state and federal constitutional rights to the effective assistance of counsel, to present a defense, to confront and cross-examine witnesses, to due process and the right to a fair trial, to a reliable, individualized determination of death eligibility and sentence, to equal protection of the law, and to be free of cruel and unusual punishment. (AOB 278-289.) Although acknowledging that "[t]his Court has held the trial court has discretion to appoint a second attorney to represent a capital defendant[ ]," he asserts the Court's prior decisions should be overruled and that prejudice should be presumed when a

defendant in a capital case is represented by only one lawyer. (AOB 285-286.)

"The appointment of a second counsel in a capital case is not an absolute right protected by either the state or the federal Constitution. [Citations.]" (*People v. Lancaster* (2007) 41 Cal.4th 50, 71, quoting *People v. Clark* (1993) 5 Cal.4th 950, 997, fn.22.) The trial court in a capital case has discretion to appropriate funds for appointment of a second attorney. (See, e.g., *People v. Jackson* (1980) 28 Cal.3d 264, 287; *Keenan v. Superior Court* (1982) 31 Cal.3d 424, 430; *People v. Burgener* (1986) 41 Cal.3d 505, 523-524; *People v. Moore* (1988) 47 Cal.3d 63, 76; *People v. Ochoa* (1998) 19 Cal.4th 353, 408.) Generally, "under a showing of genuine need . . . a presumption arises that a second attorney is required." (*Keenan, supra*, 31 Cal.3d at p. 434.)

Although the appointment of second counsel is authorized by section 987.9, the defendant must expressly move for appointment of second counsel. (See *People v. Wright* (1990) 52 Cal.3d 367, 411.) The appointment of second counsel is expressly authorized by section 987, subdivision (d), but requires a request from the first attorney and a factual showing of the reasons why a second attorney should be appointed. (*People v. Verdugo* (2010) 50 Cal.4th 263, 277-278; *People v. Padilla* (1995) 11 Cal.4th 891, 928.) Subdivision (d) of section 987 provides in relevant part, "In a capital case, the court may appoint an additional attorney as a cocounsel *upon a written request of the first attorney appointed*." (Italics added.)

Here, defense counsel's failure to request for appointment of second counsel pursuant to section 987, subdivision (d), disposes of appellant's current claim on appeal.

Moreover, the failure to provide appellant with a second attorney was harmless. Any error in failing to appoint second counsel is evaluated under

the *Watson* standard. (*People v. Doolin*, *supra*, 45 Cal.4th at pp. 432-433, fn.28 [rejecting contention that error in denying *Keenan* counsel is reversible per se]; accord, *People v. Williams* (2006) 40 Cal.4th 287, 301.) Appellant utterly fails to explain or substantiate his claim that, because *Keenan* counsel was denied, he suffered actual and specific prejudice in the investigation or presentation of his case at trial. (See *People v. Doolin*, *supra*, 45 Cal.4th at p. 432.) He merely asserts that his representation by a single attorney violated his constitutional rights. (AOB 286-289.) "An 'abstract assertion' regarding the burden on defense counsel 'cannot be used as a substitute for a showing of genuine need.'" (*People v. Verdugo*, *supra*, 50 Cal.4th at p. 278, quoting *People v. Lucky* (1988) 45 Cal.3d 259, 280.)

Accordingly, appellant's claim must be rejected.

PENALTY PHASE ARGUMENTS

XIX. THE TRIAL COURT DID NOT COERCE THE JURY'S PENALTY VERDICT

Appellant contends the trial court coerced a verdict of death by requiring the jury to continue penalty phase deliberations after it was hopelessly deadlocked, in violation of section 1140 and his state and federal constitutional rights, thus warranting reversal of his death sentence. (AOB 290-313.) Respondent disagrees.

A. Relevant Facts

1. First Day Of Deliberations

On June 19, 2001, the jury began penalty phase deliberations at 3:20 p.m. and recessed for the day at 4:00 p.m. (27RT 3042-3043; 16CT 3910.)

2. Second Day Of Deliberations

a. Foreperson's Handwritten Note

On June 20, 2001, the jury resumed deliberations at 9:10 a.m. Before leaving for the lunch break (16CT 3912), the foreperson gave the bailiff a handwritten note stating the following:

> There are people who "lied" in order to get on this jury. They never intended to vote for death. This has come out [ ] during deliberations.
>
> Juror # 9 states she did not believe in the death penalty.
>
> Juror # 8 (person sitting in seat 8) never intended to put someone to death.
>
> [R]eligious conviction.
>
> 7 people have travel plans for Monday, June 25.

(16CT 3911 [strikethrough omitted].)

b. Hearing Held Outside Jury's Presence

The trial court reviewed the note and notified counsel. (16RT 3912.) In a hearing held outside the presence of the jury,[27] the court stated there was a note, authored by the foreperson, "raising serious concerns." The court described the note as follows:

> "There are people who," quote, "'lied,'" unquote, "in order to get on this jury. They never intended to vote for death. This has come out during deliberations.
>
> "Juror No. 9 states she did not believe in the death penalty," and then there's an arrow down to another phrase,

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[27] The court had first related that it had received a "benign" note from the foreperson (Juror No. 1) asking to either be excused from 10:30 a.m. to 2:30 p.m. on June 22, 2001, or to be excused with all the other jurors for that entire day. The court opted to have the jury deliberate on June 22, 2001, during the hours outside the period requested by the foreperson. (27RT 3046-3047.)

"religious conviction." "Juror No. 8 never intended to put someone to death.

"Two people have travel plans for Monday, June 25."

(27RT 3047.)

The court noted that Juror No. 8 was "the Afro-American gentleman who brought his son to court the first day,"[28] and that "Juror No. 9 [was] the blond-haired Caucasian woman who is a retail shop owner." They were apparently the two people identified by the foreperson. (27RT 3047.) The court stated that "this note apparently was provided to my bailiff and the foreperson asked that it be kept confidential. There's no way that I can keep a note like this confidential." (27RT 3047-3048.) The court obtained the jury questionnaires for Juror numbers 8 and 9, and had the reporter's transcript of their voir dire responses available. (27RT 3048.)

The bailiff informed the court there was one additional oral communication from the foreperson, who told the bailiff that the jury was hung at nine, four, and one. The bailiff observed that the count was incorrect because it totaled 14, when there were only 12 jurors. (27RT 3048.) At the court's direction, the bailiff advised the jury to continue deliberations. Upon that advisement, however, the jury stated that they were hung and requested to take a break. At the time of the hearing, the jury had reconvened deliberations. (27RT 3048.)

The court made the following observations:

> Now, clearly the last communication was an oral statement made by the foreperson to the bailiff. At no time have I solicited, nor have I instructed the jury to let us know how they're divided in their voting. Indeed, my earlier instructions were that they were not to so advise unless I specifically asked.

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[28] The record shows that Juror No. 7's child was in the courtroom audience on the first day of trial. (14RT 1446-1448.) The record is silent as to whether Juror No. 8's child attended any court proceedings.

But there appears to be some division among the jurors. They're indicating they're hung. There is an indication from the foreperson that Jurors Nos. 8 and 9 haven't ever been in favor of the death penalty and should not have been on this jury.

In looking at the voir dire, it is clear that Juror No. 9 expressed serious misgivings about the death penalty and she said that in part it was based on her religious convictions. But after some questioning from both sides, she was -- she did say that she would not automatically refuse to impose it if the evidence warranted, stressing the word "automatically." But from the very outset, she has expressed serious reservations about imposing the death penalty.

So it is not surprising to me that this information would now be coming out. It was something known to all of us, and she was left on this jury.

Juror No. 8, his entire questionnaire is benign, in the sense that he answered the four key questions all "no." There wasn't anything in the voir dire process that indicated that he was opposed in any fashion to the death penalty, and if indeed he is now taking a position that he would never vote for it no matter what, then there has been a misrepresentation made in the voir dire process. But, again, his statements may be that based on the evidence that's now before this jury, he may not consider it appropriate. I don't know.

So we have these two jurors who the foreperson has identified in a confidential communication as being a source of concern to him and then we have the oral communication that they're hung.

(27RT 3049-3050.) The court then solicited responses from the parties.

The prosecutor suggested that the court make a general inquiry about the deadlock without any inquiry of Juror Nos. 8 and 9. (27RT 3050-3051.) Defense counsel seconded the prosecutor's request. (27RT 3051.) Recognizing that jurors had great latitude to express opinions during deliberations, counsel also suggested that the court's inquiry be limited "as to whether or not [Juror Nos. 8 and 9] lied during voir dire, and not go into, 'Well, what did you say in the jury room?'" (27RT 3052.) The court

reaffirmed that it would avoid asking jurors about the deliberation process. (27RT 3052.)

c. Court's Inquiry Of Foreperson

Subsequently, the court conducted a lengthy inquiry of the jury. Juror No. 1 was identified as the foreperson. The following colloquy occurred between the court and the foreperson in the presence of the other jurors:

The Court: . . . Juror No. 1, you remain the foreperson?

Juror No. 1: Barely.

The Court: Hanging on.

Juror No. 1: Hanging on.

The Court: Sir, in an oral communication to my bailiff, you have indicated to the court that, in your considered judgment, the jury is deadlocked hopelessly. Is that correct?

Juror No. 1: That is correct.

The Court: If the court were to ask the jury to continue with deliberations, do you feel that there is any reasonable probability that the jury might arrive at a verdict?

Juror No. 1: There is not.

The Court: Is there anything that the court could do, either in terms of providing additional jury instructions, the rereading of testimony, or anything like that, that might assist the jury in reaching a decision?

Juror No. 1: No.

The Court: "No." Okay. You may be seated, sir. [¶] One last question, or series of questions, directed to the foreperson, and I want you to be very careful and please do not volunteer any information other than as a direct response to the following questions. [¶] With respect to this phase of the trial, how many ballots have been taken by the jury?

Juror No. 1: 36.

The Court: Six?

Juror No. 1: How many total ballots overall?

The Court: Yes. How many total times have you voted?

Juror No. 1: There are a total of 36 ballots. We voted three times.

The Court: So you voted three times. [¶] Now, without telling me how the numbers break down in favor of death or life without the possibility of parole, what was the numerical breakdown of the jury on its last ballot?

Juror No. 1: Seven-four-one.

The Court: All right. Thank you.

(27RT 3053-3054.) The remaining jurors indicated, in the affirmative, that they believed the jury was hopelessly deadlocked and that further deliberations would not bring about a verdict in the case. (27RT 3054-3055.)

At sidebar, the court and the parties discussed the significance of the "Seven-four-one" breakdown of the jury's last ballot. In order to determine whether the "one" ballot represented a juror abstaining in the vote, the court proposed to ask what was the numerical breakdown of the two prior ballots. The inquiry was aimed at determining if there was an abstention to vote during all three ballots. In that case, the court noted that a juror might be "failing to vote and sabotaging the process and the like," "[b]ut it may have been that someone was moved from a vote in one way or the other. So I'll gather a bit more information[.]" (27RT 3055-3059.)

In the presence of the jury, the court asked the foreperson whether, in the third and most recent ballot, any of the votes ("Seven-four-one") represented an abstention. The foreperson replied in the negative and explained that the "one" vote was made by a juror who was merely

undecided at the time of the third ballot, and who was not refusing to vote. (27RT 3060.) The foreperson indicated that the numerical breakdown of the second ballot was "Nine-two-one." The breakdown for the first ballot was "Eight-three-one." The foreperson agreed with the court's assessment that "each time you have taken a ballot, someone has indicated at that vote that that person was undecided." (27RT 3061.)

At sidebar, the court observed that "[t]he trend is moving away from unanimity." (27RT 3061.) The court made the following further observations:

> The one undecided person, assuming it's the same person, appears to be resolute in being undecided. Whatever the three votes favored on vote one, it eroded to two on vote two but is up to four on vote three, and whatever the majority of the votes were, it started at eight, went to nine, and now down to seven. So this jury, while trying -- there's no positive direction in the deliberations.
>
> My intention under these circumstances is to direct that they continue their deliberations. We have far too much invested in this for me at this point in time to just simply say on their first report of a failure to deliberate -- or to reach a decision to let them go. So I'm going to ask that they deliberate tomorrow.
>
> I'm also going to ask that each of you be here at 3 o'clock tomorrow afternoon, and we'll take stock of where we are.

(27RT 3062.)

Defense counsel objected to the court's proposed action, stating:

> I'm afraid that they might interpret your comments -- I mean, after they all said that they don't believe that a verdict could be reached or that they're hopelessly deadlocked, they might interpret your comments to mean they should change their votes and reach a verdict. I'm very much afraid of that and, therefore, I would ask the court to dismiss the jury and declare a mistrial for that reason.

(27RT 3062-3063.) In the alternative, counsel requested that the court give an admonition to the jury "to the effect that 'I'm not asking you to reach' -- I'm not trying to make you reach a verdict.'" (27RT 3063.) Counsel reiterated his concern that the court's proposed action "could result in a death penalty as a result of jurors thinking that the . . . court wants them to reach a verdict, especially if the breakdown is most of them are in favor of the death penalty" and noted that the penalty phase trial lasted two days and the jury had completed one day of deliberations. (27RT 3063.)

The court asked defense counsel, assuming the three undecided ballots were cast by the same person, "Do you think that person is actively deliberating?" (27RT 3063-3064.) Counsel replied, "Oh, yeah. That's not misconduct to be at this point undecided. They haven't decided yet after one day." The court stated, "Isn't that an argument that I should continue them in their deliberations?" Counsel responded, "It wouldn't really matter how that one person decides because they'd still be split." The court observed, "You never know what the dynamic in the jury room is." (27RT 3064.) The prosecutor added, "And it's clear that things are changing. You don't know the effect that a person being persuaded -- that person may have two or three people that are with him or her. . . ." (27RT 3064.)

The prosecutor observed that when the court was making its initial inquiry of the foreperson, "it seemed like he wanted to answer with more information," and suggested "maybe we could get that other information, because it seemed like he was going to say something." Defense counsel had no objection to the court getting more information from the foreperson. Counsel also reiterated his concern about the court's proposal for deliberations to continue as follows:

> As I understand it, the reason the court is not going to declare a mistrial is because the court feels that they should have more time to deliberate. So if that's the case, maybe -- I almost want to say maybe the court --

> To just say, "Go back and deliberate," I'm afraid that will be misinterpreted. But if the court explained -- said something to the effect that "I'm going to give you a little more time" and maybe something to the effect that "that doesn't mean I'm ordering you to all agree. I'm just going to give you more time. I understand one of you hasn't made up his mind yet," maybe the -- and to focus on the person that hasn't made up his mind yet and find out -- or maybe give that person a little more time so that there can be a clear seven to five or eight to four.

(27RT 3065-3066.)

The prosecutor disagreed with counsel's proposed admonition stating, "I don't think we should focus on one person. I think that is a problem, and we don't know what that would do to the dynamics." (27RT 3066.) Counsel responded by suggesting the court admonish the jury as follows: "'I'm considering, ladies and gentlemen, doing this" and this and this, 'having you come back tomorrow and' -- something like that, polling on that, and mentioning, if you want, that one person is not decided. . . ." Counsel argued that the court's proposed action of informing the jury to continue deliberations essentially told the jury , "'I'm not accepting what the 12 of you said,'" given that jurors stated they were '"hopelessly deadlocked and any more time isn't going to work.'" The court's proposed action, counsel argued, "could be easily understood that Judge Greene wants a -- you know, wants agreement, because there's a lot of power that comes from the bench." (27RT 3066-3067.)

In open court, the court began by informing the jury that "nothing that I say in asking any questions of you should be interpreted in any way that I am looking for a certain decision from you or favoring a certain decision from you. I am -- I think if there's one thing we've learned from the beginning of this trial, that what I've tried to do is be entirely fair to both sides, be entirely neutral, be entirely objective. So nothing that I say now

should be viewed as being different from that approach that I have taken throughout. Okay?" (27RT 3068.)

The court then asked the foreperson, "When I asked earlier if there was anything we could do to assist, whether through the rereading of testimony, rereading of jury instructions, whatever, you ultimately answered no, but there was some hesitation before you gave that no. [¶] Is there anything that you think that the court and the lawyers might do at this juncture?" The foreperson requested to speak to the court at sidebar. The court granted the request and the following colloquy occurred at sidebar:

> The Court: We're now at sidebar with the foreperson. [¶] Now, before you say anything, what I do not --
>
> Juror No. 1: We can hear you outside.
>
> The Court: What I do not want you to do is inquire -- or have you disclose anything that anyone is saying in the jury room. I do not want to invade the privacy of the jury room deliberations.
>
> So if what you want to tell me is something that is happening in the jury room, that's one thing. Then I really would prefer not to hear it.
>
> Secondly, though, if you, based upon information you have received, believe that some misconduct has occurred in connection with the jurors who are seated -- namely, they misrepresented something to me or to the lawyers in the voir dire process -- then that's something that happened in open court and as to which I would make legitimate inquiry and as to which we could have a legitimate discussion.
>
> What I want to do is to preserve the sanctity of the jury room and not have you tell us all the things that are being said in there, because that's really between you and the other jurors.
>
> But if there's something that has been improperly said to me or to the lawyers in response to their questions by any juror in open court during the selection process, then that's important for us to know. If someone said, "Oh, yeah, I lied about everything when I was doing the voir dire because I

wanted to get to this point," that is the kind of information that I need to know, because that would be misconduct.

So in light of that admonition, is there anything you have to tell us?

Juror No. 1: Yes. [¶] First of all, I do not believe this jury will ever come to a verdict ever.

Secondly, there was one juror who reiterated her testimony during the voir dire process, in which she mentioned that she did not believe in the death penalty but would keep an open mind towards the charges.

What she meant was that she would never vote for the death penalty. She -- her religious convictions do not lead her to the death penalty. But she -- she just can't in any circumstance see herself voting for the death penalty.

The Court: This is Juror No. 9?

Juror No. 1: Yes, it is.

The Court: I'm aware of what she has said during the voir dire process, and -- okay.

So you think that there is just no way that this jury could ever reach a decision in part because there's at least one juror who said, based on religious convictions, she would never feel comfortable voting for the death penalty.

Juror No. 1: I'm trying to follow your instructions and keep the sanctity. [¶] There are -- there is one, yes.

The Court: Then what I intend to do is at an appropriate juncture make inquiry of Juror No. 9 to see if there has been any failure on her part to disclose her true feelings in the voir dire process.

Now, is there anything else that you have to tell me without disclosing any of the deliberative discussions of the jury?

Juror No. 1: Even -- the jury would still be at an impasse.

The Court: Even if Juror No. 9 were to be excused and someone else, you're still thinking that it would be difficult.

Juror No. 1: Yes.

The Court: Well, we'll deal with that issue as well.

First of all, any questions, Mr. [Prosecutor]?

[The Prosecutor]: No.

The Court: [Defense counsel]?

[Defense counsel]: No.

The Court: You may return to your seat, sir. Thank you.

(27RT 3068-3071.)

After the foreperson left sidebar, the court and the parties discussed whether the foreperson's representation of Juror No. 9's comments constituted misconduct. Defense counsel believed that there was no misconduct. (27RT 3071-3072.)

The court then asked the prosecutor, "if the court were to indicate that it's prepared to declare a mistrial, is there an objection from the People?" The prosecutor responded, "Based upon what we have on the record, no. It would seem appropriate." However, the prosecutor added, "I would just maybe ask if the court could ask one more time if there's anything that -- ask the jurors if there's anything we can do. But it sounds like it's more than one juror. It sounds like his concern is only as to one." (27RT 3072.) Defense counsel objected to the court asking the same question twice. After the court pointed out that it had only asked the foreperson that question, and not every juror, defense counsel suggested the court ask the remaining jurors the same question, "start[ing] with Juror No. 2." The court agreed. (27RT 3072.)

d. Court's Inquiry Of Juror Nos. 2 Through 12

In open court, the colloquy between the court and Juror Nos. 2 through 12 occurred as follows:

> The Court: Juror No. 2, is there anything additionally that the court can do, in terms of either rereading of testimony or further instructions on the law, that would assist this jury, in your opinion, in reaching a decision?
>
> Juror No. 2: No.
>
> The Court: Juror No. 3, what would be your answer to that question?
>
> Juror No. 3: I think it's possible. I think that if there is new evidence presented -- [¶] I don't know that anything needs clarification.
>
> The Court: I'm not proposing to open the evidence. The evidence is what the evidence is.
>
> Juror No. 3: Okay.
>
> The Court: But one thing I could consider doing -- and I'm not promising I would do this. I didn't even discuss it with the lawyers -- I could reopen argument in this case, for instance, allow both the attorneys to reargue for a certain period of time.
>
> Juror No. 2, do you think that would help in any way?
>
> Juror No. 2: You just want a yes or a no?
>
> The Court: Yes.
>
> Juror No. 2: No.
>
> The Court: Juror No. 3, if I were to provide additional readback of instructions, if I were to provide readback of testimony, or if I were to even allow reargument of the case -- but I would not allow the evidence to be reopened -- would any of that help you in reaching a decision, in your opinion?
>
> Juror No. 3: No.

The Court: Juror No. 4, your answer?

Juror No. 4: Yes.

The Court: You think it might help.

Juror No. 4: Uhm-hmm.

The Court: Juror No. 5?

Juror No. 5: Yes.

The Court: Juror No. 6?

Juror No. 6: It's worth a shot. Yes.

The Court: Juror no. 7?

Juror No. 7: No.

The Court: Juror No. 8, would anything additional --

Juror No. 8: Possibly.

The Court: Juror No. 9?

Juror No. 9: Possibly.

The Court: Juror No. 10?

Juror No. 10: No.

The Court: Juror No. 11?

Juror No. 11: I believe so, yeah. Yes.

The Court: Juror No. 12?

Juror No. 12: Yes. More than likely, it would help.

The Court: So what I need to know is, collectively from you, what it is that might help, whether it be, you know, me going over the jury instructions again or if you want a certain portion of the testimony reread, or if you want me to reopen the case for argument.

Now, I haven't -- I haven't --

Just one moment, Juror No. 12.

I haven't discussed this with counsel, and I haven't reached a final decision that I would permit that. I'm just generally inquiring now to see what, if anything, we could do to assist this jury in trying to reach a decision.

Obviously, each and every one of us in this courtroom has a lot invested in the case in terms of our time, our energy, and if we can reach a decision, I'd like to. And by my saying that, I'm not suggesting that you should reach any decision one way or the other. I'm just generally inquiring.

Juror No. 12.

Juror No. 12: When you say open for arguments, did you mean the attorneys would re-present the closing portion?

The Court: Yes, their closing argument. They could summarize it. I might give them 15 minutes apiece or some period of -- limited time to reargue the case to the extent that the jury wished to identify any issues that should be addressed in reargument, I might consider that, so that you have -- you can give them a clue of what it is that you need to hear from them about an argument.

So what I'm going to do at this juncture is I'm going to excuse the jury for tonight, as we have reached the hour for recess of 4 o'clock. I'm going to ask that you continue tomorrow with your deliberations and that you let us know what it is that we can do to assist you, identify what it is, reread of instructions, reread of testimony, opening for reargument.

If it's for reargument, let me know what it is that -- the issues that you wish to have the attorneys address in such an argument. Secondly, if it's testimony you want reread, identify for me what testimony it is. Thirdly, if it's instructions on the law, let me know what it is that you have a question about.

If there's some instruction that you read and you don't understand it, let me know, and we'll help you try and interpret that or provide some additional assistance.

So with that said, I'm going to excuse you tonight. Now, none of you are to talk about the case until you reconvene tomorrow to continue with your deliberations. You're not to form or express any opinions about it overnight. I don't want

you thinking about it. The only time you start to form or express those opinions are when you're in the jury room with the other 11 jurors.

I know, it's hard not to think about it, but I -- just go home and have a good day, each and every one of you, and do something to take your mind off of these proceedings at least overnight.

I'll ask that you please return at 9 o'clock tomorrow morning.

(27RT 3073-3077.)

Outside the presence of the jury, the court told the parties that it had reopened other cases for argument when the jury was deadlocked. The court noted that, when it had mentioned reopening closing argument as a possibility, "it obviously struck a chord with some of the jurors, that they thought that that might help them, and I intend tomorrow to have them tell us what it is in their opinion that might help them." The court stated that it had not made a final decision to allow reargument in this case. The court intended to listen to the jury's suggestions and then discuss, with the parties, the course of action to be taken. The court concluded, "there is enough going on with some of these jurors who are saying that, with some help, as yet unidentified, maybe they think it's worthwhile to continue with the discussions, and I'm not willing to simply ignore that for the time being. I'd like to find out more what it is they think would help them." (27RT 3077-3078.)

3. Third Day Of Deliberations

a. Jury Submits Two Request Forms

The following morning, on June 21, 2001, the jury resumed deliberations at 9:15 a.m. (16CT 3936.) The jury subsequently sent the court two "jury request" forms. The first request form, signed by the foreperson, stated, "'We, the Jury in the above-entitled action, REQUEST:

New Arguments - different spin on final arguments (15 minutes maximum w/no babbling) (no visual aid).'" (16CT 3928.)

The second request form, stated: "'We, the Jury in the above-entitled action, REQUEST: to hear from Donald Brooks.'" (16CT 3929.)

b. Discussion Outside The Jury's Presence

Outside the presence of the jury, the court and the parties discussed further action in light of the two jury request forms. (28RT 3079-3089.) The court's tentative decision was not to order further argument from the parties. (28RT 3079-3083.) The prosecutor agreed with the court. (28RT 3083.) Defense counsel stated that he did not wish to reargue the case. (28RT 3083-3084.)

Defense counsel moved for a mistrial on the ground that the jury was hung. In the alternative, counsel requested the court to poll the jury again to determine whether it was deadlocked. If the jury was deadlocked, counsel indicated that he would make another mistrial motion. Finally, counsel moved for mistrial on the basis of the jury's request to hear appellant testify. The jury's request for appellant's testimony, counsel argued, indicated that the jury was not following the court's earlier instructions that appellant had a right not to testify and not to discuss his failure to testify during deliberations. (28RT 3084-3086.)

The court denied the motions for mistrial. (28RT 3086.) The court granted the defense request to simply tell the jury that its request to hear appellant testify was "denied" without further explanation. (28RT 3087-3089.)

The court also intended to inform the jury that it would not hear further argument in this case, but the court "remain[ed] ready to read back any testimony, [and] to assist in [their] understanding any jury instructions, if [they were] having difficulty in that regard. . . ." (28RT 3087.)

c. Foreperson's Request For A "Deeper Explanation" Of Mitigating And Aggravating Factors

The court advised the jury consistent with its prior rulings. (28RT 3090-3091.) The court then asked the foreperson if the jury had taken any additional votes in the morning during deliberations. (28RT 3091.) The foreperson replied in the negative. He also asked the court for "[a] deeper explanation of [factors in mitigation and aggravation] A through K of . . . our jury instructions." Specifically, the foreperson asked, "if you find one item in mitigation, is that enough for life in prison, if you find just one, or do you need several for each, or is it a scale? How does that operate?" The court stated that it would confer with the parties, but believed the answer to the foreperson's question was in the instruction itself. (28RT 3091-3092.)

The court then asked if the votes reported yesterday -- the three votes in deadlock -- was still the jury's current position. (28RT 3092.) The foreperson stated that he had neglected to inform the court about a fourth ballot conducted by the jury the previous day which was split, "Three-eight-one." (28RT 3092.) The court excused the jurors, but admonished them not to deliberate. (28RT 3093-3094.)

Outside the presence of the jury, the court read CALJIC No. 8.88 and concluded that it directly answered the foreperson's question. (28RT 3093-3094.) Counsel requested that the court answer the question by stating, "Yes," because one factor was enough to support a finding of life without the possibility of parole. Counsel represented that a publication he called, "Rucker's book," contained the citations supporting his position. (28RT 3094-3095.) The prosecutor disagreed because counsel's suggested response "feeds right into what the instruction says you can't do, which is a mechanical weighing," and argued that the language of CALJIC No. 8.88 supplied the correct answer to the foreperson's question. (28RT 3095-

3096.) Counsel countered that nothing in the prosecutor's argument contradicted counsel's suggestion given that the jury could attribute weight to one, some, or all factors as it saw fit. (28RT 3096.)

In order to clarify the foreperson's precise question, the court read the transcript of the colloquy. (28RT 3096.) The court then concluded that it would reread the relevant sections of CALJIC No. 8.88 to the jurors and then excuse them for the lunch break. The court stated it would consider additional argument, if any, presented by counsel after the lunch break. (28RT 3096-3097.)

d. Court's Response To Jury Request: Reread Portion Of CALJIC No. 8.88

In the presence of the jury, the court read the foreperson's question from the reporter's transcript. (28RT 3097-3098.) The court then informed the jurors, "In response to the question as posed by your foreperson that I have just read, I'm going to reread to you a portion of the two-page jury instruction that's numbered [CALJIC No.] 8.88" as follows:

> It is now your duty to determine which of the two penalties, death or confinement in the state prison for life without the possibility of parole, shall be imposed on the defendant.
>
> After having heard all the evidence and after having heard and considered the arguments of counsel, you shall consider, take into account, and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed.
>
> An aggravating factor is any fact, condition, or event attending the commission of a crime which increases its guilt or enormity or adds to its injurious consequences which is above and beyond the elements of the crime itself.
>
> A mitigating circumstance is any fact, condition, or event which does not constitute a justification or excuse for the crime in question, but may be considered as an extenuating

circumstance in determining the appropriateness of the death penalty.

The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale or the arbitrary assignment of weights to any of them. You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider.

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

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

(28RT 3098-3100.) The court cautioned the jury not to deliberate during lunch and then released them for the break. (28RT 3100.)

e. Counsel's Request For Further Instruction

Counsel subsequently submitted a handwritten brief to the court stating the following:

Defendant requests the court tell the foreman and jury the following:

In addition to the instructions I read before lunch, specifically in response to your question, one mitigating circumstance may be sufficient to support a decision that death is not appropriate punishment in this case.

(16CT 3930.) Counsel cited three cases, *People v. Berryman* (1993) 6 Cal.4th 1048, 1099, *People v. Grant* (1988) 45 Cal.3d 829, 857, and *People v. Johnson* (1989) 47 Cal.3d 1194, 1245, in support of his request. (16CT 3930.) Counsel also attached to his brief excerpts from each of the three cited cases. (16CT 3931-3933.)

Outside the presence of the jury and after the lunch break, the court stated it had received counsel's brief and read the attached excerpts, which appeared to support giving an instruction that one mitigating factor alone was sufficient to support a decision against death. (28RT 3102-3103.)

The prosecutor pointed out that counsel had culled one line in an instruction (CALJIC No. 8.84.2) discussed in *People v. Johnson, supra*, 47 Cal.3d 1194, that was essentially the same as the instruction (CALJIC No. 8.88) that the court had already reinstructed the jury with. The instruction in *Johnson* stated exactly what the law prohibits: performing a numerical count or mere balancing of factors. The prosecutor thus objected to counsel's proposed instruction because focusing on one line in the cited cases was prejudicial and contrary to the law. (28RT 3103-3104.)

The court agreed that CALJIC No. 8.84.2 no longer existed as it had been subsumed within, or replaced by, CALJIC No. 8.88, which the court had read to the jury. The court noted that the three cited cases were decided in 1993, 1988, and 1989 – all at a time when CALJIC No. 8.88 was not in existence as the standard jury instruction. (28RT 3104.)

Counsel clarified that he was "not requesting an instruction as such," but rather was "requesting a response to the foreman's question, which [was] a little different. . . ." (28RT 3104.) Counsel had used, during his closing argument, the very words he was requesting that the court give to the jury, who was now asking the court whether one factor was "enough." (28RT 3104-3105.) Counsel also told the court to "forget about" two of the three cases he cited – *Grant* and *Johnson* – and to instead focus on *Berryman*, which stated that one mitigating factor was enough to support a verdict for life imprisonment. Counsel thus requested the court to tell the jury "Yes," or to use the precise language from *Berryman*. Counsel was "open" to including some "balancing language" as a compromise with the prosecutor. (28RT 3105-3106.)

After hearing additional argument from the parties (28RT 3106-3110), the court denied the defense request and ruled that it would not give the jury further instruction, as CALJIC No. 8.88 adequately and properly reflected the current state of the law. (28RT 3110-3111.) The court intended to instruct the jury to begin deliberations as they had not begun to do so that day. (28RT 3111.) The court stated that it would allow the jury to continue deliberating and declined to set a deadline for declaring a mistrial. (28RT 3112.) Counsel subsequently made a motion for mistrial, which the court denied. (28RT 3112.)

f. Jury's Verdict

The jury resumed deliberations after the lunch break and indicated that it had reached a verdict at 3:05 p.m. (16CT 3936.) On being polled, each juror affirmed unequivocally that the verdict imposing the death penalty was the individual verdict of that juror. (28RT 3114-3115.)

B. The Trial Court Did Not Coerce The Penalty Verdict Or Abuse Its Discretion Under Section 1140

Appellant contends that the trial court coerced the jury to return the death verdict and that the coercion of the jury violated section 1140 and his state and federal constitutional rights. (AOB 290-313.) The trial court did not coerce the death verdict or abuse its discretion under section 1140.

Section 1140 provides:

> Except as provided by law, the jury cannot be discharged after the cause is submitted to them until they have agreed upon their verdict and rendered it in open court, unless by consent of both parties, entered upon the minutes, or unless, at the expiration of such time as the court may deem proper, it satisfactorily appears that there is no reasonable probability that the jury can agree.

Thus, "[t]he court may ask jurors to continue deliberating where, in the exercise of its discretion, it finds a 'reasonable probability' of agreement. [Citations.] Any claim that the jury was pressured into

reaching a verdict depends on the particular circumstances of the case. [Citations.]" (*People v. Pride* (1992) 3 Cal.4th 195, 235, fn. omitted.)

Appellant first argues that "[t]he trial court erred by forcing the jury to continue deliberations after it was hopelessly deadlocked." (AOB 301.) He further contends, "[g]iven the numerical split of the jury, the trend away from unanimity, and all 12 jurors agreeing they were hopelessly deadlocked, there was no reasonable probability the jury was going to reach a unanimous verdict. The trial court's additional efforts to reach a verdict simply resulted in the jury being coerced into a verdict."

These claims lack merit. The trial court did not abuse its discretion when it asked jurors to continue deliberating after it had ascertained the most recent numerical split of the jury at "seven-four-one," reached on the second day of deliberations after only three votes had been taken. The court initially asked the foreperson if there was anything, such as providing additional jury instructions or rereading testimony, that the court could do that might assist the jury in reaching a decision. (27RT 3053.) The foreperson replied no and indicated that the jury had voted three times. At the court's instruction, the foreperson stated the numerical division of the jury's last ballot was "Seven-four-one," without indicating which votes were in favor of death or life without the possibility of parole. (27RT 3054.) The remaining jurors indicated that they believed they were hopelessly deadlocked and that further deliberations would not bring about a verdict in the case. (27RT 3054-3055.)

Upon further inquiry, the foreperson indicated that the "one" vote did not represent an abstention or refusal to vote, but rather was made by a juror who was still undecided at the time of the third ballot. The results of the first ballot were "Eight-three-one," and the second ballot "Nine-two-one." (27RT 3053-3054, 3060-3061.)

At sidebar, defense counsel agreed with the court that, assuming the three undecided votes were cast by the same juror, he or she was actively deliberating. (27RT 3064.) In response to defense counsel's concerns over the court's proposal to order the jury to continue deliberations, the court informed the jury that "nothing that I say in asking any questions of you should be interpreted in any way that I am looking for a certain decision from you or favoring a certain decision from you. I am -- I think if there's one thing we've learned from the beginning of this trial, that what I've tried to do is be entirely fair to both sides, be entirely neutral, be entirely objective. So nothing that I say now should be viewed as being different from that approach that I have taken throughout. Okay?" (27RT 3068.)

Without objection from defense counsel, the court then engaged in further inquiry of the foreperson at sidebar regarding possible misconduct by Juror No. 9. Before asking the foreperson any questions, the court cautioned the foreperson, "I do not want to invade the privacy of the jury room deliberations," and "What I want to do is to preserve the sanctity of the jury room and not have you tell us all the things that are being said in there, because that's really between you and the other jurors." (27RT 3068-3071.)

Defense counsel had no objection to the prosecutor's request to ask the remaining jurors the question initially posed solely to the foreperson of whether there was anything that the court could do to assist the jury to reach a decision. The court then asked the remaining jurors if additional readback of instructions, readback of testimony, or reargument of the case would be helpful in reaching a decision. Four jurors replied "no," five jurors replied "yes," and two jurors replied "Possibly." (27RT 3073-3075.) The court excused the jury for the day and ordered the jury to continue deliberations the next day and to identify what the court could do to assist the jury. (27RT 3076-3077.)

The court scrupulously formulated its response to the foreperson's first note by narrowing its inquiry to the numerical breakdown of the jurors' votes and each juror's opinion on the possibility of reaching a verdict. "It is settled that a court may inquire into the numerical division of the jury in a deadlock during the penalty phase." (*People v. Butler* (2009) 46 Cal.4th 847, 884-885; see also *People v. Howard* (2008) 42 Cal.4th 1000, 1030.)[29] The court's decision to ask jurors to continue deliberating was within its discretion. (*People v. Butler, supra*, 46 Cal.4th at p. 885, citing § 1140 and *People v. Breaux* (1991) 1 Cal.4th 281, 319.) The record amply supports the trial court's decision considering the jury initially declared itself deadlocked after only two days of deliberations and three votes, each reflecting a different numerical split. Seven of the 12 jurors ultimately indicated that a verdict was possible in responding to the court's inquiry. (27RT 3073-3075.) Thus, the trial court did not abuse its discretion in asking jurors to continue deliberations. (*People v. Howard, supra*, 42 Cal.4th at p. 1030.)

The court "steered well clear of pressuring the jurors into reaching a verdict, telling them" (*People v. Butler, supra*, 46 Cal.4th at p. 885): "Nothing that I say in asking any questions of you should be interpreted in any way that I am looking for a certain decision from you or favoring a certain decision from you. I am -- I think if there's one thing we've learned from the beginning of this trial, that what I've tried to do is be entirely fair to both sides, be entirely neutral, be entirely objective. So nothing that I

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[29] Appellant cites *Brasfield v. United States* (1926) 272 U.S. 448, 450 [47 S.Ct. 135, 71 L.Ed. 345] and *Lowenfield v. Phelps* (1988) 484 U.S. 231, 237-239 [108 S.Ct. 546, 98 L.Ed.2d 568] in support of his claim that the trial court's inquiry into the numerical division of the jury constituted coercion. (AOB 303-305.) This Court has repeatedly rejected this contention even "in recognition of the fact that the federal procedural rule is otherwise." (*People v. Howard, supra*, 42 Cal.4th at pp. 1030-1030.)

say now should be viewed as being different from that approach that I have taken throughout. Okay?" (27RT 3068.) "The jurors could not have construed this comment as a request for a verdict, because the court was simply asking each of them in open court for his or her view or the mere possibility of a verdict if deliberations were to resume." (*People v. Butler*, *supra*, 46 Cal.4th at p. 885; see also *People v. Russell* (2010) 50 Cal.4th 1228, 1252; *People v. Haskett* (1990) 52 Cal.3d 210, 241 ["The judge did not abuse her discretion when, learning of the impasse, she inquired whether there was anything she could do 'to assist the jury in arriving at any kind of verdict.'"].)

Second, the trial court did not, as appellant asserts, "pressure[ ] the jury by commenting that 'Each and everyone one of us in this courtroom has a lot invested in the case in terms of our time, our energy, and if we can reach a decision, I'd like to.'" (AOB 303; 27RT 3075.) The court immediately followed the above-quoted comment by stating, "And by my saying that, I'm not suggesting that you should reach any decision one way or the other. I'm just generally inquiring." (27RT 3075.) The court's challenged comment plainly was not an attempt to coerce the jury. (See *People v. Butler, supra*, 46 Cal.4th at p. 884 [rejecting claim that court improperly referred to considerations of hardship suffered by the court itself, the attorneys, and the cities of Long Beach and San Pedro, as well as the court's comment that the cities, the parties, and the witnesses "deserved better"]; *People v. Price, supra*, 1 Cal.4th at p. 467 [trial court's remarks to jury "properly stressed that it was not attempting to coerce the jury in any way and that if the weekend respite did not provide a fresh perspective, the jury should feel free to again report an impasse"]; *People v. Keenan* (1988) 46 Cal.3d 478, 534 [court dispelled any inference it expected a prompt penalty verdict where it "neither insisted that a deadlock be resolved, nor urged minority jurors to give special attention to majority views, nor

suggested that failure to reach a decision would have any specific consequences"].)

From the record, it appears the jury deliberated for approximately 40 minutes on the first day of penalty phase deliberations on January 19, 2001 (27RT 3042-3043; 16CT 3910), and approximately three hours on the second day on January 20, 2001, before the foreperson informed the bailiff that the jury was hung at nine, four, and one (27RT 3048; 16CT 3912). The court did not abuse its discretion in declining to declare a mistrial after the jury indicated it was unable to reach a verdict after only a short period of deliberation. (*People v. Breaux, supra*, 1 Cal.4th at pp. 317-320; *People v. Sandoval* (1992) 4 Cal.4th 155, 196.) This Court has upheld trial courts' denials of mistrials "even after fruitless deliberations for longer periods." (See *People v. Bell* (2007) 40 Cal.4th 582, 617, and cases cited therein.)

Third, appellant's claim that "[t]he pressure exerted by the trial court was the only possible explanation for the jury reaching a verdict following its firm statements in court that it was deadlocked" (AOB 305) is nothing more than sheer speculation. (See *People v. Johnson* (1992) 3 Cal.4th 1183, 1254-1255; *People v. Alexander* (2010) 49 Cal.4th 846, 932.) After announcing the deadlock on the second day of deliberations (June 20, 2001), the jury continued to deliberate the following day and submitted two request forms. (16CT 3928-3929, 3936.) The jury was instructed with CALJIC No. 8.88 in response to the foreperson's request for "[a] deeper explanation of] factors in mitigation and aggravation] A through K of . . . [the] jury instructions." (28RT 3091-3092, 3097-3100.)

The jury resumed deliberations after a lunch break for approximately one and one-half hours before reaching its verdict at 3:05 p.m. (16CT 3936.) "The jury's continued deliberations indicate that the penalty determination was the product of its own reasoning processes, not judicial coercion." (*People v. Johnson, supra*, 3 Cal.4th at p. 1255; see also *People*

v. Alexander, supra, 49 Cal.4th at p. 932 ["Contrary to defendant's arguments, the fact that the jury reached a unanimous verdict fairly soon (in terms of court time) after receiving the court's supplemental instruction does not necessarily reflect that the court's instructions had some improper influence on the verdict"].)

Finally, appellant's reliance on a federal decision, *Jiminez v. Myers* (9th Cir. 1993) 40 F.3d 976 ("*Jiminez*") (AOB 306-308), is misplaced. This Court is not bound by decisions of the lower federal courts, even on federal questions. (*People v. Crittenden* (1994) 9 Cal.4th 83, 120, fn.3.) In any event, Jiminez is factually distinguishable. The appellate decision in *People v. Whaley* (2007) 152 Cal.App.4th 968, 984, accurately set forth the facts in *Jiminez* as follows:

> After nearly five hours of deliberations, the *Jiminez* jury sent the court a note stating that it was unable to reach a verdict. The court inquired as to the number of votes taken and the results of the most recent vote. The foreperson responded that five or six votes had been taken and the most recent vote had a numerical division of nine to three. The judge then inquired as to whether there had been movement, and the foreperson said there had been movement in one direction. After a three-day weekend, the jury returned to its deliberations. Three hours later, the jury sent a note advising the court that it was at an impasse. Both counsel agreed that the jury was hung and the case should be set for retrial. However, the court inquired of the jury as to the numerical division and, upon learning that it was eleven to one, instructed the jurors to continue deliberating for the rest of the day. (*Jiminez, supra*, 40 F.3d at pp. 978-979.)
>
> The federal appellate court in *Jiminez* determined that the trial court had given a "de facto *Allen* charge," explaining that "[i]n view of the disclosure after the second impasse that only one juror remained in the minority and the trial court's implicit approval of the 'movement' toward unanimity, the court's instruction to continue deliberating until the end of the day sent a clear message that the jurors in the majority were to hold their position and persuade the single hold-out juror to join in a unanimous verdict, and the hold-out juror was to cooperate in

the movement toward unanimity." (Jiminez, supra, 40 F.3d at p. 981.)

(*People v. Whaley, supra*, 152 Cal.App.4th at p. 984.)

In the present case, there was no single hold-out juror as in Jiminez. The trial court's order for continued deliberations also "did not implicitly approve a movement towards unanimity or otherwise send a message that the holdout juror[s] w[ere] to cooperate with the majority." (*People v. Whaley, supra*, 152 Cal.App.4th at p. 984.) Rather, as discussed above, the trial court asked the jury to continue deliberations and emphasized that "nothing [it said] in asking any questions of [the jury] should be interpreted in any way that [it was] looking for a certain decision from [the jury] or favoring a certain decision" (27RT 3068) and that it was "not suggesting that [it] should reach any decision one way or the other" (27RT 3075). Thus, *Jiminez* is inapposite and does not support appellant's claim.

Accordingly, the trial court did not coerce the jury's penalty verdict and it did not abuse its discretion, under section 1140, in determining the reasonable probability of reaching a verdict.

XX. THE CHALLENGE TO THE TRIAL COURT'S INQUIRY ON THE NUMERICAL DIVISION OF THE JURY IS FORFEITED, AND IN ANY EVENT, IT WAS NOT ERROR

Appellant acknowledges that this Court has approved of ascertaining the numerical breakdown of a deadlocked jury in *People v. Carter* (1968) 68 Cal.2d 810 (*Carter*), and that he failed to object to the trial court's inquiry in this regard. However, he contends that any objection would have been futile given this Court's decision in *Carter* and that the Court "should alter its holding in *People v. Carter* and rule that the trial court's inquiry into the numerical breakdown of the jury's deliberations is inherently prejudicial." (AOB 314-322.)

This claim is forfeited. (See *People v. Lewis* (2006) 39 Cal.4th 970, 1038 [failure to object to the trial court's comments forfeited defendant's state law claim that it interfered with the jury's deliberations and coerced a verdict and also forfeited related constitutional claims]; *People v. Anderson* (1990) 52 Cal.3d 453, 469 [failure to object to trial court's allegedly coercive remarks waived any claim of error based thereon].) Although appellant contends that he was excused from objecting to the trial court's inquiry, no such futility is shown on the facts of this case. When informed of the deadlock on the second day of deliberations, trial court solicited suggestions from both parties. Defense counsel agreed with the prosecutor's recommendation for a general inquiry regarding the deadlock of the jury. (27RT 3051.) Counsel also did not object to further inquiry regarding the two prior ballots cast by the jury as well as asking the foreperson clarifying questions regarding the most recent ballot. (27RT 3058-3059.) Although, counsel did object to the trial court's proposed order for deliberations to continue on the second day of deliberations (27RT 3062-3063) and moved for mistrial on the third day of deliberations (28RT 3084-3086, 3112), on this record, appellant cannot reasonably assume that it would have been futile to object to the trial court's inquiry on the numerical division.

Accordingly, an objection would not have been futile, and if appellant had an objection to the trial court's inquiry on the numerical division of the jury, he was required to make it below. Because he did not, the claim is forfeited. (See *People v. DePriest* (2007) 42 Cal.4th 1, 56 ["The court's solicitation of questions and complaints before denying the motion undermines the defendant's suggestion that an objection would have been futile, and would not have prevented any of the errors cited on appeal"]; *People v. Roberts* (1992) 2 Cal.4th 271, 336 [rejecting contention that objection would have been futile because at the time of trial there was no

case law forbidding challenged comment in closing argument as "prudence would have dictated an objection whether any law immediately came to mind or not"].)

In any event, the trial court's inquiry of the numerical division of the jury was proper. This Court has repeatedly rejected challenges to this procedure even "in recognition of the fact that the federal procedural rule is otherwise." (*People v. Howard, supra*, 42 Cal.4th at pp. 1030-1030.) The arguments set forth by appellant are not new, nor are the concerns he raises unique or necessarily implicated by reference to the specific facts or particular circumstances of this case. Appellant has offered no legal or factual basis that would dictate that *Carter* does not resolve this claim against him, nor has he set forth facts or an argument which would dictate or suggest the issue should be revisited and reconsidered.

This claim is forfeited, and in any event, inquiry on the numerical division of the jury was not error. Accordingly, appellant's challenge must be rejected.

XXI. APPELLANT WAS NOT PREJUDICED BY THE JURY'S REQUEST TO "HEAR FROM [HIM]"

Appellant contends the judgment of death must be reversed because the jury considered his failure to testify in violation of his right to silence under the state and federal constitutions. (AOB 323-335.) Respondent disagrees.

A. Relevant Facts

Appellant waived his right to testify at the guilt phase trial. (22RT 2483-2484.) In the guilt phase trial, the jury was instructed with CALJIC No. 2.60 as follows:

> A defendant in a criminal trial has a constitutional right not to be compelled to testify. You must not draw any inference from the fact that a defendant does not testify. Further, you must neither

discuss this matter nor permit it to enter into your deliberations in any way.

(16CT 3828; 23RT 2513-2514.)

Appellant waived his right to testify at the penalty phase trial. (26RT 2909-2910.) During the conference on the penalty phase jury instructions, defense counsel objected to the trial court's proposal of repeating the guilt phase instructions that applied during the penalty phase. (26RT 2922-2924; 27RT 2945-2946.) Counsel believed that repeating the applicable guilt phase instructions during the penalty phase would be error and stated that doing so "could create very serious error to regive any of the instructions that have already been given," and "strongly urge[d] the court not to do [it]." (27RT 2945-2946.)

The trial court indicated that it would not repeat the count-specific instructions. (27RT 2946.) However, the court was concerned about the "basic instructions" given at the guilt phase and its duty to identify and incorporate them by reference at the penalty phase. (27RT 2946.)

Counsel further argued that tactically, the requested defense instructions, modified by the court, "would tend to be lost if the jury is reread other instructions, and tactically that would not be good for the defense. So that's one reason." Counsel specifically cited the instruction regarding a non-testifying defendant, arguing "to reinstruct the jury that -- about the defendant not testifying, I think that would be very prejudicial. I don't want any more mention made of the defendant not testifying. [The jury has] already been instructed that the defendant doesn't have to take the stand." Thus, counsel objected to any request to give CALJIC Nos. 2.60 and 2.61.[30] Counsel reasoned, "all the previous instructions are couched in

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[30] The jury was instructed with CALJIC No. 2.61 at the guilt phase trial as follows:

(continued...)

terms of guilt or innocence of the charges. This would be very confusing for the jury," and then repeated his earlier arguments to omit CALJIC No. 2.60 in the penalty phase. (27RT 2947-2949.)

In response to the court's inquiry, counsel also objected to having the original set of jury instructions available to the jury in the jury room during the penalty phase deliberations. Counsel reiterated the tactical reason for the objection: "the punishment phase instructions -- would get lost, would get buried in the pile," and requested that the applicable guilt phase instructions not be sent into the jury room. (27RT 2949.)

The court took a recess to consult with another trial judge and to consider counsel's request and objections. (27RT 2950.) After the recess, the court made a compromise ruling and stated that it would not reread the prior guilt phase instructions. However, the court intended "to advise the jury that they may consider such of those instructions as they deem appropriate, they should not consider those instructions that they deem inapplicable to this phase of the trial" and would give a copy of those instructions for the jury's review, if necessary, during deliberations. (27RT 2950-2951.) The trial court overruled counsel's objection to the ruling. (27RT 2951.)

The court instructed the jury, as relevant here, at the close of the penalty phase trial:

(...continued)

> In deciding whether or not to testify, the defendant may choose to rely on the state of the evidence and upon the failure, if any, of the People to prove beyond a reasonable doubt every essential element of the charge against him. No lack of testimony on defendant's part will make up for a failure of proof by the People so as to support a finding against him on any such essential element.

(16CT 3829; 23RT 2514.)

> Ladies and gentlemen, in the early guilt or innocence phase of the trial, I instructed you on the law applicable to that phase of the trial. You should consider those prior instructions on the law to the extent that you view them as properly applying to any of the issues present in this penalty phase of the trial.
>
> However, you should not consider any of the prior instructions on the law which you find to be inapplicable to the questions and issues now before you in this penalty phase.

(27RT 3032-3033.)

The facts related to the jury's written request "to hear from [appellant]" (16CT 3929) during the penalty phase deliberations were discussed in part XIX. A., *ante*. Counsel moved for a mistrial on the basis of the jury's request, arguing the jury was not following the trial court's earlier instructions that appellant had a right not to testify, and not to discuss his failure to testify during deliberations. (28RT 3084-3085.)

The prosecutor responded that on the day before the jury submitted its request, "the court properly cast a very broad net yesterday, asking them is there anything at all that they might benefit from, and I think them coming back with saying this might be of benefit to us does not show that they're engaging in any kind of misconduct at all, but -- based on the note itself." (28RT 3086.)

Counsel countered that the jury's request was not a proper response to the court's offer to assist the jury as the request disregarded the court's instructions. (28RT 3086.)

The trial court denied the motion for mistrial and proposed to tell the jury why appellant would not be talking to them: "He has a right not to talk to them and he's exercised that right and they're not to consider it for any reason or purpose whatsoever, period." (28RT 3086.)

Defense counsel requested that the court simply tell the jury that its request to hear appellant testify was "denied" without further explanation. The court granted counsel's request. (28RT 3087-3089.) In the presence of

the jury, the court reread the jury's request form and stated, "That request is denied" in conformance with counsel's request. (28RT 3090.)

After the death verdicts were announced, counsel declined to make a motion for new trial. (29RT 3122.) Subsequently, during the hearing on the defense motion to modify the death verdict, counsel argued, as relevant here, "the jury didn't follow the court's instruction which repeatedly was given to them, that [appellant] did not have to take the stand. They were deadlocked, and they inappropriately asked -- I forget the exact wording of the question[.]" (29RT 3139.) The court reminded counsel that the jury had "said they'd like to hear from [appellant]." Counsel argued that the jury's request "was basically asking him to take the stand." (29RT 3139.)

As relevant here, the court stated the following in denying the motion to modify the death verdict:

> In response to my inquiry of the jury if there was anything else we could do to assist them when they were reporting being deadlocked in the penalty phase, one of the issues that I raised with them was the possibility of opening the matter for argument. I invited them to let me know what it was that they thought might help them.
>
> One of the things they said was "we'd like to hear from the defendant." And I told the jury at that time that that was a request that would not be considered and that it was inappropriate and that we would move forward.
>
> Obviously, I did not go into any great length to explain to them that the defendant has a right not to testify and he chose to exercise that right, which is perfectly proper, and in exercising that right it cannot be held against him. But I can guarantee you that what the jury wanted to know was what was the defendant's motivation when he set that car on fire. Was he finishing the job? Was she in the back seat moaning and groaning even though in a semiconscious state, or did he think she was dead and he was just destroying the evidence?
>
> I think the answer to that question could very clearly have changed the jury's thinking about this case. And, indeed, I've thought long and hard about it. I can't make up an answer to

that question. I cannot speculate or conjecture. That evidence is not before this court to be reweighed. It was not before the jury to be considered. . . .

(29RT 3149-3150.)

B. The Jury's Request To "Hear From [Appellant]" Did Not Constitute Prejudicial Misconduct

As this Court explained in *People v. Leonard* (2007) 40 Cal.4th 1370:

> The Fifth Amendment to the federal Constitution provides that no person "shall be compelled in any criminal case to be a witness against himself." A defendant may invoke this right at the penalty phase of a capital case, even though the risk of self-incrimination is diminished because the defendant has already been convicted. [Citations.] The right not to testify would be vitiated if the jury could draw adverse inferences from a defendant's failure to testify. Thus, the Fifth Amendment entitles a criminal defendant, upon request, to an instruction that will "minimize the danger that the jury will give evidentiary weight to a defendant's failure to testify." [Citation.]

(*People v. Leonard, supra*, 40 Cal.4th at pp. 1424-1425.)

Generally, violating an instruction not to discuss defendant's failure to testify constitutes jury misconduct. (See *People v. Loker*, *supra*, 44 Cal.4th at p. 749; *People v. Leonard, supra*, 40 Cal.4th at p. 1425.) "'This misconduct gives rise to a presumption of prejudice, which "may be rebutted . . . by a reviewing court's determination, upon examining the entire record, that there is no substantial likelihood that the complaining party suffered actual harm." [Citations.]'" (*People v. Loker, supra*, 44 Cal.4th at p. 749, quoting *People v. Leonard, supra*, 40 Cal.4th at p. 1425.) "'Whether prejudice arose from juror misconduct . . . is a mixed question of law and fact subject to an appellate court's independent determination.'" (*People v. Danks* (2004) 32 Cal.4th 269, 303.)

"'Transitory comments of wonderment and curiosity' about a defendant's failure to testify, although technically misconduct, 'are

normally innocuous, particularly when a comment stands alone without any further discussion.'" (*People v. Avila* (2009) 46 Cal.4th 680, 727, quoting *People v. Hord* (1993) 15 Cal.App.4th 711, 727-728.)

In *People v. Leonard*, this Court found no prejudicial misconduct where the jurors "merely expressed regret that defendant had not testified, because such testimony might have assisted the jurors in understanding him better." (*People v. Leonard, supra*, 40 Cal.4th at p. 1425.) According to the Court, such statements are "'not the same as punishing the Defendant for not testifying [or] drawing negative inferences from the absence of testimony.'" (*Ibid.*)

Similarly, in *People v. Loker*, this Court upheld the trial court's finding that the defendant was not prejudiced by juror misconduct based on mentioning his failure to testify during penalty deliberations "because the discussions were brief, the foreperson admonished the jury, and thereafter the subject was dropped." (*People v. Loker, supra*, 44 Cal.4th at p. 749.) Citing its decision in *People v. Leonard*, the Court concluded, "It is natural for jurors to wonder about a defendant's absence from the witness stand." (*People v. Loker, supra*, 44 Cal.4th at p. 749.) "'[T]he purpose of the rule prohibiting jury discussion of a defendant's failure to testify is to prevent the jury from drawing adverse inferences against the defendant, in violation of the constitutional right not to incriminate oneself.'" (*Ibid.*) The Court reasoned that "the purpose of the rule against commenting on defendant's failure to testify was served, and the presumption of prejudice [was] rebutted" even if the jury's comments gave rise to adverse inferences, because the foreperson admonished the jury. (*Ibid.*)

Here, appellant merely speculates that "[t]he jury must have drawn an adverse inference when it was told its request to hear from appellant was denied." (AOB 333.) However, "'merely referencing that they wish he would have testified is not the same as punishing [appellant] for not

testifying.'" (*People v. Leonard, supra*, 40 Cal.4th at p. 1425.) As the trial court pointed out, the jury's request "to hear from [appellant]" was in response to the court's earlier inquiry "if there was anything else we could do to assist them when they were reporting being deadlocked in the penalty phase," and the court's invitation "to let me know what it was that they thought might help them." (29RT 3149.) Thus, the jury's request did not draw "'negative inferences from the absence of testimony'" (*People v. Leonard, supra*, 40 Cal.4th at p. 1425), but was only an unsurprising answer to the court's broad question of what would be helpful in reaching a verdict. Accordingly, there is no substantial likelihood that appellant was prejudiced by the jury's request "to hear from [him]."

Moreover, although the trial court initially indicated that it would admonish the jury, "[Appellant] has a right not to talk to them and he's exercised that right and they're not to consider it for any reason or purpose whatsoever, period" (28RT 3086), the court did not do so at defense counsel's express request and instead told the jury its request was "denied" without further explanation. (28RT 3087-3090.) Appellant has invited any error in the court's failure to instruct and admonish the jury (see *People v. Hughes*, *supra*, 27 Cal.4th at pp. 345-346), and also has forfeited any claim that the trial court erred by failing to take any further action, or conduct an inquiry into possible misconduct. (See *People v. Boyette*, *supra*, 29 Cal.4th at p. 430 [defendant forfeited claim by failing to object to court's proposal not to respond to juror's note]; *People v. Avila, supra*, 46 Cal.4th at p. 728 [finding defendant forfeited any claim court's questioning of jurors was inadequate]; *People v. Russell, supra*, 50 Cal.4th at p. 1250 [claim that court's questions to juror constituted reversible error because they were improper, intrusive, and coercive was forfeited].)

Accordingly, appellant's claim must be rejected.

XXII. THE TRIAL COURT'S RESPONSE TO THE JURY'S QUESTION REGARDING A SINGLE MITIGATING FACTOR WAS PROPER

Appellant contends the judgment of death should be reversed because the trial court, in determining how to respond to a question from the jury asking for further explanation of aggravating and mitigating factors, and if a single mitigating factor was enough to return a life sentence, refused to give his requested instruction that a single factor in mitigation was sufficient to impose a sentence of life without the possibility of parole, in violation of his state and federal constitutional rights. (AOB 336-353.) Respondent disagrees.

A. Relevant Facts

The relevant facts are fully set forth in part XIX. A.2, *ante*. To summarize, the foreperson asked the court for "[a] deeper explanation of [factors in mitigation and aggravation] A through K of . . . our jury instructions." The foreperson clarified his request as "if you find one item in mitigation, is that enough for life in prison, if you find just one, or do you need several for each, or is it a scale? How does that operate?" (28RT 3091-3092.)

Outside the presence of the jury, defense counsel requested that the court answer the foreperson's question by stating, "Yes," because one factor was enough to support a finding of life without the possibility of parole. (28RT 3094-3095.) The court declined to give counsel's proposed response because a relevant portion of CALJIC No. 8.88 directly answered the foreperson's question. (28RT 3093-3094, 3096-3097.)

After the court reread a portion of CALJIC No. 8.88 to the jury (28RT 3098-3100),[31] counsel subsequently requested the court to tell the jury the following: "In addition to the instructions I read before lunch, specifically in response to your question, one mitigating circumstance may be sufficient to support a decision that death is not appropriate punishment in this case." (16CT 3930.) After a protracted discussion with the parties, the court denied counsel's request because CALJIC No. 8.88 adequately and properly reflected the current state of the law. (28RT 3102-3111.)

B. The Trial Court's Response Was Proper

Raising only contentions that he failed to raise below, appellant contends that CALJIC No. 8.88 failed to communicate that the jury could impose a life sentence based on one mitigating factor. (AOB 341-344.) At trial, appellant made only a general objection to the trial court's re-reading of CALJIC No. 8.88, but on appeal raises several contentions regarding CALJIC 8.88 that he failed to raise below. This Court has repeatedly rejected similar contentions.

First, he claims that the language in CALJIC No. 8.88, "[t]he weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale, or the arbitrary assignment of weight to any of them. You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider," "did not tell the jury that a single factor in mitigation was sufficient to impose a life sentence." (AOB 341.)

Second, he claims the language, "You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the

[31] Appellant erroneously claims that the trial court did not re-read CALJIC 8.88. (AOB 337.)

various factors you are permitted to consider," "suggested that mitigating factors could be ignored" and "allowed the jury to assign no weight to a mitigating factor." (AOB 341.)

Third, he claims the language, "To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life," "did not include any language stating that: (1) life was mandatory if mitigating circumstances outweighed aggravating circumstances, and; (2) death did not have to be imposed even if aggravating circumstances outweighed mitigating circumstances. [Citation.]" (AOB 341-342.)

Section 1138 provides that when, after it has begun deliberating, the jury "desire[s] to be informed on any point of law arising in the case, . . . the information required must be given. . . ." "The court has an obligation to rectify any confusion expressed by the jury regarding instructions, but has discretion to determine what additional explanations are sufficient to satisfy the jury's request for information. [Citations.]" (*People v. Smithey*, *supra*, 20 Cal.4th at p. 1009.) "This does not mean the court must always elaborate on the standard instructions. Where the original instructions are themselves full and complete, the court has discretion under section 1138 to determine what additional explanations are sufficient to satisfy the jury's request for information." (*People v. Beardslee*, *supra*, 53 Cal.3d at p. 97; accord *People v. Tate* (2010) 49 Cal.4th 635, 707; *People v. Dykes* (2009) 46 Cal.4th 731, 802.) "Indeed, comments diverging from the standard are often risky." (*People v. Beardslee, supra*, 53 Cal.3d at p. 97.)

Here, in response to the jury's request, which included not just the query about a single mitigating factor but also asked for "[a] deeper explanation of [factors in mitigation and aggravation] A through K of . . . our jury instructions" (28RT 3091-3092), the trial court re-read a portion of

CALJIC No. 8.88, which informed the jury that it was not merely to balance the number of aggravating circumstances against the number of mitigating circumstances, and advised that jurors were free to assign whatever weight they deemed appropriate as to any factor (28RT 3098-3100). The trial court's response was proper. This was "an evenhanded framed instruction that addressed [appellant's] concern." (*People v. Redd* (2010) 48 Cal.4th 691, 754-755 [finding CALJIC No. 8.88 was evenhandedly framed instruction that addressed defendant's concern in his similar proposed instruction]; see also *People v. Davis*, *supra*, 46 Cal.4th at pp. 621-622 [court properly rejected as duplicative similar proposed instruction as jury already had been instructed to consider sympathy for the defendant, to consider any fact as a mitigating circumstance, and to weigh mitigating circumstances against aggravating circumstances]; *People v. Burney*, *supra*, 47 Cal.4th at p. 265 [finding trial court properly rejected request for similar instruction where jury was instructed with CALJIC No. 8.88]; *People v. Lewis* (2009) 46 Cal.4th 1255, 1316 [rejecting claim that CALJIC No. 8.88 failed to convey that one mitigating factor may outweigh all aggravating factors and finding that standard jury instructions "'are adequate to inform the jurors of their sentencing responsibilities in compliance with federal and state constitutional standards'"]; *People v. Kelly* (2007) 42 Cal.4th 763, 799 [accord].)

Moreover, an instruction, such as the one proposed by defense counsel in this case, has been found to be properly rejected as argumentative and misleading. (See, e.g., *People v. Salcido* (2008) 44 Cal.4th 93, 162-163 [finding that similar proposed instruction "was misleading because it wrongly implied that at least one mitigating factor was needed to justify a sentence of life imprisonment without parole"]; *People v. Carter* (2003) 30 Cal.4th 1166, 1225; *People v. Seaton* (2001) 26 Cal.4th 598, 688-689.)

The reasoning of the foregoing authorities applies with equal force when a court is faced with answering a question like the one asked by the jury in this case. CALJIC 8.88 emphasizes it is not the number of sentencing factors, but the totality of all the circumstances that must be considered in determining the appropriate penalty. Accordingly, the trial court's response to the jury's question was proper and it did not abuse its discretion in rejecting appellant's proposed response. (*People v. Beardslee*, *supra*, 53 Cal.3d at p. 97.)

XXIII. THE TRIAL COURT PROPERLY DENIED THE MISTRIAL MOTIONS BASED ON ALLEGED JUROR MISCONDUCT AND PROPERLY REFUSED TO REMOVE JUROR NO. 5

Appellant contends the judgment must be reversed because the trial court erroneously denied a defense motion for mistrial based upon juror misconduct at both the guilt and penalty phases of the trial and erroneously failed to remove the juror who engaged in serious misconduct. Alternatively, he argues that the judgment of death must be reversed for the same reasons. (AOB 354-365.) Respondent disagrees.

A. Relevant Facts

At the close of the penalty phase evidence, and outside the presence of the jury, the prosecutor informed the court that as the jurors were leaving the courtroom, he observed Juror No. 5 with a non-fiction book titled, "The Gift of Fear."[32] The book dealt with the subject of stalking and in particular quoted the prosecutor several times. Defense counsel argued that Juror No. 5 committed misconduct. The court stated that it would pursue the matter when the jury returned the following Tuesday and noted, "By convening

[32] At the next court date on this matter, the prosecutor informed counsel that the book's author was Gavin De Becker. (27RT 2953.)

such a hearing, I am not finding that there is any misconduct. I'm simply going to inquire." (26RT 2918-2919.)

The following Tuesday, the court questioned Juror No. 5 in chambers and outside the presence of the other jurors. In response to the court's questioning, Juror No. 5 stated the following. She had been reading the book, "The Gift of Fear," the previous week. The subject matter of the book was "protection." She had not been reading the book before the trial began and as soon as she came across the prosecutor's name, she stopped reading the book. (27RT 2953-2954.)

In response to the court's question, "Is there anything about that book and what you read in it up until the point you stopped reading it that would have any impact on your service here as a juror," Juror No. 5 stated, "No." (27RT 2954.)

In response to the court's question, "Has it caused you in any fashion to favor one side over the other," Juror No. 5 stated, "Absolutely not." (27RT 2954.)

Juror No. 5 explained that she started to read the book during the trial because her chiropractor gave it to her. Juror No. 5's chiropractor had just read the book, thought "it was really great," and "someone else in her office had read it and they were talking about it, and so they loaned it to [Juror No. 5]." In response to the court's question, "Do you feel that you're just as fair, impartial, and objective about this case now as you were before you ever started reading that book," Juror No. 5 stated, "Yeah," and clarified that she had not gotten "very far" into the book. (27RT 2954.)

In response to the prosecutor's questions, Juror No. 5 stated that she had not spoken with any other jurors about the book or anything dealing with it and she believed that she had begun reading the book "last week." (27RT 2955.)

In response to defense counsel's questions, Juror No. 5 stated that she went to her chiropractor on a Friday, probably on June 8, about two weeks before the current inquiry. Juror No. 5 believed that "the other part of the trial was still going on when [she] got the book." Juror No. 5 stated that the subject of the book was "About listening to your intuition." When she found out it was about stalking, she stopped reading the book. She denied reading the book the day before the current inquiry. She stated that she stopped reading the book the week before the current inquiry and did not remember if the court was in trial when she did so. Juror No. 5 clarified that she did not begin immediately reading the book when she had received it; she began reading the book in the evening at home and brought it to court when she reached page 17 and had not gotten "very far." Juror No. 5 had not learned anything "new" from reading the book that she did not already know, so reading a small portion of the book had not affected how she felt about anything in this case. Juror No. 5 admitted that her chiropractor knew she was a juror sitting in this case because she had to schedule her pilates meetings around court dates, but denied that her chiropractor gave her the book for that reason. Juror No. 5 explained that her chiropractor gave her the book because "[the chiropractor] was very enthusiastic about reading it, and [Juror No. 5's] pilates instructor had read it as well, and [thought] that all women should read the book." (27RT 2955-2959.)

In response to further questioning from the prosecutor, Juror No. 5 stated that she had the book for a few days before she began reading it. She believed that she began reading it the week before the current inquiry. She had begun and stopped reading the book in the same 24-hour period and had only brought the book to court for one or two days, but had only read the book once during that time. (27RT 2959-2960.)

Juror No. 5 stated, in response to further questioning from defense counsel, that she the last time she had brought the book to court was the previous Thursday. She also might have brought it another day, but had not read it on that occasion. (27RT 2960-2961.)

Outside Juror No. 5's presence, the prosecutor argued that Juror No. 5 did not commit misconduct because she was not in possession of the book or she did not read it during the guilt phase trial, she only had the book for a day the previous week, she stopped reading the book once she discovered the subject matter of the book was stalking, and the book had no impact on her service as a juror in this case. (27RT 2962.)

Counsel made motions for mistrial of both the guilt and penalty phase trials based on Juror No. 5's responses. Alternatively, if the mistrial motions were denied, counsel requested the court to excuse the juror. (27RT 2962.)

The court denied both mistrial motions for the following reasons. Juror No. 5 did not seek out the book, but rather a professional friend or associate gave it to her. Juror No. 5 read the book briefly. She stopped reading the book once she came to the point where the prosecutor was quoted. Finally, Juror No. 5 indicated that the book would have and has had no effect on her ability to be fair, objective, and impartial as a juror. For the same reasons, the court denied the request to remove Juror No. 5 from the jury. (27RT 2962-2963.)

B. The Trial Court Properly Denied The Mistrial Motions And Denied The Request To Remove Juror No. 5

A motion for mistrial is directed to the sound discretion of the trial court. (*People v. Jenkins*, *supra*, 22 Cal.4th at pp. 985-986.) The trial court did not abuse its discretion in denying the motions in the present case. Juror No. 5 did not have possession of the book or had not read it during the guilt phase trial. In the penalty phase, Juror No. 5, when questioned,

gave no indication that her impartiality was impaired by reading a small portion of the book. She also had not discussed the book with any other juror. (27RT 2953-2960.) "The record demonstrates the absence of any incurable prejudice of the sort that would require the granting of a motion for mistrial. (See *Illinois v. Somerville* (1973) 410 U.S. 458, 461-462 [93 S.Ct. 1066, 35 L.Ed.2d 425 [noting trial court's broad discretion in ruling on mistrial motions].)" (*People v. Jenkins, supra*, 22 Cal.4th at p. 986; see also *People v. Maury* (2003) 30 Cal.4th 342, 434 [decisions on whether to investigate possible juror misconduct, to retain juror, and to deny motion for mistrial all rest within the broad discretion of the trial court, whose decisions must be upheld on appeal "if any substantial evidence exists" to support them].) Thus, the trial court did not abuse its discretion in denying the mistrial motions in this case.

C. Juror No. 5 Did Not Commit Misconduct

This Court set forth the following guidelines in resolving appellant's present claim:

> "'Misconduct by a juror . . . usually raises a rebuttal "presumption" of prejudice. . . .' [Citation.] However, 'the introduction of much of what might strictly be labeled "extraneous . . ." cannot be deemed misconduct. The jury system is an institution that is legally fundamental but also fundamentally human. Jurors bring to their deliberations knowledge and beliefs about general matters of law and fact that find their source in everyday life and experience. That they do so is one of the strengths of the jury system. It is also one of its weaknesses; it has the potential to undermine determinations that should be made exclusively on the evidence introduced by the parties and the instructions given by the court. Such a weakness, however, must be tolerated. "'[I]t is an impossible standard to require . . . [the jury] to be a laboratory, completely sterilized and freed from any external factors.'" [Citation.] "'The safeguards of juror impartiality . . . are not infallible; it is virtually impossible to shield jurors from every contact or

influence that might theoretically affect their vote.'" [Citation.]'" [Citation.]

(*People v. Loker, supra*, 44 Cal.4th at pp. 746-747.)

"'It is misconduct for a juror to consider material [citation] extraneous to the record. [Citations.] Such conduct creates a presumption of prejudice that may be rebutted by a showing that no prejudice actually occurred.' (*People v. Mincey* (1992) 2 Cal.4th 408, 467.)" (*People v. Williams* (2006) 40 Cal.4th 287, 333.)

Here, there was no misconduct because Juror No. 5 stated that she had not been reading the book before the trial began and as soon as she came across the prosecutor's name and realized the subject matter of the book, she stopped reading it. Juror No. 5 also said that what she read – only 17 pages – of the book did not affect her impartiality in this case. In addition, she did not discuss the book with any other juror. (27RT 2953-2955.) Therefore, there was no misconduct because the extraneous material, the book, was never considered by Juror No. 5 and did not affect her impartiality.

Even assuming misconduct occurred, it was not prejudicial. "'[W]hen misconduct involves the receipt of information from extraneous sources, the effect of such receipt is judged by a review of the entire record, and may be found to be nonprejudicial.' [Citation.]" (*People v. Williams*, *supra*, 40 Cal.4th at p. 333.) "The verdict will only be set aside if there appears to be a substantial likelihood of juror bias. Such bias can be inherent or circumstantial. As to inherent bias, [this Court] consider[s] whether the extraneous material, judged objectively, is inherently and substantially likely to have influenced the juror. [This Court] review[s] the trial record to determine the prejudicial effect of the extraneous information." (*People v. Loker, supra*, 44 Cal.4th at p. 747, internal citations and quotation marks omitted.)

"Even if the extraneous information was not so prejudicial, in and of itself, as to cause 'inherent' bias under the first test, the nature of the misconduct and the 'totality of the circumstances' surrounding the misconduct must still be examined to determine objectively whether a substantial likelihood of actual bias nonetheless arose." (*People v. Loker, supra*, 44 Cal.4th at p. 747.)

"Whether prejudice arose from juror misconduct is a mixed question of law and fact. [This Court] review[s] legal issues independently, and accept[s] the trial court's factual findings if they are supported by substantial evidence." (*People v. Loker, supra*, 44 Cal.4th at p. 747.)

Here, the trial court's finding is supported by substantial evidence. Juror No. 5 did not seek out the book; her chiropractor gave it to her. Juror No. 5 only read the book briefly. Once she came to the prosecutor's name in the book and learned that stalking was the subject matter of the book, she stopped reading it. Juror No. 5 indicated that the book would have no effect and has had no effect on her ability to be fair, objective and impartial. Accordingly, the trial court's finding "that there is nothing in all of these disclosures that should disqualify her from being a juror" is supported by substantial evidence. (27RT 2953-2963; see *People v. Williams, supra*, 40 Cal.4th at p. 334-336 [finding no prejudicial misconduct from juror who brought pages from the Book of Numbers into the jury room and passed them around to other jurors, stating that the passage had given her comfort].) For the same reasons, there is no substantial likelihood that actual bias arose.

Accordingly, there was no juror misconduct and even assuming otherwise, it was not prejudicial.

XXIV. THE TRIAL COURT HAD NO SUA SPONTE DUTY TO INSTRUCT ON THE ELEMENTS OF AGGRAVATING OTHER CRIMES EVIDENCE; THE VERSION OF CALJIC NO. 8.87 GIVEN IN THIS CASE DID NOT CONFUSE THE JURY

As relevant to section 190.3, factor (b), the prosecution presented evidence of appellant's prior acts of domestic violence against his former wife, Mary Christian. (25RT 2780-272818; 26RT 2821-2825.) Appellant contends the judgment of death must be reversed because the trial court, in violation of appellant's rights to due process and a fair trial, admitted this aggravating evidence without a sua sponte definition of the elements of the crimes appellant allegedly committed and without requiring the prosecutor to inform the jury what crimes appellant had committed. (AOB 366-381.) These claims lack merit.

A. The Trial Court Had No Sua Sponte Duty To Instruct On The Elements Of Aggravating Other Crimes

As appellant himself acknowledges, this Court has repeatedly found that a trial court has no sua sponte duty to instruct on the elements of aggravating other crimes. (AOB 366-367, fn. 3, citing *People v. Cook* (2006) 39 Cal.4th 566, 611.) Appellant presents no persuasive reason to depart from these precedents. (*People v. Carter, supra*, 30 Cal.4th at p. 1227; see also *People v. Taylor, supra*, 48 Cal.4th at p. 654; *People v. Ervine* (2009) 47 Cal.4th 745, 804; *People v. Howard, supra*, 42 Cal.4th at p. 1027.)

B. Appellant Has Forfeited His Challenge To CALJIC No. 8.87

The jury was instructed with CALJIC No. 8.87 as follows:

> Evidence has been introduced for the purpose of showing that the defendant has committed criminal acts or activity which involved the express or implied use of force or violence or the threat of force or violence. Before a juror may consider any

> criminal acts or activity as an aggravating circumstance in this case, a juror must first be satisfied beyond a reasonable doubt that the defendant did in fact commit the criminal acts or activity. A juror may not consider any evidence of any other criminal acts or activity as an aggravating circumstance.
>
> It is not necessary for all jurors to agree. If any juror is convinced beyond a reasonable doubt that the criminal activity occurred, that juror may consider that activity as a fact in aggravation. If a juror is not so convinced, that juror must not consider that evidence for any purpose.

(16CT 3920; 27RT 3037.)

Appellant contends that the failure to identify the specific "other crimes" in CALJIC No. 8.87 violated his rights. Appellant has forfeited this claim because he did not object to the instruction on this specific ground below. As appellant himself acknowledges, defense counsel made a general objection to CALJIC No. 8.87 in its entirety. In the alternative, counsel requested the court to delete the first sentence of the instruction and instead lead with the second sentence. (AOB 372, fn. 4, citing 26RT 2927-2928.) Appellant never raised the claim he now presents on appeal. Moreover, the instruction of the jury with CALJIC No. 8.87 did not affect appellant's substantial rights. Accordingly, he has forfeited his challenge to CALJIC No. 8.87 on the ground that the specific unadjudicated criminal acts were not identified in the instruction. (See *People v. Elam* (2001) 91 Cal.App.4th 298, 310.)

Even assuming the claim has been preserved for appellate purposes, it lacks merit. Neither the court nor the prosecutor had a duty to identify the specific aggravating crimes or criminal activity in this case because all of the acts involved appellant's conduct of domestic violence against Mary Christian. (See *People v. Thompson* (1984) 160 Cal.App.3d 220, 224-226 [spousal abuse is on-going course of conduct crime].) There was no other aggravating evidence admitted under section 190.3, factor (b), so the jury

would not have been confused over which "other crimes" the prosecution was relying on as aggravating circumstances. Thus, CALJIC No. 8.87 did not run afoul of this Court's decision in *People v. Robertson* (1982) 33 Cal.3d 21, 55, fn. 19, which states: "In order to avoid potential confusion over which "other crimes" -- if any -- the prosecution is relying on as aggravating circumstances in a given case, the prosecution should request an instruction enumerating the particular other crimes which the jury may consider as aggravating circumstances in determining penalty."

Accordingly, CALJIC No. 8.87, as given here, did not violate appellant's rights. (*People v. Haskett, supra*, 52 Cal.3d at p. 249 [instruction did not run afoul of *Robertson* where it related specifically to the attacks on two witnesses and the jury was told to consider those crimes only if they found beyond a reasonable doubt that defendant had committed them]; see also *People v. Taylor, supra*, 48 Cal.4th at p. 656 [finding that the failure to identify an actual crime did not undermine the reasonable doubt standard for considering an unadjudicated crime as an aggravating factor].)

Moreover, the prosecutor identified, during his opening statement, the specific criminal activity that would be presented during the penalty phase:

> Ms. Christian was exposed to acts of violence at the hands of [appellant], exposed to domestic violence, had a shotgun pointed at her stomach when she was pregnant, her face placed in scalding water, was a victim of violence at the hands of [appellant] during the course of their relationship.

(25RT 2734.) The prosecutor also outlined this other crimes evidence during his closing argument. (27RT 2970-2971.) The jury could not have been confused about which other crimes the prosecution was relying on as aggravating circumstances in this case. Accordingly, appellant's claim must be rejected.

XXV. THE TRIAL COURT PROPERLY MODIFIED APPELLANT'S PROPOSED PENALTY PHASE INSTRUCTIONS

Appellant contends the judgment of death must be reversed because the trial court refused to give a series of defense requested instructions regarding how the jury should determine whether to impose the death penalty in violation of his right to state and federal due process of law and in violation of the prohibition against cruel and unusual punishment in the federal and state constitutions.[33] (AOB 382-403.) Respondent disagrees. As set forth below, the trial court properly modified or refused the proposed defense instructions.[34]

A. Proposed Instruction On Victim Impact

The defense proposed instruction on victim impact provided as follows:

> Evidence has been introduced in this case that may arouse in you a natural sympathy for the victim or the victim's family.
>
> You must not allow such evidence to divert your attention from your proper role in deciding the appropriate punishment in this case. You may not impose the penalty of death as a result of an irrational, purely emotional response to this evidence.

(26RT 2929.)

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[33] On October 17, 2008, appellant filed a document entitled, "Motion to Augment the Record on Appeal" in this Court. Appellant supplemented the motion on February 18, 2009. On March 11, 2009, the Court granted the motion to augment the appellate record with copies of the following four penalty phase jury instructions that had been proposed by trial counsel, which were attached to appellant's motion: (1) "Victim impact," (2) "Mercy," (3) "Sympathy," and (4) "Lingering Doubt as to the Extent of Defendant's Guilt."

[34] Appellant does not challenge the modification of his proposed instruction defining life without the possibility of parole. (See 16CT 3925; 26RT 2939-2940.)

During the conference on penalty phase jury instructions, the court noted that this proposed instruction was based on *Payne v. Tennessee* (1991) 501 U.S. 808, 111 S.Ct. 2597, 2608, and *People v. Edwards* (1991) 54 Cal.3d 787, 836. (26RT 2929.)

The prosecutor pointed out that *People v. Edwards* specifically authorized victim impact evidence, and found that victim impact was a proper subject of the prosecutor's closing argument. The prosecutor objected to the proposed instruction's language, "You must not allow such evidence to divert your attention from your proper role," which seemed to indicate that the jury could not consider victim impact evidence for any purpose and suggested that the jury's proper role was not to consider such testimony. (26RT 2929-2930.)

The court agreed that the language highlighted by the prosecutor was improperly worded given that the jury's "proper role in deciding the punishment in this case involves considering victim impact evidence." As phrased, the court refused to give the proposed instruction on victim impact. (26RT 2930.)

The prosecutor added that he objected to the second paragraph of the proposed instruction in its entirety because it suggested that if the jury considered victim impact evidence, it would divert the jury from its proper role. (26RT 2931.)

The court indicated that it would give the proposed instruction if counsel deleted the first sentence of the second paragraph, which would leave the following language:

> Evidence has been introduced in this case that may arouse in you a natural sympathy for the victim or the victim's family. You may not impose the penalty of death as a result of an irrational, purely emotional response to this evidence.

(26RT 2931.)

The court granted counsel's request to give the proposed instruction as modified by the court. (26RT 2931-2932.) The court subsequently instructed the jury with this modified instruction. (16CT 3922; 27RT 3038.)

A trial court may "properly refuse an instruction offered by the defendant if it incorrectly states the law, is argumentative, duplicative, or potentially confusing [citation], or if it is not supported by substantial evidence." (*People v. Moon* (2005) 37 Cal.4th 1, 30.) On review, this Court reviews the legal correctness of an instruction. (*People v. Hamilton* (2009) 45 Cal.4th 863, 948.)

Here, the trial court's modification of the proposed instruction on victim impact was proper. This Court has repeatedly held that it is not error to refuse an instruction substantially identical to the instruction appellant offered below because the proffered instruction is misleading insofar as it suggested that the jury may not be moved by sympathy for the victims and their survivors, and that the standard instructions adequately convey to the jurors the proper consideration and use of victim impact evidence. (See *People v. Tate*, *supra*, 49 Cal.4th at p. 708 [trial court properly refused "a defense instruction that while evidence had been introduced to show the 'specific harm caused by the defendant's crimes,' such evidence was not to 'divert [the jury's] attention from [its] proper role of deciding whether defendant should live or die'"].) Accordingly, appellant's challenge to the trial court's modification of the proposed instruction on victim impact should be rejected.

Moreover, contrary to what appellant suggests (AOB 389-390), "the evidence here cannot be fairly characterized as inflammatory, as it did not divert the jury from the task at hand." (*People v. Brady*, *supra*, 50 Cal.4th at p. 577.) "The jury here heard traditional victim impact evidence: family members and friends extolled [the victim's] virtues and demonstrated they

missed [the victim]. Neither the type nor the amount of evidence warrants reversal." (*Ibid.*) Thus, appellant's contention must be rejected.

B. Proposed Instruction On Mercy

The proposed instruction on mercy read:

> After considering all the aggravating and mitigating factors that are applicable in this case, you may decide to impose the penalty of life in prison without the possibility of parole in exercising mercy on behalf of the defendant. [¶]
>
> You may decide not to impose the penalty of death by granting the defendant mercy regardless of whether or not you determine he deserves your sympathy.

(26RT 2932.)

The prosecutor noted that there was no specific provision in the standard CALJIC instructions regarding this proposed instruction. The court observed that the proposed instruction was "above and beyond CALJIC." The prosecutor was concerned that giving this instruction in conjunction with the modified version of the modified instruction on victim impact had the effect of instructing the jury on their task "with a little too much detail," but submitted the matter to the court's discretion. (26RT 2933.)

The court stated that because the proposed instruction on mercy "really says what the jury is able to do," in that it could "exercise mercy," the court "would not want them to not know that they could exercise that by failing to say it." (26RT 2933.)

The prosecutor objected to the second paragraph of the proposed instruction because it sounded "very dictatorial," but had no objection to the instruction if it consisted solely of the first sentence. The prosecutor concurred with the court that instruction correctly stated that the jury could exercise mercy. (26RT 2933.)

The court was inclined to give the proposed instruction on mercy if it were limited to its first sentence:

> After considering all the aggravating and mitigating factors that are applicable in this case, you may decide to impose the penalty of life in prison without the possibility of parole in exercising mercy on behalf of the defendant.

(26RT 2933.)

Counsel then made a request to instruct the jury with the instruction as modified by the court. The court granted the request because the second paragraph of the proposed instruction sounded dictatorial and the court did not wish to invade the province of the jury in that regard. (26RT 2934.) The court instructed the jury with the proposed instruction on mercy, as modified. (16CT 3924; 27RT 3038.) The jury was also told that it "may consider sympathy or pity for . . . the defendant . . . if you feel it appropriate to do so in determining to impose the penalty of life in prison without the possibility of parole, rather than the penalty of death." (27RT 3039; 16CT 3924.)

Appellant now contends that these instructions "were not an adequate substitute for the sentence excluded by the trial court" because the excluded sentence in the mercy instruction "specifically referred to not imposing the death penalty because of mercy even if the jury concluded appellant did not deserve their sympathy." (AOB 391.) The court's modification of the proposed instruction on mercy did not violate appellant's constitutional rights. Appellant has no basis to complain since the court gave a specific mercy instruction, and it was not required to give additional confusing language linking a lack of sympathy to a finding of mercy. At the very least, the language at issue was properly omitted because it was argumentative. (See *People v. Carter*, *supra*, 30 Cal.4th at pp. 1126-1127.)

The jury was instructed pursuant to CALJIC No. 8.85 (Penalty Trial - Factors for Consideration), which directs the jury to consider "any other

circumstance, which extenuates the gravity of the crime even though it is not a legal excuse for the crime, and any sympathetic or other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial." (16CT 3919; 27RT 3036.) As this Court has previously explained, "CALJIC No. 8.85 adequately instructs the jury concerning the circumstances that may be considered in mitigation, including sympathy and mercy." (*People v. Ervine*, *supra*, 47 Cal.4th at p. 801; see also *People v. Burney*, *supra*, 47 Cal.4th at p. 261 [same].)

Moreover, the jury was also told, consistent with another modified defense instruction, that it "may consider sympathy or pity for . . . the defendant . . . if you feel it appropriate to do so in determining to impose the penalty of life in prison without the possibility of parole, rather than the penalty of death." (27RT 3039; 16CT 3924.) Appellant complains that "[t]he jury was not instructed whether it should consider [sympathy and pity]" and that "[t]his instruction failed to convey clearly to the jury its ability to impose a life sentence based on mercy regardless of other factors." (AOB 392.) The sympathy instruction given at trial would not have misled the jury as appellant suggests. The sympathy instruction was duplicative of the given mercy instruction as well as the language in CALJIC No. 8.88 to consider "any fact" as a mitigating circumstance, and to weigh mitigating circumstances against aggravating circumstances. (16CT 3926-3927; 27RT 3039-3041; see *People v. Davis*, *supra*, 46 Cal.4th at p. 622 [trial court had no duty to instruct jury with portion of proposed instruction regarding mercy, sympathy, and/or sentiment]; *People v. Brasure* (2008) 42 Cal.4th 1037, 1070 [proposed instruction to consider "mercy, sympathy and/or sentiment" was duplicative of standard instruction given].)

Finally, in closing argument, defense counsel told the jury it could exercise mercy toward appellant. Counsel quoted CALJIC No. 8.85, factor (k) and outlined appellant's background, childhood, and character. (27RT 2981-2984.) Counsel further argued that "only one factor -- that you feel is a -- is an important consideration in not fixing the punishment of death is enough. Okay? That's enough." (27RT 2994.) Specifically, counsel argued that appellant's good character alone was "enough for you not to vote for death, then that's okay, and that would be factor k." (27RT 2994-2995.) In his final argument, counsel repeated this point stating, "Remember, one factor is sufficient to vote for life." (27RT 3032.)

Thus, because the trial court instructed the jury with CALJIC Nos. 8.85 and 8.88 and defense counsel argued, without objection, that the jury could consider appellant's background and character and sentence appellant to life without the possibility of parole, there is no reason to believe that the jury may have been misled about its obligation to take into account mercy in making its penalty determination. (*People v. Wallace* (2008) 44 Cal.4th 1032, 1089-1090.)

C. Proposed Instruction On Lingering Doubt

The proposed instruction on lingering doubt read:

> Add at end of CALJIC 8.85(a)
>
> Lingering Doubt as to Extent of Defendant's Guilt
>
> A juror who voted for conviction at the guilt phase may still have a lingering or residual doubt as to whether the defendant truly did not kill Lisa Kerr in the heat of passion. Such a lingering or residual doubt, although not sufficient to raise a reasonable doubt at the guilt phase, may still be considered as a mitigating factor at the penalty phase. Each individual juror may determine whether any lingering or residual doubt is a mitigating factor and may assign it whatever weight the juror feels is appropriate.

(See Aug. granted Oct. 17, 2008.)

The court had "a serious problem" with this proposed instruction. (26RT 2934.) The court reasoned as follows:

> This jury has, by unanimous action and by evidence that it considered convinced it [sic.] beyond a reasonable doubt, found the defendant guilty of first degree murder with special circumstances.
>
> Now you're asking me to say, well, to the extent there was any doubt in your mind beyond a reasonable doubt that's short of beyond any possible doubt, that lingering doubt in some manner can be used by you in your consideration of the punishment issue.
>
> I have real problems with that.

(26RT 2934.)

Counsel argued that "Cases have approved [the proposed instruction on lingering doubt], or not disapproved it." (26RT 2934.) The prosecutor countered that case law indicated that the instruction was optional and that it was not required sua sponte. The prosecutor shared the court's concern and stated that if the court was inclined to give a lingering doubt instruction, the prosecutor had "much less objection" to a prior version of the proposed instruction that was a short, three-line instruction. The prosecutor also specifically objected to specific mention of "heat of passion" in the current proposed instruction because multiple theories of murder had been presented to the jury. (26RT 2934-2935.)

Defense counsel stated that he would tell the jury, in closing argument, the substance of the proposed instruction. Counsel suggested that the court give the instruction as currently proposed, or that it alternatively give a modified version of it that addressed the prosecutor's concerns. (26RT 2935) The prosecutor reiterated that he objected to the proposed instruction in its entirety, but if the court was going to give a lingering doubt instruction, the prosecutor argued that reference to heat of passion be omitted. (26RT 2935.) Defense counsel then suggested

omitting the second sentence of the first paragraph to address the prosecutor's concern. (26RT 2935.)

The court noted that the prosecutor was requesting the prior version of the proposed instruction be given, which read as follows:

> It's appropriate for you to consider in mitigation any lingering doubt you may have concerning the defendant's guilt. Lingering or residual doubt is defined as that state of mind between beyond a reasonable doubt and beyond all possible doubt.

(26RT 2935-2936.)

The court stated that the first sentence of counsel's "lengthy instruction" and the last sentence would be acceptable to give to the jury but refused to give the rest of the proposed instruction. (26RT 2936.) The court also informed counsel he was free to argue the substance of the omitted sentences. (26RT 2936.)

The lingering doubt instruction as read to the jury provided as follows:

> It is appropriate for you to consider in mitigation any lingering doubt you may have concerning the defendant's guilt. Lingering or residual doubt is defined as that state of mind between beyond a reasonable doubt and beyond all possible doubt.

(27RT 3038-3039; 16CT 3923.)

"The United States Supreme Court has held that there is no federal constitutional right to a 'residual doubt' instruction at the sentencing phase of a capital case." (*People v. Hartsch* (2010) 49 Cal.4th 472, 511-512.) This Court has "repeatedly held that instruction on lingering doubt is not required by state law, and that the standard instructions on capital sentencing factors, together with counsel's closing argument, are sufficient to convey the lingering doubt concept to the jury." (*Id.* at 513; see also *People v. Hamilton, supra*, 45 Cal.4th at p. 948.) Appellant offers no basis

for reexamining the issue. (*People v. Watson* (2008) 43 Cal.4th 652, 697; *People v. Zamudio* (2008) 43 Cal.4th 327, 370.)

Appellant nonetheless argues that even though the court gave a lingering doubt instruction, it was an inadequate substitute for the proposed instruction because the given instruction "was too broad to direct the jury to the defense theory of lingering doubt" as it "precluded the jury from giving any meaningful consideration to whether appellant was guilty merely of manslaughter when it assessed the mitigating evidence." (AOB 395-396.) Appellant also contends that the trial court erred in not giving the lingering doubt instruction as requested because he was entitled to an instruction that pinpointed the defense theory of lingering doubt, i.e. that he killed in the heat of passion. (AOB 393-394.) These claims must be rejected.

The modified instruction given to the jury was not "too broad" as appellant suggests. Rather, the instruction "'adequately convey[ed] the concept of lingering doubt and its proper relevance to the penalty decision.'" (*People v. Harrison* (2005) 35 Cal.4th 208, 256; see also *People v. Seaton*, *supra*, 26 Cal.4th at p. 688 [deletion of two sentences from proposed lingering doubt instruction defining lingering doubt and telling the jury it could consider lingering doubt as to the truth of the special circumstance allegations as a mitigating factor was not error because "the sentences in question were largely redundant"].)

Moreover, there was no reasonable probability of jury confusion regarding the instruction in light of other standard instructions given to the jury. The concept of lingering doubt was also sufficiently encompassed in section 190.3, factors (a) and (k), as set forth in CALJIC No. 8.85, with which the jury was instructed. (*People v. Thompson*, *supra*, 49 Cal.4th at pp. 138-139; see *People v. Rogers*, *supra*, 46 Cal.4th at p. 1176 [refusal to give lingering doubt instruction was not required as the concept is sufficiently covered in CALJIC No. 8.85].)

Furthermore, appellant was not entitled to a pinpoint instruction that highlighted the guilt phase defense of heat of passion. "State law does not require instructions highlighting specific mitigating evidence." (*People v. Yeoman* (2003) 31 Cal.4th 93, 152.)[35] Insofar as appellant contends that his proposed instruction would have instructed the jury that lingering doubt caused by his heat of passion could be considered as mitigation, this claim is equally unavailing. As noted in *Yeoman*: "the trial court adequately set forth that principle by giving CALJIC No. 8.85. Apart from repeating factor (k), the [omitted language] merely argued the evidence." (*Ibid.*)

Similarly, federal law does not support appellant's claim that a pinpoint instruction was warranted. "[J]ury instructions violate the Eighth Amendment to the United States Constitution only if there is a reasonable likelihood the jury has understood them as barring consideration of constitutionally relevant evidence." (*People v. Yeoman, supra*, 31 Cal.4th at p. 152, citing *Buchanan v. Angelone* (1998) 522 U.S. 269, 276 [118 S.Ct. 757, 139 L.Ed.2d 702].) There is no likelihood this occurred here because the trial court instructed the jury with an expanded version of CALJIC No. 8.85 to consider "[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime, and any sympathetic or other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death, whether or not related to the events for which he is on trial." (16CT 3919; *People v. Yeoman, supra*, 31 Cal.4th at p. 152.)

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[35] Appellant's reliance on *People v. Gay* (2008) 42 Cal.4th 1195 (AOB 394-395) is misplaced. *Gay* held that exclusion of evidence, in the penalty retrial phase, that the defendant did not fire any of the shots that killed the victim was prejudicial where "lingering doubt" was the heart of the penalty phase defense and despite the jury's instruction with a lingering doubt instruction. (42 Cal.4th at pp. 1214-1217, 1223-1228.) Unlike *Gay*, there is no issue here regarding the exclusion of penalty phase evidence.

Here, the trial court permitted defense counsel to argue the substance of the omitted sentences of the proposed instruction -- that the jury may consider lingering or residual doubt as to whether he killed Kerr in the heat of passion as a factor in mitigation. (26RT 2936.)

Although counsel did not explicitly mention "lingering or residual doubt" in closing argument, he did articulate to the jury why he believed the jurors should consider appellant's mental or emotional state in determining their penalty verdict. In the context of the factor of whether appellant committed the offense while under the influence of extreme mental or emotional disturbance, counsel argued that guilt phase witnesses had testified that appellant was "going around like a crazy person" and had described him as "highly emotionally charged" when it came to Kerr. (27RT 3003-3004.) Counsel stated that appellant was "extremely emotionally disturbed" when he killed Kerr and urged the jury to consider that factor in mitigation. (27RT 3004-3005, 3029.) Counsel also noted, in the context of the factor of whether appellant committed the murder under circumstances in which he reasonably believed to be a moral justification for extenuation for his conduct, that the jury had rejected a manslaughter verdict and there was no *legal* justification for Kerr's death. However, counsel urged the jury to consider evidence that showed appellant reasonably believed, in his mind, that killing Kerr was *morally* justified given his belief that Kerr was leaving him and having a romantic relationship with Harvey. (27RT 3008-3011, 3029-3031.)

Plainly, defense counsel did in fact argue the evidence of heat of passion as warranting a life sentence rather than death, and the jury was thus aware of its mitigating character, whether considered as a factor relating to appellant's mental or emotional disturbance, moral justification, or general lingering doubt. (*People v. Lawley* (2002) 27 Cal.4th 102, 166.)

Accordingly, appellant's challenge to the modification of the proposed lingering doubt instruction must be rejected.

D. Proposed Instruction On Sympathy

The proposed instruction on sympathy read as follows:

> Although you were instructed during the guilt phase of this trial that you must set aside any sympathy or pity for the -- for a defendant in determining his guilt or innocence, this rule does not apply to the penalty phase of the trial.
>
> You may consider sympathy or pity for a defendant if you feel it appropriate to do so in determining to impose a penalty of life in prison without the possibility of parole.
>
> If any of the evidence arouses sympathy or compassion in you to such an extent as to persuade you that death is not the appropriate punishment, you may react in response to these feelings of sympathy and compassion and impose life in prison without the possibility of parole.

(26RT 2936-2937.)

The prosecutor objected to this instruction as duplicative to the mercy instruction. The prosecutor also noted that *People v. Daniels* (1991) 52 Cal.3d 815, cautioned against giving this instruction. (26RT 2937-2938; see also Aug. granted Oct. 17, 2008, "Sympathy" instruction and cited authorities.)

The court noted that *People v. Daniels* authorized the proposed sympathy instruction and stated that it would instruct the jury with a modified version of the instruction:

> Although you were instructed during the guilt phase of this trial that you must set aside any sympathy or pity for a defendant in determining his guilt or innocence, this rule does not apply to the penalty phase of the trial. You may consider sympathy or pity for . . . the defendant . . . if you feel it appropriate to do so in determining to impose the penalty of life in prison without the possibility of parole, rather than the penalty of death.

(26RT 2938-2939 [ellipses in the original].) The jury was so instructed at the conclusion of the penalty phase closing arguments. (27RT 3039; 16CT 3924.)

As set forth above, the proposed instruction on sympathy was largely duplicative of the defense instruction on mercy, which the trial court gave as previously discussed, and of the other standard instructions that were given at the penalty phase. (*People v. Smith* (2005) 35 Cal.4th 334, 371; *People v. Smith* (2003) 30 Cal.4th 581, 638.) Moreover, the omitted language was argumentative insofar as it stated that one mitigating circumstance could outweigh all the aggravating factors, without stating the reverse. Sympathy, mercy, and pity, are essentially synonymous in the context of deciding which sentence to impose. (See *People v. Ochoa* (1998) 19 Cal.4th 353, 459.)

Moreover, as previously mentioned above, defense counsel quoted CALJIC No. 8.85, factor (k) and outlined appellant's background, childhood, and character. (27RT 2981-2984.) Counsel further argued that "only one factor -- that you feel is a -- is an important consideration in not fixing the punishment of death is enough. Okay? That's enough." (27RT 2994.) Specifically, counsel argued that appellant's good character alone was "enough for you not to vote for death, then that's okay, and that would be factor k." (27RT 2994-2995.) Considering this argument by counsel and the other instructions given at the penalty phase, the sympathy instruction given in this case more than adequately informed the jury that it could consider sympathy alone in arriving at its penalty determination. (See *People v. Jackson* (1996) 13 Cal.4th 1164, 1244.)

XXVI. APPELLANT IS ESTOPPED FROM CHALLENGING THE TRIAL COURT'S PROCEDURE ON GUILT PHASE INSTRUCTIONS DURING THE PENALTY PHASE; TO THE EXTENT THE CLAIM IS NOT PROCEDURALLY BARRED, APPELLANT SUFFERED NO PREJUDICE

Appellant contends the death penalty should be reversed because the trial court instructed the jury that it could apply the guilt phase instructions that it deemed applicable in the penalty phase in violation of his rights to due process, a fair trial, and against imposition of cruel and unusual punishment under the state and federal constitutions. (AOB 404-414.) This claim is procedurally barred. Even assuming the claim has been preserved for appellate purposes, the jury instructions given did not prejudice appellant.

A. Relevant Facts

During the conference on penalty phase jury instructions, the trial court enumerated the jury instructions specific to the penalty phase and stated the following:

> In light of the use note requirements, we have to deal with the issue of instructions previously given during the guilt or innocence phase of the trial; what, if any, of those should be repeated.
>
> Now, I read the use note for this particular situation to require that I instruct again those instructions that would apply during the penalty phase of the trial which may have been given earlier.

(27RT 2945.)

Defense counsel objected to instructing the jury with the applicable guilt phase instructions stating the following:

> I believe that it would not only be error, but it could create very serious error to regive any of the instructions that have already been given.

> I strongly urge the court not to do this; in particular, allowing the jury to be instructed on the elements of murder or the elements of stalking or the elements of any of these crimes or the elements of special circumstances, or even giving those instructions to the jury and letting them take them in. . . .

(27RT 2945-2946.)

The court indicated that it would not re-give the instructions mentioned by counsel. The court clarified that it was concerned instead with its duty, as set forth in the CALJIC Use Note, to identify and incorporate by reference, if not to reread the "basic instructions." The court noted that "it's one of those rock-in-a-hard-place type situations" because on the one hand, counsel asserted it was error to give those instruction, and on the other hand, the court's failure to do so may constitute error. (27RT 2946.)

The prosecutor noted that in *People v. Babbitt* (1988) 45 Cal.3d 660, the case cited in the Use Note to CALJIC No. 8.84.1, the jury was told, pursuant to CALJIC No. 1.00, that it could not consider sympathy. In the present case, however, the trial court would be giving, pursuant to defense request, instructions on sympathy and mercy, so that the jury would be told twice that they could consider sympathy, thus alleviating the issue presented in *Babbitt*. The prosecutor had no objection to withdrawing the count-specific instructions. (27RT 2946-2947.)

Defense counsel made a further record of his objection to giving the basic instructions from the guilt phase as follows:

> Well, first of all, tactically, the court has agreed to give, I think, five special instructions requested by the defense, and although we did object to the court modifying them, we still are not unhappy with what the court is going to give the jury.
>
> Those instructions tactically would be -- would tend to be lost if the jury is reread other instructions, and tactically that would not be good for the defense. So that's one reason.

Another reason is -- I don't know if this is a reason, but to reinstruct the jury that -- about the defendant not testifying, I think that would be very prejudicial. I don't want any more mention made of the defendant not testifying. They've already been instructed that the defendant doesn't have to take the stand.

There's a request for [CALJIC Nos.] 2.60 and 2.61. We would object to that. I don't know the court's feeling on that, but a lot of these requests, they're all couched -- all the previous instructions are couched in terms of guilt or innocence of the charges. This would be very confusing for the jury.

But mainly I don't want the -- I want the jury -- in the light of the court's rulings on our request, I want the jury to hear those instructions.

I'm going to make a request, incidentally, that the court give these instructions at the end of the argument rather than before, but I'll get to that in a minute.

But I want the jury to hear those instructions uncluttered by rereading instructions they've already received that really don't apply to the penalty phase, because every instruction requested, even if it's silent -- all those instructions were drafted and designed to bear on the question of guilt or innocence of the charges.

(27RT 2947-2949.)

In response to the court's inquiry, defense counsel stated that the jury should not have the original set of jury instructions available to it in the jury room during penalty phase deliberations. Counsel reiterated that the penalty instructions that the defendant had requested "would get lost, would get buried in the pile" of instructions given during the guilt phase. Counsel requested that only the instructions specific to the penalty phase be sent into the jury room. Counsel concluded, "I've given tactical reasons. I've objected to giving the other instructions, and the D.A. is agreeing. I mean, I don't -- I can't imagine in my wildest dreams that some appellate court would --[.]" (27RT 2949.)

Regarding the appellate ramifications, the court stated,

> We all know that instructional error is the most frequently found of all error. Failure to instruct when I'm obliged to instruct or --
>
> I, quite frankly, just don't wish to have the opportunity to do this entire matter over again if I can avoid making anything -- taking any action that a reviewing court would later decide were inappropriate or was incorrect.

(27RT 2949.)

The court took a brief recess to consider and discuss the matter with a fellow judge. (27RT 2950.) The court concluded that it would not read the prior guilt phase instructions, but would simply advise the jury that they may consider the instructions as they deemed appropriate, and they should not consider those instructions that they deemed inapplicable to the penalty phase trial. The court also ordered that the written guilt phase instructions would, however, go into the jury room. (27RT 2950-2951.)

The court's ruling was acceptable to the prosecutor. The court overruled counsel's objection to having the written instructions in the jury room. (27RT 2951.)

The trial court subsequently instructed the jury as follows:

> Ladies and gentlemen, in the early guilt or innocence phase of the trial, I instructed you on the law applicable to that phase of the trial. You should consider those prior instructions on the law to the extent that you view them as properly applying to any of the issues present in this penalty phase of the trial.
>
> However, you should not consider any of the prior instructions on the law which you find to be inapplicable to the questions and issues now before you in this penalty phase.

(27RT 3032-3033.) The court then gave the standard penalty phase instructions (CALJIC Nos. 8.84, 8.84.1, 8.85, 8.87, and 8.88) and the modified defense instructions. (27RT 3033-3041.) In particular, CALJIC No. 8.84.1 provided in pertinent part, "You will now be instructed as to all the law that applies to the penalty phase of this trial. . . . You must accept

and follow the law that I shall state to you. Disregard all other instructions given to you in other phases of this trial." (16CT 3917; 27RT 3034.)

B. Appellant Is Estopped From Raising The Instant Claim

Appellant raises several claims related to the guilt phase instructions in the penalty phase. First, he contends the trial court erred by instructing the jury that it should apply the guilt phase instructions it deemed applicable and ignore the instructions it deemed inapplicable. (AOB 407-408.) Instead, appellant argues that the trial court should have instructed the jury which guilt phase instructions applied to the penalty phase. (AOB 408-409, 412-414.) He also asserts that the trial court's instructions were contradictory and prejudicial. (AOB 408, 411-414.) Finally, appellant contends that the invited error does not preclude review of the trial court's failure to instruct the jury regarding the guilt phase instructions that applied to the penalty phase. (AOB 409-410.)

Appellant is estopped from raising the instant claims on appeal because he invited any error by requesting that no guilt phase instructions be given to the jury, orally or in written form. (See *People v. Harris*, *supra*, 43 Cal.4th at p. 1319 [counsel invited error to claim the court should have reread applicable guilt phase instructions]; see also *People v. Ervine*, *supra*, 47 Cal.4th at p. 804 ["defendant forfeited any claim with respect to the failure to reinstruct in particular on the respective duties of the judge and jury and the concluding instructions "by failing to request such instructions at trial"].) A trial court's duty to instruct the jury correctly can be negated if counsel invited the error. (See *People v. Halvorsen*, *supra*, 42 Cal.4th at p. 416.)

Counsel specifically asked the trial court to refrain from reinstructing the jury with the applicable guilt phase instructions. Counsel explicitly stated that "tactically," he wanted the jury to hear the penalty phase

instructions "uncluttered" by reinstructing the jury with the guilt phase instructions because the latter instructions "were drafted and designed to bear on the question of guilt or innocence of the charges," and that the special instructions requested by the defense "would tend to be lost if the jury is reread other instructions, and tactically that would not be good for the defense." Counsel also had a tactical purpose for omitting mention of specific guilt phase instructions that he believed were harmful to the defense. (27RT 2947-2949.)

Because the trial court addressed this defense request by drafting its special instruction regarding the jury's consideration of the applicability, if any, of the guilt phase instructions to its penalty deliberations, appellant should be estopped from challenging the trial court's rulings related to the defense request. (See *People v. Coffman*, *supra*, 34 Cal.4th at p. 49 ["'[i]f defense counsel intentionally caused the trial court to err,'" acting for tactical reasons and not out of mistake, the claim is barred on appeal as invited error]; *People v. Prieto* (2003) 30 Cal.4th 226, 264-265 [defense counsel's deliberate tactical choice to request an instruction bars consideration of error in the giving of the instruction on appeal]; see also *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1193 ["Inasmuch as defendant both suggested and consented to the responses given by the court, the claim of error has been waived"].)

C. The Instructions Given Did Not Prejudice Appellant

As set forth above, the record shows that defense counsel had a tactical reason for objecting to any guilt phase instructions being repeated at the penalty phase, orally or in writing. The trial court's special instruction (27RT 3032-3033) was consistent with the language of CALJIC No. 8.84.1 (16CT 3917). Counsel did not ask the trial court to give CALJIC No. 8.84.1 in addition to the court's special instruction. "Thus to the extent that error affected [appellant's] substantial rights, he is not barred

from raising a claim of instructional error without an objection in the trial court." (*People v. Harris, supra*, 43 Cal.4th at p. 1319.)

On facts similar to the instant case, this Court has found no resulting prejudice from the omission of guilt phase instructions on general evidentiary principles. In *People v. Ervine, supra*, 47 Cal.4th 745, the trial court did not orally reinstruct the jury with applicable instructions regarding the evaluation of evidence during the penalty phase trial. Instead, the court supplied the jury with the entire written set of the guilt phase instructions and instructed the jury with CALJIC No. 8.84.1, which provides in relevant part, "You will now be instructed as to all the law that applies to the penalty phase of this trial. . . . You must accept and follow the law that I shall state to you. Disregard all other instructions given to you in other phases of this trial." (*People v. Ervine, supra*, 47 Cal.4th at p. 803.) Ervine asserted on appeal an almost identical claim related to the trial court's instructional procedure. (*Ibid.*) This Court rejected the claim of prejudice as follows:

> We note first that the assumption underlying defendant's argument-i.e., that the jury was unaware that it should apply the written instructions it had been given from the guilt phase-is dubious. The isolated sentence in CALJIC No. 8.84.1 directing the jury to "[d]isregard all other instructions given to you in other phases of this trial" must be read in conjunction with the court's earlier instruction to "disregard any jury instruction given to you in the guilt determination of this trial *which conflicts with these princip[les]*" and the court's subsequent instruction with respect to section 190.3, factor (b) that the elements of assault with a deadly weapon "have been previously described to you, in your earlier set of instructions *which you will have in the juryroom.*" (Italics added.) Considering the penalty phase instructions as a whole [citation], combined with the fact the jury was supplied with a written set of the guilt phase instructions, we do not see a reasonable likelihood the jury failed to understand that it was to apply those earlier written instructions to the extent they were not inconsistent with the new instructions the court was providing. [Citations].

(*People v. Ervine, supra*, 47 Cal.4th at pp. 803-804.)

This Court further concluded that "even if the jury misunderstood its duty to apply the appropriate guilt phase instructions, defendant was not prejudiced. Defendant does not explain how the absence of these instructions could have affected the jury's evaluation of the evidence adversely to him [citation], and the jury would have independently applied many of the points made in the instructions, which the jury had already heard at the guilt phase, as a matter of 'common sense' or 'logic.'" (*People v. Ervine, supra*, 47 Cal.4th at p. 804.)

In the instant case, the trial court did not orally reinstruct the jury with the applicable guilt phase instructions at the request of the defense. However, it did supply the jury with the entire written set of guilt phase instructions. (27RT 2950-2951.) Although the trial court also instructed the jury with CALJIC No. 8.84.1, which directed the jury to "[d]isregard] all other instructions given to you in other phases of this trial," that language must be read in conjunction with the court's special instruction to "consider those prior instructions on the law to the extent that you view them as properly applying to any of the issues present in this penalty phase of the trial" and to "not consider any of the prior instructions on the law which you find to be inapplicable to the questions and issues now before you in this penalty phase." (27RT 3032-3033.)

"Thus, considering the penalty phase instructions as a whole [citation], combined with the fact the jury was supplied with a written set of the guilt phase instructions," there is no reasonable likelihood the jury failed to understand that it was to apply those earlier written instructions to the extent they were not inconsistent with the new instructions the court was providing." (*People v. Ervine, supra*, 47 Cal.4th at p. 804; see also *People v. Harris, supra*, 43 Cal.4th at p. 1320 ["the jury was given the guilt phase instructions in written form, and would reasonably have understood that they could therefore consider them"]; cf. *People v. Lewis* (2008) 43

Cal.4th 415, 534-536 [trial court's failure to give guilt phase instructions at penalty phase was harmless under either the state "reasonable probability" standard or the "harmless beyond a reasonable doubt" standard where no written guilt phase instructions given to jury]; *People v. Moon, supra*, 37 Cal.4th at p. 36 [finding harmless error where the court failed to reinstruct the jury, the written copies of the guilt phase instructions were retrieved from the jury, and the jury was told "'not to refer to the instructions previously given to you any further'"].)

Furthermore, appellant fails to suggest how the jury, without the standard instructions regarding the consideration and evaluation of evidence, might have misunderstood or misused the evidence presented at the penalty phase. (AOB 412-414.) "[H]e does no more than speculate that their absence somehow prejudiced him." (*People v. Carter, supra*, 30 Cal.4th at p. 1221.)

Accordingly, appellant's challenge to the trial court's instructional procedure below must be rejected.

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

Appellant contends the judgment of death must be reversed because CALJIC No. 8.88 failed to convey to the jury the scope of its discretion regarding imposition of the death penalty in violation of his right to due process and the prohibition against the imposition of cruel and unusual punishment under the state and federal constitutions. (AOB 415-420.) Respondent disagrees.

Before the penalty phase deliberations, the trial court read CALJIC No. 8.88 (1989 rev.) as quoted above in part XIX.A.3.d, *ante*, which described the process of weighing the factors in aggravation and mitigation to arrive at the penalty determination. In relevant part, the instruction stated that: (1) "After having heard all of the evidence, and after having

heard and considered the arguments of counsel, *you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances* upon which you have been instructed," (2) "You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider," and (3) "To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (16CT 3926-3927.) This Court has held that CALJIC No. 8.88 "'properly instructs the jury on its sentencing discretion and the nature of its deliberative process.'" (*People v. Dykes*, *supra*, 46 Cal.4th at p. 816, quoting *People v. Valencia*, *supra*, 43 Cal.4th at p. 310; see also *People v. Smith*, *supra*, 35 Cal.4th at p. 370.)

Although appellant acknowledges that this Court has previously determined that CALJIC No. 8.88 properly informs the jury of its sentencing discretion, he nevertheless argues that the instruction was deficient essentially for two reasons. First, appellant states that the combination of the two phrases quoted above required the jury to impose a death sentence if aggravating factors outweighed mitigating factors, but also allowed the jury to arbitrarily disregard mitigating factors. (AOB 416.)

Appellant's claim should be rejected. "[W]hen jurors are informed that they have discretion to assign whatever value they deem appropriate to the factors listed, they necessarily understand that they have discretion to determine the appropriate penalty." (*People v. Brasure*, *supra*, 42 Cal.4th at p. 1063 [internal quotation marks omitted].) The phrase, "you shall consider, take into account, and be guided by the applicable factors of aggravating and mitigating circumstances" did not suggest that the jury was allowed to arbitrarily disregard mitigating circumstances. The jurors were

expressly given the definition of a mitigating circumstance and informed that it "may be considered as an extenuating circumstance in determining the appropriateness of the death penalty." The jury was also told that, "The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale, or the arbitrary assignment of weights to any of them"; "In weighing the various circumstances you determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances"; and "To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (16CT 3926-3927.)

"In addition, the penalty phase arguments of counsel emphasized the scope and nature of the jury's sentencing discretion." (*People v. Brasure, supra*, 42 Cal.4th at p. 1063.) The prosecutor began his penalty phase argument by telling the jury, "The decision today, the decision you make, is what is the appropriate penalty between death and life without the possibility of parole. That's the options the law provides, and the law puts forward certain factors to be considered." (27RT 2966.) He continued by stating, "Now, the role that the jury plays in this is to balance these factors and to look at them, to listen to them, the evidence that is there, and to make that determination, uniquely your determination as a jury, which ones apply and what weight, what moral or sympathetic weight, that they have. that is your decision to do." (27RT 2966.) The prosecutor specifically informed the jury that it could consider "Any other circumstances which extenuate the gravity or give you a sympathetic effect about the defendant's character," which included the testimony "from the defense, mother and

sister, the impact upon them, about his life." (27RT 2975.) The prosecutor concluded:

> And when you balance -- when you balance all the evidence in this case, when you balance the aggravating factors here against the only mitigating factor that you have there, which is one of sympathy -- which is something you can consider, if you deem appropriate. The court will instruct you on that. That is something, if you wish to consider, you certainly may.
>
> Consider that in light of what is appropriate. Consider that and the consequences that were left. And when you do --
>
> And as we've talked here, I've intentionally tried to keep a flat tone, for the emotion in this case speaks out of here -- out of here and the exhibits.
>
> And when you look at this in a just light, when you look at this -- applying the law, when you look at the evidence, when you sit down and do that mental balancing test between the options here, the only appropriate option is to impose the death penalty on the defendant.

(27RT 2978-2979.)

Defense counsel similarly emphasized the jury's discretion to consider what he deemed were the mitigating factors in this case. He began by stating that "This is not a death penalty case. That's not the appropriate penalty here." (27RT 2980.) Counsel informed the jury, "You can consider, and the most important factor for you to consider . . . is what we call factor k," and proceeded to outline what he deemed were mitigating circumstances. (27RT 2981.) Counsel also told the jury that the instructions commanded that the jury "must consider" mitigating factors, including appellant's emotional disturbance at the time he committed the killing. (27RT 3005.) In final argument, counsel stated that "one [mitigating] factor is sufficient to vote for life." (27RT 3032.)

Considering CALJIC No. 8.88 as a whole and counsels' arguments to the jury, there is no likelihood the jurors were misled as to their sentencing

responsibility or discretion. (See *People v. Brasure, supra*, 42 Cal.4th at pp. 1063-1064; *People v. Rogers, supra*, 46 Cal.4th at p. 1179 [considering the oral and written instructions as a whole, in conjunction with the parties' arguments, there was no reasonable likelihood the jury was led to believe it could disregard defendant's mitigating circumstances in determining the appropriate penalty].)

Appellant further argues that CALJIC No. 8.88 was not proper in light of its omission of the following modification that was used and upheld in *People v. Smith, supra*, 35 Cal.4th at page 371, that stated, "**You may, but are not required to return a judgment of death** if each of you are persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole," and asks this Court to reconsider it prior holdings. (AOB 417 [bold in original].) The standard instruction, as given in this case, states in relevant part, "To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (16CT 3926-3927.)

Although, as appellant notes, this Court in *Smith* did not find the modified language in that case to be error (35 Cal.4th at p. 371), it specifically addressed the defendant's claim that CALJIC No. 8.88 was defective because it implies death is the only appropriate sentence once a juror concludes that the aggravating circumstances so substantially outweigh mitigating ones that death is warranted. (*Id.* at p. 370.) The Court concluded that the instruction was correct, in that "the jury is not free to return a life verdict regardless of the evidence. If aggravating circumstances are so substantial in comparison with mitigating circumstances as to warrant the death penalty, then death is the appropriate penalty." (*Ibid.*)

Accordingly, appellant's constitutional challenge to CALJIC No. 8.88 should be rejected.

XXVIII. THERE WAS NO ERROR IN THE PENALTY PHASE THAT REQUIRES REVERSAL

Appellant contends that the individual and cumulative impact of the alleged errors set forth in AOB issues XIX through XXVII, deprived him of his state and federal rights to due process, to a jury determination of the facts under the Sixth and Fourteenth Amendments, and violated the prohibition against cruel and unusual punishment under the state and federal constitutions. (AOB 421-423.) Respondent disagrees.

A defendant -- even one facing capital punishment -- is entitled to a fair trial, not a perfect trial. (*People v. Cunningham*, *supra*, 25 Cal.4th at p. 1009; *People v. Box* (2000) 23 Cal.4th 1153, 1214, 1219; cf. *People v. Marshall*, *supra*, 50 Cal.3d at p. 945; see *Schneble v. Florida* (1972) 405 U.S. 427, 432 [92 S.Ct. 1056, 31 L.Ed.2d 340]; see also *United States v. Hasting*, *supra*, 461 U.S. at pp. 508-509 ["[G]iven the myriad safeguards provided to assure a fair trial, and taking into account the reality of the human fallibility of the participants, there can be no such thing as an error free, perfect trial, and. . .the Constitution does not guarantee such a trial"].)

Respondent has argued throughout that appellant received a fair trial. Simply stated, appellant has failed to show otherwise. There was no penalty phase error and thus, there is no cumulative impact of errors in this case. (*People v. Bacon*, *supra*, 50 Cal.4th at p. 1129.) In any event, whether considered individually or for their cumulative effect, the alleged errors could not have affected the outcome of the penalty phase trial. (See *People v. Nelson* (2011) 51 Cal.4th 198, 320; *People v. Panah* (2005) 35 Cal.4th 395, 501.)

Accordingly, appellant's cumulative error claim must be rejected.

XXIX. APPELLANT'S CHALLENGE TO THE TRIAL COURT'S DENIAL OF THE MOTION TO MODIFY THE DEATH VERDICT IS FORFEITED; EVEN ASSUMING OTHERWISE, THE TRIAL COURT PROPERLY DENIED THE MOTION

Appellant contends the judgment of death must be reversed because the trial court, which "implicitly acknowledged that the evidence appellant tortured Ms. Kerr was weak," erroneously considered to his failure to testify when it denied his automatic motion to vacate the death judgment (§ 190.4, subd. (e)) in violation of appellant's right against self-incrimination and cruel and unusual punishment and right to due process under the state and federal constitutions. (AOB 424-430.) This claim is forfeited and even assuming otherwise, it lacks merit.

A. Relevant Facts

At the hearing on the automatic motion to modify the death verdict, the trial court correctly identified the relevant law governing its duties in deciding the motion (29RT 3126) and then heard argument from defense counsel (29RT 3126-3141) and the prosecutor (29RT 3141-3143). As relevant here, counsel stated, "the jury didn't follow the court's instruction which repeatedly was given to them, that Mr. Brooks did not have to take the stand. They were deadlocked, and they inappropriately asked -- I forget the exact wording of the question." The court interjected that the jury "said they'd like to hear from Mr. Brooks." (29RT 3139.) Counsel added, "And that was basically asking him to take the stand." (29RT 3139.)

At the conclusion of argument, the court stated, "With respect to this motion, I have made an independent review of the weight of the evidence [and] . . . independently determined the propriety of the penalty." (29RT 3143.) After noting that the aggravating and mitigating factors were set

forth in section 190.3, the trial court applied the factors to this case. (29RT 3143-3149.)

Pointing to the court's next remarks, which focused on the jury's question about whether it could hear from appellant at the penalty phase, appellant argues that the trial court improperly considered his failure to testify in denying the motion to reduce the penalty.[36] The court explained that the jury's question about hearing from appellant followed the report of a deadlock and the court's question of whether it could do anything to assist the jury. The court stated its belief that even though it denied the request, the jury likely was wondering about appellant's motivation when he set fire to the victim's car, such as whether he thought she was dead when he set the fire. Noting that such evidence was not before the jury or the court to consider, the court expressly stated "I cannot fill in the blanks. I can only reweigh the evidence that was presented." (29RT 3149-3150.)

B. The Instant Claim Is Forfeited

"If a defendant fails to make a specific objection to the court's ruling at the modification hearing, the claim is forfeited. (See *People v. Riel, supra*, 22 Cal.4th at p. 1220.) This rule applies only to cases in which the modification hearing was conducted after the finality of this court's decision in *People v. Hill* (1992) 3 Cal.4th 959, 1013. (*People v. Riel, supra*, 22 Cal.4th at p. 1220.) As [appellant's] modification hearing was held post-*Hill*, the forfeiture rule applies here." (*People v. Mungia* (2008) 44 Cal.4th 1101, 1140.) "[T]he defendant must bring any deficiency in the ruling to the trial court's attention by a contemporaneous objection, to give the court an opportunity to correct the error." (*Id.* at p. 1141.)

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[36] The trial court's comment was quoted above in part XXI.A., *ante*.

Accordingly, appellant's claim that the trial court improperly considered appellant's failure to testify in denying the motion to reduce the penalty is forfeited because he did not raise it in the court below.

C. Even Assuming This Claim Has Been Preserved For Appellate Purposes, It Lacks Merit

Even assuming the claim has not been forfeited, the record is clear that the trial court did not improperly consider appellant's failure to testify. In response to an argument by defense counsel, the trial court clarified that the jury's request "to hear from [appellant]" was a reaction to the court's earlier inquiry "if there was anything else we could do to assist them when they were reporting being deadlocked in the penalty phase," and the court's invitation "to let me know what it was that they thought might help them." (29RT 3149.) Thus, the trial court's comment did not draw "'negative inferences from the absence of testimony.'" (*People v. Leonard, supra,* 40 Cal.4th at p. 1425.) Moreover, although the trial court believed that the jury's request to hear from appellant during the penalty phase trial stemmed from its desire "to know what was the defendant's motivation when he set that car on fire," the court stated that it could not "make up an answer to that question. I cannot speculate or conjecture. That evidence is not before this court to be reweighed. It was not before the jury to be considered." (29RT 3149-3150.) In fact, the court expressly stated "I cannot fill in the blanks. I can only reweigh the evidence that was presented." (29RT 3150.) Thus, the court never considered anything related to appellant's failure to testify at the penalty phase in rendering its decision on the motion to reduce the penalty.

In any event, "the trial court is presumed to have acted to achieve *legitimate* sentencing objectives." (*People v. Carmony* (2004) 33 Cal.4th 367, 376-377, emphasis added; see also *People v. Coddington* (2000) 23 Cal.4th 529, 644, overruled on other grounds in *Price v. Superior Court*

(2001) 25 Cal.4th 1046, 1069, fn. 13 ["As an aspect of the presumption that judicial duty is properly performed, we presume . . . that the court . . . is able to distinguish . . . relevant from irrelevant facts, and to recognize those facts which properly may be considered in the judicial decisionmaking process."]; *People v. White Eagle* (1996) 48 Cal.App.4th 1511, 1523 [reviewing court "'must indulge in every presumption to uphold a judgment, and it is defendant's burden on appeal to affirmatively demonstrate error-it will not be presumed. [Citations.]'"]; Evid. Code, § 664 [presumption that official duty has been regularly performed]; Cal. Rules of Court, rule 4.409 [trial court is presumed to have considered all of the relevant sentencing criteria unless record affirmatively reflects otherwise].)

Here, the trial court correctly stated,

> In determining the motion, I must determine whether the weight of the evidence supports the verdict, and to do so, I must independently reweigh the evidence. I am considering only the evidence which was properly before the jury in terms of deciding this motion. In particular, this court is not considering any probation report that has been prepared in connection with this matter, as that material was not presented to the jury.

(29RT 3126; see also 29RT 3143 ["With respect to this motion, I have made an independent review of the weight of the evidence. I have independently determined the propriety of the penalty"].)

There is no suggestion in the record that the trial court considered improper evidence in its ruling. In denying the automatic application for modification, the trial court found that the aggravating substantially outweighed the mitigating circumstances after discussing those factors on the record. (29RT 3143-3150.)

Accordingly, appellant's claim that the trial court improperly considered his failure to testify at the penalty phase as a reason for denying the motion to modify the death verdict must be rejected. (See, e.g., *People*

v. Brady, *supra*, 50 Cal.4th at pp. 588-589; *People v. Wallace*, *supra*, 44 Cal.4th at pp. 1096-1097; *People v. Tafoya* (2007) 42 Cal.4th 147, 196; *People v. Lewis*, *supra*, 39 Cal.4th at p. 1064; *People v. Martinez*, *supra*, 31 Cal.4th at pp. 701-703; *People v. Riel*, *supra*, 22 Cal.4th at pp. 1220-1223.)

XXX. CALIFORNIA'S DEATH PENALTY STATUTE DOES NOT VIOLATE THE STATE AND FEDERAL CONSTITUTIONS

Appellant raises several claims regarding the constitutionality of the death penalty law as interpreted by this Court and as applied at his trial. He maintains that many features of the death penalty law violate the state and federal constitutions. (AOB 431-493.) As he himself concedes (AOB 431), these claims have been raised and rejected in prior capital appeals before this Court. Because appellant fails to raise anything new or significant which would cause this Court to depart from its earlier holdings, his claims should be rejected.

A. Penal Code Section 190.2 Is Not Impermissibly Broad

Appellant asserts that Penal Code section 190.2 is constitutionally defective, as it fails to "meaningfully narrow" the class of death eligible defendants. (AOB 432-436.) This Court has repeatedly rejected such claims, and appellant has not distinguished his case from those previously decided. (See, e.g., *People v. Mills* (2010) 48 Cal.4th 158, 213.) Appellant's claim should likewise be rejected.

B. Penal Code Section 190.3(A) Does Not Allow For An Arbitrary Or Capricious Imposition Of The Death Penalty

Appellant asserts that Penal Code section 190.3, subdivision (a), violates the federal Constitution because "prosecutors have used it to characterize any fact concerning a murder as 'aggravating' within the statute's meaning." (AOB 436-444.) This Court has repeatedly rejected

such claims, and appellant offers nothing to distinguish his case from those previously decided. (See, e.g., *People v. Mills, supra*, 48 Cal.4th at p. 214; see also *Tuilaepa v. California* (1994) 512 U.S. 967, 971-980 [114 S.Ct. 2630; 129 L.Ed.2d 750].) Appellant's claim should also be rejected.

C. California's Death Penalty Statute And Instructions Did Not Provide For The Arbitrary Imposition Of Death

Appellant also contends that the death penalty statute and accompanying jury instructions contained no safeguards to protect against the arbitrary imposition of death. (AOB 444-445.) As explained below, each of these claims has previously been rejected by this court and are meritless.

First, appellant claims the instructions failed to require written findings from the jury or unanimity as to aggravating circumstances.[37] (AOB 444.) This Court has concluded that the death penalty law is not unconstitutional for failing to require that the jury be unanimous in finding the existence of an aggravating factor or for failing to require the jury to provide written findings. (*People v. Mills, supra*, 48 Cal.4th at p. 214.)

Second, appellant contends the death penalty statute failed to assign to the State the burden of proving beyond a reasonable doubt the existence of an aggravating factor, that aggravating circumstances outweigh mitigating

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[37] Appellant also raised related claims stating that no instruction was given to the jury requiring jury agreement on any particular aggravating factor (AOB 458-462) and California law violates the Sixth, Eighth, and Fourteenth Amendments to the federal Constitution by failing to require that the jury base any death sentence on written findings regarding aggravating factors (AOB 471-475). These claims have also been rejected.

circumstances, or that death is the appropriate penalty.[38] (AOB 444-445.) This Court has rejected this claim. (*People v. Mills, supra*, 48 Cal.4th at p. 214.)

Third, in a related claim, appellant contends that California's sentencing scheme violates the equal protection clause of the federal Constitution. (AOB 482-489.) This Court has rejected this claim. (*People v. Lee* (2011) 51 Cal.4th 620, ___ [2011 WL 651850 at p. *23]; *People v. Solomon, supra*, 49 Cal.4th at p. 844.)

D. California's Death Penalty Statute And Instructions Set Forth The Appropriate Burden Of Proof

Appellant contends that the death verdict was not premised on findings beyond a reasonable doubt by a unanimous jury that one or more aggravating factors existed and that these factors outweighed mitigating factors. He claims his constitutional right to a jury determination beyond a reasonable doubt of all facts essential to the imposition of a death penalty was thereby violated. (AOB 445-447.) In a related claim, appellant contends that a proper interpretation of federal case law mandates that the imposition of death must be found true beyond a reasonable doubt. (AOB 447-458.)

This Court has also held that the sentencing function at the penalty phase is not susceptible to a burden-of-proof qualification. (*People v. Manriquez* (2005) 37 Cal.4th 547, 589; *People v. Burgener* (2003) 29

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[38] Appellant also raised related claims stating that due process and the cruel and unusual punishment clauses of the state and federal constitutions require that the jury be instructed that they may impose a sentence of death only if they are persuaded beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors and that death is the appropriate penalty (AOB 462-468) and even if there could constitutionally be no burden of proof, the trial court erred in failing to instruct the jury to that effect (AOB 470-471). These claims have also been rejected.

Cal.4th 833, 885; *People v. Anderson* (2001) 25 Cal.4th 543, 601; *People v. Hawthorne* (1992) 4 Cal.4th 43, 79.) Thus, the penalty phase instructions were not deficient by failing to assign to the State the burden of proving beyond a reasonable doubt the existence of an aggravating factor. (See *People v. Morgan* (2007) 42 Cal.4th 593, 626; *People v. Brown* (2004) 33 Cal.4th 382, 401.) Nothing in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435], *Ring v. Arizona* (2002) 536 U.S. 584 [122 S.Ct. 2428, 153 L.Ed.2d 556], or *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403], impact what this Court has stated regarding the sentencing function at the penalty phase not being susceptible to a burden-of-proof quantification. This Court has expressly rejected the argument that Apprendi, *Ring*, and/or *Blakely* affect California's death penalty law or otherwise justifies reconsideration of this Court's prior decisions on this point. The reasoning set forth above applies equally to appellant's claim that the State was required to prove an aggravating factor beyond a reasonable doubt. (*People v. Romero* (2008) 44 Cal.4th 386, 428-429.)

E. Proof By A Preponderance Of The Evidence Was Not Constitutionally Compelled

Appellant contends that even if proof beyond a reasonable doubt was not constitutionally required, a burden of proof of at least a preponderance of the evidence was required as a matter of due process. (AOB 468-470.) This Court has rejected this claim. (*People v. Mills, supra*, 48 Cal.4th at p. 214.)

F. No Tie-Breaking Rule Is Necessary

Appellant contends that a burden of proof is required in order to establish a tie-breaking rule and to ensure even-handedness. (AOB 470.) This Court has held, "No 'tie-breaking rule' is necessary, and the jury need

not be instructed that there is no burden of proof." (*People v. Brady, supra*, 50 Cal.4th at p. 590; *People v. Gamache* (2010) 48 Cal.4th 347, 407 [accord].)

G. Intercase Proportionality Review Is Not Required

Appellant claims that the death penalty statute, as interpreted by this Court, forbids inter-case proportionality review, thereby guaranteeing arbitrary, discriminatory, or disproportionate impositions of the death penalty. (AOB 475-480.) This Court has held that "[t]he federal Constitution does not require intercase proportionality review. [Citation.] The absence of disparate sentence review does not deny a defendant the constitutional right to equal protection. [Citation.]" (*People v. Romero, supra*, 44 Cal.4th at p. 429; accord, *People v. Mills, supra*, 48 Cal.4th at p. 214.)

H. The Prosecution May Rely On Unadjudicated Criminal Activity

Appellant claims that the prosecution may not rely on unadjudicated criminal activity in the penalty phase, and even if it were constitutionally permissible to do so, such alleged criminal activity could not serve as a factor in aggravation unless found to be true beyond a reasonable doubt by a unanimous jury. (AOB 480-481.) This Court has rejected this claim. (*People v. Mills, supra*, 48 Cal.4th at p. 214.)

I. The Death Penalty Statute Does Not Improperly Use Restrictive Adjectives

Appellant contends the inclusion in the list of potential mitigating factors of such adjectives as "extreme" (factors (d) and (g)) and "substantial" (factor (g)) acted as barriers to the consideration of mitigation. (AOB 481-482.) This Court has held that "[t]he use of the adjectives 'extreme' and 'substantial' do not make the sentencing statute (§ 190.3) or

instructions unconstitutional. [Citation.]" (*People v. Romero, supra*, 44 Cal.4th at p. 429.)

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

Finally, appellant claims that the use of the death penalty as a regular form of punishment falls short of international norms. (AOB 489-493.) This claim has been repeatedly rejected by this Court, which has stated that "'[i]nternational law does not prohibit a sentence of death rendered in accordance with state and federal constitutional and statutory requirements. [Citations.]'" (*People v. Tate, supra*, 49 Cal.4th at p. 713.) Appellant has not presented any significant or persuasive reason for this Court to reconsider its prior decisions, and the present claim must therefore be rejected.

CONCLUSION

For the reasons stated, respondent respectfully requests that the judgment and sentence of the trial court be affirmed in all respects.

Dated: May 12, 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 72,609 words.

Dated: May 12, 2011

KAMALA D. HARRIS
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DECLARATION OF SERVICE

Case Name: **People v. Donald L. Brooks** Case No.: **S099274**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is 300 South Spring Street, Suite 1702, Los Angeles, CA 90013. 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 12, 2011, I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail system of the Office of the Attorney General, addressed as follows:

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On May 12, 2011, I caused the Original and thirteen (13) copies of the **RESPONDENT'S BRIEF** in this case to be delivered to the California Supreme Court at 350 McAllister Street, San Francisco, CA 94102 by Overnight Delivery.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on May 12, 2011, at Los Angeles, California.

J. Villegas
Declarant

J. Villegas
Signature

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