In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **ALEJANDRO AVILA,** **Defendant-Appellant.**	**CAPITAL CASE** Case No. S135855

Orange County Superior Court Case No. 02CF1862
The Honorable William R. Froeberg, Judge

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STATEMENT OF THE CASE

On July 22, 2002, the District Attorney of Orange County filed a criminal complaint charging appellant Alejandro Avila with the murder of Samantha Runnion and other offenses, committed on July 15, 2002. (1 CT 1.) On September 6, 2002, the District Attorney of Orange County noticed appellant it intended to seek death. (1 CT 42, 73.)

Following a preliminary hearing, on December 5, 2002, the District Attorney of Orange County filed an Information that alleged Avila kidnapped (count 1: Pen. Code, § 207)[1], forcibly committed "lewd and lascivious" acts against [forcible sexual assualt of vaginal and of anal area] (counts 2 and 3: § 288, subd. (b)), and murdered Samantha Runnion (count 4: § 187, subd (a)).[2] Special circumstances were also alleged that Avila committed the murder while engaged in the commission of kidnapping, and while engaged in the commission of lewd and lascivious acts against a child under the age of 14, which rendered him eligible for the death penalty or life imprisonment without possibility of parole (§ 190.2, subd (a)(17)(E)). (1 CT 156-158.)

Avila pled not guilty and denied the special circumstances allegations on December 16, 2002. (1 CT 167.)

Avila's motions for a change of venue were denied. (6 CT 1148; 46 CT 12221, 12285, 12308; 17 RT 3117 et seq; 21 RT 3908 et seq.) Jury

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

[2] This case involves a child's sexual assault and murder and prior child molest victims. In addition, witnesses related to appellant share his surname. Accordingly, respondent will refer to victims and witnesses - other than law enforcement personnel - by first name. No disrespect is intended and this is designed in part to promote privacy, respect, and integrity for the victims. (See Cal. Const., art. I, § 28, subd. (b); see also 46 CT 12314.)

selection commenced on March 3, 2005, and a jury was empanelled on March 16, 2005. (17 RT 3194; 21 RT 3879.) On April 28, 2005, the jury found Avila guilty as charged and found the special circumstance allegations to be true. (46 CT 12480-12485; 47 CT 12524-12525; 34 RT 6581-6585.)

The penalty phase began on May 5, 2005. (47 CT 12534.) On May 16, 2005, the jury imposed death. (47 CT 12705; 36 RT 7216-7218.)

On July 22, 2005, the trial court denied Avila's motions for a new trial and modification of the death verdict (§§ 1181 and 190.4, subd (e)), and sentenced him to death. The court stayed execution of the term related to the non-homicide offenses pursuant to section 654. (48 CT 12810; 36 RT 7243-7244.)

STATEMENT OF FACTS[3]

In early 2001, Appellant Avila was acquitted in Riverside County of sexually molesting his girlfriend's seven year-old daughter Catherine, and Catherine's cousin Alexis. A pedophile now emboldened by the acquittal, Avila set out to molest again the following summer. Avila had previously been with his girlfriend and Catherine to the Smoketree condominium complex in Stanton, a complex where Catherine often played with other young girls. So in the early evening on July 15, 2002, Avila drove over to the complex and found five year-old Samantha playing outside with her friend. He lured Samantha with a plea to help him find his puppy, then grabbed and abducted her, and drove her away. Samantha's playmate provided the police a description and Avila's sketch was broadcast over the

[3] For convenience of the Court, respondent observes that opening statements were provided and testimony began at Reporter's Transcript Volume 23 - 23 RT 4213 [opening statements] and 23 RT 4268 [first witness].

news. Alexis' mother saw his sketch and called the police. (See 23 RT 4269 et seq., 4283 et seq; 24 RT 4450-4453; 29 RT 5444-5453.)

Samantha's body was found the next day. Avila had sexually assaulted her (vaginally and anally), strangled her to death, and dumped her body in a remote area off Ortega Highway. (23 RT 4327-4334 [discovery of body]; 24 RT 4416-4428 [autopsy].) Avila's car matched the description of the car used in the kidnapping and its tire tread was comparable to tracks left at the scene, and impressions from Avila's feet were similar to barefoot impressions found at the crime scene. (23 RT 4339-4346; 25 RT 4696 et seq.; 28 RT 5112-5156, 5242-5290; 29 RT 5334-5337.) In addition, Avila's DNA was found under Samantha's fingernails, and her DNA inside Avila's car. (24 RT 4554 et seq; 26 RT 4796 et seq; 28 RT 5157 et seq.)

I. GUILT PHASE EVIDENCE

A. Molestations of Other Girls Before Samantha's Abduction And Murder

Lizbeth (Beth) met Avila during the summer of 1996. They began dating two or three years later and after a few months started living together. Avila was not interested in a normal sexual relationship and never initiated sex. They would occasionally have sexual intercourse, but only after Lizbeth "begged" for it. Avila said he simply was not interested in sex. Avila was, however, preoccupied with adult pornographic movies, displayed an abnormal interest in young girls, wanted Lizbeth to dress in little girls'clothing, and told her how much he liked blond, blue-eyed girls. (25 RT 4649-4652, 4656-4658.)

Catherine was Lizbeth's daughter. Around 1997, and when Catherine was about seven years old, she and her two brothers went to live with their father Jim, at the Smoketree Town Home condominium complex in Stanton. (25 RT 4569-4571, 4593-4594.) While living with her father, Catherine knew other young girls who also lived there, including Samantha

and Samantha's older sister. (25 RT 4594-4595.) But every other weekend from early 1997 through March of 1999, Catherine and her brothers stayed with her mother in Lake Elsinore. (25 RT 4571-4572, 4586.) Her mother often drove over to the Smoketree condominiums to pick up the children. She would sometimes be accompanied by Avila, and Avila had even come alone to pick up the children. (25 RT 4572, 4595-4596, 4662.)

Avila liked to bathe Catherine. (25 RT 4561-4562.) When Lizbeth went to work, Avila would babysit Catherine. (25 RT 4660.) And, Avila often suggested to Lizbeth that Catherine sleep in the bed with them. (25 RT 4661-4662.)

During Avila's relationship with Lizbeth, he sexually molested Catherine over fifty times. Avila never sexually penetrated her, but would have her take off her clothes, kiss her mouth and vagina, masturbate himself and had her kiss his penis. (25 RT 4587, 4589, 4597-4601.) He also asked her to insert tubes into her vagina for practice so he could have intercourse with her when she was older. Avila also showed her pornographic films and sometimes filmed her as well. (25 RT 4601-4603.) Catherine further explained that, "If I would try to jerk away, he would put his hand over my mouth and jerk me and say, "Don't move." (25 RT 4600.)

Avila also molested Catherine's cousin Alexis, who on some weekends would come to Lake Elsinore and stay with her aunt and Catherine. During one of these visits when Alexis was about seven years-old, Avila put his hand under each girl's pajamas and onto the "private area and moved it fast," to show them how to masturbate. (24 RT 4455-4461, 4481; 25 RT 4605-4606, 4641.) Catherine told Alexis to let him do it, because "it feels good." (24 RT 4469.) On an earlier occasion when Alexis was about five-years-old, Avila told Alexis and Catherine to take off their clothes and play together. (24 RT 4474.)

Catherine was initially afraid to report being molested, because Avila threatened to hurt her and her family if she told anyone. But after she found out Avila molested her friend Cara, it "gave me the courage to tell." So in December of 1999, after her mother had broken up with Avila and he moved out, Catherine told her mother and father about her being molested. (25 RT 4604-4605, 4683.)

After Avila's break-up with Catherine's mother, Avila moved into Jose B.'s home in Lake Elsinore.[4] This was from about September through December of 1999. Cara was Jose's daughter and lived there as well. (24 RT 4495-4496, 4499, 4512-4513.) At this time Cara was 11 years-old. (24 RT 4518.) The summer before Avila had moved in, he offered to take Cara to Knott's Berry Farm amusement park, so Cara stayed with him at his own home the night before. That evening Avila asked her to touch his penis and inserted a test tube into her vagina. He put his hand over her mouth and warned her that if she told anyone about this incident, "someone could be killed." (24 RT 4514-4515, 4520-4524, 4532-4533, 4542.)

Cara later told investigators[5] that when Avila lived in her home, she saw photos of young girls having sex with adult men on Avila's computer.

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[4] Alexis's mother was an ex-girlfriend of Jose. (24 RT 4484.)

[5] Cara did not tell anyone about what Avila had done until after she heard about Samantha's abduction and murder. (24 RT 4517-4518.) She was afraid she would be taken away from her father, because Avila lived there. (24 RT 4530-4531.) Cara also knew Catherine, whom she described as "my dad's girlfriend's sister's daughter." (24 RT 4515-4516.) She had seen Avila bathe Catherine before. Avila would also show her videos of Catherine, and always commented to her about Catherine's beauty. (24 RT 4517.) Cara also knew Catherine's cousin Alexis; she and her father lived with Alexis and her family when Catherine told her mom what had happened with Avila. (24 RT 4525-4526.) In other words, these girls all knew about each other being molested, but decided to simply keep quiet about it. (24 RT 4551.)

He would also tickle her "legs and by my private parts." (24 RT 4515.) And when he became angry with her, Avila would put his fingers around Cara's neck and choke her. He did this nine or ten times. (24 RT 4519-4520.) When Jose learned about what Avila had done, he threatened to shoot him. (24 RT 4501-4502.)

Riverside County Sheriff's Detective Eric Davis investigated the molestation of Catherine. He interviewed Avila in January of 2000, and observed a second interview a few days later. (25 RT 4686-4689.) Both times Avila denied that he inappropriately fondled Catherine. He acknowledged he may have touched her vaginal area, but claimed it was in a non-sexual way while bathing and drying her off. (25 RT 4688-4690.)

During an initial search of Avila's room at Jose's house, the police only discovered adult pornography videos. (25 RT 4688-4692.) However, the police kept Jose out of the house until early 2000 as part of the molestation investigation. When Jose returned to his home, he went into the bedroom formerly occupied by Avila, to clean up the mess and debris that Avila left behind. At that time, Jose found a photograph partially hidden amongst debris, and which had been previously overlooked by the police. (24 RT 4496-4497, 4498-4501, 4506.) The photograph was a computer printer image of a naked seven-year-old Asian girl straddling an adult man's penis. (24 RT 4498-4499.) Jose turned it over to the police. (24 RT 4510.)

Avila was never prosecuted for Cara's molestations. But he was arrested and prosecuted for sexually molesting Catherine and Alexis. In January of 2001, a Riverside County Superior Court jury found him not guilty. (26 RT 4746-4747; 29 RT 5404, 5538-5539 [Exh. P-101].) After the acquittal, Avila bragged to his sister Elvira that, "I could do anything I want to that little girl and I can't be charged for it because of double jeopardy." (26 RT 4753.)

Avila then met Ruby Hernandez in November 2001, and they began dating the following month. They broke up on July 11, 2002. (26 RT 4783.) During this time, Avila lived with family members in an apartment complex in Lake Elsinore. Avila and his sister Elvira shared one apartment, and his mother Adelina and sister Adelita lived in another. (26 RT 4722-4723, 4732-4733.)

B. Samantha's Abduction And Murder, And the Investigation That Followed

On July 15, 2002, Avila promised to cook a chicken dinner so his family could eat around 6 or 6:30 p.m. (26 RT 4722-4723.) At about 4:00 p.m., Avila left the apartment complex to go buy some water. (26 RT 4734.) He never returned to cook dinner. Avila's sister Elvira called him just before 6:00 p.m. to find out why Avila had not yet returned home. (26 RT 4722-4726, 4734-4735, 4761.) Avila claimed he was in Corona and just felt like going for a drive. (26 RT 4735.) They did not speak to him again until about 3:00 a.m. the next morning, when he called from the apartment complex gate and asked them to buzz him inside. (26 RT 4736.)

Five-year-old Samantha lived at the same Smoketree Condominium complex where Catherine lived with her father. Samantha lived there with her grandmother Virginia, mother Erin, and mother's fiancee Ken, along with Ken's two young children - Paige and Conner. At that time, Paige was four or five years older than Samantha and Conner was about a year younger than Samantha. (23 RT 4269-4270.) On July 15 at about 5:30 p.m., Erin was at work and Virginia watched her grand-daughter Samantha. Samantha was playing outside on the front lawn with her six-year-old neighbor and friend Sarah. They were having a tea party. (23 RT 4270-4271, 4283-4285.) The girls took a break to have dinner and met back outside to continue playing sometime after 6:00 p.m. The front lawn was

considered a play area in the complex where many children played. (23 RT 4273-4274.)

Around 6:30 p.m., Avila's green car passed by the complex, went around the block, and then stopped in front where Samantha and Sarah were playing. Avila got out. Avila asked if they had seen a little puppy and when Samantha approached to ask how big the puppy was, Avila grabbed her. As Samantha kicked and screamed for help, he threw her into the car. He then got back into the car and sped away. Sarah ran home and told her mother and Samantha's grandmother, Virginia, what happened and they called 9-1-1. (23 RT 4274-4276, 4285, 4287-4296.) Based upon Sarah's description, a police artist made a sketch of Samantha's abductor. (23 RT 4296-4297.) The sketch was then broadcast across local television stations.[6] Alexis' step-mother, Tammy Jean, saw the sketch and thought it looked like Avila. She contacted the police in Riverside. (24 RT 4450-4451; 29 RT 5444-5453.)

Avila's cell phone and bank records indicated that after he left his apartment that afternoon, Avila drove all over Southern California during the next three hours. He stopped at 5:18 p.m. and withdrew $40 from the Lake Elsinore branch of Bank of America, and twice stopped for gas, but gas station video tapes did not show Samantha in Avila's car. (See 29 RT 5403-5404, 5405, 5423 [Exhs. 57-59 (videotape stills)]; see also 28 RT 5240.) Shalina Carlson, who was driving that evening with her boyfriend from San Clemente to Lake Elsinore along the Ortega Highway, heard what seemed to be a little girl screaming for help. Shalina thought this was around sunset or 6:00 p.m., but was unsure of her exact location when she heard the scream. (23 RT 4305-4325; 30 RT 5681.) When she learned

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[6] The sketch, which bore a striking resemblance to Avila, was People's Exhibit 4. (29 RT 5539; 46 CT 12316.)

about Samantha's abduction, she contacted the police and they went out to the area with her to try and determine where she heard the screams. (23 RT 4310, 4317-4318.)

Around 9:15 that evening, Avila checked into the Comfort Inn in Temecula. He did not have a child with him and no one noticed anything unusual. (See, e.g., 29 RT 5433-5436, 5449-5527; 30 RT 5558 et seq; 32 RT 5991 et seq.) Then, at about 11:15 p.m., Avila called his most recent girlfriend, Ruby. Avila asked her to meet him at the motel but she refused. Avila telephoned her at about 3:00 a.m., on the morning of July 16, and again tried to get her to come to the Comfort Inn. She agreed to come there, but never did. (26 RT 4783-4787.) Then about 20 minutes later, Avila called his sister Elvira from outside the gate of their complex, and asked her to let him in. When he got inside, she asked him where he had been. Avila replied he had gone to the beach and joked, as he often did, that he had also gone to Japan and China. Avila did not seem nervous or upset. He left the apartment a few minutes later. (26 RT 4736.) The next morning, Avila did something out of the ordinary for himself–he took out the trash and cleaned his room.[7] (26 RT 4742-4743.) In addition, Avila's sister Elvira noticed that when Avila returned, he had a scratch on the back of his leg. Avila claimed he had been scratched while climbing over a baby gate inside the home. But this made no sense to Elvira because the gate did not have any rough edges. (26 RT 4743-4746.)

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[7] Incidentally, the police never located the shoes or clothes worn by Avila or clothes worn by Samantha at the time of her abduction. (See 24 RT 4230 [People's opening], 29 RT 5342 [Avila's shoes worn that evening unrecovered].) However, a security video taken at the Arco station depicted Fila tennis shoes worn by Avila that evening. Forensic experts obtained these shoes from Fila and determined the shoes seen in the video had similarities to shoes prints left at the crime scene. (28 RT 5287-5292; 29 RT 5276-5279, 5280-5283.)

Around 3:15 p.m. that afternoon, two young men called the police to report finding something unusual near the intersection of the Killen Truck Trail and the Ortega Highway. (23 RT 4326-4328.) About 45 minutes later, Riverside Sheriff's Corporal Donovan Brooks arrived and met with the two witnesses, and they went to the area. Brooks discovered Samantha's naked body in a relatively remote, but popular area for hang-gliding. (23 RT 4327-4331; 24 RT 4555-4557 [crime scene photographs].) According to Elvira, Avila was familiar with this area because they had been there about two months earlier to watch a meteor shower. (26 RT 4740-4741.)

The next morning, July 17, Dr. Richard Fukumoto performed an autopsy of Samantha's body. (24 RT 4418.) He observed vaginal and anal bleeding and trauma from something being inserted into each area. (24 RT 4422-4423.) He also observed massive bleeding in the head from being struck twice, and a very swollen brain. (24 RT 4423-4424.) The blow to Samantha's head may have caused her to lapse into a semi-conscious or unconscious state, but she was still alive for a significant period of time after. (24 RT 4426-4427.) Samantha had also been asphyxiated by compression on her neck area, which meant pressure by hand squeezing, a choke hold, an elbow, or something else that compressed her neck and airway. This prevented her from breathing and caused her death. (24 RT 4424, 4427.) In other words, Samantha survived being struck in the head but was then suffocated until she died. (24 RT 4427.)

Dr. Fukumoto also believed Samantha was still alive when she was sexually molested. (24 RT 4425.) And recognizing time of death to be an estimate, Dr. Fukumoto estimated Samantha died about 30 to 36 hours

before the autopsy, or around 8:00 p.m. or a few hours later, on the evening of July 15.[8] (24 RT 4428-4429.)

Orange County Sheriff's Department Investigator Brian Sutton retraced Avila's steps the night of Samantha's abduction and murder, coinciding with Avila withdrawing money from the Lake Elsinore Bank about 5:15 p.m., abducting Samantha about 6:30 p.m., and until he checked into the motel just after 9 p.m.. He drove over 200 miles. According to Investigator Sutton, Avila could have drove from the bank in Lake Elsinore through Southern California and arrive at the Smoketree complex in Stanton to abduct Samantha at about 6:30 p.m., drive around, stop for gas at both the Arco and Chevron station at the times noted on surveillance cameras, then get to the Kileen Truck Trail hang-gliding area to kill Samantha or dump her body about 8:30 p.m.. Avila still had time to drive to, and check in, at the Comfort Inn shortly after 9:00 p.m. (29 RT 5404-5420.)

On July 18, 2002, Avila was under surveillance as part of the investigation into Samantha's death. (15 RT 2746.) Officers observed Avila drive to the area near his apartment, then approached and detained him. (15 RT 2721-2732.) Avila's neighbor Leonard Ward was present at the scene and felt Avila did not seem nervous. Avila voluntarily agreed to go back to the Sheriff's station. (29 RT 5477-5480, 5486-5492; see also 15

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[8] This time-frame would coincide with the time period between Samantha's abduction and when Avila checked in alone at the Comfort Inn in Temecula. However, since the time of death was merely an estimate, the People recognized it was possible that Avila left her unconscious body in the car when he checked into the Inn but later dumped her body early the next morning, before he headed home. (See 23 RT 4238 [opening statement]; 33 RT 6384-6385 [People's closing statement referring to time of death]; 34 RT 6553-6554.) [People's rebuttal referring to time of death].)

RT 2556.) At that time, Avila was questioned and then arrested.[9] (48 CT 12827 et seq.)

A computer was eventually seized from Avila's mother's apartment. This was a computer that Avila used. Avila's mother never used the computer and the only two people with passwords to access the internet were Avila and his sister Adelita. (26 RT 4711-4713.) Computer expert James Dale Vaughn analyzed the hard drive. (29 RT 5348-5350.)

The computer contained several child pornography images. (29 RT 5357-5360.) This included photographs of adults and children engaged in various sexual activities, and over a dozen movie clips of sex acts between adults and children, or between children and children. Also, around 4:30 a.m. on July 14 – the day before Samantha's abduction - someone had printed out a multi-part story involving an adult man engaging in sexual activities with his daughters and granddaughters. In addition, there were chat room conversations discovered between someone in the house who used the nickname "Girl*Lover," and in which he said that he liked girls under 12 years of age. During the chat conversation, he shared with others feelings and sexual desires concerning children.[10] (25 RT 4700-4702; 29 RT 5350-5363, 5366-5372.) When asked during one chat if Avila liked

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[9] The defense moved to exclude Avila's statements to investigating officers because he was not admonished of his rights. But after an evidentiary hearing, the court concluded the statements were admissible because it was an informal conversation about his whereabouts, and, he was not in custody at the time. Avila did not confess to the murder and the interview ceased when he requested an attorney. Avila was thereafter processed for forensic sampling. (15 RT 2720-2804; 17 RT 3159-3170.) It does not appear the prosecution sought to introduce any of Avila's interview statements at trial. (See 23 RT 4263-4264.) In any event, Avila does not raise any claim of error about the interview or statements.

[10] Adelita denied she ever used these chatrooms or accessed pornography. (26 RT 4713.)

living in California, Avila replied, "I live four thousand feet in the mountains where you can do anything to little kids." (Exh. P-96.)

Avila's green Ford Thunderbird was also found at his residence. It generally matched the description of the car provided by Sarah. (25 RT 4696-4700.) Forensic experts determined the tires on Avila's car had sufficient similarities to tire tracks found near Samantha's body. The forensic experts also compared shoe prints taken from the scene with shoes found during a search of Avila's apartment, but concluded none of the shoes recovered from his home matched the shoe prints. However, they also compared barefoot impressions left at the crime scene with impressions of Avila's feet. Like the tire tracks, the barefoot prints contained sufficient similarities to Avila's feet. (23 RT 4339-4346; 28 RT 5112-5156, 5242-5290; 29 RT 5334-5337.)

DNA samples were also taken from Samantha's heart blood and fingernails, a napkin found near Samantha's body, and from swabs taken from Avila and inside his car. Forensic analysts tested and compared the samples and concluded that Avila's DNA was left under Samantha's fingernails, and Samantha's DNA had been left in Avila's car.[11] (See, e.g. 23 RT 4377-4378, 4384-4385, 4388-4389; 24 RT 4394-4395, 4396-4400, 4406, 4554-4562; 26 RT 4794-; 28 RT 5157 et seq.)

C. Defense

Avila did not testify. The defense theory was that someone else abducted Samantha. (See 23 RT 4242-4243 [defense opening suggesting

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[11] DNA frequency estimates evidence suggested the sample taken from Samantha's fingernails to be consistent with Avila by a standard of one in six million. (26 RT 4832-4842.) Some of the DNA located in Avila's car was consistent with Samantha by a standard of one in three trillion. (26 RT 4844-4846.)

phone records revealed he could not have driven the distance required].) The defense also challenged the strength of the prosecution evidence:

Regarding the prior offenses, Avila's sister Elvira claimed Lizbeth fabricated the molestation incidents with Alexis and Catherine because she was angry at Avila and vowed revenge. (30 RT 5639.)

As far as the pornography discovered on the Avila family computer, defense computer expert Jeff Fischbach opined the computer was infected with a Trojan-Horse virus and it would have been possible for other computer users to remotely log in and access child pornography. (30 RT 5708 et seq.) But the People's computer expert noted that there were no viruses. (29 RT 5364-5365.)

In an effort to dispute the evidence he abducted Samantha, Avila presented testimony from one of Samantha's neighbors, Lynn Grimm. Grimm had seen a "lime green vehicle" in the area immediately before Samantha's kidnapping, but thought that it was a Honda. (29 RT 5444.) Similarly, a few hours after the kidnapping, Sarah told a social worker the car she saw had capital "H"s on its wheels. (4 CT 572.) However, Samantha's grand-mother Virginia confirmed that at the time of the abduction, there were two green cars parked in the area, including a dark green Honda. Sarah was shown these cars and said Samantha was taken in a different colored car. (23 RT 4276.)

Regarding the forensic evidence, defense entomologist James Webb testified that based upon the size and number of maggots recovered from Samantha's body and the time they deposited their larvae, she could not have been killed until the early morning hours of July 16, or hours after Avila checked into the Comfort Inn. (29 RT 5505-5513.) However, Webb admitted on cross-examination that if the body were placed in the area just before the end of daylight, flies might not have found it and deposited their larvae until the next morning. (29 RT 5514.)

Defense experts also claimed proper protocols were not followed in collecting and analyzing the forensic evidence, that the Orange County Crime Laboratory (where the testing had been done) had a history of failing to follow proper procedures, and, that there was a possibility of contamination because the DNA samples had been mixed improperly. Defense experts also asserted DNA is transferable and there was a possibility the DNA found in Avila's car might have been planted there to incriminate Avila. This was based partly on testimony from the People's forensic expert Elizabeth Thompson, who conceded that when Avila's vehicle had first been examined, no DNA had been found. It was only after she was asked to examine it a second time that Samantha's DNA was discovered.[12] (See 24 RT 4394-4396; 30 RT 5562 et seq., 5666 et seq; 31 RT 5766 et seq., 5848 et seq., 5869 et seq; 32 RT 5996 et seq., 6067 et seq., 6179 et seq.) But the People's experts rebutted these claims and explained that the DNA was both properly analyzed and that the defense experts misinterpreted the available data.[13] (33 RT 6236 et seq.)

In an effort to establish someone else may have left Samantha's body, the defense presented witness Johan Larsson who lived near this area and testified that when he left for work in the early morning hours of July 16, he noticed a small SUV or pick-up truck in the area near where Samantha's

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[12] The second examination followed the car being "super-glued," a term for a more involved process where cyano-acrylate is applied in a vapor form to coat the interior of the car. The chemical process attracts salts and oils in fingerprints to make them easier to locate and identify with other testing methods. The process also helps to identify saliva and other biological fluids that might not otherwise be easily observed. (24 RT 4396-4397, 4414-4415.)

[13] Respondent also notes Avila neither challenges the sufficiency of the evidence, nor makes any claim on appeal about the DNA or other forensic evidence.

body was later found. The trunk was open and an individual was leaning in as if taking something out or putting something in. There was also a motorcycle parked in the area. It was highly unusual for there to be any vehicles in that area at that time of the morning. However, Larsson said he had observed this activity much earlier in the morning, between 4:15 and 4:45 a.m. (29 RT 5455-5476.)

As far as Avila's actions after the murder, Avila's sister tried to downplay his out-of-character behavior in cleaning up his room and taking out the trash the morning after he returned to the apartment. She noted that she had asked him to clean up his room because there was going to be an inspection of the complex. But, she also admitted that Avila never took these inspections seriously before, and, still considered his taking out the trash and cleaning his room that day to be unusual. (26 RT 4742-4743.)

II. PENALTY PHASE EVIDENCE

A. Prosecution Case In Aggravation

Samantha's grandmother Virginia was taking care of Samantha at the time of her abduction. When Virginia heard Samantha had been killed, it felt as if she had "the life sucked out of me ... I just went dead." (34 RT 6631.) Virginia noted that Samantha was a joy to be around and had many friends. After the murder, other children at the Smoketree complex, including Samantha's stepbrother and sister, were afraid to go outside and play in fear that like Samantha, they might be abducted and "gone forever." (34 RT 6629-6633.)

Samantha's mother Erin explained she gave birth to Samantha at the age of 21, and described Samantha as "my purpose." (34 RT 6634.) On July 15, Erin got a message from her mother and learned Samantha had been kidnapped. She initially thought Samantha's biological father (who lived in Massachusetts) decided to visit and was not concerned, because she

knew he would not hurt her. (34 RT 6635.) She tried to stay calm but worry and fear took over. As soon as she got home that evening, she ran outside with photos of Samantha, hoping people would help find her. (34 RT 6634-6635.) The next day, she was at the Sheriff's Department waiting to be interviewed and learned her daughter's body had been found. Erin screamed out, "why do they have to kill them?" and collapsed on the floor. (34 RT 6636-6637.)

Erin described Samantha as a courageous child who believed in heroes and doubtless thought someone would save her:

> What just infuriates me is I know she thought that somebody would save her. I know she believed in heroes. She believed that the good guys always won. And that's why I think she fought so hard because she thought she would win. But it's just she was so proud, and she died so humiliated, so her entire vision of the world devastated.

(34 RT 6638.) Erin explained that by the time of the trial some two-and one-half years later, her stepson, Connor, still had nightmares. Erin managed to finally focus on happy memories of Samantha. But being in the same courtroom with Avila brought back her terror. And even though she had since given birth to the baby sister Samantha had always had wanted, Erin was simply unable to fully enjoy being a mother again. (34 RT 6633-6640.)

Several photographs, including one depicting Samantha as an angel on the last Halloween before her death, were also admitted. (34 RT 6640-6643 [People's Exhibits 112-118].)

B. Defense Case In Mitigation

The defense presented section 190.3, subdivision (k) evidence. Witnesses testified that Avila came from a dysfunctional and poor family, one that abused the children. Several family members described the Avila men as alcoholics who sexually assault their wives and daughters, and had

fist fights in front of their children. Avila was the youngest and smallest of the boys. His father Rafael would call him a "fag" and "fairy," would get drunk, and repeatedly hit him with a belt. The Avila women were completely dependant upon their husbands and lazy, and never cared properly for the children. Avila's mother Adelina would often not feed her children. (See e.g. 34 RT 6657 et seq. [Adriana Avila - Avila's aunt], 6667 et seq. [Laura S.- Avila's second cousin], 6680 et seq. [Erin Avila - Avila's sister-in-law], 6751 et seq. [Angelina C. - Avila's father was her uncle]; 35 RT 6779 et seq. [Alma Ramirez- married to Avila's uncle Francisco] 6799 et seq. [Ofelia Avila- married to Avila's uncle Santiago], 6811 et seq. [Manuel Avila Rodriguez- Avila's uncle], 6845 et seq. [Teresa Avila – Avila's Aunt], 6891 et seq. [Antonia Hernandez- Avila's cousin], 6906 et seq. [Maria Avila- Avila's Aunt].)

Tammy Daddato, a Bell Gardens' police officer, testified that in 1989, Avila's father Rafael was arrested for child abuse, and the children were removed from the family home by the Department of Children's Services. (35 RT 6819 et seq.) In addition, Rafael shot and killed a neighbor in front of Avila and then fled the country. He eventually returned, pled guilty to manslaughter, and went to prison. (35 RT 6906 et seq.)

Dr. Matthew Mendel, a child psychologist specializing in the effects of sexual abuse on male children and the author of "The Male Survivor: Impact of Sexual Abuse Upon Men," also testified. He stated the male Avila children were traumatized, ashamed, and endured years of pain and suffering from a pattern of alcoholism, sexual abuse, and physical abuse. But he also admitted this did not predestine them to molest or abuse children as adults. In fact, none of the patients referenced in his book became molesters. (34 RT 6692-6750.)

Francisco Gomez, a forensic psychologist, performed an assessment of the Avila family history. He described Rafael as an abusive person, who

was an alcoholic, controlling, and manipulative. (35 RT 6933-6944.) He described Avila's mother Adelina as completely dependent, highly depressed, and submissive. (35 RT 6933 et seq.) Because Avila grew up abused, in poverty, and with two dysfunctional parents, Dr. Gomez opined that there existed a high risk he would experience severe problems as an adult and that children like Avila risked at least a 50 percent chance of becoming molesters as adults. Other risk factors in the Avila family increased chances Avila would be unable to function as a normal adult. (35 RT 6949-6991.)

Others who knew Avila testified as to his character. Toni Arnsberger, a one-time co-worker, described him as a generally upbeat, cheerful, and generous person. Avila was a hard worker who did not want to talk about his father. (34 RT 6643-6648.) Another co-worker, Ruth Olivia Conley, said Avila often helped people in distress and once helped her with a flat tire on the freeway at 2:00 a.m. (35 RT 6930 et seq.) Other former co-workers described Avila as a good worker. (See e.g., 34 RT 6832-6837 [Showana Royal] and 6900-6903 [Dora Arrendondo].)

Ellen Micheli, Avila's teacher when he was 14 or 15 years of age, said that while he was in a "high risk" class, he was not a disciplinary problem. However, he did not easily associate with other boys and seemed effeminate. (35 RT 6775 et seq.) Finally, according to former priest Rudolph Gil, after Avila's father killed the neighbor and fled to Mexico, Avila had to become the man of the house while in high school. Avila made sure his sisters attended Mass and Catechism classes. (35 RT 6838 et seq.)

C. Prosecution Case In Rebuttal

Forensic psychiatrist Dr. Park Dietz testified he reviewed the reports of Drs. Mendel and Gomez and listened to their testimony, and considered other evidence presented at trial, including that Avila may have

downloaded a story involving incest the night before Samantha's abduction. Dr. Dietz concluded Avila was a pedophile. He explained, however, that pedophiles have free will and ability to refrain from attacking children. Furthermore, pedophilia does not include an impulse to kill the child victims. (36 RT 7032-7097.)

ARGUMENT

I. THE TRIAL COURT PROPERLY DENIED AVILA'S MOTION FOR CHANGE OF VENUE AND NO PREJUDICE RESULTED

Asserting Samantha's abduction and murder resulted in an "unprecedented firestorm of publicity in Orange County," Avila contends that when the trial court denied his pretrial motion for change of venue, it violated his federal and state constitutional rights to due process of law, a fair trial, and an impartial jury. (AOB 22; U.S. Const., Amends. 5th, 6th, 14th; Cal. Const., art. I, §§ 1, 15, 16; see also § 1033, subd. (a).) Denial of the change of venue motion was neither in error nor prejudicial.

This Court has described the standard a criminal defendant must meet to prevail on a motion for a change of venue:

> A motion for change of venue must be granted when "there is a reasonable likelihood that a fair and impartial trial cannot be had in the county" in which the defendant is charged. (§ 1033, subd. (a).) The trial court's initial venue determination as well as our independent evaluation must consider five factors: "'(1) nature and gravity of the offense; (2) nature and extent of the media coverage; (3) size of the community; (4) community status of the defendant; and (5) prominence of the victim.' [Citations.]" (*People v. Leonard* (2007) 40 Cal.4th 1370, 1394, 58 Cal.Rptr.3d 368, 157 P.3d 973.) On appeal, a successful challenge to a trial court's denial of the motion must show both error and prejudice, that is, that "at the time of the motion it was reasonably likely that a fair trial could not be had in the county, and that it was reasonably likely that a fair trial was not had. [Citations.]" (*People v. Davis* (2009) 46 Cal.4th 539, 578, 94 Cal.Rptr.3d 322, 208 P.3d 78.) Although we will sustain the trial court's determination of the relevant facts if supported by

> substantial evidence, "'[w]e independently review the court's ultimate determination of the reasonable likelihood of an unfair trial.'" (*People v. Hart* (1999) 20 Cal.4th 546, 598, 85 Cal.Rptr.2d 132, 976 P.2d 683.)

(*People v. Famalaro* (2011) 52 Cal.4th 1, 21; see also Pen. Code, § 1033 ("In a criminal action pending in the superior court, the court shall order a change of venue: (a) On motion of the defendant, to another county when it appears that there is a reasonable likelihood that a fair and impartial trial cannot be had in the county. . . .")

A. The Defense Motions For Change of Venue And Trial Court Rulings

About six months before jury selection, Avila moved to change the venue of his trial because of pre-trial publicity. (6 CT 1148-1157; 7 CT 1227-1237 [amended motion].) Avila's motion referred to the various media outlets that decried Samantha's murder, and included exhibits of news and print articles, television report transcripts, and radio and internet broadcast materials. (7 CT 1238; 47 CT 12742.) Avila conceded publicity "subsided over time," but also relied on a public opinion poll conducted after his arrest, and which found most persons in Orange County were familiar with the case, and, a majority believed him guilty and deserved the death penalty. (6 CT 1174-1176.) The prosecution acknowledged the case evoked natural sympathies and publicity, but suggested a change of venue would only be appropriate if it became apparent during jury selection an impartial jury could not be selected. (38 CT 10393-10418.)

The trial court first denied the motion before jury selection, on February 14, 2005, and after it had conducted a hearing and considered testimony from "experts" and consultants who addressed the affect of the pre-trial publicity. (See, e.g., 12 RT 2172-2305; 13 RT 2327-2377, 2420-2501 [defense expert Bronson]; 14 RT 2511-2609; 16 RT 2828-2988 [prosecution expert Ebbesen]; 16 RT 2989-3044; 17 RT 3045-3079 [New].)

The court concluded the potential jury pool was not tainted and denied the motion, without prejudice to renew if the defense believed a fair panel could not be selected. (17 RT 3117-3123.)

Jury selection then began on March 3, 2005. On March 7, the court learned some of the prospective jurors communicated with AM station KFI's radio talk show hosts "John and Ken." (See 18 RT 3398 et seq.) On March 14, Avila renewed his change of venue motion. (46 CT 12221.) The court reserved ruling pending examination of potential jurors. During the selection process, those jurors who admitted they could not be fair and impartial were excused for cause, as compared to those who indicated that although they had been exposed to publicity, they could set aside opinions they may have formed as to Avila's guilt or punishment. (Compare 20 RT 3648-3656 and 19 RT 3507-3543; 20 RT 3729.)

After the defense had exercised all of its 20 peremptory challenges, the trial court denied Avila's request for six additional peremptory challenges.[14] (21 RT 3976.) Avila again renewed his change of venue motion, but the trial court denied it, finding there were a sufficient number of jurors not adversely influenced by pre-trial publicity, and that the publicity did not preclude Avila from receiving a fair trial. Furthermore, over 150 prospective jurors were questioned, and those with extensive recollection of media accounts had been excused for various reasons, while those whom the defense were unable to excuse for cause and remained, had only a limited knowledge of the facts of the case. (22 RT 4206-4208.)

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[14] Avila claimed he needed additional challenges to remove panelists 151, 194, 201, 210, 211, and 255, who stated they could set aside their pre-judgment from the pre-trial publicity. (See 21 RT 3976.) His argument about the denial of additional peremptory challenges is addressed below.

B. Because Avila Failed to Establish a Reasonable Likelihood of An Unfair Trial In Orange County, the Trial Court Properly Denied Avila's Motion For Change of Venue

Avila's focus here on appeal is the extensive pre-trial publicity in this case. Admittedly, there existed a significant amount of pre-trial publicity. But a change of venue was not warranted because Avila failed to show there existed a reasonable likelihood that a fair and impartial trial could not be held.

Initially, Avila concedes the other factors – i.e., the nature and gravity of the offense, the size of the community, the community status of the defendant and the prominence of the victim - were not predominant enough to warrant a change of venue. Indeed most of these factors were neutral or weighed against a change of venue. As this Court observed in the Orange County case of *Famalaro*, the nature of gravity of the capital offense alone does not require change of venue, the size of the Orange County community "weighed 'heavily against a change of venue,'" the lack of community ties of the defendant was a "neutral" factor, and while the victim's "posthumous celebrity status" may have weighed in favor of a change in venue, that would have followed the defendant to whatever community where venue ultimately resided. (*People v. Famalaro, supra*, 52 Cal.4th at pp. 22-24.)

Avila nevertheless maintains the "unprecedented firestorm of publicity" and sympathy engendered for Samantha - whose death "catapulted her into posthumous stardom" - made it reasonably unlikely that he could receive a fair trial.[15] (AOB 46-50.) Respondent disagrees.

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[15] Before addressing the merits, respondent observes that Avila's attempt to portray an unfair atmosphere includes referencing former Orange County Sheriff Mike Corona. Avila points out that Corona announced he

(continued...)

Famalaro is particularly instructive. Ten years prior to Avila's trial, the murder and discovery in a freezer of the sexually molested, brutally beaten, and frozen body of 23-year-old Denise Huber - whom the defendant abducted off an Orange County freeway when her car broke down - also involved extensive and intensive amount of media coverage. Ironically, testimony offered in this case by Bronson and Ebberson was similar to the testimony they offered during a venue hearing in the *Famalaro* case. (*People v. Famalaro*, *supra*, 52 Cal.4th at pp. 19-20.) But there, this Court observed even a saturation of pre-trial publicity does not require a change of venue. (*Id.* at p. 23.) As this Court explained,

> "When pretrial publicity is at issue, 'primary reliance on the judgment of the trial court makes [especially] good sense' because the judge 'sits in the locale where the publicity is said to have had its effect' and may base [the] evaluation on [the judge's] 'own perception of the depth and extent of news stories that might influence a juror.'" (*Skilling v. United States, supra*, – — U.S. at p. ——, 130 S.Ct. at p. 2918.) Here, we agree with the trial court's conclusion that defendant did not show a reasonable likelihood that he could not receive a fair and impartial trial in Orange County. The trial court's denial of defendant's pretrial motion for a change of venue was therefore proper.

(*People v. Famalaro*, *supra*, 52 Cal.4th at p. 24.)

(...continued)
was "one-hundred percent" sure Avila was Samantha's killer after Avila's arrest. (AOB 22 and 41.) But as the trial court noted, there was no evidence this had any effect or influence on the prospective jurors and excluded it from evidence. (33 RT 6358-6359). But Avila goes on with umbrage to describe Corona being elevated to hero-status and his national media appearances after the arrest. He then discusses Corona's downfall for being convicted and imprisoned for witness tampering in an unrelated case. (AOB 22, fn. 2, and 41.) This is not appropriate. Corona's demise post-dated the trial here and is not part of the appellate record. And other than mere sensational value, it offers no relevancy to the appeal.

Perhaps recognizing the import of *Famalaro*, Avila maintains a more comparable case in recent memory was the murder of Polly Klaas and trial of Richard Allen Davis. In so doing he complains the trial court in that case recognized pre-trial publicity had warranted a change of venue out of Sonoma County and into Santa Clara County. (AOB 47, referring to *People v. Davis* (2009) 46 Cal.4th 539, 569.)[16]

Ironically in *Davis* the defendant claimed that change of venue violated his rights, because the people in the transferred county were just as prejudiced against him. (*People v. Davis, supra*, 46 Cal.4th at p. 574.)

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[16] Avila also suggests this case is more like *Daniels v. Woodford* (9th Cir. 2005) 428 F.3d 1181, where the Ninth Circuit presumed prejudice and a due process violation, based on inflammatory media coverage. (AOB 40-41.) The contention is unavailing. First, *Daniels* is a federal habeas case and not controlling authority. (*People v. Avena* (1996) 13 Cal.4th 394, 431.) Second, it involved a pre-Antiterrorism and Effective Death Penalty (AEDPA) habeas matter that had followed this Court's affirmance of the judgment on direct appeal and rejection of the very same venue argument. (See *People v. Daniels* (1991) 52 Cal.3d 815, 851-853.) Third, the Ninth Circuit found a due process violation merely because empanelled jurors knew of or remembered pre-trial publicity, and did not engage in any evaluation as to whether it affected the jurors' views or bias against the defendant. Thus, its validity is questionable given that the court ignored Supreme Court precedent of *Irvin v. Dowd* (1961) 366 U.S. 717, 723 [81 S.Ct. 1639, 1643, 6 L.Ed.2d 751] ["'It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence prese[nted in court'"], and, is undercut further by the more recent Supreme Court case of *Skilling v. U.S.* (2011) __ U.S. __ [130 S.Ct. 2896, 2923, 177 L.Ed.2d 619] ["This face-to-face opportunity to gauge demeanor and credibility, coupled with information from the questionnaires regarding jurors' backgrounds, opinions, and sources of news, gave the court a sturdy foundation to assess fitness for jury service"].) In any event, the similarity between *Daniels* and the instant case was no different than most other high profile murders: extensive pre-trial publicity, the murdered officers becoming posthumous celebrities, and editorialized media comments which clamored for the death penalty. (*Daniels v. Woodford, supra,* 428 F.3d at pp. 1211-1212.)

Nevertheless, this Court recognized that often in high profile, noteworthy trials where media coverage permeates, similar concerns would exist within the changed venue location as well. The shining light of publicity, however, does not preclude a fair trial. (*Id.* at pp. 575-576 ["The mere presence of such awareness on the jurors' part, without more, does not presumptively deny a defendant due process, because to hold otherwise "'would be to establish an impossible standard.'" (Citations omitted.)].)

Here, the trial court considered not just the extent of the pre-trial publicity, but also independently reviewed the effect on prospective jurors, based on their answers to the juror questionnaire and their response to voir dire questions. (See 22 RT 4207-4208.) The trial court's "face-to-face opportunity to gauge demeanor and credibility, coupled with information from the questionnaires regarding jurors' backgrounds, opinions, and sources of news, gave the court a sturdy foundation to assess fitness for jury service." (*Skilling v. U.S., supra*, 130 S.Ct. at p. 2923.) Like in *Famalaro*, where the trial court addressed these same factors before trial and again after jury selection commenced, the trial court's denial of the motion for a change of venue in this case was entirely proper. (*People v. Famalaro, supra*, 52 Cal.4th at p. 29 ["The trial court denied defendant's motions, agreeing with the prosecution that the selection process had successfully eliminated the prospective jurors who held fixed opinions, and had not caused the remaining jurors to become biased."].)

In other words, and like in *Famalaro*, "none of the problematic prospective jurors survived the selection process. The trial court properly excused all of the biased prospective jurors for cause; on appeal, defendant does not identify a single prospective juror as to whom the court erroneously denied a defense challenge for cause." (*Famalaro, supra*, 52 Cal.4th at p. 30.) Respondent acknowledges Avila sought to peremptorily challenge six additional jurors that he believed pre-judged his guilt, despite

their assurances to the court they could set aside any prejudgment or information they had learned before trial and be fair and impartial. (See AOB 36.) But Avila does not separately contend he was erroneously denied a challenge for cause for any, nor raise any claim on appeal that the selection process was defective, that jurors held bias the selection process failed to detect, or, that these or any other jurors engaged in misconduct or considered inadmissible evidence during the guilty or penalty trial or deliberation process.

Given just how extraordinary the circumstances must be for pretrial publicity to entitle any defendant to a remedy such as additional peremptory challenges or a change of venue, respondent suggests that this Court compare the instant case to others where similar arguments were rejected.

For instance, in *People v. Bonin*, this Court upheld the denial of a change-of-venue motion and a request for additional peremptory challenges, finding that there was "no reasonable likelihood that jurors who will be, or have been, chosen for the defendant's trial have formed such fixed opinions as a result of pretrial publicity that they cannot make the determinations required of them with impartiality." (*People v. Bonin* (1988) 46 Cal.3d 659, 672-673, citing *Patton v. Yount* (1984) 467 U.S. 1025, 1035 [104 S.Ct. 2885, 81 L.Ed.2d 847, 856].) Bonin was convicted of and sentenced to death for the murders of 14 people in Orange County and Los Angeles County in what was dubbed the "freeway killings" of 1979 and 1980. He was convicted in Los Angeles first and then raised the change of venue motion in his subsequent Orange County trial. (*Bonin, supra*, 46 Cal.3d at pp. 668, 673.) Like the venire in the instant case, most of the prospective jurors in *Bonin* had been exposed, at least to some degree, to publicity about the case particularly in light of the previous Los Angeles trial. (*Id.* at p. 675.) This Court nevertheless upheld the denial of

Bonin's change of venue motion, finding that despite the "extensive" news coverage surrounding the case and despite the gravity of the crimes, the community in which the case was being tried was large and due to the passage of time since the Los Angeles County conviction, the media attention had diminished. (*Id.* at pp. 677-678.) Thus, this Court concluded that Bonin's speculation about the possibility of an unfair trial was insufficient to show that he would be unable to be tried by a fair and impartial jury in Orange County. (*Id.* at 678.) On that basis, this Court upheld the trial court's denial of both the change-of-venue motion and the defendant's request for additional peremptory challenges. (*Id.* at p. 679.)

Another comparable case is *Skilling v. United States, supra*, 130 S.Ct. 2896. *Skilling* involved the highly inflamed trial that resulted in the conviction of a former chief executive officer of the Houston-based Enron, in a case that garnered tremendous national media attention. (*Id.* at pp. 2911-2912.) A multitude of people in the Houston area were directly or indirectly impacted by the economic effect of Enron's demise, and the news coverage included substantial personal interest stories from individuals expressing their anger toward those involved. (*Id.* at pp. 2907-2912.) The United States Supreme Court affirmed the federal district court's denial of a change-of-venue motion, and concluded that the defendant had failed to establish a presumption of prejudice. (*Id.* at p. 2915.) The import of the *Skilling* decision is not affected by the fact that *Skilling* may have involved corporate crime whereas the matter before this Court is the murder of a young child. *Skilling* stands for the proposition that even in the face of pervasive media coverage, a fair trial by an impartial jury can be had where the voir dire process, both written and oral "successfully secure[s] jurors who were largely untouched by" pretrial publicity. (*Id.* at p. 2920.)

Here, the voir dire process and the responses of the seated jurors ensured that no juror was so affected by pretrial publicity, such that he or

she was unable or unwilling to set aside any preconceived opinion, and could instead decide the case based solely upon the evidence presented at trial. Furthermore, the trial court made reasonable factual determinations in that regard. Accordingly, there was not reasonable likelihood of an unfair trial and the trial court properly denied the motion for a change of venue.

C. The Pre-Trial Publicity Did Not Support a Presumption of Prejudice

Avila nevertheless appears to suggest prejudice must be presumed here, merely because of the extensive inflammatory pretrial publicity and the notoriety of the case. (AOB 38-41.) Respondent again disagrees.

Avila was entitled to be tried by "a panel of impartial, 'indifferent' jurors." (*Irvin v. Dowd, supra,* 366 U.S. at p. 722.) A trial court may be unable to seat an impartial jury because of prejudicial pretrial publicity or an inflamed community atmosphere. (*Rideau v. Louisiana* (1963) 373 U.S. 723, 726 [83 S.Ct. 1417, 10 L.Ed.2d 663].) Prejudice is presumed when the record demonstrates that the community where the trial was held was saturated with prejudicial, and inflammatory media publicity about the crime. (*Id.* at pp. 726-727; *Harris v. Pulley* (9th Cir. 1988) 885 F.2d 1354, 1361.) Under such circumstances, it is not necessary to demonstrate actual bias. (*Ibid.*) The presumption of prejudice is "'rarely invoked and only in extreme situations.'" (*United States v. McVeigh* (10th Cir. 1998) 153 F.3d 1166, 1181; *Nebraska Press Assn v. Stuart* (1976) 427 U.S. 539, 554 [96 S.Ct. 2791, 49 L.Ed.2d 683].) And, as this Court has observed, "[t]his prejudice is presumed only in extraordinary cases – not in every case in which pervasive publicity has reached most members of the venire." (*People v. Prince* (2007) 40 Cal.4th 1179, 1216, orginal emphasis.)

For the reasons detailed above, the publicity in Avila's case was not such as to support a presumption of prejudice. Indeed and as Avila admits, most of the publicity he focuses on subsided long before the trial began,

and was unremarkable in comparison to other capital cases. (See AOB 25 ["The publicity subsided over time"] and 26 (referring to 38 CT 10393-10418 [People's opposition to change of venue motion noting that "[m]ost of the publicity had occurred within a few weeks after Samantha [ ] was killed and Appellant was arrested"].)

D. Avila Fails to Establish Prejudice

In addition to lacking a basis to presume prejudice, Avila also fails to establish that any actual prejudice resulted from the denial of his change of venue motion. Actual prejudice is demonstrated where a sufficient number of the jury panel has such fixed opinions about the guilt of the defendant that they could not impartially judge the case, and a trial before that panel would be inherently prejudicial. (*Harris v. Pulley, supra*, 885 F.2d at p. 1364.) In deciding whether there was actual prejudice against a defendant, the reviewing court "must determine if the jurors demonstrated actual partiality or hostility that could not be laid aside." (*Id.* at p. 1363.)

To that end, a juror need not be "totally ignorant of the facts and issues involved." (*Murphy v. Florida* (1975) 421 U.S. 794, 799-800 [95 S.Ct. 2031, 44 L.Ed. 2d 589].) "'It is sufficient if the juror can lay aside his impression or opinion and render a verdict based upon the evidence presented in court.'" (*Id.* at p. 800, quoting *Irvin v. Dowd, supra*, 366 U.S. at p. 723; *People v. Fauber* (1992) 2 Cal.4th 792, 819.) "[A] key factor in gauging the reliability of juror assurances of impartiality is the percentage of venireman who `will admit to a disqualifying prejudice.'" (*Harris v. Pulley, supra*, 885 F.2d at p. 1364, quoting *Murphy v. Florida, supra*, 421 U.S. at p. 803.) As this Court has observed:

> [I]t should be emphasized that the controlling cases "cannot be made to stand for the proposition that juror exposure to information about a state defendant's prior convictions or to news accounts of the crime with which he is charged alone presumptively deprives the defendant of due process." (*Murphy*

> *v. Florida, supra*, 421 U.S. at p. 799 [44 L.Ed.2d at p. 594].) "It is not required ... that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion of the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court."

(*People v. Harris* (1981) 28 Cal.3d 935, 949-950, quoting *Irvin v. Dowd, supra*, 366 U.S. at pp. 722-723; accord, *People v. Cooper* (1991) 53 Cal.3d 771, 883; *People v. Weaver* (2001) 26 Cal.4th 876, 908.) And, "[t]he defendant bears the burden of proof that the jurors chosen have such fixed opinions that they cannot be impartial." (*People v. Hayes* (1999) 21 Cal.4th 1211, 1250, citing *People v. Sanders* (1995) 11 Cal.4th 475, 505.)

In this case, the questioning of jurors during voir dire demonstrates the lack of taint of jurors by pretrial publicity. None of the jurors held a fixed opinion regarding Avila's guilt, let alone one he or she would not set aside so as to decide the case on the evidence presented at trial. (See *People v. Welch* (1999) 20 Cal.4th 701, 745.) Indeed and as set forth above, no sitting juror's initial impressions of the case were resolutely held, and all of the jurors provided assurances, deemed credible by the trial court, that any pretrial publicity they had heard would not prevent them from performing their duties fairly and impartially. (*People v. Coffman & Marlow* (2004) 34 Cal.4th 1, 47; *People v. Cooper, supra*, 53 Cal.3d at p. 807.)

Accordingly, Avila has failed to show either error or prejudice as a result of having been tried in Orange County. This claim must, therefore, be denied.

II. THE TRIAL COURT PROPERLY DENIED AVILA'S MOTION FOR ADDITIONAL PEREMPTORY CHALLENGES AS HE FAILED TO DEMONSTRATE THE LIKELIHOOD OF AN UNFAIR TRIAL

Similar to his change of venue argument, Avila claims that in light of the extensive pretrial publicity, the trial court's denial of his request for six additional peremptory challenges made it reasonably likely he would not receive a fair trial with an impartial jury.[17] (AOB 51-57.) The trial court properly denied Avila's request for additional peremptory challenges. As explained in Argument I, *supra*, Avila failed to show the pretrial publicity prevented a fair trial. Moreover, Avila fails to demonstrate prejudice from the denial of additional peremptory challenges, and fails to establish how the trial would have been any fairer had such challenges been provided.

"Peremptory challenges are intended to promote a fair and impartial jury, but they are not a right of direct constitutional magnitude." (*People v. Webster* (1991) 54 Cal.3d 411, 438, citing *Ross v. Oklahoma* (1988) 487 U.S. 81, 88-89 [108 S.Ct. 2273, 101 L.Ed.2d 80, 90].) "[P]eremptory challenges are within the States' province to grant or withhold, the

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[17] Avila maintains that at trial he requested additional peremptories based on "inflammatory" pre-trial publicity, but on appeal he fails to refer where the record below supports his assertion. (AOB 52-53.) Instead, he baldly states defense counsel exhausted twenty peremptories, then requested six more peremptory challenges to use on panelists numbers 151, 194, 201, 210, 211 and 225, and based on 3 reasons: (1) exposure to inflammatory publicity, (2) personal identification with the victim and her mother, and/or (3) sympathy with friends who were sexual assault victims. (AOB 52-53.) But then Avila merely describes answers from four of these jurors and references the trial court's denial of the request for additional peremptories. (AOB 53, referring to 20 RT 3631, 21 RT 3945; 16 CT 3479, 3518 [juror answers] and 21 RT 3976 [court ruling].)

mistaken denial of a state-provided peremptory challenge does not, without more, violate the Federal Constitution." (*Rivera v. Illinois* (2009) 556 U.S. 148, 158 [129 S.Ct. 1446, 173 L. Ed. 2d 320].) As a result, in order to establish a constitutional entitlement to additional peremptory challenges, Avila was required to show at least that he was likely to receive an unfair trial before a biased jury without the challenges. (*People v. DePriest* (2007) 42 Cal.4th 1, 23.)

Based on the foregoing change of venue argument, Avila's was not a case so extraordinary that the pervasive pretrial publicity rendered his request for additional peremptory challenges a constitutional necessity in order to ensure the fairness of his trial. Implicit in Avila's argument is the premise that the only way to protect against negative impact from pretrial publicity was to grant additional peremptory challenges. Significantly there are other ways to protect against the same risks, but Avila chose not to avail himself of all of them. For example, while he did move to change the venue of his trial, he could have alternatively asked for a continuance of the trial to further allow the media spotlight to fade. The fact that he did not request a continuance on this basis is a relevant consideration in determining whether the publicity was so pervasive that unfairness to his proceedings should have been presumed.

Avila further suggests additional peremptory challenges were needed in order to replace those that he had used to dismiss prospective jurors whom he had unsuccessfully challenged for cause. (AOB 52, referring to panelists 151, 194, 201, 210, 211 and 225.) These were panelists who sat on the jury, despite his belief they could not be fair and impartial because of the pre-trial publicity, their personal identification toward the victim and her mother, or sympathy toward sexual assault victims. (See AOB 52, referring to 21 RT 3976; 16 CT 3479 [juror who stated he would be fair despite former girlfriend being sexual assault victim)] 16 CT 3518 [juror

who would be fair despite niece being a rape victim]; 20 RT 3631 [juror who insisted he would be fair despite having listened recently to the AM "John and Ken" show]; and 21 RT 3945 [stay-at-home mom who supported death penalty but who could set aside sympathies and be fair and impartial]). But Avila concedes these panelists were not excusable for cause, because they stated they could be fair and impartial. (AOB 56, referring to *People v. Hecker* (1990) 219 Cal.App.3d 1238, 1242.) To that end, he does not suggest the panelists lied or misled the court on this basis. Instead, he simply maintains there were a greater number of panelists who stated they could be fair and objective than the number of peremptory challenges he was afforded. (AOB 56.) Respondent is unclear how that assertion results in a viable claim of error.

Regardless, while Avila expressed specific dissatisfaction as to these jurors given their exposure to pre-trial publicity, he did not do so for the remaining jurors. This is indicative of his impression that other jurors were not tainted by the very same pretrial publicity and held no bias against him. In any event, that jurors may have known generally about the crime did not equate to pervasive, prejudicial pretrial publicity that required additional peremptory challenges to ensure the fairness of the proceeding. As this Court observed in *People v. Davis, supra,* 46 Cal.4th 539:

> We have never required potential jurors to be ignorant of news accounts of the crime or free of "'any preconceived notion as to the guilt or innocence of an accused.'" (*People v. Harris* (1981) 28 Cal.3d 935, 950 [171 Cal. Rptr. 679, 623 P.2d 240], quoting *Irvin v. Dowd, supra*, 366 U.S. at p. 723; see also *People v. Riggs* (2008) 44 Cal.4th 248, 281 [79 Cal. Rptr. 3d 648, 187 P.3d 363]; *In re Hamilton* (1999) 20 Cal.4th 273, 295 [84 Cal. Rptr. 2d 403, 975 P.2d 600].) The mere presence of such awareness on the jurors' part, without more, does not presumptively deny a defendant due process, because to hold otherwise "'would be to establish an impossible standard.'" (*People v. Harris, supra*, 28 Cal.3d at pp. 949–950, quoting *Irvin v. Dowd, supra*, 366 U.S. at p. 723.) In the absence of

> some reason to believe otherwise, it is only necessary that a potential juror be willing to set aside his or her "'impression or opinion and render a verdict based on the evidence presented in court.'" (*Harris*, at p. 950, quoting *Irvin v. Dowd*, at p. 723; see *People v. Riggs, supra*, 44 Cal.4th at p. 281.)

(*People v. Davis, supra*, 46 Cal.4th at p. 575.)

Moreover, Avila's suggestion that he was entitled to additional peremptory challenges because he used challenges to dismiss those prospective jurors he unsuccessfully challenged for cause, is also untenable. This Court rejected the same argument in *People v. Yeoman* (2003) 31 Cal.4th 93:

> To be sure, we have observed that "an erroneous denial of a challenge for cause can be cured by giving the defendant an additional peremptory challenge." (*People v. Bittaker, supra*, 48 Cal.3d 1046, 1088, 259 Cal.Rptr. 630, 774 P.2d 659.) Yet, while a trial court that was convinced it had erred might well grant additional peremptory challenges, the mere claim of error cannot reasonably be thought sufficient to compel the court to do so. Otherwise, the number of peremptory challenges a trial court must allow would be limited only by the number of challenges for cause a party was willing to assert, regardless of merit. In another context, we have held that "to establish [a] constitutional entitlement to additional peremptory challenges ..., a criminal defendant must show at the very least that in the absence of such additional challenges he is reasonably likely to receive an unfair trial before a partial jury." (*People v. Bonin* (1988) 46 Cal.3d 659, 679, 250 Cal.Rptr. 687, 758 P.2d 1217 [rejecting a claim of error based on the trial court's refusal to allow additional peremptory challenges to redress the effects of pretrial publicity].) We see no reason the same standard should not apply in this context. Applying that standard, we conclude defendant cannot show the trial court's failure to allow additional peremptory challenges caused him to receive an unfair trial, because he did not challenge any sitting juror for cause.

(*Yeoman, supra*, 31 Cal.4th at pp. 118-119.)

Finally, Avila cannot show any actual prejudice resulted from the denial of additional peremptory challenges. None of the jurors here had unwavering opinions concerning his guilt, let alone fixed opinions and unwillingness to change even if contrary evidence was presented at trial. Moreover, if Avila's point is that media attention was so pervasive that his entire jury pool was tainted, then an infinite number of peremptory challenges would not have been sufficient. If he sought a jury of 12 individuals who knew nothing about his case, the task was an impossible one. Moreover, Avila was not constitutionally entitled to an ignorant jury. (E.g., *People v. Davis, supra*, 46 Cal.4th at p. 580 [every seated juror had prior knowledge of case]; *People v. Ramirez* (2006) 39 Cal.4th 398, 434 [11 jurors had prior knowledge of case]; *People v. Bonin, supra*, 46 Cal.3d at p. 678 [10 jurors with prior knowledge]; *People v. Leonard* (2007) 40 Cal.4th 1370, 1396-1397 [8 jurors].) "The relevant inquiry is ... whether the jurors ... had such fixed opinions that they could not judge impartially the guilt of the defendant." (*Patton v. Yount, supra*, 467 U.S. at p. 1035.)

Here, each seated juror Avila now complains about stated he or she could set aside any external influence and fairly decide the matter on the evidence presented in the courtroom. Thus, the voir dire process ensured Avila was tried by a panel of jurors untainted by pretrial publicity, and failure to grant him additional peremptory challenges was neither error nor prejudicial. Avila's claim must, therefore, be rejected.

III. EVIDENCE AVILA PREVIOUSLY MOLESTED OTHER CHILDREN WAS PROPERLY ADMITTED UNDER EVIDENCE CODE SECTIONS 1101 AND 1108 DURING THE GUILT PHASE AND AS AGGRAVATING EVIDENCE IN THE PENALTY PHASE

Avila argues admission of his prior child molestation offenses violated his right to a fundamentally fair trial and penalty determination, deprived him of due process, and constituted an abuse of discretion and reversible error. (AOB 58-80.) The argument lacks merit. The evidence

was admissible under Evidence Code sections 1101 and 1108. Further, the trial court did not abuse its discretion in finding the probative value of the evidence outweighed any prejudice. For similar reasons, the evidence was properly admitted in the penalty phase.

A. The Defense Motion to Exclude Evidence of Avila's Prior Acts of Child Molestation and the Trial Court's Ruling Regarding the Admissibility of the Evidence

Prior to trial, Avila filed a motion to exclude evidence that he molested Catherine, Alexis, and Cara in the year preceding Samantha's abduction, molestation, and murder. Avila had never been charged with the offense involving Cara, and was acquitted of the charges involving Catherine and Alexis in early 2001. Avila contended the prior offense evidence was weak because in addition to the acquittal, the victims' complaints were not corroborated and the allegations made by Catherine and Alexis came after his bitter separation from Catherine's mother, Avila's ex-girlfriend. Avila also contended the evidence should have been excluded under Evidence Code section 352, based on the speculative assertion he had already been "convicted" by pre-trial publicity and the jury would assume him a habitual child molester. And, he separately contended the evidence would infect the penalty phase and the jury would consider the offenses for which he was acquitted as aggravating evidence. (See AOB 58-60, referring to 43 CT 645-655; 15 RT 2812-2816, 2818.)

The prosecution asserted the evidence was probative to Avila's identity as the perpetrator of the charged offenses and motive under Evidence Code section 1101, as well as Avila's propensity to molest young girls under Evidence Code section 1108. The prosecution theorized Avila knew young girls resided at the Smoketree condominium complex and went there again to molest Catherine, or at least abduct a young girl to gratify his

sexual desires.[18] Additionally, the evidence was relevant to prove Avila's motive to murder Samantha, in order to eliminate a victim-witness and avoid being arrested and subjected to another trial, thereby escaping punishment a second time. (See 34 RT 6538 [People's rebuttal].) Further, the prosecution maintained the prior crimes evidence was not unduly prejudicial: unlike the present offenses, the uncharged crimes involving Catherine, Alexis, and Cara did not involve any brutal sexual assaults or murder, so even if the jury believed Avila committed the prior offenses, it would not naturally assume he committed the charged crimes. On a separate basis, the prosecution argued the evidence was admissible during the penalty phase trial under factor (a), since it involved the nature and circumstances of the crime, and under factor (b), as other crimes evidence. The prosecution alternatively suggested that if it was not admissible under factors (a) and (b), that the court could instruct the jury it should not consider the offenses which resulted in acquittals. (45 CT 11972; 15 RT 2806-2812, 2817.)

The trial court ruled the prior crimes evidence admissible under Evidence Code section 1108, during the guilt phase trial. Moreover, the court determined any prejudicial affect was relatively minimal under Evidence Code section 352, given that the probative value was extremely

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[18] As noted in the Statement of Facts, in January of 2001, a Riverside County Superior Court jury found Avila not guilty of the molestations of Catherine ands Alexis. (26 RT 4746-4747.) After the acquittal Avila bragged to his sister Elvira that because of "double jeopardy," he could now do anything he wanted to "that little girl" and never again be criminally charged. (26 RT 4752-4753.) While Avila's motive was not expressed or clear, the People theorized he returned to the condominium complex with a plan to find and molest Catherine again, or decided at some point to simply take Samantha. (See 26 RT 4747-4753 [evidence]; 33 RT 6375-6376 and 6409-6410 [People's closing statement] 34 RT 6538-6540, 6557-6538 [People's rebuttal argument].)

high and in light of the conduct being less brutal and relatively minimal when compared to the instant case, plus the fact that these offenses did not involve convictions. The trial court was also confident the jury would follow its instructions on the nature of the prior offense evidence, and that it may consider the previous acquittals in determining its relevance for the present crimes. As to the penalty phase trial, the court deferred ruling concerning admissibility of the evidence. (15 RT 2819-2821.)

B. Prior Acts of Molestation Evidence[19]

When Catherine was about seven years-old, she and her brothers lived with their father at the Smoketree condominiums in Stanton. There she became friends with other young girls, including Samantha. Every other weekend from early 1997 through March of 1999, Catherine and her brothers stayed with her mother in Lake Elsinore. Avila was living with Catherine's mother and he would come to pick her up at the complex. (25 RT 4569-4572, 4587-4588, 4592, 4594-4595, 4596, 4660, 4662.)

Avila wanted Catherine to sleep in bed with her mother and him. (25 RT 4661-4662.) And when Catherine's mother was away at work, Avila would babysit her. He also sexually molested her over 50 times. He never sexually penetrated her, but would have her take off her clothes, kiss her mouth and vagina, masturbate himself, and ask her to insert tubes into her vagina for practice so he could have intercourse with her when she was older. He showed her pornographic films and even filmed her. Sometimes during the molestations, Avila would put his hand over her mouth, jerk her, and threaten, "don't move." Catherine was initially afraid to report the incidents, but eventually complained about them to both her mother and father around December of 1999. (25 RT 4586-4588, 4589, 4596-4604,

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[19] The trial court provided a limiting instruction before prior offense testimony was presented. (24 RT 4453-4454.)

4634, 4660, 4677-4678.) Avila had threatened to hurt her and her family if she told anyone, but when she found out one of her friends had been molested by Avila, it "gave me the courage to tell." (25 RT 4604-4605.)

Alexis was Catherine's cousin, and sometimes on weekends visited Catherine and her aunt in Lake Elsinore. On one visit when Alexis was about five, Avila told the girls to take off their clothes and play together. (24 RT 4474.) During another visit when Alexis was about seven, Avila put his hand under each girl's pajamas and onto the "private area and moved it fast," to show them how to masturbate. (24 RT 4455-4461, 4481; 25 RT 4641.) Catherine told Alexis to let him do it, because "it feels good." (24 RT 4469.)

Avila also molested Cara both during and before he moved into her home. The summer before he moved in, Avila offered to take Cara to the Knott's Berry Farm amusement park, so Cara stayed with him the night before. That evening Avila asked her to touch his penis and inserted a test tube into her vagina. He put his hand over her mouth and warned her that if she told anyone about this incident "someone could be killed." (24 RT 4514-4515, 4520-4524, 4532-4533, 4542.) And after Avila broke up with Catherine's mom and moved in with Jose, Cara saw photos of young girls having sex with adult men on Avila's computer. He would also tickle her "legs and by my private parts." (24 RT 4515.) In addition, Avila choked her on nine to ten occasions, when he became angry with her. (24 RT 4519.)

Before the testimony, and again at the conclusion of the guilt phase trial, the trial court instructed the jury it could consider the prior offenses for the "limited" purposes it was offered, if it determined by a preponderance of the evidence that Avila committed the offenses. And in making that determination, the jury could consider the previous acquittals. The trial court also instructed the jury the prior offenses were but one factor

they could consider in evaluating whether the prosecution had proved Avila's guilt for the charged offenses beyond a reasonable doubt. (24 RT 4453-4454; 33 RT 6331 and 6334-6340; 46 CT 12403 et seq. [CALJIC Nos. 2.50.01, 2.50.1, 2.50.2, 2.90].)

In regard to the penalty phase, the prosecutor conceded that because Avila had been acquitted, the incidents involving Catherine and Alexis were inadmissible in the penalty phase as prior criminal activity under factor (b). This was correct. (*People v. Lewis & Oliver* (2006) 39 Cal.4th 970, 1052; *People v. Anderson* (2001) 25 Cal.4th 543, 584.) But the prosecution contended those offenses were still admissible as circumstances of the offense under factor (a), as evidence of Avila's premeditation and motive for the murder. To that end, the court and both parties agreed the prosecutor could argue that "the motive for this killing was to avoid having to go through a sexual assault trial as he had in the past," but not otherwise refer to the offenses involving Catherine and Alexis. Further and over Avila's objection that it was unduly prejudicial, the trial court ruled the incident involving Cara could be considered as aggravation under factor (b). (47 CT 12526-12534; 34 RT 6590-6601.)

In accordance with the parties' agreement and the court's ruling, the prosecutor made limited references to the Catherine and Alexis incidents during the penalty phase argument. The prosecutor briefly asked the jury to consider only the prior criminal activity involving Cara as aggravating evidence under factor (b), because it provided "insight" into Avila, but did not ask the jury to impose the death penalty because of this previous offense. (36 RT 7126-7127.) During penalty phase instruction, the court instructed the jury that before a juror can consider this as evidence of other violent criminal activity in aggravation, he or she must find the existence of such activity beyond a reasonable doubt. (34 RT 6613-6614; 35 RT 7013-

7014, 7110-7111; see also *People v. Foster* (2010) 50 Cal.4th 1301, 1364; *People v. Huggins* (2006) 38 Cal.4th 175, 239.)

C. The Trial Court Properly Admitted Evidence of Avila's Prior Acts of Child Molestation Under Evidence Code Sections 1101 And 1108

Evidence Code sections 1101 and 1108, both permit in some capacity the introduction of prior offenses and uncharged misconduct. (*People v. Villatoro* (2012) 54 Cal.4th 1152, 1161-1162.) This may include evidence of an offense that resulted in an acquittal. (See *People v. Mullens* (2004) 119 Cal.App.4th 648 [in sex offense prosecution in which trial court admitted propensity evidence defendant committed an uncharged sex offense, evidence the defendant was acquitted of that offense is admissible].) A trial court's rulings on the relevance, prejudice, and admission or exclusion of other crimes evidence under Evidence Code sections 1101 and 1108, as well as under section 352, are reviewed for abuse of discretion. (*People v. Davis, supra*, 46 Cal. 4th at p. 602; *People v. Carter* (2005) 36 Cal.4th 1114, 1147.)

This Court recently discussed the rules governing admissibility of evidence under section 1101:

> In order to be admissible to prove intent, the uncharged misconduct must be sufficiently similar to support the inference that the defendant '"probably harbor[ed] the same intent in each instance." [Citations.]' [Citation.] [¶] A greater degree of similarity is required in order to prove the existence of a common design or plan.... [¶] To establish the existence of a common design or plan, the common features must indicate the existence of a plan rather than a series of similar spontaneous acts, but the plan thus revealed need not be distinctive or unusual.... [¶] The greatest degree of similarity is required for evidence of uncharged misconduct to be relevant to prove identity. For identity to be established, the uncharged misconduct and the charged offense must share common features that are sufficiently distinctive so as to support the inference that the same person committed both acts. [Citation.]

'The pattern and characteristics of the crimes must be so unusual and distinctive as to be like a signature.'" [Citation.] [fn. omitted] ¶ Other-crimes evidence is admissible to prove the defendant's identity as the perpetrator of another alleged offense on the basis of similarity "when the marks common to the charged and uncharged offenses, considered singly or in combination, logically operate to set the charged and uncharged offenses apart from other crimes of the same general variety and, in so doing, tend to suggest that the perpetrator of the uncharged offenses was the perpetrator of the charged offenses." [Citation.]' [Citation.] The inference of identity, moreover, need not depend on one or more unique or nearly unique common features; features of substantial but lesser distinctiveness may yield a distinctive combination when considered together. [Citation.]."

(*People v. Vines* (2011) 51 Cal.4th 830, 856-857.)

And in regard to admission under section 1108, this Court explained,

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 for 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* (1999) 21 Cal.4th 903, 915, 89 Cal.Rptr.2d 847, 986 P.2d 182 (*Falsetta*).)"

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

In this case, the prior recent molestations of Catherine, Alexis, and Cara, were properly admitted during the guilt phase under Evidence Code

section 1101, to show Avila's intent and motive.[20] They were also separately admissible as propensity evidence under Evidence Code section 1108.[21]

The prior offenses were relevant to Avila's intent under section 1101, in that he at least "probably harbor[ed]" the same intent to molest Catherine again, if not yet another young (preferably blonde) girl. (See *People v. Scott* (2011) 52 Cal.4th 452, 471 ("To be admissible to prove intent, the charges must be sufficiently similar to support the inference that the defendant probably harbored the same intent in each instance" and citing 2 Wigmore, Evidence (Chadbourne rev. ed. 1979) § 302, p. 241 ["The recurrence of a similar result ... tends (increasingly with each instance) to negative accident or inadvertence or self-defense or good faith or other innocent mental state, and tends to establish (provisionally, at least, though not certainly) the presence of the normal, i.e., criminal, intent accompanying such an act...."].)

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[20] As noted above, the trial court ruled the evidence admissible under section 1108, presumably because the parties primarily discussed this evidence under Evidence Code section 1108 while marginally discussing section 1101. In regards to section 1101, the prosecution argued the evidence was admissible to show identity, which requires the greatest degree of similarity where the pattern and characteristics of the crimes must be so unusual and distinctive as to be like a signature. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 403.) Admittedly, the prior offenses were not as brutal as the molestation here, but the present and prior offenses all involved some form of vaginal penetration. Regardless, this Court need not determine whether the evidence of identity was sufficient in this case, because the trial court properly found the evidence admissible for other reasons.

[21] That this was a homicide case does not affect the admissibility of 1108 evidence, because Avila was also charged with sexual related offenses and the murder occurred while in the commission of sexual offenses. (*People v. Story* (2009) 45 Cal.4th 1282, 1291-1292.)

Avila's prior molestation of Catherine was coupled with an unusual attraction to her, so much so that Catherine's mother ended her relationship with him. (25 RT 4683.) And he also always commented about Catherine's beauty to Cara. (24 RT 4517.) Simply put, Avila was a pedophile drawn to Catherine. And after his acquittal, Avila believed he was free to molest Catherine again without getting caught. (26 RT 4753.) Indeed, the day after viewing an incest story on the family computer, Avila returned to the very area where he knew Catherine often lived- evidencing desire to again molest her, or at least another young girl.

Admittedly, Avila's prior offense victims were securely inside the home where he lived and he had no need to "hunt" them like Samantha. But if Avila intended to find and molest Catherine, that he instead took Samantha did not vitiate such intent. In any event, even if Avila changed his mind when he arrived, or even intended to prey upon another child, he clearly groomed his prior victims and their parents to cultivate trust and facilitate his being alone with them. In that respect, Avila went to a place where he knew other children lived and played outside. These children might recognize him and not be on guard, or he could take better advantage of an opportunity to find and be alone with a child without adult supervision. And in fact, Avila cultivated Samantha's trust here, by asking her to help find his lost puppy.

Avila's recent acquittal emboldened him to continue molesting Catherine and it was entirely reasonable to infer that he wished to find and molest her again, or at the very least molest another young girl. All of this was in the belief there would be no consequence to him. Alternatively, the prior molestations involved Avila putting his hand over the children's mouths and threatening to kill them if they told anyone. Samantha's murder thus served a separate ulterior purpose, one Avila perhaps realized

after he had been caught: eliminate the only witness to his depraved sexual acts to prevent arrest and face another trial.

But even if not admissible under section 1101, the prior offense evidence was admissible as propensity evidence under section 1108. As this Court has recognized:

> Regardless of the admissibility of the challenged evidence under Evidence Code section 1101, subdivision (b), there was no error in the Toni P. evidence being considered by the jury because it was admissible under Evidence Code section 1108 to show that defendant had a predisposition to commit the sexual offenses in this case. (See *Davis, supra*, 46 Cal.4th at p. 603, fn. 6, 94 Cal.Rptr.3d 322, 208 P.3d 78; see also *People v. Smithey* (1999) 20 Cal.4th 936, 972, 86 Cal.Rptr.2d 243, 978 P.2d 1171 (*Smithey*) [""""[A] ruling or decision, itself correct in law, will not be disturbed on appeal merely because given for a wrong reason. If right upon any theory of the law applicable to the case, it must be sustained regardless of the considerations which may have moved the trial court to its conclusion.' [Citation.]" [Citation.]'"].) Admissibility under Evidence Code section 1108 does not require that the sex offenses be similar; it is enough the charged offense and the prior crimes are sex offenses as defined by the statute. (*People v. Frazier* (2001) 89 Cal.App.4th 30, 41, 107 Cal.Rptr.2d 100.) That criterion is clearly met here.

(*People v. Jones, supra*, 54 Cal.4th at p. 50.)

For similar reasons as to section 1101, there was no abuse of discretion in the admission of the prior offense evidence under section 1108. The evidence was clearly probative to Avila's propensity to molest young girls. Further, the trial court here engaged in the weighing process required by section 352, and in so doing properly observed the probative value of the prior offense evidence was not outweighed by a substantial likelihood it would prejudice the jury. (*People v. Ewoldt, supra*, 7 Cal.4th at pp. 404–407.) To that end, Avila even recognizes that, "so long as Evidence Code section 352 is properly applied to exclude unduly

prejudicial other crimes evidence, there is no due process problem." (AOB 70; see also *People v. Falsetta* (1999) 21 Cal.4th 903, 915.)

Here, the evidence was probative of Avila's propensity to commit sexual offenses (*Falsetta, supra*, at p. 915 ["evidence that [the defendant] committed other sex offenses is at least circumstantially relevant to the issue of his disposition or propensity to commit these offenses"].) And although serious crimes, they certainly were not more serious or inflammatory than the charges against Avila in the present case (see *People v. Lewis* (2009) 46 Cal.4th 1255, 1287), and, were not too remote in time from the present case.

At the very least, it cannot be said the trial court's ruling on the admissibility of this evidence constituted an abuse of discretion. (*People v. Story, supra*, 45 Cal.4th at p. 1295 ("Like any ruling under section 352, the trial court's ruling admitting evidence under section 1108 is subject to review for abuse of discretion.) Here, the court carefully considered the evidence, found it had significant probative value and ensured that it would minimize any prejudice with its instructions. Further, the evidence did not take long to present in an otherwise extensive capital trial. The ruling came well within the court's discretion and Avila presents no compelling argument that its admission in the guilt phase resulted in prejudicial error.

But even if this Court found error, Avila's prejudice argument does not suggest the court improperly instructed the jury on the manner to consider or weight the other offense evidence. Instead, he baldly speculates the jury may not have followed the court's admonition not to consider the offenses for which he was acquitted during the penalty phase. (AOB 73.) Thus, the prejudice argument asserts the jury might not have convicted him and sentenced him to death if it had not learned of the prior offenses and in so doing, points to what he perceives to be weakness in witness testimony and in the physical evidence collected. (See AOB 75-80.) Curiously, Avila

does not separately challenge the sufficiency of the evidence that supported his conviction or the special circumstance finding.

In any event, given the uncharged act evidence was significantly less inflammatory than the charged offenses, there was minimal risk the jury would be motivated to punish Avila for the uncharged offenses, and Avila presents no convincing argument that the section 352 analysis employed here was not a sufficient safeguard against prejudice. Moreover, and despite Avila's perception to the contrary, he and his car were identified at the scene of the abduction, his movements and whereabouts before and after the abduction coincided with the location of the kidnapping and location he dumped Samantha's body, his actions after the murder were unusual and suspicious, and forensic evidence placed him at the scene, his DNA under Samantha's fingernails, and her DNA in his car. Consequently, Avila fails to establish that admission of the evidence resulted in a manifest miscarriage of justice. (*People v. Lewis*, *supra*, 46 Cal.4th at pp. 1286-1289.)

Alternatively, Avila challenges admission of this evidence during the penalty phase. But the prior offenses against all girls were entirely admissible during the penalty phase under section 190.3, subdivision (a) [nature and circumstances of the crime], because they supported the prosecution's theory as to why Avila returned to this condominium complex a mere 18 months after his acquittal. (See *People v. Guerra* (2006) 37 Cal.4th 1067, 1154, overruled on other grounds, *People v. Rundle* (2008) 43 Cal.4th 76, 151 (evidence that bears directly on the defendant's state of mind contemporaneous with the capital murder is relevant under factor (a), as circumstances of the crime.) In *Guerra*, this Court noted that because the defendant's mental condition suggested he "experienced 'emotional fulfillment, psychological satisfaction from pain' and enjoyed causing [the victim] to suffer to be relevant to the

circumstances of [the victim's] murder, such matters could properly be considered by the jury as evidence in aggravation under section 190.3, factor (a)." (*Id.* at p. 1154.) Here, Avila's state of mind was one of committing forcible sexual molestations against one particular, or other young children under the belief he could do so without consequence.

Additionally, under section 190.3, subdivision (b), a jury may hear facts surrounding prior criminal activity involving force or violence. (E.g., *People v. Moore* (2011) 51 Cal.4th 1104, 1135; *People v. Carey* (2007) 41 Cal.4th 109, 135; *People v. Jurado* (2006) 38 Cal.4th 72, 135; *People v. Zapien* (1993) 4 Cal.4th 929, 987; *People v. Mickle* (1991) 54 Cal.3d 140, 187; *People v. Melton* (1988) 44 Cal.3d 713, 754.) Thus, the incident with Cara, where Avila inserted a test tube into her vagina was separately admissible under factor (b), so long as the jury found it proven beyond a reasonable doubt. And as the prosecution argued, this incident also involved evidence Avila threatened to kill her if she told anyone, which suggested he had no difficulty in killing a victim to avoid punishment. (See 34 RT 7127.)

Consequently, the prior offenses were properly admitted during the guilt and penalty phases. Avila's claims to the contrary should be rejected.

IV. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING CRIME SCENE PHOTOGRAPHS OR LETTING WITNESSES DESCRIBE PORNOGRAPHY FOUND ON AVILA'S COMPUTER

Avila argues crime scene photographs were gruesome, inflammatory, unduly prejudicial, cumulative, and violated his rights to a fair trial and penalty determination under the Eighth Amendment and Due Process Clause of the Fourteenth Amendment, as well as analogous California constitutional provisions. He makes a similar argument for the admission

of child pornographic images found on his family's home computer.[22] (AOB 77-94.) Neither has merit.

The trial court's relevance determination, like Evidence Code section 352 and 1101 rulings as to other uncharged offenses, are subject to the deferential abuse-of-discretion standard. (*People v. Carter, supra*, 36 Cal.4th at p. 1147 [Evid. Code, § 352]; *People v. Brown* (2003) 31 Cal.4th 518, 577 [relevance]; *People v. Lewis* (2001) 25 Cal.4th 610, 637 [Evid. Code, § 1101].) With regard to the admission of probative evidence, this Court has observed:

> The prejudice which exclusion of evidence under Evidence Code section 352 is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence. All evidence which tends to prove guilt is prejudicial or damaging to the defendant's case. The stronger the evidence, the more it is "prejudicial," The "prejudice" referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues. In applying section 352, "prejudicial" is not synonymous with "damaging."

(*People v. Karis* (1988) 46 Cal.3d 612, 638, internal quotation marks omitted.)

Evidence is not rendered inadmissible under section 352 unless its probative value is "substantially" outweighed by the risk of such prejudice. In making this determination, trial courts enjoy broad discretion. (*People v. Michaels* (2002) 28 Cal.4th 486, 532.) Further, that discretion will only be

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[22] The court and parties discussed the admissibility of the photographs and the pornography at the same time. (See 17 RT 3125.) Avila objected to the crime scene photos and the pornography found on the computer under Evidence Code section 352, as well as the Fifth, Sixth, Eighth and Fourteenth Amendments and the California Constitution article II, sections 15, 16 and 17. His argument focused on section 352. (17 RT 3129-3130.)

disrupted on appeal upon a showing that it was exercised "in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10.)

First and in regard to Avila's possession of child pornography, the court agreed with the prosecution that the incest story downloaded the day before Samantha's abduction was probative to his motive and intent for molesting then killing Samantha. In so doing, the court also recognized that the images found on his computer (which depicted inter alia a young girl straddling an adult man's penis and oral sex between adult males and children) were potentially inflammatory and exercised its discretion under section 352 to exclude the images themselves. Instead, the court obviated potential prejudice by having witnesses merely testify about the pornography found on the computer. (See 15 RT 2720; 17 RT 3135-3145, 3153-3156.)

The jury learned the computer to which Avila had access contained several child pornography images. This included photographs of adults and children engaged in various sexual activities, and over a dozen movie clips of sex acts between adults and children or between children and children. And at about 4:30 a.m. on July 14, someone printed out a multi-part incest story involving an adult man engaging in sexual activities with his daughters and granddaughters. Also stored on the computer were chat room conversations where the participants shared feelings and sexual desires concerning children. (25 RT 4700-4702; 29 RT 5347-5363, 5366-5372.) The jury also heard from Cara's father, Jose, that he found a photo inside the bedroom once occupied by Avila, of a young Asian girl straddling a man's penis. (24 RT 4494, 4498-4499.)

During his guilt-phase closing argument, the prosecutor briefly discussed this evidence, in asking the jury to conclude Avila's motive and intent was the sexual molestation of Samantha. (33 RT 6404-6410.) The

prosecution did not mention the photographs during the penalty phase argument. Admission of the evidence, particularly in this limited fashion, was entirely proper. (*People v. Memro* (1995) 11 Cal.4th 786, 865 ["the photographs, presented in the context of defendant's possession of them, yielded evidence from which the jury could infer that he had a sexual attraction to young boys and intended to act on that attraction"].)

Second and in regard to admission of crime scene photographs, six photographs were presented and the prosecutor maintained the crime scene photographs were relevant and probative as to Samantha's body and the trauma inflicted to her vaginal and anal area, in order to prove she had been sexually assaulted before her murder. (17 RT 3125-3134 (identified as Crime Scene- People, or "CS-P").) The court recognized some photographs were particularly gruesome and thus specifically addressed its discretion under Evidence Code section 352 before ruling some admissible. (15 RT 2821-2824; 17 RT 3133-3135.) In so doing, the court even remarked that photograph CS-P4, which was a closer view of Samantha's naked body with legs spread and that showed bleeding of the sexual organs- was "the worst of the lot." Nevertheless, it ruled this photo admissible because it was probative and not inherently prejudicial. (17 RT 3135.) Thus and to corroborate the pathologist's testimony, the jury observed crime scene photographs that depicted Samantha's bruised and bleeding vagina and anus. (24 RT 4416 et seq.) The prosecution did not seek to admit any autopsy photographs. (17 RT 3125-3126.) Consequently, these were the only photographs before the jury that displayed the sexual assault and trauma inflicted to Samantha and they were no more graphic than what would have been presented in autopsy photographs.

Avila's arguments against admission of the crime scene photos are that (1) they had no probative value because he did not contest sexual assault, (2) they were cumulative to the pathologist's testimony, and (3)

they were unduly prejudicial because, any juror "would have to be devoid of all human emotion to objectively weigh the evidence." (AOB 90.) The arguments lack merit.

First, whether Avila disputed that a sexual assault occurred is not consequential, because the prosecution nonetheless was required to present evidence from which the jury could conclude beyond a reasonable doubt that the molestation offense occurred. "[P]hotographs of murder victims are relevant to help prove how the charged crime occurred," and prosecutors are "not limited to details provided by testimony of live witnesses." (*People v. Booker* (2011) 51 Cal.4th 141, 170-171; *People v. Gurule* (2002) 28 Cal.4th 557, 625 ["[P]rosecutors ... are not obliged to prove their case with evidence solely from live witnesses; the jury is entitled to see details of the victims' bodies to determine if the evidence supports the prosecution's theory of the case."]; *People v. Blacksher* (2011) 52 Cal.4th 769, 827 [autopsy photos properly admitted where evidence showed nature and placement of fatal wounds, and photo illustrating wound indicated victim in defensive position just before being shot was relevant to issue of malice and intent to kill].)

Second, the photographs corroborated the medical examiner's testimony and helped the jury to weigh his credibility, and better understand his testimony about the injuries to Samantha before she died and her death. In any event, the cumulative nature of the photographs was not sufficient to order them excluded.

Avila's argument is really a thinly-veiled prophylactic effort to exclude both autopsy and crime scene photographs as a matter of law,

because their very nature evokes prejudice.[23] The law is to the contrary. As this Court observed in cases involving the admissibility of photographs over a section 352 objection in murder cases, "'"'"[m]urder is seldom pretty, and pictures in such a case are always unpleasant'" . . . .'" (*People v. Cowan* (2010) 50 Cal.4th 401, 475, citing *People v. Pierce* (1979) 24 Cal.3d 199, 211.) Of course, the same is true with child pornography images. But unpleasant pictures are routinely admitted in criminal trials. (See *People v. Navarette* (2003) 30 Cal.4th 458, 496 ["sexually suggestive" photograph of unclothed murder victim necessary for the jury to see as it was the nature of the crime]; *People v. Memro, supra*, 11 Cal.4th at pp. 865- 866 [trial court did not abuse discretion in admitting pictures of child victims murdered in "ghastly manner"].)

In this case, the photos were highly probative as to the location of the body in this area, as well as showed the jury the manner in which she was found- naked and bloodied by the assault which occurred before her death. The photos helped the jury to better understand the manner in which Samantha was killed and her body discarded, and also helped explain the evidence collected at the scene. (See 33 RT 6382-6382 [People's closing describing conditions observed and arguing "he doesn't throw her body off that side. He wants it found for some reason" and 6385 ["What kind of an animal poses a little girl like this?"] and 6386 [asking jurors to observe injuries and that "he ripped her up so bad. He got off on that."].)

Further, the record shows that trial court was keenly aware of the effect and potential prejudice that flowed from photographs which depicted a sexually molested and murdered child. But the court was also equally

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[23] Avila relies in part on cases that address the admission of autopsy photographs. (See AOB 81-84, referring to e.g. *People v. Burns* (1952) 109 Cal.App.2d 524; *People v. Poggi* (1988) 45 Cal.3d 306.)

mindful of the relevance and probative value of this evidence. As a result, the court admitted some photographs and excluded others. It cannot be said that in so doing, it abused its discretion.

V. THE TRIAL COURT PROPERLY ADMITTED VICTIM IMPACT EVIDENCE DURING THE PENALTY PHASE OF AVILA'S TRIAL

Focusing on one photograph of Samantha dressed as an angel on the Halloween before her death, Avila contends the death judgment must be reversed because the victim impact evidence during the penalty phase of his trial invited the jury to base its decision on emotion and thus created a fundamentally unfair penalty trial and unreliable sentence of death. (AOB 94-99.) Avila recognizes the victim impact evidence in this case was far less extensive and intensive than the evidence presented in the cases he relies upon for his argument. Regardless, the trial court acted well within its broad discretion and neither committed error nor denied Avila any constitutional right in admitting this evidence.

Victim impact evidence is admissible under federal law "unless such evidence is so unduly prejudicial that it results in a trial that is fundamentally unfair," and under state law "so long as it is not so inflammatory as to elicit from the jury an irrational or emotional response untethered to the facts of the case." (*People v. Taylor* (2010) 48 Cal.4th 574, 645-646, quotation marks omitted.)

In California, Penal Code section 190.3, subdivision (a), permits the prosecution to establish aggravation by the circumstances of the crime. The word "circumstances" does not mean merely immediate temporal and spatial circumstances, but also extends to those which surround the crime "materially, morally, or logically." (*People v. Edwards* (1991) 54 Cal.3d 787, 833.) Factor (a), allows evidence and argument on the specific harm caused by the defendant, including the psychological and emotional impact on surviving victims and the impact on the family of the victim. (*Id.* at pp.

833-836; see also *People v. Brown* (2004) 33 Cal.4th 382, 398; *People v. Taylor* (2001) 26 Cal.4th 1155, 1171; *People v. Mitcham* (1992) 1 Cal.4th 1027, 1063; *People v. Pinholster* (1992) 1 Cal.4th 865, 959.)

In this case, the victim impact evidence was entirely proper. Before the penalty phase began, the prosecutor notified the trial court and defense counsel of his intention to introduce victim impact evidence, including two photographs where Samantha was dressed as an angel or princess. The defense objected and the trial court marked the photographs and reserved ruling until after it had heard the testimony. (34 RT 6588; see also 34 RT 6688-6690 [renewed objection and ruling].)

During the penalty phase trial, the People relied on the evidence presented at trial as evidence in aggravation and otherwise presented very little evidence beyond victim impact. (34 RT 6578.) The People only presented two witnesses, Samantha's mother and grand-mother, as well as a few photographs of Samantha while alive.

Samantha's mother Erin described her reaction to learning of her daughter's death, of how she collapsed on the floor of the Sheriff's office, her painful memories revived being in the same courtroom with Avila, the nightmares of her step-son, and her own inability to fully enjoy being a mother to her newly born child. (34 RT 6623-6640.) Photographs, including one that depicted Samantha as an angel on the last Halloween before her death, were also admitted.[24] (34 RT 6589; 6640-6643; People's Exhs. 112-118.) During the closing penalty phase argument, the prosecutor

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[24] The prosecutor presented a conservative eight photographs. (47 CT 12534.) Other than the cumulative nature of the photographs, the defense focused only on the prejudicial affect of the one that depicted Samantha dressed as what appeared to be an angel (ie.,white dress with crown on head). (34 RT 6588-6589 [Exh. P-113].)

asked the jury to take into account the impact of Samantha's death on her family. (36 RT 7162.)

The totality of the victim impact witness testimony offered here was the very type of "personal perspectives" and testimony concerning "the kinds of loss that loved ones commonly express in capital cases." (*People v. Taylor, supra*, 48 Cal.4th at p. 646; *People v. Martinez* (2010) 47 Cal.4th 911, 961.) Such testimony, although emotional, was not surprising, shocking, or inflammatory. Instead, it was a tragically obvious and predictable consequence of Avila's murder of a young child. (*People v. Sanders, supra,* 11 Cal.4th at p. 550.)

Avila nevertheless claims that when coupled with pretrial publicity that condemned Samantha's murderer and the community having adopted her as "our little girl," this one photograph made it more likely he would be sentenced to death for killing this "angelic" little girl. (AOB 98-99.) But to suggest victim impact evidence must be limited and tailored in light of how the local community responds to the murder of a child, is devoid of any judicial support and ignores the permissible scope of victim impact testimony.

Photos of the victim alive are generally admissible in the penalty phase. A photo of a victim while alive constitutes a "circumstance of the offense" which portrays the victims as the defendant saw them at the time of the killing. (*People v. Anderson, supra*, 25 Cal.4th at p. 594; *People v. Lucero* (2000) 23 Cal.4th 692, 714; *People v. Edwards, supra,* 54 Cal.3d at p. 832.) Further, admission of this photograph did not exceed the bounds of admissible victim impact evidence. Indeed, independent of the one photograph, the entirety of the victim impact evidence admitted in this case was far less extensive than victim impact evidence this Court has upheld in other capital cases. (E.g., *People v. Prince, supra,* 40 Cal.4th at pp. 1286-1291 [cautioning against but finding no prejudicial error in admission of

video tape " montage" or photographic evidence tantamount to an emotional tribute to the victims]; *People v. Kelly* (2007) 42 Cal.4th 763, 793 [same].) Consequently, Avila's argument to the contrary should be rejected.

VI. AVILA'S CUMULATIVE-ERROR CLAIM FAILS

Avila contends that any combined prejudice from the alleged errors raised on appeal warrants reversal of the guilt and penalty phase and death judgment. (AOB 100-101.) No error occurred, and even if error is assumed to have occurred, Avila has failed to show any prejudice resulted. (*People v. McKinzie* (2012) 54 Cal.4th 1302, 143; *People v. Alfaro* (2007) 41 Cal.4th 1277, 1316; *People v. Abilez* (2007) 41 Cal.4th 472, 523.)

A criminal defendant is entitled to a fair trial, but not a perfect one, even where he has been exposed to substantial penalties. (See *People v. Marshall* (1990) 50 Cal.3d 907, 945; *People v. Hamilton* (1988) 46 Cal.3d 123, 156; see also *Schneble v. Florida* (1972) 405 U.S. 427, 432 [92 S.Ct. 1056, 31 L.Ed.2d 340]; see, e.g., *United States v. Hasting* (1983) 461 U.S. 499, 508-509 [103 S.Ct. 1974, 76 L.Ed.2d 96] ["[G]iven the myriad safeguards provided to assure a fair trial, and taking into account the reality of the human fallibility of the participants, there can be no such thing as an error-free, perfect trial, and...the Constitution does not guarantee such a trial."].)

Any claim based on cumulative error must be assessed to see if it is reasonably probable the jury would have reached a result more favorable to the defendant in the absence of the asserted errors. (*People v. Holt* (1984) 37 Cal.3d 436, 458.) Applying that analysis to the instant case, this contention should be rejected. Notwithstanding Avila's arguments to the contrary, he received a fair and untainted trial. The Constitution requires no more. And even when considered together, it is not reasonably probable that, absent the alleged errors, Avila would have received a more favorable

result, and any errors were harmless. Thus, even cumulatively, any errors are insufficient to justify a reversal of the verdict and death sentence.

VII. THIS COURT SHOULD REJECT AVILA'S ROUTINE CHALLENGES TO THE CALIFORNIA DEATH PENALTY STATUTE

Avila concedes he merely advances "routine instructional and constitutional challenges" to California's death penalty statute. (AOB 102, referring *People v. Schmeck* (2005) 37 Cal.4th 240, 303; see also 34 RT 6587.) As these challenges have repeatedly been rejected by this Court, they require little discussion.

A. Penal Code Section 190.2 is Not Impermissibly Broad

Contrary to Avila's assertion (AOB 105-108), "[s]ection 190.2, which sets forth the circumstances in which the penalty of death may be imposed, is not impermissibly broad in violation of the Eighth Amendment." (*People v. Farley* (2009) 46 Cal.4th 1053, 1133.) This Court has repeatedly rejected the claim that California's death penalty statutes are unconstitutional because they fail to sufficiently narrow the class of persons eligible for the death penalty. (*People v. Virgil* (2011) 51 Cal.4th 1210, 1288; *People v. Verdugo* (2010) 50 Cal.4th 263, 304; *People v. Schmeck, supra*, 37 Cal.4th at p. 304; *People v. Wilson* (2005) 36 Cal.4th 309, 361-362; *People v. Panah* (2005) 35 Cal.4th 395, 499; *People v. Welch, supra,* 20 Cal.4th at p. 767; *People v. Arias* (1996) 13 Cal.4th 92, 187.) Avila's claim fails because he gives no justification for this Court to depart from its prior rulings on this subject.

B. Penal Code Section 190.3 Does Not Allow For Arbitrary And Capricious Imposition of Death

Equally unavailing is Avila's claim the application of Penal Code section 190.3 in the penalty phase results in the arbitrary and capricious imposition of the death penalty. (AOB 109-112.) 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, supra*, 51 Cal.4th at p. 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.)

Nor is section 190.3, factor (a), applied in an unconstitutionally arbitrary or capricious manner merely because prosecutors in different cases may argue that seemingly disparate circumstances, or circumstances present in almost any murder, are aggravating under factor (a). (*People v. Carrington* (2009) 47 Cal.4th 145, 200.) Instead, "'each case is judged on its facts, each defendant on the particulars of his [or her] offense.'" (*Ibid.*, quoting *People v. Brown, supra*, 33 Cal.4th at p. 401, alteration in original.)

C. California's Death Penalty Scheme Provides Adequate Safeguards Against the Arbitrary Imposition of Death

1. Unanimity for aggravating factors not required

Avila contends that before choosing to impose death, jurors needed to unanimously find each aggravating factor true beyond a reasonable doubt and that they outweighed mitigating factors. (AOB 114.) 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 Avila's right to Equal Protection. (*People v. Cook* (2007) 40 Cal.4th 1334, 1367; *People v. Griffin* (2004) 33 Cal.4th 536, 598.)

2. Avila's burden of proof argument should be rejected

Avila also contends the failure to assign a burden of proof in California's death penalty scheme should be revisited in light of the United States Supreme Court's decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435]; *Ring v. Arizona* (2002) 536 U.S. 584 [122 S.Ct. 2428, 153 L.Ed.2d 556]; *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403]; and *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856]. (AOB 115-123.) However, this Court has determined on many occasions that Penal Code section 190.3 and the pattern instructions are not constitutionally defective because they fail to require the state to prove beyond a reasonable doubt that an aggravating factor exists, and that aggravating factors outweigh mitigating factors. This Court has also consistently rejected the claim that the pattern instructions are defective because they fail to mandate juror unanimity concerning aggravating factors. (See, e.g., *People v. Russell, supra*, 50 Cal.4th at pp. 1271-1272; *People v. Bramit, supra*, 46 Cal.4th at pp. 1249-1250; *People v. Burney, supra*, 47 Cal.4th at pp. 267-268.)

> "[U]nder the California death penalty scheme, once the defendant has been convicted of first degree murder and one or more special circumstances has been found true beyond a reasonable doubt, death is no more than the prescribed statutory

> maximum for the offense; the only alternative is life imprisonment without the possibility of parole." [Citation].

(*People v. Ward* (2005) 36 Cal.4th 186, 221-222, quoting *People v. Prieto* (2003) 30 Cal.4th 226, 263.)

As this Court explained in *Prieto*, "in the penalty phase, the jury merely weighs the factors enumerated in section 190.3 and determines 'whether a defendant eligible for the death penalty should in fact receive that sentence.'" (*People v. Prieto, supra*, 30 Cal.4th at p. 263, quoting *Tuilaepa v. California, supra*, 512 U.S. at p. 972; accord *People v. Virgil, supra*, 51 Cal.4th at pp. 1278-1279.) Avila gives this Court no reason to reconsider its previous holdings.

3. Written findings regarding aggravating factors are not required

Avila claims the California death penalty law violates his federal due process and Eighth Amendment rights because it does not require that the jury base a death sentence on "written findings regarding aggravating factors." (AOB 128-131.) Contrary to his assertion, "[t]he law does not deprive defendant of meaningful appellate review and federal due process and Eighth Amendment rights by failing to require written or other specific findings by the jury on the aggravating factors it applies." (*People v. Dunkle* (2005) 36 Cal.4th 861, 939, overruled on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; accord *People v. Foster, supra*, 50 Cal.4th at pp. 1365-1366; *People v. Gemache* (2010) 48 Cal.4th 347, 406.) Nor does the absence of such findings violate equal protection (*People v. Parson* (2008) 44 Cal.4th 332, 370) or a defendant's right to trial by jury (*People v. Avila* (2009) 46 Cal.4th 680, 724.) "Nothing in the [F]ederal [C]onstitution requires the penalty phase jury to make written findings of the factors it finds in aggravation and mitigation[.]" (*People v.*

Nelson, supra, 51 Cal.4th at p. 225.) Avila offers no justification for this Court to reconsider its earlier rulings.

4. There is no need for inter-case proportionality

Avila claims that the failure to conduct intercase proportionality review violates the Eighth Amendment. (AOB 131-134.) This Court has repeatedly rejected this contention and should do so again here. (*People v. Foster, supra*, 50 Cal.4th at p. 1368; *People v. Hoyas, supra*, 41 Cal.4th at p. 927; *People v. Cornwell* (2005) 37 Cal.4th 50, 105; *People v. Elliot* (2005) 37 Cal.4th 453, 488; *People v. Smith* (2005) 35 Cal.4th 334, 374; *People v. Jones* (2003) 29 Cal.4th 1229, 1267.)

5. Consideration of unadjudicated criminal activity does not offend due process

Avila contends unadjudicated activity cannot be considered as a factor in aggravation. (AOB 134-135.) But,

> [a]s we have previously made clear, when, as here, the jury is instructed it may consider evidence of unadjudicated criminal activity as a factor in aggravation only after being convinced beyond a reasonable doubt that the defendant committed the alleged criminal activity, no more is required. (*People v. Prieto, supra*, 30 Cal.4th at p. 263, 133 Cal.Rptr.2d 18, 66 P.3d 1123; *People v. Benson* (1990) 52 Cal.3d 754, 810, 276 Cal.Rptr. 827, 802 P.2d 330 [the reasonable doubt standard in this setting provides the substance of the presumption of innocence and the prosecution's burden of proof].)

(*People v. Taylor, supra*, 48 Cal.4th at pp. 657-658.)

Avila does not present any reason to revisit this conclusion.

6. The use of restrictive adjectives in sentencing factors is proper

Avila urges this Court to reconsider its earlier holdings and find the use of restrictive adjectives such as "extreme" and "substantial" in the list of potential mitigating factors act as barriers to the meaningful consideration of mitigation in violation of the Fifth, Sixth, Eighth and

Fourteenth Amendments. (AOB 135.) This argument has been consistently rejected by this Court. (*People v. Eubanks* (2011) 53 Cal.4th 110, 153; *People v. Brasure* (2008) 42 Cal.4th 1037, 1068; *People v. Avila* (2006) 38 Cal.4th 491, 614-615; *People v. Schmeck, supra*, 37 Cal.4th at p. 305; *People v. Morrison* (2004) 34 Cal.4th 698, 729–730.) Avila has offered no basis to reconsider these rulings.

7. Failure to instruct the jury that statutory mitigating factors were relevant solely as potential mitigating factors is not error

Avila argues the trial court's failure to advise the jury that mitigating factors could only be considered mitigating violated state law and his constitutional rights. (AOB 135-139.) This Court has repeatedly found no error in this regard:

> The trial court was not constitutionally required to inform the jury that certain sentencing factors were relevant only in mitigation, and the statutory instruction to the jury to consider 'whether or not' certain mitigating factors were present did not impermissibly invite the jury to aggravate the sentence upon the basis of nonexistent or irrational aggravating factors.

(*People v. Morrison, supra*, 34 Cal.4th at p. 730; see also *People v. Jurado, supra,* 38 Cal.4th at p. 143; *People v. Moon* (2005) 37 Cal.4th 1, 42.)

Avila offers no basis for this Court to reconsider its earlier rulings.

D. California's Death Penalty Scheme Comports With Equal Protection In That It Provides Adequate Procedural Safeguards to Capital Defendants When Compared to Non-Capital Defendants

Avila contends the capital sentencing scheme violates equal protection because it provides fewer procedural protections to death eligible defendants than for those in non-capital cases. (AOB 139-143.) Again, this Court has ruled otherwise:

> 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, 108 Cal.Rptr.3d 192, 229 P.3d 101; *People v. Martinez* (2010) 47 Cal.4th 911, 968, 105 Cal.Rptr.3d 131, 224 P.3d 877.)

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

Avila does not present any reason to revisit this conclusion.

E. California's Death Penalty Scheme Does Not Violate International Law

Avila contends the California death penalty scheme violates international law. (AOB 143-145.) 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, supra*, 52 Cal.4th at p. 849 [rejecting claim "again"]; *People v. Gonzales* (2011) 52 Cal.4th 254, 334; *People v. Hamilton* (2009) 45 Cal.4th 863, 961; *People v. Alfaro, supra*, 41 Cal.4th at p. 1322; accord *People v. Mungia* (2008) 44 Cal.4th 1101, 1143; *People v. Panah, supra*, 35 Cal.4th at p. 500; *People v. Ward, supra*, 36 Cal.4th at p. 222; *People v. Elliot, supra*, 37 Cal.4th at p. 488.) Avila does not present any reason to revisit these holdings.

Avila 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, supra*, 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).)

(*People v. Doolin, supra*, 45 Cal.4th at p. 456, quoting *People v. Demetrulias* (2006) 39 Cal.4th 1, 44.)

Avila gives this Court no reason to reconsider its previous holdings.

CONCLUSION

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

Dated: July 25, 2013

Respectfully submitted,

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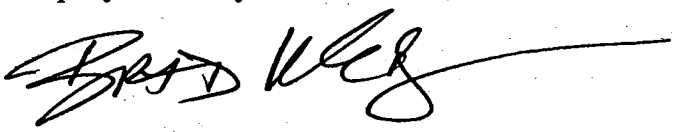

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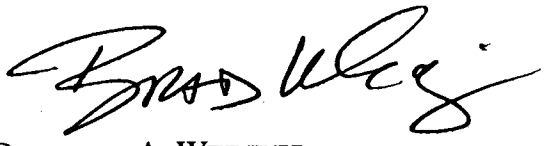
CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S BRIEF** uses a 13 point Times New Roman font and contains 20,996 words.

Dated: July 25, 2013

KAMALA D. HARRIS
Attorney General of California



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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Alejandro Avila** No.: **S135855**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On July 25, 2013, I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 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 July 25, 2013, at San Diego, California.

Bonnie Peak
Declarant

Bonnie Peak
Signature

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