SUPREME COURT COPY

In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, *Plaintiff & Respondent,* **v.** **SCOTT THOMAS ERSKINE,** *Defendant & Appellant.*	**CAPITAL CASE** Case No. S127621

San Diego County Superior Court Case No. SCD161640
The Honorable KENNETH KAI-YOUNG SO, Judge

RESPONDENT'S BRIEF

KAMALA D. HARRIS
Attorney General of California
GERALD A. ENGLER
Chief Assistant Attorney General
JULIE L. GARLAND
Senior Assistant Attorney General
HOLLY D. WILKENS
Supervising Deputy Attorney General
ROBIN URBANSKI
Deputy Attorney General
State Bar No. 228485
600 West Broadway, Suite 1800
San Diego, CA 92101
P.O. Box 85266
San Diego, CA 92186-5266
Telephone: (619) 645-2230
Fax: (619) 645-2191
Email: Robin.Urbanski@doj.ca.gov
Attorneys for Respondent

DEATH PENALTY

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STATEMENT OF THE CASE

On August 29, 2003, the San Diego County District Attorney filed an amended information charging appellant Scott Thomas Erskine with the murders of 13-year-old Charlie Keever and 9-year-old Jonathan Sellers on or about March 27, 1993. As to both victims, the information alleged special circumstances that the murder was intentional and involved the infliction of torture (Pen. Code, § 190.2, subd. (a)(18)), and that Erskine committed the murder while engaged in the commission or attempted commission of performing a lewd act on a child under the age of 14 (Pen. Code, § 190.2, subd. (a)(17)(v)). As to Charlie, the information additionally alleged a special circumstance, accusing Erskine of committing the murder while engaged in the commission or attempted commission of oral copulation. (Pen. Code, § 190.2, subd. (a)(17)(vi).) The information further alleged, as to both victims, that Erskine personally used a deadly and dangerous weapon—a rope—in the commission of the crimes. (Pen. Code, § 12022, subd. (b).) Finally, the information alleged the special circumstance that Erskine had been convicted of multiple murders within the meaning of Penal Code section 190.2, subdivision (a)(3). (11 CT 2588-2590.)

The same day, Erskine entered a "not guilty" plea and denied the allegations in the information, and jury selection commenced. (17 CT 3941.) The jury was sworn on September 18, 2003. (17 CT 3959.) Guilt phase jury deliberations began on September 30, 2003. (17 CT 3976.)

On October 1, 2003, the jury returned a verdict, finding Erskine guilty of all charges and finding true all enhancements and special-circumstance allegations. (17 CT 3978-3986.)

The penalty phase commenced on October 14, 2003. (17 CT 3995.) Penalty phase deliberations began on December 9, 2003. (18 CT 4039.)

On December 15, 2003, the jury advised the trial court that it was deadlocked, and the court declared a mistrial. (18 CT 4045.)

On March 26, 2004, jury selection for the penalty phase re-trial commenced. (18 CT 4064.) The jury was sworn on April 15, 2004. (18 CT 4080.) Penalty phase re-trial deliberations began on June 2, 2004. (18 CT 4131.) The same day, the jury determined the appropriate penalty for both offenses was death. (18 CT 4132-4134.)

On September 1, 2004, the trial court sentenced Erskine to death for the special circumstance murders of Charlie Keever and Jonathan Sellers. (18 CT 4154.)

STATEMENT OF FACTS

A. Guilt Phase

1. The People's Evidence

a. The Murders of Jonathan Sellers and Charlie Keever

Alton Williams was Jonathan Sellers's brother and the oldest of Milena Sellers's six children. Jonathan was Alton's best friend; they shared a room where they slept in bunk beds. Alton was also very close friends with Charlie Keever. (23 RT 3278.) On March 27, 1993, a Saturday, Alton and Charlie planned to go to Rally's Hamburgers in San Diego. (23 RT 3278-3279.) The boys would make this trip routinely with a big group of friends and not tell any parents where they were going. (23 RT 3280-3281.) The excursion also involved going down to the Otay River "riverbed area." (23 RT 3282; 24 RT 3303-3304, 3307, 3310.) When Charlie arrived at his house that Saturday, Alton was not there at the time. Their mother later informed him that his brother went with Charlie on the bike ride instead. (23 RT 3285-3286.)

Shawn Williamson worked at Fun Farm Go-Carts, an arcade and pet adoption center, on March 27, 1993. (23 RT 3240.) He saw Jonathan and Charlie that day. They asked if they could see the animals for adoption and left their bikes outside while they did so. (23 RT 3242-3243.) They played with the animals for a few minutes and then rode their bikes to the arcade where they played video games. (23 RT 3245.)

Cashier Linda Dassow was working at Rally's Hamburger on March 27, 1993, and saw Jonathan and Charlie that day. (23 RT 3249.) They were regular customers who always arrived on their bikes. (23 RT 3250.) She took the boys' order and saw them eat their food at a table outside. (23 RT 3250-3252.) The boys were at Rally's sometime between 11:30 a.m. and 1:00 p.m. (23 RT 3257, 3260.)

Carol Carr rode her bike on March 27, 1993, by the river bottom area in Otay Mesa. (23 RT 3265.) She saw a blue car driving where it should not have been, across a field, and then stop, blocking her path. Carr waited because she was scared. (23 RT 3270.) The driver of the car backed up, stepped out, and waved her on. She chose to leave the area instead, and when she did so, she saw the two boys. Arthur Blitz was also riding his bike in the Otay riverbed area on March 27, 1993, and saw Charlie and Jonathan as well. (23 RT 3275.) Jonathan said "hi" to him and asked about his helmet while Charlie stood with his bike about 25 feet away. (23 RT 3275-3276.)

Later that evening, Alton realized that Jonathan had not come home. He called Charlie's house and learned that the boys were not there either. (23 RT 3288.) Melina Sellers told her children—including Alton—to get in the car, and she proceeded to drive them around to Jonathan's friends' houses. The boys were still nowhere to be found. (23 RT 3288-3289.) Milena Sellers returned home with her other children at 7:00 p.m. and called the police. Realizing the seriousness of the situation now that his

mother had called the police, Alton divulged that the boys may have ridden their bikes to Rally's and on the riverbed trail. (23 RT 3289.) He also knew about a "fort" in the river bottom area. (23 RT 3283-3284.) Alton was scared his brother may have drowned. (23 RT 3289.) His mother directed him to take her to the trail. Alton complied, but only took her as far as a washed-out bridge; he did not take her all the way to the fort. (23 RT 3289-3290.)

San Diego Police Sergeant Sue Payne helped direct the search for the two boys, beginning on March 27, 1993. (24 RT 3313.) An air and ground search spanned from Saturday night through Sunday. (24 RT 3315, 3317.) It rained that Saturday night and the following day. (23 RT 3292; 24 RT 3303.) That Monday, March 29, 1993, Peter Winslow embarked on his usual bike ride from his apartment in Chula Vista through the Otay River area. (24 RT 3303-3304.) Part of his exercise regimen included dropping his bike and running for a stretch. (24 RT 3306.) As he ran that day, Winslow peered over some bushes and noticed a "camp-like thing." He looked inside and saw a little boy, hanging, and another boy laying on the ground. (24 RT 3307, 3310.) Winslow touched nothing and ran for help. He retrieved his bike and rode to the nearby Home Depot where he called the police who arrived a few minutes later. (24 RT 3310-3311.)

Sergeant Payne met Winslow at the Home Depot, and he escorted her to the location of the two boys' bodies—an area with bushes, tumbleweeds, and a hollowed-out area like a fort children would construct. (24 RT 3319-3320.) The "fort" had been constructed out of castor bean plants—tall growing trees with very thick branches or trunks. (24 RT 3346.) It was about 10 feet by 12 feet; the ground was hard, made out of trampled-down tumbleweeds. One could not see into the fort until he or she got very close to it. It had a two-foot entrance that opened into a 12-foot entryway,

resembling an igloo. (24 RT 3360-3361.) Sergeant Payne did not enter the crime scene as it was obvious the boys were dead. (24 RT 3322.)

Inside the fort, nine-year-old Jonathan was hanging from a tree branch. (24 RT 3321, 3371.) He was wearing a sweatshirt and socks, the bottom of which were dirty, but was otherwise unclothed from the waist down. He was suspended from a branch three and a half feet above the ground by a yellow rope around his neck. (24 RT 3368, 3371.) His body was partially blocking the entrance to the structure. (24 RT 3348.) Jonathan was on his knees, but the rope held him upright; his knees and knuckles touched the ground. (24 RT 3369; 25 RT 3544.) Jonathan's ankles were bound with rope as well. (24 RT 3372.) He also had a "gag" around his chin; it had been fashioned out of a terry cloth towel or pad and secured to his face with white surgical tape and black electrical tape. Jonathan had adhesive marks on his cheeks, revealing where the gag had once been attached. (24 RT 3372-3373; 25 RT 3511-3512; 3549-3550.) There was an area where the skin had been pulled off, consistent with the tape being violently torn from Jonathan's face. (25 RT 3524.) He also had a piece of white cord on his left wrist, thinner than the yellow rope around his neck, that was not attached to anything. (24 RT 3377; 25 RT 3545.)

Thirteen-year-old Charlie was off to Jonathan's side. (24 RT 3321.) He was lying face down, slightly on his right side, on top of a pile of clothes. (24 RT 3379, 3380-3381.) The pile of clothes contained both boys' shirts, pants, and shoes. They were not thrown on the ground, but rather neatly stacked. (24 RT 3389.) Charlie was wearing a hooded sweatshirt and socks, but, like Jonathan, he was unclothed from the waist down. (24 RT 3369-3370.) Charlie also had a yellow rope and white cord around his neck. His rope was tight, whereas Jonathan's was loose.

Charlie's skin had swelled up between the two ropes. (24 RT 3383.) Charlie[1] also had adhesive marks and an outline evidencing that something had been across his face. (24 RT 3385-3386.) He had tape marks from his mouth, between his chin and lower lip, to the back of his ear. There was a quarter-sized area by Charlie's left ear where his skin was missing. (24 RT 3386.)

Charlie and Jonathan lived a few blocks from each other. Their homes were less than five miles from the crime scene; Rally's was only about a mile away. (24 RT 3350.)

Among other items, law enforcement personnel collected from the crime scene a pair of jeans with red stains (24 RT 3396), a green shirt with red stains (24 RT 3399), a multicolored t-shirt with red stains (24 RT 3402-3403), and cigarette butts on the pathway leading to the crime scene (24 RT 3418-3419). They also found two bikes lying on their sides, 30 feet away from the structure. The bikes were locked together and well hidden underneath tumbleweeds. (24 RT 3414.) Sexual assault swabs were collected from the boys at the crime scene. (24 RT 3421-3422.)

Dr. John Eisele, who was employed by the San Diego County Medical Examiner's Office at the time, conducted autopsies on both boys. (25 RT 3517.) The skin between the two ropes on Charlie's neck was folded, bruised, reddened, and "hemorrhagic," meaning that there was blood under the skin and indicating that Charlie was alive when the ligatures were tied tightly around his neck. (25 RT 3521, 3529-3520.) There was a small amount of blood coming from Charlie's left ear—an occasional consequence of strangulation. He also had many pinpoint hemorrhages in the skin of his eyelids—a common consequence of strangulation. (25 RT

[1] In testifying to this fact, the San Diego police detective referred to Charlie as "Jonathan." It appears he did so out of inadvertence as the context surrounding the statement makes plain that he was referring to Charlie.

3526.) Charlie had small holes in his lip, likely caused by his lip being pushed in against his braces. (25 RT 3528.) He had an area of hemorrhaging on the muscle that runs down the side of the neck, on the base of his tongue, and pinpoint hemorrhaging in the lining of the voice box. (25 RT 3536.) Charlie had bruises on his penis and small holes or tears in the skin along the bruised area; he also had a piece of skin that was torn away on his scrotum. (25 RT 3530-3531.) These injuries occurred before Charlie's death and were not caused by dragging or insect or animal activity. (25 RT 3531-3532.) The injuries were to a very sensitive area and would have been painful. (25 RT 3541-3542.) Charlie's wrists were bruised, which was consistent with a ligature being tied around them before death. (25 RT 3533.) Charlie's anus was damaged on the inside with hemorrhaging to multiple areas. (25 RT 3538.) The damage would have occurred while Charlie was alive. Dr. Eisele could not form an opinion as to the specific cause of this damage other than to say it would have required a fair amount of force and could have been caused by a penis, finger, or some other foreign object. (25 RT 3538-3539.) Dr. Eisele opined that Charlie's cause of death was likely asphyxia by ligature strangulation and that it would have taken two to five minutes to strangle him to death. (25 RT 3540-3541.)

During Jonathan's autopsy, Dr. Eisele discovered pinpoint hemorrhages in his eyelids and over the whites of his eyes—symptoms of strangulation. He had ligature marks on his neck which indicated that the ligature had been pulled tight to strangle him and then, when he was dead or at least unconscious, the rope suspended him from the tree. (25 RT 3551-3552.) Like Charlie, the cause of Jonathan's death was asphyxia resulting from strangulation. (25 RT 3555.)

With his background in forensic odontology (the study of the mouth and teeth as it relates to the law), Dr. Norman Sperber examined

photographs of the bite marks on Charlie Keever's penis. (24 RT 3476, 3481-3482.) He noticed that the marks on Charlie's penis did not look like typical bite marks, but could have been caused by the sharp edges or corners of human teeth. (24 RT 3482.) Charlie also had an oval-shaped injury on his scrotum, laceration of the tissue, and bruising in the area, all of which are features of a human bite mark. (24 RT 3482-3483.) Dr. Sperber explained that the injury would have been a very painful one. (24 RT 3484-3485.)

Shortly after the crimes occurred, samples collected from the boys and Erskine were subjected to DNA analysis. A criminalist at the San Diego Police Department crime laboratory analyzed a swab taken from Charlie's scrotum after the sperm cells were separated from the non-sperm cells. She located one sperm cell. (25 RT 3590.) DNA analysis revealed genetic material consistent with the victims and no foreign DNA or sperm cells. (25 RT 3591-3592.) The analyst recognized that further testing of swabs of the victims might have revealed clues as to their murderer, but further testing would have consumed the samples. Accordingly, the analyst determined that no further testing should be done on the samples until DNA testing improved. (25 RT 3595.) She sealed the samples and put them away. (35 RT 3596.)

Between 1993 and 2001, DNA testing vastly improved, becoming significantly more powerful and discriminating. (25 RT 3596-3597, 3626-3627.) A reevaluation of the swabs in 2001 revealed an additional sperm cell on Charlie's scrotum swab (25 RT 3599-3600), sperm cells on an oral swab from Charlie (25 RT 3600-3601), and a single sperm cell on an Charlie's exterior anal swab (25 RT 3602-3603).[2] Again, the analyst

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[2] A penile swab and oral swab from Jonathan revealed no sperm cells. (25 RT 3603-3604.) Jonathan's exterior anal swab revealed a low number of

(continued...)

extracted the sperm cells from the non-sperm cells and stored the extraction samples for analysis. (25 RT 3601-3602.)

The Department of Justice maintains a DNA databank called the Combined DNA Information System, or "CODIS." It is a repository of DNA profiles both from unsolved cases and particular individuals who qualified to be in the database because they had committed certain serious crimes. (25 RT 3620.) In March 2001, the San Diego Police Department submitted a profile from the Otay riverbed crime scene to the Department of Justice laboratory in Berkeley for comparison with the profiles in the CODIS database. (25 RT 3619, 3621.) Of the more than 72,000 profiles in CODIS, the profile from the crime scene matched one—that belonging to Erskine. (25 RT 3621-3623.)

The San Diego Police Department continued its reexamination of the swabs taken from Charlie in 2001 as well. The sperm fraction of the oral swabs taken from Charlie revealed mixtures of DNA from Charlie and an additional person with the likely explanation that the DNA foreign to Charlie came from the sperm portion. (25 RT 3632.) Most of the DNA in the sample was not Charlie's. (25 RT 3637.) A criminalist with the San Diego Police Department compared the sperm fraction with the Department of Justice database and discovered that Erskine was a match. (25 RT 3633.) The probability that a randomly selected person would be included as a possible contributor to the mixture was 1 in 1.9 trillion in the Caucasian population, 1 in 600 billion in the Black population, and 1 in 3.5 trillion in the Hispanic population. (25 RT 3638-3639.) The criminalist also tested two cigarette butts found at the murder scene and discovered that Erskine was in all probability the source of the DNA on those items,

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(...continued)
sperm cells, but the number of sperm was so low that the sample did not qualify for further DNA testing. (25 RT 3604-3605.)

the likelihood being 1 in 10 quadrillion in the Caucasian population, 1 in 900 trillion in the Black population, and 1 in 29 quadrillion in the Hispanic population. (25 RT 3642-3643.)

A private DNA laboratory (25 RT 3560-3561) reached similar conclusions: that the sperm fraction of the separated sample revealed a mixture of DNA from two people (25 RT 3575-3576), and at every marker with respect to the sperm fraction, the sample was consistent with DNA from Erskine and Charlie (25 RT 3579-3580). With respect to the population frequencies, however, the private laboratory concluded that the odds an individual would have a DNA profile that would include him or her in this mixture at every marker were 1 in 1.6 million in the Caucasian population, 1 in 750,000 people in the Black population, and 1 in 5 million in the Hispanic population. (25 RT 3582-3583.)

After being informed of the match to Erskine in the CODIS database, Sergeant Williams Holmes obtained a search warrant, which permitted him to go to Wasco State Prison to obtain saliva and blood samples from Erskine. (25 RT 3649-3651.) Also, a criminalist examined additional items from the crime scene to determine whether there was any more evidence available for DNA testing. (25 RT 3606-3607.) The criminalist extracted cells you would find in one's mouth (epithelial cells) from a cigarette butt. A sample from cuttings of a pair of blue jeans from one of the boys revealed one sperm cell. (25 RT 3588, 3615.) A green shirt revealed one sperm cell, the boys sweatshirts each revealed a low number of sperm. (25 RT 3645-3647.)

Dr. Wendy Wright, a pediatrician at Children's Hospital, reviewed the autopsy photos and report in an effort to determine the stage of pubescent maturation of the boys. (26 RT 3667-3669.) She opined that neither boy was of the pubertal stage of development at which they could generate sperm. (26 RT 3670.)

Around the time of Charlie and Jonathan's murders, Lori Behrens was Erskine's roommate. She was in the United States Navy at that time. She had orders to be stationed on the naval sub base in San Diego around 1992 or 1993. (26 RT 3672.) At that same time, Behrens attended Southwest College in Chula Vista where she was enrolled in a business certificate program. She met Erskine there; he was taking business classes as well. (26 RT 3672-3673.) Behrens socialized with Erskine, had coffee with him, and talked with him about material discussed in their classes. (26 RT 3674.) She knew Erskine to carry a knife—a buck knife, perhaps, with a "pretty good blade"—four to five inches in length. He wore it on his hip in a dark black or navy blue case. He appeared to be skilled in using the knife as he was always "flipping it." (26 RT 3676.) Behrens also knew Erskine to be a smoker. (26 RT 3677.) Erskine became Behrens's roommate at her Mission Hills home in March 1993. (26 RT 3677-3678.) She considered him a good roommate. (26 RT 3678.) He drove two cars, one of which was an older model Volvo. (26 RT 3679.) Erskine lived with her about three and a half months—from March 1993 until the beginning of the summer. (26 RT 3680.)

b. Other Crimes Evidence

(1) Erskine's Sexual Assault on Jennifer M.[3]

On October 22, 1993, Jennifer M. was waiting for a bus around 1:00 p.m. The bus drove by without stopping for her. She began talking to herself out loud about the bus not stopping, and Erskine, who had been standing across the street, responded. (26 RT 3686.) Jennifer M. could not

[3] By the time of Erskine's trial, Jennifer M. was unavailable as a witness. A transcript of her prior testimony from February 28, 1994, was read to the jury. (26 RT 3683.)

hear Erskine, so she walked across the street. (26 RT 3686-3687.) Erskine offered Jennifer M. a ride home, and Jennifer declined, stating she would instead wait for the next bus. Erskine then asked if she wanted something to drink[4] to which Jennifer responded "yes." (26 RT 3687.) They went inside, Erskine brought Jennifer and himself beers, and they sat on the couch. (26 RT 3689.) Jennifer M. noticed that Erskine was moving around rather quickly, "running in circles basically," and from her past experience over the course of 10 years with methamphetamine, she believed Erskine was under the influence of the drug. (26 RT 3689-3690.) At the time of the events about which she was testifying, Jennifer M. was no longer using methamphetamine and was attending Century Business College. (26 RT 3690.)

Erskine asked Jennifer M. if she had drugs, and he admitted that he was under the influence of methamphetamine. He brought out a pouch of drugs and a mirror and set them on the television. Erskine locked the deadbolt on the door, sat down, and began "making out lines" on the mirror. (26 RT 3691.) Jennifer M. relented and ingested a line of methamphetamine, snorting it into her nose, as did Erskine. They each drank a beer. (26 RT 3692.)

They then moved into the other room, which was a dining room that also had a bed that pulled down from the wall. (26 RT 3694.) Jennifer M. was going to walk back into the other room when she felt something around her throat. The next thing she knew, she was on the floor and having trouble breathing. (26 RT 3695.) When she came to, she felt Erskine's arm around her throat. (26 RT 3696.) Jennifer M. tried to breathe and ask Erskine "why," but she finally allowed her body to go limp, shut her eyes, and did not move. (26 RT 3696.) When Erskine let go of her, Jennifer M.

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[4] Apparently, this encounter took place in front of Erskine's home.

opened her eyes and realized that Erskine had retrieved a knife that he was holding to her throat. He demanded her to stand up and remove all of her clothes. (26 RT 3696-3697.) Jennifer M. complied with Erskine's order as she feared for her life. (26 RT 3697-3698.) Jennifer had defecated in her underwear upon being strangled by him. (26 RT 3698.)

Erskine duct taped Jennifer M.'s mouth and tied her hands behind her back. He laid her down on the couch, got a washcloth, and cleaned her from the mess she had made in her clothes from defecating when he strangled her into unconsciousness. (26 RT 3698.) Then, with a small pair of scissors and a razor, Erskine began to cut and shave Jennifer M.'s pubic hair[5]—he said he was doing so for "hygiene reasons." (26 RT 3699.) She felt that in taking her hair, Erskine took her dignity too. (26 RT 3739.) Erskine took Jennifer into the bathroom where he turned on the shower. He removed the rope and duct tape from Jennifer and ordered her to get into the shower and wash herself; Erskine was in the shower too. Jennifer continued to comply with all of Erskine's orders because she was scared. (26 RT 3700-3701.) After the shower, Erskine provided Jennifer M. with a towel and a hairbrush so that she could brush her hair and put it in a ponytail. (26 RT 3701.)

A series of sexual assaults ensued, and Jennifer obliged Erskine in all of his orders. He told her that as long as she did everything he said, she would be okay and would walk out of his house. If she did not, she would go home in a body bag. (26 RT 3702.) Erskine first forced Jennifer M. to orally copulate him on the couch for 15 to 20 minutes. (26 RT 3701, 3703.) Then, he moved her to the dining/bedroom where he sat in a chair and forced her to orally copulate him while she was on her knees. Erskine had

[5] The jury was shown a photograph of Jennifer M.'s shaved pubic region that had been taken by the detectives while investigating the crimes against her. (28 RT 3976.)

placed four or five mirrors (the size of medicine cabinet mirrors) around the room. (26 RT 3703.) He had Jennifer go back to the other room and orally copulate him on the couch again. Erskine took the mirrors with him. (26 RT 3704.) Then, Erskine pulled the bed down from the wall and sat on the edge of the bed while Jennifer orally copulated him once again. He also inserted a dildo into Jennifer's vagina, and forced her to manipulate it while still orally copulating him. The mirrors were once again positioned around the area. (26 RT 3704-3705.) Erskine had a shotgun mounted up on the wall. (26 RT 3711.) Prior to pulling the bed down, he pulled the shotgun down, but then put it back. (26 RT 3714.)

Next, Erskine decided he needed to make a phone call. He sat on the corner of the bed, positioned Jennifer M. on her knees in front of him, and ordered her to orally copulate him while he was on the phone. (26 RT 3705.) Then, Erskine brought Jennifer onto the bed where he orally copulated her, inserted a vibrator into her vagina, and then inserted his penis into her vagina. (26 RT 3708.) Eventually, Erskine ejaculated in Jennifer M.'s mouth. (26 RT 3709.) Jennifer M. did not commit a single one of the sexual acts with Erskine willingly. (26 RT 3739.)

Erskine then provided Jennifer M. with different clothes to wear as hers were dirty. She had started to rinse out her clothes, and Erskine finished the task. (26 RT 3710-3711.) He asked her when she had last eaten a good meal and proceeded to cook her a steak. (26 RT 3710.)

Erskine, again, took the shotgun off the wall and began touching the round in the chamber. (26 RT 3711, 3713.) He told Jennifer M. that if she cared about anybody, she would not send anybody around to his door because he would not be afraid to shoot anyone. (26 RT 3712.) This "terrified" Jennifer M. more than she already was. (26 RT 3714.)

When he was through with her, Erskine took Jennifer M. to the Hyatt Regency Hotel because she had told him she was expected to meet a friend

who worked there as a cocktail waitress—to celebrate passing their first exam. (26 RT 3718.) She told Erskine that if she did not arrive as expected, her friends would know something was wrong. (26 RT 3719.) She arrived at the hotel at 6:30 and looked for her friends. (26 RT 3719-3720.) Jennifer M. did not immediately call the police as she was concerned Erskine might be watching her, and she did not want to jeopardize her safety or that of anyone else. (26 RT 3720.)

While Jennifer M. was waiting for her friends to arrive, she wrote down the details of being raped by Erskine. (26 RT 3722.) Eventually, she saw Mr. Granillo—the admissions representative at Century Business College, who had also been invited to join the celebration. (26 RT 3720.) She walked up to him and gave him a big hug. He immediately asked what was wrong. Jennifer M. said she could not tell him, but had something written down she wanted him to read. (26 RT 3722.) Granillo read what Jennifer had written and told her she needed to go to the police. Jennifer M. resisted the advice for fear that Erskine would carry out his threat to kill her and anyone that came to his door in response to her telling them what had happened. (26 RT 3723-3724.) Jennifer M. stayed at the Hyatt about an hour, and then left with Mr. Granillo. He offered to take her home, but she was afraid to go home because Erskine knew her address. (26 RT 3725.) Instead, Granillo took her to the house where he rented a room and permitted Jennifer M. to stay in the guest bedroom. (26 RT 3727-3728.) Jennifer M. stayed with Granillo the next two days as well. (26 RT 3729, 3734.) During that time, Jennifer M. looked in the mirror, pulled down her eyelids, and noticed blood lined the bottom of her eyes. (26 RT 3730, 3732.)

When she was finally able to be at home by herself, the Tuesday following the Friday when Erskine raped her (26 RT 3686), Jennifer M.

called the police. (26 RT 3736.) Officers responded, took her statement, and photographed her. (26 RT 3737.)

San Diego Police Detective Christine Gregg took Jennifer M.'s statement on October 22, 1993. (26 RT 3843-3844.) She observed that Jennifer M. was injured—both of her eyes were bruised and bloody underneath. "She was emotionally extremely shaken." (26 RT 3844.) Jennifer M. pointed out Erskine's home to the detective who then obtained a search warrant. (26 RT 3846-3847, 3851.) In executing the search warrant, Detective Gregg found a shotgun and ammunition in Erskine's living room. (26 RT 3852-3854.) A forensic specialist examined the shogun, which was on a gun rack, and observed that the action was closed and empty, the safety was on, and the magazine in place contained 410 ammunition. (26 RT 3867, 3871.) Detective Gregg also discovered a shaving kit with yellow rope next to it in the bathroom. (26 RT 3855.) Additionally, there was a pouch with narcotics inside and more yellow rope next to it in the living room closet. (26 RT 3855.) The detective also found a plastic bag containing numerous vibrators and dildos in the living room. (26 RT 3856-3857.) A search of Erskine's Volvo revealed two razors and a razor blade in the driver's side door, a brief case in the backseat, duct tape in the front seat, and a roll of adhesive tape in the passenger's door. (26 RT 3859.) Detective Gregg found yellow nylon rope in the trunk of Erskine's car. (26 RT 3860.)

Erskine was arrested outside his home. (26 RT 3865.) He had a folding knife with a four-inch blade in a sheath on his belt at the time. (26 RT 3865-3866.) When Detective Gregg met with Erskine following his arrest, he was very calm and not worried; he appeared "boastful and cocky." (26 RT 3861.)

(2) The Renee Baker Homicide

Palm Beach, Florida Police Officer Robin Smith was patrolling the intercoastal waterway on June 23, 1989. (28 RT 4001-4002.) While she was stopped in a parking lot around 7:15 a.m., a firefighter, Bill Crozier, came across a bridge in his personal vehicle, pulled into the parking lot, and waived the officer over. (28 RT 4003.) Crozier believed that he might have seen a body on the shoreline of the nearby bird sanctuary. (28 RT 4004.) Officer Smith retrieved binoculars and went with Crozier to the bridge. Through the binoculars, the officer determined that there was in fact a body on the shoreline. (28 RT 4007.) Officer Smith and Crozier walked through the bird sanctuary toward the body. (28 RT 4009.) As they neared the body, the officer noticed a purse, pants, a shirt, and a bra in a neat pile with a necklace sitting on top. (28 RT 4010-4011.) Then, Officer Smith saw a white female lying on her stomach with her hands beneath her torso. (28 RT 4011.) Her body exhibited lividity—a condition where the blood settles to the bottom of the body—and she appeared very purple. (28 RT 4012.)

Detective Gary Sallenbach arrived at the crime scene and observed the female body lying on an oyster bed. There appeared to be drag marks and bare foot prints in the sand leading to that location. (28 RT 4021, 4024, 4027.) Detective Sallenbach discovered a cigarette butt about nine feet away from the pile of clothing and purse. (28 RT 4025.) A driver's license inside the purse made it apparent that Renee Baker was the victim. (28 RT 4030.) After investigating the crime scene, Detective Sallenbach became aware that Baker's car had been located in an Albertson's parking lot. (28 RT 4031-4032.) Detective Sallenbach found the keys to that car in Baker's purse. Inside the car, the detective found an adjustable wrench on the driver's side floorboard. (28 RT 4034.) The detective looked under the hood of the car and observed that something appeared to be wrong with the

carburetor. Inside the glove box, Detective Sallenbach discovered fireworks, which were sold legally in Florida, and a bill of sale for Renee Baker. (28 RT 4035.)

In June of 1989, John Corporal worked at a fireworks stand with Erskine. (28 RT 4049-4050.) The stand was about a half mile away from an Albertson's grocery store. (28 RT 4051-4052.) Corporal identified a picture of Baker as a girl who used to visit Erskine at the fireworks stand. (28 RT 4052; Exh. 85.)

Dr. John Marraccini, Deputy Chief Medical Examiner in Palm Beach County, conducted Renee Baker's autopsy. (29 RT 4078-4079.) He took swabs from Baker's mouth, anus, and vagina, and took specimens for sexual assault detection. (29 RT 4081-4082.) Dr. Marraccini observed preliminary evidence of asphyxia in that Baker's eyes showed petechial hemorrhages. (29 RT 4082.) She also had abrasions on the right side of her neck, marks typically seen in cases of manual strangulation. (29 RT 4083.) Baker had gray foam on the outside of her face, which is often seen where the mechanism of demise is drowning. (29 RT 4084.)
Dr. Marraccini discovered injuries on Baker's tongue and lips indicative of "oral assault." (29 RT 4084.) She had abrasions and other injuries consistent with floating in an aquatic environment and scraping on the bottom. (29 RT 4084.) An examination of Baker's neck revealed scattered hemorrhages and a fracture to the left side of the hyoid bone—typical findings of strangulation. (28 RT 4085.) She had severe injuries to the back of the neck of the hyperflexion type, meaning that her head and neck had been forced forward causing hemorrhaging and snapped ligaments in the back of the neck. (29 RT 4085-4086.) A half or full Nelson (where the perpetrator's arms are pressed against the back of the victim's neck after being curled under the victim's armpits) could cause that type of damage. Baker had hemorrhaging all the way down the linings next to the spinal

cord and a permanent separation of the fifth and sixth neck bones because those ligaments had been disrupted. (29 RT 4086.) Dr. Marraccini observed bruising to Baker's left temple, suggestive of a blow to that area. An internal examination revealed findings consistent with drowning; Baker's lungs were swollen and enlarged. (29 RT 4087.)

Dr. Marraccini opined that Baker's cause of death was drowning with a contributory cause of death being blunt neck trauma; he believed Baker's head had been pushed forward and she had been strangled. The manner of death was homicide. (29 RT 4089.) Based on a microscopic examination of the tissues, Dr. Marraccini was able to determine that the posterior neck trauma (the hyperflexion) occurred first, Baker survived at least an hour, the anterior neck trauma occurred next (strangulation with such force as to fracture the hyoid bone), and drowning was the final mechanism of death. (29 RT 4089-4093.)

Dr. Cecelia Crouse, employed by the Palm Beach County Sheriff's Crime Laboratory, conducted forensic work on the Renee Baker homicide case. (28 RT 3979.) She analyzed the cigarette butt from the homicide scene and determined it contained DNA belonging to a male, but could not obtain information on enough genetic markers to enter the findings in the CODIS database. (28 RT 3983, 3985.) On July 31, 2002, Dr. Crouse obtained from West Palm Beach Police Department a DNA profile from Scott Erskine and was asked to run that profile through the local database. Erskine's profile matched that of the cigarette butt found at Baker's murder scene. (28 RT 3986.) Between 2000, when Dr. Crouse first tested the cigarette butt, and 2002, when she discovered the match to Erskine, DNA testing had become significantly more sensitive. Dr. Crouse tested the cigarette butt again using the new and improved test. (28 RT 3986-3987.) Erskine was not excluded as a contributor to the DNA on the cigarette. (28 RT 3989.) Then, Dr. Crouse examined the sexual assault swabs from

Baker and determined that the oral swab contained sperm cells. (28 RT 3989-3990.) She compared Erskine's profile with the cigarette butt and the profile obtained from the sperm fraction of Baker's oral swab. (28 RT 3993.) For the cigarette butt, the statistical frequency of the DNA profile was 1 in 640 billion in the Caucasian population, 1 in 34 billion in the Black population, and 1 in 9.6 trillion in the Hispanic population. For the sperm fraction of the oral swab, the statistical frequency of the DNA profile obtained was 1 in 33.9 quintillion in the Caucasian population, 1 in 9 quintillion in the Black population, and 1 in 110 quintillion in the Hispanic population. (28 RT 3999-4000.) Erskine's DNA profile matched the profiles obtained from both the cigarette butt and the oral swab. (28 RT 3997, 4000.)

2. Defense

Erskine did not testify or present any witnesses on his behalf. (29 RT 4094.)

B. Penalty Phase

1. Prosecution's Case in Aggravation

a. Circumstances of the Crime

Because a different jury determined Erskine's guilt for the murders of Charlie and Jonathan, the prosecutor presented substantially the same evidence of those crimes as she presented at the guilt phase of trial.

b. Erskine's Criminal Activity Involving Force or Violence

(1) Douglas Erskine

Douglas Erskine, Erskine's younger brother, testified generally about growing up in the Erskine household. (73 RT 11663-11664.) They were

a military family who moved around a lot—from San Diego, to National City, to Virginia, to Maryland, and then back to San Diego. His mother is a good mother who kept a good home and put food on the table. (73 RT 11664.) His father made a good living. The family went on vacations together. (73 RT 11667.) Douglas's parents drank, but did not have problems with alcohol. (73 RT 11668.) When they fought, it was typically after the children went to bed, although Douglas did see his father raise his hand to his mother on a couple of occasions. (73 RT 11669.) The Erskine parents taught their children right from wrong and taught them that it was wrong to hurt people. (73 RT 11678.) Their father treated their mother with respect, though their marriage was not perfect and eventually ended in divorce. (73 RT 11678-11679.)

The family moved back to San Diego when Erskine was about 15 years old; Douglas did not see a lot of his brother as he was in trouble much of the time and hospitalized. (73 RT 11669-11770.) Douglas was mostly afraid of Erskine as he was bigger and used to pick on him. When Douglas would cry, Erskine would laugh. (73 RT 11679.)

Douglas recalled an incident growing up where Erskine was calling Douglas's girlfriend names. Douglas told Erskine to "shut up." Erskine went upstairs and retrieved a broken pool cue. Douglas retrieved another pool cue and went after Erskine. (73 RT 11682-11683.)

On another occasion, Erskine told Douglas that he had made a bet with Erskine's girlfriend, Marie Serrano, that she would not like him. Marie asked Erskine why he simply would not "kick [Douglas's] ass." (73 RT 11683.) Erskine got up from the kitchen table and ran upstairs; Douglas was worried he was going to get his guns, so he followed Erskine. (73 RT 11684.) At the top of the stairs, Douglas grabbed Erskine, pulled him out of his room, and hit him. Erskine maneuvered Douglas into a headlock. (73 RT 11684-11685.) Douglas pushed Erskine against the wall,

but Erskine would not let go. Douglas passed out. (73 RT 11685.) When he awakened, Douglas realized no one was around, and he had soiled himself. (73 RT 11685-11686.)

Douglas recalled an additional incident in December 1992. (73 RT 11686-11687.) Douglas believed he had hit Erskine upon which Erskine ran outside, opened the trunk of his Volvo, retrieved a rifle, and chambered a round. (73 RT 11678.) Erskine pointed the rifle at Douglas and said, "This is for you, Doug." Douglas ran inside, slammed the door, and called the police. (73 RT 11688.)

(2) Judy C.

Judy C. is Erskine's younger sister by three years. (73 RT 11781.) When she was about seven years old, and Erskine about ten, they used to go to a vacant barn behind their house with some of her friends of similar age and Erskine's friends of similar age. (73 RT 11781-11783.) They would climb up the stairs to the loft and the girls would be made to orally copulate the boys. Erskine made Judy C. do the act through "threats" or "bribes." She couldn't recall whether Erskine forced her to orally copulate him or one of the other boys. (73 RT 11783.) Judy C. performed these acts on more than one occasion against her will. She was afraid to tell anyone what had happened out of fear for what Erskine would do to her. Judy C. never told anyone about these molestations until she was an adult. (73 RT 11784.)

Judy C. recalled being molested by Erskine on another occasion as well. She was about 11 years old when Erskine came into her room one night while she was sleeping. He felt around her body, including her breasts and her vagina. She pretended to be asleep because she was afraid. She then moved around to act as though she was waking up, and Erskine stopped. (74 RT 11785.) But when it seemed as though Judy C. had gone

back to sleep, Erskine began fondling her again. (73 RT 11785-11786.) Finally, Judy C. sat up and asked Erskine what he was doing. He claimed he must have been sleepwalking. The episode lasted 20 to 30 minutes. When it was over, they walked out of the room, and Erskine asked her not to tell their mother. Judy C. was afraid of Erskine. (73 RT 11786.) She said she would not tell, but told her mother anyway. (73 RT 11786-11787.) When she told her mother, her mother was upset and said something to the effect of, "I'm going to kill him," but Judy C. was unaware of her mother saying anything to Erskine about the incident. (73 RT 11800-11801.) After that, Judy C. tried to keep her distance from Erskine. (73 RT 11787.)

(3) Barbara G.

Barbara G. was one of Judy C.'s best friends. (74 RT 11984.) She spent a great deal of time at the Erskine family home growing up; she was there virtually everyday and spent the night there most weekends. (74 RT 11985, 11987.) The Erskine family treated Barbara G. like one of their own children. (74 RT 11989.) Barbara G. remained close with Judy C. through high school and about a year after, at which point Judy C. got married and moved away. (74 RT 11988.)

In the spring of 1976 (74 RT 12005), when Barbara G. was about 10 years old, she was playing on a chin-up bar while Judy had baseball practice at Harbor View School. (74 RT 11989-11990.) Thirteen-year-old Erskine approached Barbara G. and asked if she wanted to see his fort. Barbara G. went with him, not thinking anything of it. (74 RT 11990-11991, 12007.) They walked about five blocks. Barbara G. walked with her bicycle, for which Erskine said he had a parking spot. When they arrived, Erskine wanted her to put the bicycle inside the "fort," which was a structure made out of bushes. (74 RT 11991-11992.) Erskine pushed the bike inside so that it could not be seen from outside the fort. Then, Erskine

showed Barbara G. where to enter, saying "ladies first." Barbara G. crawled on her hands and knees. (74 RT 11992.)

Erskine entered behind Barbara G., and she felt him place a hand over her mouth and nose. He held a knife to her throat with the other hand. (74 RT 11992.) He warned Barbara G. not to scream or he would kill her. He then ordered her to crawl all the way inside, and he followed her into the middle of the fort. Barbara G. was frightened, confused, and thought Erskine was going to kill her. (74 RT 11993.)

Barbara G. was wearing shorts, and Erskine tried to pull them down as she tried to pull them back up. (74 RT 11993.) She tried to scream and tried to get away, but Erskine got hold of her ankle, and her shoe came off. Barbara G. thought she would be in trouble for losing her shoe. (74 RT 11994.) Erskine held Barbara G. down on her back and told her again not to make a noise, or he would kill her. He removed her shorts and underwear and told her to keep her "beady little eyes closed." Barbara G. did as she was told. (74 RT 11995.) Erskine inserted his finger into Barbara G.'s vagina, removed it, licked it, and put it back in again; he did this four or five times. Then, Erskine did the same thing, but with what felt like a twig or stick. (74 RT 11995-11996.) Erskine turned Barbara G. over and once he had her on her stomach, he penetrated her anus with his finger, licking his finger in between as he had done before. He used his tongue around her anus, and then inserted twigs or sticks in her anus. (74 RT 11997.) This hurt Barbara G., and she was scared. Then, Erskine turned Barbara G. over once again and put his penis in her mouth. She told him she couldn't breathe, and Erskine removed his penis every few seconds to give her air. (74 RT 11998.)

When he was done, Barbara G. said she needed to go home. Erskine made her swear to God that she would not tell anyone what he had done, or he would kill her. Barbara G. swore she would not tell. (74 RT 11998-

11999.) Barbara G. rode her bike home. She did not tell her parents immediately; they were eating dinner, and she was afraid to tell them. (74 RT 11999.) She told Judy C. at school the next day, and Judy C. advised her to tell her mother, Mrs. Erskine. (74 RT 11999.) The two girls went to the Erskine house after school, and Barbara G. waiting outside for Judy C.'s signal that her mother was home and Erskine was not. While Barbara G. waited at the back of the house, Erskine appeared, held a knife to her throat, and reminded her that she swore not to tell, and if she did, he would kill her. (74 RT 11999-12000.)

Barbara G. waited until the next day to tell Erskine's mother. Mrs. Erskine hugged her, told her she was very sorry it happened, that Erskine was simply curious, and it would never happen again. (74 RT 12011.) Barbara G. maintained her relationship with the Erskine family but avoided Erskine. Shortly after this incident, Erskine was no longer in the house in any event. (74 RT 12001-12002.)

(4) Randie C.

Randie C. had a "relationship" with Erskine when she was very young, about 11 or 12 years old. (74 RT 11975.) They saw each other nearly every day and would hang out in a "fort" in the field next to her house. (74 RT 11975-11976.) They did not have a sexual relationship, but they would hold hands and kiss. (74 RT 11976.) But when Randie C. was 11 or 12, while they were walking to 7-Eleven, Erskine asked her to "prove [her] love to him" by having sex with him. (74 RT 11977.) Randie C. said "no." Erskine hit her—a sucker punch—above her right ear. (74 RT 11978.) He hit her hard enough to make her stagger. Randie C. turned around to walk home, and Erskine followed her. (74 RT 11979.) He said he was sorry, and it would never happen again. (74 RT 11980.)

(5) Colleen L.

On April 17, 1978, when Colleen L. was 12 years old, she was at a 7-Eleven by her home when Erskine and two friends came into the store. (73 RT 11836, 11838.) One of Erskine's friends, whom Colleen L. knew, asked if she was alone. Colleen L. said "yes," and the boy asked Erskine to walk her home. (73 RT 11838.) Erskine obliged, but while walking Colleen L. home, he held a knife to her throat and warned her not to scream, or he would kill her. (73 RT 11842.) He forced her under a bridge into a drainage ditch and ordered her to take off her clothes. (73 RT 11842-11843.) Erskine forced Colleen L. to get on her knees and orally copulate him while continuing to hold the knife to her throat. (73 RT 11843-11844.) Then, Erskine forced Colleen L. onto her stomach and forced anal sex on her. (73 RT 11844.) Following that, he forced her to have vaginal and oral sex again. All the while, Erskine continued to hold the knife to Colleen L.'s throat. (73 RT 11845-11846.) Erskine's attitude during the attack was "very calm and controlled, cocky." (73 RT 11847.) Colleen L. was scared (73 RT 11842, 11847).

When Erskine was done with her, he told Colleen L. that he supposed he should walk her home as promised. (73 RT 11846.) Erskine walked her home and told her if she told anybody he would kill her sister. Despite Erskine's threat, Colleen L. told her parents. They took her to the hospital and called the police. (73 RT 11847.)

(6) Virgen M.

The day after Erskine attacked Colleen L., Virgen M. was jogging in the morning when someone tapped her on the back. (73 RT 11852-11853.) She stopped jogging, and the man who tapped her on the back immediately pulled out a knife, and told her if she was quiet and cooperative, nothing would happen to her. (73 RT 11853.) He held the knife to her abdomen.

(73 RT 11855.) Virgen M. believed the man to be serious, and she did what he told her to do because she was afraid. The man grabbed her hand and walked her toward a drainage ditch at the end of the roadway. (73 RT 11855.) Virgen M. asked him why he was doing this, and he responded, "To keep up my reputation." (73 RT 11855-11856.) To buy time, Virgen M. told the man she lived nearby and offered to take him to her home. Instead, the man told her to jump a fence they had come upon. Rather than do as he said, Virgen M. took the opportunity to run. The man chased her and grabbed her by her long hair. (73 RT 11856.) When he tried to pull her into some bushes, Virgen M. grabbed the man by his "personal parts." (73 RT 11587.) The man put her into a headlock and held the knife to the left side of her head (73 RT 11857); he told her to "shut up" (73 RT 11858-11859). The man cut her head, hand, and abdomen. Virgen M. believed the cuts to her head and abdomen were intentional while the remainder of the cuts were ones inflicting while she tried to defend herself. (73 RT 11858.) During the attack, the man was "very much in control of the situation" and "very rational." Virgen M. believed he was going to kill her if she did not escape. (73 RT 11861.)

When the man was distracted for a second, Virgen M. was able to get away. She ran to a neighbor she knew—Manuel Jimenez. (73 RT 11859.) Jimenez was driving out of his condo at the time as he was on his way to work. He saw Virgen M. with grass in her hair, crying, and he stopped to ask if she was okay. (73 RT 11866-11867.) A groundskeeper for the condo was there at the time too. (73 RT 11867.) Virgen M. said she was jogging in the vacant lot with tall shrubs adjacent to the condos when someone came out of the bushes and attacked her. (73 RT 11867.) Jimenez asked Virgen M. to describe what the man was wearing, and she did. (73 RT 11859.) The groundskeeper got into Jimenez's car and the two drove to the area. (73 RT 11867-11868.) The groundskeeper got out to

take a closer look, saw Erskine crouching in the bushes, and pulled him out. Erskine had a knife, which the groundskeeper took from him. (73 RT 11868-11869.) The men put Erskine in the backseat of Jimenez's car and drove to the condos where Virgen M. was waiting for them. (73 RT 11859-11860, 11868.) She identified Erskine as the person who had attacked her.[6] Jimenez drove Erskine to his house and told his wife to call the police. (73 RT 11869.) Erskine attempted to run, but Jimenez thwarted the effort by jumping on Erskine and holding him down until the police arrived. (73 RT 11870.)

San Diego Police Officer Norman Newton arrived at the scene and contacted Erskine. (74 RT 11876-11877.) After Erskine indicated he understood and waived his rights pursuant to *Miranda v. Arizona* (1966) 384 U.S. 436 [86 S.Ct. 1602, 16 L.Ed.2d 694], including his right to have his parents present during questioning as Erskine was 15 years old at the time, Officer Newton asked Erskine what happened. (74 RT 11878-11880, 11883-11884.) Erskine said he was cutting through a field in the area when he saw the victim jogging. He claimed not to have said anything to her, nor she to him. Erskine claimed the next thing he knew, a man stopped him and hit him in the head. (74 RT 11880.)

(7) Robert M.

Robert M. was 14 years old on June 24, 1980. (74 RT 11924.) He had finished the 8th grade, was on summer break, and was about to enter Ramona High School where he was hoping to play football as a freshman. The football coach would open the weight training facilities and the track so that the young men could use them to prepare for tryouts. (74 RT

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[6] Virgen M. also identified Erskine in a photo lineup shortly after the attack, but she was unable to identify Erskine at the time of trial 26 years later. (73 RT 11860-11861.)

11925.) Robert M. arrived at the high school that day at 6:00 a.m.; his mother drove him. The facilities were not yet open, so Robert M. waited. (74 RT 11926.) While doing so, Erskine approached him and asked him where the restroom was. Robert M. had noticed Erskine earlier, sitting on a bus stop bench in front of the school. Erskine was wearing white shoes, blue jeans, a t-shirt, a green jacket, a black western style cowboy hat with a red bandana tied around it, and he was carrying a bedroll and suitcase. Robert M. gave his impression of where he thought the bathroom might be, but indicated he was not very familiar with the school. (74 RT 11928.) Erskine left, but then returned, stating that he could not find the bathroom and asked Robert M. if he would help him look.

Robert M. accompanied Erskine, and Erskine explained that he was starting a new job at Camp Friendship—a camp for handicapped children. (74 RT 11929.) Erskine was directly behind Robert M. as they walked behind the main auditorium and school facilities building. Suddenly, Erskine's demeanor changed. He grabbed Robert M. by the hair and pushed him against the wall. Erskine was very angry. (74 RT 11930.) He said, "I'm going to motherfuck you," and warned that Robert M. had better do what he said, or he would kill him. (74 RT 11932.) Erskine ordered Robert M. to remove his gym shorts, said, "do it or I'll kill you," and held Robert M. by the collar with his other hand reared in a fist. (74 RT 11931-11934.) Robert M. was very scared. Robert M. attempted to talk Erskine out of assaulting him, begged him not to do it, and offered Erskine the dime he had in his pocket. (74 RT 11933.) Realizing he was not going to succeed, Robert M. lowered his gym shorts to his knees, but left his underwear on in hopes that Erskine would stop. (74 RT 11934.) Erskine pulled Robert M.'s underwear down several times, while Robert tried to pull them back up. (74 RT 11934.) Erskine repeatedly slapped Robert M.'s penis. (74 RT 11934-11935.)

Then, Erskine demanded that Robert M. lay on the ground and told him that he was "going to motherfuck [his] eyes out . . . ." (74 RT 11936.) Robert M. tried to run away, but he got about two steps and yelled "help" when Erskine slammed him back against the wall. Erskine started hitting him in the face as hard as he possibly could with a fist containing a large ring. Erskine hit Robert M. at least 20 times. (74 RT 11936.) Erskine threw him to the ground, and Robert M. tried to cover himself. (74 RT 11936-11937.) Erskine kicked him in the side of the head. Robert M. was terrified. Erskine continued to punch him and eventually began to choke him. (74 RT 11937.) Erskine was in control during the entire attack, which appeared to be planned. (74 RT 11950.)

At some point, Robert M. passed out. (74 RT 11937-11938.) When he came to, Erskine asked if he was okay as if he had had no involvement in the attack. (74 RT 11938.) Robert M. jumped up and took off running. He ran to the nearest house, pounded on the door, told the woman inside what had happened, and the woman contacted Robert M.'s mother to come get him. (74 RT 11939.)

Robert M. suffered many facial lacerations, and his eyes swelled shut. He had significant bruising as well, particularly to his throat. His mother took him to the hospital. (74 RT 11940.)

San Diego County Sheriff's Deputy Michael Vasorich responded to the call of an assault at Ramona High School. (74 RT 11951.) He parked his patrol car, saw a group of people, and walked toward them when Erskine approached him and informed him that he was the one who called about the boy. He also said he had seen the suspect. Erskine claimed he saw the suspect run, and Erskine went to the area from which he had run and found the boy. Erskine claimed he tried to help the boy, but he started screaming, so Erskine left to get help. (74 RT 11952-11953.) Erskine described the suspect as a White male, wearing a black cowboy hat with a

red bandana around it, a green jacket, jeans, and boots. At the time, Erskine was bare-chested, wearing jeans, white tennis shoes, and had a yellow shirt hanging out of his back pocket. (74 RT 11953-11954.)

Deputy Vasorich searched for the victim, but encountered a coach instead. Robert M. had given the coach a description of the suspect. He said he was a White male, wearing a cowboy hat with a red bandana around it, a green jacket, jeans, tennis shoes, and was carrying a yellow sleeping bag and a small brown suitcase. (74 RT 11954-11955.) The deputy looked toward the bus stop and noticed Erskine there with a yellow sleeping bag and small brown suitcase. (74 RT 11956.) The deputy asked Erskine whether he could look in the suitcase, and Erskine agreed. Erskine opened the suitcase for the deputy, but before doing so, he told the deputy that he had a black hat and green jacket inside. (74 RT 11957.) Inside the suitcase, Deputy Vasorich found the black cowboy hat with a red bandana around it (which he noted was an odd item to carry in a suitcase as the hat was crushed) and a green jacket. (74 RT 11957-11958.) The deputy arrested Erskine. (74 RT 11958.)

The case proceeded to a trial at which Robert M. testified (74 RT 11946-11947), and Erskine was convicted of a felonious assault. (74 RT 11972-11974.)

(8) Michael A.

Michael A. had lived on the streets off and on for much of his life. (74 RT 11887.) On January 6, 1981, when he was 19 years old (74 RT 11894), Michael A. was in jail, having been arrested for sleeping underneath a roller coaster (74 RT 11889). While in custody, Michael A.

encountered Erskine[7] who appeared to be the "shot caller"—the individual who was "running the show"—for the housing unit. On one occasion, a deputy came by the housing unit with envelopes which would allow inmates to order items from the commissary. (74 RT 11890.) Michael A. wished to order something, but he had no money to do so. (74 RT 11890-11891.) A group of three inmates, including Erskine, were nearby, and Michael A. asked if someone could help him pay for items from the commissary. (74 RT 11891.) Erskine asked how he was going to pay for it, hit him in the face with a fist, and then hit him in the other side of the face with a fist. Michael A. fell to the floor. (74 RT 11893-11894.) Erskine grabbed him by the back of his jumpsuit and dragged him off to the side. Erskine demanded, "You're going to suck our dicks, bitch, or I'm going to have this whole tank pull a train on you," by which Michael A. understood Erskine was going to have the inmates sexually assault him. (74 RT 11895.) Michael A. told Erskine he would rather die first, at which point Erskine "went into a frenzy," grabbed Michael A. by the back of the head, and started slamming his head into the concrete. (74 RT 11895.)

As the attack continued, Michael A. ended up partially beneath a bunk bed. (74 RT 11896.) Erskine dragged him out and told him everything would be okay if Michael A. did a favor for him—the favor was for Michael A. to orally copulate Erskine. (74 RT 11897-11898.) Michael A. complied as he was afraid of Erskine. (74 RT 11898-11899.) A guard walked by with a flashlight, and Michael A. froze. (74 RT 11899-11900.) Erskine mouthed something to the effect of, "If you say anything, you're fuckin' dead." (74 RT 11900.)

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[7] Michael A. did not identify Erskine in court, but at the time of the assault described herein, he was shown booking photos and was able to identify "Scott." (74 RT 11901-11902.) At trial, Michael A. identified that same booking photo, which was Erskine's, as the person who attacked him. (74 RT 11902.)

(9) Deborah Erskine

Deborah Erskine is Erskine's former wife. (75 RT 12031-12032.) She met Erskine at her brother's house in West Palm Beach, Florida; Erskine worked at her brother's flower and fireworks stand. (75 RT 12032.) Deborah found Erskine to be loving, caring, friendly, social, and charming. (75 RT 12032-12033.) Deborah had a daughter from a prior relationship who lived with her; Erskine was good to Deborah's daughter. (75 RT 12033-12034.)

Erskine lived in Deborah's home. (75 RT 12035.) Deborah became pregnant with Erskine's child, and after that, her relationship with Erskine changed. He became very controlling, short in temper, and hit her on a couple of occasions during arguments. (75 RT 12034.) On May 14, 1989, while Deborah was pregnant, Erskine became physical with her. They had been arguing for a couple of days about Erskine stealing money from her. (75 RT 12035.) That day, Deborah came home from work and noticed the window was closed and the curtains were drawn; normally, they were open. (75 RT 12035-12036.) Deborah was carrying groceries into the house and went directly into the kitchen, walking past Erskine who was sitting in a chair in the living room. (75 RT 12036-12037.) They started arguing as they had been, and Erskine became very angry. During the argument, they ended up in the bedroom where Erskine pushed Deborah onto the bed and put his hands around her neck. He was yelling and screaming at her while choking her. (75 RT 12037-12038.) Deborah was scared. She was six months pregnant at the time. (75 RT 12038.) Deborah tried to get off the bed, and Erskine kicked her in the stomach. He was wearing boots at the time. (75 RT 12039.) Deborah tried to leave through the front door, but Erskine blocked her. He had dead-bolted the door too. (75 RT 12040-12041.) Then, Deborah tried to leave through a sliding glass door in the back of the house that was never locked. That door was locked as well, and

it was a difficult door to unlock. Deborah had to lift the door off its track while Erskine pursued her. (75 RT 12041-12042.) Eventually, Deborah escaped and ran down the street. Erskine followed her, telling her he had a gun. Deborah ran to her mother's house, which was nearby, where her brother happened to be out front. (75 RT 12043-12044.) She yelled that Erskine had a gun and ran inside the house. Her brother got into a fist fight with Erskine. (75 RT 12044.)

After the attack, Deborah went to the hospital and discovered she had suffered pregnancy complications. She was two centimeters dilated due to Erskine kicking her in the stomach, and received orders to be on bed rest for the remainder of her pregnancy. (75 RT 12044.)

Erskine remained out of the house for sometime following the assault, but he and Deborah eventually reconciled. Erskine apologized. He continued to be physical with Deborah, but no other incident compared to this particular incident. (75 RT 12045.)

(10) Phyllis Marie Serrano

Phyllis Marie Serrano met Erskine while working at the same rental car moving business—West Coast Car Movers. (76 RT 12258.) Erskine had a supervisorial position at the company and performed very well at it. (76 RT 12269-12270.)

Serrano saw Erskine on a daily basis. (76 RT 12259.) They dated and lived together around January and February 1993. (76 RT 12259-12260.) Serrano described Erskine as social and charming. (76 RT 12260.)

On March 11, 1993, Erskine became physically violent toward Serrano. They had been living together for awhile, and Erskine was not paying his share of the expenses. (76 RT 12262.) On that day, Serrano tried to prevent Erskine from using the phone because he was not paying his share. Erskine became angry, pulled the phone out of the wall, and

threw it on the ground. (76 RT 12263-12264.) Serrano was scared. (76 RT 12264.) Erskine put his hand around her neck and applied so much pressure, it was difficult for Serrano to breath. (76 RT 12265.) Erskine raised his other hand in a fist and said he could "beat [her] ass." Serrano said she was going to call the police, and Erskine stopped. (76 RT 12265.) Serrano called 911. (76 RT 12266.) Erskine stayed at the home, and when the police arrived, they arrested him. (76 RT 12266-12267.)

After this incident, Erskine moved out for a while and moved in with his friend Lori Behrens who was his roommate at the time he murdered Jonathan and Charlie. (76 RT 12267.) In time, Erskine apologized and reconciled with Serrano. (76 RT 12267-12268.) They eventually married. Erskine was able to control his temper at all other times. (76 RT 12272.)

(11) Jennifer M. and Renee Baker

The prosecutor presented substantially the same evidence of the Jennifer M. rape and the Renee Baker homicide that she presented in the guilt phase.

c. The Impact of the Murders on the Sellers and Keever Families

Jennifer Sellers was Jonathan's twin sister. (77 RT 12472-12473.) She remembered that he was fun, loved to smile, loved to laugh, loved to make others laugh, and was happy all the time. He was always trying to keep up with his big brother Alton because he wanted to be just like him. (77 RT 12475.) A few weeks before what would have been their April 18th birthday, Jonathan got a bike as an early birthday present. He rode that bike the day he was murdered. (77 RT 12476-12477.) Before Jonathan's murder, Jennifer and Jonathan always had a birthday party together—with two cakes. (77 RT 12479.) After Jonathan's murder, their birthday became a memorial day for her brother. Their birthday was 22 days after Jonathan

was murdered. (77 RT 12513.) After Jonathan's death, her family would "put on a show" because it was Jennifer's birthday too. Jennifer missed the second cake. (77 RT 12483.)

Jennifer badly wanted to ride bikes with her brother the day of the murder, but Jonathan begged their mother not to let her go. Jennifer was upset and went to a friends house instead. (77 RT 12480-12481.) She remembered the police coming to her house and telling her family they had found some bodies. Her mother screamed and then fell on the floor. Her mother would not eat for a long time after that. (77 RT 12481.)

Since Jonathan has been gone, it has been lonely for Jennifer. She missed competing with him over things like who would have been accepted to the best college and wondered what his girlfriend would have looked like. (77 RT 12483.)

Milena Sellers had six children—three boys and three girls, including 9-year-old Jonathan. (77 RT 12485, 12515.) Milena described Jonathan much like his twin sister did—he was full of life, he loved to smile, and enjoyed making people happy. Jonathan liked to help people and got along with everybody. (77 RT 12486-12487.) Jonathan did well in school. He was enrolled in a special education program because he was dyslexic, but he was about to enter the regular program as his teacher felt he no longer required the special education program. (77 RT 12488.)

Milena knew Jonathan wanted a bike, but she did not have the money to buy him one. She happened upon a bike at a yard sale she attended with her sister, and her sister paid for it. Milena gave it to her son a few weeks before his birthday; he was so happy to have it. (77 RT 12492.) Milena wished she had never given her son the bike. (77 RT 12492-12493.)

When the family learned that Jonathan was dead, Milena's then-husband came into her room and said, "Our baby is dead . . . somebody killed our baby." (77 RT 12504.) Milena could not grasp the concept that

someone had murdered Jonathan; she thought he had drowned. (77 RT 12505.) After that, Milena could not get out of bed, could not eat, and could not sleep. She had no concept of time passing and lost a lot of weight. (77 RT 12505-12506.) Her oldest son, Alton, came into her room one day screaming that she was going to die and that the children would end up in a foster home. That was what finally got her out of bed. (77 RT 12507.) But Milena could not sit at the family table and eat dinner; it was too hard to see Jonathan's empty space and not to make him a plate. She could not pass down Jonathan's clothes to his younger brother, even though they did not have a lot of money. (77 RT 12508.)

When Milena finally had to clean out Jonathan's room, she did not want to get rid of his clothes, so she stored them in the garage. But she folded up his cub scouts shirt and put it in her own drawer. It was still there at the time of her testimony. (77 RT 12509.)

Lisa Wesley was Charlie Keever's older sister by 12 years. (77 RT 12516-12517.) To Wesley, Charlie was very sweet and did not talk back; he would simply play video games and ride his bike. (77 RT 12518.) Wesley and her husband lived down the street from Charlie with her husband. Charlie would come over to her house to play with their basset hound. He also showed an interest in cooking, so just before he was murdered, Wesley taught Charlie how to bake chocolate chip cookies. (7 RT 12519.)

When the police notified the family that they had found the bodies of two boys, Wesley's "life changed at that moment." (77 RT 12524.) She avoided Interstate 5 for years because she could see the open field from the freeway. She would not patronize any stores in the vicinity. Wesley would visit Charlie at the cemetery every Friday, taking fresh flowers to each visit for about two years after his murder. (77 RT 12525.) Wesley misses

Charlie all the time. She has children of her own now and wishes Charlie was present to be their uncle. (77 RT 12528.)

Michael Keever was Charlie's big brother. He was very close with his "little buddy" Charlie. Michael, Charlie, and their father would go fishing together routinely. (77 RT 12548.) Michael was in the military and was stationed in upstate New York at the time Charlie was murdered. A Red Cross representative told him that he was being sent home because something had happened. Michael went home to bury his brother. (77 RT 12549-12550.) Michael will never live in San Diego again as there are too many bad memories. (77 RT 12550.)

Maria Keever described her son as quiet and happy. He liked to play Nintendo, ride his bike, and go fishing with his father. (77 RT 12538.) Charlie was very close with Maria because her other children were already grown and out of the house. (77 RT 12538.) Maria still carried Charlie's wallet in her purse. (77 RT 12539.) The day that Charlie went on his last bike ride, he could not find his sweatshirt prior to leaving the house. Maria gave him hers; he was wearing his mother's sweatshirt when his body was discovered. (77 RT 12540.) At the time of her testimony, Maria explained that she still kept Charlie's belongings at home and had kept his room the same for years. She also went to the murder site for years, everyday, searching for clues or people that would provide her information. (77 RT 12546.) At one point, Maria bought a gun. She went to the site and wanted to shoot herself at the same location where her son had been killed. (77 RT 12547.) For eight years, Maria called the police everyday and sometimes twice a day. Her life had been "a living hell" since Erskine murdered her son. (77 RT 12547.)

Maria's children described how Charlie's murder destroyed their family, their mother in particular. Charlie's death "consumed" Maria; her entire life centered around talking to the police, making her name and

phone number available for people to call her with information, and even contacting psychics. (77 RT 12527.) She became "obsessed." (77 RT 12550.) Maria wanted Michael to name each of his four children "Charlie;" none of Michael's children are named "Charlie" because there were too many memories involved for Michael. (7 RT 12550.)

2. Defense Case in Mitigation

a. Being Hit by a Car at Age Five

In May 1968, when Erskine was 5 years old, he lived with his family in Navy housing in Long Beach. (78 RT 12587, 12589.) In May of 1968, Erskine was going to a school carnival with his older sister, Nadine Braudaway, who was 8 years old at the time. (78 RT 12587, 12591.) They were walking home from the carnival, and attempted to use the crosswalk to cross Pacific Coast Highway, but the cars would not stop for them. They decided to walk further down, closer to their house. They attempted to cross the street again, while not in a crosswalk, and eventually, the car in the lane closest to them stopped and waived them through. (78 RT 12593-12594.) When Braudaway stepped off the curb, she hit the side of a car, and was thrown onto her backside. (78 RT 12594.) Erskine managed to dart into the traffic and as Paul Austin[8] was driving with his family in a 1964 Chevrolet Biscayne slammed on his breaks and swerved in an effort to miss him, but hit Erskine. (15 CT 3628-3633.) Austin stopped the car and ran to Erskine who was laying in the street and bleeding from his head. (15 CT 3633-3634.)

Dr. James Grisola, M.D., a neurologist, reviewed Erskine's medical records from the May 18, 1968, car-versus-pedestrian accident. (78 RT

[8] The court permitted the defense to present Paul Austin's testimony by way of videotape. (78 RT 12561-12562.) The transcript of his testimony is Court's Exhibit 180A. (15 CT 3627-3640.)

12672, 12686-12688.) The records showed that Erskine suffered a number of injuries, including a fracture to his left femur, a fractured pelvis, fractures of several ribs, and contusions to his lung tissue and brain tissue. (78 RT 12690-12691.) When he was admitted to the hospital, Erksine was nonresponsive to external stimuli and his eyes were drifting away from each other—both of which constitute evidence of brain bruising. (78 RT 12691-12692.) A neurosurgeon was consulted and that individual opined that there was no evidence of a hemorrhage forming that would require surgery. (78 RT 12695.) After this decision, the remainder of Erskine's hospital stay, which was nearly six weeks (78 RT 12703), was on orthopedics with the goal of treating his fractures. (78 RT 12701.) Erskine was never in a coma. (78 RT 12735-12736.) Other than two episodes of headaches after the accident, Erskine had no indication of dizziness, profound memory loss, blindness, or paralysis. (78 RT 12745, 12746, 12748, 12752-12753.) Other than crying and being restless and agitated, which were normal behaviors for a five-year-old with a broken leg, Dr. Grisola could point to nothing in the medical records evidencing Erskine behaving in an unusual manner. (78 RT 12752-12753.) In Dr. Grisola's opinion, the records indicated a mild to moderate head injury. (78 RT 12753-12754, 12759, 12673.)

Dr. Grisola opined that under the medical standards at the time of his testimony, many years after the accident, more assessment of Erskine's brain injury would have been done. (78 RT 12711.) He further explained that a child with a frontal lobe injury is at risk of not fully developing in terms of their understanding of themselves or other people as being emotional entities. (78 RT 12718.) Dr. Grisola also acknowledged that someone with a head injury could also become a sociopath and develop violent and aggressive behaviors in childhood that carry into adulthood. (78 RT 12729.)

b. The Erskine Family

Braudaway testified that her parents were heavy drinkers who would bicker frequently and call each other names. (78 RT 12603-12604.) But she also acknowledged that she admired her father, that the family would go on family trips, and that her mother was a good cook. (78 RT 12601, 12646-12648.) Her father was devoted, honest, and a good provider; her mother worked hard to keep the family home. (78 RT 12652-12653.) Her parents divorced when she was 30 years old. (78 RT 12662.) Braudaway characterized her mother as a bitter divorcee who exaggerated the troubles in the marriage. (78 RT 12663.) Braudaway did not get along with Erskine growing up; his personality was unpredictable and it was hard to tell what would set him off. He would react violently at times. (78 RT 12615-12616.) Braudaway testified that she has issues with alcohol, the worst of which occurred in her late teens. (78 RT 12626.)

Rita Erskine, Erskine's mother, described her marriage as an unhappy one. (79 RT 12807.) Rita testified that she made a concerted effort not to have the marital issues affect the children. (79 RT 12918-12919.) She testified that she married Erskine's father when she was 17 years old because she was pregnant. (79 RT 12817.) She described her husband as "sex crazy." (79 RT 12822.) (79 RT 12824-12825.) Rita testified that her husband would spank her in front of the children and humiliate her. And he eventually began hitting her and throwing her around. She also testified that he had affairs throughout their marriage. (79 RT 12860-12862.) Rita was bitter about her husband's philandering because she endured it for 31 years only to have her husband divorce her. (79 RT 12912-12913.)

Rita explained with respect to the car accident that Erskine was hospitalized for two and a half months and that his condition included brain swelling. (79 RT 12835.) She also testified that after the accident, Erskine would have temper tantrums, violent headaches, and would scream and

bang his head against walls without provocation (79 RT 12844); he did not exhibit this behavior before the accident (79 RT 12839).[9]

Rita explained that Erskine's troubles worsened the older he became. He ran away from home at 13 or 14 years old and was gone for two weeks; he went to the beach to be with a girl. (79 RT 12869.) Erskine ended up at Green Valley Ranch where he was being treated by psychiatrists, including Dr. Roy Resnikoff. (79 RT 12876.) Dr. Resnikoff encouraged the entire family to be in therapy sessions, but Erskine's father did not approve of the family visits, believing only Erskine should be involved. (79 RT 12878-12880.)

Rita testified that Barbara G. never told her that Erskine raped her—she just said Erskine pulled her into a tent, started to pull her panties down, and then she got up and ran. (79 RT 12884-12885.) Rita further testified that her daughter, Judy C., never told her that Erskine molested her—she just said he had his hand underneath her blanket. (79 RT 12887.) Rita was aware her son was arrested shortly after being released from Southwood Hospital in June 1976 for putting his hands down the pants of a 12-year-old girl, fondling her, and having a knife during the act. (79 RT 12888.) Erskine went to trial for that offense; Rita did not believe the 12-year-old victim. (79 RT 12970-12971.) Erskine had told her that the 12-year-old was lying; the young girl liked what he was doing and flirted with him. (79 RT 12977-12978.) At the time of her testimony, Rita still loved her son. (79 RT 12901.)

Rita did become concerned that her son might be dangerous after the incident with the 12-year-old. She sent him to New Hampshire to live with

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[9] Dr. Thomas Wegman, a psychologist, observed that the family had exaggerated the incident, claiming that Erskine was in a coma and reverted to the mentality of a one-year-old. (84 RT 13992-13994.)

her sister-in-law, Janet Erskine. (79 RT 12889, 13008.) Erskine's aunt, Janet,[10] had a good relationship with Erskine. (79 RT 13008-13009.) Erskine started to become a problem, however, skipping school and getting into other trouble. One day, he was caught with a girl in the house (79 RT 13013), and Janet told him she had had enough and was going to send him home to California (79 RT 13015). Erskine reacted by overdosing on Valium that was in Janet's medicine cabinet, requiring his stomach to be pumped. (79 RT 13015, 13017.) Janet called the Erskines and told them what had happened, and Rita came to retrieve her son. (70 RT 12890, 13017, 13020.) Other than this incident, however, Janet never saw Erskine behave impulsively or violently while in her home (79 RT 13024); he clearly knew right from wrong (79 RT 13029).

Jeanine Piening the daughter of Rita's good friend Judy Leslie testified to what she observed in the Erskine household, which she would frequent when she was about 12 years old. (80 RT 13085-13086, 13089.) Leslie had a drinking problem, and Rita and Leslie would drink together.[11] (80 RT 13086-13087.) The Erskine parents spent a significant amount of time with the Leslie parents—typically playing cards and drinking. (80 RT 13090.) Piening loved going to the Erskine home because it was a nice house and Rita cooked great meals. (80 RT 13091.) She would routinely see fighting at the Erskine home, with physical fighting mostly between Erskine's father and Doug. (80 RT 13092-13094.) Piening explained that while the families would drink at these get-togethers, she did not see drinking to excess. (80 RT 13098.)

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[10] Janet Erskine had passed away by the time of Erskine's second penalty phase trial. Accordingly, the transcript of her testimony from the first penalty phase trial was read to the jury. (79 RT 12998.)

[11] Rita Erskine admitted that she drank, but she did not drink when her children were young and only started when Erskine was 14 or 15 and had already started getting in trouble (79 RT 12965.)

c. Erskine's Institutionalization

Erskine was no stranger to custodial facilities beginning as a young adult. He was sentenced to two years in the California Youth Authority (from May 30, 1978, to May 15, 1980) as a result of true findings on a juvenile petition with respect to the offenses against Virgen M. and Colleen L. (80 RT 13041.) Upon his release from the California Youth Authority in May 1980, Erskine was placed on parole and sent to live in a foster home. (80 RT 13042.) The foster home was that of Thomas D'Intino. D'Intino ran a program out of his home in Spring Valley for individuals being released from the California Youth Authority who required a transitional environment. (80 RT 13051-13052.) Erskine was placed in D'Intino's home because he could not return to his parents' home as his father was gone for substantial amounts of time due to his being in the military and his mother did not think she could provide the level of supervision he might need. (80 RT 13055-13056.) Erskine remained in the home about six to eight weeks. (80 RT 13059.) He seemed to obey the rules and was very quiet and withdrawn. (80 RT 13060.) His behavior suggested to D'Intino that he was very institutionalized. (80 RT 13061.) After Erskine left the home, D'Intino received a phone call from a deputy sheriff, asking if he knew Erskine and informing him that Erskine had been arrested for assault. (80 RT 13063-13064.) Erskine was arrested for the assault on Robert M. on June 24, 1980. (80 RT 13042.)

Daniel Macallair, executive director of the Center on Juvenile Criminal Justice, testified as an expert on the California Youth Authority. (80 RT 13150, 13158.) He explained generally the unofficial initiation process in the institution in which there is a hierarchy of the toughest ward to the weakest. (80 RT 13168-13169.) He also explained that new wards are typically required to join an institution-based gang, which are mainly categorized by race and ethnicity. If one did not join a gang, he was likely

to be victimized by all of the other wards. (80 RT 13179.) Macallair opined that the Youth Authority is a violent place. (80 RT 13190.) Youths who are housed there are "the worst of the worst" and are only placed there when they have failed at all other rehabilitative efforts. (80 RT 13213, 13249.) Macallair observed that Erskine's records reflected that upon initially going to the Youth Authority, a screening revealed he would be eligible for placement in a unit for the mentally ill. He was never admitted to that unit, however, as those beds are reserved for the most seriously ill wards. (80 RT 13181-13183.) At the time Erskine was a ward there, youth authority institutions had one psychologist for every 300 wards, and mental health treatment consisted of crisis intervention. (80 RT 13194.) While group therapy was available, Macallair believed it to be an ineffective method of treatment in a correctional institution where a ward naturally would not want to talk about his problems for fear of exposing his vulnerabilities and portraying himself as weak. (80 RT 13195-13196.) The Youth Authority had no treatment for sex offenders in the 1970s. (80 RT 13196-13197.) MacAllair also explained the limited resources available to a youth released from the Youth Authority to assist in his reintegration into the community; there were no special monitoring or treatment programs. (80 RT 13201-13205.)

With respect to his prior criminal record, the parties stipulated that Erskine was arrested for the crimes against Jennifer M. on November 3, 1993, and remained in custody continuously from that date until he was sentenced to 70 years in state prison and as a result of serving that sentence, has been in continuous custody ever since his crimes against Jennifer M. (88 RT 14452.) Erskine was never prosecuted for the sexual assault of Michael A., the assault with a firearm on Doug, or domestic violence against Marie Serrano. (88 RT 14453.) The California Department of Corrections has no record of Erskine having been prosecuted

or disciplined in any manner for any act of violence, association with a gang, possessing weapons or drugs, or any act of aggression or intimidation while in prison. (88 RT 14453-14454.)

d. Erskine's Mental Health

In the mid 1970s, Dr. Allan Rabin, a medical doctor practicing in child adolescent psychiatry, saw juvenile patients at Southwood Hospital in Chula Vista—a locked psychiatric facility for adolescents. (71 RT 11305, 11312-11313.) Dr. Rabin treated 13-year-old Erskine in May of 1976. (71 RT 11315.) The doctor had maintained his own personal file on Erskine, but Southwood Hospital no longer had Erskine's records at the time of the penalty phase retrial. (71 RT 11319-11320.) When Dr. Rabin met with Erskine, Erskine was very resistant to the idea of hospitalization and said, "I want to get the hell out of here." (71 RT 11339.) When told he would have to be placed in seclusion, Erskine became angry, said he wanted to go home, and had to be restrained and physically brought into the seclusion room by three workers. (71 RT 11352.)

Based on this initial meeting and his review of Erskine's records (including those relating to the car accident), Dr. Rabin diagnosed Erskine with dissociative neurosis, organic brain syndrome with a history of trauma, and borderline psychosis. (71 RT 11344, 11354.) A family history from Rita Erskine revealed that Erskine had extensive difficulty over a period of time in terms of his own maturation and development, significant head injury from a car accident, hospitalizations, and complications which put him behind in school, and a history of sexually assaulting young girls including his sister; Rita Erskine also disclosed the increasing marital strain in the household. (71 RT 11362, 11368-11369.) Rita's greatest concern about her son was that he appeared to have no guilt or remorse about hurting people. (72 RT 11483.) Dr. Rabin also ordered psychological

testing which revealed that he had low-average intellectual functioning and significant impairments in the area of memory. (71 RT 11373-11375.) The psychologist diagnosed Erskine as having an impulsive personality and hyperkinesis (hyperactivity) secondary to organic brain damage. (71 RT 11379-11380.) While hospitalized, Erskine received medication for hyperactivity, agitation, rage episodes, and mood stabilization. (71 RT 11385.) Results of a neurological consultation and an EEG were normal. (72 RT 11524-11527, 11556-11557.) Erskine was hospitalized at Southwood Hospital twice—the second time following a court order that he be detained for sexual assault. (72 RT 11381, 11452.)

Erskine handled the highly structured environment of the psychiatric facility well, and he was permitted to move into the residential component of Southwood's program. (72 RT 11394.) It took Erskine less than two weeks to run away from Southwood's residential program, resulting in his termination. (72 RT 11402-11403.) Erskine was placed in custody through the juvenile court system, but Dr. Rabin continued to see him in individual, family, and group therapy at Southwood. (72 RT 11403.) Dr. Rabin's sense after treating Erskine for a year and a half was that he was seriously disturbed, had impaired judgment, and impaired reasoning abilities that required long-term commitment on the part of his family, educators, physicians, and mental health professionals. (72 RT 11417, 11420.) But Dr. Rabin never suggested to Erskine's defense lawyers at the time that he thought Erskine was brain damaged even though this would have been important information to convey to the court. (72 RT 11576.) At the conclusion of his treatment, Dr. Rabin recommended Erskine be placed back with his family. (72 RT 11577-11578.)

Dr. Nancy Cowardin, a doctor in private practice who consults on disability issues for the justice system and other groups, was asked to give Erskine a psycho-educational assessment to measure his learning skills,

attention, memory, etc. (81 RT 13260.) She met with Erskine at the jail and administered several hours worth of tests; she also reviewed his school records, prison records, and records from prior psychiatric treatment. (81 RT 13261, 13263-13264.) Erskine's IQ was 88, which was within the average range. All of his auditory tests reflected severe deficits for an adult (81 RT 13291), and he also performed poorly on all tests with memory components (81 RT 13278, 13287, 13293-13294). Additionally, Erskine's performance on an attention test was very poor. (81 RT 13313.) While Erskine's school records exhibited failing grades in the seventh grade, he obviously obtained a high school degree or GED (and Erskine told her he had taken tests twice to accomplish this, claiming he passed both times, but the first results were lost (81 RT 13359)) as he went to Southwest Junior College and passed four out of the five classes in which he was enrolled. (81 RT 13326, 13330-13331.) He passed reading skills III, intro to business, business law, and financial planning and money management; he failed business ethics. (81 RT 13359-13360.) Erskine is not mentally retarded. (81 RT 13278, 13331-13332.)

Dr. Cowardin also analyzed a letter Erskine wrote to his mother on April 26, 2001, in which he explained that he was facing the death penalty, and he was considering pleading guilty in order to receive a punishment of 25 years to life in prison. (81 RT 13368, 13370.) Dr. Cowardin explained that the letter evidenced Erskine's ability to gather his thoughts, appropriately write on a subject, and maintain a form of communication with an intended reader. (81 RT 13387.) In no way did Dr. Cowardin's testing suggest that Erskine was incapable of learning from his past behaviors or that he did not comprehend the difference between right and wrong. (81 RT 13366-13367.)

Dr. Haig Koshkarian, a physician with a specialty in psychiatry evaluated 17-year-old Erskine in 1980. (81 RT 13398, 13403.)

Dr. Koshkarian was hired by Erskine's then attorney to determine whether he met the criteria for what at the time was referred to as a mentally disordered sex offender. (81 RT 13404.) This assessment was in relation to Erskine's criminal charges for the assault on 14-year-old Robert M. at Ramona High School. (81 RT 13419.) A mentally disordered sex offender was a person who by virtue of mental disease, defect, or disorder was predisposed to commit sexual offenses such that they represented a danger to the health and safety of others and would benefit from treatment. (81 RT 13405.) Whether the individual knew the difference between right and wrong is not part of the mentally-disordered-sex-offender definition. Individuals meeting the criteria know what they are doing is wrong, or at least that society considers it to be wrong, and they do it anyway. (81 RT 13411.) Dr. Koshkarian's assessment involved a clinical evaluation with an interview on September 11, 1980, which likely would have lasted an hour to an hour and a half. (81 RT 13404.)

During the interview, Erskine acted friendly and did not appear to take the situation very seriously. (81 RT 13421-13422.) Erskine denied attacking Robert M. and spoke with anger about his past sexual assaults. He explained that he had a problem with anger, which would manifest itself in angry sexual assaults. (81 RT 13422.) Of import to Dr. Koshkarian about the Robert M. assault was that not only did Erskine use force to have his way with the boy, but he also appeared to have a need to cause, or experienced gratification from causing, punishment and humiliation to the victim. (81 RT 13420.) Dr. Koshkarian believed that Erskine denied the offense partly because he did not want to face the consequences for it and partly because he was embarrassed to acknowledge homosexual behavior. (81 RT 13423.)

Dr. Koshkarian concluded that Erskine was not psychotic as he was in touch with reality, but was predisposed to eruptive, explosive, aggressive,

rageful, and violent sexual assaults. (81 RT 13427-13428.) A mental defect, disease, or disorder contributed to this predisposition—conduct disorder aggressive type in Dr. Koshkarian's estimation. (81 RT 13429-13430.) Conduct disorder refers to behavior in which the person will often violate or disregard the rights of others and break societal rules and norms; aggressive type refers to antisocial behavior which is aggressive such as assaults, beatings, muggings, rapes, and sexual assaults. (81 RT 13431.) Dr. Koshkarian opined that Erskine's conduct disorder was very severe. (81 RT 13433-13434.) A juvenile exhibiting conduct disorder could become an adult diagnosed with antisocial personality disorder. (81 RT 13432.)

Based on these findings, Dr. Koshkarian believed that Erskine qualified as a mentally disordered sex offender who might[12] benefit from a state hospital treatment program for sexual offenders, at which point the court appointed two psychiatrists from the county forensic department to reach their own conclusions as to whether Erskine qualified as a mentally disordered sex offender.[13] (81 RT 13405-13406, 13435-13436.) Both of those psychiatrists disagreed with Dr. Koshkarian, diagnosing Erskine instead with antisocial personality disorder. (81 RT 13435-13436.) Dr. Koshkarian did not disagree with the diagnosis of antisocial personality disorder, but he felt it would have been important to add the diagnosis of sexual sadism. (81 RT 13435-13436, 13470.)

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[12] The doctor qualified that he was uncertain if Erskine would actually benefit from treatment, or how much he would benefit, or if he would ever benefit enough to no longer be considered dangerous. His prognosis was "guarded." (81 RT 13467.)

[13] The trial court presiding over the proceedings pertaining to the Robert M. assault ultimately concluded that Erskine was not a mentally disordered sex offender and sentenced him to the maximum term in state prison—four years. (82 RT 13482-13483.)

Dr. Thomas Wegman, Ph.D., a psychologist with a board certification in neuropsychology, reviewed Erskine's records and interviewed him over the course of about eight hours on two days for purposes of a neurological assessment. (84 RT 13910, 13920, 13922, 13971-13972.) The testing indicated that Erskine had mildly impaired executive function—specifically, judgment, inhibition of impulses, and planning—with otherwise average intelligence. (84 RT 13923, 13935-13937.) The doctor agreed, however, that to control two children, sexually assault them, gag them, bind them, and hide their bikes required some level of planning. (84 RT 14069.) Dr. Wegman explained that people with impaired executive functioning tend to be inflexible in terms of being able to think on their feet and shift from one problem-solving strategy to another. (84 RT 13947.) Based on his interview with Erskine and his review of the records, Dr. Wegman concluded that Erskine appeared superficially normal in casual conversation, but he did not have the same facility of control a normal person would have; once he embarked on a problem-solving strategy he was unable to flexibly consider other alternatives. (84 RT 13972.) Dr. Wegman opined that this was not merely the result of brain injury[14], but also "the sick family environment," and that these things combined to predispose Erskine to be a sexual predator. (84 RT 13974-13975.) Based on his training and experience and review of the records in this case, Dr. Wegman agreed with the diagnosis of antisocial personality disorder with features of sexual sadism. (84 RT 14020.) He found as a recurrent theme through the records that Erskine would minimize or make

[14] Dr. Wegman was aware that Erskine exaggerated the extent of the injuries he suffered as a five-year-old from the car accident. In the interview with Dr. Wegman, Erskine claimed to have had brain surgery. (84 RT 13993-13994, 14047-14048.)

excuses for his behavior—a classic characteristic for someone with antisocial personality disorder. (84 RT 14032-14033.)

Dr. Judith Becker, a professor of psychology and psychiatry at the University of Arizona and also a consultant to the Arizona Community Protection and Treatment Center (where sex offenders are civilly committed under Arizona's "sexually violent persons" law), met with Erskine on December 11 and 12, 2002, and again on July 11, 2003, for a total of approximately 15 hours. (85 RT 14102-14103, 14135-14136.) Her goal was to ascertain why Erskine engaged in sexually violent behavior. (85 RT 14136.) Dr. Becker opined that Erskine had several mental disorders. First, she believed him to have intermittent explosive disorder, which is characterized by discrete episodes of aggressive impulses or aggressive behaviors that involve assaultive attacks. (85 RT 14143-14144.) Second, Dr. Becker believed Erskine to have the paraphilia of sexual sadism—a sexual disorder characterized by sexual gratification by controlling, humiliating, torturing, or harming another person. (85 RT 14145.) Third, Dr. Becker believed Erskine had paraphilia not otherwise specified, which is an attraction to that which is considered unusual, for instance, Erskine's penchant for shaving pubic hair and watching himself in mirrors while he was engaged in sexual activity. (85 RT 14146-14147.) Fourth, the doctor believed Erskine had antisocial personality disorder, which she defined as a pervasive pattern of behavior where the individual violates the rights of other people and lacks empathy and remorse for others. (85 RT 14150-14151.) Dr. Becker's review of the records as well as her interview of him indicated that Erskine cared about himself primarily and blamed others for his behavior, which was characteristic of antisocial personality disorder. (85 RT 14151, 14232-14233 [implicitly denied attacks on Robert M., Jonathan, and Charlie], 14235-14236 [denied assaulting Judy C. and her friends in the barn], 14237-14238 [with respect

to touching Judy C. in bed, Erskine claimed his brother had done something too; was not totally accountable for his own behavior and showed no remorse], 85 RT 14238-14239 [Barbara G. offense he said did not happen]; 85 RT 14240-14242 [Randie C. event he acknowledged, but unremorseful]; 85 RT 14243 [denied attacking Colleen L.]; 85 RT 14244 [acknowledged the attack on Virgen M.; said he wanted to have sex with her; showed no remorse; it was simply something he wanted to do], 85 RT 14246-14247 [denied assaulting Robert M.; said he was trying to help]; 85 RT 14251-14253 [denied killing Renee Baker; said he had no transportation at the time]; 85 RT 14254-14256 [claimed Jennifer M. was a willing, consensual partner and an active participant; showed no remorse or insight].) When combined, antisocial personality disorder and sexual sadism "are particularly lethal disorders," and The Diagnostic and Statistical Manual of Mental Disorders (DSM) cautions that a person with these two diagnoses can go on to murder. (85 RT 14153-14154.) Dr. Becker was also confident that Erskine knew the difference between right and wrong. (85 RT 14169.)

Independent of his mental health diagnoses, Dr. Becker opined that Erskine had several "risk factors", including that he sustained a head injury in a car accident, it was reported that he had a dysfunctional family in terms of Erskine's father's violence toward Erskine's mother and Erskine himself, he had been diagnosed with and medicated for attention deficit disorder, he had a history of running away, and his sexual behavior began at an early age. (85 RT 14157-14159.)

Dr. Becker opined that Erskine acted out sexually in part because his sexual pathology started at an early age and went untreated. (85 RT 14193-14194.) When Erskine started committing sexual offenses in the 1970s, there was no real treatment for sex offenders. Now, there are risk assessment tools. (86 RT 14179.) Under the standard of care at the time of her testimony, Dr. Becker would have recommended Erskine be housed in

a locked institution with intensive treatment for conduct-disordered behavior and paraphilic behavior. (85 RT 14181.)

Dr. Becker observed a theme running through Erskine's crimes. He would lure victims away from the public and gain control of them by drugs, alcohol, or weapons. He would select vulnerable victims, which is true of sexual sadists—they prey upon people they can control. In fact, all of Erskine's behavior was consistent with sexual sadism. He lured his victims to secluded locations, used whatever means he could to get his victims to do what he wanted, and threatened to kill them. (85 RT 14257.) Erskine would have been sexually aroused by the pain and fear that he would have seen in Jonathan and Charlie's eyes and the boys' cries for help. The pain Erskine must have caused to Charlie in biting his penis and scrotum and scraping the skin off would have been arousing to Erskine as well. (85 RT 14259-14260.) Dr. Becker assured that one could be comfortable that as far as the things he did to Jonathan and Charlie, that his sexual arousal notwithstanding, Erskine knew full well that what he did was wrong. (85 RT 14271.)

Dr. Jaga Nath Glassman was a staff psychiatrist with the forensic mental health services unit for the San Diego County Jail. (86 RT 14307.) He reviewed Erskine's jail records and records from the Department of Corrections. (86 RT 14314-14315.) When he first arrived at the jail, the mental health staff consistently believed Erskine presented with a psychotic disorder not otherwise specified. (86 RT 14350.) Records from the Department of Corrections indicated that Erskine had various types of depression-related diagnoses and psychotic symptoms. His diagnoses included bipolar affective disorder with paranoid and psychotic features, including hearing voices saying that people were out to get him. (86 RT 14318-14319, 14330.) While in custody, Erskine was prescribed medications to reduce his psychotic symptoms, alleviate his pervasive

depression, help deal with anxiety, panic, and insomnia. (86 RT 14334-14335.) Also at the Department of Corrections, psychiatrists diagnosed Erskine with antisocial personality disorder, borderline personality disorder, and personality disorder not otherwise specified. (86 RT 14350, 14355.) During his time in custody, Erskine was never hospitalized in either the county jail or prison, although both have facilities to hospitalize inmates whose mental conditions become severe and unmanageable. (86 RT 14365-14366.)

3. People's Rebuttal

Dr. Griesemer, a professor of neurology at University of South Carolina, Charleston Medical School with a particular area of expertise in pediatric neurology, reviewed the records of Erskine's 1968 car accident. (88 RT 14456-14458.) The records revealed no evidence of a skull fracture or major bleeding inside the head, but there was evidence that Erskine's brain had presumably been traumatized based on his "semiconscious" state. (88 RT 14459.) There was no evidence Erskine had ever been in a coma and no evidence that he received any drastic measures to treat a brain injury or swelling. (88 RT 14463-14464.) There was no evidence that he required intervention in terms of a surgical or neurological consultation. (88 RT 14465.) It appeared from the records that Erskine likely had a brain contusion or a brain bruise. (88 RT 14466.) If Erskine had been dealing solely with the head injury, and not the various other fractures, Dr. Griesemer opined Erskine might have stayed in the hospital about one week at that time. (88 RT 14465.)

Dr. Griesemer also met with Erskine to evaluate him the day before his testimony. (88 RT 14474.) It was apparent to the doctor that Erskine had problems with memory, particularly his verbal memory—it was easier for him to remember things he saw as opposed to things he heard. He also

exhibited some difficulty staying on task, but generally his attention was quite good. (88 RT 14476.) Dr. Griesemer observed no evidence of cognitive abnormality. Erskine was reasonably good at reading social situations and behaved in an appropriate manner. (88 RT 14479-14480.) He also had no difficulty with executive function, he was able to conduct abstract reasoning, and his speech comprehension was good. (88 RT 14480.) Erskine exhibited no difficulty in understanding right from wrong or experiencing general social experiences. (88 RT 14482-14483.) He understood rules and consequences for misbehaving. (88 RT 14495.) Dr. Griesemer concluded that nothing about Erskine's injury resulted in an inability to regulate his behavior; he did not find Erskine to be terribly impaired. (88 RT 14488, 14492.)

Denise Jackson worked with Erskine at the rental car moving business; they were friends. (88 RT 14617-14618.) Jackson described Erskine as controlling, but smart. His demeanor was appropriate and he properly read social cues. (88 RT 14620-14621.) Erskine became a leader at the company, organizing crews and coordinating drives. (88 RT 14621.) He did the job well. (88 RT 14623.)

Lori Behrens, also described Erskine as smart. He took sophisticated classes at school, including business law, and understood them. He was able to control his behavior, never acted out, was able to socialize normally. (71 RT 11227.)

When Sergeant Holmes went to Wasco State Prison on March 13, 2001, to take Erskine's biological samples for DNA testing, he interviewed Erskine as well. (89 RT 14647, 14649.) The tape-recorded interview was played for the jury at trial. (89 RT 14649, 14654.) During the interview, Sergeant Holmes found Erskine to be fairly friendly and conversant; the sergeant had no issues communicating with him. (89 RT 14650.) After waiving his *Miranda* rights (15 CT 3602-3603), Erskine and Sergeant

Holmes discussed Erskine's recent heart attack (15 CT 3603-3604), his depression (15 CT 3604), and his marriage, job, and child (15 CT 3609). When confronted with the fact that the sergeant was investigating the murders of Jonathan and Charlie, Erskine said, "I don't know what the hell you're talking about." (15 CT 3606.) He said that at the time, March 1993, he was living with Behrens, working at the rental car moving company, and driving a Volvo. (15 CT 3615, 3618.) He admitted to knowing the area where the boys were killed and having walked the trail five or six times. (15 CT 3616.) When Sergeant Holmes told Erskine that his DNA matched genetic material at the crime scene, Erskine continued to deny knowing anything about the crimes. (15 CT 3619-3620.)

On October 10, 2003, Erskine personally refused to be examined by Dr. Park Dietz, and his attorneys advised him to refuse to cooperate. The trial judge ordered Erskine to submit to the psychological evaluation. (90 RT 14757.) In preparation for his testimony, Dr. Dietz reviewed the police reports, witness statements, photos, tapes, school records, treatment records from Drs. Rabin and Resnikoff, and the evaluations from Drs. Cowardin, Becker, and Wegman. (90 RT 14776.) His purpose was to look at the evidence upon which the various doctors had based their diagnoses and determine whether that evidence supported their conclusions. (90 RT 14780.) He found four diagnoses that were well supported by evidence in the records. (90 RT 14780.) Those were attention deficit hyperactivity disorder (90 RT 14780-14781), polysubstance abuse (90 RT 14781), sexual sadism (90 RT 14782), and antisocial personality disorder (90 RT 14782). Dr. Dietz explained that the term for antisocial personality disorder was once "sociopath" (emphasizing the tension between the individual and society, disrespect for authority, and violating society's rules), and prior to that, the term was "psychopath." (90 RT 14785-14786.)

Dr. Dietz did not find support for a diagnosis of intermittent explosive disorder because Erskine's pattern of violence did not support it. (90 RT 14793-14794.) Typically, people with intermittent explosive disorder would destroy their own property and other people's property, including people they got along with, not just people they were angry with. (90 RT 14794.) Here, Erskine chose victims that were vulnerable, or people with whom he was angry, or people whom he simply wanted to rape. (90 RT 14795.)

With respect to sexual sadism, Dr. Dietz explained that the individual achieves sexual excitement by means of the suffering of another, which he might accomplish through binding the person, holding the person captive, humiliation, beating, choking or strangling, and foreign object penetration. When sexual sadists kill, they often do so by strangulation because it is very personal, up close, and slow, such that the sadist can watch the person suffer as he dies. (90 RT 14804, 14814-14815.) These were behaviors Erskine exhibited in the attacks on Barbara G. (90 RT 14814-14815), Colleen L. (90 RT 14815), Robert M. (90 RT 14815), Michael A. (90 RT 14816), and Jennifer M. (90 RT 14816-14818). The sexual assault, murder, and torture of Jonathan presented an extreme example of a sexually sadistic crime with Erskine having removed his pants and underwear and positioning him on his knees with a ligature around his neck and suspended from a tree; restraining the boy on his knees in this manner would have been very arousing to Erskine. (90 RT 14818-14819.) The crimes against Charlie, similarly, were extreme examples of sexual sadism. Dr. Dietz found the mutilation of Charlie's penis and scrotum extremely significant as evidence of a sadistic sexual assault as was the internal damage to his anus, which suggested foreign object penetration. (90 RT 14821.) Erskine's humiliating the boys in front of each other was also consistent with sexual sadism. (90 RT 14819.) Dr. Dietz explained that sexual sadists

often have a "rape-torture-murder kit," containing tools to facilitate their sexual pleasures. (90 RT 14820.)

Also significant to Dr. Dietz was the fact that the evidence indicated that Erskine followed Jonathan and Charlie more than 400 feet into the woods, indicating purposeful, intentional behavior. (90 RT 14826.) This was not an impulsive act. He took his "rape kit" with him; it contained two kinds of rope, two kinds of adhesive tape, and his knife. The same items were found in the trunk of his Volvo following the rape of Jennifer M., suggesting that he carries these items with him often. (90 RT 14827.) All of the acts leading up to murdering the boys were purposeful: gaining control of two boys simultaneously, hiding their bikes, binding and gagging them. (90 RT 14827-14829.) Dr. Dietz explained that Erskine had a plan that he was enacting, and each piece of it was designed to achieve a single goal of having an exciting sexual event and not get caught. (90 RT 14829-14830.)

Dr. Dietz opined that Erskine knew right from wrong at the time of these crimes and could appreciate the wrongfulness of his conduct. When confronted with his crimes, he would minimize or deny them, which he would not do if he thought his behavior was acceptable. (90 RT 14832-14833.) Similarly, Erskine chose vulnerable people—people he thought he could get away with harming; he committed his crimes in secluded areas to avoid detection; he gagged and restrained the boys so that they could not scream or run for help; he hid the boys' bikes to delay detection of the crime scene; he killed the boys to ensure they would not report him. (90 RT 14833-14835.) Nothing about Erskine's behavior was impulsive. This was a series of dozens of actions in sequence, with each action building on the one before it, to accomplish a goal. (90 RT 14841.) Dr. Dietz concluded that at the time of the murders, Erskine was not suffering from any extreme mental or emotional disturbance such that he

could not have conformed his conduct to the requirements of the law. (90 RT 14845.)

ARGUMENT

I. THE TRIAL COURT PROPERLY ADMITTED EVIDENCE OF ERSKINE'S UNCHARGED RAPE OF JENNIFER M. AND MURDER OF RENEE BAKER

Erskine contends that the trial court erred in admitting evidence of the Jennifer M. sexual assault and Renee Baker sexual assault and murder under Evidence Code sections 1101, subdivision (b), and 1108. He claims neither incident satisfied the admissibility requirements for those code sections, and he further asserts that the trial court should have excluded evidence of the incidents as unduly prejudicial under Evidence Code section 352. Finally, Erskine alleges that the erroneous admission of this evidence violated his right to due process and cannot be deemed harmless. Contrary to Erskine's assertions, the trial court properly admitted evidence of Erskine's sexual assault of Jennifer M. and murder of Renee Baker under section 1101 to prove Erskine's identity, motive, common scheme or plan, and intent in murdering Jonathan and Charlie. In any event, even if erroneously admitted, no prejudice ensued from the admission of this evidence as it was also admissible under Evidence Code section 1108 to show Erskine's disposition to commit sex offenses. Likewise, any error resulting from the admission of the other crimes evidence was harmless given the overwhelming physical evidence, including indisputable DNA evidence, demonstrating that Erskine sexually assaulted and brutally murdered 13-year-old Jonathan and 9-year-old Charlie.

Generally, character evidence—or propensity to engage in specific conduct—is inadmissible to prove a person's conduct on a specified occasion. (Evid. Code, § 1101, subd. (a)). But evidence that a person

committed a crime, civil wrong or other act is admissible not to prove the person's propensity to commit such an act, but instead to prove some fact such as motive, intent, common scheme or plan, or identity. (Evid. Code, § 1101, subd. (b).) Additionally, where a criminal defendant is accused of a sexual offense,[15] evidence that he committed another sexual offense is not prohibited by Evidence Code section 1101, so long as the evidence is not inadmissible under Evidence Code section 352. (Evid. Code, § 1108, subd. (a).)

A trial court's ruling admitting evidence under these provisions is reviewed for an abuse of discretion. (*People v. Avila* (2014) 59 Cal.4th 496, 515.)

A. The Trial Proceedings, Rulings, and Instructions Regarding Erskine's Uncharged Sex Offenses

Erskine was charged with first degree murder with special circumstances that he murdered Charlie during the commission of oral copulation and a lewd act on a child. As to Jonathan, Erskine was charged with first degree murder with special circumstances that he murdered during the commission of a lewd act on a child. (11 CT 2588-2590). Thus, the murder charges and special allegations required proof of, among other things, an intent to kill, oral copulation, and lewd conduct. (Pen. Code, §§ 187, 189, 190.2, subds. (a)(17)(v), (a)(18).)

The prosecutor moved, in limine, to introduce evidence of Erskine's uncharged prior sex offenses pursuant to Evidence Code sections 1101,

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[15] While Erskine was not charged with a sex offense, this Court has held that section 1108 applies when the prosecution accuses the defendant of first degree felony murder during the commission of any of the crimes specified in section 1108, subdivision (d)(1), which include oral copulation, rape by a foreign object, lewd or lascivious conduct, and sodomy. (*People v. Story* (2009) 45 Cal.4th 1282, 1294.) Erskine does not dispute the applicability of Evidence Code section 1108 in his case. (AOB 75-76.)

subdivision (b), and 1108.[16] (9 CT 2015-2045.) As to Renee Baker, the prosecutor argued the homicide was admissible under Evidence Code section 1108 to prove Erskine's identity and propensity to commit sexual crimes and under Evidence Code section 1101, subdivision (b) to prove motive, intent, common plan, and identity. (9 CT 2043, 2044.) She argued that, just as he had done to Charlie and Jonathan, Erskine sexually assaulted Renee Baker outdoors in a secluded area, removed her clothing and neatly piled it, forced her to orally copulate him which was established by the sperm in her mouth, strangled her, and smoked a cigarette at some point during his crime as was evidenced by the cigarette butts at the scene. (9 CT 2043.) The prosecutor argued that Evidence Code section 352 did not prevent admission of this evidence as the offenses were similar and accordingly probative on the issues of propensity, common plan, and motive. (*Ibid.*) As to Jennifer M., the prosecutor argued that Erskine sexually assaulted her just seven months after murdering Jonathan and Charlie. Just as he had done with Jonathan and Charlie, Erskine strangled Jennifer M., forced her to orally copulate him, and used yellow rope and tape to restrain and gag her. Law enforcement officers found the yellow rope and tape in the trunk of Erskine's car when they searched it in connection with Jennifer M.'s rape. (9 CT 2044.) Because Jennifer M.'s rape was close in time to the boys' murders, and because the offenses shared significant similarities, the prosecution argued that Evidence Code section 352 would not bar admission of Erskine's assault on Jennifer M. as

[16] In addition to the evidence of the Jennifer M. sexual assault and Renee Baker murder, the prosecutor sought to admit evidence of eleven other uncharged prior sexual assaults pursuant to these code sections. The trial court precluded the admission of evidence as to the other assaults during the guilt phase of Erskine's trial. (9 CT 2015-2045; 8 RT 1117-1119.)

any prejudice did not substantially outweigh the probative value of the evidence. (*Ibid.*)

The defense opposed the admission of this evidence, arguing that it was inadmissible under Evidence Code section 1101 as the uncharged offenses were dissimilar to the charged offense, the prosecutor was offering the evidence solely to establish Erskine's propensity to commit sex crimes, and it was inadmissible under Evidence Code section 1108 as the potential for prejudice substantially outweighed any probative value the evidence had. (9 CT 1916-1918, 1931-1947, 1951-1952, 2072-2080.)

The trial court heard argument on the motions during which defense counsel elaborated that because biological evidence would establish that Erskine killed Charlie and Jonathan, it was "overkill" to admit evidence of the uncharged acts. (8 RT 1060.) Defense counsel additionally asserted that the prior acts were not similar to the charged offense as they involved different types of victims and intents, such that it could only be the case that the prosecutor intended to present the evidence to suggest to the jury that Erskine was a violent sex offender who must have murdered Jonathan and Charlie. (8 RT 1061-1062.) In a departure from the written motion to exclude this evidence, with respect to Renee Baker, counsel acknowledged that the offense was strikingly similar to the murders of Jonathan and Charlie such that presentation of the evidence carried the inherent risk that if the jury believed Erskine murdered Renee Baker, it would likewise believe he must have murdered the two boys. (8 RT 1076-1077.) Similarly, with respect to the Jennifer M. rape, counsel argued that the evidence was "too probative, powerful, and prejudicial" in terms of its similarity to the instant offenses. (8 RT 1082-1083.)

The prosecutor responded by reiterating the tremendous similarities between the Renee Baker murder and the murders of the two boys: the bodies were found outdoors in locations not readily visible; the victims'

clothing was neatly piled; the victims were strangled; Erskine had ejaculated in their mouths; and he littered the crime scenes with cigarette butts marked with his DNA. (8 RT 1086-1088.) Likewise, the Jennifer M. sexual assault shared compelling similarities with the charged offenses: Erskine assaulted Jennifer M. just seven months after he murdered the boys; he choked all of the victims; he bound his victims with yellow rope which was found in the trunk of his car and the closet of his home; he gagged his victims and forced them to orally copulate him. (8 RT 1086, 1095-1097.) Additionally, the prosecutor noted the diminished prejudice with respect to the Jennifer M. crime as Erskine had already been convicted of that offense. (8 RT 1098.) The prosecutor argued these uncharged acts were relevant under Evidence Code section 1108, as well as under section 1101, subdivision (b), to establish identity, motive, intent and common plan or scheme to sexually assault people by means of violence. (8 RT 1089-1090, 1097-1098.) Finally, the prosecutor observed that the evidence of Jonathan and Charlie's murders was far more egregious than any evidence that could be presented about the Renee Baker murder or Jennifer M. sexual assault.

The trial court noted that it "had an opportunity to weigh, under 352, whether the probative value of these incidents . . . is substantially outweighed by the probability that their admission will necessitate an undue consumption of time or create a substantial danger of undue prejudice of confusing the issues or misleading the jury." (8 RT 1117.) The court ruled admissible under Evidence Code section 1108 the sexual assault of Jennifer M. and the murder of Renee Baker. (*Ibid.*) Further, the court observed that, under Evidence Code section 1101, the uncharged acts "are sufficiently similar to set them apart from offenses of the same general variety." (8 RT 1117.) Specifically, as to Jennifer M., the court noted the similar evidence with the charged murders consisting of strangulation,

forced oral copulation, and the use of the yellow rope and tape. (8 RT 1117-18.) As to Renee Baker, the court listed the similarities consisting of the oral copulation, strangulation, cigarette butts, and the piling of the victims' clothes. (8 RT 1118.) The court ruled the evidence was relevant to prove "identity, preparation, plan, modus operandi" and "whether or not, in the instant case, there was deliberation or premeditation and whether or not certain kinds of intent was present." (8 RT 1118.) The court further observed that "the instant case involves conduct far more inflammatory than the offenses sought to be introduced" and that there was no risk the jury would confuse the issues. (8 RT 1118.)

During the People's guilt phase presentation of evidence, the court cautioned the jury as follows: "Evidence concerning the crimes involving Jennifer Meyer and Renee Baker has been admitted. This evidence, if believed, may not be considered by you to prove that defendant is a person of bad character." (29 RT 4077.) At the conclusion of the guilt phase presentation, the trial court instructed the jury with CALJIC No. 2.50 as follows:

> Evidence has been introduced for the purpose of showing that the defendant committed crimes other than that for which he is on trial.
>
> Except as you will otherwise be instructed, this evidence, if believed, may not be considered by you to prove that defendant is a person of bad character or that he has a disposition to commit crimes.
>
> It may be considered by you for the limited purpose of determining if it tends to show:
>
> A characteristic method, plan or scheme in the commission of criminal acts similar to the method, plan or scheme used in the commission of the offense in this case, which would further tend to show the existence of the intent which is a necessary element of the crime charged or the identity of the person who committed the crime, if any, of which the defendant is accused,

or a clear connection between the offense and the one of which the defendant is accused so that it may be inferred that, if defendant committed the other offenses, defendant also committed the crimes charged in this case;

The existence of the intent which is a necessary element of the crime charged;

The identity of the person who committed the crime, if any, of which the defendant is accused;

For the limited purpose for which you may consider such evidence, you must weigh it in the same manner as you do all other evidence in the case.

(29 RT 4105-4106; 12 CT 2726-2727.)

Additionally, the court instructed the jury with CALJIC No. 2.50.01, in relevant part as follows:

If you find that the defendant committed a prior sexual offense, you may, but are not required to, infer that the defendant had a disposition to commit sexual offenses.

If you find that the defendant had this disposition, you may, but are not required to, infer that he was likely to commit and did commit the crime or crimes of which he is accused.

However, if you find by a preponderance of the evidence that the defendant committed prior sexual offenses, that is not sufficient by itself to prove beyond a reasonable doubt that he committed the charged crimes.

If you determine an inference properly can be drawn from this evidence, the inference is simply one item for you to consider, along with all other evidence, in determining whether the defendant has been proved guilty beyond a reasonable doubt of the charged crime.

(29 RT 4107-4108; 12 CT 2728-2729.) The trial court also instructed the jury with the corresponding instructions concerning proof of other crimes by a preponderance of the evidence. (CALJIC Nos. 2.50.1 and 2.50; 29 RT 4108; 12 CT 2730-2731.)

Finally, the trial court instructed the jury concerning evidence received for a limited purpose generally pursuant to CALJIC No. 2.09, as follows:

> Evidence concerning Jennifer M[.] and Renee Baker was admitted for a limited purpose.
>
> ¶ . . .¶
>
> At the time this evidence was admitted, you were instructed that it could not be considered by you for any purpose other than the limited purpose for which it was admitted.
>
> Do not consider such evidence for any purpose except the limited purpose for which it was admitted.

(29 RT 4105; 12 CT 2725.)

B. The Trial Court Properly Admitted Evidence of Erskine's Uncharged Sex Offenses Under Evidence Code section 1101, subdivision (b)

"Evidence of uncharged crimes is admissible to prove identity, common design or plan, or intent only if the charged and uncharged crimes are sufficiently similar to support a rational inference of identity, common design or plan, or intent. (*People v. Kipp* (1998) 18 Cal.4th 349, 369.) The highest degree of similarity between the charged and uncharged offenses is required when the uncharged offense is offered to prove identity. (*People v. Lenart* (2004) 32 Cal.4th 1107, 1123.) "[A] lesser degree of similarity is required to establish relevance to prove common design or plan, and the least similarity is required to establish relevance to prove intent." (*Ibid.*)

1. Identity

To prove identity, the admissibility of the Jennifer M. and Renee Baker offenses required a higher degree of similarity in comparison to using the evidence to prove common scheme or plan or intent. "'The

greatest degree of similarity is required for evidence of uncharged misconduct to be relevant to prove identity. For identity to be established, the uncharged misconduct and the charged offense must share common features that are sufficiently distinctive so as to support the inference that the same person committed both acts. [Citation.] "The pattern and characteristics of the crimes must be so unusual and distinctive as to be like a signature." [Citation.]'" (*People v. Jones* (2013) 57 Cal.4th 899, 930, quoting *People v. Ewoldt* (1994) 7 Cal.4th 380, 403.) Accordingly, if the trial court properly admitted the evidence to prove the murderer's identity, then it necessarily would have been admissible to prove other material facts such as common scheme or plan and intent, which require a lesser degree of similarity. (*People v. Jones*, *supra*, 57 Cal.4th at p. 930.) A trial court's ruling admitting evidence is reviewed for an abuse of discretion. (*People v. Avila*, *supra*, 59 Cal.4th at p. 515.)

The trial court properly exercised its discretion in this case. Appellant contends that the trial court improperly admitted evidence of the attack on Jennifer M. and the murder of Renee Baker to prove identity as there were insufficient distinctive common marks between those offenses and the murders of Charlie and Jonathan so as to be like a signature. (AOB 68-71.) But, contrary to Erskine's assertion, the crimes need not be identical in order to be admissible to prove identity, and here, the uncharged offenses shared plenty of distinctive similarities with the charged offense to be highly probative for this purpose.

Erskine murdered Renee Baker outdoors in a location where he was unlikely to be detected. (28 RT 4021.) He did the same with Jonathan and Charlie. (24 RT 3307, 3310, 3319-3320, 3360-3361.) Erskine piled Renee Baker's clothing neatly near the area where her body was discovered. (28 RT 4010-4011.) He did the same at Jonathan and Charlie's crime scene. (24 RT 3379, 3380-3381, 3389.) Erskine indelibly marked his

victims with his DNA, evidencing that he forced Ms. Baker, and Charlie to orally copulate him. His sperm was in their mouths. (25 RT 3600-3601, 3579-3580, 3582-3583; 3638-3639, 3642-3643; 29 RT 3989-3990, 3999-4000.) Erskine accomplished his murders of Baker, Jonathan, and Charlie the same way—strangulation. (25 RT 3540-3541, 3555; 29 RT 4089-4093.) Erskine took the time at both murder scenes to smoke cigarettes. (24 RT 3418-3419; 25 RT 3642-3643; 28 RT 4025, 3999-4000.)

Erskine sexually assaulted Jennifer M. just seven months after he murdered Jonathan and Charlie. (24 RT 3307, 3310; 26 RT 3686.) Again, he strangled Jennifer M. just as he had the boys. (25 RT 3540-3541, 3555; 26 RT 3695-3696.) Again, he forced Jennifer M. to orally copulate him (26 RT 3703, 3705, 3709), just as he had Charlie (25 RT 3600-3601, 3579-3580, 3582-3583; 3638-3639, 3642-3643). With Jennifer M., Erskine used the signature tools—yellow rope and duct tape—to restrain and gag her (26 RT 3698, 3855) just as he had the boys (24 RT 3377, 3383; 25 RT 3545). These signature items were located in his car when law enforcement searched it in connection with Jennifer's rape. (26 RT 3859-3860.)

Given the substantial commonalities between the offenses, it cannot be said, viewing the evidence in the light most favorable to the trial court's ruling (*People v. Jones*, *supra*, 57 Cal.4th at p. 931; *People v. Carter* (2005) 36 Cal.4th 1114, 1148), that the trial court acted arbitrarily or capriciously in admitting evidence of the Renee Baker murder and Jennifer M. sexual assault to prove identity. Erskine points to dissimilarities between the crimes, such as the fact that Jennifer M. was an adult female whom he attacked in his apartment over the course of several hours. (AOB at 69.) These differences are diminished by the fact that Erskine used the exact same materials to bind and gag Jennifer M., Charlie, and Jonathan, as well the forced oral copulation and strangulation involved in the offenses. Erskine also notes that Renee Baker's cause of death was

actually drowning not strangulation, that she sustained blunt force trauma injuries to her head and face, and that there was no indication she had been tied up or gagged. (AOB at 69-70.) These differences are diminished by the fact that Renee Baker's, Jonathan's, and Charlie's bodies were found in secluded outdoor locations, their clothing was neatly piled, Erskine's sperm was in Renee's and Charlie's mouths, and Erskine's cigarette butts littered both crime scenes. Although Erskine's crimes against Jennifer M. and Baker were not identical to those against Jonathan and Charlie, the trial court properly exercised its discretion in admitting the uncharged offenses to prove Erskine's identity as "'[t]o be highly distinctive, the charged and uncharged crimes need not be mirror images of each other.' [Citation.]" (*People v. Jones*, *supra*, 57 Cal.4th at p. 932.)

2. Common Scheme or Plan

Erskine's further contention that the uncharged crimes evidence was inadmissible to prove common scheme or plan is equally unavailing. He primarily complains that the trial court erred in admitting these uncharged acts to establish a common scheme or plan because, according to him, common scheme or plan was not at issue—only the identity of the perpetrator was at issue. (AOB 71-72.) The prosecutor, however, was required to prove not only that Erskine killed Jonathan and Charlie, but also that he did so intentionally while committing the alleged sexual offenses. The prosecutor was entitled to bolster its case that Erskine was the perpetrator and acted in the requisite manner with evidence that he had acted pursuant to a common scheme or plan. (See *People v. Jones*, *supra*, 57 Cal.4th at p. 933 [in proving culprit's identity, prosecutor entitled to bolster identification with additional evidence; uncharged conduct evidence also relevant to prove intent and motive].)

Moreover, as noted above, because the evidence of the Jennifer M. and Renee Baker crimes was relevant to prove identity, the evidence was necessarily admissible to prove common plan as that material fact requires a lesser degree of similarity for admissibility. To prove a common scheme or plan, evidence of the uncharged acts must show "not merely a similarity in the results, but such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations." (*People v. Kelly* (2007) 42 Cal.4th 763, 784, internal quotation marks omitted.) Uncharged acts admitted for this purpose must show "the existence of a plan rather than a series of spontaneous acts, but the plan thus revealed need not be distinctive or unusual" as would evidence admitted to prove identity. (*Ibid.*) The evidence need only support the inference that the defendant used the same plan in committing the charged offenses. (*Ibid.*) Here, the existence of a scheme to sexually assault Renee Baker in a secluded, but public, location, pile her clothes neatly, strangle her, kill her, and take time to smoke cigarettes was markedly similar to Erskine's scheme in murdering the two boys. Likewise, the existence of a scheme to sexually assault Jennifer M., strangle her, and accomplish his crime using tape and rope in a secluded location was markedly similar to Erskine's scheme with Jonathan and Charlie. The trial court properly exercised its discretion in admitting the evidence as it tended to show a common plan in luring victims to secluded locations in order to sexually assault them.

3. Intent

Finally, Erskine claims that the trial court erred in admitting the uncharged offenses to prove his intent when he murdered Jonathan and Charlie, asserting that there was no issue in the case suggesting that the crimes were an accident, inadvertent, or that they were committed by some

innocent mental state. In other words, intent was not an issue for the jury to decide. (AOB 72-74.) But again, the prosecutor was required to prove all elements of the crimes and special circumstances, including that he killed Jonathan and Charlie intentionally while committing the sex offenses. (*People v. Jones*, *supra*, 57 Cal.4th at p. 933.) Accordingly, the trial court properly admitted the evidence to prove intent as well.

C. Regardless of the Admissibility of the Uncharged Sex Offenses Under Evidence Code Section 1101, Subdivision (b), the Trial Court Properly Admitted the Evidence Under Section 1108 to Show Erskine's Propensity to Commit the Sexual Homicides in This Case

Even assuming that the trial court improperly admitted the evidence of the Renee Baker homicide and Jennifer M. sexual assault under Evidence Code section 1101, subdivision (b), the jury nonetheless properly considered the evidence as it was admissible under Evidence Code section 1108. Different than evidence admitted under Evidence Code section 1101, subdivision (b), evidence admitted under Evidence Code section 1108 may be used to demonstrate the defendant's disposition to commit sexual offenses. (*People v. Cordova* (2015) 62 Cal.4th 104, 132; *People v. McCurdy* (2014) 59 Cal.4th 1063, 1095.) "'The Legislature's principal justification for adopting section 1108 was a practical one: By their very nature, sex crimes are usually committed in seclusion without third party witnesses or substantial corroborating evidence. The ensuing trial often presents conflicting versions of the event and requires the trier of fact to make difficult credibility determinations. Section 1108 provides the trier of fact in a sex offense case the opportunity to learn of a defendant's possible disposition to commit sex crimes.'" (*People v. Avila*, *supra*, 59 Cal.4th 496, 515, quoting *People v. Falsetta* (1999) 21 Cal.4th 903, 915.) Where the sexual assault victim was killed and cannot tell the jury what happened,

the need for such evidence is particularly compelling. (*People v. Avila*, *supra*, 59 Cal.4th at p. 515.)

But Erskine argues that even though evidence of uncharged sex offenses is admissible to prove a defendant's predisposition to commit such offenses, that disposition evidence must be relevant to some issue of consequence in the case. (AOB 75.) He suggests that because there was no issue in the present case that he harbored the requisite intent for the charged crimes and special circumstances, no issue that the sex acts were nonconsensual, and no issue that he committed the sex crimes supporting the felony murder theory of the case, the trial court should not have admitted the evidence under Evidence Code section 1108 as it was not relevant to any material issue of fact. (AOB 76.)

Erskine's contention is defeated by this Court's repeated guidance with respect to the introduction of uncharged misconduct under the related provision of Evidence Code section 1101, that a defendant's not guilty plea places in issue all elements of the charged offense. (*People v. Roldan* (2005) 35 Cal.4th 646, 705-706; *People v. Catlin* (2001) 26 Cal.4th 81, 146.) Prior uncharged offenses are admissible under Evidence Code section 1101, subdivision (b) to prove a fact the prosecution must establish beyond a reasonable doubt. (*People v. Roldan*, *supra*, 35 Cal.4th at pp. 705-706.) Evidence Code section 1108 is no more restrictive and, in fact, the only restriction on the admissibility of 1108 evidence is that it must not be substantially more prejudicial than probative under Evidence Code section 352. Moreover, imposing the additional evidentiary hurdles Erskine suggests conflicts with the very purpose of Evidence Code section 1108 which is "to expand the admissibility of disposition or propensity evidence in sex offense cases." (*People v. Falsetta*, *supra*, 21 Cal.4th at p. 911.) The statute achieves that purpose by relaxing "the evidentiary restraints [that Evidence Code] section 1101, subdivision (a), imposed

. . . ." (*Ibid.*) Accordingly, Evidence Code section 1108 authorized the admission of the Jennifer M. and Renee Baker evidence at Erskine's trial to prove Erskine's propensity to commit the sexually motivated murders of Jonathan and Charlie.

D. The Evidence of Erskine's Uncharged Sex Offenses Was Not Made Inadmissible Under Evidence Code Section 352

Appellant suggests that even if the evidence of the Jennifer M. and Renee Baker offenses was relevant for a legitimate purpose pursuant to Evidence Code section 1101, subdivision (b) or section 1108, the trial court nonetheless should have excluded it pursuant to Evidence Code section 352 as the potential for prejudice substantially outweighed the probative value of the evidence. (AOB 74, 78-84.) The trial court properly admitted evidence of the Jennifer M. and Renee Baker offenses under Evidence Code section 352 as well. Evidence that qualifies for admission under Evidence Code sections 1101 and 1108 must still satisfy the admissibility requirements of Evidence Code section 352. (*People v. Cole* (2004) 33 Cal.4th 1158, 1195; *People v. Falsetta, supra*, 21 Cal.4th at p. 917.) "A court deciding whether evidence of one or more sexual offenses meeting the definitional requirements of Evidence Code section 1108 should nonetheless be excluded pursuant to Evidence Code section 352 undertakes a careful and specialized inquiry to determine whether the danger of undue prejudice from the propensity evidence substantially outweighs its probative value." (*People v. Merriman* (2014) 60 Cal.4th 1, 41.) Relevant to this consideration are factors such as the "'nature, relevance, and possible remoteness [of the evidence], the degree of certainty of its commission and the likelihood of confusing, misleading, or distracting the jurors from their main inquiry, its similarity to the charged offense, its likely prejudicial impact on the jurors, the burden on the defendant in

defending against the uncharged offense, and the availability of less prejudicial alternatives to its outright admission, such as admitting some but not all of the defendant's other sex offenses, or excluding irrelevant though inflammatory details surrounding the offense. [Citations.]'" (*People v. McCurdy* (2014) 59 Cal.4th 1063, 1098-1099, quoting *People v. Falsetta, supra*, 21 Cal.4th at p. 917.) Similar considerations are relevant to the determination of whether Evidence Code section 352 permits the admission of uncharged offenses under Evidence Code section 1101, subdivision (b). (*People v. Ewoldt, supra*, 7 Cal.4th at pp. 404-407.) As with a ruling under Evidence Code sections 1101 or 1108, a trial court's ruling under Evidence Code section 352 is likewise reviewed on appeal for an abuse of discretion. (*People v. Cordova, supra*, 62 Cal.4th at p. 132; *People v. Avila, supra*, 59 Cal.4th at p. 516.)

Erskine faults the trial court for failing to "make a record of the specific facts considered or the reasoning behind this ruling" and claims that, therefore, this Court should conduct an independent review of the matter. (AOB 80.) Erskine cites no authority requiring a trial court to recite the specific facts considered in making an evidentiary ruling. And, contrary to Erskine's assertion, the trial court's ruling indicated that it considered all of the relevant factors and determined that that the probative value of this evidence substantially outweighed its prejudicial effect as well as any risk that it would confuse or mislead the jury. (8 RT 1117.)

No reason existed to exclude this evidence. With respect to the Jennifer M. sexual assault, the trial court could reasonably determine that the offense had significant probative value in terms of its similarity with respect to the means of committing the crimes—binding his victims with yellow rope, which was found in his car following the Jennifer M. assault and strangling his victims—and also was far less inflammatory than the charged murders of Jonathan and Charlie. There is no reason to believe the

jury would have been tempted to convict Erskine of murdering two children to punish him for assaulting Jennifer M. Furthermore, the evidence of the Jennifer M. crimes was presented, primarily, by the reading of a transcript of her prior testimony, thus reducing any prejudicial, emotional impact her live testimony might potentially have had.

While Erskine had never been charged with killing Renee Baker (see AOB 83), the trial court could also reasonably determine that the fact he had not been punished for that offense was not enough to suggest undue prejudice given that the murder had significant probative value and was less inflammatory as compared to the charged murders of Jonathan and Charlie. As with the evidence pertaining to Jennifer M., there is no reason to believe punishing Erskine for the Renee Baker homicide would have motivated the jury to have convicted Erskine of special circumstance murders. Moreover, Erskine chose not to defend against the Renee Baker homicide at the guilt phase of his trial, in all probability for the strategic purpose of saving his credibility for the penalty phase, and by electing to proceed in this manner, his contention that admission of this evidence placed the unfair burden upon him of having to defend against that charge (AOB 83) is without merit. Finally, the Renee Baker evidence was highly relevant to explain how Erskine was apprehended for Jonathan and Charlie's murders so many years after the fact as it was DNA collected from the Baker and Otay riverbed crime scenes that matched Erskine's profile in the CODIS database that identified him as the killer. In any event, as noted above, the trial court provided jury instructions that focused the jury's attention on the current charges and advised it as to the limited way in which it could consider evidence of the uncharged offenses, thus counterbalancing any risk attendant in the fact that Erskine had not been charged with or convicted of Baker's murder. (CALJIC No. 2.09 [29 RT 4105; 12 CT 2725]; CALJIC No. 2.50.01 [29 RT 4107-4108; 12 CT 2725].)

In any event, as discussed previously, there were substantial similarities between the Jennifer M. sexual assault, the Renee Baker murder, and the murders of Jonathan and Charlie so as to make the evidence of the uncharged crimes highly probative. The uncharged acts were not remote. While presenting testimony about the offenses took time, it did not unduly consume time given the probative value of the acts. And the uncharged acts certainly were no more inflammatory than the nightmarish evidence of Jonathan's and Charlie's murders. Therefore, the trial court did not abuse its discretion in admitting the evidence of Erskine's uncharged assault on Jennifer M. and murder of Renee Baker.

E. Any Error in Admitting Evidence of the Uncharged Offenses Was Harmless

Finally, appellant contends that the erroneous admission of this evidence was prejudicial and violated his right to due process. (AOB 84-86.) Contrary to Erskine's assertions, most significantly, his DNA was on Charlie's body and on the cigarettes he smoked at the crime scene. It cannot be said that but for the evidence of the crimes against Jennifer M. and Renee Baker, Erskine would have received a more favorable verdict as to the charged murders. (See *People v. Carter*, *supra*, 36 Cal.4th at p. 1152.) Moreover, the admission of evidence in violation of state law only violates a defendant's federal right to due process where such error rendered his trial fundamentally unfair. (*People v. Merriman*, *supra*, 60 Cal.4th 1, 70.) No such unfairness, let alone fundamental unfairness, occurred here. The trial court properly and carefully considered the evidence's admissibility and the jury was properly instructed as to how it could consider this evidence. Erskine received a fair trial at which he was convicted based on the overwhelming evidence that he murder Jonathan and Charlie.

II. BECAUSE HER VIEWS ON THE DEATH PENALTY WOULD PREVENT OR SUBSTANTIALLY IMPAIR HER ABILITY TO BE AN IMPARTIAL JUROR, THE TRIAL COURT PROPERLY REMOVED PROSPECTIVE JUROR NO. 154 FOR CAUSE

Erskine contends the trial court erred in removing Prospective Juror No. 154 for cause as the decision was not supported by substantial evidence that her feelings about the death penalty would prevent or substantially impair her ability to perform her duties as a juror. (AOB 87-104.) Contrary to Erskine's complaint, the trial court properly excused Prospective Juror No. 154 for cause after evaluating all of her questionnaire and voir dire responses and determining that those responses evidenced a view of the death penalty that would prevent or substantially impair the performance of her duties as a juror.

A criminal defendant facing the death penalty has the right to "an impartial jury drawn from a venire that has not been tilted in favor of capital punishment by selective prosecutorial challenges for cause." (*Uttecht v. Brown* (2007) 551 U.S. 1, 9 [127 S.Ct. 2218, 2224, 167 L.Ed.2d 1014].) And a state "has a strong interest in having jurors who are able to apply capital punishment within the framework state law prescribes." (*Ibid.*) "[T]o balance these interests, a juror who is substantially impaired in his or her ability to impose the death penalty under the state-law framework can be excused for cause; but if the juror is not substantially impaired, removal for cause is impermissible." (*Ibid.*) A juror who expresses personal opposition to capital punishment is not automatically excusable for cause so long as he or she clearly states an ability to set aside that belief and consider the evidence and instructions. (*Lockhart v. McCree* (1986) 476 U.S. 162, 176 [106 S.Ct. 1758, 90 L.Ed.2d 137].) To determine if a prospective juror is excusable for cause based on his or her views of capital punishment without comprising a criminal defendant's Sixth Amendment right to an impartial jury, courts must inquire "whether the

[prospective] juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" (*Wainwright v. Witt* (1985) 469 U.S. 412, 424 [105 S.Ct. 844, 83 L.Ed.2d 841]; *People v. Capistrano* (2014) 59 Cal.4th 830, 855.) "Under *Witt*, a prospective juror is 'substantially impaired' and may properly be excused for cause if he or she is unable to follow the trial court's instruction and 'conscientiously consider all of the sentencing alternatives, including the death penalty where appropriate.'" (*People v. McKinnon* (2011) 52 Cal.4th 610, 635.) But "[u]nder decisions of the United States Supreme Court, prospective jurors who express personal opposition to the death penalty are not automatically subject to excusal for cause as long as 'they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law.' (*Lockhart v. McCree* (1986) 476 U.S. 162, 176 [106 S.Ct. 1758, 90 L.Ed.2d 137]; see *Witherspoon v. Illinois* (1968) 391 U.S. 510, 522 [88 S.Ct. 1770, 20 L.Ed.2d 776].)" (*People v. Riccardi* (2012) 54 Cal.4th 758, 778.)

Reviewing courts accord deference to trial courts' rulings on challenges for cause out of recognition that it is the trial judge who observes and converses with the prospective juror and can take note of important information that will not be conveyed in a cold record—demeanor, tone, and confidence. (*People v. Capistrano*, *supra*, 59 Cal.4th at p. 855.) As the Supreme Court stated in *Witt*, "[T]he manner of the juror while testifying is oftentimes more indicative of the real character of his opinion than his words. That is seen below, but cannot always be spread upon the record. Care should, therefore, be taken in the reviewing court not to reverse the ruling below upon such a question of fact, except in a clear case." (*Wainwright v. Witt*, *supra*, 469 U.S. at p. 428.) Accordingly, "the trial court makes a judgment based in part on the demeanor of the juror, a judgment owed deference by reviewing courts." (*Uttecht v. Brown*, *supra*,

551 U.S. at p. 9.) On appeal, a reviewing court will uphold the trial court's decision to excuse a prospective juror for cause when the ruling is adequately supported by the record, "accepting as binding the trial court's determination as to the prospective juror's true state of mind when the prospective juror has made statements that are conflicting or ambiguous." (*People v. Edwards* (2013) 57 Cal.4th 658, 752, internal quotation marks omitted.)

When asked in her questionnaire whether she harbored any biases that would interfere with her ability to fairly decide this case, Prospective Juror No. 154 wrote, "I'm not in favor of the death penalty law in general but I am fair and honest about following the judge[']s direction." (72 CT 17749.) When asked about her general feelings as to the death penalty, Prospective Juror No. 154 wrote, "I believe the U.S. should outlaw the death penalty as I do not believe 'an eye for an eye.'" (72 CT 17752.) She indicated that she "strongly opposed" capital punishment, believed it served no purpose, and did not believe it should be imposed for any crime. (72 CT 17752-17553.) In explaining why she believed life in prison without the possibility of parole was a worse punishment than death, Prospective Juror No. 154 wrote: "By taking away a person[']s freedom we have sufficiently punished them. It is, I feel, important in some cases to do this without possibility of them ever being returned to society—But <u>not</u> to take their life." (72 CT 177553 [original emphasis].) When asked whether she entertained any moral, religious, or philosophical opposition to the death penalty so strong that it would substantially affect her ability to choose the death penalty regardless of the evidence presented, Prospective Juror No. 154 indicated "yes" and further explained, "I am not positive that I will not feel responsible should the decision be the death penalty. I would need to discuss further (after the case) w/my Rabbi." (72 CT 17754 [Question 98].) When asked whether she was so strongly opposed to the

death penalty that it would substantially affect her ability to vote for that punishment no matter what evidence was presented, the prospective juror indicated "yes" and referred back to the previous answer to question 98. (72 CT 17754 [Question 100].) The questionnaire contained a question as to whether, if she were selected as a juror, she could maintain an open mind as to what the penalty ought to be, before she heard any evidence. Prospective Juror No. 154 answered "don't know" and elaborated, "I thought myself to be open minded however going through this questionnaire I'm not positive I can be a deciding vote in taking a person's life." She further indicated that she did not know whether she would be able, before reaching a decision, to listen to the evidence, arguments, and instructions and give honest consideration to both death and life without the possibility of parole. (72 CT 17755.) Finally, Prospective Juror No. 154 acknowledged the inconsistencies in her answers, noting, "I feel as though I have maybe contradicted myself about my attitude against the death penalty and my ability to be open and non-judgmental about deciding the case. But it's kind of like my being highly pro-choice but I couldn't imagine having an abortion when I found I was pregnant. Attitudes change upon circumstance and life experience. I do feel I can follow the laws laid out by the judge." (72 CT 17757.)

When questioned by defense counsel about her questionnaire responses, and specifically whether she would be able to listen to the evidence and remain open to the idea of returning a death verdict, Prospective Juror No. 154 stated, "Yes. I am able to follow the laws that the judge provides to me. However, I don't know how I would feel should the case be that this gentleman was, you know, sentenced to death. I'm not positive that I could handle that afterwards." (66 RT 10447.) But she also noted that she could choose the death penalty if she was "convinced that

[death] were the appropriate sentence in accordance with the laws of the State of California . . . ." (66 RT 10448.)

When questioned by the prosecutor about her questionnaire responses, Prospective Juror No. 154 indicated that they were accurate and that she did not wish to change them. (66 RT 10476.) She reiterated that she did not believe in the death penalty and did not believe that any crime warranted that punishment. (66 RT 10477.) She explained her questionnaire response that she "strongly opposed" the death penalty, noting that she did not know how she would feel serving on such a case and that she "would feel terrible having made that judgment, if that was the case." (66 RT 10478.) In an effort to clarify her position, Prospective Juror No. 154 stated, "[I]n my, you know, decision today I am against the death penalty, but that doesn't mean that I can't follow the law as provided to me. (66 RT 10480.) When the prosecutor asked the prospective juror whether she wished to change her affirmative answer to the question of whether she felt so strongly about the death penalty that it would substantially affect her ability to vote for it no matter what evidence was presented, she indicated, "No. I guess I will keep that answer as correct, because I did answer in the emotional state, in consideration, that I was in at that time." Prospective Juror No. 154 also indicated she felt uncertain whether she could remain open-minded in a case where she could be the deciding vote in taking a person's life. (66 RT 10482.)

The prosecutor challenged Prospective Juror No. 154 for cause (66 RT 10525) and noted that the prospective juror reiterated in oral voir dire the numerous and unequivocal anti-death penalty responses she provided on her questionnaire. (66 RT 10529-10530.) The prosecutor argued that the fact that Prospective Juror No. 154 wanted to "intellectualize that she would realistically consider both penalties" was not the standard the trial court was to consider. Rather, she was specifically

and repeatedly asked whether "her opposition to the death penalty [would] substantially affect her decision-making process" and she said "yes" on each occasion. The prosecutor urged the trial court to take Prospective Juror No. 154 at her word. (66 RT 10530.) Defense counsel countered that the prospective juror repeatedly indicated she could set aside her personal views on the death penalty, follow the court's instructions, and return a death verdict if she felt it appropriate. (66 RT 10526-10527.) Ultimately, the trial court granted the prosecutor's challenge for cause, indicating:

> All right. As far as juror 154 is concerned, the Court finds that she is not qualified to be a juror.
>
> I don't find that she's death-qualified, in particular, questions 100 and 98. And she affirmed the answer to questions 100 in the oral questioning, that she feels so strongly against the death penalty that it would substantially affect her ability to vote for the death penalty, no matter what evidence was presented, and 98, does she have any moral or religious opposition to the death penalty so strong that it would substantially affect her ability to impose the death penalty regardless of the facts.
>
> As a matter of fact, this was one of my ones that I had checked off after reading the questionnaires.
>
> So I believe that she is unable to vote for death.

(66 RT 10530-10531.)

The trial court properly excused Prospective Juror No. 154 under the *Witt* standard as her questionnaire and voir dire responses indicated her views would "prevent or substantially impair the performance of [her] duties as a juror in accordance with [her] instructions and [her] oath." (*Wainwright v. Witt, supra*, 469 U.S. at p. 424.) As *Witt* explains,

> this standard . . . does not require that a juror's bias be proved with "unmistakable clarity." This is because determinations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism. What common sense should have realized experience has proved: many veniremen simply cannot be asked enough questions to

> reach the point where their bias has been made "unmistakably clear"; these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings. Despite this lack of clarity in the printed record, however, there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law . . . . [T]his is why deference must be paid to the trial judge who sees and hears the juror.

(*Id.* at pp. 424-426, fn. omitted.)

Erskine makes much of the fact that the prosecutor and trial judge described the standard as whether Prospective Juror No. 154's views on the death penalty would substantially *affect*, as opposed to *prevent* or *impair*, her ability to return a death verdict. (AOB 99-100.) First, Erskine has identified no precedent requiring a trial court to use particular language in granting a challenge for cause. Second, regardless of the words it used in rendering its decision, the significance of the trial court's ruling on the matter is clear. The trial court determined that the prospective juror's views on the death penalty substantially impaired her ability to return a death verdict, stating among other things, "So I believe she is unable to vote for death." (66 RT 10531.) Its ruling in no way suggested a belief that Prospective Juror No. 154 would simply find it difficult to impose the death penalty. (See *People v. Stewart* (2004) 33 Cal.4th 425, 447 [difficulty in imposing the death penalty is not equivalent to a substantial impairment in the ability to impose the penalty].) Accordingly, any imprecision in the trial court's word choice does not evidence that it used some lesser or erroneous standard in excusing Prospective Juror No. 154 for cause.

In any event, because the trial court was in the best position to evaluate the prospective juror's true state of mind, having observed the juror's demeanor and in-court responses, deference is owed its decision. In this regard, both the prospective juror's responses and the trial court's

ruling in this case are akin to the scenario in *People v. Capistrano*, *supra*, 59 Cal.4th at pages 860-862. In that case, a prospective juror provided several questionnaire responses indicating that he did not believe in the death penalty and that he would not be able to impose it even if he felt it was the appropriate penalty after hearing all of the evidence. (*Id.* at pp. 861-862.) When questioned by the parties and trial court about his questionnaire responses, however, the prospective juror indicated that, depending upon the evidence presented, he might be able to impose the death penalty. But he also indicated that he had not changed his mind about the death penalty since completing the questionnaire. (*Id.* at p. 861.) The trial court excused the prospective juror for cause because he stated that his beliefs had not changed since he completed the questionnaire, and those beliefs were that he did not believe in the death penalty. (*Ibid.*) This Court upheld the trial court's decision based on the fact that the trial court's reason for excusing the juror—that although he gave conflicting answers in open court, the prospective juror stated that the strong anti-death penalty sentiments he expressed in his questionnaire had not changed—found support in the record. (*Id.* at p. 862.) "Implicit in the trial court's ruling was its conclusion the prospective juror's questionnaire responses, rather than those he gave in court about his willingness to consider the death penalty, reflected his true state of mind." (*Ibid.*) This Court deferred to the trial court's credibility determination. (*Ibid.*)

Very similar to the trial judge's reason in *Capistrano*, the trial judge here explained in excusing Prospective Juror No. 154 for cause that she gave very strong anti-death penalty responses on the questionnaire and confirmed those responses during oral voir dire questioning. (66 RT 10531.) The record supports the trial judge's reasoning. (See, e.g., 66 RT 10476, 10482 [Prospective Juror No. 154 told the prosecutor her questionnaire responses were accurate and she did not wish to change

them]; 66 RT 10477 [Prospective Juror No. 154 reiterates she did not believe in the death penalty].) While the prospective juror gave other responses during voir dire questioning indicating that she could follow the law as instructed by the trial judge, the record shows that other answers she gave both in court and on her questionnaire, were in direct conflict with those answers. Where the prospective juror gives conflicting or equivocal responses to questions regarding her views on the death penalty, the trial court is in the best position to evaluate the juror's responses, and its determination as to her true state of mind is binding on the appellate courts. (*Wainwright v. Witt*, *supra*, 469 U.S. at pp. 428-430; *People v. Carasi* (2008) 44 Cal.4th 1263, 1290; *People v. Harris* (2005) 37 Cal.4th 310, 329.) Here, just as with the trial court in *Capistrano*, implicit in the trial court's ruling was its crediting the prospective juror's questionnaire answers, and voir dire responses confirming those answers, as reflective of her true state of mind—and "'[t]his determination of [her] state of mind is binding.'" (*People v. Capistrano*, *supra*, 59 Cal.4th at p. 862, quoting *People v. Edwards*, *supra*, 57 Cal.4th at p. 752.) The trial court appropriately excused Prospective Juror No. 154 for cause.[17]

III. A PENALTY PHASE RETRIAL FOLLOWING A HUNG JURY IS CONSTITUTIONAL

Erskine contends that permitting the retrial of a penalty phase following a hung jury violates a criminal defendant's state and federal

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[17] Although no error occurred, Erskine correctly states the applicable remedy *if* the trial court had erroneously granted the challenge for cause. (AOB 104.) That is, erroneously excluding a juror for cause based on her views of the death penalty requires reversal of the death sentence only (*Gray v. Mississippi* (1987) 481 U.S. 648 [107 S.Ct. 2045, 95 L.Ed.2d 339]; *People v. Heard* (2003) 31 Cal.4th 946, 966); it does not require reversal of the guilt judgment or special circumstance findings. (*People v. Clark* (2011) 52 Cal.4th 856, 895; *People v. Stewart*, *supra*, 33 Cal.4th 425, 454-455.)

constitutional rights to a fair jury trial, reliable penalty determinations, freedom from cruel and unusual punishment, due process, and equal protection. (AOB 105-115.) He raised this challenge in the trial court (14 CT 3219-3229), and after a hearing, the trial court denied his motion and ordered a retrial. (58 RT 8913, 8924.) While acknowledging that this Court has previously rejected his claim in *People v. Taylor* (2010) 48 Cal.4th 574, 633-634, Erskine raises the claim before this Court to preserve it for future proceedings. (AOB 105.) Primarily, Erskine urges that because California is in the minority of states allowing penalty phase retrials following a hung jury, its provisions permitting this practice are contrary to evolving standards of decency. (AOB 106-107.) The fact that California is among the minority of states that permit retrial under these circumstances does not establish an Eighth Amendment violation or any other state or federal constitutional violation.

Penal Code section 190.4, subdivision (b) provides, in part: "If the trier of fact is a jury and has been unable to reach a unanimous verdict as to what the penalty shall be, the Court shall dismiss the jury and shall order a new jury impaneled to try the issue as to what the penalty shall be." Appellant maintains that permitting the retrial of a penalty phase following a hung jury violates the Eighth Amendment's bar against cruel and unusual punishment as it is contrary to the "'evolving standards of decency that mark the progress of a maturing society.'" (AOB 106-107, quoting *Trop v. Dulles* (1958) 356 U.S. 86, 100-101 [8 S.Ct. 590, 2 L.Ed.2d 630].) He relies on decisions from the United States Supreme Court prohibiting the death penalty as cruel and unusual punishment in specific circumstances. (AOB 107-109, citing, e.g., *Roper v. Simmons* (2005) 543 U.S. 551, 570-578 [125 S.Ct. 1183, 161 L.Ed.2d 1] [individuals under the age of 18]; *Atkins v. Virginia* (2002) 536 U.S. 304, 321 [122 S.Ct. 2242, 153 L.Ed.2d 335] [intellectually disabled]; *Enmund v. Florida* (1982) 458 U.S. 782

[102 S.Ct. 3368, 73 L.Ed.2d 1140] [accomplice].) But "[w]hile the United States Supreme Court has made clear that the Eighth Amendment embodies collective moral judgments about the standards of decency in a civilized society" in certain circumstances, "those collective judgments do not constrain state legislatures from arriving at differing conclusions concerning the societal benefits of seeking a death sentence at all [citation] or, as here, the societal benefits of seeking a death sentence multiple times." (*People v. Trinh* (2014) 59 Cal.4th 216, 238 [upholding death verdict following third penalty phase retrial]; see also *People v. Taylor*, *supra*, 48 Cal.4th at p. 634 ["that California is among the 'handful' of states that allows a penalty retrial following jury deadlock on penalty does not, in and of itself, establish a violation of the Eighth Amendment"].) Erskine relies heavily on the fact that California is in the minority of the states as far as authorizing multiple penalty phase trials, suggesting that the numbers represent "a strong national consensus" against the practice. (AOB 111-112.) But he "has not gone beyond the raw numbers to establish that other states' decisions not to authorize multiple penalty retrials reflect a moral consensus, as opposed to cost-benefit judgments about the value of continuing to allocate resources toward seeking the death penalty in a particular case." (*People v. Trinh*, *supra*, 59 Cal.4th at p. 238.)

Erskine further complains that subjecting him to a second penalty phase trial with its attendant hardships of embarrassment and anxiety likewise violated the Eighth Amendment. (AOB 113.) But, as Erskine acknowledges (AOB 113-114), United States Supreme Court precedent merits against his contention. The high court has addressed the propriety of a penalty phase retrial in the context of a double jeopardy claim. In *Sattazahn v. Pennsylvania* (2003) 537 U.S. 101, 107-110 [123 S.Ct. 732, 154 L.Ed.2d 588], the high court rejected the claim that the Double Jeopardy Clause of the federal Constitution barred a state from retrying a

penalty phase after the first jury was unable to reach a verdict. The Supreme Court recognized "the touchstone for double-jeopardy protection in capital-sentencing proceedings is whether there has been an 'acquittal.'" (*Sattazahn*, *supra*, 537 U.S. at p. 109.) Although *Sattazahn* did not address the precise Eighth Amendment issue Erskine raises, it is significant that the United States Supreme Court did not invalidate penalty phase retrials as unconstitutional. As this Court has stated, "[g]iven that the double jeopardy clause permits retrial following juror deadlock under such circumstances, we fail to see how subjecting defendant to retrial of the penalty phase in this case could offend the constitutional proscription against cruel and unusual punishment." (*People v. Taylor*, *supra*, 48 Cal.4th at p. 634.)

In any event, this Court has repeatedly found no federal or state constitutional infirmity in a death verdict rendered by a second penalty phase jury following a first jury's deadlock on sentencing. (*People v. Gonzales & Soliz* (2011) 52 Cal.4th 254, 311; *People v. Taylor*, *supra*, 48 Cal.4th at p. 633-634; *People v. Gurule* (2002) 28 Cal.4th 557, 645; *People v. Hawkins* (1995) 10 Cal.4th 920, 966-967.) Erskine's claim should likewise be rejected as there is no reason to revisit this Court's prior decisions.

IV. ERSKINE'S EMPIRICAL DATA FAILS TO DEMONSTRATE THAT CAPITAL JURIES DO NOT FOLLOW PRESCRIBED CONSTITUTIONAL PROTOCOLS; THE TRIAL COURT PROPERLY REJECTED HIS ALTERNATIVE JURY SELECTION PROCEDURES

Erskine asserts that California's death penalty scheme is unconstitutional because it fails in practice to meet various constitutional requirements, primarily because juries do not follow prescribed protocols. He further argues, that even if the death penalty laws are not

unconstitutional, the trial court erred by failing to consider the alternative procedures he suggested would overcome those failings—sequestered voir dire and asking prospective jurors about specific types of crimes for which they would consider the death penalty to be the only appropriate punishment. (AOB 116-126.) Erskine's assertions fail as he has offered no basis to disrupt this Court's and the United States Supreme Court's repeated affirmances of death penalty laws.

Prior to trial, Erskine filed a motion to "Declare the Death Penalty Unconstitutional for its Failure, in Practice to Meet the Minimum Constitutional Requirements of *Furman*,[18] *Gregg*,[19] and Their Progeny [and for Other Relief in the Alternative as is Justified by the Evidence]." (3 CT 591-668) The motion cited to several social science studies purporting to show that capital jurors do not follow the constitutional guidelines established by the Supreme Court's post-*Furman* jurisprudence. (3 CT 681-7 CT 1838.) Erskine maintains that this research (consisting of interviews with capital and non-capital jurors in a variety of states) demonstrates seven ways in which the jury selection process and capital juries' actual decision-making process are at odds with Supreme Court precedent from *Gregg* forward, namely: (1) prematurely deciding on penalty prior to the penalty phase; (2) the failure of jury selection to remove large numbers of death-biased jurors; (3) widespread belief among jurors that death is required if the defendant's conduct was heinous, vile, or depraved; (4) the failure of jurors to comprehend the law, primarily with respect to mitigating evidence; (5) the erroneous belief of the majority of jurors that the law, and not the jurors themselves, is responsible for the

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[18] *Furman v. Georgia* (1972) 408 U.S. 238 [92 S.Ct. 2726, 33 L.Ed.2d 346].

[19] *Gregg v. Georgia* (1976) 428 U.S. 153, 198 [96 S.Ct. 2909, 49 L.Ed.2d 859].

punishment decision; (6) jurors' misperception that a defendant would be released from prison at some point if they did not choose death as the punishment; and (7) stark differences between the races in their reactions to the same evidence where the case involved a black defendant and a white victim, and the probability of a death sentence being tied to the racial/gender make up of the jury. (AOB 118-122.) In a reply to the prosecution's opposition to the motion (10 CT 2188-2203), Erskine discussed alternative procedures he would request if the trial court determined the death penalty was not unconstitutional. Those alternative procedures were: (1) sequestered voir dire per *Hovey v. Superior Court* (1980) 28 Cal.3d 1; and (2) asking prospective jurors whether they believed death to be the only appropriate punishment for certain crimes. (10 CT 2271-2274.)

After considering the briefing of the parties, the social science studies offered by the defense, and lengthy arguments on the topic, the trial court ruled that it would not conduct individual, sequestered *Hovey* voir dire (10 RT 1362), and it declined to include in the questionnaire the defense's proffered questions regarding jurors' attitudes about whether the death penalty was the only appropriate punishment for certain crimes (see, e.g., 10 CT 2304-2335 [defense proposed questionnaire]; 11 CT 2432-2437 [defense objections to court's amended questionnaire]; 11 CT 2550-2587 [final version of questionnaire] .) The court deferred resolving the motion regarding the constitutionality of the death penalty until after a jury had in fact reached a death verdict. (10 RT 1366-1367.)

After the penalty phase retrial, the court heard extensive testimony from Dr. William J. Bowers about the jury survey studies he conducted as a research scientist at the Capital Jury Project. (95 RT 15217-15318; 96 RT 15320-15479; 104 RT 16624-16783.) Ultimately, the trial court denied Erskine's motion to declare the death penalty unconstitutional in general

and as applied in his case. (105 RT 16851-16852.) The court was not persuaded by Dr. Bowers or the information in the survey studies, reasoning:

> A lot of the study doesn't consider, if a juror has feelings or thoughts on a subject, whether those thoughts or feelings may be set aside and whether a juror may be able to follow jury instructions.
>
> Throughout our courts—both the U.S. Supreme Court and the California Supreme Court, the Ninth Circuit—there always is the crucial assumption underlying our system that jurors understand and faithfully follow court instructions.
>
> I don't believe the evidence that was produced in support of defendant's motion rebuts that presumption in this case.
>
> There was a time lag from the time decisions were made by the jurors and the time they were interviewed. An analogy that I think is pretty appropriate in this regard would be as follows:
>
> This is more like an open book exam, where a student is entitled to take in notes to the exam. The notes would be like the jury instructions, the law, and then apply the facts and then make a decision in answering a test question.
>
> The questioning of the Capital Jury Project, of course, doesn't refer—doesn't allow the jurors to refer to those notes, or the instructions, in the jury room with them to refer to during their deliberations.
>
> ...
>
> But it seems to me that, in many of these cases, before we can come to broad, sweeping conclusions, I think we've got to go back and look at fact-specific cases and fact-specific jurisdictions. And I think there is some difficulty in lumping in the practices and procedures and different wording of statutes in coming to broad, sweeping conclusions.
>
> And sometimes I think it's more than just a choice of words. The choice of words in the instrument is really critically important.

> It is not news to anyone that how someone fills out survey results often is critically dependent on the actual wording that is used and the kind of survey. And I think we can look at a lot of those questions and look at specifically how those questions were framed.
>
> And for those reasons, including the fact that I think the court is bound by precedent, the defendant's motion is denied.

(105 RT 16852-16854.)

The trial court appropriately denied Erksine's motion to declare the death penalty unconstitutional. The social science studies Erskine offered in support of his claim, at most, establish the possibility of premature decision-making, jury-selection bias, and juror misapprehension of instructions regarding the death penalty in various states within a limited time frame based on interviews with a limited number of jurors. Dr. Bowers testified that of the 353 total capital cases involved (96 RT 15396), the study involved only 36 California capital cases between the years 1988 and 1991; he did not read the transcript of any of those cases and accordingly did not know what instructions were provided to the jury. (96 RT 15415, 15419; 104 RT 16643.) Additionally, he testified that there was a six month to two year gap between the time the surveyed jurors served and the time they were interviewed. (96 RT 15423-15424, 15426.) With such a gap in time, the jurors' perceptions could have changed with outside influence and memories could have faded. Moreover, Erskine has not established that any juror mischief occurred in his case. He has failed to show that any juror was unable to follow the law as set forth in the court's instructions. It is well established that jurors are presumed to comprehend and accept the court's instructions. (*People v. Mickey* (1991) 54 Cal.3d 612, 689, fn. 17.)

Erskine's contention that jurors do not understand that a defendant will not be released from prison if they determine life without the

possibility of parole is the appropriate punishment fares no better. The trial court instructed his jury that it was its task to determine whether Erskine was to be sentenced to "death or imprisonment in the state prison for life without possibility of parole. (CALJIC No. 8.88 [16 CT 3737]; CALJIC No. 8.84 [92 RT 14941-14942, 14951].) This Court has "repeatedly deemed this pattern instruction an adequate definition of the alternative sentence to death, and [has] likewise rejected defense efforts to rely on contemporary opinion surveys . . . suggesting that many jurors do not understand that life without the possibility of parole actually means no possibility of parole." (*People v. Ervine* (2009) 47 Cal.4th 745, 798, citing *People v. Lindberg* (2008) 45 Cal.4th 1, 53; *People v. Abilez* (2007) 41 Cal.4th 472, 527-528; *People v. Boyer* (2006) 38 Cal.4th 412, 487.)

Additionally, as Erskine has failed to demonstrate there were any constitutional problems with his jury requiring amelioration, he cannot establish that the trial court erred in rejecting his alternative remedies of conducting individual, sequestered voir dire and asking additional questions as to whether prospective jurors felt the death penalty was the only appropriate punishment for particular crimes. The Constitution does not compel individual sequestered voir dire and generally, jury selection is to take place "where practicable in the presence of the other jurors in all criminal cases, including death penalty cases." (Code Civ. Proc., § 223; see *People v. Lewis* (2008) 43 Cal.4th 415, 493.) When a trial court denies a defendant's request for individual sequestered voir dire, this Court reviews that decision using the abuse-of-discretion standard, under which the relevant question is whether the trial court's decision "falls outside the bounds of reason." (*Id.* at p. 494.) Here, the trial court considered the parties' briefing and substantial arguments prior to determining that it would not conduct sequestered voir dire and would not include Erskine's proposed questions in the questionnaire. Erskine points to no incident

during the course of the jury selection process that rendered the process unconstitutional in his case, he describes no example of how questioning prospective jurors as a group precluded him from uncovering juror bias, and he fails to explain how the trial court's questionnaire was constitutionally deficient. "No abuse of discretion, constitutional error, or prejudice appears." (*Id.* at p. 495.)

V. THE TRIAL COURT'S INSTRUCTION THAT THE JURY SHOULD REACH A PENALTY VERDICT "REGARDLESS OF THE CONSEQUENCES" WAS HARMLESS

Erskine contends that the trial court erroneously instructed the second penalty phase jury with CALJIC 1.00, which stated in relevant part: "Both the People and the defendant have a right to expect that you will conscientiously consider and weigh the evidence, apply the law and reach a just verdict regardless of the consequences." (AOB 127; 66 RT 10571) He suggests that by telling the penalty phase jury to reach a verdict *regardless of the consequences*, the very thing the jury is supposed to decide, the trial court diminished the jury's sense of responsibility. He claims that while this Court has generally found this very error to be a harmless one, his case is different because the prosecutor repeatedly told the jury that it was required by law to impose the death penalty if it found the aggravating factors outweighed the mitigating factors thereby furthering the jury's sense that the law, and not the jury, was responsible for determining Erskine's punishment. (AOB 127-130.) While the trial court erred in instructing the jury to disregard the consequences at the second penalty phase of Erskine's trial, the error was harmless as the instructions

as a whole and the parties' arguments more than adequately conveyed the gravity of the jury's penalty phase decision.[20]

This Court has previously advised that "'language instructing the jury to disregard the consequences of its verdict is inappropriate and should not be given at the *penalty* phase of a capital trial.' [Citation.]" (*People v. Kipp*, *supra*, 18 Cal.4th at p. 379 (original emphasis).) But this Court has generally determined this error to be harmless when viewed in the context of the entire charge to the jury, "reasoning that the jury is almost certain to understand 'that it was entitled to disregard only those "consequences" not constitutionally relevant to its sentencing decision, and that it bore the ultimate responsibility for choosing between death and life imprisonment without parole based on the particular circumstances of the case.'" (*Id.* at pp. 379-380, quoting *People v. Ray* (1996) 13 Cal.4th 313, 354.)

This case is no different. Viewing the instructions as a whole "it is not reasonably likely the jury was misled as to the nature and gravity of its sentencing responsibility." (*People v. Ray*, *supra*, 13 Cal.4th at p. 354.) The trial court's instructions to the jury made plain that its "decision as to penalty was not to be automatic or mechanical." (*People v. Proctor* (1992) 4 Cal.4th 499, 548.) The trial court instructed the jury, twice, that *it* was responsible for determining whether Erskine would receive life without the possibility of parole or the death penalty. (CALJIC No. 8.88 [16 CT 3737]; CALJIC No. 8.84 [92 RT 14941-14942, 14951].) Additionally, the court instructed that the jurors need not agree on any matter offered in mitigation or aggravation and that each juror must make an individual assessment of

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[20] Erskine did not object to the instruction as read by the trial court. As respondent concedes that the particular language at issue was erroneously included, respondent also recognizes that an appellate court may review any claim of instructional error "even though no objection was made thereto in the lower court, if the substantial rights of the defendant were thereby affected." (Pen. Code, § 1250; *People v. Guerra* (2006) 37 Cal.4th 1067, 1138.)

the facts. (92 RT 14944.) The jury was instructed that it need not limit itself to consideration of the mitigating circumstances enumerated in the instructions, but rather that it could consider any evidence as a reason not to impose death. (92 RT 14944.) The court instructed the jury that the arguments of counsel are not evidence. (92 RT 14948.) Moreover, the court instructed that the weighing of aggravating and mitigating factors was not a counting exercise, but rather, the jury was free to assign whatever moral or sympathetic value it deemed appropriate as to the various factors. (92 RT 14952.) Most importantly, the trial court instructed the jury that:

> In weighing the various circumstances you determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances.
>
> To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life in prison without parole.

(92 RT 14952.)

The prosecutor's argument did not diminishes the jury's responsibility; it underscored that responsibility.[21] "The responsibility you've undertaken is extraordinary." (92 RT 14954.) The prosecutor argued "the aggravation in this case is substantial, *and it substantially outweighs any mitigation*," mimicking the language of CALJIC 8.88

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[21] While Erskine claims that the prosecutor argued, erroneously, that the law would be responsible for his punishment rather than the jury, at no time does Erskine call this allegedly improper argument "misconduct." (AOB 129-130.) This is likely attributable to the fact that he failed to lodge an objection on grounds of misconduct and request that the trial court admonish the jury—two factors that would defeat any claim of prosecutorial misconduct. (*People v. Seumanu* (2015) 61 Cal.4th 1293, 1328.) Moreover, as discussed below, the prosecutor properly argued the law and accurately described the penalty phase jury's responsibility in deciding Erskine's punishment.

quoted above. (92 RT 14954.) The prosecutor reminded the jury of that language later in her argument, stating, "If the aggravation outweighs the mitigation—and you heard the Court's instructions—if it substantially outweighs . . . . If the aggravation outweighs the mitigation, then your verdict is death." (92 RT 14957.) The prosecutor repeated the concept a short while later, stating, "And if the aggravation outweighs the mitigation—and as counsel told you in jury selection, it does, substantially—then your verdict shall be death." (92 RT 14958.) She ultimately argued that Erskine's crimes were "beyond the pale" and were deserving of the death penalty. (92 RT 15026.)

Defense counsel's argument also underscored the jurors' responsibility. Counsel argued that "each one of you individually has a responsibility and a legal obligation to make the decision on sentence." (92 RT 15106.) Counsel reminded the jurors of their "awesome responsibility" (92 RT 15108)—"the power to take life or the power to spare it." (92 RT 15109.) Counsel emphasized that the jurors ought to "understand, initially, that the law never requires-—it never requires a verdict of death. You need to keep that in mind." (93 RT 15118.) Counsel described the jurors' task of weighing the mitigating and aggravating factors as "an individual moral choice." (93 RT 15123.) Essentially, "[d]efense counsel told the jurors to consider and weigh the factors, as they felt appropriate. (*People v. Proctor*, *supra*, 4 Cal.4th at p. 549.) Moreover, counsel summarized CALJIC No. 8.88 in this manner:

> You may still find life even if you think aggravation outweighs mitigation. That's why we're here. That's why we're arguing so strenuously, but—and what the law says—and you'll read it in 8.88—and, certainly, I want you to double-check—when the aggravation is so substantial in comparison with mitigation, that's the death penalty. That's what we're talking about.

(93 RT 15125.)

Accordingly, the parties properly argued the instructions to the jury and emphasized the gravity of the jury's penalty decision. Any reasonable juror would have understood that it was his or her obligation to weigh the enumerated factors when deciding on the appropriate penalty. (*People v. Proctor*, *supra*, 4 Cal.4th at p. 549.) There is no probability, viewing the instructions and arguments as a whole, that Erskine would have achieved a more favorable penalty phase verdict, had the trial court not instructed the jury that it should reach a penalty verdict "regardless of the consequences." (See *People v. Kipp*, *supra*, 18 Cal.4th at p. 380.)

VI. PENAL CODE SECTION 190.2 ADEQUATELY NARROWS THE CLASS OF OFFENDERS ELIGIBLE FOR THE DEATH PENALTY

Contrary to Erskine's claim,[22] Penal Code section 190.2—which outlines the circumstances that render a defendant eligible for the death penalty—is not impermissibly broad.[23] (See AOB 131-149.) As appellant acknowledges (AOB 134), this Court has consistently held that California death penalty statute "adequately narrows the category of death-eligible defendants in conformity with the requirements of the federal constitution." (*People v. Montes* (2014) 58 Cal.4th 809, 898-899; see *People v. Jackson*

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[22] Erskine inadvertently labeled both this claim and the previous one as "V." Respondent continues the sequential numbering, making this claim "VI."

[23] Erskine raised this issue in a pretrial motion (8 CT 1839). Before commencing the penalty phase retrial, the trial court conducted a hearing on the matter at which Erskine presented testimony from Professor Steven Shatz regarding a statistical study of California death penalty cases. (57 RT 8675-8815.) The court denied the motion, observing that it was bound by this Court's numerous decisions holding that California's death penalty law satisfies the narrowing requirement. (58 RT 8904.) The court further noted that in arriving at his statistics to suggest that California's death penalty scheme did not meet the constitutional narrowing requirement, Professor Shatz necessarily had to use his subjective conclusions as to what would qualify as a death-eligible case. As such, the court noted that Professor Shatz's conclusion appeared to be based on his own subjective standard. (58 RT 8904-8905.)

(2014) 58 Cal.4th 724, 773; *People v. Jones* (2012) 54 Cal.4th 1, 85; *People v. Thomas* (2011) 51 Cal.4th 449, 506.)

Despite the weight of authority against him, Erskine argues that the ballot arguments in favor of Proposition 7, which became the current death penalty law, reflect an intent to make all murderers eligible for the death penalty. (AOB 132-133, 135.) But this Court has repeatedly recognized that assertion misconstrues the ballot arguments. (*People v. Duff* (2014) 58 Cal.4th 527, 568-569, quoting *People v. Bonilla* (2007) 41 Cal.4th 313, 358, and citing *People v. Gray* (2005) 37 Cal.4th 168, 237, fn. 23; see also *People v. Crittenden* (1994) 9 Cal.4th 83, 156 ["the death-eligibility component of California's capital punishment law does not exceed constitutional bounds"].) Further, while Erskine claims that the sheer number and breadth of California's special circumstances would allow prosecutors to argue that practically any first degree murder warranted the death penalty, his argument on this basis fairs no better. He attempts to bolster his position in two ways. First, while Erskine argues that virtually all premeditated murders would be death-penalty eligible as murders committed by means of lying in wait due to the "expansive definition announced by this Court" (AOB 140-141), this Court has repeatedly rejected that contention. (*People v. Mendoza* (2011) 52 Cal.4th 1056, 1095; *People v. Carasi*, *supra*, 44 Cal.4th at p. 1310; *People v. Cruz* (2008) 44 Cal.4th 636, 678; *People v. Lewis*, *supra*, 43 Cal.4th at pp. 515-516; *People v. Jurado* (2006) 38 Cal.4th 72, 127.) This Court has likewise rejected Erskine's argument that the felony-murder special circumstance fails to genuinely narrow the class of murderers subject to capital punishment because it would render virtually all unintentional first degree murders eligible for the death penalty. (*People v. Merriman*, *supra*, 60 Cal.4th at p. 105; *People v. Sattiewhite* (2014) 59 Cal.4th 446, 489; *People v. Myles* (2012) 53 Cal.4th 1181, 1224; *People v. Scott* (2011)

52 Cal.4th 452, 496.) Finally, Erskine attempts to support his contention with empirical data he claims shows that Penal Code section 190.2 failed to narrow the class of death-eligible murders. (AOB 145-149.) But this Court has previously considered similar statistical offerings and has never been persuaded by them. (*People v. Vieira* (2005) 35 Cal.4th 264, 303-304; *People v. Sanchez* (1995) 12 Cal.4th 1, 60-61, overruled on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421.)

Ultimately, there is no reason to revisit this Court's prior decisions, holding that "'Section 190.2 adequately narrows the class of murder for which the death penalty may be imposed [citation], and is not overbroad, either because of the sheer number and scope of special circumstances which define a capital murder, or because the statute permits imposition of the death penalty for an unintentional felony murder [citation].'" (*People v. Sattiewhite*, *supra*, 59 Cal.4th at p. 489, quoting *People v. Harris*, *supra*, 37 Cal.4th at p. 365.)

VII. ERSKINE'S DEATH SENTENCE DOES NOT CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT AND DOES NOT VIOLATE THE EQUAL PROTECTION OR DUE PROCESS CLAUSES

Erskine contends that although he was not a juvenile at the time he committed his offenses, and although he does not meet the criteria for being intellectually disabled, the reasoning in *Atkins v. Virginia*, *supra*, 536 U.S. at p. 311 [executing the intellectually disabled[24] violates the Eighth

[24] *Atkins* used the term "mentally retarded" as have prior decisions of this Court. However, more recently, the United States Supreme Court has used the term "intellectual disability" to describe the identical phenomenon. In 2012, the California Legislature amended Penal Code section 1376, which establishes procedures for the determination of mental retardation in preconviction capital cases, and replaced the term "mentally retarded" with the term "intellectual disability" without substantively changing the definition. (*People v. Boyce* (2014) 59 Cal.4th 672, 718, fn. 24.)

Amendment], and *Roper v. Simmons*, *supra*, 543 U.S. at p. 560 [executing an individual who was a juvenile at the time he committed his crime violates the Eighth Amendment], should apply to him because, according to Erskine, he is "impaired intellectually, significantly brain-damaged and severely mentally ill."[25] (AOB 150-162.) Erskine argues that applying the principles of these cases to his demonstrates that his death sentence is incompatible with the country's evolving standards of decency, is disproportionate to his diminished culpability, and does not achieve the goals of capital punishment—retribution and deterrence. (AOB 154.) As Erskine has identified no controlling federal authority barring imposition of the death penalty on mentally ill offenders and as this Court has rejected substantially similar invitations to extend *Atkins* to mental illness generally, he has offered no reason for this Court to create a new category of murderers entirely exempt from the death penalty without regard to the circumstances of their crime.

To be sure, the Eighth Amendment and Article I, section 17, of the California Constitution prohibit the imposition of any penalty disproportionate to a defendant's "personal responsibility and moral guilt." (*People v. Boyce* (2014) 59 Cal.4th 672, 718, internal quotation marks omitted.) Under the state Constitution, this Court must consider, in determining whether a particular defendant's sentence is cruel and unusual, "the circumstances of the offense, including motive, the extent of the defendant's involvement in the crime, the manner in which the crime was committed, and the consequences of the defendant's acts." (*Id.* at pp. 718-719, internal quotation marks omitted.) This Court must also consider the defendant's personal characteristics, including his age, criminal history,

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[25] Erskine raised this claim in the trial court (16 CT 3779, 3788-3791), and the trial court denied it (103 RT 16560).

and mental capabilities. (*Id.* at p. 719.) A punishment is disproportionate to the defendant's culpability such that it must be declared unconstitutional where the penalty is "grossly disproportionate to the defendant's individual's culpability, so that the punishment shocks the conscience and offends fundamental notions of human dignity." (*Ibid.*, internal quotation marks and citations omitted.)

This Court has previously rejected claims that "a defendant's low IQ, brain damage, and/or mental illness render his capital sentence grossly disproportionate to his crime." (*People v. Boyce*, *supra*, 59 Cal.4th at p. 719, citing *People v. Young* (2005) 34 Cal.4th 1149 (*Young*).) In *Young*, the 20-year-old defendant callously murdered three men, acting alone. He shot all three of his victims in the back—one as he tried to flee, another as he begged for his life on his hands and knees, and the third after he jumped from a window in an effort to escape. The defendant also attempted two other murders. This Court upheld the death sentence "despite evidence that the defendant had an IQ of 75, lifelong learning disabilities, and a probable mental disorder." (*People v. Boyce*, *supra*, 59 Cal.4th at p. 719, citing *Young*, *supra*, 34 Cal.4th at pp. 1231-1232.)

Similarly, in *People v. Poggi* (1988) 45 Cal.3d 306, this Court upheld the defendant's death sentence based on a brutal rape and murder notwithstanding that he had "suffered organic brain damage, had a history of mental illness, was schizophrenic, and mentally ill on the day of the murder." (*Id.* at p. 348.) This Court concluded that "those factors do not sufficiently reduce his culpability to make the sentence disproportionate. . . . [A] defense psychiatrist . . . testified that 'his mental illness was not of such a nature and degree . . . as to negate or diminish his criminal culpability.' [¶] Defendant acted as he did evidently to eliminate a witness and thereby avoid apprehension. He was unspeakably brutal.

He was the sole and actual perpetrator, and he killed an innocent young woman." (*Ibid.*)

Here, the evidence established that Erskine had the ability to organize his thoughts (81 RT 13387) and conduct abstract reasoning (88 RT 14480). His own experts conceded that he knew the difference between right and wrong. (81 RT 13366-13367; 85 RT 14169; see also 88 RT 14482-14483; 90 RT 14832-14833.) He had the ability to make purposeful decisions. (90 RT 14827-14829.) His behavior during the crimes was consistent with these conclusions. Controlling two children, sexually assaulting them, gagging them, binding them, and hiding their bikes certainly required some degree of focused thought and planning. (84 RT 14069; 90 RT 14827-14829.) The fact that he followed the boys more than 400 feet into the woods evidenced his purposeful, intentional behavior. (90 RT 14826.) Moreover, ample evidence demonstrated Erskine's ability to conform to social norms. He obtained a GED (81 RT 13359), became a successful college student (81 RT 13326, 13330-13331, 13359-13360), was employed in a leadership capacity at the renal car moving business (88 RT 14621), and he married. (75 RT 12031-12032, 12034; 76 RT 12272).

The jury considered all of these facts, including evidence of Erskine's mental health, and determined death to be the appropriate punishment. He committed one of the most unspeakable acts one could fathom—the brutal torture and murder of two innocent boys. Nothing about his death sentence was disproportionate to the fatal horrors he inflicted on those children. It is his crime that shocks the conscience, not the sentence the jury chose. Erskine's "individual culpability . . . places him well within the class of murders for whom the Constitution and the statute permit a sentence of death." (*People v. Boyce*, *supra*, 59 Cal.4th at p. 721, internal quotation marks omitted.)

Moreover, Erskine's contention that his sentence is incompatible with this nation's evolving standards of decency (AOB 154-156) does not withstand scrutiny. To determine whether evolving standards of decency demonstrate that death is a disproportionate penalty, this Court looks first to objective evidence. (*Atkins v. Virginia*, *supra*, 536 U.S. at p. 313.) In *Atkins*, the high court observed that many states had prohibited the execution of intellectually disabled criminals, and no state at the time had acted to reinstate the death penalty for an intellectually disabled person. From this objective information, the court concluded that "it is fair to say that a national consensus has developed against it." (*Id.* at pp. 313-316, fn. omitted.) In *Roper*, the court similarly observed that the majority of states had prohibited the death penalty for criminals under the age of 18 when they committed their crimes. (*Roper v. Simmons*, *supra*, 543 U.S. at p. 568.) In both, *Atkins* and *Roper*, the high court then asked whether there was any reason to disagree with the legislators and citizenry that had enacted these prohibitions. The court noted that intellectually disabled people have diminished capacities, lower impulse control, and less of an ability to communicate, learn from reason, and understand others' reactions. (*Atkins v. Virginia*, *supra*, 536 U.S. at pp. 318-321.) Similarly, juveniles lack a sense of maturity and responsibility, the result of which can be reckless and irresponsible behavior, which is less morally reprehensible than an adult offender. (*Roper v. Simmons*, *supra*, 51 Cal.4th at p. 1345.) The court concluded as to both categories of individuals that the purposes of capital punishment—deterrence and retribution—are not served by executing criminals with diminished culpability. (*Atkins v. Virginia*, *supra*, 536 U.S. at pp. 318-320; *Roper v. Simmons*, *supra*, 543 U.S. at pp. 572-573.) And, at least with respect to the intellectually disabled, the risk of wrongful execution increases with the possibility of false confessions and

the defendant's diminished ability to present mitigating evidence and assist counsel. (*Atkins v. Virginia, supra,* 536 U.S. at p. 320-321.)

Erskine fails to establish that mental illness and/or brain damage is akin to intellectual disability or juvenile status in terms of imposition of the death penalty. First, there is no objective evidence that society disfavors capital punishment for individuals suffering from any number of mental illnesses. As Erskine acknowledges (AOB 153, fn. 48), state and federal courts have declined to extend the holding in *Atkins* to mental illness. (*ShisInday v. Quartermain* (5th Cir. 2007) 511 F.3d 514, 521; *Mays v. State* (Tex. 2010) 318 S.W.3d 368, 379-380; *Diaz v. State* (Fla. 2006) 945 So.2d 1136, 1150-1151; *Commonwealth v. Baumhammers* (Pa. 2008) 960 A.2d 59, 96-97; *State v. Johnson* (Mo. 2006) 207 S.W.3d 24, 51; *Lewis v. State* (Ga. 2005) 620 S.E.2d 778, 764; *State v. Hancock* (Ohio 2006) 840 N.E.2d 1032, 1059-1060.) Moreover, the justifications for capital punishment—retribution and deterrence—may well be served by including the mentally ill within the category of death-eligible defendants. (*People v. Castaneda* (2011) 51 Cal.4th 1292, 1345.) Indeed, as this Court explained in *People v. Hajek & Vo* (2014) 58 Cal.4th 1144, 1252:

> [T]he circumstance that an individual committed murder while suffering from a serious mental illness that impaired his judgment, rationality, and impulse control does not necessarily mean he is not morally responsible for the killing. There are a number of different conditions recognized as mental illnesses, and the degree and manner of impairment in a particular individual is often the subject of expert dispute. Thus, while it may be that mentally ill offenders who are utterly unable to control their behavior lack the extreme culpability associated with capital punishment, there is likely little consensus on which individuals fall within that category or precisely where the line of impairment should be drawn. Thus, we are not prepared to say that executing a mentally ill murderer would not serve societal goals of retribution and deterrence. We leave it to the Legislature, if it chooses, to determine exactly the type and level

of mental impairment that must be shown to warrant a categorical exemption from the death penalty.

Erskine "effectively asks [this Court] to establish a new, ill-defined category of murders who would receive a blanket exemption from capital punishment without regard to the individualized balance between aggravation and mitigation in a specific case." (*People v. Boyce*, *supra*, 59 Cal.4th at p. 722, internal quotation marks omitted.) This Court should, once again, decline that invitation.

This Court should also reject Erskine's due process and equal protection claims (AOB 159-162) for the same reasons. The state and federal equal protection clauses guarantee equal treatment under the law under the same conditions with respect to similarly situated individuals; these clauses do not require the same treatment for circumstances or individuals that are different. (*People v. Boyce*, *supra*, 59 Cal.4th at pp. 722-723.) In *Atkins*, the Supreme Court identified intellectually disabled defendants as a unique category of offenders presenting unique circumstances. "By contrast, the Legislature could rationally conclude the permissible goals of retribution and deterrence are furthered by imposing the death penalty on murderers whose mental states do not amount to an intellectual disability." (*Id.* at p. 723, citing *People v. Hajek & Vo*, *supra*, 58 Cal.4th at pp. 1251-1252; *People v. Castaneda*, *supra*, 51 Cal.4th at p. 1345; *Matheny v. State* (Ind. 2005) 833 N.E.2d 454, 458; see also *Heller v. Doe* (1993) 509 U.S. 312, 314-315, 319-321 [113 S.Ct. 2637, 125 L.Ed.2d 257] [applying rational basis test to equal protection claim regarding commitment of intellectually disabled individuals].)

Because Erskine's punishment is entirely proportionate to the willful, deliberate, heinous acts he committed on two innocent boys and because any mental issue he may have in no way justifies his behavior, lessens his

culpability, or renders him remotely similar to the intellectually disabled or a juvenile, Erskine's claim must be rejected.

VIII. CALIFORNIA'S DEATH PENALTY DOES NOT VIOLATE INTERNATIONAL LAW OR NORMS

Erskine contends that California's use of the death penalty as a "regular form of punishment" is unconstitutional under the Eighth and Fourteenth Amendments as it violates or falls short of international norms and evolving standards of decency.[26] (AOB 163-167.) He suggests that even if capital punishment in general does not violate international norms of human decency, "its use as *regular punishment* for substantial numbers of cases—as opposed to extraordinary punishment for extraordinary crimes such as war crimes, treason, and genocide"—does. (AOB 167.) This Court has repeatedly rejected this argument, explaining that "'California does not employ capital punishment in such a manner. The death penalty is available only for the crime of first degree murder, and only when a special circumstance is found true; furthermore, administration of the penalty is governed by constitutional and statutory provisions different that those applying to 'regular punishment' for felonies.' [Citations.]" (*People v. Debose* (2014) 59 Cal.4th 177, 214, quoting *People v. Demetrulias* (2006) 39 Cal.4th 1, 43; see also *People v. Johnson* (2015) 61 Cal.4th 734, 786; *People v. Mai* (2013) 57 Cal.4th 986, 1058; *People v. Gutierrez* (2009) 45 Cal.4th 789, 834.) Erskine has offered no basis for this Court to reconsider its prior decisions.

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[26] As Erskine notes (AOB 163), the parties briefed this issue in the trial court (16 CT 3779-3788 [defense motion]; 3815-3817 [prosecution's opposition]), and the trial court conducted a hearing at which Erskine offered expert testimony (100 RT 16148-16221). After considering the testimony, the arguments of the parties, and the binding precedent of this Court and the United States Supreme Court declaring California's death penalty constitutional, the trial court denied the motion. (103 RT 16560.)

IX. CALIFORNIA'S DEATH PENALTY SCHEME IS CONSTITUTIONAL

Erskine raises several constitutional challenges to California's death penalty law. (AOB 169-213.) This Court has rejected all of them in previous decisions, and Erskine provides no compelling arguments justifying reconsideration of those decisions. Indeed, Erskine acknowledges the purposes for raising these challenges is to alert the Court to their federal constitutional underpinnings and to ask the Court to reconsider the cumulative impact of these claims in the context of California's death penalty system as a whole. (AOB 168-169.)

Erskine asserts that a jury's consideration of the circumstances of the crime under factor (a) of Penal Code section 190.3 is unconstitutional. He specifically argues that there is insufficient limitation of the circumstances of a crime the jury can consider. (AOB 169-171.) But this Court has explained, "[s]ection 190.3, factor (a), does not, on its face or as interpreted and applied, permit arbitrary and capricious imposition of a sentence of death in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution." (*People v. Linton* (2013) 56 Cal.4th 1146, 1215, quoting *People v. Brasure* (2008) 42 Cal.4th 1037, 1066.) Indeed, the United States Supreme Court has observed that "[t]he circumstances of the crime are a traditional subject for consideration by the sentencer, and an instruction to consider the circumstances is neither vague nor otherwise improper under our Eighth Amendment jurisprudence." (*Tuilaepa v. California* (1994) 512 U.S. 967, 976 [114 S.Ct. 2630, 129 L.Ed.2d 70].) Factor (a) properly permits the jury to reach its penalty decision based upon the individualized facts of the case. (*People v. Linton*, *supra*, 56 Cal.4th at p. 1215 ["each case is judged on its facts, each defendant on the particulars of his offense"].)

Erskine next contends that California's death penalty scheme contains no safeguards to prevent the arbitrary imposition of death. He complains that juries are not required to find beyond a reasonable doubt that aggravating circumstances exist, that they needed to agree that any particular aggravating factor exists, that they must find beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating circumstances. (AOB 171-196.) Contrary to Erskine's argument, this Court has consistently held that California's "'death penalty statute is not unconstitutional because it does not require "unanimity as to the truth of aggravating circumstance, or findings beyond a reasonable doubt that an aggravating circumstance (other than § 190.3, factor (b) or (c) evidence has been proved, or that the aggravating factors outweighed mitigating factors, or that death is the appropriate sentence."'" (*People v. Romero & Self* (2015) 62 Cal.4th 1, 56, quoting *People v. Dement* (2011) 53 Cal.4th 1, 55.) This Court has explained that neither the state nor federal constitutions require the jury to "make *unanimous* findings concerning the particular aggravating circumstances." (*Linton, supra*, 56 Cal.4th at p. 1215, original emphasis.) And the Supreme Court's Sixth Amendment cases in *Cunningham v. California* (2007) 549 U.S. 270 [166 L.Ed.2d 856, 127 S.Ct. 856], *Blakely v. Washington* (2004) 542 U.S. 296 [159 L.Ed.2d 403, 124 S.Ct. 2531], *Ring v. Arizona* (2002) 536 U.S. 584 [153 L.Ed.2d 556, 122 S.Ct. 2428], and *Apprendi v. New Jersey* (2000) 530 U.S. 466 [147 L.Ed.2d 435, 120 S.Ct. 2348], do not alter the constitutional viability of California's death penalty laws. (See AOB 173-186; *People v. Romero & Self, supra*, 62 Cal.4th at pp. 56-57; *People v. Dement, supra*, 53 Cal.4th at p. 55.) In fact, the constitution does not require any burden of proof nor does it require trial courts to instruct juries that there is no burden of proof. (*People v. Romero & Self, supra*, 62 Cal.4th at p. 57.) A capital jury's "sentencing function is inherently moral and normative, not factual."

(*People v. Linton*, *supra*, 56 Cal.4th at p. 1215. Therefore, the penalty determination is "not susceptible to a burden-of-proof quantification." (*Ibid.*; *People v. Jennings* (2010) 50 Cal.4th 616, 689.) This Court has observed that simply because "certain noncapital sentencing proceedings may assign a burden of proof to the prosecutor does not mean the death penalty statute violates a defendant's rights to equal protection or due process." (*People v. Dement*, *supra*, 53 Cal.4th at p. 55; *People v. Rogers* (2006) 39 Cal.4th 826, 893.) In the absence of any due process or equal protection violation, this Court has also declined to find the nonexistence of any burden of proof in capital sentencing proceedings runs afoul of the Eight Amendment's protection against cruel and unusual punishment. (See AOB 191-196; *People v. Gamache* (2010) 48 Cal.4th 347, 407.)

Erskine further asserts that the jury should have been required to make written findings regarding the aggravating factors it relied upon. (AOB 196-199.) The jury need not make written or other specific findings. (*People v. Kopatz* (2015) 61 Cal.4th 62, 95; *People v. Linton*, *supra*, 56 Cal.4th at p. 1216.) Contrary to Erskine's assertion, "[t]he law does not deprive defendant of meaningful appellate review and federal due process and Eighth Amendment rights by failing to require written or other specific findings by the jury on the aggravating factors it applies." (*People v. Riggs* (2008) 44 Cal.4th 248, 329; accord *People v. Montes* (2014) 58 Cal.4th 809, 899; *People v. Foster* (2010) 50 Cal.4th 1301, 1365-1366; *People v. Gamache*, *supra*, 48 Cal.4th at p. 406.) Nor does the absence of written findings violate equal protection (*People v. Parson* (2008) 44 Cal.4th 332, 370) or a defendant's right to trial by jury (*People v. Avila* (2009) 46 Cal.4th 680, 724.) As this Court explained in *People v. Nelson* (2011) 51 Cal.4th 198, 225, "[n]othing in the federal Constitution requires the penalty phase jury to make written findings of the factors it finds in aggravation and mitigation[.]"

Erskine claims California's capital sentencing scheme is unconstitutional because it does not allow for comparative proportionality review to guarantee against arbitrary imposition of the death penalty. (AOB 199-200.) Intercase, or comparative, proportionality review is not required by the federal Constitution, and this Court has consistently declined to engage in it. (*Pulley v. Harris* (1984) 465 U.S. 37, 43-54 [104 S.Ct. 871, 79 L.Ed.2d 29]; *People v. Boyce*, *supra*, 59 Cal.4th at p. 725; *People v. Gonzales* (2011) 51 Cal.4th 894, 957.) Neither due process nor equal protection nor the prohibition against cruel and unusual punishment nor the guarantee of a fair trial demand intercase proportionality review. (*People v. Murtishaw* (2011) 51 Cal.4th 574, 597; *People v. Foster*, *supra*, 50 Cal.4th at p. 1368.)

Next, Erskine contends that California's capital sentencing scheme violates equal protection because it affords non-capital defendants more procedural protections than capital defendants. (AOB 201-208.) This Court has repeatedly rejected this claim, finding that capital defendants and noncapital defendants are not similarly situated and, accordingly, may be treated differently without violating either equal protection or the Eighth Amendment. (*People v. Lucas* (2014) 60 Cal.4th 153, 333; *People v. Linton*, *supra*, 56 Cal.4th at p. 1216; *People v. Debose*, *supra*, 59 Cal.4th at p. 214; *People v. Manriquez* (2005) 37 Cal.4th 547, 590; *People v. Johnson* (1992) 3 Cal.4th 1183, 1242-1243.)

Erskine also argues that the prosecution violated his constitutional rights by relying on unadjudicated criminal activity as an aggravating circumstance in the penalty phase of the trial. (AOB 208-209.) Contrary to Erskine's assertion, a penalty phase jury may properly consider a defendant's unadjudicated criminal activity. (*People v. Lucas*, *supra*, 60 Cal.4th 153, 333.) Further, the trial court need not instruct the jury that it could consider the unadjudicated criminal activity only if it unanimously

found the prosecution had proven such crime beyond a reasonable doubt. (*Ibid.*; see also *People v. Barnwell* (2007) 41 Cal.4th 1038, 1059; *People v. Hoyos* (2007) 41 Cal.4th 872, 927.)

Erskine further complains that the jury was inhibited in its consideration of mitigating evidence because the instructions for factors (d) and (g) under section 190.3, used the adjectives "extreme" and "substantial." He claims these adjectives erected an impermissible barrier for the jury's proper consideration of mitigating evidence. (AOB 209.) "The use of the words 'extreme' in section 190.3, factors (d) and (g), and 'substantial' in factor (g), does not act as a barrier to the consideration of mitigating evidence in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments." (*People v. Linton*, *supra*, 56 Cal.4th at p. 1216, internal quotes omitted.)

Erskine's contention that the trial court's failure to instruct the jury that statutory mitigating factors were relevant solely as potential mitigating factors precluded a fair, reliable, and evenhanded administration of the death penalty (AOB 209-211) also fails. There is no requirement that a trial court must instruct the jury that "'statutory mitigating factors are relevant solely as potential mitigators.'" (*People v. Scott* (2015) 61 Cal.4th 363, 407, quoting *People v. Streeter* (2012) 54 Cal.4th 205, 268.)

Finally, Erskine asserts that the trial court's refusal to delete inapplicable sentencing factors from the instructions violated his Sixth, Eighth, and Fourteenth Amendment rights. (AOB 212-213.) This contention fails as well because this Court has repeatedly held that trial courts are not obligated to delete arguably inapplicable sentencing factors from the jury instructions. (*People v. Nguyen* (2015) 61 Cal.4th 1015, 1091; *People v. Thomas* (2012) 53 Cal.4th 771, 832-833; *People v. Young*, *supra*, 34 Cal.4th at p. 1226.)

In sum, Erskine's challenges to California's death penalty scheme should be rejected as he has offered no reason for this Court to reconsider its prior decisions rejecting the very same claims.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests the judgment be affirmed in its entirety.

Dated: December 15, 2015

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
GERALD A. ENGLER
Chief Assistant Attorney General
JULIE L. GARLAND
Senior Assistant Attorney General
HOLLY D. WILKENS
Supervising Deputy Attorney General

Theodora M. Cogley for

ROBIN URBANSKI
Deputy Attorney General
Attorneys for Respondent

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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 36,519 words.

Dated: December 15, 2015

KAMALA D. HARRIS
Attorney General of California

THEODORE M. CROPLEY
Deputy Attorney General
Attorneys for Respondent

SUPREME COURT COPY

Supplemental DECLARATION OF SERVICE BY U.S. MAIL

Case Name: *People v. Erskine*
No.: S127621

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 16, 2015, 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 600 West Broadway, Suite 1815, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

CALIFORNIA APPELLATE PROJECT
101 SECOND ST STE 600
SAN FRANCISCO CA 94105-3647

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 16, 2015, at San Diego, California.

STEPHEN MCGEE
Declarant

Signature

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***People v. Erskine***
No.: **S127621**

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.

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KIMBERLY J GROVE
ATTORNEY AT LAW
P O BOX 425
LIGONIER PA 15658

Attorney for Appellant
Scott Thomas Erskine
(Two Copies)

CLERK OF THE COURT
FOR HON KENNETH KAI-YOUNG SO
SAN DIEGO CO SUPERIOR COURT
P O BOX 128
SAN DIEGO CA 92112-4104

Electronic Service:
APPELLATE DIVISION
OFFICE OF THE DISTRICT ATTORNEY
COUNTY OF SAN DIEGO
da.appellate@sdcda.org

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 15, 2015, at San Diego, California.

STEPHEN MCGEE
Declarant

Signature

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