In the Supreme Court of the State of California

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. **ANGELINA RODRIGUEZ,** Defendant and Appellant.	**CAPITAL CASE** Case No. S122123

Los Angeles County Superior Court Case No. BA213120
The Honorable William R. Pounders, Judge

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

In an amended information filed by the Los Angeles County District Attorney, appellant was charged with one count of murder (Pen. Code,[1] § 187, subd. (a); count 1), one count of attempt to dissuade a witness (§ 136.1, subd. (a)(2); count 2), and one count of solicitation of murder (§ 653f, subd. (b); count 3). As to count 1, it was alleged that the murder was carried out for financial gain (§ 190.2, subd. (a)(1)) and that appellant killed the victim by the administration of poison (§ 190.2, subd. (a)(19)). (2CT 488-490.) Appellant pleaded not guilty and denied the allegations. (2CT 491.)

Appellant was tried by jury and found guilty on counts 1 and 2. The jury also found the special allegations to be true. (3CT 863-866.) The jury could not reach a verdict on count 3, and the trial court declared a mistrial as to that count. (3CT 869-871, 874.) After the penalty phase trial, the same jury reached a verdict of death on count 1. (4CT 993.)

Appellant's motions for a new trial and to modify the death verdict were denied. (4CT 1064-1068.) On count 1, appellant was sentenced to death. On count 2, appellant was sentenced to two years in prison, which was stayed. (4CT 1073-1083.)

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

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[1] All further statutory references are to the Penal Code, unless otherwise noted.

STATEMENT OF FACTS

I. GUILT PHASE

A. Prosecution

In July 2000, Mickey Marracino, a life insurance agent, sent out direct mail advertising postcards to addresses in Montebello. (12RT 1834-1835.) Marracino later received a return postcard postmarked on July 1, 2000, from appellant expressing an interest in purchasing a life insurance policy. (12RT 1837.) On July 13, 2000, Marracino called appellant and set up an appointment to meet with her and her husband, Jose Francisco "Frank" Rodriguez, two days later, on July 15, 2000, at 6:00 p.m. (12RT 1839.)

Marracino met with appellant and Rodriguez at their house. (12RT 1840-1841.) After Marracino finished his sales presentation, Rodriguez asked appellant why she wanted to purchase additional life insurance since he already had coverage through both his work and National Guard. (12RT 1842-1843.) Appellant explained that in the event of Rodriguez's death, she needed the life insurance benefits to pay the bills and be able to carry on a comfortable living. (12RT 1843-1844.) After convincing Rodriguez to purchase the life insurance policy, appellant told Marracino that she used to be an insurance agent for Prudential. (12RT 1844-1845.)

Marracino wrote up the life insurance policy by Midland National for Rodriguez in the amount of $250,000 with appellant as the primary beneficiary. (12RT 1845, 1849-1850.) Appellant's minor daughter, Autumn F.,[2] was named as the secondary beneficiary. (12RT 1874.) Appellant and Rodriguez also filled out an application under appellant's

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[2] Appellant's two minor children will be referred to by their first names to protect their privacy.

name for a policy worth $50,000. (12RT 1846-1847.) Marracino explained that it was common for couples to request different benefit amounts depending on who was the primary "bread winner." (12RT 1872.)

Three days later, on July 18, 2000, Rodriguez underwent the required medical examination for the life insurance policy. (12RT 1854.) Based on the completion of the medical examination, the effective date for Rodriguez's policy was July 26, 2000. (12RT 1855-1856.) On the other hand, Marracino was notified that appellant had failed to show up for her medical examination appointment. (12RT 1857.) When Marracino called appellant, she said that she had been out of town in Bakersfield and that she was "real busy." (12RT 1857-1859.) Although the appointment was rescheduled, appellant never showed up for a medical examination which was a prerequisite for the completion of her application for a life insurance policy.[3] (12RT 1859.)

On September 3, 2000, Luis Aguilar, a technician for the Southern California Gas Company, was dispatched to 837 Marconi Street to repair an emergency gas leak. (16RT 2529-2530, 2554.) Rodriguez, who had called for service, met with Aguilar at the house and led him to the garage. (16RT 2534.) Rodriguez told Aguilar that the leak was coming from behind the dryer. As Aguilar got closer to the dryer, he could smell the gas and hear a hissing sound. (16RT 2536.) Aguilar determined that the gas leak was coming from the valve connected to the wall. (16RT 2535-2536.) The connector around the valve was "very loose" and had to be tightened by approximately three quarters of a turn. (16RT 2538-2539.) After adjusting the valve on the dryer, Aguilar also noticed and fixed a gas leak on the

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[3] After Rodriguez's death, appellant contacted Marracino and told him that she no longer wanted to purchase the life insurance policy for herself. (12RT 1859-1860, 1875.)

water heater right next to the dryer. (16RT 2544.) Assuming the dryer had been properly installed originally, Aguilar stated that the connector could not have become so loose "on its own." (16RT 2545.)

On September 5, 2000, Rodriguez, who was a teacher with the Los Angeles Unified School District, was assigned to work as a chaperone in a bus taking students from Los Angeles to the Angel Gate Academy ("Academy"), a school facility run in partnership with the California National Guard, located in San Luis Obispo. (13RT 2067-2068, 2070.) Rodriguez had previously worked at the Academy from 1996 to 1998 while on military duty. (13RT 2068.) The bus was scheduled to leave at approximately 6:30 a.m. to pick up the students and arrive at San Luis Obispo between 1:00 p.m. and 2:30 p.m. (13RT 2070-2071.) On Thursday before September 5, 2000, there was a sudden cancellation from another teacher who was originally scheduled to work as a chaperone. Wanda Moat, an assistant coordinator at the Academy, contacted Rodriguez to work as a replacement, and he was very excited for the opportunity. (13RT 2071-2072.) Although the names of the students and teachers remaining at the school site were sent to the Academy prior to their arrival, the names of the chaperones returning to Los Angeles were not sent. (13RT 2073-2074.)

On September 7, 2000, at approximately 9:13 a.m., Rodriguez and appellant went to the Kaiser Permanente Hospital ("Kaiser Hospital") in Baldwin Park. (12RT 1958-1960, 1967.) Rodriguez told Dr. William Chao, an emergency physician, that he was vomiting a lot and that he had three episodes of diarrhea before arriving at the hospital. (12RT 1958-1960.) Dr. Chao diagnosed Rodriguez with food poisoning. (12RT 1960.) Appellant never mentioned to Dr. Chao that she suspected Rodriguez had been poisoned by someone. (12RT 1961.) Rodriguez's medical records also lacked any notations regarding a possible poisoning. (12RT 1962-1963.) Had Dr. Chao known that Rodriguez might have been poisoned, he

would have ordered a toxicology screening and continued to observe the patient for further reactions. (12RT 1963.) Instead, Dr. Chao ordered a standard blood test for Rodriguez to determine his kidney function and other side effects. (12RT 1963-1964.) Rodriguez was discharged at 2:15 p.m. with instructions to drink a lot of fluids, specifically Gatorade. (12RT 1963.) Appellant was present during the discharge process. (12RT 1965-1966.)

On Saturday, September 9, 2000, at approximately 3:19 a.m., Officer Stephen Sharpe of the Montebello Police Department ("MPD") received a dispatch call to respond to the residence located at 837 Marconi Street in Montebello. (11RT 1772.) Officer Sharpe arrived at the location in less than two minutes. (11RT 1773.)

Officer Sharpe found appellant and her young daughter in the house. (11RT 1774.) Inside the bedroom, Officer Sharpe discovered Rodriguez lying face down on the carpet next to the bed. (11RT 1774; 12RT 1805.) Rodriguez was wearing only a white t-shirt and nothing else. Officer Sharpe checked for vital signs but found none. Aside from some blood from Rodriguez's nose, there were no other obvious signs of trauma. (11RT 1774.) The paramedics arrived shortly thereafter and pronounced Rodriguez dead. (11RT 1775.)

Officer Sharpe remained at the scene for approximately two hours and thirty minutes until Investigator Brenda Shafer of the Los Angeles County Coroner's Office ("Coroner's Office") arrived to take over the investigation. (11RT 1776, 1782.) During this time, Officer Sharpe noticed that appellant's crying appeared to be rehearsed or "kind of forced." Although he could hear appellant crying, there appeared to be no tears. (11RT 1783.) While talking to appellant, Officer Sharpe also noticed that she would stop crying immediately to answer his questions. He found this type of behavior to be odd because in his prior experience, he often found

those who had recently lost a loved one very difficult to interview. (11RT 1783-1785.)

At approximately 7:00 a.m., Rodriguez's sister, Rebecca Perkins, who was living in Florida at the time, received a telephone call from her mother, Janet Baker, telling her that Rodriguez had died earlier in the morning.[4] (12RT 1805-1806.) Perkins was unable to get much detail about the circumstances of her brother's death because her mother was hysterical on the telephone. (12RT 1806.) Rodriguez was 41 years old at the time of his death and Perkins did not believe her brother was sick. (12RT 1807-1808.)

After getting off the telephone with her mother, Perkins called appellant a couple of hours later. (12RT 1808.) Perkins had never met appellant in person or spoken with her on the telephone. (12RT 1817, 1820.) She had not attended Rodriguez's wedding because she did not approve of her brother getting married after only two months of dating appellant. (12RT 1822.) On the telephone, Perkins asked appellant what had happened to Rodriguez and appellant responded, "He drank too much." Perkins was dumbfounded by appellant's response because she knew her brother did not drink any alcohol. Appellant told Perkins that Rodriguez was sick with a stomach infection on Wednesday and Thursday and that she had taken him to the hospital on Friday. (12RT 1809.) After returning from the hospital, appellant went to sleep on the couch and when she woke up around 3:30 a.m., Rodriguez was already dead. (12RT 1809-1810.) During the conversation, appellant briefly placed Perkins on hold to take another call. When appellant returned, she told Perkins that someone from Rodriguez's military reserve unit had called inquiring about his absence

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[4] Perkins received the phone call at approximately 10:00 a.m. in Florida, or 7:00 a.m., in California. (12RT 1806.)

from the weekend duty. Appellant told the caller that Rodriguez had died. Perkins's conversation with appellant ended shortly thereafter. (12RT 1810-1811.)

A few hours later, Perkins called appellant back to find out the contact information for Rodriguez's military reserve unit because she wanted to know if anyone from the unit had any knowledge of any illness. (12RT 1811-1812.) During the second telephone conversation, appellant told Perkins that Rodriguez had died from eating cookies and Gatorade given to him by the people working at the Academy. (12RT 1813.) Appellant explained that she had been terminated from the Academy on bad terms and that the employees also disliked Rodriguez. (12RT 1814-1815.) Appellant also stated that the students at Rodriguez's middle school tried to poison him a few months earlier, in June. (12RT 1814.)

During both telephone calls, Perkins found odd that appellant displayed no emotions and did not appear to be crying or upset. According to Perkins, appellant "didn't cry, she wasn't upset, she was just matter of fact. She was [] indifferent, . . . for her husband dying, she had no emotion." (12RT 1816-1817.) After the two telephone conversations with appellant, Perkins called Officer Sharpe at the police station. (11RT 1781; 12RT 1815.) Perkins told Officer Sharpe about the information received from appellant regarding the alleged poisoning by the Academy employees. She indicated to Officer Sharpe that appellant's story appeared suspicious and asked him to document the information in his report. (12RT 1815-1816.)

At approximately 10:17 a.m., appellant called Marracino and left a message on his answering machine that Rodriguez had died. (12RT 1861-1862.) When Marracino called appellant back a little after 11:00 a.m., she asked about her $250,000 death benefits. (12RT 1862, 1864.) Marracino told her that the insurance company required an official death certificate

with a cause of death in order to process the claim. (12RT 1862-1863.) He also told her that Midland National would be conducting their own investigation to determine the cause of death which was the normal procedure for deaths occurring within the first two years of the policy. (12RT 1864.) During the telephone conversation with appellant, Marracino noticed that she was not crying and appeared to show no emotions or any signs of being upset about losing her husband. (12RT 1864-1865.)

Shirley Coers, who was Rodriguez's older sister living in Illinois, also received the news of her brother's death from her mother. (12RT 1877.) On Sunday, September 10, 2000, appellant told Coers on the telephone that she wanted to cremate Rodriguez's body and sprinkle the ashes on his favorite beach. Coers thought appellant's intent to cremate her brother's body was "too cold" since the family members had not had a chance to pay their respects yet. (12RT 1879.) On the next day, appellant told Coers that she had changed her burial plans because someone from Rodriguez's military unit had contacted appellant and informed her that he was entitled to a free burial at a Riverside cemetery. (12RT 1880.) During the multiple telephone conversations with Coers, appellant appeared to be very calm and did not cry at all. (12RT 1880-1881.)

On Monday, September 11, 2000, Marracino contacted Midland National and notified the insurance company about Rodriguez's death. (12RT 1867.) In the following weeks, appellant continued to contact Marracino on several other occasions inquiring about "when [she was] going to get paid." (12RT 1865-1866.) She repeatedly asked whether a death certificate was needed for the payment of her benefits and Marracino informed her that both the certificate and cause of death were required. (12RT 1866-1867.)

On the same morning, MPD Lieutenant Gregory Wilsey received a call from appellant inquiring about the handling of Rodriguez's body by the

Coroner's Office. (12RT 1902-1905.) Lieutenant Wilsey informed appellant that the preliminary autopsy of Rodriguez came out inconclusive as to his cause of death. Based on Officer Sharpe's report about the possible poisoning, Lieutenant Wilsey told appellant that any information she could provide regarding any type of poison her husband could have ingested around the house would be helpful in narrowing down his cause of death. (12RT 1907-1909, 1914-1915.)

During the same conversation, appellant told Lieutenant Wilsey that she believed her husband might have been poisoned by someone from the Academy. Appellant stated that earlier in the year, she and her husband had "blown the whistle" on someone who was involved in a child abuse incident. Appellant believed that there was animosity toward Rodriguez because some people had been reassigned or fired over the incident. (12RT 1915-1916.) According to appellant, Rodriguez had traveled to San Luis Obispo several days before his death while working as a chaperone to students being transported to the Academy. (12RT 1916.) Lieutenant Wilsey found odd that appellant's initial focus was on the disposition of Rodriguez's body instead of the determination of a cause of death. He also noted that appellant showed no emotion during the discussion. (12RT 1916-1917.)

That same afternoon at approximately 3:00 p.m., after the telephone conversation with appellant, Lieutenant Wilsey went to appellant's house and, with her permission, looked around for possible poisonous items. (12RT 1919, 1922, 1929.) Lieutenant Wilsey searched the bedroom adjacent to the master bedroom. During the search, appellant gave Lieutenant Wilsey an ant killer dust and two receipts from the Gas Company dated September 3, 2000. (12RT 1922-1923.)

On September 14, 2000, Detective Brian Steinwand and his partner, Sergeant Joe Holmes, of the Los Angeles County Sheriff's Department

("LASD"), took over the investigation of Rodriguez's death and interviewed appellant at the station for approximately two hours. (12RT 1917-1919, 1930-1931, 1937-1938, 1972-1973.) At the time of the interview, Detective Steinwand was aware that Rodriguez's autopsy result was still pending while awaiting the toxicology report. (12RT 1938-1939.)

During the interview, appellant discussed her relationship with Rodriguez. Appellant and Rodriguez met in February 2000 while working together at the Academy in San Luis Obispo. (12RT 1939.) The Academy provided a four-week boot camp program for troubled junior high school children which involved both a military regimen and college courses. (12RT 1939-1940.) Appellant and Rodriguez wed on April 8, 2000. (12RT 1940.) Appellant stopped working at the Academy at the end of March 2000 and approximately one week later, appellant and Rodriguez moved to Montebello because Rodriguez had been hired as a teacher by the Los Angeles Unified School District. (12RT 1941.)

Appellant also told Detective Steinwand that she believed Charles "Chad" Holloway had killed her husband. (12RT 1937.) Appellant explained that together with her husband, she had "blown the whistle" on certain child abuse incidents allegedly committed by Holloway involving the Academy children. (12RT 1941-1942.) On the weekend before Rodriguez's death, appellant's daughter Autumn was away at her father Thomas Fuller's house in Tehachapi because it was the Labor Day weekend. (13RT 2021.) According to appellant, Rodriguez traveled to San Luis Obispo on Tuesday, September 5, 2000, while acting as a chaperone in a bus taking students to the Academy. (3CT 654, 657.) While at the school, Rodriguez was offered some cookies and a bottle of Gatorade by someone in the administrative office. (12RT 1942-1943; 3CT 659-660.) He returned from the trip on the same day and went to bed feeling tired and "groggy." (3CT 660.) In the next morning, on Wednesday, Rodriguez

woke up, went to work for two hours, and returned home feeling tired and looking flushed. (3CT 660-661.) At 7:30 p.m., Rodriguez began throwing up. (3CT 662.) At 5:00 a.m. on Thursday, Rodriguez became very sick and appellant told him she was going to take him to the hospital. (3CT 663.) Between 8:30 a.m. and 9:30 a.m., appellant took Rodriguez to Kaiser Hospital in Baldwin Park where he was treated in the emergency room. (3CT 664-666.) They left the hospital at approximately 2:30 p.m. (3CT 666.)

After returning home, appellant fed Rodriguez some soup and water together with his medication. (3CT 667-668.) Appellant continued to check on Rodriguez throughout Friday and believed he was feeling better. (3CT 669-671.) She checked on him for the last time at 10:00 p.m. before falling asleep on the couch. (3CT 671-672.) Appellant woke up at approximately 3:00 a.m. on Saturday and found Rodriguez on the floor. (3CT 672.)

Appellant also told Detective Steinwand that she could not get the insurance money until the final determination of her husband's cause of death. (12RT 1950; 3CT 672-673.) She asked Detective Steinwand whether the police could do anything to expedite the determination of cause of death by the Coroner's Office. (12RT 1950; 3CT 674.) Appellant raised the insurance issue two or three times during her interview. (12RT 1950.)

During one of the telephone conversations with Coers, appellant stated that Rodriguez had died from eating poisoned cookies and Gatorade from an officer at the Academy. (12RT 1881-1882.) On Friday, September 15, 2000, Coers told appellant she could not understand how someone could poison another person. (12RT 1882-1883.) Appellant responded by stating that there were many ways of poisoning someone. Appellant gave an example of poisoning someone with oleander tea. (12RT 1883.) Coers found odd that appellant knew how to poison

someone. (12RT 1883-1884.) Coers later told her mother about appellant's statements on how to use poison to kill a person. (12RT 1884.)

On the day of Rodriguez's funeral, Coers and Baker rode in the limousine with appellant. (12RT 1884-1885.) During the ride, Baker asked appellant about her previous statements to Coers regarding the use of oleander leaves as poison. (12RT 1885-1886.) Appellant pointed to some bushes on the side of the freeway and said, "That's oleander." (12RT 1886.)

Perkins also traveled to California to attend Rodriguez's funeral. (12RT 1823.) During the three funeral proceedings, Perkins observed appellant's demeanor and found it odd that she did not appear to be upset or saddened by her husband's death. (12RT 1825-1826.) Perkins never saw appellant cry during Rodriguez's funeral. (12RT 1826.)

Sometime between September 15 and 26, 2000, Sergeant Holmes had a telephone conversation with appellant in which she inquired about the Coroner's Office and whether he could "push the coroners" in determining the cause of death. (12RT 1974-1975; 3CT 675-676.)

On September 26, 2000, at approximately 11:50 a.m., Sergeant Holmes interviewed Baker about her earlier conversation with appellant during the limousine ride to the cemetery. (12RT 1978-1981.) Baker stated that appellant had mentioned the poisonous effect of oleander. (12RT 1981.)

On September 27, 2000, based on the information obtained from Baker, Detective Steinwand contacted the Coroner's Office and advised them of the possibility of Rodriguez being poisoned with oleander. (12RT 1984.) He also informed the Coroner's Office about a chemical substance called chlorpyrifos which was found in the ant poison recovered from appellant's house. (12RT 1984-1985.)

On the same day, Detective Steinwand and Sergeant Holmes conducted another interview with appellant at her house. (12RT 1985-1986.) Appellant told Detective Steinwand that she was looking to move to Paso Robles and that she was having difficulties financially due to the delay in determining Rodriguez's final cause of death. (3CT 678-679.) Appellant also stated that she had notified the insurance company but that she could not get paid until she obtained a death certificate. (3CT 679-680.)

On September 28, 2000, appellant called Detective Steinwand and inquired about any progress from the Coroner's Office. (12RT 1993-1995; 3CT 682.) She asked Detective Steinwand if there was any document from the Coroner's Office that she could submit to her insurance company. (3CT 684, 686.)

On the same day, Elaine Nash, a claims representative with Midland National, spoke with appellant on the telephone. (12RT 1893-1894.) Appellant asked Nash whether a deferred death certificate was sufficient to process her claim. Nash told her that a finalized death certificate with the cause of death was an absolute requirement before any payments could be made on the insurance policy. (12RT 1895.) Appellant told Nash that an autopsy was being conducted but the toxicology was still outstanding. Appellant also indicated that she preferred to deal directly with Nash instead of talking to her local insurance agent. (12RT 1896.) Nash advised appellant that the claim process would take approximately four to six weeks from the receipt of a final death certificate and that Midland National would be conducting a routine review of the claim because the death had occurred within two years of the beginning of the policy. (12RT 1897.)

On October 3, 2000, Nash received another call from appellant requesting that a claim form be faxed to her. (12RT 1898-1899.) Nash told appellant that in contested claims, the claim form could not be faxed and

that the form had already been mailed to her on September 28, 2000. (12RT 1899.) Appellant asked Nash to send a letter to appellant's realtor verifying the funds from the insurance policy so that she could complete the purchase of a house. (12RT 1899-1900.) Nash did not send any letter to the realtor because appellant's claim was still pending. (12RT 1900.) No benefits were paid under the policy. (12RT 1901.)

On October 4, 2000, Sergeant Holmes and Detective Steinwand went to the Academy and interviewed some of its personnel, including Holloway. (13RT 2027.) Holloway was not considered a suspect in the murder of Rodriguez. (13RT 2028.)

On October 5, 2000, Sergeant Holmes called appellant to set up an interview with her. He called her again later in the day to reschedule the interview to the following day. (13RT 2022-2024.) During the second telephone conversation, Sergeant Holmes led appellant to believe that Holloway was a suspect in the murder of her husband. (13RT 2028-2029.) He told appellant that it would be easier to search Holloway's house if he knew what kind of poison to look for. (3CT 690-692.) In response, appellant suggested "[i]t could be the flowers on the road." (3CT 692.)

On October 6, 2000, Sergeant Holmes interviewed appellant at her house. (13RT 2031.) Again, Sergeant Holmes pretended to be interested in Holloway as a suspect in an attempt to obtain further information from appellant. (13RT 2032-2033; 3CT 696-697.) Sergeant Holmes told appellant that the Coroner's Office needed to know what poison to look for in order to conduct the appropriate tests and determine the cause of death. (13RT 2037; 3CT 700.) When asked about the poisonous plant she had brought up on the previous day, appellant stated it was a plant that grew in the middle of the freeway with red and white flowers but that she could not recall the plant's name. (3CT 698-699.)

On October 9, 2000, Detective Steinwand and Sergeant Holmes went to appellant's house and noticed that she had already moved out. (12RT 1997; 13RT 2035.) Detective Steinwand was looking through the backyard and saw a large oleander plant growing in the yard adjacent to appellant's house. The plant had grown over the common wall into appellant's backyard.[5] (12RT 1997-1998; 13RT 2035.)

On October 19, 2000, appellant called Sergeant Holmes and stated that an unknown man had called her on her cell phone shortly after 8:00 a.m. and said that he had a conversation with Holloway. According to this man, Holloway had told him, "They'll never be able to track me." (13RT 2040-2041.) The anonymous caller told appellant to look for anti-freeze as the poison that killed Rodriguez. (13RT 2041; 3CT 703-704, 706.) Prior to this conversation, Sergeant Holmes had no idea that anti-freeze could be the poison ingested by Rodriguez. (15RT 2402.)

On the same day, Detective Steinwand and Sergeant Holmes contacted the Coroner's Office and advised them to look for anti-freeze as the possible poison that killed Rodriguez. (13RT 2046.) They also prepared a search warrant for appellant's cell phone records. (13RT 2047.) The records showed no incoming calls to appellant's cell phone on October 19, 2000, prior to her conversation with Sergeant Holmes. (13RT 2052-2054.)

On December 12, 2000, Detective Steinwand and Sergeant Holmes interviewed appellant at her apartment in Paso Robles. (15RT 2374.)

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[5] Detective Steinwand later returned to the property in March 2001 and collected a sample from the oleander plant which was submitted to the LASD crime lab. (12RT 1998, 2002-2003.) Lynne Herold, an LASD criminalist, examined the plant sample submitted by Detective Steinwand and confirmed that it was oleander, a poisonous plant commonly found in Southern California. (12RT 2005-2007, 2009-2011.)

During the interview, Detective Steinwand informed appellant that the Coroner's Office had found ethylene-glycol[6] in Rodriguez's body. (15RT 2375.) In an attempt to bait appellant to provide further information, Detective Steinwand told her it would be important to find evidence that Holloway knew in advance that Rodriguez was coming up to San Luis Obispo on September 5, 2000. (15RT 2375-2376.) Appellant also discussed the anonymous phone call she allegedly received on October 19, 2000, in which the caller urged appellant to tell the police to look for anti-freeze as the poison that killed Rodriguez. (15RT 2380.) Appellant told Sergeant Holmes that she would outline the October 19, 2000 conversation with the anonymous caller in writing and send it to him later. Sergeant Holmes and Detective Steinwand never received the written outline from appellant. (15RT 2381-2382.) Detective Steinwand told appellant that after the interview, they were going to interrogate Holloway, again in an attempt to lead appellant to believe that Holloway was a suspect in the murder of Rodriguez. (15RT 2382.)

After interviewing appellant, Detective Steinwand and Sergeant Holmes met with Holloway and asked for his cooperation in the investigation of Rodriguez's murder. Holloway agreed to participate in a three-way recorded telephone conversation with appellant. (15RT 2383-2384.)

On December 13, 2000, Holloway and Detective Steinwand set up a three-way call to appellant. (3CT 789.) When Holloway asked appellant why she was accusing him of poisoning Rodriguez, appellant repeatedly told him to talk to the investigators. (3CT 793-796.) Approximately a minute after appellant hung up on Holloway, she sent a "911" page to

[6] Ethylene-glycol is the primary chemical component of common automotive anti-freeze. (13RT 2085-2086.)

Sergeant Holmes. (15RT 2385-2386.) When Sergeant Holmes called her back, appellant told him that Holloway had just contacted her. (3CT 797.) According to appellant, Holloway stated, "Well, they'll never be able to . . . catch me anyway," and that appellant "better watch [her] back." (3CT 798.) No such statements had been made during Holloway's recorded conversation with appellant. (3CT 789-796.)

On January 19, 2001, Sergeant Holmes called appellant and told her that the Coroner's Office had found oleander in Rodriguez's body in addition to anti-freeze. He also informed her that the death certificate should be ready in a few weeks. (15RT 2403.) Appellant asked Sergeant Holmes whether he was able to gather any evidence showing Holloway knew Rodriguez was coming to the Academy on September 5, 2000. (15RT 2404.) Appellant stated that when she used to work "at the admin.," she always received a fax in advance with the names of students and teachers coming up to the Academy. (3CT 815.)

On February 5, 2001, Sergeant Holmes received an anonymous fax sent to the LASD Homicide Bureau. (15RT 2407.) The three-page document did not contain a fax cover sheet but on the top of each page, there was a line that stated, "sent by Staples [#] 702," with a phone number and the date and time stamp of "February 5th, 8:34 a.m." (15RT 2408.) On the first page of the faxed document, it stated, "Urgent. Detective Holmes, I mailed this to you. Why is Chad [Holloway] still free? Thought maybe you did not get it. Here it is again." (15RT 2409, 2411.) The second page appeared to show a document pertaining to a faculty orientation on August 23, 2000, and the third page contained a circled handwritten name, "F. Rodriguez." (15RT 2412-2413.)

The Los Angeles County District Attorney's Office charged appellant with the murder of Rodriguez and an arrest warrant was issued for appellant. (15RT 2414.) On February 6, 2001, Detective Steinwand and

Sergeant Holmes traveled to Paso Robles to serve a search warrant and arrest appellant. (15RT 2414-2415.) On the way to Paso Robles, Sergeant Holmes received a page from appellant. (15RT 2416.) Sergeant Holmes called appellant on her cell phone and told her that he had gotten an anonymous fax and that he would like to find out who the sender was. Appellant pretended she had no knowledge of the fax. Appellant told Sergeant Holmes that she wanted to be present during Holloway's arrest because she "would like to see the expression on his face . . . ." (15RT 2417.)

On February 7, 2001, appellant was arrested for the murder of Rodriguez at her apartment in Paso Robles. (12RT 1933; 15RT 2418.) After appellant's arrest, Detective Steinwand left to interview appellant's daughter while Sergeant Holmes searched her apartment. (15RT 2418-2419.) From appellant's purse, Sergeant Holmes found a napkin with the handwritten fax number of the LASD Homicide Bureau, a piece of paper with what appeared to be monetary calculations, and a fax confirmation sheet from Staples with the same documents faxed to Sergeant Holmes a few days earlier.[7] (15RT 2432-2439.)

On February 9, 2001, Sergeant Holmes received an envelope on the mail containing the same documents he received through fax on February 5, 2001, with the addition of a note that stated, "I found this in second platoon's locker in Sergeant Holloway's papers. I figured this is how he knew Sergeant Rodriguez was coming to [San Luis Obispo] . . . . I hope this helps fry the bastard." (15RT 2440-2443.)

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[7] Barbara Torres, an LASD forensic document examiner, examined the writing "F. Rodriguez" on the document found in appellant's purse and opined that it was written in original ink and that it was not a photocopy or printout from a machine. (15RT 2447-2452.)

Loren Matthew Morones had known appellant for eight years after meeting her through his aunt, Palmira Gorham. (15RT 2455.) At the time of appellant's arrest, Morones was sharing an apartment with appellant and her daughter in Paso Robles. (14RT 2312; 15RT 2456.) Morones was locked up in San Luis Obispo County jail in the summer of 2000 until he was released on July 17, 2000. (15RT 2456.) After his release, Morones and appellant began seeing each other until it evolved into a sexual relationship on August 26, 2000. (14RT 2311; 15RT 2457-2458.) Morones continued to meet with appellant in Paso Robles before and after Rodriguez's death. (15RT 2458-2459.)

Approximately a week before Rodriguez's death, appellant told Morones that she had left the gas on in the garage so that her husband could either die from inhaling the gas or from a possible explosion. (15RT 2460.) Morones did not say anything to appellant because he did not want to get involved. (15RT 2423-2424.) Morones did not initially tell the police about the gas leak conversation, but he later told Detective Steinwand and Sergeant Holmes in July 2001. (15RT 2462.)

Sergeant Holmes and Detective Steinwand interviewed Morones three times. The last interview occurred on July 11, 2001, at Morones's house in Shandon. (16RT 2517-2518.) Detective Steinwand went to Morones's house to serve a search warrant for the letters sent by appellant from jail. (16RT 2518.) After the search, Morones told Detective Steinwand about the gas leak conversation he had with appellant. (16RT 2519.) In order to corroborate the gas leak story, Detective Steinwand obtained the records from the Gas Company which showed a service request to fix a gas leak at appellant's house. (16RT 2520-2521.)

Gorham became friends with appellant while attending beauty school together in San Luis Obispo. (14RT 2293.) At the time, Gorham was living in Paso Robles and appellant was living in Atascadero. (14RT

2293-2294.) They were good friends for approximately two years until appellant married Don Combs, with whom Gorham did not get along. After appellant divorced Combs and before she met Rodriguez, Gorham and appellant began talking again. (14RT 2294.) While appellant was engaged to Rodriguez, she was living in Paso Robles. (14RT 2295.) Gorham attended appellant and Rodriguez's wedding in April 2000 held in Templeton, a city located between Paso Robles and Atascadero. (14RT 2294-2295.) After the wedding, appellant and Rodriguez moved to Montebello in Southern California. (14RT 2295-2296.)

Starting approximately a month after the wedding, appellant began visiting Paso Robles either by herself or with her daughter. (14RT 2296-2297.) Appellant usually visited every other week and stayed at Gorham's house for the entire weekend. (14RT 2297.) Appellant also stayed with Gorham's sister, Georgia Morones. (14RT 2262.) Appellant told Gorham that she did not like living in Los Angeles, was unhappy with her new church and that she missed being around Gorham and her family. (14RT 2297-2298.)

Approximately two to three months into her marriage, appellant's visits to Paso Robles became more frequent. (14RT 2298.) Appellant was staying with Gorham or her sister every weekend and complaining about her marriage. (14RT 2298-2299.) Specifically, appellant complained that Rodriguez was very strict with her daughter and not as loving as she wanted him to be. (14RT 2299.)

Gorham recalled having two conversations with appellant between June and July 2000 in which appellant discussed different types of poison. (14RT 2299-2300.) The first conversation occurred at Gorham's house in Paso Robles. Appellant was complaining about how unhappy she was with Rodriguez and Gorham jokingly suggested that she should divorce him just like appellant had divorced her previous husbands. Appellant responded by

saying, "No, this one has [] life insurance policy." She added, "If I were to kill him, at least I'll end up with a little bit of money." Gorham did not take appellant's statements seriously. (14RT 2300.) At some point during the conversation, Gorham's mother walked in and told appellant a story about a woman who had tried to kill her husband by using oleander tea but was later caught and sent to jail. (14RT 2301-2302.) Appellant just laughed. (14RT 2302.)

Either a day or the weekend after the conversation, Gorham and her boyfriend, Conrado Apodaca, had another conversation with appellant. (14RT 2302-2303.) Gorham told appellant that one of the dogs from the neighboring apartment building had escaped and tried to attack her son. Even though the police was called, nothing had been done about the dogs. (14RT 2303.) Apodaca, who was listening to the conversation in the living room, said that the problem could be taken care of by just soaking some hot dogs in anti-freeze and throwing them over the fence to the dogs. (14RT 2303-2305.) When appellant asked why he would do that, Gorham said she had seen on television that anti-freeze is sweet to the taste and colorful so kids and animals often drank it without thinking twice. (14RT 2305.)

Approximately two weeks later, Gorham was talking with appellant on the telephone when she heard what appeared to be a jack hammer in her kitchen. (14RT 2306.) Gorham asked appellant what she was doing and appellant responded that she was making Rodriguez a "special milk shake." Gorham then realized that the loud noise was from a blender. (14RT 2307.) Appellant had previously told Gorham that Rodriguez liked having milk shakes when he was ill. (14RT 2308.) Gorham asked appellant whether Rodriguez was sick and appellant responded, "Not yet." (14RT 2307.) Appellant had always made weird comments about killing Rodriguez and such conversation had gotten "kind of old." Gorham told appellant,

"Whatever you're doing, don't tell me about it. I don't want to know. Just don't tell me." (14RT 2308.)

Two weeks to a month later, Gorham learned from appellant that Rodriguez had died. Gorham thought appellant "seemed pretty cold" on the telephone. (14RT 2309.) On the following weekend, Gorham came to visit appellant in Montebello for two days. (14RT 2310.) After Rodriguez's funeral arrangements had been completed, appellant was staying most of the time at Paso Robles. A few weeks after Rodriguez's death, appellant moved back to Paso Robles. (14RT 2310.) Up until appellant's arrest, Gorham saw appellant almost everyday. Gorham overheard appellant talking on the telephone several times with either the police or the Coroner's Office and the conversations were always about whether there was a final determination of cause of death and that she needed a death certificate to get the insurance money. (14RT 2328.)

On the day of appellant's arrest, Gorham was interviewed by Sergeant Holmes and Detective Steinwand twice. (14RT 2313.) During the first interview, she did not tell the police about the conversations she had with appellant regarding oleander, anti-freeze or milk shake, because she was with her mother and Apodaca's father. When Sergeant Holmes and Detective Steinwand returned to interview Gorham after speaking to Morones's father, Florencio "Loren" Morones, Gorham told them about the oleander, anti-freeze and milk shake conversations. (14RT 2315.)

In late March 2001, Gorham was told by her niece, Angela Contreras, that appellant was trying to contact her from jail. (14RT 2315-2316.) Gorham became concerned that appellant may try to convince her to change or recant her statements to the police. (14RT 2320.) Gorham expressed her concerns to Detective Steinwand and at his suggestion, she agreed to record any telephone conversations with appellant. (14RT 2320-2321.)

On March 27, 2001, appellant called Contreras who connected the call to Gorham in a three-way conversation. (14RT 2322.) During the conversation, appellant told Gorham that her attorney had asked her why Gorham was not in jail with appellant because "per [Gorham's] own words . . . , [she was] making it sound like [she was] an accomplice." (3CT 760-761.) When Gorham expressed a concern that retracting her statements was "just gonna make it look worse," appellant suggested lying to the police that Gorham had caught Apodaca and appellant together and that made Gorham "snap." (3CT 762; 14RT 2326.) Appellant also told Gorham that after the milk shake conversation, Gorham "knew what [appellant] was doing, and [she] didn't stop [her]." (3CT 764.)

In May 2002, LASD Deputy Nicholas Zabokrtsky was working at Twin Towers Correctional Facility. (14RT 2226-2227.) Module 211 is a discipline module where inmates are sent for administrative segregation. Each inmate is housed in single-man cells with a small window on the door and no windows facing outside. (14RT 2215, 2228.) At the time, the inmates had a view of the hallway through the window on their doors. (14RT 2234-2235.) An inmate may be taken out of the cell for various reasons such as for outdoor recreation, showers, meeting with attorneys or court appointments. (14RT 2229, 2231-2232.) The inmates housed in module 211 are able to communicate with each other by passing notes, also known as "kites," or by just yelling down the hallway. (14RT 2233.) Two inmates housed in adjacent cells could communicate by talking through either the walls or the plumbing vent. (14RT 2235-2236.)

From May 8 to 9, 2002, Gwendolyn Hall and appellant were housed in adjacent cells in module 211. Appellant was on administrative segregation while Hall was being disciplined for alleged possession of narcotics in jail. (14RT 2214-2215, 2237-2238.) On May 9, 2002, Hall approached Deputy Zabokrtsky and his partner, Deputy Rachel Jimenez,

about some information she had obtained from appellant. (14RT 2238-2239.) The information from Hall caused Deputy Zabokrtsky to be concerned for Gorham's safety, a witness in appellant's case. (14RT 2239.) Hall gave Deputy Zabokrtsky a handwritten note she had prepared during her conversation with appellant. (14RT 2241.) Deputy Zabokrtsky contacted Detective Steinwand regarding the information received from Hall. (14RT 2239-2240, 2244.)

On May 10, 2002, Detectives Steinwand, Patrick Valdez, and Wayne Holston, Sergeant Randy Seymour, and Deputies Zabokrtsky and Jimenez interviewed Hall. (14RT 2240-2241, 2245.) Deputy Zabokrtsky gave Detective Steinwand two sets of notes taken by Hall during her conversation with appellant. (14RT 2246.) According to Hall, appellant told her that she had killed her husband with anti-freeze by feeding him Gatorade filled with anti-freeze for four to five days. (3CT 725, 728.) Hall also said that appellant asked her to kill Gorham, a witness in her case. (3CT 726.) Initially, appellant offered Hall $20,000 to put Gorham in a coma. She later changed her offer to $25,000 and then to $30,000 if Hall agreed to kill Gorham. (3CT 727.) Appellant told Hall to take Gorham to Pismo Beach and "[j]ust kill the bitch." (3CT 733.) Appellant suggested feeding anti-freeze to Gorham first before breaking her neck to make the killing look like a robbery. She also suggested taking a U-Haul truck because Gorham had a lot of nice furniture and computers in her house. (3CT 725-726, 738-739.) Appellant explained that she could buy Hall a house after appellant got released with the insurance money from her husband's death. (3CT 727.) Appellant asked Hall to send her a card with the message, "Job well done," to indicate that Gorham had been killed. (3CT 726, 728; 14RT 2263-2264.) Hall's handwritten notes showed Gorham's name, telephone number and directions to her house in Paso Robles. (3CT 732.)

Hall also said appellant mentioned a witness named "Linda," and Detective Steinwand asked Hall if the name was Linda Allen. (3CT 720; 14RT 2254.) During the investigation, Detective Steinwand had interviewed Allen twice while she was housed with appellant at the Twin Towers jail regarding some conversations she had had with appellant. (14RT 2254-2255.) Although the interviews with Allen had been recorded, the recording was not played to the jury and Allen did not testify at trial. (14RT 2256.)

Dan Anderson, a supervising criminalist with the Coroner's Office, conducted the toxicological analysis of biological samples collected from Rodriguez's body. (13RT 2078-2079, 2081-2082.) Generally, the biological samples are collected during the autopsy of a decedent and a preliminary screening for common drugs of abuse is run. If the screening returns negative results, the Coroner's Office requires investigative help in order to narrow down the list of other potential tests to run. (13RT 2082-2084.) There is no such thing as a "general screen for everything" and without a specific target, it is "almost like looking for a needle in a haystack." (13RT 2083.)

The Coroner's Office does not have a basic screening test that can look for ethylene-glycol. With the specific knowledge to look for ethylene-glycol, a criminalist would have to make the necessary adjustments to a scientific instrument to identify the chemical component. (13RT 2085-2086.) Similarly, there is no basic screening test that can identify the chemical component of an oleander plant. In order to test for oleander, the Coroner's Office must send the biological specimen to two different outside laboratories with capability to run such a test. (13RT 2086-2087.)

In Rodriguez's case, the Coroner's Office ran the initial screening for the common drugs of abuse, including alcohol. The results came back negative for all compounds except for hydrocodone or Vicodin which was

positive. (13RT 2087-2088.) The amount of hydrocodone found in Rodriguez's system was consistent with therapeutic usage. The screening also returned a positive result for diphenhydramine or Benadryl which is found in common cough syrups. (13RT 2088.) The amount of diphenhydramine found in Rodriguez's system was also consistent with therapeutic usage. (13RT 2089.)

Based on additional information received from Sergeant Holmes, on November 9, 2000, the Coroner's Office sent Rodriguez's blood specimen to Medtox Laboratories in Minnesota for supplemental toxicology testing for ethylene-glycol and chlorpyrifos, a common chemical component of ant poison. (13RT 2089-2094.) Although there was no chlorpyrifos found in Rodriguez's system, the testing identified a fatal amount of ethylene-glycol. (13RT 2094-2097.) After receiving the supplemental toxicology results, Anderson tested Rodriguez's heart blood, femoral blood, gastric contents and vitreous fluid for ethylene-glycol. Every specimen tested positive for fatal levels of ethylene-glycol. (13RT 2100-2102, 2108.)

On December 26, 2000, Anderson sent samples of Rodriguez's blood, urine, liver, and stomach contents to Birgit Puschner, a toxicologist at the University of California, Davis ("UC Davis"), to be tested for oleander. (13RT 2106-2107, 2113-2115.) Every specimen tested positive for oleander. (13RT 2118.) The significant amount of oleander found in Rodriguez's stomach contents indicated a recent exposure through ingestion. (13RT 2119.)

Dr. Ogbonna Chinwah, a deputy medical examiner with the Coroner's Office, performed Rodriguez's autopsy on September 10, 2000. (13RT 2163-2164.) At the conclusion of the autopsy, Dr. Chinwah was unable to determine Rodriguez's cause of death. (13RT 2165.) On November 28, 2000, after receiving a toxicology report showing positive results for ethylene-glycol and oleander in Rodriguez's body, Dr. Chinwah

examined Rodriguez's kidney tissue under a microscope and noticed the presence of crystals consistent with ethylene-glycol ingestion. (13RT 2166-2169.) Based on the toxicology report and kidney tissue examination, Dr. Chinwah concluded that Rodriguez's cause of death was ethylene-glycol and oleander poisoning. (13RT 2170.)

Dr. Richard Clark, an emergency medicine physician and a medical toxicologist, is the director of the Poison Center at the University of California, San Diego ("UC San Diego"). (13RT 2120-2121.) Ethylene-glycol is a type of alcohol commonly found in anti-freeze that is sweet to the taste. Many dogs and other animals are poisoned with ethylene-glycol after consuming the substance from leaky automobile radiators. (13RT 2125.)

There are three phases of toxicity caused by an ethylene-glycol poisoning. In the first phase, the poisoned person may show signs very similar to a regular alcohol intoxication such as feeling dizzy or lightheaded. (13RT 2126.) In the second phase, the person starts to feel sick when the body begins to metabolize the ethylene-glycol which increases the body's acidic level, causing heart and liver damage. A person in the second phase would display symptoms such as vomiting, unsteady gait, dizziness, and slurred speech. (13RT 2127, 2129-2130.) In the third phase, the metabolite of ethylene-glycol called oxylorphan begins to combine with the body's calcium to form crystals which can lead to a kidney failure. (13RT 2127-2128.) A death caused by a kidney failure triggered by ethylene-glycol poisoning would be considered a "delayed death." (13RT 2128.) An earlier death could result when the ethylene-glycol causes an extreme drop in the body's calcium concentration which can lead to paralysis and irregular heartbeats. (13RT 2128-2129.)

Oleander nerium is a type of plant that is commonly found on the Southern California freeways. (13RT 2130.) The toxin or poison found in

oleander affects the heart when ingested by a human. (13RT 2130-2131.) The two common methods of ingesting the oleander poison is through drinking oleander tea or using it as a rectal enema. (13RT 2131-2132.) The oleander tea can be prepared by crushing the plant leaves and boiling them in hot water. (13RT 2132.) The oleander tea can also be mixed with another tea, coffee or soup to disguise the poison's bitter taste. (13RT 2133-2134.)

The medical records from the Kaiser Hospital showed two blood tests performed on Rodriguez on September 7, 2000, two days before his death. (13RT 2146.) The blood test results showed normal levels of serum creatinine and bicarbonate which were indicative of Rodriguez not having yet ingested ethylene-glycol. (13RT 2147-2150.)

Based on the autopsy report, the Coroner's Office toxicology report, the UC Davis toxicology report, and the Kaiser Hospital medical records, Dr. Clark opined that Rodriguez died of an ethylene-glycol poisoning. (13RT 2138.) The amount of ethylene-glycol found in Rodriguez's femoral blood was approximately five times the minimum fatal level for a human being while the amount found in the heart blood and vitreous fluid was approximately six times the minimum fatal level. (13RT 2139-2140.) Based on the amount of ethylene-glycol found in Rodriguez's system at the time of his death, Dr. Clark opined that Rodriguez must have consumed at least four to five shot glasses of ethylene-glycol all at once. Had Rodriguez consumed the ethylene-glycol in smaller amounts over a longer period of time, he would have had to consume an even greater quantity. (13RT 2151.)

Dr. Clark further opined that Rodriguez consumed the ethylene-glycol between 5 and 24 hours of his death. (13RT 2141-2143.) This conclusion was based on the fact that there was a small amount of ethylene-glycol found in Rodriguez's stomach at the time of his autopsy. Since it

takes approximately five to six hours for the stomach and intestine to absorb ethylene-glycol, the small amount remaining in the stomach indicated that the death occurred before the full absorption took place. (13RT 2141.) Additionally, although crystals were found in Rodriguez's kidney, he did not have acute kidney damage which further indicated that he was between phase 1 and phase 3 of ethylene-glycol poisoning at the time of his death. (13RT 2142, 2144-2145.)

Dr. Clark stated that there was definitely oleander present in Rodriguez's system at the time of his death but that it was "hard to say" whether it played a role in his death. (13RT 2151-2152.) He opined that the fact that Rodriguez was found face down on the floor indicated that he might have suffered from an irregular heartbeat caused by oleander in his system. (13RT 2152.) The amount of oleander found in Rodriguez's stomach indicated that he must have consumed the plant within 24 hours of his death. (13RT 2152-2153.) The symptoms Rodriguez displayed while at the Kaiser Hospital, except for the diarrhea, were consistent with someone poisoned with oleander. There was nothing in the blood test results from the hospital that would be inconsistent with a conclusion that Rodriguez had oleander in his system. (13RT 2153.)

B. Defense

The parties stipulated to the following facts. Gorham's telephone number in September 2000 was (805) 237-9011. On Saturday, September 2, 2000, at 10:11 a.m., there was a one-minute long telephone call made from appellant's home telephone number of (323) 726-2565 to Gorham's telephone number. On Sunday, September 3, 2000, at 2:51 a.m., there was another one-minute long telephone call made from appellant's number to Gorham's number. On Monday, September 4, 2000, at 1:33 p.m. and 5:54 p.m., there were two one-minute long telephone calls made from

appellant's home telephone number to Georgia Morones's telephone number of (805) 238-3759. (16RT 2559-2561.)

Appellant presented no other evidence. (16RT 2563.)

II. PENALTY PHASE

A. Prosecution

Thomas Fuller and appellant married on March 15, 1990. (18RT 3027.) They had two children, Autumn, who was born on November 25, 1990, and Alicia F., who was born on August 7, 1992. (18RT 3028-3029.) Alicia had been born two months prematurely and was hospitalized in a neonatal intensive care for a few months after her birth. She also suffered from apnea and bradycardia, which caused her to stop breathing and her heart to stop occasionally. (18RT 3037-3038.) Alicia's heart had to be monitored by a device even after she came home from the hospital. She was a "little bit behind" in the development of her motor skills and was just starting to crawl at 13 months. (18RT 3038-3039.)

In the winter of 1992 and 1993, Fuller, appellant and their children were visiting Fuller's parents in Michigan. (18RT 3036-3037.) The family was dining at a restaurant when a waitress noticed the pacifier in Alicia's mouth and said that the type of pacifier Alicia had might be part of a recall.[8] (18RT 3037.) Alicia continued to use the same pacifier even after the waitress's warning.[9] (18RT 3052.)

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[8] The parties stipulated that in March 1993, Gerber voluntarily recalled the type of pacifier used by Alicia based on five consumer reports that the pacifiers had separated into three pieces: the pacifier shield, the shield end cap, and the rubber baglet. (21RT 3576.)

[9] According to appellant's deposition testimony taken on February 19, 1996 in the civil case she filed against Gerber, the pacifier that killed Alicia had been in appellant's friend's house for a few months before she got it back. (21RT 3543.) Appellant washed the pacifier and checked to

(continued...)

On July 8, 1993, appellant purchased a $50,000 life insurance policy with Prudential for her daughter Alicia. (17RT 2934-2938.) Appellant sold the policy to herself while she was a Prudential insurance agent from March 29 to August 23, 1993. (17RT 2942-2943.) Appellant designated herself as the primary beneficiary under Alicia's life insurance policy. (17RT 2936.) Alicia's grandmother Ana Fuller and sister Autumn were listed as the secondary beneficiaries, but the policy did not include her father as a beneficiary. (17RT 2937.)

On September 18, 1993, Fuller was in San Diego for business. (18RT 2030; 21RT 3555.) Appellant woke up between 7:00 a.m. and 7:30 a.m. (21RT 3555.) At approximately 9:00 a.m., appellant went for a walk with Autumn and Alicia. (21RT 3556.) They returned home at approximately 9:45 a.m. and appellant made some snacks for the kids. (21RT 3556-3557.) At approximately 10:15 a.m., after the feeding, Alicia appeared to be sleepy, so appellant laid her down in her crib for a nap. (21RT 3558-3559.) Alicia was facing down on her stomach and was wearing a t-shirt and a pair of pants. (21RT 3561-3562.) Her head was sideways, and she had the pacifier in her mouth. (21RT 3563.) Appellant returned at approximately 10:30 a.m. to check on Alicia and verified that she was sleeping with the pacifier still in her mouth. (21RT 3564-3566.) Appellant left to play with Autumn and returned to check on Alicia between 11:00 a.m. and 11:30 a.m. (21RT 3568-3569.) Appellant noticed Alicia was not breathing, she had turned pale blue, and was very still.

(...continued)
make sure it was intact and had no cracks or evidence of wearing. (21RT 3544.) Appellant said she regularly checked the bulb of the pacifier by pulling on it once a week. (21RT 3548.) Appellant also said she used a pacifier saver which was a long ribbon attached to the handle of the pacifier and clamped onto the infant's clothes to prevent the pacifier from dropping on the ground. (21RT 3553.)

(21RT 3570-3571.) Alicia's eyes were partially open and she felt cold and clammy. (21RT 3572.) At approximately 11:45 a.m., appellant called 911. (21RT 3573.)

At approximately 11:55 a.m., firefighter David Mandeville of the Santa Barbara County Fire Department received a dispatch call for "an infant not breathing" and responded to 3912 Mesa Circle in Lompoc. (17RT 2820-2821, 2841-2842.) When Mandeville arrived at the scene, appellant was waiting outside the house. Mandeville thought it was unusual that the mother was outside because normally the parents remained with a choking infant. (17RT 2843.)

Another firefighter remained with appellant while Mandeville went to the back room where the infant was. Alicia was in the crib, laying on her back and was not responsive. (17RT 2844.) Mandeville picked Alicia up and began administering CPR. (17RT 2844-2845.) When Mandeville tried to perform mouth-to-mouth resuscitation, he noticed an obstruction inside the mouth. He used his finger to swipe inside Alicia's mouth and after several attempts, he was able to remove the object stuck approximately an inch down her throat. (17RT 2845-2847.) After removing the object, Mandeville noticed that it was the rubber nipple of a pacifier. (17RT 2847.) The nipple fell on the floor and Mandeville continued to administer CPR on Alicia until the paramedics arrived. (17RT 2824-2826, 2848-2849.)

Sergeant Ralph Ginter and Deputy Ted Teodte of the Santa Barbara County Sheriff's Department ("SBSD") arrived at the scene shortly after the firefighters. (17RT 2820-2822.) Sergeant Ginter entered the residence and saw that the firefighters had already taken Alicia out of the crib. Sergeant Ginter escorted appellant to the other room. (17RT 2822.) He later found the plastic backing of a pacifier lying in the crib. (17RT 2828.) The separated rubber nipple was left on the bedroom floor. (17RT 2830.)

The paramedics placed Alicia in the back of the ambulance and Mandeville drove to the hospital. (17RT 2849-2850.) On the way to the hospital, the ambulance broke down and everyone had to wait for a backup ambulance to arrive. (17RT 2835-2836, 2850.) The paramedics continued to administer medical care to Alicia until they arrived at the hospital. (17RT 2851.)

Appellant was transported to the hospital by Sergeant Ginter. (17RT 2826.) He found strange that appellant was not crying or did not appear to be distraught. (17RT 2838-2839.) At the hospital, appellant was notified that her daughter had died. Appellant asked Sergeant Ginter for the plastic backing of the pacifier, stating that she wanted the manufacturer or the retailer "to pay," and that she did not want this to happen to another child. (17RT 2832.) According to Sergeant Ginter, appellant was "adamant" that she wanted the broken pacifier back. (17RT 2832-2833.) He released the plastic backing to appellant at the hospital. (17RT 2829-2830.)

On September 20, 1993, Dr. Wallace Carroll, a medical examiner with the Santa Barbara County Coroner's Office, conducted Alicia's autopsy. (17RT 2860, 2867-2868.) Dr. Carroll determined the cause of death to be asphyxiation due to an airway obstruction, or in other words, Alicia had choked to death. (17RT 2868-2869.) At the time of her death, Alicia had two lower front baby teeth. (17RT 2869, 2876-2877.)

On September 22, 1993, SBSD Deputy Claude Tuller attempted to contact Alicia's parents to inform them about the autopsy results. (17RT 2860.) Deputy Tuller spoke with Fuller and asked whether he could take some photographs of the pacifier pieces involved in the incident. (17RT 2861-2862.) Fuller referred Deputy Tuller to the family attorney, Richard Brenneman. (17RT 2862.) Deputy Tuller picked up the pacifier pieces from Brenneman's office, took the photographs, and later returned the pieces back to Brenneman. (17RT 2863-2864.)

On October 22, 1993, Prudential made a life insurance payment of $50,172 to appellant for the death of Alicia. (17RT 2938-2940.) Prior to Alicia's death, Fuller was unaware that appellant had obtained a $50,000 life insurance policy on behalf of Alicia two months before his daughter's death.[10] (18RT 3033-3034.)

Barry Novak, a personal injury plaintiff's attorney, was hired by appellant and Fuller to replace Brenneman and represent the family in the lawsuit stemming from Alicia's death. (17RT 2914-2915.) The agreement stated that Novak would receive 40 percent of any recovery after deducting costs. (17RT 2915-2916.) Novak filed a lawsuit against Gerber, the manufacturer of the pacifier, and Sears, the retailer, but the latter was ultimately dismissed from the lawsuit. (17RT 2916.)

Novak sent the torn rubber nipple and the plastic backing plate to Wolfgang Knauss, a professor at the California Institute of Technology, for an expert analysis but instructed him not to perform any destructive testing. (17RT 2917-2918, 2920.) Knauss, an expert in the area of failure and fracture of polymers and rubbers, received the pacifier in two pieces and it appeared that the rubber nipple had torn off from the rubber piece inside the plastic shield. (17RT 2947-2948, 2951, 2953.) After examining the pieces, Knauss concluded that the damage to the structure was not consistent with a child having chewed through the rubber. His conclusion was partly based on the fact that the point of fracture on the rubber nipple was too close to the plastic shield. (17RT 2958.) Knauss also found that the surface of the tear was not consistent with a repeated sucking action. (17RT 2959-2962.) Instead, Knauss believed the fracture was caused by some external trauma or tool, possibly a chair or other hard object rolling over the pacifier.

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[10] The insurance money was used as a down payment on a house that Fuller kept as part of a divorce settlement. (18RT 3057.)

(17RT 2963, 2967.) The indentations found on the rubber nipple were also consistent with the use of a pair of pliers which could have caused the fracture. (17RT 2969.)

After receiving the items and results back from Knauss, Novak sent the pacifier pieces and several exemplar pacifiers to another expert, Gary Hamed of the University of Akron. (17RT 2920-2921.) Hamed's analysis of the pacifier pieces concluded that the fracture may have been caused by an initial cut on the rubber nipple which led to the complete fracture due to a baby's normal sucking action. (17RT 2972.) Knauss disagreed with Hamed's conclusion and stated that the forces involved in a baby's sucking would be insufficient to cause the fracture. (17RT 2973-2976.)

Approximately six months to a year after Alicia's death, Fuller and appellant were contacted by a local television station for an interview. (18RT 3042.) Fuller noticed appellant smiling during some portions of the interview as if she was enjoying the attention and thought that her behavior was inappropriate. (18RT 3043, 3048.)

Fuller and appellant were having problems in their marriage and had been considering divorcing each other approximately three to six months before Alicia's death. (18RT 3038-3039.) Appellant was "very upset" about the state of their marriage. (18RT 3041-3042.) They finally divorced in the middle of 1995. (18RT 3027, 3049.)

The lawsuit against Gerber eventually settled in 1996, with Gerber agreeing to pay $710,000. After deducting the cost of litigation and attorney's fees, the remainder of the settlement amount was divided between appellant and Fuller, with appellant receiving 60 percent ($246,242.37) and Fuller receiving 40 percent ($164,161.58). (17RT 2924-2925.) Appellant told Fuller that she should be entitled to a bigger share of the money because she had found Alicia dead in her crib, causing her greater emotional trauma. (18RT 3032-3033.)

On February 7, 2001, after arresting appellant at her apartment for the murder of her husband, Detective Steinwand went to Autumn's school to conduct an interview while Sergeant Holmes remained at appellant's apartment to execute a search warrant. (18RT 3075-3076.) After interviewing Autumn for approximately an hour, Detective Steinwand made arrangements for her father to pick her up from school. (18RT 3076-3077.)

Among the documents recovered from appellant's apartment during the search was a copy of Knauss's report to Novak. (18RT 3077-3078.) Detective Steinwand was already aware that one of appellant's daughters had died while under her care. (18RT 3078-3079.) He contacted SBSD, Gerber, Knauss and several other people in an attempt to find out if there was any connection between Alicia's death and the current homicide investigation. (18RT 3079-3080.)

On May 10, 2002, Detective Steinwand interviewed Hall at the jail. (18RT 3080.) At the conclusion of the interview, Detective Steinwand asked Hall whether she would be willing to record her conversations with appellant. (18RT 3082.) Detective Steinwand instructed Hall that he was not interested in any information regarding Rodriguez's murder but only regarding the solicitation to murder Gorham. (18RT 3083.) Hall agreed to the arrangement. (18RT 3084.)

On May 11 and 12, 2002, Deputy Zabokrtsky met with Hall and exchanged the recorded tapes with new blank ones. (18RT 3088-3089.) On May 14, 2002, Detective Seymour came to the jail to pick up the tapes and recorder from Deputy Zabokrtsky. (18RT 3089-3090.) On May 21, 2002, Detective Valdez asked Hall to record another conversation with appellant. (18RT 3090.) Detective Valdez picked up the recorded tape on the following day. (18RT 3091.)

The May 10, 2002 audio tape recording of the conversation between Hall and appellant was played to the jury. (18RT 3122-3123.) In the recording, appellant discussed different methods of having Gorham killed, such as a "robbery gone bad" or a "boyfriend gone mad." (4CT 880-881.) Hall asked appellant how she felt about the fact that Gorham was her friend and appellant responded, "You're making me feel bad every time you say that." Appellant also stated that she understood when Hall said, "Once it's done, you can't bring nobody [*sic*] back." (4CT 881.)

Appellant and Hall also had a discussion about Allen. (4CT 881.) When Hall told appellant, "You must have Linda under control," appellant responded, "I'm not worried about her, but she dug her own. You know? [Chowchilla State Prison] ha[s] their own system. They have their own accountability over there. You know what I mean?" (4CT 881-882; 18RT 3126.) Detective Steinwand explained that Chowchilla was a state prison for women, that Erlinda or Linda Allen had once been housed either with or next to appellant at the county jail, and she had previously provided some information about appellant's case. (18RT 3125-3126.)

Appellant gave Hall Gorham's address and described the layout of the house. When Hall told appellant that she was writing down the information in a book, appellant said, "Too much paper trail . . . is not a good thing." (4CT 882-883.) Appellant repeatedly made sure that Hall was not writing down appellant's name on any of the papers and said that she was "just nervous." (4CT 884.) When Hall asked how she was going to get paid, appellant suggested taking a trip to Las Vegas in order to avoid suspicion in transferring a large sum of money from appellant's account. (4CT 884-885.)

Appellant said that Gorham's house was so old that nobody would be surprised "if it blew up[] from a gas leak or something." Hall and appellant agreed that Gorham's kids should be out of the house because

"[w]e don't want to be killing nobody['s] [*sic*] kids." (4CT 885.) Appellant also said, "for somebody to . . . go in and shoot them in the head while they're sleeping would not be . . . surprising," and the shooter could use a pillow to muffle the sound. (4CT 889.) Appellant explained to Hall that there was an alley next to Gorham's house and that it could be used as the getaway route. (4CT 890.) They agreed that after "job's been done," Hall would send appellant a kid's birthday card with the message, "Happy Birfday Cuz [*sic*]." (4CT 891-893.) While discussing how fast her trial would last, appellant said, "now without these two big [witnesses] . . . it will probably get over and done with . . . ." (4CT 894.)

The May 11, 2002, audio tape recording of the conversation between Hall and appellant was also played to the jury. (18RT 3131.) In the recording, appellant asked Hall whether "the guys that you're talking about [were] smart enough to make it look like a suicide." (4CT 897.) Appellant asked whether "these guys" had access to drugs and syringes, and suggested injecting Gorham with a powerful drug such as cyanide or heroin and "doing an overdose." (4CT 898-899.) Appellant referred to the "noise" option, i.e., using a firearm, and said, "even the noise thing they can make [it] look self inflicted." (4CT 901.) Appellant elaborated, "You know, grab her hand, put her hand around [the gun] and this way the dust is on her." (4CT 901.) Referring to the "silent kind" or the drug overdose option, appellant discussed using gloves and planting the proof to put the blame on Gorham's boyfriend. (4CT 904.)

Appellant also gave Hall a list of expensive items inside Gorham's house and said that the "computer [was] worth a couple of grand." (4CT 905.) Appellant said Hall could act as the getaway driver because "they need a brain" "to tell them go do this." Appellant noted that it was ultimately Hall's decision because "it's your investment." (4CT 907.) Appellant suggested going to Gorham's house early in the morning,

watching her leave the house with the kids, and then waiting until her return to make sure Gorham was alone in the house. (4CT 909.) She also expressed a concern about killing Gorham by forcing her to drink anti-freeze because Hall told appellant that the alleged killers were not too big. (4CT 911-913.) Appellant commented, "I'm wondering if . . . the two of those out of the way, if we couldn't just get the case dropped." (4CT 913.)

In a conversation between appellant and Hall on May 21, 2002, appellant said, "There won't be anybody left to intimidate." When Hall referred to appellant as "a cold little mother fucker," appellant responded, "No, I'm not cold. I'm just practical. It's just reality." (4CT 962-963; 20RT 3474-3476.)

On May 21, 2002, Detective Valdez met with Hall and instructed her to tell appellant that a man named Antonio Davis would be acting as a middleman between Hall and the alleged hit man. (20RT 3314.) Detective Valdez also gave a fictitious address of 14332 Leggett Avenue in Norwalk. (20RT 3315.) On the same date, appellant released $60 from her jail account to Antonio Davis. (20RT 3370-3371.)

On June 3, 2002, at the request of Detective Valdez, Detectives Steinwand and Seymour drove to Gorham's house and took two photographs of Gorham with a fake gunshot wound to the head. (20RT 3315-3316, 3401-3402.)

On June 8, 2002, Deputy Jose Mejia met with appellant at the jail for approximately 30 minutes posing as Antonio Davis. (20RT 3318, 3407-3408.) A video recording of the conversation between appellant and Deputy Mejia was played to the jury. (20RT 3416, 3424.) During the meeting, appellant and Deputy Mejia communicated with each other through the intercom and by exchanging notes through the Plexiglas window. (20RT 3321-3322, 3411-3412.) Deputy Mejia showed appellant two pictures of Gorham with a gunshot wound to the head. (20RT 3414,

3425-3426; 4CT 942-943.) Appellant said in a note, "I thought Gwen[dolyn Hall] stopped it," and referred to the victim as "My star witness," and "Best friend of six years." (20RT 3441, 3449.) Deputy Mejia showed appellant a note that said, "How do you want to take care of it? These guys are asking about the money." (20RT 3429.) Appellant wrote, "It's up to how long insurance takes." (20RT 3428.) Appellant also wrote, "as soon as insurance in, about 45 days I give to Gwen." (20RT 3442.) She also gave Deputy Mejia her mother's contact information and asked him to call her. (4CT 946-947; 20RT 3430.) Appellant told Deputy Mejia in a note, "I thought she was joking." (20RT 3444.)

Immediately after the meeting with Deputy Mejia, appellant was searched by other deputies who found two pieces of handwritten notes and a homemade address book. (20RT 3320-3321, 3462-3468.) The address book contained an entry with the name Antonio Davis and the fake address provided by Detective Valdez. (20RT 3389.)

B. Defense

Gary Hamed specializes in the area of fracture of natural rubber. (19RT 3184.) Novak sent Hamed the pacifier pieces related to Alicia's death in addition to several exemplar pacifiers. (19RT 3190-3191.) Hamed performed tensile tests on the new pacifiers by pulling them until they failed in order to measure the strength and elongation needed to cause a failure. The rubber nipples failed by growing a crack. (19RT 3191.) During his research, Hamed found out that the strength of natural rubber decreases "quite a bit" if a cut is introduced on the edge of the rubber surface. (19RT 3194-3195.)

Hamed measured the strength of the nipple that had failed in Alicia's pacifier and found it to be significantly less than the exemplars. The discoloration of the nipple was also consistent with a degradation. (19RT 3198-3199.) Hamed opined that the surface abrasions noted by Knauss did

not necessarily indicate a torsion or twisting action. (19RT 3201-3202.) He also opined that fewer the number of teeth, the larger the effect would be on the nipple. (19RT 3208.) Hamed believed there were three forces acting on the pacifier that caused it to fail: sucking, clamping/pulling, and teeth. (19RT 3212.)

During cross-examination, Hamed admitted that the nipple from the accident pacifier stretched to eight times its length before it broke. (19RT 3221.) Hamed also agreed that the abrasions on the nipple could have been caused by intentionally stepping on it or rolling a heavy object over it. (19RT 3252-3253.)

Autumn testified and asked the jury not to execute appellant so that she can continue to see her mother. (19RT 3266.)

Appellant's mother, Anita Rivera, testified that appellant was born on June 1, 1968. The family, including appellant's sister, Gigiana Colaiacovo, lived in the projects at 7115 Beach Channel Drive in Rockaway Beach, New York. (20RT 3502-3504.) They lived at this address until appellant was approximately seven to eight years old and then moved to the bottom apartment of Rivera's aunt's house on 6944 Hessler Avenue in Rockaway Beach. (20RT 3504.) Rivera was a registered nurse working a lot of hours. Her husband would come and go whenever he felt like it and Rivera had a hard time being home with two daughters. (20RT 3505-3506.)

While living at 6944 Hessler Avenue, when appellant was approximately nine to ten years old, she ran away from home. (20RT 3504-3505.) On the following day, Rivera found appellant staying at a girls home approximately seven to eight blocks away. (20RT 3507-3508.) Since appellant was 10 years old, she told Rivera that she wanted to leave because she felt she was unwanted. (20RT 3508-3509.)

Appellant moved in with her paternal grandfather when she was 13 years old. When appellant turned 14 years old, she told Rivera that she was having sex with her grandfather. Rivera removed appellant from the grandfather's house and contacted her husband. A few weeks later, Rivera's husband came back and said that he did not believe appellant had been molested. (20RT 3510.)

Appellant was a little below average student during her junior high school years. (20RT 3514.) She was "quite rebellious" during her high school years. (20RT 3515.) Appellant attended a parochial school for the first eight years of her education. (20RT 3516.) When appellant was 16 years old, she was hospitalized for an attempted suicide by overdose of Tylenol. (20RT 3521-3522.) She became emancipated when she was 16 or 17 years old and began living with her first husband. (20RT 3516.) Appellant and her sister attended the Catholic church once a week until they were teenagers. (20RT 3517-3518.) Appellant's sister, who grew up in same home environment as appellant, has never been in any trouble with the law. (20RT 3520.)

Rivera told the jury that she did not want her child taken from her. She believed that if appellant is given life in prison without the possibility of parole, she can at least hold on to her for a little while longer. (20RT 3511.)

Colaiacovo is appellant's sister. (21RT 3580.) While growing up in New York, appellant's mother, grandmother, and aunt played bingo at church every Tuesday. (21RT 3587-3588.) Colaiacovo and appellant, together with three other young female cousins, spent the Tuesday evenings at their grandfather's apartment. (21RT 3589-3590.) The apartment was kept dark with the television on. Colaiacovo recalled her grandfather sitting on the couch while all the girls sat in front of him. (21RT 3590.) On the first bingo night, Colaiacovo's grandfather took her to the bedroom,

told her to drop her pants and lay on the bed. He pulled his pants down and laid on top of Colaiacovo and rubbed his penis on her vaginal area. (21RT 3590-3594.) After he was finished, the grandfather told Colaiacovo not to tell anyone and promised to get her a prize. (21RT 3594-3595.)

On the following week, Colaiacovo returned to her grandfather's apartment and the same molestation occurred again. This time, her grandfather ejaculated on Colaiacovo's stomach. Colaiacovo was eight years old. (21RT 3597-3598.)

On the third bingo night, Colaiacovo's grandfather again tried to take her to the bedroom but she ignored him. (21RT 3600.) Her grandfather took appellant to the bedroom instead and remained inside with her for approximately 15 minutes. (21RT 3601.) These bingo nights continued for approximately one year. (21RT 3601-3602.) When appellant was about 13 years old, she went to live with her grandfather for a year. While appellant was living with her grandfather, Colaiacovo noticed that she was wearing a lot of trendy clothes and jewelry. (21RT 3605.)

Colaiacovo visited appellant and Alicia four times before Alicia's death, the last visit occurring a month before the incident. (21RT 2580.) When Colaiacovo came to visit appellant and Alicia in California for two weeks, she noticed Alicia had two pacifiers. (21RT 3621.) Alicia was very attached to her pacifiers and often popped it out of her mouth, making a popping sound. (21RT 3623.) Colaiacovo said appellant was a great mother who loved her children and gave them great care. (21RT 3581.) On the day of Alicia's death, appellant called Colaiacovo from the hospital and told her that Alicia had suffocated on the pacifier. (21RT 3585.)

Colaiacovo told the jury that appellant is a good person and asked for a chance to continue her relationship with appellant. (21RT 3606.)

On May 7, 2003, appellant's counsel and defense private investigator Lawrence Sanchez traveled to New York in an attempt to

locate and interview appellant's father, Ralph Morales. (21RT 3537.) After several attempts to contact Morales, they agreed to meet in front of Sanchez's hotel on May 9, 2003. (21RT 3538.) Sanchez and counsel interviewed Morales on the street next to his taxi cab for approximately 10 to 15 minutes because he refused to go anywhere else. (21RT 3538-3539.) Morales was told that appellant was in jail and that she was facing a death penalty trial. Morales insisted that he had to leave but agreed to meet again on the following day. (21RT 3539.) They exchanged contact information and Morales agreed to call Sanchez on the following morning at 9:00 a.m. (21RT 3539-3540.) Morales never called. Sanchez's multiple attempts to reach Morales before leaving New York were unsuccessful. (21RT 3540.)

Dr. William Vicary, a psychiatrist, conducted a psychiatric evaluation of appellant. His evaluation was based on multiple interview sessions with appellant lasting approximately eight hours, interviews with her family members, and review of relevant documents obtained from the prosecution and the defense, schools, and other psychological reports. (21RT 3627-3631.) He also administered the Million Psychological Test which consisted of true and false questions to determine whether appellant was depressed, schizophrenic or normal. (21RT 3631.)

Dr. Vicary characterized appellant's family as a "troubled family." His conclusion was based on the fact that appellant's father was rarely around, requiring her mother to work double shifts and making her unavailable to take care of her children. (21RT 3634.) The relationship between the parents and the children was very distant and the children did not have "much of a relationship" with each other. (21RT 3635.)

Appellant shared with Dr. Vicary that she had been sexually abused by her paternal grandfather. (21RT 3636.) Dr. Vicary opined that appellant, due to her age and the desire for some affection, became a willing participant in the repeated incidents of sexual abuse which

continued until she was approximately 15 or 16 years old. Appellant became pregnant twice by her grandfather and was forced to have therapeutic abortions. (21RT 3636-3637.) Appellant tried to tell other family members about her grandfather's abuse but received no help. (21RT 3638-3639.) When appellant told her mother about the abuse, she told appellant not to tell the police but to contact her father. Appellant was eventually blamed for her grandfather's actions. (21RT 3640.) Dr. Vicary said that appellant began blaming herself for the sexual abuse. (21RT 3640-3641.)

Dr. Vicary stated that victims of sexual abuse fall into three different categories. The victims in the first category are very resilient with a support group to help them through the situation unscarred. The second group of victims includes someone like Colaiacovo who is not in trouble with the law but maintains poor personal relationships. The victims in the third group include someone like appellant who becomes very self-destructive with suicide attempts, mental illness, and criminal behavior. (21RT 3641-3642.) A person suffering from a severe long term trauma is more likely to suffer from a psychiatric damage. (21RT 3642-3643.) When the abuser is a family member, the psychological damage is greater than instances when the abuser is a stranger. (21RT 3643.) Dr. Vicary opined that a victim of sexual abuse is more likely to have multiple partners, suffer from clinical depression, and lead to substance abuse. (21RT 3645-3650.) Dr. Vicary noted that appellant's jail records showed appellant with a high pulse rate, which was consistent with someone who had been traumatized. (21RT 3652-3653.)

Dr. Vicary opined that appellant's history of abuse did not prevent her from being a loving mother herself. During his interviews, Dr. Vicary found appellant to be the most emotional and animated when she was talking about her children. (21RT 3654.) Dr. Vicary also opined that

appellant would have a positive future institutional adjustment, meaning she would be a model prisoner while incarcerated in prison. (21RT 3655.)

During cross-examination, Dr. Vicary admitted that appellant's elevated heart rate and depression were also consistent with someone who had been subjected to a long term incarceration for the first time and who was facing a capital murder trial. (21RT 3659-3661.) He also admitted that defendants facing criminal charges often lie during their psychiatric evaluation interviews. (21RT 3678.)

In formulating his opinion, Dr. Vicary partly relied on the evaluation report prepared by another psychologist, Richard Romanoff, who had been hired by appellant's previous counsel and had interviewed her for approximately 24 hours. (21RT 3675.) Romanoff noted that appellant had a tendency to embellish her accounts of past events in "an extremely dramatic manner," and concluded that appellant's "pattern of distortion and fabrication throughout the investigation" into her husband's murder "renders . . . the truth of any particular reported recollection by [appellant] as suspect." (21RT 3682-3683.) Romanoff concluded, and Dr. Vicary agreed, that appellant operated from a survival oriented perspective who acted to protect herself without consideration for negative consequences on other people. (21RT 3688-3689.) Romanoff also concluded, and Dr. Vicary agreed, that appellant killed her husband for personal and selfish reasons. (21RT 3690.)

Dr. Vicary acknowledged that appellant had used her daughter to help poison her husband with Gatorade. (21RT 3705.) Dr. Vicary still considered appellant a loving and supportive mother despite the fact that she poisoned her husband to death for money and used her nine-year-old daughter as an unwitting accomplice in that murder. (21RT 3706.)

ARGUMENT

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

Appellant contends that the trial court's excusal of two prospective jurors for cause based on their death penalty views violated her rights to a fair and impartial jury and to due process. (AOB 77-86.) Specifically, appellant argues that the voir dire of Prospective Juror Nos. 2 and 8 established that their position on the death penalty would neither prevent nor substantially impair their ability to impose a sentence of death. (AOB 82-85). 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 or her 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 fairly 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 No. 2

According to her juror questionnaire, Prospective Juror No. 2 (juror no. 030525976) was a 43-year-old African-American woman who had lived in Compton for 18 years. (6CT 1389.) She was employed by the Los Angeles County District Attorney's Office as a legal office support assistant. (6CT 1389.) The juror wrote that her general feelings about the death penalty were "for and against," and that her philosophical opinion was "neutral." (6CT 1401.) She believed that life in prison without the possibility of parole was worse punishment than death. (6CT 1402.)

During oral voir dire, Prospective Juror No. 2 stated that she had been an employee with the Los Angeles County District Attorney's Office for 13 years but that she would have no reluctance in voting not guilty. (8RT 936-937.) She also stated that her prior contacts with a deputy coroner or the Sheriff's personnel would not affect her opinion on witness credibility. (8RT 938-939.)

The court also asked Prospective Juror No. 2 about her response in the questionnaire stating her belief that life imprisonment without the possibility of parole was a worse punishment than death. (7RT 946.) The court explained that at the penalty phase, the prosecutor would be presenting aggravating factors and requesting the greater penalty, i.e., a sentence of death, while appellant's counsel would be presenting the mitigating factors and requesting the lesser penalty, i.e., a life sentence

without the possibility of parole. (7RT 946-947.) The exchange below followed:

> THE COURT: . . . So what I'm getting at is if you feel that the aggravating circumstances are so substantial in comparison to the mitigating circumstances that it warrants the greater penalty, both sides are saying that's the death sentence.
>
> If you feel the mitigating circumstances are sufficient, that merits the lesser penalty of life without parole.
>
> Can you adjust your decision based on the expectation of the parties and the proof of the evidence in the penalty phase?
>
> PROSPECTIVE JUROR NO. 2: I guess I could.
>
> THE COURT: I'm sorry. I couldn't hear that.
>
> PROSPECTIVE JUROR NO. 2: I guess I could.
>
> THE COURT: Do you understand what I was explaining?
>
> PROSPECTIVE JUROR NO. 2: I understand. I understand. Only because I've come across in my dealings with the office, and there was only one particular time that I kind of agreed with that particular penalty phase because of those circumstances.
>
> THE COURT: Okay. To make it rather vivid, if Mr. Houchin produces in you the view that the mitigating circumstances are sufficient to justify the lesser penalty, he would not be asking for the death sentence. To you the lesser penalty is death rather than life without parole. He's asking for the lesser penalty of life without parole rather than the death sentence.
>
> So if he basically succeeds in convincing you, he wants the lesser penalty of life without parole, not the death sentence that you think is less.
>
> So can you adjust that final decision based on the expectation of the parties?
>
> PROSPECTIVE JUROR NO. 2: Yes.

(7RT 947-948.)

When appellant's counsel asked whether her opinion of the appropriateness of death penalty would depend on the number of people who are dead, Prospective Juror No. 2 answered, "possibly." Prospective Juror No. 2 stated that "if [she] believed there are more people who died, [she] might be more in line with the death penalty." (7RT 981.) She also said that the death penalty is not used enough and explained that death would be appropriate for a person who continues to commit violent crimes in "a pattern where it just continues to escalate." (7RT 982.)

When the prosecutor asked each juror whether he or she could "personally vote for the death penalty . . . if the aggravating evidence substantially outweighed the mitigating evidence and under the law death was the appropriate punishment," Prospective Juror No. 2 answered, "I don't know." (7RT 1008.) The following discussion ensued:

> [PROSECUTOR]: I think you mentioned that you've seen death penalty cases come across your desk in the course of your duties for the District Attorney's Office, correct?
>
> PROSPECTIVE JUROR NO. 2: Yes.
>
> [PROSECUTOR]: And I think . . . in response to one of the court's questions you said that only once you'd agreed with it.
>
> Is that accurate what I'm remembering?
>
> PROSPECTIVE JUROR NO. 2: Yes.
>
> [PROSECUTOR]: Can you tell me what you meant by that?
>
> PROSPECTIVE JUROR NO. 2: This particular defendant was very violent and he had committed several murders and he had finally been caught, and during the process of the trial, he also did some things that got rid of a jury panel because he did some things in front of the jury that caused the jury panel to be dismissed and it was like a mistrial, so in that

instance he was a very bad person. He never showed any kind of remorse and he just seemed like an evil person, so yeah, I agreed with it then.

[PROSECUTOR]: I'm sure you've heard about a number of death penalty cases that come through the Office. Out of all the cases that you've come across that you've had any contact with or heard any of the facts, is that the only time you agreed with what the Office had decided to do in a penalty phase, death penalty case?

PROSPECTIVE JUROR NO. 2: Yes.

[PROSECUTOR]: I want you to think long and hard about this, and I'm not trying to put you on the spot, but both Mr. Houchin and myself and the court, we really need an honest answer, because if you're selected to sit as a juror in this case and if we get to a penalty phase . . . we don't get to ask you questions again.

If we do get to that point of the trial, I'm going to be standing up here at the closing arguments after the penalty phase, and I'm going to be asking you to personally vote for death.

Do you think in the appropriate circumstances if you found the aggravating substantially outweighed the mitigating and that you felt death was the appropriate punishment under the law, could you personally vote to sentence somebody to death?

PROSPECTIVE JUROR NO. 2: I'm not sure.

[PROSECUTOR]: Is that the best answer you can give us right now?

PROSPECTIVE JUROR NO. 2: That's the best I can give.

[PROSECUTOR]: As you sit here today, you don't know whether you could do that or you couldn't do that?

PROSPECTIVE JUROR NO. 2: No, I don't.

[PROSECUTOR]: Okay. Would you feel more comfortable not sitting on a case like this?

PROSPECTIVE JUROR NO. 2: Yeah, I think I would. You holding somebody's life in your hands, and I mean people do wrong, but I'm not really really really for the death penalty. I understand it and I think there are some circumstances it should be death, but I don't know if I personally could say, yeah, this person deserves to die.

[PROSECUTOR]: As a personal matter you're uncomfortable making that decision?

PROSPECTIVE JUROR NO. 2: Yes.

(7RT 1008-1011.)

The prosecutor challenged Prospective Juror No. 2 for cause based on her "philosophical position on the death penalty" and "her personal ability to be able to impose death in the appropriate circumstances," as reflected in her response that "she just doesn't know whether she could do it." (8RT 1035-1036.) Defense counsel objected, stating that Prospective Juror No. 2, "while perhaps equivocal, is not substantially impaired." (8RT 1037.) The court granted the challenge for cause as to Prospective Juror No. 2 and noted as follows:

THE COURT: The juror no. 2 surprised me. I had thought from the questions and answers that I went through the juror was acceptable, but she did . . . severely limit at least the part about the death penalty, that there were very few circumstances in which she could impose it.

In fact, I think [] she was talking about only one case that she ever saw in the District Attorney's Office in which she could have or would have agreed to impose the death penalty.

[¶] . . . [¶]

And her statement finally that she was not sure that she could impose the death sentence I think does indicate that it is . . . not a realistic, practical possibility that she would do that, particularly given the circumstances here. Perhaps on a defendant who has killed 25 people she might be able to do that, so I will allow the challenge for cause to juror no. 2.

(8RT 1038-1039.)

Here, substantial evidence supported the trial court's excusal of Prospective Juror No. 2 for cause. Although Prospective Juror No. 2 initially stated that her opinion of the death penalty was "neutral" (6CT 1401), her later responses clearly reflected an opinion that she would impose the death penalty only in severely limited circumstances. For example, Prospective Juror No. 2 stated that while working in the District Attorney's Office, she has only encountered one case in which she believed the facts were severe enough to deserve a death penalty. (7RT 947-948.) She explained that the defendant in that case had committed multiple murders and had acted out in front of the jury causing a mistrial. She also said that the defendant showed no remorse and appeared to be an "evil person." (7RT 1009.) These responses in essence limited the circumstances that Prospective Juror No. 2 would impose a death penalty to a multiple murder defendant who showed no remorse for his actions. Since appellant was being tried for a single murder of her husband, Prospective Juror No. 2's views of death penalty would have substantially impair the performance of her duties as a juror. (See *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"].)

Furthermore, Prospective Juror No. 2's responses regarding her ability to impose a death penalty were ambiguous at best. When the court asked whether she could adjust her opinion that life imprisonment without the possibility of parole was a greater punishment than death to impose the appropriate punishment based on the evidence presented at the penalty phase, Prospective Juror No. 2 answered, "I guess I could." (7RT 947-948.) During the questioning by the prosecutor, Prospective Juror No. 2 said she was "not sure" whether she could personally vote to sentence

somebody to death and reiterated that not being sure was the best answer she could give. When the prosecutor again asked whether she knew if she could sentence someone to death, Prospective Juror No. 2 answered, "No, I don't." She explained that she was "uncomfortable" making the life and death decision and changed her prior opinion about being neutral toward the death penalty by saying, "I'm not really really really for the death penalty. I understand it and I think there are some circumstances it should be death, but I don't know if I personally could say, yeah, this person deserves to die." (7RT 1008-1011.)

To the extent Prospective Juror No. 2 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"].) Because the trial court's determination as to Prospective Juror No. 2'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 No. 8

According to his juror questionnaire, Prospective Juror No. 8 (juror no. 031353373) was a 68-year-old Asian man who had lived in Los Angeles for 30 years. He was retired but working part-time as a legal assistant filing legal documents, negotiating settlements, attending mediations and dealing with clients. (7CT 1846.) Prospective Juror No. 8 noted that his cousin had been a victim of a crime and expressed dissatisfaction with the law enforcement response by characterizing it as "non-chalant." (7CT 1850.) To the question of whether he had any religious or moral feeling that would make it difficult or impossible for him to sit as a juror, Prospective Juror No. 8 wrote, "Most [i]ngrained in my mind is the dictum: 'Judgment is mine!' Vengeance is as hazy as judgment to me." (7CT 1852.) Prospective Juror No. 8 also noted that he had a prior unpleasant experience with a peace officer when he was "apprehended [] for no apparent reason." (7CT 1855.)

As to his general feelings about the death penalty, Prospective Juror No. 8 wrote, "Death penalty does not seem to deter others from committing the crime; the current system seems to mete out the death penalty a bit loosely." He characterized his view of the death penalty as "moderately in favor." (7CT 1858.)

During the oral voir dire, Prospective Juror No. 8 explained that his cousin had been murdered at his house but the police response was "nonchalant" because "they went through the motion of gathering all the evidence" but "they didn't treat it seriously." (8RT 1087-1088.) When the court asked whether his prior negative experience with the law enforcement would cause him to prejudge an officer's testimony here or require the officer to prove something extra to be believed by him, Prospective Juror

No. 8 answered that his feelings were "ambivalent" but that he "would take it one at a time." (8RT 1088.)

The court asked Prospective Juror No. 8 as to his questionnaire response about the religious or moral feelings toward judging another person as follows:

> THE COURT: Okay. [On] [p]age 7 you've indicated about a religious or moral feeling making it difficult for you to sit in judgment of another person.
>
> Are we talking about a difficulty, a concern that you have or basically an impossibility?
>
> PROSPECTIVE JUROR NO. 8: My attitude towards capital punishment is, if it is . . . a punishment, it is my feeling [it] doesn't seem to be a deterrent to – it doesn't seem to achieve the purpose really.
>
> . . . It's still a tooth for a tooth kind of thing rather than to punish the accused. And I tend more to not favor capital punishment.
>
> THE COURT: Okay. But that then has to do with the penalty phase rather than your ability to decide the facts in this case; is that right?
>
> PROSPECTIVE JUROR NO. 8: No. I can decide the case towards the guilt or not – or innocence.
>
> THE COURT: Okay.
>
> PROSPECTIVE JUROR NO. 8: I can divorce . . . the punishment from . . . my thinking of the evidence and of the case.

(8RT 1090.)

Regarding Prospective Juror No. 8's prior experience with the law enforcement, the following exchange took place:

> THE COURT: . . . [On] [p]age 10 you've indicated positive and negative contacts with peace officers.

Would either the negative or positive affect your judgment of an officer here such that the officer would have to prove something special, basically start out with a disadvantage or an advantage because of the positive or negative contacts?

PROSPECTIVE JUROR NO. 8: I don't have a general attitude towards officers with neither here nor there, but I have had experiences with them both positive and negative.

THE COURT: Right.

PROSPECTIVE JUROR NO. 8: And . . . I will be very very questioning on the officer's veracity, you know.

THE COURT: So an officer would start out with a disadvantage because of your prior contacts?

PROSPECTIVE JUROR NO. 8: Not really. I . . . don't make a general statement.

THE COURT: Okay.

PROSPECTIVE JUROR NO. 8: That everyone is bad.

THE COURT: Okay.

PROSPECTIVE JUROR NO. 8: Or everyone is good.

(8RT 1091.)

During defense counsel's questioning, Prospective Juror No. 8 reiterated his view that the death penalty did not have a deterrent effect while life imprisonment without the possibility of parole had a deterrent effect. (8RT 1094-1095.) He identified that the prior negative experience with the law enforcement involved LASD. (8RT 1095-1096.) Prospective Juror No. 8 said that in an appropriate case, "[g]iven all the evidence and the facts and the gravity of the crime," he could impose the death penalty. (8RT 1096.)

The prosecutor inquired Prospective Juror No. 8 about his feelings toward judging the credibility of law enforcement officers as follows:

[PROSECUTOR]: Juror no. 8, when the judge asked you some questions about your prior contacts with police officers, and then he asked you about how you would view them if they testified in this case, I think your response was you would have questions or you'd question their veracity.

Do you remember giving that response?

PROSPECTIVE JUROR NO. 8: Right.

[¶] . . . [¶]

[PROSECUTOR]: Okay. Let me ask you this: Do you think an officer who came in here and testified would start out sort of in a hole in terms of his credibility, your evaluation of his credibility based upon your prior contact with the police that you talked about in your questionnaire?

PROSPECTIVE JUROR NO. 8: Say that again, please.

[PROSECUTOR]: Well, a police officer testifies in this case, would you have more questions about his credibility than you would any other witness who comes in here and testifies?

PROSPECTIVE JUROR NO. 8: I think I would have, yeah.

[PROSECUTOR]: Okay. Let me ask you this: You're going to hear from Sheriff's detectives, Sheriff's deputies in this case. You'll also hear from civilians who aren't law enforcement officers. Would you treat those Sheriff's deputies differently in terms of evaluating the credibility than you would a regular witness who wasn't a law enforcement officer?

PROSPECTIVE JUROR NO. 8: I would.

[PROSECUTOR]: You would?

PROSPECTIVE JUROR NO. 8: Yes.

(8RT 1097-1098.)

Regarding his religious or moral feelings that would make it difficult to judge another person, Prospective Juror No. 8 stated that he believed in the statement, "Vengeance is mine." (8RT 1098-1099.) He stated that his

religious beliefs would not affect his ability to be fair to the prosecution's case. (8RT 1099.) The following discussion ensued regarding how the religious concerns would affect the penalty phase:

> [PROSECUTOR]: Okay. So your statement in your questionnaire about having these religious or moral concerns about sitting in judgment, can you set that aside and be fair to me in a penalty phase, or can you not set that aside and not be fair to me in a penalty phase?
>
> PROSPECTIVE JUROR NO. 8: My problem is more on the penalty side. I tend. . . towards the guilt phase, I can be in judgment of that. I am comfortable with it. It's just that the capital punishment is one that makes me uncomfortable.
>
> [PROSECUTOR]: All right. When you say it makes you uncomfortable, do you think that lack of comfort would affect your ability to fairly evaluate my side of the case in a penalty phase?
>
> We're only talking about the penalty phase.
>
> PROSPECTIVE JUROR NO. 8: In the penalty phase, it might affect.
>
> [PROSECUTOR]: Do you think it would affect your ability to be fair to me? That's the question I'm asking you.
>
> [¶] . . . [¶]
>
> At the close of this case, if we reach a penalty phase, I'm going to stand up here in front of the jurors and I'm going to ask you to return a verdict of death.
>
> [¶] . . . [¶]
>
> Do you think that your moral or religious concerns would affect your ability to fairly decide that issue from my perspective?
>
> PROSPECTIVE JUROR NO. 8: I don't think so because . . . mine is emotional side. If I divorce my emotions from . . . my kind of belief that capital punishment is not a

deterrent, if it is only on that phase, . . . I would not be affected by . . . your side. I would still be . . . fair to your arguments.

[PROSECUTOR]: Well, If we're in a penalty phase, do you think you can set aside whatever emotional feelings you have or philosophical or religious feelings, do you think you can set those aside in the part of the case where you will be deciding, if we get there, whether this defendant gets life in prison or whether she gets the death penalty?

Can you fairly decide that, or would your feelings cause you to lean in favor of her and to hold it against me or not consider my position?

PROSPECTIVE JUROR NO. 8: I would . . . definitely make sure that my emotion will not enter into it.

(8RT 1100-1101.)

The prosecutor challenged Prospective Juror No. 8 for cause stating that "he basically admitted he can't be fair to police officers and he would not judge them by the same standards as any other witness." The prosecutor also noted that "notwithstanding [Prospective Juror No. 8's] final answer, he's given other answers which indicate that he's incapable . . . of deciding penalty fairly." (8RT 1101-1102.) The court rejected Prospective Juror No. 8's response that his religious belief was only applicable to the penalty phase because his statement, "Vengeance is mine," was made on page 7 of the questionnaire, even before the jurors were aware that the case involved a capital punishment, which was first mentioned in page 12 of the questionnaire. (8RT 1102-1103.) Over defense objections, the court granted the challenge for cause. (8RT 1103.)

Here, substantial evidence supported the trial court's excusal of Prospective Juror No. 8 for cause. The juror's responses to the questionnaire and during the oral voir dire made it clear that he had particularly negative experience with LASD, which was the primary investigating agency involved in this case. When the court asked whether

his prior negative experience with the law enforcement would cause him to prejudge an officer's testimony, Prospective Juror No. 8 answered that his feelings were "ambivalent." (8RT 1088.) He also indicated that he would be "very very questioning on the officer's veracity." (8RT 1091.) During the prosecutor's questioning, Prospective Juror No. 8 stated that he would have more questions about an officer's credibility than he would have of other witnesses and that he would treat the testimony of Sheriff's deputies differently in terms of credibility than he would a non-law enforcement witness. (8RT 1097-1098.)

Moreover, Prospective Juror No. 8 provided conflicting answers as to whether his religious or moral belief that "vengeance is mine," would affect his ability to impose the death penalty. Although in the questionnaire, Prospective Juror No. 8 characterized his view of the death penalty as "moderately in favor" (7CT 1858), he later stated during the oral voir dire that he "tend[ed] more to not favor capital punishment." (8RT 1090.) During the prosecutor's questioning, Prospective Juror No. 8 also admitted that capital punishment made him feel "uncomfortable" and the "lack of comfort" could affect his ability to fairly evaluate the prosecution case in the penalty phase. (8RT 1100-1101.)

As stated previously, to the extent that Prospective Juror No. 8 gave conflicting answers, the trial court resolved those differences adversely to appellant by granting the challenge. (*People v. Harrison*, *supra*, 35 Cal.4th at pp. 227-228.) The trial court's determination of Prospective Juror No. 8's biased state of mind is supported by substantial evidence and the challenge for cause was properly granted. (See *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].) Accordingly, appellant's claim must be rejected.

II. APPELLANT WAS NOT SUBJECTED TO UNLAWFUL AND INHUMANE CONDITIONS OF CONFINEMENT IN VIOLATION OF HER RIGHT TO COUNSEL AND DUE PROCESS

Appellant contends that she was subjected to unlawful and inhumane conditions of confinement, resulting in a violation of appellant's constitutional rights under the First, Fourth, Fifth, Sixth and Fourteenth Amendments. (AOB 86-119 [Arg. II].) More specifically, appellant argues that the trial court denied her telephone access and visits from her defense counsel, and interfered with her legal correspondence, resulting in a violation of appellant's rights under the Fifth, Sixth and Fourteenth Amendments. (AOB 119-124 [Art. III.) Respondent disagrees.

A. Factual Background

Appellant was arrested on February 7, 2001. (14RT 2267.) On February 27, 2001, the court appointed the Los Angeles County Public Defender's Office to represent appellant. (1CT 14.) On April 17, 2001, the court issued an order to terminate appellant's telephone privileges based on her attempts to contact and dissuade a witness. (2RT 13-14, 21.) On September 26, 2001, appellant retained a private attorney, M.R. Ward, to represent her. (1CT 178.)

On December 14, 2001, the court held a hearing on appellant's request to lift the restrictions on her telephone privilege. (2RT 12.) Appellant's counsel stated that he understood the reasons for the restricted telephone privilege but suggested allowing appellant limited access to telephone to make collect calls to counsel. (2RT 14.) The prosecutor objected, stating that he was unsure whether LASD had the capability to program the telephone system to limit the calls to counsel's office only.

(2RT 15.) The court agreed that appellant should be able to contact her counsel but expressed a concern about reestablishing appellant's ability to contact and threaten witnesses. (2RT 18-19.)

After reviewing the original order imposing the telephone restrictions and the affidavit in its support, the court stated, "You're not going to be successful in getting reestablishment of phone contact with counsel." (2RT 21-22.) The prosecutor noted that despite the limited telephone privilege, there was no restriction in appellant's ability to meet with counsel face-to-face. In fact, the prosecutor stated that "every attempt ha[d] been made to allow [appellant] to have contact with her family even beyond that that's allowed normal inmates in the county jail." (2RT 22.) The prosecutor said that he would consult with LASD personnel on whether the jail had the logistical capability to establish a limited telephone privilege. (2RT 26-27.) Counsel told the court that he "had met [appellant] in the attorney booth with the separation in the prior communications," but that he was not permitted to meet with her face-to-face to look over photos and recordings. (2RT 23-25.) The court concluded the hearing by issuing an order granting counsel unlimited face-to-face meetings with appellant at the jail. (2RT 25, 29.)

On January 7, 2002, appellant sent a letter to the court stating that she had fired Ward as her counsel and requesting temporary reinstatement of her telephone privileges to look for a new attorney. (1CT 192-193.) Specifically, appellant requested a 30-day telephone access with unlimited and unmonitored calls everyday from 7:00 a.m. to 9:00 p.m. (1CT 195.) She also requested telephone contact with her daughter who was in her father's sole custody. (1CT 196-197.)

On January 16, 2002, the court addressed appellant's request to remove Ward as her counsel. (2RT 33.) Appellant stated that she wished to continue looking for a new private attorney. (2RT 35.) As to appellant's

request to reinstate her telephone privileges to look for a new attorney, the court stated that it was not inclined to grant it because of the concern that appellant could use the telephone to dissuade witnesses. (2RT 35-36.) Deputy Paul Schrader testified that there was no way to limit the jail telephone system to allow calls only to one particular number. (2RT 36-39.) Deputy Schrader noted that it would take special manpower and impose a "big burden" on LASD to monitor appellant during her telephone calls in order to make sure she did not hang up the call to her attorney and dial someone else. (2RT 39-41, 44.) The court ultimately denied appellant's request to reinstate her telephone privileges due to the limited resources available to LASD and the security concerns. The court noted that the order "really means that counsel has to visit his client much more frequently at the jail, which [the court] know[s] is a burden, but [the court] also know[s] the security problems." (2RT 45.)

On June 24, 2002, appellant sent an 11-page letter to the court complaining about various conditions of confinement. (1CT 204-215.) In the letter, appellant alleged that she had been exposed (but treated) for tuberculosis, allowed to shower in limited frequency, given limited recreation time, given medication that had been "toyed with," and endured sexual advances and being watched by male staff during showers. (1CT 207.) Appellant also complained about the conditions in module 211 where she was being housed. Specifically, appellant was discontent about the poor lighting, low temperature, presence of bugs, and lack of windows, fresh air, television, newspapers, and outdoor recreation. (1CT 207-208.) She further complained about the "24/7 door pounding, yelling, pepper spraying, inmate verbal fights, lesbian sex talk," the noise from the loud speakers, and other inmates calling her a "[b]aby killer." (1CT 209.) Appellant claimed that there was a "housing problem," and that she suspected that "the detective" was intentionally keeping her in module 211

just to torment her. (1CT 210.) Appellant also noted that she had not been receiving her mail for over two weeks. She claimed that mail was the only way of communication with her counsel and family. (1CT 213.) Finally, appellant had the following suggested solutions: (1) transfer to a federal detention center; (2) appointment of a non-biased investigator to look into her complaints; (3) access to the law library; and (4) a mental health evaluation. (1CT 210-212.)

On August 1, 2002, Ward filed a formal motion to be relieved as counsel of record. (1CT 220.) In support of his written motion, Ward stated that he was unable to properly represent appellant due to her "total lack of cooperation in the preparation for trial, and her totally uncalled for misbehavior while in jail." (1CT 221.) Specifically, Ward noted as follows:

> Due to her deliberate acts, all against this counsel's advice, [appellant] has been placed in "Administrative Segregation," where she had been housed for over one year. This housing arrangement was imposed for security purposes and [appellant]'s telephone call privilege was terminated by court order to prevent her from calling witnesses and attempting to induce them to testify in her favor and to prevent witness intimidation by telephone. Consequently, the lack of telephone privileges has hampered defense by a limitation of telephonic contact between [appellant] and counsel. Counsel has made 19 personal visits with [appellant] at Twin Towers Correctional Facility and has "visited" and interviewed [appellant] in lock up during each Court appearance. Counsel, as well as previous counsel for [appellant], repeatedly advised [appellant] to refrain from discussing her case with anyone other than counsel.

(1CT 221-222, original emphasis.) Ward also stated that despite counsel's specific advice to refrain from discussing her case with others, appellant repeatedly discussed her case with another female inmate and ultimately solicited her to hire someone outside of jail to kill a witness. (1CT 222.)

At the hearing, after a long discussion of options available to appellant, the court proposed postponing the matter for approximately one week until a new appointed counsel could be located to replace Ward. (2RT 82.) The court also discussed the potential difficulties in allowing appellant access to law library if she chose to represent herself. The prosecutor reminded the court that the reason for appellant's continued placement in module 211 was due to her own behavior in attempting to dissuade a witness from testifying and the more recent attempt to solicit another inmate to murder the same witness. (2RT 84.)

On August 13, 2002, both the Public Defender's Office and the Alternate Public Defender's Office declared conflict in representing appellant. (2RT 90-94.) The court relieved Ward as appellant's counsel and appointed Alex Kessel from the Bar Panel as her new counsel. (1CT 235.)

On August 16, 2002, the court relieved Kessel as appellant's counsel due to his vacation schedule and replaced him with Michael Yamamoto, another Bar Panel attorney. (2RT 97.)

On August 22, 2002, Yamamoto filed a motion to withdraw as appellant's counsel , stating that he was unable to establish an attorney-client relationship with appellant and that she did not wish to be represented by him. (1CT 237-238.) On August 28, 2002, the court admonished appellant that she could not "continue to reject attorneys until [she] find[s] the one that pleases [her] the most." (2RT 100.) The court relieved Yamamoto as appellant's counsel with a referral to the Bar Panel to select a new counsel. (2RT 102-103.) After the hearing, the Bar Panel selected David Houchin as appellant's new counsel. (1CT 242.)

On November 7, 2002, appellant's counsel advised the court that on November 6, 2002, appellant had received a letter from her previous counsel, Ward, which was postmarked August 7, 2002 and marked as

opened in error on August 14, 2002. (2RT 116-117.) The letter apparently contained "a discussion from her prior counsel as to the case, as to how he anticipates that it could or should proceed, and some steps that she should perhaps consider taking." (2RT 117.) The prosecutor assured the court that "whatever deputies may or may not have seen, [he] ha[d] not seen that letter, and no one from the jail has contacted [him], and no one referred to the contents of that letter." Appellant's counsel noted that his concern was "perhaps informants popping up," and the court responded that there was not much that could be done at this point and appellant's counsel at the time, Ward, had already been relieved long time ago. The court ordered the letter to remain in the custody of appellant's current counsel and noted, "If there is a problem, we'll need to examine what's in the record to see if that could generate the problem that might come up." (2RT 118.)

On August 22, 2003, appellant's counsel moved to have limited telephone privileges reinstated for appellant to contact counsel based on some new information received from LASD. (2RT 154-155.) The prosecutor stated that he "ha[d] no objection to [appellant] having access to a phone to call Mr. Houchin and Mr. Houchin only, as long as that is in fact possible . . . [and] the Sheriff can guarantee that the calls will go only to Mr. Houchin . . . ." (2RT 156.) The court signed the order granting limited telephone privileges for appellant to contact her counsel only. (2RT 157-158.)

On the same date, the court also issued an order to the Sheriff's Department to provide appellant with an "emotional state evaluation – medication status," with the results to be provided by August 28, 2003. (2CT 412-413.) On August 27, 2003, Shirin Sharitha, Ph.D., evaluated appellant and noted that she "had been receiving [mental health treatment] from Twin Towers jail for the past 2 y[ears]." (2CT 432.)

On August 28, 2003, the court held an in camera hearing to address the prosecutor's concerns regarding appellant's telephone privileges. (2RT 168.) During the hearing, the prosecutor stated that although the jail is equipped with a telephone system in which the calls can be limited to certain pre-programmed telephone numbers according to an inmate's booking number, appellant would be able to bypass the system if she obtained another inmate's booking number. The prosecutor noted that he had been informed by LASD personnel that appellant had been in contact with other inmates in jail. (2RT 172-174.) After extensive discussions on how to allow appellant access to a telephone without jeopardizing jail or witness safety, the court let the previous order granting appellant limited telephone access stand with an understanding that the deputy in charge of jail telephone systems would be brought in for further questioning. (2RT 176-186.)

On August 28, 2003, appellant's counsel acknowledged that appellant had received continuous treatment by a psychologist every three weeks. (2RT 416.) However, counsel noted that based on his client's behavioral change in the last two weeks, there might be something additional or different from what she had been treated for in the past two years. (2RT 416-417.) Counsel requested the court for a more specific mental health evaluation and the court responded, "That's fine. If you'll complete [the order] and if [appellant] knows what she needs, we'll order that." (2RT 417.)

On August 29, 2003, after receiving additional information regarding the jail telephone system, the court issued an order granting appellant limited telephone privileges to contact her counsel on Mondays, Wednesdays and Fridays, between 6:00 p.m. and 8:00 p.m. Counsel agreed that "that would be fine . . . ." (4RT 420-424.) The court also issued an order allowing appellant to meet with her counsel face-to-face without any

partition to go over audio tapes. (4RT 425-426.) The court further ordered a psychiatric evaluation of appellant with a report due date of September 15, 2003. (2CT 442-443.)

On the same date, the court also held an in camera hearing without the presence of the prosecutor to address appellant's medical concerns. (4RT 477-478.) During the in camera hearing, appellant addressed the court directly regarding the conditions of her confinement in module 211. (4RT 479-493.) Specifically, appellant stated that she could not understand why she had been in module 211 for so long "because [she was] not a discipline problem . . . in the jail . . . ." (4RT 480.) Appellant stated that she had suffered from eating disorders, hysteria, and claustrophobia. (4RT 480-482.) She said she could not eat or sleep and that her doctor could only see her every three weeks due to scheduling problems. (4RT 482.) Appellant also informed the court that her jail cell did not have any windows and that her tray slot had been covered with a metal plate. (4RT 485.) Appellant described her physical symptoms as lack of sleep, throwing up at least once a day, stomach problems, skin problems, headaches and muscle problems. (4RT 489.) When the court asked what solution appellant was proposing, she said that she needed to be moved out of module 211 and that she needed more frequent mental health counseling. (4RT 490-491.)

After listening to appellant's complaints, the court found that based on the evidence previously presented to the court, it was appropriate for the jail personnel to treat appellant differently from the standard population. (4RT 493.) The court noted that it was concerned about appellant's allegation that she was locked up in a cell with no windows. The court concluded that "the doctors are the ones that need to evaluate her both physically and mentally" and that the court was "really not qualified to say what's happening is appropriate or inappropriate." (4RT 494.) Appellant's

counsel suggested ordering a psychiatric evaluation and having a report ready for the court's review in a couple of weeks. (4RT 495.) The court agreed that a psychiatric evaluation would be appropriate and that he could not make a decision by just listening to appellant's side. (4RT 495-496.) The court stated that if appellant wished to have a hearing on the issue of having her moved out of module 211 and the conditions of her confinement, the court would order "whatever hearing [appellant] think[s] is appropriate as far as housing is concerned." Counsel stated that he would contact the County Counsel's Office regarding the scheduling of a hearing on the issue of appellant's housing . (4RT 497.)

On September 3, 2003, appellant filed a written "Motion for Evidentiary Hearing RE: Defendant's Constitutional Rights and Appropriateness of Present Housing Assignment." (2CT 447-451.) On September 15, 2003, the court held a hearing on appellant's motion with a representative from the Los Angeles County Counsel's Office appearing on behalf of LASD. (5RT 503.) Michael Maloney, a psychologist and program director for the women's mental health in Los Angeles County jails, testified that Dr. Diana Delcarlo, a psychiatrist, had been counseling appellant every three weeks and prescribing her anti-depression and anti-anxiety medication. (5RT 506.) Maloney stated that the frequency of appellant's visits with Dr. Delcarlo was greater than the number of visits a typical inmate in appellant's condition would receive. Maloney opined that appellant did not fall within the definition of "in need of mental health counseling." (5RT 507.) On or about July 14 or 16, 2003, another staff psychologist visited appellant and told Maloney that "it would be good to talk to her once a week," but Maloney said, "We don't have time to do that." Although Maloney agreed that "it would be helpful, nice for [appellant] to be able to talk to someone, [] her condition [did not] warrant

it," i.e., "it[] [was] not like a psychological or psychiatric emergency." (5RT 509-510.)

Deputy Zabokrtsky testified that module 211 cells do not have any outside windows except for a door slot and a door window which remains covered by an aluminum shield. (5RT 511-513.) The door window had been ordered covered by a court order approximately two months earlier due to security concerns. (5RT 515-516.) Module 231 is a less restrictive administrative segregation housing unit in which the cells have outside facing windows and glass doors. (5RT 517.) While housed in module 211, appellant received one hour of day room privileges when she would be allowed to walk out of her cell and take shower. (5RT 519.) The day room in module 231 was larger in size and appellant would be able to talk to another inmates but she would still be limited to one hour of outside time. (5RT 519-521.)

Deputy Zabokrtsky further testified that in module 231, the inmates can communicate with other inmates verbally, through the use of hand signals, or by using "jailhouse kites," which are notes or letters passed around to each other or "fished." (5RT 522-523.) Sealing off the door slots and the bottom gaps severely curtails an inmate's ability to communicate through kites. (5RT 523-524.) Some cells in module 211 are blocked with a rolled up towel duct-taped from outside to prevent any unauthorized items from being slipped under the door. (5RT 524.)

The inmates housed in module 231 have access to a payphone in the day room with which unrestricted collect calls may be made during their one-hour recreation time. The majority of the inmates in module 211 do not have telephone privileges but some inmates, including appellant, have restricted telephone access. (5RT 525.)

At the conclusion of the hearing, the court indicated that based on Deputy Zabokrtsky's testimony, appellant should not be moved back to

module 231 because she would have "far too much access to other inmates," and "[t]hat[] [was] the source of the problem in the first place." (5RT 528.) The court expressed a concern, however, regarding appellant being housed in a cell with no openings to the outside. Appellant's counsel acknowledged that he "underst[ood]" the court's concerns regarding moving appellant back to module 231 and submitted to the court on that issue. (5RT 529.) After extensive discussions, the parties agreed to implement certain changes to appellant's housing restrictions and the court ordered that appellant's cell window be uncovered for two hours a day during her waking hours, that her clinical visiting hours with a mental health professional be increased to the extent possible, and that she be given an opportunity to shower every other day. (5RT 554.)

After appellant's conviction and the jury's death verdict in the penalty phase, appellant wrote a letter to the court on December 3, 2003, requesting that all mail addressed to her be delivered "immediate[ly]," that all original photographs of appellant's family members used during trial as evidence be returned to her, that an appellate attorney be appointed to her before the next court hearing, that a copy of the Los Angeles Times newspaper be delivered to her cell daily, and that her telephone privileges be restored. (4CT 1001-1007.)

On December 12, 2003, the court stated that it had received appellant's letter just two days earlier because appellant had addressed the letter to "CCB, . . . S 101," and it took a long time to be routed to the appropriate judge. (23RT 3889.) Regarding the late delivery of mail, the court stated that a restriction of mail delivery would not be appropriate. Appellant's counsel noted that he was unaware of any problems with the mail system. Appellant stated that she had not seen mail in over two months and that she had filed a complaint. (23RT 3890.) The court told appellant that the bailiff would look into the problem to see if any order

should be made to address the mail issue. Regarding the request for the daily newspaper delivery, the court ruled that "given the restrictions," it would be appropriate for appellant to receive the newspaper. (23RT 3891.) The court denied appellant's request to reinstate telephone privileges, stating that based on the evidence at trial, the court was still concerned for the safety of witnesses. (23RT 3892.) As to appellant's request for an appellate counsel, the court stated that there would be time to work on that. (23RT 3893.)

At the hearing, appellant also complained about the use of leg chains and extra security measures imposed on her while incarcerated in the jail. (23RT 3897-3898.) The court stated that according to LASD, the additional security measures were imposed after appellant had threatened to kill one of the deputies. (23RT 3898-3899.) After noting that it did not believe restraints were unnecessary at least while appellant was in the courtroom, the court set the matter for further hearing at a later date. (23RT 3899-3901.)

On December 18, 2003, the court held a hearing on appellant's request for a reduction on restraints used by LASD. (23RT 3906.) Kevin Christy, a jail psychologist, testified that one day after returning from court, appellant was particularly upset about Deputies Zabokrtsky and Jimenez who had testified at her trial. (23RT 3909.) Appellant requested Christy not to have Deputies Zabokrtsky and Jimenez be around her because "she didn't know how she would respond to them" and that "she was afraid she might do something to them." (23RT 3909-3910.) Christy immediately reported appellant's statement to LASD personnel because he was concerned for the safety of Deputies Zabokrtsky and Jimenez. (23RT 3910.)

Deputy Zabokrtsky testified that it was common practice for LASD to upgrade the security measures on an inmate who had been convicted in a

death penalty case because the inmate "no longer has anything to lose." (23RT 3917.) As to appellant, the increased security measures were necessary because of the jury's return of a death verdict, appellant's solicitation of murder while in custody, and the recent threat to Deputy Jimenez as reported by Christy. (23RT 3917-3918.) Based on the testimonies of Christy and Deputy Zabokrtsky, the court found the increased security measures to be appropriate and denied appellant's motion to reduce the restraints. However, the court ordered that appellant not be placed in any restraints at the next court hearing. (23RT 3923-3924.) The court also issued a clarifying order instructing the "Sheriff's Department to deliver all of the defendant's mail to the defendant," and to have the Los Angeles Times newspaper delivered to her cell daily. (23RT 3933-3934.)

On January 12, 2004, at the sentencing hearing, appellant had an opportunity to make a statement to the court directly. During her statement, appellant made various references to the conditions of her confinement, mostly reiterating her previous allegations of mistreatment. (23RT 3978-4015.) After the pronouncement of judgment of death, counsel requested the original family photographs used as evidence during trial be substituted with digital photocopies and the originals be returned to appellant. The court granted appellant's request. (23RT 4026.)

B. The Conditions of Confinement Did Not Violate Appellant's Constitutional Rights

Appellant contends that she was subjected to unlawful and inhumane conditions of confinement which intruded in her rights to due process of law, to assist in her own defense, and to effective counsel. Specifically, appellant alleges that she was unjustifiably housed under administrative segregation in module 211 where she was deprived of telephone privileges,

medical attention, sleep, sunlight, nutrition, recreation time, contact with other inmates and family, subjected to physical and mental abuse, and denied her right to counsel and privileged attorney-client documents. (AOB 86-124.) Appellant's allegations are meritless.

> Some courts have recognized, in the context of civil rights actions brought by pretrial detainees, that certain conditions of confinement may so impair the defendant's ability to communicate with counsel or otherwise participate in the defense that a due process violation or an infringement of the right to effective assistance of counsel results. (See *Johnson-El v. Schoemel* (8th Cir. 1989) 878 F.2d 1043, 1051 [observing that pretrial detainees have a substantial due process interest in effective communication with counsel and that if this interest is respected inadequately, the fairness of trial may be compromised]; *Campbell v. McGruder* (D.C. Cir. 1978) 580 F.2d 521, 531-532 . . . [stating that conditions of confinement, apart from the fact of confinement itself, that impede a defendant's ability to prepare a defense or damage the defendant's mental alertness at trial are "constitutionally suspect" and must be justified by compelling necessity]; *Jones v. City and County of San Francisco* (N.D.Cal. 1997) 976 F.Supp. 896, 913 [lack of privacy for pretrial detainee's consultation with counsel may implicate Fourteenth and Sixth Amendments if attorney's ability adequately to prepare a defense is impaired]; *Dillard v. Pitchess* (C.D.Cal. 1975) 399 F.Supp. 1225, 1236 [sleep deprivation due to transportation schedule between jail and courthouse may violate due process of law by affecting defendant's ability to assist counsel].) On the other hand, conditions of confinement that have not actually affected the defendant adversely are not grounds for reversal of a conviction; as [the California Supreme Court] ha[s] determined, a defendant who was representing himself has no right to a continuance on the ground he had not received eight hours of sleep the night before the proceeding, when notwithstanding this adverse condition of confinement, the record indicated the defendant was awake and capable of participating in the proceedings. (*People v. Smith* (1985) 38 Cal.3d 945, 953 . . . ; see also *People v. Davis* (1987) 189 Cal.App.3d 1177, 1197 . . . [no indication defendant's performance as pro se counsel was affected adversely by sleep deprivation], disapproved on another point in *People v. Snow* (1987) 44 Cal.3d 216, 225 . . . .)

(*People v. Jenkins* (2000) 22 Cal.4th 900, 1002.)

Here, the record does not indicate that the conditions of appellant's confinement so interfered with her ability to communicate with counsel or assist in the defense as to constitute a violation of appellant's rights to due process or effective assistance of counsel.

Regarding appellant's repeated complaints about her lack of telephone privileges and inability to contact counsel, the record shows that the court tried to reasonably accommodate appellant's often unreasonable requests under the circumstances. Appellant's constant complaints about her telephone privileges consistently ignored the fact that the revocation was precipitated by her own criminal actions of dissuading a key prosecution witness from testifying at trial over a telephone call she made from jail. After appellant's first request to lift the restrictions on her telephone privileges on December 14, 2001, the court patiently considered appellant's contentions in two separate hearings (December 14, 2001 and January 16, 2002) which included live testimony from Deputy Schrader who stated that individually monitoring appellant's telephone calls would impose a "big burden" on LASD. (2RT 12-25, 35-45.) Appellant nevertheless insisted that she was entitled to daily unlimited and unmonitored calls from 7:00 a.m. to 9:00 p.m. (1CT 195.) Although the court recognized that normally appellant should be able to contact her counsel via telephone, after reviewing the original order imposing the telephone restrictions and the affidavit in its support, the court agreed with the prosecutor that granting appellant's wishes would be too much of a security threat. (2RT 18-19, 21-22.) The court, however, reminded appellant that the denial of her telephone access "really means that counsel has to visit his client much more frequently at the jail . . . ," and issued an order granting counsel unlimited face-to-face meetings with appellant at the jail. (2RT 25, 29, 45.) Indeed, Ward, who was appointed appellant's

counsel on September 26, 2001, represented to the court that up until August 1, 2002, he had personally visited appellant 19 times at the jail and had interviewed appellant in each of the court appearances. (1CT 178, 221-222.)

When the issue of telephone privileges resurfaced on August 22, 2003, the court again held multiple hearings (August 22, 28 and 29, 2003) and painstakingly considered all available alternatives in granting appellant limited telephone access without jeopardizing jail or witness safety. (2RT 154-155, 168, 172-186; 4RT 420-424.) The prosecutor even told the court that he had no objections to granting appellant telephone access to contact her counsel so long as LASD had the means to prevent calls to anyone else. (2RT 156.) The court ultimately granted appellant limited telephone privileges to contact her counsel on Mondays, Wednesdays and Fridays, between 6:00 p.m. and 8:00 p.m., and her counsel specifically agreed that this schedule "would be fine . . . ." (4RT 420-424.) Additionally, the court issued another face-to-face visitation order so that appellant's counsel could visit her and go over audiotapes without any partition between them. (4RT 425-426.)

Even after appellant's conviction and the jury's death verdict in the penalty phase, the court reconsidered the telephone privileges issue as it was brought up again on December 12, 2003. (4CT 1001-1007; 23RT 3889.) Based on the evidence at trial, the court noted that it was still concerned for the safety of witnesses and denied appellant's request to unlimited telephone access. (23RT 3892.)

The record in this case clearly shows that appellant's telephone restrictions were imposed because of her own criminal behavior and each time she requested an unrestricted access to a telephone, the court carefully balanced appellant's rights versus the security limitations of the jail and the safety of witnesses appellant may threaten. The court went to extraordinary

lengths to accommodate appellant's requests, granting her six separate hearings to consider the telephone issue alone. Although the telephone privileges remained revoked, the court granted multiple requests for face-to-face visitation orders which allowed counsel unlimited personal visits with appellant. After Houchin was appointed counsel of record on August 22, 2002, he raised the telephone issue for the first time on August 22, 2003, at which point the court granted appellant limited telephone access to contact her counsel three times a week for two hours each time. In other words, appellant had ample opportunity to contact and assist her counsel with her defense through counsel's personal visitations at the jail, during the numerous pretrial court appearances, and through up to six hours of telephone calls per week. Indeed, according to one of appellant's previous attorneys, Ward, it was not the restrictive conditions of confinement but *appellant's* "total lack of cooperation in the preparation for trial . . ." that caused difficulties and delays in preparing for the trial. (1CT 221.) Thus, there was no violation of appellant's right to effective counsel or to aid in her defense.

With respect to appellant's complaints that her legal mail was being tampered with or not being timely delivered, the record again reflects that the trial court promptly addressed the issue and granted the relief requested by appellant. When Houchin brought up the issue of late delivery of an opened letter by Ward to appellant, the court asked counsel to keep the letter in his custody and re-raise the issue, which he never did, in case "there is a problem" in the future. The prosecutor assured the court that he had no personal knowledge of the letter and that he was not aware of its contents. (2RT 118.) The next time appellant notified the court that she had not received her mail in over two months, the court told appellant that the bailiff would look into the issue even though counsel noted that he was unaware of any problems with the mail system. (23RT 3890-3891.)

Approximately a week later, the court issued an order to LASD "to deliver all of [appellant's] mail to [her]." (23RT 3933-39354.)

Similarly, appellant's complaints that she was denied proper medical or mental health care are unfounded. In a letter appellant sent to court on June 24, 2002, she complained that she had been exposed to tuberculosis, but at the same time, acknowledged that she had been treated for the illness. (1CT 207.) On August 27, 2003, psychologist Sharitha reported that appellant had been receiving mental health treatment at the jail for the past two years. (2CT 432.) On August 28, 2003, counsel acknowledged that appellant had been receiving continuous treatment by a psychologist every three weeks. (2RT 416.) When counsel noted that his client's behavior appeared to have changed in the past two weeks, the court said, "if [appellant] knows what she needs, we'll order that." (2RT 417.) Dr. Delcarlo testified that she had been counseling appellant every three weeks and prescribing her anti-depression and anti-anxiety medication. (5RT 506.) The mental health program director for the jail opined that appellant was not in need of mental health counseling and that her condition did not warrant additional counseling sessions because there was no psychological or psychiatric emergency. (5RT 507-510.) Despite the program director's opinion, the court still accommodated appellant's request by ordering additional clinical visitations with a mental health professional. (5RT 554.) As demonstrated by this record, appellant was given timely and proper care for her mental health and medical needs and her ability to prepare or assist her counsel in the defense of her case was not affected.

The same is true with appellant's other complaints of improper conditions of confinement. Again, appellant complains that she was improperly assigned to administrative segregation in module 211 but she conveniently ignores the fact that the additional security measures were necessitated by her own criminal actions of dissuading a prosecution

witness from testifying and then later soliciting the murder of the same witness. Notwithstanding appellant's role in causing her own predicament, the court granted almost every request appellant had, such as personal daily delivery of newspaper to her cell, having her cell window uncovered two hours daily during appellant's waking hours, increased recreational hours outside her cell, and the opportunity to shower every other day. (5RT 554; 23RT 3891, 3933-3934.) These were privileges not available to other inmates housed in module 211 and were accommodations made specifically based on appellant's requests. The record amply demonstrates that the trial court properly and timely handled appellant's complaints and that she was able to participate in the proceedings or confer with her counsel despite the limitations of being housed in a segregated module for security reasons. Therefore, there was no unconstitutional interference with appellant's ability to assist in her own defense or to effective counsel.

Appellant's reliance on two cases, *Milton v. Morris* (9th Cir. 1985) 767 F.2d 1443, and *People v. Stansbury* (1993) 4 Cal.4th 1017, reversed on other grounds in *Stansbury v. California* (1994) 511 U.S. 318 [114 S.Ct. 1526, 128 L.Ed.2d 293], in support of her argument is misplaced. (AOB 87-88.) Both of these cases dealt with the issue of whether a defendant who has asserted the right to represent himself or herself could be deprived of a meaningful opportunity to prepare a defense based on various conditions of confinement. (*Milton v. Morris*, *supra*, 767 F.2d at pp. 1445-1446; *People v. Stansbury*, *supra*, 4 Cal.4th at p. 1046.) Appellant's case is obviously distinguishable from *Milton* and *Stansbury* because appellant was not representing herself but had an appointed counsel at all times who had the resources for investigation and the means to present a defense. (See *People v. Jenkins*, *supra*, 22 Cal.4th at p. 1001.)

Moreover, even in self-representation cases, the courts "have acknowledged that the institutional and security concerns of pretrial

detention facilities may be considered in determining what means will be accorded to a defendant to prepare his or her defense." (*People v. Jenkins*, *supra*, 22 Cal.4th at pp. 1000-1001.) In this case, as demonstrated above, appellant was not deprived of all means of preparing her defense, but she merely found her restricted accommodations at the jail facility, brought upon by her own fault, to be disagreeable and disruptive. As the record demonstrates that the conditions imposed on appellant related to legitimate security concerns and her concerns were promptly addressed and appropriately remedied by the court, appellant's constitutional rights were not violated.

III. THE TRIAL COURT DID NOT COMMIT ERROR OR OTHERWISE FAIL TO DISCHARGE APPELLANT'S RETAINED COUNSEL AT HER REQUEST

Appellant contends that the trial court committed reversible error in failing to discharge her retained counsel, Ward. (AOB 125-142.) Respondent disagrees.

A. Factual Background

On December 14, 2001, appellant appeared for a pretrial conference, during which she indicated that she was seeking replacement counsel, and that she needed telephone access in order to find a different attorney. (2RT 13.) As the trial court was apparently aware of appellant's restriction on telephone access due to the solicitation charge, the exchange devolved into the prosecutor informing the court of appellant's termination of telephone access and the nature and extent of trial counsel's contact with appellant, and the trial court's inquiry as to whether anything could be done at the jail to grant her limited access via telephone to her attorney.[11] (2RT 13-29.)

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[11] Specifically, the trial counsel informed the court as follows:

(continued...)

On the next court appearance date, January 16, 2002, the trial court indicated that it had received a written request for a change of counsel. (2RT 33.) However, in that written request, appellant made clear that she had not yet obtained new counsel. (See 1CT 193.) Trial counsel indicated that appellant had the absolute right to change attorneys if she so desired, but that if she did find another attorney, that he would continue working on the case until he was relieved by the court. (2RT 33.) The trial court clarified that although appellant had the right to change attorneys, it could deny the request if it were made for purposes of delay. (2RT 34.) The trial

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(...continued)

And I would submit one way around that would be more frequent visitations from counsel; however, for the past month in this case I have been involved in a four defendant case in Norwalk, not that I've been involved that deeply, but we're trying to make some dispositions in that, to clear the calendar for this case, and I have an associate counsel named Mr. Orosco who I've been conferring with and meeting and we've been working on this case.

And also I submitted a letter for mitigation on the special circumstances, which at least with some modesty I think helped get rid of that death penalty.

So it's not that I've been sleeping at the wheel or going on the golf course. I don't even play golf, and I haven't been deliberately ignoring her, but I'm a lawyer, not a babysitter, so I go see her when I can, and I have felt in my discretion within the past month I've been busy on this case and also trying to clear the calendar on the other one.

If that makes Ms. Rodriguez unhappy, well, so be it. I'm the lawyer, she's the client, and I have talked to her in depth I think as far – I'm not so – I think when and if we go to trial on this, I have to talk to her extensively some more, but it has to be my choice when and where and how often we're going to do it.

(2RT 24.)

court advised appellant that if she could not afford an attorney, the court would appoint one for her, but she would not be allowed to select an appointed attorney. The trial court then asked appellant if she wanted to continue to look for counsel or had anything to add. Appellant replied, "I would still like to look, yes." (2RT 35.) The trial court indicated, however, that it was not inclined to change her access to telephone privileges given the charges in the case. (2RT 35-36.) A representative from LASD at Twin Towers jail then testified that it would be impossible to even grant appellant limited, monitored, telephone access at a specific time, and the trial court therefore denied appellant's request for telephone access. (2RT 36-45.) The matter was continued to March 13, 2002, thereby "giv[ing appellant] more time to make a decision about [her] attorney." (2RT 50.)

On March 13, 2002, the prosecutor indicated that he intended to resubmit appellant's case to the penalty committee for evaluation as to whether to charge the case as a death penalty case. (2RT 53.) The matter was continued until April 25, 2002. (2RT 58.)

On April 25, 2002, the prosecutor indicated that he was still waiting to hear back from the penalty committee as to its decision. (2RT 59.) The matter was continued to May 29, 2002. (2RT 62.)

On May 29, 2002, the prosecutor indicated that he was awaiting a final decision from the penalty committee. (2RT 63.) The matter was continued to August 1, 2002. (2RT 65.)

On August 1, 2002, trial counsel filed a motion to be relieved as appellant's attorney. The motion was based on the fact that in regards to the solicitation charge, an informant had apparently speculated that she thought that appellant's attorney had paid the person whom appellant wanted to have killed. The motion also mentioned that appellant had been uncooperative and her actions in custody led to the possibility of additional charges being filed against her, thereby resulting in administrative

segregation where it was hard for trial counsel to contact appellant. (2RT 69, 71.) Ironically, although appellant had previously indicated she had sought to have trial counsel replaced, when informed that trial counsel sought to be relieved, she protested, stating that he had agreed to represent her, and also asking whether or not she could get her retainer back. (2RT 69.) As for the retainer, trial counsel stated that appellant's mother had provided it, and that based on the amount of work he had done on the case up to that point, the work he had done far exceeded the amount of the retainer. (2RT 74.)

The trial court asked appellant what her final feelings were, noting that the retainer fee was probably not going to be returned, and that if trial counsel were allowed to withdraw, appellant would have to find another private counsel, which was difficult for her to do without telephone privileges, or have counsel appointed. Appellant asked about a third option – self-representation. The trial court asked appellant whether she wanted counsel relieved, and if so, which of the three choices she wanted to make. Appellant asked to speak with trial counsel before making a decision, and was granted a recess to do so; the trial court also indicated it would grant appellant more time to think the matter over, but she indicated that she only needed ten minutes to speak with trial counsel about the issue. (2RT 76-79.)

When court reconvened, appellant indicated that she would allow trial counsel to withdraw, but then inquired about what a "court-appointed attorney" meant. The trial court explained that option, as well as the option of obtaining and retaining an attorney of appellant's own choosing, and self-representation, along with the accompanying dangers and risks of representing herself. The trial court suggested that appellant be given a week to make a decision, with trial counsel continuing to represent her. Appellant inquired about how long the appointment process would take for

a court-appointed attorney, as well as whether she would have access to the law library if she represented herself. (2RT 80-87.)

The trial court then indicated as follows:

> I did want to indicate that based on the past requests that you've made, the current information provided in this hearing, the change in circumstances from the original case that we've also talked about, the increased financial burden on the defense and on Mr. Ward in meeting the new information and that no additional funds apparently are forthcoming from the defense side, and in addition I think to some extent counsel's state of health, we've had some concerns about that, we've had some delays, but the major things I've already mentioned. For those reasons I will allow change of counsel, but only at that point where Ms. Rodriguez has made a decision about representing herself or having counsel represent her so that she's constantly represented until she decides to represent herself.

(2RT 87-88.)

At the next proceeding on August 13, 2002, the Public Defender's Office indicated it had a conflict and could not represent appellant; therefore, a Bar Panel attorney was appointed, and Ward was relieved as counsel. (2RT 90-96.)

B. Applicable Law

The right to retain counsel of choice is – subject to certain limitations – guaranteed under the Sixth Amendment to the federal Constitution. *United States v. Gonzalez-Lopez* (2006) 548 U.S. 140, 144, 151-152 [126 S.Ct. 2557, 165 L.Ed.2d 409]; *People v. Ramirez* (2006) 39 Cal.4th 398, 422.) In California, this right "reflects not only a defendant's choice of a particular attorney, but also his decision to discharge an attorney whom he hired but no longer wishes to retain." (*People v. Ortiz* (1990) 50 Cal.3d 975, 983.) The right to discharge a retained attorney, is, however, no absolute. (*Ibid.*) The trial court has discretion to "deny such a motion if discharge will result in 'significant prejudice' to the defendant [citation], or

if it is not timely, i.e., if it will result in 'disruption of the orderly processes of justice' [citations]." (*Ibid.*; see *United States v. Gonzalez-Lopez*, *supra*, 548 U.S. at p. 152 [a trial court has "wide latitude in balancing the right to counsel of choice against the needs of fairness" and "against the demands of its calendar"].)

C. The Trial Court Did Not Fail to Discharge Appointed Counsel at Appellant's Request

Here, the problem for appellant is that the trial court did not fail to discharge appointed counsel at her request. Rather, the trial court tried (unsuccessfully) to assist her in this regard by probing LASD as to whether appellant could be granted limited telephone access to assist her in finding a replacement counsel. (2RT 36-45.) Indeed, on January 16, 2002, the trial court specifically asked appellant if she wished to continue to look for counsel, and her reply was, "I would still like to look, yes." (2RT 35.) On that date, the trial court granted a continuance, specifically noting that the continuance would also provide appellant with more time to make a decision about discharging counsel. (2RT 50.) Appellant was aware that her telephone privileges were restricted and would make it difficult for her to locate replacement counsel. (2RT 35-36.) Then, on August 1, 2002, when trial counsel sought to withdraw as appellant's counsel, ironically, appellant seemed to protest the withdrawal, although she acknowledged that she had previously sought to discharge him. (2RT 69.) Trial counsel was eventually allowed to withdraw, and a Bar Panel attorney, not private counsel, was appointed in his place. (2RT 90-96.)

In other words, this is not a case where appellant had already located a replacement attorney and moved to discharge her current trial counsel with that replacement attorney in hand and ready to take over the case. Instead, appellant simply sought telephone privileges in order to assist in finding a replacement attorney, and the trial court, while denying her

telephone privileges due to her prior actions in soliciting the murder of a witness in the case, sought to accommodate her by granting her as much time possible to make an informed decision. In fact, while appellant said she would only need ten minutes to discuss with trial counsel whether or not to allow him to withdraw, the trial court indicated that appellant could take as long as she wanted, and may need longer than ten minutes. Certainly, the trial court did not "bully and scare appellant into keeping Ward as defense counsel," nor did it "all but order[] Ward to use up appellant's retainer which it knew appellant wanted for new counsel." (AOB 139.)

Although during the hearing on trial counsel's motion to withdraw, the trial court stated, "[Y]ou did ask the Court at some point to relieve counsel, and I determined that that was not appropriate, I think. That's my recollection anyway. I'm not positive that that's the case" (2RT 76), the trial court's recollection was incorrect. Even though the trial court ultimately denied appellant's request for telephone privileges to assist her in finding replacement counsel, at no point did the trial court deny appellant's request to relieve counsel. Indeed, although appellant claims that the trial court erroneously denied her request to discharge her retained counsel, she fails to cite where in the record the trial court actually denied the request. (See AOB 125-142.)

The record demonstrates that the trial court went to extraordinary lengths to accommodate appellant's continuous demands for a new counsel. In fact, appellant rejected the Public Defender's Office which represented her during the preliminary hearing, fired her private counsel, Ward, after failing to follow his instructions not to discuss her case with anyone else, fired her Bar Panel appointed counsel, Yamamoto, after failing to cooperate with him and refusing to establish an attorney-client relationship, before finally being appointed her trial counsel, Houchin, about whom she also

complained. (1CT 14, 178, 192-193, 237-238, 242; 2RT 97; 5RT 643.) There is nothing in the record to indicate that the trial court ever denied appellant's request to remove her retained counsel, and this claim should be rejected.

IV. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN DENYING APPELLANT'S *MARSDEN* MOTION UNDER THE CIRCUMSTANCES

Appellant contends that the trial court abused its discretion in denying her *Marsden* (*People v. Marsden* (1973) 2 Cal.3d 118) motion for appointment of new counsel. (AOB 143-180.) On the contrary, the trial court properly exercised its discretion in denying appellant's *Marsden* motion under the circumstances.

A. Factual Background

In September 2003, appellant filed a four-page request for an in camera hearing, which trial court treated as a *Marsden* motion. In the request, appellant claimed that there had been a "complete breakdown of trust and conflicts of interest" between her and trial counsel. (2CT 483.) She contended that her mental state should be investigated, evaluated, and offered as evidence at trial. She further contended that trial counsel had replaced a previous expert, Dr. Castellano, with a new expert, Dr. Vicary, but that she felt that Dr. Castellano was more qualified and not subject to ethical challenges which could impair Dr. Vicary. Appellant also contended that she was entitled to certain "capital case entitlement" like co-counsel, a co-investigator, and an outside mental health therapist. (2CT 483-484.) She also expressed her right to be present at every hearing and to be made fully aware of all guarantees provided a defendant in a capital case. (2CT 484.)

A hearing on appellant's *Marsden* motion was held on September 26, 2003. The trial court noted that although appellant had mentioned a "complete breakdown of trust and conflicts of interest," she had failed to explain "what the breakdown means and how it occurred and what the conflicts are." The trial court further noted that the motions seemed to be "largely a disagreement about the psychiatric assistance that you might receive, that you want instead of Dr. Vicary a Dr. Castellano . . . ," and informed appellant that she was not entitled to two attorneys or multiple investigators in a capital case. As for an outside mental therapist, the trial court stated that there would have to "be some showing of the necessity for that, and in my view you are a very intelligent person." (5RT 619-620.) The trial court noted that appellant's right to be present at every hearing and all discussions between the parties on the record would be adhered to. (5RT 620.)

When asked to explain specific facts and circumstances regarding her breakdown of trust and conflict of interest with trial counsel, appellant stated that there were issues about her defense that trial counsel was not looking into, specifically for the solicitation count, and that there were witnesses that had not been contacted and that trial counsel did not plan to contact. (5RT 620-621.) The trial court asked appellant to specify who the witnesses were. (5RT 621-622.) Appellant then listed doctors in the jail, a mental health worker named Heidi, a mental health worker named Hildy, people who apparently were aware of her experiences in module 211 and her purportedly abusive and cruel treatment there. (5RT 623.) The trial court responded that appellant was still not providing enough specifics, and was talking about her state of mind: "You need to tell me again what specifically should be done that isn't being done or the opposite, what's being done that shouldn't be." (5RT 625.)

Appellant mentioned two people who could be relevant to the solicitation charge, "because all this is based around the state that they had put me into . . . ." (5RT 625.) Appellant stated, "There is a lot of detail in my case. I don't know how else to explain it. It – there's a lot of question as far as his direction and his interest in this case. He's just pushing to get it done, and that's not right." In response, the trial court noted that trial counsel had been on the case for a year, and, in his opinion, "that's not pushing," since based on its experience, "that's average time [to prepare for a capital trial]." (5RT 627.) Appellant then expressed dissatisfaction with the amount of time trial counsel seemed to have been spending on the penalty phase as opposed to the guilt phase, to which the trial court replied,

> Why would you expect otherwise? The first thing to do is to try to defend the guilt phase, and the second thing, because you don't get time between the phases to investigate the penalty phase, to be prepared for the penalty phase.

(5RT 628.)

Appellant then mentioned that she had been in custody for a long time and that she needed an "extensive psychological examination for all three counts, including my history." (5RT 630-631.) The trial court replied:

> Isn't this kind of a catch 22 where the person who says he or she needs psychological help is one who's to be examined?
>
> In other words, how – the point is if you really needed psychological treatment, psychological help, I would think you'd be the last person to know about that. It would be somebody else that would say something is strange about the things you're saying or what you're doing, we need to see what kind of mental health you need. You're the one saying you need mental help.
>
> And let me mention, too, the video that I saw of you being interviewed or talking with the undercover officer who

> purportedly had carried out a contract killing on your behalf, you were intelligent, charming, lucid, very persuasive.

The trial court noted that the video was "pretty good evidence that you are altogether [*sic*], that your mind is working very well." (5RT 631.)

Appellant stated that although she may look strong on the outside, "on the inside I'm a mess." (5RT 632.) According to appellant, "I'm just – I'm not comfortable with as things stand, and the push to get things done and when I know that there's other areas that need to be hit, that need to be investigated, need to be talked about." (5RT 632-633.)

Later, appellant stated, "I don't understand what he's doing. I don't understand his approach. I don't understand how things can be left out that need to be in. I don't understand these things." (5RT 633.) When the trial court asked for specifics, appellant again mentioned the investigation into the solicitation count:

> There are witnesses, like I said, Angel Garcia for one, there's Cynthia Rodriguez, there's Arlene Dugmore, all have information on witnesses such as Miss Allen, such as Miss Hall. They've not been spoken to.
>
> Like I said, I'm looking into the events for the last two years, especially the first year, which is what led up to – it's been over a year since this situation happened, okay. What has led up to that? What happened that led up to that?

(5RT 634.)

Appellant acknowledged that trial counsel was a "good attorney," but felt that more needed to be done. (5RT 635.) The trial court advised appellant as follows:

> The point is that you don't have to be ready for trial, your attorney has to be ready to represent you. Given the circumstances that you've been in custody for over two years and during a large part of that time you've had no telephone contacts because of the solicitation charge, obviously you're not going to be prepared for trial.

Your attorney outside is the one that has to prepare for trial, and you're already indicating, which is quite true, he's a very good attorney.

(5RT 636-637.)

After appellant agreed to allow trial counsel to respond to her comments, trial counsel responded as follows:

Well, perhaps I believe that the issue that my client brings up is the issue that has caused the most problems in our discussions. I'm not aware of any arguments with my client. I know that we've had some very matter of fact discussions with respect to her central issue.

Her central issue, as she relates it to me, is her placement in [module] 211, her handling by Deputy Jimenez and what affect that may have had upon her with respect to the solicitation count.

I've indicated to her that her mental state with regards to that solicitation count is something that can be commented on by her. She wishes that a doctor can take the stand and in her place testify as to what it was that caused her to say and do those things which the Court has been apprised of in different testimony, and also the videotape the Court has also reviewed.

Diminished capacity is no longer a defense. I've indicated to her that certainly if there are some things going on in her head, she has every opportunity to take the stand and explain to the trier of fact why it is that she did the things that she did. She can get on the stand and she can contradict the truthfulness of different testimonies that we have heard here and what I anticipate will be other testimony after this trial begins.

That has been, if there has been a sore spot, that has been the sore spot.

With regards to her mental state, I've had the opportunity to have and review for some time and with others a report, a very lengthy report prepared by a panel psychologist Dr. Richard Romanoff.

(5RT 637-638.)

Trial counsel then continued:

And because of discussions I've had with my client with respect to Dr. Romanoff and with Dr. Romanoff himself and also with other counsel that have preceded me on this case, without getting into the specifics, that's why I need to make a change in the mental health expert insofar as the penalty phase, and that has been done.

I believe a very competent doctor that has been appointed who has represented to me we'll have no problem preparing for what I believe that I may need should we have a penalty phase. I can explain why that doctor was chosen while others were not.

It appears in the document that I read earlier that my client gave me that she wishes very much that a psychologist Ms. Castellano be appointed. In fact, in my declaration I prepared for the appointment of another second doctor to evaluate my client for potential penalty phase, it was Dr. Castellano who was the one who accepted and said that she would be able to assist.

She was the one who called me the next day and said that she had had discussions with other attorneys on other cases, and, unfortunately, she was going to have to change her mind. I'm sure she would have been very qualified. I know that Dr. Vicary is very well qualified.

With respect to again the defense that she wishes that there be more investigation of the solicitation, there are only certain things that others can do for us on that mental state. I'm sure that Dr. Vicary, and I've talked to him about also addressing that issue, that was not an issue when the initial report was prepared by Dr. Romanoff. This occurred, after he was appointed, after he did his workup.

Certainly, Dr. Vicary will rely in part on the report and the work and the tests that Dr. Romanoff did, and I have asked him also if he could take a look at the issues that my client wishes very much to discuss, what, if any affect her treatment by the deputies in 211 had on her committing what's been alleged as a solicitation of murder.

(5RT 639-640.)

The court then asked about the witnesses on the solicitation count that appellant had mentioned, to which trial counsel responded:

> Yes, these people who my understanding, talking with my client, also she has provided a list of those people for the investigator that's been appointed on this case, go also to the issue of things that may have been said by Jimenez to others there, things that Jimenez has done not only to my client but to other people who are there, and pretty much the way I understand it a character impeachment perhaps of Deputy Jimenez on the issue of what may have led to my client doing what is alleged in the solicitation for murder count.

(5RT 640.)

Trial counsel then elaborated further on Deputy Jimenez:

> Well, when we had our hearing, and apparently according to the testimony provided by Jimenez and another deputy officer, she does not have this hands-on daily contact with my client. As I recall her testimony, it was perhaps she is available in that area and perhaps is personally in that area fairly infrequently.
>
> And to be honest about it, Judge, when I have people that are in the position to come in in a guilt phase or certainly a penalty phase with regards to my client's activity, my concern was, should my client be transferred someplace else, the potential was I could double up the number of deputies who would be coming in here with not so kind things to say of my client.
>
> I was thinking more in terms of damage control, I'll be very honest with the Court. With respect to where my client was, talking with her, keeping her settled, being able to keep the potential evidence against us that may come in in the penalty phase at a minimum.

(5RT 641.)

The trial court replied:

> Okay. Well, bottom line is are you prepared to try the case in the three charges that are pending, which – of which [appellant] has said very little about the murder charge, the

attempt to dissuade a witness from testifying, Ms. Gorham's testimony.

She's focused a little bit on the solicitation charge, which is Count 3, and then mostly on her current housing situation, the fact that she does not want to be in and has not wanted to be in 211, and we had a hearing on that very issue as to why – as to why she was there and what the circumstances were, and this Court, of course, has corrected two things, allowing phone calls that were disallowed by our master calendar court, and then seeking to have the jail cell open at least two hours of the day, meaning that there was ability to see beyond the confines of the jail cell with having that window uncovered for two hours.

(5RT 642.)

When asked if he was ready to try the case, trial counsel stated that he was, adding, "And *I can explain my approach to this case and my theory of representing my client has differed with her opinions and her wishes and her desires, and these are just hard decisions that I have to make, and I'm going to make them.*" (5RT 642, italics added.) The trial court agreed:

They are, and I don't think, [appellant], you understand that. Your attorney has to decide the tactics in the case, and you are not educated in the law, and you've not tried any death penalty cases. There will be some times when you think your attorney is doing something wrong, but he must do that.

You've had some difficulty with attorneys. You didn't seem to like the public defender that represented you at the preliminary hearing, you didn't seem to like your own retained attorney, Mr. Ward. Mr. Yamamoto came in, and he's one of the finest attorneys that I've ever seen in criminal defense work. I've known him for almost 20 years, and for some reason there was a conflict and he very quickly left the case.

Mr. Houchin has been on it since – well, a full year, since September of last year, but it seems that you have some desire to control the attorney, which you can't do. The attorney is not a puppet. The attorney has to do what's required under the law, and that may at times be in disagreement with what you want to have done.

You've already though acknowledged that he is a good attorney, and as I said, I've had personal experience with him, and I know that that is true. He also has that reputation.

Your concern seems to centralize on the issue of your custody, and we did have a hearing on that. I don't think that's going to change because of the circumstances, meaning that with the charges against you, you had to be first of all separated from others.

Since now you are facing the death penalty, because of the solicitation charge different things had to be established to control the situation and to prevent further solicitation, assuming that there was one, and that was something that the master calendar court dealt with.

But I don't see a reason to replace your counsel, and I don't see a reason for postponement. Obviously you're nervous about the situation. Nobody going into a death penalty trial, and that includes the Court as well as the attorneys and certainly a defendant who has been waiting for two years for this, is anxious to see that process go forward, but two and a half years almost now, it has been a long process, and it has to end at some point.

You have to basically put your trust in your attorney, recognizing that he is a good attorney, and at some point justice has to take place. We have to have the trial and see whether you're guilty of these charges, and, if so, what the penalty should be.

(5RT 643-644.)

After a brief discussion between trial counsel and appellant, the trial court asked appellant if she had anything else to say. (5RT 645.) The trial court then denied the *Marsden* motion as follows:

As I see what you're saying is though you respect the ability of your attorney, you think there's more time necessary.

He, being on the outside and in contact with these people, is in a better position to know whether the defense is ready to proceed, and I can understand two things about your situation.

One is no one who is confined in jail for two years is going to be as normal as everyone else. The circumstances are difficult to tolerate, and in some cases oppressive, especially under your circumstances. Though as we've had the hearing on it, there are things that you apparently did that would justify the circumstances. There are tape recordings that substantiate some of the allegations made against you.

And the other thing is anyone facing the death penalty is not going to be anxious to go to trial. So it's a natural feeling on your part to delay as much as possible what may be inevitable. At some point the case has to be tried, and it has been pending in the Los Angeles superior court for trial and trial preparation since September of 2001, so this case is two years old in this courthouse and more than that from the time that you were arrested and first charged with this offense.

So if you don't have anything new or different to say or express to the Court, I'm going to decline or deny your request to replace counsel, which is a – the effect of the *Marsden* motion, and I don't see any need to grant a postponement based on what I've heard here.

You've got to put your trust in the attorney. He is a great advocate. You've got to allow him to do his job.

Okay. If there's nothing else, then we are ready – this portion to be concluded and sealed in the court file, and we're ready for the prosecutor to return to the courtroom.

(5RT 645-647.)

B. Applicable Law

"A defendant is entitled to have appointed counsel discharged upon a showing that counsel is not providing adequate representation or that counsel and defendant have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result." (*People v. Jones* (2003) 20 Cal.4th 1229, 1244-1245.) When the defendant seeks to remove appointed counsel "the trial court must permit the defendant to explain the basis of his contention and to relate specific instances of counsel's inadequacy." (*People v. Cole* [(2004) 33 Cal.4th 1158, 1190].) The trial court's ruling is reviewed for abuse of discretion. (*Ibid.*)

(*People v. Panah* (2005) 35 Cal.4th 395, 431; see *People v. Jackson* (2009) 45 Cal.4th 662, 682.) "A trial court should grant a defendant's *Marsden* motion only when the defendant has made 'a substantial showing that failure to order substitution is likely to result in constitutionally inadequate representation.'" (*People v. Hines* (1997) 15 Cal.4th 997, 1025.)

C. The Trial Court Properly Denied Appellant's *Marsden* Motion Under the Circumstances

Here, in a nutshell, appellant related only generalized, unspecific complaints about trial counsel's lack of readiness for trial and her lack of trust in him. However, "if a defendant's claimed lack of trust in, or inability to get along with, an appointed attorney were sufficient to compel appointment of substitute counsel, defendants effectively would have a veto power over any appointment and by a process of elimination could obtain appointment of their preferred attorneys, which is certainly not the law.'" (*People v. Berryman* (1993) 6 Cal.4th 1048, 1070.) In addition, "the number of times one sees his attorney, and the way in which one relates with his attorney, does not sufficiently establish incompetence." (See *People v. Silva* (1988) 45 Cal.3d 604, 622.) Appellant's remaining complaints appeared to evince a disagreement with counsel's choice of an expert witness and other lay witnesses whom appellant believed were not being looked into. (2CT 483-484; 5RT 634.) However, trial counsel explained how the expert witness was selected, and also indicated that as to the solicitation count, appellant had provided witness names to his investigator, and his understanding was that appellant believed those witnesses could be used as character impeachment of Deputy Jimenez. (5RT 640-641.)

Trial counsel also explained, with respect to appellant's complaints about being in module 211 and conditions of confinement, that a hearing had been held on the issue, and that he had not sought to have her

transferred or otherwise make waves as a means of "damage control" for fear that if she were transferred, even more deputies might come in to testify and say negative things about appellant. (5RT 641.) Moreover, trial counsel explained that appellant appeared to disagree with his theory of presenting the case, but that since he was the attorney, he would be making those "tough decisions." (5RT 642.) "A defendant does not have the right to present a defense of his own choosing, but merely the right to an adequate and competent defense. [Citation.] Tactical disagreements between the defendant and his attorney do not themselves constitute an 'irreconcilable conflict.' '. . . [C]ounsel is "captain of the ship" and can make all but a few fundamental decisions for the defendant.' [Citation.]" (*People v. Welch* (1999) 20 Cal.4th 701, 728-729; see *People v. Nakahara* (2003) 30 Cal.4th 705, 719.)

The record shows that appellant was afforded ample opportunity to explain the bases of her dissatisfaction with trial counsel and to cite specific instances of his purportedly inadequate performance. Her complaints, however, largely amounted to a disagreement over trial tactics and generalized distrust in her trial attorney and whether he was prepared to go to trial. Appellant's specific complaints were addressed by trial counsel[12] and amounted to her misunderstanding either what had occurred (regarding the expert witness), or not knowing what trial counsel was aware of (regarding her lay witnesses on the solicitation charge). To the extent appellant complains that the trial court improperly defended trial counsel against her complaints when it disagreed with certain of her assertions, "The trial court is not required to sit mute while a defendant advances

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[12] Of course, "Inquiring of counsel is necessary for the trial court to evaluate the defendant's request and for appellate review." (See, e.g., *People v. Fierro* (1991) 1 Cal.4th 173, 205; *People v. Memro* (1995) 11 Cal.4th 786, 854-855.)

patently erroneous grounds for substitution of counsel." (*People v. Panah*, *supra*, 35 Cal.4th at p. 432, citation omitted.)

And the trial court did not deny appellant's motion "in large part because of its own opinions regarding the competency of Mr. Houchin." (AOB 166.) Rather, the trial court, while acknowledging that appellant herself had admitted that trial counsel was doing a good job and agreeing that he was a competent attorney, denied appellant's motion because appellant failed to demonstrate that trial counsel's representation was inadequate, or that she and counsel had become embroiled in an irreconcilable conflict. Trial counsel explained that he had been preparing for and was ready to go to trial, and that appellant largely disagreed with his trial tactics, which does not amount to an irreconcilable conflict. (See *People v. Welch*, *supra*, 20 Cal.4th at pp. 728-729 ["Tactical disagreements between the defendant and his attorney do not by themselves constitute an 'irreconcilable conflict'"].) "Given the overwhelming evidence of defendant's guilt, defense counsel was not obliged to pursue futile lines of defense simply because defendant demanded them, and his refusal to do so did not justify his removal as counsel." (*People v. Panah*, *supra*, 35 Cal.4th at p. 432.) Therefore, under the circumstances, her showing was inadequate, and the trial court properly exercised its discretion in denying appellant's *Marsden* motion.

V. THERE WAS NO DENIAL OF MEANINGFUL HEARING ON APPELLANT'S COMPETENCY TO PROCEED TO TRIAL

Appellant claims that she was denied a "meaningful" mental competency hearing before proceeding to trial in violation of her due process rights. (AOB 180-198.) Respondent disagrees.

A. Factual Background

On June 24, 2002, appellant sent the court an 11-page letter complaining about various conditions of confinement while being incarcerated at module 211. (1CT 204-215.) In the letter, appellant alleged that the conditions in the jail were "so bad that if [she did not] get help soon [she] d[id] not believe [she] will be sound minded enough for trial." (1CT 205.) As one of the "possible solutions" to ameliorate her situation, appellant requested a mental health evaluation to verify whether she was "mentally strong enough to continue proceeding at this time." (1CT 210, 212.)

Following the brief reference to a mental health evaluation in her June 2002 letter, appellant personally appeared in court with her counsel (Ward, Yamamoto, or Houchin) on August 1, 13, 16, and 28, 2002, September 9, 2002, November 7, 2002, February 7, 2003, March 25, 2003, June 20, 2003, and July 28, 2003, in many instances addressing the court directly regarding her conditions of confinement and legal representation issues. During these 10 appearances, neither appellant nor her counsel ever raised any issue regarding appellant's mental health. (2RT 66-144.)

On August 22, 2003, the court held a hearing to discuss pretrial issues and appellant's motion to have limited telephone privileges reinstated. Again, there was no discussion on the record regarding appellant's mental health condition. (2RT 145-163.) The court did issue an order to LASD to provide appellant with an "emotional state evaluation – medication status," with the results to be provided by August 28, 2003. (2CT 412-413.)

On August 27, 2003, the court received a report from Sharitha, a jail psychologist, who stated that appellant "had been receiving [mental health treatment] from Twin Towers jail for the past 2 y[ears]" and that appellant "was last evaluated by this clinician on 8-27-03." (2CT 432.)

On August 28, 2003, trial counsel raised the issue of appellant's mental health for the first time since appellant's June 2002 letter. Counsel acknowledged that appellant had been under continuous treatment by a psychologist every three weeks but noted that based on appellant's behavioral change in the last two weeks, there might be something additional or different from what she had been treated for in the past two years. (2RT 416-417.) Counsel asked the court for a more specific mental health evaluation and the court responded, "That's fine. If you'll complete [the order] and if [appellant] knows what she needs, we'll order that." (2RT 417.)

On August 29, 2003, the court held an in camera hearing outside the presence of the prosecutor to address appellant's mental health concerns. (4RT 477-478.) Addressing the court directly, appellant stated that she was suffering from eating disorders, hysteria, and claustrophobia. (4RT 480-482.) She said she could not eat or sleep and that her doctor could only see her every three weeks due to scheduling problems. (4RT 482.) Appellant described her physical symptoms as lack of sleep, throwing up at least once a day, stomach problems, skin problems, headaches and muscle problems. (4RT 489.) Her suggested solution to her complaints was to have her moved out of module 211 and more frequent mental health counseling. (4RT 490-491.) At the end of the hearing, the court agreed with counsel that a psychiatric evaluation would be appropriate and issued an order to LASD to provide a psychiatric evaluation to appellant and report back to court by September 15, 2003. (4RT 495; 2CT 442.)

On September 15, 2003, the court held a hearing on appellant's motion regarding the appropriateness of her housing assignment in module 211. (5RT 503.) During the hearing, Maloney, a psychologist and program director for the women's mental health in Los Angeles County jails, testified that Dr. Delcarlo, a psychiatrist, had been counseling appellant

every three weeks and prescribing her anti-depression and anti-anxiety medication. (5RT 506.) Maloney stated that the frequency of appellant's visits with Dr. Delcarlo was greater than the number of visits a typical inmate in appellant's condition would receive. Maloney opined that appellant did not fall within the definition of "in need of mental health counseling." (5RT 507.) On or about July 14 or 16, 2003, another staff psychologist visited appellant and told Maloney that "it would be good to talk to her once a week," but Maloney said, "we don't have time to do that." Although Maloney agreed that "it would be helpful, nice for [appellant] to be able to talk to someone, [] her condition [did not] warrant it," i.e. "it[] [was] not like a psychological or psychiatric emergency." (5RT 509-510.) At the end of the hearing, the parties agreed to implement certain changes to appellant's housing restrictions which included additional clinical visiting hours with a mental health professional. (5RT 554.)

The trial began on September 29, 2003. (2CT 551.)

On October 23, 2003, after both parties had rested in the guilt phase, the court issued an order for LASD to dispense appellant's prescription medications. She apparently had not received the medications due to her being in court for trial. (3CT 819.)

On October 24, 2003, the court issued another order to LASD to provide appellant medical care for "swollen throat, cough and high fever." (4CT 1000.)

On October 29, 2003, the jury returned guilty verdicts on counts 1 and 2. (3CT 863-866.) On November 12, 2003, the jury returned a verdict of death on count 1. (4CT 993.)

On November 14, 2003, LASD provided a medical report to the court, which stated as follows:

In response to your court orders dated October 23rd and October 24, 2003, Inmate Angelina Rodriguez was examined and treated on November 12, 2003 at Twin Towers Correctional Facility, by Manuel Natividad, M.D.

Remarks:

1. Patient has a current diagnosis of Cold Symptoms (resolved).

2. Patient's medications are up-to-date.

3. Patient's prognosis is good.

4. Patient's care and treatment are continuing.

5. Patient is fit to continue trial proceedings.

(4CT 997.)

B. Applicable Law

A person cannot be tried while mentally incompetent and is deemed incompetent "if, as a result of a mental disorder or developmental disability, the defendant is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner." (§ 1367, subd. (a).) Incompetency requires the lack of a """"sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding – and . . . a rational as well as a factual understanding of the proceedings against him."""" (*People v. Lewis* (2008) 43 Cal.4th 415, 524, quoting *Dusky v. United States* (1960) 362 U.S. 402, 402 [80 S.Ct. 788, 4 L.Ed.2d 824].)

Due process requires that the trial court conduct a competency hearing when it is presented with substantial evidence of incompetence. (*People v. Lewis*, *supra*, 43 Cal.4th at p. 524.) Evidence is "substantial" if it raises a "'reasonable or bona fide doubt concerning the defendant's competence to stand trial, . . . [and may arise from] the defendant's

demeanor, irrational behavior, and prior mental evaluations. [Citations.]'" (*Ibid.*) A "defendant must exhibit more than bizarre . . . behavior, strange words, or a preexisting psychiatric condition that has little bearing on the question of whether the defendant can assist his defense counsel." (*People v. Ramos* (2004) 34 Cal.4th 494, 508.)

Section 1368 codifies the procedure to be followed in California when a doubt concerning the defendant's competency arises during the pendency of criminal proceedings and provides as follows:

> (a) If, during the pendency of an action and prior to judgment, a doubt arises in the mind of the judge as to the mental competence of the defendant, he or she shall state that doubt in the record and inquire of the attorney for the defendant whether, in the opinion of the attorney, the defendant is mentally competent. . . . At the request of the defendant or his or her counsel or upon its own motion, the court shall recess the proceedings for as long as may be reasonably necessary to permit counsel to confer with the defendant and to form an opinion as to the mental competence of the defendant at that point in time.
>
> (b) If counsel informs the court that he or she believes the defendant is or may be mentally incompetent, the court shall order that the question of the defendant's mental competence is to be determined in a hearing which is held pursuant to Section 1368.1 and 1369. If counsel informs the court that he or she believes the defendant is mentally competent, the court may nevertheless order a hearing. Any hearing shall be held in the superior court.
>
> (c) Except as provided in Section 1368.1, when an order for a hearing into the present mental competence of the defendant has been issued, all proceedings in the criminal prosecution shall be suspended until the question of the present mental competence of the defendant has been determined. If a jury has been impaneled and sworn to try the defendant, the jury shall be discharged only if it appears to the court that undue hardship to the jurors would result if the jury is retained on call. If the defendant is declared mentally incompetent, the jury shall be discharged.

"The court's decision whether to grant a competency hearing is reviewed under an abuse of discretion standard." (*People v. Ramos*, *supra*, 34 Cal.4th at p. 507.) An appellate court cannot appraise whether a defendant's conduct in the trial court indicates insanity, an attempt to feign insanity to delay the proceedings, or sheer temper. (*People v. Marks* (2003) 31 Cal.4th 197, 220.) Therefore, the decision of the trial court is given deference and will be upheld on appeal if supported by substantial evidence. (*People v. Rogers* (2006) 39 Cal.4th 826, 847; *People v. Hightower* (1996) 41 Cal.App.4th 1108, 1111.)

C. Appellant Was Not Denied a Mental Competency Hearing

Appellant contends that the trial court failed to follow the procedures set forth in section 1368 and order a mental competency hearing despite appellant's repeated requests for one in violation of her due process rights. (AOB 192-198.) This claim is factually incorrect and should be rejected.

The record shows that appellant first requested a mental health evaluation in a letter she sent to court in June 2002. (1CT 210, 212.) However, aside from this passing reference to a mental health evaluation unsupported by any specific description of psychological symptoms, there was no further mentioning of any mental health issues by either appellant or her counsel during the following 10 court appearances. (2RT 66-144.) A single letter by appellant containing a generalized request for a mental health evaluation based on her own opinion was hardly sufficient, let alone substantial, evidence casting doubt on appellant's competency to compel a competency hearing at this point. (*People v. Welch*, *supra*, 20 Cal.4th at p. 742.)

Approximately a year after appellant had first mentioned a mental health evaluation, on August 28, 2003, when counsel finally requested the

court for a more specific mental health evaluation, the court readily instructed counsel to prepare the appropriate order and said, "if [appellant] knows what she needs, we'll order that." (2RT 417.)

On the very next day, August 29, 2003, the court held an in camera competency hearing during which appellant described in detail her mental condition. (4RT 477-478, 480-489.) At the conclusion of the hearing, the court appropriately noted that "doctors are the ones that need to evaluate [appellant] both physically and mentally" and ordered a psychiatric evaluation of appellant with a due date of September 15, 2003. (4RT 494.)

Although the court did not receive a written psychological report by September 15, 2003, the program director for the women's mental health in jail testified in person that appellant had been receiving treatment for depression and anxiety every three weeks but that she did not fall within the definition of "in need of mental health counseling" necessitating additional psychiatric intervention. (5RT 507, 509-510.) In light of the opinion of the head jail psychologist that appellant was not in need of mental health counseling, the court had no reason to further suspect appellant's competency to proceed to trial. (See, e.g., *People v. Welch*, *supra*, 20 Cal.4th at p. 738 [opinion of a qualified psychologist that the accused is, because of mental illness, incapable of understanding the purpose or nature of the criminal proceedings or incapable of assisting in his defense satisfies the substantial evidence test].)

In fact, the nature and extent of appellant's participation in the proceedings demonstrated that she understood their purpose, and did not provide substantial evidence she was incompetent to stand trial. (*People v. Lewis*, *supra*, 43 Cal.4th at pp. 525-526; *People v. Halvorsen* (2007) 42 Cal.4th 379, 406-407.) To the contrary, appellant took every opportunity to address the court directly regarding her dissatisfaction with her conditions of confinement and legal representation and was often successful in

obtaining appropriate relief for herself. (See 2RT 157-158; 4RT 420-424; 5RT 554; 23RT 3923-3924, 3933-3934.) Thus, the record is void of any indication that appellant was suffering from a mental disorder or incapacity that prevented her from understanding "the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner." (§ 1367, subd. (a).)

The same was true with the issue of mental health evaluation. When appellant, through her counsel, requested a more detailed mental health evaluation, the court promptly granted a hearing and ordered a psychiatric evaluation. (2RT 416-417.) In lieu of a written report, the court heard directly from the head jail psychologist who testified that appellant was not in need of psychiatric help. (5RT 507.) Indeed, the head psychologist's opinion was echoed by another jail psychiatrist, Dr. Natividad, who reported less than two months later on November 14, 2003, that appellant's "prognosis is good" and that she "is fit to continue trial proceedings." (4CT 997.) Therefore, there was no failure to order a competency hearing, and appellant's due process rights were not violated.

VI. THE TRIAL COURT DID NOT ERR IN ALLOWING TESTIMONY REGARDING APPELLANT'S DEMEANOR

Appellant claims that there was improper testimony by various witnesses regarding her demeanor. (AOB 198-212.) Respondent disagrees.

A. Factual Background

1. Sergeant Holmes

On August 28, 2003, during the pretrial stage, the court held an Evidence Code section 402 hearing on the admissibility of appellant's taped statements made to Sergeant Holmes during a jail interview which took place on February 11, 2011. (2RT 191.) At the hearing, Sergeant Holmes explained that during the first part of the interview, he let appellant tell her

version of how her husband had died. (2RT 228.) On the second half of the interview, Sergeant Holmes told appellant about the murder investigation and that he believed appellant was being untrue. The prosecutor asked Sergeant Holmes about any change in appellant's demeanor after she had been told that she was lying. (2RT 229.) Counsel objected as speculative, and the court overruled the objection. (2RT 229-230.)

Sergeant Holmes stated that initially appellant was "very confident" and that "[s]he controlled the interview, but that "[a]fter [he] explained everything . . . she was visibly shaken." (2RT 230.) Sergeant Holmes explained why he believed appellant was "visibly shaken," as follows:

> [HOLMES]: . . . [H]er eyes are the most noticeable thing. Her eyes became larger and larger because she didn't realize and was unaware of the things that we knew.
>
> [¶] . . . [¶]
>
> The best way to describe it is towards the end of the interview, her eyes were twice as hard as they were at the beginning. I think it is my belief that she was visibly shaken.

(2RT 230-231.) At the conclusion of the hearing, the court found the taped interview and its transcript admissible at trial. (2RT 260.)

At trial, while explaining one of the taped telephone conversations with appellant, Sergeant Holmes stated that he was using a ruse to endear himself to her in an attempt to obtain information about what poison might have been used to kill Rodriguez. (13RT 2028-2029.) Sergeant Holmes further explained his reasoning for using a ruse as follows:

> [HOLMES]: . . . I knew that she was calling everyday and every single conversation was regarding financial, getting money to make it, and she wanted the Coroner's Office to come back as soon as possible with a cause of death so that she could be financially better off.

[PROSECUTOR]: And was that opinion based on the various conversations we heard yesterday in court that both you and your partner had with her during this timeframe leading up to October the 5th?

[HOLMES]: Yes. On those dates and every time . . . I talked to her, it was . . . always mentioned, and so it was financially driven to find out, so I knew some way we needed to find out what type of poison he was poisoned with.

(13RT 2029-2030.)

2. Officer Sharpe

At trial, the prosecutor asked Officer Sharpe whether he had observed anything unusual about appellant's demeanor in light of the fact that she had just found her husband dead in her house. Counsel objected to the question as vague and calling for speculation, but the court overruled the objection. (11RT 1782.) Officer Sharpe said that "the way [appellant] was crying" "[t]o him it seemed rehearsed or kind of forced." Officer Sharpe explained his reasoning as follows:

Although it was audible, the crying noise, there was a lack of tears, and as soon as I would talk to her, ask her a question, she would immediately kind of snap out of it and answer the questions real quick, and in my experience that's usually someone who just lost their husband, they're very difficult to speak with and communicate to.

(11RT 1783.)

Officer Sharpe stated that he had experience talking to people who had just lost their loved ones in approximately 20 occasions. He explained:

When you deal with someone like that, they're very upset and they really don't want to talk to you. The little information you can get from them, it's hard to understand because they're crying, they have a lump in their throat, so to say, and it's just very awkward and very hard to talk to them.

(11RT 1784.) Officer Sharpe said that appellant was "a lot easier to talk to," and noted that "as soon as [he] began speaking with her, it was like as

if she'd forgotten about what was going on . . . ." (11RT 1785.) He added, "I may have seen some tears, but there was a great lack of them." (11RT 1786.) Counsel's repeated objections on speculation grounds were all overruled. (11RT 1782-1786.)

3. Rebecca Perkins

At trial, Rodriguez's sister, Rebecca Perkins, testified that she had two telephone conversations with appellant on the day of her brother's death. (12RT 1816.) Perkins explained her observations as follows:

> [PROSECUTOR]: [Appellant's] emotional state or her demeanor as far as you could tell from speaking to her over the phone during those two phone conversations, was it similar in both conversations?
>
> [PERKINS]: Yes, it was.
>
> [PROSECUTOR]: Did anything about it strike you as odd?
>
> [PERKINS]: She had no emotion.
>
> [PROSECUTOR]: Now, when you say she showed or expressed no emotion, what did you observe or hear when you were talking to her that led you to that conclusion?
>
> [PERKINS]: She didn't cry, she wasn't upset, she was just matter of fact. She was not indifferent, she didn't – for her husband dying, she had no emotion.

No objections were asserted. (12RT 1816-1817.)

Later in the testimony, when the prosecutor inquired about Perkins's opinion on appellant's emotional state during the funeral proceedings, she answered, "[Appellant] wasn't upset about losing a husband." Counsel objected as speculative and the court sustained the objection. (12RT 1825.) Perkins stated that during the extended funeral proceedings, it was concerning to her that appellant was neither crying nor upset. (12RT 1826.)

4. Mickey Marracino

At trial, Mickey Marracino, the insurance agent who had sold Rodriguez's life insurance policy, was asked whether there was anything odd about appellant's demeanor during his telephone conversation with her on the day of Rodriguez's death. (12RT 1864.) Marracino noted as follows:

> Well, there was no emotion to it whatsoever. It was sort of matter of fact the way she was talking to me and explaining everything. She didn't cry. She didn't hesitate in any way, she didn't lose any train of thought or . . . [¶] . . . [¶] . . . stop to compose herself the way other people have done when I've talked to them when they've lost a loved one.

Counsel objected on speculation grounds but was overruled. (12RT 1864-1865.)

5. Shirley Coers

At trial, the prosecutor asked Rodriguez's sister, Shirley Coers, whether she had found anything unusual about appellant's demeanor during the two telephone conversations they had immediately following Rodriguez's death. Coers stated that appellant "always seemed very calm," meaning she was "not upset, not crying, not sad." (12RT 1880.) Counsel objected on speculation grounds but was overruled. (12RT 1880-1881.)

6. Lieutenant Wilsey

At trial, the prosecutor inquired about Lieutenant Wilsey's telephone conversation with appellant and whether he found anything odd about the call. Lieutenant Wilsey said, "It was dry, she was dry, there was no emotion . . . ." (12RT 1916.) Counsel objected on speculation grounds but the court overruled the objection. (12RT 1916-1917.) Lieutenant Wilsey explained as follows:

> Her first questions were relating to the Coroner's Department, the disposition of the body. She had mentioned

that she wanted to have the body cremated, and the questions were centered around that, not, you know, cause of death, which is normally what we hear or, you know, what's happening with the case, that kind of thing.

Those things came in the conversation that came at the end, and there were very few questions in that regard.

(12RT 1917.)

B. Appellant's Evidentiary Claim Has Been Forfeited

Preliminarily, appellant's failure to specifically object to the opinion testimony of each of the witnesses forfeits the issue on appeal. This Court has held that a failure to challenge the qualifications of witnesses offering opinions based on special skill, training and experience at trial forfeits the issue on appeal. (*People v. Bolin* (1998) 18 Cal.4th 297, 321; *People v. Williams* (1997) 16 Cal.4th 153, 194-195; *People v. Roberts* (1992) 2 Cal.4th 271, 298; see also *People v. Virgil* (2011) 51 Cal.4th 1210, 1249 [claim of improper lay opinion forfeited on appeal for failure to specific objection at trial]; *People v. Hamilton* (2009) 45 Cal.4th 863, 917 [failure to object to improper lay opinion forfeited the claim on appeal].)

Moreover, this Court has held:

> Under California law, error in admitting evidence may not be the basis for reversing a judgment or setting aside a verdict unless "an objection to or a motion to exclude or to strike the evidence . . . was timely made and *so stated as to make clear the specific ground of the objection or motion* . . . ." (Evid. Code, § 353, subd. (a), italics added.) "In accordance with this statute, we have consistently held that the 'defendant's failure to make a timely and specific objection' on the ground asserted on appeal makes that ground not cognizable. [Citations.]" (*People v. Seijas* (2005) 36 Cal.4th 291, 302.) Although no "particular form of objection" is required, the objection must "fairly inform the trial court, as well as the party offering the evidence, of the specific reason or reasons the objecting party believes the evidence should be excluded, so the party offering the evidence can respond appropriately and the court can make a fully

informed ruling." ([*People v.*] *Partida* [(2005)] 37 Cal.4th [428,] 435.)

(*People v. Zamudio* (2008) 43 Cal.4th 327, 354.)

In this case, appellant's counsel only objected to some of the challenged testimony on speculation grounds. He offered no further explanation. (2RT 229-230; 11RT 1782-1786; 12RT 1816-1817, 1825, 1864-1865, 1880-1881, 1916-1917; 13RT 2029-2030.) This objection failed to specify that Sergeant Holmes, Officer Sharpe, Perkins, Marracino, Coers, and Lieutenant Wilsey were expressing improper opinion about appellant's demeanor. As a result, appellant has forfeited the issue on appeal.

C. The Evidence of Appellant's Demeanor Was Properly Admitted

Notwithstanding the forfeiture, all of the challenged testimony was admissible as either lay or expert opinion.

Evidence Code section 800 states: "If a witness is not testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is permitted by law, including but not limited to an opinion that is: [¶] Rationally based on the perception of the witness; and [¶] (b) Helpful to a clear understanding of his testimony." (See *People v. Farnam* (2002) 28 Cal.4th 107, 153.) "Lay opinion testimony is admissible where no particular scientific knowledge is required, or as 'a matter of practical necessity when the matters . . . observed are too complex or too subtle to enable [the witness] accurately to convey them to court or jury in any other manner.'" (*People v. Williams* (1988) 44 Cal.3d 883, 915.)

A trial court's exercise of discretion in admitting or excluding evidence is reviewable for abuse and will not be disturbed except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.

(*People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10; *People v. Jones* (1998) 17 Cal.4th 279, 304; see *People v. Mixon* (1982) 129 Cal.App.3d 118, 127 ["Admission of lay opinion testimony is within the discretion of the trial court and will not be disturbed 'unless a clear abuse of discretion appears.'"].)

Here, the testimony regarding appellant's demeanor was properly admissible as lay opinion. Sergeant Holmes testified that his opinion that appellant was "visibly shaken" after being told that the police knew she had been lying all along was based on his personal observation that appellant's "eyes became larger and larger" and that "her eyes were twice as hard as they were at the beginning." (2RT 230, 232.) As to his opinion that appellant "wanted the Coroner's Office to come back as soon as possible with a cause of death so that she could be financially better off," Sergeant Holmes explained that "every time . . . [he] talked to [appellant], [money] was . . . mentioned . . . ." (13RT 2029-2030.)

The same is true as to the rest of the witnesses who testified about appellant's demeanor. Officer Sharpe noted that his opinion that appellant's crying appeared to be "rehearsed or kind of forced" was based on his personal observation that although appellant was audibly crying, there were little or no tears. (11RT 1783, 1786.) Perkins's opinion that appellant "had no emotion" was based on her personal observation that appellant "didn't cry," "wasn't upset," and appeared "indifferent." (12RT 1816-1817.) Marracino's opinion that appellant showed "no emotion" was based on his observation that she "didn't cry," "didn't hesitate in any way," did not "lose any train of thought," or "stop to compose herself." (12RT 1864-1865.) Coers's opinion that appellant appeared "very calm" was based on her personal perception of appellant during the two telephone conversations they had following Rodriguez's death, in which appellant was "not upset, not crying, not sad." (12RT 1880.) Lieutenant Wilsey also

based his opinion that appellant seemed "dry" with "no emotion" on his personal impression during the telephone conversation with her. (12RT 1916-1917.) Since the testimony regarding appellant's demeanor was based on personal perceptions or observations of appellant's subtle physical manifestations, it was properly admitted as lay opinion. (See *People v. Williams*, *supra*, 44 Cal.3d at p. 915.)

Additionally, the opinion testimony from Officer Sharpe was also admissible as an expert opinion. A trial court's decision to admit opinion testimony based on a witness's special skill, knowledge, training and experience is also reviewed for an abuse of discretion. (*People v. Lindberg* (2008) 45 Cal.4th 1, 45; *People v. Prince* (2007) 40 Cal.4th 1179, 1222.) This Court has held: "In determining the admissibility of expert testimony, 'the pertinent question is whether, even if jurors have some knowledge of the subject matter, expert opinion testimony would assist the jury.' [Citation.]" (*People v. Lindberg*, *supra*, 45 Cal.4th at p. 45.)

Evidence Code section 720 provides: "(a) A person is qualified to testify as an expert if he has special knowledge, skill, experience, training or education sufficient to qualify him as an expert on the subject to which his testimony relates. Against the objection of a party, such special knowledge, skill, experience, training, or education must be shown before the witness may testify as an expert. [¶] (b) A witness' special knowledge, skill, experience, training, or education may be shown by any otherwise admissible evidence, including his own testimony." (See also *People v. Bolin*, *supra*, 18 Cal.4th at p. 321; *People v. Killebrew* (2002) 103 Cal.App.4th 644, 651.)

Evidence Code section 801 provides: "If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is: [¶] (a) Related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact; and

[¶] (b) Based on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion." (See also *People v. Brown* (2004) 33 Cal.4th 892, 905-908; *People v. Humphrey* (1996) 13 Cal.4th 1073, 1088.)

During Officer Sharpe's five and a half years of experience as a police officer and in the scope of his law enforcement duties, he had interviewed people who had just lost their loved ones in approximately 20 separate occasions. (11RT 1772, 1784.) He explained that in his experience, people who had lost a loved one would be "very difficult to speak with," unwilling to talk to police officers, "very upset," and "crying." (11RT 1784.) It was based on this law enforcement experience in interviewing victims who had lost loved ones that Officer Sharpe arrived at a conclusion that appellant's crying appeared to be "rehearsed or kind of forced." (11RT 1783.) As the opinion of Officer Sharpe was related to a subject that was sufficiently beyond the common experience of the jurors and based on his personal and special knowledge and skill as a law enforcement officer, his testimony regarding appellant's demeanor was proper expert opinion. (See *People v. Brown*, *supra*, 33 Cal.4th at pp. 905-908.)

In any event, even if the testimony regarding appellant's demeanor was improperly admitted, its admission was harmless in light of the overwhelming evidence of appellant's guilt. The evidence established appellant had purchased a $250,000 life insurance policy for her husband just two months before his death, naming herself as the primary beneficiary. (12RT 1845, 1849-1850.) Appellant learned about the use of

oleander tea as poison from Gorham's mother and the use of anti-freeze from Gorham's boyfriend. (14RT 2301-2305.) Posing as an anonymous informant, appellant alerted the police to look for anti-freeze as the poison that had killed her husband and provided false documentation in an attempt to frame the murder on Holloway. (13RT 2040-2041; 15RT 2380, 2408-2409.) The evidence further established that appellant had easy access to oleander plant which was found in her own backyard. (12RT 1997-1998; 13RT 2035.) In light of the entire record, it is not reasonably possible that the jury would have returned a more favorable verdict but for the evidence of appellant's demeanor. (See *People v. Jablonski* (2006) 37 Cal.4th 774, 833; *People v. Ervin* (2000) 22 Cal.4th 48, 103.)

VII. THERE WAS NO JUDICIAL BIAS WARRANTING REVERSAL IN THIS CASE

Appellant contends that the trial court was biased against her and favored the prosecution, thereby warranting reversal of her convictions and death sentence. (AOB 212-226.) On the contrary, this claim was waived on appeal, and, in any event, no judicial bias occurred.

A. Appellant Forfeited Any Judicial Bias Claim

Appellant failed to raise a claim of judicial bias at trial. By failing to raise at trial a claim of judicial bias, appellant has forfeited it. (*People v. Farley* (2009) 46 Cal.4th 1053, 1110; *People v. Samuels* (2005) 36 Cal.4th 96, 114.)

B. Applicable Law

A criminal defendant "has a due process right to an impartial trial judge under the state and federal Constitutions. [Citations.]" (*People v. Guerra* (2006) 37 Cal.4th 1067, 1111, disapproved on another ground in *People v. Rundle* (2008) 43 Cal.4th 76, 151.) The constitutional right to due process "requires a fair trial in a fair tribunal before a judge with no

actual bias against the defendant or interest in the outcome of the case." (*People v. Guerra, supra*, 37 Cal.4th at p. 1111.) "[W]hile a showing of actual bias is not required for judicial disqualification under the due process clause, neither is the mere appearance of bias sufficient. Instead, based on an objective assessment of the circumstances in the particular case, there must exist '"the probability of actual bias on the part of the judge or decisionmaker [that] is too high to be constitutionally tolerable."' [Citation.]" (*People v. Freeman* (2010) 47 Cal.4th 993, 996.) "[I]t is the exceptional case presenting extreme facts where a due process violation will be found. [Citation.]" (*Id.* at p. 1006.)

The trial court has both the duty and the discretion to control the conduct of the trial. (*People v. Snow* (2003) 30 Cal.4th 43, 78.) "Mere expressions of opinion by a trial judge based on actual observation of the witnesses and evidence in the courtroom do not demonstrate a bias. [Citations.]" (*People v. Guerra, supra*, 37 Cal.4th at pp. 1111-1112.) Adverse or erroneous rulings, especially those that are subject to review, are also insufficient to establish a charge of judicial bias. (*Id.* at p. 1112.)

In reviewing a claim of judicial misconduct or bias on appeal, the appellate court must assess whether any misconduct or bias that is proven was so prejudicial as to deprive the defendant of a fair trial. (*People v. Guerra, supra*, 37 Cal.4th at p. 1112.) "Indeed, '[the reviewing court's] role . . . is not to determine whether the trial judge's conduct left something to be desired. . . . Rather, [it] must [be] determine[d] whether the judge's behavior was so prejudicial that it denied [appellant] a fair, as opposed to a perfect, trial.' [Citation.]" (*People v. Snow, supra*, 30 Cal.4th at p. 78.)

C. No Judicial Bias Occurred

Here, appellant contends she was denied a fair trial because the trial judge was biased against her, as demonstrated by various rulings and

comments during the trial proceedings. However, the record demonstrates otherwise.

As for the trial court's comment regarding appellant's request for telephone access to find a replacement attorney (AOB 216-217), the trial court simply advised appellant that the issue had already been decided, and that the position was not going to change, especially in light of the fact that appellant was on trial for "dissuading witnesses." (2RT 20-21.) Regarding the trial court's assorted comments regarding appellant's relationship with her numerous attorneys (AOB 217-220), at best, the trial court's comments could be said to exhibit some frustration with the fact that appellant appeared to be manipulating the legal system, and was essentially trying to manufacture conflicts or problems with either her retained or appointed attorneys until she was appointed the attorney she wanted. (See, e.g., 5RT 643-644.) Such comments do not evince judicial bias. (*People v. Guerra*, *supra*, 37 Cal.4th at pp. 1111-1112.)

Regarding the trial court's comments or rulings on appellant's conditions of confinement issues (AOB 221-224), appellant largely only has herself to blame for the restrictions and conditions of confinement imposed on her due to her criminal acts of dissuading a prosecution witness and then later soliciting murder of the same witness while incarcerated. The trial court was obligated to defer to jail staff on those matters, since they were responsible for the security, staffing and day-to-day operations of the jail. (See *Bell v. Wolfish* (1979) 441 U.S. 520, 547-548 [99 S.Ct. 1861, 60 L.Ed.2d 447] ["Prison administrators [] should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security"].) In any event, the record shows that the trial court went to extraordinary lengths in an attempt to accommodate appellant's endless list of complaints such as reinstating her

limited telephone privileges (4RT 420-424), ordering LASD "to deliver all of [appellant's] mail to [her]" (23RT 3933-39354), increasing visitation hours with a mental health professional (5RT 554), allowing personal daily delivery of newspaper to her cell (5RT 554), ordering appellant's cell window to be uncovered two hours daily during her waking hours (23RT 3891), increasing recreational hours outside her cell, and allowing her an opportunity to shower every other day (23RT 3933-3934).

The trial court also did not bully or demean appellant during the hearing on her *Marsden* motion. (AOB 222.) To the contrary, the trial court carefully explained to appellant the need for her to relate specific instances of inadequate representation by trial counsel, and allowed her to speak fully and completely on the issue prior to denying her request. (5RT 619-647.)

As for the trial court's alleged expression of bias towards the prosecution (AOB 224-226), on December 12, 2003, after appellant's guilt and penalty phase trials had been completed and during a "status check" regarding motions and the automatic motion for modification and sentencing, the prosecutor stated as follows:

> Your Honor, one other issue I think that we may need to address at that final date is I don't know if the Court recalls, but during the penalty phase, and it begins at page 3343 of the transcript and continues on through , I believe, 3359 of the transcript, and basically what it has to do with is we had played the videotape, we were about to play the videotape of the meeting with Deputy Mejia and [appellant] when he was in his undercover capacity, and some of the questions counsel was asking on cross-examination of Deputy Valdez caused me to ask for a side bar, and I expressed my concern to the Court that the questions were suggesting that the only reason we had gone to this trouble of putting an undercover deputy into a meeting with [appellant] was to somehow generate consciousness of guilt evidence or to turn this into a death penalty case, because at the time it was only a life without possibility of parole case, and I had essentially made to the Court an offer of proof as to how

that investigation had started, why we conducted it in the way that we did because of our concerns other inmates that had been released might be out looking for Ms. Gorham, that Ms. Hall wasn't the only one who had been contacted to cause harm.

I indicated to the Court I wanted the record to be complete on appeal, and I may want to continue the 402 and basically have Deputy Steinwand and Deputy Valdez come in here and testify to their intent and the discussions that they had with me about how we were to proceed in this investigation.

And I intend to subpoena them for that hearing, with the Court's permission, and actually place that on the record. I don't believe it will take very long. I would essentially document the offer of proof or support the offer of proof that I made at the side bar and then later in open court essentially the fact that this was not intended to create a death penalty case out of a life without parole case, it was not intended to create consciousness of guilt evidence, it was intended to make sure that we did everything that we could to protect Ms. Gorham and guarantee that if there was anybody on the outside who intended to follow through on this request, we did our very best to investigate this case and prevent it from happening.

So I would be asking permission to call those two witnesses at whatever hearing date we select to essentially finish the 402 and complete the record so that the Court's ruling will be fully supported on appeal.

(23RT 3894-3895.)

The trial court responded as follows:

I think that's a very good idea, given the power of that videotape in the penalty phase. That is, Ms. Rodriguez' reaction to the information she received was I think very powerful evidence that persuaded the jury rather quickly that she had no remorse, so I agree with you.

I think that should be done, at least to make the record clear. I think it was a valid argument on Mr. Houchin's part, but it would do well to finish taking the evidence on that subject.

(23RT 3895-3896.)

The trial court later permitted the prosecutor to call two witnesses, Detective Steinwand and Deputy Valdez, to support his claim that the solicitation investigation commenced because of information initially provided by Hall, and that it was investigated because there was a threat to the security of a witness (Gorham), not because it would result in evidence relevant to the underlying murder charge or because it would result in evidence that might make the case a death penalty case. (See 23RT 3936-3969.) The trial court found the two witnesses' testimony to be credible. (23RT 3970.)

Contrary to appellant's argument, the fact that the trial court allowed the prosecutor to put on additional testimony during an evidentiary hearing held post-conviction and outside the presence of the jury does not demonstrate a bias against appellant. Just as the prosecutor did in this case, appellant could have also recalled any witness she might have believed would have helped clarify the record for appellate review. Further, appellant had the opportunity to cross-examine both witnesses and attack their credibility and prosecution theory on the issue. (23RT 3936-3969.) There was no impropriety or bias in allowing a party to introduce truthful testimony to clarify the investigation process that ultimately led to admissible trial evidence. Therefore, appellant's claim of judicial bias is without merit. (See *People v. Guerra*, *supra*, 37 Cal.4th at p. 1112 ["a trial court's numerous rulings against a party – even when erroneous – do not establish a charge of judicial bias, especially when they are subject to review"].)

VIII. APPELLANT'S RIGHTS WERE NOT VIOLATED BY HER ABSENCE FROM CERTAIN PROCEEDINGS

Appellant contends that the trial court violated her constitutional rights to personal presence at all critical stages of the proceedings by

conducting three hearings in appellant's absence. (AOB 227-232.) Respondent disagrees.

A. Factual Background

On August 28, 2003, the trial court convened the parties to hold a hearing on multiple pending motions. (2RT 164-166.) Appellant was present with her counsel. (2RT 164.) During the hearing, the prosecutor brought up the issue of appellant's telephone privileges. Specifically, the prosecutor stated that after the trial court issued an order granting appellant provisional telephone privileges at the last hearing, he spoke with a deputy from the Twin Towers jail who conveyed some information that made him concerned about the reinstatement of appellant's telephone privileges. (2RT 166-167.) The prosecutor requested an in camera hearing to provide the court with the information he had received from the deputy as follows:

> [PROSECUTOR]: I finally got a call back from Deputy Bisaha early this week, and he related to me some things that caused me concern.
>
> I since talked to another deputy from the Twin Towers jail that has provided me information that caused me additional concern about extending these phone privileges to Ms. Rodriguez.
>
> I'm reluctant to state in open court what my concerns are only because if she doesn't already know about this, it would be telegraphing to her what is possible.
>
> What I would request is to be allowed to go in camera with the court, provide the court with the information I have received by way of a proffer, and then the court can decide whether it needs to disclose that on the record and then make its ruling on the phone privileges, but at this point that's what I would request, and that's what I ask the court if I can do at this time.
>
> THE COURT: But basically you're saying that the procedure that was outlined earlier does not work?

[PROSECUTOR]: What I'm saying is based upon my knowledge now of how the procedure works, based on my conversation with Deputy Bisaha, and based on some additional information I think establishes contacts between this inmate, between Ms. Rodriguez and some state prison – some sentenced state prisoners who are down here housed near her, I believe she knows how to manipulate the system, manipulate the phone system to call someone other than Mr. Houchin.

I do not in any way think that Mr. Houchin would engage in this kind of conduct or connect her to anybody other than himself, but I do believe that based upon the information I could provide to the court, this inmate is aware of how – Ms. Rodriguez, this defendant, is aware of how she can manipulate the system and possibly contact an investigator for one of these other inmates.

THE COURT: Okay. Mr. Houchin, any comment?

[COUNSEL]: No. I would also ask for the in camera first before we have a discussion in open court.

THE COURT: All right. Let's I guess do that first then, we'll go into chambers.

(2RT 164-165.)

While in chambers, without the presence of appellant, the prosecutor reminded the court that in March 2001, appellant had contacted a prosecution witness, Gorham, from the jail by placing a three-way call through her niece. During the telephone call, which was recorded, appellant was heard attempting to dissuade Gorham from testifying and threatening to implicate her in the murder if she did not change her testimony. (2RT 169-170.) Approximately a year later, in March 2002, appellant solicited Hall to kill Gorham. (2RT 170-171.) Based on these developments, the prosecutor filed a motion to have appellant's telephone privileges terminated which was eventually granted by Judge Stephen O'Neill. (2RT 172.)

The prosecutor indicated that after the trial court had issued an order granting a limited exception to Judge O'Neill's previous order to allow appellant to have telephone contact with her attorney only, the prosecutor found out from a jail deputy that there was a potential flaw in the telephone system which could permit appellant to use another inmate's booking number to dial telephone numbers other than her attorney's. (2RT 172-174.) The prosecutor stated that he could have the jail deputy appear before the court to provide more detailed information and allow the court an opportunity to ask questions directly. The court responded that it wanted additional information and noted, "it's very important for . . . an inmate to be able to contact her attorney, and that's the reason I granted the exception to [Judge O'Neill]'s ruling." (2RT 177.)

The prosecutor reiterated that the reason he had asked for an in camera hearing was to avoid informing appellant of the potential method of circumventing the telephone system in the event she was unaware of it. (2RT 178.) The prosecutor inquired whether the court's order allowing limited telephone access should be forwarded to the jail while the new issue of potential flaw in the system is being explored. (2RT 179.) The court instructed the prosecutor to go ahead and fax the order to the jail. (2RT 182.) The parties agreed to reconvene for further hearing on the matter on the following day with the presence of the jail deputy who would provide further information. (2RT 185.)

On the following day, August 29, 2003, the parties appeared for further hearing on the telephone privileges issue. The court noted on the record that counsel and prosecutor were present but that appellant was "en route and may join us in just a moment." In appellant's absence, the court framed the issue as "whether there is a foolproof method of allowing [appellant] to telephone from county jail to counsel . . . ." (4RT 419.) The prosecutor summarized the information he had received from Deputy Steve

Bisaha and briefly explained an alternate solution to the telephone problem. (4RT 419-420.) Deputy Bisaha, who was also present at the hearing, began providing a description of the jail telephone system and its limitations when appellant arrived and joined the hearing. (4RT 420-421.) At the conclusion of the hearing, the parties agreed to allow appellant limited telephone access on Mondays, Wednesdays and Fridays, from 6:00 p.m. to 8:00 p.m. (4RT 424.)

On September 29, 2003, before appellant had been brought out from the lockup, and outside of the presence of the jury, the court ordered Hall, a prosecution witness, to return to testify on October 15, 2003, at 9:00 a.m. Both counsel and prosecutor were present. (6RT 659-660.)

B. Appellant Had No Right to Be Present at the Proceedings in Question

"Broadly stated, a criminal defendant has a right to be personally present at certain pretrial proceedings and at trial under various provisions of law, including the confrontation clause of the Sixth Amendment to the United States Constitution, the due process clause of the Fourteenth Amendment to the United States Constitution, section 15 of article I of the California Constitution, and sections 977 and 1043." (*People v. Cole* (2004) 33 Cal.4th 1158, 1230.) However, a criminal defendant does not have the right to be personally present under the Sixth Amendment unless his appearance is necessary to prevent interference with his opportunity for effective cross-examination. (*Kentucky v. Stincer* (1987) 482 U.S. 730, 740, 744, fn. 17 [107 S.Ct. 2658, 96 L.Ed.2d 631]; *People v. Waidla* (2000) 22 Cal.4th 690, 741.) Further, such right does not arise under the Fourteenth Amendment unless the defendant finds himself at a "stage . . . that is critical to [the] outcome" and "his presence would contribute to the fairness of the procedure." (*Kentucky v. Stincer*, *supra*, 482 U.S. at p. 745; *People v. Waidla*, *supra*, 22 Cal.4th at p. 742; see also *United States v.*

Gagnon (1985) 470 U.S. 522, 526 [105 S.Ct. 1482, 84 L.Ed.2d 486] [noting that while a defendant's right to be present is rooted largely in the confrontation clause, such right may also arise under the due process clause in situations where the defendant is not actually confronting the witnesses or the evidence against him].)

Similarly, under the California Constitution, a defendant has no right to be present at hearings that occur outside the jury's presence on questions of law or other matters that do not bear a reasonably substantial relation to the fullness of his opportunity to defend against the charges. (*People v. Cole*, *supra*, 33 Cal.4th at p. 1231.) Under sections 977 and 1043, there is no right to be present, even in the absence of a written waiver, where the defendant has no such right under the California Constitution. (*Ibid.*) Lastly, the burden is on the defendant to demonstrate that his absence prejudiced his or her case or denied him or her a fair trial. (*People v. Bradford*, *supra*, 15 Cal.4th at p. 1357.)

Contrary to appellant's assertions, she had no constitutional or statutory right to be personally present at any of the proceedings in question. All of the proceedings involved hearings between the court and counsel conducted outside the presence of the jury, in which procedural or legal matters were discussed. (See *People v. Cole*, *supra*, 33 Cal.4th at pp. 1231-1232 [no right to be present at hearings occurring outside the jury's presence on questions of law or other matters that do not bear a reasonably substantial relation to the opportunity to defend].) The proceedings held on August 28 and 29, 2003, were a continuation of previous hearings, all held in appellant's presence, regarding the limited reinstatement of appellant's telephone privileges to contact her attorney. (See 2RT 13-29, 35-45, 155-157.) In fact, the court had already issued an order reinstating appellant's telephone privileges on August 22, 2003 (2RT 158-159), and the in camera proceedings on August 28 and 29, 2003 were necessary to address potential

security concerns based on information received from the jail deputy in charge of the telephone system (2RT 164-165). The proceeding on September 29, 2003 was a routine administrative matter of ordering a witness back for a future date. None of these hearings had any substantial relation to appellant's opportunity to defend against the charges.

Furthermore, on every occasion, defense counsel was present and was fully able to represent appellant's interests. Particularly, as to the first two hearings regarding the telephone privileges, counsel waived appellant's presence by expressly joining in the prosecutor's request to hold the proceeding in camera. (2RT 165.) While "[i]t may be that if personal presence truly bears a substantial relation to a defendant's opportunity to defend against the charges, counsel's waiver would not forfeit the claim," the very fact that counsel did not think appellant's presence was necessary "strongly indicates that [her] presence did not, in fact, bear [] a substantial relation" to the fullness of her opportunity to defend. (*People v. Cleveland* (2004) 32 Cal.4th 704, 741.)

Finally, appellant cannot demonstrate how her attendance at such hearings would have assisted the defense or otherwise altered the outcome of her trial. (See *People v. Benavides* (2005) 35 Cal.4th 69, 89 [failure to show that defendant's presence would have served any purpose]; *People v. Bradford*, *supra*, 15 Cal.4th at pp. 1357-1358 [defendant failed to show his attendance at hearings would have assisted the defense or altered the outcome of trial]; *People v. Johnson* (1993) 6 Cal.4th 1, 19 [no showing defendant's presence would have assisted his defense in any way]; see also *United States v. Gagnon*, *supra*, 470 U.S. at pp. 526-527 [the central inquiry in determining whether due process principles entitled a defendant to appear at a hearing is whether the defendant's presence reasonably could have assisted his defense of the charges against him].) At the conclusion of the two hearings regarding the reinstatement of appellant's telephone

privilege, the parties were able to resolve the issue by agreeing to grant appellant access to a telephone every Monday, Wednesday and Friday, between 6:00 p.m. to 8:00 p.m., to contact her attorney. (4RT 424.) Since appellant's desired result, which was the reinstatement of her telephone privileges to contact her attorney, was accomplished despite appellant's absence from the hearings, she cannot demonstrate any prejudice. Therefore, appellant's claim should be rejected.

IX. THERE WAS NO VIOLATION OF APPELLANT'S RIGHT TO CONFRONT WITNESSES UNDER *CRAWFORD*

Appellant contends that her right to confront witnesses under *Crawford v. Washington* (2004) 541 U.S. 36 [124 S.Ct. 1354, 158 L.Ed.2d 177] (*Crawford*) was violated when the trial court allowed the admission of various evidence. Specifically, appellant argues that the following evidence should not have been admitted: (1) Hall's recorded statements and handwritten notes; (2) Autumn's statements regarding Gatorade; (3) Alicia's autopsy report statements; (4) ethylene-glycol test results; (5) oleander test results; and (6) Dr. Clark's expert opinion. (AOB 233-257.) Respondent disagrees.

A. Applicable Law

This Court has recently issued a trio of cases involving the "constitutionality of a prosecution expert's testimony about certain information in a report prepared by someone who did not testify at trial." (*People v. Lopez* (Oct. 15, 2012, S177046) __ Cal.4th __ [2012 WL 4856705]; see also *People v. Dungo* (Oct. 15, 2012, S176886) __ Cal.4th __ [2012 WL 4856703]; *People Rutterschmidt* (Oct. 15, 2012; S176213) __ Cal.4th __ [2012 WL 4856697].) In these three cases, this Court discusses and synthesizes the four recent decisions of the United States Supreme Court: *Crawford, supra*, 541 U.S. 36; *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305 [129 S.Ct. 2527, 174 L.Ed.2d 314]; *Bullcoming v. New*

Mexico (2011) 564 U.S. __ [131 S.Ct. 2705, 180 L.Ed.2d 610]; and *Williams v. Illinois* (2012) 567 U.S. __ [132 S.Ct. 2221, 183 L.Ed.2d 89]. (*People v. Lopez*, *supra*, 2012 WL at **3-7; *People v. Dungo*, *supra*, 2012 WL at **3-5; *People v. Rutterschmidt*, *supra*, 2012 WL at **5-6.)

From these four United States Supreme Court decisions, this Court stated the following rule in *Lopez*: "[A] statement is testimonial when two critical components are present. [¶] First, to be testimonial, the out-of-court statement must have been made with some degree of formality or solemnity." (*People v. Lopez*, *supra*, 2012 WL at *8.) Second, "an out-of-court statement is testimonial only if its primary purpose pertains in some fashion to a criminal prosecution." (*Ibid.*) In *Lopez*, this Court considered only the first prong, whether the nontestifying analyst's laboratory report on the concentration of alcohol in the defendant's blood was made with sufficient formality to render it non-testimonial. (*Id.* at *9.) The California Supreme Court analyzed the report in detail, before concluding that the report lacked formality and therefore, the trial court was correct in permitting the prosecution to introduce the report into evidence and in permitting the prosecution's expert witness to testify regarding it. (*Id.* at **9-11.) The *Lopez* Court discussed in detail a notation on the first page of the report regarding the labeling of the defendant's blood sample, which was "undisputed[ly]" admitted for its truth. (*Id.* at *10.) In finding there was no error in admitting the report, the Court stated, "To the extent that any other notations on the first page of the chart could be considered testimonial, their admission was harmless '"beyond a reasonable doubt . . ."' in light of the expert witness's independent opinion that the defendant's blood sample contained a blood-alcohol concentrate over the legal limit. (*Id.* at *11.)

The *Lopez* Court also considered whether an analyst's testimony based on raw, machine-generated data violated a defendant's right to confront and cross-examine the machine's operator:

> We agree with those federal appellate courts that have upheld the use of such printouts. (See *U.S. v. Moon* (7th Cir. 2008) 512 F.3d 359, 362 ["the instruments' readouts are not 'statements,' so it does not matter whether they are 'testimonial'"]; *U.S. v. Washington* (4th Cir. 2007) 498 F.3d 225, 231 ["the raw data generated by the machines do not constitute 'statements,' and the machines are not 'declarants'"]; see also *Bullcoming*, *supra*, 564 U.S. at p.___ [131 S. Ct. at p. 2722] (conc. opn. of Sotomayor, J.) [the prosecution's introduction only of "machine-generated results, such as a printout from a gas chromatograph," may not violate the defendant's confrontation right].) Because, unlike a person, a machine cannot be cross-examined, here the prosecution's introduction into evidence of the machine-generated printouts shown in pages two through six of nontestifying analyst Pena's laboratory report did not implicate the Sixth Amendment's right to confrontation.

(*People v. Lopez*, *supra*, 2012 WL at *9.)

B. There Was No Violation of Appellant's Sixth Amendment Right to Confront Witnesses

Appellant alleges that there were six different instances of improper admission of evidence that violated her right to confront witnesses under the Sixth Amendment. As shown below, appellant's arguments are meritless.

1. Hall's Recorded Interview and Handwritten Statements

From May 8 to 9, 2002, Hall and appellant were housed in adjacent cells in module 211. (14RT 2214-2215.) On May 9, 2002, Hall approached Deputies Zabokrtsky and Jimenez about some information she had obtained from appellant. (14RT 2238-2239.) Hall also gave the deputies a handwritten note she had prepared during her conversations with

appellant. (14RT 2241.) On May 10, 2002, Detective Steinwand, together with several other detectives, conducted a tape-recorded interview of Hall at the jail. (14RT 2240-2241, 2245.)

Hall was subpoenaed to testify at the guilt phase of appellant's trial but repeatedly failed to appear as ordered. (1RT 141; 11RT 1594.) She even alluded to making up "some kind of medical excuse" not to come to court but the court warned her that she may be placed in custody until she testified. (14RT 2195-2199.)

On October 21, 2003, Hall was called as a prosecution witness in the guilt phase. (14RT 2213.) After answering some initial questions, Hall repeatedly responded, "I don't recall," to the substantive questions concerning her jailhouse conversations with appellant. (14RT 2213-2218.) During the questioning, trial counsel asked to approach the bench and said,

> [COUNSEL]: I'm assuming the prosecutor is laying foundation to Green [*People v. Green* (1971) 3 Cal.3d 981] this witness.
>
> THE COURT: Yes.
>
> [COUNSEL]: All right.

(14RT 2216.) After the prosecutor's direct examination, trial counsel conducted a full cross-examination of Hall. (14RT 2218-2224.)

Just before Detective Steinwand's testimony, trial counsel brought up a potential foundational issue regarding the prosecutor's examination of Hall as follows:

> [COUNSEL]: I'm not sure the prosecutor asked Ms. Hall that she in fact wrote out some notes and gave them to anybody, so my concern would be a foundation for this and perhaps no [*People v. Green*] issue at this point.
>
> [PROSECUTOR]: Well, I think she's generally denied any conversation – of ever having a conversation with [appellant], so by definition she's denied that she ever took any notes of any such conversation.

THE COURT: I think that's true. She was not asked specifically about notes, but that she didn't recall any of these conversations. I think that's sufficient.

(14RT 2242.)

The prosecutor called Detective Steinwand, who testified about his May 10, 2002 interview with Hall as well as the statements contained in the handwritten notes provided to him by Hall. During Detective Steinwand's testimony, the prosecutor played Hall's recorded interview to the jury. (14RT 2244-2292.)

At some point after Hall's testimony, the prosecutor brought up the foundational requirements of admitting Hall's prior inconsistent statements as follows:

[PROSECUTOR]: . . . When I put Gwendolyn Hall on the stand the other day, as the court found she was uncooperative, feigned a lack of recollection, and therefore the court allowed to get into the prior statements under the *Green* decision, California versus Green.

THE COURT: Yes.

[PROSECUTOR]: Counsel had made an objection to that, the court overruled it.

In abundance of caution, I wanted to state something for the record. I didn't confront Ms. Hall about the actual statement she gave to Detective Steinwand. I wanted to get her off the stand as quickly as possible, and I frankly didn't want to embarrass her or cause her anymore hardship inside the jail than she's already possibly going to get because of this.

The court did order Ms. Hall back for this coming Tuesday, which I think satisfies the other requirement of Greening a witness, which is that if the witness is not confronted with the earlier statement, she still has to be available to counsel to be further cross-examined on it if counsel chooses to do so. [¶] . . . [¶] I will, if counsel wishes to call her to the stand prior to resting, to further examine her about the statement she gave to Detective Steinwand on May 10th, I am more than willing to

agree to any continuance necessary, and myself and Detective Steinwand will do whatever we have to do to [] get her here today . . . .

THE COURT: Any response to that?

[COUNSEL]: That's fine. I appreciate it. I will not need her.

THE COURT: I'm sorry. You will not need her?

[COUNSEL]: I will not need her.

THE COURT: I do think her position on all of those issues was self-evident, and when she said she didn't even recall [appellant].

(16RT 2506-2508.)

After the jury returned a guilty verdict, the prosecutor notified the court that he anticipated calling Hall as a penalty phase witness, and introducing her statements "either [] through Green[ing] the testimony, or if she testifies . . . truthfully from the stand[,] . . . introduce some tape recordings of the conversations she had with [appellant] . . . ." (29RT 2795.)

Prior to Hall's penalty phase testimony, the parties again discussed the probability of having to "Green" her after putting her on the stand for foundational purposes. (18RT 3066-3074.) As anticipated, during a preliminary evidentiary hearing held outside of the jury's presence, Hall claimed that she could not recall anything regarding her conversations with appellant. (18RT 3098-3099.) Trial counsel also had an opportunity to cross-examine Hall but she again responded that she could not recall. (18RT 3099-3100.) The court ruled that it was not necessary to put her on the stand in front of the jury because her lack of cooperation was obvious:

It's self-evident that she's going to continue doing what seems to expedite things for her, meaning that she recognizes she's failing to testify truthfully when she says she doesn't recall, but

> it does allow impeachment of her testimony when the court finds, as it does, that she's not truthful when she says she does not recall.
>
> So I don't think that's necessary in front of the jury. It doesn't get us any further than we did – than we got before when she testified previously, so she has been excused.

(18RT 3099-3100.) During the penalty phase, the prosecutor called Detective Steinwand to testify about Hall's recorded interview statements which were again played to the jury. (18RT 3118-3138.)

Appellant claims that Hall's statements and handwritten notes given to Detective Steinwand were testimonial and made for possible use at trial. (AOB 237-243.) However, appellant's right to confront witnesses could not have been violated because Hall testified at trial and available for cross-examination.

The confrontation clause of the Sixth Amendment to the United States Constitution provides, "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." In *California v. Green* (1970) 399 U.S. 149 [90 S.Ct. 1930, 26 L.Ed.2d 489] (*Green II*), the United States Supreme Court reversed the California Supreme Court's decision in *People v. Green* (1969) 70 Cal.2d 654 (*Green I*) and held the substantive use of a witness's prior inconsistent statements under Evidence Code section 1235 did not violate the defendant's right to confront witnesses against him. The United States Supreme Court held: "[T]he Confrontation Clause is not violated by admitting a declarant's out-of-court statements, as long as the declarant is testifying as a witness and subject to full and effective cross-examination." (*Green II*, *supra*, 399 U.S. at p. 158.)

On remand, this Court held that the substantive use of the witness's prior inconsistent statements at trial was permissible notwithstanding his purported lack of memory of the crucial events. (*People v. Green* (1971) 3

Cal.3d 981, 989-990 (*Green III*).) "Whether or not a witness is actually cross-examined, the fact the defendant has an adequate opportunity to carry out such an inquiry satisfies the confrontation clause." (*Id.* at p. 990.)

In *Crawford, supra*, 541 U.S. at pp. 53-54, the United States Supreme Court transformed the Sixth Amendment jurisprudence by holding the confrontation clause bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." Although precluding the use of many types of testimonial hearsay previously admitted in criminal trials under state rules of evidence, however, the *Crawford* Court expressly reaffirmed its decision in *Green II, supra*, 399 U.S. 149. In footnote 9 of its opinion, the Court "reiterate[d] that, when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements . . . . The Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it . . . ." (*Crawford, supra*, 541 U.S. at p. 59, fn. 9.)

Here, like the witness who was present and testified at Green's trial, but who frustrated a fully effective cross-examination by falsely claiming a lack of recollection as to most of the significant events included in his statement to the police, Hall was present at trial and testified as to several matters regarding her incarceration in module 211 of the jail, but answered, "I don't recall," in response to questions about her jailhouse conversations with appellant, matters she had discussed in length in her tape-recorded statement to Detective Steinwand. (See *Green II, supra*, 399 U.S. at pp. 158-159; 14RT 2213-2225.)

Furthermore, although on cross-examination Hall repeatedly responded that she could not recall either appellant or conversations she had with her, trial counsel did not attempt to question Hall about any other

matters that may have assisted appellant's defense. In particular, counsel did not ask Hall any questions about either her personal background or attempt to explore any motive for fabricating the statements appellant had made to her, which might have undermined the reliability of her extrajudicial statements to the police. (14RT 2218-2224; 18RT 3099-3100.) In fact, the prosecutor even offered to have Hall personally picked up by Detective Steinwand to make her available for any further cross-examination but trial counsel responded, "That's fine. I appreciate it. I will not need her." (16RT 2506-2508.) Nothing in the record suggests Hall would have refused to provide additional biographical information to supplement the answers she gave on direct examination. (Cf. *Green III*, *supra*, 3 Cal.3d at p. 990 ["Porter was on the stand and under oath . . . . Defendant thus had the opportunity to cross-examine him, but in effect declined to do so"].) Under these circumstances, Hall's presence at trial, on the witness stand and available for cross-examination, satisfied the requirements of the confrontation clause, and the admission of her prior recorded interview statements and the handwritten notes was proper. (*United States v. Owens* (1988) 484 U.S. 554, 558-660 [the confrontation clause guarantees only an opportunity for effective cross-examination, not cross-examination that is effective]; see also *People v. Cummings* (1993) 4 Cal.4th 1233, 1292 & fn. 32 [admission of police officer's record of interview with witness implicating defendant, pursuant to Evidence Code section 1237 (past recollection recorded), did not violate defendant's confrontation clause rights notwithstanding witness's testimony at trial he had no recollection of his conversation with either the police officer or defendant].)

The confrontation clause argument presented by appellant in this case is virtually identical to the contention considered and rejected by the Court of Appeal in *People v. Perez* (2000) 82 Cal.App.4th 760. The

witness in that case had responded to each of the prosecutor's questions about the night of the crime or what she had told the police, "I don't remember" or "I don't recall." (*Id.* at p. 766.) The witness did answer questions from one defendant relating to bias but repeatedly answered "I don't remember" to questions regarding the crime and her statements to the police. (*Ibid.*) Analyzing the confrontation clause issue, the Court of Appeal explained, "The witness Gutierrez was not absent from the trial. She testified at length at trial and was subjected to lengthy cross-examination. The jury had the opportunity to observe her demeanor, and the defense cross-examined her about bias. Even though she professed total inability to recall the crime or her statements to police, and this narrowed the practical scope of cross-examination, her presence at trial as a testifying witness gave the jury the opportunity to assess her demeanor and whether any credibility should be given to her testimony or her prior statements. This was all the constitutional right to confrontation required." (*Ibid.*) As was the case in *Perez*, Hall was present at trial as a testifying witness and the jury was able to assess her demeanor, thus satisfying appellant's right to confrontation. Therefore, appellant's claim herein should be similarly rejected.

2. Autumn's Statements Regarding Gatorade

While discussing the penalty phase evidence, the prosecutor brought up the fact that trial counsel intended to call Autumn as a defense witness and had asked the prosecutor to make her available for testimony. The prosecutor noted that as a courtesy to the court and trial counsel, as well as to avoid having to serve Autumn with a subpoena, he agreed to contact Autumn's father and make her available for testimony. (18RT 3158.) The prosecutor also told the court that based on trial counsel's representation that Autumn would be called to "essentially to ask the jury not to kill her mother," he intended to cross-examine Autumn regarding her prior

statements to the police. The prosecutor said that Autumn made a statement on the day of appellant's arrest stating that appellant had a special bottle of Gatorade for Rodriguez, that Autumn was not allowed to drink from it, and that appellant had Autumn help her feed the special Gatorade to Rodriguez prior to his death. (18RT 3159.) Trial counsel objected and asked for an evidentiary hearing to explore the issue further and the court said, "We'll do that." (18RT 3161-3162.)

On the day of Autumn's testimony, the prosecutor told the court that he would refrain from cross-examining Autumn regarding her statements to Detective Steinwand based on Autumn's father's concerns and Autumn's fragile emotional state. (18RT 3262-3263.) Autumn was eventually called as a defense witness and testified that she "would like it for [the jury] not to execute [her mother] and make it so [she] can see her." The prosecutor had no cross-examination questions for Autumn. (19RT 3266.)

During the defense expert testimony at the penalty phase, Dr. Vicary testified that he had relied on the evaluation report prepared by Romanoff, appellant's previous psychologist. (21RT 3675.) The prosecutor cross-examined Dr. Vicary with the statements contained in Romanoff's report, including the fact that appellant had used Autumn to help poison her husband with a special bottle of Gatorade. (21RT 3705.) Dr. Vicary opined that he still considered appellant to be a loving and supportive mother despite the fact that she had poisoned her husband to death for money and used her young daughter as an unwitting accomplice in that murder. (21RT 3706.)

Appellant now claims that the use of Autumn's statements regarding the special bottle of Gatorade to cross-examine Dr. Vicary violated her right under the confrontation clause. (AOB 243-246.) Appellant is incorrect.

Here, the use of Autumn's statements to the police regarding Gatorade to cross-examine Dr. Vicary did not violate appellant's rights under the confrontation clause because Autumn was called as a *defense* witness and subject to examination by trial counsel during the penalty phase. There had been extensive discussions prior to Autumn's testimony regarding her statement pertaining to the special Gatorade and how the prosecutor had already turned over all the reports regarding Autumn's statements to the defense as part of discovery. (18RT 3158-3162.) Thus, appellant cannot possibly claim a lack of knowledge of Autumn's prior statements at the time of her testimony. Since appellant had full knowledge of the damaging statements, she could have examined Autumn about the inconsistencies in the three separate statements given to Detective Steinwand but chose not to do so.

Further, the fact that Dr. Vicary's cross-examination occurred after Autumn's testimony is irrelevant. Trial counsel could have easily requested the court to place Autumn on call before excusing her after the testimony and even though he did not do so here, based on the prosecutor's agreement to make Autumn available as a courtesy to the defense, she could have been easily recalled for further testimony had trial counsel believed it was necessary. In any event, the confrontation clause is satisfied so long as appellant had "a prior *opportunity* for cross-examination." (*Crawford, supra,* 541 U.S. at pp. 53-54, italics added.) Since Autumn testified in court and was subject to examination during the penalty phase, the use of her statements to cross-examine the defense expert did not violate appellant's rights under the confrontation clause.

3. Alicia's Autopsy Report Statements

During the penalty phase, Dr. Carroll testified that on September 20, 1993, he and his staff performed Alicia's autopsy in Santa Barbara. (17RT 2865-2868.) Dr. Carroll stated that he supervised the autopsy by

"view[ing] the body and return[ing] for the view of the organs and so forth and review[ing] all the dictation and so forth." (17RT 2868.) Dr. Carroll determined the cause of death to be asphyxiation due to airway obstruction, or in other words, Alicia had choked to death. (17RT 2868-2869.) Based on the observations and notes made by Ducale, a pathologist assistant, Dr. Carroll noted that Alicia had two lower front teeth at the time of her death. (17RT 2869, 2873, 2876-2877.)

Appellant claims that Dr. Carroll's testimony based on his assistant's notes on the number and location of Alicia's teeth violated her confrontation clause rights because "[w]hether or not Alicia had any teeth and where they were was evidence essential to the prosecutor's theory that appellant murdered her daughter." (AOB 250-251.) Appellant is again incorrect.

This Court in *People v. Dungo, supra*, 2012 WL 4856703, specifically noted that "[a]n autopsy report['s] . . . statements describing the pathologist's anatomical and physiological observations about the condition of the body, . . . which merely record objective facts, are less formal than statements setting forth a pathologist's expert conclusions. . . . Such observations are not testimonial in nature." (*Id.* at *6.) The Court in *Dungo* also found that "criminal investigation was not the *primary* purpose for the autopsy report's description of the condition of [victim]'s body; it was only one of several purposes. . . . The autopsy report itself was simply an official explanation of an unusual death, and such official records are ordinarily not testimonial." (*Id.* at *8, original italics.) The Court then concluded:

> In summary, Dr. Lawrence's description to the jury of objective facts about the condition of victim['s] body, facts he derived from Dr. Bolduc's autopsy report and its accompanying photographs, did not give defendant a right to confront and cross-examine Dr. Bolduc. The facts that Dr. Lawrence related

> to the jury were not so formal and solemn as to be considered testimonial for purposes of the Sixth Amendment's confrontation right, and criminal investigation was not the primary purpose for recording the facts in question.

(*Ibid.*)

Similarly, Dr. Carroll's description of the number and location of Alicia's teeth were purely objective facts derived from the observations of the pathologist assistant as noted in the autopsy report. These facts were not so formal and solemn to be considered testimonial for purposes of the Sixth Amendment's confrontation clause. Further, as this Court noted in *Dungo*, the usefulness of autopsy reports is not limited to criminal investigation and prosecution as such reports are often used by decedent's relatives to determine whether to file a wrongful death suit or by insurance companies to determine whether a particular death is covered under their policies. (*People v. Dungo*, *supra*, 2012 WL at *7.) At the time Alicia's autopsy report was prepared, these were precisely the reasons for which the report was used for, i.e., appellant's decision to file a wrongful death suit against Gerber and Prudential's decision to pay out the life insurance policy to appellant. As the primary purpose of the recording the number and location of Alicia's teeth was not for criminal investigation and prosecution, the statements were not testimonial and there was no violation of appellant's rights under the confrontation clause.

4. Medtox Laboratories Test Results for Ethylene-Glycol

Dan Anderson, a supervising criminalist with the Coroner's Office, testified that on November 9, 2000, he sent Rodriguez's blood specimen to Medtox Laboratories in Minnesota to conduct further toxicology testing for ethylene-glycol and chlorpyrifos. (13RT 2089-2094.) Anderson stated that on November 20, 2000, the Coroner's Office received the test results back from Medtox Laboratories indicating "amounts of ethylene-glycol in the

victim's system." (13RT 2096-2097.) Anderson opined that the level of ethylene-glycol found by Medtox Laboratories was "consistent with a fatal amount of ethylene-glycol." (13RT 2097.) After receiving the supplemental toxicology results from Medtox Laboratories, Anderson tested Rodriguez's heart and femoral blood, gastric contents and vitreous fluid for ethylene-glycol. He found ethylene-glycol in every tested specimen and opined that the amounts he had found were all fatal levels of ethylene-glycol. (13RT 2100-2102, 2108.)

Appellant argues that the test results from Medtox Laboratories were testimonial and should not have been admitted through Anderson's testimony. (AOB 251-252, 255-256.) To the contrary, the test results from Medtox Laboratories were computer-generated non-testimonial data and thus admissible.

In *People v. Lopez*, *supra*, 2012 WL 4856705, this Court found that a non-testifying criminalist's laboratory report on the defendant's blood alcohol content was not testimonial and thus admissible through the testimony of another criminalist. (*Id.* at *11.) In doing so, the Court found that the portion of the report consisting of purely computer-generated numerical data did not implicate the Sixth Amendment's right to confrontation. (*Id.* at *9.) As to the portion of the report containing handwritten annotation linking the defendant's blood sample to the computer-generated test results, the Court found that the notation was "nothing more than an informal record of data for internal purposes . . . not prepared with the formality required by the high court for testimonial statements." (*Id.* at *10.)

Similar to *Lopez*, the report from Medtox Laboratories regarding Rodriguez's blood analysis for ethylene-glycol lacked the formality required for testimonial statements. The record shows that the report here simply indicated the amounts of ethylene-glycol found in the victim's

system without any formal statement or opinion explaining the numerical data. (13RT 2097.) "In *Melendez-Diaz*, 'the certificates were sworn to before a notary' by the testing analysts who had prepared the certificates. (*Melendez-Diaz*, *supra*, 557 U.S. at p. 309.) And in *Bullcoming*, the laboratory analyst's certificate regarding the result of his analysis was '"formalized" in a signed document' that expressly referred to court rules providing for the admissibility of such certificates in court. (*Bullcoming*, *supra*, . . . 131 S.Ct at p. 2717.) Such formality is lacking here." (*People v. Lopez*, *supra*, 2012 WL at *11.) Since Medtox Laboratories report containing the numerical amounts of ethylene-glycol found in the victim's blood samples was not testimonial in nature, the trial court did not err in allowing the prosecution expert Anderson to testify regarding it.

In any event, to the extent that the Medtox Laboratories report could be considered testimonial, its admission was harmless """beyond a reasonable doubt."""" (*People v. Lopez*, *supra*, 2012 WL at *11, citing *People v. Geier* (2007) 41 Cal.4th 555, 608 [beyond a reasonable doubt standard of error applies to violations of 6th Amendment confrontation right].) Here, after receiving the test results from Medtox Laboratories, Anderson himself tested the victim's heart and femoral blood, gastric contents and vitreous fluid for ethylene-glycol. At trial, based on his test results, Anderson independently opined that he found ethylene-glycol in every tested specimen and that the amounts found were all fatal levels of ethylene-glycol. (13RT 2100-2102, 2108.) In light of Anderson's independent opinion establishing the fatal levels of ethylene-glycol in the victim's body, any error in admitting the allegedly testimonial Medtox Laboratories test results was harmless beyond a reasonable doubt. (See *People v. Lopez*, *supra*, 2012 WL at *11 [finding admission of nontestifying analyst's laboratory report harmless beyond a reasonable

doubt in light of testifying witness's independent opinion that defendant's blood sample contained alcohol].)

5. UC Davis Oleander Test Results

In addition to the ethylene-glycol test results from Medtox Laboratories, Anderson also testified about the oleander test results. Specifically, Anderson stated that on December 26, 2000, he sent samples of Rodriguez's blood, urine, liver, and stomach contents to Puschner, a UC Davis toxicologist, to be tested for oleander. (13RT 2106-2107, 2113-2115.) Without discussing the actual test results, Anderson stated that he transcribed Puschner's test results into his final report. (13RT 2108.)

Following Anderson's testimony, Puschner testified in person regarding her test results. (13RT 2113.) She stated that every specimen provided to her tested positive for oleander. (13RT 2118.) Puschner opined that the significant amount of oleander found in Rodriguez's stomach indicated a recent exposure through ingestion. (13RT 2119.)

Appellant argues that Anderson's reference to Puschner's oleander test results violated her confrontation rights. (AOB 252-253, 255.) However, unlike the test results from Medtox Laboratories, Puschner testified in person regarding her own report. She was available for cross-examination but trial counsel stated that he had "[n]o questions" for her. (13RT 2119.) Since appellant had an opportunity to cross-examine the witness who had actually prepared the oleander report, the confrontation clause was fully satisfied. (*Crawford*, *supra*, 541 U.S. at pp. 53-54.)

6. Dr. Clark's Expert Testimony

Dr. Clark, an emergency medicine physician, a medical toxicologist and director of the Poison Center at UC San Diego, testified as a prosecution expert. (13RT 2120-2121.) During his testimony, Dr. Clark stated that based on the autopsy report, the Coroner's Office toxicology

report, the UC Davis toxicology report, and the Kaiser Hospital medical records, it was his opinion that the victim died of an ethylene-glycol poisoning. (13RT 2138.)

Appellant appears to argue that Dr. Clark's reliance on these reports to formulate his expert opinion violated her right to confront the witnesses that had actually prepared the reports. (AOB 253-256.) Appellant is again incorrect.

Here, Dr. Clark's reliance on medical records, as well as autopsy and toxicology reports, to formulate his opinion as to the victim's cause of death did not violate appellant's right to confrontation under the Sixth Amendment. An expert may generally base his opinion on any matter known to the expert, including hearsay not otherwise admissible, which may "reasonably . . . be relied upon" for that purpose. (Evid. Code, § 801, subd. (b); *People v. Montiel* (1993) 5 Cal.4th 877, 918-919; *People v. Gardeley* (1996) 14 Cal.4th 605, 617-618.) The United States Supreme Court in *Crawford* specifically acknowledged that the confrontation clause of the Sixth Amendment "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." (*Crawford, supra*, 541 U.S. at p. 59, fn. 9.) In California, the appellate courts have consistently rejected the notion that *Crawford* has made hearsay evidence relied upon by an expert inadmissible if such hearsay evidence is not offered for its truth. (See *People v. Sisneros* (2009) 174 Cal.App.4th 142, 153-154; *People v. Ramirez* (2007) 153 Cal.App.4th 1422, 1427; *People v. Cooper* (2007) 148 Cal.App.4th 731, 747; *People v. Thomas* (2005) 130 Cal.App.4th 1202, 1210.) Since the reports and records appellant complains of here were not admitted for their truth but only for the purpose of formulating Dr. Clark's expert opinion, appellant's right to confront witnesses was not implicated.

Furthermore, the United States Supreme Court has stated that "medical reports created for treatment purposes" are "not . . . testimonial" within the meaning of *Crawford.* (*Melendez-Diaz v. Massachusetts*, *supra*, 557 U.S. at p. 312, fn. 2.) As the medical records from Kaiser Hospital were all made prior to Rodriguez's death and for treatment purposes, they were not testimonial within the meaning of *Crawford.*

As to the rest of the reports appellant complains of, none of them triggered his right to confront witnesses because the declarant, or the actual preparer of each report, actually testified in person at trial. Dr. Chinwah, who performed Rodriguez's autopsy and prepared the report testified in court regarding his findings and opined that Rodriguez's cause of death was ethylene-glycol and oleander poisoning. (13RT 2163-2165, 2170.) Anderson, who prepared the final Coroner's Office toxicology report, testified in court and opined that the level of ethylene-glycol found in the victim's body was a fatal amount. (13RT 2100-2102, 2108.) Puschner from UC Davis testified in person regarding her testing of Rodriguez's tissue and blood samples and finding significant amounts of oleander. (13RT 2118-2119.) Appellant had a full opportunity to confront and cross-examine each of these witnesses, and Dr. Clark's reliance on their reports did not violate appellant's rights under the Sixth Amendment. This claim fails.

X. THERE WERE NO GUILT PHASE ERRORS TO ACCUMULATE WHICH AFFECTED THE PENALTY VERDICT

Appellant contends that the cumulative effect of multiple errors at the guilt phase warrants reversal of the penalty phase, since the jury was instructed at the penalty phase to consider "all the evidence which has been received during any part of the trial of this case." (AOB 258-263, citing 22RT 3863.) On the contrary, there were no guilt phase errors to

accumulate here, and therefore, no errors which could have affected the penalty verdict.

Criminal defendants are guaranteed a fair trial by the due process clause of the Fourteenth Amendment of the United States Constitution. (*Crane v. Kentucky* (1986) 476 U.S. 683, 690 [106 S.Ct. 2142, 90 L.Ed.2d 636]; *Strickland v. Washington* (1984) 466 U.S. 668, 684-685 [104 S.Ct. 2052, 80 L.Ed.2d 674].) Due process guarantees that a criminal defendant will be treated with "that fundamental fairness essential to the very concept of justice. In order to declare a denial of it[,] [it] must [be] f[ound] that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevents a fair trial." (*United States v. Valenzuela-Bernal* (1982) 458 U.S. 858, 872 [102 S.Ct. 3440, 73 L.Ed.2d 1193].)

In assessing claims of cumulative error, the test is whether "it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*People v. Watson* (1956) 46 Cal.2d 818, 836; see *People v. Holt* (1984) 37 Cal.3d 436, 458.) Such claims are ordinarily made in "close cases." (E.g., *People v. Bunyard* (1988) 45 Cal.3d 1189, 1236; *People v. Holt, supra*, 37 Cal.3d at pp. 458-459.)

However, the present case was anything but close, and respondent has demonstrated that there were no errors to accumulate. Moreover, even if there were any errors at the guilt phase, they were plainly harmless even if viewed cumulatively, since the evidence of appellant's guilt was overwhelming. (See *People v. Riel* (2000) 22 Cal.4th 1153, 1215 ["[w]e have found no error that, even in cumulation, was prejudicial"]; *People v. Pride* (1992) 3 Cal.4th 195, 269 ["[a]ny errors that did occur, whether viewed singly or in combination, were inconsequential"].) Simply put, appellant convinced her husband to take out an additional $250,000 life

insurance policy, then killed him by poisoning his drink in the hopes of cashing in on that insurance policy. Moreover, unlike in the cases appellant attempts to rely on, *Satterwhite v. Texas* (1988) 486 U.S. 249 [108 S.Ct. 1792, 100 L.Ed.2d 284], and *Smith v. Zant* (11th Cir. 1988) 855 F.2d 712 (AOB 260-261), none of the purported guilt phase errors cited by appellant deal with *erroneously admitted evidence* the jury may have considered in determining what penalty to impose; rather, appellant cites her conditions of confinement, the supposed "many interferences with appellant's constitutionally guaranteed right to counsel committed by the jail staff," the court's alleged failure to properly evaluate her competency, and alleged judicial bias (AOB 258-259).

A defendant is entitled to a fair trial, not a perfect one. (*People v. Welch*, *supra*, 20 Cal.4th at p. 775.) Even assuming arguendo any error occurred, appellant has at most shown that her "'"trial was not perfect – few are,"' especially few of the length and complexity of this trial. There was no prejudicial error either individually or collectively." (*People v. Cooper* (1991) 53 Cal.3d 771, 839, citation omitted.) Appellant received a fair trial; therefore, her claim of cumulative error at the guilt phase and the penalty phase (which is predicated on her claim of error at the guilt phase) must be rejected.

XI. THE TRIAL COURT PROPERLY ADMITTED EVIDENCE OF APPELLANT'S MURDER OF HER INFANT DAUGHTER IN AGGRAVATION AT THE PENALTY PHASE

Appellant contends, for various reasons, that evidence of her murder of her infant daughter was improperly admitted at the penalty phase. (AOB 263-322.) Respondent disagrees.

A. Factual Background

On July 8, 1993, appellant purchased a $50,000 life insurance policy for her one-year-old infant daughter, Alicia, and designated herself as the primary beneficiary under the policy. (17RT 2934, 2936.) Less than three months later, on September 18, 1993, Alicia was found choking on a piece of rubber detached from her pacifier. (17RT 2820-2821, 2844-2847.) Alicia was later pronounced dead at the hospital. (17RT 2832.) On October 22, 1993, appellant received $50,172 from the life insurance company for the death of Alicia. (17RT 2938-2940.) Appellant and her then husband, Fuller, filed a lawsuit against the manufacturer of the pacifier and later settled for $710,000. (17RT 2924-2925.)

The District Attorney's Office initially decided not to seek the death penalty in the instant case. (1RT 10.) On March 13, 2002, based on further investigation of Alicia's 1993 death, the prosecutor informed the court that he intended to resubmit appellant's case to the penalty committee for a reevaluation of the decision not to seek the death penalty in this case. (2RT 53.) On August 1, 2002, the court was notified by the prosecutor that the People had made a decision to seek the death penalty. (2RT 67.) The prosecutor also filed a Notice of Evidence in Aggravation which stated that in the event of a penalty phase, the People intended to introduce evidence of appellant's "murder of her daughter, Alicia [], on or about September 18, 1993 in Santa Barbara County." (1CT 218-219.)

On March 25, 2003, appellant filed a Motion for Preliminary Examination of Uncharged Offenses. (1CT 253-263.) The prosecutor filed the People's opposition on June 12, 2003. (2CT 349-359.) On August 29, 2003, during the hearing on appellant's motion, trial counsel argued that appellant was "entitled to at least an evidentiary hearing to see if there's even enough [aggravating evidence of appellant's involvement in the death of Alicia] to get to a jury." (4RT 452.) The prosecutor argued that there

had been sufficient offer of proof made from the facts contained in the Gerber lawsuit file already turned over to appellant and that under *People v. Ochoa* (1998) 19 Cal.4th 353, such a preliminary examination was subject to the discretion of the court and not mandatory. (4RT 457-458.) When the court asked trial counsel what evidence he would like to offer at the hearing, he responded, "I think a hearing would be appropriate . . . for the court to have [Knauss] come in and testify as to the foundation [of his opinion]. I think obviously this is going to be the issue, causation." (4RT 461.) The court agreed that Knauss's testimony may be helpful but found that for purposes of the hearing, the testimony of the paramedics and the deputies who responded to Alicia's 911 call was not necessary, noting "[p]erhaps if we listen to [Knauss's] testimony, that [] will be sufficient." (4RT 463-464.)

On September 19, 2003, the court held a hearing to determine the admissibility of the evidence regarding the death of appellant's daughter. (5RT 560.) Knauss testified that in 1994, he was contacted by appellant's civil attorney, Novak, to examine a child's pacifier that had failed. (5RT 564.) After examining the pacifier, Knauss concluded that the break in the rubber nipple was inconsistent with the theory that a 13-month old infant with only two lower teeth could have chewed through the rubber causing it to break and ultimately choking her to death. (5RT 569-570, 575.) He noted that the fracture structure of the rubber was so irregular that it was unlikely to have been caused by a repeated sucking action. (5RT 569.) Knauss also found unusual the fact that the location of the break was so close to the plastic shield because a break caused by either biting or sucking would have occurred further away from the shield. (5RT 571-572.)

According to Knauss, the rubber nipple failed because of an external trauma, i.e., most likely a hard object running over the nipple and breaking it. (5RT 579.) His opinion was based on markings found on the rubber that

could have been caused by "sharp edges." (5RT 580.) Knauss said that the markings on the rubber were consistent with a "heavy object" such as a plier being used to cause the initial fracture. (5RT 581-582.)

At the conclusion of the hearing, the court found that there was sufficient evidence to be submitted to the jury for evaluation at the penalty phase. (5RT 607-608.)

B. The Trial Court's *Phillips* Hearing Was Adequate and Sufficient Under the Circumstances; the Trial Court Applied the Correct Legal Standard

Appellant contends that the trial court denied her right to an adequate *Phillips* (*People v. Phillips* (1985) 44 Cal.3d 29) hearing, since the evidence presented was insufficient "to permit a trier of fact to find criminal activity beyond a reasonable doubt." (AOB 268-274.) She further contends that the trial court failed to apply the correct legal standard in determining whether the aggravating evidence should be introduced at the penalty phase. (AOB 274-278.) Not so.

In *Phillips*, this Court advised that "in many cases it may be advisable for the trial court to conduct a preliminary inquiry before the penalty phase to determine whether there is substantial evidence to prove each element" of other violent crimes the prosecution intends to introduce in aggravation under section 190.3, factor (b). (*People v. Phillips*, *supra*, 44 Cal.3d at p. 72, fn. 25.) However, such a hearing is not required, and does not need to include live testimony. (*People v. Whisenhunt* (2008) 44 Cal.4th 174, 225.) "Moreover, a trial court's discretion to admit 'other crimes' evidence at the penalty phase is reviewed for abuse of discretion, and no abuse of discretion will be found where, in fact, the evidence in question was legally sufficient." (*People v. Boyer* (2006) 38 Cal.4th 412, 477, fn. 51.)

As noted by this Court in *Whisenhunt*, "the purpose of a *Phillips* hearing is to determine whether the prosecution has substantial evidence to support the other-crimes evidence it intends to introduce in aggravation." (*People v. Whisenhunt, supra*, 44 Cal.4th at p. 225.) Here, as in *Whisenhunt*, the prosecution presented substantial evidence of the murder through the testimony, inter alia, of Knauss, an expert on the failure of viscous materials including rubber, who testified that the physical condition of appellant's 13-month old daughter Alicia's pacifier was inconsistent with the scenario that Alicia, with only two bottom teeth, could have bit through it or sucked it such that it broke. (5RT 569-572, 575.) Knauss concluded that the failure "was due to external trauma" of the pacifier – that a hard object ran over the nipple of the pacifier and broke it. (5RT 578-579.) The damage could also be consistent with application of a pair of pliers. (5RT 595-596.)

Knauss's testimony in the present case was similar to the testimony held to constitute substantial evidence in *Whisenhunt*. In *Whisenhunt*, Dr. Mark Shallit testified that based upon his records, his opinion was that the defendant's niece's femur had been deliberately broken. (*People v. Whisenhunt, supra*, 44 Cal.4th at p. 224.) This Court concluded that "the prosecution presented substantial evidence of the other crime through the testimony of Dr. Shallit and thus met its burden." (*Id.* at p. 225.) Similarly here, Knauss's testimony constituted substantial evidence that appellant caused the death of her daughter by tampering with the pacifier. Therefore, in finding that the evidence was "sufficient to withstand a challenge under factor (b), . . . and . . . to show that it should be submitted to a jury and let the jury evaluate" (5RT 608), the trial court applied the proper standard of proof and did not abuse its discretion in admitting the evidence of Alicia's death.

C. There Was Substantial Evidence for the Jury to Have Found Beyond a Reasonable Doubt That Appellant Deliberately Killed Alicia

Appellant contends that, even assuming the evidence of Alicia's death was properly admitted, the evidence presented at the penalty phase was legally insufficient for the jury to have found beyond a reasonable doubt that appellant murdered her. (AOB 278-298.) Respondent disagrees.

A conviction for murder requires the commission of an act that causes death, done with the mental state of malice aforethought. (§ 187.) Malice may be either express or implied. (§ 188.) Express malice is an intent to kill. (*People v. Nieto Benitez* (1992) 4 Cal.4th 91, 102.) Implied malice does not require an intent to kill. Malice is implied when a person willfully does an act, the natural and probable consequences of which are dangerous to human life, and the person knowingly acts with conscious disregard for the danger to life that the act poses. (*People v. Knoller* (2007) 41 Cal.4th 139, 152.)

The law recognizes two degrees of murder. The degrees are distinguished by the mental state with which the killing is done. A person who kills unlawfully with implied malice is guilty of second degree murder. (*People v. Knoller*, *supra*, 41 Cal.4th at pp. 151-152.) A person who kills unlawfully and intentionally is guilty of first degree murder if the intent to kill is formed after premeditation and deliberation. (§ 189; see *People v. Mendoza* (2011) 52 Cal.4th 1056, 1069.) If the person kills unlawfully and intentionally but the intent to kill is not formed after premeditation and deliberation, the murder is of the second degree. (*People v. Nieto Benitez*, *supra*, 4 Cal.4th at p. 102.)

In reviewing a sufficiency of evidence challenge, the reviewing court views the evidence in the light most favorable to the verdict and determine whether any rational trier of fact could have found the essential

elements of the crime proven beyond a reasonable doubt. (*People v. Cervantes* (2001) 26 Cal.4th 860, 866; *People v. Caldwell* (1984) 36 Cal.3d 210, 217.)

Here, at the penalty phase, the evidence established that in July 1993, appellant purchased a $50,000 life insurance policy for her infant daughter, designating herself as the primary beneficiary. (17RT 2934-2938.) She never told her then-husband Fuller about the life insurance policy. (18RT 3033-3034.) Less than three months later, on September 18, 1993, Alicia was found choking on her pacifier in her crib, while she was under appellant's care. (17RT 2820-2821.) Mandeville, who was the first firefighter to arrive at the scene, thought it was unusual that appellant was waiting outside her house instead of remaining next to her choking daughter. (17RT 2843.) Sergeant Ginter, who transported appellant to the hospital, found strange that appellant was neither crying nor distraught and noted that appellant was more focused on getting the broken pacifier back from the police. (17RT 2826, 2832-2833, 2838-2839.)

Within four days of Alicia's death, appellant had already hired an attorney to pursue a lawsuit against Gerber. (17RT 2860-2862.) Appellant eventually hired another attorney and filed a lawsuit against Gerber which settled for $710,000. (17RT 2914-2915, 2924-2925.) Appellant also received $50,172 under her daughter's life insurance policy. (17RT 2938-2940.)

Knauss, who had been the first expert hired by appellant's civil attorney in the case against Gerber, testified that the fracture on the rubber nipple was caused by some external tool or trauma, possibly a chair or pliers, and not from a sucking or biting action by an infant. (17RT 2963, 2967, 2969.) Appellant's then-husband, Fuller, also testified that several months before Alicia's death, the family was dining in a restaurant when a

waitress noticed Alicia's pacifier and told appellant that it might be part of a manufacturer's recall. (18RT 3036-3037.)

Viewing the evidence in the light most favorable to the judgment, certainly a rational trier of fact could have found that appellant, as she had done with her husband in the instant case, had deliberately damaged Alicia's pacifier and then killed her for financial gain (i.e., to sue Gerber and collect the insurance money from the policy she had taken out on Alicia). Several months before Alicia's death, a waitress had advised appellant and her husband that the type of pacifier Alicia was using might be subject to a recall, yet Alicia continued using the pacifier after the waitress's warning. (18RT 3037, 3052.) According to her civil deposition testimony, appellant said that the pacifier that killed Alicia had been in her friend's house for a few months before she got it back. (18RT 3543.) Prior to giving it to Alicia, however, appellant said she washed it and made sure it was intact and had no cracks or evidence of wear; she checked the built of the pacifier by pulling it once every week, and also used a pacifier saver which was a one and a half foot long ribbon attached to the handle of the pacifier and clamped onto the infant's clothes to prevent the pacifier from dropping to the ground. (18RT 3544, 3548, 3553.) At no time did appellant observe that the pacifier was "less than intact." (18RT 3547-3549.)

In other words, if appellant's story was to be believed, the damage to the pacifier was caused by Alicia, who either bit or sucked the pacifier apart and then choked on the rubber nipple portion of it. Knauss, an expert in the area of failure and fracture of polymers and rubbers, received the pacifier in two pieces, and it appeared that the rubber nipple had torn off from the rubber piece inside the plastic shield. After examining the pieces, however, Knauss concluded that the damage to the structure was not consistent with a child having chewed through the rubber, or caused by repeated sucking

action. (17RT 2958-2962.) Instead, Knauss believed the fracture was caused by some external trauma or tool, possibly a chair or other hard object rolling over the pacifier. (17RT 2963, 2967.) The indentations found on the rubber nipple were also consistent with the use of a pair of pliers which could have caused the fracture. (17RT 2969.)

Additionally, while being transported to the hospital, appellant was not crying or did not appear to be distraught. (17RT 2826, 2838-2839.) When informed that Alicia had died, appellant asked the police officer for the plastic backing of the pacifier, stating that she wanted the manufacturer or the retailer "to pay," and that she did not want this to happen to another child, and was adamant that she wanted the broken pacifier back. (17RT 2832-2833.) Moreover, about six months to a year after Alicia's death, Fuller and appellant were contacted by a local television station for an interview. (18RT 3042.) During the interview, Fuller noticed appellant smiling during portions of the interview as if she enjoyed the attention; Fuller thought her behavior was inappropriate. (18RT 3043, 3048.)

Appellant argues that a "multitude of scenarios" as to why or how the pacifier failed were possible, and that the pacifier might have failed simply due to age. (AOB 296-298.) Although those scenarios might be possible and show that different inferences could be drawn from the facts, it was also reasonable to infer, as the prosecution argued, that appellant deliberately damaged the pacifier and killed her daughter. (Cf. *People v. Culver* (1973) 10 Cal.3d 542, 548 [it is not the place of an appellate court to reweigh the evidence or substitute its assessment of a witness's credibility for that of the trier of fact].) As previously noted:

> "In reviewing a challenge to the sufficiency of the evidence, we do not determine the facts ourselves. Rather, we 'examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence – evidence that is reasonable, credible and of solid value – such that a

> reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citations.] We presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.] [¶] The same standard of review applies to cases in which the prosecution relies primarily on circumstantial evidence and to special circumstance allegations. [Citation.] '[I]f the circumstances reasonably justify the jury's findings, the judgment may not be reversed simply because the circumstances might also reasonably be reconciled with a contrary finding.' [Citation.] We do not reweigh evidence or reevaluate a witness's credibility. [Citation.]" [Citations.]

(*People v. Scott* (2011) 52 Cal.4th 452, 487.) Accordingly, the prosecution offered substantial evidence for the jury to find beyond a reasonable doubt that appellant killed Alicia.

D. The Trial Court Properly Admitted Statements Made by Appellant During a Civil Deposition

Appellant contends that the trial court erred in admitting statements made during a deposition taken related to a civil action. (AOB 298-303.) Specifically, she contends that her statements did not qualify as party admissions under Evidence Code section 1220. (AOB 301.) She is mistaken – "The exception to the hearsay rule for statements of a party is sometimes referred to as the exception for *admissions* of a party. However, Evidence Code section 1220 covers all *statements* of a party, whether or not they might otherwise be characterized as admissions. [Citations.]" (*People v. Horning* (2004) 34 Cal.4th 871, 898, fn. 5, original italics.)

E. Appellant's Deposition Testimony Was Not Admitted to Show Consciousness of Guilt

Citing *People v. Kimble* (1988) 44 Cal.3d 480, 498, appellant claims that a party's false statement may be admitted in a civil or criminal case not to prove the truth of the matter stated, but to show consciousness of guilt. (AOB 303-304.) Appellant then contends that, assuming arguendo her

deposition testimony was admissible to show consciousness of guilt, the trial court prejudicially erred in failing to instruct the jury to that effect. (AOB 304.) Again, appellant is mistaken. Party admissions are not admissible only as evidence of consciousness of guilt requiring a consciousness of guilt instruction; they are by definition an exception to the hearsay rule, and as such, are admissible for their truth. In any event, *Kimble* relates to false statements made by a defendant *at the time of arrest.* (*People v. Kimble*, *supra*, 44 Cal.3d at p. 496.) Appellant's deposition testimony, on the other hand, was made in connection with appellant's civil suit against the manufacturer of the pacifier, and the statements were introduced only to prove that appellant made them, not necessarily that they were true. (See *id.* at p. 498 ["because the defendant's prior statement is not being introduced to prove the truth of the statement but simply to prove that the defendant made it, the jury can properly evaluate the evidence to determine if the statement was made"].) Moreover, as appellant herself notes (AOB 305-306), this Court has never held that the trial court has a sua sponte duty to instruct the jury concerning consciousness of guilt (*People v. Najera* (2008) 43 Cal.4th 1132, 1139), so even assuming arguendo appellant's deposition testimony constituted consciousness of guilt, no sua sponte instruction on it was required.

F. The Prosecution Expert Did Not Testify Beyond the Scope of His Expertise

Appellant contends that at the penalty phase and the pre-penalty phase hearing, Knauss was not qualified to testify as an expert witness, and testified beyond the scope of his expertise. (AOB 307-315.)

> "Expert opinion testimony is admissible only if it is '[r]elated to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact.'" [Citations.] "When expert opinion is offered, much must be left to the trial court's discretion." [Citation.] The trial court has broad discretion in deciding whether to admit or exclude

> expert testimony [citation], and its decision as to whether expert testimony meets the standard for admissibility is subject to review for abuse of discretion. [Citations.]

(*People v. McDowell* (2012) 54 Cal.4th 395, 425-426.) The reviewing court will find error regarding a witness's credentials as an expert only if "'"the evidence shows that a witness *clearly lacks* qualification as an expert . . . ."' (Italics in original, [citations].)" (*People v. Chavez* (1985) 39 Cal.3d 823, 828.)

At the outset, to the extent appellant contends Knauss was unqualified as an expert, her claim was waived on appeal – she herself admits that at the pretrial hearing to determine the admissibility of evidence of Alicia's death, trial counsel stipulated that Knauss was qualified as an expert on the failure of viscous materials, including rubber. (AOB 308, citing 5RT 563.) And at trial, trial counsel did not "object to Knauss's qualification as an expert on rubber at trial." (AOB 309.)

Appellant's remaining gripes as to Knauss's testimony concern the weight to be given to his testimony, not its admissibility. (See, e.g., AOB 310 ["Knauss admitted he had not done any studies with regard to aging or degradation of latex natural rubber. (RT 3001-3002.)"]; 311 ["Knauss freely admitted that the only tool mark analysis he had ever conducted was on tires (RT 2993.) Knauss also agreed that failure's [*sic*] and/or cuts with respect to latex natural rubber do not act or react the same as other materials. (RT 2995-2996.) Knauss did not perform any tests on the pacifier Alicia choked on. (RT 2995.)]".) Trial counsel cross-examined Knauss extensively at trial regarding what testing or studies he had done on the pacifier and latex natural rubber, and called his own expert on the fracturing of natural rubber, Hamed, to counter Knauss's opinion. The jury was instructed on how to evaluate and assess an expert witness's testimony and how to weigh the opinion of one expert against the other. (CALJIC

Nos. 2.80, 2.81, 2.82, 2.83; 4CT 981-982.) Accordingly, under the circumstances, the trial court did not abuse its discretion in admitting Knauss's testimony, and Knauss's testimony did not exceed the scope of his expertise.

G. The Trial Court Properly Exercised Its Broad Discretion in Excluding Opinion Testimony Regarding Whether the Amount of the Settlement from the Gerber Lawsuit Was "Nuisance Value" or Not

Appellant contends that the trial court abused its discretion in precluding "defense expert" Novak from opining that the $710,000 settlement in the case involving Alicia's death was "far from nuisance value," since "[t]he fact that Gerber settled the case without admitting liability in an amount which exceeded in the representing attorneys [*sic*] opinion, nuisance value, was circumstantial evidence that the pacifier was defective." (AOB 317-318; see AOB 315-320.) On the contrary, the trial court properly exercised its discretion in precluding testimony on "nuisance value" under the circumstances.

Prior to testifying at trial, Novak, the attorney who represented the Fullers (appellant and her former husband) in the lawsuit against Gerber regarding the death of Alicia involving the pacifier, testified outside the presence of the jury. During his testimony, he was questioned about the $710,000 settlement, and what the amount of the settlement told him about the case. Novak testified that the amount was an "appropriate settlement for the death of the child and for the emotional distress claimed by [appellant] at the time, given the strength and weaknesses of the case in terms of the liability and the theories that were asserted." (17RT 2892.) Novak was then asked what the term "nuisance value" meant, and he answered that "nuisance value" was what a defendant would be willing to pay to get rid of a case – their anticipated cost of defense or "some other small amount in order to dispose of the case." (17RT 2892-2893.) Trial

counsel then asked Novak whether the $710,000 settlement was a "nuisance value settlement," and over the prosecutor's objection that the question called for speculation and was beyond Novak's expertise, Novak answered that the settlement amount was far from nuisance value, since it was a significant amount of money for Gerber to pay. (17RT 2893-2894.)

On redirect examination, Novak admitted that he did not know what Gerber's gross revenues were back in 1996 for determining whether or not this was a nuisance value case. (17RT 2895.) He further admitted that he did not know if Gerber had done any projections to see what kind of damage a public trial would have on their ability to do business in the baby industry, and did not know what kind of "observations or prognostications" Gerber may have made in deciding whether or not pursuit of the lawsuit to the end was going to harm them more than paying $710,000 to make it go away. (17RT 2895-2896.)

Later, in response to a question by the trial court, Novak defined "nuisance value" as follows:

> Nuisance value, in my experience, is payment of five or $10,000, maybe $15,000 to get rid of a case so that a defendant does not have to incur the expense of the lawyer to try the case.
>
> It is – it is a decision by the defense that this case has no merit, but it will cost us so many thousands of dollars to hire a doctor to examine the plaintiff or to hire a lawyer to defend the case, we're willing to put out that amount of money in order to put this case to bed, and has no bearing whatsoever to the value of the case in terms of the damages.
>
> It is an assessment by the defense that we don't want to spend the time and money on this case, we don't believe the case has merit, but we're willing to satisfy the claimant and pay.

When asked whether nuisance value included loss of reputation to the defendant, Novak said he did not think it included loss of reputation. (17RT 2902.)

Later that afternoon, before Novak testified in front of the jury, trial counsel asked the trial court if it would allow Novak to testify about nuisance value. The trial court responded as follows:

> My concern with it is this: if the suggestion is or at least with this witness' opinion, Mr. Novak, that this was more than nuisance value, he does not, as I asked him to define it, take into that definition loss of reputation to Gerber Foods.
>
> They may well feel that this was a nuisance case, that they could defeat it, but that in the process they would lose substantial income based on the loss and faith of other customers.
>
> So not only as to the pacifier but as to their other products, and he does not know to what extent that calculation would enter into the total value that Gerber agreed would be sufficient to make the case go away.

(17RT 2909.)

The prosecutor voiced his objection to testimony on nuisance value as follows:

> Well, Your Honor, my feeling on that is it's his opinion based on being a plaintiff's lawyer what nuisance is. It's not really relevant to what Gerber may have viewed the problem with this lawsuit as.
>
> I mean Gerber is certainly going to have concerns if we push this thing to trial and we have a public two or three week trial about this, whatever media stir it may have created in the beginning when it was filed is only going to be brought up again, and for an extended period of time, and for Mr. Novak to suggest that he knows what nuisance value is to Gerber without even knowing how much money they make, what percentage of that is devoted to baby products, what fear they might have if this comes out during the press over a two or three week period in a public trial will cause irreparable damage to their reputation and their ability to sell baby products in the community, whether or not they ultimately prevail on liability.

> I think that's nothing he can testify about. I think his opinion is essentially irrelevant and unfounded. It's something that really only Gerber can tell or talk about.

(17RT 2910.)

The trial court agreed with the prosecutor's objection, sustained it, and disallowed testimony as to whether the amount of the settlement was for more than nuisance value:

> That seems [to] me the way I view it, to the extent that in essence what the defense wants to do is to suggest by this that Gerber Foods recognized, in spite of their settlement not saying that they admitted liability, that they were in fact liable, that they created a defective product, and that's an issue in this case, what did actually cause the death of the baby, was it a defective product or something else, so I don't see that being – the mere fact that I allowed it to come in outside the presence of the jury was an issue of exploration to see what the answers would be and what they were based on, and I will sustain the objection to that question as to whether this witness believes that settlement was more than for nuisance value.

(17RT 2910-2911.)

The trial court properly exercised its discretion in sustaining the prosecutor's objection and not allowing Novak to opine that the $710,000 settlement by Gerber was more than nuisance value. During the hearing outside the presence of the jury, Novak admitted that he had *never worked as a defense lawyer*, so he was simply speculating when he assumed that as part of the settlement process, the defendants attorneys would try to evaluate a case against other similar or same cases to come up with some type of value. (17RT 2891-2892.) Having never worked as a defense lawyer, let alone a lawyer for a large child food/products manufacturer like Gerber, Novak could hardly be said to have sufficient knowledge as to whether a $710,000 settlement on Gerber's part in 1996 was more than nuisance value. This is especially true since he admitted that he did not know Gerber's gross revenues in 1996, nor did he take into account

Gerber's potential loss of reputation and resulting loss of monies based on that loss of reputation and customers. Moreover, while the trial court excluded Novak's testimony on nuisance value, it specifically ruled that the defense would not be precluded from arguing that the settlement amount was for more than nuisance value. (17RT 2912.) Therefore, the trial court properly excluded Novak's testimony on nuisance value.

Appellant contends the prosecutor "seized upon the trial court's ruling" to argue that to Gerber, the settlement was nothing more than the cost of doing business. (AOB 319-320.) But, as pointed out earlier, the trial court allowed *both sides* to argue competing inferences based on the fact that Gerber settled the lawsuit for $710,000. Trial counsel simply made a strategic decision not to focus on the settlement amount but instead, to attack the credibility of Knauss's opinion. (22RT 3823-3825.) As both sides were given equal opportunity to argue any inferences from the Gerber settlement, there was no abuse of discretion in excluding Novak's improper opinion.

H. The Trial Court Properly Instructed the Jury

Appellant contends that the trial court failed to instruct the jury as to the incident involving Alicia's death. Specifically, she contends that the trial court failed to instruct the jury that it must first be satisfied beyond a reasonable doubt that the defendant did in fact committed the criminal act. (AOB 320-321.) She is mistaken.

At the penalty phase, the trial court instructed the jury on first and second degree murder. (4CT 984-985; see AOB 321.) The trial court also instructed the jury with CALJIC No. 8.87 as follows:

> Evidence has been introduced for the purpose of showing that the defendant has committed the following criminal acts: Murder and Solicitation of Murder which involved the express or implied use of force or violence. Before a juror may consider any criminal acts as an aggravating

> circumstance in this case, a juror must first be satisfied beyond a reasonable doubt that the defendant did in fact commit the criminal acts. A juror may not consider any evidence other than criminal acts as an aggravating circumstance.

(4CT 983.)

The instruction went on to define reasonable doubt, and explained that "[i]t is not necessary for all jurors to agree. If any juror is convinced beyond a reasonable doubt that the criminal activity occurred, that juror may consider that activity as a fact in aggravation. If a juror is not so convinced, that juror must not consider that evidence for any purpose." (4CT 984.)

Accordingly, the trial court properly instructed the jury in the present case.

I. There Were No Errors to Accumulate

Appellant speculates that "without this aggravating circumstance [of Alicia's death] having been found by the jury, appellant would not have been sentenced to death. She contends that any errors with respect to the evidence of Alicia's death, considered singly or cumulatively, warrants reversal. (AOB 321-322.) On the contrary, respondent has demonstrated above that there were no errors to accumulate here, and even assuming there were any errors, they were plainly harmless even if viewed cumulatively. (*People v. Riel*, *supra*, 22 Cal.4th at p. 1215; *People v. Pride*, *supra*, 3 Cal.4th at p. 269; *People v. Welch*, *supra*, 20 Cal.4th at p. 775.) The evidence of Alicia's death was properly admitted, the jury was properly instructed on how to use the evidence and the applicable burden of proof, and appellant received a fair penalty phase trial. Accordingly, her claim of cumulative error at the penalty phase must be rejected.

XII. THE TRIAL COURT PROPERLY ADMITTED EVIDENCE REGARDING APPELLANT'S COMMENTS ABOUT ERLINDA ALLEN AS PART OF THE PEOPLE'S CASE IN AGGRAVATION

Appellant contends that the trial court erred in admitting evidence regarding appellant's comments about Erlinda Allen as part of the People's case in aggravation at the penalty phase because her comments did not constitute the use or attempted use of force or violence or the express or implied threat to use force or violence. (AOB 323-331.) Respondent disagrees.

A. Factual Background

In his notice of aggravation filed on July 23, 2002, the prosecutor listed appellant's "post arrest solicitation of the murder and/or assault upon People's witnesses Erlinda Allen and Palmira Gorham." (1CT 218-219.) In an April 29, 2003 complaint, appellant was charged only with the solicitation to commit the murder of Palmira Gorham. (1CT 273-276.) The solicited individual was Hall, an inmate who had been housed in an adjacent cell. On August 29, 2003, the trial court granted the prosecutor's motion to consolidate the solicitation charge with the murder case. At trial, Hall testified briefly at the guilt phase, but not at the penalty phase. The jury hung on the solicitation to commit murder charge, and the trial court subsequently declared a mistrial on that charge. (3CT 871, 873-874.)

Appellant objected to the admission of Hall's tape-recorded conversations during which appellant solicited the murder of Allen at the penalty phase as being irrelevant. The trial court overruled the objection, noting that the recording was "part of the conversation regarding elimination of witnesses," and that "[e]ven though it's not a charged offense, it does tend to suggest that that's what she intended to do to carry it out." (18RT 3064.)

B. Testimony Relating to the Solicitation of Murder of Erlinda Allen Was Properly Admitted

The gist of appellant's contention is two-fold: first, since Allen did not testify in any proceeding, she was not one of the People's witnesses, and second, the evidence of the alleged solicitation to murder Allen did not amount to a crime. (AOB 323.) Neither of these grounds are persuasive.

The trial court has broad discretion in ruling on the admissibility of evidence, and its ruling will be upheld on appeal unless there is a clear showing of an abuse of discretion that prejudiced the appellant – i.e., a showing the court's ruling exceeded the bounds of reason and it is reasonably probable a result more favorable to the appellant would have been reached absent the error. (See *People v. Thomas* (2011) 51 Cal.4th 449, 488; *People v. Williams* (1997) 16 Cal.4th 153, 196-197; *People v. Alvarez* (1996) 14 Cal.4th 155, 203.) In a death penalty case, the trial court's discretion to exclude evidence as unduly prejudicial during penalty phase is even more circumscribed than the admission of evidence during the guilt phase because "'"the sentencer is expected to subjectively weigh the evidence, and the prosecution is entitled to place the capital offense and the offender in a morally bad light."'" (*People v. Booker* (2011) 51 Cal.4th 141, 187, citation omitted.)

Regarding appellant's first contention, as the prosecutor explained, the tape recordings were provided to the defense as part of discovery, and although the People elected not to call Allen as a witness, "we never notified the defense affirmatively we were not going to use her." (18RT 3062.) Therefore, in appellant's mind, Allen was going to be called as a witness against her, which is precisely why appellant "made arrangements" with other inmates to "take care" of Allen once she got to Chowchilla state prison by injecting her with AIDS-tainted blood. (18RT 3062.) In other words, the evidence showed that, as with Gorham, appellant solicited the

murder of another potential prosecution witness against her. It is of no consequence that the notice in aggravation listed Allen as a "People's witness," but that she did not testify at trial. Allen was a potential prosecution witness whom the prosecution decided ultimately not to call, but, at the time appellant solicited Allen's murder, *appellant* understood Allen to be a potential prosecution witness against her – if this were not the case, appellant would not have told Hall, "It's – well, now without these two big ones [Allen and Gorham] it – it will probably get over and done with." (18RT 3063.)

As to appellant's second contention, the evidence was more than sufficient to constitute solicitation of murder of Allen, and therefore, to constitute criminal activity as defined under section 190.3, subdivision (b).

> "Solicitation is defined as an offer or invitation to another to commit a crime, with the intent that the crime be committed. The crime of solicitation, which is restricted to the solicitation of particular serious felony offenses, is complete once the verbal request is made with the requisite criminal intent; the harm is in asking, and it is punishable irrespective of the reaction of the person solicited. Thus, solicitation does not require the defendant to undertake any direct, unequivocal act towards committing the target crime; it is completed by the solicitation itself, whether or not the object of the solicitation is ever achieved, any steps are even taken towards accomplishing it, or the person solicited immediately rejects it. [Citations.]" [Citations.]

(*People v. Wilson* (2005) 36 Cal.4th 309, 328.)

In the instant case, Hall stated that appellant "[was] getting a letter from somebody in . . . Chowchilla [State Prison]," and that appellant "want[ed] some people to do somethin' to [Allen] . . . in prison," such as "get[ting] somebody['s] blood that's HIV or AIDS positive and shoot you in the back with it." (3CT 773-745.) According to Hall, she "g[ot] the impression from talking to [appellant] that she expect[ed] that [Hall] would get some friends of [hers] to do this[.]" (3CT 745.) When Hall told

appellant, "You must have [Allen] under control," appellant responded, "I'm not worried about her, but she dug her own. You know? [Chowchilla State Prison] have their own system. They have their own accountability over there. You know what I mean?" (4CT 881-882; 18RT 3126.) Appellant further stated that she "[had] friends at Chowchilla . . . ." (4CT 895.) Coupled with appellant's repeated references to eliminating Allen as a witness, such as getting Allen "out of the way" (4CT 913), "put[ting] [her] down 'cause you know she's playing herself out" (4CT 923), and "bur[ying] herself" (4CT 963), there was sufficient evidence that appellant had solicited Hall to murder Allen at Chowchilla prison. Therefore, the testimony relating to the solicitation to murder Allen was properly admitted during the penalty phase.

XIII. THE JURY WAS NOT MISLED BY BEING INSTRUCTED WITH THE MITIGATING FACTOR UNDER SECTION 190, SUBDIVISION (D)

Appellant contends it is reasonably likely that one or more jurors were misled into thinking that, if appellant killed under the influence of mental or emotional disturbance that was less than extreme, such disturbance was not a factor in mitigation. (AOB 331-339.) Respondent disagrees.

In the present case, the jury was instructed that, in determining the appropriate penalty, it should consider, inter alia, "whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance." (CALJIC No. 8.85(d); § 190.3, subd. (d); 4CT 983.) During the penalty phase closing arguments, the prosecutor argued as follows:

> First of all, was [appellant] operating under extreme mental or emotional disturbance at the time she committed the

crime? Is that some kind of mitigation? You heard no evidence of that, ladies and gentlemen.

She had her psychiatrist come in here on Friday and testify. You didn't hear one word out of him that she was psychotic when she committed this crime, she was delusional, she was hallucinatory, she didn't know what she was doing, she had no impulse control. You didn't hear any of that.

What you heard was, well, she's depressed. Well, ladies and gentlemen, you also know from my cross-examination of Dr. Vicary that when he asked her and determined she was depressed, she'd been in custody for two and a half years facing the prospect of a capital trial, and he had to agree with me that, hey, a lot of people in jail are depressed. Jail is a depressing place.

She's been in custody for two and a half years, she's got the stress and the anxiety of facing the prospect of a capital murder trial. That's just as likely of an explanation for why she's depressed as anything that occurred prior to the murder of Frank.

And even if she was depressed at that time, that's not some extreme mental or emotional disturbance that somehow mitigates this crime. It doesn't justify getting her husband to buy a $250,000 life insurance policy when you've already decided that he's going to die.

It doesn't justify poisoning him with oleander from a bush in your backyard, and when that doesn't work fast enough you move on to the anti-freeze and you load him up with that. It does not justify, it does not mitigate that kind of conduct.

It's not the extreme mental and emotional disturbance that the law is talking about.

(22RT 3746-3747.)

"'The use of the limiting adjectives "extreme" and "substantial" in the instruction on section 190.3, factors (d) [(referring to "extreme mental or emotional disturbance")] and (g) [(referring to "extreme duress" and

"substantial domination" by another)] does not unconstitutionally prevent the jury from considering mitigating evidence." (*People v. Moore* (2011) 51 Cal.4th 386, 416-417, citing *People v. Taylor* (2009) 47 Cal.4th 850, 899.) As appellant acknowledges (AOB 333), this Court has previously rejected this contention "because jurors remain free to weigh lesser mental disturbance, duress, or domination under the 'catchall' provision of section 190.3, factor (k), which permits consideration of '[a]ny other circumstance which extenuates the gravity of the crime.'" (*People v. Moore*, *supra*, 51 Cal.4th at p. 416, citing *People v. Wright* (1990) 52 Cal.3d 367, 443-444.)

Appellant urges this Court to reconsider these holdings, noting that in the instant case, the prosecutor argued to the jury that appellant's claim of depression was not severe enough to qualify as "extreme" disturbance under factor (d). (AOB 336-338.) However,

> [n]othing in the prosecutor's argument or the court's instructions . . . precluded the jury from considering the evidence of [appellant's] mental impairments, whether under factor (d) (to the extent jurors disagreed with the prosecutor's assessment of the impairments as less than extreme), section 190.3, factor (h) (referring to "mental disease or defect" as potentially impairing [appellant's] ability to appreciate the criminality of his conduct or conform it to the law's requirements) or the catchall factor (k).

(*People v. Moore*, *supra*, 51 Cal.4th at p. 416.) In fact, the prosecutor specifically reminded the jury of the catchall factor (k) during his closing arguments, noting that the jury could "consider any other extenuating circumstances that [they] find to be present in this case." (22RT 3756-3757.) Since appellant "was neither prevented from introducing evidence of mental impairment, nor precluded from arguing its relevance and force as mitigation," no constitutional violations occurred. (*People v. Moore*, *supra*, 51 Cal.4th at p. 417.)

XIV. THE TRIAL COURT PROPERLY DENIED APPELLANT'S APPLICATION FOR MODIFICATION OF THE DEATH SENTENCE

Appellant contends that the trial court improperly denied her application for modification of the death sentence under section 190.4, subdivision (e), depriving her of due process of law and a fair and reliable penalty determination in violation of her Fifth, Eighth, and Fourteenth Amendment rights. Specifically, she contends the trial court failed to make an independent on-the-record reweighing of the aggravating and mitigating factors, improperly minimized or ignored mitigating factors while giving undue weight to aggravating ones, and improperly considered aggravating matters not within the statutory list. (AOB 340-348.) Respondent disagrees.

A. Factual Background

On January 8, 2004, appellant filed a written motion for reduction of sentence and attached a supplemental psychiatric report by Dr. Vicary discussing various mitigating factors in appellant's case, including her alleged remorsefulness. (4CT 1038-1042.) The prosecutor filed an opposition to motion to modify penalty setting forth the aggravating factors. (4CT 1022-1032.)

On January 12, 2004, the court held the hearing on appellant's motion to reduce sentence. (23RT 3975.) Trial counsel argued that the court should consider the fact that appellant had not been in trouble with the law all her life before this case and that she had been raised in a family with sexual abuse from a very early age. Counsel also relied on Dr. Vicary's supplemental report indicating that appellant had remorse for her actions. (23RT 3976.) At this point, the court interjected as follows:

> THE COURT: How do you square what the doctor has said, Dr. Vicary's report of January 7, 2004, where he says [appellant] does have remorse for the murder of her husband and

that she's reluctant to share that remorse for legal and psychological reasons?

There has been no indication of remorse at all during the trial, and in fact it's hard to believe that there would be any remorse. He was only married for a few months when she created the circumstances under which he received a $250,000 life insurance with her as a beneficiary, and two months after that roughly attempts to kill him through the use of loosening the gas connection, which also endangered not only her husband but also the community around her husband in the event that there had been an explosion, then attempting to poison him with oleander poisoning, and on the failure of that a week later poisoning him for a long period of time with anti-freeze.

And I have to say it is the coldest killing I've ever seen. Most of the murders, and most of the cases we have are murders cases in this court, over the past 20 years I've never seen a colder heart. She seemed to have no care for the agony that she put her husband through, and the sole goal being to make a profit in his death.

So I don't see how the doctor's opinion squares with any of the evidence that I've seen throughout this trial.

[COUNSEL]: I thought it necessary for me to talk to Dr. Vicary and see what he could do with regards to this issue, given the importance of that lack, apparently, of apparent remorse to the jury, and I felt obligated to present that to the court.

THE COURT: Of course.

(23RT 3976-3978.)

After listening to appellant's personal statement, the court denied the motion to modify the sentence. (23RT 4018-4024; 4CT 1064-1068.)

B. There Was No Error in Denying Appellant's Application for Penalty Modification

In ruling on a defendant's application for modification of a verdict under section 190.4, subdivision (e), the trial court "'must independently reweigh the evidence of aggravating and mitigating factors presented at

trial and determine whether, in its independent judgment, the evidence supports the death verdict.'" (*People v. Carrington* (2009) 47 Cal.4th 145, 201.) A trial court ruling on the application should not consider evidence that was not presented to the jury during the penalty phase of the trial. (*People v. Ramos* (1997) 15 Cal.4th 1133, 1184.) On appeal, although the trial court's ruling is subject to independent review, the reviewing court does not make a de novo determination of penalty. (See *People v. Brady* (2010) 50 Cal.4th 547, 588; *People v. Wallace* (2008) 44 Cal.4th 1032, 1096.)

Initially, appellant forfeited any claim of error regarding the trial court's ruling on her application for sentence modification because she failed to assert a timely objection. (See *People v. Brady*, *supra*, 50 Cal.4th at p. 589; *People v. Rogers*, *supra*, 39 Cal.4th at p. 907.)

Even assuming there was no forfeiture, the record demonstrates that the court applied the proper standards and thoughtfully considered appellant's motion for modification of sentence. Appellant claims that the trial court's reading from a prepared written order indicated the court had prejudged the sentence of death. (AOB 346-347.) However, by preparing a written order in advance of the hearing, "[t]he trial court's apparent goal was simply to ensure that, *if* it decided to sentence [appellant] to death, it could do so without any technical omissions in the pronouncement of sentence." (*People v. Seaton* (2001) 26 Cal.4th 598, 696, original italics.) As appellant also acknowledges (AOB 346), this Court has already held that reading from a prepared tentative order did not indicate a prejudgment:

> The practice of formulating tentative rulings in advance of argument and reducing those tentative rulings to writing is commonplace and unobjectionable. [Citation.] . . . "To do so does not mean that the court is unalterably bound by the writing or that it will not amend or even discard the writing if counsel's arguments persuade the court that its tentative views were incorrect. Nothing in the record indicates that the trial court

> failed to give due consideration to defense counsel's argument at the hearing." [Citation.]

(*People v. Medina* (1995) 11 Cal.4th 694, 783.) Indeed, the record in this case shows that the court carefully considered both trial counsel's and appellant's statements at the hearing before pronouncing its ruling on the motion to modify the sentence. (23RT 3975-4024.) Thus, there was no improper prejudgment here.

Appellant also claims that the trial court improperly considered evidence of appellant's lack of remorse as an aggravating factor in denying the motion for modification of sentence even though there was no such evidence presented to the jury. (AOB 347.) However, although Dr. Vicary had not specifically testified during the penalty phase trial that appellant was remorseful for her actions, he did testify that appellant had continuously denied killing her husband. (21RT 3691-3692.) Based on this testimony, the prosecutor argued to the penalty phase jury that appellant lacked remorse for her actions. (22RT 3797-3798.) Additionally, although the trial court disagreed with Dr. Vicary's opinion regarding appellant's remorse based on the court's own observations of appellant throughout the trial (23RT 3976-3977), the lack of remorse was not cited as an aggravating factor during the pronouncement of the ruling during the hearing or even mentioned in the trial court's written order denying the modification application. (23RT 4018-4024; 4CT 1064-1068.) Therefore, there was no improper consideration of a factor not previously presented to the penalty phase jury in ruling on appellant's application.

Finally, appellant argues that the court ignored the mitigating factor of appellant's family history as a child abuse victim and the effect of her family's blaming of appellant for such abuses. (AOB 347-348.) Appellant is incorrect. Dr. Vicary's supplemental report specifically mentioned appellant's "traumatic family background and a childhood during which

[appellant] was repeatedly sexually molested by a series of adult males," as well as "[h]er family blam[ing] her for this . . . ." (4CT 1041.) Trial counsel made sure to highlight this point to the court at the hearing by discussing appellant's "unusual" background, "problems with the paternal grandfather," and the "molestations that took place . . . when she was of a very tender age . . . ." (23RT 3976.) During the pronouncement of the ruling, as well as in the written order, the trial court specifically mentioned that it had considered "evidence [that] suggested that [appellant] was sexually molested as a young girl by a family member." (23RT 4022; 4CT 1067.) As the record clearly demonstrates the court considered all appropriate factors before ruling on appellant's application for modification of sentence, this claim should be rejected.

XV. THE CALIFORNIA DEATH PENALTY STATUTE AND INSTRUCTIONS ARE CONSTITUTIONAL

Appellant contends that the California death penalty statute and instructions are unconstitutional because they fail to instruct the jury on any penalty phase burden of proof. (AOB 348-388.) These "laundry list"-type arguments have been repeatedly rejected by this Court.

Specifically, a death sentence need not be premised on findings by a unanimous jury that one or more aggravating factors exist, that these factors outweigh the mitigating factors, and that death is the appropriate penalty. (See *People v. Brady*, *supra*, 50 Cal.4th at p. 590; *People v. Burney* (2009) 47 Cal.4th 203, 267-268.) Neither *Apprendi v. New Jersey* (2000) 530 U.S. 466 [147 L.Ed.2d 435, 120 S. Ct. 2348] nor *Ring v. Arizona* (2002) 536 U.S. 584 [153 L.Ed.2d 556, 122 S.Ct. 2428] compels a different result. (See *People v. Brady*, *supra*, 50 Cal.4th at p. 590; *People v. Martinez* (2009) 47 Cal.4th 399, 455.)

"There is no need to instruct the jury at the penalty phase (1) regarding a burden of proof, except as to section 190.3, factors (b) and (c),

or the absence of a burden of proof, (2) regarding the meaning of the term 'mitigation,' (3) that mitigating factors can be considered only in mitigation, (4) that if the mitigating evidence outweighs the aggravating evidence, the jury must impose a sentence of life without the possibility of parole, or (5) that the jury is not required to impose the death penalty even if it finds the aggravating evidence outweighs the mitigating evidence. The trial court need not omit from the instructions any mitigating factors that appear not to apply to the defendant's case.' [Citation.]" (*People v. Fuiava* (2012) 53 Cal.4th 622, 732-733 citing *People v. Letner and Tobin* (2010) 50 Cal.4th 99, 208-209.) "Nor is the trial court required to instruct the jury concerning (1) which factors are aggravating and which are mitigating [citation], (2) the absence of a requirement that the jurors unanimously agree upon the existence of a particular mitigating factor [citation], (3) the meaning of a sentence of life imprisonment without the possibility of parole [citation], or (4) the existence of a presumption in favor of a sentence of life imprisonment without the possibility of parole [citation]." (*People v. Fuiava*, *supra*, 53 Cal.4th at p. 733.)

Appellant provides no viable reason for this Court to reverse its prior holdings on this issue. Therefore, this claim should 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. (AOB 389-403.) To the extent appellant did not request the specific modifications alleged here, he has forfeited 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 (AOB 390, fn. 82), 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, abrogated on other grounds in *People v. Coombs* (2004) 34 Cal.4th 821, 860; *People v. Johnson*, *supra*, 6 Cal.4th at p. 52, overruled on another ground in *People v. Rogers* (2006) 39 Cal.4th 826, 879).

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* (2008) 44 Cal.4th 93, 163; *People v. Maury* (2003) 30 Cal.4th 342, 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. THE FAILURE TO PROVIDE INTERCASE PROPORTIONALITY REVIEW DID NOT VIOLATE APPELLANT'S CONSTITUTIONAL RIGHTS

Appellant contends that the absence of intercase proportionality renders California's death penalty law unconstitutional. (AOB 403-408.) This Court has previously held to the contrary and appellant has not advanced any persuasive arguments requiring this Court to reject its prior holding. (*People v. Abel* (2012) 53 Cal.4th 891, 943; *People v. Thomas* (2012) 53 Cal.4th 771, 836; *People v. Fuiava, supra*, 53 Cal.4th at p. 733.)

XVIII. CALIFORNIA'S DEATH PENALTY LAW DOES NOT OFFEND EVOLVING STANDARDS OF DECENCY IN VIOLATION OF INTERNATIONAL LAW AND THE EIGHTH AMENDMENT

Appellant contends that California's death penalty law offends standards of decency under the Eighth Amendment and international law. (AOB 408-414.) This Court has repeatedly rejected this contention. "'The death penalty, when applied in accord with state and federal statutory and constitutional requirements, does not violate international law. [Citation.] International norms of human decency do not render the death penalty, applied as a regular form of punishment, violative of the Eighth Amendment. [Citations.]'" (*People v. Weaver* (2012) 53 Cal.4th 1056, 1093, citing *People v. Cowan* (2010) 50 Cal.4th 401, 510; see also *People v. Castaneda* (2011) 51 Cal.4th 1292, 1356; *People v. Thomas, supra*, 51 Cal.4th at p. 507.) Appellant provides no viable reason for this Court to reverse its prior holdings on this issue. Therefore, this claim should be rejected.

XIX. THE UNITED STATES CONSTITUTION DOES NOT REQUIRE WRITTEN FINDINGS REGARDING AGGRAVATING FACTORS

Appellant claims that his Fifth, Eighth and Fourteenth Amendment rights were violated because the instructions given in this case did not require the jury to make written findings about the aggravating factors they found and considered in imposing a death sentence. (AOB 414-417.) This Court has repeatedly rejected the claim that written findings regarding aggravating factors are constitutionally required. (See *People v. Cornwell* (2005) 37 Cal.4th 50, 105; *People v. Panah*, *supra*, 35 Cal.4th at p. 499; *People v. Snow*, *supra*, 30 Cal.4th at p. 126; *People v. Maury*, *supra*, 30 Cal.4th at p. 445; *People v. Fauber* (1992) 2 Cal.4th 792, 859.) The above decisions are consistent with the United States Supreme Court's pronouncement that the federal Constitution "does not require that a jury specify the aggravating factors that permit the imposition of capital punishment." (*Clemons v. Mississippi* (1990) 494 U.S. 738, 746, 750 [110 S.Ct. 1441, 108 L.Ed.2d 725] citing *Hildwin v. Florida* (1989) 490 U.S. 638 [109 S.Ct. 2055, 104 L.Ed.2d 728].) Appellant has provided no new reason for this Court to reconsider its prior decisions rejecting this very claim. Therefore, her claim should be denied.

XX. 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 417-421.) 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*, *supra*, 26 Cal.4th at pp. 675, 691-692; *People v. Ochoa*, *supra*, 26 Cal.4th at p. 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* (2000) 23 Cal.4th 1153, 1214, 1219, disapproved on another ground in *People v. Martinez* (2010) 47 Cal.4th 911, 948, fn. 10.) The record shows appellant received a fair trial. His claims of cumulative error should, therefore, be rejected.

XXI. FAILURE TO OBJECT TO INSTRUCTIONS CONSTITUTES A WAIVER UNLESS THE INSTRUCTION AFFECTS A SUBSTANTIAL RIGHT; ACTUAL ERROR MUST BE CITED TO OBTAIN RELIEF

Appellant wishes this Court to excuse "any failure of defense counsel to request or object to any of the jury instructions." (AOB 421-422.) This argument lacks merit.

Instructional error affecting a defendant's substantial rights is not waived by a failure to object. (§ 1259; *People v. Cleveland*, *supra*, 32 Cal.4th at p. 749.) However, in order to state a cognizable issue for appellate review, appellant must assert actual error:

> [O]n appeal from a judgment it is a cardinal rule that the duty devolves upon the appellant not only to specify the error of which he complains, but also to establish to a reasonable certainty that without such error having been committed, the result of the trial of the action would have been substantially different from that which was actually reached by the trial court.

(*People v. Britton* (1936) 6 Cal.2d 10, 13.) It is not proper to shift the burden of finding error to the court or to respondent. (*People v. Clay* (1964) 227 Cal.App.2d 87, 100.)

Here, appellant makes a broad claim that any failure to request any instruction should be excused. But the rule that instructional error is not waived applies only to instructions affecting his substantial rights. (§ 1259.) In any case, this Court need not consider an assertion of error that is not based on a showing of actual error. (*People v. Britton*, *supra*, 6 Cal.2d

at p. 13.) Because appellant does not point to any actual error, his claim should fail.

XXII. APPELLANT'S REQUEST TO REVIEW ALL CLAIMS ON THE MERITS RATHER THAN APPLYING ANY PROCEDURAL BARS SHOULD BE REJECTED

Appellant requests the Court not to apply any procedural bars to any of his claims but, instead, to review them on their merits because of the finality of the death penalty. (AOB 424-425.) Although this Court has recognized that exceptions to the forfeiture doctrine with respect to certain constitutional claims raised for the first time on appeal (see *People v. Boyer*, *supra*, 38 Cal.4th at p. 441, fn. 1; *People v. Partida* (2005) 37 Cal.4th 428, 433-439), it has "never held that forfeiture is inapplicable to an entire class of cases . . . ." (*People v. Richardson* (2008) 43 Cal.4th 959, 984, fn. 11.) Furthermore, state decisions resting on independent and adequate state grounds render the state court's decision immune from federal review. (*Wainwright v. Sykes* (1977) 433 U.S. 72, 81, 87-88 [97 S.Ct. 2497, 53 L.Ed.2d 594].) Therefore, appellant's request to ignore any applicable procedural bars to his claims on appeal should be rejected.

XXIII. FOR PURPOSES OF THE DIRECT APPEAL, THIS COURT SHOULD CONSIDER ISSUES ONLY IF THEY WERE PRESENTED IN APPELLANT'S OPENING BRIEF

Appellant states, "if this Court determines that any habeas claims should have been raised in this appeal, appellant incorporates each and every allegation based on the trial and appellate record." (AOB 426.) Appellant cannot use this approach to avoid his duty to raise any record-based issue he wishes the Court to consider in his direct appeal. The longstanding rule in this state is:

> habeas corpus cannot serve as a substitute for an appeal, and, in the absence of special circumstances constituting an excuse for failure to employ that remedy, the writ will not lie where the

> claimed errors could have been, but were not, raised upon a timely appeal from a judgment of conviction.

(*In re Dixon* (1953) 41 Cal.2d 756, 759.)

Appellant appears to be attempting to create a "fall back position" that would allow him to avoid the requirement that he present error in his direct appeal. This, he cannot do. (See *People v. Richardson*, *supra*, 43 Cal.4th at p. 1038 [declining appellant's request to incorporate by reference any habeas petition arguments that should have been raised on appeal because the rules of court do not permit such incorporation].)

Alternatively, appellant appears to be attempting to expand the scope of the issues that may be considered in his future habeas corpus proceeding. While "[a]ppellate jurisdiction is limited to the four corners of the record on appeal" (*In re Carpenter* (1995) 9 Cal.4th 634, 646), habeas corpus claims are limited to matters beyond the four corners of the record. (*People v. Waidla*, *supra*, 22 Cal.4th at p. 703, fn. 1.) Appellant should not be permitted to raise claims in his future habeas corpus proceedings that should have been brought in his direct appeal.

CONCLUSION

For the foregoing reasons, the judgment should be affirmed in its entirety.

Dated: December 13, 2012

Respectfully submitted,

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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 56,219 words.

Dated: December 13, 2012

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DECLARATION OF SERVICE BY U.S. MAIL
CAPITAL CASE

Case Name: **People v. Angelina Rodriguez** No.: **S122123**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter.

I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On December 17, 2012, I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

PLEASE SEE THE ATTACHED SERVICE LIST

The one copy for the California Appellate Project was placed in the box for the daily messenger run system established between this Office and California Appellate Project (CAP) in Los Angeles for same day, 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 December 17, 2012, at Los Angeles, California.

E. Obeso
Declarant

Edith Obeso
Signature

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