SUPREME COURT COPY

In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **KEVIN DARNELL PEARSON,** **Defendant and Appellant.**	**CAPITAL CASE** Case No. S120750

SUPREME COURT
FILED
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Deputy

Los Angeles County Superior Court Case No.
NA039436
The Honorable Bruce F. Marrs, Judge

RESPONDENT'S BRIEF

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DEATH PENALTY

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STATEMENT OF THE CASE

In the second amended information filed by the Los Angeles County District Attorney, appellant was charged with murder (count I; Pen. Code, § 187, subd. (a))[1], second degree robbery (count II; § 211), kidnapping to commit another crime (count III; § 209, subd. (b)(1)), forcible rape while acting in concert (count IV; § 264.1), forcible rape (count V; § 261, subd. (a)(2)), sexual penetration by foreign object while acting in concert (count VI; §§ 289, subd. (a)(1), 264.1), sexual penetration by foreign object (count VII; § 289, subd. (a)(1)), and torture (count VIII; § 206). As to count I, the following special circumstances were alleged: the murder was committed while appellant was engaged in the commission of (1) robbery (§ 190.2, subd. (a)(17)(A)); (2) kidnapping (§ 190.2, subd. (a)(17)(B)); (3) kidnapping for purposes of rape (§ 190.2, subd. (a)(17)(B)); (4) rape (§ 190.2, subd. a)(17)(C)); and (5) rape by foreign object (§ 190.2, subd. (a)(17)(K)). It was further alleged that the murder was intentional and involved the infliction of torture within the meaning of section 190.2, subdivision (a)(18). As to counts IV to VII, it was further alleged that the victim was kidnapped and tortured within the meaning of section 667.61, subdivisions (a) and (d), and that the victim was kidnapped and a deadly weapon was used within the meaning of section 667.61, subdivisions (a), (b), and (e). As to counts III to VII, it was further alleged that appellant used a dangerous and deadly weapon within the meaning of section 12022.3, subdivisions (a) and (b).[2] As to all counts, it was further alleged

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

[2] Appellant states that application of section 12022.3, subdivision (b), on counts III to VII constitutes error and that only section 12022.3, (continued...)

that appellant personally used a deadly and dangerous weapon within the meaning of section 12022, subdivision (b)(1). (4CT 1113-1122.)

Appellant pleaded not guilty and denied the allegations. (4CT 1124-1125.) Trial was by jury. (6CT 1466.) On September 5, 2003, appellant's motion to exclude his statement was denied. (56CT 16089.) On the same day, the presentation of evidence on the guilt phase began. (56CT 16089-16091.) At 2:45 p.m. on September 24, 2003, the jury deliberations on the guilt phase began. (56CT 16139.) At 2:20 p.m. on September 26, 2003, the jury found appellant guilty as charged.[3] (57CT 16253-16275.)

On September 30, 2003, jury trial in the penalty phase began. (57CT 16277-16279.) At 5:10 p.m. on October 2, 2003, jury deliberations began. (57CT 16287.) On October 3, 2003, the jury announced a deadlock, but the court ordered the jury to continue deliberations. (57CT 16291-16292.) At 10:45 a.m. on October 7, 2003, the jury reached a verdict of death. (57CT 16304, 16307-16308.)

On November 19, 2003, the court denied appellant's motion to modify the death penalty verdict. (58CT 16571-16573.) On the same day, the trial court sentenced appellant to death on count I. As to the remaining counts, the trial court sentenced appellant to 66 years plus life with the possibility of parole plus 25 years to life in state prison. The court ordered appellant to pay a $10,000 restitution fine (§ 1202.4), and a parole revocation fine (§ 1202.45) in the same amount was imposed and stayed. The court granted appellant 2,050 days of presentence custody credits,

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(...continued)
subdivision (a), allegation applied. (AOB 4, fn. 4.) There is no error, as the amended information alleged both subdivisions.

[3] On count I, the jury found that appellant was "[a]n Aider and Abettor and had the intent to kill; or was a Major Participant and acted with reckless indifference to human life." (57CT 16253.)

consisting of 1,783 days of actual custody and 267 days of conduct credit. (58CT 16571-16590.)

This appeal from the judgment of death is automatic. (§ 1239, subd. (b).)

STATEMENT OF FACTS

I. GUILT PHASE

A. Prosecution Evidence

On December 29, 1998, Monty Gmur lived on Cedar Avenue in Long Beach. Appellant, Gmur's friend, lived next door. Appellant visited Gmur regularly to use a music studio in Gmur's home. (16RT 3212-3213, 3265-3266.) On that day, appellant was at Gmur's house for awhile along with other people. (16RT 3213-3214.) When appellant left the house with "Chris," Warren Hardy, also known as "No Good," and Jamelle Armstrong, Hardy's half-brother and also known as "June," they were drunk but walking fine. (16RT 3249-3250, 3268, 3282-3283.)

Sometime between 11:00 p.m. and midnight, Penny Keptra, also known as Penny Sigler ("Sigler"), left her home in Long Beach to go to a store. Her friend Joseph O'Brien gave her a ten dollar book of food stamps and asked her to buy him a soda and candy bar. O'Brien had purchased the food stamp book from Nix's Check Cashing in Long Beach. O'Brien never saw Sigler again. (16RT 3438-3439.)

Sigler was 5 feet 2 inches tall and weighed 115 pounds. (17RT 3841.) On December 30, 1998, Sigler's dead body was discovered by the embankment of the 405 freeway in Long Beach near Wardlow and Long Beach Boulevard. (16RT 3439; 17RT 3626.) A chain link fence on the west side of the embankment ran parallel to a drainage ditch. A nylon mesh to keep trash out of the drainage ditch was held up by wooden stakes.

(17RT 3628-3631.) A large amount of blood was found in the drainage ditch near the body, and smeared blood was found on the mesh and fencing. (17RT 3632, 3635-3639.) A broken stake was found in the drainage area, and a tennis shoe (People's Exh. 16I) was found on the embankment. (17RT 3637, 3640.)

The same day, appellant told Gmur, "We killed a white woman" after they had left Gmur's house. (16RT 3214-3215.) After Gmur heard about the murder on the news, he called appellant and asked, "Please tell me I'm not look at you guys on the news." Appellant said he had a lot to tell Gmur. (16RT 3235-3236.) On December 31, 1998, appellant told Gmur that after he left Gmur's house, he got separated from Hardy at the Wardlow train station and that he tried to stop Hardy when he saw Hardy stomp on a woman. (16RT 3215-3216, 3264.) Appellant said he was worried he had left his fingerprints on a shoe left behind at the crime scene and he had helped Hardy and Armstrong move the body over a fence. Appellant blamed Armstrong and especially Hardy for all of the violence inflicted upon the victim. (16RT 3233-3235.) Appellant said Hardy asked the woman for money. She said she did not have any, but Hardy became enraged after finding food stamps on her. (16RT 3237.) Hardy hit her with a stick. (16RT 3268.)

Appellant was like a son to Rosemary Furtado, who lived with Steven Lam. (17RT 3525-3526.) A day after the murder, appellant came to Furtado's house and told her that "something bad had happened." (17RT 3527-3528.) Lam overheard appellant tell Furtado that he had helped his friends move a body. (16RT 3441-3443.)

Before New Year's Eve in 1998, appellant went to Tiyarie Felix's house around 2 a.m. with Armstrong and Hardy. Felix was Hardy's girlfriend. Appellant had a blue duffle bag, which he placed in the back

bedroom. (16RT 3313-3318, 3323-3324, 3349-3351, 3418.) Later, appellant and Armstrong left without the duffle bag. (16RT 3345-3346.)

On January 5, 1999, Gmur reported appellant to the police. (16RT 3216; 17RT 3646-3647.) Appellant was arrested. (17RT 3649-3650.) On January 6, 1999, Long Beach Police Detective Bryan McMahon advised appellant of his *Miranda*[4] rights and interviewed him. (17RT 3625-3626, 3652-3656, 3708-3709.) Initially, appellant did not mention the Sigler murder. (17RT 3655.) Then he said he was at Gmur's house on December 29, 1998, and left with "Chris," Hardy, and Armstrong. After "Chris" went home, they purchased some liquor and drank near the Metro station. They took the train to the Wardlow station. As they walked towards Long Beach Boulevard, Hardy fell behind appellant and Armstrong. When a woman screamed, "Help me," appellant turned around and saw Hardy punching a woman. The woman broke away from Hardy as he grabbed her jacket. When the woman tried to climb a fence, Hardy hit her with a stick. She ended up on the other side of the fence, and Hardy, Armstrong, and appellant jumped the fence. Hardy continued beating her with the stick and stomped on her. After Hardy dragged the woman's body to a drainage ditch area, he sat on her chest, unzipped his pants, and said, "Suck my dick." When appellant told Hardy that he could get AIDS because the victim's face was bloody, Hardy zipped his pants and continued beating her with the stake. When Hardy jabbed the stick about six to eight times into the victim's vagina, Armstrong said, "Cool," and assisted. After appellant said, "What the heck are you doing," Hardy stopped and said they had to clean up. (17RT 3656-3661, 3666-3669.)

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

Following appellant's idea to move the body, appellant and Armstrong wrapped their shirts around the victim to avoid leaving any fingerprints and dragged her up the embankment. They put all the clothing into a bag and jumped over the fence. While waiting for the bus, Armstrong threw the stake into a field. At the transfer stop, Hardy threw away the bag of clothing in a trash can.

On the night of the murder, appellant wore an olive colored Dickies long-sleeved shirt, brown Dickies pants, black socks, white t-shirt, and black tennis shoe with gold trim. Armstrong wore a gray sweater and overalls. Hardy wore a white shirt with brown stripes, brown cap, and brown pants. There was some blood on appellant's and Hardy's clothing. They stayed at Hardy's girlfriend's house that night. The next day, appellant and Hardy went back to Long Beach for some clothing. (17RT 3669-3674.)

Following the interview, appellant was taken to where Armstrong threw the stake, but the stake was never found. (18RT 3708-3709.) Officers returned to the crime scene and found a white sock and a food stamp book cover. (16RT 3400, 3402-3405.) The book cover was found about 30 yards away from the victim's body. (16RT 3410.) From appellant's house, officers recovered a pair of black and white tennis shoes with gold trim, a letter, and a rag with a stain on it. (18RT 3819-3820.)

On January 7, 1999, search warrants were served on Hardy at Felix's house and on Armstrong. (18RT 3710-3714.) From Felix's house, officers recovered Hardy's leather jacket[5] (People's Exh. 13), hat, clothing, and size 9 Guess shoes (People's Exh. 17A-C), as well as a food stamp book (People's Exh. 34). They also found Haryd's gray duffle bag from the

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[5] According to Gmur, Hardy wore a similar jacket on the night of the murder. (16RT 3229-3230.)

master bedroom and a blue duffle bag from the back bedroom. (16RT 3306-3312, 3317-3320, 3412-3421; 19RT 3903.) Inside the blue duffle bag, the officers found a pair of size 12 black Redwood boots (People's Exhs. 17D-F, 29), and some clothing, including brown Dickies pants (People's Exh. 12). (16RT 3418-3419, 3429; 19RT 3902-3903.) According to Gmur, appellant wore similar boots and pants on the night of the murder. (16RT 3230-3233.)

After officers spoke with Hardy and Armstrong, Detective McMahon interviewed appellant again. When Detective McMahon told appellant to tell the truth and that his story was inconsistent with Hardy and Armstrong's story, appellant said everything he had said up until taking the train to the Wardlow station was true. (18RT 3713-3716.) As Hardy, Armstrong, and appellant walked up Wardlow being boisterous and saying, "Happy New Year. Merry Christmas," a woman yelled back, "Yeah, Merry Christmas. Happy New Year." They walked up to her. After talking to her, "things started getting a little crazy," and Hardy asked her for money. The victim said she did not have any, but appellant went through her pockets. When the victim tried to get away, appellant and Armstrong took her to the ground and took her clothes off. After they undressed her, Hardy said, "We have to finish the job." (18RT 3716-3720.)

Armstrong and Hardy stomped on the victim's upper body and head. After appellant and Armstrong lifted the victim and threw her over a chain link fence to the embankment area, they jumped the fence. Armstrong dragged the victim, who was calling for help, down to the drainage ditch area behind a business. As Armstrong held one of the victim's legs, appellant held her other leg and inserted his penis into her. She struggled and told him to stop. (18RT 3720-3724.) After appellant got off of her, Hardy walked up with a stake and began beating her. When Hardy stomped on her, Armstrong and appellant joined in. Appellant, who was

wearing large steel-toe black boots that weighed about 10 pounds and had waffle-type soles, stomped on her about five or six times. After Armstrong took the stake from Hardy and jabbed it into the victim's vagina, Hardy joined. Together, they shoved the stake into the victim's vagina several times. (18RT 3724-3726, 3731-3732, 3849-3850.)

Appellant and Armstrong wrapped their shirts around the victim's hands and legs and dragged her body up the embankment. They put their shirts and the victim's clothing into a plastic bag that Hardy had found. (18RT 3726-3729.) Seeing only one shoe, Hardy asked if all the clothing had been collected. After he was told that they had the other shoe, the three men jumped the fence. Armstrong threw the stake away in a field, and they took a bus to Hardy's girlfriend's house in Los Angeles. They threw the clothing away in a trash can at a bus stop in Los Angeles. (18RT 3729-3730.) Hardy spent the victim's food stamps at a market near his girlfriend's apartment the next day. (18RT 3730-3731.)

Raffi Djabourian, deputy medical examiner of the Los Angeles County Department of Coroner, conducted the autopsy on Sigler. (15RT 2926-2927.) Sigler had 114 injuries, 94 of which were external, and another 25 fractures. (15RT 2995-2996.) Sigler had blunt force injuries on her backside, arm, abdomen, left breast, and upper chest. Her eye injury was consistent with asphyxia or strangulation. Someone stepping on her neck with a heavy shoe could have also caused the eye injury. (15RT 2929-2933, 2892-2893.) Sigler's right ear was partly torn off. She had lacerations and bruisings on both sides of her head, inside of her mouth, neck, and shoulders. The bruisings on her left breast and right thigh were consistent with a bite mark. (15RT 2933-2936, 2939-2940.) Some of her injuries on her hands, arms, and forearms were consistent with defensive injuries. (15RT 2937-2938.) Some of the lacerations were consistent with being thrown over a chain-link fence. (15RT 2983.)

Sigler had multiple fractures in her larynx area, cheeks, skull, and jaw. (15RT 2944-2949, 2987-2989.) Some of her injuries on her neck, thigh, and back, including her broken neck bones, were consistent with the use of a wooden stake. (15RT 2951-2952.) Sigler had multiple bruises and lacerations around her genital and anus areas, and a small wood splinter was found in her vagina. The injuries to her genital and anus areas were consistent with the use of a tapered wooden stake, not a male penis. (15RT 2952-2955, 2968-2969, 2974-2976, 2992-2995.) All of Sigler's lacerations could have been caused by a wooden stake. (15RT 2978, 2985-2986.)

Sigler died from injuries to her head and neck region. Components of her death included blunt force trauma and asphyxia. (15RT 2980-2981.) The bleeding and bruising at the base of her brain was a contributing factor. (15RT 2990-2991.) All of her injuries, including the sexual assault injuries, were premortem. (15RT 2938, 2996-2997.)

DNA analysis was conducted on samples of the leather jacket, brown Dickies pants, overall jeans, black Guess shoes, black Redwood boots, a colored t-shirt, and a bite mark from People's Exhibits 12, 13, and 17. (15RT 3045-3048.) The blood stain on the brown pants came from Sigler. (15RT 3071-3072, 3076-3078, 3094.) The blood stain on the leather jacket contained Sigler's DNA. (15RT 3072-3073, 3094.) The saliva from a bite mark contained Sigler's and Hardy's DNA. (15RT 3073-3074, 3093-3094.) The combined blood and semen stain on the colored t-shirt belonged to Armstrong. (15RT 3138.) Blood stains on one of the black Guess shoe, brown pants, overalls, and leather jacket matched Sigler's DNA profile. (15RT 3139-3141.) A blood stain on one of the black Redwood boot was consistent with Sigler's blood. (15RT 3139-3142.)

The serial number on two of the food stamps that originated at a Nix's Check Cashing in Long Beach and received at Lorena's Market on 6725 South Broadway in Los Angeles matched the food stamp cover found at the

crime scene. (16RT 3175, 3191-3192, 3195, 3437-3438.) The shoe prints found at the crime scene were similar to the shoe patterns of the black Guess shoes from Felix's master bedroom (People's Exh. 17A-C) and the black Redwood boots in the blue duffle bag (People's Exhs. 17D-F, 29). (18RT 3825-3826, 3847-3848.)

After his arrest, appellant sent Furtado a letter. He described bones breaking and wrote, "I didn't kill here [*sic*] [;] I just kicked her in the head six times after she was unconscious." (16RT 3443; 17RT 3490-3491, 3493.) In another letter, appellant told Furtado he was involved in a murder. (17RT 3528-3530.) In a letter appellant sent to Janisha Williams, Furtado's daughter, appellant said that he heard the victim's bones break when she was beaten, that he came upon the victim after Hardy and Armstrong began the beating, and that the victim was raped but that he could not remember who had raped her. (17RT 3530-3533.)

B. Defense Evidence

Appellant testified in his own behalf. (19RT 3904.) In December 1998, appellant lived with his mother, who lived next to Gmur. (19RT 3905-3906.) Appellant worked in the Conservation Corps. (19RT 3943.) Appellant knew his friend Armstrong since 1996 and only met Hardy twice. (19RT 3909-3910.) In 1996, appellant joined the Capone Thugs Soldiers, a rap group started by Armstrong, Hardy, and "Capone," and became known as "Scrappy." There were about 10 boys and 10 girls in the group; each had a nickname. (19RT 3911-3912, 4086A-4087A.) After Armstrong threatened appellant in Hardy's presence in October 1998, appellant did not talk to Armstrong. (19RT 3920.)

Around 4:00 p.m. on December 29, 1998, appellant went to Gmur's house. Appellant wore his work uniform, brown Dickies pants, tan long-sleeved Dickies shirt, and size 10 black steel-toe boots, which were "almost the same" as the boots in People's Exhibit 29. He drank beer and smoked

marijuana with the other people there. (19RT 3920-3925, 3944-3947.) While appellant was in Gmur's studio writing music, Armstrong arrived with Hardy and "Chris." (19RT 3926-3928.) Armstrong wore black boots (People's Exhs. 17 D-F, 29), and Hardy wore black shoes (People's Exh. 17A-C). (19RT 3945-3946.) Appellant and Hardy went to a liquor store and purchased more liquor. At about 9 p.m., appellant, Armstrong, Hardy, "Chris," appellant's brother Harold, and Gannett Bland went to appellant's mother's house, jumped "Chris" into their rap group, and continued drinking. (19RT 3923, 3925, 3929-3935, 3940-3941.)

Later, appellant, Armstrong, and Hardy dropped "Chris" off at a bus stop. Appellant and Armstrong agreed to spend the night at Hardy's house in Los Angeles. When they missed the last train, they walked to Long Beach Boulevard and waited for the bus. But when they saw a train, they took it instead to Wardlow Road. (19RT 3949-3952, 4083A.)

As appellant walked behind Armstrong with his head down, someone yelled, "Ouch." Across the street, Hardy had his hand on Sigler's jacket. (19RT 3953-3957.) Hardy asked Sigler if she had any money. When she said she did not, Hardy said, "Why are you lying to me?" and searched her pockets. Hardy hit Sigler on the shoulder and took off her jacket. Armstrong held Sigler's hands while Hardy searched the jacket. Appellant told Armstrong and Hardy to leave her alone, but they continued to assault her. (19RT 3958-3960.) Hardy said, "Why you start lying to me?" and punched her face. When Sigler spat on him, Armstrong hit her on the back of the head with his fist. Appellant told them to leave her alone, but they continued attacking her. (19RT 3963-3964.) After Hardy and Armstrong had Sigler on the ground, they kicked her for awhile before throwing her over a chain link fence. Sigler, distressed and in pain, said, "Help me," in a voice that sounded "like a gurgle." Hardy, Armstrong, and appellant climbed over the fence. (19RT 3964-3966.)

After Armstrong dragged Sigler to the drainage ditch area, Armstrong and Hardy kicked her. Armstrong kicked her in the head and neck area, while Hardy kicked her in the chest. When appellant walked up to them, Armstrong and Hardy stripped Sigler and beat her using their hands and feet. Appellant told them to leave her alone. Hardy turned around and said, "We have to finish the job." (19RT 3966-3971.) As appellant attempted to go back over the fence, Hardy asked where he was going, and appellant stopped. After Hardy walked up to appellant and gave him a "threatening look," appellant returned to where Sigler was. (19RT 3971-3973.)

Armstrong beat Sigler on the head with a stick he had found while Hardy kicked her. Appellant told them to stop, but they continued. (19RT 3973-3976.) When Armstrong hit Sigler on the neck, she stopped making the gurgling sound. (19RT 3981-3982.) Armstrong put the stick in Sigler's vagina as Hardy stomped on her neck. There was a lot of blood on the stick and "all over her." (19RT 3977-3979, 4076A.) After Hardy grabbed the stick from Armstrong, he put it in Sigler's vagina, and Armstrong kicked her. (19RT 3981.) The stick was inserted into her vagina about six or seven times. (19RT 4076A.)

After they stopped the beating, they looked at appellant and said, "We got to clean up." Appellant and Armstrong took their shirts off and moved Sigler's body up the embankment. Appellant did not want to touch her. After appellant and Armstrong put Sigler's clothing and one of her shoes, which matched the shoe in People's Exhibit 16I, in a plastic grocery bag that Hardy had, they climbed over the fence. (19RT 3981-3985, 3988.)

While waiting for a bus, Armstrong threw the stick in a field. During the bus ride, Hardy had an altercation with another passenger. When the bus driver threatened to call the police, appellant told the driver that he would keep Hardy calm. (19RT 3991-3993.) After they got off the bus in

Los Angeles, Hardy threw the bag of clothing in a trash can, and they took another bus to Felix's house. Appellant stopped at a gas station and bought a cigar. They arrived after midnight. (19RT 3995-3997, 4079A.) As they walked in the house, Hardy told Felix that he would kill her if she said anything. (19RT 3998-4000.)

At about noon on December 30, 1998, appellant went home with Hardy, Felix, and Felix's girlfriend. When appellant's mother told him to get out of the house, he packed some clothing and shoes in his blue duffle bag, and they returned to Felix's house. Sometime during the day, Hardy used the food stamps he had found in Sigler's jacket at a store. Appellant spent the night at Felix's house and went back to Long Beach the next day, leaving his duffle bag at Felix's house. Armstrong followed. (19RT 4001-4003, 4005-4009, 4011-4013, 4026.)

At about 4:00 p.m. on December 31, 1998, appellant went to Gmur's house and talked to him about the "mess" involving Sigler. Appellant told Gmur that he was with Hardy and Armstrong when they beat Sigler, robbed her, "and everything." (19RT 4008-4010.)

When appellant was interviewed by Detective McMahon, he was scared and did not tell the truth. (19RT 4013-4014.) In the second interview, appellant changed his story and told the police what they wanted to hear so that he could be released. (19RT 4016-4017.) Appellant did nothing to stop Hardy and Armstrong from killing Sigler because he was afraid of them and believed they would attack him. (19RT 4019.)

II. PENALTY PHASE

A. Prosecution Evidence

Janisha Williams knew appellant for about 11 years, and he was like an older brother to her. Williams, appellant, and about 25 of their friends

belonged to Capone Thugs Soldiers ("CTS"), a gang. To join CTS, one had to fight two people for a few minutes. (21RT 4444-4450.) Twice, appellant used a stick during the initiation. Once, about 10 members of CTS, including Williams and appellant, "beat somebody up for the fun of it." (21RT 4450-4453.) Williams told Detective McMahon that appellant once kicked a Hispanic lady off her bike and that the paramedics came to assist. Appellant has kicked a couple of people off their bicycles. When appellant got angry, he could have a hot temper. (21RT 4453-4456.)

Prior to December 29, 1998, Gmur had known appellant for about a year. At approximately 6:30 p.m. on December 29, 1998, appellant arrived at Gmur's house. Appellant, who was with Hardy, Armstrong, and "Chris," did not smell of alcohol. After about three hours, Hardy left and came back with three bottles of alcohol. Hardy mixed the drinks and drank with Armstrong, appellant, and "Chris." After a few hours, appellant asked Gmur if they could use one of Gmur's back rooms to put "Chris on the block" or jump him into their gang. When Gmur said no, the four men left. Appellant was able to carry on a conversation with Gmur, and he did not have any problems walking. When they returned about 15 minutes later, Hardy phoned someone called "Capone" and said, "Chris is cool. We're going to call him Playboy." After the call, appellant, Hardy, Armstrong, and "Chris" left. None of the men had any problems walking, but they were "loud, boisterous, rowdy, [and] obnoxious." (21RT 4409-4414, 4424-4429, 4432-4434, 4442.)

Teddy Keptra, Sigler's son, was 15 years old when she was murdered. Before the murder, Sigler, who did not work, was home when Keptra came home from school. Since her death, it has not been easy for Keptra, and he did not finish high school. (21RT 4477-4480, 4484.) Keptra worked at a grocery store before Sigler's murder, but he quit the job after the murder.

(21RT 4481, 4485.) Keptra still missed Sigler and thought about her all the time. (21RT 4482.)

B. Defense Evidence

Collette Burnett ("Collette"), appellant's mother, testified. Appellant had one older brother, three younger brothers, and one younger sister. (21RT 4540-4542.) When appellant was four months old, Collette met Harold Burnett ("Burnett"). They later married and lived in South Central Los Angeles. Appellant had a good relationship with Burnett, and Burnett was good to all the children. (21RT 4542-4545.) Burnett died in 1986 when appellant was nine years old. (21RT 4546; 23RT 4778.) In 1989, Collette had a breakdown, and her children stayed with her sister-in-law. Appellant returned to Collette in January 1990 after three weeks in foster care. (23RT 4778-4781.)

In December 1989, Collette began living with Saleem and married him in June 1991. Saleem and Collette practiced Islam. Saleem was abusive to Collette. When Saleem hit Collette, appellant tried to stop him. (23RT 4781-4784.) Collette disciplined her children by spanking, having them stand in the corner, or grounding them. Sometimes, Collette hit appellant with a belt, broomstick, or mop handle. (23RT 4785-4786.) In 1995, Collette had another breakdown and was hospitalized for three days. (23RT 4785-4786.)

Growing up, appellant did chores around the house and babysat his siblings. When appellant was 15 years old, he had his first job selling candy. In 1996, appellant worked at a grocery store and then joined the Job Corps in Utah. In 1997, appellant returned to California and worked with the Conservation Corps. At the time he was arrested, he was not working. (23RT 4787-4790.)

Harold Burnett ("Harold"), appellant's younger brother, testified. Harold was close to appellant, and appellant helped his siblings with school

and homework. (23RT 4843-4844.) Harold and appellant were part of CTS, a rap group. (23RT 4844.) Appellant's siblings did all the household work in the house. Appellant tried to help them so that Collette would not get upset. Collette spanked her children using her hands or belts. (23RT 4848.) Saleem was nice in the beginning, but later became abusive, hitting Collette numerous times. Collette did not allow Saleem to lay hands on the children. (23RT 4848-4849.)

Appellant kept Harold out of trouble by making him go to school and taking him to youth programs. Harold never saw appellant lose his temper or become violent. Harold pled no contest to terrorist threats in January 2003 and was placed on probation. (23RT 4850-4851.)

Barbara Johnson, appellant's neighbor, testified. Johnson met appellant's family when they moved two doors next to her in 1991 or 1992. Appellant and his siblings were respectful. Once, when Saleem tried to hit appellant and another boy with a two by four, Johnson's son took the two by four away from Saleem. (21RT 4516-4519.) Sometimes, appellant helped Johnson with her grandchildren and children by babysitting them and taking them to the park. (21RT 4519-4521.) During the four years appellant lived near Johnson, she never saw him fight, curse, yell, or hang out with gangs. (21RT 4522.) Appellant took care of his younger siblings and appeared to have a good relationship with his mom. Johnson never had any problems with appellant, and she never saw him drink, smoke, gamble, or steal. (21RT 4523-4524.) Later, appellant was in the Job Corps and moved out of the state. (21RT 4524-4526.)

Jack Rothberg, a psychiatrist who examined appellant, testified. (22RT 4573-4576.) Rothberg interviewed appellant four times in 2003, totaling about three to four hours. (22RT 4575-4576, 4611-4612.) Appellant grew up in a difficult environment. He did not see his biological father until he was four years old, and his mother was "indifferent, lazy,

absent," punitive, and sometimes critical. Appellant was close to his stepfather, but he was murdered when appellant was 10 or 11 years old. After his stepfather died, appellant's mother had two psychiatric hospitalizations, and appellant was placed with his aunt and later in foster care. A few years later, appellant's mother married an abusive man who used belts and sticks in physical altercations. Appellant's second stepfather, who was "very difficult, mean, [and] abusive," had altercations with appellant and the family. (22RT 4577-4578, 4582-4583.) Appellant had a good relationship with his siblings and was a parental figure to them to some extent. His relationships with women were reasonably stable. As an adolescent, appellant's performance in school faltered. Appellant was in the Conservation Corps and volunteered at a park to work with younger kids. He also had a nurse's aide license. Appellant, who had a girlfriend in the military, had plans to join the military as well. (22RT 4579-4580.) Appellant was never involved in a gang and had never been arrested. He was interested in rap music and was involved in making music with a group of his friends. (22RT 4584-4585.) Appellant drank often and heavily at times. He also smoked marijuana daily. (22RT 4585.)

Rothberg also related that some months before the incident, Armstrong and Hardy, joined by one of their gang friends, threatened appellant with a gun after appellant confronted Armstrong about stealing something belonging to him. Appellant was afraid and stayed away from Armstrong and Hardy until the night of the incident. (22RT 4586-4587.)

Appellant told the police different versions of what happened on December 29 because he was unfamiliar with police procedures and believed it would help him. He also believed putting the burden on himself would help Armstrong, who recently had a baby. Appellant's statements to the police were more incriminating than the various versions of the event appellant gave to Rothberg. (22RT 4592-4593.) Rothberg explained that

appellant gave various versions about December 29 because the traumatic nature of the event caused him to block unpleasant emotions and to avoid remembering the details. Also, appellant was naïve and believed he could help himself or Armstrong by saying certain things. (22RT 4594-4596.)

Rothberg administered a personality test to appellant. The test showed that appellant tended to be paranoid and had difficulties with substance abuse and impulse control. Appellant's profile was psychotic. (22RT 4597-4599, 4666.) The test also showed that appellant has the potential for dangerous explosive outbursts, is prone to being hostile, tense, and agitated, projects his anger and aggressive impulses onto others, and reacts manipulatively when feeling trapped. (22RT 4665-4667.) Based on appellant's background, Rothberg concluded that appellant was afraid of Armstrong and Hardy, was shocked and paralyzed from doing anything, and felt unable to extricate himself from the situation. (22RT 4599-4601.) Although Armstrong's and Hardy's statements to the police that appellant raped Sigler were consistent with appellant's January 7, 1999, statement, Rothberg believed appellant's claim that he did not rape her. Rothberg also believed appellant over Gmur because Gmur was not "completely independent." (22RT 4629-4636, 4652-4653.) Appellant still had "a great deal" of rage within him. (22RT 4692-4693.)

The parties stipulated that appellant did not have any prior convictions. (23RT 4869.) The jury was instructed that Williams's failure to obey the court's order to be back to be a defense witness was "something" for them to consider. (23RT 4842.)

ARGUMENT

I. THE TRIAL COURT PROPERLY EXCUSED FIVE PROSPECTIVE JURORS FOR CAUSE WHOSE VIEWS ON THE DEATH PENALTY SUBSTANTIALLY INTERFERED WITH THEIR ABILITY TO FUNCTION AS JURORS

Appellant contends that the trial court's excusal of five prospective jurors for cause based on their death penalty views violated his rights to a fair and impartial jury and to due process. (AOB 47-138.) Specifically, appellant argues the following: (1) Roger B. did not express disqualifying death penalty views (AOB 66-67); (2) Christina O. was an "unbiased, unimpaired juror" (AOB 78-79); (3) Christina R.'s belief that life without the possibility of parole ("LWOP") was a more severe penalty than death would not have substantially impaired her ability to perform as a juror (AOB 98-100); (4) Robert D.'s unwillingness to commit to a death penalty if the only special circumstance proved was kidnapping or robbery would not have substantially impaired his ability to perform as a juror (AOB 117-118); and (5) some of Danilo M.'s comments were taken out of context, and the court failed to reconcile those comments with his other responses (AOB 133-135). Respondent disagrees.

A. Applicable Law

A prospective juror may be excluded if his views would prevent or substantially impair the performance of his duties as a juror in the case before the juror. (*Wainwright v. Witt* (1985) 469 U.S. 412, 424 [105 S.Ct. 844, 852, 83 L.Ed.2d 841]; *People v. Earp* (1999) 20 Cal.4th 826, 853; *People v. Bradford* (1997) 15 Cal.4th 1229, 1318; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1140); *People v. Wader* (1993) 5 Cal.4th 610, 652-653.) If a juror gives conflicting or ambiguous answers to questions about his views on the death penalty, the trial court is in the best position to evaluate the juror's responses, so its determination as to the juror's true

state of mind is binding on the appellate court. (*Wainwright v. Witt*, *supra*, 469 U.S. at pp. 428-429; *People v. Phillips* (2000) 22 Cal.4th 226, 234; *People v. Rodrigues*, *supra*, 8 Cal.4th at p. 1147.) Any ambiguities in the record are resolved in favor of the trial court's assessment, and the reviewing court determines whether the trial court's findings are fairlry supported by the record. (*People v. Crittenden* (1994) 9 Cal.4th 83, 122; *People v. Howard* (1988) 44 Cal.3d 375, 417-428.) "When there is no inconsistency, but simply a question whether the juror's responses demonstrated a bias for or against the death penalty, the trial court's judgment will not be set aside if supported by substantial evidence. [Citation.]" (*People v. Roybal* (1998) 19 Cal.4th 481 519.)

B. The Trial Court Properly Excused Prospective Juror Roger B. for Cause

According to his juror questionnaire, prospective juror Roger B. (juror no. 1633) was a 41-year-old bartender from Long Beach. (58CT 16525-16526.) Roger B., a Catholic, attended services regularly and considered religion to be "very important." (58CT 16531-16532.) He had religious beliefs that would prevent him from judging the conduct of another as to the death penalty. (58CT 16532 [question no. 31].) He listed the death penalty as a potential bias or reason that could interfere with his ability to be an impartial juror. (58CT 16552 [question nos. 139-140.)

As to the death penalty portion of the questionnaire, he noted that he had "mixed feelings about the death penalty." (58CT 16561 [question no. 178].) He said that he did not share the views of his church but that he "moderately" held those views. (58CT 16561 [question no. 184].) He believed the death penalty was used "too often." (58CT 16561 [question no. 183].) After affirming that some crimes deserved the death penalty and that he would be able to impose the death penalty (58CT 16562 [question nos. 188, 191], 16565 [question no. 209]), Roger B. stated that he was

unsure about his ability to set aside his religious convictions and decide the penalty question solely upon the factors presented, the defendant's background, and the law (58CT 16563-16564 [question no. 200]).

During oral voir dire, Roger B. told defense counsel that he could consider both death and life without the possibility of parole as options. (8RT 1270.) In discussion with the prosecutor, Roger B. said his "mixed feelings" about the death penalty stemmed from his Catholic upbringing. (8RT 1270-1271.) While the Catholic church was against the death penalty, Roger B. said that he was "on the fence" about the death penalty. (8RT 1271-1272.) He believed death was "a stiff penalty," but said, "I *think* I could [impose the death penalty]." (8RT 1273, 1275, italics added.) When the prosecutor noted that his answer was equivocal, Roger B. said, "Yes. If you want a definitive answer, then I'm not going to give you one and I'll say no. I'll say no, I couldn't, if you want a definite answer." (8RT 1275.) In further questioning by defense counsel, Roger B. said that he would consider both penalty options. (8RT 1275.)

The prosecutor challenged Roger B. for cause. She argued that Roger B.'s response was equivocal and that she doubted his ability to impose the death penalty. (8RT 1276.) Defense counsel countered that Roger B. said he would be able to consider all options. (8RT 1277.) The court noted that while the words, "I *think*, I could [impose the death penalty]" by themselves do not "undermine" *Witt*, Roger B.'s response showed "more than just use, a semantic use." (8RT 1277, italics added.) The court stated:

> The juror's response is a bit equivocal, capable of conflicting and multiple inferences, in a state of mind. [¶] Based upon his responses and his demeanor, this court will excuse him because it's an equivocal response to the question that are [*sic*] provided in this case.

(8RT 1277.) After hearing further argument by counsel and reviewing Roger B.'s juror questionnaire, the court reiterated that the juror's response

was equivocal and granted the prosecution's motion. Specifically, the court noted Roger B.'s "timing of his response, his state of mind, and his demeanor" and agreed with the prosecutor's observations about Roger B.'s "hesitation and length of time it took [him] to answer the questions." (8RT 1278-1282.)

Here, substantial evidence supported the trial court's excusal of Roger B. for cause. Roger B. said his religious beliefs would affect his service as a juror. (58CT 16532.) Although he did not share the views of his church, he stated that he had "mixed feelings" about the death penalty. (58CT 16561.) Even after affirming that he would be able to impose the death penalty in some cases, Roger B., who attended church regularly and deemed religion to be "very important," was unsure whether he could set aside his religious convictions in deciding the death penalty question. (58CT 16531-16532, 16562-16564.) Finally, when pressed for a definitive answer on his ability to impose the death penalty, Roger B. admitted that he could not impose it. (8RT 1275.)

To the extent Roger B. gave conflicting answers, the trial court resolved those differences adversely to appellant by granting the challenge. (*People v. Harrison* (2005) 35 Cal.4th 208, 227-228 [court properly excused juror who said that "maybe" she could not impose the death penalty and later said it would be "very, very difficult" but that she could "probably do it"]; *People v. Ayala* (2000) 24 Cal.4th 243, 275 [because the potential juror's answers were "inconsistent, but included testimony that she did not think herself capable of imposing the death penalty, we are bound by the trial court's determination that her candid self-assessment showed a substantially impaired ability to carry out her duty as a juror"].) Indeed, in addition to his responses, the trial court noted Roger B.'s demeanor during the oral voir dire, including his hesitation and the length of time he took to answer the questions. (8RT 1281-1282.) Because the

trial court's determination as to Roger B.'s true state of mind is supported by substantial evidence, it is binding on this Court. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1114-1115 [while some answers showed a willingness on the part of the prospective juror to follow the law and the court's instruction, other answers furnished substantial evidence of the prospective juror's inability to consider the death penalty].)

C. The Trial Court Properly Excused Prospective Juror Christina O. for Cause

According to her juror questionnaire, prospective juror Christina O. (juror no. 6619) was a 29-year-old single woman from Long Beach who worked as a fraud coordinator for a phone company. (58CT 16476-16479.) She had served as a juror in three trials, including as a foreperson, and said she "would like to be a juror again." (58CT 16483 [question nos. 30, 33].) When asked about her feelings on serving as a juror, she said, "I want to be a juror because I feel I can contribute to the jurors by having unbiased opinions. I think it's our civil duty." (58CT 16484 [question no. 37].) She wrote that she "would like to sit on this case" because she was unbiased, had prior jury experience as a foreperson, and her job would pay for her time. (58CT 16503 [question no. 138].) Later, she reiterated that if she had a choice, she would choose to be a juror on this case because she had time and prior jury experience. (58CT 16519 [question no. 231].)

As to the death penalty, she said she did not "have any feelings" about it. (58CT 16512 [question no. 178].) When asked whether California should have the death penalty, she marked both "yes" and "no" and explained that she did not "have a view on this as of yet." (58CT 16513 [question no. 186].) She was also "uncertain" about whether she "approve[d] or disapprove[d]" of the death penalty (58CT 16519 [question no. 228]). When asked whether she had the same view as those who say they support the death penalty but could not personally impose it, Christina

O. marked "no." However, she immediately qualified that response by writing, "I'm not sure where I stand but if I strongly felt strong about something, I would stand behind it." (58CT 16513 [question no. 188].)

She did not think the death penalty should be abolished because it may have a deterrent effect on some criminals. (58CT 16513 [question no. 187].) She also did not believe the death penalty should be mandatory in all murder cases because "not all murder cases are the same" and at times "it's better for one to live in prison for life." (58CT 16513 [question no. 189].) On LWOP, she "like[d]" the idea that people found guilty would "have to live with their crime for the rest of their live[s]" and that "[i]t's also cheaper than the death penalty." (58CT 16513 [question no. 193].) When asked if it would be impossible for her to vote for death under any circumstances, she circled "no" and explained, "I would have to be in that situation." (58CT 16513 [question no. 194].)

During oral voir dire, Christina O. told defense counsel that she could impose the death penalty in the appropriate case. (11RT 1996). When defense counsel asked her to explain her statement about standing behind her beliefs (question no. 188), Christina O. said, "I think with that answer, because I'm uncertain of how I really feel about the death penalty, unless I had everything presented in front of me, so I don't know what I really meant on that one." (11RT 2001.) She reiterated that she could vote for death "in the appropriate case" and that she "would choose to be a juror on this case because [she] actually ha[d] the time to devote to it." (11RT 2001.)

After stating that she needed to know Christina O.'s feelings about the death penalty, the prosecutor inquired as follows:

> [The Prosecutor]: But in this particular case, it wouldn't be fair to the defendant or the People or the victim's family, if you truly, at this point in time, don't know what you will do.

> Prospective Juror No. 6619: I think with that, I'd have to be an actual juror to see what's presented for me. I'm not saying that I can't vote for it or that I wouldn't vote for it, but I think that I have to have all of the evidence before I can say anything concerning this case itself.

(11RT 2004.) When the prosecutor said she needed to know whether Christina O. was someone that supported the death penalty but could not vote for it, Christina O. said, "No, I could vote for it." (11RT 2004-2005.) Christina O. said she was "positive" that she could vote for the death penalty and volunteered that such penalty would be appropriate in a child murder case. (11RT 2005-2006.)

The prosecutor challenged Christina O. for cause. She argued that Christina O.'s uncertainty about the death penalty made her "a wild card" and that it was unfair to have someone who had "no idea what she's going to do" on the jury. (11RT 2008-2209.) Defense counsel argued Christina O. was uncertain about imposing the death penalty in this case without having heard all the facts but that she would be able to impose it in an appropriate case. (11RT 2209-2210.) The prosecutor countered that most people who did not have a view on the death penalty, like Christina O., usually would not be able to impose it. (11RT 2011.) Citing *People v. Guzman* (1988) 45 Cal.3d 915, the court granted the People's challenge, based on Christina O.'s "equivocal views on capital punishment and conflicting responses." (11RT 2011-2012.)

Later, in ruling on appellant's new trial motion, the court further explained its finding on Christina O. (23RT 4995-4997.) After noting Christina O.'s responses to juror questionnaire numbers 188, 186, and 178, the court explained:

> In analyzing these responses, this juror does not know about the death penalty, has no feelings toward the death penalty, and has no views on the death penalty. She also indicates that if she had a strong feeling about something, she

> would stand behind it. [¶] Given that she has no such strong feelings about the death penalty, the response to question 188 seemingly supports this court's finding regarding her state of mind that she is equivocal on her equivocal view on capital punishment and conflicting and equivocal responses regarding the imposition of the penalty of death. [¶] Likewise, her oral responses to voir dire similarly give the equivocal responses that support her responses to the questionnaire.
>
> [¶] . . . [¶]
>
> Since this juror had no strong feelings on the death penalty, by her own statements, she could not stand behind them. Therefore, when asked whether she's one that supports the death penalty, but yet couldn't impose it, this juror responded quote, "I'm not sure where I stand," close quote.
>
> This series of responses, coupled with her affirmation of the responses during voir dire, gives this court a view of her state of mind, shows an equivocal view on the imposition of the death penalty, and supports this court's grant of a challenge for cause.

(23RT 4996-4997.)

Here, substantial evidence supported the trial court's excusal of Christina O. for cause. Her answers in voir dire seemed to indicate that she would be able to impose the death penalty in an appropriate case. Christina O. did not believe the death penalty should be abolished and volunteered that she could vote for the death penalty in a child murder case.

Nevertheless, viewed in the totality of her other responses, the trial court made a factual determination that her answers did not reflect her true state of mind based on her other answers and demeanor. Christina O. wanted to serve as a juror in this case. Stating that she had previously served as a juror in three trials, she said that she wanted to be a juror again in her questionnaire. (58CT 16483.) Later, she wrote that she wanted to be a juror because she believed she could "contribute to the jurors by having unbiased opinions." (58CT 16484.) She also told defense counsel that she

would choose to be on the jury. (11RT 2001.) And yet her views on the death penalty were ambiguous. Specifically, on question number 188, she first said she did not feel the same as those who support the death penalty but could not personally vote to impose it. Then she qualified her answer by explaining, "*I'm not sure where I stand* but if I strongly felt strong about something, I would stand behind it." (58CT 16513, italics added.) When defense counsel asked her to explain her answer to question number 188, Christina O. reiterated, "I'm uncertain of how I really feel about the death penalty, unless I had everything presented in front of me, so I don't know what I really meant on that one." (11RT 2001.) Based on her answers and demeanor, the court could determine that Christina O. was someone who was uncertain about whether she could personally impose the death penalty but seemingly gave correct answers because she wanted to sit on the jury.

As the United States Supreme Court stated in *Witt*, a juror's bias need not be "proved with 'unmistakable clarity.'" (*Wainwright v. Witt*, *supra*, 469 U.S. at p. 424.) *Witt* explained the difficulty in assessing juror bias:

> [D]eterminations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism. What common sense should have realized experience has proved: many veniremen simply cannot be asked enough questions to reach the point where their bias has been made "unmistakably clear"; these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings.

(*Id.* at pp. 424-425, footnote omitted.) While the record might lack in clarity, *Witt* found that a trial judge could be "left with the definite impression" about a prospective juror's ability to faithfully apply the law. (*Id.* at pp. 425-426.)

That is the situation in this case. After considering Christina O.'s answers, which the court found to be equivocal on her true state of mind

given the totality of her voir dire and questionnaire responses as well as her demeanor, the trial court had a "definite impression" as to her true state of mind regarding the death penalty. As *Witt* concluded, "deference must be paid to the trial judge who sees and hears the juror." (*Wainwright v. Witt*, *supra*, 469 U.S. at p. 426.)

D. The Trial Court Properly Excused Prospective Juror Christina R. for Cause

According to her juror questionnaire, prospective juror Christina R. (juror no. 3806) was a 32-year-old single woman from Los Angeles who worked as a staffing specialist at a bank. (29CT 8194, 8197.) She stated that she "would listen to both sides" and follow the court's instructions. (29CT 8218, 8225-8227 [question nos. 160 & 170].)

As to the death penalty portion of the questionnaire, Christina R. said mandatory punishment in all murder cases should be the death penalty. (29CT 8231 [question no. 189].) She also said LWOP should be the mandatory punishment in all murder cases. (29CT 8231 [question no. 190].) She believed that LWOP was worse for defendants than death because they have to live "the rest of their lives with that on their conscience." (29CT 8232 [question no. 198].) She could not see herself rejecting LWOP and voting for death in an appropriate case. (29CT 8234 [question no. 209].) She could also not see herself rejecting death and voting for LWOP in an appropriate case. (29CT 8234 [question no. 210].) When asked whether "the cost of keeping someone in prison for the rest of their life [would] be a consideration for [her] in deciding the punishment of [LWOP] or death," she checked both "yes" and "no." (29CT 8234 [question no. 213].) She believed that both LWOP and death were severe sentences, but that LWOP was the more severe punishment. (29CT 8236-8237 [question nos. 225-227].)

During oral voir dire, Christina R. changed her answer to question number 209 and said she could reject LWOP and vote for death. (12RT 2202-2203.) But when she told the prosecutor that her answer to question number 210 remained the same, the prosecutor asked whether both of her answers were "no." Christina R. apologized and said she was "a little nervous." (12RT 2203.) Assuming appellant was convicted of first degree murder, one of the special circumstances was found true, and the aggravating factors substantially outweighed mitigating factors, Christina R. said that she could impose the death penalty. (12RT 2205.) When the prosecutor repeated question numbers 209 and 210, Christina R. responded "yes" to both and explained that she could choose either death or LWOP in the appropriate case. (12RT 2205-2206.)

Christina R. also explained that she believed LWOP was the more severe punishment because the defendant would realize "sooner or later" what he or she did was wrong. (12RT 2207.) If the instant case deserved the most severe punishment, Christina R. stated that she would impose LWOP. (12RT 2211-2212.) In further questioning by defense counsel, Christina R. said that she could impose the death penalty in a case where the defendant had no conscience, no remorse, and a history of violence. (12RT 2215.) She also said that she could set her personal beliefs aside and follow the law, which declared death as the worse penalty, and impose it if aggravating factors substantially outweighed mitigating factors. (12RT 2215-2216.)

The prosecutor then asked the following questions:

> [The Prosecutor]: If the mitigating circumstances outweigh the aggravating circumstances, what will you vote for?
>
> [Christina R.]: Life in prison.
>
> [The Prosecutor]: If the mitigating circumstances are equal, what will you vote for?

[Christina R.]: Life in prison.

[The Prosecutor]: If the aggravating factors substantially outweigh the mitigating circumstances, what will you vote for?

[Christina R.]: Life in prison.

[The Prosecutor]: You will never vote for death will you, because you believe that life without the possibility of parole is the absolute worse punishment that can happen to someone, correct?

[Christina R.]: Yes and no.

(12RT 2217.)

Defense counsel submitted without argument, and the prosecutor challenged Christina R. for cause, stating that she would not be able to impose the death penalty. (12RT 2218.) Citing *People v. Cox* (1991) 53 Cal.3d 618, and *People v. Cooper* (1991) 53 Cal.3d 771, the court granted the prosecutor's challenge "based upon the juror's state of mind that is seen by the court in this case." (12RT 2218.)

Here, substantial evidence supported the trial court's excusal of Christina R. for cause. She gave conflicting answers about the death penalty in the questionnaire and during voir dire. (29CT 8231, 8234; 12RT 2202-2203, 2211-2212, 2215-2217.) She wavered on whether she could impose the death penalty under any circumstances. (29CT 8234; 12RT 2202-2203, 2205-2206.) She believed LWOP was the worse penalty but stated that she could follow the law and impose death where aggravating factors substantially outweighed mitigating factors. (12RT 2207, 2215-2216.) In the end, however, she said that she would vote for LWOP if aggravating factors substantially outweighed mitigating factors. (12RT 2217.) Her responses indicated that her views on the death penalty would have substantially impaired her ability to perform her duties as a juror.

Further, to the extent Christina R. gave conflicting or contradictory answers, the trial court resolved those differences adversely to appellant by granting the challenge. Given Christina R.'s vacillations and contradictions, the trial court's conclusion as to her true state of mind—that she was unfit to serve as a juror—must be upheld since it is supported by substantial evidence. (*People v. Griffin* (2004) 33 Cal.4th 536, 558-561 [although at some point, each prospective juror "may have stated or implied that she would perform her duties as a juror," this did not prevent the trial court from finding, on the entire record, that each nevertheless held views that substantially impaired her ability to serve]; *People v. Welch* (1999) 20 Cal.4th 701, 747 [court permissibly excused a juror who said he did not know whether he could ever see himself feeling that death was the appropriate sentence].)

E. The Trial Court Properly Excused Prospective Juror Robert D. for Cause

According to his juror questionnaire, prospective juror Robert D. (juror number 7384) was a 72-year-old, transportation business owner from Long Beach. (42CT 11973-11974, 11976.) As to the death penalty portion of the questionnaire, he stated that he believed the death penalty was "OK in rare circumstances" and should be imposed in "worst cases." (42CT 12009 [question no. 178], 12010 [question no. 191].) He believed both death and LWOP were severe sentences. (42CT 12015 [question nos. 225, 226].) He thought deciding which punishment was more severe was difficult and that "[t]he person convicted must judge this." (42CT 12016 [question no. 227].)

During oral voir dire, Robert D. explained that death would be a worse punishment for him but that someone else might believe LWOP was worse. (12RT 2253-2254.) When defense counsel asked whether he would have an open mind about the sentence where appellant was found guilty of

murder and one or more of the special circumstances, Robert D. said, "it would depend on which of those, because those are very varying degrees of --." (12RT 2248.) When the prosecutor asked Robert D. to elaborate, he said that the special circumstances were in "varying degrees of severity" and that "[i]f the kidnapping were found to be true, but torture was not, that would . . . make a difference in [his] decision." (12RT 2255.) He also explained that if only kidnapping were found true, he "would be less likely to convict or to feel the same as if say all five of those circumstances were found to be true." (12RT 2256.)

When the prosecutor asked if he could impose the death penalty if kidnapping was the only special circumstance found to be true, Robert D. said he would need more information first. (12RT 2256-2257.) The prosecutor explained the penalty phase procedure to Robert D., including the weighing of aggravating and mitigating factors, and posed several hypothetical questions. (12RT 2257-2259.) If kidnap was the only special circumstance found true, Robert D. said he "would have to say life [in prison without the possibility of parole] rather than death." (12RT 2258.) If rape was the only special circumstance found true, Robert D. said he probably could not impose the death penalty. (12RT 2258-2259.) If rape with a stake was the only special circumstance found true, Robert D. said he could impose the death penalty. (12RT 2259.) If robbery was the only special circumstance found true, he said he would "[m]ore likely [than] not" be able to impose the death penalty. (12RT 2259.) If torture was the only special circumstance found true, he said he would "more likely" be able to impose the death penalty. (12RT 2259.)

He also said that his decision whether to impose death "would depend on which of the special circumstances or how many [were found true]," although he could not say how many special circumstances would have to be found true to warrant the death penalty. (12RT 2264-2265.) Ranking

the egregiousness of the special circumstances, he said aggravated rape with a stick and torture were "bad," and rape was next. He did not "see [kidnapping] as serious a special circumstance" or robbery "as much as a special circumstance or serious a special circumstance." (12RT 2265-2266.) He said he would probably not vote for death if kidnapping and robbery were the only special circumstances found true. (12RT 2266.) He also said the only time he would vote for death is if rape with a stake or torture were found true. (12RT 2266-2267.)

When the prosecutor asked if he could "be a judge" and not put himself in the defendant's or the victim's position, Robert D. first answered, "I think so." (12RT 2263-2264.) The prosecutor asked for an affirmative answer, and he said, "I can do that." (12RT 2264.)

In a scenario posed by defense counsel where the robbery involved physical harm or threat of danger, such as being "dragged out in front of your family, children, or something like that," and where appellant had 10 prior robbery convictions, Robert D. said he could vote for death. (12RT 2268.) In another scenario where the murdered victim was kidnapped "in front of their children . . . or from church or something like that," had his finger cut off, and was beaten, and there were aggravating and mitigating factors involving appellant, Robert D. said he could consider the death penalty. (12RT 2269-2270.) In apparent contradiction to his prior statements, Robert D. said he could consider the death penalty "in all of the circumstances." (12RT 2270-2271.)

The prosecutor challenged Robert D. for cause. (12RT 2271.) She argued that he had already decided the criteria for imposing the death penalty and that he would require the prosecution to prove more than one special circumstance or a specific circumstance to be found true in order to impose the death penalty. (12RT 2271.) Defense counsel argued that Robert D. would consider all the facts and that he would impose the death

penalty in an appropriate case where aggravating factors substantially outweighed mitigating factors. (12RT 2272-2273.) The prosecutor countered that Robert D. already knew that the robbery in this case involved food stamps and clothing and that he had already decided that the death penalty was not warranted for a robbery. (12RT 2273-2274.) Defense counsel disagreed and argued that Robert D. was not predisposed but opened to hearing all the facts of the case. (12RT 2274-2275.)

Citing *People v. Roybal, supra*, 19 Cal.4th 481, the court granted the prosecution's challenge. (12RT 2276.) The court noted that a prospective juror's views about the death penalty in the abstract were controlling under *Roybal* and stated that Robert D. had already "assigned weight in the type of case that would qualify versus the type that would not, which is not the law."[6] (12RT 2276.)

Here, substantial evidence supported the trial court's excusal of Robert D. for cause. Robert D. gave conflicting answers on whether he would rely on number and nature of the special circumstances findings, regardless of the circumstances. He stated that he would not be able to impose the death penalty where a defendant was found guilty of murder and only a special circumstance of rape, robbery, or kidnap was found true. (12RT 2258-2259.) Further, defense counsel's hypotheticals failed to "rehabilitate" Robert D. (*People v. Braford, supra*, 15 Cal.4th at p. 1320.) While Robert D. said he would be able to impose the death penalty in extreme scenarios presented by defense counsel involving robbery and kidnapping (12RT 2268-2270), these "hypothetical examples presented more egregious facts than those involved in the present case." (*People v.*

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[6] In *Roybal*, the prospective juror "repeatedly stated that she would not vote for the death penalty 'in this case,' i.e., a case involving a single victim" although she might do so in a case involving multiple victims and cannibalism. (*People v. Roybal, supra*, 19 Cal.4th at p. 519.)

Bradford, *supra*, 15 Cal.4th at p. 1320, and cases cited therein.) Sigler was not "dragged out in front of [her] family, children, or something like that," and appellant did not have any prior convictions. Unless one of the more "egregious" special circumstances, such as rape with a stake or torture, was found true, Robert D. had expressed he would not impose the death penalty. The trial court did not err in determining that Robert D.'s views towards the death penalty would substantially impair his ability to sit as a juror.

Moreover, to the extent Robert D. indicated he would consider all the circumstances, it was a statement in conflict with his earlier ones, and the court made a credibility and factual assessment regarding his true state of mind. "When a juror's views are conflicting or ambiguous, the trial court's determination as to his or her state of mind generally is binding on a reviewing court." (*People v. Roybal*, *supra*, 19 Cal.4th at p. 519, internal quotations omitted, citing *People v. Samayoa* (1997) 15 Cal.4th 795, 822.) Since there was substantial evidence from which the trial court could have concluded that this juror held disqualifying predetermined views on which types of cases warranted the death penalty, it properly excused him for cause.

F. The Trial Court Properly Excused Prospective Juror Danilo M. for Cause

According to his juror questionnaire, prospective juror Danilo M. (juror no. 0746) was a 48-year-old postal worker from Long Beach. (58CT 16427-16428, 16430.) He indicated that he was "nervous" about having to judge the conduct of another and that he did not "like judging other people's conduct." (58CT 16434 [question no. 30].)

As to the death penalty portion of the questionnaire, he noted that he did not have any views on the death penalty (58CT 16463 [question no. 179]), that California should have the death penalty (58CT 16464 [question no. 186]), and that he was not someone who supported the death penalty

but could not impose it (58CT 16464 [question no. 188]). He did not believe that the death penalty should be mandatory in all murder cases, but believed LWOP should be mandatory. (58CT 16464 [question nos. 189-190].) He said the death penalty should be imposed in "heinous crimes." (58CT 16464 [question no. 191].)

In an appropriate case, he could not see himself rejecting LWOP and voting for death, but he could reject death and vote for LWOP. (58CT 16467 [question nos. 209-210].) He did not believe LWOP was a severe sentence because defendants' relatives could still visit them. (58CT 16469 [question no. 225].) He also did not believe death by lethal injection was a severe sentence (58CT 16469 [question no. 226]), but said death was the more severe punishment between death and LWOP (58CT 16470 [question no. 227]). When asked to explain why he thought death was the more severe punishment, Danilo M. wrote, "[T]aking the criminal's life does not bring back the life he took." (58CT 16470 [question no. 227(A)].) He indicated that he would rather not be a juror in this case if he had a choice. (58CT 16470 [question no. 231].)

During voir dire, Danilo M. told defense counsel that whether the death penalty was appropriate in a case depended "on the crime committed or [the] brutality of the crime." (12RT 2377.) After defense counsel explained the aggravating and mitigating factors, defense counsel asked the following:

> [Defense Counsel]: If you considered everything and you felt that life without the possibility of parole was not appropriate in this case, you could vote for death?
>
> Prospective Juror No. 0746: No.
>
> [Defense Counsel]: You would never vote for death?
>
> Prospective Juror No. 0746: No.

[Defense Counsel]: If you decide that life without the possibility of parole was not an appropriate sentence, in this case, could you then vote for death?

Prospective Juror No. 0746: No.

[Defense Counsel]: You could never vote or [*sic*] for death?

Prospective Juror No. 0746: No.

[Defense Counsel]: Under any circumstances?

Prospective Juror No. 0746: Under no circumstances.

[Defense Counsel]: You said you believed in the death penalty.

Prospective Juror No. 0746: Yes, I believe in the penalty[.] [A]s I have said earlier[,] it depends on the kind of crime[,] the brutality of the crime.

(12RT 2379-2380.) When defense counsel asked if he could impose the death penalty after considering everything and deciding that "this was the worse of all cases," Danilo M. said he could. (12RT 2380.)

Danilo M. told the prosecutor that the death penalty would be appropriate in a case where a family was massacred. (12RT 2385.) In a single victim case, Danilo M. said he would need to know more facts about the case. (12RT 2386.) The prosecutor then asked the following:

[Prosecutor]: Tell me, in your mind, how the person has to be killed or murdered, in order for you to impose the death penalty.

Prospective Juror No. 0746: Maybe for fun, you know, for chopping the body up, you know—you know, those kind[s] of stuff.

[Prosecutor]: Anything else you can think of?

Prospective Juror No. 0746: No, ma'am. I'm sorry.

(12RT 2387-2388.)

The prosecutor asked Danilo M. about his statement, "[T]aking the criminal's life does not bring back the life he took":

> [Prosecutor]: . . . . [¶] How is that going to affect you in determining whether or not you should impose the death penalty, that statement that you wrote?
>
> Prospective Juror No. 0746: I mean, I have no idea. But to me, taking one's life for the crime that he committed will bring back everything that was taken out. [¶] To me, maybe there's some way that a person who did that kind of crime can be rehabilitated.
>
> [Prosecutor]: So in your mind, would you vote for life without the possibility of parole, because you believe the person might be able to be rehabilitate[d]?
>
> Prospective Juror No. 0746: Yes, ma'am.
>
> [Prosecutor]: Even if it was an appropriate case for the death penalty?
>
> Prospective Juror No. 0746: I mean, I will vote for the death penalty depending on the brutality of the crime, as I have said earlier. But if, at some point, there comes a point that—see, to me sometimes they kill somebody with a spur of the moment. Now, if you do that, that means you didn't do it purposely or intentionally.
>
> [¶] . . . [¶]
>
> Prospective Juror No. 0746: So maybe that person can be—what do you call that—in one way or another can be reformed.
>
> [Prosecutor]: Okay. So if somebody kills another person, purposely or intentionally, they might be able to be reformed so, therefore, you would vote for life without the possibility of parole?
>
> Prospective Juror No. 0746: Yes, ma'am.
>
> [Prosecutor]: Do you believe that all people can be reformed who commit crimes?

Prospective Juror No. 0746: Yes, ma'am.

[Prosecutor]: So would it be accurate to say that because you believe that all people who commit crimes can be reformed, you would always vote for life without the possibility of parole?

Prospective Juror No. 0746: Yes, ma'am, that's a possibility.

(12RT 2388-2389.)

Defense counsel further questioned Danilo M. about his views on reform:

[Defense Counsel]: Okay. Now, if your choices are death and life without parole, a person you think needs to be reformed, they would live the rest of their life in prison?

Prospective Juror No. 0746: Yes, ma'am.

[Defense Counsel]: Being reformed. [¶] Are you saying that that would apply to the people who, after considering the facts, where the good outweighed the bad, those people might be deserving of life without parole?

Prospective Juror No. 0746: Yes, ma'am.

[¶] . . . [¶]

[Defense Counsel]: If somebody commits a brutal crime like murder with torture?

Prospective Juror No. 0746: Yes, ma'am.

[Defense Counsel]: And you also hear that they've committed crimes in the past?

Prospective Juror No. 0746: Yes, ma'am.

[Defense Counsel]: Would you think that that person could be reformed?

Prospective Juror No. 0746: If it's habitually, or if it keeps on happening, I don't think so.

[Defense Counsel]: Okay. So in that case you would vote for death; is that correct?

Prospective Juror No. 0746: Yes, ma'am.

[Defense Counsel]: But if a person committed a murder with torture and you heard evidence at a penalty phase, hearing that the person was basically good, kind to strangers, and took care of neighbors' children and all of that, that you would consider as life without the possibility of parole?

Prospective Juror No. 0746: Yes, ma'am.

(12RT 2390-2391.)

The prosecutor challenged Danilo M. for cause. (12RT 2392.) She argued that Danilo M. might have "a language issue" and that his answers about the death penalty were inconsistent and incomprehensible. (12RT 2392-2393.) Defense counsel countered that Danilo M. was not difficult to understand to her, the court, or the court reporter and that he consistently stated he would weigh the facts and impose death or LWOP in an appropriate case. (12RT 2393-2394.) When the prosecutor noted Danilo M.'s responses to question numbers 209, 210, 214, and 215, defense counsel argued that the questions were confusing to other jurors as well. (12RT 2394-2395.)

The court granted the People's challenge for cause. The court noted Danilo M.'s response to questions about purposeful killing:

> If there is a purposeful killing, what kind of sentence would he impose? And he indicates, "life without parole," because he believes all people could be reformed. Those were his exact words. [¶] So given that that is the case, he was asked whether or not would he impose life without parole in all cases, because he believes all people could be reformed? [¶] And he said, "Possibly."

> And I think that based upon that, that gives me the impression of his state of mind, that his responses and whether or not he could impose the death penalty is unequivocal.

(12RT 2395-2396.)

Here, substantial evidence supported the trial court's excusal of Danilo M. for cause. Danilo M. believed that LWOP should be mandatory in all murder cases and the death penalty reserved for "heinous crimes." (58CT 16464.) He could not see himself rejecting LWOP and voting for death in an appropriate case. (58CT 16467.) He repeatedly told defense counsel that he could not vote for death "under any circumstances" even though he also said that he could impose the death penalty in the "wors[t] of all cases." (12RT 2379-2380.) He also believed that all criminals could be reformed and admitted that he might always vote for LWOP because of this belief. (12RT 2388-2391.) Danilo M.'s responses showed "an unalterable preference" against the death penalty, and the trial court properly excused him for cause. (*People v. Bradford*, *supra*, 15 Cal.4th at p. 1320 and cases cited therein [for-cause excusal proper even though the juror could vote for death in "specified, particularly extreme cases"].)

To the extent Danilo M. gave conflicting answers the trial court resolved those differences adversely to appellant by granting the challenge. And, because the trial court's determination as to Danilo M.'s true state of mind is supported by substantial evidence, it is binding on this Court. (*People v. Barnett*, *supra*, 17 Cal.4th at pp. 1114-1115.)

II. APPELLANT'S *MIRANDA* MOTION WAS PROPERLY DENIED AS READVISEMENT WAS NOT NECESSARY

Appellant argues that the trial court violated his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments in denying his *Miranda* motion. Specifically, appellant argues that a readvisement of his *Miranda* rights was

required before his second interview with Officer McMahon on January 7, 1999. (AOB 139-159.) Respondent disagrees.

A. Relevant Proceedings

At the Evidence Code section 402 hearing, Officer McMahon testified. Before Officer McMahon began an untaped interview with appellant around 1:00 p.m. on January 6, 1999, he advised appellant of his *Miranda* rights, and appellant signed the waiver form. (15RT 2884-2886, 2896.) When the tape recorder was turned on at 5:46 p.m., Officer McMahon reminded appellant of the advisement form he had signed earlier. After the interview was finished at about 6:40 p.m., Officer McMahon prepared search warrants of additional suspects' locations, while other officers took appellant to various locations he had mentioned during the interview. Around 5:00 a.m. on January 7, 1999, appellant was booked. (15RT 2887-2891, 2897, 2902-2903.) After Hardy and Armstrong were arrested and interviewed on the same day, Officer McMahon interviewed appellant again. When Officer McMahon asked appellant if he recalled his rights from the previous day, appellant said he did and agreed to talk. (15RT 2892-2894.) At 5:19 p.m., Officer McMahon began tape recording the second interview, which had started around 3:55 p.m. (15RT 2899-2900.) Both of appellant's interviews with Officer McMahon were conducted at the police station's interview room. (15RT 2894.)

Among other things, defense counsel argued that the officer was required to advise appellant that he did not have to continue before beginning the second interview. (15RT 2906-2907.) The prosecutor argued that a readvisement was not required because appellant had been in continuous contact with the police. (15RT 2907-2908.) The court found that appellant waived his *Miranda* rights on both of the interviews. Specifically, the court found that there was continuous law enforcement contact between the two interviews, that appellant was reinterviewed by the

same officer who had interviewed him the first time, and that the time lapse between the interviews was not long. (15RT 2908-2909.)

B. Readvisement of Appellant's *Miranda* Rights Was Not Required

A statement made by a criminal suspect during police interrogation is admissible at trial only if the police advised the suspect of certain constitutional rights and the suspect knowingly and intelligently waived them. (*Miranda v. Arizona*, *supra*, 384 U.S. at pp. 478-479.) The totality of the circumstances surrounding the confession must show that (1) the relinquishment of rights was voluntary and (2) the waiver was made with full awareness of the rights and the consequences of the waiver. (*Moran v. Burbine* (1986) 475 U.S. 412, 421 [106 S.Ct. 1135, 891 L.Ed.2d 410]; *People v. Clark* (1993) 5 Cal.4th 950, 986, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) A valid waiver may be either express or implied from the actions and words of the defendant. (*People v. Whitson* (1998) 17 Cal.4th 229, 246, 250.) "A suspect's expressed willingness to answer questions after acknowledging an understanding of his or her *Miranda* rights has itself been held sufficient to constitute an implied waiver of such rights. [Citations.]" (*People v. Cruz* (2008) 44 Cal.4th 636, 667.) A court may properly conclude that the *Miranda* rights were waived only if the "totality of the circumstances surrounding the interrogation" reveals both an uncoerced choice and the requisite level of comprehension of rights. (*Moran v. Burbine*, *supra*, at p. 421, citing *Fare v. Michael C.* (1979) 442 U.S. 707, 725 [99 S.Ct. 2560, 61 L.Ed.2d 197].)

As this Court has held repeatedly, "a *Miranda* readvisement is not necessary before a custodial interrogation is resumed, so long as a proper warning has been given, and the subsequent interrogation is reasonably contemporaneous with the prior knowing and intelligent waiver.

[Citations.]" (*People v. Smith* (2007) 40 Cal.4th 483, 504, internal quotations omitted.) To determine whether readvisement is necessary, the following factors must be considered:

> 1) the amount of time that has passed since the initial waiver; 2) any change in the identity of the interrogator or location of the interrogation; 3) an official reminder of the prior advisement; 4) the suspect's sophistication or past experience with law enforcement; and 5) further indicia that defendant subjectively understands and waives his rights. [Citation.]

(*Ibid.*)

When a trial court has held a full hearing on the question of a *Miranda* issue and has expressly found against appellant's position, the reviewing court "accept[s] the trial court's resolution of disputed facts and inferences, and its evaluation of credibility, if supported by substantial evidence. [Citation.]" (*People v. Whitson, supra*, 17 Cal.4th at p. 248.) Further, while the reviewing court independently determines whether those facts show the challenged statements were illegally obtained, it "give[s] great weight to the considered conclusions of a lower court that has previously reviewed the same evidence. [Citations.]" (*Ibid.*, internal quotations omitted.)

Here, readvisement was not necessary when Officer McMahon began the second interview with appellant on January 7, 1999. Officer McMahon first advised appellant of his *Miranda* rights when the interview began at 1:00 p.m. on January 6, 1999. Appellant waived his rights and signed the waiver form. Around 5:46 p.m., Officer McMahon reminded appellant of his rights, and the interview continued. After the interview ended around 6:40 p.m., appellant remained in custody, accompanied officers to various locations, and was later booked. When Officer McMahon began the second interview around 3:55 p.m. the next day, January 7, only 22 hours elapsed since appellant was reminded of his rights and impliedly waived them at

5:46 p.m. the previous day during the first interview. When Officer McMahon asked appellant if he recalled his rights from the previous day, he stated that he did and agreed to talk to the officer. Both interviews were conducted by Officer McMahon and at the same location. Between the two interviews, appellant, who had been in continuous contact with the police, cooperated with the police in their investigation. There was no evidence that appellant was impaired in any way that undermined his willingness to speak with the police. Under the circumstances, Officer McMahon was not required to readvise appellant of his *Miranda* rights before the second interview on January 7, 1999.

Appellant's attempt to distinguish *People v. Thompson* (1992) 7 Cal.App.4th 1966, and *People v. Mickle* (1991) 54 Cal.3d 140, cases relied on by the prosecutor and the trial court, fail for its focus on a single factor, appellant's past experience with law enforcement. (See AOB 148.) As this Court explained in *Mickle*, however, the courts must examine "the totality of the circumstances" in determining whether readvisement is necessary. (*People v. Mickle*, *supra*, 54 Cal.3d at p. 170.) Thus, while appellant did not have a prior experience with law enforcement, the remaining factors favor a finding that readvisement was not necessary. (See *People v. Smith*, *supra*, 40 Cal.4th at p. 504 [noting that this Court in *Mickle* found "readvisement was unnecessary when 36 hours had elapsed between interrogations, because the defendant was still in custody, was interviewed by the same interrogators, was reminded of his prior waiver and was familiar with the justice system, and there was nothing to indicate he was mentally impaired or otherwise incapable of remembering the prior advisement"].)

In any event, any error in admitting appellant's January 7, 1999, statement was harmless. In *Arizona v. Fulminante* (1991) 499 U.S. 279, 307-310 [111 S.Ct. 1246, 113 L.Ed.2d 302] the Supreme Court determined

that admission of a coerced confession is a "trial error" subject to harmless error analysis under the standard of *Chapman v. California* (1967) 386 U.S. 18, 36 [87 S.Ct. 824, 17 L.Ed.2d 705] ("*Chapman*"). (See *People v. Cahill* (1993) 5 Cal.4th 478, 509-510.) Here, there was substantial, independent, and credible evidence of appellant's guilt. Sigler's DNA was found on appellant's pants and boot. Appellant described the beatings and the sexual assaults inflicted upon Sigler to Officer McMahon during the first interview. He admitted being present during the attack on Sigler and helping his confederates dispose of her body and other evidence. Although appellant claimed he did not participate in the attack, he made incriminating statements to others. Appellant admitted to Gmur that he and his cohorts "killed a white woman." He told Gmur that he assisted Hardy and Armstrong in throwing Sigler's body over a fence. He also told Furtado that he kicked Sigler six times in the head and Williams that Sigler was raped. As there is no reasonable doubt that the exclusion of the second interview would have affected the result, any error was harmless beyond a reasonable doubt, and appellant's claim should be rejected.

III. THERE IS NO REQUIREMENT TO RECORD THE *MIRANDA* ADVISEMENT AND THE ENTIRE INTERROGATION

Appellant contends that law enforcement's failure to record the entire interrogation, including the *Miranda* advisement, violated his rights to due process, privilege against self-incrimination, and to counsel. Appellant argues that there is a "national trend" towards "a general requirement for verbatim recording of interrogations in homicide cases" and that the failure to record led to "the irretrievable loss of exculpatory evidence." (AOB 150-159.) Respondent disagrees.

As appellant acknowledges, this Court has rejected a similar claim in *People v. Holt* (1997) 15 Cal.4th 619, 664. (See AOB 153.) More recently,

this Court refused to revisit its decision in *Holt* in *People v. Gurule* (2002) 28 Cal.4th 557, 603. Appellant has not provided any reason for this Court to depart from its prior decisions in *Holt* and *Gurule*. Accordingly, appellant's claim should be rejected.

IV. SUBSTANTIAL EVIDENCE SUPPORTED THE PERSONAL USE OF A DEADLY WEAPON ALLEGATION

Appellant contends that his rights to due process and a fair trial were violated because there was insufficient evidence that he personally used a deadly weapon, a stake, in the commission of the offenses. (AOB 159-169.) Respondent disagrees.

In reviewing an insufficiency of evidence claim, the court asks "whether after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. [Citation.]" (*People v. Maury* (2003) 30 Cal.4th 342, 403, italics original, internal quotations omitted.) The evidence upon which the judgment relies must be "reasonable, credible, and of solid value." (*People v. Jones* (1990) 51 Cal.3d 294, 314.) The reviewing court cannot reweigh the evidence or evaluate the credibility of the witnesses. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) Rather, the reviewing court must "presume the existence of every fact the trier of fact could reasonably deduce from the evidence. [Citation.]" (*In re Bartholemew D.* (2005) 131 Cal.App.4th 317, 322.) When a verdict is supported by substantial evidence, the appellate court must defer to the lower court's findings. (*People v. Smith* (2005) 37 Cal.4th 733, 739.)

Section 12022, subdivision (b)(1), punishes "[a]ny person who personally uses a deadly or dangerous weapon in the commission of a felony or attempted felony." Similarly, section 12022.3, subdivision (a),

additionally punishes a person who "uses a firearm or a deadly weapon in the commission of" certain violations. "In order to find 'true' a section 12022(b) allegation, a fact finder must conclude that, during the crime . . . , the defendant himself or herself intentionally displayed in a menacing manner or struck someone with an instrument capable of inflicting great bodily injury or death. [Citations.]" (*People v. Wims* (1995) 10 Cal.4th 293, 302- 303, overruled on another ground in *People v. Sengpadychith* (2001) 26 Cal.4th 316, 326.) Court of Appeal opinions disagree as to whether section 12022.3, subdivision (a), requires personal use. (*In re Travis W.* (2003) 107 Cal.App.4th 368, 372, fn. 3; compare *People v. Reed* (1982) 135 Cal.App.3d 149, 153 [personal use required] with *People v. Le* (1984) 154 Cal.App.3d 1, 11 [personal use not required].) Nevertheless, "[t]he weight of California authority is that [section 12022.3] enhancement requires personal use of the weapon. [Citations.]" (Com. to CALJIC No. 17.19.1 (Spring ed. 2009.)

Here, there is circumstantial evidence from which a rational jury could have inferred that appellant personally used a stake in the commission of the offenses. There was evidence that many of Sigler's injuries were caused by the use of a wooden stake more than the few times appellant attributed to Hardy and Armstrong. (See 15RT 2951-2952, 2978, 2985-2986; 18RT 3724-3725.) Appellant acted in concert with Armstrong and Hardy from the beginning in robbing, kidnapping, raping, torturing, and murdering Sigler. Hardy, Armstrong, and appellant acted together in demanding money from Sigler, searching her pockets, and keeping her from running away. Appellant and Armstrong threw Sigler over the fence to the embankment area. All three men stomped on her. Armstrong held Sigler down as appellant raped her. After Hardy beat her with a stake, the stake was passed to Armstrong, and he jabbed it into Sigler's vagina. Hardy joined Armstrong in shoving the stake into Sigler. After they

finished torturing Sigler, all three men cleaned up the crime scene and left together. Viewing the evidence as a whole in the light most favorable to the prosecution, a rational jury could reasonably infer that appellant, who had actively participated in all stages of the crime from the beginning and had exhibited the same intent as Hardy and Armstrong in gratuitously torturing Sigler, had also personally used the stake on Sigler.

Further, appellant's testimony denying that he used the stake was untrustworthy. The entirety of his testimony was directed towards minimizing his own involvement. From the beginning, appellant attempted to blame Hardy and Armstrong for all of the violence inflicted upon Sigler and lied about his own involvement. While he testified that he was an innocent bystander, he told Furtado in a letter that he kicked Sigler six times in the head. (16RT 3443; 17RT 3490-3491, 3493.) He also told Gmur that he helped Hardy and Armstrong move Sigler's body over the fence (16RT 3233-3234) although he testified that it was Hardy and Armstrong who threw Sigler's body over the fence (19RT 3965). Also, while appellant claimed that the black Redwood boot found in the blue duffel bag belonged to Armstrong, appellant admitted that the blue bag, as well as the clothing and the shoes in it, was his, and Felix testified that the bag was undisturbed since appellant had left it at her house. (16RT 3315-3317; 19RT 3945, 4001, 4005.) The jury was entitled to discredit appellant's self-serving statements as not credible. (CALJIC No. 2.21.2; 57CT 16171.)

Similarly, appellant's testimony that he was too afraid of Hardy and Armstrong was unbelievable. (19RT 4019.) Even under appellant's own version of the events, he demonstrated only his close friendship with the two and no fear of them. Before the crime, Hardy, Armstrong, and appellant partied together, initiated a new member into their group together, and planned to sleep at Hardy's house together. After the crime, when

Hardy got into an altercation with another passenger, appellant kept the bus driver from calling the police and later spent the night at Hardy's house. The next day, appellant and Hardy were together when appellant returned home to pick up some clothing and when Hardy spent Sigler's food stamps at a market.

Remembering there was evidence that allowed the jury to conclude that the victim suffered much greater injuries from use of the wooden stake than appellant's self-serving testimony indicated, the deadly weapon enhancement finding is supported by substantial evidence, and appellant's claim should be rejected.[7]

V. THE JURY INSTRUCTIONS ON TORTURE, MURDER BY TORTURE, AND SPECIAL CIRCUMSTANCE OF TORTURE WERE PROPER

Appellant argues that the jury instructions on torture, murder by torture, and special circumstance of torture were flawed and violated his rights under Fifth, Sixth, Eighth, and Fourteenth Amendments. (AOB 169-207.) Respondent disagrees.

A. Any Instructional Error on Felony Murder Based upon Torture Was Harmless

Although appellant was not charged with felony murder with torture as an underlying predicate felony, the court included torture as one of the underlying felonies in instructing the jury on felony murder. (57CT 16196 [CALJIC No. 8.10 "Murder—Defined"], 16200 [CALJIC No. 8.21 "First Degree Felony-Murder"].) Appellant argues that the trial court erred in instructing the jury on felony murder based upon torture because torture (§

[7] In so far as the Court concludes that section 12022.3, subdivision (a), enhancement does not require personal use, that allegation in counts III to VII should be affirmed.

206) was not added to the list of felonies authorized for felony murder in section 189 until 1999, after he had committed the offenses in 1998. (AOB 188-191.) Respondent agrees. When the crimes were committed in 1998, torture was not one of the enumerated felonies defining first degree felony murder. (See *People v. Cole* (2004) 33 Cal.4th 1158, 1219-1220 [section 206 added to section 189 as an enumerated felony defining first degree murder in 1999].) Thus, the trial court appears to have erred in instructing the jury that it could find appellant guilty of first degree murder based on the predicate offense of torture. (See, e.g., *People v. Haley* (2004) 34 Cal.4th 283, 315-316 [error to instruct on felony murder based on sodomy when section 189 did not include sodomy as a predicate offense when defendant murdered the victims].)

Nevertheless, any error was harmless. Such error is harmless if the reviewing court "could determine from the record that the jury necessarily found defendant guilty on a proper theory. [Citation.]" (*People v. Haley*, *supra*, 34 Cal.4th at p. 315, internal quotations omitted; see *Brown v. Sanders* (2006) 546 U.S. 212, 220 [126 S.Ct. 884, 163 L.Ed.2d 723] [consideration of an invalidated sentencing factor renders the death sentence unconstitutional "unless one of the other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances."].)

Here, the jury was given five different predicate felonies upon which to base a first degree felony murder conviction. The jury found all five predicate felonies to be true beyond a reasonable doubt by their guilty verdicts on those felonies and by their felony murder special circumstance findings. (57CT 16253-16256, 16259-16260, 16263-16264.) Indeed, the jury, which also found appellant guilty of torture and murder by means of torture (57CT 16254, 16265), was never asked to make any specific finding on whether the murder was committed in the commission of torture.

Because the verdicts conclusively established the jury unanimously agreed on other proper bases for finding first degree felony murder, the error was harmless. (See, e.g., *People v. Marshall* (1997) 15 Cal.4th 1, 38 [where there was defective robbery murder theory of felony murder but appropriate attempted rape murder theory, reversal not required because the court could determine from an attempted rape special circumstance finding that the jury necessarily and unanimously found defendant guilty on a proper felony murder theory].)

B. The Jury Was Properly Instructed on the Crime of Torture

Appellant contends that the trial court failed to properly instruct the jury on the specific intent requirement for the crime of torture (count VIII). Specifically, appellant argues that CALJIC No. 9.90 only required the actual perpetrator but not appellant personally to harbor the specific intent to inflict the injury and that the prosecutor argued for appellant's guilt on torture based on the natural and probable consequence doctrine even though the jury was instructed that natural and probable consequence doctrine did not apply to the crime of torture (CALJIC No. 3.02; 57CT 16186-16187). (AOB 192-194.) Respondent disagrees.

As to the crime of torture, the jury was instructed with CALJIC No. 9.90 in relevant part as follows:

> In order to prove this crime, each of the following elements must be proved:
>
> 1. A person inflicted great bodily injury upon the person of another; and
>
> 2. The person inflicting the injury did so with specific intent to cause cruel or extreme pain and suffering for the purpose of revenge, extortion, persuasion, or for any sadistic purpose.

(57CT 16231). In closing argument, the prosecutor explained the natural and probable consequence theory and said as follows:

> One who aids and abets another in the commission of a crime or crimes is not only guilty of that crime, which is the rape here – we have the defendant admitting he did the rape – or those crimes, but is also guilty of any other crime committed by a principal, which the kidnapping, the robbery, the rape with a stake, and the torture, which is a natural and probable consequence of the crimes originally aided and abetted.
>
> In order to find the defendant guilty of any of the following crimes: murder, robbery, kidnap for rape, rape in concert, rape, also known as sexual penetration . . . by a foreign object, a wooden stake in concert, sexual penetration by a foreign object, a wooden stake, as charged in counts 1 through 7, you must be satisfied beyond a reasonable doubt that,
>
> No. 1 The crime or crimes of murder, robbery, kidnap for rape, rape in concert, rape, sexual penetration by a foreign object, a wooden stake in concert, or sexual penetration by a foreign object, a wooden stake, were committed.
>
> [¶] . . . [¶]
>
> 2. That the defendant aided and abetted any of those crimes.

(20RT 4219-4220.) She continued to explain appellant's involvement in the crimes as an aider and abettor. (20RT 4220-4222.) Later, the prosecutor reiterated the elements of torture and stated as follows:

> 1. Infliction of great bodily injury. [¶] Ladies and gentlemen, 114 wounds. 90 and 24 – 90 external, 24 internal. That's been proven to you beyond a reasonable doubt. [¶] 2. Done with the specific intent to cause cruel or extreme pain and suffering for the purpose of revenge or any sadistic purpose. [¶] Beating her over and over and over again, clearly cruel they intended – *and the defendant, specifically*, intended to cause her extreme pain or suffering.

(20RT 4239-4240, italics added.)

Initially, to the extent appellant argues that the court had a duty to sua sponte modify the standard pattern jury instruction, his claim is forfeited for failure to request modification. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 503 ["A party may not argue on appeal that an instruction correct in law was too general or incomplete, and thus needed clarification, without first requesting such clarification at trial."]; *People v. Gutierrez* (1993) 14 Cal.App.4th 1425, 1439 ["If appellant sought a modification of a correct instruction it was his duty to request the modification."].) In any event, CALJIC No. 9.90's failure to identify appellant as "the *person* inflicting the injury," did not result in the jury finding appellant "vicariously liable" for the crime of torture. (AOB 192.)

In determining instructional error, this Court must examine the contested instruction to determine "whether there is a 'reasonable likelihood' that the jury understood the charge as the defendant asserts. [Citations.]" (*People v. Kelly* (1992) 1 Cal.4th 495, 525.) The correctness of jury instructions is to be determined from all of the instructions given by the court. (*People v. Holt*, *supra*, 15 Cal.4th at p. 677.) To show a "reasonable likelihood," the defendant must overcome the presumption that the jury followed the court's instructions and was able to understand and correlate them correctly. (*People v. Sanchez* (2001) 26 Cal.4th 834, 852.) Even if a particular instruction is silent as to a required mental state, the instructions as a whole are not misleading where an element missing from one instruction is supplied by another instruction. (*People v. Castillo* (1997) 16 Cal.4th 1009, 1016.)

Section 206 does not require that a defendant personally inflict injury. (*People v. Lewis* (2004) 120 Cal.App.4th 882, 888-889.) Indeed, there is no "legislative intent to exempt an aider and abettor in torture from liability for prosecution." (*Id.* at p. 889 [there is no "reason why one who facilitates torture . . . should be less culpable than the actual torturers"].) "A 'person

aids and abets the commission of a crime when he or she, acting with (1) knowledge of the unlawful purpose of the perpetrator, and (2) the intent or purpose of committing, encouraging, or facilitating the commission of the offense, (3) by act or advice aids, promotes, encourages or instigates, the commission of the crime.' [Citation.]" (*People v. Marshall, supra*, 15 Cal.4th at p. 40.) An aider and abettor's liability could be based either on the aider and abettor's own necessary mental state or the natural and probable consequence theory. (*People v. McCoy* (2001) 25 Cal.4th 1111, 1117.)

When a specific intent crime such as torture is charged, "the prosecution must show that the defendant acted with knowledge of the criminal purpose of the perpetrator *and* with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense. [Citation.]" (*People v. McCoy, supra*, 25 Cal.4th at p. 1118, internal quotations omitted, italics original.) In other words, the accomplice must "know[] the full extent of the perpetrator's criminal purpose and give[] aid or encouragement with the intent or purpose of facilitating the perpetrator's commission of the crime. [Citation.]" (*Ibid.*, internal quotations and footnote omitted.)

"[P]resence at the scene of the crime, while insufficient of itself to make one an aider and abettor, is one factor which tends to show intent. Other factors which may be considered include the defendant's failure to take steps to prevent the commission of the crime, companionship, and conduct before and after the crime. [Citation.]" (*People v. Pitts* (1990) 223 Cal.App.3d 606, 893.)

Here, modification of CALJIC No. 9.90 was not required. Because an aider and abettor does not have to directly inflict the injury to be guilty of torture, CALJIC No. 9.90 did not have to specifically identify "the

defendant" as "the person inflicting the injury" with the requisite specific intent.

Appellant was guilty of the crime of torture as a perpetrator or direct aider and abettor. As noted above, the prosecutor argued that appellant and his cohorts had the specific intent to cause cruel or extreme pain in beating Sigler. The prosecutor's argument was supported by the evidence that appellant actively participated and shared his companions' specific intent to commit all of the charged crimes against Sigler. He threw Sigler's body over a fence so that he and his cohorts could assault and torture her away from public view, raped her while he and Armstrong held her down, repeatedly kicked her with his 10-pound boot, and collected her belongings before fleeing the scene together with Hardy and Armstrong. When the bus driver threatened to call the police for Hardy's unruly behavior on their way to Felix's house, appellant kept the situation from escalating by telling the bus driver that he would keep Hardy calm. Appellant's actions plainly allowed any rational trier of fact to conclude that he personally intended to torture Sigler either directly or by aiding Hardy and Armstrong.

Contrary to appellant's claim, the prosecutor's argument was not based on the natural and probable consequences theory.[8] (See AOB 193.) The prosecutor's introductory statement mentioning torture as one of the natural and probable consequence of rape (20RT 4219) was immediately followed by a more detailed and lengthy statement specifically excluding torture from consideration under the natural and probable consequence theory (20RT 4219-4222).

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[8] In a later part of Appellant's Opening Brief, he states that "the crime of torture was not prosecuted under the natural and probable consequence doctrine." (AOB 195, fn. 58.)

In any event, any error was harmless because there is a basis in the record to find that the verdict was not based on a natural and probable consequences theory at all. (*People v. Guiton* (1993) 4 Cal.4th 1116, 1128-1130 [any error in instructing the jury on a legally erroneous theory of liability is harmless if there is a basis on the record to find that the verdict was based on a valid ground].) Here, the jury was instructed on the section 667.61, subdivision (d), allegation as follows:

> It is further alleged as to Counts 4, 5, 6, and 7, that the defendant inflicted torture on the victim during the commission of the charged offenses. If you find the defendant guilty of Count 4, 5, 6, or 7, you must determine whether the defendant tortured the victim of the present offense pursuant to Penal Code § 667.61(d)(3). In order to prove the truth of this allegation, each of the following elements must be proved:
>
> (1) The defendant committed the charged offense in the particular count;
>
> (2) The *defendant* inflicted torture on the victim as defined elsewhere in these instructions;
>
> The People have the burden of proving beyond a reasonable doubt the truth of these allegations. If you have a reasonable doubt that any such allegation is true, you must find it to be not true.

(57CT 16248, italics added.) The jury found the allegation to be true. (57CT 16257-16264.) The jury also found true the allegation that appellant personally used a deadly weapon in the commission of torture. (57CT 16265.) The jury's findings show no uncertainty about appellant's intent regarding the crime of torture: appellant was either a perpetrator or actually intended the torture of the victim. In either case, appellant's guilt of the crime of torture was not based on the natural and probable consequence theory. Accordingly, appellant's claim must be rejected.

C. The Jury Was Properly Instructed on Murder by Torture

Appellant contends that the trial court's instruction of murder by torture likewise was flawed because the jury was not required to find appellant harbored the requisite specific intent regarding torture. Specifically, appellant argues that the jury was only instructed to find whether "the perpetrator," not appellant, committed the murder while harboring the required intent to inflict extreme and prolonged pain (57CT 16203 [CALJIC No. 8.24 "Murder by Torture"]) and that the prosecutor compounded the error by telling the jury that they did not have to determine which of the three men inflicted the torture. (AOB 194-197.) Respondent disagrees.

The prosecutor argued that appellant was guilty of first degree murder based on three theories: premeditation, felony murder, and murder by torture. (20RT 4222-4227.) The jury was instructed on aiding and abetting liability generally (57CT 16182 [CALJIC No. 3.00 "Principals—Defined"], 16183 [CALJIC No. 3.01 "Aiding and Abetting—Defined"]), and natural and probable consequences theory specifically as to counts I through VII, including murder, count I (57CT 16186-16187 [CALJIC No. 3.02 "Principals—Liaiblity for Natural and Probable Consequences"]). The prosecutor relied on aider and abettor liability, including the natural and probable consequence theory. (20RT 4218-4222.) Under the natural and probable consequence theory, "an aider and abettor is guilty not only of the intended crime, but also for any other offense that was a natural and probable consequence of the crime aided and abetted. [Citation.]" (*People v. McCoy*, *supra*, 25 Cal.4th at p. 1117, internal quotations omitted.)

Initially, to the extent appellant argues that the court had a duty to sua sponte modify the standard pattern jury instruction, his claim is forfeited for failure to request modification. (*People v. Gutierrez*, *supra*, 14 Cal.App.4th

at p. 1439.) In any event, the jury was properly instructed on murder by torture.

Regardless of any deficiency in the murder by torture instructions, the jury's factual findings plainly sustained the theory of murder by torture. The jury found appellant guilty of count VIII, torture, which required it to find either that he personally inflicted the torture, or shared the perpetrator's requisite intent when he aided and abetted the torture. In finding the torture-murder special circumstance (§ 190.2, subd. (a)(18)) to be true, the jury found that "*the defendant* intended to inflict extreme cruel physical pain and suffering" upon Sigler.[9] (57CT 16212, 16254, italics added.) Moreover, under the natural and probable consequence theory, appellant, who admitted robbing and raping Sigler and was convicted of raping her with the wooden stake and torturing her, did not need to share in the perpetrator's murderous intent to be guilty of murder by torture as well. (See *People v. McCoy*, *supra*, 25 Cal.4th at p. 1117 ["if a person aids and abets only an intended assault, but a murder results, that person may be guilty of that murder, even if unintended, if it is a natural and probable consequence of the intended assault"].) Accordingly, appellant's claim must be rejected.

D. The Jury Was Properly Instructed on the Torture-Murder Special Circumstance

Appellant contends that the trial court's instructions on torture-murder special circumstance were flawed. (AOB 197-204.) Specifically, appellant argues that the jury was not instructed to find that appellant intended to inflict torture (AOB 197-200) and intended to kill (AOB 201-204). Respondent disagrees.

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[9] Since appellant was the only defendant in the case, this finding necessarily related to him.

As to the torture-murder special circumstance, the jury was instructed with CALJIC No. 8.81.18 as follows:

> To find that the special circumstance, referred to in these instructions as murder involving infliction of torture, is true, each of the following facts must be proved:
>
> 1. The murder was intentional; and
>
> 2. The defendant intended to inflict extreme cruel physical pain and suffering upon a living human being for the purpose of revenge, extortion, persuasion or for any sadistic purpose.
>
> Awareness of pain by the deceased is not a necessary element of torture.

(20RT 4169-4170; 57CT 16212.)

Contrary to appellant's claim, the jury was instructed on the intent to torture and to kill for the torture-murder special circumstance. (See AOB 197-203.) First, CALJIC No. 8.81.18 specifically required the jury to find that "the defendant," i.e., appellant and not any other perpetrator, intended to inflict pain for sadistic purpose. Intent to kill was not necessarily required for the torture-murder circumstance, in that the jury could have found this allegation true if appellant was a major participant who acted with reckless indifference to human life, while also sharing the perpetrator's intent to torture the victim. Here, the jury was properly instructed on the required intent. The jury was instructed with CALJIC No. 8.80.1, in pertinent part as follows:

> Unless an intent to kill is an element of a special circumstance, if you are satisfied beyond a reasonable doubt that the defendant actually killed a human being, you need not find that the defendant intended to kill in order to find the special circumstances to be true.
>
> If you find that a defendant was not the actual killer of a human being or if you are unable to decide whether the defendant was the actual killer or an aider or abettor or co-conspirator, you cannot find the special circumstance to be true

> unless you are satisfied beyond a reasonable doubt, that *the defendant, with an intent to kill*, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted any actor in the commission of the murder in the first degree or with reckless indifference to human life and as a major participant aided, abetted, counseled, commanded, induced, solicited, requested, or assisted in the commission of one or more of the following crimes: robbery, kidnapping, kidnapping for rape, rape, rape by a foreign object[,] a wooden stake, or torture pursuant to Penal Code section [190.2] (a)(17) which resulted in the death of a human being, namely Penny [Keptra] also known as Penny Sigler.

(20RT 4168, italics added; 57CT 16209.) The jury was also instructed with CALJIC No. 8.83.1, in pertinent part as follows:

> The specific intent or mental state with which an act is done may be shown by the circumstances surrounding its commission. But you may not find a special circumstance alleged in this case to be true unless the proved surrounding circumstances are not only, (1) consistent with the theory that *the defendant had the required specific intent* or mental state, but (2) cannot be reconciled with any other rational conclusion.

(20RT 4171, italics added; 57CT 16214.) Where the defendant is not the actual killer, intent to kill is not necessarily required for the special circumstance if he was a major participant and acted with reckless indifference to human life. (See *People v. Smithey* (1990) 20 Cal.4th 936, 1016.) Under these instructions, the jury had to find that appellant either was the actual killer, intended to kill the victim, or was a major participant who acted with reckless indifference to human life, in addition to harboring the intent to torture her in order to find the special circumstance to be true. Viewing the instructions as a whole, the jury was correctly instructed on the intent required for the torture-murder special circumstance.

Second, the prosecutor did not "compound the error" by failing to specifically name appellant as "the perpetrator" in her closing argument. (AOB 199, 202.) Appellant's quotations of the prosecutor's closing

argument, except for one instance, are taken out of context. (See AOB 195-199.) Except for one instance (20RT 4351), the prosecutor was not discussing the torture-murder special circumstance but murder by torture (20RT 4227), felony murder (20RT 4226), robbery (20RT 4352), and special circumstances for felony sex offenses (20RT 4239). Although the prosecutor once said the jury must find "either the defendant or an accomplice Hardy or Armstrong intended to inflict extreme cruel physical pain" for appellant to be guilty of torture-murder special circumstance (20RT 4351), she said elsewhere that appellant intended to torture Sigler (*ante*, Arg. V.B. & C.). Indeed, while acknowledging that she could not prove who actually killed Sigler, the prosecutor argued that all three men, Hardy, Armstrong, and appellant, acted together with an intent to torture and kill her. (20RT 4224, 4227.)[10] She said, "Ladies and gentlemen, clearly this was an intentional killing. Striking somebody over and over and over again in the head, and almost disemboweling her was an intentional act." (20RT 4226.) To the extent there was any confusion about the law in the prosecutor's argument, the jury was instructed to ignore counsel's argument and to follow the court's instructions. (57CT 16156 [CALJIC No. 1.00].)

Third, contrary to appellant's claim, including torture in the list of predicate crimes in CALJIC No. 8.80.1 did not result in omitting the intent requirement for section 190.2, subdivision (a)(18). (See AOB 199.) CALJIC No. 8.80.1, a general introductory instruction on special

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[10] Commenting on the prosecutor's use of "they," defense counsel told the jury that it did not "have to consider what they did and they didn't, [but] only as it applies to Mr. Pearson's intent and knowledge." (20RT 4267.) In her rebuttal argument, the prosecutor explained that she said "they did this" and "they did that" in the context of aiding and abetting liability and that appellant, as the principal, was "equally guilty." (20RT 4352.)

circumstances, was followed by CALJIC No. 8.81.17, specifically discussing the elements for crimes listed under section 190.2, subdivision (a)(17), which did not include torture, and CALJIC No. 8.81.18, specifically discussing the elements for section 190.2, subdivision (a)(18), torture. (57CT 16209-166212.) Moreover, as the instructions and the verdict form indicated that the applicable statute for special circumstance of murder involving torture was section 190.2, subdivision (a)(18) (57CT 16212, 16254), there was no reasonable likelihood that the inclusion of torture in CALJIC No. 8.80.1 as an applicable crime for a felony murder special circumstance led the jury to apply the instruction in an impermissible manner. Also, the jury never expressed any confusion about the various torture instructions during deliberation.

Last, the verdict form tracked the language of section 190.2, subdivision (a)(18), and was not "incomprehensible." (AOB 200.) "There are innumerable authorities which declare that the form of the verdict is immaterial, if the intention to convict of the crime charged is unmistakably expressed. [Citations.]" (*People v. McKinney* (1945) 71 Cal.App.2d 5, 13-14.) On the torture-murder special circumstance, the jury verdict read as follows:

> We, the Jury, find the allegation that the defendant, KEVIN DARNELL PEARSON, committed the murder of PENNY SIGLER [*sic*] was intentional and involved the infliction of torture, within the meaning of Penal Code Section 190.2(a)(18) to be true.

(57CT 16254.) Read in light of CALJIC No. 8.81.18, the jury instruction on section 190.2, subdivision (a)(18), it is clear that the jury intended to find the allegation that "[t]he murder was intentional and involved the infliction of torture" true. (§ 190.2, subd. (a)(18).) Under CALJIC No. 8.81.18, the jury was required to find that appellant intended the torture of the victim, and CALJIC No. 8.80.1 required the jury to find that appellant

either was the actual killer or intended that the victim be killed. The verdict reflected these findings.

In any event, any error was harmless. (See *People v. Morales* (1989) 48 Cal.3d 527, 561 [failure to instruct on an element of a special circumstance subject to *Chapman*].) First, in finding appellant guilty of the crime of torture (count VIII), the jury necessarily found that appellant intended to torture Sigler under the instructions relating to that crime. (*Ante*, Arg. V.B.) This Court has confirmed that the intent to torture required for the torture murder special circumstance is the same intent required for the crime of torture. (*People v. Elliot* (2005) 37 Cal.4th 453, 479.)

Second, evidence that appellant intended to kill Sigler was overwhelming. (See, e.g. *People v. Wilson* (2008) 44 Cal.4th 758, 804 [error in the written torture instruction harmless where, among others, evidence that the defendant tortured and killed the victim was overwhelming].) It is well established that specific intent to kill may be established by circumstantial evidence, including inferences drawn from the defendant's conduct and the nature of the injury inflicted upon the victim. (*People v. Cain* (1995) 10 Cal.4th 1, 40; *People v. Lashley* (1991) 1 Cal.App.4th 938, 945-946.) After approaching Sigler, appellant went through her pockets looking for money. When she tried to get away, he and Armstrong took her down to the ground and undressed her. When Hardy said, "We have to finish the job," the beatings began. Appellant and Armstrong threw Sigler's body over a fence and dragged her to a ditch. There, appellant raped her, repeatedly stomped on her, and beat her to death with his cohorts, inflicting 114 injuries, all of which were premortem. Appellant then "finished the job" by moving her body away from public view and collecting her belongings before leaving the scene. The next day, he told Gmur that he and his cohorts "killed a white woman." Thus, from

the moment Sigler attempted to get away, appellant intended to kill her and did so by means of torture. Further, these facts show that even if appellant did not intend to kill Sigler, he was a major participant who acted with reckless indifference to human life while entertaining the intent to torture her. Accordingly, any error was harmless, and appellant's claim must be rejected.

VI. THE COURT PROPERLY INSTRUCTED THE JURY ON THE MURDER SPECIAL CIRCUMSTANCES

Appellant contends that the trial court failed to properly instruct on all the elements of the murder special circumstances in that it gave confusing and conflicting instructions. Specifically, appellant argues that CALJIC No. 8.80.1,[11] while correct in law, was convoluted and difficult to

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[11] The court instructed the jury with CALJIC No. 8.80.1 (Post June 5, 1990 Special Circumstances--Introductory) as follows:

> If you find [the] defendant in this case guilty of murder in the first degree, you must then determine if [one or more of] the following special circumstance[s] [are] true or not true: robbery, kidnapping, kidnapping for rape, rape, rape by a foreign object[,] a wooden stake, or torture.
>
> The People have the burden of proving the truth of a special circumstance. If you have a reasonable doubt as to whether a special circumstance is true, you must find it to be not true.
>
> Unless an intent to kill is an element of a special circumstance, if you are satisfied beyond a reasonable doubt that the defendant actually killed a human being, you need not find that the defendant intended to kill in order to find the special circumstances to be true.
>
> If you find that a defendant was not the actual killer of a human being or if you are unable to decide whether the defendant was the actual killer or an aider or abettor or co-

(continued...)

understand, and that CALJIC No. 8.81.17,[12] while easy to understand, failed to include the specific intent requirements of section 190.2, subdivision (d). (AOB 208-219.) Respondent disagrees.

(...continued)

conspirator, you cannot find the special circumstance to be true unless you are satisfied beyond a reasonable doubt, that the defendant, with the intent to kill [aided,] [abetted,] [counseled,] [commanded,] [induced,] [solicited,] [requested,] [or] [assisted] any actor in the commission of the murder in the first degree or with reckless indifference to human life and as a major participant [aided,] [abetted,] [counseled,] [commanded,] [induced,] [solicited,] [requested,] [or] [assisted] in the commission of one or more of the following crimes: robbery, kidnapping, kidnapping for rape, rape by a foreign object a wodden stake or torture, pursuant to Penal Code § 190.2(a)(17) which resulted in the death of a human being, namely Penny Keprta [*sic*] also known as Penny Sigler.

A defendant acts with reckless indifference to human life when that defendant knows or is aware that [his] acts involve a grave risk of death to an innocent human being.

You must decide separately each special circumstance alleged in this case. If you cannot agree as to all of the special circumstances, but can agree as to one or more of them, you must make your finding as to the one or more upon which you do agree.

In order to find a special circumstance alleged in this case to be true or untrue, you must agree unanimously.

You will state your special finding as to whether this special circumstance is or is not true on the form that will be supplied.

(57CT 16209-16210.)

[12] The court instructed the jury with CALJIC No. 8.81.17 (Special Circumstances—Murder in Commission of ___ Penal Code § 190.2(a)(17)), as follows:

(continued...)

Initially, appellant's claim amounts to an argument that the court should have clarified these instructions that were correct in law for the jury. His failure to request such clarification, however, forfeits his claim on appeal. (*People v. Gutierrez*, *supra*, 14 Cal.App.4th at p. 1439.)

Moreover, CALJIC Nos. 8.80.1 and 8.81.17 were coherent and not conflicting. CALJIC No. 8.81.17 does not purport to give all the elements of the special circumstance, but instructs the jury on the timing of the murder: i.e., the murder must occur while appellant is engaged in one of the listed crimes. On the other hand, CALJIC No. 8.80.1 instructs the jury on intent requirements for the special circumstances where the defendant is not the actual killer, consistent with section 190.2, subdivisions (c) and (d). Repeating the mens rea requirements under section 190.2, subdivisions (c) and (d), to CALJIC No. 8.81.17, would have resulted in a duplicative instruction to which appellant was not entitled. (See *People v. Gurule*, *supra*, 28 Cal.4th at p. 659.)

Nothing in CALJIC No. 8.81.17 led the jury to believe it could find the special circumstances true without determining the required mental state as instructed in CALJIC No. 8.80.1. A single instruction to a jury must not be judged in isolation but must be viewed in the context of the overall

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(...continued)

> To find that any of the special circumstances, referred to in these instructions as murder in the commission of robbery, kidnapping for rape, rape, or rape by a foreign object-a wooden stake, is true, it must be proved:
>
> 1. The murder was committed while [the] defendant was [engaged in], [or] [was an accomplice] in the [commission] of one or more of the following crimes: robbery, kidnap, kidnapping for rape, rape, or rape by a foreign object-a wooden stake.

(57CT 16211.)

charge. (*People v. Frye* (1998) 18 Cal.4th 894, 957, disapproved on other grounds in *People v. Doolin*, *supra*, 45 Cal.4th at p. 421, fn. 22.) Further, it is presumed that the jurors were intelligent and capable of understanding the instructions (*People v. Laws* (1993) 12 Cal.App.4th 786, 796), and followed the instructions as given. (*People v. Osband* (1996) 13 Cal.4th 622, 714.) Considered as a whole, these instructions adequately instructed the jury on the required mental state for a defendant who was not the actual killer without confusion or conflict as appellant contends, and there was no reasonable likelihood that the jury misunderstood the law. Accordingly, appellant's claim must be rejected.

VII. ANY ERROR IN THE TRIAL COURT'S INSTRUCTION ON VOLUNTARY INTOXICATION AS TO THE CRIME OF TORTURE WAS HARMLESS

Appellant contends that the trial court erred in failing to include torture with other specific intent offenses for which the jury was to consider the applicability of the voluntary intoxication defense. (AOB 219-227.) Respondent submits that any error was harmless.

Voluntary intoxication is not a defense, but "bears on the question of whether the defendant actually had the requisite specific mental state." (*People v. Saille* (1991) 54 Cal.3d 1103, 1119.) Like "pinpoint" instructions, "[t]hey are required to be given upon request when there is evidence supportive of the theory, but they are not required to be given sua sponte." (*Ibid.*) If the defendant's proffered instruction was incorrect, the trial court must give its own instruction. (*Ibid.*; *People v. Sanchez* (1950) 35 Cal.2d 522, 527-528 [the trial court's duty to adequately instruct on the law not excused by the defendant's proposed instruction that was erroneous in part].)

In this case, the court agreed to instruct the jury on voluntary intoxication as requested by the defense. (19RT 4113-4120.) The parties agreed that the crime of torture (count VIII) was a general intent crime. (19RT 4113-4114.) The jury was generally instructed as to all of the charged offenses, including count VIII, that voluntary intoxication was not a defense to the crime, but that an exception existed to allow consideration of it where there were issues relating to specific intent and mental state. The court listed counts I-III, but not count VIII, as crimes the jury had to determine whether appellant possessed a required intent or mental state. (57CT 16194-16195 [CALJIC No. 4.21.1].) The elements of torture, however, include "the specific intent to cause cruel or extreme pain and suffering for . . . any sadistic purpose. [Citation.]" (*People v. Burton* (2006) 143 Cal.App.4th 447, 451-452.) Thus, it appears that the jury was not instructed to consider whether voluntary intoxication affected appellant's ability to form the required mental state for torture, count VIII.

Any error, however, was harmless as "the factual question posed by the omitted instruction was necessarily resolved adversely to the defendant under other, properly given instructions." (*People v. Sedeno* (1974) 10 Cal.3d 703, 721, overruled in part on other grounds in *People v. Breverman* (1998) 19 Cal.4th 142, 149, and disapproved on other grounds in *People v. Flannel* (1979) 25 Cal.3d 668, 684, fn. 12; see *People v. Coffman* (2004) 34 Cal.4th 1, 96.) The jury was instructed on voluntary intoxication as to murder (count I), robbery (count II), and kidnapping for rape (count III), as well as the special allegations. In finding appellant guilty of those crimes, the jury necessarily found that appellant had the required mental state to commit torture in spite of his intoxication. Accordingly, appellant's claim must be rejected.

VIII. THE VARIOUS STANDARD JURY INSTRUCTIONS DID NOT UNDERMINE THE REASONABLE DOUBT STANDARD

Appellant argues that various standard instructions violated the requirement of proof beyond a reasonable doubt. (AOB 227-241.) Specifically, appellant argues that instructions on circumstantial evidence (CALJIC Nos. 2.90, 2.01, 2.02, 8.83, and 8.83.1)[13] undermined the requirement of proof beyond a reasonable doubt (AOB 228-231), and that other instructions (CALJIC Nos. 1.00, 2.21.1, 2.21.2, 2.22, 2.27, 2.51, and 8.20)[14] replaced the reasonable doubt standard with preponderance of the evidence test (AOB 232-237). As appellant concedes, however, this Court has repeatedly rejected constitutional challenges to these instructions. (See AOB 237; *People v. Kelly* (2007) 42 Cal.4th 763, 792, and cases cited therein; *People v. Nakahara* (2003) 30 Cal.4th 705, 715.) Further, while appellant asks this Court to revisit its prior decisions on the issues (AOB 237-240), this Court has declined to do so in the past, and appellant does not offer compelling reason to do so now. (See *People v. Samuels* (2005) 36 Cal.4th 96, 131.)

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[13] CALJIC Nos. 2.90 [Presumption of Innocence—Reasonable Doubt—Burden of Proof], 2.01 [Sufficiency of Circumstantial Evidence – Generally], 2.02 [Sufficiency of Circumstantial Evidence to Prove Specific Intent or Mental State], 8.83 [Special Circumstances—Sufficiency of Circumstantial Evidence—Generally], 8.83.1 [Special Circumstances—Sufficiency of Circumstantial Evidence to Prove Required Mental State].

[14] CALJIC Nos. 1.00[Respective Duties of Judge and Jury], 2.21.1 [Discrepancies in Testimony], 2.21.2 [Witness Willfully False], 2.22 [Weighing Conflicting Testimony], 2.27 [Sufficiency of Testimony of One Witness], 2.51 [Motive], 8.20 [Deliberate and Premeditated Murder].

IX. THERE WAS NO CUMULATIVE ERROR AT GUILT PHASE

Appellant argues that the cumulative effect of errors at trial resulted in a miscarriage of justice and requires a reversal. (AOB 242-245.) Respondent disagrees.

Where few or no errors have occurred, and where any such errors found to have occurred were harmless, the cumulative effect does not result in the substantial prejudice required to reverse a defendant's conviction. (*People v. Price* (1991) 1 Cal.4th 324, 465.) "A defendant is entitled to a fair trial, not a perfect one." (*People v. Mincey* (1992) 2 Cal.4th 408, 454.) As stated in *People v. Kronmeyer* (1987) 189 Cal.App.3d 314, 349, when a defendant invokes the cumulative error doctrine, "the litmus test is whether defendant received due process and a fair trial." Accordingly, any claim based on cumulative error must be assessed "to see if it is reasonably probable the jury would have reached a result more favorable to defendant in their absence." (*Ibid.*)

Here, appellant has failed to demonstrate that any possible errors could have affected the verdict. Consequently, his claim should be rejected.

X. THE USE OF UNCHARGED OFFENSES AS EVIDENCE IN AGGRAVATION WAS CONSTITUTIONAL

Appellant argues that his death sentence should be vacated because the use of his uncharged offenses as a sentencing factor under section 190.3, factor (b) ("factor (b)") violated his rights to due process and a reliable penalty phase determination under the Fifth, Eighth, and Fourteenth Amendments.[15] (AOB 245-250.) Respondent disagrees. This Court has

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[15] During the penalty phase, Williams described following conduct by appellant: (1) twice, appellant hit someone with a stick during CTS

(continued...)

long held that admitting evidence of uncharged offenses in the penalty phase does not violate due process or the Eighth Amendment's guarantee of a reliable penalty verdict. (*People v. Gallegos* (1990) 52 Cal.3d 115, 194 [rejecting due process, Eighth Amendment reliability, and equal protection objections to factor (b) evidence]; see also *People v. Morrison* (2004) 34 Cal.4th 698, 729 [consideration of factor (b) evidence "is not unconstitutional and does not render a death sentence unreliable"]; *People v. Jenkins* (2000) 22 Cal.4th 900, 1054 [declining to revisit whether consideration of factor (b) evidence renders the "death sentence unreliable and violates the Fifth, Sixth, Eighth, and Fourteenth Amendments of the federal Constitution"].) Accordingly, appellant's claim must be rejected.

XI. CALIFORNIA'S DEATH PENALTY STATUTE IS CONSTITUTIONAL

Appellant contends that California's death penalty statute is unconstitutional because it failed to provide common safeguards present in other death penalty statutes. (AOB 250-275.) Respondent disagrees.

A. The Jury Is Not Required to Find Beyond a Reasonable Doubt That Aggravating Factors Exist, That They Outweigh the Mitigating Factors, or That Death Is the Appropriate Sentence

Appellant argues that the jury must be required to find beyond a reasonable doubt that aggravating factors exist, that the aggravating factors outweigh the mitigating factors, and that death is the appropriate penalty.

(...continued)
initiations; (2) once, appellant and other CTS members "beat somebody up for the fun of it," and (3) once, appellant kicked a woman off her bicycle. (21RT 4450-4456.) During her closing argument, the prosecutor argued that appellant's activity as a CTS member in hitting people with sticks, knocking people off their bikes, and beating people "for the fun of it" satisfied the requirements of factor (b). (23RT 4895-4896.)

(AOB 251-259.) As this Court explained in *People v. Demetrulias* (2006) 39 Cal.4th 1, California's death penalty statute does not require instruction on burden of proof in the penalty phase and "is not invalid for failing to require . . . (2) proof of all aggravating factors beyond a reasonable doubt, (3) findings that aggravation outweighs mitigation beyond a reasonable doubt, or (4) findings that death is the appropriate penalty beyond a reasonable doubt. [Citation.]" (*Id.* at p. 43; accord *People v. Rogers* (2006) 39 Cal.4th 826, 893; *People v. Blair* (2005) 36 Cal.4th 686, 753; *People v. Davis* (2005) 36 Cal.4th 510, 571; *People v. Brown* (2004) 33 Cal.4th 382, 402.) Unanimity is required only as to the appropriate penalty. (*People v. Stanley* (2006) 39 Cal.4th 913, 963; *People v. Anderson* (2001) 25 Cal.4th 543, 590.)

Appellant argues that *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435], *Ring v. Arizona* (2002) 536 U.S. 584 [122 S.Ct. 2428, 153 L.Ed.2d 556], *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531,159 L.Ed.2d 403], and *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856], require that the aggravating factors be found beyond a reasonable doubt by a unanimous jury. (AOB 251-259.) This claim should be rejected. *Ring* is inapplicable to the penalty phase of California's capital murder trials because "once a defendant has been convicted of first degree murder and one or more special circumstances have been found true under California's death penalty statute, the statutory maximum penalty is already set at death. [Citation.]" (*People v. Stanley*, *supra*, 39 Cal.4th at p. 964.) Thus, "any finding of aggravating factors during the penalty phase does not increase the penalty for a crime beyond the prescribed statutory maximum [citation], [and] *Ring* imposes no new constitutional requirements on California's penalty phase proceedings. [Citations.]" (*Ibid.*, internal quotations and brackets omitted.)

Similarly, in *People v. Morrison*, *supra*, 34 Cal.4th 698, this Court held that *Apprendi*, *Ring*, and *Blakely* do not "affect[] California's death penalty law or otherwise justif[y] reconsideration of the foregoing decisions. [Citations.]" (*Id.* at p. 730; accord *People v. Rogers*, *supra*, 39 Cal.4th at p. 893; *People v. Blair*, *supra*, 36 Cal.4th at p. 753.) More recently, this Court held that *Cunningham* "merely extends the *Apprendi* and *Blakely* analyses to California's determinate sentencing law and has no apparent application to California's capital sentencing scheme. [Citation.]" (*People v. Salcido* (2008) 44 Cal.4th 93,167.)

Appellant also argues that the jury must be required to find beyond a reasonable doubt that aggravating factors outweigh the mitigating factors. (AOB 259-261.) As this Court, however, explained, "neither the cruel and unusual punishment clause of the Eighth Amendment, nor the due process clause of the Fourteenth Amendment, requires a jury to find beyond a reasonable doubt that aggravating circumstances exist or that aggravating circumstances outweigh mitigating circumstances or that death is the appropriate penalty. [Citations.]" (*People v. Blair*, *supra,* 36 Cal.4th at p. 753.) Furthermore, "the trial court need not and should not instruct the jury as to any burden of proof or persuasion at the penalty phase. [Citations.]" (*Ibid.*; accord *People v. Demetrulias*, *supra*, 39 Cal.4th at p. 43; *People v. Gray* (2005) 37 Cal.4th 168, 236; *People v. Wilson* (2005) 36 Cal.4th 309, 360.) Accordingly, appellant's claim should be rejected.

B. The Jury Is Not Required to Find Factual Determinations by Beyond a Reasonable Doubt During the Penalty Phase

Appellant separately argues that "the burden of proof for factual determinations during the penalty phase of a capital trial . . . must be beyond a reasonable doubt." (AOB 261-264.) This Court, however, has repeatedly held that "California's death penalty law is not unconstitutional

for failing to impose a burden of proof--whether beyond a reasonable doubt or by a preponderance of the evidence--as to the existence of aggravating circumstances, the greater weight of aggravating circumstances over mitigating circumstances, or the appropriateness of a death sentence. [Citations.]" (*People v. Stanley, supra*, 39 Cal.4th at p. 964 and cases cited therein.) Accordingly, appellant's claim should be rejected.

C. The Jury Is Not Required to Make Written Findings of Aggravating Factors

Appellant argues that the jury must make written findings of aggravating factors. (AOB 264-267.) Respondent disagrees. The jury is not required to make written findings regarding aggravating factors. (*People v. Rogers*, *supra*, 39 Cal.4th at p. 893, *People v. Blair*, *supra*, 36 Cal.4th at p. 754; *People v. Davis*, *supra*, 36 Cal.4th at p. 571; *People v. Griffin*, *supra*, 33 Cal.4th at pp. 593-594; *People v. Rodriguez* (1986) 42 Cal.3d 730, 777-778.)

D. Intercase Proportionality Review Is Not Required

Appellant contends that intercase proportionality review is required in capital sentencing. (AOB 267-269.) Respondent disagrees. "Comparative intercase proportionality review by the trial or appellate courts is not constitutionally required." (*People v. Snow* (2003) 30 Cal.4th 43, 126; accord *People v. Demetrulias*, *supra*, 39 Cal.4th at p. 44; *People v. Gray*, *supra*, 37 Cal.4th at p. 237; *People v. Blair*, *supra*, 36 Cal.4th at p. 753; *People v. Stitely* (2005) 35 Cal.4th 514, 574; *People v. Anderson*, *supra*, 25 Cal.4th at p. 602.)

E. The Death Penalty Statute Does Not Allow Arbitrary and Capricious Imposition of Death

Appellant argues that factor (a) of section 190.3 has been applied in an arbitrary and capricious manner in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. (AOB 269-271.) This claim should be

rejected pursuant to the authority of *People v. Manriquez* (2005) 37 Cal.4th 547: "Section 190.3, factor (a), is not overbroad, nor does it allow for the arbitrary and capricious imposition of the death penalty. [Citations.]" (*Id.*, at p. 589, fn. omitted.)

F. Reliance on Unadjudacted Criminal Activity Is Constitutional

Appellant argues that reliance on unadjudicated criminal activity violated his right to due process and that the jury should have been required find unanimously on the truth of such findings. (AOB 272.) Respondent disagrees. "In itself, introduction of evidence of unadjudicated criminal activity under section 190.3, factor (b), does not offend the federal Constitution. [Citations.]" (*People v. Maury*, *supra*, 30 Cal.4th at p. 439.) "The jury need not unanimously decide the truth of unadjudicated crimes. [Citation.]" (*People v. Carpenter* (1999) 21 Cal.4th 1016, 1061.)

G. The Use of Restrictive Adjectives in Mitigating Factors Was Proper

Appellant contends that the use of the adjectives "extreme" in factors (d) and (g) and "substantial" in factor (g) "acted as barriers to the consideration of mitigation." (AOB 273.) Respondent disagrees. "The use of adjectives such as 'extreme' and 'substantial' in section 190.3 penalty factors (d) and (g) does not impermissibly restrict the jury's consideration of mitigating evidence in violation of the Eighth or Fourteenth Amendments. [Citations.]" (*People v. Blair*, *supra*, 36 Cal.4th at pp. 753-754; accord *People v. Demetrulias*, *supra*, 39 Cal.4th at p. 42; *People v. Wilson*, *supra*, 36 Cal.4th at p. 360; *People v. Harris* (2005) 37 Cal.4th 310, 376 Accordingly, appellant's claim should be rejected.

H. The Trial Court Was Not Required to Instruct That Mitigating Factors Were Relevant Solely As Potential Mitigators

Appellant contends that the trial court erroneously failed to instruct the jury which factors were relevant as mitigating circumstances. (AOB 273-275.) Respondent disagrees. The trial court is not required to instruct the jury which factors are relevant as mitigating circumstances and which factors are relevant as aggravating circumstances. (*People v. Wilson*, *supra*, 36 Cal.4th at p. 360; *People v. Farnam* (2002) 28 Cal.4th 107, 191-192.) It is also not required to advise the jury which statutory factors are relevant solely as mitigating circumstances. (*People v. Farnam*, *supra*, 28 Cal.4th at p. 192. This claim should be rejected.

XII. ABSENCE IN CALIFORNIA'S DEATH PENALTY STATUTE OF PROCEDURAL SAFEGUARDS AVAILABLE TO NON-CAPITAL DEFENDANTS DOES NOT VIOLATE EQUAL PROTECTION

Appellant argues that California's death penalty statute violates equal protection because it "provides significantly fewer procedural protections" than those afforded to non-capital defendants. (AOB 275-278.) Respondent disagrees.

This Court has rejected the claim that procedural differences in capital and non-capital cases, including the availability of certain "safeguards" such as intercase proportionality review, violate equal protection principles under the Fourteenth Amendment. (See *People v. Blair*, *supra*, 36 Cal.4th at p. 754; *People v. Ramos* (1997) 15 Cal.4th 1133, 1182; *People v. Cox*, *supra*, 53 Cal.3d at p. 691; *People v. Allen* (1986) 42 Cal.3d. 1222, 1287-1288.) As this Court has observed, capital case sentencing involves considerations wholly different from those involved in ordinary criminal sentencing. (*People v. Blair*, *supra*, 36 Cal.4th at p. 754; *People v. Danielson* (1992) 3 Cal.4th 691, 719-720, overruled on other grounds in

Price v. Superior Court (2001) 25 Cal.4th 1046, 1069, fn. 13.) "By parity of reasoning, the availability of procedural protections such as jury unanimity or written factual findings in noncapital cases does not signify that California's death penalty statute violates equal protection principles." (*People v. Blair*, *supra,* 36 Cal.4th at p. 754.)

XIII. CALIFORNIA'S DEATH PENALTY STATUTE IS CONSTITUTIONAL AS INTERPRETED AND APPLIED IN APPELLANT'S TRIAL

Appellant argues that California's death penalty statute, as interpreted and applied in his trial, violated the Constitution. (AOB 278-291.) Respondent disagrees.

A. Section 190.2 Is Not Impermissibly Broad

Contrary to appellant's claim, section 190.2 is not impermissibly broad. (See AOB 281-285.) This Court has consistently rejected the claim that the California death penalty statute fails to narrow, in a constitutionally acceptable manner, the class of persons eligible for the death penalty. "California's statutory special circumstances (§ 190.2, subds. (a)(1)-(22)) are not so numerous or inclusive as to fail to narrow the class of murderers eligible for the death penalty." (*People v. Yeoman* (2003) 31 Cal.4th 93, 165.) "The special circumstances listed in section 190.2 adequately narrow the class of murders for which the death penalty may be imposed." (*People v. Snow*, *supra*, 30 Cal.4th at p. 125.) "The statute (§ 190.2) does not impose overbroad death eligibility, either because of the sheer number and scope of special circumstances which define a capital murder, or because the statute permits capital exposure for an unintentional felony murder." (*People v. Anderson*, *supra*, 25 Cal.4th at p. 601; see, e.g., *People v. Marks* (2003) 31 Cal.4th 197, 237; *People v. Box* (2000) 23 Cal.4th 1153, 1217; *People v. Ochoa* (1998) 19 Cal.4th 353, 479.)

Appellant argues that the death penalty applies to "virtually all intentional murders" in California. (AOB 283.) The defendant in *People v. Crittenden*, *supra*, 9 Cal.4th 83, made a similar argument: "In particular, defendant contends that the categories of murder subjecting a defendant to eligibility for the death penalty have been expanded to the extent that the death penalty law does not perform the mandated narrowing function. This development, defendant asserts, is reflective of an original unconstitutional purpose, harbored by the proponents of the law, to apply the death penalty in every case of murder." (*Id.* at p. 154.) This Court held in *Crittenden*, "[e]ven taking into account this statutory expansion, however, we believe the death-eligibility component of California's capital punishment law does not exceed constitutional bounds." (*Id.* at p. 156.)

B. The Administration of California's Death Penalty Is Not Arbitrary

Citing Judge Noonan's dissenting opinion in *Jeffers v. Lewis* (9th Cir. 1994) 38 F.3d 411, 425-428, appellant, citing "the rarity and unpredictable order" of executions and lengthy review process, argues that the administration of California's death penalty is so arbitrary as to violate the Eighth Amendment. (AOB 285.) Respondent disagrees. As noted in *People v. Demetrulias*, *supra*, 39 Cal.4th at p. 44, this Court rejected a similar contention in *People v. Snow*. (See *People v. Snow*, *supra*, 30 Cal.4th at p. 127.) There, the Court explained:

> The federal appellate court has rejected this argument (*Woratzeck v. Stewart* (9th Cir.1997) 118 F.3d 648, 652); we do so as well. 'If Woratzeck's death sentence does not violate the Eighth Amendment, then neither does the scheduling of his execution. Arizona must establish some order of execution. There has been no prima facie showing that this scheduling violates the Eighth Amendment.' (*Ibid.*) The same is true here. Defendant does not face imminent execution and can hardly claim he is being singled out for either quick or slow treatment of his appeal and habeas corpus proceedings. More generally,

> defendant makes no showing that the number of condemned prisoners executed in California, or the order in which their execution dates are set, is determined by any invidious means or method, with discriminatory motive or effect, or indeed according to anything other than the pace at which various defendants' appeals and habeas corpus proceedings are concluded, a matter by no means within the sole control of the state.

(*Ibid.*) Appellant provides no reason for this Court to depart from its prior holding.

C. Prosecutorial Charging Discretion Does Not Render California's Death Penalty Statute Unconstitutional

Appellant argues that it is unconstitutional to permit an individual prosecutor unbridled discretion to decide whether the death penalty will be imposed. Such discretion, he argues, creates the risk of county by county arbitrariness based on "irrelevant and impermissible considerations, or simple arbitrariness." (AOB 285-287.) Respondent disagrees. As held in *People v. Crittenden*, *supra*, 9 Cal.4th 83:

> Prosecutorial discretion to select those eligible cases in which the death penalty actually will be sought does not, in and of itself, evidence an arbitrary and capricious capital punishment system, nor does such discretion transgress the principles underlying due process of law, equal protection of the laws, or the prohibition against cruel and unusual punishment. [Citations.]

(*Id.* at p. 152; see also *People v. Koontz* (2002) 27 Cal.4th 1041, 1095; *People v. Steele* (2002) 27 Cal.4th 1230, 1269; *People v. Earp*, *supra*, 20 Cal.4th at p. 905 ["There is no constitutional proscription against delegating to each district attorney the power to effectively decide in which cases to seek the death penalty"]; *People v. Ochoa*, *supra*, 19 Cal.4th at p. 479; *People v. Ray* (1996) 13 Cal.4th 313 at p. 359.) Appellant provides no persuasive basis for his request that this Court reconsider its prior holdings on this issue. Accordingly, his claim should be rejected.

D. Limitations in California's Postconviction Relief Do Not Render California's Death Penalty System Arbitrary or Unreliable

Citing Justice Blackmun's dissenting opinion in *Callins v. Collins* (1994) 510 U.S. 1141 [114 S.Ct. 1127, 127 L.Ed.2d 435], appellant contends that limitations in California's postconviction relief procedure in capital cases is "strikingly similar" to the limitations in federal postconviction review of the death penalty, which is "fraught with arbitrariness, discrimination, caprice, and mistake." (AOB 287-288.) Respondent disagrees. This Court has previously rejected a similar claim in *People v. Demetrulias*, *supra*, 39 Cal.4th at page 44. (*People v. Salcido*, *supra*, 44 Cal.4th at p. 169; *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255.)

E. Inadequacy of Postconviction Relief in Federal and State Courts Does Not Render California's Death Penalty System Arbitrary or Unreliable

Citing Justice Blackmun's concurring opinion in *Sawyer v. Whitley* (1992) 505 U.S. 333 [112 S.Ct. 2514, 120 L.Ed.2d 269], and this Court's opinion in *In re Clark* (1993) 5 Cal.4th 750, appellant argues that current limitations of postconviction relief in federal and state courts such as those resulting from the expansion of procedural bars render review of California's capital convictions and sentences more arbitrary and less reliable than when capital punishment was resumed in 1976. (AOB 288-289.) As this Court noted in *People v. Salcido*, *supra*, 44 Cal.4th 93, appellant "has not established or provided authority for the proposition that such a result has occurred." (*Id.* at p. 169.)

Indeed, the limits placed on a defendant's right to federal habeas corpus review and relief have consistently been found by the high court to be proper and constitutional. (See *Calderon v. Thompson* (1998) 523 U.S. 538, 554-555, 558 [118 S.Ct. 1489, 140 L.Ed.2d 728]; *Felker v. Turpin*

(1996) 518 U.S. 651, 654-665 [116 S.Ct. 2333, 135 L.Ed.2d 827]; 28 U.S.C. § 2244, subd. (b).) These limits reflect the high court's respect for "'the State's interest in the finality of convictions that have survived direct review within the state court system'" balanced with need to remedy actual injustice. (*Calderon v. Thompson*, *supra*, 523 U.S. at pp. 554-558; *In re Clark*, *supra*, 5 Cal.4th at pp. 787-788.)

The limits placed on a defendant's right to state habeas corpus review and relief have been also been found to be entirely proper and constitutional. (*In re Clark*, *supra*, 5 Cal.4th at pp. 750, 763-799; see also *In re Robbins* (1998) 18 Cal.4th 770, 777-778.)

> California law . . . recognizes that in some circumstances there may be matters that undermine the validity of a judgment or the legality of a defendant's confinement or sentence, but which are not apparent from the record on appeal, and that such circumstances may provide a basis for a collateral challenge to the judgment through a writ of habeas corpus. At the same time, however, our cases emphasize that habeas corpus is an extraordinary remedy that "was not created for the purpose of defeating or embarrassing justice, but to promote it" [Citation], and that the availability of the writ properly must be tempered by the necessity of giving due consideration to the interest of the public in the orderly and reasonably prompt implementation of its laws and to the important public interest in the finality of judgments. For this reason, a variety of procedural rules have been recognized that govern the proper use of the writ of habeas corpus, including a requirement that claims raised in a habeas corpus petition must be timely filed.

(*In re Robbins*, *supra*, 18 Cal.4th at pp. 777-778, fn. omitted.) Accordingly, appellant's claim should be rejected.

F. Use of the Death Penalty Does Not Violate International Law and/or the Constitution

Appellant contends that use of the death penalty as a regular form of punishment violates international law and the Eighth and Fourteenth Amendments. (AOB 289-291.) Respondent disagrees. As this Court

stated in *People v. Hillhouse* (2002) 27 Cal.4th 469, at page 511, "had defendant shown prejudicial error under domestic law, we would have set aside the judgment on that basis, without recourse to international law. . . . [¶] . . . International law does not prohibit a sentence of death rendered in accordance with state and federal constitutional and statutory requirements." (See also *People v. Loker* (2008) 44 Cal.4th 691, 756; *People v. Harris* (2008) 43 Cal.4th 1269, 1323; *People v. Ghent* (1987) 43 Cal.3d 739, 778-779 (maj. opn.); *id.* at pp. 780-781 (conc. opn. of Mosk, J.); *People v. Vieira* (2005) 35 Cal.4th 264, 305; *People v. Jenkins*, *supra*, 22 Cal.4th at p. 1055.)

XIV. APPELLANT WAS NOT DENIED HIS RIGHT TO BE TRIED IN A FAIR PROCEEDING UNDER INTERNATIONAL LAW

Appellant contends his verdict and death sentence must be reversed because he was denied his international rights to a fair trial by an independent tribunal and to minimum guarantees for the defense. (AOB 291-304.) Specifically, he argues that "his right to minimum guarantees for the defense under principles established by the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (ICCPR), and the American Declaration of the Rights and Duties of Man (American Declaration)" was violated. (AOB 291.) Respondent disagrees. This claim has been repeatedly rejected by this Court. (*People v. Mungia* (2008) 44 Cal.4th 1101, 1143; *People v. Harris, supra*, 37 Cal.4th at p. 365; *People v. Wilson*, *supra*, 36 Cal.4th at p. 362; *People v. Ward* (2005) 36 Cal.4th 186, 222; *People v. Brown*, *supra*, 33 Cal.4th at p. 403; *People v. Hillhouse*, *supra*, 27 Cal.4th at p. 511; *People v. Ghent*, *supra*, 43 Cal.3d at p. 783.) Accordingly, appellant's claim fails.

XV. THE TRIAL COURT'S INSTRUCTIONS ON FACTOR (B) WERE CONSTITUTIONAL

Appellant argues that the trial court's instructions to the jury regarding factor (b) of section 190.3 rendered his death sentence unconstitutional. (AOB 304-313.) Specifically, appellant argues that the use of unadjudicated criminal activity evidence as an aggravating factor violated his right to due process (AOB 305-306), that the instruction failed to require a unanimous finding on the unadjudicated criminal activity evidence (AOB 306-308), and that the absence of such a requirement rendered his death verdict unreliable (AOB 309-312.) Respondent disagrees.

As discussed above, this Court has held that the use of unadjudicated offenses as an aggravating factor does not violate due process. (See *ante*, Arg. X.) Further, there is no requirement that the jury as a whole unanimously find the existence of other violent criminal activity beyond a reasonable doubt before an individual juror may consider such evidence in aggravation. (See *People v. Griffin*, *supra*, 33 Cal.4th at p. 585; *People v. Benson* (1990) 52 Cal.3d 754, 809-811; see also *People v. Lewis* (2006) 39 Cal.4th 970, 1068.) Thus, "[a]llowing consideration of unadjudicated criminal activity under factor (b) is not unconstitutional and does not render a death sentence unreliable. [Citations.]" (*People v. Morrison* (2004) 34 Cal.4th 698, 729.) Appellant's claim must be rejected.

XVI. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY WITH CALJIC NO. 8.88

Appellant argues that the trial court's use of CALJIC No. 8.88 violated his constitutional rights as follows: the instruction was impermissibly vague and misleading; it failed to inform the jurors that a sentence of life without the possibility of parole was required if mitigation

outweighed aggravation; its "so substantial" standard created a presumption favoring death; it failed to inform the jurors that the central determination is whether the death penalty is the appropriate punishment; and the terms "aggravating" and "mitigating" circumstances are vague and ambiguous. (AOB 313-332.) To the extent appellant did not request the specific modifications alleged here, he has waived his claim on appeal. (*People v. Daya* (1994) 29 Cal.App.4th 697, 714 ["defendant is not entitled to remain mute at trial and scream foul on appeal for the court's failure to expand, modify, and refine standardized jury instructions"].) In any event, as appellant recognizes, CALJIC No. 8.88 has been found to be constitutional (*People v. Moon* (2005) 37 Cal.4th 1, 41-42; *People v. Crew* (2003) 31 Cal.4th 822, 858), and this Court has rejected all of appellant's challenges to the standard instruction (*People v. Ochoa* (2003) 26 Cal.4th 398, 452; *People v. Johnson* (1993) 6 Cal.4th 1, 52, overruled on another ground in *People v. Rogers*, *supra*, 39 Cal.4th at p. 879). (See AOB 315, fn. 141.)

Indeed, the language of CALJIC No. 8.88 is not unconstitutionally vague; it adequately conveys the weighing process and is consistent with section 190.3. (*People v. Chatman* (2006) 38 Cal.4th 344, 409; *People v. Smith* (2006) 35 Cal.4th 334, 370; *People v. Davenport* (1995) 11 Cal.4th 1171, 1231, overruled on another ground in *People v. Griffin*, *supra*, 33 Cal.4th at p. 555, fn. 5.) The instruction "[i]s not unconstitutional for failing to inform the jury that if it finds the circumstances in mitigation outweigh those in aggravation, it is required to impose a sentence of life without the possibility of parole [citation]." (*People v. Moon*, *supra*, 37 Cal.4th at p. 42.) The instruction informs the jury regarding the proper weighing of aggravation and mitigation to determine whether death or life without parole is warranted. (*People v. Perry* (2006) 38 Cal.4th 302, 320; *People v. Smith*, *supra*, 35 Cal.4th at p. 370.) The "so substantial" language does not create a presumption for death. (*People v. Salcido*,

supra, 44 Cal.4th at p. 163; *People v. Maury*, *supra*, 30 Cal.4th at p. 440.) Rather, it properly admonishes the jury "to determine whether the balance of aggravation and mitigation makes death the appropriate penalty." (*People v. Arias* (1996) 13 Cal.4th 92, 171.) "The statutory language referring to aggravating and mitigating circumstances is not vague or ambiguous. [Citations.]" (*People v. Salcido*, *supra*, 44 Cal.4th at p. 164.) Appellant has not provided any reason for this Court to depart from its past decisions. Accordingly, appellant's claim must be rejected.

XVII. THERE WAS NO CUMULATIVE ERROR

Appellant contends that the cumulative effect of errors during the guilt and penalty phases requires reversal of the death verdict. (AOB 332-346.) Respondent disagrees because there was no error, and, to the extent there was error, appellant has failed to demonstrate prejudice.

Moreover, whether considered individually or for their cumulative effect, the alleged errors could not have affected the outcome of the trial. (See *People v. Seaton* (2001) 26 Cal.4th 598, 675, 691-692; *People v. Ochoa*, *supra*, 26 Cal.4th at pp. 447, 458; *People v. Catlin* (2001) 26 Cal.4th 81, 180.) Even a capital defendant is entitled only to a fair trial, not a perfect one. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1009; *People v. Box*, *supra*, 23 Cal.4th at pp. 1214, 1219.) The record shows appellant received a fair trial. His claims of cumulative error should, therefore, be rejected.

XVIII. THE TRIAL COURT PROPERLY IMPOSED SEPARATE PUNISHMENT FOR USE OF A DEADLY WEAPON, SEXUAL PENETRATION BY OBJECT, AND ALL FELONIES EXCEPT FOR MURDER AND RAPE; PUNISHMENT FOR FORCIBLE RAPE SHOULD BE STAYED

Appellant argues that the trial court erred in imposing separate punishment for the personal use of a deadly weapon allegation (§ 12022, subd. (b)(1)) in count II and personal use of a deadly weapon allegation (§ 12022.3, subds. (a) & (b)) in count IV. (AOB 347-348.) He also argues that section 654 barred separate punishment for forcible rape while acting in concert (count IV) and forcible rape (count V), for sexual penetration by foreign object while acting in concert (count VI) and sexual penetration by foreign object (count VII) (AOB 348-349), and for all felonies except for murder (counts II-VIII) (AOB 349-350). Respondent agrees that section 654 precluded him from being sentenced on both counts IV and V. As to the remaining counts and enhancements, section 654 did not apply.

A. Applicable Law

Section 654 bars punishment for conduct that violates more than one statute but that constitutes one indivisible transaction. (*People v. Perez* (1979) 23 Cal.3d 545, 551.) Whether a course of criminal conduct is divisible into more than one act depends on the intent and objective of the actor. (*Ibid.*; *People v. Green* (1996) 50 Cal.App.4th 1076, 1084.) "If [a defendant] entertained multiple criminal objectives which were independent of and not merely incidental to each other, he may be punished for independent violations committed in pursuit of each objective even though the violations shared common acts or were part of an otherwise indivisible course of conduct." (*People v. Beamon* (1973) 8 Cal.3d 625, 639; see *People v. Coleman* (1989) 48 Cal.3d 112, 162.) The fact that both violations share common acts or were simultaneously committed is not

determinative. (*People v. Beamon, supra*, 8 Cal.3d at p. 639; see also *In re Hayes* (1969) 70 Cal.2d 604, 607-609.)

A trial court has broad latitude in determining whether section 654 applies. (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1143.) On appeal, the trial court's findings are upheld "if there is any substantial evidence to support them." (*Ibid.*) The trial court's determinations are reviewed "in the light most favorable to the respondent," and "the existence of every fact the trial court could reasonably deduce from the evidence" is presumed. (*Ibid.*)

B. Separate Punishment for Sexual Penetration by Object in Concert and Sexual Penetration by Object Was Proper under Section 654; Forcible Rape Should Have Been Stayed under Section 654

Here, the trial court properly imposed separate punishment for sexual penetration by foreign object in concert (count VI) and sexual penetration by foreign object (count VII). Armstrong jabbed the stake into Sigler's vagina first. Then Hardy joined Armstrong, and they both jabbed the stake into Sigler's vagina several times. Appellant's participation as an aider and abettor in Armstrong's act and later in Armstrong and Hardy's act constituted separate sex crimes. Thus, appellant was properly punished separately for counts VI and VII.

As to forcible rape in concert (count IV) and forcible rape (count V), appellant appears to be correct that the term imposed for count IV should be stayed. The evidence showed that Sigler was raped once by appellant while Armstrong held one of her legs and Hardy looked on. As both counts were based on the same act of a single sexual penetration, the sentence imposed for the lesser offense should be stayed. (*In re Adams* (1975) 14 Cal.3d 629, 636-637.) The court imposed a one strike sentence of 25 years to life on count V and a determinate sentence on count IV. Thus, the sentence on count IV should be stayed.

C. Separate Punishment for All Felonies Except Counts III and IV Was Proper under Section 654

Except for counts III (kidnap for rape), which the court stayed, and IV (forcible rape in concert), which the court should have stayed (see, *ante*, Arg. XVIII.B), section 654 is inapplicable to the remaining counts. As the trial court noted, the crimes against Sigler were "separate acts of violence." (23RT 5021.) The court described the sequence of events as follows:

> First came the robbery, after the robbery was completed came the kidnapping, which dragged – they pulled her to a remote location after the kidnapping. I believe the next thing that happened was the rape and rape in concert and rape with a stake. You know, they are distinct acts of criminal conduct and distinct time frames. Even though they happened within a period of time, each one of the crimes finished before the next one happened, and they were – and the crime took place at separate places, due to the fact that they kept on moving her.

(23RT 5020-5021.) The trial court was correct.

Appellant did not have a single objective because his intent to kill in murder was separate from and not incidental to his objectives in robbery, rape, sexual penetration by foreign object and in concert, and torture. Appellant intended to take Sigler's property in robbery, to sexually gratify himself in rape, to sexually abuse her in sexual penetration by foreign object and in concert, and to inflict cruel pain and suffering for a sadistic purpose in torture. As the court noted, one crime was completed before the next one was committed. Further, the acts that constituted each offense were different from the blunt force trauma and asphyxia that caused Sigler's death. Robbery was accomplished by taking Sigler's food stamps. Rape was accomplished by appellant's inserting his penis into Sigler's vagina. Sexual penetration by foreign object was accomplished by first Armstrong, and then Hardy and Armstrong, inserting a stake into Sigler's vagina. Torture was accomplished by repeatedly beating her over a

prolonged period. Under the circumstances, there was evidence that appellant committed each felony for a "distinct and separate purpose" than another. (*People v. Garcia* (1978) 86 Cal.App.3d 314, 317.) Accordingly, appellant's claim must be rejected.

D. Separate Punishment for Use of a Deadly Weapon and Personal Use of a Deadly Weapon Was Proper under Section 654; In Any Event, Remand for Sentencing Is Necessary on the Enhancements

Initially, this Court has not decided whether section 654 applies to enhancements.[16] (See generally, *People v. Palacios* (2007) 41 Cal.4th 720, 728 [expressly declining to reach the question of whether section 654 generally applies to enhancements, leaving that question "for another day"]; *People v. Coronado* (1995) 12 Cal.4th 145, 157, and cases cited therein.) Assuming section 654 applies to enhancements, the trial court properly imposed separate punishment for the section 12022, subdivision (b)(1), enhancement on count II and section 12022.3, subdivision (a), enhancement on count IV.

Here, appellant's intent and objective in using the stake to commit the robbery (count II) was independent from his intent and objective in using the stake to commit forcible rape in concert (count IV). While there may

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[16] Whether section 654 applies to sentence enhancements is an issue currently pending before this Court in *People v. Rodriguez* (2007) 157 Cal.App.4th 14, review granted March 12, 2008, S159497. In *People v. Gonzalez* (2008) 43 Cal.4th 1118, this Court recently commented on the trial court's decision to impose the section 12022.53, subdivision (d), enhancement and to stay the additional firearm enhancements (the section 12022.53, subdivisions (b) and (c), enhancements, and the section 12022.5 enhancement) pursuant to section 654. The Court noted, "Although the trial court correctly stayed all of the prohibited firearm enhancements, it incorrectly issued those stays under section 654, which applies only to offenses punishable in different ways, not to prohibited enhancements committed in the commission of an unstayed offense." (*People v. Gonzalez, supra*, 43 Cal.4th at p. 1124, fn. 5.)

have only been a single stake used during the crimes against Sigler, the stake was used in multiple ways for multiple purposes on multiple occasions and caused various injuries on Sigler. Thus, separate punishment for personal use of a deadly weapon on counts II and IV was proper.

Nevertheless, because count IV should have been stayed per section 654 (see *ante*, Section B), any enhancement attached to the stayed count should also be stayed. (*People v. Bracamonte* (2003) 106 Cal.App.4th 704, 711, disapproved on other grounds in *People v. Gonzalez* (2008) 43 Cal.4th 1118, 1130, fn. 8 [""an enhancement must necessarily be stayed where the sentence on the count to which it is added is required to be stayed [under section 654]""].)

Remand, however, is necessary on the remaining enhancements. The jury found true the personal use of a deadly weapon enhancements under both sections 12022, subdivision (b)(1), and 12022.3, subdivisions (a) and (b), to be true.[17] (57CT 16253-16275.) Unless otherwise provided by statute, enhancement may only be imposed or stricken and may not be stayed. (*People v. Haykel* (2002) 96 Cal.App.4th 146, 151.) The court, however, only imposed a one-year use enhancement in count II and a ten-year personal use enhancement in count IV. (58CT 16571-16590.) Thus, the court erred in failing to impose or strike the enhancements found true by the jury, and the case must be remanded for resentencing on the enhancements to give the court an opportunity to exercise its discretion

[17] Although the jury found the section 12022.3 allegation on count III, kidnap for rape (§ 209, subd. (b)(1)), to be true, section 12022.3 did not apply to that offense. (See § 12022.3 [enhancement applies to "each violation or attempted violation of Section 261, 262, 264.1, 286, 288, 288a, or 289"].) The trial court never imposed the section 12022.3 enhancement on count III.

under section 1385 on whether to strike the enhancements.[18] (See *People v. Jones* (2007) 157 Cal.App.4th 1373, 1380-1383 [the trial court retains discretion to strike section 12022, subdivision (b), enhancements]; *People v. Sutton* (1985) 163 Cal.App.3d 438, 446, disapproved on other grounds in *People v. Equarte* (1986) 42 Cal.3d 456, 465, fn. 12 [the trial court retains discretion strike section 12022.3 enhancements].)

Further, the abstract of judgment should be corrected as to count VI. On count VI, appellant was found guilty of sexual penetration by object in concert pursuant to sections 289, subdivision (a)(1), and 264.1. (23RT 5036.) The court imposed an upper term of 8 years. (23RT 5040.) The upper term under section 264.1, however, is not 8 years, but 9 years. Thus, the abstract of judgment should be corrected to indicate that appellant was sentenced to 9 years on count VI.

XIX. APPELLANT'S UPPER TERM SENTENCE SHOULD BE UPHELD

Appellant claims that under *Cunningham v. California*, *supra*, 549 U.S. 270, the trial court erred by imposing an upper term based on facts that were neither found by the jury nor admitted by appellant. Accordingly, he claims that his Fifth, Sixth, and Fourteenth Amendment rights to a jury trial, proof beyond a reasonable doubt, and due process were violated and his sentence should be reversed. (AOB 350-364.) Respondent disagrees because the trial court based the upper term on facts that the jury necessarily found, and any error was harmless beyond a reasonable doubt.

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[18] Where the sentence on a count is stayed, the court is required to also stay the enhancement on which it is added. (*People v. Bracamonte*, *supra*, 106 Cal.App.4th at p. 711.) Thus, any enhancements on counts III and IV must also be stayed. (See, *ante*, Section C.)

A. Procedural Background

At the sentencing hearing on November 19, 2003, the trial court noted the following aggravating factors: (1) the crimes involved great bodily harm and cruelty; (2) the victim was vulnerable; (3) the crime involved sophistication and planning; and (4) appellant has engaged in violent conduct indicating a serious danger to society. (23RT 5019-5020.) The court did not find any mitigating circumstances. (23RT 5020.) Based on the "gravity of this case and the aggravating factors," the court imposed the upper term on counts II (robbery), IV (forcible rape in concert), VI (sexual penetration by object in concert), and VII (sexual penetration by object). (23RT 5021, 5039-5041.)

B. The *Cunningham* Decision

In *Cunningham*, the United States Supreme Court held that California's procedure for selecting upper terms under former section 1170, subdivision (b), violated the defendant's Sixth and Fourteenth Amendment right to jury trial because it gave "to the trial judge, not to the jury, authority to find the facts that expose a defendant to an elevated 'upper term' sentence." (*Cunningham v. California*, *supra*, 549 U.S. at p. 274.) The Court explained that "the Federal Constitution's jury-trial guarantee proscribes a sentencing scheme that allows a judge to impose a sentence above the statutory maximum based on a fact, other than a prior conviction, not found by a jury or admitted by the defendant." (*Id.* at pp. 274-275.)

C. The Upper Term Was Constitutional Based on the Jury's Findings

An upper term sentence based on at least one aggravating circumstance complying with *Cunningham* "renders a defendant eligible for the upper term sentence," and "any additional fact finding engaged in by the trial court in selecting the appropriate sentence among the three

available options does not violate the defendant's right to jury trial." (*People v. Black* (2007) 41 Cal.4th 799, 812 (*Black II*).) An aggravating circumstance is "legally sufficient" under *Cunningham* if it was "found to exist by the jury" or "has been admitted by the defendant . . . ." (*Black II*, *supra*, 41 Cal.4th at p. 816; see *People v. Towne* (2008) 44 Cal.4th 63, 76 & fn. 4; *People v. Calhoun* (2007) 40 Cal.4th 398, 406-408.)

Here, the aggravating circumstance that the crimes involved a high degree of great bodily harm and cruelty was inherent in the jury's findings that appellant personally used a deadly weapon in the crimes (57CT 16253-16265; see 23RT 5019) and inflicted torture (57CT 16254), and fully satisfied the constitutional requirement in *Cunningham*. This rendered appellant eligible for the upper term. Under these circumstances, the trial court's reliance on other aggravating circumstance findings did not violate *Cunningham*.

D. Any *Cunningham* Error Was Harmless

An appellate court properly finds *Cunningham* error harmless if it "concludes, beyond a reasonable doubt, that the jury, applying the beyond-a-reasonable doubt standard, unquestionably would have found true at least a single aggravating circumstance had it been submitted to the jury . . . ." (*People v. Sandoval* (2007) 41 Cal.4th 825, 839; accord, *People v. Wilson*, *supra*, 44 Cal.4th at pp. 812-813 [any *Cunningham* error was harmless because the jury would have found that the victim was vulnerable or that appellant isolated the victim].)

Here, each of the trial court's reasons for imposing the upper term was based on largely uncontested or overwhelming evidence. Sigler was alone at night when appellant and his cohorts robbed her of her food stamps. Appellant and his cohorts then savagely beat her, threw her over a fence, raped her, and sexually assaulted her using a stake. She had 114 injuries, all of which were premortem. Therefore, the jury would have found any of

these facts beyond a reasonable doubt had they been presented, rendering the *Cunningham* error harmless. Accordingly, this Court should reject appellant's contention.

If this Court disagrees and finds prejudicial *Cunningham* error, however, it should remand for resentencing under the reformed system prescribed by this Court. (See *People v. Sandoval*, *supra*, 41 Cal.4th at pp. 843-852.) Under this reformed system, the resentencing court would exercise its "discretion to select among the three available terms," giving a statement of reasons for its selection, but with no requirement of an additional factual finding or of a statement of "ultimate facts." (*Id.* at pp. 846-847, 852.) The court would also use the amended rules of court as guidance. (*Id.* at p. 846; see Cal. Rules of Court, rules 4.405-4.452, as amended May 23, 2007.)

CONCLUSION

For the foregoing reasons, respondent respectfully asks that the matter be remanded for resentencing on the enhancements, and in all other respects the judgment be affirmed.

Dated: August 10, 2009

Respectfully submitted,

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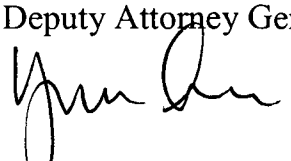

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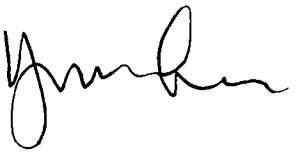
CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S BRIEF** uses a 13 point Times New Roman font and contains 28526 words.

Dated: August 10, 2009

EDMUND G. BROWN JR.
Attorney General of California



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DECLARATION OF SERVICE

Case Name: **People v. Kevin Darnell Pearson** No.: **S120750**

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; my business address is 300 South Spring Street, Suite 1702, Los Angeles, CA 90013. 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 that same day in the ordinary course of business.

On **August 13, 2009**, I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail system of the Office of the Attorney General, addressed as follows:

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On August 10, 2009, I caused Thirteen (13) copies of the **RESPONDENT'S BRIEF** in this case to be delivered to the California Supreme Court at 300 S. Spring Street, Los Angeles, CA 90013 by **Personal Delivery**.

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 **August 13, 2009**, at Los Angeles, California.

Nora Fung
Declarant

Signature

YKL:nf
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