In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **JOSEPH ANDREW PEREZ, JR.,** **Defendant and Appellant.**

CAPITAL CASE

Case No. S104144

Contra Costa County Superior Court Case No. 990453-3
The Honorable Peter L. Spinetta, Judge

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STATEMENT OF THE CASE

In an indictment filed in the Contra Costa County Superior Court on March 24, 1999, appellant Joseph Andrew Perez, Jr. and two codefendants, Lee Snyder and Maury O'Brien, were charged as follows: Count 1—murder (Pen. Code, § 187)[1]; Count 2—residential robbery (§§ 211/212.5, subd. (a)); Count 3—residential burglary (§§ 459/460, subd. (a)); Count 4—unlawful driving or taking of a vehicle (Veh. Code, § 10851, subd. (a)). (3 CT 769-771.) The indictment further alleged special circumstances as to Count 1, i.e., that the murder had been committed while the defendants were engaged in the commission of a robbery and a burglary. (3 CT 769-770.)

Codefendants Snyder and O'Brien later moved to sever their trials from that of appellant, and the motions were granted. (3 RT 584, 667.)

On October 16, 2001, a jury convicted appellant on all counts and found true the special circumstances. (15 RT 3688-3689.)

On November 16, 2001, the penalty phase trial concluded with the jury's verdict of death. (24 RT 5540; 5 CT 1920-1922.)

On January 25, 2002, the trial court denied appellant's motion for a new trial and formally sentenced him to death. (24 RT 5618.)

This automatic appeal followed.

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[1] Unless otherwise indicated, all statutory references are to the Penal Code.

STATEMENT OF FACTS

A. The Guilt Phase of Trial

1. The Prosecution Case

a. Introduction

There was no dispute at trial that the victim in this case, Janet Daher, was murdered during a burglary of her Lafayette home on the afternoon of March 24, 1998.[2] The primary prosecution witness was Maury O'Brien, who admitted that he had been one of the burglars. In brief, O'Brien testified that he, Lee Snyder, and appellant Joseph Perez had burglarized Janet's house in the hope of stealing money and property to buy drugs. Janet was inside the house at the time of the burglary, and appellant and Snyder killed her so she could not identify them to the police.

O'Brien's testimony, discussed at length below, was confirmed by many independent sources.[3]

b. Joe Daher

In the spring of 1998, Joe Daher lived with his wife, Janet, and their daughters, Lauren and Annie, at 1253 Rose Lane in Lafayette. (9 RT 2060.) Around 2:00 p.m. on March 24, 1998, Joe left the house to attend Lauren's softball game in Livermore. (9 RT 2061-2063.) Janet stayed home, alone. (9 RT 2061.) As Joe drove away, he left the garage door open, as he often did, to allow family members easy access to the interior of the house. (9 RT 2063-2064.)

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[2] For clarity, we sometimes refer to Janet Daher and the members of her family by their first names.

[3] Appellant's lead trial attorney, William Egan, Jr., acknowledged in his opening statement to the jury that O'Brien and Snyder had killed Janet, but Egan insisted appellant had played no role in the crime. (See 9 RT 2052-2054.)

c. Neighborhood witnesses

A number of people noticed three suspicious-looking men walking in the Dahers' neighborhood on the afternoon of the killing, March 24, 1998.

Around 2:15 p.m., Roger Parkinson, an employee of the Lafayette School District, was driving southbound on Happy Valley Road. (9 RT 2154-2156.) He saw three men in dark clothing walking on the side of the road in his direction. (9 RT 2157-2158, 2164.) The men looked out of place in the upscale neighborhood, and one of the men had tattoos, possibly in the form of lightning bolts, on his neck. (9 RT 2158-2160, 2166, 2177-2179.) The tattooed man may have been White and around 27 years old, and the other two men may have been Hispanic and around 18 or 19 years old. (9 RT 2162-2164.) All three men had dark hair, and the tattooed man had a "good sized" mustache and possibly a tinge of red in his hair. (9 RT 2164-2165.)[4]

Parkinson was shown photospreads of possible suspects some time later, but he was unable to make a positive identification. (9 RT 2166.) At trial, appellant stood up in the courtroom, and Parkinson said he looked like the tattooed man. (9 RT 2168.) When asked how strongly he felt, Parkinson said, "Just his face looks like him." (9 RT 2168.)

Nathan Bunting was supervising an engineering work crew on Happy Valley Road around 2:30 p.m. on March 24, 1998. (10 RT 2236-2238.) Bunting noticed three men walking on the road toward his crew, and he

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[4] At the time of the crime, appellant was 26 years old, O'Brien was 18, and Snyder was 17. (See 15 RT 3565; 20 RT 4606; 2 Supp. CT 439.) When arrested, appellant had tattoos on the sides on his neck. One tattoo read "Thug Life" and the other read "RIP Lil' Ed Sully." (12 RT 2696-2697; see also Exhs. 62, 63.) A number of witnesses described appellant's appearance at trial, and they generally said that he was "light skinned" and blue-eyed, and that he had reddish-blond hair. (See, e.g., 15 RT 3567; 16 RT 3883; 23 RT 5030; Exh. 57.)

became concerned because the men "looked kind of punky," as if they "didn't fit" in the neighborhood. (10 RT 2237-2238.) One man, who looked White and in his mid-twenties, had a tattoo on his neck. (10 RT 2238-2239, 2243, 2255.) The other two men looked Hispanic and around 17 or 18 years old. (10 RT 2238-2239.) Bunting watched the men the entire time they walked toward him, "in case something [went] wrong." (10 RT 2237, 2239.) As the three men walked by, the tattooed man—who appeared to be the leader of the group—said something like, "What's up?" (10 RT 2240-2243.) The men continued walking toward Rose Lane. (10 RT 2242, 2246-2247.)

About ten weeks later, on June 8, 1998, police officers showed Bunting four six-pack photospreads, including one containing appellant's photo. (10 RT 2243-2245.) Bunting selected appellant's photo and said (or wrote) something like, "That's him. That's the closest." (10 RT 2245, 2259; see also 12 RT 2798-2803; Exh. 39A.) In the courtroom during trial, Bunting twice identified appellant as the tattooed man. (10 RT 2245-2246, 2265.)[5]

Interior designer Kathy Burke, an acquaintance of Janet Daher, was driving to meet a client around 2:15 p.m. on March 24, 1998. (9 RT 2113-2114, 2133, 2153.) She saw three men walking on Rose Lane. (9 RT 2114-2115, 2133, 2153.) The men may have been White and between 18 and 21 years old, and one man was noticeably taller than the others. (9 RT 2123-2124, 2137-2139.) As Burke drove by the men, they looked at her in

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[5] After Bunting identified appellant for the second time in the courtroom at trial, the prosecutor asked appellant to stand up and say, "What's up?" (10 RT 2265-2266.) Appellant complied, and the prosecutor asked Bunting, "Can you tell or not?" (10 RT 2266.) Bunting answered, "No." The prosecutor asked, "Is the defendant the same person you saw on the road?" (10 RT 2266.) Bunting said, "I can't be exact, but yes, he looks a lot like him." (10 RT 2266.)

"a very mean way." (9 RT 2118.) The men were wearing dark clothing which seemed unusually heavy for the warm weather. (9 RT 2115, 2122.) One man wore a dark stocking cap, while the other two men wore baseball caps. (9 RT 2115, 2122.) The men all looked "unkempt," and they may have had facial hair. (9 RT 2123.)

Burke felt alarmed and fearful. (9 RT 2118.) She thought the men were "not nice people," and she drove past them a few times to let them know they were being watched. (9 RT 2117-2120, 2134-2135.)

When Burke reached her client's house, she called 911 and asked the police to investigate. (9 RT 2120.) As she drove out of the neighborhood some time later, she pulled into the Dahers' cul-de-sac and waited for the police. (9 RT 2120.) No patrol car arrived, so Burke left for a meeting in San Francisco. (9 RT 2120-2121.) At the time, the Dahers' garage door was closed. (9 RT 2120.)

Burke was asked to view a live lineup a few months later, in June 1998. (9 RT 2126-2127.) When she viewed the lineup, there were other people in the room who seemed to be associated with Janet's killers. (9 RT 2127, 2146-2149.) Burke was very nervous and confused. (9 RT 2127, 2145-2149.) She identified one or two men in the lineup as possibly having been on Rose Lane on March 24, 1998, but she later realized she had not been thinking clearly. (9 RT 2127-2129.) She called the police the next day to say she was not confident of her identifications. (9 RT 2127-2128, 2145, 2149-2150.)[6]

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[6] Appellant was in the lineup that Burke viewed, but he was not one of the men she identified. (See 9 RT 2127-2128, 2144, 2147, 2151; 13 RT 2961-2966.)

d. The discovery of the SUV and Janet's body

Annie Daher got out of school at 3:00 p.m. on March 24, 1998, and she walked to a nearby restaurant where her mother routinely picked her up. (9 RT 2101.) Janet never arrived. (9 RT 2102.) Annie eventually walked home, arriving some time between 4:30 and 5:15 p.m. (9 RT 2103, 2107.) Janet did not appear to be home, but a television was on in the family room near the kitchen. (9 RT 2104-2105.) Annie walked through the ground floor rooms and saw Janet's purse on the living room floor. (9 RT 2105.) The strap of the purse was broken, and the contents of the purse were strewn nearby. (9 RT 2105; see also 9 RT 2187.) Annie phoned a friend, her father, and the police. (9 RT 2105-2107.)

Around the same time, Richard Solbrack, an employee of a roofing company in Cordelia (near Fairfield), observed a Mercedes SUV parked in the company's storage lot. (10 RT 2270-2271, 2287.) Solbrack did not recognize the SUV, and it was oddly parked between a fence and a shed, as if someone had tried to hide it. (10 RT 2271-2274, 2289, 2303-2304.) Solbrack called the police. (10 RT 2271-2273.) When officers arrived, they checked the Vehicle Identification Number of the SUV and learned it was registered to the Dahers. (10 RT 2290.)

Two other officers went to the Dahers' house. (9 RT 2185-2196.) One officer remained downstairs with Annie, while the other searched the upstairs bedrooms. (9 RT 2189.) He discovered the body of Janet in the master bedroom. (9 RT 2191.) She was lying face down on the far side of the bed, and a telephone cord was wrapped around her hands and neck, as if she had been "hog tied" and strangled to death. (9 RT 2191-2192; see also Exhs. 37, 38.) There was a pool of blood beneath her body. (9 RT 2191.) In each bedroom, drawers were open and clothes and other objects were strewn on the floor. (9 RT 2190-2191.)

e. Maury O'Brien

In early June 1998, the police received a tip that Maury O'Brien had been involved in the killing of Janet. (12 RT 2837; 14 RT 3152-3160.) O'Brien was in jail for a theft at the time, and the police questioned him for several days, starting on June 5, 1998. (14 RT 3160-3165; see also 11 RT 2517-2518, 2521.) O'Brien initially denied any involvement in the killing of Janet, but the police told him they had strong evidence against him. (14 RT 3162-3163; see also 11 RT 2582.) O'Brien quickly admitted he had been involved in the crime, but he insisted he had not personally harmed Janet. (14 RT 3162-3163; see also 11 RT 2589.)

O'Brien described the crime as a witness for the prosecution at trial (see 11 RT 2431-2607), and the recordings of his prior police interviews were also played for the jury (see 13 RT 3034-3037; Exhs. 107, 107A). O'Brien acknowledged to the jury that he was facing charges of capital murder, burglary, robbery of a residence, and car theft, and he said he was testifying for the prosecution in the hope of avoiding a death sentence. (11 RT 2431-2432, 2590-2597.)[7]

O'Brien was 22 years old at the time of trial. (11 RT 2432.) He and Lee Snyder had grown up in the same neighborhood in Fairfield, and they had committed crimes and used drugs together throughout their teenage years. (11 RT 2432-2439.)

Snyder was living with his father in San Francisco in early 1998. (11 RT 2437.) At that time, O'Brien and Snyder continued to commit crimes

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[7] Our summary focuses primarily on O'Brien's trial testimony, which was largely consistent with his pretrial statements to the police. References to O'Brien's interview statements are indicated by citations to the transcripts, found in Volumes 3 and 4 of the Supplemental Clerk's Transcript.

and use drugs together, and their drug suppliers included Jason Hart in San Francisco and Sonny Sandu in Fairfield. (11 RT 2242-2444.)

A day or two before March 24, 1998, O'Brien and Snyder decided to rob Sandu. (11 RT 2444-2445.) They devised a plan to buy drugs from Sandu in Fairfield and steal his money and drugs at gunpoint. (11 RT 2445.) They told Hart about their plan. (11 RT 2445.) Hart refused to participate in the proposed robbery, but he agreed to buy any drugs stolen from Sandu. (11 RT 2445-2446.)

A few days later, Hart came to Snyder's house with appellant, whom Hart called "Rock." (11 RT 2445-2451.) The men talked about the proposed robbery of Sandu, and appellant asked to participate. (11 RT 2446-2449.) O'Brien and Snyder agreed, and they snorted some cocaine together. (11 RT 2453.)[8]

O'Brien, Snyder, and appellant asked Hart to drive them to Fairfield, but he refused. (11 RT 2451.) Hart nonetheless drove the three men to the "Balboa" (presumably Balboa Park) BART station in San Francisco, and they rode the train to the East Bay. (11 RT 2452-2454.) They initially intended to get off at Pleasant Hill or Walnut Creek, but they got off early, at the Orinda station, to smoke a cigarette. (11 RT 2454, 2569.) When they got back on the train, they looked at the large, secluded houses in the hills and decided to rob "a house" instead of Sandu. (11 RT 2454-2459, 2569-2570.)

The men got off the train in Lafayette and walked toward the hills. (11 RT 2454-2458.) O'Brien had some knives and Snyder had a nine-millimeter handgun, and appellant was not armed. (11 RT 2461-2462.)

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[8] Many witnesses testified at trial about using various drugs, including cocaine. It appears that appellant's drug use was limited to marijuana. (See, e.g., 10 RT 2345, 2392; 11 RT 2496, 2504, 2507.)

O'Brien was wearing blue jeans, a black leather jacket, and a dark blue watch cap. (11 RT 2462.) Snyder was wearing a dark Green Bay Packers jacket. (11 RT 2463.) Each man also had a pair of gloves. (11 RT 2472.)

As the men walked in the direction of Rose Lane, a woman drove past them a few times. (11 RT 2464.) The woman was obviously "eyeballing" them, but they did not abandon their plan to commit a robbery. (11 RT 2464.) They eventually saw a house with an open garage door. (11 RT 2466.) They walked into the garage, and appellant pressed a button on the wall to close the door. (11 RT 2466.) Snyder seemed afraid to go into the house, so O'Brien took the gun from him and led the way inside. (11 RT 2467.)

The men entered the kitchen and saw a woman, Janet, leaning over a counter. (11 RT 2468-2469.) O'Brien said, "This is a robbery." (11 RT 2469.) Janet turned around and started to say something, and appellant hit her in the side of the head. (11 RT 2469.) She fell to the floor and curled into a ball, crying. (11 RT 2469.) O'Brien ran through the house to see if anyone else was present. (11 RT 2470.) After determining that the house was empty, O'Brien returned to the kitchen and held Janet at gunpoint while appellant and Snyder searched the house for valuables. (11 RT 2471.) Janet was cooperative, and she said her daughter would be home from school in 15 minutes. (11 RT 2474-2475.) O'Brien yelled to Snyder by name, saying they had to leave quickly. (11 RT 2474.) Appellant became angry and decided to kill Janet because she had heard Snyder's name. (11 RT 2475.)

Appellant and Snyder returned to the kitchen, then led Janet upstairs. (11 RT 2478.) Snyder seemed extremely excited, apparently "tweaking out" from the cocaine he had ingested and the stress of the burglary. (11 RT 2468, 2474-2475.) O'Brien stayed downstairs for a time, standing near a window as a lookout. (11 RT 2480.) He later went up to the master

bedroom, and he saw Snyder ripping the cord off the bedroom telephone. (11 RT 2480-2481.) O'Brien went back downstairs but soon returned to the master bedroom. (11 RT 2480-2482.) He could not see Janet well because she was lying on the floor on the far side of the bed. (11 RT 2481-2483.) It looked like appellant was sitting on top of her, tying her hands behind her back and choking her with the telephone cord. (11 RT 2482-2485.) Snyder threw a stereo speaker at Janet's head, then helped appellant choke her. (11 RT 2482-2485.) The two men seemed to be "tag-teaming" Janet, pushing on her neck and trying to choke her with the cord. (11 RT 2482-2485, 2488.) At one point, Snyder ripped a videotape from the bedroom entertainment unit because he thought a surveillance camera might be recording them. (11 RT 2490; see also 3 Supp. CT (Exh. 107) 464-465, 477, 529, 546.)

Appellant told O'Brien to go downstairs to get a knife. (11 RT 2486.) O'Brien gave appellant a folding knife from his pocket, and appellant repeatedly stabbed Janet in the back and neck. (11 RT 2487-2490.) Appellant gave the knife back to O'Brien, and he put it in his pocket. (11 RT 2490.)

The men filled a blue laundry bag with jewelry and other items, including a cell phone and a Nintendo game. (11 RT 2491, 2500.) A Mercedes SUV was in the garage with its keys in the ignition, and they used it as their getaway car. (11 RT 2490-2492.) Appellant drove the SUV, and O'Brien sat in the front passenger seat and Snyder sat in back. (11 RT 2492.) During the getaway drive, O'Brien and Snyder consumed cocaine. (3 Supp. CT 498.)

The men drove toward Fairfield, but they stopped at a gas station in Cordelia to buy beer. (11 RT 2494.) They saw a nearby motel, the Overnighter Motel, and O'Brien rented a room while appellant and Snyder "ditched" the SUV nearby. (11 RT 2494-2496; see also Exh. 54 [motel

registration form signed by O'Brien].) Appellant and Snyder came to the motel room, and the three men drank beer and O'Brien and Snyder snorted cocaine. (11 RT 2496.) They opened the laundry bag and dumped the stolen property onto the bed. (11 RT 2496.) They divided up the property, and appellant and Snyder took most of it because they had killed Janet. (11 RT 2497-2498.) Appellant and Snyder talked about how they had earned "a stripe" for having killed Janet. (3 Supp. CT 571; 4 Supp. CT 816.)

The men still wanted to rob the drug dealer Sandu, so they went to a nearby gas station and paged him. (11 RT 2493, 2499.) Sandu did not return the page, so they decided to look for him by walking to Fairfield. (11 RT 2499-2500.) They left the Nintendo game at the motel, but took their beer and drank as they walked. (11 RT 2499-2500.) As they crossed an overpass, appellant and Snyder told O'Brien to get rid of the knife that appellant had used to stab Janet. (11 RT 2500-2501.) O'Brien threw the knife into some bushes. (11 RT 2501.)

The men arrived in Fairfield by sunset, but they did not find Sandu. (11 RT 2501.) They bought sandwiches and went to a nearby park, then to the home of Justin Mabra, an acquaintance of O'Brien and Snyder. (11 RT 2502-2504.) O'Brien went inside Mabra's house and tried to call Sandu again. (11 RT 2503-2504.) Sandu did not answer, so O'Brien went outside. The three men talked for a while with Mabra and his girlfriend, Meghan McPhee. (11 RT 2504.) They also sat inside McPhee's car and talked. Everyone except appellant snorted cocaine. (11 RT 2504.)

About an hour later, O'Brien said that he, Snyder, and appellant needed a ride to San Francisco. (11 RT 2505-2506.) Mabra and McPhee refused. (11 RT 2505.) O'Brien contacted other friends, "Little Jay" and "Rob," and they picked them up and drove back to the Overnighter Motel. (11 RT 2506-2507.) There, they smoked marijuana and used cocaine. (11 RT 2506-2507.) They decided to get the SUV from the roofing company

storage lot, but they saw lots of police cars in that area so they went back to the motel. (11 RT 2508.)

Appellant phoned Jason Hart to ask for a ride back to San Francisco. (11 RT 2507-2509.) Appellant told Hart that they had robbed and killed a woman, and Hart agreed to pick them up. (11 RT 2511-2512.) Hart eventually arrived at the motel with a man named Mac Shawn, and they drove back to San Francisco. (11 RT 2510-2513.) During the drive, the three men continued to talk about the robbery and killing of a woman. (11 RT 2511-2512.) Mac Shawn was angry because he did not want to be associated with such serious crimes. (11 RT 2511.)

Once they reached San Francisco, the men continued to "party" with drugs. (11 RT 2513.) They also offered to sell some of Janet's jewelry to Hart, and he bought two rings from O'Brien. (11 RT 2513.) Hart refused to buy a large diamond ring from Snyder. (11 RT 2514.)

Over the next few days, O'Brien spent time with Andrea Torres and Lacey Harpe. (11 RT 2515-2516.) O'Brien told the women he had been involved in a very serious crime, but he lied about some of the details so people would not link him to the killing of Janet. (11 RT 2516-2517, 2578-2579.) The incident was bothering him "real bad." (11 RT 2517.)

O'Brien was arrested for committing a theft in late May 1998, and he was carrying some of Janet's jewelry at the time. (11 RT 2517-2518, 2554-2555, 2559, 2575-2576, 2598.) The police interviewed him about a week later, starting on June 5, 1998. (11 RT 2517-2518, 2521, 2554-2555.) He initially denied any involvement in the killing of Janet, but he eventually told the police what had happened. (11 RT 2517-2518.) He lied about a few things, primarily to protect Snyder, but his overall account was truthful. (11 RT 2518, 2583, 2590; see also 3 Supp. CT 548, 564.)

After the interview, O'Brien led the police to the bushy area where he had thrown the knife used to stab Janet. (14 RT 3162-3163; see also 10 RT

2317-2323; 14 RT 3162-3163.) The police collected the knife as evidence. (10 RT 2317-2320; see also Exh. 46.) It had a six-inch handle and a four-inch blade. (10 RT 2320.)

f. Justin Mabra

Justin Mabra, 21 years old at the time of trial, testified that he had known O'Brien and Snyder while they were all growing up in Fairfield. (10 RT 2334-2344). One night in March 1998, Mabra was at his parents' house with his girlfriend, Meghan McPhee. (10 RT 2339-2340.) O'Brien and Snyder came to the house with a third man, appellant. (10 RT 2340, 2350.) O'Brien, Snyder, and appellant were all wearing dark clothing, and Snyder's jacket had a Green Bay Packers logo on it. (10 RT 2346, 2353-2354.) Appellant had very short hair, a receding hairline, and a goatee. (10 RT 2366.) He also had several rings on his fingers and a baseball cap worn low on his head. (10 RT 2346, 2349, 2352, 2366.)

The group talked outside the house for a while, and O'Brien said that he and his friends needed a ride to San Francisco or Cordelia. (10 RT 2342-2344.) Mabra and McPhee declined to give them a ride, but the group talked outside the house for a while, then sat in McPhee's car and talked and used cocaine. (10 RT 2342-2345.) O'Brien, Snyder, and appellant were later picked up by some other men. (10 RT 2374.)

Several weeks later, Mabra attended a live lineup at the Contra Costa County jail. (10 RT 2350.) Appellant was in the lineup, and Mabra identified him as the man who had come to his house with O'Brien and Snyder in late March. (10 RT 2352; 13 RT 2961-2962.)[9]

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[9] In identifying appellant at the lineup, Mabra placed a question mark on a card indicating appellant's position because appellant had been wearing a baseball cap high on his head during the lineup, but he had worn his cap low on his head when they met in late March 1998. (10 RT 2350-2352, 2355, 2366, 2375; 13 RT 2962.) Mabra was nonetheless confident at (continued...)

g. Meghan McPhee

Meghan McPhee testified that O'Brien, Snyder, and appellant had come to Justin Mabra's house one night in late March 1998. (10 RT 2389, 2400.) McPhee knew two of the men, O'Brien and Snyder, and she confidently identified appellant—both at trial and in a live lineup about a month or two after meeting him—as the third man. (10 RT 2386, 2391, 2401-2403, 2418-2419; 13 RT 2961-2962; Exh. 57, 60.) Snyder had been wearing a black and green sports jacket or parka, and appellant had worn dark clothing and a baseball cap. (10 RT 2396.) Appellant also had a large diamond stud in his ear. (10 RT 2394, 2413-2414.) The group spent about 30 minutes together, talking outside the house and using cocaine inside McPhee's car. (10 RT 2392, 2407, 2418-2419.) The three men said they needed a ride somewhere, but McPhee declined because she had to work the next day. (10 RT 2397-2398.) Some other men arrived later and drove the three men away. (10 RT 2399-2400, 2411.)

h. Deshawn Dawson

Deshawn Dawson, a.k.a. Mac Shawn, testified that he once rode with Jason Hart to Fairfield, and that Hart picked up three young men and drove them back to San Francisco. (12 RT 2650-2652.) During the drive, the three men talked about robbing someone, but they did not mention hurting anyone. (12 RT 2653-2654.)

i. Jason Hart

Jason Hart testified under a grant of immunity. (12 RT 2662.) He had been charged with multiple crimes, including receiving stolen property, selling drugs, and accessory-after-the-fact to murder. He understood he

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(...continued)
trial that appellant was the man who had been with O'Brien and Snyder. (10 RT 2352, 2378-2381.)

would not be prosecuted for those crimes if he testified truthfully. (12 RT 2662-2263.)

Hart lived and sold drugs in San Francisco in 1998, and he knew O'Brien, Snyder, and appellant. (12 RT 2664-2667.) One day in late March 1998, Hart introduced appellant, known as "Joe Rockhead," to O'Brien and Snyder. (12 RT 2664-2670.) O'Brien and Snyder were talking about robbing a drug dealer, and appellant asked if he could participate because he needed money. (12 RT 2670-2671.) O'Brien and Snyder agreed. Hart refused to participate in the robbery, but he agreed to buy any stolen drugs. (12 RT 2669, 2676.)

A day or two later, Hart drove appellant to Snyder's house, and he later drove the three men to the Balboa BART station so they could ride the train to rob the drug dealer. (12 RT 2674-2679.) Hart spent the rest of the day with his friend, "Shawn." (12 RT 2679-2681.

Later that afternoon or evening, appellant called Hart and asked for a ride back to San Francisco from Fairfield. (12 RT 2681-2682.) Hart and Shawn drove to the Overnighter Motel and picked up O'Brien, Snyder, and appellant. (12 RT 2682-2683.) The three men got into Hart's car with a purple bag. (12 RT 2683-2684.) As they drove back to San Francisco, appellant said they had robbed and strangled a woman in Lafayette. (12 RT 2684-2686, 2740.) Appellant also displayed the stolen jewelry. (12 RT 2687.) Shawn yelled at the men because they had committed such a "crazy" crime. (12 RT 2686-2687.)

The men drove to Snyder's house, where they looked more closely at the stolen jewelry. (12 RT 2689.) Hart bought a diamond ring from appellant for $200, and appellant gave him a second ring for free. (12 RT 2692-2693, 2696.) Snyder wanted to sell a particularly large diamond ring for $1,000, but Hart did not have that much money on hand. (12 RT 2689-2690.)

Hart was arrested on June 9, 1998. (12 RT 2706.) The police said they knew he was involved in the murder of Janet, and they warned him that he might be facing the death penalty. (12 RT 2712-2714, 2718.) Hart initially said he knew nothing about the crime, but when the police described some of the details of the killing, he said he "guessed" they were correct. (12 RT 2715-2716.) Hart later retrieved some of the jewelry he had bought from appellant, Snyder, and O'Brien. (12 RT 2721-2722.)

j. Andrea Torres

Andrea Torres, 22 years old at the time of trial, testified that she had been Snyder's girlfriend in 1996 and 1997. (12 RT 2757-2761.) Torres also knew appellant as "Joe Rock," and she had met O'Brien once or twice before March 1998. (12 RT 2762-2765.)

On March 27, 1998 (i.e., three days after the killing of Janet), Snyder, appellant, and O'Brien stopped by Torres' house. (12 RT 2767-2768.) They left after a while, and Snyder later returned and said that O'Brien had been arrested for carrying a knife on BART. (12 RT 2769.) Snyder was wearing a Green Bay Packers jacket at the time. (12 RT 2770-2771, 2781, 2784.) They went to the house of Torres' cousin to party, and Snyder displayed a gun, a gold necklace, and a large diamond ring. (12 RT 2771-2775.) Torres asked Snyder where he had gotten the jewelry, and he said, "You don't need to worry about it." (12 RT 2775.)

Torres was later shown a photo of some of Janet's jewelry, and one of the rings in the photo looked "exactly" like the large diamond ring that Snyder had displayed to her. (12 RT 2772-2773; see also 9 RT 2085; Exh. 26.)

k. Other evidence

Police officers examined the Dahers' house on the night of the killing. As noted by the first officer on the scene, Janet's body lay face down in the

master bedroom, and it appeared that the cord from the bedroom telephone had been used to bind her hands behind her back and strangle her. (9 RT 2191; 13 RT 2894, 2921-2926, 2952-2953.) It also appeared that she had been stabbed many times in the back and neck. (13 RT 2894, 2922, 2928.) Blood spatters, low on the nearby wall, indicated that the stabbings had occurred while Janet was lying on the floor near the wall. (13 RT 2900-2903.) One bloodstain on the bedroom comforter had the pattern of a textured leather glove, and another stain showed the outline of a double-edged knife. (13 RT 2904.) The stain of the knife suggested the blade was about three and a half inches long and nearly an inch wide. (13 RT 2904.) A stereo speaker and a ripped up videotape lay on the floor, and the room appeared to have been ransacked. (9 RT 2073-2076, 2079; 13 RT 2888, 2892-2894, 2897.)

Investigating officers also examined the Dahers' house with a "static dust footprint lifter." They discovered at least four patterns of footprints in the garage and laundry room. (13 RT 2881-2883.) One pattern was consistent with a relatively uncommon pair of shoes that Snyder was wearing when arrested on March 27, 1998. (13 RT 2937-2942, 2962.) A pair of eyeglasses lay on the kitchen floor. (13 RT 2887.) Smudges of makeup on the inner frame of the glasses suggested the frame may have been forcefully pressed against Janet's face. (13 RT 2887.)

The police also examined the Dahers' Mercedes SUV. (10 RT 2307-2313.) They observed bloodstains in the front and rear passenger areas, and traces of white powder on the back seat. (10 RT 2309-2313; 14 RT 3338.) The powder was later determined to be cocaine. (10 RT 2313; 14 RT 3338.)

The autopsy of Janet confirmed that she had died from ligature strangulation from a telephone cord wrapped tightly around her neck. (13 RT 3007-3009.) She also had suffered multiple stab wounds and cuts to the

neck and the upper back and arms. Many of those cuts, and particularly a deep slice to the neck, would have been fatal. (13 RT 3009-3019.) There was not much blood in Janet's lungs, so she probably died before all of the stab wounds had been inflicted. (13 RT 3020.) There were no apparent defensive wounds on Janet's hands or forearms. (13 RT 3020.)[10]

Records subpoenaed from the Overnighter Motel, located 0.4 miles from the roofing company where the Dahers' SUV had been abandoned, showed that a room had been rented by "Maury O'Brien" at 3:31 p.m. on March 24, 1998. (10 RT 2328-2332; 12 RT 2818-2820, 2836-2837; Exh. 54 [registration form].) The owner of the motel gave the police a Nintendo Game Station he had found outside the room later that night or the next day. (12 RT 2824, 2836.)

On March 27, 1998, Snyder was arrested and placed in Juvenile Hall for a matter unrelated to the killing of Janet. (13 RT 2962.) A few months later, after O'Brien had described the killing of Janet to the police in June 1998, officers retrieved property that had been inventoried from Snyder after his arrest, including a gold necklace that had belonged to Janet. (13 RT 2963; see also 9 RT 2108-2109.) Other officers obtained from Jason Hart some of the jewelry he had bought from the three defendants shortly after the killing. (13 RT 2963.) That jewelry also had belonged to Janet. (13 RT 2963.)

Other officers searched Snyder's home in San Francisco on June 7, 1998. (12 RT 2806-2808.) Inside a kitchen drawer they found more property of the Dahers, including jewelry and a cell phone. (12 RT 2808; see also 9 RT 2082-2088.)

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[10] Additional details about the autopsy are provided in Argument XVII below.

2. The Defense Case

a. Lacey Harpe

Lacey Harpe, 19 years old at the time of trial, testified that she had been O'Brien's girlfriend when she was around 15 and 16, but that they had broken up about a year later. (14 RT 3341-3343.)

Some time in 1998, O'Brien gave Harpe some jewelry, which she suspected was stolen. (14 RT 3345, 3357.) A few days later, O'Brien told Harpe that he, Snyder, and a third man had killed a woman for her car and $20. (14 RT 3346.) O'Brien described the incident to Harpe a few times, and he sometimes "switched up" certain details. (14 RT 3348.) As examples, O'Brien had alternately said that the killing had occurred in San Francisco and various other places. (14 RT 3346.) Also, O'Brien had said at times that Snyder had stabbed the woman, but at other times he said he did not know who the killer had been. (14 RT 3346-3349.)

Harpe acknowledged that police officers had questioned her, within a relatively short time after O'Brien was arrested, about her prior conversations with him. (14 RT 3344.) When talking with the police, Harpe did not mention that O'Brien had said that Snyder had stabbed the victim. (14 RT 3349.) Some 9 to 12 months later, however, Harpe told a defense investigator that O'Brien had said that Snyder had stabbed the victim. (14 RT 3351-3353.)

On cross-examination, Harpe again acknowledged that her statement to the defense investigator—that O'Brien had said Snyder had stabbed the victim—differed significantly from her prior statements to the police. (14 RT 3361-3362, 3370.) Harpe insisted she had not lied to the defense investigator or the police, but she said she had been very upset when talking to the police. (14 RT 3370-3374.) She also said that she had not told the police everything about her discussion with O'Brien, and that her

recollection of events when talking to the investigator may have been affected by newspaper accounts she had read in the intervening 9 to 12 months. (14 RT 3362-3363, 3375-3376, 3391-3397.)

b. Ken Whitlatch

Contra Costa County Sheriff's Deputy Ken Whitlatch testified that he had met with prosecution witnesses Nathan Bunting and Roger Parkinson on March 26, 1998. (14 RT 3400-3403.) Both men said that they had seen a tattoo or tattoos on the neck of one of the men walking on Happy Valley Road on the afternoon of the killing. Both men tried to draw tattoos like those they had seen. (14 RT 3402-3403.) Neither man was certain of the image of that tattoo (or tattoos), but Parkinson thought he may have seen a lightning bolt, while Bunting thought it was a fireball or a "blur." (9 RT 2166, 2176-2179, 2181; 10 RT 2255; 15 RT 3586-3587; see also Exhs. C, D.)

3. Prosecution rebuttal

The parties stipulated that Nancy Wagar, the mother of Lacey Harpe's boyfriend, had given the police some jewelry that Harpe had received from O'Brien some time after the killing. The jewelry belonged to the Dahers. (14 RT 3423.) The trial court also read portions of a police interview with Jason Hart in which Hart described how appellant and the other men had talked about how they had killed and strangled Janet. (14 RT 3418-3422.)

B. The Penalty Phase of Trial

1. The Prosecution Case

a. Appellant's prior crimes involving violence

The prosecutor introduced evidence of several violent crimes appellant had committed in the years before the killing of Janet.

Apolinario Campo, 77 years old at the time of trial, testified that appellant had robbed him in 1992 by striking him in the face with a piece of wood and taking his money and gold necklace. (16 RT 3887, 3912-3915.)

Andrea Torres testified that she met appellant when she was around 12 or 13 years old and appellant was 18 or 19. (17 RT 4044-4046.) Torres was attracted to appellant, and she had allowed him into her house late one night when her mother was asleep and her father was at work. (17 RT 4047-4048.) Torres and appellant watched TV for a while, and they started kissing and fondling. (17 RT 4049, 4066.) Torres took off her pants, and they continued to kiss. (17 RT 4049-4050, 4066.) Appellant initiated sexual intercourse, but Torres told him to stop. (17 RT 4050-4051, 4067-4070.) Appellant pinned Torres's arms down and covered her mouth with his hand, then completed the intercourse. (17 RT 4052, 4067-4068.)[11]

Appellant came to Torres's house a few other times. On one occasion, he attempted intercourse but quickly "backed off." (17 RT 4054.) Another time, appellant came to Torres's house with a gun. He took her into a bedroom, and Torres submitted to intercourse because she felt "kind of freaky" about the gun. (17 RT 4056-4057.)

Andrea Salcedo and Anthony Sandoval testified that appellant had threatened Sandoval with a rifle in early 1994. Salcedo and appellant were married at the time, but appellant was not living with her because he had recently been sent to jail. (16 RT 3892-3893; 17 RT 3993-3994.) Salcedo went out with Sandoval one night, and he returned to her house to visit her the next day around noon. (16 RT 3892-3893; 17 RT 3995-3996.) Earlier

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[11] As discussed in Argument XVIII.G below, Torres's description of the rape was ambiguous in some respects. The best reading of her testimony suggests appellant became forceful immediately after he penetrated her, when she protested that she did not want to engage in intercourse. (See 17 RT 4050-4051, 4067-4070.)

that morning, appellant had escaped from the jail and gone to Salcedo's house. (17 RT 3996-3998.) When Sandoval arrived at the house, appellant told him to leave. (16 RT 3893; 17 RT 4000-4001, 4027.) Sandoval refused, and appellant grabbed a rifle and threatened him. (16 RT 3893-3894; 17 RT 4000-4001, 4027.) The rifle was not loaded, but appellant chased Sandoval and tried to hit him with it. (16 RT 3894-3897; 17 RT 4001-4004, 4018.)

The prosecutor also introduced into evidence Exhibits 8 through 11—certified copies of appellant's prior convictions for felon in possession of a firearm, car theft, receiving stolen property, escape from prison without force, and robbery. (18 RT 4192-4193.) Exhibit 11 also showed that appellant had been released from prison on parole on February 21, 1998, i.e., about one month before the killing of Janet. (18 RT 4193.)

b. Prison misconduct

The prosecutor also presented evidence of appellant's violent conduct while he had been in prison or jail over the years.

In May 1994, a guard at Susanville prison observed appellant and another inmate, Contreras, hitting a third inmate, Armenta. (17 RT 3946-3952.) Other guards broke up the fight before anyone was seriously injured. Appellant told a guard that Armenta had started the fight by attacking Contreras. (17 RT 3990-3992.) Because Contreras was appellant's friend, appellant said he had joined the fight and "dealt with" Armenta. (17 RT 3992.)

In September 1994, appellant shared a prison cell with another inmate, Aragon. (17 RT 3959.) A guard came to the cell to lead the men to the showers. (17 RT 3959.) The guard handcuffed Aragon through a slot in the cell wall. Before the guard could handcuff appellant, he punched and kicked Aragon inside the cell. (17 RT 3959-3961, 3971-3972.) Guards entered the cell and stopped the attack. (17 RT 3962-3965, 3971-3976.)

In November 1994, a guard saw appellant punch another inmate, Lira, in the prison yard. (17 RT 3980-3983.) It does not appear that Lira was seriously injured. (17 RT 3983.)

On October 12, 1999, appellant was in the Contra Costa County jail. (17 RT 4113-4114.) He repeatedly asked to see a mental health specialist, but the guards said he would have to wait unless he felt suicidal. (17 RT 4115-4116.) Later, appellant kicked the door of his cell. (17 RT 4117-4118.) The guards told him to stop, but he refused. (17 RT 4117-4119.) The guards decided to take appellant to a more remote location of the jail so he would not disturb other inmates. (17 RT 4119.)

The guards approached appellant's cell and ordered him to put his hands through the wall slot to "cuff up." (17 RT 4120-4122.) Appellant refused. (17 RT 4121.) The guards entered the cell, and appellant punched one of them in face. (17 RT 4121-4123.) The guards physically subdued appellant, and he continued to violently resist. (17 RT 4123-4125.)

c. Victim impact testimony

Annie and Lauren Daher testified about the impact of Janet's death on their lives. Lauren was 15 years old when her mother died, and the killing had occurred just eight days before her sixteenth birthday. (18 RT 4181.) When Lauren arrived at home on the evening of the killing, the police talked to her father and he "just hit the ground hysterical." (18 RT 4182.)

Lauren further testified that her mother "was the kindest and most gentle and caring person I think I've ever met. The kind of person that would do anything for anyone." (18 RT 4183.) Although Lauren and Janet had often fought a lot, they still had a great relationship. (18 RT 4184.) The death of Janet was "the hardest thing" Lauren ever could have imagined. (18 RT 4184.) She said, "I have turned into the mom of the family. I have . . . a lot more responsibilities than I ever would have managed [*sic*] that I had taken for granted when I had her." (18 RT 4184.)

After Janet's death, Lauren missed her sixteenth birthday, her high school graduation, Mother's Day, and Thanksgiving. (18 RT 4184-4185.) She also said, "[M]y entire junior year of high school, I didn't really go to school because I couldn't get up in the morning. There were times I just wished I wouldn't wake up." (18 RT 4185.) Lauren also had been in counseling for four years. (18 RT 4185.) Lauren thought about her mother every day, "[m]ore than once or twice a day." (18 RT 4186.)

Annie Daher, who was 12 when Janet was killed, testified that the day of her mother's death was "absolutely terrible." (18 RT 4188.) Annie was "scared to death the whole time," and when a policeman told her father of the killing, "he just collapsed." (18 RT 4188.) Annie felt bad because she had never appreciated her mother as much as she should have. Janet was a strong role model and "an incredibly giving person," and Annie loved her very much. (18 RT 4189.)

Annie also said that she had been going to therapy, she found it difficult to concentrate on school work, and she was exhausted and depressed. (18 RT 4191.) She thought about her mother every day. (18 RT 4191-4192.)

2. The Defense Case[12]

a. The October 1999 jail incident

Inmates from the Contra Costa County jail testified that guards had been unresponsive to appellant's requests to see a mental health specialist on October 12, 1999. Among other things, the inmates said that appellant had asked to see a specialist, but the guards had either ignored his requests or taunted him. (18 RT 4212-4222, 4254-4259, 4336-4338, 4341-4343.)

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[12] Appellant's summary of the penalty phase defense evidence is exhaustive and accurate. Our summary focuses on the broad themes of the evidence.

Appellant became agitated, and the guards entered his cell and forcibly handcuffed him and led him out of the cell. (18 RT 4222-4227, 4333-4334, 4346-4348.) One of the guards made hostile comments to appellant like "Next time I will put you in the hospital," and "I'm going to fuck you up." (18 RT 4229, 4349.)

Medical personnel from the jail identified photographs showing bruises and cuts on appellant's face, shoulders, and back immediately after the incident. (18 RT 4196-4203, 4310; 20 RT 4712-4715.) Appellant had been given ice packs for his wrist and shoulder. (18 RT 4205.)

b. Appellant's childhood and youth

Appellant's family members and friends provided extensive testimony about his childhood and family life. In brief, appellant's parents had been hard core drug users and criminals, and they had neglected and abused him for much of his early life.

Appellant's father, "Big Joey" Perez, used and sold drugs throughout appellant's childhood. (19 RT 4392-4406, 4498; 20 RT 4622-4625.) When appellant cried as a baby, Big Joey blew marijuana smoke into his nose to put him to sleep. (20 RT 4611, 4726.) As appellant grew older, Big Joey used and sold marijuana and other drugs in appellant's presence, and he sometimes let appellant smoke a joint with him. (19 RT 4498-4503; 20 RT 4594, 4616-4620, 4726-4728.) Once, when appellant was seven or eight and acting foolishly while high, Big Joey beat him because appellant "couldn't hold his mud" and "act like a man." (20 RT 4630-4633.) When appellant was a teenager, he served as a lookout when Big Joey committed auto burglaries and other crimes to finance his drug habit. (20 RT 4607, 4638-4639, 4643-4647.) Big Joey went to prison four times during appellant's childhood. (20 RT 4660-4661.)

Appellant's mother, Dolores Perez, neglected him throughout his childhood, and she later left Big Joey and lived with men who treated

appellant abusively. (19 RT 4398-4399, 4414, 4423, 4509-4513, 4515-4519, 4525-4526, 4567; 21 RT 4815.) Once while Dolores was living with a drug dealer named Richard Rossi, appellant spent the night with them. (19 RT 4535-4537; 20 RT 4764-4765.) Two men broke into the house and beat Rossi severely, demanding his money and drugs. (20 RT 4770-4771.) The men also tied up appellant and Dolores, then threatened to shoot appellant in the head. (19 RT 4536-4541; 20 RT 4770.) Appellant was nine years old at the time, and he was severely traumatized by the incident. (19 RT 4546; 20 RT 4770.)

Appellant was eventually placed with his grandparents because Dolores was unable (or unwilling) to keep him. (19 RT 4426, 4445; 20 RT 4652; 21 RT 4869.) Although appellant was distraught over his perceived abandonment by his mother, he thrived under the care of his grandmother, BeeBee. (19 RT 4429-4434; 20 RT 4654, 4740-4743, 4750; 21 RT 4873-4874.) BeeBee could be cruel and violent at times, but she was also kind and loving toward appellant, and he excelled at school while he lived with her. (19 RT 4433-4439; 20 RT 4778-4782, 4787; 21 RT 4933.)

BeeBee died of a stroke when appellant was 12, and her death was devastating to him. (19 RT 4437, 4441-4444, 4549-4550.) Thereafter, appellant lived sporadically with his mother and other family members, including his Uncle Frank and his Aunts Lolita and Loretta. Throughout much of this time, appellant misbehaved and neglected his work and studies. (19 RT 4449-4456, 4565-4570; 21 RT 4835-4840, 4876-4878, 4883-4890, 4915-4916; 22 RT 4987-4989.)

Over the next several years, appellant committed minor crimes and was placed in foster care, youth homes, and work camps. (19 RT 4453; 21 RT 4878-4883, 4889; 22 RT 4960-4966, 4990-4997.) He never regained the work ethic he had learned under BeeBee, and he invariably ran away from each placement and continued to commit crimes. (21 RT 4818-4819,

4836-4838, 4847-4850, 4894, 4908-4910, 4917-4918; 22 RT 4960-4966, 4985.) At age 14, appellant was sent to the California Youth Authority, where he was exposed to serious gang activity and violence. (19 RT 4454, 4570; 22 RT 4970.)

When appellant was released from the Youth Authority, he lived for a time with his Uncle Frank, who gave him money, food, and clothing. (19 RT 4455-4458.) Frank also arranged for appellant to work at Golden Gate Fields, but appellant lost the job because he often partied all night with his friends. (19 RT 4458-4461.) Appellant moved out of Frank's house and started using drugs. (19 RT 4462-4464.) He was placed in a foster home, and he seemed "empty" and "lost." (22 RT 5024-5034.)

Appellant was later sent to prison. After he got out, his Uncle Frank again arranged a job for him, but he neglected his duties and eventually left the area. (19 RT 4465-4470.)

Appellant married Andrea Salcedo when he was around 20 years old. (20 RT 4671-4672.) Appellant was sent to jail or prison shortly thereafter, and his father, Big Joey, had a sexual relationship with Salcedo during that time. (20 RT 4673-4675.)

c. Other testimony

Psychologist Gretchen White prepared a "psycho-social history" of appellant's life. (22 RT 5046-5048.) Dr. White summarized appellant's childhood by saying he had grown up "in a family that was remarkably unstable," in which "dissocial behavior was the norm." (22 RT 5047-5048.) Dr. White found that appellant had not been a "typically delinquently oriented child," but that he was "a child who [had] been overwhelmed with chaos, violence, and loss." (22 RT 5075.) Dr. White's report was similar to an analysis of appellant that had been prepared by a psychotherapist in 1985. (See 21 RT 4929-4941.)

Daniel Macallair, Vice President of the Center on Juvenile and Criminal Justice, testified as an expert on juvenile detention facilities. (23 RT 5133-5138.) He said that research shows that the California Youth Authority contributes to delinquent behavior in minors because of inadequate programs, poor staff-inmate relationships, racial and ethnic tensions, overcrowding, and gang warfare. (23 RT 5139.) Appellant was in CYA from 1986 to 1992, and all five adverse conditions existed during that time period. (23 RT 5140.)

Macallair further testified that in 1988, more than 70 percent of the wards of the Youth Authority had been committed for a violent offense, and that wards were exposed to violence on a regular basis. (23 RT 5142.) Appellant had been 14 years old when he first entered CYA in 1986, and he was one of the youngest wards in the system. (23 RT 5144.)

Macallair explained an informal CYA initiation rite, in which new wards would be asked by others if they wanted to join a gang for protection. (23 RT 5150.) If a new ward responded by fighting, he would be accepted into a gang. (23 RT 5151.) Macallair said that "[j]oining a gang in the Youth Authority is considered essential for ensuring yourself protection." (23 RT 5154.)

Macallair also explained that wards of the Youth Authority are under constant stress, which produces significant psychological consequences. (23 RT 5159-5160.) A large number of youths committed to CYA re-offend. (23 RT 5184.) Ninety percent are rearrested after their release. (23 RT 5184.)

Macallair acknowledged that appellant had run away from three good rehabilitation programs—Natividad Ranch, Camp Glenwood, and Moss Beach—before he had been sent to the Youth Authority. (23 RT 5194; see also 18 RT 4975-4976.) Macallair also said, however, that it is "not unusual to have kids run from programs." (23 RT 5194.)

Susan Frankel, a San Francisco attorney who mentored Youth Authority parolees, met with appellant a few times after his release in 1989. (22 RT 5001.) Appellant was 17 at the time, and he seemed motivated to straighten out his life. (22 RT 5002.) Frankel corresponded with appellant and met with him a year or two later, when he was applying to City College of San Francisco. (22 RT 5004-5005.) Frankel saw appellant about a year later, and he seemed "harder" and "less innocent." (22 RT 5006-5007.)

3. Prosecution rebuttal

The prosecution presented testimony from three witnesses about the forcible extraction of appellant from his Contra Costa County jail cell on October 12, 1999. Sheriff's Sergeant Scott Worthan testified that he had attended an administrative hearing regarding the incident, and that appellant had not mentioned during the hearing that he had been beaten or kicked while handcuffed. (23 RT 5219-5221.) Patricia Ford, an inspector from the District Attorney's office, explained that the cell extraction could not have been observed in the manner described by one of the defense witnesses because of the physical layout of the jail. (23 RT 5223-5227.) Jerry Sanchez, a former deputy at the jail, testified similarly. (23 RT 5241-5243.)

ARGUMENT

I. THE TRIAL COURT'S RESTRICTIONS ON JURY VOIR DIRE WERE REASONABLE

Appellant argues that the trial court imposed two unreasonable restrictions on jury voir dire: (1) the court did not allow the attorneys to question the prospective jurors individually and in sequestration; and (2) the court did not allow the defense attorneys enough time to question the prospective jurors.

A. Factual Background

Prior to trial, the defense attorneys filed several motions relating to jury voir dire, including a request for sequestered questioning of individual jurors, in accordance with *Hovey v. Superior Court* (1980) 28 Cal.3d 1. (4 CT 1305-1323; 5 RT 1068.) The trial court denied the motion, noting that *Hovey* had been superceded in 1990 by the passage of Proposition 115 and the ensuing enactment of Code of Civil Procedure section 223. (5 RT 1068.) The court agreed to question jurors individually if sensitive issues were to arise, but the court said it had customarily found group voir dire to be helpful and educational to the jury panel as a whole. (5 RT 1067-1070.) The court also said that it would allow the attorneys to question each prospective juror for two or three minutes immediately after the court's voir dire of that juror. (5 RT 1161-1162.) Defense Attorney Egan asked if it might be more efficient to allow the attorneys an extended period to question an entire group of jurors, e.g., 24 or 36 minutes for each group of 12 jurors. (5 RT 1162.) The court said it would consider such an option. (5 RT 1162.)

On the first day of jury selection, September 18, 2001, the court advised the attorneys that it would question the first group of 25 prospective jurors for about 75 minutes, then allow the attorneys for each side to ask followup questions for 30 minutes. (7 RT 1439-1441.) The defense attorneys protested that this arrangement would allow them little more than one minute of questioning per juror. (7 RT 1441-1444.) The court responded that the defense attorneys would have had extensive exposure to each juror before the attorneys even began their voir dire questioning. (7 RT 1441-1442.) Specifically, each juror would have completed a 30-page questionnaire, and the court would have questioned the group for a full 75 minutes. (7 RT 1441-1443.) The court also pointed out that some jurors inevitably would require no individualized questioning

because their disqualifying biases would be apparent from their questionnaires and their courtroom responses to the court's voir dire. (7 RT 1442-1444.)

Voir dire was conducted over the next two days in the manner prescribed by the trial court. (See 7 RT 1445-1942.) After the conclusion of the process, the court commented that the defense attorneys had used their full 30 minutes to question the first group of 25 jury candidates, but less than their allotted time to question later groups. (See 8 RT 1985; see also 7 RT 1708-1721 [defense attorney's questioning of the second group of jurors consumed only 13 pages of transcript]; 7 RT 1834-1850 [defense questioning of third group of jurors consumed only 16 pages of transcript].) The defense attorneys did not request additional time to question any jurors, and the attorneys did not object to the final composition of the jury. (8 RT 1985.)

B. Sequestered Questioning of Prospective Jurors Is Neither Constitutionally nor Statutorily Required

Appellant argues that the trial court violated his rights to a fair trial by an impartial jury and to a reliable penalty determination under the federal Constitution. Appellant argues primarily that the open-court voir dire was improper because some of the prospective jurors seemed to have prejudged the case, while other candidates revealed facts about the case that would have been inadmissible at trial. (See AOB at 90-92.) As examples, some of the prospective jurors said they would find it difficult or impossible to consider mitigating evidence—and particularly psychiatric testimony—in the penalty phase of trial. Other jurors said they had read about the case in the newspapers and concluded appellant was guilty, while still others said they were troubled by the fact that a criminal defendant has no duty to present exculpatory evidence at trial. (See AOB 90-92 and relevant record citations.) Appellant argues that the trial court could have prevented the

jury panel as a whole from hearing such prejudicial comments by conducting sequestered questioning of individual jurors.

Virtually identical claims have been rejected by this Court many times. In one of the more recent cases, *People v. Famalaro* (2011) 52 Cal.4th 1, 34-35, the defendant had argued in the trial court that it was necessary to question prospective jurors individually and in sequestration to prevent bias among prospective jurors who were unfamiliar with the case. The trial court denied the motion, and the defendant renewed the argument on appeal, claiming the record of jury selection indicated that the prospective jurors had been "exposed to a poisonous environment." (*Id.* at p. 34.) The defendant noted that some of the prospective jurors had commented during voir dire that the defendant should "fry," and that they had felt uncomfortable just looking at the defendant and "breathing the same air" in the courtroom. (*Ibid.*) Other prospective jurors acknowledged that they had learned about the case by sitting through jury selection, and that their knowledge of the case had led them to believe in the defendant's guilt, with death as the appropriate penalty. (*Ibid.*)

This Court found no error or prejudice, first explaining the relevant legal principles:

> Individual sequestered jury selection is not constitutionally required, and jury selection is to take place "where practicable . . . in the presence of the other jurors in all criminal cases, including death penalty cases." [Citation.] Accordingly, in reviewing a trial court's denial of a defendant's motion for individual sequestered jury selection, we apply the "abuse of discretion standard," under which the pertinent inquiry is whether the court's ruling "falls outside the bounds of reason." [Citation.] Group voir dire may be "'impracticable when, in a given case, it is shown to result in actual, rather than merely potential, bias.'" [Citations.]

(*People v. Famalaro*, *supra*, 52 Cal.4th at p. 34.)

Applying these principles to the facts of *Famalaro*, this Court found that the trial court had not been required to conduct individual and sequestered voir dire, even though some jurors had openly expressed their belief of the defendant's guilt:

> True, during the unsequestered jury selection process it became apparent that some prospective jurors had prejudged defendant's guilt and believed he should be executed. But whenever a defendant is charged with a heinous crime that is widely publicized, potential jurors are likely to learn that some members of the community have prejudged the defendant's guilt and punishment. The trial court here acted within its discretion when it implicitly concluded that in this case exposure to such comments did not automatically impair the ability of all prospective jurors to fairly decide the case. The record reveals no incidence of a prospective juror's mention in the jury selection process of inadmissible evidence that would have prejudiced the defendant.

(*People v. Famalaro*, *supra*, 52 Cal.4th at p. 35; see also 5 Witkin & Epstein, Cal. Criminal Law 4th (2012) Criminal Trial, § 570, p. 878, citing *People v. Box* (2000) 23 Cal.4th 1153, 1178 [in a capital case involving the murder of small boy, the trial judge did not abuse its discretion in denying sequestered voir dire of prospective jurors who had, or had spent time with, small children]; *People v. Alfaro* (2007) 41 Cal.4th 1277, 1315 [Proposition 115 leaves courts discretion to conduct sequestered death-qualification voir dire in appropriate cases]; *People v. Jurado* (2006) 38 Cal.4th 72, 101 [the U.S. Constitution does not require sequestered death-qualification voir dire of every prospective juror in a capital case]; *People v. Carter* (2005) 36 Cal.4th 1215, 1247 [Proposition 115's 1990 abrogation of *Hovey* is to be applied prospectively].)

In light of these authorities, the trial court here did not err in denying appellant's motion for sequestered voir dire.

C. The Trial Court Did Not Impose Unreasonable Time Limits on the Defense Attorneys' Questioning of Individual Jurors

Appellant also argues that the trial court erred in placing time limits on his attorneys' individualized questioning of jurors. Appellant contends the allotment of only 30 minutes of questioning for each group of 25 jurors prevented his attorneys from selecting a fair and impartial jury. (AOB 77.)

Again, the trial court pointed out that the 30-minute allowance would almost certainly allow enough time for the defense attorneys to question prospective jurors. The defense attorneys had been given a thorough overview of each juror's background and attitudes from their 30-page questionnaires and the court's preliminary voir dire questioning. Some jurors in each group were clearly challengeable for cause, so little or no time was needed to question them. Most important, although the defense attorneys had spent all of their 30-minute allotment in questioning the first group of jurors, their questioning of the second two groups was relatively brief. The attorneys did not ask to apply any of their unused time to question jurors from the first group, and the attorneys accepted the final jury without objection. Thus, it is fair to assume they were satisfied with the overall time allotments and the final composition of the jury.

In a similar case, *People v. Avila* (2006) 38 Cal.4th 491, 533, three codefendants were charged with capital murder. The prospective jurors were given lengthy questionnaires, and the trial court announced prior to voir dire that it intended to conduct its own questioning of the first 24 jurors. The court added that it would allow the prosecutor and each defense attorney to question the jurors individually, allowing 45 minutes for the first defense attorney to question the first 24 jurors, and 30 minutes for the other two defense attorneys to question the later groups of 13 jurors. The

trial court also agreed to give additional time for questioning upon a showing of good cause. (*Id.* at pp. 533-534.)

On appeal, the defendants argued that the limitation of voir dire questioning violated their constitutional rights to an impartial jury. This Court rejected the arguments on the ground that neither the state nor the federal Constitution, nor any state statute, required *any* individualized voir dire questioning of prospective jurors by attorneys. As a result, a time limit on individualized questioning, particularly after the attorneys had been exposed to juror questionnaires and prior questioning by the court, could not be improper. The Court explained: "Because the [trial] court was not required to afford defendant any time at all to question prospective jurors under Code of Civil Procedure section 223 as then in effect, it did not abuse its discretion in setting a time limit on counsel-conducted voir dire, either individually or in the aggregate." (*People v. Avila*, *supra*, 38 Cal.4th at pp. 534-535; see also *People v. Wright* (1990) 52 Cal.3d 367, 419 [in light of the trial court's "fairly lengthy" questioning of prospective jurors on their attitudes toward the death penalty, a limit of three questions per juror for the defense attorney was not unreasonable], overruled on other grounds in *People v. Williams* (2010) 49 Cal.4th 405, 459.) In light of these authorities, appellant's rights were not violated.[13]

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[13] This Court also noted in *Avila* that Code of Civil Procedure section 223 was amended in 2000 (i.e., after the trial in *Avila* and before the trial of this case) to provide counsel for each party with the right to some direct voir dire. (See *People v. Avila*, *supra*, 38 Cal.4th at p. 534, fn. 27.) The amended code section reads as follows: "Upon completion of the court's initial examination, counsel for each party shall have the right to examine, by oral and direct questioning, any or all of the prospective jurors. The court may, in the exercise of its discretion, limit the oral and direct questioning of prospective jurors by counsel. The court may specify the maximum amount of time that counsel for each party may question an individual juror, or may specify an aggregate amount of time for each party, (continued...)

II. THE LEAD DEFENSE ATTORNEY DID NOT HAVE A CONFLICT OF INTEREST

Appellant contends his lead attorney at trial, William Egan, Jr., labored under a conflict of interest because he had previously defended a client before the trial judge, the Honorable Peter Spinetta. Specifically, appellant notes that Egan had once represented a client, Yvonne Eldridge, in a criminal trial over which Judge Spinetta had presided. After Eldridge was convicted in that case, Judge Spinetta granted a motion for a new trial on the ground that Egan had rendered ineffective assistance of counsel. The People appealed, and the matter was pending in the Court of Appeal at the time of appellant's trial. Appellant now argues that Egan either should have moved to disqualify Judge Spinetta from presiding over this case, or turned the representation over to another attorney on the ground of a conflict of interest.

A. Factual Background

Trial of this matter was assigned to Judge Spinetta in early November 1999. (See 3 RT 601.) On November 5, 1999, Defense Attorney Egan met in chambers with Judge Spinetta to discuss whether that assignment "was a good one." (3 RT 601.) The prosecutor and the attorney for codefendant Snyder had both been invited to attend the meeting, but neither appeared. (3 RT 601-602.) Appellant also did not attend the meeting. (3 RT 601.)

(...continued)
which can then be allocated among the prospective jurors by counsel." (Code Civ. Proc., § 223, as amended by Stats. 2000, ch. 192, § 1.) Because appellant asserts only constitutional challenges to the voir dire process in this case, the 2000 statutory changes to CCP section 223 do not affect our analysis. In any event, the trial court did not violate the revised version of CCP section 223 because the defense attorneys were given a full 30 minutes to question each group of 25 jurors.

Judge Spinetta summarized the issue as he understood it. (See 3 RT 602-603.) He noted that in a prior criminal trial over which he had presided, Egan had represented defendant Yvonne Eldridge. (3 RT 602.) After Eldridge was convicted of multiple charges, she retained a new attorney and moved for a new trial on the ground that Egan had rendered ineffective assistance of counsel. (3 RT 602.) Judge Spinetta granted the motion, and the People appealed.

At the time of Judge Spinetta's discussion with Egan in November 1999, the Court of Appeal had not issued a final ruling on the People's appeal in *Eldridge*. (3 RT 602.) Judge Spinetta repeatedly assured Egan that the *Eldridge* matter would have "absolutely no impact" on his attitude toward appellant's trial. (See 3 RT 605; see also 3 RT 603 [Judge Spinetta said the *Eldridge* matter would have "no impact on me whatsoever"]; 3 RT 604 [Judge Spinetta assured Egan that if "anyone wondered" whether the prior events from the *Eldridge* trial might have generated "inimical" feelings in him toward appellant or Egan, "the answer to that is an unequivocal no"].) Judge Spinetta also said that he had granted Eldridge's motion for a new trial more on grounds of due process than ineffective assistance of counsel. (3 RT 605, 610.)

Egan responded that the grant of a new trial in *Eldridge* had been "the worst thing" that had happened in his career, and he wanted to "clear the air" so that neither he nor Judge Spinetta would feel uncomfortable if the trial of appellant's case were to remain before Judge Spinetta. (3 RT 608-609.) Egan repeatedly said that he wanted the case to remain before Judge Spinetta. (3 RT 608-609 ["I want to be in this court"]; 3 RT 609 ["I'm fine" in this court].) Judge Spinetta also said he felt "very comfortable" presiding over appellant's trial. (3 RT 608-609.)

Egan next commented that if the Court of Appeal ultimately were to agree that Egan had been ineffective in *Eldridge*, Judge Spinetta might have

to report Egan to the state bar. (3 RT 610.) Judge Spinetta said that if he were required to file such a report, he most likely would postpone any action until the conclusion of appellant's trial, and he would probably do little more than reiterate the prior reasons he had given for granting Ms. Eldridge a new trial. (3 RT 610-611.) Judge Spinetta again said he did not foresee any particular problems if he were to preside over appellant's trial, but he would give the matter additional thought. (3 RT 612.)

Judge Spinetta next wondered if Egan's tactics or performance in appellant's trial might somehow be affected by the pending appeal in *Eldridge*. (3 RT 612-613.) Judge Spinetta noted that "outsiders" might speculate that "Egan might have had to make decisions in this case . . . with an eye towards what effect it might have on what the Judge says to anybody who's investigating the [*Eldridge*] matter." (3 RT 613.) Egan agreed. (3 RT 613-614.) Judge Spinetta encouraged Egan to discuss the matter with appellant. (3 RT 613-615.) At the conclusion of the discussion, Egan suggested he might not be seriously harmed by any adverse report to the state bar because he was intending to retire after appellant's trial. (3 RT 613.) Egan's final comment on the matter was, "[M]y desire, whether or not it has any bearing on anything, is to have the case stay here." (3 RT 615.)

On November 10, 1999, Judge Spinetta discussed the matter with Egan and counsel for codefendant Snyder, Michael Sterret. (3 RT 620-628.)[14] Judge Spinetta again noted that he might be required in the future to report Egan to the state bar for ineffectiveness in *Eldridge*. (3 RT 621-622.) Judge Spinetta said he did not think that was likely, because such a report would have to be made only if the judgment in Eldridge's case were

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[14] At that time, Snyder had not yet moved to sever his trial from appellant's.

reversed on the basis of ineffective assistance of counsel, and a judgment had never been rendered in *Eldridge*. (3 RT 622-626.)

Judge Spinetta again said that even if he ultimately became required to report Egan to the state bar, that requirement would not affect his attitude toward appellant's trial. (3 RT 624.) Judge Spinetta first noted that any report he would file in *Eldridge* would be based solely on the record of that case. (3 RT 624.) More significantly, Judge Spinetta did not think Egan would be placed in an adversary posture toward appellant in this case, merely because Judge Spinetta might be filing a report about Egan's performance in *Eldridge*. (3 RT 624-625.) In fact, if such "external circumstances" were to affect Egan in any way, they would motivate him to provide appellant the *best* representation possible. (3 RT 625-625.) Judge Spinetta explained: "I don't see that I'm putting you in any conflict situation. [¶] Because the only thing that you could do to impress me in connection with [appellant's trial] would be the sort of thing that's consistent with the interest of your clients. And that is effective representation of your current client." (3 RT 624-625; see also 3 RT 626 [Judge Spinetta tells Egan, "There's no possible decision I see you could be making with an eye towards me that would be inimical to the interests of your client"].) Judge Spinetta also noted that a defense attorney had once appeared in his courtroom while facing a conflict of interest in that he had been criminally charged himself, and he was concerned that he might have an incentive to fight less vigorously for his client so the prosecuting district attorney would treat the defense attorney's own case more favorably. (3 RT 625.) Egan's final comment on the matter was that he did not think he had been placed "in a conflict situation." (3 RT 627-628.)[15]

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[15] On April 6, 2000, the First District Court of Appeal reversed the trial court's order granting Ms. Eldridge's motion for new trial on the (continued...)

B. There Was No Conflict of Interest

In *People v. Doolin* (2009) 45 Cal.4th 390, 417, this Court explained the circumstances under which a defense attorney faces a conflict of interest in representing his or her client in a criminal trial:

> A criminal defendant is guaranteed the right to the assistance of counsel by the Sixth Amendment to the United States Constitution and article I, section 15 of the California Constitution. This constitutional right includes the correlative right to representation free from any conflict of interest that undermines counsel's loyalty to his or her client. [Citations.] "It has long been held that under both Constitutions, a defendant is deprived of his or her constitutional right to the assistance of counsel in certain circumstances when, despite the physical presence of a defense attorney at trial, that attorney labored under a conflict of interest that compromised his or her loyalty to the defendant." [Citation.] "As a general proposition, such conflicts 'embrace all situations in which an attorney's loyalty to, or efforts on behalf of, a client are threatened by his responsibilities to another client or a third person or his own interests. [Citation.]'"

A claim of a Sixth Amendment violation based on a conflict of interest is a category of ineffective assistance of counsel which generally requires a defendant to show: (1) counsel's deficient performance; and (2) a reasonable probability that, absent counsel's deficiencies, the result of the proceeding would have been different. (*People v. Doolin*, *supra*, 45 Cal.4th at p. 417, citing *Mickens v. Taylor* (2002) 535 U.S. 162, 166.) In the

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(...continued)
grounds that the record was inadequate to support the order (case No. A081674). (See *People v. Eldridge*, case No. A094113, 2002 WL 31103022.) The Court of Appeal remanded the matter for further factual investigation. After Judge Spinetta made those findings and again ordered a new trial on December 20, 2000, the First District affirmed the grant of a new trial on September 20, 2002, i.e., long after the conclusion of appellant's trial. (See *People v. Eldridge*, case No. A094113, 2002 WL 31103022).

context of a conflict of interest claim, deficient performance is demonstrated by a showing that defense counsel labored under an actual conflict of interest "that affected counsel's performance—as opposed to a mere theoretical division of loyalties." (*People v. Doolin*, *supra*, 45 Cal.4th at p. 417; *Mickens*, *supra*, 535 U.S. at p. 171.) "[I]nquiry into actual conflict [does not require] something separate and apart from adverse effect." (*Mickens*, *supra*, 535 U.S. at p. 172, fn. 5.) "An 'actual conflict,' for Sixth Amendment purposes, is a conflict of interest that adversely affects counsel's performance." (*Ibid.*)

This Court has suggested that a determination of whether counsel's performance was "adversely affected" under the federal standard "requires an inquiry into whether counsel 'pulled his punches,' i.e., whether counsel failed to represent defendant as vigorously as he might have, had there been no conflict." (*People v. Doolin*, *supra*, 45 Cal.4th at p. 418.) In undertaking such an inquiry, the court is bound by the record. But where a conflict of interest causes an attorney not to do something, the record may not reflect such an omission. (*Ibid.*) Accordingly, the court must examine the record to determine: (1) whether arguments or actions omitted would likely have been made by counsel who did not have a conflict of interest; and (2) whether there may have been a tactical reason (other than the asserted conflict of interest) that might have caused any such omission. (*Ibid.*; see also *People v. Cox* (2003) 30 Cal.4th 916, 948-949.)[16]

In this case, appellant suggests that Defense Attorney Egan labored under a conflict of interest in representing him before Judge Spinetta, but

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[16] Appellant argues that the test for prejudice under California law differs from the test under federal law. In *People v. Doolin*, *supra*, 45 Cal.4th at pages 420-421, this Court abandoned the separate California test for prejudice.

appellant does not specifically discuss the nature of the conflict. Appellant merely states:

> As Mr. Egan was "intending to retire" after this trial (3 RT 613), his overriding concern would have been to go out with a clear record. To do that, he would be unlikely to do anything at appellant's trial which could cause Judge Spinetta to cast him in an unfavorable light with regard to the state bar. Mr. Egan's overriding concern would have been in controlling and limiting the damage already done to his relationship with the trial judge, not in vigorously defending his client.

(AOB 105-106.)

We do not disagree that Egan had reason to be concerned about the *Eldridge* matter. Judge Spinetta had found Egan to have been ineffective in that case, and the matter was currently pending in the Court of Appeal. But Egan's concern over *Eldridge* would not reasonably have affected his representation of appellant in this case. Preliminarily, it must be presumed that Judge Spinetta would treat the *Eldridge* matter, as he had promised, solely on the basis of the facts and law applicable to that case. More important, Judge Spinetta reasonably said that he would think poorly of Egan in this case only if he were to render poor assistance to appellant.

Finally, appellant has not remotely suggested that he was in fact prejudiced by anything that Egan did (or did not do) at trial because of the alleged conflict. There is no dispute that Egan actively cross-examined prosecution witnesses throughout trial. Egan also raised reasonable objections, presented colorable defense evidence, and delivered coherent opening and closing arguments. In light of any allegation (much less proof) that Egan had "pulled his punches" or otherwise rendered poor performance on appellant's behalf, there is no basis for reversal on the ground of conflict of interest.

III. THE TRIAL JUDGE WAS NOT REQUIRED TO RECUSE HIMSELF BECAUSE OF COMMENTS HE HAD MADE AT SNYDER'S SENTENCING HEARING

Appellant contends his convictions must be reversed because the trial court, Judge Spinetta, was biased (or appeared to be biased) against him. Specifically, appellant notes that Judge Spinetta had presided over the prior trial of codefendant Lee Snyder in late 2000. After Snyder's jury voted to convict, Judge Spinetta denied his motion for a new trial and sentenced him to life in prison without possibility of parole (LWOP). Among other things, Judge Spinetta said that the evidence against Snyder, including the trial testimony of Maury O'Brien, had been credible and strong. In light of these statements, which were reported in some Bay Area news outlets, appellant argues that Judge Spinetta was required to recuse himself from presiding over appellant's trial.

A. Judge Spinetta's Rulings at Snyder's Posttrial Hearings

The three original defendants in this case—appellant, Snyder, and O'Brien—were jointly charged by an indictment filed in the Contra Costa County Superior Court on March 24, 1999. (3 RT 478.) The trials of Snyder and O'Brien were later severed from that of appellant. (3 RT 665-667.) Snyder was tried first, and he was convicted as charged in December 2000. (See 4 CT 1175.) Snyder later moved for a new trial, arguing, inter alia, that the evidence was insufficient to support his convictions.

Judge Spinetta denied Snyder's motion for new trial at the outset of his sentencing hearing on March 2, 2001. (See 4 CT 1177-1179.) Judge Spinetta stated, in relevant part:

> I find that the evidence in this case was sufficient to support the verdicts that were rendered by the jury. It's true that the testimony of Maury O'Brien was particularly incriminating of Mr. Snyder, but Mr. O'Brien was not the only evidence that incriminated the defendant. There was substantial other evidence which one, independently tended to establish the

defendant's guilt; and which two, also corroborated Mr. O'Brien's testimony.

I am persuaded that the evidence that was presented in this case indicates that Mr. O'Brien was telling the truth in all material regards, and I am further persuaded that the totality of the evidence, independently reviewed and weighed, supports the jury's findings. . . . I am further persuaded that there is evidence independent of what Mr. O'Brien stated, evidence which not only corroborates Mr. O'Brien, but which by itself, independently establishes the guilt of the defendant in this matter.

. . . I am as confident as one can be that no injustice has occurred and that the jury has rightfully convicted defendant of the crimes charged in this case.

(4 CT 1178-1179.)

Turning to sentencing, Judge Spinetta asked Snyder if he had any final comments for the court to consider. (4 CT 1155.) Snyder said he felt sympathy for the Daher family, but he insisted he had not been involved in the robbery and killing of Janet. (4 CT 1155.)

Judge Spinetta responded that the evidence of Snyder's guilt was very strong, and that the atrociousness of the crimes fully justified an LWOP sentence. (See 4 CT 1156-1160.) Among other things, Judge Spinetta reiterated some of the comments he had made in denying Snyder's motion for a new trial. He said:

Evidence was presented. Based upon that evidence, the jury found you guilty of each and all the charges.

I reviewed that evidence . . . to assure myself that there was substantial . . . evidence to support those verdicts.

. . . I am persuaded as much as anyone can be in these matters, that the verdicts were supported by substantial evidence and that you, in fact, did commit the murder that you were charged with and the other crimes you are charged with.

(4 CT 1156.)

Judge Spinetta later said:

> This murder was senseless. It was vicious. It was heinous.
> . . .
>
> This was all done with premeditation. Indeed, it's striking to me here, . . . these individuals, including . . . you, Mr. Snyder, set out to go kill someone else in Solano, stopped over in Lafayette, killed someone, Mrs. Daher, and then continued on to go to Solano to kill that individual again.
>
> This premeditation permeates the whole process. The murder itself was . . . cold, it was callous, and it was perpetrated by what clearly were indifferent murderers, among whom you are to be counted, Mr. Snyder.

(4 CT 1167-1168.)

Toward the conclusion of his comments, Judge Spinetta said:

> One of the reasons I have allowed the TV coverage that is taking place here is I want to give as much widespread notice as possible as to what happens to people who commit horrendous crimes of this nature. It's important to send out the message that individuals who do these things are going to be held accountable.

(4 CT 1170.)

B. Appellant's Motion to Disqualify Judge Spinetta

On March 19, 2001, appellant moved to disqualify Judge Spinetta from presiding over his trial on the basis of the statements he had made at Snyder's posttrial hearings. (4 CT 1135-1182; 4 RT 834.) Appellant argued that Judge Spinetta had expressed his personal belief in the truth of the trial testimony of O'Brien, thereby requiring him to disqualify himself under Code of Civil Procedure sections 170.1, subdivision (a)(6)(c) and 170.3, subdivision (c)(3). Appellant also argued that "a person aware of the facts might reasonably entertain a doubt" of Judge Spinetta's impartiality at appellant's trial. (4 CT 1135-1146 .) An accompanying motion made the same request on constitutional grounds. (4 CT 1182-1183.) Exhibits to the

motions included a story in the *Contra Costa Times* stating that "Maury O'Brien told the jury in detail what he, Snyder and Joseph Perez did the day they robbed and killed Daher. O'Brien told the truth about the material facts, Spinetta said." (4 CT 1150.) A story in the *San Francisco Chronicle* stated that "[f]ellow suspect Maury O'Brien provided riveting testimony at Snyder's trial and is expected to testify against Perez." (4 CT 1153.)

Judge Spinetta filed a written answer to appellant's motion in which he denied having said or done anything that would disqualify him. (4 CT 1184-1188.) Judge Spinetta first noted that all of his prior comments had been made "in open court, in the course of official proceedings, and in the context of the discharge of [his] judicial duties . . . in ruling on defendant Lee Snyder's motion for new trial and sentencing him." (4 CT 1185.) Judge Spinetta further noted that Code of Civil Procedure section 170.2, subdivision (b), expressly provides that "(i)t shall not be a grounds for disqualification that the judge . . . (h)as in any capacity expressed a view on a legal or factual issue presented in the proceeding . . . ." (4 CT 1185.) Judge Spinetta also wrote:

> Even if the Perez trial is viewed as a separate proceeding from that involving Snyder (notwithstanding both of them being charged with the same crimes as co-defendants in the same docket), . . . [m]y comments regarding the credibility of Maury O'Brien and the reasons I gave for sentencing Mr. Snyder to life without possibility of parole were exclusively based upon and related solely to the evidence presented in the Snyder trial. Since my comments in the Snyder "case" were limited to the evidence presented there, it cannot reasonably be inferred from those comments that I have pre-judged the Perez "case" in any manner. Any decisions I am called upon to make in the Perez "case" will have to be based on the evidence presented there.

(4 CT 1186; see also 4 RT 839-840 [Judge Spinetta comments in court upon the filing of his declaration, "[A]ll I did was make statements in the

discharge of my legal duties, and I was required by the law to make certain factual findings and certain legal findings in connection with the Snyder case. And by reason of that, . . . I am not disqualified."].)

Judge Spinetta also filed a supplemental answer to the disqualification motion on April 2, 2001. (See 4 CT 1203-1205.) Among other things, Judge Spinetta further explained his prior comments about the testimony of O'Brien at Snyder's trial:

> I did not state Mr. Maury O'Brien "is telling the truth," which makes it sound as if I am endorsing his general credibility. The import of my remarks was that I found the testimony that Mr. O'Brien gave at the Snyder trial to be credible, in light of the cross-examination conducted, and evidence presented, there. This judgment regarding Mr. O'Brien's credibility, which I was required to make in passing on defendant Snyder's new trial motion, is specific, and was limited, to Mr. O'Brien's testimony in the Snyder case, and I do not consider myself precluded in any way from coming to a different judgment if warranted by the evidence at the Perez trial.

(4 CT 1204.)

Judge Bernard Garber of the San Joaquin County Superior Court was assigned to rule on appellant's disqualification motion. (4 CT 1238; see also Code Civ. Proc., § 170.3, subd. (c)(3).) Judge Garber denied the motion on several grounds. He first noted that "the fact that a judge presided over a prior trial does not by itself bar him or her from presiding over a retrial." (4 CT 1240, citing *People v. Aubrey* (1970) 11 Cal.App.3d 193.) Judge Garber also observed that "there is no prohibition that would prevent the trial judge from hearing multiple separate trials of co-defendants." (4 CT 1240.)

Judge Garber next found that Judge Spinetta's comments on the testimony of Maury O'Brien at Snyder's trial had not constituted an all-purpose endorsement of O'Brien's testimony. Instead, Judge Garber found

that Judge Spinetta had limited his comments "to those which were necessary in ruling upon the motion for new trial and factors in determining the appropriate sentence" for Snyder. (4 CT 1240.) Judge Garber also found that Judge Spinetta had not expressed a personal opinion of appellant's guilt, "but was merely making a legal ruling as to sufficiency of the evidence in the trial of the co-defendant [Snyder]." (4 CT 1241.) In sum, Judge Garber found that Judge Spinetta had made "legitimate and appropriate comments necessary to make rulings in the case of the co-defendant." (4 CT 1241.)

C. Judge Spinetta Was Not Required to Recuse Himself

Judge Spinetta had no duty to recuse himself from appellant's trial, merely because he had presided over the separate trial of codefendant Snyder. In *Kreling v. Superior Court* (1944) 25 Cal.2d 305, 312, this Court explained the relevant law:

> When the state of mind of the trial judge appears to be adverse to one of the parties but is based upon actual observance of the witnesses and the evidence given during the trial of an action, it does not amount to that prejudice against a litigant which disqualifies him in the trial of the action. It is [the judge's] duty to consider and pass upon the evidence produced before him, and when the evidence is in conflict, to resolve that conflict in favor of the party whose evidence outweighs that of the opposing party. The opinion thus formed, being the result of a judicial hearing, does not amount to that bias and prejudice contemplated by section 170, subdivision 5 of the Code of Civil Procedure.

(See also *People v. Yeager* (1961) 55 Cal.2d 374, 391 [same], overruled on other grounds in *People v. Chi Ko Wong* (1976) 18 Cal.3d 698, 716, fn. 14.)

In re Richard W. (1979) 91 Cal.App.3d 960, is particularly relevant here. There, two minors were observed committing a burglary in a hotel. Separate proceedings were held in juvenile court before the same judge. The second minor tried, Richard W., argued on appeal that his trial had

been unfair because his judge had heard evidence in the first trial that was harmful to him.

The Court of Appeal found no basis for reversal. The court first noted that if Richard W.'s trial attorney had truly believed that the trial judge had been prejudiced, the attorney had "had the ability to disqualify that judge under the provisions of Code of Civil Procedure section 170.6." (*In re Richard W.*, *supra*, 91 Cal.App.3d at p. 967.) Because no disqualification motion had been made in the trial court, the Court of Appeal found no reason to believe the trial judge was biased (or that the defense attorney believed the judge was biased). (*Ibid.*)

The Court of Appeal also found no reason to believe that Richard W.'s trial judge should have recused himself: "A judge is not disqualified to try a case merely because he previously, in a separate proceeding, heard a case of a coparticipant or passed on the application of a codefendant for probation." (*In re Richard W.*, *supra*, 91 Cal.App.3d at p. 968; see also also *People v. Kennedy* (1967) 256 Cal.App.2d 755, 759 [same]; *People v. Gibbs* (1970) 12 Cal.App.3d 526, 537 [same].)

In light of these cases, Judge Spinetta had no duty to disqualify himself from presiding over appellant's trial, merely because he had presided over Snyder's trial and found that the evidence had supported Snyder's conviction and sentence. Moreover, even if Judge Spinetta had neglected such a duty, the defense easily could have remedied the problem by moving to disqualify him under Code of Civil Procedure section 170.6. In the absence of such a motion, it must be presumed that the defense attorneys did not truly consider Judge Spinetta to be biased against appellant.

D. There is No Evidence That the Verdicts Were Tainted by Judge Spinetta's Comments

Appellant also argues that his trial was unfair because Judge Spinetta's comments at Snyder's posttrial hearings had tainted the jury pool for appellant's trial. Appellant notes that some of the jurors had expressed their belief during voir dire that appellant was guilty of killing Janet Daher. Appellant assumes those beliefs were based on Judge Spinetta's prior comments.

Preliminarily, all prospective jurors were asked—both in their questionnaires and during voir dire—whether their ability to judge appellant's case would be affected by pretrial publicity. (See, e.g., Jury Questionnaire at pp. 11-15.) Although some jurors responded affirmatively, it does not appear that any such jurors referred to Judge Spinetta's prior comments at Snyder's trial. Also, any juror who felt biased against appellant for any reason was dismissed for cause. (See, e.g., 7 RT 1576-1577, 1666-1667, 1671-1674.)

More important, many murder trials generate substantial pretrial publicity, and some potential jurors invariably declare themselves unable to evaluate the case impartially. A primary purpose of voir dire is to discover such jurors and dismiss them for cause. There is no evidence that any of the jurors who sat on appellant's jury were aware of, much less affected by, Judge Spinetta's comments at Snyder's trial. Thus, there is no basis for reversal.

IV. THE TRIAL COURT DID NOT "STACK" THE JURY IN FAVOR OF A DEATH SENTENCE BY "REHABILITATING" DEATH-PRONE JURORS THROUGH LEADING AND SUGGESTIVE VOIR DIRE QUESTIONS

Appellant contends the trial court deprived him of an impartial jury through improper questioning during voir dire. Specifically, appellant contends the court asked leading and suggestive questions to half a dozen

prodeath jurors, in an apparent attempt to "rehabilitate" them so they could not be dismissed for cause. (AOB 122-123.)

Preliminarily, appellant never raised his appellate claim of error as an objection in the trial court. Nor did appellant exhaust all of his peremptory challenges. Under many authorities, appellant's claim of appellate error would be deemed forfeited. (See, e.g., *People v. Jones* (2012) 54 Cal.4th 1, 45-46; *People v. Mills*, *supra*, 48 Cal.4th at p. 186; *People v. Harris* (2005) 37 Cal.4th 310, 330.) At the same time, this Court held in *People v. Whalen* (2013) 56 Cal.4th 1, 28, that a claim of judicial misconduct during voir dire is not necessarily forfeited by the defendant's failure to object at trial.

Even if appellant's claim of error is not forfeited, this Court has rejected virtually identical claims many times. In *People v. Whalen*, *supra*, 56 Cal.4th at page 25, the Court explained the relevant legal principles:

> "A prospective juror's personal views concerning the death penalty do not necessarily afford a basis for excusing the juror for bias in a capital case. [Citation.] Rather, '[t]o achieve the constitutional imperative of impartiality, the law permits a prospective juror to be challenged for cause only if his or her views in favor of or against capital punishment "would 'prevent or substantially impair the performance of his . . . duties as a juror' " in accordance with the court's instructions and the juror's oath.' [Citation.] Under this standard, a prospective juror is properly excluded in a capital case if he or she is unable to follow the trial court's instructions and 'conscientiously consider all of the sentencing alternatives, including the death penalty where appropriate. [Citations.]' [Citations.] The analysis is the same whether the claim is the failure to exclude prospective jurors who exhibited a prodeath bias, or wrongful exclusion of prospective jurors who exhibited an antideath bias. [Citations.]"

It is well known that prospective jurors in a capital case "commonly supply conflicting or equivocal responses" to voir dire questions about their potential biases or their incapacity to serve. (See *People v. Whalen*, *supra*,

56 Cal.4th at p. 25.) When a jury candidate gives conflicting or equivocal answers about his or her willingness to fairly consider the two possible punishments, death and LWOP, the trial court has a duty to determine, through its observation of the juror's demeanor and verbal responses, the juror's actual state of mind. (*Ibid.*)

In *People v. Mills* (2010) 48 Cal.4th 158, 189-190, this Court confirmed that a trial court has broad leeway in questioning jurors about disqualifying biases in a capital case:

> Trial courts must of course "be evenhanded in their questions to prospective jurors . . . and should inquire into the jurors' attitudes both for and against the death penalty to determine whether these views will impair their ability to serve as jurors." [Citation.] But the court has "broad discretion over the number and nature of questions about the death penalty. We have rejected complaints about 'hasty' [citation] or 'perfunctory' voir dire. [Citation.] We also have found no error where the court relied heavily on three, four, or five general questions tracking language from *Witherspoon* [*v. Illinois* (1968)] 391 U.S. 510 [88 S.Ct. 1770, 20 L.Ed.2d 776], and [*Wainwright v.*] *Witt, supra*, 469 U.S. 412, 424 [105 S.Ct. 844]." [Citation.]

Applying these principles to the facts in *Mills*, this Court found that a trial court did not err in questioning jurors in a capital case, even though some of the trial court's questioning of "life-leaning" and "death-leaning" jurors was not perfectly proportionate. (*People v. Mills*, *supra*, 48 Cal.4th at p. 189-190.) This Court explained:

> We have reviewed the voir dire proceedings and conclude the trial court did not abuse its broad discretion in its manner of questioning. Defendant finely parses the [trial] court's questioning, arguing the brevity of the court's questioning of "life-leaning" jurors as compared to "death-leaning" ones was indicative of the court's lack of impartiality, but his cited examples involve prospective jurors who stated flatly that they could not or would not vote to impose the death penalty. . . . In any event, given the trial court's broad discretion in this area, we cannot predicate a finding of error merely on the number of questions the court asks. [Citation.] We defer to the trial court's

> assessment of the sincerity of these jurors' views and conclude the brevity of the court's questioning was a function of its implicit assessment that further questioning was not likely to render the venireperson qualified to sit in a capital case.
>
> Nor does the court's occasional use of leading questions when attempting to rehabilitate "death-leaning" jurors suggest a lack of impartiality. We trust our trial courts understand and appreciate the importance of the voir dire procedure and the need to be "evenhanded" in questioning prospective jurors in a capital case. [Citation.] We assume the trial court formulated its questions based on the individual characteristics of each juror, including the jurors' questionnaire answers and in-court demeanor. To second-guess these choices would encourage the trial court to engage in substantially the same questioning of all prospective jurors irrespective of their individual circumstance, something we have declined to do. [Citations.]

(*People v. Mills*, *supra*, 48 Cal.4th at p. 189-190; see also *People v. Martinez* (2009) 47 Cal.4th 399, 447 [although the record ostensibly supported the defendant's claim that the trial court had "rehabilitated" three death-leaning jurors while failing to rehabilitate two life-leaning jurors, such a "limited sample of the trial court's overall performance" did not establish error].)

In this case, the trial court's questioning of prospective jurors was even-handed, if not favorable to the defense. Whenever a prospective juror expressed a categorical opinion about the death penalty—either for or against—the court questioned that juror about his or her opinion. Some jurors quickly confirmed that their position was absolute, and they were invariably dismissed for cause. (See, e.g., 7 RT 1499-1500, 1519 [J.K. would not impose the death penalty]; 7 RT 1500-1502, 1519 [T.G. would not impose the death penalty]; 7 RT 1537-1538, 1575 [E.C. would be inclined to "go with my conscience as opposed to the law"]; 7 RT 1685, 1706 [I.B. could not impose the death penalty]; 7 RT 1686, 1706 [J.D. could not consider LWOP]; 8 RT 1785, 1813 [A.S., Jr., would always

impose the death penalty]; 8 RT 1786, 1813 [S.M. would not impose the death penalty]; 8 RT 1789-1790, 1813 [G.M. would not impose the death penalty].)

In many other cases, prospective jurors who had expressed categorical opinions about the death penalty in their questionnaires softened or clarified their positions when questioned on voir dire. Appellant correctly notes that six jurors who initially seemed strongly in favor of the death penalty (or otherwise pro-prosecution) ultimately said, upon questioning by the court, that they could fairly apply the law. The court declined to dismiss those jurors for cause. (See 7 RT 1484-1487 [Juror No. 3 (also referred to as No. 8) had written that she might be sympathetic to the victim in this case]; 7 RT 1489-1493 [Juror No. 4 was not fluent in English and he seemed unclear about the prosecutor's burden of proof]; 7 RT 1507-1513 [Juror R.R. initially thought it would be "very difficult" for him to consider a defendant's social history, but he eventually said, "I think I can do it"]; 7 RT 1626-1629 [Juror No. 4 (also referred to as No. 1) said she had previously read about the case in the press, but she could base a verdict solely on evidence presented in the courtroom]; 7 RT 1637-1641 [Juror No. 10 (referred to by the Court as No. 37) had indicated on his questionnaire that he was concerned about the "high cost of LWOP" and he thought the death penalty was always appropriate in some cases].)

Appellant does not argue that the trial court was required to dismiss for cause any of the six jurors discussed above. Instead, appellant merely argues that the trial court's questioning of the jurors led them to give answers that precluded a challenge for cause.

Appellant fails to note that the trial court also probed the attitudes of prospective jurors who appeared to be strongly *opposed* to the death penalty or who otherwise appeared pro-defense. In many cases, the additional voir dire questioning "rehabilitated" those candidates, and the

trial court refused to dismiss many of them for cause. (See, e.g., 7 RT 1481-1482, 1518 [Juror No. 2 had opposed the death penalty "unequivocally" 10 or 11 years earlier and "would probably struggle" over imposing the death penalty today, but nonetheless believed he or she could follow the law]; 7 RT 1493-1496, 1518-1519 [C.R.'s religion said, "Thou shalt not kill" and she "honestly [did] not believe in the death penalty," but she said would try to follow the law]; 7 RT 1533-1536 [Juror No. 23, M.S., wrote on his questionnaire that he would require the prosecutor to prove his case "by something more than" proof beyond a reasonable doubt, but he agreed on voir dire to accept and apply the law]; 7 RT 1648-1650 [Juror M.R.J., who was ultimately dismissed for cause, wrote that he could never impose the death penalty, but he later said he would "be willing to listen" to arguments in favor of it]; 7 RT 1655-1657 [Juror No. 52, R.E.F., initially said, "I'm against the death penalty. I don't believe in killing any human being," but after the trial court explained the law to him, he said he could follow it]; 7 RT 1678-1682, 1704, 1726-1727 [Juror No. 59 wrote on his questionnaire that "there better not be any doubt" about the defendant's guilt, but after the court explained the burden of proof beyond a reasonable doubt, he said he understood]; 8 RT 1781-1784, 1813 [Juror No. 77, F.G., wrote on her questionnaire that the prosecution evidence should be "true and accurate without doubt or speculation," but the trial court explained the legal burden of proof and she said she could accept it]; 8 RT 1802-1803, 1813 [Juror No. 93 wrote on her questionnaire that she had a problem with the death penalty, but she later said she would follow the law]; 8 RT 1823-1824 [Juror No. 96, C.R., wrote on his questionnaire that he "dislike[d]" the death penalty, but he was prepared to follow the law]; 8 RT 1824-1830 [Juror No. 98, Y.P., wrote that she did not like the death penalty and did not believe that if "one life is taken, another should be taken"; she nonetheless said in court that she could follow the law]; 7 RT 1923-1931 [Juror No. 117

wrote or said, "There should not be any doubt" about a defendant's guilt, but she said in court that she could apply the proper burden of proof].)

In short, the trial court here did nothing more than probe the attitudes of all jurors who had expressed strong opinions about the death penalty. It appears that the court's questioning "rehabilitated" more prospective jurors who were favorable to the defense than to the prosecution. At a minimum, the questioning was evenhanded.

Finally, appellant does not identify any juror who was either: (1) dismissed for cause after expressing a willingness to consider the two sentencing options of LWOP and death; or (2) allowed to sit on the jury after expressing a categorical refusal (or inability) to consider both options. As a result, the trial court did not abuse its discretion in questioning the jurors about their attitudes toward the death penalty.

V. APPELLANT'S TRIAL WAS NOT TAINTED BY PROSECUTORIAL MISCONDUCT BASED ON THE DELAYED FILING OF A NOTICE OF AGGRAVATION

Appellant contends the prosecutor committed misconduct by intentionally waiting until the eve of the guilt phase of trial to file his notice of aggravation for the penalty phase. (AOB 135-136.) In Argument V, appellant complains he was not given adequate notice that the penalty phase evidence would include appellant's rape of Andrea Torres in 2005. In Argument VIII, appellant complains that the prosecutor's late disclosure of a police report relating to the rape violated California's discovery statutes and *Brady v. Maryland* (1963) 373 U.S. 83. Because the claims are so closely related, we address them together.

A. The Law of Prosecutorial Misconduct

The applicable federal and state standards regarding prosecutorial misconduct are well established. Under federal constitutional standards, a prosecutor's "intemperate behavior" constitutes misconduct if it is so

"egregious" as to render the trial "fundamentally unfair" under due process principles. (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.) Under state law, a prosecutor commits misconduct by engaging in deceptive or reprehensible methods of persuasion. (*Ibid.*)

A defendant generally may not complain on appeal of prosecutorial misconduct unless in a timely fashion—and on the same ground—the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety. (*People v. Fuiava* (2012) 53 Cal.4th 622, 679.) A defendant's failure to object and to request an admonition is excused only when an objection would have been futile or an admonition ineffective. (*Ibid.*; see also *People v. Arias* (1996) 13 Cal.4th 92, 159.)

"Lengthy criminal trials are rarely perfect," and a reviewing court should not reverse a judgment on the basis of prosecutorial misconduct "absent a clear showing of a miscarriage of justice." (*People v. Hill* (1998) 17 Cal.4th 800. 844, citing Cal. Const., art. VI, § 13; *Chapman v. California* (1967) 386 U.S. 18, 24.)

B. *Brady v. Maryland* and California's Discovery Statutes

In *People v. Verdugo* (2010) 50 Cal.4th 263, 279-280, this Court explained a prosecutor's constitutional and statutory duties to disclose evidence to a criminal defendant:

> "Pursuant to *Brady* [*v. Maryland*], *supra*, 373 U.S. 83 [83 S.Ct. 1194], the prosecution must disclose material exculpatory evidence whether the defendant makes a specific request (*id.* at p. 87 [83 S.Ct. 1194]), a general request, or none at all." [Citation.] "For *Brady* purposes, evidence is favorable if it helps the defense or hurts the prosecution, as by impeaching a prosecution witness. [Citations.] Evidence is material if there is a reasonable probability its disclosure would have altered the trial result. [Citation.] Materiality includes consideration of the effect of the nondisclosure on defense investigations and trial strategies. [Citations.] Because a constitutional violation occurs

only if the suppressed evidence was material by these standards, a finding that *Brady* was not satisfied is reversible without need for further harmless-error review. [Citation.]" [Citations.]

Section 1054.1 (the reciprocal-discovery statute) "independently requires the prosecution to disclose to the defense, . . . certain categories of evidence 'in the possession of the prosecuting attorney or [known by] the prosecuting attorney . . . to be in the possession of the investigating agencies.'" [Citation.] Evidence subject to disclosure includes "[s]tatements of all defendants" (§ 1054.1, subd. (b)), "[a]ll relevant real evidence seized or obtained as a part of the investigation of the offenses charged" (*id.*, subd. (c)), any "[r]elevant written or recorded statements of witnesses or reports of the statements of witnesses whom the prosecutor intends to call at the trial, including any reports or statements of experts" (*id.*, subd. (f)), and "[a]ny exculpatory evidence" (*id.*, subd. (e)). "Absent good cause, such evidence must be disclosed at least 30 days before trial, or immediately if discovered or obtained within 30 days of trial. (§ 1054.7.)" [Citation.]

Upon a showing both that the defense complied with the informal discovery procedures provided by the statute, and that the prosecutor has not complied with section 1054.1, a trial court "may make any order necessary to enforce the provisions" of the statute, "including, but not limited to, immediate disclosure, . . . continuance of the matter, or any other lawful order." (§ 1054.5, subd. (b).) The court may also "advise the jury of any failure or refusal to disclose and of any untimely disclosure." (*Ibid.*) A violation of section 1054.1 is subject to the harmless-error standard set forth in *People v. Watson* (1956) 46 Cal.2d 818, 836, 299 P.2d 243. [Citation.]

Section 190.3 explains the statutory requirements for discovery of aggravating evidence in a capital case: "Except for evidence in proof of the offense or special circumstances which subject a defendant to the death penalty, no evidence may be presented by the prosecution in aggravation unless notice of the evidence to be introduced has been given to the defendant within a reasonable period of time as determined by the court, prior to trial." Section 190.3's use of the phrase "prior to trial" has

generally been interpreted to mean "before the case is called," or "before the jury is sworn." (See, e.g., *People v. Salcido* (2008) 44 Cal.4th 93, 113; *People v. Jurado* (2006) 38 Cal.4th 72, 136 [notice of aggravation is generally considered timely if given prior to commencement of jury selection because the purpose of the notice provision is to give the defendant a reasonable chance to defend against the charge]; *People v. Roberts* (1992) 2 Cal.4th 271, 330 [section 190.3's "plain language gives the court discretion to determine what amount of notice is reasonable, but the evidence must be given to a defendant before the case is called"].)

Section 190.3 requires pretrial notice of aggravating evidence, but not discovery of such evidence. (*People v. Salcido*, *supra*, 44 Cal.4th at p. 113; see also *People v. Gonzalez* (2006) 38 Cal.4th 932, 955.)

C. Factual Background

Appellant was indicted in 1999, but jury selection for his trial did not begin until September 2001. Throughout pretrial proceedings, Defense Attorney Linda Epley repeatedly asked the prosecutor for his notice of aggravation, and the prosecutor mailed her an informal notice on March 1, 2001, i.e., more than six months before the start of jury selection. (See 4 CT 1217.) The informal notice listed appellant's prior felony convictions and acts of force or violence, and specifically referred to an uncharged rape of "Andrea Jones." (4 CT 1217.) Epley acknowledged the notice a week later, on March 8, 2001, and it appears that she immediately began investigating the rape. (See 5 CT 1568 [letter from Epley to the prosecutor acknowledging receipt of the notice and stating Epley's assumption that "Andrea Jones" was the same person as Andrea Torres]; 5 CT 1567 ["Report of Investigation" written to defense counsel by a private investigator explaining his attempts to contact Andrea Torres at her mother's home on March 5, 2001].)

A few weeks later, on March 16, 2001, the parties met to discuss the court's proposed juror questionnaire. (4 RT 788.) After that discussion, Epley complained that the prosecutor's informal notice of aggravation was inadequate. The prosecutor responded that he had no duty to provide any notice until "a reasonable time" before trial, and the trial court noted that at least one case had held that a notice was timely if provided on the eve of jury selection. (4 RT 793-795, citing *People v. Johnson* (1993) 6 Cal.4th 1, abrogated on other grounds in *People v. Rogers* (2006) 39 Cal.4th 826, 879.) The prosecutor also said he had recently received reports from the San Francisco Police Department relating to the some of the aggravating evidence, and he promised to send copies of those reports to Epley without delay. (4 RT 793.)

During pretrial hearings held on various issues over the next several months, Epley continued to request a formal notice of aggravation and discovery from the prosecutor. (See, e.g., 4 RT 861-866, 883-886.) The prosecutor again said he was trying to collect information about some of appellant's crimes from the San Francisco Police Department. (4 RT 863-866.) On June 27, 2001, the prosecutor said he had not talked to Andrea Torres personally because she did not want to discuss how she had been raped by appellant. (4 RT 886.)

In a hearing held on July 27, 2001, the prosecutor said he was still trying to prepare a formal notice of aggravation, but he could not complete the document until the trial court released appellant's file from the California Department of Corrections. (4 RT 960.) The prosecutor also said he was planning to talk to a San Francisco Police Officer, Detective Martin, about the rape of Andrea Torres. (4 RT 959.)

The prosecutor filed a formal notice of aggravation on August 16, 2001. (4 CT 1278-1281.) In a hearing on pretrial motions held on September 4, 2001, Epley complained that she had not yet received any

discovery relating to the rape of Torres. (5 RT 1017-1018.) The prosecutor said that the SFPD police file on the matter appeared to be missing. (5 RT 1017-1018.)

During another hearing on September 10, 2001, Epley again said she had not received any discovery about the rape. (5 RT 1166.) The prosecutor said he intended to call Torres and possibly an SFPD detective—whose name had already been disclosed to the defense—as witnesses about the rape. (5 RT 1168-1169.) The prosecutor also said he believed he had once seen a police report from the SFPD about the rape, but he could not locate it. (5 RT 1173-1174.)

Jury selection began on September 12, 2001 (see 6 RT 1198), and guilt verdicts were announced on October 16, 2001 (15 RT 3686).

On October 2, 2001, the prosecutor provided Epley with a copy of a two-page SFPD report. (5 CT 1555, 1576-1578.) That report stated that Torres had told a police officer on June 30, 1992, that appellant had "sexually assaulted" her three times, including incidents of vaginal rape and cunnilingus, between May 25 and May 29, 1992. (5 CT 1577-1578.) The report also stated that Torres had identified appellant's photo from a photospread on August 11, 1992, and that Torres "did not desire to prosecute." (5 CT 1578.)

On October 11, 2001, the prosecutor gave Epley additional pages from the SFPD report and an "Inpatient Progress Report" from San Francisco General Hospital. (See 5 CT 1619-1632.) Those documents described in greater detail Torres's reports of appellant's sexual assaults. Among the notations in the reports were "[Victim] stated that [suspect] raped and forced her to orally copulate him three times in her house." (5 CT 1621; see also 5 CT 1622 ["Joseph Perez . . . overpowered and forced [the victim] . . . into vaginal intercourse"].)

On October 23, 2001, the parties met to discuss in limine motions for the penalty phase of trial. (16 RT 3725-3831.) The prosecutor apologized for having given the police reports "late" to Eply, but he added that he had given the full reports to her as soon as he had received them. (16 RT 3740-3741, 3753.) He also said that the only SFPD report he had reviewed in the early stages of trial had been a one-paragraph summary of the rape. (16 RT 3740.) Epley moved to prohibit the prosecutor from presenting any evidence about the rape, and the court took the matter under submission. (16 RT 3755.) The court said it was more inclined to grant the defense a continuance to develop the evidence about the rape. (16 RT 3755.)

The penalty phase of trial began six days later, on October 29, 2001. Before the jurors entered the courtroom, the court ruled on a few final motions. (16 RT 3813-3831.) The court ruled that the prosecutor had not violated any discovery provisions because he had given the defense an informal notice of aggravation more than six months before the start of trial. (16 RT 3814-3815.) The court also noted that a formal notice had been filed in mid-August 2001, and that section 190.3 requires only that notice be given to the defense within a "reasonable" time before trial. (16 RT 3814-3818.) The court also noted that section 190.3 requires a prosecutor to provide notice of aggravating evidence, but not discovery of underlying reports or evidence. (16 RT 3814-3816; see also *People v. Roberts*, *supra*, 2 Cal.4th at p. 330 [after the prosecutor provided notice to the defense of aggravating evidence, "the defense was not entitled to a summation of the witnesses' expected testimony"].)

The trial court next noted that the only reports relating to the Torres rape had been prepared by the San Francisco Police Department. Because that agency had not been involved in the investigation of the killing of Janet Daher, those reports were not considered within the control of the prosecutor in this case for purposes of section 1054 and *Brady v. Maryland*,

supra, 373 U.S. 83. (16 RT 3814-3818; see also *People v. Zambrano* (2007) 41 Cal.4th 1082, 1133 [for purposes of *Brady* and the California discovery statutes, a prosecutor is required to provide discovery only of evidence obtained by parties involved in the investigation or prosecution of the charges against the defendant], overruled on other grounds in *People v. Doolin*, *supra*, 45 Cal.4th at p. 421, fn. 22.) The court also noted that the prosecutor may have seen prior references to the SFPD report about the rape of Torres, and that he finally located and turned over those reports to the defense in early October 2001. (16 RT 3816-3822.)

Finally, the trial court said it would have been willing to grant the defense a continuance of the penalty phase of trial to further investigate the Torres rape. (16 RT 3817-3818.) The defense had never requested a continuance, however, and there was no reason to believe that a continuance would have been futile. Thus, the court saw no need for any other type of sanction. (16 RT 3817-3822.)

D. There Is No Basis for Reversal

In light of the trial court's extensive analysis, appellant's claims of prosecutorial misconduct, *Brady* error, and discovery violations fail. Preliminarily, the prosecutor informally told the defense, six months before the guilt phase of trial began, that he intended to present penalty phase evidence that appellant had raped (or attempted to rape) Andrea Torres. More important, the formal notice of aggravation was provided a full month before the jury was sworn, and more than two months before the penalty phase began.

There is also no basis for reversal as a result of a section 1054 or *Brady* violation. Because the SFPD was not part of the prosecution team for the murder of Janet Daher, the prosecutor initially had no duty to obtain the report for the defense. Even if the prosecutor had received a copy of the report from SFPD some time before trial, he could not locate it for several

months. After the prosecutor discovered his copy of the report in early October 2001, he immediately gave it to the defense.

More important, although appellant characterizes the SFPD report as "exculpatory," it was not. The report simply notes that Torres had told a police officer in 1992 that appellant had sexually assaulted her three times, including at least one instance of vaginal rape. That information was consistent with the prosecutor's notification references to appellant's rape of Torres in 1992. Nothing about the SFPD information would have been helpful to the defense or harmful to the prosecution.

Finally, appellant has not shown any prejudice from the delayed disclosure of the police reports. The primary prejudice alleged for the guilt phase of trial is that appellant was unable to voir dire the jurors about their attitudes toward rape. (AOB 141.) The general purpose of death-qualification voir dire, however, is to explore the attitudes of the jury candidates toward capital punishment in the abstract, without regard to the specific evidence that will be produced at trial. (See, e.g., *People v. Medina* (1995) 11 Cal.4th 694, 746; *People v. Clark* (1990) 50 Cal.3d 583, 596-597.) Thus, the notice of aggravation is not intended to assist defense counsel in preparation for voir dire. (See *People v. Whalen*, *supra*, 56 Cal.4th at p. 74.) More important, even though a defense attorney may be allowed some leeway in voir dire questioning jurors about the underlying facts of the case at hand (see *People v. Cash* (2002) 28 Cal.4th 703, 720-723), the defense attorneys here were aware of the alleged rape of Andrea Torres long before voir dire began. As a result, they easily could have crafted general questions about the jurors' attitudes toward such a crime.

Appellant appears to argue that the delayed disclosure of the SFPD reports prejudiced him in two ways in the penalty phase of trial. First, appellant notes that section 190.3, subdivision (b), requires that any aggravating evidence involve the commission of a crime involving force or

violence. (AOB 183.) Appellant argues that the "minimal facts" in the SFPD report "'do not provide enough information about the incident to determine if the events involve a crime, a statutory rape as defined in Penal Code section 261.5 (which would not qualify as Penal Code 190.3(b) evidence) or a forcible rape as described in Penal Code 261' which would qualify.'" (AOB 183, quoting appellant's pretrial motion at 5 CT 1559-1560.)

The argument lacks merit. The SFPD reports refer to appellant's sexual assaults—including forcible rape and cunnilingus—on Torres. Even if the reports do not provide extensive details about the incidents, they gave appellant fair notice of the nature of Torres's penalty phase testimony. Critically, Torres testified at trial that appellant had accomplished sexual intercourse upon her by force, and that testimony was clearly admissible under section 190.3, subdivision (b). Nothing in the SFPD reports contradicted that testimony.

Appellant also argues that he was prejudiced by the late disclosure of the SFPD reports because "the defense was not afforded a fair opportunity to decide whether [appellant] should take the stand to deny [the rape allegation], as there were no other witnesses." (AOB 186.) The claim is puzzling. If appellant and Torres were the only witnesses to the rape, then the defense would not have needed additional time to determine whether appellant should have testified to rebut the accusation. If appellant believed Torres's accusation was baseless—either because there had been no sexual intercourse or because the intercourse had been consensual—then appellant could have testified to that effect. Also, if appellant believed there were witnesses who could impeach Torres, he could have told his attorneys of those witnesses long before trial. Most important, if the defense attorneys had truly believed they needed additional time to prepare for the penalty phase of trial, the trial court was willing to grant a continuance. Because

the attorneys did not request a continuance or explain why a continuance would have been futile, there was no possibility of prejudice.

VI. APPELLANT'S OTHER CLAIMS OF PROSECUTORIAL MISCONDUCT FAIL

Appellant contends the prosecutor committed misconduct in several other ways, apart from the alleged delay in the filing of the notice of aggravation (see Argument V above).

A. The Prosecutor Did Not Offer Victim-Impact Evidence at the Guilt Phase of Trial

Appellant contends the prosecutor offered improper victim-impact evidence in the guilt phase of trial when examining two of Janet's surviving relatives, husband Joe Daher and daughter Annie. (AOB 142-143.) Appellant complains that Joe should not have been allowed to testify that he had known Janet for 30 years, i.e., since he and Janet had attended high school together. (9 RT 2081.) Appellant also argues that Annie should not have been allowed to testify in the guilt phase at all because "she did not witness anything, did not add anything to the State's case for guilt, and did not view [Janet's] body." (AOB 142-143.) Appellant contends the purpose of Annie's testimony "was solely to elicit sympathy for the victim's family." (AOB 143.)

Neither of appellant's attorneys objected to the testimony of Joe or Annie as improper victim-impact evidence, so the contentions are forfeited on appeal. (See *People v. Hartsch* (2010) 49 Cal.4th 472, 510.)

More important, there was nothing impermissible about the testimony of Joe or Annie. During the guilt phase of a capital trial, a prosecutor may not present victim-impact evidence or argue to the jury for the sole purpose of appealing to sympathy for the victim. (See, e.g., *People v. Salcido* (2008) 44 Cal.4th 93, 151; *People v. Stansbury* (1993) 4 Cal.4th 1017, 1057 [same], overruled on other grounds in *Stansbury v. California* (1993) 510

U.S. 943.) In this case, however, both Joe and Annie provided relevant (albeit relatively minor) prosecution evidence, and their testimony could not have elicited undue sympathy for Janet. Again, Joe described how he had left the family house for daughter Lauren's softball game around 2:00 p.m. on the day of the killing. Joe did not close the garage door when he drove away, and Janet was alone in the house at the time. Annie testified that Janet routinely picked her up at school at 3:00 p.m., but Janet did not show up that day. Annie also testified that when she arrived at home between 4:30 and 5:15 p.m., the house was quiet and the garage door was closed.

The testimony of Joe and Annie, considered together, supported Maury O'Brien's testimony that he and his confederates had entered the Dahers' house through the open garage door around 2:30 p.m., and that they had left the house, closing the garage door behind them, shortly after 3:00 p.m. In short, the testimony of Joe and Annie provided helpful background information about the killing, but nothing that improperly focused on the impact of the crime on the victim or her family. Thus, there was no error or possibility of prejudice. (See *People v. Salcido*, *supra*, 44 Cal.4th at p. 107 [the wife of a murder victim did not provide victim-impact evidence in providing relevant testimony about how the victim had recently changed his work schedule so the wife would not have to drive during her pregnancy].)

B. The prosecutor did not vouch for the credibility of Jason Hart

Appellant contends the prosecutor committed misconduct by "vouching" for one of his witnesses, Jason Hart.

The contention fails.

> It is settled that "[a] prosecutor is prohibited from vouching for the credibility of witnesses or otherwise bolstering the veracity of their testimony by referring to evidence outside the

> record. [Citations.] Nor is a prosecutor permitted to place the prestige of [his or her] office behind a witness by offering the impression that [he or she] has taken steps to assure a witness's truthfulness at trial. [Citation.] However, so long as a prosecutor's assurances regarding the apparent honesty or reliability of prosecution witnesses are based on the 'facts of [the] record and the inferences reasonably drawn therefrom, rather than any purported personal knowledge or belief,' her comments cannot be characterized as improper vouching. [Citations.]"

(*People v. Frye* (1998) 18 Cal.4th 894, 971.)

At one point in his closing argument in the guilt phase of trial, the prosecutor talked about the testimony of Jason Hart. The prosecutor noted that Hart had told the police and testified at trial that he had been with appellant, O'Brien, and Snyder on the morning and evening of the killing of Janet. Hart had given the three men a ride to the Balboa BART Station late that morning, and he gave them a ride home from an East Bay motel in the evening. During the drive home from the motel, appellant and the two other men talked about how they had robbed and killed a woman.

The prosecutor argued that Hart had had no reason to falsely implicate appellant in any crime. At one point in his argument, the prosecutor stated: "[Y]ou think Jason Hart is going to tell the cops that he gave three guys a ride from what amounted to a murder if he didn't do it? *Well, we know he didn't do it, so he's not going to do that.*" (15 RT 3578, italics added.) Appellant now argues that the italicized comments constituted improper vouching. (AOB 143.)

As an initial matter, the prosecutor's comments on their face are bit jumbled, in that they alternately suggest that Hart did something and did not do something. The plain meaning of the comments, however, is apparent. When the prosecutor said, "We know [Hart] didn't do it," he was undoubtedly referring to the killing of Janet. At the same time, it appears that the prosecutor was trying to argue that Hart had told the police the truth

when he acknowledged having given a ride to appellant, O'Brien, and Snyder from Fairfield to San Francisco on the morning and evening of the killing.

More important, the defense did not object to the prosecutor's comments, most likely because the comments were permissible. Hart's testimony about the rides he had given to appellant and the other men was facially credible because the testimony implicated Hart in serious crimes, including accessory to murder and receiving stolen property. Thus, even though there was no evidence that Hart had been involved in the killing, it was clear that he had been with the defendants in the aftermath of that crime. Because Hart implicated himself in serious crimes in describing what he had heard during the ride home to San Francisco, his description of appellant's damning admissions was inherently credible.

In any event, Hart's testimony was confirmed by the trial testimony of both O'Brien and Mac Shawn, who had also been in Hart's car during the evening drive from Fairfield to San Francisco.

In short, Hart had no incentive to tell the police that he had helped appellant on the night of the crime. In fact, he had a positive disincentive to make such an incriminating statement. The prosecutor was therefore entitled to argue that Hart's statement (and his later trial testimony, which was consistent with that statement and confirmed by other evidence) was credible.

C. Any Improper Questioning of Susan Frankel Was Harmless

Appellant contends the prosecutor committed misconduct during the penalty phase of trial by aggressively questioning defense witness Susan Frankel on two occasions.

Frankel testified as a minor defense witness during the penalty phase of trial, explaining that she had once served in a volunteer program to assist

young parolees. In brief, Frankel testified that she had tried to serve as a friend and mentor to appellant in the early 1990's. Appellant initially seemed eager to "straighten out" his life, but Frankel noticed that he appeared "harder" and "less innocent" when she saw him a year later. (22 RT 5006-5007.)

On cross-examination, Frankel said she had received correspondence from appellant prior to trial in which he had denied any involvement in the murder of Janet. (22 RT 5010.) The prosecutor asked Frankel if she thought that appellant's denial "might be relevant evidence that you should let somebody know about?" (22 RT 5010-5011.) Frankel said no. (22 RT 5011.) The prosecutor continued his questioning as follows:

> Q. If—let me ask you this question: If he would have confessed to the crime in the letter, would you have turned it over to anybody?
>
> A. I think it would be speculating—
>
> Q. No—
>
> A. —as to what I would have done at that time.
>
> Q. If he had written you in the letter—
>
> MS. EPLEY: I'm going to object as relevance [*sic*], your Honor.
>
> THE COURT: Sustained. Sustained. Speculation.
>
> BY MR. SEQUEIRA:
>
> Q. You didn't want to answer that question, did you, so you interposed your own objection because you're a lawyer; isn't that true?
>
> MS. EPLEY: Objection, your Honor. Argumentative.
>
> THE COURT: Sustained.
>
> BY MR. SEQUEIRA:

Q. Isn't it true you didn't want to answer that question, ma'am?

MS. EPLEY: Objection, your Honor. The question's [*sic*] been sustained.

THE COURT: Sustained. Sustained.

BY MR. SEQUEIRA:

Q. Is there anything he would have written in the letter that would have made you turn it over to the authorities?

MS. EPLEY: Objection. Relevance.

THE COURT: Sustained.

(22 RT 5011-5012.)

Although the defense attorneys did not request a jury admonition at trial, appellant now argues that the prosecutor's questions were "designed to discredit Frankel, to imply that she was biased toward appellant, and that she would have possibly acted unethically in order to protect him." (AOB 144.)

Appellant makes too much of a minor matter. Frankel was obviously sympathetic toward appellant, and there was no doubt that she wanted to assist his defense. Any statements appellant had made to Frankel about the killing of Janet would have been relevant penalty phase evidence, in that they would have shed light on appellant's lack of remorse for the crime. (See *People v. Blacksher* (2011) 52 Cal.4th 769, 844 [it is permissible for a prosecutor to comment in the penalty phase of trial on a defendant's lack of remorse so long as it is not explictly characterized as an aggravating factor]; *People v. Boyette* (2002) 29 Cal.4th 381, 455 [same]; *People v. Holt* (1997) 15 Cal.4th 619, 691; see also Argument VI.E below.)

Even assuming the prosecutor should have modified or discontinued his questioning after defense objections had been sustained, neither Frankel's testimony nor the prosecutor's attempt to show her bias in favor

of appellant could have affected the outcome of trial. Again, Frankel was a minor defense witness. Her testimony on direct examination covered only eight pages of transcript, and her comments about appellant were unremarkable and consistent with the testimony of several other defense witnesses. Thus, even if the prosecutor's questioning was a bit overaggressive, appellant could not have suffered prejudice.

On continued cross-examination by the prosecutor, Frankel acknowledged that she had never asked appellant why he had been incarcerated, either when he was awaiting trial for the murder of Janet or when he had been imprisoned for prior crimes. (22 RT 5015.) Frankel said that she had never wanted to confront or embarrass appellant about his crimes. (22 RT 5015-5016.) The prosecutor questioned Frankel as follows:

> Q. Well, because isn't it a particularly heinous crime that he goes into a woman's house and strangles her with a telephone cord and stabs her to death—
>
> MS. EPLEY: Objection.
>
> THE COURT: Sustained. Let's not be argumentative, please.
>
> MR. SEQUEIRA: Q. How do you feel about that?
>
> MS. EPLEY: Objection. Relevance.
>
> THE COURT: Sustained.

(22 RT 5016.)

Appellant contends these questions were "designed to bias the jury against" him. (AOB 144.)

Again, the defense attorneys did not request a jury admonition, and the questions were innocuous. The jurors had convicted appellant of robbing and killing Janet in the guilt phase of trial, so they knew the details of appellant's crimes. Thus, assuming the prosecutor's questions were

technically argumentative, they could not have affected the outcome of the trial.

D. The Reference to Appeals Was Proper

Appellant contends the prosecutor improperly referred during the penalty phase of trial to appellant's right to appeal his conviction.

At the outset of his penalty phase closing argument, the prosecutor acknowledged that the jurors faced a difficult task in deciding the appropriate penalty for appellant. (24 RT 54-4-5406.) The prosecutor noted that he and the defense attorneys had been trained to present penalty phase evidence in the light most favorable to their respective positions. (24 RT 5406-5407.) The prosecutor nonetheless insisted he had no intention of playing "semantical games" with the jury. (24 RT 5407.) He stated:

> [F]or Joseph Andrew Perez, who's a cowardly killer, I'm going to ask you to return a death sentence, to put him on a bus from the Martinez Detention Facility, go across the Richmond/San Rafael bridge, go to a single cell in San Quentin, sit on death row until his appeals process is over and be executed. That's what I'm asking you to do.

(24 RT 5407.)

Neither defense attorney objected to these comments. After the prosecutor completed his argument, Attorney Egan moved for a mistrial. (24 RT 5469-5470.) He said that some of the prosecutor's comments had been so improper that they could not be cured by an admonition. (24 RT 5469-5470.) The court promised to hear to Egan's motion after he had completed his argument, and Egan did not object. (24 RT 5469-5470.)

After the jury retired to deliberate, the court heard Egan's mistrial motion. Egan argued, inter alia, that the prosecutor's reference to appellant's right to appeal had been improper. Egan stated:

> [The prosecutor] said that [appellant] would get on a bus, go to San Quentin, sit there for however many years it took until all of his appeals were exhausted.

> I believe that was an improper reference to reference that. The cases discuss what life without the possibility of parole means. They discuss possible commutation exists. What happened when he asked that question—I believe that he cannot mention the possibility of being released on appeal, which is certainly an inference if an appeal—if there is such a thing as an appeal. It must mean, perhaps, the appeal will be successful.

(24 RT 5531.)

The prosecutor responded as follows:

> As to the appellate process, it was very clear what I was trying to do. I was trying to let the jury know that whatever they voted for I meant death, and I was describing the process of the defendant getting escorted. I did not talk about any successful appellate process. It was merely a passing reference, and it was not focused on lack of remorse, not in the traditional sense.

(24 RT 5533-5534.)

The trial court found no misconduct. The court said:

> References to the appellate process, one always . . . has to be careful about references to the appellate process when those references are utilized in a way to suggest—to diminish, really the jury's sense of responsibility.
>
> I don't think the context in which they were used here demonstrates or indicated any attempt to do that, to diminish their sense of responsibility. I don't think that was either the purpose or the effect here. It was a passing reference in the context, which, as I say, did not invite the jury to treat the case any more lightly or with any less responsibility.

(24 RT 5534-5535.)

Simply stated, the trial court's ruling was correct. It is common knowledge that defendants convicted of capital crimes in California are entitled to appeal their convictions, regardless of the ultimate punishment imposed, i.e., death or LWOP. Contrary to Defense Attorney Egan's claim, the prosecutor did not state or imply that appellant might be released from prison during the pendency of an appeal. Instead, the prosecutor merely

asked the jury to impose a death verdict so that appellant would "sit on Death Row" at San Quentin until the sentence could be legally carried out. There was no misconduct.

E. The References to Appellant's Lack of Remorse Were Permissible

Appellant contends the prosecutor improperly referred in his penalty phase closing argument to appellant's lack of remorse.

In discussing the circumstances of the killing of Janet Daher, the prosecutor noted that the killing had been particularly brutal, and that many of her 17 stab wounds must have been gratuitous. (24 RT 5422-5424.) The prosecutor also noted that appellant had never displayed any remorse for his crimes. (24 RT 5425-5426.) The prosecutor further pointed out that appellant and his confederates had seemed to "celebrate" the robbery and murder by driving to Cordelia, buying beer at a gas station, and drinking it in the Overnighter Motel. (24 RT 5425-5426.) Also, O'Brien and Snyder had consumed cocaine in the stolen SUV during the drive to Cordelia. (24 RT 5425-5426; 3 Supp. CT 498.) Later, when the three men met with Justin Mabra and Meghan McPhee, appellant was proudly wearing one of Janet's earrings. (24 RT 5426.)

The defense attorney did not object to these comments during the prosecutor's closing argument, but the attorney later argued in his motion for a new trial that the comments had been improper and prejudicial. (24 RT 5469-5470.) Because the objection came too late to be cured by any admonition, appellant's claim of error is forfeited on appeal.

In any event, the trial court correctly held that the prosecutor's comments were appropriate in that they had been made "in the context of the certain circumstances attendant to the crime, how defendant behaved at the time of the crime and immediately after." (24 RT 5535.)

This Court has repeatedly confirmed that a prosecutor may present evidence and comment on a defendant's lack of remorse in committing a capital crime. In some cases, the Court has unequivocally stated that lack of remorse is a permissible aggravating factor. (See, e.g., *People v. Hawthorne* (2009) 46 Cal.4th 67, 94 [a prosecutor is entitled to develop and argue the lack of evidence or remorse in the penalty phase of a capital trial], overruled on other grounds in *People v. McKinnon* (2011) 52 Cal.4th 610, 637-645; *People v. Hinton* (2006) 37 Cal.4th 839, 907 [the presence or absence of remorse is a factor universally deemed relevant to a jury's penalty determination]; *People v. Marshall* (1996) 13 Cal.4th 799, 855 [same].) In other cases, this Court has stated the rule more narrowly: "Conduct or statements demonstrating a lack of remorse made at the scene of the crime or while fleeing from it may be considered in aggravation as a circumstance of the murder under section 190.3, factor (a). [Citations.] 'On the other hand, postcrime evidence of remorselessness does not fit within any statutory sentencing factor, and thus should not be urged as aggravating.' [Citation.]" (*People v. Collins* (2010) 49 Cal.4th 175, 227.) In still other cases, the Court has held that the *presence* of remorse may be a mitigating factor, so a prosecutor may comment on the absence of that factor. (See, e.g., *People v. Dyer* (1988) 45 Cal.3d 26, 82.)

Whatever the precise contours of the rule, the prosecutor here was entitled to comment on appellant's lack of remorse in the immediate aftermath of the murder. Again, appellant first attempted to kill Janet by strangling her with a telephone cord, and he pulled the cord so tightly that it dug a furrow into her neck. Although Janet must have been gravely injured by the strangulation, appellant stabbed and sliced her with a knife 17 times in the upper back, arms, and neck. Some of those wounds, even if inflicted alone, would have been fatal, and all of them must have been torturous. Immediately after the killing, appellant and his confederates completed the

burglary of Janet's house and fled in her SUV. During the drive, O'Brien and Snyder consumed cocaine. After they arrived in Cordelia, the three men stopped at a gas station and bought beer. They drank the beer in the Overnighter Motel while happily dividing their loot. Appellant and Snyder proudly talked about how they had earned "a stripe" for killing Janet. The three men then went to Fairfield in the hope of robbing drug dealer Sandu. When they later met with Justin Mabra and Meghan McPhee, appellant was proudly wearing one of Janet's earrings. In short, the prosecutor was entitled to argue that the circumstances of the killing were atrocious, and that appellant had never showed any hesitation or remorse in killing Janet Daher. There was no misconduct.

VII. THE TRIAL COURT CORRECTLY DISMISSED JUROR NO. 7 FOR CAUSE

Shortly after trial began, one of the sitting jurors, Juror No. 7, informed the court that his attitude toward the death penalty had changed. Although Juror No. 7 had stated throughout voir dire that he could impose the death penalty under appropriate circumstances, he realized—after continuing to think about the matter for several more days—that he could not impose the death penalty under any circumstances. The trial court dismissed Juror No. 7 for cause, and appellant argues that the dismissal violated his constitutional rights to due process and an impartial jury.

A. Factual Background

Jury voir dire was completed on September 19, 2001, and trial began five days later, on September 24, 2001. Before the attorneys gave their opening statements, the trial court announced that a sitting juror, Juror No. 7, had approached him earlier that morning and "indicated that he wanted to discuss with me his level of comfort with sitting on a death penalty case and suggesting that—that he may have some difficulty in that regard." (9

RT 2010.) The court had told the juror that they would discuss the matter later in the presence of counsel. (9 RT 2010.)

Trial began with the attorneys' opening statements and the testimony of a few prosecution witnesses. (9 RT 2007-2199.) At the conclusion of the day, the court excused all jurors other than Juror No. 7. (9 RT 2199.) The court asked Juror No. 7 to explain his concerns. Juror No. 7 said that after he had been sworn the previous week, he had had "time and reason to reflect further on . . . the death penalty." (9 RT 2199.) The court reminded Juror No. 7 of some of his comments on his jury questionnaire, including his statement that he had no moral, religious, or philosophical qualms about the death penalty. (9 RT 2200; see also 5 JQ 1618-1625.) The court asked: "Has anything changed in terms of how you would respond to that question now?" (9 RT 2200.) Juror No. 7 said yes and explained, "I no longer think that I am capable of making that decision myself." (9 RT 2200.) Juror No. 7 further explained that his qualms about the death penalty had come from "deeper thought, personal reflection." (9 RT 2201.) On questioning by the court, Juror No. 7 said he could not set aside his personal feelings about the death penalty: "I can't conceive of a situation where I would reach that conclusion." (9 RT 2203.) Juror No. 7 also said that he did not have a problem with the recent judgment and execution of the "Oklahoma City Bomber," Timothy McVeigh, but he added, "[I]f I was on that jury, I can't imagine coming to that conclusion, that the penalty of death was preferable or somehow a better conclusion to reach than life in prison without parole." (9 RT 2203.) Juror No. 7 again acknowledged that he had previously said he was capable of imposing a death verdict, but he said "I no longer think I can do that." (9 RT 2204.) He denied that there had been "any specific event" that triggered his change of mind, other than "further reflection" since the conclusion of voir dire. (9 RT 2204.)

The court excused Juror No. 7 for the evening, then briefly discussed the matter with counsel. (9 RT 2204-2209.) The prosecutor argued that Juror No. 7 was "unrehabilitable" [*sic*], and the court said it was inclined to agree. (9 RT 2206.) The court nonetheless observed that removing a sitting juror "is always a matter of very—always a very, very, serious matter, and before doing it, I feel we have to explore every possibility and consider all angles." (9 RT 2206.) Defense counsel argued that Juror No. 7 had said, "I don't see myself reaching the position where I felt that the aggravating circumstances would so outweigh the mitigating circumstances that death would be the punishment I would choose," and that such an attitude did not disqualify him. (9 RT 2207.)

Before the trial proceedings resumed the next morning, the court again questioned Juror No. 7. Among other things, the court asked, "Is your state of mind such that you could sit back, listen to the aggravating evidence, listen to the mitigating evidence, and then make—and honestly consider whether the aggravating circumstances or evidence outweighs [*sic*] the mitigating evidence or vice-versa. Can you honestly consider those things? . . . [¶] Or is your state of mind such that no matter what the aggravating circumstance is and no matter what the mitigating circumstance evidence is that you could not ever vote for life—or for death?" (10 RT 2215.) Juror No. 7 answered: "Right now, thinking through the different possibilities, I can't imagine a case where I could find—where I would find the death sentence a more appropriate penalty than life imprisonment without possibility of parole." (10 RT 2215-2216.) On further questioning by the court, Juror No. 7 stated: "I can't—I don't see me being capable of saying that death would be a more appropriate penalty than life in prison without possibility of parole." (10 RT 2216.) The court concluded the questioning and excused Juror No. 7 from the courtroom. (10 RT 2216.)

The prosecutor moved to dismiss Juror No. 7 for cause. (10 RT 2217.) The court noted that Juror No. 7 had seemed to have "had difficulty understanding what we were getting at." (10 RT 2217.) Defense counsel disagreed that Juror No. 7 was disqualified and argued alternatively that even if Juror No. 7 were deemed unable to sit during the penalty phase of trial, he should be allowed to sit for the remainder of the guilt phase. (10 RT 2217-2218.) The court said, "The reason for excusing him, if there's a reason for excusing him, has to do with his inability to perform the duties and responsibilities of a juror during the penalty phase, that is, make the decision that a juror's called upon to make in that phase." (10 RT 2218.) The court also noted that if Juror No. 7 had expressed his current views during voir dire, the court would have dismissed him upon a challenge for cause. (10 RT 2218.) The court wondered whether Juror No. 7's penalty-phase "deformity" was "good reason for excusing him from participating in the culpability phase." (10 RT 2218.)

The court considered various scenarios. The first involved letting Juror No. 7 continue to sit for the guilt phase of trial without telling him that he would be excused at the penalty phase. (10 RT 2218.) The court feared that under such circumstances, Juror No. 7's decision in the guilt phase might be affected by his desire not to participate in the penalty phase. (10 RT 2218-2219.) The court also noted, "We haven't voir dired him about that." (10 RT 2219.) On the other hand, the court observed that "[i]f I do tell him and tell him don't worry about it, you're not going to be in the penalty phase, all you have to do is make the culpability decision, that might also affect him in the culpability phase. He might say, all right, if I don't have to worry about that, it might make it easier for him to render a decision of guilt, for example, because, remember, he did say he has no problem with other people imposing the death penalty. It's just he doesn't want to participate in it." (10 RT 2219.) Finally, the court noted that an

appellate court "might say, well, under these circumstances, they facilitated the possibility of his rendering a guilty verdict." (10 RT 2219.) Again noting that the parties had not questioned Juror No. 7 about any of the posited scenarios, the court said it was inclined to excuse him. (10 RT 2219-2220.)

Defense counsel offered the trial court a "third option"—to tell Juror No. 7 that "at this point it's not really an issue for him as a juror. If he wants to raise it again at a point where it does become an issue, he can do so, and the court will listen to him and ask him questions again." (10 RT 2220.) Defense counsel stated that this "isn't so different from a situation where a juror in the middle of proceedings realizes that they do, in fact, know a potential witness and they don't know if it would affect their ability to be a juror. [¶] And I certainly have been in situations where the court says, well, let's see what happens. If it does in fact become a problem for you, let us know and we'll address it then. I had that happen many times. I've even had it happened [*sic*] during voir dire where the court in a capital case—where a court says, well, if that becomes an issue for you, something that the juror raised, let us know and we'll take care of it then." (10 RT 2220.)

The prosecutor responded that "the People have a right to have jurors that are . . . death qualified." (10 RT 2221.) He further argued that allowing Juror No.7 to remain for the guilt phase would deny the prosecution its right "to have 12 jurors that are willing to consider both penalties." (10 RT 2221.)

The court reviewed the circumstances and arguments and again noted that Juror No. 7 had unequivocally stated in his questionnaire and on voir dire that he could impose the death penalty, but that he later realized he could not do so. (10 RT 2223.) The court stated: "[Juror No. 7's] state of mind in my view substantially impairs his ability and prevents him from

being able to properly discharge a key duty and responsibility of a juror in a capital case and that is to honestly consider both alternatives, both alternative punishments that are available by law in this type of a case and to make a decision based upon a relative comparison of the aggravating evidence and the mitigating evidence. [¶] In effect what we have here is a person whose views have led him—are such as to have him prejudge the case—at least, the penalty phase of the case—without regard to the evidence." (10 RT 2224.)

The court concluded the hearing by stating that "the danger of telling [Juror No. 7] or not telling him or keeping him would—given his state of mind about the penalty, carries with it too great of a danger to impact him on the culpability decision." (10 RT 2225-2226.) The court decided to approach the situation as if the issue had arisen before Juror No. 7 had been sworn. Because Juror No. 7 would have been dismissed for cause if he had expressed his current opinions during voir dire, the court considered it appropriate to dismiss him in light of the changed circumstances. (10 RT 2226.)[17]

B. The Dismissal of Juror No. 7 Was Reasonable

A trial court may discharge a sitting juror for good cause at any time, including during deliberations, if the court finds that the juror is unable to perform his or her duty. (*People v. Lomax* (2010) 49 Cal.4th 530, 588-590, citing § 1089.) When a trial court is informed of allegations which, if proven true, would constitute good cause for a juror's removal, a hearing is required. (*People v. Cleveland* (2001) 25 Cal.4th 466, 478.)

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[17] Later during trial, the court again summarized its reasons for dismissing Juror No. 7, explaining that the "unitary jury requirements of the Penal Code" made it preferable for a single jury to hear both phases of a capital murder trial. (11 RT 2428-2429.)

A sitting juror's actual bias, which would have supported a challenge for cause, renders him "unable to perform his duty" and thus subject to discharge and substitution. (*People v. Lomax*, *supra*, 49 Cal.4th at p. 589.) In the death penalty context, "[a] juror may be disqualified for bias, and thus discharged, from a capital case if his views on capital punishment 'would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath."' (*Ibid.*, quoting *Wainwright v. Witt* (1985) 469 U.S. 412, 424.)

In reviewing a trial court's dismissal of a sitting juror for cause, "the basis for a juror's disqualification must appear on the record as a 'demonstrable reality.'" (*People v. Lomax*, *supra*, 49 Cal.4th at p. 589.) This standard involves "a more comprehensive and less deferential review" than simply determining whether any substantial evidence in the record supports the trial court's decision. (*Ibid.*) Instead, it must appear that the court as trier of fact did rely on evidence that, in light of the entire record, supports its conclusion that bias was established. (*Ibid.*)

In light of these principles, little further analysis of the dismissal of Juror No. 7 is required. Juror No. 7 initially believed during voir dire that he could impose the death penalty. Five days later, at the start of trial, he announced that he had given the matter further thought, and he realized he could not impose the death penalty. In other words, Juror No. 7 categorically stated that if the case were to proceed to a penalty phase, he would not be able to follow the law by fairly considering both LWOP and death. As a result, Juror No. 7 was unqualified to sit in the penalty phase of appellant's trial. (See *People v. Lomax*, *supra*, 49 Cal.4th at p. 557 ["For a juror to decide a case before it is submitted is misconduct"].)

Although the trial court might have had the discretion to wait until the penalty phase of trial to dismiss Juror No. 7, the Court was not required to do so. In fact, in *People v. Fields* (1983) 35 Cal.3d 329, 352, this Court

explained why a single jury is preferred for the entirety of a capital case, discussing some of the reasons noted by the trial court in this case:

> [T]he preference for a single jury [in a capital case] goes well beyond considerations of administrative convenience or expense and reflects a legitimate attempt to assure—insofar as possible—that the decision-making process of a death penalty case is a coherent whole. The preference for a single jury is by no means a one-sided matter; such a procedure may provide distinct benefits for both the prosecution and the defense. From the prosecution's point of view, the use of a single jury to determine both guilt and penalty may make it less likely that a juror's belief as to the inappropriateness of the death penalty will improperly skew the determination of guilt or innocence; as the drafters of the Model Penal Code's death penalty provision observed, "a juror's knowledge that he may not be in a position to control sentencing may induce him to hold out against conviction even when liability is plain." [Citation.] From defendant's perspective, the use of a single jury may help insure that the ultimate decision-maker in capital cases acts with full recognition of the gravity of its responsibility throughout both phases of the trial and will also guarantee that the penalty phase jury is aware of lingering doubts that may have survived the guilt phase deliberations. [Citation.] Thus, there are a number of weighty considerations to support the statutory preference for a single jury in capital cases.

(See also *Lockhart v. McCree* (1986) 476 U.S. 162, 175-176 [recognizing "the State's concededly legitimate interest in obtaining a single jury that can properly and impartially apply the law to the facts of the case at both the guilt and sentencing phases of a capital trial"].)

Appellant's authorities are inapposite. In *Jennings v. Florida* (1987) 512 So.2d 169, 172-173, a juror in a capital case announced during the guilt phase of trial that she could not impose the death penalty. The juror said she could nonetheless be fair in the guilt phase, and both the prosecutor and the defense agreed to let her remain seated for that phase. After the defendant was convicted, the trial court dismissed the juror for the penalty phase, and the defendant was sentenced to death. He argued on appeal that

the trial court had erred in dismissing the juror in question, but the Florida Supreme Court disagreed. The supreme court recognized that there had been no need to dismiss the juror in the guilt phase because she had been acceptable to both the prosecution and the defense. At the same time, the juror was unacceptable for the penalty phase because she was unable to consider the death penalty. Thus, Florida Supreme Court found that the trial court's resolution of the unusual problem was not unfair to either party. Here, in contrast to *Jennings*, the prosecutor strongly objected to the presence of Juror No. 7 for both phases of appellant's trial.

In the lead California cases cited by appellant, trial courts dismissed jurors during deliberations in capital cases because there was some evidence that those jurors were refusing to deliberate. (See *People v. Allen and Johnson* (2011) 53 Cal.4th 60; *People v. Wilson* (2008) 44 Cal.4th 758.) This Court reversed in each case because, although the jurors in question had displayed strong opinions in rejecting the consensus of the other jurors, it had not been proven to a demonstrable reality that those jurors were refusing to deliberate or otherwise unwilling to follow the law. In *People v. Pearson* (2012) 53 Cal.4th 306, this Court understandably found error when a trial court dismissed a prospective juror for cause merely because she had at times been ambivalent about the death penalty during voir dire. (*Id.* at p. 332.)

In contrast to these cases, the trial court here was required to dismiss Juror No. 7 at some point in the proceedings because he had a crippling bias for the penalty phase of trial—he categorically could not impose the death penalty. Even if the trial court had the power to allow Juror No. 7 to remain seated for the guilt phase, the preferable option was to dismiss him at the outset so a single jury would hear both phases of appellant's trial.

VIII. THE EVIDENCE OF APPELLANT'S RAPE OF ANDREA TORRES WAS PROPERLY ADMITTED IN THE PENALTY PHASE OF TRIAL

See Argument V.

IX. APPELLANT'S TRIAL WAS NOT UNFAIR, MERELY BECAUSE IT BEGAN SHORTLY AFTER THE SEPTEMBER 11 TERRORIST ATTACKS

Appellant contends his convictions must be reversed because his trial began on September 12, 2001, i.e., the day after the terrorist attacks on the Pentagon and the New York World Trade Center. Appellant argues that "[t]he intense pro-government patriotic fervor generated by this traumatic event meant that the defense was operating under a tremendous disadvantage both in attempting to discredit the State's case for appellant's guilt and in opposing the State's request for the death penalty." (AOB 187.)

The defense did not object or request a continuance of trial as a result of the 9/11 attacks, so appellant's claim of error on appeal has been forfeited.

The claim also lacks merit. In *Sheppard v. Maxwell* (1966) 384 U.S. 333, 350, the United States Supreme Court discussed the due process requirement that a criminal defendant be "fairly tried in a public tribunal free of prejudice, passion, excitement, and tyrannical power." The Supreme Court noted that the "very purpose of a court system" is "to adjudicate controversies, both criminal and civil, in the calmness and solemnity of the courtroom according to legal procedures.'" (*Id.* at pp. 350-351; see also *Cox v. State of Louisiana*, 379 U.S. 559, 583 (1965) (Black, J., dissenting).) "Among these 'legal procedures' is the requirement that the jury's verdict be based on evidence received in open court, not from outside sources." (*Sheppard, supra*, 384 U.S. at p. 351.) The Supreme Court further explained:

> Due process requires that the accused receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused. And appellate tribunals have the duty to make an independent evaluation of the circumstances. Of course, there is nothing that proscribes the press from reporting events that transpire in the courtroom. But where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it to another county not so permeated with publicity.

(*Id.* at pp. 362-363.)

In light of these principles, the Supreme Court ruled in *Sheppard* that the murder conviction of Dr. Sam Sheppard had been tainted by massive negative publicity—"a 'Roman holiday' for the news media"—which had occurred both before and during the trial. (384 U.S. at p. 356.)

Appellant's trial was not tainted by the September 11 terrorist attacks. Although there does not appear to be any California case directly on point, several federal and state courts have held that a defendant in a criminal case was not denied due process, merely because his trial occurred at the time of (or shortly after) major terrorist attacks.

In one particularly relevant case, *United States v. Lampley* (10th Cir. 1997) 127 F.3d 1231, the defendants were convicted of several violent crimes in the Eastern District of Oklahoma on the one-year anniversary of the bombing of the Murragh Federal Building in Oklahoma City. Among other things, the defendants were convicted of plotting to bomb buildings of the Anti-Defamation League in Texas and the Southern Poverty Law Center in Alabama.

The defendants argued on appeal that their constitutional right to trial by an impartial jury had been prejudiced by the following factors: the occurrence of the trial in Oklahoma on the anniversary of the Oklahoma

City bombing; the corresponding presence of substantial security forces in the courthouse; the pervasive media publicity; the placement of a memorial wreath on the courthouse door and a memorial sign in front of the courthouse; and the admission of statements relating to the Oklahoma City bombing during trial. (*Id.* at p. 1236.)

The Tenth Circuit Court of Appeals found no error or prejudice. The Court of Appeals first noted that the defendants had not properly preserved their claims on appeal by objecting or moving for a change of venue at trial. (*United States v. Lampley*, *supra*, 127 F.3d at p. 1236.) More substantively, the Court of Appeals found that the trial court had taken all necessary steps to ensure a fair trial. Although there had been a heightened presence of armed security guards in the courthouse at the time of trial, the Court of Appeals noted that armed guards "have become commonplace in most public places," and a trial in the presence of such guards is not unfair "'so long as their numbers or weaponry do not suggest particular official concern or alarm.'" (*Id.* at p. 1237, quoting *Holbrook v. Flynn* (1986) 475 U.S. 560, 569.) Also, the district court had stated on the record that the presence of plainclothes security officers in the trial courtroom had been unobtrusive, and the jurors had repeatedly said that they could evaluate the case without being swayed by outside influences. (127 F.3d at pp. 1237-1238.) Under the circumstances, the Court of Appeals found that the defendants' right to a trial by an impartial jury had not been compromised.

A host of other state and federal cases have reached similar conclusions in the specific context of the terrorist attacks on September 11. (See, e.g., *United States v. Templeton* (8th Cir. 2004) 378 F.3d 845, 847, fn. 2 [noting in passing that the federal district court had denied a motion for a mistrial that was brought after the September 11 terrorist attacks occurred on the second day of trial]; *United States v. Capelton* (1st Cir. 2003) 350 F.3d 231, 236-237 [the district court did not err in denying defendants'

request for a mistrial in the aftermath of the September 11 terrorist attacks and a bomb threat on courthouse in the absence of particularized allegations of prejudice from the defendants]; *United States v. Merlino* (D.Mass. 2002) 204 F.Supp.2d 83, 89-90, *aff'd in part and rev'd in part on other grounds in* 592 F.3d 22 (1st Cir. 2010); *cert. den.* __ U.S. __, 131 S.Ct. 283, 178 L.Ed.2d 186 (2010) [defendants were not deprived of a fair trial in the wake of the September 11 terrorist attacks, where the defendants were charged with "common garden-variety crimes" rather than terrorism and the trial court queried prospective jurors and excused those who had qualms about sitting in a federal building in the aftermath of the attack]; *Harris v. State* (Okla.Crim.App. 2004) 84 P.3d 731, 739-740 [defendant charged with first-degree murder and subject to the death penalty was not entitled to a mistrial based on the fact that his trial was conducted during the week of September 11, 2001; the defendant's offenses bore no resemblance to the terrorist attacks, and the jurors had expressed no concern that their ability to fairly evaluate the evidence would be affected by the unfolding national events].)

The only California case that appears even remotely to address this issue is *People v. Zurinaga* (2007) 148 Cal.App.4th 1248. There, the defendants were charged with robbery and false imprisonment by violence in connection with a robbery of 10 college students in their residence hall. In closing argument, the prosecutor analogized the defendants' crimes at some length to the terrorist attacks of September 11, 2001. The Court of Appeal found that the prosecutor's analogy constituted misconduct because the 9/11 attacks were not relevant to the charged crimes, but inevitably would have triggered an emotional reaction in the jurors. The Court of Appeal nonetheless found no basis for reversal, given that: (1) the trial court had admonished the jurors that counsel's arguments were not evidence, and that they should not be influenced by sympathy for the

victims in reaching their verdict; and (2) the evidence against the defendants was very strong. (*Id.* at pp. 1259-1260.)

In this case, the defense attorneys did not request a postponement of trial on the basis of the 9/11 terrorist attacks, and a change of venue would have been meaningless, given the national impact of the attacks. In fact, Defense Attorney Egan told the court on the morning of September 11, 2001, the day before jury selection was set to begin, that he might request a continuance because he sensed the attacks had triggered "an awful lot of anger" in the community. (5 RT 1194.) At the same time, Egan said that the effect of the terrorist bombings on a California criminal trial would be speculative and "very, very difficult to assess." (5 RT 1194.)

It does not appear that the defense attorneys mentioned the 9/11 attacks again before the commencement of trial. The attacks were mentioned by the attorneys a few times during trial, but not in any significant way. The prosecutor briefly alluded to the attacks in his closing arguments, but in ways that the defense must have appreciated. As examples, at the outset of his guilt phase closing argument, the prosecutor stated: "[T]these are difficult times . . . and things have happened in our world that have made us very unsettled. . . . But we all appreciate our freedoms and our rights maybe more dearly than we ever had before." (15 RT 3541.) The prosecutor also encouraged the jurors to "remember those rights" while deliberating, "otherwise they mean nothing." (15 RT 3541.) After describing a criminal defendant's rights—including the privilege against self-incrimination, the presumption of innocence, and the beyond-a-reasonable-doubt burden of proof—the prosecutor said, "[I]f we don't honor that, what good is it?" (15 RT 3541-3542.)

Defense Attorney Egan also referred to the terrorist attacks in his guilt phase closing argument by noting that the murder of Janet Daher had shocked the Lafayette community. (15 RT 3594.) Egan also noted that

"the whole country has felt their sense of personal security rattled in some way or another." (15 RT 3594.)

Egan also referred to 9/11 during his opening statement in the penalty phase of trial. He stated, "With all that's going on in our country and around the world, it's very important that we continue to honor the process here and most particularly impartiality and fairness." (16 RT 3848.)

The prosecutor returned to the subject of 9/11 in his closing argument in the penalty phase. He stated, "[J]ustice is a foundation of freedom. And as recent events have shown, the price of freedom is high." (24 RT 5406.)

In short, the prosecutor and the defense attorneys made a few brief references to the September 11 terrorist attacks, but the thrust of their comments was to remind the jurors of the ideals of American justice. If anything, those arguments worked to appellant's advantage. The defense attorneys never objected to any aspect of the proceedings, so there is no basis to hold that appellant's constitutional rights were violated.

X. THE TRIAL COURT DID NOT "ENDORSE" A PROSPECTIVE JUROR'S INCONSISTENT VOIR DIRE STATEMENTS

Appellant contends his constitutional rights were violated when the trial court "endorsed" the inconsistent comments of a prospective juror, M.P.B., during voir dire. (AOB 191.)

A. Factual Background

Prospective Juror No. 19, M. P. B., wrote many comments on his juror questionnaire which appellant considers disqualifying. As examples, M.P.B. wrote:

- He was not willing to consider "psychological, psychiatric or other mental health testimony regarding a defendant in determining the appropriate sentence at the penalty phase." (2 JQ 503.) In explaining his response, M.P.B. wrote "crime=punishment." (2 JQ 503.)

- He was unwilling to consider any background information or social history in considering the appropriate punishment. He wrote comments like "I don't care for a history lesson." (2 JQ 503.)
- He thought a life prison sentence was worse than death because of the cost to the taxpayers. (2 JQ 503-504.)
- He wrote "maybe" when asked whether he could accept the presumption of innocence. (2 JQ 494.)
- He wrote that "[i]f a person committed a crime, they should be punished without regard to mental health." (2 JQ 498.) He also wrote, "It should not matter that a person is drunk, stoned, high, enraged or had a bad day." (2 JQ 498.) He added that if a person commits a crime in such a state, "it is reasonable to assume they might temporarily revert to that state and perform in the same way." (2 JQ 498.)
- He was "strongly against" a life sentence without the possibility of parole, and he wrote "[i]f a person is to be caged for life, why not save the taxpayers money and execute them in 5 years." (2 JQ 501.) He thought a death sentence was always appropriate for all 16 types of murders listed in Question No. 113 of the questionnaire (e.g., murder with a gun, murder during a robbery, murder of a child, etc.). (2 JQ 502.)

In his voir dire questioning in court, M.P.B. initially said that he worked at a small consulting firm, and he expressed concern about the viability of his company if he were to serve as a juror in a prolonged trial. (7 RT 1523-1525.) M.P.B. admitted he had strong views about the criminal justice system, but he said he could follow the law. (7 RT 1526.) At one point, he said it was "problematic" that a criminal defendant does not have to present any evidence, but he later said he could "live with" that concept.

(7 RT 1526.) He also said he could accept the prosecutor's burden of proof and listen to psychiatric evidence despite having written the opposite—"I don't care for a history lesson"—on his questionnaire. (7 RT 1526-1527.)

The court thanked M.P.B. and said, "It would have been very easy for you to give answers that would automatically disqualify you so that you could get back to work. [¶] I believe you tried to answer every question, notwithstanding the pressures of work, and I thank you very much. And I appreciate your honesty." (7 RT 1529.)

Defense Attorney Egan requested a bench conference. (7 RT 1529.) There, he objected that the court had "congratulated" M.P.B. "for giving these answers that I think are extraordinarily inconsistent with what he's done, and now I'm supposed to be attacking this guy after the court has congratulated him." (7 RT 1530.) The court responded, "You can ask him questions. I didn't affirm his answer. I simply said that I felt that he answered truthfully." (7 RT 1530.)

A few minutes later, after additional questioning of other prospective jurors by the court, Egan was allowed to ask questions of his own. (7 RT 1541.) After briefly questioning a few other jurors (7 RT 1541-1547), Egan questioned M.P.B. at length, i.e., for 10 pages of transcript. (See 7 RT 1547-1557.) Egan focused on M.P.B.'s questionnaire, reading aloud many of the questions and answers, and he asked M.P.B. if he could reconcile his responses to the questionnaire with his responses to the court's voir dire questions. In some instances, M.P.B. said that he had not understood the distinction, when filling out his questionnaire, between the guilt and penalty phases of a capital murder trial. (7 RT 1549-1552.) In other instances, M.P.B. said he would follow the trial court's instructions to consider the evidence presented to him, but he would probably not give much value to psychiatric or social history evidence. (7 RT 1552-1556.) M.P.B. acknowledged that the questionnaire had asked whether he could follow the

law in the penalty phase of trial regardless of any personal feelings about the death penalty. (7 RT 1556.) M.P.B. had responded to that question by writing, "Yes?" (7 RT 1556; see also 2 JQ 503.) He explained in court that he believed he could make such a decision, but he could not be sure until he was actually required to do so. (7 RT 1556-1557.)

After Egan and the prosecutor completed their individual questioning of the jurors, the court entertained challenges for cause. (See 7 RT 1573-1583.) The court granted one of the prosecutor's first two challenges for cause, and the attorneys stipulated that a third juror should be dismissed because of her medical condition. (7 RT 1573-1575.) The court then sustained Egan's first two challenges for cause. (7 RT 1576-1577.) Egan next said he intended to challenge M.P.B. and another juror, R.R., for cause. The court agreed to dismiss M.P.B., but not R.R. (7 RT 1578-1579.) The court said that the questioning of M.P.B. as a whole had revealed, both through his responses and his demeanor, that he would not be open-minded in the penalty phase of trial. (7 RT 1578-1579.)

B. There Was No Endorsement

Notwithstanding the trial court's dismissal of M.P.B. for cause, appellant now argues that the court committed structural error by "endorsing," in the presence of the jury, M.P.B.'s "impermissible" attitudes towards a capital murder trial. (AOB 193-194.)

Simply stated, the claim is factually incorrect. M.P.B. made it clear in his questionnaire that he would not be an attractive juror for a defendant charged with capital murder. He also made it clear that it would be financially difficult for him and his business if he were to sit through an extended jury trial. On questioning by the trial court during voir dire, M.P.B. again said that prolonged jury service would be a hardship for him and his business, but he also said that he could follow the court's instructions and fairly evaluate the case if selected as a juror. The trial

court thanked M.P.B. for his candor, emphasizing that it appreciated M.P.B.'s refusal to falsely portray himself as a potentially bad juror merely to avoid a financial burden. It bears noting that the trial court, the prosecutor, and both defense attorneys routinely thanked other prospective jurors for their honest and candid answers to voir dire questions. (See, e.g., 7 RT 1536, 1538, 1583, 1650, 1676, 1695, 1706, 1721, 1727; 8 RT 1833, 1837, 1838, 1841.)

In short, the trial court did not "endorse" M.P.B.'s attitudes toward capital litigation. Instead, the court questioned M.P.B. about the attitudes he had expressed on his questionnaire in an attempt to flesh out his written comments. In so doing, the court fulfilled its obligation to help the parties select an impartial jury. The court thanked M.P.B. for speaking honestly during voir dire, but did not remotely approve of M.P.B.'s opinions. The court later agreed with the defense attorneys that M.P.B.'s opinions justified a challenge for cause. In sum, the court's handling of the matter was exemplary, not erroneous.

XI. THE JURY SELECTION PROCEDURES WERE NOT BIASED IN FAVOR OF PRODEATH JURORS

Appellant contends the jury voir dire process was tainted because the trial court failed to dismiss a number of "biased" jurors for cause. The argument is both forfeited and meritless.

Appellant notes that five potential jurors had written comments on their jury questionnaires suggesting bias in favor of the prosecution or against the defense. Appellant argues that the trial court had a sua sponte duty to exclude those jurors from the panel. The jurors in question were Juror L.M.D., Juror No. 3, Juror No. 1, Juror R.R., and Juror N.Q.M.[18]

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[18] The trial transcript refers to many of the jurors not only by their names but also by two different numbers—the numbers they were initially (continued...)

Appellant's argument has not been properly preserved for appeal. Although the record is somewhat difficult to analyze because of the different numbers used to refer to the prospective jurors, it does not appear that appellant raised any challenge—either peremptory or for cause—to three of the jurors in question. (See 7 RT 1573-1583, 1671-1675, 1701-1706, 1725-1727; 8 RT 1813, 1857-1863 [no challenges to Juror L.M.D. (also referred to as Juror No. 10 and Juror No. 37), Juror No. 3 (also referred to as Juror No. 8), or Juror No. 1 (also referred to as Juror No. 4)].) Moreover, although appellant challenged a fourth juror, N.Q.M. (also referred to as Juror No. 28) for cause, the trial court *granted* that challenge. (See 7 RT 1727.) Thus, the trial court denied only one of appellant's challenges for cause, i.e., the challenge to prospective juror R.R. (also referred to as No. 29). (See 7 RT 1559.) As we show below, the trial court had ample reason to deny that challenge. Even if not, a defendant who desires to preserve a claim of error in the improper denial of a challenge for cause must: (1) use a peremptory challenge to remove the juror in question; (2) exhaust his or her peremptory challenges or justify the failure to do so; and (3) express dissatisfaction with the jury ultimately selected. (*People v. Taylor* (2009) 47 Cal.4th 850, 884-885; *People v. Blair* (2005) 36 Cal.4th 686, 741; see also cases cited by appellant at AOB 207-208.)

Here, appellant was entitled to 20 peremptory challenges during voir dire (see Code Civ. Proc., § 231, subd. (a); *People v. Lewis* (2008) 43 Cal.4th 415, 492), but his attorneys exercised only ten peremptory challenges in the entire voir dire process (see 7 RT 1735-1737, 1867-1870, 1875-187, 1938-1939 [the defense attorneys exercised only nine

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(...continued)
given as jury candidates, and the numbers they were later given as seated jurors. We refer to the jurors by the initials and numbers used by appellant.

peremptory challenges in selecting the original 12 jurors, and only one peremptory challenge in selecting the alternates]). At the conclusion of voir dire, neither defense attorney expressed any dissatisfaction with the selection process or with the composition of the jury. (8 RT 1938-1942, 1985.) Thus, appellant may not argue on appeal that biased jurors were allowed to sit on his jury.

Appellant nonetheless argues that an appellate challenge to the erroneous inclusion of a juror in the panel may be raised upon a showing "of one of two things: *either* that [the defendant] was deprived of a peremptory challenge he would have used to remove a juror who participated in the case *or "that a biased juror actually sat on the jury that imposed the death sentence."* (AOB 208, quoting *People v. Blair*, *supra*, 36 Cal.4th at p. 742, italics in AOB.)

In *People v. Taylor*, *supra*, 47 Cal.4th at pages 884-885, this Court expressly held that *Blair* does not alter the traditional rule stated above, i.e., that a defendant must exhaust his peremptory challenges *and* object to the final composition of the jury before raising an appellate challenge to the erroneous inclusion of a juror at trial.

Given appellant's failure to properly preserve this issue for appeal, we have no duty to refute his argument on the merits. We nonetheless note that appellant misreads the record in characterizing the jurors in question as "unequivocally" biased against him. (See AOB at p. 202.)

A. Juror L.M.D.

Appellant first contends Juror L.M.D. "had several disqualifying answers in his juror questionnaire." (AOB 196.) Appellant notes that Juror L.M.D. wrote that he "had heard, from newspapers and television, that '[a] Lafayette house was robbed and the woman at the house was shot and killed by the robbers.'" (AOB 196.) Juror L.M.D. also wrote that he had "assumed what [he] was reading/hearing [about the case] was for the most

part accurate." (AOB 196, citing 3 JQ 928.) Appellant does not explain why a jury candidate should be disqualified from serving, merely because he had assumed—before being called for jury duty—that news accounts of a crime had generally been accurate.

Appellant also accuses Juror L.M.D. of expressing "racist" views by stating that "some racial or ethnic groups 'tend to be more violent than Whites and/or are more inclined to commit crimes.'" (AOB 196, citing 3 JQ 931.) Appellant's accusation of racism is both unfair and puzzling, given that appellant acknowledges that Juror L.M.D. also wrote on his questionnaire that he was referring to people "who come from poorer backgrounds or where education is not encouraged." (3 JQ 931.)

Appellant also suggests Juror L.M.D. had a crippling bias because he believed mental health experts like psychiatrists are "not always correct," and he would have to hear the testimony of any particular expert before evaluating it. (See AOB 196-197; 7 RT 1639; 3 JQ937, 938.) L.M.D. later made similar comments on voir dire, saying that he had personally experienced good and bad counselors, so he would have to observe an expert in court before evaluating his or her opinion. (7 RT 1639.) Those comments were reasonable.

Finally, appellant quotes from portions of Juror L.M.D.'s questionnaire and voir dire comments which suggest he was categorically in favor of the death penalty. (See AOB 196.) Appellant overlooks many comments which suggest the opposite. As examples, Juror L.M.D. wrote on his questionnaire that both death and LWOP could be appropriate punishments, depending on the circumstances. (3 JQ 940-941.) He also wrote that the defendant's guilt in a capital case should be proven "beyond any doubt." (3 JQ 934.) He did not believe the death penalty should always be imposed for many types of murders (3 JQ 942), and he was "neutral" about whether LWOP or death was an appropriate punishment for

murder. (3 JQ 940-941.) Juror L.M.D.'s comments on voir dire showed a similar openmindedness which precluded a challenge for cause. (See 7 RT 1637-1641.)

B. Juror No. 3

Appellant's accusations of bias in Juror No. 3 are even more implausible. Juror No. 3 wrote on her questionnaire that she had been the victim of both a rape and a mugging. (1 JG 143.) Not surprisingly, she wrote (and later said on voir dire) that she would be sympathetic to a crime victim. (1 JQ 144; 7 RT 1486.) During voir dire, however, she said she would apply only the relevant legal factors in the guilt and penalty phases of trial. (7 RT 1486-1489.) Juror No. 3 also had heard that the victim in this case had been killed in her home after leaving the garage door open, and Juror No. 3 had thereafter cautioned her husband to keep their garage door closed. (1 JQ 148.) Also, Juror No. 3 had a brother who used to work as a defense attorney for the New York Police Department, but she did not think that would affect her. (7 RT 1485-1487.) Juror No. 3 believed this case involved a "terrible tragedy" of a murder, but she also wrote that "every person deserves a fair trial and is innocent until proven guilty." (1 JQ 149.) She further wrote that "[b]eing a juror is an awesome responsibility and determining the fate of any life deserves the gravest consideration." (1 JQ 149.) Juror No. 3 also wrote that no type of murder should always require imposition of the death penalty. (1 JQ 162.) In short, Juror No. 3's comments as a whole indicated that she could be fair.

C. Juror R.R.

Appellant next notes that the questionnaire of prospective juror R.R. strongly suggested he would be a pro-prosecution juror in that he was "strongly in favor" of the death penalty and he did not believe a defendant's childhood or social history should have any bearing on the penalty phase of

trial. (See AOB 198-200, 2 JQ 804, 807.) Both the trial court and the defense attorney questioned R.R. at some length during voir dire, and he reiterated many of his pro-prosecution comments. (7 RT 1507-1514, 1566-1569.) At the same time, R.R. repeatedly said he could follow the law and give appellant "a fair shake." (7 RT 1508-1509, 1512-1515, 1569.) The defense attorney later challenged R.R. for cause, but the court denied the challenge by stating that R.R. was "obviously a very careful person, [a] very thoughtful person" who had given forthright and honest answers on voir dire. (7 RT 1579.) That determination is supported by the record and is entitled to respect on appeal. (See *People v. Crittenden* (1994) 9 Cal.4th 83, 122 ["Where a prospective juror provides conflicting answers to questions concerning his or her impartiality, the trial court's determination as to that person's true state of mind is binding upon the appellate court."].) In any event, the defense later exercised a peremptory challenge against R.R. (8 RT 1735), so there was no possibility of prejudice.

D. Juror No. 1

Appellant next notes that Juror No. 1 had read and heard much about this case from friends and news accounts, and that she had been "horrified" by the crime. (1 JQ 80.) She also wrote, however, that she could be open-minded and fair, and her opinions about the death penalty and LWOP were "neutral." (1 JQ 80-98; 7 RT 1625-1629.) Her responses to the trial court's voir dire questions also showed that she could be fair. (See 7 RT 1625-1629.) There was no reason to dismiss her for cause.

E. Juror N.M.Q.

Finally, appellant accuses the trial court of error, if not bad faith, in its voir dire questioning of prospective juror N.Q.M. (also referred to as No. 28). (AOB 201-202.) After describing N.Q.M. as a "clearly confused" candidate, appellant states that the trial court "led" and "coaxed" her "to the

'right' answers" in determining guilt and punishment. (AOB 201-202.) Once again, the court did nothing more than probe N.Q.M.'s attitudes about the case. (See 7 RT 1630-1637.) Critically, the court later *granted* the defense attorney's motion to dismiss N.Q.M. for cause. (7 RT 1726-1727.) Thus, appellant's allegations as to N.Q.M. are factually incorrect.

In sum, appellant was represented by two experienced attorneys at trial. Those attorneys challenged several jurors for cause, including one of the jurors discussed above, and the trial court granted many of those challenges. The trial court denied a challenge to Juror R.R. for good reasons, and the defense attorneys exercised a peremptory challenge to him. If the attorneys had believed there were additional jurors who were biased against appellant, they had many peremptory challenges remaining. Because they did not challenge any of those jurors or the panel as a whole, appellant's post hoc argument is not merely waived or forfeited, but factually untenable.

XII. THE TRIAL COURT DID NOT ERR IN ADMITTING PHOTOGRAPHS OF THE CRIME SCENE AND THE VICTIM DURING THE AUTOPSY

Appellant contends the trial court erred in admitting photos of the crime scene and the body of the victim, Janet Daher.

Prior to trial, appellant moved to preclude the prosecutor from introducing into evidence any of the photos of Janet's body that had been taken during the police investigation or the subsequent autopsy of her body. (See 8 RT 1948-1950, 1957-1980.) The prosecutor noted that he had "hundreds" of photos of the crime scene and autopsy, but he had chosen just a few photos to illustrate to severity of Janet's wounds. The trial court reviewed the photos and ruled that three crime scene photos and four

autopsy photos would be admissible. (8 RT 1958-1960, 1975.)[19] The court found that the photos were not excessively gruesome, and that their probative value outweighed any prejudicial effect. (8 RT 1960, 1964, 1975, 1979-1981.)

Appellant now argues that the court abused its discretion because those photos were particularly gruesome and unnecessary to prove any disputed issue at trial.

The trial court did not err. In *People v. Roldan* (2005) 35 Cal.4th 646, 713, overruled on other grounds in *People v. Doolin*, *supra*, 45 Cal.4th at p. 421, fn. 22, this Court explained that "the admission of allegedly gruesome photographs is basically a question of relevance over which the trial court has broad discretion." "'[M]urder is seldom pretty, and pictures, testimony and physical evidence in such a case are always unpleasant.'" (*Ibid.*, quoting *People v. Pierce* (1979) 24 Cal.3d 199, 211.)

Even if autopsy photographs are cumulative of other evidence like a coroner's detailed testimony, the photographs need not be excluded from evidence. "[P]rosecutors, it must be remembered, are not obliged to prove their case with evidence solely from live witnesses; the jury is entitled to see details of the victims' bodies to determine if the evidence supports the prosecution's theory of the case." (*People v. Gurule* (2002) 28 Cal.4th 557, 624.) "A trial court's decision to admit photographs under Evidence Code section 352 will be upheld on appeal unless the prejudicial effect of such photographs clearly outweighs their probative value." (*Ibid.*; see also

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[19] In discussing the photos of Janet during in limine motions, the parties referred to the exhibits by the numbers used in Snyder's trial, and appellant follows that practice. (See AOB 211-214, citing Snyder Exh. Nos. 39, 40, 59, 107, 108, 109, 111.) The photos introduced at appellant's trial were Exhibit Nos. 97 through 100 and 102 through 105. (See 13 RT 3009-3021; 4 CT 1519.)

People v. McKinzie (2012) 54 Cal.4th 1302, 1351 ["Autopsy photographs are routinely admitted to establish the nature and placement of the victim's wounds and to clarify the testimony of prosecution witnesses regarding the crime scene and the autopsy, even if other evidence may serve the same purposes"]; *People v. Howard* (2010) 51 Cal.4th 15, 33 [same]; *People v. Lewis* (2009) 46 Cal.4th 1255, 1283 [victim photos "reflect the viciousness and strength of the assault, which is relevant to prove that defendant acted with malice and sought to ensure the victim was dead"].)

In this case, the trial court admitted only a handful of photos that showed Janet's body at the crime scene and during the autopsy. The crime scene photos showed the body from a distance, and because Janet was lying face down on the floor, they were not particularly gory. The autopsy photos showed the body cleansed of blood, and they showed little of Janet's face. The purpose of the photos was to show that Maury O'Brien's description of the killing of Janet had been accurate, and that the severity of the wounds proved that the killing had been intentional. (See 8 RT 1962, 1969, 1972, 1974.) Significantly, the photo that was arguably the most gruesome, Exhibit No. 101, was excluded from evidence. That photo showed a deep slice to Janet's throat, and it could have been admitted to eliminate all doubt about the killer's intent. Thus, the trial court was generous to appellant in deciding which photos should be admitted and excluded.

The cases cited by appellant are inapposite. In *People v. Marsh* (1985) 175 Cal.App.3d 987, 998, the Court of Appeal found error (albeit harmless error) in the admission of seven "terribly gruesome and terribly upsetting" autopsy photos, particularly because "the jury was not enlightened one additional whit by" the admission of the photos. In *People v. Smith* (1973) 33 Cal.App.3d 51, 69, the Court of Appeal held that autopsy photos should have been excluded because they were particularly

gory and had little probative value. The Court of Appeal found that two of the photos showed a victim's "seminude, terribly mutilated, bloody corpse" and that the photos had "a sharp emotional effect, exciting a mixture of horror, pity and revulsion." (*Ibid.*) The Court of Appeal also found that the prosecutor had not even explained at trial why the photos were necessary. (*Ibid.*)

Again, the trial court here reviewed all autopsy and crime scene photos and selected only a handful for the jury to see. Although those photos are "not pretty," they accurately reveal the manner in which Janet Daher was killed. There was no abuse of discretion.

XIII. JASON HART'S IMMUNITY AGREEMENT WAS PROPERLY DISCLOSED TO THE JURY

Appellant contends his conviction and sentence were constitutionally tainted because the trial court allowed the jury to learn that Jason Hart had testified for the prosecution under a grant of immunity. Appellant contends the disclosure of the immunity agreement "left [the] jury with the impression that the trial court was vouching for the truthfulness of a key prosecution witness." (AOB 220.)

The argument fails. Hart testified for the prosecution on September 27, 1998. (See (12 RT 2660-2755.) Before he took the stand, the defense attorneys objected outside the presence of the jury to any disclosure that Hart's immunity agreement required him to testify "fully and truthfully" at appellant's trial. (12 RT 2637-2641.) The trial court overruled the objection. (12 RT 2646.) At the outset of Hart's testimony, he said that he had been charged with selling drugs, receiving stolen property, and being an accessory-after-the-fact to murder. He understood he could not be prosecuted for those crimes if he testified truthfully at appellant's trial. (12 RT 2663.)

The trial court did not err in allowing the jury to learn that Hart was testifying under a grant of immunity. As this Court explained in *People v. Fauber* (1992) 2 Cal.4th 792, 821,

> [T]he existence of a plea agreement is relevant impeachment evidence that must be disclosed to the defense because it bears on the witness's credibility. [Citation.] Indeed, we have held that "when an accomplice testifies for the prosecution, full disclosure of any agreement affecting the witness is required to ensure that the jury has a complete picture of the factors affecting the witness's credibility." (*People v. Phillips* (1985) 41 Cal.3d 29, 47, 222 Cal.Rptr. 127, 711 P.2d 423.)

(See also *People v. Fauber*, *supra*, 2 Cal.4th at p. 823 ["Our decision in [*Phillips*] requires full disclosure to the jury of any agreement bearing on the witness's credibility, including the consequences to the witness of failure to testify truthfully"]; *People v. Frye* (1998) 18 Cal.4th 894, 971 [the prosecutor properly read to the jury the terms of a witness's immunity agreement, which stated that the witness had "promised to tell the truth in exchange for the district attorney's promise to refrain from charging her with any crimes relating to the [victims'] murders"].)

Significantly, the immunity agreement at issue in *Fauber* was materially different than the prosecutor's agreement with Hart in this case. In *Fauber*, the jury was specifically told that: (1) the witness's immunity was contingent on the prosecutor's finding that the witness had testified truthfully at the defendant's trial; and (2) any disputes over the witness's credibility would be resolved by the trial court that presided over the relevant proceedings. (2 Cal.4th at pp. 821-822.) This Court found that there had been no need for the jury to learn about specific determinations of the testifying witness's credibility, but that any error was harmless. The Court first explained why the disclosure of the prosecutor's approval of the testimony was harmless:

> The prosecutor argued for [the witness's] credibility based on the evidence adduced at trial, not on the strength of extrajudicial information obliquely referred to in the plea agreement. Moreover, common sense suggests that the jury will usually assume—without being told—that the prosecutor has at some point interviewed the principal witness and found his testimony believable, else he would not be testifying. We note, too, that the requirement that [the witness] preliminarily satisfy the prosecutor as to his credibility "cuts both ways": it suggests not only an incentive to tell the truth but also a motive to testify as the prosecutor wishes. [Citation.]

(*People v. Fauber*, *supra*, 2 Cal.4th at p. 822.)

This Court next explained why the disclosure of the trial court's involvement in the immunity agreement in *Fauber* had been harmless: "The jury could not reasonably have understood [the testifying witness's] plea agreement to relieve it of the duty to decide, in the course of reaching its verdict, whether [the witness's] testimony was truthful." (2 Cal.4th at p. 823.) This Court also noted that any error was minimized by the fact that the trial court had repeatedly instructed the jury that "[e]very person who testifies under oath is a witness. You are the sole judges of the believability of a witness and the weight to be given to his testimony . . . ." (*Ibid.*)

In this case, the jury was told that Jason Hart was testifying against appellant under a grant of immunity, and that a condition of the immunity was Hart's truthful testimony at appellant's trial. No mention was made of the role of the prosecutor or the trial court in determining whether Hart's trial testimony was truthful. Thus, the disclosure of the terms of the immunity agreement was not merely permissible, but required under the law.

XIV. THE ERROR IN PLAYING THE RECORDED POLICE INTERVIEW OF O'BRIEN WAS HARMLESS

Appellant argues that his constitutional rights were violated because the jurors heard (or were exposed to) an inadmissible and prejudicial

excerpt of the recorded police interviews of Maury O'Brien conducted between June 5 and June 8, 1998.

As shown above, the prosecution evidence in this case included both live testimony from Maury O'Brien and excerpts of his recorded interviews with the police shortly after his arrest in June 1998. Before the excerpts of the recorded interviews were played for the jury, the prosecutor and Defense Attorney Egan reviewed the excerpts to ensure that they contained only relevant and admissible evidence. The attorneys also worked together to prepare a transcript of the edited recordings. (See 13 RT 2869-2871, 3029-3030.)

It appears the attorneys made a few mistakes in preparing the recordings and the transcripts, and appellant argues that one of those mistakes violated his constitutional rights. Specifically, the jury was allowed to hear the following portion of O'Brien's interview with the police:

Detective Gregory: How tall was [appellant]?

Mr. O'Brien: Um, he was shorter than I was.

Sergeant Dussell: Okay.

Detective Gregory: I'll stand up.

Mr. O'Brien: Probably about your height.

Detective Gregory: Okay. Was he—I don't consider myself muscular. Is he like me?

Mr. O'Brien: No, he's bigger.

Detective Gregory: Huskier than me?

Mr. O'Brien: He's just—yeah, he's—

Sergeant Dussell: Muscular?

Mr. O'Brien: *Yeah, he just got out of the penitentiary.*

(13 RT 3051-3052.)

Appellant argues that the jury should not have heard this portion of the interview, and particularly the italicized comment, because it informed the jury of appellant's prior criminality. (AOB 226-228.)

The prosecutor and the trial court agreed that the jury should not have heard the comment in question. The court encouraged the defense attorneys to formulate any necessary jury instructions and/or admonitions, and the court also agreed to voir dire the jurors to determine whether they could disregard the comment. (13 RT 3080-3083, 3090-3092, 3105-3106.) The court later admonished the jury that the comment should not have been played for them because O'Brien's belief that appellant had been in the penitentiary was both speculative and irrelevant. (14 RT 3149.) The court asked the jurors if they would be able to disregard the comment, and they all nodded affirmatively. (See 14 RT RT 3150; see also 15 RT 3647 [in denying appellant's posttrial motion for new trial, the court stated that all the jurors had nodded, "without hesitation," when asked if they could disregard the reference to appellant's time in the penitentiary].)

Under the circumstances, there is no basis for reversal. The relevant legal principles were summarized in *People v. Harris* (1994) 22 Cal.App.4th 1575, 1581:

> There is little doubt exposing a jury to a defendant's prior criminality presents the possibility of prejudicing a defendant's case and rendering suspect the outcome of the trial. [Citations.]
>
> Whether in a given case the erroneous admission of such evidence warrants granting a mistrial or whether the error can be cured by striking the testimony and admonishing the jury rests in the sound discretion of the trial court. [Citation.] "'A mistrial should be granted if the court is apprised of prejudice that it judges incurable by admonition or instruction. [Citation.] Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions.'

> [Citation.] Although most cases involve prosecutorial or juror misconduct as the basis for the motion, a witness's volunteered statement can also provide the basis for a finding of incurable prejudice. [Citation.]"

Significantly, this Court (and the lower appellate courts) have frequently found errors of this type to be harmless. In *People v. Gamache* (2010) 48 Cal.4th 347, 386, 396, a videotape of a police interview of the defendant was inadvertently given to the jurors during their deliberations in the penalty phase of a capital trial. The error was not discovered until after the defendant had been sentenced to death. The defendant brought a motion for a new penalty phase of trial, but the trial court denied the motion and this Court affirmed, largely because of the strength of the other evidence introduced at trial. The Court also noted that similar errors had been found harmless in many other cases. (See *id.* at p. 397-398 ["We have consistently pardoned jurors for considering extrinsic evidence that finds its way into the jury room through party or court error"], citing *People v. Cooper* (1991) 53 Cal.3d 771, 836 [harmless error where a transcript never intended for the jury's eyes was inadvertently marked as an exhibit, admitted, and sent to the jury room]; see also *People v. Clair* (1992) 2 Cal.4th 629, 665 [a court clerk inadvertently supplied jurors with an unredacted audiotape and transcript of statements by the defendant to the police; portions of the conversation had been excluded by the court as irrelevant and unduly prejudicial]; *People v. Jackson* (1996) 13 Cal.4th 1164, 1213 [a clerical error may have resulted in the jury's receiving an unredacted transcript of the defendant's statements; even if so, the court's error did not equate to juror misconduct]; *People v. Jordan* (2003) 108 Cal.App.4th 349, 364, [court's inadvertent submission of parole information to the jury was ordinary error]; *People v. Rose* (1996) 46 Cal.App.4th 257, 264 [inadvertent receipt of a police report during deliberations was ordinary error].)

In this case, the error was even less serious than the errors in *Gamache* and the cases cited therein. Critically, the error here was realized by the attorneys shortly after it occurred, rather than while the jury was deliberating. Thus, the attorneys and the court were able to fashion a timely and appropriate remedy. Again, the court informed the jurors that O'Brien's comment about appellant's time in the penitentiary was both speculative and irrelevant. The jurors all acknowledged that they could disregard the comment.

More important, any comment by O'Brien about appellant's prior time in prison could not have affected the verdicts. As explained in Argument XV below, the evidence against appellant in the guilt phase of trial was extremely strong. O'Brien's descriptions of the killings were inherently credible and confirmed by multiple independent sources, and appellant's defense was virtually nonexistent. At the penalty phase of trial, the jury learned through admissible evidence that appellant had a long criminal background. Thus, O'Brien's brief reference to appellant prior criminality was immaterial in the guilt phase of trial, and redundant of other evidence in the penalty phase. There was no possibility of prejudice.[20]

Appellant also argues that the error is not subject to harmless error review by citing *Maynard v. Cartwright* (1988) 486 U.S. 356, 363-366, and *Godfrey v. Georgia* (1980) 446 U.S. 420, 432-433. Neither case is

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[20] The parties below recognized that appellant's claim might be characterized as ineffective assistance of counsel, given that Defense Attorney Egan had admitted that he had "flat out missed" the problems with the tapes and transcripts because he and the prosecutor had been "very rushed" in their review of the materials. (See 13 RT 3074-3077.) To prevail on a claim of ineffective assistance of counsel, appellant would have to show that there is a reasonable probability that, but for the defense attorney's errors, the outcome of trial would have been different. (*Strickland v. Washington* (1984) 466 U.S. 668, 693-694.) For the reasons stated above, appellant cannot make such a showing.

applicable. In both of those cases, a jury had sentenced a defendant to death on the basis of a constitutionally impermissible aggravating circumstance, so the U.S. Supreme Court found it necessary to remand for resentencing. Nothing of that nature occurred here.[21]

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[21] At trial, the parties discussed two other mistakes in the editing of the tapes and transcripts, but appellant does not argue on appeal that those mistakes were prejudicial to him. (See 6 CT 1955-1956; see also 13 RT 3049-3106; AOB 221, 226-227 [challenging only O'Brien's references to appellant's time in the penitentiary].) In brief, the two other mistakes were trivial. At one point, the jury heard the following colloquy between the officers and O'Brien:

Sergeant Dussell: You're not covering up for Lee [Snyder] anymore?

Mr. O'Brien: No.

Sergeant Dussell: Now is the—

Mr. O'Brien: That was the only time I covered up for Lee.

Sergeant Dussell: *Okay. I have a test that you can take.*

Mr. O'Brien: I don't know that I would pass the test because I'm pretty nervous.

Sergeant Dussell: Well, let me explain it to you.

(See 13 RT 3060.)

The trial court found no prejudice from these brief references to a "test" (which apparently was a "voice stress test"), largely because the tape contained no explanation of the nature of the test. (13 RT 3040, 3055, 3059-3060, 3065-3071, 3079-3080, 3108.) Also, the court instructed the jurors to disregard the references to the test, and they all agreed to do so. (13 RT 3041-3042, 3070, 3079-3080.)

Another error occurred because the interview transcript initially given to the jurors had not been fully redacted. That transcript contained an inadmissible statement by O'Brien that had been edited out of the recording, but not redacted from the transcript. In that statement, O'Brien had said to the police, "Well, I believe [appellant] wants to kill me right now because he knows that I saw him." (13 RT 3054-3056.)

The inadmissible statement of O'Brien appeared on page 94 of the transcript originally given to the jurors. The attorneys noticed the mistake

(continued...)

XV. THE TRIAL COURT PROPERLY ADMITTED THE TESTIMONY OF MAURY O'BRIEN AND JASON HART

Appellant contends his constitutional rights were violated when Maury O'Brien and Jason Hart were allowed to testify against him at trial. In Argument XV, appellant argues that neither O'Brien nor Hart should have been allowed to testify because they were both accomplices to the robbery and murder of Janet Daher, and both men had been granted immunity by the prosecutor. In short, appellant contends the two witnesses "were compelled to testify in ways which would satisfy the prosecutor," thereby making their testimony insufficiently reliable to be admitted at trial. (AOB 234.) In Argument XVI, appellant contends the testimonies of O'Brien and Hart, even if properly admitted, were insufficiently corroborated to support the jury verdicts. (AOB 242-243.) Because the arguments are so closely related, we address them together.

A. The Law of Accomplice Testimony

The principles relating to accomplice testimony are well established. Section 1111 states as follows: "A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the

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(...continued)
during a break in the proceedings, before the recording had reached that portion of the interview. (See 13 RT 3037-3038, 3054-3055, 3062-3064, 3077-3079.) The attorneys deleted the inadmissible statement from the transcript and gave redacted copies of page 94 to the jurors before continuing to play the recording. (*Ibid.*) In other words, the offending statement of O'Brien had been fully edited from the audiotape, and the corresponding text had been deleted from the transcript, before the audiotape had reached that portion of the interview. For those reasons, the trial court found no possibility of prejudice to appellant. (13 RT 3077-3079.)

offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof."

An accomplice is "one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given." (§ 1111; see also *People v. Fauber*, *supra*, 2 Cal.4th at p. 833.) To be chargeable with the identical offense, the witness must be considered a principal under section 31. (*People v. Fauber*, *supra*, 2 Cal.4th at p. 833, *People v. Hoover* (1974) 12 Cal.3d 875, 879.) Section 31 defines principals to include "[a]ll persons concerned in the commission of a crime . . . whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission . . . ." (§ 31.) An accessory after the fact, however, is not liable to prosecution for the identical offense, and so is not an accomplice. (*People v. Fauber*, *supra*, 2 Cal.4th at p. 833; *People v. Hoover*, *supra*, 12 Cal.3d at p. 879; § 32.)

Under section 1111, there must be evidence tending to connect the defendant with the crimes "without aid or assistance from the testimony of" the accomplice. (*People v. Davis* (2005) 36 Cal.4th 510, 543.) Such independent evidence need not corroborate the accomplice as to every fact to which he testifies or establish the corpus delecti, but is sufficient if it tends to connect the defendant with the crime in such a way as to satisfy the jury that the accomplice is telling the truth. (*People v. Fauber*, *supra*, 2 Cal.4th at p. 834.) Although the corroborating evidence must do more than raise a conjecture or suspicion of guilt, it is sufficient if it tends in some degree to implicate the defendant. (*People v. Szeto* (1981) 29 Cal.3d 20, 27.) The corroborative evidence may be slight and entitled to little consideration when standing alone. (*Ibid.*) Unless a reviewing court determines that the corroborating evidence should not have been admitted or that it could not reasonably tend to connect a defendant with the

commission of a crime, the finding of the trier of fact on the issue of corroboration may not be disturbed on appeal. (*Ibid.*)

B. Immunity for Accomplices

This Court has frequently rejected the contention "that the testimony of an immunized accomplice necessarily is unreliable and subject to exclusion." (*People v. Jenkins* (2000) 22 Cal.4th 900, 1010; *People v. Allen* (1986) 42 Cal.3d 1222, 1251-1252 & fn. 5; see also *United States v. Singleton* (10th Cir. 1999) 165 F.3d 1297, 1301 ["'[n]o practice is more ingrained in our criminal justice system than the practice of the government calling a witness who is an accessory to the crime for which the defendant is charged and having that witness testify under a plea bargain that promises him a reduced sentence'"].) This Court also has rejected the contention "that the testimony of an accomplice who has received a favorable plea agreement in return for his or her testimony is inherently unreliable." (*People v. Jenkins*, *supra*, 22 Cal.4th at p. 1010; see also *People v. Andrews* (1989) 49 Cal.3d 200, 231.)

"Immunity or plea agreements may not properly place the accomplice under a strong compulsion to testify in a particular manner—a requirement that he or she testify in conformity with an earlier statement to the police, for example, or that the testimony result in defendant's conviction, would place the witness under compulsion inconsistent with the defendant's right to fair trial." (*People v. Jenkins*, *supra*, 22 Cal.4th at p. 1010.) Although there is "some compulsion inherent in any plea agreement or grant of immunity," "it is clear that an agreement requiring only that the witness testify fully and truthfully is valid." (*Ibid.*) "Such a plea agreement, even if it is clear the prosecutor believes the witness's prior statement to the police is the truth, and deviation from that statement in testimony may result in the withdrawal of the plea offer, does not place such compulsion upon the witness as to violate the defendant's right to a fair trial. (*Ibid.*) In

addition, the testimony of persons who may be subject to prosecution as accessories unless they "cooperate" with the police is not inadmissible as coerced unless something more than the threat of prosecution is shown. (*Ibid.*)

When an accomplice to a crime testifies at the defendant's trial under a grant of immunity, this Court must review the record and reach an independent judgment whether the agreement under which the witness testified was coercive and whether the defendant was deprived of a fair trial by the introduction of the testimony, keeping in mind that factual conflicts are generally resolved in favor of the judgment below. (*People v. Jenkins*, *supra*, 22 Cal.4th at p. 1010.)

C. O'Brien and Hart Were Not Unreliable Witnesses, Merely Because They Had Incentives to Testify on Behalf of the Prosecution

There is no dispute that the foundation of the prosecution case against appellant lay in the testimony of O'Brien, who testified that appellant had actively participated in the robbery of Janet Daher and that appellant had personally strangled and stabbed her to death. The prosecution case also was supported by the testimony of Hart, who testified that: (1) O'Brien, Snyder, and appellant had discussed robbing a drug dealer on the morning of March 24, 1998; and (2) the three men talked later that night about how they had robbed and stabbed a woman in Lafayette.

The testimony of both O'Brien and Hart was admissible at appellant's trial, even though both men had been involved with appellant in his criminality and had incentives to testify at his trial. Preliminarily, appellant makes two errors in discussing the testimony of O'Brien and Hart. First, appellant states that both men had been given immunity for their testimony. (See AOB 233-234.) It is true that Hart told the jury that he had received use immunity for the crimes he had committed with appellant on the

evening of the killing, to wit, selling drugs, receiving stolen property, and accessary-after-the-fact to murder. (12 RT 2662-2663.) O'Brien testified, in contrast, that he had not received immunity of any kind. At the outset of his testimony, he acknowledged that he had been charged with capital murder and a number of related crimes, and that he was testifying for the prosecution in the *hope* of avoiding the death penalty. At the same time, O'Brien said that neither the police nor the prosecutor had made any promises to him in exchange for his testimony, and his charges had not been resolved at the time of appellant's trial. (11 RT 2431-2432, 2590-2597.)

Additionally, appellant errs in arguing that Hart was an accomplice of appellant and O'Brien in the robbery and killing of Janet, thereby requiring additional corroboration of his trial testimony under section 1111 before it could be considered by the jury. As shown above, for purposes of section 1111, an accomplice is one who "is liable to prosecution for the *identical* offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given." (§ 1111, italics added.) Although Hart was charged with crimes that arose *after* the killing of Janet, he had played no active role in any crime before the robbery and killing. In fact, O'Brien had twice asked Hart to participate in the robbery of drug dealer Sandu, but Hart refused both times. Admittedly, Hart had agreed to buy any drugs that might be stolen from Sandu, and he later drove O'Brien, Snyder, and appellant to the Balboa BART station in San Francisco. But even if Hart might have been an aider and abettor of the proposed robbery of Sandu in Fairfield, Hart played no role in the independent burglary of the Daher house in Lafayette.

Most important, even if Hart theoretically could have been charged as an aider and abettor of the burglary of the Dahers' house (given that he had driven the three men to the BART station in San Francisco), Hart could not

possibly have been charged with the capital murder of Janet. (See *Enmund v. Florida* (1982) 458 U.S. 782; *Tison v. Arizona* (1987) 481 U.S. 137 [capital punishment is constitutionally impermissible for an accomplice to a felony murder unless he was either a killer or a "major participant" in the felony and he acted with intent to kill or reckless indifference to human life].) Thus, Hart was not an accomplice of appellant for purposes of section 1111, and his trial testimony was more than adequate to corroborate O'Brien's trial testimony and to directly implicate appellant in the robbery and killing of Janet.[22]

In any event, the jurors were correctly instructed on how to consider the testimony of O'Brien and Hart. The principles of accomplice liability were explained at length, and the jurors were specifically told that the testimony of an accomplice is to be viewed with caution and must in any event be independently corroborated. (15 RT 3506-3509, 3558-3560; 5 CT 1731-1740.) The jurors were also told that O'Brien was an accomplice as a matter of law if the charges against appellant were true. (15 RT 3508-3509; 5 CT 1741.) Finally, the jurors were told that, in evaluating the credibility of a witness, they could consider any prior criminal conduct reflecting adversely on his credibility, and whether he was testifying under a grant of immunity. (15 RT 3494; 5 CT 1710.)

The jury had no reason to believe that either O'Brien or Hart tailored his trial testimony solely to please the prosecutor or to secure appellant's conviction. Both men had been interviewed by the police prior to trial, and recordings of O'Brien's lengthy interviews were played for the jury. Although there were some minor discrepancies in O'Brien's various

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[22] Our analysis is similar to that performed by the Court of Appeal in *People v. Snyder* (2003) 112 Cal.App.4th 1200, 1220-1222, in which Hart was found not to have been an accomplice of the three codefendants based on the evidence presented at Snyder's trial.

accounts of the crime, his statements as a whole were consistent over time and confirmed by many independent sources. Hart's testimony, although far less significant than O'Brien's, also was consistent with the evidence as a whole.

In describing the robbery and killing of Janet, O'Brien first testified (as he had told the police) that he had plotted the robbery of drug dealer Sandu with Snyder and appellant at Snyder's house on the morning of March 24, 1998. O'Brien also said that Hart had given the three men a ride to the Balboa BART station so they could take the train to the East Bay. O'Brien's accounts of these details were confirmed by Hart's trial testimony.

O'Brien further explained that he, appellant, and Snyder had taken the BART train to Lafayette, then gotten off and walked toward the large, secluded houses in the hills. When they saw the Dahers' open garage door around 2:30 p.m., they walked inside. They encountered Janet in the kitchen, and appellant hit her in the head, knocking her to the floor. They ransacked the house for valuables and took Janet to the master bedroom. There, on the far side of the bed, appellant and Snyder bound and strangled Janet with the phone cord, and appellant stabbed her many times. Snyder also threw a stereo speaker at Janet's head, and he ripped up a videotape because he feared the killing might have been recorded.

O'Brien's descriptions of these critical details were confirmed in many respects. Again, there is virtually no doubt that the killing had occurred, as related by O'Brien, between 2:30 and 3:00 p.m. on March 24, 1998. Joe Daher testified that Janet was alone in the house when he left around 2:00 p.m. that day, and Annie Daher testified that Janet had failed to pick her up at school at the customary pickup time of 3:00 p.m. Three independent citizens saw three suspicious-looking men walking in the Dahers' neighborhood around 2:15 or 2:30 p.m. Those citizens described

the heights, ages, and clothing of the suspicious-looking men, and those descriptions roughly matched O'Brien, appellant, and Snyder. Critically, two of the citizens saw tattoos on the neck of one of the three men, and appellant had tattoos on his neck at the time. Two of the citizens also identified appellant in the courtroom at trial. It appears that appellant lived in San Francisco at the time of the killing, and there was no evidence that he had any ties to Lafayette. Also, there was no defense evidence to provide an innocent explanation for appellant's presence in the Dahers' neighborhood at that time.

O'Brien's description of the manner of the killing of Janet was confirmed by the police examination of the Dahers' house on the evening of the crime. Janet's body was discovered at the far side of the bed in the master bedroom. She had been "hogtied," strangled, and stabbed in the manner described by O'Brien, and a stereo speaker and a ripped-up videotape lay nearby. A pair of glasses, with smudged makeup on the interior frame, lay on the kitchen floor, consistent with O'Brien's assertion that appellant had punched Janet in the face or head in the kitchen.

O'Brien also described how he, appellant, and Snyder had left the Dahers' house in their SUV after the killing. They drove to Cordelia, and O'Brien and Snyder snorted cocaine powder along the way. They bought beer, and O'Brien rented a motel room while appellant and Snyder "ditched" the SUV nearby.

Again, independent evidence confirmed O'Brien's account. The registration records of the Overnighter Motel in Cordelia showed that a room had been rented by "Maury O'Brien" at 3:31 p.m., and the Dahers' SUV was observed in a roofing company storage lot, less than half a mile from the motel, later that afternoon. The van was parked in an odd manner and location, as if someone had wanted to hide it, and there were traces of cocaine powder on the back seat.

O'Brien further described how he, appellant, and Snyder had walked from the motel to Fairfield in the hope of finding and robbing drug dealer Sandu. As they walked, O'Brien threw his knife into some bushes. When they reached Fairfield, they did not find Sandu, so they went to the home of Jason Mabra. There, they talked with Mabra and his girlfriend for about half an hour.

These details were confirmed when O'Brien led the police to the knife on June 5, 1998, and when Mabra and Meghan McPhee testified that they had talked with O'Brien, Snyder, and appellant at Mabra's home one night in late March 1999. Both Mabra and McPhee identified appellant, in pretrial lineups and at trial, as the man who had been with O'Brien and Snyder.

O'Brien further described how he, appellant, and Snyder had gotten a ride back to San Francisco from Hart and "Mac Shawn" later that night. Both Hart and Deshawn Dawson testified to that effect. Hart and Dawson also remembered the three men talking about robbing a woman. Hart specifically remembered the men, including appellant, saying they had killed the woman.

Significantly, appellant's attorney admitted at the outset of trial that O'Brien and Snyder had killed Janet, and the attorney impliedly acknowledged that O'Brien's overall description of the killing was accurate. Appellant's attorney nonetheless argued that there was no independent evidence that *appellant* had been one of the killers. That argument was refuted by the prosecution evidence discussed above. Moreover, O'Brien had no incentive to falsely implicate appellant (or anyone else) as one of his confederates. O'Brien confessed his involvement in a capital murder within minutes of meeting with the police, and he confessed in the hope of avoiding a death sentence. (See 3 Supp. CT 463.) If appellant had not been one of the killers, O'Brien's story

would have been completely discredited if appellant could have presented a credible alibi for the time of the killing. In such a case, O'Brien would have had little chance of receiving leniency from the police, the prosecutor, or a jury. In short, once O'Brien implicated himself in a capital crime, he had no reason to jeopardize his best chance of leniency by falsely implicating others in the crime.

Finally, O'Brien's interview statements to the police were inherently credible for two additional reasons. First, O'Brien never attempted to minimize his culpability by suggesting that he was a minor actor in the killing. In fact, O'Brien repeatedly told the police that he considered himself equally guilty of the murder, along with appellant and Snyder, because he had been an active participant in the robbery and he had done nothing to save Janet. (See Exh. 111A, 3 Supp. CT 664 [O'Brien said, "I'm pretty much as guilty as all of them, you know?"]; 4 Supp. CT 771 [O'Brien said he felt guilty of the murder because he had had a gun but he did not stop appellant and Snyder from killing Janet]; 4 Supp. CT 805 [O'Brien said he was guilty of the killing because he "let it happen"] 4 Supp. CT 811 [O'Brien said "it probably doesn't make any difference whether [he] stabbed her or choked her or not" because he was actively involved in the robbery]; 4 Supp. CT 819 [O'Brien said he would probably get the same prison sentence as appellant and Snyder regardless of whether he had actually stabbed Janet].) Second, in one of the later interviews the officers falsely told O'Brien, as an interrogation technique, that the killing had been recorded on the Dahers' bedroom videorecorder. O'Brien reacted with apparent relief by saying, "So you know I didn't kill her." (See Exh. 107A, 3 Supp. CT 528; see also 3 Supp. CT 536 [O'Brien insisted there could not possibly be a videotape of him killing Janet]; 4 Supp. CT 830 [when the officers continued to accuse O'Brien of killing Janet, he

demanded to see the videotape because he knew he "didn't do anything" to Janet].)

Considering the circumstances as a whole, there was more than enough independent evidence to confirm not only that O'Brien had told the truth to the police and at trial, but that appellant had robbed and killed Janet.[23]

XVI. THERE WAS SUFFICIENT NON-ACCOMPLICE CORROBORATING EVIDENCE

As shown in Argument XV above, appellant contends there was insufficient non-accomplice evidence to support his convictions. The contention fails for the reasons stated above.

XVII. THE TESTIMONY OF A PATHOLOGIST WHO REVIEWED THE AUTOPSY REPORT OF JANET DAHER WAS ADMISSIBLE

Appellant contends his constitutional rights were violated by the introduction of testimony regarding Janet's death by a pathologist who was not present at the autopsy.

A. Factual Background

The autopsy of Janet was performed by Dr. Susan Hogan, an employee of Forensic Medical Group. (13 RT 3004.) At the time of trial, Dr. Hogan had moved across the country, so the prosecutor called another employee of Forensic Medical Group, Dr. Brian Peterson, to testify about Dr. Hogan's report. (8 RT 1968; 13 RT 3002-3004.) Dr. Peterson had performed thousands of autopsies, and he had testified as an expert witness in hundreds of trials. (13 RT 3002-3004.)

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[23] In light of the strength of the evidence summarized above, any error in the guilt phase of trial was harmless. We therefore incorporate by reference this prejudice analysis in all guilt phase arguments.

Dr. Peterson first explained that a pathologist performing an autopsy typically dictates findings into a recorder as the body is examined. (13 RT 3005.) The pathologist later reviews and edits a transcript of the dictation, then signs a written report. (13 RT 3005.) Dr. Peterson based his trial testimony on Dr. Hogan's report, the autopsy photos, and his personal medical knowledge. (13 RT 3007, 3010, 3022.)

Dr. Peterson said that the body of Janet was reported to have been brought to the morgue in the condition it was found, i.e., with a telephone cord wrapped around Janet's neck and extending down to bind her hands behind her back. (13 RT 3007-3008.) The cord was wrapped so tightly around Janet's neck that it left a furrow in the skin. (13 RT 3007-3009.) Also, there was blood in the whites of Janet's eyes and in the muscles of her neck. (13 RT 3007-3008.) Dr. Peterson explained that such injuries were consistent with strangulation by an object like a cord. (13 RT 3007-3008.)

Dr. Peterson also discussed photos of multiple stab and slice wounds in Janet's back, neck, and arms. (13 RT 3010-3020.) Some of those wounds were superficial, while others would have been fatal because they had penetrated deeply into vital organs and arteries. (13 RT 3010-3020.) The wounds were of such size that they could have been caused by prosecution Exhibit 46 (the knife recovered with the assistance of O'Brien on June 5, 1998). (13 RT 3021.) One long slice to Janet's throat severed her trachea, jugular vein, and carotid artery. (13 RT 3017.) Many of the stab wounds were very deep, i.e., all the way to the bolster (handle) of the knife. (13 RT 3018.)

Dr. Peterson also testified that there were abrasions, consistent with rug burns, on the left side of Janet's face. (13 RT 3024.) There were no specific head wounds. (13 RT 3025.)

Dr. Peterson opined that Janet's death had been the result of strangulation and stabbing. (13 RT 3020-3021.) He believed Janet had first been strangled because there was some, but not much, blood in her chest and lungs. (13 RT 3020.) The presence of blood in those areas indicated that Janet's heart was still beating when the stab wounds were inflicted, but the heartbeat probably would have been faint. (13 RT 3020.) If the stab wounds had been inflicted before Janet was strangled, there would have been more blood in those areas. (13 RT 3020.)

B. Dr. Peterson's Testimony Was Permissible

Appellant did not object to Dr. Peterson's testimony at trial, but he now argues that the testimony violated the Confrontation Clause of the federal Constitution, as interpreted by *Crawford v. Washington* (2004) 541 U.S. 36. (AOB 248-249.) Specifically, appellant contends the autopsy results were "central" to the prosecution case, and he complains that he was not given the opportunity to cross-examine the author of the autopsy report, Dr. Hogan. (AOB 246-248.)

Even if appellant's argument had been properly preserved for appeal, this Court rejected an identical argument, just one month after appellant's opening brief was filed, in *People v. Dungo* (2012) 55 Cal.4th 608. There, this Court found no Confrontation Clause violation when a pathologist testified at the defendant's trial on the basis of objective facts in the performing pathologist's autopsy report, as supplemented by the testifying pathologist's own interpretation of the facts. (*Id.* at p. 621.) The Court explained:

> [The testifying pathologist's] description to the jury of objective facts about the condition of victim Pina's body, facts he derived from [the performing pathologist's] autopsy report and its accompanying photographs, did not give defendant a right to confront and cross-examine [the performing pathologist]. The facts that [the testifying pathologist] related to the jury were not so formal and solemn as to be considered

> testimonial for purposes of the Sixth Amendment's confrontation right, and criminal investigation was not the primary purpose for recording the facts in question.

(*Ibid.* See also *Williams v. Illinois* (2012) __ U.S. __, 132 S.Ct. 2221, 2228 [out-of-court statements by experts used solely to explain their assumptions are not within the scope of *Crawford*, and a lab report prepared before the defendant was a suspect was different than the extrajudicial statements at issue in *Crawford*].)

In this case, as in *Dungo*, the prosecutor did not introduce Dr. Hogan's report into evidence, and Dr. Peterson did not explain to the jury any of Dr. Hogan's medical conclusions. Instead, Dr. Peterson reviewed the autopsy photos and recited Dr. Hogan's factual descriptions of Janet's injuries. Dr. Hogan then gave the jury his own interpretation of those injuries. On cross-examination, the defense attorney asked Dr. Peterson a few questions about Dr. Hogan's conclusions, but appellant cannot complain about responses to his own attorney's questions on appeal. In any event, the defense attorney's most important question related to the timing of Janet's death, and Dr. Hogan said he *disagreed* with any suggestion in Dr. Hogan's report that Janet may have died before she was stabbed. (See 13 RT 3025.) Thus, there was no violation of the Confrontation Clause or *Crawford*.[24]

Finally, even if Dr. Peterson's testimony had been improper, any error was harmless beyond a reasonable doubt. Two sheriff's deputies testified that they had observed Janet's body in the master bedroom, bound with a telephone cord around the hands and neck. (9 RT 2191-2192; 13 RT 2894-2895.) Those deputies also observed cuts to Janet's upper back and neck

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[24] It appears that Dr. Peterson testified (and presumably was cross-examined) at the trial of codefendant Snyder in early 2001. (See *People v. Snyder*, *supra*, 112 Cal.App.4th at p. 1210.)

and blood spatters on the wall, consistent with a stabbing in that location of the bedroom. (9 RT 2191-2192; 13 RT 2894-2895, 2900-2903.) A third deputy attended the autopsy and observed Janet's wounds as she was examined by Dr. Hogan. (13 RT 2920-2930.) The mere description of Janet's body by any of those eyewitnesses would have been sufficient to confirm Maury O'Brien's testimony that Janet had been strangled and stabbed to death. Of course, Dr. Peterson's testimony about the timing of Janet's death was relevant, in that it was consistent with O'Brien's testimony that appellant and Snyder had strangled Janet before stabbing her, but the timing of those events was a minor issue at trial. As shown in Argument XV above, O'Brien's overall description of the killing was confirmed by evidence from multiple independent sources. The precise cause and timing of Janet's death were not material to the prosecution case, so any error would have been meaningless.

XVIII. APPELLANT'S TRIAL WAS NOT TAINTED BY MISCELLANEOUS ERRORS

Appellant contends several miscellaneous errors occurred at the guilt and penalty phases of trial.

A. The Family of the Victim Properly Sat in the Courtroom During Both Phases of Trial

Appellant contends his due process and equal protection rights were violated because Janet's family members were allowed to sit in the courtroom throughout the guilt and penalty phases of trial. (AOB 259-260.) Appellant cites no authority to support his contentions, almost certainly because none exists. Crime victims and their family members and friends routinely appear in court during trials, and no case to our knowledge has suggested that the presence of such interested parties violates a defendant's rights. Indeed, spectators in a courtroom may be excluded only for compelling reasons like misconduct. (See, e.g., *People v. Woodward*

(1992) 4 Cal.4th 376, 437-438 ["The Sixth Amendment public trial guarantee creates a 'presumption of openness' that can be rebutted only by a showing that exclusion of the public was necessary to protect some 'higher value,' such as the defendant's right to a fair trial, or the government's interest in preserving the confidentiality of the proceedings."].)

Appellant does not suggest that the members of the Daher family committed any type of misconduct during trial. Even if they had, an admonition normally would have been sufficient to dispel any prejudice. (See, e.g., *People v. Houston* (2005) 130 Cal.App.4th 279 [no error where family members and friends of a murder victim wore buttons depicting the victim's face during trial; any prejudice was dispelled by the court's admonition to the jurors to base their verdict solely on the evidence presented at trial].) Thus, there was neither error nor any possibility of prejudice.

B. The Trial Court Was Not Required to Provide Extra Compensation to Low-Income Jurors

Appellant contends he was deprived of a jury by his peers because the trial court did not offer extra compensation to potential jurors with low incomes.

This Court has rejected the identical contention many times. (See *People v. DeSantis* (1992) 2 Cal.4th 1198, 1216 [dismissal of low-income jurors for hardship did not make defendant's jury underrepresentative]; *People v. Harris* (1989) 47 Cal.3d 1047, 1076-1077 [same]; *People v. Milan* (1973) 9 Cal.3d 185, 195-196 [no constitutional violation where all low income prospective jurors in a capital case were granted hardship dismissals].) Appellant offers nothing to support a departure from this precedent.

C. The Trial Court Did Not "Coach" Maury O'Brien

Appellant contends the trial court improperly assisted the prosecutor by "coaching" Maury O'Brien during his testimony on direct examination. The court did nothing more than ask a simple question to clarify an ambiguous (and unimportant) portion of O'Brien's testimony.

While testifying on direct examination, O'Brien described the events of the day of the killing, from early morning until late at night. O'Brien explained that he and his confederates, appellant and Snyder, had originally planned to rob drug dealer Sandu in Fairfield, and that Jason Hart had given them a ride to the Balboa BART station in San Francisco. (11 RT 2452-2454.) O'Brien, appellant, and Snyder rode the train to the East Bay, toward Pleasant Hill or Walnut Creek, but they got off at the Orinda station to smoke a cigarette. (11 RT 2454.) The prosecutor asked O'Brien, "And while you were on the BART or while you were out smoking a cigarette, did you discuss your plan some more?" (11 RT 2454.) O'Brien said, "Well, some time while we were on the BART, [Snyder] and [appellant] were looking out into the hills over there between Orinda and Lafayette, and we wanted to go rob a house instead of going up to Fairfield." (11 RT 2454.) O'Brien also said, "The plans changed right then." (11 RT 2455.) The prosecutor asked, "Were you guys still doing dope?" (11 RT 2455.) O'Brien replied, "Yeah. Me and [Snyder] did dope at BART before we got on BART and after we got off BART before we started walking up to—back into the hills." (11 RT 2455.) The trial court asked, "At what BART station?" (11 RT 2455.) O'Brien replied, "Lafayette BART station." (11 RT 2455.)

Defense Attorney Egan requested a bench conference. (11 RT 2455-2456.) There, he complained that the court had helped O'Brien "change his testimony" with its clarifying question about where the men had last smoked dope. (11 RT 2455-2456.) The court noted that it had simply

asked O'Brien, "What BART station?" (11 RT 2455.) Egan said that O'Brien had initially implied that the men had smoked dope only at Orinda, not Lafayette, and that the court should have allowed the defense to expose any inconsistencies in O'Brien's testimony on cross-examination. (11 RT 2456-2457.) The court responded, "I asked him a very neutral question about where did he do the dope. It could have been any number of stations from Balboa all the way up to Pleasant Hill where he said he was going. . . . It was neutral. I asked him in a neutral way." (11 RT 2457.)

Appellant now contends the trial court's question of O'Brien—"At what BART station?"—constituted improper "coaching" of a witness.

A trial court's power, indeed its responsibility, to clarify testimony is well-settled. (*People v. Spector* (2011) 194 Cal.App.4th 1335, 1368.) "'A trial court has both the discretion and the duty to ask questions of witnesses, provided this is done in an effort to elicit material facts or to clarify confusing or unclear testimony.'" (*Ibid.*, quoting *People v. Cook* (2006) 39 Cal.4th 566, 597.)

The trial court here did nothing improper. O'Brien's overall description of the BART train ride was not perfectly clear. O'Brien initially said that he and his confederates had gotten off the train at Orinda to smoke a cigarette. He also said that the men had decided at some point—either at the Orinda station or after they got back on the train—to rob a house in the nearby hills. As a result, they got off the train at the next stop, Lafayette, and walked toward the hills. O'Brien did not make it clear whether they had used drugs: (1) before they had gotten on the BART train in San Francisco; (2) during the stop at Orinda; and/or (3) after they finally

got off the train in Lafayette. Thus, the trial court was entitled to ask the simple clarifying question, "What BART station?"[25]

In any event, the timing and location of the drug use had little significance in O'Brien's overall testimony. His important testimony—that he and his friends had ultimately gotten off the train in Lafayette and walked to the Dahers' house—was not merely confirmed by independent evidence, but never disputed by the defense. There was neither error nor prejudice.

D. CALJIC No. 17.41.1 Was Properly Given to the Jury

Appellant contends the trial court erred in instructing the jury during the guilt phase of trial with CALJIC No. 17.41.1, the "snitch" instruction. That instruction requires jurors to inform the trial court of any juror's refusal to properly deliberate.

Appellant acknowledges that this Court has rejected his argument many times. (See AOB 261, citing *People v. Brady* (2010) 50 Cal.4th 547, 587; *People v. Williams* (2001) 25 Cal.4th 441; *People v. Wilson* (2008) 44 Cal.4th 758, 805-806.) He offers nothing to support a different decision in this case.

E. The Aggravating Evidence of Appellant's Prior Acts of Violence Was Admissible

Prior to the penalty phase of trial, the prosecutor indicated that he intended to present aggravating evidence that appellant had been involved in five prior acts of violence while in prison or jail. (16 RT 3773.) The parties discussed each of the incidents, and the court ruled that the evidence of two of the incidents, involving inmates Flores and Lucas, suggested that

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[25] On cross-examination, Defense Attorney Egan questioned O'Brien on this topic and the testimony remained the same. (See 11 RT 2568-2570.)

appellant might not have been the aggressor. (16 RT 3773-3778.) The court therefore allowed evidence of only three incidents, involving victims Armenta, Contreras, and Lira. As shown in the statement of facts above, there was evidence that appellant had attacked jail or prison inmates in each of those incidents.

In *People v. Moore* (2011) 51 Cal.4th 1104, 1135, this Court explained that both former and present section 190.3, factor (b) provide that, in making the penalty determination in a capital trial, the trier of fact is to consider, if relevant, "'[t]he presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the expressed or implied threat to use force or violence.'" Evidence admitted under this provision must establish that the conduct was prohibited by a criminal statute and satisfied the essential elements of the crime. (*Ibid.*) The prosecution bears the burden of proving the factor (b) crimes beyond a reasonable doubt. (*Ibid.*)

In *Moore*, the defendant's claims were similar to those of appellant. Moore argued that evidence of incidents in which he had fought with other inmates at San Quentin prison had been insufficient to establish that he had engaged in the "willful and unlawful use of force or violence upon the person of another." (*People v. Moore*, *supra*, 51 Cal.4th at p. 1136.) Moore also argued that the evidence had not proved that his actions had been "unlawful" because he may have been provoked, acting in self-defense, or engaging in "horseplay" or mutually agreed upon combat with his foes. (*Ibid.*) This Court rejected the arguments:

> The evidence . . . did not raise any legal justification for defendant's actions, and, therefore the prosecution was not required to introduce evidence negating any possible justification for the activities. [Citation.] In addition, "[v]oluntary mutual combat outside the rules of sport is a breach of the peace, mutual consent is no justification, and both participants are guilty of criminal assault. [Citation.] Thus,

> where the prosecution's evidence shows a jailhouse scuffle, the scene as witnessed does not suggest defendant may have been acting in self-defense, and defendant presents no evidence in mitigation, a finding of criminal assault is justified." [Citation.]

(*People v. Moore*, *supra*, 51 Cal.4th at p. 1136.)

In short, appellant was involved in at least five violent incidents while incarcerated in the years before his trial. The trial court prohibited the prosecutor from introducing evidence of two of those incidents because there was some evidence that appellant had acted in self-defense. The court did not abuse its discretion in allowing the jury to hear the evidence of the other three incidents.

F. The Trial Court Was Not Required to Admonish the Jury, Sua Sponte, to Disregard a Courtroom Outburst by the Father of Andrea Torres

During the penalty phase cross-examination of prosecution witness Andrea Torres, she described her various sexual experiences with appellant, including the time he had forcibly raped her. (17 RT 4066-4071.) Torres acknowledged that she did not initially report the rape to the police. (17 RT 4073.) The following exchange occurred:

> Q. Was there a reason why you didn't go to the police?
>
> A. I just didn't —I felt no need to go.
>
> Q. Would it be fair to say that you were feeling ambivalent about the situation?
>
> A. Uh-huh.
>
> Q. Mixed feelings?
>
> A. Yeah.
>
> Q. What were your mixed feelings?
>
> A. First of all, I didn't want to deal with it.

AUDIENCE MEMBER: Just like a 13 year old. You're leading the witness on here.

THE COURT: One second, please. The attorneys will . . .

AUDIENCE MEMBER: I know. But my daughter was 13 years old, your Honor.

THE COURT: Sir, hold on one second.

(17 RT 4074.)

The court ordered a recess and discussed the situation with the attorneys. (17 RT 4074.) The audience member who had spoken out identified himself as Andrea's father, Mr. Torres. (17 RT 4074-4075.) The court told Mr. Torres that he was free to talk to the attorneys about their questioning of his daughter, but that he could not speak out in the courtroom during trial. (17 RT 4075.) Mr. Torres apologized for his outburst. (17 RT 4075.)

When the proceedings resumed, the trial court did not admonish the jury to disregard Mr. Torres's comments. (17 RT 4077.) Appellant now argues that the court had a sua sponte duty to give such an admonition.

Preliminarily, a defendant's failure to object to and request a curative admonition for spectator misconduct waives the issue on appeal if an objection and admonition would have cured the misconduct. (*People v. Hill* (1992) 3 Cal.4th 959, 1000, overruled on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046.)

More substantively, misconduct of a spectator in the courtroom is a ground for mistrial or reversal only if the misconduct is "of such a character as to prejudice the defendant or influence the verdict." (*People v. Chatman* (2006) 38 Cal.4th 344, 368-369; *People v. Lucero* (1988) 44 Cal.3d 1006, 1022.) In *Holbrook v. Flynn* (1986) 475 U.S. 560, 572, the U.S. Supreme Court framed the federal constitutional question as whether the jury saw something that "was so inherently prejudicial as to pose an unacceptable

threat to defendant's right to a fair trial." A trial court is entrusted with broad discretion to determine whether spectator conduct is prejudicial. (*People v. Lucero*, *supra*, 44 Cal.3d at p. 1022.)

Here, the courtroom outburst of Mr. Torres could not have affected the jury's verdicts. Again, Andrea Torres explained that she had not reported her rape by appellant because she "didn't want to deal with it." Mr. Torres commented that his daughter had acted "just like a 13 year old," and he complained that the defense attorney had been "leading [Andrea] on." The point and purpose of Mr. Torres's complaint is unclear, given that the defense attorney did not seem to be "leading" Andrea Torres in any way. Mr. Torres was likely unhappy to see his daughter re-live a traumatic event in open court, however, and his distress is understandable. It is fair to assume that neither defense attorney requested a jury admonition because they realized Mr. Torres's outburst had no relation to any disputed issue at trial. Thus, the brief outburst could not have affected the jury's attitude toward the case.[26]

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[26] Mr. Torres spoke out again during trial, after his daughter interrupted her testimony to say to appellant, "[S]top snickering over there." (17 RT 4088.) Appellant responded, "You can shut the fuck up." (17 RT 4088.) Mr. Torres said to appellant, "No, you shut the fuck up." (17 RT 4088.) The court dismissed the jurors and admonished Andrea Torres, appellant, and Mr. Torres not to disrupt the proceedings. (17 RT 4089-4094.) The court also ordered Mr. Torres to leave the courtroom. (17 RT 4094.) After the jurors returned to the courtroom, the court instructed them sua sponte, "I want you of course to disregard that little tripartite exchange we had just before we adjourned a moment ago. [¶] And I remind you to keep focused on the evidence in this case and what is presented with respect to the aggravating and mitigating factors. That's where your focus should be, not on any extraneous matters such as we had just experienced." (17 RT 4099.)

G. The Court Properly Instructed the Jury on the Crime of Lewd Acts on a Child Under 14

Appellant contends the trial court erred during the penalty phase of trial by instructing the jury on the crime of lewd conduct with a child under 14 (§ 288, subd. (a)).

As shown above, the prosecution evidence in the penalty phase of trial included a number of incidents in which appellant had committed uncharged crimes involving force or violence. The evidence of those incidents was introduced under section 190.3, subdivision (b) [aggravating circumstances include "the 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"]. One of those aggravating incidents was appellant's 1992 sexual assault on Andrea Torres. The prosecutor was required to prove that crime beyond a reasonable doubt. (*People v. Russell* (2011) 50 Cal.4th 1228, 1267.)

The pattern jury instructions on prior violent crimes at the time of appellant's trial were CALJIC Nos. 8.85 and 8.87 (6th ed. 1997). Those instructions explained that the jury could consider, inter alia, "[t]he presence or absence of criminal activity by the defendant, other than the crimes for which [he] has been tried in the present proceedings, which involved the use or attempted use of force or violence." (24 RT 5376, 5380.) Later instructions explained the elements of a number of relevant crimes, including assault and aggravated assault, battery and aggravated battery, robbery, rape, and lewd conduct on a child under 14. (24 RT 5381-5394.)

The parties agreed that the trial court was required to read CALJIC Nos. 8.85 and 8.87 to the jury, and the prosecutor asked the trial court to instruct the jury not only on the underlying crime of rape, but also on the lesser crime of lewd conduct on a child under 14. (24 RT 5366-5372.) The

defense objected to any instruction on lesser crimes to rape, but the court found that Andrea Torres's testimony about the rape had been slightly unclear as to whether appellant had applied force before or after sexually penetrating her. (24 RT 5371.) The court appeared to be concerned that the jurors might believe appellant was not guilty of forcible rape if he had initially penetrated Torres with her consent, but continued the act against her will through force. (24 RT 5370-5371; see also *People v. Vela* (1985) 172 Cal.App.3d 237 [a defendant is not guilty of forcible rape if he sexually penetrates a woman with her consent, even if she later withdraws consent], overruled in *In re John Z.* (2003) 29 Cal.4th 756.) As a result, the trial court agreed to instruct the jury not only on the crime of rape, but also on lewd conduct on a child under 14. (24 RT 5366-5372.) The trial court noted that an aggravating factor in the penalty phase of a capital trial is *any* prior crime, regardless of its nature, that is committed by force and violence. (24 RT 5370-5372.)

The court did not err. In most cases involving a challenge to unadjudicated prior crimes involving force and violence in the penalty phase of trial, the defendant complains on appeal that the trial court erred by *failing* to instruct on the elements of prior crimes. (See, e.g., *People v. Brown* (2003) 31 Cal.4th 518, 571; *People v. Anderson* (2001) 25 Cal.4th 543, 588; *People v. Hart* (1999) 20 Cal.4th 546, 651; *People v. Cain* (1995) 10 Cal.4th 1, 72.) This Court has repeatedly rejected such claims, noting that although a trial court has no sua sponte duty to instruct on the elements of prior crimes involving force and violence, "a trial court is not prohibited from giving such instructions on its own motion when they are 'vital to a proper consideration of the evidence.' [Citation.]" (*People v. Hart*, *supra*, 20 Cal.4th at p. 651.)

In any event, the jury heard Andrea Torres's testimony that she had become attracted to appellant when she was 12 or 13 and he was 18 or 19.

In describing her first sexual encounter with appellant, she said that he had come to her house late at night and forced intercourse on her. Although Torres had actively participated in the sexual activity at the outset, she told appellant to stop, either immediately before or after he penetrated her. (See RT 4050-4051, 4067-4070.) Appellant nonetheless pinned Torres's arms with one arm and covered her mouth with another, then completed the intercourse. Even if appellant's crime was not necessarily forcible rape at the time (see *People v. Vela*, *supra*, 172 Cal.App.3d 237), it was undeniably unlawful sexual conduct on a child under 14.

In short, the jury correctly heard admissible testimony about appellant's behavior with Torres. If the jurors developed any animus toward appellant, it was because his behavior was appalling, not because the trial court explained to them the legal elements of various sex crimes, including lewd conduct on a child under 14. Any error was harmless.

H. The Trial Court Did Not Err in Instructing the Jury on How to Weigh the Aggravating and Mitigating Evidence in the Penalty Phase of Trial

Appellant contends the trial court misled the jury on how to weigh aggravating and mitigating evidence in the penalty phase of trial.

1. Factual background

Prior to the conclusion of the penalty phase of trial, the court discussed jury instructions with the attorneys. (23 RT 5258-5353.) The final instructions were based almost entirely on the standard CALJIC instructions. Among other things, the instructions explained that the jury's task in the penalty phase of trial was not merely to determine facts, "but also, and more importantly, to render an individualized normative and moral determination in accordance with the law . . . about the penalty appropriate for the defendant." (24 RT 5374; see also 24 RT 5399.) The instructions allowed the jury to consider pity and sympathy for appellant,

but not to be influenced by bias or prejudice against him. (24 RT 5375, 5399.) The instructions listed the aggravating and mitigating factors of section 190.3, and further explained that the weighing process did not involve "a mere mechanical counting of factors on each side of an imaginary scale, or the arbitrary assignment of weights to any of them." (24 RT 5400.) The instructions also told the jurors they were "free to assign whatever moral or sympathetic value [they deemed] appropriate" under "the totality of the circumstances." (24 RT 5400.) The jurors were also instructed that "[t]o return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances, that it warrants death insteadf of life without parole." (24 RT 5376-5378, 5400.)

At one point during the closing argument of Defense Attorney Epley, she told the jury, "[I]f you find that the mitigation should equal the aggravation in weight, you must vote for life." (24 RT 5483.) The trial court interrupted, "No, that's not correct. The last instruction . . . the last statement of law stated by counsel is incorrect, ladies and gentlemen. You ignore that." (24 RT 5483.)

After a lengthy bench conference in which the trial court explained to Epley that LWOP is not the "default" verdict in a capital sentencing trial (24 RT 5485, 5488), Epley resumed her argument to the jury in accordance with the court's comments. She stated: "[F]or you to ever be able to return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances, that it warrants death instead of life without parole." (24 RT 5494-5495.) Epley then continued her argument that LWOP was the more appropriate punishment for appellant, given all the circumstances of the case. (24 RT 5495 et seq.)

Immediately after Epley finished her argument, the trial court gave the jury a final clarifying instruction. The court stated:

> Just for clarification purposes, I do want to give you one more instruction on the law at this time. And it is as follows: If you find that the aggravating factors are so substantial in comparison to the mitigating factors as to warrant death, you may vote for death. If you find that the mitigating factors are so substantial in comparison to the aggravating factors as to warrant life without the possibility of parole, you may vote for life without the possibility of parole. If after a comparison of the aggravating and mitigating factors you are unable to conclude that either death or life without the possibility of parole is warranted, you may vote for neither. I hope that clarifies the law with respect to this subject matter.

(24 RT 5526; 5 CT 1919.)

The defense attorneys did not object to these instructions. (24 RT 5526.)[27]

The defense attorneys later moved for a mistrial on various grounds, but they did not mention the court's concluding instructions on the weighing process for aggravating and mitigating factors. (See RT 5531-5536.)

The jurors announced the death verdict on November 16, 2001. (24 RT 5539-5540.) More than two months later, on January 25, 2002, the defense attorneys filed a motion for a new trial. They argued, among other things, that the trial court's concluding instructions on the weighing process for aggravating and mitigating evidence had been improper. (24 RT 5566-5569.) The court denied the motion, finding that: (1) the attorneys had forfeited any challenge to the instructions by waiting until after the

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[27] Appellant writes that the defense attorneys "objected to this instruction when it was given" (AOB 276), but this appears to be an error. As appellant notes (AOB 276), the first defense objection to the instruction appears in the transcript at 24 RT 5569, i.e., in the argument on the motion for new trial held on January 25, 2002.

announcement of a verdict to object; and (2) the instructions had, in any event, been correct. (24 RT 5584-5586.)

2. The trial court did not err

Appellant contends the trial court erred in two respects: (1) in telling the jury that Epley's argument on the weighing process for aggravating and mitigating evidence had been incorrect (Argument XVIII(A)(viii)); and (2) in reading the supplemental instructions on the weighing process immediately after the final arguments (Argument XX).

Neither contention has merit. The language of Epley's initial argument to the jury—that the jurors were *required* to vote for LWOP if they found that the evidence in mitigation "equaled" the evidence in aggravation—misstated the law. (See, e.g., *People v. Wader* (1993) 5 Cal.4th 610, 662 [jurors must consider and weigh the evidence and they may impose death only if they find that the aggravating circumstances are "so substantial in comparison with the mitigating circumstances that it [*sic*] warrants death instead of [LWOP]"]; *People v. Duncan* (1991) 53 Cal.3d 955, 978 [same]; *People v. Sully* (1991) 53 Cal.3d 1195, 1244-1245 [the weighing process is not mechanical].) After Epley discussed the matter at the bench with the trial court, she resumed her argument by correctly stating that the death penalty could be imposed only "if the aggravating circumstances are so substantial in comparison with the mitigating circumstances it warrants death instead of life without parole." (24 RT 5494.) That statement echoed the trial court's original jury instructions, which also were correct, so the jury could not have misunderstood the law.

The trial court's supplemental instructions on the weighing process also stated the law correctly. Appellant argues that those instructions were improper because they "informed the jury merely that the death penalty may be imposed if aggravating circumstances are 'so substantial' in comparison to mitigating circumstances that the death penalty is

warranted." (AOB 279.) Appellant acknowledges that this Court has repeatedly approved this "so substantial" language (AOB 279, citing *People v. Duncan* (1991) 53 Cal.3d 955; see also *People v. Wader*, *supra*, 5 Cal.4th at p. 662), but appellant contends the language is improper for several reasons (AOB 279-286). Among other things, appellant contends: (1) the term "substantial" means only "of or having substance," and therefore lowers the prosecutor's burden of proof and is inconsistent with section 190.3 and the Fourteenth Amendment (AOB 279); (2) the instruction allows a death sentence when that punishment is "warranted" rather than when that punishment is "appropriate"; and (3) the instruction does not specifically require the jury to impose LWOP when the mitigating factors outweigh the aggravating factors.

This Court has repeatedly held that CALJIC No. 8.88, and its "so substantial" forumulation, is constitutional. In *People v. Rogers* (2006) 46 Cal.4th 1136, 1179, this Court rejected each of appellant's challenges to the instruction:

> CALJIC No. 8.88 is not constitutionally flawed or impermissibly vague because (1) it uses the phrase "so substantial" to compare aggravating factors with the mitigating factors [citations]; (2) it uses the term "warrants" instead of "appropriate" [citations]; (3) it fails to instruct the jury that a life sentence is mandatory if the aggravating factors do not outweigh the mitigating factors [citations]; (4) it fails to instruct that a verdict of life in prison could be returned even if the circumstances in aggravation outweighed those in mitigation [citations]; and (5) it fails to instruct that neither party in a capital case bears the burden of persuasion on the penalty determination [citations].

In light of *Rogers* (and many other cases which have held similarly), the trial court's instructions on the weighing process were correct.[28]

XIX. THE TRIAL COURT DID NOT ALLOW IMPERMISSIBLE "VICTIM IMPACT" EVIDENCE AT THE PENALTY PHASE OF TRIAL

As explained in the Statement of Facts above, the prosecutor's final two witnesses in the penalty phase of trial were Janet's daughters, Lauren and Annie. In brief, the girls testified that Janet had been a loving and generous mother, and each girl had had a very hard time coping with Janet's death. (18 RT 4181-4189.)

Appellant argues that the testimony of Lauren and Annie violated due process as impermissible victim-impact evidence. A passage from *People v. Garcia* (2011) 52 Cal.4th 706, 751-752, suffices to refute the claim: "The People are entitled to present a "'complete life histor[y] [of the murder victim] from early childhood to death.'" [Citation.] Such evidence, which typically comes from those who loved the murder victim, shows "how they missed having [that person] in their lives." [Citations.]"

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[28] CALJIC No. 8.88 does not contain any statement like the final sentence of the trial court's supplementary instruction. Again, that sentence stated: "If after a comparison of the aggravating and mitigating factors you are unable to conclude that either death or life without the possibility of parole is warranted, you may vote for neither."

Nothing about this sentence was improper. Again, the crucial instruction for the jury in a capital case is that a death sentence may be imposed only if the aggravating factors so substantially outweigh the mitigating factors as to warrant death. Because the jury was instructed to this effect, it cannot be doubted that they unanimously agreed that death was appropriate for appellant. If the jurors had been unable to agree (or even decide) on a punishment, the supplementary instruction's final sentence allowed them to notify the court of that result. The jurors expressed no difficulty in reaching a verdict; although they requested some of the exhibits, they asked no substantive questions of the court and they announced a verdict after just a day and a half of deliberations. (See 5 CT 1845, 1848-1849, 1854.) Thus, there was no possibility of prejudice.

There was no error.

XX. THE TRIAL COURT DID NOT ERR IN GIVING THE "SO SUBSTANTIAL" JURY INSTRUCTION

In Arguments XX and XXI, appellant argues that the trial court erred in reading to the jury the supplemental jury instruction which stated that the jurors could impose the death penalty only if they found that the aggravating factors were "so substantial in comparison to the mitigating factors as to warrant death." For the reasons stated in Argument XVIII.H above, the arguments fail.

XXI. THE READING OF THE "SO SUBSTANTIAL" JURY INSTRUCTION DID NOT REQUIRE A NEW TRIAL

See Arguments XVIII.H and XX above.

XXII. CALIFORNIA'S CAPITAL SENTENCING SCHEME IS CONSTITUTIONAL

Appellant contends his death sentence must be reversed because California's capital sentencing scheme is unconstitutional. Appellant alleges a number of defects in the scheme, but he acknowledges that this Court has rejected each individual allegation on its own. (AOB 287.) Appellant nonetheless argues that the defects as a whole render the scheme unconstitutional. Because none of appellant's individual claims have merit, the challenge to the scheme as a whole must fail.[29]

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[29] A few of appellant's claims do not explicitly cite contrary decisions of this Court. For the sake of completeness, we note that subclaims B.ii and B.iii were rejected in *People v. Williams* (2008) 43 Cal.4th 584, 649. Subclaim F was rejected in *People v. Weaver* (2001) 26 Cal.4th 876, 992, and subclaims G.i and G.ii were rejected in *People v. Farnam* (2002) 28 Cal.4th 107, 177.

XXIII. SECTION 190.3 IS CONSTITUTIONAL AND THE PENALTY PHASE INSTRUCTIONS GIVEN TO APPELLANT'S JURY WERE APPROPRIATE

Appellant contends section 190.3 and its related jury instructions violated the Constitution in many ways. Appellant acknowledges that his arguments have been repeatedly rejected by this Court, but he asks the Court to reconsider its positions. Appellant has not raised any argument that requires reconsideration.

XXIV. APPELLANT'S DEATH SENTENCE IS PROPORTIONATE TO THE SERIOUSNESS OF HIS CRIMES

Appellant argues that his death sentence must be reversed because it is grossly disproportionate to his crimes and the punishment received by his coconspirators O'Brien and Snyder. Appellant notes that the prosecutor did not seek the death penalty for Snyder, and Snyder was ultimately sentenced to life in prison without possibility of parole. O'Brien was charged with capital murder, but his trial had not occurred at the time appellant was sentenced.

Preliminarily, there is no doubt that appellant's crimes supported the imposition of the death penalty. The evidence at trial showed that appellant entered the Dahers' house—just one month after being released from prison on parole—with the intent to commit a robbery. Once inside, appellant punched Janet in the head and searched her house for valuables to steal. After O'Brien called out to Snyder by name, appellant announced that Janet had to be killed because she might be able to identify Snyder. Appellant tied Janet up and strangled her with a telephone cord, then repeatedly stabbed her in the back, neck, and arms. Within hours of the killing, appellant was drinking beer and taking active steps to rob another victim, drug dealer Sandu. Appellant had prior felony convictions and he had committed many uncharged acts of violence. Under the circumstances,

appellant's death sentence was commensurate with his guilt and his background as a whole.[30]

It is irrelevant that Snyder and O'Brien did not also receive the death penalty. Even if the culpability of Snyder and O'Brien might be seen in the abstract as identical to that of appellant, his sentence would not be unconstitutional merely because his confederates received more lenient sentences. "[I]ntracase proportionality review" is an examination of whether a defendant's death sentence is proportionate to his individual culpability, irrespective of the punishment imposed on others. (*People v. Sanchez* (1995) 12 Cal.4th 1, 84, disapproved on other grounds in *People v. Doolin*, *supra*, 45 Cal.4th at p. 421, fn. 22; see also *People v. Adcox* (1988) 47 Cal.3d 207, 274.) "The Eighth Amendment to the federal Constitution does not require us to incorporate into our proportionality determination any comparison of defendant's sentence with that of another culpable person, whether charged or uncharged." (*People v. Sanchez*, *supra*, 12 Cal.4th at p. 84.)

In any event, it cannot be said that appellant's death sentence was grossly disproportionate to the punishments imposed on his confederates. Snyder was a minor at the time of the crimes, so he could not have been charged with capital murder. (See section 190.5 [prohibiting capital punishment for any defendant who was under the age of 18 at the time of the crime].) Additionally, Snyder's culpability was arguably less serious

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[30] In his order denying appellant's automatic motion for modification of the death judgment, Judge Spinetta fully endorsed the jury's verdict by summarizing the aggravating and mitigating evidence. (See 6 CT 1976-1985.) At the conclusion of his ruling, he wrote that "nothing less than a sentence of death strikes me as sufficiently fitting" punishment for appellant. (6 CT 1985; see also 24 RT 5597 [court stated at sentencing that it had "no hesitation" in signing appellant's death warrant in view of the "reprehensibility" of his character and actions].)

than appellant's. Snyder was "tweaking" on cocaine at the time of the burglary, and he gave his gun to O'Brien before they entered the house. More important, the decision to kill Janet was appellant's, not Snyder's, and appellant was the initiator and primary actor in the killing. Snyder nonetheless received the most serious punishment permissible for a minor, life in prison without possibility of parole.

Finally, it cannot be said that O'Brien's punishment (or less serious punishment) is relevant to appellant's death sentence. By O'Brien's account, he did not encourage or participate in the killing of Janet, other than to follow appellant's order and give him a knife. O'Brien was nonetheless charged with capital murder, and his fate was undecided at the time of appellant's trial. Although O'Brien acknowledged that he was hoping to avoid the death penalty by testifying against appellant, he also said he had not received any promises of leniency from the police or the prosecutor. At a minimum, O'Brien acknowledged that he would be sentenced to prison for a very long time, whatever the outcome of his trial. Even if O'Brien ultimately did not receive the death penalty, it cannot be said that his sentence affects the validity of appellant's death sentence.

XXV. THE DEATH PENALTY DOES NOT VIOLATE EQUAL PROTECTION PRINCIPLES UNDER AMERICAN OR INTERNATIONAL LAW

Appellant contends the death penalty violates equal protection principles under both American and international law, and specifically the International Covenant on Civil and Political Rights. Appellant's claims have been rejected by this Court many times. (See, e.g., *People v. Virgil* (2011) 51 Cal.4th 1210, 1290; *People v. Jennings* (2010) 50 Cal.4th 616, 690; *People v. Hamilton* (2009) 45 Cal.4th 863, 961; *People v. Cook* (2006) 39 Cal.4th 566, 619-620; *People v. Hillhouse* (2002) 27 Cal.4th 469, 511.) Appellant offers nothing that would support a different holding in this case.

XXVI. APPELLANT'S DEATH SENTENCE IS NOT ARBITRARY UNDER INTERNATIONAL LAW

Appellant contends the death penalty is an arbitrary punishment under international law. Again, appellant's claims have been rejected by this Court many times. (See, e.g., *People v. Virgil* (2011) 51 Cal.4th 1210, 1290; *People v. Jennings* (2010) 50 Cal.4th 616, 690; *People v. Hamilton* (2009) 45 Cal.4th 863, 961; *People v. Cook* (2006) 39 Cal.4th 566, 619-620; *People v. Hillhouse* (2002) 27 Cal.4th 469, 511.) Appellant offers nothing that would support a different holding in this case.

XXVII. APPELLANT WAS NOT DENIED THE RIGHT TO BE TRIED BY AN IMPARTIAL TRIBUNAL

Appellant contends he was denied the right to have his case tried by an impartial tribunal because of extensive pretrial publicity. As shown in Argument IX above, appellant's trial attorneys did not request a continuance of trial or a change of venue, so his claim on appeal is forfeited. In any event, similar claims have been rejected by this Court many times. (See, e.g., *People v. Virgil* (2011) 51 Cal.4th 1210, 1290; *People v. Jennings* (2010) 50 Cal.4th 616, 690; *People v. Hamilton* (2009) 45 Cal.4th 863, 961; *People v. Cook* (2006) 39 Cal.4th 566, 619-620; *People v. Hillhouse* (2002) 27 Cal.4th 469, 511.) Appellant offers nothing that would support a different holding in this case.

XXVIII. APPELLANT DOES NOT HAVE THE RIGHT TO LITIGATE HIS RIGHTS BEFORE INTERNATIONAL TRIBUNALS

Appellant contends he was denied the right to have his case tried by an impartial international tribunal. The claim has been rejected many times. (See, e.g., *People v. Virgil* (2011) 51 Cal.4th 1210, 1290; *People v. Jennings* (2010) 50 Cal.4th 616, 690; *People v. Hamilton* (2009) 45 Cal.4th 863, 961; *People v. Cook* (2006) 39 Cal.4th 566, 619-620; *People v.*

Hillhouse (2002) 27 Cal.4th 469, 511.) Appellant offers nothing that would support a different holding in this case.

XXIX. APPELLANT'S CLAIMS DO NOT VIOLATE OTHER INTERNATIONAL LAWS

Appellant alleges a number of other violations of international law, all of which have been rejected many times. (See, e.g., *People v. Virgil* (2011) 51 Cal.4th 1210, 1290; *People v. Jennings* (2010) 50 Cal.4th 616, 690; *People v. Hamilton* (2009) 45 Cal.4th 863, 961; *People v. Cook* (2006) 39 Cal.4th 566, 619-620; *People v. Hillhouse* (2002) 27 Cal.4th 469, 511.) Appellant offers nothing that would support a different holding in this case.

XXX. APPELLANT'S CHALLENGE TO LETHAL INJECTION IS NOT COGNIZABLE ON APPEAL

Appellant contends his sentence is illegal because it involves the use of lethal injection. (AOB 377-391.) A challenge to the method of a future execution is not cognizable on appeal because such a claim does not impugn the validity of the judgment. (*People v. Burney* (2009) 47 Cal.4th 203, 270.)

XXXI. THERE IS NO BASIS FOR RELIEF ON GROUNDS OF CUMULATIVE ERROR

Appellant contends his convictions and sentence must be reversed on the ground of cumulative error. As shown above, there was no individual error. Even if there had been one or more errors, they were not sufficient to require reversal of either the convictions or the sentence.

CONCLUSION

For the reasons stated, we ask that the judgment be affirmed.

Dated: April 11, 2013

Respectfully submitted,

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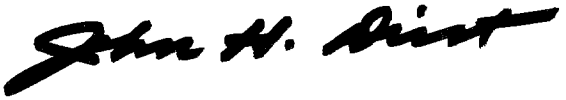

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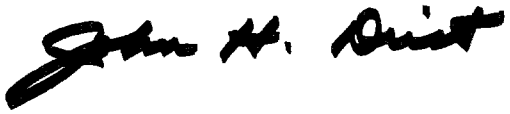
CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 46,926 words.

Dated: April 11, 2013

KAMALA D. HARRIS
Attorney General of California



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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***People v. Joseph Perez***

No.: **S104144**

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 April 11, 2013, 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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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 April 11, 2013, at San Francisco, California.

S. Chiang
Declarant

Signature

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