In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **SOCORRO SUSAN CARO,** **Defendant and Appellant.**	**CAPITAL CASE** Case No. S106274

Ventura County Superior Court Case No. CR47813
The Honorable Donald D. Coleman, Judge

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

In an information filed by the Ventura County District Attorney, appellant was charged with three counts of murder (Pen. Code,[1] § 187, subd. (a)). As to each count, the information further alleged that appellant personally and intentionally discharged a firearm, to wit, a handgun, which proximately caused great bodily injury and death (§ 12022.53, subd. (d)). The information also alleged the multiple-murder special circumstance (§ 190.2, subd. (a)(3)). (1CT 73-75.)

Appellant entered pleas of not guilty and not guilty by reason of insanity, and denied the special allegations. (1CT 94, 105.) Trial was by jury. On November 5, 2001, the jury found appellant guilty of three counts of first degree murder and further found the firearm enhancements true. (10CT 1900.) The next day, appellant withdrew her plea of not guilty by reason of insanity. (10CT 1920.) On December 10, 2001, following a jury trial on the penalty phase, the jury fixed the penalty at death for each count. (11CT 2241.)

On April 5, 2002, the trial court imposed a sentence of death as to each count. The court further imposed a sentence of 25 years to life for the firearm enhancement as to each count, to be served concurrently to the sentence of death. The court imposed a $10,000 restitution fine. Appellant received 857 days of custody credit, consisting of 857 days of actual custody. (12CT 2536, 2544-2548.)

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

STATEMENT OF FACTS

On the evening of November 22, 1999, following an argument between appellant and her husband that caused appellant to believe her marriage was ending, appellant shot and killed three of their sons: 11-year-old Joey, eight-year-old Michael, and five-year-old Christopher. Appellant then shot herself in the head but survived. At trial, the defense relied on the theory that appellant's husband was the actual perpetrator who attempted to frame appellant for the murders because he was having an affair with one of his employees.

I. GUILT PHASE

A. Prosecution Evidence

1. Background

Appellant worked as an extern in Dr. Xavier Caro's medical office in 1979, and she and Dr. Caro began dating in 1980. (20RT 3577.) Appellant later left the office and returned to school. (20RT 3577-3578.) In 1984, while still dating Dr. Caro, appellant returned to Dr. Caro's office and began working as the office manager. (20RT 3578-3579.) In 1986, appellant and Dr. Caro got married. (20RT 3579, 3581; 22RT 3972, 3984.)

Appellant and Dr. Caro had four children: Xavier, known as "Joey," was born on May 12, 1988; Michael (also known as "Mikey") was born on November 10, 1991; Christopher was born on July 13, 1994; and Gabriel was born on August 11, 1998. (20RT 3582.)

At the beginning of the marriage, appellant and Dr. Caro lived in a home that he owned in Granada Hills. In 1994, they moved to a home on Presilla Road in Camarillo, which the Caro family referred to as the "castle house." (20RT 3577-3588, 3594-3595.) Appellant's parents, Gregorio and

Juanita Leon,[2] then moved into Dr. Caro's Granada Hills home and sold their own home. The Leons placed the proceeds from their home sale in an investment account at Wedbush, Morgan, and Stanley ("Wedbush account"), and Dr. Caro had the power of attorney over the account. (20RT 3599-3602.) Dr. Caro continued to pay the mortgage and some of the regular expenses for the Granada Hills home. (20RT 3605.)

Juanita had her own bedroom in the Caros' Camarillo home and she stayed overnight three or four times a week. Juanita helped with cooking and tending to the children. (20RT 3598.) Gregorio ran errands for the Caro family and occasionally performed bricklaying and landscaping chores at the Camarillo home. (20RT 3602, 3604-3605.)

The Caros owned vacation property in Waterford, and the Caros and Leons vacationed together at the property several times a year. (20RT 3607.) Gregorio helped maintain the vacation property by performing some chores and supervising the handyman. (20RT 3608.)

In 1993 or 1994, Dr. Caro purchased a .38-caliber Smith and Wesson revolver (Peo. Exh. No. 30) for home protection, and he modified it for appellant's use by making the trigger easier to pull and by customizing the handle to make it more attractive. (20RT 3611-3613.) Dr. Caro arranged for personalized firearm lessons for himself and appellant, and appellant practiced shooting the .38-caliber gun at the firing range. (20RT 3613-3615.) The .38-caliber gun and another gun were stored in a locked gun safe located in a walk-in closet in the home; the guns were loaded when kept in the safe. (20RT 3615, 3618-3619.) The safe had a five-button combination lock; Dr. Caro knew the combination, and he did not tell it to appellant. (20RT 3618.)

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[2] Respondent will generally refer to Gregorio and Juanita Leon by their first names or as the "Leons."

Dr. Caro and appellant frequently argued during their marriage. (20RT 3621.) Following an argument in 1994 or 1995, Dr. Caro walked up the stairs in the house and encountered appellant holding the .38-caliber gun at the top of the stairs. (20RT 3623.) Appellant held the gun up and yelled, "Aha." (20RT 3624.) Dr. Caro turned around, grabbed Joey, and drove away from the house. (20RT 3624-3625.) While driving away, appellant called Dr. Caro's car phone and asked him to return home. (20RT 3625.) Dr. Caro told her that he would not return unless she placed the guns outside of the house, and appellant agreed. (20RT 3625.) Dr. Caro turned around and saw the gun case and the gun safe in the middle of the driveway. (20RT 3626.) Dr. Caro noticed for the first time that the lid on the gun safe had been damaged, and it appeared that it had been pounded open; there were multiple scratches and pound marks around the damaged area that he had not previously observed. (20RT 3627, 3634.) The lid appeared to still close and the safe appeared to lock; the safe opened with the correct combination. (20RT 3631.)

Appellant worked as the office manager at Dr. Caro's office until August 1999. (20RT 3581, 3636.) Lisa vanEssen was appellant's assistant. (20RT 3645; 26RT 4698-4699.) In 1998 and 1999, appellant's duties as the office manager included reviewing and paying the office bills, and hiring and managing the office staff. (20RT 3637-3639.) At the office, appellant also paid the Caros' personal bills and her parents' bills with checks from the Caros' personal checking account. (26RT 4717-4718.) Appellant used a signature stamp of Dr. Caro's signature to sign the checks, and Dr. Caro never saw the incoming bills or outgoing checks. (20RT 3639.)

In the early part of 1999, the office finances were in trouble because there was insufficient incoming money to pay all of the combined expenses, i.e., the office expenses, the Caros' personal expenses, and the Leons' expenses. (26RT 4715, 4723.) Appellant and vanEssen received more

frequent calls from the office landlord about unpaid rent; at one point in 1999, the past due rent totaled about $70,000. (26RT 4715-4716.) Other office bills also went unpaid. (20RT 3667.)

In early August 1999, Dr. Caro received a call from the office landlord about the unpaid rent. (20RT 3646.) On August 10, 1999, Dr. Caro received a three-day notice to quit from the landlord; the total amount of unpaid rent at the time was over $44,000. (20RT 3666-3667.) Dr. Caro confirmed with vanEssen that the office owed back rent and further learned that there were other unpaid bills. (26RT 4726-4727.) Together with vanEssen, Dr. Caro then reviewed the financial records, including a handwritten ledger itemizing the expenses paid on behalf of the Leons. (26RT 4725-4726.)

Dr. Caro was surprised to discover from his review of the records that the expenses paid on behalf of the Leons were much greater than he had previously thought. (20RT 3647; 26 RT 4728, 4772.) Dr. Caro learned for the first time that he was paying for the Leons' car insurance, health insurance, utility bills, football tickets, gasoline charges, and other expenses. (20RT 3647-3648.) The financial records showed that appellant wrote numerous checks in 1998 and 1999 from the Caros' personal account that were directly payable to the Leons or paid for expenses incurred by the Leons; the total amount of these checks was slightly over $150,000. (20RT 3648-3649, 3653-3663.) Dr. Caro believed these checks represented only a fraction of what was paid on behalf of the Leons during that time period. (25RT 4577.)

In the first or second week of August 1999, Dr. Caro told appellant not to return to the office as the office manager. He then appointed vanEssen as the manager and temporarily closed his office to formulate a budget to address the financial issues. (20RT 3646, 3669, 3677; 26RT 4700.) Dr. Caro also took check-writing privileges away from appellant

and confiscated credit cards. (20RT 3665.) Dr. Caro further told appellant that her parents needed to start paying for their own personal expenses, and he began transferring money from the Leons' Wedbush account into the Caros' personal account as reimbursement for the expenses paid on behalf of the Leons. (20RT 3665; 22RT 4041-4042; 25RT 4584; 26RT 4735.) The financial situation dramatically improved after vanEssen became the manager. (20RT 3671.)

In August 1999, Dr. Caro's marriage to appellant "was not a particularly happy one." (20RT 3695.) The financial problems and the removal of appellant as the office manager impacted the marriage. (20RT 3671.) Dr. Caro gave appellant an ultimatum and told her things needed to change or else he would leave. (20RT 3695; 21RT 3765-3766.) Appellant suggested that they receive counseling, and Dr. Caro agreed. (21RT 3766.)

Dr. Caro believed appellant was depressed, and he suggested that she see a medical professional and take Prozac. (21RT 3765-3766, 3770, 3775.) In August 1999, appellant asked Dr. Caro to prescribe Prozac for her, and he initially prescribed a low daily dosage of 10 milligrams. (21RT 3774-3775.) When appellant subsequently complained the dosage was too low, Dr. Caro increased the daily dosage to 20 milligrams and later increased it to 30 milligrams for the 10 days before her menstrual period. (21RT 3776-3777.) Appellant appeared to respond well. (21RT 3779.)

On August 27, 1999, Dr. Caro had a meeting with a divorce lawyer. (20RT 3697.) During the meeting, Dr. Caro received documents and took notes concerning the possible division of assets and potential monthly alimony payments. (20RT 3698-3706.) Dr. Caro placed all of the documents in his briefcase and kept them there. At some later point in time, appellant held the meeting notes in her hand and asked Dr. Caro if he was planning to get a divorce. (20RT 3706-3707.)

In July and August 1999, Dr. Caro began a romantic relationship with Laura Gillard, a biofeedback technician who worked in the office at the time. (20RT 3671-3673.) Dr. Caro and Gillard communicated with each other through email. (20RT 3673-3674.) In one email, Gillard expressed concern about a relationship while appellant was working in the office, and Dr. Caro indicated that he had ideas about seeing Gillard outside of the office. (20RT 3674-3675.) Dr. Caro first had sex with Gillard in the first week of August 1999, and they had sex twice that month. (20RT 3676.) During this time period, the office was closed to deal with the financial issues, and appellant was vacationing with the children and her parents at the Waterford property. (20RT 3676-3677.)

On a Saturday in August 1999, while en route to meet with Dr. Caro to review the financial records, vanEssen received a phone call from appellant. (26RT 4740.) Appellant asked if vanEssen was meeting Dr. Caro at the office, and further stated that she wanted to make sure it was vanEssen and not Laura Gillard who was meeting with Dr. Caro. (26RT 4741-4742.) VanEssen told appellant, "There's nothing going on there, Cora." (26RT 4742.)

After August 1999, appellant told vanEssen in several conversations that she did not think Dr. Caro loved her anymore and that "he was going to leave them with nothing." (26RT 4743.) In a conversation in September or October 1999, appellant was upset and told vanEssen that she discovered notes from a meeting that Dr. Caro had with a divorce lawyer. (26RT 4743, 4745.)

In another phone conversation during the same period, vanEssen asked how appellant was doing, and appellant responded, "Not good, Lis." Appellant also stated, "Sometimes I think it would just be better if I wasn't here." (26RT 4744.) After vanEssen told appellant to "[s]top it," appellant stated that she was serious and that she had been sitting on the bed holding

a gun, looking at the gun, and "thinking about doing it." (26RT 4744.) VanEssen again told appellant to stop talking like that, and appellant replied, "What would it matter, Lis?" (26RT 4744.) VanEssen told appellant that she had four boys that needed her, and appellant again stated, "What would it matter?" (26RT 4744-4745.)

In the first part of November 1999, vanEssen had lunch with appellant, and appellant seemed fine. Appellant drank a margarita and did not appear to have any problems handling the drink. (26RT 4747.) Appellant stated that she felt the Prozac was helping her by keeping her less volatile and more even-keeled. (26RT 4748-4749.)

2. The night of November 22, 1999

On the evening of November 22, 1999, Dr. Caro returned home from work between 6:00 and 6:30 p.m. (21RT 3782.) Dr. Caro changed into a shirt, sweatpants, and sandals. (21RT 3782-3783, 3814-3116.) Consistent with his regular habit, he removed his wedding ring, strung his bracelet through the ring, and placed the ring on top of his bureau. Dr. Caro and appellant then had dinner, with both of them drinking margaritas prepared by appellant. (21RT 3783-3784.)

Joey came to the table and made a negative comment about appellant and Dr. Caro drinking margaritas. (21RT 3785-3786.) Dr. Caro did not like the tone of Joey's comment and stated to appellant that their parents would never have allowed them to take that tone. (21RT 3787.) Appellant defended Joey and stated Dr. Caro was being harsh. (21RT 3788.) Dr. Caro told appellant that Joey needed to be disciplined. Appellant disagreed. (21RT 3789.) Dr. Caro went upstairs to Joey's room and removed the television and a videogame system from the room; Joey was laying face-down in his bed at the time and appeared to be asleep. (21RT 3790-3791.)

Appellant and Dr. Caro continued arguing upstairs about disciplining Joey, but the argument then switched to the issue of whether Dr. Caro loved her. (21RT 3792.) Appellant stated to Dr. Caro that he did not love her, did not listen to her, and did not respect her. (21RT 3793.) Dr. Caro replied, "I'm leaving." (21RT 3794.) When Dr. Caro put on a jacket and started walking out of the master bedroom, appellant grabbed him by the shoulders. Dr. Caro kept walking away from appellant. (21RT 3795.) Appellant slid to the floor and held onto Dr. Caro's ankles. (21RT 3796.) Dr. Caro pulled away from appellant and kept walking. Juanita came up the stairs and yelled at Dr. Caro, "Get out, you brute." (21RT 3797.) Dr. Caro walked past Juanita. He entered the garage and drove away in his car, a 1989 Mercedes 420 SEL. (21RT 3797-3799.)

After Dr. Caro left, appellant told Juanita: "Now, Mom. I have no money now. I don't know what I'm going to do." (30RT 6330.) Appellant also stated: "Mom, we're going to starve now." (31RT 6538; Peo. Exh. No. 106 [Detective Wade's interview of Juanita].) At a later point in the evening, Juanita left the house and returned to her own home. (28RT 5018, 5022.) Before Juanita left, appellant stated: "Well, I guess I'm crazy like he says I am. Mom, he says I am crazy." (30RT 6331.)

Meanwhile, Dr. Caro drove to his office in Northridge. (21RT 3800-3804.) While driving, he received a call on his car phone. Believing that appellant was the caller, Dr. Caro turned down the volume on the phone. (21RT 3805.) Shortly after Dr. Caro arrived at his office, the office phone began ringing. (21RT 3808.) Dr. Caro then unplugged the two phones in the reception area. (21RT 3808-3809.)

Dr. Caro eventually answered the phone, but he hung up after hearing appellant on the other end. (21RT 3808-3809.) The phone kept ringing and Dr. Caro answered it. (21RT 3817.) Appellant asked Dr. Caro to come home; appellant was crying and seemed agitated. (21RT 3818-3819.) Dr.

Caro told appellant that he did not want to go home. (21RT 3819.) Appellant replied: "That's the thing I've always admired about you, X. You always know the difference between right and wrong." Appellant was no longer crying or agitated when she made this statement. (21RT 3819-3820.) She then hung up. (21RT 3819-3820.) Dr. Caro tried to call appellant back, but neither appellant nor the answering machine picked up the call. (21RT 3820.) Dr. Caro worked for a short period of time and then decided to go home, leaving the office at about 10:30 p.m. (21RT 3821-3823, 3830.)

Dr. Caro arrived at his home and noticed that Juanita's car was gone. He parked his car in the garage and entered the house through the door leading to the kitchen. (21RT 3835.) Dr. Caro went upstairs and saw that the boys' bedrooms were dark. (21RT 3836.) He then walked into the master bedroom and saw appellant lying on her right side in a semi-fetal position on the carpet. (21RT 3837.) When Dr. Caro nudged appellant and pushed her hair away from her face, he noticed bloodstained froth around her mouth and thought that she had overdosed. (21RT 3838-3839.)

Dr. Caro called 911 from a phone in the bedroom, informing the 911 operator that he was a physician and that appellant might have overdosed or slit her wrists. (21RT 3840-3842.) When Dr. Caro rolled appellant onto her back to ascertain her condition, he noticed the .38-caliber Smith and Wesson revolver underneath appellant. (21RT 3843-3845.) He picked up the gun and noticed shell casings scattered underneath appellant. Dr. Caro opened the gun and saw a single shell in the gun. (21RT 3845-3846.) At some point, he walked into the closet and looked at the gun safe, which was still on the shelf. (21RT 3848-3849.)

When the 911 operator asked if there were any children in the house, Dr. Caro went into Joey's bedroom and turned on the lights. (21RT 3850-3851.) Joey was lying face-up on the bed, his arms were stretched out

above him, his legs were down, his eyes and mouth were open, he was pale, and there was a large amount of blood. (21RT 3852.) Dr. Caro used his fingertips and felt for a carotid pulse on Joey's neck, but he did not feel a pulse. (21RT 3852-3853.) Dr. Caro screamed. (21RT 3855.)

Dr. Caro then walked to the end of Joey's bedroom, walked through the adjoining Jack-and-Jill bathroom, and entered the bedroom shared by Michael and Christopher. (21RT 3855.) Dr. Caro turned on the lights and saw Christopher and Michael lying in the bottom bunk of the bunk bed. (21RT 3856, 3864-3865.) Neither boy was breathing and both of their faces were ashen. Michael's eyes were open. (21RT 3866.)

Dr. Caro exited the main bedroom door, went back to the 911 operator, and stated that his children had been shot. (21RT 3869.) Dr. Caro returned to the master bedroom, kicked appellant on her buttocks, and yelled, "You bitch." (21RT 3869-3870.) Dr. Caro stated to the 911 operator: "She shot my babies. She shot my babies." (21RT 3870.)

After the 911 operator asked how many children were present, Dr. Caro went to Gabriel's crib, which was located in an alcove in the master bedroom, and found Gabriel unharmed. (21RT 3870-3871.) Dr. Caro told the 911 operator, "We've got one alive here." (21RT 3871.) He picked up Gabriel from the crib. (21RT 3871.)

Thinking that one of the other boys might also be alive, Dr. Caro carried Gabriel and went to check on the other boys again. (21RT 3872.) Dr. Caro went into Joey's room and immediately recognized that Joey was not alive; Joey was not breathing, he had not moved, and there was so much blood. Dr. Caro did not touch Joey at this time. (21RT 3873.)

Dr. Caro then went through the Jack-and-Jill bathroom and entered the bedroom of Michael and Christopher. (21RT 3873-3874.) Dr. Caro noticed that "Mikey started breathing. He had agonal respirations. He was taking deep, gasping breath." (21RT 3874.) Dr. Caro attempted to

resuscitate Michael while still holding Gabriel with his left arm. (21RT 3874.) Dr. Caro knelt down next to Michael, pinched Michael's nose with his right hand, and gave him two breaths. (21RT 3874-3875.) Michael did not respond. Dr. Caro placed Gabriel down and decided to administer chest compressions to Michael. (21RT 3875.) Because Michael was propped up, Dr. Caro reached with his left hand to bring Michael's neck down to reposition him for chest compressions. When Dr. Caro placed his hand around Michael's head, the back of Michael's skull came off in Dr. Caro's hand. (21RT 3875-3876.) Dr. Caro placed Michael's head back down, grabbed Gabriel, and ran out of the room. (21RT 3876.)

Dr. Caro went back to the 911 operator and told her the responders needed to get there fast, and the operator told him they were on their way. (21RT 3876.) Dr. Caro ran to the mezzanine and saw that headlights were going down the wrong private road, and he ran back and relayed that information to the 911 operator. Dr. Caro then ran downstairs and unlocked the front double doors. Dr. Caro went back to the kitchen and called Juanita on a second phone line to see what had happened. (21RT 3877.) He told Juanita that appellant "shot the babies." (21RT 3878.)

Dr. Caro returned to the front door area and encountered two deputies with their guns out. The deputies grabbed Dr. Caro and pulled him outside. A deputy asked where the gun was, and Dr. Caro stated that it was upstairs. One deputy entered the house, and the other stayed with Dr. Caro. (21RT 3879.) The deputies kept Dr. Caro outside of the house for the entire night; he was allowed into the foyer area for a moment with the children when the bodies were about to be brought out. (21RT 3881.)

3. Emergency and law enforcement personnel arrive at the scene

Ventura County Sheriff's Deputies Mark Fullerton and Anthony Tutino were the first to respond to the scene, and they directed Dr. Caro,

who was holding Gabriel in his arms, outside the residence. (17RT 3024-3025, 3048-3049.) Dr. Caro appeared very distraught and emotional. (17RT 3024-3025, 3027-3028, 3049.)

The two deputies entered the residence and went upstairs, and Deputy Tutino noticed bloodstains at different locations on the staircase. (17RT 3025, 3050-3051.) The deputies found appellant lying on the master bedroom floor. Appellant was breathing heavily, and her shirt was raised up to her shoulder area. Several pools of blood, a pool of vomit, and several expended casings were located near appellant. (17RT 3026-3027, 3053-3055.) Appellant was later airlifted away from the scene and taken to the hospital. (18RT 3269, 3343-3344.) Deputy Tutino searched the master bedroom for the gun, but could not find it. (17RT 3055-3056.)

Emergency rescue personnel and additional sheriff's deputies began arriving at the scene. (17RT 3167; 18RT 3199-3200, 3231, 3286, 3296, 3322, 3424-3425; 19RT 3513, 3521.) The emergency personnel immediately determined that Joey and Christopher were deceased. (17RT 3156-3158, 3329-3331, 3386-3387, 3333; 19RT 3436, 3440-3444.) A firefighter who examined Michael was unsure if he detected a pulse and thought that he heard a single gasp of air, and he therefore asked for assistance. (18RT 3221, 3216-3217, 3224, 3331, 3333.) An emergency medical technician (EMT) examined Michael, but did not detect a pulse or respiration. (18RT 3337-3338; 19RT 3444-3445.) The firefighter and the EMT attempted to move Michael toward the foot of the bed in order to establish a better airway, but they ceased the movement when the EMT noticed some portions of Michael's scalp were going to remain on the pillow. The EMT then pronounced Michael deceased. (19RT 3445-3446.)

Deputies and emergency personnel noticed bloodstains on Gabriel's socks. (17RT 3048, 3168; 18RT 3324; 19RT 3430.) One of the responding deputies took digital photographs of the scene. (18RT 3298-3307.) A

sheriff's deputy ultimately recovered the .38-caliber Smith and Wesson revolver from a closet area in the master bedroom. (18RT 3240.)

At some point during the evening, deputies escorted Dr. Caro and Juanita Leon into the garage. Using a tape recorder attached to his belt, Deputy Tutino recorded part of the conversation that occurred between Dr. Caro and Juanita in the garage. (17RT 3074, 3078.) Dr. Caro asked Juanita why she had left, and she responded that she felt that they did not want her there anymore. (17RT 3075.) In the garage, Dr. Caro alternated between being calm and visibly upset. (17RT 3077.) Dr. Caro stated, "Why did she do this?", "She killed my best friend. She killed my Joey," and "She wasn't messing around. She shot them all in the head." (17RT 3077.)

4. Appellant's statements at the hospital

Between 12:40 to 1:00 p.m. on November 23, 1999, Ventura County Sheriff's Detective Cheryl Wade made her first contact with appellant in appellant's hospital room, and Detective Wade placed a tape recorder in the room to record appellant's statements. (30RT 6346-6347; 31RT 6544.) Detective Wade asked appellant how she had injured her foot, and appellant initially stated that she did not recall. (31RT 6526-6527.) In response to a subsequent question asking how appellant got hurt, appellant stated that she might have fallen down the stairs. (31RT 6527.) In response to a specific question asking how appellant got bruised, appellant stated, "Wrestling with a boy." (31RT 6528.)

When Detective Wade told appellant that she was suspected of "hurting" her boys, appellant's demeanor changed and she began crying. (31RT 6604, 6610.) Detective Wade did not tell appellant which of the boys she was suspected of hurting. (31RT 6606.) Appellant then asked what her husband had told Detective Wade. (31RT 6605.) Appellant also asked about Gabriel's well-being by name, but did not inquire about Michael, Christopher, or Joey by name. (31RT 6606.) Appellant

specifically asked, "Where is Gabriel? Where is Gabriel? Is the baby okay? The baby, is he okay?" (31RT 6609.)

That same afternoon, Detective Wade escorted Juanita into appellant's room. (31RT 6528.) Detective Wade remained in the room while Juanita was there, and Detective Wade recorded the conversation between appellant and Juanita. (31RT 6528-6529.) Appellant stated to Juanita, "X is going to need somebody," and that he should not be by himself tonight. (31RT 6530.) Juanita asked appellant, "Why did you do this?" and recited a prayer over appellant. (31RT 6531.) Appellant clutched the front of her nightgown and stated, "My babies. My babies. I'm sorry. I'm sorry." (31RT 6531.)

On November 24, 1999, appellant asked Deborah Anderson, a nurse, "Has my husband called?" (28RT 6060.) Appellant was not upset or crying, and did not appear fearful when asking this question. (28RT 6061.)

5. Physical evidence

a. Appellant's injuries

At 12:27 a.m. on November 23, Ventura Sheriff's Deputy Jeffrey Miller responded to Los Robles Hospital and observed that appellant had an open, quarter-sized wound to the right side of head, a bruise on her right bicep, bruising on the inside of the thighs, and swelling and bruising on the top of her left foot. (15RT 2635-2636, 2646-2647.)

At 2:30 a.m., Dr. Donald Pryor, a neurological surgeon, began surgery on appellant. (20RT 3714-3715.) Appellant had "a large stellate explosion-type injury in the right parietal area where the scalp is literally blown apart, and there was no entrance or exit; it was a single large wound, and underneath in there was a compound depressed skull fracture which pushed the outer table of the bone into the brain." (20RT 3715.) Pieces of bone were missing from the inner table, and these bone pieces and some

bullet fragments were driven about two inches into the brain. (20RT 3716-3717.) Dr. Pryor recovered two bullet fragments during the surgery. (20RT 3721.)

Based on the injury, Dr. Pryor opined the firearm was held against the scalp. (20RT 3718.) The "firearm was likely discharged from inferior towards the superior direction and struck the skull tangentially," and the bullet traveled upwards on the side of appellant's head. (20RT 3718.) Dr. Pryor found nothing to indicate the wound was inconsistent with a self-inflicted wound. (20RT 3751.) CAT scans of appellant's head taken prior to the surgery showed that all of the bullet fragments were either at or above the level of the bullet hole, and that there were two bone fragments below the hole. (20RT 3720-3724; 25RT 4608-4609.)

On December 1, 1999, Dr. Mark Robinson, an orthopedic surgeon, performed surgery to repair appellant's fractured foot. (26RT 4615-4616.) The foot injury involved the forepart of the foot being broken away from the middle part of the foot. (26RT 4618.) The most common way for this injury to occur is to "come straight down on a pointed foot," and such an injury could also occur from falling down the stairs. (26RT 4619.)

b. Autopsies

On November 24, 1999, Dr. Janice Frank, the Assistant Chief Medical Examiner for Ventura County, performed the autopsies of the victims. (36RT 7385, 7387, 7392, 7400.)

The cause of Joey's death was a gunshot wound to the head. (36RT 7387-7388.) The entrance wound was a contact wound, meaning the gun muzzle was placed snugly against the skin surface before the gun was fired. (36RT 7387-7389.) The entrance wound was on the right side of the head. The bullet traveled from right to left, and slightly back to front and upwards. The bullet passed through the right and left sides of the brain and exited the left side of the head. (36RT 7389-7390.) Dr. Frank found

gunshot residue inside the entrance wound. (36RT 7389.) Because the wound through the brain was extensive, Dr. Frank concluded that it was likely the wound rendered Joey immediately incapacitated and unconscious. (36RT 7391.)

With respect to Michael, the cause of death was a gunshot wound to the head. (36RT 7392.) The entrance wound was a contact wound on the left side of the head, near the top of the head. (36RT 7394-7395.) The bullet perforated the skull, passed through the left and right sides of the brain, and struck the skull on the opposite side. (36RT 7395.) Dr. Frank recovered the bullet from underneath the scalp on the right side of the head, about one inch from the top of the head. (36RT 7397.) The wound would have resulted in immediate unconsciousness and incapacitation. (36RT 7399.)

The wound to Michael also caused bleeding in the brain. (36RT 7395.) Because the skull had multiple fractures, including at the base of the skull, these fractures would have affected where the blood in the brain would have traveled. (36RT 7395-7396.) Dr. Frank found "evidence that blood had been aspirated into the lungs, and this blood would have communicated with the respiratory space through fractures in the base of the brain." (36RT 7396.) Specifically, Dr. Frank found blood in the nasal cavity and the right lung, with the blood arriving in the lung through the inhalation of a breath. (36RT 7396, 7429.) Dr. Frank therefore concluded that "at least one breath had been taken after the injury." (36RT 7399; see also 36RT 7396.) These findings were consistent with Michael having agonal breathing, which was reflex breathing by someone with a serious injury or close to death. (36RT 7430, 7443.)

With respect to Christopher, the cause of death was two gunshot wounds to the head. (36RT 7400.) Both entrance wounds were in the same general location in the front-left area of the head, just inside the hairline; it

was not possible to clearly define the discrete entrance for each wound due to the bone fractures and significant skin tearing. (36RT 7400-7401.) At least one of the wounds was a contact wound due to the soot deposited on the outer surface of the skull. (36RT 7401-7402, 7436-7437.) The other wound could have been a contact wound, but it could not be determined with certainty. (36RT 7436-7437.)

One gunshot wound involved a tangential entrance wound; the bullet entered at a superficial angle, grazed across the head, and exited almost immediately without penetrating deeply into the brain. (36RT 7403-7404.) This bullet damaged the surface of the brain on the left side. (36RT 7404.) The bullet passed from front to back, with very little right-to-left or up-and-down deviation. Christopher's face would have been facing the gun at the time the bullet was fired. (36RT 7407.) It was possible that this wound would not have been immediately incapacitating, and it was possible Christopher could have moved after receiving this wound. (36RT 7408.)

The bullet that caused the other gunshot wound traveled in a different direction. This bullet penetrated deeply into the brain on a left-to-right and downward trajectory. (36RT 7409.) The bullet interrupted the nerve pathways that connected the right and left sides of the brain, it produced injury to deep structures in the brain, it passed through the parietal lobe on the left side of the brain and the occipital lobe on the right side of the brain, and it produced some skull fractures. (36RT 7409.) This wound was a "very severe injury" that would have been immediately incapacitating. (36RT 7409-7410.) This bullet did not exit the head, and Dr. Frank recovered the bullet underneath the scalp. (36RT 7409, 7411-7412, 7438.) Dr. Frank did not observe any fractures that would have allowed blood to flow specifically into the nasal cavity to be aspirated into the lungs. (36RT 7410.) Dr. Frank found no evidence Christopher was breathing in or exhaling blood at any time, and she did not find any blood in the lungs.

(36RT 7410, 7438.) The interval between the two gunshots needed to be sufficiently long enough to allow for the completely different bullet trajectories. (36RT 7435-7436.) Based on the autopsy findings, Dr. Frank could not determine which of the two gunshot wounds occurred first. (36RT 7407, 7435.)

c. The victims' blood on appellant's shorts and shirt

In the early morning hours on November 23, 1999, Deputy Miller recovered appellant's pajama shorts (Peo. Exh. No. 7) and shirt (Peo. Exh. No. 8) at the hospital; the clothes were collected from a backboard that appellant had been lying on. (15RT 2637-2639; 2641-2642.)

Edward Jones, a forensic scientist with the Ventura County Sheriff Department's Crime Laboratory, cut eight samples from eight different stained areas on appellant's shorts; these samples were subsequently sent to the Santa Clara County Crime Laboratory for DNA testing. (34RT 7050-7067.) Five of the stains appeared to be stains from projected blood, i.e., blood that flew through the air and landed on a target. (34RT 7056, 7066-7067.) One of the other stains was significantly different, and Jones believed that a "piece of scalp may have hit it with bloody hair on it." (34RT 7065-7066; see also 34RT 7056.) A different stain was yellow in color, tested presumptive positive for blood, and a microscopic examination of the stain showed that it was tissue with a great deal of nuclei; these factors led to the opinion that this stain was from brain matter. (34RT 7063-7064.)

Jones also cut out samples from different stained areas of appellant's shirt, and these samples were also sent to the Santa Clara laboratory for testing. (34RT 7067-7078.) Several of the stains appeared to be projected blood. (34RT 7073, 7076.)

Lisa Brewer, a supervising criminalist with the DNA unit in the Santa Clara County Crime Laboratory, performed DNA testing on the submitted samples (as well as all of the other samples submitted for DNA testing in this case) using the polymerase chain reaction (PCR) technique. (29RT 6075, 6083, 6095-6096.)

All eight of the stains from appellant's shorts tested presumptive positive for blood, and the DNA profile of each of the eight stains matched the DNA profile of either Christopher or Joey. (29RT 6104, 6115, 6118-6120, 6125, 6128, 6130-6138.) Specifically, the DNA profile of five of the stains matched Christopher's DNA profile. (29RT 6118-6120, 6130-6132, 6134-6135, 6138.) The frequency of this DNA profile occurring in the general population was greater than one in 260 billion, and the frequency of the profile occurring in the Hispanic population was one in 2.3 trillion. (29RT 6123, 6127, 6129.) Joey was a possible minor contributor as to one of the five stains, and appellant was a possible minor contributor as to another stain. (29RT 6118-6120, 6137-6138; 30RT 6271-6272.) The DNA profile on the remaining three stains matched Joey's DNA profile. (29RT 6105-6110, 6114, 6117, 6125-6126.) The likelihood of that DNA profile occurring in the general population was greater than one in 260 billion, and the frequency of the profile occurring in the Hispanic population was one in 1.2 trillion. (29RT 6108, 6127.)

All 29 stains from appellant's shirt tested presumptive positive for blood. (29RT 6139, 6141-6146, 6149, 6153, 6156, 6159-6160, 6164, 6167-6177.) The DNA profile of two of these stains matched Joey's DNA profile, and Christopher and Michael were possible minor contributors as to one of those stains. (29RT 6147-6148, 6150-6152; 30RT 6285-6286, 6289.) Joey was a possible source as to another stain. (29RT 6177-6179.) The DNA profile of 19 stains matched appellant's DNA profile, and Christopher was a possible minor contributor as to two of those stains.

(29RT 6140, 6142-6143, 6145, 6154-6159, 6161, 6165, 6167-6172; 30RT 6293.) The testing of the remaining stains resulted in partial DNA profiles, with appellant as the possible source. (29RT 6172-6176.)

d. Appellant's bloody palm prints on the doorframe

Bloodstains containing fingerprint or palm print details were found on a doorframe that connected Joey's bedroom to the Jack-and-Jill bathroom. (15RT 2696-2697, 2759-2760.) The portion of the doorframe containing the bloodstains was cut out and treated with aqueous amido black, a chemical process used to develop latent prints in blood. (15RT 2760-2764.)

Edward Brannon, a latent print examiner for the Federal Bureau of Investigation, found two latent palm prints on the cut-out portion of the doorframe, and further determined that both latent palm prints were left by appellant because they matched an inked print from appellant's right palm. (27RT 4897-4901, 4909, 4934-4935.) Brannon also concluded that the blood found on the doorframe was present on the person's hand before the hand touched the doorframe because the coloration of the ridges was consistent with the color of blood; in other words, the blood was transferred from the hand to the doorframe, and the latent palm prints did not result from the hand touching blood that was already on the doorframe. (27RT 4911, 4941-4942.)

Brannon also examined three areas of blood above one of the palm prints and concluded that the location of these bloody areas was consistent with the placement of the fingers of the person who left the adjacent palm print. (27RT 4907, 4911-4912, 4954.) Brannon also concluded that these areas of blood were likely caused by fingers due to the presence of ridge detail, but there was insufficient detail or information to perform a comparison. (27RT 4907, 4944-4956, 4965, 4973, 4976-4979, 4982-4983.)

Michael Parigian, a Ventura County Crime Laboratory forensic scientist, took two samples from the blood found on the doorframe; the samples were taken from areas without any ridge details. (32RT 6670-6676.) One of these samples was submitted to the Santa Clara County Crime Laboratory for DNA testing. (32RT 6676.) This sample tested presumptive positive for blood. DNA testing showed that the major DNA profile matched Joey's DNA profile, and that Christopher was a possible minor contributor. Appellant and Michael were excluded as possible contributors. (29RT 6185-6186.)

e. Joey's blood in the master bathroom sinks

Bloodstains were found in two sinks in the master bathroom, and samples of the bloodstains were collected and submitted for DNA testing. (15RT 2735-2739.) A sample recovered from one sink tested presumptive positive for blood, and the DNA profile matched Joey's DNA profile. (29RT 6199-6201; 30RT 6297.) A stain recovered from the other sink tested presumptive positive for blood; the major DNA profile matched Joey's DNA profile and Christopher was a possible minor contributor. Appellant and Michael were excluded as possible sources. (29RT 6202-6203.)

f. Blood in appellant's fingernail scrapings

In the early morning hours on November 23, 1999, an evidence technician with the Ventura County Sheriff's Department collected fingernail scrapings from both of appellant's hands at the hospital. (33RT 6849-6852.)

Jones tested the fingernail scrapings for blood, and the tests resulted in a presumptive positive for the scrapings from each hand. (35RT 7220-7224.) The fingernail scrapings were then submitted to the Santa Clara laboratory for testing. (39RT 7933-7934.) The scrapings, which were red-

brown in color, also tested presumptive positive for blood at the Santa Clara laboratory. (29RT 6181-6183.) DNA testing of the scrapings from the right hand showed that a mixture was present with no major contributor; appellant, Christopher, and Joey were possible contributors. (29RT 6182.) DNA testing of the scrapings from the left hand showed that there was no major profile; appellant and Joey were possible contributors. (29RT 6183-6184.)

g. Other bloodstains

Jones found high-velocity spatter on a large pillow in the lower bunk bed, and the directionality of the spatter on the pillow was straight toward the wall and consistent with blood spatter on the wall behind the bunk bed. (36RT 7366-7368.) DNA testing of two bloodstain samples from that large pillow showed that the DNA profile matched Christopher's DNA profile. (29RT 6194-6195.)

DNA testing of a bloodstain sample from the wall behind the bunk bed showed that the DNA profile matched Christopher's profile. (29RT 6197-6198; 32RT 6624-6629.) In light of the DNA results, Jones opined that the spatter on the wall originated from Christopher's head. (36RT 7317-7319, 7366-7367.)

Jones also found high-velocity blood spatter on the pillow underneath Christopher's head; the spatter originated from Christopher's head, and the directionality of the spatter was traveling towards or over Michael's face. (36RT 7334-7335, 7351-7352, 7365.) DNA testing of a bloodstain sample from a blanket in the lower bunk showed that the DNA profile matched Christopher's profile. (29RT 6192-6193.)

DNA testing of a bloodstain sample from Gabriel's sock showed that the DNA profile matched Michael's DNA profile. Appellant, Joey, Christopher, and Dr. Caro were excluded as sources. (29RT 6217.)

DNA testing of a bloodstain sample from the staircase carpet in the Caro residence, and DNA testing of a bloodstain sample from the staircase railing, showed that Michael was a possible source as to both stains. Appellant, Joey, Christopher, and Dr. Caro were excluded as possible sources. (29RT 6207-6208, 6213-6215; 33RT 6879-6883.)

Jones examined the recovered gun and observed the presence of blood on the barrel, the yoke, and the area where the cylinder locked in on the bottom of the barrel. In the area where the grip met the frame, Jones observed apparent brain matter that was yellow in color. (35RT 7203-7204.)

h. Blood on Dr. Caro's clothes

Margaret Schaeffer, a supervising forensic scientist in the crime laboratory of the Ventura County Sheriff's Department, examined Dr. Caro's shirt and sweatpants for the presence of any projected bloodstains, i.e., stains that resulted from some force other than gravity that caused blood to travel and end up on the target surface. (31RT 6434-6535, 6437.) From her examination of the items, Schaeffer located one bloodstain on the sweatpants which, in her opinion, was the result of projected blood; the stain consisted of a single drop, was round in shape and about 1.5 millimeters in diameter, and was located slightly below the left knee area of the sweatpants. (31RT 6437-6438, 6511.) Later DNA testing of the stain determined that Michael was a possible source of the blood; appellant, Joey, Christopher, and Dr. Caro were excluded as possible donors. (29RT 6204-6206; 30RT 6298.)

Parigian examined Dr. Caro's green jacket for the presence of high-velocity blood spatter and projected blood, and he did not detect either high-velocity blood spatter or projected blood. (32RT 6678-6679.) The jacket contained 15 stains that tested presumptive positive for blood, and all of these stains appeared to be transfer stains that resulted from a bloody

object touching the jacket. (32RT 6699, 6710-6711, 6713-6722, 6725, 6726-6728; 33RT 6730, 6787.) The transfer stains could have been caused by wet blood on the bottom of Gabriel's socks while Dr. Caro was holding Gabriel, by the jacket coming into contact with blood on the bed rail and the bunk bed, and by the sleeve coming into contact with another bloody area on the jacket. (33RT 6787, 6820-6821.)

Parigian did not observe any high-velocity blood spatter on Dr. Caro's blue sandals. (32RT 6681, 6685.) He observed some projected blood, consisting of three spherical bloodstains about a millimeter in diameter, on the strap of the left sandal. (32RT 6681-6682.) Parigian classified the projected blood as medium-impact spatter because the blood particles were concentrated in a small area and he did not observe the mist or small particles that were characteristic of high-impact spatter. (32RT 6687-6688.)

Parigian examined Dr. Caro's socks and did not observe the presence of high-velocity blood spatter. (32RT 6679.) Testing on the right sock was negative for blood. (33RT 6743-6744.) Three bloodstains in the heel area of the left sock appeared to be smeared. (33RT 6748.) Five areas of bloodstains on the top side of the left sock appeared to come from the same source that caused the projected blood on the left sandal. (33RT 6753-6754.) Parigian could not determine whether the bloodstains were projected or transferred, and the nature of the material was one of the reasons he could not make that determination. (32RT 6679-6680.)

i. Englert's expert testimony on bloodstains and spatter

Rod Englert, a consultant specializing in homicide scene reconstruction and a retired police officer, testified as an expert on bloodstain interpretation. (37RT 7468-7472.) Low-velocity bloodstains include drops of blood that come down at 90 degrees or other angles,

transfers, and swipes. (37RT 7483-7484.) A drop of blood that falls at 90 degrees will be round when it strikes the surface, and scalloped edges sometimes occur when the drop strikes a porous surface. (37RT 7484.) When a drop of blood strikes at an angle, it becomes oblong; the more acute the angle, the more elongated the stain. (37RT 7485.) A drop of blood that falls into another drop of blood will result in satellite spatter to the side. (37RT 7491-7492.)

Medium-velocity spatter occurs when energy is impacted into a source of blood. When that energy strikes a source of blood, it will create a random distribution with small and large drops that travel away from the attacker and strike an adjacent surface. (37RT 7486.) Medium-velocity spatter does not travel very far. (37RT 7497.)

High-velocity spatter typically result from gunshots. (37RT 7487, 7502.) When the energy from a projectile goes into a source of blood, it creates high-velocity spatter that is often referred to as an aerosol mist or a cloud because it is a fine mist of tiny droplets that only travels a short distance. (37RT 7487-7488, 7497.) Larger drops will travel further than the small droplets. (37RT 7488, 7497.)

Back spatter, which is blood traveling back toward the shooter, can occur if a bullet strikes a large source of blood (such as the heart or head). For example, if the bullet strikes the head and the bullet does not exit, pressure builds up inside the head and blood will travel back toward the shooter in a cone shape because of displacement. (37RT 7487.) If the bullet exits, pressure is relieved and forward spatter, also in a cone shape, occurs; back spatter in such a situation may or may not occur. (37RT 7487-7488.) High-velocity spatter from a head generally comes out in a cone shape. (37RT 7504.) Hair on the scalp or other objects can block some of the blood. (37RT 7504-7505.) Blood in a fine mist dries very quickly. (37RT 7505-7506.)

Englert examined the bedding from Joey's room. (37RT 7512.) High-velocity mist was present on a pillow, and the directionality of the spatter was to the left. (37RT 7514-7515.) There was a bullet-type defect on a pillow, just above a pool of blood. (37RT 7514-7515, 7520.) There were two separate patterns of blood pooling on the bedding that were inconsistent with each other, which indicated that two different bleeding events occurred at separate times. (37RT 7516.)

Englert opined that Joey was face-down in the pillow when he was shot, and this opinion was based on the examination of the bedding, the trajectory of the wound through the head, and the recovery of a bullet from the left side of the bed. (37RT 7520-7521.) Because Joey was found lying face-up on his right side and back, and in light of the medical examiner's opinion that Joey had suffered an incapacitating wound, Englert opined that Joey's face-up body position was consistent with someone moving him after he had been shot. (37RT 7522.) The presence of 90-degree drops of blood between two large stains was consistent with rolling Joey over to the left side of the bed. (37RT 7522-7524.) The bloodstains on Joey's chest and the side of the torso were consistent with Joey lying face-down in a pool of blood, and the bloodstains on Joey's left arm were consistent with his left arm folded underneath him. (37RT 7525-7527.)

Englert concluded that Michael was shot while he was face-up and the shooter was on Michael's left side, and this conclusion was based on the crime scene photographs and the autopsy results showing that Michael suffered a contact gunshot wound to the left side of the head. (37RT 7538-7539.) Englert found no indication that Michael volitionally moved after he was shot because of the extensive bleeding and the absence of any disturbance or disruption of the blood patterns underneath his body. (37RT 7540.) The evidence indicated that Michael was shot before Christopher

because Michael's right arm was found underneath Christopher. (37RT 7540-7541.)

No high-velocity spatter or mist from Michael's wound was found, and Englert explained that Michael's hair could have blocked it. (37RT 7541-7542.) Blood ran down the side of the bed next to Michael, causing bloodstains on a pillow, the bedrail, and the floor. (37RT 7540-7544.) There was a pooling stain on the floor with satellite spatter (i.e., blood dripped in blood) and coagulation. (37RT 7544-7546.) A disruption in this stain suggested the stain had been stepped in, and this was consistent with transfer stains adjacent to the main large stain. (37RT 7544-7545.)

Based on the trajectory of the bullet that caused Christopher's tangential head wound, Christopher was facing the shooter at the time of this gunshot. (37RT 7547.) Englert concluded that this tangential wound occurred before the other gunshot wound suffered by Christopher, and that Christopher was sitting up when the tangential wound occurred. This conclusion was based on the evidence that Christopher was found lying on top of a bone fragment and a bullet fragment with hair and tissue attached to it, and the evidence that the bullet that caused the tangential wound to Christopher was the only bullet that exited from a victim's body in that bedroom. (37RT 7548-7550, 7557.) In addition, most of the multiple fragments from that bullet were found near the head of the bed or on the floor, and the absence of bullet damage to any of the pillows collected from the room indicated that Christopher was not lying down in the bed or on the pillow when the tangential wound occurred. (37RT 7550-7552.)

At the time the tangential wound occurred, Christopher's head was facing to the left, over Michael's body. Christopher's position was somewhere between just off the pillow to being seated upright at 90 degrees, but the exact position could not be determined. (37RT 7552.)

Englert opined that the shooter was standing to Christopher's left when Christopher started to sit up in bed. (37RT 7553.)

The bloodstains on Christopher's T-shirt were located on the left side of the shirt (consistent with the wound on the left side of the head) and involved elongated, angular drops of blood. (37RT 7559-7561.) These angular blood drops were consistent with the directionality of the blood traveling from up to down on the shirt, and required Christopher to be in an upright position rather than lying down. (37RT 7560.) Bloodstains on the left side of Christopher's shorts were round and similar to 90-degree drops, which was consistent with Christopher sitting up and having his head directly over the left side of the shorts while bleeding. (37RT 7562-7563.) The pattern of 90-degree blood drops on Christopher's right thigh and calf indicated that his head passed over his bent right leg while bleeding, and Englert opined that Christopher "actually came up on his knee" in order to generate that staining pattern. (37RT 7565-7570, 7582-7583.)

A V-shaped pattern of 90-degree blood drops on blankets, a pillow, and a "Goofy" doll found underneath the bed indicated that Christopher's head was directly over the bloodstain patterns, and further indicated that his head moved forwards and then backwards in a V-shaped direction while bleeding after the first gunshot. (37RT 7571-7577, 7582.) Englert also opined that Christopher's head moved over the edge of the bed in order to generate the 90-degree bloodstain on the Goofy doll. (37RT 7576-7577.) A bloodstain on Christopher's right forearm was a transfer stain from a pool of blood on a blanket. (37RT 7578-7580.) The staining pattern on the back of Christopher's shorts was consistent with pooling and lying down in a source of blood. (37RT 7563.) Christopher came back down onto his pillow after he moved around and generated these staining patterns; this position was shown by the large amount of high-velocity mist from the second shot that went across the left side of the pillow. Englert opined that

Christopher came back down onto his pillow by one of two ways: either voluntary movement by Christopher or someone placed him into that position. (37RT 7583-7584.)

The second gunshot generated a large amount of blow-back spatter because it penetrated into the large, pre-existing wound from the first gunshot. (37RT 7558, 7584-7585.) The high-velocity spatter mist predominately went across the pillow that Christopher was lying on, to the left side of his head. (37RT 7584-7585, 7588.) High-velocity spatter mist was also present on Christopher's left ear and temple, the right side of Michael's face, several pillows, the bed post closest to the left side of Michael's head, and the wall. (37RT 7584-7588.) The wall had tissue, hair, and Christopher's blood. (37RT 7585.) Larger blood droplets were present further away from the entry wound. (37RT 7590-7592.)

A computer animation consisting of eight separate scenes (Peo. Exh. No. 90) was played during Englert's direct examination testimony. The animation illustrated Englert's opinion as to how the shootings of Michael and Christopher occurred in order to generate the bloodstain spatters in this case. (37RT 7533-7534, 7536, 7453, 7552, 7557-7558, 7563-7564, 7583, 7607-7609.)

Englert examined appellant's shorts and observed high-velocity spatter on the inner-left crotch area. (37RT 7592-7594, 7598.) The individual spatter stains were about one millimeter in length and were consistent with the size of the spatter stains on Michael's face. (37RT 7595-7596, 7598, 7600.) Englert opined that the spatter in this area of the shorts was consistent with blowback spatter from the second gunshot fired into Christopher's head, and that the evidence was consistent with the conclusion that the person wearing the shorts was the person who shot Christopher. (37RT 7594, 7634.) He further opined that, at the time of the second gunshot, the shooter was standing at the junction of the left side of

the bed and the head of the bed, the shooter's legs were spread apart, and the shooter's left leg was about two feet from the bed. (37RT 7605-7607.)

Englert also observed a transfer stain, about two to two-and-one-half inches in length, on the outer portion of the left side of the shorts, which was consistent with bloody hair coming into contact with that area of the shorts. (37RT 7611-7613.) Englert opined that the evidence was consistent with the conclusion that the person wearing the shorts came into direct contact with Joey's bloody hair. (37RT 7634.)

On appellant's T-shirt, Englert observed high-velocity spatter across the top portion of the right shoulder and down the right shoulder blade area, with the directionality of the stains going from up to down. (37RT 7615-7616.) In Englert's opinion, the spatter pattern was consistent with the upward angle of the gunshot wound to the right side of appellant's head. (37RT 7616-7617.) The DNA testing results, which showed that it was appellant's blood on the shirt, were consistent with a gunshot wound caused by a gun held over the right shoulder, at an upward and slightly forward angle. (37RT 7616-7617.) The right arm needed to be raised up and the right elbow extended in order for the high-velocity spatter to get onto the outer portion of the right sleeve. (37RT 7617-7618.)

Englert examined Dr. Caro's green jacket and found transfer bloodstains on the right-front pocket and the back of the right sleeve. (37RT 7618-7619.) Englert did not observe any projected blood or high-velocity spatter on the jacket, and the absence of high-velocity spatter on the jacket was significant in light of the high-velocity spatter generated by the gunshots to Christopher and appellant. Because Englert would have expected to see high-velocity spatter on the jacket if the person wearing the jacket had been in close proximity to either Christopher or appellant at the time of the gunshots, the absence of high-velocity spatter indicated the

person who shot Christopher and appellant was not wearing that jacket at the time of the shooting. (37RT 7619-7621, 7629.)

Englert also examined other clothing from Dr. Caro. Englert found no projected blood on Dr. Caro's shirt. (37RT 7621.) On Dr. Caro's sweatpants, Englert found transfer bloodstains on the front of both pant legs. (37RT 7622.) Englert was aware that one stain of projected blood had already been cut from the pants and sent for DNA testing, and he did not find any evidence of projected blood on the pants that was consistent with being in the presence of spatter from a gunshot. (37RT 7622.) Englert did not observe any projected blood on Dr. Caro's socks that was consistent with being in the presence of a high-velocity spatter event. (37RT 3734.) Three small, irregular stains on the left strap of one of Dr. Caro's sandals were consistent with a blood-dripped-in-blood pattern and could have occurred when the sandal was in close proximity to a pooling stain with blood-dripped-in-blood satellite spatter on the floor near Michael. (37RT 7625-7628.) These stains on the sandal were not consistent with high-velocity or medium-velocity spatter. (37RT 7627.)

Englert identified the bloodstains found on the stairway carpet in the Caro home as transfer stains that occurred when something wet with blood came into contact with the carpet. (37RT 7629-7630.) In Englert's opinion, Gabriel's blood-soaked socks could have left the transfer stains on the stairway carpet. (37RT 7630.) A transfer stain on a stairway bannister was consistent with a swipe from cloth and could have come from Gabriel's socks. (37RT 7632.) This transfer stain contained coagulated blood, and the blood in this stain would not have coagulated after it was transferred onto the bannister. (37RT 7630-7632; 38RT 7801-7802.)

j. Ballistics evidence

A sheriff's department evidence technician recovered several bullet fragments from the bedroom shared by Michael and Christopher, including

two fragments found in the top bunk, a fragment with an attached clump of hair that was found in the lower bunk, a fragment found on top of a pillow in the lower bunk, and fragments found on the floor. (33RT 6870-6874; 34RT 7022-7923, 7026-7027.) The technician also recovered a bullet fragment from Joey's bedroom. (33RT 6868-6869.)

In the master bedroom, the evidence technician recovered two lead fragments from the bed, two lead fragments from the floor, and five expended cartridge cases. (33RT 6865-6867, 6874-6877; 34RT 7022, 7028; 39RT 8044-8045.) A sheriff's department detective recovered three fragments from the top of a dividing wall in the master bedroom. (39RT 7900-7901; see also 16RT 2784-2786.) Ammunition found in the residence included a box containing .38-caliber Winchester Silver Tips; this specific type of ammunition fit into the .38-caliber Smith and Wesson revolver recovered from the residence. (39RT 8039-8040.)

James Roberts, a forensic scientist specializing in firearm and toolmark analysis at the Ventura County Sheriff's Laboratory, determined that four of the recovered bullets or bullet fragments had been fired from the recovered .38-caliber revolver: (1) the bullet, which consisted of a Winchester Silver Tip core and jacket, recovered during Michael's autopsy; (2) the bullet recovered during Christopher's autopsy; (3) the bullet fragment recovered from Joey's room; and (4) a jacket fragment from a Winchester Silver Tip-type bullet recovered from the top bunk in Michael and Christopher's room. (39RT 8035-8040, 8042-8043.) Roberts also determined that the jacket fragment found in the top bunk, and the bullet fragment with an attached clump of hair found in the lower bunk, were from the same Silver Tip-type bullet. (39RT 8040-8042; 40RT 8141.) Roberts further determined that the cartridge cases recovered from the master bedroom had been fired from the revolver. (39RT 8045-8048.)

A lead fragment found on the floor of the master bedroom was consistent with being part of a bullet that fragmented upon initially striking a hard object, such as a skull, at high speed and then striking another object. (33RT 6875; 40RT 8095-8099.) Roberts also determined that the size and shape of this lead fragment were extremely similar to a depression or mark in the master bedroom ceiling, near a dividing wall. (40RT 8099-8101, 8104.) The ceiling depression tested positive for the presence of lead residue, and a Phillips-head screw in the area of the damaged ceiling was consistent with a mark on the right side of the lead fragment. (40RT 8102, 8104-8105.) The ceiling damage was consistent with a gun being fired in an upward direction and part of the bullet traveling upwards. (40RT 8109-8110.)

Two of the fragments recovered from the top of the dividing wall in the master bedroom were small lead fragments that were consistent with lead fragments from a bullet that fragmented upon striking a hard object. (Peo. Exh. Nos. 122, 123; 40RT 8107-8108, 8113.) The third fragment recovered in this area was a small bone fragment, and Roberts found a small lead fragment on the bone surface. (Peo. Exh. No. 121; 35RT 7205; 40RT 8107.) In Roberts' opinion, the location of the three fragments on the top of the dividing wall was consistent with a gun held to the side of the head and fired in an upward direction. (40RT 8113-8114.)

A pillow found in Joey's bed had bullet damage. (15RT 2689-2690; 39RT 8048-8049.) A mark on Joey's bedroom wall was consistent with damage caused by a bullet moving at a very low velocity; a bullet striking an intervening target, such as a human head and a pillow, would significantly slow the bullet's velocity. (15RT 8050-8051.) There was no evidence of bullet damage to any of the bedding items found in the room shared by Michael and Christopher. (39RT 8052-8055.)

Roberts determined that the revolver's trigger pull weight was less than the normal trigger pull range, and it appeared the main spring had been modified to lighten the trigger pull. (40RT 8129, 8185, 8187-8188.) Roberts examined the gun safe and found toolmarks near the top of the safe that were consistent with a prying-type tool being used to open the safe. (40RT 8114-8115, 8124.) Roberts also determined that the safe's locking mechanism was not operating properly, allowing the safe to be opened by turning the knob without using the keypad buttons to input the combination. (40RT 8116-8117, 8125-8127.)

k. Gunshot residue tests

In the early morning hours of November 23, 1999, an evidence technician collected gunshot residue (GSR) samples from appellant and Dr. Caro. (33RT 6833-6838, 6846-6848.) Using a microscope, Jones did not detect any blood on the GSR samples from Dr. Caro. (35RT 7207-7209, 7227-7230; Peo. Exh. No. 71G, 71H.) Jones examined the GSR samples from appellant and determined there was blood present on the sample taken from appellant's right palm. (35RT 7219, 7230; Peo. Exh. No. 71C, 71D.)

Laila Benham, a criminalist with the Santa Clara County Crime Laboratory, examined the GSR samples taken from appellant and found particles "highly specific" to gunshot residue from the sample taken from the back of the right hand. (40RT 8072-8074.) A particle is "highly specific" to gunshot residue if that one particle contains all three elements of lead, barium, and antimony. (40RT 8087-8088.) As to the sample from appellant's right palm, Benham did not find any three-component particles (lead, barium, and antimony), but found some particles that contained lead-antimony, which was consistent with gunshot residue but not highly specific to gunshot residue. (40RT 8074.) No inference could be drawn based on the location of the gunshot residue. (40RT 8075.) As to the samples from Dr. Caro, Benham found particles highly specific to gunshot

residue on the sample from the back of the right hand. (40RT 8076, 8080.) The findings did not specifically indicate whether either of the individuals actually fired a firearm. (40RT 8077.)

Based on a hypothetical that was consistent with the prosecution's evidence, Benham opined that a person could get gunshot residue on his or her hands if that person either (1) found the gun used to commit the murders on the floor, picked up the gun, opened the cylinder, and carried the gun to another room, or (2) touched any of the children who had been shot. (40RT 8077-8079.)

6. Additional evidence

Security camera video of the parking garage at Northridge Hospital showed a car resembling Dr. Caro's car entering the parking area reserved for doctors at 9:24 p.m. on November 22, 1999. (16RT 2900-2901, 2909, 2917-2918, 2961.) The video also showed the same car exiting the parking garage at 10:36 p.m. (16RT 2919, 2961.) A Mercedes dealership employee testified that the car depicted in the security video was consistent with the appearance, model, and year of Dr. Caro's Mercedes. (16RT 2932-2939.)

On the evening of November 22, 1999, Tim Yang – who was usually the first to arrive at Dr. Caro's office in the morning and the last to leave in the evening – closed Dr. Caro's office at 5:45 p.m. The following morning, Yang arrived at the office and noticed it was in a different condition than when he left it the previous night because the lights were on and the two phones in the reception area were disconnected. (15RT 2652-2655.)

On November 23, 1999, Dr. Caro, accompanied by Detective Dan Thompson, returned to his house to collect some personal items. When Dr. Caro retrieved his gold bracelet from a drawer in a master bedroom closet, he discovered that appellant's wedding and engagement rings were attached to the bracelet (in addition to his own wedding ring that he had attached to

the bracelet the previous night). Dr. Caro started crying. (19RT 3553-3557; 21RT 3888-3889.)

Shortly before the commencement of trial, a district attorney investigator drove from Dr. Caro's Northridge office to the Caro home, using the same route and speeds that Dr. Caro had previously described. The investigator started the drive at 10:36 p.m., and arrived at the house at 11:17 p.m. The total distance traveled was 32.1 miles. (40RT 8194-8200.)

Dr. Michael Gitlin, a psychiatrist and professor of clinical psychiatry at UCLA, testified as an expert on psychiatry and psychopharmacology. (34RT 6906-6907, 6913.) In Dr. Gitlin's opinion, Prozac (the brand name for the drug Fluoxetine) does not cause people to be suicidal or aggressive. (34RT 6916-6917.) Studies indicate that medications that increase brain serotonin, such as Prozac, are associated with a diminished likelihood of aggressive or violent behaviors, and that Prozac does not increase suicidal thinking. (34RT 6917-6919.) The Food and Drug Administration has also determined that Prozac does not increase the risk for suicide or aggressive violent behavior. (34RT 6918-6920.) Prozac does not interact with alcohol in any meaningful way, and it does not affect a person's ability to recognize objects such as a gun and understand the purpose of that object. (34RT 6922.)

B. Defense Case

1. Appellant's testimony

Testifying on her own behalf, appellant denied killing her children. (48RT 9692, 9695.) After appellant and Dr. Caro argued and Dr. Caro left the house on the evening of November 22, 1999, appellant had no memory of the subsequent events that occurred to her and her children that evening, and her next memory involved waking up at the hospital the following day. (46RT 9304-9307, 9349-9350, 9636-9638, 9695.)

Appellant worked as Dr. Caro's office manager from 1984 until August 1999. (45RT 9146-9147.) The problems with paying the office rent first began in 1997, and appellant made Dr. Caro aware of the problems. (46RT 9265-9268.) In February 1999, the unpaid back rent totaled about $50,000. (46RT 9267.) The rent problems arose because of reduced payments from insurance companies. (46RT 9265.) When appellant and Dr. Caro discussed obtaining additional money to pay the overdue rent, Dr. Caro did not express any dissatisfaction with appellant's performance as an office manager. (46RT 9269.)

From 1993 onwards, Dr. Caro was aware that appellant was paying the living expenses associated with the Granada Hills home on behalf of her parents, and Dr. Caro was aware of the money she was giving to her parents. (48RT 9617, 9619.) In 1998 and 1999, appellant and Dr. Caro discussed the family finances and expenditures. They did not always agree about expenditures, and Dr. Caro usually decided any disagreements. (46RT 9193-9194.) Prior to August 1999, appellant handled the Caros' personal checking account. (46RT 9184.) On numerous occasions before August 1999, appellant obtained cash for use during family vacations by writing checks to her parents. (46RT 9188-9189, 9192, 9216.)

On August 11, 1999, while appellant and the children were on vacation in Waterford, Dr. Caro called appellant and demanded that the checkbook for the personal checking account be returned to him. (46RT 9185.) Dr. Caro agreed to let appellant use two or three checks for the children during the vacation. (46RT 9185-9186.) After appellant returned from the Waterford trip, she was unable to access the office and personal financial records from her home computer. (46RT 9335.) From August until November 1999, Dr. Caro provided blank checks to appellant if she requested them and told him the purpose for the checks. (46RT 9215, 9219-9220.)

Dr. Caro had the power of attorney for the Leons' trust account, and this authority was given during the year the Leons sold their Canoga Park home. (46RT 9195, 9199.) Appellant started paying the bills for the Leons' expenses and she kept a ledger of these bills; Dr. Caro knew where appellant kept this ledger. (46RT 9195-9196.) Appellant and Dr. Caro never discussed whether they would be reimbursed for the expenses paid on behalf of the Leons. (46RT 9197.) A $10,000 transaction in March 1999 was the first time money was transferred from the Leons' trust account into the Caros' personal checking account; appellant and Dr. Caro discussed this transfer before it took place. (46RT 9271.) After August 1999, Dr. Caro did not tell appellant about any subsequent transfers from the Leons' trust account. (46RT 9280.)

Dr. Caro purchased the .38-caliber Smith and Wesson handgun for appellant and arranged shooting lessons for her. Appellant had no prior experience with firearms before the lessons, and she learned how to load and shoot a gun during the lessons. (46RT 9166-9168.) When Dr. Caro traveled on trips out of town, he would hand the gun to appellant and she would place the gun on a shelf behind the bed. (48RT 9542.) When Dr. Caro returned from the trips, appellant would "pop" the gun safe open with the prong side of a hammer and place the gun in the safe; she would then close the safe by pushing the lid down without using the combination. (48RT 9546-9548.) The first time appellant took the gun out of the safe was in August 1998, and the last time she removed the gun from the safe was in June 1999. (48RT 9549, 9551-9552.) Appellant denied ever brandishing the gun at Dr. Caro. (46RT 9231; 48RT 9553.)

Appellant was unaware of the affair between Dr. Caro and Laura Gilliard at the time, and there was nothing in their behavior at work that caused her to be suspicious of an affair. (46RT 9252.) There was a period of time in 1999 that appellant was concerned about whether Dr. Caro still

loved her because he stopped telling her that he loved her. (46RT 9252-9253.) Dr. Caro was also very critical of everything she did, and communication between the two became difficult. (46RT 9253.) Many of the changes in the marriage started when Dr. Caro turned 50 years old in 1997. (46RT 9253.) By 1999, appellant had communicated with Dr. Caro about working on their marriage, and they attempted to do so in 1999. (46RT 9253.)

In August 1999, after appellant saw a lawyer's business card, Dr. Caro told appellant for the first time that he had made an appointment with a divorce lawyer. (46RT 9245, 9249; 48RT 9563-9564.) Based on what Dr. Caro told appellant, she believed that Dr. Caro did not keep the appointment. (46RT 9250.) Appellant later found notes reflecting a division of community property in the event of a divorce; she did not discuss these notes with Dr. Caro, but she was dismayed and felt betrayed. (46RT 9250-9251; 48RT 9628, 9630.) Appellant believed that she and Dr. Caro could work out their differences, and that they were both committed to doing so. (46RT 9251-9254.)

Appellant denied telling vanEssen that she was sitting on the bed, looking at the gun, and thinking about "doing it." (48RT 9648, 9682.) The statement, "Sometimes I think it would just be better if I wasn't here," as described in vanEssen's testimony, did not sound like something appellant would say. (48RT 9673.)

In an email that appellant sent to Dr. Caro on June 24, 1999, appellant wrote that her decreased presence in the office caused her to feel unneeded and insignificant, and that, "At this point I feel pretty lost." (48RT 9623-9624, 9667.) In an email that appellant sent to Dr. Caro on October 11, 1999, she wrote: "I'm lonely," "I'm isolated," "I've got nowhere to go or a career to fall back on," and "I'm scared. I don't have anyone to talk to." (48RT 9623-9625, 9667.)

On the evening of November 22, 1999, Dr. Caro was "distant" when he came home. (46RT 9293.) Appellant ate dinner with Dr. Caro and they both drank margaritas that she had prepared. (46RT 9292-9293.) Joey asked Dr. Caro to come upstairs and see something on the Nintendo videogame system, and Dr. Caro indicated that he would come later. Joey replied, "Oh, okay. I get it. Go ahead and have your little drinks." (46RT 9294.) Dr. Caro then got in Joey's face. Appellant told Joey to run and go upstairs to his room, and that she would come later to talk to him. (46RT 9295.) Dr. Caro told appellant that he did not appreciate that she had interfered and not backed him up. (46RT 9295.) Dr. Caro went to sit on a couch in the den. Dr. Caro then ran upstairs, and appellant followed. (46RT 9296.)

In Joey's room, Dr. Caro disconnected the Nintendo game system and carried the television out of the room and down the stairs. (46RT 9297.) Appellant looked at Joey, and he appeared to be asleep; Joey was face up, his eyes were closed, and he was breathing through his mouth. Appellant turned the lights off and went downstairs to the garage to see what Dr. Caro was doing. (46RT 9300.) In the garage, Dr. Caro placed the television between two cars. (46RT 9301.) When appellant asked why he took the television, Dr. Caro stated that Joey was being disrespectful and he did not like it. (46RT 9301.)

Appellant and Dr. Caro started arguing, and the argument continued inside the house. (46RT 9301-9302.) Their voices got loud, and the argument proceeded from the downstairs kitchen to the upstairs master bedroom. (46RT 9302.) During the argument, Dr. Caro told appellant that he was not going with the family to Waterford for Thanksgiving. (46RT 9302-9303.) Dr. Caro further stated, "I'm leaving." (46RT 9303.) Appellant asked what he meant, and Dr. Caro replied, "You know what I mean." (46RT 9303; 48RT 9634.) Appellant interpreted that statement to

mean that Dr. Caro was going to divorce her. (48RT 9635.) Dr. Caro walked out of his closet and was dressed in a maroon-colored USC jacket, a pair of blue Dockers pants, a white button-up short-sleeve shirt, and tennis shoes. (46RT 9304-9305.)

On direct examination, appellant testified that she had no memory as to what occurred after Dr. Caro stated that he was leaving and walked out of the closet. (46RT 9303.) She had no memory of seeing Dr. Caro leave the house, talking to her mother, calling Dr. Caro, or getting into bed to go to sleep. (46RT 9303-9307; 48RT 9632.)

On cross-examination, appellant testified that she was drinking a margarita in her bedroom after Dr. Caro left the house and just before she got ready to go to bed. (48RT 9633-9634.) The last thing she remembered from November 22 was being upstairs in her closet, getting ready for bed, and looking in a pitcher of margaritas that she had brought upstairs. (48RT 9637-9638.) Her children were alive at the time. (48RT 9695.)

Appellant did not remember what she was wearing when Dr. Caro left the closet, but she would not have been wearing the pajama shorts (Peo. Exh. No. 7) in November 1999 because those shorts were pregnancy shorts and too large for her at the time. (46RT 9306; 48RT 9637.) Appellant did not recall ever seeing the shirt (Peo. Exh. No. 8) and had no idea how it would have gotten on her body. (46RT 9306.) Appellant did not remember how her bloody palm print got on the doorframe of Joey's bedroom. (48RT 9695.)

The next thing that appellant remembered was waking up in the hospital. (46RT 9349-9350; 48RT 9695.) While talking to Detective Wade, there were periods of time where appellant was in pain or falling asleep. (48RT 9523.) Appellant was telling the truth to Detective Wade when she told the detective about the last thing that she could remember. (48RT 9524.) Appellant asked about Gabriel because she thought they had

been in a car accident. (48RT 9522.) Appellant did not remember communicating with Debbie Anderson about Dr. Caro. (46RT 9352.)

2. Expert testimony

Dr. Frederick Lovell, a pathologist and former Chief Medical Examiner for Ventura County, testified about appellant's head wound and opined that the gun was held at "essentially right angles to the side of [appellant's] skull" and at a "[v]ery slightly downward angle" that was less than 10 percent. (41RT 8356-8357.) Dr. Lovell's opinion that that the gun was pointed at a slight downward angle was based in part on CAT scans showing a bullet fragment below the wound. (41RT 8362, 8409, 8411-8412.) Dr. Lovell, however, was unsure of the exact mechanism as to how a bullet fragment could have struck the ceiling if the gun was not fired in an upward direction. (41RT 8422, 8555.)

In Dr. Lovell's opinion, it was "highly unlikely" that appellant's head wound was self-inflicted, and this opinion was based on several factors: the location of appellant's wound was a "very unusual area for a self-inflicted wound"; in light of the angle that the bullet impacted the skull, the gun would have been held at "an awkward angle"; and the location of the bullet fragments shown in the CAT scans. (41RT 8390-8391, 8394-8395, 8407, 8409.) Dr. Lovell also opined that the bruise on one of appellant's arms was due to fingers grabbing the arm, and it was a fresh-appearing bruise that occurred within one or two days preceding her hospitalization. (41RT 8388-8390.)

Herbert MacDonell, a consulting forensic scientist, testified as a blood spatter expert. (44RT 8771.) Contrary to Englert's conclusion, MacDonell did not find any high-velocity impact spatter mist in the crotch area of appellant's shorts; instead, the projected bloodstains were intermediate-sized particles that were "more consistent with a beating." (44RT 8793-8795, 8842-8845, 8915-8920.) Some transfer stains on the shorts were

consistent with a hair swipe stain caused by bloody hair brushed against the garment. (44RT 8839-8840.) Although Englert concluded one stain was a hair swipe, MacDonell could neither reach nor rule out that conclusion because of the absence of fine-line detail. (44RT 8840-8841.)

MacDonell did not find any directionality to the bloodstains in the shoulder area on appellant's shirt, and he opined that it was unlikely that the stains on the shirt resulted from high-velocity impact because there were not enough stains in a concentrated area. (44RT 8848-8850, 8939-8940.) MacDonell did not find any projected blood on Dr. Caro's jacket; the bloodstains on the jacket resulted from a surface transfer mechanism, i.e., blood was transferred to the jacket after direct contact with a bloody object. (44RT 8940-8941.) The stains on Dr. Caro's sweat pants appeared to be transfer stains. (44RT 8943-8945.)

3. Additional evidence

Gregorio and Juanita Leon, appellant's parents, testified that appellant was a good and loving mother. (45RT 9040, 9091.) In 1998 and 1999, Gregorio regularly purchased groceries for the Caro family; he primarily paid for the groceries with a credit card in Dr. Caro's name, and he later started paying with checks in the latter part of 1999 after the credit card was taken away. (45RT 9018-9019, 9050.) Also, in 1998 and 1999, appellant gave checks to Gregorio, and he either purchased items for the Caro family with the checks or cashed the checks and returned the cash to the Caros. (45RT 9027, 9031-9032, 9053, 9069, 9071-9074, 9077.)

Jodi Atkinson and Sandra Tischler were elementary school teachers for the Caro children, and appellant regularly volunteered in their classrooms. Atkinson and Tischler opined that appellant was a good and loving mother, and they observed nothing unusual about appellant's behavior on November 22, 1999. (43RT 8741-8744, 8748-8749, 8751, 8753.)

Gregg Stutchman, a consultant in audio and video forensics, digitally enhanced certain portions of the recorded hospital conversation between Detective Wade and appellant, and the enhanced portions were played to the jury. (53RT 10266-10272, 10276, 10278, 10291, 10279, 10282-10285, 10288.) One of the enhanced portions included the statement by appellant, "You have to ask the boys." (53RT 10291.)

II. PENALTY PHASE

A. Prosecution Evidence

1. Appellant's prior acts of violence

On the afternoon of June 10, 1982, Jeanine Milner was waiting in her car at the Topanga mall for a parking space that was about to become available. Appellant drove her car past Milner's car and stopped at an angle in front of Milner's car. Appellant stated that it was her parking spot and Milner disagreed, and they engaged in a verbal argument that involved profanity and name-calling. (60RT 11654-11655.) Appellant then exited her car and walked over to Milner's car. (60RT 11655-11656.) Appellant reached through the partially open driver's window, grabbed Milner's hair with both hands, and pulled Milner's head toward the window. (60RT 11656-11657.) Milner's forehead struck the window, resulting in a large bump on the forehead. (60RT 11657-11658, 11662.) Appellant re-entered her car and drove away, and Milner was able to get the license plate of appellant's car. (60RT 11659.) Milner went to the emergency room and received treatment. (60RT 11661-11662.) Milner later wrote a letter to appellant asking for compensation and an apology, and she received no response. (60RT 11663, 11688-11689.) Milner subsequently obtained an attorney and filed a lawsuit against appellant. (60RT 11665.)

Bridgette Bierend was waiting for a parking space at the mall when she witnessed the incident between appellant and Milner. Bierend observed appellant and Milner verbally arguing over the parking space, and she saw appellant reach into Milner's car and pull Milner's head into the side window. She observed a red mark on Milner's forehead. After appellant drove away, Bierend accompanied Milner when they reported the incident to the police at the mall. (60RT 11692-11698.)

Dr. Caro testified about prior acts of violence that appellant committed against him during their arguments. During an argument in August 1988, appellant punched Dr. Caro on the jaw with her right hand; Dr. Caro did not hit appellant before she punched him. (60RT 11705-11707, 11712.) The next day, appellant complained that her right hand was hurting. Dr. Caro took an X-ray of appellant's hand at his office and noticed a fracture in the knuckle area of the pinkie finger. (60RT 11707-11711.) Another doctor, Dr. Robert Kochsiek, eventually set the fracture. (60RT 11712.)

During an argument in 1996 or 1997, appellant struck Dr. Caro with her right hand, causing a black eye to Dr. Caro the next morning. (60RT 11715-11717.) At the office, Lisa vanEssen made a statement about the black eye. (60RT 11718.)

During a different argument in the late 1990's, appellant threw a jewelry box at Dr. Caro and the box struck him in the right eye. (60RT 11718-11722.) In February 1998, Dr. Caro's ophthalmologist diagnosed Dr. Caro with an injury to the right eye, and Dr. Caro subsequently underwent a laser surgery procedure for an eye condition. (60RT 11723-11725.)

In another argument during the late 1990's, appellant threw a "C" battery at Dr. Caro from a distance of six to eight feet away. The battery missed Dr. Caro and tore through the screen on a screen door, landing

outside. (60RT 11726-11731.) In a separate argument that occurred in the kitchen in the late 1990's, appellant grabbed a butter knife from a drawer and brandished it at Dr. Caro. (60RT 11740-11743.)

In an argument that occurred in the bathroom in 1998 or 1999, appellant picked up a set of hot rollers, which weighed about three pounds, and threw it at Dr. Caro. He moved, and the object struck the counter and bounced into the mirror, causing the mirror to break. (60RT 11732-11738.) The mirror was repaired in July 1999. (60RT 11738.)

Dr. Caro acknowledged that, up until 1988, he would hit appellant back after she first hit him in an argument, and that this occurred on four to six occasions. (61RT 11767.) During one argument in 1986, Dr. Caro punched appellant, causing her to fall. (61RT 11803, 11825-11826.) After 1988, Dr. Caro would physically move away from appellant to resolve their arguments. (61RT 11768.) Beginning six to 12 months prior to November 1999, Dr. Caro modified his approach to dealing with appellant in arguments by attempting to keep his voice down and doing nothing to upset her. (61RT 11768-11769.) Dr. Caro acknowledged that he forced himself sexually on appellant in September 1995 because he felt at the time that appellant was not having sex with him frequently enough. (61RT 11804-11805.) He further acknowledged that, on three or four occasions after 1988, he grabbed appellant in such a way as to cause bruising on her arms. (61RT 11805.)

Lisa vanEssen testified that appellant discussed the incident in the parking lot at the Topanga mall. Appellant stated that she was waiting for a parking space when another woman "snagged the space from her," and she got into an altercation with the other woman and hit her. (61RT 11852-11854.)

VanEssen recalled seeing Dr. Caro in the office with a black eye in 1996 or 1997. (61RT 11855.) Before Dr. Caro arrived in the office that

morning, appellant called vanEssen and told her that Dr. Caro had a black eye and that he received it when she threw a jewelry box in his direction. (61RT 11855-11856.) When Dr. Caro arrived, he also told vanEssen that appellant had thrown a jewelry box at him and hit him in the eye. (61RT 11856.) In the mid-summer of 1999, appellant called vanEssen and told her that there would be a bill coming into the office regarding the repair or replacement of a mirror. Appellant stated that she had thrown something at the mirror and the mirror broke. (61RT 11856.)

At some point prior to 1991, Dr. Robert Kochsiek, an orthopedic surgeon, treated appellant for a "boxer's fracture," which was a bone fracture in the hand sustained by the closed fist striking a firm object, such as a jaw. (62RT 11912-11914.)

Dr. Richard Yook, an ophthalmologist, observed a retinal tear on the edge of Dr. Cora's retina during a routine examination in February 1998. Dr. Yook subsequently performed laser treatment to seal the tear. (62RT 11921, 11924.) A retinal tear could occur from the shrinking of the vitreous (the gel inside the eye), blunt trauma by being struck in the eye, or infection. (62RT 11922-11923, 11927.)

2. Evidence about the victims

Dr. Caro described the victims. Joey was diagnosed with attention deficit hyperactivity disorder, and he had difficulty fitting in with the other kids in school. Joey was an excellent and precocious student who started reading when he was three years old. (61RT 11770.) Joey had a great memory, loved to read, and loved watching movies, especially the "Star Wars" movies. (61RT 11771-11774.)

Michael was born with an ear deformity that would have required plastic surgery later in his life. (61RT 11776.) Michael was a very loving and gentle child, was easy to raise, and was one of the most popular boys in school. (61RT 11775-11776.) He was musically gifted and enjoyed

singing. (61RT 11777.) Michael was also a gifted athlete who played soccer, baseball, and basketball, and he was the most athletically talented of the Caro children. (61RT 11777-11778.) Michael loved other children, especially babies, and he showed an affinity for Gabriel when Gabriel was born; Michael would crawl into Gabriel's crib, keep him company, and hold him. (61RT 11776.) Michael and Christopher were best friends, and Christopher adored Michael. Michael looked out for Christopher, and Michael decided to sleep in the same bed with Christopher because Christopher was afraid of the dark. Michael worshipped Joey. (61RT 11778.)

Christopher was a lively, witty, and funny child, and he was known as the family jokester. (61RT 11779-11780.) Christopher was the brightest of the three children. (61RT 11783.)

Gabriel always followed his brothers around and he called them "the guys." (61RT 11784-11785.) About one to two weeks after the murders, Dr. Caro took Gabriel to the Presilla house and Gabriel walked around saying, "Guys? Guys? Guys?" (61RT 11785-11786.) Gabriel was three years old at the time of trial. (61RT 11786.) When Gabriel sees photographs of his brothers, he sometimes called them by name and sometimes called them "the guys." (61RT 11786.)

A videotape (Peo. Exh. No. 6) was played to the jury. (61RT 11788.) The tape consisted of three scenes: the first scene showed six-year-old Joey on third base at a baseball game; the second scene showed Christopher crawling up the stairs; and the third scene showed all three boys and Dr. Caro, with Dr. Caro holding Christopher and the two other boys kicking a soccer ball with Dr. Caro. (61RT 11786-11788.)

Maria Hernandez, who worked as a housekeeper for the Caro family in 1999 and still worked for Dr. Caro in that capacity at the time of trial, observed all three of the older brothers playing with Gabriel. (61RT

11846.) Michael enjoyed playing with Gabriel the most. (61RT 11846-11847.) Gabriel has three large photographs of his brothers in a closet, and Gabriel always goes into the closet and says, "Hi, guys." (61RT 11848.)

B. Defense Evidence

1. Appellant's mental state at the time of the offenses

Dea Boehme, a supervising forensic scientist in the toxicology section of the Ventura County Sheriff's Department Crime Laboratory, analyzed a serum sample that was drawn from appellant at 12:30 a.m. on November 23, 1999. (61RT 11878-11884.) The results from the gas chromatograph test showed .15 grams percent alcohol in the serum, which indicated an alcohol concentration of .138 percent in the blood at the time the blood was drawn. (61RT 11881-11183.) A person with that level of alcohol "would be feeling the effects of alcohol rather strongly," and the person's ability to process information would be negatively affected. (61RT 11884, 11888.) For a woman who weighed between 125 to 140 pounds, a blood alcohol level of .138 was consistent with three drinks in the system. (61RT 11893-11894.)

Denise Lyons, forensic scientist for the Ventura County Sheriff's Department Crime Laboratory, performed a drug screen on appellant's urine sample, and the testing detected fluoxetine (Prozac), norfluoxetine (a metabolite of Prozac), lidocaine (a stimulant often given by emergency personnel), and metazolam (a sedative commonly administered by emergency personnel or in a hospital setting). (62RT 12027-12028, 12031-12034, 12044.) Testing on the urine sample also indicated the possible presence of the metabolite of Xanax, but it was below the standard cut-off limits so it was not reported. (62RT 12038-12039.) Lyons also performed a test on a blood sample from appellant for purposes of determining the

presence of alprazolam (Xanax) in appellant's blood, and no alprazolam was detected. (62RT 12036-12038.)

Kady Nygren, a licensed family therapist, first saw appellant on September 23, 1999, following a referral from another therapist. (62RT 11969.) Appellant was 40 minutes late for the first session, and she explained she was late because her husband had forgotten to come home early and she did not want to call him because she did not want to become controlling. (62RT 11970.) Nygren observed that appellant was very apologetic for being late, was "very anxious," and was "wringing her hands and fidgety." (62RT 11970.)

Nygren's next session with appellant was on September 30, 1999, and Nygren's provisional diagnosis of appellant after this meeting was "major depression recurrent." (62RT 11971-11973, 11997-11998.) In this session, appellant stated that she was having marital and financial problems. (62RT 11973.) During questions about appellant's relationship with her husband, it was revealed that there were "anger issues," but appellant did not ask Nygren to help with those issues. (62RT 11974.) Appellant admitted that there were some angry verbal outbursts with her husband and some pushing and shoving. (62RT 11974.) Appellant also expressed concern that she had been fired without a note of appreciation or a gold watch. (62RT 11975.)

Nygren's last two sessions with appellant occurred on November 4 and 17, 1999. (62RT 11975.) In the November 4 session, appellant wanted to talk about her son Joey, and Nygren attempted to refocus appellant on her marriage. (62RT 11976.) Nygren concluded that appellant had a "poor sense of self." (62RT 11979-11980.) In the November 17 session, appellant indicated that she was concerned about her husband's loyalty to the family. (62RT 12010.) Following that session, Nygren had the same

diagnosis of major depression and had no concerns that appellant was suicidal. (62RT 11981-11982.)

Dr. Daryl Matthews, a forensic psychiatrist, was a consultant for the prosecution prior to trial. (63RT 12230.) In Dr. Matthews' opinion, appellant was suffering from some form of depression in November 1999, and the depression was "instrumental" in the homicides and suicide attempt. (63RT 12233-12234, 12247, 12270.) Dr. Matthews also opined that appellant was in a "somewhat intoxicated state" at the time of the killings, and the interplay between alcohol and depression made it easier to act on impulses that would otherwise not be acted upon. (63RT 12247, 12258.)

Dr. Matthews explained that the motives of depressed women who kill their children generally fall into three classifications: (1) the altruistic filicide, which is premised on the idea that, if the woman kills herself, the children are better off dead than being alive without their mother; (2) a woman with "serious personality problems" that causes her to have difficulty distinguishing between herself and the children; and (3) a killing committed out of revenge to punish the child's father. (63RT 12250-12251.)

In Dr. Matthews' opinion, appellant was in the altruistic filicide classification, and he previously provided this opinion to the prosecution. (63RT 12254-12255, 12296.) He explained that women in this group "are primarily committing suicide and taking their children with them as a secondary act" in order to prevent something bad from happening to the children they love rather than trying to do something unkind to them. (63RT 12255.)

Dr. Matthews found that appellant had some negative personality features that fell into two groups: borderline personality features and dependent personality features. (63RT 12258.) Dr. Matthews was

convinced that appellant's depression was not a psychotic depression because people with a psychotic depression generally have delusions or hallucinations, and there was no evidence that appellant had delusions or hallucinations at the time of the offenses. (63RT 12275-12276.) Dr. Matthews therefore did not believe that the diagnosis of major depressive disorder with mood congruence psychotic symptoms was the correct diagnosis for appellant. (63RT 12275.)

Dr. Ines Monguio, a clinical neuropsychologist, conducted a psychological evaluation of appellant in June 2000. (64RT 12316.) As to the Axis I diagnosis, Dr. Monguio opined that, prior to her brain injury, appellant suffered from: (1) chronic depression with mood congruent psychotic features; (2) alcohol dependence without physiological dependence; and (3) alcohol abuse. (64RT 12340-12341, 12347.) Dr. Monguio's conclusion regarding psychotic features was based on appellant's statement that she would be left destitute and unable to support herself if Dr. Caro left, and Dr. Caro's description of appellant being suspicious of people talking behind her back at work. (64RT 12354-12355.) As to the Axis II diagnosis, Dr. Monguio concluded that appellant suffered from dependent personality disorder. (64RT 12341-12342.) Dr. Monguio also found support for a diagnostic opinion that appellant was suffering from amnesia caused by the brain injury and surgery. (64RT 12364.)

2. Appellant's character, background, and history

Gregorio Leon, appellant's father, testified that appellant was an obedient, loving, and happy child who never caused problems. (62RT 11931-11932, 11934, 11939.) As a child, appellant accompanied Gregorio on boating trips and Rams football games. (62RT 11932-11933.) Appellant began collecting dolls as a child and she continued this hobby in high school. (62RT 11934-11935.) In high school, appellant was a

cheerleader and played basketball and volleyball. (62RT 11934.) Appellant graduated from high school in 1975 with a "C" average. (62RT 11939.)

Aside from Dr. Caro and Armando Valencia (appellant's high school boyfriend), Gregorio was not aware of appellant having any other boyfriends. (62RT 11935.) Appellant lived with her parents until she was 28 years old (when she then went to live with Dr. Caro), and appellant never acted violently or caused any problems during that time period. (62RT 11939-11940.) Before the murders, Leon was not aware that appellant and Dr. Caro were involved in physical fights with each other. (62RT 11940.) After the murders, the Leons used their entire savings to hire a private attorney for appellant, and the attorney stopped working on the case because the Leons ran out of money. (62RT 11940.)

Gregorio observed that appellant was protective of the boys. (62RT 11953-11954.) Appellant always took care of the boys' health needs, the boys always had good clothing, she arranged the parties for the children, and she enjoyed the celebrations she had with the children. (62RT 11954.) Appellant appeared loyal to her husband. (62RT 11955.)

Sally Guzman, appellant's aunt, saw appellant three or four times a week when appellant was a child. (63RT 12192.) Appellant never caused any trouble as a child, teenager, or young adult. (63RT 12192-12193.) Prior to appellant's marriage, Guzman never knew appellant to be violent in any respect. (63RT 12193.) After appellant's marriage, Guzman saw appellant and the children about twice a week. (63RT 12193-12194.) Appellant was a good, patient mother who was always concerned about her children, and the children were happy. (63RT 12194-12195.) Appellant visited Guzman on the morning of November 22; appellant seemed happy and stated that they were going to leave for the vacation home. (63RT 12195.) Appellant always told Guzman that she loved her, and Guzman

unconditionally loved appellant. (63RT 12196.) Guzman did not want to see appellant receive the death penalty. (63RT 12200.)

Denice Leon (Denice), appellant's aunt by marriage, first met appellant when appellant was 10 or 11 years old, and had known appellant for 34 years. Denice had a very close relationship with appellant, and Denise and her husband were Gabriel's godparents. (65RT 12512.) As a child, appellant was active, energetic, and full of life. (65RT 12513.) She never got into trouble as a child and she was very protective of her younger cousins. (65RT 12513, 12515.) Denice had never known appellant to act in any violent manner prior to appellant's marriage, and Denice never suspected any violence in appellant's relationship with Dr. Caro. (65RT 12514.) In Denice's opinion, appellant was a very caring, loving, and protective mother at all times. (65RT 12515-12516.) Denice loved appellant and appellant expressed her love to Denice. In Denice's opinion, appellant should not be put to death. (65RT 12516.)

Louis Flores, who had known appellant since she was a child, testified that appellant was very obedient as a child. Flores, who was Joey's godfather, further testified that appellant "was very lovable" with her children, and she was patient and very attentive to their needs. (63RT 12185-12186, 12188.)

Armando Valencia, a captain with the Los Angeles City Fire Department, began dating appellant in high school, their dating relationship lasted seven to eight years, and the relationship ended in 1980 when she started dating Dr. Caro. (62RT 12117-12118, 12120.) Appellant was never violent toward Valencia or anyone else during their dating relationship, and it was Valencia's opinion that she was a good person. (62RT 12115, 12118.) After their relationship ended, appellant attended memorial services for members of Valencia's family. (62RT 12117.)

Dr. Alberto Campain, a former partner with Dr. Caro in a medical practice, hired appellant as a back-office nurse in 1982 or 1983 and stopped working with her in December 1984. (63RT 12175, 12181.) Appellant was a very compassionate and caring person to Dr. Campain's elderly patients, she never exhibited any sign of a temper, and she was the best back-office nurse in his 25 years of medical practice. (63RT 12178-12179.) On two occasions, appellant and Armando Valencia took Dr. Campain's two young children to a Dodgers game. (63RT 12178.)

David Leon, appellant's cousin and a senior Christian pastor, spent a great deal of childhood time at appellant's home. (62RT 12132-12133.) Appellant was protective of her younger cousins, she seemed to be a happy child, and Pastor Leon never saw her act violently as a child. (62RT 12133.) During family gatherings, he observed that appellant was very attentive to her children. (62RT 12137-12138.) About a month before the murders, appellant and her children attended a service at Pastor Leon's church for the first time, and he remembered Joey and Michael enjoying it. (62RT 12138-12140.) Prior to her incarceration, appellant appeared to have genuine religious faith. (62RT12142-12143.) Pastor Leon ministered to appellant after her arrest, and he opined that she had genuine faith throughout the course of his ministry to her. (62RT 12144-12145.) In the course of his ministry, appellant had never confessed to killing her children, and she always cried when discussing the children. (62RT 12151, 12156-12157.)

Margaret Oberon, employed by the Catholic Archdiocese as a chaplain for the Ventura County jail facilities, ministered to appellant about once a week for a two-year period. (65RT 12503-12505.) Appellant had never confessed to killing her children, and she always cried when talking about her children. (65RT 12505-12506.) In Oberon's opinion, appellant was a faith-filled woman with a great deal of compassion for the people

around her. (65RT 12506.) Oberon also believed appellant was a positive influence in the jail, and appellant's positive qualities included the encouragement she gave to others, her trust in God, and the positive attitude and hope she brought to others in the jail. (65RT 13507-12508.) Oberon described appellant's faith as "[s]trong, [u]nwavering, and "[v]ery centered in Christ, in his salvation." (65RT 12508.)

Beverly Meyer, Joey's first grade elementary school teacher, testified that appellant and Joey were very affectionate toward each other, appellant attempted to act upon Meyer's recommendations for assisting Joey, appellant regularly volunteered in the classroom, and she was very good with the other students. (62RT 12072-12075, 12077-12078.) Meyer saw appellant with her other children and they appeared to be a "delightful family." (62RT 12079.) In Meyer's opinion, appellant was an outstanding mother and a very friendly and loving person. (62RT 12077, 12079.)

Carol Bjordahl, Joey's third grade teacher, testified that Joey was a happy child, Joey and appellant were very affectionate toward each other, appellant was very responsive in attempting to address Joey's attention issues in the classroom, and appellant was a very active volunteer parent in the classroom. (62RT 12085-12087.) Appellant was very supportive of Bjordahl when Bjordahl's mother died, and appellant also organized a surprise bridal shower in the classroom for Bjordahl. (62RT 12089-12090.) Appellant seemed very caring and affectionate toward all of her children. (62RT 12088-12090.) In Bjordahl's opinion, appellant was a loving person and a very good mother. (62RT 12090-12091.)

Jodi Atkinson, Joey's fifth grade teacher, testified that appellant was affectionate toward Joey. (65RT 12494-12495.) When appellant volunteered in the classroom, she worked with a specific group of five children to assist them in their reading. (65RT 12495-12496.) Atkinson never observed appellant express any level of frustration with the children,

and she was extremely positive with the students. (65RT 12496-12497.) On November 22, 1999, Atkinson observed appellant pick up Joey from school; appellant gave Joey a hug and a high-five and they walked off together to the car. (65RT 12498.)

Sandra Tischler, who previously testified in the guilt phase, became acquainted with appellant as a teacher for Christopher and Michael. (62RT 12097.) Appellant volunteered in the classroom and on field trips, and she was warm when interacting with the other students. (62RT 12098-12102.) Michael appeared to be a happy child, and appellant was always affectionate toward her children. (62RT 12100.)

Janice Thornton, Michael's second grade teacher, testified that Michael was a happy and outgoing child who wrote about appellant in positive terms in his journal. (62RT 12110, 12112.) Appellant offered to volunteer in the classroom, but Thornton did not need parent volunteers at the time. (62RT 12110.)

Robin Clark testified that her children attended the same school as the Caro children. The Clark family and the Caro family also attended the same Catholic church, and Clark taught Michael in a religious education class at the church. (63RT 12208-12209.) Michael was a very affectionate and intelligent child, and he was at a level above the other children as to religious education. (63RT 12210.) Michael had a very loving and close relationship with his mother, and appellant was very loving and affectionate with all of her children. (63RT 12210-12213.) In Clark's opinion, appellant was a very good mother. (63RT 12215.)

3. Additional evidence

In two interviews with Investigator Barnes, Dr. Caro made several prior inconsistent statements regarding appellant's acts of violence toward him. In a tape-recorded interview in January or February 2000, Dr. Caro stated that in February 1998, appellant and Dr. Caro were arguing and

appellant threw jewels at him and they struck him in the eye; Dr. Caro furnished records from Dr. Yook in support of that incident. (63RT 12301-12302.) In the same interview, Dr. Caro stated that the incident in which appellant suffered a boxer's fracture occurred in 1996 or 1997, and appellant injured her hand by striking him in his jaw. (63RT 12303.) In an interview in March 2001, Dr. Caro stated that he thought he received a black eye from appellant in 1997, he tried to hold her or push her away and she hit him in the right eye, and he used makeup to cover up his eye; Dr. Caro did not say anything about a jewelry box. (63RT 12298-12300.)

The parties stipulated that appellant had no prior convictions. (62RT 12130.)

ARGUMENT

I. APPELLANT DID NOT HAVE A RIGHT TO BE PRESENT WHEN THE PARTIES STIPULATED TO THE EXCUSAL OF PROSPECTIVE JURORS

Appellant contends that her constitutional and statutory rights to be present at a critical stage of the proceedings were violated when the trial court, the prosecution, and defense counsel agreed through email exchanges to excuse 62 prospective jurors. (AOB 125-133.) This claim is without merit.

The jury screening process for hardship excusals took place over five court days, between July 17 and 23, 2001. (6RT 767.) On the first day of hardship screening, the trial court and the parties initially agreed to discuss the individual hardship requests in chambers rather than in open court. The court then asked defense counsel, "And would your client waive her presence for purposes of the discussions on hardship and whatever the parties basically stipulate to?" Defense counsel replied, "Yes, your Honor." (6RT 768.)

The ensuing screening process for each jury panel generally proceeded as follows. The prospective jurors requesting hardship excusals were asked to complete the hardship forms and return to the courtroom after a short recess. Outside the presence of the prospective jurors, the court and the parties then discussed the individual hardship requests, with counsel stipulating to most of the requests. With the exception of the first two jury panels on July 17 (6RT 800-819, 859-884), these discussions generally occurred in open court and in appellant's presence. Questioning of individual jurors regarding details of their hardship requests also occurred in open court and in appellant's presence. For the prospective jurors who did not request hardship excusals or whose hardship requests were denied, they were directed to complete written juror questionnaire regarding their views on capital punishment, and were further ordered to return to the courtroom on July 31. (E.g., 7RT 967-1026.)

On the second day of hardship screening, the trial court asked the parties if they had been able to review the questionnaires. Defense counsel replied affirmatively and also noted that, based on her communications with the prosecution, the prosecutors were doing the same. The court then asked the parties for an estimate as to how many prospective jurors would be excludable for cause based on their questionnaire answers. The prosecutor replied that there were a number of prospective jurors who answered in their questionnaires that they would find someone not guilty in order to avoid the penalty phase, and defense counsel replied that there were a number of prospective jurors who answered that a person convicted of killing a child should receive the death penalty. (7RT 1084-1085.) The court noted that the goal of the hardship screening was to have at least 200 prospective jurors complete the questionnaire, with no more than 50 percent of them stipulated for cause based solely on their questionnaire answers. (7RT 1087.)

During the hardship screening on July 20, the court noted for the record that three prospective jurors – Prospective Jurors S.B., E.G., and E.M. – had telephonically contacted the court the previous day and requested hardship excusal. The court also set forth the reasons for the hardship requests as to each of these prospective jurors. In open court and in appellant's presence, the parties stipulated to the excusals of these three jurors. (8RT 1327-1330.)

At the outset of the final day of hardship screening (July 23), the prosecutor asked about the possibility of calling in a second jury panel that day. The prosecutor explained that based "on informal conversations with the defense," both parties believed there would be "almost a 50 percent cause rate" with respect to prospective jurors likely to be successfully challenged for cause. (9RT 1332.)

Later that day, and in appellant's presence, the trial court noted for the record that the court's secretary had received telephone calls from five prospective jurors – Prospective Jurors J.L., C.W., G.F.M., D.R., and J.H.S. – requesting hardship excusals. After the court set forth the reasons for the hardship requests, the parties stipulated to the excusals of these five prospective jurors in open court and in appellant's presence. (9RT 1369-1371.)

Later the same day, the court asked the parties, "When can we meet to deal with any stipulations the parties have in terms of excluding people who have completed the questionnaire for cause – or any stipulations?" (9RT 1427.) The court noted that, in light of the prosecutor's estimate that there would be a 50 percent excusal rate for cause, it did not anticipate the parties would have much disagreement as to some of the challenges for cause. The court also noted that although there was a theoretical possibility of rehabilitating the prospective jurors, attempts to rehabilitate some of them

"would be a waste of time" in light of their written answers. (9RT 1427-1428.)

Defense counsel responded that she had "no intention of wasting someone's time in jury selection," that she had spent the entire weekend reviewing the questionnaires, that she had at least 39 to 40 people on the list for excusal, and that she fully expected that her list and the prosecution's list would share a "considerable" number of the same names. (9RT 1428.) The court therefore scheduled the next hearing for July 27 to address any stipulated excusals for cause. (9RT 1428.)

On July 25, 2001, the trial court sent a memorandum to the parties via email. (1 Supp. CT 110-111; 9RT 1431.) In the memorandum, the trial court first noted that eight prospective jurors – Prospective Jurors E.G., S.B., E.M., J.L., C.W., G.F.M., D.R., and J.H.S. – had already been excused pursuant to past agreement. The court further indicated in the memorandum that nine additional prospective jurors had contacted the court's secretary since the last court session and asked to be excused. The court identified these nine prospective jurors and their reasons for requesting excusal, and the court asked the parties for their "positions on these requests as soon as possible." (1 Supp. CT 110-111.) Later that afternoon, both the prosecution and the defense sent separate emails to the trial court, with both parties stipulating to the excusal of the nine new prospective jurors requesting excusal, as well as the eight prospective jurors previously discussed. (1 Supp. CT 112-113.)

On July 26, 2001, defense counsel sent an email to the trial court that listed a total of 62 prospective jurors "that both the prosecution and defense agree can be excused due to either hardship or cause." The listed 62 prospective jurors included the names of the 17 prospective jurors referenced in the prior set of emails sent on July 25. (1 Supp. CT 114-115.)

The next court hearing occurred the following day, in the presence of appellant. The court noted for the record that it had received defense counsel's email regarding the parties' agreement as to the excusal of the prospective jurors for hardship and cause. Defense counsel clarified that it was a "joint e-mail" and "it was something that we all worked on." The court indicated that all of the emails would be entered into the record and made a permanent part of the file. (9RT 1431-1432.)

"'Under the Sixth Amendment's confrontation clause, a defendant has the right to be personally present at any proceeding in which his appearance is necessary to prevent "'interference with [his] opportunity for effective cross-examination.' [Citation.]" (*People v. Harris* (2008) 43 Cal.4th 1269, 1306.) "'Similarly, under the Fourteenth Amendment's due process clause, a criminal defendant does not have a right to be personally present at a particular proceeding unless he finds himself at a "stage . . . that is critical to the outcome" and "his presence would contribute to the fairness of the procedure."' [Citations.]" (*People v. Cole* (2004) 33 Cal.4th 1158, 1231.)

Under article I, section 15 of the California Constitution, the "state constitutional right to be present at trial is generally coextensive with the federal due process right." (*People v. Harris, supra*, 43 Cal.4th at p. 1306.) "And, lastly, under sections 977 and 1043, a criminal defendant does not have a right to be personally present, even in the absence of a written waiver, where he does not have such a right under article I, section 15 of the California Constitution." (*People v. Cole, supra,* 33 Cal.4th at p. 1231.) Thus, as this Court has explained, a criminal defendant does not have the constitutional or statutory "right to be personally present in chambers or at bench discussions outside the jury's presence on questions of law or other matters as to which his [or her] presence bears no reasonable, substantial relation to his opportunity to defend the charges against him [or her]." (*People v. Harris, supra*, 43 Cal.4th at p. 1306.)

This Court has consistently "rejected claims of error based on a defendant's absence from jury screening discussions." (*People v. Gonzales* (2013) 54 Cal.4th 1234, 1254; see also *People v. Lopez* (2013) 56 Cal.4th 1028, 1051-1052 ["we have rejected the claim that a defendant's absence from sidebar or chambers conferences during which prospective jurors were questioned violated the defendant's right to be present"]; *People v. Virgil* (2011) 51 Cal.4th 1210, 1233-1236 [defendant's absence from bench conferences involving the questioning and discharge of prospective jurors did not violate his constitutional and statutory rights to be present during critical stages of the trial]; *People v. Butler* (2009) 46 Cal.4th 847, 865 [discussion of voir dire procedures "is not a critical stage for purposes of a defendant's constitutional and statutory rights to be present"]; *People v. Rogers* (2006) 39 Cal.4th 826, 855-856 [defendant did not have constitutional or statutory right to be present at in-chambers conference where his counsel stipulated to hardship excusals]; *People v. Benevides* (2005) 35 Cal.4th 69, 88-89 [no error from defendant's absence when the prosecution and defense agreed to stipulate to the excusal of prospective jurors based solely on their questionnaire responses]; *People v. Ervin* (2000) 22 Cal.4th 48, 72-74 (*Ervin*) [defendant did not have constitutional or statutory right to be present at jury screening discussions where counsel stipulated to excusals of prospective jurors based on bias or hardship because defendant's presence "would have served little purpose"].)

Here, as an initial matter, appellant fails to recognize that eight of the 62 prospective jurors referenced in the July 26 email were previously excused by stipulation in appellant's presence, in open court, and on the record. (8RT 1327-1330; 9RT 1369-1371.) Thus, as to these eight prospective jurors (Prospective Jurors E.G., S.B., E.M., J.L., C.W., G.F.M., D.R., and J.H.S.), appellant's claim is factually incorrect.

Moreover, appellant's claim also fails with respect to the other 54 prospective jurors. Under this Court's established precedent, appellant had no constitutional or statutory right to be present at any jury screening discussions because her presence did not bear a reasonable, substantial relation to her opportunity to defend the charges against her. (*People v. Benevides, supra,* 35 Cal.4th at p. 89; *Ervin, supra,* 22 Cal.4th at pp. 72-74.)

This Court's decision in *Ervin, supra*, is particularly instructive. In that case, the trial court allowed the "prosecutor and defense counsel to screen out, by stipulation, and outside defendant's presence, more than 600 prospective jurors whose questionnaires showed they were probably subject to challenge and excusal" because the questionnaire answers "clearly showed they (1) would automatically vote for death, (2) would never vote for death, or (3) suffered a financial or physical hardship preventing jury service." (*Ervin, supra*, 22 Cal.4th at p. 72.) These prospective jurors were then "excused without conducting any individual voir dire examination." (*Ibid.*) In rejecting the defendant's claim on appeal that this jury screening procedure violated his statutory and constitutional right to be present at all critical stages of the proceedings, this Court explained that "[d]efendant's presence at counsels' jury screening discussions at issue here would have served little purpose." (*Ibid.*)

Here, it is apparent from the surrounding circumstances that the prosecution and defense held informal discussions – conducted outside of court and without the participation of the trial court – that ultimately resulted in the parties agreeing to the excusal of certain prospective jurors for cause based on their questionnaire answers, and that the July 26 email from defense counsel to the trial court served to memorialize the parties' agreement. As in *Ervin,* appellant's "presence at counsels' jury screening discussions at issue here would have served little purpose." (*Ervin, supra,*

22 Cal.4th at p. p. 74.) For the same reasons, appellant had no right to be present at any part of the screening process that resulted in the stipulated excusals for hardship.[3] (*People v. Rogers, supra,* 39 Cal.4th at pp. 855-856 [defendant did not have constitutional or statutory right to be present at in-chambers conference where his counsel stipulated to hardship excusals].)

Appellant argues that *Ervin* is inapposite here because the "emails did not discuss the criteria for excusal, unlike the *Ervin* case where at least the parameters for excusal were agreed upon in advance." (AOB 132.) Appellant's attempt to distinguish this case from *Ervin* is unavailing. Here, the record indicates that, prior to July 26, the court and the parties had discussed stipulated excusals for cause based on the questionnaire answers, with the court and counsel agreeing that such stipulations would be appropriate for those prospective jurors who were likely to be successfully challenged for cause based on their questionnaire answers and could not rehabilitated. (7RT 1084-1087; 9RT 1427-1428.)

Appellant also cites a Washington case, *State v. Irby* (Wash. 2011) 246 P.3d 796, to support her proposition that the use of email to decide jury excusals violates the defendant's right to be present. (AOB 128-131.) As appellant acknowledges, however, the reasoning in that case conflicts with this Court's well-established precedent.

Finally, appellant fails to meet her burden of establishing prejudice from her absence. Appellant argues that her involvement "might have discouraged hasty excusals without questioning" (AOB 132-133), but this argument is purely speculative. As defense counsel noted, she had "no intention of wasting someone's time in jury selection" by attempting to

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[3] As previously noted, appellant was personally present when the parties stipulated to the excusal of eight prospective jurors whose names were included in the final list of 62 prospective jurors. (8RT 1327-1330; 9RT 1369-1371.)

rehabilitate prospective jurors who realistically could not be rehabilitated through questioning (9RT 1428). (See *People v. Gonzales, supra*, 54 Cal.4th at p. 1254 ["Experienced counsel saw no need for defendant's presence"].) Moreover, there is nothing in the record to suggest that appellant's presence would have altered counsel's professional judgment that the prospective jurors could be excused without the need for questioning. (See, e.g., *People v. Kelly* (2007) 42 Cal.4th 763, 782 [rejecting defendant's claim "that had he been present, he could have advised counsel to make better legal arguments"]; *People v. Waidla* (2000) 22 Cal.4th 690, 742-743 [rejecting argument that defendant could have "nudged" his counsel to request an instruction on a lesser included offense]; *People v. Johnson* (1993) 6 Cal.4th 1, 19 [rejecting defendant's argument that he "might have helped his counsel in questioning" a juror as "unduly speculative"].)

II. THE STIPULATED EXCUSALS OF THE PROSPECTIVE JURORS DID NOT VIOLATE SECTION 190.9; MOREOVER, THE APPELLATE RECORD IS ADEQUATE TO PERMIT MEANINGFUL APPELLATE REVIEW

In a related claim, appellant contends the excusals of the 62 prospective jurors violated section 190.9 and deprived appellant of any meaningful appellate review of these excusals. (AOB 134-136.) This claim is without merit.

Section 190.9, subdivision (a)(1), provides in pertinent part as follows: "In any case in which a death sentence may be imposed, all proceedings conducted in the superior court, including all conferences and proceedings, whether in open court, in conference in the courtroom, or in chambers, shall be conducted on the record with a court reporter present."

"[S]tate law entitles a defendant only to an appellate record 'adequate to permit [him or her] to argue' the points raised in the appeal." (*People v.*

Rogers, supra, 39 Cal.4th at p. 857.) "Under the due process and equal protection clauses of the federal Constitution's Fourteenth Amendment, and under state law, a criminal defendant is entitled to an appellate record that is 'sufficient to permit adequate and effective appellate review.' [Citations.]" (*People v. Elliott* (2012) 53 Cal.4th 535, 595.) "'The defendant has the burden of showing the record is inadequate to permit meaningful appellate review.' [Citations.]" (*Ibid.*)

Here, defense counsel agreed to every aspect of the challenged jury screening procedure, including any off-the-record discussions between the prosecution and the defense on the stipulated excusals for cause. Appellant therefore forfeited the instant claim. (*People v. Rogers, supra*, 39 Cal.4th at p. 857 [because defense counsel agreed to hold off-the-record discussions of hardship questionnaires, defendant forfeited claim the trial court erred in failing to transcribe the proceedings]; *Ervin, supra*, 22 Cal.4th at p. 73 [because defense counsel stipulated to every aspect of the challenged jury screening procedure, "defendant is barred from raising on appeal defects in the procedure in which he acquiesced"].)

In any event, the claim fails on the merits. First, as previously noted, the stipulated excusals as to eight of the 62 prospective jurors occurred on the record. (8RT 1327-1330; 9RT 1369-1371.) Second, section 190.9 was not violated because any email exchanges between the court and counsel did not involve any *oral* proceedings that required transcription by a court reporter. (See Cal. Rules of Court, rule 8.320(c)(3) [reporter's transcript must contain the "oral proceedings at trial"].) Moreover, as previously explained, the stipulated excusals for cause set forth in the July 26 email resulted from informal discussions between the prosecution and defense that were conducted outside of court and without the participation of the trial court. Such informal discussions between counsel are not "proceedings" within the meaning of section 190.9. (*People v. Harris,*

supra, 43 Cal.4th 1269, 1281 [requirement that "all proceedings" during trial be transcribed does not include "'private conferences . . . among counsel and cocounsel . . . .'"].) Accordingly, section 190.9 was not violated.

Furthermore, even assuming arguendo that section 190.9 was violated, the appellate record is adequate to permit meaningful appellate review. As explained earlier, the hardship excusals and the reasons for the excusals as to eight of the prospective jurors were set forth on the record during the reported proceedings held on July 20 and 23, 2001. (8RT 1327-1330 ; 9RT 1369-1371.) As to the other nine prospective jurors who requested excusal, their reasons were set forth in the court's emailed memorandum to the parties, which is part of the record. (1 Supp. CT 110-111, 116-117.) Also, all of the email communications between the trial court and the parties are contained in the clerk's transcript. (1 Supp. CT 110-117.) Finally, as to the remaining prospective jurors who were excused based on their questionnaire answers, their questionnaires are part of the record. Under these circumstances, the appellate record is adequate to permit meaningful appellate review, especially since the record plainly shows that appellant stipulated to the excusals of the 62 prospective jurors and therefore forfeited any claim of error based on the excusals. (*People v. Rogers, supra*, 39 Cal.4th at pp. 858-859 [because the hardship questionnaires, the clerk's minutes of the proceedings, and the on-the-record excusals of the prospective jurors whose hardship questionnaires were discussed in chambers were made part of the record on appeal, the record was adequate to establish that defendant stipulated to the excusals and therefore forfeited any claim of error based on the excusals].)

III. THE TRIAL COURT PROPERLY EXCUSED PROSPECTIVE JUROR J.W. AND PROSPECTIVE JUROR D.S. FOR CAUSE

Appellant contends the trial court erred in excusing Prospective Juror J.W. and Prospective Juror D.S. for cause because both prospective jurors stated that they could impose the death penalty. (AOB 137-151.) Appellant is incorrect.

"[T]he right to an impartial jury afforded by the state and federal Constitutions mandates that persons who oppose the death penalty are not disqualified from serving as jurors in a capital case simply by virtue of their personal views on that punishment." (*People v. Fuiava* (2012) 53 Cal.4th 622, 656; see also *Wainwright v. Witt* (1985) 469 U.S. 412 [105 S.Ct. 844, 83 L.Ed.2d 841] (*Witt*); *Witherspoon v. Illinois* (1968) 391 U.S. 510 [88 S.Ct. 1770, 20 L.Ed.2d 776] (*Witherspoon*).) "Under the applicable state and federal constitutional provisions, prospective jurors may be excused for cause if their views would prevent or substantially impair the performance of their duties." (*People v. Lancaster* (2007) 41 Cal.4th 50, 78.)

"""Assessing the qualifications of jurors challenged for cause is a matter falling within the broad discretion of the trial court. [Citation.] The trial court must determine whether the prospective juror will be 'unable to faithfully and impartially apply the law in the case.' [Citation.]""" (*People v. Lancaster, supra.* 41 Cal.4th at p. 78.) "The trial court is in the best position to determine the potential juror's true state of mind because it has observed firsthand the prospective juror's demeanor and verbal responses." (*People v. Clark* (2011) 52 Cal.4th 856, 895.) "Hence, the trial judge may be left with the 'definite impression' that the person cannot impartially apply the law even though, as is often true, he has not expressed his views with absolute clarity. [Citation.]" (*People v. DePriest* (2007) 42 Cal.4th 1, 21.) "When the prospective juror's answers on voir dire are conflicting or equivocal, the trial court's findings as to the prospective juror's state of mind are binding on appellate courts if supported by substantial evidence." (*People v. Duenas* (2012) 55 Cal.4th 1, 10; accord, *People v. Jones* (2012)

54 Cal.4th 1, 41 ["When such conflicting or equivocal answers are given, the trial court, through its observations of the juror's demeanor as well as through its evaluation of the juror's verbal responses, is best suited to reach a conclusion regarding the juror's actual state of mind"].)

A. Prospective Juror J.W.

When asked in the questionnaire to describe his general feelings regarding the death penalty, J.W. wrote, "strongly support where clearly warranted." (17 JQCT 5064.) When asked to choose the option that most accurately stated his death penalty position, J.W. checked off "Strongly in favor." J.W. also indicated that he believed the death penalty served the purpose of deterrence. In response to the question of whether the death penalty should be automatically imposed for the murder of a child, J.W. checked off "No" and wrote, "depends on circumstances – but tend to favor." (17 JQCT 5065.)

Answering the question of whether he had "any particular feelings or beliefs about the application of the death penalty to women," J.W. checked off "Yes" and wrote, "can't help but have gut reaction against – unless clearly warranted." In response to a question asking whether his views on the death penalty had changed over time, J.W. checked off "No" and further wrote, "wife is adamantly against. It's an issue we disagree on." Answering the question as to how often he felt the death penalty was sought, J.W. checked off "Too seldom" and wrote, "would have strongly favored it, had I been a juror in several publicized cases." J.W. also indicated that he felt the death penalty was imposed "Not often enough." (17 JQCT 5065.)

J.W. further indicated that he had no strong views against the death penalty that would cause him to refuse to find a defendant guilty of first degree murder, refuse to find any special circumstance true, or always vote against the death penalty, regardless of the evidence. (17RT JQCT 5066.)

J.W. also indicated that he was open minded about what the penalty should be, and that he did not have feelings in favor of the death penalty that were so strong that he would always vote for the death penalty regardless of the evidence. (17 JQCT 5067.)

J.W. checked off "Yes" in response to the question, "If you were a juror at a penalty phase, would you be able to listen to all the evidence, as well as the judge's instructions on the law, and give honest consideration as to both death and life without parole before reaching a decision?" J.W. further wrote: "However, a conviction with death penalty could damage my marriage. My wife has deep convictions." (17 JQCT 5067.)

During voir dire, the court asked J.W. whether there was anything about his views on the death penalty that were not covered in the questionnaire. J.W. responded: "When I filled out the questionnaire, I hadn't thought about it as thoroughly as I have since. I think it's very unlikely I would vote for the death penalty in this case, but it's not impossible." The court asked what made J.W. say it was unlikely, and he answered, "Personal concerns and just convictions." J.W. did not believe that there were any reasons why he could not be fair and impartial to both sides. (10RT 1508.)

In response to questioning from defense counsel, J.W. explained that he had reevaluated his views on the death penalty prior to coming to court, and he acknowledged that his current views on the death penalty were different than what he had written on the questionnaire. When asked to explain why he changed his views on the death penalty, J.W. responded: "I haven't changed my convictions regarding the death penalty per se. Knowing what I know about this case and just being honest, I think it would be difficult for me to apply it." (10RT 1509.) J.W. also indicated that he did not have any preconceived notions about the case, and that he could conceive of a case where he would not have the same type of

hesitancy regarding the imposition of the death penalty as he had in this case. (10RT 1510-1511.) J.W. indicated that he was willing to accept the responsibility for an independent decision on whether something constituted an aggravating or mitigating circumstance. (10RT 1512.)

J.W. stated that his wife's opposition to the death penalty "might" have an effect on him and "[t]hat was a personal concern." (10RT 1512.) J.W. said that he spoke to his wife about the possibility of his jury service in a capital case. (10RT 1513.) When asked whether he would be able to set aside his concern that his wife was a "staunch anti-death penalty feeler," J.W. replied: "I think so, but it's – it's a very difficult decision, and when there are personal ramifications, it's hard to guarantee." (10RT 1513.) Counsel asked if he could currently give an answer as to whether he could forget about his wife's opinions while acting as a juror in this case, and he replied affirmatively. (10RT 1514.)

During questioning by the prosecutor, J.W. reaffirmed his answers on the questionnaire that he supported the death penalty and that his wife vehemently opposed the death penalty. (10RT 1592.) The prosecutor then asked whether he "could really impose death on another human being and then go home and have a conversation with your wife and that would be okay in your life?" J.W. answered: "The reason I mentioned what I did is I know it would be okay in the short-term, and the long-term effects on our relationship would be, in my opinion, unpredictable." (10RT 1592-1593.) The prosecutor next asked, "Is that something you would worry about when you're trying to do your job as a juror in here?" J.W. replied, "Yes." When asked if that would perhaps impair his ability to impose death in a case that called for it, J.W. answered, "Perhaps." (10RT 1593.)

In response to additional questioning, J.W. indicated that he personally considered himself a death penalty supporter and that he would vote for it on the ballot. When the prosecutor asked J.W. if he did not think

he could personally impose the death penalty, J.W. replied, "We were talking hypothetically earlier about the McVeigh case. I could have easily there." J.W. then continued: "I guess – I'm sorry. Also old-fashioned. The thought of imposing the death penalty on a woman is an effort." (10RT 1593.)

When the prosecutor asked if he could impose the death penalty on appellant after hearing considerable evidence about her life and background, including evidence from her family members, J.W. answered, "Theoretically, yes. I said it wasn't impossible. I do think the probability is low." (10RT 1594.) Contrasting appellant's case with the McVeigh Oklahoma City bombing case, the prosecutor then asked J.W. if he could impose death in a case involving a triple murder committed in Ventura. J.W. answered, "There have been several recently." The prosecutor next asked if he could impose death in this case, and J.W. replied, "If I heard enough factors that led me to think it was the right thing to do." (10RT 1594.) J.W. further indicated that he would balance the aggravating and mitigating factors. In response to the question as to whether he could impose death in a case where a single aggravating circumstance was so overwhelming in comparison to the mitigating circumstances, J.W. replied: "Certainly. It would depend on my judgment." (10RT 1595.)

The prosecutor challenged J.W. for cause, arguing that his comments reflected that "he will be unable to impose death on a female defendant" and that "he's got a gut opposition to imposing death on a woman." The prosecutor also noted J.W.'s comments indicating that he would have personal issues with his wife in the event he were placed in the position where he needed to impose death. (10RT 1630-1631.)

Defense counsel disagreed, arguing that J.W.'s "hesitancy" in imposing the death penalty in a case of a triple murder committed by a female did not disqualify him and that his comments indicated that he

would be able to perform his duty as a juror "despite the gender of the defendant." (10RT 1631.)

The trial court granted the challenge for cause, explaining as follows:

> All right. Once again, I believe the issue is: Will a juror's position on the issue of capital punishment affect or substantially impair the juror's ability to be neutral on the question of life in prison without the possibility of parole or death and therefore follow the Court's instructions as to which penalty to impose.
>
> He has stated that he could consider imposing the death penalty as – but I'm not convinced that, in light of his statements in the questionnaire and one of the first statements he made while being seated, it's unlikely he will vote death penalty in this case based upon what he knows, it seems to me that his mind-set at present is one that substantially impairs his ability to reasonably consider both punishments and to reasonably consider both punishments as a reasonable possibility in this case.
>
> And he did indicate in the questionnaire that he did not believe in the death penalty for women, and he reemphasized that there – that – he said he might be old-fashioned, so I think it's good that chivalry is not dead yet in our society, but I am of the opinion that he would be unable to faithfully and impartially apply the law.
>
> Furthermore, by some of his statements he's made during questioning, it's clear he discussed his views on capital punishment with his wife after leaving the last proceeding. And in light of his comments on the questionnaire as to how adamantly opposed his wife is to it, I can understand why he would do that, but I think that violates the admonition of the Court to the jurors at the last proceeding.
>
> So I'm of the opinion that he is substantially impaired, could not be neutral and consider the possibility of imposing either of the two punishments, and therefore I will grant the challenge for cause.

(10RT 1631-1632.)

The trial court did not err in excusing J.W. because the court reasonably concluded from the record that J.W. was not capable of imposing the death penalty in this case. First, the record amply supported the finding that J.W. would be substantially impaired in discharging his duties as a juror due to his concern that a death penalty verdict would have negative consequences on his marriage in light of his wife's strong opposition to the death penalty. J.W. wrote in the questionnaire that "a conviction with death penalty could damage my marriage" because of his wife's "deep convictions" against the death penalty. (17 JQCT 5067.) In voir dire, J.W. stated that it was "very unlikely I would vote for the death penalty in this case" because of "[p]ersonal concerns." (10RT 1508.) J.W. subsequently identified his wife's strong opposition to the death penalty as a "personal concern" and acknowledged that his wife's views "might" have an effect on him. (10RT 1512.) J.W. further indicated that "it's hard to guarantee" that he could set aside his wife's views on the death penalty, that the long-term effects of a death penalty verdict on the relationship with his wife would be "unpredictable," that the possible negative consequences on his marriage would be something he would worry about while performing his duties as a juror, and that these potential consequences would "[p]erhaps" impair his ability to impose the death penalty in a case that warranted such a penalty. (10RT 1513, 1592-1593.)

Because these comments reflected doubts regarding J.W.'s ability to make the penalty determination due to his concerns about the negative impact of a death verdict on his personal life, the trial court could reasonably conclude that such concerns would prevent or substantially impair his performance as a juror in a capital case. (*People v. McKinzie* (2012) 54 Cal.4th 1302, 1340 [prospective juror's answer that voting for death would make her "very unhappy" and that her views "would probably" incline her to vote for life "reflected doubts regarding her ability

to make the penalty determination, and the trial court could reasonably conclude that "her feelings regarding the effect of imposing the death penalty would substantially impair her performance as a juror in a capital case"].)

Second, the record also supported the finding that J.W.'s views on the application of the death penalty to women would prevent or substantially impair the performance of his duties as a juror. J.W. wrote in the questionnaire that he had a "gut reaction against" applying the death penalty to women. (17 JQCT 5065.) When asked in voir dire whether he could personally impose the death penalty, J.W. initially stated that he could do so in the McVeigh case, but further explained: "I guess – I'm sorry. Also old-fashioned. The thought of imposing the death penalty on a woman is an effort." (10RT 1593.) J.W. also indicated in voir dire that "it's very unlikely I would vote for the death penalty in this case, but it's not impossible." (10RT 1508.) When asked whether he could impose the death penalty on appellant after hearing considerable evidence about her life and background, J.W. answered: "Theoretically, yes. I said it wasn't impossible. I do think the probability is low." (10RT 1594.)

These comments, coupled with the trial court's observations of J.W.'s responses and demeanor, fairly supported the trial court's ruling. (*People v. Duenas, supra*, 55 Cal.4th at p. 12 ["Comments that a prospective juror would have a 'hard time' or find it 'very difficult' to vote for death" reflect 'a degree of equivocation' that, considered 'with the juror's hesitancy, vocal inflection, and demeanor, can justify a trial court's conclusion" that the juror's views would prevent or substantially impair the performance of his duties as a juror]; see also *People v. Williams* (2013) 58 Cal.4th 197, 278 [prospective jurors properly excused because they "indicated at various times that, in light of their views concerning capital punishment, they would be unable to consider the death penalty as a reasonable possibility"];

People v. Fuiava, supra, 53 Cal.4th at pp. 660-661 [trial court could reasonably conclude that the juror's ability to follow the law would be substantially impaired in light of prospective juror's statements that she would have a "real problem" voting for death and that it would be "very unlikely" she would ever vote for death]; *People v. Lancaster, supra*, 41 Cal.4th at p. 80 [trial court properly excused prospective jurors for cause because they "gave answers during voir dire indicating there was only a slim possibility they could vote for the death penalty, regardless of the state of the evidence"].)

Furthermore, J.W.'s comments that he could theoretically impose the death penalty in an appropriate case, such as in the proffered McVeigh hypothetical, "did not deprive the trial court of discretion to find, after considering the prospective juror's answers, demeanor, and tone, that his feelings about the death penalty would substantially impair the performance of his duties as a juror." (*People v. Duenas, supra*, 55 Cal.4th at p. 12; see also *People v. McKinzie, supra*, 54 Cal.4th at pp. 1335, 1338, 1342 [excusals for cause supported by substantial evidence where prospective jurors indicated they were willing to consider the death penalty only in certain narrow circumstances, such as mass murders, that were not involved in the instant case].)

Appellant also argues that there was no evidence in the record to support the trial court's finding that J.W. had discussed his death penalty views with his wife after he became a potential juror in this case. (AOB 149-150.) Not so. J.W. stated that he had discussed with his wife the possibility of being a juror in a capital case. (10RT 1513.) Furthermore, in light of J.W.'s acknowledgement that his questionnaire answers regarding his death penalty views substantially differed from his subsequent voir responses, coupled with his expressed concerns regarding the effect of his wife's strong opposition to the death penalty, the trial court could

reasonably conclude that J.W.'s newly amended views on capital punishment resulted from recent discussions with his wife. In any event, as set forth above, the record amply supported the trial court's ultimate finding that J.W. would be substantially impaired in discharging his duties as a juror.

Finally, the instant case is distinguishable from *People v. Pearson* (2012) 53 Cal.4th 306 (*Pearson*). In that case, this Court held that the trial court erred in excusing a prospective juror whose views on the death penalty in general were "vague and largely unformed," but who "made no conflicting or equivocal statements about her ability to vote for a death penalty in a factually appropriate case." (*Id.* at p. 330.) Here, by contrast, J.W.'s responses regarding the possible negative consequences of a death penalty verdict on his marriage, and his acknowledged difficulty in his ability to impose the death penalty on a woman, supported the trial court's finding that J.W. would be substantially impaired in his ability to serve as a juror. (See *People v. Nunez and Satele* (2013) 57 Cal.4th 1, 24-25 [distinguishing *Pearson* because the record supported the trial court's finding that the views of the excused prospective juror would have substantially impaired the performance of her duties]; *People v. McDowell* (2012) 54 Cal.4th 395, 418-419 [same].)

B. Prospective Juror D.S.

When asked in the questionnaire to describe his general feelings regarding the death penalty, D.S. wrote: "It should be used only in the most extreme cases[.] I do not believe that killing the defendant is a solution to the first killing, so I would strongly object to the death penalty unless overwhelmingly convinced of intent free of mental impairments." (15 JQCT 4490.) Asked to describe his general feelings about life imprisonment without the possibility of parole (LWOP), D.S. wrote, "I support this over the death penalty." (15 JQCT 4490.) When asked to

choose the option that most accurately stated his death penalty position, D.S. checked off "Somewhat opposed," and further inserted the words "to strongly" between the printed "Somewhat" and "opposed." (15 JQCT 4491.) In response to the question as to whether he believed the death penalty served any purpose, D.S. checked off "No." (15 JQCT 4491.)

D.S. indicated that he did not believe the death penalty should be imposed automatically for the murder of a child, and further indicated that he did not have any particular feelings or beliefs about the application of the death penalty to women. (15 JQCT 4491.) When asked whether his views on the death penalty had changed over time, D.S. checked off "Yes" and wrote, "When I was younger I had not given much thought and I tended to be more supportive of it." (15 JQCT 4491.) In response to the question about his views on how often the death penalty is sought, D.S. checked off "Too often" and "Randomly," and further wrote, "Too many minorities and women, few white men." (15 JQCT 4491.) Responding to the question about his view on how often the death penalty is imposed, D.S. checked off "Too often." (15 JQCT 4491.)

When asked whether he felt so strongly against the death penalty that he would refuse to find the defendant guilty of first degree murder, regardless of the evidence, in order to end the case before it got to the penalty phase, D.S. placed a "?" in the "No" option. When asked whether he felt so strongly against the death penalty that he would refuse to find any special circumstance true, regardless of the evidence, in order to end the case before it got to the penalty phase, D.S. placed a "?" in the "Yes" option. In response to the question as to whether he had feelings against the death penalty that were so strong that he would always vote against the death penalty, regardless of the evidence, D.S. placed a "?" in the "No" option and further wrote, "But almost always." (15 JQCT 4492.)

In response to the question, "At this point, before you have heard any evidence, do you believe you are open minded about what the penalty should be?", D.S. placed a "?" in the "No" option and further wrote, "I would require sufficient evidence to convince me that the death penal[ty] will serve a purpose beyond retribution." When asked if he could listen to all of the evidence and the instructions on the law as a penalty phase juror and give honest consideration to both death and life without parole before reaching a decision, D.S. placed a "?" in the "No" option and further wrote, "I would begin from the position that the life without parole is enough punishment and no more is needed." (15 JQCT 4493.)

Asked by the trial court during voir dire whether there was anything regarding his views on the death penalty that were not covered in in the questionnaire, D.S. stated that he had hoped he had made himself "clear" in the questionnaire. (10RT 1640.) When defense counsel noted that it appeared "pretty clear" that he had "some qualms about applying the death penalty," D.S. replied affirmatively. Asked if he thought his qualms about the death penalty would prevent him from sitting as a juror in a case where the death penalty was a possible punishment, D.S. answered: "If I understand the proceeding correctly, I would have no objection to deciding guilt or innocence. But when we got to the next phase, I would have some very definite thoughts on it." (10RT 1643.) Defense counsel asked whether those thoughts would prevent him from following the law requiring him to keep an open mind and consider all of the evidence. D.S. answered that, as to the penalty phase, "I have some feelings that it seems to me might be in – in conflict with – I don't know how to answer your question." (10RT 1643.)

D.S. further stated: "The problem is probably, it seems to me, that the – the problem is that I believe that a killing is a killing is a killing, and to kill a second time for vengeance because the first killing occurred is

ridiculous unless there is proof offered that – that it would protect society, and then of course I think society comes first. [¶] So I – it's a complicated thing, and I would – I don't know exactly how to answer your question." (10RT 1644.) When asked whether he would be able to set aside his belief that the death penalty should be reserved for those who present a danger to society, D.S. replied: "There seems to be an assumption here that – that when we go into – if we were to go into the jury room to discuss it, that somehow we would be discussing the legal aspects of it as if we were lawyers, and I don't assume that. I assume we will be discussing it as we perceived what was presented to us. [¶] And at that instance, I just wanted to make it clear that I will be looking for that – that there is a threat to society." (10RT 1646.) In response to additional questioning, D.S. indicated that he was willing and able to follow the law requiring the weighing of aggravating and mitigating circumstances, and that he would be able to impose a death sentence if the aggravating circumstances outweighed the mitigating circumstances. (10RT 1647.)

During voir dire questioning by the prosecutor, D.S. indicated that it was "fair to say" he had qualms about the death penalty. D.S. reaffirmed his belief that to kill a second time for vengeance was "ridiculous," "[u]nless there is a threat to society. And then there's a threat to society, then I will support the – the death penalty." (10RT 1690-1691.) The prosecutor asked, "So in this case then, do you think you could ever impose death?" D.S. answered, "I have yet to hear anything." (10RT 1691.) When the prosecutor asked if there was any case where he could impose the death penalty if the only two sentencing options were LWOP or the death penalty, D.S. replied, "Certainly." (10RT 1691.) D.S. further explained: "Because just the fact that you've proven the person guilty and that I have voted for the person guilty and guilty three times is what you're saying, certainly you've presented a tremendous amount of information that would

sway me toward the death penalty. [¶] But it would be dependent on what you present. If all you present is – is some – is a simple set of facts that occurred and nothing beyond that, then I might not be. It depends on what you present. [¶] I don't know – I don't know anything about the case. Of course I read it three, four months ago, but I haven't dwelt on it, so I don't know." (10RT 1692.)

The prosecutor then asked D.S. the following question: "So in your mind, even though the only two options are death – death penalty or life in prison without parole, those are the only two options, and you believe that the death penalty is warranted if you're going to save society or protect society from a threat, doesn't life in prison do the same thing?" D.S. replied: "Aren't you saying that – in other words, you can't prove that it – that it's a threat to society, that the only thing you can prove is an actual murder and you want me to forecast what I would judge on what you may or may not prove? I can't do that." (10RT 1692.) D.S. further stated that his penalty phase decision would "be based on all of that information" in the penalty phase, "and there might be stuff in that would cause me to say yes, all right, it's – it's – the death penalty is there. But there – I don't know – " (10RT 1693.)

The prosecutor then began to ask the following question: "Even though society would still be protected by life in prison without parole, even though –" D.S. answered: "Even – okay. That's a tough one. There would be – it would be very difficult." D.S. further explained: "Very difficult. I don't know exactly what the answer is. But I certainly will say it will be very difficult." (10RT 1693.) When asked if there was any justification for the death penalty other than the protection of society, D.S. indicated that he "hadn't thought that through" and he did not "have an answer to that." (10RT 1694.)

When the prosecutor asked if could impose the death penalty on appellant after hearing evidence about her life and background, D.S. answered, ". . . you're asking a hypothetical that doesn't have enough basis still for me to answer. So the answer is I can't answer that kind of question. That's too ethereal." (10RT 1694.) The prosecutor asked D.S. if he "could ever vote death on a murder case where the only option is death or life in prison without parole or if you are so in favor of life in prison without parole because it serves the purpose of protecting society to you that you just wouldn't impose death." D.S. responded, "I cannot say that absolutely I would never do it." When the prosecutor asked, "So it's possible?", D.S. answered: "It's possible. But I certainly have expressed hesitation." (10RT 1695.)

The prosecutor challenged D.S. for cause. (10RT 1700.) Defense counsel opposed the challenge, arguing that D.S. stated that he "needs to hear the information before he could make the decision. He certainly could impose it in this case." (10 RT 1702.) In response to defense counsel's argument, the trial court stated, "I disagree because, one, he said it would be very difficult. I believe there's case authority that allows just for that." (10RT 1702.)

The trial court further explained:

> More importantly, the only time he indicated he could consider a vote of death would be in a situation which he believes society would be benefited, i.e[.], a notion of future dangerousness. [¶] Future dangerousness is not a factor in aggravation. It is not a matter that the jury can ever hear anything about. . . . I think he is in fact – with that mind-set I think that does substantially impair his ability to be neutral and give serious consideration to both potential punishments in the penalty phase.

(10RT 1702-1703.)

Defense counsel argued that although he understood the "Court's concern because of his stated position that there was – that the one circumstance he could see it being appropriate was for security," D.S. further indicated that he could impose the death penalty depending on what the facts were and that he would weigh the aggravating and mitigating circumstances. (10RT 1712-1713.)

The trial court responded as follows:

> All right. Again I concluded that I believe that the views expressed by [D.S.] in the questionnaire and his answers while in voir dire substantially impair his ability to be neutral and to follow the Court's instructions. I was left with the definite impression that the prospective juror would be unable to faithfully and impartially apply the law. [¶] And, once again, the issue is not whether a juror can simply consider imposing the death penalty in any case but whether the juror is able to consider it as a reasonable possibility in this case and he indicated it would be very difficult and furthermore indicated the only – I thought unequivocally stated the only time he would to impose it would be in a situation in which society would be protected, and that's when he hesitated when confronted with the fact that LWOP would serve that protective interest and I believe his consideration for imposition of the death penalty was on some notion of future dangerousness, which is not a factor in aggravation. [¶] So for those reasons I – I believe his ability to be fair and substantially consider both of the potential punishments in a penalty phase if we arrive at it was indeed substantially impaired. So I did grant the challenge for cause.

(10RT 1713-1714.)

The record fairly supported the trial court's decision to excuse Prospective Juror D.S. for cause. D.S.'s questionnaire reflected doubt and ambivalence about his ability to vote for the death penalty. When asked whether he felt so strongly against the death penalty that he would refuse to find any special circumstance true, regardless of the evidence, in order to end the case before it got to the penalty phase, D.S. placed a "?" in the "Yes" option. In response to the question whether he had feelings against

the death penalty that were so strong that he would always vote against the death penalty, regardless of the evidence, D.S. placed a "?" in the "No" option and further wrote, "But almost always." (15 JQCT 4492.) When asked in the questionnaire if he believed he was openminded about the appropriate penalty befor hearing any evidence, D.S. placed a "?" in the "No" option and further wrote, "I would require sufficient evidence to convince me that the death penal[ty] will serve a purpose beyond retribution." When asked if he could listen to all of the evidence and the instructions on the law as a penalty phase juror and give honest consideration to both death and life without parole before reaching a decision, D.S. placed a "?" in the "No" option and further wrote, "I would begin from the position that the life without parole is enough punishment and no more is needed." (15 JQCT 4493.) These conflicting and ambiguous responses suggested that D.S.'s views would prevent or substantially impair his ability to perform his duties as a juror. (See, e.g., *People v. McDowell, supra*, 54 Cal.4th at p. 417 [in answering question whether she would always vote against death, prospective juror circled "no," but then put a question mark by it].)

D.S.'s answers during voir dire further supported the trial court's finding that D.S.'s views on the death penalty would prevent or substantially impair the performance of his duties as a juror. Asked if he thought his qualms about the death penalty would prevent him from sitting as a juror in a case where the death penalty was a possible punishment, D.S. answered: "If I understand the proceeding correctly, I would have no objection to deciding guilt or innocence. But when we got to the next phase, I would have some very definite thoughts on it." (10RT 1643.) When defense counsel then asked whether those thoughts would prevent him from following the law requiring him to keep an open mind and consider all of the evidence, D.S. answered that, as to the penalty phase: "I

have some feelings that it seems to me might be in – in conflict with – I don't know how to answer your question." (10RT 1643.) Thus, with these comments, D.S. directly contrasted his ability to keep an open mind and fairly weigh the evidence at the guilt phase with his inability to do the same at the penalty phase. (*People v. Fuiava, supra*, 53 Cal.4th at p. 660 [substantial evidence supported excusal for cause where prospective juror "herself contrasted her ability to weigh the evidence fairly in reaching a determination of the issue of defendant's guilt with her ability to consider a verdict of death at the penalty phase"].)

In addition, D.S.'s statements that he would only vote for a death verdict in a case where there was a threat to society further indicated that D.S. was only willing to consider a death verdict in extreme or narrow hypothetical situations that presented more egregious facts than those involved in the instant case. (*People v. McKinzie, supra*, 54 Cal.4th at pp. 1335, 1338, 1342 [excusals for cause supported by substantial evidence where prospective jurors indicated they were willing to consider the death penalty only in certain narrow or extreme circumstances, such as mass murders, that were not involved in the instant case].) Also, when the prosecutor questioned D.S. on that point and asked whether he would be willing to consider a death verdict in the penalty phase even though an LWOP sentence would similarly protect society, D.S. hesitated and acknowledged that it was a "tough one" and that it would be "very difficult." (*People v. Duenas, supra*, 55 Cal.4th at p. 12 ["Comments that a prospective juror would have a 'hard time' or find it 'very difficult' to vote for death" reflect 'a degree of equivocation' that, considered 'with the juror's hesitancy, vocal inflection, and demeanor, can justify a trial court's conclusion" that the juror's views would prevent or substantially impair the performance of his duties as a juror]; see also *People v. Williams, supra,* 58 Cal.4th at p. 278 [prospective jurors "indicated at various times that, in

light of their views concerning capital punishment, they would be unable to consider the death penalty as a reasonable possibility"]; *People v. Fuiava, supra*, 53 Cal.4th at pp. 660-661 [prospective juror stated that she would have a "real problem" voting for death and that it would be "very unlikely" she would ever vote for death]; *People v. Lancaster, supra*, 41 Cal.4th at p. 80 [prospective jurors "gave answers during voir dire indicating there was only a slim possibility they could vote for the death penalty, regardless of the state of the evidence"].)

In sum, in light of D.S.'s questionnaire and voir dire responses, coupled with the trial court's ability to observe his "responses, demeanor, tone of voice, and other cues not readily apparent to the reviewing court [citation]" (*People v. Clark, supra*, 52 Cal.4th at p. 900), the trial court properly excused D.S. for cause.

C. In Any Event, Any Error Was Harmless

Assuming this Court were to find that any prospective jurors had been erroneously excluded, the error was harmless. As the Chief Justice recently observed, the United States Supreme Court in *Gray v. Mississippi* (1987) 481 U.S. 648, 666 [107 S.Ct. 2045, 95 L.Ed.2d 622] examined two theories upon which harmless error analysis might be applied to a violation of the review standard created under *Witherspoon-Witt*. (*People v. Riccardi* (2012) 54 Cal.4th 758, 840-846 (conc. opn. of Cantil-Sakauye, C.J.).) The majority in *Gray* rejected only one of those theories, however; that is, it rejected the contention that an erroneous *Witherspoon-Witt* exclusion had no effect on the composition of the jury. *Gray* found that the exclusion necessarily had an effect on the jury composition, even if one assumed that the prosecutor in any circumstance would have exercised a peremptory challenge against the death-scrupled prospective juror. Thus, as the Chief Justice concluded in *Riccardi*, "*Gray* stands for the proposition that *Witherspoon-Witt* error is reversible per se because the error affects the

composition of the panel '"as a whole"' [citations] by inscrutably altering how the peremptory challenges were exercised [citations]." (*Id.* at p. 842 (conc. opn. of Cantil-Sakauye, C.J.).) But as the Chief Justice also noted in *Riccardi*, one year after *Gray*, the high court in *Ross v. Oklahoma* (1988) 487 U.S. 81 [108 S.Ct. 2273, 101 L.Ed.2d 80], rejected the *Witherspoon-Witt* remedy as well as the rationale developed for it in *Gray*, as applied to a wrongly included pro-death juror, explaining that the Sixth Amendment is not implicated simply by the change in the mix of viewpoints held by jurors (be they death penalty supporters or skeptics) who are ultimately selected. (*People v. Riccardi*, *supra*, at pp. 842-844 (conc. opn. of Cantil-Sakauye, C.J.).)

Notwithstanding the Chief Justice's observations in *Riccardi*, this Court felt "compelled to follow that precedent that is most analogous to the circumstances presented here[,]" which was *Gray*, as opposed to *Ross*. (*People v. Riccardi*, *supra*, 54 Cal.4th at pp. 845 (conc. opn. of Cantil-Sakauye, C.J.).) Respondent respectfully asks this Court to revisit this conclusion in light of the observation that in *Gray*, the State (as well as the dissent) had argued the error had *no effect* on the case. Here lies "a reasoned basis" (*id.* at p. 844 fn. 2), for the different results in these cases. The "no-effect" rationale for adopting a harmless error rule only goes so far, and allowed the *Gray* Court to reject it so long as there was some effect on the jury composition. The state's proffered rationale therefore never required the Court to account for the nature of a *Witherspoon-Witt* violation. Here, however, the People now ask the Court to do so. The appropriateness of harmless error analysis, we submit, should take into account the "differing values" particular constitutional rights "represent and protect[.]" (*Chapman v. California* (1967) 386 U.S. 18, 44 [87 S.Ct. 824, 17 L.Ed.2d 705] (conc. opn. of Stewart, J.).)

Witherspoon protects capital defendants against the State's unilateral and unlimited authority to exclude prospective jurors based on their views on the death penalty. Accordingly, "'*Witherspoon* is not a ground for challenging any prospective juror. It is rather a limitation on the State's power to exclude . . . .' [Citation.]" (*Wainwright v. Witt*, *supra*, 469 U.S. at p. 423.) Beyond this protection is the simple misapplication of the *Witherspoon-Witt* standard because it does not grant the prosecution the unilateral and unlimited power to exclude death-scrupled jurors, and as this Court has recognized, no cognizable prejudice results simply from the absence of any viewpoint or the existence of any particular balance of viewpoints among the jurors. (*People v. Riccardi*, *supra*, 54 Cal.4th at pp. 843-844 (conc. opn. of Cantil-Sakauye, C.J.); *Lockhart v. McCree* (1986) 476 U.S. 162, 177-178 [106 S.Ct. 1758, 90 L.Ed.2d 137].) Thus, exclusion of a juror through misapplication of the *Witherspoon-Witt* standard results in mere "technical error that should be considered harmless[.]" (*Gray v. Mississippi*, *supra*, 481 U.S. at p. 666.)

IV. ANY ERROR IN DENYING DISCOVERY OF INFORMATION ABOUT PROSPECTIVE JURORS WAS HARMLESS

Relying principally on *People v. Murtishaw* (1981) 29 Cal.3d 733 (*Murtishaw*), appellant filed a pretrial motion to obtain "copies of all prosecution jury records and all prosecutorial investigations of prospective jurors to be called in the trial of this case." (3CT 561-564.) In a declaration attached to the motion, defense counsel explained that the defense was seeking access to information regarding "prior convictions of prospective jurors," the "political party affiliation" of the prospective jurors, and the "records of the previous service of prospective jurors and how they may have voted on previous cases on which they sat." (3CT 564.)

The prosecution filed a written opposition, asserting two grounds: (1) the discovery provisions of Proposition 115 (passed in 1990) effectively overruled the holding in *Murtishaw*; and (2) the information requested by appellant was the work product of the prosecution. (3CT 576-579.)

At the hearing on the motion, the parties submitted the matter on the written papers. (4RT 411.) The court then ruled as follows: "Based upon what I believe the law is in the state of California, I concur with the points raised by the district attorney, and therefore, the motion is denied." (4RT 411-412.)

Appellant contends the trial court erred in denying the motion. (AOB 152-156.) Appellant, however, cannot prevail on this claim. First, insofar as the motion requested "copies of all prosecution jury records and all prosecutorial investigations of prospective jurors to be called in the trial of this case," this broad request necessarily included materials that were the work product of the prosecutors, and such privileged materials were protected from disclosure under section 1054.6.[4]

Moreover, even assuming any error occurred, it was necessarily harmless because "'it is entirely speculative whether denial of access caused any significant harm to the defense.'" (*People v. Pride* (1992) 3 Cal.4th 195, 227, quoting *Murtishaw, supra*, 29 Cal.3d at p. 767.)

V. APPELLANT FORFEITED HER FOURTH AMENDMENT CLAIM, AND TRIAL COUNSEL WAS NOT INEFFECTIVE IN FAILING TO FILE A SUPPRESSION MOTION

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[4] Section 1054.6 provides as follows: "Neither the defendant nor the prosecuting attorney is required to disclose any materials or information which are work product as defined in subdivision (a) of Section 2018.030 of the Code of Civil Procedure, or which are privileged as provided by the Constitution of the United States."

Appellant contends the Ventura County Sheriff's Department unlawfully seized her clothing from the hospital without a warrant, in violation of her Fourth Amendment rights. (AOB 157-168.) Recognizing that her trial counsel never filed a motion to suppress this evidence, appellant further asserts her trial counsel was ineffective for failing to file such a motion. (AOB 157, 165-168.) Appellant has forfeited the Fourth Amendment claim, and the related claim of ineffective assistance of counsel is also without merit.

A. Factual Background

Ventura County Sheriff's Deputy Jeffrey Miller testified at trial that, on November 23, 1999, he was dispatched to Los Robles Hospital to observe appellant's condition and tape-record any spontaneous statements made by appellant. (15RT 2633-1634, 2640.) At 12:27 a.m., Deputy Miller arrived at the hospital, where he observed several injuries on appellant, including an open, quarter-sized wound to the side of her head. (15RT 2634-2635.) At the hospital, Deputy Miller collected pajama pants or shorts (Peo. Exh. No. 7), a T-shirt (Peo. Exh. No. 8), and a pair of underwear, from the "backboard that she'd been on." (15RT 2637.) The pajama shorts had been "cut off her." (15RT 2638.) The shorts and shirt were "spread out" on the backboard; "basically cut off, as looking like material with blood on it." (15RT 2641-2642.) Deputy Miller recovered the clothing items "as part of an investigation," but he did not recall whether it was his decision or the suggestion of another deputy at the hospital. (15RT 2641.)

B. Appellant Forfeited the Fourth Amendment Claim

A "motion to test the validity of a search of seizure must be raised in the superior court to preserve the point for review on appeal." (*People v. Miranda* (1987) 44 Cal.3d 57, 80.) Here, in light of appellant's failure to

file a motion to suppress the evidence under section 1538.5, appellant forfeited the Fourth Amendment claim. (*Id.* at p. 81.)

C. The Ineffective Assistance of Counsel Claim is Without Merit

To succeed on a claim of ineffective assistance of counsel, the defendant must establish both: (1) that counsel's representation fell below an objective standard of reasonableness; and (2) that there is a reasonable probability that, but for counsel's unprofessional errors, a determination more favorable to defendant would have resulted. (*Strickland v. Washington* (1984) 466 U.S. 668, 690 [104 S.Ct. 2052, 80 L.Ed.2d 674].) The reviewing court defers to counsel's reasonable tactical decisions in examining a claim of ineffective assistance of counsel, and there is a strong presumption that counsel's conduct falls within a wide range of reasonable professional assistance. (*People v. Weaver* (2001) 26 Cal.4th 876, 925-926.) "'[C]ounsel's decisionmaking must be evaluated in the context of the available facts.'" (*Ibid.*)

"On direct appeal, a conviction will be reversed for ineffective assistance only if (1) the record affirmatively discloses counsel had no rational tactical purpose for the challenged act or omission, (2) counsel was asked for a reason and failed to provide one, or (3) there simply could be no satisfactory explanation." (*People v. Mai* (2013) 57 Cal.4th 986, 1009.) "[E]xcept in those rare instances where there is no conceivable tactical purpose for counsel's actions, claims of ineffective assistance of counsel should be raised on habeas corpus, not on direct appeal." (*People v. Lopez* (2008) 42 Cal.4th 960, 972; see also *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 267.) "An appellate court should not declare that a police officer acted unlawfully, suppress relevant evidence, set aside a jury verdict, and brand a defense attorney incompetent unless it can be truly confident all the relevant facts have been developed and the police and

prosecution had a full opportunity to defend the admissibility of the evidence." (*People v. Mendoza Tello, supra,* 15 Cal.4th at p. 267.)

"To make a showing of constitutionally inadequate representation by counsel when failure to seek suppression of evidence on a Fourth Amendment ground is asserted as the basis for the ineffective counsel claim, the party must establish that the Fourth Amendment claim has merit and that it is reasonably probable that a different result would have been rendered had the evidence been excluded." (*People v. Coddington* (2000) 23 Cal.4th 529, 652, overruled on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.)

Here, the claim of ineffective assistance of counsel must be rejected. The record does not affirmatively disclose that trial counsel had no rational tactical purpose for not seeking to suppress the evidence of the clothing seized from the hospital, counsel was never asked to explain the decision not to file a suppression motion, and appellant has failed to demonstrate that there simply could be no satisfactory explanation for counsel's actions. (See *People v. Mendoza Tello, supra,* 57 Cal.4th at pp. 267-268.)

For instance, in light of appellant's trial testimony that she did not recall ever seeing the shirt and that she had no idea how that shirt got on her body (46RT 9306), trial counsel could have reasonably concluded that a motion to suppress the shirt would have been futile because the defense could not establish at a suppression hearing that appellant had a legitimate expectation of privacy in the seized shirt. (See *People v. Jenkins* (2000) 22 Cal.4th 900, 972 ["A defendant has the burden at trial of establishing a legitimate expectation of privacy in the place searched or the thing seized"]; *People v. McPeters* (1992) 2 Cal.4th 1148, 1171 ["'The legitimate expectation of privacy must exist in the *particular area searched or thing seized* in order to bring a Fourth Amendment challenge.'"].) Also, trial counsel could have reasonably concluded that the likelihood of an

unsuccessful suppression motion carried potential risks at trial because any inconsistency between appellant's testimony at the suppression hearing and at trial regarding the shirt would have exposed appellant to impeachment. (See *People v. Boyette* (2002) 29 Cal.4th 381, 415, fn. 5 [If a defendant's testimony at a pretrial suppression hearing is inconsistent with his or her testimony at trial, the prosecution may use such pretrial testimony for impeachment]).

Moreover, appellant cannot establish that a suppression motion would have been successful. First, the record indicates that the seizure of the clothing was justified under the plain view doctrine. "The plain-view doctrine authorizes seizure of illegal or evidentiary items visible to a police officer whose access to the object has some prior Fourth Amendment justification and who has probable cause to suspect that the item is connected with criminal activity." (*Illinois v. Andreas* (1983) 463 U.S. 765, 771 [103 S.Ct. 3319, 77 L.Ed.2d 100].) The plain view doctrine applies if the officer is lawfully present in the place from which the object is viewed, the incriminating nature of the object is immediately apparent, and the officer has a lawful right of access to seize the object. (See *Horton v. California* (1990) 496 U.S. 128, 136-137 [110 S.Ct. 2301, 110 L.Ed.2d 112].)

Here, all of the requirements for the plain view doctrine are satisfied. Deputy Miller was lawfully present at the hospital when he viewed the clothing because he was properly performing his duty to investigate a shooting that had occurred earlier that evening; indeed, there is nothing to suggest that Deputy Miller's presence at the hospital was not permitted by the hospital staff. (See *United States v. Davis* (4th Cir. 2012) 690 F.3d 226, 233-234, & fn. 13 (*Davis*) [police officer was lawfully present in the hospital room while fulfilling his duty to investigate a reported shooting when he observed a bag containing clothing of shooting victim]; *People v.*

Brown (1979) 88 Cal.App.3d 283, 291 ["The notion that a nurse can authorize a visitor's entrance (albeit on official business) seems not only to accord with the everyday practices of hospitals (the nurse characterized her conduct relative to this incident as 'routine') but with everyday expectations of hospital patients"].) Similarly, Deputy Miller had a lawful right of access to the clothing at the time of the seizure because he collected the clothing from the same location and under the same circumstances as his initial observation of the clothing, i.e., from the backboard during the course of his lawful presence at the hospital. (*Davis, supra*, 690 F.3d at p. 234 [because the officer was lawfully present in the hospital room, "he thus had lawful access in the ordinary course of his investigation to the bag of clothing"].) Lastly, the incriminating nature of the clothing was immediately apparent because a shooting with multiple victims had just occurred, appellant was both a shooting victim and a possible suspect, and appellant's clothing looked like "material with blood on it" (15RT 2641-2642). (*Id.* at pp. 236-237 [incriminating nature of shooting victim's clothing was immediately apparent because the clothing almost certainly contained blood and a bullet hole, which would have been evidence in prosecution of shooter].) Thus, in light of the applicability of the plain view doctrine, trial counsel was not ineffective in failing to raise a futile suppression motion. (*People v. Thompson* (2010) 49 Cal.4th 79, 122 ["Counsel is not ineffective for failing to make frivolous or futile motions"].)

The record also indicates that a suppression motion would have been futile because the evidence was also admissible under the inevitable discovery doctrine. "Under the inevitable discovery doctrine, illegally seized evidence may be used where it would have been discovered by the police through lawful means." (*People v. Robles* (2000) 23 Cal.4th 789, 800.) Here, in light of the evidence that the sheriff's department obtained

vials of appellant's blood and urine from the hospital pursuant to a search warrant on November 23, 1999 (30RT 6342-6346), trial counsel could have reasonably concluded that appellant's clothing would have been discovered by lawful means and the evidence was therefore admissible under the inevitable discovery doctrine.

Appellant relies on the Pennsylvania case of *Commonwealth v. Silo* (Pa. 1978) 389 A.2d 62 (*Silo*) (AOB 160-163), but her reliance is misplaced. In that case, the police asked the nurse to give them any personal belongings that the defendant had when he was admitted to the hospital. The nurse then obtained the defendant's clothing from his hospital room and gave it to the police. On appeal, the prosecution relied on two theories to justify the warrantless seizure of the defendant's clothing from the hospital: (1) the seizure was incident to the arrest; and (2) the nurse on duty consented to the seizure of the defendant's clothing. (*Id.* at pp. 21-22.) The *Silo* court rejected the first argument because the police did not arrest the defendant before the clothing was seized, and the court rejected the second argument because the nurse's access and control over the clothing did not include the ability to use the clothing. (*Id.* at pp. 22-24.) *Silo* is inapposite to the instant case because it did not address the applicability of the plain view doctrine or the inevitable discovery doctrine, nor is there any indication that either of those two doctrines would have been applicable to the facts of that case.

Finally, the claim of ineffective assistance of counsel should be rejected because appellant cannot establish prejudice. Even if the evidence of appellant's clothing had been suppressed, the remaining evidence established a strong case of appellant's guilt. For instance, appellant left bloody palm prints on the doorframe (27RT 4897-4901, 4909, 4934-4935), and blood found adjacent to these palm prints matched Joey's blood (29RT 6185-6186). In addition, the fingernail scrapings taken from appellant

tested presumptive positive for blood, with Christopher and Joey as possible contributors. (29RT 6182-6184.) The ballistics and medical evidence that appellant's head wound was consistent with a self-inflicted wound (30RT 3718-3724, 3751; 40RT 8102-8114), and the evidence that appellant was in emotional despair when Dr. Caro left the house (30RT 6330-6331; 31RT 6538), further established appellant's guilt. By contrast, there was little or no evidence to support the defense theory that Dr. Caro was the perpetrator. Because it is not reasonably probable that a different result would have been rendered had the evidence been excluded, appellant cannot establish prejudice.

In sum, appellant cannot establish either deficient performance or prejudice on this record. Accordingly, the claim of ineffective assistance of counsel should be rejected.

VI. THE TRIAL COURT PROPERLY ADMITTED STATEMENTS THAT APPELLANT MADE AT THE HOSPITAL

Appellant contends the trial court erred in admitting statements that she made while being questioned in the intensive care unit following brain surgery, in violation of her Fifth Amendment right against self-incrimination and Fourteenth Amendment right to due process. Appellant specifically alleges the statements were inadmissible because she did not receive or waive her *Miranda*[5] rights before the statements were made, and because the statements were also involuntary. (AOB 169-193.) This claim is without merit.

A. Factual Background

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[5] *Miranda v. Arizona* (1966) 384 U.S. 436 [86 S.Ct. 1602, 16 L.Ed.2d 694].

At trial, the prosecution sought to admit two statements that appellant made to Detective Wade in the hospital before Detective Wade advised appellant of her *Miranda* rights. Specifically, the prosecution sought to admit appellant's statement that she "might have fallen down the stairs" in response to Detective Wade's statement that she did not know how appellant had gotten hurt, and appellant's statement that she was "wrestling with the boys" in response to Detective Wade's question as to how appellant got bruised. The prosecution asserted the statements were admissible because appellant was not in police custody at the time of the statements and *Miranda* warnings were therefore not required. The prosecution argued that appellant had not been formally arrested at the time of the statements, she was not restrained in any manner beyond what her own injuries caused, she was in a hospital, there were only one to two officers in the room, Detective Wade's demeanor was calm, and no accusatory questions were asked. (7CT 1390-1393.)

In a written response filed on September 12, 2001, the defense opposed the admission of the statements on two principal grounds: (1) the statements were involuntary under the totality of the circumstances, and (2) the statements were obtained in violation of *Miranda*. As to the argument that the statements were involuntary, the defense argued the statements were made in a coercive environment dominated by Detective Wade because appellant was in great pain and on medication, "[mo]st interaction with medical staff had to go through Detective Wade," Detective Wade "interfered with the doctors' physical examinations," medical staff delayed giving appellant pain medication so as not to interfere with Detective Wade's interrogation of appellant, the medical staff "would not give the defendant a codeine shot until Detective Wade approved it," "[m]edical staff asked Detective Wade to decide 'what's right and what's not,'" and appellant's access to family, friends, and legal counsel was restricted. (7CT

1428-1429.) As to the *Miranda* argument, the defense asserted that a "reasonable person in the defendant's position would believe that she was not free to leave the hospital without Detective Wade's approval because Detective Wade just had to find out what happened." (7CT 1430-1431.)

The court held a hearing on the admissibility of the statements on September 14, 2001. (30RT 6354.) The prosecution first called Dr. Susan Ashley, a psychologist, who testified as follows. In November 1999, Dr. Ashley did not have privileges at Los Robles Medical Center. (30RT 6357-6358.) On November 23, 1999, Senior Deputy District Attorney Richard Holmes contacted Dr. Ashley and asked her to go to the hospital and attempt to interview appellant. (30RT 6358.) When Dr. Ashley arrived at the hospital at about 1:00 p.m. and stated that she was there to meet with Holmes, a hospital employee escorted Dr. Ashley to appellant's room in the intensive care unit. (30RT 6359, 6361, 6365, 6378-6379.) Holmes told Dr. Ashley that he wanted her to interview appellant at the appropriate time and also observe appellant. (30RT 6359-6360.) Dr. Ashley then sat outside the room's doorway and began taking notes about her observations at about 1:05 p.m. (30RT 6360-6365, 6368.) At some point, Dr. Ashley also sat inside the room. (30RT 6364-6365.) Dr. Ashley was at the hospital until about 3:45 p.m. (30RT 6364-6365, 6368.)

Dr. Ashley initially observed appellant making comments about her arm and throat hurting, with the nurses making responding comments. (30RT 6365-6366.) Dr. Ashley noticed bruises on appellant's legs and apparent dried blood on the right foot. (30RT 6366, 6388.) Dr. Ashley also observed a nurse perform a brief mental status exam, asking appellant if she knew where she was, the date, and the year. (30RT 6366.) Appellant responded that she knew she was in the hospital and identified the correct date. (30RT 6366.)

During the time of Dr. Ashley's observation, appellant laid in the hospital bed and Detective Wade sat on the side of the bed. (30RT 6367-6368, 6370.) Detective Wade did not interfere with any medical personnel tending to appellant, and Detective Wade did not request that medical personnel withhold any kind of medical treatment. (30RT 6368, 6377.) Detective Wade was calm, soft-spoken, and polite when speaking to appellant, and Detective Wade did not speak to appellant in any kind of threatening manner. (30RT 6369, 6377.) Detective Wade was dressed in street clothes rather than a uniform. (30RT 6382.) Detective Jose Rivera, who was also present at appellant's bedside, was not dressed in a uniform. (30RT 6381-6382.)

Appellant's demeanor, orientation, and responsiveness were consistent throughout the time of Dr. Ashley's observation. (30RT 6371.) Appellant did not appear disoriented or unable to understand what was being said to her; instead, appellant appeared to be awake and alert, and she responded appropriately to questions from medical personnel and Detective Wade. (30RT 6370-6371, 6375.) Appellant verbalized that she was in pain several times, and asked for ice for her throat and a pillow for her arm. (30RT 6371.) Appellant complained about her throat hurting, her neck feeling sore, and told the doctor working on her foot that she had myofascitis. (30RT 6371.) A nurse told appellant that her arm was hurting because she was receiving potassium. (30RT 6372.) Appellant later asked why she was receiving potassium, and a nurse told her that her potassium was low. (30RT 6372.) A doctor discussed possible surgery, and appellant responded by giving a thumbs up. (30RT 6373.) Appellant also stated that her husband was a doctor and rheumatologist. (30RT 6374.)

In response to Detective Wade's statement to appellant that they did not know how she got hurt, appellant stated, "I might have fallen down the stairs." (30RT 6394, 6397.) This statement occurred at about 2:27 p.m.

(30RT 6398.) Appellant was also asked about her mother's name, and appellant replied "Juanita Leon." (30RT 6398-6399.) At 2:25 p.m., a nurse asked appellant if she knew why she was there, and appellant replied, "They operated on my head." (30RT 6388.) Dr. Ashley was not present when Detective Wade advised appellant of her *Miranda* rights. (30RT 6376.) Dr. Ashley stopped her observations of appellant at 3:45 p.m. because appellant had received a pain shot and fell asleep. (30RT 6376.)

The prosecution next called Detective Cheryl Wade, who testified as follows. On November 23, 1999, Detective Wade went to Los Robles Medical Center to observe appellant, and a hospital attendant walked Detective Wade into the intensive care unit. (30RT 6401.) The hospital staff also allowed Detective Wade into appellant's room, and Detective Wade did not have any problems staying by appellant's bedside. (30RT 6402, 6416.) Detective Wade had interviewed patients at that hospital on several prior occasions, and the hospital staff had provided her access to the patient rooms on those occasions. (30RT 6402.) When Detective Wade went to appellant's room, she was aware that appellant was a possible suspect in the deaths of her three children. (30RT 6418.)

Detective Wade recorded the activities that occurred in the hospital room, including the conversations with appellant. These recordings (which consisted of two tapes) were played at the hearing, and the recording transcripts were admitted into evidence for the purpose of the hearing. (30RT 6403-6409; Peo. Spec. Exh. Nos. 1, 2 [tapes]; Peo. Spec. Exh. Nos. 1A, 1B [transcripts]; 1 Supp. CT 39-73 [Peo. Spec. Exh. No. 1A].) Detective Wade turned off the tape recorder when she left the room or appellant was asleep. (30RT 6411.)

During the time that Detective Wade was present in appellant's room, she did not restrict appellant's movement beyond what appellant's physical condition already restricted her from doing. (30RT 6411.) After telling

appellant that she was suspected of hurting her boys, Detective Wade advised appellant of her *Miranda* rights. (30RT 6409.) Prior to this point, Detective Wade did not advise appellant that she was under arrest. (30RT 6409.) Detective Wade advised appellant of her *Miranda* rights after being told to do so by Mr. Holmes. (30RT 6418.)

After Detective Wade concluded her testimony and the defense indicated that it was not presenting any evidence at the hearing (30RT 6422), the trial court ruled that the statements were admissible. The trial court first found that appellant was not in law enforcement custody for purposes of *Miranda*. (30RT 6423.) On the issue of voluntariness, the trial court ruled, "I don't believe the evidence supports an inference or an allegation that Ms. Wade did anything to overcome the will of Miss Caro." (30RT 6429.) The trial court explained that appellant was "in the hospital not because of anything law enforcement did, not because of anything the state did or an agent of the state." (30RT 6427.) The trial court further explained that there was no evidence adduced at the hearing to suggest that appellant "felt compelled to say anything or perceived Ms. Wade as a member of the hospital staff or perceived Ms. Wade as having direct control over her medical care or perceived Miss Wade as having the power to withhold medical care." (30RT 6429-6430.)

The trial court specifically found that there was no evidence to support the defense allegation that medical personnel wanted to give appellant stronger pain medication but delayed administration because they did not want to interfere with Detective Wade's interview of appellant. When defense counsel replied that she heard such a statement on the second tape, the court noted that it had heard a nurse talking to Detective Wade, that such a statement "may have been in the nurse's state of mind," and that Detective Wade stated, "Do what you would normally do." (30RT 6429.)

The trial court therefore found there was no evidence that Detective Wade did anything to interfere with appellant's medical treatment. (30RT 6430.)[6]

Detective Wade then testified at trial about appellant's statements in the hospital as follows. When Detective Wade first asked appellant how she had injured her foot, appellant initially stated that she did not recall. (31RT 6526-6527.) In response to a subsequent question that asked how appellant got hurt, appellant stated that she might have fallen down the stairs. (31RT 6527.) In response to a specific question that asked how appellant got bruised, appellant stated, "Wrestling with a boy." (31RT 6528.)

B. Appellant Was Not In Police Custody For Purposes of *Miranda*

Appellant contends the trial court erred in finding that she was not in police custody and was therefore not entitled to *Miranda* warnings prior to questioning by Detective Wade. (AOB 182-188.) Contrary to appellant's claim, the trial court properly found that appellant was not in police custody for purposes of *Miranda*.

"'Before being subjected to "custodial interrogation," a suspect "must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed."' [Citations.]" (*People v. Leonard* (2007) 40 Cal.4th 1370, 1399-1400.) "An interrogation is custodial, for purposes of requiring advisements under *Miranda*, when 'a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.'" (*People v. Moore* (2011) 51 Cal.4th 386,

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[6] The court further ruled that, under Evidence Code section 356, the defense would be permitted to introduce appellant's responses to other questions posed to her on the issue as to how she got injured. (30RT 6428.)

394-395, quoting *Miranda, supra*, 384 U.S. at p. 444.) "Whether a defendant was in custody for *Miranda* purposes is a mixed question of law and fact." (*People v. Leonard, supra*, 40 Cal.4th at p. 1400.) The reviewing court applies a deferential substantial evidence standard to the trial court's factual findings regarding the circumstances surrounding the interrogation, and it must independently decide whether, given those circumstances, a reasonable person in the defendant's position would have felt free to end the questioning and leave. (*Ibid.*)

Here, appellant was not in custody for purposes of *Miranda* because any restraint on appellant's freedom of movement resulted from the need to medically treat her serious gunshot injuries in the intensive care unit rather than from any law enforcement conduct. The location of the questioning – an intensive care room in the hospital – was not an inherently custodial setting. Also, the questioning of appellant occurred in the presence of medical personnel who continuously treated appellant throughout the interview (1 Supp. CT 40-45, 47-50, 54-57, 60-61, 65-70, 72), and this public exposure rendered the situation less "police-dominated." (*People v. Mosley* (1999) 73 Cal.App.4th 1081, 1091 [defendant not in custody for *Miranda* purposes where interview was conducted in the presence of medical personnel who continued to treat the defendant]; *Wilson v. Coon* (8th Cir. 1987) 808 F.2d 688, 689 [defendant not in custody where he was being restrained by ambulance personnel for medical examination at time of interview, and the court explained that "public exposure reduces the likelihood that law-enforcement agents will use oppressive or abusive tactics and renders the situation less 'police-dominated'"].)

Furthermore, Detective Wade's questioning of appellant was not accusatory or threatening. To the contrary, Detective Wade was calm, soft-spoken, and polite, and many of Detective Wade's initial comments involved reassuring appellant, asking about her physical well-being, and

attempting to improve appellant's physical comfort. (30RT 6369, 6377; 1 Supp. CT 40-43, 45-47, 51-53, 57-62, 64-65, 69-71.) Also, only two law enforcement officers (at most) were present in the room, the officers were not dressed in uniforms, and appellant was not physically restrained by the officers. (30RT 6381-6382.) In addition, as the trial court found, Detective Wade did not interfere with any of appellant's medical treatment. (30RT 6368, 6377.) Under these circumstances, a reasonable person in appellant's position would not have believed that she was in police custody.[7] (*People v. Mosley, supra*, 73 Cal.App.4th at 1088-1091 [*Miranda* advisements not required where defendant was in the physical custody of ambulance paramedics at the time of interview by officer]; *United States v. Martin* (9th Cir. 1985) 781 F.2d 671, 673 [defendant not in custody when he was questioned by the police while being treated in the hospital].)

C. Appellant's Statements Were Voluntary

Relying primarily on *Mincey v. Arizona* (1978) 437 U.S. 385, 398 [98 S.Ct. 2408, 57 L.Ed.2d 290] (*Mincey*), appellant further argues the admission of the statements violated due process because the statements were involuntary. (AOB 188-191.) She is incorrect.

"A criminal conviction may not be founded upon an involuntary confession." (*People v. Williams* (2010) 49 Cal.4th 405, 436.) "A confession or admission is involuntary, and thus subject to exclusion at

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[7] Appellant argues that several law enforcement actions that occurred while she was unconscious – such as placing bags over her hands and feet, seizing her clothing, taking photos of her, and the presence of an officer in the operating room during surgery and in the post-operative recovery room – further supported the conclusion that she was in police custody. (AOB 187-188.) Appellant, however, does not explain why a reasonable person in appellant's situation would have felt that he or she was in police custody from such circumstances when he or she was unaware of such circumstances while unconscious.

trial, only if it is the product of coercive police activity." (*People v. Williams* (1997) 16 Cal.4th 635, 659.) "The due process inquiry focuses on the alleged wrongful and coercive actions of the state . . . and not the mental state of the defendant." (*People v. Weaver, supra*, 26 Cal.4th at p. 921.)

"In evaluating the voluntariness of a statement, no single factor is dispositive." (*People v. Williams, supra*, 49 Cal.4th at p. 436.) "The question is whether the statement is the product of an '"essentially free and unconstrained choice or whether the defendant's will has been overborne and his capacity for self-determination critically impaired"' by coercion." (*Ibid.*) "Relevant considerations are '"the crucial element of police coercion [citation]; its location [citation]; its continuity" as well as "the defendant's maturity [citation]; education [citation]; physical condition [citation]; and mental health."' [Citation.]" (*Ibid.*) On appeal, the trial court's findings as to the circumstances surrounding the statements are upheld if supported by substantial evidence, but the trial court's finding as to the voluntariness of the statements is subject to independent review. (*Ibid.*)

In *Mincey*, the defendant was shot in the hip during the course of a narcotics raid in which a police officer was killed, and the defendant was transported to the hospital for treatment. At the hospital, the defendant received various drugs, tubes were placed in his throat and nose, a catheter was attached to his bladder, and a device was attached to his arm for intravenous feeding. At about 8:00 p.m. that evening, a few hours after the defendant had been wounded, a detective interrogated the defendant in the intensive care unit. The defendant was unable to talk due to the tube in his mouth, and he responded to the detective's questions by writing answers on a piece of paper. The detective told the defendant that he was under arrest for the murder of a police officer, advised the defendant of his *Miranda*

rights, and began to ask questions about the events surrounding the shooting. The defendant repeatedly asked that the interrogation stop until he could get a lawyer, but the detective continued to question the defendant until almost midnight. (*Mincey, supra*, 437 U.S. at p. 396.)

The United States Supreme Court held the defendant's statements to the detective were involuntary and could not be used against him at trial. (*Mincey, supra*, 437 U.S. at pp. 398-402.) The high court noted that the defendant had been seriously wounded a few hours earlier, he had complained to the detective about leg pain, he was confused and unable to think clearly because some of his written answers were not entirely coherent, and he had been questioned while lying on his back on a hospital bed encumbered by tubes, needles, and breathing apparatus. (*Id.* at pp. 398-399.) The *Mincey* court emphasized that the defendant repeatedly and "clearly expressed his wish not to be interrogated" and "vainly asked [the detective] to desist" throughout the interrogation, but the detective repeatedly ignored those requests and continued the interrogation. (*Id.* at pp. 400-401.) The Supreme Court therefore concluded that the defendant's statements "were not 'the product of his free and rational choice'" in light of the undisputed evidence that the defendant did not want to answer the detective's questions, but "his will was simply overborne" because he was "weakened by pain and shock, isolated from family, friends, and legal counsel, and barely conscious." (*Id.* at pp. 401-402.)

Mincey is inapposite to the instant case because law enforcement did not engage in any coercive activity that overcame appellant's will. Unlike *Mincey*, Detective Wade did not continuously disregard repeated requests by appellant to stop the questioning. Indeed, appellant did not request that Detective Wade stop her questioning at any point prior to the *Miranda* advisements, and once appellant invoked her *Miranda* rights, Detective Wade scrupulously honored that invocation by terminating the

interrogation. (33RT 6811.) Furthermore, Detective Wade's questioning was not aggressive or accusatory; instead, Detective Wade questioned appellant about her injuries in a calm, polite, and soft-spoken manner. (30RT 6369, 6377; 1 Supp. CT 50, 52, 57-58, 61-62, 64-65, 71.) Also, at the outset, Detective Wade encouraged appellant to sleep and rest, and indicated to appellant that they could talk after she woke up. (1 Supp. CT 46-47, 53.) In addition, Detective Wade verbally reassured appellant, repeatedly asked appellant if she needed anything, and attempted to improve appellant's physical comfort, such as by providing ice chips to appellant, adjusting her robe, moving pillows, conveying appellant's request for Tylenol to the nurse, untangling the wires around appellant, and adjusting the bed. (1 Supp. CT 40-43, 45-47, 51-53, 58-61, 64, 69-70.) Finally, although appellant indicated that she was in pain, appellant understood and responded appropriately to questions posed by Detective Wade and the medical staff. (30RT 6370-6371, 6375; 1 Supp. CT 54-58, 62, 65, 70-71.)

Accordingly, in light of the totality of the circumstances, appellant's statements were not involuntary because law enforcement did not engage in coercive activity. (*People v. Carrington* (2009) 47 Cal.4th 145, 175 [rejecting claim that confession was involuntary because questioning that occurred over the course of eight hours was "not aggressive or accusatory," the officers instead "chose to build rapport with defendant and gain her trust in order to persuade to tell the truth," and the defendant's "answers were coherent"]; *People v. Panah* (2005) 35 Cal.4th 395, 472 [even though defendant was sometimes irrational during the interrogation at the hospital, statements were voluntary because defendant was responsive to the police questioning]; *People v. Breaux* (1991) 1 Cal.4th 281, 301 [rejecting claim that statement made to police at hospital was involuntary due to the effect of morphine administered at the hospital because "there was nothing in the

record to indicate that the defendant did not understand the questions that were posed to him"]; *People v. Jackson* (1989) 49 Cal.3d 1170, 1189 [rejecting claim that statements made at hospital were involuntary due to defendant's physical and mental condition after ingestion of drugs and confrontation with officers and police dog because "evidence showed that defendant was able to comprehend and answer all the questions that were posed to him"]; *People v. Perdomo* (2007) 147 Cal.App.4th 605, 618-619 [statements elicited at hospital were voluntary where the defendant did not ask for the interrogation to cease, and the officers' tone was conversational and not threatening].)

D. Any Error Was Harmless

Finally, even assuming arguendo that the trial court erred in denying the motion, any error was harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. at p. 36.) The two statements by appellant were not critical to the prosecution's case because they did not directly inculpate her as the shooter. Moreover, there was overwhelming evidence of appellant's guilt. Numerous bloodstains on appellant's shorts and shirt matched the victims' DNA (29RT 6104-6110, 6114-6120, 6125-6138, 6147-6148, 6150-6152; 30RT 6285-6286, 6289), and these bloodstains were consistent with the conclusion that appellant shot the victims and then shot herself in the head (37RT 7592-7594, 7598, 7600, 7634, 7615-7618). In addition, as previously set forth in Argument V, additional blood, DNA, ballistics, and physical evidence showed that appellant was the perpetrator. By contrast, the defense theory that Dr. Caro was the perpetrator was weak. Accordingly, any error was plainly harmless.

VII. TRIAL COUNSEL WAS NOT INEFFECTIVE IN FAILING TO FILE A PRETRIAL SUPPRESSION MOTION ON THE GROUND THAT LAW ENFORCEMENT VIOLATED APPELLANT'S FOURTH AMENDMENT RIGHT TO PRIVACY IN THE HOSPITAL

Appellant contends trial counsel was ineffective by failing to file a pretrial motion to suppress the evidence gathered by law enforcement while appellant was in surgery and in her hospital room on the ground that such evidence was obtained in violation of appellant's Fourth Amendment rights. According to appellant, such a suppression motion was warranted because law enforcement repeatedly invaded her reasonable expectation of privacy in the operating room during surgery, in the recovery room, and in the intensive care room. Appellant further asserts it was reasonably probable the trial court would have granted such a motion and suppressed the evidence seized from the hospital, including all statements made by appellant to Detective Wade or her mother in the intensive care room, the scrapings obtained from appellant's hands and feet, the photos of appellant in the operating room, the bullet fragments removed from appellant's head, and Detective Rivera's testimony about appellant's interactions with Dr. Pryor in the recovery room. (AOB 194-211.) This claim fails.

A. Factual Background

During the redirect examination of Detective Wade, the prosecutor asked if appellant ever inquired about the well-being of any of her children by name, and Detective Wade answered affirmatively. When the prosecutor next asked Detective Wade to identify the children that appellant asked about by name, defense counsel objected on relevancy grounds. After the trial court overruled the objection, Detective Wade answered "Gabriel," and further testified that appellant did not inquire about any of the other children by name. (31RT 6606.) Upon further questioning on that issue, Detective Wade testified that appellant specifically asked, "Where is Gabriel? Where is Gabriel? The baby, is he okay?" (31RT 6609.)

The following day (September 18), the defense filed a motion to strike Detective Wade's testimony regarding appellant's statements asking about

Gabriel, which had been made after she had invoked her *Miranda* rights. (33RT 6793-6796; 8CT 1476-1478.) In the written motion, the defense cited *People v. Brown, supra*, 88 Cal.App.3d 283 (*Brown*), and argued that appellant "had an expectation of privacy in her intensive care room," Detective Wade's "entry in the intensive care room was unlawful" because appellant was not detained at the time, Detective Wade's "observations [of appellant in the room] must now be suppressed," and "any statements made by [appellant] subsequent to *Miranda* which are overheard by law enforcement when they are in a position not lawfully allowed should be stricken." (8CT 1477-1478.)

The prosecution filed a written opposition the next day. (8CT 1482-1487.) The prosecution asserted that no *Miranda* violation occurred because appellant's statements about Gabriel were spontaneous and not made as a result of interrogation. (8CT 1484-1485.) As to the Fourth Amendment claim, the prosecution argued that appellant was required to file a pretrial suppression motion on Fourth Amendment grounds and could not raise such a motion during trial. (8CT 1485-1486.) Noting the holding in *Brown* that no Fourth Amendment violation occurred in that case, the prosecution further argued that *Brown* failed to support appellant's claim that Detective Wade did not have a right to be in the intensive care room at the time of appellant's statements, and that appellant' s attempt to distinguish *Brown* was unavailing. (8CT 1486.) The prosecution's opposition included a six-page transcript of the portion of the tape recording where appellant made the statements about Gabriel. (8CT 1489-1494.)

On September 19, 2001, the court began the hearing on appellant's motion. At the outset of the hearing, the defense argued that once appellant invoked her *Miranda* rights, no law enforcement officer had any right to be present in appellant's room 50 minutes later. (33RT 6804.) The defense

further argued that, if the court determined that the officer's presence in the room was lawful after the *Miranda* invocation, the defense wanted to reopen the evidence to demonstrate that the hospital social worker assigned to assist appellant was prevented by law enforcement from performing her duties. (33RT 6805-6806.) In response, the prosecution argued that it was in excess of the trial court's jurisdiction to entertain a midtrial motion based on Fourth Amendment grounds. (33RT 6806.)

The parties agreed that the statements at issue occurred after appellant invoked her *Miranda* rights, but the parties disagreed as to whether the statements were voluntary or made in response to interrogation. (33RT 6807-6808.) The court instructed the prosecution to make a record as to when the statements were made in relation to the *Miranda* invocation and the circumstances surrounding the making of the statements. (33RT 6808.)

The evidentiary portion of the hearing ultimately took place during the portions of three days (September 19, 20, and 21). Detective Wade was called as a witness, and she testified as follows. After Detective Wade advised appellant of her *Miranda* rights, appellant asked for an attorney. (33RT 6810.) Following the invocation, Detective Wade did not make any threats or promises in order to get appellant to talk to her. (33RT 6810.) After appellant invoked *Miranda*, Detective Wade asked about the phone number of appellant's mother because appellant had previously stated that she wanted her mother, and Detective Wade also asked whether appellant was comfortable. (33RT 6811; 35RT 7098-7099.) Appellant responded to those questions. Detective Wade did not ask appellant any questions pertaining to the investigation. (33RT 6811.) Detective Wade then left the room for about 20 minutes; Detective Rivera remained in the room and was seated on the side of the bed closest to the sliding doors. (33RT 6812, 6816; 35RT 7085.)

After Detective Wade returned to the room, she started a third tape recording. (33RT 6812.) During this third recording, appellant asked, "Where is Gabriel?" (33RT 6812.) Appellant's statement was not made in response to any questioning by Detective Wade. (33RT 6813.) Prior to that statement, appellant asked, "Who found us?" Detective Wade answered, "Your husband." (33RT 6813.) Appellant responded, "Oh." (33RT 6813.) Appellant then stated, "Oh, my God, no, no, no, Mom, no," and other statements that Detective Wade could not understand. (33RT 6813.) Detective Wade asked, "What?" Appellant then stated, "Where is Gabriel? Where is Gabriel? The baby, is he okay?" (33RT 6814.) Appellant appeared alert at this time. (33RT 6814.)

The defense called Nina Priebe, who testified as follows. On November 23, 1999, Priebe was a clinical social worker assigned to the Los Robles intensive care unit. (35RT 7111.) Priebe began her shift between 9:00 and 9:30 a.m. that day, and spent most of the day in the intensive care unit. (35RT 7112, 7114.) Appellant would have been one of Priebe's first priorities because it was a traumatic situation, and Priebe's responsibilities would have included determining what appellant needed in terms of supportive counseling or seeing her family. (35RT 7112.) Priebe would have attempted to contact appellant's mother and would also have taken responsibility for obtaining an attorney if appellant requested one. (35RT 7113-7114.) Between 2:00 and 4:00 p.m., Priebe heard appellant screaming. (35RT 7114.) Looking through the room's sliding glass door, Priebe saw appellant talking to the police; appellant was upset and screaming very loudly. (35RT 7115, 7117.) The female officer in the room appeared to be attempting to calm appellant down with "a very soothing voice." (35RT 7118.) Priebe believed the officer was attempting to comfort appellant based on a combination of the detective's "body stance"

and her voice remaining "calm"; Priebe "personally would do that with someone upset, you know." (35RT 7118.)

Priebe started moving toward the door to enter appellant's room, but she did not enter because a nurse, Debbie Anderson, stopped her and told her not to go in.[8] (35RT 7118.) Priebe heard appellant screaming for less than 10 minutes. (35RT 7120-7121.) Priebe knew the female in the room was a police officer because they had previously introduced themselves to each other. (35RT 7119.) Priebe did not stay and wait for the police to leave because she ended her work shift at 4:15 or 4:30 p.m. (35RT 7120-7121.)

In response to questions from the trial court, Priebe testified that she was aware of appellant's injuries, that the social worker's responsibilities included determining whether a psychiatrist or psychologist was needed for an evaluation of a patient to determine whether appellant was a suicide risk, and that she did not did not recall taking any action in that regard. (35RT 7121.) She further testified that, unlike the situation of a possible suicide risk for a patient in a regular hospital floor, it would not be the practice in the intensive care unit to have someone in the room at all times for a patient who was a potential suicide risk because there would be a low nurse-to-patient ratio. (35RT 7122.)

The court ruled as follows:

> With regards to the actual issue involved as to a motion to strike the testimony of Cheryl Wade, that motion is denied. [¶] The Court having listened to the tape recordings as well as the transcripts of the proceedings occurring within the hospital room, it is very clear from listening to the transcripts – excuse

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[8] The court sustained the prosecution's motion to strike Priebe's answer that she did not enter appellant's room because "Debbie Anderson, her nurse, told me that the police had asked us not to comfort her – " (35RT 7116.)

me – listening to the tapes and – reading the transcripts in conjunction with listening to the tapes that at the time that Mrs. Caro asked the question "Where is Gabriel?" that question did not arise as a result of any interrogation by the law enforcement officers. [¶] An interrogation is defined as: "Express questioning concerning the facts under investigation or behavior that the police should know is reasonably likely to elicit an incriminating response." [¶] And no such question was occurring at the time by any of the law enforcement officers in the room. And as a response to Mrs. Caro the law enforcement even asked a question of "What?" and then M[rs.] Caro clearly stated on the tape recording and in the transcript "Where is Gabriel? Where is Gabriel? The baby? The baby?" Is he okay?" [¶] And I looked, Miss Farley, I looked in People's Special Exhibit 1 and People's Special Exhibit 2, 'cause 356 issues I looked through both of those transcripts to see if there was a section or segment on either of those transcripts in which any suggestion or statement was made to her concerning the other children and their status and could find none.

(35RT 7125-7126.)

The court further explained:

So the motion to strike that there was a violation of *Miranda* or because the statements occurred after a – or the question occurred after a *Miranda* invocation and was somehow the result of any interrogation by law enforcement is denied.

It appears to me that the question asked by Mrs. Caro was a question voluntarily asked by her with full knowledge that Cheryl Wade was a member of law enforcement and a member of the Sheriff's Department.

On the new grounds also raised of the Fifth [*sic*] Amendment violation, I believe the law is clear and that is I believe that under the cases cited and the one I relied on most specifically is – strange name for a case – but *People v. Takencareof*, a 1981 decision at 119 Cal.App.3d 492, which says that: "A Court which hears such a motion at trial when neither exception exists is not merely acting in excess of its power; it's acting in excess of its jurisdiction." [¶] And the question was asked November 23rd, 1999, and we are now on – well, I believe the time it was testified to was the third week of

> September of the year 2001 and that the defense had the transcripts, had the tape recordings well in advance of this trial and failed to make a Fourth Amendment motion, some theory of – I presume a reasonable expectation of privacy argument, and the Court would be in excess of its jurisdiction as the law stands to entertain such a motion.
>
> Even if the Court were to entertain such a motion, however, no authority has been cited that I'm aware of that suggests that while in a hospital room a person has an expectation of privacy, particularly if they're the subject of an ongoing police investigation trying to ascertain what occurred and in light of the situation here in which a reasonable person could indeed adduce that Mrs. Caro was a potential suicide risk and there was a necessity to be present at all times to ensure that she did not harm herself. [¶] So the motion is denied.

(35RT 7126-7127.)

B. Appellant Cannot Demonstrate That A Pretrial Suppression Motion Would Have Been Meritorious

In *New v. United States of America* (8th Cir. 2011) 652 F.3d 949, the federal appellate court rejected a similar claim that trial counsel was ineffective in failing to move to suppress statements the defendant made to a law enforcement agent in a hospital room on the ground that the agent's warrantless entry in the defendant's hospital room constituted an unreasonable search under the Fourth Amendment. (*Id.* at pp. 952-953.) The court explained that the defendant had failed to make a sufficient showing that counsel's performance was deficient because there was a "split of authority on the question of whether a patient has a reasonable expectation of privacy in a hospital room," and the defendant had "not identified any controlling legal authority that directly supported his Fourth Amendment argument," or any controlling authority that clearly indicated such an argument would have been successful. (*Ibid.*)

Here, as in *New*, appellant cannot establish that trial counsel's performance was deficient because she has failed to identify any controlling

legal authority, let alone any controlling legal authority at the time of trial in 2001, that directly establishes that the proposed Fourth Amendment claim would have been successful.

Appellant primarily relies upon *People v. Brown, supra,* 88 Cal.App.3d 283 (AOB 205-209), but *Brown* does not demonstrate that a suppression motion in this case would have been successful. In *Brown,* the police went to the hospital for the purpose of talking with the defendant and possibly taking him to the police station for interrogation. A nurse escorted the defendant from a "day room" back to his hospital room, and the nurse then permitted the officers to enter the defendant's hospital room. While in the room, the officers noticed a pair of shoes with blood on them. (*Id.* at p. 288.) On appeal, the defendant claimed that the observation of the blood-soaked shoes should have been suppressed because the officers did not have a legal right to be present in the hospital room. (*Id.* at p. 289.) In resolving the issue, the appellate court noted the unique nature of a hospital with respect to general expectations of privacy, explaining that, "at least for certain purposes, a hospital room is fully under the control of the medical staff; yet for other purposes it is "'the patient's room.'" (*Id.* at pp. 290-291.) The court therefore explained that "it is not inappropriate to view a hospital room as one within joint dominion, as least for certain purposes." (*Id.* at p. 291, fn. omitted.)

The *Brown* court held that the officers had a right to be in the hospital room, explaining that the "notion that a nurse can authorize a visitor's entrance (albeit on official business) seems not only to accord with the everyday practices of hospitals (the nurse characterized her conduct relative to this incident as 'routine') but with everyday expectations of hospital patients." (*People v. Brown, supra*, 88 Cal.App.3d at p. 291.) The court also noted that the officers were not in the room to search it and the defendant did not refuse to see the officers. (*Id.* at pp. 291-292.) The

Brown court further emphasized the "narrowness" of its holding: "We merely hold that no Fourth Amendment violation occurs when a nurse permits an officer to enter a sentient patient's hospital room for purposes unrelated to a search, the patient does not object to the visit, and the officer then sees evidence in plain sight." (*Id.* at p. 292.)

The actual holding in *Brown* does not directly support appellant's proposed Fourth Amendment suppression motion, a point that appellant implicitly acknowledges when she argues that the "circumstances of appellant's case are different than in *Brown* . . . . " (AOB 207.) Indeed, as the trial court impliedly recognized, *Brown* reasonably supports the conclusion that the law enforcement presence at the hospital was lawful in appellant's case. Here, under the reasoning in *Brown*, the hospital staff had, at a minimum, joint dominion over the operating room, the recovery room, and the intensive care room. Moreover, as in *Brown*, it was uncontested that the hospital staff consented to the presence of the police in the various areas of the hospital (30RT 6401-6402, 6416), this permission was apparently routine because it was granted to Detective Wade on other prior occasions (30RT 6402), and appellant never objected to the law enforcement presence in her intensive care room. In light of these circumstances, *Brown* does not establish that the suggested pretrial suppression motion would have been successful. Accordingly, trial counsel's decision not to file a pretrial suppression motion based on *Brown* did not fall below an objective standard of reasonableness.

Appellant also cites the decision of the New Jersey Supreme Court in *State v. Stott* (N.J. 2002) 794 A.2d 120, 127, which explained that "we accept as a basic premise that a hospital room is more akin to one's home than to one's car or office." (AOB 208-209.) That decision, however, was not available to trial counsel at the time of the 2001 trial, and trial counsel did not render deficient performance in failing to anticipate a case from

another jurisdiction. Moreover, as the federal appellate court explained in *New, supra*, there is a "split of authority on the question of whether a patient has a reasonable expectation of privacy in a hospital room." (*New, supra*, 652 F.3d at p. 952.)

For instance, in the Wisconsin case of *State v. Thompson* (1998) 222 Wis.2d 179, 192 [585 N.W.2d 905], which was available at the time of appellant's trial, the appellate court rejected a similar Fourth Amendment claim. In that case, a police officer recovered the defendant's clothing and other physical evidence from the emergency room where the unconscious defendant was being treated for a drug overdose. (*Id.* at p. 182.) An officer was also present in the operating room and observed the defendant's subsequent surgery, and cocaine recovered from the defendant's body during the surgery was provided to the officer. (*Id.* at pp. 182-183.) On appeal, the defendant claimed the police recovery of the physical evidence in the emergency room and operating room constituted an improper search and seizure under the Fourth Amendment. (*Id.* at p. 184.)

The *Thompson* court held that the defendant "had no reasonable expectation of privacy in the emergency room or the operating room, and thus the officer's actions did not constitute a search of seizure." (*Thompson, supra*, 222 Wis.2d at p. 187.) Rejecting the analogy to the search of a residence, the court explained that the "consent for the officer to be present was given by hospital staff and a supervising physician, who had at least common, if not exclusive, authority over the premises," and that such consent would authorize a valid search. (*Id.* at pp. 191-192.) The court also recognized that state statutory provisions and historical notions of privacy generally accorded patients a significant measure of privacy in their medical treatment, but further concluded that

> historical notions of privacy are not offended when a police officer, in responding to an emergency call and with the

> acquiescence of hospital staff, enters the treatment area of an emergency room. Nor are historical notions of privacy offended when an officer observes a surgical procedure with the permission of the operating surgeon, given a patient's traditional surrender to his or her physician of the right to determine who may and may not be present during medical procedures.

(*Id.* at p. 192; see also *People v. Courts* (1994) 205 Mich.App. 326, 328 [517 N.W.2d 785] [a hospital patient's expectations of privacy are not similar in nature to the expectations of privacy for homes and motel rooms, and "[n]o one who had ever spent time in a hospital room could continue to harbor any false expectations about his personal privacy or his ability to keep the world outside from coming through the door"].)

In sum, neither the leading California case nor case authority from other jurisdictions available at the time of trial directly supported appellant's Fourth Amendment argument. Because appellant cannot establish that a pretrial suppression motion would have been successful, she cannot demonstrate that trial counsel rendered deficient performance in failing to file such a motion.[9]

Finally, the claim of ineffective assistance of counsel also fails because appellant cannot establish prejudice. Even if appellant's

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[9] To the extent appellant asserts that her Fourth Amendment rights were violated by Detective Wade's continued presence in the hospital room *after* appellant invoked her right to counsel (see AOB 195), she is incorrect. Once Detective Wade advised appellant of her *Miranda* rights, appellant was essentially in police custody. Under these circumstances, appellant did not have a reasonable expectation of privacy in her hospital room because "it would be wholly unrealistic not to expect the police to place [her] under surveillance" in the hospital. (*United States v. George* (9th Cir. 1993) 987 F.2d 1428, 1432 [defendant did not have a reasonable expectation of privacy in his hospital room because he was admitted to the hospital under police supervision following his arrest].) Thus, the trial court properly denied appellant's midtrial motion to strike Detective Wade's testimony.

statements regarding Gabriel had been suppressed, it is not reasonably probable appellant would have received a more favorable result in light of the overwhelming evidence presented by the prosecution (see Arguments V and VI, *infra*).

VIII. THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S REQUEST FOR A CONTINUANCE TO SECURE THE ATTENDANCE OF A WITNESS AT THE HEARING ON THE ADMISSIBILITY OF APPELLANT'S STATEMENTS AT THE HOSPITAL

Appellant contends the trial court abused its discretion and violated her right to a fair trial by denying her request for a continuance to secure the attendance of Debbie Anderson at the hearing on the admissibility of appellant's post-*Miranda* statements at the hospital. (AOB 212-220.) This claim is without merit.

As previously noted, the hearing on appellant's motion to strike Detective Wade's testimony about appellant's statements asking about Gabriel took place during the portions of three court days (September 19-21). Because the defense did not complete its cross-examination of Detective Wade on September 19, the court continued the hearing until the following morning, with defense counsel indicated "[t]hat would be great with our calendar as well." (33RT 6818-6819.)

The cross-examination of Detective Wade continued the following day. (34RT 6893-6902, 6987-6998.) During the cross-examination, the trial court asked defense counsel for a time estimate on the presentation of any further evidence. Defense counsel replied that she did not anticipate taking longer than 20 additional minutes to complete Detective Wade's cross-examination and 10 to 15 minutes to present the testimony of Nina Priebe. (34RT 6999.) When defense counsel further requested that the hearing be concluded the following morning rather than later that day, the court indicated that it did not have a problem with that request if counsel could assure the court that the defense witness would be available the

following morning. After defense counsel replied that the witness's schedule allowed her to be available in the morning, the court indicated the hearing would resume at 8:00 a.m. the following morning. (34RT 7001.)

The parties completed their examination of Detective Wade and Priebe the next day. (35RT 7100, 7122.) Following the completion of Priebe's testimony, defense counsel stated that she wanted to call Debbie Anderson, but further noted that she had not been able to alert Anderson to return to court. Defense counsel therefore indicated that she wanted to consult with her investigator. The court denied the request, noting that "[a]ll parties knew today was the day we were going to have the hearing," that they had discussed the available witnesses for the hearing the previous day, and that the hearing was not going to be delayed any further. (35RT 7123-7124.) The court then gave defense counsel an opportunity to see if Anderson was outside the courtroom. (35RT 7124.) Counsel later explained that, although Anderson had previously been a trial witness, Anderson had not worked at the hospital in the last two days, the defense had no other means of reaching her, and the defense had attempted to the best of their ability to contact her and request her testimony. (35RT 7124.)

As to the continuance request, the trial court ultimately ruled as follows:

> All right. Well, I – I recall Ms. Anderson's testimony. And if you're asking for a continuance in this hearing to be able to obtain the availability of this witness, that request is denied. [¶] You had ample opportunity to have your witnesses present. And the Court has been I believe extremely generous in allowing time for this hearing and for other hearings that have been occurring at the – the last minute.

(35RT 7125.)

"The decision whether to grant a continuance of a hearing to permit counsel to secure the presence of a witness rests in the sound discretion of the trial court." (*People v. Roybal* (1998) 19 Cal.4th 481, 504.) "'To

establish good cause for a continuance, defendant had the burden of showing that [she] had exercised due diligence to secure the witness's attendance, that the witness's expected testimony was material and not cumulative, that the testimony could be obtained within a reasonable time, and that the facts to which the witness would testify could not otherwise be proven.' [Citation.]" (*Ibid.*)

Here, no abuse of discretion occurred because appellant failed to establish good cause for a continuance. First, as the trial court correctly observed, the court had already been generous in providing time during the midst of trial to hear a motion that should have been made prior to trial. Also, appellant had an ample opportunity to obtain the availability of witnesses, especially since the hearing on appellant's motion was held over the course of three days.

Moreover, appellant failed to show good cause with respect to Anderson because appellant never indicated during the first two days of the hearing that she wanted to call Anderson as a witness or that she was having difficulty contacting Anderson. For instance, when the trial court asked defense counsel on the second day of the hearing for a time estimate on the presentation of further evidence, counsel stated that she did not anticipate taking longer than 20 additional minutes to complete Detective Wade's cross-examination and 10 to 15 minutes to present the testimony of Priebe; notably, defense counsel made no mention of Anderson. (34RT 6999.) In addition, on the same day, the trial court granted defense counsel's request that the hearing be concluded the following morning rather than later that day after counsel assured the court that Priebe would be available to testify the following morning; again, counsel made no mention of Anderson's testimony or any difficulties in securing her attendance. (34RT 7001.)

Furthermore, appellant failed to establish any of the factors. For instance, appellant failed to show that Anderson's testimony was material and not cumulative. The trial court had previously found that there was no evidence to support the defense allegation that Detective Wade had interfered with appellant's medical treatment. (30RT 6429-6430.) In making that earlier ruling, the trial court was aware from the recordings that a nurse (possibly Anderson) had indicated that she did not want to disturb Detective Wade's questioning by giving appellant stronger pain medication, and that Detective Wade had replied, "Do what you would normally do." (30RT 6429.) Given the court's earlier findings, appellant failed to show that Anderson's testimony was necessary to support the motion. In addition, appellant failed to show the testimony could be obtained within a reasonable time because she provided no time estimate as to when Anderson could testify. Under these circumstances, no abuse of discretion occurred.

Finally, even assuming arguendo that the trial court erred in denying the continuance, appellant suffered no possible prejudice. (*People v. Watson* (1956) 46 Cal.2d 818, 836; see also *People v. Montes* (2014) 58 Cal.4th 809, 860 [any error from denial of continuance was not prejudicial].) First, there is nothing to indicate that Anderson's proposed testimony was dispositive on the issues of whether: (1) appellant's statements about Gabriel resulted from interrogation, or (2) appellant's Fourth Amendments rights were violated by Detective Wade's continued presence in the hospital room. Indeed, as to the latter issue, respondent has previously explained that appellant's Fourth Amendment claim lacked merit. Thus, appellant cannot show that a continuance would have resulted in the trial court granting appellant's motion to strike Detective Wade's testimony about appellant's statements concerning Gabriel. Moreover, even assuming arguendo the trial court would have granted appellant's

motion, there was no prejudice because the remaining prosecution evidence presented an overwhelming case of appellant's guilt.

IX. THE TRIAL COURT DID NOT VIOLATE APPELLANT'S SIXTH AMENDMENT RIGHT TO PRESENT A DEFENSE THROUGH ITS EVIDENTIARY RULINGS

Citing a litany of various evidentiary rulings by the trial court during the lengthy trial, appellant contends that these evidentiary rulings individually and cumulatively violated her Sixth Amendment right to present a defense. (AOB 221-253.) This claim, which attempts to aggregate a series of routine and unrelated evidentiary rulings into an alleged constitutional violation, is without merit.

"'"As a general matter, the ordinary rules of evidence do not impermissibly infringe on the accused's right to present a defense. Courts retain, moreover, a traditional and intrinsic power to exercise discretion to control the admission of evidence in the interests of orderly procedure and the avoidance of prejudice." [Citation.]' [Citation.]" (*People v. Gurule* (2002) 28 Cal.4th 557, 620; accord, *People v. Edwards* (2013) 57 Cal.4th 658, 728.)

Here, as fully set forth below, the trial court did not abuse its discretion under state law in its routine evidentiary rulings, and any state-law error was plainly harmless. Accordingly, appellant's federal constitutional claim necessarily fails. (*People v. Riccardi, supra,* 54 Cal.4th at p. 809 ["The routine and proper application of state evidentiary law does not impinge on a defendant's due process rights."]; *People v. Gurule, supra*, 28 Cal.4th at p. 620 ["Defendant does not explain why the routine evidentiary rulings of which he complains rise to the level of a constitutional violation."].)

A. The Trial Court Properly Ruled That Appellant Did Not Have A Pretrial Right To Privileged Psychotherapy Records

At a pretrial hearing, defense counsel notified the trial court that the defense was seeking the disclosure of records pertaining to the treatment of Dr. Caro by Lynn Allen, a Marriage, Family and Child Counselor (MFCC), and that the defense was preparing to litigate the discoverability of those records. (2RT 90-91.)

Allen filed a motion to quash the subpoena for the psychotherapy records, arguing that the documents were privileged under the psychotherapist-patient privilege. (1CT 181-189.) Allen, a licensed psychologist and MFCC, explained that she entered into a confidential psychotherapist-patient relationship with Dr. Caro in early August 1999, and that this relationship continued until on or about March 11, 2000. (1CT 186.) Allen further indicated that Dr. Caro's attorney had contacted her attorney and expressed Dr. Caro's intention to claim the psychotherapist-patient privilege under Evidence Code section 1014. (1CT 187-188.) Citing *People v. Hammon* (1997) 15 Cal.4th 1117 (*Hammon*), Allen further argued that appellant was not entitled to an in camera review of the documents. (1CT 188-189.)

Dr. Caro also filed a brief opposing the production of his psychotherapy records. In that brief, Dr. Caro specifically explained that he was asserting the psychotherapist-patient privilege under Evidence Code section 1014, and argued that appellant was not entitled to production of the privileged documents under *Hammon*. (1CT 190-192.)

Appellant filed an opposition to the motion to squash, arguing the records were not privileged, and that, even if a psychotherapist-patient relationship formed, Dr. Caro waived the privilege by disclosing portions of his communications with Allen. (1CT 195-198.) Appellant also argued

that the trial court should not rely on *Hammon* to quash the subpoena, explaining that a state-law evidentiary privilege may have to yield to a defendant's Sixth Amendment right of confrontation at trial and she was therefore "entitled to the records since due process requires effective cross examination of such a material witness." (1CT 199-200.)

At the hearing on the motion, Allen testified about the existence of the psychotherapist-patient relationship with Dr. Caro. (2RT 111-139, 155-165.) Following argument by counsel, the trial court found that a psychotherapist-patient relationship was formed and existed, that Dr. Caro did not waive the privilege by his statements to third persons, and that under *Hammon*, appellant's Sixth Amendment rights of confrontation did not authorize the disclosure of privileged information. (2RT 164.) The court therefore granted the motion to quash without prejudice to appellant raising the issue again at a later stage of the proceedings. (2RT 165.)

The trial court's ruling was proper under *Hammon*. In *Hammon*, this Court rejected the defendant's claim that pretrial access to documents protected by the psychotherapist-patient privilege was "necessary to vindicate his federal constitutional rights to confront and cross-examine the complaining witness at trial or to receive a fair trial." (*People v. Hammon, supra*, 15 Cal.4th at p. 1119.) Noting the divided views of the United States Supreme Court justices in *Pennsylvania v. Ritchie* (1987) 480 U.S. 39 [107 S.Ct. 989, 94 L.Ed.2d 40] on the proper application of the Sixth Amendment Confrontation Clause to the issue of pretrial discovery, this Court declined to "hold that the Sixth Amendment confers a right to discover privileged psychiatric information before trial" because this Court did not "see an adequate justification for taking such a long step in a direction the United States Supreme Court has not gone." (*Id.* at p. 1127.) Accordingly, under *Hammon*, appellant did not have a right to discover privileged psychotherapy records prior to trial.

Appellant nevertheless argues that this Court should reconsider the holding in *Hammon*, but she offers no persuasive reasons (such as any recent United States Supreme Court authority) for doing so. (AOB 231.) As this Court recently observed, "invocation of the confrontation or compulsory process clauses in a claim involving pretrial discovery 'is on a weak footing' because it is unclear whether or to what extent those constitutional guarantees grant pretrial discovery rights to a defendant." (*People v. Clark, supra,* 52 Cal.4th at pp. 982-983; see also *People v. Martinez* (2009) 47 Cal.4th 399, 454, fn. 13 ["we have rejected claims that the Sixth Amendment right of confrontation extends to requiring the granting of pretrial discovery motions"].) Appellant's claim of error therefore fails.

B. The Trial Court Properly Admitted Autopsy Photos

Appellant next contends the trial court abused its discretion in admitting four autopsy photographs of the victims' head injuries (Peo. Exh. Nos. 40A, 42B, 44B, and 44C). She specifically argues that the four autopsy photographs were gruesome, were irrelevant to any material issue at the guilt phase, and were cumulative of other prosecution evidence. (AOB 232-236.) No abuse of discretion occurred.

Following the completion of voir dire, the prosecution filed a motion to admit four autopsy photographs of Joey (Photograph Nos. 40A-40D), five autopsy photographs of Michael (Photograph Nos. 42A-42E), and five autopsy photographs of Christopher (Photograph Nos. 44A-44E). The prosecution argued that the 14 photographs were extremely probative on the issues of malice, intent to kill, and premeditation, and that the photographs illustrated and explained the coroner's testimony. (6CT 1071-1092.)

With respect to the four photographs at issue in this claim, the prosecution specifically argued that People's Exhibit No. 40A (originally

identified as Photograph No. 40B at the time of the motion) was a close-up shot of Joey's wound that showed stellate tearing and illustrated Dr. Frank's opinion that Joey suffered a contact gunshot wound. (6CT 1088; 13RT 2305-2306.) As to People's Exhibit No. 42B, the prosecution explained that this photograph was the only photograph showing the stellate tearing and massive hemorrhaging caused by the bullet entering Michael's head, and the photograph corroborated Dr. Frank's opinion that the wound was a contact gunshot wound. (6CT 1089; 13RT 2314-2315.)

With respect to People's Exhibit No. 44B, the prosecution argued that the photograph showed the total damage to Christopher's head caused by the two gunshots. As to People's Exhibit No. 44C, the prosecution argued that this photograph was a close-up view of the area on Christopher's skull where the bullet tangentially struck the head and caused a "beveled" effect, which showed that appellant shot Christopher twice. (6CT 1091-1092; 13RT 2317-2318.)

Over defense objection, the trial court ruled that two autopsy photographs of Joey (including Peo. Exh. No. 40A), three autopsy photographs of Michael (including Peo. Exh. No. 42B), and five autopsy photographs of Christopher (including Peo. Exh. Nos. 44B, 44C), were admissible because the probative value of the evidence outweighed the danger of undue prejudice. The court further found that the remaining four photographs were inadmissible because the prejudicial impact outweighed the probative value. (13RT 2306-2328.)

At trial, Dr. Frank testified that Joey "died from a contact gunshot wound to the head" and that she made that determination from examining the entrance wound. (36RT 7387-7388.) Dr. Frank explained that a contact gunshot wound may cause the deposit of soot and the splitting of the scalp, that the splitting or tearing of the scalp will usually radiate around from the hole caused by the bullet, that these wounds are called stellate

entrance wounds, and that Joey's entrance wound had stellate tearing and the deposit of soot. (36RT 7389.) Dr. Frank further testified that People's Exhibit No. 40A showed the entrance wound on the right side of Joey's head, explaining that the photograph showed a "large defect in the skin" and the "tears radiated in different directions around" a central hole. (36RT 7389.)

With respect to Michael, Dr. Frank testified that Michael suffered "a contact gunshot wound to the head" because of the "tears that radiated around the central hole" and the deposit of soot. Dr. Frank then identified People's Exhibit No. 42B as showing that gunshot wound. (36RT 7394-7395.)

Dr. Frank testified that Christopher "sustained two gunshot wounds to the head," that the "entrance of both wounds was in the same general location," that "[t]his was a complex wound," and "it was not possible to clearly define the discre[te] entrance for each of those wounds." (36RT 7400.) Dr. Frank also testified that one of the gunshot wounds was a tangential gunshot entrance wound where the bullet entered at a superficial angle and grazed across the head without penetrating deeply into the brain. (36RT 7403.)

Dr. Frank explained that People's Exhibit No. 44B depicted the "large, gaping, torn injury which extend[ed] from the front to back of" Christopher's head, after the hair on the scalp had been shaved away. (36RT 7401.) According to Dr. Frank, the photograph showed "scalloped edging" at the front of the wound, and this scalloping represented the bony entrance of one of these wounds. Dr. Frank further observed that, "in fact there was some soot deposited on the outer surface of the skull in this area that is consistent with at least one of these wounds being a contact gunshot wound." (36RT 7401.)

Dr. Frank further testified that People's Exhibit No. 44C was "a close-up of the bony scalloped area" she had previously described, and that she "was able to see on this scalloped area soot deposited in one area" and "some chipping away of the surface of the bone, which is consistent with the bullet having exited almost at the same location that it enters the body." (36RT 7402.) Dr. Frank explained that "a portion of this bony defect was inwardly bevel[]ed" and a nearby area had "outward bevel[]ing" where soot was deposited, and this indicated that "the bullet went in at a very superficial angle and essentially entered and exited almost immediately, lifting off a piece of bone and tearing the scalp as it passed." (36RT 7403.) Using People's Exhibit No. 44C, Dr. Frank identified an area of outward beveling, which indicated that "at least part of the bullet exited at that site." (36RT 7404.)

"'"The admission of photographs of a victim lies within the broad discretion of the trial court when a claim is made that they are unduly gruesome or inflammatory. [Citations.] The court's exercise of that discretion will not be disturbed on appeal unless the probative value of the photographs clearly is outweighed by their prejudicial effect. [Citations.]" [Citation.]' [Citation.]" (*People v. McKinzie, supra*, 54 Cal.4th at p. 1351.) "'Autopsy photographs are routinely admitted to establish the nature and placement of the victim's wounds and to clarify the testimony of prosecution witnesses regarding the crime scene and the autopsy, even if other evidence may serve the same purposes.' [Citation.]" (*Id.* at p. 1352.)

Here, the trial court did not abuse its discretion in admitting the four autopsy photographs. The four photographs were highly probative because they assisted the jury in understanding Dr. Frank's testimony regarding the nature of the gunshot wounds suffered by all three victims, which in turn strongly established that appellant acted with malice aforethought and premeditation. (*People v. Montes, supra,* 58 Cal.4th at p. 862 [autopsy

photographs were "very probative" because they "assisted the jury in understanding the testimony of the pathologist"]; *People v. McKinzie, supra*, 54 Cal.4th at p. 1351 ["The autopsy photos supported Dr. Frank's testimony regarding the causes of the victim's death"]; *People v. Cruz* (2008) 44 Cal.4th 636, 671 [photos admissible to corroborate or clarify coroner's testimony].)

For instance, the two autopsy photographs of Christopher's "complex" head injuries illustrated and clarified Dr. Frank's testimony regarding the cause of Christopher's death, i.e., Christopher suffered two gunshot entrance wounds in the same area, the entrance wounds were not clearly defined, at least one wound was a contact wound, one wound was a "tangential" wound, and the inward and outward beveling demonstrated the tangential wound. This evidence, in turn, strongly supported the prosecution's theory that appellant acted with malice and premeditation in shooting Christopher twice in the head at close range. Similarly, People's Exhibit Nos. 40A and 42B supported Dr. Frank's testimony that Joey and Michael suffered gunshot contact wounds to the head, which again bolstered the prosecution's theory that appellant shot her victims with premeditation and the intent to kill.

Furthermore, the probative value of the autopsy photographs outweighed any risk of undue prejudice. As this Court has explained, "murder is seldom pretty '[b]ut as unpleasant as these photographs are, they demonstrate the real-life consequences of [defendant's] actions. The prosecution was entitled to have the jury consider those consequences.' [Citation.]" (*People v. Mills* (2010) 48 Cal.4th 158, 192.) Moreover, in light of the trial court's careful examination of each of the 14 proffered photographs, its consideration of defense counsel's arguments as to each photograph, and its ultimate exclusion of four photographs, the record

"strongly supports the conclusion that the trial court did not abuse its discretion; that is, the court did not act arbitrarily or with caprice." (*Ibid.*)

Finally, even assuming arguendo the trial court erred in admitting the autopsy photographs, any error was not prejudicial because of the overwhelming evidence of guilt. (*People v. Watson, supra,* 46 Cal.2d at p. 836.)

C. The Trial Court Did Not Abuse Its Discretion In Its Routine Evidentiary Rulings

Appellant argues the trial court erred in eight evidentiary rulings. (AOB 237-247.) Appellant is incorrect.

"A trial court's rulings on the admission or exclusion of evidence is reviewed for abuse of discretion." (*People v. DeHoyos* (2013) 57 Cal.4th 79, 131.) The trial court has broad discretion to determine the relevance of evidence [citation], and [the reviewing court] will not disturb the court's exercise of that discretion unless it acted in an arbitrary, capricious, or patently absurd manner [citation]." (*People v. Jones* (2013) 57 Cal.4th 899, 947.)

A "trial court has broad discretion to determine whether a party has established the foundational requirements for a hearsay exception . . . ." (*People v. DeHoyos, supra,* 57 at p. 132.) An appellate court reviews the "trial court's conclusions regarding foundational facts for substantial evidence," and reviews the "trial court's ultimate ruling for an abuse of discretion." (*Ibid.*)

1. Dr. Caro's testimony regarding the money appellant gave to her parents

During the direct examination of Dr. Caro, the prosecutor asked the following question: "Now, we've just been talking about a few specific checks here for the years 1998-1999. Does this reflect the total amount of money that you believe or have reason to believe the defendant gave her

parents during those two years?" The defense objected based on hearsay and insufficient foundation as to personal knowledge. The court overruled the objection, and Dr. Caro testified that he did not believe the checks represented the total amount. (20RT 3664.)

Appellant argues the trial court should have sustained the objection based on insufficient foundation as to personal knowledge. According to appellant, the prosecution's theory was based on Dr. Caro being "clueless about the money that appellant was giving her parents," and therefore Dr. Caro's testimony on this issue was based on speculation and only served to portray her in a negative light. (AOB 237.)

No abuse of discretion occurred. The challenged question and answer were in the context of Dr. Caro's discovery of the amount of money that appellant was giving to her parents *after* his review of the corporate and personal finances in early August 1999. (20RT 3646-3647.) Because Dr. Caro's answer was based on his investigation into his finances, the trial court correctly overruled the defense objection

During the redirect examination of Dr. Caro, the prosecutor asked, "Now do you believe that those checks covered all of the expenses that were made on behalf of the Leons during that time period?" Defense counsel objected based on speculation and insufficient foundation. The court overruled the objection after the prosecutor added the proviso, "If you know." Dr. Caro then testified, "I do know that those checks represent only a fraction of what was paid to the Leons over that period of time for their expenses." (25RT 4577.)

Appellant again argues the trial court erred because there was an insufficient foundation for Dr. Caro's testimony. (AOB 237-238.) Again, no abuse of discretion occurred. After the prosecutor limited the question to Dr. Caro's knowledge, the trial court properly overruled the objection.

Moreover, as previously explained, Dr. Caro's testimony was based on his review of the financial documentation in August 1999.

2. Attempted impeachment of Dr. Caro regarding whether he had sex with Gillard at a hotel after November 22, 1999

Appellant next contends the trial court erred in sustaining the prosecution's relevancy objection when defense counsel attempted to ask Dr. Caro whether it was his testimony that he did not have sex with Gilliard at the Marriott hotel subsequent to November 22, 1999. (23RT 4262.) Appellant argues the ruling was in error because Dr. Caro was the key prosecution witness, his credibility was at issue, and Dr. Caro had given conflicting statements regarding the continuation of his relationship with Gillard. (AOB 238-239.)

No abuse of discretion occurred because the question involved attempted impeachment on a collateral issue. (*People v. Contreras* (2013) 58 Cal.4th 123, 152 ["the trial court has wide latitude under state law to exclude evidence offered for impeachment that is collateral and has no relevance to the action"]; *People v. Riccardi, supra,* 54 Cal.4th at p. 809 [trial court has broad power to control presentation of proposed impeachment evidence to prevent criminal trials from degenerating into nitpicking wars of attrition over collateral credibility issues].) As the trial court reasonably concluded: "It's not important where any sexual activity occurred or – subsequent to November 22nd. What's important is the evidence you have now. There was a relationship. The relationship continued after that date on two more occasions. Where, when, how, in my opinion, is simply not relevant." (23RT 4264.)

3. Reference to defense expert not called in case

During the cross-examination of Edward Jones, a forensic scientist with the Ventura County Sheriff Department's Crime Laboratory, Jones testified that he examined appellant's panties on July 10, 2001, and that occasion was the first time he had custody of the item. (36RT 7311-7312.)

Defense counsel then asked Jones whether that was the first time he had ever examined the item, and Jones replied that he may have examined the item "on a date earlier than that when other examiners were looking at them." Defense counsel asked when that occurred, and Jones answered, "That would have been either with Richard Fox or Herb MacDonnell. One of them or both." (36RT 7312.)

On redirect examination, the prosecutor asked Jones if he had testified on cross-examination that he first examined the panties in the presence of either Richard Fox or Herb MacDonnell. After Jones testified that was the first time he was aware of the panties, the prosecutor asked, "And who is Richard Fox?" Defense counsel objected on relevancy grounds. (36RT 7375.)

At a sidebar conference, the prosecutor argued the evidence was relevant to explain to the jury "who these people are." The court replied that the proffered reason did not explain why the name Richard Fox was relevant, and indicated the prosecutor could instead elicit from Jones that "he was displaying them to people who were retained by the defense." (36RT 7376.) Defense counsel objected to the area of inquiry because any information that defense experts conducted their own examination of the panties would contravene *People v. Coddington, supra*, 23 Cal.4th at page 606, which held that the work product privilege is violated by cross-examination and argument that suggested defense counsel did not call nontestifying experts because their testimony would not have been favorable. Defense counsel also indicated that she did not have any problem with testimony that the panties were available for inspection by the defense. (36RT 7377.)

In front of the jury, the trial court sustained the defense's relevancy objection. The prosecutor then asked Jones: "Mr. Jones, when you removed the panties for examination, was that to provide access to that

particular item to defense experts?" Jones replied affirmatively. (36RT 7378.)

Appellant contends the trial court erred in "allowing in the testimony about Fox" because neither Fox nor his role as a defense expert was relevant to establishing when Jones first saw the panties, and the "defense had a right not to have the jury learn about its use of an expert who had not testified." (AOB 240.)

The trial court did not abuse its discretion. First, the trial court sustained the defense objection to the prosecutor's question about the identity of Fox. Second, the trial court properly permitted the prosecutor to elicit the limited testimony that the panties were available for independent testing. (*People v. Scott* (2011) 52 Cal.4th 452, 489 [prosecutor's questions properly sought to clarify that "DNA samples were available for independent testing," and the "mere fact that a piece of evidence was given to the defense says nothing about what the defense team did or did not do with the evidence"].)

4. Attempted impeachment of Dr. Caro regarding psychologist's advice for increase of appellant's Prozac dosage

Appellant contends the trial court erred by sustaining the prosecution's objection to the defense's attempts to elicit testimony that Dr. Caro told Detective Thompson that his psychologist advised him to increase appellant's Prozac dosage. Appellant asserts that this evidence was admissible for the non-hearsay purpose of impeaching Dr. Caro's trial testimony regarding his recollection of what he told the detectives. (AOB 241-242.)

During the cross-examination of Dr. Caro, defense counsel explained that she intended to elicit evidence that Dr. Caro "told the first law enforcement officers who interviewed him that – that his psychologist had

prescribed Prozac for his wife" (22RT 3963), and that Dr. Caro "told the police in the early morning hours of November the 23rd that the dosage had even been increased by his psychologist based on the fact that his wife had problems immediately preceding her period" (22RT 3964). The prosecutor objected on several grounds, including the assertion that Dr. Caro had merely stated that he had talked to his therapist about his wife and that Dr. Caro never stated that somebody else actually prescribed the Prozac. (22RT 3965.) The trial court ruled that it would permit the defense to ask if Dr. Caro consulted with any medical doctors in prescribing Prozac, and that the defense could impeach him with any inconsistent statements. (22RT 3966-3967.)

Defense counsel later asked Dr. Caro the following question: "Did you tell the police when you were interviewed initially that your psychologist had prescribed Prozac for Cora?" (22RT 3968.) After the trial court overruled the prosecutor's objection, Dr. Caro answered: "I don't recall if I used those words when I spoke to the sheriff's department." (22RT 3969.) Defense counsel then asked if Dr. Caro discussed Prozac with the sheriff's department during the initial interview, and Dr. Caro answered, "To the best of my recollection, I mentioned to them that Cora had been started on Prozac by me." (22RT 3969.)

During the defense's direct examination of Detective Thompson, defense counsel indicated that she was seeking to elicit evidence that Dr. Caro told Detective Thompson that appellant's "Prozac dosage was increased on the advice of his psychologist." (42RT 8486.) The trial court indicated that the proffered evidence was "was not an inconsistent statement to his testimony." (42RT 8488.) Defense counsel argued that Dr. Caro told the detectives that "my psychologist thought my wife needed an increase in dosage of Prozac." (42RT 8488.) When the trial court stated that was not what Dr. Caro stated to the detectives, defense counsel replied,

"Yes, it is. It's in the transcript. We haven't gotten to it yet." (42RT 8489.) The trial court ultimately ruled, "Well, based on the record I've heard, that statement is not admissible." (42RT 8489.)

No abuse of discretion occurred because the trial court correctly concluded that appellant had failed to show Dr. Caro's purported statement to Detective Thompson was inconsistent with Dr. Caro's trial testimony. During cross-examination, defense counsel asked whether Dr. Caro told the detectives that his "psychologist had *prescribed* Prozac" for appellant, and Dr. Caro answered that he did not recall using those words. (22RT 3968-3969, emphasis added.) When defense counsel asked if Dr. Caro discussed Prozac during the initial interview with the sheriff's detectives, Dr. Caro answered: "To the best of my recollection, I mentioned to them that Cora had been started on Prozac by me." (22RT 3969.)

Notably, defense counsel did not ask Dr. Caro on cross-examination whether he told the detectives that his psychologist had *advised* an *increase* in appellant's Prozac dosage, and Dr. Caro did not otherwise deny making such a statement to the detectives. Thus, the proffered impeachment evidence – that Dr. Caro told the detectives that appellant's "Prozac dosage was increased on the advice of his psychologist" (42RT 8486) – was not inconsistent with Dr. Caro's testimony that appellant "had been started on Prozac by me" and that he did not recall telling the detectives that his "psychologist had prescribed Prozac." Because there was no inconsistency, the trial court did not abuse its discretion in excluding the evidence.

5. Testimony on what Dr. Caro stated to appellant about the appointment with the divorce attorney

During the direct examination of appellant, the trial court sustained the prosecutor's hearsay objections to the following two questions: (1) "And do you recall whether or not on that same date, the date that your husband was to have the appointment with the divorce attorney, that he had

told you that he had changed his mind and had not gone?"; and (2) "Did your husband tell you whether or not he had kept the appointment with the divorce attorney?" (46RT 9246.) Defense counsel argued that the statement was not offered for the truth, and was instead offered as a prior inconsistent statement by Dr. Caro. (46RT 9245-9246.) At a sidebar conference, defense counsel further argued that the statement was relevant because it explained that appellant was upset about Dr. Caro lying to her about not going to the divorce attorney. (46RT 9246-9247.) The trial court ruled that the objection remained sustained, and that the defense could elicit appellant's testimony as to the reason she got upset. (46RT 9247-9248.) Appellant subsequently testified that she believed the appointment with the divorce attorney was ultimately not kept based on something Dr. Caro told her. (46RT 9250.)

Appellant contends the trial court erred in excluding Dr. Caro's statement to her as hearsay. (AOB 243.) Even assuming arguendo the trial court erred, appellant suffered no possible prejudice because the defense was able to elicit appellant's testimony that, based on Dr. Caro's statement to her, she believed Dr. Caro had not kept the appointment with the divorce attorney. (46RT 9250.)

6. Detective Wade's testimony about Juanita's statement regarding what appellant was sorry for

During the direct examination of Juanita Leon, Juanita testified that she did not recall whether appellant made any statements about her emotional state or what had happened to her children while Juanita was saying a prayer over appellant, and that she did not recall appellant stating, "I'm sorry. I'm sorry for what happened to my babies." (28RT 5060.) Juanita further testified that she did not recall being interviewed by a female detective, and did not recall telling this detective that appellant told her that she was sorry for what happened to her babies. (28RT 5060.)

Defense counsel later objected to the prosecution's attempt to introduce Juanita's statement to Detective Wade as an inconsistent statement. Defense counsel specifically argued that Detective Wade had asked Juanita to give an opinion as to what appellant meant when appellant stated that she was sorry. (31RT 6519-6522.) The trial court disagreed, explaining that Juanita's statement to Detective Wade – "I'm so sorry for what happened to my babies" – was a statement that Juanita was "attributing to [appellant], not to her own perceptions," and the statement was "not paraphrased or stated her as an opinion." (31RT 6522-6524.) The court further found that Juanita's other statement – "She's so sorry what happened" – was not admissible. (31RT 6522-6523.)

During the direct examination of Detective Wade, the prosecutor asked the following question: "When you interviewed Juanita Leon on November the 24th, did you ask Juanita Leon whether or not she knew what the defendant was saying she was sorry for the night before?" Defense counsel objected on multiple grounds. (31RT 6532.) After clarifying that it "was the same question in the transcript that I observed," the trial court overruled the objection. (31RT 6532-6533.) The prosecutor then asked: "Did you ask Juanita Leon, 'Do you know what she was saying she was sorry for the other night,' then?" Detective Wade answered, "Yes." Asked to read the relevant portion of the transcript, Detective Wade further testified: "She says, 'I'm sorry. So sorry for what happened to my babies, mother.' And she touched her tummy." (31RT 6533.)

Appellant contends the trial court erred in overruling the objection because Juanita's statement to Detective Wade was simply Juanita's speculation as to what appellant meant with her statement about being sorry. (AOB 243-245.)

The trial court did not abuse its discretion. As the court reasonably concluded, the admitted statement involved Juanita directly repeating

appellant's hospital statement to Detective Wade rather than Juanita's interpretation of appellant's statement. In light of this foundational finding, the trial court properly ruled the statement was admissible because it was inconsistent with Juanita's trial testimony on that issue.

7. Dr. Caro's statement to Juanita that appellant shot the children in the head

The defense sought to admit testimony from Deputy Tutino that appellant said to Juanita in the garage, "She shot them in the head. She wasn't messing around." (47RT 9441.) Defense counsel initially argued that the statement was inconsistent with Dr. Caro's trial testimony that he did not know that Joey and Christopher were shot in the head. (47RT 9452-9454.) The trial court noted that it did not recall that testimony from Dr. Caro and asked defense counsel to identify the location of that testimony in the transcript. Defense counsel indicated that she was not prepared to do that at the moment, but that she would supply it. (47RT 9453.)

At a subsequent discussion of the issue, the trial court observed that, based on the photographic evidence, "it does appear to the Court that it doesn't require a medical degree, after having looked at these children, to know where they were shot." (49RT 9733.) After defense counsel noted the evidence was contrary as to Joey, the prosecutor argued that Dr. Caro's trial testimony regarding Joey's injuries was not inconsistent with the statement appellant was seeking to introduce. (49RT 9733.) Defense counsel argued an inconsistency existed because Dr. Caro did not testify that he observed a head wound on Joey; counsel, however, acknowledged the inconsistency only allowed for "minimal argument" because of the stress of the situation described by Dr. Caro. (49RT 9735.) Defense counsel further argued the statement was relevant because it was circumstantial evidence that Dr. Caro had more knowledge of the wounds

suffered by the children than indicated in his trial testimony, which in turn was relevant to the issue of third-party culpability. (49RT 9735-9736.) The trial court ultimately ruled the statement was inadmissible. (49RT 9736.)

Appellant contends the trial court erred in excluding the evidence because it was admissible for a non-hearsay purpose and was relevant to show that Dr. Caro "knew more when he was talking to Juanita that he should have known based on his version of what he did that night." (AOB 246-247.)

The trial court did not abuse its discretion in excluding the statement. As the trial court noted, the locations of the children's wounds were fairly apparent to a layperson, let alone a medical doctor like Dr. Caro. Because the excluded statement did not reasonably support the ultimate inference that appellant seeks to draw from the evidence, i.e., that Dr. Caro had more knowledge of the injuries than he indicated because he was the actual shooter, the trial court did not abuse its broad discretion in excluding the evidence. Similarly, in light of the acknowledged "minimal argument" that was supported by the excluded evidence, appellant suffered no prejudice.

D. No Prejudicial Error Occurred From The Exclusion of Evidence That Dr. Caro Told Juanita That Appellant Stated She Killed The Kids

At an Evidence Code section 402 hearing, Deputy Tutino testified that he documented in his report that he overheard Dr. Caro tell Juanita that appellant had stated to him that she killed the kids. (49RT 9760.) The specific statement from Dr. Caro was documented in the report as follows: "Cora told Xavier that she had killed all the kids." (49RT 9781.) When Deputy Tutino wrote that statement in his report, he did not use quotation marks, but he placed that statement in a paragraph that listed statements by Dr. Caro that he heard. (49RT 9761-9762.) Deputy Tutino believed that

particular paragraph in his report was accurate to the best of his knowledge. Deputy Tutino, however, did not currently remember hearing that particular statement from Dr. Caro, and reading the report did not refresh his recollection. (49RT 9762-9763.) The report was dated November 23, 1999, with a time of 0600 hours; Deputy Tutino could have written the report within two hours of that listed time. (49RT 9761.)

The defense asserted that it had laid a sufficient foundation for admitting the statement – "Cora told Xavier that she had killed all the kids" – under the past recollection recorded hearsay exception. The court indicated that it did not believe the defense could establish the necessary foundation under Evidence Code section 1237 on the present state of the record. The court specifically explained the defense had failed to have the hearsay declarant testify that the statement he made was a true statement of such fact. (49RT 9770-9771.) Defense counsel disagreed, arguing that Deputy Tutino, not Dr. Caro, was the relevant hearsay declarant. (49RT 9771-9772.)

The court ultimately ruled the statement was not admissible under the past recollection recorded hearsay exception. (49RT 9783-9785.) The court observed that the written statement – "Cora told Xavier that she had killed all the kids" – was "not accurate or correct" because appellant "wasn't part of the interview and/or conversation that was occurring." (49RT 9784.) The court further explained that there was no indicia of trustworthiness. The court observed that the purported statement was not contained in the recording of the conversation between Dr. Caro and Juanita, even though the report indicated that it was a brief synopsis of the recording and actually referred back to the cassette tape for further details. (49RT 9784-9785.)

Appellant contends the trial court erred in failing to admit the statement under the past recollection recorded hearsay exception set forth in Evidence Code section 1237.

Evidence Code section 1237 provides as follows:

> (a) Evidence of a statement previously made by a witness is not made inadmissible by the hearsay rule if the statement would have been admissible if made by him while testifying, the statement concerns a matter as to which the witness has insufficient present recollection to enable him to testify fully and accurately, and the statement is contained in a writing which:
>
> (1) Was made at a time when the fact recorded in the writing actually occurred or was fresh in the witness' memory;
>
> (2) Was made (i) by the witness himself or under his direction or (ii) by some other person for the purpose of recording the witness' statement at the time it was made;
>
> (3) Is offered after the witness testified that the statement he made was a true statement of such fact; and
>
> (4) Is offered after the writing is authenticated as an accurate record of the statement.
>
> (b) The writing may be read into evidence, but the writing itself may not be received in evidence unless offered by an adverse party.

Even assuming arguendo the trial court erred in failed to admit the evidence under Evidence Code section 1237, it is not reasonably probable appellant would have received a more favorable result because the excluded statement did not constitute persuasive evidence in support of appellant's defense. (*People v. Watson, supra,* 46 Cal.2d at p. 836.) First, the statement in the report that "Cora told Xavier that she had killed all the kids" involved Deputy Tutino's paraphrasing of Dr. Caro's purported statement to Juanita rather than a direct quotation of that statement. Second, Deputy Tutino's inability to recall Dr. Caro making that statement, coupled with the absence of the purported statement from the audio

recording of the conversation between Dr. Caro and Juanita, substantially weakened the evidentiary weight of the excluded statement. Similarly, the absence of any trial testimony from Juanita that Dr. Caro made such a statement to her, and Dr. Caro's denial of making such a statement (24RT 4350), further weakened the evidentiary value of the excluded statement. Finally, in light of the overwhelming evidence of guilt (including the bloody palm prints left by appellant on the doorframe, the bloodstains on appellant's clothing, appellant's bloody fingernail scrapings, and appellant's attempted suicide), any exclusion of the evidence was plainly harmless.

E. No Cumulative Evidentiary Error Occurred

Finally, there is no merit to appellant's contention that the cumulative effect of the alleged evidentiary errors requires reversal. (AOB 252-253.) Any assumed evidentiary error was harmless under the *Watson* standard in light of the nature of the alleged error and the overwhelming evidence of appellant's guilt. (*People v. Farley* (2009) 46 Cal.4th 1053, 1110; *People v. Samuels* (2005) 36 Cal.4th 96, 113-114.) Furthermore, appellant's federal constitutional claim fails "'because generally, violations of state evidentiary rules do not rise to the level of federal constitutional error.' [Citation.]" (*People v. Samuels, supra*, 36 Cal.4th at p. 114.)

X. THE TRIAL COURT PROPERLY ADMITTED THE COMPUTER ANIMATION

Appellant contends the trial court abused its discretion in admitting a computer animation that illustrated the opinion of the prosecution's blood spatter expert. (AOB 254-264.) This claim is without merit.

The prosecution filed a pretrial motion to admit a computer animation as demonstrative evidence that illustrated the opinion of prosecution blood spatter expert Rod Englert regarding how the shootings of Michael and

Christopher occurred and the manner by which the blood was deposited on physical objects, including appellant's clothing. (3CT 497-506.) The prosecution specifically argued that explaining the blood evidence would prove "the identity of the defendant as the shooter," and also prove malice aforethought, premeditation, and deliberation. (3CT 499.) At the hearing on the motion, the computer animation, which was about two minutes in length, was played for the court's review. (4RT 414.)

Over appellant's objection, the trial court ruled that the animation was admissible for the purpose of illustrating the expert's opinion, and the court further indicated that it would instruct the jury accordingly. (4RT 448-449.) The court ordered the animation be modified to reflect a clear break between the depiction of Michael's shooting and the depiction of Christopher's shooting. (4RT 449.) The court further ordered that the animation be limited to items that were actually illustrative of the expert's testimony, specifically noting that the animation could not show that Christopher's eyes were open at the time of the shooting because the expert could not testify to such a fact. (4RT 449.)

During the prosecutor's opening statement, the trial court overruled defense counsel's objection to the prosecutor's description of the computer animation. (14RT 2488.) The court then read the following instruction to the jury:

> All right. Ladies and gentlemen, you are about to be shown a video that consists of several computer animated scenes. This is an animation based on an expert's opinion. There are what are called crime scene reconstruction experts who could, without using a computer, get on the stand and testify that based on their analysis of the evidence they have concluded that the crime occurred in a certain manner. And then they can describe to you the manner in which they believe it occurred. They can use charts or diagrams or photographs to illustrate their testimony.

> The computer animation we have here is nothing more than that, an illustration of the expert's opinion. You are instructed to treat it no differently than you would any chart or diagram of the evidence.
>
> The animation is not intended to be a film of what actually occurred, nor is it an exact re-creation. Therefore, they may be facts that are not exactly accurate or not exactly as they occurred, but may be reasonably close.
>
> It is important to keep in mind that an animated video is not an actual film of what occurred, nor is it intended to be an exact, detailed replication of every detail of every event or every movement. It is only an aid to giving you an overall view of the particular version of the events, based on particular viewpoints or particular interpretations of evidence made by an expert witness.
>
> Witnesses who have special knowledge, skill, experience, training or education in a particular subject are referred to as expert witnesses. In determining what weight to give to any opinion expressed by an expert witness, you should consider the qualifications and believability of the witness, the facts and materials upon which each opinion is based, and the reasons for each opinion.
>
> An opinion is only as good as the facts and reasons on which it is based. If you find that any fact has not been proved, or has been disproved, you must consider that in determining the value of the opinion. Likewise, you must consider the strengths and weaknesses of the reasons on which it is based.
>
> You are not bound by an opinion. Give each opinion the weight you find it deserves. You may disregard any opinion if you find it to be unreasonable.

(14RT 2489-2490.) During a subsequent break in the prosecutor's opening statement, the trial court repeated the instruction. (14RT 2499-2500.)

At trial, Englert testified that the animation accurately reflected his opinion as to how the shootings of Michael and Christopher occurred in order to generate the bloodstain spatters in this case. (37RT 7534.) Before the animation was played to the jury during Englert's testimony, the trial

court again gave the same instruction regarding the animation that it had previously given during the opening statement. (37RT 7534-7535.) The trial court subsequently repeated the same instruction during the final instructions. (56RT 10869-10870.)

The animation, as played to the jury, consisted of eight separate scenes that illustrated Englert's opinion as to the following events: (1) the shooting of Michael; (2) the staining of the pillow, bedrail, and floor that would have occurred after Michael was shot; (3) Christopher's position at the time he was first shot; (4) the location of the shooter on the left side of the bed, and one of the various positions that Christopher was in at the time he was first shot and received the tangential wound; (5) the movement of Christopher's head over his shirt and shorts after the first gunshot; (6) the movement of Christopher as he came up on a knee and moved his head toward the bed railing before he came back down on the pillow; (7) the respective positions, from the shooter's perspective, of the shooter and Christopher at the time the second shot was fired; and (8) the same event as depicted in the previous scene, but from the reverse angle on the right side of the bed. (37RT 7533-7534, 7536, 7543-7544, 7552-7553, 7557-7558, 7563-7564, 7583, 7607-7609.)

"[A] computer animation is not substantive evidence used to prove the facts of a case; rather it is demonstrative evidence used to help a jury to understand substantive evidence." (*People v. Duenas, supra,* 55 Cal.4th at p. 21.) "In a case like this one, where the animation illustrates expert testimony, the relevant question is not whether the animation represents the underlying events of the crime with indisputable accuracy, but whether the animation accurately represents *the expert's opinion* as to those events." (*Ibid.*) "A trial court's decision to admit demonstrative evidence is reviewed for abuse of discretion." (*Ibid.*)

Here, the trial court did not abuse its discretion in admitting the computer animation as demonstrative evidence. First, the animation was relevant to the central issue of the identity of the shooter, as well as the issues of premeditation and deliberation, because it illustrated Englert's expert testimony as to how the shootings of Michael and Christopher occurred and the resulting manner by which the victims' blood was deposited on physical objects, including appellant's clothing. (3CT 497-506.) Indeed, contrary to appellant's assertion that the evidence was not probative on the central issue of identity (AOB 262), the animation was highly relevant to that issue because it illustrated Englert's opinion that the blood spatter found on appellant's shorts was consistent with the blowback of blood from the second gunshot to Christopher's head. (37RT 7592-7596, 7600-7601, 7605-7609.)

Furthermore, the trial court reasonably concluded that the probative value of the evidence was not substantially outweighed by the risk of undue prejudice. The trial court repeatedly cautioned the jury regarding the limited role of the animation, explaining that the animation simply illustrated the expert's opinion, that the animation was not an exact recreation of the events, and that the jury was not bound by the expert's opinion. (See *People v. Duenas, supra*, 55 Cal.4th at p. 24 ["the trial court appropriately instructed the jury that the animation was not an exact recreation and only showed the prosecution's version of the events"].) Although appellant attacks the language of the cautionary instruction given in this case (AOB 263), the language of the cautionary instruction properly explained the limited role of the animation. (*Ibid.*)

Appellant also contends the animation only illustrated Englert's speculation as to "how the shooter actually stood." (AOB 263.) She is incorrect. As this Court has explained, "Whatever uncertainty may exist as to the actual facts in this case, the animation accurately *illustrates the*

opinions of the prosecution's experts with regard to how the murder occurred, and that it is all it purported to do." (*People v. Duenas, supra*, 55 Cal.4th at p. 22.)

Finally, even assuming arguendo the trial court erred in admitting the animation, it is not reasonably probable appellant would have received a more favorable result. (*People v. Watson, supra,* 46 Cal.2d at p. 836.) As previously noted, the trial court repeatedly instructed the jury on the animation. Furthermore, the jury was clearly aware of the nature of the shootings from all of the physical and photographic evidence admitted at trial. Finally, there was overwhelming evidence of appellant's guilt. Accordingly, any error was harmless.

XI. NO PROSECUTORIAL MISCONDUCT OCCURRED IN CLOSING ARGUMENT; MOREOVER, ANY POSSIBLE MISCONDUCT WAS NOT PREJUDICIAL

Appellant contends the prosecutor repeatedly committed misconduct in closing argument. (AOB 259-278.) No prosecutorial misconduct occurred; moreover, any misconduct was not prejudicial.

"'A prosecutor commits misconduct when his or her conduct either infects the trial with such unfairness as to render the subsequent conviction a denial of due process, or involves deceptive or reprehensible methods employed to persuade the trier of fact.' [Citation.]" (*People v. Maciel* (2013) 57 Cal.4th 482, 541.) "A defendant asserting prosecutorial misconduct must further establish a reasonable likelihood the jury construed the remarks in an objectionable fashion." (*People v. Duff* (2014) 58 Cal.4th 527, 568.)

"A prosecutor's argument may be vigorous as long as it is a fair comment on the evidence, which can include reasonable inferences or

deductions to be drawn therefrom.' [Citation.]" (*People v. Edwards, supra,* 57 Cal.4th at p. 736.)

> "[T]he prosecutor has a wide-ranging right to discuss the case in closing argument. He has the right to fully state his views as to what the evidence shows and to urge whatever conclusions he deems proper. Opposing counsel may not complain on appeal if the reasoning is faulty or the deductions illogical because these are matters for the jury to determine." [Citation.]

(*People v. Tully* (2012) 54 Cal.4th 952, 1043.)

"'As a general rule a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion – and on the same ground – the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety.' [Citation.]" (*People v. Maciel, supra,* 57 Cal.4th at p. 541; see also *People v. Duff, supra,* 58 Cal.4th at p. 567 ["To preserve a claim of prosecutorial misconduct, a defendant must seek a jury admonition or show one would have been futile"].)

A. Guilt Phase Argument

Appellant first contends that the prosecutor improperly vouched for the truthfulness of Dr. Caro's trial testimony on the following three instances. (AOB 267-268.)

> Now, Dr. Caro testified to you about firing the defendant in August and he testified truthfully about it. He told you that, yes, these financial problems were one of the reasons that he fired the defendant, but he also admitted to you that he was in love with Laura Gillard and that Laura Gillard was also part of the reason that he got rid of his wife as the office manager.

(57RT 10741-10742, emphasis added.)

> Now, like I told you in opening statements you are the judges of how this affair affects Dr. Caro's credibility as a witness. Dr. Caro is just a man with flaws and imperfections like everybody else. [¶] One thing about Dr. Caro on this issue

is he was honest. He was honest when he testified. That's all you can ask.

(55RT 10745-10746.)

After dinner you heard testimony that the defendant asked Dr. Caro how he felt about going to Waterford the next day and you heard him testify that he said to her he had mixed feelings about it, ambivalent feelings. [¶] She didn't like hearing that. Probably not many people would. But he was honest. He answered her question honestly. That's what this man does. He never said he was not going to go. But based on the way the marriage had been going, probably a very reasonable response that he gave her.

(55RT 10755-10756.)

Appellant forfeited this claim of improper vouching by failing to object to the above comments. (*People v. Redd* (2010) 48 Cal.4th 691, 741.) Moreover, no misconduct occurred because "the prosecutor's comments concerning [Dr. Caro] were based upon facts established by the testimony and did not refer to evidence outside the record." (*Ibid.*)

Appellant next contends that the prosecutor interjected her personal opinion in the following remarks:

As most of us were following along in the transcript, trying to listen to the tape and discern the words that were actually spoken, Dr. Caro was sitting up here and having to listen to that tape, too. And some of you may have noticed what he did as that tape was being played. [¶] He stifled sobs as he sat on that witness stand. He bowed his head and crumpled over in pain as he was going to listen to that story in his own words again. [¶] It wasn't loud. It wasn't meant really for you to see or to hear, but it was a rare glimpse into the emotional side of this man and the depth of the pain that he carries around with him, even though most of the time it's tough to see.

(55RT 10732.) Appellant argues that there is no evidence in the record regarding Dr. Caro's physical actions on the stand, but the prosecutor

nevertheless "urged the jury to consider these 'facts' in assessing" Dr. Caro's credibility. (AOB 268-269.)

Appellant forfeited this claim by failing to object to the remarks. The claim also fails on the merits. Contrary to appellant's contention, it is not significant that the record does not reflect Dr. Caro's demeanor while listening to the tape on the witness stand because "the demeanor of witnesses[] is rarely reflected in the record." (*People v. Navarette* (2003) 30 Cal.4th 458, 516.) Moreover, the prosecutor's reference to Dr. Caro's demeanor on the witness stand was proper because the "demeanor and manner of a witness while testifying was a proper factor" to consider in determining the believability of a witness.[10] (*People v. Jackson, supra*, 49 Cal.3d at p. 1205.)

Appellant further argues the prosecutor expressed her personal opinion in the following section of the closing argument.

> And Deputy Tutino heard Dr. Caro say again and again, "She killed my best friend. She killed my best friend." [¶] You know that Dr. Caro was talking about Joey. Like any father Dr. Caro would want to believe that he loved all of his children equally. I'm sure he did a great job making each child feel loved and feel –

(55RT 10836-10837.) Defense counsel objected on the ground that the prosecutor was expressing her own personal opinion, and the trial court sustained the objection. (55RT 10837.) The prosecutor then resumed her argument as follows:

> But as difficult as it is to say, you can tell from the state of the evidence that Dr. Caro had a special place for Joey. Joey was the one who made Dr. Caro a father for the first time. Joey

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[10] Pursuant to CALJIC No. 2.20, the jury was instructed that the "demeanor and manner of the witness while testifying" was a permissible factor to consider in determining the believability of a witness. (55RT 10693; 11CT 2128.)

> was the one who was most like a person. He was the oldest at the time. [¶] And when Dr. Caro sat there in his family room saying "She killed my best friend," he was talking about Joey. *That's probably why he was the defendant's first target.*

(55RT 10837, emphasis added.)

As to the first remark, there was no possible prejudice because the trial court sustained defense counsel's objection. (*People v. Bramit* (2009) 46 Cal.4th 1221, 1244 [reviewing court assumes the jury heeded the trial court's rulings that sustained objections to the argument].) Moreover, the topic of the remark (i.e., whether Dr. Caro made each child feel equally loved) was inherently innocuous.

As to the second remark, appellant forfeited the claim by failing to object. The claim also fails on the merits because the prosecutor's argument was a fair comment on the evidence. It was reasonable to infer that appellant shot Joey first because he was the oldest child and therefore the one most likely to investigate the sound of a gunshot, and it was reasonable to infer that Joey's death would cause the most emotional pain to Dr. Caro in light of the close relationship between Dr. Caro and Joey (17RT 3077 ["She killed my best friend. She killed my Joey"]). Moreover, there was no possible prejudice because the prosecutor used the qualifying word "probably," and the prosecutor later explained, "We can't tell you for certain" that Joey was shot first. (55RT 10791.)

Appellant further contends that the prosecutor improperly relied on facts not in evidence when she made the following remarks regarding the reasons why the prosecution did not call Detective Lorenzen as a witness.

> "You've heard that one of the sergeants who was out on the crime scene, Sergeant Lorenzen, was the lead investigator. Well, it was really the lead investigator on the case in name only because you know that he didn't really do much of the actual work himself. [¶] He was sort of coordinating the arrival and the duties of all the other deputies and all of the other investigators who came and did work on this case. [¶] And you

> saw him testify in the defense case, and you know why the People didn't put him on in the prosecution's case. Because he didn't really do that much on the case. It was all delegated to other people.

(58RT 10838.) Appellant argues that the prosecutor's proffered reason for not calling Detective Lorenzen was not based on evidence, and the actual reason was based on Detective Lorenzen's dishonesty in another matter. (AOB 270-271.)

Appellant forfeited the claim by failing to object. The claim also fails on the merits. In light of the numerous law enforcement witnesses who testified about their direct responsibilities in the investigation, coupled with Detective Lorenzen's testimony in the defense case regarding his more limited investigative duties in the case, including his duty at the crime scene to assign responsibilities for the investigation to other law enforcement personnel (43RT 8711), the prosecutor's remarks were a fair comment on the evidence.[11] Finally, there was no possible prejudice because the prosecution's reasons for declining to call Detective Lorenzen as a witness were irrelevant and had no possible bearing on any of the contested issues at trial.

Appellant next argues the prosecutor improperly impugned the integrity of the defense and defense counsel with the following remarks in the rebuttal argument. (AOB 271.)

> The prosecution and the defense have different tasks in a criminal trial. The prosecution has to prove to jurors beyond a reasonable doubt the truth of the allegations against a defendant. The defense attorney just has to confuse one of you. That's all she has to do. [¶] That's the tactic that many defense attorneys employ. Confusion. Throw up smoke. Try and mislead jurors.

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[11] Appellant's assertion that the prosecution declined to call Detective Lorenzen as a witness because of his dishonesty in another matter is purely speculative.

> And maybe, by chance, they'll get lucky and get one. It's what I tend to call a fluid defense.

(57RT 11103.) Appellant further argues the prosecutor committed misconduct by stating, "I just ask that you not be the one that the defense is trying to target for confusion." (57RT 11129.)

Appellant forfeited the claim by failing to object to the above remarks. The claim also fails on the merits because, viewed in proper context, the challenged remarks properly argued that there was no evidence to support the various theories proffered by the defense (57RT 11104-11129). (*People v. Kennedy* (2005) 36 Cal.4th 595, 626 ["It is not misconduct for a prosecutor to argue that the defense is attempting to confuse the jury."]; *People v. Smith* (2003) 30 Cal.4th 581, 635 ["The prosecutor did not attack defense counsel's integrity but instead attacked the defense case and argument."].)

B. Penalty Phase Argument

Appellant summarily contends the prosecutor committed 15 separate instances of misconduct in the penalty phase argument. (AOB 273-274.) These claims are without merit.

Appellant first argues the prosecutor improperly argued that Christopher moved after being shot in order to "get away from his killer" (65RT 12592; see also 65RT 12601 ["Christopher was trying to get away"], 12634 ["he started moving"]), and Christopher was "fighting . . . for his life" (65RT 12712). (AOB 272.)

Appellant forfeited this claim by failing to object to the challenged remarks. The claim also fails on the merits because the remarks constituted fair comment on the evidence. Dr. Frank testified that it was possible that Christopher's tangential head wound was not immediately incapacitating and that he could have moved after receiving the wound. (36RT 7408.) In addition, Englert opined that the tangential head wound resulted from the

first gunshot (37RT 7548-7549, 7557), that the blood spatter patterns from that tangential wound indicated that Christopher came up on his knee after the first shot and moved his head in a forward and backward V-pattern (including moving his head over the edge of the bed) (37RT 7571-7577, 7582), and that voluntary movement by Christopher was one of two ways in which he could have come back down on his pillow (37RT 7583-7584). In light of this evidence, the prosecutor properly argued that Christopher was attempting to get away after the first gunshot.

Appellant next contends the prosecutor unfairly appealed to the emotions of the jurors by inviting them to cry for each of the boys (AOB 272; 65RT 12592), by misstating the law regarding the burden of proof for every factor in the penalty phase (AOB 273; 65RT 12596), and by improperly arguing that the defense changed its story (AOB 273; 65 RT 12605). Although the trial court sustained defense counsel's objections to these remarks, appellant did not request a jury admonition; these claims are therefore forfeited. (*People v. Duff, supra*, 58 Cal.4th at p. 567 [prosecutorial misconduct claim forfeited where defendant timely objected but elected to forego curative instruction].) Moreover, appellant suffered no possible prejudice because the trial court sustained the objections. (*People v. Edwards, supra*, 57 Cal.4th at p. 742 [no possible prejudice from the prosecutor's comment because the trial court immediately sustained defendant's objection]; see also *People v. Bramit, supra*, 46 Cal.4th at p. 1244.) Also, there was no possible prejudice with respect to the alleged misstatement regarding the applicable burden of proof for the factors in the penalty phase because the jury was correctly instructed on that issue. (11CT 2194-2195, 2199-2200.)

Appellant also contends the prosecutor committed misconduct by speculating that appellant planned to kill Gabriel but had to use Gabriel's

bullet to shoot Christopher twice. (AOB 272.) The challenged remarks are set forth below:

> Gabriel had to grow up and come to terms with the fact that this woman murdered his brothers just to hurt his daddy and that she probably planned on killing him, too, that his brother Christopher, who was just five years old, saved Gabriel's life by making her shoot him twice, using up the bullet that was probably meant for Gabriel. He, too, is a victim of the defendant's.

(65RT 12594.)

Appellant forfeited the claim by failing to object to the challenged remarks. The claim also fails on the merits. The prosecutor's remarks were a fair comment in light of the evidence that appellant shot three of her children and herself but inexplicably spared Gabriel. Finally, appellant suffered no possible prejudice because the prosecution's penalty phase argument was not centered on the assertion that appellant also intended to kill Gabriel.

Appellant argues the prosecutor improperly relied on facts not in evidence to compare appellant to other women facing marital problems. (AOB 273.) The challenged remarks are set forth below.

> So this marriage was failing. The defendant was upset about that. That's what we argued to you from the very beginning of this case. [¶] She was losing all of her wealth and prestige and status of being Mrs. Dr. Xavier Caro. [¶] But is that extreme emotional or mental disturbance? Is that extreme? [¶] This defendant's situation is really not that much different from other people who are facing difficult relationships or failed marriages. [¶] In fact, hers was a lot better. She knew how much money they had. She knew that she'd be fine in the event of a divorce. She'd start off with a million dollars in cash and assets. She'd have a beautiful home. She'd have spousal support payments of $3,000 to $5,000 a month. [¶] She had a big family. She had support. David Leon came in here and said to you she wasn't shunned by any of the family that he knew of. She had options. She had places to go. [¶] The only real emotional disturbance or strain that separates this defendant

> from any other woman or any man who's facing a failing marriage is her vanity. Her pride. The thought that she might not have a maid anymore, that she wouldn't be able to have this fantastic lifestyle and lavish gifts on other people because it was all a reflection of her –

(65RT 12600.)

No misconduct occurred. Viewed in context, the challenged remarks properly argued that appellant's marital problems were commonplace and therefore failed to show "extreme" mental or emotional disturbance, within the meaning of factor (d) of section 190.3. Moreover, there was no possible prejudice in light of the nature of the remarks and the strong aggravating evidence.

Appellant argues the prosecutor improperly impugned the integrity and credibility of Dr. Monguio when the prosecutor stated: "Miss Monguio was a bought-and-paid-for defense expert –" (AOB 273; 65RT 12609.) Although the trial court sustained an objection, the prosecutor's remark was not misconduct because it properly argued the expert "was biased because of her compensation" and was "well within acceptable trial practice." (*People v. Caldwell* (2013) 212 Cal.App.4th 1262, 1272 [prosecutor properly argued that main defense expert witness was "kind of like Walmart for defense attorneys"].) Moreover, appellant suffered no possible prejudice because the trial court sustained the objection, and the prosecutor's remaining remarks attacking Dr. Monguio's credibility were based on the evidence. (65RT 12608-12609.)

Appellant further argues the prosecutor relied on facts not in evidence by arguing that all murders are committed when people are going through bad times in their lives. (AOB 273.) The challenged remarks are set forth below.

> Now, Dr. Daryl Matthews, who testified for the defense, is the only honest, qualified psychiatric expert that you heard from. He said the defendant did have some kind of depressive

> disorder. He said that there were some difficult events going on in her life, which is exactly what you heard about in the guilt phase. He wouldn't give her any specific diagnosis. She was suffering from some depression. [¶] And we agree. Absolutely. At the time these murders were committed, she was going through a bad time in her life. All murders are committed when people are going through bad times in their lives. Being depressed at times is part of life. Everybody has to deal with it. [¶] The difference is that most people don't commit multiple murder when they don't like the way their lives are progressing. [¶] Selfish, narcissistic people do. They want to hurt back. [¶] But was the defendant impaired by mental defect when she murdered these three children? Dr. Matthews said no. She was depressed, but it didn't affect her ability to recognize a gun, to recognize her children.

(65RT 12610-12611.)

Appellant forfeited the claim by failing to object. Moreover, no misconduct occurred. Drawing upon common experience that everyone will endure difficult times at some point during their lives (see *People v. Bramit, supra*, 46 Cal.4th at p. 1242 ["in closing argument attorneys may use illustrations drawn from common experience"]), the challenged remarks properly argued that that the defense evidence regarding appellant's depression failed to show mental disease or defect, within the meaning of factor (h) of section 190.3. Moreover, appellant suffered no possible prejudice because the challenged remarks were brief and not critical to the prosecution's argument against the mitigating evidence presented by appellant.

Appellant further argues that the prosecutor incorrectly stated that there was no conclusive evidence that appellant's toxicology screen did not test positive for Xanax. (AOB 273.) Appellant, however, suffered no possible prejudice because the prosecutor subsequently acknowledged to the jury that she had erred regarding the presence of Xanax, and the parties

eventually stipulated to the presence of Xanax in appellant's blood. (65RT 12623; 66RT 12781.)

Appellant argues the prosecutor misstated the law by asserting the jury could only consider sympathy for appellant and not her family. (AOB 273-274.) The challenged remarks are set forth below.

> You can consider sympathy for the defendant. You can consider anything you would like that helps you feel sorry for her or in some way mitigates what she's done or makes you want to be merciful. The law allows you to do that. [¶] Not sympathy for her family. That is not allowed. Not sympathy for Aunt Sally or any of the other individual witnesses. Sympathy for the defendant.

(65RT 12616.)

No misconduct occurred because the prosecutor "properly directed the jury not to consider sympathy for defendant's family as mitigating evidence." (*People v. Smithey* (1999) 20 Cal.4th 936, 1000; see also *People v. Williams* (2013) 56 Cal.4th 165, 197 ["The impact of a defendant's execution on his or her family may not be considered by the jury in mitigation"]; *People v. Ochoa* (1998) 19 Cal.4th 353, 456 ["In summary, we hold that sympathy for a defendant's family is not a matter that a capital jury can consider in mitigation, but that family members may offer testimony on the impact of an execution on them if by so doing they illuminate some positive quality of the defendant's background or character."].)[12]

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[12] Appellant cites *Cullen v. Pinholster* (2011) __ U.S. __ [131 S.Ct. 1388, 179 L.Ed.2d 557] (*Pinholster*) for the proposition that the "United States Supreme Court has held that it is reasonable for a defendant in a capital case in California to rely on sympathy for his family as a factor in mitigation at the penalty phase." (AOB 274, fn. 121.) Appellant misreads *Pinholster*. In that case, the United States Supreme Court held that, in the context of a claim of ineffective assistance of trial counsel, counsel acted reasonably because the ""family sympathy"" mitigation defense was

(continued...)

Appellant argues the prosecutor committed misconduct by "repeatedly comparing appellant to poor, abused, inner-city kids and said that, in comparison, she deserved no sympathy." (AOB 274.) This claim is without merit.

The relevant portion of the record is set forth below:

> This defendant is not sympathetic. She's a short-tempered, spoiled woman. She's had a life of absolute luxury. She's had it all. Her life and her upbringing have been far too good, far too normal to deserve sympathy. She's not someone who was beaten as a child by the only parent that she did know, who wound up selling dope at age twelve to put food in her mouth, getting hooked on drugs. She had none of those problems. Nothing. [¶] What is her excuse? She had everything. She grew up with a pool and a ski boat and family. She dumped Armando Valencia so that she could marry her doctor.
>
> [Defense counsel]: This is improper, your Honor. I object.
>
> THE COURT: Sustained.
>
> [Defense counsel]: And may the record also reflect that factor (k) is up on the projector screen while these statements are being made?
>
> THE COURT: Sure. The record can reflect that.
>
> [Prosecutor]: This defendant lived a fantastic life. She had a maid and a handyman. 99 percent of the world doesn't have it that good. She had nothing to complain about. [¶] And even the life she was going to have without Dr. Caro was going to be lavish by comparison to most people. [¶] So this is not the poor

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(...continued)
known to the defense bar *at the time* and had been used by other attorneys." (*Pinholster*, 131 S.Ct. at p. 1404, emphasis added.) The *Pinholster* trial occurred in 1984. (*Id.* at p. 1395.) Here, appellant's trial occurred in 2001, after this Court first explained in 1998 that sympathy for a defendant's family is not a proper mitigating factor. (See *People v. Ochoa, supra*, 19 Cal.4th at p. 456.)

> inner-city kid who never had a chance. This is the defendant who had it all and who deserves no pity.

(65RT 12617-12618.)

The above remarks did not constitute misconduct because they properly focused on the argument that appellant was not entitled to sympathy based on the evidence presented at trial. (*People v. Rogers* (2009) 46 Cal.4th 1136, 1181 ["The prosecution is not guilty of misconduct when it attempts to persuade the jury that defendant has not presented a case deserving of sympathy or mercy."].) Indeed, this Court has previously held that similar remarks were proper. (See *People v. Zambrano* (2007) 41 Cal.4th 1082, 1175 [prosecutor properly argued that defendant did not deserve sympathy by urging that "sympathy might be appropriate for someone who had been born in a ghetto, or had suffered a broken home or childhood abuse, but the 'opposite' was true of defendant, who grew up in an intact family in a beautiful home in Long Beach"].)

Appellant contends the prosecutor committed misconduct by repeatedly describing Dr. Caro as honest when discussing his testimony regarding the unadjudicated offenses appellant committed against him. (AOB 274.) Appellant forfeited this claim by failing to object to the challenged remarks. Moreover, this claim is without merit for the same reasons as the similar claim of misconduct in the guilt-phase argument, i.e., the prosecutor's comments concerning Dr. Caro were based upon facts established by the testimony and did not refer to evidence outside the record. (65RT 12624-12629.)

Appellant contends the prosecutor improperly speculated that the victims would have been successful and wonderful. (AOB 274.) Appellant forfeited this claim by failing to object. Furthermore, no misconduct occurred. In light of Dr. Caro's penalty-phase testimony regarding the attributes of his children (61RT 11770-11780, 11783), as well as the

descriptions of the victims from their teachers (62RT 12086, 12100, 12210), the prosecutor's remarks that the victims "would have been successful" and "would have been wonderful" (65RT 12361) constituted fair comment on the evidence.

Appellant asserts the prosecutor committed misconduct by improperly asking the jurors to imagine themselves as Christopher in bed before he was shot and while appellant was shooting him. (AOB 274.) No misconduct occurred because "it is proper at the penalty phase for a prosecutor to invite the jurors to put themselves in the place of the victims and imagine their suffering." (*People v. Slaughter* (2002) 27 Cal.4th 1187, 1212.)

Appellant lastly contends the prosecutor committed misconduct by stating that appellant "slaughtered" the victims. (AOB 274.) Appellant forfeited this claim by failing to object. Moreover, no misconduct occurred because the prosecutor's use of the term (65RT 12632) was a fair comment on the evidence of the crimes, i.e., appellant shot three of her children in the head at close range. (*People v. Rundle* (2008) 43 Cal.4th 76, 163 ["prosecutor's statements were a fair use of colorful language to explain the prosecution's view of the evidence"].)

In sum, appellant forfeited most of her claims of prosecutorial misconduct, the prosecutor did not commit misconduct in argument, and any misconduct was not prejudicial in light of the nature of the remarks and the overwhelming evidence of guilt.

XII. THE TESTIMONY REGARDING THE FACTOR (B) CRIMINAL ACTS COMMITTED AGAINST DR. CARO DID NOT VIOLATE APPELLANT'S CONSTITUTIONAL RIGHTS

Appellant contends that several of the unadjudicated criminal acts committed against Dr. Caro that were presented by the prosecution in the penalty phase under 190.3, factor (b), were too vague and nonspecific to

constitute proof beyond a reasonable doubt that a criminal offense occurred, and that the lack of specificity deprived her of a fair opportunity to defend against the acts. (AOB 279-289.) She specifically argues that much of the evidence regarding these incidents came from the uncorroborated testimony of Dr. Caro, and the prosecution's notice of aggravating evidence failed to provide any dates as to "when appellant purportedly gave Xavier a black eye, gave Xavier a detached retina, threw a battery at Xavier, or threw pizza and pointed a butter knife at Xavier." (AOB 281.) According to appellant, the prosecution's use of these vague allegations of prior unadjudicated crimes violated her rights to due process, to confront and cross-examine witnesses against her, and to a reliable determination of penalty under the Sixth, Eighth, and Fourteenth Amendments. (AOB 285.) This claim is without merit.

On April 16, 2001, the prosecution filed its notice of aggravating evidence. (2CT 242-244.) As to the factor (b) evidence, the notice specifically stated as follows:

> II. Factor B Evidence: Prior Uncharged Acts of Violence
>
> A. Parking lot incident
>
> 1. Jeanine Milner
> 2. Bridgette Bierend
> 3. Det. Price, LAPD
>
> B. Prior incident at USC Football game
>
> 1. Dr. Xavier Caro
>
> C. Prior incident at Granada Hills house where def kicked Dr. Caro in the groin during an argument
>
> D. Prior incident (1988) where def punched Dr. Caro with a fist and broke her hand
>
> 1. Dr. Robert Koschiek [*sic*]

E. Prior incident where def punched Dr. Caro, giving him a black eye

1. Lisa Van Essen

F. Prior incident where def threw necklace box at Dr. Caro, detaching retina

1. Dr. Richard Yook

G. Prior incident where def threw pizza and other items at Dr. Caro, then threatening Dr. Caro with a knife

H. Prior incident where def threw an object at Dr. Caro at Precilla [*sic*] house; object went through the screen

I. Prior incident where def threw an object at Dr. Caro; object hit the kitchen counter, chipping tile

J. Prior incident where def threw hot roller set at Dr. Caro in the bathroom; curlers hit mirror, breaking mirror

K. Prior incident where def slapped Joey across the face during an argument between Dr. Caro and def

L. Prior incident where def shoved Christopher to the ground during an argument between Dr. Caro and def

M. Prior incident (1994-5) where def threatened Dr. Caro and Joey with a gun

(2CT 243-244.)

The prosecution subsequently filed a pretrial motion to also admit most of these factor (b) incidents in the guilt phase under Evidence Code section 1101, subdivision (b). (3CT 538-559.) The motion specifically included descriptions of 10 acts of violence committed by appellant against Dr. Caro. (3CT 545-549.) For instance, the "black eye" incident was described with the following details: during a verbal fight that occurred at some point in the last few years, appellant punched Dr. Caro and gave him a black eye; Lisa vanEssen saw the black eye the following morning; and

appellant later told vanEssen that she had given Dr. Caro a black eye by throwing a jewelry box at him. (3CT 545-546.)

The "detached retina" incident was described in the motion as follows: during a verbal fight at the Camarillo house, appellant retrieved a necklace box and threw it at Dr. Caro, hitting him in the eye; a week later, an ophthalmologist discovered that Dr. Caro had a detached retina during a routine eye exam; and Dr. Caro remembered this incident was distinct from the black eye incident. (3CT 546.)

The motion described the "thrown battery" incident as follows: during a verbal argument in the kitchen at the Camarillo home, appellant threw a "C" battery at Dr. Caro from a distance of 20 feet; Dr. Caro ducked and the battery hit the open window, ripped through the screen, and was lost outside; and the screen was never replaced and still contained the tear. (3CT 546.)

The "thrown pizza, broken tile, knife" incident was described in the motion as follows: during an argument in the kitchen at the Camarillo house, appellant swept her hands across the table, throwing several items (including a pizza) at Dr. Caro; appellant also picked up an object from the table and threw it at Dr. Caro; this thrown object missed Dr. Caro and struck the countertop of the kitchen island, breaking one of the tiles; during the fight, appellant grabbed a butter knife and held it toward Dr. Caro at a distance of four feet; and Dr. Caro persuaded appellant to put the knife down. (3CT 547-548.)

On June 18, 2001, the prosecution filed another notice of aggravating evidence. (4CT 815-817.) As to the factor (b) evidence regarding acts of violence committed against Dr. Caro, the notice listed the same 10 incidents that had been previously set forth in the prosecution's motion to admit evidence of these incidents at the guilt phase. (4CT 816-817.)

On November 15, 2001, prior to the commencement of the penalty phase, appellant filed a motion for an evidentiary hearing to determine whether substantial evidence supported each element of the unadjudicated crimes offered in aggravation. (10CT 1938-1946.) With respect to the incidents involving Dr. Caro as a victim, appellant specifically argued that "these ten incidents will be disputed and contested" and the "credibility of the accusations will be vigorously attacked . . . ." (10CT 1943.) Appellant therefore asserted that the trial court should conduct an Evidence Code section 352 analysis as to each incident, and exclude any evidence of a particular incident if the probative value was "substantially outweighed by the unfair and prejudicial burden of defending multiple diverse and cumulative incidents, the consumption of time of conducting numerous and protracted 'mini-trials' on each incident, and the resulting confusion in deliberations . . . ." (10CT 1944-1945.) Citing the "thrown pizza, broken tile, knife" incident as an example of evidence that should be excluded as prejudicial, appellant noted that she "denies ever displaying a knife during any verbal dispute with Dr. Caro . . . ." (10CT 1945.)

At the hearing on the motion, defense counsel argued that an evidentiary hearing was required because "there are some very significant defenses to acts which it's claimed occurred." (59RT 11393.) After the court indicated that it did not believe an evidentiary hearing would assist the court and that the defense had the right to rebut the prosecution's evidence and "provide defenses to convince the jury that it didn't occur," defense counsel replied, "Not only that it did not occur, but that there's a defense –." (59RT 11394.) Defense counsel further explained that, in order to adequately defend at least four of the incidents alleged by Dr. Caro, the defense would need to use information that the court had previously found was prejudicial, inflammatory, or not probative in the guilt phase. (59RT 11395.) The court replied that, based upon its review of the case

law, it would likely overrule any Evidence Code section 352 objections to such evidence by the prosecution at the penalty phase. (59RT 11296.) The trial court lastly ruled that, based on the prosecution's prior offer of proof as to the incidents involving Dr. Caro, there was sufficient evidence for a jury to conclude beyond a reasonable doubt that the offenses involved the use of force, violence, or threats of violence. (59RT 11396.)

"The section 190.3 notice need not recite each and every circumstantial fact surrounding an otherwise duly noticed factor (b) crime." (*People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1051.) "The notice is sufficient if the defendant has a reasonable opportunity to respond." (*Ibid.*)

In *People v. Rundle, supra,* 43 Cal.4th 76, this Court rejected a similar claim that the "generic testimony" of the defendant's ex-wife – which consisted of a "nonspecific series of acts occurring over a period of several months, without providing exact dates upon which specific acts of forcible sodomy or oral copulation occurred" – unconstitutionally deprived the defendant of notice of the allegations and the opportunity to present a defense, and constituted insufficient evidence of the offenses to allow the jury to consider this testimony under factor (b). (*Id.* at pp. 182-185.) This Court explained that, as to generic factor (b) testimony, adherence to the requirements of "notice of the evidence to be introduced, the opportunity to confront the available witnesses, and the requirement of proof beyond a reasonable doubt" ensures a defendant due process, and the "non-specific nature of the testimony will affect its weight rather than its admissibility or the constitutionality of defendant's trial." (*Id.* at pp. 183-184.)

Here, all of the requirements were satisfied. Appellant received written notice of the evidence to be introduced regarding her acts of violence against Dr. Caro (2CT 243-244; 3CT 545-549; 4CT 816-817), she had the opportunity to confront and cross-examine the available witnesses (including Dr. Caro) at trial as to those incidents (e.g., 61RT 11790-11811),

and the jury was instructed that before it could consider such evidence in aggravation, it must find beyond a reasonable doubt that appellant committed the criminal acts against Dr. Caro (66RT 12794-12975). Thus, the absence of specific dates as to some of the incidents did not violate appellant's constitutional rights. (*People v. Rundle, supra*, 43 Cal.4th at pp. 183-185.)

Furthermore, appellant makes no showing that the lack of specific dates regarding some of the incidents denied her the opportunity to respond. To the contrary, appellant argued below that "these ten incidents will be disputed and contested," the "credibility of the accusations will be vigorously attacked" (10CT 1943), and "there are some very significant defenses to acts which it's claimed occurred" (59RT 11393). Moreover, the incidents that lacked specific dates (i.e., the "black eye" incident, the "detached retina" incident, the "thrown battery" incident, and the "thrown pizza, broken tile, knife" incident) were sufficiently distinctive to allow appellant the opportunity to respond. For instance, as to the "thrown pizza, broken tile, knife" incident, the defense asserted in its motion that appellant "denies ever displaying a knife during any verbal dispute with Dr. Caro . . . ." (10CT 1945.) Similarly, defense counsel later argued to the court that appellant "never attacked her husband with a knife, never threatened him with a knife, never brandished a knife." (61RT 11808.) Moreover, during the penalty phase, appellant was able to impeach Dr. Caro's testimony with prior inconsistent statements regarding these incidents. (63RT 12298-12302.)

There is also no merit to appellant's argument that the admission of the evidence violated her constitutional rights because Dr. Caro's testimony regarding these incidents was mostly uncorroborated. Questions regarding Dr. Caro's account of the incidents went to the weight rather than the admissibility of the evidence, and it was for the jury to decide whether Dr.

Caro "properly recalled and recounted defendant's violent acts." (*People v. Stitely* (2005) 35 Cal.4th 514, 564 [rejecting claim that factor (b) was inadmissible because the witness's testimony was untrustworthy]; see also *People v. Rundle, supra*, 43 Cal.4th at p. 185 ["The absence of testimony associating particular acts with specific dates may have affected the weight of the evidence, but did not render the testimony so unreliable that as a matter of constitutional due process the jury should not have been permitted to consider it as potential evidence in aggravation"].)

Finally, even assuming arguendo that any error occurred, it was not prejudicial. The incidents involving Dr. Caro were insignificant in comparison to the most powerful aggravating evidence, namely, the circumstances of the murders of three children. Thus, any error in admitting the evidence was harmless under any standard.

XIII. THE TRIAL COURT PROPERLY DISCHARGED JUROR NO. 9 DURING DELIBERATIONS BASED ON MISCONDUCT; THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION FOR A NEW TRIAL

Appellant contends the trial court violated her right to a fair and impartial jury when it dismissed a juror, Juror No. 9, during deliberations because he discussed the deliberations in a conversation with another juror (Juror No. 11) outside of the jury room. According to appellant, the record fails to support the trial court's finding that there was good cause to dismiss Juror No. 9. She further argues that, if this Court concludes that Juror No. 9 was properly dismissed, the trial court erred by failing to also dismiss Juror No. 11. Appellant lastly contends the trial court erred in failing to grant a new trial based on Juror No. 11's declaration. (AOB 290-326.) As fully set forth below, all of appellant's arguments lack merit.

A. Factual Background

On October 30, 2001, prior to the commencement of the guilt-phase deliberations, the trial court gave the jury its final instructions, including the following instruction: "'During periods of recess, you must not discuss with anyone any subject connected with this trial, and you must not deliberate further upon the case until all twelve of you are together and reassembled in the jury room.'" (57RT 11168.)

In the late afternoon on the fourth day of deliberations (Friday, November 2, 2001), the foreperson sent a note indicating that a particular juror was refusing to engage in reasonable deliberations based on the evidence. (58RT 11245-11249; 10CT 1894.) After discussing the matter with the parties, the court agreed to excuse the jury for the weekend, instruct the jury with CALJIC No. 17.41.1, and conduct an inquiry regarding the note on Monday morning. (58RT 11249-11252.) In the presence of the jury, the court then excused the jury for the weekend, read CALJIC No. 17.41.1, and again admonished the jury as follows:

> But I need to give you the admonition you've heard so many times before, but you need to hear it again. [¶] And that is you cannot discuss this case outside the presence of the jury room with the other 11 or 12 jurors. [¶]. . . [¶] You're not to deliberate upon the case any further during the weekend, and the only time you can discuss the case, deliberate the case is when you're back in the jury room Monday and all 12 jurors are present in the jury room.

(58RT 11252-11253.)

At the outset of the proceedings on Monday, November 5, 2001, defense counsel explained that at about 5:43 p.m. on Friday afternoon, Mr. Carlton, the defense investigator, observed Juror No. 9 and Juror No. 11 talking in the parking lot. When Mr. Carlton approached his car, which was about 10 feet from the two jurors, the two jurors stopped talking, both said hello to Mr. Carlton, and Mr. Carlton drove off. (58RT 11256.)

Defense counsel indicated that based on the questions asked on Friday, it was the defense position that it was Juror No. 9 who was the juror alleged to be refusing to deliberate. Defense counsel explained that this opinion was also based on the in-court observations of the juror, the types of questions that were posed by the juror during the trial regarding legal issues, and the manner in which the juror conducted himself at the jury view of the residence. (58RT 11257.) Defense counsel expressed her concern that the two jurors were talking together in the parking lot for at least 30 minutes before being observed by Mr. Carlton, and that the two jurors were discussing the case. Defense counsel indicated that if they were discussing the case, they violated the court's orders, the jurors should be excused, and alternates seated in their positions. (58RT 11258.)

The prosecution stated that it would not oppose the court asking the two jurors whether they were discussing the case in the parking lot, but further argued that the court should not delve into the deliberative process and inquire about the note sent by the foreperson on Friday. (58RT 11258-11259.) The prosecution also indicated that its position was that the court should reinstruct the jurors on a few key areas and request that the jurors continue deliberating. (58RT 11259.) Defense counsel responded: "We are willing to stipulate at this time that the juror who is referenced in the final note of Friday be excused and the alternate be seated." (58RT 11260.) When the court asked if the prosecution would join the stipulation, the prosecutors responded that the People would join the stipulation if appellant personally joined in it. (58RT 11260.) Following a short recess, appellant indicated that she understood the proposed stipulation and consented to it. (58RT 11262.) After the prosecution agreed to the stipulation, the court accepted the stipulation and found that appellant's consent was free and voluntary. (58RT 11262-1163.)

The court then asked that the foreperson, Juror No. 3, come into the courtroom. The court asked the foreperson to identify the juror referenced in the note sent the previous Friday. (58RT 11263.) The foreperson replied that there had been "some changes in that note since it was passed to the court," and the note was no longer an issue. (58RT 11264.) The court asked the foreperson to return to the jury room and resume deliberations. (58RT 11264.) Defense counsel then asked the court to make the inquiry as to the two jurors observed in the parking lot on Friday, and the prosecution did not object to that request. (58RT 11264, 11266.)

The court first conducted an inquiry of Juror No. 9. The court asked Juror No. 9 if there was any discussion about the case during any part of Juror No. 9's conversation with Juror No. 11 in the parking lot. Juror No. 9 answered: "There was. There was one line, I think. One or two lines. That's correct." (58RT 11268.) Juror No. 9 described the discussion about the case as follows:

> The comment which was discussed between myself and the one juror only – . . . . – was in regards to the emotionalism of what was going on in the jury room and the fact that emotions were very highly charged. [¶] We were – there was some personal stuff said, which made it difficult for deliberations to take place, and there was also a comment in regards to the personal – or not personal, excuse me, in regards to the emotional state, which sounds really bad, but it was – in fact, the exact quote was in regards to the defendant. And it would have been 'she had to be emotional on that night.' And my response to that was that I agree.

(58RT 11269.)

The court asked if that was the only discussion regarding the case, and Juror No. 9 replied, "That's correct." (58RT 11269.) Juror No. 9 acknowledged that he was aware of the court's repeated admonitions that the jurors could not discuss the case outside the presence of all the jurors in the deliberation room, and he apologized. (58RT 11269-11270.)

The court asked Juror No. 9 if it was either he or Juror No. 11 who had raised the subject matter about the case. Juror No. 9 replied, "It very well could be me, sir," but further stated that he did not actually remember. (58RT 11270.) The trial court asked if there was anything else about the jury room deliberations that was discussed with the other juror. Juror No. 9 responded "no" and explained that it "pretty much revolved around that it was very emotional in there the past few days." (58RT 11270.) Juror No. 9 also stated that he "did comment" that it was "difficult" and "not productive when people's tempers get so flared up and they start to use personal attacks and stuff like that." (58RT 11270-11271.) Juror No. 9 further stated the remainder of the conversation with Juror No. 11 involved the weekend in general, movies, and "all that kind of stuff." (58RT 11269.)

The court then examined Juror No. 11. The court asked if the subject matter of the case was included in her parking lot conversation with Juror No. 9, and Juror No. 11 answered, "Not specifically, no." (58RT 11272.) The court then asked if the two jurors had discussed anything at all about the deliberations, and Juror No. 11 replied, "Sort of." When asked to explain her answer, Juror No. 11 stated: "Basically, he thanked me for taking the time to listen – . . . . – and to understand his perspective of things." The court asked if Juror No. 9 had attempted to further discuss the deliberations with her, and Juror No. 11 answered, "I don't believe so." The court asked, "Did you advocate that he do anything during the deliberations?" Juror No. 11 replied "No." The court lastly asked, "And was that all of the conversation involving the case?" Juror No. 11 responded "Yes." (58RT 11272.)

Defense counsel requested the excusal of Juror No. 9 for cause, arguing that Juror No. 9 knowingly and willingly violated the specific orders of the court and "attempted to engage another juror in discussions about the emotional state of Mrs. Caro" in order to "convince her of his

position . . . ." (58RT 11273-11274.) Defense counsel stated: "I want (juror #9) off. He's deliberately and intentionally violated his oath as a juror. I just couldn't be more concerned about it." (58RT 11274.) As to Juror No. 11, defense counsel indicated that she first needed to speak with her cocounsel because the juror apparently recognized Mr. Carlton and said hello to him first. (58RT 11273.) The prosecution noted that it appeared that Juror No. 9 brought up the issue of appellant's emotional state of mind, and that it could be construed as discussing the case with individual jurors rather than with the entire jury. The prosecution was therefore willing to excuse Juror No. 9 if appellant personally agreed with the request. (58RT 11274-11275.) Upon the court's inquiry, appellant personally consented to the excusal of Juror No. 9. (58RT 11275.)

The court then ruled as follows: "All right. The Court also finds good cause for the removal of Juror No. 9 from the jury panel as a result of his, I believe, flagrant violation of the Court's order regarding discussing the matter outside the presence of the jury room with another juror and discussing subject matter that is indeed in the Court's opinion deliberations on evidence received in this case." (58RT 11275.)

In open court, the trial court then discharged Juror No. 9, with the court explaining its decision as follows:

> And, (juror #9), as a result of our discussion this morning concerning your conversation on Friday evening, I'm going to excuse you from any further participation in this case. [¶] I thank you very much for your willingness to serve, but I believe you violated the Court's orders regarding discussion of this case outside the presence of the jury room. And therefore I am required, I believe, to excuse you from any further service and to seat an alternate.

(58RT 11276.)

The court also invited the parties "to raise any issues regarding Juror No. 11" following a recess. The court observed that it did not know how

Juror No. 11 knew Mr. Carlton, and further noted that Juror No. 11 and Mr. Carlton were both county employees. (58RT 11278.)

The prosecutor expressed his concern that, if the trial court was finding that there was "two-way participation" between Juror No. 9 and Juror No. 11, Juror No. 11 would appear to be "in the same situation as Juror No. 9." The prosecutor further noted that he did not hear evidence from either juror that Juror No. 11 had made a comment about appellant's emotional state. Defense counsel agreed that Juror No. 9 did not state that Juror No. 11 had made a comment about appellant's emotional state. Defense counsel further stated that it was Juror No. 11's perception that Juror No. 9 was thanking her for listening to what he had said in deliberations, and that Juror No. 11 "did not really understand what (juror #9) was attempting to do, which is to gain support, further support for his position back in deliberations, and that she didn't offer any information about the case or discuss any of the facts of the case." Defense counsel concluded that "would be the logical finding," based on "putting the two memories of what took place outside in the parking lot together." The trial court agreed, explaining: "I took (juror #11)'s comments to be it was (juror #9) who was the initiator of the conversation and (juror #11) was kind of stuck and being nice." (58RT 11279.)

When the trial court asked if the prosecution was seeking to excuse Juror No. 11, the prosecutor responded "no" and explained that the People simply wanted to make clear on the record that the trial court was not making a finding that there was a two-way discussion between the jurors that would disqualify Juror No. 11. (58RT 11279-11280.) The prosecutor further explained: "I just wanted to try and make the record as clear as possible so that somebody down the road, if they're there, looks back and says, well, the trial court found there was a discussion between two jurors and only one was excused. So there's error there. But I think the Court has

made it clear that the Court did not find that Juror No. 11 discussed the case." The court replied, "No. And no one is asking to excuse Juror No. 11. I presume if the parties felt there was something inappropriate in what she said, I would have heard it by now." (58RT 11280.)

Defense counsel indicated she would need to meet with her cocounsel and Mr. Carlton. Defense counsel also indicated that she was curious about the movies the jurors discussed and if Juror No. 9 discussed the movie "The Others" in an attempt to persuade Juror No. 11. Defense counsel also noted that if the jurors were talking about movies in general, it might be the jurors were romantically interested in each other, which would not present a problem. (58RT 11280.)

Following a recess, defense counsel indicated that Mr. Carlton had no further information regarding Juror No. 11, and that Mr. Carlton had never had any type of relationship with her other than his participation in county-related negotiations and issues. (58RT 11284.) The court found that it "was satisfied that nothing has occurred that would jeopardize (juror #11)'s ability to continue to be a fair, impartial juror for both sides." (58RT 11284-11285.) When the court asked the parties if they desired to be heard, the parties then discussed an issue unrelated to Juror No. 11. (58RT 11285-11287.)

After the jury rendered its penalty verdict, appellant filed a motion for a new trial that raised several issues, including allegations of juror misconduct. (12CT 2301-2320.) The motion included a four-page declaration from Juror No. 9, with the last two pages of the declaration primarily focused on the parking lot discussion between Juror No. 9 and Juror No. 11. (12CT 2325-2328.) Juror No. 9's declaration stated that he and Juror No. 11 "continued with the conversation that we had started in the deliberation room" as they walked to their cars, he did "not remember which one of us initiated the topic of the deliberations or trial," he "found

some measure of comfort in the fact she discussed the case logically and intelligently," and "we both neglected Judge Coleman's admonitions." (12CT 2327.)

Juror No. 9 further described the substance of their conversation about the case as follows:

> I told her I appreciated that she discussed the case calmly without flying into a tantrum as others had done. There was mutual discussion revolving around the events that took place that day. We both agreed that what had happened and that some of the things said were unfortunate. We then moved onto the topic of Mrs. Caro's state of mind. I made the point that Cora was of the opinion that her husband was going to leave her and the boys. He had done it before and he was just going to do it again. The e-mails and interviews showed this. "He doesn't want us anymore Mom . . . I think he's going to leave me . . . I did not have the 4 boys in order to ruin you financially." This might cause us to question the motive presented by the prosecution.
>
> [Juror No. 11] said this 'was just the last straw for Cora'. Yes, he was going to leave her (again) and that this time she couldn't stand it. [Juror No. 11] said to me, in a raised voice with some animation in the arms, "Well Tony, you know she had to be emotional that night."

(12CT 2327.)

The People's opposition to the new trial motion included a declaration from Juror No. 11. (12CT 2432-2434.) In the declaration, Juror No. 11 described the parking lot conversation, in pertinent part, as follows:

> 7) On the evening of the fourth day of deliberations, Juror #9 and I walked to our cars together in the parking lot. Juror #9 brought up the topic of the deliberations. He made comments about how difficult deliberations were, and that the deliberations had gotten personal. He stated that the deliberations had become too emotional. I said something to the effect of, "Well, it had to be an emotional night, so it's understandable that we're emotional in there."

8) I did not say, "She had to be emotional that night." I did not make any reference to the defendant's mental state during that conversation.

9) Neither Juror #9 nor I discussed e-mails, interviews of the defendant, or any other specific item of evidence related to the case during that conversation.

(12CT 2433.)

At the hearing on the new trial motion, the trial court noted that, as to the issue of the parking lot conversation, the last two pages of Juror No. 9's declaration did not "add anything to this case." (67RT 12925.) Defense counsel disagreed, arguing that the declaration showed that both Juror No. 11 and Juror No. 9 committed misconduct. (67RT 12926.) Defense counsel specifically asserted that the questioning of Juror No. 11 during deliberations led the parties and the court to erroneously believe that Juror No. 11 was merely attempting to get away from Juror No. 9, whereas Juror No. 9's declaration showed that Juror No. 11 also discussed appellant's emotional state. (67RT 12926-12967.) In response, the prosecutor argued that Juror No. 11's declaration denied the events as described by Juror No. 9, that Juror No. 11's declaration was consistent with the evidence adduced during the court's earlier inquiry during deliberations, and that there was a strong factual basis to support Juror No. 11's version of the events. The prosecutor also noted that the defense had the opportunity to further question Juror No. 11 or request her excusal, but the defense declined to do so. (67RT 12927.)

The court found that Juror No. 9's declaration did not differ "in any great substantial part" from the evidence received by the court at the time of the inquiry. The court further found that Juror No. 11's declaration was "indeed consistent with what the Court heard on the date in question at the time it made its inquiry." (67RT 12928-12929.) The court also noted that the defense was well aware of Juror No. 11's participation in the parking lot

conversation, that neither party requested the excusal of Juror No. 11, and that it was now "disingenuous" for the defense to raise the allegation that Juror No. 11 also committed misconduct. (67RT 12929.) The court further found that, even if there was misconduct, it was not inherently and substantially likely to have influenced Juror No. 11, and that it was not substantially likely that Juror No. 11 was biased against a party because of the conversation. (67RT 12929.)

In a subsequent discussion regarding other allegations set forth in Juror No. 9's declaration, the trial court explained that after reading the declarations of the other jurors, "it appears to the Court that [Juror No. 9] infers motive or intent or conduct which a better factual analysis would not show that that was the import of that statement or the intent of the conduct or the motive of the person who made the statement. [¶] In other words, he's quick to jump to conclusions without a sufficient reliance on the context of what occurs or analysis of the intentions of the actor." (67RT 12935.) When defense counsel asked if the court was making a credibility finding as to Juror No. 9, the court replied, "I guess you could characterize it as a credibility finding – . . . . I think Mr. (Juror No. 9) just assumes things and perhaps believes them to be accurate when in fact a further analysis would reveal they're not accurate." (67RT 12936.)

B. Appellant Forfeited The Claim That The Trial Court Improperly Discharged Juror No. 9; Moreover, The Claim Fails On The Merits Because The Trial Court Had Good Cause To Discharge Juror No. 9

Under section 1089, the "trial court may discharge a juror for good cause at any time, including during deliberations, if the court finds that the juror is unable to perform his or her duty." (*People v. Lomax* (2010) 49 Cal.4th 530, 588.) "[A] juror's inability to perform as a juror must be shown as a 'demonstrable reality' [citation], which requires a 'stronger evidentiary showing than mere substantial evidence' [citation]." (*People v.*

Wilson (2008) 44 Cal.4th 758, 821; see also *People v. Barnwell* (2007) 41 Cal.4th 1038, 1052-1053.) "The trial court's decision to discharge or retain a juror is reviewed for abuse of discretion." (*People v. Harris* (2013) 57 Cal.4th 804, 856.)

A juror commits misconduct by "violating the court's admonition not to discuss the case with anyone outside the courtroom." (*People v. Nunez and Satele, supra,* 57 Cal.4th at p. 55; see also *People v. Linton* (2013) 56 Cal.4th 1146, 1194 ["A juror who violates his or her oath and the trial court's instructions is guilty of misconduct"]; *People v. Ledesma* (2006) 39 Cal.4th 641, 743 [juror "admitted that he had discussed the case with his wife in violation of the court's admonition – an act that constitutes deliberate misconduct"].) In determining whether juror misconduct occurred, the reviewing court accepts the trial court's credibility determinations and findings on questions of historical fact if supported by substantial evidence. (*People v. Linton, supra*, 56 Cal.4th at p. 1194.)

As an initial matter, appellant forfeited the claim that the trial court erred in discharging Juror No. 9. Defense counsel not only did not object to the discharge of Juror No. 9 or move for a mistrial, but she forcefully sought the discharge of Juror No. 9 on the basis of intentional misconduct. (58RT 11273-11274.) In addition, appellant personally consented to the juror's discharge. (58RT 11275.) Under these circumstances, appellant plainly forfeited any claim regarding the discharge of Juror No. 9. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1029 [claim of improper juror discharge forfeited where "defendant not only did not object to the substitution of the juror or move for a mistrial, but sought to have her excused"]; see also *People v. Wilson* (2008) 43 Cal.4th 1, 25 [defendant forfeited claim that juror was improperly discharged during deliberations because defendant "failed to object or to move for a mistrial"].)

The claim also fails on the merits because Juror No. 9's inability to perform as a juror was shown as a demonstrable reality. The evidence amply supported the trial court's finding that Juror No. 9 intentionally committed misconduct by discussing the case with another juror outside of the jury room. Juror No. 9 admitted that he discussed the deliberations with Juror No. 11 in the parking lot, and he further acknowledged that he was aware of the court's repeated admonitions that the jurors could not discuss the case outside the presence of all the jurors in the deliberation room. (58RT 11268-11270.) Juror No. 11 indicated that it was Juror No. 9 who initiated the discussion about the deliberations by thanking her for taking the time to listen and understand his perspective, and Juror No. 9 acknowledged that "[i]t very well could be" that he was the one who brought up the issue of the deliberations in the conversation. Thus, as both parties agreed at the time, the trial court reasonably found that Juror No. 9 initiated the topic of the deliberations during the parking lot conversation, that Juror No. 11 did not affirmatively discuss the case during the conversation, and that Juror No. 11 "was kind of stuck and being nice." (58RT 11279-11280.)

In light of this intentional misconduct by Juror No. 9, the trial court had good cause to discharge him. As this Court has explained, a "'judge may reasonably conclude that a juror who has violated instructions to refrain from discussing the case . . . cannot be counted on to follow instructions in the future' and is unable to perform [his] duty as a juror." (*People v. Nunez and Satele, supra*, 57 Cal.4th at p. 55; accord, *People v. Ledesma, supra*, 39 Cal.4th at p. 743 ["'[A] juror's serious and willful misconduct is good cause to believe that the juror will not be able to perform his or her duty"].)

Citing *People v. Wilson, supra,* 44 Cal.4th 758 (*Wilson*), appellant contends that any misconduct by Juror No. 9 was trivial and insufficient to

warrant dismissal. (AOB 301-311.) According to appellant, any mention of the case was merely a "technical violation of the court's admonition," it was "no surprise that jurors" would comment on emotional deliberations involving the murder of three children, and Juror No. 9's comments and actions did not indicate an inability to perform his duties as a juror. (AOB 310.)

Appellant is incorrect, and her reliance on *Wilson* is misplaced. In that case, the trial court discharged a juror, Juror No. 5, during the penalty phase deliberations. (*People v. Wilson, supra*, 44 Cal.4th at p. 814.) One of the grounds cited by the trial court for discharging Juror No. 5 was that he had prejudged the penalty when he stated to another juror during the guilt phase: "The whole thing is a problem with authority, and this is what happens when you have no authority figure." (*Id.* at p. 836.)

On appeal, this Court held that, under the circumstances, it could not "conclude the mere utterance of one or two short sentences" established to a demonstrable reality that Juror No. 5 had prejudged the question of penalty. (*Wilson, supra*, 44 Cal.4th at p. 841.) This Court explained that "Juror No. 5's solitary and fleeting comments to a fellow juror, made during a break early in the guilt phase portion of the trial, were a technical violation of both section 1122 and the court's admonition to the jury not to discuss the case." (*Id.* at p. 839.) This Court further explained that "the violation was a trivial one: one, possibly two sentences, spoken in rhetorical fashion and not in an obvious attempt to persuade anyone." (*Id.* at pp. 839-840.) This Court also noted that, in light of Juror No. 5's initial vote to impose the death penalty during the penalty phase deliberations, Juror No. 5 had not prejudged the case when he made the comments during the guilt phase, and that the comments merely indicated that he "was entertaining various concerns about the case in his mind and improperly

blurted out one of his thoughts at an inappropriate moment." (*Id.* at pp. 840-841.)

Here, the circumstances of Juror No. 9's misconduct differ sharply from the circumstances in *Wilson*. Unlike the timing of the comments in *Wilson*, Juror No. 9's comments about the deliberations occurred while the deliberations were ongoing. Furthermore, Juror No. 9's comments were not "spoken in rhetorical fashion" or "improperly blurted out at an inappropriate moment." To the contrary, it was reasonable to conclude from the circumstances that, by initiating the discussion about the deliberations and thanking Juror No. 11 for listening to him and considering his perspective during deliberations, Juror No. 9 was attempting to persuade Juror No. 11 in favor of his views on the case that he had advocated in deliberations. The record therefore supported the trial court's conclusion that Juror No. 9 committed a "flagrant violation" of the court's order not to discuss the case outside the jury room. Accordingly, *Wilson* is inapposite.

Seizing on the trial court's remarks to Juror No. 9 that it was "required" to dismiss Juror No. 9 because of his violations of the court's orders (58RT 11276), appellant further argues that the trial court erred in concluding that any misconduct, including trivial misconduct, warranted dismissal. (AOB 308, 310-311.) She is incorrect. First, considered in proper context, the trial court's comment about being "required" to dismiss Juror No. 9 was merely an attempt to explain to Juror No. 9, a layperson, the reason for his dismissal; in other words, the trial court was not attempting to set forth the legal standard for discharging a juror under section 1089. Moreover, in light of the trial court's earlier ruling that there was "good cause" for removing Juror No. 9 because of his "flagrant

violation" of the court's order (58RT 11275), the trial court plainly understood the appropriate legal standard under section 1089.[13]

Citing Juror No. 11's post-trial declaration, appellant further argues that this declaration supports the argument that the trial court erred in discharging Juror No. 9 because the discussion about the deliberations did not constitute serious and willful misconduct. Appellant also argues that Juror No. 11's post-trial declaration showed that Juror No. 11 was not truthful during the questioning by the trial court because Juror No. 11 acknowledged in the declaration that she had engaged in a limited discussion with Juror No. 9 about the deliberations. (AOB 320-323.)

Appellant's attempt to cite evidence subsequent to the trial court's ruling is unavailing. Based on the evidence available at the time of the trial court's decision to discharge Juror No. 9, the trial court's decision was proper when made. "[T]herefore, even if later-presented evidence might have contradicted to some degree the evidence the court had before it when it ruled, this would not establish grounds for concluding defendant had been denied [her] rights or a fair trial by that ruling." (*People v. Fuiava, supra,* 53 Cal.4th at p. 716.)

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[13] Appellant also argues that Juror No. 9 might have been improperly discharged because he was suspected of being the holdout juror. (AOB 311-312.) Not so. The record plainly shows that the trial court discharged Juror No. 9 on the basis of his misconduct in discussing the deliberations with Juror No. 11 outside of the jury room.

C. Appellant Forfeited The Claim That The Trial Court Erred In Failing to Discharge Juror No. 11; Moreover, The Trial Court Did Not Abuse Its Discretion By Retaining Juror No. 11

Appellant further argues that, if this Court concludes the trial court properly discharged Juror No. 9, the trial court erred in failing to also dismiss Juror No. 11. (AOB 313-320.) This argument fails.

As an initial matter, appellant forfeited the claim that the trial court erred in failing to discharge Juror No. 11. The record shows that the trial court specifically asked the parties about their positions as to Juror No. 11 and invited additional discussion as to that juror. Appellant, however, did not propose any additional questioning of Juror No. 11, did not seek Juror No. 11's excusal or otherwise object to Juror No. 11's continued service, and did not request a mistrial at that time on the ground that Juror No. 11 committed misconduct. (58RT 11278-11280, 11284-11287.) Under these circumstances, appellant forfeited the instant claim regarding Juror No. 11. (*People v. Foster* (2010) 50 Cal.4th 1301, 1340 [juror misconduct claim forfeited where "at no time did defense counsel propose additional questions, object to any juror's continued service, or request a mistrial on the ground of juror misconduct"]; *People v. Lewis* (2009) 46 Cal.4th 1255, 1308 [defendant forfeited claim that juror should have been dismissed for misconduct because defendant "failed to request [the juror] be discharged or that a mistrial be declared"]; *People v. Stanley* (2006) 39 Cal.4th 913, 950 [juror misconduct claim forfeited because defense counsel did not object to juror's continued service or request a mistrial on juror misconduct grounds]; *People v. Holloway* (2004) 33 Cal.4th 96, 124 [defendant forfeited claim that court erred in failing to discharge juror "by failing to seek the juror's excusal or otherwise object to the court's course of action."].)

Moreover, the claim fails on the merits because the trial court did not abuse its discretion by retaining Juror No. 11. Based on the information obtained through the inquiry of Juror No. 9 and Juror No. 11, the trial court reasonably found that it was Juror No. 9 who initiated the topic of the deliberations during the parking lot conversation, that Juror No. 11 did not affirmatively discuss the case during the conversation, and that Juror No. 11 "was kind of stuck and being nice." (58RT 11279-11280.) Thus, as both parties agreed at the time (58RT 11279-11280, 11284-11287), the trial court properly concluded that Juror No. 9 engaged in intentional misconduct by affirmatively discussing the case outside the deliberation room, whereas Juror No. 11 did not commit misconduct because she was merely a passive recipient of Juror No. 9's unsolicited comments regarding the deliberations. Accordingly, in light of this well-supported finding that the two jurors engaged in sharply disparate conduct, the trial court properly discharged Juror No. 9 and properly retained Juror No. 11. (*People v. Jablonski* (2006) 37 Cal.4th 774, 807 [no abuse of discretion in trial court's decision to retain juror because the record did not show the juror was unable to fulfill her functions as a demonstrable reality].)

Appellant again cites Juror No. 11's post-trial declaration in support of her argument that the trial court erred in failing to dismiss Juror No. 11. (AOB 322-323.) As previously explained, the trial court's decision was proper when made, and appellant's attempt to cite subsequent evidence is unavailing. (*People v. Fuiava, supra,* 53 Cal.4th at p. 716.)

D. The Trial Court Did Not Abuse Its Discretion In Denying The Motion for a New Trial

Appellant contends the trial court erred in not granting a new trial based on Juror No. 11's declaration. Appellant argues that the declaration cast doubt on Juror No. 11's veracity and called into question whether Juror No. 9 was wrongly dismissed or Juror No. 11 was wrongly retained.

Appellant further asserts that, to the extent the trial court found that any misconduct by Juror No. 11 was not prejudicial, the trial court could not properly justify the dismissal of Juror No. 9. (AOB 323-326.) Appellant is incorrect.

"The trial court is vested with broad discretion to act upon a motion for new trial." (*People v. Dykes* (2009) 46 Cal.4th 731, 809.) "'"A trial court's ruling on a motion for new trial is so completely within that court's discretion that a reviewing court will not disturb the ruling absent a manifest and unmistakable abuse of that discretion."' [Citation.]" (*People v. Thompson, supra,* 49 Cal.4th at p. 140.)

"When the motion is based upon juror misconduct, the reviewing court should accept the trial court's factual findings and credibility determinations if they are supported by substantial evidence, but must exercise its independent judgment to determine whether any misconduct was prejudicial." (*People v. Dykes, supra*, 46 Cal.4th at p. 809.) "Although juror misconduct raises a presumption of prejudice [citation], [the reviewing court] determine[s] whether an individual verdict must be reversed for jury misconduct by applying a substantial likelihood test." (*In re Boyette* (2013) 56 Cal.4th 866, 889.) "That is, the 'presumption of prejudice is rebutted, and the verdict will not be disturbed, if the entire record in the particular case, including the nature of the misconduct or other event, and the surrounding circumstances, indicates there is no reasonable probability of prejudice, i.e., no substantial likelihood that one or more jurors were actually biased against the defendant.' [Citation.]" (*Id.* at pp. 899-890.)

Here, the trial court did not abuse its discretion in denying the new trial motion. Although appellant now focuses on Juror No. 11's declaration and scarcely mentions Juror No. 9's post-trial declaration, appellant's allegation in the new trial motion that Juror No. 11 committed misconduct

was factually based on Juror No. 9's declaration. (12CT 2303, 2326-2327.) Thus, the focus of the motion and hearing with respect to Juror No. 11 involved the allegations in Juror No. 9's declaration that Juror No. 11 had *extensively* discussed the case during her conversation with Juror No. 9. (67RT 12925-12929.)

With respect to the sharply conflicting accounts of the parking lot conversation that were presented in the declarations of Juror No. 9 and Juror No. 11, the trial court plainly credited the substance of Juror No. 11's declaration. In her declaration, Juror No. 11 denied Juror No. 9's allegation that she referenced appellant's mental or emotional state during her parking lot conversation with Juror No. 9, and she denied the allegation that she and Juror No. 9 discussed any specific items of evidence. (12CT 2433.) As noted by the trial court, these statements in Juror No. 11's declaration were consistent with the information obtained during the initial inquiry of the jurors.

Conversely, the trial court had a reasonable basis to place little weight on Juror No. 9's declaration. In the initial juror inquiry, Juror No. 9 explained that only "[o]ne or two lines" of his conversation with Juror No. 11 involved the case, and that the comment about the case was limited to the emotional nature of the deliberations. (58RT 11268-11269.) By contrast, Juror No. 9's declaration newly asserted that he and Juror No. 11 mutually discussed the deliberations and the evidence involving appellant's state of mind. (12CT 2327.) In light of Juror No. 9's inconsistent descriptions of the conversation, and the general consistency of Juror No. 11's account, the trial court had an ample basis to credit Juror No. 11's declaration over Juror No. 9's declaration. (See *People v. Loker* (2008) 44 Cal.4th 691, 749 [trial court's acceptance of version of discussions presented in amended declarations was a credibility determination supported by substantial evidence].)

Moreover, there is no merit to appellant's contention that Juror No. 11's declaration showed that she was not truthful during the trial court's questioning about the parking lot conversation. As the trial court correctly observed, Juror No. 11's declaration was generally consistent with her statements during the court's inquiry, i.e., that Juror No. 9 had initiated the topic of the deliberations, that Juror No. 9 had stated the deliberations had become personal and too emotional, and that the issue of the emotional nature of the deliberations was the only part of their conversation involving the case. (12CT 2433; 58RT 11272.)

Although Juror No. 11's declaration revealed that she made a responding comment to Juror No. 9 that referenced the deliberations – "Well, it had to be an emotional night, so it's understandable that we're emotional in there" –this responding comment was consistent with Juror No. 11's basic account of the conversation during the inquiry, i.e., that it was Juror No. 9 who injected the issue of the deliberations into their conversation by thanking her for listening to him and understanding his perspective, and that she did not engage Juror No. 9 in an extended discussion about the deliberations or the case.

Furthermore, even assuming arguendo that Juror No. 11's comment – "Well, it had to be an emotional night, so it's understandable that we're emotional in there" – constituted misconduct, the presumption of prejudice is adequately rebutted. In context, Juror No. 11's responding comment was merely a brief, polite, and noncommittal reply to Juror No. 9's unsolicited complaints about the emotional nature of the deliberations. Moreover, the underlying substance of the comment did not demonstrate a substantial likelihood that Juror No. 11 was actually biased against appellant. The brief comment did not advocate for a guilty verdict, nor did it specifically reference appellant's state of mind or any particular item of evidence. In

short, there is nothing to indicate that Juror No. 11's brief comment was an attempt to persuade Juror No. 9 on the merits of the case.[14]

To the extent the comment "it had to be an emotional night" generally referenced the trial evidence, this generalized reference was innocuous, especially since it reflected the unremarkable proposition that strong emotions surrounded the shooting deaths of three young children. Finally, any misconduct was not prejudicial in light of the overwhelming evidence that the events immediately preceding the shooting (i.e., the undisputed argument between Dr. Caro and appellant) and the events immediately after the shooting (e.g., Dr. Caro's discovery of the bodies and his emotional response) involved a great deal of emotion, and in light of the overwhelming evidence of appellant's guilt. Under these circumstances, the presumption of prejudice is adequately rebutted. (*People v. Lewis, supra,* 46 Cal.4th at p. 1309 [no prejudice from juror's conversation with her husband about the manner in which the jury picked the foreperson and the foreperson's refusal to reveal results of first jury poll]; *People v. Loker, supra,* 44 Cal.4th at p. 749 [no prejudice from jury's brief discussion of defendant's failure to testify]; *People v. Leonard, supra,* 40 Cal.4th at p. 1425 [same]; *People v. Danks* (2004) 32 Cal.4th 269, 306-310 [no prejudice in light of nature of misconduct and strong penalty phase evidence].)

XIV. THE TRIAL COURT DID NOT ERR IN AUTHORIZING THE DESTRUCTION OF NOTES TAKEN BY THE DISCHARGED JUROR

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[14] By contrast, as previously explained, Juror No. 9's injection of the topic of the deliberations into the conversation and his thanking of Juror No. 11 for listening to him and understanding his perspective reasonably supported the conclusion that Juror No. 9 was attempting to persuade Juror No. 11 into agreeing with the positions that he had advocated during deliberations.

Appellant contends the trial court violated Government Code section 68152, subdivision (e)(1), and deprived her of critical evidence when it authorized the post-trial destruction of notes taken by Juror No. 9 (the juror dismissed during deliberations). (AOB 327-330.) This claim is without merit.

On February 1, 2002, appellant filed a motion for an order releasing the personal notes of excused Juror No. 9. According to the motion, the order was necessary to allow the defense an opportunity to present evidence of prejudicial jury misconduct because the notes described and memorialized overt acts of misconduct observed by Juror No. 9. (11CT 2247-2249.)

At the hearing on the motion, the trial court explained that the referenced "notes are when jurors in the case were given notebooks by the Court to take notes during the trial for their use if they so desired during deliberations." (66RT 12831.) The court further explained that there "are no such notes, so the Court could not comply with the order even if nobody objected or the Court was inclined to grant the order." (66RT 12831.) The trial court then asked the court bailiff to testify under oath about the notes. (66RT 12831.)

Deputy Rachele Ford, the bailiff, testified as follows. When Juror No. 9 was excused, his notes (consisting of three and one-half notebooks) were left in the jury room and he was told that he could retrieve them at the conclusion of the trial. The bailiff told Juror No. 9 that the notebooks would not be mailed to him because they were too voluminous; the alternate jurors were told the same information. (66RT 12831.) Juror No. 9 later made two phone calls to the judicial secretary and indicated that he was going to come in and retrieve the notes, but he did not show up on either day. Because the courtroom was going to be dark for three weeks during the trial judge's vacation, and the bailiff did not believe that it was

wise to leave the notebooks in the courtroom during that time period, the bailiff destroyed Juror No. 9's notes (as well as the notes of Alternate Juror No. 2 and Alternate Juror No. 5) by shredding them. (66RT 12832.) The notes were shredded prior to the trial court's vacation in late December or early January. (66RT 12834.)

The trial court noted for the record that the bailiff had asked the court for guidance prior to destroying the notes, and the court had instructed the bailiff to shred the notes because Juror No. 9 did not retrieve the notes on the scheduled times. (66RT 12834.) The trial court further explained that it was the court's standard practice to shred and destroy all juror notebooks following the trial. (66RT 12832-12833.)

Contrary to appellant's contention, the destruction of the notes did not violate former Government Code section 68152, subdivision (e)(2),[15] which required that "court records" in capital cases be "retain[ed] permanently."

At the time of appellant's trial, Government Code section 68151, subdivision (a), defined a "court record" as follows:

> (1) All filed papers and documents in the case folder; but if no case folder is created by the court, all filed papers and documents that would have been in the case folder if one had been created.
>
> (2) Administrative records filed in an action or proceeding, depositions, paper exhibits, transcripts, including preliminary hearing transcripts, and tapes of electronically recorded proceedings filed, lodged, or maintained in connection with the case, unless disposed of earlier in the case pursuant to law.
>
> (3) Other records listed under subdivision (j) of Section 68152.

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[15] Former Government Code section 68152 was repealed in 2013, and a similar statute took effect in 2014. (Stats. 2013, ch. 274, § 4, effective January 1, 2014.)

(Stats. 1996, ch. 1159, § 14.)

Subdivision (j) of former Government Code section 68152 listed "other records" as follows:

(1) Applications in forma pauperis: any time after the disposition of the underlying case.

(2) Arrest warrant; same period as period for retention of the records in the underlying case category.

(3) Bench warrant: same period as period for retention of the records in the underlying case category.

(4) Bond: three years after exoneration and release.

(5) Coroner's inquest report: same period as period for retention of the records in the underlying case category; if no case, then permanent.

(6) Court orders not associated with an underlying case, such as orders for destruction of court records for telephone taps, or to destroy drugs, and other miscellaneous court orders: three years.

(7) Court reporter notes: 10 years after the notes have been taken in criminal and juvenile proceedings and five years after the notes have been taken in all other proceedings, except notes reporting proceedings in capital felony cases (murder with special circumstances where the prosecution seeks the death penalty and the sentence is death), including notes reporting the preliminary hearing, which shall be retained permanently, unless the Supreme Court on request of the court clerk authorizes the destruction.

(8) Electronic records made as the official record of the oral proceedings under the California Rules of Court: any time after final disposition of the case in infraction and misdemeanor proceedings, 10 years in all other criminal proceedings, and five years in all other proceedings.

(9) Electronic recordings not made as the official record of the oral proceedings under the California Rules of Court: any time either before or after final disposition of the case.

(10) Index, except as other specified: retain permanently.

(11) Index for cases alleging traffic violations: same period as period for retention of the records in the underlying case category.

(12) Judgments within the jurisdiction of the superior court other than in a limited civil case; retain permanently.

(13) Judgments within the jurisdiction of the municipal court or of the superior court in a limited civil case: same period as period for retention of the records in the underlying case category.

(14) Minutes: same period as period for retention of the records in the underlying case category.

(15) Naturalization index: retain permanently.

(16) Ninety-day evaluation (under Section 1203.03 of the Penal Code): same period as period for retention of the records in the underlying case category, or period for completion or termination of probation, whichever is longer.

(17) Register of actions or docket: same period as period for retention of the records in the underlying case category, but in no event less than 10 years for civil and small claims cases.

(18) Search warrant: 10 years, except search warrants issued in connection with a capital felony case defined in paragraph (7), which shall be retained permanently.

(Stats. 1998, ch. 931, § 236.)

Under the specific definition of "court records" set forth in former Government Code sections 68151 and 68152, personal notes taken by a juror did not qualify as "court records" that were required to be permanently retained. The destruction of Juror No. 9's notes therefore did not violate former Government Code section 68152, subdivision (e)(1).

Furthermore, appellant suffered no possible prejudice from the destruction of the notes. The absence of the notes did not preclude appellant from submitting a four-page declaration from Juror No. 9 in support of her motion for a new trial (12CT 2325-2328), and appellant

makes no showing that the destroyed notes would have substantially bolstered the credibility of Juror No. 9's declaration. Moreover, Juror No. 9's notes had no possible impact on the actual verdicts rendered in this case because the reconstituted jury began deliberations anew after Juror No. 9's discharge. Accordingly, any error was not prejudicial.

XV. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DECLINING TO ALLOW APPELLANT TO CALL A WITNESS AT THE HEARING ON THE MOTION FOR A NEW TRIAL

Appellant contends the trial court erred in not allowing the defense to call witnesses at the hearing on the motion for a new trial. (AOB 331-338.) This claim is without merit.

As previously noted, Juror No. 9's declaration was included as an exhibit in appellant's motion for a new trial. In the fifth paragraph of that declaration, Juror No. 9 discussed the jurors' deliberations regarding the photograph that depicted Dr. Caro's car leaving the parking lot. In the last sentence of that paragraph, Juror No. 9 stated as follows: "One day during deliberations, we asked the bailiff if we could see that photograph projected on the wall and she stated that we could only have the evidence we already had in the jury room." (12CT 2325-2326.)

At the hearing on the new trial motion, defense counsel cited the above portion of Juror No. 9's declaration and argued that the jury's request for the photograph was never communicated to the defense or the prosecution at the time. (67RT 12917.) In response to that argument, the trial court stated, "I'm informed by the bailiff that never occurred." (67RT 12917.) Defense counsel then asked to take evidence on that issue. The trial court asked if defense counsel wished to call the bailiff, and counsel responded affirmatively. (67RT 12917-12918.)

Defense counsel then examined the bailiff as follows.

Q: Yes. Mrs. Ford, do you recall a period when you were in the jury deliberations room during the course of this case and a request was made to see a photograph of a car which purported to be Dr. Caro's?

A. No.

Q. Do you recall a request being made of you regarding seeing a photograph projected?

A. No.

Q. Was there any juror that made a request of you to get additional opportunity to observe items of evidence?

A. No.

(67RT 12918-12919.)

When the trial court asked defense counsel if she wished to present any further evidence on that issue, counsel stated that she wanted to call Juror No. 3, the foreperson. Following an objection from the prosecution, defense counsel made the following offer of proof as to Juror No. 3: "I believe Mr. (Juror No. 3) would testify that the – that a conversation did take place with the bailiff regarding getting an additional item of evidence or an opportunity to view the photograph projected on the wall and that in fact a response was made." (67RT 12919.)

The prosecutor argued that the inquiry was irrelevant because Juror No. 9 was not part of the jury that rendered the verdicts. (67RT 12920.) The court noted that there was nothing in Juror No. 3's declaration "relating to the subject matter that you now wish to call him as a witness on." In response, defense counsel asserted that she "did not know that area was in controversy," and therefore requested leave to adduce additional evidence. (67RT 12920.)

The court ruled that, based on the offer of proof, it would not permit defense counsel to call Juror No. 3 as a witness. (67RT 12922.) The court

explained that the matter was set for hearing that day and it had not seen any declaration from Juror No. 3 regarding that issue.[16] The court therefore found that, "based on the current state of the record, I'm of the opinion that (Juror No. 9's) statement that a request was made to the bailiff for additional evidence did not occur." (67RT 12922.)

The trial court did not abuse its discretion in declining to allow testimony from Juror No. 3 (or any other juror)[17] on the issue of whether the jury requested a photograph from the bailiff. First, although this factual issue was included in Juror No. 9's declaration, appellant did not expressly assert in her written motion that the bailiff's response to the jury's request constituted an independent legal ground for a new trial. (12CT 2301-2320 [motion], 2465-2473 [response to prosecution's opposition].) Second, as noted by the trial court, appellant did not submit a declaration from Juror No. 3 on that issue, and the declaration from Juror No. 3 that was included as an exhibit to the prosecution's opposition made no reference to a request to view a photograph. (12CT 2400-2404.) As this Court has previously explained, an evidentiary "hearing should not be used as a 'fishing expedition.'" (*People v. Hedgecock* (1990) 51 Cal.3d 395, 419.)[18]

Furthermore, the trial court had an ample basis to conclude that Juror No. 9's "statement that a request was made to the bailiff for additional evidence did not occur." (67RT 12922.) The court was entitled to credit

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[16] A declaration from Juror No. 3 was included as an exhibit to the prosecution's opposition to the new trial motion. (12CT 2400-2404.)

[17] In the instant claim, appellant asserts the trial court erred in not permitting her to call "witnesses" or "other jurors." (AOB 331, 335.) The record, however, indicates that appellant only requested to call Juror No. 3 as a witness.

[18] The trial court permitted appellant to subsequently file an additional declaration on the issue if she desired (67RT 12922), but the record does not indicate that appellant filed any such declaration.

the bailiff's testimony and reject the contrary allegation contained in Juror No. 9's declaration. Also, as noted by the trial court, appellant proffered no declaration from Juror No. 3 or any other deliberating juror in support of this particular allegation. Moreover, the jury (prior to Juror No. 9's discharge) had no difficultly in making written requests for the readback of testimony (10CT 1883, 1886), and the absence of a similar written request for a photograph strongly suggests that no such request occurred. Given these circumstances, the trial court reasonably precluded appellant from eliciting further testimony on the issue. (See *People v. Schmeck* (2005) 37 Cal.4th 240, 294 [trial court reasonably precluded defense counsel from eliciting testimony from other jurors in resolving issue of juror misconduct].)

Finally, even assuming arguendo that the trial court abused its discretion, the error was not prejudicial. Even assuming that additional inquiry would have resulted in testimony supporting Juror No. 9's allegation, the bailiff's alleged response to the request for a photograph had no possible impact on the verdicts actually rendered in this case. Following Juror No. 9's discharge and the seating of an alternate juror in his place, the reconstituted jury was instructed to set aside and disregard all past deliberations and begin deliberations anew. (58RT 11291.) Indeed, all of the jurors in the reconstituted jury indicated in their declarations that they complied with the instruction and began their deliberations anew after the alternate juror was seated. (12CT 2395, 2399, 2404, 2407, 2410, 2414, 2418, 2422, 2425, 2429, 2434, 2437.) Thus, the alleged request for the photograph during the prior deliberations was irrelevant to the actual verdicts rendered in this case. In light of these circumstances, any error in declining to allow appellant to call Juror No. 3 as a witness was plainly harmless.

XVI. APPELLANT'S CLAIMS AGAINST CALIFORNIA'S DEATH PENALTY STATUTE SHOULD BE REJECTED

Appellant contends that California's death penalty statute, as interpreted by this Court and applied at appellant's trial, violates the United States Constitution. (AOB 339-359.) Respondent submits that all of appellant's claims against California's death penalty statute should be rejected.

First, contrary to appellant's claim (AOB 339-340), "[s]ection 190.2 is not impermissibly broad." (*People v. Rountree* (2013) 56 Cal.4th 823, 862; ; see also *People v. Lightsey* (2012) 54 Cal.4th 668, 731 [same]; *People v. Souza* (2012) 54 Cal.4th 90, 141 [same]; *People v. Moore, supra*, 51 Cal.4th at p. 415 ["The set of special circumstances qualifying a first degree murder for capital sentencing (§ 190.2) is not impermissibly broad."].)

Second, there is no merit to appellant's claim that the broad application of section 190.3, factor (a), violates her constitutional rights. (AOB 341-342.) "'We repeatedly have held that consideration of the circumstances of the crime under section 190.3, factor (a) does not result in arbitrary or capricious imposition of the death penalty. [Citations.]'" (*People v. Brasure* (2008) 42 Cal.4th 1037, 1066; see also *People v. Lightsey*, *supra*, 54 Cal.4th at p. 731; *People v. Souza*, *supra*, 54 Cal.4th at pp. 141-142; *People v. Moore*, *supra*, 51 Cal.4th at p. 415.)

Third, there is no merit to appellant's claims that the jury instructions accompanying the death penalty statute: (1) failed to set forth the appropriate burden of proof; (2) failed to require the prosecution to bear the burden of persuasion at the penalty phase; (3) failed to require unanimity regarding aggravating factors; (4) caused the penalty determination to turn on an impermissibly vague and ambiguous standard; (5) failed to inform the jury that the central determination is whether death is the appropriate

penalty; (6) failed to inform the jury it could impose a life sentence even if aggravation outweighed mitigation; (7) failed to inform the jury that it was required to impose life without the possibility of parole if it found mitigation outweighed aggravation; (8) failed to inform the jury regarding the standard of proof and lack of need for unanimity as to mitigating circumstances; (9) failed to inform the jury on the presumption of life; and (10) failed to require the jury to make written findings. (AOB 342-354.) In *People v. Moore*, this Court stated:

> "'Our statute "is not invalid for failing to require (1) written findings or unanimity as to aggravating factors, (2) proof of all aggravating factors beyond a reasonable doubt, (3) findings that aggravation outweighs mitigation beyond a reasonable doubt, or (4) findings that death is the appropriate penalty beyond a reasonable doubt." [Citation.] No instruction on burden of proof is required in a California penalty trial because the assessment of aggravating and mitigating circumstances required of penalty jurors is inherently "'normative, not factual' [citation] and, hence, not susceptible to a burden-of-proof quantification.'" [Citation.] Nor is an instruction on the *absence* of a burden of proof constitutionally required. [Citation.]" [Citation.] The United States Supreme Court's decisions in *Apprendi v. New Jersey* [(2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435]] and its progeny do not establish a Sixth Amendment right to determination of particular aggravating factors, or the balance of aggravation and mitigation beyond a reasonable doubt, or by a unanimous jury. [Citations.] "Finally, [n]o instruction on a presumption that the sentence should be life without parole, rather than death, was constitutionally required." [Citation.]

(*People v. Moore*, *supra*, 51 Cal.4th at pp. 415-416, original emphasis; see also *People v. Williams, supra,* 58 Cal.4th at p. 294 ["'the trial court need not and should not instruct the jury as to any burden of proof or persuasion at the penalty phase'"]; *People v. Loy* (2001) 52 Cal.4th 46, 78 ["The instructions do not impermissibly fail to inform the jurors regarding the standard of proof and lack of need for unanimity as to mitigating

circumstances"]; *People v. Lightsey*, *supra*, 54 Cal.4th at p. 731; *People v. Page* (2008) 44 Cal.4th 1, 57 [rejecting claim that instructions failed to inform the jury that it was required to return a life sentence if it found that mitigation outweighed aggravation]; *People v. Lewis* (2008) 43 Cal.4th 415, 533-534.)

Fourth, there is no merit to appellant's claim that the instructions: (1) improperly used restrictive adjectives, such as "extreme" and "substantial," in the list of potential mitigating factors; (2) failed to delete inapplicable sentencing factors; and (3) improperly failed to inform the jury not to consider the deterrent effect or the cost of the death penalty (AOB 355-357). (*People v. Jones, supra,* 57 Cal.4th at p. 980 [no rule of constitutional rule requires the instructions to delete inapplicable sentencing factors, and instructions not unconstitutional for including adjectives "extreme" and "substantial"]; *People v. Elliott, supra,* 53 Cal.4th at pp. 590-591 [trial court not required to instruct on deterrent effect or cost of death penalty if neither party raised the issue of cost or deterrence at trial].)

Fifth, there is no merit to appellant's claims regarding the prohibition against intercase proportionality review and the Equal Protection Clause. (AOB 357-359.) This Court has stated:

> Comparative intercase proportionality review of death sentences is not constitutionally required. [Citations.] "Because capital and noncapital defendants are not similarly situated in the pertinent respects, equal protection principles do not mandate that capital sentencing and sentence-review procedures parallel those used in noncapital sentencing." [Citation.]

(*People v. Moore*, *supra*, 51 Cal.4th at p. 417.)

Finally, there is no merit to appellant's claim that the use of the death penalty violates international law. (*People v. Moore*, *supra*, 51 Cal.4th at p. 417.)

XVII. NO CUMULATIVE ERROR OR PREJUDICE OCCURRED

Appellant lastly contends that the cumulative effect of the asserted trial errors requires reversal. (AOB 360-362.) This claim is without merit. Because no errors occurred, "there is, accordingly, nothing to cumulate." (*People v. Duff, supra,* 58 Cal.4th at p. 568.) Moreover, any errors were harmless under any applicable standard in light of the nature of any errors and the overwhelming evidence presented by the prosecution; thus, "[a]ny conceivable cumulative prejudicial effect does not establish that [appellant] was denied due process of law or a fair trial." (*People v. Contreras, supra,* 58 Cal.4th at p. 173.)

CONCLUSION

Accordingly, for the reasons stated, respondent respectfully asks that the judgment be affirmed.

Dated: May 14, 2014

Respectfully submitted,

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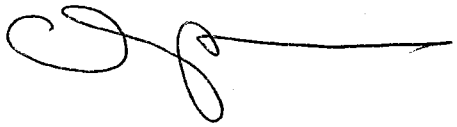

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CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S BRIEF** uses a 13 point Times New Roman font and contains **63,136** words.

Dated: May 14, 2014

KAMALA D. HARRIS
Attorney General of California

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Deputy Attorney General
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DECLARATION OF SERVICE

Case Name: **People v. Socorro Susan Caro**
No.: **S106274**

I declare:

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

On **May 14, 2014**, I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope in the internal mail system of the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

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On **May 14, 2014**, I caused **eight** (8) copies of the **RESPONDENT'S BRIEF** in this case to be delivered to the California Supreme Court at 350 McAllister Street, First Floor San Francisco, CA 94102-4797 by **FEDEX,** Tracking No. 898903647098.

On **May 14, 2014**, I caused one electronic copy of the **RESPONDENT'S BRIEF** in this case to be submitted electronically to the California Supreme Court by using the Supreme Court's Electronic Document Submission system.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on **May 14, 2014**, at Los Angeles, California.

Nora Fung
Declarant

Signature

CLM: nf
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