In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **JOHN SAMUEL GHOBRIAL,** **Defendant and Appellant.**	**CAPITAL CASE** Case No. S105908

Orange County Superior Court Case No. 98NF0906
Honorable John J. Ryan, Judge

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

Appellant John Samuel Ghobrial was apprehended and arrested on March 22, 1998. (7 RT 1577-1578.) On March 24, 1998, the District Attorney of Orange County filed a criminal complaint charging Ghobrial with the murder of Juan Delgado, committed on or about March 20, 1998. (1 CT 32.)

On June 29, 1998, the Orange County District Attorney filed an information charging Ghobrial with the murder of Juan Delgado. (Pen. Code, § 187, subd. (a).) A special circumstance was alleged that the murder was committed during the commission or attempted commission of a lewd and lascivious act on a child under the age of 14, in violation of Penal Code section 288. (Pen. Code, § 190.2, subd. (a)(17)(5).)[1] It was further alleged that the offense was a serious felony within the meaning of Penal Code section 1192.7, subdivision (c)(1). (1 CT 87-88.)

On September 8, 1998, Ghobrial entered a plea of "not guilty" and denied the allegations in the information. (1 CT 117; 1 RT 10.)

Jury selection in this case began on September 10, 2001, the day before the World Trade Center bombings. (2 RT 325, 401.) When proceedings resumed on September 13, 2001, the trial court initially denied defense counsel's motion for a continuance base on potential bias against Ghobrial, an Egyptian national. However, after questioning the prospective jurors regarding potential bias, several jurors immediately asked to be excused, saying they could not be impartial. (2 RT 522-536.) The trial court granted the renewed motion for continuance, which the prosecutor

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[1] Penal Code Section 190.2, was subsequently amended in 1995 resulting in subdivision (a)(17)(5) now being designated as subdivision (a)(17)(E). Stats. 1995, chapters 477-478 (S.B. 32), §§1-2 (Prop. 196, approved March 26, 1996, eff. March 27, 1996).

joined, finding good cause to continue the matter. (2 RT 538; see also footnote 3, below.)

Jury selection resumed on October 29, 2001. (3 RT 557; 5 RT 1212.) The jury was sworn on November 28, 2001, and the guilt-phase presentation began that same day. (2 CT 367; 5 RT 1212.)

On December 11, 2001, the jury found Ghobrial guilty of first degree murder. (2 CT 484; 9 RT 2040.) The jury also found the special circumstance allegation to be true. (2 CT 485; 9 RT 2040.)

The penalty phase began December 12, 2001. (2 CT 505.) On December 20, 2001, the jury determined the appropriate penalty is death. (2 CT 560; 11 RT 2814.)

On April 10, 2002, the trial court denied Ghobrial's motion to modify the verdict pursuant to Penal Code section 190.4 (e), and sentenced Ghobrial to death for the murder of Juan Delgado. (3 CT 635-639, 640-646.)

STATEMENT OF FACTS

A. Guilt phase

1. Prosecution's case

In March 1998, twelve-year-old Juan Delgado was in the seventh grade at Washington Middle School in La Habra. (6 RT 1300-1301; 8 RT 1827.) He was at school on Tuesday, March 17. His classmate, Armando Luna, saw Juan after school that day. The two boys were supposed to go to Homework Club, but Juan decided not to go. (6 RT 1301; 8 RT 1827.) Luna spoke to Juan at about 3:30 that afternoon, right before Homework Club was to begin. Juan left by himself. (6 RT 1307-1308.) Juan never returned to school. (8 RT 1827.)

The next day, Josefina Gomez was helping out at her family's restaurant on La Habra Boulevard after school, between 3:00 and 4:00 p.m.

(6 RT 1310-1311.) She heard Juan call her name, "Josie," and wave to her. (6 RT 1313, 1317.) Juan was walking with a one-armed man near the alleyway behind the restaurant. The man had a basketball tucked under his arm and was holding Juan by the hand. (6 RT 1311-1313, 1317.) Juan started to walk toward Gomez as if to talk to her, but the man gestured for Juan to come back. (6 RT 1317-1319.) Gomez had seen the man before, begging for money or food. (6 RT 1315.) At trial, she identified that man as appellant John Samuel Ghobrial. (6 RT 1313.) The two seemed friendly. (6 RT 1319.) Gomez never saw Juan again. (6 RT 1314.)

On March 21, 1998, Lorenzo Estrada was outside gardening when he noticed a concrete cylinder sitting next to the curb at the corner of Willow Street and Greenwood Avenue. (6 RT 1429, 1431, 1518-1519.) The cylinder had not been there when Estrada got home earlier that morning between 1:15 and 1:30 a.m. (6 RT 1429-1431.) The concrete was still moist and was not completely set. Blood was leaking from the cylinder onto the curb. (7 RT 1519-1520.) A second cylinder was found around the corner in the grassy area between the street and the sidewalk on Walnut Street. (7 RT 1583-1584, 1589-1590.) Inside the two cylinders were the dismembered partial remains of Juan Delgado. (7 RT 1516-1517.)

The investigation

Just south of 501 Willow, near the intersection of Willow and Highlander, police found a shopping cart with what appeared to be cement inside. (7 RT 1523-1524.) A pressed wood board, a long piece of wood and two pieces of wire were found across the street from the first cylinder, near the intersection of Willow and Greenwood. The wire was similar to wire found inside the concrete cylinders. (7 RT 1524, 1555-1556, 1561-1562.) A red Target shopping basket was found in the back yard of 531 Willow. (7 RT 1524-1525, 1565.) A blue plastic jug with cement on the outside was found in front of 521 Willow, and a black tub with two pieces

of pressed wood and cement inside was found just south of 500 North Willow. (7 RT 1525, 1557, 1563.) A blanket and a blue thong sandal were found on Willow Street just west of the house at the corner of Willow and Highlander. (7 RT 1525, 1558.) More wire was found in the middle of the street near the blanket and the sandal. (7 RT 1560, 1564.)

Police found more cement in the street in front of 641 Greenwood. (7 RT 1559.) Wet cement with a track through it was found in the driveway. (7 RT 1526-1527, 1559.) There was a padlocked shed in the back of that property. (7 RT 1527.) Pressed wood boards similar to the board found near the first concrete cylinder, concrete debris, and wet cement were found outside the shed (7 RT 1562-1563, 1566). Ghobrial had been living in the shed behind 641 West Greenwood for about 20 days. He rented the shed from the homeowner, Maria Asturias, for $100 a month. (6 RT 1417-1419.)

After obtaining a search warrant, police found wet cement on the floor inside the shed, and a small amount of what appeared to be blood on the beige carpet. (7 RT 1510-1511, 1529.) A blue thong matching the sandal found on Willow Street, empty concrete bags, and black trash bags were found inside the shed. (7 RT 1539, 1566-1567.)

Police found pornographic magazines beside the bed. (7 RT 1511-1512, 1530.) Near the base of a dresser, they found a trowel, a saw, a saw blade, scissors, a knife, and one latex glove with cement on it. (7 RT 1530, 1536, 1549-1550.) A cleaver with what appeared to be blood on it was found underneath some wire. (7 RT 1530, 1534.) The packaging for the cleaver was in a box under a shelf against the west wall. (7 RT 1534.) Two more saw blades were found in a dresser drawer, and the packaging for the blades was found on the east side of the bed. (7 RT 1535.) Packaging from a butcher knife was found in the top dresser drawer. (7 RT 1549.)

On top of the dresser was a box of latex gloves, and a pair of tin snips. Two pair of bolt cutters and a capping tool were also found in the shed. (7 RT 1530-1531, 1533.) A label for rabbit wire was found near the bed. (7 RT 1537.) What appeared to be bloodstains were visible on a quilt and a blanket inside the shed. (7 RT 1538.)

A black stockpot with what appeared to be cement inside was found on the shelf along the north wall, above the dresser. (7 RT 1540.) A receipt from a Super Kmart store was under the shelf, and a Home Depot receipt was found on the bed. (7 RT 1541.) A detention slip with Juan Delgado's name on it was found under the shelf. (7 RT 1542.) Police found other paperwork with Juan's name on it on the bed. (7 RT 1542, 1549.)

Jorge Delgado identified a pair of shoes found in the shed as belonging to his little brother, Juan. (6 RT 1295-1296.) Jorge accompanied a police officer to Ghobrial's shed and identified other items of clothing belonging to his brother—a pair of pants, a belt, a shirt, and underwear. (6 RT 1297-1298.)

Ghobrial was arrested at around 7:20 a.m. on March 22, 1998. (7 RT 1577-1578.)

Forensic evidence

The larger of the two cylinders weighed 204 pounds before it was broken open. The smaller cylinder was around 88 pounds. Once the concrete cylinders were broken apart, Dr. Aruna Singhiana, a forensic pathologist, performed an autopsy of the remains. (7 RT 1450-1451, 1515.) The body had been dismembered. The larger cylinder contained the two legs, the torso, and the right arm, while the smaller cylinder contained Juan's head and his left arm. (6 RT 1516-1517.) Each piece had been wrapped separately in plastic garbage bags. The entire lower abdomen and

pelvis were missing. (7 RT 1451.) The pieces of the body were covered with a wet, powdery gray material that adhered to the body. (7 RT 1452.)

The examiner found no external damage to the head. (7 RT 1479.) There were no injuries to the skull or brain. (7 RT 1479-1480.) She found no ligature marks. (7 RT 1480-1481.) There was a small petechial hemorrhage inside the left eyelid. A petechial hemorrhage is caused by increased intracranial pressure, leading to the breakdown of the small capillaries in the affected area. (7 RT 1452.) The head was severed at the thyroid. The cuts were irregular and jagged, with multiple cuts overlaying each other. There was no other obvious trauma to the head. (7 RT 1452-1453.)

Other than dismemberment, Dr. Singhiana found no other injuries to the torso. (7 RT 1479.) Both arms had been removed from the upper torso and the torso itself was severed at the umbilical, again with jagged irregular cuts. (7 RT 1454-1455.) Small petechial hemorrhages were found on the surface of both lungs. (7 RT 1457.)

There was a small cut on the upper right forearm, and a 3/4-inch cut on the left wrist which showed a loose skin flap and possible bruising to the site. (7 RT 1455-1456.) Dr. Singhiana found four or five serrated cuts near the point where the left arm was severed from the torso. (7 RT 1457.)

Both legs had been completely severed. Each hip joint was missing entirely. The right lower leg had four or five small overlapping three-inch cuts. (7 RT 1456.)

Dr. Singhiana found no defensive wounds, no broken fingernails, and no bite marks on the tongue. (7 RT 1492, 1499-1500.)

Over a year later, on March 27, 1999, a third concrete cylinder was found outside an abandoned convalescent hospital at 605 Walnut. That cylinder contained the missing pelvis. (7 RT 1579-1580.) It was also covered in concrete. (7 RT 1458.) The penis, scrotal sac, prostate, seminal

vesicle, testicles, epididymus, and a portion of the bladder were completely missing. (7 RT 1458-1459, 1465-1467.) The cuts were irregular and jagged. (7 RT 1458-1459.)

Although partially decomposed, the skin of the lower abdomen was still identifiable. A portion of the severed hip joint was attached to the pelvis. The anus and rectum were intact. (7 RT 1458.) The femur was separated, showing multiple, overlapping linear cuts to the bone and tissue. (7 RT 1459.) According to Dr. Singhiana, the anus was dilated but had no visible external tears. (7 RT 1459-1460.) She found no gross tearing or bruising to the anal area. (7 RT 1472.) The anal area was dehydrated, contained a large amount of concrete, and showed signs of decomposition. (7 RT 1505.) At trial, Dr. Singhiana testified that she could not say conclusively that there were no tears in anus, but only that she was unable to identify any tears, due at least in part to the condition of the body. (7 RT 1505-1506.)

Dr. Singhiana classified the death as a homicide, but could not specify a cause of death. (7 RT 1460.) Death could have been caused by asphyxia which was consistent with the petechial hemorrhaging found in the eye and in the lungs. (7 RT 1460.) The examiner was unable to say whether Juan died before or during the dismemberment. She found no evidence of trauma or healing processes which would have indicated that his injuries occurred before death. (7 RT 1461, 1477, 1485-1486.) The lack of any healing response was inconclusive because if death occurred within a short time of the injury, there might have been no time for the healing process to begin. (7 RT 1504-1505.) The death certificate indicated death by unspecified means, but the examiner could not rule out asphyxia as the cause of death. (7 RT 1481-1482.)

Orange County criminalist Laurie Crutchfield took swabs from the anus and the surrounding area. (7 RT 1610-1611.) The swab was inserted

into the rectum and the interior portion of the rectum was swabbed. (7 RT 1621.) There was less area to swab in this case because only the anus, the sphincter itself, was intact. (7 RT 1621-1622.) Crutchfield collected as much material as possible from the perianal area and the rectum. (7 RT 1622-1623.) She prepared a slide from one of these swabs and submitted the swabs and the slide for analysis. (7 RT 1611-1612.) Aimee Yap, a forensic scientist at Orange County Crime Lab, received the six anal swabs and one slide and examined the swabs for the presence of semen. (7 RT 1626-1627.) Yap conducted a microscopic examination of a portion of the swab. (7 RT 1628.) She found a few sperm cells on the swabs. Sperm cells are identifiable because of their unique shape or morphology. (7 RT 1628.) Yap used what is called a Christmas tree stain, using a red stain that stains cellular material, and a green stain that stains the cellular membranes. The red stain stains sperm cells "differentially," meaning that areas with more nuclear material, such as the sperm head, stain darker than other areas. (7 RT 1629.) Yap found what she identified as a partially degraded sperm cell, and two intact sperm cells. (7 RT 1630; 8 RT 1711.) Only the heads were identifiable because tails are very fragile and commonly break during the analysis of samples. (7 RT 1632.) Yap was unable to extract DNA from any of the sperm cells. (7 RT 1632.) The rectal samples were tested for P30, a protein found in seminal fluid, with negative results. (7 RT 1628.)

Ghobrial's fingerprints were found on the blue plastic tub, the plastic packaging for the butcher knife, and the stockpot found inside the shed. (7 RT 1586-1587, 1593-1595.)

Forensic scientist Lisa Winter extracted DNA from the quilt and blanket found inside the shed as well as from the bloodstained carpet. (7 RT 1553.) She also extracted DNA from the human tissue found on the cleaver from the shed. (7 RT 1551-1552.) More DNA was recovered from

the bloodstains found near the dresser and on the north wall of the shed. (7 RT 1552-1553.) DNA from the blood and tissue found on those items matched the victim, Juan Delgado. (7 RT 1601.) The population frequency of this particular DNA profile was "more rare than one in one trillion" individuals. (7 RT 1602.) The DNA isolated from the blanket and the carpet was a mixture of DNA from more than one contributor. (7 RT 1600.) The major contributor of the DNA found was Juan Delgado. Ghobrial was excluded as the minor contributor. (7 RT 1601.)

Other witness testimony

Yvette Trejo was working as a cashier at the Super Kmart store at Imperial and Idaho around 12:30 a.m. on Thursday, March 19, 1998. (6 RT 1345.) Ghobrial was in her checkout line for 15 to 20 minutes. He seemed nervous and kept looking around. He had something black underneath his fingernails and rusty brown stains on his hand. (6 RT 1346.) Ghobrial asked her to ring each item separately. He stopped several times during the transaction and went back for different items. He paid mostly in quarters. (6 RT 1346, 1349-1351.) Ghobrial bought a large stockpot, knives, a wooden cutting board with knives, a white plastic cutting board, and skillets. (6 RT 1346-1347.) Trejo noticed that Ghobrial was able to use his "stub" arm very effectively. He knocked some papers off the register, but picked them up using one hand and his stub. (6 RT 1349.)

At about 1:30 in the afternoon on March 19, Ghobrial approached Alan Hlavnicka, an employee at the Home Depot store in La Mirada, and asked him about putting in a concrete walkway. (6 RT 1361-1362, 1367.) Hlavnicka spent about 30 minutes helping Ghobrial. (6 RT 1368.) He directed him to the items he needed and explained how to mix the concrete and how to reinforce it with rebar so that it would not crack. (6 RT 1362.) Ghobrial picked out bags of concrete mix, a black tub to mix it in, a trowel, and bolt cutters. (6 RT 1363.) Ghobrial purchased rabbit wire because he

wanted wire with smaller squares than what was usually used for concrete walkways. (6 RT 1363-1365.)

Hlavnicka helped Ghobrial load his items into the cart. Ghobrial asked him how to cut the wire to the correct size and Hlavnicka showed him where to find bolt cutters. (6 RT 1365.) Ghobrial asked Hlavnicka if he could give him a ride to his job site. Hlavnicka asked his assistant manager if he could do so, but he was unable to leave the store. Hlavnicka helped Ghobrial push his cart to the register. (6 RT 1365-1366.)

Ghobrial asked cashier Thomas Favila if he had everything he needed and the right tools to mix concrete. Favila said that he did and pointed out the instructions on the bag of concrete mix. (6 RT 1355-1356, 1358-1359.) Ghobrial purchased ready-mix concrete, a mixing tool, a trowel, a capping tool, bolt cutters, rabbit wire, and other items totaling $79.22. He paid with $80 in cash, then left the store. (6 RT 1357-1358, 1363, -1365.) Ghobrial asked several people in the store for a ride. (6 RT 1374.)

Rene Hojnacki was driving east on Imperial Highway between 1:30 and 2:15 p.m. on March 19 when she saw Ghobrial pushing a Home Depot shopping cart along the highway. (6 RT 1377, 1387.) She saw him a second time on her way back to a friend's house, and then a third time at around 2:45 p.m. Ghobrial was crossing the street with a shopping cart as she was stopped at a red light. (6 RT 1378-1379, 1387.) She noticed his missing arm. She made a U-turn and pulled into a parking lot, then got out, and asked where Ghobrial was going. (6 RT 1379, 1381-1382.) Ghobrial told her he was going to La Habra and that he was taking the cement and wire to build a fence for a man. He said he was doing the job to earn money to feed his children. Hojnacki saw a bundle of wire and two or three bags of cement in the cart. (6 RT 1379.) It was a hot day, and Hojnacki wanted to give him a ride, but was late to pick up her daughter and did not have room in her car for Ghobrial and his bags of cement and other items.

(6 RT 1379-1380.) She gave him some change so that he could buy himself something to drink. (6 RT 1380, 1385.) She drove back by the same area after she picked up her daughter, but Ghobrial was gone. (6 RT 1387-1388.)

At around 3:00 or 3:30 p.m. on March 19th, an older man in a pickup dropped Ghobrial off near the intersection of Idaho Street and Imperial Highway in La Habra just as Steven Mead was getting off work at a nearby construction site. The older man offered Mead $10 to give Ghobrial and his things a ride home. (6 RT 1390-1392, 1396.) Mead said no at first, but eventually agreed to give Ghobrial a ride and loaded the bags of concrete, wire and other tools into his truck. Ghobrial gave Mead directions to his home. (6 RT 1392-1393.) The drive took about 30 to 45 minutes. Ghobrial was sweating profusely, and smelled strongly of cologne. (6 RT 1397-1399, 1401-1402.)

Mead dropped Ghobrial in front of the house and Mead helped Ghobrial unload the concrete and other items near the curb. (6 RT 1395-1396.) When Mead asked why he bought the concrete and other items without any means of transporting it, Ghobrial told Mead that he had four children, and needed money to feed them. (6 RT 1395.)

Gina Thompson was in a car traveling south on Walnut Street with her husband at around 11:40 p.m. on March 20, when she saw a one-armed man struggling to push a shopping cart down the sidewalk on the west side of Walnut. (6 RT 1403-1406, 1408.) The man was dirty, and his hair and clothing were disheveled. (6 RT 1414.) The man was headed north toward Whittier Boulevard. (6 RT 1408, 1410.) Thompson saw two rough-textured, box-shaped objects, and a piece of wood protruding from the cart. (6 RT 1406, 1416.)

Between 11:30 p.m. and midnight on Friday, March 20, homeowner Jose Madrigal saw Ghobrial pulling an empty shopping cart west on

Highlander. Ghobrial's manner was casual and he did not seem to be in a hurry. (6 RT 1424-1425.) Madrigal described him "as cool as a cat." (6 RT 1426.) Madrigal had seen Ghobrial panhandling on other occasions near the Northgate supermarket. (1425.) Madrigal made eye contact, but Ghobrial said nothing and kept walking. (6 RT 1427.) Madrigal was sure the cart was empty. (6 RT 1428.)

Ghobrial checked into the La Habra Motel on East Whittier Boulevard, near Harbor Boulevard, on the evening of March 21. He checked out around 7:00 or 8:00 the next morning. He had stayed at the motel on other occasions. He was alone both when he checked in and when he checked out of the motel. (6 RT 1434-1435.)

At trial, the owner of the property where the shed was located, Maria Asturias, testified that Ghobrial was very quiet. Asturias spoke to him once about having a woman over, to tell him it was not allowed. (6 RT 1420.) Ghobrial used the shower in her house, and sometimes watched her television for a few minutes. (6 RT 1420-1421.)

Juan's classmate, Armando Luna, testified that he and Juan saw Ghobrial at a Taco Bell sometime around December 1997. Ghobrial had a sign saying that he was hungry. Juan bought a candy bar and gave it to Ghobrial. (6 RT 1302-1303, 1305-1306.)

Between two weeks to one month before Juan's murder, Alfonso Solano saw Ghobrial and Juan together at the Northgate Market Shopping Center. (6 RT 1321-1324, 1329-1330.) He thought the two were "horsing around"—Ghobrial threw his cap at Juan, then picked it up and threw it again. (6 RT 1324.) Juan was running in circles and Ghobrial was yelling at Juan. (6 RT 1330.) Solano thought Juan was teasing Ghobrial. (6 RT 1331-1332.) Ghobrial sometimes laughed, but seemed angry and grew frustrated and irritated with Juan. (6 RT 1333-1335.) Ghobrial was yelling and cursing. (6 RT 1335.)

Solano had seen Ghobrial panhandling at that liquor store before, and had given him money. (6 RT 1325-1326. 1330-1331.)

Juan approached Solano and told him in Spanish, "Senor, sir, he is going to kill me." (6 RT 1327.) Solano thought Juan was kidding and responded, "Don't worry. You will mess him up," adding "He only has one arm." (6 RT 1327.) Quietly, so that Ghobrial could not overhear, Solano told Juan, "But if he keeps bothering you, go and tell the guy from the liquor store to call the police." (6 RT 1327-1328.)

Ghobrial told Juan, "I am going to kill you. I will kill you and eat your pee-pee." (6 RT 1327.) He repeated the statement several times. (6 RT 1327-1328, 1338-1339.) According to Solano, Ghobrial sometimes looked angry, and at other times was smiling as he said it. (6 RT 1328, 1339-1340.) He had a weird expression on his face. It seemed to Solano as if "he wanted to do it in a way." (6 RT 1340.)

2. Defense

Isabel Camacho worked at the Juan Pollo Chicken restaurant on Harbor and La Habra. She saw Juan in the restaurant on Monday, March 16, between 4:30 and 6 p.m. (8 RT 1722-1726, 1727.)

Cesar Garcia also worked at Juan Pollo Chicken. He saw Juan in the restaurant around 3 p.m. on Wednesday, March 18. (8 RT 1717, 1719-1721.)

Juan's classmate, Armando Luna, saw Juan shortly before Homework Club at 3:30 on Tuesday, March 17. (8 RT 1732.) Juan told him that he did not want to go home because he was afraid of his mother. He did not tell Luna where he was going. (8 RT 1733.)

Juan Duarte was a friend and classmate of Juan Delgado. Both boys were in sixth grade at Washington Middle School. (8 RT 1735-1736.) About a month before his death, Juan asked Duarte if he could spend the night at Duarte's house. (8 RT 1737-1738.) Duarte's father said no and

asked where he lived so that he could drive him home. Juan said that he was going to his aunt's house. He did not want Duarte's father to take him home. (8 RT 1738.)

Around February 1998, Duarte saw Juan and Ghobrial walking together at the Pic N Save store. (8 RT 1740-1741.) The two were talking and appeared friendly. (8 RT 1742-1743.)

Cipriano Flores had been a classmate of Juan Delgado since the third grade. (8 RT 1752.) He saw Juan at the end of the school day on March 17 at around 4:30. (8 RT 1753-1754.) Both boys were just finishing soccer practice and Flores was on his way home. (8 RT 1753.) Juan asked if he could go to Flores's house. (8 RT 1754.) He told Flores that he did not want to go home because his mother would hit him or spank him. (8 RT 1755.) Juan had never been to Flores's house before. (8 RT 1755-1756.) The boys watched television and played Nintendo. They ate dinner and watched a movie. (8 RT 1756-1757.) Cipriano's mother came home from work around 9:30 or 10:00. (8 RT 1757.) Before dinner, Juan asked Flores if he could spend the night. (8 RT 1758.)

The next morning, Cipriano's mother dropped them off at school. Juan told Cipriano that he was not going to go to school because he did not want to tell his brother and sister where he had been the night before. (8 RT 1759.) Cipriano went into the school, but Juan did not. (8 RT 1759.)

Flores saw Juan later that day on his way home from soccer practice. (8 RT 1760-1761.) Juan again asked if he could come over again. (8 RT 1762.) Flores said yes, and later that evening, Juan asked if he could spend the night again. (8 RT 1762-1763.) Juan told Cipriano to tell his mother that Juan's parents were in Los Angeles because he did not want to go home. (8 RT 1763.) Cipriano's mother did not want Juan to spend a second night with them and told Juan to get his things so that she could take him home. (8 RT 1763.) They got to Juan's house around 9:30 p.m. She

went to the door and spoke to someone inside, then came back to the car and told him to go inside. (8 RT 1764, 1770-1772)

Claudia Hatch, a Pic 'N' Save employee, saw Ghobrial in the store between 5:00 and 5:30 p.m. on March 19, 2001. He approached her and handed her a flier without speaking. (8 RT 1747-1749.) She had seen Ghobrial at a nearby market on earlier occasions. (8 RT 1749-1750.)

Elizabeth Thompson, a forensic scientist with the Orange County crime lab, attended the autopsy of the pelvis section in March 1999. (8 RT 1728-1729.) She heard Dr. Singhania say that she believed the dismemberment of the pelvis occurred after death based on the appearance of the tissues. (8 RT 1730.)

Dr. David Posey viewed the slides prepared by Aimee Yap from swabs of the victim's anus. (8 RT 1791-1792, 1802.) He testified that to identify sperm cells definitively, one must be able to identify the head, body, and tail of the sperm. (8 RT 1795-1796.) Dr. Posey looked for the presence of sperm cells under the microscope, but did not see any cells on the slides that he would identify as a sperm cell. (8 RT 1792-1793, 1801.)

The negative P30 test suggests that there was no seminal fluid present in the samples. A negative test is one of the things he considers in concluding whether sperm cells are present. (8 RT 1803.) The inability to extract DNA indicates that no DNA is present and suggests that no spermatozoa is present on the slide. (8 RT 1803-1804.)

The FBI crime lab protocol requires the presence of an intact sperm cell, meaning the head, body, and tail, in order to conclusively identify a sperm cell. (8 RT 1806.) Dr. Posey examined photographs of what Yap identified as sperm cells, and concluded that they were not sperm cells. (8 RT 1812-1813.)

A 12-year-old boy is capable of producing sperm cells. (8 RT 1815.)

3. Rebuttal

Edwin Jones, a forensic scientist with the Ventura County Sheriff's Department crime lab, examined the same slides that Aimee Yap prepared from the swabs taken from Juan's anus. (8 RT 1830-1831.) According to Jones, sperm heads are very hearty cells that can be detected long after the P30 protein has broken down. (8 RT 1836-1837.) Sperm tails, on the other hand, are more fragile. Sperm heads can be detected and identified long after the tail has detached and broken down. (8 RT 1837-1838.) The idea that both the sperm head and tail must be present to conclusively identify a sperm cell is a minority view in the scientific community. (8 RT 1838-1839.) Jones found other sperm cells in addition to those identified by Yap. (8 RT 1840-1843.) He was certain that the objects he identified were sperm cells. (8 RT 1843-1844.)

B. Penalty phase

1. Prosecution Case-in-Aggravation

a. Other crimes evidence

In 1993, Ghobrial and a younger cousin, seven-year-old Michael William F., attended the wedding of Michael F.'s sister. (9 RT 2071.) Ghobrial offered Michael something sweet. (9 RT 2072.) Ghobrial took him from the house to a railroad. (9 RT 2078.) Ghobrial told Michael to take his clothes off, but Michael refused. Ghobrial tied him up with a rope and pushed a white handkerchief into his mouth. He hit Michael in both jaws with his closed fist. (9 RT 2072.) Ghobrial removed the boy's clothes and his own clothes. (9 RT 2073.) He tried to put his penis in Michael's anus, but Michael was too small. (9 RT 2073-2074.) Ghobrial stabbed Michael with a switchblade, and struck him in the head with his shoes. (9 RT 2072.) He lost consciousness. (9 RT 2072.) Ghobrial threw him over a nearby wall and left. (9 RT 2072.)

Michael was found by a school security officer. (9 RT 2086-2087.) He told the medical personnel at the hospital that Ghobrial had stabbed and attacked him. (9 RT 2089.)

Michael suffered several stab wounds in the arm, chest and stomach. He showed the scars to the jury. (9 RT 2074-2075.) Ghobrial also stabbed him several times in the area under his testicles. (9 RT 2084.) Ghobrial stepped on his face and head. Michael's jaw was broken. He still has difficulty speaking because of his injuries and his jaw is permanently damaged. (9 RT 2075-2076, 2085.) Police and medical reports regarding the attack were admitted into evidence by stipulation of both parties. [2] (11 RT 2616; Defense Exh. K.) Michael had six perforating stab wounds to the abdomen, requiring surgery to repair the intestine. He also suffered several other stab wounds—15 to the arm and left shoulder, one to the neck, three to the left chest, two to the right shoulder, two to his right and left hands, and five in the right jaw. He had a lacerated wound to the scrotum and bruising and trauma to his left scalp, as well as a number of other small superficial wounds. (Defense, Exh. K, at p. 5-6.)

Michael told police that Ghobrial asked him to go with him to buy some candies. Ghobrial took him to a railway, then took out a plastic bag and a glove. He put on the glove and asked Michael to take off his clothes. He asked Michael to show him his penis. Ghobrial stabbed him in the abdomen, shoulder, hands, and penis with a jackknife. (Defense Exh. K at p. 28-29.) Michael told police that Ghobrial bound him with rope, put a

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[2] Police and medical reports relating to Ghobrial's attack on Michael refer to Michael by a different surname than is reflected in the record at the time of his testimony in the penalty phase. Ghobrial is referred to as John Samuel Ragheb in the police and medical reports. (Defense Exh. K.)

handkerchief in his mouth, and then put his penis in his anus. (Defense Exh. K at 49-51

b. Victim impact evidence

Juan's father, Jose Delgado, testified that Juan was a restless child. He liked to earn money by helping take care of yards for a few dollars. (9 RT 2108.) Juan played with his siblings, especially the youngest, Omar. He was always obedient. (9 RT 2108-2109.) Jose, a truck driver, was away from home for long periods. (9 RT 2109.) He misses his son a lot. He is bitter because he was not there to defend his son. (9 RT 2109.)

Margarita Delgado, Juan's mother, testified that Juan was the sixth of her seven children. (9 RT 2111.) One of her daughters, Eloisa, has special needs and must be cared for as if she was an infant. (9 RT 2111.) Juan was very obedient and hardworking. He liked to help older people to bring in trashcans and to pick up trash or to wash his neighbor's cars. (9 RT 2111.) Juan's death makes her feel as if she is missing everything. All of her children were affected and their grades have suffered. The other children are now rebellious and angry. (9 RT 2112.) A picture of Juan taken just before the murder was admitted into evidence. (9 RT 2110.)

2. Defense Case-in-Mitigation

a. Testimony of Ghobrial's family / Ghobrial's history of mental illness in Egypt

Ghobrial's father, Samwiael Ghobrial, testified that he was away from his family for long periods during Ghobrial's childhood. The family lived in the village of Tahta near Sohag in southern Egypt. (10 RT 2445-2446.) Ghobrial was the second of six children. As a child, Ghobrial was isolated. (10 RT 2447-2448, 2450.) He had problems in school and was treated differently. His performance in school was poor compared to his siblings.

Ghobrial never attended college. He attended an agricultural trade school in Sohag. (10 RT 1447-2448.)

Although the Ghobrial family is Christian, the children attended a Muslim school. While attending that school, Ghobrial was once stabbed with a compass. (10 RT 2448.)

Ghobrial's father reported hitting him over the head with a table when Ghobrial was about seven years old. His head was bleeding and he required medical treatment. (10 RT 2449.) Another time, Ghobrial fell and hit his head on the bed stand when he was very young. (10 RT 2449.)

When he was in junior high, Ghobrial became obsessed with the idea that there was gold buried in his house. He dug inside the garage, and continued to dig for years, well into his young adulthood, even after he was told that there was no gold buried there. (10 RT 2450-2452.)

Before he went into the army, Ghobrial interceded when his father assaulted his mother. (10 RT 2452.) His father beat him very badly. (10 RT 2453.)

Ghobrial had emotional problems before he went into the army. (10 RT 2449.) He would occasionally spit and had "hand shivering." After leaving the army, Ghobrial was worse. (10 RT 2450.)

Ghobrial's arm was amputated after an accident. (10 RT 2453.) After the accident, his behavior was different. He sold personal, expensive items from his father's house. His father beat him with a metal chain and tied him up. (10 RT 2453-2454.) Ghobrial had outbursts of anger, sometimes directed at his mother. According to his father, Ghobrial "would have tied her up and beat her sometimes." (10 RT 2454.) He picked fights with Muslims and was beaten. (10 RT 2454.) He defecated on the roof or in the garage. Sometimes he stared as if he were lost. He became even more isolated. (10 RT 2455.)

His father took him to doctors both before and after his time in the army. (10 RT 2456.) Ghobrial saw doctors in Sohag, Asyout, and Cairo. (10 RT 2457.) One day, he began to spit and foam at the mouth. His hand shook badly and he fell down. He was treated with electroconvulsive therapy. (10 RT 2456.) He was given medication, but according to Ghobrial's father, it did not help. The medicine made him very sleepy and caused him to drool. (10 RT 2457.)

Sohag, where Ghobrial grew up, is in a rural area in Egypt. There is tension between the Christians and Muslims living in the area. (11 RT 2604-2605.) In the early 1990s, psychiatric care in Egypt was generally poor because of the stigma surrounding mental illness in that country. Electroconvulsive therapy was commonly used to treat psychotic illness. Newer antipsychotic medications with fewer side effects were not widely used. The older antipsychotic drugs caused patients to be lethargic and sedated, and to develop Parkinson's disease-like symptoms. (11 RT 2605-2609.)

Ghobrial's 15-year-old sister, Janet Salama, testified that when she was very young, Ghobrial taught her stories and verses from the Bible. He attended Sunday school with her. He showed her how to draw. Ghobrial made her feel happy and joyous. He was her best friend, her brother. He was everything to her. He was like a father to her. He still gives her advice even though he has been in jail. (10 RT 2650-2652.)

b. Ghobrial's life in Orange County

Athanasius Ragheb is a priest at a Coptic Orthodox church in Santa Ana. (11 RT 2610.) Ghobrial lived in a house provided by the church for about six months. Ghobrial attended church and went to confession during his stay there. He often asked the priest, "Am I upsetting God somehow? Is God pleased with me?" (11 RT 2611-2612.) Ghobrial was simple and humble, but not very smart. (11 RT 2612.) The priest gave him food and

money, which Ghobrial would then give away to others in need. (11 RT 2613.) He kept a low profile and did not interact with people. Based on his own observations, the priest did not think Ghobrial was sane. (11 RT 2614.)

Hortencia Cisneros worked at the Taco Bell in La Habra in March 1998. She saw Ghobrial a couple of times at the Northgate market when she and her mother were shopping for groceries. (9 RT 2115-2116.) Ghobrial would stand just outside the entry to the market. (9 RT 2117.) He "looked like he was dreaming, kind of just like staring." (9 RT 2118.) Ghobrial never spoke to her. He looked "out of it," as if he were "somewhere else." (9 RT 2118.) He did not make eye contact. (9 RT 2119.) On one occasion, he held his hand out and her mother gave him a dollar or two. (9 RT 2119-2120.)

Isabel Camacho worked at the Juan Pollo Chicken restaurant. (9 RT 2121.) She saw Ghobrial in the restaurant two or three times a week in the year leading up to the murder. (9 RT 2122.) She also saw him once outside the Northgate market asking for coins. (9 T 2122, 2127.) Ghobrial sometimes purchased food or handed out fliers for a nearby market. (9 RT 2123.) He would hand Camacho a flyer and walk out immediately. He never smiled or spoke to her. (9 RT 2124.)

When he bought food, he usually purchased three whole chickens at a time and paid in coins. (9 RT 2125.) He never said anything apart from placing his order. (9 RT 2126.) His expression was serious and he showed no emotion. (9 RT 2127.) Once he came to the restaurant and asked Camacho for paper money in exchange for his coins. He came back a few minutes later and told her that she had made a mistake and had not given him enough money. (9 RT 2128.) Camacho told him that her manager was the only person who could approve a refund and that the manager would be

available the next morning. (9 RT 2128-2129.) He returned the next morning, but was not angry or upset. (9 RT 2129-2130.)

Rosalva Serrano saw Ghobrial twice at the La Michoacana market. (9 RT 2135.) He was standing alone, holding out his hand for money. (9 RT 2135.) He looked people over head to toe. Serrano thought his expression was "weird" and the way he looked at her made her feel "uncomfortable." (9 RT 2136.) He never spoke to her or smiled at her. (9 RT 2136-2137.)

Imran Bholat owned the La Superior Market in 1997 and 1998. (9 RT 2139.) He did not know Ghobrial by name, but saw him in the market at least once a week for about a year. (9 RT 2139-2140.) Ghobrial came in to buy sodas or other items. He spoke with Bholat sometimes, but was quiet. (9 RT 2140.) Ghobrial asked Bholat if he could work at the store, or hand out flyers for him, but Bholat told him that he did not have any work for him. (9 RT 2141-2142.) Bholat saw Ghobrial standing outside stores and assumed that he was asking for money. (9 RT 2143.)

Cesar Garcia worked at Juan Pollo Chicken, and saw Ghobrial about twice a week in the restaurant. Once, Ghobrial asked if he could pass out fliers for the restaurant. (11 RT 2574.) On other occasions, he saw Ghobrial walking or panhandling in the area, usually alone. Ghobrial spoke very little English. He sometimes bought food in the restaurant. One time he ordered three whole chickens, uncut, and paid for the order in coins. He then asked for the order to be put in a trash bag instead of a regular bag. (11 RT 2575-2581.)

Krisha Cauley worked at the Pic 'N' Save in La Habra. She saw Ghobrial in the store a few times, usually in the late evening. (11 RT 2582-2583.) He wandered around the aisles and did not always buy anything. He never spoke to her, but sometimes stared at her, making her feel uncomfortable. (11 RT 2584-2585.) He once purchased a pair of sandals,

paying with coins. (11 RT 2585-2586.) She saw him panhandling outside the La Michoacana market. (11 RT 2586-2587.)

c. Mental health experts

Ghobrial presented testimony from 19 mental health professionals who observed or assessed Ghobrial's mental health status during the three and a half years between 1998 and 2001 that he was in custody awaiting trial. Those witnesses testified to their observations and assessments regarding Gobhrial's mental health.

1998

Registered nurse Virginia Sollars assessed Ghobrial on March 24, 1998, upon his arrival at the Orange County Jail. He was mumbling to himself. His eyes were blinking rapidly and he looked at the floor most of the time. He laughed inappropriately throughout the interview. (10 RT 2404, 2406.) Through an interpreter, Ghobrial said he had been treated in Egypt for mental problems. He used to take medication, but did not know the name of the medication. He was no longer taking any psychiatric medication. He said that he had had command hallucinations telling him to hurt others and himself. (10 RT 2260-2261, 2405-2406.) He had suicidal thoughts, "wanting to get through with courts, end with life." (10 RT 2260-2261, 2405-2406.)

A psychiatrist examined him the next day. Dr. Jasminka Depovic noted that Ghobrial was alert, but disheveled, and that his affect was inappropriate. He did not speak much English and was unable to answer questions about whether he was having homicidal or suicidal thoughts. (10 RT 2430.) She diagnosed Ghobrial as suffering from a psychotic disorder, not otherwise specified. (10 RT 2429.) A person who is psychotic "is out of touch with reality." They suffer from hallucinations or delusions and hold beliefs that are not consistent with reality. (10 RT 2280-2281.)

After the initial assessments, Ghobrial claimed to speak no English and requested an interpreter. (10 RT 2262.) Within a few days, Dr. Teresa Farjalla observed Ghobrial talking to himself, and on another occasion drawing a devil with soap. (10 RT 2464.) By the end of March, Dr. Jose Flores-Lopez noted that Ghobrial was uncooperative and refusing to speak. (10 RT 2477.)

Ghobrial was interviewed through an interpreter on April 2, 1998. Ghobrial reported a history of psychiatric treatment while in Egypt. He denied having suicidal thoughts. He said he had a history of feeling at times "like the devil is in him." He reported a history of intermittent auditory hallucinations, as well as periods up to days long that he could not remember. (10 RT 2263.) Mental health nurse Kay Cantrell noted that Ghobrial had been overheard speaking English with others, but that he would not speak English with her. (10 RT 2264-2265.)

On April 2, he told Dr. Depovic that he only spoke a "little English." He said that he had undergone mental health treatment in Egypt, saying, "I am crazy in Egypt," and that he "[w]as in hospital." (10 RT 2431.) He was crying and said that he wanted to take medication for the voices or problems in his head. (10 RT 2432.) On April 3, Dr. Steven Johnson observed that Ghobrial was dirty and disheveled, but was in no apparent distress. Ghobrial was continued on Haldol, an antipsychotic medication. (10 RT 2273-2274.) On April 4, Dr. Flores-Lopez noted that Ghobrial had "a silly grin" and seemed to be responding to auditory hallucinations. (10 RT 2477.) On April 6, Dr. Depovic reported that Ghobrial denied hallucinating and had refused medications for the past two days. (10 RT 2432.) The next day he told her, "I am not crazy." He again refused medication and asked to be transferred to regular housing. (10 RT 2433.) On April 9, a nurse noted that Ghobrial was alert and smiling but indicated his English was limited. He would not sign a release to allow the medical

personnel to speak with his attorney, or to speak with his doctor. (10 RT 2265-2266.) On April 10, Ghobrial was cleared to move to a less acute ward. (2275.) On April 13, Dr. Flores-Lopez noted that Ghobrial had refused medications since April 7 and noted no evidence of any acute mental illness. (10 RT 2477-2478.) By April 23, Ghobrial was alert, oriented, and appeared clean and well-groomed. (9 RT 2160.) His mood appeared normal and his affect was appropriate. (9 RT 2161.) Ghobrial told his case manager, "I'm happy because I give myself for God." (9 RT 2162.) He reported eating and sleeping well and denied thoughts of harming himself or others. (9 RT 2162.)

But in May, Ghobrial was referred to mental health by deputies due to his bizarre behavior. Ghobrial did not respond to verbal commands, his food was all over his cell and he was reported to be talking to himself. (10 RT 2257.) Nurse Linda Price observed Ghobrial pacing in the recreation area, talking to himself. He did not look at her or respond to verbal prompts. She noted that he seemed to be responding to internal stimuli, but that it was difficult to assess because of his uncommunicative behavior and the language barrier. She concluded that he was a potential danger to himself or others. He was placed in a safety gown, placed on observation, and a psychiatric evaluation was requested. (10 RT 2258.) Over the next several days, members of the mental health team reported that Ghobrial seemed to be hearing voices or responding to internal stimuli, and that he was smiling or grinning inappropriately. (10 RT 2374; 11 RT 2590-2593.) Except for one instance on May 22 (11 RT 2593), Ghobrial denied experiencing hallucinations, having suicidal or homicidal thoughts, or having other psychiatric symptoms. He refused medication. (10 RT 2276, 2372-2374, 2376; 11 RT 2590, 2592.) Despite his denials, he was again diagnosed as suffering from unspecified psychosis. (10 RT 2276; 11 RT 2590.) In general, Ghobrial was reported to be coherent and cooperative.

(See 10 RT 2276, 2373-2375.) By May 22, he was deemed stable enough to be transferred to another unit. (10 RT 2276.)

However, on May 25, Ghobrial complained of anxiety, saying he felt "scared of everything." (10 RT 2277-2278, 2375.) He admitted auditory hallucinations of someone "calling [his] name." (10 RT 2375.) Although he was alert and coherent, he seemed confused. (10 RT 2376.) Ghobrial was prescribed Mellaril, another antipsychotic. (10 RT 2277-2278.) Dr. Johnson saw Ghobrial on May 27. He was doing well on the medication, with no reported side effects. He denied suicidal thoughts, paranoia, or hallucinations, and seemed stable. (10 RT 2278-2279.) On May 28 and 29, Dr. John Woo noted that Ghobrial displayed an inappropriate affect, although he denied psychiatric symptoms. (11 RT 2593.) He told Dr. Woo that he was afraid of going to court. (11 RT 2594.)

By early June, Ghobrial was again alert and coherent, and displayed an appropriate affect. (10 RT 2376-2378.) He told doctors that he no longer needed to be medicated, and asked to be transferred back to regular housing. (10 RT 2376-2378, 2433.) He denied having hallucinations or wanting to harm himself or others. (10 RT 2376-2378.) According to mental health specialist Margaret Wiggenhorn, Ghobrial was cooperative, speaking to her in broken, but understandable English. (10 RT 2378.) As of June 4, he was compliant (10 RT 2434), but he refused his medication on June 12 (9 RT 2164). At a June 22 follow-up assessment, nurse practitioner Kristen Whitmore noted that Ghobrial was alert, and oriented, but appeared to speak very little English. He showed no signs of depression, no overt psychosis, and no suicidal or homicidal ideation. She assessed that he was stable on his medications and continued him on Mellaril. (9 RT 2189.)

On July 10, Ghobrial insisted that he saw four black men in his empty cell. He was more disheveled and grinned inappropriately. (9 RT 2165.)

On July 13, Whitmore noted that Dr. Lopez reported that Ghobrial was sexually preoccupied, insisting that nurses apply antifungal cream to his groin because he only had one arm. She increased his dosage for Mellaril. (9 RT 2176-2177.) By July 24, his behavior was "increasingly bizarre." Although he was taking his medication, he was mute and did not respond verbally or follow simple commands. (9 RT 2167-2168.) Some of the members of the mental health treatment team felt that Ghobrial was malingering, trying to present symptoms of mental illness. (9 RT 2177-2178.) The team noted that Ghobrial was under stress and decided to increase the dosage of Mellaril. (9 RT 2179.)

On August 3, Nabeel Bechara, a registered nurse, tried to interview Ghobrial in Arabic. He was uncooperative, and answered only, "I don't know," or "I don't remember." He said his medication interfered with his memory. (10 RT 2254-2255.) By August 15, deputies complained that he was smearing food in his cell and shaking. Ghobrial did not speak. His eyes made slight jerking movements, and his lips moved without speaking. He was decompensating and appeared to be responding to internal stimuli. He was returned to the psychiatric unit. (10 RT 2268; 10 RT 2464-2465.) Over the next few days, he was noted to be paranoid and delusional and appeared to be responding to internal stimuli. His medication was changed from concentrate to tablet form. (10 RT 2478-2479.) Dr. Flores-Lopez noted a silly grin, and bizarre actions, and that Ghobrial stuck his fingers in his ears, a common sign in patients with auditory hallucinations. He assessed Ghobrial as possibly schizophrenic. (10 RT 2479.)

On September 3, Ghobrial reported auditory hallucinations, saying that he heard his family speaking to him, or heard unseen people talking inside his cell. (9 RT 2166.) On September 8, Whitmore saw Ghobrial for follow-up evaluation. Although Ghobrial reportedly understood English when spoken to by deputies, Ghobrial insisted that he spoke, "no English,"

when questioned by Whitmore. (9 RT 2181.) He did manage to tell her that he was hearing voices. (9 RT 2181.) Other nurses had observed Ghobrial speaking with other inmates. (9 RT 2181.) Ghobrial appeared alert and oriented, but she was unable to fully assess his orientation or to complete a mental status examination. (9 RT 2183.) She noted that Ghobrial was calm, but had "a silly grin." (9 RT 2184.) Whitmore noted that the information from deputies and nurses suggested that Ghobrial was "manipulating," "and likely wants a label as mentally ill." He was continued on his existing medication. (9 RT 2184.)

In late September, he was moved to an acute housing unit after he was found to have tied a string tightly around his penis. He said that he did not remember doing so, that he woke up and found it. He reported that it had happened many times, but that he was usually able to remove the string himself. He was placed in a safety gown so that he could not harm himself. (9 RT 2169; 10 RT 2434-2435.) His behavior was considered possibly self-mutilating. (10 RT 2481.) He continued to admit to auditory hallucinations and suicidal thoughts. (9 RT 2280, 2282-2283; 10 RT 2435.) His dosage of Mellaril was increased and suicide precautions were continued. (9 RT 2280, 2284.) Doctors also prescribed Prozac, an antidepressant. (9 RT 2282.) On September 26, Ghobrial told Dr. Farjalla that the medications were helping. He agreed not to hurt himself or tie anything around his penis. (10 RT 2465-2466.)

Dr. Johnson decreased Ghobrial's dosage for Mellaril on October 7, because he seemed oversedated. (10 RT 2285.) On October 9, Dr. Farjalla noted that there had been no further incidents of self-destructive behavior. (10 RT 2466.) She observed Ghobrial talking to himself in the mirror in his cell on October 13. (10 RT 2467.) On October 31, Ghobrial appeared disheveled. He smiled and nodded but seemed only semi-cooperative,

probably due to the language barrier. He denied suicidal or homicidal ideation, and denied hearing voices or experiencing paranoia. (9 RT 2169.)

When assessed in November, Ghobrial told nurse practitioner Whitmore, "Prozac is good." He liked taking the Mellaril at nighttime. He appeared to be trying to make more of an effort to interact, but still insisted that he did not understand English. She noted his affect was more appropriate and that he was not depressed or suicidal. He still claimed to hear voices. (9 RT 2186.) Dr. Flores-Lopez saw no evidence that Ghobrial was responding to internal stimuli. (10 RT 2481.) He noted that Ghobrial was looking in the mirror and talking to himself, but only when Dr. Flores-Lopez was nearby. (10 RT 2482-2483.) Other information suggested that Ghobrial talked to himself even when the doctors were not present. He noted that Ghobrial was possibly malingering. (10 RT 2483.)

In December, Ghobrial's mental health case manager observed that Ghobrial refused eye contact and did not respond to questions. He talked to himself continually and stared at the floor. She noted that when Ghobrial took his medications, he was compliant, cooperative, and appropriate, and that he socialized with other inmates. (9 RT 2170.) After he subsequently reported an injury to his left scrotum, Ghobrial was re-evaluated due to his history of self-mutilation. He admitted causing the abrasions. He was again moved to the acute mental health unit and placed in a safety gown. (9 RT 2170; 10 RT 2286-2287, 2467, 2485.) Dr. Flores-Lopez assessed Ghobrial as suffering from some form of psychosis and noted the need for further testing and examination to rule out malingering. (10 RT 2485.) After a December 29 team staffing, assisted by an interpreter, Ghobrial was assessed as suffering from psychosis and depression. (10 RT 2467-2468.) On December 30, Ghobrial was reportedly unresponsive, but on December 31, Ghobrial said that he was "okay," and the doctor noted no apparent distress. (10 RT 10 RT 2289.)

1999

In January 1999, Dr. Flores-Lopez noted that Ghobrial "remained manipulative," possibly in an effort to remain in mental health housing rather than being returned to general population. (10 RT 2486-2488.) At the time of this assessment, Ghobrial was being treated with Zyprexa, Mellaril, and Prozac. (10 RT 2489.) Members of the treatment team continued to note Ghobrial's unkempt and disheveled appearance, and Ghobrial continued to report auditory hallucinations despite receiving antipsychotic medications. (10 RT 2253, 2289-2296, 2381; 11 RT 2594.)

In February and March, Ghobrial was observed talking to himself on various occasions. (10 RT 2382-2383.) He admitted that he was still hearing voices, "just a little." (10 RT 2468.) On one occasion, Dr. Flores-Lopez noted a "silly affect and grin." (10 RT 2489.) On March 25, he noted that Ghobrial remained manipulative. He had reported having diarrhea, possibly in an attempt to stop or change his medications. Ghobrial denied experiencing auditory hallucinations or any other psychiatric symptoms. (10 RT 2490-2491.)

On April 1, Ghobrial reported hearing more voices and asked to see a doctor. Ghobrial cut out articles from the paper about his case and showed them to the caseworker. (10 RT 2384-2385.) On April 8, Dr. Flores-Lopez noted that Ghobrial reported increased auditory hallucination, and appeared to be responding to internal stimuli only when he was aware that he was being observed. Deputies reported that his behavior was normal and that his ability to speak English improved at other times. (10 RT 2491-2492.) Other reported information indicated that he showed signs of responding to internal stimuli even when he was unaware of being witnessed. (10 RT 2492.) Dr. Flores-Lopez made a notation in the medical record that he had recommended that Ghobrial be sent to a mental hospital so that he could be fully assessed to rule out malingering and to assess whether he was

competent to stand trial. (10 RT 2492-2493.) Ghobrial continued to talk to himself and to report auditory hallucinations. (10 RT 2385-2386.) On May 17, although Ghobrial had been taking Zyprexa and Depakote, Dr. Flores-Lopez noted that his behavior was unchanged whether on or off the medications. (10 RT 2493.)

On May 19, Ghobrial was returned to the acute mental health unit after urinating in his cell and failing to respond to deputies' directions. (10 RT 2298, 2469.) Dr. Flores-Lopez noted that his behavior suggested that he might be psychotic, but that other notes suggested possible malingering. (10 RT 2297.) Dr. Farjalla noted that Ghobrial had exhibited no self-destructive behavior for over four months. (10 RT 2469.) The auditory hallucinations continued. (10 RT 2470.)

On June 3, Ghobrial reported feeling very bad. The voices were increasing. He seemed more upset and depressed, but denied any intent to hurt himself or others. He did not respond to prompting. (10 RT 2386-2388.) Over the next several days, observers noted that Ghobrial had urinated or defecated on himself or on the floor of his cell. (10 RT 2387-2388, 2436, 2494.) Dr. Flores-Lopez noted that Ghobrial remained psychotic and there was a strong element of malingering. (10 RT 2493-2494.) At trial, the doctor explained that malingering could not be ruled out without a complete mental status examination, medical history, and testing. (10 RT 2394-2395.)

In June, Ghobrial was placed on observation for possible suicidal ideation because he was not eating. (10 RT 2299-2300, 2436.) He again claimed to be unable to speak English. He was alert, but trembled. His speech was quiet and he seemed anxious. (10 RT 2299.) Ghobrial then resumed eating and was taken off safety precautions on June 18. (10 RT 2300.) For about the next ten days, no signs of psychosis were noted other than poor hygiene, anxiety, and a flat affect. (10 RT 2301-2302, 2436-

2437.) He was placed on observation again on June 28 after urinating on the floor. On June 29, he told Dr. Depovic that he was not experiencing any hallucinations and denied not eating. He was disheveled, with a blunt affect. (10 RT 2437.)

For the remainder of June and throughout September, staff noted Ghobrial's blunt or flat affect. He continued to report either no auditory hallucinations or reduced auditory hallucinations. (10 RT 2437-2440, 2496.) On July 2, Dr. Flores- Lopez noted that Ghobrial was chronic and stable, but that he remained symptomatic despite taking the maximum dose of Zyprexa. (10 RT 2495-2496.) On July 21, Ghobrial was alert and smiling. He expressed satisfaction with his medications and denied hallucinations. He was then cleared for transfer to a less acute mental health unit. (10 RT 2269.) In late July, Dr. Flores-Lopez noted that Ghobrial mentioned the devil had spoken to him. (10 RT 2496.) Dr. Farjalla observed Ghobrial moving his lips as though he were talking to himself. (10 RT 2471-2472.)

On August 4, 1999, Dr. Johnson assessed Ghobrial with the aid of a translator. Ghobrial complained of tremor, dry mouth, auditory hallucinations and excessive sleep. (10 RT 2306.) Dry mouth and excessive sleep were side effects of his medications. Dr. Johnson noted that Ghobrial was still psychotic despite several months on medications. Dr. Johnson discontinued Ghobrial's prescription for Zyprexa and suggested treatment with Seroquel, a different antipsychotic medication, in order to decrease Ghobrial's hallucinations. (10 RT 2307.) Dr. Johnson updated Ghobrial's initial diagnosis of psychosis, not otherwise specified, to a diagnosis of schizoaffective disorder after meeting with the treatment team. (10 RT 2308-2309.) Schizoaffective disorder is a diagnosis applied to those who have symptoms of schizophrenia and bipolar disorder. (10 RT 2305.) The symptoms may range from mild to severe, and the severity of

the symptoms often fluctuate over time. (10 RT 2305.) There is no single medication to treat the symptoms of schizoaffective disorder. Some patients do not respond to any of the medications. Some patients respond better to certain medications. (10 RT 2305-2306.) On August 13, Ghobrial was in the acute mental health unit. Dr. Flores-Lopez indicated that Ghobrial was likely suffering from schizoaffective disorder. (10 RT 2496-2497.)

On August 19, Dr. Raafat Girgis, a forensic psychiatrist at Patton State Hospital, was called in by Ghobrial's mental health team to evaluate Ghobrial in his native language. Dr. Girgis is a native Egyptian and earned his medical degree at the University of Cairo. (11 RT 2596-2597.) Dr. Girgis spent about 1 1/2 hours with Ghobrial. He noted that Ghobrial was easily distracted, and appeared to be responding to internal stimuli, but was cooperative and friendly. Ghobrial indicated that he heard voices that told him to cut himself, especially his genitals. He said that he sometimes heard voices that made him angry and made him want to hurt people, but he did not give details. (11 RT 2597-2598.) Dr. Johnson assessed Ghobrial with Dr. Girgis. Ghobrial reported that he liked his new medication, and was no longer having tremors, but still had auditory hallucinations. The dosage for Seroquel was increased. (10 RT 2310-2311.)

On September 3, Dr. Flores-Lopez noted that Ghobrial remained chronically ill with schizoaffective disorder and would likely have the illness for the rest of his life. (10 RT 2497-2498.) Although Dr. Johnson noted on September 9 that Ghobrial had good hygiene, appeared in good spirits, and showed no sign of distress (10 RT 2312), on September 19, 1999, Ghobrial again reported auditory hallucinations. He was unkempt, disheveled, and was talking to himself in his cell. (10 RT 2389-2390.) He came to the door to greet his caseworker, but he did not appear to

understand what the caseworker was saying and answered yes to almost every question asked. (10 RT 2390-2391.)

On October 27, nurse practitioner April Barrio noted that she was unable to obtain a subjective statement from Ghobrial, as he repeatedly insisted that he did not understand English. He reported no side effects from his medications. He was alert, oriented, and responded to commands from the deputies to close doors, but his affect was inappropriate—he had a "bizarre bright grin" and a wide-eyed stare. (9 RT 2198-2199.) He seemed attentive and did not seem to be responding to internal stimuli, or to be suffering from auditory or visual hallucinations. Although he still seemed to be mentally ill, he appeared to be stable on his medications. (9 RT 2200-2201.) His existing medications were continued. (9 RT 2202.)

On November 12, 1999, Ghobrial reported that he was able to sleep and was taking his medications. Deputies reported that he had been cooperative and compliant. (11 RT 2615-2616.) On November 23, nurse Barrio assessed Ghobrial after he complained of abdominal pain. His cell was cluttered and the toilet area was "a mess." His clothes were unkempt and dirty. He appeared to be responding to internal stimuli. He moved his lips as if he were speaking to someone. (9 RT 2194-2195.) He did not really speak or listen to Barrio. She noted positive auditory hallucinations, but no paranoid, suicidal or homicidal ideation. (9 RT 2195.) Deputies again reported that Ghobrial was compliant and had not caused any problems. (9 RT 2196.) She noted a slight increase in psychosis, and decompensation of Ghobrial's grooming and self-care. He did not appear to be in any danger. (9 RT 2196.) Barrio renewed Ghobrial's prescriptions for Seroquel, Depakote, a mood stabilizer, and Paxil, an antidepressant. (9 RT 2197-2198.) Ghobrial was transferred to another unit for closer psychiatric monitoring. (9 RT 2198; 10 RT 2498-2499.)

Throughout December 1999, Ghobrial was observed talking to himself. According to his caseworker, Ghobrial seemed preoccupied, but the caseworker saw no signs of self-destructive behavior. Ghobrial told him that his medications were okay and reported no problems. (10 RT 2391-2393.)

2000

On January 13, 2000, caseworker Leonard Luna noted that Ghobrial appeared to be in a good mood. He smiled and answered questions politely. He expressed satisfaction with his medication. (10 RT 2393.) Luna observed that Ghobrial was constantly talking to himself. (10 RT 2394.) On January 27, Luna noted that Ghobrial was not in distress, and reported no problems, but was still talking to himself. His next court date was set for July 28. (10 RT 2394.) Dr. Flores-Lopez noted that Ghobrial might respond poorly to the increased stress of upcoming court dates. He observed continuing symptoms of psychosis. (10 RT 2499.) In February 2000, Dr. Flores-Lopez assessed Ghobrial's illness as chronic and noted that he was responding to stressors. (10 RT 2499-2500.)

As of March, Ghobrial continued to have poor communication in English, but elaborated more, and was able to respond to questions. He admitted hearing voices, saying that he heard a voice that "[c]alls my name. Tells me to kill myself." (9 RT 2203.) He denied any side effects from the medication, but Barrio noted weight gain, a known side effect of Seroquel and Depakote. (9 RT 2203-2204.) He was alert, oriented, and appeared less disheveled. His cell was still "trashy," according to deputies. He spoke in monosyllables, but his mood was normal and his affect appropriate. (9 RT 2204.) He maintained good eye contact and seemed coherent. He reported no hallucinations, paranoia, or suicidal or homicidal ideation. (9 RT 2204.) He was assessed as stable on medications, but manifesting chronic mental illness. (9 RT 2204-2205.) By April 7, Ghobrial's grooming had

improved, his eye contact was good, and he tried to interact with Barrio. He again reported no auditory hallucinations, and no paranoid or suicidal ideation. He appeared to be stable and responding to medications. (9 RT 2205.)

Dr. Depovic saw Ghobrial with the aid of an interpreter on April 25. Ghobrial had reportedly defecated in the shower. He claimed to have hurt himself a week earlier "by tying the knot on his penis." (10 RT 2441.) Ghobrial said he did this "to stop breathing." (10 RT 2441.) On April 26, Dr. Depovic noted a blunted affect, and on April 27, he reported reduced hallucinations. (10 RT 2441.) On May 4, Ghobrial denied hallucinations or suicidal or homicidal thoughts. He was disheveled, and still talking to himself. (10 RT 2395.) On May 5, Dr. Depovic spoke to him about cleaning his cell and taking a shower. (10 RT 2442.) On May 10, he reported no problems. He denied hallucinations or suicidal thoughts. He was observed to be talking to himself in his cell most of the time. He was still unkempt and disheveled, but reported no problems with his medication. His next court date was set for July 25. (10 RT 2395.)

Dr. Johnson assessed Ghobrial on May 16. He complained of auditory hallucinations and wanted more medication. Ghobrial was talking to himself constantly. Dr. Johnson noted poor hygiene and found that Ghobrial remained psychotic. His prescription for Seroquel was increased. (10 RT 2313.) On May 24 and 31, Ghobrial was depressed or withdrawn, with a flat affect. (10 RT 2409-2410.) On June 17, Ghobrial again claimed he was unable to speak English. Ghobrial's cell was clean. He was diagnosed and treated as suffering from psychosis, not otherwise specified, with a provisional diagnosis of schizoaffective disorder. (9 RT 2206.) Barrio observed him talking to himself in the dayroom. His grooming had improved, but his affect was inappropriate. She noted positive auditory hallucinations. She assessed him as partially stable and noted that he

remained bizarre and inappropriate but seemed to have improved self-care and care for his surroundings, possibly because of the prescribed mood stabilizer or increased monitoring by deputies. (9 RT 2207-2208.) Poor hygiene was again noted on June 20. (10 RT 2410.)

On July 1, 2000, nurse practitioner Barrio reported that Ghobrial was speaking English. He reported reading his Bible every day. He admitted hearing voices, but denied any self-destructive behavior. His cell was cleaner and he seemed more appropriate and responsive. He was alert and oriented, but his mood varied. He seemed distracted and inappropriately cheerful. (9 RT 2208-2209.) Barrio noted increased communication and coherent thoughts, along with increased religiosity and auditory hallucinations. She concluded that he was slightly improved from the previous assessment. (9 RT 2209.) On July 5, Ghobrial's mood was pleasant and his affect was appropriate. (10 RT 2410.) On July 11, Ghobrial reported having a command hallucination telling him to wrap a sheet around his penis, but reported having "happy voices" at present. (10 RT 2410-2411.) On July 15, Ghobrial told Barrio that he had shaved his eyebrows because an auditory hallucination told him to. He complained of not sleeping and said that the hallucinations were increasing. He was complying with his medications, but had a poor response to the medications. (9 RT 2212.) He was disheveled, unkempt, and had a broad inappropriate grin. (9 RT 2213.) Barrio increased the dosage for his antidepressant, renewed the prescription for Depakote, and increased the dosage for Seroquel. (9 RT 2213.) Barrio consulted with Dr. Johnson to form a treatment plan. They decided to add Ativan, a tranquilizer, to help Ghobrial sleep. (9 RT 2214-2215.)

On July 20, Dr. Depovic observed Ghobrial rocking in his bed. He refused to say if he was suicidal. He was very disheveled, and had body odor. His room was messy, with food "all over." He appeared to be

responding to internal stimuli. Dr. Depovic determined that he might be dangerous to himself or others. He showed poor insight and judgment. (10 RT 2442-2443.) By July 21 to 23, he reported that he was starting to feel better. He had no complaints, and was eating well and smiling. He denied suicidal or homicidal thoughts, but reported hearing voices. Dr. Depovic noted he had an "anxious" affect. (10 RT 2443.) On July 25, Ghobrial was observed to have been picking at his face, causing abrasions. (10 RT 2411-2412.) He said that voices were telling him to pick at his face and to rub the abrasions with butter and coffee grounds. (10 RT 2412.) He was transferred back to the acute mental health unit. (10 RT 2470.) On July 29, Dr. Juventino Lopez interviewed Ghobrial using a fellow inmate as an interpreter. Ghobrial did not appear to be responding to internal stimuli and did not report any severe psychotic symptoms. (10 RT 2516-2517.) On July 31, Ghobrial reported difficulty sleeping, possibly due to the recent change in medications. Dr. Lopez resumed his medications at the previous dosages. (11 RT 2517.)

On July 31, Ghobrial was assessed as alert and oriented. He spoke broken English, was soft-spoken and goal directed. He denied being suicidal and denied any intent to harm himself. He admitted auditory hallucinations, saying that he heard his name being called. (9 RT 2148.) He also heard command hallucinations telling him to "tie things on his penis" and to rub his forehead, but denied that he was experiencing any hallucination at that moment. He denied having anything tied to his penis at that time. (9 RT 2149.) Ghobrial said he had not been sleeping at night. (9 RT 2150.) On August 3, he reported experiencing depression and anxiety. He was concerned about his legal issues, and asked about his next court date, which was set for August 11. (10 RT 2412.) On August 12, Ghobrial admitted having had auditory hallucinations telling him to put butter on his mouth and to rub coffee grounds between his eyebrows. He

was sleeping better and his depression varied. He denied suicidal ideation, but admitted tying his penis. His appearance was disheveled and his cell was "trashed." (9 RT 2215.) He was assessed as partially stable, with poor response to medication. (9 RT 2217-2218.)

On August 26, he reported hearing his mother calling his name, telling him not to kill himself. He said that he had not been "tying his penis," and had no further fixation with coffee grounds or cutting his eyebrows. (9 RT 2219.) Barrio noted that his response to medication was fair. His cell was cleaner. He was calmer and better-groomed. He seemed less preoccupied with internal stimuli and his affect was more appropriate although he still reported auditory hallucinations. He was assessed as mostly stable on medications. (9 RT 2219-2220.) She noted that he met the criteria for civil commitment under Welfare and Institutions Code section 5150 in that he was unable to care for himself due to mental illness.[3] (9 RT 2220.) On September 6, he reported both auditory and visual hallucinations. He heard footsteps and felt a woman touching him while he slept. He had poor hygiene and several physical complaints. (10 RT 2413-2414.) On September 10, he again reported that he felt someone touching him. He was inappropriately cheerful and still reported auditory hallucinations.

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[3] Welfare and Institutions Code section 5150 provides for an involuntary commitment under the Lanterman-Petris-Short Act (LPS Act) as follows:

When any person, as a result of mental disorder, is a danger to others, or to himself or herself, or gravely disabled, a peace officer, member of the attending staff, as defined by regulation, of an evaluation facility designated by the county, designated members of a mobile crisis team provided by Section 5651.7, or other professional person designated by the county may, upon probable cause, take, or cause to be taken, the person into custody and place him or her in a facility designated by the county and approved by the State Department of Mental Health as a facility for 72-hour treatment and evaluation.

Ghobrial was only partially stable despite his medications. (9 RT 2221.) On September 25, Barrio observed Ghobrial in his cell, lying on his back with his head hanging off the end of the bed. His lips were moving as if he were chanting or talking with someone. He seemed disoriented, with decreased English comprehension and decreased ability to communicate. (9 RT 2222.) He reported hearing voices say, "Voices, food, John, eat." She noted he was only partially stable and ordered the "5150" flag to remain in place. (9 RT 2223.) At trial, Barrio explained that a "5150" flag alerts others that the patient should not be released without a mental health assessment. (2224.) The next day, Ghobrial reported olfactory hallucinations. He was having trouble sleeping and his hygiene was poor. (10 RT 2415-2416.)

On October 8, Ghobrial reported hearing a woman's voice telling him when to eat and providing a constant commentary on his behavior. (9 RT 2225.) He reported visual hallucinations of a woman running by and feeling as if someone was touching his shoulder. He denied hearing any voices telling him to engage in self-destructive behavior. Barrio noted a good response to medications and compliance with medication. (9 RT 2225.) Ghobrial was more communicative, offering comments and trying to relate information without prompting. His affect was more flat, but his thoughts were coherent and organized. (9 RT 2226.) As of October 11, Ghobrial was hyper-talkative and rambling. His English was sometimes broken, but at other times clear. (10 RT 2416-2417.) On October 21, he reported that he continued to hear voices and to feel a woman touching him. His affect was inappropriately cheerful. His thoughts were coherent and organized. (9 RT 2228.)

On November 4, 2000, Ghobrial denied any problems, but reported auditory hallucinations of a woman calling his name. He also reported occasional tactile hallucinations. Barrio noted poor grooming and an

unkempt appearance, but observed nothing to suggest that he was experiencing hallucinations or delusions while she was speaking with him. He was assessed as partially stable and his medications were renewed. (10 RT 2231-2233.) When evaluated on November 14, Ghobrial continued to complain of voices telling him, "Go, John; eat, John; John bad." (10 RT 2234.) Deputies reported that he refused to come out to the dayroom when given the opportunity to do so. He reported increased tactile hallucinations of a woman touching him. His cell was unclean. His clothing was unkempt and his personal grooming was poor. His voice was soft and whispering. (10 RT 2233-2234.) Barrio noted his response to his prescribed medications was poor. (10 RT 2236.) On December 2, Ghobrial began to complain of auditory hallucinations telling him to scratch himself and to pull his hair. Barrio noted that he was not responding to medications at maximum dosages. (10 2236-2237.) By mid-December, Ghobrial continued to complain of voices telling him to pull his hair. Barrio observed thinning hair at the front of his head. (10 RT 2238.) He was experiencing tactile hallucinations of someone touching him. He was alert, and oriented, but his affect was inappropriate. He was only partially stable. (10 RT 2237-2238.) Ghobrial was started on Risperdal to augment his current treatment and to target the auditory hallucinations. (10 RT 2240.) By December 29, Ghobrial told Barrio, "Voices are better, not so much. Sometimes I feel sad." (10 RT 2240-2241.) Barrio noted diminished hallucinations and compulsive hair pulling. (10 RT 2241.) His compliance with medications was good and he was responding to the medications, and sleeping better. (10 RT 2241-2242.) Barrio increased the dosage of Risperdal. She kept the "5150" flag in place because she considered him to be a danger to others and gravely disabled. (10 RT 2243.)

2001

On January 9, 2001, Dr. Johnson found Ghobrial to be alert and oriented, but disheveled. His case manager reported that the auditory hallucinations continued. Dr. Johnson discontinued his prescription for Paxil. (10 RT 2315.) His caseworker noted that she saw hair in Ghobrial's cell and thinning spots on his head even though Ghobrial denied pulling his hair out. Ghobrial had an upcoming court date set for January 19. (10 RT 2418.)

Dr. Johnson assessed Ghobrial three times in February. On February 1, he was alert and oriented, but disheveled. He denied hallucinations, but reported headaches. Dr. Johnson changed the prescription for Depakote to a different formulation with fewer side effects. (10 RT 2315-2316.) On February 16, Dr. Johnson saw no signs of any adverse side effects to the medications. Ghobrial was alert, oriented, and was sleeping well. His hygiene was good, and his mood was cheerful. He denied any type of hallucinations, or suicidal, homicidal, or paranoid thoughts. Dr. Johnson continued his existing medications – Risperdal, Depakote, Ativan, and Seroquel. (10 RT 2318-2319.) On February 27, Dr. Johnson again observed no side effects, and found Ghobrial to be alert and oriented. He was calm and coherent, though his hygiene was poor. He denied having any type of hallucination, suicidal, homicidal, or paranoid thoughts, but his case manager had reported auditory hallucinations. (10 RT 2319.) He was still considered psychotic. Dr. Johnson increased the dosage for Risperdal. (10 RT 2320.)

On March 7, he told his caseworker that he had been pulling his hair out. He said that he wanted medication "to make him feel happier." (10 RT 2419.) On March 16, the caseworker noted that he was still pulling out chunks of hair. She noted he had bald spots on his head and she saw hair on the floor. (10 RT 2419-2420.) When Dr. Johnson saw Ghobrial that

same day, Ghobrial complained of depression, and asked for a "happy pill." (10 RT 2320.) Dr. Johnson found him to be alert and oriented. He denied having any hallucinations, suicidal, homicidal, or paranoid thoughts. (10 RT 2321.) Dr. Johnson prescribed Paxil again, increased his dosage for Seroquel and Risperdal, and changed the frequency and dosage for Depakote. (10 RT 2322.) Although on March 20 he was still pulling his hair and seemed depressed, by March 29 he reported feeling much better, and was no longer pulling his hair. (10 RT 2420, 2517-2518.) On April 10, Dr. Lopez interviewed Ghobrial with the help of Dr. Ebtiesam Khaled who spoke Arabic and acted as an interpreter. Ghobrial was assessed as having schizoaffective disorder, with improved stability and moderate residual depressive symptoms. (10 RT 2518-2519.)

On May 8, Dr. Johnson saw Ghobrial with an interpreter present. Ghobrial still complained of headaches and said he experienced auditory hallucinations around noontime everyday. He reported having tremors and insomnia. Dr. Johnson observed a mild tremor. (10 RT 2322.) He noted that Ghobrial was disheveled, but coherent. The doctor increased the dosage for Seroquel and Risperdal, and directed that the Paxil be taken at bedtime. (10 RT 2323.) On May 16, Ghobrial told Dr. Khaled that he was feeling much better and was not hearing voices as frequently. He reported better sleep and no tremors. He was alert and oriented with "fair" eye contact. (10 RT 2347.) Ghobrial reported fewer auditory hallucinations and less depression. (10 RT 2348.) Dr. Khaled noted poor insight into his mental illness. He assessed Ghobrial as still suffering from schizoaffective disorder and continued his existing medications. (10 RT 2348-2349.) On May 21, Dr. Khaled observed that Ghobrial was physically shaking. (10 RT 2349-2350.) He was otherwise alert and oriented with fair eye contact and grooming. Ghobrial reported that the voices were not bothering him as much, and he was less depressed, and had no suicidal or homicidal

thoughts. Dr. Khaled started him on Cogentin to help control the shaking. (10 RT 2350.) On May 31, Ghobrial reported that he was still hearing voices, but that the shaking had lessened. He was alert and oriented, with good eye contact, but a blunted affect. Dr. Khaled noted continued auditory hallucinations, and continued the medications. (10 RT 2351.)

According to Dr. Lopez, on June 4, Ghobrial reported that his auditory hallucinations were getting better. (10 RT 2520.) On June 15, his caseworker noted reported tremors and an unsteady gait. (10 RT 2421.) On June 21, he told Dr. Khaled that the voices were "on and off, half and half." Dr. Khaled noted that Ghobrial was not fully oriented, and had reported feeling dizzy and falling a lot. Lab tests revealed low blood sugar and Ghobrial was referred for medical evaluation. (10 RT 2352.) On June 25, nurse Rachelle Gardea observed Ghobrial stagger and almost fall. (9 RT 2150.) Ghobrial was alert and oriented, but could not explain why he had almost fallen. He denied suicidal ideation, but admitted to continued auditory hallucinations, claiming to have heard a voice that said his name, or sometimes his mother's voice talking to him. (9 RT 2151.) Ghobrial said he was taking his prescribed medications and felt that the medications diminished, but did not stop the hallucinations. (9 RT 2152.) He admitted pulling his hair out "a little bit," but could not give a reason. (9 RT 2152.) He denied feeling anxious about his upcoming court date. (9 RT 2152.) Ghobrial told Dr. Khaled that he could not sit up and felt dizzy. He said that he had fallen three times. He claimed to hear voices. (10 RT 2353.) The doctors found no physical reason for the dizziness or falling. His medications were continued. Dr. Khaled noted that Ghobrial had an upcoming court date set for June 29. (10 RT 2354.) The next day Ghobrial claimed that he could not stand up straight to use the bathroom. (10 RT 2354.) He admitted that he still heard voices but not as often as before. Dr. Khaled noted that he appeared paranoid and guarded. (10 RT 2355.) On

June 26, he again complained of dizziness and inability to sit up. (10 RT 2355.) On June 27, he reported he was pulling his hair more often but otherwise feeling better. He said he was experiencing fewer auditory hallucinations. (10 RT 2356.) Dr. Khaled found him to be guarded and preoccupied, which Dr. Khaled attributed to his upcoming court date. (10 RT 2356-2357.) He denied any suicidal or homicidal ideation. Ghobrial was placed on closer observation so that his vital signs, blood pressure, and blood sugar could be monitored. His medications were continued. (10 RT 2357.)

When he spoke with Dr. Khaled on July 2, he was unable to remember whether he had fallen the day before. (10 RT 2357.) He was alert with fair grooming and eye contact. He claimed that the voices had lessened. His memory was poor and he seemed very guarded and suspicious. He had poor insight and judgment. (10 RT 2358.) On July 3, he told Dr. Khaled, "I wanted to kill myself. And I looked around, I can't find anything to kill myself with." (10 RT 2358.) He said he heard voices. (10 RT 2358.) He was partially oriented and preoccupied with depression and a desire to hurt himself. He reported auditory hallucinations and suicidal ideation. (10 RT 2359.) He was assessed as suicidal and psychotic. Deputies reported that Ghobrial had fallen down four times that morning but Ghobrial could not remember falling. Dr. Khaled continued suicide precautions. (10 RT 2359.) When Ghobrial spoke to Dr. Johnson the next day, he appeared anxious and denied falling. He denied any suicidal ideation. He was continued on his existing medications. (10 RT 2324.) On July 5, he told Dr. Khaled that he would not hurt himself. He reported hearing voices from the window and doors, but no one was there. Dr. Khaled noted that Ghobrial was partially oriented, and seemed paranoid. He found him to be still psychotic, but not suicidal. (10 RT 2359-2360.) On July 9, Ghobrial said he was still falling, but did not feel

dizzy. He reported auditory hallucinations, and seemed preoccupied with his physical symptoms. Dr. Khaled reduced his dosage for both Paxil and Depakote. (10 RT 2360-2361.) By July 10, he continued to report auditory hallucinations. He was unable to sit up. He was very sleepy, and unable to answer many questions. (10 RT 2361.) On July 11, he told Dr. Khaled that he kept hearing two people talking to each other. He was only partially oriented and answered many of the doctor's questions with "I can't remember." He said he felt depressed. (10 RT 2362.)

On July 12, Ghobrial reported auditory hallucinations and depression, but no suicidal thoughts. The suicide watch was discontinued. (10 RT 2362-2363.) Throughout the remainder of July, he reported less hair-pulling and less-frequent falls. (9 RT 2154; 10 RT 2363, 2365, 2367.) He was still experiencing auditory hallucinations, but those were decreasing. (9 RT 2153; 10 RT 2362-2367.) Nurse Gardea noted Ghobrial was compliant with his prescribed medications, and that he denied any anxiety about his upcoming court date. She noted that his behavior in the unit had been appropriate. (9 RT 2154.)

Ghobrial was assessed several more times in August. Ghobrial initially reported that he was coping well and had no complaints. (10 RT 2521-2522.) Staff reported that Ghobrial was more quiet and withdrawn. On August 20, the doctor noted that his cell was malodorous and food had been spilled on the floor. Doctor Lopez noted increased depressive symptoms and that Ghobrial appeared to have regressed with symptoms that were more repressive. (10 RT 2522.) On August 22, Ghobrial reported that he was doing well with his current medications. He had no complaints of dizziness or loss of balance or other adverse side effects. (10 RT 2524.) On August 24, Ghobrial denied any side effects, and was cheerful, smiling, alert, and oriented. He was not having any hallucinations, or suicidal, homicidal, or paranoid thoughts. His existing

medications were continued. (10 RT 2325.) On August 27, he reported hearing his father's voice cursing at him through the television, but denied having suicidal thoughts. (10 RT 2368.) The next day Ghobrial said he felt fine—the voices and the depression were "better." (10 RT 2368.)

Mental health case manager Saundra King saw Ghobrial on September 4, after his return from court. She noted that he was alert and coherent, with a pleasant mood, and appropriate affect. (10 RT 2422.) On September 5, Dr. Farjalla noted that Ghobrial exhibited poor insight and judgment. (10 RT 2472-2473.)

Dr. Ari Kalechstein, a psychologist specializing in neuropsychology, administered neuropsychological tests to Ghobrial in January and February 2001. Some of the tests given are used to detect malingering, while others are sensitive to attention or tests that measure "executive system functioning" or "frontal lobe functioning." (10 RT 2525, 2530.)

Dr. Kalechstein administered five tests focused on issue of attention. On the first test, the digit span test, Ghobrial scored in the lowest range, or 16th percentile. (10 RT 2531-2532.) He scored in the 12th percentile on the second test, the trail-making test. (10 RT 2532-2534). He scored in the 32nd percentile or low average on the color trail test. (10 RT 2534-2535.) On both the fourth test, or symbol digit modalities test, and the fifth test, the spatial span test, Ghobrial scored in the first percentile or impaired range. (10 RT 2535-2536.)

Dr. Kalechstein also administered a series of four tests designed to measure executive functioning or frontal lobe functioning. (10 RT 2537.) Ghobrial scored in the impaired or borderline impaired range on all of these tests. (See 10 RT 2538-2541 [Wisconsin card sorting task, 1%; rough figural fluency test, 2 %; trail making, 2 %; color trails, 6 %].)

When given tests designed to detect malingering, Ghobrial performed within normal limits, indicating that he was putting forth his best efforts. (10 RT 2542-2545.)

According to Dr. Kalechstein, the results of these tests "showed that [Ghobrial] had more specific types of impairment, particularly on tests of executive systems functioning." The test results were indicative of frontal lobe impairment and were consistent with a psychotic illness such as schizophrenia or schizoaffective disorder. (10 RT 2545-2546.)

d. Corrections expert

Daniel Vasquez testified as an expert on correctional issues and conditions of confinement. (10 RT 2550-2551.) According to Vasquez, an inmate that has been convicted of a crime against a child would likely be housed in a protective custody setting. (10 RT 2562.) An inmate who was convicted of a homicide involving the molestation of a child, was non-English speaking, had a physical disability, and suffered from mental illness requiring medication would be housed in protective custody. (10 RT 2565-2568.) Such a person would not be a risk to others because he would be isolated and housed in a single cell, and would have no access to other inmates. (10 RT 2568-2570.) The inmate would continue to receive medication for mental illness. (10 RT 2570.)

ARGUMENT

I. THE TRIAL COURT WAS NOT REQUIRED TO ORDER A COMPETENCY HEARING

Ghobrial contends the trial court's failure to order a competency hearing violated Penal Code section 1367 and violated his constitutional rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments. Specifically, Ghobrial contends that: (1) his history of mental illness; (2) the testimony of mental health experts during the penalty phase; (3)

evidence of self-mutilation or suicidal ideation; and (4) the effects of his prescribed antipsychotic and antidepressant medications constituted substantial evidence of incompetence. (AOB 48-73.) Ghobrial's claim of error does not withstand scrutiny where, as here, his counsel never declared any doubt about his mental competency and the evidence of Ghobrial's mental illness presented during his trial did not include any substantial evidence of mental incompetency to stand trial.

Compelling a defendant to stand trial while mentally incompetent is a denial of due process. (*Pate v. Robinson* (1966) 383 U.S. 375 [86 S.Ct. 836, 15 L.Ed.2d 815]; *People v. Lewis and Oliver* (2006) 39 Cal. 4th 970, 1047.) A criminal defendant is deemed competent to stand trial if he "'has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding'" and he "'has a rational as well as factual understanding of the proceedings against him.'" (*Godinez v. Moran* (1993) 509 U.S. 389, 396, 397-402 [113 S.Ct. 2680, 125 L.Ed.2d 321]; *Dusky v. United States* (1960) 362 U.S. 402, 402 [80 S.Ct. 788, 4 L.Ed.2d 824] (per curiam); *People v. Ary* (2011) 51 Cal.4th 510, 517.) An accused is entitled to a mental competency hearing if he presents substantial evidence that he is incapable, because of mental illness, of understanding the nature of the proceedings against him or of assisting in his defense in a rational manner, or "[i]f counsel informs the court that he or she believes the defendant is or may be mentally incompetent." (Pen. Code, §§ 1367, 1368; *People v. Marks* (2003) 31 Cal.4th 197, 214-215.)

Penal Code section 1368, subdivision (a), requires a trial court to suspend criminal proceedings at any time "prior to judgment" if the court reasonably doubts "the mental competence of the defendant." A defendant can create a bona fide doubt concerning his competency to stand trial through substantial evidence of mental incompetence, or the trial court can raise the issue on its own. (*People v. Ary, supra*, 51 Cal.4th at p. 517;

People v. Lewis (2008) 43 Cal.4th 415, 524; *People v. Blair* (2005) 36 Cal.4th 686, 711; see Pen. Code, § 1368, subds. (a), (b).) "Only when the accused presents 'substantial evidence' of incompetence does due process require a full competency hearing. [Citation.]" (*People v. Lewis and Oliver, supra*, 39 Cal. 4th at p. 1047.) "Evidence is not substantial enough to mandate a mental competence hearing unless it raises a reasonable doubt on the issue. [Citation.]" (*Ibid.*) Evidence is "substantial" if it raises a reasonable doubt about the defendant's ability to stand trial. (*People v. Jones* (1991) 53 Cal.3d 1115, 1152-1153.) Substantial evidence of incompetence may arise from several sources, including a defendant's own behavior. (*People v. Ramos* (2004) 34 Cal.4th 494, 507-508.)

When the trial court does not entertain a doubt as to a defendant's competence, the court is not required to hold a competency hearing. (*People v. Howard* (2011) 51 Cal.4th 15, 45.) "The court's decision whether to grant a competency hearing is reviewed under an abuse of discretion standard." (*People v. Ramos, supra*, 34 Cal.4th at p. 507.) The trial court's decision is entitled to deference because, unlike the reviewing court, the trial court has had the opportunity to observe the defendant during trial. (*People v. Howard, supra,* 51 Cal. 4th at p. 45.)

The Supreme Court has stated that "[r]equiring that a criminal defendant be competent has a modest aim: it seeks to ensure that the defendant has the capacity to understand the proceedings and to assist counsel." (*Godinez v. Moran, supra*, 509 U.S. at p. 402.) "When the evidence casting a doubt on an accused's present competence is less than substantial . . . [i]t is within the discretion of the trial judge whether to order a competency hearing." (*People v. Welch* (1999) 20 Cal.4th 701, 742.) A trial court's duty to conduct a competency hearing may arise at any time prior to judgment. (*People v. Rogers* (2006) 39 Cal.4th 826, 8479.)

Evidence of mental illness alone is insufficient to raise a doubt as to Ghobrial's competency. (*People v. Rogers, supra*, 39 Cal.4th at p. 849.) "[E]ven a history of serious mental illness does not necessarily constitute substantial evidence of incompetence that would require a court to declare a doubt concerning a defendant's competence and to conduct a hearing on that issue." *People v. Blair, supra*, 36 Cal.4th at p. 714.) The mere fact that Ghobrial had a diagnosed mental disorder and had been treated by a psychiatrist is not substantial evidence sufficient to raise a doubt about a defendant's current mental competence. (*People v. Deere* (1985) 41 Cal.3d 358, disapproved on other grounds in *People v. Bloom* (1989) 48 Cal.3d 1194, 1228, fn. 9 ["Evidence that merely raises a suspicion that the defendant lacks present sanity or competence but does not disclose a present inability because of mental illness to participate rationally in the trial is not deemed 'substantial' evidence requiring a competence hearing"]; *People v. Young* (2005) 34 Cal.4th 1149, 1217-1218 [finding a psychologist's testimony about defendant's mental condition insufficient when "he did not relate his findings in terms of defendant's competency to stand trial"]; *People v. Welch, supra*, 20 Cal.4th at p. 742 [explaining that more is necessary than psychiatric testimony that defendant is psychopathic "with little reference to his [his] ability to assist in his own defense"].)

> In *People v. Lewis, supra*, 43 Cal.4th at p. 524, this Court explained:
>
> 'Evidence of incompetency to stand trial may emanate from several sources, including the defendant's demeanor, irrational behavior, and prior mental evaluations.' [Citations omitted.] But to be entitled to a competency hearing, 'a defendant must exhibit more than bizarre... behavior, strange words, or a preexisting psychiatric condition that has little bearing on the question of whether the defendant can assist his defense counsel. [Citations omitted.]'

In this case, Ghobrial's father testified that Ghobrial had a history of mental illness and had undergone treatment of some kind while living in

Egypt. (10 RT 2449-2457.) While in custody awaiting trial, Ghobrial was assessed numerous times over more than three years. At times, he was seen talking to himself, and appeared to be responding to internal stimuli. He reported experiencing hallucinations, usually auditory, but occasionally visual or tactile. At other times, he denied having hallucinations, or reported decreased hallucinations. At least some members of the treatment team at times suspected Ghobrial of being manipulative or malingering. (See 9 RT 2177-2178, 2184; 10 RT 2263, 2297, 2483, 2486-2488, 2491-2492, 2494.) He was initially diagnosed with "psychosis, not otherwise specified," but was eventually diagnosed as suffering from schizoaffective disorder. (9 RT 2206; 10 RT 2429, 2276; 2297, 2308-2309, 2348-2349, 2467-2468, 2479, 2485, 2493, 2496-2498, 2518-2519; 11 RT 2590.) His treatment team prescribed several different antipsychotic and antidepressant medications with varying results. As of August 2001, Ghobrial was prescribed Seroquel and Risperdal, both antipsychotic medications, Paxil, an antidepressant, and Depakote, a mood stabilizer. (10 RT 2322-2323, 2326, 2520.)

Conspicuously absent from the mental health experts' penalty phase testimony was any testimony that Ghobrial was unable to understand the proceedings against him, or that he was unable to consult with his lawyers with a reasonable degree of rational understanding. (See *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1111 [defense psychiatrist's opinion without elaboration or details did not establish substantial evidence of incompetence].) Similarly, there was no testimony that any of the prescribed medications interfered with his ability to understand the proceedings or to assist with his defense. (See AOB 65-66.) In *People v. Danielson*, this court found that a defense psychiatrist's testimony that high doses of medication had been prescribed for defendant was not sufficient to raise a reasonable doubt as to defendant's competence. (*People v.*

Danielson (1992) 3 Cal.4th 691, 726-728, overruled on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069.)

Ghobrial points to testimony by Dr. Girgis and Dr. Flores-Lopez that he contends should have raised a doubt as to his competence. (AOB 58-63.) As neither of the psychiatrists testified that they had examined Ghobrial and found that he was incapable of understanding the criminal proceedings or is assisting in his defense, their testimony was not substantial evidence requiring a competency hearing.

> [I]f a qualified mental health expert who has examined the defendant "'states under oath with particularity that in his professional opinion the accused is, because of mental illness, incapable of understanding the purpose or nature of the criminal proceedings being taken against him or is incapable of assisting in his defense or cooperating with counsel,'" that is substantial evidence of incompetence. [Citations.]

(*People v. Lewis, supra*, 43 Cal.4th at p. 525.)

None of the mental health experts testified that they had examined Ghobrial and found him to be incompetent to stand trial. Dr. Girgis testified that Ghobrial's hallucinations interfered with his ability to communicate. (11 RT 2599, 2601.) Here, as in *Lewis*, Dr. Girgis's testimony said nothing about Ghobrial's competence to stand trial. Accordingly, that testimony was insufficient to raise a doubt about Ghobrial's competence.

Dr. Flores-Lopes testified that in April 1999, he had recommended that Ghobrial be sent to a mental hospital where he could be fully assessed to rule out malingering and to assess him for competency to stand trial:

> Q: Did you have a notation in that note about court proceedings as well at the end?
>
> A: On which note? April 7th?
>
> Q: I'm sorry. April 7th still.

A: Correct. I made the recommendation as well that I wasn't sure that he was competent. That he needed a competency assessment.

Q: And by competent, you meant competent to stand trial?

A: Correct.

Q: Competent to understand the nature of the proceedings against him?

A: Correct.

Q: Because of psychotic illness, correct?

A: Correct.

(10 RT 2492-2493.)

Dr. Flores-Lopez never gave an opinion that Ghobrial was incompetent. Instead, his testimony was merely that in April 1999, he recommended that Ghobrial be evaluated for competency and to rule out malingering. It does not appear from the record that such an evaluation was conducted. Moreover, Dr. Flores-Lopez's testimony was based on his examination of Ghobrial in 1999. Nothing in his testimony suggests that Ghobrial was incompetent at the time of trial in November - December 2001. There was no testimony regarding his mental health status or prescribed medications at the time of trial. Nothing in the record below suggests that Ghobrial exhibited any type of disruptive behavior or that his demeanor in the courtroom might have suggested to the trial court that he was incompetent to stand trial.

Ghobrial also contends his incompetency was demonstrated in the record through his father's testimony about Ghobrial's head injuries as a child, and by testimony that he beat his son very badly. (10 RT 2449, 2452-2453; see AOB 66.) A person with significant brain damage may nonetheless be competent to stand trial. (*People v. Leonard* (2007) 40

Cal.4th 1370, 1415-1416.) Additionally, the record fails to establish any correlation between these injuries and Ghobrial's competence to stand trial. Any speculation about possible brain injury is an untenable basis for finding the trial court erred in failing to declare a doubt as to Ghobrial's mental competency. (See *People v. Rodrigues, supra*, 8 Cal.4th at p. 1111 [statement by defense psychiatrist that he felt defendant had brain damage did not constitute substantial evidence of incompetence].)

Ghobrial also points to evidence of suicide attempts or ideation to support his claim that there was substantial evidence of incompetence. (AOB 64-65.) Although actual suicide attempts or ideation may, in combination with other factors, constitute substantial evidence raising a doubt as to mental competence to stand trial, any evidence of Ghobrial's suicidal tendencies were insufficient to require a competency hearing because they were not accompanied by any bizarre behavior, testimony of a mental health professional as to competence, or any indication of an inability to understand the proceedings or to assist counsel. (See *People v. Rogers, supra*, 39 Cal.4th at p. 848.)

Although Ghobrial relies on *Maxwell v. Roe* (9th Cir. 2010) 606 F.3d 561 (see AOB 43-44), that case is clearly distinguishable. In *Maxwell*, the defendant "had a "history of mental illness, frequently refused to take his prescribed antipsychotic medications, was unable to verbally or physically control himself in the courtroom, and exhibited increasingly paranoid and psychotic behavior that impaired his communication with defense counsel and reasoning regarding his defense. Furthermore, during the trial, [the defendant] attempted suicide and spent a substantial portion of the trial involuntarily committed to a hospital psychiatric ward." (*Id.* at p. 565.)

Similarly, in *Drope v. Missouri* (1975) 420 U.S. 162 [95 S.Ct. 896, 43 L.Ed.2d 103], the Supreme Court concluded the defendant had raised a sufficient doubt as to his competence to stand trial by a combination of

factors, including: (1) a pretrial psychiatric report that concluded the defendant suffered from "'[s]ociopathic personality disorder, sexual perversion,'" borderline mental deficiency, and chronic anxiety reaction with depression (*Drope v. Missouri* 420 U.S. at 164, fn. 1); (2) defendant's wife's testimony that the defendant tried to strangle her a few days before his trial began on charges he had forcibly raped her (*Id.* at p. 166); and (3) the defendant's suicide attempt during trial (*Id.* at pp. 167, 169).

No similar evidence was before the trial court in this case. Although there was testimony that Ghobrial, at certain points during treatment prior to his trial, might have met the criteria for commitment under Welfare and Institutions Code section 5150, or that his file had a "5150" flag to prevent his release without further evaluation (see 9 RT 2220, 2223; 10 RT 2241-2242, 2258), unlike the defendant in *Maxwell*, nothing before the trial court indicates that Ghobrial was involuntarily committed, either before or during the proceedings. Prior to trial, Ghobrial at times reported suicidal thoughts. (See 10 RT 2260-2261, 2405-2406 [March 1998]; 9 RT 2280, 2282-2283; 10 RT 2435 [September 1998]; 9 RT 2203 [March 2000]; 10 RT 2358-2359 [July 2001]). At times during his pretrial custody, Ghobrial had exhibited certain self-harming behaviors (9 RT 2169; 10 RT 2434-2435, 2481 [September 1998-tied string around his penis]; 9 RT 2170; 10 RT 2286-2287, 2467, 2485 [December 1998-abrasions to scrotum]; 10 RT 2299-2300, 2436 [June 1999-not eating]; 11 RT 2597-2598 [August 1999-reported hearing voices telling him to cut himself]; 10 RT 2441 [April 2000-reported trying to tie knot in his penis to stop his breathing]; 9 RT 2149, 2212; 10 RT 2410-2412 [July 2000-reported voice telling him to wrap sheet around penis, shaved his eyebrows, heard voices telling to pick at face and rub with butter and coffee grounds]; 9 RT 2215 [August 2000-"tying his penis"]; 10 RT 2236-2238 [December 2000-voices telling him to scratch himself and to pull his hair]; 10 RT 2419-2420 [March 2001-hair

pulling]; 9 RT 2152; 10RT 2356 [June 2001-hair pulling].) Apart from these instances, he denied any suicidal ideation. By August 2001, he denied having any hallucinations, or suicidal, homicidal, or paranoid thoughts (10 RT 2325, 2368.) In September 2001, his case manager noted that he was alert and coherent, with a pleasant mood and appropriate affect. (10 RT 2422.) There was no evidence that Ghobrial was suicidal during the proceedings, and nothing in his behavior or demeanor during trial suggested that he was mentally incompetent to stand trial.

In the present case, the fact that defense counsel did not declare a doubt as to Ghobrial's competency, while not dispositive, is significant because trial counsel interacts with the defendant on a daily basis and is in the best position to evaluate whether the defendant is able to participate meaningfully in the proceedings. (*People v. Rogers, supra,* 39 Cal.4th at p. 848.) That neither the trial judge, the prosecutor, nor defense counsel perceived cause to doubt Ghobrial's competence, were facts "deem[ed] significant" in *Hernandez v. Ylst* (9th Cir. 1991) 930 F.2d 714, 718. The failure of Ghobrial's attorney to raise the issue is "persuasive evidence" that Ghobrial's competence was not in doubt. (*Adams v. Wainwright* (11th Cir. 1985) 764 F.2d 1356, 1360.) As the United States Supreme Court noted, "defense counsel will often have the best-informed view of the defendant's ability to participate in his defense." (*Medina v. California* (1992) 505 U.S. 437, 450 [112 S.Ct. 2572, 120 L.Ed.2d 353] see also *People v. Howard* (1992) 1 Cal.4th 1132, 1164 [trial counsel's opinion about his client's competence, although not dispositive, is important consideration].)

Ghobrial's claim of error is belied by the fact that: (1) no mental health expert ever gave an opinion that he was incompetent; (2) defense trial counsel never declared a doubt as to Ghobrial's competence; and (3) the trial court's observations of Ghobrial did not provide any indication of mental incompetency. There was no basis for the trial court to declare a

doubt as to Ghobrial's mental competence. Given the absence of substantial evidence Ghobrial was mentally incompetent, this claim should be rejected.

II. GHOBRIAL'S DEATH SENTENCE DOES NOT CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT

Ghobrial contends his death sentence must be vacated because the Fifth, Sixth, Eighth and Fourteenth Amendments prohibit the imposition of the death penalty on people who are mentally ill. (AOB 74-93.) Ghobrial's contention is legally unsupportable.

In *Atkins v. Virginia* (2002) 536 U.S. 304, 321 [122 S.Ct. 2242, 153 L.Ed.2d 335], the United States Supreme Court held that execution of a mentally retarded defendant is cruel and unusual punishment under the Eighth Amendment. In *Roper v. Simmons* (2005) 543 U.S. 551 [125 S.Ct. 1183, 161 L.Ed.2d 1], the United States Supreme Court held that the Constitution precludes the execution of persons 17 or younger at the time of their crime.

Ghobrial contends that the rationales underlying *Atkins* and *Roper* apply equally to the execution of a criminal who is severely mentally ill. In *People v. Castaneda* (2011) 51 Cal.4th 1292, 1344-1345, this Court rejected the defendant's claim that his antisocial personality disorder was analogous to mental retardation or juvenile status for purposes of death-penalty eligibility under *Atkins v. Virginia,* and *Roper v. Simmons*. As in *Castaneda*, Ghobrial has not shown that his mental illness is analogous to either mental retardation or juvenile status.

"To decide whether evolving standards of decency dictate that death is an excessive punishment, the high court looks first to objective evidence." (*People v. Castaneda, supra*, 51 Cal.4th at p. 1344, citing *Atkins v. Virginia, supra*, 536 U.S. at p. 313.)

> [I]t is not the burden of [a state], however, to establish a national consensus approving what their citizens have voted to do; rather, it is the heavy burden of [the defendant] to establish a national consensus against it.

(*State v. Wilson, supra*, 413 S.E.2d at pp. 20-26, internal quotations omitted.)

Ghobrial fails to satisfy his burden of showing that a national legislative consensus has developed against the execution of mentally ill individuals, as was the case in *Atkins* with mentally retarded individuals. (*Atkins v. Virginia, supra*, 536 U.S. at pp. 314-317.) "In addition to considering objective evidence, the high court applies its own judgment, 'by asking whether there is reason to disagree with the judgment reached by the citizenry and its legislators.'" (*People v. Castaneda, supra,* 51 Cal.4th at p. 1344, quoting *Atkins v. Virginia, supra*, 536 U.S. at p. 313.)

Other federal and state courts have consistently declined to extend *Atkins* to the mentally ill. (See, e.g., *Joshua v. Adams* (9th Cir.2007) 231 Fed. Appx. 592, 593; *ShisInday v. Quarterman* (5th Cir. 2007) 511 F.3d 514, 521; *In re Neville*, 440 F.3d 220, 221 (5th Cir.2006); *Mays v. State* (Tex. 2010) 318 S.W.3d 368, 379-380; *Commonwealth v. Baumhammers* (Pa. 2008) 960 A.2d 59, 96-97; *Lawrence v. State* (Fla. 2007) 969 So.2d 294; *State v. Ketterer* (Ohio 2006) 855 N.E.2d 48; *Matheny v. State* (Ind. 2005) 833 N.E.2d 454; *State v. Johnson* (Mo. 2006) 207 S.W.3d 24, 51; *Lewis v. State* (Ga. 2005) 620 S.E.2d 778, 764; *State v. Hancock* (Ohio 2006) 840 N.E.2d 1032, 1059-1060.) Ghobrial provides no basis for this Court to conclude otherwise.

Ghobrial has not established the existence of a national consensus that the execution of mentally ill offenders is inconsistent with "evolving standards of decency." (*State v. Hancock, supra*, 108 Ohio St. 3d at p. 82, citing *Trop v. Dulles* (1958) 356 U.S. 86, 101 [78 S.Ct. 590, 2 L.Ed.2d 630] (plurality opinion); see also *State v. Wilson* (S.C. 1992) 413 S.E.2d 19, 23-

27 [death sentence for a person acting under an "irresistible impulse" to commit an offense due to mental illness does not constitute cruel and unusual punishment].)

Not every mental illness is comparable to mentally retarded and/or juvenile offenders with respect to reasoning, judgment, and impulse control. "Mental illnesses come in many forms; different illnesses may affect a defendant's moral responsibility or ability to be deterred in different ways and to different degrees." (*State v. Hancock, supra*, 840 N.E.2d at p. 1059.)

Capital defendants are permitted to present evidence of mental illness or impairment in mitigation. (Pen. Code, § 190.3, subd. (h).) This provides the individualized determination that the Eighth Amendment requires in capital cases. (*State v. Hancock, supra*, 108 Ohio St. 3d at p. 83.) Ghobrial asks this Court to establish a new, ill-defined category of capital murderers who would be exempt from the death penalty without an individualized balance of aggravating and mitigating factors specific to that case. Such a rule would constitute a significant and unwarranted extension of *Atkins* and *Roper*.

To the extent that Ghobrial relies on *Panetti v. Quarterman* (2007) 551 U.S. 930 [127 S.Ct. 2842, 168 L.Ed.2d 662] and *Ford v. Wainwright* (1986) 477 U.S. 399 [106 S.Ct. 2595, 91 L.Ed.2d 335] to suggest that he is incompetent to be executed (see AOB 90-91), such a claim is premature. The determination of whether a defendant is mentally competent to be executed is not determined until the defendant's execution date has been set. (*People v. Leonard, supra*, 40 Cal.4th at p. 1430, citing Penal Code § 3700.5.)

III. THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE FIRST DEGREE MURDER CONVICTION AND THE SPECIAL CIRCUMSTANCE FINDING

Ghobrial contends that there was insufficient evidence to support the conviction of first degree murder, as well as the true finding as to the special circumstance of murder in the commission of, or attempted commission of, child molestation. (AOB 94-127.) Not so. The evidence was not only sufficient, it was overwhelming, and the conviction and special circumstance finding must be affirmed.

The rules governing appellate review of sufficiency of the evidence are well established.

> [T]he court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence -- that is, evidence which is reasonable, credible, and of solid value -- such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.

(*People v. Johnson* (1980) 26 Cal.3d 557, 578; see also *People v. Ledesma* (2006) 39 Cal.4th 641, 722-723.)

A reviewing court must "presume in support of the judgment the existence of every fact the jury could reasonably infer from the evidence." (*People v. Bloyd* (1987) 43 Cal.3d 333, 346-347 [citations omitted]; see also *People v. Rayford* (1994) 9 Cal.4th 1, 23; *People v. Johnson, supra*, 26 Cal.3d at p. 576.) The question is, after drawing all inferences in favor of the judgment, could any rational trier of fact have found Ghobrial guilty beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 318-319 [99 S.Ct. 2781, 61 L.Ed.2d 560].) Before a judgment of conviction can be set aside for insufficiency of the evidence to support the trier of fact's verdict, it must clearly appear that upon no hypothesis whatever is there sufficient evidence to support it. (*People v. Bolin* (1998) 18 Cal.4th 297, 331; *People v. Redmond* (1969) 71 Cal.2d 745, 755.) In a case where

findings of the trial court are based upon circumstantial evidence, the reviewing court "must decide whether the circumstances reasonably justify the findings of the trier of fact. . . ." (*People v. Proctor* (1992) 4 Cal.4th 499, 528-529.) If the reviewing court finds "that the circumstances also might reasonably be reconciled with a contrary finding [it] would not warrant reversal of the judgment." (*Id.* at p. 529; accord, *People v. Cain* (1995) 10 Cal.4th 1, 39; see *People v. Ceja* (1993) 4 Cal.4th 1134, 1138 [a review of circumstantial evidence uses the same standard as sufficiency of the evidence].)

Although the reviewing court must ensure the evidence is reasonable, credible, and of solid value, it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206; *People v. Jones* (1990) 51 Cal.3d 294, 314.) Thus, if the verdict is supported by substantial evidence, the reviewing court must give due deference to the trier of fact and not substitute its evaluation of a witness's credibility for that of the fact finder. (*Ibid.*)

The same sufficiency-of-the-evidence standard applies to the jury's special circumstance finding. (*People v. Clark* (2011) 52 Cal.4th 856, 943.) Accordingly, a special circumstance finding may not be reversed simply because the circumstances might reasonably be reconciled with a contrary finding. The finding must be upheld if the circumstances reasonably support the jury's findings. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1129, overruled on other grounds in *People v. Rundle* (2008) 43 Cal.4th 76, 151.)

Ghobrial's contention that insufficient evidence supports his conviction is without merit. His conviction of first degree murder, and the true finding of the special circumstance must be affirmed.

A. There Was Sufficient Evidence That the Murder Was Premeditated

A murder that is premeditated and deliberate is murder in the first degree. (Pen. Code, § 189.) "Premeditated" means "considered beforehand," and "deliberate" means "formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action." (*People v. Mayfield* (1997) 14 Cal.4th 668, 767; see also *People v. Jurado* (2006) 38 Cal.4th 72, 118-119.) An intentional killing is premeditated and deliberate "if it occurred as the result of preexisting thought and reflection rather than unconsidered or rash impulse." (*People v. Stitely* (2005) 35 Cal.4th 514, 543 [108 P.3d 182, 26 Cal.Rptr.3d 1].) This Court has explained that:

> The process of premeditation and deliberation does not require any extended period of time. 'The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity, and cold, calculated judgment may be arrived at quickly. . . .'

(*People v. Mayfield, supra*, 14 Cal.4th at p. 767, quoting *People v. Thomas* (1945) 25 Cal.2d 880, 900.)

A reviewing court typically considers three kinds of evidence to determine whether a finding of premeditation and deliberation is adequately supported: preexisting motive, planning activity, and manner of killing. (*People v. Stitely, supra*, 35 Cal.4th at p. 543.) However, these factors "are not exclusive, nor are they invariably determinative." (*People v. Combs* (2005) 34 Cal.4th 821, 850.) The factors "need not be present in any particular combination to find substantial evidence of premeditation and deliberation." (*People v. Stitely, supra*, 35 Cal.4th at p. 543; *People v. Silva* (2001) 25 Cal.4th 345, 368.) The factors serve to "guide an appellate court's assessment whether the evidence supports an inference that the killing occurred as the result of preexisting reflection rather than

unconsidered or rash impulse." (*People v. Bolin, supra*, 18 Cal.4th 297, 331-332.) In conducting this analysis, a reviewing court draws all reasonable inferences necessary to support the judgment. (*People v. Stitely, supra*, 35 Cal.4th at p. 543.)

Here, Ghobrial's actions before the crime support a finding that the killing was premeditated and deliberate. Although the manner of killing was unclear, the other two factors identified by this Court as an aid to determining premeditation and deliberation—preexisting motive and planning activity—support Ghobrial's conviction for first degree murder.

Ghobrial threatened to kill Juan only a few weeks before the murder. (6 RT 1321-1324, 1329-1330.) Juan was teasing Ghobrial outside a liquor store and Ghobrial became angry and frustrated. (6 RT 1324, 1330-1335.)

Juan approached a bystander, Solano, and told him that Ghobrial was going to kill him. Solano thought Juan was kidding, but told Juan "But if he keeps bothering you, go and tell the guy from the liquor store to call the police." (6 RT 1327-1328.)

Solano heard Ghobrial tell Juan, "I am going to kill you. I will kill you and eat your pee-pee." (6 RT 1327.) He repeated the statement several times. (6 RT 1327-1328, 1338-1339.) Less than a month later, Juan was dead. (7 RT 1516-1517.) His penis was never found. (7 RT 1458-1459, 1465-1467.)

Juan's last day at school was March 17. (8 RT 1827.) Juan spent that night with his classmate, Cipriano Flores. The next morning, Cipriano's mother dropped them off at school, although Juan did not go in. (8 RT 1752-1759.) Josefina Gomez saw Juan with Ghobrial outside her family's restaurant on La Habra Boulevard after school, between 3:00 and 4:00 p.m. on March 18. (6 RT 1310-1311.) Juan spent that evening with Flores at Flores's apartment, but Cipriano's mother drove him home later that same evening, around 8 or 9:00 p.m. (8 RT 1760-1764, 1772.)

Ghobrial's purchases at Kmart were made shortly after midnight on Thursday, March 19, only a few hours after Mrs. Flores dropped Juan off at home. (6 RT 1346-1347) His purchases at Home Depot were made in the early afternoon on March 19. (6 RT 1361-1362, 1367.) The concrete cylinders containing Juan's remains were not found until the morning of March 21, 1998. (6 RT 1429-1431, 1518-1519.)

There was no testimony establishing Juan's precise time of death. Although the prosecutor did not argue that Ghobrial's purchases occurred prior to the killing, the jury could have properly inferred that Ghobrial's purchases were made prior to Juan's death. Thus, Ghobrial's purchase of the stockpot, knives, cutting boards, and skillets, or even the cement mix, wire and other items used to dispose of the body, could properly have been considered by the jury as evidence that Ghobrial planned the killing.

This evidence supports an inference that the killings occurred "as the result of preexisting reflection rather than unconsidered or rash impulse." (*People v. Bolin, supra,* 18 Cal.4th at pp. 331-332.) Ghobrial's earlier threat to Juan and the purchase of these items makes it "reasonable to infer that he considered the possibility of homicide from the outset." (*People v. Alcala* (1984) 36 Cal.3d 604, 626; see also *People v. Marks, supra*, 31 Cal.4th at p. 232; *People v. Steele* (2002) 27 Cal.4th 1230, 1250 [defendant's act of carrying knife to victim's residence demonstrates planning].)

Even assuming that Ghobrial's purchases took place after Juan was already dead, Ghobrial's actions in dismembering and disposing of the body would appear to be inconsistent with a state of mind that would have produced a rash, impulsive killing. (See *People v. Perez* (1992) 2 Cal.4th 1117, 1128.) Ghobrial's conduct after the killing, while perhaps not sufficient in itself to establish premeditation and deliberation, are facts

which a jury could reasonably consider in finding premeditation and deliberation. (*People v. Perez, supra*, 2 Cal.4th 1117, 1128.)

Finally, Ghobrial had a motive to kill Juan. The jury could have properly inferred that having committed or attempted to commit a lewd act on the child, Ghobrial determined it was necessary to kill Juan to prevent him from identifying him, or telling the others what he did. (See *People v. Memro* (1995) 11 Cal.4th 786, 863.) A trier of fact could have reasonably found that Ghobrial "killed [Juan] in a cold and calculated attempt to silence [him]." (*People v. Booker* (2011) 51 Cal.4th 141, 173.)

Ghobrial's argument ignores the standard of review for allegedly insufficient evidence, and instead argues his version of the events rather than facts and inferences to be drawn in favor of the verdict. Thus, he contends the evidence showed that Ghobrial had "no weapon" and "had made no preparation for disposing of the body" until after the killing. (See AOB 100.) He also contends the murder was not premeditated and deliberate because the evidence suggests the killing might have been an accidental asphyxiation. (AOB 103-104.) In reviewing a claim of insufficient evidence, it is irrelevant that evidence presented at trial was possibly consistent with a different interpretation than the one found by the jury. (*People v. Proctor, supra*, 4 Cal.4th at p. 529.) Instead, a reviewing court presumes the existence of every fact in support of the judgment that the jury "could reasonably infer from the evidence." (*People v. Bloyd, supra,* 43 Cal.3d at pp. 346-347.) After having drawn all inferences in favor of the judgment, the reviewing court then determines whether "any rational trier of fact" could have found the defendant guilty beyond a reasonable doubt. (*Jackson v. Virginia, supra*, 443 U.S. at pp. 318-319.)

Considering the totality of the evidence here, and presuming the existence of every fact in support of the judgment that the jury could

reasonably infer from the evidence here, substantial evidence of premeditation and deliberation existed, and this claim must be rejected.

Even assuming that there is not sufficient evidence to support a finding of premeditation and deliberation, the conviction of first degree murder must be affirmed because the jury affirmatively found the special circumstance to be true. (2 CT 485; 9 RT 2040.) If one theory of liability is found to be unsupported by 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. Johnson* (1993) 6 Cal.4th 1, 42; see also *People v. Kelly* (2007) 42 Cal.4th 763, 789 [true findings of rape and robbery special circumstances make it unnecessary to determine whether the murder was premeditated].)

B. There Was Sufficient Evidence of Felony Murder Based on Actual or Attempted Molestation of Juan Delgado as Well as the Special Circumstance of Murder in the Course of Actual or Attempted Molestation

Ghobrial contends there was insufficient evidence the murder was committed in the course of an attempted or actual forcible lewd conduct with a child under fourteen, and therefore there was insufficient proof of first degree felony murder. For the same reasons, he argues there was insufficient evidence to support the true finding as to the special circumstance. He submits there was insufficient evidence (1) that he touched or attempted to touch Juan in a lewd manner, (2) that he did so with the required intent, or (3) that Juan was under 14 at the time of his murder. (AOB 107-126.) He misconstrues the evidence and the standard of review. Because substantial evidence supported both the felony murder conviction and the special circumstance finding, Ghobrial's argument fails.

A killing which is committed "in the perpetration of, or attempt to perpetrate" a lewd act on a child under fourteen is first degree murder. (Pen. Code, § 189.)

The homicide is committed in the perpetration of the felony if the two were parts of "one continuous transaction." (*People v. Sakarias* (2000) 22 Cal.4th 596, 624, quoting *People v. Mason* (1960) 54 Cal.2d 164, 168-169.) "'There is no requirement of a strict "causal" [citation] or "temporal" [citation] relationship between the "felony" and the "murder."'" (*People v. Hart* (1999) 20 Cal.4th 546, 611, citing *People v. Berryman* (1993) 6 Cal.4th 1048, 1085.) The "killing need not occur in the midst of the commission of the felony, so long as the felony is not merely incidental to, or an afterthought to, the killing." (*People v. Elliott* (2005) 37 Cal.4th 453, 469, quoting *People v. Proctor, supra,* 4 Cal.4th at p. 532.)

Penal Code section 288, subdivision (a), prohibits "willfully and lewdly commit[ing] any lewd or lascivious act,..., upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child...." Subdivision (b)(1) prohibits a lewd act committed by "use of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person...."

For felony murder, the required mental state is the specific intent to commit the underlying felony. (*People v. Friend* (2009) 47 Cal.4th 1, 49.) "'Because intent for purposes of Penal Code section 288 can seldom be proven by direct evidence, it may be inferred from the circumstances.'" (*In re Mariah T.* (2008) 159 Cal.App.4th 428, 440 quoting *People v. Mullens* (2004) 119 Cal.App.4th 648, 662.) In deciding whether to infer specific intent, "the trier of fact has always been free to consider the relationship of the parties, the nature of the touching, and the presence or absence of any

nonsexual purpose under section 288." (*People. v. Martinez* (1995) 11 Cal.4th 434, 450, fn. 16.)

Ghobrial points to a lack of physical evidence that he attempted any lewd behavior with Juan (AOB 108-111), or evidence that he did so with the required sexual intent (AOB 112-119). Contrary to his assertions, the evidence was overwhelming that Ghobrial committed or attempted a lewd act. Sperm cells were found inside Juan's rectum. (7 RT 1621, 1630; 8 RT 1711, 1840-1843.) This, in itself, is sufficient evidence for the jury to find that Ghobrial committed a lewd act. (*People v. Thompson* (1990) 50 Cal.3d 134, 170 [finding of sperm in the victim's anus is in itself sufficient evidence of sodomy].) Moreover, the victim's body was found nude—his clothing had been removed and was later found on a shelf inside Ghobrial's shed. (6 RT 1297-1298.) As this Court recently stated, "the circumstance of the victim's being found partially or wholly unclothed is not by itself sufficient to prove a rape or an attempted rape has occurred, [but] such a fact is not irrelevant and is one of the relevant circumstances." (*People v. Rundle*, *supra*, 43 Cal.4th at p. 139; see also *People v. Holloway* (2004) 33 Cal.4th 96, 138-139 [sufficient evidence of intent to rape, even in the absence of physical evidence the victim suffered a sexual assault].) And as the prosecutor noted, the fact that Juan's penis had been severed from the rest of his body (7 RT 1458-1459, 1465-1467) and was never recovered, strongly suggested that the crime was sexually motivated. (See, e.g. *People v. Guerra, supra*, 37 Cal.4th at pp. 1131-1132 [defendant's escalating sexual interest and knife wounds on victim's breasts supported inference that he committed attempted rape].) Ghobrial's contention that the "more reasonable" inference is that he ate the penis (AOB 116) ignores the applicable standard of review which does not entail reweighing the evidence and requires that the evidence be viewed in the light most favorable to the judgment. (*Jackson v. Virginia, supra*, 443 U.S. at pp.

318-319; *People v. Booker, supra*, 51 Cal.4th 141. 173.) Accordingly, even assuming arguendo, that Ghobrial's eating Juan's penis is a reasonable inference to be drawn from the evidence, it would not negate the reasonable inference from the evidence of a sexual motivation in severing Juan's penis.

Ghobrial points to the lack of trauma to Juan's body (apart from the dismemberment) and the lack of anal tearing or semen to argue that there was insufficient evidence to support the felony murder or special circumstance. But Juan's pelvis was not recovered for more than a year after the death. (7 RT 1458, 1579-1580.) The anal area was dehydrated, contained a large amount of concrete, and showed signs of decomposition. (7 RT 1505.) Dr. Singhiana testified that she could not say conclusively that there were no tears in the anus, but only that she was unable to identify any tears, due at least in part to the condition of the body. (7 RT 1505-1506.) As this Court has pointed out, it is more likely, when a victim is discovered a relatively short time after the crime, that the victim's body will show evidence of a sexual assault—such as trauma to the body or sexual organs, or the presence of the perpetrator's bodily fluids. The absence of such evidence in such a case may be strong evidence the defendant did not have, or did not intend to have, sexual contact with the victim. By contrast, the absence of such evidence is inconclusive and does not tend to eliminate a sexual assault, depending on the nature of the crime scene or when the body is found in an advanced state of decomposition. (*People v. Rundle, supra*, 43 Cal.4th at p. 139.) Having drawn all inferences in favor of the judgment, a rational jury could easily have found that the murder occurred during the commission of, or attempted commission of a lewd act on a child.

Ghobrial also challenges the adequacy of the evidence in support of the felony murder conviction and the lewd act special circumstance, contending that the prosecution failed to establish that Juan was alive when

the sexual assault was committed. (AOB 119-120.) There is no requirement that the victim actually be alive to support the attempted lewd act special circumstance if Ghobrial intended to commit the lewd act with a live body. (See *People v. Thompson* (1993) 12 Cal.App.4th 195, 201-202 [discussing attempted rape special circumstance].)

When an individual attempts to rape or molest a victim, reasonably or mistakenly believing that the victim is alive, the perpetrator is guilty of having attempted the underlying felony. (See *People v. Hart, supra,* 20 Cal.4th at p. 611.) One who attempts to rape a live victim, kills the victim in the attempt, then has intercourse with the body, has committed only attempted rape, not actual rape, but is guilty of felony murder. (*People v. Booker, supra*, 51 Cal.4th at p. 175; *People v. Lewis* (2009) 46 Cal.4th 1255, 1299; *People v. Huggins* (2006) 38 Cal.4th 175, 218.) Where a defendant intends to commit a sexual assault but fails to accomplish that purpose while the victim is alive, the felony murder special circumstance is not negated by intercourse after death. (*People v. Lewis, supra,* 46 Cal.4th at p.1299; *People v. Kelly* (1992) 1 Cal. 4th 495, 525 ["it . . . does not matter whether actual penetration did not occur until after death for purposes of the special circumstance"].)

Lastly, Ghobrial contends there was insufficient evidence that Juan was under 14 at the time of the killing. (AOB 119-120.) To prove the commission of a lewd or lascivious act on a child under the age of 14, there must be competent proof that the child was less than 14 years old. (Pen. Code, § 288; *People v. Adams* (1935) 7 Cal.App.2d 743, 746, citing *People v. Levoy* (1920) 49 Cal.App. 770, 771.) Juan's brother, Jorge Delgado, was 18 at the time he testified in November 2001, and thus, would have been 14 or 15 when the murder occurred. Juan was younger than Jorge. (6 RT 1295.) More specifically, Armando Luna, a classmate of Juan's, testified that both he and Juan were 12 years old and in seventh grade in March

1998. (6 RT 1300-1301.) "[U]nless the testimony is physically impossible or inherently improbable, testimony of a single witness is sufficient to support a conviction." (*People v. Young, supra,* 34 Cal.4th at p. 1181, citing *People v. Allen* (1985) 165 Cal.App.3d 616, 623.) Sufficient evidence supports the jury's finding that Juan was a child under 14.

In sum, the jury was presented with substantial direct and circumstantial evidence from which it could reasonably conclude that Ghobrial committed or attempted to commit a lewd act on a child. Thus, the evidence supported the jury's conviction of first degree murder on a felony murder theory as well as the true finding as to the lewd act special circumstance.

IV. THE TRIAL COURT PROPERLY EXCLUDED EVIDENCE THAT JUAN DELGADO SOUGHT OUT THE COMPANY OF ADULT MEN

Ghobrial contends the trial court violated his rights to present a defense, to a fair trial, and to a reliable guilt and penalty determination when it excluded evidence that the victim was known to seek out the company of adult men. (AOB 128-140.) The trial court properly exercised its discretion and did not violate Ghobrial's constitutional rights in excluding the evidence because it was irrelevant.

A. The Proffered Evidence and the Trial Court's Ruling

During his opening statement, Ghobrial's defense counsel told the jury that he "wanted to tell them about the victim." The prosecution objected, arguing that the victim's background was irrelevant. (5 RT 1235.) Defense counsel argued that the victim's background was relevant to show that Ghobrial and the victim had a relationship not based on Ghobrial's sexual desire. (5 RT 1237.) Defense counsel said that defense witnesses would testify that Juan Delgado sought out adults, and attached himself to other adults. Counsel argued that the evidence was relevant to

negate any presumption that Ghobrial was motivated by lewd intent toward Delgado. (5 RT 1237.)

The trial court overruled the objection and the opening statement continued. (5 RT 1238.) Defense counsel told the jury that Juan hung out at the strip mall across the street from his home for hours, well into the evening and night. (5 RT 1239-1241.) Counsel mentioned the manager of a nearby market who was expected to say that Juan liked to hang out and talk with Antonio, an employee who worked in the meat department. (5 RT 1241-1242.) Other witnesses would say that he spent time with an adult male who worked a local gas station. (5 RT 1242.) Defense counsel also told the jury that Pat Norman would testify that Juan approached her at the Taco Bell. (5 RT 1244.1245.) When defense counsel went on to describe other witnesses that saw Juan at the same strip mall, speaking to other customers, the prosecutor objected as irrelevant. The trial court sustained the objection. (5 RT 1245-1250.)

When argument resumed the next day, defense counsel told the jury that Juan would often approach and try to befriend other adults. The trial court sustained the prosecutor's objection that the information was irrelevant and cumulative. (6 RT 1270-1271.)

At trial, as the prosecution's case-in-chief was coming to a close, defense counsel filed an offer of proof regarding several witnesses the defense intended to call to show that Juan sought out and "was comfortable with companionship with strange adults." (2 CT 381.)

- According to the defense, Imran Bholat would testify that when he worked at a market in La Habra, Juan liked to hang around with Antonio, who worked in the meat department. (2 CT 381.)

- Isabel Camacho would testify that Juan frequently visited the Juan Pollo Chicken restaurant. He could not stand still. She gave him lemons and water to make lemonade. (2 CT 382.)
- Cesar Garcia saw Juan at Juan Pollo beginning around January 1998, eventually as often as once or twice a week. He was not clean and his hair was uncombed. He seemed to be streetwise and in control. (2 CT 382.)
- Hortensia Cisneros saw Juan panhandling for money near a Taco Bell in La Habra. (2 CT 382.)
- Patti Norman saw Juan at Taco Bell about a week before the murder. Juan approached her table. She bought him a burrito. He left when she did, "walking very close to her." After leaving, Juan walked toward a man standing near the nearby market. (2 CT 382.)
- Rosario Serrano saw Juan at Taco Bell almost every day. He spoke to other customers, asking for "game pieces." He opened the door for other customers and picked up items they had dropped. (2 CT 383.)
- Diane Hujhsman worked at Farr's Stationary in La Habra. She saw Juan walk past the store on a Wednesday evening about a week and a half before the murder. The next Saturday, Juan was at the store for two hours, talking to other customers. He returned twice more that day, and again on Sunday. On Sunday, he stayed for two hours and asked customers for money. She called police because she was worried about him. He came back to the store again around 4:30 or 5:00 the same day. She saw him walking towards Taco Bell at about 8:30 that night. (2 CT 383.)

- Aubrey Chapman also works at Farr's Stationary. She saw him several times on Sunday, March 15. He was "shadowing" people in the parking lot. She called police, who came and spoke to Juan. (2 CT 383.)
- Krisha Garcia saw Juan at Pic 'N' Save at least two nights a week. He would get "very close" to customers. (2 CT 383.)
- Oscar Leon saw Juan on February 20, 1998, at a donut shop between 11:00 p.m. and 12:00 a.m. Juan asked to play a video game with him. Juan asked Leon to take him to look for his mother. Leon took Juan to two nearby grocery stores, but they could not find her. Juan tried to give Leon directions to his house, but did not know his address. Juan cried when Leon mentioned calling the police. Leon took him back to the donut shop, but the two fell asleep in the car. Leon took Juan to the police station at around 6:00 a.m. (2 CT 384.)
- Juan Duarte, the victim's classmate, would testify that Juan went to his house a week or two before the murder. At around 9:00 p.m., he asked Duarte to ask if he could spend the night. Duarte's father said no and asked where he lived so that he could drive him home. Juan did not want to go home, and said that he was going to see his aunt. Juan told Duarte that he did not like being at home. (2 CT 384-385.)

Defense counsel argued the proposed testimony was relevant to show that Juan was a child who avoided going home and latched onto strange adults. Counsel contended this negated the presumption that Ghobrial sought out the victim for sexual purposes. Defense further argued that it was relevant to show that other adults could have been the source of sperm found in Juan's anus. (2 CT 385.)

At a December 4, 2001 hearing on the admissibility of the proffered testimony, defense counsel explained that some defense witnesses were expected to testify that they saw the victim on the days leading up to his death, but that others would be asked to testify as to the victim's behavior in the months leading up to his death. (8 RT 1670-1671.) The trial court noted that it had read defense counsel's offer of proof, but did not think the evidence was relevant. (8 RT 1671.) Defense counsel suggested that the testimony was relevant to show that Juan was trying to avoid his home, and that he was seeking out other places to spend the night. Counsel argued the testimony was relevant to negate any inference that Ghobrial lured Juan to the shed in order to molest him. (8 RT 1671-1672.)

The trial court found that absent an allegation of kidnapping or false imprisonment, how Juan got to Ghobrial's shed or why he went there was irrelevant. (8 RT 1672.) The prosecutor agreed that there was no doubt there was a friendship between Ghobrial and Juan, and that there was no evidence to suggest that Ghobrial lured Juan to the shed, arguing that Juan's motive for going to the shed was not relevant. (8 RT 1674-1675.)

The trial court further noted that there was already evidence that Juan had received detention for not going to classes, and that his brother testified that he spent time away from the home, thus the additional testimony was unnecessary. (8 RT 1675.) The court reasoned that with evidence of a non-threatening friendly relationship established, and absent any evidence that Juan was lured to the shed or forcibly abducted, the proffered evidence was not relevant. (8 RT 1675-1679.)

The trial court also indicated that it would allow witnesses to testify as to Juan's actions after March 17, but sustained the prosecution's objections to the remaining testimony. (8 RT 1678-1679.) Defense counsel asked the trial court to reconsider the admissibility of Oscar Leon's testimony, arguing that Juan not only asked his classmates to let him spend the night at

their houses, he also sought out unknown male adults and tried to manipulate them into giving him a place to stay. (8 RT 1681-1687.) The prosecution responded that the testimony was irrelevant and cumulative, and that the victim's state of mind was not at issue. (8 RT 1683-1684.)

The trial court determined that the testimony was not relevant, and might be used to infer that the victim was promiscuous. (8 RT 1685.) The trial court reiterated its decision that the testimony was inadmissible, finding that it was irrelevant, speculative, and unduly time-consuming. (8 RT 1687.)

B. The Trial Court Properly Exercised Its Discretion in Excluding the Proffered Testimony

Only relevant evidence is admissible, and all relevant evidence is admissible unless excluded under the federal or California Constitution or by statute. (Evid. Code §§ 350, 351; *People v. Scheid* (1997) 16 Cal.4th 1, 13-14.) Relevant evidence is defined as evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) "The test of relevance is whether the evidence tends 'logically, naturally, and by reasonable inference' to establish material facts such as identity, intent, or motive." (*People v. Hamilton* (2009) 45 Cal.4th 863, 913.) Trial courts have broad discretion in relevancy determinations, but lack "discretion to admit irrelevant evidence." (*Ibid.*)

In this case, evidence that Juan sometimes sought out the company of other adults was simply not relevant. Defense counsel argued that the evidence was relevant to explain Juan's motivation for seeking out Ghobrial or accompanying him to the shed. However, Juan's motivation or intent in spending time with Ghobrial was not at issue, and does nothing to prove or disprove whether Ghobrial himself sought out Juan for sexual

purposes. As such, the trial court properly excluded the testimony as irrelevant.

Defense counsel further argued that the evidence was relevant to show that other adults could have been the source of sperm found in Juan's anus. (2 CT 385.) The proffered evidence was too tenuous and speculative to be admitted as third party culpability evidence.

Third party culpability evidence, like other types of exculpatory evidence, is admissible only if it is relevant, and its probative value is not substantially outweighed by the dangers of undue prejudice, delay, or confusion of the issues. (*People v. Hamilton, supra*, 45 Cal.4th at p. 913.) Thus, courts are not required to admit any evidence, regardless of remoteness, to show a third person's possible culpability. (*People v. Prince* (2007) 40 Cal.4th 1179, 1242.) Instead, to be admissible, third party culpability evidence must "be capable of raising a reasonable doubt of defendant's guilt." (*People v. Hall* (1986) 41 Cal.3d 826, 833-834; see also *Holmes v. South Carolina* (2006) 547 U.S. 319, 327, fn. * [126 S.Ct. 1727, 164 L.Ed.2d 503], citing *People v. Hall, supra*, as an example of a widely accepted third party culpability evidence rule.) Evidence of another person's motive or opportunity to commit a crime, without more, is insufficient to raise a reasonable doubt about a defendant's guilt. "[T]here must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime." (*People v. Hall, supra*, 41 Cal.3d at p. 833.)

In this case, the testimony could not have connected another person to the crime in any manner. The mere fact that Juan spent time with other adult males is irrelevant without some link between these men and Juan's sexual assault and murder. Accordingly, the trial court properly exercised its discretion in excluding the testimony, because it was inadmissible as third party culpability evidence and irrelevant. (See e.g., *People v.*

Hamilton, supra, 45 Cal.4th at p. 913 [trial court properly excluded proffered third party culpability evidence in penalty phase where evidence did nothing to connect third party to crime in any manner]; *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1136-1137 [trial court properly excluded evidence that "Pablo or some other third party involved in drug trafficking had a motive or possible opportunity" to commit the murder]; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1018 [trial court properly excluded evidence victim associated with Hell's Angels members and drug dealers, because the evidence failed to identify a possible suspect apart from defendant, did not link any third party to the commission of the crime, and did not establish an actual motive for murder, only a potential one].) Because there was no state law error, Ghobrial's constitutional claims also fail. (*People v. Prince, supra,* 40 Cal.4th at p. 1243; *People v. Panah* (2005) 35 Cal.4th 395, 482, fn. 31.)

Even if the trial court had erred in excluding the witnesses' testimony, the error was harmless. Given the absence of evidence linking any of these other men (or women) to Juan's death, and given the evidence found in Ghobrial's shed and the witnesses that observed him planning and carrying out the disposal of Juan's body, there is no reasonable possibility that Ghobrial would have received a more favorable outcome but for the exclusion of this testimony.

V. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON FIRST DEGREE PREMEDITATED MURDER AND FIRST DEGREE FELONY MURDER

Ghobrial contends the trial court erred by instructing the jury on first degree premeditated murder and first degree felony murder because the information charged him only with second degree malice murder in violation of Penal Code section 187 and not first degree murder in violation of section 189. (AOB 141-147.) This Court has repeatedly held that "a

defendant may be convicted of first degree murder even though the indictment or information charged only murder with malice in violation of section 187." (*People v. Famalaro* (2011) 52 Cal.4th 1, 37; *People v. Brasure* (2008) 42 Cal.4th 1037, 1057-1058; *People v. Morgan* (2007) 42 Cal.4th 593, 616-617; *People v. Geier* (2007) 41 Cal.4th 555, 591-592; *People v. Carey* (2007) 41 Cal.4th 109, 131-132; *People v. Hughes* (2002) 27 Cal.4th 287, 368-370.) Ghobrial offers no cogent reason to hold otherwise. The information here also alleged lewd act upon a child special circumstances, putting him on notice that the prosecution was proceeding on a felony-murder theory. (*People v. Morgan, supra*, 42 Cal.4th at pp. 616-617; *People v. Carey, supra*, 41 Cal.4th at p. 132.)

In *People v. Famalaro, supra*, 52 Cal.4th at p. 37, this Court also rejected the claim that the United States Supreme Court's decision in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435] requires the indictment or information to specifically plead first degree murder. The Court noted that even assuming that a fact increasing the maximum penalty must be pleaded with greater specificity under *Apprendi*, both second degree murder and first degree murder in the absence of special circumstances carry a maximum penalty of life in prison. And even though the defendant in *Famalaro* was sentenced to death, a greater punishment than life in prison, the special circumstance allegations that made him eligible for the death penalty were specifically pleaded. *(Ibid.)* Here, as was the case in *Famalaro*, the information charged Ghobrial with murder in violation of section 187 and specifically alleged the special circumstance that made him eligible for the death penalty. (1 CT 87-88.) No greater specificity in pleading was required.

VI. THE JURY WAS NOT REQUIRED TO AGREE UNANIMOUSLY AS TO THE THEORY OF FIRST DEGREE MURDER

Ghobrial contends the trial court erred in failing to instruct the jury that it had to agree unanimously on a theory of first degree murder in order to convict him of that charge. (AOB 148-158.) As he acknowledges in his opening brief (AOB 148), this court has repeatedly rejected identical claims. (See *People v. Famalaro, supra*, 52 Cal.4th at p. 38; *People v. Loker* (2008) 44 Cal.4th 691, 707-708; *People v. Morgan, supra*, 42 Cal.4th at p. 617; *People v. Nakahara* (2003) 30 Cal.4th 705, 712.) Ghobrial offers no legal or factual basis for this Court reconsidering the issue.

VII. THERE WAS NO INSTRUCTIONAL ERROR

Ghobrial contends guilt phase instructional errors were prejudicial and violated his rights to due process, a fair trial, to trial by jury, and to a reliable verdict. (AOB 159-174.) Specifically, he claims: (1) that giving CALJIC No. 2.01 (Sufficiency of Circumstantial Evidence), No. 2.02 (Sufficiency of Circumstantial Evidence to Prove Specific Intent or Mental State), No.8.83 (Special Circumstances—Sufficiency of Circumstantial Evidence), and No. 8.83.1 (Special Circumstances—Sufficiency of Circumstantial Evidence to Prove Required Mental State) undermined the requirement of proof beyond a reasonable doubt (AOB 160-165); and (2) that the provisions of CALJIC Nos. 2.01 (Sufficiency of Circumstantial Evidence), 2.21.1 (Discrepancies in Testimony), 2.21.2 (Witness Willfully False), 2.22 (Weighing Conflicting Testimony), 2.27 (Sufficiency of Testimony of One Witness), and 8.20 (Deliberate and Premeditated Murder) vitiated the reasonable doubt standard (AOB 165-169). He acknowledges that this Court has previously rejected constitutional challenges to these instructions but asks this Court to reconsider its prior rulings upholding the challenged instructions. (AOB 170-172.) His contentions lack merit and should be rejected.

This Court has repeatedly rejected claims identical to those Ghobrial raises here, and should do so again. The jury was instructed with CALJIC No. 2.90 (Presumption of Innocence—Reasonable Doubt—Burden of Proof) (2 CT 454; 9 RT 2013.) This instruction correctly defines reasonable doubt. (*People v. Turner* (1994) 8 Cal.4th 137, 203.) CALJIC No. 2.90 on the presumption of innocence and reasonable doubt satisfies due process. (*People v. Rundle, supra*, 43 Cal.4th at p. 155; *People v. Rogers, supra*, 39 Cal.4th at p. 889.)

CALJIC Nos. 2.01, 2.02, 8.83, and 8.83.1, which refer to an interpretation of the evidence that "appears to you to be reasonable," do not dilute the prosecution's burden of proof. (*People v. Hughes, supra,* 27 Cal.4th at pp. 346-347.) In *People v. Wilson* (2008) 43 Cal.4th 1, 23, this Court held that instruction with CALJIC Nos. 2.01 and 8.83.1 does not create an impermissible mandatory conclusive presumption of guilt, nor permit the jury to determine guilt based on something less than proof beyond a reasonable doubt.

When accompanied by the usual instructions on reasonable doubt, the presumption of innocence, and the People's burden of proof, instruction with CALJIC Nos. 2.01, 2.02, 2.21.1, 2.21.2, 2.27, 8.83, and 8.83.1 is unobjectionable. (*People v. Howard* (2008) 42 Cal.4th 1000, 1026.) The burden of proof beyond a reasonable doubt is not reduced by instruction with CALJIC Nos. 2.90, 2.01, 2.02, 8.83, 8.83.1, 1.00, 2.51, 2.21.1, 2.21.2, 2.22, 2,27, and 8.20. (*People v. Friend, supra,* 47 Cal.4th at p. 53.) In *People v. McKinnon* (2011) 52 Cal.4th 610, 677, this Court reaffirmed that instruction with CALJIC Nos. 2.02, 2.21.2, 2.22, and 8.20 does not impermissibly lessen the prosecution's burden of proof. (See also *People v. Rogers, supra*, 39 Cal.4th at p. 889 [CALJIC Nos. 2.01, 2.02, 2.21.2, 2.22, and 2.27 do not lessen or shift burden of proof].) CALJIC No. 2.21.2 does not lower the beyond-a-reasonable-doubt standard. (*People v. Carey,*

supra, 41 Cal.4th at pp. 130-131; *People v. Maury* (2003) 30 Cal.4th 342, 428-429; *People v. Nakahara, supra*, 30 Cal.4th at p. 714.) CALJIC No. 2.22 does not effectively replace the beyond-a-reasonable-doubt standard with a preponderance-of-the-evidence standard. (*People v. Carey, supra,* 41 Cal.4th at p. 131.) Nor does CALJIC No. 2.27 erroneously suggest to the jury that both the prosecution and the defense have the burden to prove facts. (*Ibid.*) In *People v. Montiel* (1993) 5 Cal.4th 877, this court held that when read in context with the other instructions, CALJIC No. 2.27 in no way lessens the prosecution's burden of proof. (*Id.* at p. 941; see also *People v. McKinnon, supra*, 52 Cal.4th at p. 677.) In *People v. Crew* (2003) 31 Cal.4th 822, this Court rejected claims that CALJIC Nos. 8.20, 2.21.2, and 2.22 lessen the prosecution's burden of proof. (*Id.* at p. 847-849.) Moreover, as this Court explained in *People v. Rogers, supra*, 39 Cal.4th at p. 826, when, as here, the jury is instructed on the presumption of innocence and reasonable doubt under CALJIC No. 2.90, the instructions satisfy due process. (*Id.* at p. 889, citing *Victor v. Nebraska* (1994) 511 U.S. 1, 7 [114 S.Ct. 1239, 127 L.Ed.2d 583] and *People v. Millwee* (1998) 18 Cal.4th 96, 161.) Finally, in *People v. Jurado, supra*, 38 Cal.4th at p. 127, this Court held that CALJIC No. 8.20 defining premeditation does not suggest a defendant must absolutely preclude the possibility of premeditation rather than merely raising a reasonable doubt.

In sum, because this Court has previously rejected arguments identical to the ones advanced here, and because Ghobrial provides no compelling reasoning for revisiting these settled issues, this Court should summarily reject his claim.

VIII. GHOBRIAL FORFEITED HIS PROSECUTORAL MISCONDUCT CLAIMS AND IN ANY EVENT, THE CLAIMS LACK MERIT

Ghobrial contends the prosecutor committed misconduct on numerous occasions by referring to the September 11, 2001 terrorist attacks during both the guilt phase closing argument, the penalty phase, and the penalty phase closing argument, violating his constitutional rights to due process and a reliable death judgment. (AOB 175-184.) He contends that because of the timing of his trial, which took place in late 2001,[4] and because Ghobrial was an Egyptian national, the prosecutor's references to September 11 and to the terrorists responsible for the September 11 attacks were severely prejudicial and violated his due process rights. (AOB 233-256.) Ghobrial forfeited these claims by failing to object at trial. In any

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[4] Jury selection in this case began on September 10, 2001, the day before the World Trade Center bombings. (2 RT 325, 401.) When proceedings resumed on September 13, 2001, defense counsel moved for a continuance. In support of the motion, counsel submitted several news articles and videotapes of television coverage that identified the perpetrators of the terrorist attacks as Saudi Arabian or Egyptian, and showing Egyptians celebrating the attack on the United States. (2 RT 401-402.) Counsel expressed her concern that anti-Middle Eastern or anti-Islamic sentiment might prejudice Ghobrial's ability to receive a fair trial. (RT 402-405, 408-410.) The trial court denied the motion, but indicated that it would address the question of bias with the potential jurors. (2 RT 413-414.) On September 17, 2001, defense counsel submitted additional media coverage as examples of reported anti-Arab sentiment in the country and in the community. (2 RT 506-507.) After the prospective jurors were brought in, the trial court raised the issue of the September 11 attacks and asked if those events affected their ability to be a fair and impartial juror. Several jurors immediately asked to be excused, saying they could not be impartial. (2 RT 522-536.) Defense counsel renewed her motion, and the prosecutor joined. (2 RT 536-538.) The trial court granted the motion, finding good cause to continue the matter. (2 RT 538.) Jury selection resumed on October 29, 2001, and the trial presentation began on November 28, 2001. (3 RT 557; 5 RT 1212.)

event, the prosecutor did not commit misconduct, and even if he had, no prejudice ensued.

"A prosecutor's conduct violates the Fourteenth Amendment to the federal Constitution when it infects the trial with such unfairness as to make the conviction a denial of due process. Under California law, a prosecutor who uses deceptive or reprehensible methods of persuasion commits misconduct even if such actions do not render the trial fundamentally unfair. Generally, a claim of prosecutorial misconduct is not cognizable on appeal unless the defendant made a timely objection and requested an admonition. In order to be entitled to relief under state law, defendant must show that the challenged conduct raised a reasonable likelihood of a more favorable verdict. In order to be entitled to relief under federal law, defendant must show that the challenged conduct was not harmless beyond a reasonable doubt." (*People v. Blacksher* (2011) 52 Cal.4th 769, 828, fn. 35, emphasis added, internal quotation marks & citations omitted; *People v. Clark, supra,* 52 Cal.4th at p. 960.)

Ghobrial recognizes that he failed to object to any of the prosecution's references to September 11 during the guilt or penalty phase closing arguments that he now claims were improper. He asserts that this Court should nonetheless consider the merits of his claims because an objection would have been futile and a curative instruction would not have cured the harm. (AOB 182.)

Even assuming error, a timely objection and admonition would have cured any harm. The record refutes Ghobrial's claim that a proper objection would have been futile or that the trial court could not have cured any possible harm by giving an admonition. (See *People v. Friend, supra*, 47 Cal.4th at p. 30.) Ghobrial's fundamental rights argument does not provide a basis for avoiding the forfeiture rule. (*People v. Burney* (2009) 47 Cal.4th 203, 266.)

A. The Prosecutor's Reference to the FBI and Terrorists in the Guilt Phase Closing Argument was Not Improper

During the guilt phase closing argument, the prosecutor discussed the expert testimony regarding the protocols used to identify sperm. He acknowledged that the protocol used by the FBI required both an intact head and tail to conclusively identify a sperm cell, but argued that this was a minority position in the scientific community, and that the identification of sperm cells by Yap and Jones was accurate. In discussing the FBI protocol, the prosecutor made a single, fleeting reference to "terrorists," saying:

> And I submit to you if you think back about the testimony that Aimee Yap and Ed Jones—especially of course Ed Jones, who has seen thousands of these cases, thousands—is the more qualified.
>
> Now we hear FBI. The FBI has a protocol. And you know, I'm not about here—the FBI is out there trying to hunt down terrorists. I'm not trying to take a shot at them. But they have signs, and protocols are what they are. They are in the minority.
>
> And like I said, if all you had was the pelvis and that's all you had and you say, "Well it's the FBI, gee," but it's sperm. You know it's sperm.

(8 RT 1929.)

Defense counsel failed to object to these remarks or to request an admonition. Accordingly, the claim of error is forfeited on appeal. In any event, the prosecutor's fleeting reference to "terrorists" was not improper and could not have prejudiced Ghobrial The prosecutor was not, in any sense, likening this case to terrorism, but instead was merely emphasizing that he was not attacking the FBI's credibility or reputation in disagreeing with the FBI's laboratory protocol. When the claim focuses on comments made by the prosecutor before the jury, the question is whether there is a

reasonable likelihood the jury construed or applied any of the complained-of remarks in an objectionable fashion. (*People v. Ayala* (2000) 23 Cal.4th 225, 283-284; *People v. Frye* (1988) 18 Cal.4th 894, 970, overruled on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421.)

Moreover, the trial court instructed the jury that any statements made by the attorneys were not evidence. (5 RT 1206.) The jurors are presumed to have followed these instructions. (*People v. Sanchez* (2001) 26 Cal.4th 834, 852.) Consequently, it is not reasonably possible that, but for the challenged comments, Ghobrial would have received a more favorable result. (*People v. Valdez* (2004) 32 Cal.4th 73, 134 [any possible prejudice was mitigated by the court's instruction that counsel's statements were not evidence].)

B. Ghobrial Cannot Show Prejudice from the Prosecutor's Penalty Phase Questioning of Dr. Flores-Lopez Regarding How he Defined Evil and Whether he Considered Osama Bin Laden to be Evil Because Defense Counsel's Objections to the Line of Questions Were Sustained

Ghobrial also points to questions asked of Dr. Flores-Lopez during the penalty phase proceedings. (AOB 1179-180.) He cannot show that the prosecutor's remarks violated due process because the trial court sustained defense counsel's objections to the questions as irrelevant.

At one point during recross-examination, the prosecutor questioned Dr. Flores-Lopez about the ability of a person with schizophrenia or schizoaffective disorder to malinger or to commit intentional acts:

> Q: Let's be clear on this then. The fact that someone malingers at times doesn't necessarily mean they're always going to malinger then, does it?
>
> A: I don't quite understand.
>
> Q: Well, I mean you're talking about someone you've diagnosed as having schizo-affective disorder, being

schizophrenic. And what defense counsel is saying is that there's still plenty of evidence that he's schizophrenic, and that he's not malingering his illness, but he can malinger at times; he can lie; he's capable of lying, right?

A: Right. The fact that you're schizophrenic or schizo-affective doesn't prevent you from the ability to lie.

Q: That's right. And he can lie and know that he's lying, correct?

A: I would guess.

Q: Sure. He can commit intentional acts, right? He can intend to do something and do it, right?

A: I would have to say yes, uh-huh.

Q: Right, okay. And the fact that he has symptoms of schizophrenia or schizophrenic does not stop him from being an evil person if he wants to be an evil person, does it?

(10 RT 2509-2510.)

At this point, the trial court sustained a defense objection that the question was outside the scope of direct. (10 RT 2510.) The prosecutor continued:

Q: By Mr. Brent: Nothing stops him from doing intentional evil acts if he wants to do it, does it?

A: I'm not sure what you mean by evil.

Q: You don't know what that word means?

A: Not in your context.

Q: What context? Is Osama bin Laden an evil man?

[Defense counsel]: I'm going to object. It's irrelevant.

The court: Sustained.

Q: By Mr. Brent: What does evil mean to you?

[Defense counsel]: I'm going to object to the whole line of questioning.

The court: Sustained.

[Prosecutor]: Thank you.

(10 RT 2509-2510.)

Defense counsel did not request an admonition or request that any of Dr. Flores-Lopez's responses be stricken. Ghobrial has forfeited any claim that the prosecutor's reference to Bin Laden violated his due process rights, because he did not object on this basis at trial or request a curative admonition. (See *People v. Sanders* (1995) 11 Cal.4th 475, 549 [failure to seek a curative instruction after an objection waives claim of prosecutorial misconduct].) Moreover, as noted above, the trial court instructed the jury that any statements made by the attorneys were not evidence, and further instructed the jury that the jurors were not to assume to be true any insinuation suggested by a question asked of a witness. (5 RT 1206.) It is not reasonably probable that, but for these comments, Ghobrial would have received a more favorable result.

C. The Prosecutor's References to September 11 or to Ghobrial's Nationality did Not Violate Due Process.

During penalty phase closing argument, the prosecutor made references to September 11 and terrorism. Ghobrial has forfeited his claim that such references constituted prejudicial misconduct because, as he concedes (see AOB 182), he failed to object on this ground at trial and did not ask the trial court to admonish or instruct the jury not to be persuaded by inappropriate references. An objection is required even for alleged misconduct occurring during the penalty phase. (*People v. Coddington* (2000) 23 Cal.4th 529, 636.) In this case, even if the challenged references constituted misconduct, if an objection had been made, any error could have been cured by an admonition to disregard the references. (See *People v. Jones* (1998) 17 Cal.4th 279, 308-309 [prosecutorial misconduct

resulting from comparing defendant to terrorist could have been cured if objection raised in trial court].)

Wide latitude is given to prosecutors during closing argument at the penalty phase. (*People v. Schmeck* (2005) 37 Cal.4th 240, 298-299.) Prosecutorial misconduct during penalty phase argument is subject to the reasonable possibility standard of prejudice (see *People v. Brown* (1988) 46 Cal.3d 432, 448) which is the same in substance and effect as the beyond a reasonable doubt standard enunciated in *Chapman v. California* (1967) 386 U.S. 18 [87 S.Ct. 824, 17 L.Ed.2d 705]. (*People v. Bennett* (2009) 45 Cal.4th 577, 605, fn. 13; *People v. Wallace* (2008) 44 Cal.4th 1032, 1092.) In deciding whether there is "a reasonable possibility that the jury construed or applied the prosecutor's comments in an objectionable manner, [the court does] not lightly infer that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements." (*People v. Guerra, supra*, 37 Cal.4th at p. 1153, internal citations & quotations omitted.) Even assuming that the prosecutor's references to September 11 constituted misconduct that could not have been cured by a timely objection and admonition, there is no reasonable possibility the jury would have rendered a more favorable verdict absent the alleged errors.

In his introductory remarks during his penalty phase closing arguments, the prosecutor mentioned September 11 when discussing how difficult it was to ask a jury to impose the death penalty:

> And so here's the government represented by me—you know—I'm in essence the government speaking, and I'm saying, "Take a life, take a life." And it's not easy for me to do. You know, we're compassionate people. And I'm getting off this in a second, but give me that minute. I'm not going to talk all that long this morning, so give me a minute here. You know, we are a compassionate people. We have, out of the tragedy that happened in September, we found out how compassionate we

> are. There's just an outpouring of support and patriotism, whatever you want to call it, we have that in our makeup. Here's somebody from the government saying, "Let's execute somebody. Let's execute a man, a person that's in this courtroom, all right? So I'm in that position that's rather odd, frankly, and that's strange for me and, perhaps, is for you as well and the defense attorneys.

(11 RT 2659-2660.)

It is well established that prosecutors may state matters not in evidence, but which are common knowledge or are illustrations drawn from common experience, history, or literature. (*People v. Sassounian* (1986) 182 Cal.App.3d 361, 396.) Here, the prosecutor was entitled to draw from common experience to acknowledge that asking the jurors to impose the death penalty was a difficult thing. There is no reasonable possibility Ghobrial would have received a more favorable verdict without this comment given its brevity and the context in which it was made.

Ghobrial also complains that references to Ghobrial's "foreignness" "encouraged the jurors to act on latent biases and permitted them to use inadmissible and unadmitted evidence in aggravation in violation of Ghobrial's rights under the Fifth, Eighth, and Fourteenth Amendments." (AOB 180, 181.)

In discussing the factors in aggravation and mitigation under Penal Code 190.3, the prosecution mentioned Ghobrial's immigrant status:

> The presence or absence. What does it mean if there's an absence? If there's an absence of a felony conviction, frankly, that's mitigating. I'm going to submit to you it's not worth a lot. You're not going to give a lot of weight to that. It's sort of odd that that is mitigating. You would think that if you didn't commit crimes would sort of be the given, that would be law, but the law says that's mitigating, you have to determine how much weight that is.
>
> *Mr. Ghobrial came into this country and within a short period of time he committed the ultimate crime. He committed*

the ultimate felony. But you consider that under factor (a). You don't get to consider that here.

Now (a) and (b), because there is no (c), (a) and (b), and then in a minute I'm going to talk about (i), age, that's on the next chart, those are the only things that you could consider aggravating..

(11 RT 2662-2663 [emphasis added].)

This reference to Ghobrial's status as an Egyptian immigrant was not prejudicial error. A prosecutor improperly appeals to the passions and prejudices of the jury by making racial or ethnic arguments unless the racial or ethnic backgrounds of the principals are relevant to the case. (See *People v. Herring* (1993) 20 Cal.App.4th 1066, 1074; *People v. Charlie* (1917) 34 Cal.App. 411, 417.)

Here, the jury had already heard testimony regarding Ghobrial's upbringing and life in Egypt and that he had relocated to the United States. (See e.g., 10 RT 2445-2652.) The prosecutor did not err in commenting on and drawing inferences from the evidence presented at trial. (*People v. Hill* (1998) 17 Cal.4th 800, 819.) When read in context, it is clear that this remark was not intended to highlight his immigrant status, but rather to argue that because Ghobrial had only been in the country for a relatively short time, the presence or absence of prior felony convictions under factor (c) might carry less weight. (See Pen. Code, § 190.3.) Comments will not be construed as an improper appeal to the passions and prejudices of the jury unless a reasonable juror would have so interpreted them. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1379.)

Later in his argument, the prosecution again discussed Ghobrial's move to the United States and his subsequent life here, not to emphasize his foreignness, but to distinguish Ghobrial's actions from those whose mental illness prevents them from making choices or controlling their behavior:

> So I'm trying to talk about someone that's far different from that, who has all these capabilities. He's–he managed to immigrate to America. He managed to get out of Egypt and to work his way here. He did it. Okay? To beg for money. To buy food. You heard people talk about coming into the store and buy soda, to buy chicken, and ask them to put three chickens in a plastic bag. I guess that's to show he's nuts because he doesn't have a car. He can put it over his shoulder and carry it. He's able to pay Maria Astorias $100 a month for a shed. Able to do that. No one is having—seeing him responding to internal stimuli out in the street. No one is talking about that going on.
>
> He's able to prey on a child. He's not a rabid dog who's just automatically aggressive and violent who's just turned on—who's just biting and biting and biting. He's able to choose when he wants to be violent. He's able to choose when he wants to satisfy his grotesque, perverse sexual needs. He is able to make that choice. He is not a robot. He is not a rabid dog. And then I—then in referring to what I just talked about, he's not demonstrating psychotic symptoms before the arrest on the charges other than I guess that he's staring at people and I, you know, I asked somebody if it is like a stare of, you know, have pity on me. You know, give me money. You know, how can you read his mind? How can you know?"

(11 RT 2700-2702.)

"'Prosecutors have wide latitude to discuss and draw inferences from the evidence at trial.'" (*People v. Smith* (2003) 30 Cal.4th 581, 617, quoting *People v. Dennis* (1998) 17 Cal.4th 468, 522.) The reasonableness of such inferences is a question for the jury to determine. (*Ibid.*) In this case, the prosecutor's reference to Ghobrial's leaving Egypt and making his way to the United States was not an improper reference to Ghobrial's race or ethnicity, but rather a fair comment on the inferences to be drawn from evidence already presented.

Ghobrial also complains about the prosecutor's use of an analogy between Ghobrial's mental illness and the actions of those who committed the September 11 attacks. To rebut any defense argument that Ghobrial's

mental illness should preclude the imposition of the death penalty, the prosecution argued that Ghobrial should still be held accountable for his own actions:

> And I told you in my rebuttal, I said, you know, that's sort of the theme here of whether it's sort of this ability to still be an evil person even though we're mentally disturbed to some degree. All right? That's what separates this case, and that's really the decision when it comes down to it that you're going to be asked to make.
>
> Was this defendant capable, even though he was to some degree, defense will tell you a lot—that he was a lot more disturbed than I'm going to tell you, but I'm not telling you he wasn't. I never was, and I never will.
>
> Can those two ideas exist—can they co-exist?
>
> You know what's interesting? I'm jumping ahead when I do this. It's interesting to think about this whole notion of delusions or hallucinations. And I was thinking about, you know, when you think about the religions of the world, not that I'm any expert on the religions of the world, but I think about, you know, Moses talking about God speaking to him from a burning bush. And the finger of God coming out and writing the [ten] commandments. Islam—Islam was given to Mohammed in dream. All right? These were delusional people under today's psychiatry. Now, I'm not saying—I'm not trying to make more of that than it is, but what I am telling you is it is interesting because psychiatry doesn't seem to really fit there for whatever that's worth. And psychiatry would seem to want to label with a mental disorder any bad behavior. You know, those—and I'm just giving an example. I'm not trying to make more of this than it is, but, I mean, you know, those these people in Al Qaeda, they're all schizophrenic because they all became suicide bombers because they had this vision that there's going to be 48 or 50 virgins waiting for them on the other side. And maybe they were. Maybe they were because the numbers are so great of people who are—you know, who are schizophrenic. But it doesn't stop them from doing evil acts. And nothing about the defendant's mental disturbance stopped him from doing evil acts. And that's the thing I'll be talking about. I'll come back to that.

(11 RT 2674-2676.) Defense counsel made no objection to these remarks at trial and did not request an admonition.

A prosecutor is given wide latitude and the argument may be vigorous as long as it amounts to fair comment on the evidence, including reasonable inferences or deductions drawn from it. (*People v. Gamache* (2010) 48 Cal.4th 347, 371.) To prevail, Ghobrial must show a reasonable likelihood that the jury misunderstood or applied the prosecutor's remarks in the improper manner he suggests. (*Ibid.*) A misconduct claim cannot be supported by singling out words, phrases or a few sentences; the prosecutor's argument is evaluated by examining the statements in the context of the argument as a whole. (*People v. San Nicolas* (2004) 34 Cal.4th 614, 665-666, citing *People v. Lucas* (1995) 12 Cal.4th 415, 475.)

Ghobrial contends the prosecutor improperly injected passion and prejudice into the jury decision by comparing his actions to those of the Al Qaeda suicide bombers. However, the prosecutor did not compare Ghobrial or his crimes to those infamous figures. He simply used those figures to illustrate that a person suffering from delusions could still choose to commit criminal acts.

While it is generally improper to compare a defendant or his crimes to infamous figures in history (*People v. Jones* (1997) 15 Cal.4th 119, 180), the use of infamous figures is not improper when illustrating legal points or proper argument. (*Ibid.*) In *Jones*, the prosecutor referred in argument to Adolf Hitler, Charles Manson, and Richard Chase (the "Sacramento Vampire Killer"), but "did not suggest that the offenses charged against defendant were as heinous as those committed by Hitler, Manson, and Chase." (*Ibid.*) "[I]t is proper for the prosecutor to use these well-known examples of irrational murders to illustrate his point regarding the limits of the defense of insanity." (*Ibid.*)

In *People v. Millwee, supra*, 18 Cal.4th 96, the prosecutor's comparison of the defendant's crimes to those of Adolf Hitler and Charles Manson was permissible to make "clear that the death penalty was not automatically or necessarily appropriate in every first degree murder case...." (*People v. Millwee, supra*, 18 Cal.4th at p. 153.) In *People v. Pinholster* (1992) 1 Cal.4th 865, the prosecutor's reference to Adolf Hitler was not "an attempt to revive the issue of Nazism or gang membership," but was a proper attempt to diminish the weight of the defendant's mitigation evidence; i.e., his mother's love. (*Id.* at p. 964.) In *People v. Maury, supra,* 30 Cal. 4th 342, the prosecutor's implied references to Adolf Eichmann and Adolf Hitler "did not suggest that the offenses charged against the defendant were as heinous as those committed by Eichmann or Hitler." (*Id.* at p. 420.) The Eichmann reference made the point "that multiple murderers can look like 'common, ordinary looking' people, such as defendant." (*Ibid.*)

In *People v. McDermott* (2002) 28 Cal.4th 946, the prosecutor compared the defendant to a Nazi crematorium worker by day who listened to Mozart at night. (*Id.* at p. 1003.) But the comparison did not compare the defendant's crime to the genocidal killings of the Nazi regime; it properly illustrated the argument "that human beings sometimes lead double lives, showing a refined sensitivity in some activities while demonstrating barbaric cruelty in others." (*Ibid.*)

In contrast, in *People v. Zurinaga* (2007)148 Cal.App.4th 1248, the Court of Appeal held that error was committed by prosecutorial comment in a home invasion case when prosecutor attempted at length to compare the September 11 terrorists with the home invaders by analogizing them as a small band of attackers who were able to overcome a larger group of victims. In *Zurinaga*, during closing argument, the prosecutor compared the defendant's home invasion robbery of nine college students to the

events of September 11. (*Id.* at p. 1250.) The prosecutor brought in a chart showing the flight numbers and airplanes that went down, as well as the numbers of passengers and crew who died. (*Ibid.*) To counter the defendants' theory that the victims outsized their alleged invaders, the prosecutor went into a detailed account of the number of hijackers in the airplanes versus the number of passengers, and the fact the hijackers used box cutters as their weapons. (*People v. Zurinaga, supra,* 148 Cal.App.4th at pp. 1255-1256.) The prosecutor told the jurors "it was his duty to 'transport' the jurors to the crime scene so that they could feel the 'terror' the victims experienced." (*Ibid.*)

The *Zurinaga* court found that, although "prosecutor's are afforded wide latitude during closing argument," the prosecutor's remarks regarding September 11 "crossed the line," "[were] not brief," and "constituted misconduct." (*People v. Zurinaga, supra*, 148 Cal.App.4th at p. 1259.) "Although the 9/11 incident itself is undoubtedly a matter of common knowledge, the specific information the prosecutor presented regarding the airlines, flight numbers, and numbers of passengers and crew is not." (*Ibid.*) The reviewing court found that the prosecutor's remarks were based on facts not in evidence, that his analogy involving the victims of the home invasion robbery and the 9/11 passengers was inapt. The court found that the mere mention of "9/11" invoked fear, dread, and anger and that the prosecutor's remarks were "the sort of 'foul blow' that exceeds the legitimate bounds of advocacy. [Citation]." (*Id.* at p. 1260.)

Unlike *Zurinaga*, the prosecutor's remarks here were relatively brief and did not rely on facts not in evidence. The prosecutor made no suggestion that either Ghobrial, personally or his crimes were comparable to the crimes of terrorists. The argument properly illustrated the point that Ghobrial's mental illness did not absolve him of culpability for his actions. There is no reasonable likelihood that the prosecutor's references to Al

Qaeda would have been understood by the jury as an attempt to somehow equate Ghobrial's crime with those of terrorists on September 11, 2001.

Even assuming that the prosecutor remarks in this case were error, any error was harmless. Even though the *Zurinaga* court "disapproved of the prosecutor's conduct," the court was "unable to conclude that it 'so infected the trial with unfairness as to make [the defendants'] convictions a denial of due process." (*People v. Zurinaga, supra*, 148 Cal.App.4th at p. 1251.) As was the case in *Zurinaga*, here the trial court instructed the jurors to decide the case based only on the evidence, that counsel's arguments were not evidence, and that they must not let bias, sympathy, prejudice, or public opinion influence their decision. (5 RT 1206.) The jurors are presumed to have followed the instructions given. (See *People v. Zurinaga, supra*, 148 Cal.App.4th at p. 1260.) The remarks were brief, and would have been understood by the jurors as argument rather than evidence. Given the compelling evidence in aggravation, and the evidence presented in mitigation, there is no reasonable possibility the jurors would have reached a different outcome absent these remarks.

Lastly, Ghobrial complains that the prosecutor characterized Ghobrial's actions as "evil," referring back to his earlier cross-examination of Dr. Flores-Lopez: (AOB 181.)

> I had Dr. Flores-Lopez. Here's my question: Well, I mean, you're talking about someone you've diagnosed as having schizo-affective disorder, being schizophrenic. And what defense counsel is saying is that there's still plenty of evidence that he's schizophrenic and not malingering, but he can malinger at times. He can lie. He's answered, right, the fact that you're schizo-affective or schizophrenic doesn't prevent you from the ability to lie, or I would submit to do any wrong thing you want to do.
>
> 'Question: That's right. And he can lie and know that he is lying, correct?

Answer: I would guess. Sure.

Question: Sure. He can commit intentional acts, right? He can come in and do it, right?

Answer: I would have to say, yes, uh-huh.

Question: Nothing stops him from doing intentional evil acts if he wants to do it, does it?

Answer: I'm not sure what you mean by evil.

Question: You don't know what that answer means?

Answer: Not in your context.'

What did he know what my context was? They just don't want to call it. They just don't want to call evil evil. Okay?

(11 RT 2699-2700.) Again, defense counsel made no objection. The argument is forfeited because no objection was made.

Moreover, the prosecutor's remarks were not improper. As this Court recently reiterated, "the use of derogatory epithets to describe a defendant is not necessary misconduct," if "[t]he prosecutor's remarks...were founded on evidence in the record and fell within the permissible bounds of argument." (*People v. Friend, supra*, 47 Cal.4th at p. 32, citations omitted [prosecutor did not commit misconduct when he stated that defendant was "living like a mole or the rat that he is"]; *People v. Zambrano* (2007) 41 Cal.4th 1082, 1172, [prosecutor did not commit misconduct by calling defendant in penalty phase of capital case "especially evil" and a "dangerous sociopath,"]; *People v. Edelbacher, supra,* 47 Cal.3d at p., 1030, [prosecutor did not commit misconduct by calling defendant "a snake in the jungle," since it was based on the evidence, and our high court noted, citing precedent, that a prosecutor may properly call defendant an "animal" in the appropriate context], disapproved on other grounds by *People v. Loyd* (2002) 27 Cal.4th 997, 1008, fn. 12.)

The prosecutor's remarks were fleeting, and were not so powerful that Ghobrial was denied a fair trial. Unless there was something in the record that would suggest otherwise, or the prosecutor's remarks were particularly egregious, reviewing courts generally "presume the jurors treated the prosecutor's comments as words spoken by an advocate in an attempt to persuade." (*People v. Cole* (2004) 33 Cal.4th 1158, 1204.)

Prosecutorial misconduct during penalty phase argument is subject to the reasonable possibility standard of prejudice (see *People v. Brown, supra,* 46 Cal.3d at p. 448) which is the same in substance and effect as the beyond a reasonable doubt standard enunciated in *Chapman v. California, supra,* 386 U.S. at p. 18. (*People v. Bennett, supra,* 45 Cal.4th at p. 605, fn. 13; *People v. Wallace, supra,* 44 Cal.4th at p.1092.) Considering the relative brevity of the challenged remarks, the jury instructions given, and the evidence presented in aggravation and mitigation, there is no reasonable possibility the prosecutor's alleged error affected the jury's decision to impose the death penalty, nor is there any indication that they had any effect on the case. Thus, any alleged errors were harmless.

IX. CALIFORNIA'S DEATH PENALTY STATUTE DOES NOT VIOLATE THE FEDERAL CONSTITUTION OR INTERNATIONAL LAW

In a series of arguments, Ghobrial contends California's capital sentencing scheme violates the Constitution. None of his claims has merit.

A. Penal Code Section 190.2 is Not Impermissibly Broad

Contrary to Ghobrial's assertion (AOB 185-259-260), "[s]ection 190.2, which sets forth the circumstances in which the penalty of death may be imposed, is not impermissibly broad in violation of the Eighth Amendment." (*People v. Farley* (2009) 46 Cal.4th 1053, 1133.) This Court has repeatedly rejected the claim that California's death penalty statutes are unconstitutional because they fail to sufficiently narrow the

class of persons eligible for the death penalty. (*People v. Virgil* (2011) 51 Cal.4th 1210, 1288; *People v. Verdugo* (2010) 50 Cal.4th 263, 304; *People v. Schmeck, supra*, 37 Cal.4th at p. 304; *People v. Wilson* (2005) 36 Cal.4th 309, 361-362; *People v. Panah, supra*, 35 Cal.4th at p. 499; *People v. Welch, supra*, 20 Cal.4th at p. 767; *People v. Arias* (1996) 13 Cal.4th 92, 187.) Ghobrial's claim fails because he gives no justification for this Court to depart from its prior rulings on this subject.

B. The Application of Section 190.3, Factor (a), Did Not Violate Ghobrial's Constitutional Rights

Equally unavailing is Ghobrial's claim that the application of section 190.3 in the penalty phase results in the arbitrary and capricious imposition of the death penalty. (AOB 186-187.) Allowing a jury to find aggravation based on the "circumstances of the crime" under section 190.3, factor (a), does not result in an arbitrary and capricious imposition of the death penalty. (*People v. Virgil, supra*, 51 Cal.4th at p. 1288. As the United States Supreme Court noted in *Tuilaepa v. California* (1994) 512 U.S. 967 [114 S.Ct. 2630, 129 L.Ed.2d 750], "The circumstances of the crime are a traditional subject for consideration by the sentencer, and an instruction to consider the circumstances is neither vague nor otherwise improper under our Eighth Amendment jurisprudence."

"Nor is section 190.3, factor (a) applied in an unconstitutionally arbitrary or capricious manner merely because prosecutors in different cases may argue that seemingly disparate circumstances, or circumstances present in almost any murder, are aggravating under factor (a)." (*People v. Carrington* (2009) 47 Cal.4th 145, 200.) Instead, "'each case is judged on its facts, each defendant on the particulars of his [or her] offense.'" (*Ibid*, quoting *People v. Brown* (2004) 33 Cal.4th 382, 401.)

C. There Was No Error in the Penalty Phase Instructions

1. The jury is not required to find beyond a reasonable doubt that aggravating circumstances exist or that aggravating circumstances outweigh mitigating circumstances or that death is the appropriate penalty

Contrary to Ghobrial's argument (AOB 188-190), the jurors were not constitutionally required to find beyond a reasonable doubt that the aggravating factors outweighed mitigating factor, and the trial court was not required to instruct the jury that such a finding was required. (*People v. Bunyard* (2009) 45 Cal.4th 836, 858 [rejecting argument that *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856]; *United States v. Booker* (2005) 543 U.S. 220 [125 S.Ct. 738, 160 L.Ed.2d 621]; *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403]; *Ring v. Arizona* (2002) 536 U.S. 584 [122 S.Ct. 2428, 153 L.Ed.2d 556]; and *Apprendi v. New Jersey, supra,* 530 U.S. at p. 466 support a claim of constitutional error]; *People v. Romero* (2008) 44 Cal.4th 386, 429.) Furthermore, "neither the cruel and unusual punishment clause of the Eighth Amendment, nor the due process clause of the Fourteenth Amendment, requires a jury to find beyond a reasonable doubt that aggravating circumstances exist or that aggravating circumstances outweigh mitigating circumstances or that death is the appropriate penalty." (*People v. Blair, supra*, 36 Cal.4th at p. 753.) In fact, "the trial court need not and should not instruct the jury as to any burden of proof or persuasion at the penalty phase." (*Ibid.*)

2. There is no constitutionally required burden of proof at the penalty phase

Ghobrial contends that some burden of proof is constitutionally required for a capital jury's finding that an aggravating factor exists, that the aggravating factor outweighs the mitigating factors, and that death is the

appropriate sentence, or that life without parole is presumed to be the appropriate sentence. Ghobrial further contends that if no burden of proof is required, the jury should have been so instructed. (AOB 190-191.) As this Court has repeatedly held, "no burden of proof or burden of persuasion is required during the penalty determination." (*People v. Bennett, supra*, 45 Cal.4th at p. 631.) As this Court has explained: "Because the determination of penalty is essentially moral and normative [citation], and therefore is different in kind from the determination of guilt, there is no burden of proof or burden of persuasion. [Citation.]." (*People v. Lenart* (2004) 32 Cal.4th 1107, 1136-1137, quoting *People v. Hayes* (1990) 52 Cal.3d 577, 643.) The penalty phase determination is "not akin to 'the usual fact-finding process,' and therefore 'instructions associated with the usual fact-finding process–such as burden of proof–are not necessary.'" (*People v. Lenart, supra,* 32 Cal.4th at p. 1137, quoting *People v. Carpenter* (1997) 15 Cal.4th 312, 417-418.)

Ghobrial argues that Evidence Code section 520, which imposes the burden of proof on the prosecution in a criminal case, creates a burden of proof requirement in penalty phase proceedings , citing *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346 [100 S.Ct. 2227, 65 L.Ed.2d 175]. (AOB 190.) This Court has considered the applicability of Evidence Code section 520 to capital sentencing determinations, and rejected the contention that it creates a burden of proof. (*People v. Lenart, supra*, 32 Cal.4th at pp. 1136-1137.)

There is no constitutional requirement that a capital jury be instructed concerning a burden of proof. (*People v. Samuels* (2005) 36 Cal.4th 96, 137.) Conversely, there is no constitutional requirement to instruct that there is no burden of proof. Because the penalty determination process is normative, not factual, there is no burden of proof at the penalty phase. Therefore, no instruction on the burden of proof is required, as to either the

presence or absence of any such burden. (*People v. Elliot, supra,* 37 Cal.4th at p. 488; *People v. Cornwell* (2005) 37 Cal.4th 50, 104, overruled on other grounds in *People v. Doolin, supra,* 45 Cal.4th at p. 421.)

3. There Is No Requirement the Jury Make Unanimous Findings as to the Aggravating Factors or That Ghobrial Engaged in Prior Unadjudicated Criminal Activity

Ghobrial contends his rights under the Sixth, Eighth, and Fourteenth Amendments to the Constitution were violated because there is no assurance that the jury found, either unanimously or by a majority, which aggravating circumstances warranted the death penalty, and that he engaged in prior criminality. (AOB 191-193.) There is no constitutional requirement that a capital jury reach unanimity on the presence of aggravating factors. (*People v. Martinez* (2009) 47 Cal.4th 399, 455; *People v. Burney, supra*, 47 Cal.4th at p. 268.) Nor is there a constitutional requirement that a capital jury unanimously agree that prior criminal activity has been proven. (*People v. Martinez, supra*, 47 Cal.4th at p. 455; *People v. Dykes* (2009) 46 Cal.4th 731, 799.) Nor does the failure to require jury unanimity as to aggravating factors violate Ghobrial's right to Equal Protection. (*People v. Cook* (2007) 40 Cal.4th 1334, 1367; *People v. Griffin* (2004) 33 Cal.4th 536, 598.)

4. CALJIC No. 8.88 is not impermissibly vague and ambiguous for using the word "substantial"

Ghobrial contends the phrase "so substantial" in the instruction to the jury that their determination of penalty depended on whether the jurors were "persuaded that the aggravating circumstances are so *substantial* in comparison with the mitigating circumstances that it warrants death instead of life without parole" (CALJIC No. 8.88 [emphasis added]) was impermissibly vague and ambiguous in violation of his rights under the Eighth and Fourteenth Amendments to the Constitution. (AOB 194.)

Ghobrial's contention is without merit. (*People v. Carrington, supra*, 47 Cal.4th at p. 199; *People v. Bramit* (2009) 46 Cal.4th 1221, 1249.)

5. CALJIC No. 8.88 is not unconstitutional for failing to inform the jury that the central determination is whether death is the appropriate punishment

Ghobrial contends CALJIC No. 8.88, informing the jurors that they can return a death verdict if the aggravating evidence "warrants" death violates the Eighth and Fourteenth Amendments to the Constitution because the correct inquiry is whether the death penalty is "appropriate," not whether it is "warranted." (AOB 194-195.) This contention lacks merit. (*People v. Rogers* (2009) 46 Cal.4th 1136, 1179; *People v. Jackson* (2009) 45 Cal.4th 662, 701.)

6. The instructions were not constitutionally deficient because they failed to inform the jurors that if mitigation outweighed aggravation, they must return a sentence of life without the possibility of parole

Although the instructions informed the jury the circumstances under which it could return a death verdict, Ghobrial contends the instructions were deficient because they did not inform the jury of the converse–that if the mitigating circumstances outweigh the aggravating circumstances they must return a verdict of life without the possibility of parole. He claims the instructions therefore violated his right to due process. (AOB 195-196.) His claim is without merit. (*People v. Carrington, supra,* 47 Cal.4th at p. 199; *People v. Medina* (1995) 11 Cal.4th 694, 781-782.)

7. The instructions were not constitutionally deficient in failing to inform the jury as to the standard of proof and that unanimity was not required as to mitigating circumstances

Ghobrial contends the failure to instruct the jury as to a burden of proof as to facts in mitigation or the lack of need for jury unanimity as to mitigating circumstances violated his Eighth Amendment rights. (AOB 196-197.) This Court has previously found that "[t]he trial court need not instruct that the beyond-a-reasonable-doubt standard and the requirement of jury unanimity do not apply to mitigating factors." (*People v. Rogers, supra*, 39 Cal.4th at p. 897; see also *People v. Loy* (2011) 52 Cal.4th 46, 78; *People v. Cook, supra*, 40 Cal.4th at p. 1365; *People v. Breaux* (1991) 1 Cal.4th 281, 314-315.) Thus, the instructions were not constitutionally deficient in failing to so instruct the jury.

8. There is no requirement to instruct the jury that there is a presumption of life

Ghobrial argues the trial court's failure to instruct the jury that life without possibility of parole is presumed to be the appropriate sentence violated his rights under the Eighth and Fourteenth Amendments. (AOB 197-198.) As Ghobrial acknowledges, this Court has rejected the argument that an instruction on the presumption of life is required in capital cases. (*People v. Arias, supra*, 13 Cal. 4th at p. 190; see *People v. Abilez* (2007) 41 Cal.4th 472, 532.)

D. Written Findings Are Not Constitutionally Required

Ghobrial claims the failure of the jury to make any written findings during the penalty phase violated his rights under the Sixth, Eighth, and Fourteenth Amendments to the Constitution. (AOB 198.) This Court has consistently rejected any claim that the jury must make written findings as to aggravating factors. (*People v. Riggs* (2008) 44 Cal.4th 248, 329; *People*

v. Elliot, supra, 37 Cal.4th at p. 488; *People v. Cornwell, supra*, 37 Cal.4th at p. 105.)

E. There is No Constitutional Requirement to Delete Inapplicable Sentencing Factors

Ghobrial next contends his constitutional rights were violated because the trial court failed to delete inapplicable sentencing factors in CALJIC No. 8.85, which sets forth factors that may be considered in mitigation or aggravation. (AOB 199.) The trial court is not required to delete inapplicable sentencing factors from the standard instruction. (*People v. Burney, supra*, 47 Cal.4th at p. 261; *People v. Bramit, supra*, 46 Cal.4th at p. 1248.)

F. Intercase Proportionality Review is Not Constitutionally Required

Ghobrial contends the failure to conduct intercase proportionality review violates the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution because the proceedings are conducted in a constitutionally arbitrary, unreviewable manner. (AOB 199.) This Court has repeatedly rejected this contention and should do so again here. (*People v. Cornwell, supra*, 37 Cal.4th at p. 105; *People v. Elliot, supra*, 37 Cal.4th at p. 488; *People v. Smith* (2005) 35 Cal.4th 334, 374; *People v. Jones* (2003) 29 Cal.4th 1229, 1267.)

G. California's Capital Sentencing Scheme Does Not Violate Equal Protection

Ghobrial argues California's capital sentencing scheme violates the Equal Protection Clause because it gives more procedural protections to non-capital defendants. As examples, Ghobrial complains that in capital cases there is no burden of proof, the jurors need not agree on what aggravating circumstances apply, and there are no written findings. (AOB 200.) As this Court has repeatedly and consistently held, equal protection

does not "deny capital defendants equal protection because it provides a different method of determining the sentence than is used in noncapital cases. [Citation.]" (*People v. Elliot, supra*, 37 Cal.4th at p. 488; accord *People v. Dunkle* (2005) 36 Cal.4th 861, 940; *People v. Panah, supra*, 35 Cal.4th at p. 500.) This is because "capital and noncapital defendants are not similarly situated and therefore may be treated differently without violating constitutional guarantees of equal protection of the laws or due process of law. [Citation.]" (*People v. Manriquez* (2005) 37 Cal.4th 547, 590.) Thus, Ghobrial's argument is without merit.

H. California's Death Penalty Law Does Not Violate International Law

Lastly, Ghobrial contends the death penalty violates international law, the Eighth and Fourteenth Amendments and "evolving standards of decency." (AOB 200-201.) This Court has repeatedly rejected similar arguments and should do so again here. "International law does not prohibit a sentence of death rendered in accordance with state and federal constitutional and statutory requirements. [Citation.]" (*People v. Alfaro* (2007) 41 Cal.4th 1277, 1332; accord *People v. Mungia* (2008) 44 Cal.4th 1101, 1143; *People v. Elliot, supra*, 37 Cal.4th at p. 488; *People v. Panah, supra*, 35 Cal.4th at p. 500.)

X. THERE WAS NO CUMULATIVE ERROR

Ghobrial argues that the cumulative effect of the claimed errors in this case warrants reversal of the judgment and sentence. (AOB 202-204.) As discussed above, there are no errors to cumulate. (See *People v. Thornton* (2007) 41 Cal.4th 391, 453.)

A criminal defendant is entitled to a fair trial, but not a perfect one, even where he has been exposed to substantial penalties. (See *People v. Marshall* (1990) 50 Cal.3d 907, 945; *People v. Hamilton* (1988) 46 Cal.3d 123, 156; see also *Schneble v. Florida* (1972) 405 U.S. 427, 432 [92 S.Ct.

1056, 31 L.Ed.2d 340]; see, e.g., *United States v. Hasting* (1983) 461 U.S. 499, 508-509 [103 S.Ct. 1974, 76 L.Ed.2d 96] ["[G]iven the myriad safeguards provided to assure a fair trial, and taking into account the reality of the human fallibility of the participants, there can be no such thing as an error-free, perfect trial, and...the Constitution does not guarantee such a trial."].)

Any claim based on cumulative error must be assessed to see if it is reasonably probable the jury would have reached a result more favorable to the defendant in their absence. (*People v. Holt* (1984) 37 Cal.3d 436, 458.) Applying that analysis to the instant case, this contention should be rejected. Notwithstanding Ghobrial's arguments to the contrary, the record contains no errors and no prejudicial error has been shown. To the extent any error arguably occurred, the effect was harmless. Review of the record without the speculation and interpretation offered by Ghobrial shows that he received a fair and untainted trial. The Constitution requires no more.

Even when considered together, it is not reasonably probable that, absent the alleged errors, Ghobrial would have received a more favorable result, and any errors were harmless. Thus, even cumulatively, any errors are insufficient to justify a reversal of the verdicts.

CONCLUSION

Respondent respectfully requests the judgment of conviction and sentence of death be affirmed in its entirety.

Dated: February 3, 2012

Respectfully submitted,

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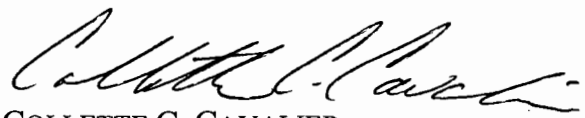

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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 33,791 words.

Dated: February 3, 2012

KAMALA D. HARRIS
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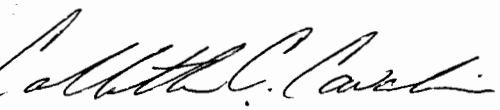

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **PEOPLE v. JOHN SAMUEL GHOBRIAL** No.: **S105908**

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 **February 3, 2012,** 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 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

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For delivery to:
Honorable John J. Ryan, Judge

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 **February 3, 2012**, at San Diego, California.

Jena Ray
Declarant

Signature

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