In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

GRAYLAND WINBUSH,

Defendant and Appellant.

Case No. S117489

Appellate District, Case No. 128408B
Alameda County Superior Court, Case No.
The Honorable Jeffrey W. Horner, Judge

RESPONDENT'S BRIEF

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page

CASES

STATUTES

CONSTITUTIONAL PROVISIONS

UNITED STATES CONSTITUTION

OTHER AUTHORITIES

INTRODUCTION

Appellant was convicted and sentenced to death for the stabbing and strangulation murder, committed in the course of a robbery, of Erika Beeson on December 22, 1995, ten days after appellant was released from California Youth Authority (CYA). Appellant, with the help of accomplice Norman Patterson, initially set out to rob Beeson's boyfriend, Mario "Bo" Botello, who was Christmas shopping at the time of the murder.

Appellant spent four years at CYA before the murder. Upon his release, he began contacting some of the people he had grown up with in South Berkeley, including Patterson, and Botello's best friend, Maceo Smith. Two days before the murder, Patterson dropped by Botello's apartment to visit and brought appellant with him. When appellant saw Botello's gun, purchased legally, he demanded that Botello "get him a gun" so he could start robbing drug dealers. For the next two days, appellant pestered Botello by telephone, and eventually gave him a deadline of December 22, 1995 to provide him a firearm. Botello did not want to comply. On December 22, 1995, appellant called Botello to say that he and Smith were about to come over to Botello's apartment. Botello left home immediately after telling his girlfriend, Beeson, not to let them enter their apartment. When appellant and Smith arrived, appellant was furious that Botello was gone and Beeson was refusing to let them inside.

Appellant decided to rob Botello later that evening. When Botello's good friend, Smith, refused to help him, appellant turned to Patterson, who, like Smith, would not arouse Botello's suspicion in gaining entry to his apartment. When appellant and Patterson arrived at the apartment, around 8:00 p.m., Beeson was home alone.

Appellant and Patterson robbed and attacked Beeson, severely beating her with the butt of the same shotgun that appellant had admired two days earlier and strangling her with appellant's belt when she began to make

noise. Having realized just before leaving that Beeson was still alive, appellant used one of Beeson's kitchen knives to stab her eight times in and around her neck.

Appellant's primary claims attack the jury selection process, admission of his multiple confessions to law enforcement and to his mother, denial of his severance motion, and the admission of evidence during the penalty phase concerning his lengthy history of violent conduct.

STATEMENT OF THE CASE

On November 14, 2002, the District Attorney of Alameda County filed a second-amended information charging appellant with first degree murder and alleging an enhancement for use of a deadly and dangerous weapon, and special circumstance for commission of the murder while engaged in a robbery. (Pen. Code, §§ 187, 190.2, subd. (a)(17)(A), 12022, subd. (b).)[1] (9 CT 2430-2432.)

On May 9, 2003, the jury found appellant guilty of murder with special circumstance, and found the enhancement true. (168 RT 13182-13185;11 CT 2815-2816.) On June 16, 2003, the jury imposed a sentence of death. (194 RT 14933-14936; 11 CT 2889-2890, 2892.)

On July 11, 2003, the trial court denied appellant's motion for new trial and his automatic motion for modification of his death sentence, and entered an order of commitment pending execution of appellant's death sentence. (196 RT 15019;11 CT 2958-2959, 2964-2969)

The matter is before this Court pursuant to automatic appeal (§ 1239, subd. (b).)

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

STATEMENT OF FACTS

A. Guilt Phase Evidence

1. Events Leading up to the Murder

In December 1995, the victim, 20-year-old Erika Beeson,[2] and her 21-year-old boyfriend, Mario "Bo" Botello, had been together for about two years. (120 RT 8893-8894; 122 RT 9129, 9136; 138 RT 10635.) In April 1995, they moved from Beeson's parents' home into the second floor of a three-story apartment building on Claremont Avenue in Oakland near the Highway 24 off-ramp. (119 RT 8062-8063;122 RT 9134.)[3] The apartment had a security gate that required being "buzzed in" to enter, and an exterior stairwell to gain access to the upper floors. (122 RT 9134-9135.) The couple had a kitten and two pit-bull puppies who were four and six months old. (122 RT 9136; 123 RT 9226.)

Botello was a small-time marijuana dealer who sold mostly to people he knew. (113 RT 7437-7438; 114 RT 7630; 115 RT 7650; 122 RT 9152-9153.) Botello was "best friends" with Maceo Smith, with whom he had grown up in South Berkeley. (113 RT 7466; 115 RT 7675.) Indeed, Botello and Smith had been like brothers since the fourth grade. (133 RT 10190.) Maceo Smith lived with his longtime girlfriend, Iva Mosley, and their son, "Little Maceo." (113 RT 7466; 115 RT 7679; 116 RT 7784.) Botello, Smith, and Mosley had known each other since they were about 13

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[2] We primarily refer to the witnesses, including Erika Beeson, by last name. To avoid confusion, at times we respectfully refer to witnesses, including Beeson's family members, by first name.

[3] Beeson and Botello moved shortly after police conducted a search of Erika's parents' home, looking for, but not finding, guns in Beeson's bedroom. (120 RT 8896-8897, 8899-8900.) Beeson's family was thereafter evicted based on suspected drug involvement and Botello's living in the home without the landlord's permission. (143 RT 11221.)

years old. (122 RT 9130.) Once Botello introduced Mosley to Beeson, they became best friends, and the two couples socialized together nearly every day. (113 RT 7464, 7467-7468; 115 RT 7676.)

Botello, Smith, and Patterson knew each other in elementary school. (122 RT 9132; Supp. CT 99-100.) Appellant and Patterson met because they used to fight each other as members of different neighborhood gangs. (133 RT 10188; Supp. CT 96.)

Botello met appellant when they were about 14 years old. (122 RT 9132-9133.) Appellant had tried to intimidate Botello by fighting with him. (122 RT 9175.) In 1991, when appellant was still 14 years old, he was arrested and sent to California Youth Authority (CYA) where he spent the next four years. (133 RT 10124-10125; 144 RT 11250.)

On December 12, 1995, at 19 years old, appellant was paroled from CYA, subject to electronic monitoring. (109 RT 7190; 133 RT 10124; 144 RT 11246, 11252.) Appellant went to live with his grandmother in Berkeley. (144 RT 11232.) Within a few days of his release, appellant removed the electronic ankle bracelet and began to contact friends, "most of them[,] drug dealers," whom he knew from middle school before he was incarcerated. (113 RT 7468; 144 RT 11253; 149 RT 11648; Supp. CT 117.) Appellant began to get together with Patterson. (133 RT 10189; Supp. CT 97.) By that time, appellant's older brother had married Patterson's older sister, and Patterson felt compelled to "look out" for appellant. (133 RT 10188; 151 RT 11847; Supp. CT 96.)

Around that same time, Patterson and Botello began spending time together. (1222 RT 9151.) On Wednesday, December 20, 1995, eight days after appellant was paroled and two days before the murder, Patterson brought appellant to Botello and Beeson's apartment. (114 RT 7632-7633; 122 RT 9164; 123 RT 9207.) Botello, Patterson, and appellant spent the visit talking and smoking marijuana. (122 RT 9165-9166.) Beeson, who

was home at the time, was excluded from the conversation. (116 RT 7750; 122 RT 9165.) Appellant later told police that, he had smoked "weed" with Beeson and "she got off with an attitude." (129 RT 9864-9865.)[4] At some point during the visit, Botello, appellant, and Patterson became aware that police had entered another apartment in the building. (122 RT 9167.) The three of them moved from the living room to Botello's bedroom for about ten minutes. (122 RT 9167-9168.)

In the bedroom, appellant noticed a 12-gauge shotgun and asked Botello how he obtained it. (122 RT 9169.) Botello said he bought the gun at "Traders," a sporting goods store. (122 RT 9154, 9169.) Appellant asked Botello if he had more any more guns since he wanted one to rob somebody. (122 RT 9168.) Appellant began pressuring Botello to get him a gun, and took Botello's phone number to follow up. (122 RT 9168-9169, 9173.) Botello described appellant as "weird," and wanted nothing to do with getting him a gun. (122 RT 9173-9175.) Appellant was also pushy and aggressive in demanding money for clothes since, notwithstanding his release on parole, he was still wearing prison garb. (115 RT 7635; 122 RT 9175-7176.) Botello gave him 40 dollars, but appellant was not placated and inexplicably acted as if Botello owed him something more. (122 RT 9175-9176.)

After the threesome returned to the living room, Botello's marijuana supplier, Colin "Chuck" Gaffey, briefly stopped by to deliver marijuana. (115 RT 7629, 7633.) Botello took Gaffey into the bedroom, shut the door, and in hushed tones warned him to be careful because appellant was

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[4] Mosley testified that one of the reasons she and Beeson felt uncomfortable with appellant was that he had excluded them from being "around," and being "part of the guys too." (116 RT 7750.) Botello could not remember whether Beeson had smoked marijuana with them, but he was clear that she had not sat and talked. (122 RT 9165.)

"broke" and wanted to rob someone. (115 RT 7636; 122 RT 9171.) Appellant and Patterson left after about an hour. (122 RT 9165.)

Over the next two days, appellant pressured Botello to get him a large-caliber gun. (122 RT 9183-9190.) Appellant called Botello about six times after the visit, saying he needed the gun to rob "some Mexican people up in Hayward" who were making a lot of money by drug dealing. (122 RT 9181-9183.) In one call, appellant asked Botello about his supplier, "Chuck" Gaffey as a potential robbery target. (123 RT 9213-9214.) When Botello dissuaded him, appellant, "out of the blue," asked Botello if he loved Beeson. (122 RT 9192-9193; 123 RT 9213-9214; 124 RT 9350.) At the time, Botello thought it was a weird question, but did not consider it a threat. (122 RT 9194.)

Appellant continued to ask Botello if he knew other "suckers," besides Gaffey, to rob, and told him he "didn't want a small gun; he wanted something big." (123 RT 9213.) Botello tried to be polite and put appellant off, hoping he would go away and find a gun elsewhere. (122 RT 9184.) Botello told appellant he did not know anyone who could obtain a gun, and that his own gun was "legal from the store." (122 RT 9193.) He tried to dissuade appellant, to no avail, by encouraging him to contact his "temp agency" for legitimate work. (123 RT 9208-9209.)[5] Eventually, appellant gave Botello a deadline of Friday, December 22, 1995 to obtain a gun for him. (123 RT 9212-9213.)

On December 22, 1995, around noon or 1:00 p.m., Smith picked up appellant and brought him to the home he shared with Mosley in Emeryville. (113 RT 7471-7472; 114 RT 7541; 115 RT 7678; 118 RT

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[5] Botello, who had a "temp job lined up for the next week," told appellant to contact "a lady named Carmel." (122 RT 9191; 123 RT 9208.) Appellant told Botello he contacted her but that "that bitch tripping; she ain't going to give me a job." (123 RT 9208-9209.)

7903.) Appellant made Mosley uncomfortable. (115 RT 7678-7679.) She was taken aback that, within moments of his arrival, appellant, in her own home, was "trying to get at me" sexually by saying to Smith that "my son Little Maceo would be having a little brother who would be named Little Grayland running around." (115 RT 7678-7679; 120 RT 8925-8926; 121 RT 9027.)

Smith and appellant talked about doing a robbery together later that evening. (113 RT 7483; 114 RT 7529-7530; 121 RT 8999-9000.) Appellant called Botello again to pester him about getting a gun. (122 RT 9195-9196.) Appellant told Botello that he and Smith were going to come to Botello's apartment. (122 RT 9195-9196.) By this warning, appellant and Smith expected Botello would be there when they arrived. (113 RT 7485-7486; 116 RT 7733.) As soon as they left, however, Mosley called Beeson to tease her that "weird" appellant was headed her way and he was going to be her problem now. (116 RT 7223-7224, 7780, 7790.)

As soon as Botello heard Smith and appellant were on their way, he left. (116 RT 7792.) Botello did not have a gun for appellant and was worried that, if offended, appellant was dangerous. (122 RT 9197-9198; 124 RT 9349.) Botello was concerned because of the fight they had had before appellant went to CYA, and because appellant was just released from a lengthy term and set upon obtaining a gun to rob people. (122 RT 9197-9198.) Botello was not worried about leaving Beeson behind at the apartment since his close friend, Smith, would be with appellant. (124 RT 9342.)

When Smith and appellant arrived ten minutes later, around 3:00 p.m., Beeson told them Botello was not at home refused to let them enter. (113 RT 7486-7489; 114 RT 7553-7554; 127 RT 9651.) Beeson told them twice

that Botello was gone[6] so that Smith, with whom she would often joke around, would understand she was serious. (116 RT 7377-7378.)

Appellant was furious that Botello was gone and that Beeson would not let them in the apartment. (113 RT 7849; 117 RT 7880.) He complained to Smith that Beeson was a bitch who always listened to her boyfriend. (113 RT 7490-7491; 114 RT 7534; 117 RT 7880.) Appellant and Smith went upstairs to look for Botello at the apartment of Botello's friend, Steve Benczik. (117 RT 7861, 7880.) When Benczik was not home, appellant became upset again. (117 RT 7880.) Having found neither Botello nor Benczik, appellant and Smith returned to Smith's home in Emeryville. (113 RT 7491; 114 RT 7541.)

After their unsuccessful "visit" to Botello's apartment, appellant told Smith they should rob Botello. (109 RT 7191; 115 RT 7652; 123 RT 9267.) Smith did not want to rob his friend and refused to participate. (114 RT 7530; 115 RT 7653; 123 RT 9267.) Instead, Smith and appellant went their separate ways. (113 RT 7495.)

Appellant called Smith's home repeatedly, and Smith tried to dodge his phone calls. (116 RT 7797; 117 RT 7883; 118 RT 7901-7902.) Smith told Mosley that appellant "was sick and crazy and wanted to get and kill people." (116 RT 7751; 118 RT 7901-7902, 127 RT 9661-9662.) Smith left home, claiming he had gone to get his hair cut at someone's home until shortly after 7:00 p.m., and then met Mosley at a theater in Emeryville to see the "male-bashing movie" she had selected. (113 RT 7495-7497; 116 RT 7802.)[7]

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[6] Botello had gone to the apartment of his supplier, Collin Gaffey. (123 RT 9214-9215.)

[7] When Smith spoke to Iva Mosley, around 7:00 p.m., he told her he was rushing to get his hair cut in Berkeley. (118 RT 7895.) Mosley

(continued...)

Smith had prearranged to meet up with appellant after the movie was over. (114 RT 7537-7539.) Police later noted that Smith provided them with a "minute by minute alibi" with unusually precise detail to account for the period during the afternoon and evening in which he and appellant were apart. (109 RT 7148). Without disclosing the specifics, Smith acknowledged that appellant and Patterson had told him something that alerted him he would need an alibi. (122 RT 9096.)

When Botello learned from Beeson that appellant and Smith had come and gone that afternoon, he returned to his apartment. (123 RT 9215.) Botello had planned to shop that afternoon with Beeson's friend, Grace Sumisaki, for Christmas presents for Beeson and her mother. (123 RT 9215-9216; 124 RT 9352.) Botello left with Sumisaki, around 3:45 p.m. (123 RT 9216.) Botello's last conversation with Beeson was just after dark, around 5:00 p.m., while he was waiting for Sumisaki outside a nail salon. (123 RT 9217, 9219-9220.) Beeson was by herself at home. (123 RT 9217-9218.)

At 7:30 p.m., while Botello was at the mall in San Leandro, he received a call from Andre Williams, Botello's uncle and contemporary, who was visiting the Bay Area for the holidays and staying with their common grandfather/father. (111 RT 7276-7278.) Botello was supposed to get together with Williams that evening but was late to pick him up. (111 RT 7278.) Botello told Williams to have his father drive him to his apartment, but to first call Beeson and let her know to expect him. (111 RT 7278-7279.) Around 7:35 p.m., Williams spoke with Beeson to let her

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(...continued)
insisted that he hurry to the movie, and when he showed up, about 20 or 30 minutes later, his hair was not cut. (116 RT 7745; 118 RT 7896.)

know that he would be dropped off there shortly. (111 RT 7276, 7278-7279.)

About 15 minutes later, Williams arrived and "buzzed" Beeson to let him through the apartment's security gate, but received no response. (110 RT 7281-7283.) After waiting for about 10 minutes, Williams' father drove him to a friend's home in Berkeley. (110 RT 7282-7283.) Williams called Botello's apartment about 10 times, between about 8:00 and 9:15 p.m., and each time, received a busy signal. (110 RT 7283-7285, 111 RT 7294-7295.)

Beeson's mother also tried to reach her several times that evening and received a busy signal. (119 RT 8070-8071.) Beeson and her mother used to speak on the phone several times a day. (119 RT 8070.) They last spoke around 6:00 p.m., that evening. (119 RT 8070.) Beeson was home alone and in good spirits. (119 RT 8070.)

That same day, Beeson's friends, Elaine White and Monique Geara, stopped by after Christmas shopping, at around 6:00 p.m., and saw Beeson for about 45 minutes. (115 RT 767-7668.) White called Beeson later that evening, around 8:00 or 9:00 p.m., but, as with Williams and Beeson's mother, received a busy signal. (115 RT 7670-7671.)

Knowing that Botello had plans to be out that evening, Beeson had arranged to "watch TV and hang out" with her friends, Jennifer Onweller and Amy Kekki. (111 RT 7356.) At around 8:00 p.m., Onweller called Beeson to let her know she was ready to come over, but received a busy signal. (111 RT 7356-7357, 7362.) Onweller spoke with Beeson daily, and knowing that Beeson's phone had a "call-waiting" feature that prevented a busy signal, she became concerned. (111 RT 7362-7363.) After waiting and redialing multiple times, Onweller called the operator who told her that Beeson's phone was off the hook. (111 RT 7363-7364.)

Onweller and Kekki drove to Beeson's apartment. (111 RT 7364.) When they arrived, at about 9:30 p.m., Beeson's line was still busy. (113 RT 7424.) Finding the security gate propped open with a rock, Onweller and Kekki went upstairs to Beeson's apartment. (113 RT 7424.) The front door was locked and no one responded when they knocked. (113 RT 7424-7425.) They saw, inside the apartment, that the lights were on, the bedroom door was shut, the dogs who were usually at the window were absent, and the television was on a sports channel which was unusual for Beeson. (113 RT 7424-7425.) They walked down the block to see if Beeson had taken her dogs to the park, but did not find her. (113 RT 7425.) Onweller and Kekki returned to the apartment, and Onweller began to write a note asking Beeson to call them when she came home. (113 RT 7427.)

Just before 10:00 p.m., while Onweller was writing the note, Botello arrived home with five or six shopping bags from his Christmas shopping. (108 RT 7209; 113 RT 7427.) Sumisaki dropped him and left as soon as he went through the security gate which was still propped open with a rock. (111 RT 7343-7344; 123 RT 9221-9223.) Botello looked happy and excited to see Onweller and Kekki at the door. (113 RT 7427.) Onweller told him that she and Kekki had been knocking at the door for a little while and, with the line busy, thought Beeson was not at home. (113 RT 7428; 123 RT 9223.) Botello could see through the living room window that the television was on a sports station which was strange since Beeson did not watch sports. (108 RT 7097; 123 RT 9224.) He also heard his dogs barking from the bedroom. (123 RT 9224-9225.) The front door was locked and Botello did not have the keys with him, so he opened the front window to enter the house. (113 RT 7428; 123 RT 9225, 9227.)

2. The Murder

Appellant and Patterson arrived sometime around 8:00 p.m., planning to rob Botello. (129 RT 9863-9865; Supp. CT 108.) They brought

masking tape with them. (109 RT 7115-7116; 127 RT 9630-9631.) Patterson rang the bell and told Beeson that he wanted to buy marijuana. (Supp. CT 108.) Botello was not at home. (147 RT 11506-11508.)

After hesitating once she saw appellant, Beeson let them into the apartment. (147 RT 11506-11508; Supp. CT 109.) Appellant had Patterson put Beeson and Botello's two pitbull puppies into a bedroom. (147 RT 11509-11510.) Beeson was upset and began to make noise. (Supp. CT 11, 47-48.) Appellant thought she acted like she was not scared. (Supp. CT 50.) Appellant told her to "break herself," i.e., submit, but she refused to cooperate. (156 RT 12207-12208; Supp. CT 11, 50.) When Patterson emerged from the bedroom, he had Botello's 12 gauge shotgun. (147 RT 11511; Supp CT 111.) Beeson was beaten with the gun. (156 RT 12208; Supp. CT 10-12, 114.) Using appellant's belt, Patterson, and then appellant strangled Beeson on the floor next to her couch. (Supp. CT 11-13.)

Appellant went into the bedroom and began searching through the dresser for money. (147 RT 11511-11512; Supp. CT 9.) Appellant discovered $300 in one of the drawers and put it in his pocket before returning to the living room. (147 RT 11511-11512; Supp. CT 9, 32.) Appellant also took Botello's marijuana. (Supp. CT 32, 47-48.)

Despite her injuries, Beeson was still alive. (Supp. CT; 157 RT 12209-12210.) Just before leaving, appellant decided to stab and kill her with a chef's knife that Beeson's mother had purchased when Beeson attended cooking school. (119 RT 8063-8064, 8066; Supp. CT 15-16, 113.) Appellant later told a cellmate that Beeson had resisted, and he had stabbed the side of her face and shoulder before he went to gather his loot, telling her that she had a smart mouth and that she didn't know "who you fucking with," and later inflicted the fatal wounds, just before he left the apartment. (156 RT 12209-12210.)

Appellant stabbed Beeson eight times—once in the face, near her left ear, and seven more times in the back of her neck. (138 RT 10673-10674, 10688-10703.) The stab wounds ranged from one and one-eighth of an inch to two inches in length. Most were between two and four inches deep, and included both an exit wound and a near-exit wound in the front of Beeson's neck. (138 RT 10676, 10680-10681.) Appellant told police that his last plunge of the knife was intended to put Beeson, like a dog, out of her misery. (134 RT 10257-10258; Supp. CT 16.) In her struggle, Beeson had left bloody fingerprints on the wall. (108 RT 7097-7098.)

Beeson's death was by "asphyxiation due to strangulation and multiple stab wounds." (138 RT 10634.) She had multiple blunt injuries on her body and soft tissue hemorrhages about her head. (138 RT 10634, 10641-10644.) She had multiple scrapes and bruises around her nose, near her eye, and near her chin. (138 RT 10641-10642.) The size of the circular bruise on the bridge of her nose matched the barrel of Botello's shotgun. (138 RT 10644.) She also had bruises on both her arms, recent bruises on her leg and knee cap, and two bruises on her back, one of which measured five by five inches across. (138 RT 10648, 10653-10657.) This large back bruise had small lines, consistent with Beeson's being held down by a clothed knee or shoe, or scraped across a rug. (138 RT 10658-10659.) She had three blunt injuries to her head. (140 RT 10849-10851.)

The injuries to Beeson's neck were consistent with having struggled against being strangled, and also with being choked by a belt that was repeatedly pulled and released. (138 RT 10666-10667, 10696.) The autopsy examination showed that Beeson had been alive when she was stabbed and strangled. (140 RT 10847-10848, 10852-10853.) She most likely died within three to five minutes after her wounds were inflicted. (140 RT 10855.)

After appellant finished stabbing Beeson, he and Patterson immediately left the apartment. (Supp. CT 18, 113-1114.) Appellant told police he threw the knife into the water at Aquatic Park, in Berkeley, on the way to his grandmother's house. (Supp. CT 18.) He got rid of his shirt in which he had wrapped the bloody knife, and changed clothes. (Supp. CT 115-116.) Patterson told police they briefly stopped at his house so he could change his shoes. (155 RT 12056-1257; Supp. CT 116.)

After the murder, appellant and Patterson got together with Smith and another friend, Michael Hilliard. (114 RT 7542-7543; 116 RT 7726-7727.) On the way to Smith's house, appellant told Patterson, "don't trip, don't trip. We gonna have a alibi, we're gonna have a alibi." (Supp. CT 116.) Appellant and Patterson arrived together at Smith's apartment around 10:15 p.m., just after Smith arrived home from the movie theater. (118 RT 7897-7898.) Mosley did not allow appellant inside her home because he made her uncomfortable. (116 RT 7747-7749.)

Smith, appellant and Patterson left to get Hilliard, some fast food, and hard liquor, and headed to a park in Berkeley to joke about "old times." (114 RT 7542-7544; 134 RT 10233-10234; 154 RT 12016.) Appellant, who had no money earlier, suddenly had money to spend. (117 RT 7884; 118 RT 7912.) Appellant and Patterson were in a good mood and were bragging about the people they used to beat up when they were kids. (114 RT 7543-7544; 120 RT 8956-8957.) Patterson told police that after they were done "partying" and Patterson was driving appellant home, appellant began laughing about having done "all of that" for $200. (134 RT 10233-10234.)

3. Botello's Discovery of Beeson's Body

Just after Botello opened the front door, he dropped his shopping bags and began screaming and yelling for Onweller and Kekki to come inside. (113 RT 7430; 119 RT 8002.) He saw Beeson in the living room, laying on

the floor in blood, and noticed the apartment had been ransacked. (123 RT 9228, 9233-9235.) Onweller said that upon entering the apartment, she "[s]aw my friend on the floor with blood everywhere." (113 RT 7430.) Beeson was laying in a fetal position on the floor between the couch and television, with her face toward the adjacent wall. (113 RT 7430-7431.) Her blood was in a puddle on the floor next to her and in "handprints" on the wall. (113 RT 7431.) There was blood in her ear, on her face, on her neck and shirt. (113 RT 7432; 123 RT 9231.) She did not appear to be breathing. (123 RT 9231.) A gold chain necklace that appeared to have been cut was also on the floor between the coffee table and the television set. (113 RT 7432; 119 RT 8024.) A piece of wadded up masking tape with blood was next to Beeson's torso. (123 RT 9232-9233.) Beeson, in this position, was not visible from the window outside. (123 RT 9229.)

Onweller found the telephone under the couch cushion and used it to call 911 at 9:53 p.m. (108 RT 7027-7029; 113 RT 7430, 7432-7434) Botello took the phone from Onweller who was too upset to pass on the dispatcher's instructions about reviving Beeson. (123 RT 9236-9237.) He frantically told the dispatcher that there was blood all over, Beeson was not breathing or moving, and they needed an ambulance quickly. (108 RT 7039-7041; 123 RT 9237-9238.) He also told the dispatcher that his dogs were locked in another room, which was unusual. (108 RT 7042-7043.) The dispatcher tried to instruct Botello how to give Beeson "CPR," but Botello told him that he did not want to touch her and that she was already dead. (108 RT 7041-7042.) The 911 operator described Botello as "frantic," "very agitated," "upset," and "terrified." (108 RT 7039, 7041-7042.)

Within five minutes, the police arrived and requested immediate dispatch of medical personnel. (108 RT 7034-7035; 123 RT 9242.) At that time, Botello had blood on his hands from having touched Beeson to check

her pulse. (113 RT 7434-7435.) There was blood on Onweller's shoes from the carpet. (113 RT 7435.) When Botello opened the door to the bedroom, his two dogs ran out and also tracked blood throughout the apartment. (113 RT 7325.)

Officer Johnson entered the apartment first. (108 RT 7050-7051, 7060, 7066.) Just like Onweller, he saw Beeson curled up in a fetal position, fully clothed, by the stereo and television entertainment system. (108 RT 7054.) Officer Johnson thought that Beeson was wearing a red shirt, but later examination showed the shirt had been white and was just stained by the blood. (107 RT 6993; 108 RT 7054, Exhibit 23.)[8] As soon as Officer Johnson secured the apartment, paramedics entered with a defibrillator to attempt to revive her. (108 RT 7080-7084.) The paramedics cut off Beeson's clothing above her waist to use the defibrillator and assess her wounds. (108 RT 7085.) As the coroner removed Beeson's body from the crime scene, police found masking tape and a pink and green polyester "hair scrunchy" underneath her body. (119 RT 8010, 8022.) Nearby on the floor was a roll of masking tape that contained a drop of blood, and an unidentified phone number. (119 RT 8010-8011.)

Botello discovered that the robbers had taken $300 from his bedroom drawer, his 12-gauge shotgun, marijuana, and a piece of stereo equipment known as a graphic equalizer. (109 RT 7114, 7167; 122 RT 9160, 9162-9164, 9241; 163 RT 12782.) Botello initially told police that he suspected appellant and Smith, two associates of Patterson's, had committed the murder. (109 RT 7114-7115, 7160-7161.) Police considered Patterson a suspect as well. (109 RT 7183.) Botello also told police that before the

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[8] The photographs in Exhibit 23 are described in the hearing on in-limine motions. (24 RT 1538-1539.)

murder, Beeson had told him that she knew, via Mosley, that appellant had told Smith he wanted to kill innocent bystanders during robberies. (127 RT 9661-9662, 9683.)

4. Events Leading to the Arrest of Appellant and His Accomplice

Police interviewed Botello, Onweller, and Kekki after briefly taking them into custody at the crime scene. (127 RT 9637.)[9] Botello was distraught. (109 RT 7113.) At 5:00 a.m. the next morning, Botello called Smith to tell him that Beeson had been robbed and murdered, and he suspected appellant had committed the crimes. (114 RT 7577; 123 RT 9255; 124 RT 9388.) Smith acted like Botello was joking and hung up. (124 RT 9388.) When Botello called him back, Smith acted serious and told him that appellant had been with him the entire day and night. (114 RT 7578; 123 RT 9258-9259; 124 RT 9388.)

The day after the murder, Smith called Botello's neighbor, Steve Benczik, and told him that appellant had killed Beeson, and suddenly had money to spend. (127 RT 9639-9640.) Smith also told Benczik that he was afraid to go home, fearing that appellant was going to harm his girlfriend, Mosley. (117 RT 7886; 127 RT 9640.) After the murder, Mosley too, was afraid to stay in her apartment and within days, began staying elsewhere and eventually moved out. (117 RT 7837-7839.) Mosley told Beeson's sister, Lisa, that within a day or so after the murder, appellant began making threatening phone calls to her, asking her whether she loved her son. (117 RT 7838-7839; 119 RT 8054-8055.)

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[9] Grace Sumisaki, Christopher Rochel, and Andre Williams were also interviewed. (127 RT 9637-9638.)

A few days after the murder, Smith told Botello that appellant had wanted Smith to help him rob Botello, but Smith had refused because Botello was his "pardner," i.e., close friend. (123 RT 9266-9267.)

On December 25, 1995, the Oakland Tribune published a news article disclosing that Beeson had been robbed and murdered in her apartment. (131 RT 9991-9992.) The article said that Beeson had been stabbed and beaten over the head, but mentioned nothing about strangulation. (131 RT 9991-9992.)

Also on December 26, 1995, police discovered that appellant's electronic monitoring system had been disabled and appellant was classified as "missing," for three days beginning the evening of the murder until 7:04 p.m. on Christmas day. (109 RT 7141; 118 RT 7933-7937, 7940-7941, 7945-7947.) They conducted a parole search of appellant, and took him to the police station for a short time to adjust the strap of his monitoring device. (109 RT 7142-7144; 118 RT 7915.) They did not interview him or discuss the murder that day as they did not want to tip him off that he was a suspect. (109 RT 7144-7145, 7180-7181; 127 RT 9641-9642.) At that time, they felt that the ill-fit of his electronic bracelet was insufficient probable cause to arrest him for the murder or revoke his parole. (118 RT 7917). In the next few months, on January 26, and March 2, 1996, appellant was hospitalized for gunshot wounds and each time, was not wearing his ankle bracelet. (119 RT 8046-8048;144 RT 11265, 11267.)

In the course of the investigation, Officer Olivas talked to a number of people who had heard that appellant was bragging about having committed the murder. (133 RT 10155-10156.) When he was eventually apprehended, Patterson also told police appellant had been bragging about the murder. (Supp. CT 116.)

About a year after the murder, Smith cornered Andre Williams on the street and told him that he was not responsible for Erika's murder. (115 RT

7653.) Smith told him that appellant had asked him to participate, but he had refused. (115 RT 7653.) Andre Williams relayed this information to Botello. (115 RT 7658.)

On April 4, 1996, appellant and an accomplice, Michael Boddie, were taken into custody for robbing a Chevron station. (133 RT 10124, 10151; 144 RT 11267.) Initially, appellant provided two false aliases to the investigating officers. (130 RT 9942-9943; 133 RT 10151; 144 RT 11268.) By the next day, police had discovered appellant's true identity, and decided to interview him about Beeson's murder. (127 RT 9643; 144 RT 11268.) In his April 5, 1996, interview, appellant disclosed that he met Botello through Smith, was at his apartment twice, and met the same white girl on both occasions but never conversed or argued with her. (127 RT 9643, 9647-9650.)

Later that day on April 5, 1996, Julia Phillips made an anonymous call to police, telling them that she had heard from some friends of appellant's cousin that appellant had cut his electronic ankle bracelet and robbed and killed Botello's girlfriend. (142 RT 11054-11055; Supp. CT 78-85.)

Appellant pleaded guilty to the Chevron robbery, and remained in jail anticipating that he would be transferred to prison. (133 RT 10124; 144 RT 11269-11270.)

a. Patterson's Robbery of the Shell Gas Station

On April 30, 1996, witnesses reported the gun-point robbery of a Shell gas station in Oakland that was eventually traced to Patterson. (122 RT 9101, 9104-9105, 9114-9116; 131 RT 11026.) A police SWAT team arrested Patterson in the early hours of May 1, 1996. (125 RT 9448, 9452.) On the way to the police station, Patterson said to one of the officers sitting with him in the car, "You all didn't come get me about a murder?" (125 RT 9505.) The officer, who knew nothing about a murder, paused a

moment before responding, "No. Not unless you want to talk to me about one." (125 RT 9505-9507.) Patterson laughed and said, "Naw, I don't think so." (125 RT 9505.) When Patterson asked, "Then what are you here for?" the officer told him he would find out when they arrived downtown. (125 RT 9506.)

In the subsequent search of Patterson's home, police recovered the shotgun registered to Botello and the graphic equalizer, both of which were stolen from Botello and Beeson's apartment on the night of the murder. (125 RT 9466; 126 RT 9539; 141 RT 10999-11000.)

b. Patterson and Appellant Individually Confess to the Crimes

(1) Patterson's confession

At about 4:00 p.m. on May 1, 1996, after Patterson was interviewed and confessed to robbing the Shell gas station, Officer Olivas, a homicide detective, took Patterson to an interview room in the homicide section, at the other end of the floor of the police station. (128 RT 9710-9711, 9740.) During the course of the interview, Patterson confessed to participating with appellant in the robbery and murder of Beeson. (130 RT 10032; 134 RT 10224-10225; Supp. CT 107-120.) Specifically, Patterson told police that he went with appellant to Botello's house between 8:00 p.m. and 9:00 p.m., intending to rob him of money and marijuana. (Supp. CT 108.) Patterson claimed that he did not want to go, but that appellant had called him "a punk" and "was just talking about how he's take me off the map." (Supp. CT 108.) When they arrived, appellant told Beeson to take her dogs in the bedroom which she resisted doing, initially, saying they would not bite. (Supp. CT 109.)

Patterson claimed that the dogs escaped from the bedroom and appellant instructed him to put them back. (Supp. CT 109.) He told police that when he returned to the living room, he saw appellant straddling

Beeson on the ground, face down, while he strangled her with his belt and she struggled against him. (Supp. CT 109-110.) Patterson claimed that at appellant's instruction, he returned to the bedroom to get Botello's shotgun. (Supp. CT 111.) When he returned to the living room again, appellant was still strangling Beeson and was complaining, "[t]his is a strong bitch, this is a strong bitch." (Supp. 112.) Patterson claimed that he laid the shotgun on the couch, and appellant picked it up and used it to beat Beeson in the face. (Supp. CT 114-115.) Patterson said that during this time, again at appellant's direction, he was gathering Botello's marijuana which Botello stored in distinctive plastic containers. (Supp. 112; 124 RT 9391-9392.)

Finally, Patterson said, after appellant became tired and Beeson became too weak to struggle, appellant got up, went to the bedroom, and returned with Botello's money. (Supp. CT 112.) Patterson claimed that as appellant was "in the room going through stuff," he was stationed by the front door as the lookout. (Supp. CT 113.) Patterson told police that when they were ready to leave, Beeson was still breathing, and appellant got a knife from the kitchen and looked at Patterson, "like what you want me to do?" before he began stabbing or "pumping" Beeson. (155 RT 12053; Supp. CT 113.) Later in the interview, Patterson said that, at appellant's instruction, Patterson got the knife from the kitchen, and gave it to appellant who told him, "give me it."

Patterson claimed that, after the murder, he left the apartment first, and appellant followed while carrying the knife wrapped in his T-shirt. (Supp. CT 113-115.) Patterson said appellant kept saying, "that was a strong bitch" and "I had to killer her, I had to stab her." (Supp. CT 114, 119.)

Patterson said that from the murder scene, they next went to Aquatic Park in Berkeley where appellant threw away the knife,[10] and then on to Patterson's house so Patterson could change shoes, and to appellant's grandmother's house so appellant could change clothes. (Supp. CT 115-116.) Next, on their way to Smith's house, Patterson said that appellant kept telling him, "don't trip, don't trip. We gonna have a alibi, we're gonna have an alibi." (Supp. CT 116.) Patterson said that appellant kept the shotgun at his house the first night but later gave it to Patterson, worried that police would search him because he had "cut" his "ankle bracelet." (Supp. CT 117.) Patterson also told police that he was concerned when appellant began bragging about the murder as if he had done it alone. (Supp. CT 116, 118.)

After Patterson's taped interview, police took a break and placed Patterson back in room 202, i.e., the adjacent room that was not set up for recording. (134 RT 10217, 10241-10243.) When they returned after the break, Patterson told them, that to strangle Beeson, appellant pulled the straps of the belt around her neck using all his strength while counting to 20, released a little bit, and then repeated pulling while counting to 20. (134 RT 12044-12045.)

(2) Appellant's confessions

After Patterson confessed, Officer Olivas arranged to have appellant transported from jail to the police station to be interviewed. (128 RT 9776-9778.) On May 3, 1996, appellant spoke with Officers Olivas and McKenna after he was advised of and waived his *Miranda*[11] rights and privileges. (128 RT 9785.) Appellant initially denied any involvement or contact with Beeson during the evening she was murdered. (128 RT 9804-

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[10] The knife was never recovered. (130 RT 9954-9956.)

[11] *Miranda v. Arizona* (1966) 384 U.S. 436, 444.

9806.) Eventually, police showed appellant a picture of Patterson in custody, and played a few minutes of Patterson's taped statement. (129 RT 9855-9860.) Appellant's demeanor, which had been confident and arrogant throughout the interview, suddenly changed. (129 RT 9851, 9860.) He put his head down and under his breath said, "That motherfucker," and then, "The streets make me bitter. (129 RT 9860-9861.)

At the point appellant appeared ready to confess, police surreptitiously recorded his statements ("first recording"). (129 RT 9875-9879; Supp. CT 151-170.) Appellant's demeanor on the first recording was highly animated and excited as he described and indeed, voluntarily reenacted his and Patterson's roles in strangling and stabbing Beeson, and Beeson's role as the victim. (129 RT 9899-9902; 130 RT 9922; 145 RT 11323-11324; Supp CT 151-170; Exh. 1.)[12]

Appellant confessed to robbing and murdering Beeson. (129 RT 9863-9865; Supp. CT 13, 17, 25, 32, 153-184.) Just as in Patterson's statement, appellant admitted that he personally strangled and stabbed Beeson. (Supp. CT 13-16.) He also admitted robbing her of $300, marijuana, and the shotgun, although he claimed not to remember having stolen the graphic equalizer. (129 RT 9897-9898; Supp. CT 168, 177.) At the end of the first recording, appellant expressed his satisfaction at getting this off his chest. (129 RT 9902; Supp. CT 19.)

Immediately after the first recording, appellant knowingly provided another taped statement to police, i.e., "second recording," in which he spoke in a calm and measured demeanor and, once again, confessed to strangling and stabbing Beeson in the course of robbery. (130 RT 9924-

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[12] The surreptitious first recording of appellant's statement to police was introduced as Exhibit 4 at the preliminary hearing, and relabeled Exhibit 1 at trial. (11 CT 2937.)

9927; Supp. CT 172-184.) In his statements to police, appellant provided details about the crimes that would have been known only to the perpetrators such as the position of Beeson's body and her various wounds and injuries. (129 RT 9886; 130 RT 9922, 9928; 132 RT 10101-10103; 148 RT 11589, 11601; Supp. CT 11-12.)

One of the primary differences between the confessions of appellant and Patterson was that each one blamed the other for fighting with Beeson and beating her with the shotgun. (147 RT 11525-11527; Supp. CT 10, 114.) Appellant alone talked about a motivation for strangling Beeson, namely to keep her from making a commotion that would draw attention to their crime. (134 RT 10254; 149 RT 11586.) In appellant's version only, Patterson started to beat Beeson because, having visited two days earlier, Beeson was not taking them seriously as robbers. (129 RT 9865; 134 RT 10250-10251; 149 RT 11573-11574; Supp. CT 10-11.) Although both Patterson and appellant described appellant having gone alone into the apartment bedroom, only appellant described how he had to search the room before he found the money he took during the robbery. (149 RT 11574-11576; Supp. CT 9.) Appellant claimed that he instructed Patterson to strangle Beeson when she began making a commotion which would draw attention to their robbery. (129 RT 9865, 9892-9895; 134 RT 10254; Supp. CT 10-11.) Appellant alone raised a concern, which he eventually attributed to Patterson, that he was motivated to stab Beeson because she could identify them. (134 RT 10253-10255; 1149 RT, 11590-11591, 11599; Supp. 13.) While Patterson claimed that appellant had planned the robbery from the start and had threatened him if he did not participate, appellant claimed his initial intent was to buy marijuana and he decided to commit robbery once he was inside the apartment. (134 RT 10246-10247; Supp. CT 4, 107-108.) Appellant also claimed that he stayed at home after the murder, while Patterson described having changed shoes and clothes,

before going out to "party" with Smith and Michael Hilliard at a park that evening. (134 RT 10258-10259; Supp. CT 18-19, 116-117.)

Notwithstanding his accusations against Patterson, appellant admitted primary responsibility for strangling and stabbing Beeson. In appellant's version, he claimed that he had to strangle Beeson by grabbing one end of the belt when Patterson, acting alone, was unable to "put her to sleep" as appellant had instructed. (134 RT 10256; Supp. CT 11.) Appellant similarly claimed that he stabbed Beeson after Patterson lost his nerve and refused to "slice her" with the kitchen knife appellant had given him. (134 RT 10256-10257; 135 RT 10342-10345; 149 RT 11602-11603; Supp. CT 15-16.)

Appellant claimed he stabbed Beeson three times—first, to scare her into submission; second, as an accident; and third, to put her out of her misery as one would do to a suffering dog. (134 RT 10257-10258; Supp. CT 15-16.) Patterson claimed that appellant stabbed Beeson at least four times. (147 RT 11537; Supp. CT 113.) Appellant alone described the direction of the thrust and the position of the stab wounds. (148 RT 11604-11605; 149 RT 11634-11635; Supp. CT 15-16.) He alone described how Beeson became weaker and began to lose consciousness as he stabbed her. (149 RT 11637-11638; Supp. CT 16.) Appellant claimed that after the murder he left Beeson's apartment first and Patterson followed seconds later, while Patterson reversed the order and said that it took appellant a couple of minutes to leave. (147 RT 11538; Supp. CT 17, 114.)[13]

Minutes after appellant gave police the second taped statement, he asked to call his mother. (130 RT 9930, 9932.) Officer Olivas told him the call was going to be recorded. (130 RT 9930, 9932.) Police set up a hand-

[13] Appellant's testified at trial about differences between his and Patterson's confessions. (147 RT 11521-11538.)

held recorder to hook into the telephone receiver. (136 RT 10434-10435. Appellant told his mother that he had stabbed a woman to death, and, three times, told her that he told the police the truth. (146 RT 11457-11460, 11486, 11492; Supp. CT 35-39.)

Later that same evening, appellant made two additional recordings for the District Attorney's investigators—one about his role with Patterson, and the other without mention of Patterson—in which he acknowledged committing the murder in the course of the robbery. (130 RT 9930-9931; 141 RT 10976-10979; Supp. CT 205-229.)

5. Investigation and other Events While Appellant was in Custody

a. Interview of Julia Phillips regarding her earlier "anonymous" call to police

On May 9, 1996, Officer Olivas interviewed Patterson's "old, on occasion" girlfriend, Latonya "Tonya" Wilson. (130 RT 9947-9948; 142 RT 11093.) He played Wilson a tape of the anonymous call of April 5, 1996 that accused appellant of having murdered Beeson, and learned that the caller was Julia Phillips. (130 RT 9947-9949.) He interviewed Phillips that same day. (130 RT 9949.) Phillips was frightened that police had identified her and she was afraid that appellant would find out she made the call. (142 RT 11057.)

b. Interview of Tyrone Freeman

On May 15, 1996, just after he interviewed Julia Phillips, Officer Olivas received another anonymous call from a woman informing him that Tyrone Freeman, a person who had been in a holding cell with appellant at the jail, had relevant information about appellant and his murder of Beeson. (130 RT 9951, 9954.) Police interviewed Freeman at the jail the next day. (156 RT 12270.)

A week earlier, on May 8, 1996, Tyrone Freeman and appellant were together in a holding cell awaiting court proceedings. (156 RT 12201, 12214.) Appellant told Freeman that in the course of a robbery, he had pistol whipped and then murdered a white girl by strangling her with a belt and then stabbing her with a knife. (156 RT 12203-12205, 12209-12210, 1221.) Appellant said that he and his brother-in-law, "Nate," entered the victim's apartment to commit the robbery, but that the victim, later identified as Beeson in a news article, had a "smart mouth," and refused to cooperate. (156 RT 12204, 12207-12208.) Appellant then pulled out a gun, told "Nate" to go search the house, and demanded Beeson submit or "break herself." (156 RT 12208.) Appellant told Freeman he had pistol-whipped her before removing his belt and choking her. (156 RT 12208-12209.) Appellant said that Beeson tried to grab a knife off a counter, but that he grabbed it instead. (156 RT 12209). Appellant told Freeman that he started scratching the side of Beeson's face with the knife because she was "pissing him off" with her "smart mouth." (156 RT 12209.) Freeman recounted, "He basically said you don't know who you fucking with. Then he stabbed her like right in the back of the shoulder blade." (156 RT 12210.) Appellant wore surgical gloves during the crime. (156 RT 12210.) He told Freeman that "Nate" had found money in the back bedroom and spoke of pit bull dogs in the back room as well. (156 RT 12205-12206.) In addition to the money, they stole a chrome-plated pistol-grip shotgun, and a digital scale. (156 RT 12205.) Appellant also told him that before he and "Nate" left the apartment, appellant stabbed Beeson in the back to put her out of her suffering. (156 RT 12210.)

Appellant told Freeman that he had partially confessed to police, but was going to blame the entire crime on "Nate," and claim that he knew nothing. (156 RT 12201, 12211.) Specifically, appellant was going to say that "Nate" came to him the day after the crime and confessed to having

done everything while under the influence of drugs and alcohol. (156 RT 12211.) Appellant told Freeman he was going to recant and falsely claim that he was not of sound mind when he made his confession. (156 RT 12224.)

c. Botello's confrontation with Patterson outside barbershop

Patterson was released on bail on July 11, 1997. (149 RT 11674; 10 CT 2618.) Sometime after Patterson's release, Botello was at a barbershop getting his hair cut when Patterson walked in. (124 RT 9393-9394.) As soon as they made eye-contact, Patterson left, and Botello and other people there followed him out to the street. (124 RT 9394.) Patterson told Botello that appellant had forced him to come with him to Botello's apartment, but that he was just the lookout while appellant committed the murder. (156 RT 12237.) Botello wanted to kill Patterson, but decided he could do it with so many people surrounding them. (124 RT 9403.)

d. Patterson's attack on Julia Phillips

In the late evening of or early morning following September 24, 1998, Patterson called Julia Phillips, asking her to go with him to smoke a "joint." (142 RT 11060.) Patterson gave no indication he knew about Phillips' anonymous call to police, made two years earlier, that implicated only appellant in Beeson's murder. (142 RT 11059-11060.) Based on their conversation, Phillips expected that they were also going to pick up Latonya Wilson. (142 RT 11061, 11093.) Instead, Patterson drove away from Wilson's home and headed toward King Middle School, in North Berkeley. (142 RT 11061-11063.) When Phillips asked why they were heading toward the school, Patterson told her, "We're going to talk." (142 RT 11064.)

When they arrived at the middle school, Phillips and Patterson sat on some benches in a dark, park-like playground area away from the street.

(142 RT 11064-11065, 11067, 11117, 11123.) Instead of smoking a joint, Patterson told Phillips that he needed to ask her a question, namely, whether she was the one on "that tape" of the phone call to police. (142 RT 11065-11067.) Phillips was scared and denied she had made the call. (142 RT 11067.) She later related that Patterson had told her, he did not care or was not worried about it "because the tape didn't say anything about me." (142 RT 11067-11068.) Patterson told her he was cold and pestered her to sit on his lap. (142 RT 11069-11070.) Phillips, who was scared, quickly suggested they go back to Patterson's car. (142 RT 11069-11070.) On the way to the car, Patterson asked her again if it was her voice on the anonymous-call tape, and Phillips told him, no, that it belonged to appellant's cousin, Lakeisha Lovely. (142 RT 11069.)

Once they were in the car, Phillips asked Patterson about smoking "weed." (142 RT 11071.) Phillips related that Patterson told her, "We're not smoking weed," and then demanded she "give me some head," saying, "I'm trying [to] have some fun and get all the sex I can because I might have to do some time." (142 RT 1071-1072.) Phillips refused, and Patterson began to threaten to "slap" and "beat your ass." (142 RT 11071-11072.) When Phillips tried to get out of the car, Patterson began beating her in the face. (142 RT 11072-11075.) Patterson came around to the other side of the car to continue beating Phillips, and knocking out her front teeth, breaking her nose, and causing bruising so severe that one of her eyes swelled shut. (140 RT 10900; 142 RT 11076, 11089-11090.) Phillips related that Patterson beat her in the car's passenger seat, the back seat, midway out of the car, and outside the car, and strangled her repeatedly to stop her from screaming. (142 RT 11076-11077, 11086.) He ripped off her shirt and bra, and slammed the car door against her legs. (142 RT 11079-11080, 11092.) Phillips heard him say, "I'm going to kill you," I'm going to do you like we did that bitch," "That was you on that tape," and "I don't

want to have to do this to you. You are going to end up like that bitch." (142 RT 11082-11083.) He repeated these kinds of statements throughout the attack, linking his "taking her" in the car to killing her just as had been done to Beeson. (142 RT 11075, 11084-11085.) Phillips resisted being forced back into the car by holding onto a nearby pole. (142 RT 11080-11081.) Some of her body was underneath the car when Patterson threatened to run her over. (142 RT 11085.)

A neighbor heard and described her screams as "blood curdling." (139 RT 10789.) A group of fraternity brothers from the university who were attending an event at the middle school, also ran toward the screams and saw Patterson trying to force Phillips into his car. (139 RT 10821-10825, 10827.) One of the fraternity brothers shone his flashlight on them and said, "Hey, what are you doing?" (139 RT 10826.) Patterson quickly let go, and said "Don't you mind. That's my new wife. She's acting crazy, or kind of crazy," before he quickly drove away from the scene. (139 RT 10795, 10816, 10827.) Police arrived on the scene at 2:10 a.m. to investigate. (156 RT 12228) In 1999, Patterson was convicted of several charges stemming from the attack on Julia Phillips, including retaliation against a prosecution witness. (140 RT 10845; 155 RT 12102.)

6. Trial of the Guilt Phase

a. Incidents leading Smith and Mosley to Fear Testifying

At trial, the prosecutor admitted evidence, through impeachment, that Mosley and Smith were frightened about testifying at trial. (119 RT 8071-8075; 121 RT 9081-9082.) In September 2002, at the start of trial but before the presentation of evidence, appellant called Smith from jail. (120 RT 8955-8956.) Smith would not disclose the subject matter, but admitted that he told appellant he could suck his dick and hung up on him. (114 RT 7550, 7562; 120 RT 8955-8956.) Also that fall, Smith refused to meet with

an investigator with appellant's defense team. (114 RT 7563-7564.) Mosley told the prosecution that Smith was upset that a defense investigator had asked him to provide appellant's alibi for the night of the murder. (113 RT 7498-7499,7505-7506; 114 RT 7550-7551; 116 RT 7723; 120 RT 8927-8928; Supp CT 73.)[14] On December 22, 2002, the anniversary of Beeson's murder, the Oakland hair salon that Smith and Mosley operated was burglarized, and a day or two later, Mosley's car was broken into while parked at her mother's house in Berkeley. (114 RT 7568, 7570; 115 RT 7686-7687.) Smith and Mosley believed that these burglaries, occurring right before trial and on the anniversary of Beeson's death were threats intended to intimidate them from testifying. (115 RT 7688-7691; 119 RT 8072-8075; 120 RT 8947-8949, 8964-8965.) While waiting outside the courtroom during trial, Smith, echoing Mosley's statements just after the crime, told Beeson's mother that he was afraid of what might happen to his children if he testified. (114 RT 7547-7549; 119 RT 8071-8076.) He made similar statements to the prosecutor and his inspector that Mosley and their children would suffer harm if he testified. (120 RT 8963-8964.) Smith refused to allow his interviews with police to be recorded. (121 RT 9017.)

Smith indicated to the district attorney and his investigator that appellant and Patterson had admitted robbing and killing Beeson, but told them he did not want to talk about it. (120 RT 8957-8958.)

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[14] Smith refused to speak but nodded affirmatively when the prosecutor and his inspector asked him to tell them about when appellant asked him to lie and provide him with an alibi for the night of the murder. (120 RT 8969-8970; 121 RT 8999.)

b. Appellant and Patterson testify at the guilt phase of trial

Appellant testified at trial, and Patterson also testified on rebuttal. (144 RT 11245; 149 RT 11675.) Appellant's defense was that he was never at the crime scene, was coerced by police into providing a false confession, and that there was no physical evidence that connected him to the crime scene. (146 RT 11491; 147 RT 11532; 163 RT 12786-12787, 12789-12790; 164 RT 12901, 12936.) Specifically he claimed that on the night of the murder, he took the bus to his "Auntie's" house and stayed there between 7:00 p.m. and 10:00 p.m. (144 RT 11259-11260.) Appellant said that the Officers McKenna and Olivas had coerced him to provide a false confession by threatening him with the death penalty, and they had continued to interrogate him after he had invoked his right to counsel and his privilege against self-incrimination. (144 RT 11276-11277, 11279-11280.) Contrary to police testimony, appellant claimed that Officer McKenna had shown him a picture of the shotgun stolen from Botello's house and claimed the gun had appellant's fingerprints. (144 RT 11275.) Appellant also claimed that he learned various details of the crime from the police officers during the interview, and from Patterson's taped statement which the officers played for him in its entirety, and replayed after he asked to hear it again. (144 RT 11276-11279, 11282.) Appellant testified that he lied to his mother about his having killed Beeson because police were standing nearby and he wanted to keep his "deal" with police to avoid the death penalty and to prevent his mother from coming to court and making a scene that would jeopardize this bargain. (144 RT 11284-11285;146 RT 11478-11480.)

Appellant called six other witnesses in his defense. Appellant's two defense investigators and Patterson's investigator discussed the extent and appropriateness of their respective contacts with Smith. (143 RT 11167-

11168, 11207-11208, 11211-1212.) The property manager of Beeson and Botello's apartment testified that he had suspected there was drug activity in the apartment. (143 RT 11216-11217.) Beeson's parents' landlord similarly testified about evicting Beeson's family due to Botello's living there and drug involvement. (143 RT 11220-11221.) Appellant's aunt served as appellant's alibi witness, testifying briefly that while she could not remember when or how many times, at some point between appellant's release and April 1996, appellant came to her house and it could have been after dark. (144 RT 11232-11233.) She also testified that on January 26, 1996, she and a younger friend of appellant were shot as bystanders when appellant was standing in front of her house. (144 RT 11233)

In closing, appellant's counsel argued that police erroneously focused on appellant based on street rumors that were fueled by appellant's being "the odd man out[,] [t]he new kid on the block" who was "weird," "wants to rob people," and "makes us feel uncomfortable." (164 RT 12916; 165 RT 12972.)

Patterson testified in rebuttal that he too was not present at the murder and had provided a false confession to police. (149 RT 11677-11678.) He claimed that police had threatened him with the death penalty and promised him he would receive bail if he claimed that he had witnessed appellant commit the murder. (149 RT 11683-11684; 151 RT 11813-11814; 155 RT 12060.) When cross-examined, Patterson admitted that while out on bail he told appellant that he confessed and implicated him because "the police had beat me up." (155 RT 12051.) Despite no outward appearance of injuries, Patterson claimed that Officer Madarang had simultaneously hit and choked him with one hand, while holding a pen in his other hand, resulting in a possible abrasion on Patterson's inside lip. (151 RT 11814-11815.)

Jurors deliberated for approximately 10 hours over the course of three days before rendering verdicts of guilty on all counts against both defendants. (168 RT 13181-13185; 11 CT 2716, 2719, 2722.)

B. Penalty Phase Evidence

During the penalty phase, the prosecution introduced evidence in aggravation under section 190.3, subdivision (b) (Factor B evidence), and victim impact evidence consisting primarily of the testimony of Beeson's mother and sister and some photographs, cards and letters, and a report card. (177 RT 14048, 14054, 14060, Exh. 138.) Appellant introduced an investigator to rebut testimony that appellant was the aggressor in one of his jailhouse fights, and an expert in learning disabilities to establish that appellant suffered from dyslexia, attention deficit hyperactivity disorder (ADHD), and weaknesses in executive functioning that had not been treated. (183 RT 14401-14411; 184 RT 14448.)

1. The prosecution's Factor B evidence

The prosecutor introduced evidence of criminal activity involving 19 incidents of violence or threats of violence as Factor B evidence. The first three incidents, in March 1989, September 1990, and May 1991, occurred before appellant was sent to CYA. The next four incidents occurred while appellant was at CYA and were directed toward CYA staff or other wards. The three incidents that followed, each of a sexual nature, occurred while appellant was briefly on parole at the end December 1995 through the beginning of April 1996, and were all directed at Julia Phillips. The next incident was appellant's robbery of the Chevron station that occurred just before he confessed to Beeson's murder. Eight other incidents occurred while appellant was in jail awaiting trial of this case, and involved two thwarted attacks against inmates and additional criminal activity directed at sheriff deputies or other jail staff.

a. The three incidents before CYA

(1) Threats and attempted assault of Dejuana Logwood in her van

On March 6, 1989, appellant threatened and tried to attack Dejuana Logwood. (172 RT 13520-13533.) Logwood and her boyfriend had just arrived home and were exiting Logwood's van when they were approached by appellant and an accomplice. (172 RT 13521-13523.) The accomplice pulled a gun on Logwood's boyfriend and he fled. (172 RT 13522-13526.) Logwood remained in the van and tried to find her keys which had fallen out of her purse. (172 RT 13526.) Appellant and his accomplice began threatening Logwood, saying things like, "[l]et us in. Give us your money or we're going to kill you." (172 RT 13527.) Logwood opened her sunroof and began screaming for help. (172 RT 13528.) Appellant had a long stick or umbrella which he used to jab, and eventually cracked, some of the van's stained-glass portholes. (172 RT 13528-13530.) When Logwood found her keys, the accomplice stood in front of the van, pointed his gun at her, and demanded she give them a ride. (172 RT 13531-13532.) Appellant stood next to her door. (172 RT 13531.) Both appellant and the accomplice told Logwood they were going to count to ten and shoot her if she did not let them in. (172 RT 13532.) Logwood testified:

> I said, "Okay. I'm going to let you guys in." And with that gun pointed at me, I'll never forget, that was the worst thing ever happened in my life. So, I started up the van and I just took off. And then I hear gunshots, so I'm swerving and just going for it. And that was just terrible.

(172 RT 1353-13532.)

(2) Resisting being arrested by Officers Seib and Randall

On September 22, 1990, Officers Seib and Randall of Berkeley Police Department approached a large group of men standing together in a "hot

spot" of drug activity. (176 RT 13953-13954.) Appellant broke away from the group and appeared to toss something into the bushes. (176 RT 13954.) After a pat-down search revealed appellant had rock cocaine in his sock, he tried to flee. (175 RT 13955-13956.) Police grabbed appellant and the two officers wrestled with him for some amount of time before they could handcuff him. (176 RT 13956.)

(3) The high-speed chase in which appellant rammed a police car and threatened officers

On May 21, 1991, at around 2:30 a.m., appellant initiated a high-speed car chase through Berkeley and Oakland that lasted a half-hour. (172 RT 13586, 13589, 13594-13597). In the course of the chase, appellant discarded cocaine and a .357 magnum revolver, and rammed a police car which had swerved to avoid a head-on collision. (172 RT 13596-13597, 13607-13609.) While appellant was being booked, he told the officer who chased him, "I shouldn't have run. I should have got out of my car and started shooting at you." After the officer who was in the car he rammed entered the room and said, "You almost killed me, my friend," appellant responded, "Oh, you are the punk asshole I rammed. I should have run straight into you and then jumped out and started shooting." (172 RT 13610.) The officer responded, "You mean you tried to hit me?" and appellant said, "Hell mother fucking yeah, I did. I was trying to fuck you up. I ain't scared of no punk ass Berkeley police. I would have had a bigger car, I would have taken out hell of cars. Let me be in a fifty [Mustang] next time and see who wins." (172 RT 13610.)

b. The four incidents at CYA's Paso Robles facility, and appellant's purported insight about his aggression before his release on parole

(1) Threats and struggles against CYA teacher Ream, and security staff Spinks and Bittick

On July 16, 1993, at around 11:00 a.m., appellant became agitated during a search at CYA's Paso Robles facility, and verbally abusive toward his teacher, Juanita Ream (formerly McEwen). (174 RT 13814-13815; 175 RT 13921-13922.) Kerry Spinks, the group supervisor charged with security arrived to remove appellant from the classroom. (174 RT 13811-13812.) Appellant was initially cooperative until Spinks tried to search his shoes. (174 RT 13816.) Appellant, who was handcuffed, became verbally abusive, and challenged Spinks to settle things "one-on-one." (174 RT 13816.) Appellant also challenged and threatened the CYA Senior Youth Counsel, Dan Bittick, and struggled against him to escape while being taking to the van transporting him to temporary detention. (174 RT 13816, 13825, 13832.)

When appellant returned to the classroom, having been "written up" for the earlier misbehavior, he continued to act in a threatening manner, calling the teacher a coward and a "bald-hair bitch," and saying, "I don't have to listen to you. You're not my teacher. You're just a bitch." (175 RT 13918, 13920-13923.) The teacher testified that she "hardly did any write-ups at my job in the eight years I was there," but had written up appellant for threatening behavior and had him removed by security three times during the summer of 1993—on July 16, July 19, and August 3. (175 RT 13920, 13923.)

(2) Attempted sexual assault of roommate with a dirk

On February 11, 1994, around 7:30 p.m. appellant attacked his roommate at CYA's Paso Robles facility using a dirk while threatening to sexually assault him. (174 RT 13795-13797, 13804.) While doing "lockouts," youth counselors overheard appellant on the room intercom on saying to his roommate "You are going to be my pussy," "You are going to give it to me," and "I'll make you submit." (174 RT 13795.) Senior youth counselor, Jeffrey Germond, ran to appellant's room and found him leaning on his bunkmate who was on his back on the lower bunk while appellant clenched a sharpened toothbrush like an "ice pick" at his bunkmates throat. (174 RT 13796, 13805.) Germond reported "[b]oth wards were completely bathed in sweat and breathing deep and rapidly." (174 RT 13796.) As Germond pulled appellant off his bunkmate, appellant repeatedly warned his victim to say they were horse playing. (174 RT 13796.) Once cuffed, appellant physically resisted being removed from the room and threatened Germond with bodily harm. (174 RT 13796-13797.)

(3) Attack on ward Onie in the shower

On July 15, 1994, appellant attacked another ward at CYA, Daryl Onie, while they were in the showers and supervised by at least two and possibly three staff members. (175 RT 13894-13895, 13915-13916.) Appellant was maced, but continued to chase Onie down the hall where he was maced and eventually handcuffed. (175 RT 13895.) After the incident, when asked why he would continued to pursue Onie, appellant responded, "If I'm going to catch some time, why should I stop?" (175 RT 13897.)

(4) Attack on CYA counselors Smith and Barkas

On November 10, 1994, appellant attacked CYA Paso Robles counselors Dwight Smith and Tim Barkas. (172 RT 13549-13550.) After arguing with the counselors earlier that evening that he was slighted on his portion of enchiladas, appellant began screaming and banging on his cell for the next couple of hours, and encouraged the other wards to join him. (172 RT 13542-13545; 175 RT 13899.) Smith and Barkas followed prescribed progressive measures of discipline, leading them eventually to open enough of appellant's cell door to spray mace inside. (172 RT 13546-13549.) Appellant, who had wrapped himself in a blanket to avoid the mace, ran from the back of his cell and hit the door with enough force to escape to the hallway. (172 RT 13549-13550.) Appellant began punching and wrestling with the youth counselors, injuring Smith in the ensuing fight. (172 RT 13553.) In addition to using the blanket to shield himself from the mace, appellant had put some kind of oil or grease on his body that made him too slippery for Smith and Barkas to subdue. (175 RT 13904.) Another youth counselor, Valerie Godfrey, left her post in the control room, snuck up on appellant from behind, grabbed him by the back of his head, and sprayed mace directly at his face. (175 RT 13904.) Godfrey described the difficulty of gaining control of appellant:

> Q. Was he hard to get a hold of with all those slippery oils?
>
> A. He was almost impossible—at one point I got one cuff on him; he got the cuff loose and swing his cuff around.
>
> Q. How did you finally get control of him?
>
> A. I sat on him.
>
> Q. Okay. And at that point were the three of you able to get him into handcuffs?

A. Yes, we had to cuff his feet first while I was sitting on his upper shoulder and neck, and then got a hold of the loose cuffs that I had gotten on one.

(175 RT 13905.)

(5) Appellant's good behavior before his release on parole

Between December 1994 until his release in December 1995, appellant was housed at "Chad," another CYA facility. (176 RT 13961.) During this 12-month period, appellant had no "Level B" discipline for serious offenses. (176 RT 13964.) He performed well in his assigned job as hall worker, and in classes addressing empathy towards victims and anger management. (176 RT 13964-13966.) In noting appellant's progress and his insight into his past behavior, CYA senior youth counselor, Craig Jackson, noted that appellant "has stated that he often reacted aggressively in order to gain stature among his peers and to make himself feel good." (176 RT 13969-13970.)

c. Incidents after appellant's parole from CYA

(1) Three incidents involving sexual violence or threats of violence directed at Julia Phillips

Julia Phillips testified that during the roughly three-month period when appellant was out of custody, between December 12, 1995 and April 4, 1996, appellant repeatedly pressured her to have sex with him. (170 RT 13360, 13371.) She described, with specificity, three incidents that occurred at the home of her friend and appellant's cousin, Lakeisha Lovely, who lived downstairs from appellant when he stayed with his sister. (170 RT 13360-13361.) In the first instance, appellant pinned Phillips on the floor while she was sitting under a hot hair dryer, squatting over her with his pants down and penis exposed, groping her and demanding oral sex while she tried to push him away. (170 RT 13361-13364; 171 RT 13457.)

On another occasion, at Lovely's house, Phillips was sitting on a couch/bed and watching television with Lovely, appellant, and appellant's little brother, Christopher. (170 RT 13364-13365.) Appellant pushed Phillips down and straddled her, pinning her down by her wrists. (170 RT 13365.) When appellant let go of one hand to pull down her pants, Phillips tried to fight him off. (170 RT 13365-13366.) Appellant grabbed her wrists again and demanded his little brother pull down Phillips's pants. (170 RT 13366.) His brother refused telling appellant to "get off of her," and, together with Lovely, told appellant to leave Phillips alone. (170 RT 13366.)

The third incident occurred sometime after January or March 1996, when appellant had a cast on his leg from having been shot. (119 RT 8046-8048; 170 RT 13369, 144 RT 11265, 11267.) Once again, at Lovely's, appellant began pressuring Phillips to have sex. (170 RT 13367-13368.) Phillips retreated to the bathroom to get away. (170 RT 13368.) Appellant entered the bathroom, shut the door, turned out the light, and pulled out a gun. (170 RT 13368-13371.) Phillips was extremely frightened. (170 RT 13370.) When asked what she thought was going to happen, she said, "I don't know. I was in a dark bathroom and he had a gun." (170 RT 13370.) Appellant eventually let her out when Lovely's mother began banging on the door and demanding they come out. (170 RT 13370-13371.)

Phillips eventually acquiesced to appellant's demand for sex, testifying:

> He eventually was just—you know, pushing me around a lot, so I just gave in to him.
>
> [Witness crying].
>
> And he didn't think I was going to give in because I had resisted him so much, so we walked out the back door and he held me by my neck up the stairs to his sister's house. And I told him he could let my neck go because I wasn't going to run. And he still

held my neck. But we went in and I laid down and let him do whatever he wanted.

(170 RT 13371.)

Phillips explained, "I was tired of being harassed by him. I was tired of being touched and poked and pulled." (171 RT 13464.)

(2) Robbery of the Chevron Station

On April 4, 1996, appellant and an accomplice robbed a Chevron gas station on MacArthur Blvd. in Oakland, using a gun and threatening to kill the gas station worker. (175 RT 13864-13867.)

d. Incidents occurring while appellant was in jail awaiting trial for Beeson's murder

(1) Attack on jail guard when water cut off after shower time ended

On March 1, 1997, around 2:00 p.m., appellant attacked jail guard, Deputy Lannon and broke his nose. (173 RT 13687-13691.) Appellant had run into the shower just as the control room technician had flashed the lights that prisoners needed to return to their cells to be counted for "lock down." (173 RT 13680, 13683.) Appellant was told he would have two minutes to wash off his soap and became upset when, after about five minutes, the shower water was turned off and Deputy Lannon told him to return to his cell to rinse off or sit in an isolation cell. (173 RT 13683-13688, 13696-13967.)

(2) Attempted attack on inmate while loading onto prison bus for the courthouse

On February 6, 1998, appellant attacked a fellow inmate on the bus that transported prisoners from the jail to court. (172 RT 13507-13508.) Appellant had freed his hands and, had he not been stopped by the guard, he had ability to use waist chain from his restraints as a weapon. (172 RT

13502, 13507-13509.) Both appellant and the other inmate, Juan Merced, were held in administrative segregation, and thus isolated from other prisoners. (172 RT 13503-13506.) Appellant told Merced he attacked him for saying he was in protective custody, a classification that often applies to pedophiles, gang dropouts and inmates of slight stature who cannot protect themselves. (172 RT 13508-13509.)

(3) Three incidents comprising series of threats to deputies, including Deputy Wyatt, after appellant caught passing hot water through the cell door

On July 28, 1999, appellant was written up for discipline by Deputy Tammie Wyatt, for his involvement in passing hot water through a cell door, an activity that became forbidden a few weeks earlier after it had damaged the electronics in the doors. (176 RT 13982-13985.) Appellant was angry with the new rule because, with only one hour of pod-time, it limited his ability to consume his commissary items throughout the day. (176 RT 13981-13982.) Appellant told Deputy Belluomini, who was investigating, that he would be made to "starve in his cell without access to hot water," warned him that deputies should not come into his cell, and if they did, "that it would be on and they would be assaulted." (176 RT 13983.) When Belluomini asked if appellant was going to attack deputies who came to his cell, appellant responded, "No, I am not threatening anybody." (176 RT 13983.)

Shortly thereafter, appellant attempted to hit Deputy Wyatt with his food tray which he shoved at her with enough force that the food dumped out on her when she caught it. (176 RT 13992-13993.) Appellant later told Deputy Belluomini that he was still angry at Deputy Wyatt for writing him up about the hot water without having first given him a verbal warning. (176 RT 13988-13989.) Deputy Belluomini reported that appellant told him, "if he wanted to get a write-up, he could get one for a much more

severe incident. He went on to say that people better not come up to his cell or there can be trouble." (176 RT 13989.) When asked, appellant again denied that his statement was a threat. (176 RT 13989.)

After appellant was interviewed, Deputy Belluomini, Deputy Wyatt and another deputy, escorted appellant back to his pod and removed his restraints. (176 RT 13989.) Without restraints and before stepping back into his pod, appellant turned to Deputy Wyatt and told her she better not come up to his cell. (176 RT 13989.) The deputies had to tell appellant several times to step into his pod before he finally complied. (176 RT 13989.)

(4) Attack on Deputy Bradley during a routine window check

July 4, 2001, shortly before 11:00 p.m., appellant attacked Deputy Bradley during the nightly "window check" of appellant's cell at the North County jail by punching him in the side of his face hard enough to dislodge and break Bradley's eye glasses. (173 RT 13638, 13642-13643.) Appellant had turned out the lights, and a struggle ensued on the concrete floor with Bradley and two other guards who were conducting the check. (173 RT 13645-13646.) Before they entered the room, appellant had refused to comply with the order to sit on his bed saying, "Why do I have to sit on my bed? I don't have a problem with you guys." (173 RT 13652.) They deputies entered nonetheless because they did not perceive appellant as a threat. (173 RT 13652.)

After appellant was handcuffed and taken to the infirmary, he spontaneously told the deputy who escorted him, "The DA is not going to charge this case," "I don't have any marks on my hands," and "No deputies have any injuries or marks." (173 RT 13670.)

(5) Attempted attack on inmate Razo

On July 9, 2002, appellant tried to attack another inmate, "Razo," and in the process, punched and wrestled with deputies Higgins and Lack, who were escorting Razo up the stairs to his cell after a dentist appointment. (173 RT 13722-13723; 174 RT 13836; 175 RT 13880-13881.) Appellant, like Razo, was housed in the administrative segregation unit and was out of his cell for his solitary "pod time" when Razo and the deputies entered the pod. (173 RT 13718, 13730-13731; 174 RT 13841-13845.) Although customary procedure would have required appellant to "lock down" when Razo entered the pod, Deputy Higgins decided not to interfere with appellant's one hour of pod time since appellant had complied with his order to stand about 30 to 35 feet away and gave no other indication of danger. (174 RT 13841; 175 RT 13879-13880, 13885; 177 RT 14038-14039.) Razo, who was waist chained, was "virtually defenseless" when appellant started to attack, causing Deputy Lack to push Razo up the stairs and out of the way. (176 RT 14309.) Deputy Lack, who was on the bottom of the pile when he and Deputy Higgins were wrestling to gain control of appellant, suffered injuries that caused him to miss work for a week. (177 RT 14046.)

(6) Attack near courthouse holding-cell

On January 14, 2003, around noon, appellant was in a holding cell on the tenth floor of the Oakland courthouse, about to be transported back to the jail at Santa Rita. (175 RT 13931-13932.) Deputy Judy Miller-Thrower passed by the cell and saw appellant folding up a bed sheet. (175 RT 13933.) Bed sheets, which can be used like rope, are contraband as they present a security risk in a holding cell. (175 RT 13932-13933.) Deputy Miller-Thrower testified that as appellant was being shackled for the bus, she warned him, "I wouldn't bring your sheet with you to court,

and he said, I didn't bring a sheet, and I said, well, then you don't mind giving it up. And he said, again, I didn't bring a sheet." (175 RT 13934.) She described appellant's demeanor as "a little arrogant." (175 RT 13934.)

She noticed that appellant, who was wearing a dress shirt for court, appeared "puffy above the waist line," and suspected he was hiding the bed sheet on his body. (175 RT 13935) After she escorted appellant to the elevator, Deputy Miller-Thrower told her suspicion to Deputy Jeglum. (175 RT 13936.) When Deputy Jeglum asked appellant to turn around by the elevator, appellant said, "Don't put your fucking hands on me. I don't have a sheet," and took a "bladed stance," i.e., planting himself like a fighter and raising his fists to resist the search. (175 RT 13937-13938.) Deputy Jeglum struggled with appellant, pinned him to the back of the elevator, and performed a search which yielded no bed sheet. (175 RT 13938-13939.) After completing the search, Deputy Jeglum stepped back from the elevator, and appellant lunged at him (175 RT 13939.) Deputy Jeglum put up his hand and pushed appellant into the elevator cage and shut the door. (175 RT 13939.)

Deputy Miller-Thrower went back to appellant's cell and found a large bed sheet, neatly folded, placed under newspapers. (175 RT 13940.)

2. Victim impact evidence

Beeson's mother and sister, Melitta and Lisa Beeson, testified as victim impact witnesses. (177 RT 14048, 14060.) Melitta Beeson testified that her daughter, Erika, was loyal, rebellious, fearless, and went out on a limb for others. (177 RT 14049.) She said that Erika Beeson had transferred to many schools because of a learning disability, and had been a rebellious teenager who drank and stayed out late. (177 RT 14049-14050.) Erika Beeson also enjoyed rowing in crew, art, music and dancing. (177 RT 14050.) Erika Beeson was close to her father, Fred Beeson, who died on May 28, 1996, about five months after his daughter's murder. (177 RT

14051.) Fred Beeson, who used to spend hours practicing flamenco and Spanish guitar, never played again after Erika Beeson died. (177 RT 14051.) Celebrating Christmas was difficult since that was the anniversary of Erika Beeson's death. (177 RT 14052-14053.) Melitta Beeson said she missed her daughter's laughter and sense of humor. (177 RT 14052-14053.)

Lisa Beeson also talked about how this murder had ruined her life and that her anger and pain remain. (177 RT 14066-14068.) She described how her family no longer celebrates Thanksgiving, Christmas, or Erika and Fred Beeson's April birthdays that the family used to celebrate together. (177 RT 14052, 14065.) Just before the murder, Lisa Beeson had finished the penultimate semester of law school and was going to Bolivia over the winter break to attend the wedding of her friend. (177 RT 14060-14061.) On the day before the murder, just before she left for the airport, Lisa Beeson had her last conversation with her sister who was at her parents' house baking and decorating cookies. (177 RT 14060-14061.)

Lisa Beeson described coming home after her father had called to tell her that her sister had died, saying, "everything was a mess. Nobody was functioning. A lot of chaos." She described her mother as "totally incapacitated," and her father as "shut down," "broken," "depressed," and "obsessed with figuring out what happened." (177 RT 14062.) Lisa Beeson dropped out of law school and "came home." (177 RT 14063.) She eventually finished law school, but practiced only a short time, finding it difficult, since the murder, to focus. (177 RT 14067-14068.)

Lisa Beeson arranged for the memorial service that occurred a week or so in advance of her sister's body being cremated. (177 RT 14063-14064.) Her father accompanied her and chose the actual grave site, but Lisa did everything else. (177 RT 14063.) Her mother could not help. (177 RT 14064.) Her mother was also too upset to bury her daughter's

ashes after the mortuary notified them that her remains had been delivered. (177 RT 14064.) Lisa Beeson said, "My father didn't want to go either, but he wouldn't let me go by myself." (177 RT 14064.) Lisa was upset with the mortuary because the funeral director drove them to the gravesite, putting Lisa in the front seat and her father in the back with Beeson's ashes. (177 RT 14064-14065.) She described seeing her father in the backseat through a rear-view mirror, saying, "they had a really cheap label with her name on it stuck to the box, and he had his hand on it, and he just kept stroking the top of the box." (177 RT 14065.) She also described visiting the graves of Beeson and her father, and her "ritual" of preparing and leaving identical bouquets at the site. (177 RT 14066.)

The prosecutor introduced a notebook containing 53 photographs, a group of Erika Beeson's letters, a Christmas list she had given her mother just before she was murdered, and a report card. (176 RT 14011, 14013, 14029; 177 RT 14054.)

3. Defense mitigation evidence

Appellant called two witnesses in mitigation. Dennis Burke, an investigator for defense counsel, testified about his interviews with two prisoners at Santa Rita jail who rebutted the prosecution's evidence that appellant had initiated or was the aggressor in an altercation with Deputy Lannon at Santa Rita jail that began when the shower water was turned off as described in section B.1.d.(1), *ante*. (183 RT 14403-14405, 14407-14410.) Both prisoners had significant criminal histories. (183 RT 14415-14421.)

The defense also called Dr. Candelaria-Greene who testified that appellant suffered from dyslexia and ADHD, and had poor motor skills, poor auditory and visual processing ,and weak executive function. (184 RT 14455-14456, 14458, 15560.)

4. Argument and Verdict

The prosecutor's closing argument during the penalty phase focused primarily on appellant's lengthy and violent criminal history, and his ability to plan and conceal his actions. (188 RT 14684-14688.) The prosecutor concluded by showing a video montage of some of the photographs and portions of distinct audio recordings of statements given by appellant, Patterson, and Mosley after the murder. (188 RT 14706.)

Defense counsel summarized the arguments against death, stating:

> First, the case is not the worst of the worst. Second, society, government, whatever you want to call that entity, did not keep the social contract. Third, the police made a deal and bargain and we should honor it. And fourth, Grayland was young at the time of this crime, and we don't kill young people, people that are not yet emotionally mature.

(190 RT 14843.)

In reference to the "social contract," counsel explained that if appellant's learning disabilities had been treated, "in all likelihood we'd have a different Grayland, and we wouldn't be sitting here, standing here today." (190 RT 14846, 14851-14852.)

Deliberations began the afternoon of June 10, and on June 16, 2003, the jury returned a unanimous verdict of death as to appellant, and life in prison without possibility of parole as to Patterson. (194 RT 14933-14936; 11 CT 2881, 2884, 2887, 2890 .)

ARGUMENT

SECTION ONE—PRETRIAL ISSUES

I. *PITCHESS* RULINGS

Appellant brought several motions to discover personnel records of officers at California Youth Authority and the Alameda County Sheriff's Office and now requests this Court conduct independent review to

determine if the trial court erred in failing to disclose additional records. (AOB 78-82.)

A trial court's decision on the discoverability of material in police personnel files under *Pitchess* is reviewed for abuse of discretion. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1228.) Respondent has no objection to this Court reviewing the materials produced to confirm that the trial court did not improperly withhold material ordered disclosed or abuse its discretion in its order of disclosure.

II. THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S *BATSON/WHEELER* MOTIONS CHALLENGING THE PROSECUTION'S EXERCISE OF PREEMPTORY CHALLENGES AS DISCRIMINATORY [15]

A. Background

1. Jury selection process generally

The jury selection procedures were set forth by the trial court in conference with counsel. (49 RT 3069-3076.) Fourteen panels, from "A" through "N," each consisting of ninety jurors, were called and directed to complete a 41-page questionnaire. (49 RT 3069-3076; 69 RT 4064-4066; 12 CT 2976-184 CT 52557.) The racial makeup of the 1209 prospective jurors who completed questionnaires consisted of 708 white, 237 Asian/Pacific Islander, 115 black, 75 Hispanic, 32 mixed race, 2 native American, and 40 whose race could not be determined from the questionnaire. (12 CT 2976-184 CT 52557.) The parties stipulated to dismiss jurors for cause based on their responses to the questionnaire, and

[15] Since all motions, objections, and challenges regarding jury selection were asserted collectively by the defense, all references to the defense will not distinguish between appellant and co-defendant Patterson, nor between their respective counsel unless indicated specifically. (104 RT 6600, 6609-6613, 6652-6655.)

the remaining jurors were called back for individual sequestered voir dire pursuant to *Hovey v. Superior Court* (1980) 28 Cal.3d 1, 80 (*Hovey* voir dire).[16] (51 RT 3243-3244; 55 RT 3461-3463, 3469.) The trial court allowed parties to clarify answers to determine a prospective juror's "true beliefs" in a particular area, but did not permit "rehabilitation" of jurors during the voir dire process (49 RT 3100-3101). After voir dire yielded a pool of 73 qualified jurors, the parties stipulated to a random order of selection to appear, and thereafter exercised their peremptory challenges. (103 RT 6555-6557, 6576-6577, 6580-6592; 104 RT 6628-6645.) The racial make-up of the 73 jurors qualified consisted of 49 white, four African-American, ten Asian/Pacific Islander, three mixed race,[17] four Hispanic, and three whose race could not be determined from the questionnaire. (103 RT 6850-6592.)

Each side, i.e., the prosecutor and, collectively, the two defendants, had 30 peremptory challenges and 12 additional peremptory challenges available for alternates. (104 RT 6652-6655.) The defense, by stipulation, chose to exercise their challenges jointly. (104 RT 6652-6655.) The prosecutor exercised ten peremptory challenges in selecting the initial 12 jurors, and eight peremptory challenges in selecting the six alternate jurors. (104 RT 6635-6636, 6645.) The defense exercised five peremptory challenges in selecting the initial panel, and five in selecting the alternative jurors. (104 RT 6635-6636, 6643, 6645.) The last juror selected for the 18-

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[16] After *Hovey*, individual sequestered voir dire in a capital case became discretionary. (*People v. Vieira* (2005) 35 Cal.4th 264, 287-288 [*Hovey* voir dire requirement abrogated by Proposition 115, enacting Code of Civil Procedure section 223].)

[17] Three prospective jurors identified themselves as Puerto Rican/Hawaiian, Asian/Hispanic, and Caucasian/Latino. (75 CT 21226; 146 CT 41647; 175 CT 49975.

member panel, as numbered on the random list, was Juror No. 51. (103 RT 6588; 104 RT 6645.)[18]

The trial court described the composition of the trial and alternate jurors noting there were 11 women and 7 men, ranging in age from 24 to 61 years. (105 RT 6841.) The trial court observed "that every city in Alameda County of significant size is represented except for the cities of Fremont, Pleasanton, and Berkeley." (105 RT 6841-6842.) With respect to race and ethnicity, the trial noted "there are 13 Caucasian jurors's [*sic*], three Hispanic jurors, and two Asian jurors." (105 RT 6841-6842.) The Hispanic jurors described themselves as "Spanish," "Puerto Rican," and "hispanic." (105 RT 6842 ; 182 CT 51903, 51985; 184 CT 52354) The two Asian jurors described themselves as "Asian," and Filipino. (105 RT 6842; 184 CT 52395, 183 CT 52272].

2. *Batson/Wheeler* Motions

The defense jointly asserted motions under *Batson-Wheeler* after the prosecution exercised its second, sixth, and tenth peremptory challenges. (104 RT 6629, 6631, 6635.)[19] The defense claimed that the prosecution challenged three African-American prospective jurors based on their race and, in effect, had eliminated all African-Americans from serving since the remaining African-American juror, by random order of selection, was beyond reach after exercise of all peremptory challenges. (104 RT 6670-6672.) Defense counsel argued that striking all three prospective African-American jurors was prima facie evidence of discriminatory intent, claiming that, other than race, these prospective jurors were no different

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[18] B.G. was Juror No. 51 on the random list, and became alternate Juror No. 13 when seated, and eventually substituted for Juror No. 5 just before the start of trial. (103 RT 6588; 104 RT 6645, 105 RT 6845.)

[19] To avoid attachment of jeopardy, the jury panel was not sworn until after the trial court ruled on these motions. (104 RT 6655.)

than seated jurors in their attitudes about the death penalty or the kind of jobs they held. (104 RT 6673-6674.) In addition, the defense claimed, as a further demonstration of discriminatory intent, that the prosecutor had strayed from his routine sequence of voir dire questions with respect to two of the three prospective jurors challenged. (104 RT 6672-6673.)

Over the prosecutor's objection, the trial court found that the defense had stated a prima facie case of discrimination in juror selection, referencing the low degree of proof for this threshold question, and observing:

> [T]he parties are far better served if the court does make a finding, and giving everyone a chance to address the issues on their merits, not a parochial level alone, but to give the District Attorney a chance to address in detail and factually the reasons for his exercise of his challenge and to allow counsel for the defendants to respond to that presentation and in as much detail as they can.

(104 RT 6681-6682.)

The prosecution thereafter stated multiple race-neutral reasons for challenging each of the jurors. (104 RT 6685-6718, 6743-6755.) The defense argued that, notwithstanding the prosecutor's reasons, the challenged jurors had each indicated they could be impartial and some of the race-neutral reasons applied to several other jurors whom the prosecutor had not challenged. (104 RT 6718-6729, 6734-6742.)

The trial court found the prosecutor's stated reasons, in each instance, were nondiscriminatory, truthful, and credible based on its independent and careful observations during the selection process. (104 RT 6763-6764.) The trial court emphatically rejected the defense claim that the prosecutor questioned challenged jurors in a manner different from selected jurors, noting it had carefully reviewed the transcripts in detail the previous evening and that same day, stating, "I just don't see that that claim is supported by the record." (104 RT 6764-6766.) Rather, the trial court

observed the prosecution had a similar approach to voir dire with differences driven by the differences in the jurors' individual questionnaires or individual responses to the court's voir dire. (104 RT 6766-6765.)[20] The trial court noted the irony of this unsupported claim by the defense finding:

> [i]f there are differences that appear in the approach of counsel, it's not with the District Attorney. It's with counsel for the defendants. There we do see dramatic difference in approach by counsel to each individual juror. And as we've noted previously, sometimes those rose to the level of no questions at all.

(104 RT 6767.)[21]

B. Substantial Evidence Demonstrates the Prosecutor's Race-Neutral Reasons Were Not a Pretext for Discrimination

1. Standard of Review

A prosecutor "may exercise a peremptory challenge to excuse a juror for any permissible reason or no reason at all," (*People v. Huggins* (2006) 38 Cal.4th 175, 227), but race-based use of a peremptory challenge violates the federal constitutional guarantee of equal protection of the laws and the state constitutional right to a jury drawn from a representative cross-section of the community. (*Batson v. Kentucky*, (1986) 476 U.S. 79, 89; *People v. Wheeler* (1978) 22 Cal.3d 258, 276-277.) Courts use a three-step process

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[20] The trial court's observations were indeed supported by the record. See, e.g., P.S., [removal of Justice Bird] (96 RT 6028-6029); J.T., [hung jury] (96 RT 6045-6046); S.H., [prior murder] (100 RT 6303-6305); C.H., [father's legal/judge career and death penalty in Minnesota] (87 RT 5435-5436) ; Juror No. 13 [murder partner's police-officer nephew](81 RT 4916-4917); Juror No. 15 [work experience with drug users and psychology studies] (72 RT 4209-4211).

[21] The trial court's observation regarding voir dire by one or more defense counsel was also supported by the record. See, e.g., S.G.(92 RT 5722); S.L. (99 RT 6252-6253); D.T. (90 RT 5659).

to determine whether a prosecutor used peremptory challenges in an improper manner. (*People v. Lancaster* (2007) 41 Cal.4th 50, 74.)

> First, the defendant must make out a prima facie case by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose. Second, once the defendant has made out a prima facie case, the burden shifts to the State to explain adequately the racial exclusion by offering permissible race-neutral justifications for the strikes. Third, if a race-neutral explanation is tendered, the trial court must then decide whether the opponent of the strike has proved purposeful racial discrimination.

(*Johnson v. California* (2005) 545 U.S. 162, 168, citations, footnote, and internal quotation and edit marks omitted.)

> A prosecutor asked to explain his conduct must provide a "'clear and reasonably specific' explanation of his 'legitimate reasons' for exercising the challenges." [Citation.] "The justification need not support a challenge for cause, and even a 'trivial' reason, if genuine and neutral, will suffice." [Citation.] A prospective juror may be excused based upon facial expressions, gestures, hunches, and even for arbitrary or idiosyncratic reasons.

(*People v. Lenix* (2008) 44 Cal.4th 602, 613.)

"[T]he ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." (*Purkett v. Elem* (1995) 514 U.S. 765, 768; *People v. Stevens* (2007) 41 Cal.4th 182, 192.)

The trial court's ruling on the issue of purposeful racial discrimination is reviewed for substantial evidence, "[b]ut we apply this deferential standard of review only when 'the trial court has made a sincere and reasoned attempt to evaluate each stated reason as applied to each challenged juror.'" (*People v. McDermott* (2002) 28 Cal.4th 946, 971; *People v. Avila* (2006) 38 Cal.4th 491, 541.) The proffered reasons are circumstantial evidence of the prosecutor's true motives. (*Lenix, supra*, 44

Cal.4th at p. 627.) "Thus, care must be taken not to accept one reasonable interpretation to the exclusion of other reasonable ones," and deference must be accorded to the trial court's factual findings. (*Id* at pp. 627-628.)

In short, "[t]he existence or nonexistence of purposeful racial discrimination is a question of fact." (*People v. Lewis* (2008) 43 Cal.4th 415, 469.) Thus, on review, a Court must

> presume that a prosecutor uses peremptory challenges in a constitutional manner and give great deference to the trial court's ability to distinguish bona fide reasons from sham excuses. So long as the trial court makes a sincere and reasoned effort to evaluate the nondiscriminatory justifications offered, its conclusions are entitled to deference on appeal.

(*People v. Burgener* (2003) 29 Cal.4th 833, 864, citations omitted.)

"As with the state of mind of a juror, evaluation of the prosecutor's state of mind based on demeanor and credibility lies peculiarly within a trial judge's province. Deference is necessary because a reviewing court, which analyzes only the transcripts from voir dire, is not as well positioned as the trial court is to make credibility determinations." (*Miller-El v. Cockrell* (2003) 537 U.S. 322, 339 (*Miller-El I*), citations and internal quotation marks omitted; see *Rice v. Collins* (2006) 546 U.S. 333 [126 S.Ct. 969, 976] ["Reasonable minds reviewing the record might disagree about the prosecutor's credibility, but on habeas review that does not suffice to supersede the trial court's credibility determination"].)

2. Substantial evidence demonstrates the prosecutor's reasons were plausible and credible and not a pretext for discrimination

The issue raised by appellant is whether, under the third step of the analysis, there is substantial evidence to support the trial court's ruling that appellant did not meet his burden of proving purposeful racial discrimination after the prosecution set forth its race-neutral justifications for the strikes. (*Lancaster, supra*, 41 Cal.4th at p. 74.) The trial court

correctly denied the motion as to the three challenged jurors—E.T., B.W., and T.W.—finding that in each case, the prosecutor's race neutral reasons were credible, truthful and supported by the record. (104 RT 6763-6764.)

The trial court's rulings and observations as to each juror and its evaluation of the proffered reasons was extensive. Before discussing the jurors individually, the trial court noted that it had paid "very close attention" throughout the selection process to demeanor, and had reviewed the questionnaires and the transcripts as well in preparation for the motion. (104 RT 6763-6764.) The trial court stated, "I watched each juror. I listened and watched very carefully to determine not only what that juror said, but how they said it, their demeanor, their manner in responding to the court's questions, to the prosecutor questions, to counsels' questions representing the two defendants." (104 RT 6762.)

Distinct from the trial court's own comments, the record offers additional support for the trial court's rulings, drawn from the observations of counsel for appellant's codefendant. (104 RT 6741.) Counsel for codefendant Patterson acknowledged the legitimacy of the prosecutor's stated reasons, just after he articulated a comparative analysis—indeed the only comparative analysis offered with any specificity—that focused on jurors who were not challenged. (104 RT 6741.) With remarkable candor, defense counsel stated:

> I feel given the state of the record, I have no choice to join in this motion. I think not to do so would be, in effect, absence of counsel [*sic*], but by doing so, it's by no means a personal attack, or should he draw any personal *inference of personal misconduct or bias, racism* on behalf of Mr. [prosecutor]. *I'm confident that that's not a factor.*

(104 RT 6741, italics added.)

A defense claim of race discrimination in jury selection, however, is indeed personal—it attacks the prosecutor's subjective reasons for

exercising a peremptory challenge as pretext for discrimination. (*Lenix, supra*, 44 Cal.4th at p. 613; *Purkett, supra*, 514 U.S., at p. 769.)

> At the third stage of the *Wheeler/Batson* inquiry, "the issue comes down to whether the trial court finds the prosecutor's race-neutral explanations to be credible. Credibility can be measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy." [Citation.] In assessing credibility, the court draws upon its contemporaneous observations of the voir dire. It may also rely on the court's own experiences as a lawyer and bench officer in the community, and even the common practices of the advocate and the office that employs him or her.

(*Lenix, supra*, 44 Cal.4th at p. 613.)

Thus defense counsel's candid admission that neither racism, bias, nor personal misconduct were factors in the prosecutor's challenge to these jurors is additional evidence supporting the trial court's findings that the proffered reasons for the challenge were race-neutral. (*People v. Jones* (2011) 51 Cal.4th 346, 361 [defense counsel's failure to comment on prosecutor's race-neutral reasons for challenge supported finding that prosecutor was truthful].)

Aside from extensive general findings supporting denial of the motion, the trial court also made extensive specific findings evaluating the particular reasons offered as to each of the three challenged jurors individually.

a. Juror E.T.

The prosecutor provided four reasons that, individually and collectively, prompted him to exercise his second peremptory challenge against Juror E.T., a 55-year-old "Afro-American" woman. (104 RT 6629, 6683-6692; 58 CT 164266.) First, distinct from her questionnaire responses, E.T. revealed that she had mixed feelings about whether she could impose the death penalty and gave conflicting responses that

reflected some ambiguity. (104 RT 6683-6685.) A prosecutor's doubts about a prospective juror's willingness to impose the death penalty is a legitimate race-neutral reason to exercise a peremptory challenge. (*People v. Pride* (1992) 3 Cal.4th 195, 230; *People v. Ledesma* (2006) 39 Cal.4th 641, 678.) Even if a prospective juror eventually asserts that he or she can be fair, a prosecutor may justifiably remain skeptical based on earlier responses that conflict or express uncertainty. (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1126; *Ledesma, supra*, 39 Cal.4th at p. 678.) The prosecutor's observations were supported by the record. E.T. stated during voir dire that she had "mixed feelings" about capital punishment, and did not know how to respond to the prosecutor's questions about bias. (79 RT 4726.) While she was not against capital punishment, she stated, "at the same time, I don't believe that somebody should just be able to take somebody's life, either." (79 RT 4726.)

Second, the prosecutor noted that E.T.'s responses raised concerns that her religious views might interfere with her ability to impose the death penalty. (104 RT 6684-6685.) During voir dire, E.T. had told the prosecutor, "Well, it's like the Bible says, only God is supposed to be able to really take somebody's life. So who are we, you know, to kill somebody, you know. It's not our place. But then at the other hand, I don't believe that somebody should be—just be able to take somebody else's life, either." (79 RT 4728.) Although E.T. eventually stated her religious views would not influence her decision, she initially responded, stating, "[t]hat's really a hard question, you know," and "you have to live [with it], right?" (79 RT 4728-4729.) Religious sentiments too, even when expressed with ambivalence, are a legitimate, race-neutral basis to exercise a peremptory challenge. (*People v. Rushing* (2011) 197 Cal.App.4th 801, 812-813 [potential juror's religious views sufficient to support peremptory challenge notwithstanding juror's assertion her beliefs would not interfere with her

duties at trial]; *People v. Catlin* (2001) 26 Cal.4th 81, 118 [reluctance to impose the death penalty on religious grounds was race-neutral ground for peremptory]; *People v. Cash* (2010) 28 Cal.4th 703, 725.)

Third, the prosecutor was concerned that E.T. had a negative bias toward law enforcement. (104 RT 6686.) E.T. had reported in her questionnaire that she had been arrested for obstruction of justice. (104 RT 6686; 58 CT 16440.) During voir dire, E.T. minimized the incident, describing it as a "slightly out of hand" dispute that arose in the course of helping her sister move away from her brother-in-law after an "altercation." (79 RT 4724; 104 RT 6686-6688.) E.T. claimed that she was coming down her sister's stairs when police arrived at the home and an officer "pushed me back, and I was holding clothes like this, so I didn't see who he was. I said who was being funny. He made some kind of remarks and I retaliated." (79 RT 4724.) The prosecutor, however, obtained a police report that characterized the incident as a dispatch to a burglary in progress in which E.T. had refused to identify herself. (104 RT 6689.) Police discovered that another woman who was helping with the move had an outstanding no-bail felony arrest warrant. (104 RT 6689-6690.) E.T. physically blocked police from entering the house, thus allowing the arrest suspect to flee the scene. (104 RT 6689.) The prosecutor summarized this reason behind his exercise of the peremptory stating:

> Ms. [E.T.], who apparently willfully and intentionally tried to prevent a police officer from serving a warrant, and then came in here and described it as a situation where things got a little out of hand, some words were exchanged, he dropped his charges. I dropped mine. All of that indicates to me a serious attitude issue about law enforcement, despite the fact that her husband was a retired INS agent.

(104 RT 6691.)

Negative experiences with law enforcement is a race-neutral reason to exercise a peremptory challenge. (*People v. Lomax* (2010) 49 Cal.4th 530,

575-576; *People v. Turner* (1994) 8 Cal.4th 137, 171, disapproved on other grounds by *People v. Griffin* (2004) 33 Cal.4th 536, 555, fn. 5; *People v. Sanders* (1990) 51 Cal.3d 471, 500.) The prosecutor's concern that E.T. not only suffered a conviction for obstruction, but had misrepresented the seriousness of her encounter with police and had successfully blocked their pursuit of a no-bail suspect, was unquestionably a legitimate race-neutral reason to exercise a peremptory challenge. (*Lomax, supra*, 49 Cal.4th at 575-576.)

Fourth, the prosecutor noted that the nature and unusually limited number of questions defense counsel asked of this witnesses corroborated his sense that E.T. would favor the defense. (104 RT 6691-6692.) The decision not to voir dire a prospective juror is a legitimate, plausible, race-neutral reason to exercise a peremptory where the trial court makes a sincere and reasoned effort to evaluate whether such reason is a nondiscriminatory justification for the challenge. (*People v. Ervin* (2000) 22 Cal.4th 48, 75-76.)

The trial court undertook a sincere and reasoned evaluation, and based on extensive findings, ruled that each of the prosecutor's stated reasons was not a pretext for racial discrimination. (104 RT 6763-6764, 6769.) The trial court validated the prosecutor's concerns, having similarly perceived E.T.'s comments about religion as:

> startling and dramatic statements of a reservation regarding the application of the death penalty based on what appear to be strongly held religious beliefs. I would note that and I believe [the prosecutor] has correctly stated this, this is the only juror of the jurors we interviewed who expressed these views to the level and strength that she did express them.

(104 RT 6768-6769.)

Similarly, the trial court, having reviewed the police report of E.T.'s arrest for obstruction, echoed the prosecutor's reasons for challenging her in race-neutral terms:

> The juror here physically interfered with the activities of an officer in such a way that a person who had a no bail felony arrest warrant was successful in escaping because of this juror's interference. Now, as I've said, that's not minor conduct. [¶] The juror's explanation for this conduct in this courtroom made it much more minimal in appearance.

(104 RT 6772.)

The trial court noted that these reasons alone were valid race-neutral reasons to exercise a peremptory challenge to E.T. (104 RT 6773.) The trial court rejected the defense claim that a challenge based on the defense's failure to voir dire was a race-neutral claim, noting that E.T.'s statements provided the most significant support for the prosecutor's challenge, and under *Ervin, supra*, 22 Cal.4th at pp. 75-76, this reason was upheld as race neutral. (104 RT 6773-6775.) The trial court's ruling was correct. Inference of defense bias from defense counsel's failure to ask questions or "engage prospective jurors in more than desultory voir dire" is analogous to the inference of discrimination drawn from a prosecutor who fails to question prospective jurors of a cognizable group. (*People v. Taylor* (2010) 48 Cal.4th 574, 615.) The trial court correctly rejected appellant's claim that since multiple inferences could be drawn from its failure to voir dire a prospective juror, the prosecutor's inference was not credible as race-neutral. When multiple inferences can be drawn, the trial court's evaluation of a particular inference must be accorded deference. (*Lenix, supra*, 44 Cal.4th at pp. 627-628.) Indeed, the trial court's finding that the prosecutor's inference was credible, is even stronger in light of the defense's failure to assert any one of the multiple inferences it claimed

could be drawn as the actual reason for the failure to voir dire this juror. (*Ibid.*)

Thus, substantial evidence supports the trial court's extensive findings that the prosecutor's multiple reasons to exercise a peremptory challenge against E.T. were race-neutral. Appellant fails to demonstrate how those reasons were inherently implausible, and deference requires the findings be upheld.

b. Juror B.C.

The prosecutor exercised his sixth peremptory challenge to Juror B.C., a 54 year old "Black American" woman. (104 RT 6631; 87 CT 24546.) The prosecutor provided a number of reasons for the challenge, falling into three general areas of concern. (104 RT 6692.) First, the prosecutor believed that B.C.'s prior experience as a foreperson of a "hung" jury and her satisfaction with that experience would make her less inclined to reach a unanimous verdict, particularly in a capital case. (104 RT 6694-6697.) The prosecutor noted that B.C. repeatedly described her satisfaction with the process of deliberations and the outcome of a trial in which the jury rendered guilty verdicts on charges of attempted robbery and felon-in-possession of a firearm, and "hung" on the more difficult charge of attempted murder. (104 RT 6696.) The prosecutor was particularly concerned that, as the foreperson, B.C. had not exercised sufficient leadership to lead other jurors toward a unanimous outcome on a "difficult charge," and took "the easier way out to simply agree not to agree." (104 RT 6696-6697.) He was also concerned that B.C.'s prior experience as a foreperson might cause jurors in appellant's trial to elect her to this leadership role again. (104 RT 6696-6697.) In addition, when B.C. responded to defense counsel that she would provide her individual "input" and vote on the case rather than going with the majority, the prosecutor "viewed that somewhat of a challenge to her to dig in and take on the rest

of the panel as perhaps she had done once before." (104 RT 6697.) A prospective juror's "experience of sitting on a hung jury constitutes a legitimate concern for the prosecution, which seeks a jury that can reach a unanimous verdict." (*Turner, supra*, 8 Cal.4th at p. 170.) Thus, the record demonstrates that this first reason provided by the prosecutor was plausible and race-neutral.

Second, the prosecutor was concerned that B.C. perceived that appellant would not get a "fair shake" because he was too poor to afford a good lawyer—a bias that was exacerbated when defense counsel led her to believe he was donating his time to this case. (104 RT 6698-6703.)[22] The defense voir dire began:

Q. Good afternoon.

A. Good afternoon.

Q. First of all, I think the perception of the general public is that there is a private lawyer and there are public defenders; correct?

A. Yes.

Q. But in real life there is also something in between: private lawyers who participate in a system.

A. Okay.

Q. Yes. So, it is like a lot—

A. Is it kind of like, like at Highland [Hospital] where you have your doctors that donate time there? They are private but they donate.

Q. Correct. Correct.

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[22] B.C. had written in a questionnaire response, "I feel that minorities cannot usually afford to pay for the legal representation as the white race—economics." (87 CT 24565.) The prosecutor also noted that B.C. had mentioned two people—O.J. Simpson, and a Warrior's basketball player who had raped B.C.'s daughter—who were wealthy and were either not convicted or not charged with serious crimes. (104 RT 6703.)

A. Okay. I got you.

Q. And lots of people don't know.

A. No, I didn't know that.

Q. I know. Lots of people don't.

(86 RT 5303-5304.)

Immediately after voir dire, long before any peremptory challenges were exercised, the trial court admonished counsel not to broach the subject of attorney compensation observing, "the impression that was left with the juror I think was that the attorneys are donating their time to this case. And that is not true as we know." (86 RT. 5311.) Thus, in articulating this second reason for the challenge, the prosecutor was concerned that B.C. would "not be open-minded to what I'm saying. She would always have a concern at the front of her mind that these lawyers are working for free; these defendants can't pay for their defense; they're not getting good representation." (104 RT 6704.) The prosecutor noted, moreover, that B.C.'s bias, linking money to lawyering, was neither vague nor theoretical, but grew out of her personal experience. (104 RT 6753-6754.) B.C.'s daughter was the victim of a date-rape by a professional basketball player who was never charged, and indeed, B.C. had linked this experience to O.J. Simpson's acquittal demonstrating "that she has concerns over wealthy defendants being able [to] buy their way out, and indigent defendants not being able to do so." (104 RT 6754.) "[D]istrust of the legal system, particularly its treatment of indigent defendants," is a race-neutral basis to exercise a peremptory challenge. (*Pride*, *supra*, 3 Cal.4th at p. 230; accord *People v. Farnam* (2002) 28 Cal.4th 107, 138; see *People v. Clark* (2011) 52 Cal.4th 856, 907 [belief that facts could be manipulated and corrupt attorneys could "hoodwink" jurors is race neutral basis for peremptory challenge].)

Third, the prosecutor was concerned that B.C. was more likely to accept appellant's contention that he had given a false confession. (104 RT 6706-6707.) The prosecutor noted that when defense counsel asked in voir dire whether a person could make a false confession, most jurors hesitated or reflected or asked for clarification before responding. (104 RT 6706.) The prosecutor noted that B.C. was one of the few jurors who quickly and emphatically responded, without hesitation, that a false confession was possible. (104 RT 6706-6707; 86 RT 5309.) Based on the tone, demeanor, choice of words, and speed of B.C.'s response, the prosecutor felt "that she was more apt to accept that defense, or to give that defense credence than some other jurors in the panel." (104 RT 6707.) Bias against law enforcement, as demonstrated by demeanor, is a race neutral basis to exercise a peremptory challenge. (*Lenix, supra*, 44 Cal.4th at p. 628.) A trial court's factual findings from having observed the demeanor of the prospective juror and the prosecutor, and its finding that the prosecutor's inferences are plausible and credible, must be accorded deference by a reviewing court. (*Stevens*, *supra*, 41 Cal.4th at p. 198; *Batson, supra*, 477 U.S. at p. 98, fn. 21; *Hernandez v. New York* (1991) 500 U.S. 352, 364-365.)

The trial court found that the prosecutor's stated reasons were plausible, truthful, and indeed an accurate reading of B.C.'s demeanor. (104 RT 6776, 6785-6786.) B.C.'s responses in voir dire and to the jury questionnaire are also support for the trial court's factual findings. (86 RT 5289-5310; 87 CT 24545-24585.) Specifically, the trial court found the prosecutor had a legitimate concern that B.C., as foreperson of a jury that "hung" on the most serious charge, had "led the way to take the easy way out," and had a justified "fear that she would be elected foreperson precisely because of that experience," noting that "the prosecutor's entitled to make those kind of speculations. . . . They certainly comport with

common sense and our general experience." (104 RT 6779.) Moreover, just as it did after B.C.'s voir dire, the trial court again noted that defense counsel had misled B.C. to believe that defendants were being represented pro bono, playing into B.C.'s bias against indigent defendants and "her worst fears and suspicions about the system." (104 RT 6781-6783.) The trial court ruled "this is a reason that has nothing whatsoever to do with race. It has everything to do with a distrust of the legal system, especially with regard to the treatment of indigents." (104 RT 6783.) The trial court also noted that B.C.'s linking wealth and unfair treatment in the criminal justice system "in many contexts" was serious and probably influenced by her daughter having been raped by a wealthy professional basketball player who was never prosecuted. (104 RT 6784-6785.) Finally, the trial court found that B.C.'s response to voir dire about the possibility of a false confession was unusually prompt and definite and "something that impressed me immediately at the time; I made a note of it at the time. There's an area that is bound to be [of] concern to [the prosecutor], and it was." (104 RT 6785-6786.)

In light of these factual findings and the substantial evidence supporting them, the trial court's ruling must be accorded deference and appellant's claim of pretextual discrimination fails. (*Lenix, supra*, 4 Cal.4th at pp. 627-628; *Miller-El I*, 537 U.S. at p. 339.)

c. Juror T.W.

The prosecutor exercised his tenth and last of 30 peremptory challenges against prospective-juror T.W., a 57 year-old "Black American" man. (104 RT 6635; 181 CT 51616.) Before exercising the challenge, the prosecutor had twice moved to have T.W. dismissed for cause—initially during a hearing on T.W.'s statements and omissions in the questionnaire, and again, following T.W.'s voir dire. (102 RT 6459, 6499-6500; 181 CT 51635, 51649.) T.W.'s questionnaire responses failed to disclose his prior

arrest for public drunkenness and in response to three questions, revealed his bias against the criminal justice system as unfair to African-Americans. (102 RT 6459, 6500-6501; 181 CT 51630, 51632, 51635.) Specifically, when asked in the questionnaire to describe his "feelings about the effectiveness of our criminal justice system," T.W. wrote, "I think the system is unfair to black." (181 CT 51635.) When asked, "Do you feel that minorities are treated fairly by the criminal justice system," T.W. responded, "No," and explained, "So much to say[.] The history of slavery go to deep in this country." (181 CT 51635.) T.W. checked two boxes on his questionnaire to show he was "Neutral" about the death penalty at present, but that his views had "**changed** substantially in either **intensity or nature**," and wrote to explain, "because of the number of black on death row." (181 CT 51649, bold in original.)

In arguing against the challenge for cause, defense counsel stated, among other things, that "[t]his is a black man of which there have been very few on these panels." (102 RT 6461.) The trial court responded, without ambiguity, that consideration of race was improper and would not be used to determine whether there was cause for dismissal. (102 RT 6461.) The trial court denied the initial challenge for cause, noting that voir dire was necessary to determine whether T.W.'s omission of his prior arrest was a deliberate attempt to deceive the court. (102 RT 6464.)

In voir dire that followed, T.W. disclosed the prior arrest promptly and in detail, leading the prosecutor to infer that T.W. "had no failure of memory at all," and his omission of the arrest from the questionnaire was deliberate. (102 RT 6500-6502.) T.W. continued to express strong views that African-Americans were treated unfairly by the criminal justice system

based on prejudice and were thus disproportionately on death row. (102 RT 6500-6501.)[23]

After voir dire, the prosecutor renewed his challenge for cause. (102 RT 6499-6500.) The trial court denied the second cause challenge noting at the outset that, "of all the jurors I've encountered so far in this case, this easily presents the most complex series of issues to me." (102 RT 6515.) The trial court was not convinced that T.W. was impartial and was uncomfortable with T.W.'s failure to disclose his prior arrest on his questionnaire, but nonetheless concluded that its reservations did not rise to the level of cause for dismissal. (102 RT 6516-6517.) In ruling, the trial court validated the prosecutor's concerns about T.W.'s potential bias:

> I understand fully [the prosecutor's] concern about this person sitting on this jury for a variety of reasons. I think it would be—it would be stretching credulity somewhat to assume that [T.W.'s] view on racism and slavery in the United States, as he referred to repeatedly throughout this questionnaire, would not enter into his judgment and his discussions, and the decision he would make as a juror. I think it stretches credulity somewhat to assume that his views about what he views as the disproportionate number of African-Americans on death row is not also going to play a role in his judgment in this case. I am not certain by saying—I'm not certain—the bottom line is I feel I can't state that as a matter of law, that rises to the level of cause. It certainly, without prejudging any motions in this respect—I underscore that, I am not prejudging motions in that

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[23] In addition, T.W. noted in voir dire that he was unlikely to vote for death involving two defendants because it was hard to envision two people equally contributing to making a crime "so heinous." (102 RT 6495-6496.) He also hesitated in answering whether he could vote for death in a case that did not involve a child victim, sex, mutilation, or serial killing if the evidence called for it, stating, "Well, it's difficult to say, because I don't know what you're going to present. But I don't know. I just don't know how to answer. I don't know what kind of evidence you would present. I mean, I think to impose the death sentence, it has to be pretty heinous, ugly kind of act." (102 RT 6494-6495.)

> respect, but should there be motions, I could certainly see that these reasons stated so repeatedly in writing and here in court could very well support a decision by the prosecutor not to allow this juror to sit.
>
> Again, I state that as a general matter, only I'm not prejudging any ruling or any motion in that respect. But those are separate issues.
>
> Now, I'm afraid, and I'm afraid I use the word afraid because it conveys a distinct feeling of uncomfort here, discomfort on my part, because I'm not totally satisfied in my mind, in my heart as the judge for many years, and as a lawyer for many years before that, that this man is a totally impartial juror. But I don't believe he has presented the kinds of things on which I can make that decision as a matter of law. Accordingly, I'm going to deny the challenge for cause. And I'm going to deny it on both grounds.
>
> And I'm not totally comfortable with my decision regarding his 647(f) arrest, either. I'm not totally—I feel that I'm being somewhat inconsistent on that. And that bothers me, although consistency should not be the basis for a court's ruling. I think in fairness, I'm not going to say that he is to the degree on the that issue deceived me [*sic*]. So the challenge [for cause] is denied.

(102 RT 6516-6517, italics added.)

In exercising the peremptory challenge to T.W., the prosecutor incorporated all reasons provided in support of his two earlier challenges for cause. (104 RT 6707.) In sum, the prosecutor's reasons were that T.W. had negative views about Oakland Police officers; T.W. had denied a prior arrest by Oakland Police in his questionnaire despite demonstrating a clear memory of the incident during voir dire; T.W. had a bias against the death penalty; and T.W. believed the criminal justice system was racist and the credibility of individual participants would be influenced by racial prejudice and the defense decided not to ask T.W. any questions during voir dire. (104 RT 6707-6717.)

The prosecutor noted specifically T.W.'s responses in voir dire that revealed negative views about police officers and distrust of the criminal justice system. (104 RT 6707-6709.) Specifically, T.W. noted in his questionnaire that the particular types of crimes that were especially upsetting were "innocent people going to jail." (104 RT 6707-6708; 181 CT 51632.) When the prosecutor asked T.W. in voir dire to explain what he was thinking by that response, T.W. referenced a problem with "the system" that resulted in the release of "the whole death row" in a state back East, and the "Riders" case that was then in trial against four rogue Oakland Police officers. (104 RT 6707-6708.)

"A prospective juror's distrust of the criminal justice system is a race-neutral basis for his excusal." (*Clark, supra*, 52 Cal.4th at p. 907; *People v. Jordan* (2006) 146 Cal.App. 4th 232, 254 [prospective juror's first thought associated with police was racial profiling].) Even assuming, as the defense argued at trial, that distrust of the criminal justice system is a predominate view that would disproportionally exclude African-Americans from serving as jurors, it is still a race neutral reason if plausible and credible. (*People v. Calvin* (2008) 159 Cal.App.4th 1377, 1386-1388.) As the Court of Appeal noted in *Calvin*:

> If the prosecutor here had dismissed the African-American jurors based on his assumptions about their attitudes, he would have demonstrated the type of group-based discrimination outlawed by both the equal protection clause and the California Constitution's guarantee of a trial by a jury drawn from a representative cross-section of the community. He did not. The prosecutor reviewed the questionnaires submitted by these jurors and questioned the jurors closely. The skeptical views for which he challenged them were not a result of prosecutorial assumptions but were actually expressed by the jurors themselves. The fact that similar attitudes are held by many other African–Americans does not convert the prosecutor's challenge into intentional race-based discrimination.

(*Calvin, supra*, 159 Cal.App.4th at p. 1388)

The prosecutor was also concerned that T.W.'s belief, that Oakland Police Department had recently improved, belied an overall-negative attitude about the police department in a case in which credibility of Oakland Police officers was prominent. (104 RT 6709.) The prosecutor noted:

> So here's a juror, and I have a case that's going to rise and fall on the conclusion of credibility of officers, correct? Who says he's currently upset by the Riders situation, but it's a lot better now than it used to be. So historically it's a bad police department in his point of view, and with something as egregious and dramatic, as horrible as the Riders case, he says that's an improvement over how it's been. I don't believe I can get a fair trial from him if I have to rely on Oakland police officers.

(104 RT 6709.)

A negative inference of bias drawn when criminal justice is described as "improved," is a plausible and race-neutral reason to exercise a challenge. (*People v. Vines* (2011) 51 Cal.4th 830, 849 [juror's statement that "O.J. Simpson trial" restored his faith in the justice system was race neutral basis for challenge where prosecutor believed Simpson trial was a travesty]; *People v. Cruz* (2008) 44 Cal.4th 636, 659-660 [prosecutor's race-neutral concern about juror's immaturity supported by young juror's view that criminal justice had improved over time].)

The prosecutor noted that T.W.'s failure to disclose his arrest for public drunkenness from the broadly-worded questionnaire tailor-made to prompt disclosure of that kind of arrest, did not "square" with his "good memory of that incident" in voir dire. (104 RT 6709-6711.) In describing the incident, T.W. stated:

> I had had too much to drink and there had been a cab that cut me off, and I was on my way home from the Sizzler, had been out. My wife was out of town, so anyway, I pinned this cab driver, wouldn't let him—and I flagged down the police, and that was the wrong thing to do. The police ended up taking me to jail.

(102 RT 6497.)

The prosecutor argued that T.W.'s description of his call to police as "the wrong thing to do," was more evidence of his negative attitude toward Oakland Police Department—the same police agency whose credibility was at issue in this case. (104 RT 6711.) The prosecutor stated:

> Now, that's exactly the situation I have with [T.W.], which is the police agency that arrested him, and as he put it, the wrong thing for him to do was to ask the police for help, because they took me to jail is, as that [T.W.] says, historically has been so bad that given the current Riders case, even with that things have improved.

(104 RT 6711.)

Moreover, T.W.'s failure to disclose his prior arrest on the questionnaire, the prosecutor's reasonable inference that the omission was intentional based on T.W.'s forthcoming and detailed recollection during voir dire, and indeed, even the prior conviction itself were race neutral reasons to exercise a peremptory challenge. (*People v. Booker* (2011) 51 Cal.4th 141, 166-167 ["less than forthcoming responses" on questionnaire and during voir dire whether family members had prior convictions]; See *Lomax, supra*, 49 Cal.4th at 575-576 [prospective juror's prior misdemeanor conviction].)

The prosecutor also argued that T.W.'s voir dire responses demonstrated bias against the death penalty. (104 RT 6711-6712.) When questioned whether he could impose the death penalty under various circumstances, T.W. gave rambling answers that were either evasive, uncertain, or qualified. (104 RT 6711-6712.)

> [Prosecutor]: So let me ask you a series of questions now. If you find the evidence calls for it, could you vote to impose the death penalty in a case where we don't have a child victim, we don't have a sexual murder, there's no mutilation, there's no serial killing? Is that something you could do?

A. Well, it's difficult to say, because I don't know what you're going to present. But I don't know. I just don't know how to answer. I don't know what kind of evidence you would present. I mean, I think to impose the death sentence, it has to be pretty heinous, ugly kind of act. If that is true with this case, I could, but I don't know what kind of evidence you have, so—

Q. Okay. So you're saying that the fact that it's not a child victim, it's not a sexual murder, it's not a mutilation murder, it's not a serial killing, the fact that we're just talking about one adult murder, that doesn't take us out of death penalty for you?

A. It doesn't take it out of it, but it would have to have some kind of heinous ugly kind of situation in order for me to do that.

Q. Okay. We're not permitted to preview all the evidence to you. The very limited, very scanty description I just gave you is what we're limited to, so I apologize for that.

Let me take you to my next question. If you found the evidence called for it, again, everything you heard, could you vote for death on two people where only one person had been murdered?

A. *It seems unlikely*, but again, I don't know what your evidence is. But I suppose I could, but it seems unlikely.

Q. Why do you say it seems unlikely? What crosses your mind when you tell us that?

A. Well, *I can't envision in my mind what could occur to make two people so involved that it would—both of them would be equally as contributing to make it so heinous.*

(102 RT 6494-6496, italics added.)

In contrast, when asked whether he could return a life sentence against one or both of the defendants, T.W.'s responses were brief, unqualified, and affirmative. (104 RT 6712; see 102 RT 6496.) By paraphrasing T.W.'s contrasting answers, the prosecutor reasonably inferred that T.W. demonstrated bias against the death penalty:

Not it seems unlikely, not I don't know, it would have to be pretty bad, it would have to be pretty heinous. I don't know

> what your evidence is. Not a long, rambling answer, could you return two life verdicts? Yes. Can you return, you know—yes, that's his answer. Um, so those answers in and of themselves indicate a juror who is not inclined to vote death in this case.

(104 RT 6712.)

The prosecutor's race-neutral concern that T.W. exhibited bias against the death penalty was plausible and supported by the record. "A tendency toward equivocation is seldom the first quality sought in a prospective juror by the party bearing the burden of proof." (*Lancaster*, *supra*, 41 Cal.4th at p. 76.) Just as with challenged-prospective-juror E.T., Section II.B.2.a, *ante*, reluctance to impose the death penalty, or ambiguity created through uncertainty, is a race-neutral reason to exercise a peremptory challenge. (*Ledesma, supra*, 39 Cal.4th at p. 678; *Pride, supra*, 3 Cal.4th at p. 230; *Gutierrez, supra*, 28 Cal.4th at p. 1126; *People v. Howard* (1992) 1 Cal.4th 1132, 1156.) Particularly when coupled with concerns that the criminal justice system is unfair to minorities, the reluctance to impose the death penalty is a plausible race-neutral reason to exercise a peremptory challenge. (*Vines, supra*, 51 Cal.4th at p. 850-851.)

The trial court ruled that the prosecutor's race-neutral reasons for challenging T.W. were plausible and credible. (104 RT 6795-6799.) As a threshold matter, the trial court noted that, in light of authorities it had recently reviewed, it "might very well have granted the challenge for cause," but that at this juncture it was "not going to rewrite history" and would proceed to rule on the peremptory challenge. (104 RT 6788-6790, 6799.) In light of those authorities, however, the trial court noted that the prosecutor had a legitimate race-neutral concern that T.W. would not impose the death penalty, demonstrated by T.W.'s concern that innocent people are convicted, that the system is unfair to African-Americans, particularly in capital cases, and his repeated assertion that it was

"unlikely" he could impose the death penalty on two defendants in a case involving one victim. (104 RT 6791-6795.)

The trial court found the prosecutor's race-neutral concerns about T.W. credible, noting the prosecutor had promptly challenged T.W. for cause, the defense had failed to ask T.W. any questions in voir dire, and T.W. had failed to disclose a prior arrest in his questionnaire. (104 RT 6795-6796.) The trial court also found credible the prosecutor's concern that T.W. had a negative view of Oakland Police Department, and his historical distrust would cover the time of the murder in this particular case. (104 RT 6797-6798.) The trial court agreed with the prosecutor's assessment that T.W. "had a preconception of the ability of Caucasian jurors, prosecutors, witnesses, and everyone else of that particular ethnic background, to fairly evaluate the case," and that he appeared to have "his own mind made up" in a manner "disadvantageous" to the prosecution. (104 RT 6798.)

As just discussed, the trial court's findings pertaining to the multiple race-neutral, plausible, and credible reasons offered by the prosecution, are supported by the record and entitled to deference. (*Lenix, supra*, 44 Cal.4th at pp. 627-628; *Calvin, supra*, 159 Cal.App.4th at p. 1388.) Appellant's claim fails.

3. Appellant fails to show the prosecutor's reasons were a pretext for discrimination

a. Appellant's statistical analysis is irrelevant and misleading

Appellant contends that error must have occurred because there were no African-Americans on the jury, focusing this court's attention on the panel as a whole. (AOB 87, 94.) This indeed, is a relevant, although not conclusive, inference in determining whether the defense has demonstrated a prima facie case. (*People v. Box* (2000) 23 Cal.4th 1153, 1188-1189

disapproved of on other grounds by *People v. Martinez* (2010) 47 Cal.4th 911, 948, fn. 10; *Johnson, supra*, 545 U.S. at p. 173.) Once a prima facie case has been determined, however, the correct analysis focuses on the purpose behind each individual peremptory challenge. (*Avila, supra*, 38 Cal.4th at p. 549; *Johnson, supra*, 545 U.S. at p. 169, fn. 5.)

Appellant incorrectly reasons that the prosecutor's challenges to E.T., B.C., and T.W. must have been racially motivated because African-Americans were underrepresented based on what "one would have expected" looking at the purported racial composition of particular cities within the county. (AOB 87-88.) "The Sixth Amendment requirement of a fair cross section on the venire is a means of assuring, not a representative jury (which the Constitution does not demand), but an impartial one (which it does)." (*Holland v. Illinois* (1990) 493 U.S. 474, 480.) In short, there is no statistical "disparate impact" theory of discrimination in evaluating a *Batson/Wheeler* ruling, particularly at this third stage of the analysis, that "trumps" review of the trial court's assessment of the plausibility and credibility of the prosecutor's reasons for exercising individual challenges. (*Avila, supra*, 38 Cal.4th at p. 549; *Johnson, supra*, 545 U.S. at p. 169, fn. 5.)[24] Assuming appellant's statistical argument is a disguised attack on the venire for failure to represent a cross-section of the community, it also fails since such a challenge requires, among other things, a prima facie showing by the defense that "underrepresentation is due to systematic exclusion of the group in the jury-selection process" by the county—not the prosecutor. (*People v. Burney* (2009) 47 Cal.4th 203, 226.) Indeed, even in a challenge to the selection of the venire, a defendant falls short of the burden based

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[24] Even assuming there were, the small sample size alone is not a reliable indicator of discrimination. (See *People v. Bell* (2007) 40 Cal.4th 582, 598.)

solely on "statistical evidence of a disparity." (*People v. Horton* (1995) 11 Cal.4th 1068, 1088.)

Even if it were relevant, moreover, appellant's statistical analysis is misleading. For example, appellant relies on (1) a secondary publication; (2) that purports to accurately reference the 2000 U.S. Census; (3) taken two years before the jury was selected, in claiming that "a remarkable seven of the 18 jurors were from the relatively small community of Livermore, with a population 74 percent white and 1.49 percent black." (AOB 87.) Appellant similarly claims the prosecutor's peremptory challenges were racially motivated because Oakland "is predominantly black (35.08 percent black and 23.52 percent white)" and the sole Oakland juror was white. (AOB 87-88.) Assuming these statistics are accurate, the four corners of the appellate record contain no evidence from which a reviewing court can draw any such conclusions. (*People v. Waidla* (2000) 22 Cal.4th 690, 703, fn. 1, 743.) Indeed, the implicit suggestion that Livermore jurors are overwhelmingly white misrepresents the seven Livermore jurors who actually sat on appellant's panel since one of these jurors was Hispanic and another was Asian. (184 CT 52354, 52395.) Thus, using appellant's logic, the record demonstrates that 28.5 percent of the jurors from Livermore were nonwhite.

Furthermore, appellant's claim fails based on an unsupported premise that jurors from cities, towns, or neighborhoods within a county in which one racial group predominates should be either excluded or included, depending on the race of the defendant. He cites no authority for such claim, and indeed, the authority is contrary. "Although a defendant has a right to a jury drawn from a fair cross-section of the community as a means of ensuring his or her right to an impartial jury, he or she has no right to a jury that reflects the racial composition of the community." (*People v. Crittenden* (1994) 9 Cal.4th 83, 119-120; see *Lockhart v. McCree* (1986)

476 U.S. 162, 178-179.) Indeed, appellant's stated premise as to the Livermore jurors—"the chance that a person living in Livermore *would have a black neighbor* was extremely unlikely," (AOB 87, italics added)—is itself racist, since it suggests that jurors who do not count an African-American among some of their "best friends" or acquaintances have a deficient ability to evaluate evidence impartially. Certainly a defendant from Samoa, Bangladesh, or even Liechtenstein would not be deprived of a fair trial or equal protection if judged by jurors who knew no one of that ethnicity, national origin or cognizable group status. (*Calvin, supra*, 159 Cal.App.4th at p. 1386; *Lockhart, supra*, 476 U.S., at pp. 178-179.)

For this same reason, this Court must reject appellant's non sequitur that, by striking two of three jurors "who lived in the predominately black city of Oakland," the prosecutor "loaded the jury with non-black jurors from one of the most lily-white towns in Alameda County: Livermore." (AOB 87-88.) Appellant improperly imputes affirmative control of the jury selection process for the panel or venire from the county jury commissioner to an individual prosecutor. (Code of Civ. Proc., § 195; Pen. Code § 1046; *Burney, supra*, 47 Cal.4th at p. 226; *People v. De Rosans* (1994) 27 Cal.App.4th 611, 619 [counsel's impression of jury composition insufficient for fair-cross-section challenge].)

Appellant's claims are not supported by his reliance on a plethora of cases which state merely that a prosecutor's challenge to some, many, or all members of a cognizable group, is relevant but not dispositive in evaluating a prosecutor's justification for exercising the peremptory challenge.[25] In

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[25] *Snyder v. Louisiana* (2008) 552 U.S. 472, 477; *People v. Snow* (1987) 44 Cal.3d 216, 225; *Huggins, supra*, 38 Cal.4th 175, 236, *People v. Blacksher* (2011) 52 Cal.4th 769, 801-802, *Bell, supra*, 40 Cal.4th at p. 599; *Lancaster, supra*, 41 Cal.4th at p. 76; *People v. Kelly* (2007) 42

(continued...)

short, there is no one factor that trumps the prosecutor's stated reasons, if found plausible and credible, including whether the prosecutor challenged all three of the only three African-Americans to make it into "the box" before the selection was finalized. (*Snow, supra*, 44 Cal.3d at p. 225; *Lenix, supra*, 44 Cal.4th at pp. 613-614, 627-629.)

b. Comparative Analysis Does not Demonstrate Error

Appellant claims that the prosecutor's reasons for challenging the three African-American potential jurors were a pretext for race discrimination because the prosecutor failed to exercise challenges to non-African-American jurors based on these reasons. (AOB 92-93.) In *Lenix*, this Court noted that "[C]omparative juror analysis is but one form of circumstantial evidence that is relevant, but not necessarily dispositive, on the issue of intentional discrimination." (*Lenix, supra*, 44 Cal.4th at p. 622.) As a cautionary note in making any "formulaic comparison," this Court also observed that "the selection of a jury is a fluid process, with the challenges for cause and peremptory strikes continually changing the composition of the jury before it is finally empanelled." (*Id.* at p. 623.)

Specifically, appellant compares five of the trial jurors and one alternate—Juror Nos. 5, 6, 8, 10, 11, and 16—to challenge the prosecutor's race neutral reasons for challenging E.T., B.C., and T.W., claiming the trial court's contrary findings are unsupported by the evidence. (AOB 92-93.) As a threshold matter, only one of four defense counsel at trial raised this claim with any specificity, and in doing so, expressed strong reluctance

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(...continued)
Cal.4th 763, 778-780; *People v. Turner* (1994) 8 Cal.4th 137, 169-170, disapproved on other grounds in *Griffin, supra*, 33 Cal.4th at p. 555.

about joining with other defense counsel to assert the *Batson/Wheeler* objection. (104 RT 6739-6741.)[26]

> In conducting comparative analysis, appellate review is necessarily circumscribed. The reviewing court need not consider responses by stricken panelists or seated jurors other than those identified by the defendant in the claim of disparate treatment. Further, the trial court's finding is reviewed on the record as it stands at the time the *Wheeler/ Batson* ruling is made. If the defendant believes that subsequent events should be considered by the trial court, a renewed objection is required to permit appellate consideration of these subsequent developments.

(*Lenix, supra*, 44 Cal.4th at p. 624.)

The defense limited its comparison to just two of the proffered race-neutral reasons: (1) that money buys a good defense; and (2) that minorities are treated unfairly. (104 RT 6739-6741.) Neither point of comparison applied to E.T. (104 RT 6683-6692, 6739-6741.)

Appellant's comparative analysis fails to demonstrate the prosecutor's race-neutral reasons were a pretext for race discrimination, and indeed, the prosecutor was remarkably consistent in exercising challenges without regard to race.

c. Affect of Money on Criminal Justice System: Juror Nos. 8, 10, and 16

The defense used the link between money and a good defense to compare challenged juror B.C. with Juror Nos. 8, 10 and 16. (104 RT 6740-6741.) All three of the seated jurors raised the issue in their questionnaire in response to Question No. 18, which asked, "What are your

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[26] Other defense counsel primarily disputed the inferences drawn by the prosecutor. (104 RT 6718-6729.) Argument, in this vein, is insufficient to demonstrate pretext on review as "possible contrary inferences do not undermine the genuineness of the prosecutor's explanation." (*Lenix, supra*, 44 Cal.4th at p. 628.)

feelings about the effectiveness of our criminal justice system?" (183 CT 52127, 52208; 184 52455.) A close look at their responses, however, fails to demonstrate a parallel circumstance with B.C. These jurors, distinct from B.C., were not misled to believe that defense counsel were working pro-bono and, moreover, each one had a combination of strong and peculiar qualities supporting the prosecutor's inference they were likely to favor the prosecution. As the prosecutor noted:

> So in terms of the invitation for a comparative analysis, it's not a one issue comparison. Most jurors, I'm not aware that we've had any jurors that I would describe as perfect, that on every single issue that I might have question on they gave what I would consider to be the most favorable possible answer. No juror me[e]ts that requirement. They're all on a spectrum. The jurors that I challenged and cut were all jurors who I felt on that spectrum were poor for me.

(104 RT 6752.)

Juror No. 8 was a 69-year-old white woman from San Leandro. Two of her questionnaire responses linked the quality of "lawyering" with an ability to pay. (183 CT 52127-52128.) Her response to Question No. 18 was: "The O.J. trial made me somewhat skeptical but maybe it was just good lawyering!" (183 CT 52127.) In response to Question No. 2—"Would you like to see any changes to our system of criminal justice"—Juror No. 8 responded, "Yes," explaining, "It would seem that money speaks, i.e., O.J., Moxley case, Senator Ted Kennedy." (183 CT 52128.) Neither the trial court nor the parties asked Juror No. 8 about her views about money and criminal justice during voir dire. (75 RT 4431-4450.)

The prosecutor decided not to challenge Juror No. 8, primarily for her strong regrets about having served as a juror in another murder case in which she and another juror held out for a guilty verdict, but eventually, voted for acquittal. (104 RT 6750-6751.) The prosecutor stated, "Now, my read on that is she has an opportunity to redo her jury service here, . . . I

don't think she's going to make the same mistake again." (104 RT 6750-6751.)

The trial court's rejection of the defense comparison between B.C. and Juror No. 8, and the credence given to the prosecutor's reasons for keeping Juror No. 8 are supported by the record. In addition to describing her prior jury experience as one in which the jurors had "given the wrong verdict," Juror No. 8's sudden need for a glass of water and temporary disruption of the proceedings to recover from a dry throat, could reasonably be interpreted as regret about how she handled her prior jury service. (75 RT 4442-4444, 4450.) Juror No. 8 demonstrated, moreover, that that she was attentive and engaged in this trial by asking the court at the outset of voir dire if she could take notes during trial and providing strong answers on whether she could impose a death sentence under various scenarios. (75 RT 4432, 4436-4437.) She expressed strong belief that people needed to take responsibility for their actions and accept punishment when warranted. (75 RT 4439-4440.)

Juror No. 10 was a 52-year-old white woman from Castro Valley.[27] She responded to Question No. 18 about the effectiveness of our criminal justice system stating, "very effective if you have plenty of money & an excellent attorney." (183 CT 52208.) When defense counsel questioned her about this response in voir dire, Juror No. 10 was clear that she was speaking in general terms and not focused on this particular case, followed by strong, prosecution-oriented statements about eliminating appeals.

> Q. It is your feeling that the criminal justice system is okay, but it is better if you have a lot of money and a good lawyer. Is that what you are saying?

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[27] Juror No. 10 was excused for cause by stipulation when the mother of a prosecution witness informed the court that she recognized Juror No. 10 as a distant cousin. (113 RT 7413-7414.)

A. I found a lot of cases have been settled quite well with the use of money and a good attorney.

Q. Okay. So the fact that we haven't settled this one quite well is already an indication that we're—

A. No, I didn't say that. That is what you said.

Q. That is what I said.

You also said something about there are too many appeals. That the system is too slow.

[¶] . . .[¶][28]

Q. Would you like to see any changes in the criminal justice system? You have yes, and you checked yes. Please explain. "narrow the appeals down on death penalty cases."

What were you thinking about there?

A. If a person is found guilty of a crime that involves the death penalty, I mean where there is absolutely no doubt that the party is guilty, I don't see the —I don't see the necessity in having all the appeals because it involves a lot of money and it ties up the court.

(76 RT 4546.)

Unlike B.C., whose concerns about the quality of lawyering applied to specifically to the instant trial (86 RT 5302-5304), Juror No. 10's "clarification," of her attitude about money and criminal justice referred to "settlement," of cases generally, and not this particular matter. (76 RT 4546.) Furthermore, Juror No. 10's interruption of the voir dire to accuse defense counsel of misinterpreting her answer about this issue, along with defense counsel's abrupt change of subject, suggests subtle hostility toward defense counsel. (76 RT 4546.) (See *Farnam, supra*, 28 Cal.4th at p. 138

[28] Objection omitted.

[reasonable and race-neutral to challenge prospective juror who accused prosecutor of trying to put words in his mouth].)

Substantial evidence supports the prosecutor's contention that Juror No. 10 was an unusually strong juror for the prosecution and not comparable to B.C. (104 RT 6751.) The prosecutor believed Juror No. 10 would likely be sympathetic to the victim since she too had a background with drugs and, even more significant, had once been strangled by her ex-husband after an argument. (104 RT 6751.) In addition, Juror No. 10 was a butcher who would not be bothered by the gore of the pictures and, moreover, a supervisor who probably was used to making hard decisions. (104 RT 6751.) The prosecutor also noted that "when asked what type of changes she'd like to see to the criminal justice system,"—the follow-up question after defense counsel asked about the link between money and criminal justice—Juror No. 10 said, "she'd like death penalty appeals to be shortened." (104 RT 6751.) For all these reasons, the prosecutor concluded, "I think she's probably a pretty strong juror." (104 RT 6751.) Thus, a full comparison with Juror No. 10 fails to demonstrate that the challenge to B.C. was a pretext for race discrimination. (*Lenix, supra*, 44 Cal.4th at p. 624.)

> Two panelists might give a similar answer on a given point. Yet the risk posed by one panelist might be offset by other answers, behavior, attitudes or experiences that make one juror, on balance, more or less desirable. These realities, and the complexity of human nature, make a formulaic comparison of isolated responses an exceptionally poor medium to overturn a trial court's factual finding.

(*Ibid.*)

Juror No. 16, was a 49-year-old white woman from Livermore. (184 CT 52436, 52441.) She responded to Question No. 18, about the effectiveness of our criminal justice system, stating, "Generally effective—but access (financially) to effective attorneys can be beneficial." (184 CT

52455.) Neither the court nor the parties asked about this response in voir dire. (77 RT 4597-4609.)

The prosecutor could not remember much about Juror No. 16, except that she was a strong juror for the prosecution:

> With [Juror No. 16], I'm not remembering quite specifically the details in her questionnaire or her transcript. Much of my memory of her, though, is that I concluded that she is strongly in favor of the death penalty. That she's absolutely capable of doing this job. I believe she's a woman who's got a brother-in-law in Kern County, and now a judge in Kern County. I believe she is a juror that if she makes it into the box, that I will be able to persuade.

(104 RT 6752.)

The record supports the prosecutor's specific and general recollection. (184 CT 52435-52475; 77 RT 4597-4609.) In the questionnaire, Juror No. 16 disclosed that her husband had been "assaulted & stabbed," and in voir dire, revealed that the crime was committed by "three juveniles, two of them were over 18," and that she had been with him when it occurred. (184 CT 52452; 77 RT 4604.) Consistent with the prosecutor's recollection, Juror No. 16 disclosed that her brother-in-law had been an assistant district attorney and was now a Superior Court judge in Kern County. (194 CT 52454,-52455.) Juror No. 16 also provided a prosecution-oriented response to Question No. 21—"Would you like to see any changes to our system of criminal justice?"—stating, "more timely action —swift, speedy trial—less appeal & re-appeals of cases that prolong the sentencing of the convicted." (184 CT 52456.) Similarly, her detailed answers to Question Nos. 25 and 26 strongly favored criminal liability for aiding and abetting and felony murder, from which it was reasonable to infer she would be a strong juror for the prosecution. (184 CT 52457-52458.) Consistent with the prosecutor's recollection, Juror No. 16 characterized herself as "Moderately in favor" of the death penalty, but also stated that it was dictated and a

punishment "which fits the crime," for crimes that were "so violent & inhuman." (184 CT 52469.) Juror No. 16 responded similarly in voir dire, stating "Yes, I could," when asked if she could impose the death penalty in a case that did not involve multiple murders, a sex crime or mutilation. (77 RT 4600.) Juror No. 16 also said she could impose death on both defendants notwithstanding that there was just one victim. (77 RT 4600-4601.) Juror No. 16 acknowledged that voting for death would be stressful, and indeed a more difficult decision to reach, but that she could handle it:

> Q. Which do you think is would be a more difficult decision to reach, death or life?
>
> A. The death penalty, I think, would be pretty tough but—
>
> Q. Okay. If you find that the evidence calls for it, will you knuckle down and deal with that difficulty?
>
> A. Yes.
>
> Q. That's your personality?
>
> A. Yes.

(77 RT 4603.)

When asked by defense counsel to identify the kind of crime "that's over the line" in a continuum warranting the death penalty as punishment, Juror No. 16 said "I think that . . . there are crimes that are committed that the death penalty is *the only, in my mind, the only penalty I could put for*—I can't put my finger on it. I don't know exactly what it is." (77 RT 4607-4608, italics added.) In light of the brutal and bloody nature of the murder in this case, involving a victim who was acquainted with her attackers, a strangling, and multiple, deep, and bloody stab wounds, the prosecutor's inference that Juror No. 16 would be a strong juror for the prosecution was reasonable. (*Lenix, supra*, 44 Cal.4th at p. 624.)

Most significant, even assuming Juror Nos. 8, 10, and 16 had identical views linking wealth with quality of representation, unlike B.C., none of them were misled to believe that appellant and his codefendant were being represented pro-bono in this case. (86 RT 5303-5304; 104 RT 6782-6785.) Substantial evidence, moreover, supports the prosecutor's belief that, to the extent these jurors had expressed some degree of bias in general terms, it would not lead to sympathy for these defendants, or distrust of the prosecution in this case since, as just discussed, each juror had strong and distinct qualities favorable to the prosecution, e.g., Juror No. 8's remorse on a prior murder trial for having changed her vote to acquittal; Juror No. 10's having been the victim of a strangling and her frustration with the criminal justice system for allowing lengthy appeals; and Juror No. 16's having witnessed her husband's stabbing along with her frustration with lengthy appeals. Furthermore, the views of these jurors about the quality of representation for indigent defendants surfaced as generalized observations which, unlike B.C., were not linked to dramatic personal experiences as a victim or close relation to a victim of crime in which the offender was not prosecuted. (76 RT 4546 ; 104 RT 6720, 6741; 183 CT 52127-52128, 52208; 184 CT 52455.)

Thus, the record supports the trial court's findings that B.C.'s bias was "deep and significant." (104 RT 6784.) As the court specifically noted, B.C.'s misimpression that defense counsel were donating their time to the case gave the prosecutor "every reason to fear that [B.C.] was forever poisoned to him by the representations that were made." (104 RT 6782.) The trial court's factual findings that the prosecutor's concern with B.C.'s bias, distinct from other jurors was "a real concern" and not a trivial matter, and his reasons for the challenge were "more than plausible," truthful, and not a pretext for race discrimination is supported by substantial evidence. (104 RT 6784-6785.) (*Pride, supra*, 3 Cal.4th at p. 230.) Comparative

analysis offered as circumstantial evidence of pretext is insufficient to challenge the trial court's findings. (*Lenix, supra*, 44 Cal.4th at pp. 627-628.)

d. Criminal Justice System's Unfair Treatment of Minorities: Juror Nos. 5, 6, 11, and 16

At trial, appellant argued that comparative analysis of Juror Nos. 5, 6, and 11 demonstrated that one of the prosecutor's race-neutral reasons for challenging prospective juror T.W.— T.W.'s belief that the criminal justice system is unfair to minorities—was a pretext for discrimination. (104 RT 6740-6741.)[29] He renews this argument on appeal as to Juror Nos. 5, 6, and 11, and adds Juror No. 16 who mentioned unfair treatment of minorities in her questionnaire. (AOB 108-110.) Comparative analysis not only fails to support his contention, it provides additional evidence demonstrating that the prosecutor's challenge was race-neutral.

Juror No. 5 was a 37-year-old "Puerto Rican" man from Hayward. (82 CT 51985.) Question No. 19 of the jury questionnaire stated, "Do you feel that minorities are treated fairly by the criminal justice system?" (82 CT 51985.) In response, Juror No. 5 checked, "No," and explained, "Empirical data has proven this fact." (82 CT 51985.) Neither the trial court nor the parties followed up on or questioned Juror No. 5 about this response in voir dire. Unlike T.W., however, Juror No. 5's view about disparate treatment in criminal justice was a data-driven theory that had no relationship to his ability to serve in this trial. Indeed, Juror No. 5 had strong feelings about the effectiveness of the criminal justice system,

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[29] As discussed and quoted at length in section II.B.2, *ante*, at trial, defense counsel concluded his comparative analysis showing by stating he felt compelled to join the motion with the other defense counsel but nevertheless, was confident that the prosecutor had not engaged in "personal misconduct," "bias" or "racism," in exercising the challenge. (104 RT 6741.)

stating in response to Question No. 18, "Best system in the world." (182 CT 52004.)

The prosecutor listed a number of reasons he decided not to challenge Juror No. 5, all of which are supported by substantial evidence. (104 RT 6748-6749.) Specifically, Juror No. 5 provided strong prosecution-oriented answers in his questionnaire and on voir dire, referencing his answers to questions concerning personal responsibility, aider and abettor liability, felony murder liability, and the relative weight of DNA evidence. (182 CT 51984, 52006-52007, 52018-52019; 101 RT 6425-6436; 104 RT 6748-6749.) The prosecutor specifically noted that Juror No. 5 was a financial adviser capable of being decisive, and appeared to be "a conservative person throughout his questionnaire." (104 RT 6748.) The prosecutor was particularly confident that Juror No. 5 would be likely to impose the death penalty, stating:

> I was favorably impressed by his answers on my series of death penalty questions. And perhaps most importantly for me, when I asked him which penalty would be harder to impose, he said they would be the same.
>
> Now, when I hear a juror say that there's no difference to him in terms of the difficulty of imposing a death or life sentence, that's a juror that I find to be very favorably disposed towards imposing the death penalty. And given the facts that I anticipate presenting in this case, that's a juror that I think is going to be very good for me.

(104 RT 6759; see 101 RT 6434.)

Juror No. 5's strong prosecution-oriented responses and his enthusiasm for the criminal justice system as the "[b]est system in the world" distinguished him from T.W. Indeed, his brief description of unfair treatment of minorities in the questionnaire appeared more theoretical—based on "empirical data"—rather than an expression of personal bias in connection with this particular trial. (182 CT 52004.)

Juror No. 6 was a 40-year-old white woman from Livermore. (182 CT 52026, 52031.) She responded to Question No. 19's inquiry about fair treatment of minorities by checking, "No," and explaining, "Not at all times, but usually." (182 CT 52045.) Defense counsel followed up in voir dire by acknowledging this response and asking whether police officers might sometimes treat an African-American defendant unfairly. (76 RT 4530.) Juror No. 6 acknowledged that police were capable of both fair and unfair treatment. (76 RT 4530.) When next asked about judging the testimony of police officers, Juror No. 6 spoke about her experience as a nurse and how that affected her ability to judge credibility, stating:

> There would be a lot of things that I would have to hear and see.
>
> I worked in—like I said, I used to work in the emergency room. I met police right there as the crime has just occurred.
>
> *That level of anxiety, it is difficult—at some point the race issue doesn't play into it.* However, once people go home and they relive the crime, and having witnessed tragedy, some of those things can come into more effect here than they probably would be right at the moment it happened. So I would have to say that I would have to really pay attention and listen and just take in all the facts.

(76 RT 4519, italics added.)

The prosecutor argued that there was nothing comparable between Juror No. 6 and T.W. (104 RT 6749-6750) He noted that Juror No. 6's niece had been killed by a serial murderer who was then on death row in Texas. (104 RT 6749.) He stated:

> She expressed perhaps the most articulate recitation of a variety of kinds of reasons for voting for the death penalty as any juror I've ever come across. She talked about the difference between the fact that in California we impose the penalty, but do not carry it out, and that she had some desire, if we're not going to carry it, perhaps we shouldn't have a death penalty, or alternatively, we should start carrying it out. She was very knowledgeable. She had a specific number in mind about the

> number of people [o]n death row. She had some idea about the number of executions that we've had in the last decade. She also discussed the importance of the symbolism of the a [*sic*] jury returning a verdict of death, even where it's probably not going to be carried out, that sends a message to the community, and it sends a message about the case.

(104 RT 6749-6750.)

The record provides overwhelming support for the prosecutor's analysis that Juror No. 6's perspective on the death penalty was unique and likely to favor the prosecution. (104 RT 4527-4528.) Juror No. 6 stated in voir dire:

> I know that we have over 600 people in California on death row and we—in the last 10 years we have executed three people. I know that information because I had a little tiny vested interest in what was going on in Texas and the difference between the two states.
>
> And I told–I told him earlier that I have had a lot of time to think about it, and the bottom line is it doesn't really matter whether we actually implement it because the sentence has been given.
>
> What I can tell you is that I hope that we get to the point where we're either doing—we're doing what we're going to say we are going to do or change the law. In the absence of that, I can certainly look at the evidence, come to a conclusion with a group of people I would be with.
>
> I think the death penalty is a very strong statement. It is a strong statement to society and you hope it would deter other people from doing similar crimes, but we all know that sometimes people are not given the right chance or the evidence is not appropriate or real or all those other things.

(76 RT 4527-4528.)

To the extent that Juror No. 6 expressed reservations about the fairness of the criminal justice system in her questionnaire, her answers in voir dire demonstrated a strong belief in imposing the death penalty as a "strong statement" about crime and as a deterrent, even if the penalty was

never implemented. (76 RT 4527-4528.) This was an extreme contrast with T.W., who acknowledged strong beliefs that prejudice was pervasive throughout the system and that it was reasonable to infer that innocent people could be convicted, and African-Americans disproportionately sentenced to death. (102 RT 6487-6492.)

Juror No. 11 was a 42-year-old white man from Castro Valley. (183 CT 52231, 52236.) Responding to Question No. 19 about whether minorities are fairly treated by the criminal justice system, Juror No. 11 placed an "X" in between "Yes" and "No," and stated: I have seen newspaper & news accounts that address this. I do believe that ethnicity is an issue in the criminal justice system. *However, I have no strong personal opinion.*" (183 CT 52250, italics added.) Neither party nor the trial court asked about this response nor inquired specifically about issues of race or ethnicity. (82 RT 4969-4980.) Juror No. 11's lack of a strong personal opinion, notwithstanding his information about race and criminal justice drawn from news media, distinguished him from T.W. who repeatedly acknowledged "strong" personal views about unfair treatment of minorities and maintained strong feelings that African-Americans "are not now being treated fairly in this system," even as he entered the courtroom that day. (102 RT 6488.) The strength and certainty of T.W.'s feelings expressed in his questionnaire responses were not comparable to the single response given by Juror No. 11 on this issue. T.W.'s response about effectiveness of our criminal justice system was: "I think the system is unfair to black" (181 CT 51635). His feelings about "whether minorities are treated fairly by our criminal justice system" was, "To much to say The history of slavery go to deep in this country." (181 CT 51635.) T.W. described the particular types of crimes "especially upsetting," to him as simply, "Innocent people going to jail" (181 CT 51632). T.W.'s described his opinion about the death penalty as "Neutral," and noted that it had changed

substantially "Because of the number of black on death row [*sic*]" (181 CT 51649.)

Moreover, the prosecutor had strong race-neutral reasons not to challenge Juror No. 11. In responding to comparative analysis at trial, the prosecutor, having stated moments earlier that he "always liked supervisors because they have to make decisions, oftentimes hard decisions," observed that Juror No. 11 was a captain for the fire department (104 RT 6751; 183 CT 52232.) Indeed, Juror No. 11's questionnaire responses demonstrated that he was a supervisor who was responsible for employee discipline. (183 CT 52232.) The prosecutor also observed that Juror No. 11 would likely favor the prosecutor as one of his questionnaire responses "was very focused on the issue of remorse." (104 RT 6751-6752.) Juror No. 11 characterized his feelings about prior criminal acts in the questionnaire stating, "I feel that the death penalty is only for causes of extreme acts in which there is no remorse." (183 CT 52266.) On this issue alone, the prosecutor felt confident that Juror No. 11 would be a strong juror for the prosecution, stating:

> [B]ased on my evaluation of the evidence in this case, that if we get to a penalty phase, I'm probably going to do pretty well on that issue, that specific issue. [¶] We got people in this case who bailed out and went and tried to rape and murder witnesses in this case. Both defendants have a significant number of post murder acts, factor [§ 193, subdivision] (b) type incidents that will be coming into evidence. So I feel like with [Juror No. 11], despite his view that ethnicity is something of an issue in the system, that I'll probably do pretty well with him as well.

(104 RT 6752.)[30]

Juror No. 16, as discussed in section II.B.3.c, *ante*, was a 49-year-old white woman from Livermore. (184 CT 52436, 52441.) Her qualified

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[30] The prosecutor also did not challenge Juror No. 18 who similarly expressed strong feelings about remorse. (88 RT 5513-5514.)

response to Question No. 19 was that, generally speaking, minorities were treated fairly by the criminal justice system. (184 CT 52455.) She checked, "Yes," in response to the specific question, and then explained, "For the most part yes but as in all aspects of life some people can be judged (unfairly) based on their race or ethnicity." (184 CT 52455.) Neither the trial court nor the parties followed up on this response in voir dire, and indeed, there was no need to do so as Juror No. 16, "for the most part" believed the criminal justice system was fair. (184 CT 52455.)

Rather than racial bias, the parties' voir dire questions focused primarily on death-penalty bias, with the defense focusing particularly on an incident in Juror No. 16's presence in which "three juveniles, two of them were over 18," attacked and stabbed her husband. (77 RT 4599-4609.) The only mention of race during Juror No. 16's voir dire was when defense counsel asked her the race of the three attackers, to which she responded "white." (77 RT 4604.) Juror No. 16's broad generalized observation— characterizing fair treatment of minorities as the rule and racial prejudice, as with "all aspects of life," as the exception—was a stark contrast with T.W.'s adamant view that disparate treatment leading to convictions of innocent people "happens more than I would think I would like." (102 RT 6487-6490.) Indeed, T.W.'s comments about racial prejudice implied that he believed such prejudice was normative, while the ability to judge evidence with an open mind was the exception to the rule. T.W. testified:

> A. Well, people come into a place like this with stereotypical images and views of people, and they're not capable of making good decisions based on facts. They already have their minds made up in a lot of cases.
>
> Q. Who are you talking about? What position do they play in the system?

A. Well, I guess I'm talking about white people, and I don't know, probably a lot of black people's minds are made up as well, and maybe they're not capable of making decisions based on facts.

Q. Are you—is it your belief that the—let's concentrate on the first part of your statement. You indicated white people.

A. Yes.

Q. That would include myself; it would include the prosecutor; it would include all counsel for defendants in this case, and it may very well include, if you're selected as a member of the jury, at least some members of the jury. Is it your view that these folks would tend to have their minds made up and not be able to analyze facts correctly?

A. No, I don't feel that about all white people, no, or all black—

Q. But—

A. —black people.

Q. You have a feeling to some degree, or you wouldn't have told me that; is that correct?

A. Yes.

(102 RT 6489-6490.)

As discussed in section II.B.3.c, *ante*, when asked about Juror No. 16 for comparative analysis, the prosecutor recalled little except that she was "strongly in favor of the death penalty," capable, and the sister-in-law of a judge in Kern County. (104 RT 6752.) As noted, in section II.B.3.c, *ante*, Juror No. 16 was indeed a strong juror for the prosecution since she had witnessed her husband's stabbing by a group of three young people, similar in age to the two defendants in this case, and her major complaint about criminal justice was that lengthy appeals "prolong the sentencing of the convicted." (184 CT 52452, 52456; 77 RT 4604.)

Thus, comparative analysis with Juror Nos. 5, 6, 11, and 16, does not aid appellant since none of them engendered a distrust of the criminal justice system comparable to that of T.W. Juror No. 5 thought this criminal justice system was "the best in the world." (182 CT 52004.) Jurors 6 and 16 felt that generally speaking, the system fairly treated minorities. (182 CT 52045; 184 CT 52455.) Juror No. 11 had seen news accounts about unfair treatment of minorities and believed that ethnicity was an issue in criminal justice, but claimed he had no strong personal opinion. (183 CT 52250.)

Even assuming any of the foregoing jurors were "close" in comparing their views on criminal justice and race, none had multiple race-neutral reasons—negative views of the Oakland Police Department; omission of an arrest in the questionnaire; and bias against the death penalty—that supported the prosecutor's challenge of T.W. (Cf. *Ledesma, supra*, 39 Cal.4th at p. 678 [a combination of reasons may support a challenge where no single reason is dispositive]).

e. Prosecutor's race-neutral reasons to challenge E.T., B.C., and T.W. were consistent with his exercise of other peremptory challenges

Ordinarily, a "reviewing court need not consider responses by stricken panelists or seated jurors other than those identified by the defendant in the claim of disparate treatment." (*Lenix, supra*, 44 Cal.4th at p. 624.) Here, however, the prosecutor's challenges to non-African-American jurors provides additional evidence that his challenges to B.C., E.T., and T.W. were race neutral and not a pretext for discrimination.

Just as with B.C., the prosecutor was attuned to prospective jurors concerned with a disparity in treatment between defendants based on income/assets, and he challenged or excused several white prospective jurors holding such views. See, e.g., R.C. (73 CT 20693, 20712); P.W.

(157 CT 44600, 44619); E.I. (102 CT 28973, 28992); P.B (104 RT 6632;147 CT 41687); and P.S. (157 CT 44619).[31] Indeed, the prosecutor excused prospective Juror P.S., even though, as the sister of a strangling victim, she had qualities from which to infer she might have been sympathetic to the prosecution. (96 RT 6029-6030.) As the Supreme Court noted in *Lenix*, there is likely no single question or answer or circumstance that will be determinative, and things such as demeanor may override an otherwise facially favorable prospective juror. (*Lenix, supra*, 44 Cal.4th at p. 623-624.)[32]

Similarly, just as with T.W., the prosecutor exercised challenges to white or non-African-American jurors who, like T.W., noted some degree of disparity in the fair treatment of minorities, or believed innocent people could be wrongly convicted. Indeed, the prosecutor was remarkably consistent in challenging jurors who expressed any concern that innocent people were sent to prison, notwithstanding other qualities that might favor the prosecution. See, e.g., D.T., (120 CT 34179, 34198; 34206); P.L. (83 RT 5076; 53 CT 14989); S.G. (92 RT 5762-5763; 150 CT 42623),[33] P.B. (147 CT 41688, 41707; 91 RT 5701, 5707), and R.V. (169 CT 48149-48150, 48164). The prosecutor also challenged or supported dismissal of non-African-American prospective jurors who acknowledged racial

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[31] For reasons not stated in the record, before exercising peremptory challenges, the parties stipulated to excuse white prospective juror, K.K., who thought that private counsel could provide a superior defense. (42 CT 11709, 11728; 75 RT 4479, 4482; 103 RT 6574.)

[32] The prosecutor also challenged C.I., a "Pacific Islander," after defense counsel made inappropriate comments of a personal nature unrelated to the trial, similar to counsel's personal comments to B.C. about how defense attorneys are paid. (80 RT 4795, 4798-4800; 104 RT 6631.)

[33] S.G., noted in her questionnaire that she was strongly in favor of the death penalty notwithstanding that "it is usually applied to the wrong people." (150 RT 42623.)

prejudice might play a part in their decision. See, e.g., R.L. (100 RT 6328-6332; 163 CT 46528); T.N., (83 RT 5086-5087, 5091; 80 CT 22743.) Indeed, T.W.'s responses were strikingly similar to those P.B., a white 47 year old prospective juror, whom, like T.W., the prosecutor unsuccessfully challenged for cause before exercising a peremptory challenge. (147 CT 41688, 41707; 91 RT 5707, 5711-5712, 5715-5716; 104 RT 6632.)

The prosecutor's challenges of non-African-American prospective jurors were consistent, moreover, with other race-neutral reasons he provided that appellant did not include in his comparative analysis. See, e.g., S.H., [false confession possible] (100 RT 6311); J.B., [false confession possible] (90 RT 5680-5681.); K.H., [prior service on jury that "hung" on murder charge and convicted on lesser offense] (71 RT 4128, 4135, 104 RT 6633);[34] P. B. [defense did not voir dire] (91 RT 5710); S.L. [defense did not voir dire] (99 RT 6252-6253); W.H. [defense did not voir dire] (99 RT 6236); S.G., [counsel for codefendant did not voir dire] (92 RT 5722); D.T. [counsel for codefendant did not voir dire; counsel for appellant asked two routine questions about remaining impartial] (90 RT 5659); J.W. [failure to disclose criminal history] (35 CT 9863; 73 RT 4233-4239), and J.G. [failure to disclose criminal history] (101 RT 6444-6453; 150 CT 42672).

Although challenged either by the defense, or by stipulation, the record nonetheless reflects the prosecutor's strong concerns about two non-African-American jurors who, like E.T., were reluctant to impose the death

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[34] Indeed, when K.H., a white prospective juror, belatedly disclosed her "hung jury" experience to defense counsel, the prosecutor emphatically sought to reopen voir dire, telling the trial court, "[i]t has great importance in my evaluation of her in a possible use of a peremptory challenge or not." (71 RT 4135-4136.) The prosecutor also questioned white prospective juror N.P. extensively about his hung jury experience in voir dire (90 RT 5639-5642; 129 CT 36722), although as Juror No. 54, the opportunity to challenge him did not arise. (103 RT 6588-6589; 104 RT 6645.)

penalty based on religion. See, e.g. P.G. (137 CT 38928; 91 RT 5717-5718, 5722); H.L. (83 RT 5079).

This claim should be denied.

III. THE TRIAL COURT DID NOT ERR IN RULINGS PERTAINING TO CAUSE FOR DISMISSAL OF TWO JURORS AND ONE PROSPECTIVE JUROR

Appellant claims that the trial court erred by denying two of his challenges for cause (Juror Nos. 12 and 9), and granting one of the prosecutor's cause challenges (prospective juror E.I.). (AOB 126-128, 134135.) His claims challenging denial of the cause challenges are forfeited as appellant could have removed these jurors using any of his 25 remaining peremptory challenges and he failed to object to the jury once impaneled. (*People v. Thomas* (2012) 54 Cal.4th 908, 935.) His attack on the grant of the cause challenge also fails as the record provides overwhelming support for the trial court's exercise of discretion. (*People v. Virgil* (2011) 51 Cal.4th 1210, 1243-1244.)

A. Background

1. Juror No. 12

In exercising a challenging for cause, the defense claimed that Juror No. 12 demonstrated bias in favor of the death penalty under the circumstances of this particular case. (95 RT 5972.) The trial court denied the cause challenge with extensive findings, drawn from the questionnaire, responses in voir dire, and demeanor, that Juror No. 12 would not prejudge the case. (95 RT 5975-5978.)

Juror No. 12's questionnaire responses indicated that he was "moderately in favor" of the death penalty, and would vote for it were a ballot measure because, "[i]n some cases that's the way it should be." (183 RT 52305-52306.) When asked, however, whether substantial criminal history would prompt him to "always vote for death, instead of the

alternative of life imprisonment without possibility of parole," Juror No. 12 marked, "No," and explained, "Sometimes the alternative is better." (183 CT 52307.) Juror No. 12 confirmed that he still felt this way, when questioned by the trial court during voir dire. (95 RT 5953.)

Similarly, when questioned in voir dire by Patterson's counsel, Juror No. 12 acknowledged that he did not feel strongly in favor of or against the death penalty, stating, "Yeah, I could go either way." (95 RT 5964.) In response to a series of questions by the defense about circumstances that would warrant a death penalty, Juror No. 12 explained, four times, that he could not commit to a position one way or the other. (95 RT 5964-5967.) After this exchange, defense counsel apologized for not being clear, and again asked, if, after hearing all the evidence and having made a decision "that these guys are guilty of the murder," whether "this is a case where the death penalty should be applied," to which Juror No. 12, responded, "Yeah." (95 RT 5967.) Before answering this last question, Juror No. 12 had interrupted counsel to clarify that he was being asked about a decision "after listening to everything." (95 RT 5967.) The trial court thereafter followed up to clarify whether Juror No. 12's answer reflected his attitude after the guilt phase of trial, to which Juror No. 12 emphatically responded that he could not make up his mind until after he heard the evidence at the penalty phase. (95 RT 5967-5968.)

> Q. Let me just follow up, [Juror No. 12], because I'm not sure we're communicating with each other here. If you were convinced along with the other jurors at the end of the guilt phase of the trial, the first stage of the proceeding, that the defendants or either of them were guilty of murder in the first degree, and they did the things that counsel have described here, that they murdered a young woman in the course of a robbery, by the means that you've heard described here, with a knife and belt, would you still want to hear the evidence that would be presented at the penalty trial, or would your mind be made up at that point; you don't want to hear any more evidence; you don't

need to hear any more evidence? The death penalty is the only appropriate verdict. That's what we need to know. Is your—are you still—do you still want to hear whatever evidence is going to be presented at the penalty trial before you make up your judgment, or is that something that you just don't need to hear?

A. *Yeah. That's what I was trying to tell him. You know, I couldn't make up my mind without hearing everything, all the evidence and that before I decided, you know—*

Q. Okay.

A. *—about the death penalty.*

Q. So when you say you want to hear everything you mean the evidence, including the evidence at the second phase of the trial, the penalty trial. You want to hear that, too, before you make a decision?

A. *Exactly. Yeah.*

(95 RT 5967-5968, italics added.)

Appellant's counsel repeated this scenario in voir dire by asking Juror No. 12 about various circumstances that would warrant the death penalty, and Juror No. 12 again, repeatedly, and with apparent exasperation, stated that he could not answer the question without having heard all the evidence, until asked a, lengthy, compound question about imposing the death penalty during a robbery murder, to which he responded, "Yes." (95 RT 5969-5971.)

In denying the defense motion for cause, the trial court noted that judging by his demeanor, Juror No. 12 appeared tired of being asked the same question repeatedly, and interpreted the final question as requiring him to assume a circumstance in which he must decide the penalty after the guilt phase. (95 RT 5976-5978.)[35] Based on all of Juror No. 12's answers

[35] The prosecutor noted that, aside from Juror No. 12's demeanor showing "he was tired of answering the same question," his final answer (continued...)

and his demeanor, the trial court found that there was insufficient showing to grant the cause challenge. (95 RT 5976-5978.)

2. Juror No. 9

Counsel for appellant challenged Juror No. 9 for cause because she was similar to the victim, Beeson, "in terms of age, her gender, her appearance, her race." (80 RT 4838-4839.)[36] The issue arose in voir dire after defense counsel noted that Juror No. 9 stated in the questionnaire that the types of crimes especially upsetting to her were "Bloody crimes." (80 RT 4833;183 CT 52165.) After a drawn-out question emphasizing the victim's age and the brutality of the murder before asking whether it would be difficult to be objective, Juror No. 9 responded, "[a] little more so, being young and in my 20s." (80 RT 4833.) When asked by defense counsel whether she felt it was appropriate for her to serve on this kind of case, repeating that "the victim was a young woman about your age who was strangled and stabbed in her own home," Juror No. 9 responded, "Probably not," noting that she did not think she would "make it as a juror in this case, considering that I'm almost the same profile as [the victim] is, it sounds like." (80 RT 4834.)

After the trial court followed up, Juror No. 9 acknowledged that these details about the victim would not affect her fairness toward the parties, but rather, made her feel "uneasy and squeamish." (80 RT 4836.) In the voir

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(...continued)
supporting the challenge concerned a factual situation different from this case, i.e., one in which a killing was planned in advance of, rather than during, the robbery. (95 RT 5973-5974.)

[36] Initially, one of appellant's counsel raised concerns that Juror No. 9 felt she would not be appropriate for the case because she was squeamish about viewing bloody photographs. (80 RT 4838-4839.) Appellant's other counsel did not find the bloody photographs a basis for the cause challenge. (80 RT 4841-4842.)

dire that followed, Juror No. 9 responded, consistent with prior answers in voir dire and notwithstanding her squeamishness or uneasiness about the victim, that she had not prejudged the case against the defendants. (80 RT 4831, 4836-4837.)

Significantly, Patterson's counsel decided not to join in the motion until just before the matter was submitted, noting that without additional inquiry, it was unclear whether Juror No. 9's comments demonstrated a lightening of the prosecution's burden. (80 RT 4838, 4842.) The prosecutor noted that, but for age and gender, there were no other similarities between Juror No. 9 and the victim, and that indeed, they associated with different kinds of people (police officers vs. marijuana users), and were from different areas of the county (Livermore vs. Berkeley/Oakland). (80 RT 4840.)

The trial court denied the challenge for cause. (80 RT 4843-4844.) After noting that there was no dispute about Juror No. 9's openness to either penalty, the trial court found that "squeamishness and bloody crimes being upsetting to her" was insufficient for a cause challenge. (80 RT 4843.) The trial court noted that a juror's preference about whether the case for which she was called was "appropriate" was not helpful or a barometer of that juror's fitness to serve. (80 RT 4843-4844.) The trial court ruled that the similarity in age, gender, and race between the victim and Juror No. 9 was insufficient cause to grant the challenge, stating:

> In terms of the demographics, as the word has been used, [Juror No. 9] is female and she is 24 years old. In terms of whether she physically resembles the victim, I don't believe she does, but that is an obviously subjective thing. But the fact she is young and 24 and a white female does not exclude her from service here.
>
> The fact that she is not looking forward to and doesn't relish the idea of seeing bloody photographs, in view of all the rest of the

answers she has given here I don't think makes her a juror that should not sit in this case or would indicate she cannot be fair.

She told me, and I think in very clear terms, that she would be fair to both defendants. She would be fair to all parties in this case, notwithstanding the concerns she voiced here.

(80 RT 4844.)

3. Prospective juror E.I.

Appellant claims the trial court erred in dismissing prospective juror E.I. for cause. (AOB 134-135.) The defense submitted the matter without objection immediately after E.I. told the trial court that, having thought about the matter, she did not want "to live with my conscience" and return a death verdict. (86 RT 5327.) After the trial court thanked and excused E.I., defense counsel also offered implicit thanks, stating, "The truth is what you have told us," and "That is why we have this process." (86 RT 5327-5328.)

E.I.'s feelings about the death penalty were mixed, and sometimes contradictory from the start of the selection process. During the trial court's introductory voir dire, E.I. stated that she did not think she could vote for death in a case with one victim, no sexual assault, mutilation, or a serial killer. (86 RT 5319.) The trial court noted that it was inclined to excuse E.I. for cause but offered counsel the opportunity to conduct more voir dire. (86 RT 5319-5320.) During the prosecutor's voir dire, E.I. acknowledged that, absent commission of serial murders or violence beyond a "normal range" that "simply causes death," E.I. would not vote for death, prompting the prosecutor to challenge E.I. for cause. (86 RT 5321-5322.)

The trial court did not rule, but instead allowed the defense to proceed with voir dire. (86 RT 5322.) In answering questions by counsel for codefendant Patterson, E.I., as throughout her questionnaire, provided

mixed and contradictory responses about circumstances in which the death penalty was appropriate or should be required. (86 RT 5323-5324;102 CT 2908.) E.I. stated, for example, "I do believe in the death penalty in most cases, but for the most part, life in prison will handle it." (86 RT 5323-5324.) By the time appellant's counsel conducted voir dire, E.I. had changed her mind and firmly asserted that she could no longer vote for the death penalty. (86 RT 5327-5328.)

A. I *don't want to send anybody to death.*

Q. You are saying you wouldn't vote for death?

A. I'm beginning to think more and more—as *I'm more and more on the spot, I don't want to live with my conscience—*

Q. I'm not trying to ask you to do that. *I agree, I couldn't either.*

Are you telling me that *you would not want to return a verdict of death?*

A. *No.*

[Appellant's counsel]: I would submit it.

THE COURT: I'm inclined to excuse this juror. Does anyone want to be heard?

[Patterson's counsel]: Submitted.

[Prosecutor]: Submitted.

THE COURT: [E.I.], I'm going to excuse you. Thanks for your time.

[E.I.]: Thank you, but—

THE COURT: No, we wanted your opinions.

[Appellant's counsel]: *The truth is what you have told us.*

[Patterson's counsel]: *That is why we have this process.*

(86 RT 5327-5328, italics added.)

The trial court noted its reasons stating:

> I form the definite impression from the views she stated principally here in this courtroom, that her views on capital punishment would prevent or substantially impair the performance of her duties as a juror in accordance with her instructions and her oath.
>
> [¶] . . .[¶]
>
> Now, her last answer, the last questions I think really eliminate any further questions on it. "More and more I think I don't want to send anyone to death."
>
> So, clearly at the end her views became crystal[l]ized that she could never return a verdict of death, so based on her last answer alone she was clearly excusable.
>
> Even short of that, though, I think her answers were clear that she should be excused.

(86 RT -5328-5329)

After excusing E.I., the trial court admonished appellant's counsel for injecting his personal views in the case through "representations about how you would vote if you were a juror," noting, "You can't tell her I wouldn't vote for it either." (86 RT 5329-5330.)

B. The Trial Court Did Not Err in Denying Appellant's Challenges for Cause

1. Appellant forfeits these claims on appeal

Appellant's claim, attacking the denial of his cause challenges to Juror Nos. 12 and 9, is forfeited on appeal as he failed to meet any element of the three-pronged test to preserve this issue. (*People v. Mills* (2010) 48 Cal.4th 158, 186; *Thomas, supra*, 54 Cal.4th at p. 935.)

> [T]o preserve this claim for appeal we require, first, that a litigant actually exercise a peremptory challenge and remove the prospective juror in question. Next, the litigant must exhaust all of the peremptory challenges allotted by statute and hold none in

> reserve. Finally, counsel (or defendant, if proceeding pro se) must express to the trial court dissatisfaction with the jury as presently constituted.

(*People v. Mills*, *supra*, 48 Cal.4th at p. 186.)

Here, defense counsel failed to remove the jurors unsuccessfully challenged for cause by using any of their 25 remaining peremptory challenges. (104 RT 6629, 6632-6635, 6652-6653.) Moreover, rather than express dissatisfaction with the jury as constituted, defense counsel twice noted their satisfaction—first, at the time the defense "passed;" and second, after an in-chambers discussion with the trial court to confirm the parties' satisfaction with the selected panel. (104 RT 6636, 6654-6656.)

Defense counsel's forfeiture of this issue was patently tactical. Indeed, the record demonstrates that defense counsel were well-aware of these requirements to avoid such forfeiture. During jury selection, defense counsel specifically requested the trial court order that claims arising from denial of cause challenges be preserved for appeal without requiring exhaustion of peremptory challenges, even while candidly acknowledging there was no authority for such an order. (102 RT 6522-6525; 103 RT 6614-6615.)[37] Thus, having had 25 peremptory challenges at his disposal during trial, appellant forfeits his claim. (*Mills, supra*, 48 Cal.4th at p. 186.)

Notwithstanding contrary authority, appellant claims that his failure to exercise a peremptory challenge was a tactical decision to avoid "even less sympathetic jurors" and argue on review that maintaining these jurors

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[37] Defense counsel's rationale for such an order, i.e., that there would be insufficient jurors left in the panel if all challenges were exhausted, anticipated a problem that never came to fruition as the parties both passed after collectively exercising 15 peremptory challenges to a panel that began with roughly 73 jurors. (103 RT 6574, 6592, 6594; 104 RT 6636, 6654).

deprived him of a fair trial in violation of the Sixth Amendment. (AOB 143-144.) His reliance on *United States v. Martinez-Salazar* (2000) 528 U.S. 304, 315 [no federal statutory or due process violation if defendant exercises a peremptory challenge under federal law to cure erroneous denial of cause challenge], *People v. Boyette* (2002) 29 Cal.4th 381, 418-419, *Gray v. Mississippi* (1987) 481 U.S. 648, 668 [dismissal of juror without sufficient cause is reversible error], *Gomez v. United States* (1989) 490 U.S. 858, 876 [reversible error where magistrate presides at selection of jury in felony trial without defendant's consent], *Lockhart, supra*, 476 U.S. at p. 182, and *Taylor v. Louisiana* (1975) 419 U.S. 522, 528-530 is unavailing as none of these cases shield a tactical decision of counsel from forfeiture, or transform a reasonable tactic into a constitutional violation. In *Martinez-Salazar*, in finding a tactical decision to exercise a peremptory challenge was not a statutory violation under federal law, our high Court observed, "A hard choice is not the same as no choice." (*Martinez-Salazar, supra*, 528 U.S. at p. 315.) Similarly, in *Boyette*, the Supreme Court of California rejected this same claim as a constitutional violation of the right to an impartial jury. (*Boyette, supra*, at pp. 418-419.) *Gray* is inapposite as there, the Court noted that a prosecutor's tactical decision to exhaust peremptory challenges, after the trial court erroneously failed to excuse some of the challenged jurors for cause, could not justify its erroneous dismissal for cause which, unlike a peremptory challenge, was constitutional in origin. (*Gray, supra*, 481 U.S. at p. 668.) *Gomez* is also inapposite as it addressed a federal claim regarding a magistrate's authority to preside over jury selection—not dismissal of a juror for cause. (*Gomez, supra*, 490 U.S. at p. 876.) *Lockhart v. McCree* is inapposite as it addressed the constitutionality of "death qualification" of a jury. (*Lockhart, supra*, 476 U.S. at p. 182. *Taylor v. Louisiana* is inapposite as it struck down a state procedure that excluded women from serving as jurors absent

a declaration of a desire to serve. (*Taylor v. Louisiana, supra*, 419 U.S. at pp. 528-530.) None of these cases excuse appellant's forfeiture, and his claim fails.

2. The trial court did not err in denying challenges for cause to Juror Nos. 12 and 9

The "proper standard for determining when a prospective juror may be excluded for cause" is "whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" (*Wainwright v. Witt* (1985) 469 U.S. 412, 424.) The standard for a capital case is no different from any other criminal case with a right to jury under the Sixth Amendment. (*Id.* at p. 423.) This Court recently noted:

> Under decisions of the United States Supreme Court, prospective jurors who express personal opposition to the death penalty are not automatically subject to excusal for cause as long as "they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law." (*Lockhart v. McCree* (1986) 476 U.S. 162, 176, 106 S. Ct. 1758, 90 L.Ed.2d 137; see also *Witherspoon v. Illinois* (1968) 391 U.S. 510, 522, 88 S. Ct. 1770, 20 L.Ed.2d 776 (*Witherspoon*).)

(*People v. Riccardi* (2012) 54 Cal.4th 758, 778.)

The burden is on the party seeking exclusion for bias to show that the prospective juror lacks impartiality. (*Wainwright v. Witt, supra*, 469 U.S. at p. 423.) On appeal, the record is reviewed de novo to determine whether the trial court had sufficient information about the challenged juror's state of mind to permit it to reliably determine whether his or her views would prevent or substantially impair the performance of the prospective juror's duties. (*People v. Cook* (2007) 40 Cal.4th 1334, 1343.)

> [I]n determining whether the removal of a potential juror would vindicate the State's interest without violating the defendant's right, the trial court makes a judgment based in part on the demeanor of the juror, a judgment owed deference by reviewing

> courts. [Citation.] [¶] Deference to the trial court is appropriate because it is in a position to assess the demeanor of the venire, and of the individuals who compose it, a factor of critical importance in assessing the attitude and qualifications of potential jurors.

(*Uttecht v. Brown* (2007) 551 U.S. 1, 9 [habeas review not warranted].) The trial court's resolution of this factual question must be upheld if supported by substantial evidence. (*People v. Moon* (2005) 37 Cal.4th 1, 14.)

As discussed above, the trial court's ruling was supported by overwhelming evidence as to both challenged jurors. The record provides ample evidence of Juror No. 12's exasperation at defense counsel for badgering him during voir dire and misinterpreting responses asserting that he would need to hear all evidence, including penalty-phase evidence, before he could render a decision about whether the death penalty were warranted. (95 RT 5964-5968.) Indeed, the trial court specifically questioned the juror about this fact, thus obtaining the specific information relevant to determine whether Juror No. 12's state of mind would substantially impair his ability to perform his duties as a juror. (95 RT 5967-5968.)

Similarly, there was substantial and consistent evidence that Juror No. 9's uneasiness about a young-adult-female victim would not affect her ability to be impartial in judging appellant. (80 RT 4831, 4836-4837.) When asked questions focused on the defendants, rather than the victim, Juror No. 9 stated "they could be not guilty. They could be guilty. They could be the right people, the wrong people," "With no evidence, you don't know, " and "it would just determine [*sic*] on all the circumstances as to what they were to determine if it was death or if it was just life in prison. I mean, you have to look at the whole picture." (80 RT 4831, 4836-4837.) Indeed, the trial court specifically clarified that Juror No. 9's feelings about

the victim were distinct from her state of mind in performing her duties as a juror without substantial impairment. (80 RT 4836.)

In short, the trial court followed up with the challenged jurors on the specific questions relating to bias, and thereafter made a factual determination that each could perform duties without substantial impairment. (80 RT 4836; 95 RT 5967-5968.) Applying deference, the ruling must be upheld. (*Moon, supra*, 37 Cal.4th at p. 14; See *Uttecht v. Brown, supra*, 551 U.S. at p. 9; see also *Riccardi, supra*, 54 Cal.4th at p. 782 [voir dire required to clarify ambiguity in questionnaire].)

3. The trial court did not err in excusing Juror E.I. for cause

As discussed at length in section III.B.2, *ante*, a prospective juror must be excused for cause when his or her views would prevent or substantially impair the performance of duties as a juror. (*Wainwright v. Witt, supra*, 469 U.S. at p. 424.)

> Generally, the qualifications of jurors challenged for cause are matters within the wide discretion of the trial court, seldom disturbed on appeal. [Citations.] There is no requirement that a prospective juror's bias against the death penalty be proven with unmistakable clarity. [Citations.] Rather, it is sufficient that the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law in the case before the juror. [Citations.] 'On review, if the juror's statements are equivocal or conflicting, the trial court's determination of the juror's state of mind is binding. If there is no inconsistency, we will uphold the court's ruling if it is supported by substantial evidence. [Citations.]'

(*Virgil, supra*, 51 Cal.4th at pp. 1243-1244.)

As noted at length in section III.A.3, *ante*, E.I. gave equivocal and conflicting responses throughout her questionnaire and voir dire. (102 CT 29006, 29008; 86 RT 5318-5328.) She stated at the outset of introductory questions by the trial court that this particular case "doesn't seem to be the

kind of case where I would vote for the death penalty," and at the conclusion of voir dire, acknowledged, without ambiguity she would not return a death verdict, prompting appellant's counsel immediately to submit the matter. (86 RT 5319, 5327.) The trial court specifically recognized these answers in concluding that E.I.'s views about capital punishment would prevent or impair her ability to consider returning a verdict of death in the case presented. (86 RT 5328-5329.)

Additional support for the trial court's reading of E.I.'s view is demonstrated by defense counsel's immediate submission of the matter, and his comments to the trial court after it admonished him for infusing about his personal view of the death penalty into voir dire. (86 RT 5329.) After the trial court indicated that the prejudice from these improper comments, based on "[t]he way the colloquy was going . . . was soon to become a moot point," appellant's counsel agreed, noting in "my own defense[,] she said she couldn't vote for death . . ." (86 RT 5330.) Indeed, appellant failed to object to the excusal of E.I., notwithstanding the trial court's invitation for argument.[38] (86 RT 5327-5328.) While failure to object does not necessarily forfeit the issue as a matter of law, (*People v. McKinnon* (2011) 52 Cal.4th 610, 643 [forfeiture of *Witt/Witherspoon* claim applies prospectively]), the trial court's evaluation of this witness is compelling evidence, nonetheless, and requires deference. (*Vines, supra*, 51 Cal.4th at p. 854.)

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[38] Appellant claims that the objection was preserved, relying on *People v. Collins* (2010) 49 Cal.4th 175, 226-227. That case is inapposite as it holds that an issue is preserved for appeal when the trial court interposes its own objection, *consistent with the defense claim on appeal*, and the defense submits the matter. (*Ibid.*) By contrast, the concerns the trial court raised about E.I. are contrary to appellant's claim raised for the first time on appeal.

Even if error occurred, defense counsel's improper expression of his personal view of the death penalty, untethered to any evidence, was improper, and would also have provided sufficient cause to excuse this juror. (See *People v. Ghent* (1987) 43 Cal.3d 739, 772 ["prosecutors should refrain from expressing personal views"].)

IV. THE TRIAL COURT DID NOT ERR BY ALLOWING ADMISSION OF APPELLANT'S STATEMENTS TO POLICE, INCLUDING HIS CONFESSION, AT TRIAL

Appellant claims that the trial court erred in admitting appellant's statements to police, the district attorney's investigative team, and his mother, as coerced based primarily on purported threats and promises of leniency that his statements would allow him to avoid the death penalty. (AOB 145, 155.)

The parties filed cross motions in limine to admit and preclude appellant's taped confessions to police officers and the district attorney's office. (6 CT 1384-1403, 1528-1529.) Appellant claimed that his confession to police was involuntary, having been induced by "certain interrogation techniques to manipulate and intimidate suspects," and promises of leniency to avoid the death penalty. (6 CT 1391.) The method of coercion appellant complains of on appeal is not specific. Appellant appears to argue that police issued threats and promises of leniency in a section of his opening brief that describes the arguments made at trial, i.e., section, IV.B., "The Parties' Arguments." (AOB 155-156.) In the argument section of the brief, i.e., section IV. D., appellant refers to circumstances that involved "*suggestions* of leniency," appellant's "limited educational background," and police "duplicity" in telling appellant they had some pretty good evidence against him including fingerprints on Botello's stolen gun. (AOB 160, 163, italics added.) Despite these ambiguities, we presume that appellant continues to assert that he was

coerced by promises of leniency to avoid the death penalty. (AOB 155-156.)

In addition to listening to the tapes and examining other documentary evidence, the trial court heard testimony by appellant himself, Officers Olivas and McKenna who conducted appellant's interview, Inspector Don Lopes who was present during the interview with the district attorney's office, and Dr. Richard Ofshe who was a defense expert on interrogation techniques. (33 RT 2125-2126, 2154-2168.) The trial court ruled that all appellant's statements, to law enforcement and his taped call to his mother, were admissible. (33 RT 2121-2179.)

A. Background: Evidence Presented at the Pretrial *Miranda* Hearing

Patterson confessed to police officers about his and appellant's role in the robbery and murder, and provided a recorded statement on May 2, 1996 at 11:39 p.m. (14 RT 802, 806; Supp. CT 107-120.)[39] Patterson's interview ultimately concluded shortly before 1:00 a.m. on May 3, 1996. (13 RT 806-807.)[40] Appellant was in custody at the Santa Rita jail for the Chevron robbery when police obtained a removal order, at 9:15 a.m., to transfer him to Oakland to be interviewed. (14 RT 808-810; 28 RT 1823.)

Appellant arrived at the interview room, Room 201, at 10:15 a.m., and the interrogation began 11:07 a.m. (13 RT 811-812.) Appellant was properly advised of and waived his *Miranda* rights within the first three minutes after the interview began. (14 RT 815-818; 28 RT 1812.) Appellant was never refused food, drink or bathroom breaks. (14 RT 831-

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[39] The transcript of Patterson's statements was marked as Exhibit 3A in the *Miranda* hearing and remarked as exhibit 71A at trial. (11 CT 2946.)

[40] After providing the recorded statement and a break, Patterson began volunteering additional information about the crime and police continued the interview another half-hour before concluding. (13 RT 807.)

832; 28 RT 1826, 1829.) In total, there were five breaks in-between six interview sessions, accounting for four-and-a-quarter of the nearly ten hours of appellant's interview before police began recording and appellant confessed to the murder. (14 RT 822-848.)[41]

In the first session of the interview, appellant discussed how he knew Botello. (14 RT 823.) Appellant told Sergeant Olivas that he had gone to Botello's house with Smith, had spoken to Beeson, and left after learning that Botello was not at home. (16 RT 927-928.)

In the second session, Sergeant Olivas asked appellant about his parole ankle monitor and a possible power outage in December, and confirmed that appellant knew Patterson and Smith. (14 RT 824-825.) Appellant also denied knowing anything about Botello's shotgun. (14 RT 824.) Just before the second break, Sergeant Olivas confronted appellant saying, without providing any detail, that he had pretty good evidence on him concerning the murder of Beeson. (14 RT 825; 30 RT 1953.) Appellant denied any involvement. (14 RT 826; 30 RT 1945.)

Thirty minutes into this second break, police took appellant to the bathroom, and the third session, in which police began to confront appellant

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[41] Appellant was interviewed (1) for 50 minutes from 11:10 a.m. to 12:00 p.m., followed by an hour break; (2) for 1 hour, 15 minutes, from 12:54 p.m. to 2:09 p.m., followed by a 40 minute break; (3) for one hour, eight minutes from 2:47 to 3:55 p.m., followed by a 45 minute break during which appellant was provided with lunch; (4) one hour and 35 minutes, from 4:40 p.m. to 6:15 p.m., followed by a 10-minute break; (5) 55 minutes from 6:25 p.m. to 7:20 p.m. followed by a one-hour, thirty-eight minute break. (14 RT 822- 824, 826, 829-830, 837, 839-840, 843, 848.)

The next two sessions (numbered consecutively here) were recorded and lasted: (6) about 44 minutes from 8:58 p.m. to 9:42 p.m., followed by an 18 minute break (surreptitious recording beginning at 9:12 p.m.); (7) about 25 minutes from 10:02 p.m. to 10:27 p.m. (knowingly recorded). Appellant called his mother at about 10:30 p.m. (15 RT 863, 869-870; 16 RT 983; Supp. CT 2, 21.)

about the murder, resumed ten minutes later. (14 RT 831; 16 RT 945-946.) During the third interview session, appellant acknowledged that he had been to Botello's apartment and that he did not like Botello's pit bull dogs. (14 RT 829.) Contradicting an earlier statement, appellant now admitted having seen the shotgun at Botello's apartment. (14 RT 829.) Appellant also claimed that he had only one belt, and admitted that by the end of January 1996, he had removed his ankle monitoring bracelet. (14 RT 829.) During the subsequent break, Sergeant Olivas provided appellant with lunch from the Oakland City Jail. (14 RT 830-831; 16 RT 947.)

During the fourth session, beginning at 4:40 p.m., police showed appellant a picture of Patterson in custody, taken during the prior break, and played the first four or five minutes of Patterson's recorded statement to police. (14 RT 831-835; 30 RT 1944.)[42] These few minutes of Patterson's interview provided no details about the murder or robbery, but rather, allowed Sergeant Olivas to show appellant "that the evidence I do have is actually real, something I haven't made up." (14 RT 834.) Sergeant Olivas testified about the change in appellant's demeanor once he played the tape:

> His—for lack of a better term, attitude changed. He–up until that point he was confident in his denial to me. He would laugh and smirk a lot and kept saying I didn't have anything on him. [¶] When I played that portion, his countenance changed. He became subdued. Not subdued, somber. Quiet. [¶] He sat back in his chair, lowered his head, and I was able—because I was only an arm's length apart and I was able to read his lips and hear what he had said. And he said it in a low voice like in a whisper, quote, unquote, "that motherfucker."
>
> [¶] . . . [¶]

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[42] At trial, Officer Olivas admitted playing Patterson's taped statement in "small portions," and "partial sections." (132 RT 10094, 10097.) Officer McKenna testified that Officer Olivas "played several very brief portions." (136 RT 10432.)

He then also was—still with his head lowered and he had said, "the streets made me bitter."

(14 RT 836-837.)[43]

Around 5:50 p.m., appellant began to make incriminating statements, telling Sergeant Olivas that he had gone to Beeson's house to do a robbery. (14 RT 837-838.) In the 25 minutes before the next break, appellant told Sergeants Olivas and McKenna that he had earlier been at Beeson's house and smoked weed with her, and he did not plan "the way it happened," but "she didn't take the robbery seriously." (14 RT 838-839.) Appellant had not specifically described what happened and the officers took a 10-minute break at 6:15 p.m. (14 RT 838-839; 16 RT 961.)

During the fifth session, beginning at 6:25 p.m., appellant made five statements that Sergeant Olivas wrote down verbatim: (1) I admit I was there; (2) If I get the death penalty, I get it; (3) Once I got there, it all went sour; (4) I have to play it out; (5) I'm fucked. (14 RT 840-841.) Officer Olivas testified that appellant's comment about the death penalty was unprompted. (14 RT 841-843.) When asked about the context in which appellant made the statement about the death penalty, Sergeant Olivas testified:

Q. Who was the first person in there to utter the words "death penalty"?

A. Mr. Winbush.

Q. Okay. Did you ever talk about the death penalty during this interview?

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[43] At trial, Officer McKenna testified that after hearing portions of the tape, appellant said, "It's his word against mine," "That motherfucker," "He is lying like a motherfucker," "Yeah, I'm gone. Any way you look at it. This punk, let him walk," "Let's say I took a life," and "Let him walk." (136 RT 10409-10410.)

A. No, I did not.

Q. Did Sergeant McKenna ever talk about the death penalty?

A. No, he did not.

Q. Did either you and Sergeant McKenna at any time during this interview discuss with Mr. Winbush what the penalty might be for this robbery/murder?

A. No.

Q. Did anybody other than Mr. Winbush make any comments about possible penalties in this case?

A. No.

Q. When he said, "If I get the death penalty, I get it," had you asked him a question that caused him to make that statement?

A. No.

Q. Was that statement just volunteered by Mr. Winbush?

A. Yes, it was.

Q. It was just a remark that he made?

A. Yes.

Q. Did you respond to that remark when he said "If I get the death penalty, I get it"? Did you respond to that at all?

A. No.

Q. Did Sergeant McKenna respond to it at all?

A. No.

Q. Did any police officer to your knowledge discuss penalty with Grayland Winbush on May 3rd?

A. No.

Q. Were any threats about penalty made or promises about penalty made?

A. No.

Q. At any time?

A. No.

(14 RT 841-843.)

Following this fifth session, the officers took a longer 98 minute break from 7:20 p.m. to 9:00 p.m. (14 RT 843.) Sergeant Olivas arranged to have appellant surreptitiously recorded during the next interview session, and it took some time to set up the recording equipment. (14 RT 843-844, 846-847.) Sergeant Olivas explained that up to that point, appellant had made general statements admitting that he was "there," and "it went sour," but had yet to provide details. (14 RT 845.) Although not certain, Sergeant Olivas anticipated that appellant might be ready to provide those details, and did not want to inhibit his disclosure by recording him openly. (14 RT 845-846; 16 RT 969-970.)[44] Appellant also used the bathroom during this break, at about 8:00 p.m. (14 RT 843.)

At 9:02 p.m., just after the sixth interview session began, before the recording device was turned on, and with no question pending appellant stated, "I'm going to get what I'm going to get." (14 RT 848; 30 RT 1970-1971.) Sergeant Olivas testified:

Q. Okay.[¶] So, again, was this a statement made in response to questioning?

A. No.

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[44] At trial, Sergeant Olivas testified that appellant "started making statements like, 'I'll get what I get,' or those type of things. 'I went there to do the robbery.' So he's not totally forthcoming with everything, but he's starting to get bits and pieces, and I don't know if he was ever going to tell me everything, so I wanted to start recording what he was telling me at that point." (129 RT 9878.)

Q. Okay. After he made the statement "I'm going to get what I'm going to get," did either you or Sergeant McKenna engage him in discussion about penalty in this case?

A. No.

(14 RT 848.)

For 30 minutes, between 9:12 p.m. and 9:42 p.m., police surreptitiously recorded appellant's statements including his confession to the murder and robbery. (14 RT 853; 15 RT 861-862; Supp. CT 153-170.) Appellant described how he stabbed Beeson, and together with Patterson, strangled her. (15 RT 861; Supp. CT 163-164, 166-167.) He provided details about the items taken in the robbery, the handling of Beeson's dogs, and his disposal of the knife after the murder. (15 RT 861-862.) He showed the officers' Beeson's positioning during the attack, and corrected them when they described his demonstration in words. (Supp. CT 165.) His tone on this tape was animated. (Exh. 1, 1A.)[45] Appellant's last statement in this first recording was, "Man, I get this off my chest, man." (Supp. CT 169.)

After a nearly 20-minute break, at 10:00 p.m., police brought a tape recorder to the interview room. (16 RT 983.) During this seventh interview session, lasting about 25 minutes, appellant gave a formal statement, repeating more succinctly the facts he had just provided to police. (15 RT 864; 16 RT 983; Supp. CT 171-184.)

Just after recording his statement for police, appellant asked to speak to his mother on the telephone. (15 RT 867.) Sergeant Olivas informed appellant that his conversation would be monitored and he would have to wait a minute so police could hook up recording equipment to a phone at

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[45] Court's Exhibits 4 and 4A were labeled as Exhibits 1 and 1A for trial.

one of the sergeant's desks just outside the interview room in the homicide section. (15 RT 868-869.) Knowing this, appellant still wanted to speak to his mother, and indeed confessed to her too, that he had committed the murder and had just told police the truth. (15 RT 868; Supp. CT 188-189) He told her that initially, he was not going to tell police anything but changed his mind after police showed him a picture and played him a tape of Patterson, his "crime partner," that showed Patterson in custody. (Supp. CT 186, 188.) He also told his mother that Patterson was going to get "maybe like fifteen and I was gonna get, they were gonna go for the death penalty on me. So I just, you know, tell them the truth." (Supp. CT 189.) Appellant told his mother that by talking to police, he and Patterson were going to get life terms. (Supp. CT 187-189.) The brief call began at 10:30 p.m. (15 RT 869-870; 16 RT 983.)

After speaking with his mother, and using the bathroom, appellant was returned to the interview room. (16 RT 983-984.) Around this same time, Sergeant Olivas informed the district attorney's investigative team about the crime. (20 RT 1203-1204.) From 1:05 a.m. to 2:00 a.m. on May 4, 1996, appellant gave two recorded statements to the District Attorney's investigative team, again confessing to the murder. (18 RT 1108-1109, 1113-1114; Supp. CT 204-220, 221-229.) The second recording was an "*Aranda* statement" in which appellant described his own actions without mentioning his co-defendant. (18 RT 1112, 1117; 20 RT 1213; Supp. CT 221-229.)

Appellant testified that during the interview, police did not harm or threaten him with physical harm, took him to the bathroom when needed, and did not deprive him of his physical needs. (28 RT 1820-1822, 1824-

1826, 1829.)[46] Contrary to the testimony of the officers, however, appellant claimed that Sergeant McKenna had shown him a picture of the gun stolen from Botello's home the night of the murder claiming it had appellant's fingerprints. (28 RT 1813-1814.) In addition, appellant claimed that Sergeant McKenna "then told me unless I admit my part in it, he said basically I would be given the death penalty." (28 RT 1814-1815, 1872.) Appellant also testified that the officers played, not a portion, but the entire tape of Patterson's confession with the details of the murder—not once, but twice through to the end. (28 RT 1818.) Appellant testified that after the officers played the tape, he initiated a conversation about what might happen if he gave additional information about the murder, and Sergeant McKenna told him it would help him avoid the death penalty if Beeson's killing began as an accident or was unintentional. (28 RT 1818-1819.)

Appellant reiterated that once he asked Sergeant McKenna "*if I admit more knowledge*" of the murder, the Sergeant would call his "District Attorney friend" and "talk to him about the murder/robbery charge," and appellant "wouldn't have to worry about the death penalty if they would keep their end of the bargain." (28 RT 1819-1820, italics added.) When asked if he believed the officers' "threat of the death penalty," appellant initially evaded the question, stating, "I didn't have any reason not to believe them, yes." (28 RT 1820.) He subsequently testified that he thought the officers could "make it not a death penalty case" because "[t]hey had all the power." (18 RT 1820.)

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[46] Appellant waffled about whether Officer Olivas had given him lunch consistent with a log of the events that day. Appellant initially stated that he could not remember, later stated that the officer had lied about providing lunch, subsequently asserted he could not remember whether he had lunch, and eventually admitted that he did not remember "asking for food and being denied." (28 RT 1826-1829.)

Dr. Ofshe, a sociologist testified for the defense that it was reasonable to infer that police used coercive techniques to elicit a confession. (21 RT 1359-1360, 1368.) He claimed that police "formatted" a death scenario that minimized appellant's intention, suggesting that Beeson's death was an accident in an intended robbery, prompting appellant to infer that he would suffer less punishment if he confessed. (21 RT 1342, 1345, 1359-1360, 1368.) In addition, he claimed, based on appellant's words only, that appellant was "offered life rather than death if he would comply and speak about the crime." (22 RT 1388.) Ofshe also inferred, again from appellant's statements, that police contaminated the interrogation before recording the confession by providing appellant with details of the murder to elicit a version of the facts that was not accurate. (23 RT 1353-1354.) Ofshe contradicted himself, in one instance claiming the details "of how the killing act occurred is probably not true," (23 RT 1380), and later on acknowledging that appellant was "possibly" credible when he told his mother that his confession to the police was the truth (23 RT 1399). Ofshe also acknowledged appellant claimed that police told him they had his fingerprints on a gun, but failed to mention this fact in the subsequent call to his mother explaining why he confessed. (27 RT 1770.)

In subsequent argument, defense counsel noted that appellant's claim that his statements were involuntary was not based on "deprivation of physical needs," but rather, on credibility, with the central issue being whether appellant was threatened with the death penalty or promised life if he cooperated. (31 RT 2006, 2065.) The parties agreed that the determination of voluntariness required the court to determine "who is telling the truth," (31 RT 2006), as between "Sergeant Olivas and McKenna on the one side of that, and . . . Dr. Ofshe and Mr. Winbush on the other side." (31 RT 2043.)

The defense initially indicated, albeit with some ambiguity, that it would not challenge admission of the taped phone call appellant made to his mother,[47] but later changed its mind as the trial court was about to rule, arguing "[i]t bears the fruit of the poison, clearly." (31 RT 2012-2013, 33 RT 2123-2124.) In a lengthy ruling discussing all the evidence and credibility of each witness, the trial court found all of appellant's statements voluntary and each of the five recordings admissible. (33 RT 2121-2179; 34 RT 2181-2183.)

B. Appellant's Confessions to Law Enforcement Were Admissible

Appellant's claim that his statements to law enforcement were coerced and erroneously admitted is incorrect. (AOB 163-164.) The terms "coerced" and "involuntary" are used interchangeably "to refer to confessions obtained by physical or psychological coercion, by promises of leniency or benefit, or when the totality of circumstances indicates the confession was not a product of the defendant's free and rational choice." (*People v. Cahill* (1993) 5 Cal.4th 478, 482, fn.1, internal italics omitted.) Before admitting a confession in evidence, the burden is on the prosecution to demonstrate that it was voluntary under a preponderance-of-evidence standard. (*People v. Ramos* (2004) 121 Cal.App.4th 1194, 1201.)

> On appeal, the trial court's findings as to the circumstances surrounding the confession are upheld if supported by substantial evidence, but the trial court's finding as to the voluntariness of the confession is subject to independent review.

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[47] Defense counsel argued: "Defendant Winbush's recorded phone call to his mother could be interpreted as Defendant Winbush's admitting to the murder. If it is admitted, I expect that at trial the prosecutor will argue exactly that. Here the defendant is being candid to his mom and admits his involvement in the murder. I believe that argument is for another day and before another trier of fact. [¶]This hearing concerns whether or not Defendant Winbush was coerced by the police. (31 RT 2012-2013.)

> In determining whether a confession was voluntary, the question is whether defendant's choice to confess was not essentially free because his will was overborne.

(*People v. Holloway* (2004) 33 Cal.4th 96, 114, internal edit and quotation marks omitted.)

A defendant's statements are involuntary, and thus inadmissible as violative of due process, if obtained by threats or promises, whether express or implied. (*People v. Clark* (1993) 5 Cal.4th 950, 988, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) The court looks at the totality of circumstances to determine the voluntariness of a confession. (*Holloway, supra*, 33 Cal.4th at p. 114.) In reviewing whether threats or promises of leniency were made, the court must not evaluate a defendant's statements in a vacuum, but rather takes into account the full conversation with officers conducting the interview. (*Ramos, supra*, 121 Cal.App.4th at p. 1203.) "Among the factors to be considered are the crucial element of police coercion; the length of the interrogation; its location; its continuity as well as the defendant's maturity; education; physical condition; and mental health." (*Boyette, supra*, 29 Cal.4th at p. 411, internal quotation and edit marks omitted.) If the record demonstrates a conflict in the testimony, it must be resolved in favor of the judgment. (*People v. Thompson* (1990) 50 Cal.3d 134, 166; *People v. Tully* (2012) 54 Cal.4th 952, 993[must rely on version most favorable to the People if supported by the record]; *People v. Cahill* (1994) 22 Cal.App.4th 296, 310 [independent review of uncontradicted facts].)

Reference to the death penalty, even by police officers, does not necessarily render a defendant's statement involuntary.

> "[A] confession will not be invalidated simply because the possibility of a death sentence was discussed beforehand. [Citations.] We have found a constitutional violation in this context only where officers threaten a vulnerable or frightened suspect with the death penalty, promise leniency in exchange for

> the suspect's cooperation, and extract incriminating information as a direct result of such express or implied threats and promises."

(*People v. Williams* (2010) 49 Cal.4th 405, 443.)

The Court, in *Williams*, also noted that "[d]eception does not undermine the voluntariness of a defendant's statements to the authorities unless the deception is of a type reasonably likely to procure an untrue statement." (*Ibid.*, internal quotation marks omitted.)

Appellant's claim of coercion rested on a determination of credibility, namely whether appellant was truthful in claiming that officers issued threats and promises of leniency regarding the death penalty to prompt his confession, or whether the officers were truthful in testifying that no such discussion occurred. (31 RT 2006-2007.) The trial court agreed "with counsel, all counsel when they urge on me that the credibility of witnesses is of critical, critical importance." (33 RT 2126-2127, 2154.) The trial court ruled, at great length and in detail, that all the government officials who interviewed appellant were truthful and credible (33 RT 2145-2147, 2154-2157, 2160-2161; 34 RT 2184), and that appellant and his defense expert, Dr. Ofshe, were not credible. (33 RT 2159, 2162-2169, 2174-2177.) The trial court explicitly set forth its observations of Sergeant Olivas' demeanor so that years later, the record would be "crystal clear." (33 RT 2146-2147.)

> When you see Officer Olivas and you hear him testify in person, as we have all done, it would not be a great exaggeration, I think, really not an exaggeration at all to say there is perhaps no more mild-mannered, unoffensive, unantagonistic, soft-spoken, nonconfrontational, pleasant person on the face of the earth than Sergeant Olivas.
>
> Now, I know that's a pretty broad statement, a little hyperbole there, but I've searched my memory of law enforcement witnesses, and I don't think I could find anyone who allegedly falls more squarely into the category I've described by all those

> adjectives I just stated in Sergeant Olivas. I think the record should reflect that kind of description. I've been asked by counsel here, and it's not inappropriate at all in that the position be urge on me in a case of this nature, but I've been asked to conclude that the interview, this interview Sergeant coerced false confessions out of two individuals. If they were not false—and I'm going to talk about that distinction later when I talk about Dr. Ofshe—there was urging of counsel is that they were at least not voluntary, they were the product of at least psychological coercion. If I address those claims, then I must at least, in passing, describe that the very transcript can't reflect what I just observed here.
>
> If you have to be interviewed by the police, you would have to look a long, long way to find a kinder or gentler man to do it than Sergeant Olivas.

(33 RT 2146-2148.)

Thus, in this contest of credibility, after extensive evaluation of each witness who testified and the evidence introduced, the trial court determined that appellant's claim of coercion was not credible. (33 RT 2121-2179.)

In *Tully*, this Court similarly rejected the defendant's claim of coercion stating:

> Defendant bases his involuntariness claim on interpretations of the evidence and questions of the credibility of witnesses that the trial court implicitly rejected. Because substantial evidence supports those factual determinations, we rely on them and, therefore, independently reject defendant's claim that his March 30 statement was the result of either threats or promises.

(*Tully*, *supra*, 54 Cal.4th at p. 993.)

Here too, the trial court's findings are supported by substantial evidence. Sergeant Olivas testified at length about the voluntariness of appellant's statements. (14 RT 819-822, 841-843; 30 RT 1991-1992.). He testified that appellant was neither harmed, threatened, nor given promises of leniency to prompt him to talk. (14 RT 819; 30 RT 1991-1992.) He also

testified that appellant appeared mentally competent, sober, not under the influence of drugs, and indeed "came off as kind of bright" and "streetwise." (14 RT 820, 846.) Sergeant Olivas testified specifically that he made no threats, promises, or mention of the death penalty. (14 RT 818, 841-843.) Sergeant Olivas also testified there was no discussion about sentencing when asked about appellant's recorded conversation with his mother. (15 RT 871-872.) He testified again, on rebuttal, that neither he nor Sergeant McKenna made direct or implied threats or promises of any sort, including a discussion about the death penalty. (30 RT 1991-1992.) Sergeant Olivas denied that he was motivated to obtain appellant's confession so that he would have sufficient evidence to charge him. (16 RT 941.) He also noted that he did not provide appellant with "facts," but only generally indicated that he had "evidence." (16 RT 949.)

Sergeant McKenna, called by the defense, also testified there were neither threats nor promises of any sort made to appellant to prompt him to talk to the officers. (30 RT 1920, 1961-1962, 1973.) Sergeant McKenna stated there was no discussion of the death penalty or any other penalty or sentencing. (30 RT 1974-1975.) When Sergeant McKenna was asked specifically about having shown appellant a picture of a shotgun, he responded, "I—there was no photograph of a shotgun." (28 RT 1813-1814; 30 RT 1957.)

Inspector Lopes, of the district attorney's office, also testified that no threats were made or promises given to appellant in connection with the two recorded statements appellant gave to the district attorney's investigative team. (18 RT 1113-1114.) Those two recorded statements reflect that appellant was twice advised and twice waived his *Miranda* rights before providing his statements. (Supp. CT 205, 222.)

The trial court's finding that appellant and his expert, Dr. Ofshe, lacked credibility also had ample support in the record. The trial court

described at length Dr. Ofshe's demeanor and the substance of his testimony that led the court to conclude that Dr. Ofshe was biased, "disingenuous," and unpersuasive. (33 RT 2168-2178.) The trial court provided four examples in which Dr. Ofshe demonstrated bias, or a lack of credibility: (1) by having linked coercion to truthfulness and then refusing to address questions about appellant's statements to his mother that he told police the truth about the crime (33 RT 2169-2174; (2) by his wholehearted acceptance of appellant's version and rejection of the officer's version of the facts while ignoring extrinsic evidence reflecting on credibility (33 RT 2174-2175); (3)) by his fixation on an irrelevant hypothetical scenario about a "death threat on the way to the bathroom" that he admitted was contrary to the evidence in this case (27 RT 1773, 1775-1776; 33 RT 2175-2177); and (4) by his refusal to answer basic and routine questions about income earned by testimony as an expert (33 RT 2177-2178). Thus, the trial court concluded that Dr. Ofshe's testimony had little weight in this particular case and should be disregarded. (33 RT 2168-2169, 2174-2176, 2178.)

Since the trial court's findings, including its credibility findings, are supported by substantial evidence, they are entitled to deference and cannot be disturbed on review. (*Thompson, supra*, 50 Cal.3d at p. 166; *Tully, supra,* 54 Cal.4th at p. 993.) Appellant's references to his "limited educational background," or his allegation that police used duplicity in telling him they had good evidence against him or they had his fingerprints on Botello's gun, do not help him. As a threshold matter, there was overwhelming testimony in conflict with those conclusions showing appellant's criminal sophistication in the context of a custodial interrogation, and establishing that appellant was not shown a picture of Botello's shotgun, an allegation that was part and parcel with appellant's contention about police having found his fingerprint on the weapon. (28

RT 1813, 1858-1859; 30 RT 1957.) Even assuming appellant's contentions were accurate, it would not render his confession involuntary. (*Williams, supra,* 49 Cal.4th at p. 443-445 [deception does not undermine voluntariness unless likely to procure untrue statement].)

Appellant's belated complaint that his interrogation was lengthy and continuous, misleadingly characterizing the hours spent by counting interviews and breaks collectively, must be rejected. (AOB 164.) Clearly, the length of his interrogation was not so severe since appellant explicitly chose not to challenge admission of his statements based on deprivation of physical needs but rather, on threats and promises of leniency alone. (31 RT 2006, 2065.) Indeed, the trial court reasonably found that appellant's interrogation, occurring while he was already in custody, posed no additional restraint, i.e., that breaks were more frequent than those at court, and appellant's personal needs were attended to through the interview process. (33 RT 2157-2158.) Sergeant Olivas indicated that there was no significant difference in the size of appellant's pod at the jail and his interview room at the police station. (16 RT 989-990.) (See *Howes v. Fields* (2012) __U.S.__, 132 S.Ct. 1181, 1191-1192 [special security precautions removing prisoner from regular routine or isolating prisoner for questioning not always indicative of heightened custody or voluntariness].

Moreover, the evidence at trial, and particularly appellant's testimony, provides additional support that the trial court's findings and credibility determinations were correct. Just as at the pretrial hearing, the officers who interviewed appellant testified at trial that there were no discussions of penalty of any kind, and appellant received neither threats nor promises of leniency at any time. (128 RT 9789-9791; 132 RT 10108; 136 RT 1403-1405, 10413-10414, 10436.) Officer Olivas testified that, far from being coerced, appellant appeared confident, arrogant, and in control of the interview process. (127 RT 9795; 129 RT 9851, 9858-9859; 132 RT

10108.) Indeed, appellant's recorded call to his mother, in which he explained how the law of murder was different from the Three Strikes Law, demonstrated a level of fluency and sophistication about criminal penalties typical of someone who has spent time in custody with other prisoners. (133 RT 1057-1058.) Inspector Lopes noted that appellant easily recounted the events of the crime from memory, without a written "script" or verbal prompting, and with no mention that he was falsely confessing then, or earlier when he spoke to police. (141 RT 10992-10993.)

Appellant's own testimony similarly belies any claim of coercion. He testified that he knew of his right to refuse to talk to police about a subject he did not want to discuss and had demonstrated this knowledge on multiple occasions, or in his words, "I knew my *Miranda*." (145 RT 11333-11334, 11359.)

In finding appellant guilty, the jury itself rejected appellant's claim of false and coerced confession. (163 RT 12786, 12789-12790, 12793.) Appellant's counsel repeatedly argued that the jurors were "the exclusive judges of the truth of these confessions." (165 RT 12946-12947; see 164 RT 12910.)

People v. Neal (2003) 31 Cal.4th 63, 82, 84-85, on which appellant relies, is inapposite as there, police questioned the defendant after he had invoked right to counsel and his privilege against self-incrimination, and made promises and threats that the trial court found did not occur here. *Taylor v. Maddox* (9th Cir. 2004) 366 F.3d 992, 1005 is also inapposite. In *Taylor v. Maddox*, the federal court found the state court's holding that the defendant's confession was voluntary was an unreasonable determination of the facts because the state court failed to consider or acknowledge highly probative testimony. By contrast, the trial court's ruling and review of the testimony and evidence was thorough, detailed, specific, and extensive. (33 RT 2121-2179; 34 RT 2181-2183.)

Based on the overwhelming evidence in support of the trial court's findings, appellant's claim of coercion must fail. (*Thompson, supra*, 50 Cal.3d at p. 166; *Tully, supra*, 54 Cal.4th at p. 993; *Cahill, supra*, 22 Cal.App.4th at p. 310; *Williams, supra*, 49 Cal.4th at p. 443.)

C. Appellant's Phone Call to His Mother Was Correctly Admitted

Again, without addressing the specifics of his purported coercion, appellant appears to challenge admission of the tape of his phone call to his mother as involuntary. (AOB 148, 152, 15, 160.) This claim is specious.

The trial court correctly found appellant's call to his mother was not related to a custodial interrogation and was admissible since it did not involve state action and moreover, appellant had advance notice he would be recorded on the phone call. (33 RT 2139-2140.) These findings were supported by the evidence and appellant raises nothing to dispute them other than his discredited theory, as just noted, that he had a deal with police to provide false testimony. (15 RT 868.) (*Howes, supra*, 132 S. Ct. at p. 1191-1192.) His testimony at the pre-trial *Miranda* hearing—that he falsely told him mother he committed a murder to prevent her from coming down to the police station at trial and embarrassing him by making a "big commotion"—was implausible. (28 RT 1876, 1880.)

Appellant's testimony at trial, moreover, belies any claim of coercion since he told his mother the reason he confessed was that police had proven to him, with Patterson's picture and taped statement, that they had evidence against him. (146 RT 11463-11464.)

> Q. You didn't refer to Norman to your mother in that passage as the guy who wrongfully accused me, did ya? You called him your crime partner, right?
>
> A. The crime—yes.

Q. You called him your crime partner in that conversation, didn't ya?

A. Yes.

Q. That mean the person you did the crime with, isn't it?

A. Yes.

Q. *Okay. So when you're talking with your mother who's not intimidating you and not coercing you, you're telling her, you're telling the truth, right?*

A. *Yes.*

Q. *And you're telling her that you did this murder, right?*

A. *Yes.*

Q. *And that your crime partner told on you, right?*

A. *Yes.*

Q. *And that's why you confessed, right?*

A. *Yes.*

(146 RT 11477-11478, italics added.)

D. Error, if any, was Harmless

The erroneous admission of an involuntary confession in violation of due process is prejudicial unless found harmless beyond a reasonable doubt. (*Cahill, supra,* 5 Cal.4th at p. 509-510; *Arizona v. Fulminante* (1990) 499 U.S. 279, 310; *Chapman v. California* (1967) 386 U.S. 18, 24.) The evidence here demonstrates error, if any, fails to meet the *Chapman* standard for prejudice.

As a threshold matter, appellant's testimony at trial allowed admission of all his prior statements for purposes of impeachment. (Evid. Code §§ 780, subd. (h), 1235,.) Other witnesses, too, placed him at the crime scene. Tyrone Freeman's testimony established that appellant had confessed to the

murder and provided details known only to the murderer. (156 RT 12201-12204.) Patterson's taped confession, introduced during by appellant during his cross-examination of Officer Olivas, also implicated appellant. (132 RT 10084-10088; Supp. CT 107-120.)

Notwithstanding Patterson's attempt to recant some of his statements at trial, he admitted that others had told him that appellant was bragging about having committed the murder. (154 RT 12031; 155 RT 12061-12063.) Indeed, Patterson acknowledged that his purportedly-false statements to police describing the murder were so convincing that, as the prosecutor observed, "kind of rings true, doesn't it?" (155 RT 12056.) Patterson knew, for example, that Beeson had been bludgeoned in the back of the head with the gun, and that there was enough blood that after the crime that appellant had to change clothes, and Patterson needed to change his shoes. (155 RT 12055-12057.)

There was abundant circumstantial evidence that connected appellant to the crime. Appellant's electronic monitoring device showed he left the house shortly before the crime. (109 RT 7141; 118 RT 7933-7937, 7940-7941, 7945-7947.) Botello and appellant testified about appellant's desire to obtain a gun, and Botello testified that appellant told him he wanted the gun to do a robbery. (122 RT 9168-9169, 9173. 9181-9190, 9195-9196.) Officers Kozicki and Banks testified that witnesses told them that appellant wanted to rob Botello and to kill people (116 RT 7751; 118 RT 7902, 127 RT 9661-9662.) Botello testified that appellant had given him a deadline of December 22, 1995 and he and Smith both spent time dodging appellant that day. (122 RT 9096, 9197; 123 RT 9212-9213.)

Moreover, assuming error only as to appellant's statements to law enforcement, then appellant's phone call to his mother is additional evidence undermining his defense theory since he confessed to her too, and told her he was "telling the story straight" to the police. (146 RT 11457;

Supp. CT 35-39.) Indeed, appellant testified that he told his mother that he told her "the truth," even after she protested initially that she did not want to know. (146 RT 11461-11462; Supp. CT 35, 38-39.) He also told his mother, contrary to his claim that Patterson had falsely accused him of the crime, that he and Patterson not only had committed the crime together, but that he alone was culpable for having stabbed Beeson. (146 RT 11486, 11492; Supp. CT 38-39.)

Even excluding appellant's statement to his mother, the evidence was sufficient such that error, if any, was harmless beyond a reasonable doubt. (*Chapman, supra*, 386 U.S. at p. 24.) Appellant's claim of prejudice fails.

V. THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTIONS FOR SEVERANCE

Appellant moved to sever his trial from codefendant Patterson on multiple occasions. Each motion, while prompted by a particular action in the proceedings, was premised on claims that appellant and Patterson had antagonistic defenses and that Patterson's counsel acted as a second prosecutor in the proceedings. In each case, the trial court denied the motion, incorporating the reasons given in its prior rulings.

On appeal, appellant challenges denial of severance claiming he was unduly prejudiced when the trial court allowed him to introduce, against Patterson only, the anonymous call of Julia Phillips which implicated appellant in the murder, and when it allowed Patterson to introduce the testimony of Tyrone Freeman. (AOB 168-172.) Appellant's claims are without merit.

A. Background

Appellant moved pretrial to sever trial from codefendant Patterson. (4 CT 893-932; 9 CT 2298-2312.) Patterson had filed a motion to sever trial, but for tactical reasons after the trial court ruled that the recorded statements of both defendants would be admitted, Patterson withdrew his

severance motion and also withdrew his confrontation-clause objection to the admission of appellant's recorded statements (34 RT 2185-2191.) Appellant claimed severance was warranted because Patterson's prior statements could not be sufficiently redacted to avoid a confrontation violation, and because he and Patterson had antagonistic defenses. (9 CT 2300, 2306, 2309.) As to the antagonistic defenses, appellant noted that Patterson, along with the prosecution, planned to use the testimony of a jailhouse informant, Tyrone Freeman, who claimed that appellant had confessed his involvement in the murder. (9 CT 2311-2312.)

After ordering redaction in Patterson's out-of-court statements inculpating appellant, the trial court denied appellant's severance motion, noting that under the controlling authority—*Zafiro v. United States* (1993) 506 U.S. 534, 537-538; *People v. Hardy* (1992) 2 Cal.4th 86, 168; *People v. Boyde* (1988) 46 Cal.3d 212, 232; *People v. Cummings* (1993) 4 Cal.4th 1233, 1286; *People v. Turner* (1984) 37 Cal.3d 302, 312 [disapproved on other grounds in *People v. Anderson* (1987) 43 Cal.3d 1104, 1149-1150]; *People v. Jackson* (1996) 13 Cal.4th 1164, 1208—appellant's claim of antagonistic defenses was insufficient. (39 RT 2479-2480.)

Appellant repeated his antagonistic-defenses and second-prosecutor claims on each occasion in which Patterson's examination of witnesses or closing argument suggested that primary, or indeed any, responsibility for the murder rested with appellant. (117 RT 7809-7811 [examination of Mosley]; 124 RT 9361-9362, 9369-9370 [examination of Botello][48]; 155 RT 12084-12085, 156 RT 12182, 12187-12188 [examination of Tyrone Freeman]; 161 RT 12699-12700 [Patterson's closing argument attacking

[48] Appellant elicited the incriminating response as to both defendants, later stricken as to Patterson. (124 RT 9361-9362.)

credibility of Patterson and appellant][49]; 163 RT 12837, 12840-12841 [Patterson's closing argument focusing on Tyrone Freeman's testimony]; 171 RT 13417-13418 [examination of Phillips in penalty phase]; 175 RT 13943-13945 [cross-examination of Major, Ream, and Miller-Thrower in penalty phase]; 190 RT 14811-14812, and 190 RT 14880-14881 [Patterson's closing argument references to Tyrone Freeman in penalty phase].)

In a couple of instances involving examination of Julia Phillips, the trial court denied appellant's severance motions by precluding evidence it deemed unduly prejudicial. During the guilt phase, the prosecutor called Julia Patterson to testify about Patterson's attack on her at the middle school (Statement of Facts, section A.5.d., *ante*). (138 RT 10709-10710.) Appellant moved for severance anticipating that the trial court would allow Patterson or, possibly the prosecutor, to examine Phillips about appellant's threatening and sexual misconduct toward her. (138 RT 10716-10717, 10719; 139 RT 10748.) The trial court precluded admission of this evidence, including an accusatory statement against appellant made in the course of Patterson's attack, during the guilt phase, thus resolving appellant's concern. (138 RT 10719, 10721-10723, 10733-10735; 139 RT 10750-10758.) When Patterson sought to introduce this same evidence in cross-examining appellant, the trial court renewed its ruling that evidence of appellant's conduct toward Phillips was unduly prejudicial in the guilt

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[49] Patterson's counsel argued that Patterson and appellant lived in a world in which lying and disrespect toward women were part of the culture. (161 RT 12699.) Indeed, Patterson's counsel impliedly attacked the credibility of prosecution witnesses who also lived in that world and, having noted that Beeson was "brought to live in that world too," further argued that living in that culture did not equate with guilt. (161 RT 12669-12671.)

phase, once again eliminating any potential conflict. (146 RT 11404-11410,11426-11427.)

B. The Trial Court Reasonably Denied Appellant's Motions for Severance

California Penal Code section 1098 states in relevant part that "[w]hen two or more defendants are jointly charged with any public offense, whether felony or misdemeanor, they must be tried jointly, unless the court order[s] separate trials." Section 1098 creates "a statutory preference for joint trial of jointly charged defendants." (*People v. Cleveland* (2004) 32 Cal.4th 704, 725-726; *People v. Pinholster* (1992) 1 Cal.4th 865, 932; accord *People v. Carasi* (2008) 44 Cal.4th 1263, 1296 ["The Legislature has expressed a preference for joint trials"]; *People v. Coffman* (2004) 34 Cal.4th 1, 40 [same]; see also *People v. Morganti* (1996) 43 Cal.App.4th 643, 672 [noting this preference was enhanced by passage of Proposition 115]. " '[S]everance may be called for when "there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." ' " (*People v. Souza* (2012) 54 Cal.4th 90, 109.)

In *Souza*, this Court noted the standard of review on appeal stating:

We review a trial court's denial of a severance motion for abuse of discretion based upon the facts as they appeared when the court ruled on the motion. [Citations.] If we conclude the trial court abused its discretion, reversal is required only if it is reasonably probable the defendant would have obtained a more favorable result at a separate trial. [Citations.] If the court's joinder ruling was proper when it was made, however, we may reverse a judgment only on a showing that joinder resulted in gross unfairness amounting to a denial of due process.

(*Souza, supra*, 54 Cal.4th at p. 109, internal quotation marks omitted.)

Appellant and Patterson's cases involved "common crimes involving common events and victims," which is "a classic case for a joint trial." (*Lewis*, *supra*, 43 Cal.4th at pp. 452-453, internal quotation marks omitted.) Nonetheless, appellant claims severance was warranted because he and Patterson had antagonistic defenses and Patterson acted as a second prosecutor. The trial court did not abuse its discretion in rejecting all of these claims.

Antagonistic defenses do not per se require severance. (*People v. Letner* (2010) 50 Cal.4th 99, 150; see *Zafiro*, *supra*, 506 U.S. at pp. 538-541 [mutually antagonistic defenses are not prejudicial per se under Federal Rules of Criminal Procedure].)

> "If the fact of conflicting or antagonistic defenses alone required separate trials, it would negate the legislative preference for joint trials and separate trials 'would appear to be mandatory in almost every case.' " [Citation.] Accordingly, we have concluded that a trial court, in denying severance, abuses its discretion only when the conflict between the defendants alone will demonstrate to the jury that they are guilty. If, instead, "there exists sufficient independent evidence against the moving defendant, it is not the conflict alone that demonstrates his or her guilt, and antagonistic defenses do not compel severance."

(*Letner, supra*, 50 Cal.4th at p. 150.)

The antagonism must be such that "the acceptance of one party's defense precludes the other party's acquittal." (*Carasi*, *supra*, 44 Cal.4th at p. 1296.)

The trial court did not abuse its discretion since the defenses of appellant and his codefendant, far from antagonistic, were complimentary. (*People v. Diggs* (1986) 177 Cal.App.3d 958, 972.) Notwithstanding their statements to police implicating each other in the murder, appellant and Patterson each testified that they had made false confessions and that they were not present at the murder. (144 RT 11276-11277, 11279-11280; 149 RT 11677-11678.) Far from offering a defense precluding the other party's

acquittal, each defendant corroborated the other party's theory that police had individually coerced them to provide a false confession. (See *People v. Greenberger* (1997) 58 Cal.App.4th 298, 363 [independent defenses were neither mutually exclusive nor antagonistic].) Contrary to appellant's claim, Patterson did not "abandon" his claim that he was absent during the crime. (162 RT 12712, 12724.) Rather, using the metaphor of a road that forked in two directions, Patterson argued alternative exculpatory theories. (162 RT 12712; see 165 RT 13006-13007.).

Moreover, to the extent Patterson's prior statements to police were incriminating, appellant found their usefulness outweighed any disadvantage. Appellant, not the prosecutor, introduced Patterson's taped confession to cross-examine Officer Olivas about whether he had played Patterson's tape for appellant before appellant confessed. (132 RT 10083-10085). This tactic was essential to establish how appellant could confess to a murder about which he supposedly knew nothing. (132 RT 10083-10085.) Appellant's two counsel acknowledged that, having introduced Patterson's taped statement to police, they had opened the door to full examination about Patterson's statements. (132 RT 10114-10117.) Moreover, appellant had full opportunity to cross-examine Patterson, and chose not to do so. (155 RT 12118.)

Furthermore, as the trial court noted in denying severance, the independent evidence against appellant "based on evidence that comes out of his own mouth" was overwhelming. (39 RT 2445.) Indeed, Appellant himself took the greater share of the blame in his own statements to police and in his phone call to his mother and, with the testimony of Botello, Mosley, and Smith establishing motive, a timeline, and consciousness of guilt, there was abundant independent evidence of appellant's guilt apart from Patterson's confession. (*Letner, supra*, 50 Cal.4th at p. 150.) Appellant consistently claimed sole responsibility for the stabbing, and told

his mother how he had described Patterson's role in the killing for police "so we could both just even it out." In short, appellant's relative culpability in a crime in which he and Patterson each admitted active participation did not present an irreconcilable conflict that warranted separate trials. (*Souza, supra,* 54 Cal.4th 111-112; *Letner, supra*, 50 Cal.4th at p. 151.)

Appellant's claim that severance was warranted because "there was an evident strategy by the prosecution to permit Winbush and Patterson to try each other," also fails. (AOB 178.) The claim that a codefendant acts as a second prosecutor is a variation of the claim of conflicting defenses. (*Letner, supra*, 50 Cal.4th at p. 153.) "A court's denial of a motion for severance is reviewed for abuse of discretion, judged on the facts *as they appeared at the time of the ruling.*" (*Coffman, supra*, 34 Cal.4th at p. 41, italics added.)

Appellant speculates that, but for having been joined together, the prosecutor would never have introduced the testimony of Tyrone Freeman. (AOB 169, 175.) As a threshold matter, appellant's citation to the record does not support his claim that "[t]he prosecutor had decided that he was not intending to call Freeman as a witness, because he was an unreliable jail-house informant. (18-RT 1084, 1094.)" (AOB 175.) Rather the record demonstrates that, while the prosecutor generally was adverse to having jail-house informants testify, he had not made a decision and indeed, could not make the decision since it hinged on "issues that dovetail and are interrelated" with court rulings pertaining to the "*Miranda* and severance issues." (17 RT 1085-1086, italics added.)[50]

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[50] The issue arose in a discussion about whether the prosecutor had an affirmative discovery obligation after Freeman had testified at the preliminary hearing to investigate and provide an updated address to defense counsel if the prosecutor had not determined whether he would call Freeman to testify at trial. (17 RT 1074-1088;18 RT 1093-1096.)

Later in the proceedings, when Patterson's counsel announced his intent to introduce Freeman's testimony in rebuttal, the prosecutor joined with Patterson to argue in favor of admitting this evidence. (156 RT 12169-12172, 12181.) It is no merit that Freeman's testimony was introduced in Patterson's rebuttal, rather the prosecutor's rebuttal case as Patterson's rebuttal preceded the prosecution's rebuttal. Indeed, due to Freeman's unavailability, his testimony consisted of the *prosecutor's* preliminary-hearing examination. (156 RT 12199.) Freeman was included on the prosecution's witness list. (9 CT 2254.) Indeed, the prosecutor responded to defense counsel's speculation that the prosecutor planned not to introduce Freeman's testimony stating:

> In terms of [appellant's counsel's] comments to the extent that he's offering me advice on how to prosecute these cases, I will gladly take that advice and give him the weight to which I think they're entitled. To the extent that he's expressing his views on my behalf, I want to be really clear he doesn't speak for me. He's not actively describing my thought process about this case or my internal work product, and this court should not consider [appellant's counsel's] comments as representing what I might—what I might have to say if I were asked the same questions.

(156 RT 12181.)

Furthermore, appellant's counsel used Patterson's introduction of Freeman's testimony to attack the prosecutor's claim that Freeman was reliable, arguing that reliability was belied by the prosecutor's failure to call Freeman as a witness in his case in chief. (164 RT 12905-12906.) Thus, appellant fails to show how Patterson's presentation of evidence tending to incriminate him "lessen[ed] the prosecution's burden, or result[ed] in gross unfairness amounting to a denial of due process." (*Letner, supra*, 50 Cal.4th at p. 153.)

Appellant's claim that admission of Julia Phillips' anonymous phone call during the guilt phase for limited purpose against Patterson was unduly

prejudicial and warranted severance is meritless too. (AOB 168.) Jurors were correctly instructed on the limited purpose of this evidence immediately before the tape was played and must be presumed to follow the instruction. (127 RT 9697-9698.) (*Letner, supra*, 50 Cal.4th at p. 152.) Similarly appellant's claims that Patterson's counsel elicited testimony during examination of various witnesses that implicated appellant did not warrant severance. "The mere fact that a damaging cross-examination that the prosecution could have undertaken was performed instead by codefendant's counsel did not compromise any of defendant's constitutional or statutory rights." (*Jackson*, *supra*, 13 Cal.4th at p. 1208.)

Appellant's claim that he was entitled to be tried separately at the penalty phase because he was judged more harshly next to his codefendant and prejudiced as to individualized sentencing is without merit. (AOB 173-174.) Indeed the record provides weak support for this claim. While Patterson's counsel characterized appellant as the "motivating factor" for the crime during the penalty phase, he also argued that evidence that appellant exerted extreme duress or domination over Patterson, a mitigating circumstance under 190.3, subdivision (g) (Factor G), was insufficient. (189 RT 14734.) Moreover, the contrast between the two defendants in terms of available aggravating evidence was significant and provides a much more likely basis for the difference in penalty in a joint trial.

Appellant appears to seek a per se rule that would thwart joint trials in every capital case. (*Hardy*, *supra*, 2 Cal.4th at p. 168.) This Court has rejected this argument noting that it would negate the statutory preference for joint trials. (*People v. Taylor* (2001) 26 Cal.4th 1155, 1174.) Jurors were instructed that they "must decide separately the question of the penalty to each defendant," (190 RT 14871; 11 CT 2933), and must be presumed to have followed the instruction. (*Ibid.*; *Letner, supra*, 50 Cal.4th at p. 152.) There is no showing here that jurors did not perform their duty

as instructed, and indeed, the difference in verdicts demonstrates they were able and willing "to assess independently the respective culpability of each codefendant" and were not "confused by the limiting instructions." (*Ervin*, *supra*, 22 Cal.4th 48, 69.)

C. Error, if any, was Harmless

Assuming the trial court abused its discretion in denying severance, "reversal is required only upon a showing that, to a reasonable probability, the defendant would have received a more favorable result in a separate trial." (*Coffman*, *supra*, 34 Cal.4th at p. 41.) As discussed in section V.B., *ante*, if denial of severance was proper at the time of the ruling, then reversal is required only upon a demonstration of gross unfairness amounting to a denial of due process. (*Souza, supra*, 54 Cal.4th at p. 109.) In light of the overwhelming and separate evidence against each defendant individually, appellant fails to meet both standards. (*Ibid.*)

As discussed in V.B., *ante*, nearly all the evidence in this trial, particularly appellant's own incriminating statements and the testimony of Tyrone Freeman, were admissible against him in a separate trial. Appellant's confessions to police and his mother, and the circumstantial evidence presented by the remaining witnesses put appellant at the scene of the crime and gave him a motive for the attack. Appellant's claim that Patterson would not have testified against him at trial is speculative, particularly since Patterson offered testimony in this trial corroborating appellant's claim of coercion.

Appellant's claims of prejudice and gross unfairness thus fail.

SECTION TWO—GUILT PHASE ISSUES

VI. THE TRIAL COURT DID NOT ERR IN ALLOWING ADMISSION OF PHOTOGRAPHS OF THE VICTIM TAKEN BY POLICE AT THE CRIME SCENE

A. Background

Defense counsel filed in limine motions to exclude admission of photographs, including crime-scene photographs taken of the victim's body on the floor of her living room shortly after police arrived. (6 CT 1339-1346.) At the subsequent hearing, counsel for both defendants asserted objections initially to autopsy photographs taken of Beeson claiming "there is a basic indignity in showing the victim nude, set out on a table," and the autopsy pictures were cumulative of other photographs the prosecution sought to introduce.[51] (24 RT 1541-1542.) The prosecutor responded to the claimed indignity, stating:

> Your Honor, I just want to respond very briefly to [defense counsel's] point that we can do everything from the neck up because she was strangled and stabbed.
>
> What you are going to hear by the time I'm through with my presentation today is how she had injuries to both legs, to her buttocks area, to her—very, very close to her groin area on her legs, both arms, hands, back, face.
>
> She had injuries all over her body. And one of the things that is going to become plain is that this was a long, slow killing. It took quite awhile, and she sustained a lot of punishment. And that is what these photos show.
>
> They are segregated in these exhibits by body area, and for that reason. So, I would ask you to keep that in mind of any kind of argument that you have heard already about cumulative effect and about how we can be decent by not showing her body. She

[51] Appellant's counsel also objected to the autopsy photographs because they showed a large quantity of blood. (24 RT 1540-1541.)

wasn't treated decently, and I think I'm entitled to prove that, so I wanted to respond to that.

(24 RT 1543-1544.)

The trial court noted that it would review all the photographs together at the conclusion of argument to determine if any of them would be cumulative. (24 RT 1544.)

The next day, the trial court heard arguments about whether the admission of crime-scene photographs was unduly inflammatory because they depicted the victim as semi-nude, and "the fact of the matter is, a nude body is prejudicial." (25 RT 1598, 1606, 1608, 1615, 1626.) The defense also argued that the crime scene had changed and that other pictures could show the scene without displaying Beeson's nude body. (25 RT 1601-1603.) The defense noted that certain facts the prosecution claimed would be corroborated by the photographs, such as the sports station to which the television was tuned, or that the victim had died, were not in dispute or could be presented using other photographs. (25 RT 1603-1604, 1618.)

The prosecutor argued that the crime-scene photographs were relevant because they demonstrated and would corroborate testimony about "the primary areas where the victim was," paramedics' unsuccessful efforts at reviving her, Beeson's injuries as they appeared at the crime scene, and the tangible items around Beeson's body including the stereo unit from which the defendants claimed to have taken Botello's marijuana, rolls of masking tape, and the television shown tuned to a sports channel. (25 RT 1598-1600.) In addition, the pictures challenged appellant's self-serving statements to police that Beeson's death was accidental or not particularly bloody. (25 RT 1611-1612.) The prosecutor argued that the photographs were a "starting point" to help the witnesses to explain their observations, and "to the extent that the photographs show something different than the way the killers left the scene, witnesses will explain what those difference

are." (25 RT 1611.) In addition, the photographs demonstrated the brutality of the murder by showing the quantity of blood near Beeson's body and, unlike any other photos, her proximity to the bloody "finger painting" on the adjacent wall while she struggled to stay alive—all of which would rebut appellant's stated intention that he merely wanted Beeson put to sleep. (25 RT 1611-1612, 1622-1623.) Indeed, the photos demonstrated why the first police officer on the scene incorrectly concluded that Beeson's white blood-soaked shirt was red. (25 RT 1601, Exh. 23.)

After reviewing all the photographs, including those presented by the defense without the victim, the trial court denied appellant's in limine motion and ruled the photographs admissible. (25 RT 1663.) The trial court noted that the law was well-settled that the prosecution was entitled to prove the factual elements using photographs, in addition to testimony that would establish those same facts, and notwithstanding a defense offer to stipulate to those facts. (25 RT 1634-1635.) Echoing the prosecution's reasons for introducing these photographs, the trial court found "all have significant probative value." (25 RT 1661-1663.) The trial court observed that the nudity of the victim in the crime scene photographs was not inherently prejudicial, and jurors would be presumed to follow instructions relating to the photographs. (25 RT 1633, 1638-1639, 1658-1662.) Indeed, the trial court observed that jurors would already see photographs of nudity in the autopsy photographs showing extensive injuries all over the victim's body. (25 RT 1633, 1658.) The trial court also found that there was nothing misleading about photographs depicting the victim's body after paramedics had undressed her. (25 RT 1657-1658.)

Defense counsel renewed their objection to the admission of the crime-scene photographs after a pretrial hearing in which the trial court ruled that three violent or potentially violent incidents with sexual overtones against Julia Phillips would be admissible at the penalty phase.

(51 RT 3298-3300.) The trial court again overruled the objection reiterating its earlier findings that their probative value far outweighed any potential prejudice, and the incidents with sexual overtones were distinct and would not be admitted until after the guilt phase. The trial court noted, "There's just no shred of evidence anywhere in this case that would indicate that there was in fact a sexual assault. [¶] I see no ambiguity here." (51 RT 3302-3303.)

The trial court admitted photographs of the victim taken at the crime scene into evidence. (108 RT 7100, 7104; Exh. 23.)[52]

B. Admission of Crime-Scene Photographs was Not Error

Appellant claims that admission of photographs of the victim taken by police at the crime scene were unduly prejudicial in violation of Evidence Code section 352, and his Fifth, Eighth, and Fourteenth Amendment rights under the federal constitution to due process and a fair trial. (AOB 179, 184.) He is incorrect.

The trial court reasonably exercised its discretion in admitting the photographs to show the deliberate nature of the murder and to explain and corroborate other evidence and the testimony of other witnesses. (*People v. Thomas*, *supra*, 54 Cal.4th at p. 935; *People v. Riggs* (2008) 44 Cal.4th 248, 303–304; *People v. Lewis* (2001) 25 Cal.4th 610, 641–642.) Absent an abuse of discretion, "the constitutional aspect of defendant's claim is also without merit." (*Thomas, supra*, 54 Cal.4th at p. 935.)[53]

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[52] Although there appears to be some indication in the record that the objection was withdrawn, (108 RT 7100, 7104), the trial court assured appellant's counsel that his objection was timely and preserved. (110 RT 7262.)

[53] Appellant also claims that an error of state law is also a violation of state due process, relying on *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346, and *Hewitt v. Helms* (1983) 459 U.S. 460, 466. (AOB 184.) Such a broad claim does not find support in either of these cases, and as this Court

(continued...)

Appellant's claim that Beeson's nakedness was misleading or inflammatory is specious as nothing about the crime-scene photos even remotely suggested there was a sexual angle to appellant's crime. Indeed, from the outset of his opening statement, the prosecutor noted that, "There was no rape here," (105 RT 6859), the first police officer on the scene saw the Beeson clothed in a white shirt that appeared red (105 RT 6873), and Beeson's clothing was removed by emergency personnel in the process of trying to revive her (105 RT 6873-6874).

Consistent with the prosecutor's opening statement, Botello testified that Beeson was dressed when he entered the room and discovered her body. (123 RT 9231.) Furthermore, the first officer at the crime scene, Officer Johnson, testified that Beeson was fully dressed when he arrived. (108 RT 7050-7051, 7054.) The evidence technician testified that the paramedics had removed Beeson's clothes in order to revive her. (119 RT 7995.) The jury also heard appellant's recorded statement in which he told police that Beeson was fully clothed in sweat pants and a shirt throughout the attack and when he and Patterson left the apartment. (Supp. CT 181-182.) The forensic experts also testified there were no evidence of sexual activity involving the victim. (136 RT 10477, 10489, 138 RT 10640-10641, 10684; 140 RT 10848.) When examined about the attack, the DNA expert was told specifically to assume "that there was no rape, no sexual assault of any type, so when [the victim's] body was found, she was fully clothed." (137 RT 10579.)

(...continued)
noted in *Boyette, supra*, 29 Cal.4th at p. 419, fn. 6, must be rejected as it would transform every statutory error into one of constitutional dimension. (*Hicks, supra*, at p. 346 [length of unauthorized sentence was clear liberty interest raising due process concerns]; *Hewitt, supra*, at pp. 469-472 [state regulations governing administration of prisons did not create state due process right].)

The photographs of Beeson's body, while disturbing, do not "subliminally suggest[] a sexual component to the murder." (AOB 182.) They are neither sexually prurient nor inflammatory. (AOB 182, Exh. 23.) Two photographs show Beeson's back, neck, and back of her head with knife wounds in her neck and her hair matted with blood. (Exh. 23 A & B). The four remaining photographs show her lifeless bloody body on its side on top of a blood-soaked shirt, with her back toward the camera, and with paramedic defibrillator pads attached to her chest. (Exh. 23 C, D, E, F.) Indeed, the jury saw numerous autopsy photographs of the victim unclothed. (138 RT 10635-10638.)

The disturbing nature of the photographs, moreover, does not preclude their admissibility as unduly prejudicial. "[V]ictim photographs and other graphic items of evidence in murder cases always are disturbing." (*People v. Heard* (2003) 31 Cal.4th 946, 976.) These photographs too, were "not so gruesome as to have impermissibly swayed the jury '*in light of the testimony detailing each and every fact relating to the crime scene and victims.*'" (*People v. Scheid* (1997) 16 Cal.4th 1, 20.)

Appellant is also incorrect in arguing that the photographs were cumulative of uncontested testimony by the pathologist. (AOB 182.) As a threshold matter, his claim that there was no dispute related to the pathologist's testimony about Beeson's death is not supported by the record. Counsel for appellant and Patterson cross-examined the pathologist to attempt to discredit the defendants' statements to police about how the crime occurred. (see e.g., 140 RT 10874-10876 [kind of knife used], 10886 [adhesive applied].) Regardless, the absence of controversy does not preclude admission of relevant evidence. As this Court noted in admitting photographs that corroborated a witness's account of murder committed in the course of a robbery and burglary, "we have made clear that the absence of a defense challenge to particular aspects of the prosecution's case or its

witnesses does not render victim photographs irrelevant." (*Lewis, supra*, 25 Cal.4th at p. 641.)

Furthermore, as the challenged photographs were the only ones showing Beeson's body in relation to the crime scene and include her blood-soaked clothing close to the time of the crime, they were not cumulative. (25 RT 1660-1663.) Their corroboration of other testimony also did not make them erroneously cumulative as this Court has held repeatedly in regard to photographs consistent with expert testimony about the cause of death. (*Riggs, supra*, 44 Cal.4th at p. 304; *Heard, supra*, 31 Cal.4th at p. 976; *People v. Carter* (2005) 36 Cal.4th 1114, 1168.) Indeed, photographs aid in corroborating nonexpert testimony without being cumulative. "Because the photographs and videotape could assist the jury in understanding and evaluating the witnesses' testimony, the trial court was not required to exclude them as cumulative." (*People v. Pollock* (2004) 32 Cal.4th 1153, 1171.)

In *Heard*, this Court distinguished nearly all of the cases appellant relies on noting that, after independent review, [t]he photographs, while unquestionably unpleasant, do not appear to be of the sort that might inflame a jury." (*Heard, supra*, 31 Cal.4th 977 and fn. 13 [distinguishing or finding unpersuasive *People v. Smith* (1973) 33 Cal.App.3d 51, 68, *People v. Turner*, *supra*, 37 Cal.3d at pp. 320-321; *People v. Burns* (1952) 109 Cal.App.2d 524, 541].) *People v. Hendricks* (1987) 43 Cal.3d 584, 594, does not aid appellant as there, the Court found harmless error in the failure to exclude a photograph of one victim while alive on grounds of relevance, but found no error in admitting photographs of another victim who was dead. *People v. Karis* (1988) 46 Cal.3d 612, 638 is inapposite as it concerned weighing the prejudicial value of admitting out-of-court statements subject to a hearsay exception.

Lastly, appellant's claim that "[a] photograph of a naked, young white woman is the kind that tends to evoke an emotional bias against a defendant, particularly a young black man," is specious. (AOB 184.) Just as the prosecutor observed with regard to appellant's claim that there was a sexual aspect to the pictures: "[I]t's a straw man; it doesn't exist. It's not part of the facts, evidence in this case. It's not here. The only people who mentioned this are the defense attorneys. It doesn't exist." (25 RT 1617.)

C. Error, if any, was Harmless

Error, if any, in the admission of the challenged crime-scene photos was harmless as it is not "reasonably probable the jury would have reached a different result had the photograph been excluded." (*Scheid, supra*, 16 Cal.4th at p. 21; *People v. Watson* (1956) 46 Cal.2d 818, 836.) Appellant's claims based on federal constitutional violation are forfeited by his failure assert a specific or timely objection. (*Riggs, supra*, 44 Cal.4th at p. 304.)

The photographs were used for demonstrative purposes, and the scenes they depicted were fully corroborated by the testimony of witnesses. (*Scheid, supra*, 16 Cal.4th at p. 20.)

Moreover, apart from photographs, there was overwhelming evidence of guilt. Appellant's five taped confessions, along with Patterson's taped confession provided overwhelming detail about the murder. As discussed in Section IV.D., *ante*, Botello and Smith's testimony, along with the police officers who investigated the case, established a timeline and motive. Appellant's cutting his electronic monitoring device left him without an alibi at the time of the crime, and his purported alibi witness, his aunt, did not have a specific recollection of appellant's presence at her house other than when she was shot, a month or so after the murder. (144 RT 11232-11233.)

Appellant's own testimony that he had falsely confessed was inherently incredible. Indeed, appellant admitted lying when he was in

trouble. (144 RT 11288-11289-11290.) He admitted deliberately and repeatedly lying to police when they interviewed him under a false alias about the Chevron gas station robbery he committed a month before he confessed to Beeson's murder. (144 RT 11295; 145 RT 11324-11328; Supp. CT 122-129.) He sometimes admitted lying after confronted on the stand with inconsistent statements. (145 RT 11320-11323.) Sometimes, he could not decide whether to admit or deny having lied. (145 RT 11318-11319; 146 RT 11469-11472.) One such example occurred when the prosecutor examined appellant about statements in a psychiatric report taken when appellant was 16 years old:

> Q. Is that something you might have told a psychiatrist that you shot at people previously?
>
> A. I have never shot anyone.
>
> Q. I'm asking, would you have told a psychiatrist that?
>
> A. I was a kid then. I don't know what I may—
>
> Q. So you might have told him that.
>
> A. Possible.
>
> Q. Okay. Am I understanding correctly, if you did tell him that, that that was a lie, right?
>
> A. I wouldn't say it was a lie.
>
> Whatever I was telling them in this report, some of these things, I don't recall.

(145 RT 11319.)

Appellant also admitted threatening people and acknowledged sometimes having "put on a face to cooperate" when he was in trouble. (146 RT 11442.) Contrary to appellant's claim that he embellished his purportedly false confession to implicate Patterson, many of the differences

in appellant's version increased his culpability over Patterson. (147 RT 11521-11538.)

In short, the evidence against appellant, much of which came from his own mouth, was overwhelming rendering error, if any, nonprejudicial.

VII. THE TRIAL COURT DID NOT ERR IN ALLOWING A COURTROOM DEPUTY TO BE SEATED NEAR APPELLANT WHEN APPELLANT TESTIFIED

Appellant claims that the trial court erred when it ruled, pretrial, that it would station a courtroom deputy near appellant if he took the witness stand and that any error in discretion is reviewed under the *Chapman* standard for prejudice. (AOB 191.) He is incorrect as the trial court stated valid reasons for its decision and carefully considered placement of the deputy to avoid undue prejudice. Although prejudice is correctly assessed under the *Watson* standard, assuming error occurred, it would be harmless regardless of the standard applied.

A. Background

Just before appellant testified at a pretrial *Miranda* hearing, defense counsel asserted an objection to having a sheriff's deputy accompany appellant and sit near the witness stand if appellant decided to testify at trial. (28 RT 1802-1804, 1841.) Given the nature of the charges, the trial court overruled the objection and ruled that all in-custody witnesses, including those for the prosecution, would have a sheriff's deputy sitting near them on the witness stand. (28 RT 1802-1803, 1805, 1835-1838.) The trial court stated, "It is my practice—and I think the practice of most judges in the building—that the defendants with the charges we have before us, defendants will be accompanied by a bailiff." (28 RT 1802-1803, italics added.) The trial court relied on *People v. Duran* (1976) 16 Cal.3d 282, 291, fn. 8, noting that, unless unreasonable in number, the presence of armed guards in the courtroom "is a factor that is appropriate and need not

be justified by the court in any kind of a hearing." (28 RT 1837.) After hearing argument, the trial court measured the distance between the bailiff and the witness stand to make sure it was the same as between the bailiff and the counsel table. (28 RT 1838-1839.) The trial court deliberately positioned the bailiff so as not to block jurors' view of the in-custody testifying witness, noting the unfettered ability to observe witness demeanor was important. (28 RT 1840-1841.)

The only in-custody witnesses to testify live were appellant and his co-defendant. Patterson's counsel read the in-custody preliminary hearing testimony of jailhouse-informant Tyrone Freeman who was out-of-custody and unavailable by the time of trial. (156 RT 12198, 12200.)

B. The Trial Court Reasonably Exercised Discretion by Stationing a Courtroom Deputy Near Appellant During His Testimony

In *People v. Stevens* (2009) 47 Cal.4th 625, 629, this Court held that "stationing of a courtroom deputy next to a testifying defendant is not an inherently prejudicial practice that must be justified by a showing of manifest need." Nonetheless, "the trial court must exercise its own discretion in ordering such a procedure and may not simply defer to a generic policy." (*Id.* at p. 644.) In *Stevens*, the trial court met this standard when it stated reasons for its decision, albeit ones that were "not a model of clarity," and demonstrated that it had weighed the need for this security measure against potential prejudice to the defendant. (*Id.* at p. 642-643.) In *People v. Hernandez* (2011) 51 Cal.4th 733, 743, the trial court's showing fell short. In *Hernandez*, the trial court "asserted that it had seen a deputy at the witness stand 'in every trial I've ever done ... because of security,' and noted that a bailiff was 'supposed' to sit behind 'all defendants' who testify, 'even in a petty theft' case.'"

The trial court's showing in appellant's case is more analogous to the showing made in *Stevens* than in *Hernandez*. Unlike *Hernandez,* which applied the practice routinely to defendants in all criminal cases, the trial court in this case limited its practice to "defendants *with the charges we have before us.*" (28 RT 1803, italics added.) The trial court was well-aware of the gravity of those charges, along with allegations of criminal activity involving force, violence, or threats of violence pertaining to 44 uncharged incidents from a hearing, concluded one day earlier, on admission of Factor B evidence. (16 RT 1697.) The trial court reasoned, moreover, that it did not "perceive any difference in what [defense counsel] described as nonverbal communication with the bailiff seated behind [appellant] at counsel table or next to him on the witness stand." (28 RT 1803.)

In *Hernandez, supra*, 51 Cal.4th at pp. 743-744, the security procedure was a fait accompli and the trial court's reasons were a "post-hoc justification." By contrast here, the trial court was not wedded to its position, having invited argument and additional authorities, and stating that it was open to being "persuaded otherwise." (28 RT 1804.) The trial court decided that, in this case, it would apply the same practice to all in-custody witnesses, including witnesses for the prosecution, thus crafting a procedure that avoided undue prejudice to the defense. (28 RT 1805.) (*Holbrook v. Flynn* (1986) 475 U.S. 560, 569 ["Our society has become inured to the presence of armed guards in most public places"].) Stationing the deputy near appellant for a pretrial hearing, out of the presence of jurors, demonstrates that the court had safety concerns not limited to when jurors were present. The trial court also weighed concerns about prejudice, in advance of any testimony, using a measuring tape to assure the distance between appellant and the bailiff remained the same, regardless if appellant testified, and ordering the bailiffs placed so as not to obstruct jurors' view

of the defendant. (28 RT 1839-1841.) In short, by noting that its concerns pertained to the particular charges in this case, and weighing various procedural elements to make sure the security measure taken did not unduly focus attention on appellant, the trial court reasonably exercised its discretion. (*Stevens, supra*, 47 Cal.4th at p. 642-644.)

C. Error, if any, was Harmless

Error, if any, was harmless as appellant cannot demonstrate that it was reasonably probable placement of a sheriff's deputy near him during his testified affected the verdict. (*Hernandez, supra*, 51 Cal.4th at p. 746 [*Watson* standard applies].) Relying on dissenting opinions, appellant contends that the error is of constitutional dimension requiring the State to show that it was harmless beyond a reasonable doubt under the *Chapman* standard of review. (AOB 191.) Under either standard, appellant's claim fails as the evidence of guilt was overwhelming. See discussion in sections IV.D., and VI.C., *ante*.

SECTION THREE—PENALTY PHASE ISSUES

VIII. THE TRIAL COURT DID NOT ERR IN ALLOWING ADMISSION OF VICTIM IMPACT EVIDENCE

Appellant sets forth multiple claims attacking what he collectively and summarily refers to as "victim impact evidence." Specifically, appellant claims he suffered prejudice because (1) Beeson's mother and sister testified in the penalty phase after they attended the guilt phase of trial; (2) the evidence admitted was excessive and appealed to racial bias by erroneously inviting a comparison of the relative "societal worth" between Beeson and appellant; (3) the evidence admitted about the impact on the Beeson's survivors was unrelated to the offense; (4) the evidence admitted about Beeson's funeral and her sister's graveside visits was improper; and

(5) an 18-minute video used in the prosecutor's closing argument was unduly inflammatory. (AOB 199-200, 202-203, 210-215, 219-220.)

A. Background

During in limine motions before the guilt phase, the prosecutor and appellant filed cross motions to admit and limit victim impact evidence during the penalty phase of trial. (40 RT 2503-2505; 5 CT 1253-1285; 9 CT 2270-2297, 2361-2365.) The trial court rejected appellant's claim that victim impact evidence was limited to impact on family members who were percipient witnesses to the crime. (40 RT 2601-2606 ; 43 RT) The trial court also found no authority to limit victim impact evidence to impact that was foreseeable by appellant at the time of the crime. (40 RT 2606-2611.)

Noting that "every ruling I make and every analysis I engage in is going to be with as careful consideration of the factors set out in Evidence Code section 352," the trial court precluded two of Beeson's friends as victim impact witnesses finding their testimony, while admissible, would be duplicative of the testimony anticipated to be given by Beeson's mother, sister, and her boyfriend, Botello. (42 RT 2613-2616.) The trial court allowed admission of 53 photographs, consisting of two-to-three photographs from each year of Beeson's life, noting that it had eliminated roughly half of the photographs the prosecutor had sought to introduce. (47 RT 2964-2965; 176 RT 14029.)

After the penalty phase commenced, defense counsel renewed their objection to the number of photographs of the victim deemed admissible, particularly childhood photographs, based on *Salazar v. State* (Tex. Crim. App. 2002) 90 S.W.3d 330, 332, a newly-decided case from Texas's highest state court. (175 RT 13947; 176 RT 1400.) Although the prosecutor was still undecided whether he would create a video montage, the defense asserted an objection to preclude use of the photographs in a video, and again sought to preclude victim impact evidence generally,

claiming it invited vengeance and a comparison between the victim and the defendants. (176 RT 14007-14012.)

The trial court reviewed *Salazar*, but found it inapposite to the present case. (176 RT 14002-14004, 14012-14013, 14027-14032.) The trial court noted that the in limine hearing on victim impact evidence "went on for several days and it was an intense, intense hearing" based on the court's careful and extensive review of the proffered evidence. (176 RT 14028.) The trial court recalled that more of the proffered evidence was excluded than admitted, and noted that the probative value of the photographs admitted substantially outweighed any prejudicial effect. (176 RT 14029.)[54]

B. Admission of Victim Impact Evidence Was Proper

Section 190.3, subdivision (a) (Factor A) allows jurors to consider "[t]he circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to Section 190.1." "[V]ictim impact evidence is admissible as a circumstance of the crime under section 190.3, factor (a), so long as it 'is not so inflammatory as to elicit from the jury an irrational or emotional response untethered to the facts of the case.'" (*People v. Pearson* (2013) 56 Cal.4th 393, 467.)

Under the federal constitution, admission of victim impact evidence is proper unless it is so unduly prejudicial as to render the trial fundamentally unfair. (*Payne v. Tennessee* (1991) 501 U.S. 808, 825.) In *Payne*, our High

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[54] The trial court noted emphatically, "if the record is clear on nothing else, let it be clear on this: that every decision I made in that in limine hearing that I will incorporate by reference now was with a very clear understanding that I was, in fact, weighing the prejudicial effect versus the probative value under section 352 of the Evidence Code." (176 RT 14029.)

Court held that the state "has a legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in, by reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family." (*Ibid.*) In reference to *Payne*, this Court has noted that "[s]tate law is consistent with federal law in this regard. 'Unless it invites a purely irrational response from the jury, the devastating effect of a capital crime on loved ones and the community is relevant and admissible as a circumstance of the crime. . . ." (*People v. Garcia* (2011) 52 Cal.4th 706, 751.)

Appellant's claims challenging victim impact evidence as outside these parameters are incorrect and his factual claims are unsupported or contradicted by the record.

1. Testimony of the victim's mother and sister during the penalty phase did not violate appellant's right of due process

Appellant contends that allowing Beeson's mother and sister to testify at the penalty phase violated his right of due process since they both attended the guilt phase and had cried or appeared upset. (AOB 199.) He argues that Beeson's mother and sister should have been permitted either to attend the guilt phase of trial "which would convey their emotions about Beeson," or testify at the penalty phase, "but not both." (AOB 199.) Appellant argues that the conduct of Beeson's mother and sister as spectators during the guilt phase improperly influenced jurors and should have precluded them from testifying during the penalty phase. (AOB 199.) Appellant's claim is incorrect and relies on facts that contradict the trial court's explicit factual findings. (106 RT 6897-6898; 148 RT 11584.)

As a threshold matter, the law does not require a victim's surviving family to choose to attend just one phase of a capital trial.

Section 1102.6 authorizes attendance at trial by immediate family of a murder victim, provided they will not testify as witnesses. (§ 1102.6, subds. (a), (c)(3), (d), Evid. Code § 777.) Family members may not be excluded unless four criteria are met. (§ 1102.6, subd. (b).)

> (1) Any movant, including the defendant, who seeks to exclude the victim from any criminal proceeding demonstrates that there is a substantial probability that overriding interests will be prejudiced by the presence of the victim.
>
> [¶] . . . [¶][55]
>
> (2) The court considers reasonable alternatives to exclusion of the victim from the criminal proceeding.
>
> (3) The exclusion of the victim from any criminal proceeding, or any limitation on his or her presence at any criminal proceeding, is narrowly tailored to serve the overriding interests identified by the movant.
>
> (4) Following a hearing at which any victim who is to be excluded from a criminal proceeding is afforded an opportunity to be heard, the court makes specific factual findings that support the exclusion of the victim from, or any limitation on his or her presence at, the criminal proceeding.

(§ 1102.6, subd. (b).)

Ignoring the statutory authority that entitles Beeson's family to attend trial, appellant's claim is that, as a factual matter, the presence of Beeson's family was an improper influence when they later testified at the penalty phase. (AOB 199-200.)

"A spectator's conduct is grounds for reversal if it is 'of such a character as to prejudice the defendant or influence the verdict.' [Citations.] The trial court has broad discretion to ascertain whether a

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[55] The statute provides a nonexclusive list of six "overriding interests," which include "[t]he defendant's right to a fair trial," and "[t]he court's interest in maintaining order." (§ 1102.6, subd. (b)(A), (D).)

spectator's actions were prejudicial." (*People v. Myles* (2012) 53 Cal.4th 1181, 1215.) In *Myles*, the defense similarly complained that the conduct of the victim's surviving wife improperly influenced both the verdict and imposition of the death penalty when jurors observed her nodding during the testimony of a prosecution witness, crying, and receiving comfort from support persons. (*Ibid.*) The Supreme Court noted that the trial court reasonably exercised its discretion not to exclude the victim's wife, having acknowledged she was "upset," but "not making a disturbance." (*Ibid.*) On those facts, the Supreme Court concluded that the record was insufficient to show the defendant was prejudiced by the presence of the victim's wife at trial. (Id. at 1214-1216.)

The record of disturbance in appellant's case is even less sufficient than in *Myles*. Appellant objected to or moved to preclude Beeson's family's attendance at the guilt phase of trial during in-limine motions (104 RT 6818-6821), during a recess in opening statements just after the prosecutor described anticipated evidence of Beeson's strangulation and stabbing (106 RT 6894-6897), and during appellant's testimony (148 RT 11584). The trial court overruled appellant's pretrial objection noting that it would rigidly enforce rules of decorum, and denied his two subsequent motions after the jury was impaneled. (104 RT 6828; 105 RT 6843;106 RT 6897; 148 RT 11584.) In denying appellant's motions, the trial court specifically noted that it had been carefully watching the audience and observed no outbursts or other behavior that was distracting to jurors or affected decorum. (106 RT 6897-6898; 148 RT 11584.)

After opening statements, the trial court observed:

> First of all, with respect to our relative positions in the courtroom, as counsel are aware—the record may not reflect—I'm at the front of the courtroom looking back, so that the audience portion of the courtroom is in my direct view at all

> times. Direct, meaning they all, meaning the audience portion of the courtroom, are directly in front of me.
>
> I was paying very close attention throughout the portion of the opening statement that took place this morning and I did not see anything which I think can remotely be described as prejudicial.

(106 RT 6897.)

Defense counsel asserted another objection during opening statement noting that Erika's mother and sister left the room during opening statement after the prosecutor showed photos of Erika at the crime scene. (107 RT 6969.) The trial court again noted that it had the best and most consistent view of the audience, and noted at length and in detail that jurors remained focused and not distracted by the audience and there was neither a display of emotion nor a break in decorum. (107 RT 6970-6972.)

Similarly, in denying appellant's motion midway through appellant's examination, the trial court again observed:

> I see nothing occurring in the audience portion of the courtroom that is either distracting to the jury, or in any way violates any orders that I have previously made, nor have I observed anything of that nature occurring during the hour that we have been in session. And I have been observing all parties in the courtroom, including those in the audience portion of the courtroom.

(148 RT 11584.)

Just as in *Myles*, the trial court's observations here are entitled to deference. "Having observed the courtroom proceedings firsthand, the trial judge was in the best position to evaluate the impact of [the family member's] conduct in front of the jury." (*Myles, supra*, 53 Cal.4th at pp. 1215-1216.) Based on the trial court's explicit factual findings, the record fails to demonstrate improper influence of a spectator and appellant's claim must be rejected. (*Ibid.*)

Appellant's reliance on *People v. Valdez* (1986) 177 Cal.App.3d 680, 692-695 is inapposite as it involved a violation of an exclusion order to prevent a witness from being tainted by the testimony of other witnesses—not to prevent jurors from being exposed to spectators. Appellant describes his remaining authorities, all from other states, as addressing the *proximity* of family members to the prosecution—a different issue. (AOB 199-200.) In any event, the trial court overruled that objection noting that none of the spectators, including the defendants' families, would be sitting in close proximity to the jurors or the proceedings. (104 RT 6818, 6820.)

With neither legal authority nor factual support, appellant's claim fails.

2. Admission of victim impact evidence did not violate appellant's constitutional rights to due process and a fair trial

Appellant claims it was error to admit victim impact evidence as it invited jurors to compare "the societal worth" of appellant with that of his victim and alleges the prosecutor made this comparison to appeal to racial bias. (AOB 200, 210.) Acknowledging, nonetheless, this claim was rejected in *Payne*, appellant also claims that the victim impact evidence introduced was excessive. (AOB 202-203, 205.) He contends, as he did at trial, that such evidence must limited to the testimony of a single family member who was also a percipient witness to the crime, and the impact must have been foreseeable to appellant. (AOB 202-203.) (40 RT 2528; 5 CT 1253, 1267.) He is incorrect.

As earlier noted, the prosecution has a "legitimate interest" in "'reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family.'" (*People v. Prince* (2007) 40 Cal.4th 1179, 1286, quoting *Payne, supra*, 501 U.S. at p. 825.)

Appellant's argument that this invites jurors to compare societal worth in violation of constitutional protections relies on *Booth v. Maryland* (1987) 482 U.S. 496, 504-505, and *South Carolina v. Gathers* (1989) 490 U.S. 806, 811-812, which the United States Supreme Court, in *Payne*, expressly overruled. (*Payne, supra*, at 501 U.S. at pp. 827-830.) Appellant's specific claims have been raised and rejected by this Court too:

> This court previously has rejected arguments "that victim impact evidence must be confined to what is provided by a single witness (*People v. Zamudio* (2008) 43 Cal.4th 327, 364), that victim impact witnesses must have witnessed the crime (*People v. Brown* (2004) 33 Cal.4th 382, 398), and that such evidence is limited to matters within the defendant's knowledge (*People v. Pollock* (2004) 32 Cal.4th 1153, 1183)." (*People v. Carrington* (2009) 47 Cal.4th 145, 196–197, (*Carrington*).) We also have concluded that "construing section 190.3, factor (a) to include victim impact evidence does not render the statute unconstitutionally vague or overbroad." (*Id.* at p. 197.) Defendant provides no persuasive argument for reconsideration of these decisions.

(*McKinnon, supra*, 52 Cal.4th at p. 690.)

The rationale for allowing victim impact evidence discussed in *Payne*—counteracting the mitigating evidence offered by a defendant—applies with equal force here. (*Payne, supra*, 501 U.S. at p. 825.) The defense had no issue asking jurors to compare appellant with his victim in seeking their sympathy. In rebuttal closing, defense counsel argued:

> We have a—we have a clear contrast here. We have the loving support that Erika Beeson's family gave Erika. She had her problems. Things were tough, but she was coming out of 'em. They sent her to different schools. They explored and they experimented so that they could help her. What did society do for Grayland? Mr. [prosecutor] asks where was Grayland's family in court? The question should be where was Grayland's family when he was in kindergarten desperately needing help? Ritalin could have helped, and we never offered it, nor had you been offered any explanation whatsoever as to why we did not.

Nothing.

> Society's failure was the cause of this illness, and it could have been avoided. One only needs to look at Erika to see what could have been.

(190 RT 14846-14847.)

Appellant's reliance on *Village of Willowbrook v. Olech* (2000) 528 U.S. 562, 564 is also inapposite. In *Village of Willowbrook*, a homeowner alleged that she was singled out when local government officials imposed an arbitrary and unreasonable condition not required of her neighbors before it would connect her to the local water supply. (*Id.* at p. 563.) In a per curiam opinion, our High Court held that a plaintiff may state a claim for violation of equal protection based on a "class of one," when "intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." (*Id.* at p. 564.) Appellant, even in a class of his own, fails to show how the State acts arbitrarily, or treats him differently from other defendants accused of murder. If appellant is suggesting, perhaps, that the penalty phase forces a comparison between him and his victim in violation of equal protection, then he has the argument backwards. (AOB 207). Equal protection invites comparison rather than precludes it with the aim of precluding disparate treatment that is arbitrary or without rationale. (*Griffin v. Illinois* (1956) 351 U.S. 12, 17; *Cooley v. Superior Court* (2002) 29 Cal.4th 228, 253.) Thus, *Village of Willowbrook* lends no support to appellant's position.

Furthermore, appellant's claim that "racism, subliminally and explicitly, infected and permeated [appellant's] trial" is staunchly contradicted by the record. (AOB 209.) Indeed appellant's counsel—not the prosecutor—referenced race when, during the guilt phase, he argued how appellant might have appeared during his interrogation, stating:

> Sergeant Olivas admitted that the physical environment of the interrogation room is intimidating. I believe he even said it would intimidate you jurors. . . .[¶] *But this young black kid, he is tough. He can take it.*

(165 RT 12975, italics added.)

Appellant cites no such references to race by the prosecution. Indeed, the prosecution argued that the death penalty was warranted based on the quantity and quality of Factor B incidents—and those victims were racially diverse. Focusing specifically on appellant, the prosecutor argued:

> Who is Grayland Winbush? His list of victims is long. The ones that I wrote down on my piece of paper are among the many, Officer Bjeldaness, Officer Woods with Berkeley Police Department, Officer Seib, CYA counselor Spinks and Bittick, CYA counselor Germond, CYA inmate Juan Trevino, CYA counselors Dwight Smith and Tim Barcas. Alameda County Sheriff's, Deputy Sheriff Lannon, inmate Juan Merced, Deputy Sheriffs Brady and Upchurch, inmate Razo, Deputy Sheriffs Jeff Lack, Pat Higgins, Deputy Sheriff Jaglin (phonetic). Oddly enough, Maceo Smith, Mario Botello. And then we have CYA counselor Craig Jackson, who was certainly the victim of being conned for a year.
>
> Among the women that I wrote down, Dejuana Logwood. Do you remember her telling us this is about the worst thing that ever happened in her life, that robbery back in 1989? The teacher at CYA, Juanita Ream[], CYA counselor Valerie Godfrey, Julia Phillips, Wanda Major, the clerk at the Chevron Station, Deputy Sheriff Tammy Wyatt, Deputy Sheriff Judy Miller [Thrower], Iva Mosley, and most significantly, of course, Erika Beeson.

(188 RT 14684-14685.)

The speciousness of appellant's contention, i.e., that victim impact evidence was a pretext to appeal to racial bias, is also demonstrated by jurors' decision not to impose the death penalty against Patterson who was also an African-American man found guilty of murdering the same

victim.[56] Having distinguished between the two defendants, the jurors responded in a manner that was measured and consistent with their task rather than irrational or purely subjective. (*Prince, supra*, 40 Cal.4th at p. 1288.) Thus, appellant's claim fails.

3. The trial court did not err in admitting victim-impact evidence pertaining to the effect of Beeson's death on her survivors

Appellant contends, in summary fashion, that the admission of victim impact evidence was excessive. (AOB 211.) He claims that Beeson's mother and sister "testified at length" about their enduring sense of loss, and the booklet of photographs and the videotape duplicating portions of the photographs and taped statements were an "exhaustive account of [Beeson's] complete life history." (AOB 211, 213). The record does not support these contentions and his claim of excess must fail.

Rather, as just discussed in section VIII.B.2., *ante*, admission of the testimony and documentary victim impact evidence in this case was well within constitutional standards and neither excessive nor inflammatory. (*Payne, supra*, 501 U.S. at p. 825; *Garcia, supra*, 52 Cal.4th at p. 751.)

As a preliminary matter, the trial court carefully weighed and limited the number of witnesses to preclude cumulative testimony, otherwise admissible, by two of Beeson's friends. (42 RT 2613-2616; 47 RT 2921.) The trial court also reviewed, line-by-line, an investigator's report of each witness' anticipated testimony, precluding certain statements and areas of inquiry that would be unduly prejudicial. (43 RT 2709; 44 RT 2735-2736; 45 RT 2837-2838;47 RT 2967-2970.) The trial court ruled that victim-impact witnesses "may not make a characterization or opinion about the

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[56] Appellant's counsel also included a question in the jury questionnaire designed to ferret out bias based on the difference in race between the two defendants and Beeson. (50 RT 3223-3224; 9 CT 2419.)

crime itself, the defendant, and the appropriate sentences." (48 RT 2981-2982.) In addition, the trial court, without objection, instructed the prosecution "not only [to] focus directly on the issues, but . . . [to] use the format of leading questions not suggesting the answer, but questions that focus their attention directly on the issues before the court." (48 RT 2984.)

In addition, the trial court carefully and individually examined each item of documentary evidence—consisting primarily of photographs and a few cards, notes, and school reports—and excluded roughly half of the evidence the prosecution sought to introduce. (47 RT 2935-2967.)[57] The trial court noted that it had carefully considered and weighed "[e]very single scrap of evidence, whether it's oral testimony or whether it is written documents, photographs, or things," under Evidence Code section 352, and applied the standards set forth in *Payne, supra*, 501 U.S. at p. 825 and *People v. Edwards* (1991) 54 Cal.3d 787, 836. (47 RT 2963.) The number of photographs used was 53, which accounted for two-to-three photographs from each year of Beeson's life. As this Court has observed, "the People are entitled to present a complete life history of the murder victim from early childhood to death." (*Tully, supra*, 54 Cal.4th at p. 1032, internal edit and quotation marks omitted; *People v. Kelly* (2007) 42 Cal.4th 763, 796 [montage of photographs and video clips from throughout 19-year-old victim's life]; *People v. Zamudio* (2008) 43 Cal.4th 327, 363 [montage of 118 photographs of two elderly victims covering most of their adult lives].) The video used about half of the 53 photographs of Beeson while alive, and at 18 minutes, was within the range or shorter than other videos not deemed excessive by this Court. (See, e.g., *Zamudio, supra*, 43 Cal.4th at pp. 363–

[57] Generally speaking, the trial court primarily disallowed some of multiple photographs submitted representing each year of Erika's life and excluded a school report, but allowed cards and handwritten notes. (11 CT 2948-2949, referencing Exhibits 59-91.)

368 [14 minutes]; *Kelly, supra*, 42 Cal.4th at pp. 793–799 [20 minutes]; *Prince, supra*, 40 Cal.4th at pp. 1286–1291 [25 minutes].)

The testimony of the sole witnesses, Beeson's mother, Melitta, and her sister, Lisa, was well within constitutional standards. "[A]n average of two witnesses per victim is not excessive." (*Booker, supra*, 51 Cal.4th at p. 194.) The testimony itself was brief, lasting 18 minutes for Melitta, and 19 minutes for Lisa. (177 RT 14048-14059, 14059-14068; 11 CT 2859.) (*Booker, supra*, 51 Cal.4th at p. 190 [six relatives of three victims testified over course of three days].) Indeed, the prosecution did not call Botello, whom the trial court had ruled, in limine, could testify about victim impact. (42 RT 2614-2615.) The documentary evidence, authenticated by Melitta, was placed in a notebook and introduced as a single exhibit, so that neither witness was faced with having to review the individual pictures, cards, and notes in front of the jury. (177 RT 14054-14055.) As the trial court observed, this was an appropriate procedure "[b]oth to shorten the length of the testimony, but also to minimize the chance for an emotional reaction by the witnesses." (47 RT 2957.) As such, its admission passed constitutional muster. (*Id.* at pp. 190-194.)

4. The trial court did not err in admitting testimony by Beeson's sister about the funeral and the sister's visits to Beeson's grave

Appellant contends that the trial court erroneously admitted three portions of Lisa's testimony describing Beeson's memorial service and her burial. (AOB 213-214.) First, appellant challenges Lisa's testimony about visiting Beeson's grave (AOB 213):

Q. Do you go visit her grave?

A. Yes.

Q. Is your dad buried next to her?

A. Yes.

Q. You go through a specific sort of ritual before you go?

A. Yes.

Q. What do you do?

A. I can't buy prearranged bouquets, I have to buy the flowers myself in bunches and make identical bouquets, always pretty much a single flower, always a rose. The two cups are different depths, so I have to cut them differently so they stand evenly together, and I tie them together with a ribbon.

Q. You do that each time?

A. Yes.

(177 RT 14066)

In pretrial motions, the trial court overruled appellant's objections and ruled that Lisa's description of visiting her sister's grave and preparing flowers for both her sister and father's graves was admissible. (44 RT 2770-2771; 9 CT 2286.) The trial court observed:

> To ask a rhetorical question, how can you say that testimony of two flower arrangements together with a common ribbon, cutting one set of flower stems longer so that the arrangements will remain at the same level, how can you say that is inflammatory rhetoric? Those are the most mundane of words. The image they create may be powerful, but it is an appropriate powerful one to crystallize the loss suffered by these people.

(44 RT 2771.)

Second, appellant challenges Lisa's description of Beeson's memorial service (AOB 214):

Q. Tell us about Erika's funeral.

A. We had a memorial, not a funeral. And I did the whole thing. I arranged everything.

Q. Did your parents help arrange things?

A. My father went with me. He actually chose the grave site. But I did everything else.

Q. Was your mom able to help?

A. No.

Q. At the memorial service did your friends and family come?

A. Yeah, a lot of people came.

Q. Did you—was it left to you to select the musical passages and readings for that memorial service?

A. Music was two very close family friends knew Erika, her whole life pretty much. And I gave a little guidance in what to play. And as far as readings and who spoke, I gave the eulogy, and I had a couple people say and I chose every reading.

(177 RT 14063-14064.)

In pretrial motions, defense counsel asserted an objection to Lisa's anticipated testimony that the memorial service had readings and guitar music by family friends, and that she had selected the readings and the speakers. (144 RT 2745-2747; 9 CT 2285.) Defense counsel asserted no objection to Lisa's anticipated testimony that she had made the funeral arrangements with her father, or that many people had attended the memorial service. (44 RT 2745; 9 CT 2285 [paragraph 13].) The trial court approved all anticipated testimony describing the memorial service, and overruled the defense objections. (44 RT 2747.)

Third, appellant attacks admission of Lisa's description of Beeson's burial (AOB 214):

Q. . . . [I]n addition to the memorial service, was there a separate time when you actually dealt with a burial?

A. Yeah. It was a week or ten days later. And, um—

Q. Was Erika cremated?

A. She was.

Q. So how did you deal with her remains?

A. The mortuary, or whatever it's called, cemetery called us when they received her body, and when it was ready for burial. It was on a Wednesday morning. My father and I went to bury her.

Q. Did your mom go?

A. No.

Q. She too upset to go? [*sic*]

A. Yes. My father didn't want to go, either, but he wouldn't let me go by myself.

Q. What happened when you got to the cemetery, or the mortuary?

A. They told us to ride in their car, the funeral director. And since he had to drive, and put me in the front seat, put my father in the back seat. Put a gold cement box on the seat next to him with her inside.

Q. That make you angry that they did that?

A. Very much so. I thought they could have handled it better.

Q. You remember looking in the rear-view mirror and seeing your father in the back seat of that car?

A. Yeah.

Q. What was he doing?

A. He had—they had a really cheap label with her name on it stuck to the box, and he had his hand on it, and he just kept stroking the top of the box.

(177 RT 14064-14065.)

The defense objected during pretrial motions to Lisa's anticipated testimony describing the funeral. (44 RT 2745-2746; 9 CT 2285.)

The trial court ruled that Lisa's description of the funeral and her part in it was entirely appropriate under *Payne, supra*, 501 U.S. at p. 825, and *Edwards, supra*, 54 Cal.3d at p. 836:

> Well, it strikes me, again, that considering the kind of thing that the *Payne* case, *Edwards* case, and all the other cases that follow these decisions say, this funeral may be a subject that returns to the minds of every member of this family every[]day. They may never forget this funeral. They may never forget the readings. They may never forget the music. They may never forget the fact that their sister, their daughter was in [a] casket. And I sense that the funeral crystallized their anguish. And the memory of that funeral has continued to crystallize their anguish and probably will do it until the end of their days.
>
> I don't see anything inappropriate to what appears to be really an innocuous reference here to readings and music. I just see nothing inflammatory, nothing of the kind of thing that the *Edwards* case warned against here.
>
> And I think in terms of being a focal point of the loss felt by this family, I can't imagine a single event that might be more pivotal in reflecting that loss than the funeral service or related services, burial services, things of that nature.

(44 RT 2747-2748, italics added of case names.)

Defense counsel objected to portions of Lisa's statements describing her anger with the cemetery caretakers and for being taken to the burial site in a blue Taurus as distinct from a red Oldsmobile, but noted explicitly that "we're no objecting to the stroking of the box." (44 RT 2749-2753; 9 CT 2286.) Defense counsel objected to Lisa's use of the particular word "imploded," as distinct from saying "her dad shut down," as unduly inflammatory as it might link defendant's culpability with her father's death from an aneurism six months after the murder. (44 RT 2749.) The trial court overruled the objections finding that a description of how family members experienced the death was admissible victim impact evidence under *Payne*. (44 RT 2755-2757.)

Before reviewing anticipated testimony during pretrial motions, the trial court acknowledged that the defense had preserved its objection to victim impact testimony generally for family members who were not

percipient witnesses to the crime. (44 RT 2730.) The trial court noted, however, that if not asserted at the pretrial hearing, objections to the particulars in the anticipated testimony of each witness would not be preserved. (44 RT 2730.)

The trial court ruled correctly and appellant's claims fail. As a threshold matter, appellant forfeits his claim on appeal challenging Lisa's testimony that on the way to the burial, her father "kept stroking the top of the box" that contained Beeson's remains. (AOB 214, referring to 177 RT 14065.) Defense counsel stated he had no objection "to the stroking of the box." (44 RT 2753.) (*People v. Partida* (2005) 37 Cal.4th 428, 435.)

Even if considered on its merits, appellant's claim as to this statement and all testimony of which he complains on appeal, fails. Testimony may be emotional without being inflammatory. (*People v. Brady* (2010) 50 Cal.4th 547, 575-576.) As this Court has already observed, "evidence of a victim's family's grief at funeral services, and the condition of the victim's body, is admissible and relevant." (*Booker, supra*, 51 Cal.4th at p. 192; see *People v. Sandoval* (1992) 4 Cal.4th 155, 191.) The brief testimony of Beeson's mother and sister, straightforward and factually descriptive, passes constitutional muster. (*Booker, supra*, 51 Cal.4th at pp. 192-193.)

5. Playing the video during closing argument was proper

During closing argument, the prosecutor played an 18-minute video consisting entirely of admitted evidence, namely, some photographs of the victim and the defendants, and portions of taped statements from appellant, Patterson, and Iva Mosley. (183 RT 14428-14429; 188 RT 14706.) In arguing for the videotape's admission outside the presence of the jury at a special hearing before closing argument, the prosecutor stated,

> I would point out that I have used less than half of the victim impact photographs. That I have used no more than about 10 percent of the autopsy photographs that were admitted. I have

used I think only one of six crime scene photos showing Erika Beeson's body at the crime scene. No photos are up there in this video for more than about five seconds at a time.

(183 RT 14428-14429.)

Three days later, in closing argument just before the videotape was played, the prosecutor stated:

I'm going to play a videotape now. This videotape has—let me tell you just a bit about it. It has some of the pictures from the book, exhibit 138. It has some pictures from the crime scene. A few pictures from the autopsy. It has a soundtrack that is spliced pieces from evidence that you have before you. The start of it, some of it difficult to hear as the tape rolls. We heard 'em in court. There's a piece of tape from an interview with Iva Mos[le]y. And then there's some back and forth between the confessions of Norman Patterson and those of Grayland Winbush. And you'll hear that there are very clear demarcation points in the tape. The tape stops abruptly so that you can tell there are pieces, they're simply segments, okay, that are taken from various places. Okay. And they're strung together to tell you the story of this, particularly in light of this argument by the defense that to hear from the family of Erika Beeson is a waste of your time, but you need to hear from Norman Patterson's family.

The purpose of this tape is to keep your focus for why we're here, because Erika Beeson was murdered so brutally. You'll note some different things in this tape. One of the things that you'll note in this tape, you know, all of us as we are here in this moment in life, we have with us our childhood, and who that is. Now, I suppose the younger you are, the closer you are to your childhood, but we all carry our childhood with us, and you'll see in one of the photos here of Erika Beeson from about seven or eight years old, that there's a photo of her holding some cabbage patch dolls, and you'll also see in the murder scene in the apartment she saved her dolls and stuffed animals. And it's an indication that you have that she was a wonderful person, you know.

(188 RT 14705-14706.)

Appellant attacks admission of video montages generally (AOB 215), and attacks the prosecutor's use of this particular video montage in closing argument as inflammatory and confusing (AOB 218-219).

As a threshold matter, appellant's contention that victim impact evidence was designed to appeal to racial prejudice is without support in the record. (AOB 4, 200, 207-208, 222.) Indeed, the trial court granted a request by appellant's counsel to include a question in the juror questionnaire specifically designed to elicit racial bias based on the defendants as young black males, and the victim as a young white female. (50 RT 3223-3224; 9 CT 2419.) Appellant's claim is belied, moreover, by the jury's verdict which did not impose the death penalty on his codefendant of the same race. As nothing "suggested the jury should impose the death penalty for racial reasons," appellant's specious claim must be rejected. (*Kelly*, *supra*, 42 Cal.4th at p. 799.)

Moreover, video montages generally, and the video montage introduced against appellant, in particular, was not error. As discussed in section VIII.B, *ante*, the prosecution may introduce evidence providing a "quick glimpse" into the victim's life to remind the sentencer of the uniqueness of the loss, and the photographs included in the video were just a fraction of the limited number of photographs admitted into evidence. (*Payne, supra*, 501 U.S. at pp. 822, 825.)

Appellant's claim that the particular videotape admitted against him was inflammatory and confusing is incorrect. Appellant mischaracterizes the video as victim impact evidence since the video was not received in evidence, but rather was a demonstrative aid for closing argument. (183 RT 14425, 14427; Court's Exh. 105.) The video portion consisted of some still pictures of Beeson, her family, and the crime, against an audio background of the taped statements given by appellant, his co-defendant, and Iva Mosley—all of which were admitted into evidence. (183 RT 1424-

14425; Court's Exh 105.) Thus, nothing about the video was additional, irrelevant, or enhanced the emotion of the factual presentation. (*Kelly, supra*, 42 Cal.4th at p. 798.) There was no confusion in the overlay of admitted and distinct audio portions, with admitted photographs. (183 RT 14442.) As a demonstrative aid, it was comparable to having the prosecutor hold up pictures or display slides while playing portions of audio evidence. (See *People v. Wash* (1993) 6 Cal.4th 215, 257 [confession played in opening statement].) In short, "the videotape was simply 'a repackaging of the evidence.'" (*People v. Bramit* (2009) 46 Cal.4th 1221, 1241.)

Appellant's reliance on *Salazar v. State* (Tex. Crim. App. 2002) 90 S.W.3d 330, 332 and *United States v. Sampson* (D. Mass. 2004) 335 F.Supp.2d 166, 193, as this court has noted previously, is neither binding nor persuasive. (*Brady, supra*, 50 Cal.4th at pp. 580-581; *Prince, supra*, 40 Cal.4th at pp. 1288-1289; *Booker, supra*, 51 Cal.4th at p. 190 [distinguishing *Salazar*].)

His contention, moreover, the video eulogized Beeson's life or "exceeded every limitation that this court unanimously set forth in *People v. Prince*" is also incorrect. (AOB 218.) As a threshold matter, this Court set no hard and fast limitation on victim impact evidence as appellant claims, and indeed, noted that there are "no bright-line rules by which to determine when such evidence may or may not be used." (*Prince, supra*, 40 Cal.4th at p. 1288.) Rather, the parameters for admission of evidence were:

> a general understanding that the prosecution may present evidence for the purpose of reminding the sentencer that the victim is an individual whose death represents a unique loss to society but that the prosecution may not introduce irrelevant or inflammatory material that diverts the jury's attention from its proper role or invites an irrational, purely subjective response.

(*Id.* at p. 1288, internal edit, citations, and quotation marks omitted, accord *Garcia*, *supra*, 52 Cal.4th at p. 751.)

Unlike the video-montage of already-admitted evidence the prosecutor used as a visual aid here, the Court in *Prince* considered whether a single 25-minute television interview of the victim, given months before her murder, was admissible as evidence in the first instance. (*Prince, supra*, 40 Cal.4th 1287-1290). The Court did not apply set "limitations" to preclude jurors from viewing, through a compilation video, evidence already admitted. (*Ibid.*)

The trial court astutely noted "[t]hat somehow using a video recording somehow makes impermissible what would be perfectly permissible if [the prosecutor] simply held photographs up and played a tape recording, an audiotape recording alone," was a "classic example of a distinction without a difference." (183 RT 14443.) Indeed, the trial court observed, there was nothing "impermissible about using what is frankly very low tech technology, a videotape, which is nothing more than the kind of VHS tape recording which virtually every household in America has used for years." (183 RT 14443.) Appellant's claim of error fails.

C. Error, if any, was Harmless

Assuming any of the evidence appellant complains of concerning victim impact was erroneously admitted, it was not reasonably possible the error affected the verdict, and it was harmless beyond a reasonable doubt. (*People v. Abilez* (2007) 41 Cal.4th 472, 525-526; *Chapman, supra*, 386 U.S. at p. 24.) The standard for assessing prejudice during the penalty phase, regardless whether the error is based on state law or of constitutional dimension, is the same. (*Abilez* at p. 526.)

> We held in *People v. Brown* (1988) 46 Cal.3d 432, 448, 250 that state law error occurring at the penalty phase must be assessed on appeal by asking whether it is reasonably possible the error affected the verdict. Defendant contends that, because a life is at

> stake, we should instead apply the standard for federal constitutional error set forth in *Chapman v. California* (1967) 386 U.S. 18, 24, 87 S. Ct. 824, 17 L.Ed.2d 705, that is, that reversal is required unless it is shown the error was harmless beyond a reasonable doubt. We have held, however, that the two standards are the same "in substance and effect."

(*Id.* at pp. 525-526.)

Most telling, notwithstanding the admission of victim impact evidence against both defendants. the jury imposed a death sentence on appellant alone, thus demonstrating that the evidence did not divert the jury's attention from its proper role or invite an irrational, purely subjective response. (*Prince, supra*, 40 Cal.4th at p. 1288.)

As just discussed in section VIII.B.5. *ante,* the photographs, and the audio statements contained in the video were already in evidence. Thus, there was nothing in the video of which the jurors were not already aware. (*Wash, supra*, 6 Cal.4th 215, 257.)

Moreover, as demonstrated by the trial court summary of the evidence before it denied the motion to modify the verdict (§ 190.4, subdivision (e)), the evidence in aggravation against appellant was overwhelming in quantity and quality and evidence of circumstances in mitigation was weak. (196 RT 14976-15019.) In context, the relative weight of the victim impact evidence made its admission harmless beyond a reasonable doubt. (196 RT 14986-14989.)

IX. THE TRIAL COURT DID NOT ERR IN EVIDENTIARY RULINGS PERTAINING TO THE TESTIMONY OF JULIA PHILLIPS ABOUT APPELLANT DURING THE PENALTY PHASE

Appellant challenges three evidentiary rulings pertaining to the testimony of Julia Phillips, admitted as Factor B evidence during the penalty phase of trial, as errors of constitutional dimension. (AOB 223.)

Specifically, appellant claims (1) the evidence of his criminal activity was insufficient (AOB 225-226); (2) he was incorrectly precluded from cross-examination and denied a continuance to gather impeachment evidence after Phillips denied having made false accusations of rape (AOB 228); and (3) he was unduly prejudiced when the trial court admitted limited purpose evidence about Phillips' ability to recall the impetus for making an anonymous call to police (AOB 229-230). Each of appellant's claims fails.

A. Julia Phillips' Testimony Was Properly Admitted As Factor B Evidence

Appellant claims there was insufficient evidence that his three assaults on Phillips were crimes involving violence or the threat of violence under section 190.3, subdivision (b). He is incorrect.

Prior to commencement of the guilt phase, the prosecution filed a supplemental motion to admit Factor B evidence and trial court conducted a preliminary inquiry, out of the presence of the jury, to determine the admissibility of Julia Phillips' testimony during penalty-phase evidence. (*People v. Phillips* (1985) 41 Cal.3d 29, 72, fn. 25.) The prosecutor's supplemental motion outlined three incidents of criminal activity consisting of acts of violence or potential violence, each with sexual overtones, committed by appellant, supported by a transcript of an interview with Julia Phillips. (51 RT 3287- 3289; 9 CT 2373-2374 [B-51, B-52, B-53], 2382-2383, 2385-2387.)[58] The supplemental motion specified the multiple Penal Code violations associated with each of the three incidents. (9 CT 2373-2374, citing §§ 242, 243.4, 314 [B-51]; §§ 236, 242, 243.4, 417 [B-52]; §§ 236, 242, 243.4 [B-53].) In requesting a hearing to test Julia Phillips'

[58] Based on the evidence at trial, these incidents are described in more detail under Statement of Facts, section B.1.c.(1), *ante*.

credibility, appellant's counsel stated that, if the allegations were true, he would concede their admissibility as crimes:

> [W]e will concede that if true, the incident described by Julia Phillips on November 11th of this year described various crimes, and in fact some of them are quite shocking, that Mr. Winbush exposed himself and asked for oral sex, that he pulled a gun on her in the bathroom and tried to rape her and asked his brother to assist her, to assist him. *If true, those are crimes*, and they're very shocking crimes.

(51 RT 3290, italics added.)

Finding the allegations unambiguous, the trial court correctly ruled the three incidents admissible (51 RT 3295-3298.) (see *People v. Sanders* (1995) 11 Cal.4th 475, 543 [no discretion to exclude admissible evidence as unduly prejudicial].)

Appellant's claim of insufficient showing of criminal activity, premised on having this Court reweigh the evidence in light of Phillips' admissions "that he never beat her or hit her," (AOB 225-226), is meritless. As the trial court observed and defense counsel acknowledged, the three incidents alleged were "clearly an act of violent [*sic*] or threatened or implied violence," and "clearly violation of penal statutes." (51 RT 3290, 3297.) The evidence at trial supported the pretrial allegations. Phillips testified that she fought against appellant during the first two assaults. (170 RT 13364-13366.) In the first incident, Phillips feared that appellant was going to burn her with the hair dryer as he "forcefully" groped her and demanded oral sex. (170 RT 13362-13364.) In the second incident, appellant pinned Phillips down by her wrists while trying to sexually assault her. (170 RT 13364-13366.) In the third incident, appellant imprisoned Phillips in a bathroom where she had fled to avoid his sexual demands, turned out the lights, shut the door, and pulled out a gun, or as Phillips characterized the threat, "I was in a dark bathroom and he had a gun." (170 RT 13369-13370.) These incidents involved multiple crimes,

as the prosecutor noted in his supplemental motion for admission. (9 CT 2373-2374.) Defense counsel's tactical choice not to have jurors instructed as to specific elements of what he referred to as "shocking crimes" does not vitiate the sufficiency of the evidence of criminal activity. (51 RT 3290.) (See *Hardy*, *supra*, 2 Cal.4th 86, 206 [no duty to instruct on other crimes].)

Appellant's reliance on *People v. Boyd* (1985) 38 Cal.3d 762, 778 and *Bramit, supra*, 46 Cal.4th at p. 1239 is misplaced. In *Boyd*, there was no evidence to support certain elements of the defendant's uncharged crimes. (*Boyd, supra*, 38 Cal.3d at pp. 777-778.) In *Bramit*, the evidence introduced did not constitute criminal conduct at the time of its commission, although this Court found the error harmless. (*Bramit, supra*, 46 Cal.4th at p. 1239.) By contrast, appellant's conduct was indisputably criminal, and supported by substantial evidence. Appellant's claim is specious.

B. Court Did Not Err in Precluding Cross-Examination of Unsubstantiated Allegations or in Denying an "Eleventh-Hour" Motion for Continuance

Appellant contends that he was denied his rights of due process and confrontation because the trial court precluded him from asking Julia Phillips follow-up questions after she denied having made false claims of rape, and denied his motion for continuance to find witnesses to impeach her. (AOB 228-229.) Appellant's claims fail.

1. Background

Appellant attempted to examine Julia Phillips about two incidents in which she allegedly lied about having been a victim of sexual misconduct. (170 RT 13391; 171 RT 13438.) In the first instance, defense counsel, asked, "And didn't you tell Nicole that you had sex with her baby's father because he forced himself on you?" to which Julia Phillips responded, "No, I didn't." (170 RT 13991.) After one more question in which Julia Phillips

acknowledged that she knew "a guy named Pie," the prosecutor asserted an objection. (170 RT 13391.)

In chambers, defense counsel made an offer of proof that Julia Phillips had falsely told her friend, Nicole, that Nicole's boyfriend, "Pie," had raped her. (170 RT 13391, 13394.) The prosecutor objected to this line of inquiry as its aim was to elicit character evidence involving Phillips' prior sexual acts, precluded under Evidence Code sections 782, 1101, subdivision (a), and 1103, subdivision (a), since Beeson, not Phillips, was appellant's victim in the charged crime. (171 RT 13426-13427.) The trial court noted that in the penalty phase of a capital case in which the prosecution was required to prove an uncharged crime, Phillips was analogous to a victim of a charged offense. (171 RT 13432-13433.) Based on this rationale, the trial court ruled that the initial inquiry and Phillips's denial that she had falsely accused "Pie" of rape would remain in evidence. (171 RT 13434.) The trial court also ruled that if the defense wished to produce impeachment witnesses, such as Pie or Nicole, it would conduct a hearing to determine admissibility of their testimony. (171 RT 13434-13437.)

In the second instance, discussed only in chambers, defense counsel claimed that Julia Phillips had told "various people" that she had falsely accused Zeke, the grandfather of her friend and neighbor, Donise, of having had sex with her. (171 RT 13438-13439.) The prosecutor objected, stating, "That offer of proof didn't even include a claim of false rape, just that she had sex with somebody. I object on relevance; I object on 1101 grounds. I don't think we fit within 1103." (171 RT 13439.) The trial court noted that the defense's offer of proof appeared based on a "very vague allegation," and that "[i]t would appear at least in part that this line of questioning is, in fact, a fishing expedition." (171 RT 13442.) The trial court ruled, however, that if the defense met the notice and procedural requirements for

an offer of proof required by Evidence Code section 782, it would hear and determine admissibility of the claim through witnesses and also permit the defense to recall Julia Phillips. (171 RT 13442-13443.)

The defense asked for a continuance and the trial court denied the request finding that the defense had notice of these issues, and noting several times that Julia Phillips, if necessary, could be recalled if appellant made the proper showing. (171 RT 13442, 13444-13445.)

2. The Trial Court Reasonably Exercised its Discretion

The trial court reasonably exercised its discretion in precluding the defense from further examination without a showing that it had a reasonable and good faith basis to inquire further once Julia Phillips denied having asserted she was raped, regardless whether the assertion was true or false. (*People v. Tidwell* (2008) 163 Cal.App.4th 1447, 1457-1458.) As the trial court reasonably inferred, additional questions were a "fishing expedition." (171 RT 13442.) Defense counsel's "very vague" offer of proof with respect to "Zeke," did not establish relevance because there too, defense counsel failed to establish rape, let alone a false accusation of rape. (171 RT 13438-13439, 13441-13442.) "'[T]he Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.'" (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 679.)

The trial court's denial of appellant's request for a continuance was also a reasonable. A trial court has broad discretion to grant or deny a motion for continuance, but may do so only upon a showing of good cause. (§ 1050, subd. (e); *People v. Grant* (1988) 45 Cal.3d 829, 844.)

> When a continuance is sought to secure the attendance of a witness, the defendant must establish "he 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."

(*People v. Jenkins* (2000) 22 Cal.4th 900, 1037.)

Appellant failed to demonstrate good cause to request an "eleventh-hour" continuance. (*Ibid.*) As noted by the prosecutor, Phillips' claims against appellant were no surprise. (170 RT 13399-13400.) They were outlined in the police report of her 1998 assault,[59] and provided again in November 2002, about six months before the issue arose in trial, when the prosecution turned over Phillips's recorded statement to its own investigators. (170 RT 13400; see 9 CT 2376, 2382-2388.) Appellant also had notice that the prosecution planned to introduce these allegations when it made a supplemental pretrial motion heard November 13, 2002, and the trial court ruled them admissible under section 190.3. (51 RT 3287-3298; 9 CT 2373-2374.) Appellant failed to show diligence in locating known witnesses or explain how this would not have caused delay in the proceedings. Just as this Court observed in *People v. Howard*, *supra*, 1 Cal.4th at p. 1171, "[i]nstead, defendant could only offer the prospect of further delay while he searched." Appellant's claim is without legal or factual support and must be denied.

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[59] At trial, defense counsel argued that appellant's sexual assaults of Phillips, distinct from nonsexual harassment, was new information first disclosed in November 2002, and not with the initial police report taken in 1998 after Patterson's assault on Phillips. (171 RT 13430-13431.) Defense counsel acknowledged that the 1998 police report stated that Phillips told police that she had told Patterson that appellant had raped her, but then argued dismissively, "she does not say that was true," and noted that Phillips did not repeat the information in subsequent interviews. (171 RT 13430-13431.)

C. The Trial Court Did Not Err in Admitting Limited-Purpose Evidence About Julia Phillips' Ability to Recall the Event on the Day She Anonymously Reported Appellant to Police

Appellant claims that his due process rights were violated when, over his hearsay objection, the trial court allowed Julia Phillips to testify that she heard a visiting friend, "Charles," criticize appellant for killing Beeson. (AOB 229.) Appellant also claims that the trial court's limiting instruction was insufficient. (AOB 229.) He is incorrect. After extensive cross-examination attacking Phillips' memory pertaining to various police reports, the trial court correctly admitted the challenged evidence for the limited purpose of establishing her ability to recall the events on the day she made an anonymous call to police.

1. Background

The defense cross-examination of Julia Phillips attacked her credibility from all directions. The primary thrust was that Phillips had falsely accused appellant of sexual misconduct because she failed to mention appellant's harassment of her or disclose its sexual nature to police until close to trial—and attacking her memory of the details in her statements to police was key to this approach. (170 RT 13386-13391; 171 RT 13447-13467.) In testifying about her discussions with police just after Patterson's brutal attack, while she in the hospital and at home, Phillips needed her memory refreshed and was frequently unsure exactly how she had characterized appellant's conduct. (171 RT 13450-13453.) The defense also challenged Phillips' credibility for failing to report appellant's sexual misconduct toward her when she made the anonymous call to police and later on, when police identified her as the anonymous caller and interviewed her about the murder. (171 RT 13448-13449, 13453-13455.) The defense suggested that, regardless of whether her accusations of sexual

misconduct were true or false, Phillips's animosity toward appellant had prompted her to make the anonymous call to police to accuse him of murder. (171 RT 13453, 13455.)

> Q. And part of the conversation was about the incident at Martin Luther King, part with Mr. Patterson, but part of it was about why you made the tape—the anonymous phone call about Grayland Winbush; is that correct?
>
> A. I don't know it was about why. It was just about the fact that why that happened to me because of the tape that I made, the call that I made.
>
> Q. Okay. When you told him—you told Sergeant Page there that certainly that Grayland would harass you a little bit; isn't that correct?
>
> A. I don't remember if I did, but if it's on paper I must have.
>
> Q. And you were trying to be complete and telling the truth; isn't that correct?
>
> A. Yes.

(171 RT 13453.)

Defense counsel refreshed Julia Phillips' recollection to show that after the Patterson attack, she told police that she was prompted to make the anonymous call to police because of appellant's threats of physical, not sexual, violence. (171 RT 13454-13455.) During the examination that followed, however, Julia Phillips addressed the truth of the matters that occurred based on her present memory of those events, rather than what she had told police after the Patterson attack. (171 RT 13454-13455.)

> Q. Did you tell Sergeant Page [after the Patterson attack] that Grayland was threatening to beat you?
>
> A. I just said he used to say stuff like, if you don't—if you don't let me if—if you don't let me—if you don't come over, I'm going to beat your ass, or you know, just—I just told him. I must have said that, yes.

Q. And did you say that he wanted you to go up to his sister's apartment and that you didn't go up there?

A. He wanted me to go several times.

Q. And you told them that you never went up there, correct? Isn't that what you told Sergeant Page on that tape?

A. That particular day that I found out that—I don't know. I don't know.

Q. You never told Sergeant Page or Sergeant Sanches or Sergeant McElroy that Grayland Winbush had sex with you, did you?

A. No, I didn't.

Q. And you were talking about Grayland Winbush at the time, correct?

A. Yes.

Q. And you were—you were very angry with him, correct?

A. Yes.

Q. You were trying to get him in trouble so he would go away to prison forever, correct?

A. Yes.

Q. And you never said anything of any of those things, did you?

A. No.

Q. In fact, you never told any law enforcement about that until you spoke to Officer Patel or Inspector Patel in November of last year; isn't that correct?

A. I think so, yes.

Q. That was the first time you ever said that to anybody; isn't that true?

A. Yeah.

(171 RT 1354-1356.)

Later on, during cross-examination, defense counsel asked Phillips if the day she acquiesced to having sex with appellant was in the morning, "after Ray and Charles had just left?" (171 RT 13463.) Julia Phillips was not clear on the question and the trial court sustained an objection based on vagueness. (171 RT 13463.)

On redirect examination, the prosecutor asked a series of questions to place Phillips's various statements to police in context, and demonstrate that her accusations of appellant's sexual criminal activity towards her were true. Phillips testified that, even if she had no specific memory when police interviewed her at the hospital after Patterson's attack, she was truthful when she reported that, during the attack, Patterson had asked and she had acknowledged that appellant had raped her. (17 RT 13468.) She testified that when she spoke to police two days later, while recuperating at her sister's home, she explained why she had made the anonymous call that had prompted Patterson's attack. (171 RT 134668-134669.)

> Q. Do you remember telling Detectives Sanches and Page how it was that you learned that Grayland Winbush had murdered Erika Beeson?
>
> A. Yes.
>
> Q. Can you tell us what you told them?
>
> A. I told 'em that we had friends over, two guys, and as they were leaving, one of the guys said, "Your cousin's crazy for killing that white girl."
>
> Q. Miss Phillips, I need to stop for a second. You said we. Who is we?
>
> A. Me and Lakeisha.
>
> Q. And what residence were you at when you said that?
>
> A. We were at Lakeisha's apartment.

Q. You're at Lakeisha's mom's house?

A. Yes.

Q. The same house where Grayland was saying come upstairs?

A. Yes.

Q. You and Lakeisha had a couple friends over?

A. Two guys.

Q. Okay. What were their names?

A. Charles and Reggie.

Q. Okay. And they were getting ready to leave, right?

A. Yes.

Q. And did one of them say something to Lakeisha? Is that what you're saying?

A. Charles said to Lakeisha.

[DEFENSE COUNSEL]: We're going to object to this as hearsay.

THE COURT: What it's being offered for?

[PROSECUTOR]: Well, to give context to [defense counsel's] questions about how she didn't tell the police that she went upstairs with Grayland.

(171 RT 13469-13470.)

After an in-chambers conference (171 RT 13496-13497), the trial court overruled the objection and instructed:

I'm going to allow any testimony regarding what the individuals whose names have just been mentioned said to Ms. Phillips; it is not offered for the truth of the matter asserted, so this is a limiting instruction; you're not to consider for the truth of matter asserted; you may consider it for whatever the evidence points to Ms. Phillips for whatever bearing it has for Ms. Phillips' ability

to recall only for that day. For that limited purpose you may consider it.

(171 RT 13470-13471.)

The prosecutor continued the examination, and after defense counsel objected, once again instructed the jury on the limited purpose nature of the testimony:

Q. So you're standing there with Reggie, Charles and Lakeisha, right?

A. Yes.

Q. And you hear—I'm sorry, was it Reggie or Charles that spoke to Lakeisha?

A. Charles.

Q. What did Charles say to Lakeisha?

A. *Your cousin is crazy for killing that white girl.*

Q. Okay. Then did Reggie and Charles leave?

A. They left.

Q. Did you have some conversation with Lakeisha at that point?

A. I asked her after they left, Grayland killed—killed Mario Botello—

[Defense counsel]: your honor?

THE COURT: your—

[Defense counsel]: I object at this time, hearsay. We have certainly pointed down the day, so now those—

THE COURT: No, I understand your objection, Mr. [defense counsel], but it is overruled again. Whatever conversation came now from Lakeisha to Ms. Phillips is also offered not for the truth of the matter asserted, but for whatever bearing it has, if any, on Ms. Phillips' ability to recall the date in question. So you may—why don't you ask the question again.

[Prosecutor]: Sure.

Q. What was the conversation you then had with Lakeisha once Reggie and Charles left?

A. I asked her Grayland killed Mario's girlfriend, and she said yes. And I said, "why?" and she said, "they were trying to rob her, and she wouldn't cooperate so they killed her."

Q. Okay. At that point did Grayland Winbush appear?

A. He came in, like, maybe two or three minutes after.

Q. Okay. And did you hear Grayland Winbush say something at that point?

A. He said, "I seen those guys come in last night and I just seen 'em leave, and if I wanted to, I could have robbed 'em."

Q. Okay. Did you go on to tell Detectives Page and Sanches about Grayland Winbush's, about whether or not you went upstairs with Grayland Winbush that day?

A. I—I told 'em I didn't go upstairs with them that day.

Q. Okay. Is that a different day than the day that he grabbed you by the neck and wouldn't let go and headed upstairs?

A. Yes.

Q. That was a totally different day?

A. Yes.

(171 RT 13471-13472, italics added.)

Julia Phillips acknowledged that when she told police in general terms that appellant had been harassing her, she was referring to the specific incidents of sexual assault. (171 RT 13472, 13475-13476.)

Defense counsel argued in closing that Phillips was not credible because these sexual attacks were either not reported or understated:

The only evidence of a sexual assault on a woman by Grayland Winbush comes by Julia Phillips. And Miss Phillips spoke to

> the police in 1996 about Grayland Winbush, saying bad things about Grayland Winbush, was trying to get him in as much trouble as she could, and she didn't say anything about being sexually assaulted by Grayland Winbush in 1996 when she spoke to the police. Not one word.
>
> And what did she tell the police in 1998 after the incident with Norman? She said that Grayland had harassed her. She also told the police that there is evidence that she told the police that Norman said did Grayland rape you and she said yes. But she didn't tell the police that Grayland raped her. Not until November of last year did Julia Phillips come forward with this information.
>
> Julia Phillips is not a credible witness as to the sexual assault on her by Grayland Winbush.

(189 RT 14763-14764.)

2. Assuming appellant's claim is preserved, the trial court did not abuse its discretion in allowing Julia Phillips' testimony to be admitted for a limited purpose

Appellant claims the statements by Charles to Lakeisha, and by Lakeisha to Phillips, implicating appellant in the murder, were unduly prejudicial notwithstanding their limited purpose. (AOB 230.) Appellant's claim is specious. The trial court reasonably admitted this evidence as relevant to the Factor B crimes against Julia Phillips with the appropriate instruction defining its limited purpose.

Appellant's claim of undue prejudice at the penalty phase based on incriminating hearsay evidence is misplaced. The evidence of which he complains implicates him in Beeson's murder, a crime of which he was already found guilty. (*Box*, *supra*, 23 Cal.4th at p. 1201, disapproved on another ground in *People v. Martinez* (2010) 47 Cal.4th 911, 948, fn. 10.)

In *Box*, the trial court rejected the defendant's claim that certain crime-scene photographs were inadmissible at the penalty phase as unduly inflammatory, finding that the defendant had already been convicted of the

crime. (*Ibid.*) The trial court found that, with regard to Factor B evidence, the trial court's concern must focus on whether the challenged evidence "unfairly persuades jurors to find the defendant guilty" of the Factor B crime—not the Factor A murder. (*Ibid.*) The evidence at issue here was probative of a factor B crime, namely whether appellant had threatened or committed sexual assaults against Julia Phillips, and whether Julia Phillips' testimony in support was credible. To that end, evidence relevant to Phillips' ability to recall the crimes she reported to police was highly probative. (171 RT 13453-13456.) Hearsay statements about appellant's murder of Beeson were not prejudicial since they were not admitted for the truth, and moreover, concerned a crime, the commission of which was no longer disputed. (*Ibid.*) Furthermore, the record fails to demonstrate that the jury, twice instructed in the moment and once before deliberations, considered this evidence for anything other than its limited purpose. (171 RT 13470-13472; 190 RT 14858.) (*Coffman, supra*, 34 Cal.4th at pp. 43-44.)

Appellant cites a myriad of cases, none of which involve introduction of evidence in a penalty phase trial, nor a procedural posture in which evidence implicating a defendant in the Factor A crime was admitted for limited purpose in support of Factor B criminal activity.[60] His argument fails.

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[60] *People v. Thompson* (1988) 45 Cal.3d 86, 103, *Bell, supra*, 40 Cal.4th at p. 608, *People v. Coleman* (1985) 38 Cal.3d 69, 92-93, *People v. Ervine* (2009) 47 Cal.4th 745, 775-776, *People v. Mayfield* (1997) 14 Cal.4th 668, 751, *People v. Whisenhunt* (2008) 44 Cal.4th 174, 204-205, *In re Spencer* (1965) 63 Cal.2d 400, 403, *People v. Reyes* (1974) 12 Cal.3d 486, 503-504, *People v. Pitts* (1990) 223 Cal.App.3d 606, 837.

D. Error, if any, was Harmless

Assuming Phillips' testimony "that several people believed that Winbush killed Beeson" (AOB 230) was admitted erroneously, and assuming further, that the limiting instruction outlining its nonhearsay purpose was inadequate, the error is harmless. Appellant's sole basis for challenging admission of the evidence was hearsay, and as such, his due process claim is limited to the parameters of this claim. (*Partida, supra*, 37 Cal.4th at pp. 435-438.) It was not reasonably possible the error affected the verdict and it was harmless beyond a reasonable doubt. (*Abilez, supra*, 41 Cal.4th at pp. 525-526; *Chapman v. California, supra*, 386 U.S. at p. 24.)

As a threshold matter, the jury was well-aware from all of Julia Phillips' testimony that she "had a strong motive for favoring the prosecution with [her] testimony." (*People v. Dyer* (1988) 45 Cal.3d 26, 48.) Jurors heard the tape of Julia Phillips' anonymous call to police reporting appellant's murder in which Phillips' admitted that her information about the murder was not based on personal knowledge. (Supp. CT 81.) Moreover, as demonstrated by the trial court's summary of the evidence before it denied the motion to modify the verdict (§ 190.4, subdivision (e)), the evidence in aggravation against appellant was overwhelming in quantity and quality, and the evidence in mitigation was weak, making any error harmless beyond a reasonable doubt. (196 RT 14976-15019.)

X. THE TRIAL COURT DID NOT ERR IN ALLOWING TESTIMONY ABOUT ACTS COMMITTED BY APPELLANT AS A JUVENILE OR AS A JUVENILE WARD

Appellant appears to set forth two claims related to juvenile offenses or misconduct. First, appellant claims the trial court erred in admitting

testimony by his expert, Dr. Candelaria-Greene, about appellant's juvenile incidents of misconduct reported in the documents she reviewed to render an opinion. (AOB 237, 242.) As a corollary, appellant argues that the trial court's limited purpose instructions, given just prior to this testimony and again before deliberations, were "ineffectual and pretextual" to prevent consideration of these incidents as factors in aggravation. (AOB 234, 236.) Appellant's claim is forfeited, and fails on the merits.

His implicit argument is that jurors cannot follow instructions, and if carried to its logical conclusion, would preclude attacking an expert's credibility by demonstrating the basis for a poorly-reasoned opinion. This Court should decline appellant's request to reconsider its reasoning in *Bramit, supra*, 46 Cal.4th at pp. 1238-1239 and like-minded decisions and affirm the judgment. (AOB 242.)

Second, though not explicit, appellant appears to claim error in the direct admission of seven juvenile offenses introduced as Factor B evidence under 190.3, by listing those incidents under section X.A., of his opening brief, titled "The Relevant Facts." (AOB 236-237, sections X.A. 2-8.) Having grouped the limited-purpose evidence with the Factor B evidence, appellant argues that he preserved claims as to *all* evidence through a single objection that made it futile to object again. (AOB 233-234.) Appellant's claims, to the extent preserved, are without merit.

A. Limited-Purpose Testimony of Dr. Candelaria-Greene

Appellant claims that Dr. Candelaria-Greene should have been precluded, on cross-examination by the prosecutor, from referring to any of appellant's reported juvenile misconduct. (AOB 234, 243.) With the exception of a general reference to appellant's "attempted arson at age 8," appellant fails to identify and does not provide record citations for specific testimony he claims was erroneously admitted. (*People v. Sullivan* (2007) 151 Cal.App.4th 524, 549 [appellant bears burden of showing error].)

As a threshold matter, appellant forfeits his due process claim to the doctor's testimony about incidents contained in the materials she reviewed because, as defense counsel correctly observed, cross-examination in this area was indisputably admissible:

> I listened to the District Attorney and he said he could argue—the various documents that he and the expert have been talking are in, obviously to whatever extent they bear on her decision-making process. They are not in for the truth of the matter asserted.
>
> And I would—I may be saying which is obvious anyway, but a whole series of conduct has been talked about where there is no evidence other than a piece of paper, which is clearly hearsay. No question he can cross-examine the expert with that. I didn't object. There would be no reason to object. I think that is totally proper. That does not, however, put the facts in evidence. It is only put in for the purpose of judging the opinion presented to us by the expert witness.

(187 RT 14531.)

When asked if he was requesting a "limiting instruction," appellant's counsel told the trial court that he would ask later "when you get ready to instruct the jury and not now." (187 RT 14531.) When the trial court advised that it was going to give the limiting instruction sua sponte, defense counsel responded that a limiting instruction "would clearly address my concern. The only question is the timing," suggesting that the trial court provide just a pattern instruction before deliberations. (185 RT 14533.) After this discussion and just before Dr. Candelaria-Greene resumed testifying, the trial court gave the limiting instruction without objection. (186 RT 14549-14550.)

Having failed to object at trial, appellant's forfeits the issue on appeal. (*Partida, supra*, 37 Cal.4th 428, 435; *People v. Bolin* (1998) 18 Cal.4th 297, 326 [defense counsel agreed to giving the instruction and failed to object to wording].) Appellant's claim is not preserved through his pretrial

objection to admission of a juvenile incident as factor B evidence. (AOB 233, citing 19 RT 1179-1187 and 186 RT 14549-14550.) That objection was neither timely nor specific to the limited-purpose testimony of Dr. Candelaria Greene. (*Partida, supra*, 37 Cal.4th at p. 434; *People v. Lewis* (2006) 39 Cal.4th 970, 1027.) Thus, appellant's new and belated claim should be rejected. (See *People v. Seaton* (2001) 26 Cal.4th 598, 681 [challenge to questions challenging accuracy of information for expert opinion forfeited].)

Even if preserved, however, appellant's claim fails on the merits. Jurors were instructed, with significant repetition, that mention of these incidents was for the limited purpose of showing the basis for the doctor's opinion:

> The second limiting instruction pertains to a portion or portions of the testimony of the witness, Dr. Candelaria-Greene. And those—a portion of the testimony to which I'm referring are the portions of various reports from the California Youth Authority, from governmental agencies here in Alameda County, and other governmental agencies that were referred to during cross-examination by [the prosecutor] of the witness, and I anticipate may become a portion of the testimony this morning. The portions of those reports that were referred to by the doctor in her testimony related to incidents of reported behavior of the defendant Grayland Winbush. To the extent those reports were read into the record or those have—there was reference to them, *they are not admitted or not given for the truth of the matter that is set forth therein. Instead they are admitted only to show the basis of the doctor's opinion and not, as I said, for the truth of the matter.*
>
> So that is a limiting instruction. *You will consider those references to such reports only as to the degree to which they show, if they do show, the basis or bases of the doctor's opinion.*
>
> Now, later on, as I had in the first stage of the proceedings, I will—when I instruct you on the law in this case, included among those instructions will be an instruction that certain evidence was received for a limited purpose, *and you will be*

reminded that you are to consider it only for the limited purpose for which it is admitted.

(186 RT 14549-14550, italics added.)

As forewarned, the trial court repeated the instruction about limited purpose evidence again, before deliberations. (190 RT 14858.) Furthermore, the prosecutor specifically argued that all the "new incidents" that arose during Dr. Candelaria-Greene's testimony were distinct from the Factor B incidents introduced by the prosecution, and had a limited purpose. (188 RT 14694.) The prosecutor argued, "So all that stuff from the expert, you don't consider that as aggravation evidence. Okay. You consider that in terms of what your evaluation of her opinion [*sic*]." (188 RT 14694.)

Jurors are presumed to follow a limiting instruction, and nothing in the record rebuts this presumption. (*Coffman*, *supra*, 34 Cal.4th at p. 83; *People v. Russell* (2010) 50 Cal.4th 1228, 1270-1271.) Appellant's contention that the prosecutor's mere mention of the juvenile incidents, by their nature, caused jurors to disregard the limiting instruction is speculative. (*People v. Bivert* (2011) 52 Cal.4th 96, 123.) "Moreover, any attempt to ground the claim in evidence of the jurors' subjective reasoning processes would violate Evidence Code section 1150." (*Ibid.*) Appellant's claim fails as meritless.

B. Seven Factor B Juvenile Incidents

Appellant contends that he was deprived of due process when the trial court admitted Factor B evidence consisting of criminal activity that occurred when he was between the ages of 12 and 17 years. (AOB 236-237.) The law does not support him.

"[E]vidence of violent juvenile misconduct that would have been a crime if committed as an adult is admissible under section 190.3, factor

(b)." (*Bramit, supra*, 46 Cal.4th at p. 1239; accord *Bivert, supra*, 52 Cal.4th at pp. 122-123; *People v. Lee* (2011) 51 Cal.4th 620, 648-649.)

> Such evidence is permitted because it enables the jury to make an individualized assessment of the character and history of the defendant to determine the nature of the punishment to be imposed. Thus, although the fact of the juvenile adjudication is inadmissible, the conduct underlying the adjudication is relevant to the jury's penalty determination and admissible as violent criminal activity under factor (b).

(*People v. Taylor* (2010) 48 Cal.4th 574, 653, internal edit and quotation marks omitted.) The foregoing authorities reject the contention that admission of Factor B evidence in aggravation is equivalent to imposing punishment for any of those crimes, distinct from the charged crime, in violation of the constitutional principles set forth in *Roper v. Simmons* (2005) 543 U.S. 551, 569-570.

> Defendant's reliance on *Roper v. Simmons, supra*, 543 U.S. 551, 125 S.Ct. 1183, is badly misplaced. That case holds that the execution of individuals who were under 18 years of age at the time of their capital crimes is prohibited by the Eighth and Fourteenth Amendments. It says nothing about the propriety of permitting a capital jury, trying an adult, to consider evidence of violent offenses committed when the defendant was a juvenile. An Eighth Amendment analysis hinges upon whether there is a national consensus in this country against a particular punishment. [Citations.] Defendant's challenge here is to the admissibility of evidence, not the imposition of punishment.

(*Bramit, supra*, 46 Cal.4th at p. 1239, accord *Bivert, supra*, 52 Cal.4th at p. 122; *Lee, supra*, 51 Cal.4th 649.)

Appellant acknowledges these authorities, but nonetheless requests this Court "to reconsider the barbaric, unconstitutional practice of using criminal acts by a child as young as 8 or 12 years old as a reason to execute

him for a murder done as a teenager." (AOB 246.)[61] He claims his "challenge here is both to the admissibility of evidence and the imposition of punishment." (AOB 242.) Appellant misapprehends the issue. The presence or absence of criminal activity is a legitimate factor to be considered in imposing punishment for the charged crime, in this case, of murder with special circumstances. (§ 190.3, subd. (b); see *People v. Jackson* (2009) 45 Cal.4th 662, 691 [penalty phase involves a moral assessment of all the relevant facts].)

Appellant, to the extent he relies on *Roper v. Simmons, supra*, 543 U.S. 551, speculates that jurors—contrary to all instruction and despite having been presented with evidence of Beeson's brutal murder and appellant's lifetime of criminal activity—punished appellant for his juvenile offenses alone. In *Bivert*, this Court rejected a similar claim based on admission of three murders the defendant had committed as a juvenile, i.e., crimes even more egregious than those which appellant complains were erroneously admitted. (*Bivert, supra*, 52 Cal. 4th at pp. 122-123.) This Court characterized the defendant's claim that the juvenile offenses were the primary basis to impose death as "purely speculative," noting:

> The jurors may well have regarded the capital crime itself—the premeditated, unprovoked killing of a fellow inmate by a life prisoner—as egregious enough to warrant the death penalty. Moreover, any attempt to ground the claim in evidence of the jurors' subjective reasoning processes would violate Evidence Code section 1150. [Citation.] Defendant has not established that the use in aggravation of three prior murders he committed as a juvenile rendered his death sentence for the charged in-prison murder unconstitutional.

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[61] In referring to a criminal act or acts at age eight, appellant is presumably is referring to testimony of Dr. Candelaria-Greene who considered juvenile incidents to render an opinion, and who was cross-examined about them for the limited purpose of allowing the jury to evaluate her credibility, as just discussed at length in section X.A., *ante*.

(*Id.* at p. 123.)

Appellant's claim is no different and similarly fails to establish how the admission of this evidence rendered his sentence for the murder of Beeson unconstitutional. (*Ibid.*) His claim fails.

C. Error, if any was Harmless

Assuming the trial court erred in allowing evidence of or testimony about any criminal activity that appellant committed as a juvenile, it was not reasonably possible the error affected the verdict and it was harmless beyond a reasonable doubt. (*Abilez, supra*, 41 Cal.4th at pp. 525-526; *Chapman, supra*, 386 U.S. at p. 24.) As demonstrated by the trial court's summary of the evidence before it denied the motion to modify the verdict (§ 190.4, subdivision (e)), the evidence in aggravation against appellant, even excluding the juvenile offenses, was overwhelming in quantity and quality, and the evidence in mitigation was weak, making any error harmless beyond a reasonable doubt. (196 RT 14976-15019.)

XI. THERE WAS A SUFFICIENT SHOWING TO ADMIT FACTOR B EVIDENCE PERTAINING TO FIVE INSTANCES OF CRIMINAL ACTIVITY THREATS, OR IMPLIED THREATS OF VIOLENCE

Appellant contends the trial court erred in admitting evidence pertaining to five incidents introduced by the prosecution as crimes of violence or threats or implied threats of crimes of violence under section 190.3, subdivision (b). (AOB 247.) For the most part, appellant either attacks the factual basis for construing appellant's words or actions as threatening, or argues that the threatening behavior was insufficiently severe. (AOB 248-253.) His challenge to the admissibility of each of these incidents is without merit.

A. The five incidents of criminal activity involving force or violence were correctly admitted under Section 190.3, subdivision (b)

This Court recently observed:

> The purpose of 190.3, factor (b) "is to enable the jury to make an individualized assessment of the character and history of a defendant to determine the nature of the punishment to be imposed." [Citation.] We have repeatedly held that the statute does not violate any federal constitutional guarantees.

(*Tully, supra*, 54 Cal.4th at p. 1029.)

Section 190.3 twice states—in the preface and subdivision (b)— that a jury may consider the presence or absence of criminal activity, distinct from the present offense, which involved the use or attempted use of force or violence as a factor in determining whether to impose the death penalty. (§190.3.) Finding consideration of this factor constitutional, our High Court has noted, "Factor (b) is phrased in conventional and understandable terms and rests in large part on a determination whether certain events occurred, thus asking the jury to consider matters of historical fact." (*Tuilaepa v. California* (1994) 512 U.S. 967, 976; accord *People v. Moore* (2011) 51 Cal.4th 1104, 1135.) "[E]vidence admitted under this provision must establish that the conduct was prohibited by a criminal statute and satisfied the essential elements of the crime." *Moore, supra*, 51 Cal.4th 1104, 1135.)

Although not required, a trial court may conduct a preliminary inquiry out of the presence of the jury, i.e., a *Phillips* hearing, to determine whether there is sufficient evidence of each element of the proposed prior offense to allow its introduction into evidence. (*People v. Phillips* (1985) 41 Cal.3d 29, 72, fn. 25; *People v. Fauber* (1992) 2 Cal.4th 792, 849.) Once a threshold showing is made that evidence is admissible, a court has no discretion to exclude it as unduly prejudicial under Evidence Code section

352 since "'the question for the jury is not one of fact in determining guilt.'" (*Sanders, supra*, 11 Cal.4th at p. 543.) The standard of review for whether the trial court erred in making a preliminary determination to admit Factor B evidence is abuse of discretion. (*Tully, supra*, 54 Cal.4th at p. 1027; *People v. Wallace* (2008) 44 Cal.4th 1032.)

The trial court conducted a pretrial *Phillips* hearing and determined there was sufficient evidence to admit, among many incidents of criminal activity, the incidents appellant sets forth in his opening brief at section XI.A., 1-5. (AOB 248-252.) Appellant made the tactical decision not to have the jury instructed on the specific elements of these crimes. (175 RT 13909-1311.) (*Phillips, supra*, 41 Cal.3d 29, 73, fn 25 [tactical decision not to seek instruction on elements forfeits claim that instruction should been directed toward a different crime].) Jurors were properly instructed that they were required to find that appellant had committed the Factor B crimes beyond a reasonable doubt, and to "[d]isregard any instruction which applies to facts determined by you not to exist." (190 RT 14866-14868.) The prosecutor echoed the reasonable-doubt instruction in his argument, cautioning jurors about his burden, both generally and in the context of a particular crime in which the Factor B evidence was disputed. (187 RT 14661-14662.)

Each of appellant's claims fails, either as forfeited, without error, and assuming error, as nonprejudicial.

1. Incidents of July 16, 19, and August 3, 1993 involving CYA teacher and security staff

Appellant claims that the trial court erroneously admitted testimony of Juanita Ream, appellant's teacher at CYA, because there was insufficient showing that his conduct violated section 69 prohibiting the use of threats or violence to deter or prevent an executive officer in the performances of duties. (AOB 248-249.) Appellant's claim must be rejected.

As a threshold matter, appellant distorts the issue by failing to provide the full basis for admissibility which also included violation of section 415 which prohibits unlawful fighting in a public place, disturbing the peace, and use of offensive words to provoke an immediate violent reaction. At the pretrial hearing to determine admissibility, the prosecutor submitted reports and described the anticipated evidence as:

> The series of incidents in July and August of 1993 where Winbush repeatedly was verbally abusive to a female CYA teacher. In one of those incidents, Winbush had a physical confrontation with CYA security staff who were removing him from the classroom. This series of incidents is described in the discovery documents provided to the parties . . . . These acts violated Penal Code §§ 69 *and* 415.

(7 CT 1582 with reports at 1891-1910 [B-27], italics added.)

Based on this report, appellant objected, pretrial, to evidence of appellant's verbal misconduct on August 3, subsequent to the physical confrontation on July 16, claiming the evidence was not credible. (20 RT 1260-1265.) The trial court's pretrial ruling , admitting incidents that "led to the acts of violence" on July 16, 1993, was ambiguous as to the circumstances under which it would allow events subsequent to July 16, 1993. (20 RT 1256-1267.) Appellant arguably forfeits his claim on appeal as he failed to object to evidence of any of these three incidents when introduced at trial. (*Partida, supra*, 37 Cal.4th at p. 434; *People v. Stanley* (1995) 10 Cal.4th 764, 823-824.) In any event, appellant's claim fails on the merits.

Pretrial, the prosecutor presented sufficient evidence of force, violence, or threat of violence, and violation of sections 69 and 415. (20 RT 1256-1257; 7 CT 1891-1910 [B-27].) Appellant's verbal abuse interfered with his teacher's ability to carry out her duties, and turned into a physical altercation with CYA security when he was removed. (7 CT 1892, 1895-1897.) Thus, the trial court reasonably exercised discretion in

allowing admission of this evidence. (*People v. Harris* (2008) 43 Cal.4th 1269, 1311.)

At trial the prosecution presented the testimony of the three witnesses who were victims of appellant's threats: (1) Kerry Spinks, in charge of security; (2) Daniel Bittick, in charge of investigation; and (3) Juanita Ream (formerly Juanita McEwen), the teacher who had asked security to remove appellant from the classroom and who was verbally abused upon his return. Collectively, they testified that on July 16, 1993, at around 11:00 a.m., appellant became agitated during a search at CYA, and became verbally abusive toward his teacher. (174 RT 13814-13815.) Kerry Spinks, the group supervisor charged with security arrived to remove appellant from the classroom. (174 RT 13811-13812.) Appellant was initially cooperative until Spinks tried to search his shoes. (174 RT 13816.) Appellant was handcuffed, became verbally abusive, and challenged Spinks to settle things "one-on-one." (174 RT 13816.) Appellant also challenged and threatened the CYA Senior Youth Counselor, Dan Bittick, and was physically struggling to escape as he was removed and placed in the van transporting him to temporary detention. (174 RT 13816, 13825, 13832.)

Appellant was "written up" that same day by Juanita Ream, the teaching assistant for the reading program at CYA. (175 RT 13918, 13920-13923.) Appellant was verbally threatening and abusive to Ream, telling her she was a coward, a "bald-hair bitch," and "I don't have to listen to you. You're not my teacher. You're just a bitch." (175 RT 13922.) Ream said that she "hardly did any write-ups at my job in the eight years I was there," but had written up appellant for threatening behavior and had him removed by security three times during the summer of 1993—on July 16, July 19, and August 3. (175 RT 13920, 13923.)

Appellant claims there was insufficient evidence of his intent to interfere with official duties or his capacity to carry out his threats, and that

"abusive and even threatening language does not violate a penal statute and is inadmissible under factor (b)." (AOB 249.) He is incorrect. As just discussed, the record belies his factual claims. (174 RT 13814-13816; 175 RT 12922-13923.) Juanita Ream described appellant's conduct as threatening, encompassing both his words and actions:

> Q. What kind of things was he saying to you?
>
> A. He was calling me a bitch. He was saying he didn't have to listen to me. I was a teacher assistant, so—but that wasn't—that had nothing to do with anything. But he was just very threatening to me, and I felt threatened.
>
> Q. Okay. Was he threatening to you with his words?
>
> A. Yes. His actions could—was almost inciting with the rest of the classroom.

(175 RT 13922.)

Juanita Ream also testified:

> Q. Did he discuss the significance of your writing up after he returned to class with you?
>
> A. He walked straight in the classroom and see your write-up means nothing [*sic*]. I can do whatever. Your write-up means nothing. He goes to the table continues to talk about me to the other wards. And, again, I felt threatened. I hardly did any write-ups at my job in the eight years I was there.
>
> Q. Okay. You wrote him up three times that summer; is that right?
>
> A. Yes, I did.
>
> Q. For this kind of behavior?
>
> A. Yes.
>
> Q. Each time of those did you call security and have him removed from the classroom?
>
> A. Yes, I did.

Q. Because—that's because you felt threatened and incited?

A. Yes, very.

(175 RT 13922-13933.)

Appellant's physical attack on CYA security linked to his removal from the classroom, and his retaliatory attitude toward his teacher upon return gave context to his conduct, showing that appellant was indeed capable of acting on threats. (*Harris, supra*, 43 Cal.4th 1311; *People v. Iboa* (2012) 207 Cal.App.4th 111, 121.) "'[E]vidence of the surrounding circumstances is admissible to give context to the episode, even though the surrounding circumstances include other criminal activity that would not be admissible by itself.'" (*People v. Thomas* (2011) 51 Cal.4th 449, 505.)

Appellant's reliance on *People v. Boyd, supra*, 38 Cal.3d at 777, *People v. Tuilaepa* (1992) 4 Cal.4th 569, 589-591, and *People v. Wright* (1990) 52 Cal.3d 367, 425-426 does not help him. As this Court noted in *Harris, supra*, all three of these cases failed to recognize, in the context of section 71, a parallel statute, that there is no requirement of a present ability to carry out a threat. Rather it is "sufficient if the defendant made a threat with the requisite intent and it reasonably appears to the recipient that the threat could be carried out." (*Harris, supra*, 43 Cal.4th at p. 1311.)

2. Appellant's comments to parole officer about his attitude towards his victims

Appellant claims that the trial court erred in admitting statements appellant made to his parole officer, Craig Jackson, as evidence not covered under one of the statutory categories that permits aggravating evidence. (AOB 249-250.) Referring to appellant, the parole officer wrote a report stating "He has stated that he often reacted aggressively in order to gain stature among his peers and to make himself feel good." (8 CT 2021 [7 CT 1585, B-34].)

At the pretrial hearing, defense counsel objected to admissibility of these statements as Factor B evidence because they were too vague to imply threats or refer to specific criminal acts. (23 RT 1502-1503.)[62] The trial court, paraphrasing the Supreme Court's opinion in *People v. Payton* (1992) 3 Cal.4th 1050, 1063, found the statements admissible as "evidence of statements from defendant's own mouth demonstrated his attitude towards his victim was highly probative." (23 RT 1504.)

At trial, Officer Jackson described appellant's model behavior at CYA's "Chad" facility for one year, which led to his recommending appellant's release, noting that appellant behaved well, attended classes, worked hard at a job, accepted responsibility, showed remorse for prior criminal offenses, and committed no serious disciplinary offenses even after he was attacked by another ward. (176 RT 13963-13970, 13974-13975.) In the course of the examination, the prosecutor asked the parole officer about appellant's attitude toward his prior victims:

> Q. Did you talk to him about his change in attitude?
>
> A. Yes.
>
> Q. What did Mr. Winbush tell you about the reasons for his change in attitude?
>
> A. One of the things I really remember is the fact that he stated that he taught himself how to read while he was in the Youth Authority. That is what really caught my attention about Grayland.
>
> And then we talked about his maturity level, how he was young when he first came in. To most adolescents that come to the Youth Authority he was young. And when he was at Chad, his

[62] The defense also objected claiming the statements were hearsay, and unreliable as pandering to obtain a parole recommendation. (23 RT 1474-1476.)

maturity level grew and he was able to function around other individuals.

Q. Did he tell you during some of these conferences that he understood that he had often reacted aggressively toward others in order to gain stature among his peers?

A. We talked a little bit about that. *His behavior, his past behavior, other institutions and things like that. And that was one of the things that came up at the time.*

Q. Did you write in your report the following:

"He has stated that he often reacted aggressively in order to gain stature among his peers and to make himself feel good."

A. Yes.

Q. Okay. Those are things he told you, right?

A. Yes.

Q. He demonstrated that he had insight into why he acted violently, right?

A. Yes.

Q. Understood why he did, right?

A. Yes.

Q. Understood ways he could choose not to be violent, right?

A. Yes.

(176 RT 13970, italics added.)

Relying on *Boyd, supra*, 38 Cal.3d 778-779, appellant claims his statements about the reasons for his past crimes, i.e., to gain status among his peers and make himself feel good, should have been precluded because it involved impermissible character evidence. He is incorrect. Officer Jackson's testimony about appellant's self-expressed attitude toward his victims was directly relevant to the plethora of Factor B criminal activities

admitted that occurred before appellant transferred to "Chad" and changed his ways. (*Payton, supra*, 3 Cal.4th at pp. 1063-1064; see *Thomas, supra*, 51 Cal.4th at p. 449.) In *Wallace, supra*, 44 Cal.4th at p. 1081, this Court found that a defendant's conduct in damaging a police car and resisting arrest after his Factor B crime, i.e., brandishing a weapon, was admissible as a surrounding circumstance that gave context to the crime. So too, appellant's "insight" about how he felt when he committed his Factor B offenses was admissible. (*Ibid.*)

Assuming, moreover, that appellant's statements were not admissible as Factor B evidence, they were nonetheless probative and admissible regarding appellant's state of mind and lack of remorse in committing the principal murder. In *People v. Nelson*, this Court considered whether a trial court erred by admitting a defendant's song lyrics which spoke about his desire to kill police officers. (*People v. Nelson* (2011) 51 Cal.4th 198, 221-224.) Without resolving the issue of error, this Court observed that the lyrics might have been relevant to the defendant's remorseless state of mind when he committed the principal murder, i.e., "Factor A" evidence. Indeed, the prosecutor in this case argued as much when he observed how appellant feigned rehabilitation in the year before his release, while in the immediate days thereafter, committed a murder that led him to party and brag to his peers—all consistent with his earlier-stated desire to feel good and assert his stature through aggressive conduct.

Appellant's claim that the trial court erred in admitting this statement as evidence of future dangerousness must also be rejected. (AOB 250.) Support for this claim does not appear as a record citation in appellant's opening brief, and indeed, the trial court makes no mention of future dangerousness in finding the evidence admissible. (23 RT 1476-1477.) Similarly, appellant provides no authority, other than "poor public policy," for his claim that use of appellant's candid assessment of his past behavior

is inadmissible. Indeed, the authority is contrary. (*Payton, supra*, 3 Cal.4th at pp. 1063-1064.)

Assuming error, this evidence was not prejudicial since, in context, it favored appellant. Officer Jackson's testimony that appellant was capable of sustained good conduct over a relatively long period of incarceration, was potent evidence to counter an inference of future dangerousness. (176 RT 13964-13967.) The statement complained of referenced earlier feelings and was discussed in terms of his growth and movement away from such behaviors and attitudes. Thus assuming error from admission of this testimony, it was not reasonably possible the error affected the verdict and it was harmless beyond a reasonable doubt. (*Abilez, supra*, 41 Cal.4th at pp. 525-526; *Chapman, supra*, 386 U.S. at p. 24.)

3. Deputy Belluomini's testimony regarding violence and threats of violence to Deputy Wyatt

In the pretrial *Phillips* hearing, the prosecutor made a preliminary showing about a series of three incidents involving Deputy Tammie Wyatt that, individually and collectively, demonstrated appellant's intent to interfere with the Deputy's performance of her duties in violation of section 69. (23 RT 1505-1509; 7 CT 1586; 8 CT 2190-2196 [B-45].) After the prosecutor described the anticipated evidence, defense counsel submitted the matter without argument, and the trial court ruled all three incidents admissible. (23 RT 1509.) Appellant challenges admission of the third incident only, consisting of a threat he made in retaliation for having been disciplined for the preceding two incidents. (AOB 251.)

Deputy Belluomini, who investigated the incidents, testified at trial that on July 28, 1999, Deputy Wyatt wrote a discipline report citing appellant for passing hot water through a cell door to another inmate, an activity that had been recently banned after cell-door electronics were damaged. (176 RT 13982-13985.) Appellant was angry with the new rule

because, with only one hour of pod-time, it limited his ability to consume his commissary items throughout the day. (176 RT 13981-13982.) Appellant told Deputy Belluomini that he would "starve in his cell without access to hot water," warned him not to come into his cell, and noted that if he or anyone else entered, "it would be on and they would be assaulted," while also saying, when questioned, that he was not threatening anybody. (176 RT 13983.)

Less than a week later, on August 3, 1999, appellant shoved his food tray through the cell-door slot, trying to hit Deputy Wyatt, but succeeding only in dumping his food on her. (176 RT 13993.) Appellant told Deputy Belluomini that he was still angry at Deputy Wyatt for having disciplined him about the water incident without having given him a verbal warning. (176 RT 13988-13989.) Deputy Belluomini reported that appellant told him, "if he wanted to get a write-up, he could get one for a much more severe incident. He went on to say that people better not come up to his cell or there can be trouble." (176 RT 13989.) Again when asked, appellant denied that his statement was a threat. (176 RT 13989.)

After appellant was interviewed, Deputy Belluomini, Deputy Wyatt and another deputy, escorted appellant back to his pod and removed his restraints. (176 RT 13989.) Without restraints and before stepping back into his pod, appellant turned to Deputy Wyatt and told her she better not come up to his cell. (176 RT 13989.) The deputies had to tell appellant several times to step into his pod before he finally complied. (176 RT 13989.)

Appellant claims that his "remark" to Deputy Wyatt "that she better not come up to his cell," was not admissible, relying on *Boyd, supra*, 38 Cal.3d at p. 77, and *Wright, supra*, 52 Cal.3d at pp. 425-426. Specifically, he claims that this threat was not a violation of section 69 because it was not imminent and there was no showing that appellant harbored intent or

created a reasonable belief the threat would be carried out. (AOB 251). As discussed in section XI.A.1., *ante*, an imminent threat is not required. (*Harris, supra*, 43 Cal.4th at p. 1311.) This remark, moreover, which followed an earlier threat, an incident of violence, and removal of appellant's shackles, and preceded his refusal to enter the pod, could only be understood as a threat. (*Ibid.*) Appellant's claim is meritless.

4. Threats to Deputy Humphries

On February 1, 2000, appellant threatened Deputy Humphreys after Humphreys told appellant several times to end a phone call and go to his cell for "lock down," during "pill call," when medicine was to be distributed. (170 RT 13298-13303, 13310.) In the pretrial *Phillips* hearing, the trial court ruled that appellant's statements were admissible as implicit threats of violence in violation of sections 69 and 415, overruling the defense objection that the statements were not imminent threats. (23 RT 1509-1512; 7 CT 1586; 8 CT 2197-2199 [B-46].)

Appellant challenges admission of this evidence on two grounds. First, appellant claims that his conduct consisted of "mouthing off" to Officer Humphries without "actual threats or physical aggression." (AOB 252.) He is incorrect. Officer Humphries testified that after appellant hung up the phone, he approached the porthole in the glass wall dividing them and, in a voice loud enough to draw the attention of the other inmates and bring them to the doors of their cells, (170 RT 13299-13302), he shouted:

> You better check your attitude. You came in here with attitude today. You don't know who you are dealing with. I'll be here everyday, Humphries.
>
> (170 RT 13301.)

When Officer Humphries explained that the nurse was about to dispense medications, appellant shouted:

> You don't know who you are dealing with. I will be here everyday, Humphries. . . .[¶]I don't care if you are writing me up. I have been here a long time. I have been in every pod. I don't care where I get sent. You need to check your stuff. You still have to come in my room.

(170 RT 13303.)

As the trial court correctly observed, this kind of conduct is sufficient under section 190.3, subdivision (b). (23 RT 1512.) (*Gutierrez*, *supra*, 28 Cal.4th at pp. 1153-1154.)

Second, appellant claims that Officer Humphries's testimony that appellant was housed in the Administrative Segregation Unit was inadmissible, ambiguously suggesting either that this information itself was inadmissible, or the officer's state of mind was not relevant. (AOB 252.) Under either rationale, he is incorrect.

As a threshold matter, defense counsel did not assert an objection to preclude evidence that appellant was housed in an Administrative Segregation Unit, thus forfeiting this specific claim. (*Partida, supra*, 37 Cal.4th at p. 434.) Indeed, both defense counsel questioned Officer Humphries at length about the procedures of this segregated unit. (170 RT 13312-13313, 13316-13317.)

Even if considered on the merits, appellant's claim fails. The officer's testimony about procedures and physical layout of the unit provided essential context, not only for understanding how the conflict arose, but also to explain how appellant's statements were a threat. (170 RT 13295-13297.) Appellant delivered his message—eye to eye from behind a glass wall during a time he was supposed to be back in his cell—about an anticipated and limited time of physical contact where no wall would separate them. (*Iboa*, *supra*, 207 Cal.App.4th at p. 120 [harsh words with physical conduct evidence threat of violence in violation of § 69].) Humphries's state of mind in feeling threatened is additional circumstantial

evidence relevant in determining whether appellant's words were a threat. (*People v. Hines* (1997) 15 Cal.4th 997, 1061 [danger of serious threat need not be immediate as long as reasonable tendency to produce fear in victim].)

Appellant's reliance on *Wright, supra*, 52 Cal.3d at p. 425-426, & fn. 20, does not help him as there, the Court held that the violent conduct alleged was not criminal, and that merely being housed in a location for violent inmates was not itself evidence of violent conduct.

The trial court's admission of appellant's statements as Factor B evidence was without error.

5. Testimony of Deputies Foster and Thrower-Miller related to Appellant's confinement

Appellant claims that the trial court erroneously admitted character evidence by allowing two different sheriff's deputies to testify about circumstances that implied appellant was dangerous in prison. (AOB 252-253.) His claim fails as to both witnesses. Deputy Foster's testimony was properly introduced to rebut testimony elicited by the defense. (174 RT 13775-13776.) Deputy Miller-Thrower's testimony was introduced, without objection, to establish the circumstances surrounding appellant's Factor B criminal activity. (175 RT 13941.)

a. Deputy Foster's testimony in rebuttal

Deputy Foster testified for the prosecution about a Factor B incident in which Patterson—not appellant—put his fists up like a boxer, i.e., took a "bladed stance," to prevent a search of his cell and the discovery of contraband "Pruno" alcohol. (174 RT 13773-13775.) Upon cross-examination, appellant's counsel introduced the subject of his client, and opened the door to questions about appellant's reputation for dangerousness:

Q. Deputy Foster, do you know this gentleman [appellant] seated to my right?

A. Yes, I do.

Q. And you know him as Carl Young?

A. Yes, I do.

Q. And have you known him for years at the jail?

A. In passing.

Q. How has his demeanor been toward you?

A. He has been no different than most of the inmates I have come in contact with.

Q. You never have had any problems with him?

A. Not to my recollection.

(174 RT 12775-13776.)[63]

On redirect examination, the prosecutor asked:

Q. Does Carl Young have a reputation in the Sheriff's Department as being an excessively violent inmate toward staff?

(174 RT 13776.)

The trial court overruled the defense objection, finding that the defense had opened the door to admitting evidence of appellant's character. (174 RT 13787.) Thus, the deputy testified:

THE WITNESS: *Yes, he does.*

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[63] Defense counsel was reasonable in making the tactical decision to elicit this evidence as it showed, in mitigation, that appellant's conduct in prison was no different from that of other prisoners Deputy Foster encountered in his years of experience as a jail guard. (174 RT 13776.) (*Coffman, supra*, 34 Cal.4th at p. 86 [tactical decision to introduce evidence "while not risk-free," was reasonable and entitled to deference].)

Q. ([Prosecutor]:) *Is that a reputation you have heard about over many years that he has been an inmate there?*

A. *Yes.*

Q. *From many different deputies?*

A. *Correct.*

(174 RT 13788.)

As a threshold matter, appellant misapprehends the standard for error in attacking the admission of evidence merely because it bears on reputation or propensity. Admission of evidence at the penalty phase of a capital trial is governed by whether it is probative of at least one of the specific statutory aggravating factors under section 190.3 (*Nelson, supra*, 51 Cal.4th at p. 222.) More significant however, even the statutory-factors limitation does not apply to the challenged testimony of Deputy Foster. "Evidence offered as rebuttal to defense evidence in mitigation, however, is not subject to the notice requirement of section 190.3 and need not relate to any specific aggravating factor." (*Coffman, supra*, 34 Cal.4th at p. 109.)

In *People v. Mason* (1991) 52 Cal.3d 909, 960-961, this Court found the trial court had reasonably exercised discretion to admit rebuttal testimony by a guard prompted by remarkably similar circumstances. Similar to appellant, the defense initiated "the wholly unrelated subject of defendant's behavior in jail" when it asked a guard whether the defendant had caused him any problems when they occasionally exercised. (*Id.* at p. 960.) This Court found that "[b]ecause the defense had elicited some of this evidence and exploited it in an attempt to show that defendant was not dangerous, [the defendant's] testimony was arguably proper rebuttal," and admissible as a reasonable exercise of discretion. (*Id.* at p. 962.)

Having raised the issue of appellant's demeanor initially, and having elicited from Deputy Foster that it was like that of any other inmate and never caused him problems over a period of years, the defense opened the

door to impeachment or rebuttal evidence about whether Foster knew appellant to be dangerous. (*Id.* at pp. 960-961; *Payton*, *supra*, 3 Cal.4th at pp. 1066-1067; see *People v. Chatman* (2006) 38 Cal.4th 344, 404-405 ["penalty phase rebuttal evidence is proper if it relates directly to a particular character trait defendant offers in his own behalf"].)

Appellant's reliance on *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1233 and *Boyd, supra*, 38 Cal.3d at p. 778, or federal cases pertaining to due process, does not help him where the evidence in issue was presented to rebut mitigating evidence introduced by the defense. (*Mason, supra*, 52 Cal.3d at p. 962.)

Assuming error, admission of this evidence was not prejudicial as there was no reasonable possibility it affected the verdict, rendering the error harmless beyond a reasonable doubt. (*Jackson*, *supra*, 13 Cal.4th at p. 1232.) Appellant's dangerousness while incarcerated was an obvious inference from the quantity and quality of Factor B incidents introduced that occurred while appellant was incarcerated.

b. Deputy Miller-Thrower's statements about Appellant being housed in administrative segregation

Appellant claims that Deputy Miller-Thrower's testimony acknowledging the Sherriff's Department had given him an "administrative segregation" classification for the security of staff and other inmates was improper character evidence.

On direct examination, Deputy Miller-Thrower testified that just before noon on January 14, 2003,[64] as she was preparing to transport him from the courthouse to the jail, she observed appellant in his holding cell with a contraband bed sheet. (175 RT 13932-13933.) Before escorting

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[64] This incident occurred in the midst of jury selection. (70 RT.)

appellant to the elevator and while another deputy applied handcuffs and waist restraints outside the cell, Deputy Miller-Thrower told appellant that she knew about the bed sheet. (175 RT 13934-13935.) Appellant denied he had a bed sheet. (175 RT 13935.) Deputy Jeglum, who was stationed at the elevator, tried to conduct a search while appellant resisted to the point that the deputy had to brace him against the elevator's back wall near a cage containing another prisoner. (175 RT 13938-13939.) After finding no bed sheet, Deputy Jeglum stepped out of the elevator and appellant lunged at him. (175 RT 13939.) Deputy Jeglum was able to push appellant back into the second elevator cage before reentering and taking the elevator down to the bus. (175 RT 13939-13940.) Five minutes later, Deputy Miller-Thrower found the bed sheet hidden in appellant's cell. (175 RT 13940.)

On brief cross-examination by codefendant's counsel, Deputy Miller-Thrower acknowledged that appellant was transported in chains because he was held in administrative segregation and this classification was for the security of staff and other inmates. (175 RT 13941.) Appellant made no objection, and indeed, made the tactical decision not to cross-examine Deputy Miller-Thrower.

On appeal, appellant now objects to the following testimony:

Q. Good morning, Deputy.

A. Good morning.

Q. I understand that you were moving Mr. Winbush from a cell up on the 10th floor?

A. Yes.

Q. To the elevator to get him to a bus?

A. Yes.

Q. And is his classification such that any time you move him even from within a jail he has to be in chains, restraints?

A. Yes, he is.

Q. Okay. Is that a classification that the Sheriff's Department made?

A. Yes. It's called administrative segregation.

Q. And as part of ad seg, anytime, even within a secure situation when he's moved he has to be chained?

A. Yes.

Q. And that's for the security of staff and other inmates?

A. Yes.

(175 RT 13941.)

As a threshold matter, appellant's failure to object to this testimony at trial forfeits his claim on appeal. (*Partida, supra*, 37 Cal.4th at p. 434.) Even on the merits, however, the claim fails as the testimony provides context for details that were part and parcel with his being reasonably questioned about contraband, chained, separated, and searched. (*Thomas, supra,* 51 Cal.4th 449, 505.)

Assuming error occurred, there was no reasonable possibility that it affected the penalty determination. (*Abilez, supra*, 41 Cal.4th at p. 526.) A great number of witnesses preceding Deputy Miller-Thrower had testified, under appellant's examination or without his objection, that appellant was held in administrative segregation under more stringent procedures with the obvious, if not explicitly-stated purpose of protecting staff and other inmates. (e.g., 170 RT 12395, 13317 [Humphries]; 172 RT 13504-13505 [Daily];173 RT 13638-13639 [Bradley]; 173 RT 13654-13655 [Upchurch]; 174 RT 13841 [Dagneau]; 175 RT 13878 [Higgins].) Indeed, appellant's counsel had already examined Deputy Abrams in detail about the security

procedures designed to protect and segregate inmates held in "ad seg." (173 RT 13673-13674, 13730-13731.) Although defense counsel chose not to cross-examine Deputy Miller-Thrower, he had already elicited Deputy Upchurch's acknowledgement that "[p]eople can be put in administrative segregation for reasons other than behavior problems." (173 RT 13659.) Thus, any negative inference about appellant's character would have been drawn from the overwhelming number of incidents of appellant's bad behavior—not his placement in administrative segregation. (*Abilez, supra*, 41 Cal.4th at pp. 525-526.) Since Deputy Miller-Thrower did not reveal new information the jury had not already heard from multiple other witnesses, there was no reasonable possibility the testimony of which appellant complains affected the penalty determination and it was harmless beyond a reasonable doubt. (*Ibid.*)

B. Error, if any, was Harmless

In addition to all the context-specific reasons just provided in section XI.A., *ante*, admission of the evidence, individually or collectively, was not prejudicial. (*Abilez, supra*, 41 Cal.4th at pp. 525-526.) Moreover, as demonstrated by the trial court's summary of the evidence before it denied the motion to modify the verdict (§ 190.4, subdivision (e)), the evidence in aggravation against appellant was overwhelming in quantity and quality, and the evidence in mitigation was weak, making any error harmless beyond a reasonable doubt. (196 RT 14976-15019.)

XII. THE TRIAL COURT DID NOT ERR IN ALLOWING CROSS-EXAMINATION OF DEFENSE EXPERT DR. CANDELARIA-GREENE ABOUT ANTISOCIAL PERSONALITY DISORDER OR FUTURE DANGEROUSNESS

A. Background

The defense called Dr. Candelaria-Greene during the penalty phase, to testify, in mitigation, that appellant suffered from learning disabilities and if properly treated, was unlikely to pose a danger in prison. (184 RT 14458, 14460, 14462-14464.) After voir dire by the defense, the trial court qualified "the doctor as an expert in the field of learning disabilities and special education." (184 RT 14452.)[65] Before proceeding with her testimony, however, the trial court repeated an instruction about expert testimony noting, "[t]he law is the same, but I will reread it because some time has passed," (184 RT 14452), and instructed:

> A witness who has special education, training, that—who has special knowledge, skill, experience, training or education in a particular subject may testify to certain opinions. Any such witness is referred to as an expert witness. 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 or 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.

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[65] On redirect examination, the defense established that this was Dr. Candelaria-Greene's first time testifying in court. (187 RT 14632.)

> All right. Again, that's the law that applies to the manner in which you may consider any testimony of someone whose been deemed an expert.

(184 RT 14452-14453.)

Dr. Candelaria-Greene proceeded to testify, on direct examination, that based solely on her review of appellant's school, medical, probation, and CYA records, appellant suffered learning disabilities, namely dyslexia and attention deficit hyperactivity disorder (ADHD). (184 RT 14453, 14458, 14460.) From her review of these records, she concluded that appellant had poor motor skills, poor auditory and visual processing, and poor executive functioning which involves "organizing, planning, structuring, having a good sense of time." (184 RT 14455-14456.) Dr. Candelaria-Greene noted that appellant was never treated with drugs or received family counseling for his ADHD. (184 RT 14462-14463.) Defense counsel asked Dr. Candelaria-Greene about the relationship between ADHD treatment with drugs and reduced recidivism:

> Q. Okay. And now, let me ask you this: Recently—recently being, say, the last ten years, this is not 20 years back, but this is more recent, have there been some studies in prisons concerning what happens to prisoners who have—and these are obviously adults, they're all up in an adult prison—ADHD and Ritalin treatment, and what do those studies seem to indicate?
>
> A. Well, for example, there was an excellent study done in Colorado with the Colorado prison system, showing that if individuals with the classic signs of ADHD were given treatment, which included psycho stimulants, such as Ritalin, and counseling for at least six months, that the recidivism rate upon their release simply plummeted. It was down from what we see nationwide, from 50 to 60 percent way down to 10 percent.
>
> Q. Okay. *And as to people who were serving life terms so that parole was not a consideration*, was there any impact upon their behavior in the prison system?

A. Yes. The authors of the research indicated that they were, at last, that they were able to do vocational education, they were able to take up hobbies for the first time with some kind of concentration, but most of all, *there was a greater degree of safety associated with the defendants—I mean, with the prisoners and those around him. Because there was better able ability to control impulses.*

Q. Okay. And this is treatment which was given to adults, not to children?

A. Yes.

Q. Not to children. This is adult prison system?

A. Yes.

(184 RT 14463-14464, italics added.)

Just before concluding his direct examination, defense counsel elicited additional testimony about the serious problems that occur with people who have poor executive functioning, and about Dr. Candelaria-Greene's diagnosis as based, not on some "black magic," but on the standard set of diagnostic elements and studies contained in the DSM IV manual "put out by the American Psychiatric Associates." (184 RT 14464-14466.)

On cross-examination, the prosecutor asked Dr. Candelaria-Greene whether appellant met the elements for antisocial personality disorder as a psychopath or sociopath. (184 RT 14488.) Dr. Candelaria-Greene stated that she could not respond since she was not a psychologist. (184 RT 14488.) She proceeded to respond, nonetheless, that the documents she reviewed to render her opinion showed that appellant had a "conduct disorder." (184 RT 14486.) When the prosecutor announced he would follow up in this area, defense counsel objected, claiming that questions about the DSM IV were outside the scope of Dr. Candelaria-Greene's expertise. (184 RT 14486, 14518, 14524.) The trial court overruled the objection noting that Dr. Candelaria-Greene relied on the DSM IV in

reaching her conclusions and "[i]n fact, she emphasized this on direct examination" to bolster credibility for her diagnosis. (184 RT 14518-14519, 14526.)

Dr. Candelaria-Greene acknowledged that a minor's conduct disorder can be directly linked to that person's suffering an antisocial personality disorder as an adult. (184 RT 14503.) Based on her review of appellant's records, Dr. Candelaria-Greene testified that appellant met the elements of a conduct disorder and an antisocial personality disorder. (184 RT 14490-14506; 187 RT 14557.)

Before Dr. Candelaria-Greene next testified, the trial court gave a limited purpose instruction precluding jurors from considering appellant's prior conduct, disclosed in testimony about his records, except for the nonhearsay purpose of showing the basis of the doctor's opinion. (186 RT 14549-14560.)

On cross-examination, the prosecutor attacked Dr. Candelaria-Greene's credibility by demonstrating that her far-reaching conclusions about the effect of appellant's learning disabilities were based on reports of others, including psychologists with face-to-face contact with appellant, whose testing was limited or incomplete because appellant was resistant or cooperated inconsistently. (186 RT 14554-14556, 14563, 14567, 14571.) When confronted with portions of the materials that discussed appellant's conduct without attributing it to learning disabilities, Dr. Candelaria-Greene explained that she chose to focus on portions of the records solely within her expertise:

> I—I focused on learning disabilities, and I focused on ADHD because that is my area of expertise. We know very well that at least 50 percent of those with ADHD also have conduct disorders. So it's not surprising to me that he would have these types of behaviors. But as a learning specialist primarily and as not a psychologist I felt it was appropriate to focus on those things that I'm more expert in. That I am expert in.

(186 RT 14572.)

When asked about her failure to address appellant's areas of strength, Dr. Candelaria-Greene acknowledged that she was aware of them, but "I focused on his learning disability." (186 RT 14589.)

Dr. Candelaria-Greene testified on cross-examination that there is a higher incidence of ADHD and learning disabilities in the prison population but acknowledged that the vast majority of people with ADHD were not "killers." (187 RT 14615-14616.) She testified, without objection, that without intervention, the best predictor of future dangerousness is past violence. (187 RT 14619-14620, 14630-14631.) Dr. Candelaria-Greene also testified that the records she reviewed to render her opinion reported or referred to incidents of violence, and that some of the people who had personally evaluated appellant indicated that his potential for future violence was high. (187 RT 146520-14622.) After the prosecutor stated that his next line of inquiry would refer to those records, defense counsel objected claiming, in sidebar, that future dangerousness was beyond the doctor's expertise. (187 RT 14623, 14652.)

The trial court, citing a number of case authorities, overruled the objection noting that defense counsel had opened the door to this topic since "the linchpin of [Dr. Candelaria-Greene's] examination and her testimony was that if Grayland Winbush was treated with Ritalin and received personal counseling in conjunction with treatments with Ritalin, there would be a greater degree of safety to other prisoners and those around him." (187 RT 14653.) The trial court also found the defense had introduced the topic when Dr. Candelaria-Greene described the study of Colorado prison inmates treated with Ritalin and counseling and noted "that their recidivism plummets, and went on [in]this vein for a significant period of time in her direct testimony." (187 RT 14653.)

Appellant's counsel responded to the trial court's reporting of the sidebar discussion in which appellant asserted his objection claiming he must not have made himself clear. (187 RT 14655.) Defense counsel noted, "[t]ere is no question that we raised and that it was proper to discuss future dangerousness." (187 RT 14655.) Reframing his objection, he limited his challenge to questions by the prosecutor that required Dr. Candelaria-Greene "to read statements from the psychological reports which are out of her area of expertise. And the sentences themselves were objectionable. Not the sentiment." (187 RT 14656.)

After reviewing reports of appellant's conduct since his arrest describing appellant's potential for violence, Dr. Candelaria-Greene testified, just as she had earlier, that appellant's "potential for future violence is high, given his past behavior if nothing is unchecked." (187 RT 14630-14631.)

On redirect examination, Dr. Candelaria-Greene testified that one of possible the criteria for diagnosing ADHD was:

> the symptoms do not occur exclusively during the course of a pervasive developmental disorder, schizophrenia, or other psychotic disorders and are not better accounted for by another mental disorders (for example, mood disorder, anxiety disorder, disassociative disorder, or a personal disorder.)

(187 RT 14639.)

Dr. Candelaria-Greene then opined, "although I'm not a psychologist, and I—I haven't—I haven't reviewed the exact definitions of these disorders, but I would say that it's generally true, because I didn't see evidence of these disorders." (187 RT 14639.) Nonetheless, she testified, "approximately 50 percent of those with A.D.H.D. have conduct disorder, although, roughly—let's see, yes, up to two-thirds of those with A.D.H.D. also have some kind of psychiatric disorder too." (187 RT 14640.)

B. The Trial Court Reasonably Permitted Cross-Examination of Dr. Candelaria-Greene on antisocial personality disorder and appellant's future dangerousness

1. Antisocial personality disorder

Appellant claims that the trial court erred by permitting the prosecutor to ask Dr. Candelaria-Greene whether appellant fit the criteria in the DSM IV for antisocial personality disorder. (AOB 255.) He contends that to present an alternative diagnosis, the prosecutor was required to bring in his own expert in rebuttal, rather than ask questions of a defense witness beyond her expertise. (AOB 258.) He is incorrect. Once Dr. Candelaria-Greene suggested a broad-based link between appellant's past conduct and his learning disabilities, i.e., suggesting a diagnosis, the prosecutor could attack her credibility by "questioning that diagnosis or suggesting an alternative diagnosis." (*People v. Smith* (2005) 35 Cal.4th 334, 359; accord *Clark*, *supra*, 52 Cal.4th at p. 936, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn 22.)

As a threshold matter, Dr. Candelaria-Greene held herself out as a mental health professional when she issued an opinion, indeed bolstered her opinion, with use of the DSM IV. (184 RT 14465-14466.) The limits of her expertise are legitimate areas of cross-examination once she renders a diagnosis. (Evid. Code, § 721; *People v. Gray* (2005) 37 Cal.4th 168, 215-216 .)[66] The prosecutor cross-examined Dr. Candelaria-Greene on the

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[66] Appellant presents a false comparison between the DSM IV and Witkin's legal treatise, claiming that a criminal lawyer is not qualified to render an opinion about civil law just because Witkin publishes treatises in both areas. (AOB 256.) As a threshold matter, Witkin is a secondary treatise rather than a diagnostic manual. But even assuming it were not, an attorney, regardless of area of expertise, can opine that certain conduct may (continued...)

identical source material, i.e., the DSM IV, on which she based her diagnosis. (Evid. Code, § 721, subds. (a), (b) (1); *Clark, supra*, 5 Cal.4th at p. 1013.) Thus, using this same source, the prosecutor was entitled to challenge Dr. Candelaria-Greene's choice of one diagnosis over an alternative that fit the facts of the case. (*Ibid.*)

In *People v. Seaton*, *supra*, 26 Cal.4th at p. 679 the defense expert claimed that the defendant suffered from an anxiety disorder with an atypical combination of avoidant, dependent, and borderline personality. (*Ibid.*) Just as at appellant's trial, the prosecutor cross-examined the expert, demonstrating that the defendant's behavior met each element of antisocial personality disorder. (*Ibid.*) The defendant attacked this testimony claiming "the prosecutor went 'beyond rebuttal' in using [the expert's] testimony to support his own conclusion that defendant was antisocial or sociopathic." (*Id* at p. 680.) Contrary to appellant's claims that this Court's ruling was based solely on the defense's failure to object and or that any impropriety was nonprejudicial (AOB 255-256), this Court found the claim "unmeritorious," holding that the prosecutor was entitled to undermine the expert's diagnosis by demonstrating that an alternative diagnosis might be more consistent with the evidence. (*Ibid.*)

Appellant's attempt to distinguish *Seaton*, claiming his expert's limited expertise shielded her from this kind of cross-examination (AOB 255), is unavailing. (*Id.* at p. 681.) In *Seaton*, the defense expert was unable to answer whether the defendant met certain elements of the disorder based on a lack of factual knowledge about the defendant's conduct. (*Ibid.*) This Court approved cross-examination in this area of

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(...continued)
give rise to both civil and criminal liability, and discuss basic distinctions between the two areas.

deficit as "a permissible attempt to test the strength of [the expert's] diagnosis." (*Ibid.*) In short, an expert's lack of knowledge, lack of expertise, or limited knowledge of facts on which to base an opinion, are permissible areas to test the credibility of a diagnosis. (*Smith, supra*, 35 Cal.4th at p. 359.)

Appellant claims that an alternative diagnosis must be established through a separate rebuttal witness, rather than on cross-examination of an expert (AOB 257), relying on *People v. Daniels* (1991) 52 Cal.3d 815, in which the prosecution used a rebuttal expert "to establish the diagnostic factors for sociopathy." (*Id.* at p. 883.) The Court in *Daniels*, however, established no rule of "competing experts" to attack a defense-expert diagnosis. Indeed, the Court characterized impeachment of the defendant's witness as "cross-examination," rather than rebuttal, stating:

> But by presenting a psychological expert defendant necessarily opened the door to *cross-examination* inquiring into the factual basis of the expert's opinion; likewise by presenting character evidence defendant opened the door to *cross-examination* inquiring into the factual basis of the witness's judgment of his character. If defendant presents such evidence he must expect that it will be tested by *cross-examination*. Thus defendant cannot prevent the evidence in question from being heard by the jury; his only remedy to reduce the risk that the penalty sentence is based in part on that evidence is to request a limiting instruction.

(*Id.* at p. 884, italics added.)

Appellant relies on *People v. Davis* (2009) 46 Cal.4th 539, 620, incorrectly claiming, as with *Daniels*, that impeachment of his expert with an alternative diagnosis requires a rebuttal expert. (AOB 257.) That case fails to address the issue of alternative diagnosis and is inapposite. In *Davis*, the parties agreed that defendant suffered from antisocial personality disorder, and disputed whether the prosecution could cross-examine the

defense expert and present a rebuttal expert on lack of remorse as an element of the disorder, distinct from a factor in aggravation. (*Ibid.*)

People v. Castaneda (2011) 51 Cal.4th 1292, 1335-1336, and *People v. Williams* (1997) 16 Cal.4th 153, 251-252, are also inapposite. In *Casteneda*, the defense expert was determined not qualified to render an opinion. (*Castaneda, supra*, 51 Cal.4th at pp. 1335-1336.) In *Williams*, the Court considered whether the prosecutor had committed misconduct in introducing hearsay during cross-examination by reading from a probation report, ruled inadmissible, rather than asking whether the defense expert whether he was familiar with or had relied on the probation report in rendering an opinion. (*Williams, supra*, 16 Cal.4th at p. 252.)

2. The trial court did not err in allowing the prosecutor to cross-examine Dr. Candelaria-Greene on future dangerousness after she raised the issue on direct examination by the defense

Appellant claims that the trial court erred in allowing the prosecutor to cross-examine Dr. Candelaria-Greene on his future dangerousness contending that the prosecution introduced the issue through expert testimony in its case in chief rather than on rebuttal. (AOB 264.) Appellant's claim is without merit.

Appellant's claim is based on a false premise, namely, that the prosecutor impermissibly raised the issue of future dangerousness in the first instance, by way of expert opinion. (AOB 264.) (*People v. Murtishaw* (1981) 29 Cal.3d 733, 767-768, disapproved on other grounds in *People v. Lee* (1987) 43 Cal.3d 666, 670.) The record shows otherwise. Appellant, not the prosecutor, raised the issue of future dangerousness when his expert, Dr. Candelaria-Greene, testified that, if medicated, prisoners with appellant's diagnosis serving life terms exhibited "a greater degree of safety associated with the defendants—with the prisoners and those around him. [*sic*]. Because there was better able ability [*sic*] to control impulses." (184

RT 14463-14464.)[67] Having thus raised the issue of future dangerousness, the trial court did not err in allowing the prosecutor to cross-examine appellant's expert on this issue. (*People v. Jones* (2003) 29 Cal.4th 1229, 1260-1261.)

C. Error, if any, was Harmless

Assuming error in cross-examination of Dr. Candelaria-Greene, either in examining her about an alternative diagnosis or future dangerousness, it was not reasonably possible the error affected the verdict and it was harmless beyond a reasonable doubt. (*Abilez, supra*, 41 Cal.4th at pp. 525-526; *Chapman v. California* (1967) 386 U.S. 18, 24.)

As the trial court demonstrated in its lengthy summary of the penalty case, the evidence of incidents in aggravation, in quantity and quality, was overwhelming and evidence of circumstances in mitigation was weak. (196 RT 14976-15019.) In context, the relative weight of the evidence appellant claims should have been excluded made its admission harmless beyond a reasonable doubt. (*Ibid.*)

Moreover, there was abundant evidence of appellant's future dangerousness in prison independent of Dr. Candelaria-Greene's testimony. "Assertions of future dangerousness are permissible if supported by the evidence and not based on expert opinion." (*Bramit, supra*, 46 Cal.4th 1221, 1244.) The prosecutor's argument attacking the credibility of "the good doctor" implicitly urged jurors to disregard her testimony altogether. (188 RT 14689.) Rather, the primary thrust of the prosecutor's argument, supported by a multitude of incidents, was that appellant was dangerous

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[67] Indeed, Dr. Candelaria-Greene's inadvertent slips of the tongue arguably emphasized appellant's future dangerousness: "The authors of the research indicated . . . most of all, there was a greater degree of safety associated *with the defendant[']s*—I mean, with the prisoners and those around *him*." (184 RT 14464, italics and bracket added.)

because he was deliberate and planned his violent conduct. (188 RT 14687-14690.) The prosecutor referenced Dr. Candelaria-Greene's opinion, for what it was worth, after listing numerous incidents of appellant's heinous activities, and treated her credibility with sarcasm and her opinion as nearly superfluous, saying, "I mean, *even* his own expert witnesses, *the good doctor, says. . .*" (188 RT 14689, italics added), and "His violence in the future is a near certainty. *Even* his expert witness agrees with that." (188 RT 14690, italics added). In short, assuming error, it was without prejudice.

XIII. THE PROSECUTOR DID NOT COMMIT MISCONDUCT

Appellant claims that the prosecutor committed various acts of misconduct in violation of the Fifth, Eighth, and Fourteenth Amendment rights to a fair penalty determination. (AOB 267.) Each of his claims is specious.

A. The Prosecutor's use of "evil," during opening statement, and "violent jerk" in a hypothetical question to an expert were not misconduct

Appellant contends that his constitutional rights were violated through use of epithets in two instances. (AOB 267.) In the first incident, the prosecutor referred to appellant and Patterson as "evil men," in his guilt-phase opening statement. (105 RT 6884). A day later, defense counsel objected, and the trial court sustained the objection as "slightly over the line into the area of argument," and directed the prosecutor not to use the term in opening statement. (107 RT 6950.)

In the second incident, the prosecutor examined Dr. Candelaria-Greene, the defense expert on learning disabilities during the penalty phase, and asked her a hypothetical question about assessing an unwilling subject, using the epithet, "violent jerk." (186 RT 14572-14573.) The trial court sustained defense counsel's objection and instructed the prosecutor to

reframe the question and use a word other than "jerk." (186 RT 14572-14573.) The prosecutor rephrased, describing in detail the qualities that he intended using the term, "jerk," as shorthand, and the defense asserted no additional objection. (186 RT 14573.)[68]

As a threshold matter, appellant arguably failed to preserve these issues through timely and specific objections at trial. He objected to the word "evil" in opening argument, a day late, and failed to object to the use of "jerk" when the prosecutor provided a definition of the word that placed it in context for purposes of the hypothetical. (*Partida, supra*, 37 Cal.4th at p. 434).

If preserved, moreover, his claims are without merit. When supported by the evidence, this Court has "condoned a wide range of epithets to describe the egregious nature of the defendant's conduct" in argument during the penalty phase. (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1172, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22 ["evil," "liar," and "sociopath"].) Words like "evil" and "jerk" are far less derogatory than other epithets whose use was not misconduct. (E.g., *Farnam, supra*, 28 Cal.4th 107, 168, ["monstrous," "cold-blooded," "vicious," "predator"]; *People v. Thomas* (1992) 2 Cal.4th 489, 537, ["mass murderer, rapist," "perverted murderous cancer," "walking depraved cancer"]; *People v. Sully* (1991) 53 Cal.3d 1195, 1249,

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[68] The prosecutor rephrased the question, stating, "If someone is a person who engages in a pervasive pattern of disregard for and violation of rights of others occurring most of their life, okay, and they're violent and they don't have any fear of authority figures, and they don't want to listen to anybody, and they get violent if they're told to comply with rules—I used shorthand jerk for that—but using the term from antisocial personality disorder, same kind of terms used in a conduct disorder, right?" (186 RT 14573.)

["human monster," "mutation"]; *People v. Friend* ((2009) 47 Cal.4th 1, 84 ["insidious little bastard"].)

The prosecutor's use of the term "evil" in opening statement in the guilt phase, even if considered error when uttered, was unlikely to rise to the level of violation of constitutional dimension or affect the penalty determination. (AOB 267.) Jurors were specifically instructed in guilt and penalty phases that "an opening statement is not evidence," or "an argument" but "simply an outline by counsel of what he believes or expects the evidence will show in this trial." (105 RT 6857; 169 RT 13215-13216.) To the extent this term was argumentative in opening statement, defense counsel resurrected it and argued in closing that this characterization was unsupported by the evidence. (163 RT 12795.) Indeed, the evidence amply supported an inference that appellant—having taken charge in beating, strangling, and stabbing Beeson eight times in the head and neck to finish her off, partying with friends afterwards, along with many other acts of violence and intimidation—was evil and thus the term would not have improperly inflamed the jury. (*Friend, supra*, 47 Cal.4th at p. 84.)

The use of "jerk" in a hypothetical question to Dr. Candelaria-Greene was no different in lacking any potential to inflame the jurors. The jury was instructed that "[a] question is not evidence, and it may be considered only as it helps you to understand the answer." (190 RT 14856.) Moreover, there was evidence supporting use of this term when Dr. Candelaria-Greene acknowledged that the qualities the prosecutor had attributed to "jerk" as a shorthand, were the same elements associated with antisocial personality disorder or a conduct disorder. (186 RT 14573.)

Appellant's authorities are easily distinguished. In *People v. Yeoman* (2003) 31 Cal.4th 93, 149, *People v. Sanders*, *supra*, 11 Cal.4th at p. 527, and *People v. Hawkins* (1995) 10 Cal.4th 920, 960-961, disapproved on another ground in *People v. Lasko* (2000) 23 Cal.4th 101, 110, the Court

did not analyze the error but rather, assumed the epithet was arguably improper before finding no misconduct. Other cases did not involve a brutal murder, and thus considered the use of an epithet or characterization of the defendant in a context other than the penalty phase of a capital case. (e.g., *People v. Fosselman* (1983) 33 Cal.3d 572, 577, 580, [false imprisonment, assault with deadly weapon]; *People v. Hunter* (1942) 49 Cal.App.2d 243, 250 [kidnapping].) In *People v. Chatman, supra*, 38 Cal.4th at p. 388, this Court easily distinguished *Darden v. Wainwright* (1986) 477 U.S. 168, 180, noting that our High Court had found many comments made by the prosecutor were undoubtedly improper, although not prejudicial, "but did not specifically single out use of the word 'animal' as improper."

As just noted, there was overwhelming evidence to support use of the epithets of "evil," and "jerk." Assuming use of either or both of these terms was error, it was not reasonably possible the error affected the verdict. (*Abilez, supra*, 41 Cal.4th at pp. 525-526; *Chapman, supra*, 386 U.S. at p. 24.) In context, "these epithets played an extremely minor role, in comparison to the lengthy discussion of defendant's prior criminal and violent acts." (*Hawkins, supra*, 10 Cal.4th at p. 961.) Appellant's claim that he suffered constitutional violations from use of these terms is specious.

B. The Prosecutor's Arguments were Based on Facts in Evidence and Permissible Inferences

Appellant claims that the prosecutor committed misconduct by arguing about facts not evidence, namely, (1) that appellant's expert, Dr. Candelaria-Greene, did not want to be in the same room with appellant; (2) that appellant's family did not love him enough to testify; and (3) that prison conditions were pleasant. (AOB 270.) None of these claims is meritorious.

The prosecutor attacked Dr. Candelaria-Greene's credibility in claiming that appellant would not pose a future danger by highlighting, repeatedly, that she had failed to interview appellant face-to-face, in contrast with the reports she had reviewed of numerous experts who had met with appellant and reached a contrary conclusion. (184 RT 14475; 186 RT 14571; 187 RT 14624, 14626) In argument, the prosecutor emphasized this deficiency again, by suggesting that there had to be some rationale for why an expert would render an opinion about future dangerousness of someone sight-unseen, while ignoring contrary conclusions of others who had conducted a personal evaluation. (188 RT 14694-14695.) After reminding jurors of the limited-purpose nature of the forty or fifty incidents discussed in the reports Dr. Candelaria-Greene had reviewed, the prosecutor argued:

> But the other opinion she offered, [appellant] will be dangerous in the future if he's sent to prison on a life sentence. Okay. And the information that you evaluate when you look at that opinion is all the violent stuff we talked about, he beat his mother, he beat his sister. He was a fire setter. He was assaultive in school. He tried to stab another student in school. He tried to stab a teacher. He assaulted the school secretary. All of that stuff that her opinion's based on, all the people who actually took the time with him face-to-face and evaluated him, even though she might have said they didn't evaluate him enough times, but each of those people evaluated him times that they did, but all those people who concluded—I think there were eight or nine different spots I pulled out of records where someone wrote down on a piece of paper that his potential for future violence is high.
>
> Now, remember, I'm talking to you guys now about what extenuates, what lessens the seriousness of the crime, and I'm talking about the mitigation evidence that Winbush put before you. Okay? And what it boils down to is he'll be dangerous in the future. And I'm suggesting to you that that's not a basis to give him a break and a lesser sentence.

> She wouldn't even sit down with him face-to-face. Now whether that's a slight-of-hand legal strategy or she didn't want to be in the same room with him, *don't know*. But she wouldn't even sit in the same room with him.

(188 RT 14694-14695, italics added.)

The prosecutor's conditional phrasing indicated that the prosecutor, while drawing legitimate inferences from evidence, was not certain as to which inference was correct. The thrust of his argument was that for *whatever* reason the doctor did not meet with appellant, i.e., whatever inference could be drawn from this evidence, it was insufficient to lend credibility to her opinion.

There was plenty of evidence, moreover, to infer that appellant was dangerous, and to the extent the there was insufficient evidence that Dr. Candelaria-Greene was frightened to meet with him, it was not reasonably possible to have affected the penalty verdict. (*Abilez, supra*, 41 Cal.4th at pp. 525-526; *Chapman, supra*, 386 U.S. at p. 24.) Indeed, *any* reason to explain the doctor's failure to meet with appellant bolstered the doctor's credibility by suggesting *some* rationale for this critical failure on her part.

Appellant's next claim, i.e., that the prosecutor improperly argued that his family did not want to be with him, also fails. The prosecutor argued:

> Where are the family members? They're here in the community; they're local; they're around. Where are they? Why didn't they come in here and tell you something? The closest thing he got was Kameka Patterson-Goodwin. The one time that she met him, he was sexually inappropriate with her, his brother's wife, while his brother's in jail. First time he met her, he's talking to her about having sex. Sounds like Iva Mos[le]y, doesn't it?

(188 RT 14695)

The defense failed to object to this argument, thus forfeiting any claim on appeal. (*Zambrano, supra*, 41 Cal.4th at pp. 1173-1174, disapproved of on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

Moreover, appellant did not preserve his claim by his attempt to address the prosecutor's argument in rebuttal, nor did the trial court err in precluding his argument. (AOB 271.) Preservation of a claim of prosecutorial misconduct for appeal requires a timely and specific objection and request for an admonishment. (*Clark,* 52 Cal.4th at p. 960.) "The failure to timely object and request an admonition will be excused if doing either would have been futile, or if an admonition would not have cured the harm." (*Ibid.*)

In rebuttal, the defense argued, "None of his family members came in here and testified because Grayland didn't want to subject them to this process." (189 RT 14766.) The prosecutor objected claiming, "[t]here is no evidence of that," and the trial court correctly sustained the objection without admonition. (189 RT 14766.)[69] Responding to the prosecutor's argument in rebuttal is not an exception to the general rule requiring objection. (*Clark, supra*, 52 Cal.4th at p. 960; see *People v. Clair* (1992) 2 Cal.4th 629, 662 [no per se exception to misconduct forfeiture rule for capital trials].) Unlike an objection which raises and seeks immediate resolution of an error, rebuttal argument comments on the evidence, and is thus insufficient to avoid a forfeiture. (*Clark, supra*, 52 Cal.4th at p. 960; see *Blacksher*, *supra*, 52 Cal.4th at p. 839 [no futility demonstrated when defense counsel had no hesitation in lodging objections during closing arguments]; *People v. Riel* (2000) 22 Cal.4th 1153, 1213 [no unusual circumstances presented to suggest objection would have been futile].)

Even if preserved, the claim fails on the merits. As this Court noted in *Zambrano*, where the defendant raised the same issue, "[t]he argument is

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[69] The only arguably-related evidence was appellant's testimony that his mother did not attend trial because "she can't handle it," not because it was appellant's desire not to subject her, or any other family member, to the process. (148 RT 11577.)

meritless in any event. The prosecutor never suggested defendant had a legal burden to present family members in mitigation. He merely commented, as is permitted, on defendant's failure to call logical witnesses." (*Ibid.*) This was fair comment, and not misconduct. (*People v. Medina* (1995) 11 Cal.4th 694, 758.)

Appellant's third claim, i.e., that the prosecutor "grossly exaggerated the pleasures of prison life" by arguing prison life was like being incarcerated at CYA, misconstrues the record. (AOB 271.) In context, the prosecutor provided a factual narrative of the defendants' activities, occurring just after Beeson died, after he read a book passage describing how a victim "ceases to be a part of everyday reality, ceases to exist" in contrast with the murderer's "ongoing reality." (188 RT 14700-14704.) Appellant objected, at sidebar, to a description of prison with respect to a term of life without parole, but stated he had no objection to conditions of incarceration at CYA and the jail "and reasonable inferences to be drawn from the evidence that the jury has actually heard." (188 RT 14708.)

When the parties concluded their sidebar discussion, the prosecutor resumed his argument about past incarceration. (188 RT 14703) As to future conditions of incarceration, however, the prosecutor was vague as to the specific details of "institutional life," and more focused on the experiences that Beeson and her family would be missing, stating:

> You've heard from evidence what life is like in jail and what life is like in the California Youth Authority. You get to play sports, basketball, card games, make home-made alcohol; there's marijuana, cookies, and enchiladas, canteen privileges. There are—there are telephones, there are letters, there are visits. There's sex. You've heard evidence that a full life exists behind bars. Maybe not the life, if you imagine yourself going from where you are now to prison, maybe not a life you would like to think of, but if you're in a situation where Norman Patterson and Grayland Winbush are, which is you know that this is what your life is, this is what your life is going to be until you die, and if

> you get yourself a life sentence out of this trial, you get to have that institutional life, and you've heard evidence about jail and about the California Youth Authority, and that includes all those things, things to look forward to. Most of the same things that we all have in our lives now, although they're in a different form.
>
> With a life sentence, you get to watch your children grow up, watch your family grow; you get to hear about news from your family, when people do well, when they don't. And you know what? Erika got none of this. Erika got none of this. It was all taken away in a horrible, horrible half hour. It was taken away from her. No marriage, no kids, no cookies, no enchiladas. All of her dreams were violently erased.
>
> Her family has been destroyed. They have some good memories; they have these few photos and some cards. They have some murderously bad memories. Her father, Fred, his last six months, a horrible six months. Lisa's left with the memory of Fred in the back seat of that car stroking a box of Erika's ashes. It's not fair that they get a lenient sentence of life. They've gotten lawyers, they've gotten preliminary hearings, they've gotten evidence, they've gotten months of motions. They've gotten a jury. Erika got executed. They decided. They decided together. It's not fair.

(188 RT 14704.)

As a threshold matter, appellant's failure to seek admonishment forfeits his claim of misconduct. (*People v. Redd* (2010) 48 Cal.4th 691, 753.) Even if considered on the merits, however, appellant's claim still fails. The prosecutor's argument was not that prison itself was a pleasant environment, but rather, that appellant should warrant no pity as he would continue to have life experiences, regardless of quality, while Beeson, his victim, had ceased to exist.

Indeed, counsel for Patterson argued that prison was not a "Club Med. It's not a country club. It's not where Martha Stewart's going. . . . Well, the bad news is that you're going to live the rest of your life in a little steel cage surrounded by iron bars, behind concrete walls wrapped up in barbed

wire every day for the left of your life. [*sic*]." (190 RT 14828-14829.) Appellant's counsel, while precluded from naming a specific prison, was permitted to rebut all inferences that appellant's conditions were going to be pleasant. (190 RT 14839-14840.)

> Now, we often hear from district attorneys about the country club theory of prisons. This never gives us any detail about such things as lack of freedom, lack of choice, even lack of basic privacy. With the toilet and wash basin in the cell, people have likened it to living their entire life in a bathroom. The fact is that many private homes have bathrooms that are bigger than the cell that the defendant must spend 23 hours a day in. Frankly, unless and until the system is comfortable with his behavior, Grayland will not have anyone to interact with, and even in his one hour out of his cell, he will be alone. His only contact with the outside world would be little, or an occasional visit, if, as I expect, he's sent to Pelican Bay Prison.
>
> [Prosecutor]: I'm going to object to this.
>
> THE COURT: Sustained. The specific prison is not evidence in the case.
>
> [Defense counsel]: I'm not allowed to give my impression as to where he may be incarcerated?
>
> THE COURT: That's right.
>
> [Defense counsel]: Okay. If he is sent to any prison other than San Quentin, the miles start to become a real prohibition to people visiting. You know, in about 20 years, Grayland may hear a knock at the door, and a voice will say your mom's died. Maybe in about 10 more years, Grayland will hear a knock at the door of his cell, and a voice had say your brother has died, and maybe in another 30, 10 years, someone will open the door – will open the door and say Grayland Winbush has died. Life without choice, without society, and without privacy. He's— this is not a country club.

(190 RT 14839-14840.)

Thus, to the extent both sides discussed the details of incarceration, neither side presented it as a pleasant penalty option in and of itself. Appellant's claim of misconduct fails.

C. Prosecutor's Statements in Rebuttal Closing During the Penalty Phase

Appellant claims there was prosecutorial misconduct during the prosecutor's rebuttal closing argument during the penalty phase in violation of his right to due process and a fair trial. (AOB 272, 275-276.) He alleges the prosecutor made personal attacks denigrating defense counsel, impermissibly suggested jurors place themselves in the role of the victim, and improperly referred to other cases not before this jury. (189 RT 14776-779, 794-796) Appellant's claim must fail as it is forfeited, and if considered on the merits, is insufficient evidence of misconduct, and even if arguably misconduct, was insufficient to render the trial unfair.

This Court succinctly described the standard for prosecutorial misconduct in *People v. Espinoza*, stating:

> A prosecutor's rude and intemperate behavior violates the federal Constitution when it comprises a pattern of conduct "so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process." [Citations.] But conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves "'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.'" [Citations.] Included within the deceptive or reprehensible methods we have held to constitute prosecutorial misconduct are personal attacks on the integrity of opposing counsel.

(*People v. Espinoza* (1992) 3 Cal.4th 806, 820.)

Appellant claims that the prosecutor's arguments, in rebuttal, attacked the personal integrity of opposing counsel. (AOB 272-274.) As a threshold matter, he failed to assert a timely objection, thus forfeiting his claim on appeal. (*People v. Gionis* (1995) 9 Cal.4th 1196. 1215-1216.) If

considered on the merits, his claim fails nonetheless. In context, by pointing out the inconsistency of the defense positions at guilt and penalty phases, the prosecutor zealously described and rebutted defense counsel's penalty argument premised on "lingering doubt" about facts intrinsic to the guilt verdict. (*Medina, supra*, 11 Cal.4th at p. 759.)

Appellant took the witness stand during the guilt phase and testified that he was not present at the murder and his five taped confessions were utterly false. (147 RT 11532.) Five sentences into argument at the penalty phase, however, appellant's counsel used the purportedly-false confessions to argue that the murder could only have been a rash act and should preclude penalty-appropriate inferences bearing on appellant's character as a deliberate, cunning and methodical predator. (189 RT 14761.) Defense counsel argued:

> And I assume that you found that Grayland's confession was true or *essentially* true based on the tapes that you heard, the transcripts and the taped phone conversation with his mother. I believe that you found the confession to be *essentially* true, and the evidence supports your verdict. I'm not going to argue with your verdict.
>
> And what does that confession show? The confession shows a drug transaction gone wrong. Grayland said he went there to buy marijuana and later on they decided to commit a robbery. Norman said they went there with the intention to rob. I don't know what you found. *I don't know if you found as to that fact one way or the other. You weren't required to. But, in any event, there was no evidence, there was no evidence of planning for a murder.*

(189 RT 14761, italics added.)[70]

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[70] Later in the argument, defense counsel repeated, "It was a rash, impulsive killing with weapons at hand. That makes it a first-degree murder. That makes it a crime where Grayland Winbush will never ever get out of prison, ever. [¶] . . . *It is not sadism that controls Grayland*

(continued...)

Just before concluding, the defense argued that, even if truthful, appellant's confession was in exchange for a promise of leniency to avoid the penalty of death:

> As I said, I'm not going to second guess your verdict, but Grayland was made a promise by the police. Listen to the tape of his call to his mother. I believe that is evidence, Exhibit 3, and the transcript. *He was promised life if he would confess. He made a true confession as you found. You can honor the promise made by the police.*
>
> (People's Exhibit No. 3)
>
> *Don't ratify the last mistake made by the system. You, in fact, are the only ones who can give Grayland the benefit of his bargain that he made with Sergeants Olivas and McKenna.*
>
> Listen to the tape of his call to his mother. Give Grayland life in prison. Make the moral choice. Choose life over death, because ultimately that makes us all more human.

(189 RT 14774-14775, italics added.)

In *rebuttal*, and prefacing his comments with an admonition to focus on the evidence, the prosecutor responded:

> I'm asking you to *focus on the evidence, focus on the law here, the standards that you are supposed to apply, okay? Weigh the aggravation against the mitigation and see what you come out with.*
>
> You know, you were just told about the police making a promise. "I'm not second-guessing the verdict."
>
> I want to remind you to think about the previous argument that you heard on behalf of Mr. Winbush at the guilt phase. It went on for about a day-and-a-half. It was all about how he is innocent. He was never there. He didn't do it. It was a false confession.

(...continued)
Winbush's behavior but impulsivity, and this was a robbery gone wrong."
(189 RT 14765, italics added.)

Now you are being told by the same attorney for the same defendant, oh, well, he did do it. Okay. You guys are right. We tried to fool you last time. You guys were right. The evidence does support your verdict.

It's as though it is whatever we can say to try and fool you and beat you. Whatever we can say to try and trick you into making a mistake as a jury, to get you to make the wrong decision that will favor the defendants.

We will say anything to you, anything whatsoever. We will spend a day-and-a-half telling you that these were false confessions and he was never there. And we will rundown every witness in the case. *We will call the police liars and get up here and stand right up in front of you and say you were right, the evidence supported your verdict.* Okay?

There is a concept in some capital cases that is referred to as lingering doubt. That is, even though the jury has made a finding of guilt, there is something in the back of their minds, well maybe they didn't do it. I just want to really emphasize to you at this point that while you heard arguments on behalf of both defendants at the end of guilt, certainly much stronger for Winbush than Patterson, but arguments from both of them inviting you or urging you to believe these—this rubbish that was testified to, these lies that were testified to by both defendants about false confessions, and what you have been told today by lawyers for each of those defendants is that they are guilty of these murders.

So, to the extent that you heard *arguments to the contrary* at the end of the guilt phase, *you were being intentionally misled.* And as you analyze *the defense arguments* here every which way they can think of to persuade you—and let me say really loudly, to give the lenient sentence, the lesser of the two sentences, *every argument*, anything they can say *no matter how it relates to the evidence* you heard or anything else in this courtroom *no matter how it relates to facts, morality, fairness*, whatever it will take to get you to do the more lenient thing. Lenient. I'm saying it loud and clear. I want to say it in a clear and loud voice, lenient. The lesser sentence.

(189 RT 14776-14778, italics added.)

Appellant's argument fairly responded to the defense counsel's attempt to reargue the facts of the guilt phase by showing the inconsistency in counsel's theories. In *Medina*, the Court rejected a similar claim by a defendant that the prosecutor had demeaned his counsel's integrity by arguing "'any experienced defense attorney can twist a little, poke a little, try to draw some speculation, try to get you to buy something.'" (*Medina, supra*, 11 Cal.4th at p. 759.) Similarly, in *Gionis*, the Court found that a prosecutor's argument was within "the bounds of permissible vigor," in highlighting differences between the defense opening statement and the evidence and noting that defense counsel's "job" was to "get him off." (*Gionis, supra*, 9 Cal.4th at pp. 1217-1218.) The Court relied on *People v. Bell* (1989) 49 Cal.3d 502, 538, in which the prosecutor had similarly argued that it was defense counsel's """job to get this man off. He wants to confuse you."""" (*Gionis, supra*, 9 Cal.4th at p. 1217.) The Court found that the prosecutor's argument was not an attack on counsel's integrity in "'present[ing] a defense dishonestly,'" i.e., a suggestion that counsel had falsified evidence, but rather, an attack on the credibility of the inferences counsel was asking jurors to draw. (*Ibid.*) Rather, "the challenged comments could properly be understood as a reminder to the jury that it should not be distracted from the relevant evidence." (*Id.* at p. 1218.)

The prosecutor's attack on the credibility of the defense counsel's trial tactics and arguments in this matter was no different. (*Redd, supra*, 48 Cal.4th at p. 749; see *Zambrano, supra*, 41 Cal.4th at p. 1155 [guilt phase].) The prosecutor argued that jurors were "intentionally misled" by argument, "no matter how it relates to the evidence," and "no matter how it relates to facts, morality, fairness"—all required considerations at the penalty phase. (189 RT 14778.) The prosecutor did not suggest that defense counsel had fabricated or deceived the jury as to the evidence of factors in aggravation

and mitigation they were to consider. (see *Clark, supra*, 52 Cal.4th at p. 961.)

Even assuming the prosecutor's comments were denigrating or discourteous, the conduct was neither egregious nor systematic to render appellant's trial fundamentally unfair. (*Espinoza, supra*, 3 Cal.4th at p. 820.) In *Espinoza*, the Court found no constitutional violation of due process where "[t]he prosecutor's behavior, though on occasion rude and intemperate, did not comprise a pattern of egregious misbehavior making the trial fundamentally unfair," but "were occasional rather than systematic and pervasive" lapses from courteous demeanor in a lengthy trial. (*Ibid.*) Here too, the prosecutor's argument focused on the evidence presented to persuade that consideration of the factors in aggravation and mitigation led to reasoned decision to impose death:

> [Co-Defendant Counsel's] personal belief about the death penalty and anything that what [Appellant's counsel] wants to inject about you playing God or anything like that, that is rubbish. That is stuff you shouldn't be considering. It is improper. It is wrong argument. It doesn't belong here, okay? You need to decide this case based on the facts. Follow the law. Weigh the aggravation against the mitigation. And reach an unanimous verdict.

(189 RT 14779.)

Clearly the comments were not unduly inflammatory as the jury imposed different penalties for appellant and his codefendant, notwithstanding prosecutor's comments directed toward both defendants.

Furthermore, the prosecutor committed no misconduct to the extent his comments arguably suggested that jurors place themselves in the position of the victim. (189 RT 14794-14796.) As a threshold matter, appellant failed to object, thus forfeiting any claim on appeal (*Redd, supra*, 48 Cal.4th at p. 749.) Appellant makes a claim, unsupported by the record, that such an objection would have been futile, which prompted defense

counsel to make the tactical decision to respond by argument. (AOB 275.) His oblique reference to his earlier objection to the prosecutor's mention of the Oklahoma City bombing—an objection at a different time and on a different ground—fails to demonstrate futility. (*Partida, supra*, 37 Cal.4th at p. 434.)

Even if preserved, appellant's claim fails as unsupported by the law or the record. An argument "inviting the jurors to put themselves in the shoes of the victim," is entirely appropriate at the penalty phase "because there 'the jury decides a question the resolution of which turns not only on the facts, but on the jury's moral assessment of those facts as they reflect on whether defendant should be put to death." (*Wash, supra*, 6 Cal.4th at p. 263.)

The prosecutor's rebuttal argument, moreover, was one based on reason. The defense had argued Beeson's death resulted from a routine murder rather than "the worst of the worst" that might be perpetrated by a sniper or a bomber. (189 RT 14765; 189 RT 14794.)[71] The prosecutor responded, stating repeatedly, "they are telling you this is not a bad murder, right? This is not a bad murder, okay?," while describing the evidence demonstrating that Beeson's death was slow and painful, rather than instantaneous as from a bombing or sniper attack. (189 RT 14794-14796.)

Appellant relies on *People v. Gonzales* (2011) 51 Cal.4th 894, 952, which is easily distinguished. In *Gonzales*, the prosecutor made a purely emotional appeal by reading a letter to the murder victim that invited jurors "to go far beyond their role as the arbiters of punishment," and assume responsibility for society's failure to protect the victim and consider

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[71] Defense counsel argued, "[a]nd as terrible as any murder is—and by definition murder is terrible—this murder of Erika Beeson is simply not the worst of the worst. . . . This is not some type of home-grown terrorist bombing killing. Not a crazed sniper." (189 RT 14765.)

themselves part of her nuclear family. (*Id.* at pp. 950, 952) By highlighting the evidence that Beeson's death was indisputably slow and painful, the prosecutor made a rational, not an emotional appeal rebutting the defense argument that this was not a "worst of the worst" kind of murder. (*Wash, supra*, 6 Cal.4th at p. 263.)

Appellant's claim that the prosecutor persisted asking questions about the Oklahoma bombing after the trial court sustained an objection is meritless. (AOB 274, 276.) As just noted, once the trial court sustained the objection, the prosecutor spoke of a generic bombing, which, as the parties had earlier litigated, was not objectionable. (180 RT 14189.)[72] In context, the argument focused on instantaneous death from any bombing and not any particular bombing. (189 RT 14795-14796.)[73]

D. Error, if any, was Harmless

As just noted in section XIII.C., *ante*, each of the errors alleged were harmless beyond a reasonable doubt, and none of the acts of alleged misconduct either individually or collectively, deprived appellant of a fair trial. (*Chapman, supra*, 386 U.S. at p. 24; *Espinoza, supra*, 3 Cal.4th at p. 820.) Moreover, as demonstrated by the trial court's summary of the evidence before it denied the motion to modify the verdict (§ 190.4, subdivision (e)), the evidence in aggravation against appellant was overwhelming in quantity and quality. (196 RT 14976-15019.) In context,

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[72] Ironically, appellant and his codefendant had earlier opposed the prosecutor's motion to exclude such references, and pushed for an "advisory ruling" that would allow reference to notorious cases in generic terms. (180 RT 14169-14191.)

[73] After the objection was sustained, the prosecutor stated, "She suffered more than a hundred victims suffered in a bomb blast because they all went out immediately. And she slowly is being strangled." (189 RT 14795-14796.)

the relative weight of the victim impact evidence was minor. (196 RT 14986-14989.)

Appellant's nonspecific claim that any admonition was insufficient to cure the harm is speculative and without support in the record. (AOB 278-279.) The trial court sustained one defense objection during the prosecutor's argument. (189 RT 14795.) Neither the trial court's ruling in that instance, nor its meticulous consideration of the issues throughout the entire trial, supports appellant's claim of futility in seeking admonishment if a meritorious objection had been asserted and sustained. (*Redd, supra*, 48 Cal.4th at p. 754.)

E. There Was No Cumulative Prejudice

Appellant claims that if individually insufficient, the acts of claimed prosecutorial misconduct, when considered collectively, require reversal as they demonstrate cumulative prejudice. (AOB 279.) He is incorrect.

"The 'litmus test' for cumulative error 'is whether defendant received due process and a fair trial.'" (*People v. Cuccia* (2002) 97 Cal.App.4th 785, 795.) Appellant is entitled only to a fair trial, not a perfect one. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1010; *Box, supra*, 23 Ca1.4th at p. 1214; *People v. Barnett* (1998) 17 Ca1.4th 1044, 1182.)

There is no cumulative prejudice, however, where the errors do not undermine the facts supporting guilt, nor result in prejudice. (*People v. Hinton* (2006) 37 Cal.4th 839, 872; *People v. Lucky* (1988) 45 Cal.3d 255, 303; see *Hammond v. United States* (9th Cir. 1966) 356 F.2d 931, 933 [any number of "almost errors," if not errors, cannot constitute "cumulative error"].) Appellant received a fair trial, which is all that is required. (*People v. Alcala* (1992) 4 Cal.4th 742,810; *People v. Kelly* (1990) 51 Cal.3d 931, 970.) As the record fails to demonstrate error or prejudice, appellant's claim fails.

XIV. THE TRIAL COURT DID NOT ERR IN PERMITTING THE PROSECUTOR TO ARGUE THERE WAS NO EVIDENCE OF EMOTIONAL DISTURBANCE

Appellant claims that the trial court made two errors that allowed jurors to infer that the absence of evidence of a particular factor in mitigation, namely, emotional disturbance, could be considered a factor in aggravation. (AOB 280-281.) First, he contends the trial court erroneously denied appellant's "request to modify CALJIC No. 8.85 to strike all factors on which there was no evidence." (AOB 281.) Second, he contends that the trial court permitted the prosecutor to make an "implicit[]" argument that absence of evidence of mitigation "made the crime worse" which could be considered a factor in aggravation. (AOB 280-281.) Appellant's claims are without merit.

A. The Prosecutor Did Not Argue the Absence of Emotional Disturbance as an Aggravating Factor

Appellant claims that the trial court erred by allowing the prosecutor to argue that there was no evidence of emotional disturbance, factor (d) in mitigation, because it permitted *implicit* argument and unlawful *inference* that the absence of evidence in mitigation was an aggravating factor. (AOB 280-281.) In short, he claims that the prosecutor implicitly or almost committed "*Davenport* error." (*People v. Davenport* (1985) 41 Cal.3d 247, 289–290 [prosecutor may not argue that lack of evidence of a mitigating factor may be considered as a factor in aggravation].) His claim is meritless.

Appellant raised this argument initially when he sought modification of CALJIC No. 8.85 to exclude instruction on *all* factors in mitigation he alleged were unsupported by any evidence, namely factors (c), (d), (e), (f), and (h). (179 RT 14122-14123, 14128.) The trial court correctly denied appellant's request to stray from the pattern instruction. (*McKinnon*, *supra*,

52 Cal.4th at p. 692.) Citing a great number of authorities, the trial court observed that, "the California Supreme Court has ruled on this issue multiple times, and the judgment of the Supreme Court again multiple times, is that the trial judge is not required to edit this instruction by deleting the aggravation and mitigation factors which is clearly inadmissible under the fact of the present case." (179 RT 14126-14128.)

Appellant misconstrues the record in claiming that the prosecutor "implicitly "argued an "unlawful inference" that the absence of emotional disturbance could be considered a factor in aggravation. (AOB 280-281.) The prosecutor specifically argued:

> I want to be absolutely clear. I've talked to you about evidence has to be used in categories, so you've—I've talked to you about aggravating factors. There is not an aggravating factor that in any way says lack of mitigation. So the fact that there's no mitigation for Norman Patterson, that is not an aggravating factor. Okay. It's important that you apply this evidence properly. It's part of our due process; it's part of our fair trial.
>
> So the absence of mitigation is not an aggravating factor.

(188 RT 14698.)

Patterson's counsel echoed the prosecutor's argument:

> [T]he thing Mr. [prosecutor] told you this morning is true, and I want to emphasize it. When we're talking about factors in mitigation—and I'll get to those this afternoon—the absence of any one factor is not aggravation. . . . That there's no factor (d), (e), (f), (g), so it's more likely that this is a case that deserves the death penalty? That's not the law.

(188 RT 14731-14732.)

Appellant's claim lacks support in the record even if limited to the particular statements of which he complains on appeal. (AOB 281 citing

"187-RT 14669-70.")[74] Appellant relies on the prosecutor's statements delivered mid-way during his opening argument that discussed the absence of evidence of mitigation with regard to Patterson—not appellant. (187 RT 14664, 1466-14670.)

The prosecutor argued:

> Now, let's look at the mitigation evidence that we have here.
>
> I told you in the opening statement that we're dealing with factors (a) through (k). (a), (b) and (c) are factors in aggravation. And (d) through (k), with one exception, are factors in mitigation. There is one factor (i) that is more of a neutral thing that can be applied as you see fit, and I will come to that in a minute.
>
> The first factor in mitigation is: "whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance."
>
> You have no evidence of that in this case. There is no evidence by Norman Patterson describing his own conduct. There is no evidence by Grayland Winbush describing Norman Patterson's conduct. There is no evidence by Maceo Smith of this. And then you have Kevin Johnson saying that basically in a contemporaneous time frame, a couple days later, [Patterson] is enjoying Christmas.

(187 RT 14669-14670.)

Appellant's counsel objected, and later explained his basis was that he wanted to preserve his earlier objection, implicitly referencing his request

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[74] Appellant's opening brief states, "During closing penalty argument, the court permitted the prosecutor to argue there was no evidence about the first factor in mitigation—emotional disturbance—thus using the alleged absence of emotion disturbance as a factor in aggravation by implicitly arguing it made the crime worse. (187-RT 14669-70.)" (AOB 280-281.)

to modify CALJIC No. 8.85. (187 RT 14681.)[75] The trial court overruled the objection noting that it found nothing improper about the prosecutor's argument. (187 RT 14682.) As just noted, the trial court correctly overruled appellant's objection to modify the jury instruction, and nothing in the prosecutor's argument remotely suggested that the absence of this mitigating factor "made the crime worse," (AOB 281), or served as an aggravating factor. (*McKinnon, supra*, 52 Cal.4th at p. 692.) On the contrary, the prosecutor argued that emotional disturbance "was a factor in mitigation, but did not apply on the facts of this case. There was nothing improper about that assertion." (*People v. Williams* (2013) 56 Cal.4th 165, 199.)

Appellant's premature objection to argument about Patterson highlights the meritlessness of his claim as to appellant. When discussing the absence of this mitigating factor as to appellant, the prosecutor argued:

> Let me talk about factors in mitigation for Grayland Winbush. And if I hit one, I'll put it up. Okay? You saw me taking down for Norman Patterson. So the first one is factor (d), whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance. Like Norman Patterson, we have no evidence of that. No evidence of mental disturbance whatsoever; none. Not from any witness, not from any confession statement. It's just the usual, normal, everyday Grayland Winbush that we have.

(188 RT 14690.)

Contrary to appellant's claim, the prosecutor did not reference a crime made worse, nor suggest that the absence of this mitigating factor was a factor in aggravation or should have tipped the scales in any manner against appellant. (188 RT 14690.) When the prosecutor characterized appellant,

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[75] Counsel asked to put the basis for the objection on the record later, and the trial court responded, "All right. The objection is overruled." (187 RT 14670.)

absent emotional disturbance, as the "usual, normal, everyday Grayland Winbush," the only possible inference was that absent this mitigating factor, the scales were at an equilibrium. (*People v. Panah* (2005) 35 Cal.4th 395, 496-497 [Proper to argue lack of evidentiary support for factors in mitigation and no *Davenport* error implied by record].)

Consistent with the prosecutor's plain and explicit statement that "the absence of mitigation is not an aggravating factor," (188 RT 14698), the prosecutor also argued that evidence in aggravation was limited to incidents he had introduced as Factor B evidence. (188 RT 14693-14694.)[76]

Appellant's reliance on *People v. Doolin* (2009) 45 Cal.4th 390, 456, *Riel, supra*, 22 Cal.4th at p. 1223, and *People v. Hamilton* (1989) 48 Cal.3d 1142, 1184, 1186 is unavailing. In *Doolin*, this Court noted that the statutory language of this mitigating factor "does not unconstitutionally suggest that the absence of such factors amounts to aggravation." (*Doolin*, at p. 456, internal quotations and edit marks omitted.) As the trial court gave the pattern instruction, CALJIC No. 8.85, modeled on this statutory language, appellant's reliance on this authority does not help him. (190 RT 14864; 11 CT 2918.) In *Riel*, the Court rejected the defendant's claim of implied *Davenport* error, and in *Hamilton*, the *Davenport* error was on the face of the record and not implied. (*Riel*, at p. 1223; *Hamilton* at p. 1186.) On the present record, in which *Davenport* error is neither express nor implied, none of appellant's authorities compel a conclusion of error.

B. Error, if any, Was Harmless

Assuming error, it was not reasonably possible the prosecutor's argument affected the verdict. (*Abilez, supra*, 41 Cal.4th 472, 525-526;

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[76] Moreover, the prosecutor set forth additional parameters when he argued that jurors were not to consider the multiple incidents Dr. Candelaria-Greene testified about in the reports as Factor B evidence. (188 RT 14694.)

Chapman, supra, 386 U.S. at p. 24.) Aside from instruction on the factors in CALJIC No. 8.85, the trial court also instructed jurors with CALJIC Nos. 17.40 and 8.88, which informed the jurors that the parties "are entitled to the individual opinion of each juror," and that the weighing of the factors was not a mechanical process, but rather one left to whatever moral or sympathetic weight deemed appropriate for the factors they were permitted to consider. (190 RT 14868, 14871; 11 CT 2918-2919, 2927) Later on, the prosecutor emphasized that to impose death, the jurors, individually, had to be persuaded "that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death." (188 RT 14696.)

Moreover, as demonstrated by the trial court summary of the evidence before it denied the motion to modify the verdict (§ 190.4, subdivision (e)), the evidence in aggravation against appellant was overwhelming in quantity and quality and evidence of circumstances in mitigation was weak. (196 RT 14976-15019.) In context, the relative weight of the implied *Davenport* error, assuming the improper inference was drawn, made the prosecutor's argument harmless beyond a reasonable doubt. (196 RT 14986-14989.)

XV. THE TRIAL COURT DID NOT ERR IN DENYING MODIFICATION OF HIS DEATH SENTENCE UNDER SECTION 190.4, SUBDIVISION (E)

Appellant claims that the trial court erred in denying his application for modification of the death verdict under section 190.4, subdivision (e), in violation of his constitutional rights under the Fifth, Sixth, Eighth and Fourteenth Amendments. (AOB 285.) Citing no specific examples, save one, appellant argues in conclusory fashion that the trial court "either minimized the mitigating factors or ignored them, while at the same time exaggerating the aggravating factors and giving them undue weight." (AOB 285.) Appellant is specific as to a single contention, namely that the

trial court speculated when it stated that appellant had " 'coveted a gun to use in committing robberies, *perhaps in committing murders*,'" with no evidence to support the latter purpose, and thus impermissibly "relied on this speculation as a reason to impose the death sentence." (AOB 285, [referencing 196 RT 14980], italics added.)

The motion to modify the death penalty is automatic upon return of a death verdict. (§ 190.4, subd. (e).) "In ruling on the application, the judge shall review the evidence, consider, take into account, and be guided by the aggravating and mitigating circumstances referred to in Section 190.3, and shall make a determination as to whether the jury's findings and verdicts that the aggravating circumstances outweigh the mitigating circumstances are contrary to law or the evidence presented." (§ 190.4, subd. (e).) The trial judge's function is not to make an independent and de novo penalty determination, but rather, to independently reweigh the evidence and determine whether the weight of the evidence supports the jury's verdict. (*People v. Jones* (1997) 15 Cal.4th 119, 190-191, disapproved on other grounds in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1; *Cunningham*, *supra*, 25 Cal.4th at p. 1039.) On direct appeal, the California Supreme Court reviews the trial court's determination after independently considering the record and does not make a de novo determination of penalty. (*People v. Memro* (1995) 11 Cal.4th 786, 884.)

As a threshold matter, appellant's claim that the trial court refused to modify the death verdict because the trial court considered an improper inference purportedly not supported by the record is forfeited by his failure to assert an objection at trial. (*People v. Tafoya* (2007) 42 Cal.4th 147, 196; *People v. Mungia* (2008) 44 Cal.4th 1101, 1139-1141 [forfeiture absent contemporaneous objection allowing trial court to correct the alleged error].) Assuming his claim is preserved, it is nonetheless without merit.

As defense counsel argued in the guilt phase, there was testimony from both Botello and appellant that appellant coveted Botello's gun. (164 RT 12900.) Indeed there was evidence that appellant's stated purpose was to use the gun to commit robberies. (122 RT 9168, 9181-9183.) Appellant's concern that the trial court's ruling was based on speculation that appellant also coveted the gun to commit murders overstates the case. The trial court noted, almost as an afterthought, that appellant "perhaps" wanted the gun for this purpose. (196 RT 14980.) Moreover, this was a reasonable inference, assuming the inference was drawn, given that there was testimony that appellant wanted to kill people, or kill bystanders during robberies. (116 RT 7751; 118 RT 7901-7902; 127 RT 9661-9662, 9683.) Most important, however, was that appellant did kill someone, without a gun, and indeed, by two different means that were especially brutal and invasive. In context, as noted in the portions quoted in appellant's opening brief, the trial court's concern was with appellant's overall history of extreme violence, without regard to the nature or origin of the weapon. (AOB 282-284.)

Furthermore, the trial court's extensive ruling, recounting in detail the overwhelming evidence in aggravation, made clear appellant's desire for a gun, for whatever reason, was not the sole or most critical factor in the court's decision. (196 RT 14997.) The trial court noted that the Factor B evidence:

> demonstrate[d], again, beyond a reasonable doubt, that Grayland Winbush's pattern of violence—often extremely severe violence—had extended throughout his life, both before the murder of Erika Beeson and after he committed the murder. They demonstrate that Grayland Winbush was extremely violent and is extremely violent towards virtually everyone with whom he has contact. Everyone. Everywhere, he is violent towards his peers. He is violent towards people he knows. He is violent towards strangers. He is violent towards police officers. He is violent towards counselors. He is violent towards teachers. He

> is violent towards persons with whom he is incarcerated, fellow inmates in custodial institutions. He is violent towards guards and other staff members in custodial institutions.
>
> The reasonable inference which can and which absolutely must, I think, be honed from this evidence is simply this: the cruel and brutal murder of Erika Beeson was not an aberrant act. It was not an act uncharacteristic of Grayland Winbush. It was not an isolated act, somehow not representative by who he is or how he has led his life. On the contrary, the murder of Erika Beeson was entirely in character for Grayland Winbush. It was a demonstration—a horrific and terrifying demonstration–of exactly who he is and exactly who he has always been, and, most importantly, exactly who he will continue to be in the future.

(196 RT 14997-14998.)

Thus, even if considered on the merits, the record demonstrates in overwhelming detail that the trial court adequately and extensively reviewed, considered, and weighed the circumstances in aggravation and mitigation and its ruling must be upheld. (*Cunningham, supra*, 25 Cal.4th at p. 1040.) Assuming error, it was harmless. (*People v. Whitt* (1990) 51 Cal.3d 620, 660 [*Davenport* error harmless under any standard where primary aggravating weight drawn from callous nature of the crimes and defendant's prior convictions].)

XVI. IMPOSITION OF THE DEATH PENALTY FOR FELONY MURDER DOES NOT VIOLATE THE EIGHTH AMENDMENT OR INTERNATIONAL LAW

Appellant claims that the death penalty is a disproportionate punishment for felony murder in violation of his rights under the Eighth Amendment and International Law as it does not require a culpable state of mind. (AOB 286, 296.) He claims that he was sentenced to death "solely because of the robbery-murder special circumstance" citing cases in which a defendant's involvement was tangential to the murder. (See, e.g., *Tison v. Arizona* (1987) 481 U.S. 137, 158 [upholding conviction of get-away driver

as accomplice]; *Enmund v. Florida* (1982) 458 U.S. 782, 797 [reversing conviction of get-away driver as aider and abettor]; *Anderson*, *supra*, 43 Cal.3d at p. 1147 [aider and abettor defense].) Appellant's involvement in Beeson's murder, by contrast, was not attenuated, and indeed, his intention to kill was well-demonstrated when he not only strangled her, but stabbed her multiple times to assure himself she was dead.

Moreover, this Court has repeatedly rejected such claims, and appellant offers nothing to distinguish his case from those previously decided. (See, e.g., *People v. Stanley* (2006) 39 Cal.4th 913, 966-967 [and cases cited therein].) Contrary to appellant's claim, "[t]he death penalty as applied in this state is not rendered unconstitutional through operation of international law and treaties." (*Nelson, supra*, 51 Cal.4th at p. 227.)

XVII. THERE WAS NO CUMULATIVE ERROR

Appellant claims that he was deprived of due process during the guilt and penalty phases because cumulatively, the claimed errors were prejudicial and require reversal under *Chapman v. California, supra*, 386 U.S. 18. (AOB 303, 306.) He is incorrect.

"The 'litmus test' for cumulative error 'is whether defendant received due process and a fair trial.'" (*Cuccia*, *supra*, 97 Cal.App.4th at p. 795.) Appellant is entitled only to a fair trial, not a perfect one. (*People v. McDowell* (2012) 54 Cal.4th 395, 442; *Cunningham*, *supra*, 25 Cal.4th at p. 1010; *Box*, *supra*, 23 Cal.4th at p. 1214; *People v. Barnett*, *supra*, 17 Cal.4th at p. 1182.)

There is no cumulative prejudice, however, where the errors do not undermine the facts supporting guilt, nor result in prejudice at either the guilt of penalty phase. (*Virgil*, *supra*, 51 Cal.4th at p. 1290-1291; *Hinton*, *supra*, 37 Cal.4th at p. 872; *Lucky, supra*, 45 Cal.3d at p. 303; see *Hammond v. United States*, *supra*, 356 F.2d at p. 933 [any number of "almost errors," if not errors, cannot constitute "cumulative error"].)

Appellant received a fair trial, which is all that is required. (*Alcala*, *supra*, 4 Cal.4th at p. 810; *Kelly*, *supra*, 51 Cal.3d at p. 970.)

Appellant has not demonstrated error or prejudice. This claim therefore fails.

XVIII. APPELLANT'S RIGHTS ARE NOT VIOLATED BY THE TIME INCURRED IN PROCESSING HIS APPEAL

Appellant claims that, through no fault of his own, he has suffered too much delay in his appeal in violation of his Eighth Amendment right to be free from cruel and unusual punishment, his Fourteenth Amendment rights of due process and equal protection, and international law. (AOB 307.)

This Court has repeatedly rejected such claims, and appellant offers nothing to distinguish his case from those previously decided.

"The death row delays in the present case do not constitute cruel and unusual punishment because they resulted from the 'desire of our courts, state and federal, to get it right, to explore ... any argument that might save someone's life.'" *McDowell, supra*, 54 Cal.4th at p. 412 ; *People v. Brown* (2004) 33 Cal.4th 382, 404; *People v. Demetrulias* (2006) 39 Cal.4th 1, 45 [and cases cited therein]; *Knight v. Florida* (1999) 528 U.S. 990, [and cases cited therein].)

XIX. ERRORS OF STATE LAW ARE NOT AUTOMATICALLY DEEMED VIOLATIONS OF FEDERAL DUE PROCESS

Appellant claims, in conclusory fashion, that unspecified violations of state law, indeed, "any" and thus all violations of state law, should be deemed federal violations of due process. (AOB 312.) He is incorrect and his claim must be rejected.

As a preliminary matter, appellant seeks no remedy on direct appeal by raising this issue. (AOB 312). Presumably, appellant raises this nonspecific "catch-all" issue to avoid a exhaustion bar in any subsequent

federal habeas petition. Appellant's reliance on *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346 for the proposition that unspecified state errors are automatically due process errors of constitutional dimension has been summarily rejected as meritless. (See, e.g., *People v. Weaver* (2001) 26 Cal.4th 876, 986-987.) Appellant's claim is contrary to Congress's stated intent to limit federal review by habeas to questions of federal law only. "A contrary holding would convert all incorrect rulings by our trial courts into constitutional error. We thus reject his reading of *Hicks*." (*Boyette, supra*, 29 Cal.4th at p. 419, fn. 6.)

XX. PROCEDURAL BARS APPLY IN CAPITAL CASES

Appellant requests, rather than claims, that this Court ignore all procedural bars to his claims, and consider each one on the merits. (AOB 313.) While this Court may have the discretion to do so depending on the procedural bar at issue, nothing compels a different standard for applying a procedural bar in a capital case. (see *Clair, supra*, 2 Cal.4th at p. 662.)

XXI. ISSUES ANTICIPATED TO BE RAISED BY UNFILED HABEAS PETITION CANNOT BE INCORPORATED INTO THIS DIRECT APPEAL

Lacking any authority, appellant asks this Court to incorporate all issues he may raise in his anticipated habeas petition in this appeal. (AOB 314.) As a threshold matter, his request is premature, in essence, placing an unborn horse before a cart that he is thinking about remodeling. Even if possible, his request ignores the procedural requirements and timelines that distinguishes direct appeal from the discretionary review in a habeas petition for extraordinary relief. This Court has previously rejected such requests and should do so again. "[H]abeas corpus cannot serve as a substitute for an appeal, and, in the absence of special circumstances constituting an excuse for failure to employ that remedy, the writ will not lie where the claimed errors could have been, but were not, raised upon a

timely appeal from a judgment of conviction." (*People v. Richardson* (2008) 43 Cal.4th 959, 1038.)

XXII. CALIFORNIA'S DEATH PENALTY STATUTE DOES NOT VIOLATE THE UNITED STATES CONSTITUTION

As appellant acknowledges, his claim that California's death penalty statute violates the federal constitution have been repeatedly rejected by this Court. (AOB 315). Appellant raises claims here to preserve them for federal review. (AOB 315). As he offers nothing to distinguish his case from those previously decided, his claims should be rejected. (See, e.g., *Nelson, supra*, 51 Cal.4th at pp. 225-227 [and cases cited therein]; *People v. Harris* (2005) 37 Cal.4th 310, 365-366 [and cases cited therein].)

XXIII. SPECIAL CIRCUMSTANCES UNDER SECTION 190.2 IS NOT IMPERMISSIBLY BROAD

Appellant asserts that Penal Code Section 190.2 is constitutionally defective as it fails to properly narrow the class of death-eligible defendants. (AOB 317.) This Court has repeatedly rejected such claims, and appellant offers nothing to distinguish his case from those previously decided. (See, e.g., *Stanley*, *supra*, 39 Cal.4th at p. 958 [and cases cited therein]; *People v. Demetrulias* (2006) 39 Cal.4th 1, 43 [and cases cited therein].) Furthermore, the United States Supreme Court has held that California's death penalty statute performs the requisite narrowing function. (*Tuilaepa, supra*, 512 U.S. at p. 976.)

XXIV. CALIFORNIA'S DEATH PENALTY PROVIDES APPROPRIATE SAFEGUARDS TO AVOID ARBITRARY AND CAPRICIOUS SENTENCING

Appellant asserts that Penal Code Section 190.3(a) fails to adequately guide the jury's deliberations, thereby resulting in arbitrary and capricious imposition of the death penalty. (AOB 319-320.) This Court has repeatedly rejected such claims, and appellant offers nothing to distinguish

his case from those previously decided. (See, e.g. *Stanley, supra*, 39 Cal.4th at p. 967 [and cases cited therein]; *Harris*, *supra*, 37 Cal.4th at p. 365 [and cases cited therein].) Moreover, the United States Supreme Court has rejected this claim too with regard to California's death penalty. (*Tuilaepa v. California*,, *supra*, 512 U.S. at p. 979.)

XXV. CALIFORNIA'S DEATH PENALTY PROVIDES APPROPRIATE SAFEGUARDS TO AVOID ARBITRARY AND CAPRICIOUS SENTENCING

Appellant sets forth a broad, somewhat repetitive, claim attacking the provisions of California's death penalty as depriving him of necessary safeguards to avoid arbitrary and capricious sentencing. (AOB 321-341) These include: lack of written findings or unanimity regarding aggravating circumstances; no requirement that aggravating circumstances be proved beyond a reasonable doubt or found to outweigh mitigating circumstances; no instruction as to burden of proof except for other criminal activity and prior convictions; death is the appropriate punishment, absence of intercase proportionality review, uncharged activity as an aggravating factor, and instruction on factors of circumstances in aggravation. All of these claims have been previously rejected by this Court, and appellant offers nothing specific to his case that would justify a departure from those holdings. (See, e.g., *Demetrulias, supra*, 39 Cal.4th at pp. 39-45 [and cases cited therein]; *Harris, supra*, 37 Cal.4th at p. 365 [and cases cited therein]; *Nelson, supra*, 51 Cal.4th at p. 227.)

XXVI. CALIFORNIA'S DEATH PENALTY STATUTE DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE

Appellant asserts that the California death penalty statute violates the Equal Protection Clause of the Constitution due to its failure to require a specific burden of proof or unanimous findings for aggravating circumstances. This claim has previously been rejected by this Court and

appellant offers nothing specific to his case that would justify a departure from that holding. (See, e.g. *Harris, supra*, 37 Cal.4th at p. 365 [and cases cited therein]; *Nelson, supra*, 51 Cal.4th at p. 227.)

XXVII. CALIFORNIA'S USE OF THE DEATH PENALTY DOES NOT VIOLATE THE EIGHTH AND FOURTEENTH AMENDMENTS OR INTERNATIONAL LAW

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

XXVIII. CALIFORNIA'S USE OF THE DEATH PENALTY DOES NOT VIOLATE INTERNATIONAL LAW

Appellant asserts that California's use of the death penalty violates international law. This Court has repeatedly rejected such claims and appellant offers nothing specific to his case that would warrant a reversal of that position. (See, e.g. *Demetrulias, supra*, 39 Cal.4th at p. 43 [and cases cited therein]; *Harris, supra*, 37 Cal.4th at p. 365 [and cases cited therein], *Nelson, supra*, 51 Cal.4th at p. 227 [and cases cited therein].)

CONCLUSION

Accordingly, respondent respectfully requests that the judgment be affirmed.

Dated: July 11, 2013

Respectfully submitted,

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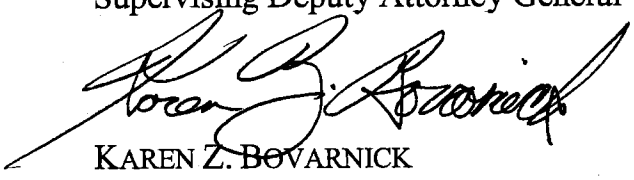

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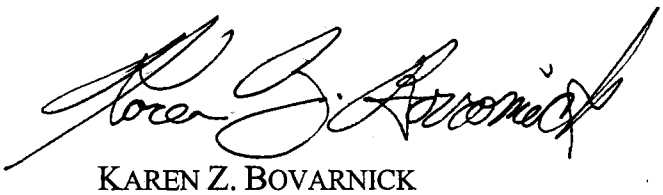
CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S BRIEF** uses a 13 point Times New Roman font and contains 77,842words.

Dated: July 11, 2013

KAMALA D. HARRIS
Attorney General of California



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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Winbush**
No.: **S117489**

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 July 11, 2013, I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on July 11, 2013, at San Francisco, California.

B. Zuniga
Declarant

Signature

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