In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **MICHAEL AUGUSTINE LOPEZ,** **Defendant-Appellant.**

CAPITAL CASE

Case No. S099549

Alameda County Superior Court
Case No. H-28492A
The Honorable Philip V. Sarkisian, Judge

RESPONDENT'S BRIEF

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INTRODUCTION

Appellant was convicted and sentenced to death after he sexually assaulted and tortured his girlfriend's 21- month old granddaughter, Ashley, over the course of a week, and eventually murdered her. Ashley suffered blunt force trauma over her entire body including her face, and endured severe bruising, trauma and a "penetrating injury" to her genitals. In the three days before Ashley died, she could be heard screaming at 4:00 a.m., before appellant left for work when he claimed he was changing her diaper. The two other children who lived with appellant witnessed the fatal blow when appellant entered their bedroom, picked up Ashley, lifted her over his head, and threw her to the ground, cracking her skull.

In addition to routine claims challenging the death penalty, appellant's primary claims challenge the sufficiency of the evidence for each charge and enhancement, and the testimony of the child witnesses, multiple instructions, allege prosecutorial misconduct, and allege the jury was coerced into reaching a verdict. None of these claims, either individually or cumulatively, deprived appellant of his rights to a fair trial.

STATEMENT OF THE CASE

On May 3, 2000, the Alameda County District Attorney filed an information charging appellant in count 1 with murder and alleging the special circumstance of torture (Pen. Code, §§ 187, 190.2(a)(18));[1] in count 2 with assault resulting in death of a child under eight years old (§273ab); and in count 3 with lewd and lascivious conduct on a child under 14 and alleged an enhancement for great bodily injury (§§ 288(b)(1), 1203.066(a)(2), 12022.8). The District Attorney alleged five enhancements

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

for prison-prior convictions (§ 667.5(b)).[2] (5 CT 991-996.)[3] On May 5, 2000, the District Attorney filed notice to seek the death penalty against appellant. (5 CT 1007.)

On January 22, 2001, appellant was convicted of murder in the first degree with the special circumstance of torture. (72 RT 4728; 6 CT 1287-1289, 1293-1300.) On March 15, 2001, the jury imposed a sentence of death. (83 RT 5242-5243; 6 CT 1471-1472.)[4]

On July 20, 2001, the trial court denied appellant's motion for new trial and his automatic motion for modification of his death sentence and entered an order of commitment pending execution of appellant's death sentence. (83 RT 5224, 5227-5228; 6 CT 1545, 1578-1581.)

The matter is before this Court pursuant to automatic appeal. (83 RT 5243; § 1239.)

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[2] As for appellant, enhancements were alleged as to all but the second of six prior convictions set forth in the information. (5 CT 1000-1002.)

[3] The information charged appellant's co-defendant, Sandra Harris, with the murder (without special circumstance) and assault alleged in counts 1 and 2, added an additional charge in count 4 of child endangerment likely to result in death with enhancement for having caused the death, and set forth one prior conviction not alleged as an enhancement. (§§ 187, 273ab, 273a(a), 12022.95) (5 CT 997-1002.)

[4] The trial court imposed the death penalty for the murder with the special circumstance of torture, and stayed appellant's remaining sentence consisting of 25 years-to-life for the assault on a child, six years for lewd and lascivious conduct with a five-year enhancement for great bodily injury, and five additional years for the prison-prior enhancements. (83 RT 5242-5243.) Respondent notes that, although the trial court listed only four prison-priors at the sentencing hearing, the verdict reflects findings as to five priors which is consistent with the court's sentence. (6 CT 1288-1289.)

STATEMENT OF FACTS

This matter arises out of the death of 21-month old Ashley Dimichino, resulting from injuries that occurred over the course of a week that she stayed with appellant and Sandra Harris, appellant's girlfriend and codefendant. [5]

A. Guilt Phase Evidence

Ashley came to stay with appellant and Harris after her great-grandfather, Jesse Lopez, went into the hospital to be treated for a leg infection. Jesse Lopez and his wife, before she passed away, had taken care of Ashley because Ashley's mother, Nicole, was addicted to drugs and had lost custody of her children. (43 RT 3075.) Ashley and Jesse Lopez lived in Castro Valley (43 RT 3047-3048.), together with Nicole's younger sister, 17-year-old Laurie Strodtbeck. (40 RT 2824; 41 RT 2890; 43 RT 3047-3048, 3050, 3078.)

Sandra Harris was Laurie and Nicole's mother, and Jesse Lopez's daughter. (43 RT 3048.) Harris and appellant lived together in a two-bedroom apartment at a complex in Hayward, about 10 minutes away from Jesse Lopez. (43 RT 3052-3053, 3085; 51 RT 3527-3528.) Appellant and Harris lived with Michael Jr., their three-and-a-half-year-old son, and Sabra Baroni, another of Nicole's children. (41 RT 2886; 42 RT 2992, 3003; 43 RT 3052, 3075; 51 RT 3525-3527; 52 RT 3581; 53 RT 3631-3632.) Sabra and Michael Jr. shared a bedroom but each had separate beds. (51 RT 3528.) Although Laurie lived with her grandfather, she used to visit her mother regularly during the day while appellant was at work and together, Laurie and her mother would use methamphetamines. (43 RT 3080-3081; 44 RT 3145.) Appellant also used "a lot" of methamphetamines. (44 RT

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[5] Harris was a co-defendant at trial, but is not part of this appeal.

3145-3146.) Appellant and Harris would send Laurie out to buy them their drug supply, with appellant providing Laurie with the purchase money. (44 RT 3146.)

In May 1999, Jesse Lopez injured his leg, developed an infection and, due to his chronic diabetes, had to be hospitalized for several days while he was treated. (40 RT 2818; 43 RT 3083.) On Wednesday, May 26, 1999, just before Jesse Lopez was going to be admitted to the hospital, Laurie, who was visiting with her mother, left and went to the doctor's office to pick up Ashley. (43 RT 3049, 3083, 3085; 44 RT 3127.) After getting Ashley, Laurie went back to Harris and appellant's home and asked them to watch Ashley while her grandfather was in the hospital. (43 RT 3086.) Harris and appellant refused saying that they were already taking care of two other children and could not afford to take care of Ashley. (43 RT 3053-3054, 3086.) Laurie went back to the hospital with Ashley. (44 RT 3127-3128.) Jesse Lopez gave Laurie a check to cash for $400 to cover the expenses of taking care of Ashley. (44 RT 3127-3128.)

Laurie brought Ashley home where she took care of her from Wednesday, May 26, until Saturday morning, May 29, 1999. (43 RT 3050, 3052, 3085.) During the three nights that Laurie was in charge, Ashley, consistent with her usual habit, slept through the night, from about 9:00 p.m. to 7:30 or 8:00 a.m., without needing her diaper changed. (40 RT 2819; 43 RT 3051-3052; 44 RT 3109.) During that period, Laurie's friend, Kelly Reiss, came over to help her care for Ashley. (44 RT 3128.)

The weekend after Jesse Lopez went into the hospital was Memorial Day weekend, and Laurie had already made plans to get together with some friends. (43 RT 3082-3083.) On Friday, May 28, 1999, Laurie again asked her mother and appellant to watch Ashley for the weekend. (43 RT 3086-3087.) Again, appellant refused. (43 RT 3087.)

Despite the prior refusals, the next day, Saturday, May 29, 1999, Laurie brought Ashley to appellant and Harris's home. (43 RT 3052-3053.) When they arrived, Ashley was healthy and had no injuries. (40 RT 2842; 43 RT 3089-3091.) Appellant and Harris again refused to take care of Ashley. (43 RT 3053; 44 RT 3130.) Laurie was upset and crying because appellant and Harris were pressuring her to break her plans for the weekend. (44 RT 3130.) Appellant told Laurie that she would have to give them money to take care of Ashley, implying that it was a financial burden on them. (44 RT 3130; 44 RT 3146-3147.) Laurie said she would have to check with her grandfather. (43 RT 3054.) Jesse Lopez later told Laurie to wait until he was out of the hospital. (43 RT 3054.) Eventually, however, Laurie left Ashley with appellant and Harris. (43 RT 3054.) While at appellant's home, Ashley shared a bed with Sabra in the children's bedroom, while appellant and Harris slept in the other bedroom. (51 RT 3528, 3541-3542.)

The next day, Sunday, May 30, 1999, Sandra Harris left home at around 9:00 a.m. to go visit Nicole in jail. (59 RT 3962.). A neighbor, Lupe Murillo, observed Ashley outside from about 9:00 or 10:00 a.m. until about noon, playing with the other two children and some neighbor children. (41 RT 2913, 2927.) Ashley appeared healthy and was walking normally. (41 RT 2914, 2926.) When Harris returned home, at about 2:30 p.m., appellant told her that Ashley had diaper rash. (59 RT 3962-3963.) Appellant also called Laurie that same day and said he and Harris would continue to care for Ashley because Jesse Lopez was too sick to do it. (43 RT 3091.) Later that day, appellant went to Jesse Lopez's home, met with Laurie, and demanded the money that Jesse Lopez had left with her to take care of Ashley. (43 RT 3055.) Notwithstanding her grandfather's earlier request that she wait until he was out of the hospital, Laurie gave appellant $200. (43 RT 3055-3056.)

One day later, on Memorial Day, May 31, 1999, Harris went to Jesse Lopez's home to talk to Laurie Strodtbeck who had been in an argument with a friend. While there, Sandra Harris saw Laurie's boyfriend, David Smith, and "nonchalant[ly]" mentioned to him that Ashley had bruises on her "private parts" from riding a bicycle. (42 RT 2981-2983, 2987-2988.)

Appellant was employed as a janitor at International Window, and routinely worked from 6:00 a.m. to 2:30 p.m., with a short lunch break at approximately 10:00 a.m. (45B RT 3218-3222.) Harris worked every day as assistant manager of the apartment complex. She worked from 3:00 p.m. to 6:00 p.m. in an office next door to, and with a door adjoining, their apartment. (41 RT 2885, 2901, 2911, 2938, 2956; 42 RT 2994-2995.)

On Tuesday, June 1, 1999, Luz Arzate, the apartment manager working in the adjoining office, heard Ashley crying in pain off and on all day, from the moment she walked in the door, at 9:00 a.m. (42 RT 2994-2995, 3005.) When the manager confronted Harris about the crying, Harris told her that Ashley was sick with fever and vomiting, and also that Ashley had bruises. (42 RT 2995-2996.) Laurie had gone to visit Harris for about an hour that day when appellant was out with Ashley. (44 RT 3133.) Laurie left as soon as appellant returned so that she barely saw Ashley. (44 RT 3133.) However, Harris had told Laurie that Ashley had injured herself riding a bike because her feet could not reach the pedals. (44 RT 3132.)

On Wednesday, June 2, 1999, Ms. Arzate again worked her normal 9:00 a.m. to 3:00 p.m. shift, and again heard Ashley crying in pain—even more than the day before. (42 RT 2996.) When Arzate confronted Harris a second time about Ashley's crying, Harris told her that Ashley still was sick, but also told her that Ashley had more bruises every day. (42 RT 2997.) When Arzate asked Harris how the baby would get bruises, Harris told her that maybe Michael Jr. was hitting Ashley. (42 RT 2997.)

At appellant's request, Leonora Murillo, the 14-year-old upstairs neighbor and daughter of Lupe, babysat Ashley and Sabra for a few hours Wednesday afternoon. (41 RT 2932, 2939-2941.) Leonora described Ashley as "scared, tired" and "confused, dazed like." (41 RT 2940.) Leonora was alarmed that Ashley's face was bruised. (41 RT 2940.) Harris told her the bruises were from horseplay. (41 RT 2941.) Harris told police that she heard Ashley crying after appellant changed her diaper before he left for work. (60 RT 4044.)

That same Wednesday, Laurie had gone with Harris to visit Nicole at jail. When they returned to the apartment, Harris showed Laurie Ashley's injuries "in her private area." (43 RT 3058-3059.) Laurie was shocked, and described the injuries to Ashley's genitals, stating, "[i]t was just bruised badly, very badly. It was red and purple and blue. And there was like—it was awful." (43 RT 3059; 44 RT 3134.) Laurie's immediate response was to ask her mother if there were any perverts that lived around there. (43 RT 3059-3060.) Laurie also saw blood on Ashley's diaper, and bruises on Ashley's inner thighs. (43 RT 3060; 44 RT 3100, 3105.) She told her mother that Ashley needed to see a doctor. (43 RT 3061; 44 RT 3103.) Harris's response was that they had no medical insurance and could not afford to pay for a doctor. (43 RT 3061.) Harris also said that she would wait for appellant to come home from work and take her to the doctor later. (44 RT 3134-3135.) When appellant came home, however, he did not want to take Ashley to the hospital. (44 RT 3134-3135.) Later that evening, when appellant came home from work, Ashley suddenly became "very clingy" with Laurie, and would scream whenever Laurie got up to leave. (43 RT 3061-3063.)

On Thursday, June 3, 1999, Laurie saw additional bruises on Ashley's head. (43 RT 3064.) Harris claimed that Ashley had hit her head by rolling off the bed onto a dresser. (44 RT 3105.) Laurie also told police that she

had seen blood on Ashley's diaper. (44 RT 3101.) Luz Arzate, the apartment manager said that on this day, she heard Ashley crying, but "it was more like a weak cry now. Thursday was like a weak and a help cry." (42 RT 2998.)

At appellant's request, the babysitter, Leonora came again that evening to watch Ashley and Sabra. (41 RT 2942.) Leonora described Ashley as "more bruised" on the left side of her face, the side opposite from the bruises she saw the day before. (41 RT 2942.) The bruises were "[p]urple, big." (41 RT 2943.) Ashley was no longer active but just "laying there." (41 RT 2943.) When Harris was changing Ashley's diaper, she pointed to the bruising on Ashley's bottom area which Lupe described as "swollen, big—just big dark, swollen area." (41 RT 2944-2945.) Lupe told Harris that she needed to take Ashley to the hospital. (41 RT 2915.) Harris told Murillo that the new bruises to Ashley's face were caused by Ashley having rolled off the bed and hitting the side of the dresser. (41 RT 2946.) Murillo told Harris that this was impossible because the dresser was too far from the bed for this scenario to have occurred. (41 RT 2947.)

Murillo's older sister, Esmeralda, also saw Ashley Thursday evening and noticed her bruises. (41 RT 2899.) Esmeralda had been out with Laurie and when they returned that evening, she saw Ashley in just her diaper, sleeping in appellant's bed between appellant and Harris. (41 RT 2887.) Shortly thereafter, Ashley woke up, and Esmeralda described her as "tired, really tired," and "really quiet." (41 RT 2880.)

On Friday, June 4, 1999, Harris heard Ashley crying in the morning, around 4:00 a.m., while appellant claimed to be changing Ashley's diaper before he left for work. (60 RT 4044.) The two other children living in the house, five-year old Sabra, and three-and-a-half-year-old Michael Jr. testified that Ashley was crying that morning. They stated that appellant came in the room and they both witnessed appellant lift Ashley up above

his head, and throw her to the ground, or as Michael Jr. described it, "cracked her head." (51 RT 3523; 53 RT 3673-3674.) Ashley stopped crying, and did not "wake up" after this. (51 RT 3523; 53 RT 3673-3674.)

Later that same morning, Harris tried to wake Ashley and she would not stir. (43 RT 3043.) Laurie arrived at the home around 9:00 a.m. (43 RT 3065-3066.) She saw Sabra and Michael Jr. up and about without Ashley. (43 RT 3066-3067.) Harris asked Laurie to check on Ashley, and when she did, it appeared to her that Ashley was still sleeping. (43 RT 3066-3067; 44 RT 3108.)

That same day, appellant arrived at work at his usual start time, at 6:00 a.m. (45B RT 3218-3219, 3222, 3228-3229.) When appellant came home for lunch, at around 10:00 a.m., Ashley was still not up. (43 RT 3068.) Appellant fixed himself something to eat, while Harris went into the bedroom to wake up Ashley. (43 RT 3068-3069.) When Ashley did not respond to Harris's voice, Harris picked her up, and it became clear that Ashley was unconscious. (43 RT 3043, 3069.) Appellant then grabbed Ashley from Harris and began shaking her. (43 RT 3069.) As soon as appellant picked up Ashley, her head flopped to the side. (43 RT 3043.) Laurie told her mother that they needed to take Ashley to the hospital at that moment. (43 RT 3069.) Appellant, while still holding Ashley, said to Harris, "You can't take this baby to the hospital, Sandra, they will think you beat the shit out of this baby. They will arrest you, Sandra." (43 RT 3069-3070; 44 RT 3139.) Harris responded, saying, "Bullshit, I didn't lay a finger on that baby." (44 RT 3143.) When Laurie grabbed her car keys, appellant opened Ashley's eyes claiming that she was responding, when indeed, Ashley was unresponsive. (43 RT 3070.)

Laurie drove Ashley and her mother to the hospital emergency room, arriving shortly before noon. (43 RT 3070; 45A RT 3176.) According to the attending emergency room physician, Dr. Rodrigues, Ashley "was

essentially close to dying" from her head injuries when she arrived. (45A RT 3178-3179.) Dr. Rodrigues noted that Ashley "was also very badly bruised all over her body. Most impressive was her perineal area and her abdominal area." (45A RT 3177.) Dr. Rodrigues noted that Ashley had "extensive trauma to the perineum" that could "absolutely not" be construed as diaper rash. (45A RT 3180.) Based on her examination, Dr. Rodrigues also concluded that none of Ashley's injuries were accidentally caused. (45A RT 3180.) She also noted that Ashley's bruises were in various stages of healing, with some fresh from recent trauma, others from injuries inflicted two-to-three days earlier, and still others from trauma inflicted within the week. (45A RT 3188-3189.) The emergency room nurse, Carol Boynton, suspected that Ashley had been abused based on her observation of Ashley's injuries. (45A RT 3203, 3208-3209.)

Ashley was transported to the intensive care unit at Children's Hospital Oakland where she was examined by Dr. Crawford, the pediatric Medical Director of the Center for Child Protection. (47 RT 3276, 3282.) Dr. Crawford noted that Ashley had more than 100 bruises on virtually every part of her body—arms, legs, belly, back, buttocks and genitals—as well as her face. (47 RT 3282-3297, 3309.) The doctor opined that many of those bruises were consistent with having been punched by an adult fist. (47 RT 3287.) The bruises on Ashley's torso were consistent with her being grabbed by an adult hard enough to have left fingerprints. (47 RT 3288-3289, 3332.) Distinct from having been bruised through trauma, Ashley's ear was also torn, which was consistent with its having been pulled or squeezed hard with a finger or thumbnail. (47 RT 3293-3294.) Dr. Crawford testified that Ashley's "extremely swollen, extraordinarily swollen and bruised" labia with "fairly evenly distributed" bruising was "a crush-type injury," consistent with having been punched, and was not a

straddle injury. (47 RT 3289-3291.) Indeed, Dr. Crawford had never seen that degree of labia swelling before. (47 RT 3290.)

In addition to the swelling and bruising, Ashley's was injured by a penetrating foreign object, consistent with an erect male penis, "inserted very violently into her genitalia." (47 RT 3291-3293.) Dr. Crawford described Ashley's injuries, stating that "an area inside of the genitalia area called the posterior fourchette," was "ripped and torn, basically from where her vagina opens, and the tear extends to the margin of her anus right where the sphincter is," and that trauma alone, such as a kick, could not account for this type of injury. (47 RT 3291-3293, 3296, 3299.) He noted, "[I]n order to cause this laceration, an object was penetrating into [Ashley's] genitalia through the labia majora pushing up towards the posterior fourchette, which is that area right here, and in the context of doing so, it lacerated, tore the tissue." (47 RT 3312.) He also opined that she had been shaken. (47 RT 3334.)

Ashley's injuries demonstrated that she suffered multiple instances of abuse. (47 RT 3300.) Dr. Crawford noted that Ashley would have bled from the genital injury, and it would have been "quite painful for an infant, or toddler, or an adult to have this much tissue torn," and very uncomfortable when Ashley urinated or defecated. (47 RT 3296-3298.) Dr. Crawford also noted that Ashley's genital injuries were at least three days old and consistent with harm from injuries inflicted six days earlier, and that they would have caused her to walk funny. (47 RT 3297-3298.)

Dr. Crawford opined that the nature of Ashley's injuries, including her genital injuries, demonstrated that they were intentional. (47 RT 3305-3306.)

Comparing Ashley's two CT scans, taken at approximately 1:00 and 4:00 p.m. on Friday, Dr. Crawford estimated that the fatal head injury was inflicted between five and ten hours earlier. (47 RT 3301-3303.) He noted

the fatal blow to the head would have rendered Ashley unconscious. (47 RT 3304.)

Ashley never regained consciousness and died from her injuries that night. (43 RT 3070-3071; 47 RT 3304.) Specifically, Ashley died due to blunt force trauma to her head, inflicted within the 24-hour period before she was brought to the hospital, which caused a subdural hematoma, i.e., swelling so great that the pressure on her brain stem caused her to stop breathing. (45A RT 3179, 3181, 3191, 3195; 47 RT 3301, 3319, 3325.)

Before Harris left for the hospital, appellant told her he would take Michael Jr. and Sabra to the babysitter, and meet her at the hospital. Appellant neither took the other children to the babysitter nor went to the hospital. Instead, at 10:30 a.m., after his half-hour lunch break, he returned to work with Sabra and Michael Jr. staying in his truck. (45B RT 3222-3223.) He left shortly thereafter, purportedly to attend to family business and never returned. (45B RT 3233.)

On the afternoon of June 4, 1999, appellant showed up in Modesto at the home of his sister, Patricia Hindman, someone whom he rarely saw. Michael Jr. was with him.[6] (43 RT 3018-3019, 3023-3024.) At the time of this visit, appellant's car was red. (43 RT 3019.) Appellant stayed at his sister's house a short time, roughly 30 minutes. (43 RT 3019.) While there, his mother called and this prompted Patricia Hindman to ask appellant about Ashley. (43 RT 3021.)[7] Appellant told his sister that Ashley had knocked her head on the bed, after which appellant kissed her goodnight, and then, Ashley went to sleep. (43 RT 3022-3023.) Appellant also asked her for directions to the highway. (43 RT 3023.)

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[6] At some point in time, Sabra had been returned to Harris.

[7] Hindman testified that her mother told her "about Ashley," but denied knowing that Ashley had died. (43 RT 3021-3022.)

In mid-June,[8] appellant drove with Michael Jr. to Monte Rio and spent three or four days with his long-time friend and ex-brother-in-law, Isaac Corrales, and Corrales's, girlfriend, Kelly Matheson. (44 RT 3161.) By the time he arrived at Isaac Corrales's home, appellant had changed his car color from red to gray. (44 RT 3161-3162.)

Meanwhile, appellant was terminated from his job for failing to show up to work for three days. (45B RT 3223, 3225.) Nearly a week after Ashley was hospitalized, on June 10, 1999, appellant called his boss, Rick Johnson, and told him that he had not returned to work because of a "family crisis." (45B RT 3225.) He asked Johnson to leave his final paycheck underneath a garbage can at the office so he could pick it up later that evening. (45B RT 3226.) Johnson refused this arrangement since company policy precluded release of the check without his signature. (45B RT 3226.) Appellant told Johnson that he had some problems he had to deal with that prevented him from coming in person to pick up his check. (45B RT 3227.) Instead, appellant sent Kelly Matheson to pick up the check for him with a note authorizing its release. (45B RT 3226-3227, 3229-3230.) Isaac Corrales and Kelly Matheson traveled the distance from Monte Rio to Hayward since appellant had promised to pay them for feeding and clothing Michael Jr. during their stay. (44 RT 3162, 3171.)

Isaac Corrales said that appellant told him a number of ways that Ashley had been hurt before he left home, namely that Michael Jr. hit Ashley on the head with a toy-box lid, another boy hit her with a toy while playing, and that Ashley had been hurt on a bike. (44 RT 3163-3165, 3167, 3169-3170.) Isaac Corrales also claimed that appellant said that Ashley

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[8] The record is silent as to appellant's whereabouts between June 4 when he left his sister's house and mid-June which was the estimate given for his arrival in Monte Rio.

was fine when he kissed her goodnight, and that it was his idea to take Ashley to the hospital the next day when she did not wake up. (44 RT 3164-3166.)

Appellant was apprehended on June 29, 1999, after a neighbor, Melissa Herrrera, saw him lurking around at the apartments. Herrera knew the police were looking for appellant so she called them to report him. (57 RT 3870.)

Immediately after Ashley's funeral, Sabra told her aunt, Laurie Strodtbeck, that she had walked into appellant's bedroom and saw him thrusting his torso on Ashley. (52 RT 3621-3622.) Following Harris's arrest, Sabra and Michael Jr. were removed and placed in foster care. While in foster care, Michael Jr. independently told people that appellant had thrown Ashley to the floor, cracking her head on the ground. (53 RT 3703-3704.) Ashley's aunt, Cindy Jardin, testified that shortly after she took custody of Sabra, in mid-July 1999, Sabra told her that appellant had come into her room, hit her in the chest and Ashley in the stomach, removed Ashley to another room where he ripped off Ashley's diaper and beat her in the vaginal area while Ashley screamed. (52 RT 3584-3585.) Sabra also told her next foster mother, Debra Karavias, who took custody in January 2000, that appellant had put his genitals on Ashley's genitals. (52 RT 3613-3616.)

On June 6, 1999, Harris called police and provided them with a pair of shorts and a T-shirt that she had seen him wearing on late Saturday evening of Memorial Day weekend, when Harris went to help Laurie hide her car and left appellant was left alone with Ashley. (44 RT 3094-3096; 48 RT 3353, 3362-3363, 3370-3371.) Harris told police that the clothing had been hanging on the bathroom door. Although police had previously searched the apartment, they had not seen the clothing. (48 RT 3361.) Testing of these items revealed a spot of Ashley's blood. (50 RT 3467, 3500.)

Appellant's defense was that it was reasonable to conclude that someone else caused Ashley's injuries and death; that drugs and alcohol would have vitiated appellant's capacity to form an intent to commit the charged crimes; that the assault of Ashley was not sexual; and that, even assuming it was, the injuries to her genitals were not fatal and occurred three days prior to death. (68 RT 4543, 4551-4553; 69 RT 4595.)

The defense suggested that Ashley's injuries could have been caused by appellant's three year old son, Michael Jr. since Michael Jr. had been observed hitting, kicking, or choking other children, or by an eight-year-old neighbor, Rouslen, who had been observed saying sexually suggestive things to the other children and who co-defendant Harris claimed, had poked Ashley in the genitals with a stick used to lock sliding aluminum windows. (48 RT 3366; 53 RT 3543-3646; 53 RT 3653-3656 3709; 59 RT 3969; 69 RT 4577-4586.)

The defense also suggested that Ashley's aunt, Laurie Strodtbeck, a methamphetamine addict, could have been responsible for Ashley's abuse and death since she was with Ashley before she brought her to appellant's home, and despite the fact that Ashley was unconscious when Laurie arrived that morning, was alone with her for some period of time she and Harris brought Ashley to the hospital emergency room. (69 RT 4599-4600, 4602.) The defense further suggested that Ashley's grandmother - appellant's co-defendant - Sandra Harris, had motive and opportunity to have inflicted abuse and the fatal injuries. (69 RT 4602-4605.) Indeed, the defense suggested that Laurie Strodtbeck and Sandra Harris could have acted in concert in inflicting the abuse and causing Ashley's death. (69 RT 4606.)

B. Penalty Phase Evidence

1. Prosecution evidence in aggravation

In its case-in-chief, the state presented evidence of six instances of prior conduct involving violence on the part of appellant, five of which involved appellant's arrest and prosecution.

a. Save-Mart shoplifting

The first instance occurred in October 1992, when appellant was detained for shoplifting some meat by the clerk of the store. Appellant was taken to an office and police were called. Prior to the arrival of the police, appellant tried to leave and when the clerk attempted to restrain him, the two wrestled and appellant was gouging the clerk's eyeball. (74 RT 4766-4769.) As a result of the fight, the clerk's eye was "a little scratched," and his shirt was ripped. (74 RT 4774.)

When police arrived at the scene, appellant was struggling with store personnel. Police restrained him with handcuffs. Appellant became violent, kicking toward the police officer. (74 RT 4775-4777.)

b. Alpha Beta Foods shoplifting

In May 1986, appellant was detained by store personnel for shoplifting a bottle of Southern Comfort. When police arrived, appellant was already in handcuffs. While the officer was getting information regarding the theft, appellant lunged up from the chair he was sitting in and hit the officer with his shoulder and elbow, knocking the officer back a bit, but otherwise not injuring him. While leaving the store and getting into the police car, appellant again threw his shoulder into the officer, saying "You better not take me to jail, better not book me." Once at the jail, appellant also threatened the officer. According to the officer, appellant said he was going to "fuck me and my family up," and that he "could see my wife with her panties pulled down." (74 RT 4782-4786.)

c. Knife assault on estranged wife and step-son

Donna Thompson, appellant's estranged wife,[9] testified regarding an incident in August of 1991 involving herself, Patrick, her 15-year-old son from a prior marriage, and appellant. Although she and appellant were living apart at the time, he would not leave her alone, coming over regularly. On August 26, 1991, appellant came to Thompson's house after having been released from jail. Appellant grabbed a knife from her kitchen and chased Patrick, who fled to the bathroom. When Ms. Thompson tried to interfere, appellant lunged at her face with the knife, although he missed her. She managed to hit his arm, knocking the knife away, and called the police. (74 RT 4796-4798.) When appellant was arrested, he claimed that Patrick had pulled a gun on him. Patrick, when questioned, stated that he had gone to get a pellet gun. (74 RT 4815-4816.) Appellant subsequently pled no contest to a violation of § 417(a)(1), exhibiting a dangerous and deadly weapon. (PE 68, 74 RT 4818.)

d. Assault on estranged wife

In January 1994, Ms. Thompson was working for the Salvation Army. Part of her job was to make bank deposits. Appellant, who was drunk, was driving Ms. Thompson's car when they got into an altercation. Appellant was "yelling and screaming and trying to hit" her. Ms. Thompson had her hand on the door and appellant, who had stopped to avoid hitting another car, suddenly shoved her out of the car. Appellant hung on to the money that was to have been deposited, "playing games" with Ms. Thompson by calling her to say he had the checks. She ultimately lost her job. (74 RT 4798-4799.) On cross-examination, Ms. Thompson was asked if she ever

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[9] Ms. Thompson testified at the trial that, although she had wanted to divorce appellant for some time, she either did not have an address for him to be served, or he was in and out of jail. (74 RT 4798.)

threatened to have appellant killed. In response she said, "No, but he has me. He said the Mexican Mafia would kill my son and my brother. But I've never threatened that with him." (74 RT 4806-4807.)

e. Assault on Michael Lopez, Jr.

Julieta Romero, a young neighbor of appellant and Harris, testified about an incident where appellant hit Michael Jr. some time prior to Ashley's murder. Ms. Romero stated that Michael Jr. was not listening when he was told to go inside. She said she saw appellant "grab him and picked him up by the hand and got a stick and hit him like a piñata." (75 RT 4825.) Appellant then dropped the stick and continued hitting Michael Jr. with his hand. Ms. Romero estimated that appellant hit Michael Jr. 20 times with the stick before hitting him with his hand. (75 RT 4826-4827.)

f. December 1990 assault

In December 1990, Officer Tom Haselton was working in Union City and responded to a report of an unauthorized vehicle at the sanitation plant. (75 RT 4834-4835.) Appellant was the driver of the car. Officer Haselton had appellant perform some field sobriety tests which resulted in appellant being arrested for DUI. When Officer Haselton placed appellant in handcuffs, he became violent and tried to kick the officer. Once appellant was placed in the patrol car he began kicking the inside of the car. (75 RT 4837.) Appellant was then placed in a transport van to be taken to the police station. When the van arrived at the jail and appellant was being removed, he "tried to get a little bit of momentum and he jumped out and tried to jump on top of [another officer] with his knees." (75 RT 4848.) When the officer pushed appellant back against some lockers, appellant split his lip and was transported to the hospital. (75 RT 4848-4849.)

2. Victim impact evidence

The jury also heard testimony from various family members regarding the impact of Ashley's death on their lives. Jesse Lopez, Ashley's great-grandfather, told them how his world turned upside down. He described Ashley's radiant smile and good-nature. (76 RT 4857-4859.) Ashley's aunt, Laurie Strodtbeck, talked about her sadness and loss, and the difficulty in having to say good-bye to a child who, just weeks before, was "playing around like any normal child would." She also talked about having lost everything due to all of this, including her niece and her mother (appellant's co-defendant). (76 RT 4864-4867.) Finally, the jury heard from Maria Demichino, Ashley's paternal great-grandmother. She spoke of her sadness over Ashley's death and of arranging and paying for the funeral. She said that she visits Ashley's grave every Sunday after church. (76 RT 4869-4871.)

3. Defense mitigation evidence

In mitigation, appellant called a number of witnesses, beginning with a clinical neurophsychologist. Nell Riley, Ph.D., testified that she saw appellant in December 2000 and administered several tests to assess him. Although she stated that his IQ score was 66, she emphasized that she did not find him to be mentally retarded as he suffered from no real adaptive functioning deficits. (77 RT 4887-4890, 4912.) Dr. Riley talked about appellant's low test scores in reading and math, where he functioned between a third and fifth grade level. (77 RT 4888-4889.) She also noted that he told her he had been in special education classes throughout school. Noting his occupational status as a janitor, Dr. Riley indicated that his life history seemed consistent with her findings of low function. She reiterated, however, that appellant's ability to hold a job, have a house, drive a car, and "do what pretty much normal people do," prevented a mental

retardation diagnosis. (77 RT 4890.) Dr. Riley also noted that many of appellant's siblings had been in special education classes in school. She also mentioned that appellant told her of being in an auto accident that resulted in a coma lasting for several days, which Dr. Riley indicated could have caused, or contributed to, certain of appellant's limitations.[10] (77 RT 4891.)

Appellant called two police officers who were involved in investigating the allegations relating to January 1994 assault on Donna Thompson. Officer Greg Olmstead indicated that his original report of the incident reflected that Ms. Thompson (then Lopez) stated appellant threatened to "smash her face in," stopped the car and told her to get out. The report also indicated that appellant had been calling her to say that he had the money and checks belonging to the Salvation Army. Further contact one week later indicated that appellant said he was not going to give back the money. (78 RT 4954-4955.) Charles Rhoades, a retired police officer, indicated that the report he obtained from Donna Thomson reflected a greater level of violence than what had been reported to Officer Olmstead. He also indicated that, although he referred the matter to the District Attorney's Office, they had declined to prosecute. (78 RT 4956-4959.)

Two co-workers testified in appellant's behalf. They told the jury that appellant would bring his kids – Sabra and Michael Jr. – to work to celebrate co-worker's birthdays, and that they seemed happy. Appellant would bring people flowers or birthday cake on special occasions. In addition, appellant often spoke of religion. Both co-workers identified

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[10] Dr. Riley could not confirm the accident because no medical records were available. Brian Olivier, a private investigator, later testified that he attempted to obtain those records, but they had been destroyed due to their age. (78 RT 5007-5009.)

photographs of various employees taken with appellant's children. (78 RT 4962-4971.)

Pilar Ford, a neighbor, spoke of appellant's church attendance and Michael Jr.'s dedication ceremony. (78 RT 4975-4976.) Several family members testified to appellant's care and concern for them or their children, and spoke of gifts he had given them. (78 RT 4979-5002.) Tamy Hutchinson, recalled appellant bringing Michael Jr. and Sabra to watch his nephew's Little League games. (78 RT 5003-5005.)

Appellant's mother and father also testified. Appellant's mother, Delores Lopez, told the jurors that he was number six of ten children. None of the boys, including appellant, completed high school, and only three of the girls did. Appellant did complete his GED while in prison. She also talked about appellant's drawings, several of which were introduced. She also talked about appellant's accident which left him in a coma for four days and that afterwards he was different, not as happy. Mrs. Lopez stated that appellant had a drinking problem, but that he stopped drinking when he started going to church. She stated that appellant would bring Sabra and Michael Jr. to family functions, but not Sandra. She also claimed that appellant did not discipline Michael Jr., and, that while appellant himself had been spanked with a belt on occasion while growing up, he told her that you should not spank kids with belts. (79 RT 5017-5026.)

Appellant's father, Alex Lopez, spoke of his own military service in World War II and Korea, including being awarded two Purple Hearts and a "brown [sic] star." He also spoke of having to work a lot to provide for his family and that the kids had to pitch in. Mr. Lopez did not hit his children, stating that he would only have to "look at them like that," if they were misbehaving. Because he lived in the same apartment complex as appellant, Mr. Lopez regularly saw appellant and Michael Jr. together. Although he described Michael Jr. as sometimes being out of control, he

never saw appellant hit the child. Mr. Lopez knew Sabra from family gatherings and babysitting, but he did not know Ashley. (79 RT 5027-5031.)

Both of appellant's parents told the jury that they loved appellant and wanted him to live. They have visited him since he was incarcerated and would continue to do so. Alex Lopez again pointed to his own military service and wished that appellant could be spared. (80 RT 5047-5052.)

4. Rebuttal evidence

In rebuttal, the state submitted evidence that appellant had committed welfare fraud by failing to report income while he was receiving benefits. The amount of the overpayment was $2705.00. When confronted, appellant admitted his failure to report and asked to be allowed to repay the amount. He was not charged with fraud. (80 RT 5053-5062.)

ARGUMENT

I. ADMISSION OF TESTIMONY BY CHILD WITNESSES WAS PROPER

Appellant claims that his federal and state constitutional rights were violated when the trial court allowed testimony by six-and-one-half-year-old Sabra and five-year-old Michael Jr. Specifically, he claims a statutory violation under Evidence Code section 702, and violation of his right to due process claiming that the trial court erred in finding the children's testimony reliable, trustworthy, and that it was based on their personal knowledge. (AOB, p. 33.) Contending that the children's testimony was indeed untrustworthy, appellant asserts that his punishment of death, resting upon this evidence, violates the Eighth Amendment prohibition against cruel and unusual punishment. (AOB, pp. 32-88.) These claims are without merit.

A. Introduction

Sabra Baroni was five years old at the time she witnessed events surrounding appellant's abuse and murder of Ashley, and she was six-and a-half years old at the time she testified. (51 RT 3513, 3524.)

Michael Jr. was three-and-a-half years old when Ashley died, and was nearly five[11] when he testified. (53 RT 3671.)

On November 6, 2000, the trial court heard appellant's motion to have Sabra determined incompetent, having reviewed the written motion and opposition. (39 RT 2681; 5 CT 1117.1-1117.9.) Defense counsel argued that, notwithstanding the findings of the magistrate during the preliminary hearing, the trial court was required to conduct a hearing to determine competence to testify, and that, in any event, based on the preliminary hearing testimony, Sabra was unable to communicate effectively and showed signs of having been coached. (38 RT 2684-2689.) The trial court denied the motion based on the findings made by the magistrate who heard Sabra testify at the preliminary hearing, noting that the defense's suggestions of brainwashing and instances of inconsistent statements would be "fair game" for cross-examination. (38 RT 2693-2694; 5 CT 1147.)

As to the demand for a second competence hearing, the trial court stated:

> We do have a judge who listened to the minor testify at the preliminary hearings. He made some comments, expressed some concerns. But under 701, he did find her to be qualified.
>
> And I guess the issue is do I have to revisit that? Do we have to put this child through another preliminary proceeding outside the presence of the jury before we decide whether she can testify at the trial?

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[11] Michael Jr. testified on December 5, 2000. His fifth birthday was in January 2001. (53 RT 3666.)

> And I don't see, you know, any authorities or any cases that—at least I haven't seen any yet—that indicate that's a requirement.
>
> We have the judge's findings, factual findings. He listened to her. And unless counsel can furnish me with some authority that indicates I'm required to conduct my own hearing as to her competency, I'm not going to do so.
>
> And based on Judge Picetti's findings, accordingly, I'll deny the defendant's motion to exclude that child's testimony.

(38 RT 2693.) The trial court reiterated this ruling later on, noting that, if Sabra's trial testimony proved incompetent after direct examination, it would revisit its initial ruling. (38 RT 2714-2715.)

During the November 6 hearing, appellant stated his intent to make a similar competence motion regarding Michael Lopez, Jr., if the prosecution chose to call him as a witness. Appellant subsequently filed a motion in limine to preclude Michael Jr.'s testimony. (38 RT 2693, 2713; 5 CT 1140-1144.) The court indicated that a hearing regarding Michael Jr.'s testimony would be held prior to his actually being called. (38 RT 2713.) That hearing was held on December 5, 2000. (53 RT 3665-3670.) The parties questioned Michael Jr. about his ability to distinguish between the truth and a lie, and established that he would tell the truth. (53 RT 3665-3667.) Based upon his statements, the trial court ruled that Michael Jr. would be allowed to testify. (53 RT 3670.)

B. The Trial Court Did Not Err in Admitting the Testimony of Sabra or Michael Jr.

Appellant claims that the court erred in admitting the testimony of Sabra and Michael Jr. because there was insufficient showing that these witnesses had personal knowledge of the events to which they testified (See Evid. Code § 702; AOB, pp. 32-88.) Witness competence to testify actually involves two aspects – the ability to communicate and understand the obligation to be truthful, and personal knowledge of the subject matter

of their testimony. The party challenging the competency of a witness bears the burden of demonstrating disqualification. (*People v. Anderson* (2001) 25 Cal.4th 543, 573.)

The determination of a witness's "[c]apacity to communicate, or to understand the duty of truthful testimony, is a preliminary fact to be determined exclusively by the court," and the "court's determination will be upheld in the absence of a clear abuse of discretion." (*Id.*) As noted above, the trial court found, based on the findings of Judge Picetti at the preliminary hearing, and its own observations of Michael Jr. in the jury-out hearing, that the children were capable of communicating and understanding the difference between a truth and a lie. Appellant does not appear to challenge those findings here, relying solely on the "personal knowledge" prong contained in Evid. Code § 702.

Section 702's requirement of "personal knowledge" deals with the witness's "capacity to perceive and recollect particular events." (*Anderson, supra,* 25 Cal.4th at p.573.) This is fundamentally different from a determination that grounds for impeachment exist. Under Evid. Code § 702, "the court may exclude the testimony of a witness for lack of personal knowledge *only if no jury could reasonably find* that he has such knowledge." (*Anderson, supra,* 25 Cal.4th at p. 573 [emphasis in original].) "*[I]f there is evidence that the witness has those capacities*, the determination whether he in fact perceived and does recollect is left to the trier of fact." (*Id.* at p. 573-574 [emphasis in original].)

Here, there was no evidence that the children lacked the ability or opportunity to perceive the events leading to Ashley's death, and that formed the basis of their testimony against appellant. In fact, it was undisputed that the children all slept in the same bedroom, with Ashley and Sabra sharing a bed. (51 RT 3528.) Rather, appellant asserts only that their

inconsistent statements and factors such as interviewer bias and the use of leading questions evidenced "brainwashing."

C. There Was Sufficient Evidence that the Witnesses Had Personal Knowledge of Appellant's Actions

Appellant argues there was insufficient foundation for Sabra and Michael Jr.'s testimony by setting forth purported inconsistencies in their testimony about their personal knowledge of the events they witnessed. This contention fails as the record establishes that the witnesses indeed had personal knowledge. Moreover, inconsistent testimony is insufficient to undermine the substantial evidence that established personal knowledge since the jury was able to judge the children's testimony in light of their entire testimony and all inferences are to be drawn in favor of the verdict. """Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citations.]""" (*People v. Avila* (2006) 38 Cal.4th 491, 589.)

1. Sabra's testimony

Sabra and Ashley, along with Michael Jr., shared a bedroom in appellant's apartment, with Sabra and Ashley sharing a bed. Sabra provided testimony about the lewd and lascivious conduct by appellant, his physical assault on Ashley by punching her in the diaper area, and of the fatal blow inflicted early Friday morning.

a. Lewd and lacivious conduct

Sabra stated that she had seen appellant walk around the house without pants on, and that when he did so she could see "his privates." (51 RT 3519.) The prosecutor then asked if she had ever seen appellant do anything with his privates and Ashley's privates. After some reluctance,

and an indication that it was embarrassing to speak of, Sabra demonstrated appellant's actions:

> THE COURT: What did he do Sabra?
>
> MR. ANDERSON: May the record reflect – I don't know the jury can see – she took her hands, put her arms up and made a motion going towards her body.
>
> Q: Is that what you did, Sabra?

A: (witness nods head).

> Q: Is that what you saw Big Mike[12] do with Ashley?
>
> A: (witness nods head).
>
> THE COURT: She nodded affirmatively to those last two questions.

(51 RT 3519-3520.) On cross-examination Sabra confirmed that she personally saw appellant thrusting his groin area toward Ashley's groin:

> Q: Now, do you remember when you testified in Hayward when Ms. Horn was asking you questions, she asked you if you ever saw -- now I'm talking about in Hayward in court -- she asked you if you ever saw Big Mike take Ashley and go like this against his privates, do you remember that?
>
> A: (witness shakes head).
>
> Q. Okay. You're shaking your head no. Sabra, I think you may have said this morning that you saw, or actually the district attorney made some motion, that you saw Big Mike holding Ashley and going something like this with her. And I'm moving my arms towards my body. Did you say you actually saw that?
>
> A. Yes.
>
> Q. Okay. Did you actually see that or did somebody tell you that's what you should remember seeing saw that?

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[12] Defendant was referred to as "Big Mike," to distinguish him from Michael Jr., who was referred to as "Little Mike." (42 RT 3003-3004.)

A. Saw that.

Q. I'm sorry?

A. Saw that.

(51 RT 3551-3552.)

b. The "diaper bruise"

Sabra testified that she saw appellant punch Ashley "in her privates," and demonstrated by punching with her right fist in a downward motion. She indicated that Ashley was crying when he did this. (51 RT 3517-3518.)

c. The fatal blow

Sabra testified that she remembered the night that Ashley died. (51 RT 3520.) She saw appellant come into their room:

[MR. ANDERSON] Q: Now, Sabra, *do you remember* the night that Ashley never woke up again?

A: *Yes.*

Q: Did you see Big Mike that night?

A: No.

Q: Well –

MR. HOVE: I'm sorry, what was that answer?

THE COURT: Answer was "no."

[MR. ANDERSON] Q: *Do you remember* if Big Mike came into the room the night that Ashley died?

MR. HOVE: Objection, that's been asked and answered already. She said she didn't see –

THE COURT: Overruled.

THE WITNESS: *Yes.*

MR. CANNADY: Objection, leading and suggestive.

(51 RT 3520-3521.)

Sabra was in the room when appellant grabbed Ashley, hiding under the covers because she was afraid. When asked what appellant did, Sabra testified that appellant had thrown Ashley to the ground, repeating her answer three times before it became audible, and confirming it a fourth time with a nod. (51 RT 3522.) When the prosecutor asked Sabra to perform a physical demonstration, Sabra indicated how appellant held Ashley, but refused to act out appellant's role in committing the murder. (51 RT 3522-3523.) Rather, the prosecutor took on that gruesome part, and Sabra testified that the prosecutor's demonstration was indeed accurate. (51 RT 3521-3523.)

> [MR. ANDERSON] Q: Now, *do you remember* how he held Ashley the night that she died?
>
> MR. HOVE: Objection, that assumes a fact not in evidence.
>
> THE COURT: Overruled.
>
> THE WITNESS: *Yes.*
>
> [MR. ANDERSON] Q: *Do you remember*? *And how did he hold her*?
>
> A: (*Indicating*).
>
> Q: Come here for a second Sabra, okay?
>
> A: (Witness shakes head).
>
> DEFENDANT HARRIS: She's afraid of him.
>
> THE COURT: Please, Mrs. Harris. Please.
>
> [MR. ANDERSON] Q: Sabra, can you stand right here, with Mommy right here?[13]

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[13]The prosecutor refers to Harris as Sabra's "Mommy," "Emma," or "Amma." (51 RT 3567; see 51 RT 3528; 52 RT 3620-3621.)

MR. HOVE: Can the record indicate she is shaking her head in a "no" fashion?

[MR. ANDERSON] Q: Can you stand right next to Mommy? Pretend this is Ashley. Can you show me how Big Mike held Ashley the night she died?

Like that?

A: (Witness nods head).

Q: *Did he do something with Ashley?*

A: *Yes.*

Q: *What did he do?*

A: (Inaudible response).

Q: *He what?*

A: (Inaudible response).

MR. HOVE: I'm sorry, Judge.

[MR. ANDERSON] Q: *What did he do when he held her like this?*

A: *Threw her on the ground.*

Q: Threw her on the ground?

A: (Witness nods head)

THE COURT: Nodding affirmatively.

[MR. ANDERSON] Q: Did he hold her like that above the head?

A: (Witness nods head).

Q: Did he throw her on the ground?

A: (Witness nods head).

Q: Was it like this?

A: (Witness nods head).

THE COURT: The witness has nodded affirmatively.

MR. ANDERSON: May the record reflect, Your Honor, I took People's No. 11, placed it up on my head and threw it to the ground in a downward thrust?

MR. CANNADY: May the record reflect it was arm's length he held it above his held, the doll? Thank you.

[MR. ANDERSON] Q: Was Ashley crying before he threw her to the ground?

A: Yes.

Q: What *were you doing, Sabra?*

A: *Hiding under the covers.*

Q: I'm sorry, say that again?

A: Hiding under the covers.

Q: You were under the covers?

A: (Witness nods head).

Q: Were you scared?

A: (Witness nods head).

THE COURT: Nodding yes.

[MR. ANDERSON] Q: When Big Mike threw her on the ground, did Ashley cry ever again?

A: No.

(51 RT 3520-3523, italics added.)

Viewing Sabra's testimony and reluctant demeanor as a whole, the record demonstrates that she was present and witnessed appellant's violent murder of Ashley, even if she could not bring herself to personally imitate appellant's actions when he inflicted the fatal blow. Indeed, Sabra's

testimony established that she was in close proximity when these events occurred since she shared a bed with Ashley. (51 RT 3541-3542, 3554.)

The defense contention that Sabra was inaudible, or that her personal knowledge was merely acknowledgement of leading questions is belied by the record. When defense counsel argued that Sabra was inaudible, the court indicated that most of her answers were being heard.[14] Moreover, the record shows that Sabra's testimony was not unduly influenced by the form of the questions and indeed, established that she had personal knowledge of the events to which she testified. Rather than passively or reflexively agreeing with the prosecutor's questions, Sabra was specific in the facts that established her personal knowledge. She testified, for example, that she and Ashley were together because Ashley had come to live *with her*, rather than her having gone to live with Ashley:

> Q: At some point, did you live with Ashley or did Ashley come and live with you?
>
> A: Live with me.
>
> Q: Live with you?
>
> A: (witness nods head).

(51 RT 3515.) Sabra similarly corrected defense counsel for Harris when his question suggested one answer, but she provided another. (51 RT 3555.)[15] She also testified that she did *not* see appellant hit Ashley on the head, or in places other than her genitals, demonstrating that she was

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[14] To the extent that Sabra did nod, or specific answers were inaudible, the record accurately reflects that fact, as with any witness who fails to verbally respond to a question. (51 RT 3515-3516.)

[15] Harris's counsel suggested that Sabra had seen Harris only once since the preliminary hearing, and Sabra responded that she thought this was the second occasion she had seen her, and then confirmed it was the second time she had seen Harris in court. (51 RT 3555.)

specific about what she saw and did not see. (51 RT 3519.) She was similarly precise when recounting with whom she lived (and did not live) when she turned six years old, and indeed corrected herself when she mispoke. (51 RT 3556.)

Sabra answered twice, before and after an objection, that she had seen appellant hit Ashley, and noted where the blows landed with no prompting by the prosecution:

> Q: Did you ever see Big Mike punch Ashley?
>
> A: Yes.
>
> MR. HOVE: Object as foundation.
>
> THE COURT: Overruled. The answer may remain.
>
> [MR. ANDERSON] Q: The answer was "yes," that was your answer?
>
> A: (Witness nods head).
>
> Q: You're nodding. That was affirmative.
>
> Where did you see Big Mike punch Ashley?
>
> A: In her privates.

(51 RT 3517.)

The question of Sabra's credibility and the suggestion that the prosecution was unduly suggestive were presented front-and-center before the jury through cross-examination and closing argument, and additionally when the defense made speaking objections in the presence of the jury during Sabra's testimony.

> Q: Sabra, when Ashley was being punched in her privates by Big Mike, was she crying?
>
> A: Yes.
>
> Q: Was she crying real hard?

A: Yes.

MR. HOVE: *I'm going to object to the leading nature of the question.*

THE COURT: Overruled.

MR. ANDERSON: I would point out, Your Honor, I have filed with the court and given counsel the appropriate Penal Code sections and Evidence Code sections for taking testimony from a child under 10.

MR. HOVE: *That's correct. But you don't get to spoon feed them.*

THE COURT: Let's move on.

(51 RT 3518, italics added.)

[MR. ANDERSON] Q: Do you remember if Big Mike came into the room the night that Ashley died?

MR. HOVE: Objection, that's been asked and answered already. She said she didn't see –

THE COURT: Overruled.

THE WITNESS: Yes.

MR. CANNADY: Objection, leading and suggestive.

MR. ANDERSON: Your Honor, I think the rules of evidence indicate one counsel alone gets to speak for one side.

MR. CANNADY: I apologize to counsel, Your Honor.

[MR. ANDERSON] Q: Now, do you remember how he held Ashley the night that she died?

MR. HOVE: Objection, that assumes a fact not in evidence.

(51 RT 3521 [italics added].)

Sabra also withstood repeated attempts by the defense to obtain different answers when she indicated she did not recall Michael Jr. hitting or kicking Ashley. (51 RT 3542-3543.)

Sabra was confronted with inconsistent statements that she made at the preliminary hearing denying that she had witnessed appellant's conduct in the murder or molestation, or that Michael Jr. hit Ashley on the head. (51 RT 3549-3553.) The jury was also shown video-tapes of Sabra's interviews regarding the events and was able to see first hand certain inconsistencies with her trial testimony. (DE JJ, 58 RT 3917-3918; DE TT, 64 RT 4339.)

In addition, the defense exhaustively examined Sabra about potential bias. Sabra testified that "people" had told her that she should no longer like appellant or his codefendant, Harris. (51 RT 3528-3529.) Sabra also testified that, after the murder, she was cared for by her aunt Cindy who told her appellant was wicked and told Sabra to call him "Wicked Mike," rather than "Big Mike," and gave Sabra toys after the preliminary hearing when she used the new moniker. (51 RT 3546-3547.)[16]

As noted above, on cross-examination addressing appellant's sexual molestation of Ashley, Sabra specifically denied that her testimony was coached, and affirmed her personal knowledge of the matters to which she was testifying saying that she "saw that." (51 RT 3551-3552.) Sabra stated that she did not remember Michael Jr. hitting Ashley on her head (51 RT 3543), nor did she remember Michael Jr. hitting anyone with Power Ranger toys. (51 RT 3555.)

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[16] Under examination by defense counsel for Harris, Sabra also acknowledged her love for "Grandpa Jesse" Lopez and "Aunt Laurie," both prosecution witnesses, and refused to answer whether she loved her "Grandma Emma," appellant's co-defendant. (51 RT 3553-3554.) Cindy Jardin, Debra Karavias, and Laurie Strodtbeck, called to rehabilitate Sabra after she was impeached with inconsistent statements made at preliminary hearing, were also extensively examined for bias and inconsistent statements. (52 RT 3605, 3615-3618, 3622-3624.)

2. Michael Jr.'s Testimony

Michael Jr.'s testimony related to the final blow inflicted when appellant threw Ashley to the floor in the early hours of Friday, June 4, 1999. Michael Jr. testified that he shared a room with Ashley. (53 RT 3683.) Like Sabra, he testified that Ashley was crying when appellant came into the room. (53 RT 3675.) He saw appellant pick up Ashley and throw her to the ground, cracking her head:

Q: Okay. *Now, do you remember the night that Ashley never woke up again?*

A: *Yes.*

Q: Okay. Were you sleeping in bed at one point in that night?

A: Yes.

Q: Was your bed separate from Ashley's?

A: Yes.

Q: Okay. *Did you see your dad come in the room that night*?

A: Yes.

Q: *Did you see your dad pick up Ashley?*

A: *Yes.*

Q: *What did you see him do with Ashley the night that she never woke up again?*

MR. HOVE: I'm sorry, I'm unable to see the witness.

THE WITNESS: *Cracked her head.*

[MR. ANDERSON] Q: He smacked her head?

A: Yeah.

Q: *How did he do that?*

A: (inaudible response).

Q: He what?

A: *He threw her.*

Q: *Threw her where?*

A: *On the hard floor.*

Q: When he threw her on the hard floor— could you step down here for a minute?

A: Okay.

Q: I want you to show me something. Stand right here. Okay

Let's pretend this is Ashley. Okay?

Can you show me how your daddy held Ashley when he threw her on the floor?

Come down here so there is a little room.

Pretend that's Ashley. Okay? Show me how he threw her on the floor.

A: *(Witness complies).*

MR. ANDERSON: *May the record reflect, Your Honor, he took the exhibit, People's No. 11, kind of lifted his hands a little bit, and then threw it out in front of him*?

Okay. You can take your chair, Michael.

Q: Now, can you hear me, again?

A: Yes.

Q: Okay. *Now, when Ashley was thrown on the floor, did she ever get up*?

A: *No.*

Q: Where is Ashley now?

A: In heaven.

Q: *Was Ashley crying before your daddy threw her on the floor?*

A: *Yes.*

Q: Do you know why she was crying?

A: No.

Q: *When you saw Ashley get thrown on the floor, were you afraid?*

A: *Yes.*

Q: What did you do?

A: *I just crawled under my bed.*

(53 RT 3673-3675.)

Although Michael Jr. had no prior testimony with which the defense could impeach him, he was cross-examined about possible coaching. (53 RT 3677-3678.) Counsel further asked him about instances where he had hit or kicked other children or adults and he denied this. (53 RT 3679-3680.) The defense later offered testimony through other witnesses to contradicted that testimony. (53 RT 3695, 3709; 58 RT 3921, 3924, 3936-3937.) Finally, the defense was able to get him to contradict his testimony about seeing appellant:

Q. Michael, the night you say that your dad picked up Ashley, it was dark in your room, wasn't it?

A. Yes.

Q. And you were asleep, weren't you?

A. Yes.

Q. And you didn't see anything, did you?

A. No.

Q. People have told you -- people told you that your dad hurt Ashley, didn't they?

A. Yes.

Q. And they told you that your dad picked Ashley up and threw her down, didn't they?

A. Yes.

Q. And they told you to say that in court, didn't they?

A. Yes.

(53 RT 3680-3681.) All of this took place in the jurors' presence, allowing them to consider it in weighing Michael Jr.'s testimony.

D. The admission of Sabra and Michael Jr.'s testimony did not violate appellant's constitutional rights.

Appellant contends that the children's testimony was unreliable, and that its use therefore violated his rights under the Eighth and Fourteenth Amendments. This claim is based on the inconsistencies in the testimony and the alleged unduly suggestive nature of the prosecution's examination. Because the inconsistencies and potential for bias and fabrication were fully developed at trial, however, appellant's claim is actually one of dissatisfaction with the credibility findings made by the jury.

Appellant makes a generalized assertion that children are not reliable, citing to dicta in the Supreme Court decision of *Kennedy v. Louisiana* (2008) 544 U.S. 407, 443, noting "heightened concerns" over the reliability of evidence in child rape cases. (AOB, p. 86.) Here, relying on instances of suggestive questions and the fact that the children discussed the case with various people over a period of time, appellant asserts that their testimony is so unreliable that it cannot meet the "heightened reliability standards" to support a death sentence. Again, however, this comes down

to a claim based entirely upon the credibility determinations made by the jurors.

As this Court has noted, even facts such as consultation with a psychiatrist and discussion of the facts with the prosecutor and others, as well as gaps in memory, do not render a witness incompetent. Where such matters are developed at trial, the jury is capable of assessing credibility and weighing various factors that would detract from a witness's believability in reaching its decision. In rejecting a similar claim that the witness's testimony was sufficiently unreliable to satisfy the heightened standards of a capital case this Court said:

> Also without merit is defendant's claim that Deanna's testimony was unreliable and, because it contributed to a judgment of death, it violated his constitutional rights under the Eighth and Fourteenth Amendments. Defendant was fully afforded the protections of the procedures constitutionally required to ensure reliability in the factfinding process. As we have previously remarked in rejecting essentially the same contention, defendant "'was given an opportunity to be heard and to cross-examine in a judicial forum.' [Citation.]" (*People v. Cudjo, supra*, 6 Cal.4th at p. 623, 25 Cal.Rptr.2d 390, 863 P.2d 635, quoting *People v. Mincey, supra,* 2 Cal.4th at p. 445, 6 Cal.Rptr.2d 822, 827 P.2d 388.)

(*People v. Dennis* (1998) 17 Cal.4th 468, 525.)

Appellant claims that the trial court's "fail[ure] to consider the effect of suggestive questioning" in making its determination of competence deprived appellant of the "protections of the procedures constitutionally required to ensure reliability in the factfinding process." (AOB, p. 87.) As discussed above, however, it is not the duty of the trial court to weigh the credibility of a witness before allowing him to testify. The court must determine only that the witness can communicate, can understand the oath, and had the ability to perceive the events that are the subject matter of the testimony. All else, including any inconsistencies or indications of

fabrication, is for the jury to determine. "[T]he court may exclude the testimony of a witness for lack of personal knowledge only if no jury could reasonably find that [she] has such knowledge. ... [I]f there is evidence that the witness has those capacities, the determination whether [she] in fact perceived and does recollect is left to the trier of fact." (*People v. Dennis, supra*, 17 Cal.4th at p. 525; see also *People v. Avila, supra*, 38 Cal.4th at p. 589; *People v. Mincey* (1992) 2 Cal.4th 408, 443.)

Here, appellant had exactly what was required, a full opportunity to be heard and to cross-examine the witnesses. As he has noted by his examples, he thoroughly explored potential inconsistencies and bias in the children's statements and, in addition, he presented testimony of others in support of his allegations. The jurors, who were in the best position to observe the demeanor of all of the witnesses and assess the children's actual words, chose to believe the children. That is entirely within the jury's province.

While acknowledging that the dissent in *Kennedy* indicated that corroboration of potentially unreliable child testimony would be sufficient to address any Eighth Amendment concerns, appellant baldly states that "the testimony of the children in the present case is uncorroborated by any independent evidence." (AOB, p. 87.) Such a claim takes an exceedingly narrow view of the term "corroboration."

Although true that no other witness saw appellant actually inflict the injuries on Ashley, eye-witness testimony is not the sole form that corroboration takes. In this case, the injuries themselves corroborate the testimony of Sabra and Michael Jr.

Sabra testified to seeing appellant holding Ashley and making a thrusting movement of his pelvis against hers. The medical testimony indicated that the injuries to Ashley's genitalia included a penetrating injury that was consistent with pressure from an adult penis, and was not

consistent with a "straddle injury" or with kicking. (39 RT 2784, 2793; 45A RT 3190; 47 RT 3290-3293, 3298-3299, 3342-3343.) Similarly, Sabra testified that she saw appellant punching Ashley in her diaper area. The jury saw the photos of that bruising, and was told that it was consistent with being punched and totally inconsistent with any type of diaper rash. (39 RT2759; 47 RT 3285.) Ashley also had some pattern bruising that was consistent with an adult grabbing and squeezing her, as appellant would have done for either the sexual assault or the beating. (45A RT 3189; 47 RT 3288-3289.)

Finally, both Sabra and Michael Jr. testified and either demonstrated, or adopted the demonstration of the manner in which appellant held Ashley over his head before throwing her to the floor. Again, the nature of the fatal injury was consistent with the attack described by the children, and inconsistent with the various explanations offered by appellant – fall against a dresser, being hit by Michael Jr. with the lid of a toy box. (39 RT 2770, 2773-2774; 47 RT 3306-3309, 3323, 3341.)

The timing of the various injuries also corroborates the children's testimony. The diaper bruising and genital injuries were both older than the skull fracture, which is consistent with Sabra having seen appellant inflict them at a time other than the incident described by both children on the last day of Ashley's life. The genital injury was estimated to have occurred between 72 hours and one week prior to Ashley's death. (47 RT 3297.) The genital injury would have been painful and would likely have caused Ashley to "walk funny." (47 RT 3297.) This is consistent with the evidence that Ashley was walking awkwardly on Sunday, May 30, and with appellant's statement to Harris that Ashley was injured while she was in his care that day, albeit he claimed the injury was caused either by a child's kick or being hurt on a bike. (60 RT 4016-4019.)

Dr. Crawford testified that, based upon the two CT scans taken at the hospital, the fatal skull fracture occurred within 24 hours prior to Ashley being seen, and more likely within "the 5, 6, 7, 10-hour period," which is consistent with Michael Jr. and Sabra's testimony that appellant cracked Ashley's head on the floor the night that she "didn't wake up again." (47 CT 3302-3303.)

The trial court properly evaluated the children's ability to communicate and perceive events, and correctly determined that anything else relating to coaching or bias was "fair game" for cross-examination and it was up to the jury to determine the truth. Appellant, as he has demonstrated with the examples cited, had ample opportunity to challenge the children's testimony and explore areas of inconsistency. This is what the constitution requires. This claim should be denied.

II. SUBSTANTIAL EVIDENCE SUPPORTS APPELLANT'S CONVICTION FOR FIRST DEGREE MURDER AND THE SPECIAL CIRCUMSTANCE OF TORTURE

Appellant claims that the record is insufficient to support the jury's findings of guilt as to first-degree murder and the torture-murder special circumstance. (AOB, pp. 89-112.) Evidence was presented in support of three theories of first-degree murder: premeditated and deliberate murder, torture murder, and felony-murder. Appellant asserts that this failure applies to all three theories. Appellant is incorrect.

A. Legal Standard

In evaluating a sufficiency of the evidence claim on appeal, courts must determine "'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319, italics omitted; see also *People v. Kraft* (2000) 23 Cal.4th 978, 1053.)'" (*People v. Virgil* (2011) 51 Cal.4th 1210,

1263.) "[T]he court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) The court must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence and must draw all reasonable inferences in support of the judgment. (*People v. Gonzales* (2011) 51 Cal.4th 894, 941.) "'Although it is the jury's duty to acquit a defendant if it finds the circumstantial evidence susceptible of two reasonable interpretations, one of which suggests guilt and the other innocence, it is the jury, not the appellate court that must be convinced of the defendant's guilt beyond a reasonable doubt.'" (*People v. Virgil*, *supra*, 51 Cal.4th at p. 1263.) As appellant acknowledges, determinations of witness credibility and the truth or falsity of the facts supporting a conviction are within the exclusive province of the jury and the court must accord due deference to those findings. (AOB, p. 90.) To the extent that appellant's argument rests on his insistence that the testimony of Sabra and Michael Jr. should not be believed, this Court has rejected similar claims. (*People v. Solomon* (2010) 49 Cal.4th 792, 817 [rejecting claim that testimony was not "reasonable, credible, and of solid value," because it was "thoroughly discredited," holding that it is the "task of the jury, not the reviewing court, to determine the credibility of witnesses."].)

"Reversal on this ground is unwarranted unless it appears 'that *upon no hypothesis whatever* is there sufficient substantial evidence to support [the conviction].'" (*People v. Bolin* (1998) 18 Cal.4th 297, 331 [italics added].)

B. Sufficient Evidence of Deliberation and Premeditation Supports Appellant's Conviction for First-Degree Murder

Appellant claims insufficient evidence to support his conviction for first degree murder because there was insufficient evidence of planning, motive, and the manner of killing. As an initial matter, respondent notes that this Court need not address the sufficiency of the evidence under a theory of premeditation and deliberation, as the record indicates that the conviction rested on a theory of torture murder which, as discussed below, is also supported by sufficient evidence. (*People v. Letner* (2010) 50 Cal.4th 99, 168 [even if evidence of premeditation was insufficient, reversal would not be required where evidence supported felony-murder and jury found felony-murder special circumstance]; *People v. Hovarter* (2008) 44 Cal.4th 983, 1018-1019 [court need not address premeditated murder where jury sustained verdicts as to felony-murder special circumstances, thereby necessarily finding defendant guilty of first degree felony-murder]; *People v. Lewis* (2008) 43 Cal.4th 415, 507 [where evidence supports felony murder theory, court can affirm without addressing sufficiency of other two theories].) Nonetheless, the evidence is sufficient to support this theory.

Appellant seeks to emphasize the lack of specifics in the prosecution's closing argument to bolster his claim. While true that the prosecutor in this case did not do an element-by-element outline for each theory, choosing instead a more global approach to the discussion of the evidence, that in no way is determinative of the sufficiency of the evidence. In *People v. Perez* (1992) 2 Cal.4th 1117, 1125-1126, this Court reversed the finding of the Court of Appeal noting that the court, "while purporting to follow the *Anderson* analysis, failed to focus on the evidence presented and the possible inferences drawn therefrom, but instead reviewed the theories

articulated in the prosecutor's argument. It is elementary, however, that the prosecutor's argument is not evidence and the theories suggested are not the exclusive theories that may be considered by the jury." Appellant's emphasis on the closing argument is misplaced.

In *People v. Anderson,* (1968) 70 Cal.2d 15, 26-27, this Court identified three categories of evidence that are relevant to determining sufficiency for premeditation and deliberation – (1) planning activity, (2) motive, and (3) manner of killing. "However, these factors are not exclusive, nor are they invariably determinative. [Citation.] ""*Anderson* was simply intended to guide an appellate court's assessment whether the evidence supports an inference that the killing occurred as the result of preexisting reflection rather than unconsidered or rash impulse. [Citations.]"" [Citation.]" (*People v. Lee* (2011) 51 Cal.4th 620, 636; see also *People v. Whisenhunt* (2008) 44 Cal.4th 174, 200 ["As we have observed, the *Anderson* factors are simply an aid for the reviewing court, and an "[u]nreflective reliance" on *People v. Anderson* is inappropriate."]; *People v. Tafoya* (2007) 42 Cal.4th 147, 172 [*Anderson* factors are not the exclusive means to establish premeditation and deliberation].) The limited nature of evidence in one or more categories may be offset by the evidence in another. (See, e.g., *People v. Jennings* (2010) 50 Cal.4th 616, 645-646 ["If the evidence of preexisting motive and planning activity by itself is sufficient to support the first degree murder conviction of a theory of premeditation and deliberation, we need not review the evidence concerning the manner of killing."]; *People v. Lenart* (2004) 32 Cal.4th 1107, 1127 ["This court has, for example, concluded that an execution-style killing may be committed with such calculation that the manner of killing will support a jury finding of premeditation and deliberation, despite little or no evidence of planning and motive."].) In this case, ample evidence

existed from which the jury could have found premeditation and deliberation.

1. Evidence of planning

Appellant asserts that there was no evidence of planning in this case, and relies particularly on the fact that "Ashley was killed in front of two witnesses and within earshot of Sandra Harris." (AOB, p. 93.) While superficially appealing, this assessment fails to account for the fact that the two witnesses were very young children, who may well have been discounted by appellant as possible witnesses. As seems likely, based upon appellant's strenuous arguments both here and in the trial court, appellant may very well have assumed that neither Sabra nor Michael Jr. would be able or willing to tell anyone what they saw that night, particularly if they feared similar treatment at appellant's hand. Alternatively, appellant may have felt confident that, even if they did testify, they would not be believed.

As for Sandra Harris's presence in the apartment, not only was she appellant's paramour, but, as appellant was well aware, she had already turned a blind eye (and ear) to his prior abuse of Ashley throughout the week, and seemed willing to accept any explanation offered by him regarding the injuries. So long as he did nothing in her presence, appellant may have felt confident that he was safe from her testimony.

Appellant had spent the week leading up to the murder continually inflicting abuse on 21-month-old Ashley. This Court has held that the "methodical infliction" of injuries and continuing and escalating acts of abuse can support a finding of premeditation and deliberation. (*People v. Whisenhunt, supra,* 44 Cal.4th at p. 201.) Additionally, despite the fact that Ashley routinely slept until approximately 9:00 a.m., without the need for a diaper change, appellant developed the "habit" of waking her each morning at 4:00 a.m. and changing her diaper when he did Michael Jr.'s. (61 RT 4135.) He also spent the week developing numerous explanations for

Ashley's growing number of injuries, ensuring that they were attributable to either accident (bike, fall off bed) or maltreatment by others (hitting, poking with stick), including his own son. Interestingly, appellant made minimal efforts at best to alleviate the conditions that were purportedly resulting in Ashley's injuries – e.g., no indication that Ashley and Michael Jr. were separated or that Michael Jr. was punished, no effort to place a barrier at the sides of the bed to prevent rolling off. In fact, the only thing appellant allegedly did was to order Rouslen to leave the home after claiming that the child was poking Ashley's genitals with a stick. (59 RT 3971.)

Further, the fatal blow was not immediately fatal, yet appellant simply returned an unconscious, but living Ashley to her bed and went to work without alerting Harris to any problems. Moreover, when he returned from work at 10:00, to find Ashley still alive, he sought to avoid or at least delay her receipt of medical treatment by stating that Harris would be in danger of arrest and, more significantly, by attempting to minimize Ashley's condition by shaking her, pulling open her eye and claiming she was responsive. (43 RT 3069-3070; 44 RT 3143.)

A review of the evidence in the light most favorable to the judgment, and drawing all reasonable inferences, shows that the jury could reasonably have found that appellant planned Ashley's murder.

2. Motive

Evidence showed that appellant did not want to care for Ashley, either by himself or in conjunction with Harris. They actively refused to care for her twice, with appellant apparently preferring to leave the 21-month-old in the care of her 16-year-old drug-addicted aunt rather than allow Harris to care for her for a few days. Purportedly, Ashley's short-term placement in his household during the hospitalization of Jesse Lopez placed a financial strain on the family. Further, as appellant notes, the jury heard Pilar Ford's

opinion that appellant's actions could have been an effort to punish Harris for allowing Ashley to stay in their home. (54 RT 3716.) Although appellant asserts that the evidence of possible motives was inadequate to justify murder (AOB, p. 94.), a defendant's motive need not be rational to support a finding of first degree murder. (*People v. Whisenhunt, supra*, 44 Cal.4th at p. 202; *People v. Pensinger* (1991) 52 Cal.3d 1210, 1238.) Here, there was more than sufficient evidence of motive.

3. Manner of killing

Ashley's murder was the culmination of a week of on-going brutality. The final blow came when appellant picked her up over his head and threw her to the floor, cracking her skull. Although appellant asserts that the *only* evidence of how Ashley died was the testimony of Sabra and Michael Jr. (AOB, p. 96.), the jury also had the medical testimony which indicated that the alternative theories suggested by appellant would not account for the injuries. (39 RT 2770, 2773-2774; 47 RT 3306-3309, 3323, 3341.) While true that "brutality alone cannot show premeditation," factors such as the victim's young age and resulting inability to defend herself can be considered. (*People v. Pensinger, supra*, 52 Cal.3d at p. 1238.) Given Ashley's age and size, it is perfectly reasonable for the jury to infer that appellant intended her death when he slammed her into the floor. Moreover, as noted above, by simply placing the unconscious child back into bed with no attempt to examine her or ensure her well-being, and in light of his later attempts to avoid or delay medical treatment, the jury was perfectly reasonable in inferring that he intended Ashley to die.

Contrary to appellant's assertion, this case is not so different from *Whisenhunt* in terms of the underlying reasoning. Although the manner of harm there was hot cooking oil versus beatings, the progression of bruises over Ashley's body over the course of the week establishes the ongoing nature of the abuse in this case. Further, while true that this Court noted the

defendant's actions in seeking to be alone with the child, as discussed above, it is likely that appellant did not consider Sabra and Michael Jr. to be a true threat to him, nor had Harris given any indication that she was likely to thwart his desires by reporting him or taking any other action to interfere on Ashley's behalf.

Considering the record as a whole, including all reasonable inferences, it cannot be said that "upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction]." (*People v. Bolin, supra,* 18 Cal.4th at p. 297.)

C. There Was Substantial Evidence of Murder by Torture

As noted above, this Court need find only one of the three theories of first degree murder to be supported by the evidence. Nonetheless, the evidence is sufficient to support a finding of murder by torture.

"The intent to torture 'is a state of mind which, unless established by *the defendant's own statements* (or by another witness's description of a defendant's behavior in committing the offenses), must be proved by the *circumstances surrounding the commission of the offense* [citations], which include *the nature and severity of the victim's wounds*.'" (*People v. Mungia* (2008) 44 Cal.4th 1101, 1137 [internal citations omitted, emphasis in original].) To support a torture-murder special circumstance, the person tortured must be the person killed and there must be some proximity in time or space between the torture and the murder. (*People v. Bemore* (2000) 22 Cal.4th 809, 843-844; *People v. Barnett* (1998) 17 Cal.4th 1044, 1161-1162.) A defendant need not intend to kill his victim, so long as there is proof of intent to torture. (*People v. Whisenhunt, supra,* 44 Cal.4th at p. 201.)

1. Condition of Ashley's body

While this Court has cautioned against giving undue weight to the severity of a victim's wounds, it has held that "[t]he jury may infer the intent to inflict extreme pain from the circumstances of the crime, the nature of the killing, and the condition of the body." (*People v. Chatman* (2006) 38 Cal.4th 344, 390; see also *People v. Mincey, supra,* 2 Cal.4th at p. 433 ["It does not follow, however, that because the severity of the victim's wounds is not necessarily determinative of the defendant's intent to torture, the nature of the victim's wounds cannot as a matter of law be probative of intent. Intent is a state of mind. A defendant's state of mind must, in the absence of the defendant's own statements, be established by the circumstances surrounding the commission of the offense."].)

In this case, as shown graphically in the prosecution exhibits, Ashley's tiny body was covered with more than 100 bruises of varying ages and sizes. (PE 1-10, 28-36; 47 RT 3309.) Her diaper area was entirely bruised and swollen, further exacerbated by a tear in the posterior fourchette, extending from the vaginal opening to the margin of the anus. (PE 7-9, 34; 47 RT 3289-3292.) Even her ear had suffered a tear. (PE 35; 47 RT 3293-3294.) Finally, she had suffered a skull fracture in the hours shortly before being taken to the hospital.

Dr. Crawford, in addition to describing Ashley's numerous injuries, talked about the force needed to inflict many of them. The bruising to her labia was attributed to "massive blunt force trauma." (47 RT 3290.) Dr. Crawford stated that he had never seen swelling of that magnitude before, including cases in which a ten-year-old child, standing full height, dropped on a metal bar. (47 RT 3290.) The tear in the posterior fourchette was the result of some object being "inserted very violently into her genitalia." (47 RT 3292.) The centimeter and a half tear to Ashley's ear required a tearing or squeezing with sufficient force to cut the skin. (47 RT 3293-3294.) As

for the skull fracture, it was the type of injury that requires a "very significant dramatic event," such as a car accident or a fall from a high story window. (47 RT 3323.) If it were inflicted with a blow from an object (e.g. a toy box lid), the object would have to be "wielded with extreme violence." (47 RT 3307.)

The caution expressed by this Court in placing undue reliance upon the condition of the victim was in recognition of the fact that "[h]orrible wounds may be as consistent with a killing in the heat of passion or an explosion of violence, as with the intent to inflict cruel suffering." (*People v. Chatman, supra*, 38 Cal.4th at p. 390.) Here, the pattern of injuries, most of which were non-life-threatening in and of themselves, combined with the lack of any evidence that would support a "heat of passion" argument, should alleviate such concerns. Moreover, it is not only the condition of Ashley's body that supports a finding that appellant intended to inflict cruel suffering.

2. Without a doubt appellant would have known that the injuries inflicted were likely to cause pain and suffering

As noted above, Ashley suffered more than 100 bruises over her tiny body during the week she was living with appellant. As Dr. Crawford testified, anyone who has had a bruise knows that it will hurt, at least to some extent. (47 RT 3308-3309.) As he stated, over the course of the week, Ashley "was repetitively exposed to multiple episodes of blunt trauma, with pain being associated with each one. ... I think this child would have been terrified and in pain for a fairly extended period of time." (47 RT 3309.)

Dr. Crawford also specifically noted the pain that would have been caused by the tearing in the genital area. "It's a rip of skin, basically. So I think it would be quite painful for an infant, or toddler, or an adult, to have

this much tissue torn." (47 RT 3297.) Further, noting that it was an open wound, any irritation would have been "in order of magnitude, more painful than just a little bit of stinging ... and adding urine and stool to that would be very uncomfortable. ... I think she would have walked funny. If she walked, she would have walked in a manner to try to minimize the discomfort to herself." (47 RT 3298.)

As to the skull fracture, although no pain level was described, in light of the amount of force needed to cause the injury, the only reasonable inference is that the victim would likely suffer pain as a result. The fact that Ashley was apparently rendered unconscious by the blow does not detract from appellant's intent as there is no requirement that the victim actually feel pain, only that the defendant intend pain. (*People v. Davenport* (1985) 41 Cal.3d 247, 268 ["[i]t has long been held that awareness of pain by the victim is not an element of first degree murder by torture."].)

In addition to simple common sense and experience, appellant would have been aware that he was continually inflicting pain by Ashley's cries. Sabra and Harris both testified to hearing Ashley cry at times when appellant was with her. His ongoing maltreatment of her in the face of her obvious suffering is evidence from which jurors could have inferred an intent to inflict "cruel suffering." (See *People v. Gonzales, supra,* 51 Cal.4th at p. 942 ["The long course of painful abuse suffered by Genny suggested that defendant and Ivan habitually torture her."]; *People v. Pensinger, supra*, 52 Cal.3d at p. 1240 [evidence that defendant cut child while she screamed demonstrated that he was aware of her pain and intentionally continued to inflict it over a considerable period sufficient for jury to infer sadistic intent to give pain in punishment for crying]. Since there was no evidence that would provide any type of justification of appellant's actions or any indication by him that he was frustrated by

Ashley's behavior to the point of "explosive violence" or that the injuries were the result of some misguided discipline, it was also reasonable for the jury to infer that appellant had some "sadistic purpose" in mind.

3. Appellant's actions demonstrate an intent to cause pain and suffering in addition to death

The fatal blow was certainly the skull fracture inflicted in the early morning hours of June 4, 1999. As noted above, given the force required to cause Ashley's head trauma, there can be no question but that appellant knew his actions in raising her over his head and hurling her to the floor would cause extreme pain and involve a high probability of death. While Ashley was apparently rendered unconscious by the blow, she was certainly still alive and therefore likely to be suffering pain, particularly if she were to regain consciousness. Moreover, there is no requirement that the victim actually feel pain, only that the defendant intend to inflict it. (*People v. Steger* (1976) 16 Cal.3d 539, 546.)

Had appellant intended only that Ashley die, or that her suffering be limited, he likely would have made sure of her death at that point. Instead, however, he simply placed the unconscious child back into her bed before leaving for work. By failing to seek medical treatment, or even to notify Harris about the injury, appellant ensured that Ashley would be left to suffer.

Appellant's intent was further demonstrated upon his return to the apartment mid-morning. At that point, Harris and Laurie Strodtbeck, upon checking Ashley to determine why she hadn't yet awakened, discovered that she was unresponsive. When it was suggested that she needed to be taken to the hospital, appellant attempted to dissuade Harris with threats of legal action, and further, by attempting to make the women believe that Ashley was responding. (43 RT 3069-3070.) These actions by appellant

both ensured Ashley's ultimate death as well as needlessly prolonging any possible suffering.

4. The record is sufficient to support the jury's finding of first degree torture murder.

As set forth above, there are numerous factors in this record that support the jury's finding of torture. The jury was free to consider the ongoing acts of cruelty inflicted over the course of the week preceding Ashley's death in determining the requisite intent. As this Court has held,

> The finding of murder-by-torture encompasses the totality of the brutal acts and the circumstances which led to the victim's death. [Citations.] The acts of torture may not be segregated into their consitutent elements in order to determine whether any single act by itself cause the death; rather, it is the continuum of sadistic violence that constitutes the torture.

(*People v. Proctor* (1992) 4 Cal.4th 499, 530-531.) In *People v. Jennings, supra,* 50 Cal.4th at p. 644, this Court noted the medical testimony that the cause of death was attributable to "'*the entire problem*' – that it, the drugs, the physical injuries, and the malnutrition and emaciation – '*all working together*' to bring about the resulting death," supported a finding of torture murder. Similarly, in this case, although the final cause of death was the skull fracture and accompanying swelling of the brain, as appellant notes, Dr. Rogers, the pathologist testified as follows:

> Well, the cause of death are all of the blunt injuries on the body taken together in their totality. The most serious, of course, are the head injury. We can take out and discuss in and by themselves these individual bruises to the skin and they, or course, by themselves, are not life-threatening. But in their own little way, they contributed to the death.

(39 RT 2790.)

While an ongoing course of abuse will not invariably support such a finding, to defeat it, this Court has rejected such an inference where there is evidence that the injuries were the result of episodes of "explosive

violence" or excessive alcohol rather than cruelty. (*People v. Steger, surpa*, 16 Cal.3d at p. 548; *People v. Anderson* (1965) 63 Cal.2d 351, 359; *People v. Tubby* (1949) 34 Cal.2d 72, 77-78.) In contrast, in *Jennings* this Court found that the evidence of deliberate starvation, "along with the evidence of chronic and acute physical abuse, [was] sufficient to support defendant's first degree murder conviction on the basis of murder by torture." (*People v. Jennings, supra*, 50 Cal.4th at p. 645.) Similarly, in *Mincey*, this Court found that "the length of time over which the beatings occurred, the number of injuries inflicted, the variety of objects with which the injuries were inflicted and the fact that the victim was made to eat his own feces," established the requisite planning to inflict cruel pain and suffering. (*People v. Mincey, supra*, 2 Cal.4th at p. 435.) While true that the victim in *Mincey* suffered abuse beyond that inflicted on Ashley, that does nothing to minimize the nature of the torture she experienced over the course of the week preceding her death, including more than 100 bruises, tearing of tissue and hemorrhaging around the bladder. (39 RT 2791-2792.)

From the record as a whole, read in the light most favorable to the judgment, it cannot be said that there is no reasonable hypothesis that would support a finding of first degree torture murder.

D. There Was Substantial Evidence of Felony Murder

As previously noted, this Court need not address sufficiency for all theories of first degree murder so long as sufficient evidence exists to support one of those theories. Here, however, evidence is sufficient in each case.

In addition to murder, appellant was charged with, and convicted of, a violation of section 288(b)(1), lewd and lascivious conduct with a child under the age of 14. The prosecution argued, and the jury was instructed, that one theory of first degree murder in this case was felony murder. In

order to be guilty of felony murder, the jury must find the specific intent to commit the underlying felony.

The elements of an offense under section 288(b)(1) are: (1) a person touched the body of a child; (2) that the child was under 14 years of age; (3) that the touching was done with the specific intent to arouse, appeal to, or gratify the lust, passions, or sexual desires of that person or the child; and (4) the touching was done by the use of force, violence, duress, menace, or fear of immediate and unlawful injury on the child or another person. In this case, contrary to appellant's assertions, and as set forth in more detail in Claim III, the record supports a finding that appellant committed the specified felony and, furthermore, that there was a sufficient connection between his ongoing commission or attempt to commit the felony and the murder itself.

As appellant acknowledges, the information charging a violation of section 288(b)(1), alleged that the offense occurred between May 30 and June 4, 1999. The medical evidence established that the tear in Ashley's genitals occurred some three to seven days prior to the fatal head injury, and, in light of Harris's observations regarding the first appearance of the diaper area bruising, it seems likely to have occurred on Sunday, May 30, while Ashley was in appellant's care. (42 RT 2982; 43 RT 3057; 47 RT 3297; 59 RT 3963, 3975; 60 RT 4016, 4019.) Additional evidence was offered, however, from which a reasonable inference could be made that this was not the end of appellant's sexual abuse of Ashley.

Debra Karvias testified to statements made by Sabra regarding her observations of appellant making thrusting motions with his pelvis toward Ashley's pelvis. (52 RT 3613-3614.) Sabra also testified to this. (51 RT 3519-3520.) Although Sabra did not precisely identify the timing of this event, she told her aunt Laurie that it happened one night when she woke up and saw appellant thrusting against Ashley and Ashley was screaming.

(52 RT 3621-3622.) Since the Sunday incident did not occur at night, the only reasonable inference is that this was a second incident. Additionally, in his case in defense, appellant called Dr. Rogers, who conducted the autopsy, to discuss possible causes of the bruising and genital trauma. On cross-examination, Dr. Rogers stated that additional squeezing of the genitals following the original injury could account for the darker bruises and would have caused additional pain. (56 RT 3815-3816.) The evidence also disclosed numerous small bruises on the insides of Ashley's thighs. (PE 7-8, 10; 45A RT 3189; 47 RT 3290.)

Harris testified that it was appellant's routine to change Ashley's diaper in the mornings before he left for work. (60 RT 4002.) Although in her direct testimony she denied that this occurred on the Friday morning when Ashley was killed, on cross-examination she was impeached with her prior statements to police indicating that appellant was with Ashley on Friday morning, purportedly changing her diaper. She also mentioned during her police interview that she had wondered why appellant was always changing Ashley's diaper since her grandfather, Jesse Lopez, had reported that Ashley always slept through the whole night. (60 RT 4042-4048.)

Appellant attempts to make much of the fact that neither Sabra nor Michael Jr. mentioned appellant changing Ashley's diaper on the morning of June 4, 1999. (AOB, p. 107.) Such a failure, however, could simply be due to the fact that the children were asleep at the time. Alternatively, if they were awake and Ashley began crying when appellant entered the room, he may have avoided touching Ashley on that occasion. Given appellant's history of changing Ashley's diaper in the early morning hours, particularly as Ashley did not routinely need her diaper changed at that time prior to going to stay with appellant, the jury could reasonably find that he continued to fondle Ashley under the guise of caring for her. Since Ashley

was crying just before appellant threw her to the floor, the jury could reasonably have found that the fondling occurred that morning, or that appellant at least intended to continue fondling her when he entered the room.

While the killing need not exactly occur concurrently with the commission of the felony, the felony must be more than merely incidental to the killing. (*People v. Elliot* (2005) 37 Cal.4th 453, 469.) Nor does felony murder require a strict causal relationship between the felony and the homicide, so long as the two are part of one continuous transaction. The existence of such a single transaction is a jury question. (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1141; *People v. Sakarias* (2000) 22 Cal.4th 596, 624.)

In this case, as discussed above, appellant had developed a habit of changing Ashley's diaper in the early morning hours, despite the fact that she had not been in the habit of needing her diaper changed at that time prior to coming under appellant's care. Further, as noted above, evidence reasonably supports a finding that appellant molested Ashley on more than one occasion and probably continuously throughout the week. Because Ashley was living in his home, she was constantly under his control, and most certainly was directly under his control on Friday morning, June 4. Such continuous control can support a finding of felony murder, even where there is a break between the underlying crime and the killing. (*People v. Thompson* (1990) 50 Cal.3d 134, 171-172 [continuous transaction demonstrated by defendant's continued control over victim between commission of felony and killing].)

As with the other two theories, a review of the record viewed in the light most favorable to the judgment, and including all reasonable inferences, demonstrates that a reasonable juror could have found appellant guilty of first degree felony murder.

E. There Was Substantial Evidence to Support the Torture-Murder Special Circumstance

The standard of review for sufficiency as to special circumstances is the same as for the offense itself. (*People v. Kelly* (2007) 42 Cal.4th 763, 787-788.) To establish the special circumstance of torture murder, the state must prove that the murder was intentional and the defendant intended to inflict extreme cruel physical pain and suffering upon the victim. For the reasons set forth above, the record amply supports a finding that appellant intended to inflict extreme cruel physical pain and suffering upon Ashley. His repeated infliction of bruises over Ashley's body, including her genital area, together with his treatment of her after slamming her into the floor, including efforts to prevent her receiving medical treatment, provide ample evidence from which a jury could reasonably infer cruel and sadistic intent upon the part of appellant.

F. Conclusion

For the reasons set forth above, this claim should be denied.

III. SUBSTANTIAL EVIDENCE SUPPORTS APPELLANT'S CONVICTION FOR FORCIBLE LEWD AND LASCIVIOUS ACTS, AND THE ENHANCEMENT FOR GREAT BODILY INJURY

Appellant contends that there is insufficient evidence to support a finding that he committed forcible lewd and lascivious acts upon Ashley Dimichino. He likewise submits that the enhancement of great bodily injury is unsupported. As set forth above, review for sufficiency of the evidence requires that the record be considered in the light most favorable to the judgment, including all reasonable inferences that may be drawn from the evidence.

A. Background

The evidence adduced at trial showed that Ashley suffered horrific bruising to her genital area as well as a tear to the posterior fourchette from

the opening of the vagina to the anus. This tear was consistent with an attempt to insert a male penis into the baby's genitals. (47 RT 3293.) The bruising in the genital area first appeared on Sunday, after Ashley was left in appellant's care, and continued to worsen over the course of the week. The deep color of the bruising seen at the time of death was consistent with Ashley's genitals being repeatedly bruised, such as by pinching. (56 RT 3815.) In addition to the bruising and tear, Ashley's body suffered a number of small bruises on the inner thighs consistent with adult fingertips. (45A RT 3189.) Apart from the physical evidence, Sabra reported seeing appellant's privates, and seeing him thrusting his pelvis against Ashley. She also observed appellant punching Ashley in the groin. (51 RT 3517-3520.)

Despite suggestions proffered by appellant to others, prior to Ashley's death, the injuries she suffered to her genital area were not consistent with falling on a bike or being kicked by Michael Jr. Although not specifically addressed by the medical experts, the self-serving statements of Harris regarding an alleged incident with a child named Rouslen and a stick, were simply not credible and were rightly rejected by the jury.

B. Substantial Evidence Supports Appellant's Conviction of Forcible Lewd and Lascivious Conduct

1. Genital laceration

Appellant asserts first that the evidence indicates that the genital laceration was received by Ashley before she came to stay with appellant and Harris. (AOB, p. 116.) While true that the outer temporal limit for the genital tear would have allowed it to have occurred on Friday, May 28, Dr. Crawford actually stated that it occurred "anywhere from three to five or six or seven days," and "I would estimate it as in the order of 72 hours to *perhaps* as long as a week." (47 RT 3297 [emphasis added].) Dr. Crawford specifically stated that the status of the injury on Friday would be

consistent with it occurring on the previous Sunday. (47 RT 3298.) He went on to note that if there was information describing the child as being "asymptomatic and then became symptomatic, that would help us in understanding when this tear happened." (47 RT 3297-3298.)

In this case, the jury had exactly the type of information Dr. Crawford mentioned. Laurie Strodtbeck reported that Ashley was fine when she was dropped off at appellant's home on Saturday. Harris likewise made statements to that effect. A neighbor, Lupe Murillo, saw Ashley on Sunday morning playing with the other children and did not notice any indication that she was in pain. (41 RT 2912.) David Smith, Laurie Strodtbeck's boyfriend, reported that, on Memorial Day, Harris told him that Ashley had bruises on her private parts from riding a bicycle. (42 RT 2982.) Harris, herself, made statements that appellant told her the baby's diaper area was red when she returned to their home on Sunday, after appellant had been watching Ashley. Purportedly, the injury was due to Ashley playing on a bike with no seat. (60 RT 4020.) At that time, Harris noted that Ashley was "walking funny," something that Dr. Crawford indicated was likely following the infliction of the injury.

Contrary to appellant's assertion, Laurie Strodtbeck saw some blood in Ashley's diaper as late as Wednesday, and Luz Arzate testified that Ashley could be heard crying at various times throughout the week. (42 RT 2995-2998; 43 RT 3059.) While Ashley's initial suffering may have somewhat abated by the time Harris returned on Sunday, hence the lack of evidence that she was crying when Harris saw her, Ashley was still "walking funny," and her continued fussiness was likely the result of constant irritation of the laceration from urine and feces in addition to the ongoing physical abuse evidenced by the growing constellation of bruises over her entire body.

2. Genital bruising

To the extent that the injury causing the tear could have contributed to bruising in the area, evidence demonstrated that the genital bruising increased over the course of the next several days, which would be indicative of a fresh injury on Sunday in combination with ongoing trauma. The most severe bruising, however, was likely caused by the incident Sabra witnessed where appellant punched Ashley in the genitals. Again, because the bruising became significantly worse over the course of several days, the jury could find that there was ongoing abuse.

Further evidence that the abuse was ongoing comes from Sabra's testimony that she saw appellant thrusting his pelvis against Ashley's. As previously discussed, Sabra told her aunt Laurie that this occurred at night, while she had been sleeping, which would mean that it was a separate occurrence from the Sunday afternoon incident that appellant attributed to a bike. Additionally, as the pathologist noted, the dark coloration of the bruising around the labia could support a finding that ongoing trauma, such as pinching, occurred.

Appellant's discussion of "innocent" grooming and "normal and healthy upbringing" behaviors in this context is preposterous. (AOB, p. 123.) This is not a case of the state alleging molestation based upon a prolonged hug or overly intimate touching during a bath. There can be no "innocent" explanation for appellant's brutal treatment of Ashley. Appellant's proffered alternatives – a bike with a broken seat, being kicked by Michael Jr., or being poked with a stick by Rouslen – are either inconsistent with the injuries or not credible. On the record before this Court, there is simply no basis on which to find that the particular focus on Ashley's genital area for the most severe of the injuries (other than the fatal skull fracture), combined with Sabra's observations and the doctor's testimony that the laceration was consistent with being caused by a male

penis, supports any reasonable inference other than that appellant intended to gratify his own lust.

C. Substantial Evidence Supports the Enhancement for Great Bodily Injury

Appellant asserts that there is insufficient evidence to support a finding that he was the one who inflicted Ashley's genital injuries. As discussed above, although the medical testimony provided a range of time during which the genital laceration and bruising occurred, that is not the only evidence before the jury. The neighbor's report of seeing Ashley playing on Sunday morning is inconsistent with the tear having occurred prior to that, as is Laurie Strodtbeck's statement that Ashley was fine when she was dropped off at appellant's home.[17] Most significantly, Harris's report that she observed Ashley "walking funny" when she returned to the apartment on Sunday afternoon, coupled with appellant's statement to her that Ashley was "red down there" from playing on a broken bike also puts the injury within the time frame that Ashley was under appellant's care. The jury's finding that appellant inflicted the grievous bodily injury is amply supported by the record.

IV. EVIDENCE OF SABRA'S BROKEN LEG WAS PROPERLY ADMITTED TO SHOW HER STATE OF MIND

Appellant contends that the trial court erred by admitting limited-purpose evidence to show Sabra's state of mind in testifying, namely, that appellant had broken Sabra's leg seven months before the murder. (AOB, pp. 128-129.) Each time the evidence was offered, however, the trial court specifically instructed the jury that it was to be considered solely for this limited purpose and not for the truth of the matter asserted. This claim fails

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[17] The possible admission attributed to Strodtbeck that Ashley may have had a mild diaper rash at the time is not supportive of a finding that the laceration had occurred on Friday.

as admission of this evidence to Sabra's state of mind, after she was impeached with prior inconsistent statements, was not an abuse of discretion. Moreover, even if admitted in error, it was harmless in light of overwhelming evidence of appellant's guilt, and the evidence elicited by appellant supporting the original version that the break was the result of an accident.

A. Factual Background

In November 1998, Sabra Baroni suffered a broken femur. At the time of the incident, she stated that she had broken her leg attempting to jump off her bed to go to the video store with appellant and Michael Jr. Harris saw Sabra in the hallway of their apartment. Appellant claimed that that was where he found her. A child protective services investigation was conducted that resulted in a finding of accidental injury. Sabra was returned to the custody of appellant and Lopez.

Sabra was interviewed by Detective Koller on June 4, 1999. In addition to asking Sabra about the events surrounding Ashley's death, Detective Koller asked her about her broken leg. Sabra told Detective Koller that it was an accident, that appellant did not do it. (55 RT 3752.) Following that interview, however, Sabra made a number of statements to different people that it was actually appellant who broke her leg. In fact, in a second interview with Detective Koller, Sabra said that appellant threw her to the ground breaking her leg and that he threatened to hurt her if she told anyone. (55 RT 3780-3781.)

At Ashley's funeral Sabra told her aunt Laurie that appellant had broken her leg, and that he had threatened to kill both herself and Harris if she told. (52 RT 3621.) In July 1999, Cindy Jardin, Sabra's great-aunt was given temporary custody of Sabra. Sabra told Jardin that "Michael broke my leg," and later said that she had not told anyone earlier because appellant had threatened to kill her. (52 RT 3583-3584.) Debra Karavias,

Sabra's foster mom from January to July 2000 testified that Sabra showed her the screws in her leg and stated that appellant threw her down and broke her leg. (52 RT 3610-3612.) In August 2000, Sabra moved to another foster home. Her foster mother Beth Hanson testified that Sabra was having nightmares. On one occasion Sabra said, "Big Mike is chasing me, he's gonna kill me." On another occasion she said, "Big Mike is gonna hurt me." (64 RT 4329-4330.) On one occasion, when Sabra was playing with Hanson's daughter, she told her that the scar on her leg was from "when Big Mike broke [it]." (64 RT 4327.) In the state's case in rebuttal, Dr. Crawford testified that he examined Sabra when her leg was broken. He did not believe the explanation given by Sabra that she broke her leg by catching it on the bed. (63 RT 4249.)

Prior to trial, appellant sought a ruling preventing the state from introducing evidence regarding Sabra's broken leg. The prosecution indicated that the evidence was not being offered under Evid. Code section 1101(b),[18] but that the state sought to introduce it as evidence of Sabra's fear of appellant which could explain inconsistencies in her statements. (38 RT 2701-2703.) The trial court indicated that such testimony would not come in until re-direct, but at that point, assuming that cross-examination developed some inconsistencies between her testimony and prior statements, the court said:

> I think would be proper redirect as to why she – I mean, if that's the theory, why she didn't testify this way because she feared Mr. Lopez or whatever the case might be, that seems to be the

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[18] At the time of appellant's trial, Evid. Code § 1109, which allows instances of prior abuse to be offered as propensity evidence, applied only to instances of "domestic violence" which was defined as between spouses, or people in a similar relationship. It was not until amendments in 2004, that § 1109(a)(3) was added to include prior instances of child abuse which would have allowed the admission of evidence of Sabra's broken leg.

> issue in my mind, whether it comes in under direct or in the cases cited by Mr. Anderson – probably going to come in in redirect.

(38 RT 2703.) Appellant argued that any fear Sabra may have felt regarding the incident when her leg was broken would be irrelevant to her testimony regarding Ashley's murder. (38 RT 2703-2705.) Appellant also asserted that the evidence would not come in under Evid. Code 1101, at which point the court said, "We all agree." (38 RT 2707.) Appellant then asserted that allowing it in as evidence of state of mind would be equally unduly prejudicial. (38 RT 2707.) After reviewing counsel's arguments and authorities, the court made the following ruling:

> I am going to not permit the district attorney to refer to the incident about the broken leg in the opening statement. I will not permit him to question her about it during her direct examination.
>
> We'll just wait and see what the cross-examination is, and it may well be – I don't mean to prejudge this – it may be likely that the evidence would come in, if there is evidence of inconsistencies in her testimony. It just depends. We'll have to hear the cross-examination.
>
> But at this stage we're not going to allow it in opening statements or direct. And we'll revisit that after her cross-examination.

(38 RT 2716.) Just prior to Sabra taking the stand at trial, appellant renewed his objection to any evidence regarding threats or abuse against Sabra by appellant. The court reiterated that such evidence was not to come in on direct. (51 RT 3510-3511.)

On direct examination, Sabra testified that she saw appellant punch Ashley in her privates, and demonstrated this to the jury. (51 RT 3517.) She also testified that appellant held Ashley above his head and threw her to the floor. (51 RT 3522.)

On cross-examination, appellant and Harris challenged Sabra's testimony, asking her about inconsistencies with her testimony at the preliminary hearing. (51 RT 3545-3553.) Sabra agreed that her great-aunt Cindy Jardin had called appellant "wicked," and that she told Sabra to call him "Wicked Mike." (51 RT 3547.) She also said that Jardin gave her toys when she was in court for the preliminary hearing. (51 RT 3547.) Appellant also tried to get Sabra to recall statements made to the police. (51 RT 3548-3551.) When confronted with her preliminary hearing testimony regarding the sexual assault on Ashley, Sabra said that she did not recall denying seeing appellant doing anything. (51 RT 3551-3553.) Appellant then asked Sabra if many people had spoken to her since that time and Sabra said she did not remember. (51 RT 3553.)

On redirect, Sabra, when asked, stated that she was nervous and afraid. When asked specifically if she was afraid of appellant, Sabra did not answer. (51 RT 3557-3558.) It was at this point that the prosecution asked Sabra whether appellant had ever done anything to her. Appellant objected but the court overruled, although it did give the following instruction, "This is limited strictly to the witness's state of mind, not for the truth of any answer the witness might give." (51 RT 5558.) When the prosecutor specifically asked Sabra who broke her leg, both appellant and Harris objected. The court said, "Again, I will emphasize to the jury, if there is an answer, it's admissible solely to show her state of mind as to other statements she may have made and to other questions on cross-examination." (51 RT 3559.) After a few more questions, appellant moved for a mistrial. The trial court denied the motion but indicated that counsel would be allowed to make further statements at the conclusion of Sabra's testimony. (51 RT 3563.) When Sabra's testimony was complete, appellant renewed his motion for mistrial asserting that he had not opened any doors on cross-examination that would allow the introduction of

evidence regarding the broken leg. The trial court found that, based upon the questioning that indicated Sabra's preliminary hearing testimony was different than her trial testimony, "at that point, you get into the witness's state of mind why she might have done that, why she might have feared Mr. Lopez." (51 RT 3571.) Following additional argument, the court reiterated its position stating:

> It puts you in a very difficult position, I agree, and I'm sure it was a difficult decision for you to decide whether you were going to go into that area or not.
>
> But I think what she did, as we indicated, at that point her state of mind, her possible fear of Mr. Lopez would be an explanation for her prior testimony.

(51 RT 3573.)

Additional testimony was proffered by various witnesses regarding statements Sabra made about appellant breaking her leg. The court repeatedly instructed the jury as to the limited purpose for which such testimony was offered and, in addition, invited counsel to prepare a special instruction regarding this evidence. (51 RT 3558; 52 RT 3578, 3583, 3614; 63 RT 4234.)

During appellant's case in defense, he offered testimony regarding Sabra's statements that her broken leg was an accident. (55 RT 3752.) He also elicited testimony regarding other inconsistent statements made by Sabra. Appellant played Sabra's taped interviews for the jury. (DE JJ, TT; 58 RT 3913; 64 RT 4339.)

In rebuttal, the state recalled Dr. Crawford who testified regarding his examination and treatment of Sabra's broken leg. The trial court again instructed the jury that this evidence was limited to Sabra's state of mind. (63 RT 4234.)

B. The Testimony Regarding the Broken Leg Was Admissible Evidence of Bias, Interest, or Other Motive Affecting a Witness's Credibility and to Rebut the Inference Raised on Cross-examination that Sabra's Testimony Was Fabricated by Adults Who Influenced Her

This evidence was offered by the prosecution to establish that Sabra was fearful of appellant and that fear could be impacting her ability to testify. Evidence of a witness's fear is relevant to their credibility and therefore admissible. (*People v. Valencia* (2008) 43 Cal.4th 268, 302; *In re Freeman* (2006) 38 Cal.4th 630, 649-650.) As such, its admissibility rests within the sound discretion of the trial court. (*People v. Gray* (2005) 37 Cal.4th 168, 220.) Admissibility is not limited only to the existence of fear, but "[a]n explanation of the basis for the witness's fear is likewise relevant to the jury's assessment of his or her credibility and is well within the discretion of the trial court." (*People v. Guerra* (2006) 37 Cal.4th 1067, 1141-1142.)

Appellant complains because the prosecutor stated initially that the threat evidence was relevant to explain why Sabra did not "come clean" with authorities at the time her leg was broken. (AOB, p. 139.) Although that is the statement that was made initially, it is clear from the context of the court's ruling that the determination of admissibility was linked to the introduction of evidence that Sabra had made inconsistent statements regarding appellant's involvement in Ashley's molestation and murder. (38 RT 2716; 5 CT 1137-1139, 1147.)

Just before Sabra testified, the defense also asserted a preemptive objection to preclude the prosecutor from eliciting testimony "about whether or not [Sabra] was struck by [appellant], whether or not [appellant] made a fist and stuck it in her face, you know, held it up to her face, that kind of thing." (51 RT 3511.) Noting that it was not appropriate to elicit

such testimony on *direct* examination, the trial court specifically left the door open as to whether it might become relevant after Sabra was cross-examined by the defense. (51 RT 3511.)

After Sabra was confronted by the defense with inconsistent statements she made at the preliminary hearing, she became "nonresponsive" and refused to answer questions or claimed she had no memory of subjects about which she was examined on direct examination and acknowledged that she was nervous and afraid. (51 RT 3553, 3557-3558.) Indeed, when the prosecutor asked Sabra if she was afraid of appellant, she admitted that she did not want to answer the question. (51 RT 3558.) He followed up by asking, implicitly, the basis for her fear of appellant, before asking specific questions about whether and how Sabra had broken her leg. (51 RT 3558.) Defense counsel objected repeatedly at the outset of the questioning and the trial court twice instructed that any testimony about Sabra's broken leg was offered to show Sabra's state of mind—her belief that appellant had broken her leg, thus explaining her fear in testifying—and was not admitted for the truth of the matter asserted, namely, that appellant had broken Sabra's leg. (51 RT 3558, 3559.)

The defense moved for a mistrial and it was denied. (51 RT 3563, 3570.) The defense argued that since it did not raise the subject of Sabra's broken leg under cross-examination, it was not a relevant area for impeachment. (51 RT 3570, 3572.) In denying the motion, the trial court observed:

> THE COURT: I don't recall the precise question and answer but, generally, she was asked about her testimony at the preliminary hearing, and I believe her testimony on cross-examination at one point at the PX is that she didn't see the things that she testified she saw here.
>
> MR. HOVE: Correct.

THE COURT: It seems to me, at that point, you get into the witness's state of mind why she might have done that, why she might have feared Mr. Lopez.

(51 RT 3751.)

Although Sabra's stated fear arose out of a prior incident when appellant had injured her rather than a specific threat directed toward her testimony in this case, the fact that she had experienced threats from appellant tied to her telling others of his criminal behavior would support an inference that she feared similar retaliation in this case. Indeed, given her age and the severity of the injury she suffered, there is no reason to suppose that, like an adult, Sabra would be able to compartmentalize various threats and somehow know that appellant's original threats to kill her and/or Harris would not apply to Ashley. This is particularly true in this case where Sabra was a witness ultimately to the murder of her young sister.

In light of the record, and the fact that the evidence was excluded prior to the introduction of Sabra's inconsistent statements, the trial court's decision to allow the testimony regarding Sabra's broken leg was not error.

C. Even if This Court Finds that the Evidence Should Not Have Been Admitted, under the Circumstances of This Case Any Error Was Harmless

As discussed above, the trial court repeatedly instructed the jury that the evidence regarding Sabra's broken leg was being introduced for the sole purpose of showing her state of mind and not for the truth of the matter.

Q: Well, did Mike ever do anything to you, Big Mike?

MR. HOVE: I'm going to object to this.

THE COURT: I'm going to allow it. This is limited strictly to the witness's state of mind, not for the truth of any answer the witness might give.

(51 RT 3558.)

THE COURT: Again, any elements with respect to statements made by Sabra about her leg and Mr. Lopez is limited solely to her state of mind. It's not offered for the truth of the matter stated.

(52 RT 3583.)

MR. HOVE: I'm going to object to that as irrelevant.

THE COURT: Yes. All the evidence with respect to the broken leg, again, remember, ladies and gentlemen, it is limited solely to the state of mind of Sabra, it's not the truth of – for the truth of the matters stated therein. So, let's move on.

(52 RT 3614.)

MR. CANNADY: For the record, Your Honor, we do have a continuing objection to this line of questioning as to the November incident.

THE COURT: All right. This evidence, again, we assume that it's going to deal with Sabra's broken leg. Again, this is received for a limited purpose and I just wanted to remind you of that. This is limited. It's not propensity evidence, rather it's evidence to show the state of mind of the witness, Sabra.

(63 RT 4234.)

In addition to the above cautionary instructions given at the time of Sabra's and others' testimony, the court also invited counsel to submit a special instruction. This occurred during a jury-out hearing just prior to the testimony of Cindy Jardin. Following a discussion of earlier testimony, the court said:

THE COURT: Well, there's also been elicited on cross-examination, as I recall, she said that didn't happen at the preliminary examination, unless I'm mistaken, and – when was, I guess, this would have to be a statement made before the PX?

MR. ANDERSON: That is correct. That is correct. This was made – it's going to be post June the 15th of 1999 and before the preliminary hearing, which was April of this year.

THE COURT: So it would be offered as prior inconsistencies?

MR. ANDERSON: Thanks.

THE COURT: I would invite counsel to prepare, if you want, a special instruction to the limited nature of that testimony regarding the leg. Clearly that's just a state of mind evidence, so I think you might think of that instruction when you're preparing your instructions.

(52 RT 3578.)

In addition to the numerous examples set forth above, appellant's counsel reiterated the limited nature of the evidence during closing, before proceeding to argue, based on this evidence, that Sabra's testimony was not credible:

Okay. Now, let's go over to one other thing, this thing about Sabra breaking her leg. Now, that evidence, ladies and gentlemen, was introduced for a limited purpose to the state of mind of Sabra. I guess to show that she was fearful. That's the sole reason that evidence is here in the courtroom.

(69 RT 4588.)

Further, appellant extensively cross-examined Sabra and the other witnesses in an effort to demonstrate that Sabra's statements implicating appellant were planted by family members. Appellant also clearly established that Sabra and Michael Jr. were returned to appellant and Sandra Harris based on a conclusion by children's services that the broken leg was the result of an accident. Additionally, the jurors viewed the two video-taped interviews of Sabra containing statements inconsistent with her trial testimony.

In light of the extensive impeachment efforts on cross-examination, the admission of the agency finding that the break was accidental, and particularly in light of the repeated instructions to the jury that the evidence was being admitted for a limited purpose, any error in its admission is harmless beyond a reasonable doubt.

V. FAILURE TO GIVE A UNANIMITY INSTRUCTION WAS NOT ERROR

A. Forfeiture

As an initial matter, appellant has forfeited review of this claim by failing to object to the proposed first-degree murder instructions. (65 RT 4352-4355.) In any event, the claim is without merit.

B. The Trial Court's Ruling Was Not Erroneous

The court instructed the jury on three possible theories of first-degree murder: deliberate and premeditated murder (CALJIC No. 8.20; 6 CT 1353.), murder by torture (CALJIC No. 8.24; 6 CT 1355.), and felony murder (CALJIC No. 8.21; 6 CT 1354.). (71 RT 4695-4700.) Appellant contends that the trial court should have instructed jurors that they must unanimously agree on which theory supported the first-degree murder charge in order to convict. (AOB, pp. 152-163.) As appellant concedes, the courts of this state have repeatedly rejected this claim. (See, e.g., *People v. Geier* (2007) 41 Cal.4th 555, 591; *People v. Silva* (2001) 25 Cal.4th 345, 367; *People v. Carpenter* (1997) 15 Cal.4th 312, 394; *People v. Pride* (1992) 3 Cal.4th 195, 249-250; see also *Schad v. Arizona* (1991) 501 U.S. 624, 645 [instructions that do not require the jury to agree on theory supporting murder conviction do not violate due process].)

Appellant cites language from the plurality opinion in *People v. Dillon* (1983) 34 Cal.3d 441 for the proposition that unanimity as to the theory supporting the murder conviction is required because felony murder is distinct from other types of first-degree murder and does not require proof of malice as an element of the offense. (AOB, p. 154-155.) As this Court has explained, however, the cited language in *Dillon* "means only that the elements of the two kinds of murder differ; there is but a single statutory offense of murder. [Citations.] 'Felony murder and premeditated

murder are not distinct crimes. . . .' [Citation.]" (*People v. Silva*, *supra*, 25 Cal.4th at p. 367.) Furthermore, subsequent to its ruling in *Dillon* this Court has repeatedly reaffirmed its holding in *People v. Witt* (1915) 170 Cal. 104, that felony murder is not a separate offense than other forms of malice murder. (See, e.g., *People v. Geier, supra*, 41 Cal.4th at p. 591; *People v. Hughes* (2002) 27 Cal.4th 287, 369; *People v. Gallego* (1990) 52 Cal.3d 115, 189.) Appellant offers nothing unique to his case that would justify overturning this Court's long-established precedent.

This claim is without merit.

VI. THE TRIAL COURT DID NOT ERR BY INSTRUCTING ON FIRST DEGREE MURDER

Appellant claims that the trial court erred by instructing on first degree murder – both premeditated and felony murder – when he was charged only with second degree murder in the information.

A. Forfeiture

As an initial matter, respondent notes that appellant failed to object to the giving of a first degree murder instruction at the time of trial, therefore he has forfeited this claim on appeal. (*People v. Virgil, supra,* 51 Cal.4th at p. 1260.) In any event, the claim is without merit.

B. The Trial Court Correctly Instructed on First Degree Murder

Appellant claims that it was error to instruct the jury on first degree murder – either premeditated or felony murder – because the information charged him only with second degree murder in violation of § 187. As appellant acknowledges, this Court has previously rejected similar claims. (See, e.g., *People v. Bramit* (2009) 46 Cal.4th 1221, 1236 [information charging second degree murder under section 187 adequate to charge murder in any degree]; *People v. Hughes, supra,* 27 Cal.4th at pp. 369-370 [and cases cited therein].) Relying on language in *People v. Dillon, supra,*

appellant argues that the malice element included in section 187 creates a sufficiently significant distinction to prevent a finding of first degree murder under section 189. This Court has specifically rejected this argument, noting in *Bramit, Hughes* and other cases, that the holding in *People v. Witt, supra*, has been reaffirmed subsequently to *Dillon*. Similarly, appellant's reliance on *Green v. United States* (1957) 344 U.S. 184, is misplaced as that case dealt with a question of double jeopardy where a jury rejected a finding of first degree murder in the initial trial, convicting the defendant of second degree murder. Following a reversal on appeal, the Court held that the differences between the two degrees would prevent a retrial for first degree murder under the double jeopardy clause.

Appellant also asserts that the holding of *Apprendi v. New Jersey* (2000) 530 U.S. 466, requires the giving of such an instruction. This argument has likewise been rejected. In *Bramit*, this Court held:

> We rejected this claim, too, in *Harris, supra*, 43 Cal.4th 1269, 78 Cal.Rptr.3d 295, 185 P.3d 727. "The *Apprendi* claim is illusory; the information included special circumstance allegations that fully supported the penalty verdict." (Id. at p. 1295, 78 Cal.Rptr.3d 295, 185 P.3d 727.)

(*Bramit, supra*, 46 Cal.4th at p. 1236.) Here, as in *Bramit*, appellant was charged with a special circumstance – torture murder – which the jury unanimously found to exist. Thus, death was the maximum punishment possible based upon the charging instruments.

Appellant offers nothing unique to his case that would warrant overturning this Court's precedent. This claim is without merit.

VII. THE TORTURE MURDER SPECIAL CIRCUMSTANCE DOES NOT VIOLATE THE EIGHTH AMENDMENT

Appellant presents a facial challenged to the special circumstance of torture-murder. This Court has previously rejected similar challenges and appellant provides no basis to support a different decision in this case.

(See, e.g., *People v. Bemore, supra,* 22 Cal.4th at p. 843 [and cases cited therein].)

VIII. THE CALIFORNIA DEATH PENALTY STATUTE IS CONSTITUTIONAL

Appellant asserts a number of challenges to California's death penalty statute, although he acknowledges that they have previously been decided adversely to his position. The specific claims are addressed briefly below.

A. Penal Code Section 190.2 Is Not Impermissibly Broad

Appellant asserts that Penal Code Section 190.2 is constitutionally defective as it fails to properly narrow the class of death-eligible defendants. This Court has repeatedly rejected such claims, and appellant offers nothing to distinguish his case from those previously decided. (See, e.g., *People v. Stanley* (2006) 39 Cal.4th 913, 958 [and cases cited therein]; *People v. Demetrulias* (2006) 39 Cal.4th 1, 43 [and cases cited therein].)

B. Penal Code Section 190.3(a) Is Not Impermissibly Broad

Appellant asserts that Penal Code Section 190.3(a) fails to adequately guide the jury's deliberations, thereby resulting in arbitrary and capricious imposition of the death penalty. This Court has repeatedly rejected such claims, and appellant offers nothing to distinguish his case from those previously decided. (See, e.g., *Stanley, supra*, 39 Cal.4th at p. 967 [and cases cited therein]; *People v. Harris* (2005) 37 Cal.4th 310, 365 [and cases cited therein].)

C. California's Death Penalty Provides Appropriate Safeguards to Avoid Arbitrary and Capricious Sentencing

In addition to the above two provisions, appellant asserts that other aspects of California's death penalty statute deprive him of necessary safeguards to avoid arbitrary and capricious sentencing. These include: no

requirement that aggravating circumstances be proved beyond a reasonable doubt; no instruction as to burden of proof except for other criminal activity and prior convictions; lack of written findings or unanimity regarding aggravating circumstances; no requirement that the jury find beyond a reasonable doubt that aggravating circumstances outweigh mitigating circumstances and that death is the appropriate punishment and no instructions mandating or favoring a sentence of life without the possibility of parole. All of these claims have been previously rejected by this Court, and appellant offers nothing specific to his case that would justify a departure from those holdings. (See, e.g., *Demetrulias, supra*, 39 Cal.4th at pp. 39-45 [and cases cited therein]; *Harris, supra*, 37 Cal.4th at p. 365 [and cases cited therein].)

D. Lack of Written Findings Does Not Prohibit Meaningful Appellate Review

Appellant asserts that the California death penalty statute violates the Sixth, Eighth and Fourteenth Amendments as well as his right to meaningful appellate review because it does not require written findings regarding sentencing. This claim has previously been rejected by this Court and appellant offers nothing specific to his case that would justify a departure from that holding. (See, e.g. *People v. Cook* (2006) 39 Cal.4th 566, 619.)

E. The Jury Instructions on Aggravating and Mitigating Factors Are Not Unconstitutional

Appellant asserts that the failure to omit inapplicable sentencing factors from CALJIC No. 8.85 violated his constitutional rights. This claim has previously been rejected by this Court and appellant offers nothing specific to his case that would justify a departure from that holding. (See, e.g. *People v. Cook, supra,* 39 Cal.4th at p. 618.)

F. There Is No Constitutional Requirement of Inter-Case Proportionality.

Appellant asserts that the failure of California's capital sentencing statute to require inter-case proportionality review renders it unconstitutional. This claim has previously been rejected by this Court and appellant offers nothing specific to his case that would justify a departure from that holding. (See, e.g. *People v. Famalaro* (2011) 52 Cal.4th 1, 77; see also *Pulley v. Harris* (1984) 465 U.S. 37, 50-51 [proportionality review not constitutionally required].)

G. California's Death Penalty Statute Does Not Violate the Equal Protection Clause

Appellant asserts that the California death penalty statute violates the Equal Protection Clause of the Constitution due to its failure to require a specific burden of proof or unanimous findings for aggravating circumstances. This claim has previously been rejected by this Court and appellant offers nothing specific to his case that would justify a departure from that holding. (See, e.g. *Harris, supra*, 37 Cal.4th at p. 365 [and cases cited therein].)

H. California's Use of the Death Penalty Does Not Violate the Eighth and Fourteenth Amendments or International Law

Appellant asserts that California's use of the death penalty violates international norms and thus violates the Eighth and Fourteenth Amendments. This Court has repeatedly rejected such claims and appellant offers nothing specific to his case that would warrant a reversal of that position. (See, e.g., *Demetrulias, supra*, 39 Cal.4th at p. 43 [and cases cited therein]; *Harris, supra*, 37 Cal.4th at p. 365 [and cases cited therein].)

IX. THE TRIAL COURT DID NOT UNDULY PRESSURE JURORS TO REACH A VERDICT IN THE PENALTY PHASE

Appellant claims that the trial court placed undue pressure on the jurors to return a verdict during the penalty phase of the trial. He alleges that this was done by the failure to properly address assertions of deadlock and by failure to dismiss a juror who asked to be discharged due to stress.

A. The Trial Court Did Not Err in Failing To Declare a Mistrial on the Basis of Perceived Deadlock

1. First deadlock note

The jury began penalty phase deliberations on March 1, 2001, at 10:05 a.m. (83 RT 5182; 6 CT 1455.) They deliberated until 4:40 p.m., with a break for lunch, and then adjourned for the weekend. (83 RT 5187.) On March 5 and 6, they deliberated from approximately 9:30 a.m. to 4:00 p.m. (83 RT 5188-5189.)

On March 7, 2001, the jury began deliberations at 9:30 a.m. Shortly before 3:00 p.m., the jury sent a note to the court stating, "Jury is deadlocked." (83 RT 5190.) The court advised counsel of the note, indicating that it intended to release the jurors for the rest of the day and have them resume deliberations on March 8. Appellant asked to have the jurors questioned as to whether further deliberations would be helpful, but the court denied this request stating that it was still too early in the process to warrant a mistrial. (83 RT 5191-5192.)

On March 8, 2001, the jurors resumed deliberations at 9:15 a.m. (83 RT 5194.) Following the lunch break, the jurors sent out a note asking for clarification as to which acts of violence could be considered in aggravation. (83 RT 5194.) The trial court, after conferring with counsel for both sides, sent the jury a written response, and the jury continued deliberations until adjourning at 4:00 p.m. (83 RT 5194-5197.) The jury reconvened on March 12, from 9:08 a.m. to 3:10 p.m. (83 RT 5198.)

2. Second deadlock note

On March 13, 2001, the jury began deliberations at 9:20 a.m. At 11:03, the jurors returned to court to address a second note indicating deadlock. (83 RT 5199.) The note also indicated that Juror No. 5 had a prepaid vacation beginning the following week and would be unavailable. (6 CT 1469.) A second note requested that the alternates be allowed to return to work until explicitly needed, citing adverse impact on career growth by Juror No. 15. (6 CT 1466.)

The trial court, after first carefully warning the foreperson to carefully limit his answers only to the questions asked and not to divulge the specifics of the vote breakdown, inquired as to the number, timing and general numeric division of the votes taken during the course of deliberations. In response, the foreperson provided the following information: there had been votes taken every day after the first day of deliberations; the first vote was five-seven; the votes on March 12 and 13 were six-six; he could not recall the breakdown of the other votes. (83 RT 5199-5201.)

The trial court then asked the foreperson if he felt there was a reasonable probability that a verdict might be reached, to which the foreperson responded, "No, I do not." The court also asked if anything might assist the jury in arriving at a verdict, such as further instructions or a read back of testimony. The foreperson responded, "If there is some additional instructions or guidance, that may be of assistance," but went on to indicate that there did not appear to be any confusion and he felt the jury was "hopelessly deadlocked." (83 RT 5202.) The trial court then began to question other jurors, asking only if they agreed that further deliberations would not result in a punishment. Juror No. 1 agreed with the foreperson, but Juror No. 3 stated "I'm not sure that I do." At that point, the judge ceased polling the jurors stating, "All right. Then I'm going to instruct you

all to go upstairs and continue your deliberations. We will await communication from the jury. Thank you very much." (83 RT 5202-5203.)

At 2:00 p.m. that afternoon, the jury sent out a note requesting clarification on the definition of "extreme duress" and "lingering doubt." The court sent the jurors a written response and they continued deliberations until they adjourned for the day at 3:35 p.m. (83 RT 5203-5206.) The jury resumed deliberations at 9:20 a.m. on March 14 and adjourned at 4:04 p.m. (83 RT 5207.) A verdict was reached on March 15, 2001.

3. The court's decision was not an abuse of discretion

The decision to ask jurors to continue deliberations in the face of a claim of deadlock rests within the sound discretion of the trial court. (*People v. Howard* (2008) 42 Cal.4th 1000, 1029-1030; *People v. Bell* (2007) 40 Cal.4th 582, 616; *People v. Pride, supra,* 3 Cal.4th at p. 265.) The court may conduct such inquiries as it deems appropriate to determine whether reasonable probability exists that a verdict can be reached, but while "some such questioning may be required to establish legal necessity for discharging the jury [citations omitted], it is not a prerequisite to denial of a motion for mistrial." (*People v. Rodriguez* (1986) 42 Cal.3d 730, 774.)

In this case, the first indication of possible deadlock occurred after four days of deliberations. Appellant complains that the court failed to conduct any inquiry of the jurors upon receipt of the first note, and simply sent them back based upon its opinion that four days was insufficient time to justify a mistrial. Although, as appellant points out, the penalty phase itself did not involve an extensive amount of time, the jurors were properly instructed that they could consider all of the evidence presented, including that which was offered during the guilt phase. This is particularly

significant in light of appellant's plea during argument that the jury should consider lingering doubt based upon the evidence adduced during the guilt phase. In *Bell*, this Court upheld the denial of a motion for mistrial when the court advised the jury that ten hours of deliberation was not long enough to properly consider all of the issues and sent them back for further deliberations. (*Bell, supra*, 40 Cal.4th at p. 613.) Similarly, this Court has upheld denials of mistrial where deliberations had exceeded 14 hours. (*People v. Sandoval* (1992) 4 Cal.4th 155, 194-197), and 11 days (*People v. Rodriguez, supra,* 42 Cal.3d at pp. 774-775.).

In light of the lengthy nature of the trial, including the guilt phase, the court's decision to extend deliberations without specific inquiry was not an abuse of discretion. This is further demonstrated by the fact that the jurors continued their deliberations for two and one-half days, even asking for clarification regarding acts of violence before the second deadlock note was submitted.

Following receipt of the second deadlock note, the trial court did conduct a basic inquiry as noted, obtaining general information as to the number of votes and numeric breakdown, but not as to the specifics of the results. Such inquiries are appropriate when deadlock is asserted. While the foreperson indicated that he felt the jury was hopelessly deadlocked, he also indicated that it was possible that additional instructions or guidance could be of assistance. Further, while Juror No. 1 agreed with the foreperson's assessment, Juror No. 3 did not. (83 CT 5202-5203.) Given this response, the trial court's decision to allow the jurors to continue their deliberations was not an abuse of discretion. As with the first deadlock note, the accuracy of the court's assessment is further supported by the fact that the jury subsequently requested further clarification regarding duress and residual doubt, and they continued deliberating for two days before reaching a verdict. (83 CT 5203-5213.)

B. The Trial Court Did Not Err in Failing to Discharge Juror No. 8

1. Juror No. 8's request to be discharged

On March 15, 2001, the jury resumed deliberations at 9:20 a.m. At 9:45, the court and counsel met in chambers with Juror No. 8, who had requested to speak privately with the judge. When asked, Juror No. 8 made the following statement:

> I have reached a level of intolerable stress at this point, which I reached last weekend. And I'm trying to live with it every day. Yesterday I felt I was going to snap, you know, during the day. I don't want that to happen. I think I'm a fairly stable person, and the -- it's just affecting every part of my life at this point, my job, my health. I feel like I'm just getting more and more tense every day.
>
> My job, my work has piled up. This has gone on much longer than we originally thought. You said six to eight weeks or longer. This has gone into four months. I go into work every day after here and try to do a day's work in an hour, hour and a half. It's not working.
>
> My boss asked me the other day if I did something and I was totally blank. I didn't know what he was talking about. I looked through my pile of stuff that is there and I had done it and don't even remember doing it.
>
> You know, that's kind of scary.
>
> I don't know what else to say. I'm just like -- I wake up crying at night because of the gravity of this case, and how I take it seriously, and I just wanted to ask to be taken off the case.

(83 RT 5209-5210.) The judge acknowledged the hard work of the jury and the length of deliberations preceding Juror No. 8's request. He then went on to say:

> I am going to ask you to try to continue to participate. If you're not able to – I'm going to ask you to give it a try. You know, if you, after perhaps further deliberations, you still feel that it's

just too stressful and it's at the point where it's interfering with your health, tell the bailiff, again, and we'll talk to you, again.

At this point, I'm going to ask you to please continue.

Are you willing to continue?

(83 RT 5210.) In response to the question, Juror No. 8 stated, "I'll try," and returned to the jury room at 9:50 a.m. (83 RT 5210.)

The court then asked counsel if they wanted to address the record. Mr. Anderson, the prosecutor, stated that he felt the juror's mental health was being affected. The court stated that "If she had indicated a reluctance to continue ... I would have granted her request." Contrary to appellant's assertion, the court did disagree with the prosecutor's assertions regarding Juror No. 8. When Mr. Anderson claimed that Juror No. 8 "almost broke down into tears. I could see her lips quivering," the court said, "I didn't see that." Mr. Anderson then asserted, apparently based upon his prior statement that, "It seems she is mentally stressed to a point she is unable to continue to perform her duties as a juror." At that point, the judge stated, "I made it clear to her, all she needs to do is let the bailiff know and we'll bring her down. If she does, I would be inclined to excuse her. But not at this point." (83 RT 5211.) Appellant did not object to the judge's ruling or otherwise indicate any concerns with the court's action. Mr. Cannady simply noted that one juror was likely to be gone after that day due to a prepaid vacation, and that Juror No. 8 was "stressed out because of the case." (83 RT 5212.)

The jury returned its verdict at 2:20 p.m. The jurors were individually polled and all stated their agreement with the verdict of death. (83 RT 5213-5215.)

2. Forfeiture

Appellant asserts that his rights were violated when the trial court refused to dismiss Juror No. 8 at her request. As an initial matter, appellant has forfeited this claim due to his failure to object to the court's decision. (*People v. Holloway* (2004) 33 Cal.4th 96, 164.) Appellant asserts that his failure to object is somehow excused because he "did not disagree with the prosecutor's argument." While true that counsel did not affirmatively state that the prosecutor's observations were incorrect, neither did counsel join in those observations nor take issue with the court's statement that it did not observe the behavior indicated. Other than noting the impending absence of another juror and a comment about case-related stress, counsel essentially stood mute. In any event, there is no error.

3. The record does not demonstrate that Juror No. 8 was unable to function as a juror

A trial court's decision regarding the discharge of a sitting juror is reviewed for an abuse of discretion. Disqualification of a juror must be shown as a "demonstrable reality" on the record. (*People v. Zamudio* (2008) 43 Cal.4th 327, 349-50; *People v. Wilson* (2008) 43 Cal.4th 1, 25; *People v. Cleveland* (2001) 25 Cal.4th 466, 474.) As appellant notes, the demonstrable reality test appears to have been applied only in misconduct cases, and respondent notes further that it appears to apply only to instances where discharge occurs. Under either abuse of discretion or demonstrable reality, however, the trial judge's decision was not error.

The decision to discharge a juror during deliberations is not to be taken lightly. The specific procedures to be employed in determining the need for such discharge, including the decision regarding the conduct of a hearing or the extent of inquiry, are matters left to the sound discretion of the trial court. (*People v. Guerra, supra,* 37 Cal.4th at p. 1159; *People v. Beeler* (1995) 9 Cal.4th 953, 989.)

Here, the trial court held a hearing out of the presence of other jurors to allow Juror No. 8 to express her concerns. The trial court listened to Juror No. 8's statement regarding her stress. While Juror No. 8 certainly indicated that she was experiencing significant stress related to the gravity of the case and the length of time involved, unlike the juror at issue in *People v. Thompson*, she did not state that she was unable to participate or come to a decision. (*People v. Thompson* (2010) 49 Cal.4th 79, 136 [juror excused after stating, "I'm ready to run out that door. I do not want to be here any longer. I don't want to talk to any other jurors."].) In this case, the example Juror No. 8 gave of the impact on her ability to function related to her efforts to continue to perform her regular job functions outside of, and in addition to, regular court hours making it akin to a belated request for a hardship discharge. Further, she stated that the stress level had reached a peak the prior weekend, yet she clearly had been able to continue deliberations during the three intervening days. The trial court was able to observe Juror No. 8's demeanor during her statement. While, as noted, the prosecutor asserted that she was on the verge of crying, the court's own observations were contrary.

To justify discharge, a juror must be unable to perform her function. Such inability "must appear in the record as a 'demonstrable reality' and will not be presumed." (*People v. Guerra, supra*, 37 Cal.4th at p. 1158.) The trial court advised Juror No. 8 that she could, and should, notify the bailiff if her stress continued or increased, thus making it clear that the court would reconsider her request. The court asked her if she was willing to continue and she stated that she would try. The court did not abuse its discretion in failing to discharge Juror No. 8.

C. There Was No Cumulative Coercive Impact upon the Jury

Finally, appellant asserts that the cumulative impact of the trial court's handling of matters during jury deliberations had a coercive effect on the jury. In addition to the two deadlock notes and Juror No. 8, discussed above, appellant also cites to the court's failure to address the impending vacation of Juror No. 5 that would have made her unavailable for the week of March 19-23 and resulted in the need to replace her with an alternate. As with Juror No. 8, appellant raised no objection to the trial court's failure to address the upcoming vacation and therefore has forfeited review of this portion of the claim. Nonetheless, it is equally lacking in merit.

On Tuesday, March 13, 2001, when the jury sent out its second note asserting deadlock, there was also a note reminding the court of Juror No. 5's impending vacation. While true that the court did not address that matter at the time, it does not follow that the jurors felt that no one would be dismissed, "no matter what their extenuating circumstances might be." (AOB, p. 211.) Moreover, as appellant points out, the trial court also failed to address a note requesting that alternate jurors be released until such time as they were actually needed. (AOB, p. 205.) In light of the failure to release the alternate jurors, it would seem that any "message" to be inferred by the jurors was that alternates still remained available should the need arise – i.e. if Juror No. 5, or any other juror needed to be replaced. The alleged coercive impact of this action is further reduced when one considers that, when the court sent the jury back to continue deliberations, two-and-one-half days of deliberations remained in the week before Juror No. 5 would become unavailable. During that remaining time, the jury did not make any further reference to the impending unavailability, rather they continued their deliberations, even asking for further clarification on other matters.

Because the trial court did not err in its handling of the various jury issues, there is no cumulative coercive impact that would justify reversal.

X. THERE WAS NO ERROR DURING THE PENALTY PHASE RESULTING IN IMPROPER CONSIDERATION OF AGGRAVATING EVIDENCE

Appellant asserts that error occurred when allegedly conflicting instructions were given the jury that, combined with the prosecution's penalty phase argument, allowed the jury to improperly consider instances of violent conduct that were not included in CALJIC No. 8.87.

A. Introduction

During the penalty phase, the prosecution introduced evidence of prior convictions under section 190.3(b). Additionally, five incidents of violent criminal activity were included in CALJIC No. 8.87. (AOB, p. 215.) The acts listed in CALJIC No. 8.87 were as follows:

> The October 1992 incident at Savemart involving alleged assault and resisting arrest.
>
> The May 1986 incident at Alpha Beta and Jail involving alleged assaults and resisting arrest.
>
> The August 1991 incidents involving Donna Thompson and her son, alleging assault with a deadly weapon.
>
> The June 1999 incident involving the alleged assault on Michael Lopez, Jr.
>
> The December 1990 incident at the sanitation plant and later at the jail involving alleged assault and resisting arrest.

(83 RT 5174-5175.) The record contains evidence of other instances of violence on the part of appellant which forms the basis for his allegation of error.

During deliberations, the jury sent out a note requesting clarification regarding appellant's violent criminal acts. The note stated:

> Can any acts of violence be considered as an aggravating circumstance or are we limited to the 5 acts of violence listed on 8.87 of the jury instruction? "A juror may not consider any evidence of any other criminal acts as an aggravating circumstance" vs. C8841 [sic] "you must determine what the facts are from the evidence received during the entire trial unless you are instructed otherwise."

(6 CT 1462.) The court responded to the question by submitting the following note:

> You have asked if any acts of violence may be considered as an aggravating circumstance, or, are you limited to the 5 acts of violence listed in 8.87 of the jury instructions.
>
> Under instruction 8.85, you are limited to the 5 acts of violence alleged to have occurred and listed in instruction 8.87 as aggravating circumstances. Before a juror may consider any such criminal act as an aggravating circumstance in this case, a juror must first be satisfied beyond a reasonable doubt that the defendant did in fact commit the criminal act.
>
> Under instruction 8.85, you shall consider all the evidence which was received during both the guilt and penalty trials in determining which penalty is to be imposed on the defendant. You shall consider, take into account and be guided by all the factors in that instruction which you find to be applicable.

(6 CT 1463 [italics in original].)

Appellant objected to the inclusion of the third paragraph. He now claims that the response to the jurors' question, combined with the prosecution's penalty phase argument was misleading and allowed the jurors to consider improper evidence in aggravation. This is not the case.

B. The Trial Court Correctly Instructed the Jury and the Response to the Jurors' Question Was Appropriate

Appellant's complaint regarding CALJIC Nos. 8.85 and 8.87 is that 8.87 did not specifically include all of the violent incidents which evidence existed in the record. Evidence of other criminal activity may be used in aggravation only where a juror is convinced beyond a reasonable doubt that

the conduct occurred and that it constituted a crime. While the trial court must instruct sua sponte on the standard of proof, there is no requirement that specific instances of conduct be listed. (*People v. Medina* (1995) 11 Cal.4th 694, 770–771.) Essentially, appellant's complaint is that the instruction was incomplete.

This is similar to the situation before this Court in *People v. Lewis* (2001) 25 Cal.4th 610. There, as here, evidence was before the jury regarding an incident that was not included in those listed in 8.87. In denying relief on the claim, this Court held:

> The instruction as given was not erroneous, only incomplete, and "a party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language." [citation]

(*People v. Lewis, supra*, 25 Cal.4th at p. 675.)

Here, appellant was aware of the proof presented at trial. He did not object to the admissibility of most of the evidence he now cites as improper. Appellant did not object to the proposed 8.87 instruction, nor did he request the inclusion of the additional incidents that apparently were overlooked. Therefore, under *Lewis*, he cannot now be heard to complain of the failure to specifically list the items.

In any event, as this Court found in *Lewis*:

> [T]here is no reasonable possibility the jury at the penalty phase misunderstood the law about its consideration of unadjudicated criminal activity. (*People v. Kelly* (1992) 1 Cal.4th 495, 525-526, 3 Cal.Rptr.2d 677, 822 P.2d 385.) The trial court instructed the jury generally to "consider all of the evidence which has been received during any part of the trial" and to be guided by the statutory factors, including "[t]he presence or absence of criminal activity by the defendant ... which involved the use or attempted use of force or violence or the express or implied threat to use force or violence...." (CALJIC No. 8.85.) That instruction was followed by CALJIC No. 8.87, which began with the agreed-upon listing of five incidents of alleged violent

> criminal activity. The instruction continued: "Before a juror may consider *any of such alleged criminal activity* as an aggravating circumstance in this case, a juror must first be satisfied beyond a reasonable doubt that the defendant did in fact commit *such criminal activity*. A juror may not consider any evidence of any *other* crime as an aggravating factor." (*Ibid.*, italics added.) Given the charge, the jury may have understood it was not to consider the Greene incident as a factor in aggravation because it was not "any of such alleged criminal activity" recounted in the instruction. If so, the omission of the Greene incident helped rather than harmed defendant. (*People v. Riel, supra,* 22 Cal.4th at p. 1214, 96 Cal.Rptr.2d 1, 998 P.2d 969.) But even if the jury believed it could consider evidence of the threat to Greene in the same manner as the other evidence of violent criminal activity presented by the prosecution at the penalty phase, it would also have understood that the incident could be used as a factor in aggravation only on proof beyond a reasonable doubt, as the instruction directed.

(*People v. Lewis, supra*, 25 Cal.4th at pp. 666-667.) Here, as in *Lewis*, there is no reason to believe that the jurors, assuming they felt that they could consider other violent acts, would ignore the burden of proof set forth in 8.87 as to what was required before those acts could be used in aggravation. Nothing in the court's response to their question implies otherwise.

The jurors were properly instructed regarding the factors to be considered in aggravation and mitigation under CALJIC No. 8.85, and regarding the burden of proof as to incidents of violent criminal activity under CALJIC No. 8.87. The instructions and the written response correctly stated the law. Jurors are presumed to follow their instructions and, as this Court held in *Lewis*, there is no reason to assume that, if the jurors consider incidents inadvertently omitted from 8.87, they will fail to apply the proper standard in evaluating them.

C. The Specific Instances Relied on by Appellant Did Not Result in an Erroneous Penalty Determination

Appellant discusses several specific instances of violent acts which he claims the jury erroneously considered.

1. Other instances relating to Donna Thompson

In addition to the knife attack against Ms. Thompson and her son that was included in 8.87 as given, the jury heard evidence of another altercation between Ms. Thompson and appellant – an argument in Ms. Thompson's car resulting in her being pushed from the car and appellant taking possession of money and checks belonging to the Salvation Army, and for which Ms. Thompson was responsible. That testimony came in without objection. (74 RT 4798-4799.) Appellant also complains of a statement made by Ms. Thompson that appellant had threatened to have her and her brother killed by the Mexican Mafia. That statement came in in response to a question by appellant on cross-examination. No motion to strike was made, nor did appellant ask for any type of limiting instruction. (74 RT 4806.)

As noted above, appellant did not object to CALJIC 8.87 as given, nor did he request the inclusion of these incidents. Given these failures, even assuming that the jurors did consider them, there is no error, nor, under *Lewis*, is there any basis to suppose that the jurors would not have applied the appropriate standard before giving such consideration.

2. References to statements in Sandra Harris's taped police interviews.

During the penalty phase argument, the prosecution invited the jurors to consider statements made to police by Sandra Harris as further evidence supporting Donna Thompson's testimony. This was done as a part of the discussion addressing appellant's challenge to the incident involving the knife attack on Ms. Thompson and her son. Appellant objected asserting

that the statements, contained in the video tapes, had been admitted solely against Ms. Harris. (81 RT 5084.) In response, the prosecution noted that the jurors would be instructed that they could consider evidence from all phases of trial. The court overruled the objection. (81 RT 5084.)

The record is somewhat muddled regarding the admission of the Harris tapes. The tapes were not offered during the state's case-in-chief. As a part of her defense, Harris took the stand and testified regarding a number of matters. She was subjected to cross-examination by both the state and appellant. In rebuttal, the state then played the taped statements given by Harris to the police. When they were first offered, appellant asked that they be admitted solely against Harris and the court agreed. (65 RT 4344.) After some of the tapes were played, appellant again requested a limiting instruction. (65 RT 4365.) At that point, the court denied the request for a limiting instruction, advising appellant that he would be allowed to recall Harris for further cross-examination or in surrebuttal if appellant felt there were additional matters that needed to be addressed based on the tapes. (65 RT 4365.) Appellant did recall Harris briefly. (67 RT 4424-4432.)

Typically, in a joint trial, statements of one defendant are inadmissible against the other defendant due to the right to confront and cross-examine witnesses. (*Bruton v. United States* (1968) 391 U.S. 123; *People v. Aranda* (1965) 63 Cal.2d 518, 527-531, superseded by statute on another ground, see *People v. Fletcher* (1996) 13 Cal.4th 451, 465.) Before the tapes were played, it was reasonable for the court to instruct that they were to be admitted only against Harris. Once they had been played, however, and it was determined that she had already testified regarding many of the statements in those tapes, it was equally reasonable for the court to determine that there was no confrontation issue since appellant had had an opportunity to cross-examine Harris, and the court was willing to grant him

leave to recall her for any additional questioning he deemed necessary. Thus, it would appear that the initial ruling limiting the admissibility was withdrawn.

Even if the later refusal to grant a limiting instruction did not serve to withdraw the initial ruling, any error in overruling the objection to the prosecution's argument was harmless. The jury heard from Donna Thompson that appellant entered her home, obtained a knife from the kitchen and chased her 15-year-old son into another room. They also heard how, when Ms. Thompson attempted to distract appellant from her son, appellant swung the knife at her face. Ms. Thompson also related a second incident in which she and appellant were fighting in her car, a fight that ended with appellant pushing her out of her car. In contrast, the statements from Harris's tapes that the prosecution pointed to were a reference to seeing a restraining order taken by Ms. Thompson against appellant, and appellant's statement that he never loved Thompson, he just "used her and abused her." While neither of those statements are particularly flattering to appellant, they are neither surprising nor particularly significant when compared to the actual incidents testified to by Ms. Thompson.

Appellant also asserts that the jury would, by the prosecutor's specific and limited citation of the above statements, have gone on to consider other statements contained in the tapes, including statements regarding appellant's drug use, his verbal abuse of Harris and Laurie, and Harris's speculation that appellant was responsible for Ashley's death. (AOB, p. 274.) As noted above, the ruling on the admissibility of those tapes against appellant is somewhat muddled, although the final ruling seemed to be that, in light of appellant's opportunity to cross-examine Harris about the statements contained in the tapes, they could be considered. Nonetheless, given the specific emphasis that the prosecutor placed on the limited statements relative to Donna Thompson, it is pure speculation to assume

that the jury would parse out other aspects of the tapes. Moreover, the record contains evidence of appellant's drug use and verbal abuse of Laurie Strodtbeck that was independent of the Harris tapes, therefore their additional evidentiary value for purposes of sentencing was minimal at best, and, as discussed above, *Lewis* supports a finding that the jury would likely have applied the requisite standard of proof.

3. Use of phrase "assaults against Sabra" during penalty argument

Appellant next asserts error based upon the prosecutor's inclusion of the three words "assaults against Sabra" in his list of things to weigh against the mitigation offered by appellant. As an initial matter, respondent notes that appellant did not object to the statement at the time it was made. (81 RT 5094.) He has, therefore, forfeited review of this claim. (*People v. Gonzales* (2011) 52 Cal.4th 254, 283.) In any event, the jury had been repeatedly instructed as set forth in claim IV, *supra*, that all testimony relating to Sabra's broken leg was offered only as to her state of mind and for no other purpose. Because the jury is presumed to follow the law, the prosecution's limited statement could not have been prejudicial to petitioner.

4. Other items from the guilt and penalty phase

Finally, appellant asserts that the prosecution's statement that the jurors could consider all of the evidence from both phases of trial allowed them to improperly consider in aggravation evidence that appellant physically assaulted and threatened Sabra Baroni, abused drugs, physically and verbally abused Sandra Harris, that he feared "losing control" when caring for his son, hit Harris's grandson, Joseph, and escaped from jail. This assertion is speculative at best, and fails to consider the various instructions that the jurors were given regarding the use to which such testimony, particularly that related to Sabra, could be put. Moreover, to the

extent that any of these matters would be considered acts of violence that could have been included in CALJIC 8.87, this Court's holding in *Lewis, supra,* supports a finding that the jurors would have applied the appropriate burden of proof. As to allegations of appellant's drug use, the record contained evidence put in by appellant of excessive alcohol use, at least in his past, offered in part to explain the prior criminal behavior. As to any "loss of control" relating to Michael Jr., appellant's beating of him "like a piñata" was before the jury and included in CALJIC No. 8.87.

5. Appellant's complaints rely on speculation and, in any event, any error was harmless

In summary, appellant's assertion that the jurors considered nonstatutory aggravation is speculative. In any event, in light of the instructions given, to the extent that they did consider evidence of violent acts not specifically listed in CALJIC No. 8.87, there is no reason to presume that they ignored that instruction's mandate to apply the appropriate standard of proof. Finally, given the brutal nature of the murder, appellant's prior convictions and his other violent criminal behavior, any error in consideration of purportedly improper aggravating evidence was harmless beyond a reasonable doubt.

XI. THERE WAS NO PROSECUTORIAL MISCONDUCT DURING THE PENALTY PHASE ARGUMENT

Appellant claims that the prosecutor committed misconduct during the penalty phase by implicitly commenting on appellant's failure to testify in noting that appellant never expressed remorse for his crimes. (AOB, pp. 233-234.) He is incorrect. Furthermore, because any conceivable error was harmless beyond a reasonable doubt, appellant is not entitled to relief.

A. Introduction

As a part of his discussion of the mitigation evidence presented, the prosecutor made the following remarks, including the italicized portions on which appellant relies in support of this claim:

> MR. ANDERSON: ... Finally, the defense called two nieces—strike that—three nieces, two sisters, both parents, a little league mother, two former co-workers, Pilar Ford and two ex-Newark police officers.
>
> *Other than the fact [appellant] was kind to them, brought them flowers, drew cards and cartoons for them, babysat for them, I didn't hear any of them say [appellant] had any remorse for this crime. Not one.*
>
> Want to know what's a terrible shame? I'll tell you what's a terrible shame. The defendant, obviously, has two parents who love and care greatly for him. Make no mistake about that, they love their son. I would have been shocked if they said something to the contrary. That's a given. They love him without any reservation whatsoever.
>
> And he's broken their hearts, too. He's broken their hearts, too. He's made them victims, also.
>
> I don't think you can ever overestimate a love a mother has for her children. There is no question about that. All moms love their kids. That's human nature. I'm sure Osama-Bin-Laden's mother loves him. I'm sure Timothy McVeigh's mother loves him. Probably even Saddam Hussein's mother loves him.
>
> *Did you ever hear Mr. or Mrs. Lopez say: [Appellant] told me, sorry, Mom, for breaking your heart. Sorry, Mom, for putting you through this all these years. Sorry, Mom, for having you come to court and having you beg for my life. Sorry, Mom, for—*
>
> MR. HOVE: Objection, your Honor, he can't offer this under the Evidence Code. We've been through this before. Improper argument.
>
> THE COURT: Sustained.

MR. HOVE: Ask that the district attorney be admonished not to do this.

THE COURT: Let's move on.

MR. ANDERSON: *Did you ever hear one word of remorse from him?*

MR. HOVE: Once again, *Griffin* error. I object on that, your Honor.

THE COURT: I had sustained your objection. Mr. Anderson, move on.

MR. HOVE: I move for a mistrial based on—

THE COURT: Denied. Move on.

(81 RT 5110-5112 [italics added].) The prosecutor then went on to a discussion of sympathy and residual doubt. (81 RT 5112.)

B. The Prosecutor's Comments Did Not Constitute Error under *Griffin v. California* (1965) 380 U.S. 609.

Appellant claims that the comments referenced were a "deliberate and pointed reference to appellant's failure to testify" in violation of *Griffin v. California*. (AOB, p. 235.) Looking at the comments in context, however, this is not the case.

The comments were made as a part of the discussion of the mitigation evidence presented. Specifically, the comments were introduced by reference to the testimony of family and friends regarding appellant's good character and their love for him. This Court has consistently held that prosecution comment on the lack of evidence that a defendant has ever expressed remorse does not constitute *Griffin* error, "even where it faults the defendant for failing to confess guilt and express remorse during his guilt phase testimony." (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1173 [and cases cited therein].)

"The presence or absence of remorse is a factor '"universally" deemed relevant to the jury's penalty determination.' ... So long as the prosecutor's argument does not amount to a direct or indirect comment on the defendant's invocation of the right to silence at the penalty phase [citations], it does not violate constitutional principles." (*People v. Lewis* (2001) 25 Cal.4th 610, 673-674 [argument that "[n]owhere in this trial did you see any evidence of any remorse on his behalf" not error, even where defense presented no mitigation evidence at penalty phase]; see also *People v. Jurado* (2006) 38 Cal.4th 72, 141 [lack of remorse is relevant to evaluation of mitigating factors]; *People v. Stansbury* (1993) 4 Cal.4th 1017, 1067-1068 [no error to argue lack of remorse as a reason not to extend mercy].) The determinative factor in finding *Griffin* error is thus a direct comment tied to the defendant's failure to take the stand.

Here, there was no such connection. The first statement noted was "I didn't hear any of them say [appellant] had any remorse for this crime." (81 RT 5110.) This is a reference to the testimony of family, friends and co-workers, *not* the appellant. Likewise, the second statement asked the jury if they ever heard Mr. or Mrs Lopez say that appellant told *them* that he was sorry. In addition to referencing testimony of others regarding out-of-court statements made to them, the remorse spoken of was for "breaking [their] heart," "putting [them] through this," and "having [them] come to court and [] beg for [appellant's] life." (81 RT 5111.) The last statement, asking if the jury heard one word of remorse from the appellant, followed immediately upon the reference to statements made to his parents and others, and thus would be understood, in context, to reference non-testimonial statements by appellant. (See *People v. Brasure* (2008) 42 Cal.4th 1037, 1059 [in discussing harmlessness of purported *Griffin* error, court observed that the prosecutor's comment was ambiguous, noting that the "suggestion defendant should 'stand up' and take responsibility for his

actions did not necessarily refer to testifying, especially as the prosecutor had just referred to private letters defendant had written in which he sought to evade responsibility"].

Taken in context, the statements cited are similar to the facts in *People v. Crittenden* (1994) 9 Cal.4th 83. In that case, the prosecutor asked the defendant's sister on cross-examination if, in any of the letters he had written to her, he had ever expressed remorse. In closing argument the prosecutor then referenced the defendant's lack of remorse. In finding no error, this Court held:

> The prosecutor's reference to defendant's lack of remorse was not a comment upon his failure to testify during the trial or to take the stand and confess his guilt following the guilt phase, but was a legitimate reference to the circumstance that, in communications with numerous individuals, defendant never expressed regret concerning the murders.

(*Crittenden, supra*, 9 Cal.4th at p, 147.)

C. The Error, If Any, Was Harmless

As noted above, the only comment that even remotely constituted a comment on the failure to testify is the last one – "Did you ever hear one word of remorse from him?" – and it is, at best, ambiguous coming on the heels of the references to statements made to family and friends. Even assuming arguendo, however, that this statement was *Griffin* error, it is harmless beyond a reasonable doubt.

This Court has long held that "brief and mild references to a defendant's failure to testify, without any suggestion that an inference of guilt be drawn therefrom, are uniformly held to constitute harmless error." (*People v. Hovey* (1988) 44 Cal.3d 543, 572; *People v. Jackson* (1980) 28 Cal.3d 264, 305; *People v. Vargas* (1973) 9 Cal.3d 470, 480.) Further, to find prejudice, the challenged comment must either "'serve to fill an evidentiary gap in the prosecution's case,' or 'at least touch a live nerve in

the defense, ...'" (*Vargas, supra*, 9 Cal.3d at p. 481.) The comments in this case did neither.

This claim is without merit.

XII. THE TRIAL COURT DID NOT ERR IN ADMITTING EVIDENCE THAT APPELLANT HAD PREVIOUSLY COMMITTED WELFARE FRAUD

In rebuttal at the penalty phase, the prosecution called Jennifer Hazeltine, an inspector with the District Attorney's office. Ms. Hazeltine testified that in June 1996, she received a referral indicating that appellant, while receiving welfare benefits, had been employed and failed to report his income, resulting in the unlawful receipt of $2705.00 in benefits. When confronted, appellant admitted to the failure to report income and asked to be allowed to repay the money at $40.00 per month. (80 RT 5053-5058.)

Appellant claims that the trial court erred in admitting this testimony. According to appellant, this evidence was not proper rebuttal in light of the limited nature of the character evidence introduced in mitigation.

A. Background

Appellant characterizes the mitigation evidence as "testimony of a mental health expert regarding appellant's low IQ score, coworkers' testimony that appellant sometimes brought Sabra and Michael, Jr. to work with flowers and birthday cakes and that they seemed happy, and testimony from family members who described appellant as 'different' after a serious car accident in 1983 ... ." (AOB, p. 237.) He further asserts that, "[w]hile family members described appellant as having positive qualities, including having a good relationship with his son and Sabra, none offered an opinion about a character trait for honesty, or any other incident that would be properly rebutted by evidence of welfare fraud." (AOB, p. 238.)

Appellant's summary overlooks the evidence he presented during the penalty phase regarding the alleged importance of his Christian beliefs in

his life, including regular church attendance, prayer and his constant efforts to discuss his beliefs and convert others. (See, e.g., 78 RT 4965-4966, 4975-4977, 4995-4996; 79 RT 5023.) In his closing argument, appellant's counsel stated:

> Some people don't like injecting religion into things, but religion has a place, ladies and gentlemen, it has a place because it shows that somebody has at least acknowledged their failings, acknowledge their need for something more in their lives, and Mike recognized that. Obviously, it didn't cure him but it showed something about that and he was a religious person.

(82 RT 5158.) Counsel also argued the significance of the dedication ceremony at the church where appellant "gave his son back to God." (82 RT 5158.) In addition to this, the jurors had heard about appellant's belief in God and his church attendance during the guilt phase. (See, e.g. 43 RT 3074, 53 RT 3678, 59 RT 3974, 60 RT 4083.) During closing argument on guilt, counsel said:

> Mike took the kids to church. What does that mean? Well, I think that gives some insight as to where he was. You heard that he was very very much a follower of Jesus.

(69 RT 4609.)

In addition to the showing the importance of religion in his life, appellant introduced testimony from a mental health expert regarding his low IQ score and the fact that, although appellant was not mentally retarded, he did suffer some impairments, performing at a third to sixth grade level on various math and reading tests. The expert also stated that appellant had been in special education classes in school, a fact consistent with lifelong learning difficulties. (77 RT 4887-4890.) On cross-examination, however, when asked if such a person could be capable of committing welfare fraud, she admitted that a person with appellant's IQ could lie. (77 RT 4921-4922.) In closing argument, counsel argued appellant's limitations as

another basis for sympathy noting that appellant was a "good employee," a "good janitor," noting that he "didn't have the mental juice to go farther." (82 RT 5155.)

Although appellant did object to the admission of testimony regarding appellant's investigation for welfare fraud (80 RT 5039-5041), he did not object to the cross-examination of the mental health expert noted above, nor did he object to the admission of his statement admitted to the fraud and offering to repay the money. (80 RT 5067; PE 72.) The trial court found that the evidence was admissible. (80 RT 5041.)

B. The Evidence of Appellant's Welfare Fraud Was Properly Admitted as Rebuttal Character Evidence

Appellant now claims that evidence relating to the incident of welfare fraud was improper rebuttal because it "was not responsive to any of the mitigation evidence presented." (AOB, p. 238.) The admission of evidence in rebuttal is a matter left to the sound discretion of the trial court. (*People v. Hart* (1999) 20 Cal.4th 546, 653; *People v. Raley* (1992) 2 Cal.4th 870, 912.) The court's decision in this regard will not be disturbed on appeal in the absence of "palpable abuse." (*People v. Kelly* (1990) 51 Cal.3d 931, 965.)

Appellant relies on this Court's holdings in *People v. Rodriguez, supra,* and *People v. Ramirez* (1990) 50 Cal.3d 1158, for the proposition that rebuttal character evidence must "relate directly to a particular incident or character trait defendant offer[ed] in his own behalf." (*Rodriguez, supra,* 42 Cal.3d at pp. 790-792.) However, this Court has also stated:

> The scope of proper rebuttal is determined by the breadth and generality of the direct evidence. 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. [citations omitted]

(*People v. Loker* (2008) 44 Cal.4th 691, 709.) In light of the evidence presented by appellant in this case, the evidence at issue constituted proper rebuttal.

As noted above, appellant, throughout the trial introduced evidence of his regular church attendance, prayer, and the general importance of God in his life. This was emphasized to the jury during arguments at both the guilt and penalty phase. A well-known tenet of Christianity is honesty and truthfulness, therefore evidence of dishonesty was proper rebuttal. As this Court has stated:

> Although we cautioned in Rodriguez that "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" (42 Cal.3d at p. 792, fn. 24, 230 Cal.Rptr. 667, 726 P.2d 113), here defendant's good character evidence was not limited to any singular incident, personality trait, or aspect of his background. The defense evidence painted an overall picture of an honest, intelligent, well-behaved, and sociable person incompatible with a violent or antisocial character. The breadth and generality of this good character evidence warranted rebuttal evidence of the scope offered. (Cf. *People v. Ramirez* (1990) 50 Cal.3d 1158, 1192–1193, 270 Cal.Rptr. 286, 791 P.2d 965.)

(*People v. Mitcham* (1992) 1 Cal.4th 1027, 1072.) In *People v. Ramos* (1997) 15 Cal.4th 1133, 1172-1173, this Court allowed rebuttal evidence relating to weapons possession in prison following defense testimony regarding discussions "about church," "about the Lord," and "about serving Him, seeking Him, His consolation for us, His strengthening for us. ... Other witnesses had established that the Church of la Luz del Mundo was a Christian-based sect, implying tenets of nonviolence." (See also *People v. Siripongs* (1988) 45 Cal.3d 548, 579 [finding that evidence that defendant was "a devout Buddhist and a good son" opened the door to evidence of

prior theft convictions]; *People v. Bouchee* (1977) 400 Mich. 253, 262-263, 253 N.W.2d 626, 630 [evidence claiming, religious, moral and God-fearing qualities would be subject to rebuttal by evidence of prior convictions]; *State v. Hale* (1969) 21 Ohio App.2d 207, 215-216, 256 N.E.2d 239, 245 [evidence of juvenile record admissible to rebut character evidence including church affiliation, attendance and religious propensities].)

Respondent further submits that the mental health evidence, to the extent that it was offered to demonstrate appellant's limitations, opened the door to evidence showing his ability to manipulate others, including lying to receive financial benefits. (*People v. Hawthorne* (2009) 46 Cal.4th 67, 92; *People v. Zapien* (1993) 4 Cal.4th 929, 991 [where defendant introduced evidence he had conquered his drug addiction and converted to Christianity at the time of offense, it was proper to admit evidence tending to show that after murder defendant was shoplifting and using drugs].)

The trial court did not abuse its discretion in admitting the evidence of appellant's welfare fraud.

C. Error, If Any, Was Harmless

Even if error, admission of relatively brief evidence was harmless. As noted, although Ms. Hazeltine stated that appellant failed to report income resulting in an overpayment of benefits, she acknowledged that he admitted to the failure and immediately offered to make restitution as soon as possible. His signed statement to that effect was entered as an exhibit. (80 RT 5057.) Ms. Hazeltine further stated that no criminal charges were filed against appellant. (80 RT 5058.) In light of the evidence of appellant's cooperation, the limited extent of the evidence at issue and the overwhelming nature of the aggravating evidence, there is no reasonable possibility that had the jury not heard this evidence, it would have rendered a different penalty verdict, therefore, the error, if any, was harmless. (See *People v. Cunningham* (2001) 25 Cal.4th 926, 1019.)

XIII. THERE IS NEITHER CUMULATIVE ERROR NOR PREJUDICE

Appellant claims cumulative effect of the errors raised require reversal. He is incorrect. As set forth above, appellant has not established that any prejudicial error occurred at either phase of his trial, therefore this claim fails. (*People v. Virgil, supra,* 51 Cal.4th at pp. 1290-1291.)

CONCLUSION

Accordingly, respondent respectfully requests that the judgment be affirmed.

Dated: September 29, 2011

Respectfully submitted,

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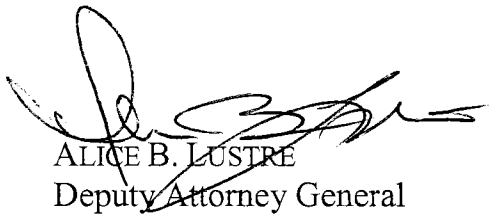
CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 31,332 words.

Dated: September 29, 2011

KAMALA D. HARRIS
Attorney General of California



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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Michael Augustine Lopez**
No.: **S099549**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On September 29, 2011, I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

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The Honorable Nancy O'Malley
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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 September 29, 2011, at San Francisco, California.

Pearl Lim
Declarant

Signature