SUPREME COURT COPY

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In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **GEORGE WILLIAMS, JR.,** **Defendant and Appellant.**	**CAPITAL CASE** Case No. S131819

SUPREME COURT
FILED
SEP 11 2014
Frank A. McGuire Clerk
Deputy

San Diego County Superior Court Case SCD172678
The Honorable David J. Danielson, Judge

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DEATH PENALTY

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INTRODUCTION

In April 1996, appellant abducted 14-year-old Rickie Blake from her home one night and then raped her and strangled her to death. DNA evidence identified appellant as the rapist and killer years after the murder. In January of 2003, when appellant was arrested for the murder in Indiana, he told police he had never seen, met or spoken to Rickie Blake. At trial, appellant's defense was that he had consensual intercourse with Rickie Blake and that a neighbor, George Bell, had killed her in an unrelated event. The prosecution presented evidence at trial that appellant had previously sexually molested his six-year-old daughter two years before the murder of Rickie Blake and had brutally raped Velma Williams and her six-year-old daughter just days after the rape and murder of Rickie Blake. The jury convicted appellant of kidnapping, rape and murder and found special circumstances true.

In the penalty phase, the prosecution presented evidence of two additional rapes committed by appellant. The defense presented evidence of appellant's upbringing, replete with domestic violence, alcohol abuse and an absent father. The defense also presented evidence of appellant's military service and expert testimony that appellant had many of the risk factors found to be prevalent among sexual offenders. Two defense witnesses who had interacted at different times in appellant's life in Indiana, were unable to travel from Indiana to San Diego, and did not testify. The trial court excluded videotaped interviews of the witnesses as unreliable hearsay and then denied appellant's request midway through the penalty phase to adjourn the penalty phase and have the court and parties travel to Indiana to conduct conditional examinations of the witnesses. The jury returned a death verdict.

Appellant claims his constitutional rights were violated when the prosecution failed to disclose notes memorializing observations of a

witness during the autopsy, observations that undermined his defense that the intercourse between the victim and appellant and the victim's death took place at different times. However, the trial court eliminated any prejudice when it excluded the undisclosed evidence and any mention of, consideration of, or reliance on the evidence by the expert witnesses. Appellant also claims his constitutional rights were violated when the trial court admitted evidence of two uncharged sexual offenses under Evidence Code section 1108, because of the prejudicial nature of the evidence and because section 1108 is unconstitutional. The precedent of this court makes it clear that section 1108 is constitutional and that the evidence admitted under section 1108 – offenses committed close in time to the charged offenses, resulting in convictions, similar in many respects and no more inflammatory than the charged offenses - were properly admitted by the trial court.

As to the penalty phase, the trial court was within its discretion in excluding the videotaped statements of two defense witnesses as unreliable hearsay because the statements contained multiple layers of hearsay, were unclear regarding the personal knowledge of the declarants and could not be clarified or put into context through cross-examination. In addition, any relevant information in the statements were cumulative to other evidence presented to the jury and there was no reasonable possibility of a different penalty verdict had the statements been admitted.

Appellant received a fair trial. The trial court was well within its discretion in its decisions to admit and exclude evidence, and in its instructions to the jury. The evidence overwhelmingly supported the jury's guilty verdicts in the guilt phase and its death verdict in the penalty phase. The judgment should be affirmed in its entirety.

STATEMENT OF THE CASE

On September 28, 2004, a jury found appellant George Williams Jr. guilty of the first degree murder of Rickie B., in violation of Penal Code section 187, subdivision (a) (Count 1), and found true special circumstances allegations that the murder was committed during the commission of a rape, within the meaning of Penal Code section 190.2, subdivision (a)(17), and that the murder was committed during the commission of a kidnapping, within the meaning of Penal Code section 190.2, subdivision (a)(17). The jury also found appellant guilty of forcible rape, in violation of Penal Code section 261, subdivision (a)(2) (Count 2), and kidnapping, in violation of Penal Code section 207, subdivision (a). (11 CT 2494-2498.) Appellant admitted he had been previously convicted of a serious felony, within the meaning of Penal Code sections 667, subdivision (a) and 1192.7, subdivision (a). (11 CT 2484.)

On November 8, 2004, the jury found that the penalty in this case shall be death. (11 CT 2542-2544; 25 CT 5450.) On February 24, 2005, the trial court denied appellant's automatic motion to modify the sentence under Penal Code section 190.4 and denied appellant's motion to reduce the penalty to life without parole. (11 CT 2546-2549.) Appellant was sentenced to death on count one. Sentences on counts two and three were stayed pursuant to Penal Code section 654. (11 CT 2546; 25 CT 5616-5618.)

This appeal is automatic.

STATEMENT OF FACTS

GUILT PHASE EVIDENCE

In April 1986 Rickie Ann Blake was in eight grade and had just turned fourteen years old. She was less than five feet tall and weighed 120 pounds. She lived with her parents and her older sister "Bootsie" on

Oleander Avenue in Chula Vista. Her older brother Bobby was overseas in the service. (17 RT 2550-2552, 2772-2773; 8 CT 1881-1884.) Rickie was shy, afraid of the dark and would not answer the door for anyone she did not know. She never snuck out at night or drank alcohol and would not leave the house alone at night, especially without shoes. (17 RT 2563-2565, 2727, 2748, 2791, 2793; 8 CT 1894.) She played with her Cabbage Patch dolls. (8 CT 1886.) Rickie was not allowed to date. (17 RT 2728.) Her "boyfriend" was Henry Lopez, an eighth grader attending a nearby school. They spoke often on the phone but had never even kissed. She had no interest in any other boys. (17 RT 2597-2599, 2602, 2749, 2751; 8 CT 1886.) She liked to go to the local skating rink on the weekends. (17 RT 2729, 2774; 8 CT 1885.) Rickie and her best friend Kristin wrote letters to each other talking about "girl stuff." (17 RT 2752-2753.) Rickie showered daily and would never wear the same clothes two days in a row. (8 CT 1895.)

One night, around 10:00 p.m., a man named George called Rickie. The man's voice sounded older and it was not their neighbor George Bell. Bootsie's friend Angela Caruso took the phone, told the man he should not be calling a girl Rickie's age, and hung up on him. (17 RT 2731-2733.)

On Thursday, April 10, 1986, Rickie's father picked her up from school and took her to the dentist to get her teeth filled. When they returned home at about 6:00 or 6:30 p.m., Rickie complained that her teeth hurt and instead of eating dinner had ice cream and aspirin. (17 RT 2568-2570, 2778; 8 CT 1887.)

When her parents went to bed at around 9:00 or 9:30 p.m., Rickie was watching a Padres game on television. The parents' bedroom door was closed. (17 RT 2571-2572; 8 CT 1889-1890.) Rickie's sister Bootsie returned home around 10:30 p.m. with her two girlfriends and Rickie went outside to talk to them. The girlfriends left and Rickie and Bootsie went

inside. Rickie was talking on the phone to Henry Lopez and Kristin on a three-way call. Bootsie locked the front and back doors and asked Rickie to get off the phone. Rickie hung up and brought the phone to Bootsie in her bedroom. (17 RT 2779-2782.) Around 11:00 or 11:30 p.m., the phone rang, Bootsie answered, and a man named George asked for Rickie. It was not George Bell. Rickie came in, got the phone, and took it into her bedroom. Bootsie fell asleep. (17 RT 2782-2786.)

The next morning Ms. Blake woke up around 5:00 a.m. The front door was open, the lights and television were on. Rickie's shoes were near the front door and her bed had not been slept in. Rickie's Cabbage Patch dolls had not been changed into their pajamas, something Rickie did every night. (17 RT 2573-2575; 8 CT 1890-1891.) The Blakes called neighbors and friends and then the police. Mr. Blake drove around looking for Rickie. (17 2576-2579, 2787-2790; 8 CT 1894-1895.)

Rickie's body was found by a motorist on Friday, April 11, 1986, after 10:00 p.m., on the Main Street off-ramp from Interstate 15. (18 RT 3035-3037.) Rickie's body was laying on her back, her face appeared to have been beaten and she was dead. (18 RT 3041-3042.) Her body had bruising around the left eye and cheek and slight bruising on her chin and lip. She was wearing a pink sweatshirt, black pants and socks, and no shoes. Her socks were very dirty. (18 RT 3206-3211, 3227.) It did not appear Rickie was killed at the scene where her body was found. (18 RT 3211-3215, 3328-3331.)

Two beer cans found on the side of the road near the body were collected. No fingerprints could be recovered from the beer cans. Two footprints were discovered in the dirt next to the body. In the roadway

there was a series of oil drops that appeared to be fluid from a vehicle.[1] Tracks from the dual rear wheels of a truck were in the roadway. (18 RT 3216-3222, 3272, 3279-3280.) The distance between where Rickie Blake's body was found and appellant's wife's apartment was 2.7 miles, six minutes driving time. The distance between where Rickie's body was found and her home was ten miles, 14 minutes driving time. (23 RT 4872-4873.)

Angela Cardenas, Rickie's friend, identified a photograph of appellant as a person she had seen at the skating rink. (17 RT 2735-2736.) Bootsie Blake also identified appellant as a person she had seen at the skating rink. (17 RT 2794-2795.) .) The owner of the skating rink and a regular customer of the skating rink in 1986 both identified appellant's photo as someone who looked familiar to them. (20 RT 3822-3824, 3846-3848.) A security guard for the skating rink identified appellant's photo as a person he saw standing around or walking around outside the skating rink in 1986. (20 RT 3832-3834, 3836-3839.) Appellant was good at roller skating and went to the skating rink regularly. (20 RT 3871, 3893-3894.)

There were bloodstains on the collar of Rickie's pink sweatshirt, on the collar of the white tank top worn under her sweatshirt and on her bra straps. Rickie's black pants and underwear had the odor of urine. (18 RT 3311-3318.) Oral, vaginal and rectal swabs were taken by the Medical Examiner's office. There was a positive result on a chemical test for sperm on the vaginal swab. DNA testing did not exist in May of 1986. (18 RT 3318.)

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[1] The swabs taken from a stain on the asphalt where the victim's body was found was tested to determine whether the stain was from transmission fluid or motor oil. It could not be differentiated through testing whether the stain was transmission fluid or motor oil. (25 RT 5446-5449.)

No drugs were detected in the samples provided from the autopsy of Rickie Blake. There was .04 percent alcohol in Rickie's blood. Alcohol was not detected in the vitreous humour of the eyeball. (18 RT 3336-3339.) It could not be determined whether the alcohol was from ingestion of decomposition. (18 RT 3340-3345.)

A. The autopsy

Dr. John Eisele performed the autopsy of Rickie Blake on April 12, 1986. (22 RT 4601, 4605.) She was wearing a pink hooded sweatshirt, and a white sleeveless tank top and a white bra were both pulled above her breasts. (22 RT 4607-4608.) Her socks were dirty. There were light linear areas above the breasts indicating something was pressed up against the upper area of the chest when lividity was forming. The bra pulled above the breasts would account for the light linear areas above the breasts. (22 RT 4613-4614.) The eyelid on the left eye was swollen and bruised. There was bruising in the inside lining of the eyelids on both eyes. The condition of the left eye was from blunt trauma, like a punch. The condition of the right eye could be from trauma to the eye or squeezing of the neck collapsing the jugular vein. There was bruising on the inside of the upper lip and bruising and tearing on the inside of the lower lip and gums. The trauma to the mouth was consistent with being caused by a beverage bottle. (22 RT 4617-4625.) The injuries to the face took place very close to the time of death. (22 RT 4626.) On the left side of her neck, beneath the chin, there was an area of bruising and a small scrape. There was also a small linear scrape on the left side of the neck. Pressure or squeezing, rather than a blow, would have caused the injuries to her neck. (22 RT 4626-4629.) There was a large hemorrhage over the forehead and two smaller areas over the right and left sides of the top of the head. The injuries indicated three separate impacts from a blow or object that could have caused unconsciousness. The object could have been a fist, a board, a club, or the

head being slammed down on an object. (22 RT 4630-4632.) There were several areas of hemorrhage in the soft tissue of the neck, consistent with the neck being squeezed by hands, a ligature or some other item. (22 RT 4633-4635.)

Dr. Eisele did not observe any injuries or abnormalities in the genital exam. However, it is not unusual to see no physical injuries on the victim of a rape. Dr. Eisele took a swab from the victim's vagina, and smeared it on a microscope slide. (22 RT 4636-4639.) On the vaginal slide Dr. Eisele saw spermatozoa heads, meaning the sperm had started to degenerate. A fresh ejaculate would contain intact sperm with heads and tails. (22 RT 4640-4641.) The victim tested at a .04 blood alcohol level, with no alcohol detected in the vitreous humour fluid in the eye, and was probably a combination of alcohol ingestion and decomposition. (22 RT 4641-4643.)

Dr. Eisele determined the cause of death was asphyxia by strangulation. (22 RT 4643.) Dr. Eisele's opinion was that the time of death was between 1:00 a.m. on April 11, to between 12 and 24 hours before that. (22 RT 4646-4648.) Dr. Eisele's opinion as to the time the victim had sex last was speculative. He gave defense counsel an estimate that the sex took place most likely between 48 and 72 hours before death. (22 RT 4649-4651.) He maintained his opinion that the sexual intercourse took place more than 48 hours before the victim's death. (22 RT 4674-4681-4682.)

Dr. Glenn Wagner had been the San Diego County Medical Examiner for 14 months at the time of the trial. (22 RT 4770.) Dr. Wagner reviewed the materials in the Coroner's case file, including the autopsy findings of Dr. Eisele and the investigative report. (22 RT 4775-4778.) Dr. Wagner opined that the time of death for Rickie Blake was the morning hours of April 11, 1986, more likely between midnight and 8:00 in the morning. (22 RT 4793-4794; 23 RT 4802-4806.) Dr. Wagner opined that Rickie's bra

had been displaced at or close to the time of death. (23 RT 4806-4807.) The injuries to the mouth indicated trauma to the mouth with her teeth partially closed. (23 RT 4807-4809.) The injuries to her mouth, the fluid in her lungs and the blood alcohol of .04 without alcohol in the vitreous humour all were consistent with her being force fed alcohol and the alcohol going into her lungs. (23 RT 4810-4814.) Dr. Wagner concluded that this was a strangulation death, the bruising on the neck and face occurred prior to death. (23 RT 4816-4618.)

Dr. Wagner reviewed the slides from the swabs of Rickie's vagina and saw the presence of spermatozoa and heads. (23 RT 4819-4921.) The vaginal cells indicated that Rickie was prepubertal, had not had her first period. (23 RT 4822, 4824-4825.) Dr. Wagner saw an intact sperm on the slide of the vaginal swab. (23 RT 4823-4824.) Dr. Wagner opined that Rickie was sexually assaulted. (23 RT 4825-4827.) Dr. Wagner concluded the sexual assault took place within 24 hours of the preparation of the slides from the vaginal swab. (23 RT 4827-4828.) Dr. Wagner had a high level of confidence in his opinion. (23 RT 4851.)

B. DNA results

Rickie Blake's pants and under-wear tested positive for sperm. (19 RT 3473, 3476-3489, 3489-3496.) In 2002 and 2003, DNA testing was done on the pants and underwear of Rickie Blake. Samples were broken down into sperm and non-sperm fractions. The sperm fractions were the same, showing one donor of the sperm. (19 RT 3621-3627.) A reference sample from appellant was tested in March 2003 after the DNA data bank found a match between appellant and the sperm samples from Rickie Blake's underwear. The DNA from appellant's blood sample matched the sperm fraction on the underwear. The statistical probability of a random match was such that the only reasonable inference was that the sperm

sample taken from Rickie Blake's vaginal swab and sperm samples from her clothing were from appellant. (19 RT 3616, 3627-3634, 3634-3639.)[2]

C. Appellant's statement to police

Appellant was arrested in Gary, Indiana on February 11, 2003. He was interviewed by police. (19 RT 3697-3702.) Appellant was told there was an arrest warrant for him for the murder of a girl in San Diego. Appellant said, "I don't know nothing about that." (8 CT 1907.) He said "I ain't touched nobody." Appellant said he was locked up on April 18, 1986, for the rape of a mother and daughter, and the week before he was arrested he was staying with his sister. (8 CT 1908-1911.) He claimed not to know a young girl named Rickie Blake. When he was shown photographs of Rickie Blake, he said he had never seen her, had never met her and had never been to Chula Vista. He said, "I'm sure. I've never seen her before in my life." (8 CT 1912-1914; 19 RT 3703-3704.) When asked how his sperm got into Rickie Blake, appellant said, "I didn't kill her." When asked if he had sex with her but was embarrassed to talk about it, he said no. Appellant said, "I didn't do nothing." (8 CT 1916-1920.) (19 RT 3704.)

D. Uncharged acts of sexual misconduct

1. 1984 molest of Idella Williams, appellant's daughter

In December of 1984, appellant's daughter, Idella was six years old, and was living with appellant, her mother, her sister and brother. One day Idella's mother was not home but appellant was at home and was drinking. Idella was in her nightgown. Appellant came into her room and rubbed

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[2] The DNA from the vaginal swab was compared to the DNA of various persons. Mr. Blake, Henry Lopez, Rickie's uncles, Greg Richardson, Vladimir Delva and George Bell were all excluded as the source of the DNA in the vaginal swabs. (26 RT 5894-5896.)

lotion on her vaginal area. She initially was quiet but eventually said "Daddy, daddy," to try to get him to stop touching her. He stopped and left her room. (20 RT 3856-3864.) Appellant was drinking alcohol and sitting on the floor when Idella's mother came home. Idella was standing by the bed, complaining that she was not feeling well. When asked what was wrong, Idella told her mother appellant had rubbed some lotion on her. When she told appellant what Idella told her, appellant said nothing. Idella told medical personnel and the police what happened. (20 RT 3864-3868, 3881-3885, 3886-3889.) Idella told her mother that appellant gave her some of his alcoholic drink. (20 RT 3890.) Appellant pled guilty in court for what he did to Idella. (20 RT 3872.)

2. April 17, 1986 rape of Velma Williams and her six-year-old daughter Alicia

In April of 1986, Velma Williams had two daughters: Alicia, age six; and Latisha, age four. Ms. Williams was living in a two bedroom apartment at 945 45th Street in San Diego. Brenda Williams, appellant's wife, lived across the hall. (20 RT 3933-3935.) On April 18, 1986, at about 8:30 p.m., Velma took out the trash and as she returned to her apartment, appellant followed her into her apartment. She told him she was tired and going to go to bed. When appellant forced his way past her, she told him to leave and that she would call the police. She picked up the phone in her bedroom but appellant pulled the phone cord out of the wall. He said, "Well, I am not going to leave until I fuck you." (20 RT 3938-3940.) Appellant pulled out a knife. He told her to take her pants off. She did. Appellant was drinking a 40 ounce bottle of Olde English and offered her some. When she said no, he tried to force her to drink some by putting the bottle to her mouth. (20 RT 3941-3943.) Appellant bound her wrists with a curling iron cord and bound her ankles with the phone cord. He poured baby oil on her vagina and anus. He vaginally raped her and used

the knife to cut some of her public hair. (20 RT 3943-3945.) Then he told her to turn over and anally raped her. Appellant retied her hands behind her, tied her legs again and then tied her hands and legs together. Appellant asked her who else was in the apartment and she told him her girls were in their room asleep. (20 RT 3946-3947.) Ms. Williams begged appellant not to do anything to her daughters. Appellant left the bedroom and a few minutes later she heard a girl scream from her daughters' room. Appellant returned to Ms. Williams bedroom and vaginally raped her again. After the rape, appellant fell asleep. Ms. Williams was able to get her wrists untied, slowly crawled away from appellant, picked up his knife, quickly grabbed some clothes and went to her girls' room. There was a pool of blood in her older daughter's bed. She left with the girls and called the police. (20 RT 3948-3954.) The police went into the apartment and brought appellant out. Ms. Williams and her daughter were treated at the hospital. (20 RT 3955-3957.)

An examination of Alicia showed her wrists had a raised circumferential linear mark, consistent with the use of some form of restraint. (22 RT 4751, 4756-4758.) Alicia's injuries were consistent with a partial penetration of her vagina, more consistent with a penis than a finger. (22 RT 4767-4769.)

E. Defense evidence

Jerry Chism, a retired Criminalist, compared the photograph of the right shoe impression found at the scene with a photograph of appellant's right bare foot. He concluded that appellant's bare foot did not make the shoeprint from the scene. The shoe print from the scene was 15 inches long. (19 RT 3650, 3653-3657.) Mr. Chism also viewed photographs of a fluid stain at the scene where the victim's body was found. The pool of fluid and the fluid indicated a vehicle stopped and then accelerated from the scene. A size seven or eight shoe that appellant would wear could not have

made the shoe print at the scene. (19 RT 3657-3661.) The length and width of the shoe, accepting Mr. Chism's measurements, would be made by a shoe size 19. (19 RT 3676.)

1. Evidence of George Bell's culpability for the murder

Gloria Cardenas was married to George Bell and had three children with him. (23 RT 4878-4879.) After 1993, they began to have marital problems related to Bell's alcohol and methamphetamine abuse. Ms. Cardenas first heard of Rickie Blake about two years after she married Bell. (23 RT 4880-4881.) Bell spoke to her often about Rickie Blake's death. He said it was an accident. He was always high on methamphetamine or drunk when he spoke about Rickie's death and sometimes would cry. (23 RT 4882-4883.) When she suggested to him that he was probably there because he knew so much about the murder, Bell said nothing. (23 RT 4885.) Many times Bell told her he would put her six feet under and that he had done it before. He said that Rickie had a tire mark on her face, that Rickie's body was dumped on Main Street, and that Rickie's glasses were in the trunk of a car that was crushed at the junkyard. (23 RT 4889.) Bell was violent to Ms. Cardenas. He would choke her, put a pillow over her face or hold his hand over her mouth and nose. Bell also hit her, once causing her to go to the hospital. (23 RT 4891-4892.) Bell raped Ms. Cardenas a couple of times too. (23 RT 4895.) Bell disliked cats. The neighbor had twenty cats and Bell killed some of them. (23 RT 4892-4893.) Bell refused to visit his stepfather's grave at the cemetery because Rickie was buried in the same cemetery. (24 RT 5010-5011.) Bell always blamed Greg Richardson for Rickie's death. (24 RT 5016.)

Greg Richardson was a mechanic living a block down the street from the Blakes. Bell told Richardson that he was with Bell's girlfriend Tink and had dropped her off at 9:00 p.m. on the night Rickie disappeared. (25

RT 5337-5341.) Richardson asked Bell directly if he killed Rickie and Bell said nothing. (25 RT 5343-5344.) Bell told Richardson in the garage that Rickie's death maybe was an accident. (25 RT 5417.) Bell speculated that maybe someone tried to have sex with Rickie and put their hand over her mouth and accidently suffocated her. (25 RT 5410-5411.) Richardson had worked on Bell's car. (25 RT 5402-5403.) Bell's car leaked pink transmission fluid and also leaked black engine oil. (25 RT 5430-5431.)

Nolan Kennedy was a neighbor and friends with both Bobby Blake and George Bell. After Rickie's death, Bell spoke about her murder, wondering what happened to her, and sometimes spoke like he had been there. Everyone in the neighborhood was trying to figure out who did it. (24 RT 5075-5078.) Once Bell said he thought Rickie's death was an accident. Bell blamed Greg Richardson for the murder. (24 RT 5079-5083.) Bell and Greg Richardson were blaming each other for the crime. (24 RT 5089-5090.)

Michaele Schmuckal lived in Chula Vista in 1986, was friends with Bootsie Blake and also knew George Bell. After Rickie's death, Bell said he was sorry about Rickie's death and that it should not have happened. He said it was an accident. (24 RT 5212-5214; 25 RT 5289-5291.)

Andrea "Tink" Armstrong was George Bell's girlfriend in 1986. On April 10 and 11 of 1986, she was in Los Angeles attending a funeral. George Bell told her over the phone that Rickie Blake was missing. Bell once struck her in the face, causing her to have two black eyes. (25 RT 5320-5323, 5330.)

George Bell was interviewed in Tijuana, Mexico, on January 8, 2004, by a defense investigator. He said Rickie was like a sister to him. Bell said the morning Rickie was missing he answered the phone and Ms. Blake asked if Rickie was there. (25 RT 5483-5485.) Bell said the night before Rickie disappeared he came home from work, and Cindy and Rickie were

on the front porch. He said he went to his girlfriend's house at around 7:00 p.m., they returned to his home at around 9:30 and he drove Tink home at around 10:00 p.m. He said he returned home at around 10:30 or 11:00 p.m. (25 RT 5488-5489, 5493.)

2. Evidence of a relationship between Rickie and appellant

Ramy Forrest was friends with Rickie Blake through school. Ramy only saw Rickie during school as Ramy's parents were strict. (24 RT 5102-5104.) Ramy and Rickie spoke a lot on the phone. Rickie told her that she was interested in an African-American boy named George from the skating rink. One day at school, Rickie introduced Ramy to George. (24 RT 5106-5110.) Rickie talked about George. (24 RT 5111-5112.) More recently, when the police told Ramy that the suspect in this case was George Williams, she looked on the Internet and saw appellant's photograph. He did not look like the boy named George that Rickie introduced her to because appellant was older. (24 RT 5114-5115.) A defense investigator showed her a different photograph of appellant, one that looked like the person named George she met with Rickie at school. (24 RT 5115-5117.)[3] Rickie asked Ramy to keep her relationship with George quiet because he was Black. She met the person named George a month or two before Rickie was killed. (24 RT 5117-5118.) The male named George that Rickie introduced to Ramy was high school age. (24 RT 5123.) Ramy identified appellant in court as the person named George that Rickie introduced her to at school. (24 RT 5140.)

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[3] The parties stipulated that the photograph, Exhibit 60, was an army photograph of appellant was taken in 1974 when appellant was 19 years old. (26 RT 5897.)

F. People's rebuttal evidence

George Bell testified he lived on Oleander Street with his brother Jaime and sisters Cindy, Sonny, and Myrna. He knew Rickie Blake because he was friends with her older brother Bobby. (26 RT 5631-5632.) At the time Rickie was killed, Bell was working as a carpenter with his father. His girlfriend at that time was Andrea Armstrong, "Tink." He saw Tink every day. (26 RT 5633-5636.) On the morning Rickie went missing, Ms. Blake called Bell's home, asked whether Rickie was at the Bell's house. Bell woke his mother up and gave her the phone. Bell ran down to the Blakes' house. The police were already present. (26 RT 5636-5640.) At the end of the day, Bell found out that Rickie had not yet been found. Eventually he found out from Detective Olais and Mrs. Blake that Rickie's body had been found. He spoke to people about how the murder could have happened. Bell spoke to a neighbor, Greg Richardson, about the case and to Bobby Blake when Bobby got back home. (26 RT 5641-5644.) Bell also spoke to police about his theories regarding Rickie's death. Bell was suspicious of Richardson and he told the police so. (26 RT 5644-5647.) Bell had an LTD with transmission problems until he had a co-worker install a new transmission in the car. (26 RT 5653-5655.) Bell and Richardson pointed the finger at each other regarding Rickie's death. (26 RT 5657.) Bell told people that he was sorry about what happened to Rickie and would get emotional when speaking about it. (26 RT 5663-5664.)

Bell told a defense investigator he was with Tink after work on the day Rickie was missing. He also told the investigator that he took Rickie and Cindy for ice cream, but he was not sure whether it was the day Rickie went missing or a day or two before. He would usually pick up his girlfriend after work and they would spend the evening together. (26 RT

5666-5668.) Bell admitted talking to his wife Gloria about theories he had regarding how Rickie was killed. (26 RT 5709-5710.) He also acknowledged that he did not answer when Richardson asked him whether he killed Rickie. (26 RT 5805-5806.)

On the night of Rickie's disappearance or the day before, Rickie asked Cindy Bell whether she had given Rickie's phone number to someone named George. Rickie was wondering why the person named George was calling her. In the past, Cindy sometimes gave Rickie's phone number, claiming it was her number, to guys Cindy was not interested in. (26 RT 5860-5862.)

Andrea Armstrong testified that George Bell had an older brother type relationship with Rickie Blake and looked out for Rickie and Cindy. (26 RT 5888-5889.) Many of the people in the neighborhood got together in the park and discussed what might have happened to Rickie and shared their theories as to what happened. (26 RT 5889-5890.) George Bell never indicated to her that he was involved in Rickie's murder. (26 RT 5892.)

PENALTY PHASE EVIDENCE

A. 1981 Rape of Sandra Stephens

On November 13, 1981, Sandra Stephens was 15 years old and was living in Compton with her family. She met appellant because her brother and appellant worked at the naval shipyard. (31 RT 7237-7238.) That night she was sitting in a van at her house with appellant, her brother, her sisters and a couple of friends. They were drinking and smoking marijuana. Appellant told Sandra to drive to the store with him. She did. Appellant drove past the store and then started hitting her in the face and calling her names. Appellant continued to drive around as she begged him to let her out of the van. (31 RT 7239-7241.) Appellant stopped in a deserted, dark area and forced her into the back of the van. He ripped her clothes off and

vaginally raped her. Sandra was able to grab her jacket and open the door to the van. She ran to a police car and told the officer that appellant had raped her. Appellant drove off. (31 RT 7242-7245, 7256-7259, 7269-7270.) The police followed appellant over several blocks and eventually lost sight of the van. They got the license number of the van. (31 RT 7259-7260.) Later the police spotted appellant's van parked behind a house. They knocked on the door, made contact with appellant, and turned him over to Long Beach Police. (31 RT 7262-7264, 7271.) Sandra testified at a preliminary examination but did not return for the trial because she wanted to put the incident behind her. (31 RT 7246-7248.)

B. 1985 Rape of Valendar Rackley

Valendar Rackley joined the Navy in 1984 and was training to be a Chaplain's Assistant. She met appellant on the base. (31 RT 7291-7292.) On June 13, 1985, she went out with appellant and his friend to a couple of clubs. Appellant was driving and they were all drinking. Appellant dropped his friend off and then drove to a freeway overpass. (31 RT 7292-7294.) Appellant said he wanted to have sex with Ms. Rackley. She said no. He forced himself on her, tying her up with his belt and some shoestrings. He took her clothes off and then vaginally raped her. Appellant asked her if she was going to tell and she said no. He took her back to the Navy base. (31 RT 7295-7297.) Eventually she reported the rape to her commanding officers and to the police. (31 RT 7298-7300, 7305-7308.)

C. April 18, 1986 rape and sodomy of six-year-old Alicia Conrad

Alicia Conrad described the night appellant raped her on April 18, 1986. Alicia was six years old and her four-year-old sister slept in the same bedroom in a different bed. (31 RT 7313-7315.) Alicia was awakened by appellant putting a sock in her mouth and telling her to be quiet. He tied

her hands behind her, pushed her into the bathroom, bent her over the bathtub, and started having sex with her. (31 RT 7316-7317.) In the bathroom he put his penis in her anus. It hurt. Then he took her into another room where he penetrated her vagina. (31 RT 7318-7319.) Alicia wound up on the living room floor. Later her mother came in and hurried them out of the apartment. They called the police and took her to the hospital. She stayed at the hospital three nights because of the tearing and bleeding. She contracted Herpes. (31 RT 7320-7322.) She was very distrustful of guys when she was growing up. (31 RT 7322-7323.)

Dr. Marilyn Kaufhold examined Alicia Conrad. Alicia was prepubertal. Dr. Kaufhold found general bruising of the vestibule and the opening of the urethra. The hymen was torn completely through the lower portion and into the vaginal wall and was bleeding briskly. (31 RT 7332-7336.) Alicia was bleeding so much she soaked through a woman's menstrual pad. When Alicia reported painful blisters in her genital area and fever a few days later, she tested positive for Herpes. (31 RT 7336-7338.)

D. The 1998 molest of Leon Fuller

Leon Fuller lived in Indiana and was appellant's cousin. (31 RT 7339-7341.) On February 13, 1998, Leon was at his aunt's house in Gary, Indiana, with his cousin Mark, and appellant's son, George III. Leon was 14 years old. Leon, Mark and appellant's son went to sleep on the floor of the den. Leon woke up to find appellant behind him, pulling his hand out of the back of Leon's pants. Leon felt a sharp pain in his butt. (31 RT 7341-7344.) Leon went to the bathroom to check himself out. Leon felt moisture in his butt. When Leon returned from the bathroom, appellant was gone. Leon told his cousin Mark about what happened. Eventually

Leon was interviewed by the police and a criminal case was filed as a result. (31 RT 7344-7347.)[4]

E. Rickie Blake's family's testimony

Bootsie Blake, Rickie's sister, testified that Rickie was shy except when she was around the family. Rickie always wanted to be around Bootsie. When Rickie died, they were starting to get close. Bootsie had one of Rickie's Cabbage Patch dolls at her wedding. Bootsie went to the cemetery on Rickie's birthdays. (31 RT 7324-7327.) Their mother took Rickie's death very hard. Their mother would sit in the living room, daydreaming and talking about Rickie. A week before their mother died, she said she was going to see Rickie when she died. Rickie was a "daddy's girl." Rickie and her dad watched Padres games together and went to get ice cream often. Rickie's death affected Bootsie "immensely" as she had trouble trusting people and had trouble trying to remember Rickie. (31 RT 7327-7328.)

William Blake, Rickie's father, testified that before she died, Rickie was shy but starting to come out of it. She was never any trouble. She played with her dolls, played soccer, and sang in the choir. He missed Rickie's smile, helping her with homework, and her playing with the cats. She was happy being with her family. (31 RT 7368-7370.) Mr. Blake and his wife could not bear to help clean Rickie's stuff out of her room. Rickie's mother was devastated. They were sad all the time, especially on holidays. He was both happy and relieved when he found out someone had been arrested for Rickie's murder after 17 years. (31 RT 7372-7375.)

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[4] Mark King, Leon's cousin, testified that Leon told him the next day that appellant had done something to him the night before but made King promise not to tell anyone. King told his grandmother a couple days later. King told the police what Fuller told him appellant had done to him. (31 RT 7364-7367.)

F. Defense evidence

Lela Drew, appellant's mother, was 68 years old at the time of trial. Appellant was her only child. She reviewed her family tree, identifying her ancestors and siblings. (32 RT 7478-7481, 7484-7485, 7487-7491.) She grew up in Arkansas. The family moved up north in 1942. (32 RT 7481-7483, 7488-7489.) They were living in Gary, Indiana, when her mother had a stroke in 1948. Her father returned to the south, and Ms. Drew, her mother and two brothers moved in with her uncle H.B. After about three years, Ms. Drew's father returned. Ms. Drew's mother had a another stroke in 1953 and died. (32 RT 7492-7497.) Ms. Drew's father hit her and her siblings when he drank and they misbehaved. He also gambled their money away. (32 RT 7499-7502.)

Ms. Drew met appellant's father when she was 17 years old. She got pregnant with appellant at 18. Her aunt "whooped" her and kicked her out of the house for a few months. (32 RT 7609-7612.) After appellant was born, they moved around and stayed with various family members. (32 RT 7614-7618.) Appellant's father would come around at times but would not do anything for them. He was always drunk. (32 RT 7619-7622.) Ms. Drew and appellant would get kicked out of one family member's home and move into another family member's home. She was receiving welfare. (32 RT 7622-7627.) In around 1960, they moved into an apartment with no furniture. Ms. Drew got a job washing dishes in a restaurant. Appellant did "pretty good" in school. (32 RT 7627-7633.) Ms. Drew then met John Small. He was married but he paid to have them move, bought furniture and bought appellant clothes. Ms. Drew and Small argued a lot and got into physical fights. (32 RT 7633-7638.) When appellant misbehaved, his mother hit him. (32 RT 7638-7639.) In 1966, Ms. Drew got sick with a bowel obstruction and was hospitalized. Appellant stayed at his uncle's home. (32 RT 7642-7644.) Appellant kept running away from his uncle's

house until finally, when the police called his mother, she told the police to keep appellant and he was placed in foster care. (32 RT 7648-7655.) Appellant's mother denied drinking alcohol. (32 RT 7655.)

When appellant was 12 or 13 years old, Ms. Drew got a job, found a place to live and got appellant out of the foster system. She worked at a place in Chicago, commuting every day from Gary. (32 RT 7662-7663.) In 1970, appellant's mother got a job at U.S. Steel where she worked for 30 years and retired. Eventually she bought a home on Taft Street. (32 RT 7664.) When she started working at U.S. Steel, she started seeing a man named Ernie Frazier. They would get into physical fights, some in front of appellant. During one particularly lengthy fight, she stabbed Frazier in the back and was arrested. (32 RT 7665-7672.) In high school, appellant was in the R.O.T.C. There were a lot of drug and gang activity in their neighborhood but appellant was not involved in that. Appellant told her he could get his high school diploma while in the Army, so she gave her permission for appellant to join the Army. (32 RT 7675-7676.) Appellant did not get his diploma in the Army but got his G.E.D. while in prison. Appellant was able to find work after he got out of the service. He got a good job at U.S. Steel. (32 RT 7677-7680.) Appellant only worked at U.S. Steel for about a year before he was fired because he did not show up for work. He was living with his mother in her house. (32 RT 7681-7683, 7700-7701.) Appellant did not see his father often as he was growing up and his father had no real negative impact on him during those years. (33 RT 7817-7818.)

Yvonne King was appellant's aunt, his mother's sister. She testified that appellant was kind, had many skills and would help anyone. He had a great attitude and would fix things for people. (34 RT 8391-8393.) Her father and appellant's grandfather, Papa Drew was a heavy drinker and a gambler. When he drank he was violent and would beat the children with a

belt. (34 RT 8400-8401, 8404-8405.) Aunt Frances was very mean. She beat the kids with regularity. (34 RT 8409-8413.) When appellant's mother got pregnant with him, Aunt Frances hit her with a cord and kicked appellant's mother out of the house. (34 RT 8415-8416.) Appellant's father always had a bottle of liquor with him and would come by their house at night. (34 RT 8417-8419.) Appellant's father was always drinking and said he had been drinking since he was 13 or 14 years old. John Small also drank but he was just a social drinker. Another boyfriend of appellant's mother, Mozelle Savage, also had an alcohol problem. John Small and appellant's mother had physical fights. (35 RT 8426-8430.) Appellant's mother drank vodka only on one occasion after she got out of the hospital. Ms. King never saw appellant's mother drink other than that. (35 RT 8431-8432.) In her brother Earl's house, the adults were drinking all the time. They argued and fought all the time too. They hit the kids too. (35 RT 8433-8436.) Aunt Dolores called appellant names and grabbed the kids' genitals. (35 RT 8437.) After appellant left his uncle Earl's home, he went into foster care. Regarding the incident with Leon Fuller, appellant had been drinking and had a drinking problem. (35 RT 8438-8440.) Ms. King believed appellant was a very caring person, a good nephew and she loved him. (35 RT 8443.)

Sheila Drew Thompson was appellant's cousin, but he was like a brother to her. She first met appellant when he was 10 or 11 years old, and he lived with her family on and off for about four years. There were a lot of people living in the house. The children slept on the floor. There was not much food in the house but the adults would drink vodka for breakfast and not stop drinking until they went to bed. (34 RT 8263-8266, 8295.) When the adults in the house were drinking, they would fight, using foul language and hit each other. They would refer to the kids with derogatory terms. The kids were beaten every day for no reason. (34 RT 8267-8270.)

Appellant received the same beatings as the other children but would take his "whooping" and not react. (34 RT 8272-8273.) Her aunt would grab the kids by their private parts and make comments about whether they were having sex. (34 RT 8287-8288.) Once when appellant was caught smoking cigarettes, his mother burned his hand with the cigarette. (34 RT 8292.) Ms. Thompson described an incident where her father put a noose around their necks and made them stand on a chair. Her cousin got tired, jumped and was hanging by the neck until they cut her down. (34 RT 8289-8291.) Ms. Thompson never saw appellant's mother drink alcohol. (34 RT 8276.) Appellant told her he was unhappy in his marriage. (34 RT 8279-8282.)

Sergeant Louis Stewart was the R.O.T.C. instructor at Roosevelt High School from 1968 to 1989. In that neighborhood there were gang problems, drug problems and a wide range of criminal activity. It was a segregated community. (34 RT 8360-8364.) Appellant was an M.P., and was assigned various functions throughout the high school. Appellant earned a number of medals. (34 RT 8368-8372.)

Earthel Bennett retired from the Army in 1978 and then worked for the California Highway Patrol for 23 years. (33 RT 7865-7866.) Mr. Bennett was appellant's supervisor in the Army in 1974. Appellant was dedicated, responsible, trustworthy and asked questions so he could do his job better. Appellant was a launcher crewman when they were stationed in South Korea. (33 RT 7870-7873, 7876.) Appellant had a secret clearance status. (33 RT 7874.) Mr. Bennett initial impression of appellant was that he was a team player and wanted to do a good job. He was a quick study and a hard worker. Appellant was a "shining star." (33 RT 7879-7881.) Eventually, Mr. Bennett and appellant developed a father-son relationship. Mr. Bennett had not seen or spoken to appellant since 1975. (33 RT 7882-7883.) Mr. Bennett evaluated appellant and rated him outstanding or excellent in every category. (33 RT 7895-7903, 7905.)

Jerry Hays worked for 38 years with the Navy, both active duty and as a civilian, and was involved with Navy personnel records in both capacities. He reviewed records regarding appellant's experience in the Navy. Appellant graduated from boot camp on November 17, 1978. He then trained to be a boiler technician. In 1979 he was assigned to the U.S.S. Leahy, a cruiser that was part of a battle group. (36 RT 8840-8845.) Appellant was honorably discharged and reenlisted in the Navy in March of 1981. He was discharged from the Navy in July of 1985, when he received an other than honorable discharge. (36 RT 8847-8850, 8857.) Appellant had a alcohol related disciplinary entry in June of 1979 and other disciplinary entries in September of 1979, January of 1981, July of 1981 and March of 1982. A disciplinary entry in July 1982 was possibly alcohol related. (36 RT 8852-8854.)

Aaron Pratt was released from prison on June 28, 2004, and had been convicted of several felonies, including perjury. (36 RT 9019-9020.) Pratt enlisted in the Navy in 1979 and met appellant when they were assigned to the U.S.S. Mars. They were like brothers. Appellant was lovable, caring, consistent and true and took an interest in Mr. Pratt's life when Pratt was going through some struggles. The last time Mr. Pratt saw appellant was in 1985. Appellant befriended Pratt when he was new in the Navy and showed him areas where he could improve as a sailor. (36 RT 9020-9023.) Appellant loved his children a great deal. He took pride in his work and would perform work without being asked. (36 RT 9024-9027.) Mr. Pratt drank alcohol with appellant often and saw appellant drunk. Appellant would show poor judgment when he was drunk and did things he would not normally do. Appellant got into trouble many times in the Navy involving his use of alcohol. (36 RT 9029-9032.) Appellant was compassionate, trustworthy, and a good friend. (36 RT 9035.)

Marvin Rowe supervised appellant in the construction business from 1994 or 1995 until 1997. Appellant was just starting as a carpenter and was a quick learner and hard worker. (33 RT 8016-8018.) Appellant worked as a trouble-shooter, fixing whatever problems came up on a job. Appellant worked on and off for Mr. Rowe for two or three years. He had a good attitude, but did not always show up for work. (33 RT 8020-8022, 8024.) Appellant was locked up for a couple of years during the time he was working with Mr. Rowe. (33 RT 8026-8027.)

James Esten worked for the California Department of Corrections in a number of capacities from 1973 to 1992. (36 RT 8863-8866.) Mr. Esten reviewed appellant's prison records from California and from Indiana to determine whether appellant had any acts of violence or behavior problems indicating he might be dangerous in the future in a prison environment. He interviewed appellant twice. Appellant entered the California prison system on July 16, 1986 and was paroled on January 21, 1995. (36 RT 8867-8873, 8874-8876.) Mr. Esten opined that appellant did not pose a threat of future dangerousness to staff, other inmates, or other employees if sentenced to life without parole. (36 RT 8879-8882, 8888.)

George Williams III, appellant's son, was born in 1982. He was a custodian at a store in Gary, Indiana. Appellant was out of his life for a long time while appellant was in prison in California. They had built things together, worked on cars and lifted weights. When appellant moved back to Gary, they got to know each other. George III testified he loves his father and believes he is a good guy. (34 RT 8319-8322.) Elizabeth Williams, appellant's daughter, was born in 1981. Appellant had been in prison for a large part of her life but they now had a good relationship and she loved him. (34 RT 8325-8326.)

Deborah Franklin had a son with appellant, named Daniel. Daniel was born in 1974. When she gave birth to Daniel, she was 16 years old,

appellant was 18. Appellant was the mascot in high school and he cared about everyone. He dressed up in a costume, took her to games and was fun to be around. (34 RT 8330-8334.) She did not tell appellant when she first got pregnant and told him in a letter after he left Gary to join the Army. Ms. Franklin's father helped raise Daniel and did not want appellant or his family involved in the child's life. (34 RT 8335-8337.) Appellant met his son Daniel when Daniel was around 20 years old. Appellant wanted to meet Daniel earlier but Ms. Franklin would not allow it. (34 RT 8337-8339.) Daniel Franklin was 30 years old at the time of trial. He first found out that appellant was his father when he was a teenager. He met appellant in 1995, when Daniel was 21 years old. Appellant taught him how to build things. Daniel loved appellant. (34 RT 8348-8352.)

1. Psychological experts

Dr. Douglas Tucker, a psychiatrist, treated sex offenders and evaluated Sexually Violent Predators. (33 RT 8057-8065.) Dr. Tucker's specialty was sex offenders and substance abuse. (33 RT 8066-8067.) The risk factors that predispose a person to commit sexually violent offenses include sexual abuse as a child, alcohol abuse and dependence, physical abuse and neglect, and brain damage. (33 RT 8073-8076.) Alcohol intoxication and dependence are related to sexual offenses. (33 RT 8076-8079.) A large part of alcohol abuse is genetic predisposition, a person who is the child of an alcoholic. (33 RT 8081-8085.) Another part of the alcohol abuse and dependence risk factor is environmental, experience and observations while growing up. (33 RT 8085-8086.) Childhood abuse and neglect can also predispose persons for alcohol abuse and dependence. (33 RT 8086-8090, 8104.) Persons who have been sexually abused as a child have a much greater risk of engaging in sexually violent offenses. (33 RT 8099-8102.) Brain damage results is a disproportionate amount of sexually

inappropriate behavior. Brain damage would act synergistically with other risk factors for sexually violent offenses. (34 RT 8201-8206.)

Dr. Daniel Delis conducted a neuropsychological evaluation of appellant. Appellant told him he had a concussion as a child with no residual problems, was hit with a wrench as a teenager and had an alcohol related car accident in 1981 where he lost consciousness. (35 RT 8475-8478.) An M.R.I. showed no evidence of brain damage. (35 RT 8479-8480.) Appellant's scores on I.Q. tests over the years were consistent, in the average to below average range. On many of the tests, appellant scored well, indicating a number of cognitive strengths. (35 RT 8485-8488.) On tests sensitive to frontal-lobe brain damage, appellant's scores were consistent with having frontal brain injuries. (35 RT 8491-8493.) Appellant also told Dr. Delis about an incident of sexual abuse with the director of a Boys Club when appellant was between 12 and 14 years old. Appellant also said he received some beatings as a child but it did not happen very often. Appellant's school records indicated that he may have been exposed to adult sexual activity and had an exaggerated curiosity about sex as a young child. (35 RT 8494-8497.) Appellant was exhibiting sexual problems at a young age, possibly from being exposed to adult sexual behavior or from being sexually molested. (35 RT 8498-8499.) Dr. Delis found a relationship between appellant's car accident and possible brain damage and this first report of sexual assaultive behavior. He found significant that appellant had abnormal sexual impulses, started drinking heavily in the 1980's, had a possible injury affecting the frontal lobes and only then began acting out. (35 RT 8498-8500.)

Dr. Rahn Minagawa did a forensic evaluation of appellant. (35 RT 8531, 8605-8607.) Appellant's childhood history was filled with neglect, abuse, alcohol abuse and domestic violence. He determined appellant was alcohol dependent. (35 RT 8608-8614.) Dr. Minagawa concluded that

appellant's mother was an alcoholic. (35 RT 8613-8614.) Alcoholism in the family is one of the most significant factors for alcohol dependence. (35 RT 8615.) Dr. Minagawa opined appellant was a pedophile. (35 RT 8615-8616.) He did not believe appellant had antisocial personality disorder. (35 RT 8621.) Appellant presented as two different individuals, the sober person and the person abusing alcohol. Records from the military and correctional records indicated appellant can control his behaviors when in a structured environment. Alcohol appears to have been a factor in every one of his criminal offenses. (35 RT 8622-8627.) Appellant was also a victim of sexual abuse as a child. (35 RT 8627-8628.) Appellant's criminal history seems to have started in 1981 and has always been related to his abuse of alcohol. (35 RT 8640-8641, 8654-8655, 8658.)

G. Prosecution rebuttal evidence

In 1986 Dr. Mark Kalish performed a psychiatric evaluation of appellant. (36 RT 9001-9005.) Appellant told him that his first sexual experience was at age 10 or 11 with a younger cousin. Appellant denied having a history of psychiatric or medical treatment. He admitted to significant alcohol use and claimed he had been drinking prior to the offenses he was charged with. (36 RT 9006-9008.) Dr. Kalish found appellant's cognitive functioning to be normal. (36 RT 9009-9011.) Appellant gave no indication that he had been abused, molested or neglected during his childhood. (36 RT 9011.) Appellant admitted he had pedophilic fantasies. (36 RT 9017.)

Clifford Merrill, a probation officer for Solano County, prepared a probation report in April 1985 for the case in which appellant molested his daughter. Appellant told him he was raised by his aunt and mother and described his childhood as happy although he ran away three times and was placed in foster care. He said he had not been physically abused, neglected or sexually molested. (36 RT 9051-9054.) He claimed he had no unusual

sexual desires and said that although he regularly drank alcohol, he did not have an alcohol problem. Appellant claimed that his 1981 arrest for rape and oral copulation was consensual sex. (36 RT 9055-9056.) Alcohol played a significant role in the molest of appellant's daughter. (36 RT 9057.)

Dr. Park Dietz, a forensic psychiatrist, conducted a psychological evaluation of appellant. (37 RT 9105-9106.) Dr. Dietz diagnosed appellant with pedophilia, a sexual deviation of persistent attraction to prepubescent children, based on his sexual molestation of two six-year-old girls and his admission that he has sexual fantasies about children. Dr. Deitz also diagnosed appellant with sexual sadism, the persistent desire to cause the suffering of one's sexual partner. Support for this diagnosis were the number of times appellant tied up or bound the victims of his sexual assaults, including children, where binding them was unnecessary to control them. (37 RT 9110-9113.) A third diagnosis was paraphilia not otherwise specified, an enduring desire for sexual activity with an adolescent, a person past puberty but not yet an adult. (37 RT 9113-9114.) A fourth diagnosis was alcohol abuse. (37 RT 9115-9116.) Another diagnosis was antisocial personality disorder. (37 RT 9119-9122.) Examining appellant's childhood history for childhood adversities, there was evidence of alcoholism in appellant's family. Appellant suffered from paternal abandonment and maternal neglect, having to rely on others to care for him. He also may have been molested as a child. (37 RT 9125-9130.) Other adversities were that he may have been physically abused as a child, and that he witnessed violence between adults he was living with, including instances where his mother was physically abused. These adversities do not mean a person will commit crimes in adulthood but they increase the odds of bad outcomes in adult life. (37 RT 9131-9133.) Regarding brain damage, the results of the testing suggest appellant might have mild

cognitive disorder, but that this condition would not have affected his future conduct. (36 RT 9135-9137.) It was not appellant's choice to have an alcoholic father or to have a genetic predisposition for alcoholism. (37 RT 9146.) Dr. Dietz did not have a strong disagreement with Dr. Minagawa that appellant was alcohol dependent. (37 RT 9153-9165.)

GUILT PHASE ISSUES

ARGUMENT

I. THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION FOR MISTRIAL AFTER EXCLUDING THE EVIDENCE NOT DISCLOSED TO THE DEFENSE BECAUSE THE FAILURE TO DISCLOSE THE EVIDENCE HAD NO IMPACT ON THE DEFENSE

Appellant claims the trial court erroneously denied his motion for mistrial based on the failure of the prosecution to disclose the notes and observations by Criminalist Bill Loznycky regarding vaginal slides obtained during an examination of the victim's body in 1986. Appellant also appears to suggest that a change in the expected testimony Dr. John Eisele, the pathologist who performed the autopsy in 1986, was somehow linked to the discovery violation and also caused prejudice to the defense. (AOB 68-84.)

The failure of the prosecution to obtain and provide to the defense the notes of Bill Loznycky was a discovery violation which was completely cured by the trial court's ruling that the information contained in Mr. Loznycky's notes would not be disclosed to the jury and could not be presented to or considered by any expert witness. Appellant's motion for mistrial was properly denied because the discovery violation did not prejudice appellant. Further, any change in Dr. Eisele's testimony, if there was a change, was limited and based on his subsequent review of the slides he prepared during the 1986 autopsy, information immediately disclosed to and known by the defense as soon as Dr. Eisele reviewed the slides again.

There was no discovery violation related to Dr. Eisele's testimony and no basis for the grant of a mistrial.

A. Proceedings below

On August 12, 2004, three weeks before opening statements in the guilt phase of the trial, defense counsel requested any reports from a witness, Dr. Glenn Wagner. The prosecution indicated Dr. Wagner might be called to rebut the testimony of a defense expert. Defense counsel stated that their expert would testify as to the time of sexual intercourse given the observations by Dr. Eisele that only degraded sperm were observed. (RT 914-917.) The trial court stated that if the prosecution had made a decision to present rebuttal evidence, there was an obligation on the prosecution to provide discovery on the rebuttal witnesses. (9 RT 918, 922.)[5]

During the defense opening statement on September 2, 2004, defense counsel told the jury that Dr. John Eisele, who performed the autopsy of the victim, would testify that he saw only occasional sperm heads on the slides of the vaginal swabs of the victim, indicating that intercourse took place 48 to 72 hours before the victim died. (17 RT 2530-2534.)

On the afternoon of September 7, 2004, during the prosecution's case-in-chief, defense counsel indicated he had just received three new photographs of the slide of the vaginal swab, the slide reviewed by Dr. Eisele during the autopsy. The photographs were apparently taken by Dr. Eisele that morning using different illumination. Defense counsel complained that it was unfair for the prosecution to show Dr. Eisele new

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[5] In appellant's subsequent motion for sanctions, defense counsel indicated that the defense was aware of Dr. Wagner's opinion regarding the presence of an intact sperm on the slide of the vaginal swab and the timing of the sexual intercourse in relation to the assault and murder of the victim. In fact, the defense interviewed Dr. Wagner more than a week before defense opening statement. (8 CT 1849.)

photographs without the defense having an opportunity to ask him if the photographs would change his previously stated opinion that the sexual intercourse took place at least 48 hours before the victim's death. (18 RT 3253-3255.) Defense counsel indicated that it was aware the prosecution planned to call Dr. Wagner, who would opine that the intercourse took place much closer in time to the killing of the victim. (18 RT 3254-3255.) Defense counsel had previously received Dr. Wagner's report and photographs of the vaginal slide. The defense sent the report and photographs to Dr. Eisele, who told them that he saw no intact sperm in the photographs and therefore disagreed with Dr. Wagner. (18 RT 3256.) The defense asked the court to delay Dr. Eisele's testimony until they could discuss the new photographs with him. (18 RT 3257.)

The prosecution stated that the vaginal slide reviewed by Dr. Wagner was the same slide reviewed by Dr. Eisele and that the defense had access to the slide. The three new photographs were taken by Dr. Eisele that morning in preparation for his testimony. (18 RT 3257-3258.) Outside the presence of the jury, Dr. Eisele testified that he was aware that he and Dr. Wagner disagreed as to the time of the sexual intercourse. Dr. Eisele stated his opinion, given to defense counsel during an interview, had not changed. Dr. Eisele initially only saw sperm heads on the slide of the vaginal swab but had looked at the slide again that morning and saw one intact sperm. (18 RT 3305-3307.)

The trial court ruled that Dr. Eisele would not be allowed to testify that day so that the defense could review the photographs and prepare to cross-examine the witness. (18 RT 3307-3308.) The court indicated that fairness required the defense have additional time to prepare for the witness and ordered that Dr. Eisele not testify until the following week. The defense requested a mistrial and the trial court deferred ruling on the request. (18 RT 3309-3310.)

Criminalist Bill Loznycky testified that bloodstains were found on some of Rickie Blake's clothing. The blood was presumed to be the victim's blood. (18 RT 3313-3318.) Loznycky also examined the swabs taken at the Coroner's office. The swabs were chemically checked for the presence of sperm and the vaginal swab was positive. He checked the vaginal swab microscopically and detected sperm. (18 RT 3318.)

On September 10, 2004, the defense filed a Motion for an Evidentiary Hearing, Sanctions for Discovery Violation and for Mistrial. (8 CT 1847-1863.) The motion was based on production of bench notes prepared by Criminalist Bill Loznycky regarding a slide prepared from a vaginal swab of the victim in 1986. The defense argued that Mr. Loznycky's potential testimony regarding what he saw on the slide would alter the opinion of an important witness, Dr. Eisele, *and that the court should either grant a mistrial or prevent Mr. Loznycky from testifying.* (8 CT 1847-1848.) The motion set forth that Mr. Loznycky's notes indicated he saw intact sperm on the slide taken from the vaginal swab of the victim. Loznycky explained that in 1986 he prepared a slide from the victim's vaginal swab and viewed the slide under a microscope, seeing many intact sperm. He placed the swab and slide in an envelope and had not seen the items since 1986. (8 CT 1851.) The defense stated that in light of Loznycky's observations, Dr. Eisele's opinion would be altered regarding the time between intercourse and death. (8 CT 1853.)

At a hearing, the prosecutor explained that he requested lab reports and notes regarding the DNA, received the reports and provided the reports to the defense. The prosecutor did not believe Loznycky had anything to do with the DNA. After Sean Soriano testified, Soriano called the prosecutor and told him he saw notes from Loznycky indicating Loznycky saw sperm with tails on the slides. The prosecutor requested the notes, notified defense counsel, and agreed not to use the evidence from Loznycky

in the guilt phase. (21 RT 4248-4250.) The prosecutor stated that the defense was aware that Dr. Wagner observed sperm with tails in the vaginal slide. The prosecution argued that excluding the evidence of the observations by Loznycky would eliminate any prejudice to the defense. (21 RT 4250-4251.)

The defense stated that the prosecutor provided Loznycky's notes to the defense on September 8, 2004. The notes indicated Loznycky saw many sperm with heads and tails on the vaginal slide. Dr. Eisele told the defense his opinion of the time between intercourse and death would change if he assumed numerous intact sperm were observed on the vaginal slide. (21 RT 4251-4253.)

The trial court recognized the significance of evidence that appellant had sex with the victim at or near the time of death allowed an inference that he was the cause of her death. (21 RT 4256.) The defense complained that the prosecution was "hacking away" at the opinion of Dr. Eisele, by consulting with Dr. Wagner and then having him write a report. (21 RT 4258.) The court stated that the issue was whether there was a discovery violation worthy of sanctions or whether it was evidence processed in the search for the truth that turned out to be unfavorable to the defense. (21 RT 4260-4261.) The court understood that the prosecution was agreeing to not call Loznycky as a witness but that the revision of Dr. Eisele's opinion would somewhat undermine the defense position. (21 RT 4263-4264.) The defense claimed the discovery issue was broader and included the prosecution's retention of Dr. Wagner. (21 RT 4266.) The defense claimed that the prosecutor asking Dr. Eisele to again review the vaginal slide was the real due process violation and that the court should grant a mistrial. (4267-4270.)

The prosecutor opposed the request for a mistrial, claiming the exclusion of the Loznycky evidence was an appropriate sanction. The

defense was aware of Dr. Wager's report and testimony that he had seen an intact sperm when they made their opening statement, and it was not a violation to inform Dr. Eisele of that information before he testified. There was no prejudice to the defense. (21 RT 4270-4271.) Defense counsel conceded they were on notice regarding Dr. Wagner's observation of the intact sperm. But it was not until the prosecution asked Dr. Eisele to look at the slides again that he changed his opinion. (21 RT 4272-4273.)

The trial court concluded that there were two levels of asserted discovery violations, discovery of Loznycky's notes from 1986 and the expected testimony of Dr. Eisele and Dr. Wagner. The trial court ruled that Loznycky's testimony regarding his observations of the vaginal slide would be excluded from guilt phase as well as any reference to his observations. The trial court concluded that the defense reasonably based its defense on Dr. Eisele's expertise and their expert, Dr. Gabaeff. The court noted that the prosecution then responded by attempting to undermine the testimony of Dr. Eisele and Dr. Gabaeff, through the testimony of Dr. Wagner. There was nothing sanctionable, nothing fundamentally unfair, and the conduct of all the attorneys was reasonable. (21 RT 4275-4278.) The motion for mistrial was denied. (21 RT 4279, 4281-4282.)

The defense subsequently requested that Dr. Eisele be cautioned not to give any opinions that relied on or considered the excluded information provided by Loznycky. The court and the prosecution agreed. (221 RT 4429-4430.) The prosecutor indicated that Dr. Eisele had been told that Loznycky and his information did not exist and that he should not mention it or consider it. (22 RT 4600-4601.)

Dr. Eisele testified that he saw spermatozoa heads on the vaginal slide, meaning the sperm had started to degenerate and the sperm was not intact with heads and tails. A fresh ejaculate would contain intact sperm with both heads and tails. (22 RT 4640-4641.) Dr. Eisele's opinion as to

the time the victim had sex involved a range because of the large number of variables involved. He acknowledged he had given defense counsel an estimate that the sex took place most likely between 48 and 72 hours before death. Dr. Eisele testified he was not comfortable giving an estimate of when the sex took place. (22 RT 4649-4651.) Dr. Eisele also testified that his recent observation of the intact sperm did not change his opinion that it was more consistent that the sexual intercourse took place more than 48 hours before the victim's death. "More consistent" is a low level of certainty. (22 RT 4674-4681.) Dr. Eisele reiterated his opinion that the observations of sperm he saw recently were more consistent with intercourse taking place more than 48 hours before death. (22 RT 4682.)

Dr. Wagner testified that he saw the presence of spermatozoa and heads in the vaginal slide. (23 RT 4819-4921.) Dr. Wagner opined that Rickie was sexually assaulted, based on the presence of sperm within the vaginal vault, laboratory findings and DNA findings, as well as the physical injuries to the body and the position of the bra. (23 RT 4822-4827.) Regarding the timing of the sexual assault, Dr. Wagner made an estimate based on the presence of sperm on the vaginal smear relative to the low but detectable acid phosphatase in the toxicology report. Dr. Wagner concluded the sexual assault took place within 24 hours of the preparation of the slides from the vaginal swab. (23 RT 4827-4828, 4830.) Dr. Wagner had a high level of confidence in his opinion. (23 RT 4851.)

B. Appellant was not prejudiced by any failure to disclose evidence.

The prosecution must disclose material exculpatory evidence in response to a request by the defendant or even where there has been no request at all. (*Brady v. Maryland* (1963) 373 U.S. 83 [83 S.Ct. 1194, 10 L.Ed.2d 215]; *In re Brown* (1998) 17 Cal.4th 873, 879.)

> "Evidence is material if there is a reasonable probability its disclosure would have altered the trial result. [Citation.] Materiality includes consideration of the effect of the nondisclosure on defense investigations and trial strategies. [Citations.] Because a constitutional violation occurs only if the suppressed evidence was material by these standards, a finding that *Brady* was not satisfied is reversible without need for further harmless-error review. [Citation.]"

(*People v. Verdugo* (2010) 50 Cal.4th 263, 279, citing *People v. Zambrano* (2007) 41 Cal.4th 1082, 1132-1133, overruled on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

The obligation to disclose material exculpatory evidence is not limited to evidence the prosecutor knows of or possesses, but also includes evidence known of or possessed by others acting on the side of the prosecutor, including police. (*Kyles v. Whitley* (1995) 514 U.S. 419, 437 [131 L.Ed.2d 490, 115 S.Ct. 1555].) Where the undisclosed evidence is not favorable to the defense, there is no violation of *Brady*. (*Verdugo*, *supra*, at p. 289.)

To establish prejudice from the failure to disclose exculpatory evidence, a defendant bears the burden to show a reasonable probability that if the evidence had been disclosed the result of the trial would have been different. (*People v. Gonzalez* (2006) 38 Cal.4th 932, 960; *People v. Bohannon* (2000) 82 Cal.App.4th 798, 806-807.)

This court "independently review[s] the question whether a *Brady* violation has occurred, but give[s] great weight to any trial court findings of fact that are supported by substantial evidence. (*People v. Salazar* (2005) 35 Cal.4th 1031, 1042.)" (*People v. Letner and Tobin* (2010) 50 Cal.4th 99, 176.)

A trial court's ruling on a motion for mistrial, and its determination of whether the defendant has been incurably prejudiced, "is by nature a speculative matter, and the trial court is vested with considerable discretion

in ruling on mistrial motions." (*People v. Hines* (1997) 15 Cal.4th 997, 1038, citing *People v. Haskett* (1982) 30 Cal.3d 841, 854.)

Appellant attempts to combine the failure of the prosecution to obtain and disclose Mr. Loznycky's notes with the alleged change of Dr. Eisele's expected testimony as to the time of the intercourse in relation to the time of the victim's death, and the testimony of prosecution witness Dr. Wagner that the intercourse and death of the victim occurred close in time, to establish prejudice for his *Brady* claim. However, the prosecutor's acknowledgment of the failure to properly obtain and disclose the Loznycky notes and the trial court's ruling that the Loznycky evidence could not be admitted or even mentioned, considered or relied on by the experts in this case, cured any prejudice from the failure to disclose the inculpatory Loznycky evidence. And, the alleged change in Dr. Eisele's testimony was completely unrelated to the Loznycky evidence, was the result of the witness reviewing the evidence again before his trial testimony, was disclosed to the defense immediately, and was not the product of any error or inappropriate conduct by the prosecutor. Evidence that does not materialize in the way defense counsel hopes or even states it will, absent improper conduct by the prosecution, does not establish a violation of appellant's rights.

In a hearing during the trial, Dr. Eisele testified that when reviewing the vaginal slide that morning, he saw one intact sperm and had changed one of his findings but had not changed his opinion that he had provided to the defense. (18 RT 3306.) He also testified at the hearing that the report of Dr. Wagner, previously given to him, had not changed his findings or opinion. (18 RT 3306-3307.) The trial court decided to postpone Dr. Eisele's testimony to allow the defense time to prepare cross-examination, not because of any discovery violation, but because the defense had just become aware, as did the trial court and the prosecution, that Dr. Eisele had

seen something in his review of the evidence that day that he had not seen in 1986. (18 RT 3307-3308.)

During his trial testimony on direct examination, a week after the hearing, Dr. Eisele testified he saw no intact sperm when he looked at the vaginal slide in 1986, indicating the ejaculate was not fresh. (22 RT 4639-4641.) Dr. Eisele gave what he deemed an imprecise time of death, between 12 and 24 hours before the victim's body was discovered at the scene. (22 RT 4646-4648.) He testified he was uncomfortable giving a time the victim had intercourse because of the unpredictable variables involved. He also said he had seen one intact sperm on the vaginal slide more recently but the observation did not impact his ability to give a time when the intercourse took place. (22 RT 4649-4651.)

On cross-examination, Dr. Eisele confirmed that he had previously told the defense that his observations of the vaginal slide in 1986 indicated that the intercourse had taken place more than 48 hours before death. (22 RT 4672-4673.) He confirmed that he disagreed with Dr. Wagner that Wagner's photographs of the vaginal slides showed an intact sperm. (22 RT 4678.) He testified that he reviewed the slide more recently and saw one intact sperm, but it did not change his earlier opinion that he had given to the defense. (22 4679-4680.) Finally, Dr. Eisele testified that his opinion had always been and was that his observations of the vaginal slide were more consistent with intercourse having taken place more than 48 hours before the victim's death. (22 RT 4681-4682.)

Thus, according to Dr. Eisele's testimony, his opinion was the same as when he talked to the defense months earlier, and had not changed. His testimony provides no support to appellant's claim that he was prejudiced by, or that his counsel's representations to the jury during opening statement were undermined by, any failure to disclose evidence.

Dr. Wagner's testimony was that the presence of an intact sperm, which he saw in his examination of the vaginal slide, indicated the sexual intercourse took place less than 24 hours from the time the vaginal swab was taken during the autopsy. (23 RT 4828.) However, it is clear from the record that the defense was well aware of Dr. Wagner's testimony before the defense opening statement and the defense did not assert that Dr. Wagner's testimony was the basis for their motion for mistrial. (21 RT 4265-4266, 4270-4272.) Thus, because Dr. Wagner's opinion and the basis for his opinion were provided to the defense before their opening statement, and his opinion did not consider or rely on Loznycky's observations, Dr. Wagner's testimony also does not help satisfy appellant's burden that a failure to disclose evidence prejudiced appellant.

Appellant relies on a number of federal cases where courts have granted mistrials for discovery violations to avoid "trial by ambush." (AOB 76-81.) Preliminarily, decisions of the federal courts of appeal are not binding on this court. (*People v. Williams* (2013) 56 Cal.4th 630, 668.) In *United States v. Kelly* (2nd Cir. 1969) 420 F.2d 26, a case appellant claims is "strikingly similar" to this case, New York City narcotic detectives were convicted of engaging in narcotics trafficking after they retained cocaine they seized in a raid and arranged with another man to sell the cocaine for them. (*Id.* at p. 27.) The prosecution tested the cocaine, finding the cocaine the detectives sought to sell came from the same batch seized by the detectives in a previous raid. The results of the tests were not provided to the defense. Testimony regarding the testing of the cocaine was presented at trial through the prosecution's first witness. A defense request for a delay during the trial was denied. (*Id.* at p. 28.) The federal Court of Appeal held that the trial court should have granted the request for the delay in order for the defense to conduct their own tests to determine

the similarity between the two samples of cocaine and granted a new trial. (*Id.* at p. 29.)

There was no similarity between *Kelly* and the present case. The discovery violation in this case was the failure to provide notes of Mr. Loznycky, describing his observations in 1986 of intact sperm on the vaginal slide taken from the victim. But this evidence was not presented to the jury and was not considered by any expert witness regarding the time of the intercourse by appellant with the victim. The failure of the prosecution to provide the Loznycky information was not prejudicial because it had no impact on the trial. And the alleged changes between Dr. Eisele's original statements to the defense regarding the timing of the intercourse and the victim's death and his testimony at trial was not due to the undisclosed information from Loznycky, but was based on Dr. Eisele's opportunity to observe the vaginal slide more contemporaneously with his testimony at the trial, observations immediately provided to the defense. Moreover, Dr. Eisele's testimony was delayed to allow the defense to prepare. And the testimony of Dr. Wagner, regarding the timing of the intercourse in relation to the autopsy, was known by and provided to the defense well prior to the defense opening statement. There was no prejudicial discovery violation here.

Appellant's reliance on the other federal cases he cites is equally unavailing. (In *United States v. Camargo-Vargara* (11th Cir. 1995) 57 F.3d 993, the trial court denied the defendant's motion for mistrial when a DEA agent testified to a statement made by the defendant to the agent that was not disclosed by the prosecution to the defense. The statement was inconsistent with the defense theory, presented during opening statement, that the defendant wanted nothing to do with the drugs. (*Id.* at p. 998.) The court held that a discovery violation constitutes reversible error only when it results in the defendant having an inadequate opportunity to prepare a

defense or it substantially influences the jury. (*Id.* at pp. 998-999.) The court found substantial prejudice from the nondisclosure of the statement because the defense had unknowingly prepared and presented a defense inconsistent with the undisclosed statement and the prosecution was able to use the defendant's statement to persuade the jury that the defense was untenable. (*Id.* at p. 999.)

However, in the present case the jury was not presented with the undisclosed evidence and Loznycky's observations were treated at the trial as if they never happened. The real impact on appellant's defense was that Dr. Eisele again reviewed the evidence he had previously seen 18 years before and as a result was somewhat less confident in the opinion he had earlier shared with the defense. Also, the defense theory was further damaged by the testimony of Dr. Wagner, not because he testified based on previously undisclosed information, but because of his stellar qualifications and his ability to interpret the evidence the defense was well aware of. Appellant was not prejudiced by any failure to disclose evidence to the defense.

In *United States v. Noe* (11th Cir. 1987) 821 F.2d 604, the defendant was convicted of conspiracy to distribute methamphetamine and distribution of methamphetamine after the prosecutor admitted on rebuttal the recording of a telephone conversation between an undercover agent and the defendant, a recording not disclosed to the defense. The recording undermined the defense that the defendant was in Costa Rica at the time of the alleged transactions. (*Id.* at p. 606.) The Court of Appeal reversed the convictions because the undisclosed evidence admitted by the prosecution "attacked the very foundation of the defense strategy," and denied him the opportunity to prepare a defense to meet the prosecution's evidence. (*Id.* at p. 607.) Again in *Noe*, the undisclosed evidence was admitted at trial and impeached the defense presented through the testimony of the defendant.

Here, the undisclosed evidence, Loznycky's observations memorialized in his notes, were not admitted at trial in any form. The evidence that impeached appellant's defense theory, Dr. Eisele's watered-down support of the defense theory and Dr. Wagner's testimony undermining the defense theory, were not the product of any undisclosed evidence or discovery violation.

The other federal cases cited by appellant are equally distinguishable. (*United States v. Lanoue* (1st Cir. 1995) 71 F.3d 966, 976-978 [finding prejudice where undisclosed statement by defendant used to impeach defense witness]; *United States v. Thomas* (2nd Cir. 2001) 239 F.3d 163, 168 [finding prejudice where undisclosed statements by defendant in prior administrative hearing used to impeach his trial testimony]; *United States v. Alvarez* (1st Cir. 1993) 987 F.2d 77, 84-85 [reversal of convictions for failure to disclose defendant's incriminating statement to custom's agent admitted at trial]; *United States v. Rodriguez* (11th Cir. 1986) 799 F.2d 649, 652-654 [mistrial should have been granted for inadvertent failure to disclose to defense contents of wallet taken from defendant and used to impeach defendant's testimony]; *United States v. Pascual* (5th Cir. 1979) 606 F.2d 561, 564-566 [convictions reversed where undisclosed incriminating letter from defendant admitted by prosecution at trial]; *United States v. Padrone* (2nd Cir. 1969) 406 F.2d 560, 561 [new trial ordered where recorded statement by defendant not disclosed to defense used to impeach defendant's testimony].)

In each of these cases, the undisclosed evidence was either admitted by the prosecution at trial or used during cross-examination to impeach the defendant or defense witness, thereby undermining the defense theory. In the present case, the observations of Loznycky were not admitted, not referred to during the examination of any witness and not provided to, relied on, or considered by any expert. The evidence that undermined the

defense theory here was the re-examination of evidence by Dr. Eisele, disclosed to the defense immediately, and the testimony of Dr. Wagner, known to the defense prior to their opening statement. Appellant can demonstrate no prejudice from the failure to disclose Mr. Loznycky's notes. The defense was fully aware that Dr. Eisele completed his autopsy report in 1986 when he made the observations that he did not see any intact sperm in the victim's vaginal slide. The defense was aware that the vaginal slide examined by Dr. Eisele in 1986 had been preserved and was available for either side and any witness to examine. The defense based their theory on a tactical determination that the evidence of Dr. Eisele's opinion, as the pathologist who performed the autopsy on the victim in 1986, would raise a reasonable doubt regarding the timing of the intercourse between appellant and the victim notwithstanding evidence of Dr. Wagner's opinion that put the timing of the intercourse close to the time of the murder. Mr. Loznycky's notes of his observations of the vaginal slide in 1986 did nothing to impact, impeach or change this conflicting evidence. Thus, the discovery violation did nothing to prejudice the defense presented at trial – that intercourse between appellant and the 14-year-old, prepubescent victim was consensual and that the murder was committed by George Bell rather than appellant. Because the discovery violation did not prejudice appellant, the trial court properly denied appellant's motion for mistrial.

II. THE PROSECUTOR DID NOT COMMIT PROSECUTORIAL ERROR DURING ARGUMENT BY POINTING OUT THAT THE DEFENSE PRESENTED AT TRIAL WAS INCONSISTENT WITH APPELLANT'S STATEMENTS TO POLICE

Appellant claims the prosecutor erred during closing argument when he suggested that the defense presented to the jury was concocted by defense counsel. Appellant claims the prosecutor's argument impugned the character of defense counsel and constituted a violation of his due process rights. (AOB 84-89.) Although appellant identifies three comments by the

prosecutor as prosecutorial error, he objected in the trial court to only one, thereby forfeiting claims as to the other two. In any event, the prosecutor's argument was not improper, as his argument merely pointed out that appellant's defense at trial was factually inconsistent with his statement to police. Finally, appellant can demonstrate no prejudice as the complained of comments were brief and insignificant in the context of lengthy prosecution opening and rebuttal arguments.

A. Proceedings below

During the prosecution's case-in-chief, a tape recorded police interview of appellant on April 11, 2003, was played for the jury. During the interview appellant claimed he never knew a girl named Rickie Blake and when shown multiple photographs of Rickie Blake, said he had never met her or seen her. (8 CT 1913-1914.) He said, "I'm sure. I never seen her before in my life." (8 CT 1914.) He reiterated that he did not know and had never met Rickie Blake or talked to her on the telephone. (8 CT 1918.) Appellant said he did not know how his sperm got inside of Rickie Blake. (8 CT 1918-1919.)

Appellant's defense at trial, particularly the explanation for the uncontested DNA evidence showing he had intercourse with Rickie Blake near or sometime before she was killed, was that appellant and Rickie engaged in consensual intercourse and she was later killed by another person, presumably George Bell. During closing argument, the prosecutor pointed out the disparity between appellant's claim to the police that he did not know and had never met Rickie Blake, and the defense theory at trial that appellant had consensual sex with her. The prosecutor opened his argument by stating that the jury had been presented with three factual theories: one, that appellant raped and murdered Rickie Blake and also committed sexual offenses against other victims; two, based on his statement to police, that he committed the other offenses but had nothing to

do with the rape and murder of Rickie Blake; and three, that he committed the sexual assaults against other victims, and he had consensual sex with Rickie Blake, but George Bell killed her. (28 RT 6405-6406.)

The prosecutor later pointed out that the jury had heard two defenses, the first defense from appellant when he told the police he had never met or seen the victim. "That was his defense. And it stinks. And it's a lie. And it's wrong. And it's his defense. That is the defense he came up with. And we know it is wrong because the DNA tells us it's wrong." (28 RT 6443-6444.) The prosecutor then told the jury that the second defense, the defense presented in opening statement, was that appellant had consensual sex with the victim and that George Bell killed her. (28 RT 6444.) The prosecutor ended his opening argument by saying,

> This man raped fourteen-year-old Rickie Blake. And this man in the courtroom with us today is the man who killed fourteen-year-old Rickie Blake, and now has the nerve to say it was love, consensual sex, and George Bell did it. But actually, he didn't say that. He said, "I didn't do anything." That is his defense. He lied the first time when he spoke to the officers. Don't let it happen a second time.

(28 RT 6456.)

The defense argued that Rickie Blake was starting a relationship with appellant and having sex with him was about acceptance, affirmation and affection. (28 RT 6464-6465.) Defense counsel argued the credibility of Dr. Eisele's testimony that intercourse happened 48 to 72 hours before Rickie Blake died (28 RT 6473-6474, 6476-6477, 6603, 6605-6606) and attacked Dr. Wagner's testimony as not credible. (28 RT 6477-6478, 6605-6607.) Defense counsel went on to argue that the evidence showed that George Bell committed the murder. (28 RT 6610-6615, 6618-6624, 6629, 6333.)

In rebuttal argument, the prosecution pointed out that the defense did not mention appellant's statement to police in their closing argument, "He

says he's not guilty because he didn't do anything. That's his choice, his defense, his words on tape. Everything else is a secondary defense." (28 RT 6634.) The prosecutor continued:

> What can we find, because that first one he wants to use doesn't work. We got to scramble to find something else. And that's what we heard about from the defense, the second best defense. Jesus, Williams, why didn't you come up with the best one the first time. I thought I did. But he didn't.
>
> MR. WADLER: I would object that that is improper argument, your honor.
>
> THE COURT: Overruled.
>
> MR. DUSEK: He told you what his defense is, and his defense falls flat on his face.

(28 RT 6634-6635.)

The prosecutor later explained how George Bell had no motive to kill Rickie, "There goes the crummy motive that they had, the opportunity it was there, which it wasn't. There goes the defense, the second defense." (28 RT 6651.) Finally, the prosecutor concluded rebuttal argument, "This case has been proven beyond a reasonable doubt, and perhaps we even have gone further up the scale. His first defense fails. His second defense, stand-by defense, cannot be supported by the evidence. He's guilty of all charges." (28 RT 6655-6656.)

B. Forfeiture

As a general rule to raise a claim of prosecutorial error on appeal requires that the defendant objected to the alleged error in the trial court on the same grounds and requested the jury be admonished to disregard the improper comment. (*People v. Hill* (1998) 17 Cal.4th 800, 820; *People v. Berryman* (1993) 6 Cal. 4th 1048, 1072.)

Where the defendant claims the prosecutor erred in argument to the jury by casting aspersions on defense counsel and defense witnesses, the

claim is waived by a failure to object to the remarks and request a curative instruction. (*People v. Sapp* (2003) 31 Cal.4th 240, 310; *People v. Wash* (1993) 6 Cal.4th 215, 265; *People v. Benson* (1990) 52 Cal.3d 754, 795; *People v. Bell* (1989) 49 Cal.3d 502, 537-538.)

Appellant claims that the prosecutor erred in argument on three occasions during closing argument when he suggested "defense counsel was complicit in concocting a defense." (AOB 84-85.) However, defense counsel objected only once, in response to the second of these alleged improper assertions by the prosecutor, during the beginning of rebuttal argument. Thus, because defense counsel failed to object to the first and third comments by the prosecutor that appellant now claims were prejudicial misconduct, claims related to those statements have been forfeited.

C. The prosecutor did not engage in prejudicial error during argument.

> The applicable federal and state standards regarding prosecutorial misconduct are well established. "A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct 'so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.'" (*People v. Gionis* (1995) 9 Cal.4th 1196, 1214; *People v. Espinoza* (1992) 3 Cal.4th 806, 820.) Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves """"the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.'"" (*People v. Espinoza* (1992) 3 Cal.4th 806, 820.)" (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.)

(*People v. Hill* (1998) 17 Cal.4th 800, 819.)

In determining the scope of permissible prosecutorial argument, a prosecutor is given wide latitude and may argue vigorously, "as long as it amounts to fair comment on the evidence, which can include reasonable

inferences, or deductions to be drawn therefrom." (*Hill, supra*, 17 Cal.4th at p. 819, citing *People v. Williams* (1997) 16 Cal.4th 153, 221.)

> It is, of course, improper for the prosecutor "to imply that defense counsel has fabricated evidence or otherwise to portray defense counsel as the villain in the case. . . . Casting uncalled for aspersions on defense counsel directs attention to largely irrelevant matters and does not constitute comment on the evidence or argument as to inferences to be drawn therefrom." (*People v. Thompson* (1988) 45 Cal.3d 86, 112.)

(*People v. Fierro* (1991) 1 Cal.4th 173, 212.)

In *People v. Farnham* (2002) 28 Cal.4th 107, this court rejected a claim that the prosecutor had improperly implied in argument that defense counsel knew the defendant was guilty and fabricated a defense. This court held that the prosecutor's contentions that defense counsel's arguments regarding DNA and suppressed evidence were not supported by the record were appropriate as the prosecutor's argument did not impugn defense counsel's honesty and integrity. (*Id.* at p. 171.)

The present case is similar to *People v. Bemore* (2000) 22 Cal.4th 809, in which this court rejected a capital defendant's claim that the prosecutor in argument accused defense counsel of fabricating a defense, undermining the fundamental fairness of the trial. In *Bemore*, the prosecutor argued in the guilt phase that once the prosecution showed that the defendant had size 13 feet, the defense pursued "defense two," that the defendant's car was not at the crime scene, until the evidence showed the car was there, when the defense switched to a theory that the defendant was not present at the crime scene. (*Id.* at pp. 844-845.) Later, the prosecutor referred to evidence showing the defendant had size 13 shoes, the shoe size of the killer, stating that despite defense counsel's denials, the defendant did wear size 13 shoes. The trial court overruled a defense objection. (*Id.* at p. 845.) After finding that the claim had been waived because defense counsel failed to object to much of the claimed misconduct, this court held

that no misconduct occurred, finding "the prosecutor has wide latitude in describing the deficiencies in opposing counsel's tactics and factual account." (*Id.* at p. 846, citing *People v. Frye* (1998) 18 Cal.4th 894, 977-978 and *People v. Medina* (1995) 11 Cal.4th 694, 759.)

Here, the defense theory at trial was that somehow 30-year-old appellant had a consensual relationship with prepubescent 14-year-old Rickie Blake that resulted in consensual intercourse, that occurred contemporaneously with, but was unrelated to her murder. This defense was presented despite virtually no direct or circumstantial evidence to support the defense theory except for the tenuous testimony of the pathologist who conducted the autopsy in 1986 who speculated regarding the time of intercourse in relation to the time of death. More importantly, the defense was completely contradictory to appellant's statement to police that he did not know and had never met the victim. The prosecutor merely pointed out the inconsistency of appellant's lies to police and the defense he offered at trial. The prosecutor's reference to the defense theory at trial as a "secondary defense," merely pointed out this inconsistency to the jury. Further, appellant's interpretation of the prosecutor's argument as impugning the integrity of defense counsel would have required the jury to unreasonably attach a sinister meaning to a rather straight-forward argument.

Even where a prosecutor called a defense attorney "irresponsible" for attacking the credibility of a prosecution witness and characterized the defense theory as "ludicrous" and "a smoke screen," this court has found the comments as properly addressing the lack of evidentiary support for the defense rather than an attack on the integrity of defense counsel. (*People v. Frye*, *supra*, 18 Cal.4th at p. 978, overruled in part by *People v. Doolin*, *supra*, 45 Cal.4th at p. 421, fn. 22.)

Finally, appellant has not and can not demonstrate that the prosecutor's argument unfairly prejudiced him or deprived him of his right to a fair trial. In *People v. Wash*, *supra*, the court found that despite numerous allegations of prosecutorial misconduct by the defendant, regarding comments much more directly critical to defense counsel than those here, the defendant failed to show any prejudice.

> We find no prejudicial error in any event. Defendant cites two statements which allegedly implied that defense counsel had fabricated evidence. Recalling defendant's responses on cross-examination, the prosecutor observed, "Somebody must have told him, say 'I don't know' when you can't think of why [defendant committed the offenses]—don't say, 'Because I wanted to.'" We agree that the statement was arguably improper as suggesting that someone--presumably trial counsel -- counseled defendant to feign a loss of memory. However, we discern no possibility that this passing remark in the prosecutor's lengthy and detailed argument had any affect on the verdict.

(*Wash*, *supra*, at pp. 265-266.)

The authority cited by appellant to support his claims of prejudicial prosecutorial error actually demonstrate the mild nature of the prosecutor's comments in this case and the lack of prejudice to appellant. In *People v. Hill*, *supra*, this court found the prosecutor committed numerous acts of misconduct in the guilt phase of a capital trial, including the "most egregious" acts of misstating or mischaracterizing the evidence (*Hill*, 17 Cal.4th at pp. 824-827), referring to facts not in evidence (*Id.* at pp. 828-829), misstating the law (*Id.* at pp. 830-832), and intimidating defense witnesses (*Id.* at pp. 834-835). In addition, this court noted that the prosecutor improperly made derogatory comments directed at defense counsel attacking counsel's integrity, interrupting counsel with specious objections, bickering, laughing, making faces, and name calling. (*Id.* at pp. 833-834.) This court concluded that because the prosecutor committed "serious, blatant, and continuous misconduct at both the guilt and penalty

phases of trial," along with other unrelated serious errors, the judgment required reversal. (*Id.* at pp. 845-847.)

In *People v. Bain* (1971) 5 Cal.3d 839, during closing argument the prosecutor suggested to the jury that the defendant's "story" was concocted by defense counsel. After an objection by defense counsel, the prosecutor renewed his claim that defense counsel manufactured the defense, stating, "Now if that shoe fits, he can wear it." (*Id.* at p. 845.) After another objection and request for mistrial, the prosecutor continued this theme, claiming the defendant had been coached on what to say by defense counsel. (*Id.* at p. 846.) The prosecutor also stated several times his personal belief in the defendant's guilt and suggested that because the prosecutor and the defendant were both Black, the prosecutor would not have charged the defendant unless the prosecutor believed he was guilty. (*Ibid.*)

This court found that the "unsupported implication by the prosecutor that defense counsel fabricated a defense constitutes misconduct," as there was no evidence that defense counsel fabricated the defense, a defense consistent with the defendant's pre-arrest statements. (*Bain*, 5 Cal.3d at p. 847.) These comments by the prosecutor along with the prosecutor's expression of a personal belief in the defendant's guilt "built on a racial foundation," was held to constitute prejudicial misconduct requiring reversal. (*Id.* at pp. 849-850.)

The prosecutor here never claimed the defense counsel fabricated a defense or any evidence and never engaged in the conduct condemned in *Hill* and *Bain* as prosecutorial misconduct. The prosecutor's references to the defense theory at trial being inconsistent with appellant's statement to police and inconsistent with the credible evidence were fair comments and did not constitute prosecutorial error.

III. THE TRIAL COURT DID NOT IMPROPERLY INTERFERE WITH APPELLANT'S ABILITY TO PRESENT THIRD PARTY CULPABILITY EVIDENCE

Appellant claims the trial court erroneously limited his ability to present third party culpability evidence, specifically hearsay statements of George Bell to Ms. Blake in 1996, unfairly restricted defense counsel's cross-examination of Bell regarding the statement to Ms. Blake, and improperly refused proposed defense pinpoint instructions regarding evidence that Bell committed the murder of Rickie Blake. (AOB 90-106.) Appellant suffered no prejudice from the trial court's ruling that Ms. Blake's statement to FBI Agent Kelly regarding what she was told by George Bell was inadmissible hearsay because Bell testified and admitted making the statement. The trial court was well within its discretion in sustaining objections to three questions asked of Bell on cross-examination by defense counsel because the questions were improper. And the trial court properly declined to instruct the jury with certain proposed jury instructions because the instructions improperly directed the jury to specific pieces of evidence, were argumentative and were duplicative of other instructions given by the trial court.

A. Proceedings below

Appellant made a pretrial motion to allow the defense to present evidence of third party culpability, namely, evidence and statements by George Bell that would allow the jury to infer that Bell might have been the killer of Rickie Blake. (4 CT 769-789.) The prosecution filed an Opposition, claiming the vague statements by Bell and other ambiguous circumstantial evidence of Bell's involvement in the murder were incapable of raising a reasonable doubt of appellant's guilt and therefore should be excluded. (4 CT 858-868.) Appellant filed a Reply. (7 CT 1524-1549.) Appellant asserted that due process requires "key" evidence to be admitted

even when it conflicts with a state evidentiary rule and identified specific hearsay evidence and the defense theories of admissibility. (7 CT 1529-1536, 1536-1548.)

On June 7, 2004, the trial court held a hearing on the defense's motion to admit third party culpability evidence. (4 RT 666.) The court ruled that appellant was entitled to have the jury evaluate the evidence of third party culpability. (4 RT 672-673.) After extensive arguments by both sides, the court agreed with the defense and ruled there was sufficient evidence to allow a third party culpability defense and that the prosecution would be required to object specifically to any specific evidence it believed was inadmissible. (4 RT 706-707, 708-709.)

B. The trial court was within its discretion in excluding the hearsay testimony of FBI agent Kelly regarding what Ms. Blake told him that Bell said during a 1996 telephone call.

Appellant filed an in limine motion to admit the hearsay statement of Alicia Blake (the victim's mother) made to FBI Agent Jack Kelly on August 19, 1996, that on August 16, 1996, at approximately 12:20 a.m., she received a phone call from George Bell in which he told her, "I can't live like this anymore. I can't hurt you anymore. I need to talk to Olais." (7 CT 1642-1654.) Appellant argued that these alleged hearsay statements of Bell were relevant to the defense that Bell killed the victim Rickie Blake. (7 RT 1643.) Appellant argued that the statements made by Bell to Ms. Blake were not hearsay, as the statements were not offered for the truth but rather to demonstrate Bell's consciousness of guilt. Appellant acknowledged the statement by Ms. Blake to Agent Kelly was hearsay without an applicable statutory hearsay exception, but claimed the hearsay statement should be admitted under due process because the hearsay was reliable and trustworthy. (7 CT 1644-1649.) Appellant argued the hearsay

statement met the five factors set forth in *Chia v. Cambra* (9th Cir. 2002) 281 F.3d 1032, and therefore should be admitted. (7 CT 1650-1653.)

The prosecution filed an opposition to the motion. (8 CT 1699-1714.) The opposition noted that the defense had not questioned Ms. Blake at the preliminary hearing regarding the conversation with George Bell, in order to preserve her testimony, and that George Bell was available so the defense could question him regarding the statement he allegedly made to Ms. Blake. (8 CT 1700-1701.) The prosecution argued that the defense had failed to show the statement allegedly made by Bell to Ms. Blake met the requirements of admissibility set forth by the United States Supreme Court. (8 CT 1705-1708.) The opposition also asserted that decisions of this court supported the exclusion of the statement made by Ms. Blake to Agent Kelly on hearsay grounds. (8 CT 1708-1710.)

A hearing was held on the admissibility of the statement. The court asked defense counsel how the admission of the statement was supported by *Green v. Georgia* (1979) 442 U.S. 95 [99 S.Ct. 2150, 60 L.Ed.2d 738], or any of the other cases cited. (10 RT 927.) Defense counsel argued that where hearsay evidence is reliable and critical to a determination of the guilt of a criminal defendant, due process "trumps a mechanical application of the hearsay rule." Defense counsel argued the statement was reliable because the declarant acknowledged he made the statement and was critically exculpatory because the statement was consistent with other statements attributed to Bell by other witnesses showing his consciousness of guilt for the murder of Rickie Blake. (10 RT 927-934.) The prosecution argued that the defense had other means for admitting the statement of Bell to Ms. Blake, by calling Bell as a witness and asking if he made the statement, thereby demonstrating the reliability of the statement and the context in which it was made. (10 RT 934-941.) The trial court ruled that the statement made by Ms. Blake to Agent Kelly regarding what Mr. Bell

said to her in 1996 was hearsay without an applicable exception. The court acknowledged authority that permits admission of hearsay evidence when required by due process but ruled that the evidence of Bell's statement to Ms. Blake admitted through Agent Kelly was not reliable, critical, or necessary within the meaning of that authority, and excluded the evidence. (10 RT 944.)[6]

During the defense case, George Bell's wife, Gloria, testified that on numerous occasions George Bell spoke to her about Rickie's death, saying it was an accident and something about a car being crushed with Rickie's glasses in it. His comments suggested that he was there when Rickie was killed. (23 RT 4882-4883.) When she asked Bell if he was there, Bell said nothing. (23 RT 4885.) Bell made other statements to Gloria regarding the circumstances of Rickie's death. (23 RT 4889, 4891, 4896.) Nolan Kennedy testified that after Rickie's murder, Bell spoke about what happened to her, sometimes acting like he was there when it happened. (24 RT 5075-5078.) Bell would get emotional when he spoke about Rickie's death and speculated that the death was an accident. Bell said he thought Richardson was involved in the murder. (24 RT 5079-5083.) Greg Richardson testified that he directly asked Bell if he killed Rickie and Bell did not respond. (25 RT 5343-5344.) Bell speculated to Richardson that Rickie's death involved someone trying to have sex with her and then

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[6] After a hearing under Evidence Code section 402, in which FBI Agent Jack Kelly testified, the prosecution conducted a conditional examination of Agent Kelly. (21 RT 4314-4322, 4322-4325.) Kelly testified in the conditional examination that he interviewed George Bell in August of 1996, and Bell admitted calling Ms. Blake recently and asking to speak to the investigator assigned to the murder case. Bell said he called Ms. Blake after speaking to Greg Richardson, a neighbor, and the conversation rekindled Bell's suspicions that Richardson was somehow involved in Rickie Blake's death. (21 RT 4333-4338.)

suffocating her by putting a hand over her mouth. (25 RT 5410-5411.) Bell told Richardson that maybe Rickie's death was an accident. (25 RT 5417.)

On rebuttal, George Bell was called as a witness by the People. Bell acknowledged speaking to both Richardson, Bell's wife Gloria, the police, and others regarding the circumstances of Rickie's death. (26 RT 5643-5645, 5663-5664, 5686, 5709-5710, 5806-5808, 5810-5813.) Bell also admitted calling Ms. Blake in August of 1996 at 12:20 a.m. He admitted telling Ms. Blake during the call that "I can't live like this anymore. I can't hurt you anymore." (26 RT 5713.) He testified he asked her how to reach Detective Olais because he had recently spoken to Richardson and the conversation raised issues for him about Rickie's murder. (26 RT 5714-5715.)

During closing argument, defense counsel specifically addressed the telephone call made by Bell to Ms. Blake in August 1996. Defense counsel twice quoted Bell as saying to Ms. Blake, "I can't live like this anymore. I can't hurt you anymore." Counsel characterized the statement as consciousness of "crushing guilt" by Bell. (28 RT 6628-6629.)

This court applies the abuse of discretion standard of review to a ruling by a trial court on the admissibility of evidence. (*People v. Prince* (2007) 40 Cal.4th 1179, 1242; *People v. Robinson* (2005) 37 Cal.4th 592, 625; *People v. Rowland* (1992) 4 Cal.4th 238, 264.)

In *Green v. Georgia*, *supra*, the United States Supreme Court held that a defendant's due process rights are violated when hearsay testimony at the penalty phase of a capital trial is excluded, if both of the following conditions are present: (1) the excluded testimony is "highly relevant to a critical issue in the punishment phase of the trial," and (2) there are substantial reasons to assume the reliability of the evidence. (*Id.* at p. 97.)

However, this court has "repeatedly rejected the broad reading of *Green v. Georgia* that [appellant] urges," where the hearsay evidence "bore no special indicia of reliability." (*People v. Eubanks* (2011) 53 Cal.4th 110, 150, citing *People v. Weaver* (2001) 26 Cal.4th 876, 980-981.)

Moreover, this court has found no constitutional violation where a trial court uses the ordinary rules of evidence to exclude evidence of third party culpability. (*People v. Cudjo* (1993) 6 Cal.4th 585, 611, citing *People v. Hall* (1986) 41 Cal.3d 826, 834-835.)

Even in capital cases, where a trial court has misapplied Evidence Code section 352 to exclude third-party-culpability evidence, there is no constitutional error and the applicable standard of prejudice is that for state law error, the error is harmless if it is not reasonably probable the verdict was affected. (*People v. Williams* (2008) 43 Cal.4th 584, 630; *People v. Prince*, *supra*, 40 Cal.4th at p. 1243.) As noted above, at trial Bell admitted calling Ms. Blake in August of 1996 and admitted telling her, "I can't live like this anymore. I can't hurt you anymore." (26 RT 5713-5715.) And during closing argument, defense counsel twice quoted Bell's statement to Ms. Blake and characterized the statement as consciousness of guilt. (28 RT 6628-6629.) Appellant suffered no prejudice as a result of the trial court's ruling that Bell's hearsay statement to Ms. Blake repeated by Ms. Blake to Agent Kelly was inadmissible hearsay.

C. The trial court was within its discretion in sustaining three objections to defense counsel's cross-examination of George Bell.

George Bell was called by the prosecution on rebuttal and testified on direct for 40 transcript pages. (28 RT 5631-5671.) He was under cross-examination for approximately 72 transcript pages. (28 RT 5671-5701, 5709-5717, 5802-5829, 5834-5838.) Appellant claims that three objections sustained by the trial court to questions asked by defense counsel on cross-

examination of Bell were not only erroneous rulings by the trial court but also violated his constitutional rights. (AOB 95-99.) The first sustained objection occurred during this exchange after Bell was allowed to refresh his recollection with the prior statement he made to Agent Kelly:

> Q: Sir, isn't it true that you did call Mrs. Blake up August of 1996 at 12:20 a.m., late night/early morning?
>
> A: Well, it proved to me that I did.
>
> Q: You did do it, didn't you, sir?
>
> A: Yes.
>
> Q: And when you called up Mrs. Blake, you told her, "I can't live like this anymore. I can't hurt you anymore," didn't you?
>
> A: Yes. I don't remember it. But I did eventually, yes.
>
> Q: Sounds like something you might have said?
>
> A: No.
>
> Q: Okay. Did you tell her that you wanted to talk to Olais after you said, "I can't live like this anymore. I can't hurt you anymore. I need to talk to Olais"?
>
> MR. DUSEK: Objection. Misstates the evidence.
>
> THE COURT: Sustained.

(26 RT 2712-2713.)

Defense counsel then went on to question Bell about the circumstances of the phone call to Ms. Blake. (26 RT 5714-5715.) After that, defense counsel did not return to the subject of the call by Bell to Ms. Blake. (26 RT 5715-5838.)

The subject of the second claim, that the trial court erred in sustaining the prosecutor's objections during the cross-examination of George Bell,

was regarding the second to last question asked of Bell on cross-examination.

> Q: Isn't it true that when you would get liquored up or get high on drugs, you'd start talking about this, about what happened with Rickie Blake, isn't it?
>
> A: Only when I was by myself, not jibber jabber with everybody, no. Just mental things, kicking back, drink a couple beers, think and praying, you know.
>
> Q: And then you'd decide to call Ms. Blake at 12:30 at night 10 years after this accident?
>
> MR. DUSEK: Asked and answered.
>
> THE COURT: Sustained.
>
> BY MR. REICHERT: The night Rickie Blake died were you outside with the cat, her cat, in your hands?
>
> A: No, no.
>
> MR. REICHERT: [No] further questions, your honor.

(26 RT 5838.)

The subject of the third claim, that the trial court erred by sustaining an objection during the cross-examination of Bell, was about the effects of Bell's drug and alcohol abuse.

> Q: Back in 1986 weren't there times where you would do or say things and not remember them because of alcohol or drugs?
>
> A: Can you repeat that again?
>
> Q: Sure. You would because of alcohol and drugs, you would do or say things and then later on not remember them?
>
> MR. DUSEK: Calls for speculation.
>
> THE COURT: Sustained.

(26 RT 5814.)

Defense counsel immediately changed the subject and asked about Michelle Schmukel. (26 RT 5814-5816.) Again, defense counsel did not question Bell again on the subject of the effect of alcohol and drugs on Bell's memory. (26 RT 5814-5838.)

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." (*Pointer v. Texas* (1965) 380 U.S. 400, 400-401 [85 S.Ct. 1065, 13 L.Ed.2d 923]) The right of confrontation entitles a defendant in a criminal trial to cross-examine witnesses. (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 678 [106 S.Ct. 1431, 89 L.Ed.2d 674]; *Alvarado v. Superior Court* (2000) 23 Cal.4th 1121, 1137.)

"It does not follow, [however], that the Confrontation Clause of the Sixth Amendment prevents a trial judge from imposing any limits on defense counsel's inquiry into the potential bias of a prosecution witness." (*People v. Williams*, *supra*, 16 Cal.4th at p. 207.) The Confrontation Clause provides an opportunity for the defendant to engage in effective cross-examination, "not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." (*Delaware v. Fensterer* (1985) 474 U.S. 15, 20 [106 S.Ct. 292, 88 L.Ed.2d 15] (per curiam); *People v. Wilson* (2008) 44 Cal.4th 758, 793-794.)

> The confrontation clause allows "trial judges . . . wide latitude . . . to impose reasonable limits on . . . cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 679 [89 L.Ed.2d 674, 683, 106 S.Ct. 1431].)

(*People v. Von Villas* (1992) 11 Cal.App.4th 175, 229.)

> A trial court's limitation on cross-examination pertaining to the credibility of a witness does not violate the confrontation clause unless a reasonable jury might have received a

> significantly different impression of the witness's credibility had the excluded cross-examination been permitted."

(*People v. Quartermain* (1997) 16 Cal.4th 600, 623-624.)

In *Wilson*, this court concluded that the trial court's precluding defense counsel from further cross-examination of a prosecution witness regarding his habitual drug use and prior drug convictions was not error where there was no evidence that drug use by the witness effected his perception or memory. (*Wilson*, 44 Cal.4th at p. 794.)

Appellant's three claims of trial court error during the cross-examination of George Bell deserves little of this court's attention as the prosecutor's objections were correctly sustained, appellant was not prevented from admitting any relevant evidence, and absent the sustained objections the jury would not have received a significantly different impression of Bell's credibility. The first sustained prosecutor's objection, that defense counsel's question misstated Bell's testimony, was correct because the question asked whether Bell asked Ms. Blake if he told her he wanted to speak to Detective Olais after he said, "I can't live like this anymore. I can't hurt you anymore. I need to talk to Olais." As appellant concedes, the question assumed that Bell told Ms. Blake twice that he wanted to talk to Olais, which was not what Bell said. (AOB 96; 26 RT 5713.) Counsel for appellant could have clarified with Bell what he said to Ms. Blake but chose not to. In any event, as stated above, the evidence of what Bell said to Ms. Blake was clear and counsel for appellant effectively argued the statement as evidence of Bell's guilt.

The second alleged error was when the trial court sustained an "asked and answered" objection to appellant counsel's question whether when Bell got liquored up or high he would talk about Rickie Blake, "And then you'd decide to call Ms. Blake at 12:30 at night 10 years after this accident." The objection was properly sustained as counsel for appellant had already

questioned Bell about the call to Ms. Blake. (26 RT 5712-5715.) Moreover, the question appears to have been asked to make a point rather than to obtain information.

The third alleged error by the trial court was when it sustained a "speculation" objection by the prosecutor to a question, "You would because of alcohol and drugs, you would do or say things and then later on not remember them." The phrasing of the question itself shows its speculative nature, as how would someone know if they had done or said something they had forgotten. Moreover, the subject of Bell's prior drug and alcohol use had been raised on cross-examination of Bell by counsel for appellant numerous times. (26 RT 5672-5673, 5682, 5684-5685, 5699-5700, 5715, 5813-5814.)

Finally, if any of the rulings on the objections appellant complains of were erroneous, it is not reasonably probable that appellant would have obtained a more favorable result absent the error. (*People v. Watson* (1956) 46 Cal.2d 818, 836; *People v. Boyette* (2002) 29 Cal.4th 381, 427-428; *People v. Fudge* (1994) 7 Cal.4th 1075, 1102-1103; *People v. Cudjo*, *supra*, 6 Cal.4th at pp. 611-612.)

D. The trial court properly refused to give defense proposed jury instructions regarding the evidence that George Bell killed the victim because the instructions were argumentative and cumulative to other instructions.

Appellant complains that the trial court erred by refusing to give proposed defense instructions regarding willfully false statements by George Bell and failure to deny an accusation when given an opportunity to reply. He claims the failure to give these instructions prevented the jury from understanding how to properly weigh and apply the evidence regarding George Bell's statements and failure to deny accusations that he killed Rickie Blake. (AOB 99-103.) The trial court acted within its

discretion in refusing to instruct the jury with the proposed defense instructions that pinpointed the specific evidence related to George Bell rather than the general defense theory. The proposed instructions were also argumentative and repetitive of other instructions given by the trial court.

The defense proposed giving four special instructions that addressed the evidence presented that George Bell committed the murder of Rickie Blake. After a discussion with the parties regarding jury instructions, the trial court agreed to give a modified version of defense proposed instruction number one. (27 RT 6227-6232.)

> You have heard evidence that George Cardenas Bell may have committed the crime or crimes for which the defendant, George Williams, has been charged.
>
> The burden is on the People to prove beyond a reasonable doubt that the defendant is the person who committed the crimes with which he is charged.
>
> If, after considering the evidence regarding George Cardenas Bell and all of the other evidence in this case, you have a reasonable doubt whether the defendant was the person who committed the crime or crimes, you must give the defendant the benefit of that doubt and find him not guilty.

(9 CT 2002; 28 RT 6672-6673.)

Regarding defense proposed instructions two, three, and five, the prosecutor objected that the proposed instructions were argumentative and improperly attempted to focus the jury on specific pieces of evidence rather than on the theory of the defense. (27 RT 6232.)[7] Defense counsel argued

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[7] Defense proposed instruction two directed the jury that if it found that George Bell made willfully false or deliberately misleading statements regarding the crime, the jury "may consider those statements as raising a reasonable doubt as to the guilt" of appellant because they tend to prove consciousness of guilt on the part of Bell. (9 CT 1968.)

(continued...)

that he simply modified CALJIC No. 2.03 to apply to Bell's statements and allow the jury to decide whether Bell made willfully false or misleading statements regarding the crime. (27 RT 6232-6233.) The trial court refused to instruct the jury with the defense proposed instructions two, three or five. (27 RT 6233.)

A trial court has the discretion to refuse an instruction proposed by a party if the instruction is an incorrect statement of law, is argumentative, is duplicative of other instructions or if the instruction might confuse the jury. (*People v. Gurule* (2002) 28 Cal.4th 557, 659, citing *People v. Sanders*

(...continued)

Defense proposed instruction three told the jury that if it found that Bell attempted to suppress evidence implicating him in the crime, it may consider that circumstance as raising a reasonable doubt as to the guilt of appellant because the evidence tends to prove a consciousness of guilt on Bell's part. (9 CT 1969.)

Defense proposed instruction five provided:

> If you should find from the evidence that there was an occasion when George Cardenas Bell, under conditions which reasonably afforded him an opportunity to reply, failed to make a denial in the face of an accusation, expressed directly to him, charging him with the crime for which the defendant is now on trial, or tending to connect him with its commission and that he heard the accusation and understood its nature, then the circumstance of his silence on that occasion may be considered against him as indicating an admission that the accusation was true.
>
> If you find that this circumstance occurred you may view that evidence as raising a reasonable doubt as to the guilt of the defendant, George Williams.
>
> However, its weight and significance, if any are matters for your determination.

(9 CT 1970.)

(1995) 11 Cal.4th 475, 560, and *People v. Hendricks* (1988) 44 Cal.3d 635, 643.)

"A defendant has the right, on request, to instructions that pinpoint the theory of the defense, not specific evidence as such." (*People v. Wright* (1988) 45 Cal.3d 1126, 1137.) When a proposed instruction merely invites the jury to draw favorable inferences to the defendant from specific items of evidence, a trial court properly rejects the proposed instruction. (*People v. Kraft* (2000) 23 Cal.4th 978, 1063, citing *People v. Mincey* (1992) 2 Cal.4th 408, 437.)

In *People v. Wright*, *supra*, this court upheld a trial court's rejection of a special defense instruction directing the jury to specific evidence in determining the guilt of the defendant.

> Defendant's second proposed instruction lists certain specific items of evidence introduced at trial, and would advise the jury that it may "consider" such evidence in determining whether defendant is guilty beyond a reasonable doubt. The court refused to give this instruction because it is argumentative, i.e., it would invite the jury to draw inferences favorable to the defendant from specified items of evidence on a disputed question of fact, and therefore properly belongs not in instructions, but in the arguments of counsel to the jury.

(*Wright*, 45 Cal.3d at p. 1135.)

In *People v. Hartsch* (2010) 49 Cal.4th 472, this court upheld the trial court's rejection of ten proposed defense instructions that were duplicative of the standard jury instruction on credibility. (*Id.* at p. 500.) And relevant to appellant's claim here, this court also upheld the trial court's rejection of a defense modification of CALJIC No. 2.03 that directed the jury that the untruthfulness of the testimony or prior statements of a witness could be an indication of the guilt of the witness. This court found that there was no authority to support such an instruction. (*Id.* at pp. 500-501.)

The proposed defense instructions rejected by the trial court here, directing the jury to evidence that George Bell made false statements regarding his whereabouts on the night of the murder, his failure to respond when he was asked if he was involved in the murder, and his unidentified attempts to suppress evidence implicating him in the murder, were attempts to direct the jury to specific pieces of evidence. These proposed instructions were duplicative of the instruction given by the trial court that the jury could consider the evidence presented related to George Bell's guilt for the crimes charged in determining whether appellant's guilt had been proven beyond a reasonable doubt. (28 RT 6672-6673.) The proposed instructions were also argumentative and misleading in that the instructions told the jury that if they found true the evidence related to Bell's false statements or failure to respond to accusations, the jury could consider that evidence as raising a reasonable doubt of appellant's guilt. (9 CT 1968-1970.)

Further, even if the trial court's refusal to instruct the jury with the proposed defense instructions was erroneous, appellant was not prejudiced because the substance of the proposed instructions was conveyed through the instruction regarding George Bell given by the trial court. Also, the jury would have understood that evidence relating to George Bell's guilt for the murder of Rickie Blake, if believed, would be a consideration in determining whether appellant was guilty beyond a reasonable doubt. (*People v. Kraft*, 23 Cal.4th at p. 1066.) The defense argument made it abundantly clear that the defense position was that the evidence of George Bell's statement's after the murder, false statements regarding his whereabouts at the time of the murder and failure to deny any accusations about his involvement constituted reasonable doubt of appellant's guilt. "Although counsel's arguments are not a substitute for a proper jury instruction, such detailed argument supports our conclusion that the error in

refusing the instruction was harmless in this case." (*People v. Fudge*, *supra*, 7 Cal.4th at p. 1111, citing *Wright*, *supra*, 45 Cal.3d at pp. 1148-1149.) Therefore, it is not reasonably probable that had the proposed instructions been given, appellant would have obtained a more favorable result. (*Kraft*, *supra*, at p. 1066; *People v. Watson*, *supra*, 46 Cal.2d at p. 836.)

E. There was no cumulative error or prejudice

The trial court errors asserted by appellant either were clearly not erroneous or were clearly not prejudicial. Thus, under the circumstances, the combined effect of these assumed errors did not deny defendant a fair trial, a reliable verdict, or any other constitutional right. (*People v. Harrison* (2005) 35 Cal.4th 208, 255; *People v. Monterroso* (2004) 34 Cal.4th 743, 768.)

IV. THE EVIDENCE OF UNCHARGED SEXUAL MISCONDUCT WAS PROPERLY ADMITTED UNDER EVIDENCE CODE SECTIONS 1108 AND 352; EVIDENCE CODE SECTION 1108 IS NOT UNCONSTITUTIONAL

Appellant claims the trial court abused its discretion when it ruled that uncharged acts of sexual misconduct committed by appellant were admissible under Evidence Code 352 to show appellant had a propensity to commit acts of sexual misconduct. Appellant claims the trial court erred and violated his due process rights when it failed to find the sexual misconduct evidence should be excluded as unduly prejudicial under the facts of this case. (AOB 110-113.) Appellant also claims this court should reconsider its holding in *People v. Falsetta* (1999) 21 Cal.4th 903 (*Falsetta*), and find that admitting evidence of uncharged sexual misconduct to demonstrate propensity to commit such acts violates due process. (AOB 113-118.)

This court has held numerous times that pursuant to Evidence Code section 1108, evidence of prior acts of sexual misconduct committed by a defendant are admissible in a capital case to show the defendant's propensity to commit the charged sexual offense, as long as the trial court properly exercises its discretion under Evidence Code section 352 and finds the probative value of the evidence is not substantially outweighed by undue prejudice. In this case the trial court properly exercised its discretion in ruling that two instances of sexual misconduct committed by appellant were admissible in his trial for the rape and murder of Rickie Blake. The two instances were the molest of appellant's daughter in 1984 and the rapes of Velma Williams and her six-year-old daughter in April of 1986, just days after the rape and murder charged in this case. Both instances of sexual misconduct found admissible by the trial court resulted in convictions and both were similar in that the victims were prepubescent children and appellant attempted to use alcohol to accomplish the rapes. The trial court was well within its discretion in admitting the evidence of the two incidents of sexual misconduct. Finally, appellant has presented this court with no basis to reject its precedent and hold that Evidence Code section 1108 is unconstitutional.

A. Proceedings below

On February 24, 2004, appellant filed a pretrial motion to exclude evidence sought to be admitted by the prosecution in their case-in-chief that appellant had committed several uncharged acts of sexual misconduct. (3 CT 622-641.) The defense indicated that it understood the prosecution would seek to admit evidence of three incidents of sexual misconduct committed by appellant: 1) a sexual assault on his daughter Idella W. in 1984 for which he was convicted; 2) the forcible rapes of Velma W. and her six-year-old daughter Alicia C. in 1986 for which he was convicted; and 3) a sexual assault of Leon F. in 1998 for which he was convicted. It

was understood the prosecution was not seeking to admit evidence in the guilt phase of forcible rapes by appellant of Sandra Stephens in 1981 and Valender Rackley in 1985. (3 CT 623.) The defense position was that the evidence was inadmissible to prove any fact under Evidence Code section 1101, subdivision (b). (3 CT 624-630.) Appellant also argued the evidence was inadmissible under Evidence Code section 1108 because of the undue prejudice of the admission of the evidence and the lack of similarity between the charged crimes and the uncharged misconduct. (3 CT 630-636.) Finally, appellant claimed Evidence Code section 1108 was unconstitutional, violating due process and equal protection, and because the uncharged acts committed after the charged offenses, they were inadmissible under section 1108 as ex post facto. (3 CT 637-639, 639-640.)

The People filed a motion to admit acts of uncharged sexual misconduct under Evidence Code sections 1101 and 1108. (5 CT 1019-1053.) The motion identified five incidents of sexual assault committed by appellant from 1981 to 1998. (5 CT 102-1023.) The People's motion set forth the relevancy of the evidence of uncharged misconduct and indicated the prosecution was seeking only to admit evidence of three incidents of sexual misconduct, acts resulting in criminal convictions and taking place in 1984, 1986 and 1998. (5 CT 130-132.) The motion described why the evidence of uncharged misconduct was admissible as propensity evidence under Evidence Code sections 1108 and 352, as well as admissible under Evidence Code section 1101, subdivision (b), to prove intent, common plan or scheme and identity. (5 CT 1032-1035, 1035-1041.)

A hearing was held by the trial court on the admissibility of the evidence of uncharged sexual misconduct. (4 RT 641-642.) The prosecutor described the three incidents of sexual misconduct it was seeking to admit. (4 RT 642-643.) Defense counsel argued that the

evidence was inadmissible as propensity evidence and since the offenses were committed prior to the enactment of section 1108, admission of the evidence would be ex post facto. (4 RT 643-647.) The prosecutor pointed out that the ex post facto issue was decided in *People v. Fitch* (1997) 55 Cal.App.4th 172, and because section 1108 did not change the burden of proof, applying the statute to a crime committed before it was enacted was not ex post facto. (4 RT 657-659.) The trial court ruled that application of section 1108 in this case was not ex post facto. (4 RT 659.)

As to the admissibility of the evidence of the three incidents under section 1108, the trial court found that each of the three incidents were the type of sexual misconduct that would directly bear on appellant's propensity to commit sexual offenses and therefore relevant as to whether appellant committed the rape charged in this case. The evidence had "significant probative value." As to undue prejudice, the three incidents were not remote in time to the charged offenses, the incidents resulted in convictions which enhanced the reliability of the evidence and after weighing the probative value and potential for undue prejudice, the trial court found no undue prejudice sufficient to require the exclusion of the evidence. (4 RT 661-662.)

The prosecution presented only two incidents of uncharged sexual misconduct in the guilt phase. Idella Williams, appellant's daughter, testified she had a "pretty good" relationship with appellant. (20 RT 3854-3856.) In December of 1984, when Idella was six years old, she was home in her room by herself. Her mother was not home but appellant was at home and he was drinking. She was in her nightgown. Appellant came into her room and rubbed lotion on her vaginal area. Idella initially was quiet, pretending to be asleep, but then said "Daddy, daddy," to try to get him to stop touching her. He stopped and left her room. (20 RT 3856-3864.) She told her mother what appellant had done. Her mother took her

to the hospital and subsequently she was questioned by police. (20 RT 3864-3868.) Brenda Williams, appellant's wife and Idella's mother, testified that appellant was drinking alcohol and sitting on the floor corner when she came home. (20 RT 3881-3885.) Idella was standing by the bed, complaining that she was not feeling well. Idella said appellant had rubbed some lotion on her. Ms. Williams took Idella to the hospital. (20 RT 3886-3889.) Ms. Williams told the police that Idella told her that appellant gave her some of his alcoholic drink. (20 RT 3890-3893.)

Velma Williams testified that on April 18, 1986, she was living at an apartment with her two daughters. Alicia C. had just turned six. Brenda Williams, appellant's wife, was her neighbor. (20 RT 3933-3935.) After Velma put her daughters to bed, she took out the trash. As she returned to her apartment, appellant followed her in. She told him that she was tired and ready to go to sleep. Appellant forced his way past her and she told him to leave and that she would call the police. Appellant pulled the phone cord out of the wall and said, "Well, I am not going to leave until I fuck you." (20 RT 3938-3940.) Appellant pulled out a knife and waved it around. He told her to take her pants off and she did. Appellant tried to force Ms. Williams to drink some of his beer. (20 RT 3941-3943.) Appellant bound her wrists and ankles together. Appellant poured baby oil on her vagina and anus. He had vaginal intercourse with her and used the knife to cut some of her pubic hair. (20 RT 3943-3945.) Then he told her to turn over and had anal intercourse. He ejaculated in her vagina. Appellant retied her hands behind her, retied her legs and then tied her hands and legs together. Appellant asked who else was in the apartment, and Ms. Williams told him her girls were in their room asleep. (20 RT 3946-3947.)

Ms. Williams begged appellant not to do anything to her daughters. Appellant left the room and a few minutes later she heard a scream from

her daughters' room. Appellant returned to Ms. Williams's bedroom and raped her again. After appellant fell asleep, she was able to get the ties on her wrists loose, she slowly crawled off appellant, picked up his knife, quickly grabbed some clothes and went to her girls' room. She noticed a pool of blood in Alicia's bed. She took the girls out of the apartment and called the police. (20 RT 3948-3954.)

Dr. Marilyn Kaufhold treated Alicia C., finding found both of Alicia's wrists had a raised circumferential linear mark, consistent with the use of some form of restraint. (22 RT 4751, 4756-4758.) Dr. Kaufhold believed Alicia's injuries were consistent with a partial penetration of her vagina, more consistent with a penis than a finger. (22 RT 4767-4769.)

B. Standard of review

The court's ruling under Evidence Code section 1108 is subject to review for abuse of discretion. (*People v. Loy* (2011) 52 Cal.4th 46, 61; *People v. Story* (2009) 45 Cal.4th 1282, 1295.)

> "Under the abuse of discretion standard, 'a trial court's ruling will not be disturbed, and reversal of the judgment is not required, unless the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.' [Citation.]"

(*People v. Lewis* (2009) 46 Cal.4th 1255,1286; *People v. Hovarter* (2008) 44 Cal.4th 983, 1004; see also *People v. Wesson* (2006) 138 Cal.App.4th 959, 969 [abuse of discretion standard applies to admission of evidence under Evid. Code, § 1108].)

C. The trial court was within its discretion in admitting the two incidents of sexual misconduct under Evidence Code sections 1108 and 352.

California Evidence Code section 1108 provides in relevant part:

> (a) In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by

> Section 1101, if the evidence is not inadmissible pursuant to Section 352.
>
> (b) In an action in which evidence is to be offered under this section, the people shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered in compliance with the provisions of Section 1054.7 of the Penal Code.
>
> "Sexual offense" includes violations of Penal Code sections 261 (rape), 269 (aggravated sexual assault of a child), 286 (sodomy), 288 (lewd or lascivious acts on a child), and 289 (forcible sexual penetration). (Evid. Code § 1108, subdivision (d).)

An exception to the general rule against admitting propensity evidence is Evidence Code section 1108, subdivision (a), which provides for the admissibility of evidence of other sexual offenses in the prosecution of a sexual offense, subject to Evidence Code section 352.

> "[T]he 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 the defendant's possible disposition to commit sex crimes." (*People v. Falsetta* (1995) 21 Cal.4th 903, 915.)

(*People v. Jones* (2012) 54 Cal.4th 1, 49.)

In determining the admissibility of evidence of other sexual offenses under section 352, a trial court considers "its nature, relevance, and possible remoteness, 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," and must consider less prejudicial alternatives such as admitting some of

the defendant's other sex offenses or excluding inflammatory details of the offense. (*People v. Loy*, 52 Cal.4th at p. 61, citing *Falsetta*, *supra*, 21 Cal.4th at p. 917)

In *Jones*, a capital murder case, this court recognized that to be admissible under Evidence Code section 1108, the evidence of the uncharged sexual misconduct does not have to be similar to the charged offense as long as the uncharged sex offenses were those enumerated in the statute. (*Jones*, *supra*, 54 Cal.4th at p. 50, citing *People v. Frazier* (2001) 89 Cal.App.4th 30, 41.)

This court in *Jones* found the evidence of the uncharged sexual misconduct, a prior forced oral copulation and sexual assault, had substantial probative value as to the defendant's propensity to commit sexual offenses that was not outweighed by the likelihood it would prejudice the jury. This court found the source of the information regarding the uncharged sexual misconduct was independent of the charged offenses, the uncharged sexual misconduct resulted in convictions, and although serious, the uncharged crimes were no more inflammatory than the charged offenses. (*Jones*, at pp. 50-51, citing *People v. Lewis* (2009) 46 Cal.4th 1255, 1287.) This court also found the uncharged sexual misconduct was not remote in time to the charged conduct, a gap of only six years, much of which the defendant was in custody, and was not cumulative. (*Id.* at p. 51.) This court held that the trial court acted within its discretion in admitting the evidence of the uncharged sexual misconduct under Evidence Code section 1108 and 352. (*Ibid.*) This court also rejected the defendant's claims that the erroneous admission of the uncharged offenses denied his federal constitutional right to due process, and his right to a reliable adjudication at all stages of a death penalty case. (*Id.* at p. 51, fn. 12.)

In *People v. Lewis*, *supra*, another capital rape-murder case, in 1991 the female victim was found in her apartment with her pants off, her shirt

pushed up, and throat slashed. The evidence showed that the defendant had flirted with the victim the previous night, had visited her apartment later that evening and he told police he had consensual sex with the victim in her apartment. The defendant's account of his activities after he left the victim conflicted with other evidence. (*Lewis*, 46 Cal.4th at p. 1260.) The prosecution also admitted evidence through the testimony of a prior victim and a police detective, that in September 1987, appellant visited a woman's apartment, threatened her with a knife and raped her. (*Id.* at pp. 1276-1278.) The defendant claimed the admission of the evidence of the 1987 rape was an abuse of the trial court's discretion, unduly prejudicial and violated his rights to due process and a fair trial under the federal Constitution. (*Id.* at p. 1284, 1286.)

This court found no abuse of discretion. This court found the probative value of the evidence of the prior rape was strong, as the offense shared similarities with the charged rape and murder, the prior rape was not remote in time, and the evidence of the prior rape was independent of the evidence of the charged offenses. This court also found the risk of undue prejudice was minimal because the defendant had been convicted of the prior rape, there was little likelihood the jury would be distracted or confused by the evidence of the prior rape, and the rape was less inflammatory than the evidence that the defendant raped, strangled and cut the throat of the victim in the charged offenses. (*Lewis*, 46 Cal.4th at pp. 1287-1288.) Finally, this court rejected the defendant's request to reconsider *Falsetta* and also rejected the defendant's claim that the admission of the evidence of the prior rape violated his federal Constitutional rights. (*Id.* at pp. 1288-1289.)

In *People v. Loy*, *supra*, a jury convicted the defendant of the 1996 first degree murder of his 12-year-old niece with the special circumstance that the murder was committed while in the commission of a lewd and

lascivious act on a child under the age of 14, and returned a verdict of death. (*Loy*, 52 Cal.4th at pp. 50-51.) The trial court admitted evidence through the testimony of other victims that the defendant had raped, sodomized and forced a 16-year-old girl to orally copulate him in 1975 and had done the same thing to another female victim in 1980. Both incidents resulted in convictions. (*Id.* at pp. 54-55.) This court quickly rejected the defendant's claim that section 1108 was unconstitutional, finding no reason to reconsider its holding in *Falsetta* and pointing out that the Ninth Circuit Court of Appeals had held a similar federal rule to be constitutional in *United States v. LeMay* (9th Cir. 2001) 260 F.3d 1018, 1024-1027. (*Loy*, at pp. 60-61.)

This court found no abuse of discretion and found "little reason" to exclude the evidence. This court found the fact that the defendant had been convicted of both sexual assaults weighed heavily in favor of the admission of the evidence as did the fact that the evidence of the prior offenses was presented quickly, leaving additional evidence of the offenses to be presented at the penalty phase. (*Loy*, 52 Cal.4th at p. 60.) Moreover, this court found that rather than distracting the jury from their inquiry regarding the charged offenses, the evidence of the uncharged sexual assaults actually assisted the jury in determining whether the defendant was the person who perpetrated the charged offenses. (*Id.* at pp. 61-62.) This court acknowledged the inevitable prejudicial effect of this type of evidence but found that the uncharged offenses were not particularly inflammatory in comparison to the charged offenses, did not require a significant amount of time to present and were not remote despite the 21-year and 16-year gap between the prior offenses and the charged offenses, as the defendant had been in custody for much of that time. (*Id.* at p. 62.) Finally, this court found that the similarity between the charged and uncharged offenses, relevant but not dispositive to the admissibility determination, need not be

sufficiently similar to be admitted under section 1101, subdivision (b). The fact that the ages of one of the uncharged victims was close to the age of the murder victim and the fact that the defendant choked the victims provided additional relevance favoring admission of the evidence of the uncharged offenses. (*Id.* at p. 63; see also *People v. Wilson* (2008) 44 Cal.4th 758, 797-798 [trial court within discretion under Evidence Code sections 1108 and 352 in admitting evidence of prior rape in guilt phase of capital murder/rape trial].)

Here, the trial court was well within its discretion in determining the evidence of the molest of appellant's daughter in 1984 and the rape of Velma Williams and her six-year-old daughter less than one week after the charged rape and murder of Rickie Blake was admissible under sections 1108 and 352. First, although not necessary to a finding of admissibility, there were similarities between the uncharged and charged offenses. In both of the uncharged incidents appellant had sex with children, six-year-olds; while in the current case he raped a 14-year-old who was small in stature and prepubescent. There was also evidence that appellant used or attempted to use alcohol during the rape of Velma Williams, during the molest of his daughter, and in the rape and murder of Rickie Blake. Second, appellant's prior offenses were not remote in that the molest of his daughter occurred two years before the charged offense and the incident with Velma Williams and her daughter took place less than a week after the murder of Rickie Blake. Third, there was no issue as to the certainty of the commission of appellant's uncharged offenses, as both resulted in convictions. Fourth, the evidence of appellant's uncharged sexual offenses was presented quickly and concisely. In fact, Alicia Conrad did not testify until the penalty phase and the fact that she contracted Herpes was not presented in the guilt phase. Thus, it is unlikely the jurors were confused, misled, or distracted from their main inquiry. (See *Falsetta*, *supra*, 21

Cal.4th at p. 917.) In addition, two rapes committed by appellant and the molest of his cousin Leon Fuller were not presented in the guilt phase. Fifth, although the rapes of Velma Williams and her daughter would not have reflected well on appellant, appellant's participation in those crimes or the molest of his daughter would not have evoked a stronger emotional reaction than appellant's crime against Rickie Blake, the brutal rape and murder of a sweet, 14-year-old child. Thus, the trial court, in concluding the evidence of the uncharged sexual offenses was admissible under sections 1108 and 352, did not act arbitrarily or capriciously.

Appellant claims that *People v. Harris* (1998) 60 Cal.App.4th 727, an appellate court decision, provides support for his claim that the evidence should have been excluded under section 352. (AOB 111.) *Harris* is distinguishable. In *Harris*, the court held the trial court abused its discretion in admitting evidence of a prior sex offense under section 1108 in the prosecution of a mental health nurse for sex offenses involving a patient. (*People v. Harris*, *supra*, at p. 730.) The charged offenses involved "breach of trust" offenses by a caregiver, and the prior offense involved a "vicious" sexual attack on an apparent stranger. (*Id.* at p. 738.) The court of appeal found that the following factors militated against admission of the prior offense: "The evidence was remote, inflammatory and nearly irrelevant and likely to confuse the jury and distract it from the consideration of the charged offenses." (*Id.* at p. 742.) In finding the evidence was inflammatory, the appellate court noted the charged offenses were "of a significantly different nature and quality than the violent and perverse attack on a stranger[,]" which was presented in an "incomplete and distorted" way. (*Id.* at p. 738.)

Here, in contrast, the evidence of appellant's prior sexual offenses was brief and straightforward, the prior offenses were not inflammatory compared to the instant capital offense, were not remote, and were similar

to the charged crime in certain important aspects. (*People v. Harris*, *supra*, 60 Cal.App.4th at p. 739.) Thus, unlike *Harris,* the "safeguard" of section 352 did not fail in this case. (*People v. Loy*, 52 Cal.4th at p. 64.)

Appellant also suggests that because in the present case he was charged with murder as well as rape, the evidence of the uncharged sexual offenses was somehow less probative. (AOB 110-112.) However, in *People v. Story*, *supra*, 45 Cal.4th at p. 1285, this court held that a murder committed during the course of a rape is a "sexual offense" within the meaning of Evidence Code section 1108. Moreover, in each of the cited capital offenses above, *Lewis*, *Loy*, *Jones*, and *Wilson*, the defendant was convicted of murder along with a sexual offense. This court in *Loy* made it clear that evidence under section 1108 was particularly probative where the defendant claims mistaken identity. (*Loy*, *supra*, 52 Cal.4th at pp. 61-62.) And in *Lewis*, like the present case, there was undisputed evidence that the defendant had sex with the victim. In *Lewis*, the defendant admitted it to police (*Lewis*, 46 Cal.4th at p. 1270), but the evidence of the uncharged sexual offenses was used to show he killed the victim. The bottom line was that in the present case, as in the other cases cited, proof that appellant raped the victim also established he killed the victim.

D. Harmless error

Even if the section 1108 evidence should have been excluded in the guilt phase, it is not reasonably probable that, absent the evidence of appellant's prior sexual offenses, appellant would have obtained a better result. (See *People v. Malone* (1988) 47 Cal.3d 1, 22; *People v. Watson*, *supra*, 46 Cal.2d at p. 836.) There was substantial evidence to support his conviction without the section 1108 evidence. The DNA evidence linked 30-year-old appellant to having sex with a 14-year-old child, despite significant evidence that she had done nothing more than kiss a boy before. The scientific evidence established that the sex took place near or at the

same time as the murder. Appellant told police he had never met and spoken to Rickie Blake. And the evidence to support the defense theory that George Bell committed the murder was weak and speculative.

Based on the foregoing, it is not reasonably probable that, absent the evidence of appellant's prior sexual offenses, the jury would have reached a different result in this case. For the same reasons, and to the extent appellant's Sixth, Eighth, or Fourteenth Amendments were violated by admission of the evidence, the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705].

E. Evidence Code section 1108 is constitutional

This court has repeatedly and consistently held that the admission of evidence of uncharged sexual misconduct section 1108 to show propensity does not violate a defendant's federal Constitutional rights. (*Jones*, *supra*, 54 Cal.4th at p. 51, fn. 12; *Lewis*, *supra*, 46 Cal.4th at pp. 1288-1289; *Loy*, *supra*, 52 Cal.4th at pp. 60-61, citing *United States v. LeMay*, *supra*, 260 F.3d at pp. 1024-1027.) This court should decline appellant's invitation to reconsider the correctness of *Falsetta*. (*Wilson*, *supra,* 44 Cal.4th at p. 797.)

PENALTY PHASE ISSUES

V. THE TRIAL COURT WAS WITHIN ITS DISCRETION IN REFUSING TO ADMIT THE VIDEOTAPED INTERVIEWS OF DEFENSE WITNESSES ANNIE WHITFIELD AND SOPHIE WILLIAMS; IN SUSTAINING AN OBJECTION TO A QUESTION ASKED OF A DEFENSE EXPERT REGARDING ONE OF THE VIDEOTAPED INTERVIEWS; AND IN REFUSING TO ADJOURN THE TRIAL TO CONDUCT CONDITIONAL EXAMINATIONS OF THE WITNESSES IN INDIANA

Appellant complains that the trial court violated his due process rights by refusing to admit videotaped interviews of defense witnesses Annie Whitfield and Sophie Williams during the penalty phase. He claims the

videotaped statements of these witnesses were based on their first hand knowledge, were highly relevant and should have been admitted despite being hearsay; because the statements were reliable. (AOB 127-136, 141-155.) Appellant also claims the trial court erred when it sustained an objection by the prosecution to a question asked of a defense expert regarding the use a portion of one of the recorded statements as a basis for his opinion. (AOB 136-137, 155-157.) And finally, appellant claims the trial court abused its discretion by refusing to grant his request to adjourn the trial of the penalty phase to conduct conditional examinations of Ms. Whitfield and Ms. Williams in Indiana. (AOB 137-140, 157-159.)

The trial court was well within its discretion in excluding the videotaped hearsay statements of Ms. Whitfield and Ms. Williams because the foundation, context, and source for the statements were unknown and the statements were not reliable. The trial court did not err in sustaining the prosecutor's objection to a question asked a defense expert and any error in that regard was clearly harmless. Finally, the trial court was within its discretion in refusing appellant's request to adjourn the penalty phase to conduct conditional examinations of Ms. Whitfield and Ms. Williams in Indiana.

A. Proceedings below

On June 7, 2004, defense counsel indicated to the court that he was going to Indiana on June 9th to determine defense witnesses to be called in the penalty phase. (4 RT 743.) On Wednesday, July 7, 2004, defense counsel indicated that he had determined the penalty phase witnesses to be called by the defense and had given the names to the prosecution. (5 RT 762.) On September 30, 2004, prior to the start of the penalty phase, appellant moved to present videotaped recordings of witnesses Ann Whitfield and Sophie Williams in lieu of their live testimony. The statements were obtained by a defense investigator sent to Indiana to

videotape the statements of both witnesses. (30 RT 6825-6826.) Defense counsel stated that Ms. Whitfield's statement was regarding the state appellant was in when he arrived at her home and the contact she had with appellant's mother. He claimed Ms. Williams statement related to her contact with appellant after he got out of prison and returned to Indiana where he worked for Ms. Williams's husband and became close to the family. (30 RT 6826-6827.)

The prosecutor opposed the admission of the videotapes, stating there was no exception to the hearsay rule and that the interviews of both witnesses allowed the defense investigator to ask "softball" questions without cross-examination. The prosecutor also noted that the interviews were full of second and third-hand hearsay, inadmissible information and information of which the witnesses had no personal knowledge. (30 RT 6827-6828.) The defense responded that the prosecution had the opportunity to interview the witnesses in Indiana, and that there is a more relaxed treatment of hearsay in the penalty phase of a capital trial. Defense counsel emphasized that the prosecution still had the opportunity to go to Indiana and interview the witnesses. (30 RT 6828-6831.) The trial court ruled that the videotaped statements were evidence relevant to factor k. The court deemed the information provided by these witnesses to be highly relevant, and found there was no compelling reason to believe the evidence unreliable. The court ruled that subject to specific evidentiary objections to specific parts of the recorded statements, the statements of Ms. Whitfield and Ms. Williams would be admitted. (30 RT 6831-6832.)

On Monday, October 4, 2004, the prosecutor noted that he had not received the transcripts of the videotaped statements and that redactions needed to be done to the transcripts. (31 RT 7410-7411.)

When the penalty phase continued on October 12, 2004, the trial court indicated it had rethought the admissibility of the unsworn videotape of Ms.

Williams. The court noted that although hearsay rules are relaxed at the penalty phase, the rules are not abrogated completely. The court noted that the residual due process exception to the hearsay rule required a showing of reliability. The court pointed out that the reliability of evidence is often demonstrated during cross-examination where context is demonstrated and information is clarified. After reading the transcript of Ms. Williams's interview, the court had concerns regarding her personal knowledge of appellant, her relationship with him and when she knew him. The court concluded that it would be grossly unfair to present the videotaped statement of Ms. Williams to the jury because her statement was not fair or reliable. (32 RT 7413-7415.) The court ruled Ms. Williams's videotaped statement was inadmissible. (32 RT 7416.)

The trial court indicated it had many of the same concerns regarding the videotaped statement of Ms. Whitfield. Ms. Whitfield's statement was not as open to misinterpretation as to when she obtained her knowledge regarding appellant, but it was clear she was discussing appellant as a young boy that spent a short amount of time with her. The court indicated that many parts of the statement were not based on first hand knowledge, were multiple layers of hearsay or were inherently unreliable. The court indicated it was inclined to exclude Ms. Whitfield's statement too. (32 RT 7416-7417.) The court stated that it initially believed defense counsel's argument to admit the statement was reasonable until the court reviewed the contents of the statement and realized that admitting the statement would be grossly unfair. (32 RT 7417.) Defense counsel argued the videotaped statements provided the heart and soul of the mitigation case and that the prosecutor had the ability to argue the weaknesses of the statements to the jury. (32 RT 7418-7421.) The trial court pointed out that Ms. Whitfield's statement was unsworn, contained multiple levels of hearsay, that there would be no meaningful cross-examination of the

declarant, and no opportunity to test its context, reliability or credibility. The court ruled the reliability of the evidence had not been established to satisfy the residual due process exception to the hearsay rule. The videotaped statement by Ms. Whitfield was excluded. (32 RT 7421.)

B. Audiotaped statement of Sophie Williams

Ms. Williams stated she met appellant through her husband who hired young men to rehabilitate homes. She said appellant asked her husband to teach him to be a carpenter. Her husband said appellant was a quick learner. After her husband died, appellant called her to ask how she was doing and whether she needed anything. One day her lawnmower stopped and appellant came over and fixed it. (28 CT 5657-5659.) Appellant called her several times a week. Appellant built a porch to close off their bedroom and when they needed a component connected to their stereo, appellant connected it. (28 CT 5660-5661.) Ms. Williams's husband said appellant did everything he was asked and he thought very highly of appellant. She said that appellant talked more to her husband than he did to her. Her husband told her that appellant went to the hospital to be there when his daughter had a baby. Appellant asked them for $20 to give to his daughter for diapers and was given the money. (28 CT 5661-5662.) She said she referred appellant to do some work on the gutters of her church and appellant did a good job. She said that once appellant brought her over a plate of barbeque and greens. (28 CT 5662-5663.) She said appellant once asked her the colors of her bathroom and then made something to match it. (28 CT 5664-5666.) She concluded by saying that appellant was a caring person and thought of her husband as a father figure. He was a kind hearted person, very gentle, and she would trust him in her home. She did not think appellant would want to misuse or do anything to anyone. (28 CT 5666-5667.)

C. Audiotaped statement of Annie Whitfield

Ms. Whitfield, 73 years old, gave foster care to over a hundred children. Appellant was her first foster child to have this kind of trouble. He was a sweet little kid. (28 CT 5669-5671.) When appellant was placed with her, she already had three other foster children in her home. He hugged her and called her mama. When she fixed him breakfast, he said he had never been treated that way. Appellant's mother was supposed to buy him an Easter suit but she didn't and appellant was crying. Appellant's mother used nasty words and hit him. Ms. Whitfield told her not to come back. Appellant was happy there until his mother started interfering, trying to get him back. (28 CT 5673-5675.) Appellant told Ms. Whitfield that his mother left him alone at night and did not get him decent clothes. After he left Ms. Whitfield's home, appellant would visit and ask to come back. (28 CT 5676.) Ms. Whitfield said appellant's mother would call him when she was drunk and ask to speak to him. She said appellant's mother was drinking real heavy but "they" claimed she stopped drinking. (28 CT 5678.) Appellant cried whenever his mother visited because he was afraid she was going to take him back. During the incident at Easter, his mother slapped him across the face. She appeared to have been drinking on that occasion. (28 CT 5680-5681.) When Ms. Whitfield gave appellant a bath, she saw scars that looked like he had been whipped with a switch or a belt. Appellant said a man or his mother did it. He said when he disobeyed his mother, she would whip him. At various times after he stopped living there, appellant came back to visit but then would disappear. (28 CT 5682-5684.) The social worker told her that appellant was taken from the home because he was being abused and left alone. The social worker said there was no food in the house. (28 CT 5685.) Appellant told her there was one guy hanging around his mother who he did not like. Appellant said when

he told his mother that, she "tore his butt up." Appellant said his mother did not drink much but Ms. Whitfield's husband knew someone who said she drank quite a bit. (28 CT 5687-5688.) Ms. Whitfield heard appellant's mother was a prostitute. (28 CT 5691.) Ms. Whitfield was told by one of her friends that appellant was molested by one of the men living in his house. (28 CT 5694.) She heard that appellant was caught by a teacher having sexual affairs with another little boy. Ms. Whitfield said appellant had eight children with his wife. (28 CT 5697.) Ms. Whitfield said she would want to tell the jury that appellant was abused, that he was bitter against his own mother, and that he never got counseling so it would not be fair to give him death. The appellant she knew would not take a life and she did not believe he did. She did not believe appellant would lie about it either. (28 CT 5698-5699.)

D. The trial court was within its discretion in refusing to admit the recorded hearsay statements of Ms. Williams and Ms. Whitfield because the statements were hearsay, lacked foundation, had limited relevance and their reliability could not be tested on cross-examination.

Initially, it must be pointed out that a major premise asserted by appellant - that the prosecutor had no objection to portions of Ms. Williams's and Ms. Whitfield's statements being admitted and even identified the portions of the recorded statements he found objectionable - is faulty. Appellant suggests that the prosecutor agreed that some of the recorded statements were admissible. (AOB 124, 127-136, 139 fn. 31, 152.) Not so. Initially, when the defense requested the court to admit the videotaped interviews of Ms. Williams and Ms. Whitfield, the prosecutor objected to the admission of the interviews as hearsay, because there would be no opportunity to cross-examine the responses to "softball" questions asked by the defense investigator, and the statements were full of second and third-hand hearsay and speculation. The prosecutor pointed out that

there were many statements in the interviews lacking personal knowledge by either Ms. Williams or Ms. Whitfield. (30 RT 6827-6828.) Transcripts of the interviews had not yet been provided to the court or the prosecutor. (30 RT 6828-6829.) The trial court granted the defense request to admit the statements subject to prosecution objections on grounds other than hearsay. (30 RT 6831-6832.) Subsequently, the trial court reviewed the recorded statements of Ms. Williams and Ms. Whitfield and found the statements untested, unreliable and grossly unfair to present to the jury. (32 RT 7414-7415, 7416-7417, 7421.)[8]

Therefore it is clear from the record that the prosecutor was always opposed to the admission of the videotaped statements of Ms. Whitfield and Ms. Williams, that he timely objected to the admission of the statements, and that his markings on the transcripts of the interviews were merely additional objections to specific portions of the interviews in light of the trial court's initial ruling that the videotaped interviews would be admitted.

The federal Constitution prohibits the State from imposing limitations resulting in the exclusion of relevant mitigating evidence that can be considered by the court or jury considering the appropriate sentence in a capital case. (*Eddings v. Oklahoma* (1982) 455 U.S. 104, 114-115 [102 S.Ct. 104, 71 L.Ed.2d 1]; *Lockett v. Ohio* (1978) 438 U.S. 586, 604-605 [98 S.Ct. 2954, 57 L.Ed.2d 973].) In *Woodson v. North Carolina* (1976) 428 U.S. 280 [96 S.Ct. 2978, 49 L.Ed.2d 944], the plurality held that the Eighth Amendment "requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a

[8] Exhibits H and J were the transcripts of the interviews of Ms. Whitfield and Ms. Williams, respectively, that were marked with objections by the prosecutor. (CT 30 5972-6004, 6005-6015; 36 RT 8949-8950.)

constitutionally indispensable part of the process of inflicting the penalty of death." (*Id.* at p. 304.)

> An instruction prohibiting juries from basing their sentencing decisions on factors not presented at the trial, and irrelevant to the issues at the trial, does not violate the United States Constitution. It serves the useful purpose of confining the jury's imposition of the death sentence by cautioning it against reliance on extraneous emotional factors, which, we think, would be far more likely to turn the jury against a capital defendant than for him. And to the extent that the instruction helps to limit the jury's consideration to matters introduced in evidence before it, it fosters the Eighth Amendment's "need for reliability in the determination that death is the appropriate punishment in a specific case." (*Woodson*, 428 U.S., at 305.)

(*California v. Brown* (1987) 479 U.S. 538, 543 [107 S.Ct. 837, 93 L.Ed.2d 934].)

However, a defendant has no constitutional right to present evidence in the penalty phase of a capital case lacking in foundation for admissibility. In *People v. Morrison* (2004) 34 Cal.4th 698, the defense sought to introduce evidence during the penalty phase of a capital trial that a large amount of cash was found at the home where the home invasion robbery and murder took place, suggesting that the victims were involved in drug trafficking activity. (*Id.* at pp. 720-723.) The trial court sustained the prosecutor's hearsay and relevance objections. (*Id.* at p. 723.)

> Exclusion of the inadmissible hearsay at issue did not violate defendant's constitutional rights. As we recently explained, the United States Supreme Court has never suggested that states are without power to formulate and apply reasonable foundational requirements for the admission of evidence. (*People v. Ramos* [(1997)], *supra*, 15 Cal.4th [1133] at p. 1178 [discussing *Chambers v. Mississippi* (1973) 410 U.S. 284 [35 L.Ed.2d 297, 93 S.Ct. 1038], *Skipper v. South Carolina* (1986) 476 U.S. 1 [90 L.Ed.2d 1, 106 S. Ct. 1669], and other U.S. Supreme Court decisions]; see also *People v. Phillips* (2000) 22 Cal.4th 226, 238.) Foundational prerequisites are fundamental, of course, to any exception to the hearsay rule. (*People v.*

> *Ramos*, *supra*, 15 Cal.4th at p. 1178.) Application of these ordinary rules of evidence to the alleged drug-related components of the proffered testimony did not impermissibly infringe on defendant's right to present a defense. (See *ibid.*, and cases cited therein.)

(*Morrison*, at pp. 724-725.)

This court in *Morrison* did recognize that the due process rights of a defendant can require the admission of hearsay evidence at the penalty phase of a capital trial, contrary to a state's evidentiary rules if: (1) the evidence is "highly relevant to a critical issue" and (2) the evidence was substantially reliable. (*Morrison*, at p. 725, citing *People v. Champion* (1995) 9 Cal.4th 879, 938, and *People v. Phillips* (2000) 22 Cal.4th 226, 238.) However, this court concluded that the exclusion of the evidence did not deprive the defendant of due process because, even assuming the presence of the money in the home at the time of the murder was a mitigating circumstance, the presence of the money did not extenuate the circumstances of the murder and "did not render defendant's actions any less aggravated, heinous, or reprehensible than they otherwise would be." (*Morrison*, at p. 725.)

In *People v. Phillips*, *supra*, the defendant sought to introduce a hearsay statement regarding the shooting he was involved in. The trial court excluded the statement as hearsay, finding the statement had not been shown to be spontaneous and "absence of an indication [the declarant] had personally perceived the events." (*Id.* at p. 235.)

> Thus, assuming Graybill's statement to Nichols was otherwise spontaneous, its admissibility turns on whether he was relating events he saw himself or repeating what he had heard from some other source. As this is a factual question, we will uphold the trial court's determination if it is supported by substantial evidence. (*People v. Jones* (1984) 155 Cal.App.3d 653, 660.) We review for abuse of discretion the ultimate decision whether to admit the evidence. (*Ibid.*; see also *People*

> *v. Raley* (1992) 2 Cal.4th 870, 894; *People v. Poggi* (1988) 45 Cal.3d 306, 318.)

(*Phillips*, at pp. 235-236.)

This court in *Phillips* held that the evidence supported the court's finding that the hearsay declarant could have been repeating statements made by the defendant or someone else. (*Phillips*, at p. 237.) This court also rejected the defendant's claim that the exclusion of the hearsay statement violated his due process rights to present mitigating evidence. (*Id.* at pp. 237-238, citing *Skipper v. South Carolina* (1986) 476 U.S. 1, 4 [106 S.Ct. 1669, 1670, 90 L.Ed.2d 1] and *Green v. Georgia*, *supra*. This court stated that the rule stated in *Green* regarding the admission of relevant mitigating evidence did not abrogate the California Evidence Code.

> Exclusion of hearsay testimony at a penalty phase may violate a defendant's due process rights if the excluded testimony is highly relevant to an issue critical to punishment and substantial reasons exist to assume the evidence is reliable.

(*Phillips*, at p. 238, citing *People v. Kaurish* (1990) 52 Cal.3d 648, 704.) This court held, however, that because there was an insufficient basis to conclude the hearsay declarant spoke from personal knowledge, there was no substantial basis to believe the statement was reliable, and thus the defendant's rights were not violated. (*Phillips*, at p. 238.)

In *People v. Champion*, *supra*, 9 Cal.4th 879, a capital defendant sought to admit evidence during the penalty phase that gang members and parolees told a parole officer that they did not believe the defendant committed the murders, to show he had been making a good faith effort to turn his life around prior to his arrest for the murders. (*Id.* at pp. 937-938.)

After acknowledging that hearsay testimony is inadmissible at the penalty phase of a capital case, this court rejected the defendant's claim that the hearsay evidence should have been admitted to protect his due process rights, finding the statements from the gang members were not highly

relevant to the defendant's innocence, were unreliable, and were properly excluded. (*Id.* at p. 938.)

This court has repeatedly rejected a broad reading of *Green v. Georgia*, *supra*. (*People v. Stanley* (1995) 10 Cal.4th 764, 839 [holding videotapes made by the defendant had no indicia of reliability and therefore were properly excluded when offered for the truth]; *People v. Weaver*, *supra*, 26 Cal.4th at pp. 980-981 [upholding the exclusion of videotapes made by the defendant to confirm his Vietnam War experiences]; *People v. Eubanks*, *supra*, 53 Cal.4th at p. 150 [hearsay mitigating evidence at penalty phase properly excluded as it had no indicia of reliability].)

In *Eubanks*, this court also held as to the excluded evidence,

> the proffered statement by a career counselor that defendant had said she was molested by her father and the investigative report regarding defendant helping an inmate obtain medical assistance, was not "highly relevant."

(*Eubanks*, 53 Cal.4th at p. 151.)

In *People v. Gonzales* (2012) 54 Cal.4th 1234, the defendant sought to admit statements by his wife and co-perpetrator to show her high level of involvement in the death of their niece, thereby demonstrating to the jury that his culpability was reduced. The trial court excluded the statements as hearsay, offered for the truth of the statements. (*Id.* at p. 1288.) Finding that the exclusion of hearsay testimony in the penalty phase only violates due process when the excluded testimony "is highly relevant to an issue critical to punishment" and "substantial reasons exist to assume the evidence is reliable," this court held the proffered hearsay statements "do not meet this high standard." (*Id.* at p. 1290.)

Finally, it has often been repeated that cross-examination is the "greatest legal engine ever invented for the discovery of truth." (*California v. Green* (1970) 399 U.S. 149, 158 [90 S.Ct. 1930, 26 L.Ed.2d 489]; *People v. Brock* (1985) 38 Cal.3d 180, 197.)

Appellant overstates the relevance of the videotaped interviews of Ms. Williams and Ms. Whitfield and understates the lack of reliability of the interviews, interviews that were conducted by a defense investigator with an obvious agenda and not subject to cross-examination to challenge, clarify, or put the statements into context. Ms. Williams did not identify the time frame or circumstances in which she interacted with appellant. (28 CT 5657.) She then discussed the relationship between appellant and her husband, indicating that her information regarding appellant and her husband's relationship and appellant's work habits were based on her 72-year-old memory of what her husband told her decades before. (28 CT 5657-5659.) She stated that after her husband died, appellant called and asked how she was doing and also one day stopped by to start her lawnmower. And although she said, "[appellant] always calls" and "always called me at least two, three, four times a week," the year and for what period of time was not indicated. (28 CT 5659-5660.) Ms. Williams relied on statements from her deceased husband to conclude that appellant was "a very good young man," that he went to the hospital when his daughter had a baby, and borrowed $20 from Ms. William's husband to buy his daughter diapers. (28 CT 5661-5662.) Similarly, her description of the work appellant did for the church suggests it is based on hearsay rather than personal knowledge. (28 CT 5662-5663.) Ms. Williams said that appellant brought her food on a holiday, maybe Memorial Day, without identifying a time frame. (28 CT 5663.) Ms. Williams also speculated that her husband was like a father to appellant. (28 CT 5664.) She also said that once, when he was working with her husband, appellant made something for her bathroom. (28 CT 5665-5666.) In response to a concluding question from the defense investigator regarding what she would like to tell the jury, she said appellant had a good relationship with her husband, that appellant was a wonderful person, and that she missed him. (28 CT 5666-5667.)

When the circumstances of the interview are considered, along with the lack of indication of where Ms. Williams obtained her information, when her interaction with appellant was and for how long, and the fact that no cross-examination would be available to test her recollection or to clarify information, the trial court was well within its discretion in finding the videotaped statement unreliable and inadmissible.

Ms. Whitfield, 73 years old, stated that she was a foster care mother starting in 1960 or 1961. (28 CT 5668-5669.) She said appellant was a sweet little kid. (28 CT 5671.) She said that when appellant first came to her home, he hugged her and asked if he could call her mom. He apparently was not used to being fed breakfast. (28 CT 5673-5674.) Unfortunately, Ms. Whitfield was not asked and did not say when she cared for appellant and for what period of time. Ms. Whitfield recalled an Easter when appellant's mother said she would get him an Easter suit but did not. She said that appellant started crying and his mother yelled at him and slapped him once across the face. (28 CT 5674-5675, 5680.) She said appellant told her his mother left him alone and did not cook for him or provide decent clothes. (28 CT 5676.) Ms. Whitfield said that when appellant's mother called him, she sounded drunk, without being asked or explaining how Ms. Whitfield knew she was drunk. Ms. Whitfield said appellant's mother was drinking "real heavy" when Ms. Whitfield was caring for appellant and "they claimed that she stopped drinking," when appellant left Ms. Whitfield's care. No clarifying questions were asked regarding her personal knowledge or the time frame of appellant's mother's drinking. (28 CT 5678, 5681.) Ms. Whitfield later stated that appellant said his mother drank but "not too much," and that her husband's friend told her husband that appellant's mother drank quite a bit. (28 CT 5688.) Ms. Whitfield stated that appellant had scars she thought were from being hit with a switch or belt and that appellant told her his mother or some man

did it. She said that appellant said he got whipped by his mother when he misbehaved. (28 CT 5682-5683.) Ms. Whitfield said she saw appellant a few times when he got out of the service but he disappeared and she never saw him again. (28 CT 5684.) A social worker told her that appellant was being left alone by his mother and there was no food in the house. (28 CT 5685.) She said that she was told appellant was teased by other children. (28 CT 5686.) When asked about times when appellant would cry and say his mother did not love him, Ms. Whitfield said it happened "not very often." (28 CT 5688.) She said she heard appellant's mother was a prostitute. (28 CT 5691.) She said she had been told by someone that appellant was sexually abused by men, one that was living with his mother. (28 CT 5694.) Ms. Whitfield said she was surprised appellant would rape a girl because he had eight children with his wife. (28 CT 5697.) She concluded by saying that appellant as a small child was loved, that he was bitter against his mother, and that it would be unfair for the jury to give him death because he made a mistake and does not deserve to die. (28 CT 5698-5699.)

It is clear from the interview of Ms. Whitfield that much of what she remembered and described was about a very small boy, that much of what she said was based on statements from other persons and that the circumstances, context, time frame and duration of her interaction with appellant was unstated. She was appellant's foster mother for a short time when appellant was very young. Her recollection of appellant's mother drinking was based partially on what others said and partially on her recollection of how appellant's mother sounded on the telephone. She described scars that she speculated was from beatings, scars shown to the jury. Her account of appellant's sexual abuse was anecdotal and unreliable. And the limited information she provided that was relevant to the jury's determination of penalty, was untested by cross-examination and had

limited indicia of reliability. The trial court was not arbitrary, or capricious when it exercised its discretion and found the hearsay interviews unreliable and inadmissible.

E. Harmless error

Even if the trial court erred by excluding the videotaped statements, because "the statements did not significantly alter the scenario before the jury," there is no reasonable possibility that the jury would have returned a different penalty had the statements been admitted into evidence. (*Gonzales*, *supra*, 54 Cal.4th at p. 1290, citing *People v. Robinson*, *supra*, 37 Cal.4th at pp. 641-642.)

Notwithstanding appellant's claim that the statements of Ms. Williams and Ms. Whitfield were critical as mitigation evidence in the penalty phase of the trial, the portions of the statements that appear to be based on personal knowledge were either marginally relevant or cumulative to other evidence presented to the jury. Much of Ms. Williams's statement related to experiences or opinions of her deceased husband. The time frame of her experiences with appellant were not clear. She said appellant called her several times a week to see how she was doing, came to her house once to start her lawnmower, brought her some food once, and made something for her bathroom when he was working with her husband. Ms. Whitfield's statement was inherently of limited relevance because appellant was quite young when she knew him and she cared for him for a short period of time. She said when appellant was a "sweet, little kid" he hugged her, called her mama and appreciated her feeding him. Her statements regarding appellant's mother and her drinking were speculative. She said she saw scars on appellant's body - information known to the jury, that his mother hit him – information also provided by other witnesses, and that he was abused, bitter against his own mother and never got counseling – all

information provided by other witnesses or easily inferred from other evidence.

Considering the cumulative nature of most of this evidence, along with the horrific nature of the crimes appellant committed against Rickie Blake and the other horrible rapes and child molests he committed, it is not reasonably possible the jury would have returned a different penalty verdict had the trial court admitted the evidence.

F. The trial court properly sustained the single objection to the testimony of Dr. Minagawa regarding his opinion of appellant's mother's alcoholism.

During the defense case in the penalty phase, defense expert Dr. Minagawa testified that appellant was alcohol dependent. (35 RT 8610-8611.) He based his conclusion that appellant was alcohol dependent on interviews from other persons regarding his drinking behavior, information provided by appellant himself, and other records he reviewed. Dr. Minagawa stated that 60 percent of alcohol dependence is attributable to family history and 40 percent to socialization. He stated that the facts that appellant's father and mother were alcoholics, there were numerous adults drinking in his home, and the physical abuse and neglect, all contributed to appellant's alcohol dependence. (35 RT 8613-8614.) When asked where he obtained the information that appellant's mother was an alcoholic, Dr. Minagawa stated, "From interviews with family members, and also from the impression of the foster mother who was taking care of Mr. Williams when he was – ." The prosecutor interrupted with a hearsay objection that was sustained by the court. No motion to strike was requested or granted. (35 RT 8614.) Dr. Minagawa went on to say that family alcoholism was one of the most significant risk factors for alcohol dependence. (35 RT 8615.)

Evidence Code section 802 provides:

> A witness testifying in the form of an opinion may state on direct examination the reasons for his opinion and the matter (including, in the case of an expert, his special knowledge, skill, experience, training, and education) upon which it is based, unless he is precluded by law from using such reasons or matter as a basis for his opinion. The court in its discretion may require that a witness before testifying in the form of an opinion be first examined concerning the matter upon which his opinion is based.

However, even though expert testimony can be based on information that had not been admitted and has been ruled inadmissible, the information must be a type reasonably relied by experts in the field to form their opinions. (*People v. Gardeley* (1996) 14 Cal.4th 605, 618; *People v. Archuleta* (2014) 225 Cal.App.4th 527, 543.) And such information used to base an expert's opinion must be reliable as well. (*Gardeley*, at p. 618.) A trial court "has considerable discretion to control the form in which the expert is questioned to prevent the jury from learning of incompetent hearsay." (*Id.* at p. 619, citing *People v. Price* (1991) 1 Cal.4th 324, 416.)

This court has observed that the trial court has broad discretion in the admission of expert opinion evidence, and the trial court can exclude the hearsay basis of an expert witness's opinion in the exercise of that discretion. (*People v. Nicolaus* (1991)54 Cal.3d 551, 582.)

> "'While an expert may state on direct examination the matters on which he relied in forming his opinion, he may not testify as to the details of such matters if they are otherwise inadmissible. [Citations.] The rule rests on the rationale that while an expert may give reasons on direct examination for his opinions, including the matters he considered in forming them, he may not under the guise of reasons bring before the jury incompetent hearsay evidence. [Citation.]'" (*People v. Coleman* (1985) 38 Cal.3d 69, 92.)

(*Nicolaus*, at p. 583.)

Prior to the testimony of Dr. Minagawa, the trial court had excluded the videotaped statement of Ms. Whitfield because she spent a short amount of time with appellant as a very young boy, her statements in many parts were not based on first hand knowledge, included multiple layers of hearsay and were inherently unreliable. The trial court ruled that the inability of the prosecutor to cross-examine Ms. Whitfield as to context, reliability and credibility precluded the admission of the statement. (32 RT 7416-7417, 7421.) Later in the penalty phase, after the court ruled Ms. Whitfield's statement was unreliable, defense expert Dr. Minagawa testified that appellant was alcohol dependent based on statements from persons who had seen appellant drink, incidents from the military, his prior DUI's, and his family history of alcoholism. (35 RT 8610-8613.) Dr. Minagawa testified without objection that appellant's mother and father and other family members were alcoholics. (35 RT 8613.) It was only when defense counsel asked Dr. Minagawa where he obtained the information that appellant's mother was an alcoholic, and he stated, "From interviews of family members, and also from *the impression of the foster mother* who was taking care of Mr. Williams when he was --," that the prosecutor objected. (Emphasis added.) The prosecutor's hearsay objection that was sustained by the court. (35 RT 8614.)

In Ms. Whitfield's recorded statement, she said she thought appellant's mother sounded drunk when she called, without being asked or explaining how Ms. Whitfield knew she was drunk. Ms. Whitfield stated appellant's mother was drinking "real heavy" when Ms. Whitfield was caring for appellant and "they claimed that she stopped drinking," when she stopped caring for appellant. No clarifying questions were asked regarding her personal knowledge and the time frame of appellant's mother's alleged drinking. (28 CT 5678, 5681.) Ms. Whitfield also said that appellant said his mother did not drink much but that Ms. Whitfield's husband's friend

told her husband that appellant's mother drank quite a bit. (28 CT 5688.) The unreliability of Ms. Whitfield's statements regarding appellant's mother's drinking was manifest. Certainly the trial court was well within its discretion in refusing to allow Dr. Minagawa to discuss the hearsay statements of Ms. Whitfield under the guise of the basis for his expert opinion.

More importantly, appellant suffered no prejudice from the sustaining of the objection to Dr. Minagawa's testimony. No motion to strike was requested or granted regarding the testimony. (35 RT 8614.) From the record it is clear that Dr. Minagawa was allowed to testify to his diagnosis that appellant was alcohol dependent and that his alcohol dependence was derived from a family history of alcoholism, including his father, mother and other family members, and socialization, living in a house where alcohol was regularly abused. (35 RT 8612-8613.) Dr. Tucker had previously testified extensively that alcohol abuse and dependence was a risk factor for engaging in sexual offenses. (33 RT 8073-8074, 8075-8078, 8081-8094.) And Dr. Dietz, a witness for the prosecution, testified on rebuttal that appellant met the criteria for alcohol abuse (37 RT 9115), that there was evidence of alcohol dependence (37 RT 9118-9119), that there was a history of alcoholism in appellant's family (37 RT 9125-9126), that it was not appellant's fault that he had a genetic predisposition for alcoholism (37 RT 9146), and that he did not have a strong disagreement with Dr. Minagawa's diagnosis that appellant was alcohol dependent (37 RT 9153). Finally, the prosecutor acknowledged that there was no real difference between alcohol dependence and alcohol abuse, and that there was no dispute that appellant drank a lot but argued that alcohol did not effect the crimes he committed. (38 RT 9281-9285.)

And defense counsel argued "that the reality on the alcohol was overwhelming," referencing the prosecutor's expert to support his

argument, and that alcohol played a significant role in all of appellant's crimes. (38 RT 9319-9320.) Defense counsel also argued that appellant was genetically predisposed by his family's alcoholism to develop alcohol dependence (38 RT 9338-9340) and lived in a place where "drunks drink 365 days a year, seven days a week, 24 hours a day. . . ." (38 RT 9347).

In light of the lack of any limitations on the testimony of Dr. Minagawa as a result of the trial court sustaining the objection, the other virtually uncontested testimony of Dr. Minagawa, Dr. Tucker, and prosecution expert Dr. Deitz, that appellant had a family history and childhood exposure to alcoholism which resulted in appellant developing alcohol dependence, and the ability of defense counsel to argue appellant's alcohol dependence as a mitigating factor; appellant has failed to show any prejudice as a result of the trial court's ruling.

G. The trial court was within its discretion in refusing appellant's request to adjourn the penalty phase trial to conduct conditional examinations of Ms. Whitfield and Ms. Williams in Indiana.

On October 18, 2004, appellant filed a motion to recess the penalty phase to have the court and counsel travel to Indiana to conduct conditional examinations of Ms. Whitfield and Ms. Williams. (9 CT 2143-2145.) At the hearing on the request, defense counsel argued that the testimonies of Ms. Whitfield and Ms. Williams were "absolutely necessary," especially in light of court sustaining the hearsay objection to Dr. Minagawa's testimony that he believed appellant's mother was an alcoholic based on reviewing Ms. Whitfield's statements. (36 RT 8945-8947.) The prosecutor opposed the request as untimely. The prosecutor also argued the videotaped interviews were multiple layers of hearsay and that there was no statutory authority for a conditional examination in a capital case. (36 RT 8947-8948.) The court indicated it had reviewed the videotaped interviews of Ms. Whitfield and Ms. Williams, that there had been no additional

submission to the court showing the proposed scope of the conditional examinations of these witnesses and no adequate showing to justify a conditional exam. (36 RT 8950.) Defense counsel responded that Ms. Whitfield had personal knowledge of injuries and abuse and made observations of appellant's mother and her drinking and that there were areas of Ms. Williams's interview that she spoke from personal knowledge. As a fall back position, counsel requested that redacted versions of the videotaped interviews be admitted. Counsel acknowledged there was no statutory authority for the conditional exam request but based the request on due process and fundamental fairness. Counsel represented that he could redact the multiple layers of hearsay and other prejudicial content but would include the portions of Ms. Whitfield's statement relied on by Dr. Minagawa in forming his opinion that appellant's mother was an alcoholic. (36 RT 8950-8952.) The prosecutor claimed the taped interviews were generally unreliable and any reliable evidence had been presented through other witnesses. The prosecutor objected to the admission of the tapes in their entirety. (36 RT 8952-8953.)

The court characterized the relevant testimony of Ms. Williams as statements made to other persons, that appellant called her, once fixed her lawnmower and cooked for her once. The court found this evidence had been covered by other witnesses and would be cumulative. The court characterized Ms. Whitfield's videotaped statement as showing she had no idea what happened to appellant either before or after he was with her, that much of her testimony was "hearsay of the most unreliable kind," that her only direct knowledge involved speculation regarding appellant's mother's condition when she answered phone calls made by appellant's mother, and there had been testimony by appellant's mother and other witnesses regarding that subject matter. The court concluded that there was very little admissible evidence in Ms. Whitfield's statement and to the extent there

was any evidence that was neither inadmissible nor cumulative, it was so limited as to not justify a conditional exam. Defense counsel's request was denied. (36 RT 8955-8956.)

Penal Code section 1335, subdivision (a), provides:

> (a) When a defendant has been charged with a public offense triable in any court, he or she in all cases, and the people in cases other than those for which the punishment may be death, may, if the defendant has been fully informed of his or her right to counsel as provided by law, have witnesses examined conditionally in his or her or their behalf, as prescribed in this chapter.

Penal Code section 1336, subdivision (a), provides:

> (a) When a material witness for the defendant, or for the people, is about to leave the state, or is so sick or infirm as to afford reasonable grounds for apprehension that he or she will be unable to attend the trial, or is a person 65 years of age or older, or a dependent adult, the defendant or the people may apply for an order that the witness be examined conditionally.

A trial court has broad discretion to grant or deny a request for a conditional examination. (*People v. Jurado* (2006) 38 Cal.4th 72, 114; *People v. Mays* (2009) 173 Cal.App.4th 1145, 1160.)

Lee v. Superior Court (1976) 58 Cal.App.3d 851, 853, interpreted Penal Code section 1335, subdivision (a), to prohibit the People from conducting a conditional examination in a capital case while granting the right of a criminal defendant the right to conditionally examine witnesses in all cases. In *Jurado, supra*, this court held that the prosecution may conduct a conditional examination of a witness when the life of the witness is in jeopardy. (*Jurado*, 38 Cal.4th at p. 113.)

A trial court has the "'inherent . . . discretion to control the proceedings to ensure the efficacious administration of justice.'" (*People v. Gonzalez, supra*, 38 Cal.4th at p. 951.)

Appellant cites no authority that he had the right to have the trial court adjourn the penalty phase of the trial, and have the court, court staff, defense counsel, prosecutor and presumably appellant travel to Indiana to conduct conditional examinations of these witnesses. Certainly the disruption of the trial and the jury as well as the inconvenience, expense, and security issues involved in such a trip would seem to support the proper exercise of discretion by the trial court in denying such a request. As pointed out about, in Section V, (A), the relevant and admissible evidence that could have been provided by Ms. Whitfield and Ms. Williams, even assuming they could have participated in a conditional examination in Indiana, was minimal and was cumulative to evidence presented by other witnesses. Any testimony regarding appellant's mother's drinking history, even assuming Ms. Whitfield could provide any such testimony, was unnecessary as the issue was not really contested. And given the time frame and limited contact between appellant and these witnesses, their testimony would have added little mitigation to the extensive aggravating evidence presented to the jury. Therefore, there is no reasonable possibility that the jury would have returned a different penalty had the relevant portions of the testimony of Ms. Williams and Ms. Whitfield been presented to the jury. (*Gonzales*, *supra,* 54 Cal.4th at p. 1290, *Robinson*, *supra*, 37 Cal.4th at pp. 641–642.)

VI. THE TRIAL COURT PROPERLY REFUSED A PROPOSED DEFENSE INSTRUCTION THAT THE JURY SHOULD NOT CONSIDER RACE IN ARRIVING AT A PENALTY VERDICT

Appellant claims his right to an impartial jury and to a reliable death penalty was violated when the trial court refused to instruct the jury with his proposed penalty phase instruction that the jury should not consider race in arriving at its penalty verdict. (AOB 161-174.) The trial court properly

rejected the proposed penalty phase jury instruction as it was soundly rejected by this court in *People v. Smith* (2003) 30 Cal.4th 581, 639.

A. Proceedings below

On October 8, 2004, appellant filed a number of proposed penalty phase jury instructions that he requested the court give. (10 CT 2193-2230.) Among these instructions was a proposed instruction that the jury not consider race in determining the proper penalty in this case.

> In arriving at a proper penalty in this case, you shall not consider the race, color, religious beliefs, national origin, sex, or sexual orientation of the defendant or any victims, and you may not impose a sentence of death unless you agree unanimously that you would impose a sentence of death for the crimes in question no matter what the race, color, religious beliefs, national origin, sex or sexual orientation of the defendant or any victims, may be.
>
> The jury shall return to the court a certificate, signed by each juror and to be provided to you, that consideration of the race, color, religious beliefs, national origin, sex, or sexual orientation of the defendant or any victims was not involved in reaching his or her individual decision and that the individual juror would have made the same recommendation regarding a sentence for the crime in question no matter what the race, color, religious beliefs, national origin, sex, or sexual orientation of the defendant, or any victim, may be.

(10 CT 2198.)

The prosecution filed an opposition to this proposed instruction, citing *People v. Smith, supra*, 30 Cal.4th at p. 639. (10 CT 2240.) During a discussion of the instructions proposed by the defense, the prosecutor reiterated his written objection to this instruction, defense counsel submitted, and the trial court ruled that the instruction would not be given. (37 RT 9243.)

B. The trial court properly refused appellant's proposed instruction.

This court in *Smith* rejected the same claim of instructional error. *Smith* was a capital case in which the defendant was convicted of murder in the commission of a rape and sentenced to death. The victim was Japanese and the defendant was Black. The trial court refused the defendant's request to instruct the jury to disregard the racial background of him and the victim and to sign a certificate stating they had not considered race in reaching their verdict. (*Smith*, *supra*, 30 Cal.4th at pp. 595, 639.) This court pointed out that the requested instruction was taken from a federal statute (18 U.S.C. § 3593(f)) requiring the instruction and certificate in federal capital prosecutions. This court held that the instruction was not constitutionally required, and although race was not a proper consideration in deciding whether to impose the death penalty, "the court need not interject the issue of race itself and then tell the jury to disregard it, at least absent some indication the jury might improperly consider race." (*Smith*, at p. 639, citing *State v. Roseboro* (2000) 351 N.C. 536 [528 S.E.2d 1, 13].)

In *Roseboro*, the defendant claimed the trial court committed constitutional error by refusing to give a proposed jury instruction that the race of the defendant or victim should not be considered by the jury in their sentencing determination. The instruction did not require the jurors to sign a certificate. The *Roseboro* court recognized that the United States Supreme Court in *Turner v. Murray* (1986) 476 U.S. 28, [106 S.Ct. 1683, 90 L.Ed.2d 27], held that in a capital trial where the defendant is accused of an interracial crime, and the defendant requests it, the prospective jurors should be told of the victim's race and questioned during voir dire on the issue of racial bias. (*Roseboro*, *supra*, 528 S.E.2d at p. 13, citing *Turner*, *supra*, 476 U.S. at 36-37.) The *Roseboro* court rejected the defendant's claim that the same due process concerns that entitles a capital defendant to

an inquiry during voir dire regarding racial bias entitled him to a jury instruction directing the jury not to consider race in determining the appropriate sentence. (*Roseboro*, at p. 13, citing *State v. Richardson* (1996) 342 N.C. 772, 792, 467 S.E.2d 685, 696, cert. denied, 519 U.S. 890, [136 L. Ed.2d 160, 117 S.Ct. 229["Turner is not authority for the proposition that a trial court in the trial of an interracial crime must instruct the jury to disregard racial considerations where defendant requests such an instruction."].)

The *Roseboro* court concluded that the proposed instruction "would have, in effect, injected racial bias into the jurors' consideration of defendant's sentence and diverted their attention away from the more pertinent issues of defendant's character and the circumstances of the crime." (*Roseboro*, 528 S.E.2d at p. 13.)

A simple review of the wording of the proposed instruction demonstrates why the trial court here properly denied appellant's request. The instruction would have required the jurors to unanimously agree that each of them would have imposed the death penalty no mater what the race, color, etc., the defendant or the victim had been. This would have injected racial bias into the trial and penalty determination and then directed the jury not to consider it, contrary to this court's reasoning in *Smith*. (*Smith*, *supra*, at p. 639; *Roseboro*, *supra*, at p. 13.) And although the victim in this case was Caucasian and appellant is Black, there was absolutely no "indication the jury might improperly consider race." (*Smith*, at p. 639.) Moreover, the instruction also required each juror to sign a certificate and return it to the court certifying that the race, color, religious beliefs, national origin, sex or sexual orientation of the victim or the defendant was not involved in the verdict on the sentence and that the same verdict would have been reached regardless of the victim's or defendant's race, color, etc. Such a process

would have been burdensome, was unnecessary in this case and was not constitutionally required. (*Smith*, at p. 639.)

Therefore, in response to appellant's claim that the trial court could and should have given part of the proposed instruction (AOB at p. 165, citing *People v. Fudge*, *supra,* 7 Cal.4th at p. 1110), no part of the instruction should have been given.

Finally, although there was no question regarding race or racial bias on the jury questionnaire, there is no indication appellant requested any questions on race or racial bias be included in the questionnaire. Absent such a request, a trial court is not required to ask such questions in voir dire. (*People v. Bolden* (2002) 29 Cal.4th 515, 539; *People v. Kelly* (1992) 1 Cal.4th 495, 518.) Also, it is clear that defense counsel understood he could inquire on the subject of race and racial bias during voir dire, because he did. (12 RT 1195-1198 [questioning a prospective juror about racism, acknowledging that appellant was African-American and most of the prospective jurors were not, discussing a situation where a woman falsely identified a carjacker as African-American, questioning the jury panel whether anyone would tend to believe appellant was guilty or deserved the death penalty because he was African-American]; 14 RT 1816-1818 [defense discussion with juror regarding juror questionnaire answer that she weakly opposed the death penalty because of racism in imposing it]; (14 RT 1842-1843 [prosecutor's questioning of same juror regarding imposition of death penalty too often against racial minorities, juror asked whether she had a sense that race would play a part in this case].)

Therefore, it is clear either party could have addressed the jury in voir dire regarding any aspect of race or racial bias or the fact that the victim was Caucasian and appellant is African-American. Appellant's claim that the trial court was required to give his proposed instruction should be rejected.

VII. THE TRIAL COURT WAS WITHIN ITS DISCRETION IN DENYING APPELLANT'S REQUEST TO INSTRUCT THE JURY THAT A DEATH SENTENCE MEANT APPELLANT WOULD BE EXECUTED AND A LIFE WITHOUT PAROLE SENTENCE MEANT APPELLANT WOULD NEVER BE PAROLED

Appellant claims the trial court erred by refusing appellant's request to instruct the jury in the penalty phase that a death sentence meant appellant would be executed and that a sentence of life without parole meant appellant would never be paroled. (AOB 176-180.) In addition, appellant claims the trial court exacerbated the problem by sustaining an objection during defense counsel's argument in the penalty phase that a reviewing court would not overturn any decision the jury made regarding punishment. (AOB 180-181.) Appellant asserts that "the trial judge gave the jurors a legally incorrect impression that someone else other than they had responsibility for making their decision correct and violated *Caldwell*[9] when he failed to instruct them otherwise." (AOB 180-181.)

The trial court in no way told or even suggested to the jury that their decision on penalty would be reviewed and therefore that the ultimate responsibility for the decision was not with the jury. The trial court rejected appellant's request to instruct the jury with an instruction repeatedly determined by this court to be erroneous. The trial court also properly sustained the prosecutor's "improper argument" objection, without elaboration, when defense counsel argued that the jurors were "gods" and it would be impossible for any reviewing court to overturn their decision.

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[9] *Caldwell v. Mississippi* (1985) 472 U.S. 320, 328-329 [105 S.Ct. 2633, 86 L.Ed.2d 231], held that it was constitutionally impermissible impose a death sentence determined by a jury "who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere."

A. Proceedings below

Prior to the trial on the guilt phase, appellant filed an in limine motion requesting to pre-instruct the jury that the penalty of life without parole meant appellant would not be paroled. (2 CT 366-379.) Appellant also requested certain special non-CALJIC instructions be given to the jury. (2 CT 380-391.) Among these requested instructions was a proposed instruction that the jury must assume the penalty it chooses will be carried out. (Defense Special Instruction No. 7; 2 CT 391.) The People filed an Opposition to the request that jurors be pre-instructed that life without parole means that appellant would never be paroled. (5 CT 1081-1087.) The People also filed an Opposition to the request that jurors be instructed using non-CALJIC instructions. (5 CT 1088-1095.)

The trial court held a hearing on the defense requests. Regarding appellant's request that the jury be told life without parole means appellant would never be paroled, the trial court referred defense counsel to this court's precedent stating that such an instruction was inaccurate and should not be given. (4 RT 632-634.) That request was denied by the trial court. (4 RT 636.) Regarding the request that the court instruct the jury using non-CALJIC instructions, the trial court indicated it was aware of its obligation to instruct the jury properly and would defer ruling on the request until the jury instruction conference during the trial. (4 RT 636-637.)

Prior to the penalty phase, the trial court reiterated that appellant's request to instruct the jury that a sentence of life without parole meant appellant would not be paroled was denied. (30 RT 6819-6820.) The court, at the request of the parties, again deferred ruling on the request to instruct with proposed non-CALJIC instructions. (30 RT 6820-6822.)

Prior to argument at the penalty phase, appellant requested 36 proposed penalty phase jury instructions. (10 CT 2193-2230.) Included in

the request was proposed instruction No. 3, that a sentence of life without parole meant appellant would be imprisoned for the rest of his life. (10 CT 2196.) The People filed an Opposition to the requested proposed penalty phase instructions. (10 CT 2234-2272.) The Opposition argued that proposed instruction No. 3 should not be given because it was factually inaccurate. (10 CT 2238.) At the hearing on the proposed jury instructions, the court ruled that proposed penalty phase instruction No. 3 would not be given. (37 RT 9242-9243.)

During defense argument in the penalty phase, almost at the very beginning, defense counsel told the jurors that they were 'gods," deciding whether appellant lived or died, and that they should assume whatever punishment they chose would be carried out. (38 RT 9307-9308.) Defense counsel then told the jurors that a reviewing court will give great deference to their decision, and that it would be "difficult if not impossible for any court to look down on [their verdict] and say, well, this jury got it wrong. They won't do that." The prosecutor objected to this as improper argument and the trial court sustained the objection. (38 RT 9308.) Defense counsel responded by repeating "that whatever punishment you come to will be carried out." (38 RT 9308.) Defense counsel repeatedly told the jury throughout argument that if they chose life without parole, appellant would never be released from prison and would die in prison. (38 RT 9309 ["He will be in a hell hole, in a California State Prison, for the rest of his natural born life. Period. No matter what decision you make here, he will die in prison."], 9311-9312 ["He will die in prison, no matter what you decide."], 9313, 9322 ["He will pay with his life. He will die in prison. No matter which one you choose."], 9324, 9349 ["Society will be protected because he is not eligible for parole. He will never do it again. He will be inside prison walls."], 9365 ["The monster is already dead. He won't exist where you are going to send him for the rest of his life."], 9366 ['and I ask you

and I urge you to punish George by something you have already guaranteed, that he spend the rest of his natural life in state prison . . ."]

B. The proposed instruction that "life without the possibility of parole" meant appellant would never be paroled was properly rejected.

This court has consistently and repeatedly held that a defendant's rights are not violated by trial court in a capital case refusing to instruct that a sentence of life without the possibility of parole means the defendant will never leave prison. (*People v. Moon* (2005) 37 Cal.4th 1, 43 [standard jury instruction "[i]s not unconstitutional for failing to define the meaning of life without the possibility of parole."], citing, *People v. Jones* (1998) 17 Cal.4th 279, 314.); *People v. Dickey* (2005) 35 Cal.4th 884, 929 ["no instruction defining life imprisonment without possibility of parole was required."], citing *People v. Hughes* (2002) 27 Cal.4th 287, 405; *People v. Dunkle* (2005) 36 Cal.4th 861, 940 ["The trial court was not required to instruct the jury that a sentence of life imprisonment without possibility of parole means that a defendant will never be paroled."], citing *People v. Arias* (1996) 13 Cal.4th 92, 172.)

In *Arias*, *supra*, this court explained that a trial court's refusal to give an instruction "that the jury must assume a sentence of death meant defendant would be executed," and that a life without parole sentence meant the defendant "will spend the rest of his life confined in state prison and will not be paroled at any time," was proper because the instruction was inaccurate. (*Arias*, 13 Cal.4th at p. 172.) This court held that because of the Governor's power to commute or pardon, it would be incorrect to tell the jury that a life sentence would be carried out. (*Ibid.*, citing *People v. Gordon* (1990) 50 Cal.3d 1223, 1277, and *People v. Thompson* (1988) 45 Cal.3d 86, 130.) This court further held that no additional instruction was necessary under the federal Constitution as the jury was given a choice

between death and life without the possibility of parole and therefore would not have speculated that the defendant might be released if sentenced to life without parole. (*Arias*, at p. 173.)

Regarding appellant's contention that the failure to give the instruction was exacerbated when the trial court sustained an objection to defense counsel's argument that a reviewing court would not scrutinize any decision the jury made as to punishment, this court rejected a similar claim in *People v. Smith*, *supra*, 30 Cal.4th at p. 636. In *Smith*, the trial court sustained an objection when defense counsel was arguing "that defendant would never have a parole hearing." This court found defense counsel's statement inaccurate and the sustaining of the objection inconsequential in light of the arguments of both sides that a life without parole verdict meant the defendant would die in prison. The court concluded that, "The jury understood the significance of its choices." (*Smith*, at p. 636.)

In this case, defense counsel was arguing that it would be "difficult if not impossible" for a reviewing court to conclude the jury "got it wrong," regarding punishment. (38 RT 9308.) This statement is inaccurate and it seems inappropriate to direct the jury to a lack of effective review of their decision. In addition, the argument of counsel repeatedly made it clear that a finding of life without parole would mean appellant would not be paroled and would die in prison. The jury understood its choices.

VIII. THERE WAS NO CUMULATIVE ERROR

Appellant claims that even if this court finds the errors he has asserted do not require reversal of his convictions or sentence in isolation, this court should find the cumulative impact of these asserted errors require reversal of the judgment. He claims he was given "a grossly unfair guilt and penalty trial in which errors infected every aspect of the case." (AOB 181-182.)

This court has recognized that multiple trial errors may have a cumulative effect. (*People v. Hill*, *supra*, 17 Cal.4th at pp. 844-848; *People v. Holt* (1984) 37 Cal.3d 436, 458-459.) In a "closely balanced" case, this cumulative effect may warrant reversal of the judgment "where it is reasonably probable" that it affected the verdict. (*People v. Wagner* (1975) 13 Cal.3d 612, 621.)

However, if the reviewing court rejects all of a defendant's claims of error, it should reject the contention of cumulative error as well. (*People v. Anderson* (2001) 25 Cal.4th 543, 606; *People v. Bolin* (1998) 18 Cal.4th 297, 335.) Even where "nearly all of [a] defendant's assignments of error" are rejected, reversal is not warranted based on cumulative error. (*People v. Bradford* (1997) 14 Cal.4th 1005, 1057; see also *People v. Hughes*, *supra*, 27 Cal.4th at p. 407 [judgment affirmed where only "one possible significant error" at penalty phase].)

IX. CHALLENGES TO CALIFORNIA'S DEATH PENALTY STATUTE

Appellant presents "a number of often raised constitutional attacks on the California capital sentencing scheme that have been rejected in prior cases." Pursuant to *People v. Schmeck* (2005) 37 Cal.4th 240, 303-304, appellant presents previously rejected claims and requests this court to reconsider its decisions. (AOB 182-183.) As these challenges have repeatedly been rejected by this court, they require little discussion. Moreover, appellant has provided no basis for this court to reconsider its prior well-reasoned decisions rejecting the claims.

A. Factor (a): Appellant complains that Penal Code section 190.3, subdivision (a), permits the jury to sentence a defendant to death based on the "circumstances of the crime," resulting in the arbitrary and capricious imposition of the death penalty. Allowing a jury to find aggravation based on the "circumstances of the crime" under Penal Code section 190.3, factor (a), does not result in an arbitrary and capricious imposition of the death

penalty. (*People v. Virgil* (2011) 51 Cal.4th 1210, 1288.) As the United States Supreme Court noted in *Tuilaepa v. California* (1994) 512 U.S. 967 [114 S.Ct. 2630, 129 L.Ed.2d 750], "The 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." (*Id.* at p. 976.)

Appellant contends that section 190.3, subdivision (a), violated his constitutional rights because the jury was not instructed that before choosing to impose death, jurors needed to unanimously find each aggravating factor true beyond a reasonable doubt and that aggravating factors outweighed mitigating factors. This Court has consistently rejected these claims. (*People v. Nelson* (2011) 51 Cal.4th 198, 225; *People v. Hoyos* (2007) 41 Cal.4th 872, 926; *People v. Russell* (2010) 50 Cal.4th 1228, 1271-1272; *People v. Bramit* (2009) 46 Cal.4th 1221, 1249-1250; *People v. Burney* (2009) 47 Cal.4th 203, 267-268.) There is no constitutional requirement that a capital jury reach unanimity on the presence of aggravating factors. (*People v. Martinez* (2009) 47 Cal.4th 399, 455; *People v. Burney*, *supra*, 47 Cal.4th at p. 268.) The Eighth and Fourteenth Amendments do not require the jury to unanimously find the existence of aggravating factors or that aggravating factors outweigh mitigating factors. (*People v. Nelson*, *supra*, 51 Cal.4th at p. 225; *People v. Hoyos*, *supra*, 41 Cal.4th at p. 926.) Nor does the failure to require jury unanimity as to aggravating factors violate appellant's right to Equal Protection. (*People v. Cook* (2007) 40 Cal.4th 1334, 1367; *People v. Griffin* (2004) 33 Cal.4th 536, 598.)

B. Factor (b): Appellant claims that the instruction to the jury that it could consider uncharged acts by appellant involving the express or implied use of violence to determine his sentence violated his constitutional rights because the jury was not instructed that it must unanimously agree that the

conduct occurred. Appellant acknowledges that this court has held that the death penalty statute and related instructions are not unconstitutional for failing to require jury unanimity as to aggravating factors. (*People v. Collins* (2010) 49 Cal.4th 175, 261; *People v. D'Arcy* (2010) 48 Cal.4th 257, 309; *People v. Ward* (2005) 36 Cal.4th 186, 221-222. Appellant's claim that his constitutional rights were violated by allowing a jury that convicted him of first degree murder determine whether he had committed other criminal activity has also been rejected by this court. (*People v. Williams* (2013) 56 Cal.4th 165, 201-202; *People v. Hawthorne* (1992) 4 Cal.4th 43, 77; *People v. Medina* (1990) 51 Cal.3d 870, 907.)

C. Factor (c): Appellant also claims that instructing the jury that it could use appellant's prior felony conviction as an aggravating factor without requiring the jury to unanimously find that appellant suffered the prior conviction, violated his federal Constitutional rights. As appellant notes, this claim has been previously and repeatedly rejected. (*People v. Collins*, *supra*, 49 Cal.4th at p. 261; *People v. Martinez* (2010) 47 Cal.4th 911, 967.)

D. Factors (b) and (c): Appellant claims his rights under the Double Jeopardy Clause of the federal Constitution were violated by allowing the jury to consider appellant's prior convictions in determining the proper punishment. This claim has also been repeatedly rejected. (*People v. Williams*, *supra*, 56 Cal.4th at p. 201; *People v. Bacigalupo* (1991) 1 Cal.4th 103, 134-135.)

E. Factor (i): Appellant claims his constitutional rights were violated because the jury was instructed it could consider his age in its determination of the proper sentence. He acknowledges this court has repeatedly rejected this claim. (*People v. Mills* (2010) 48 Cal.4th 158, 214; *People v. Smithey* (1999) 20 Cal.4th 936, 1005.)

F. Inapplicable, vague, limited and burdenless factors: Appellant complains his federal Constitutional rights were violated because the trial court used the standard instruction at the penalty phase, CALJIC No. 8.85, because the instruction: 1) failed to delete inapplicable factors; 2) contained vague and ill-defined factors such as (a) and (k); 3) limited factors (d) and (g) by adjectives such as "extreme" or "substantial;" and 4) failed to specify a burden of proof as to mitigating or aggravating factors. These claims have been repeatedly rejected. (*People v. Cruz* (2008) 44 Cal.4th 636, 680 [factor (a) not unconstitutionally vague or overbroad]; *People v. Schmeck*, *supra*, 37 Cal.4th at p. 305 [no constitutional violations in failing to delete inapplicable factors or in failing to specify the burden of proof]; *People v. Maury* (2003) 30 Cal.4th 342, 439-440 [same]; *People v. Thompson* (2010) 49 Cal.4th 79, 144 [use of adjectives "extreme" and "substantial"]; *D'Arcy*, *supra*, 48 Cal.4th at p. 309 [same].)

G. Failure to narrow: Appellant claims California's death penalty scheme violates the Eighth Amendment by failing to provide a meaningful way to distinguish between defendants sentenced to death and those who are not. He acknowledges this claim has been repeatedly rejected by this court. This court has held that Penal Code section 190.2 "does not contain so many special circumstances that it fails to perform the constitutionally mandated narrowing function. (*People v. Bennett* (2009) 45 Cal.4th 577, 630, citing *People v. San Nicolas* (2004) 34 Cal.4th 614, 677; *D'Arcy*, *supra*, 48 Cal.4th at p. 308.)

H. Burden of proof and persuasion: Appellant claims that although the jury in a capital case must find aggravating circumstances exist, aggravating circumstances outweigh mitigating circumstances, and death is the appropriate sentence, in order to impose a death sentence, the failure to require the jury to make these findings beyond a reasonable doubt violated his federal Constitutional rights. This court has repeatedly held that no

burden of proof or persuasion is required in the penalty determination. (*People v. Taylor* (2010) 48 Cal.4th 574, 662; *People v. Ervine* (2009) 47 Cal.4th 745, 810; *Bennett, supra*, 45 Cal.4th at p. 631; *People v. Elliot* (2005) 37 Cal.4th 453, 487-488.)

I. Written findings: Appellant claims the California death penalty scheme violates the federal Constitution because it fails to require the jury to make written findings as to the aggravating and mitigating factors found and relied on. This court has repeatedly found otherwise. (*People v. Nelson, supra*, 51 Cal.4th at p. 225; *Collins, supra*, 49 Cal.4th at p. 261; *People v. Loker* (2008) 44 Cal.4th 691, 755.)

J. Mandatory life sentence: Appellant claims the standard penalty instructions violate the federal Constitution because they fail to direct the jury that if it determines mitigating factors outweigh aggravating factors, it must return a sentence of life without parole. This court has rejected this argument. (*People v. McWhorter* (2009) 47 Cal.4th 318, 379; *People v. Moon, supra*, 37 Cal.4th at p. 42; *People v. Dennis* (1998) 17 Cal.4th 468, 552.)

K. Unconstitutionally vague standard for decision making: Appellant also asserts that the standard instruction that the jury may impose a death sentence only if the aggravating factors are "so substantial" compared to the mitigating factors creates an unconstitutionally vague standard, but admits this claim has been repeatedly rejected by this court. (*People v. Carrington* (2009) 47 Cal.4th 145, 199; *People v. Catlin* (2001) 26 Cal.4th 81, 174; *People v. Mendoza* (2000) 24 Cal.4th 130, 190.)

L. Intercase proportionality review: Appellant asserts California's death penalty scheme violates the federal Constitution because it fails to require intercase proportionality review. This court has repeatedly rejected this contention and should do so again here. (*People v. Foster* (2010) 50 Cal.4th 1301, 1368; *People v. Gamache* (2010) 48 Cal.4th 347, 407; *People*

v. Cornwell (2005) 37 Cal.4th 50, 105; *People v. Elliot, supra*, 37 Cal.4th at p. 488.)

M. Disparate sentence review: Appellant asserts the California death penalty scheme is unconstitutional because it fails to afford capital defendants with the same disparate sentence review as that afforded defendants under the determinate sentence law. Once again, this claim has been repeatedly rejected. (*Collins, supra*, 49 Cal.4th at p. 261; *Dunkle, supra*, 36 Cal.4th at p. 940.)

> The death penalty law does not violate equal protection by denying capital defendants certain procedural safeguards that are afforded to noncapital defendants because the two categories of defendants are not similarly situated. (*People v. Redd* (2010) 48 Cal.4th 691, 758; *People v. Martinez* (2010) 47 Cal.4th 911, 968.)

(*People v. Lee* (2011) 51 Cal.4th 620, 653.)

N. International law: Appellant contends the California death penalty scheme violates international law. This court has repeatedly rejected similar arguments and should do so again here. International law does not prohibit a sentence of death where, as here, it was rendered in accordance with state and federal Constitutional and statutory requirements. (*People v. Blacksher* (2011) 52 Cal.4th 769, 849 [rejecting claim "again"]; *People v. Gonzales* (2011) 52 Cal.4th 254, 334; *People v. Hamilton* (2009) 45 Cal.4th 863, 961.) Appellant does not present any reason to revisit these holdings.

Appellant also contends that the use of the death penalty is contrary to prevailing civilized norms. But international law does not require California to eliminate capital punishment. (*People v. Blacksher, supra*, 52 Cal.4th at p. 849; *People v. Martinez, supra*, 47 Cal.4th at p. 968; *People v. Doolin, supra*, 45 Cal.4th at p. 456.) Furthermore, California does not

impose the death penalty as regular punishment in California for numerous offenses. (*Doolin*, at pp. 456-457.) Instead,

> "[t]he 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 from those applying to 'regular punishment' for felonies. (E.g., Cal. Const., art. VI, § 11; §§ 190.1-190.9, 1239, subd. (b).)"

(*Doolin*, *supra*, 45 Cal.4th at p. 457, quoting *People v. Demetrulias* (2006) 39 Cal.4th 1, 44.)

O. Cruel and Unusual Punishment: Appellant asserts that the death penalty violates the Eighth Amendment's proscription against cruel and unusual punishment but recognizes this assertion has been repeatedly rejected by this court. (*Thompson*, *supra*, 49 Cal.4th at p. 144; *People v. Taylor*, *supra*, 48 Cal.4th at p. 663; *People v. Hoyos*, *supra*, 41 Cal.4th at p. 927; *People v. Moon*, *supra*, 37 Cal.4th at p. 47.)

P. Cumulative deficiencies: Appellant claims that California's capital sentencing scheme violates the Eighth and Fourteenth Amendments when one considers the defects of the scheme in combination and appraises the cumulative impact of those defects. Because appellant has identified no aspect of the California capital sentencing scheme that has not been repeatedly upheld by this court, his claim regarding the cumulative impacts of such "defects" must be rejected as well.

CONCLUSION

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

Dated: September 9, 2014

Respectfully submitted,

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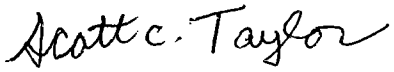

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CERTIFICATE OF COMPLIANCE

I certify that the attached Respondent's Brief uses a 13 point Times New Roman font and contains 37,850 words.

Dated: September 9, 2014

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***People v. George Williams, Jr.***
No.: **S131819**

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 September 10, 2014, 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 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on September 10, 2014, at San Diego, California.

Kimberly Wickenhagen
Declarant

Kimberly Wickenhagen
Signature

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