SUPREME COURT COPY

In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

REX ALLAN KREBS,

Defendant and Appellant.

CAPITAL CASE

Case No. S099439

SUPREME COURT
FILED

MAY 26 2011

Frederick K. Ohlrich Clerk

Deputy

San Luis Obispo County Superior Court
Case No. F283378
The Honorable Barry T. LaBarbera, Judge

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DEATH PENALTY

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STATEMENT OF THE CASE

In an information filed by the District Attorney of San Luis Obispo County, appellant was charged with two counts of murder (Penal Code,[1] § 187, subd. (a); counts I & II), two counts of kidnapping for sexual purposes (§ 209, subd. (d); counts III & VI), three counts of forcible rape (§ 261, subd. (a)(1); counts IV, VII-VIII), first degree residential burglary (§ 459; count V), and forcible sodomy (§ 286, subd. (c); count IX). A multiple murder special circumstance was alleged. (§ 190.2, subd. (a)(3).) As to counts I and II, there were two additional special circumstances alleged, that the murders were committed while appellant was engaged in the commission of kidnapping and forcible rape. As to count II, a special circumstance was alleged that the murder of one victim was also committed while appellant was engaged in the commission of forcible sodomy. (§ 190.2, subd. (a)(17).) As to all counts, it was alleged that appellant had suffered prior convictions for residential burglary, assault with intent to commit rape, forcible rape, and forcible sodomy (§§ 667, subds. (a), (d), & (e), 1170.12, subds. (b) & (c)), and served a prior prison term for those crimes (§ 667.5, subd. (b)). (4CT 876-883.) The prosecution elected to seek the death penalty against appellant. (4CT 916.)

Appellant pleaded not guilty and denied the prior conviction and special circumstance allegations. (4CT 917.)

Appellant moved to change venue. (6CT 1495-1537.) The trial court denied the motion. (9CT 2358; 10CT 2438-2452.) Division Six of the Second District Court of Appeal issued a peremptory writ of mandate, and ordered a change of venue. (10CT 2658-2665.) Venue was moved to Monterey County. (14CT 3796.)

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[1] All further statutory references will be to the Penal Code, unless otherwise specified.

Trial was by jury. (19CT 5167-5168.) Following the presentation of evidence at the guilt phase, the jury found appellant guilty as to each of the charged offenses, and found the special circumstance allegations true. (20CT 5468-5482; 21CT 5753-5769.) Appellant admitted the prior conviction allegations, and the trial court found them true. (22CT 5774.) A penalty phase trial was held, and the jury fixed the punishment as death. (23CT 6236-6240.)

The trial court denied appellant's motions for a new trial and to modify the death penalty verdict pursuant to section 190.4, subdivision (e). (24CT 6306, 6397.) The trial court sentenced appellant to the death penalty as to counts I and II. The court also imposed and stayed a state prison term of 166 years to life, comprised of 25 years to life as to each of counts III-V and VII-IX, and 16 years because of appellant's prior convictions. Appellant was ordered to pay a restitution fine of $10,000, and to make direct victim restitution to the mother of one of the victims in the amount of $70,000. (24CT 6407-6418.)

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

STATEMENT OF FACTS

This case involves the sadistic kidnappings, rapes, and murders of two 20-year-old female college students in the San Luis Obispo area in November 1998 and March 1999. The testimony the prosecution adduced at the guilt phase showed that appellant forcibly abducted the women, the first after attacking her while she was walking home from a fraternity party late at night, and the second after attacking her in her home, also late at night. He bound both women with rope and took them to an isolated area in Davis Canyon, where he lived.

Appellant gagged the first victim with her own panties and took her to an abandoned cabin near his apartment, where he raped her. He then gagged her a second time, and left her "hogtied" in the cabin while he went

to his apartment to have a drink. According to what he later told police, she apparently choked to death on her restraints while he was away. He buried her near his apartment the next day. Despite a massive investigation regarding her disappearance, she remained missing for several months.

Four months later, appellant selected a second victim after he spotted her getting out of her car when he was driving home from a bar. Appellant surreptitiously watched her while she was inside her apartment on several occasions, using the roof of her apartment as a vantage point. Finally, he broke into her apartment and subdued her. He took her to the abandoned cabin near his apartment. He tied her up on a couch and left her there, while he went to chop some wood by the side of the road. He did so at a time of the day when he knew that his landlord's daughter would be passing by on her way to work, as he wanted her to see him that morning. The two had a brief, casual conversation, and his landlord's daughter continued on her way to work. Appellant then returned to the cabin and moved the second victim to his apartment, where he raped her twice. He also sodomized her. He strangled her to death after she saw his face while attempting to escape. He also buried the second victim near his apartment.

Appellant had been paroled from prison about a year before the first murder. He was apprehended because his parole officer realized that the second crime was similar in nature to a burglary and rape appellant had committed years earlier, and began investigating. Appellant subsequently was arrested and eventually made full confessions to both murders. He also showed police the shallow graves where he had buried the two women. After his arrest, appellant told a reporter that he was a "monster" who deserved the death penalty.

Appellant presented no defense at the guilt phase.

At the penalty phase, the prosecution presented evidence of appellant's prior criminal history, and victim impact evidence from family

members of the two women he murdered. For his part, appellant presented evidence concerning his abusive childhood and expert testimony regarding paraphilia, a sexual sadism disorder. In rebuttal, the prosecution called several lay witnesses, along with forensic psychiatrist Dr. Park Dietz. Dr. Dietz testified that, while he believed that appellant had paraphilia, the disorder does not affect a person's capacity to control his urges. He also noted that most sexual sadists do not commit violent crimes in order to satisfy their urges.

A. Guilt Phase Evidence

1. Prosecution Evidence

a. The Disappearance of Rachael Newhouse on November 12, 1998

Rachael Lindsay Newhouse went to high school in Irvine and graduated in 1996. She enrolled at the California Polytechnic State University at San Luis Obispo (hereafter "Cal Poly"), majoring in nutrition. In her junior year, she moved into a house on Gerda Street in San Luis Obispo. She shared the house with Robin Silver, Adrienne Gunness, Nichole Tylenda, and Beth Nelson. (23RT 6161-6162.)

On Thursday, November 12, 1998, Newhouse had plans with her high school friend and fellow Cal Poly student Andrea West to attend a fraternity-sorority function at a bar called Tortilla Flats. Newhouse drove her car to West's home on Foothill Street, arriving at about 5:15 that evening. (23RT 6164-6166.) Newhouse and West went clothes shopping at the Central Coast Mall, using West's car. West bought a shirt at a Wet Seal store, but Newhouse did not buy anything. They returned to West's home. They had dinner and some drinks, and got dressed to go out. (23RT 6167-6168.) Newhouse was wearing black pants, a blue shirt with clear buttons on the sleeves, a white bra, black and red lacy underpants, and

black Doc Martens penny loafers. Newhouse was wearing several pieces of jewelry, including a Quicksilver watch with a leather band, two pairs of earrings, and an identification bracelet which had her name and address on it. (23RT 6169-6171.)

Using Newhouse's car, she and West stopped at a supermarket. They ran into two male students who mentioned that there was a "pre-party" on Dana Street. Newhouse and West said they would probably see them there. (23RT 6171-6172.) Newhouse and West went to Luneta Street, where West's boyfriend, Chris Vyn, lived. They arrived at Vyn's home at about 8:30 and had some drinks. Damon Bailey drove them to the pre-party on Dana Street. Newhouse left her car parked in Vyn's driveway and her keys and her wallet in Vyn's bedroom, as she did not intend to drive any more that night. (23RT 6172-6173.) Newhouse planned to either go back to Vyn's house with West and sleep there, in which case her car and her keys would be there, or alternatively, if she got a ride back to West's house on Foothill, use West's car to drive home when she was ready. (23RT 6174.)

At the pre-party, Newhouse and West both drank beer from a keg and a shot of Jagermeister. (23RT 6176.) A big group, approximately 20 to 25 people, walked over to Tortilla Flats, arriving at about 10:30. Newhouse and West decided to stick together because they both were under 21 and the restaurant had separate sections for the bar and for patrons under the age of 21. Newhouse was able to get into the bar, but West was not. West stood around for most of the evening by herself. (23RT 6177-6178.) West, who was upset with Newhouse because she had been left alone all night, saw her by the bathrooms at about 11:30. Newhouse asked her what was wrong, but West said she did not feel like talking about it right then. Newhouse walked toward the front door. (23RT 6179.) She was intoxicated. West assumed that Newhouse either would call her roommates for a ride or walk home. (23RT 6180-6181.)

To walk from Tortilla Flats to Newhouse's home on Gerda Street, the shortest way would be to use the Jennifer Street Bridge. (23RT 6181.) The bridge connected the residential neighborhood where Newhouse lived with downtown San Luis Obispo. Newhouse and her roommates had used the bridge on prior occasions. (23RT 6134.)

West left Tortilla Flats at around 2:00 a.m. (23RT 6182.) When she arrived at Vyn's house, Newhouse's car was still in the driveway. West spent the night at Vyn's house. (23RT 6182.)

West left Vyn's house at about 11:00 the next morning, Friday, November 13, 1998. (23RT 6182.) Newhouse's car was still in the driveway, and her purse and keys were still in Vyn's bedroom. (23RT 6183.) West tried to call Newhouse around 12:30, but she was not home. She subsequently received several telephone calls from other friends, asking if she had seen Newhouse. West learned that Newhouse did not show up for work that day at SLO Brew, where she worked as a hostess. (23RT 6140, 6183-6184.)

Adrienne Gunness received a telephone call from one of their other roommates, Nichole Tylenda, at about 5:30 or 6:00 Friday evening, concerning Newhouse not arriving at work. They decided to file a missing person's report with the police, and called them a little after 6:00. (23RT 6139-6140.) Newhouse's parents, who lived in Irvine, arrived in San Luis Obispo after midnight that night. (23RT 6141.)

b. The Discovery of Newhouse's Blood on the Jennifer Street Bridge and the Initial Police Investigation Regarding her Disappearance

Kevin Lewis, a Cal Poly student, crossed the bridge shortly after 12:45 a.m. on Friday, November 13, 1998. He saw what he thought might be blood drops on the stairs. (23RT 6151.) He placed a paper bag he was carrying on top of one of the blood drops, and realized that it probably was

fresh blood. (23RT 6153-6154.) The next day, Lewis told a friend what he had seen, and his friend got him in touch with the police. (23RT 6155.) Lewis eventually threw the paper bag away. (23RT 6158.)

San Luis Obispo Police Officer Chris Staley responded to the Jennifer Street Bridge at about 7:45 Friday morning after a report had been made about the blood at the top of the bridge. (23RT 6209.) Officer Staley, who also had training as a crime scene investigator, saw the puddle of blood. He checked the surrounding area. He spotted some drops of blood on the stairs, but did not notice any additional blood. He called dispatch and told them what he had observed. There had been concerns expressed by people about possible exposure to any contaminants which might be in the blood. As there was a lot of foot traffic on the bridge, and given that there had been no reported incidents on the bridge, he told dispatch to have someone from the City clean the blood up. (23RT 6207, 6213, 6224-6225.)

At about 8:30 or 8:45 a.m., another Cal Poly student named Theresa Audino noticed a large pool of blood at the end of the Jennifer Street Bridge, near a ramp on the side of the bridge. (23RT 6193-6194.) It appeared to be "semi-fresh." (23RT 6195.) Audino noticed a blood trail going down the stairs, and she followed it to a planter which was located next to a parking spot. (23RT 6196.) Audino called the police, who said they were already aware of the presence of the blood on the bridge. (23RT 6199.) She had crossed the bridge at about 11:30 the previous evening, and did not notice anything unusual on the stairs at that time. (23RT 6193.)

At about 5:00 p.m., Officer Staley returned to the Jennifer Street Bridge. He was accompanied by Detective Jerome Tushbant, who was investigating an unrelated case. Even though the area had been washed, Officer Staley was able to obtain a swab of blood from the top of the ramp on the bridge, in the area where he had earlier observed the large pool of blood. (23RT 6226-6228.)

Officer Thomas Depriest and Detective Dan Bresnahan did followup crime scene investigation at the Jennifer Street Bridge on Sunday, November 15, 1998. Officer Depriest looked for evidence, and photographed the scene. (23RT 6239-6240.) He swabbed possible bloodstains he observed at the top of the ramp on the bridge, at an area near the top landing, a stair, the sidewalk at the bottom of the stairs, and a parking space. (23RT 6242-6245.) He also found a hair in the blood he observed in the parking lot. (23RT 6246.)

On Monday, November 16, 1998, evidence technician Gilbert Rendon went to the Jennifer Street Bridge and observed the bloodstains at the top of the bridge and on the stairs. He also observed what he believed was a bloody handprint on a handrail on the stairway. (23RT 6272.) Rendon called another evidence technician, Rick Neufeld of the San Luis Obispo County Sheriff's Department, and asked him to attempt to locate fingerprints on the handrails. (23RT 6274.) Neufeld discovered another handprint on a railing. Fire department personnel removed the portions of the handrail where the handprint was observed, and they were sent to the FBI for analysis. (23RT 6278-6279.) Rendon hypothesized that the manner in which the bloodstains were found showed that a person had been lying in the pool of blood, was helped or dragged down the stairs while bleeding, was laid down in the parking space where the blood was later found, and then was placed in a vehicle. (23RT 6276-6277.)

Detective Cynthia Dunn became the lead investigator at the San Luis Obispo Police Department regarding the disappearance of Newhouse. The investigation was a large one. It began with approximately 10 to 12 investigators, but ended up with about 60 or more investigators working on the case. (23RT 6255-6256.) Eventually, they asked the California Department of Justice and the Federal Bureau of Investigation ("FBI") for assistance after being unable to find Newhouse. (23RT 6257-6258.) In the

course of the investigation, police took hair samples from Newhouse's hairbrush, and blood samples from her parents. (23RT 6141, 6259.)

FBI agents mapped and diagrammed every one of the bloodstains on the Jennifer Street Bridge in December 1998. (26RT 6807-6808.)

Forensic analysis showed that the hair recovered from the parking lot was Newhouse's. (25RT 6819.) Testing also showed that the blood recovered from the Jennifer Street Bridge was from the same person, and belonged to the offspring of Newhouse's parents. (25RT 6675-6678; 26RT 6842-6843, 6863-6866.)

c. The Disappearance of Aundria Crawford on March 10, 1999, and the Initial Police Investigation

Aundria Lynn Crawford grew up in Fresno. (23RT 6300.) She moved to San Luis Obispo County in May 1998, and began studying fashion design at Cuesta College. At first she lived in Los Osos, which is located about 15 miles north of San Luis Obispo. She moved into Unit B of a duplex located at 420 Branch Street in San Luis Obispo in January 1999, to be closer to school and work. She worked at a veterinary clinic for awhile, and then got a job at Kragen Auto Parts. (23RT 6301-6302, 6309, 6327.)

Crawford had a small plastic "eight ball" on her key chain. She generally wore a T-shirt and panties to bed. (24RT 6425-6426.) She owned a black sweatshirt that had a "Hard Rock Cafe" logo on it, but wore it infrequently, as it was a souvenir from a trip she had taken to Washington D.C. (24RT 6427-6428.)

Stephanie Nicolopoulos met Crawford shortly after Crawford moved to Los Osos, and they became close friends. (23RT 6300.) They were in contact daily, either by phone or pagers, or else they were physically together. (23RT 6303.)

On Wednesday, March 10, 1999, Nicolopoulos stopped by Crawford's apartment for lunch. (23RT 6306.) Later, at about 5:00 or 6:00 p.m., Nicolopoulos called Crawford to thank her for her giving Nicolopoulos' mother a birthday card. (23RT 6307.) She talked to Crawford again at about 11:00 that night, for about an hour, and the two made plans to attend a performance at the Performing Arts Center at Cal Poly the following evening. They decided to meet at the University Union at about 6:45. (23RT 6308.)

Crawford spoke on the telephone with her friend Justin Park from 1:42 a.m. until 2:46 a.m. on Thursday, March 11, 1999. They discussed Crawford's midterm examinations, a problem she had had earlier that day with her boyfriend, Joshua Beene, and other things that were going on that week. (24RT 6364-6365; 27RT 7196.)

Later in the day on Thursday, Nicolopoulos paged Crawford a few times to discuss a possible alternative meeting place, but her pages were not returned. Nicolopoulos went to meet Crawford at 6:45 p.m., but Crawford did not show up. Nicolopoulos waited for about 30 minutes, and then called Crawford. There was no answer, so Nicolopoulos drove to her apartment. (23RT 6308-6309.) She pounded on the door, but there was no response. Crawford's car was still parked in the driveway, and Nicolopoulos thought it was strange that Crawford would not be at home while her car was there. Nicolopoulos looked through some windows and noticed that things looked out of place. Specifically, some window blinds looked like they had been moved. It was difficult for Nicolopoulos to see anything else, as it was dark, and she left. (23RT 6310-6311, 6313.)

Shortly after midnight, Officer Jon Paulding of the San Luis Obispo Police Department was asked to go to 420 Branch Street and check on a young woman who had not responded to several pages and phone calls from her mother, Gail Eberhart Crawford. (23RT 6315-6316.) He arrived

at the apartment, which was dark. He noticed that there was a car parked in the driveway. (23RT 6317.) He knocked on the door but there was no response. He called dispatch and asked them to telephone Crawford, which they did. There was no response. He walked to the back of the apartment and looked in the window. It appeared that no one was home, and he left a note on the car in the driveway. He asked dispatch to call Mrs. Crawford and tell her that he was unable to contact anyone at the apartment. (23RT 6318.) At that point, he heard some neighbors in the yard. They told him that they had last seen Crawford earlier the previous day. He left the location and resumed patrol. (23RT 6319.)

Officer Paulding returned to Crawford's apartment at about 5:15 a.m. on Friday, March 12, 1999, after speaking to Mrs. Crawford. By this time, she was very concerned about Crawford. She thought Crawford might be sick or injured and thus unable to answer the door or the telephone. She asked him to go back out to the apartment, try to contact Crawford, and enter the premises if he was unable to contact her and see if she was inside. (23RT 6320.) All the doors were locked, however. He also checked the car which was parked in the driveway. It was unlocked. Crawford's purse was inside, but there were no keys in the purse. Dispatch was able to contact Crawford's landlord, who came out with a key to the apartment. (23RT 6320-6322.)

Officer Paulding and another officer entered the apartment, along with Crawford's landlord, to ascertain if she was there. (23RT 6323.) Officer Paulding found Crawford's pager on top of a counter. The apartment was fairly neat and nothing seemed unusual, although he did notice some items in various places on the floor and the bathroom tub. He called Mrs. Crawford and told her that he had inspected Crawford's apartment but had been unable to find Crawford. (23RT 6324.) Mrs. Crawford told him that Crawford had missed an appointment with a friend the prior evening, which

to Officer Paulding made the situation more serious. As she did not have any classes or a job scheduled that day such that he could attempt to contact her at those locations, he prepared a missing person's report. (23RT 6325.)

At about 6:00 or 6:30 a.m., Nicolopoulos received a telephone call from Beene. He said that Mrs. Crawford was trying to reach Nicolopoulos. Nicolopoulos called Mrs. Crawford, who was in Fresno. She was extremely worried about Crawford. Nicolopoulos told her about Crawford not meeting her the previous evening as planned. (23RT 6311-6312.)

Officer Mark Brady went to Crawford's apartment on Sunday, March 14, 1999, to attempt to find some dark-colored sweats that Mrs. Crawford said were missing, and Crawford's prescription glasses. He found the glasses in Crawford's car, but was unable to locate the sweats. (25RT 6633-6634.)

Officer Paulding went back to the apartment about a week after his first visit there to evaluate the lighting conditions inside the apartment. He determined that there was a stairwell light that could not be seen from the front of the apartment, but could be seen from the back. (23RT 6329-6330.)

Detective Tushbant was the lead detective regarding the Crawford case. (23RT 6332.) At his request, Detective Dunn, the lead investigator regarding Newhouse's disappearance, attempted to collect tissue and blood samples for comparison to some items found in Crawford's apartment. (23RT 6333.) She was able to obtain a tissue sample from a plastic surgeon in Fresno, who had removed a mole from Crawford's body in 1993. (23RT 6333-6334.) She also obtained a blood sample from Crawford's father, James Eberhart. (23RT 6334-6335.)

d. Appellant's Apartment and the Nearby Abandoned A-Frame Cabin in Remote Davis Canyon

In 1998 and 1999, appellant, a convicted sex offender, lived in a converted "barn apartment" located at 3880 Davis Canyon Road, in Davis Canyon. The apartment was approximately ten miles southwest of San Luis Obispo. It was owned by Muriel Wright. Mrs. Wright's son, Lawrence Wright, was the assistant manager at 84 Lumber, where appellant worked. She agreed to rent the apartment to appellant after her son spoke to her about appellant needing a place to live. The apartment was on a dirt road, about a mile and a half from the main road, in a sparsely populated part of the canyon.[2] (24RT 6456-6458, 6497, 6504-6505.) The apartment was located about 50 yards away from Mrs. Wright's home. Her daughter Debra lived with Mrs. Wright in her home. (24RT 6505-6506, 6515; 26RT 6945.)

There was an abandoned, unfinished A-frame cabin about a mile and a quarter away from appellant's apartment. Mrs. Wright and her husband had built the cabin in 1960. She and her husband lived in the cabin for about a year after it was first built. After that time, their children lived in the cabin for awhile. Her brother-in-law began remodeling the cabin in the 1980's, but due to health problems he was unable to finish the project. (24RT 6503-6504.)

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[2] Appellant had been given permission by parole authorities to reside in an unincorporated area of San Luis Obispo County. This was because residents in Atascadero and other locations where appellant had lived for various periods of time after he initially was paroled found out that he was a sex offender and exerted pressure on both the police department and appellant himself for appellant to move. (24RT 6497; 26RT 6942.) There were only about three or four homes between See Canyon, which was adjacent to Davis Canyon, and appellant's apartment. (24RT 6458; see also 24RT 6500-6501.)

e. Appellant's Knowledge of Mrs. Wright's Vacation Plans in March 1999 and Debra Wright's Interactions with Appellant on March 11, 1999, and the Following Weekend

Mrs. Wright told appellant that she would be out of town for a few weeks in March 1999, and asked him to feed her dog while she was gone. She left on March 6 or March 7, and returned home on March 19. (24RT 6507-6509.)

Debra Wright saw appellant chopping wood at the side of the road at about 8:00 a.m. on March 11, 1999, while she was driving to work. They spoke briefly. He did not appear to be intoxicated. Appellant appeared to be winded from chopping the wood, and talked about needing to quit smoking. (24RT 6519-6521.)

Debra Wright also saw appellant and his girlfriend, Roslynn Moore, the following weekend. Appellant appeared to be happy and in a good mood. (24RT 6521-6522.)

f. The Investigation by Appellant's Parole Officer and Appellant's Arrest

David Zaragoza, appellant's parole officer, first heard about Crawford's disappearance on March 16, 1999, when he read about it in the San Luis Obispo Tribune. He was also aware that Newhouse had disappeared several months earlier. He noticed that there were some similarities between Crawford's disappearance and the case which caused appellant to be under parole supervision, and decided to visit appellant's residence. He called 84 Lumber and found out that appellant would be off work the following day. (24RT 6455-6456.)

Zaragoza went to appellant's apartment the next day, March 17, 1999. (24RT 6456.) Appellant met Zaragoza outside the apartment when he drove up. Appellant was limping, as if he was in pain, and was holding his rib area. (24RT 6456.) There was some sort of support apparatus around

his ribs. Zaragoza asked him what happened, and appellant said that he had hurt himself by falling onto some firewood. Zaragoza did not believe him, as there were no injuries on his hands or arms, which he would have expected to see if appellant had actually fallen in the way that he described. As he did not want to alert appellant to his suspicions, Zaragoza said he had to get back to his office. When he arrived at his office, he called Detective Tushbant. (24RT 6465-6466.) Zaragoza told Detective Tushbant about his conversation with appellant and appellant's injury. He also said that appellant had previously used a modus operandi similar to the one used in Crawford's abduction, and that appellant lived in a very isolated area. (24RT 6467.)

On March 19, 1999, agents from the California Department of Justice's Sexual Predator Apprehension Team arrived at Zaragoza's office and reviewed appellant's file. Zaragoza told them about how appellant committed the rape that resulted in him being sentenced to prison. The agents shared some information they had concerning appellant. (24RT 6468.) The agents had previously made an appointment with appellant for 7:00 p.m. They decided to perform a parole search as quickly as possible, in case appellant got off work early and went home to get rid of any incriminating evidence. (24RT 6469-6470.)

They arrived at appellant's apartment at 6:30 p.m., but appellant was already there. Zaragoza said they wanted to perform a parole search and interview him. Agent Karen Sandusky of the Department of Justice interviewed appellant. (24RT 6471.) Zaragoza and the other Department of Justice agents searched appellant's apartment. In a wooden box, Zaragoza found an "eight ball" key chain which had been reported as being missing from Crawford's residence. He also seized some BBs and some boots. Appellant admitted that he had a BB gun at work, which was a

violation of the conditions of his parole. (24RT 6472, 6474-6475.) The investigators left at about 8:15. (24RT 6476.)

The following morning, March 20, 1999, Zaragoza decided to go to 84 Lumber and locate the BB gun. He planned to ascertain whether it looked like a firearm, and to take appellant into custody if it did. Zaragoza asked for help from the San Luis Obispo Police Department and the Department of Justice agents. (24RT 6476.) When appellant arrived for work, Zaragoza asked him where the BB gun was. He said it was under the cash register, and Zaragoza removed it. It looked like a semiautomatic handgun. Zaragoza arrested him for violating parole, and he was transported to the San Luis Obispo County Jail. (24RT 6478, 6498.)

g. The Police Searches of Appellant's Apartment

On April 6, 1999, police officers and FBI agents served a search warrant at appellant's apartment. They collected numerous items of evidence, including the jump seat from appellant's truck, which was found in an unfinished storage area. Stains on the jump seat tested positive for blood. (24RT 6532-6538; 26RT 6808.)

Officers searched the abandoned cabin near appellant's apartment on April 23, 1999. They found blood on a couch cushion, as well as the wood frame of the couch and on the floor underneath the couch. The couch cushions and the frame were booked into evidence. The part of the floor that had blood on it was removed. (25RT 6622-6624.)

Another search of appellant's apartment was conducted on April 24, 1999. Fourteen plastic flex ties were found in a toolbox located on the floor of the den. (24RT 6550.) Crawford's keys were found on a hillside about 47 feet from appellant's apartment. (24RT 6551-6552; 25RT 6576-6577.)

h. The Police Questioning of Appellant and his Confession

Following his arrest, appellant was interviewed on several occasions by Assistant Chief Investigator Larry Hobson, of the San Luis Obispo District Attorney's office. (26RT 6939.) Appellant initially denied having anything to do with the disappearance of either Newhouse or Crawford. On April 22, 1999, however, he confessed to raping both victims. He claimed that Newhouse accidentally choked to death while he left her hogtied in the abandoned cabin near his apartment. He admitted intentionally strangling Crawford to death in his apartment. (26RT 6940-6985.) The April 22 interview was videotaped.[3] (26RT 6986, 7016.)

i. Newhouse

Appellant said that he had never seen Newhouse before seeing her walking down the street at about midnight on November 12, 1998. She was intoxicated. (21CT 5493, 5496.) Appellant had been drinking that night as well, at three different bars.[4] (21CT 5495.) He followed her in his truck. (21CT 5493, 5496.) He assumed she was heading toward the Jennifer Street Bridge. He parked his truck and went up on the bridge, where he waited for her. (21 CT 5498.) She in fact walked up the ramp to the bridge. (21CT 5500.)

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[3] The videotape was played for the jury at trial. (26RT 7021-7024.) A transcript of the interview was prepared and provided to the jury. (26RT 7019; 21CT 5491-5748.) Other interviews were also videotaped, and transcripts were also provided to the jury. (21CT 5611-5693 [interview conducted on April 21, 1999], 5694-5748 [interview conducted on April 27, 1999]; see also 26RT 7067 [videotape of April 27 interview played for the jury at trial].)

[4] The bars – Mother's, The Library, and Bulls – were located in downtown San Luis Obispo and catered to Cal Poly students. (26RT 7041.)

Newhouse walked past appellant. Without saying anything to her, he turned around and punched her in the jaw. (21CT 5502-5503.) She staggered against the railing and screamed. He picked her up and threw her down on the ground. (21CT 5504.) She was dazed. He punched her again and knocked her out. (21CT 5505.) He grabbed her by the hair and dragged her down the stairs. (21CT 5506.) She was bleeding from the back of her head as a result of him smashing her body on the platform. She also was unconscious. He laid her down on the ground, unlocked his truck, and placed her behind the seats, on the jump seats. (21CT 5507-5509.) He tied her hands behind her back, using some rope he had. (21CT 5510.) He drove a little way, and then stopped. He tied her legs. (21CT 5512-5513.) He ripped her panties off even though her pants were still on and gagged her with them so she could not scream, using rope to tie them into her mouth. (21CT 5513-5515.)

Appellant drove Newhouse to the abandoned A-frame cabin near his apartment in Davis Canyon. She regained consciousness. He carried her over his shoulder into the cabin. Once he got inside, he untied her legs, leaving her hands tied. He pulled her pants off, took her panties out of her mouth, and raped her. (21CT 5518-5520.) Newhouse swore at him while he was raping her, saying "Fuck you, you piece of shit," and "Get out of me." (21CT 5521.) She fought him as well as she was able, given that her hands were still tied behind her back. After he was finished raping her, he turned her over on her stomach and hogtied her, tying her hands and legs together and forcing her legs up in an L shape. (21CT 5522-5523.) He ran a loop of rope around her neck to keep her legs up, and stuffed her panties back in her mouth. He went to his apartment, where he had a shot of whiskey and thought about what he was doing. (21CT 5524-5525.)

Appellant returned to the cabin about 10 or 15 minutes later. Newhouse was dead, either because she strangled herself while struggling

or because her legs relaxed. He cut some of the ropes, but left her hands and feet tied together. (21CT 5525-5526, 5538-5539.) He took her outside and set her behind the cabin. He went to his apartment, and returned the next morning. (21CT 5527-5528.)

Appellant drove down the road and dug a grave. (21CT 5528-5530.) He waited until about 11:30 p.m. or midnight, put Newhouse's body in the back of his truck, drove to the gravesite, buried her, and went back home. (21CT 5530-5533.) He noticed that there was some blood in his truck, so he removed the jump seat. He tried to get the blood out of the carpet with carpet cleaner. It did not work, so he cut a portion of the carpet out. He discarded it the next day in a dumpster at a gas station. (21CT 5534-5536.)

Appellant's girlfriend Moore came to his apartment that weekend and spent the night. (21CT 5533-5534.) Appellant claimed that he did not intend to kill Newhouse, and had planned to take her back to town and let her go after he raped her. (21CT 5540.)

ii. Crawford

Appellant said that he first saw Crawford about a week before he raped and killed her. Appellant had left a bar and saw her getting out of her car as he passed her apartment. (21CT 5542-5543.) He drove to the next block over and parked, and walked to the back of her apartment. He watched her for a few minutes through her window. (21CT 5544-5546.) He returned to her apartment one night about a week later, again after he had been drinking. (21CT 5546-5548.) He watched her from her roof while she was getting ready for bed. He thought about abducting her that night. (21CT 5546-5551.) He went back a third time late in the evening, about four or five days later, once again after he had been drinking. Again using her roof as a vantage point, he watched her walk around inside her apartment. (21CT 5552-5554.)

The next time he went to Crawford's apartment was the night he decided to abduct her. He had worked that day, gone home, and drank. It was after midnight when he arrived at Crawford's apartment. He had a pair of pantyhose over his head and was wearing gloves. The apartment was dark, but he knew she was home because her car was there. He checked the doors, but they were locked. (21CT 5555-5559, 5569-5570.) He crawled into her apartment through a small, unlocked bathroom window, injuring his ribs in the process. (21CT 5560-5562, 5604.) He heard a noise, but realized it was Crawford's cat. (21CT 5563-5564.) Crawford opened the bathroom door. She was wearing a T-shirt and a pair of underwear. Appellant punched her in the mouth. She fell back against the wall, and he punched her three or four more times, until she was unconscious. (21CT 5565-5566.) He hogtied her the same way he had tied up Newhouse, using some rope he brought with him. He placed some duct tape over her mouth. (21CT 5567-5568.) He placed a pillowcase over her head so she could not identify him. (21CT 5569.)

Appellant gathered up a few of Crawford's sweatshirts and a pair of her sweatpants, some of her CDs and videotapes, and her VCR, which he threw away a few days later. (21CT 5571-5574.) He also took her "eight ball" key chain from her coffee table. (21CT 5580.) He took Crawford's belongings out to his truck, looked around and saw that no one was around, and went back inside Crawford's apartment. She was conscious by that point, and struggling. He forced her into his truck. He went back inside and cleaned up her blood with a towel. (21CT 5577-5579.) He drove to Davis Canyon, with Crawford tied up in the back, the duct tape still across her mouth. (21CT 5584.)

Appellant parked near the abandoned cabin where he had raped Newhouse. He carried Crawford inside and left her on a couch. (21CT 5585.) He went to his apartment and drank some more. It started to get

light. (21CT 5586.) He drove down to a wood pile by the side of the road because he knew that Debra Wright would be going to work soon, and he wanted her to see him. He started chopping some wood. He spoke with her briefly when she drove past. (21CT 5587-5588.)

Appellant went back to the cabin and brought Crawford back to his apartment. (21CT 5588.) He knew that Mrs. Wright was out of town, and that Debra Wright would not be home from work until later that evening. (21CT 5591-5592.) He placed Crawford on his bed. He untied the part of the rope which joined her hands and feet together, but left her hands and feet tied. He cut her T-shirt off with a pair of scissors and tore off her panties. He raped and sodomized her, the pillowcase still over her head, and her mouth still taped with duct tape. (21CT 5589-5590, 5593.) After he ejaculated, he went to the kitchen to drink some coffee and whiskey. (21CT 5591.) He passed out and woke up about an hour or two later. (21CT 5592.)

Appellant took Crawford off the bed, and made her bend over a coffee table. He removed the pillowcase from her head and blindfolded her with a bandanna. Only her hands were tied at this point. He removed the duct tape from across her mouth. She was crying. She asked him why he was hurting her, but he did not answer. She asked him to stop, and pleaded with him to let her go. (21CT 5594-5595.) He raped her a second time. He told her not to look at him. He let her put a pair of her sweats on, and put her back in the bedroom. (21CT 5596-5597.) He took another nap on the couch. (21CT 5598.)

Appellant was awakened by Crawford coming out of the bedroom. She had managed to get her blindfold off, but her hands were still tied behind her back. Appellant got her on the ground and forced her onto her stomach. He strangled her to death, from behind, using the rope he had previously used to bind her feet. He put her body on the bedroom floor so

he would not have to look at what he had done, and then got really drunk. (21CT 5599-5600.) He dug a grave in the yard and buried her in it early in the afternoon. (21CT 5601.) She was clad in sweat pants and a sweatshirt when he buried her. He kept another of her sweatshirts hanging in his closet. (21CT 5603.)

Appellant washed the clothes he was wearing when he murdered Crawford, and burned other items. (21CT 5609.) He threw Crawford's keys away a few days later, in some bushes near his apartment. He put the eight ball ornament in a wooden box in his apartment. (21CT 5581-5582.)

iii. Appellant's Additional Statements Concerning the Crimes

On April 21, 1999, the day before he confessed, appellant told investigator Hobson that he hated women and had no respect for them. He forced himself on women because his mother had failed to stop his father from abusing him when he was a child. (21CT 5658-5659.) He also admitted that he had fantasized about raping women when he was in prison. (21CT 5653.) His fantasies involved tying women up and cutting their clothes off. (21 CT 5734.) When he actually raped women, it gave him both pleasure and a sense of dominance. He used ropes to help him control his victims. (21CT 5718.) Torture was not part of his fantasies, just dominance and control, and the ability to have sex with his victims repeatedly over a period of time. (21CT 5742.)

On April 27, 1999, appellant gave some additional details regarding the crimes. He acknowledged that Hobson had never threatened or coerced him, and that he had always spoken to Hobson voluntarily. (21CT 5695.) He said that Newhouse regained consciousness before they arrived at the cabin, and swore at him on the drive there. That made him angry, and also made him want to rape her. (21CT 5707-5708.) He told her to be quiet. (21CT 5712.) She could have made herself a less easy target had she not

drunk anything that night, and stayed with her friends. (21CT 5739-5740.) He denied torturing Newhouse with some electrical wires with alligator clips on them which police found inside the cabin. (21CT 5705.)

Appellant said he was attracted to Crawford because she was young and had a nice figure. (21CT 5736.) He was acting out a fantasy when he raped her. (21CT 5716.) His rape fantasies always involved strangers rather than women that he actually knew. (21CT 5717-5718.) Between the first and second rape of Crawford, he took her into the bathroom and let her use the toilet while she had the pillowcase over her head. (21CT 5701-5702.) Appellant panicked and realized that he had to kill Crawford because she saw his face when she came out of his bedroom. (21CT 5719.) He did not experience any sexual thrill when he killed her, and killing was not part of his sexual fantasies. (21CT 5735.) He left Crawford tied up because he had hoped that she would die like Newhouse did and it would not be necessary for him to kill her himself. (21CT 5720-5721.) He would have taken Crawford into town and released her later that night had he she not tried to escape. (21CT 5724, 5726.)

Appellant said that he did not use a condom when he raped either Newhouse or Crawford, and planned to wash their bodies in his bathtub so he would not be identified through DNA. (21CT 5704, 5713-5714.) When he abducted Crawford, he thought about certain mistakes he had made when he committed previous crimes which led to him being caught. He tried to not repeat those mistakes. (21CT 5731-5732.) He initially claimed that he confessed rather than invoking his constitutional rights because of his "conscience." However, he then admitted that he would not have confessed had the authorities not known about Newhouse's blood on the jump seats. (21CT 5743-5745.)

Appellant tried to rape a young girl under a bridge in Idaho when he was 18 years old.[5] (21CT 5727.) He committed his first rape when he was 21 years old.[6] (21CT 5726.)

iv. Hobson's Testimony Concerning Appellant's Interviews

Hobson testified in detail regarding his various interviews of appellant and appellant's confession. He first interviewed appellant on March 21, 1999, the day after he was arrested. Appellant assumed that Hobson wanted to talk to him about the disappearance of Newhouse and Crawford because he was on parole for rape. He was quiet and tense during the interview. (26RT 6939-6942.) Appellant claimed a lack of recollection of his activities on November 12 and 13 of the prior year. (26RT 6944.) He said he had gone to work at 84 Lumber on Wednesday, March 10, 1999, and then stayed home all night. (26RT 6945.) He was supposed to meet Moore, who was pregnant, and go to a doctor's appointment the next morning, Thursday, March 11, 1999, but he forgot about the appointment. He injured himself that morning when he slipped and fell into a pile of wood. He spent the rest of that morning buying flowers for Moore and trying to find her so he could apologize for missing her doctor's appointment. She spent the night with him at his apartment on Thursday through Sunday that week. (26RT 6946-6947.) He had seen fliers concerning the disappearances of the two women,[7] but denied ever seeing either Newhouse or Crawford. He had been by Tortilla Flats several times

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[5] It appears that the victim of the attempted rape was Jennifer E., whose testimony will be summarized below.

[6] It appears that the victim of this rape was Shelly C., whose testimony will also be summarized below.

[7] At the penalty phase, appellant's employer said that a flier regarding Newhouse's disappearance was posted on the front door of 84 Lumber. (34RT 8800.)

but never went inside. He had never been on Branch Street. (26RT 6947-6948.) He first acquired the eight ball seized from his apartment in prison, and had it shipped to him when he was paroled in 1997. (27RT 6948-6949.) Appellant gave Hobson permission to search his vehicles and his apartment. (26RT 6950.)

Hobson also spoke to Moore to try to verify appellant's alibi. He set up a phone call between her and appellant, which he tape-recorded, unbeknownst to appellant. Although appellant did not make any admissions during the call, Hobson thought it was significant that appellant did not deny being responsible for the crimes, and asked about the status of the police investigation. (26RT 6951-6953.)

Hobson next interviewed appellant on April 1, 1999. Appellant said he wanted to cooperate and show authorities that he was not responsible for the disappearance of either Newhouse or Crawford. Hobson said he was going to display photos of appellant and his vehicles to the public. Appellant said he knew the police had a job to do and that distributing the photos would eliminate him as a suspect. (26RT 6953-6956.) He admitted driving on Branch Street on a few occasions on the way to a bar. (26RT 6957.) There were other minor inconsistencies between what he told Hobson that day and what he had said on March 21. (26RT 6956.) Hobson told appellant that they had tested the eight ball seized in his apartment and determined it was not manufactured until 1998. Appellant said, "That's strange." (26RT 6958.) With respect to Hobson's question about asking for appellant's assistance in the investigation, appellant asked if they could take him to Crawford's apartment. The investigators did not do so. (26RT 6960.)

The next interview was on April 21, 1999. By that time, the investigation had progressed significantly. Specifically, Hobson had received a report from the California Department of Justice regarding blood

found on the jump seat of appellant's truck. Appellant again denied ever having seen either Newhouse or Crawford. Hobson showed appellant Crawford's eight ball and told him it belonged to her. Appellant said, "No way." (26RT 6966-6977.) Hobson told him they had found traces of blood in his truck, and that blood on the jump seat had been tested and determined to be Newhouse's. When Hobson asked for appellant's help in finding the bodies of the missing women, appellant said he was "dying" and wanted 30 minutes to think about it. On the drive back to the jail, appellant started crying. Hobson asked him what he was thinking about, and he replied, "A dead man walking." (26RT 6979-6983.)

On April 22, 1999, appellant made full confessions regarding the kidnappings, rapes, and murders of both Newhouse and Crawford, as set forth above. (26RT 6985.) Later that day, Hobson arranged for Moore to come to the police station along with Greg Vieau, appellant's employer. Appellant was permitted to talk to them, and he told them what he had done. (26RT 7042.)

On April 24, 1999, appellant told Hobson that he had spoken to a reporter from the Fresno Bee. Appellant told the reporter that he was a "monster" who deserved the death penalty. (26RT 7049-7050.) Appellant also said that he injured his knuckles when he punched Newhouse on the Jennifer Street Bridge. (26RT 7064.) On the drive to Davis Canyon, Newhouse managed to get her panties out of her mouth and she swore at him. (26RT 7051-7052.) When they got inside the cabin, he cut her shirt with a utility knife. He ripped it down the back and unbuttoned the buttons in the front. Newhouse asked appellant to let her go. (26RT 7052.) After he killed her, he placed her body in a trash bag so her blood would not get in his truck when he drove her to the grave he had dug. (26RT 7062.) He noticed her blood on one of the cushions on the couch, so he turned it over. He tried to cover up some blood under the couch by putting dirt over it.

(26RT 7054.) He threw his clothes in the dumpster where he discarded Newhouse's clothing, rather than washing them, as he first said. (26RT 7053.) The knots he made in the ropes when he hogtied Newhouse were similar to knots he would make if he was dealing with a load of lumber. (26RT 7053-7054.) He started to feel safe when no one contacted him after Newhouse disappeared, and starting thinking about rape again. (26RT 7056-7057.) Crawford tried to convince appellant that she had not seen his face before he killed her. (26RT 7060.) Before he buried Crawford, he retied her exactly like he had tied Newhouse to make sure Crawford was dead. (26RT 7061.)

Hobson conducted followup interviews with appellant on April 27, April 28, and April 30, 1999. His final interview with appellant was on May 6, 1999, following Hobson's trip to Idaho to speak with appellant's friends and relatives. (26RT 7065-7067; 27RT 7085-7087.)

i. The Discovery of the Bodies

On the afternoon of April 22, 1999, following appellant's confession, Hobson and other officers took appellant to Davis Canyon. Appellant showed them where he buried both bodies. Appellant also accompanied them as they went through his apartment. (26RT 7043-7044.) He said that he raped Crawford over a coffee table in the living room. (26RT 7045.) Appellant showed them a sweatshirt he had in his closet, which he said he took from Crawford's house the night he abducted her. (26RT 7047.) On the drive back to San Luis Obispo, the officers recovered a green trash bag which contained Crawford's VCR and some videotapes and CDs he took from her apartment. (26RT 7045, 7047-7048.)[8]

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[8] The officers videotaped their visit to Davis Canyon. (26RT 7043-7046.) The videotape was played at trial for the jury. (26RT 7046.)

Officers returned to Davis Canyon the following day, April 23, 1999, to recover the bodies. (26RT 6808.) Newhouse's body was found in a grave which had been dug on an embankment above Davis Canyon Road, underneath a large pile of brush and some plastic trash bags. (26RT 6881-6882, 6887.) The grave was about three feet deep. Her body was contorted, as her legs were bent up by her torso and her feet were next to her head. (26RT 6887.) Her body was clothed only in a shirt and a bra. (27RT 7136, 7144.) Her shirt had been cut up the back, essentially in half, and the shoulder portions of the shirt had been pulled down onto her arms. Her bra was also pulled down. (27RT 7143.) The officers removed all the dirt from around the body, carefully lifted the body out of the grave so as to attempt to keep it intact, and placed it in a body bag. (26RT 6888.)

Crawford's grave was right behind appellant's apartment. (26RT 6877.) It was covered with trash and debris. (26RT 6892.) Her grave was about two to three feet deep. Her body was curled up in sort of a fetal position, on her back, with her arms underneath her back. (26RT 6893-6894.) Her body was also carefully removed from the grave and placed in body bag. (26RT 6895.) She was clothed in black sweatpants and a black sweatshirt with a "Hard Rock Cafe" logo. She had been blindfolded with a bandanna. There was a rope placed around her neck, torso, and extremities. There were plastic flex ties on her wrists. (26RT 6894; 27RT 7152.)

Both bodies were transported to a facility in Templeton, where they were X-rayed. They were then taken to an autopsy facility in Los Osos. (27RT 7136.) Both gravesites were photographed and diagrammed. (26RT 6886, 6895.) No additional evidence was recovered from either gravesite. (26RT 6895.)

j. The Autopsies

Dr. George Sterbenz performed the autopsies on both Newhouse and Crawford on April 24, 1999, including examining each for sexual assault.

(27RT 7137-7138, 7151.) He had also been present when their bodies were exhumed from their graves in Davis Canyon. (27RT 7133-7134.)

Newhouse's body was in an advanced state of decomposition. (27RT 7138.) Her skin was discolored and putrified. (27RT 7139.) Her body weighed 90 pounds when it was autopsied, but Dr. Sterbenz believed Newhouse weighed more than that when she was alive. She was five feet, five inches tall, and had brown hair. (27RT 7141.) She had earrings on, and a bracelet with "Rachael" inscribed on it. (27RT 7142.) It appeared that she had suffered a head injury and there was evidence of dried blood in her hair. Her skull was intact, and there was no evidence of a hemorrhage within her head. Her internal organs were also intact, and showed no evidence of disease. (27RT 7145-7146.) She died as a result of asphyxia, but Dr. Sterbenz was unable to specify precisely how she was smothered or strangled. (27RT 7148.) Neither manual strangulation nor ligature strangulation could be ruled out. (27RT 7149.)

Crawford's body was somewhat decomposed, but was better preserved than Newhouse's. She was also five feet, five inches tall. Dr. Sterbenz estimated that she weighed 110 pounds when she was alive. (27RT 7151.) Her clothing and the ligatures binding her were removed and preserved as evidence. (27RT 7152.) There were two lacerations on her inner cheek, consistent with a blow to the face. (27RT 7154-7155.) She had a bruise on the top of her head. Her internal organs were also intact with no evidence of disease. Crawford died as a result of asphyxia by ligature strangulation. (27RT 7161.)

Vaginal and rectal swabs were taken from both victims during their autopsies, but they tested negative for semen. (25RT 6709; 27RT 7137-7139.) Due to the conditions of their bodies, it would not be unusual if a sexual assault examination was negative even if the victims had been raped. (27RT 7139-7140.)

k. Appellant's Rape of Shelly C. in 1987[9]

Shelly C. was 21 years old and living in San Luis Obispo County in 1987. She and her roommate Lisa lived in a duplex, along with Shelly's child and Lisa's two children. (23RT 6088-6089.) On Saturday, May 23, 1987, Shelly went to a bar in Pismo Beach, and then to the restaurant where both she and Lisa worked to visit Lisa. Shelly left the restaurant around 3:00 on Sunday morning, stopped at a market to buy some cigarettes, and drove home. (23RT 6092-6094.) She noticed that there was a car behind her on the drive home. When she arrived at her home, the car passed her driveway, but then turned around and came back down the street. She looked through a knothole in her fence and saw that the car had stopped in a field next to her house. (23RT 6095-6096.)

Shelly went inside her house at about 3:15 a.m. and got ready for bed. The house was empty, as Lisa was still at work and the children were with babysitters. She went to bed, only to be awakened about 30 to 45 minutes later. Appellant placed his hand over her mouth and told her not to say anything louder than a whisper. (23RT 6096-6097.) A strong smell of alcohol emanated from his body. (23RT 6105.) He was holding a knife to her throat, and asked her if her kitchen knives were sharp enough to cut her throat. He said not to worry, as the knife he was holding was his. He threw the knife down. He got another knife and held it to her throat. He turned her over on her stomach and tied her hands behind her back with some rope. He cut her clothing off. He started to try to gag her with an item of clothing, and also to blindfold her, but stopped when she said she would not say anything or look at him. (23RT 6098-6099.)

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[9] The crimes involving this victim were not charged in this proceeding. The evidence concerning these offenses was admitted pursuant to Evidence Code section 1101, subdivision (b), and Evidence Code section 1108. (8RT 2759-2765.)

Appellant pulled Shelly down to the end of the bed and raped her, both rectally and vaginally. (23RT 6100.) When he was done, he pulled her back to the head of the bed. He tied her feet, and then hogtied her ankles and wrists together. He asked where her purse was. A car drove up and he asked Shelly if it belonged to her roommate. (23RT 6101.) She responded affirmatively. He said, "Have a nice day," and walked out. Lisa walked in. Shelly got her hands free. She got the knife that appellant had kicked under the bed and cut her feet loose. They drove to Lisa's mother's home and called the police. A rape examination was performed at a hospital. (23RT 6102.) Detectives went to her home and retrieved her clothing. (23RT 6103.)

Appellant confessed to the police. He told them that he first saw Shelly in the restaurant where she worked earlier that day. He said he followed her home and waited for about 15 minutes. He gained access to the house by breaking in through an unlocked living room window. He obtained a knife from the kitchen. He found the bedroom and saw Shelly lying on the bed. He tied her up with some rope he brought with him and tried to rape her two or three times. He could not recall if he ejaculated. Appellant said he did not know why he assaulted Shelly. (23RT 6112-6113.) He said he wanted counseling but was afraid of serving time in prison. (23RT 6111.)

Appellant was convicted of residential burglary, rape, and forcible sodomy, as a result of his crimes against Shelly. He was sentenced to state prison. He was paroled to San Luis Obispo County in September 1997. Agent Zaragoza was assigned to supervise his parole. (24RT 6454-6455.)

2. Defense Evidence

Appellant did not testify at the guilt phase, or offer any affirmative defense. (27RT 7196-7197.)

B. Penalty Phase Evidence

1. The Prosecution's Case-In-Chief

a. Evidence of Appellant's Prior Convictions and Prior Violent Acts

Documentary evidence was admitted showing that appellant had been convicted of grand theft in Idaho and several offenses involving Shelly C. and Anishka C. in San Luis Obispo County in 1987. (29RT 7788-7789; 23CT 6177-6233.) In addition, Anishka C. and Jennifer E. testified at the penalty phase regarding appellant's crimes against them.[10]

i. Anishka C.

Anishka C. was living with her seven-year-old daughter in Arroyo Grande in June 1987. Anishka was divorced. (29RT 7793-7797.) On June 5, 1987, she returned home and discovered that someone had broken into her house. Her bathroom window was broken and the screen door had been ripped. The toilet seat was broken and there was a footprint on it. She called the police and they took a report. (29RT 7797-7799.)

Anishka and her daughter were asleep on June 15, 1987, when a sound woke her up at about 1:00 or 1:30 a.m. She got up out of bed and turned on the bathroom light. She did not hear anything else and went back to bed. A few minutes later, appellant was on top of her, holding a screwdriver. (29RT 7799-7801.) She pleaded with him not to hurt her and said he could take her jewelry or whatever he wanted. Appellant said, "I

[10] As summarized above, Shelly C. had previously testified at the guilt phase. Jennifer E. testified in the prosecution's case-in-chief in the penalty phase, albeit out of order due to her unavailability earlier. (37RT 9644.) She testified after the defense portion of the penalty phase. It appears that Andrew Anderson, the police officer who investigated the assault on Jennifer, also testified out of order as part of the prosecution's penalty phase case-in-chief, and was not a rebuttal witness at the penalty phase. (See AOB 58.)

don't want anything. I just want you." (29RT 7801.) Her daughter had awakened, and was screaming and crying. Anishka told her daughter to get under the bed, which she did. Anishka could see that appellant's zipper was down and his belt was undone. There was a knife case hanging from his belt. (29RT 7802-7803.)

Anishka tried to get appellant away from her daughter and tried to get him out of the bedroom. She got the knife away from him. He pulled her hair. He tried to tie her up, but she kept fighting. He hit her head against the wall in the hallway. She tried to stab him, but struck his belt. She dropped the knife. He got angry and bit her finger. She opened the front door and appellant left. (29RT 7803-7805.) She called the police. (29RT 7806.)

A police officer who investigated the assault of Anishka determined that the assailant entered her home by prying open a side garage door. Some utility wires had been pulled out from where they came into the garage from the exterior of the house. The cord on the kitchen telephone had been cut. The assailant apparently got into Anishka's backyard by piling up some bags of fertilizer against the fence so he could get over the fence. (29RT 7811-7819.) A buck hunting knife was recovered at the scene. (29RT 7820.) Appellant was arrested on June 17, 1987. He had a scratch on his face, by his nose. (29RT 7822.)

Appellant told a detective that he had first seen Anishka about a month earlier, when he was working on a neighbor's garage door. He claimed he went to Anishka's home in order to steal a stereo. (29RT 7826.)

After the attack, Anishka had surgery on her finger. She was not able to fully use it again. (29RT 7806.)

ii. Jennifer E.

Jennifer E. lived in Sandpoint, Idaho, in February 1984. She was 12 years old at that time. She met appellant, who was 18 years old, through a

friend named Rama. On February 3, 1984, she and Rama met up with appellant and some other boys. They decided to go down to the beach and drink a bottle of vodka that one of the boys had. They were walking in an alley behind a theater, toward the beach, when appellant pulled her off to one side. They got into the back of a pickup truck. Appellant tried to kiss her, but she said no, as she was only 12. Appellant kept trying to kiss her. She tried to walk away, but appellant grabbed her. She tried to trip him, but he ended up tripping her and they wound up on the ground. (37RT 9647-9650, 9669.)

Appellant asked her if she wanted to have sex with him. She said she was not interested in kissing him and certainly was not interested in having sex with him. She asked him to get off of her, and tried to push him away. He tried to undo both his pants and her pants. She tried to knee him in the groin, and also went for his throat. Appellant punched her with his fist three or four times, hard, on the forehead, near her eyes, and on the jaw, causing her to bite her tongue. He put his hands around her throat and choked her. She was able to get away because they went over the top of a curb and down an embankment. She zipped her pants up and took off running. Appellant asked her not to tell about what he had done, but she went to a nearby police station and told an officer what had happened. (37RT 9650-9653.)

Jennifer was crying when she arrived at the police station. She appeared to have been injured, and Officer Andrew Anderson photographed her injuries. She was transported to a hospital. Officer Anderson questioned appellant, who said he had been drinking with some teenagers under a bridge. He was vague about what happened after that, but admitted that he had kissed and fondled Jennifer. He denied assaulting her. (37RT 9661-9669.)

b. Victim Impact Testimony

i. Newhouse

Montel Newhouse, Rachael Newhouse's mother, said that Rachael was born in Irvine and grew up there with her brother Travis and her sister Ashley, who were ages 24 and 20, respectively, at the time of trial. Rachael would have been 22 at the time of trial. She was a very conscientious student and graduated with a 4.0 grade point average. She was a bit of a perfectionist. Her family and friends were important to her, as was physical fitness. She enjoyed outdoor activities such as camping and hiking. She lettered in cross county in high school and participated in a state championship meet where she placed third. (29RT 7837-7839.) She sometimes babysat and enjoyed being with children. Motherhood was in her plans and she would have been a good mother. (29RT 7841-7842.)

Rachael chose Cal Poly because she was interested in pursuing a nutritional science major, and not many colleges offered that program. She ultimately wanted to become a registered dietician. She and some friends visited Cal Poly and she was very impressed with the school. She thought it would be a good college experience. (29RT 7839-7840.)

Mrs. Newhouse and her husband Phillip visited Rachael in San Luis Obispo at least once a year and thought it was a good fit for her. (29RT 7840.) Rachael started her junior year in 1998. She also worked at various part-time jobs. (29RT 7841.)

Mrs. Newhouse and her mother last visited Rachael in October 1998. She spoke to Rachael for the last time the night before she was murdered. They had a long conversation. Rachael was upbeat. Things were going well. She had great roommates who were a good support group. (29RT 7842.)

Mrs. Newhouse first heard that her daughter was missing on the evening of Friday, November 13, 1998. Nichole Tylenda left a message on their answering machine which said that no one had seen Rachael since the previous night. Mrs. Newhouse called her back. Tylenda said that they had called the police. Mrs. Newhouse stayed in phone contact with her friends and the police all night. She and her husband went up to San Luis Obispo early Saturday morning. They were in shock. (29RT 7843.) They met with detectives and started circulating fliers regarding Rachael's disappearance. (29RT 7844.) The next four months were very hard. She was more afraid than she had ever been in her life. They kept in constant contact with the police. (29RT 7845.)

When Mr. and Mrs. Newhouse received a phone call from Detective Dunn in April 1999 asking them to come back up to San Luis Obispo, they were somewhat prepared that the news would not be good. They were told that authorities had found Rachael's body. (29RT 7845-7846.) There were two memorial services for Rachael, one in San Luis Obispo and one in Irvine. (29RT 7846.)

It was impossible for Mrs. Newhouse to explain how Rachael's murder affected her family. She hesitated to explain how much pain their family felt because it was not fair to compare it with the pain Rachael must have suffered. She also was afraid that if they described how badly they felt about losing Rachael it would detract from the joy she had brought her family. The identification bracelet Rachael was wearing when she was murdered was a Christmas present from Mrs. Newhouse. (29RT 7847-7848.)

Patricia Turner, Rachael's aunt, said that her daughter and Rachael were basically raised together and she knew Rachael intimately. She was a "dream child," as she was a straight A student and an athlete. Turner spent some time with her the summer before she died and realized that she had

found balance in her life. The world changed for Rachael's mother following Rachael's murder. (29RT 7829-7833.) Rachael's father struggled with trying to balance a celebration of his daughter's life with the nightmare surrounding her death. (29RT 7834.) Rachael's sister Ashley had been a very determined young woman before the murder, but struggled thereafter. She sought counseling and was prescribed antidepressant medication. She was 18 and getting ready for college when Rachael was murdered, and it completely changed her future plans. (29RT 7835.)

ii. Crawford

Aundria Eberhart Crawford was Gail Crawford's only child. Aundria grew up in Fresno. Mrs. Crawford separated from her husband when Aundria was a baby, and she raised Aundria by herself. Aundria's father moved to Washington, but he stayed in touch with Aundria and she visited him twice a year when she was younger. Aundria was very open. She and her mother were best friends, more like sisters than mother and daughter. (29RT 7861-7862.) Aundria studied ballet for nine years, and Mrs. Crawford was present at each of her lessons. Aundria had to quit ballet when she was 14 years old due to a foot problem. She then became interested in horses, which were her second love. She liked fast cars and knew how to repair automobiles. (29RT 7863.)

Aundria was a good student. She was on the honor roll until she was about 15 or 16. She became frustrated with her foot problem in ballet and struggled a little bit her senior year of high school, but she graduated in 1996. She chose Cuesta College in San Luis Obispo because she and her mother and grandmother had visited Pismo Beach and San Luis Obispo for vacations. She planned to attend Cuesta College for two years and then transfer to Cal Poly. Aundria liked the area and its clean air. She had a lot of friends, both in Fresno and San Luis Obispo. Aundria was homesick but liked living in San Luis Obispo. She wanted to get married and have

children. She wanted to be an interior decorator or an architect and run her own business. She also talked about wanting to move to Wyoming and have a horse ranch. She wanted everything out of life, "all of it." (29RT 7855, 7864-7865, 7869.)

The last time Mrs. Crawford spoke to Aundria was on Tuesday afternoon, March 9, 1999. They talked about a drafting board that Aundria needed to purchase. Aundria and Mrs. Crawford often kept in touch by using a pager, and Aundria always called Mrs. Crawford back if she got paged. (29RT 7864.) Mrs. Crawford started paging Aundria on Thursday, March 11, 1999, but she did not return her pages. Mrs. Crawford knew that there was a problem. Mrs. Crawford and her mother, Jody Crawford, went to San Luis Obispo and met with the police. They went to Aundria's apartment on Friday. Mrs. Crawford knew something was wrong because Aundria's car was there, and she took it everywhere. Mrs. Crawford and her mother moved into a trailer in a mobile home park in Morro Bay for six weeks while they searched for Aundria. They looked for Aundria everywhere they could think to look, including back roads and trash dumps. The police called her on April 22, 1999, and told her that they had found Aundria's body. (29RT 7857, 7864, 7867-7868.)

Aundria's funeral was held in Fresno. She was buried in the Clovis Cemetery. There was also a memorial service at Cuesta College. The following year, her family had a memorial stone placed at Cuesta College with Aundria's name on it, and the words, "We love you forever." Aundria's death left a huge void in Mrs. Crawford's life, as she was Mrs. Crawford's whole family. (29RT 7859, 7869.)

Jody Crawford was very close to Aundria, her granddaughter. She helped her daughter Gail raise Aundria because Gail was alone. Aundria's mother worked a lot and her grandmother was like a second mother to Aundria. (29RT 7850-7852.) Her grandmother helped Aundria move into

the apartment on Branch Street in January 1999. At the time of her death, things had been going well for Aundria. Her grandmother spoke to her for the last time on March 9, 1999. (29RT 7856.) Aundria's murder affected everyone in their family, especially her other two grandchildren, ages 11 and 14 at the time of trial. Aundria's mother had been unable to go back to work or return to her normal life after Aundria was killed. Both she and Aundria's mother moved out of state afterwards because they felt like they had to move away from Fresno. (29RT 7860.)

2. Defense Evidence

a. Appellant's Childhood and Early Adult Years

Appellant was born in 1966 in Sandpoint, Idaho, to Connie and Allan Krebs. Appellant's mother was pregnant with appellant when she and appellant's father got married. (31RT 8243.) Appellant had three sisters, Lecia, Marcia, and Tracy. At various times when he was young, appellant lived in Sandpoint, as well as in Montana, Nevada, and Washington. (30RT 7915-7919.) Appellant's mother described him as being mischievous but a "good kid" when he was young. (31RT 8258.) He always looked after his sisters, and liked horses and animals. (30RT 7968-7969.)

Appellant's father was a violent person who drank a lot and also abused drugs. (30RT 7921; 31RT 8205.) He was a womanizer who did not respect women. (30RT 8068, 8076-8077.) He had a reputation for using excessive violence against women and was controlling and dominating in his relationships with them. (32RT 8381-8382.) He also treated his family poorly. He yelled and screamed at them, and used vulgar language. He was both mentally and physically abusive. (30RT 8047.) Several family members were afraid of him. (30RT 8069, 8075.) Friends and other family members were generally not welcome at the family home. (30RT 8078.)

Appellant's father did not treat appellant well when he was a baby. On one occasion, he tossed appellant over the top of a car, telling appellant's mother to catch him, which she did. (30RT 7995.)

Appellant's parents fought often, but generally not in front of their children. Appellant's mother often had visible injuries due to the abuse, which scared appellant. Appellant's mother grew tired of getting beaten and she and appellant's father eventually separated. Appellant's father came to the house where they were staying, where he beat and raped appellant's mother. (30RT 7921-7922; 31RT 8245, 8300.) Appellant's father slapped his daughters around a lot and called them bad names like "bitch" and "cunt." He also hit appellant. (30RT 7962.)

Appellant's father also beat up Bob Jackson, a man who was dating appellant's mother after the separation. Appellant's father continued to threaten appellant's mother. Finally, when appellant was about five years old, she packed up her children and her belongings one night and she and Jackson moved to Nevada. (30RT 7923, 7953.)

At first appellant's mother had a good relationship with Jackson, but after awhile he became abusive toward appellant's mother as well. (30RT 7929.) They both drank a lot. (30RT 7927; 31RT 8247-8249.) Jackson never hurt appellant's sisters, but he treated appellant differently. Both appellant's father and Jackson always called appellant "little bastard." Jackson was verbally abusive and controlling. It seemed that he did not want appellant around. Jackson sexually molested appellant's older sister, Lecia. On one occasion, he fired a gunshot over her head, which struck the television. Jackson spanked appellant and told him he was worthless. He would make appellant put soiled underwear on his head, and once made appellant wear a diaper to school. (30RT 7930-7932, 7935, 8037, 8051; 31RT 8248.) Family members observed black and blue marks and cuts on

appellant's buttocks when he was about eight or nine years old, apparently caused by a beating. (30RT 8038-8039.)

Appellant and his sisters were left home alone on many evenings while Jackson and their mother went out drinking. (30RT 7937-7938.) Once, a police officer came to check on the children because a neighbor had called about the children being left alone. (30RT 7940-7941.) There were also good times during this period, however, as the family had outings together when they engaged in activities such as four-wheeling, rock hunting, camping, and visiting ghost towns, all of which appellant seemed to enjoy. (31RT 8303.)

Appellant's father tracked them down in Nevada at one point. Appellant's mother was upset that he had found them. Jackson pointed a rifle at him. Appellant's father pulled appellant in front of him and used him as a shield, which frightened appellant. (30RT 7933-7934.)

Appellant went to live with his father on a small farm in Culvin-Culver, Idaho, for several years. One year appellant's mother and his sister spent their vacation in Idaho. Appellant wanted to return to Nevada with them at the end of the vacation. Jackson said he did not want to have "that little bastard in my house." Even though appellant begged his mother to let him to return to Nevada with the rest of the family, appellant's mother told him he would be better off with his father in Idaho, which upset him greatly. (30RT 7943-7944, 7946; 31RT 8252-8253.)

Appellant's mother and Jackson moved appellant's sisters back to Idaho in 1977, when appellant was about 12. Appellant did not move in with them, however, and continued living with his father. Appellant did not have much contact with his mother during this period, even on holidays. (30RT 7945-7946.)

Appellant dated Adonia Krug, a schoolmate, when she was 11 and he was about 14. He tried to be physically affectionate with her, but she said it

was not appropriate, and he accepted that. The relationship ended when Diana Scheyt, Krug's mother, called appellant and told him how old Adonia was. (33RT 8567-8568.) Scheyt thought appellant was a positive influence on her daughter, and allowed the two to remain friends. (33RT 8584-8585.)

When he was 15, appellant received medical attention in the emergency room for head and face injuries which caused the treating physician to file a child abuse report. (32RT 8349-8360.) Appellant's father hit appellant once when he was about 16 or 17, and gave him a bloody nose. (30RT 7963.) Appellant's aunt, Patricia Miller, was concerned that appellant's father might have been abusing appellant, but did not do anything because she was afraid of appellant's father. (30RT 7985-7988.)

Dorothy Thompson, the principal of one of the schools appellant attended in Idaho, described him as a lonesome boy. (30RT 8087.) On one occasion, appellant disappeared overnight. Another student told Thompson where he was, and said he had taken him some food and clothing to keep him warm. Thompson found appellant hiding underneath a large overturned tree root about a mile away from the school. Appellant said that he did not want to go home, and did not want to return to school either. (30RT 8088-8089.)

Robert Libbey, one of appellant's elementary school teachers, described appellant as pretty quiet. He did not have a lot of friends. Appellant was a capable student, but he did not work hard, and did not pass the seventh grade. From the outside, the Krebs property did not appear to be well kept up. It was possible that appellant was an abused child. (31RT 8143-8144.)

Another of appellant's teachers, Michael Keough, also described appellant as a loner. Keough was a part-time bartender in addition to being

a teacher, and knew that appellant's father had a reputation as being a fighter. (31RT 8146-8150.) Keough observed bruises and scratches on appellant at school. (31RT 8152.) Other students were afraid of appellant because he was physically mature and not afraid of anything. (31RT 8153.)

Sharon Braunstein, a cook in the cafeteria at the elementary school appellant attended, described appellant's physical appearance as typical of a child who had been raised on a farm in that his clothes were generally worn and not always clean. (31RT 8162-8163.) He was quiet and a loner, but was very bright. His home was run down and unkempt. (31RT 8164-8165.)

Anthony Poelstra, one of appellant's schoolmates, said that other students teased appellant, but no more than other students. (30RT 8098-8099.) Appellant's school clothes were often old and worn, but they lived in a poor area and he fit in with a lot of the students in the school. (30RT 8101.) However, another schoolmate, Debbie Rogers, said that appellant did not fit in at school due to his clothing and hygiene. (30RT 8112.) Appellant was not considered a popular student. (30RT 8113.)

Janice Grabenstein dated appellant's father and moved into his home when appellant was 17 years old. (31RT 8194.) The house was filthy and lacked running water when she moved in. (31RT 8195.) It seemed like appellant and his father had a good relationship at first, but appellant's father later started becoming verbally and physically abusive towards appellant. Once, he slapped and pushed appellant after he burned some pasta he was cooking. (31RT 8197-8198.) He called appellant bad names like "bastard" and "asshole." (31RT 8224.) Appellant's father was abusive toward appellant's sister Marcia, who had a learning disability. He called her bad names and physically abused her. (31RT 8201-8202.) He was verbally abusive toward Grabenstein's daughter Debra, who moved into their home as well. He also punched her and spanked her using pieces of

wood from a woodpile. (31RT 8217-8220.) Grabenstein left appellant's father after staying with him for over seven years, and moved away. (31RT 8194.)

Appellant's mother got divorced from Jackson and married John Hollister in the mid 1980's. They moved to California, leaving appellant and his sisters with appellant's father. (30RT 7965; 33RT 8624-8625.)

Appellant spent time in both a juvenile hall facility and county jail. (30RT 7975-7976.) He also served a sentence in state prison in Idaho. Appellant stayed with Lecia and her husband after he got out of prison in 1986, until he moved to California. (30RT 7950.)

Appellant lived with his mother and Hollister in Oceano, California, after converting a garage at their home into a spare bedroom. Appellant got a job at a fast food restaurant and bought a car. He had a girlfriend, Liesl. Family members described Liesl as pretty and very nice. Appellant was infatuated with her, and made a romantic candlelight dinner for her at his apartment when they first started dating. Appellant and Liesl had a good relationship. He got a better paying job, installing garage doors. He was arrested in 1987 for the rape and attempted rape of two young women, and he went to state prison after being convicted of those crimes. (31RT 8256-8260; 33RT 8630-8631, 8645.)

b. Appellant's Life in San Luis Obispo After Being Paroled from State Prison in 1997

Appellant's parole officer, David Zaragoza, supervised appellant's parole in San Luis Obispo and was familiar with the conditions of his parole. (34RT 8807-8808.) Appellant was classified as a "high control parolee" given the nature of his commitment offense. Zaragoza met with him within the first 30 days of his parole, and every 60 days after that. (34RT 8814.)

Upon being paroled in September 1997, appellant appeared to initially be apprehensive about living outside of prison. (34 RT 8805, 8811.) Appellant obtained a job at 84 Lumber in San Luis Obispo within a week or so of being paroled. He worked there between 50 and 60 hours a week. (34RT 8811-8812.) Appellant disclosed his commitment offense to his girlfriend Roslynn Moore, as required. (34RT 8812.) Appellant told Zaragoza that he and Moore were going to get married. (34RT 8815.) Zaragoza had a total of 52 face-to-face contacts with appellant, 22 of those at appellant's residence. (34RT 8817.) He never smelled alcohol on appellant during any of their face-to-face visits. (34RT 8818.)

On August 1, 1998, appellant was in a bar in Atascadero called "Outlaws" when he intervened to protect a friend of his, Melissa Copelan, from a man who threatened to hit her. Appellant got into a fight outside the bar, and was knocked out. (33RT 8704-8707.) Appellant never acted in a sexually inappropriate manner with Copelan or other women, at least in her presence. (33RT 8708-8709.)

Jaimie Prisco met appellant in 1998. (33RT 8711.) She said that appellant was very respectful around women. (33RT 8717.) She never saw appellant angry, and he tried to calm her down when she became angry. (33RT 8718.) Appellant brought his father to visit at her house shortly after appellant murdered Newhouse. Appellant was in a good mood at the time, and seemed like his "normal self." (33RT 8719-8721.)

Daniel Thompson, the bouncer at Outlaws, met appellant when he helped Thompson break up a fight at the bar. They became friends. Appellant got Thompson a job at 84 Lumber. (33RT 8724-8727.) Thompson saw the fight at the bar when appellant got knocked out. Thompson took appellant home from the hospital following the fight so he could recuperate. They drifted apart afterwards, but were still friends. (33RT 8729-8732.) Thompson considered appellant to be a great person.

(33RT 8737.) No female customers at the bar ever complained to Thompson about appellant, who was like a "magnet" to women. (33RT 8735.)

Greg Vieau, appellant's supervisor at 84 Lumber between September 1997 until March 1999, was of the opinion that appellant was an excellent worker. (34RT 8781, 8785.) Appellant was even the salesperson of the month one month. (34RT 8790.) Vieau considered appellant to be a friend, and appellant visited Vieau's home. Appellant stayed with Vieau at two different times, when he was looking for a place to live. Appellant helped him with projects at his home like assembling a swingset for Vieau's children. He also helped Vieau do some work on a house Vieau purchased, even though they had to work on the project after working a normal shift at 84 Lumber. (34RT 8783-8784, 8792.) Appellant could have hidden the BB gun that caused him to be taken into custody, but did not do so. Vieau went to the police station on the day appellant confessed, and was shocked when he found out that appellant had confessed to killing Newhouse and Crawford. (34RT 8794.)

Roslynn Moore met appellant about a month after she moved to San Luis Obispo in July 1997. (34RT 8859-8860.) Appellant told her that he had been in prison, and what he had been sent there for. (34RT 8862-8863.) Appellant treated her fairly well while they were dating. The relationship started out strong, but there were some "ups and downs" when appellant started going to bars. (34RT 8864.) They broke up a couple of times, once because she heard that he was seeing other women, but always got back together. (34RT 8865.) Appellant was never sexually inappropriate with her, and never tried to tie her up. (34RT 8866.)

Moore found out that she was pregnant in January 1999. Appellant was excited at first, but within a few days said he wanted her to have an abortion. He said that having a baby was not a good idea because he had

no conscience. He changed his mind again, however. (34RT 8867-8868.) Appellant told her that he loved his father, and the two seemed very close when appellant's father visited them in February 1999. (34RT 8878.)

Moore was not surprised when appellant was arrested for violating parole, as he had beer in his apartment and was frequenting bars. (34RT 8869.) Like Vieau, she was shocked when she went to the police station and appellant told her that the accusations regarding Newhouse and Crawford were true. (34RT 8871.)

c. Appellant's Post-Arrest Conduct and Statements

According to William Wammock, the assistant jail commander at the San Luis Obispo County Jail, appellant was placed on suicide watch in jail after he was arrested. Appellant also was in isolation for a period of time, for his own protection. Appellant was generally compliant with jail regulations, but had a few disciplinary problems. (34RT 8833-8838, 8842-8843.) He hid a chicken bone under his mattress on one occasion, hid some medication in his cell, and made a blow-gun. (34RT 8843-8844.) When he was in jail, appellant masturbated while fantasizing about Crawford. (37RT 9580.)

Michael Krikorian, then a reporter for the Fresno Bee, interviewed appellant in jail on April 24, 1999, a few days after he confessed to the murders. (35RT 8981.) Appellant expressed disgust with himself and sympathy for the victims' families. He said, "Two girls are dead. If I'm not a monster, then what am I"? (35RT 8983-8984.) He also said that he hoped he was given the death penalty. (35RT 8984.)

Sister Miriam Larkin first met appellant after his defense attorney called her and asked if she would be interested in seeing appellant on an ongoing basis. (37RT 9626.) Appellant expressed remorse to her for what he had done. He prayed for Newhouse and Crawford. He said that, if he

could, he would trade places with them. (37RT 9630.) She saw religious and spiritual development in appellant during the times she met with him. (37RT 9632.) She believed that God was part of appellant's life, and planned to remain in contact with appellant after sentencing. (37RT 9633.)

d. Staff Evaluations of Appellant While He was in Custody in Prior Cases

i. Juvenile Placements

Scott Mosher, a social worker at the North Idaho Children's Home, met appellant in June or July of 1981, when appellant was about 15. Appellant was sent to the Children's Home as a result of a burglary charge. Mosher worked with appellant in the facility's South House, a non-detention facility which housed young boys who were in state custody. Their goal was to try to remedy whatever behavioral or emotional difficulties their residents had. (32RT 8384-8388, 8403-8404.) Appellant was needy and fearful of his father when he first arrived at South House. (32RT 8393.) Appellant had anger management problems at first, but he made progress in this area. (32RT 8394.) He received a certificate for being "gentleman of the month" in March 1982 and an achievement award in basketball in April 1982. (32RT 8404-8405.) Mosher worked with appellant for two years. (32RT 8403.)

Frederick Deibel, an art instructor at South House, saw appellant daily and prepared written reports regarding his progress. (32RT 8488, 8493.) Deibel observed appellant change from a meek, scared young man to a positive role model for others. (32RT 8498.) Appellant did well in math, and acted as a classroom aide after he earned his GED. (32RT 8497.)

Appellant was at South House for about a year. (32RT 8403.) He went from South House to Cedar House, which was a less restrictive group home. (32RT 8396.)

Jeffrey Cirka, the program coordinator at Cedar House, was appellant's "big brother" while he was there. (36RT 9301.) Appellant was very active in the activities at Cedar House, and enjoyed playing basketball, shopping, and camping. (36RT 9302-9303.) He wanted to be a role model for other boys. (36RT 9307.) He developed empathy for other boys and staff members. He was not a bully. (36RT 9309.) He was concerned about his sisters, but did not know what he could do to help them. (36RT 9313.) Appellant discussed girls in the community he dated, but never told Cirka about any abnormal sexual fantasies. (36RT 9319.) Appellant had great vocational skills and good academic skills, and was a good example of the type of young man Cedar House sought to produce. (36RT 9313.)

Sally Gabby, a counselor who was in charge of the program at Cedar House, worked with appellant during the year that he was there. Appellant was generally well liked and had positive interactions with his peers. (32RT 8444-8447.) He had problems with anger, however, and once broke a window when he was angry. He also punched holes in walls. (32RT 8465, 8469-8470.) He was mature and responsible by the time he left Cedar House, and she felt good about the time he spent there. He left in March 1983, when he was 17, and returned to his home. (32RT 8464-8468.)

ii. State Prison

John Schrader, a probation officer in Idaho, prepared a presentence report regarding an automobile theft appellant committed when he was 18. (33RT 8591-8592.) Schrader recommended that appellant be granted probation and receive counseling. (33RT 8592-8593.) However, the judge sentenced appellant to state prison. (33RT 8600.)

Daniel Werline, a correctional officer at North Idaho Correctional Institute at Cottonwood, Idaho, evaluated appellant for the first 120 days appellant, a first-time offender, was at Cottonwood. Werline had daily

contact with appellant during this period. He believed that, aside from some immaturity, appellant had an excellent attitude. Werline prepared a favorable recommendation for appellant, and thought he should be allowed to leave the program. The judge disagreed, and appellant remained in the facility, under minimum custody status. He was trustworthy and was allowed to work in the administration office. He did not victimize other inmates. (33RT 8601-8610.) He was discharged from the facility in 1986. (33RT 8623.)

Poley Greenwood, a civilian coordinator of textile manufacturing who worked for Prison Industry Authority at Soledad State Prison in California, worked with appellant in the prison between 1992 and her retirement in 1997. They made shirts, pants, and jumpsuits. Appellant was a good employee who at times was her "right hand man." She gave him a written evaluation rating him "exceptional." After she retired, another civilian employee, Marjorie Howard, demoted appellant when Howard reorganized the textile manufacturing operation. (32RT 8519-8525.)

Several correctional officers at Soledad were of the opinion that appellant was a model prisoner who was on the Men's Advisory Council and attended AA meetings. He got along well with other inmates and did not belong to a gang while he was in prison. He had no problems with female staff members and never said anything inappropriate to them, nor did he make sexual overtures towards them. (33RT 8661-8662, 8665, 8667, 8681-8683, 8685-8686, 8699.) Appellant wrote love letters to two female prison guards when he was incarcerated at Soledad, but he did not mail them. (37RT 9578-9579.)

Utifiti Taueetia, an inmate at Soledad, served on the Men's Advisory Council with appellant. The purpose of the Council was to give advice to members of all the ethnic groups in the prison and to try to prevent violence. White inmates requested that appellant be their representative.

Appellant was on the Council for three years. Taueetia considered appellant to be a good friend and gave appellant his Bible as a goodbye gift when appellant was paroled in 1997. (34RT 8909-8914.)

e. Expert Testimony

i. Dr. Fred Berlin

Dr. Fred Berlin, a forensic psychiatrist whose primary professional area of interest pertained to sexual disorders, evaluated appellant on two occasions while appellant was awaiting trial. He spent about 12 hours with appellant. (35RT 8987-8989, 8995.) Appellant told Dr. Berlin several things that he never told the police. One of them was that he put a Halloween mask with a skull on it on prior to abducting Newhouse on the Jennifer Street Bridge. He told Dr. Berlin that he had the mask on the whole time he was with Newhouse. (37RT 9524-9525.)

Dr. Berlin opined that appellant's rapes of Newhouse and Crawford, and also his rape and attempted rape in 1987, were highly ritualistic in that he tied his victims up in a particular way, which suggested that appellant was motivated by a specific type of pathology. (35RT 9000-9001.)

Dr. Berlin diagnosed appellant as being a sexual sadist and an alcoholic. (35RT 9003.) Sexual sadism means that a person derives sexual arousal by engaging in coercive and sadistic sexual acts. (35RT 9005.) It is a disorder recognized by the Diagnostic and Statistical Manual of Mental Disorders. (35RT 9006.) It is a severe, involuntary sexual disorder, generally caused by negative early life experiences and possibly organic abnormalities in the brain. (35RT 9068, 9070-9072.) Dr. Berlin did not believe that appellant had antisocial personality disorder, but it was a "close call." (35RT 9064-9066.) Appellant's sexual disorder did not excuse the murders of Newhouse and Crawford. (35RT 9077.)

Appellant had fantasies involving the domination and control of women, and had the urge to act those fantasies out. He was preoccupied with tying women up in a particular way and cutting their clothing off. (35RT 9007.) He was, however, capable of being aroused by conventional sexual activity. (35RT 9010.) It was difficult for appellant to resist acting on his sexual urges, as his ability to control himself was impaired. This was partially due to his abuse of alcohol. (35RT 9015-9016, 9075-9076.) He could have refrained from committing the crimes, however, had there been a police officer "at his elbow." (35RT 9124-9125.) Dr. Berlin believed that appellant's ability to control himself was impaired partially because of appellant's criminal history. In addition to the crimes testified to at appellant's trial, when he was 12 or 13 appellant went into a house wearing a ski mask and armed with a knife, and masturbated inside the home. He also made obscene telephone calls when he was 14. (35RT 9017-9018.)

In Dr. Berlin's opinion, appellant tried to resist his urges by preoccupying himself with other activities such as reading the Bible and drinking. (35RT 9019.) Appellant told Dr. Berlin that the old urges came back after he was in the bar fight in August 1998, and that, after years of fighting to resist the urges, he became demoralized and stopped fighting as hard as he had previously. (35RT 9131.)

Dr. Berlin opined that appellant was under the influence of an extreme mental or emotional disturbance when he raped and killed Newhouse and Crawford. (35RT 9073-9074.) Appellant was under duress; metaphorically, he had a gun held to his head. (35RT 9075.) He would not have been a threat to either victim but for his sadism disorder. (35RT 9076.) Appellant's mental disorder would drive him to do something very similar if he were released. (35RT 9021.)

Sexual sadism can be treated medically, for example with medication to lower a person's sexual drive. (35RT 9026.) What appellant did to Newhouse and Crawford was absolutely irrational. (35RT 9027.) Appellant was not delusional, nor did he lack the ability to exercise reason. (35RT 9030.) The acts of planning appellant performed before the crimes and the efforts he made to cover them up did not mean that he could control himself. (35RT 9031.) He could defer acting on his sadistic sexual urges and fantasies, but only for awhile. (35RT 9036, 9125.) Appellant would not be a danger to others in a secure prison setting. (35RT 9061-9062.)

ii. Dr. Craig Haney

Dr. Craig Haney, a forensic psychologist, analyzed appellant's background and social history and evaluated the issue of appellant's potential adjustment to a sentence of life in prison without the possibility of parole. After reviewing numerous documents and conducting interviews of various family members and other people who knew appellant, in addition to appellant himself, Dr. Haney came to the conclusion that appellant responded very well to structured environments and would be a good "lifer" if he was sentenced to a Level IV, maximum security prison. (35RT 9144-9147; 36RT 9292, 9331-9335.) He based this conclusion on appellant's excellent work record, relative lack of serious disciplinary record in prison, renewed religious faith, and his age. (36RT 9292-9294, 9341-9348.)

Dr. Haney believed that appellant's development was affected by several risk factors, including his poverty as a child and the alcoholism of his parents and his stepfather. The negative effect of poverty can be mediated by a stable family environment, which appellant did not have. Appellant's family moved frequently, which led to a sense of instability, and there was constant fighting between various family members. (35RT

9162-9166.) Instability causes children to have anxiety about what will happen next. (35RT 9167.)

Another risk factor in appellant's life was the fact that he was chronically neglected as a child. His sister Lecia was often basically in charge of appellant and his sisters, when she was as young as 9 or 10 years old. (35RT 9168-9169.) He was also mistreated verbally and emotionally. His father and stepfather both told him that he was worthless. Appellant did not feel that he was loved by his parents. (35RT 9170.) Being exposed to violence and verbal disputes between appellant's mother and his father and stepfather constituted another risk factor which led to appellant having low self-esteem. (35RT 9171-9174.)

Appellant also had negative role models. (36RT 9239-9240.) The decision to have appellant leave his mother and his stepfather, and resume living with his father, was disastrous for appellant, as it made him feel abandoned and rejected. (35RT 9242-9244.) Appellant's father openly treated appellant's stepmother, Janice Grabenstein, as a sex object, and this contributed to a sexualized atmosphere during appellant's formative years. (36RT 9255.) Appellant's father's use of disparaging terms for women also affected appellant's interactions with women later in his life. (36RT 9256.)

Children who are exposed to the types of risk factors present when appellant was growing up often become distrustful and manifest many types of emotional and psychological disorders. They often are easily provoked, impulsive, immature, socially withdrawn, academic underachievers, have conflicts with others, and/or have disordered sexual relations. (36RT 9258-9261.) Such children need long-term therapy, and are at risk for engaging in violent criminal behavior. (36RT 9262-9263.) Appellant's socialization was complicated by the fact that, from the age of 15 to the time of trial, he had been free from institutionalization for less than four years. (36RT 9264-9265.)

Appellant's life had been traumatic and damaging from a psychological standpoint. Throughout his life, people recommended that he receive some type of treatment. However, aside from very minimal psychotherapy at the North Idaho Children's Home, he never received any psychotherapy. (35RT 9148-9149; 36RT 9265-9268, 9271.) There were many missed opportunities for treatment, for example when appellant made obscene phone calls, when he received medical treatment in an emergency room, when he was evaluated at a state hospital, when he was arrested in Idaho for auto theft, and when he was convicted for rape and attempted rape in California in 1987. (36RT 9274-9281.) In Dr. Haney's opinion, the California prison system did not provide adequate mental health care during the period of time that appellant was incarcerated at Soledad. (36RT 9287-9288.)

iii. Dr. Randal True

Dr. Randal True, a psychiatrist who worked for the Parole Division of the California Department of Corrections, staffed the parole outpatient clinic in 1997. (36RT 9409, 9412.) He evaluated appellant when appellant was paroled. Dr. True believed that appellant was doing fairly well. He saw appellant again a month later. Appellant had gotten a job and a girlfriend, and seemed to be doing better than most parolees. (36RT 9420-9421; 37RT 9472.) Dr. True's progress notes reflected that appellant denied using alcohol or drugs. (37RT 9493.) Dr. True asked appellant how things were going with his girlfriend, hoping to get a sense of how things were going, sexually speaking, for appellant, but appellant simply said, "fine." (37RT 9499-9500.) Appellant never told Dr. True that he was having rape fantasies about women. Had appellant done so, Dr. True would have assessed what was going on and decided what to do at that point. (37RT 9502.)

Dr. True diagnosed appellant as being an abuser of both drugs and alcohol, and suffering from post-traumatic stress disorder as a result of sexual abuse and abuse by his parents. He ruled out antisocial personality disorder. (36RT 9427-9428.)

Had Dr. True had more available resources in the parole outpatient clinic, he would have placed appellant in long term, one-on-one therapy, and weekly therapy groups. (36RT 9423-9424.) He did not believe that appellant received adequate mental health treatment by the Parole Division. (37RT 9476-9477.)

f. The Opinions of Appellant's Family Members and Friends Regarding the Death Penalty in this Case

Appellant's family members believed that he had some personality traits which would justify a life sentence rather than the death penalty. Appellant's mother thought he was a "loving, caring, understanding person" who had not hurt anyone until the last few years, and who could do God's work if he was spared from the death penalty. (31RT 8262.) His sister Lecia thought he had things to offer to others in prison because of his strong faith in God. (30RT 7952.) His sister Tracy believed the death penalty should not be imposed because he would be able to help others because of all the experiences he had been through. (30RT 7972-7973.)

Adonia Krug also thought that appellant should be spared from the death penalty because he had goodness in him and because he had her look up passages in the Bible. (33RT 8578-8579.) Roslynn Moore did not think that appellant should receive the death penalty even though what he did was horrible and wrong, as his life was valuable and he might be able to help other inmates inside prison. (34RT 8874.) Sister Larkin did not believe that appellant should receive the death penalty because he had goodness in

him, took responsibility for what he had done and was remorseful for his actions, and wanted to help his fellow inmates. (37RT 9635.)

3. Rebuttal Evidence

a. Testimony from Lay Witnesses

Marjorie Howard, a supervisor in textile manufacturing who worked for Prison Industry Authority at Soledad State Prison, thought that appellant was good at his prison job. However, he had a very bad temper and a bad attitude generally. He liked to do things his own way rather than follow instructions, and was manipulative. (38RT 9744-9746.) She demoted him after supervising him for about eight or nine months. Thereafter, he operated a sewing machine at the facility until he was paroled a few months later. (38RT 9746-9749.)

Liesl Turner, appellant's girlfriend in Oceano, met appellant when they both worked in a fast food restaurant, in either 1986 or 1987. She was a senior in high school. She began dating appellant and eventually moved in with him, in the bedroom he had converted from a garage at the house where his mother and John Hollister lived. (38RT 9904-9906.) Appellant was romantic and wrote her love letters and poems. They were briefly engaged to be married. (38RT 9907.) They had sexual relations when they lived together. He asked her to have anal sex, and also asked if he could tie her up. She declined. She was not afraid that doing so would make him angry. She began to be afraid of appellant because he had a picture of a pretty girl in his home, and said that he had dated her in Idaho but she had been raped and murdered. Appellant said that he had committed a crime so he could go to prison and kill the man who had raped and killed her. He said that he had killed the man in prison, and was never caught. She moved out shortly afterwards. She broke up with appellant because he had some angry outbursts and she did not feel safe with him. (38RT 9908, 9919-

9921.) They continued to have contact with each other afterwards, however, and she went to her high school prom with him. (38RT 9927.)

Wayne Nunes lived in Atascadero in 1997 and met appellant through Nunes's wife, Carol Nunes. Appellant lived with the Nuneses for about six months when appellant first got out of prison. Appellant told them he had been in prison for "date rape" and burglary. (37RT 9754-9758.) Nunes was present when appellant threatened his girlfriend, Roslynn Moore, one night. She was concerned about him violating the terms of his probation. They started fighting. Appellant threatened to kill Moore "and her friggin' family." (37RT 9758-9759.) They subsequently made up and continued their relationship. (37RT 9761.)

Investigator Hobson interviewed appellant's father in May 1999 at the Bonner County Jail in Sandpoint, Idaho. Appellant's father gave Hobson approximately 24 developed photographs. Hobson took the photographs with him when he returned to California so he could show them to appellant the last time the two talked, which was the day appellant was arraigned for the crimes involving Newhouse and Crawford. (39RT 10021-10022.) One of the photographs appellant's father gave Hobson (Peo. Ex. No. 171) depicted appellant in his apartment, shirtless and flexing his muscles. A couch and a coffee table were visible in the photo. Appellant said that the photos had been taken when his father had come to San Luis Obispo for a visit in February 1999. During the visit, which lasted for three or four days, appellant took his father around and introduced him to his coworkers and friends. The two also went out drinking together. (39RT 10023-10024.)

Janice Maher, a defense investigator, was called in order to impeach various defense witnesses about inconsistent statements they made prior to trial. Appellant's aunt, Sandra Van Rossum, told Maher that the reason appellant's mother sent appellant from Nevada to live with his father in

Idaho when appellant was young was that she could not handle appellant any more. (37RT 9673-9674.) Appellant's maternal grandmother, Arleta Howell, initially told Maher that she could not recall seeing any bruises on appellant when he was between the ages of 9 to 17, but subsequently did recall an occasion when he was about 8 or 9 years old when he had bruises on his buttocks. Michael Keough, appellant's former teacher, told Maher that appellant was stronger and more physically developed than other students his age, and he intimidated other students. (37RT 9675.)

b. Dr. Park Dietz

Dr. Park Dietz, a forensic psychiatrist, had performed research in the area of sexual sadism, among other areas. He heard Dr. Berlin and Dr. Haney testify at appellant's trial. (38RT 9768-9771.) Dr. Dietz reviewed appellant's mental health records and other reports concerning appellant's case. He also watched the videotape of appellant's confession. (38RT 9782.) He attempted to interview appellant prior to testifying, but was unable to do so because appellant refused. (38RT 9783-9786.)

Dr. Dietz agreed with Dr. Berlin's diagnosis that appellant suffered from sexual sadism, and thought appellant likely was an alcoholic. He disagreed with Dr. Berlin's opinion that appellant did not suffer from antisocial personality disorder, however. (38RT 9787-9788.) Appellant met all four criteria for having antisocial personality disorder, as (1) appellant was over 18 years old, (2) his behavior was not due to schizophrenia or mania, (3) he showed evidence of a conduct disorder before he was 15 years old, and (4) he exhibited three or more types of antisocial behavior after the age of 15. (38RT 9790-9798.)

Dr. Dietz agreed with Dr. Berlin that people do not voluntarily choose to have sexual deviances such as sexual sadism. (38RT 9800.) Appellant's sexual sadism involved bondage, captivity, and domination, but also included beating and strangulation. (38RT 9803.) The victim's suffering is

fundamentally arousing to the sadist. Sexual sadists cope with the problem in different ways. Some sadists, mainly those who have high moral standards and who do not abuse drugs or alcohol, confine their sexual deviation entirely to fantasizing and masturbation. (38RT 9804-9805.) Others sublimate their desires, for example by studying sexual sadism, finding consenting partners, looking at pornography depicting sexually sadistic imagery, using bondage and domination services, frequenting clubs specializing in bondage and domination, or committing nonviolent crimes. (38RT 9805-9808.) Only a small percentage of sexual sadists commit violent crimes in order to fulfill their desires. (38RT 9809.)

Dr. Dietz also agreed with Dr. Berlin regarding the classification of sexual sadism, but disagreed with him concerning the nature and effects of sexual sadism. In Dr. Dietz's opinion, sexual sadism is a mental disorder but not a mental disease in that it does not cause the person suffering from sexual sadism to have a profoundly different view of reality from a normal person. The only thing differentiating a sexual sadist from a normal person is what excites him or her sexually. Sexual sadism does not affect a person's capacity to control himself, and a sexual sadist can control his sexual desires just like any other person. (38RT 9811-9812, 9839-9840.)

According to Dr. Dietz, the "police officer at the elbow" test had long been used in the field of forensic psychiatry as a way of evaluating whether someone has the volitional control to conform to the law. Appellant would not have committed the crimes had a police officer been at his elbow. He was fully aware that his behavior was wrong and was capable of stopping it. (38RT 9840-9841.)

Dr. Dietz believed that a person with antisocial personality disorder who drinks is more likely to commit antisocial acts, which the person may be inhibited from doing the rest of the time. (38RT 9842.) Although psychotherapy is a generally a good thing to provide to people who have

had negative life experiences, there is no evidence to support the conclusion that psychotherapy helps persons with antisocial personality disorder. One of the great disappointments of modern psychiatry is that doctors do not know how to alter the behavior of people who have antisocial personality disorder. The belief that sexual sadism and sexual fantasies rise to the level of a compulsion is not an accepted medical or psychological view, but rather was a relatively recent fad, popularized by people from a Christian counseling point of view regarding sexual addiction beginning with masturbation and exposure to pornography. (38RT 9843-9845.)

Dr. Dietz did not believe that appellant was under the influence of an extreme mental or emotional disturbance when he raped and killed his victims because antisocial personality disorder and sexual sadism are not extreme mental or emotional disturbances. He believed that Newhouse and Crawford were subject to duress, but that appellant was not. (38RT 9846-9847.) Appellant appreciated the criminality of his conduct, and his capacity to conform his conduct to the requirements of the law was not impaired as a result of mental disease or defect. (38RT 9847.) In fact, appellant's conduct generally conformed to the requirements of the law 364 days each year, but he violated the law once a year. Appellant never even attempted to commit a rape when he was sober, yet decided to drink alcohol and put others at risk. He also put others at risk, when he chose to lie to Dr. True about not drinking or having sexual temptations, thus denying Dr. True the opportunity to intervene, by deciding to "cruise" for victims, and by deciding to carry a "rape kit" (i.e., a mask, gloves, rope, duct tape, and a flashlight) with him in his vehicle. (38RT 9848-9849.)

ARGUMENT

I. THE TRIAL COURT PROPERLY DENIED APPELLANT'S *WHEELER/BATSON* MOTION, AS SUBSTANTIAL EVIDENCE SUPPORTS THE COURT'S FINDING THAT THE REASONS ARTICULATED BY THE PROSECUTOR FOR EXCUSING CATHOLIC PROSPECTIVE JURORS WERE NOT PRETEXTUAL

Appellant's first contention is that the trial court improperly denied the motion his trial attorney made during jury selection under *People v. Wheeler* (1978) 22 Cal.3d 258, and *Batson v. Kentucky* (1986) 476 U.S. 79 [106 S.Ct. 1712, 90 L.Ed.2d 69]. (AOB 64-81.) He is incorrect.

A. The Applicable Law

Peremptory challenges, in both California and federal courts, occupy "an important position in our trial procedures" (*Batson v. Kentucky, supra,* 476 U.S. at p. 98) and are considered a "necessary part of trial by jury" (*Swain v. Alabama* (1965) 380 U.S. 202, 219 [85 S. Ct. 824, 13 L.Ed.2d 759], overruled in part on other grounds in *Batson v. Kentucky, supra,* 476 U.S. at p. 106; see also *People v. Johnson* (1989) 47 Cal.3d 1194, 1215 ["We recognized in *Wheeler*, and the United States Supreme Court recognized in *Batson*, that peremptory challenges have historically served as a valuable safety valve in jury selection."].) By enabling each side to exclude those jurors it believes will be most partial towards the other side, such challenges are a means of eliminating extremes of partiality on both sides, thereby assuring the selection of a qualified and unbiased jury. (*Holland v. Illinois* (1990) 493 U.S. 474, 484 [110 S.Ct. 803, 107 L.Ed.2d 905].)

However, both the federal and state Constitutions prohibit any advocate's use of peremptory challenges to excuse prospective jurors based on unlawful discrimination stemming from membership in a cognizable group, such as race. (*People v. Jones* (2011) 51 Cal.4th 346, 360; *People v.*

Lenix (2008) 44 Cal.4th 602, 612.) The *Wheeler-Batson* doctrine has been extended beyond racial discrimination to prohibit peremptory challenges based solely on gender (*J.E.B. v. Alabama* (1994) 511 U.S. 127 [114 S.Ct. 1419, 128 L.Ed.2d 89]) or ethnicity (*People v. Trevino* (1985) 39 Cal.3d 667, 686-687, disapproved on other grounds in *People v. Johnson, supra,* 47 Cal.3d at pp. 1219-1221). Religious membership also constitutes an identifiable group under *Wheeler*. (*People v. Richardson* (2008) 43 Cal.4th 959, 984; *In re Freeman* (2006) 38 Cal.4th 630, 643.) However, "a prosecutor, like any party, may exercise a peremptory challenge against anyone, including members of cognizable groups. All that is prohibited is challenging a person *because* the person is a member of that group." (*People v. Cleveland* (2004) 32 Cal.4th 704, 733.)

The *Wheeler/Batson* three-step inquiry is well established. First, the trial court must determine whether the defendant has made a prima facie showing that the prosecutor improperly exercised a peremptory challenge. Second, if the showing is made, the burden shifts to the prosecutor to demonstrate that the challenges were exercised for a non-prohibited reason. Third, the court determines whether the defendant has proven purposeful discrimination. The ultimate burden of persuasion regarding improper motivation rests with, and never shifts from, the opponent of the strike. (*People v. Jones, supra,* 51 Cal.4th at p. 360; *People v. Lenix, supra,* 44 Cal.4th at pp. 612-613.)

If the trial court finds that the defendant has made a prima facie showing of unlawful discrimination, the prosecutor must provide a "clear and reasonably specific" explanation of his "legitimate reasons" for exercising the challenges. (*People v. Lenix, supra,* 44 Cal.4th at p. 613.) The justification need not support a challenge for *cause*, and even a "trivial" reason, if genuine and neutral, will suffice. (*People v. Arias* (1996) 13 Cal.4th 92, 136.) A prospective juror may be excused based

upon facial expressions, gestures, hunches, and even for arbitrary or idiosyncratic reasons. (*People v. Lenix*, *supra*, 44 Cal.4th at p. 613; see also *People v. Turner* (1994) 8 Cal.4th 137, 165.) Indeed, peremptory challenges may be made "without reason or for no reason, arbitrarily and capriciously." (*People v. Jones* (1998) 17 Cal.4th 279, 294.)

At the third stage of the *Wheeler/Batson* inquiry, the issue comes down to whether the trial court finds the prosecutor's explanations to be credible. Credibility can be measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy. (*People v. Lenix*, *supra*, 44 Cal.4th at p. 613; *Miller-El v. Cockrell* (2003) 537 U.S. 322, 339 [123 S.Ct. 1029, 154 L.Ed.2d 931].) In assessing credibility, the court draws upon its contemporaneous observations of the voir dire. (*People v. Lenix*, *supra*, 44 Cal.4th at p. 613.)

Review of a trial court's denial of a *Wheeler/Batson* motion is deferential, examining only whether substantial evidence supports its conclusions. (*People v. Bonilla* (2007) 41 Cal.4th 313, 341-342.) A trial court's determination regarding the sufficiency of a prosecutor's justifications for exercising peremptory challenges is reviewed with "great restraint." (*People v. Ervin* (2000) 22 Cal.4th 48, 74.) The reviewing court presumes that a prosecutor uses peremptory challenges in a constitutional manner and gives great deference to the trial court's ability to distinguish bona fide reasons from sham excuses. (*People v. Lenix*, *supra*, 44 Cal.4th at pp. 613-614; *People v. Burgener* (2003) 29 Cal.4th 833, 864.) So long as the trial court makes a sincere and reasoned effort to evaluate the nondiscriminatory justifications offered, its conclusions are entitled to deference on appeal. (*Id.*) The United States Supreme Court has also emphasized that a state trial court's finding of no discriminatory intent is a

factual determination accorded great deference. (*Snyder v. Louisiana* (2008) 552 U.S. 472, 477 [128 S.Ct. 1203, 170 L.Ed.2d 175]; *Hernandez v. New York* (1991) 500 U.S. 352, 364-365 [111 S.Ct. 1859, 114 L.Ed.2d 395].)

B. The Relevant Proceedings Below

In this case, both the prosecutor and defense counsel ultimately exercised all of the allowable twenty available peremptory challenges following extensive voir dire and the completion of a lengthy written questionnaire by each prospective juror. The relevant proceedings surrounding the exercise of the peremptory challenges at issue on appeal are set forth below.

After voir dire, both sides began exercising peremptory challenges. Defense counsel made a motion under both *Wheeler* and *Batson* to strike the panel after the prosecutor excused Juror Number 126, on the basis that the prosecutor had improperly used his peremptory challenges to strike Catholic prospective jurors. Defense counsel argued that Juror Numbers 6, 122, and 126 had stated that they were Catholic and had been excused by the prosecutor. Counsel said that Juror Number 49 was possibly Catholic as well, although the record was less clear as to that juror. According to counsel, the prosecutor's voir dire of each prospective juror had focused on the juror's religious beliefs, the Pope, and the juror's understanding of the Catholic religion. Defense counsel noted that, pursuant to the then-recent decision in *People v. Box* (2000) 23 Cal.4th 1153, 1188, fn. 7, in evaluating the prima facie case issue a "strong likelihood" means a "reasonable inference."[11] (22RT 5950-5952.) Counsel stated that Catholics constituted a cognizable group for *Wheeler/Batson* purposes. (22RT 5953-5954.)

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[11] As will be set forth below, the trial court applied this test in ruling on appellant's *Wheeler/Batson* motion. Although that test was the relevant (continued...)

The trial court noted that a defendant need not be a member of the excluded group to make a *Wheeler/Batson* motion, but asked if the defense wished to place anything on the record regarding whether appellant was a member of the challenged group. Defense counsel acknowledged that appellant had not been baptized into the Catholic Church, but had received counseling from a Catholic nun. The court noted that there was some question in the caselaw as to whether a finding of a reasonable inference has been made if a court asks for a justification from the party who excused the jurors at issue. The court expressly stated that it could not make a finding of a reasonable inference of discrimination at that point, but said there did "seem to be at least the beginnings of a trend," and, "with that caveat," asked the prosecutor to state his reasons for excusing the three jurors in question, i.e., Juror Numbers 6, 122, and 126. (22RT 5958-5959.)

The prosecutor said that he excused Juror Number 6 because, in the juror's responses to the questionnaire, the juror expressed a great deal of faith in psychiatric testing and thought psychology and psychiatry were

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(...continued)
standard in 2001, when the jury in appellant's case was being selected (see *People v. Johnson* (2003) 30 Cal.4th 1302, 1313-1314, 1318 [citing the use of both terms in *Wheeler* and holding that they articulated the same standard, which was compatible with *Batson*]), in 2005 the United States Supreme Court reversed *People v. Johnson, supra*, 30 Cal.4th 1302, and disapproved the "reasonable inference"/"strong likelihood" standard for federal constitutional purposes, stating that a prima facie burden simply means the production of evidence that permits the trial court to draw an "inference" of discrimination. (See *Johnson v. California* (2005) 545 U.S. 162, 170 [125 S.Ct. 2410, 162 L.Ed.2d 129]; see also *People v. Carasi* (2008) 44 Cal.4th 1263, 1292-1293 [discussing *Johnson v. California*].) This point is of no moment in this case, however, as the trial court eventually ruled on the ultimate question of intentional discrimination, thus mooting the prima facie case issue. (See *People v. Mills* (2010) 48 Cal.3d 158, 174 [also referring to this situation as being a "first stage/third stage *Batson* hybrid"]; *People v. Lenix, supra*, 44 Cal.4th at p. 613, fn. 8.)

very useful, which were matters of concern because the defense planned to call a renowned psychologist, Dr. Berlin. The juror also thought that childhood abuse, having brutal parents, and alcoholism were important factors in deciding the penalty question, and the prosecutor noted that the defense would be relying on each of these factors in this case. (22RT 5960; see also 1CTPJ 114, 116 [questionnaire completed by the prospective juror].)[12]

As to Juror Number 122, the prosecutor said he excused the juror because the juror's responses to the questionnaire indicated that the juror believed that some people commit crimes because of emotional or mental problems, believed that much of psychiatry and psychology was accurate, was "strongly opposed" to the death penalty, and thought it was important to consider factors which the defense intended to rely upon such as childhood abuse and having brutal parents. (22RT 5960-5961; see also 5CTPJ 1433-1436.)

The prosecutor said he excused Juror Number 126 because the juror's questionnaire responses showed that the juror expressed concerns about the death penalty in the United States, thought it was disturbing that there are cases where the wrong person is on death row, thought it was important to consider factors the defense intended to rely on such as childhood abuse and having brutal parents, seemed to limit the type of cases the juror believed warranted the death penalty to cases like the Charles Manson case, and believed that religious beliefs and personal values might compel the

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[12] As does appellant, respondent will refer to the clerk's transcripts containing the juror questionnaires completed by jurors who were not ultimately chosen to serve in this case as "CTPJ." Respondent will refer to the clerk's transcripts which contain the questionnaires completed by the jurors who were selected to serve as "CTSJ."

juror to vote for life rather than death. (22RT 5961-5962; see also 6CTPJ 1525-1527.)

Defense counsel stated that the defense believed that at least 18 of the 83 prospective jurors were Catholic, and the prosecution had used three or possibly even four peremptory challenges as to prospective Catholic jurors. (22RT 5963.) The prosecutor noted that both members of the prosecution team were Catholic and stated there was no anti-Catholic sentiment harbored by the prosecution, but that the topic warranted inquiry given that the Catholic Church had publicly taken a stance in the decade before trial against the death penalty. In addition, the prosecutor noted that the defense intended to call a Catholic nun and also perhaps a Catholic priest,[13] and that much of the voir dire pertained to whether a juror would judge the credibility of a church official any differently from other witnesses. The prosecutor also stated that he did not intend to challenge four prospective jurors among the twelve seated prospective jurors who had identified themselves as Catholic, and that the same was true as to one prospective alternate juror. (22RT 5964-5965.)

The trial court denied the motion, noting that the prosecutor "went a lot further than you needed to." The court found no reasonable inference of discrimination on the basis of the record before it, and reiterated that it had asked the prosecutor to state his reasons for striking the jurors "just for the record." (22RT 5965-5966.)

The parties resumed exercising peremptory challenges. The prosecutor excused Juror Number 127, and defense counsel renewed the *Wheeler/Batson* motion. The trial court indicated that its ruling was the

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[13] The Catholic priest was identified as Father Coleman, from Menlo Park. He was listed as a potential defense witness, but ultimately did not testify on appellant's behalf. As summarized in the Statement of Facts, Sister Miriam Larkin testified as a defense witness in the penalty phase.

same as before, but stated the matter could be argued after additional peremptory challenges were exercised. (22RT 5972.) After the prosecutor excused Juror Number 201, defense counsel stated, "Motion, your Honor, same basis." The court reserved a ruling at that time, pending the exercise of further peremptory challenges. (22RT 5973.) Subsequently, the defense again raised its challenge to the exercise of peremptory challenges by the prosecution following another strike. (22RT 5976.)

Out of the presence of the prospective jurors, defense counsel stated that the prosecution had challenged the following Catholic prospective jurors: Juror Numbers 127, 141, and 201. Counsel stated that seven of the twenty peremptory challenges exercised by the prosecutor were against Catholics. (22RT 5977.) The prosecutor noted that he left two Catholic jurors on the panel. (22RT 5978.)

The prosecutor stated that he had no reason to believe that Juror Number 127 was Catholic as the juror had indicated that the juror did not attend any local church or belong to any religious organization. (See 6CTPJ 1540.) The prosecutor noted that the juror's questionnaire responses stated, "I do not believe that anyone has the right to take a person's life," "I support life imprisonment," and "It's difficult to say whether the death penalty is right or wrong." (22RT 5979; see also 6CTPJ 1555-1556.)

As to Juror Number 141, the prosecutor noted that the juror's questionnaire responses had indicated that the top three solutions for reducing crime were earlier intervention with young children, after-school activities, and one parent being able to stay home with children longer, none of which happened with respect to appellant. The juror had also expressed a preference for life in prison without the possibility of parole as compared to the death penalty, did not know if the death penalty provided

closure for a victim's family, and was "generally opposed to the death penalty." (22RT 5979-5980; see also 6CTPJ 1726, 1735-1736.)

Lastly, as to Juror Number 201, the prosecutor stated that the juror's questionnaire responses indicated that the juror's only opinion regarding the use of the death penalty was that it should be imposed for crimes involving children, was more comfortable with life in prison without the possibility of parole than the death penalty, could only identify deterrence as a justification for the death penalty, and only offered two solutions for reducing crime, i.e., to start teaching values at home beginning at an early age and staying involved with children at all times, both of which the defense planned to focus on in the penalty phase. (22RT 5980-5981; see also 9CTPJ 2416, 2425-2426.)

The defense again noted that much of the prosecution's oral voir dire centered on the prospective juror's religion. Defense counsel opined that there was a pattern of exclusion because approximately a third of the prosecution's peremptory challenges had been exercised against Catholics. (22RT 5981-5982.)

The trial court denied the renewed *Wheeler/Batson* motion, again finding no reasonable inference of group bias. The court furthermore stated that it obtained reasons from the prosecutor as to why the challenges were made and that, even if the court found a reasonable inference of discrimination, there were individual reasons for each of the peremptory challenges which were directly related to the individual jurors at issue and which "make sense." (22RT 5983.) The court noted that questioning regarding the Catholic religion in some instances resulted in information which was utilized to exercise informed peremptory challenges, which was legally permissible. (22RT 5983-5984.) The court also noted that two Catholic jurors still remained on the panel, but said that given that all the

peremptory challenges had been exercised, the weight of that fact was unclear. (22RT 5984.)

C. The Prosecutor Identified Reasons For Excluding Each Of The Jurors In Question Which Were Not Based On Religion And Which The Trial Court Found Credible

As set forth above, the trial court expressly found that appellant had failed to make a prima facie case of discrimination both when defense counsel first moved to strike the venire and subsequently when he renewed his motion. However, the court also ruled on the ultimate question of intentional discrimination, thus mooting the prima facie case issue. (See *People v. Mills*, *supra*, 48 Cal.4th at p. 174; *People v. Lenix*, *supra*, 44 Cal.4th at p. 613, fn. 8.)

Respondent will separately discuss the reasons articulated by the prosecutor as to each challenged juror, but notes that ambivalence or outright hostility with respect to the death penalty, or an express preference for life without the possibility of parole as compared to the death penalty, was the primary reason articulated as to all jurors except Juror Number 6. As to that juror, the prosecutor articulated other proper reasons for his peremptory challenge. Each proffered reason constituted a proper basis for exercising each peremptory challenge.

1. Juror Number 6

The prosecutor excused Juror Number 6 because the juror's responses to the questionnaire indicated that the juror expressed a great deal of faith in psychiatric testing and thought psychology and psychiatry were very useful, which were matters of concern because the defense planned to call a renowned psychologist, Dr. Berlin. The juror also thought that childhood abuse, having brutal parents, and alcoholism were important factors in deciding the penalty question, and the prosecutor noted that the defense would be relying on each of these factors in this case.

None of these reasons was based on the juror's Catholicism or religious beliefs. Given appellant's confession, any reasonable prosecutor obviously would have expected the defense to present a substantial penalty phase case. The prosecutor was justifiably concerned about this juror's receptiveness toward issues such as childhood abuse and psychiatric matters (which were in fact presented by the defense at the penalty phase). The juror's expression of a great deal of faith in psychiatric testing could be viewed as reflecting a bias in favor of a class of potential witnesses, i.e., expert witnesses, which could serve to justify exclusion. (See *People v. Gutierrez* (2002) 28 Cal.4th 1038, 1125 [juror properly excused due to the prosecutor's concern that he would place too much weight on the opinion testimony of psychologists].)

2. Juror Number 122

The prosecutor excused Juror Number 122 because the juror's responses to the questionnaire indicated that the juror believed that some people commit crimes because of emotional or mental problems, believed that much of psychiatry and psychology was accurate, was "strongly opposed" to the death penalty, and thought it was important to consider factors which the defense intended to rely upon such as childhood abuse and having brutal parents.

As set forth above, the prosecutor was justified in being concerned that this juror might place too much weight on the childhood abuse evidence and mental health expert testimony. Furthermore, the juror's strong opposition to the death penalty justified the prosecutor's exercise of a peremptory challenge. (See *People v. McDermott* (2002) 28 Cal.4th 946, 970 [a prospective juror's views about the death penalty are a permissible race- and group-neutral basis for exercising a peremptory challenge in a capital case]; *People v. Cash* (2002) 28 Cal.4th 668, 724.)

3. Juror Number 126

The prosecutor excused Juror Number 126 because the juror's questionnaire responses showed that the juror expressed concerns about the death penalty in the United States, thought it was disturbing that there are cases where the wrong person is on death row, thought it was important to consider factors the defense intended to rely on such as childhood abuse and brutal parents, seemed to limit the type of cases the juror believed warranted the death penalty to cases like the Charles Manson case, and believed that religious beliefs and personal values might compel the juror to vote for life without the possibility of parole rather than death.

Once again, this juror's willingness to rely on factors such as childhood abuse warranted the exercise of a peremptory challenge. He also appeared to be skeptical about imposing the death penalty, and a prosecutor legitimately may exercise a peremptory challenge against such a juror. (*People v. Burgener*, *supra*, 29 Cal.4th at p. 864; *People v. Catlin* (2001) 26 Cal.4th 81, 118; *People v. Turner*, *supra*, 8 Cal.4th at p. 171 [prosecutors may exercise peremptory challenges against "death penalty skeptics," i.e., prospective jurors who, although not excusable for cause under *Witherspoon v. Illinois* (1968) 391 U.S. 510 [88 S.Ct. 1770, 20 L.Ed.2d 776], nevertheless express reservations about the death penalty].) Furthermore, the juror's statement about cases where the "wrong person" is on death row reflects a distrust of the judicial system which warranted the exercise of a peremptory challenge. (See *People v. Mayfield*, *supra*, 14 Cal.4th at p. 725 [prospective juror indicated that convicted murderers should only be executed "in due time mainly because a person could be inno[cent]" and "there has been time[s] when the wrong person has take[n] the blame"; from this response, the prosecutor might reasonably be concerned that the juror's distrust of the judicial system could make him reluctant to return a verdict of death]; see also *People v. Jones*, *supra*, 17

Cal.4th at p. 294 [peremptory challenge properly exercised against a prospective juror who implied that the death penalty is meted out to people later found to be innocent].)

To the extent that the juror's religious beliefs might have caused the juror to vote for life without the possibility of parole rather than the death penalty, a prosecutor may exercise a peremptory challenge against a prospective juror who has a religious bent or bias that would make it difficult for the juror to impose the death penalty. (*People v. Richardson*, *supra*, 43 Cal.4th at p. 985; *People v. Cash*, *supra*, 28 Cal.4th at p. 725.)

4. Juror Number 127

The prosecutor stated that he had no reason to believe that Juror Number 127 was Catholic as the juror had indicated that the juror did not attend any local church or religious organization. In any event, the prosecutor noted that the juror's questionnaire responses stated, "I do not believe that anyone has the right to take a person's life," "I support life imprisonment," and "It's difficult to say whether the death penalty is right or wrong."

Leaving aside the issue of whether this juror was actually Catholic, as noted above, a prospective juror's views about the death penalty are a permissible basis for exercising a peremptory challenge in a capital case. (See *People v. McDermott*, *supra*, 28 Cal.4th at p. 970; *People v. Mayfield*, *supra*, 28 Cal.4th at p. 724.) The juror's express hostility toward the death penalty justified the juror's exclusion from the jury.

5. Juror Number 141

The prosecutor excused Juror Number 141 because the juror's questionnaire responses had indicated that the top three solutions for reducing crime were earlier intervention with young children, after-school activities, and one parent being able to stay home with children longer,

none of which happened with respect to appellant. The juror had also expressed a preference for life in prison without the possibility of parole as compared to the death penalty, did not know if the death penalty provided closure for a victim's family, and was "generally opposed to the death penalty."

The juror's proffered solutions for reducing crime were justifiably matters of concern for the prosecutor because none was present when appellant was a child. It could reasonably be inferred that the juror would be unlikely to impose the death penalty in this case due to the perception that society as a whole had somehow failed appellant when he was a child, thus reducing his moral culpability for his actions. In addition, the juror was clearly a death penalty skeptic. The juror's express hostility toward the death penalty warranted the juror's excusal. (See *People v. McDermott, supra,* 28 Cal.4th at p. 970; *People v. Mayfield, supra,* 28 Cal.4th at p. 724.)

6. Juror Number 201

The prosecutor excused Juror Number 201 because the juror's questionnaire responses indicated that the juror's only opinion regarding the use of the death penalty was that it should be imposed for crimes involving children, and this juror was more comfortable with life in prison without the possibility of parole than the death penalty, could only identify deterrence as a justification for the death penalty, and only offered two solutions for reducing crime, i.e., to start teaching values at home beginning at an early age and staying involved with children at all times, both of which the defense planned to focus on in the penalty phase.

As was the case with respect to Juror Number 141, this juror was obviously a death penalty skeptic. In addition, the juror's proffered suggestions for reducing crime could be viewed as indicating a bias in favor of appellant in terms of penalty.

Considering the totality of the circumstances, the trial court's acceptance of the prosecutor's explanation for challenging each of the jurors at issue, and the implicit credibility that necessarily underlay that acceptance, is supported by substantial evidence and thus entitled to deference. (*People v. Lenix*, *supra*, 44 Cal.4th at pp. 613-614.) It is also significant that the jury included several Catholics whom the prosecutor did not excuse. "'While the fact that the jury included members of a group allegedly discriminated against is not conclusive, it is an indication of good faith in exercising peremptories, and an appropriate factor for the trial judge to consider in ruling on a *Wheeler* objection.'" (*People v. Jones*, *supra*, 51 Cal.4th at pp. 362-363, quoting *People v. Turner*, *supra*, 8 Cal.4th at p. 168; *People v. Hartsch* (2010) 49 Cal.4th 472, 487.)

Relying heavily on *People v. Silva* (2001) 25 Cal.4th 345, 385-386, appellant argues that the trial court's ruling is not owed deference because, after hearing from the prosecutor when appellant renewed his *Wheeler-Batson* motion, it denied the motion without making a sincere and reasoned attempt to evaluate the prosecutor's credibility. (AOB 70-71, 73.) The record belies this claim: as noted previously, the court expressly stated that there were individual reasons for each of the peremptory challenges which were directly related to the specific juror and which made sense. (22RT 5983.)

In any event, as was explained in response to a similar argument in *People v. Lewis* (2008) 43 Cal.4th 415, 471, the "court denied the motions only after observing the relevant voir dire and listening to the prosecutor's reasons supporting each strike and to any defense argument supporting the motions. Nothing in the record suggests that the trial court either was unaware of its duty to evaluate the credibility of the prosecutor's reasons or that it failed to fulfill that duty." (See also *People v. Thomas* (2011) 51 Cal.4th 449, 475 [where prosecutor's stated reasons for exercising a

peremptory challenge against an African-American prospective juror were quite plausible and amply supported by the record, no express finding by the trial court that the prosecutor relied upon a nondiscriminatory reason was required, although such a finding would have been preferable]; *People v. Jones*, *supra*, 51 Cal.4th at p. 361.)

D. A Comparative Analysis Of Excluded And Nonexcluded Jurors Does Not Show That The Trial Court Erred In Finding The Prosecutor's Proffered Reasons Credible

Appellant also contends, for the first time on appeal, that a comparison of the excluded jurors and the seated jurors shows that the prosecutor's stated reasons were pretextual. (AOB 76-79.) Despite problems inherent in conducting comparative analysis for the first time on appeal – including the difficulties of comparing what might be superficial similarities among prospective jurors and trying to determine why the prosecutor challenged one prospective juror and not another when no explanation was asked for or provided at trial – both the United States Supreme Court and this Court have done so on request. (See *Snyder v. Louisiana*, *supra*, 552 U.S. at p. 472; *Miller-El v. Dretke* (2005) 545 U.S. 231 [125 S.Ct. 2317, 162 L.Ed.2d 196]; *People v. Jones*, *supra*, 51 Cal.4th at p. 364; *People v. Lenix*, *supra*, 44 Cal.4th at p. 622.)[14]

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[14] Although the United States Supreme Court engaged in comparative analysis for the first time on appeal in *Snyder*, it cautioned "that a retrospective comparison of jurors based on a cold appellate record may be very misleading when alleged similarities were not raised at trial. In that situation, an appellate court must be mindful that an exploration of the alleged similarities at the time of trial might have shown that the jurors in question were not really comparable." (*Snyder v. Louisiana*, *supra*, 552 U.S. at p. 483.) The court engaged in such analysis in that case only because there "the shared characteristic, *i.e.*, concern about serving on the jury due to conflicting obligations, was thoroughly explored by the trial court when the relevant jurors asked to be excused for cause." (*Ibid.*) In (continued...)

Comparative analysis is a form of circumstantial evidence courts can use to determine the legitimacy of a party's explanation for exercising a peremptory challenge, although such evidence may not alone be determinative of that question, can be misleading, especially when not raised at trial, and has inherent limitations given the "[m]yriad subtle nuances" of a person's demeanor that might communicate meaning to an attorney considering a challenge. (*People v. Mills*, *supra*, 48 Cal.4th at p. 177; *People v. Lenix*, *supra*, 44 Cal.4th at pp. 620-627.) "Two panelists might give a similar answer on a given point. Yet the risk posed by one panelist might be offset by other answers, behavior, attitudes or experiences that make one juror, on balance, more or less desirable. These realities, and the complexity of human nature, make a formulaic comparison of isolated responses an exceptionally poor medium to overturn a trial court's factual finding." (*People v. Lenix*, *supra*, 44 Cal.4th at p. 624.) With those caveats in mind, respondent examines appellant's arguments.

Appellant's proffered comparative juror analysis is not very probative in this case. As to certain prospective jurors, the prosecutor stated that he was concerned about their beliefs in the relevance of psychology and psychiatry, but he was not asked why he did not peremptorily challenge

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(...continued)
Jones, this Court recently also noted that, although the United States Supreme Court relied on comparative juror analysis as part of its reasons for not deferring to the lower courts in both *Snyder* and *Miller-El*, in neither case was that analysis the sole reason for its conclusion that the challenges in question were improper. The comparative analysis in both cases, this Court continued, "merely supplemented other strong evidence that the challenges were improper." (*People v. Jones*, *supra*, 51 Cal.4th at p. 364, fn. 2, citing *Snyder v. Louisiana*, *supra*, 552 U.S. at pp. 476, 482-483; *Miller-El v. Dretke*, *supra,* 545 U.S. at pp. 240-241, 253-266.) Here, in contrast to *Snyder* and *Miller-El*, there was no "strong" evidence that the challenges in question were improper.

others who shared these beliefs. When the trial court finds a prima facie case of improper use of peremptory challenges (which did not actually happen in this case, as described above), the prosecutor must state the reasons for those challenges "and stand or fall on the plausibility of the reasons he gives." (*Miller-El v. Dretke*, *supra*, 545 U.S. at p. 252.) But no authority has imposed the additional burden of anticipating all possible unmade claims of comparative juror analysis and volunteering to explain why *other* jurors were *not* challenged. (See *People v. Jones*, *supra*, 51 Cal.4th at p. 365.) One of the problems of comparative juror analysis not raised at trial is that the prosecutor generally has not provided, and was not asked to provide, an explanation for nonchallenges. (*Ibid.*) When asked to engage in comparative juror analysis for the first time on appeal, a reviewing court need not, indeed, must not turn a blind eye to reasons the record discloses for not challenging other jurors, even if those other jurors are similar in some respects to the excused jurors. (*Id.* at pp. 365-366.)

In any event, keeping in mind that an attorney must consider many factors in deciding how to use the limited number of peremptory challenges available and often must accept jurors despite some concerns about them (*People v. Jones*, *supra*, 51 Cal.4th at p. 365), the record in this case strongly suggests religion-neutral reasons why the prosecutor chose not to challenge other jurors despite their comments regarding psychiatry and psychology. (See AOB 77-78 [noting that certain jurors indicated a belief in psychiatry and psychology yet were not challenged by the prosecutor].)

For example, Juror Number 134 had worked in the juvenile justice system, thought the death penalty served the purpose of satisfying the victim's family and possibly deterring crime (1CTSJ 110), believed the death penalty should be imposed for "cold hearted murder," especially where the victim was not involved in criminal activity, i.e., was "innocent" (1CTSJ 117), and believed the death penalty was not imposed often enough

(1CTSJ 118). Juror Number 238, who had been raised Catholic (1CTSJ 283), had worked as an administrative secretary for the Tennessee Attorney General's Office (1CTSJ 277), was "happy we have" law enforcement officials (1CTSJ 287),[15] believed in the death penalty in cases of premeditated murder (1CTSJ 297), and stated that she would consider a confession to be important in choosing between life without parole and the death penalty (1CTSJ 298). Juror Number 253 had a 19-year-old daughter (1CTSJ 218),[16] had a brother who was a correctional officer (1CTSJ 224), had a respectful attitude toward law enforcement officials (1CTSJ 227), and felt the death penalty should be imposed "where legally applicable" (1CTSJ 237). Juror Number 277's husband was a federal peace officer (1CTSJ 397), and the juror had a cousin who had been molested by the cousin's father (1CTSJ 406), felt "respect" toward law enforcement officials (1CTSJ 407), and believed in the death penalty for planned murder, stating, "if [the defendant] intend[ed] to kill then they will be killed." (1CTSJ 417). Juror 265 had three daughters who were in their twenties (1CTSJ 368), had a "very good" opinion of law enforcement officials, finding them "fair and easy to deal with" (1CTSJ 377), took a "citizens' academy" class with a local police department (1CTSJ 380), was strongly in favor of the death penalty, as it was "just" and would act as a deterrent if used (1CTSJ 387), and believed the death penalty was not imposed often enough and should be imposed if there were multiple crimes (1CTSJ 388). Juror 332 had a 17-year-old daughter (1CTSJ 488), respected the position of law enforcement

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[15] In addition to investigator Hobson, the prosecution planned to, and did, call numerous law enforcement officers at trial. How a witness would evaluate their testimony and weigh their credibility was, obviously, crucial to the prosecution's case.

[16] As noted in the Statement of Facts, both Newhouse and Crawford were 20 years old when appellant murdered them.

officials (1CTSJ 497), believed justice was served by the death penalty if the crime warranted it (1CTSJ 507), and would consider a defendant's intent and how a crime was committed in choosing between life without parole and the death penalty (1CTSJ 508). Lastly, Juror Number 334 found law enforcement officials to be "generally very professional" (1CTSJ 527), believed in the death penalty "if applicable to the situation" (1CTSJ 538), and thought the death penalty was not imposed often enough (1CTSJ 538).

The same is true with respect to appellant's comparative analysis of jurors who responded to questions regarding the types of factors they would rely upon in deciding the penalty question. (AOB 78-79.) Once again, the record strongly suggests religion-neutral reasons why the prosecutor chose not to challenge some jurors despite their comments regarding factors similar to those identified by jurors who the prosecutor challenged.

For example, Juror Number 20, who attended a Catholic church about 20 to 25 times each year (1CTSJ 162), thought that law enforcement officials were dedicated and put aside their family members and money to serve the community (1CTSJ 167), had been the victim of date rape and had a son who had been molested when he was eight years old (1CTSJ 166), and felt the death penalty was not imposed often enough (1CTSJ 178). Juror Number 75 had an 18-year-old daughter (1CTSJ 38), was herself raped when she was 18 by someone she knew (1CTSJ 46), had great respect for law enforcement officials (1CTSJ 47), belonged to the Monterey Citizens Police Academy (1CTSJ 48), and thought the death penalty set an example and was a form of punishment for "incurable" criminals who have no respect for human life, and should be imposed for "gruesome murders for those with no remorse" (1CTSJ 57). Juror Number 176 felt that law enforcement officials served to promote justice and a safer community (1CTSJ 137), and believed the death penalty should be imposed for crimes of murder committed by a person "who does so out of total lack of moral

conscience or regard for life" (1CTSJ 147). Juror Number 248 respected the job law enforcement officials have (1CTSJ 77), believed in the death penalty for intentional crimes when there was no doubt about the defendant's guilt, and thought life without the possibility of parole was "a waste of tax dollars" (1CTSJ 87). Juror Numbers 253 and 334 were discussed above. Juror Number 285 thought the death penalty can serve as a deterrent (1CTSJ 447) and said physical evidence and the amount of suffering on the part of the victim would be important in deciding penalty (1CTSJ 448). Juror Number 296 respected law enforcement officials (1CTSJ 467), and thought the death penalty protected society from the most dangerous people who repeat criminal activity (1CTSJ 477). Juror Number 338 was a retired Army officer who had legal experience in the service on both the prosecution and defense side in court martial proceedings (1CTSJ 546, 554) had a generally positive attitude toward law enforcement officials (1CTSJ 557), sometimes thought that people convicted of serious crimes were treated too lightly by the courts (1CTSJ 558), and approved of the death penalty in certain, limited cases, for example the murder of a kidnapping victim (1CTSJ 567). Lastly, Juror Number 346 thought most law enforcement officials were hard workers (1CTSJ 587), believed that people accused of serious crimes were treated too lightly by the courts (1CTSJ 588), said that the death penalty provided victims' families with some feeling of justice for their loss (1CTSJ 597).

Accordingly, appellant's comparative analysis utterly fails to show that the trial court erred in finding that the reasons proffered by the prosecutor were sincere.

II. THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION TO EXCLUDE HIS CONFESSIONS

Appellant's next argument is that his videotaped confessions should have been excluded because investigator Hobson failed to scrupulously honor appellant's invocation of his rights and used other techniques which rendered his waiver of his constitutional rights involuntary. (AOB 82-123.) Respondent disagrees.

A. The Applicable Law

Under the familiar requirements of *Miranda v. Arizona* (1966) 384 U.S. 436 [86 S.Ct. 1602, 16 L.Ed.2d 694], designed to assure protection of the federal Constitution's Fifth Amendment privilege against self-incrimination under "inherently coercive" circumstances, a suspect may not be subjected to custodial interrogation unless he or she knowingly and intelligently has waived the right to remain silent, to the presence of an attorney, and to appointed counsel in the event the suspect is indigent. (*Miranda v. Arizona*, *supra*, 384 U.S. at pp. 444-445.) Statements obtained in violation of *Miranda* are not admissible to prove the accused's guilt in a criminal prosecution. (*Ibid.*) A violation of *Miranda*'s prophylactic rules creates an irrebuttable presumption, for purposes of the prosecution's case-in-chief, that a resulting statement was coerced. (*Oregon v. Elstad* (1985) 470 U.S. 298, 307 [105 S.Ct. 1295, 84 L.Ed.2d 222].) However, where there is no actual infringement of a suspect's right against self-incrimination, a subsequent statement that is preceded by proper advisements and a voluntary waiver is admissible. (*Id.* at pp. 317-318.)

In applying *Miranda*, courts normally begin by asking whether custodial interrogation has taken place. The phrase "custodial interrogation" is crucial. "Custodial" encompasses any situation in which a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. (*People v. Ochoa* (1998) 19 Cal.4th 353,

401; *People v. Mayfield* (1997) 14 Cal.4th 668, 732.) Custody consists of a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest. (*People v. Moore* (2011) 51 Cal.4th 386, 395; *People v. Leonard* (2007) 40 Cal.4th 1370, 1400.) Absent "custodial interrogation," *Miranda* simply does not come into play. (*People v. Mickey* (1991) 54 Cal.3d 612, 648.)

The test for whether an individual is in custody is objective: was there a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest. (*Thompson v. Keohane* (1995) 516 U.S. 99, 112 [116 S.Ct. 457, 133 L.Ed.2d 383]; see also *People v. Stansbury* (1995) 9 Cal.4th 824, 830.) "[T]he initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned." (*Stansbury v. California* (1994) 511 U.S. 318, 323 [114 S.Ct. 1526, 128 L.Ed.2d 293]; see also *People v. Carpenter* (1997) 15 Cal.4th 312, 384.) The question whether a defendant was in custody for *Miranda* purposes is a mixed question of law and fact. (*Thompson v. Keohane, supra*, 516 U.S. at pp. 465-466.)

Not all statements obtained by the police from a suspect who is incarcerated or otherwise confined are the product of interrogation. (*People v. Ray* (1996) 13 Cal.4th 313, 337.) "Nothing in *Miranda* is intended to prevent, impede, or otherwise discourage a guilty person, even one already confined, from freely admitting his crimes, whether the confession relates to matters for which he is already in police custody or to some other offense." (*Ibid.*) In other words, just as custodial interrogation can occur in the absence of express questioning (*Rhode Island v. Innis* (1980) 446 U.S. 291, 300-301 [100 S.Ct. 1682, 64 L.Ed.2d 297]), not all questioning of a person in custody constitutes interrogation under *Miranda*. (*People v. Wader* (1993) 5 Cal.4th 610, 637; *People v. Lewis* (1990) 50 Cal.3d 262,

274-275.) As *Miranda* itself recognized, "[c]onfessions [are] a proper element in law enforcement. Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence." (*Miranda v. Arizona, supra*, 384 U.S. at p. 478.) Nor does the fact that a suspect is questioned in a police station necessarily require a finding of custody, even if the room where questioning occurs is in a secure area. (*People v. Ochoa, supra*, 19 Cal.4th at p. 403.)

A suspect who is in custody has not invoked his or her right to silence when the suspect's statements were merely expressions of passing frustration or animosity toward the officers, or amounted only to a refusal to discuss a particular subject covered by the questioning. (*People v. Rundle* (2008) 43 Cal.4th 76, 115; *People v. Jennings* (1988) 46 Cal.3d 963, 978.) No particular form of words or conduct is necessary on the part of a suspect to invoke his or her right to remain silent. (*People v. Crittenden* (1994) 9 Cal.4th 83, 129.) However, the suspect must do so unambiguously. (*Berghuis v. Thompkins* (2010) 560 U.S. __ [130 S.Ct. 2250, 2260, 176 L.Ed.2d 1098].)

Even if the requirements of *Miranda* have been met, the admission at trial of a defendant's statements made involuntarily to government officials violates a defendant's federal due process rights under the Fifth and Fourteenth Amendments. (*Dickerson v. United States* (2000) 530 U.S. 428, 433-434 [120 S.Ct. 2326, 147 L.Ed.2d 405]; *People v. Rundle, supra*, 43 Cal.4th at p. 114.) When a defendant challenges the admission of his or her statements on the ground they were involuntarily made, the prosecution must prove by a preponderance of the evidence the statements were, in fact, voluntary. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1093.) A statement is involuntary if it is not the product of a rational intellect and a free will. (*Mincey v. Arizona* (1978) 437 U.S. 385, 398 [98 S.Ct. 2408, 57 L.Ed.2d 290].) In making a voluntariness determination, the court examines

whether a defendant's will was overborne by the circumstances surrounding the giving of a confession. (*Dickerson v. United States*, *supra*, 530 U.S. at p. 434.)

Absent state action, coercive tactics by themselves do not render a defendant's statements inadmissible. (*Colorado v. Connelly* (1986) 479 U.S. 157, 167 [107 S.Ct. 515, 93 L.Ed.2d 473]; see also *People v. Maury* (2003) 30 Cal.4th 342, 404-405 [coercive police activity is a necessary predicate to establish an involuntary confession, but does not compel a finding of that a resulting confession is involuntary].) The determination whether the authorities improperly coerced a defendant's statements involves an evaluation of the totality of the circumstances, including the nature of the interrogation and the circumstances relating to the particular defendant. (*Dickerson v. United States*, *supra*, 530 U.S. at p. 434.)

On appeal, the reviewing court reviews independently the trial court's legal determinations of whether a defendant's statements were voluntary (*People v. Guerra*, *supra*, 37 Cal.4th at p. 1093) and whether his later actions constituted an invocation of his right to silence (*People v. Gonzalez* (2005) 34 Cal.4th 1111, 1125). The appellate court evaluates the trial court's factual findings regarding the circumstances surrounding the defendant's statements and waivers, and accepts the trial court's resolution of disputed facts and inferences, and its evaluations of credibility, if supported by substantial evidence. (*Ibid.*)

B. The Relevant Proceedings Below

1. Appellant's Motion To Exclude His Confession And The Prosecution's Opposition

Prior to trial, appellant filed a written motion to exclude his confession. (16CT 4172-4184.) In his motion, appellant sought to exclude his confession on the grounds that Hobson failed to advise him of his constitutional rights under *Miranda v. Arizona*, *supra*, 384 U.S. 436 (16CT

4175-4176), his confession on April 22, 1999, was inadmissible as it was obtained by coercion after he had invoked his constitutional right to remain silent (16CT 4176-4180), and all the statements he made following his April 22nd confession should be excluded because they were the by-product of an initial involuntary admission (16CT 4180-4182).

The prosecution filed an opposition to the motion. The prosecution argued that appellant was in custody on April 22 for a parole violation and not the Newhouse/Crawford cases, his confession was voluntary, and although he invoked his right to remain silent on April 21, Hobson scrupulously honored that invocation by terminating the interview. The prosecutor also noted that appellant left open the possibility of further voluntary questioning the following day, and he made no incriminating statements on April 21. (17CT 4380-4402.)

2. The Hearing Held On The Motion

A hearing was held pursuant to Evidence Code section 402. At the hearing, the prosecution introduced copies of certified records from Idaho which pertained to prior criminal charges filed against appellant in that state, which included a statement that appellant had been advised of his constitutional rights in connection with those charges. Other documents were introduced as well, including records showing that appellant had received his GED from Lewis and Clark State College and a certificate of completion from UCLA Extension. (7RT 2185-2196.)

At the hearing, San Luis Obispo County District Attorney Investigator John Tooley testified that he had advised appellant of his *Miranda* rights on June 17, 1987, during his investigation into an attempted sexual assault of a woman that had taken place in Arroyo Grande that month. Appellant indicated that he understood his rights, and spoke to Tooley about the crime, after which appellant was placed under arrest. (7RT 2196-2198.) Detective John Ferdolage of the Arroyo Grande Police Department and

Detective Scott Thompson of the San Luis Obispo Sheriff's Department also separately advised appellant of his *Miranda* rights in connection with the same crime on June 18, 1987. Appellant agreed to speak to Detective Ferdolage (7RT 2200-2202), but invoked his right to an attorney when Detective Thompson attempted to question him (7RT 2206-2208).

Investigator Hobson also testified at the hearing. He first met appellant on March 21, 1999, at the San Luis Obispo Police Station, the day after appellant was arrested for violating the conditions of his parole. He interviewed appellant for about an hour. Appellant admitted that he had violated parole by consuming alcohol. Appellant was one of about 12 to 15 people the police were looking at with respect to the disappearances of Newhouse and Crawford, but Hobson did not tell appellant that he was a suspect in those crimes. Hobson asked appellant about the eight ball key chain that had been found in his apartment, but did not tell him that it was relevant to the investigation. (7RT 2227-2229.) Appellant told Hobson that he knew that the police would come to question him, he knew they had a job to do, and he would cooperate with them because he was confident that their investigation would show that he was not involved in the disappearance of the two women. Appellant said that the police could search his apartment or his vehicles any time, and that he was willing to answer any future questions should they arise. (7RT 2229-2230.)

Hobson spoke to appellant again on April 1, 1999. Hobson asked appellant if he was still willing to cooperate with the investigation, and appellant responded affirmatively. Hobson asked him to take a polygraph examination. Appellant initially refused, but changed his mind when Hobson told him that such examinations can eliminate suspects in some cases. An FBI agent advised appellant of his *Miranda* rights, using a printed card. Appellant signed a written form waiving his constitutional rights and giving his consent to the polygraph. (7RT 2231-2233; 18CT

4836-4837.) Appellant started the examination, but subsequently demonstrated that he understood his rights by stopping the examination. Specifically, when the polygraph examiner told appellant he would have to stop holding his breath for periods up to 25 seconds because it would affect the accuracy of the polygraph, appellant said, "That's it. I don't want to do this anymore," and began removing the attachments used in the examination. Hobson spoke to appellant after he left the room. Hobson reminded appellant of his *Miranda* rights as they had just been given to him by the FBI agent. Appellant indicated that he remembered those rights and was still willing to talk to Hobson. Appellant said that, except for taking another polygraph examination, he was willing to assist in the investigation. He asked if he could be transported to the crime scene where Crawford had been abducted in order to see if he could give the police some insight regarding the person they should be looking for, given his perspective as a convicted rapist. Hobson did not take him up on his offer. (7RT 2234-2236.)

Hobson next contacted appellant on April 21, 1999. He asked appellant if he was still willing to cooperate with the investigation, and appellant said he was. Hobson did not advise him of his *Miranda* rights at that time. Hobson transported appellant from the county jail to the police station. Hobson removed the handcuffs that were attached to appellant's waist chain, so his hands were free. Hobson referred to the *Miranda* advisements given by the polygraph examiner without restating them, and asked appellant if he still was aware of his rights. Appellant said that he did, and Hobson told appellant that they still applied. (7RT 2237, 2264; 21CT 5611.) Hobson did not ask appellant if he waived those rights as appellant was not in custody with respect to the Newhouse/Crawford cases; rather, he was in custody due to a parole violation. As far as Hobson was concerned, with respect to his investigation into the disappearance of

Newhouse and Crawford appellant was free to get up and walk out of the interview room and go back to the county jail. Hobson interviewed appellant.[17] (7RT 2236-2238, 2256-2257, 2262, 2302.) At one point in the interview, when appellant said, "I've got nothing to say," Hobson believed that appellant had invoked his right to silence. Before that time, appellant said nothing for a period of about 15 minutes. Hobson attempted to persuade him to answer his questions during that period. (7RT 2302-2303.) But, when Hobson was convinced that appellant had invoked his right to remain silent, he agreed to return him to the county jail. (7RT 2305.)

After the interview was over, Hobson drove appellant back to the county jail. (7RT 2240.) Appellant appeared to be crying while he was being transported. Hobson asked him what he was thinking about, and he said "dying," and that he was a "dead man walking." When they arrived at the entrance of the jail facility, Hobson asked appellant if he would take him to where he could find Newhouse and Crawford, or whether he should make the turn back into the jail property. Appellant told him to turn into the jail facility, and Hobson did so. (7RT 2264-2265.) Hobson told appellant that if he changed his mind and wanted to talk to him, Hobson would return to the jail any time. He also asked if appellant would allow him to come back the following day and talk to him, and appellant said, "Maybe I'll deal with it tomorrow." Hobson dropped appellant off at the jail at about 2:00 or 2:30 in the afternoon. He did not have any further contact with appellant that day. (7RT 2267-2268, 2282.)

Hobson next saw appellant about 20 hours later, at approximately 9:45 a.m. on April 22, 1999, at the county jail. Jail officials allowed him to

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[17] As noted in the Statement of Facts, this interview, and the interview which took place the following day, were videotaped, and transcripts of the interviews were prepared. (See 21CT 5611-5693 [April 21 interview], 5694-5748 [April 22 interview].)

use an employee lunch room to further question appellant. The lunch room was a large room with two doors, windows, soda and candy vending machines, and tables and chairs spread out throughout the room. In contrast to prior occasions, Hobson chose not to interview appellant at the police station (where the interview room was padded and small) because he did not want appellant to feel coerced. (7RT 2268-2269.)

Unlike the previous day, appellant was not wearing any type of restraints, just his jail jumpsuit. Hobson asked appellant how he had slept, and appellant said, "Not at all." Hobson said that the situation involving the disappearance of Newhouse and Crawford was not going to go away and they needed to talk about it, and appellant said, "I know." Hobson said he needed appellant to tell him his side of the story, because it might be totally different from what the police investigation thus far depicted. (7RT 2270.) Appellant said, "I'm nothing but an animal, and I don't deserve to live." Hobson said that what happened was either a deliberate, planned act, or alternatively a situation where his fantasies got out of control and he did things which were totally out of character. Appellant said, "Nothing can justify what I did." Hobson said the victims' families needed closure, and that appellant had spoken about having a high degree of honesty and integrity and "now wasn't the time to throw all those things out the window." (7RT 2271-2272.)

Appellant said, "Can you promise me I can go to court and get this over within a week?" Hobson replied that he could not do so, and he would have to discuss this issue with an attorney. Appellant asked, "What do you want me to tell you?" Hobson said he wanted him to tell the truth. Appellant said, "Okay. But I don't want to talk here. Let's – take me someplace else." Hobson said that before he transported appellant back to the police station he wanted to be sure that appellant understood exactly what he was going to be asking him so they did not waste time. Hobson

advised appellant of his *Miranda* rights, using a Department of Justice form. Appellant said that he understood each of his rights. (7RT 2272-2273.) Appellant then admitted that he was responsible for the disappearances and deaths of both Newhouse and Crawford. An officer prepared appellant to be transported to the police station by placing a waist chain and leg restraints on his body. Hobson drove appellant to the police station. Hobson was at the jail facility for a total of 30 minutes. (7RT 2273-2274.) At no time during the interview at the jail that morning did Hobson raise his voice or swear at appellant, or threaten him or make any promises. (7RT 2320.)

At the police station, Hobson returned to the same interview room that he had used before, and conducted an in-depth, videotaped interview. Hobson again advised appellant of his *Miranda* rights. (7RT 2274-2275.) During the interview, appellant agreed to show him where he had buried Newhouse and Crawford. Several officers accompanied them to Davis Canyon, where appellant pointed out the victims' graves. Appellant also showed the officers various other pieces of evidence, including Crawford's sweatshirt and CDs that he took from Crawford's home. (7RT 2283-2284.)

Appellant asked Hobson if he could call his girlfriend Moore and tell her about what had happened before she read about it in the newspaper, and Hobson allowed him to do so. Appellant also asked to be allowed to speak to his employer, Greg Vieau. Both Moore and Vieau came to the police station and spoke to appellant. (7RT 2285-2286.)

Hobson next spoke to appellant on April 24, 1999, after the victims were autopsied. Hobson again advised appellant of his *Miranda* rights. He asked appellant about certain discrepancies that resulted from the autopsies. Appellant said that he had met with a newspaper reporter earlier that day, and told the reporter that he was a "monster" who deserved the death penalty because the two girls were dead. (7RT 2287-2288.)

Hobson spoke to appellant the following day, April 25, 1999. He asked appellant if he recalled his *Miranda* rights from the previous day. Appellant said that he recalled and understood them, and would speak to Hobson without an attorney. During this interview, appellant told Hobson about the sexual crimes he had committed in San Luis Obispo County in 1987. (7RT 2289-2290.)

Hobson also spoke to appellant the following day, April 26, 1999, after again reminding him of his rights and appellant's agreement to speak to him without an attorney. Hobson said that an attorney would probably be coming to speak with appellant and he could request an attorney at any time. Appellant said that if and when he wanted an attorney, he would tell Hobson. Hobson also said that appellant would be arraigned for the murders of Newhouse and Crawford. They talked about appellant's relatives who lived in Sandpoint, Idaho. (7RT 2290-2291.)

On the following day, April 27, 1999, Hobson spoke to appellant at the county jail. He again advised appellant of his *Miranda* rights. Appellant gave his consent to give blood and hair samples. Appellant also described in detail what he did to Newhouse. Hobson then took him to the police station and conducted another interview because there were additional questions Hobson had. Hobson again advised appellant of his rights prior to doing so, for the second time that day. During the interview, appellant acknowledged that all their conversations had been voluntary. (7RT 2291-2293.)

Hobson next spoke to appellant the following day, April 28, 1999. Hobson asked appellant if he recalled his rights from the previous day, and appellant said he did, and understood them. They talked about the status of the investigation. (7RT 2294.)

Hobson also spoke to appellant on April 30, 1999. Hobson again reminded appellant of his *Miranda* rights. Appellant said he recalled and

understood them, and would talk to Hobson without an attorney. Appellant also said that he probably knew his *Miranda* rights better than Hobson did. (7RT 2295.)

When Hobson spoke to appellant on May 6, 1999, appellant said that he remembered his *Miranda* rights from all the other times he advised him of his rights during the investigation. (7RT 2295.)

Appellant never requested the assistance of an attorney during any of the interviews Hobson conducted with appellant. (7RT 2300.)

William Wammock, the assistant jail commander at the San Luis Obispo County Jail, also testified at the hearing. According to Wammock, after he was arrested appellant was evaluated and found to be a "high risk" inmate due to his parole status, his prior sexual assault conviction, and the fact that he claimed to be enemies of the Skinheads and Nazi Low Riders. Thus, after initially being held in a standard placement used for parolees who entered the jail, appellant was housed in isolation. Appellant had standard telephone, visitation, and commissary privileges there. He had visitors, including his girlfriend, who visited him on several occasions, including March 21, March 27, March 28, April 3, April 4, April 10, April 11, April 17, April 18, and April 24. He also was visited by a newspaper reporter on the latter date. (7RT 2326-2334, 2337, 2340-2344, 2348-2350.) He was transferred to a different cell on several occasions, once because of his depressed mental state. (7RT 2335-2336.) As far as Wammock knew, appellant was not treated differently from any other inmate with his classification while he was housed in the jail. (7RT 2356.) Appellant used the jail telephone on the morning of April 22, 1999. (7RT 2388-2389.)

Several other jail staff members testified regarding appellant's housing at the jail and his use of the telephone. (See 7RT 2397-2415; 8RT 2457-2463.) An order was issued, apparently in error, stating that appellant

was at one point temporarily denied telephone access, but it was promptly cancelled. (8RT 2407-2409.)

3. The Trial Court's Ruling On The Motion

Oral argument was presented with respect to the motion. Defense counsel argued the following. Hobson did not advise appellant of his *Miranda* rights until the interview he conducted on April 22, and prior to that date merely "reminded" appellant of his rights. Appellant was in "custody" with respect to the Newhouse/Crawford cases, as he was questioned regarding their disappearances. Appellant invoked his right to remain silent, but Hobson "cajoled" him to keep talking rather than "scrupulously honoring" the invocation of right to silence. When Hobson did advise appellant of his *Miranda* rights, it was too late. (8RT 2467-2478.)

The prosecutor argued the following in response. Appellant was never held incommunicado, as he had personal visits and used the telephone while he was in jail. Appellant had been advised of his *Miranda* rights on April 1 when he underwent a polygraph examination. Although time passed between that advisement and Hobson's subsequent interviews with appellant, case law permits law enforcement officers to remind a suspect of his rights once they have initially been given, and moreover express readvisements were made prior to appellant's actual confessions. The videotapes of the interviews showed that appellant's will was not overborne and that he was never coerced, by his own admission. Appellant's confession was voluntary, and the waivers of his rights were knowing and intelligent. (8RT 2478-2488.)

The trial court issued a written order denying the motion. In the order, the court noted that it had reviewed the April 22 videotaped confession. The court found that a reasonable person would believe that he was in custody on the dates in question due to the murder case rather than

merely the parole violation. The court stated that Hobson should have advised or at least reminded appellant of his *Miranda* rights when he first started talking to appellant on the morning of April 22, even though Hobson provided later advisements at both the jail and the police station before appellant confessed to the murders. The court accordingly excluded from the prosecution's case-in-chief the two admissions appellant made between the start of the conversation and the first *Miranda* advisement that day regarding appellant being an "animal" who did not "deserve to live," and nothing justifying "what I did." The court found that appellant's subsequent, post-advisement confession was voluntary, however, as there was no evidence that appellant's will was overcome. The court noted that appellant confessed in part because of his purported wish to ease his conscience, and also because he knew that forensic evidence had implicated him. (18CT 4932-4938.)

C. Appellant's Rights Were Not Violated On Either April 21 Or April 22

Appellant's first subclaim in this regard is that Hobson failed to scrupulously honor his invocation of his Fifth Amendment rights on April 21 by conducting further interrogation and visits in violation of *Michigan v. Mosley* (1975) 423 U.S. 96 [96 S.Ct. 321, 46 L.Ed.2d 313], which found admissible statements about a different crime obtained by officers after an incarcerated defendant had invoked his right to silence about the custodial offenses. In reaching its decision, the Supreme Court noted that an invocation of the right to silence does not create a pro se proscription against any further questioning (*id.* at pp. 102-103), but is meant to protect the right to silence by notifying a person in custody of the right and of the option to cut off questioning, thus controlling the time at which the questioning occurs, the subjects discussed, and the duration of the interrogation (*id.* at pp. 103-104). (AOB 86-102.)

As will be set forth below, appellant's reliance on *Mosley* is misplaced.

1. Appellant Was Not In Custody As To The Newhouse/Crawford Cases At The Time He Confessed

Although it is unnecessary to reach this point to uphold the admissibility of appellant's confessions on April 22, respondent notes that the prosecutor below argued that appellant was not in custody as to the Newhouse/Crawford cases at the time he confessed. The trial court concluded otherwise, finding that a reasonable person who believe custody had attached to those cases as of April 21, but because the April 22 videotaped confessions were preceded by full *Miranda* warnings, they were admissible despite the lack of earlier warnings.

As noted above, absent "custodial interrogation," *Miranda* simply does not come into play (*People v. Mickey*, *supra*, 54 Cal.3d at p. 648), and not all statements obtained by the police from a suspect who is incarcerated or otherwise confined are the product of interrogation (*People v. Ray*, *supra*, 13 Cal.4th at p. 337). In this case, appellant was already in custody on a parole violation when Hobson began questioning him. However, the mere fact of this incarceration on another offense did not require Hobson to advise appellant of his constitutional rights before questioning him about the Newhouse/Crawford cases.

In *Maryland v. Shatzer* (2010) 559 U.S. __ [130 S.Ct. 1213, 1224, 175 L.Ed.2d 1045], the United States Supreme Court noted that whether incarceration constitutes custody for *Miranda* purposes "depends upon whether it exerts the coercive pressure that *Miranda* was designed to guard against – the 'danger of coercion [that] results from the *interaction* of custody and official interrogation.'" (*Ibid.*, quoting *Illinois v. Perkins*

(1990) 496 U.S. 292, 297 [110 S.Ct. 2394, 110 L.Ed.2d 243].)[18] In *Shatzer*, the Supreme Court went on to hold that, "[w]ithout minimizing the harsh realities of incarceration, we think lawful imprisonment imposed upon conviction of a crime does not create the coercive pressures identified in *Miranda*." (*Ibid.*)

Here, there was no danger of coercion resulting from the interaction of appellant's custody status as an arrestee on a parole violation charge and Hobson's questioning. Regardless of whether constitutional advisements were required, there was evidence that appellant was aware of his rights from prior law enforcement contacts; he was also advised of them during the polygraph examination which took place on April 1, which he terminated after he chose to exercise his rights and not participate any further; and Hobson asked if appellant still recalled those rights on April 21, and drove appellant back to jail after appellant said he wanted to stop talking. These facts and circumstances supported the prosecutor's argument that appellant was not in custody with respect to the Newhouse/Crawford cases when Hobson questioned him.

Appellant was not "summoned" for questioning against his will; rather he volunteered to assist Hobson in his investigation on several occasions because, in his view, doing so would show that he was not involved in the Newhouse/Crawford cases. Also, appellant was not handcuffed during the interviews. While most of the interviews were

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[18] The Supreme Court recently granted certiorari in *Howes v. Fields*, 10-680, a case decided by the United States Court of Appeals for the Sixth Circuit, involving the Antiterrorism and Effective Death Penalty Act of 1996, which governs federal habeas actions brought by state inmates. The specific question presented is whether a prisoner is always "in custody" for purposes of *Miranda* any time that prisoner is isolated from the general prison population and questioned about conduct occurring outside the prison regardless of the surrounding circumstances.

conducted in a police station, appellant obviously felt unthreatened there as shown by the fact that, when Hobson deliberately arranged to have a more pleasant, non-custodial location made available for one of the interviews (the employee lunch room at the county jail), appellant asked to be taken someplace else to talk. The police station was obviously the most logical choice where such questioning would take place, and appellant must have known that is where the interview would be conducted. Although appellant was confronted with evidence regarding Newhouse's blood being found in his truck and Crawford's eight ball key chain being recovered from appellant's apartment, there was no undue pressure exerted against appellant. In fact, he repeatedly said that he was still willing to assist Hobson in the investigation, at one point going to far as asking to be taken to Crawford's residence in order to attempt to assist the investigation.

Under the totality of the circumstances presented, no restraints were placed upon appellant to coerce him into participating in the interviews over and above those normally associated with his status as an arrestee on a parole violation charge. (See *People v. Holloway* (1990) 50 Cal.3d 1098, 1112-1115 [no custody for Fifth Amendment purposes where officers asked defendant's parole officer if they could meet defendant in the parole officer's office but did not tell the parole officer to detain or arrest defendant, they removed the handcuffs which had been placed on defendant by the parole officer, and defendant voluntarily went with the officers to a sheriff's station for the interview; as in appellant's case, defendant was merely one of many persons being questioned, and the questioning was neither aggressive nor accusatory]; *People v. Fradiue* (2000) 80 Cal.App.4th 15, 20 [*Miranda* warnings not required where state prison inmate was interviewed about suspicious substance found in his cell, as there were no restraints placed on him to coerce him into participating in the interrogation over and above those normally associated with his inmate

status]; *Cervantes v. Walker* (9th Cir. 1978) 589 F.2d 424, 427 [county jail inmate taken to jail library for questioning about a recent fight, no *Miranda* warnings necessary when officer asked defendant about item found in his property, which turned out to be marijuana].)

Accordingly, appellant was not in custody for *Miranda* purposes as to the Newhouse/Crawford cases at the time he confessed to the crimes he committed against them.

2. Even If Appellant Was Deemed To Be In Custody As To The Newhouse/Crawford Crimes When He Was Questioned, He Did Not Unambiguously Invoke His Right To Remain Silent On April 21, A Day On Which He Made No Incriminating Statements

Appellant argues that he invoked his right to remain silent on April 21, and Hobson therefore improperly resumed contact with him on April 22, the day of his confessions.[19] It is true that on April 21, appellant, who started out by saying that he still wanted to cooperate with Hobson, ultimately said he did not want to say anything more. At that point, Hobson transported him from the police station back to the jail. However, it must be emphasized that appellant, who made no incriminating statements on April 21, left open the possibility of further voluntary questioning the following day. On that day, April 22, he ultimately confessed, twice, after being fully advised of his *Miranda* rights both times.[20] Accordingly, the

[19] As previously noted, on April 21 Hobson reminded appellant that he had been given *Miranda* advisements at the April 1 polygraph examination, elicited appellant's acknowledgement that he still was aware of those rights, and informed appellant that those rights still applied.

[20] As noted above, the trial court excluded two admissions appellant made at the county jail on the morning of April 22 as they preceded Hobson's readvisement of appellant's *Miranda* rights later that morning, at the police station. Respondent again notes that appellant was not in custody with respect to the Newhouse/Crawford cases on either April 21 or
(continued...)

events of April 21 appear to be irrelevant in evaluating whether his confession on April 22 should have been excluded. (See *Oregon v. Elstad*, *supra*, 470 U.S. 298.)

Moreover, appellant's alleged invocation of his right to remain silent on April 21 expressly left open the possibility that he would talk to Hobson on the following day, as appellant told Hobson that he might be willing to talk to him then. In *Berghuis*, the Supreme Court extended the rule set forth in *Davis v. United States* (1994) 512 U.S. 452, 459 [114 S.Ct. 2350, 129 L.Ed.2d 362], that a suspect must unambiguously invoke his right to counsel in order to preclude or terminate questioning, to cases involving a suspect's invocation of his right to remain silent. The police in *Berghuis* advised Thompkins of his *Miranda* rights, but he did not say that he wanted to remain silent or wanted an attorney. He was largely silent during the interrogation, which lasted for three hours, but toward the end of the interrogation made an admission about the shooting under investigation. (*Berghuis v. Thompkins*, *supra*, 130 S.Ct. at pp. 2256-2257.) The Supreme Court held that Thompkins did not unambiguously invoke his right to remain silent, stating: "Thompkins did not say that he wanted to remain silent or that he did not want to talk with the police. Had he made either of these simple, unambiguous statements, he would have invoked his '"right to cut off questioning."' Here he did neither, so he did not invoke his right to remain silent." (*Id.* at p. 2260, citation omitted.) It further noted: "If Thompkins wanted to remain silent, he could have said nothing in response to [the police officer's] questions, or he could have unambiguously invoked his *Miranda* rights and ended the interrogation." (*Id.* at p. 2263.)

(...continued)
April 22, and thus he was not entitled to *Miranda* warnings viz-a-viz that case. In any event, the excluded admissions were far less important than appellant's subsequent detailed confession.

Here, appellant's assertion at the end of the April 21 interview that he "had nothing to say" was not an unambiguous assertion of his right to remain silent forever, given that Hobson asked appellant if he could come back and talk to him some more the following day, and appellant left that possibility open; rather it seemed to be frustration on appellant's part or alternatively a refusal to answer the specific question posed to him at the time, but did not obligate Hobson to terminate the interview.[21] (See *id.* at pp. 115-116 [no unambiguous assertion of right to remain silent where suspect told officers he wanted to stop the interview because he had a headache and wanted to return to his cell, following which suspect said the officers could further question him over the next few days]; *People v. Stitley* (2005) 35 Cal.4th 514, 535 [suspect's statement "I think it's about time for me to stop talking" was not an unambiguous assertion of his right to remain silent, as it expressed apparent frustration but did not end the interview]; *People v. Jennings*, *supra*, 46 Cal.3d at pp. 977-978 [defendant's statement, "I'm not going to talk . . . That's it. I shut up," merely reflected a momentary frustration and animosity toward one of the officers and was not an invocation of his right to remain silent]; *In re Joe R.* (1980) 27 Cal.3d 496, 516 [suspect's statement "That's all I have to say" not an invocation of the right to remain silent]; see also *People v. Manzo* (2011) 192 Cal.App.4th 366, 381-382 [suspect unambiguously invoked his right to remain silent under *Berghuis* where suspect said "I'm doing what my right . . ."].)

Appellant now points to his earlier statements and conduct, for example shaking his head "no" when Hobson said that appellant was the

[21] The prosecution's opposition papers, filed prior to the Supreme Court's decision in *Berghuis*, took the position that appellant had invoked his right to remain silent at the end of the April 21 interview. (See 17CT 4392.)

only person who could tell the story about the murders or not saying anything for about 15 minutes at one point in the interview (see AOB 87-88; see also 21CT 5676, 5675-5681), in support of his contention that he made unambiguous assertions of his right to remain silent. They too appear to reflect only an unwillingness to answer specific questions, or frustration on appellant's part, as made clear by appellant when, at the end of the interview, he left open the possibility that he would speak to Hobson the following day.

Hobson was plainly not required to await "invitation or contact" from appellant before doing so, as appellant now contends (see AOB 95), given appellant's statement at the end of the April 21 conversation that he might be willing resume the interview the following day (see 7RT 2282). Appellant simply did not make a final, definitive assertion of his right to remain silent, as required by *Berghuis*, and thus Hobson did nothing wrong in returning the following day. (See *Berghuis v. Thompkins*, *supra*, 130 S.Ct. at p. 2264 [interrogation provides the suspect with additional information that can put his or her decision to waive, or not to invoke, the suspect's right to remain silent into perspective, as questioning commences and then continues, "the suspect has the opportunity to consider the choices he or she faces and to make a more informed decision, either to insist on silence or to cooperate"].) Accordingly, the events of April 21 appear to be irrelevant in evaluating whether appellant's confession on April 22 should have been excluded.

3. In Any Event, Appellant's Confessions On April 22 Were Preceded By Advisements And Waivers Of His *Miranda* Rights

As previously noted, when appellant allegedly invoked his right to remain silent on April 21, he left open the possibility of further voluntary questioning the following day, April 22. On April 22, appellant confessed,

twice, on videotape, after being fully advised of and waiving his *Miranda* rights both times. (See *Oregon v. Elstad, supra,* 470 U.S. at p. 305 [a voluntary statement given after *Miranda* warnings is admissible even if there have been prior unwarned statements, so long as the prior unwarned statements were not coerced].) In his first confession, he admitted killing both victims. In his second confession, he took officers to both victims' graves and showed them additional evidence such as Crawford's sweatshirt and CDs that he took from Crawford's home. The trial court properly found these confessions to be admissible because they were preceded by full *Miranda* advisements and were voluntary.

Appellant contends that the waiver of his constitutional rights on April 22 was invalid because it was the product of coercion, citing *Michigan v. Mosley, supra,* 423 U.S. 96. But, for the reasons discussed in section B of this argument, ante, and sections D and E, post, the record amply supported the trial court's conclusion that appellant voluntarily waived his rights on April 22 and voluntarily confessed to the crimes.

D. Hobson Did Not Use A "Question First, Warn Later" Technique Pursuant To Standard Police Protocol In Order To Obtain A Second Confession Which Followed An Unwarned, Inadmissible Confession

Appellant's next subclaim is that the *Miranda* warnings given on April 22 were ineffective because Hobson deliberately used a "question first," warn later technique in violation of *Missouri v. Seibert* (2004) 542 U.S. 600 [124 S.Ct. 2601, 159 L.Ed.2d 643]. (AOB 102-109.) This point lacks merit, as *Seibert* is inapposite.

In *Missouri v. Seibert,* the Supreme Court considered a confession which resulted from a written police protocol for custodial interrogation promoted by a national police training organization as well as the interrogating officer's department. That protocol called for giving no *Miranda* warnings until interrogation had yielded a confession even though

that confession would be inadmissible under *Miranda*, and then obtaining a second confession after advisements were given, on the theory that the second confession would be admissible. In *Seibert*, the suspect was not advised of her *Miranda* rights and confessed. Only then did the officer give the *Miranda* warnings, after which he led the suspect to provide the same confession a second time. (*Missouri v. Seibert, supra*, 542 U.S. at p. 604.) "In that limited context, the Supreme Court held a confession repeated after a warning inadmissible." (*In re Kenneth S.* (2005) 133 Cal.App.4th 54, 66, citing *Missouri v. Seibert, supra*, 542 U.S. at p. 604; see also *People v. Williams* (2010) 49 Cal.4th 405, 448 [following *Elstad* where suspect made four statements, and was informed of and waived his rights prior to the third and fourth interviews, claim of taint due to alleged prior *Miranda* violations rejected and it was noted that the case was not one in which it was alleged that the officers were following a policy of disregarding *Miranda*]; *People v. San Nicolas* (2004) 34 Cal.4th 614, 639 [citing both *Elstad* and *Seibert*, and holding that statement obtained on one date in violation of *Miranda* did not taint a second interview which took place six days later and where suspect was advised of his *Miranda* rights and waived them prior to the second interview].)

Here, unlike in *Seibert*, there was no evidence of any written protocol used in eliciting appellant's confession or any evidence about a policy to disregard the teachings of *Miranda*. Nor were the confessions appellant made on April 22 repetitions of a full confession obtained prior to full *Miranda* advisements. Appellant is simply incorrect when he asserts that Hobson "deliberately used a two step strategy, and took no curative measures." (See AOB 105.)

Moreover, in *Seibert*, when the suspect was interrogated, she was already under arrest and in custody. (See *Missouri v. Seibert, supra*, 542 U.S. at p. 604.) In the present case, as discussed above, appellant was not

in custody as to the Newhouse/Crawford cases at the time he confessed. Nonetheless, Hobson conscientiously reminded appellant of his *Miranda* rights both on April 21 and prior to his actual confession on April 22, following appellant's advisement and written waiver of those rights when he underwent the polygraph examination on April 1, 1999. And, when appellant chose to exercise his rights, his decision was honored: the polygraph examination of April 1 was terminated by appellant's choice, and Hobson drove him back to the jail on April 21 when appellant said he had nothing more to say that day.

Thus, because there was no "protocol" or two-step strategy utilized by Hobson, and no second confession which followed a first, unwarned confession, *Seibert* affords no basis for disturbing the trial court's ruling.

E. Appellant Forfeited Each Of His Current Contentions Regarding The Voluntariness Of His Confession, But In Any Event The Trial Court Properly Found That Appellant's Confession Was Voluntary

Appellant also argues that his waiver and confession on April 22nd were involuntary, and thus his confession should have been excluded. (AOB 109-121.) However, each of the specific claims raised on appeal was forfeited because it was not raised below. In any event, the trial court properly found that appellant's confession was voluntary.

On appeal, appellant raises a number of specific claims in support of his argument that his confession was involuntary: (1) Hobson attempted to wear appellant down by repeatedly ignoring his invocations of his right to remain silent (AOB 112-113); (2) Hobson misrepresented the evidence (AOB 113-115); (3) Hobson made misrepresentations and falsely implied that appellant would receive benefits by confessing (AOB 115); (4) Hobson physically touched appellant and told him that talking to Hobson was required (AOB 115-117); and Hobson "softened up" appellant before securing a waiver of his *Miranda* rights (AOB 118-120). Although

appellant did raise in his written motion in a general way the issue of the alleged involuntariness of his confession and even though at the hearing on the motion defense counsel spoke about Hobson's allegedly coercive efforts to undermine appellant's ability to exercise his free will, none of the specific legal theories advanced on appeal were set forth in his motion (see 16CT 4180-4182) or raised by defense counsel at the hearing (see 8RT 2467-2478). Appellant thus may not raise these points on appeal. (See *People v. Benson* (1990) 52 Cal.3d 754, 782, fn. 5; *People v. Gordon* (1990) 50 Cal.3d 1223, 1251-1252.)

Even had appellant's specific arguments been preserved, each fails. As noted above, the trial court found that appellant's confession was voluntary. The court found no evidence that appellant's will was overcome by anything Hobson said or did during the questioning. The court stated that appellant confessed in part because of his purported wish to ease his conscience, and also because he knew that forensic evidence had implicated him.

The trial court was correct. Appellant never unambiguously invoked his right to remain to silent, as discussed above. Furthermore, Hobson manifestly did not conduct a "sophisticated psychological campaign of coercive tactics designed to overcome [appellant's] will," as appellant now opines. (See AOB 112-113.) Instead, Hobson continued to question appellant in a professional manner and within the limits of the law to attempt to determine if either Newhouse or Crawford was still alive and, if not, where their bodies could be located and what role appellant may have had in their disappearance and possible murders. Any "psychological ploys" Hobson may have used were simply not the type which, under all the circumstances, are so coercive that they tend to produce a statement that is both involuntary and unreliable, which is all the law prohibits. (See

People v. Ray, *supra*, 13 Cal.4th at p. 340; *People v. Thompson* (1990) 50 Cal.3d 134, 166-167.)

As to appellant's claim that Hobson misrepresented the evidence against him, for example stating that the eight ball key chain had been determined to have been manufactured in 1998 and to have belonged to Crawford (see AOB 113-115) during the questioning conducted on April 1, 1999, and April 21, 1999, respectively, deception by police officers does not necessarily render a confession involuntary. (*People v. Thompson*, *supra*, 50 Cal.3d at p. 167.) While falsehoods told by the police to a suspect under questioning can affect the voluntariness of an ensuing confession, there must be a proximate causal connection between the deception or subterfuge and the confession. (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1240.) Here, any subterfuge did not "cause" appellant to confess, as shown by the fact that appellant did not confess on either of the dates that the allegedly deceptive statements were made. (See *id.* at pp. 1240-1241 [police deception regarding attempts to lift fingerprints from victim's dead body through the use of lasers "fall short of what is required to make out a case of prejudicial deception," as it does not follow that telling a murder suspect in the course of questioning that his prints had been lifted from the neck of a homicide victim "caused" him to confess].)

At no time during his interviews of appellant did Hobson ever threaten appellant or promise him anything, such as favorable consideration if he confessed, as appellant now argues. (See AOB 115.) At most, Hobson implored appellant to tell the truth because it was the right thing to do, but police officers are not precluded from discussing any "advantage" or other consequences that will "naturally accrue" in the event the accused speaks truthfully about the crime. (*People v. Ray*, *supra*, 13 Cal.4th at p. 340; *People v. Hill* (1967) 66 Cal.2d 536, 550.) Hobson's statements to the effect that he needed to speak to prosecutors about how the case would be

handled and, without knowing all the circumstances, he did not know how to handle the case or if death would be a possible penalty (21CT 5679, 5682), plainly do not constitute impermissible promises of leniency. Indeed, they reflect the contrary: a request for more information so that knowledgeable decisions about the case could be made.

Nor were the physical touchings of appellant by Hobson, which can only be characterized as extremely gentle, sufficient to cause appellant's will to be overcome. While appellant admits that they were not designed to cause pain and fear, he claims that they were "psychologically powerful" and "intended to coerce." (See AOB 115-117.) However, such compassionate gestures – which border on the remarkable given the circumstances – simply cannot be equated to acts of physical violence or other threatening behavior which warrant the exclusion of a suspect's confession.

Lastly, as to appellant's claim that Hobson "softened up" appellant before securing a waiver of his *Miranda* rights (AOB 118-120), nothing Hobson ever said to appellant was remotely close to the "softening up" of the suspect disapproved in *People v. Honeycutt* (1977) 20 Cal.3d 150, 160, relied upon by appellant. First and foremost, unlike the defendant in *Honeycutt*, appellant had been advised of, and waived in writing, his constitutional rights before the alleged "softening up," specifically on April 1, 1999, when he underwent a polygraph examination. Hobson also reminded appellant of those rights on April 21, 1999, the day before the alleged "softening up." Perhaps more importantly, however, there was no disparagement of the victims or ingratiating conversation with appellant on either April 21, 1999, or the following day, when appellant confessed. Rather, Hobson simply told appellant that the situation involving Newhouse and Crawford was not going to "go away," appellant needed to tell his side of the story, the investigation to that point painted an "appalling picture,"

appellant might have given in to his fantasies, he wanted to believe that appellant was not an "animal," and the victims' families needed closure. (See, e.g., 7RT 2270, 2310-2311.) These statements reflect skillful police questioning by an experienced and well-trained law enforcement officer. They did not constitute coercion on one hand or ingratiating "softening up" on the other.

Even appellant admitted that all of the conversations he had with Hobson were voluntary. (7RT 2293.) Appellant had substantial prior experience with law enforcement officials over a period of several decades. He was capable of expressly exercising his constitutional rights when he wished to do so, as demonstrated by his actions during the FBI polygraph examination. The videotaped interviews make it overwhelmingly clear that appellant was not coerced in any manner when Hobson questioned him. Based on an evaluation of the totality of the circumstances, including the nature of the questioning and the circumstances relating to appellant, the trial court properly found appellant's confession to be voluntary. (See *Dickerson v. United States*, *supra*, 530 U.S. at p. 434.)

F. Any Error Was Harmless

Appellant asserts that the *Miranda* violation prejudiced him. (AOB 121-123.) The erroneous admission of otherwise voluntary extrajudicial statements obtained in violation of *Miranda* is not per se reversible error. (*People v. Sims* (1993) 5 Cal.4th 405, 447; *People v. Johnson* (1993) 6 Cal.4th 1, 32-33.) Rather, the harmless error test set forth in *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705], must be applied, to determine whether reversal is required. (*People v. Sims*, *supra*, 5 Cal.4th at p. 447; *People v. Johnson*, *supra*, 6 Cal.4th at pp. 32-33.) Under the *Chapman* standard, an error is reversible unless it is harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.) To evaluate this question, the remainder of the evidence must be

reviewed. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 308 [111 S.Ct. 1246, 113 L.Ed.2d 302].)

Here, appellant's confessions to Hobson were undoubtedly the strongest evidence in this case. Nonetheless, any error the trial court may have committed in ruling them admissible was harmless beyond a reasonable doubt given the remaining evidence adduced against appellant.

First, there was evidence that appellant also confessed his guilt to two other people, his girlfriend and his employer. There was also evidence that appellant told a reporter that he was a monster in view of what happened to the victims, which was another admission that he killed them. In addition, on the first day officers went to appellant's apartment after Zaragoza reported his suspicions concerning appellant to the police, they found Crawford's "eight ball" key chain in a wooden box in the apartment. Before he confessed to Hobson, appellant consented to the search of his apartment and his truck, which yielded blood evidence. A search of the hillside close to appellant's apartment yielded Crawford's keys. There was the evidence of appellant's prior violent sexual assault against Shelly C. admitted as propensity evidence under California Evidence Code section 1108.

Lastly, both Newhouse and Crawford were buried near appellant's apartment, where police found them. Any violation of appellant's *Miranda* rights does not taint the admissibility of any physical evidence derived from his confessions, as the "fruit of the poisonous tree" doctrine does not apply to physical evidence seized as a result of a noncoercive *Miranda* violation. (*People v. Davis* (2009) 46 Cal.4th 539, 598, citing *United States v. Patane* (2004) 542 U.S. 630, 637-638, 645 [124 S.Ct. 2620, 159 L.Ed.2d 667].)

Accordingly, on this record, even if appellant's confessions to Hobson violated *Miranda*, the error was harmless beyond a reasonable doubt in light of the remaining evidence against appellant.

III. THE CORPUS DELICTI OF RAPE AND SODOMY AS TO CRAWFORD WAS SHOWN BY AMPLE EVIDENCE INDEPENDENT OF APPELLANT'S CONFESSION TO THOSE CRIMES

Appellant's final guilt phase issue is that there is insufficient evidence aside from his confession to support his convictions for raping and sodomizing Crawford. (AOB 123-125.) Respondent again disagrees.

A. The Applicable Law

"'In every criminal trial, the prosecution must prove the corpus delicti, or the body of the crime itself – i.e., the fact of injury, loss, or harm, and the existence of a criminal agency as its cause. In California, it has traditionally been held, the prosecution cannot satisfy the burden by relying *exclusively* upon the extrajudicial statements, confessions, or admissions of the defendant.'" (*People v. Gutierrez*, *supra*, 28 Cal.4th at pp. 1126-1127, quoting *People v. Alvarez* (2002) 27 Cal.4th 1161, 1168-1169.) Though mandated by no statute, and never deemed a constitutional guaranty, the rule requiring some independent proof of the corpus delicti has roots in the common law. (*People v. Alvarez*, *supra*, 27 Cal.4th at p. 1169.)

The independent proof may be by circumstantial evidence, and it need not be beyond a reasonable doubt; a slight or prima facie showing, permitting the reasonable inference that a crime was committed, is sufficient. (*People v. Alcala* (1984) 36 Cal.3d 604, 624-625.) The proof is sufficient if it permits an inference of criminal conduct, even if a noncriminal explanation is also plausible. (*People v. Jennings* (1991) 53 Cal.3d 334, 364; *People v. Ruiz* (1988) 44 Cal.3d 589, 610-611.) The rule has never been interpreted so strictly that independent evidence of every physical act constituting an element of an offense is necessary; instead, there need only be independent evidence establishing a slight or prima facie showing of some injury, loss or harm, and that a criminal agency was

involved. (*People v. Jones*, *supra*, 17 Cal.4th at p. 303.) The rule is intended to ensure that one will not be falsely convicted, by his or her untested words alone, of a crime that never happened. (*People v. Ochoa*, *supra*, 19 Cal.4th at p. 404; *People v. Jones*, *supra*, 17 Cal.4th at p. 301.)

California decisions have addressed the independent-proof requirement in various contexts: it has been held that the defendant may not be held to answer if no independent evidence of the corpus delicti is produced at the preliminary hearing; at trial, the defendant's extrajudicial statements have been deemed inadmissible over a corpus delicti objection absent some independent evidence of the crime to which the statements relate; and appellate courts have entertained direct claims that a conviction cannot stand because the trial record lacks independent evidence of the corpus delicti. (See *People v. Alvarez*, *supra*, 27 Cal.4th at pp. 1169-1170, and cases cited therein.)

Article I, section 28, subdivision (d) of the California Constitution, the "Truth in Evidence" provision adopted by Proposition 8 in 1982, abrogated any corpus delicti basis for excluding a defendant's extrajudicial statements from evidence. (*People v. Alvarez*, *supra*, 27 Cal.4th at p. 1165.) However, that provision did not abrogate the corpus delicti rule insofar as it provides that every conviction must be supported by some proof of the corpus delicti aside from or in addition to such statements, and that the jury must be so instructed. (*Ibid.*)

B. The Relevant Proceedings Below

Prior to trial, appellant moved to dismiss counts VII, VIII, and IX of the information, which charged him with several forcible sex offenses against Crawford, pursuant to section 995. In relevant part, he asserted that the magistrate erred at the preliminary hearing when he admitted appellant's confession as it related to the rape and sodomy of Crawford because the corpus delicti of those crimes had not been independently

established.[22] (4CT 1080-1090.) The prosecution filed written opposition. (5CT 1092-1119.) The trial court denied the motion based on the state of the evidence adduced at the preliminary hearing. The court also noted that the evidence of Newhouse's rape was sufficient to prove the corpus delicti of the sex offenses appellant committed against Crawford. (5CT 1175-1176.)

The prosecution subsequently filed a trial brief and a motion in limine, asking that evidence pertaining to appellant's offenses as to Shelly C. and Anishka C. be admitted pursuant to Evidence Code section 1101, subdivision (b), and Evidence Code section 1108.[23] (9CT 2165-2181.) The trial court granted the motion, finding that the prior and current offenses were "strikingly" similar and that the prior offenses were admissible to show intent and common plan and scheme under Evidence Code section 1101, subdivision (b). The court noted that the prosecutor could rely on

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[22] Appellant's trial took place prior to this Court's decision in *People v. Alvarez*, 27 Cal.4th 1161. There, as noted above, it was held that Proposition 8's "Truth in Evidence" provision abrogated any corpus delicti basis for excluding a defendant's extrajudicial statements from evidence.

[23] Evidence Code section 1101, subdivision (a), provides that evidence of specific instances of a person's conduct is inadmissible to prove his or her conduct on a specified occasion. One of the exceptions to this rule is codified in Evidence Code section 1101, subdivision (b), which provides that "[n]othing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident . . .) other than his or her disposition to commit such an act." Evidence Code section 1108, enacted in 1995, provides that in a criminal action in which the defendant is charged with a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Evidence Code section 1101, so long as the evidence is not inadmissible pursuant to Evidence Code section 352. Thus, Evidence Code section 1108 permits the admission of other sex crimes for the purpose of showing a propensity to commit such crimes. (*People v. Falsetta* (1999) 21 Cal.4th 903, 907.)

that evidence in summation regarding corpus delicti. The court also found the prior crimes evidence admissible under Evidence Code section 1108. (8RT 2760-2765.)[24]

Prior to investigator Hobson's testimony concerning appellant's confession, defense counsel renewed his objection to the admission of the confession based on alleged lack of corpus delicti. The trial court deferred ruling on the objection, pending the coroner's testimony. (26RT 6932.)

Subsequently, pursuant to CALJIC No. 2.72, the jury was instructed regarding the requirement that there be proof independent of appellant's confession. (27RT 7248; 20CT 5326, 5400.)[25]

C. Evidence Suggesting That Appellant Removed The Clothing Crawford Was Wearing When He Abducted Her And Re-Dressed Her After Raping and Killing Her, Along With Evidence Of The Rapes He Committed Against Shelly C. And Newhouse, Corroborated Appellant's Confession Regarding The Forcible Sex Offenses He Committed Against Crawford

There was ample corroborating evidence of appellant's violent sexual offenses as to Crawford, even though the condition of her body when it was recovered precluded any scientific evidence proving that she had been raped and sodomized.

First and foremost, it appears from the record that Crawford was not wearing underwear when she was buried. (See 27RT 7152 [coroner who

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[24] Shelly C. subsequently testified in the guilt phase, as noted previously. Anishka C., on the other hand, did not testify until the penalty phase.

[25] With respect to both the guilt and penalty phase of trial, the clerk's transcript contains two sets of jury instructions. The first set includes the number of the CALJIC given and its title, and the second includes "clean" copies which do not. The "clean" copies were submitted to the jury. (20CT 5376; 23CT 6129.) Respondent will cite to both sets of instructions when referring to specific jury instructions which were given in this case.

performed autopsy described her body as "partially clothed" when recovered, and stated that she was wearing sweat pants and a sweatshirt[26]; see also 27RT 7283 [prosecutor's closing argument noted that Crawford's panties and T-shirt were missing when her body was recovered].) In addition, the evidence tended to show that Crawford had been abducted late at night, when she generally wore only panties and a T-shirt, yet when her body was recovered it was clothed in sweat pants and a sweatshirt which she rarely wore. This evidence leads to the reasonable inference that, between the time she was kidnapped and when she was buried, her bra and panties were removed, after which she was clothed in a sweatshirt and sweatpants. Considered with the evidence of appellant's crimes against Shelly C. and Newhouse, it was reasonable for the jury to infer that appellant forcibly removed her panties and her T-shirt, raped her and sodomized her, and re-dressed Crawford using her sweat pants and her sweatshirt before burying her.

While the evidence pertaining to Crawford's clothing may not unequivocally prove that she was raped and sodomized (see AOB 124), as set forth above the required proof is sufficient if it permits an inference of criminal conduct, even if a noncriminal explanation is also plausible. (*People v. Jennings*, *supra*, 53 Cal.3d at p. 364.) A rational juror could draw such an inference based on this evidence alone. (See *People v. Ochoa*, *supra*, 19 Cal.4th at pp. 389, 406 [sufficient evidence established the corpus delicti of rape where victim's boyfriend testified that victim was wearing her sweatshirt in an orthodox fashion when he last saw her, and that she was clean and unmarked by evidence of trauma, whereas, when

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[26] Given the coroner's testimony regarding Crawford's body being "partially clothed" when it was found, appellant appears to be incorrect when he describes her as "fully clothed." (AOB 124.)

found, the state of the victim's clothing – her pants were on backward and her sweatshirt was inside out – and her hygiene suggested that she had been brutalized]; *People v. Jones*, *supra*, 17 Cal.4th at p. 302 [adequate corpus delicti shown where, among other facts, evidence showed that victim was not wearing underpants when her body was found].)

Second, sufficient corroboration was found in the evidence pertaining to the forcible sex offenses appellant committed against Shelly C. in 1987, along with similar evidence introduced as to Newhouse in this case. Leaving aside the fact that the evidence pertaining to Shelly C. was also admitted under Evidence Code section 1108 to prove appellant's propensity to commit forcible sex offenses, that evidence was admitted pursuant to Evidence Code section 1101, subdivision (b), to show common plan, given the "striking" similarities between the crimes involving Shelly C. and Crawford.

Furthermore, as the trial court aptly noted when it denied appellant's motion to dismiss under section 995, the evidence pertaining to Newhouse in the present case also established the corpus delicti of rape and sodomy as to Crawford, again because it tended to show that appellant had acted pursuant to a plan to overpower unsuspecting women, bind them in a distinctive manner, and sexually assault them. "'The presence of a design or plan to do or not to do a given act has probative value to show that the act was in fact done or not done.'" (*People v. Ewoldt* (1994) 7 Cal.4th 380, 393, quoting IA Wigmore, Evidence (Tillers rev. ed. 1983) § 102, p. 1666.) In this case, the requisite corroboration was shown by the other crimes evidence pertaining to both Shelly C. in 1987 and Newhouse. (See *People v. Robbins* (1988) 45 Cal.3d 867, 886 [adequate corroboration of alleged sexual offense found where, among other pieces of evidence, defendant's admission of similar sexual conduct as to very similar crimes committed in Texas was confirmed by scientific evidence].)

To the extent that appellant now appears to suggest a "bright line" rule in such cases which turns on whether the victim's body is unclothed when discovered (see AOB 125, citing, inter alia, *People v. Jennings*, *supra*, 53 Cal.3d 334), this Court has stated that "'[n]o universal and unvariable rule can be laid down in regard to the proof of the corpus delicti. Each case depends upon its own peculiar circumstances.'" (*People v. Ochoa*, *supra*, 19 Cal.4th at p. 405, quoting *State v. Williams* (1905) 46 Or. 287, 297.) Given the facts of this case, sufficient corpus delicti was shown as to the rape and sodomy of Crawford. (See *People v. Robbins*, *supra*, 45 Cal.3d at p. 886 ["[i]n view of the nature of the offense and the circumstances of this case (i.e., the body was not discovered for some time, hence it was impossible to verify the sexual conduct by scientific evidence, and there were apparently no eyewitnesses to the crime) we do not believe the corpus delicti rule can be interpreted to call for more; the law does not require impossible showings."].) Accordingly, appellant's claim in this regard must be rejected.

IV. THE PROSECUTION'S PRESENTATION OF REBUTTAL EXPERT TESTIMONY DURING THE PENALTY PHASE CONCERNING APPELLANT'S ABILITY TO CONTROL HIS SEXUAL URGES DID NOT VIOLATE APPELLANT'S DUE PROCESS, OR ANY OTHER, RIGHTS

In a series of arguments, consisting of Arguments IV through VIII, appellant advances various theories of error concerning California's Sexual Violent Predator (SVP) program, most of them related either to the trial court's denial of a defense request to present evidence pertaining to that program or the expert testimony of Dr. Park Dietz. (AOB 126-191.)

Through expert testimony, appellant presented evidence during the penalty phase that, although he was a sexual sadist who received great pleasure from committing exceedingly violent sexual crimes against non-consenting female victims, features of his mental disorder included the fact that appellant did not choose to have this disorder and that he lacked the ability to control acting on his urges and fantasies. (See 35RT 8987-9125 [testimony of Dr. Berlin].) Appellant was attempting to persuade the jury that these features of sexual sadism made him sympathetic, and that his life should be spared as a result. In response, the prosecution presented its own expert, who agreed with the diagnosis that appellant is a sexual sadist, but disagreed with Dr. Berlin concerning "the nature and effects of sexual sadism." (38RT 9811-9812, 9839.) Dr. Dietz agreed that sexual sadists do not choose their disorder, but opined that appellant's mental disorder only impacted how he was sexually aroused, and had no impact on appellant's ability to control his behavior. (See 38RT 9768-9902 [testimony of Dr. Dietz].)

Appellant's theme of error in connection with this evidence is that the People routinely present evidence in SVP cases to show that paraphilics, including sexual sadists, lack volitional control due to the mental disorder,

and are therefore predisposed to commit sexually violent crimes.[27] Appellant's first specific claim of error is that the prosecution's presentation of evidence in this case, through the expert opinion testimony of Dr. Dietz, conflicted with evidence state prosecutors typically present in SVP cases having nothing to do with appellant, and somehow that violated appellant's constitutional rights in this case. (AOB 126-170.) Appellant dedicates a substantial portion of his brief to this theory of error. The claim is legally faulty. For the reasons that follow, this Court should reject not only this claim, but all of appellant's related arguments.

A. The Relevant Proceedings Below

1. Summary Of The Expert Opinions

The relevant testimony of both Dr. Berlin and Dr. Dietz was thoroughly summarized in the Statement of Facts, and is not repeated in detail here. The conflict between the two expert opinions concerning volition, however, serves as the basis for six penalty phase claims of error, so some discussion of the evidence on this subject is required.

Both doctors diagnosed appellant with sexual sadism, a sexually-oriented mental disorder as contemplated by the Diagnostic and Statistical

[27] The SVP statute authorizes civil commitment proceedings where, upon expiration of incarceration imposed for a qualifying criminal conviction, and assuming certain factors are present, a sexually violent offender can be hospitalized instead of being paroled and released into the public. (Welf. & Inst. Code, § 6600 et. seq.) Subdivision (a)(1) of that statute provides defines a "sexually violent predator" as "a person who has been convicted of a sexually violent offense against one or more victims and who has a diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior." Subdivision (c) defines "diagnosed mental disorder" as a disorder which "includes a congenital or acquired condition affecting the emotional or volitional capacity that predisposes the person to the commission of criminal sexual acts in a degree constituting the person a menace to the health and safety of others."

Manual of Mental Disorders (DSM).[28] (35RT 9003; 38RT 9787-9788.) Dr. Dietz also opined that appellant had antisocial personality disorder, which is behavioral, and not mental. (38RT 9787-9788.) Dr. Berlin disagreed with this diagnosis, though he felt it was a "close call." (35RT 9066.) Dr. Berlin formally diagnosed appellant with alcoholism, and Dr. Dietz accepted appellant's reports of alcohol abuse. (35RT 9003; 38RT 9787-9788.) The key disagreement between experts for purposes of appellant's arguments now concerns the ability of a diagnosed sufferer of sexual sadism to control acting on his urges and/or fantasies solely due to the effect of the disorder. Dr. Berlin opined that a sexual sadist, like appellant, lacks volitional control over his actions. Much like the alcoholic or heroin addict cannot completely defeat the addiction without treatment, a sexual sadist cannot do so as well. (35RT 9024-9026, 9073-9076.)

Dr. Dietz disagreed. He explained that sexual sadism had no impact on one's ability to control acting out on urges or fantasies. Rather, the disorder only impacts what is sexually arousing to the afflicted. How a sexual sadist behaves is contingent on factors other than the disorder itself. As Dr. Dietz continued, most sexual sadists never act out criminally. The DSM criteria for that disorder does not require that one must do so in order to be diagnosed a sexual sadist. Lack of volitional control is also not among the DSM criterion for diagnosis. According to Dr. Dietz, morality and conscience stop most sexual sadists from committing crimes. However, when morality and conscience are compromised, it is easier for the sexual sadist to make the bad choice of acting out his fantasies upon unwilling victims. (38RT 9804-9812, 9839-9840.) Dr. Dietz further diagnosed appellant as having antisocial personality disorder. (38RT 9790-9798.) A person with such a disorder who also abused alcohol was more

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[28] The current version is the DSM IV TR. (38RT 9771.)

likely to commit crimes because those afflictions compromise morality. (38RT 9842.)

2. Defense Counsel's Penalty Phase Opening Statement

During the penalty phase opening statement, appellant's attorney claimed that Dr. Berlin would proffer testimony about California's SVP program, supposedly in some relevant way. Specifically, counsel stated:

> You will hear from Dr. Berlin that in California there is what is called a sexually violent predator program. You will hear that the State of California recognizes that there are people who have a mental disorder that causes them to be sexually violent predators and they need treatment. [¶] Rex received no treatment in prison and did not meet the criteria for the sexually violent predator program, and he was released despite his offenses. When he – when he finished his time in prison, Rex was released.

(29RT 7782.)

Thereafter, outside the presence of the jury, the trial court expressed concern over the representation that evidence concerning the SVP program would be presented. Specifically, the court explained:

> And I was a little concerned about Mr. McLennan saying he was going to present some evidence of S.V.P. I don't understand where that comes from. This is the first time it's been mentioned to me that Mr. Krebs did not qualify. I see all sorts of problems if you think you're going to present evidence that he somehow was evaluated and didn't qualify for some reason. [¶] I mean, it opens up the door to all sorts of rebuttal and I'm not sure where you want to go with that, but I want to have a hearing before you present anything. I'm not sure what exactly you meant by your opening statement.

(29RT 7879.)

Defense counsel responded that he felt the evidence of institutional failure was relevant and admissible mitigating evidence. Apparently, the theory was that appellant had not previously been committed as an SVP due

to institutional failure, and that he would have received treatment had he been civilly committed. (29RT 7780-7781.) The trial court's concern was that appellant did not qualify under the SVP criteria at the time, which is why he was simply released from prison, so it was difficult to discern how institutional failure, and failure to provide treatment to a non-qualifying offender, was relevant and admissible evidence. (29RT 7781-7782.) The court indicated that a hearing would be held prior to appellant's presentation of any SVP-related evidence. (29RT 7782.)

3. Appellant's Attempt To Admit SVP Evidence Through Officer Zaragoza's Testimony

As discussed in the Statement of Facts, David Zaragoza was appellant's parole officer when the murders were committed. (34RT 8803.) During his testimony, defense counsel asked Zaragoza if, in 1997, he was familiar with a civil commitment program designed for people who may have committed offenses such as appellant's. The prosecution objected to the question as irrelevant, and the objection was sustained. Defense counsel immediately followed up by asking Zaragoza if, at the time he first met appellant, he knew whether appellant had been "screened for any civil treatment programs." (34RT 8806.) The prosecution again objected on relevance grounds, and the objection was again sustained. (34RT 8806-8807.)

4. The Prosecution's Motion In Limine To Preclude Testimony About The SVP Program

Prior to Dr. Berlin's testimony, the prosecution moved in limine to preclude him from discussing California's SVP program because appellant was never classified as an SVP due to undisputed statutory ineligibility. (35RT 8967.) In opposition to that motion, defense counsel argued:

> As to the SVP Program, it's the same thing. The State of California has recognized that mental disorders can cause people to be sexual predators, and dangerous, and that treatment is

> needed. And it's the same thing. It's circumstantial evidence of his knowledge of what's being done to treat people. And it's also circumstantial evidence that the government is on notice that people such as Mr. Krebs need treatment, and it goes to the institutional failure issue. And it also, I think, is impeachment of what I believe is Dr. Dietz's position that there is no volitional impairment.

(35RT 8969.)

The trial court expressed its view that the proposed SVP evidence was irrelevant, but said the matter would be dealt with at a hearing. (35RT 8970.)

5. Dr. Berlin's Testimony

During direct examination, defense counsel asked Dr. Berlin if he was "aware of any legislation that supports your contention that sexual sadism is a disorder that causes danger unless treated." The prosecution objected to the question on relevance grounds and the objection was sustained. The trial court then excused the jury to address the matter of the SVP evidence. (35RT 9037.)

The prosecutor argued that because appellant had once been screened for commitment to the SVP program and it was found that he did not meet the statutory criteria for civil commitment, any discussion of the SVP program was both irrelevant and inadmissible under Evidence Code section 352. (35RT 9038-9039.) Defense counsel responded that he was not intending to solicit an opinion about whether appellant was wrongly excluded from the SVP program, but simply whether the program contemplated treatable disorders. Such testimony would support Dr. Berlin's opinion concerning the relationship between sexual sadism and lack of volitional control, since the same views were allegedly adopted by the Legislature through enactment of the SVP laws. (35RT 9039-9040.) In the midst of the argument, the trial court expressed the view that, assuming

any of the proffered SVP evidence was admissible, it would require a full explanation of the SVP program to the jury, which weighed against admission of the evidence due to the undue consumption of time which would be necessitated by doing so. (35RT 9041-9042.)

The trial court also stressed that providing treatment to violent sexual offenders was not the sole purpose of the law. The treatment provision was a prerequisite for the civil commitment statute's validity, but a primary purpose behind the SVP legislation was to keep violent disordered offenders confined, and away from the public. Thus, defense counsel's theory of relevance – that the Legislature agreed with Dr. Berlin's opinion that sexual sadism was treatable – was at best partially true, also weighed against admission of evidence due to the time that would be required to fairly develop the evidence so that it was understandable to the jury. (35RT 9042.)

Defense counsel then changed the focus of his argument, and argued that the policy behind the SVP statute supported the notion that sexual disorders, like sadism, impacted volitional control. Thus, continued counsel, that aspect of the statute supported Dr. Berlin's opinion that volitional control was compromised by paraphilias like sexual sadism. (35RT 9043.)

6. The Trial Court's Ruling

The trial court began by concluding that appellant's exclusion from the SVP program was consistent with the applicable law, so that any theory of institutional failure had to be aimed at the Legislature for failing to define sexually violent predators in a way that would have included appellant. (35RT 9050-9052.) Because there was no actual error with respect to appellant's exclusion from the SVP program, the court ruled that the proffered evidence was inadmissible. With respect to Dr. Berlin's testimony that sexual sadism was a treatable disorder, and appellant's

desire to buttress that opinion by reference to the SVP program, the court ruled:

> I'm going to exclude and not allow any further questions of Dr. Berlin as to whether the State has accepted his view of the treatability of sexual sadism. And that's basically because to allow him to answer that question now, its probative value would be that there is some support – his testimony that – or, some support for his testimony that the sexual sadism is treatable in the very broadest sense. . . . [¶] And, for me, it's substantially outweighed by not only consumption of time, which would be required to basically educate the jury as to how SVP came about, what the requirements are, what the purpose of the statute is – and, basically, as I said earlier, I think the statute was passed to keep people in custody until the State could be assured that they wouldn't commit crimes. That statute wasn't passed to treat them. . . . [¶] So the consumption of time that would be required to educate the jury as to the meaning of the [SVP statute], accepting his – Dr. Berlin's, his theory and opinion that the – that various sexual disorders are treatable is very limited probative value – has very limited probative value.

(35RT 9053-9054.)

The trial court then indicated that defense counsel could attempt to revisit the issue through a noticed motion. (35RT 9056.) Defense counsel never filed such a motion. But for a single reference to the SVP program by Dr. True during cross-examination, which resulted in a sustained objection, there was no more discussion of the subject with witnesses while testifying, or between counsel and the court.

B. Appellant's Claim That His Due Process And Eighth Amendment Rights Were Violated By The Prosecution Presenting Evidence And Theories Regarding Volitional Impairment Inconsistent With Those Presented By The People In Civil Commitment Cases Is Not Properly Raised On Appeal In The First Instance

Appellant's first specific claim of error concerning the prosecution's presentation of Dr. Dietz's testimony, in conjunction with the trial court's

determination that evidence pertaining to California's SVP program was inadmissible, is one of due process. Specifically, appellant contends that because the prosecution presented evidence, through the testimony of Dr. Dietz, that sexual sadists like appellant have control over their behavior, and because California prosecutors supposedly present contrary expert opinions in SVP cases (i.e., that paraphilics, including sexual sadists, lack volitional control), appellant's due process rights were violated. (AOB 126-170.) Neither this specific claim, nor this theory of a due process violation, was ever presented to the trial court. Accordingly, appellant cannot complain about this supposed error for the first time on appeal.

The law is straightforward. But for very limited circumstances, the failure to advance a specific argument in the trial court results in forfeiture of the argument on appeal. Phrased another way, arguments, objections or claims cannot generally be raised for the first time on appeal. (See, e.g., *People v. Millwee* (1998) 18 Cal.4th 96, 128-129 [constitutional claims waived by lack of timely and specific objection]; *People v. Carpenter*, *supra*, 15 Cal.4th at p. 362 [defendant could not make equal protection challenge for first time on appeal]; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1116, fn. 20 [defendant's federal constitutional due process, fair trial, and reliable guilt determination claims concerning the admissibility of a videotape waived in a capital case when they were not raised in the trial court].)

At set forth in the background section above, appellant sought to introduce evidence concerning California's SVP program to buttress the credibility of Dr. Berlin. Appellant never argued, suggested, or even hinted that the prosecution's presentation of Dr. Dietz's testimony that sexual sadists like appellant have control over their behavior was a due process violation because state prosecutors allegedly present contrary expert testimony in SVP cases in every instance. The trial court never had any

occasion to consider such an argument, and appellant is not permitted to raise it now, for the first time on appeal. This argument is forfeited on appeal, and should therefore be rejected on this basis.[29]

C. Even If Appellant Had Not Forfeited This Argument, His Due Process Challenge Fails

Even assuming appellant's due process challenge was not forfeited, it is nevertheless meritless and should be rejected. To facilitate the analysis of this issue, it is important to understand fully the nature of the disagreement between Drs. Berlin and Dietz. While both doctors agreed that appellant was a sexual sadist, the two disagreed on whether the disorder, in and of itself, caused appellant to commit criminal acts to fulfill his paraphilic desires. Dr. Berlin was of the opinion that the disorder left appellant without sufficient volitional control to stop himself from victimizing others, even though appellant could discern right from wrong. (35RT 9068, 9075, 9125.) Dr. Dietz was of the opinion that the true reason for appellant's criminal acts of sexual sadism was that appellant also suffered from antisocial personality disorder. If appellant did not suffer from antisocial personality disorder, he would not, in Dr. Dietz's opinion, have committed his crimes to fulfill his desires. Sexual sadism, in and of

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[29] In *People v. Partida* (2005) 37 Cal.4th 428, this Court held that an argument that evidence should be excluded under Evidence Code section 352 would preserve a subsequent due process complaint on appeal, so long as the due process objection would not have changed the way in which the trial court considered the argument or objection. In that case, the trial objection was to admission of certain gang evidence on section 352 grounds. (See *id.* at pp. 435-436.) This Court held that Partida "[could] not argue on appeal that due process required exclusion of the evidence for reasons other than those articulated in his Evidence Code section 352 argument." (*Id.* at p. 435.) Because most of the theories appellant raises on appeal regarding the SVP statute require an analysis which is fundamentally different from the one conducted by the trial court, they are almost all forfeited on appeal.

itself, did not involve the loss of volitional control. Loss of volitional control was not a diagnostic criterion under the DSM for sexual sadism. And in everyday life, the available evidence showed that when not in custody, appellant was able to refrain from committing sexually sadistic criminal acts "364 days a year." So, appellant's failure to conform his conduct to the requirements of the law was "an exception to the rule." (38RT 9848.)[30] Dr. Berlin agreed that appellant had sufficient control over his disorder that he would not have committed his crimes if police were present or he was interrupted during their commission by other people. Appellant was capable of both evaluating the risk of apprehension and avoiding it in such situations. (35RT 9124-9127.) If thwarted by police, Dr. Berlin believed appellant would have "over the long haul" been "driven" to find another victim. (35RT 9125.) Dr. Berlin did not believe appellant was antisocial, but agreed the diagnosis was "a close call." (35RT 9066.)

As explained above, the specific claim of error is that the prosecution was not constitutionally permitted to allow Dr. Dietz to testify that sexual

[30] Dr. Dietz was unable to determine whether appellant was an alcoholic and to what extent, if any, appellant was intoxicated when he committed his sexually sadistic criminal offenses because appellant refused to submit to a court-ordered examination to be conducted by Dr. Dietz. (38RT 9784, 9787-9788, 9841-9842, 9846-9847.) However, accepting appellant's statements as true that he was intoxicated every time he engaged in sexually sadistic criminal conduct, Dr. Dietz opined that this information put appellant on notice of his pattern of behavior that posed to others the risk of being victimized. Appellant's decision to drink therefore became a decision to put others at risk for harm. And because appellant had antisocial personality disorder, when appellant became intoxicated, he was more likely to commit the antisocial acts he was barely inhibited from committing the rest of the time. (38RT 9841-9842, 9848-9849.) Dr. Berlin agreed that, regardless of whether appellant had antisocial personality disorder, intoxication and sexual sadism, combined, was "like pouring fuel on a fire." (35RT 9069.)

sadists have control over their behavior, if government experts are testifying to the contrary during SVP proceedings. (AOB 126-170.) Appellant primarily relies on this Court's decision in *In re Sakarias* (2005) 35 Cal.4th 140 in support of his argument. Appellant misunderstands the limited scope of this Court's holding in that case, and that misunderstanding renders his instant argument fatally flawed.

In *Sakarias*, two defendants (Sakarias and Waidla) were tried for the joint murder of two people. The defendants received separate trials, and the same prosecutor handled both. The evidence, when viewed in its entirety, "strongly suggest[ed]" that Waidla killed one of the victims with a hatchet, and that Sakarias thereafter inflicted some post-mortem hatchet wounds. (*People v. Sakarias*, *supra*, 35 Cal.4th at p. 147.) The problem was that the prosecutor argued in each trial that each defendant was the actual killer based on the same facts, when in reality only one of them could have been the actual killer. As this Court explained, the prosecutor "did not argue at either trial the version of the attack best supported by all the evidence. Instead, at each defendant's trial he maintained the defendant on trial had inflicted *all* the chopping wounds." (*Ibid.*, emphasis in original.)

Further, the prosecutor omitted reference to some of the medical examiner evidence presented during Waidla's trial in order to make the actual killer theory look more viable in Sakarias's subsequent trial. (*People v. Sakarias*, *supra*, 35 Cal.4th at p. 148.) This Court, following a reference hearing and report by a referee, made several critical findings which resulted in the holding that Sakarias's due process rights were violated. First, this Court concluded that the prosecutor's presentation of inconsistent factual theories based on the same evidence was intentional. This Court also determined that, during Sakarias's trial, the prosecutor had "strong reason" to believe that the victim was already dead when Sakarias struck her with the hatchet. (*Id.* at pp. 151-153.) Further, this Court found that the

prosecutor deliberately refrained from asking the medical examiner about certain evidence, the omission of which helped support the argument that Sakarias inflicted the deadly hatchet wounds. (*Id.* at pp. 153-154.) Thus, the combination of these specific determinations led this Court to the conclusion that the prosecutor acted in bad faith in arguing inconsistent factual theories to the jury, which resulted in the due process violation. (*Id.* at pp. 155-167.)

In summary, in *Sakarias* this Court explained that fundamental fairness does not allow the prosecution, in the absence of a good faith justification, "to attribute to two defendants, in separate trials, a criminal act only one defendant could have committed." (*People v. Sakarias*, *supra*, 35 Cal.4th at pp. 155-156.) The court continued as follows:

> By doing so, the state necessarily urges conviction or an increase in culpability in one of the cases on a false factual basis, a result inconsistent with the goal of the criminal trial as a search for truth. At least where, as in Sakarias's case, the change in theories between the two trials is achieved partly through deliberate manipulation of the evidence put before the jury, the use of such inconsistent and irreconcilable theories impermissibly undermines the reliability of the convictions or sentences thereby obtained.

(*Id.* at p. 156.)

By stark contrast, appellant's due process argument in this case lacks any of the factual support that this Court found so critically important in *Sakarias*. Appellant's complaint is that in SVP cases, state prosecutors regularly present evidence, via expert opinion testimony, that paraphilia is a disorder which compromises volitional control and renders the afflicted predisposed to commit sexually violent crimes. In this case, however, the prosecutor presented evidence, through expert opinion testimony, that paraphilia, and specifically sexual sadism, has no impact on a person's ability to control his or her behavior, and only concerns what the afflicted

person finds to be sexually arousing. Thus, concludes appellant, the government violates the *Sakarias* principle by presenting differing opinions in unrelated criminal and civil cases. (See AOB 136-161.) The absence of similarity between the two situations is glaring.

The conclusive distinction, though there are several, is that the evidence which is the focus of appellant's argument is expert *opinion*, not fact, and is influenced by a wide variety of factors concerning the unique circumstances of each case and the training and experience of each expert. Expert witnesses offer opinions. Dr. Dietz was of the opinion that the disorder of sexual sadism, in and of itself, has no impact on the afflicted's ability to control commission of criminal offenses. Dr. Berlin disagreed, as likely do others in their field. That is the nature of forensic psychiatry. Neither expert testified, definitively, that he was correct as a factual matter, and that the other was wrong. In fact, when asked about this very subject, Dr. Dietz expressly testified that Dr. Berlin's stance on volitional control and sexual sadism was arguable, and worthy of the jury's consideration. (38RT 9857, 9862.) Thus, the notion that the prosecution presented inconsistent theories based on the same "facts" in this case, in contrast to SVP cases, is premised on a misunderstanding of what constitutes a "fact."

There are additional significant distinctions which demonstrate the massive shortcomings of appellant's *Sakarias* argument. For example, even though no "facts" are in issue, another critical factor absent from the equation is that in *Sakarias* the same "facts" were being presented to support inconsistent theories *in the same case*. The prosecutor in *Sakarias* argued that the same facts showed that two different defendants actually killed the victim, which was impossible given the facts of that case. Nothing like that happened in this case. Nothing in *Sakarias*'s narrow holding would support a conclusion that due process is violated by the State presenting different expert views in different cases involving different

litigants, different facts, and different experts. But that is exactly what appellant is arguing. What occurs in another civil proceeding which has nothing to do with appellant cannot possibly violate appellant's due process rights pursuant to *Sakarias*, regardless of the evidence in issue.

Conceivably, if appellant had been committed to a hospital following an SVP proceeding based on evidence that his sexual disorder directly impacted his volitional control and thus compelled him to commit sexual crimes, and then a contrary opinion – like Dr. Dietz's – was presented at his penalty trial, he might have something to complain about. But that is not the case. Appellant was never committed as an SVP, so his reference to proceedings that do not pertain to him is irrelevant with respect to a *Sakarias* due process argument. And even then, expert opinions change. Dr. Dietz's has changed in certain respects, and he testified in that regard. There was a point in his career that Dr. Dietz was of the opinion that treatment could cure sexual disorders. (38RT 9860-9861.) His opinion had changed by the time he testified at appellant's trial. (38RT 9862.) Thus, there is no instance of "facts" being manipulated or withheld by the prosecution, as was the case in *Sakarias*. Rather, a valid expert opinion, admissible under state law, and formed exclusively by the expert – not the prosecutor – was presented at a criminal trial.

Finally, there is absolutely no evidence of "bad faith," which was a key component of this Court's *Sakarias* due process analysis. The prosecutor in this case did nothing other than present the testimony of an expert who had a particular opinion in response to the opinion offered by appellant's expert. There is no evidence that the prosecutor somehow manipulated Dr. Dietz to testify a certain way, contrary to his actual expert beliefs. There is no evidence that this prosecutor somehow knew that Dr. Berlin's opinion was the "correct" opinion, and that no other opinion could be valid, but presented contrary evidence anyway. In short, it is impossible

to demonstrate that simply allowing a qualified expert to express his opinion through testimony at trial, consistent with state law, constitutes unconstitutional bad faith. Respondent is unaware of any authority that would support such a conclusion, and this Court should certainly not extend *Sakarias* to construct such a rule now.

D. Any Error Was Harmless

Regardless, any error was harmless under any standard of review. Appellant's primary focus in arguing prejudice was the fact that, during deliberations, the jury requested that the court reporter read back Dr. Dietz's and Dr. Berlin's testimony on the impact of sexual sadism on volitional control. (AOB 168-170.) That the jury found this evidence significant cannot be surprising, but not for the reasons underlying appellant's claim of error.

As recognized by the trial court, the utility of the SVP evidence would have been marginal at best. Neither at trial nor on appeal has appellant ever asserted that his expert, Dr. Berlin, relied upon the SVP statutory scheme in either theory or practice to come to the conclusions that sexual sadism is a treatable disorder or compromised appellant's volitional control. And there is no way the jury would have been able to use such evidence to resolve the differences of the two doctors' opinions on either of these subjects.

With respect to treatability of sexual sadism, there was no dispute between Dr. Berlin and Dr. Dietz concerning the availability of treatments for that disorder. Both testified that treatments were available. However, Dr. Dietz explained in rebuttal that the available research suggested that treatments were a failure, as evidenced by acts of recidivism. As for lack of volitional control, Dr. Berlin never testified that lack of volitional control was a diagnostic criterion for a DSM sexual sadism diagnosis. Indeed, Dr. Dietz pointed out this undisputable fact in rebuttal. (38RT 9804-9812,

9839-9840.) And both he and Dr. Berlin agreed, that if the traditional forensic "policeman at elbow" test were used to measure appellant's level of volitional control, he could refrain from engaging in criminal acts of sexual sadism. The SVP evidence therefore would have been of little or no value to the jury in resolving the differences in the doctors' opinions on these subjects.

Thus, it is the expert opinion evidence that needed to be considered on this issue, and not some unrelated statutory scheme that has no relevance to this case. When properly limited to the evidence that mattered, the jury either found Dr. Dietz to be more credible – a finding supported by the facts of this case – or found that even accepting Dr. Berlin's opinion as mitigating, it did not outweigh the heinous nature of appellant's crimes, and all the other aggravating evidence, still making death the proper penalty.

It is certainly a reasonable conclusion that, after clarifying the opinions of the experts, the jury rejected Dr. Berlin's opinion based exclusively on factual evidence other than Dr. Dietz's opinion. Dr. Dietz's opinion was supported by appellant's real-world behavior, and not just psychiatric theory. For example, Dr. Dietz's testimony that very few sexual sadists actually commit crimes, and that most sexual sadists address their urges in other ways (38RT 9804-9809), was uncontroverted. None of appellant's mental health experts asserted that Dr. Dietz was wrong in this regard. Thus, because most sexual sadists do not commit criminal offenses, the notion that the disorder inherently impacts volitional control is not supported. Admitting evidence pertaining to the SVP statute would not have changed that fact.[31]

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[31] Since both experts relied on the DSM IV TR criteria in effect at the time of trial to diagnose appellant as a sexual sadist, this Court can take judicial notice of that source material. (Evid. Code, §§ 452, subd. (h), 454,
(continued...)

Also, it was demonstrated that appellant only committed crimes when his morality had been compromised, which appellant caused by alcohol consumption. In other words, appellant only acted out criminally with respect to his sadistic urges when he was drinking. When sober, he had perfect control over his behavior. He might have had temptations, and the urges might have been strong, but so long as he did not drink, he did not act out. In fact, appellant admitted that he was successfully controlling his urges until he sustained a serious physical beating in a bar fight, after which he became demoralized and *decided* that he would not resist his urges any longer. (35RT 9019, 9131.) Thus, the actual facts were inconsistent with Dr. Berlin's opinion that appellant was compelled to commit crimes because he had no control over himself. In other words, the actual facts of this case, leaving aside the opinions of experts or the content of some

(...continued)
subd. (a)(1), 459, subd. (a).) The specific criteria for appellant's disorder is, as stated in Section 3.02.84: "(a) Over a period of at least 6 months, recurrent, intense sexually arousing fantasies, sexual urges, or behaviors involving acts (real, not simulated) in which the psychological or physical suffering (including humiliation) of the victim is sexually exciting to the person. (b) The person has acted on these sexual urges with a nonconsenting person, or the sexual urges or fantasies cause marked distress or interpersonal difficulty." It is certainly interesting to note that nothing in the DSM IV criteria for this disorder contemplates lack of control. Diagnosis under the DSM is "strictly scripture." (38RT 9790.) In fact, as Dr. Dietz accurately testified, one can properly be diagnosed a sexual sadist pursuant to this criteria without ever physically acting out. Recurrent fantasies or urges satisfy (a), and the suffering of distress or interpersonal difficulty satisfies (b). Thus, the DSM diagnostic criteria actually support Dr. Dietz's opinion that sexual sadists can control whether they act out criminally. There are actual disorders where the inability to control behavior is essential to the DSM IV TR diagnosis. (See e.g., Kleptomania, Section 312.32, where the very first factor is that there is a "Recurrent failure to resist impulses to steal objects. . . .").

statutory scheme which has no applicability here, fail to support a conclusion that appellant's disorder – and nothing else – compelled him to act criminally.

Finally, appellant presumes much considering that sexual sadism carries very little mitigating value in any event. (See, e.g., *People v. Davis* (2009) 46 Cal.4th 539, 614 [prosecutor properly argued at the penalty phase that the defendant's sexual sadism lacked mitigating value]; *People v. Guerra*, *supra*, 37 Cal.4th at pp. 1153-1154 [prosecutor properly relied upon defendant's sexual sadism in argument for imposition of the death penalty, as such evidence is admissible under section 190.3, subd. (a)].) The alleged lack of volitional control may have diminished appellant's blameworthiness for his crime as much as it indicated how great a predatory danger appellant posed to the community while he was on parole. Accordingly, the jury's penalty phase verdict would not have been different had evidence pertaining to the SVP statutory scheme been admitted.

V. THE PROSECUTOR DID NOT COMMIT MISCONDUCT BY FAILING TO CORRECT PORTIONS OF DR. DIETZ'S TESTIMONY WHICH THE PROSECUTOR ALLEGEDLY KNEW WERE FALSE AND MISLEADING

Based in large part on the same evidence discussed in Argument IV, above, appellant argues that the prosecutor committed prejudicial misconduct by failing to correct portions of Dr. Dietz's testimony that the prosecutor allegedly knew to be false and misleading. (AOB 170-173.) The notion that a lawyer knows more about psychiatry than a psychiatrist, and therefore knows if or when a psychiatrist is testifying falsely about psychiatry, is a bit hard to swallow. However, appellant's real complaint appears to be his dissatisfaction with the law that unquestionably allows a prosecutor during penalty phase rebuttal to demonstrate that proffered mitigating evidence "fails to carry extenuating weight when evaluated in a broader factual context." (*People v. Hawthorne* (2009) 46 Cal.4th 67, 92.) In any event, appellant's argument is meritless.

A. The Claim Is Forfeited On Appeal

Appellant identifies the supposed "false" and "misleading" testimony as primarily consisting of "Dr. Dietz' [sic] testimony to the effect that: A) a paraphilia does not impair volition; B) Dr. Berlin's view that it does is unaccepted; C) the "policeman at elbow" test is the appropriate test for volitional impairment . . ." (AOB 171.)

In addition, appellant contends that Dr. Dietz's testimony that sexual sadism was a disorder, and not a mental disease, was false and misleading, and known by the prosecutor to be so. (AOB 171-173.) Appellant failed to object to any of this testimony on prosecutorial misconduct grounds. In fact, none of Dr. Dietz's testimony as to these subjects was objected to on any grounds whatsoever. (38RT 9840-9841 [no objection to police officer at the elbow testimony], 38RT 9848 [no objection to testimony that

appellant did not have a mental disease]; 35RT 9848-9849 [no objection to testimony that appellant had control of his behavior and chose to act criminally]; 38RT 9844-9845 [no objection to testimony that Dr. Berlin's view of volition and paraphilia was not widely held in the psychiatric community].)

Generally, claims of prosecutorial misconduct must be preserved by an objection at trial. (*People v. Morales* (2001) 25 Cal.4th 34, 43-44; accord, *People v. Bell* (1989) 49 Cal.3d 502, 538-539.) Failure to object and request an admonition is excused only where to have done so would have been futile or an admonition would not have cured the harm caused by the misconduct. (*People v. Hill* (1998) 17 Cal.4th 800, 820.) Appellant neither acknowledges the lack of objections nor provides an explanation as to how an admonition would not have cured any harm. The argument is therefore forfeited.

B. The Prosecutor Did Not Commit Misconduct By Failing To Correct Dr. Dietz's Testimony Regarding Sexual Sadism And Volitional Control

Even if the claim had been properly preserved for appellate review, it cannot withstand even cursory scrutiny.

"Under well-established principles of due process, the prosecution cannot present evidence it knows is false and must correct any falsity of which it is aware in the evidence it presents, even if the false evidence was not intentionally submitted." (*People v. Seaton* (2001) 26 Cal.4th 598, 647, citing *Napue v. Illinois* (1959) 360 U.S. 264 [79 S.Ct. 1173, 3 L.Ed.2d 1217].) Put another way, the prosecution has the duty to correct the testimony of its own witnesses that it knows, or should know, is false or misleading. (*In re Jackson* (1992) 3 Cal.4th 578, 595, disapproved on other grounds in *In re Sassounian* (1995) 9 Cal.4th 535, 545, fn. 6.)

This obligation applies to testimony whose false or misleading character would be evident in light of information known to the police involved in the criminal prosecution (*In re Jackson*, *supra*, 3 Cal.4th at p. 595), and applies even if the false or misleading testimony goes only to witness credibility (*id.* at p. 594; *Napue v. Illinois*, *supra*, 360 U.S. at p. 269; cf. *Giglio v. United States* (1972) 405 U.S. 150, 153-154 [92 S.Ct. 763, 31 L.Ed.2d 104].) Due process also bars a prosecutor's knowing presentation of false or misleading argument. (See *Miller v. Pate* (1967) 386 U.S. 1, 6-7 [87 S.Ct. 785, 17 L.Ed.2d 690].) A prosecutor's knowing use of false evidence or argument to obtain a criminal conviction or sentence deprives the defendant of due process. (*People v. Morrison* (2004) 34 Cal.4th 698, 716-717; *People v. Sakarias*, *supra*, 22 Cal.4th at p. 633.)

It is impossible to reasonably conclude that the prosecutor in this case presented, argued, or failed to correct any false or perjurious testimony, as alleged by appellant herein. Dr. Dietz, a highly qualified expert in the field of psychiatry, testified to his professional opinions about sexual sadism, and that disorder's impact (or lack thereof) on volitional control. Dr. Dietz himself acknowledged that reasonable minds could differ on this point, and that the jury *should consider* Dr. Berlin's contrary views on the subject. (38RT 9857.) Appellant is focusing on opinion testimony, which by its very definition cannot be false. (See *Tschirky v. Superior Court* (1981) 124 Cal.App.3d 534, 539 [a statement of opinion "cannot be false and is outside the meaning of libel"].)

There is nothing improper in a prosecutor's use of a forensic psychiatrist to contest a defense mitigation diagnosis or its behavioral implications. A prosecutor may properly engage in a "proverbial 'battle of the experts'" to exploit defense mental health expert testimony to the defendant's disadvantage. (See, e.g., *In re Andrews* (2002) 28 Cal.4th

1234, 1257-1258.) The amount of volitional control appellant possessed in relation to his paraphilia is exactly the kind of subject matter traditionally within the realm of psychiatric testimony. (See, e.g., *People v. Henderson* (1963) 62 Cal.2d 482, 489 [psychiatric testimony proffered concerning whether defendant had "'normal volitional control'"].) No evidence suggests that the prosecutor somehow knew that Dr. Dietz's opinions were false and misleading, but presented them to the jury in any event. Labeling this kind of testimony as "false" is elusive because it involved the question of "free will to conform to the law." (38RT 9840.) Indeed, this Court has long recognized the "difficulty of proof" surrounding questions of free will. (See *People v. Nash* (1959) 52 Cal.2d 36, 45 ["'We do not know that the impulse was irresistible, but only that it was not resisted.'"].)

Appellant spends most of his time focusing on Dr. Dietz's opinion that sexual sadism is not a mental disease, but rather a mental disorder as proof of the misconduct in this case. (AOB 172.) This Court need look no further than the actual DSM explanation of sexual sadism in evaluating this aspect of appellant's claim.[32] The section on sexual sadism falls within the chapter entitled, "Sexual and Gender Identity Disorders." There are no references to this "disorder" also qualifying it as a "disease." Thus, any testimony that sexual sadism is not a mental disease is patently consistent with the DSM, which is the diagnostic source used in the mental health field. Thus, it is extremely difficult to comprehend how Dr. Dietz testified falsely in this respect, unless appellant likewise contends that the DSM IV-

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[32] As discussed previously, since both experts relied upon the criteria in the DSM IV TR for their respective diagnoses (see 35RT 9028; 38RT 9771, 9790-9791), judicial notice of the DSM criteria in this regard is proper. (Evid. Code, §§ 452, subd. (h), 454, subd. (a)(1), 459, subd. (a).)

TR is false as well. Appellant's argument that the prosecutor presented and failed to correct false testimony is patently meritless.[33]

C. Any Misconduct Was Harmless

In any event, any misconduct was harmless beyond a reasonable doubt. (See *People v. Adams* (1993) 19 Cal.App.4th 412, 427.) As explained in Argument IV, *supra*, the jury was likely to consider appellant's real-world behavior, which fully supported Dr. Dietz's opinion. Considering the horrible nature of the crimes and the additional aggravating evidence, and the unsympathetic nature of sexual sadism generally, even if Dr. Dietz's opinions could somehow be untrue, there is no basis upon which to conclude the jury's sentencing choice was in any way unreliable. Thus, the instant claim of error should be rejected.

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[33] In *Jacobs v. Fire Insurance Exchange* (1995) 36 Cal.App.4th 1258, in discussing the development of the insanity defense, which also used "mental disease" as part of the requisite legal criteria, the California Court of Appeal for the Third Appellate District specifically observed that definition of "mental disease" proffered by Dr. Dietz in this case was the accepted one in the field of psychiatry. Citing the American Journal of Psychiatry, the appellate court observed that the American Psychiatric Association endorsed the following proposed standard of insanity which contains no volitional component: "A person charged with a criminal offense should be found not guilty by reason of insanity if it is shown that as a result of mental disease or mental retardation he was unable to appreciate the wrongfulness of his conduct at the time of the offense. [¶] As used in this standard, the terms mental disease or mental retardation include only those severely abnormal mental conditions that *grossly and demonstrably impair a person's perception or understanding of reality* and that are not attributable primarily to the voluntary ingestion of alcohol or other psychoactive substances." (*Id.* at pp. 1284-1285, emphasis added). Thus, based on the standard in his industry, Dr. Dietz's testimony was one hundred percent accurate.

VI. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY RULING THAT SVP EVIDENCE WAS INADMISSIBLE PURSUANT TO EVIDENCE CODE SECTION 352, AND APPELLANT'S EIGHTH AMENDMENT RIGHTS WERE NOT VIOLATED BY VIRTUE OF THIS RULING

Appellant's next theory of error based on the SVP program is that the trial court's exclusion of that evidence violated the Eighth Amendment. (AOB 174-182.) This argument lacks merit.

A. The Applicable Law

Evidence Code section 352 applies to evidentiary matters at the penalty phase of a capital trial. (See *People v. Taylor* (2002) 26 Cal.4th 1155, 1167-1169.) Pursuant to that statute, a trial court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. (Evid. Code, § 352.)

It is well established that a trial court enjoys very broad discretion under Evidence Code section 352 in assessing whether the probative value of particular evidence is substantially outweighed by concerns of undue prejudice, confusion, or consumption of time. (*People v. Dyer* (1988) 45 Cal.3d 26, 73.) A trial court's discretionary ruling under section 352 will not be disturbed on appeal absent an abuse of discretion. (*People v. Lewis* (2001) 26 Cal.4th 334, 374; *People v. Alvarez* (1996) 14 Cal.4th 155, 201.) Evidence that would be "unduly time-consuming" or potentially confuse the jury is properly excludable when the probative value of the evidence is minimal. (*People v. Alcala* (1992) 4 Cal.4th 742, 788-789.)

A capital defendant does have a constitutional right to present relevant, mitigating evidence at the penalty phase of the trial. The exclusion of such evidence is a constitutional violation. (*Skipper v. South Carolina* (1986) 476 U.S. 1 [106 S.Ct. 1669, 90 L.Ed.2d 1]; *People v.*

Brown (2003) 31 Cal.4th 518, 576-577.) But, as this Court has explained, the exclusion of such evidence does not automatically require reversal, but is instead subject to the standard of review announced in *Chapman v. California* (1967) 386 U.S. 1, 18 [87 S.Ct. 824, 17 L.Ed.2d 705], that is, the error is reversible unless it is harmless beyond a reasonable doubt. (*People v. Brown*, *supra*, 31 Cal.4th at p. 576.)

B. The Relevant Proceedings Below

The procedural and factual history relevant to appellant's current complaint was set forth in great detail in Argument IV, *supra*. In brief summary, appellant wanted to present evidence of California's SVP program to show that he was a product of institutional failure, and to bolster the credibility of Dr. Berlin's opinion that sexual sadism compromised volitional control and was a treatable disorder.

The trial court ruled that the evidence would be inadmissible under Evidence Code section 352. The institutional failure theory did not apply because appellant indisputably did not qualify for commitment as an SVP, so the only dubious theory available was that the Legislature did a poor job in defining who was qualified for the program, which was not going to be admitted. Further, the court stated that treatment was only a partial justification for the program, and that keeping violent sexual offenders away from the public was the other main justification. Thus, the program's existence, in and of itself, only marginally supported Dr. Berlin's opinion that sexual sadism could be successfully treated. Finally, to the extent the SVP evidence had any probative value, the court found that it was substantially outweighed by the undue consumption of time which would be involved in the presentation of such evidence.

The trial court astutely observed that to properly understand the significance, if any, of appellant's evidence in this regard, the SVP program would need to be explained in great detail to the jury, which would have

consumed a great deal of time. Any marginal probative value did not justify such a presentation. Thus, the evidence was ruled inadmissible under Evidence Code section 352, but appellant was granted permission to revisit the issue by way of a noticed motion. (35RT 9050-9056.)

C. The Trial Court Did Not Abuse Its Discretion By Excluding The Proffered SVP Evidence

The trial court gave thoughtful consideration to appellant's theory of relevance with respect to the SVP evidence. The issue was raised multiple times, and even after the trial court made a ruling thereon, appellant was given permission to make a stronger case for admission, which never occurred. But the court's decision to exclude the evidence as unduly time consuming when it had, at best, marginal probative value, was hardly arbitrary or capricious.

Initially, appellant was *never* committed as an SVP because he did not meet the criteria when he was released from prison, prior to his commission of the murders in this case. There is no debate about this fact. So, any argument that he was somehow a product of institutional failure was incorrect, and appellant quickly abandoned this theory of admissibility below as soon as the trial court noted this obvious concern. (35RT 9039.) That appellant was never part of the SVP program, in and of itself, was sufficient justification for the trial court to exercise its discretion to exclude any reference to that program from the penalty phase without violating any of appellant's rights.

Appellant's request to bolster Dr. Berlin's testimony by showing that the California Legislature had endorsed the notion that sexual sadism was a treatable disorder was also properly rejected. To begin with, it has never been asserted that Dr. Berlin relied on the SVP statutory scheme to form his opinion that sexual sadism was treatable. Moreover, providing treatment was certainly part of the justification for the constitutionality of the SVP

scheme, but it was not the only purpose, and likely not the primary one. Courts have explained that the *purposes* of the SVP statute "are to protect the public from a select group of offenders who are extremely dangerous and to provide treatment for them." (*People v. Superior Court* (*Preciado*) (2001) 87 Cal.App.4th 1122, 1130-1131.) Considering that appellant was never classified as an SVP, and considering the large room for debate about which was the more important purpose behind the SVP law, and considering the amount of time it would have required to develop this collateral issue to fairly present it to the jury, the trial court was well within its discretion to exclude the evidence.

Additionally, appellant presented evidence apart from the SVP statute, in the form of expert testimony, that sexual sadism was a treatable disorder. (35RT 9026.) Dr. Dietz never disputed the availability of treatment. In fact, he expressly testified that the disorder could be treated with medication. (38RT 9855.) Thus, both experts *agreed* that sexual sadism was a treatable disorder.[34] The trial court did not abuse its discretion in opting to forego additional evidence to support both opinions, especially since the proposed evidence was in the form of a complicated legal scheme – the SVP law – that had nothing to do with appellant or this case. Accordingly, for all of the foregoing reasons, the trial court did not abuse its discretion when it excluded the evidence under Evidence Code section 352. Nor was appellant's right to be free from cruel and unusual punishment under the Eighth Amendment violated by virtue of this ruling.

D. Any Error Was Harmless

If the exclusion of the SVP evidence was somehow erroneous, and if that exclusion further is deemed to trigger any constitutional concerns,

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[34] The experts parted company on whether treatment was successful, with Dr. Dietz relying on research demonstrating recidivism after treatment.

appellant suffered no discernable prejudice. For reasons previously explained, the jury was unlikely to find significant mitigating value in the SVP law, in light of appellant's barbaric crimes, his actual conduct showing he made choices, and the other strong evidence in aggravation. Any error was harmless beyond a reasonable doubt. (*People v. Fudge* (1994) 7 Cal.4th 1075, 1117-1118.)

VII. THE EXCLUSION OF THE SVP EVIDENCE DID NOT VIOLATE APPELLANT'S SIXTH AMENDMENT RIGHT TO CROSS-EXAMINATION

Appellant's next theory of error in connection with the excluded SVP evidence is that he was denied his Sixth Amendment right to fairly cross-examine witnesses against him, meaning Dr. Dietz. (AOB 182-185.) This claim lacks merit.

A. The Claim Is Forfeited On Appeal

Appellant never asserted that the exclusion of the SVP evidence or any limitation the ruling imposed on his cross-examination of Dr. Dietz would violate his right to confrontation under the Sixth Amendment. Indeed, defense counsel never even attempted to ask Dr. Dietz about the SVP statute. Without an objection and an offer of proof, it is not possible to evaluate this claim. In the absence of a specific and timely objection in the trial court, the instant claim was not preserved for appellate review. (*People v. Waidla* (2000) 22 Cal.4th 690, 726, fn. 8.)

B. Appellant's Confrontation Clause Rights Were Not Violated

Previous arguments essentially show why this additional theory of error based on the same basic facts – the exclusion of SVP evidence – should be rejected. Appellant fairs no better invoking the Sixth Amendment than he does in arguing the prior theories of error.

A trial court's limitation on cross-examination pertaining to the credibility of a witness does not violate the Confrontation Clause unless a reasonable jury might have received a significantly different impression of the witness's credibility had the excluded cross-examination been permitted. (*People v. Quartermain* (1997) 16 Cal.4th 600, 623-624, citing *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 680 [106 S.Ct. 1431, 89 L.Ed.2d 674].) Assuming appellant had argued that the exclusion of the

SVP evidence violated his Sixth Amendment right to effective cross-examination of Dr. Dietz, the trial court's ruling was still proper. Respondent has already explained, in Argument VI, why the trial court did not abuse its discretion in precluding admission of evidence pertaining to the SVP program. In summary, appellant had never been committed as an SVP because he did not qualify, and the time it would have taken to fully educate the jury on that statutory scheme would have been substantial, justifying exclusion of testimony regarding the SVP program under Evidence Code section 352. (See Argument VI.)

Moreover, even if this SVP evidence had been admitted on the theory now proferred, it would not have had any significant impact on Dr. Dietz's credibility. There is no basis to conclude Dr. Dietz's opinion would have changed or been impeached had he been asked about the SVP statute. Indeed, it is clear from Dr. Dietz's testimony that even if appellant had statutorily qualified as a possible SVP candidate, then Dr. Dietz would have opined that appellant's sexual sadism did not render him incapable of refraining from committing sexually sadistic crimes. And as explained in the "Harmless Error" section of Argument IV, *supra*, Dr. Dietz's opinion that appellant maintained control over his conduct was supported not just by psychiatric opinion, but by appellant's real world behavior, which verified virtually every aspect of Dr. Dietz's testimony. (See, e.g., 38RT 9804-9809 [very few sexual sadists actually commit crimes]; 35RT 9019, 9131 [appellant decided to stop resisting his urges after suffering a beating in a bar fight].) There is no basis upon which to reasonably conclude that the jury might have had a significantly different impression of Dr. Dietz's credibility, in light of the undisputed facts of this case, had the SVP evidence been admitted. (See *People v. Quartermain*, *supra*, 16 Cal.4th at pp. 623-624.) Accordingly, appellant's Sixth Amendment argument must

fail. For similar reasons, and those previously discussed, any error was also harmless beyond a reasonable doubt.

VIII. APPELLANT'S DEATH SENTENCE DID NOT VIOLATE THE EIGHTH AMENDMENT

Appellant's final argument regarding the SVP statutory scheme is that, because he supposedly lacked control over his behavior as a direct result of his mental disorder, the Eighth Amendment to the United States Constitution prohibits capital punishment. (AOB 185-191.) This argument lacks merit.

Appellant seeks to extend the United States Supreme Court's decision in *Atkins v. Virginia* (2002) 536 U.S. 304 [122 S.Ct. 2242, 153 L.Ed.2d 335], where the Court held that execution of the mentally retarded violates the Eighth Amendment. (*Id.* at p. 321.) According to appellant, the Court's Eighth Amendment jurisprudence in this respect should be extended to criminal defendants who lacked control over their criminal behavior. (AOB 185-191.) And appellant once again turns to California's SVP statute as proof that certain disordered offenders lack such control. (*Id.*) Appellant's argument lacks merit.

First, as has been explained previously, regardless of what the SVP statute might stand for, it has nothing to do with this case or appellant because appellant was never committed as a sexually violent predator under that scheme. It is undisputed that appellant did not meet the criteria for commitment as an SVP when he was released from prison, prior to committing the murders in issue in this case.

Second, even if there were a holding of the United States Supreme Court conclusively establishing that a criminal defendant who, as the result of some mental disorder, was unable to control his criminal behavior and therefore could not be put to death, such a rule would not assist appellant now. It has been clearly established that appellant possessed control of his paraphilic desires. He presented evidence intended to disprove that presumption, but the prosecution presented overwhelming evidence which

supported a determination that appellant's criminal behavior was the product of making bad, voluntary choices. Appellant's theory is that evidence derived from California's SVP statute would have broken any tie in appellant's favor, but that is hardly the case. As explained above, the actual facts of this case, aside from the expert opinions on the subject, support a determination that appellant generally was in control of himself, and made a conscious choice to direct his sadistic desires to unsuspecting victims he had stalked. To the extent there was also evidence that appellant only committed crimes when he compromised his morality by becoming intoxicated, as Dr. Dietz pointed out appellant made the conscious decision to be intoxicated knowing alcohol affected him in that manner. Thus, unlike in *Atkins* where the evidence established mental retardation, and the question was whether the United States Constitution permitted the execution of someone with a mental defect to that degree, it has hardly been established that appellant had no control over his behavior. And contrary to appellant's insistence, the SVP statute would not, as a matter of undisputed science, prove otherwise. Appellant's Eighth Amendment argument, like all his others based on his SVP theory of evidentiary error, is fatally flawed and should be rejected.

IX. THE TRIAL COURT HAD NO SUA SPONTE OBLIGATION TO CLARIFY THE FACTOR (H) INSTRUCTION, BUT IN ANY EVENT ANY ERROR WAS HARMLESS

Appellant's next argument is that the trial court erred in failing to sua sponte clarify "mental disease or defect," within the meaning of the penalty phase jury instruction related to factor (h). In relevant part, using CALJIC 8.85 (2000 Revision), the trial court instructed the jury to consider the following in deciding the proper penalty: "Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired as a result of mental disease or defect or the effects of intoxication." (39RT 10151; 23CT 6077, 6149.)

Petitioner's justification for this argument centers on Dr. Dietz's testimony that he did not include sexual sadism as a "mental disease," which the doctor opined was limited to afflictions that grossly compromised the sufferers view of reality – sexual sadism did not have such an effect. (38RT 9839-9840.) Thus, argues appellant, without clarification of the term "mental disease," as contemplated by factor (h), the jury could have been confused and failed to consider evidence of appellant's sexual sadism in mitigation. (AOB 191-196.) Respondent disagrees.

A. The Applicable Law

A trial court has a duty to instruct the jury sua sponte "on general principles of law that are commonly or closely and openly connected to the facts before the court and that are necessary to the jury's understanding of the case." (*People v. Montoya* (1994) 7 Cal.4th 1027, 1047.) As to the pertinent matters falling outside the definition of a "general principle of law governing the case" it is the defendant's obligation to request any clarifying or amplifying instruction. (*People v. Estrada* (1995) 11 Cal.4th 568, 574.)

The law is settled that when terms have no technical meaning peculiar to the law, but are commonly understood by those familiar with the English language, instructions as to their meaning are not required. (*People v. Anderson* (1966) 64 Cal.2d 633, 639; see also *People v. Mobley* (1999) 72 Cal.App.4th 761, 780-788 [no sua sponte obligation to instruct on the term "development disability" in a sexual misconduct case where there is no special or peculiar legal or medical meaning different from the common meaning of the term].) A word or phrase having a technical, legal meaning, requiring clarification by the court, is one that has a definition that differs from its nonlegal meaning. (*People v. Estrada*, *supra*, 11 Cal.4th at p. 574.)

B. The Claim Is Forfeited On Appeal

Generally, by failing to ask the court for a clarifying instruction, where the actual instruction given was a correct statement of law, a defendant forfeits on appeal any claim that the trial court was obligated to act on its own. (*People v. Geier* (2007) 41 Cal.4th 555, 579 [where trial court's instructions are correct on the law, defendant forfeits claim of instructional error by failing to request a clarifying or amplifying instruction].) Because there is no contention that the trial court incorrectly explained factor (h) to the jury, this argument is forfeited.

C. Regardless Of Any Alleged Error, Appellant Suffered No Prejudice

To begin with, this Court has already ruled that factor (h), among others, is determinate, meaning it has a common sense core meaning that jurors are capable of understanding. (*People v. Lawley* (2002) 27 Cal.4th 102, 165.) There was no reasonable likelihood that Dr. Dietz's testimony limiting, in his view, the definition of mental diseases only to DSM mental disorders that fundamentally alter a person's perception of reality would have caused the jury to disregard entirely the testimony of Dr. Berlin. Dr.

Dietz himself urged the jury to consider Dr. Berlin's irresistible impulse testimony, and further opined on appellant's level of volitional control assuming that sexual sadism qualified as a mental disease or defect. (38RT 9848-9850, 9856-9857.) According to Dr. Dietz, a diagnosis of sexual sadism "opens the door to irresistible impulse testimony". (38RT 9860.) Dr. Dietz further acknowledged that sexual sadism is arguably a basis for finding that appellant acted under extreme emotional distress so as to cause appellant to commit criminal offenses. (38RT 9860.) And in closing, the prosecutor noted the disagreement between Drs. Berlin and Dietz on this point and advised jurors that it was up to them to determine if the factor applied and what weight, if any, to give it in determining the appropriate punishment. (39RT 10030.) And most importantly, the prosecutor never argued to the jury that it could not consider Dr. Berlin's irresistible impulse testimony. Instead, he ridiculed the idea that appellant had "bad thoughts" that compelled him to commit sexually sadistic crimes, and relied, not upon Dr. Dietz's definition of mental disease, but instead on Dr. Dietz's detailed indicators that showed appellant repeatedly made conscious decisions preparing to and including the commission of sexually sadistic crimes. (39RT 10036-10040.) Additionally, as previously argued in response to claim VI, Dr. Dietz's testimony that sexual sadism is not a mental disease is plainly consistent with the DSM, and is consistent with the definition of "mental disease" adopted by the American Psychiatric Association.

Even if this argument had not been forfeited, any error was harmless under any standard of review. Initially, even if the jury was somehow confused about whether it could consider evidence of appellant's mental disorder pursuant to factor (h), since that factor refers to a mental "disease," the jury was unambiguously permitted to consider it under factor (k), the catch-all provision. Factor (k) provides that the jury can consider, as evidence in mitigation, "any other circumstance which extenuates the

gravity of the crime even though it is not a legal excuse for the crime." (§ 190.3, subd. (k); *People v. Leonard* (2007) 40 Cal.4th 1370, 1429.) And to the extent that the jury considered Dr. Dietz's testimony as aggravating, the evidence was properly considered under factor (a). (*People v. Smith* (2005) 35 Cal.4th 334, 354-356.)

Whether it was pursuant to factor (h) or factor (k), the trial record itself verifies, as previously pointed out by appellant (see AOB 168), that the jury carefully considered appellant's mental disorder with respect to the issue of proper penalty. Specifically, during penalty phase deliberations, the jury asked that Dr. Dietz's testimony and Dr. Berlin's testimony about appellant's mental disorder, and their respective opinions on its impact on volitional control of behavior, be read back by the court reporter. (22CT 6040-6041.) Clearly, the jury was aware that the evidence pertaining to appellant's mental disorder was admissible and worthy of its consideration for purposes of assessing the proper penalty.

Thus, it certainly appears that the jury did not suffer from the confusion that appellant speculates existed due to the trial court's failure to sua sponte provide clarification regarding clarify the scope of afflictions which would qualify as a "mental disease" for purposes of factor (h). The jury knew it could consider the evidence offered by the experts, and verifiably did consider it. This argument should therefore be rejected.

X. THE TRIAL COURT DID NOT ERR BY EXCLUDING OPINION TESTIMONY REGARDING PENALTY AS TO THOSE DEFENSE WITNESSES WHO DID NOT HAVE A CONTINUING RELATIONSHIP WITH APPELLANT, ESPECIALLY GIVEN THAT NUMEROUS OTHER WITNESSES WERE ALLOWED TO TESTIFY IN THIS REGARD

Next, appellant argues that the trial court erred under California law and *Skipper v. North Carolina, supra*, 476 U.S. 1, in limiting mitigating evidence from witnesses who had a substantial relationship with him. This mitigating evidence consisted of the witnesses' opinions regarding what penalty was appropriate. (AOB 197-202.)

A. The Applicable Law

The Supreme Court has held that in capital cases the sentencer may not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record, or "any relevant mitigating evidence." (*Skipper v. North Carolina, supra,* 476 U.S. at p. 4.) From *People v. Ochoa, supra,* 19 Cal.4th 353, and other cases (see *People v. Mickle* (1991) 54 Cal.3d 140, 194; *People v. Heishman* (1988) 45 Cal.3d 147, 194), this Court has distilled a general rule: "evidence that a family member or friend wants the defendant to live is admissible to the extent it relates to the defendant's character, but not if it merely relates to the impact of the execution on the witness." (*People v. Smith* (2005) 35 Cal.4th 334, 367.)

Such evidence is relevant because it constitutes indirect evidence of the defendant's character. (*People v. Ochoa, supra*, 19 Cal.4th at p. 456.) In order to give such opinion testimony, the witness must have a "significant" relationship with the defendant. (See *People v. Smith*, *supra*, 35 Cal.4th at p. 367; see also *People v. Smith* (2003) 30 Cal.4th 581, 631 [questioning, without deciding, if attorney-client relationship qualifies as the sort of relationship that can result in such indirect evidence of the defendant's character].)

B. The Relevant Proceedings Below

The subject of possible defense testimony at the penalty phase concerning the impact of the death penalty on appellant's family members was first discussed prior to the commencement of the penalty phase. Defense counsel stated that defense witnesses should be allowed to testify that appellant should not receive the death penalty because of his upbringing and abuse inflicted upon him by his father. The prosecutor objected. Defense counsel cited *People v. Mickle, supra,* 54 Cal.3d 140, whereas the trial court stated that the lead case on point was *People v. Ochoa, supra,* 19 Cal.4th 353. The court did not make a firm ruling on this point, saying the issue was "an open" one, and that the court would reread *Ochoa.* (28RT 7534-7540.) Defense counsel also filed written briefing on this point in a motion in limine. (22CT 5841-5843.)

Subsequently, the trial court stated that it had reread *Ochoa.* The court said that it appeared to limit defense counsel's questioning of appellant's family members to the impact the death penalty would have on them in light of positive qualities appellant had. The court also stated appellant could offer evidence that he had loving relationships with his mother and other family members, the "indirect inference being that he has redeeming qualities or he wouldn't have that relationship." (28RT 7563-7564.)

As summarized in the Statement of Facts, one of appellant's sisters, Tracy Sammons, testified over prosecution objection that she believed appellant had characteristics which in her opinion justified not imposing the death penalty, i.e., he would be able to help others because of all the experiences he had been through. (30RT 7972-7973.) After Sammons had concluded her testimony, the issue of the permissible scope of inquiry on this subject was raised by the trial court. The court stated that defense counsel was entitled to ask appellant's family members why, given

appellant's background, he should not receive the death penalty. The court reiterated its understanding that it was proper to ask if appellant had some characteristics which should cause the jury to spare his life. (30RT 7977-7978.)

Thereafter, as summarized in the Statement of Facts, two other family members testified about why they believed appellant had some personality traits which would justify a life sentence rather than the death penalty. Specifically, appellant's sister Lecia testified that she thought he had things to offer to others in prison because of his strong faith in God. (30RT 7952.) Appellant's mother thought he was a "loving, caring, understanding person" who had not hurt anyone until the last few years, and who could do God's work if he was spared from the death penalty. (31RT 8262.)

Scott Mosher, a social worker who had worked with appellant at the North Idaho Children's Home for two years, beginning when appellant was 15 years old, also testified on appellant's behalf. During Mosher's testimony, the trial court sustained a prosecution objection to a question regarding whether Mosher believed appellant should receive the death penalty based on the two-year relationship he had had with appellant approximately 15 years before the charged offenses were committed and his knowledge of appellant's "character, his humanity, and the person that he was." (32RT 8416.) Defense counsel later stated that, under *People v. Mickle*, *supra*, 54 Cal.3d 140, and *People v. Heishman*, *supra*, 45 Cal.3d 147, he was entitled to elicit at the penalty phase opinions from both family members and friends concerning the appropriateness of a death sentence. Counsel stated that, in addition to Mosher, he wished to call three other witnesses who knew appellant during the same time period who would testify that appellant did not deserve the death penalty based on their prior

interactions with appellant and opinions regarding his character.[35] The court excluded such opinion testimony by Mosher, who had last seen appellant 15 years before the current offenses were committed on relevance grounds, but stated that defense counsel was entitled to ask about appellant's conduct and character when the witnesses had contact with appellant. (32RT 8425-8430.)

The subject arose again during the testimony of appellant's childhood girlfriend, Adonia Krug. The trial court ruled that, unlike the social workers and other juvenile facility staff members who had spent time with appellant when he was in a juvenile custody facility, Krug would be permitted to express an opinion about the death penalty, based on appellant's character and his positive qualities. The court so ruled because Krug had a continuing relationship with appellant, and thus was differently situated from the juvenile facility staff members. (33RT 8548-8554.)

Krug then testified that she thought that appellant should be spared from the death penalty because he had goodness in him and because he had her look up passages in the Bible. (33RT 8578-8579.) Roslynn Moore, appellant's girlfriend at the time he murdered Newhouse and Crawford, testified that she did not think that appellant should receive the death penalty, as his life was valuable and she thought he might be able to help other inmates inside prison. (34RT 8874.) Sister Miriam Larkin, who started seeing appellant after his arrest at the request of defense counsel, testified that she did not believe that appellant should receive the death penalty because he had goodness in him, took responsibility for what he

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[35] It is apparent that, in addition to Mosher, appellant was referring to Frederick Deibel, Jeffrey Cirka, and Sally Gabby, whose penalty phase testimony was summarized above.

had done, was remorseful for his actions, and wanted to help his fellow inmates. (37RT 9635.)

Following the jury's verdict at the penalty phase, appellant raised the issue of the exclusion of testimony on this point by defense witnesses Mosher, Deibel, Cirka, and Gabby, in his new trial motion, which the trial court denied. (24CT 6317-6320; see also 24CT 6373-6374 [prosecution's opposition to new trial motion], 24 CT 9397 [minute order denying new trial motion].)

C. The Trial Court Properly Excluded Opinion Testimony Regarding Penalty From Those Witnesses Who Did Not Have A Continuing Relationship With Appellant

The excluded testimony at issue involved witnesses who had known appellant between 1981 and 1983, when appellant was held in an Idaho juvenile facility. The trial court did not err in excluding their opinion testimony regarding penalty given the passage of more than eighteen years between the time the witnesses knew appellant and the penalty phase of appellant's trial, especially since it was cumulative to other opinion testimony on the same point that was admitted at the penalty phase. Because appellant was in fact allowed to present mitigating opinion testimony from numerous family members and other witnesses who had an ongoing relationship with him at the time of the crimes, there was no error in excluding the cumulative opinion of evidence of witnesses whose last contact with appellant was years earlier. (See *People v. Fierro* (1991) 1 Cal.4th 173, 241 [no violation of the right to introduce evidence on the effect of a death sentence on defendant's family where four members of defendant's family testified about the impact the defendant's execution would have].)

No published decision of which respondent is aware divests a trial court from exercising its discretion to exclude cumulative opinion

testimony from such witnesses regarding the appropriate penalty, especially when the witnesses are allowed to testify about the defendant's character generally and numerous other witnesses, such as family members and friends who have more significant ongoing or recent relationships, testify that in their opinion the defendant's life should be spared. (See, e.g., *People v. Smith*, *supra*, 35 Cal.4th at pp. 366-367 [educational therapist helped defendant with his learning problems from 1984 through 1987; defendant murdered the victim in 1990]; *People v. Ervin*, *supra*, 22 Cal.4th at p. 102 [jail chaplain precluded from giving opinion testimony about defendant's participation in worship services while defendant was awaiting trial on charged offense]; see also *People v. Phillips* (2000) 22 Cal.4th 226, 237-238 [right to present mitigating evidence does not result in entire abrogation of ordinary rules of evidence].) Accordingly, the trial court did not err by excluding the proffered opinion testimony on the penalty issue.

D. Any Error Was Harmless

Even if the trial court erred in this regard, any error was harmless. The test of prejudice here is the *Chapman* test: reversal is required unless the People prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. (*People v. Smith*, *supra*, 35 Cal.4th at p. 368; see also *Chapman v. California*, *supra*, 386 U.S. 1.)

The proffered testimony that appellant should not be executed was relevant only as it provided indirect evidence of appellant's character. The witnesses whose testimony regarding penalty was excluded were permitted to provide direct evidence about his character. For example, in this case the juvenile facility staff members testified about appellant being a positive role model, being well liked and having positive interactions with his peers, having good academic and vocational skills, having empathy for others, being concerned about his sisters, and being mature and responsible by the

time he returned to his home. These factors were argued to the jury. (39RT 10107-10108.)

There is no reason to believe that the additional opinion testimony of these witnesses that appellant's good qualities made the death penalty inappropriate would have affected the verdict in any way, especially given that numerous other defense witnesses were allowed to so testify. Thus, any error was harmless. (See *People v. Smith*, *supra*, 35 Cal.4th at p. 368 [finding error in precluding opinion testimony regarding penalty harmless beyond a reasonable doubt in light of character testimony which was given by the witness]; *People v. Ervin*, *supra*, 22 Cal.4th at p. 103 [any error in excluding jail chaplain's opinion testimony harmless given that the jury heard the chaplain testify he found defendant's involvement in the jail's religious program "consistent and extremely sincere"; assuming that the witness would have further opined that defendant had sufficiently redeeming qualities that rendered the death penalty inappropriate, in light of the whole record it was not reasonably possible the jury would have returned a different penalty verdict but for the assumed error]; *People v. Heishman*, *supra*, 45 Cal.3d at p. 194 [error in sustaining an objection put to defendant's former wife as to whether she thought defendant should receive the death penalty was harmless where another witness with whom defendant also had previously been romantically involved was allowed to testify that she felt defendant should not receive the death penalty, and given that the former wife's testimony as a whole was generally so supportive of defendant that it is very unlikely that any juror would infer that she would want to see him put to death].)

XI. THE TRIAL COURT PROPERLY ADMITTED REBUTTAL TESTIMONY GIVEN BY LIESL TURNER REGARDING WHY SHE ENDED HER RELATIONSHIP WITH APPELLANT

Appellant also argues that the trial court committed prejudicial error by admitting evidence in the rebuttal portion of the penalty phase concerning statements he made to former girlfriend Liesl Turner to the effect that he had murdered a person in prison. (AOB 202-210.) This contention is without merit.

A. The Applicable Law

Generally speaking, the scope of rebuttal lies within the trial court's discretion. (*People v. Carpenter*, *supra*, 15 Cal.4th at p. 409; *People v. Rodrigues*, *supra*, 8 Cal.4th at p. 1164.) In a capital trial, when a defendant places his character at issue during the penalty phase, the prosecution is entitled to respond with character evidence of its own. (*People v. Verdugo* (2010) 50 Cal.4th 263, 301; *People v. Loker* (2008) 44 Cal.4th 681, 709.) "The theory for permitting such rebuttal evidence and argument is not that it proves a statutory aggravating factor, but that it *undermines* defendant's claim that his *good* character weighs in favor of mercy." (*People v. Rodriguez* (1986) 42 Cal.3d 730, 791.) Once the defendant's "general character [is] in issue, the prosecutor [is] entitled to rebut with evidence or argument suggesting a more balanced picture of his personality." (*Ibid.*)

The scope of proper rebuttal is determined by the breadth and generality of the direct evidence. (*People v. Loker*, *supra*, 44 Cal.4th at p. 709.) If the testimony is "not limited to any singular incident, personality trait, or aspect of [the defendant's] background," but "paint[s] an overall picture of an honest, intelligent, well-behaved, and sociable person incompatible with a violent or antisocial character," rebuttal evidence of similarly broad scope is warranted. (*Ibid.*, quoting *People v. Mitcham* (1992) 1 Cal.4th 1027, 1072; see also *In re Ross* (1995) 10 Cal.4th 184,

207-208; *People v. Clark* (1993) 5 Cal.4th 950, 1027.) As in other cases, the scope of rebuttal must be specific, and evidence presented or argued as rebuttal must relate directly to a particular incident or character trait defendant offers in his own behalf. (*People v. Rodriguez, supra*, 42 Cal.3d at p. 792, fn. 24.)

B. The Relevant Proceedings Below

As summarized in the Statement of Facts, during the defense portion of the penalty phase, two family members testified that when appellant first moved to California, appellant dated Liesl Turner. They testified that appellant and Liesl had a "good" relationship, and that appellant made a candlelight dinner for her at his apartment when they first started dating. (33RT 8630-8631, 8645.)

Subsequently, the prosecution indicated that it wished to call Turner as a rebuttal witness. The prosecutor's offer of proof, in relevant part, was that Turner would testify as follows: when she was living with appellant, he had a photograph of a woman named Lisa who he said had been his fiancée in Idaho. Lisa had been raped and killed. Appellant stole a car so he could be sent to prison and kill the man who had killed Lisa. He followed through with his plan and was never caught for the murder. After hearing this statement Turner grew increasingly afraid of appellant. Appellant had a temper. Turner visited appellant while he was in jail in 1987 on rape and attempted rape charges. Appellant said, "No matter what happens I will find you when I get out." This affected her for years and caused her to constantly look over her shoulder. Turner felt that she could have been one of appellant's victims had she not complied with his sexual requests when they were together. The prosecutor stated that Turner's testimony was proper rebuttal to defense testimony that appellant and Turner had a good relationship. (34RT 8917-8920.)

Defense counsel objected, stating that the scope of penalty phase rebuttal testimony is narrow, and that the defense evidence adduced on the subject of the relationship between appellant and Turner was limited. (34RT 8920-8921.) The trial court stated that some of the general statements about the relationship were relevant because appellant had attempted to show during the defense case that he had several normal relationships with women. The court indicated that appellant's statement about killing a person in prison would be excluded as it had only minimal probative value, but that other portions of her proffered testimony would be allowed. (34RT 8921-8926, 8929.)

Appellant then filed a written motion, asserting that Turner's proffered testimony on the points on subjects other than the alleged killing of a prison inmate was improper rebuttal, unduly inflammatory, and would consume an undue amount of time. (22CT 6001-6009.) Following an initial discussion regarding the proper scope of Turner's testimony (37RT 9449-9464), the trial court reconsidered its prior ruling excluding appellant's assertion that he had killed the person who had raped and killed his fiancée. The court ruled that such testimony was admissible as it was relevant regarding why Turner was afraid of appellant and why their relationship ended.[36] However, the court excluded any reference to appellant's statement in 1987 that he would find Turner when he was released from prison "no matter what happens." (38RT 9727-9732.)

As summarized in the Statement of Facts, Turner testified before the jury that after she and appellant began living together, she started to be

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[36] The court directed the prosecutor to instruct Turner not to speculate that appellant had killed the girl depicted in the photograph, as any such testimony would be irrelevant and unduly prejudicial. (38RT 9730-9731.) Turner did not thereafter testify that she thought appellant killed the girl in the photograph.

afraid of him because he had a picture of a pretty girl in his home, and he said that she had been raped and murdered. Appellant said that he had committed a crime so he could go to prison and kill the man who had raped and killed her. (38RT 9905, 9907-9908.) There was a sidebar discussion regarding the permissible scope of Turner's testimony on this subject, during which the trial court stated that it would give the jury a limiting instruction regarding the testimony. (38RT 9911-9917.) The court then instructed the jury that Turner's testimony on this point was being admitted only to show why she reacted to it, and not to show that the statement was in fact true, a point on which there would not be any evidence. (38RT 9918.)[37] Turner testified that appellant said that he had killed the man in prison and was never caught. This frightened her, and she moved out shortly thereafter. (38RT 9920.) She ended her relationship with appellant because she was afraid of him. (38RT 9921.)

C. Turner's Brief Testimony As To Why She Ended Her Relationship With Appellant Properly Rebutted Evidence Adduced By The Defense Regarding The "Good" Nature Of That Relationship

The trial court did not abuse its discretion by permitting Turner to testify regarding appellant's assertion that he had killed a man in prison and gotten away with the crime, as it was relevant to why Turner ended her relationship with appellant and rebutted defense evidence regarding the "good" relationship between appellant and Turner. The defense, having chosen to not present any evidence at the guilt phase (presumably in light of appellant's confession and the strength of the physical evidence),

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[37] Subsequently, when the jury was given the full set of instructions regarding penalty, it was given CALJIC No. 2.09, a standard instruction regarding evidence admitted for a limited purpose. (39RT 10144; 23CT 6065, 6135.)

presented a wide range of penalty phase evidence from more than *forty* lay and expert witnesses, which warranted a wide range of rebuttal.

Accordingly, the prosecution called several rebuttal witnesses. As to Turner, the trial court did not "open the door to *any and all* 'bad character' evidence the prosecution [could] dredge up." (See *People v. Rodriguez*, *supra*, 42 Cal.3d at p. 792, fn. 24.) Rather, as required, the scope of rebuttal the court permitted to be elicited from her was specific, and related directly to a particular incident or character trait appellant offered in his own behalf.[38] (See *ibid.*)

As the prosecutor cogently noted, Turner's testimony regarding the photograph was proper rebuttal showing that Turner was in fact so afraid of appellant that she ended their relationship.[39] This testimony directly rebutted defense testimony that appellant and Turner had a "good" relationship during which appellant prepared romantic candlelight dinners for her. The rebuttal testimony was brief. In addition, the trial court gave the jury a limiting instruction with respect to this testimony. Accordingly, the trial court did not abuse its discretion when it admitted this evidence.

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[38] The care exercised by the trial court with respect to the scope of Turner's rebuttal testimony is shown by the fact that the court excluded evidence regarding a statement appellant made to Turner when he was arrested in 1987 to the effect that he would find her when he was released from prison "no matter what happens," on the ground that it was vague and irrelevant as the relationship was over by that point. (38RT 9730.) As noted above, the court also directed the prosecutor to instruct Turner not to speculate that appellant had actually killed the girl depicted in the photograph, as such testimony would be irrelevant and unduly prejudicial. (38RT 9730-9731.)

[39] Appellant is wrong when he states that the reason that Turner terminated her relationship was that she suspected he was having an affair with another woman. (See AOB 207.) It is obvious from Turner's testimony that she used evidence of the possible affair as a pretext to end the relationship, the real reason being that she "didn't feel safe." (38RT 9921.)

(See generally *People v. Carpenter* (1997) 15 Cal.4th 312, 409 [where defendant presented evidence that he was "very considerate," "totally respectful" to one witness "as a woman," and was very good with his children, rebuttal evidence painting a different picture, i.e., evidence that he once suggested to a 14-year-old girl that she engage in "sexual contacts" with "older men" for money, was admissible]; *People v. Zapien* (1993) 4 Cal.4th 929, 991 [where defendant had introduced evidence that, prior to his crimes, he had overcome his heroin addiction and had converted to Christianity, rebuttal witness properly allowed to establish that defendant had used drugs and had stolen to support his drug habit, which tended to cast doubt upon defendant's evidence of his good character]; *People v. Rodriguez*, *supra*, 42 Cal.3d at p. 791 [where defendant offered evidence and argument that he was a kind, loving, contributive member of his community, regarded with affection by neighbors and family, the prosecutor was entitled to rebut with evidence or argument suggesting a more balanced picture of his personality, consisting of a prior incident in which the defendant had supposedly reached for a shotgun in the back seat of his automobile when stopped by a police officer].)

Appellant's reliance on *People v. Medina* (1995) 11 Cal.4th 694 (AOB 208) in support of the proposition that a witness's fear of a defendant is improper penalty phase evidence is sorely misplaced. In *Medina*, the defendant's sister gave generally mitigating penalty phase evidence regarding the defendant's family background and childhood. On cross-examination, however, she testified that she began to fear defendant once he told her of a dream in which he viewed her naked back, which bore signs of scratches and blood. After the defendant was arrested on capital murder charges, she told a detective about the dream and speculated that maybe she would have been defendant's "next victim." This Court held that the dream evidence was probably irrelevant, as a sister's "fear" of her brother is

neither a proper aggravating factor nor proper rebuttal to her mitigating "background" evidence. (*People v. Medina*, *supra*, 11 Cal.4th at p. 769.) Here, unlike *Medina*, Turner's rebuttal evidence regarding why she broke off the relationship *did* properly rebut a point the defense chose to establish during the penalty phase, i.e., that appellant and Turner had a "good" relationship and that appellant prepared a romantic candlelight dinner for her on at least one occasion.

D. Any Error Was Harmless

In any event, there is no reasonable possibility that appellant would have received a more favorable outcome regarding penalty had Turner's testimony in this regard been excluded. (See *People v. Brown* (1988) 46 Cal.3d 432, 448.) Rather, the jury must have decided the penalty question adversely to appellant because of the truly shocking crimes he committed against Newhouse and Crawford, his documented criminal history and the fact that he was on parole for rape at the time he committed the charged offenses, and the presence of numerous aggravating factors which clearly outweighed any mitigating factors as to penalty.[40] Any error was thus harmless.

[40] Respondent notes that, on cross-examination, Turner testified that appellant's story about the photograph did not make sense to her given that a person who commits a crime cannot necessarily know ahead of time which prison he or she will be sent to. (38RT 9925.) The trial court had previously opined that appellant was likely attempting to provide his girlfriend with an explanation regarding why he had been in prison, and was "puffing" at that. (34RT 8922.)

XII. THE TRIAL COURT PROPERLY ADMITTED REBUTTAL EVIDENCE OF A PHOTOGRAPH OF APPELLANT TAKEN AFTER HE MURDERED NEWHOUSE, AS IT TENDED TO SHOW THAT HE WAS NOT IN FACT REMORSEFUL

Appellant next argues that the trial court committed prejudicial error when it admitted a photograph of himself, shirtless and flexing his muscles (Peo. Ex. No. 171), during the rebuttal portion of the penalty phase. (AOB 210-222.) Once again, respondent disagrees.

A. The Applicable Law

The rules regarding the admissibility of evidence are well established. Only relevant evidence is admissible. (Evid. Code, § 350.) 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.) The test of relevance is whether the evidence tends "logically, naturally, and by reasonable inference" to establish any fact material for the prosecution or to overcome any material matter sought to be proved by the defense. (*People v. Cunningham* (2001) 25 Cal.4th 926, 995; *People v. Garceau* (1993) 6 Cal.4th 140, 177.) The trial court retains broad discretion in determining the relevance of evidence. (*Ibid.*) Evidence is relevant when no matter how weak it may be, it tends to prove the issue before the jury. (*People v. Freeman* (1994) 8 Cal.4th 450, 491.)

As noted previously, a trial court may exclude relevant evidence pursuant to Evidence Code section 352 if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time, or create a substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. The "prejudice" referred to in the statute applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues; in applying section 352, "prejudicial" is not

synonymous with "damaging." (*People v. Coddington* (2000) 23 Cal.4th 529, 588; *People v. Bolin* (1998) 18 Cal.4th 297, 320.) A trial court's decision to admit photographs under section 352 will be upheld on appeal unless the prejudicial effect of such photographs clearly outweighs their probative value. (*People v. Gurule* (2002) 28 Cal.4th 557, 624; *People v. Allen* (1986) 42 Cal.3d 1222, 1255-1256.)

B. The Relevant Proceedings Below

At the beginning of the penalty phase, the prosecution sought to introduce a number of photographs. One of them was a photograph of appellant which his father had taken in February 1999, several months after appellant murdered Newhouse and a few weeks before he murdered Crawford. (Peo. Ex. No. 171.) The photograph was taken inside appellant's apartment. In it, appellant was shirtless and smiling, with his right arm flexed. A large muscle is visible on appellant's arm. It was offered to show how appellant looked at the time of the murders, in contrast to his appearance in court, or alternatively as rebuttal evidence after the defense attempted to show that appellant was remorseful in the penalty defense case. The trial court ruled that at that stage of the proceedings the photograph would be excluded as irrelevant, but noted that it might be proper rebuttal. (29RT 7622, 7644-7647.)

The prosecution renewed its request regarding the photograph at the end of the defense case in the penalty phase. (37RT 9686-9687.) Defense counsel objected on the basis that the photograph did not necessarily show a lack of remorse, and also pursuant to Evidence Code section 352. (38RT 9816-9819.) The trial court noted that there had been significant defense evidence regarding remorse, expressed both in letters appellant had written and in statements he made. The court concluded that the photograph was proper rebuttal, and could give rise to the inference that appellant did not begin to feel remorse until after he was arrested. The court also found that

admitting the photograph would not violate Evidence Code section 352. (38RT 9820-9824.) Subsequently, the defense additionally objected on Eighth Amendment grounds. (39RT 9954.)

Investigator Hobson testified about how he obtained the photograph. The trial court admitted it into evidence. (39RT 10021-10025.) During the prosecution's closing argument regarding penalty, the photograph was projected onto a large screen. (See 39RT 10050-10051 [prosecutor refers to the photograph during his closing argument]; see also 39RT 10086-10087 [observations made by defense counsel and the court regarding the use of the photograph].)

C. The Photograph Tended To Give Rise To A Reasonable Inference That Appellant Did Not Feel Remorse After He Murdered Newhouse

The gist of appellant's argument on appeal is that the photograph did not unequivocally prove that he lacked remorse when he confessed, allegedly due to his "conscience," and thus it should have been excluded. (See AOB 213-216.) While it may be true that remorse – like any emotion or state of mind – cannot be conclusively proved or disproved by a photograph of the person in question, this is not the test of relevance in terms of assessing the admissibility of a particular piece of evidence. As noted above, the test of relevance is whether the evidence *tends* "logically, naturally, and by reasonable inference" to establish any material fact, and in this case the photograph did so.

The photograph at issue was taken several months after appellant murdered Newhouse, at virtually the same location in his apartment where a few weeks later he would strangle Crawford to death. It is logical to assume that any remorse appellant felt because he killed Newhouse would have been stronger in February 1999 as compared to when he confessed several months later in April. Accordingly, appellant's relaxed, confident

pose could lead a reasonable juror to infer that appellant was not in fact remorseful at either point in time and thus lied to Hobson when he claimed to have confessed because of his "conscience." The jury could also have inferred that appellant's subsequent claims of remorse to Sister Larkin and others were contrived. Even if the photograph only "weakly" gave rise to such an inference, nonetheless the trial court did not abuse its discretion in allowing the photograph to be introduced because it *tended* to lead to an inference of a lack of remorse on appellant's part. (See *People v. Freeman*, *supra*, 8 Cal.4th at p. 491.)

D. The Trial Court Properly Performed The Weighing Function Required By Evidence Code Section 352

Appellant also claims that the trial court failed to weigh the probative value of the photograph against its prejudicial impact under Evidence Code section 352. Specifically, appellant contends that the court failed to balance the *degree* of relevance against the potential for prejudice the photograph might cause. (AOB 216-219.)

Here, the record shows that the trial court in fact carefully weighed the probative value of the photograph against its potential for causing undue prejudice. Indeed, the court expressly noted that the only way it could exclude the photograph under Evidence Code section 352 would be if it found that it would "be unfair in the sense that it would divert the jury's attention from their ultimate duty." (38RT 9821.) In any event, in ruling on an objection under section 352, the trial court need not expressly weigh prejudice against probative value or even expressly state that it has done so. (*People v. Riel* (2000) 22 Cal.4th 1153, 1187; *People v. Waidla*, *supra*, 22 Cal.4th at p. 724, fn. 6.)

With respect to appellant's contention that the trial court failed to balance the *degree* of relevance against the potential for prejudice admitting the photograph might cause because of an erroneous belief that if the

evidence was probative it was admissible regardless of prejudice (see AOB 218), he did not object on this ground below, and thus this point is waived. (See *People v. Anderson* (1990) 52 Cal.3d 453, 477.) In any event, the court properly weighed the probative value of the photograph against the risk of undue prejudice its admission might cause appellant, as discussed above.

E. Any Error Was Harmless And The Photograph Did Not Violate The Eighth Amendment

In any event, the photograph was not such as to overcome the jury's rationality. To the extent that the photograph did not evince a lack of remorse on appellant's part, the photograph could not have been prejudicial. As the prosecution aptly noted in its opposition to appellant's new trial motion, in the photograph appellant appeared to be "happy, healthy and smiling." (24CT 6377.) The photograph simply did not uniquely tend to evoke an emotional bias against appellant as an individual. On this record, it is not reasonably possible that appellant would have received a more favorable outcome regarding penalty had the photograph been excluded. (See *People v. Brown*, *supra*, 46 Cal.3d at p. 448.) For the same reasons, appellant's Eighth Amendment rights were not violated by the admission of the photograph. (See AOB 219-222.)

XIII. THE PROSECUTOR DID NOT COMMIT MISCONDUCT BY ELICITING EXPERT TESTIMONY THAT ONE OF THE MANY EXAMPLES OF APPELLANT'S DECEITFULNESS WAS HIS INITIAL DENIAL AND SUBSEQUENT ADMISSION TO INVESTIGATOR HOBSON THAT HE SHOT A MAN IN SANTA BARBARA IN 1987, WHICH WAS RELEVANT TO THE EXPERT'S DIAGNOSIS OF APPELLANT'S ANTISOCIAL PERSONALITY DISORDER

Appellant's next contention is that the prosecutor committed prejudicial misconduct by presenting false and misleading evidence that appellant lied about shooting a man three times in the chest in 1987. (AOB 222-228.) This contention is without merit.

A. The Applicable Law

The applicable federal and state standards regarding prosecutorial misconduct are well established. A prosecutor's intemperate behavior violates the federal Constitution when it comprises a pattern of conduct so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process. (*People v. Navarette* (2003) 30 Cal.4th 458, 506; *People v. Samayoa* (1997) 15 Cal.4th 795, 841.)

Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury. (*People v. Navarette*, *supra*, 30 Cal.4th at p. 506.) Nevertheless, as a general rule, the defense must generally make a timely objection and request an admonition to cure any harm in order to preserve a claim of prosecutorial misconduct. (*People v. Gurule*, *supra*, 28 Cal.4th at p. 657; *People v. Frye* (1998) 18 Cal.4th 894, 969.) The rule applies to capital cases. (*People v. Frye*, *supra*, 18 Cal.4th at p. 969.)

B. The Relevant Proceedings Below

Prior to Dr. Park Dietz testifying as a rebuttal witness in the penalty phase, defense counsel raised the subject of some slides that Dr. Dietz planned to use in his testimony concerning his diagnosis of appellant's antisocial personality disorder. Specifically, counsel noted that under a heading on one of the slides entitled "Deceitfulness," one of the enumerated examples of appellant's deceitfulness Dr. Dietz planned to discuss was a statement appellant made during one of the interviews conducted by investigator Hobson concerning whether appellant had shot a man in Santa Barbara in 1987 during a drug deal. Counsel said that the only information the defense had on this point was that appellant had denied involvement in the shooting.[41] (38RT 9733-9735.)

The prosecutor stated that appellant had initially denied being involved in the shooting, but that, after the tape was turned off, appellant admitted to Hobson that he had committed the shooting. The prosecutor also stated that appellant's admission had been documented in a report which was provided to the defense. The prosecutor noted that the testimony regarding the shooting had not been offered in the People's case-in-chief in the guilt phase because it was irrelevant to the charged offenses, but it was relevant in the penalty phase regarding the issue of antisocial personality disorder. (38RT 9735-9736.) When the trial court inquired as to Dr. Dietz's knowledge of appellant's admission, the prosecutor

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[41] The interview in question took place on April 27, 1999. The transcript of the interview (Peo. Ex. No. 167) shows that when Hobson asked appellant about an anonymous tip made in 1987 which identified appellant as the person who shot someone three times in the chest over a drug deal in Santa Barbara, appellant responded, "Shot somebody in the chest three times, no. Wasn't me." The following notation then appears: "(Later, KREBS admitted shooting a white male in Santa Barbara.)" (21CT 5747.)

responded that Dr. Dietz also had a copy of Hobson's report which documented the admission. (38RT 9737.)

The trial court ruled that testimony concerning the shooting incident would be allowed. Both defense attorneys denied having received a copy of the report which contained appellant's admission on this point, claiming that they only had a copy of the tape recording of the interview during which appellant denied committing the shooting. The prosecutor once again stated that the defense in fact had a copy of the report, and offered to give defense counsel another copy. The court stated that there would be a short break in the proceedings, and if the prosecutor was unable to show defense counsel that they had the report in question in their possession, "we're going to have a problem." "But assuming that you show them they do already have it," the court concluded, the proceedings would resume after the break. (38RT 9737.)

Subsequently, without further discussion on this point or any defense objection, Dr. Dietz testified that appellant's dishonesty about shooting a man "in the leg" in Santa Barbara in 1987 was one of a number of examples of appellant's deceitfulness which was relevant to his diagnosis of antisocial personality disorder. (38RT 9796.)

C. There Was No False And Misleading Testimony Adduced Regarding The Santa Barbara Shooting, As The Expert Clearly Testified That Appellant Had Been Dishonest About Shooting A Man "In The Leg"

Appellant contends that Mr. Dietz gave the "impression" that appellant had lied about the Santa Barbara shooting as he suggested that the victim had been shot three times in the chest. As noted above, the precise question Hobson had posed to appellant specifically referred to shooting the victim "three times in the chest." Although appellant initially said he was not the person who had committed the shooting, he later admitted that he shot the victim, albeit "in the leg." Dr. Dietz's testimony on this point

makes it clear that he was focusing on appellant's denial of the shooting itself.

The jury could not have been under the misimpression that appellant had admitted shooting the victim three times in the chest, as Dr. Dietz specifically testified that appellant had lied about shooting a man "in the leg" in Santa Barbara in 1987, and that this was one of a number of examples of appellant's deceitfulness which was relevant to his diagnosis of antisocial personality disorder. (38RT 9796.) Defense counsel was, of course, free to question Dr. Dietz regarding any alleged ambiguity as to the number of location of the shots. In any event, under Evidence Code section 802, Dr. Dietz was entitled to refer to the 1987 shooting as it was a basis for his expert opinion regarding antisocial personality disorder. (See *People v. Mickey*, *supra*, 54 Cal.3d at p. 688; *People v. Bell* (2007) 40 Cal.4th 582, 608 [general discussion of the law relating to testimony regarding the basis of an expert's opinion].)

Although appellant now notes that the jury was not given a limiting instruction regarding Dr. Dietz's testimony on this point (AOB 227), it does not appear that he requested any such instruction. In general, a trial court is under no duty to instruct sua sponte on the limited admissibility of past criminal conduct. (*People v. Padilla* (1995) 11 Cal.4th 891, 950; *People v. Collie* (1981) 30 Cal.3d 43, 64.)[42]

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[42] As set forth above with respect to the issue involving the rebuttal testimony given by Liesl Turner regarding why she ended her relationship with appellant, there was a limiting instruction given to the jury when she testified. In addition, the jury was later given CALJIC No. 2.09 regarding evidence which was admitted for a limited purpose. Although the trial court did not give a limiting instruction to the jury advising it not to consider Dr. Dietz's testimony for the purpose of showing that appellant actually committed the Santa Barbara shooting in 1987, it presumably would have done so had the defense so requested.

D. Appellant Was Not Prejudiced In Any Event

Finally, there is no reasonable possibility that appellant would have received a different outcome regarding penalty had Dr. Dietz not been allowed to testify regarding the statement in question as it related to his diagnosis of antisocial personality disorder. (See *People v. Brown*, *supra*, 46 Cal.3d at p. 448.) On this record, the jury surely did not vote to impose the death penalty because of any role appellant may have had in an apparently non-fatal shooting which took place more than a decade before he committed the charged offenses. As previously discussed, this was simply not a "close case" as to penalty (see AOB 228) given the horrific circumstances of appellant's crimes and the record of his prior convictions.

XIV. APPELLANT FORFEITED HIS CLAIM OF ALLEGED PROSECUTORIAL MISCONDUCT REGARDING APPELLANT'S CONVICTION FOR ASSAULTING JENNIFER E. IN 1984, BUT IN ANY EVENT APPELLANT HAS FAILED TO SHOW EITHER MISCONDUCT OR PREJUDICE IN THIS REGARD

Appellant also contends that the prosecutor committed prejudicial misconduct by falsely asserting that appellant had been convicted of sexual assault in Idaho in 1984. (AOB 228-232.) This claim was forfeited because appellant failed to object on misconduct grounds when the misconduct was alleged to have occurred. In any event, appellant has failed to show either a misstatement by the prosecutor or prejudice, and thus this contention must be rejected.

A. The Relevant Proceedings Below

According to Idaho court records, in 1984 appellant was charged with attempt to commit a violent injury upon Jennifer E. with intent to commit rape. (See 18CT 4749-4752; Peo. Ex. No. 2.) Appellant subsequently entered a plea of guilty to the charge of misdemeanor assault. (See 18CT 4756; Peo. Ex. No. 2.)

Before the commencement of the penalty phase, the prosecution indicated that even though Jennifer E. had been subpoenaed to testify, she had been hospitalized in Idaho because of mental health reasons and would be unavailable to testify in the penalty phase. (22CT 5857, 5861-5862.) According to a declaration executed by one of the prosecutors, one of Jennifer E.'s treating physicians indicated that the hospitalization was caused, at least in part, by the stress of traveling to California to testify against appellant. (22CT 5862.)

During her testimony, appellant's mother said that she thought appellant should be spared from the death penalty because, among other reasons, "until the last few years, [appellant] has hurt no one." (31RT 8262.) On cross-examination, she clarified that she meant that appellant

had only injured "the girls in California," apparently referring to Newhouse and Crawford. She claimed not to know anything about "the girl in Idaho, the neighbor." (31RT 8271.)

Out of the presence of the jury, the prosecutor indicated that he wished to cross-examine appellant's mother about a statement she made to investigators regarding appellant being convicted of "sexual assault" while he was living in Sandpoint, Idaho, for which he was sent to the Cottonwood correctional facility, obviously referring to the Jennifer E. incident in 1984. (31RT 8280-8281.) Defense counsel objected on the grounds that it was unfair and beyond the proper scope of rebuttal. Counsel also noted that appellant was not sentenced to Cottonwood for that offense,[43] but rather only spent a couple of months in county jail due to his conviction for the Jennifer E. assault. (31RT 8282.) The trial court noted that the issue was not rebuttal but rather cross-examination, and that appellant's mother had volunteered a lot of information during her testimony which opened the door to her being cross-examined about what appellant had done when he was 17 or 18 years old. The court ruled that the prosecutor could ask appellant's mother about the statement she made to investigators regarding the sexual assault of Jennifer E. (31RT 8283-8284.) Defense counsel stated that appellant was not convicted of sexual assault in connection with this incident and again noted that appellant was not sentenced to Cottonwood as a result of his crime against Jennifer E. Counsel also objected pursuant to Evidence Code section 352. The court ruled that, given appellant's mother's testimony that until recently appellant had not harmed anyone, she could be cross-examined about her statement that

[43] Appellant was in fact sentenced to Cottonwood in 1984, but on another charge, i.e., grand theft of an automobile. (See 33RT 8591-8592; see also CT Re: Confidential Documents/Probation Officer's Report 17.)

appellant had been convicted of sexual assault and sent to prison for that offense "even though those aren't the facts," as it impeached her testimony. (31RT 8284-8289.)

On cross-examination, over defense objection on the grounds of improper impeachment, appellant's mother admitted that she had told investigators that appellant had been convicted of sexual assault while he was living in Sandpoint, Idaho, and was sent to the Cottonwood facility in Idaho as a result. (31RT 8308.) She claimed that she did not know any details about the offense. (31RT 8309.)

Thereafter, without defense objection, the prosecutor asked several additional defense witnesses if they knew about appellant's conviction for sexual assault in Idaho in 1984, as testified to by appellant's mother. The witnesses either stated that they did not know anything about the Jennifer E. incident or had only heard a "rumor" about it. (See, e.g., 33RT 8579 [prosecutor referred to appellant's mother's testimony regarding appellant's 1984 conviction for sexual assault when questioning a defense witness], 8599 [same], 8740-8741 [same].)

As noted previously, Jennifer E. did ultimately testify in the penalty phase concerning appellant's assault on her in 1984.[44] Specifically, she testified that she lived in Sandpoint, Idaho, in February 1984. She was 12 years old at that time. On February 3, 1984, she and a friend met up with appellant, who was 18 years old. After drinking some vodka, they were walking in an alley behind a theater when appellant pulled her off to one side. Appellant tried to kiss her, but she resisted. They struggled, and appellant asked her if she wanted to have sex with him. She said no. He

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[44] Due to her prior unavailability, she testified out of order in that she testified after the defense portion of the penalty phase. (See 37RT 9644; see also 37RT 9647-9660.)

tried to undo her pants. Appellant punched her with his fist three or four times, hard, on the forehead, near her eyes, and on the jaw, causing her to bite her tongue. He put his hands around her throat and choked her. (37RT 9647-9653, 9669.)

B. Appellant Forfeited His Misconduct Claim

As noted above, there was no defense objection lodged on misconduct grounds when the prosecutor asked appellant's mother and several other witnesses about appellant's mother's testimony regarding the Jennifer E. incident. (See 33RT 8579, 8599, 8740-8741.) As discussed previously, to preserve a claim of prosecutorial misconduct, the defense must make a timely objection and request an admonition to cure any harm. (*People v. Gurule, supra,* 28 Cal.4th at p. 657; *People v. Frye, supra,* 18 Cal.4th at p. 969.)

As there was no timely objection on misconduct grounds, appellant's claim of prosecutorial misconduct claim regarding this testimony is forfeited.

C. In Any Event, The Prosecutor Did Not Commit Misconduct

Even had this claim been preserved, the prosecutor did not commit misconduct. As appellant notes (AOB 231), a prosecutor commits misconduct by asking a witness a question that implies a fact harmful to the defendant unless the prosecutor has reasonable grounds to anticipate an answer confirming the implied fact or is prepared to prove the fact by other means. (See *People v. Earp* (1999) 20 Cal.4th 826, 859-860.) "For a prosecutor's question implying facts harmful to the defendant to come within this form of misconduct, however, the question must put before the jury information that falls outside the evidence and that, *but for the improper question*, the jury would not have otherwise heard." (*Id.* at p. 860; see *People v. Warren* (1988) 45 Cal.3d 471, 481 [describing the gist of

the misconduct as implying in the question "facts [the prosecutor] could not prove"].)

Here, of course, prior to the questioning of the other defense witnesses the jury had heard proper impeachment testimony from appellant's mother to the effect that she had in fact told investigators – albeit mistakenly – that appellant had been convicted of sexual assault arising from the Jennifer E. incident. Accordingly, in this instance the question did not put before the jury information that fell outside the evidence and that, without which, the jury would not have otherwise heard. Thus, there was no misconduct. (See *People v. Earp, supra*, 20 Cal.4th at pp. 859-860.) To the extent that appellant is challenging the questions the prosecutor posed to appellant's mother in this regard, there was no misconduct given that the trial court ruled that the questions were appropriate. A prosecutor simply is not guilty of misconduct when he questions a witness in accordance with the trial court's ruling. (*People v. Rich* (1988) 45 Cal.3d 1036, 1088.)

In any event, the prosecutor did not falsely suggest that appellant had been convicted of sexual assault. Jennifer E. testified that appellant did in fact sexually assault her, and it was undisputed that appellant was charged with attempt to commit a violent injury upon Jennifer E. with intent to commit rape but was allowed to enter a plea to the charge of simple assault, for which he served time in county jail. In other words, he did in fact suffer a conviction stemming from his sexual assault of Jennifer E., the details of which were made known to the jury.

D. Any Misconduct Did Not Prejudice Appellant

Lastly, any alleged misconduct was not prejudicial, as it is not reasonably possible that the jury would have reached a more favorable result as to penalty had the prosecutor not asked the questions at issue. Copies of the Idaho court records regarding the Jennifer E. incident were admitted into evidence, and thus the jurors could have reviewed the

documents themselves in order to ascertain the nature of the offense appellant was charged with and ultimately was allowed to plead guilty to in connection with that incident. (See 18CT 4748-4757; see also 18CT 4743.)

Perhaps more importantly, however, is the fact that, irrespective of what exact crime appellant was allowed to plead guilty to in connection with the Jennifer E. incident, as noted above the uncontroverted testimony evidence which was ultimately introduced on this point clearly demonstrated that appellant's conduct involved a forcible sexual assault and not a mere misdemeanor assault. *Indeed, even Dr. Berlin, one of appellant's own mental health experts, so testified.* (See 35RT 9018 ["At the age of 18, Mr. Krebs was involved in an incident in which he forced himself sexually upon a young lady . . . behind a movie house or a bridge."].)

The jury's penalty determination was the direct result of appellant's heinous crimes and the presence of aggravating factors which clearly outweighed those in mitigation, rather than questions the prosecutor posed to several witnesses regarding what precise criminal offense appellant was convicted of in connection with the Jennifer E. incident. At most, the alleged acts of misconduct were a few isolated instances in a well-conducted lengthy trial in which numerous witnesses testified. (See *People v. Cox* (1999) 20 Cal.4th 936, 961; *People v. Smithey* (1999) 20 Cal.4th 936, 961.) Thus, it is not reasonably possible that the jury would have returned a verdict of life without the possibility of parole rather than death absent the alleged misconduct. (See *People v. Brown*, *supra*, 46 Cal.3d at p. 448.)

XV. Appellant Forfeited Almost All of His Claims of Prosecutorial Misconduct with Respect to The Prosecutor's Opening Statement And Closing Argument at The Penalty Phase, But in Any Event The Prosecutor Committed No Misconduct, Prejudicial Or Otherwise, during Those Arguments

Appellant's next contention is that the prosecutor committed prejudicial misconduct in his opening statement and closing argument at the penalty phase. (AOB 232-241.) This contention is without merit.

A. The Applicable Law

The purpose of an opening statement is not only to inform the jury of the expected evidence, but also to prepare the jurors to follow the evidence and more readily discern its materiality, force, and meaning. (*People v. Coddington*, *supra*, 23 Cal.4th at p. 596; *People v. Dennis* (1998) 17 Cal.4th 468, 518.) With respect to closing argument, the prosecution is given wide latitude during such argument to vigorously argue its case and to comment fairly on the evidence, including by drawing reasonable inferences from it. (*People v. Lee* (2011) 51 Cal.4th 620, 647; *People v. Gamache* (2010) 48 Cal.4th 347, 371.) A prosecutor may vigorously argue his case and is not limited to Chesterfieldian politeness, and may use appropriate epithets. (*People v. Hill*, *supra*, 17 Cal.4th at p. 819; *People v. Williams* (1997) 16 Cal.4th 153, 221.)

To prevail on a claim of prosecutorial misconduct based on remarks to the jury, the defendant must show a reasonable likelihood that the jury understood or applied the complained-of comments in an improper or erroneous manner. (*People v. Berryman* (1993) 6 Cal.4th 1048, 1072; *People v. Clair* (1992) 2 Cal.4th 629, 662-663.) In conducting this inquiry, the reviewing court does not "lightly infer" that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements. (*People v. Howard* (1992) 1 Cal.4th 1132, 1192.)

B. With The Exception Of Some Of His Claims Pertaining To The Alleged Disparagement Of Defense Counsel, Appellant Forfeited His Misconduct Claims Because He Failed To Timely Object To The Prosecutor's Comments At The Time They Were Made

Appellant failed to object to most of the prosecutor's comments which he now alleges constituted misconduct, and thus forfeited these claims. Specifically, he failed to object to the following comments in the prosecutor's penalty phase opening statement: (1) appellant was an "animal" when he bit Anishka C. (29RT 7760); (2) it was "amazing" the defense was asking for leniency in the penalty phase (29RT 7762); (3) the defense did not understand what other people understood about appellant not confessing to bring closure to victims' families (29RT 7765-7766); (4) the defense strategy was a "blame game" (29RT 7766-7767); (5) Dr. Haney's theories were "social study babble" and his claim to fame was having testified for the defense in the "Trailside Killer" case in Marin County (29RT 7768); (6) Dr. Berlin had testified in the Jeffrey Dahmer trial that Dahmer was insane (29RT 7768); and (7) Dr. Dietz thought that Dr. Berlin's theories were "nonsense" (29RT 7769).

Similarly, appellant failed to object to the following comments in the prosecutor's closing penalty phase argument: (1) members of the prosecution team had been working on appellant's case for more than two years, and they realized what the jurors "realize now," i.e., that appellant was one of the of the most cruel, calculating, and brutal individuals on the planet (39RT 10026-10027); (2) defense counsel had to seek Dr. Berlin out from across the country and could not find a suitable expert in California (39RT 10036); (3) the defense was "orchestrated" and a "pathetic blame game" (39RT 10028, 10035-10036); (4) the defense's sexual compulsion theory was "ridiculous" (39RT 10036); (5) the defense was trying to deflect responsibility and lay a "guilt trip" on the jurors (39RT 10035); (6) the

"abuse excuse" had been rejected in the Menendez brothers' trial (39RT 10040); and (7) Dr. Haney had referred to appellant as "Hole Boy" (39RT 10040).

Appellant acknowledges that he failed to timely object to the challenged comments at the time they were made, but nonetheless contends that he should be allowed to raise the claims on appeal because an admonition would not have cured the harm. He also suggests that this Court as a matter of practice has "regularly invoked its constitutional jurisdiction to review claims of prosecutorial misconduct, even in the absence of objection and request for admonition," citing as authority Justice Mosk's dissenting opinion in *People v. Wash* (1993) 6 Cal.4th 215, 276. (AOB 234-235.)

However, appellant fails to show that an admonition by the trial court would have been futile as to those instances of alleged prosecutorial misconduct to which appellant did not object at trial, and thus may not raise them now. Indeed, appellant's proposed rule would excuse an objection in virtually every case. (See *People v. Gurule*, *supra*, 28 Cal.4th at p. 651.) As to the dissent in *Wash*, where Justice Mosk did opine that the prosecutorial misconduct claims raised in that case should be reviewed on appeal notwithstanding the defendant's failure to preserve the issue, no "practice" was announced or even adverted to. Rather, as numerous decisions of this Court after *Wash* have clearly stated, a timely objection on misconduct grounds is generally required to preserve the issue for appellate review. (See, e.g., *People v. Avila* (2009) 46 Cal.4th 680, 710-711; *People v. Schmeck* (2005) 37 Cal.4th 240, 286; *People v. Gurule*, *supra*, 28 Cal.4th at p. 657; *People v. Frye*, *supra*, 18 Cal.4th at p. 969.) Furthermore, the dissent in *Wash* is not binding authority in any event. (See *In re Marriage of Bryant* (2001) 91 Cal.App.4th 789, 795 [a dissenting opinion by a member of this Court is not controlling].)

C. In Any Event, There Was No Misconduct

Even had appellant's claims of misconduct been preserved for appellate review, they are without merit. Respondent will discuss each in turn. Before doing so, respondent notes that the prosecutor's opening statement and closing argument at the penalty phase were fairly lengthy. In them, the prosecutor carefully discussed the evidence and the various aggravating and mitigating factors regarding penalty. (See 29RT 7752-7770 [opening argument]; 39RT 10026-10060 [closing argument].) While appellant has singled out words and phrases, or at most a few sentences, to attempt to demonstrate misconduct, it must be remembered that the reviewing court must view opening statement and closing argument as a whole. (See *People v. Lucas* (1995) 12 Cal.4th 415, 475.) As will be set forth below, there was no misconduct.

1. Use Of Word "Animal" And Disparagement Of Defense Counsel In Opening Statement

First, appellant claims that during his opening argument the prosecutor improperly referred to him as an "animal" and disparaged the motives of defense counsel. (AOB 232-234; see also 29RT 7760, 7763, 7765-7769.) The prosecutor's use of the word "animal" did not exceed the permissible scope of a proper opening statement in view of the anticipated testimony from Anishka C. to the effect that appellant bit her finger during the struggle between the two when appellant broke into her home in 1987 and attempted to rape her. (See 29RT 7805 [Anishka's subsequent testimony on this point].) Although the prosecutor's language may have been "dramatic," his otherwise proper opening statement did not become objectionable because he delivered it in a manner meant to hold the jurors' attention. (See *People v. Dennis*, *supra*, 17 Cal.4th at p. 518.)

Given the circumstances of appellant's rather savage behavior towards Anishka, it is clear that the prosecutor simply meant to convey the

notion that appellant's conduct was inhumane. There was no misconduct in this regard. (See *People v. Dennis, supra,* 17 Cal.4th at p. 518; see also *People v. McDermott, supra,* 28 Cal.4th at p. 1002 [no misconduct in closing argument where prosecutor asserted "I'm not so sure that Maureen McDermott really should be categorized as a human being," and described her as "mutation of a human being," a "wolf in sheep's clothing," a person who "stalked people like animals," and someone who had "resigned from the human race"]; *People v. Ochoa, supra,* 19 Cal.4th at p. 463 [no misconduct where prosecutor used epithets "perverted murderous cancer" and "walking depraved cancer" in referring to defendant during closing arguments]; *People v. Hawkins* (1995) 10 Cal.4th 920, 961 [finding no prosecutorial misconduct in closing argument by describing the defendant as "coiled like a snake" and in comparing the act of sentencing defendant to life in prison as akin to "putting a rabid dog in the pound"]; *People v. Sully* (1991) 53 Cal.3d 1195, 1249 [reference to the defendant as a "human monster" and a "mutation" in closing argument not misconduct, as use of these kinds of terms can constitute permissible comment regarding egregious conduct on a defendant's part].) When the prosecutor's opening statement is viewed as a whole, the use of the word "animal" on a single occasion played an extremely minor role in comparison to the lengthy discussion of appellant's current and prior violent criminal acts.

As to the alleged disparagement of defense counsel's motives and the "legitimacy" of the anticipated mitigating evidence the defense was going to present, there was similarly no misconduct, just appropriate comment regarding the expected evidence, to prepare the jurors "to follow the evidence and more readily discern its materiality, force, and meaning." (*People v. Dennis, supra,* 17 Cal.4th at p. 518.) It is misconduct for the prosecutor to impugn the integrity of defense counsel or to suggest that defense counsel has fabricated a defense. (*People v. Cash, supra,* 28

Cal.4th at p. 732; *People v. Bemore* (2000) 22 Cal.4th 809, 846.) However, a prosecutor is accorded wide latitude in describing the factual deficiencies of the defense case. (*People v. Cash*, *supra*, 28 Cal.4th at p. 733.)

Here, the comments in question regarding the deficiencies of the defense's anticipated penalty phase evidence (e.g., the defense strategy was a "blame game," and the defense experts' opinions were "social study babble" and, according to Dr. Dietz, "nonsense") were proper comments to assist the jury in evaluating the anticipated defense evidence, and did not suggest that defense counsel had fabricated a defense. (See *People v. Lawley* (2002) 27 Cal.4th 102, 156 [prosecutor did not commit misconduct in closing argument in capital case when he stated that defendant had presented no believable defense, and that what he did present was a "farce" and "ludicrous," as this constituted fair comment on the evidence]; *People v. Dennis*, *supra*, 17 Cal.4th at p. 522 [a prosecutor may argue from the evidence that a witness's testimony is unsound, unbelievable, or even a patent lie].)

Nor did the prosecutor commit misconduct during the opening statement by commenting that it was "amazing" the defense was asking for leniency in the penalty phase and that the defense did not understand what other people understood about appellant not confessing to bring closure to victims' families. Both remarks were proper comment on the anticipated defense case and did not in any way impugn the integrity of defense counsel.

Lastly, as to the prosecutor's statement that Dr. Berlin had testified in the Jeffrey Dahmer trial that Dahmer was insane, appellant is not totally correct in his characterization of Dr. Berlin's testimony on this point, i.e., that Dr. Berlin did not testify that Dahmer was insane. (See AOB 233-234.) Even though it appears that Dr. Berlin may not have used the word "insane" when he testified during the Dahmer trial, he did testify that

Dahmer had a mental disorder and, presumably under Wisconsin law, was not "criminally responsible" for his actions, which appears to be tantamount to a finding of insanity in California. (35RT 9087-9088.)

In any event, to the extent that the prosecutor may have inaccurately summarized Dr. Berlin's anticipated testimony on this point in some hypertechnical fashion, the jury likely credited Dr. Berlin's actual testimony on this subject rather than the prosecutor's opening statement. The trial court instructed the jurors that "[s]tatements made by the attorneys during trial are not evidence." (39RT 10142; 23CT 6062, 6131.) It must be presumed that the jury followed this instruction. (See, e.g., *People v. Ledesma* (2006) 39 Cal.4th 641, 684.)

2. Statement Of Personal Beliefs In Closing Argument

Appellant also raises a number of claims of misconduct allegedly committed in closing argument. The first of these is a claim that the prosecutor improperly injected his personal beliefs into the case when he said that members of the prosecution team who had been working on the case for more than two years had come to realize what the jurors "realize now," i.e., that appellant was one of the "most cruel, calculating individuals on the planet." (AOB 235-236; see also 39RT 10026-10027.) This statement was not an improper interjection of the prosecutor's personal beliefs, but simply a permissible "rhetorical device" to urge the jury to return a verdict of death. (See *People v. Maury* (2003) 30 Cal.4th 342, 419 [prosecutors' use of "I believe" before their argument that death was the appropriate penalty did not improperly interject prosecutor's personal beliefs into the argument].)

Even if the remark was construed to reflect the prosecutor's personal beliefs, so long as a prosecutor's beliefs are based on the evidence at trial, he or she may argue emotionally and vividly (as may defense counsel),

using terms that might be thought melodramatic or theatrical. (*People v. Ochoa*, *supra*, 19 Cal.4th at p. 463 [this Court has "declined to find misconduct even in vehement argument"].) Here, as shown by his repeated use of the phrase "you realize *now*" (39RT 10027, emphasis added), the prosecutor's comments regarding appellant being cruel and calculating were in fact based on the evidence adduced at both the guilt and penalty phase regarding appellant's crimes against Newhouse and Crawford, along with other women he had brutally victimized in the past. This fact distinguishes this case from *People v. Bandhauer* (1967) 66 Cal.2d 524, cited by appellant (AOB 235-236), where the prosecutor explicitly referred to facts not before the jury, i.e., the fact that he had come into contact with some "pretty depraved character[s]" during the "many years" he had been a prosecutor. (See *People v. Bandhauer*, *supra*, 66 Cal.2d at pp. 529-530.)

The prosecutor's comments in this case did not in any way diminish the jury's sense of responsibility concerning the ultimate decision as to penalty. Nor did the prosecutor suggest in any way that the jury should abrogate its responsibility to personally determine whether death was the appropriate penalty. There simply was no misconduct in this regard.

3. Referring To Facts Not In Evidence

Appellant also asserts that the prosecutor improperly referred to facts not in evidence when he stated that defense counsel had sought Dr. Berlin out "from across the country," and could not find a suitable expert in California. (AOB 236-238; see also 39RT 10036.) A prosecutor may not state or assume facts in argument that are not in evidence. (*People v. Stankewitz* (1990) 51 Cal.3d 72, 102.) That said, counsel is accorded great latitude at argument to urge whatever conclusions counsel believes can properly be drawn from the evidence. (*People v. Thomas* (1992) 2 Cal.4th 489, 526.)

Here, it appears that the prosecutor was correct in arguing that the defense sought Dr. Berlin out "from across the country": in *his* closing remarks, defense counsel confirmed that the defense, in fact, "went to John[s] Hopkins,"[45] "looking for the best guy we could find." (39RT 10111.) As to the prosecutor's suggestion that a suitable expert could not be located in California, this was a permissible inference from the evidence. To the extent it was not, it was adequately countered by defense counsel's claim that Dr. Berlin was "the best" mental health expert to be found. The prosecutor's statement neither "so infected the sentencing proceeding with unfairness as to render the jury's imposition of the death penalty a denial of due process" (*Romano v. Oklahoma* (1994) 512 U.S. 1, 12 [114 S. Ct. 2004, 129 L. Ed. 2d 1]) nor involved deceptive or reprehensible methods employed to persuade the trier of fact (*People v. Avila*, *supra*, 46 Cal.4th at p. 719).

4. Further Disparagement Of Counsel And Mitigating Evidence

Appellant contends that the prosecutor improperly disparaged his attorney and the mitigating evidence by referring to the defense case as "orchestrated," a "pathetic blame game defense," "ridiculous," an attempt to deflect responsibility, a "guilt trip," and the same "abuse excuse" that had been used unsuccessfully in the Menendez brothers' trial. (AOB 238-240; see also 39RT 10028, 10035-10036, 10040.) As noted above, it is misconduct for the prosecutor in argument to impugn the integrity of defense counsel or to suggest that defense counsel has fabricated a defense. (*People v. Cash*, *supra*, 28 Cal.4th at p. 732; *People v. Bemore*, *supra*, 22 Cal.4th at p. 846.)

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[45] Johns Hopkins University is located in Baltimore, Maryland. (See 35RT 8987.)

Here, however, the challenged remarks did neither, nor did they constitute an unfair disparagement of counsel which directed the jury's attention away from the evidence. (See *People v. Davis* (1995) 10 Cal.4th 463, 539 [no misconduct where prosecutor referred to the use of psychiatric testimony by the defense as "the bottom of the barrel defense" and also referred to "a lot of defense arguments I think was to try to lay a guilt trip on you," as the prosecution did not imply that defense counsel fabricated evidence or otherwise portray defense counsel as the villain in the case].) These remarks constituted fair comment on the defense case, based on the evidence. (See *People v. Lawley*, *supra*, 27 Cal.4th at p. 156; *People v. Dennis*, *supra*, 17 Cal.4th at p. 522.)

Appellant's reliance on *People v. Herring* (1993) 20 Cal.App.4th 1066 (AOB 239-240), in this regard is misplaced. *Herring* reflected an extreme instance of prosecutorial misconduct, and is easily distinguishable from this case. In *Herring*, the prosecutor argued: "[m]y people are victims. His people are rapists, murderers, robbers, child molesters. He has to tell them what to say. He has to help them plan a defense. He does not want you to hear the truth. . . ." (*People v. Herring*, *supra*, 20 Cal.App.4th at p. 1075.) In effect, the argument accused defense counsel of suborning perjury and implied that defense counsel did not believe his own client. It also implied that all those accused of crimes whom defense counsel represented were necessarily guilty of heinous crimes. (*Id.* at pp. 1075-1077.) Here, in sharp contrast to *Herring*, the prosecutor did not say that defense counsel did not want the jury to hear the truth, nor did he accuse counsel of suborning perjury. He did not say that counsel did not believe his own client, who after all did not testify on his own behalf, unlike the defendant in *Herring*. (See generally *People v. Gionis* (1995) 9 Cal.4th 1196, 1220-1221 [distinguishing *Herring*].) Rather, the prosecutor's comment addressed the quality of the defense in terms of

inferences and conclusions that could fairly be drawn from the evidence that was presented.

5. Misstatement Of The Evidence

Next, appellant asserts that the prosecutor misstated the evidence when he said that Dr. Haney had referred to appellant as "Hole Boy." (AOB 240-241; see also 39RT 10040.) As noted above, a prosecutor may not state facts in argument that are not in evidence. (*People v. Stankewitz, supra*, 51 Cal.3d at p. 102.)

Here, appellant appears to be correct when he states that it was appellant, as recounted by Dr. Haney, who called himself the "Hole Kid" (as compared to "Hole Boy," the phrase used by the prosecutor in his closing argument), rather than Dr. Haney using this term himself to describe appellant. (See 36RT 9377.) However, any inadvertent, minor misstatement in this regard by the prosecutor did not constitute an improper attack on Dr. Haney's credibility. Nor was it the type of remark which the jury was likely to have used in an improper or egregious manner in evaluating the appropriate penalty for appellant, especially because, as noted above, the trial court instructed the jurors that "[s]tatements made by the attorneys during trial are not evidence" (39RT 10142; 23CT 6062, 6131), and the jurors could rely on their own recollections of the testimony.

6. Appealing To Passion And Prejudice

Appellant's final claim of misconduct is that the prosecutor explicitly appealed to the passion of the jury by arguing that justice "is not served until the citizens of our community, jurors and citizens alike, are as outraged by what Rex Krebs did as the families of his victims." (AOB 241; see also 39RT 10059.) It is, of course, improper to make arguments to the jury that give the impression that "emotion may reign over reason" and to present "irrelevant information or inflammatory rhetoric that diverts the

jury's attention from its proper role, or invites an irrational, purely subjective response." (*People v. Padilla* (1995) 11 Cal.4th 891, 957; *People v. Lewis* (1990) 50 Cal.3d 262, 284.)

Examined under this standard, there was no improper appeal to the jury's passions and prejudices. The prosecutor's brief and isolated comment regarding the necessity of the community being as outraged by appellant's crimes as the victims' families was not such as to influenced the jury's penalty determination in any improper way. "'Isolated, brief references to retribution or community vengeance . . . , although potentially inflammatory, do not constitute misconduct so long as such arguments do not form the principal basis for advocating the imposition of the death penalty.'" (*People v. Wash, supra*, 6 Cal.4th at p. 262, quoting *People v. Ghent* (1987) 43 Cal.3d 739, 771.) Indeed, numerous decisions have rejected claims of improper appeals to passion and prejudice where the facts were much more objectionable than those at issue here. (See, e.g., *People v. Padilla, supra*, 11 Cal.4th at pp. 956-957 [arguments that defendant should be sentenced to death in order to "save his children"]; *People v. Medina* (1995) 11 Cal.4th 694, 759 [prosecutor asked the jury to "do the right thing, to do justice, not for our society, necessarily or exclusively, but for [the victim] an 18 year-old boy who was just working at a gas station one night"].)

D. Any Misconduct Did Not Prejudice Appellant

Lastly, any misconduct did not prejudice appellant. As noted previously, the jury's penalty determination was the direct result of appellant's heinous crimes and the presence of aggravating factors which clearly outweighed those in mitigation. There is no reasonable possibility that the brief and isolated comments complained of on appeal could have influenced the jury's penalty determination. (See *People v. Wash, supra*, 6 Cal.4th at pp. 261-262 [any conceivable error was harmless where

prosecutor allegedly improperly deflected the jurors' attention from the facts of the case to external considerations about the "community-at-large," as remarks were not particularly inflammatory and did not constitute the principal basis of his argument in favor of the death penalty].)

This case is nothing like *People v. Hill*, *supra*, 17 Cal.4th 800, which appellant cites repeatedly in support of his misconduct claims. (See AOB 230, 237, 239-241.) There, the prosecutor subjected the defense "to a constant barrage of . . . unethical conduct, including misstatement of the evidence, sarcastic and critical comments demeaning defense counsel, and propounding outright falsehoods," and the trial court consistently failed to curb the prosecutor's excesses. (*People v. Hill*, *supra*, 17 Cal.4th at p. 821.) The prosecutor engaged in a pattern of "serious, blatant and continuous misconduct at both the guilt and penalty phases of trial," that, *together with other errors*, required reversal of the judgment. (*Id.* at p. 844; see also *People v. Slaughter* (2002) 27 Cal.4th 1187, 1211 [distinguishing *Hill*].)

In this case, there was no "pattern" of misconduct. Nor is there a reasonable possibility that the jury would have reached a more favorable verdict as to penalty had the alleged acts of misconduct not occurred, especially given the lack of other errors. (See *People v. Brown*, *supra*, 46 Cal.3d at p. 448.)

XVI. ANY ERROR IN ORDERING APPELLANT TO UNDERGO A PSYCHIATRIC EXAMINATION BY A PROSECUTION EXPERT WAS HARMLESS

Appellant also argues that the trial court committed prejudicial error when it ordered him to submit to a psychiatric examination by Dr. Dietz. (AOB 242-244.) Respondent again disagrees.

A. The Relevant Proceedings Below

Prior to the commencement of trial, defense counsel filed a written motion to preclude the psychiatric examination of appellant. The motion asserted that although the defense planned to call Dr. Berlin at the penalty phase and Dr. Berlin would testify that appellant suffered from a mental illness which mitigated his crimes, it was unnecessary for Dr. Dietz to examine appellant, in part because Dr. Berlin would not rely on psychological testing. (19CT 4999-5000.) The motion referred to Dr. Dietz as a "hobbyist," and stated that he was unqualified to perform a medical examination of appellant given that his resume indicated that he was no longer a licensed physician.[46] (19CT 5000.) The motion relied on a magazine article (see 19CT 5005-5012) in support of the proposition that Dr. Dietz was well known to employ "exhaustive interview techniques designed to generate prejudicial fodder for the prosecution," and furthermore stated that Dr. Dietz was "well known for conducting a thorough cross-examination of a defendant and presenting highly inflammatory facts to a jury." (19 CT 5001.) The motion also asserted that the prosecution previously had "full access" to appellant when Hobson interviewed him following his arrest, and that on one day of the

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[46] In point of fact, according to his curriculum vitae Dr. Dietz was licensed to practice medicine in Virginia and Pennsylvania at the time of appellant's trial. (See 22CT 5781; see also 22CT 5776-5777 [copies of medical licenses in those states].)

interrogation, April 27, 1999, Hobson "focused on facts supporting or negating a mental illness and mental health issues." (19CT 4999.)

The prosecution filed opposition to the motion. The opposition recounted the prosecution's prior, unsuccessful efforts to arrange for the prosecution to have an expert examine appellant. The opposition noted that there is no legal requirement that a defendant tender his mental state as a prerequisite to being examined by a prosecution expert, but in any event appellant had disclosed his intent to call mental health experts at the penalty phase. The opposition also pointed out that an expert need not have a medical license to testify about medical issues. (19CT 5132-5137.)

Subsequently, after the conclusion of the guilt phase and out of the presence of the jury, Dr. Dietz testified about his background and why in his opinion it would be helpful to talk to appellant prior to Dr. Dietz testifying in the penalty phase in order to rebut Dr. Berlin's anticipated testimony regarding appellant's sexual sadism. Dr. Dietz noted that he had an ethical obligation to attempt to do so, under the guidelines promulgated by the American Academy of Psychiatry. (28RT 7565-7594.) After hearing argument from counsel, including defense counsel's assertion that the requested examination was prohibited discovery (28RT 7595-7601), the trial court found good cause for the examination, assuming out of an abundance of caution that good cause was required by the caselaw. The court rejected the notion that the requested examination constituted discovery governed by section 1054. The court ordered that appellant submit to an examination by Dr. Dietz. (28RT 7601-7606.)

After conferring with appellant, defense counsel informed the trial court that he had advised appellant not to submit to the examination because in his view Dr. Dietz had already formulated his opinions and because allowing the examination would be unfair. According to counsel, appellant had agreed to follow counsel's advice and refused to participate in

the examination. (28RT 7607.) The subject of a possible jury instruction regarding appellant's refusal to comply with the court's order was subsequently discussed on several occasions, but no jury instruction was ever given on this point due to the trial court's uncertainty about how to word the instruction in a fair manner. (See 28RT 7608; 29RT 7902; 37RT 9574; 38RT 9935-9939; 39RT 9997.)

When Dr. Dietz testified on rebuttal, he stated that he attempted to interview appellant before testifying, but appellant refused. (38RT 9784.) Prior to the prosecution's summation regarding penalty, the trial court stated that the prosecutor could comment on appellant's failure to comply with the court's order. (39RT 9997-9998.) During his summation, the prosecutor briefly noted that appellant refused to comply with the court's order, which was unfair. (39RT 10041.)

B. Although There Was Error On This Point According To A Decision Filed After The Trial Court's Ruling, Appellant Did Not Suffer Prejudice

For many years, a number of cases held that trial courts had the discretion to order defendants to undergo psychiatric examination by prosecution experts, once the defendant had placed his mental state in issue. (See generally *People v. Carpenter*, *supra*, 15 Cal.4th 312; *People v. McPeters* (1992) 2 Cal.4th 1148; *People v. Danis* (1973) 31 Cal.App.3d 782; see also *Buchanan v. Kentucky* (1987) 483 U.S. 402 [107 S.Ct. 2906, 97 L.Ed.2d 336].) However, in 2008, more than seven years after the trial court in this case ordered appellant to submit to an examination by Dr. Dietz, this Court concluded that *McPeters*, *Carpenter*, and *Danis* did not survive the passage of Proposition 115 in 1990, and held that a trial court's order granting the prosecution access to a defendant for purposes of having a prosecution expert conduct a mental examination is a form of discovery that is not authorized by the criminal discovery statutes (e.g., § 1054) or

any other statute, nor is it mandated by the United States Constitution.[47] (See *Verdin v. Superior Court* (2008) 43 Cal.4th 1096, 1106, 1116.) This Court in *Verdin* noted that the Legislature remained free to establish such a rule within constitutional limits. (*Id.* at p. 1116, fn. 9.)[48]

Thus, under *Verdin*, it would appear that the trial court erred in this case by ordering appellant to be examined by Dr. Dietz. However, appellant suffered no prejudice thereby. Given that appellant, following counsel's advice, refused to participate in the examination, the only conceivable prejudice appellant could have suffered in this regard would have been caused by Dr. Dietz's brief testimony concerning his inability to examine appellant before Dr. Dietz testified, and the prosecutor's brief comments in summation to the effect that appellant's refusal to be examined was unfair.

As was the case in *People v. Wallace* (2008) 44 Cal.4th 1032, in which this Court found error under *Verdin* harmless, the trial court's ruling did not prejudice appellant. First, in criticizing the defense expert's conclusions, the prosecution's expert did not rely on appellant's refusal to

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[47] Proposition 115, known as the "Crime Victims Justice Reform Act," added both constitutional and statutory language authorizing reciprocal discovery in criminal cases. (*Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 363-364.) Section 1054, which was added by Proposition 115, states that "no discovery shall occur in criminal cases except as provided by this chapter, other express statutory provisions, or as mandated by the Constitution of the United States." (§ 1054, subd. (e).)

[48] The Legislature promptly did so, by amending section 1054.3, subdivision (b), with the express purpose of responding to *Verdin*. (See Stats.2009, c. 297 (A.B. 1516), § 1.) That statute now authorizes a trial court to order a defendant to submit to examination by a prosecution-retained mental health expert if the defendant has placed in issue his or her mental state. Ironically, if this Court were to order a new penalty phase pursuant to *Verdin*, the trial court would be authorized to once again order appellant to be examined by a psychiatrist retained by the prosecution.

participate in the court-ordered examination. (See *People v. Wallace*, *supra*, 44 Cal.4th at pp. 1087-1088.) Moreover, Dr. Dietz's testimony on this point was brief, as was the prosecutor's commentary on this subject in his summation. Additionally, as was the case in *Wallace*, the brutality of appellant's crimes "weighs heavily in aggravation under section 190.3, factor (a)." (*Id.* at p. 1088.) Accordingly, it is not reasonably possible that the jury would have returned a verdict of life without parole in this case rather than death if the trial court had not allowed Dr. Dietz and the prosecutor to comment on appellant's refusal to cooperate with the court-ordered psychiatric examination. (See *People v. Brown*, *supra*, 46 Cal.3d at p. 448.)

XVII. PENALTY PHASE FACTOR (H), REGARDING A DEFENDANT'S CAPACITY TO CONFORM HIS CONDUCT TO THE REQUIREMENTS OF THE LAW, NEITHER SUGGESTS THAT THE ABSENCE OF MITIGATION IS AGGRAVATION NOR IS UNCONSTITUTIONALLY VAGUE

Appellant's penultimate argument consists of two challenges to the factor (h) penalty phase instruction. (AOB 245-256.) First, appellant argues that the trial court's oral voir dire advisements to jurors giving them the discretion to determine whether evidence was either aggravating or mitigating, combined with the pattern instruction's prefatory language, "whether or not" in factor (h), gave the jury discretion to conclude that the absence of impairment in appellant's capacity to control his behavior was aggravating. (AOB 245-247.)

This contention fails because it is settled that the pattern instruction does not suggest that the absence of a mitigating factor is aggravating. (*People v. Sapp* (2003) 31 Cal.4th 240, 315.) In addition, appellant's concern that the jury might have considered evidence of his sexual sadism and intoxication as aggravating factors in this case is of no moment because such consideration was proper under factor (a), concerning the circumstances of the offense. A jury may consider evidence of a mental disorder as an aggravating factor if it is relevant to the circumstances of the offense. (*People v. Smith*, *supra*, 35 Cal.4th at pp. 354-356 [sadistic pedophilia].)

Next, appellant alleges that factor (h) is unconstitutionally vague. (AOB 249-256.) However, this Court has already ruled that factor (h), among others, is not unconstitutionally vague. (*People v. Lawley*, *supra*, 27 Cal.4th at p. 165.) Appellant nonetheless argues that this factor was intended to encompass as mitigating "any mental disorder, condition or abnormality without limitation" and the jury might narrowly interpret "mental disease or defect" as referring "only to conditions which

'profoundly affect one's view of reality[.]'" (AOB 251.) Assuming arguendo that this is true, it would be of no consequence for the same reasons this Court has repeatedly rejected the argument that the word "extreme" impermissibly restricts the jury's consideration of less-than-extreme mental or emotional disturbances under factor (d). (*Ibid.*) The jury could properly consider all forms of mental disorders when factor (h) is read in conjunction with factor (k). (*People v. Leonard*, *supra*, 40 Cal.4th at p. 1429.)

Appellant argues that the meaning of factor (h) is "elusive" because it is difficult for jurors, in the context of criminal act committed upon an impulse or urge associated with a mental illness, to determine whether "'giving in' or acting upon the urge [is] properly considered an act of free will, or . . . an act evidencing an impaired capacity to control one's behavior[.]" (AOB 251-252.) However, "the difficulty of conceptualization and application inherent" (AOB 252) in this type of task is not a basis for finding factor (h) vague. "'[D]ifficulty in application is not equivalent to vagueness.'" (*People v. Jenkins* (2000) 22 Cal.4th 900, 1052.) It is sufficient that the jury had the differing prosecution and the defense perspectives on this subject to give the sexual sadism evidence moral relevance. "'Competing arguments by adversary parties bring perspective to a problem[.]'" (*Ibid.*) Appellant's attacks on factor (h) therefore fail.

XVIII. APPELLANT'S NUMEROUS ATTACKS ON CALIFORNIA'S DEATH PENALTY SCHEME HAVE BEEN REPEATEDLY REJECTED BY THIS COURT, AS APPELLANT CONCEDES, AND THUS THESE CLAIMS AFFORD NO BASIS FOR RELIEF

Appellant's final contention is a series of sub-claims concerning the validity of California's death penalty scheme. Appellant admits that each sub-claim has previously been rejected by this Court, but raises them in a summary fashion, pursuant to *People v. Schmeck*, *supra*, 37 Cal.4th at pp. 303-305. (AOB 256-267.) Because he offers no persuasive reasons for this Court to reconsider its prior rulings, these claims should be denied.

In recent cases, this Court has confirmed its rejection of all twelve challenges raised by appellant: (a) the law provides adequate narrowing of death-eligible defendants (AOB 256-257; see *People v. Nelson* (2011) 51 Cal.4th 198, 225); (b) there was no error in failing to give proof-beyond-a-reasonable-doubt instructions regarding the existence of aggravating factors, aggravating factors outweighing mitigating ones, and the determination that death was the appropriate penalty (AOB 258-259; see *Nelson*, *supra*); (c) the jury was not required to make written findings at the penalty phase (AOB 259; see *Nelson*, *supra*); (d) factor (a) is a proper aggravating factor (AOB 259-260; see *Nelson*, *supra*); (e) intercase proportionality review is not required (AOB 260; see *Nelson*, *supra*, at p. 226); (f) unadjudicated criminal activity is properly considered at the penalty phase (AOB 260-261; see *Nelson, supra*, at p. 226); (g) the trial court was not required to instruct the jury that mitigating factors could not be used in aggravation (AOB 261; see *Nelson*, *supra*, at p. 226; *People v. Booker* (2011) 51 Cal.4th 141, 197); (h) the decision on whether to seek the death penalty is properly left to prosecutorial discretion (AOB 262; see *Nelson*, *supra*, at p. 225); (i) the death-qualification process does not result in an improperly biased jury (AOB 262-263; see *People v. Howard* (2011) 51 Cal.4th 15, 26); (j) there is no error in considering victim impact

evidence at the penalty phase (AOB 263-264; *see People v. Russell* (2010) 50 Cal.4th 1228, 1264-1265); (k) California's death penalty law and procedures do not violate the International Covenant on Civil and Political Rights or prevailing civilized norms (AOB 264-266; see *Howard*, *supra*, at p. 39); and (l) pre-execution delay does not violate the state or federal Constitutions (AOB 266-267; see *Booker*, *supra*, at p. 197; *People v. Bennett* (2009) 45 Cal.4th 577, 630).

Appellant's repeatedly rejected challenges provide no basis for reversal of his judgment.

CONCLUSION

Based on the foregoing arguments and authorities, the judgment and sentence of death should be affirmed its entirety.

Dated: May 20, 2011

Respectfully submitted,

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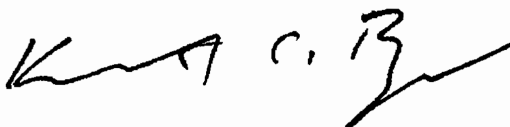

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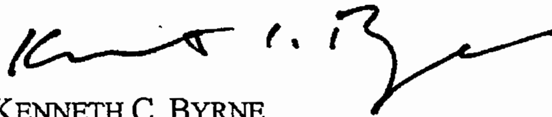
CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 59,886 words.

Dated: May 20, 2011

KAMALA D. HARRIS
Attorney General of California



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DECLARATION OF SERVICE

Case Name: **People v. Rex Allan Krebs** **Supreme Court Case No. S099439**

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 25, 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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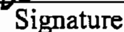
On May 25, 2011, I caused the original and thirteen (13) copies of the **RESPONDENT'S BRIEF** in this case to be delivered for filing to the California Supreme Court at 350 McAllister Street, First Floor, San Francisco, CA 94102-4797 by Federal Express mail service.

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 25, 2011, at Los Angeles, California.

Linda Sarenas
Declarant


Signature

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