In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **ARTURO JUAREZ SUAREZ,** **Defendant and Appellant.**	**CAPITAL CASE** Case No. S105876

Napa County Superior Court Case No. CR 103779
The Honorable W. Scott Snowden, Judge

RESPONDENT'S BRIEF

KAMALA D. HARRIS
Attorney General of California
GERALD A. ENGLER
Chief Assistant Attorney General
JEFFREY M. LAURENCE
Acting Senior Assistant Attorney General
ALICE B. LUSTRE
Deputy Attorney General
LEIF M. DAUTCH
Deputy Attorney General
State Bar No. 283975
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 703-5089
Fax: (415) 703-1234
Email: Leif.Dautch@doj.ca.gov
Attorneys for Respondent

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STATEMENT OF THE CASE

On February 19, 1999, the Placer County District Attorney filed an information charging appellant with the following counts and allegations, arising from a quadruple murder on July 12, 1998: (1) murder of three-year-old Areli Martinez (Pen. Code, § 187, subd. (a))[1]; (2) murder of five-year-old Jack Martinez (§ 187, subd. (a)); (3) murder of Jose Luis Martinez (§187, subd. (a)); (4) murder of Juan Manuel Martinez (§ 187, subd. (a)); (5) forcible rape of Yolanda Martinez (§ 261, subd. (a)(2)); (6) penetration of Yolanda Martinez by a foreign object through force and violence (§ 289, subd. (a)); and (7) kidnapping of Yolanda Martinez for purposes of rape (§ 209, subd. (b)(1)). (1 CT 115-119.)

The information also alleged, as to counts one, two, and seven, that appellant personally used a deadly and dangerous weapon within the meaning of section 12022, subdivision (b)(1), causing those offenses to be serious felonies under section 1192.7, subdivision (c)(23). (1 CT 116, 119.) As to counts three and four, the information alleged the personal use of a firearm within the meaning of section 12022.53, subdivision (d). (1 CT 117.) As to counts five and six, the information charged two allegations: use of a deadly weapon under section 12022.3, subdivision (a), and infliction of great bodily injury upon the victim (Yolanda) under section 12022.8. (1 CT 118.) Also as to counts five and six, the information charged four sex-crimes allegations under section 667.61: (1) kidnapping (§ 209, subd. (b)(1)); (2) personal infliction of great bodily injury (§ 12022.8); (3) personal use of a dangerous or deadly weapon (§ 12022.3); and (4) tying or binding (§ 667.61, subd. (e)(6)). (1 CT 118-119.) For count seven, the information alleged the personal infliction of great bodily

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

injury within the meaning of section 12022.7, subdivision (a). (1 CT 119-120.)

Finally, the information contained 11 special circumstance allegations: (1) multiple murder under section 190.2, subdivision (a)(3); (2-5) as to counts one through four, lying in wait within the meaning of section 190.2, subdivision (a)(15); (6-7) as to counts three and four, felony murder (robbery), under section 190.2, subdivision (a)(17)(a); (8-9) as to counts one and two, felony murder (facilitation of flight after commission of rape), within the meaning of section 190.2, subdivision (a)(17)(c); and (10-11) felony murder (facilitation of flight after commission of rape by a foreign object), under section 190.2, subdivision (a)(17)(k). (1 CT 120-122.) Appellant pleaded not guilty and denied all enhancements and special circumstance allegations. (1 CT 126; 2 RT 352.)

On January 21, 2000, appellant moved for a change of venue. (3 CT 717.) On March 21, 2000, the trial court granted the motion and ordered the case transferred to Napa County. (3 CT 867; 8 RT 1925, 1934.)

Jury selection began in Napa County on February 21, 2001. (8 CT 2112.) The jury was sworn on March 8, 2011. (8 CT 2150-2151.) The evidentiary portion of the guilt trial began on March 12, 2001, and closed on April 9, 2001. (8 CT 2154-2155; 45 RT 9983.)

On April 10, 2001, the trial court dismissed six special circumstance allegations contained in the information: as to counts three and four—two allegations that the murders of Juan and Jose were committed while appellant was engaged in the commission of a robbery; as to counts one and two—two allegations that the murders of Jack and Areli were committed to facilitate flight after the commission of rape, and two allegations that the murders were committed to facilitate flight after the commission of rape with a foreign object. (10 CT 2751; 46 RT 10129, 10133.)

On April 18, the jury found appellant guilty on all counts. (11 CT 2921-2963; 51 RT 10567-10572.) The jury also found all of the enhancement allegations and the five remaining special circumstances true: lying in wait as to counts one through four and multiple murder. (11 CT 2924-2983.)

After a penalty phase trial, the jury returned a verdict of death on June 20, 2001. (13 CT 3556, 3567; 71 RT 12945.) On October 4, 2001, the court denied the automatic application for modification of the jury's verdict. (14 CT 3766-3768; 77 RT 13356.) On November 1, 2001, the trial court sentenced appellant to death. (14 CT 3770-3771; 78 RT 13406-13408.) On April 15, 2002, the Superior Court Clerk of Napa County filed the commitment judgment of death with this Court. (15 CT 4019, 4023.)

STATEMENT OF FACTS

Introduction

On the afternoon of July 12, 1998, appellant shot his two brothers-in-law in the head, bound and raped his sister-in-law, and bludgeoned and buried alive his three-year-old niece and five-year-old nephew. The prosecution presented powerful testimony from the surviving rape victim, evidence of appellant's three separate confessions, and forensic evidence tying appellant to the murder weapons. Defense counsel did not contest appellant's guilt and instead argued that appellant had simply "snapped" and was remorseful for his actions. The jury was unpersuaded and sentenced appellant to death.

The People's Case

A. Yolanda's Testimony

At the time of her brutal attack on July 12, 1998, Yolanda Martinez was 32 years old. (31 RT 8024.) She was married to Jose Luis Martinez, and had two children with him: a five-year-old boy named Jack, and a

three-year-old girl named Areli. (31 RT 8024-8025.) She and her family had come to the United States from Mexico in 1992, and they lived in Galt (south of Sacramento) with Jose's brother, Juan Manuel Martinez. (31 RT 8025, 8031.)

Appellant was a migrant worker who spent about eight months of the year working on the Parnell Ranch in Auburn, California, and the remaining months with his wife, Isabel, and two daughters in Santa Gertudis, Mexico. (31 RT 8030.) Isabel's brothers—the adult murder victims, Jose and Juan—grew up in Santa Gertudis with appellant. (31 RT 8026, 8028.) The families were close. In fact, in 1993 and 1994, appellant and Isabel lived next door to Yolanda and Jose in an apartment complex in Ione, California. (31 RT 8033.) On one occasion, appellant came up behind Yolanda while she was cleaning, grabbed her from the waist, and pulled her towards him. (31 RT 8034.) She was angered by appellant's advance and slapped him in the face. (31 RT 8034.) Another time, appellant touched Yolanda's neck and ribs in a way that made her uncomfortable, and she told him to leave her alone. (31 RT 8035.)

Despite these advances, the Martinez's continued to be friends with appellant, even after Isabel returned to Mexico, and appellant moved to Auburn to work on the Parnell Ranch. (31 RT 8036-8037.) They frequently spent their weekends together—the very activity that led to their deaths. (31 RT 8037.)

B. The Weekend Before the Murders

Yolanda testified that her family had discussed going to visit appellant at the Parnell Ranch for the Fourth of July in 1998. (31 RT 8042.) They ultimately decided to go to San Francisco instead, but they were not able to inform appellant of the change of plans before they left. (31 RT 8042.) When they returned home later that night, appellant was waiting for them at their house in Galt. (31 RT 8044, 8048.) Appellant was upset that they had

gone to San Francisco without him and complained that "one can go crazy [on the ranch] by oneself." (40 RT 9530.) Appellant and Jose made arrangements to spent the following weekend together. (31 RT 8048, 8050.)

C. The Day of the Murders

On Sunday, July 12, Yolanda, Jose, Juan, Jack, and Areli drove to the Parnell Ranch to see appellant. (31 RT 8051.) Jack and Areli were both wearing red t-shirts and beige shorts, while Yolanda was wearing green shorts, a white t-shirt, tennis shoes, underwear, a bra, and socks. (31 RT 8052.) Juan was wearing a gold chain around his neck, Jose was wearing a gold watch, and both men had wallets. (31 RT 8053.)

When they arrived, appellant came in from the field and discussed their plans for the day. (31 RT 8054-8055, 8063-8064.) Jose wanted to work on his car, so appellant gave him a knife to scrape rust off his battery and asked Juan to take a walk with him. (31 RT 8065.) Appellant returned about 30-45 minutes later without Juan, and he told Jose that he needed to talk to him. (31 RT 8066-8067.) Yolanda continued to work on the car as she watched appellant and Jose walk off into a pasture. (31 RT 8067.) Jose and Juan were never seen alive again.

After some time, appellant returned alone and asked Yolanda for the keys to Jose's car. (31 RT 8069-8070.) Yolanda noticed that appellant had changed pants and that there was a rifle leaning against the trailer. (31 RT 8070-8071.) While appellant went to the store, Yolanda and the kids went for a walk to look for Jose, returning to the trailer after an hour and a half of fruitless searching. (31 RT 8073-8074)

Appellant returned and asked Yolanda to prepare some foil for meat from a deer he had shot. (31 RT 8075-8076.) She asked where Jose and Juan were, and appellant said that they were almost finished dressing the deer and would return soon. (31 RT 8080.) After Yolanda finished

preparations for the deer meat, she sat in a chair outside appellant's trailer and watched her kids play. (31 RT 8081.)

Suddenly, appellant came up behind Yolanda with a rope and put it around her neck. (31 RT 8082.) She clutched at the noose, but appellant threw her to the ground and kicked her repeatedly. (31 RT 8082, 8085.) He dragged her to the trailer by the rope, causing her to momentarily lose consciousness. (31 RT 8085.) The children were crying, with five-year-old Jack yelling, "don't hit my mommy," while three-year-old Areli tugged at appellant. (31 RT 8086-8087.) Appellant told the kids to shut up. (32 RT 8115.)

Appellant took Yolanda inside his trailer, threw her on the floor, bound her feet with an orange cord, tied her wrists behind her back, and put a chain around her neck. (31 RT 8087, 8089; 32 RT 8117.) As she regained consciousness, appellant was cutting off her shorts and underwear. (31 RT 8090.) He put his fingers in her anus, lowered his zipper, crawled on top of her, and put his penis in her vagina. (31 RT 8088, 8090; 32 RT 8113.) As appellant raped Yolanda, he said to her, "Since you didn't want to willingly, now you're gonna get fucked up." (31 RT 8091.) Yolanda was screaming for her husband as appellant raped her. (32 RT 8115.)[2]

When appellant finished raping her, he taped a bandanna over her mouth with gray duct tape and told her that if she moved he would strangle her. (32 RT 8118-8120.) Appellant left the trailer to get Jack and Areli. (32 RT 8210.) Yolanda struggled with her hands and feet and was able to untie herself and remove the bandanna from her mouth. (32 RT 8120.) She did this by kicking off one of her tennis shoes, which was later found in appellant's trailer. (32 RT 8121.) Yolanda undid the chain around her

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[2] Even when pushed by defense counsel, Yolanda reaffirmed that appellant "did introduce his penis there." (32 RT 8187, 8190.)

neck, grabbed a knife from the kitchen to defend herself, and ran outside. (32 RT 8122.) Not seeing her children, she ran to the Parnell Family home. (32 RT 8122.) She knocked on the family's window and got the attention of Dorothy Parnell, who let her in. (32 RT 8124.) Yolanda said that her children had been taken, and Dorothy called the police. (32 RT 8125.)

D. Police Response

Debra Smith, a police dispatcher with the Placer County Sheriff's Office, testified that the call from Dorothy Parnell came in around 9:15 p.m. (29 RT 7633-7634, 7639.) Dorothy reported that a woman was at her door, screaming and crying hysterically, and saying that she had been raped by a worker on the ranch. (29 RT 7637-7638.) Smith could hear screaming and crying in the background. (29 RT 7638.) Smith, who did not speak Spanish, turned the call over to a bilingual dispatcher, Virginia Ferral, who spoke to Yolanda. (29 RT 7640.) Yolanda told Ferral that she had been beaten, tied with a rope, chained to a bed, and raped, and that her children and husband were missing. (29 RT 7648-7650.) Yolanda told Ferral that "Arturo" had done this to her, and used the term "con-cuno" to describe her assailant, which translates to "my husband's brother-in-law." (29 RT 7649, 7651.)

Deputies Kurt Walker, Randy Owens, and Mark Reed, and Detectives Bill Summers and Diana Stewart were dispatched to the ranch. (29 RT 7643.) Ferral stayed on the line with Yolanda until Walker arrived at 9:24 p.m. (29 RT 7643, 7651.) Walker met with Yolanda, who was covered in blood and had serious injuries to her face, and she again described appellant's attack. (29 RT 7754-7755.)

Detective Stewart, who arrived shortly thereafter, described the scene when she arrived at the ranch:

> Yolanda was very hysterical, she was crying, she was upset, her face, her neck, was extremely beaten, bloody, there was blood

> coming out of her right ear, her face was swollen, her features were distorted. She was extremely upset, yelling and crying and very difficult to calm down. She had duct tape throughout, wrapped throughout her hair. She had a bandanna that was tied around her neck and around her hair. She had marks, rope marks, around her ankles, her wrists, her throat.

(30 RT 7837.) Stewart observed that Yolanda's underwear had been cut open around her genitals, and the underwear was pulled up around her waist. (30 RT 7839.)

Through Ferral, Yolanda described her attack to Detective Stewart. (30 RT 7895.) She said she was beaten, dragged, and sexually assaulted by appellant, and that she had lost consciousness for part of the attack when appellant tied a rope around her neck. (30 RT 7895.) Her children had been crying and screaming for her while she was being attacked, but she had not seen them since appellant took them away from the trailer. (30 RT 7898.)

E. Investigation and Search for Appellant

Deputies Walker, Murchison and Reed went to appellant's trailer around 9:30 p.m. to search for appellant. (30 RT 7777.) The trailer was empty, but they found a loaded .22 caliber rifle under appellant's bed, a 30.06 caliber rifle on a shelf, and ammunition for both weapons. (30 RT 7783-7785, 7810.)

Detective Summers arrived at ranch around 10:40 p.m. and spoke to the officers at the scene and to the Parnell family. (29 RT 7674, 7681.) Still unclear as to appellant's identity or appearance, Detective Summers and Deputy Reed conducted a brief search of appellant's trailer that night to benefit the ongoing manhunt. (29 RT 7691.) In the trailer and the screened-in porch area around it, Summers observed wadded gray duct tape, a roll of duct tape, and pieces of cut cord that matched the materials used to bind Yolanda. (29 RT 7703, 7707.) The officers found a checkbook on the

floor of appellant's trailer containing Jose's California driver license and bank card. (29 RT 7709, 7711.) To aid in identifying the culprit, Summers also seized vehicle registration papers bearing appellant's name, as well as an envelope containing tax documents. (29 RT 7712.)

Deputy Desiree Carrington executed a search warrant of appellant's trailer around 1:30 p.m. the next day. (32 RT 8201-8202.) Officers collected two more wadded pieces of duct tape from the trailer, a broken wooden shovel handle from the grass outside the trailer, a leash, a pair of blood-stained scissors, six knotted pieces of red twine that had been cut, Yolanda's white tennis shoe, a roll of duct tape near the bed, and several boxes of ammunition. (32 RT 8204-8210, 8216-8220.) They also found a pair of boots underneath appellant's bed that contained Jose and Juan's wallets, a watch, and a gold chain. (32 RT 8226, 8229.) Jose's wallet contained $114 in cash, while Juan's wallet had $33 in U.S. currency and $80 in pesos. (32 RT 8230.) None of these items had dirt on them. (32 RT 8232.) Yolanda identified the chain and watch as belonging to Juan and Jose. (32 RT 8128-8129.)

In the yard outside the trailer, officers found an overturned chair, numerous pieces of duct tape, two pieces of rope, a silver chain with a black strap, and a golf club. (33 RT 8267-8268, 8271-8273.) Underneath the trailer, the officers found Yolanda's green shorts and belt that appellant had cut off. (33 RT 8278.) Outside the door of the trailer, officers found three spent .22 caliber shell casings (33 RT 8278

During a walk-through of the previous day's attack, Yolanda pointed out the direction where she had last seen Jose and Juan. (29 RT 7662-7663.) Officers began searching in that direction, and technician Jane Xepoleas found a piece of rolled-up duct tape in the middle of a pasture. (33 RT 8309.) The tape had long, dark hair attached to it that was consistent with Areli's hair. (33 RT 8343; 34 RT 8455; 41 RT 9558.)

Using search dogs, officers proceeded to a manmade clearing in the middle of a berry patch, about a quarter mile from appellant's trailer. (33 RT 8353, 8355.) There was a rectangular area of freshly moved dirt, about six feet long by two feet wide, that the officers took to be a grave site. (33 RT 8357-8358; 34 RT 8511.) A blood-spattered shovel head (with the handle broken off) was next to the grave. (33 RT 8359; 34 RT 8471; 41 RT 9615.) A second full-length shovel was found nearby. (34 RT 8474.)

Technicians excavated the suspected grave site and discovered the bodies of Jack, Areli, Juan, and Jose, stacked on top of each other. (34 RT 8484-8501.) Jose and Juan had visible gunshot wounds to the head, while Jack and Areli had wet mud beneath their nostrils, suggesting they had asphyxiated. (34 RT 8495.) Technicians were unable to locate any shell casings around the grave, but they found a .22 caliber casing inside the grave. (33 RT 8311; 34 RT 8509.)[3]

F. Manhunt and Arrest

When Ted Perez, a cashier at Longs Drugs in Auburn, saw the evening news on Monday, July 13, he recognized appellant as a customer who bought a shirt from him that morning and asked for quarters for the pay phone outside. (35 RT 8812-8813, 8828.) Appellant reentered the store 15 minutes later and bought a cowboy hat. (35 RT 8813.) Appellant was captured on store surveillance footage. (35 RT 8818.)

A search of the call records from the pay phones outside Longs Drugs revealed that appellant had called friends and family in Los Angeles and Orange County, including his sister Beatrice. (37 RT 8901, 8974.) Through Beatrice, they tracked appellant to the home of Josefina Torres in Wilmington, California, near Long Beach. (37 RT 8992-8994.) Around

[3] During the trial, the jurors, lawyers, and judge visited Parnell Ranch and the grave site. (36 RT 8870- 8878; 8 CT 2214.)

8:30 p.m. on July 15, 1998 (3 days after the murders), a team of FBI agents and local law enforcement arrested appellant at that location. (37 RT 9007.) A bag was recovered from the residence containing appellant's jeans and socks, as well as the shirt and cowboy hat he bought at Longs Drugs. (37 RT 9035; 39 RT 9215.)

G. Appellant's Multiple Confessions

FBI Special Agent Elizabeth Stevens and Officer Dennis Robbins transported appellant to the Long Beach police station. (37 RT 9057.) On the way, appellant asked Stevens what he was being charged with, and when she told him four murders and a rape, he admitted the murders but denied raping Yolanda. (39 RT 9311.) He also admitted that he was planning on fleeing to Mexico the next day. (39 RT 9311.)

At the police station, appellant was given his *Miranda* warnings, after which he again confessed to murdering Jack, Areli, Juan, and Jose. (39 RT 9314-9315.) His exact words were "the homicides are true." (39 RT 9316; 42 RT 9748.) Appellant said that Jose had arranged to pick appellant up on Sunday to take him to Sacramento for his I.N.S. meeting the next day. (39 RT 9316.) But when Juan and Jose arrived, they accused appellant of cheating on their sister, Isabel. (39 RT 9320.) A heated discussion ensued, and appellant shot the men with his rifle. (39 RT 9324.) He then dragged their bodies about a hundred feet into a blackberry thicket and buried them. (39 RT 9324.) He returned to the trailer, where he beat Yolanda. (39 RT 9325.) He then walked Jack and Areli out to the hole, hit them in the head with a stick, and buried them with Juan and Jose. (39 RT 9324, 9326.) After he finished burying the bodies, he headed back to the trailer, but seeing police cars and search lights, he ran across the pasture and watched from a nearby hill. (39 RT 9326-9327.) During the interview, appellant was calm and did not appear nervous. (39 RT 9312.)

Appellant was then transported back to Placer County, where he again confessed to killing Jose, Juan, Jack, and Areli, and beating, binding, and digitally penetrating Yolanda. (Supplemental CT ("SCT") 46-107 [People's Exh. 281A]; 37 RT 9063; 42 RT 9764.) He told officers he duct-taped the children's mouths before he led them out to the grave site because they were screaming for their mother. (SCT 90; 42 RT 9787.) Appellant also admitted that he had planned the murders for "about a week" and had dug the mass grave on "Monday or Tuesday" of the week before the murders. (SCT 90, 103;42 RT 9792.) This was consistent with Detective Summers' observation that the blackberry vines around the grave were cut and "withered" by the time officers discovered the gravesite on Monday, July 13. (34 RT 8461.) Appellant came up with the plan to kill the Martinez family even earlier, but he "didn't have the courage to do it." (SCT 102.) He also admitted he dug the grave deep enough so that it could fit Yolanda's body as well. (SCT 89.) A videotape of the Placer County confession was played for the jury, and a transcript was distributed to them. (42 RT 9769-9777.)

Appellant likewise admitted the killings to his cousin, Pablo Juarez, who drove him from Sacramento to Stockton, where he hopped on a Greyhound bus to Long Beach. (37 RT 8983; 38 RT 9090, 9096.) Appellant also confessed the crimes to Josefina Torres when he arrived at her house in Wilmington. (39 RT 9240, 9244.)

H. Forensic Evidence

1. Autopsies

Dr. Donald Henrikson, a forensic pathologist, performed autopsies of Jack, Areli, Juan, and Jose. (34 RT 8572-8573.) Jack suffered multiple skull fractures, blunt force trauma to his upper back and chest, and abrasions on his face and arms. (34 RT 8575-8576, 8582-8583, 8588,

8591.) One of Jack's shoulder injuries was caused by a tubular instrument, such as a shovel handle. (35 RT 8652-8653.) He had residue from duct tape on his face, legs, and wrists, and his mouth and bronchial tree were filled with moist dirt, similar to that found under his nose. (34 RT 8576, 8580, 8598.) From these injuries, Dr. Henrikson concluded that appellant hit Jack in the head at least eight times, but that Jack's head wounds alone probably would not have killed him. (34 RT 8600, 8603.) Instead, Jack was still alive when buried and died of asphyxiation. (34 RT 8602.)

Areli's autopsy revealed contusions and abrasions to her legs, arms, trunk, and head, including at least three skull fractures. (34 RT 8605, 8613.) She had residue from duct tape along her chin and jaw, as well as on her wrists and ankles. (34 RT 8608-8611.) Even after being transported from the crime scene, Areli's hand was still tightly clenched around a twig. (34 RT 8605.) Dr. Henrikson also found mud in both her upper and lower airways and concluded that she died of asphyxiation from being buried alive, rather than from her head injuries. (34 RT 8616-8617.) Dr. Henrikson concluded that it took Jack and Areli "a few minutes" to die once buried. (34 RT 8618.)

Jose's autopsy revealed blunt force trauma to his head, trunk, right leg, and arms, as well as two gunshot wounds to his head. (34 RT 8618.) One shot was to the back of his head, and the second was over his left ear. (34 RT 8618.) Dr. Henrikson found soot deposits around both wounds, suggesting that the shots were fired from less than an inch away. (34 RT 8620-8622.) The shots to the head were the cause of death, Jose did not die immediately. (34 RT 8625.) The abrasions on Jose's back and arms suggested that he had been dragged to the grave. (34 RT 8619.) Dr. Henrikson also recovered two bullets from Jose's brain, which were consistent with a small caliber weapon like a .22 caliber rifle. (34 RT 8623-8624.)

Juan's autopsy revealed three gunshot wounds to the head, and minor blunt force trauma to the trunk and both arms. (34 RT 8628.) The contact wounds were to the back of his head, left side of his nose, and right side of his forehead. (34 RT 8628- 8630.) The shots were the cause of Juan's death, and Dr. Henrikson was able to recovered fragments of all three bullets. (34 RT 8631-8632.) These fragments were of the class and shared multiple points of similarity with test bullets fired from appellant's .22 caliber rifle, though the fragments were too damaged to conclusively state that they were fired from appellant's gun. (41 RT 9576-9578.)

2. Yolanda's SART examination

On the night of the attack, Detective Stewart took Yolanda to Auburn Faith Hospital. (30 RT 7841.) Sexual Assault Response Team nurse, Kim Marjama, noted Yolanda's injuries in her report: (1) severe swelling, bruises, and lacerations on her head, mainly on the left side of her face; (2) two black eyes; (3) two swollen lips; (4) dried blood and large contusions on her ears; (5) contusions along her jaw bone and a bright red linear abrasion encircling her entire neck; (6) four layers of duct tape stuck in her hair; (7) multiple abrasions to both arms; (8) linear abrasions encircling her wrists and on her upper thighs; (9) multiple contusions to her knees; and (10) abrasions on her ankles and feet. (31 RT 7968-7983.)

During the pelvic exam, Nurse Marjama noticed several types of vaginal trauma: (1) marked bilateral edema (swelling) to her labia; (2) an "obvious 4-millimeter divot from her right inner labia" where tissue was removed; (3) marked edema and contusions to the periurethral area; and (4) a 5-millimeter abrasion on her posterior fourchette, between her anus and vagina. (31 RT 7984-7987.) Marjama provided her expert opinion that Yolanda's injuries were consistent with blunt force trauma caused by penile penetration and digital penetration. (31 RT 7998.) In particular, "the erythema [swelling and redness] and abrasion in the posterior fourchette"

was consistent with penile penetration, while the divot on Yolanda's labia was "classically indicative of digital penetration." (31 RT 7998-7999, 8011.) Photographs were introduced showing Yolanda's injuries. (See e.g., 30 RT 7838.)

I. Ballistics and Blood

Department of Justice testing revealed that the spent shell casing found in the mass grave was fired from appellant's .22 caliber rifle. (41 RT 9588.) The three shell casings collected from outside appellant's trailer were also fired from his weapon. (41 RT 9590.) Appellant's fingerprints were found on the bandanna tied around Yolanda's neck and on pieces of duct tape recovered from the crime scene. (40 RT 9417-9418.)

DNA testing of blood stains on the scissors Yolanda used to free herself revealed that appellant could not be excluded as the source (1 in 21,000 frequency rate among Hispanics), and that the blood did not come from any of the five victims (including Yolanda). (41 RT 9709, 9727.) Appellant and Yolanda were both sources of the blood smear found on appellant's jeans, while Juan could not be eliminated as the source of blood on a shovel found near the grave. (41 RT 9713.)

Appellant's Guilt Case

Defense counsel admitted in his opening statement that appellant "took complete responsibility for everything he had done. And we, as his attorneys, will respect that." (29 RT 7631.) Instead of contesting appellant's guilt, defense counsel portrayed appellant as a nice person who "snapped" due to his loneliness from living away from his family. (48 RT 10374-10375.)

Defense counsel aggressively cross-examined the prosecution's witnesses, filed and won several motions in limine to exclude incriminating evidence, and called four witnesses: Yolanda, Detective Stewart, Dr.

Thomas Rogers (on the SART exam), and Dr. Carol Meredith (on transcription errors in appellant's interview). (45 RT 9941-9982.)

Appellant's cousin testified that appellant seemed remorseful when he confessed to killing the four victims. (38 RT 9111-9112.) Josefina Torres also said that appellant was sad, nervous, and remorseful when he arrived at her home on July 14, 1998. (39 RT 9240.) Torres added that appellant told her before the murders that he was having trouble with his in-laws, and that he was considering suicide. (39 RT 9220-9221.) Torres also testified that appellant had complained about headaches, nervousness, and sleeplessness in the years leading up to the murders. (39 RT 9248.) Appellant echoed these complaints to officers when interviewed at the Long Beach police station. (39 RT 9323.)

People's Penalty Case

Yolanda was the only penalty phase witness called by the prosecution. (12 CT 3113; 56 RT 11010.) She testified that she had known Jose for 10 years when he died at the age of 37. (56 RT 10987-10988.) He was a generous man who loved to play with Jack and Areli, and who had been planning to start his own business. (56 RT 10988-10989.) Juan was 27 and living with the Martinez family when he was killed. (56 RT 10985.) He also loved to play with Jack and Areli, and Yolanda missed both men a lot. (56 RT 10986-10987.)

Areli was three and Jack was five when they were killed. (56 RT 10996.) They were very affectionate and protective of each other. (56 RT 10996.) Jack liked school, liked to go to park and play on the swings, and liked to run and shout like any healthy kid. (56 RT 10997.) Areli loved to be with Jack and would get sad when he left for school. (56 RT 10996.) Areli liked going to McDonald's and playing with toys. (56 RT 10997.)

Yolanda was haunted by her inability to protect her children from appellant and by the look of desperation on their faces as she was being

beaten. (56 RT 10999.) She wished she could turn back time and give her life for them. (56 RT 10999.) When she was told that her family had been killed, she could not accept it and thought she was in a nightmare. (56 RT 10993.) She felt like her life had no meaning, and she was filled with desperation. (56 RT 10993.) When Yolanda returned home, she felt alone and hopeless, and she struggled financially. (56 RT 10994.) She missed everything about her family—their presence, the security she felt having Jose by her side. (56 RT 11009.) Defense counsel did not ask Yolanda any questions. (56 RT 11010.)

The prosecution also introduced a photo of the Martinez family, a photo of Jack and Areli with Juan, and a videotape that Yolanda made of the children playing just hours before appellant killed them. (12 CT 3113; 56 RT 10987-10988, 10997.)

Appellant's Penalty Case

Appellant's defense team presented testimony from 23 relatives, friends, and experts describing appellant's tough childhood in Santa Gertudis, Mexico, and his various acts of kindness and generosity over the years.

A. Appellant's Mother

Appellant's mother, Maria Suarez Aguilar, testified that appellant was the second youngest of her nine living children. (57 RT 11086, 11141.) Appellant's father, Tomas Juarez Gonzalez, drank almost every day and sometimes abused her, though he never caused her to bleed or bruise. (57 RT 11087.) Maria said that Tomas would also yell at the kids, including appellant, but he never hit them. (57 RT 11094, 11101.) At one point, Tomas' drinking and abuse was so bad that her son, Abundio, took her and

the kids to Mexico City to stay with him. (57 RT 11087-11088.) She said that appellant was too young to notice what was happening. (59 RT 11460.)

Maria said that food was sometimes scarce in the house, but the kids never went more than a day without food. (57 RT 11092, 11143.) The house did not have indoor plumbing when appellant was young, and appellant did not have access to a doctor or dentist. (57 RT 11105, 11138.) That was typical of life in Santa Gertudis. (57 RT 11105.) Appellant started school around six and began working when he was nine or ten; he gave his work wages to his parents. (57 RT 11093, 11130.)

Tomas stopped drinking when appellant got older, and appellant would visit his parents without incident whenever he returned from working in the United States. (57 RT 11104, 11128.) When appellant came home, he would bring presents for his family, help raise animals, and spend time with his wife and daughters. (58 RT 11209-11211, 11224.) He also sent money back to his family when he was working in California and helped a brother financially when his son got leukemia. (57 RT 11094; 58 RT 11217.) Maria said that she still loved appellant. (57 RT 11098.)

B. Appellant's Siblings

Appellant's oldest brother, Benjamin, testified that their father would hit his mother when he was drunk. (57 RT 11139.) Benjamin noted that the family was hit hard when Abundio drowned because he had always looked after everyone and tried to protect the other children. (57 RT 11151.) When Tomas was not drunk, he would make sure that the family had enough food and never lacked for anything. (57 RT 11172.) Tomas also tried to teach his children the difference between right and wrong, and told them not to steal. (57 RT 11172.) Benjamin never saw his father abuse appellant. (57 RT 11175.) Benjamin also said that the family moved into a nicer house when appellant was about 10, a house with running water and electricity. (57 RT 11167-11168.) At that point, the family also owned

a cow, which provided milk for the family. (57 RT 11166.) Benjamin had worked with appellant in Mexico and at a vineyard in California, and he described appellant as a good worker. (57 RT 11152.)

Appellant's sister, Beatriz, who was closest in age to appellant, echoed Benjamin's testimony, saying they had plenty to eat by the time she and appellant were growing up because their older brothers were working and sending the family money. (59 RT 11417.) She also never saw her father hit any of the children. (59 RT 11417.) Another brother, Silviano, suggested that Tomas was actually a happy drunk who disciplined the children only when they did something wrong. (58 RT 11252.)

Still other siblings had a different recollection of their father, testifying that he was a drunk who would sometime hit their mother and yell at the children. (See, e.g., 58 RT 11211; 59 RT 11407.) Appellant's brother, Daniel, testified that Tomas hit him with a rope or a stick when he was a child. (60 RT 11508.) He claimed he rescued appellant from their father several times and saw appellant cry when Tomas hit him on other occasions. (60 RT 11509.)[4] One of appellant's sisters-in-law saw Tomas go after Abundio with a knife when the boy was 18, but Abundio was able to disarm his father without suffering any injuries. (58 RT 11302.) Appellant's sister, Maria, claimed that Tomas beat her with a whip. (64 RT 12026.) She also claimed that Tomas had tried to rape her when she was 14. (64 RT 12030.) He was drunk, and she was able to escape. (64 RT 12030.) She married at 14 to get out of the house. (64 RT 12033.) She said that when Tomas was not drunk, he was a loving father to his children. (64 RT 12036.)

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[4] Daniel admitted he lied to a prosecution investigator when questioned before trial. (60 RT 11543, 11570.)

Appellant's brother, Isaias, described appellant as a loving boy who was very friendly with other kids. (58 RT 11209.) Appellant would be frightened and sad when their father became violent. (58 RT 11213.) Isaias also claimed that Tomas hit appellant several times when appellant was a child, and he recalled Tomas calling the kids "stupid jerks" and "lazy bastards." (58 RT 11213, 11225.)

Another sister, Celia, testified that, during one drunken fight, their father threw a glass at a window. (59 RT 11447.) A small piece of broken glass cut on her back, though the cut did not require stitches. (59 RT 11447, 11460.) Other than that incident, Celia never saw Tomas hit any of the kids. (59 RT 11457.)

None of appellant's siblings testified to long-term physical or psychological ailments related to their childhood. However, Beatriz did testify that appellant was not his usual self when he visited in April 1998. (59 RT 11412.) He was sad and moody during the visit, but he sounded very happy when they spoke on the phone the next month. (59 RT 11412, 11423.) Similarly, Daniel said that appellant seemed different when they spoke in March of 1998. (60 RT 11524.) Appellant had denied that anything was wrong, though he mentioned having headaches and some back pain. (60 RT 11524.)

C. Appellant's Wife and Daughter

Appellant's wife, Maria Isabel Juarez de Martinez, testified that she was born in Santa Gertrudis and met appellant through her brothers, Juan and Jose. (60 RT 11615-11616.) She and appellant started to date in 1988, when appellant was working seasonally in the United States. (60 RT 11619, 11621.) Isabel got pregnant with their first daughter, Liliana, in 1990, and she and appellant got married later that year. (60 RT 11623, 11626.) Arturo continued to work seasonally in the U.S., and Isabel and Liliana joined him in Ione, California in May 1991. (60 RT 11630, 11632.) In

1992, Yolanda and Jose also came to Ione and moved into an apartment next door. (64 RT 11904.) Later that year, Isabel and appellant had a second daughter, Jessica. (64 RT 11906.) They then moved to the Parnell Ranch in Auburn, but the family returned to Mexico in 1995 due to Isabel's medical problems. (64 RT 11906, 11913.) Thereafter, appellant would travel to the ranch alone each year as a seasonal worker. (64 RT 11913.) He sent money to Mexico every three weeks, or as Isabel needed. (64 RT 11917.)

Isabel said that appellant had complained about sleeplessness and headaches before 1998. (64 RT 11919.) In 1998, Isabel brought up the idea of separating, but appellant would not agree to it. (64 RT 11919.) They resolved the issue in April 1998, and did not discuss the subject after appellant returned to Parnell Ranch. (64 RT 11921.)

On cross-examination, Isabel said that appellant drank a lot when back in Mexico and spent most of his money partying with his friends. (64 RT 11928.) This created friction in their marriage. (64 RT 11928.) She also said that the Suarez children got along well with their parents, and most either lived nearby or visited frequently. (64 RT 11932.)

Appellant's 10 year-old daughter, Liliana, testified that she loved her father. (65 RT 12089.)

D. Educational History

Guibaldo Rodriguez Huante, a family friend in Santa Gertudis, testified that appellant went to school from age six to 15. (58 RT 11328.) Appellant's former teacher and the town mayor, Martin Orozco Rodriguez, testified that he taught appellant for three of those years. (58 RT 11334.) Appellant studied mathematics, English, natural science, social science, art, and carpentry, he got very good grades, and he was well-behaved. (58 RT 11335; 59 RT 11352-11354, 11357-11359, 11372.) Orozco described appellant as clean, neat, and well cared for as a child. (59 RT 11382.)

The defense introduced appellant's school records, which showed that some teachers were concerned about his family situation. (12 CT 3210; 59 RT 11348.) The defense also introduced a training certificate showing that appellant had received training for construction work in Mexico. (60 RT 11521.)

E. Expert Testimony

Dr. James Esten described what appellant's life would be like if sentenced to life in prison without possibility of parole, based on appellant's lack of disciplinary write-ups while housed at the Placer County and Napa County jails. (67 RT 12436, 12454, 12476-12486, 12504.)

Dr. Patricia Perez-Arce, a clinical psychologist, discussed the role of family in Mexican households and opined that appellant's father's alcoholism prevented Tomas from fulfilling the role traditionally played by the Mexican father. (67 RT 12544, 12550.) This brought shame to the family and could have affected the emotional and social development of Tomas's children. (67 RT 12550-12551.) Dr. Perez-Arce also discussed the plight of migrant workers, some of whom experience loneliness when isolated from their families in Mexico. (67 RT 12561-12562, 12598.)

The prosecution did not present any rebuttal evidence. (67 RT 12602.)

ARGUMENT

I. DEATH QUALIFICATION OF THE JURY DID NOT VIOLATE APPELLANT'S RIGHTS TO EQUAL PROTECTION AND A REPRESENTATIVE JURY

Appellant asserts that the process of death qualifying the jury violated his rights to equal protection and a representative jury and created an "unconstitutional death penalty scheme." (AOB 73.) However, as appellant concedes, defense counsel did not object on these grounds before the trial court. (AOB 108.) Thus, appellant's claim is forfeited on appeal.

(*People v. McKinnon* (2011) 52 Cal.4th 610, 636 [applying forfeiture rule to death qualification challenges].)

Nonetheless, as appellant also admits, this Court has "continued to uphold the constitutionality of death qualification." (AOB 81-82; see *People v. Chism* (2014) 58 Cal.4th 1266, 1286; *People v. Taylor* (2010) 48 Cal.4th 574, 603.) The United States Supreme Court is in accord, ruling in *Lockhart v. McCree* (1986) 476 U.S. 162, 176-177, that "'*Witherspoon*-excludables' do not constitute a 'distinctive group' for fair-cross-section purposes [and thus] 'death qualification' does not violate the fair-cross-section requirement." Appellant fails to provide a compelling reason to deviate from these holdings, and his claim should be rejected.

II. DEATH QUALIFICATION VOIR DIRE DID NOT VIOLATE PROSPECTIVE JURORS' CONSTITUTIONAL RIGHTS, NOR WAS TRIAL COUNSEL INEFFECTIVE IN FAILING TO RAISE THIS MERITLESS OBJECTION

Appellant next claims that the death qualification process violated not just his own constitutional rights but those of the prospective jurors excused during voir dire. (AOB 97.) This claim fails for at least three reasons.

First, appellant admits that defense counsel did not raise this objection before the trial court. (AOB 108.) Thus, the issue is forfeited on appeal. (*McKinnon*, *supra*, 52 Cal.4th at p. 636.) Second, appellant lacks standing to assert a death qualification claim on behalf of prospective jurors. He fails to cite any cases upholding standing for such a claim, instead relying on the inapposite ruling in *Powers v. Ohio* (1991) 499 U.S. 400, 410-415. (AOB 99.) In *Powers*, the Supreme Court held that a criminal defendant has standing to raise the equal protection rights of a juror excluded from service on the basis of his or her race, even if the excluded juror and the defendant do not share a racial identity. (499 U.S. at pp. 410, 416.) In so doing, the high court made clear that it was recognizing a narrow exception to the general rule that "a litigant must assert his or her own legal rights and

interests." (*Id.* at p. 410) The court found an exception appropriate because "the intrusion of racial discrimination into the jury selection process damages both the fact and the perception" of the jury's role as a "check against the wrongful exercise of power by the State and its prosecutors." (*Id.* at p. 411.) Such racial discrimination subjects an excluded venireperson to "a profound personal humiliation" and weakens the confidence that both jurors and defendants feel in the court system and its verdicts. (*Id.* at pp. 413-414.) The elimination of this racial discrimination from the courtroom—the ill at the heart of the 14th Amendment—was of "common interest" to both the excluded juror and the criminal defendant, and thus supported a broad interpretation of standing in that case. (*Id.* at pp. 413, 415.)

However, subsequent rulings from the Supreme Court have clarified that *Powers*' analysis does not apply to the death qualification context. For example, in *Lockhart*, the high court noted:

> The group of "*Witherspoon*-excludables" involved in the case at bar differs significantly from the groups we have previously recognized as "distinctive." "Death qualification," unlike the wholesale exclusion of blacks, women, or Mexican-Americans from jury service, is carefully designed to serve 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. There is very little danger, therefore . . . that "death qualification" was instituted as a means for the State to arbitrarily skew the composition of capital-case juries.

(476 U.S. at pp. 175-176.) Unlike racial minorities and women, the court continued, "'*Witherspoon*-excludables' are singled out for exclusion in capital cases on the basis of an attribute that is within the individual's control," namely, their declared inability to follow the law or the court's instructions. (*Id.* at p. 176.) "Because the group of '*Witherspoon*-excludables' includes only those who cannot and will not conscientiously

obey the law with respect to one of the issues in a capital case, 'death qualification' hardly can be said to create an 'appearance of unfairness.'" (*Ibid.*) Because the removal of a prospective juror during the death qualification process bears no resemblance, in kind or severity, to the interests at issue in *Powers*, appellant should not be granted standing to assert a constitutional or statutory deprivation on behalf of an allegedly aggrieved juror.

Moreover, even if appellant *does* have such standing, there is no error to be remedied because the right asserted is not as absolute as appellant would have it. Again, *Lockhart* is instructive. While appellant is certainly correct that "jury service is a hard-won and cherished right in this country" (AOB 97), the Supreme Court held in *Lockhart* that "the removal for cause of '*Witherspoon*-excludables' . . . leads to no substantial deprivation of their basic rights of citizenship." (476 U.S. at p. 176.) This is because the removal is based on their asserted inability to follow the law as dictated by the trial court, and because their removal "in capital cases does not prevent them from serving as jurors in other criminal cases." (*Ibid.*) Appellant's only support to the contrary comes from dissenting opinions. (See AOB 98, 102.)

In fact, appellant's argument, if taken to its logical extent, would dismantle the entire system of challenges for cause and peremptory challenges. He asserts that four jurors (Solari, Underwood, Tucker, and Angolini) were removed in violation of their statutory and constitutional rights, even though each said they could not vote for the death penalty under any circumstances. (AOB 101; see 4 SCT 830 [Solari]; 24 SCT 6203 [Underwood]; 23 RT 6433 [Tucker]; 21 SCT 5446 [Angolini].) Thus, despite refusing to follow the law or the judge's instructions (a disqualifying a factor under Code Civ. Proc., § 225, subd. (b)(1)(C)), these four jurors had the right, according to appellant, to serve on a capital jury so

long as they wanted to. This new rule announced by appellant must apply with equal force to all jurors and to both parties, thus foreclosing appellant's claims regarding the supposedly death-prone jurors challenged in Argument IV. The absurdity of this position is readily apparent, as "nothing in [the holdings of this Court or the Supreme Court] suggests that the right to a representative jury includes the right to be tried by jurors who have explicitly indicated an inability to follow the law and instructions of the trial judge." (*Lockett v. Ohio* (1978) 438 U.S. 586, 597.) As such, appellant's claim fails.[5]

III. APPELLANT FORFEITED HIS CLAIMS REGARDING THE CONSTITUTIONALITY OF JUROR DEATH QUALIFICATION

As explained above, appellant's claims regarding death qualification are forfeited because he failed to raise them before the trial court. (*McKinnon*, *supra*, 52 Cal.4th at p. 636.) In fact, defense counsel was actively engaged in developing the death qualification questionnaire and the process to be used, stating at one point that he "didn't have any problem with it." (7 RT 5383; 18 RT 5433.)

Appellant attempts to avoid this forfeiture by claiming that any objection would have been futile because the claims are foreclosed by binding precedent. Respondent agrees that, in addition to forfeiture, another possible avenue to dismissal of appellant's claims is to recognize that *Lockhart*, *supra*, 476 U.S. at pages 174-177, directly addresses and rejects both of appellant's arguments.

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[5] Because this claim is foreclosed by binding precedent, defense counsel was not constitutionally ineffective for failing to object on this basis. (*People v. Ochoa* (1998) 19 Cal.4th 353, 463 [counsel not ineffective for failing to make fruitless or meritless objections]; *People v. Jackson* (1989) 49 Cal.3d 1170, 1189 [same].)

IV. THE TRIAL COURT ACTED WITHIN ITS BROAD DISCRETION IN DENYING APPELLANT'S CHALLENGES FOR CAUSE AND GRANTING THE PROSECUTION'S CHALLENGE FOR CAUSE

Appellant contends that the trial court abused its discretion and prevented appellant from receiving a fair trial when it failed to excuse 16 prospective and seated jurors for cause and removed a supposedly life-prone juror for cause. (AOB 109-135.) Appellant did not preserve this issue for appeal because he did not exhaust his peremptory challenges or express dissatisfaction with the panel of jurors ultimately sworn. Further, the trial court was in the best position to evaluate the prospective and seated jurors' responses in voir and did not abuse its discretion in resolving the parties' challenges for cause.

A. Appellant's Claim Is Forfeited

To preserve a claim of error based on the denial of a challenge for cause, appellant must show that: (1) he used a peremptory challenge to remove the juror in question; (2) he exhausted his peremptory challenges or can justify failure to do so; *and* (3) he objected to the jury as finally constituted.[6] (*People v. Mills* (2010) 48 Cal.4th 158, 186.)

To begin, appellant used peremptory challenges to remove only six of the 16 prospective jurors he now contests: Barbara Thompson, Deanna Harrison, Arlene Phillips, Walt Hoyer, William Allen, and Forrest Murray. Where a defendant peremptorily challenges prospective jurors, he has no claim with respect to those jurors under *Witherspoon/Witt* since their exclusion renders a claim of erroneous inclusion moot. (*People v. Mason* (1991) 52 Cal.3d 909, 954.) Second, appellant used only 10 of his 20

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[6] The lack of express dissatisfaction with the jury serves as a forfeiture bar in cases where the trial occurred after the decision in *People v. Crittenden* (1994) 9 Cal.4th 83. (*People v. Bivert* (2011) 52 Cal.4th 96, 114.) Appellant's trial took place in 2001, well after *Crittenden* put defendants and their counsel on notice of the rule.

allotted preemptory challenges (and one additional challenge—of Deanna Harrison—while selecting alternates), while the prosecution exercised nine challenges.[7] (28 RT 7475-7483.) Finally, appellant did not object to the jury as finally constituted. Because appellant fails all three prongs of the conjunctive test for 10 of the challenged jurors, and two prongs for the remaining six contested jurors, his claims are not preserved.

Appellant argues that the forfeiture rule is not "iron-clad" (AOB 127), citing *People v. Davis* (2009) 46 Cal.4th 539, 581, for the proposition that "the existence of unused peremptory challenges strongly indicates defendant's recognition that the selected jury was fair and impartial." (AOB 127.) This argument fails for two reasons. First, the quotation, on its face, *supports* the notion that a failure to object demonstrates one's satisfaction with the jury and precludes a challenge on appeal. Second, the quoted excerpt is not taken from a *Witherspoon* analysis of the death qualification process; that language was used in analyzing the trial court's denial of a change of venue motion. (*Id.* at pp. 578-581.) In that context, this Court was merely noting the unused peremptories as additional evidence that a change of venue was not required. For both of those reasons, the quoted language from *Davis* should not be read as calling into question the strict forfeiture rule announced the next year in *Mills*.

Nor is there any doctrinal basis for appellant's analysis of the prospective jurors remaining in the venire when jury selection concluded. Courts have eschewed a highly speculative analysis and have instead chosen to apply a strict rule of forfeiture to such claims. As this Court explained in *People v. Hoyos* (2007) 41 Cal.4th 872, 904:

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[7] Appellant struck jurors Flo, Dejesus, Hoyer, Allen, Phillips, Owen, Hogan, Murray, Thompson, Kesselring, and Harrison. The prosecution struck jurors Burkholder, Anderson, La Liberte, Edenborough, O'Neill, Marcaurele, Gehb, Rew, and Hagler.

> [Appellant] asserts that our discussion in *People v. Johnson* [(1989)] 47 Cal.3d [1194] at pages 1220-1221, concerning the dynamic nature of the process of exercising peremptory challenges, somehow undermines the exhaustion requirement. Defendant is mistaken. Our discussion in *Johnson* addresses how a party with fewer remaining peremptory challenges might exercise them more sparingly, but this does not relieve defendant of the exhaustion requirement in order to preserve his claim.

(Abrogated on another ground by *McKinnon*, *supra*, 52 Cal.4th at p. 643 [reaffirming the rigidity of the forfeiture rule].) In arguing that *Johnson* "undermines these rigid rules," appellant fails to cite *Hoyos* or even acknowledge that this Court has already rejected his precise argument. (See AOB 132; see also *People v. Manibusan* (2013) 58 Cal.4th 40, 61 [rejecting speculative claim regarding relative preference of jurors and remaining venirepersons]; *Mills*, *supra*, 48 Cal.4th at p. 186 ["acceptance of this excuse would swallow the [exhaustion] rule entirely, for a defense attorney might in every case wish to hold challenges in reserve for strategic reasons"].)

Nor does that theory, introduced for the first time on direct appeal, find any support in the record or in the statements of trial counsel. (See *Hoyos*, *supra*, 41 Cal.4th at p. 904 [even assuming an argument about the relative preference for remaining venirepersons "could justify a failure to exhaust his peremptory challenges, it is mere speculation on this record"].) Because defense counsel was on notice of these requirements and failed to exhaust his peremptories or object to the constitution of the jury, the claim is not preserved for appeal.

B. The Trial Court Acted Within Its Discretion in Denying Appellant's Challenges for Cause

Assuming appellant's claim is not forfeited, it is meritless. Trial courts have broad discretion to determine the qualification of a juror who is

challenged for cause. (*People v. Whalen* (2013) 56 Cal.4th 1, 26.) A trial court may discharge a juror whose views on the death penalty "prevent or substantially impair the performance of his duties as a juror in accordance with the court's instructions and the juror's oath." (*Id.* at p. 25; *Wainwright v. Witt* (1985) 469 U.S. 412, 424.) Under this standard, a prospective juror is properly excluded in a capital case if he or she is unable to "conscientiously consider all of the sentencing alternatives, including the death penalty where appropriate." (*People v. McWhorter* (2009) 47 Cal.4th 318, 340.) "The analysis is the same whether the claim is the failure to exclude prospective jurors who exhibited a pro-death bias, or wrongful exclusion of prospective jurors who exhibited an anti-death bias." (*Whalen, supra*, 56 Cal.4th at p. 25; *Hoyos, supra*, 41 Cal.4th at p. 906.)

The trial court's decision is "seldom disturbed on appeal." (*People v. Rountree* (2013) 56 Cal.4th 823, 842.) Where a juror gives conflicting or equivocal responses to questions regarding his views on the death penalty, the trial court is in the best position to evaluate the juror's responses and demeanor, and its determination as to the juror's true state of mind is binding on appeal if supported by substantial evidence. (*Witt, supra,* 469 U.S. at pp. 428-430; *People v. Harris* (2005) 37 Cal.4th 310, 329.) "Hence, the trial judge may be left with the 'definite impression' that the person cannot impartially apply the law even though, as is often true, he has not expressed his views with absolute clarity." (*People v. DePriest* (2007) 42 Cal.4th 1, 21.)

This Court affirmed the broad discretion enjoyed by trial courts in *People v. McKinzie* (2012) 54 Cal.4th 1302. In *McKinzie*, a juror expressed preference for the death penalty in both his juror questionnaire and during voir dire. (*Id.* at p. 1343.) He indicated that first degree murder was a type of crime warranting the death penalty, and he did not think that the death penalty was imposed enough. "On a scale of 1 to 10, [the juror] marked

'10' regarding whether he believed there should be a death penalty law." (*Ibid.*) On his juror questionnaire, he stated that he was not open-minded about the penalty. (*Ibid.*) During voir dire, however, the juror said that he *could* keep an open mind and that the death penalty should not be "automatic"—though he continued to believe that someone would have to convince him not to vote for death if the defendant was convicted of first degree murder. (*Id.* at pp. 1344-1345.)

McKinzie appealed the trial court's denial of his challenge for cause, but this Court affirmed. (*McKinzie*, *supra*, 54 Cal.4th at p. 1346.) This Court noted that although the juror had expressed a preference for the death penalty, he also stated multiple times that he would not automatically vote for death and could consider both penalties. (*Ibid.* ["On this record, Juror No. 3 did not hold 'an unalterable preference in favor of the death penalty'"].)

Applying the foregoing principles to appellant's case, appellant fails to show that the trial court abused its discretion when it denied appellant's for-cause challenges of 16 prospective jurors. As outlined below, each juror indicated his or her ability to consider both possible penalties and all available evidence before making a decision. Moreover, appellant fails to acknowledge that the trial court also *granted* 19 of appellant's challenges for cause. (See 21 RT 5850 [David Stewart]; 21 RT 6041 [Barbara Lee]; 22 RT 6067 [James Barham]; 22 RT 6092 [Johnny Johnson]; 22 RT 6183 [Wendy Berry]; 22 RT 6206 [Regina Gottlieb]; 22 RT 6301 [Diana Hinrichs]; 23 RT 6367 [Jackie Potts]; 23 RT 6457 [Daniel Ordmonde]; 23 RT 6556 [Shailo Loyaperez]; 23 RT 6606 [Debra Opperman]; 23 RT 6619 [Robert Shawley]; 24 RT 6668 [Ann Marie Dearborn]; 24 RT 6687 [Diane Darnelle]; 24 RT 6787 [Jerilyn Masuda]; 24 RT 6867 [James Hull]; 27 RT 7202 [James Baumann]; 27 RT 7223 [Sherlyn Wagner]; 27 RT 7355 [Marshall Jaeger]; 27 RT 7422 [Marianne DeLong]; 27 RT 7437 [Frances

Heafner].) The parties also stipulated to the dismissal of nine other prospective jurors after voir dire. (See 21 RT 5882 [Eileen Powers]; 21 RT 5887 [Suzanne Brigham]; 21 RT 5921 [Pamela Hones]; 21 RT 5937 [Joseph Wood]; 24 RT 6662 [Gary Michaud]; 24 RT 6666 [Ronald Dack]; 24 RT 6781 [Jennie Sueyoshi]; 25 RT 6999 [Kathleen Shafer]; 25 RT 7019 [Martin Aldaco].) Viewed in this context, it is clear that the trial court carefully exercised its discretion to ensure that appellant was provided a fair, impartial jury.

1. Barbara Thompson

In her juror questionnaire, Barbara Thompson stated that the most important qualities for a juror in a capital case were "being able to listen and the objectivity to judge another person." (4 Supplemental Clerk's Transcript, Juror Questionnaires ("SCT-JQ") 858.) Thompson did not have "strong opinions" on the death penalty and thought that "sometimes it is appropriate for the crime . . . depend[ing] on the crime committed." (4 SCT-JQ 875.) She stated that life without the possibility of parole ("LWOP") could be appropriate for first degree murder "if the crime warrants it," and that she personally could vote for LWOP. (4 SCT-JQ 878, 880.) When asked to categorize her views on the death penalty, she checked Groups 2, 3, and 5, which covered a broad range of views on the practice. (4 SCT-JQ 883.) She further stated on the form that she would not *automatically* vote for either death or LWOP because "the verdict should fit the crime." (4 SCT-JQ 884.)

When questioned by the trial court, Thompson again stated that, depending on the circumstances of the case, she could vote for either LWOP or death. (21 RT 5816.) When asked about voting for death in a multiple murder case, she stated that would "have to hear all the facts before [she] made a decision like that." (21 RT 5821.)

Appellant challenged Thompson for cause, and in the denying the challenge, the trial court explained: "This is a classic situation in which the Court's evaluation of the demeanor and presentation of a witness—or a prospective juror during the voir dire process is important." (21 RT 5824.) Even when prompted to give definitive answers by defense counsel, Thompson's answers were "equivocal" and phrased as "probably" or "pretty much." (21 RT 5824.) Therefore, the trial court was satisfied that Thompson was "not a person who is automatically excluding the possibility of life without parole." (21 RT 5824.)

On March 8, 2001, defense counsel exercised a peremptory challenge to strike Thompson. (28 RT 7482.)

a. The Thompson claim is moot and meritless

To begin, appellant used a peremptory challenge to remove Thompson and did not exhaust his other peremptories. Because Thompson did not serve as a juror, any claim regarding Thompson is moot. (*Mason*, *supra*, 52 Cal.3d at p. 954.) But even on the merits, appellant's claim fails because the trial court's denial of appellant's challenge for cause was supported by substantial evidence.

As in *McKinzie*, Thompson expressed some preference in her questionnaire for the death penalty for certain crimes, such as the murder of children, and provided conflicting responses to different questions. For example, Thompson checked that a defendant who "intentionally kills another human being" should be put to death," but also checked that someone who "murders more than one human being" should *not* face automatic death. (4 SCT-JQ 879.) She later clarified in the questionnaire and during voir dire that she *could* consider LWOP, and that the appropriate penalty would depend on the facts of each case. Given Thompson's demeanor and the sequential evolution of her responses, the trial court reasonably ascribed greater significance to Thompson's verbal

explanation of her position than to her multiple-choice checkmarks on the questionnaire. For these reasons, the trial court did not abuse its broad discretion in denying appellant's challenge for cause.

2. Deanna Harrison

In her juror questionnaire, Deanna Harrison stated that she had "no problem" with the death penalty "if proven beyond doubt that [the] crime was committed." (5 SCT-JQ 1249.) She expressed skepticism about LWOP because "why pay all that money to someone who killed children?" (5 SCT-JQ 1251.) Although she checked five "automatic death" boxes and identified with Group 2 (favor the death penalty), she said that she could vote for LWOP in an appropriate case. (5 SCT-JQ 1253-1256.)

Moreover, when questioned by the trial court, Harrison stated that she could consider both death and LWOP, and that there was "not an automatic situation for [her] to reach a death penalty verdict." (21 RT 5907-5908.) She clarified that she *could* vote for death penalty based on the case description offered by defense counsel, but that she would wait to consider all of the evidence and would "be open to the possibility of a penalty other than death." (21 RT 5910-5911.)

The defense challenged Harrison for cause, but the trial court denied the challenge. (21 RT 5194.) The trial court noted that Harrison, like other jurors, was "easily led" by the lawyers' leading questions. (21 RT 5913.) However, it was clear from her responses, demeanor, and facial expressions that she would be "open to listening" to all the facts and would reserve judgment until all of the evidence had been presented at the penalty phase. (21 RT 5913.)

On March 8, 2001, while selecting alternate jurors, defense counsel exercised a peremptory challenge to strike Harrison. (28 RT 7490.)

a. The Harrison claim is moot and meritless

As with Thompson, appellant used a peremptory challenge to remove Harrison and did not exhaust his other peremptories. Because Harrison did not serve as a juror, any claim regarding Harrison is moot. (*Mason, supra,* 52 Cal.3d at p. 954.)

Moreover, the trial court's denial of appellant's challenge for cause was supported by substantial evidence. Although Harrison revealed a preference on her questionnaire for the death penalty and a skepticism of LWOP, she clarified during voir dire that she could consider both penalties, would evaluate all of the evidence before reaching a decision, and would not automatically vote for death in this case. Here, again, the trial court specifically noted Harrison's demeanor and facial expressions in finding that her verbal clarifications were more credible than her written responses. (See *Witt, supra,* 469 U.S. at pp. 428-430 [trial court is in the best position to evaluate the juror's responses and demeanor].) As such, the trial court's ruling should be affirmed.

3. Amitabh Bedi

In his juror questionnaire, Amitabh Bedi stated that "some crimes warrant the death penalty," and "if a person [] commits a heinous crime and is proven guilty without a reasonable doubt, the death penalty may be called for." (6 SCT-JQ 1516.) Bedi noted, however, that in some recent capital cases, "it seems the defendant may have been innocent or was poorly represented by legal counsel." (6 SCT-JQ 1516.) With regard to LWOP, Bedi opined that "a person who gets this sentence should be executed instead—or would be if the legal expense was not as high as it is." (6 SCT-JQ 1518.) However, he stated that it would not be impossible or extremely difficult for him to vote for LWOP if the circumstances of the case warranted it. (6 SCT-JQ 1518-1519, 1521.)

Bedi checked the automatic death boxes for random killings and killings of children and identified with Group 2: "favor the death penalty but would not always vote for it in every case." (6 SCT-JQ 1520, 1523.) When asked whether he would automatically vote for death in a first degree murder case with special circumstances, he answered: "I will consider whatever special circumstances are relevant and weigh them." (SCT-JQ 1525.)

When questioned by the trial court, Bedi reaffirmed that he could vote for either LWOP or death depending on the evidence presented at the penalty phase. (21 RT 5959.) When presented with the facts of the case, Bedi said that he "would prefer death" but could consider both sentences, and that he would be able to reserve judgment until he had heard all the evidence, including mitigating evidence from appellant's childhood and background. (21 RT 5968, 5970-5072.) Although he had difficulty imagining any mitigating circumstances that could justify appellant's actions, Bedi admitted "that may be just my lack of experience" with the criminal justice system. (21 RT 5970.)

The defense challenged Bedi for cause, but the trial court denied the challenge. (21 RT 5973, 5979.) The trial court noted that once it had explained the law surrounding murder trials, Bedi "unequivocally" said that he "would take into consideration the aggravating and mitigating circumstances and reach a decision." (21 RT 5973.) Appellant did not exercise an available peremptory challenge to remove Bedi. However, Bedi was not ultimately selected to serve as a juror.

a. The Bedi claim is moot and meritless

Because Bedi did not serve as a juror, any claim regarding his qualifications is moot. (*Mason*, *supra*, 52 Cal.3d at p. 954.) Moreover, the trial court's denial of appellant's challenge for cause was supported by substantial evidence. As in *McKinzie*, Bedi expressed strong views in favor

of the death penalty on his questionnaire, but tempered those opinions when questioned by the parties and the trial court. During voir dire, Bedi specifically stated that he would reserve judgment until the aggravating and mitigating evidence was presented, and that he could consider both possible penalties. This explanation and openness during voir dire provides substantial evidence to support the trial court's ruling. (See *People v. Jackson* (1996) 13 Cal.4th 1164, 1199 ["Each [prospective juror] modified his or her initial strong stance in favor of the death penalty in the abstract with the willingness to consider the particular circumstances of the case, and to follow the applicable law, at the penalty phase"].)

4. Patricia Kilgore

On her juror questionnaire, Patricia Kilgore stated that she did not have strong opinions on the death penalty, but "depending on the crime, the death penalty can be applicable." (6 SCT-JQ 1569.) She gave the same answer when asked about LWOP and expressed no difficulty voting for LWOP. (6 SCT-JQ 1571.) She did not check any of the five "automatic death" boxes, and identified with Group 3: "neither favor nor oppose the death penalty . . . will seriously consider both possible penalties based upon all the evidence and circumstances." (6 SCT-JQ 1573, 1576, 1578.)

When questioned by the trial court and the parties, she reaffirmed her commitment to listening to all of the evidence, reserving judgment until the end of the penalty phase, and considering both death and LWOP as possible penalties. (21 RT 5984-5985.) In fact, when asked by the prosecution if she could vote for death if she found the aggravating circumstances outweighed the mitigation, she said, "I really don't know." (21 RT 5986.) Even when pushed by defense counsel about a case involving the killing of children, Kilgore said only that she would "*probably* lean towards the death penalty in that case." (21 RT 5990.) Kilgore clarified that she "would

listen to all of the facts and weigh them and decide which [penalty] it should be." (21 RT 5993.)

Defense counsel challenged Kilgore for cause, but the trial court denied the challenge. (21 RT 5995, 5997.) The trial court explained that Kilgore demonstrated that she could "carry out the Court's instructions to a juror in the penalty phase," and she was not so emotional that "it was going to interfere with her ability to be a fair and impartial juror." (21 RT 5995-5996.) The trial court added that it was perfectly understandable for Kilgore and other prospective jurors to have a strong reaction to the killing of children, but that the test was whether they could continue to listen to all of the evidence and reserve judgment until the end of the penalty phase. (21 RT 5996-5997.) Appellant did not use an available peremptory challenge to remove Kilgore, but she was not ultimately selected to sit on the jury.

a. The Kilgore claim is moot and meritless

Because Kilgore did not serve as a juror, any claim regarding her qualifications is moot. (*Mason*, *supra*, 52 Cal.3d at p. 954.) Moreover, her demonstrated open-mindedness on the questionnaire and on voir dire provide substantial evidence to support the trial court's ruling. She repeatedly stated that no murder case was an "automatic death" case for her, and that she would carefully consider both penalties after all of the evidence had been presented. Although she became emotional when presented with the gruesome details of appellant's murder of young Jack and Areli, the trial court correctly explained that it was not unusual (or disqualifying) for a prospective juror to have that type of reaction to a truly heinous crime. As this Court has explained before: "A juror is not to be disqualified for cause simply because the issues are emotional. Disqualification for cause must ultimately rest on the existence of preconceptions which will prevent a decision from being reached based on

the evidence and the instructions of the court." (*People v. Bittaker* (1989) 48 Cal.3d 1046, 1091, rejected on other grounds in *People v. Black* (2014) 58 Cal.4th 912, 919.) The United States Supreme Court is in accord, holding in *Adams v. Texas* (1980) 448 U.S. 38, 50, that "neither nervousness, emotional involvement, nor inability to deny or confirm any effect whatsoever is equivalent to an unwillingness or an inability on the part of the jurors to follow the court's instructions and obey their oaths, regardless of their feelings about the death penalty."

Here, as in *Bittaker*, "there is no significant evidence of preconceptions which would bias the deliberations, and a clear statement of the ability to decide on the basis of the evidence." (*Bittaker*, *supra*, 48 Cal.3d at p. 1091) Appellant acknowledges as much, admitting that Kilgore told the trial court that, despite her emotional reaction to the murder of children, she "could listen to all of the facts and weigh them" and would "do her best" to be "fair and impartial." (AOB 115, citing 21 RT 5993-5994.) Being able to judge her demeanor and assess the credibility of her responses, the trial court was in the best position to evaluate Kilgore's fitness to serve as a juror, and its ruling should be upheld.

5. Roland Garza

On his juror questionnaire, Roland Garza stated that his religion (Baptist) espoused the philosophy of a "life for a life." (7 SCT-JQ 1604.) Nonetheless, he described the role of a juror in a capital case as being "able to take in all words said with an open mind." (7 SCT-JQ 1606.) He did not have any strong opinions on the death penalty or LWOP. (7 SCT-JQ 1623-1625.) He expressed no problems with voting for LWOP, and identified with Group 3: "neither favor nor oppose the death penalty . . . will seriously consider both possible penalties based upon all of the evidence and circumstances." (7 SCT-JQ 1625, 1630.) Though he checked four of the automatic death boxes, he later stated that he would not *automatically*

vote for death in a first degree murder case with special circumstances. (7 SCT-JQ 1627, 1632.)

When the trial court explained the law of murder to him, Garza said that he would be able to evaluate mitigating and aggravating circumstances and consider both death and LWOP as possible penalties. (21 RT 6001.) His decision would "depend on the circumstances and the evidence" in each case, and he would not "automatically decide to vote one way or the other until [he] heard all the facts in the case." (21 RT 6002.) This philosophy would apply even in a case involving multiple murders or the killing of children—he would consider LWOP for such crimes. (21 RT 6002, 6007.) The trial court denied defense counsel's challenge for cause. (21 RT 6008, 6010.) The trial court relied on Garza's statement that he would consider all of the evidence and would consider mitigating factors, even if he did not find the specific types of mitigation suggested by defense counsel during voir dire "particularly persuasive." (21 RT 6010.) Appellant did not use an available peremptory challenge to remove Garza from the jury, but he was not ultimately selected to serve as a juror.

a. The Garza claim is moot and meritless

Because Garza did not serve as a juror, any claim regarding his qualifications is moot. (*Mason*, *supra*, 52 Cal.3d at p. 954.) Moreover, once the law of murder was explained to him, Garza repeatedly affirmed his willingness to retain an open mind and consider all evidence before selecting the appropriate punishment. The trial court reasonably found that Garza's later written and verbal clarifications outweighed his checking of four "automatic death" categories—a position he expressly disavowed during voir dire. (See *McKinzie*, *supra*, 54 Cal.4th at p. 1346 ["Although Juror No. 3 made some statements regarding imposing the death penalty for intentional murderers, the trial court correctly observed that his comments appeared to be based largely upon an ignorance of the law, which Juror No.

3 readily admitted"].) Because the totality of Garza's responses clearly demonstrated that he would not automatically choose either penalty and would wait to decide until all mitigating and aggravating evidence had been presented, the trial court's ruling should be affirmed.

6. Arleen Phillips

On her juror questionnaire, Arleen Phillips stated that she "believe[d] in the death penalty but ha[d] some reservations." (10 SCT-JQ 2424.) She had no problem voting for LWOP "if it fits the circumstances" and identified with Group 2: "I favor the death penalty but would not always vote for it in every case." (10 SCT-JQ 2426, 2431.)

When questioned by the district attorney, Phillips stated that she believed in both LWOP and the death penalty as possible penalties, and that her choice would "depend[] on the situation." (22 RT 6158.) She did not "like to judge until I hear all the facts" and could "consider" mitigating evidence before reaching a conclusion. (22 RT 6159, 6162.) When pushed by defense counsel about child killings, Phillips admitted that she "would find it hard not to go with the death penalty." (22 RT 6163.) But she followed that by saying: "I am being honest with you when I tell you I am not sure on which way I would go, death or whatever the circumstances are until I could hear the facts." (22 RT 6165.)

The trial court denied defense counsel's challenge for cause. (22 RT 6170, 6172.) The court explained that Phillips "was fairly obstinate in her determination to say that she wasn't firmly predisposed toward a given penalty," even though she clearly wanted out of jury duty. (22 RT 6172.)

Defense counsel exercised a peremptory challenge to strike Phillips. (28 RT 7479.)

a. The Phillips claim is moot and meritless

As with Thompson and Harrison, appellant used a peremptory challenge to remove Phillips and did not exhaust his other peremptories. Because Phillips did not serve as a juror, any claim regarding Phillips is moot. (*Mason, supra*, 52 Cal.3d at p. 954.)

On the merits, the trial court's ruling should be affirmed. On her juror questionnaire and voir dire, Phillips expressed a clear willingness to consider both LWOP and death, and she resisted defense counsel's attempts to disqualify her by stating that she simply could not prejudge the case until she had heard all of the evidence at the penalty phase. These repeated assurances of impartiality and open-mindedness provide substantial evidence to support the trial court's denial of appellant's challenge.

7. Walt Hoyer

On his juror questionnaire, Walt Hoyer stated that he was a state correctional officer. (12 SCT-JQ 2931.) He said that it was important for a juror in a death penalty case "to really pay attention to *all* evidence before coming to a conclusion." (12 SCT-JQ 2940.) While "the death penalty has its place in law . . . it should only be used when it is appropriate and should not be abused." (12 SCT-JQ 2957.) In Hoyer's opinion, LWOP is also "a very good option where death penalty should not apply," and he would have no difficulty voting for LWOP in a death-eligible case. (12 SCT-JQ 2959.) He did not check any of the five automatic death boxes and identified as Group 3: "neither favor nor oppose the death penalty." (12 SCT-JQ 2961, 2964.)

Hoyer reaffirmed his support for LWOP when questioned by the district attorney and stated that he was neither "for or against" the death penalty. (22 RT 6272, 6276.) Although he had worked on death row in 1993, he was currently working at a minimum security facility. (22 RT

6272.) Most importantly, Hoyer stated that nothing about his job or experience with death row would impact his analysis of the case. (22 RT 6273.) He had "no hard and fast rule" for the death penalty because "each case is different." (22 RT 6273.) He would consider all mitigating evidence presented at the penalty phase before making a decision as to the appropriate penalty. (22 RT 6275, 6277.)

The trial court denied defense counsel's challenge for cause. (22 RT 6279, 6281.) Based on the totality of the questioning, the trial court was convinced that Hoyer "would not rule out any one possibility and that he would be able to go through the evaluation process." (22 RT 6280-6281.) Defense counsel exercised a peremptory challenge to strike Hoyer. (28 RT 7477.)

a. The Hoyer claim is moot and meritless

As with Phillips, appellant used a peremptory challenge to remove Hoyer and did not exhaust his other peremptories. Because Hoyer did not serve as a juror, any claim regarding Hoyer is moot. (*Mason, supra*, 52 Cal.3d at p. 954.)

On the merits, the trial court's ruling should be affirmed. On both his juror questionnaire and voir dire, Hoyer expressed a clear willingness to consider both LWOP and death, and he did not check any of the "automatic death" boxes. In fact, Hoyer's lack of any strong views on the death penalty and his insistence on hearing all of the mitigating and aggravating evidence suggest that the only reason for appellant's objection was Hoyer's prior service as a prison guard at San Quentin.

But the Supreme Court put to sleep nearly 80 years ago the claim that law enforcement officials like prison guards or police officers cannot serve as jurors in criminal cases. (See *United States v. Wood* (1936) 299 U.S. 123, 140, n. 9.) Instead, any such claim for disqualification must be based on a showing of actual bias. (*Ibid.*) Here, Hoyer had not worked at San

Quentin for eight years, and he said that nothing about his job or experience during that time would influence his analysis of the case. In fact, it is clear from Hoyer's statements that his time as a guard at San Quentin gave him an appreciation for the significance of a capital trial, and he repeatedly stated that he took the responsibility very seriously. The trial court found Hoyer's promises of impartiality credible, and this finding should be upheld on appeal.

8. Debra Stup[8]

On her juror questionnaire, Debra Stup stated that jurors in death penalty cases should "listen carefully with an open mind so facts from feelings can be separated." (12 SCT-JQ 3153.) She wrote that "if a person has been fairly tried and found guilty of a very serious crime, and shows no remorse—I question why, as tax payers, we should keep them in prison. If they are capable of killing a human life, they should be considered for the death penalty." (12 SCT-JQ 3170.) There is, however, "the issue of mental illness—it's a tough issue with no easy answer." (12 SCT-JQ 3170.) She checked four of the five automatic death boxes and identified as Group 2, but clarified that she would not *automatically* vote for death in all death-eligible murder cases. (12 SCT-JQ 3174-3177, 3179.)

When questioned by the trial court, Stup stated that she could withhold judgment until all of the evidence was presented at the penalty phase. (23 RT 6343.) With regard to the death penalty, she felt that the court was "asking an individual to play God," and she could vote for the death penalty only "uncomfortably . . . if I had to." (23 RT 6344.) She also said that it was important to consider a defendant's background in deciding

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[8] Although appellant refers to "Debra Strup" (AOB 117), this juror identified herself on the juror questionnaire as "Debra Ann *Stup*." (12 SCT-JQ 3143.)

a just punishment because "we are products of our environment." (23 RT 6344-6345.) Stup explained that her views on the death penalty had evolved since she filled out the questionnaire because she had more time to think about it. (23 RT 6346.) As a result, she "would be much more open minded, and try to be a lot more fair in my judgment of the facts." (23 RT 6346.) Specifically, she retracted her checkmarks on the "automatic death" categories and said that the state should not *automatically* execute a defendant for any particular type of crime. (23 RT 6347.) Instead, she would listen to all of the evidence before deciding between LWOP and death. (23 RT 6351.)

The trial court denied defense counsel's challenge for cause. (23 RT 6352, 6355.) Citing Stup's demeanor, the trial court explained that Stup appeared to be "somebody who will conscientiously follow the law, and somebody who is open to both of the possibilities, and somebody who will go through the process of deciding between the two penalties." (23 RT 6354-6355.) The trial court also reasoned that any concerns Stup had about the cost of LWOP could be addressed by an instruction to ignore the relative costs of each penalty. (23 RT 6353.) Appellant did not exercise an available peremptory challenge to remove Stup, but she was not ultimately selected to sit on the jury.

a. If anything, Stup was *life*-prone

Because Stup did not serve as a juror, any claim regarding her qualifications is moot. (*Mason*, *supra*, 52 Cal.3d at p. 954.) Moreover, as with Garza, once the law of murder was explained to Stup, she backed off her initial preference for the death penalty. In fact, upon further reflection, her views had changed markedly. She told the trial court that she actually had doubts about her own willingness to vote for death in *any* case. However, she was confident that she could withhold judgment until all of

the evidence had been presented and could be open-minded in choosing between death and LWOP.

Appellant points to statements by Stup regarding the cost of LWOP. (AOB 118.) Again, *McKinzie* is instructive. In that case, Juror No. 3 wrote on his questionnaire that he was "for" the death penalty because it "saves taxpayer $." (*McKinzie*, *supra*, 54 Cal.4th at pp. 1343-1344.) The juror further marked "10" on a scale of 1 to 10 when asked whether he believed in the death penalty and said that he would vote for a penalty other than death "only if [the defendant was] innocent." (*Id.* at p. 1344.) However, after the trial court explained the framework of the case to him, Juror No. 3 said that he had changed his mind and that he "could vote for either penalty in this case." (*Ibid.*) He agreed that death should not be "automatic" and there "might be situations were an intentional murder did not warrant death." (*Ibid.*) The trial court denied McKinzie's challenge for cause, and this Court affirmed. (*McKinzie*, *supra*, 54 Cal.4th at p. 1346.) Although Juror No. 3 had expressed a preference for the death penalty and skepticism regarding LWOP, the juror "stated on multiple occasions that he would not automatically impose death, he had not yet made up his mind, he could consider the relevant aggravating and mitigating circumstances, and he would consider both penalties." (*Ibid.*)

The same is true of Stup. Her fiscal concerns fell away as part of her evolution between the questionnaire and voir dire. In light of Stup's responses, explanations, and demeanor, the trial court reasonably found Stup's assurances of impartiality credible. That ruling should be upheld.

9. Robert Pepi

On his juror questionnaire, Robert Pepi said that he did not have strong opinions on the death penalty, that he was "for" LWOP, and he would have no problem voting for LWOP in an appropriate death-eligible case. (13 SCT-JQ 3331, 3333.) He checked the automatic death boxes for

"randomly kills" and "kills a child," and identified as Group 2: "favor the death penalty but would not always vote for it." (13 SCT-JQ 3335, 3338.)

When questioned by the district attorney, Pepi said that he would consider mitigating evidence about appellant's life and background before deciding on the appropriate penalty. (23 RT 6386.) When pushed by defense counsel, Pepi said he "doubt[ed] very much" that he could consider LWOP if appellant was convicted of killing four people, including two children. (23 RT 6388.) Based on Pepi's inconsistent answers to the two questioning parties, the trial court sought to clarify Pepi's position. (23 RT 6388.) Pepi explained that it was not "impossible" for him to vote for LWOP depending on the evidence presented, and although he would lean toward death based on what he had heard so far, he would "go through that process, listen to the evidence, evaluate it, and then reach a decision." (23 RT 6390-6391.) Pepi also clarified that he would consider whatever mitigating evidence was presented at the penalty phase, though he had difficulty imagining what type of evidence could mitigate such a horrible crime. (23 RT 6395.)

Based on these clarifications, the trial court denied the defense's challenge for cause. (23 RT 6396, 6398.) The trial court noted that "Pepi is in many ways typical of people that you will find anywhere in the jury selection of a case like this because the facts are as extreme as they are." (23 RT 6397.) Although it was clear to the trial court that Pepi did not want to serve on the jury, the trial court believed that Pepi "would go through the process, and would reserve a final determination until he had heard and evaluated the evidence." (23 RT 6398.) Appellant declined to use an available peremptory challenge to remove Pepi, but Pepi was ultimately not selected to serve on the jury.

a. Pepi could remain open-minded on penalty

Because Pepi did not serve as a juror, any claim regarding his qualifications is moot. (*Mason*, *supra*, 52 Cal.3d at p. 954.) Moreover, although Pepi offered conflicting answers on the questionnaire and in response to both parties' leading questions, the trial court properly found that Pepi's true views on the death penalty were elicited in response to the trial court's unbiased questions. When given the opportunity to explain his stance, Pepi clearly stated that he would listen to and consider all of the evidence presented by both parties (including mitigating evidence) before reaching a conclusion, and that LWOP would remain an option until the end of the case. As with Kilgore, the trial court found it unsurprising that Pepi had an emotional response to the facts of appellant's crime and saw it as a likely death penalty case. (See *Bittaker*, *supra*, 48 Cal.3d at p. 1091.) But despite his initial impression that the case seemed worthy of the death penalty, Pepi declared that he would keep an open mind until all of the evidence was presented. As such, the trial court's ruling should be affirmed.

10. William Allen

On his juror questionnaire, William Allen stated that he did not have "strong opinions" about the death penalty, but that he believed in it "based upon proof beyond a reasonable doubt." (15 SCT-JQ 3975.) He thought that LWOP was a "waste of resources," but said that he could vote for it in an appropriate case. (15 SCT-JQ 3977, 3980.) He identified with Group 2: "favor the death penalty but would not always vote for it." (15 SCT-JQ 3982.) Although he checked the automatic death boxes for multiple murders, random killing, and child killing, he clarified that he would not *automatically* vote for death in every death-eligible case. (15 SCT-JQ 3979, 3984.)

In response to questioning from the district attorney, Allen stated that he was a death penalty "supporter," but that he could vote for LWOP if the mitigating circumstances were "quite substantial." (23 RT 6588.) He would listen to the penalty instructions given by the judge and would "follow that law," specifically that he must vote for LWOP if the mitigating circumstances outweighed the aggravating circumstances. (23 RT 6589.) He would consider all mitigating evidence that was presented. (23 RT 6593.)

After conflicting statements relating to the murder of children, the trial court asked Allen to clarify his position. (23 RT 6598.) Allen said that, if appellant was convicted of four murders including killing two children, Allen would "look at it at this point like a death penalty case, but [would] listen to the aggravating and mitigating evidence, and it's not impossible that [he] would vote for life without the possibility of parole . . . [though] that is unlikely." (23 RT 6599.) Allen understood that the law dictated he must "leave that door open to listen to what was, you know, being presented at that stage of the game." (23 RT 6599.) Under the circumstances, it was possible that Allen might vote for LWOP. (23 RT 6599.)

The trial court denied the defense's challenge for cause. (23 RT 6600, 6603.) Specifically, the trial court relied on Allen's demeanor and his clarification that he could maintain an open mind until all mitigating evidence had been presented at the penalty phase, rather than automatically voting for death after conviction. (23 RT 6603.) Defense counsel exercised a peremptory challenge to strike Allen. (28 RT 7478.)

a. The Allen claim is moot and meritless

To begin, appellant used a peremptory challenge to remove Allen and did not exhaust his other peremptories. Because Allen did not serve as a juror, any claim regarding Allen is moot. (*Mason, supra*, 52 Cal.3d at p. 954.)

Moreover, Allen tempered his original statements when questioned by the trial court, and the trial court was entitled to give those clarifications greater weight than Allen's earlier answers. Despite his initial view of the case, Allen said that he would listen to all of the aggravating and mitigating evidence presented at the penalty phase, would reserve judgment until the end, and would consider voting for LWOP.

Appellant points to the final question asked by the trial court as evidence that Allen was not impartial. However, here it is useful to compare Allen's response to that of the very next juror questioned, Debra Opperman. Opperman also gave conflicting answers to the parties, but when posed with the same dichotomy by the trial court, she identified with the first group, saying that once appellant was convicted of four murders, two involving children, she would not meaningfully participate in the penalty phase and would always vote for death. (23 RT 6615.) Based on this choice, the trial court granted defense counsel's for-cause challenge of Opperman. (23 RT 6617.) Conversely, Allen did *not* say that the facts of appellant's crime would invariably cause him to vote for death. Instead, Allen chose the alternative that retained an open mind, reserved judgment until all of the evidence was presented, and could decide between two possible penalties. Therefore, the trial court's denial of appellant's challenge should be affirmed.

11. Seated Juror No. 100062101

On her questionnaire, Juror No. 100062101 stated: "I feel that if someone has been found guilty of a crime and the punishment is death, th[e]n the sentence should be carried out. We have so many prisoners on death row and they've been there for years. Our prisons are overcrowded and the taxpayers' money continues to be spent to keep them fed, housed, etc." (1 SCT-JQ 29.) However, she added: "I don't like the thought of anyone being put to death, but think about the families of the people that were murdered." (1 SCT-JQ 29.) Juror No. 100062101 wrote that her religion espoused a view that "no life should be taken—period!", but noted that "times have changed" and that "for certain crimes, death should be the punishment." (1 SCT-JQ 30.) She had not "thought too much about" about LWOP, but would be willing to consider it for a first degree murder case involving special circumstances. (1 SCT-JQ 31.)

In describing herself as a death penalty supporter, Juror No. 100062101 said that "if a person takes a life, his or hers should also be taken. There can be no chance that person could get out." (1 SCT-JQ 32.) She also expressed concern that LWOP did not actually mean LWOP, and that a defendant sentenced to LWOP might still be released "years down the road." (1 SCT-JQ 35.) She checked the boxes saying that the state should automatically put to death anyone "convicted of murder" or who "kills a child." (1 SCT-JQ 33.) She identified with Group 2: "favor the death penalty but would not always vote for it in every case of first degree murder and a special circumstance found true." (1 SCT-JQ 36.) However, she also wrote that she could vote for LWOP in the appropriate case. (1 SCT-JQ 34.)

When questioned by the district attorney, Juror No. 100062101 said she was "capable of listening to those aggravating and mitigating" factors and could vote for either death or LWOP depending on the evidence

presented. (24 RT 6652.) When asked by defense counsel about her responses to the automatic death questions, Juror No. 100062101 clarified that she "wouldn't say I would automatically go for the death penalty, but I would have to, like I said, listen to the facts and then make my decision" in accordance with the trial court's instructions. (24 RT 6655-6656.) Juror No. 100062101 also explained that any concerns she had about LWOP inmates being released would not impact her evaluation of the case and would not push her to vote for death. (24 RT 6655-6656.)

The trial court denied defense counsel's challenge for cause. (24 RT 6657, 6660.) Although recognizing that her questionnaire contained "some answers that might raise issues and were properly inquired into by the defense," the trial court found "as far as I'm concerned, she entirely satisfactorily resolved those answers" when questioned on voir dire. (24 RT 6659.) Defense counsel passed when given the opportunity to strike Juror No. 100062101. (28 RT 7475-7483.)

a. This claim is moot and meritless

Because appellant did not exercise a preemptory challenge to strike Juror No. 100062101 and did not exhaust his peremptories, any claim regarding this juror is forfeited. But even on the merits, appellant's claim fails. Although Juror No. 100062101 expressed a preference in her questionnaire in favor of the death penalty, she repeatedly affirmed that she could consider LWOP and would not automatically vote for either penalty. She also clarified on voir dire that she was capable of listening to all of the evidence at the penalty phase before reaching a decision. Perhaps most importantly, she said that any doubts she had about LWOP inmates being released would have no impact on her analysis of the proper penalty. In light of Juror No. 100062101's clarifications on voir dire, and her expressed willingness to consider all of the evidence and the possible penalties, the trial court's ruling should be affirmed.

12. Jowel Sallee

In his juror questionnaire, Jowell Sallee stated that a juror in a capital case should be able "to look past any emotions that that kind of trial might bring up" and show "open-mindedness and compassion." (19 SCT-JQ 4836.) He stated that the death penalty was "necessary" and that "there are some people that deserve it." (19 SCT-JQ 4853.) He had no problem with LWOP if "that is what's needed to [e]nforce the law, so be it." (19 SCT-JQ 4855.) He did not check any of the five "automatic death" boxes and said that he could vote for either death or LWOP in an appropriate case. (19 SCT-JQ 4857-4858.) He identified with Group 2: "favor the death penalty but would not always vote for it." (19 SCT-JQ 4860.)

When questioned by the trial court, Sallee said that he would wait until he had heard all of the penalty phase evidence before deciding between death and LWOP. (24 RT 6823.) Although he initially said that he had "very strong opinions about children being involved," which would make it hard for him to "wait to the second phase to decide" on the punishment, he later clarified that he could still consider LWOP even if appellant were convicted of killing children. (24 RT 6824.) Sallee "could wait to see what was presented in the second part of the hearing, but I don't know what would sway me to go one way as opposed to my views on the death penalty." (24 RT 6827.) But even if the case seemed like a death penalty case to him, he would "wait and listen to the remaining evidence that would be presented [] at the penalty phase," and LWOP would still be on the table. (24 RT 6829, 6831, 6833.) The trial court then asked Sallee to clarify his position:

> One thing you might have meant is, "Based on the facts that you've said the District Attorney may be able to prove, and you're asking me to assume that the District Attorney does prove, I do not consider background as being likely to be a sufficiently mitigating circumstance to get me to vote for life

> without parole . . . . The other thing you could have meant was, "Based on the facts that you have hypothesized, if I were in a penalty phase and you started putting on background evidence, I would not listen to or consider that background evidence."

(24 RT 6836.) Sallee agreed with the first proposition. (24 RT 6836.) When faced with the trial court's other dichotomy (also presented to Allen), Sallee stated that he would consider all evidence presented at the penalty phase before deciding on the appropriate penalty, though based on what he had heard, he had difficulty imagining a "sufficiently mitigating factor to get me to vote for life without parole." (24 RT 6837.)

The trial court denied defense counsel's challenge for cause, noting that Sallee was consistent from the beginning to the end of his testimony that he would wait to decide the appropriate penalty until after all of the evidence had been presented. (24 RT 6839.) Moreover, "the fact that it looks like a death penalty case based on the hypothesized facts is not by itself a disqualifying characteristic and doesn't indicate a substantial inability to comply with the Court's instructions." (24 RT 6839.)

Later in jury selection, Sallee brought in the employee handbook from his job, which showed that he only got five days of paid leave for jury duty. (28 RT 7480.) Therefore, the trial court granted Sallee a hardship excusal. (28 RT 7480.)

a. The Sallee claim is moot and meritless

To begin, appellant's claim regarding Sallee is moot because he was later removed from the venire for hardship. (See *People v. Ghent* (1987) 43 Cal.3d 739, 768 [dismissing *Witherspoon* challenge to prospective juror Mrhre because he was later "excused on the proper alternative ground of hardship"].) Appellant makes no claim that it was improper for the trial court to grant a hardship request where Sallee would be paid only for the first week of a 3-month trial. Thus, the claim regarding Sallee is moot.

However, even on the merits, the trial court's denial of appellant's challenge for cause should be affirmed. Despite Sallee's preference for the death penalty, he did not check any of the "automatic death" boxes and repeatedly stated on the questionnaire and on voir dire that he could vote for LWOP in the appropriate murder case. When given hypotheticals by the trial court, Sallee always avoided the "automatic death" answer and instead chose the option allowing for careful consideration of mitigating and aggravating evidence before choosing between two possible penalties. Based on these answers, the trial court reasonably concluded that Sallee did not have an unalterable view of the case.

13. Forrest Murray

In his juror questionnaire, Forrest Murray stated that "we need" the death penalty because "there are times in life where we need to be punished for the things we do." (19 SCT-JQ 5013.) He clarified that it would "depend on the crime," and he could vote for LWOP in an appropriate case. (19 SCT-JQ 5013, 5018, 5022.) He also said he would consider how a defendant was raised in reaching his decision. (19 SCT-JQ 5019.) He checked three of the five automatic death boxes (intentional killing, multiple murder, child killing) and identified with Group 2. (19 SCT-JQ 5017, 5020.)

In response to questioning by the trial court, Murray said he could wait until all of the evidence had been presented at the penalty phase, and the jury had deliberated, before making a decision between death and LWOP—even if appellant were convicted of killing four people, including two children. (24 RT 6879.) It was possible for him to consider LWOP, and the appropriate sentence "would depend on the case and . . . the circumstances." (24 RT 6880-6881.)

When asked by defense counsel to explain his checking of three automatic death boxes, Murray clarified: "No, I believe there's always a

time when you can put a person in prison for life without parole. It would just depend on the circumstances and whatever when it happened, you know, on the case." (24 RT 6884.) Based on what he knew about the case at that point, Murray did not know if he *would* vote for LWOP, but he was open to consider any mitigating evidence from the defense and reserving his judgment until the end of the penalty phase. (24 RT 6886-6888.)

As with other prospective jurors, the trial court presented Murray with two hypotheticals. (24 RT 6889.) As with Sallee, Murray identified with the position that this was "a very, very serious case, and looks like to me a death penalty case, but I'm not going to make that decision until I've heard all of the evidence." (24 RT 6891.) Moreover, Murray stated, it was "possible that I would vote for life without parole if, after having heard the evidence, I thought that the aggravating circumstances didn't so substantially outweigh the mitigating circumstances as to warrant a death sentence." (24 RT 6891.)

Based on this clarification and Murray's demeanor when questioned, the trial court denied defense counsel's challenge for cause. (24 RT 6894.) The trial court explained that "halfway through my first hypothetical [automatic death] he was fidgeting and it was very clear in his eye that that isn't what he was trying to say. And a quarter of the way through my second hypothetical [reserving judgment], it was very clear that he was eager to tell me, yes, that is where—what he was trying to express." (24 RT 6894.) Defense counsel exercised a peremptory challenge to strike Murray. (28 RT 7482.)

a. The Murray claim is moot and meritless

First, appellant used a peremptory challenge to remove Murray and did not exhaust his other peremptories. Thus, any claim regarding Murray is moot. (*Mason*, *supra*, 52 Cal.3d at p. 954.) Second, Murray repeatedly expressed his willingness to consider all of the evidence before choosing

between two possible penalties. Although he viewed the facts of the case as very serious, he had not prejudged the outcome and would not automatically vote for one penalty over the other. As with Allen and Sallee, his views were crystallized when presented with the trial court's hypotheticals, and his answers revealed a willingness to consider (and possibly vote for) LWOP. Therefore, the trial court properly found Murray qualified to serve as a juror.

14. William Crowe

On his juror questionnaire, William Crowe stated that jurors in death penalty cases should be able to "hear both sides and make a decision on the facts presented." (22 SCT-JQ 5695.) He did not have strong opinions about the death penalty, but said that "if the crime was a [heinous] act against someone such as murder then they to[o] should die." (22 SCT-JQ 5712.) He did not check any of the automatic death boxes and said that he could vote for LWOP in an appropriate case. (22 SCT-JQ 5716-5717.) He identified as Group 2: "favor the death penalty but would not always vote for it," adding that he "would have to weigh out all of the evidence." (22 SCT-JQ 5719, 5721.)

In response to questioning by the trial court, Crowe stated that he would "defer any decision as to whether the case should be a death penalty or a life without parole case until [he had] heard all that evidence and deliberated with the jurors," even if appellant was convicted of killing four people, including two children. (27 RT 7238.) Even in such an extreme case, it would be possible for him to vote for either penalty. (27 RT 7238.)

Crowe stated that he did not "have a problem with [the rape] allegation" or with the proof-beyond-a-reasonable doubt standard, and he would accept and apply the law even if the charges included rape. (27 RT 7240.) Although he said, "with my feelings on rape, there's possibility I could not be fair and impartial," he clarified that he "would have to sit

through and hear the evidence in order to make a decision." (27 RT 7241.) Even when pushed by defense counsel, he affirmed that he could consider LWOP: "If it's on the basis of just rape, I would consider life without parole. If a murder was involved with it, whether it be one or more, I may consider the death penalty." (27 RT 7243.) Defense counsel asked, "the death penalty would not be an automatic for you?" (27 RT 7243.) Crowe answered, "not an automatic, no." (27 RT 7243.) LWOP continued to be "an option" in Crowe's mind for dealing with murderers. (27 RT 7245.) In response to a closing question from the trial court, Crowe reaffirmed that he would be able to wait until all of the evidence was presented at the penalty phase before making a decision, rather than deciding on death once appellant was convicted of four murders and a rape. (27 RT 7248.)

The trial court denied defense counsel's challenge for cause, noting that while Crowe's answers on the questionnaire, if left unexplained, might be disqualifying, "listening to him talk and observing his demeanor while he talked satisfies me that he's not particularly impaired at all." (27 RT 7252.) Appellant failed to exercise an available peremptory challenge to remove Crowe, though he was ultimately not selected to serve on the jury.

a. Crowe could remain open-minded on penalty

Because Crowe did not serve as a juror, any claim regarding his qualifications is moot. (*Mason*, *supra*, 52 Cal.3d at p. 954.) Moreover, as with several other prospective jurors, any concerns based on Crowe's written responses were adequately probed and alleviated by his responses on voir dire. He repeatedly stated that, even in a case involving multiple murders and a rape, he would defer his decision until after all the evidence was presented, and he would not automatically vote for either penalty. Because the trial court reasonably relied on Crowe's explanations and his demeanor in denying the challenge for cause, the trial court's ruling should be affirmed.

15. Ronald Imlay

On his juror questionnaire, Ronald Imlay stated that he "agree[s] with the death penalty," but has "no problem" with LWOP and could vote for it in an appropriate case. (22 SCT-JQ 5767, 5769, 5772.) He checked four of the automatic death boxes and identified as Group 1. (22 SCT-JQ 5771, 5774.) However, he explained that he would not automatically vote for death in all death-eligible cases because "certain circumstances could be brought out that would warrant life without parole." (22 SCT-JQ 5776.)

In response to questioning by the trial court, Imlay said that, although he identified with Group 1, he would reserve judgment until all evidence had been presented at the penalty phase and would consider all the aggravating and mitigating circumstances. (27 RT 7256.) Specifically, Imlay said that the second part of the prompt—that he would "not seriously weigh and consider the aggravating and mitigating factors"—was "not my view." (27 RT 7265.) Imlay also said he could reserve judgment even if appellant were convicted of four murders, including two children. (27 RT 7256-7257.) He acknowledged that it would "be hard" to vote for LWOP in such circumstances, but that it was "possible." (27 RT 7257.) He would "seriously and open mindedly be able to listen to all of the evidence in the second phase of the trial" before making a decision as to the proper punishment. (27 RT 7257-7258.)

When questioned by defense counsel, Imlay retreated from his checkmarks for automatic death categories: "I wouldn't say my mind is absolutely made up . . . I would listen to the mitigating circumstances. (27 RT 7264.) Based on these clarifications and the trial court's credibility determination, defense counsel's challenge for cause was denied. (27 RT 7269.) Nonetheless, Imlay was ultimately not selected to serve as a juror.

a. Imlay could remain open-minded on penalty

Because Imlay did not serve as a juror, any claim regarding his qualifications is moot. (*Mason*, *supra*, 52 Cal.3d at p. 954.) Moreover, like Crowe, Imlay assuaged the trial court's concerns during voir dire. Though he leaned toward the death penalty in such an egregious case, Imlay could withhold judgment until all of the evidence was presented, and it was "possible" that he could vote for LWOP. When pushed to explain his views in greater detail, he renounced any statements that might suggest an unalterable preference for the death penalty and clarified that he could evaluate the case with an open mind. Because the trial court was entitled to credit these later verbal clarifications over earlier written responses (that Imlay himself qualified with written caveats), the trial court's ruling should be upheld.

16. Marion Sigel[9]

In her juror questionnaire, Marion Sigel stated that she used to be against the death penalty, but she now recognized that "there are people who have committed offenses so despicable that the death penalty is an appropriate end to their crime." (26 SCT-JQ 6782.) She did not check any of the automatic death boxes and said she could vote for LWOP in the appropriate case. (26 SCT-JQ 6786-6787.) She checked both Group 2 and Group 3, explaining that "the unexpected and unassumed always have a part to play in [determining punishment in] a criminal case." (26 SCT-JQ 6789, 6791.)

In response to questioning, Sigel reaffirmed that she could wait to reach a decision until all evidence had been presented at the penalty phase.

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[9] Again, appellant's spelling of this juror's name does not match the juror's own spelling on her questionnaire. (Cf. AOB 126 with 26 SCT-JQ 6755.)

(27 RT 7429.) Although she had a special concern for child victims, and the facts described to her sounded like a death penalty case, she could still "listen to and weigh the aggravating and mitigating evidence, [] participate in the deliberations, and it's possible that something would be proven that would cause [her] to vote for life without parole." (27 RT 7430.)

Defense counsel did not question Sigel, and the trial court denied the defense's challenge for cause. (27 RT 7433.) In particular, the trial court noted that Sigel "was being as straight as she's capable of being with me when she answered [the two-option hypothetical] in the way she did." (27 RT 7433.) However, Sigel was ultimately not selected as a juror.

a. Sigel could remain open-minded on penalty

Because Sigel did not serve as a juror, any claim regarding her qualifications is moot. (*Mason*, *supra*, 52 Cal.3d at p. 954.) Moreover, her written and verbal responses leave no doubt that she was qualified to serve as a juror. She did not check any of the "automatic death" boxes, had previously opposed the death penalty, and was open to voting for LWOP. Although the child element of the case troubled her, that was a normal reaction for any prospective juror to have and nothing about Sigel's demeanor or responses suggested that she was so emotionally-invested she could not remain objective and impartial. (See *Bittaker*, *supra*, 48 Cal.3d at p. 1091.) Thus, the trial court's ruling should be affirmed.

C. Any Error Was Harmless

For the reasons described above, the trial court did not abuse its considerable discretion in denying certain of appellant's challenges for cause. Nonetheless, as appellant concedes, "to prevail on a claim that the court erroneously denied a challenge for cause . . . [he] must show 'that the court's rulings affected his right to a fair and impartial jury.'" (AOB 133, quoting *People v. Clark* (2011) 52 Cal.4th 856, 895.) Where a prospective

juror "did not sit on defendant's jury, '[d]efendant could not possibly have suffered prejudice as a result of the court's refusal to excuse them at his request.'" (*People v. Hillhouse* (2002) 27 Cal.4th 469, 487-488.) Thus, the scope of any prejudice analysis is limited to Seated Juror No. 100062101—to whom appellant dedicates three short, non-substantive sentences arguing for reversal.

Here, any error was harmless. Juror No. 100062101 said she was capable of listening to all of the evidence at the penalty phase before choosing between two possible penalties. Although she expressed some initial concern on her questionnaire about the cost of LWOP and the possibility that an LWOP inmate might eventually be released, she did not raise these concerns on voir dire. Importantly, the trial court instructed the jury to ignore such considerations, telling them not to consider the relative cost of the penalties and to assume that both punishments would be carried out as described. (13 CT 3544 ["You are to assume that a sentence of death means that the defendant will be executed and a sentence of life in prison without possibility of parole means that the defendant will be imprisoned for the rest of his life and will never be considered for parole and will never be paroled"]; 13 CT 3545 ["Similarly, you may not discuss or consider the monetary cost to the state of an execution or of maintaining a prisoner for life without possibility of parole"].) "It is fundamental that jurors are presumed to be intelligent and capable of understanding and applying the court's instructions." (*People v. Bryant* (2014) 60 Cal.4th 335, 433.) Absent evidence to the contrary, and there is none here, it is presumed that Juror No. 100062101 understood and correctly applied the trial court's instructions and did not consider any concerns about cost or possible release in evaluating the case. (*People v. Talhelm* (2000) 85 Cal.App.4th 400, 409 ["Absent evidence to the contrary, we must assume that the jury followed the court's instructions"].) Absent any other suggestion of

prejudice by Juror No. 100062101, appellant has not shown that he was tried and sentenced to death by a partial or death-prone jury. Accordingly, appellant's claim should be denied.

D. Supposedly Life-Prone Juror Excused

1. Deborah Brace

On her juror questionnaire, Deborah Brace stated that a prospective juror should be disqualified for "not believing in the death penalty." (13 SCT-JQ 3208.) Sure enough, when asked about her views on the practice, Brace responded that she did "not feel this is my job giving someone death penalty. I am not God." (13 SCT-JQ 3224.) She further stated she "would not like to give someone a death penalty" and "would not want to be the juror who had to make the decision." (13 SCT-JQ 3224, 3227.) She identified with Group 4: "I have some doubts or reservations about the death penalty . . ." (13 SCT-JQ 3232.) When asked specifically if she would "refuse to find the defendant guilty of first degree murder and refuse to find special circumstance true, solely to avoid having to make a decision on the death penalty," she checked both the "yes" and "no" boxes and wrote "I am not sure at this time." (13 SCT-JQ 3232.)

When questioned about those responses, Brace explained that she was not philosophically opposed to the death penalty, but that she could not vote for the death penalty, even if she found "the aggravating factors substantially outweigh those in mitigation." (23 RT 6359.) She also specified, when asked by the district attorney, that she could not vote for death even if the prosecution proved that appellant had killed four people, including two children. (23 RT 6360.) She was "fairly definite" on this point and, when defense counsel tried to rehabilitate her, Brace explained:

> And the more I thought about it the whole week that I been here and then came back, I just kept confirming that in my mind. I'm a teacher, and I deal with children every day. I just—I just

> couldn't play that role. Even though maybe I did feel that's what he deserved, that's not my right I feel for myself. Maybe other people feel they could do that, and that's fine. And maybe that's what he did deserve, *but I in my heart could not do that.*

(23 RT 6360-6361, italics added.) She further affirmed: "I mean I just couldn't [vote for death]. I couldn't in my heart." (23 RT 6362.) She told the trial court that there was no conceivable set of facts that would allow her to vote for death. (23 RT 6362.) She further agreed with the trial court's hypothetical that she "wouldn't listen to or weigh the aggravating and mitigating circumstances in any meaningful way because whatever ended up happening I'd be voting for life without parole rather than death anyway." (23 RT 6364.)

The prosecution challenged Brace for cause, and defense counsel objected to preserve the issue but did not argue that Brace should be retained. (23 RT 6364-6365.) The trial court granted the challenge, explaining that it "couldn't get one iota of willingness to impose the death penalty in this or any other case. So I'm not, although you know how concerned I am about making a *Witt/Witherspoon* mistake, I just can't see any way that this person could be a member of the jury." (23 RT 6365.) Based on her demeanor and responses in written and verbal form, the trial court was convinced that Brace "would not be able to impose a death sentence no matter what case was before her." (23 RT 6366.)

a. Brace said she could not vote for the death penalty

"[T]hose who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law." (*Lockhart, supra*, 476 U.S. at p. 176; *People v. Avila* (2006) 38 Cal.4th 491, 529.) However, as this Court has repeatedly explained, "[t]here is no requirement that a prospective juror's bias against

the death penalty be proven with unmistakable clarity. Rather, it is sufficient that the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law in the case before the juror." (*People v. Martinez* (2009) 47 Cal.4th 399, 425.) The trial court's determination is reviewed for abuse of discretion. (*Id.* at p. 426.) "The erroneous granting of the prosecution's *Witt* challenge against a prospective juror requires automatic reversal of the penalty verdict," though it does not require reversal of the guilt phase verdict. (*People v. Tate* (2010) 49 Cal.4th 635, 666.)

People v. Moon (2005) 37 Cal.4th 1 is instructive. In that case, this Court ruled that a prospective juror was properly excused for cause where she responded she would always vote against finding special circumstances so as to avoid the death-penalty question and would vote against the death penalty "regardless of the evidence." (*Id.* at p. 15.) Although the juror indicated that there might be cases where she "could be convinced that the death penalty might be appropriate," she was unable to articulate any case wherein she would vote for death or any facts that would cause her to impose the death penalty. (*Ibid.*)

Even more similar, the challenged juror in *People v. Tully* (2012) 54 Cal.4th 952, 1000, "stated unequivocally that, notwithstanding her support of the death penalty in the abstract, she could not actually impose it. She was so clear that defense counsel did not attempt to rehabilitate her." This Court affirmed the trial court's grant of the prosecution's for-cause challenge. (*Ibid.*, citing *People v. Roldan* (2005) 35 Cal.4th 646, 697 ["[W]e previously have held it permissible to excuse a juror who indicated he would have a 'hard time' voting for the death penalty or would find the decision 'very difficult'"].) This Court similarly held in *People v. Cruz* (2008) 44 Cal.4th 636, 663, that it was proper to strike a prospective juror who stated that she was "not comfortable making the judgment on

someone's life" and did not "feel that I have a place" to choose between life and death.

These holdings support the trial court's excusal of Brace. As appellant readily admits, "Brace *did say* that she could not vote for the death penalty in this case." (AOB 134.) Moreover, as in *Moon*, Brace said that her views on the death penalty would influence her analysis at the *guilt* phase. When questioned, she said that she could vote for death only in one circumstance: when the law provided her only one option, which was to vote for death. So long as she could choose between LWOP and death, she would always choose LWOP, regardless of the evidence presented at the penalty phase. This was true even though, as in *Tully*, Brace did not have a general philosophical opposition to the death penalty. And also like *Tully*, defense counsel did not even argue that Brace should be retained in the venire.

Appellant asserts that Brace was wrongly excused because she was "a person whose respect for the law was stronger than her own feelings about the propriety of the death penalty." (AOB 135.) However, in just the preceding sentence, appellant complained that the trial court "did not ask [Brace] if her repugnance against the death penalty was stronger than her belief that regardless of her own convictions, she had to follow the law." (AOB 135.) Thus, appellant's assertion that Brace would have put her personal beliefs aside and followed the trial court's instructions is wholly speculative and belied by Brace's actual statements.

In light of Brace's clear declaration that she personally could not vote for death in this case, the trial court did not abuse its broad discretion in excusing her—a decision the trial court did not make lightly. During argument over another juror, Harry Edenborough, who also stated that he could not impose the death penalty, the trial court made clear that it was giving special attention to prosecution motions to strike prospective jurors.

(21 RT 5879.) Because an error in such a decision would result in automatic reversal, the trial court warned the district attorney: "if you find yourself losing on this kind of a close question, it's because that's what I'm scared of." (21 RT 5879.) Thus, the trial court was aware of its discretion in this area and took special care to consider the relevant factors in determining whether Brace could fairly adjudicate the case at the penalty phase. Because the record provides ample support for the trial court's conclusion that Brace "would not be able to impose a death sentence no matter what case was before her," the grant of the prosecution's for-cause challenge should be affirmed.[10]

V. THE INTERPRETIVE AND TRANSLATION SERVICES PROVIDED TO APPELLANT DID NOT VIOLATE HIS RIGHT TO A FAIR TRIAL

Appellant claims that his due process and fair trial rights were violated by: (1) the use of a non-certified witness interpreter at the preliminary examination; (2) the use of appellant's personal interpreter to clarify a witness's off-the-record outburst during the preliminary hearing; (3) the trial court's decision not to appoint a "check" interpreter; (4) "pervasive" problems with the audiovisual equipment used by the court; and (5) cumulative inaccuracies and inconsistencies in witness interpretation throughout the proceedings. (AOB 136-146.) Yet, these claims are alternately forfeited or unsupported by the record, and appellant

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[10] Appellant also suggests (in passing) that the trial court erred in granting a hardship dismissal to Julie Brown, who appellant claims was a life-prone juror. (AOB 86.) However, a review of the record cited by appellant reveals that the opposite occurred, with the trial court ruling: "Ms. Brown, I'm *not* going to grant the hospital's request for a hardship excusal . . . I'm going to ask you for the time being to remain a part of the jury selection procedure." (23 RT 6584.) Brown was not ultimately empaneled but was still in the venire when jury selection was completed.

fails to identify a single material inconsistency or inaccuracy that could have impacted the jury's evaluation of the case.

A. Appellant Was Not Prejudiced by the Use of Ximena Oliver as Yolanda's Interpreter at the Preliminary Hearing

1. Background

At the outset of the case, defense counsel requested that the trial court appoint an independent interpreter, Teri Bullington, to act as appellant's personal interpreter.[11] (1 RT 7.) The trial court granted defense counsel's request and designated Bullington as the lead interpreter for court appearances and consultations with appellant. (1 RT 7.) Bullington or another court-certified interpreter was present as appellant's interpreter at every subsequent hearing. (See, e.g., 1 RT 20 [court-certified interpreter Patricia Hyatt serving as interpreter on 9/8/98]; 1 RT 30 [Bullington serving as personal interpreter on 9/15/98].)

The preliminary hearing took place on January 20, 1999, and Bullington interpreted for appellant. (1 RT 61, 176.) When Yolanda testified, she was assisted by Ximena Oliver, who was identified as a "court-certified interpreter certified in Colusa County, Butte County, and Trinity [County]." (1 RT 224-225.) The trial court asked if the parties wanted to conduct voir dire or if they stipulated to Oliver's qualifications, and defense counsel asked Oliver only to spell her name for the record. (1 RT 225.) The trial court explained that because the "interpreter is court certified," Oliver did not "need to be sworn." (1 RT 226.)

During Yolanda's testimony, there was no indication of any inconsistencies or inaccuracies in Oliver's interpretation. At various points

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[11] Bullington's oath and interpreter certification are part of the record on appeal. (Supp. CT 5-6.)

in Yolanda's testimony, the trial court asked Yolanda to speak up because she was speaking quietly. (1 RT 228.) At other points, the interpreter asked the questioning attorney to repeat a question for Yolanda. (1 RT 232.) Oliver also provided a few clarifications of her interpretation in real time. (See 1 RT 233 ["I need to correct something for the record, sir. When I said 'he took it,' it should be 'he took him.'"]; 2 RT 279 ["I need to correct. Not 'dragging,' 'pulling.'"].) In those instances, the trial court asked the prosecutor to go over the line of questioning again. (1 RT 234.)

On March 16, 1999, about two months after appellant was held to answer, defense counsel informed the trial court that she had spoken to the Administrative Office of the Courts and had developed doubts about Oliver's certification status. (2 RT 381.) Defense counsel also claimed that a member of the defense team had listened to tapes of the preliminary hearing and thought that Oliver's interpretation was not "a literal translation." (1 CT 136; 2 RT 382.) However, the declaration containing those allegations did not identify any of the supposed inaccuracies. (1 CT 136.)

The district attorney explained that Oliver had been referred to him by the court clerk based on the clerk's search for a court-certified interpreter for his witness. (1 CT 139.) A recent investigation had shown that Oliver was not, in fact, "court-certified" but was "court certifiable" under Government Code section 68562, subdivision (c), meaning that she could be used "as an administrative hearing interpreter upon a showing of good cause." (2 RT 384-385.) In addition to being administratively-certified, Oliver had been certified in criminal cases, based on a showing of good cause, in Colusa, Butte, Trinity, and Glenn Counties.[12] (1 CT 139, 148.)

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[12] The prosecution submitted a transcript from a criminal proceeding in Glenn County from June 16, 1997, at which Oliver was qualified as an (continued...)

The district attorney further explained that he had not made an offer of good cause due to this misunderstanding with the court clerk, but he noted that there was "plenty of good cause here" given that the court clerk had exhausted her efforts to find a court-certified interpreter for Yolanda. (2 RT 384.) Margaret Daniels, the court clerk responsible for securing an interpreter for Yolanda at the preliminary hearing, submitted a declaration explaining the extensive steps she had taken to find a court-certified interpreter with no prior involvement in the case. (1 CT 143.) She had called 19 court-certified interpreters, none of whom were available for the hearing. (1 CT 143-144.) Only then did Daniels contact Oliver, who "came highly recommended by other interpreters and was "certified for Administrative hearings." (1 CT 144.) Daniels stated that she had expended "reasonable effort" to find a court-certified interpreter as required under the Administrative Office of Courts guidelines. (1 CT 144.)

The district attorney argued that the absence of a good cause finding was harmless "unless some affirmative prejudice can be shown." (2 RT 384.) He pointed out that the declaration offered by the defense team did not highlight any material mistakes or inconsistencies in Oliver's interpretation that would have made "a difference in the court's holding order" as to "any aspect of a special circumstance or an offense." (2 RT 384; see also 1 CT 140, citing *People v. Estrada* (1986) 176 Cal.App.3d 410.)

(...continued)
interpreter. (1 CT 150-159.) The trial court in that case questioned Oliver extensively about her training and experience, and Oliver stated that she had provided interpretation services at over 200 court proceedings, including preliminary hearings. (1 CT 153-154.) Accordingly, that trial court found Oliver "obviously qualified to serve as an interpreter in the case," and ruled that there was good cause based on the clerk's unsuccessful attempts to secure other interpreters. (1 CT 157, 159.)

Out of an abundance of caution, the trial court authorized the defense team "to retain a suitable qualified translator to review the tape and the transcript, make whatever approach you wish to with respect to the, to the errors you feel may occur from the transcript." (2 RT 413.) After having the defense interpreter listen to the tapes, defense counsel stated: "Our interpreter's indicated that there will never be an accurate transcription available because of problems with the sound. There are certain things that can be done to get some of the translation done, but it will take literally—it will take months to get what she is able to do." (2 RT 433.) The prosecution's interpreter faced similar problems, but rated the interpretation "acceptable overall." (2 RT 432-433.) The prosecution interpreter noted that while there were some minor errors in translation, they were "of the type that don't completely alter the general tenor of the testimony," and "the concept was not seriously compromised." (2 RT 437.) Finally, the prosecution also introduced a prior translation by a court-certified interpreter, Mary Bardellini, of Yolanda's statement from two days after the attack that was consistent with Yolanda's translated account at the preliminary hearing. (2 RT 448.)

On April 9, 1999, the trial court "decline[d] to dismiss the case," finding that none of the errors suggested by the defense were "substantive." (2 RT 437-438.) On April 13, 1999, appellant moved to set aside the information on the basis that "the use of a non-certified translator violated defendant's constitutional and statutory rights." (1 CT 177.) As the district attorney's opposition pointed out, appellant's motion did not identify a single instance of supposed mistranslation, but instead argued that Yolanda's testimony should be stricken in its entirety. (1 CT 188, 270.)

At argument on the motion, defense counsel pointed to a moment during Yolanda's testimony when Oliver clarified an earlier answer by stating that Yolanda had meant "pulling" rather than "dragging," when

describing appellant's actions. (2 RT 480.) The district attorney argued that this type of word choice—clarified by Oliver—hardly rose to the level of a constitutional violation.

The trial court again denied appellant's motion. (2 CT 313; 2 RT 529.) Specifically, the trial court found that appellant had not shown any prejudice from the use of Oliver at the preliminary hearing given that appellant spoke Spanish, was provided his own interpreter, and had not objected to the accuracy of any of Yolanda's statements. (2 RT 529.)

The defense team took a writ on the interpreter issue to the Third District Court of Appeal, but it was denied (C035066). (4 RT 1093-1094.) This Court denied review (S087339). (4 RT 1093.)

2. Appellant's claim is forfeited, and any error was harmless

A criminal defendant has a constitutional right to the use of an interpreter at his or her trial. (Cal. Const., art. I, § 14.) Among other things, the right is designed to "make the questioning of a non-English speaking witness possible." (*People v. Carreon* (1984) 151 Cal.App.3d 559, 565, fn. 1.) For witnesses, a trial court may utilize an interpreter who is neither certified nor provisionally qualified if good cause is shown. (Gov. Code, § 68561, subd. (a).) In that situation, the court should make a record showing that good cause exists, obtain a waiver from the defendant, and ensure the subject interpreter is qualified to interpret the proceedings. (Cal. Rules of Court, rule 2.893, subd. (b) [formerly rule 984.2].)

Although these procedural requirements are designed to safeguard the defendant's right to an interpreter, "[t]he failure to follow [them] alone does not give rise to a constitutional violation." (*People v. Superior Court (Almaraz)* (2001) 89 Cal.App.4th 1353, 1360.) "Improper procedures in the use of an interpreter do not rise to the level of a constitutional violation unless they result in prejudice demonstrating defendant was denied his right

to a fair trial." (*Ibid.*) The same analysis applies where the alleged error occurred *before* trial: "irregularities in the preliminary examination procedures which are not jurisdictional in the fundamental sense shall be reviewed under the appropriate standard of prejudicial error and shall require reversal only if defendant can show that he was deprived of a fair trial or otherwise suffered prejudice as a result of the error at the preliminary examination." (*People v. Pompa-Ortiz* (1980) 27 Cal.3d 519, 529.)

To begin, appellant's claim is forfeited. When given the opportunity to question Oliver's qualifications at the preliminary hearing, defense counsel passed, thereby relinquishing appellant's right to challenge the interpreter on appeal. (See *People v. McCullough* (2013) 56 Cal.4th 589, 593 [for reasons of efficiency and fairness, a right of any sort may be forfeited on appeal if the defendant fails to assert it in the trial court].)

Second, the record indicates that neither the trial court nor the district attorney discovered that Oliver was not court-certified until months after Yolanda testified and appellant had been held to answer. Had this misunderstanding with the court clerk been avoided, the prosecution could have established good cause to justify using Oliver. As the clerk explained, she had exhausted her list of 19 court-certified interpreters before contacting Oliver—an administratively-certified interpreter who had provided translation services at over 200 court hearings. Thus, there is little doubt that the trial court would have provisionally certified Oliver to interpret for Yolanda had the issue been raised in a timely fashion.

Third, despite appellant's claim of "numerous problems identified in Ms. Oliver's translations," it is not clear that Oliver made *any* mistakes. (AOB 139.) The defense team failed to identify any specific errors, and the prosecution's expert stated that—although she might have chosen different words if she had interpreted for Yolanda—Oliver accurately conveyed the

meaning of Yolanda's testimony. Instead, the record depicts Oliver as an engaged interpreter who asked for clarifications when needed and kept up with the pace of questioning. (See, e.g., 1 RT 237; 2 RT 271, 318.)

Finally, although appellant acknowledges his burden to show prejudice, he fails even to argue that Oliver's supposed errors caused him any harm. (AOB 139.) In fact, appellant *admits* that any prejudice from Oliver's supposed errors "was restricted to the preliminary hearing," and thus did not impact his trial rights. (AOB 140.) This conclusion is buttressed by the fact that Yolanda was assisted by a court-certified interpreter, Mary Lobato, when she testified at trial. (31 RT 8022.) Moreover, Yolanda's testimony at trial (and Lobato's interpretation) did not differ from Oliver's interpretation at the preliminary hearing. Thus, just as the Court of Appeal held in *Estrada*, *supra*, 176 Cal.App.3d at page 416, there is nothing in the record to show that appellant suffered any prejudice as a result of the limited use of a noncertified witness interpreter at the preliminary hearing. Appellant's claim should be rejected.

B. The Trial Court's Use of Bullington to Translate Yolanda's Off-the-Record Outburst Was Permissible

1. Background

During a break in her preliminary hearing testimony, Yolanda yelled something in Spanish at appellant. Although the comment did not occur while the court was in session, the trial court sought to clarify Yolanda's outburst by asking Oliver what Yolanda had yelled. (1 RT 246-247.) Oliver stated that Yolanda had said to appellant, "Damn you. Damn you. I hope you burn in hell." (1 RT 247.) Yolanda had also used the word "desgraciado," and Oliver and appellant's personal interpreter Bullington discussed the best translation for that word. (1 RT 247.) Bullington agreed with Oliver's translation, adding only that Yolanda had also said, "I hate you" and "Why?" (1 RT 248-249.)

Defense counsel later moved for dismissal based on the trial court's use of Bullington to clarify Yolanda's remarks. (1 RT 256.) The trial court denied the motion, explaining that Bullington had simply volunteered her opinion with no prompting from the court or the prosecution, and the discussion had not compromised the relationship between Bullington and the defense. (1 RT 259-260.) The trial court also ruled that appellant did not have a right to be present when the trial court questioned Oliver and Bullington about Yolanda's comment. (1 RT 259.) The trial court had ordered appellant to be removed for his own safety based on Yolanda's emotional outburst and "the conduct of the spectators in the front row." (1 RT 258.) Moreover, the trial court had sought clarification of comments made off-the-record, which did not constitute a "critical stage of the proceeding" at which appellant's presence was required. (1 RT 258.) The trial court later added that it had not considered any evidence related to the outburst in making its decision, and thus appellant suffered no prejudice by being absent when Bullington agreed with Oliver's interpretation. (3 RT 547.)

2. Appellant's claimed error finds no support in caselaw and, in any event, was harmless

Appellant's claims, unsupported by any cited caselaw, are unavailing. A defendant has federal and state constitutional rights, and a statutory right, to be present at any stage of the criminal proceedings that is critical to its outcome and where his presence would contribute to the fairness of the procedure. (*People v. Blacksher* (2011) 52 Cal.4th 769, 798-799.) However, there is no entitlement to be present at proceedings at which the defendant's "presence bears no reasonable, substantial relation to his opportunity to defend the charges against him." (*Id.* at p. 799.) It is the defendant's burden to demonstrate that his absence prejudiced his case or denied him a fair trial, a burden which is even higher if his attorney was

present at the disputed hearing. (*Ibid.*; *People v. Kelly* (2007) 42 Cal.4th 763, 782 [there is "an obvious difference between excluding both the defendant and his attorney and merely excluding the defendant"].)

For example, this Court found no error in *People v. Perry* (2006) 38 Cal.4th 302, 313-314, when the trial court excluded the defendant from a bench conference to determine whether spectators should be excluded from the courtroom, because it was a routine procedural matter for which defendant's presence was not required. This Court reached the same conclusion in *People v. Butler* (2009) 46 Cal.4th 847, 865, holding that a defendant need not be present for the re-reading of testimony because that was not a critical stage of the proceedings.

Here, as in *Perry* and *Butler*, appellant did not have a right to be present at the short hearing the trial court held to clarify Yolanda's off-the-record remarks. The trial court was exercising its "broad discretion to control courtroom proceedings in a manner directed toward promoting the safety of witnesses," the defendant, the spectators, and the court itself. (*Alvarado v. Superior Court* (2000) 23 Cal.4th 1121, 1150.) Based on the tenor of Yolanda's outburst and the behavior of several spectators in the front row, the trial court reasonably determined appellant should be removed from the courtroom for his own safety.

Perhaps most importantly, "nothing in this record suggests that defendant's presence on these occasions would have made any difference." (*Kelly*, *supra*, 42 Cal.4th at p. 782.) Defense counsel was present during the brief discussion about Yolanda's outburst and was able to fully represent appellant's interests. The subject of the discussion was an off-the-record comment that the trial court said played no role in its holding. Therefore, appellant has failed to show that his absence prejudiced him in any way.

Moreover, Bullington's voluntary interpretive service for the trial court did not undercut appellant's right to an exclusive interpreter. Bullington simply agreed with the interpretation provided by Oliver, adding that Yolanda had said "Why?" This outburst was not made part of the record, the trial court expressly ignored it, and it was never mentioned at trial. Given the overwhelming evidence presented against appellant at the preliminary hearing and at trial, it strains credulity to argue that Bullington's addition of "Why?" had any impact on the outcome of the case. Nor did Bullington's clarification—followed by months of unchallenged personal interpretive services for appellant—reflect any disloyalty or breakdown in the interpretive relationship between Bullington and appellant. Therefore, appellant's claim should be rejected.

C. The Trial Court Did Not Abuse Its Discretion in Denying Appellant's Request for a "Check Interpreter"

1. Background

During a January 9, 2001, pretrial conference with Judge Snowden in Napa County, defense counsel requested—in addition to the court-certified translator interpreting the proceedings for appellant—that a "check interpreter" be appointed to ensure that any Spanish-speaking witness's testimony was accurately translated by the witness interpreter. (15 RT 5138-5139.) Defense counsel acknowledged that such an occurrence was unlikely, and the trial court denied the request. (15 RT 5139.) The trial court stated:

> If you have any law that says that the defendant is entitled to a third interpreter being present in the courtroom, *i.e.* one for him, one for the witness, and then one to be sure that what the witness's interpreter is translating is translated accurately, I would want to know it. But if there is no such law, then I think my answer is that's what the certification is for. And that without some kind of a showing that you need it for some reason that I would not authorize the presence of an extra interpreter

> just to make sure that a certified interpreter is accurately translating Spanish.

(15 RT 5139-5140.) Defense counsel provided no such caselaw establishing a right to a third, "check" interpreter in the courtroom. The trial court did, however, allow the defense to place a tape recorder near the witness stand to record any Spanish-speaking witness's testimony. (15 RT 5140.)

Appellant made this request again in a motion in limine filed on February 5, 2001, but he admitted that "no case, to defendant's knowledge, compels the appointment of a check interpreter." (7 CT 1917.) On February 14, 2001, the trial court denied appellant's request, but left open the possibility that appellant could re-raise the issue if, during trial, the defense made "a showing that interpretation was happening in a materially inaccurate fashion." (18 RT 5509.) Defense counsel did not raise the issue again.

2. Appellant did not establish the need for a check interpreter

As the district attorney explained in its written opposition, there are two problems with appellant's argument. (See 7 CT 1973.) First, defendants do not have a *right* to a "check interpreter." As the Court of Appeal noted in *People v. Aranda* (1986) 186 Cal.App.3d 230, 237, a "check interpreter is *a* solution when a showing has been made that an interpreter may be biased or deficient." "The question of an interpreter's competence is a factual one for the trial court," to be reviewed deferentially for substantial evidence. (*Ibid.*; *People v. Phillips* (2000) 22 Cal.4th 226, 236.) Second, a necessary predicate to appointment of a check interpreter is a showing that the interpreters used at trial are biased or deficient. Here, appellant made no showing that the team of Napa County court-certified interpreters used at his trial was deficient in any way. Nor

did appellant identify any material inconsistencies or inaccuracies in the interpretive services offered in the Placer County portion of the proceedings. This failing is particularly important given that the trial court allowed appellant to place a small recording device near each testifying witness. Because appellant made no showing regarding the ineffectiveness of the interpreters to be used at trial, the trial court did not err in denying appellant's request for a check interpreter.

D. The Audio Equipment Used by the Trial Court Did Not Prejudice Appellant

Appellant complains that the audio equipment used in both Placer County and Napa County interfered with the interpretive services provided to appellant and to the witnesses. In support, he provides a long string cite of record references with no explanation or precedential backing. Appellant's claim fails for at least three reasons.

First, defense counsel did not formally object to the equipment used in either Placer or Napa County. In fact, several of the instances where interpreters had to ask for clarification were due to defense counsel *not using the microphone provided* and being told by the trial court to speak up. (See, e.g., 2 RT 290-291 ["Your interpreter cannot hear you. You're going to have to sit down or really scream it out."], 303, 325.)

Second, whenever issues with volume or echoes in the courtroom prevented the interpreter from hearing a question or response, or prevented the parties or the court from hearing the interpretation, the relevant party asked for clarification or repetition of the phrase. On these occasions, the trial court took the time to ensure that each participant in the proceedings was able to hear and meaningfully participate in the examination. To take one of appellant's record citations as an example, during the preliminary hearing cross-examination of Yolanda, interpreter Oliver expressed some difficulty in hearing defense counsel's questions. (2 RT 303.) Defense

counsel asked if it would be easier to hear if he did not use the microphone but spoke louder. (2 RT 303.) Oliver said that that would make it easier for her to hear, but the trial court approved the setup only after ensuring that appellant's personal interpreter (Bullington) could still hear all of the questions and answers. (2 RT 303.) Bullington assured the trial court that she could still hear the proceedings, and she asked for and received a repetition whenever she needed one. (See, e.g., 2 RT 306 ["I'm sorry?" (followed by repetition of defense counsel's question)].)

Finally, despite recording the entire trial, appellant has not identified a single inaccuracy in witness interpretation at trial. Thus, even to the extent the interpreters had to listen more closely or ask for repetitions periodically, there is no evidence that the audio equipment undercut the actual quality of the testimony provided or led the jury to rely on inaccurate interpretations in reaching its decision. Thus, any error was harmless.

E. There Were No Material Inconsistencies in the Witness Interpretation at Trial

1. Background

Appellant casts his argument broadly, but in apparent recognition that most of his claims are forfeited on appeal, he focuses solely on the interpretive services provided by Frank Valdes at appellant's Long Beach interview on July 16, 1998. (AOB 143-146.)

During its case-in-chief, the prosecution played the videotape of the Long Beach interview, during which Valdes can be heard interpreting appellant's responses, and also distributed a transcript (prepared by Valdes and distributed previously to the defense) to assist the jurors in reviewing the videotape. (42 RT 9770, 9776.) After the prosecution closed, defense counsel moved for a mistrial based on supposed inaccuracies in Valdes's interpretation of the Long Beach interview and in the transcript shown to the jury. (45 RT 9924.) Defense counsel claimed the following errors:

- "Page eight, line six. English and Spanish both indicate 'he started pushing,' not 'we started pushing.'" (45 RT 9927.)
- "[Page] fourteen, line nine. 'Stayed there,' instead of 'played there.'" (45 RT 9927-9928.)
- "[Page] twenty three, line two. 'Poor' is not used by Sergeant McDonald." (45 RT 9928.)
- "[Page] twenty six, line nine through ten. 'Relax' is 'react.'" (45 RT 9928.)
- "Page 32, line three. That should read 'because they were still around there.'" (45 RT 9928.)
- "Page 44, line eight. Should read: 'No, well first I was going to take the children.'" (45 RT 9928.)

As the trial court explained, each of these supposed "interpretation" errors by Valdes was actually a "transcription" error, meaning that the audio translation provided on the video by Valdes was correct, but minor typos had occurred in the preparation of the typed transcript shown to the jury. (45 RT 9927-9929.) Moreover, Haydee Claus, a court-certified Spanish interpreter, testified that while there were errors in Valdes' translation typical of spontaneous interpretation, there was "adequate communication between the parties" and the "integrity" of the translation was not compromised. (42 RT 9760-9761.) Even the defense's *own* certified interpreter, Dr. Carol Meredith, admitted that "substantially" all of Valdes's interpretations were correct, and that he "interpreted correctly most of the time." (45 RT 9981.)

The trial court denied appellant's motion for a mistrial, stating that it had "look[ed] line by line throughout the entirety of the tape" and found only one significant error in transcription. (45 RT 9932["no, well first I was going to take the children" rather than "no, first I was going to take [Yolanda] to see the children"].) However, the trial court ruled that, in light of its earlier instruction for the jury to consider the audio on the tape rather than the transcript, this one error was "imminently correctable." (45 RT 9932-9933.) Thereafter, the trial court not only reiterated to the jury that

there might be errors in the transcript and they should rely only on the audio on the videotape, but the trial court specifically drew their attention to the error noted above about appellant taking Yolanda to see her children. (45 RT 9934, 9952-9953; see also 47 RT 10272.)

2. The trial court did not abuse its considerable discretion

A mistrial should be granted when a trial court determines that a trial incident caused incurable prejudice. (*People v. Hines* (1997) 15 Cal.4th 997, 1038.) A trial court to whom a mistrial motion is directed has "considerable discretion" in addressing that motion. (*Ibid.*) The court's ruling should not be disturbed on appeal unless the court abused its discretion, meaning that the ruling was arbitrary or capricious or exceeded the bounds of reason. (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1121.)

No such abuse of discretion occurred here. First, although appellant asserts that Valdes was "incompetent, unqualified, and improperly used as [an] interpreter" (AOB 144), Valdes was, in fact, a court-certified interpreter whose oath and court certification are part of the record in this case. (See SCT 36-37.) Second, as the trial court noted, the errors highlighted by defense counsel were transcription errors, not interpretation errors, meaning the interpretation heard on the videotape was accurate. Experts from both sides agreed on this point. Third, the trial court reasonably concluded that only one of the transcription errors was material. The trial court highlighted this error for the jury and instructed the jury to consider only the videotape, not the transcript, as evidence. Because we presume that jurors are "intelligent and capable of understanding and applying the court's instructions" (*Bryant, supra*, 60 Cal.4th at p. 433), the distribution of the transcript was not prejudicial. And in light of appellant's numerous confessions to different law enforcement agencies and relatives, the powerful testimony provided by Yolanda, and the physical evidence

tying appellant to the crimes, there is no likelihood that any minor discrepancy in the transcript or videotape impacted the outcome of the case.

F. No Cumulative Error From the Alleged Defects

Finally, appellant contends his convictions should be reversed because the cumulative effect of the alleged interpretive errors eroded his rights to due process and "to be truly present" at his trial. (AOB 147.) Because appellant has not proven that any prejudicial error occurred at trial, there is no cumulative effect requiring reversal. (See *People v. Smithey* (1999) 20 Cal.4th 936, 1007 ["Because we find no instructional error affecting the jury's consideration of mitigating factors, defendant's claim of heightened prejudice from cumulative instructional error is without merit"].)

VI. APPELLANT'S FOURTH AMENDMENT RIGHTS WERE NOT VIOLATED BY THE OFFICERS' SEARCH OF HIS YARD AND RESIDENCE

Appellant challenges various searches that took place after he committed his crimes and fled to Southern California: (1) two searches of his trailer on the night of the crimes, (2) a search of his trailer the next day pursuant to a warrant, and (3) a search of the apartment in which he was arrested. (AOB 148-150.) The trial court properly denied appellant's motions to suppress evidence from these searches because: (1) the trailer searches were valid emergency searches to identify the missing victims and the suspect in a child kidnapping and murder case, (2) appellant abandoned his trailer when he fled to Mexico, and (3) the owner of the apartment consented to the search.

A. Background

1. Emergency search of appellant's trailer on the night of July 12, 1998

Around 9:16 p.m. on July 12, 1998, Yolanda ran to the Parnell Family's house and called 911. Yolanda was hysterical and kept screaming

over and over that she had been raped by her brother-in-law, and that her husband and children were missing. (3 RT 645-646.) She told the dispatcher that a man named "Arturo" had taken her children, but she did not provide any additional information as to his identity or whereabouts. (3 RT 647-648; 4 RT 1051.)

Placer County deputies were sent to the Parnell Ranch to look for the missing men and children. (3 RT 721.) When they got there around 9:24 p.m., one group of deputies talked to Yolanda, while Deputies Walker and Reed performed a quick sweep of the property and various ranch buildings in search of the suspect and four missing victims. (3 RT 651, 666, 727, 729.) During the sweep, officers "went through the draft horse barn, down through the stalls," and "cleared" those locations. (3 RT 729.) They proceeded to appellant's trailer to "clear [it] to make sure nobody is hiding in there." (3 RT 730.) Deputy Walker further explained that "there was concern that [the suspect] was coming back to get" Yolanda from the trailer, so they worried the suspect might be hiding in the trailer or may have brought the children or men back there. (3 RT 731.)

The deputies entered the trailer with their weapons drawn and did a quick walk-through of the dimly-lit trailer. (3 RT 731.) On a table in the bedroom, in plain view, they found "ammunition for various guns," and in looking under the bed for the suspect or victims, they found two rifles (one of which was loaded). (3 RT 733-734.) Deputy Reed seized the firearms "for safekeeping," concerned that the suspect might return to the trailer that night, retrieve his weapons, and potentially use them against the missing victims or police. (3 RT 734-735; see also 3 RT 771 ["we had concern that Arturo might come back, and so we wanted to secure [the guns] so those could not be used against us or anyone else"].)

The deputies concluded their sweep of the trailer and, although they saw pieces of torn duct tape on the floor, they did not seize anything else at

that time. (3 RT 735.) The whole sweep of the trailer took "less than two minutes," and occurred within 10 or 15 minutes of the deputies' arrival at the ranch. (3 RT 735, 739.) They continued their sweep of the rest of the property, including "each and every building located there," but were unable to find anyone. (3 RT 736-738.) This search of the ranch was performed with the consent of ranch owner, Randy Parnell, who drove the officers around the property on a four-wheeler. (3 RT 782, 785.)

2. July 12 entry of appellant's trailer for identifying information

Detective Diana Stewart was called to Parnell Ranch that night and arrived "a little after [10 p.m.]." (3 RT 787.) She was briefed by Deputy Owens about Yolanda's brutal rape and beating, and she saw the same physical injuries and hysterical demeanor that Deputy Walker described. (3 RT 788-789.) The only description or identification of the attacker that Yolanda provided was "Arturo bad." (3 RT 790.) Yolanda was unable to provide Detective Stewart with: (1) her attacker's full name; (2) a physical description; (3) a date of birth; or (4) an address. (3 RT 796-797.) Stewart was also unable to get identifying information or a description of the four missing victims, including the two adult males who might be confused for the suspect in the manhunt. (3 RT 807.) Nor was Detective Stewart able to get conclusive identifying information about the suspect from the Parnells. (3 RT 803.)

Detective Bill Summers arrived at the ranch around 10:40 p.m. (4 RT 837.) Deputy Owens briefed Summers on Yolanda's beating and rape, and informed him that an unidentified suspect and four victims were missing on the property. (4 RT 838.) Summers also learned that two rifles had been found in appellant's trailer and that deputies feared appellant had access to other weapons. (4 RT 846.) Given the language barrier, Summers had difficulty communicating with Yolanda, but he thought she said that her

attacker's name was "Arturo Suarez." (4 RT 843.) However, Randy Parnell told Summers he thought that appellant's last name was "Arturo *Juarez*." (4 RT 845.) Neither Yolanda nor Parnell could provide Summers with appellant's birth date or social security number for identification purposes. (4 RT 845, 974.)

Faced with inconsistent identifying information for the missing suspect, Summers was unable to broadcast a full description of the suspect. (4 RT 849.)[13] Therefore, Summers went to appellant's trailer in search of additional identifying information. As Summers explained at the suppression hearing:

> I had gone down to the trailer specifically to find additional identification on the children, the other missing men as well as the suspect because we didn't have full information as to the identity. And due to the exigent circumstances of the missing children I felt it necessary to go into the trailer to look for items of identification for purposes of the investigation to assist us in broadcasting a BOLO.

(4 RT 854.)

Looking through the porch screen of the trailer with a flash light, Summers saw, in plain view, a piece of crumpled duct tape similar to what he had seen stuck to Yolanda's neck. (4 RT 852-853.) In the living room of the trailer, Summers saw a checkbook cover, which he figured could contain identifying information for the suspect. (4 RT 854.) Instead, he found a driver license in the name of Jose Luis Martinez. (4 RT 854.) He took out the driver license and placed the checkbook cover back on the ground where he found it. (4 RT 855.)

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[13] The confusion over the suspect's name that night was made clear in the dispatcher's testimony. (See, e.g., 3 RT 670 ["I couldn't get [Yolanda] to clarify what the name was . . . she thinks the last name is Suarez or Juarez, something to that effect"] .)

In the same room, Summers found two envelopes with tax and DMV documents directed to "Arturo Suarez" and "Arturo Juarez Suarez," as well as documents containing appellant's social security number, date of birth, vehicle registration, and mailing address. (4 RT 855-857.) Upon finding this identifying information, Summers left the trailer, relayed the updated description to police dispatch, and requested a DMV photograph of appellant. (3 RT 685, 712; 4 RT 857-858.) Information from appellant's DMV file was entered into the dispatch log around 12:50 a.m. (4 RT 1064, 1071-1072.) Not until about 3:00 a.m., after Detective Stewart had obtained further information from Yolanda at the hospital, did authorities issue a "Be on the Lookout" (BOLO) alert for appellant. (4 RT 859.)

The whole entry by Summers lasted approximately three minutes, and he did not enter any additional rooms after finding the DMV and tax information in the living room. (4 RT 857, 881.) The trailer was then sealed with crime scene tape and was not entered again until a search warrant was executed the next day.

3. July 13 search of appellant's trailer pursuant to a warrant

Around 10:00 a.m. on July 13, 1998, Judge Kearney reviewed and issued a search warrant for appellant's trailer. The warrant was supported by an affidavit from Desiree Carrington, a Placer County deputy sheriff. (2 CT 502-509.) The affidavit chronicled Yolanda's statements to police about her attack and escape from the trailer, and Yolanda's observations of appellant's conduct with Jose, Juan, Jack, and Areli. (2 CT 505.) Carrington compiled this information based on her conversations with Detective Summers and Detective Stewart. (2 CT 505.)

Detective Summers testified that he spoke to Carrington "for a couple minutes" around 8:00 a.m. on the 13th and briefed her on the case and investigation. (4 RT 882.) He described Yolanda's allegations and the

status of the missing suspect and victims. (4 RT 923.) Summers also described his search of the trailer for identifying information the night before and gave Carrington a description of the trailer and the address. (4 RT 924.) Summers told her that he had seen a piece of crumpled duct tape and a pair of scissors on the floor of the porch, and red twine or rope, a white tennis shoe, more duct tape, and boxes of ammunition inside the trailer. (4 RT 925.) He also told her that deputies had previously located at least one rifle in the trailer. (4 RT 927.) Carrington had a similar briefing session with Detective Stewart. (4 RT 918.)

The search warrant was executed at 1:30 p.m. that afternoon. Carrington was part of the team that searched the trailer and premises. (4 RT 909.) Carrington did not knock on the trailer door before entering because she "had every reason to believe it was unoccupied." (4 RT 1038.) Deputies had been on scene all night, and they had placed crime scene tape across the front of the residence. (4 RT 1038.) Carrington had also been told that the suspect had fled, so she had no reason to make a "tactical approach" or have her weapon drawn as she approached the trailer. (4 RT 1038.)

In the trailer, officers seized: "Duct tape, red twine or rope, aluminum foil, aluminum foil box with Saran Wrap, a pair of scissors, silver chain with a blue handle . . . several boxes of different calibers of ammunition, [and] indicia with Arturo Suarez' name or address." (4 RT 913.) Officers also recovered a "pair of boots, the left boot containing . . . two wallets which contained the ID of Jose Martinez and [] three gold chains." (4 RT 914.) Although appellant has not identified which specific items he is challenging that were seized in the yard, officers seized several items from the open areas around the trailer, including: three shell casings, a wooden stick with a broken handle, several cans, a golf club, duct tape, red twine,

two ropes, a dog leash, and a pair of green shorts that had been cut around the genitals. (4 RT 914-915, 943-949.)

4. July 15 search after appellant was arrested

A federal arrest warrant was issued for appellant on July 15, 1998, charging him with unlawful flight to avoid prosecution for murder and rape. (4 RT 977-978.) A state arrest warrant had been issued in Placer County the previous day.

Around 8:40 p.m. on August 15, 1998, FBI agents arrived at a residence near Long Beach where they believed appellant was hiding. (4 RT 977-978.) They contacted the renter of the apartment, Josefina Torres, who told them that appellant was inside.[14] (4 RT 979-980.) The agents asked appellant to come outside; after some delay, he complied and was arrested. (4 RT 980-981.) Torres told agents that appellant had left a Mervyn's shopping bag inside her hallway closet and provided consent for the agents to search her apartment. (4 RT 981-982.) Agents seized the bag from the closet, as well as a cowboy hat which Torres said belonged to appellant. (4 RT 982-983.) The bag contained "dirty pants and a dirty shirt, dirty socks, a red ink pen, [] new underwear, a new pair of socks, a new blue denim shirt, and new pair of pants." (4 RT 985.) When appellant later complained that he was cold, agents retrieved one of the shirts from the bag and gave it to him to wear. (4 RT 985.)

B. Appellant's Motion to Suppress

On August 19, 1999, appellant moved under section 1538.5 to suppress evidence from these four searches. (2 CT 388-407.) The district attorney filed an opposition on August 27, 1999. (2 CT 469-493.) The

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[14] Torres also specified that appellant was not a long-term resident of the apartment and was only "staying with them for a short period of time." (4 RT 994.)

district attorney argued that the searches were permissible because they were either executed pursuant to a valid warrant or occupant's consent, or were conducted under the exigent circumstances of trying to locate a rape suspect and four missing victims. (2 CT 478, 486-492.) In supplemental briefing filed September 15, 1999, the district attorney added, inter alia, that appellant's flight from the crime scene constituted an abandonment of the trailer and a waiver of any expectation of privacy. (2 CT 538-551.)

The trial court heard testimony and argument over five days in September 1999 before denying the motion with regard to all four searches. (3 RT 636-5 RT 1175.) Specifically, the trial court ruled that: (1) appellant abandoned his trailer when he fled the Parnell Ranch after the murders; (2) Deputy's Reed's initial walk-through of the trailer was part of a valid emergency search; (3) Detective Summer's entry was valid as a search to obtain or verify the suspect's identity so a BOLO alert could issue; (4) the search warrant was supported by probable cause and reliable information; (5) the evidence in the yard/curtilage was in plain view and covered by the Parnells' consent; (6) any knock on the trailer door was useless because it had been abandoned; and (7) the FBI search was incident to arrest and pursuant to Torres's consent to search common areas. (3 CT 655; 5 RT 1166-1174.)

The defense tried to reopen the issue before a new judge during trial by requesting a de novo section 1538.5 hearing based on purported new information. (8 CT 2272-2276; 40 RT 9543.) The motion dealt only with the quantum of identifying information available to detectives in the early stages of the investigation and acknowledged that the supposed new information did "not materially alter the factual or theoretical predicates for Judge Couzens' conclusions regarding abandonment or the legal of Deputy Reed's initial entry into the trailer." (8 CT 2275.) On April 3, 2001, the trial court denied the motion to reopen the matter because any new

information did not impact the abandonment analysis, which was dispositive. (8 CT 2296; 42 RT 9811, 9817.)

C. The Trial Court Properly Denied the Suppression Motions

"In ruling on a motion to suppress, the trial court must find the historical facts, select the rule of law, and apply it to the facts in order to determine whether the law as applied has been violated." (*Bryant, supra,* 60 Cal.4th at pp. 364-365.) Appellate courts "review the court's resolution of the factual inquiry under the deferential substantial-evidence standard. The ruling on whether the applicable law applies to the facts is a mixed question of law and fact that is subject to independent review." (*Ibid.*) "On appeal [courts] consider the correctness of the trial court's ruling *itself*, not the correctness of the trial court's *reasons* for reaching its decision." (*Ibid.*) "[T]he power to judge the credibility of the witnesses, resolve any conflicts in the testimony, weigh the evidence and draw factual inferences, is vested in the trial court. On appeal all presumptions favor the exercise of that power." (*In re Arturo D.* (2002) 27 Cal.4th 60, 77.)

1. The first sweep of the trailer was a valid emergency search

The existence of an emergency requiring quick action by police officers generally excuses the Fourth Amendment search warrant requirement. (*Warden v. Hayden* (1967) 387 U.S. 294, 299.) "'Exigent circumstances' means an emergency situation requiring swift action to prevent imminent danger to life or serious damage to property, or to forestall the imminent escape of a suspect or destruction of evidence." (*People v. Panah* (2005) 35 Cal.4th 395, 465.) "There is no ready litmus test for determining whether such circumstances exist, and in each case the claim of an extraordinary situation must be measured by the facts known to the officers.'" (*Ibid.*)

In *Panah*, the defendant kidnapped, molested, and murdered an eight-year-old girl whose father lived in the defendant's apartment complex. (35 Cal.4th at p. 409.) On appeal, Panah challenged four searches, the first of which was a warrantless search of his apartment on the day the young girl disappeared. (*Id.* at p. 465.) At the time the officers made their initial entry, they had learned that a young man in his 20's lived in the apartment, that the kidnapping victim had last been seen talking to a man in his 20's, and that a television set in the apparently-empty apartment had been turned off. (*Ibid.*) The officers obtained a key from the building manager and entered the apartment to look for the missing girl. (*Ibid.*) The search lasted between five and 15 minutes, and the officers checked both upstairs and downstairs, including the closets. (*Ibid.*)

The trial court ruled the search was justified under the exigent circumstances exception, and this Court affirmed. (*Id.* at p. 466.) Among the factors cited in applying the exception were: (1) the missing victim was only eight years old, (2) she had been missing for a few hours, and (3) the only lead the police had was that the victim had last been seen talking to someone who matched the description of the apartment's occupant. (*Ibid.*) Based on these facts, the officers were entitled to perform a brief sweep of the apartment looking for the missing child victim and the suspect. (*Ibid.*; see also *People v. Eckstrom* (1974) 43 Cal.App.3d 996, 1003-1004 [emergency search for possible shooting victims].)

The same is true of the initial search of appellant's trailer. Deputies Reed and Walker were looking for four missing victims, including a three-year-old girl and a five-year-old boy; the victims had been missing for a few hours when the officers first entered the trailer; and the trailer belonged to the last person seen with the missing victims. Adding to the compelling facts in *Panah*, here, Yolanda had identified appellant as her attacker, there was no doubt that the suspect lived in the trailer, and the trailer was actually

the site of appellant's attack on Yolanda. As such, the trailer was the most logical place for the deputies to look in their frantic sweep of the ranch in search of the victims. Moreover, while the search in *Panah* lasted between five and 15 minutes, the quick emergency search of appellant's trailer lasted only two minutes.

Under the circumstances, the clear intent of the officers was to perform a quick search for the missing victims, not to collect evidence for a future prosecution. In fact, appellant appears to concede the legitimacy of the initial search, arguing that "*after* the initial search by deputy Walker and several others turned up nothing, there was no justification for *subsequent* intrusions without obtaining a search warrant." (AOB 155, italics added.) Therefore, the initial search should be upheld.

a. Appellant abandoned his trailer

Even if this Court does not accept the exigency rationale for the initial search of appellant's trailer, the trial court's alternate ruling of abandonment provides another basis for upholding the search. The leading case on abandonment of property for Fourth Amendment purposes is *United States v. Levasseur* (2d Cir. 1987) 816 F.2d 37. In that case, codefendant Manning was tipped off by accomplice Williams that the FBI was raiding Williams' house. (*Id.* at p. 40.) The agents were not able to reach Manning's home until 4:00 a.m. that night, by which time Manning had already fled. (*Id.* at p. 41.) Agents discovered that the residence was fully furnished and rent had been paid through the end of the month. (*Ibid.*) They observed weapons in the house and conducted a warrantless search of a footlocker, which contained more guns and ammunition. (*Ibid.*) The Mannings never returned to the house and were eventually found and arrested in a neighboring state six months after the search was conducted. (*Ibid.*) Based on these facts, the district court rejected the defendants'

pretrial motion that the search of the residence and the footlocker were unlawful. (*Id.* at p. 42.) Affirming, the Second Circuit held:

> Since one forfeits any reasonable expectation of privacy upon abandoning one's property, a warrantless search or seizure of abandoned property does not violate the Fourth Amendment.
>
> Abandonment is a question of fact, to be decided in objective terms on the basis of all the relevant facts and circumstances, and not on the basis of leasehold interests or other property rights.
>
> The facts and circumstances pertinent to the court's abandonment inquiry are not limited to those which were known to the officers at the time of the search or seizure. *Rather, subsequently discovered events may support an inference that appellants had already chosen, and manifested their decision, not to return to the property.*

(*Id.* at p. 44, italics added and citations omitted.) Despite the "Mannings' failure to take their weapons, clothing, and personal belongings with them to Virginia," the Second Circuit found that "the other signs of abandonment" revealed the Mannings' intent to flee and never return to their home. (*Ibid.*; see also *Abel v. United States* (1960) 362 U.S. 217, 240-241 [search of defendant's hotel room permissible after he checked out]; Wayne LaFavre, *Search and Seizure: A Treatise on the Fourth Amendment* § 2.3(e) (4th Ed. 2011) ["It has often been held that if a defendant has in fact abandoned the place where he formerly resided, then he may not have suppressed from evidence what the police find on those premises after the time of abandonment"].)

The abandonment doctrine has been adopted by California courts. (See *People v. Ayala* (2000) 24 Cal.4th 243, 278-279 [defendant abandoned containers at body shop and forfeited any expectation of privacy]; *People v. Smith* (1966) 63 Cal.2d 779, 800-801 [abandoned rental car]; *People v. Daggs* (2005) 133 Cal.App.4th 361, 365 [abandoned cell phone].) *People v.*

Ingram (1981) 122 Cal.App.3d 673, 681 [abandoned hotel room].) Abandonment in this context "is not meant in the strict property-right sense, but rests instead on whether the person so relinquished his interest in the property that he no longer retained a reasonable expectation of privacy in it at the time of the search." (*Daggs*, *supra*, 133 Cal.App.4th at p. 366.) "Abandonment is primarily a question of intent, and intent may be inferred from words, acts, and other objective facts." (*Id.* at pp. 365-366) "The question whether property is abandoned is an issue of fact, and the court's finding must be upheld if supported by substantial evidence." (*Id.* at p. 365.)

People v. Parson (2008) 44 Cal.4th 332 is illustrative of this Court's abandonment jurisprudence. In *Parson*, the defendant (like appellant) killed his victim near Sacramento and then fled south through Stockton. (*Id.* at p. 346.) He checked into a motel in Gilroy for one night but told the manager that he might stay another night or two. (*Ibid.*) However, he disappeared without paying for an additional night's stay or communicating with the managers or employees. (*Ibid.*) He left clothes and personal items in the room and left his car parked in front of the motel. (*Ibid.*) Once the defendant left, he never contacted the motel manager about the room or the items left behind. (*Ibid.*) The next time anyone heard from him was a phone call a week later from Bend, Oregon. (*Ibid.*)

On these facts, the trial court and this Court held that Parson manifested an intent to abandon his property in the motel room. (*Parson*, *supra*, 44 Cal.4th at p. 346.) Even the fact that he had left his clothes and personal items in the room did not preclude a finding of abandonment—under the circumstances, that was "entirely consistent with the trial court's [] finding that he took flight and abandoned the premises in a rush." Thus, the officers' entry and observations of the motel room (which formed the basis for a later warrant) were not improper.

Here, as in *Parson*, there are several factors supporting the trial court's finding that appellant abandoned the trailer: (1) he fled immediately after committing the crimes and seeing police arrive; (2) he was arrested three days later, hundreds of miles away, and he admitted that he was fleeing to Mexico; (3) he did not return to the trailer after he fled, nor did he call or communicate with anyone at Parnell Ranch; (4) it would have been highly risky for him to return to his trailer given the gravity of his crimes and the ensuing manhunt; and (5) he had no ties to the community other than the relatives he had just murdered. As in *Parson*, the fact that appellant left behind some of his belongings, as well as the items he stole from Juan and Jose, suggests that he fled in a rush when he saw police, not that he intended to return.[15]

Moreover, the fact that the police did not know that appellant had fled to Mexico *at the time they entered the trailer* is irrelevant. Contrary to appellant's assertion that his "subsequent course cannot be allowed to show an immediate abandonment," later-discovered facts *can* inform the court's abandonment analysis. (*Levasseur*, *supra*, 816 F.2d at p. 44.) Appellant admits as much on the next page, but suggests that subsequent events can be used only by a defendant to rebut a claim of abandonment, not by the prosecution to prove abandonment. (AOB 162.) But this claim of non-

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[15] Appellant claims that a broad reading of the abandonment doctrine would "swallow up virtually every case in which the accused does not return home after committing a crime." (AOB 161.) To be sure, flight *on its own* does not necessarily indicate an intention to permanently abandon one's home or give up one's expectation of privacy. However, cases rejecting the abandonment doctrine typically involve suspects who either eventually returned to the property, were arrested before they had a chance to flee, or were minors without viable alternate housing. (See, e.g., *In re Rudy F.* (2004) 117 Cal.App.4th 1124, 1134 [teen runaway did not intend to permanently abandon his privacy interest in bedroom where, "at the time of the search, appellant had returned home and was again living there"].)

mutuality has no support in precedent. Accordingly, substantial evidence supports the trial court's finding that appellant had abandoned his trailer, and with it, any reasonable expectation of privacy in its contents.

b. Any error was harmless

Finally, even if the initial search was improper, the only evidence to be suppressed was the two rifles seized from appellant's bedroom. The prosecution would still have been able to present Yolanda's testimony, appellant's multiple confessions, and the remainder of the physical evidence seized in subsequent searches (for the reasons explained below). In light of this overwhelming evidence of guilt and aggravation, any error in admitting the rifles was harmless beyond a reasonable doubt.

2. The second entry of appellant's trailer was a valid search for identifying information

As explained above, by the time Detective Summers entered appellant's trailer around 11:00 p.m. on the night of the murders, appellant had fled the ranch and abandoned any privacy interest in the trailer. However, Summers' search was also justified because he entered the trailer with the specific intent of locating information to identify the suspect. This Court upheld that type of search for identifying information in *People v. Hill* (1974) 12 Cal.3d 731, 756. Recognizing the importance of identifying a suspect when victims and criminals are "at large," the court found it "reasonable to believe that the names, addresses and information contained in the yellow notebook and brown address book found in the room where the murder occurred could provide a clue to the identity of the murderers." (*Ibid.*, overruled on another ground in *People v. Devaughn* (1977) 18 Cal.3d 889.) Accordingly, the law permitted the officers in *Hill* "to look inside bags, notebooks, envelopes, and pursues in pursuit of this goal." (*People v. Amaya* (1979) 93 Cal.App.3d 424, 429 [describing the holding in *Hill*].)

Here, time was running short, a woman had been badly beaten and raped, two young children and two men had been missing for several hours, and Detective Summers had been given incomplete and conflicting information about the suspect's identity. Adding to the urgency of the situation, Summers had previously seen ammunition for a handgun that had not been recovered, so he had reason to suspect the unaccounted-for suspect was armed. Summers' seizure of the DMV and tax documents, as well as Jose's driver license, enabled Summers to put out a BOLO alert for other law enforcement agencies to aid the ongoing manhunt for a suspected murderer and rapist. For these reasons, Summers' entry into appellant's trailer did not violate appellant's Fourth Amendment rights.

Even if this Court holds the search improper, any error was harmless. The only pieces of evidence seized during this search were identifying documents tying the trailer to appellant and Jose's driver license. To begin, these documents would have been inevitably discovered because the trailer was secured between the night of the murders and the execution of the search warrant the next day. (See *Nix v. Williams* (1984) 467 U.S. 431, 447 [otherwise excludable evidence may been admitted "if the government can prove that the evidence would have been obtained inevitably and, therefore, would have been admitted regardless of any overreaching by the police"].) Moreover, Yolanda's injuries and statement to police that she was attacked in appellant's trailer, as well as the Parnells' statements that the trailer belonged to appellant, would have provided probable cause for a search warrant even without any of the observations made by Detectives Summers and Stewart. Finally, the identifying information seized during the search was immaterial to the outcome of the case because appellant never contested his guilt or the identity of his victims. In light of the overwhelming evidence of guilt, and the minimal prejudice occasioned by

introduction of the identifying documents, any error is harmless beyond a reasonable doubt.

3. The July 13 search was conducted pursuant to a valid search warrant

Appellant complains that Desiree Carrington's affidavit supporting the search warrant was "not valid" because it was "not based on personal knowledge, and is based on uncorroborated hearsay." (AOB 157.) To begin, regardless the validity of the warrant, the third search of appellant's trailer was permissible because appellant abandoned the trailer when he fled to Mexico.

As to the merits of the claim, the United States Supreme Court has long held that "an affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant, so long as the magistrate is 'informed of some of the underlying circumstances' supporting the affiant's conclusions . . ." (*United States v. Ventresca* (1965) 380 U.S. 102, 108.) Even "hearsay upon hearsay does not necessarily, or as a matter of law, impose a Fourth Amendment taint upon a search warrant based, in whole or in part, upon it." (*People v. Superior Court (Bingham)* (1979) 91 Cal.App.3d 463, 469.) The Supreme Court has also noted that affidavits "must be tested and interpreted by magistrates and courts in a commonsense and realistic fashion," recognizing that they "are normally drafted by nonlawyers in the midst and haste of a criminal investigation." (*Ventresca, supra*, 380 U.S. at p. 108.) Thus, "technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area." (*Ibid.*)

Here, the trial court correctly concluded that the information supporting the affidavit was reliable. Carrington's summary was based on her briefings with Detectives Summers and Stewart, and on Yolanda's statement to police describing the attack she suffered inside appellant's

trailer. Thus, unlike cases involving confidential informants, the affidavit here was based on statements from *named* police officers and a named victim, whose statements were verified through subsequent investigation. In fact, even excluding the prior observations by officers in their search for the missing victims and suspect, the search warrant was amply supported by Yolanda's statement to police of her attack in appellant's trailer and her own observations inside the trailer. Therefore, appellant's motion to suppress was properly denied.[16]

Moreover, even if the trial court erred in admitting evidence recovered during the warranted search, any error is harmless. During the search, officers recovered the twine, chain, tape, and scissors appellant used to bind Yolanda. However, appellant confessed to binding and beating Yolanda, and his confession, her testimony, and her physical injuries would have been sufficient to support those allegations even without the evidence seized in the warranted search. The other evidence found during the search (Jose and Juan's wallets, shell casings, the broken stick, etc.) was also referenced in appellant's multiple confessions to the crime. (See, e.g., 5 CT 1344 [appellant admits he took Juan and Jose's wallets and chain, supporting robbery felony-murder charge].) Because their exclusion would not have undercut the prosecution's case in any significant way, and the

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[16] Appellant argues in passing that any items seized from his yard should also have been suppressed. However, these items were observed in plain view during execution of a valid search warrant, and thus were admissible. Moreover, Randy Parnell gave officers permission to search the entire ranch for the missing victims and appellant, including common areas. This provided officers with another valid basis for searching the open areas outside appellant's trailer.

evidence of appellant's guilt was overwhelming, any error was harmless beyond a reasonable doubt.[17]

4. The search of the Wilmington apartment was pursuant to the occupant's consent

Appellant describes the search of the Wilmington apartment in the background section of his Fourth Amendment claim, but he does not challenge that search either in the heading or body of the argument. This is likely because, as the trial court ruled, the occupant of the apartment (Torres) gave officers consent to search the common areas of her apartment, including the shared closet and hat rack in the hallway. Thus, as appellant appears to concede, the officers' seizure of appellant's belongings from those common areas was valid.

VII. APPELLANT'S REPEATED CONFESSIONS WERE NOT IMPROPERLY PROCURED OR ADMITTED

Appellant next challenges the admission of his multiple confessions to the murders. (AOB 164-174.) However, these claims fail because appellant: (1) volunteered several of his admissions without being questioned; (2) knowingly and intelligently waived his rights under *Miranda v. Arizona* (1966) 384 U.S. 436 before being questioned; and (3) challenges some evidence that was not, in fact, introduced at trial.

A. Background

On December 13, 2000, defense counsel filed a motion to suppress appellant's statements to Agent Stevens in Long Beach and to Detective McDonald in Placer County, as well as a videotaped walk-through at

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[17] Although appellant challenged the "no-knock" entry for this search before the trial court, he does not assert that claim on appeal. And for good reason. Officers *knew* that the trailer was unoccupied, having previously entered it twice before, blocked the entry with caution tape, and guarded it throughout the night.

Parnell Ranch. (5 CT 1386-1396.) Defense counsel took issue with the Spanish-language notice of rights card that appellant was provided by Stevens, and which Stevens read and discussed with appellant before securing his signed waiver. (5 CT 1388.) Defense counsel also challenged appellant's acknowledgement of his signed waiver form before the Placer County interview. (5 CT 1389.) The district attorney filed its opposition on December 19, 2000. (5 CT 1477-1489.) The trial court denied the motions to suppress on January 4, 2001. (12 RT 3190-3200.)

1. Long Beach interview

After appellant was arrested in the Wilmington apartment, he was transported by Agent Stevens and Detective Robbins to the Long Beach police station. (11 RT 2722.) During the car ride, he asked the officers what he was being arrested for. (11 RT 2723.) When Stevens told him that he had been arrested for four counts of murder and one count of rape, appellant responded, "I didn't rape the woman." (11 RT 2723.) Appellant also told Stevens that he had been on his way to Mexico when apprehended. (11 RT 2744.)

At the Long Beach police station, appellant was taken to an interview room by Stevens and Robbins. (10 RT 2693.) Stevens advised appellant that he was being charged with four counts of murder and one count of rape, and appellant again blurted out that he "didn't rape the female" but that "the murders were true." (11 RT 2725.) Appellant also volunteered, not in response to a question, that he had seen news reports of the crimes, and that "the homicides were true but he didn't rape the woman." (11 RT 2726.)

Stevens asked appellant if he was willing to talk about the crimes, and he stated that he was. (10 RT 2693, 2696.) Stevens confirmed that appellant spoke Spanish and gave him a Spanish-language *Miranda* advisement card to read, which he did. (10 RT 2696-2697; 11 RT 2728.) Appellant took "a sufficient time to read the entire document," and Stevens

saw his eyes "moving up and down the paper" as though he were reading it. (11 RT 2728.) Stevens then read the advisement form line-by-line in Spanish and asked appellant if he understood the form or had any questions. (10 RT 2696-2697.) Appellant said that he understood the form and did not have any questions. (11 RT 2728.)

The sheet informed appellant, in Spanish, that he had been told his "rights," including: (1) "I have the right to remain silent"; (2) "anything that I say can and will be used in a court of law against me": (3) "I have the right to speak to a lawyer and to have one present with me during the interrogation or interview"; (4) "If I am not able to pay or contact an attorney, one will be assigned to represent me prior to the interrogation if I desire one"; (5) "I understand each of these rights that have been described to me prior, and I wish to discuss this case with the official or officials"; and (6) "Whichever declarations I make at this moment are free and voluntary with no promise of compensation." (11 RT 2702-2703.)

Appellant said that he understood these rights, did not have an questions, and wanted to talk to the officers. (10 RT 2697-2698.) He then signed the waiver form without any hesitation and questioning began. (10 RT 2697; 11 RT 2729.) In response to a general question about what happened on July 12, appellant launched into a narrative confession. (11 RT 2731.) He said that his brothers-in-law, Jose and Juan, had come over to the ranch and were accusing appellant of cheating on his wife—their sister. (11 RT 2731.) As a result, he killed the two men with a shotgun and then beat the two children with the handle of a shovel. (11 RT 2732.) He dragged the bodies to a hole and buried them. (11 RT 2733.) He also admitted to binding Yolanda and beating her, though he denied raping her. (11 RT 2733.) Appellant said that he saw police cars as he walked back to his trailer after killing the children, so he fled through a field and watched the police search for him. (11 RT 2733.) Throughout his retelling,

appellant was "very calm, quiet, cooperative, speaking very clearly, did not appear to be shocked in any way." (11 RT 2734.) Appellant mentioned having anxiety and some medical issues in the past, but when asked by Stevens if he was still suffering from those afflictions, appellant stated that "it had been years ago." (11 RT 2755.) He did not display any signs of nervousness during the interview or express any fear that he would be mistreated if he did not cooperate. (11 RT 2764.) At no point did appellant request an attorney or indicate that he no longer wished to talk to the officers. (11 RT 2734-2735.)

The interview lasted a little over an hour and was not taped or recorded. (10 RT 2694; 11 RT 2735.) No force was used in his arrest, and he was not subjected to any extended periods of isolation. (11 RT 2720, 2724.) Appellant was given an opportunity to use the restroom, and Stevens asked if he wanted anything to drink. (11 RT 2713-2714.) Robbins and Stevens were the only officers in the room during the interview. (11 RT 2735.) Appellant was not handcuffed during the interview, and he never indicated that he was hungry or was experiencing any discomfort. (11 RT 2735.) After the interview, in response to a question from Stevens, appellant said that he was cold. (11 RT 2735.) Officers retrieved a long-sleeved shirt from the bag recovered in the Wilmington apartment and gave it to appellant. (11 RT 2735.)

2. Placer County interview

After the brief interview in Long Beach, appellant was flown to Placer County. He was interviewed the next morning by Sergeant Bob McDonald, who began the videotaped interview by showing appellant the *Miranda* Admonishment and Waiver Form that he had signed in Long Beach the night before. (4 CT 1058.) McDonald asked appellant, "do you remember this form down in Long Beach that you filled out . . . your rights. Do you understand these? Did you understand when you signed them?" (4 CT

1058; 5 CT 1297.) Appellant nodded after each question and indicated that he "understood his rights when he signed the form and understood the same rights now and was willing to talk to [the officers]." (4 CT 1058; 5 CT 1297; 12 RT 3068-3069.)

Appellant proceeded to confess to the four murders again, in greater detail this time. (4 CT 1058.) Near the end of the interview, McDonald sought to verify that appellant understood the rights that he had waived previously. (5 CT 1354.) McDonald showed appellant the waiver form he had signed and asked him to describe the rights as he understood them. (5 CT 1354.) Appellant said, "I cannot understand what rights I can have." (5 CT 1354.) Thereafter, McDonald went through each right on the form and asked whether appellant understood that right at the beginning of the interview. (5 CT 1354.) Appellant responded that he did. (5 CT 1354.)

> **McDonald:** You have the right to remain silent. And when we started our conversation did you know that?
>
> **Appellant:** Yes.
>
> **McDonald:** And it says in here that you have the right to talk to an attorney and when we started our conversation today did you understand that?
>
> **Appellant:** Yes.
>
> **McDonald:** And it says somewhere in here that you have the right to talk to an attorney before you would talk to us. Did you understand that?
>
> **Appellant:** Yes.
>
> **McDonald**: And did you decide to talk to us?
>
> **Appellant:** Yes.
>
> **McDonald:** Because you want to and you didn't want to talk to an attorney?
>
> **Appellant:** What am I going to gain by talking to a lawyer?

(5 CT 1354-1355.) Appellant later asked when he would have his first court appearance and said that he did not "understand anything about the justice system." (5 CT 1356.) Appellant's interpreter then explained that appellant's first court appearance would either be the next day or the following Monday, at which point the charges would be read and appellant could enter a plea. (5 CT 1356.)

3. Parnell Ranch Walk-Through

At approximately 10:00 a.m. the next morning, July 17, appellant accompanied detectives to the crime scene and led them through the fatal events of July 12. (10 RT 2501.) Before the videotaped walk-through began, Sergeant McDonald asked appellant through a Spanish language interpreter, Virginia Ferral, if he "recalled the prior admonishment that had been given to him and of which he was reminded the previous day." (11 RT 2878-2880.) Appellant stated that he "recalled those rights" and was still willing to answer questions. (11 RT 2882, 2923.) In response to McDonald's reminder that he had the right to an attorney, appellant asked, "Do I have the right to an attorney here?" (11 RT 2923.) McDonald responded that he was entitled to have an attorney there and that the decision was up to appellant. (11 RT 2883, 2946 [Ferral's translated response to appellant's question: "if you want"].) Appellant, however, immediately expressed concern for his safety in jail based on alleged threats by other inmates. (11 RT 2884-2885, 2924.) McDonald assured him that it was their job to keep him safe in jail. (11 RT 2885.)

Ferral asked appellant, "for right now what we want to know is knowing your rights do you want to do this with us?" (11 RT 2930.) Appellant agreed to conduct the walk-through and explained his movements on the day of the crimes. (11 RT 2885.) The videotaped walk-through took about 15 or 20 minutes, and there was very little conversation between appellant and the officers. (11 RT 2887.) Appellant's demeanor

during the walk through was "very relaxed and cooperative," as evidenced on the videotape. (11 RT 2894.) He wore a belly chain, but never expressed any discomfort during the walk-through. (11 RT 2895, 2914.) Appellant was away from the jail for less than an hour. (10 RT 2456.)

The trial court viewed the videotape at the hearing on December 20, 2000. (11 RT 2891.) The trial court ultimately excluded the videotaped walk-through as unduly prejudicial, and it was not shown to the jury. (18 RT 5531.)

B. Trial Court's Denial of the Motion to Suppress

On January 17, 2001, the trial court denied appellant's *Miranda* motion. (6 CT 1649; 12 RT 3200.) First, the trial court ruled that appellant's comments on the ride to the Long Beach police station that "the homicides are true" were "given not as a direct result of interrogation" and thus were outside the scope of *Miranda*. (12 RT 3196.) Second, the *Miranda* form which appellant read, had explained to him, and signed, adequately apprised him of his rights, and his waiver was "full and knowing." (12 RT 3196-3197.) Third, readvisement was not required for the Placer County interview the next day because appellant was shown his signed waiver form, questioned on his recollection of his rights, and given right-by-right explanations by McDonald. (12 RT 3198-3199.) Finally, appellant was reminded of his rights again before the Parnell Ranch walk through, and he failed to make an unequivocal request for counsel. (12 RT 3199-3200.) In so holding, the trial court made the following findings of fact with regard to all of the interviews: (1) appellant "was calm and cooperative"; (2) "there was no evidence of discomfort or stress"; (3) appellant "readily appeared willing to talk to the police and to fully explain the circumstances of the crime . . . he was never reluctant to speak"; (4) "there is no evidence that he was forced to sign anything or to waive his

rights"; (5) "all argument of the defendant regarding the fact that he was cold, tired or hungry [is] purely speculative." (12 RT 3200.)

1. Appellant's *Miranda* waiver in Long Beach was knowing, intelligent, and voluntary

a. Applicable law

As this Court noted last year in *People v. McCurdy* (2014) 59 Cal.4th 1063, 1085-1086, the applicable law is settled: "As a prophylactic safeguard to protect a suspect's Fifth Amendment privilege against self-incrimination, the United States Supreme Court, in *Miranda*, required law enforcement agencies to advise a suspect, before any custodial law enforcement questioning, that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." *Miranda*, by its own terms, applies only to questioning by police that is likely to elicit an incriminating response, and "[v]olunteered statements of any kind are not barred by the Fifth Amendment." (*People v. Ray* (1996) 13 Cal.4th 313, 337, quoting *Miranda*, *supra*, 384 U.S. at p. 478; see also *Rhode Island v. Innis* (1980) 446 U.S. 291, 301 [spontaneous admission while transported to jail admissible].)

Moreover, a suspect may waive his *Miranda* rights. "The waiver must be 'voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception' and knowing in the sense that it was 'made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.'" (*Ibid.*) In evaluating an alleged waiver, courts look at six factors: (1) whether the waiver was signed; (2) whether the defendant was advised of his rights in his native tongue; (3) whether the defendant appeared to understand his rights; (4) whether the defendant had a translator;

(5) whether the defendant's rights were individually and repeatedly explained to him; and (6) whether he had prior experience with the criminal justice system. (*United States v. Garibay* (9th Cir. 1998) 143 F.3d 534, 538.)

This Court looks to federal precedents in reviewing *Miranda* claims, and *United States v. Bautista-Avila* (9th Cir. 1993) 6 F.3d 1360 is instructive. In that case, the suspect was orally informed of his *Miranda* rights in his native tongue, Spanish, and was also provided a printed form that contained the *Miranda* warnings. (*Id.* at p. 1365.) The suspect signed the waiver form, indicated that he understood his rights, and proceeded to admit his involvement in a drug transaction and answer the officer's questions. (*Ibid.*) Affirming the trial court's denial of the suppression motion, the Ninth Circuit dismissed the defendant's claims that "his alienage (Mexican) and mentality (sixth grade education) prevented him from making a voluntary and knowing and intelligent waiver of his *Miranda* rights." (*Ibid.*)

In holding that the defendant's conduct (reading and listening to the warnings before signing the waiver form) outweighed any other concerns, the court cited a long line of precedent reaching the same conclusion in similar circumstances. (See, e.g., *United States v. Bernard S.* (9th Cir. 1986) 795 F.2d 749, 752 ["Most importantly, after Bedford explained each of his rights to him in English, appellant stated that he understood his rights"); *United States v. Heredia–Fernandez* (9th Cir. 1985) 756 F.2d 1412, 1415-1416 ["Heredia read the form describing his *Miranda* rights and claimed to understand these rights, subsequently signing the waiver when asked if he was willing to do so. He later said he remembered and still understood his rights, and indicated that he did not wish to have them read to him."]; *United States v. Martinez* (9th Cir. 1978) 588 F.2d 1227, 1234-1235 [defendant understood and knowingly waived his rights, primarily because

he appeared to understand them as they were read, because he signed a written Spanish-language waiver form, and because he continued to answer questions put to him by the same Mexican-accented officer who read him the rights form].)

More recently, the Ninth Circuit reached the same conclusion in *United States v. Labrada-Bustamante* (9th Cir. 2005) 428 F.3d 1252. In that case, a DEA agent read the *Miranda* warnings to the defendant (a Mexican national), summarized the rights, and elicited a response that the defendant understood his rights. (*Id.* at p. 1258.) On appeal, the defendant asserted that he was "not familiar with the United States form of justice." (*Id.* at p. 1259.) The Ninth Circuit affirmed, holding that inexperience with the criminal justice system was "merely one factor to be considered," and it was outweighed where there was "no evidence in the record of 'police overreaching,' and both agents testified that no threats or promises were made." (*Ibid.*)

b. The Long Beach waiver form properly informed appellant of his rights

Although appellant discusses his transport to the Long Beach police station after his arrest in the factual background section, he wisely does not challenge on appeal the admissibility of his blurted-out statement that he did not rape Yolanda, his adoptive admission to the murders, and his statement that he was fleeing to Mexico when arrested. Because appellant initiated the conversation with Agent Stevens by asking what he was being charged with, and volunteered the incriminating information without being questioned, these statements fall outside the ambit of *Miranda*. (See *Innis*, *supra*, 446 U.S. at p. 301; *Ray*, *supra*, 13 Cal.4th at p. 337.)

Moreover, appellant's waiver at the station was knowing, intelligent, and voluntary. Appellant not only read the Spanish-language *Miranda* advisement form, but Agent Stevens also read each line to him in Spanish.

Appellant said that he understood the form and signed it. This is exactly the same process that the Ninth Circuit approved in *Bautista-Avila*, *supra*, 6 F.3d at page 1365, which also involved a Mexican national with an elementary school education. In fact, of the six relevant factors, the only one that favors appellant is his inexperience with the American criminal justice system. But as in *Labrada-Bustamante*, *supra*, 428 F.3d at page 1258, any inexperience is outweighed by the lack of any "police overreaching" or promises or threats by Agent Stevens and Detective Robbins. Instead, the tone of the conversation was cordial and conversational; no ruses were used; appellant was not intimidated, isolated, or mistreated in any way; appellant never expressed any discomfort, asked to stop the interview, or asked for a lawyer; and he displayed a continuous willingness (even before questioning began) to talk to officers.[18] Looking at the totality of the circumstances, appellant's signed waiver was valid.

Appellant cites testimony from defense interpreter Santiago Flores that the waiver of rights form that appellant signed, after reading it *and* having it read to him, did not adequately apprise appellant of his "right to seek advice from an attorney." (AOB 166.) However, it is well established that *Miranda* warnings need not be given in any particular form, and "the essential inquiry is simply whether the warnings reasonably 'convey to [a suspect] his rights as required by *Miranda*.'" (*People v. Wash* (1993) 6 Cal.4th 215, 236-237; see also *California v. Prysock* (1981) 453 U.S. 355, 359 ["no talismanic incantation" required].) The trial court properly

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[18] Appellant's claim that he "was afraid that [the officers] would beat him if he did not" waive his rights, finds no support in the record. (AOB 180.) The officers never threatened him, physically or verbally, and his demeanor was described as calm and comfortable. For these reasons, the trial court properly ruled that any argument regarding such a perceived danger was wholly speculative.

recognized this, noting that "whether there's a better way or lesser way is not the issue. It's what is conveyed to the defendant and what reasonably can be interpreted." (12 RT 3044.)

Moreover, Flores admitted that the form *did* inform appellant that he had "a right to speak to an attorney and have him present with me while being interrogated," as well as each of the other warnings required by *Miranda*. (See also 11 RT 2702-2703 [Stevens chronicling each of the *Miranda* rights listed on the waiver form].) Flores quarreled only with the use of the word "hablar," generally translated as "to speak," instead of "consultar," meaning "to consult" or "to seek advice," when informing appellant of his right to talk to a lawyer. (12 RT 3034.) But under the circumstances, the only logical purpose of "speaking" to a lawyer would be to ask for legal advice—a right which appellant expressed waived both by signing the form and by later stating that he had no interest or need to talk to a lawyer. Thus, Flores' interpretive quibble is really a distinction without a difference, and the warning here "touched all of the bases required by *Miranda*." (*Duckworth v. Eagan* (1989) 492 U.S. 195, 203.)

Appellant also cites Flores' testimony in claiming that the "signature" block "said nothing about the signator having any understanding of the document he signed." (AOB 166.) However, appellant fails to mention that the clauses above the signature stated: "I understand each of these rights that have been described to me prior, and I wish to discuss this case with the official or officials." (11 RT 2703.) Thus, reading the document as a whole, it is clear that appellant's signature was intended as a recognition of his rights and a voluntary waiver of those rights.

Appellant also implies that the officers denied him food/drink and clothing in the interview room. (AOB 168.) However, the record is clear that Stevens asked appellant at the end of the interview if he was cold or thirsty. (11 RT 2714, 2735.) Appellant said he was not thirsty but was cold,

so officers retrieved a long-sleeved shirt from his bag and gave it to him. (11 RT 2735.) Thus, the record belies the mistreatment appellant claims. (See *United States v. Gamez* (9th Cir. 2002)301 F.3d 1138, 1144-1145 ["Nor does the government's failure to feed Gamez more than once render his confessions involuntary"].) Appellant similarly fails to provide any record citation for his assertion that he "was given no food or water during th[e] trip" from Long Beach to Placer County. (AOB 169.)

Finally, appellant challenges the role of Agent Stevens as both interviewer and interpreter. (AOB 167.) To begin, appellant does not cite any caselaw establishing a right to an independent defense interpreter at an initial interview. But more importantly, he has not identified any supposed misinterpretation in Stevens' account of his statement, which is actually *less* inculpatory in certain regards than his later confessions. As in Argument V above, unsubstantiated assertions of interpretive error do not constitute appealable issues. Accordingly, the trial court's admission of appellant's Long Beach interview should be affirmed.

2. Readvisement was not necessary before the Placer County interview

Readvisement of *Miranda* rights is unnecessary when a subsequent interrogation is "reasonably contemporaneous" to a valid waiver. (*People v. Mickle* (1991) 54 Cal.3d 140, 170.) Courts look to the amount of time that passed, any change in the location or identity of the interviewer, any official reminder of the prior advisement, the suspect's past experience with law enforcement, and any indicia that he subjectively understood and waived his rights. (*Ibid.*)

California courts have routinely held readvisement unnecessary in situations like the Placer County interview. In *Mickle*, *supra*, 54 Cal.3d at page 170, this Court held that readvisement was unnecessary where a subsequent interview was conducted at a different location 36 hours after

earlier interviews where the defendant had waived his *Miranda* rights. This Court reached the same conclusion in *People v. Pearson* (2012) 53 Cal.4th 306, 317, where there was a 27-hour gap between interviews, the defendant stayed in custody the whole time, and he was asked before the second interview if he remembered his *Miranda* rights; he said he did. The court even noted that Pearson lacked any familiarity with the criminal justice system, but that factor was not dispositive in finding that his statement of remembrance and comprehension should be credited. (*Ibid.*; see also *Guam v. De la Pena* (9th Cir. 1995) 72 F.3d 767, 770 [no readvisement needed for 15-hour gap].)

Here, only about 12 hours passed between the first advisement in Long Beach and the Placer County interview, and McDonald showed appellant the form and asked him (through court-certified interpreter Frank Valdes) if he remembered signing the waiver. Appellant indicated that he remembered signing it, that he understood his rights when he signed it, and that he was still willing to talk to McDonald. Although appellant had been moved and was now being questioned by McDonald instead of Stevens, appellant had been in custody the entire time and had expressed nothing but willingness to cooperate with police. Given the short passage of time, the reintroduction of the waiver form, and appellant's assertion that he understood his rights, further readvisement was unnecessary.

Appellant attempts to avoid this conclusion by pointing to an isolated statement during the interview that he could not "understand what rights I can have." However, the full context of the comment shows that McDonald explained each element of the *Miranda* waiver and confirmed that appellant had knowingly waived each right before agreeing to talk to police. (4 CT 1059-1060; 5 CT 1354.) For example, McDonald explained that appellant had the right to remain silent and asked appellant if he knew that at the start of the interview. (4 CT 1059; 5 CT 1354.) Appellant

answered, "yes." (4 CT 1059; 5 CT 1354.) Appellant also answered in the affirmative when the officer asked if he understood at the outset of the interview that he had "the right to talk to an attorney before you would talk to us." (4 CT 1060; 5 CT 1354-1355.) The officer clarified that, knowing those rights, appellant had made a decision to conduct the interview without talking to a lawyer. (5 CT 1355.) Appellant answered, "What am I going to gain by talking to a lawyer?" (5 CT 1355.) Thus, even appellant's later comments, when taken in context, show that he had no interest in talking to a lawyer and was speaking to officers of his own volition. Accordingly, the trial court properly admitted the videotape of the Placer County interview.

3. Readvisement was not necessary before the Parnell Ranch walk-through, the tape of which was not even shown to the jury

Because the trial court excluded the videotape of the Parnell Ranch walk-through under Evidence Code section 352, any claim regarding its admission is moot. (See 18 RT 5531.) Even so, readvisement was not necessary for the walk-through. As in *Mickle*, approximately 36 hours had passed since his signed waiver (and less than 24 hours since his oral waiver to McDonald), and appellant had been in custody during that time exhibiting a clear willingness to cooperate with police. Appellant said that he recalled those rights and was still willing to answer questions.

Moreover, appellant did not "unambiguously" invoke his right to counsel. (*Davis v. United States* (1994) 512 U.S. 452, 459.) If an accused makes a statement concerning the right to counsel "that is ambiguous or equivocal" or makes no statement, the police are not required to end the interrogation, or ask questions to clarify whether the accused wants to invoke his or her *Miranda* rights. (*Id.* at pp. 461-462.) A question about one's right to counsel is not an unambiguous invocation of the right. For example, in *United States v. Younger* (9th Cir. 2005) 398 F.3d 1179, 1187-

1188, the Ninth Circuit held ambiguous a defendant's question: "if I am right, I can have a lawyer present through all this, right?" Contrasting cases where the defendant had asked multiple times about getting a lawyer, or had refused to sign a written waiver, the *Younger* court held that the defendant's single question could not be reasonable construed as expressing a clear desire for the assistance of an attorney. (*Ibid.*; see also *People v. Scaffidi* (1992) 11 Cal.App.4th 145, 153-154 ["There wouldn't be [an attorney] running around here now, would there?" not an invocation of right to counsel].)

Similarly, here, appellant responded to McDonald's reminder of his right to counsel by asking, "Do I have the right to an attorney here?" McDonald correctly told appellant that he had that right and that the decision was up to appellant. Appellant did not ask for a lawyer but instead expressed concern for his safety in jail. As in *Younger*, appellant's statement about his right to an attorney was merely a question about the right, not an unambiguous request for an attorney. Interpreter Ferral even confirmed that appellant still wanted to conduct the walk-through, and appellant agreed. Under the circumstances, the officers were entitled to continue with the walk-through, and admission of the videotape would not have been improper at trial.

C. Appellant's Multiple Confessions Were Also Voluntary

In addition to the requirements under *Miranda*, "the due process clause of the Fourteenth Amendment precludes the admission of any involuntary statement obtained from a criminal suspect through state compulsion." (*DePriest*, *supra*, 42 Cal.4th at p. 34.) In determining whether a confession was voluntary, "the question is whether defendant's choice to confess was not 'essentially free' because his or her will was overborne." (*McCurdy*, *supra*, 59 Cal.4th at p. 1086.) This is judged by the totality of the circumstances. (*Ibid.*) On appeal, "the trial court's

findings as to the circumstances surrounding the confession are upheld if supported by substantial evidence, but the trial court's finding as to the voluntariness of the confession is subject to independent review." (*Ibid.*)

The record, as described in great detail for the *Miranda* analysis, does not reflect any police misconduct during the interviews. Nor was there anything inherently coercive in the settings or the way appellant was treated. The tone of the interviews was cordial and conversational, no ruses were used, appellant was not mistreated in any way, and appellant displayed a continuous willingness to talk to officers (even before questioning began). Instead, appellant's behavior and statements, from his arrest to his trial, made clear that "this [was] a defendant who wanted to talk." (12 RT 3151.) Given the lack of any coercion by the investigators, and appellant's clear desire to admit his crimes even without prompting from authorities, it is clear that appellant's will was not overborne during any of the interviews. (See *Anderson v. Calderon* (9th Cir. 2000) 232 F.3d 1053, 1075 ["Certainly all volunteered statements are normally voluntary"].)

D. The Trial Court Did Not Err in Its Analysis of the VCCR

Appellant also faults the trial court for not considering, as part of the *Miranda* analysis, any delay in advising appellant of his rights under the Vienna Convention on Consular Relations (VCCR). (AOB 184.)

As appellant notes, he was first advised at his arraignment on July 17, 1998, that he had the right to have the Mexican consulate informed of his arrest and to arrange a meeting with a consular representative. (1 RT 4.) Appellant asked "What for?", and after his attorney explained the potential utility of such a meeting, appellant declined to have his consulate notified. (1 RT 4-5.) When appellant later challenged the delayed VCCR advisement (discussed in greater detail in Argument VIII), the trial court ruled that any delay in advising appellant was not deliberate, and held, in

conformity with each of the federal circuits to address the issue, that suppression was not an available remedy for a violation of the VCCR. (12 RT 3192.)

To begin, it is questionable whether appellant has preserved the claim that the trial court should have expressly considered any VCCR violation as part of the *Miranda* motion. Appellant did not assert this legal argument in his *Miranda* motion to suppress. (5 CT 1386-1396.) He mentioned that he "was never advised he could contact the Mexican consulate," but did not cite the VCCR in that motion. Instead, appellant filed a separate motion seeking suppression under the VCCR, which the trial court analyzed separately and also denied. (12 RT 3191-3193.)[19] Moreover, when the trial court explained its ruling on the *Miranda* motion and did not expressly cite the delayed VCCR advisement as a factor, defense counsel did not object or request clarification of the trial court's ruling. (12 RT 3195-3201.) This, despite the trial court's invitation at the close of his ruling for "counsel to jump in at this point." (12 RT 3201.) Thus, appellant is essentially claiming error for failure to consider a factor that was not identified in his *Miranda* brief or argued to the trial court, and whose alleged oversight was not brought to the trial court's attention in a timely fashion. Put more simply: appellant faults the trial court for failing to consider an issue that was not before it. Therefore, the claim is not preserved for appeal.

Nonetheless, even on the merits, the argument fails. In support of his bold pronouncement that "the court's refusal to consider the VCCR

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[19] In denying the VCCR motion, the trial court ruled that there was "no violation of the constitutional rights of the defendant because of the violation of the Convention." (12 RT 3195.) Thus, to the extent that appellant's instant claim was raised elsewhere in the pretrial proceedings, the trial court *did* address any interplay between the VCCR violation and the voluntariness of his confessions, and found the asserted nexus unpersuasive.

violation as part of the totality of the circumstances in considering issues [*sic*] waiver and voluntariness of appellant's confessions violated his right to present a compete [*sic*] defense," appellant cites "*Crane v. Kentucky, supra.*" (AOB 185.) This undifferentiated citation to *Crane v. Kentucky* (1986) 476 U.S. 683, is perplexing. *Crane* involved a 16-year-old Kentucky boy who had no rights under the VCCR, and the VCCR played no role in that case. (*Id.* at p. 684.) Instead, federal circuits and the United States Supreme Court have repeatedly held that suppression of a defendant's statements is *not* an available remedy for a violation of the VCCR. (See *Sanchez-Llamas v. Oregon* (2006) 548 U.S. 331, 349; *United States v. Lombera-Camorlinga* (9th Cir. 2000) 206 F.3d 882, 888.) Nor has any court held that a trial court must consider evidence of a VCCR violation in analyzing a *Miranda* motion.

Instead, appellant cites dicta in *Sanchez-Llamas* that a defendant "can raise an Article 36 [of VCCR] claim as part of a broader challenge to the voluntariness of his statements to police." (548 U.S. at p. 350.) But the Supreme Court explained that such a claim would be a rarity because "[t]he failure to inform a defendant of his Article 36 rights is unlikely, with any frequency, to produce unreliable confessions." (*Id.* at p. 349.) This is because "Article 36 has nothing whatsoever to do with searches or interrogations" and "does not guarantee defendants *any* assistance at all." (*Ibid.*) "The provision secures only a right of foreign nationals to have their consulate *informed* of their arrest or detention—not to have their consulate intervene, or to have law enforcement authorities cease their investigation pending any such notice or intervention." (*Ibid.*) Thus, "in most circumstances, there is likely to be little connection between an Article 36 violation and evidence or statements obtained by police. (*Ibid.*)

This Court applied that language to reject a claim similar to appellant's in *People v. Enraca* (2012) 53 Cal.4th 735. In that case, the

defendant challenged the trial court's denial of his motion to suppress, claiming that the lack of consular notification rendered his confession involuntary. (*Id.* at p. 757.) This Court rejected the claim, noting that the defendant had confessed while being booked, just a few hours after being arrested. (*Id.* at p. 758.) Thus, even if his consulate had been notified in a timely manner, the defendant would not have been provided with a lawyer or consular representative before he confessed. (*Ibid.*)

There is a similar lack of nexus between appellant's consular notification claim and his confessions. First, we need not speculate as to how appellant would have responded to an earlier VCCR advisement because the record contains his reaction when he was advised three days later at his arraignment. After the trial court read the advisement, and defense counsel explained his rights, appellant declined to have his consulate notified. There is no reason to believe his decision would have been any different if informed of that right at the outset of the Long Beach or Placer County interviews. Appellant overlooks this subsequent declination in proclaiming that earlier advisement "would very likely have triggered an invocation of consular notification and a decision to await the consulate's assistance before making any other statements." (AOB 191.) As the Ninth Circuit held in *United States v. Amano* (9th Cir. 2000) 229 F.3d 801, 805, appellant's claim on appeal "that he would have contacted the [Mexican] consulate had he been informed of a right to do so, [i]s unpersuasive in view of the other evidence," and because it is "conclusory, self-serving, and not subject to cross-examination.'"

Second, even if appellant had asserted his right to consular notification, that would not have stopped the interview nor allowed the consulate immediately to intervene. Unlike invoking the right to counsel, the VCCR does not require law enforcement to cease its investigation pending consular intervention. (*Sanchez-Llamas*, *supra*, 548 U.S. at p. 350.)

Instead, the VCCR requires only that the consulate be notified within three days of their national's arrest. (*In re Avena* (2004) I.C.J. 12, 52, ¶ 97 [notification within three working days (five actual days) is timely].) Where, as here, a suspect confesses within that three-day window, there can be no showing of prejudice from an untimely consular notification. (*Medellin v. Texas* (2008) 552 U.S. 491, 502, fn. 1.)

Appellant conflates the purpose of the VCCR with the purpose of the *Miranda* and voluntariness analyses, and he attempts to transform dicta into a binding duty on the trial court to consider issues not presented. Because earlier advisement of his consular rights would have had no impact on the interviews, and because the interviews were free from any coercive influence, the trial court's ruling should be affirmed. [20]

E. Any Error Was Harmless

For the reasons laid out above, the trial court properly admitted evidence from the three interviews. However, even if any one or all three interviews should have been excluded, any error is harmless beyond a reasonable doubt. (*People v. Thomas* (2011) 51 Cal.4th 449, 498 [erroneous admission of statements obtained in violation of *Miranda* is reviewed for prejudice under *Chapman v. California* (1967) 386 U.S. 18].)

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[20] Appellant's citation to state cases from Iowa and Ohio, and federal cases from Minnesota and the Ninth Circuit, hardly constitutes a "substantial body of precedent." (See AOB 189.) Even so, each of appellant's cited cases is either legally irrelevant or involves the *rejection* of a VCCR claim. (See, e.g., *Amano, supra*, 229 F.3d at p. 805 [rejecting VCCR claim]; *United States v. Miranda* (D. Minn. 1999) 65 F.Supp.2d 1002, 1006 [no discussion of voluntariness]; *State v. Ramirez* (Ohio App.3d 1999) 135 Ohio App.3d 89, 97 [all VCCR claims moot]; *Ledezma v. State* (Iowa 2001) 626 N.W.2d 134, 152 [VCCR discussion unrelated to a suppression motion].)

First, the other evidence of appellant's guilt was overwhelming, including Yolanda's detailed testimony, the physical evidence tying appellant to the crimes and murder weapons, appellant's spontaneous confession to Agent Stevens while being transported, and his numerous confessions to friends and relatives during his attempted escape to Mexico. Second, much of the detail in the interviews was covered by other witnesses or evidence. For example, appellant's friends and relatives testified that he had been fighting with Juan and Jose, and that they had accused him of cheating on their sister. Appellant's statements to police were simply cumulative on this point. Finally, this was not a close death case. Appellant shot his brothers-in-law in the head, raped his sister-in-law, and bludgeoned and buried alive his five-year-old nephew and three-year-old niece. He admitted liability and offered no explanation for his actions. Accordingly, this Court can be confident beyond a reasonable doubt that, even excluding one or more of the interviews, the jury would have reached the same verdict.

VIII. THE TRIAL COURT DID NOT ERR IN FINDING ANY VIOLATION OF THE VIENNA CONVENTION ON CONSULAR RELATIONS WAS NEGLIGENT AND NONPREJUDICIAL

Appellant contends that the trial court erred in its analysis of the VCCR and in crediting the testimony of various law enforcement officials. (AOB 198-201.) Because the trial court was entitled to believe the sworn testimony of FBI agents and Placer County deputies, and because suppression is not an available remedy for a VCCR violation, appellant's claim fails.

A. Background

Appellant was arrested at 8:40 p.m. on July 15, 1998. (9 RT 2400, 2405.) He was arraigned approximately 41 hours later, at 1:30 p.m. on July 17. (1 RT 1.) At the outset of appellant's arraignment, on July 17, 1998,

the trial court asked the district attorney "to present the consular admonishment." (4 CT 1068; 1 RT 4.) Accordingly, the district attorney instructed appellant:

> [A]s a non-U.S. citizen who's being arrested and detained, you're entitled to have the District Attorney notify your consular representatives here in the United States.
>
> Consular officials from your country may be able to help you obtain legal counsel and may contact your family to visit you in detention, among other things.
>
> If you want us to notify any of your consular officials, you can request this notification now or at any time in the future. After your consular officials are notified, they may call or visit you.
>
> Do you want us to notify your country's consular officials?

(4 CT 1068; 1 RT 4.) Appellant responded: "What for?" He then discussed the matter with defense counsel, who stated: "at this time we would like to wait. We would not request any such notification right now." (4 CT 1068-1069; 1 RT 5.)

On August 23, 2000, defense counsel filed a motion to suppress and/or preclude the district attorney from seeking death based on alleged violations of the VCCR. (4 CT 911-932.) The motion argued that the arresting officers and FBI agents knew, or should have known, that appellant was a Mexican national and yet failed to advise him of his consular rights until he was arraigned. (4 RT 913-915.) Therefore, defense counsel argued, appellant's statements to interrogators the night he was arrested and the next day should be suppressed. (4 CT 923, 926.) In arguing prejudice, defense counsel opined that appellant "would have made no statements had he been notified of his VCCR rights" because he "would have contacted his consul, the consul would have recommended [appellant] make no statements until advised by counsel, and [appellant] would have followed that advice." (4 CT 924-925.) To deter future misconduct,

defense counsel added that the prosecution should be estopped from seeking the death penalty. (4 CT 925.)

In support of this motion, appellant submitted a declaration stating that he would have contacted a Mexican consular representative if informed of that right. (4 CT 1015.) Defense counsel also provided an affidavit from the Mexican Consul overseeing Placer County, which stated that he "would have advised [appellant] not to speak to United States law enforcement officials until he was represented by counsel." (4 CT 1017.)

The district attorney filed an opposition on August 31, 2000, in which he argued that appellant's rights under the VCCR were not violated because he was, in fact, notified of his consular rights within the 24-72 hour period suggested by the U.S. Department of State (41 hours after arrest). (4 CT 1043.) The district attorney also argued that any delay was not prejudicial because appellant declined to contact his consular official when given the opportunity at his arraignment, and thus an exclusionary or estoppel remedy was unwarranted. (4 CT 1046-1051.)

In an April 20, 2000 letter, the district attorney noted that the Ninth Circuit had recently held that "suppression of evidence is not an appropriate remedy for any asserted violation" of the treaty. (3 CT 876, citing *Lombera-Camorlinga*, *supra*, 206 F.3d at p. 888.) On January 3, 2001, the district attorney filed a supplemental notice of authority for the VCCR motion, citing rulings from the Fourth, Sixth, Seventh, Ninth, and Tenth Circuits declining to recognize a suppression remedy for violations of the VCCR. (See 6 CT 1589.)

The trial court held a series of hearings on the VCCR motion in September and October 2000. (8 RT 2095-10 RT 2766.) Argument was heard on January 4, 2001. (12 RT 3152.) Officers from Placer County testified that they were either unaware that appellant was a Mexican national or were unfamiliar with the VCCR in July 1998. (See, e.g., 8 RT

2098 [Deputy Michael Harris not aware of appellant's nationality]; 8 RT 2112 [Dispatcher Virginia Ferral not aware of VCCR]; 8 RT 2123 [Detective Diana Stewart not aware of VCCR notification requirements]; 8 RT 2128, 2130 [Lieutenant George Malim not aware of VCCR notification requirements]; 9 RT 2174 [Lieutenant Daniel Hall not aware of appellant's nationality]; 9 RT 2308, 2314 [District Attorney Brad Fenocchio first informed of VCCR notification requirements by Attorney General's Office less than two hours before arraignment]; 10 RT 2463-2464 [Sergeant Robert McDonald not aware of VCCR notification requirement until arraignment].)[21]

FBI special agent Randal Ferguson, who oversaw the team of officers executing the arrest warrant on July 15, 1998, testified that he did not recall whether he saw the warrant before arresting appellant and could not remember if he knew that appellant was a Mexican national. (9 RT 2387.) Ferguson stated that he did not have any discussions with Jeffrey Rinek, who wrote the affidavit supporting the arrest warrant. (9 RT 2386.) Nor was Ferguson aware of the VCCR until a September 2000 training, and thus did not know of the consular notification requirement at the time that appellant was arrested. (9 RT 2393.)

Agent Stevens testified that she knew a federal arrest warrant had been issued, but she had not seen it prior to arresting appellant. (10 RT 2659.) When defense counsel attempted to impeach her with testimony at the preliminary hearing, Stevens clarified that she knew an arrest warrant had been issued but she did not personally see it until days after the arrest.

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[21] On appeal, appellant has chosen to focus solely on any violation of the VCCR by FBI agents, not Placer County officials. (See AOB 203 ["It may be true that the Placer County District Attorney's office did not know about the VCCR until just before appellant was arraigned on July 17, 1998"].) Respondent will limit its analysis in the same way.

(10 RT 2662, 2665.) Stevens testified that she was unaware of the VCCR at the time that she arrested appellant and interviewed him in Long Beach. (10 RT 2688.) She had never attended any briefings on State Department advisories or U.S. treaty obligations. (10 RT 2688.) She became aware of the VCCR only when working on a separate federal case nearly a year later when the U.S. Attorney told her that one of the suspects was a Mexican national and needed the consular advisement. (11 RT 2708-2709.)

Detective Dennis Robbins of the Long Beach Police Department, who assisted Stevens in the arrest and interview, testified that he did not see the federal arrest warrant prior to assisting in appellant's arrest, was not informed that appellant was a Mexican national, and was not even aware of the VCCR until August 1999—over a year after appellant's arrest. (9 RT 2397, 2401.) Agent Rinek, who drafted the affidavit, was not party to the arrest or interview.

Luis Castresana, who worked at the Mexican consulate in Sacramento at the time of the murders, testified that consular intervention in an interview was not necessarily immediate, as their first step was to contact the law enforcement agency holding the suspect and arrange a time to interview him. (9 RT 2254.) Castresana also testified that "the Constitution in Mexico is very similar" to the U.S. Constitution, and suspects in Mexico enjoy the right to remain silent when questioned by police. (9 RT 2257-2258.) Moreover, Castresana testified that he contacted appellant's lawyer in August 1998 about providing consular assistance, but appellant "never request[ed] the presence of any personnel from the Consulate." (9 RT 2260.)

Defense counsel attempted to cast doubt on the witnesses' testimony that they either did not know that appellant was a foreign national or were unfamiliar with the notification requirements under the VCCR, asserting that all of the officers conspired together to intentionally deprive appellant

of his rights under the VCCR. (12 RT 3153, 3156, 3164.) The district attorney argued that any violation of the VCCR was negligent, and that no court had ever recognized suppression as a remedy for *any* type of VCCR violation (negligent or otherwise). (12 RT 3172.) Moreover, because Penal Code section 834, subdivision (c), was not enacted until six months *after* appellant's arrest, it was irrelevant to consideration of the issue. (12 RT 3171.)

On January 17, 2001, the trial court denied appellant's VCCR motion. (6 CT 1649; 12 RT 3195.) The trial court ruled that the VCCR covered appellant, as a foreign national, and that there was delay in advising him of his consular notification rights. (12 RT 3191.) However, the trial court found the violation to be "negligent" rather than "willful," accepting the officers' testimony that they did not know about the VCCR's notification requirements at the time. (12 RT 3193-3194.) Following the Ninth Circuit's ruling in *Lombera-Camorlinga* and every other court to address the issue, the trial court ruled that neither suppression of appellant's statements nor preclusion of the death penalty was an appropriate remedy. (12 RT 3192-3193.)

B. Suppression Is Not an Available Remedy for a VCCR Violation, and any Error Was Harmless

Article 36, paragraph 1(b), of the Vienna Convention, which the United States has ratified, provides that law enforcement officials "shall inform arrested foreign nationals of their right to have their consulate notified of their arrest, and if a national so requests, inform the consular post that the national is under arrest." (*People v. Mendoza* (2007) 42 Cal.4th 686, 709.) However, appellant misapprehends the scope of these rights in several ways.

First, and most importantly, this Court, the Supreme Court, and every federal circuit to address the issue has held that suppression of a confession

is not an available remedy for a violation of the VCCR. (See *Sanchez–Llamas*, *supra*, 548 U.S. at p. 349; *Enraca*, *supra*, 53 Cal.4th at p. 757; *Lombera–Camorlinga*, *supra*, 206 F.3d at p. 885.)[22] Second, appellant claims that, if notified, he would have contacted his consulate and received advice on how to handle his case. However, an arrestee does not have the right to contact the consulate; Article 36 requires only that officers must inform the consulate of the foreign national's arrest if the arrestee so requests. Even that notification need not be immediate. Upon invocation by the arrestee, the authorities need only inform the consulate within three days of their national's arrest. (See *Avena*, *supra*, I.C.J. at ¶ 97.) Luis Castresana from the Mexican consulate said that, even then, there would likely have been further delay as the consulate worked with law enforcement to schedule a meeting with appellant.

Nor has appellant demonstrated that he was actually prejudiced by the 41-hour delay in receiving the consular notification. To begin, even if appellant had been informed of his consular rights, it is clear that he would not have exercised them. When he was notified of his consular rights 41 hours after his arrest, he declined to assert them, even after his lawyer explained the benefits. Moreover, throughout the pretrial proceedings, appellant never accepted the Mexican consulates offers of assistance. Thus, unlike a case where notification was *never* made, one can deduce here that the result would have been the same even if the notification had been made 41 hours earlier. (*In re Martinez* (2009) 46 Cal.4th 945, 965 [where defendant was later apprised of his VCCR rights, "he fails to demonstrate

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[22] Appellant appears to have abandoned the argument made in his original motion that any VCCR violation should have precluded the prosecution from seeking the death penalty: "The appropriate remedy . . . is suppression of appellant's statements." (AOB 211.)

here that he suffered any prejudice because he was not notified of those rights at the time of his arrest"].)

Second, as this Court explained in *Enraca*, the VCCR "secures only a right of foreign nationals to have their consulate *informed* of their arrest or detention—not to have their consulate intervene, or to have law enforcement authorities cease their investigation pending any such notice or intervention." (53 Cal.4th at pp. 756-757.) Thus, even if appellant had requested consular notification, nothing would have prevented Agent Stevens from continuing to question him in the meantime and extract inculpatory statements.

Moreover, even if appellant *had* requested that his consulate be notified late on the night of his arrest, the outcome would not have been different. Like the defendant in *Enraca*, appellant confessed within a few hours of his arrest. Thus, even if appellant had requested the consulate be notified that night, there is little chance that the consulate would have received the message, sent a consular representative and/or lawyer to speak with appellant, and advised him to remain silent—all before he voluntarily confessed on the drive to the police station. (See *Medellin*, *supra*, 552 U.S. at p. 502, fn. 1. [where suspect confesses within three *days* of arrest, there can be no showing of prejudice from an untimely consular notification].)

Because appellant was not prejudiced by the delayed notification, and because the remaining evidence against him was overwhelming, the trial court's ruling should be affirmed. (See *Mendoza*, *supra*, 42 Cal.4th at p. 711 [no prejudice for VCCR violation].) Appellant tries to avoid this conclusion by claiming that the trial court erred in finding that the agents' failure was negligent, rather than intentional. To begin, substantial evidence supports the trial court's credibility determinations of the FBI agents and Placer County deputies. Although the VCCR has garnered more attention in the last 15 years, with the Supreme Court weighing in on

multiple occasions, the Convention's status was much different in 1998. Law enforcement officials were not widely trained on the VCCR and its notification requirements, and several agents and officers testified that they were not even aware of the VCCR until the issue was litigated in *this* case. But more importantly, the negligent-intentional distinction is of no import because no court has held suppression or preclusion of the death penalty to be an appropriate remedy for *any* type of VCCR violation. Because even a finding of bad faith (not supportable on this record) would not trigger suppression or preclusion, appellant's claim fails.[23]

IX. THE TRIAL COURT DID NOT ERR IN DECLINING TO INSTRUCT ON UNTIMELY DISCLOSURE

Appellant asserts that he was prejudiced by the trial court's failure to give an untimely disclosure instruction. (AOB 212-215.) Because Dr. Dougherty did not possess any exculpatory information, and the prosecution never intended to call him as a witness (and, in fact, did *not*), the trial court properly denied appellant's request for an instruction.

A. Background

Dr. Frank Dougherty, a forensic psychologist, watched appellant's interview in Placer County on July 16, 1998. (12 RT 3108.) He never entered the interview room, did not participate in the questioning, was not consulted after that day, and was not called as a witness at trial. (10 CT 2748-2749; 12 RT 3108.) Appellant, by his own admission, was first made aware of Dougherty in October 2000—five months before trial. (AOB 212.) Nonetheless, near the end of trial, on April 9, 2001, defense counsel requested that the jury be instructed with CALJIC No. 2.28, which

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[23] Appellant also cites section 834c in claiming violation of a "'statutory right' as well as a treaty right." (AOB 211.) But section 834c was not enacted and made effective until January 1, 2000, and thus it has no application to appellant's arrest and interviews in July 1998.

describes the parties' discovery obligations and states that a juror may consider the failure to provide timely discovery in weighing a particular piece of evidence. (10 CT 2490.) In support of the request, defense counsel submitted a declaration from Dr. Dougherty. (10 CT 2748-2749.) Dougherty declared that he had "discussed various aspects of possible mental health defenses and issues regarding [appellant], observed an interview with the defendant on or about July 16, 1998, and consulted with Deputy District Attorney Thomas Beattie and various Sherriff's Deputies regarding interview techniques." (10 CT 2748.) Dougherty thought he may have taken "some contemporaneous notes" but was unable to locate them. (10 CT 2748-2749.) Defense counsel acknowledged that neither he nor the prosecution "put Dr. Dougherty up on the stand," but opined that the psychologist's notes "may have been exculpatory in some meaningful fashion." (45 RT 10023.)

The district attorney opposed the requested instruction, noting that his office never possessed or knew of any notes taken by Dougherty and never intended to call him as a witness. (45 RT 10028.) Disclaiming any prejudice, the district attorney stated that the only comment Dougherty made while watching the interview was, "It doesn't look like there's anything wrong with [appellant]." (45 RT 10032.)

On April 11, 2001, the trial court denied appellant's request to instruct on untimely disclosure. (47 RT 10250.) The trial court explained that "it's not clear that this witness had notes," and "it would be entirely speculative to assume that those notes would include anything that would aid the jury because those notes would only be about things that the jury can view through the videotape anyway." (47 RT 10250.) Moreover, CALJIC No. 2.28 was clearly directed at non-compliance with Evidence Code section 1054, which the prosecution did not violate because it never intended to call Dougherty as a witness. (45 RT 10029-10030.)

B. Dougherty Was Neither an Intended Witness nor in Possession of Material Evidence

Section 1054.1 provides in relevant part: "the prosecuting attorney shall disclose to the defendant or his or her attorney . . . (a) The names and addresses of persons the prosecutor intends to call as witnesses at trial . . . (f) Relevant written or recorded statements of witnesses or reports of the statements of witnesses whom the prosecutor intends to call at the trial." Additionally, the prosecution must disclose, under the due process clause of the Fourteenth Amendment, "any evidence that is 'favorable to an accused' and is 'material' on either guilt or punishment." (*People v. Cook* (2006) 39 Cal.4th 566, 587.) Appellate courts apply the deferential abuse of discretion standard in reviewing a trial court's ruling on disclosure matters or the imposition of sanctions for discovery abuses. (*Ayala*, *supra*, 23 Cal.4th at p. 299; *People v. Jenkins* (2000) 22 Cal.4th 900, 951.)

Appellant's claim fails for three reasons. First, according to the express terms of section 1054.1, a prosecutor's duty to disclose a witness's identity and prepared reports arises only when the prosecutor intends to call that witness. Here, the district attorney never consulted with Dougherty after the Placer County interview and never considered calling Dougherty as a witness at trial. Because the discovery statute was not violated, there was no basis for giving CALJIC No. 2.28. Appellant cites no caselaw suggesting otherwise. Second, appellant offers nothing but speculation that Dougherty's notes were exculpatory (if they even existed). In fact, the only evidence in the record regarding Dougherty's observations is his statement that there "doesn't look like there's anything wrong with him." Thus, far from offering exculpatory evidence, Dougherty's conclusion was actually *inculpatory*—discrediting any claim of mental disease or defect that appellant might have raised at trial.

Finally, a defendant complaining of untimely disclosure must show prejudice from the delay. (*Jenkins*, *supra*, 22 Cal.4th at p. 950.) Here, appellant has failed to demonstrate prejudice under any standard. (*Chapman*, *supra*, 386 U.S. at p. 22; *People v. Watson* (1956) 46 Cal.2d 818, 836.) Appellant was informed of Dougherty's existence five months before trial began and six months before evidence regarding the Placer County interview was introduced. Thus, even if Dougherty *had* testified, appellant would have had adequate time to investigate Dougherty and prepare rebuttal evidence. Moreover, appellant was not limited in his ability to retain his own psychological experts to support any defense his attorneys could muster. Finally, the subject of Dougherty's testimony would have been his observations of the Placer County interview, the videotape of which was already shown to the jury. Under the circumstances, the absence of any such testimony was due, not to any untimely disclosure of Dougherty's existence, but to the lack of any demonstrated psychological ailment. Accordingly, the trial court's ruling should be affirmed.

X. SUFFICIENT EVIDENCE SUPPORTED THE FELONY-MURDER ALLEGATION

Appellant claims the prosecution did not present sufficient evidence that appellant formed an intent to take Juan and Jose's belongings before he killed them. (AOB 216-225.) However, appellant's careful taking and storing of their valuable items and the lack of any blood or dirt on the wallets, watch, and chain, provide sufficient evidence for a reasonable juror to infer an intent to steal. Moreover, because overwhelming evidence supported a premeditation or lying-in-wait theory of first degree murder, any error regarding the felony murder theory of liability was harmless.

A. Background

After the close of evidence at the guilt phase, defense counsel sought to dismiss six of the special circumstance allegations, including the robbery allegations with regard to Juan and Jose. (45 RT 9989-9990.) Defense counsel argued that it was "entirely clear that the purpose behind taking those items . . . was in furtherance of the murder, and not the other way around." (45 RT 9989-9990.)

The district attorney noted that the items stolen from the victims were valuable and were removed carefully so as not to damage them. (45 RT 9992.) Moreover, the mere fact that the items were left in appellant's trailer did not detract from the robbery theory, particularly because appellant told officers that he had to flee when he saw police cars during his return to the trailer. (45 RT 9993, 9998.) The district attorney also noted the sexual assault on Yolanda to highlight that this was a "multi-intent situation" where appellant "harbored murder as the main intent, but [] had a concurrent intent to commit other felonious acts against the families, and robbery was one of those, and rape was the other." (45 RT 9997-9998.)

Nonetheless, at the trial court's urging to "simplify" the charges, the district attorney agreed to dismiss the robbery special circumstance allegations for counts 3 and 4. (46 RT 10071, 10126, 10129.) The district attorney made clear that this was done because "we do not want to risk that issue on appeal." (46 RT 10129.) The district attorney did, however, continue to assert a felony murder theory of liability based on appellant's robbery of Jose and Juan. He explained that "[t]he independent felonious intent rule is limited to special circumstances" and "has absolutely no application to the felony murder [] theory itself." (46 RT 10098.) In his research, the district attorney "found no case authority that would permit its application to the felony murder theory over and beyond its application to felony murder special circumstances." (46 RT 10098.) Thus, the case

could proceed on a felony murder theory of liability based on a robbery, even if the special circumstances for that robbery were struck. (46 RT 10099, citing *People v. Green* (1980) 27 Cal.3d 1.) Defense counsel agreed with that point and conceded that *Green* draws that distinction. (46 RT 10101, 10112.)

Arguing at closing for a first degree murder conviction based on felony murder (among other theories), the district attorney explained the "requirement that the intent to take property must come before the application of the force and the actual taking of the property." (47 RT 10304.) The district attorney argued that: (1) this was a multi-intent crime and not just about murder (see Yolanda's rape); (2) the crimes were carefully planned in advance, suggesting that his taking of the property was planned; (3) the clasps on Jose's watch and Juan's necklace were not broken so as to preserve their value; and (4) there was no blood or dirt on the stolen items, suggesting that they were taken off either before appellant shot the victims or before appellant threw them in the mass grave. (47 RT 10305-10306.)

The trial court instructed the jury, "If the jury unanimously decides that the defendant is guilty of first degree murder, it is not necessary that all jurors agree on a particular theory of first degree murder." (11 CT 2871; 48 RT 10442.) The trial court also instructed the jury on the elements of robbery and told them that "the perpetrator must have formed the specific intent to permanently deprive an owner of his property before or at the time of the application of force or violence, or the use of fear or intimidation." (48 RT 10468.)

B. Appellant Evinced an Intent to Steal Before He Killed Jose and Juan

"Liability for first degree murder based on a felony-murder theory is proper when the defendant kills in the commission of robbery, burglary, or

any of the other felonies listed in section 189." (*People v. Lewis* (2001) 25 Cal.4th 610, 642.) The prosecution need not prove that the items at issue were taken before the killing occurred, only that "the defendant intended to steal the victim's property either before or during the fatal assault." (*Ibid.*) Under the felony-murder rule, "a strict causal or temporal relationship between the felony and the murder is not required; what is required is proof beyond a reasonable doubt that the felony and murder were part of one continuous transaction." (*People v. Young* (2005) 34 Cal.4th 1149, 1175.)

Moreover, a conviction for robbery felony murder is not defeated simply because the defendant was motivated by multiple intentions. (See *People v. Waidla* (2000) 22 Cal.4th 690, 734-735 [substantial evidence showed defendant was both angry at victims *and* desperate for money]; *People v. Murtishaw* (1981) 29 Cal.3d 733, 752, superseded by statute on another ground as recognized by *People v. Boyd* (1985) 38 Cal.3d 762, 773 ["the fact that defendant had an independent intent to kill . . . does not preclude a finding that he also acted with the intent to steal the car"].) "If a person commits a murder, *and after doing so takes the victim's wallet*, the jury may reasonably infer that the murder was committed for the purpose of obtaining the wallet, because murders are commonly committed to obtain money." (*People v. Marshall* (1997) 15 Cal.4th 1, 35.) "[W]hen a person is shown to be in possession of recently stolen property, slight corroborative evidence of other inculpatory circumstances which tend to show guilt supports the conviction of robbery." (*People v. Hughes* (2002) 27 Cal.4th 287, 356-358 [upholding robbery felony murder charge where defendant took the victim's wallet and other items of value after killing her].)

In evaluating a sufficiency of the evidence claim, appellate courts "examine the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is

reasonable, credible, and of solid value—that would support a rational trier of fact in finding the essential element[s] beyond a reasonable doubt." (*Lewis*, *supra*, 25 Cal.4th at p. 642.) This is true even if a reasonable interpretation of the evidence could also support the defendant's claim. (*Id.* at pp. 643-644.) Circumstantial evidence is sufficient to uphold a robbery felony murder conviction because "the intent required for robbery and burglary is seldom established with direct evidence but instead is usually inferred from all the facts and circumstances surrounding the crime."

This Court considered and rejected a claim similar to appellant's in *Murtishaw*, *supra*, 29 Cal.3d at page 733. In that case, the defendant shot and killed three film students he encountered in the desert after his car broke down. (*Id.* at pp. 744-745.) The defendant was angry that the students would not give him a ride into town, and he repeatedly told his friend that he wanted to shoot the students. (*Id.* at p. 744.) Defendant denied wanting to steal the car and claimed that he had shot the students in self-defense. (*Id.* at p. 746.) The only evidence suggesting an intent to steal came from the defendant's friend, who recalled the defendant saying something like "let's shoot the people . . . [h]e wanted to steal the car or something." (*Id.* at p. 744.)

This Court upheld Murtishaw's first degree murder conviction based on a robbery felony murder theory of liability. (*Murtishaw*, *supra*, 29 Cal.3d at p. 752.) The court noted that even "the prosecution itself seemed to have doubts about this theory. It did not charge defendant with attempted robbery or automobile theft, nor specify premeditated killing in the course of robbery as a special circumstance." (*Id.* at pp. 750-751.) The prosecution "presented three expert witnesses who stated that in their opinion the defendant killed in reaction to cumulative frustrations; none said he did so in order to steal an automobile." Moreover, the defendant had never demanded possession of the car from the victims, shot at the car

and risked disabling it, and did not, in fact, take the car after the shooting. (*Id.* at p. 752.) Nevertheless, this Court found sufficient circumstantial evidence in the record to affirm the verdict on a felony murder theory, noting that the defendant likely acted "with the concurrent goals of killing the victims and taking their car." (*Id.* at p. 751.) Importantly, the court also found, in the alternative, ample evidence "to support a verdict finding premeditated murder," rendering harmless any error regarding the felony murder charge. (*Id.* at p. 749.)

Similarly, here, there is sufficient evidence in the record to support a robbery felony murder conviction. Appellant took Jose and Juan's wallets (containing over $200), Jose's watch, and Juan's gold chain from their bodies, and rather than trying to destroy the items, he took them to his trailer and placed them inside his boots for safe-keeping. The clasps on the watch and necklace were not broken, suggesting that they had been removed carefully to preserve their value. Moreover, there was no blood or dirt on the stolen items, suggesting that they were removed either before appellant shot the victims or before he buried them. Finally, appellant would have needed funds for his escape after his pre-planned crime spree, so it is reasonable to assume that he formed the intent to steal any valuable belongings from the victims during the week leading up to the murders or during the crime itself. Accordingly, there was sufficient evidence for a reasonable juror to conclude that appellant had concurrent objectives both to kill the victims due to a family disagreement and to rob them.

As in *Murtishaw*, the district attorney's decision not to pursue robbery special circumstance allegations is not fatal to the jury's verdict. Instead, the district attorney's decision to "simplify" the charges by dismissing the robbery special circumstances recognized an important distinction between the robbery felony murder special circumstance and the crime of first degree murder based on a felony murder theory of liability. While the

felony murder theory merely requires that the killing occur "during the commission or attempted commission of the crime of robbery" (11 CT 2872 [CALJIC No. 8.21]), the robbery special circumstance requires the additional proof that "the murder was committed in order *to carry out or advance the commission of the crime or to facilitate the escape therefrom or to avoid detection*" (CALJIC No. 8.81.17, italics added). (See *People v. Williams* (1994) 30 Cal.App.4th 1758, 1762.) Thus, unlike the special circumstance, the felony-murder rule could apply even to an accidental killing committed during the perpetration or attempted perpetration of the underlying felony. (*People v. Cavitt* (2004) 33 Cal.4th 187, 197; *People v. Navarette* (2003) 30 Cal.4th 458, 505.) Due to this additional requirement, California courts have held that the robbery special circumstance sufficiently narrows the class of felony murders for which the death penalty can apply. (*People v. Lenart* (2004) 32 Cal.4th 1107, 1138.)

In light of this distinction, the district attorney's decision to drop the robbery special circumstance at the urging of the trial court is irrelevant to the sufficiency of evidence analysis for the substantive charge. This conclusion is supported by *Green, supra*, 27 Cal.3d at page 1. Appellant correctly notes that this Court held in *Green* that the robbery *special circumstance* could not stand where the defendant took his wife's clothing, purse, and jewelry after killing her to prevent her identification. (AOB 217, citing *Green, supra*, 27 Cal.3d at p. 55.) However, *Green* dealt only with the robbery special circumstance and did not invalidate the underlying conviction. (*Id.* at p. 59 ["a valid conviction of a listed crime was a necessary condition to finding a corresponding special circumstance, but it was not a sufficient condition"]; see also *People v. Thompson* (1980) 27 Cal.3d 303 [analyzing special circumstance allegation, not theory of liability].) In fact, based on the evidence presented, this Court actually *affirmed* the defendant's robbery conviction in *Green*. (27 Cal.3d at p. 58

["if the defendant intends to permanently deprive the owner of his property, the taking is larceny or robbery within the meaning of the Penal Code even if the defendant's sole intent is to destroy the property"].) The record contains sufficient evidence for a reasonable juror to reach the same conclusion here.

C. Any Error Was Harmless

Because the record contains sufficient evidence that one of appellant's concurrent objectives in killing Jose and Juan was to steal their wallets and jewelry, his conviction based on a felony murder theory of liability should be affirmed. However, as this Court held in *Murtishaw*, any error regarding the felony murder theory was harmless because the evidence supporting premeditated first degree murder and lying-in-wait murder (which were charged and argued to the jury) was overwhelming. (*Murtishaw*, *supra*, 29 Cal.3d at p. 752 ["Defendant may have intended to steal the car . . . [b]ut regardless of whether or not defendant acted with conscious motive, the evidence of planning and deliberate execution of his plan to kill the victims supports a finding of premeditated murder"].)

The Constitution does not command that a capital jury agree on a specific theory of first degree murder. (*Schad v. Arizona* (1991) 501 U.S. 624 [plurality]; *People v. Pride* (1992) 3 Cal.4th 195, 249-250.) "Ordinarily, if an alternative theory of criminal liability is found unsupported by the evidence, the judgment of conviction may rest on any legally sufficient theory unaffected by the error, unless the record affirmatively demonstrates that the jury relied on the unsupported ground." (*People v. Sanchez* (2001) 26 Cal.4th 834, 851.) A strong showing of premeditation or a true finding on the lying-in-wait special circumstance renders it unnecessary to evaluate alternate theories of first degree liability. (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1028.)

In *People v. Silva* (2001) 25 Cal.4th 345, 369, this Court found any error regarding a robbery felony murder conviction harmless because the evidence of premeditation was overwhelming. In so holding, the court noted that the murder was committed in an "isolated location" and the "manner of the killing" (multiple shotgun wounds on an unarmed victim) were consistent with a premeditated and deliberate murder. (See also *People v. Anderson* (1968) 70 Cal.2d 15, 27 [three factors for premeditation: (1) prior planning, (2) motive, (3) manner of killing].) Similarly, here, appellant admitted that he planned the murders and dug the mass grave approximately five days before the murders. On the day of the murders, he systematically executed his plan, leading Jose and Juan to an isolated part of the ranch, shooting the unarmed victims in the head, and dumping them in a pre-dug grave. Based on this evidence, and the jury's true finding on the lying-in-wait special circumstance, there can be no doubt that the jury would still have convicted appellant of first degree murder in the killings of Jose and Juan, even if not instructed on robbery felony murder. Thus, any claimed error was harmless.[24]

XI. THE LYING-IN-WAIT SPECIAL CIRCUMSTANCE IS NOT UNCONSTITUTIONAL

Appellant asserts that the lying-in-wait special circumstance is unconstitutional because it does not "genuinely narrow the class of persons eligible for the death penalty" and does not "reasonably justify the imposition" of the death penalty. (AOB 226.) This Court has repeatedly

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[24] Moreover, this claim concerns only appellant's convictions for killing Jose and Juan, and does not extend to the first degree murder convictions for killing Jack and Areli. Nor does it apply to the multiple murder and lying-in-wait special circumstance findings for those killings, each of which would independently render appellant death-eligible. Therefore, even if appellant's claim is accepted, his death sentence need not be overturned.

upheld the lying-in-wait special circumstance, and related instructions, against the claims made by appellant. (See *People v. Mendoza* (2011) 52 Cal.4th 1056, 1095 [lying-in-wait special circumstance sufficiently narrows the class of murderers eligible for the death penalty, provides a principled way of distinguishing capital murders from other first degree murders, and comports with the Eighth Amendment]; *People v. Carasi* (2008) 44 Cal.4th 1263, 1310 [lying-in-wait special circumstance is not unconstitutionally overbroad or vague].) Appellant provides no compelling reason for this Court to reevaluate this long line of precedent. Moreover, even if the lying-in-wait special circumstance allegations were overturned, the multiple murder special circumstance would still have rendered appellant death-eligible. Thus, appellant's claim should be denied.

XII. SUFFICIENT EVIDENCE SUPPORTS THE SPECIAL CIRCUMSTANCE FINDINGS REGARDING APPELLANT'S BURYING ALIVE OF HIS NIECE AND NEPHEW, AS WELL AS THE FELONY-MURDER THEORY OF LIABILITY FOR THEIR DEATHS

Appellant contends that there was insufficient evidence to support the special circumstance findings regarding the murders of Jack and Areli or to support a felony murder theory of liability for their killings. (AOB 232-240.) However, both of these claims fail because the prosecution presented sufficient evidence showing that appellant lured the children away from their mother under false premises and attacked them once isolated, and that appellant killed the children to facilitate his sexual attack on Yolanda. Moreover, any error was harmless because overwhelming evidence supported the other theories of first degree murder liability and the other special circumstances.[25]

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[25] Appellant appears to evince some confusion in discussing the "facilitation of flight" theory of first degree murder and the related special (continued...)

A. Lying in Wait

The district attorney charged appellant with the lying-in-wait special circumstance for all four murders. (1 CT 120-122.) In closing, the district attorney argued:

> The kids, I believe, is a more subtle but again definite lying in wait situation. In some fashion, he's able to calm them down and to get them to go with him up to the grave site, ostensibly to see their father. And when he gets them there, again in an area that's located far from where they can be helped, seen, or heard, he beats them with the shovel, with the shovel handle, disposes of their bodies in the grave.

(47 RT 10301.) "Even though they can physically see him, even though it's not classic ambush, he nonetheless secretes his intent from them to murder them once he gets them to the right location." (47 RT 10301.)

Thereafter, the trial court gave the lying-in-wait special circumstance instruction:

> One, the defendant intentionally killed the victim.
>
> And two, the murder was committed while the defendant was lying in wait.

(...continued)
circumstance. In his main argument heading, he claims there is "insufficient evidence to support special circumstances findings regarding the killing of the two children." (AOB 232.) However, in subheading (b), he asserts that "there was insufficient evidence to support a *felony murder conviction* for the killing of each of the two children to facilitate flight from the crime scene." (AOB 235.) His analysis then alternates between discussion of the flight theory of felony murder and the flight special circumstance. (See AOB 238 ["but it does not support a finding that the special circumstances actually charged in this case was true"].) However, given that the flight special circumstance allegations were dismissed by the trial court on April 10, 2001(46 RT 10133), and were not presented to the jury, respondent limits its analysis in Argument XII(B) to the felony murder theory of liability based on facilitation of flight.

> The term while lying in wait, within the meaning of the law of special circumstances, is defined [] as a waiting and watching for an opportune time to act, together with a concealment by ambush or by some other secret design to take the person by surprise, even though the victim is aware of the murderer's presence. The lying in wait need not continue for any particular period of time provided that its duration is such as to show a state of mind equivalent to premeditation and deliberation.
>
> Thus, for a killing to be perpetrated while lying in wait, both the concealment and the watchful waiting, as well as the killing, must occur during the same time period or in an uninterrupted attack commencing no later than the moment the concealment ends.
>
> If there is a clear interruption separating the period of lying in wait from the period during which the killing takes place, so that there is neither an immediate killing nor a continuous flow of the uninterrupted lethal events, the special circumstance is not proved. The lethal acts must begin at and continuously flow from the moment the concealment and watchful waiting ended.
>
> A mere concealment of purpose is not sufficient to meet the requirement of concealment set forth in this special circumstance. However, when a defendant intentionally murders another person under circumstances which include one, a concealment of purpose, two, a substantial period of waiting—of watching and waiting for an opportune time to act, and three, immediately thereafter a surprise attack on an unsuspecting victim from a position of advantage, the special circumstance of murder while lying in wait has been established.

(11 CT 2880; 48 RT 10456-10457 [CALJIC No. 8.81.15].)

The jury found the lying-in-wait special circumstance true for all four killings, including that of Jack and Areli. (11 CT 2925, 2932, 2939, 2946.)

1. Sufficient evidence showed that appellant lured the children away from their mother under false premises and attacked them once isolated

To sustain a true finding on the lying-in-wait special circumstance, the prosecution must prove that "an intentional murder [was] committed under

circumstances which include (1) a concealment of purpose, (2) a substantial period of watching and waiting for an opportune time to attack, and (3) immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage." (*Moon, supra*, 37 Cal.4th at p. 24, fn. 1.) In 1998, when the murders occurred, the lying-in-wait special circumstance required a showing that the defendant "intentionally killed the victim *while* lying in wait." (§ 190.2, former subd. (a)(15), italics added.) In 2000, the electorate approved Proposition 18 which, among other things, "changed the language of the lying-in-wait special circumstance to delete the word 'while' and substitute in its place 'by means of.'" (*Lewis, supra*, 43 Cal.4th at p. 512, fn. 25.) "Because [appellant's] murder occurred before this statutory change, we apply the case law interpreting the more stringent requirement of the former law." (*People v. Hajek* (2014) 58 Cal.4th 1144, 1184.)

The first element of concealment of purpose is met by showing that the defendant's "true intent and purpose were concealed by his actions or conduct. It is not required that he be literally concealed from view before he attacks the victim." (*Moon, supra*, 37 Cal.4th at p. 22.) The concealment element may manifest itself either by an ambush or by the creation of a situation where the victim is taken unaware even though he sees his murderer. (*Mendoza, supra*, 52 Cal.4th at p. 1074.) No particular period of time is required for the second element of the lying-in-wait special circumstance. A few minutes can suffice. (*Mendoza, supra*, 52 Cal.4th at p. 1073; *Moon, supra*, 37 Cal.4th at p. 23.) Finally, the defendant need not strike at the first available opportunity, but may wait to maximize his position of advantage before taking the victim by surprise. (*Hillhouse, supra*, 27 Cal.4th at p. 501.)

Appellant correctly cites *Morales, supra*, 48 Cal.3d at page 527 as instructive, but he fails even to attempt to distinguish it from his case. In *Morales*, the defendant armed himself with a weapon, lured the victim into

a car on a false pretense, waited until they reached a secluded location, and then attacked her from behind. (*Id.* at p. 554.) This Court upheld the true finding on the lying-in-wait special circumstance, despite the victim's knowledge that the defendant was behind her in the backseat. (*Id.* at pp. 554-555.) This Court reached the same conclusion in *People v. Edwards* (1991) 54 Cal.3d 787, 825-826, where the defendant: (1) saw the two child victims three hours before he killed them; (2) followed them about a quarter mile to a remote location he knew well, where there were no witnesses and the children were most vulnerable; and (3) shot the victims in the head. Even more strikingly, this Court also upheld a true finding on a lying-in-wait special circumstance in *People v. Webster* (1991) 54 Cal.3d 411, 424, 448, where the defendant led his victim to an isolated location where a grave had already been dug, and then attacked him with a knife from behind.

Similarly, here, appellant got the children to leave the trailer on the false pretense that they were going to see their father (concealment of purpose), led them approximately a quarter mile away to a pre-dug mass grave in a secluded part of the ranch away from any intervenors (substantial period of waiting for an opportune time to attack), and then beat the young children in the head with a shovel handle once they reached the mass grave (surprise attack on unsuspecting victims). Appellant's physical and strategic advantage was evidenced by the lack of any evidence of a struggle. As in *Morales*, *Edwards*, and *Webster*, there was sufficient evidence in the record for the jury to find each element of the lying-in-wait special circumstance for the killing of Jack and Areli.

Appellant counters that he did not plan to murder the children and just acted instinctively because "there was no way out." (AOB 234.) However, appellant admitted in his Placer County interview that he had planned to murder the family at least five days before the murders, and that he had dug

the grave deep enough to fit the whole Martinez family, including the children and Yolanda. (SCT 89.) Nor is there merit to appellant's claim that his binding of the children put them on notice that they would be killed, rendering the attack "unsurprising." There was no evidence of any verbal threats made to the children; in fact, they were affirmatively told that they were going to see their father. Therefore, three-year-old Areli and five-year-old Jack would not have reasonably concluded that they would be murdered when appellant led them away from the trailer. The elements of the special circumstance were met.

2. Any error was harmless

However, even if the evidence was insufficient to sustain the lying-in-wait special circumstance, any error was harmless because the case would still have progressed to the penalty phase based on the remaining special circumstances. As in *People v. Beardslee* (1991) 53 Cal.3d 68, 117, the jury filled out separate verdict forms for each of the four lying-in-wait special circumstances and for the multiple-murder special circumstance. (11 CT 2925, 2932, 2939, 2946, 2983.)[26] Thus, even excluding the lying-in-wait allegations for the children, there would have been true findings for three other special circumstances, and the case would still have proceeded to the penalty phase. (*Beardslee*, *supra*, 53 Cal.3d at p. 117 ["It is even more clearly harmless here since the jury returned a separate penalty verdict as to each murder"].)

Moreover, any error is harmless because any "invalid lying-in-wait special circumstances 'did not alter the universe of facts and circumstances

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[26] The trial court instructed the jury: "You must decide separately each special circumstance alleged in this case. If you cannot agree as to all of the special circumstances, but can agree as to one or more of them, you must make your finding as to the one or more upon which you do agree." (11 CT 2879; 48 RT 10454-10455 [CALJIC No. 8.80.1].)

to which the jury could accord weight.'" (*Hajek, supra*, 58 Cal.4th at pp. 1186-1187, quoting *People v. Bonilla* (2007) 41 Cal.4th 313, 334.) The details of Jack and Areli's murders would still have been presented as aggravating evidence at the penalty phase even if the lying-in-wait special circumstance had not been alleged for their deaths. That evidence added to the mountain of aggravating evidence for appellant's carefully planned and brutally executed murder of his brothers-in-law, rape of his sister-in-law, and burying alive of his young nephew and niece. Against this overwhelming evidence of guilt and aggravation, appellant introduced unpersuasive mitigating evidence, suggesting that his father was a reformed alcoholic who had abused his wife and yelled at his children when they were young. On this record, the court can be assured beyond a reasonable doubt that removal of the fourth and fifth special circumstances would not have impacted the jury's verdict or sentence.

B. Murder in the Commission of Rape or Penetration With a Foreign Object

In his closing argument, the district attorney explained that first degree murder convictions for the deaths of Jack and Areli could be based on three different theories: (1) premeditation and deliberation, (2) lying-in-wait, or (3) felony murder in the commission of rape or penetration with a foreign object. (47 RT 10291-10307.) With regard to felony murder, the district attorney argued that Jack and Areli heard and witnessed appellant's sexual assault on their mother, and appellant killed them to silence and/or control them during the attack. (47 RT 10296 ["But they nonetheless heard and witnessed again, according to Yolanda's testimony, as well as the defendant's own statement, parts of the assault. Either visually or aurally, they could hear what was going on."].) In fact, Yolanda testified that Jack and Areli saw appellant beating and dragging her to the trailer, with five-year-old Jack yelling, "don't hit my mommy," while three-year-old Areli

cried and tugged at appellant. (31 RT 8086-8087.) Appellant told the kids to shut up. (32 RT 8115.)

The district attorney further explained that "the person or persons killed need not be the victim of the underlying felony . . . if as a direct result others are killed who may have witnessed that particular felonious attack." (47 RT 10303.) With regard to the duration of the underlying felony, "the commission or attempted commission of rape or forcible sexual penetration continues as long as the defendant maintains control over the victim or so long as she remains confined." (47 RT 10307.) The trial court reaffirmed these two points in its instructions to the jury. (11 CT 2872 [CALJIC No. 8.21], 2973 [CALJIC No. 8.21.1].)

The jury found appellant guilty of first degree murder in the deaths of Jack and Areli. (11 CT 2923, 2930.)

1. Sufficient evidence supports the theory that Jack and Areli were killed to facilitate appellant's continuing sexual assault of Yolanda

"First degree felony murder does not require proof of a strict casual relation between the felony and the homicide, and the homicide is committed in the perpetration of the felony if the killing and the felony are parts of one continuous transaction." (*People v. Ainsworth* (1988) 45 Cal.3d 984, 1016.) The continuous transaction may continue even after the physical acts of the crime are completed if the culprit maintains control over the victim. (*People v. Guzman* (1988) 45 Cal.3d 915, 952 [a murder committed "almost immediately following the rape," as the victim got up and began to walk away, constituted felony murder]; *People v. Thompson* (1990) 50 Cal.3d 134, 171-173, [a murder committed within two hours of a lewd act on a child, while the victim was still bound, constituted felony murder]). Importantly, the person killed need not be the target of the underlying felony. (*People v. Welch* (1972) 8 Cal.3d 106, 118-119.)

Additionally, "a murder may be determined to have been committed in the perpetration of a felony if it occurred after the felony, e.g., during the attempt to escape or for the purpose of preventing discovery of the previously committed felony." (*People v. Jones* (2001) 25 Cal.4th 98, 109; see also *People v. Berryman* (1993) 6 Cal.4th 1048, 1091, overruled on another ground by *People v. Hill* (1998) 17 Cal.4th 800 [affirming felony-murder special circumstance of murder during commission of rape where the defendant "sought to eliminate Hildreth as a witness to his crimes, a witness who could have identified him positively"]; *People v. Thongvilay* (1998) 62 Cal.App.4th 71, 78[felony murder conviction upheld where motorist was killed as defendants attempted to escape from carjacking]; *People v. Hernandez* (1988) 47 Cal.3d 315, 348, [felony murder upheld where defendant raped and sodomized his victims and then killed them when they screamed and struggled to get away, because deaths were "direct product of the sexual assaults and to silence the victims"].)

When considering a challenge to the sufficiency of the evidence to support a conviction, appellate courts "review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt . . . presum[ing] in support of the judgment the existence of every fact the trier of fact reasonably could infer from the evidence." (*People v. Booker* (2011) 51 Cal.4th 141, 172.)

The record here contains sufficient evidence to uphold the jury's determination that appellant killed Jack and Areli "during the commission" of rape or penetration with a foreign object. Appellant does not contest on appeal that he raped and digitally penetrated Yolanda, and that Jack and Areli witnessed at least part of his attack. Nor does appellant rebut the fact that Jack and Areli were crying and screaming during the attack, were

grabbing at him, and were telling him to stop hurting their mother. Appellant also does not question that he left Yolanda bound and partially naked in his trailer while he gathered Jack and Areli and marched them to their deaths. This provides ample support for the district attorney's argument that appellant killed Jack and Areli to silence them, to control them during the sexual assault, to prevent them from identifying him as Yolanda's attacker, or some combination of those reasons.

Although Yolanda's bondage is sufficient evidence that the sexual assault was ongoing when appellant killed Jack and Areli, the lack of semen in Yolanda's sexual assault exam is also circumstantial evidence that appellant interrupted the sexual assault to kill the children. Yolanda recalled the children shouting and tugging at appellant while he beat her, and the jury could reasonably have inferred that he killed the children so that he could rape Yolanda without their interference or without their screams attracting the attention of the Parnells. Appellant admitted to police that he was planning on killing Yolanda when he returned to the trailer, but he was unable to follow through with his plan because Yolanda was gone and officers had arrived on the ranch. Thus, while a strict causal connection is not *required*, it would have been reasonable for the jury to interpret the killings of Jack and Areli as a step toward facilitating the continued rape and eventual murder of Yolanda.

Appellant cites isolated language from the district attorney's rebuttal to suggest that the prosecution framed its theory of felony murder not as removing an impediment to Yolanda's rape, but as a means to "facilitate escape or flight." (AOB 238.) Appellant then complains that this was error because no evidence or instruction was presented on this theory. (AOB 238.) However, when read in context, it is clear that the district attorney was discussing a *premeditation* theory of Jack and Areli's murders and was arguing that appellant's motive in killing the children might have been to

prevent their future testimony. (48 RT 10411 ["And so when one thinks it through, and weighs the consequences, and makes a decision about what they have to do, they are premeditating and deliberating and killing with malice aforethought"].) Thus, the quoted language from the district attorney's rebuttal does nothing to sully his proper argument (supported by sufficient evidence) that Jack and Areli were killed "during the commission" of Yolanda's rape.

2. Any error was harmless

Even if the trial court erred in allowing the prosecution to argue rape felony murder, any error is harmless. As explained above in Argument X, a strong showing of premeditation or a true finding on the lying-in-wait special circumstance renders it unnecessary to evaluate alternate theories of first degree liability. (*Edelbacher*, *supra*, 47 Cal.3d at p. 1028.) Here, both are true. In finding true the lying-in-wait special circumstance, the jury necessarily could have based the first degree murder verdict on a lying-in-wait theory of liability. And the case for premeditation and deliberation (which was the primary theory argued by the district attorney) was overwhelming. Appellant admitted to digging a mass grave five days in advance, and to digging it deep enough to hold the entire Martinez family. Additionally, he had the quarter-mile walk with the children to consider his course of conduct, and he proceeded to hit young Jack and Areli in the head repeatedly and bury them alive. Under the circumstances, this Court can be assured beyond a reasonable doubt that the jury would have convicted appellant of first degree murder in the deaths of Jack and Areli even without the felony murder theory.[27]

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[27] Moreover, appellant would still have been death-eligible even without the convictions for killing Jack and Areli, based on the lying-in-wait and multiple-murder special circumstances for killing Jose and Juan.

XIII. THE TRIAL COURT PROPERLY DENIED APPELLANT'S DISCOVERY MOTION REGARDING DISCRIMINATORY PROSECUTION

Appellant next contends that the trial court erred in not allowing him to pursue additional discovery regarding his claim of racial discrimination by the district attorney. (AOB 241.) However, appellant's claim fails because his generic statistical analysis was misleading and inadequate to justify additional discovery beyond the extensive information already provided to him by the district attorney.

A. Background

On January 26, 2001, appellant filed a motion for discovery related to his claim of selective prosecution under *Murgia v. Municipal Court* (1975) 15 Cal.3d 286. (6 CT 1665-1751.) The prosecution had already given appellant's defense team 69 pages of exhibits explaining its charging decisions in 74 special circumstance murder cases in Placer County. (6 CT 1665-1739.) As defense counsel admitted in his discussion of the *Murgia* discovery request, "I don't believe there's going to be a lot of dispute on the facts. We have most of the information that we need and it's going to be—there will be litigation on what the meaning is of the facts as applied." (12 RT 3204.)

Based on the evidence already provided, defense counsel argued that three white defendants (McGraw, Hill, Knorr/Cross) charged in Placer County since 1977 with multiple murders and killing children were allowed to plead guilty and the death penalty was waived. (6 CT 1667-1668.) Between 1990 and 2000, the only two capital cases that the district attorney took to trial involved African-American defendants (Williams and Harper). (6 CT 1668.) Williams was eventually found guilty, but the case was resolved for a sentence of LWOP. (6 CT 1668.) The Harper case involved a prosecution against two African Americans and two Caucasians, though

the death penalty was pursued only as to the triggerman, Harper. (6 CT 1668.) Harper, who was African-American, was also sentenced to LWOP. (6 CT 1669.)

On January 29, 2001, the district attorney filed his opposition. (6 CT 1752-1761.) He argued that appellant had not shown he was being treated differently from "similarly situated" defendants of a different race, and there was no showing of discriminatory intent or effect. (6 CT 1757.) As the district attorney had noted in a previous filing, of the special circumstance, death-eligible cases filed in Placer County between 1977 and 1998, the district attorney had pursued the death penalty against four white defendants (Van Ord, Mickey, Lee, and Rundle), and had waived the death penalty in five cases involving defendants of color, including two cases where the defendants were Hispanic (Moten, Chen, Sokha Ban, Dominguez, and Orozco-Perraza). (4 CT 1140, 1143; 10 RT 2651.) In fact, there was only one case involving a defendant of color during that period in which the district attorney *did not* waive the death penalty (Harper). (4 CT 1143.) The prosecution also criticized the defense's choice of 1990 as the cutoff for capital prosecutions: "1990 is very convenient. It happens to exclude two white defendants who are currently on death row from this county; *People v. Mickey* and *People v. Rundle*." (8 RT 1977.)

The district attorney distinguished appellant's case from each of the cases cited by defense counsel. The plea bargain that Knorr received was offered, not by Placer County prosecutors, but by the Sacramento County District Attorney's Office, who took over the case after it was transferred from Placer County. (6 CT 1753.) Moreover, Hill and McGraw were offered plea deals because they both suffered from documented, preexisting mental illnesses. (6 CT 1753-1754.) Hill had committed himself to a psychiatric facility for over a month before killing his two children, and he immediately drove their bodies to a fire station and turned himself in. (6

CT 1753-1754.) McGraw was found incompetent to stand trial for shooting his estranged wife and daughter because he was borderline mentally retarded, and a key prosecution witness died while McGraw was being restored to competency. (6 CT 1753-1754, 1768.) Moreover, Hill's wife (the mother of the child victims) opposed seeking the death penalty against him. (6 CT 1754.) Thus, the district attorney argued, the negotiated dispositions for Hill and McGraw arose from concerns about the defendants' mental health and potential weakness in the prosecution's case, rather than the fact they were both white. (6 CT 1754.) Like the *Williams* case (an abduction, rape, and murder of a young woman) and the *Harper* case (the sole triggerman in a murder-for-hire plot), appellant's case did not involve any concerns about mental health or case viability. (6 CT 1755.)

Finally, the district attorney noted that of the 46 defendants charged with special circumstances murder between 1977 and 2000, only 10 percent of the cases with racial minority defendants went to trial on death charges, while 18 percent of *white* defendants were prosecuted at trial on death charges. Two of those white defendants, Mickey and Rundle, were on death row at the time appellant's motion was argued. Given this history, , appellant had "failed to show any pattern of invidious discrimination, much less any evidence of anything which could be considered as 'stark,' 'significant,' or 'exceptionally clear.'" (6 CT 1758, quoting *People v. Keenan* (1988) 46 Cal.3d 478.)

On January 31, 2001, the trial court denied appellant's discovery motion, ruling that the threshold showing had not been made. (6 CT 1786; 13 RT 3283.) The trial court found the prosecution's statistical analysis persuasive and uncontested by the defense, and the cases cited by the defense "clearly distinctive or distinguishable from the case at bar." (13 RT 3284.)

> Counsel places great emphasis on *Hill* which does involve two homicides and two children; however, there is—it is so clear that the overriding mental health issues control that case that the decision to resolve it short of the death penalty is certainly more than warranted. With *McGraw* it's one child, one adult, and then you layer in the [section] 1368 issues as tendered by the prosecution. That also provides a clear distinction.
>
> *Knorr* referenced by the defense in my view is completely inapplicable to these proceedings because of its transfer to Sacramento County, taking the prosecution effectively out of the hands of the Placer County authorities.

(13 RT 3284.) The trial court also agreed with the district attorney that appellant's charges, if proven, were not a "close case" for the death penalty. (13 RT 3288.) "[T]he Court can't conceive of a case that would be a death penalty case if this would not be a death penalty case, assuming all those facts are established." (13 RT 3285.)

B. The Trial Court Did Not Abuse Its Broad Discretion in Limiting Discovery

The exercise of prosecutorial discretion to seek capital punishment for eligible cases within a particular county does not violate equal protection. (*People v. Vines* (2011) 51 Cal.4th 830, 890.) "Many circumstances may affect the litigation of a case chargeable under the death penalty law. These include factual nuances, strength of evidence, and, in particular, the broad discretion to show leniency." (*Keenan, supra*, 46 Cal.3d at p. 506.) "Hence, one sentenced to death under a properly channeled death penalty scheme cannot prove a constitutional violation by showing that other persons whose crimes were superficially similar did not receive the death penalty." (*Ibid.*)

A defendant is not entitled to discovery regarding charging practices in order to bring a selective prosecution claim unless the defendant submits relevant evidence that similarly situated persons are treated differently, and

offers a "plausible justification" for the information being sought. (*United States v. Bass* (2002) 536 U.S. 862, 864; *People v. Ashmus* (1991) 54 Cal.3d 932, 979-980, abrogated on another ground in *People v. Yeoman* (2003) 31 Cal.4th 93, 117.) "Discovery is not a fishing expedition." (*People v. McPeters* (1992) 2 Cal.4th 1148, 1171.) A purely statistical showing that does not describe or analyze factors or circumstances of the cases, other than race of the victim or defendant and the sentence sought or received, does not entitle a defendant to obtain discovery of the prosecution's charging practices. (*In re Seaton* (2004) 34 Cal.4th 193, 202-203; *Bass*, *supra*, 536 U.S. at p. 864 [raw statistics regarding race and death-eligible charges insufficient as it "says nothing about charges brought against *similarly situated individuals*"].)

The denial of a defendant's motion to compel discovery of a district attorney's charging practices is reviewed for abuse of discretion. (*Ashmus*, *supra*, 54 Cal.3d at pp. 979-980.) A trial court does not abuse its broad discretion unless its ruling was "arbitrary, capricious, or patently absurd" or "so erroneous that it 'falls outside the bounds of reason.'" (*Bryant*, *supra*, 60 Cal.4th at p. 390.)

This Court has established a high threshold for overturning a trial court's decision regarding discovery on a *Murgia* motion. (See, e.g., *McPeters*, *supra*, 2 Cal.4th at p. 1171; *Ashmus*, *supra*, 54 Cal.3d at p. 980.) Most recently, this Court rejected such a claim in *People v. Montes* (2014) 58 Cal.4th 809, 831-832, even when a statistical analysis similar to appellant's was coupled with racially-charged comments by the prosecutors and investigating officers during interviews with the codefendant and other individuals in the case.

Like *Montes*, appellant has failed to meet that high threshold. After reviewing the pleadings and conducting an extensive hearing, the trial court reasonably concluded that appellant had failed to provide credible evidence

that the decision to seek death in his case resulted from different treatment of similarly situated persons. Appellant selectively chose arbitrary cut-off dates to convey a misleading statistical impression of racial bias. In fact, when data was considered for the entire period for which the death penalty was available in California (1977-1998), any suggestion of bias was rebutted. During that time period:

- The proportion of white, death-eligible defendants taken to trial on death penalty charges was *twice as high* as that for minority defendants.
- The district attorney pursued death sentences against four white defendants, including two on death row at the time of appellant's motion (Mickey and Rundle).[28]
- The district attorney had waived the death penalty in five cases involving defendants of color, including two cases where the defendants were Hispanic, and the two death cases taken to trial against minority defendants ended up with LWOP sentences.

Moreover, appellant's attempt to compare his case to superficially-similar cases like McGraw, Hill, and Knorr ignores the obvious differences between the cases, namely the presence of severe, documented mental illnesses for McGraw and Hill. Instead, appellant's intercase "analysis" more closely resembles the "purely statistical showing that does not describe or analyze the facts or circumstances of any case, other than the sentence and the race of the [defendant]" and the age of the victims. (*In re Seaton*, *supra*, 34 Cal.4th at pp. 202-203.) Nor did appellant clearly describe what information he still needed to support a *Murgia* motion given the extensive disclosures already provided by the prosecution. Finally, as the trial court noted, and as appellant concedes, the facts of his crime are "egregious." (AOB 243.) If this case did not merit death charges, it is hard

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[28] When viewing the complete time range, appellant's claim that 'the only defendants against whom the prosecutor sought the death penalty were minorities" is inaccurate. (AOB 244.)

to conceive a case that would. For all of these reasons, the trial court's ruling not to order additional discovery did not fall "outside the bounds of reason," and appellant's claim should be denied.

XIV. ANY DISCLOSURE OF JAIL LOGS TO THE PROSECUTION WAS HARMLESS

Appellant challenges the prosecution's collection of appellant's jail visitor logs as violating a "host" of his constitutional rights. (AOB 245.) Because the collection of visitor logs is a routine investigative procedure authorized by statute, and because appellant was not harmed by the investigator's brief contact with two professional visitors, appellant's claim should be rejected.

A. Background

On December 13, 1999, defense counsel filed an application for a restraining order prohibiting the district attorney "from further accessing the identity of defense experts in this action and from contacting, directly or indirectly, any defense expert in the action." (3 CT 669-670.) Defense counsel alleged that Joe Bertoni, an investigator for the district attorney, had "gone over to the jail and secured the sign-in sheets for witnesses to identify . . . who the defense has been in contact with and who the defense has had come over to the jail to visit [appellant]." (5 RT 1181.) Defense counsel also moved to estop the prosecution from seeking the death penalty and/or to have the Placer County District Attorney's Office recused because of their collection of appellant's visitor logs. (3 CT 698.)

The district attorney opposed both motions, noting that defense counsel had cited no authority for his claims of misconduct. (5 RT 1183.) The district attorney acknowledged that Bertoni had accessed information "available to him through the jail" as part of the ongoing investigation into appellant's case, and that Bertoni had called two of appellant's professional visitors to request their curriculum vitae (5 RT 1183, 1194.) The trial court

stated it did not appear "anything improper was done by [the investigator] or any member of the DA's Offices," but asked the district attorney not to contact any additional visitors or access the jail logs until the matter had been briefed, argued, and resolved. (5 RT 1184-1185, 1190.) The district attorney complied with this request. (5 RT 1190.)

Investigator Bertoni submitted a declaration explaining that he had been a police officer for 28 years and that requesting jail visitation records had been standard practice in the Nevada County and Santa Clara County Sherriff's Offices, as well as during his time as an investigator for the Placer County District Attorney's Office. (5 RT 1250.) He was not aware of any prohibition against accessing jail logs for investigative purposes. (5 RT 1258.) Bertoni stated that he had obtained the jail visitor logs for appellant's case as "general continuing investigation done in the normal course of preparing a case for trial." (3 CT 684.) He obtained the logs "two or three times," both through a request to the jail and by looking up "information on my own network terminal." (5 RT 1210-1211.)

The logs listed the date and time of the visits, the name of the visitor, and for some visitors, the duration of the visit. (5 RT 1214.) From this information, Bertoni was able to identify "social or family visitors that might lead to additional sources of interviews and information." (5 RT 1225.) In fact, Bertoni had interviewed appellant's brother and Josefina Torres, and had attempted to interview two other relatives of appellant. (3 CT 684.) Bertoni also stated that he had called two professional visitors whose field of practice he could not determine and had asked for copies of their curriculum vitae. (3 CT 684.)

In Bertoni's call to the first expert, he reached a receptionist and requested a copy of the expert's CV. (5 RT 1238.) Bertoni was patched through to the expert, at which point he identified himself as a prosecution investigator and asked for a copy of her CV. (5 RT 1232, 1240.) The

expert declined to send him one, and no substantive disclosures were made regarding the expert's meeting with appellant. With the second expert, Bertoni also identified himself as a prosecution investigator and requested a copy of her CV. (5 RT 1241-1242.) The expert agreed to provide him with her CV, but did not disclose anything regarding her meeting with appellant. (5 RT 1243.)

Donna Sylvia, the corrections support supervisor from the county jail, also testified at the hearing. (5 RT 1261.) She stated that it was routine practice to turn over jail visitation records to district attorney investigators when a request was made. (5 RT 1264.) She also specified that the *purpose* of a professional visit was not logged in the jail records. (5 RT 1288.)

On February 2, 2000, the trial court denied appellant's motion for recusal or estoppel and issued several findings: (1) "the District Attorney's Office did not violate any express statutory provisions governing the records at issue"; (2) "there is an apparent gap between the express provisions of Penal Code Section 987.9 and the volume of data that may be available upon diligent investigation"; (3) "extreme sanctions are warranted only in circumstances of extreme, harmful, and illegal conduct [and] the Defense has failed to establish the necessity of either of the sanctions requested"; (4) "there has been no actual showing that the Defense has suffered material prejudice" because the information gained "will be received later by the Prosecution in the course of required disclosure or be rendered irrelevant"; (5) to avoid any *future* prejudice, "the Placer County Jail shall not disclose to any person, including the District Attorney, nor any member of its staff, either directly or indirectly, any information pertaining to the defense expert witnesses in this case." (5 RT 1355-1359.)

On December 13, 2000, defense counsel filed a "renewed motion to estop the prosecution from seeking death and/or recusal of the Placer

County District Attorney's Office" based on "the release of information by California Medical Forensic Group" to the prosecution. (5 CT 1409-1410.) The prosecution filed its opposition on December 19, 2000, explaining that a deputy district attorney had called CFMG to make sure that no psychotherapist-patient privileged material was disclosed to them pursuant to a subpoena that had been issued. (5 CT 1491.) In response, the representative from CFMG "advised that there were no materials of that nature in the file." (5 CT 1491.) Accordingly, the prosecution gained no knowledge about the content of any privileged information, and no court remedy was required. (5 CT 1491-1492.)

On December 22, 2000, the trial court denied the motion for estoppel and recusal. (6 CT 1496; 11 RT 2983.) The trial court accepted the prosecution's explanation that, rather than trying to divine defense strategy, the deputy district attorney had called CFMG to ensure that the prosecution *did not* get access to confidential psychiatric materials. (11 RT 2984.) When the issue was raised again at trial, the trial court ruled that the prosecution could not present any evidence from appellant's jail medical records in its case-in-chief, but could address the issue on rebuttal if raised by the defense. (40 RT 9477-9478.) The issue was not raised.

B. The Collection of Appellant's Visitor Logs Was Authorized by Statute

Appellant concedes that county jails have a legitimate penological interest in collecting identifying information from all persons visiting inmates in order to maintain institutional security. (AOB 251.) However, appellant claims, without citation to caselaw, that prosecution investigators may not access those jail visitor logs, and that such investigative efforts violate a defendant's constitutional and statutory rights. But courts have regularly (if impliedly) upheld this investigative practice, and there is statutory authorization for the practice in both the Civil and Penal Codes.

In fact, this Court has gone even further, upholding the recording of an inmate's actual *conversations* with visitors and allowing for the admission of such evidence at trial. (See *People v. Loyd* (2002) 27 Cal.4th 997, 1008 ["We hold that the monitoring of inmates' conversations with visitors to be another such regulation that has become valid after the 1994 amendment"].) As explained in detail below, appellant's claim should be rejected.

Civil Code section 1798.68, subdivision (a) allows government bodies, such as a county jail, to disclose information "when requested by a district attorney," provided that the information falls within subdivisions (e), (f), or (o) of Civil Code section 1798.24. Subdivision (e) permits such disclosure of personal information "if the use of the information requested is needed in an investigation of unlawful activity under the jurisdiction of the requesting agency." (Civ. Code, § 1798.24, subd. (e).) Moreover, section 1054.4 of the Penal Code, which follows the section outlining the pretrial discovery obligations of the prosecution and the defense, explains that "Nothing in this chapter shall be construed as limiting any law enforcement or prosecuting agency from obtaining nontestimonial evidence to the extent permitted by law on the effective date of this section." Thus, state statutes do not prohibit, and in fact impliedly authorize, investigative efforts like the collection of jail visitor logs, with discovery rules carving out a special protection for such methods.

Respondent was unable to find a single successful challenge in federal or state court to the collection or use of jail visitor logs. Instead, we found countless cases upholding admission of jail visitor logs for various uses by the prosecution. (See, e.g., *Neeley v. Supreme Court* (1993) 6 Cal.4th 901 [jail logs admissible evidence as exception to hearsay rule]; *People v. Almanza* (2015) 233 Cal.App.4th 990, 998 [jail visitor logs used to impeach witness at trial]; *People v. Glover* (1985) 169 Cal.App.3d 689 [jail logs admitted as inevitable discovery for impeachment purposes]; *People v.*

Owens (N.Y. Co. Ct. 1999) 182 Misc.2d 828, 829-830 [701 N.Y.S.2d 604, 605] [disclosure of jail visitor logs in death-eligible case would not give prosecution a tactical advantage]; *People v. Meehan* (Neb. Ct. App. 1998) 585 N.W.2d 459, 464 [jail logs admissible to impeach witness]; *Sutherland v. State* (Mo. 1997) 939 S.W.2d 373, 376 [jail logs admissible as business records to impeach alibi witness]; *Tarrant v. State* (Fla. 1989) 537 So.2d 150, 151 [business records exception to hearsay rule applies to jail logs]; *State v. Weston* (N.J. Ch. Div. 1986) 216 N.J.Super. 543, 545 [524 A.2d 471, 472] [disclosure of jail visitor logs would not reveal defendant's trial strategy where list "included possible expert witnesses and consultants for the defense"].) Given these permissible uses for jail logs, there is nothing inherently improper in obtaining the log of a defendant's visitors in jail during the ordinary course of an investigation.

Moreover, "recusal of an entire district attorney's office is an extreme step," with a higher recusal threshold "than that for an individual prosecutor." (*Spaccia v. Superior Court* (2012) 209 Cal.App.4th 93, 106-107.) An entire prosecutor's office should not be recused unless it is necessary to assure a fair trial. The showing of a conflict necessary to justify so drastic a remedy must be especially persuasive. (*People v. Cannedy* (2009) 176 Cal.App.4th 1474, 1482; *People v. Merritt* (1993) 19 Cal.App.4th 1573, 1581 [misconduct of prosecution investigator did not justify recusal of entire district attorney's office].) A motion to recuse "is directed to the sound discretion of the trial court, and its decision to grant or deny the motion is reviewed only for an abuse of discretion." (*Polanski v. Superior Court* (2009) 180 Cal.App.4th 507, 562.) Nor is error in resolving a recusal matter deemed "structural"; a showing of prejudice must still be made by the defendant. (*People v. Vasquez* (2006) 39 Cal.4th 47, 68 [failure to recuse conflicted judge not structural error, and was harmless under the circumstances].

Here, appellant has failed to meet the high threshold for recusal of an entire district attorney's office, or shown how the actions of investigator Bertoni prejudiced appellant or impacted the outcome of the case. (See *People v. Robbins* (1998) 45 Cal.3d 867, 883 [any discovery violation regarding jailhouse admissions and jail visitor logs was harmless because it did not affect appellant's defense strategy, and the evidence of guilt was overwhelming].) First, the jail visitor logs contained only information that could have been obtained by simply placing an investigator at the receiving desk in the county jail and allowing him to make his own observations. Second, the logs did not contain any information about the purpose of the experts' visits or their areas of expertise. In fact, the prosecution could not even tell from the jail logs whether the professional visitors were part of trial preparation as confidential expert witnesses or were doctors asked by appellant's family to see him at the jail for some personal reason. Third, Bertoni did not ask the experts about the substance of their consultations with appellant, instead asking only for a copy of their curriculum vitae. He received only one expert's CV, a document which most experts now make readily available online. Fourth, the prosecution immediately ceased the practice once the motion was brought, even calling CFMG to ensure that no confidential records would be sent to them. Finally, neither expert was called at trial, the substance of their consultation was never revealed, no limits were placed on appellant's ability to consult with other experts, and appellant has not explained how his defense strategy was impacted by Bertoni's request for their CVs. Any such claim is pure speculation, which does not establish prejudice in the face of overwhelming evidence of appellant's guilt (which limited his possible trial strategies). (*People v. Hovey* (1988) 44 Cal.3d 543, 585.)

Appellant attempts to avoid this conclusion by alluding to a number of constitutional and statutory protections. However, each of these protections

is inapplicable to the mere disclosure of the names of jail visitors. Appellant first claims that the prosecution team violated his privilege against self-incrimination through its "use of such compelled evidence derived directly from [him]." (AOB 252.) There are two problems with this argument. First, the privilege against self-incrimination is a testimonial privilege concerned with incriminating statements elicited *from a defendant*. The privilege does not protect statements or disclosures made by third parties. (*Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 367-368.) Appellant has failed to identify which compelled, incriminating statement he made to an expert that the prosecution accessed. Such a showing would be impossible, of course, because Bertoni never obtained any information about the substance of appellant's meetings with any experts. Second, the privilege against self-incrimination is concerned only with the *use* of compelled statements at a later criminal proceeding against the declarant. (*Maldonado v. Superior Court* (2012) 53 Cal.4th 1112, 1127.) Again, here, there is no suggestion that anything related to the jail visitor logs or the two uncalled experts was ever introduced at trial. Where nothing of substance was actually derived from the logs or the follow-up calls, and no evidence was introduced at trial related to the expert consultations, there can be no violation of the privilege against self-incrimination.

Appellant next asserts that the prosecution violated his right to counsel and his attorney-client privilege by "chilling" communication between appellant and his defense team. (AOB 255-257.) To begin, "the Supreme Court has never struck down a discovery scheme as violative of the right to effective assistance of counsel." (*Izazaga*, *supra*, 54 Cal.3d at p. 379.) But more importantly, such a claim is unsupported by the record. The defense team was unaware of the prosecution's access to the jail records until it moved for a restraining order and a hearing was held. Thus, there could have been no chilling effect before then, when the supposed

"interference" with the right to counsel was unknown. As soon as the motion was brought, the trial court ordered the prosecution not to access any additional visitor logs or contact any other professional visitors during the pendency of the motion. Then, as part of the trial court's ruling on the motion, the court ordered the prosecution not to determine the identity or contact any additional professional visitors. Appellant has not alleged that the prosecution failed to comply with the trial court's provisional or final orders. Thus, during the entire time that appellant and the defense team were aware of the prosecution's investigative capabilities, the prosecution was barred by court order from accessing any jail visitor logs pertaining to appellant's defense. Accordingly, there is no basis for appellant's claim of a "chilling effect" or "distrust" between him and his attorneys.

Additionally, the existence of a potential witness is an independent fact, not a confidential communication, and therefore is not covered by the attorney-client privilege. (*Coy v. Superior Court* (1962) 58 Cal.2d 210, 220 [the date of a meeting between client and attorney is not privileged, "even though it 'refers' to that relationship," because the mere fact of the meeting "is not a matter 'communicated' by the client to his attorney"]; *Rosso, Johnson, Rosso & Ebersold v. Superior Court* (1987) 191 Cal.App.3d 1514, 1518 ["As a general rule, the identity of an attorney's clients is not protected by the attorney-client privilege" because their mere identity typically does not reveal anything of substance].)

Appellant next claims that the prosecution's access to jail visitor logs violated the equal protection clause because appellant does not have access to the same records and because it punishes him based on his incarceration status. His first claim fails for the straightforward reason that appellant already knows who he met with because they were *his* guests. Thus, just as in *People v. Tillis* (1998) 18 Cal.4th 284, 296, "Whatever statutory disparity in access to [data] exists as between the defense and the

prosecution generally, it has not been shown to have affected this case." Second, appellant has not cited any case which, even by analogy, supports application of the equal protection clause of the Fourteenth Amendment as a bar to obtaining this information. Instead, courts have regularly rejected equal protection claims based solely on an investigative advantage that police enjoy for in-custody defendants that they would not have for defendants out on bail. For example, courts have upheld the admission of recorded jail calls and monitored mail (both of which would go unmonitored for a defendant out on bail), and the use of inmates in a police lineup for identification where a released defendant might not be as readily-available. (See *People v. Hunter* (1967) 252 Cal.App.2d 472, 477.) Such a ruling is particularly apt in a case like this where the defendant's in-custody status is based, not on his wealth or ability to make bail, but on the severity of his crime. For these reasons, appellant's equal protection claim fails.

Finally, appellant argues that disclosure of the names of a defendant's professional visitors violates section 987.9. (AOB 260.) While section 987.9 does impose a duty of confidentiality on courts handling applications for investigative funds in capital cases, it does not expressly impose a similar duty on the prosecution, or preclude investigative efforts by the prosecution which might ultimately uncover information about experts. In fact, section 1054.4 appears to affirm this independent investigative authority, just as this Court recognized Evidence Code section 722 as a carve-out to section 987.9 for the "compensation and expenses paid or to be paid to an expert witness." (*Berryman, supra*, 6 Cal.4th at p. 1071.) Where nothing of substance was gained through the prosecution's investigative efforts, and appellant has not explained what impact the disclosure had on his defense strategy, reversal is not warranted.

XV. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING CRIME SCENE AND AUTOPSY PHOTOS

Appellant claims that the trial court erred in admitting crime scene and autopsy photos showing the injuries he inflicted on his murder victims. (AOB 266.) However, the record shows that the trial court carefully exercised its discretion to balance the probative and prejudicial values of the photos and excluded any photos it found cumulative, irrelevant, or unduly prejudicial. Thus, appellant's claim fails.

A. Background

On February 1, 2001, the district attorney filed a motion in limine seeking to introduce 14 crime scene photos and 25 autopsy photos of the four murder victims. (7 CT 1837-1867.) The crime scene photos depicted the bodies as they were discovered in the mass grave appellant dug the week before the murders. (7 CT 1857-1860.) The autopsy photos showed the victims' head wounds, as well as dirt and scratch marks demonstrating the children were buried alive. (7 CT 1861-1867.) As the district attorney explained, the injuries depicted in the photos were not particularly "hideous or gruesome," and any sensational aspect to the photos was attributable solely to the nature of appellant's crime. (7 CT 1845.)

Appellant filed his opposition on February 9, 2001, claiming generally that the photos were "cumulative, unduly prejudicial and . . . irrelevant." (7 CT 1964.) While he did not object to the admission of photos showing the grave (A1, A2, and B3), he claimed that the other photos were "grisly and ghoulish" and were "certain to distract jurors from their duty to objectively view the evidence." (7 CT 1964-1965.)

The trial court held a hearing on February 14, 2001. (18 RT 5452.) The district attorney went through each photo and explained the unique relevance of each photo as going to a material issue in this case, such as illustrating how the victims were killed, how their bodies were disposed of,

and how they were discovered. (18 RT 5461-5466, 5469-5476.) The trial court cited its discretion under Evidence Code section 352 and went through each batch of photos, explaining its ruling on the admission or exclusion of each photo:

- A1, A2, and A3 were admitted as relevant and not unduly prejudicial, but A4 was excluded under Evidence Code section 352 because the photo of Jack's dead body and face was "a pretty heart-rendering photograph." (7 CT 2078; 18 RT 5477.)
- B1, B2, and B3 were admitted as relevant and not unduly prejudicial, but B4 was excluded under Evidence Code section 352 because the photo of Areli's dead body on top of a body bag, clutching a twig, and with her dress pulled up to her waist had "tragic overtures" and could suggest a sexual nature to the killing that was not part of the prosecution's theory. (7 CT 2078; 18 RT 5479, 5482.)
- C1, C2, and C3 were admitted as relevant and not unduly prejudicial, but C4 was excluded under Evidence Code section 352 because the photo of Jose's body and blood-covered face on top of a body bag, with his shirt pulled up and body covered in blood was unduly prejudicial. (7 CT 2078; 18 RT 5483.)
- D1 was admitted as relevant and not unduly prejudicial, while D2 was excluded under Evidence Code section 352 because the close-up photo of Juan's body and blood-covered face on top of a body bag had "an emotional quality." (7 CT 2078; 18 RT 5485.)
- E2 and E3 were admitted as relevant and not unduly prejudicial, but E1 and E4 were excluded as cumulative. (7 CT 2078; 18 RT 5486-5487.)
- F1, F2, and F4 were admitted as relevant and not unduly prejudicial, and F3 was admitted subject to cropping to remove Jack's genitals. (7 CT 2079; 18 RT 5488-5489.)
- G1 and G2 were admitted as relevant and not unduly prejudicial. (7 CT 2079; 18 RT 5490.)
- H1, H2, H3, and H4 were admitted as relevant and not unduly prejudicial or cumulative. (7 CT 2079; 18 RT 5490.)
- I1, I2, I3 were admitted as relevant and not unduly prejudicial, while I4 was excluded as cumulative. (7 CT 2079; 18 RT 5490.)
- J1, J2, and J4 were admitted as relevant and not unduly prejudicial, while J3 was excluded as cumulative. (7 CT 2079; 18 RT 5492.)
- K1 and K2 were admitted as relevant and not unduly prejudicial. (7 CT 2079; 18 RT 5492.)

In making these rulings, the trial court explained that purportedly similar photos were not, in fact, cumulative because they showed different angles, distance, or detail not present in other photos. (See, e.g., 18 RT 5481 ["Part of the reason I'm not going to grant the request [B]1 is it is somewhat different from number 2 . . . there has been some movement of that hand after the completion of the removal of dirt from this victim"]; 18 RT 5489 ["F3 shows the shoulder injury that isn't shown elsewhere"]; 18 RT 5490 ["since each appears to show something different from what any of the others show"].) The trial court also excluded the photos that most directly portrayed the faces of the victims (A4, B4, C4, D2, E4). Additionally, the trial court excluded the videotaped walk-through of Parnell Ranch, given the "Hannibal Lecter-ish quality" of the video. (18 RT 5531.)

Photographs of the exhumation were admitted during Detective Summers' testimony. (See, e.g., 34 RT 8486 [photo of Jack's shoe in grave].) Defense counsel raised concerns about the district attorney zooming in on certain parts of the photos, and the trial court gave the defense permission to object should they think a focused enlargement affected the admissibility analysis. (34 RT 8529-8531.) The autopsy photos were shown to the jury during Dr. Henrickson's testimony. (See, e.g., 34 RT 8577 [autopsy of Jack].)

B. The Trial Court Carefully Exercised Its Discretion in Reviewing the Photos

"The admission of photographs of a victim lies within the broad discretion of the trial court when a claim is made that they are unduly gruesome or inflammatory." (*Bryant, supra*, 60 Cal.4th at p. 423.) "The court's exercise of that discretion will not be disturbed on appeal unless the probative value of the photographs clearly is outweighed by their prejudicial effect." (*Ibid.*) Prosecutors "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.) "[M]urder is seldom pretty, and pictures, testimony and physical evidence in such a case are always unpleasant." (*People v. Pierce* (1979) 24 Cal.3d 199, 211.) "A defendant has no right to transform the facts of a gruesome real-life murder into an anesthetized exercise where only the defendant, not the victim, appears human." (*People v. Thompson* (1992) 7 Cal.App.4th 1966, 1974.) As this Court explained in upholding torture photos in *Hajek*, *supra*, 58 Cal.4th at pages 1215-1216, "The photographs were disturbing, but they were not unnecessarily so. They 'simply showed what had been done to the victim; the revulsion they induce is attributable to the acts done, not to the photographs.'" Such photographic evidence is admissible "even if other evidence may serve the same purposes." (*Bryant*, *supra*, 60 Cal.4th at p. 423; *Crittenden*, *supra*, 9 Cal.4th at pp. 134-135 [photos may be admitted even if cumulative of testimony on same issue].)

Accordingly, California courts have routinely upheld the admission of crime scene and autopsy photos, even where the images are disturbing or involve child victims. Appellant concedes as much. (See AOB 272-273 ["This Court has long recognized the prejudicial effect of visual images, but generally allows their admission because they also have probative value that is not clearly outweighed by that effect"].) For example, in *Montes*, *supra*, 58 Cal.4th at pages 861-862, this Court upheld the admission of 13 autopsy photos of a minor victim wearing blood-soaked clothing and a "death stare," reasoning: "While the admitted photographs confirm that 'murder is seldom pretty,' they are not of such a nature as to overcome the jury's rationality." (See also *Panah*, *supra*, 35 Cal.4th at pp. 476-477 [upholding admission of eight photos of eight-year-old murder victim]; *People v. Memro* (1995) 11 Cal.4th 786, 811-815 [upholding admission of

photos showing young boys with throats slashed]; *People v. Seastone* (1969) 3 Cal.App.3d 60, 66 [upholding admission of photos of baby's dead body].) California courts have also upheld the admission of photos and videos showing exhumations. (*People v. Moran* (1974) 39 Cal.App.3d 398, 411-412; see also *People v. Garceau* (1993) 6 Cal.4th 140, 181 [photos of mummified victims after they were unearthed were admissible].)[29]

The record here reveals that the trial court was aware of its discretion under Evidence Code section 352 to balance the probative value and prejudicial effect of the proposed photos and to exclude any photos that were unduly prejudicial, cumulative, or confusing. (See *Ramirez, supra,* 39 Cal.4th at p. 454 [no abuse of discretion where the record "reflects that the experienced trial judge was well aware of his duty to weigh the prejudicial effect of the photographs against their probative value, and carefully did so"].) First, the trial court conducted a careful consideration of the 39 proposed photos and excluded eight photos, required one to be cropped to minimize its prejudicial effect, and excluded the videotape of appellant's walk-through at the Parnell Ranch. Second, the crime scene photos demonstrated important aspects of the prosecution's case. Specifically, the order of the bodies in the grave was indicative of the order of the killings; the close range shots to the back of the adult victims' heads rebutted appellant's contention in early interviews that he had accidentally shot them during a struggle for the gun; and the adhesive tape residue on the children's arms and legs indicated that they were bound prior to the

[29] The California Court of Appeal's analysis in *Moran* is more persuasive than the dicta cited by appellant from a Oklahoma case, in which a trial court excluded an exhumation photo. (See AOB 280, citing *Fritz v. State* (Okla. 1991) 811 P.2d 1353.)

murders and supported the premeditation theory.[30] Third, the autopsy photos depicted the injuries suffered by the victims and illustrated Dr. Henrickson's testimony regarding cause of death. For example, the photos of mud beneath the children's noses, and the photo of Areli clutching the stick, were relevant to prove that the children had been buried alive and died of asphyxiation rather than head trauma. The few photos of the victims' heads and faces that were not excluded were necessary given that all four suffered either gunshot wounds or blunt force trauma to the head. Finally, the 31 photos introduced were not unduly cumulative given that the case involved four separate victims. (See *Crittenden*, *supra*, 9 Cal.4th at pp. 131-136 [upholding the admission of 24 photos of two elderly murder victims who had been repeatedly stabbed and bludgeoned]; *Panah*, *supra*, 35 Cal.4th at pp. 476-477 [eight photos of one child murder victim not unduly prejudicial or cumulative].)

Appellant claims support in *People v. Marsh* (1985) 175 Cal.App.3d 989. (AOB 277.) However, as appellant admits, the seven autopsy photos in *Marsh* were found unduly prejudicial because they depicted the actual autopsy *process* of the medical examiner, rather than simply showing the physical injuries inflicted by the defendant. (*Id.* at pp. 996-997.) For example, to depict the child victim's interior cranial injuries, the medical examiner removed parts of the victim's scalp and drilled into his skull—a process depicted in several photos. (*Id.* at p. 996.) Another photo showed the child victim's "field-dressed" torso, whereby the examiner had rolled back the ribcages "to expose the bowels." (*Id.* at p. 997.) Because the gruesome nature of those photos was attributable to the *examiner's* actions

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[30] In fact, six of the photos merely showed the children's legs and torsos with adhesive material and did not depict any potentially inflammatory injuries. (7 CT 1847-1848.)

rather than the defendant's, the photos risked confusing the juries and eliciting an unfair emotional reaction. (*Id.* at p. 998.)

Here, unlike *Marsh*, the victims' bodies were not manipulated in any way to amplify the severity of the injuries. The photos did not depict the autopsy process or portray any physical injuries not caused by appellant. Instead, the photos were more similar to the eight photos in *Panah*, *supra*, 35 Cal.4th at pages 476-477, which depicted the "[child] victim's unclad body and show[ed] injuries inflicted on her face, chest, arms, and rectum." In upholding the admission of those photos, this Court noted that the child's "body is intact," and the disturbing nature of the photos was solely attributable to the defendant's actions in killing an eight-year-old girl. (*Id.* at p. 477.) Here, appellant shot two men, beat a three-year-old girl and five-year-old boy in the head, and then buried the children alive. Just as this Court held in *Ramirez*, *supra*, 39 Cal.4th at page 454, "the photographs at issue here are gruesome because the charged offenses were gruesome, but they did no more than accurately portray the shocking nature of the crimes." Accordingly, the trial court did not abuse its discretion in admitting a subset of the photos.[31]

Moreover, even if the trial court abused its broad discretion in admitting some of the photos, any error was harmless. As this Court explained in *People v. Cole* (2004) 33 Cal.4th 1158, 1199, the erroneous admission of photographs warrants reversal of a conviction only if it is reasonably probable the jury would have reached a different result had such evidence been excluded. (Citing *Watson*, *supra*, 46 Cal.2d at p. 836.) Few California courts have ever found the erroneous admission of such photos

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[31] Appellant's reliance on *People v. Gibson* (1976) 56 Cal.App.3d 119 is similarly unavailing because both the crime scene and autopsy photos here were properly introduced and were the subject of witness testimony. (See AOB 278.)

to be prejudicial. Even in *Marsh*, *supra*, 175 Cal.App.3d at pages 998- 999, the Court of Appeal found that admission of the photos depicting the autopsy process for a two-year-old boy (and "projected many times life-size") was harmless because the other evidence of the defendant's guilt was overwhelming. The same is true here. Appellant confessed to the murders multiple times, Yolanda provided powerful testimony chronicling appellant's murderous rampage, physical evidence tied appellant to the murder weapons, and he evinced clear consciousness of guilt by attempting to flee to Mexico. Against this significant evidence, appellant offered little evidence at the guilt phase and unpersuasive mitigating evidence at the penalty phase, claiming that his father had been an alcoholic who, at times, beat his mother and his siblings. In light of the strong evidence of guilt and aggravation, appellant has not shown a reasonable probability that he would have been acquitted or sentenced to LWOP if some of the crime scene and autopsy photos had been excluded. Accordingly, his claim fails.

XVI. THE TRIAL COURT PROPERLY DENIED APPELLANT'S MISTRIAL MOTION AFTER YOLANDA'S PENALTY PHASE TESTIMONY

Appellant argues that the trial court should have granted a mistrial after Yolanda's victim impact testimony at the penalty phase. (AOB 283.) Because victim impact evidence of the sort adduced here has routinely been upheld by this Court, and because Yolanda was remarkably composed given the subject of her testimony, appellant's claim should be rejected.

A. Background

On April 23, 2001, appellant filed a motion opposing introduction of victim impact evidence as violative of his federal and state constitutional rights, and as irrelevant and unduly prejudicial under Evidence Code sections 350 and 352. (11 CT 3008.) In the alternative, appellant sought to limit any victim impact evidence "in material respects." (11 CT 3008.)

The district attorney opposed the motion, arguing that the admissibility of victim impact evidence had been upheld in *Payne v. Tennessee* (1991) 501 U.S. 808, *People v. Edwards* (1991) 54 Cal.3d 787, and countless cases since, and was codified in section 190.3. (11 CT 3023-3026.) The district attorney sought to introduce two videotapes of the Martinez family, eight photographs of the victims, a letter from Yolanda, a videotaped interview with Yolanda, and third-party testimony about the impact the murders and rape had on Yolanda. (11 CT 3027-3031; 12 CT 3080, 3095; 55 RT 10866.) Relying on *Payne* and *Edwards*, the trial court allowed the prosecution to present victim impact testimony by Yolanda, two photographs of the family, and a videotape of the children playing just hours before their death. 55 RT 10893.) However, the trial court excluded Yolanda's letter, her videotaped interview, six of the proposed photographs, and any third-party testimony about Yolanda. (45 RT 10881; 56 RT 10991.)

On May 15, 2001, Yolanda testified about the impact of appellant's crimes and described how much she missed her family. (56 RT 10987-10994.) The trial court carefully limited the scope of Yolanda's testimony in accordance with its previous rulings. (56 RT 10991.) Yolanda did not have any outbursts or breakdowns during her testimony, though she was crying when the trial court took its morning recess. (56 RT 11013.)

When the recess ended, defense counsel moved for a mistrial, claiming that Yolanda could be heard crying in the hallway during the recess. (56 RT 11013.) Defense counsel could not say whether the jurors heard Yolanda crying. (56 RT 11014.) The trial court had not heard Yolanda crying, and the deputy had not seen any jurors in the hallway during the break. (56 RT 11014.) In fact, the deputy said that Yolanda appeared calm when he saw her in the hallway. (56 RT 11014.) Defense counsel explained that his objection to Yolanda's testimony was "not case specific," but was instead a challenge to the underlying rulings by this

Court regarding the general admissibility of victim impact evidence. (56 RT 11022, 11024 ["I am quarreling with the case law"].)

Opposing the mistrial motion, the district attorney noted that he "took pains to try to tailor the questions narrowly so as to stay within the Court's order," and argued that Yolanda's testimony was powerful but was true and "about events that occurred as the direct result of the acts perpetrated by the defendant." (56 RT 11018-11019.)

The trial court denied the motion for a mistrial, citing precedent upholding the introduction of victim impact testimony. (12 CT 3114; 56 RT 11019.) The trial court explained that "the emotionalism we saw today by and large was limited to about a half a minute right at the very end of the morning, if we're talking about emotionalism of the witness. She was *actually remarkably composed throughout most of her testimony*, only becoming slightly tearful on one other occasion that I noticed." (56 RT 11020, italics added.) Other than that one occasion, Yolanda "exhibited very few overt signs of grief" and "maintain[ed] a remarkable degree of composure throughout her testimony." (56 RT 11021.)

> At the end of the morning when she was describing the helplessness she felt as she saw her children's fear for her, she began to cry uncontrollably, and that's when we took the morning recess. That certainly is emotional. But it was of such short duration and so understandable on a human level as a result of what happened, it was, I think—there is—the only conclusion you can reach overall is that her composure and testimony are actually remarkably restrained for what she has witnessed and what happened to her.

(56 RT 11021.) Any "emotionalism the defense may be talking about is . . . the emotionalism of a case in which a father and an uncle are shot and placed in a pre-dug grave, and then a mother is garroted and assaulted in the presence of her three and five-year old children, who are then duct taped, removed to the grave, clubbed, and buried alive." (56 RT 11021.)

Accordingly, the trial court denied the mistrial motion. (56 RT 11021.) The district attorney made only limited reference to Yolanda's testimony in his closing argument at the penalty phase. (See 69 RT 12762-12763, 12772-12773.)

B. Yolanda's Victim Impact Testimony Was Not Unduly Emotional

In a capital trial, evidence showing the direct impact of the defendant's crimes on the victims and their friends and family is not barred by the Eighth or Fourteenth Amendments to the federal Constitution. (*Payne*, *supra*, 501 U.S. at pp. 825-827.) "Under California law, victim-impact evidence is admissible at the penalty phase under section 190.3, factor (a), as a circumstance of the crime, provided the evidence is not so inflammatory as to elicit from the jury an irrational or emotional response untethered to the facts of the case." (*People v. Pollock* (2004) 32 Cal.4th 1153, 1180.) To the extent that appellant is challenging *Payne* and *Edwards*—as trial counsel argued below and which appellant appears to argue now (AOB 288 ["This court's interpretations of *Payne* have unreasonably expanded its holding"])—appellant "proffers no persuasive reason for [this court] to overrule [its] own decisions regarding victim-impact evidence." (*People v. Weaver* (2012) 53 Cal.4th 1056, 1086.)

Nor did the trial court err on the facts of this case. The trial court carefully considered the proposed victim-impact evidence, recognized the court's ability to limit it, admitted only one of two proposed videotapes and two of eight proposed photographs, and excluded third-party testimony and Yolanda's letter. Nor was Yolanda's testimony so emotionally charged as to rise to the level of a constitutional violation. Although she began crying near the end of her testimony, the trial court noted that this was brief and understandable given the subject of her testimony. (*People v. Garcia* (2011) 52 Cal.4th 706, 754 [surviving victim's tearful impact statement not unduly

prejudicial].) The record is ambiguous as to whether Yolanda was even crying during the recess, and even if she was, appellant has not presented any evidence that the jurors heard her. Nor did Yolanda express any opinion as to what punishment appellant deserved or state a desire to get revenge.

Instead, the victim-impact evidence at issue here is very similar, in substance and tenor, to testimony this Court has upheld in recent years. For example, Yolanda expressed sadness for not being able to help her children when appellant led them away and killed them. In *Weaver*, *supra*, 53 Cal.4th at page 1083, this Court rejected a challenge to testimony from the victim's wife that she still suffered a "lot of pain" because "I think about how Mike was crying for help, you know, and nobody was there to help him. You know, what he must have thought, my God, I'm dying . . . It was so cruel and so cold, and I think about that, and how I couldn't be there." Yolanda also testified that the murders had a negative impact on her life, that she missed her family terribly, and that the victims were generous, affectionate people. In *People v. Burney* (2009) 47 Cal.4th 203, 258, this Court upheld similar testimony from the four family members of the victim describing "the deleterious impact of the victim's murder on themselves and others, how much they missed the victim, and the victim's sweet and peaceful nature." Finally, Yolanda testified that she had depended on her husband and suffered financially as a result of the murders—the very type of testimony upheld in *Blacksher*, *supra*, 52 Cal.4th at page 841. Thus, Yolanda's testimony "was emotionally wrenching," but "was not so extreme as to divert" the jury's attention from their proper role. (*People v. Taylor* (2001) 26 Cal.4th 1155, 1172 [upholding testimony from three surviving victims and three of the victims' family members].)

Moreover, any error in failing to further limit Yolanda's victim-impact testimony was harmless beyond a reasonable doubt. (*Montes*, *supra*,

58 Cal.4th at p. 880 [applying *Chapman* standard to find any error in admitting victim-impact testimony harmless].) The prosecution's evidence at the guilt phase was overwhelming, and the bare facts of appellant's crime are heinous without any additional commentary. Against this evidence that appellant killed four relatives, raped a woman, and buried his three-year-old niece and five-year-old nephew alive, appellant presented evidence about his father's drinking and physical abuse that the jury ultimately found unpersuasive. In light of this evidentiary record, there can be little doubt that the jury would still have sentenced appellant to death had Yolanda's penalty phase testimony been limited further or eliminated altogether.

XVII. APPELLANT WAS NOT ENTITLED TO INTRODUCE EVIDENCE OF THE IMPACT HIS EXECUTION WOULD HAVE ON HIS FAMILY

Appellant asserts that the trial court improperly limited his ability to introduce evidence of the impact his execution would have on his family. (AOB 290.) Before the penalty phase, the district attorney sought to preclude reference to that type of evidence, relying on this Court's ruling in *People v. Ochoa* (1998) 19 Cal.4th 353. (12 CT 3082.) The trial court granted the prosecution's motion. (55 RT 10921.) Nonetheless, at the end of testimony from Celia Juarez (appellant's sister), Celia blurted out: "My plea is for mercy for my brother . . . . all of us in the family who love him are anguishing because of him because we all . . . love him an awful lot." (59 RT 11466.) The prosecution raised the issue after the jury was excused, and the trial court instructed the jurors that, while they could consider sympathy for appellant in rendering its verdict, they could "not consider sympathy for [appellant's] family respecting the possibility of his execution except as it may illuminate some positive quality of the defendant's background or character." (69 RT 12878.) Defense counsel still quoted Celia's outburst during his closing argument. (69 RT 12862.)

Appellant acknowledges that this Court has repeatedly rejected his claim that the federal constitution requires the jury be allowed to consider the impact of a defendant's execution on his family. (AOB 297, citing *People v. Williams* (2013) 56 Cal.4th 165, 197 ["The impact of a defendant's execution on his or her family may not be considered by the jury in mitigation"]; *People v. Bennett* (2009) 45 Cal.4th 577, 600-602 [same]; *People v. Smith* (2005) 35 Cal.4th 334, 366-367 [same].) Appellant instead "asks this Court to reexamine its position regarding evidence of the impact his execution would have on his family and friends." (AOB 293.) But appellant fails to provide a compelling reason for this Court to reconsider its long line of precedent. Respondent stands on the logic of these prior cases, only to add that, despite the court's ruling, the jury *did* hear the statement of Celia Juarez and was instructed that it could be considered as it reflected positively on appellant. There is no reason to believe that additional evidence of this nature would have impacted the jury's verdict. For these reasons, appellant's claim should be denied.

XVIII. THE PROSECUTOR DID NOT ERR IN QUESTIONING DEPUTY WALKER OR ERNESTO OROZCO

Appellant asserts that the district attorney erred in questioning Deputy Walker and Ernesto Orozco because he elicited inadmissible evidence from them. (AOB 304.) However, the district attorney did not commit prejudicial error because both contested statements were, in fact, admissible, and the prejudice claimed by appellant is purely speculative.

A. Yolanda's Gesture

During Deputy Walker's testimony on the second day of trial, the district attorney asked Walker about Yolanda's condition on the night of the attack. (30 RT 7755.) In addition to seeing significant injuries to Yolanda's face and body, Walker noted that she had a scarf around her neck. (30 RT 7756.) The district attorney asked Walker what Yolanda told

him when asked if she had been tied up, and defense counsel objected on hearsay grounds. (30 RT 7756.) The trial court overruled the objection, citing the "excited utterance" (or "spontaneous statement") hearsay exception. (30 RT 7756.) Walked stated that Yolanda "took the scarf, put it in her mouth and said, 'Arturo bad,'" while making a grating noise with her cheek and drawing her right index finger across her neck. (30 RT 7756-7757.)

Defense counsel objected, and the jury was excused. (30 RT 7757.) Defense counsel argued that he had moved to preclude reference to Yolanda's gesture, and that it was prejudicial hearsay. (30 RT 7758.) Defense counsel acknowledged that "there may be an exception under excited utterance" but thought he would have a chance to discuss it further before the testimony was elicited. (30 RT 7758.) The district attorney answered, "I know the issue was raised perhaps without a resolution . . . and actually the testimony came out a little quicker than I thought." (30 RT 7758.) The district attorney argued that the gesture fell within the excited utterance exception and was not prejudicial. (30 RT 7758-7759.)

Under questioning by the trial court, defense counsel admitted that he was not objecting to Yolanda's statement "Arturo bad," but only to the gesture and sound. (30 RT 7760.) Defense counsel moved for a mistrial, which the trial court denied. (30 RT 7765, 7767.) Even assuming that the gesture was hearsay, "the notion that this is a victim's expression of what should happen to the defendant is a stretch, candidly." (30 RT 7768.)

> This is a person who apparently had had ligature marks on her throat, was pointing to her throat and making a gesture when asked whether she had been bound. I think it is extraordinarily unlikely that what she was trying to convey was this person has done a terrible thing and should receive the death penalty. I think it is highly likely what she was trying to convey is yes, I had some kind of a binding of some sort around my neck, because that's the question that she was asked.

(30 RT 7768.) Moreover, as the trial court explained, at the time that Yolanda made the gesture on the night of the attack, "she had no idea what had happened to her husband, brother-in-law, or children other than that they weren't there. So I think the likelihood that this was an expression of a desire that the death penalty be imposed is remote, at best." (30 RT 7769.) Given that the gesture likely fell within the excited utterance hearsay exception, and that it was not unduly prejudicial as suggestive of Yolanda's desired verdict, the trial court found "the circumstances wholly insufficient to warrant a declaration of mistrial." (30 RT 7769.)

Thereafter, defense counsel asked the trial court to admonish the jury to disregard that part of Deputy Walker's testimony. (30 RT 7770.) However, when the possibility of a limiting instruction was raised, defense counsel argued, "I think, quite candidly, a limiting instruction is entirely too dangerous for the reasons I've expressed. It tells the jury not to think about the evidence in a way that will almost certainly cause them to think about it only in that way." (30 RT 7773.) The trial court thus denied the request for an admonishment and, recognizing that defense counsel had expressed strategic concerns, did not give the jury a limiting instruction either. (30 RT 7773-7774.) As with the mistrial motion, the trial court found "the likelihood of [the jury] considering it for the purpose that defense is concerned about is exceedingly remote." (30 RT 7774.) The trial court did, however, leave open the possibility of a special penalty phase instruction: "if you find that a victim has expressed a view as to how this case ought to be resolved, then you're to disregard that." (30 RT 7774.) Appellant never requested such an instruction.

1. Yolanda's gesture was neither inadmissible nor an expression of ultimate outcome

A prosecutor's error violates the Fourteenth Amendment to the United States Constitution when it "infects the trial with such unfairness as to

make the conviction a denial of due process." (*Clark*, *supra*, 52 Cal.4th at p. 960.) Prosecutorial error that does not render a trial fundamentally unfair nevertheless violates California law if it involves "the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury." (*Ibid.*)[32]

"Although offering evidence the prosecutor knows is inadmissible may be misconduct (*People v. Scott* (1997) 15 Cal.4th 1188, 1218), the adversarial process generally permits one party to offer evidence, and the other party to object if it wishes, without either party being considered to have committed misconduct." (*Harris*, *supra*, 37 Cal.4th at p. 344.) Any such error is minimized if the prosecutor refrains from referencing earlier testimony after defense counsel has objected and the trial court has ruled. (*Smithey*, *supra*, 20 Cal.4th at p. 960.)

Here, the district attorney's elicitation of Deputy Walker's testimony regarding Yolanda's gesture did not constitute prejudicial prosecutorial error. To begin, at the time of Walker's questioning, the trial court had not ruled Yolanda's gesture was inadmissible or barred the district attorney from asking about the gesture. Nor did either party believe, at the time, that the ruling on "other crimes" or "reputation" evidence applied to testimony regarding a victim's observations or statements in the instant case—as evidenced by defense counsel's admission that he was not objecting to

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[32] Because there is no evidence the prosecutor intentionally or knowingly committed misconduct, appellant's claim should be characterized as one of prosecutorial "error" rather than "misconduct." (*Hill*, *supra*, 17 Cal.App.4th at p. 823 ["We observe that the term prosecutorial 'misconduct' is somewhat of a misnomer to the extent that it suggests a prosecutor must act with a culpable state of mind. A more apt description of the transgression is prosecutorial error."]; see also ABA House of Delegates, Resolution 100B (August 9-10, 2010) [adopting resolution urging appellate courts to distinguish between prosecutorial "error" and "misconduct"].)

Yolanda's statement "Arturo bad." Thus, the district attorney did not attempt to elicit testimony that he knew was inadmissible. Instead, both defense counsel and the trial court acknowledged that the gesture might fall within with the "spontaneous statement" (or "excited utterance") hearsay exception in Evidence Code section 1240. (See *People v. Myers* (2014) 227 Cal.App.4th 1219, 1226-1227 [upholding admission of the victim's act of raising his hands during a robbery as a spontaneous statement under Evidence Code section 1240].) Accordingly, at the time of Walker's questioning, the district attorney had a good faith basis for seeking admission of Yolanda's gesture. After defense counsel objected, the district attorney ceased that line of questioning and made no further reference to Yolanda's gesture. Moreover, appellant's claim that Yolanda—on the night of the attacks, when she did not know the fate of her family—was offering her opinion as to appellant's proper punishment at a later criminal trial is illogical. Under the circumstances, it is far more likely (as the trial court found) that Yolanda was referring to the chains that appellant put around her throat, or perhaps to appellant's conduct with the rest of her family.

Therefore, the trial court did not abuse its broad discretion or exceed the bounds of reason in denying appellant's motion for a mistrial and/or admonishment. (*People v. Cox* (2003) 30 Cal.4th 916, 952 ["it cannot be said that the prosecutor's asking of a single question in violation of [the Evidence Code] constituted a pattern of conduct so egregious that it rendered the trial fundamentally unfair in denial of defendant's federal constitutional right to due process of law." But even if the district attorney committed error, no prejudice appears. Even after the trial court *overruled* appellant's objection, the district attorney ceased that line of questioning and did not reference Yolanda's gesture again at the guilt or penalty phases. As in *Cox*, "the conduct at issue was an isolated instance in an otherwise

well-conducted [three] month-long trial." (30 Cal.4th at p. 952.) Defense counsel, in discussing his equivocal request for an admonishment, agreed that a limiting instruction would only draw the jury's attention to an issue they might otherwise forget. Finally, as described above, the evidence of guilt and aggravation was overwhelming, including appellant's multiple confessions, Yolanda's other properly admitted testimony, the physical evidence tying appellant to the murder weapons, and the circumstances of the crimes (quadruple-murder, rape, burying young children alive). Accordingly, there can be no doubt that the jury would have reached the same outcome even without Deputy Walker's brief reference to Yolanda's gesture.

B. Ernesto Orozco's Testimony[33]

After initially proposing to question Orozco regarding appellant's infidelity, the district attorney informed the trial court before Orozco's testimony that he would not ask the witness about that subject. (40 RT 9479, 9492.) The district attorney also specifically admonished Orozco not to refer to any of appellant's prior violent acts or womanizing during Orozco's testimony. (40 RT 9493.)

Nonetheless, when the district attorney asked Orozco what he and appellant talked about while driving back to Parnell Ranch on the evening of July 5, 1998, Orozco answered (in Spanish): "He was talking to me about being with a girl in Santa Gertrudis." (40 RT 9516-9517.) Before the interpreter could translate the response into English, defense counsel requested a hearing, and the trial court excused the jury. (40 RT 9516.) The district attorney said that he had not intended to elicit that response

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[33] Appellant refers to this witness as "Ernest Orozco," (AOB 308-309), but the witness identified himself in court as "Ernesto Orozco." (40 RT 9502.)

from Orozco and needed "to frame that [question] more specifically as to whether he discussed anything about either—any of the victims on the way back." (40 RT 9517.) The trial court ruled that such a question was permissible. (40 RT 9517.)

Defense counsel sought a mistrial, arguing that "we don't know whether any of the jurors speak enough Spanish to understand what the answer was." (40 RT 9517-9518.) The district attorney countered that he had not violated any court order, and that he had not willfully intended to elicit any information about appellant's infidelity. (40 RT 9518.) The trial court agreed and denied the mistrial motion, stating that "there are many other things that can be done" to minimize any perceived harm. (40 RT 9520.) The trial court granted defense counsel's request to strike the Spanish portion of Orozco's comment, ordered Orozco not to say anything about appellant's womanizing, and instructed the jury to disregard any Spanish-spoken answers if they could understand Spanish. (40 RT 9521, 9529-9530.) The jury had previously been instructed: "If an objection was sustained to a question, do not guess what the answer might have been." (10 CT 2472; 29 RT 7565.)

Neither Orozco or the district attorney made any further mention of appellant's infidelity, but *defense counsel* raised appellant's infidelity during his closing argument as a possible explanation for appellant's fatal fight with Jose and Juan. (48 RT 10377.)

1. Orozco's untranslated remark was not prejudicial

As explained above, a prosecutor does not commit error simply by eliciting testimony that the trial court finds to be inadmissible. (*Harris*, *supra*, 37 Cal.4th at p. 344.) Instead, courts typically find prejudicial error only when the prosecutor *knowingly* and *repeatedly* elicits inadmissible testimony or continues to reference such testimony after the trial court has

granted an objection and struck the testimony. (See, e.g., *Scott*, *supra*, 15 Cal.4th at p. 1218; *Smithey*, *supra*, 20 Cal.4th at p. 960.)

No such showing has been made here. The district attorney admonished Orozco not to refer to appellant's statements regarding his infidelity (which were likely party admissions anyway). The prosecutor's only fault was, perhaps, in asking a broadly-worded question. The jury was never provided with a translation of Orozco's statement, Spanish-speaking jurors were ordered to ignore Orozco's untranslated answer, and the district attorney made no subsequent reference to Orozco's response. Moreover, contrary to appellant's assertion, the jury would not necessarily have known that the hearing was held in regard to Orozco's final statement. When the jury was brought back in, the trial court also gave the jury an interpretive clarification about appellant "go[ing] crazy" alone on the ranch. (40 RT 9530.) It is just as likely that the jury assumed the hearing was dedicated to that issue as to Orozco's final, untranslated response.

For these reasons, the district attorney did not commit any error in his questioning of Orozco. However, even if he did, any error was harmless, as this Court held on nearly identical facts in *People v. Friend* (2009) 47 Cal.4th 1, 33-34. In that case, the trial court ordered the prosecution not to ask a witness about a third party's hearsay statement that incriminated the defendant. (*Id.* at p. 33.) Despite the court's order, the prosecutor, on redirect, began to ask the witness a question on precisely that point. (*Ibid.*) Defense counsel cut off the prosecutor before the incriminating hearsay statement could be revealed to the jury, but defense counsel still moved for a mistrial. (*Ibid.*) The trial court denied the motion, and the prosecutor later made a reference to the hearsay statement during his closing argument. (*Ibid.*) Nonetheless, this Court held that any error was not prejudicial because "[d]efense counsel cut off the prosecutor with an objection before the hearsay statement could be revealed to the jury, [] the trial court

admonished the jury to disregard the question," the reference during closing was "brief and ambiguous," and the defendant's other confessions proved the same point. (*Id.* at pp. 33-34.)

The same is true here. Defense counsel objected before the interpreter could translate Orozco's contested remark, and the infidelity issue was also covered in appellant's Long Beach interview. Perhaps most importantly, appellant's infidelity was actually one of the central arguments in *defense counsel's* closing. In arguing that appellant should be convicted only of second degree murder or manslaughter for the deaths of Jose and Juan, defense counsel repeatedly brought up the "womanizing" allegations to support the defense theory that appellant had accidentally shot the men while arguing about his faithfulness to their sister. Thus, far from prejudicing appellant, Orozco's untranslated statement would actually have *supported* appellant's defense if any of the jurors had understood it. Therefore, this Court can be assured that the district attorney's question had no impact on the outcome of the case.

XIX. THE DISTRICT ATTORNEY DID NOT SKEW THE CASE TOWARD DEATH

Appellant alleges that his claims of prosecutorial error set out in Arguments IX, XIV, and XVI constitute cumulative error. For the reasons explained above, the district attorney did not err in his collection of appellant's jail visitor logs, discovery of Dr. Dougherty, or questioning of Deputy Walker or Ernesto Orozco. Moreover, appellant has not demonstrated why the cumulative effect of these isolated errors requires reversal. As this Court recently held in denying a claim of cumulative prosecutorial error, appellant has not shown "a 'pattern' of misconduct so 'egregious' that it infected the trial with fundamental unfairness." *(People v. Shazier* (2014) 60 Cal.4th 109, 150.) Nor was this "a close case." (*Mendoza*, *supra*, 42 Cal.4th at p. 705 [no cumulative prosecutorial error

even where court identified "several instances of misconduct" because evidence of guilt was overwhelming].) Appellant confessed to the murders multiple times, Yolanda provided powerful testimony about her attack, physical evidence tied appellant to the murder weapons, and the evidence of aggravation was strong. Any allegations of misconduct were isolated to specific pieces of evidence that either were not introduced or were never part of the prosecution's case. Notably, appellant has not alleged a single claim regarding the prosecution's closing argument. In light of the overwhelming evidence of guilt and aggravation, and the narrow reach of any alleged error, appellant's claim of cumulative prosecutorial error must fail.

XX. APPELLANT'S TRIAL DID NOT VIOLATE INTERNATIONAL LAW

Appellant contends that his trial resulted in a violation of international law, and that his convictions and death sentence should thus be set aside. However, he also concedes that this Court has routinely rejected the claim that the death penalty violates international law. (*People v. Johnson* (2015) 60 Cal.4th 966, *21.) This Court has also recently rejected the specific claims that appellant asserts regarding the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the American Declaration of the Rights and Duties of Man. (*People v. Solomon* (2010) 49 Cal.4th 792, 844; *People v. Hamilton* (2009) 45 Cal.4th 863, 961.) Appellant offers no compelling reason to revisit these holdings. (*People v. Adams* (2014) 60 Cal.4th 541, 582 ["[Defendant] asks us to reconsider our previous rejection of this claim. We decline to do so."].)

XXI. APPELLANT'S TRIAL DID NOT OFFEND INTERNATIONAL NORMS PROHIBITING RACIAL DISCRIMINATION

Appellant next claims that "this Court institutionalizes the routine practice of racism," and thus his death sentence must be vacated. (AOB

339.) This Court has routinely rejected this accusation. (*Hoyos*, *supra*, 41 Cal.4th at p. 925; *People v. Martinez* (2003) 31 Cal.4th 673, 703; *Jenkins*, *supra*, 22 Cal.4th at p. 1055.) Unable to show that he was the victim of racial discrimination, appellant cites various studies suggesting that African-American defendants and those who kill white victims are more likely to face capital charges. (AOB 328-333.) The "relevance of such studies" for appellant, who is not African-American and whose victims were not white, "is questionable." (*Hajek*, *supra*, 58 Cal.4th at p. 1253 [rejecting similar studies cited by a Vietnamese defendant].) Moreover, even if the studies did focus on Latino defendants, "the United States Supreme Court has rejected the use of such statistical evidence to show racial discrimination in capital cases." (*Ibid.*, citing *McCleskey v. Kemp* (1987) 481 U.S. 279, 312-313.) Absent any evidence that racism played a role in appellant's case, his claim must fail.

XXII. CALIFORNIA'S DEATH PENALTY STATUTE IS NOT UNCONSTITUTIONAL

Appellant raises a series of challenges to California's death penalty statute for purposes of preservation. (AOB 342-351.) These challenges have all been repeatedly rejected by this Court, and appellant offers no compelling reason to revisit these decisions.

A. Narrowing

First, appellant attacks California's capital punishment scheme because it "violates the Eighth Amendment by failing to provide a meaningful and principled way to distinguish the few defendants who are sentenced to death from the vast majority who are not." (AOB 343.) That claim was rejected by this Court in *People v. Schmeck* (2005) 37 Cal.4th 240, 304, and more recently in *Bryant*, *supra*, 60 Cal.4th at page 468.

B. Burden of Proof and Persuasion

Appellant next attacks the trial court's failure to instruct the jury that it had to find the aggravating circumstances outweighed the mitigating circumstances beyond a reasonable doubt. (AOB 344.) This Court rejected that claim in *Schmeck*, *supra*, 37 Cal.4th at page 304, and more recently in *Bryant*, *supra*, 60 Cal.4th at page 458.

C. Factor (a)

Appellant claims that section 190.3, subdivision (a), is arbitrary and capricious because it improperly permits the jury "to sentence a defendant to death based on the 'circumstances of the crime.'" (AOB 345.) This Court rejected that claim in *Schmeck*, *supra*, 37 Cal.4th at page 304, and more recently in *Bryant*, *supra*, 60 Cal.4th at page 469.

D. Factor (b)

Appellant argues that section 190.3, subdivision (b), improperly allows the jury to rely on evidence of prior criminal acts involving the use of violence without unanimously agreeing beyond a reasonable doubt that the conduct in fact occurred. (AOB 346.) That claim was rejected in *Bryant*, *supra*, 60 Cal.4th at page 469.

E. Factor (c)

Appellant attacks section 190.3, subdivision (c), claiming it improperly allows the jury to rely on a prior conviction as an aggravating factor without unanimously agreeing that the defendant committed the prior offense. (AOB 347.) Again, this Court rejected that claim in *Schmeck*, *supra*, 37 Cal.4th at page 304, and more recently in *People v. Valdez* (2012) 55 Cal.4th 82, 179.)

F. CALJIC No. 8.85

Appellant contends that CALJIC No. 8.85 is "constitutionally flawed" in four ways: (1) it fails to delete inapplicable sentencing factors, (2) it

contains vague and ill-defined factors, (3) some mitigating factors are limited by adjectives such as "extreme" or "substantial," and (4) it fails to specify a burden of proof as to either mitigation or aggravation. (AOB 348.) Appellant recognizes that these claims were rejected in *Schmeck*, *supra*, 37 Cal.4th at page 305, and more recently in *Williams*, *supra*, 56 Cal.4th at page 201.

G. Written Findings

Appellant claims that the lack of written findings by the jury as to aggravating and mitigating factors violates his Fifth, Sixth, Eighth, and Fourteenth Amendment rights. (AOB 348-349.) This Court rejected that claim in *Bryant*, *supra*, 60 Cal.4th at page 469.

H. Intercase Proportionality Review

Appellant asserts that the lack of intercase proportionality review violates his Fifth, Sixth, Eighth, and Fourteenth Amendment rights. (AOB 349.) This Court rejected this claim in *Bryant*, *supra*, 60 Cal.4th at page 469. (See also *Pulley v. Harris* (1984) 465 U.S. 37, 50-51 [no constitutional requirement of intercase proportionality review].)

I. Disparate Sentence Review

Appellant claims that the death penalty system is constitutionally infirm because it fails to afford him the disparate sentence review provided to other felons under the determinate sentence law. (AOB 350.) This Court rejected that claim in *People v. Pearson* (2013) 56 Cal.4th 393, 478.

J. Not Cruel or Unusual

Appellant asserts that the death penalty violates the Eighth Amendment's proscription against cruel and unusual punishment. (AOB 350.) This Court rejected that claim in *Adams*, *supra*, 60 Cal.4th at page 582.

K. No Cumulative Deficiency

Finally, appellant claims that the preceding defects, in combination, render California's capital sentencing scheme unconstitutional. (AOB 351.) This Court rejected such a claim in *Pearson*, *supra*, 56 Cal.4th at page 479: "Finally, the asserted flaws in our death penalty statute, whether considered individually or together, do not render it unconstitutional."

XXIII. THERE WAS NO CUMULATIVE PREJUDICE

Because appellant has failed to establish any error, he has necessarily failed to show he was denied a fair trial or otherwise prejudiced as a result of any cumulative error. (See, e.g., *People v. Martinez* (2010) 47 Cal.4th 911, 968 [finding cumulative impact of two arguable errors in prosecutor's argument, which were harmless when considered separately, did not result in prejudice to defendant in penalty phase]; *Panah*, *supra*, 35 Cal.4th at pp. 479-480 [no cumulative error in penalty phase where court identifies few errors and such errors were harmless].) As stated by this Court, defendants are entitled to "a fair trial but not a perfect one." (*People v. Cunningham* (2001) 25 Cal.4th 926, 1009.) In recognition of the importance of this case, the trial court not only provided appellant with a fair trial, but gave appellant every benefit of the doubt on close legal issues, from the change of venue to for-cause challenges during juror selection to exclusion of appellant's prior acts of violence and other favorable evidentiary rulings. Appellant's conviction and death sentence are the result, not of prosecutorial overreach or unsound court rulings, but of appellant's commission of brutal crimes that destroyed an entire family. Appellant's multiple confessions, Yolanda's powerful testimony, the physical evidence tying appellant to the murder weapons, and the gruesome facts of his crimes leave no doubt that the jury would still have convicted appellant and sentenced him to death even in the absence of the errors he asserts.

Therefore, his conviction and sentence should be affirmed.

XXIV. ANY GUILT PHASE ERRORS HAD NO PREJUDICIAL IMPACT ON THE PENALTY PHASE

Finally, appellant claims that any guilt phase errors should be considered for any possible prejudice at the penalty phase. (AOB 355.) This claim fails for several reasons. To begin, appellant has not demonstrated that any guilt phase errors actually occurred. Therefore, there is no need for an analysis of imagined errors at the penalty phase. Second, appellant has not cited any cases where a guilt phase error infused the penalty phase with a degree of unreliability or unfairness as to warrant reversal. Third, appellant provides no analysis of how any error at the guilt phase actually impacted the penalty phase or the jury's verdict. In fact, the only trial claim he even references is Argument XVI (elicitation of hearsay from Orozco and Yolanda). (AOB 355-356.) But this Court resolved a similar claim in *People v. Page* (2008) 44 Cal.4th 1, 43-44, where it held that the erroneous admission of hearsay character evidence against a capital defendant was harmless at both the guilt and penalty phases. In *Page*, the defendant was on trial for the kidnap, sexual assault, and murder of a six-year-old girl. (*Id.* at p. 6.) A waitress from a local restaurant testified that she occasionally referred to the defendant as a "pervert" because of things he had said to other waitresses. (*Id.* at p. 42.) When the prosecution asked her what he had said to her colleagues, defense counsel objected on hearsay grounds. (*Ibid.*) The trial court overruled the objection, and the waitress repeated crude comments that the defendant had made to her female coworkers. (*Ibid.*)

On appeal, the defendant claimed that the hearsay statement was prejudicial at both the guilt and penalty phases because it "portrayed him as aggressive, salacious, and disrespectful toward women," which "conflicted with one of the major themes" of his defense. (*Page*, *supra*, 44 Cal.4th at

pp. 42-43.) This Court held that the statement was hearsay but was not prejudicial with regard to either his guilt or sentence because it "added little to the substance of [the waitress's] testimony" and "the evidence against defendant was overwhelming." (*Id.* at p. 44.) Therefore, there was "no reasonable probability that the defendant would have achieved a more favorable result" at the guilt or penalty phase if the hearsay character testimony had not been admitted. (*Ibid.*; see also *People v. Carter* (2005) 36 Cal.4th 1114, 1181-1182 [any error in admitting guilt phase evidence of defendant's flight after murder was harmless at guilt and penalty phases].)

Similarly, here, the evidence supporting appellant's guilt and death sentence was overwhelming, and appellant has not explained how any of the contested guilt phase evidence prejudiced his penalty phase defense. Just like the waitress's hearsay testimony in *Page*, Orozco's character testimony and Yolanda's gesture were harmless at both the guilt and penalty phases even if improperly introduced. Even granting *all* of appellant's guilt-phase evidentiary claims, there would still have been significant evidence of guilt: (1) his car-ride confession in Long Beach; (2) Yolanda's powerful testimony at both the guilt and penalty phases describing appellant's heinous crimes; (3) the physical evidence tying appellant to the crimes; (4) the autopsies and medical examinations; (5) some of the crime scene and autopsy photos; and (6) admissions from appellant's friends and family that he had killed the victims. Against that significant evidence of guilt and aggravation, appellant offered unpersuasive testimony from his relatives about his father's drinking and physical abuse. On this record, appellant has not shown a reasonable probability that any guilt phase error would have resulted in a sentence of LWOP rather than death.

Appellant attempts to avoid this conclusion by citing outdated cases like *People v. Hamilton* (1963) 60 Cal.2d 105 and *People v. Hines* (1964)

61 Cal.2d 164. (AOB 356-357.) But this Court recognized over 30 years ago that those cases are no longer sound on the principles for which appellant cites them. Specifically, in *Murtishaw*, *supra*, 29 Cal.3d at page 774, this Court explained why the penalty phase sentencing discussion in *Hines* is no longer relevant:

> [*Hines* dates] from a past era when no standards governed the discretion of the penalty jury and in which the courts accordingly imposed few constraints on the admissibility of penalty phase evidence. Consequently, the view of the penalty determination expressed in the *Hines* decisions is no longer viable, and, to the extent that language in those cases is inconsistent with the present opinion, it is expressly disapproved.

Thus, appellant's nebulous world of penalty phase sentencing, and any claimed difficulty in reviewing death judgments, simply does not exist anymore. Instead, penalty phase jurors are now guided by a set of statutorily-defined factors, and defendants are burdened with the "reasonable probability" prejudice test familiar from *Watson*, *supra*, 46 Cal.2d at page 836.[34] Because appellant has failed to make the necessary showing of prejudice at the penalty phase, his claim should be rejected.

CONCLUSION

Accordingly, respondent respectfully requests that the judgment and sentence be affirmed.

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[34] Initially, appellant correctly recognizes the "reasonable probability" test as applicable to his claim. (AOB 359.) But then, just four pages later, he attempts to apply the *Chapman* test for his claimed errors (AOB 363). This is error.

Dated: May 21, 2015

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
GERALD A. ENGLER
Chief Assistant Attorney General
JEFFREY M. LAURENCE
Acting Senior Assistant Attorney General
ALICE B. LUSTRE
Deputy Attorney General

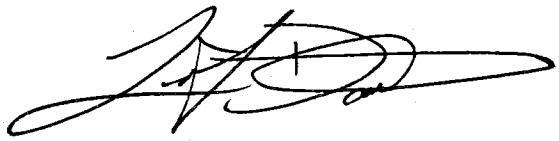
LEIF M. DAUTCH
Deputy Attorney General
Attorneys for Respondent

CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 60,841 words.

Dated: May 21, 2015

KAMALA D. HARRIS
Attorney General of California



LEIF M. DAUTCH
Deputy Attorney General
Attorneys for Respondent

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Arturo Juarez Suarez**
No.: **S105876**

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 May 21, 2015, 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:

Lisa R. Short
Snedeker, Smith & Short
PMB 422
4110 S.E. Hawthorne Blvd.
Portland, OR 97214-5246

County of Napa
Criminal Courthouse
Superior Court of California
1111 Third Street
Napa, CA 94559

Michael R. Snedeker, Esq.
Attorney at Law
Snedeker, Smith & Short
PMB 422
4110 S.E. Hawthorne Boulevard
Portland, OR 97214-5246

Michael G. Millman
Executive Director
California Appellate Project
101 Second Street, Suite 600
San Francisco, CA 94105

The Honorable R. Scott Owens
District Attorney
Placer County District Attorney's Office
10810 Justice Center Drive
Suite 240
Roseville, CA 95678

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on May 21, 2015, at San Francisco, California.

Staci Caston
Declarant

Signature

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