In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **TROY LINCOLN POWELL,** **Defendant and Appellant.**	**CAPITAL CASE** Case No. S137730

Los Angeles County Superior Court
Case No. BA240299
The Honorable William R. Pounders, Judge

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

In an indictment issued by the Los Angeles County Grand Jury, appellant was accused in count I of murdering Tammy Epperson in violation of Penal Code section 187, subdivision (a).[1] It was further alleged appellant murdered Epperson while engaged in the crime of rape, rape by instrument, and mayhem, all within the meaning of section 190.2, subdivision (a)(17), and the murder was intentional and involved the infliction of torture, within the meaning of section 190.2, subdivision (a)(18). In count II, appellant was accused of the forcible rape of Epperson, in violation of section 261, subdivision (a)(2). In count III, appellant was accused of the sexual penetration by a foreign object by means of force and violence against Epperson, in violation of section 289, subdivision (a)(1). In count IV, appellant was accused of committing mayhem upon Epperson, in violation of section 203. In count V, appellant was accused of torturing Epperson, in violation of section 206. (3CT 347-350.)

Before arraignment, appellant's trial counsel declared a doubt as to appellant's mental competency pursuant to section 1368. (3CT 355.) The trial court held a section 1368 hearing and found appellant to be mentally competent. (3CT 360.)

Appellant was arraigned, pled not guilty to all counts, and denied all special allegations in the indictment. (3CT 365-366.) The prosecution determined that it would seek the death penalty. (3CT 385.) Appellant's motion to dismiss the indictment as a violation of his due process rights was denied. (3CT 392-412; 3CT 494-512.)

Appellant's trial counsel represented to the court his desire to have appellant withdraw his not guilty plea and enter a plea of not guilty by

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

reason of insanity. The trial court and both counsel conferred and agreed not to have appellant change his plea at that time, but the trial court declared a doubt as to appellant's competency and criminal proceedings were suspended. (3CT 417-418.) The trial court held a competency hearing and found appellant competent to stand trial. (3CT 431-432.)

Appellant pled not guilty and not guilty by reason of insanity. (3CT 432.) A jury found appellant guilty as charged in count I of the murder of Epperson, found it to be murder in the first degree, and further found the murder was committed while appellant was engaged in rape, mayhem, and torture. The jury also found appellant guilty as charged in counts II, IV, and V of the forcible rape, mayhem, and torture of Epperson. The jury found appellant not guilty as charged in count III of sexual penetration by a foreign object by force and fear and found not true that the murder was committed while appellant was engaged in rape by instrument. (12CT 2955-2961.)

A sanity phase was held, and the jury found appellant was sane at the time he murdered, forcibly raped, committed mayhem upon, and tortured Epperson. (13CT 3127-3130.)

A penalty phase was held, and the jury could not reach a verdict. The trial court declared a mistrial and discharged the jury. (13CT 3174.) Appellant's motion to dismiss the penalty phase was denied. (13CT 3177-3186.)

A new jury was selected, and the penalty phase was retried. (13CT 3255-3290.) The jury fixed the penalty at death. (23CT 5646.) Appellant's motion for a new penalty phase trial was denied. (23CT 5654-5661, 5687.)

Appellant's motion to modify the verdict pursuant to section 190.4 was denied. The trial court sentenced appellant to death for Epperson's murder with the special circumstances of rape, mayhem, and torture. The trial court imposed and stayed pursuant to section 654 the concurrent terms

of eight years each for count II (rape) and count IV (mayhem) and life in prison for count V (torture). (23CT 5667-5672, 5689-5691, 5692-5698.) Credit for 1,773 days of actual custody was given. (23CT 5698.)

This automatic appeal is from the judgment of death. (23CT 5707-5716.)

STATEMENT OF FACTS

A. Guilt Phase

1. People's Case-in-Chief

a. The Murder of Tammy Epperson

(1) Events Leading Up to the Murder

The Weingart Center in downtown Los Angeles housed multiple assistance agencies, including recovery programs and employment services. The Weingart Center had 12-step programs for men, women, and children recovering from alcoholism and drug abuse. Housing at the Weingart was short-term, about six months. (8RT 1021-1022.)

Between 1998 and 1999, appellant, Timothy Todd,[2] and Tammy Epperson were all in the Weingart's Stairs program, a rehabilitation program for parolees. In the program, Todd, a recovering addict, met Epperson, an ex-heroin addict, and they became friends. (8RT 1041; 9RT 1146-1147, 1149, 1171.) Epperson did not judge Todd and was very supportive. (9RT 1163.)

Todd had met appellant in prison and was friends with him. Appellant had protected Todd in prison and saved his life. Because Todd was gay, he would have been stabbed in prison. (9RT 1147, 1187.) When

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[2] Todd had prior convictions for robbery in 1992 and 1995, both for robbing "johns" when Todd was a prostitute. The 1992 robbery was committed to support Todd's drug usage. (9RT 1147-1148.)

Todd left prison, he weighed 520 pounds and had gained 60 pounds in the last year before he testified at trial. (9RT 1148-1149.)

In 1999, Ronald Sims[3] also met Epperson at the Stairs program. After Sims met Epperson, they became boyfriend and girlfriend. (8RT 1041-1042.) In addition, Sims knew appellant through the Stairs program where they lived in the same building, but Sims had never met or spoken to appellant. (8RT 1049, 1061-1062, 1069-1070.) One time, as Sims was leaving the Weingart Center, appellant was going in and said to Sims, "You punk m.f." Sims turned around and looked at him, and appellant turned around like he was getting ready to charge Sims. Sims went out through the door. (8RT 1049.)

Todd and Epperson were in the 12-step program and graduated from the program together. (9RT 1150.) After Epperson graduated, she moved to the nearby Ballington Plaza, located at 622 Wall Street in downtown Los Angeles. (8RT 1009; 9RT 1154.) Todd moved to the Courtland Hotel. Appellant was still at the Weingart. (9RT 1154.)

The Ballington Plaza was predominantly low-income housing for low-income wage earners, people referred from various drug rehabilitation programs, and people from inmate rehabilitation programs. The Ballington Plaza had rules for residents, including that residents must pay rent on time and abide by specific rules for visitors. (8RT 1010.) There was a master key to the apartments, and tenants were not allowed to change locks without property manager Michael Ramakrishnan's permission. (8RT

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[3] In 1996, Sims was convicted of grand theft, a felony. In 1997, Sims was convicted of sales of narcotics, a felony, for selling a "nickel rock" to the police. (8RT 1043.) Sims had also been convicted of altering a registration plate on a vehicle. (8RT 1072.)

1009, 1019-1020.) If someone changed locks, that person would have to give a key to Ramakrishnan. (9RT 1129.)

Ramakrishnan knew Epperson. She was well groomed, took care of herself, spoke well, was very proud of what she was doing, communicated well, and paid rent on time. He had never had any problems with her. (8RT 1010-1011, 1018.) Epperson's apartment was very neat and decorated nicely. (8RT 1011, 1018.) Ramakrishnan saw Epperson with Todd at the Ballington but had not seen appellant with Epperson and Todd. (8RT 1026.)

In 2000, three weeks after Epperson moved into the Ballington, Epperson got Sims to move in as well. Sims lived in the F Building, and Epperson lived in the A Building. (8RT 1016, 1042-1043.) While Sims was at the Ballington for eight or nine months, Epperson and Sims remained boyfriend and girlfriend. (8RT 1043.) Sims gave Epperson a two-carat diamond heart with a gold chain, which Epperson wore all the time while they were boyfriend and girlfriend. (8RT 1070-1071; 9RT 1184.) At some point, Sims thought about marrying Epperson. (8RT 1064.) However, Sims started using drugs again, so Epperson broke up with him for about 30 days. Epperson told him he had to stop using drugs for them to be back together. (8RT 1023, 1043.)

At the Weingart, when Todd was working as a student aid in the computer room, Epperson visited him with a girlfriend. When they left, appellant asked Todd to introduce him to one of women. Todd introduced appellant to Epperson. (9RT 1151, 1168.) When Todd talked to Epperson about appellant, she was hesitant because she did not want to be in a relationship. Todd talked to her several times. Eventually, Epperson went out with appellant, and Todd went along too. (9RT 1152.) Appellant, Todd, and Epperson also watched movies in Epperson's apartment, went to the movie theater, and got food to eat. (9RT 1153-1154.) From the time

appellant met Epperson to the time she was murdered in November 2000 was about four or five months. (9RT 1155.)

Epperson got a job at G & V Communications, located on Hollywood and Vine in Hollywood. The business had live answering services, mailboxes, and voicemails. When Epperson became a manager, she offered Todd a job as her secretary. (9RT 1154-1155.) Epperson had keys to the G & V office. (9RT 1161-1163.)

Since appellant had a red Mitsubishi Mighty Max truck, he took Todd and Epperson for rides. When there was a bus strike, appellant offered to give Todd and Epperson rides several times. The truck was registered to appellant's father, Joseph Powell. (9RT 1154; 10RT 1451.) On several occasions, appellant lent his truck to Epperson. (9RT 1171-1172.)

During this time, appellant told Todd that he loved Epperson and that if he could not have her, nobody would. (9RT 1155.) Appellant told Todd he was upset because Epperson was hanging around with other men. (9RT 1170.) Todd did not see anything in Epperson's behavior that would have led him to believe she and appellant were girlfriend and boyfriend. Epperson confided in Todd and saw him daily at work. (9RT 1156.) Instead, Todd saw appellant and Epperson fighting. Epperson wanted to get away from appellant, but Todd encouraged her to give him another chance. (9RT 1168.)

Appellant visited Epperson at work and brought stuffed animals, flowers, and little gifts. Epperson threw the stuffed animals and flowers away. Epperson would become very upset many times. (9RT 1158.) Todd told appellant on many occasions to slow down, that Epperson had just had a bad relationship, and that she was not ready for another. (9RT 1159, 1185.) Appellant told Todd he had not been successful in trying to have a relationship with Epperson. (9RT 1185.) Appellant constantly called G & V. (9RT 1157.)

Around September 2000, when Sims was still living at the Ballington, Epperson told Ramakrishnan she had changed one of her locks but did not give him a duplicate key. (8RT 1020-1025, 1027.) Appellant had bought the new locks and changed them while Epperson and Todd were there. At first, Epperson was not happy that appellant bought the locks. According to Todd, the lock change had nothing to do with Sims breaking in or stalking Epperson. (9RT 1179-1181.) But according to Ramakrishnan, Epperson was concerned about Sims getting into her apartment. (8RT 1020-1025, 1027.) Sims had had a key to Epperson's apartment, and Epperson did not want him to come into her apartment. (8RT 1022-1023.) Epperson told Ramakrishnan that Sims "was basically stalking her." (8RT 1023.)

On October 14, 2000, Sims was evicted for nonpayment of rent, after he got a month and a half behind on his rent. (8RT 1016, 1044.) When Sims was evicted, Sims and Epperson were no longer boyfriend and girlfriend. (8RT 1044.) Once a tenant was evicted for nonpayment of rent, that person could not get back into the Ballington even as a guest. (8RT 1017.) Sims tried to get back in several times. (8RT 1025.)

Epperson told Sims if he did not take drugs and went back to work, they could resume their relationship. (8RT 1044-1045.) To "get clean," Sims went to the Weingart, and two days later, Sims got his job back as an electrician at Mobil Oil in Torrance. Epperson also got Sims to go to Bible study and church. (8RT 1045.) They went to the First Nazarene church across the street from the Weingart. (8RT 1046.) Sims was aware Epperson had changed her lock. (8RT 1065.)

Appellant would go on drives with Todd to Malibu. Appellant told Todd several times that he was not having any success "getting sex" from Epperson. Appellant would talk about his and Epperson's problems. Appellant said if he could not have her, no one else could. Appellant asked Todd if Epperson was having sex with others. (9RT 1214.)

Once, in late October 2000, appellant took Todd for a ride to Malibu and played some music over and over that reminded him of Epperson. Appellant said he loved Epperson and said, "If I can't have her, nobody will, I'll kill her and myself." (9RT 1155-1156.) Appellant said he had had a girlfriend before who had died and Epperson reminded him of the girlfriend. (9RT 1156.)

Appellant made several remarks about Ronald Sims and told Todd he would kill that "nigger" if he kept trying to see Epperson. (9RT 1161.) Todd understood that once Sims "got clean and sober off of drugs" that Epperson was going to marry Sims. (9RT 1181.)

In November 2000, Sims was seeing Epperson as a friend. (8RT 1043.) Just before November 12, 2000, Sims had taken his Bible to work, and on the way back to the Weingart, he lost his Bible. (8RT 1046.)

On Monday, November 6, 2000, appellant and Epperson had an argument over the telephone, and appellant kept calling her workplace. Epperson wrote in her log book every time he called. (9RT 1157, 1159, 1178.) Epperson was distraught and in tears. (9RT 1158.)

On Thursday, November 9, 2000, Todd was fired from G & V for smoking "crack." (9RT 1177-1178.)

(2) Police Find Epperson Dead in Her Apartment

On Sunday, November 12, 2000, Sims was planning on attending church with Epperson at the First Nazarene across from the Weingart. Sims was running late, so he did not go to the service since Epperson liked to be on time. (8RT 1046.) Sims waited for Epperson to get out of church at 10 a.m. and talked to her. While they were talking, Sims saw appellant across the street, pacing up and down from his red truck to the corner. (8RT 1047, 1065.) Sims and Epperson talked for about 10 minutes. (8RT 1050.) As Sims was getting ready to leave, Epperson noticed appellant and

made a comment. (8RT 1048.) Sims felt appellant was watching Epperson and him. (8RT 1049.) Epperson pointed out she had to see what appellant wanted and said, "I got to go deal with this matter now." Sims told her he would call once he got out of church, ran across the street to catch a bus, and left Epperson. (8RT 1050.) Appellant was squatting on the corner. (8RT 1065.)

About 1:10 p.m., after Sims got out of church, he went to the nearest pay phone on the corner of 8th Place. He paged Epperson three or four times, but Epperson did not call back. Epperson always returned Sims' page, so Sims went to the Ballington. (8RT 1051.) Sims saw appellant's truck parked across the street in the parking lot. (8RT 1052.) At the Ballington, Sims asked the security guard if he could go to Epperson's apartment door and tell her he was there, but the guard refused him entry. (8RT 1025, 1051.) Ramakrishnan came out and said Sims had been barred from the Ballington and there was a restraining order against him to stay away. Sims left the Ballington, went across the street, and waited for someone to come out. A man came out, and Sims asked him to go to Epperson's apartment, knock on her door, and let her know he was outside and wanted to see her. The man went back in the Ballington, came back outside, and told Sims he knocked on her door and no one answered.[4] Sims left. (8RT 1052-1053.)

At the Ballington, Security Officer Clevers Ray came on duty at the front desk just before 2 p.m. (9RT 1119, 1131.) The sign-in log, which was filled in by the prior security officer, showed Epperson and appellant checked into the Ballington at 10:45 a.m., and appellant checked out at 1:26

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[4] The statements that the man made to Sims were not admitted for the truth of the matter but to show Sims' state of mind in leaving afterward. (8RT 1053.)

p.m. (8RT 1011-1014; 9RT 1117, 1119-1121, 1131-1132, 1138.) A guest of a tenant is required to produce a California identification card with a picture, and the number next to appellant's name was from his California identification card. (8RT 1013-1014.)

Between 2 and 3 p.m., Ray saw appellant come through the sliding doors from the interior property and walk towards the front exit. Ray stopped him and asked where Epperson was because Epperson was supposed to have escorted appellant back to the lobby when he was leaving. Appellant said, "Tammy is in her unit resting." Appellant left. (9RT 1117, 1121-1123, 1128, 1132, 1136.) Appellant seemed calm, and his demeanor was not unusual. (9RT 1122, 1135.) He did not have anything on his face, hands, or clothing, such as stains. (9RT 1123, 1135.) When appellant left the Ballington, he made a right out of the doors, went up Wall Street, and did not go to the MTA parking lot across the street. (9RT 1140, 1142.)

Pursuant to Ballington policy, if a guest checked out and wanted to get back in, the security officer should notify the resident. (9RT 1140.) Ray said appellant could have snuck back into the property after checking out earlier at 1:26 p.m. or appellant could have been let back in without checking in. (9RT 1132-1133, 1140-1141.)

Ray had seen Epperson with Todd and appellant, but after a while, Ray saw only Epperson and appellant together and had seen them about two or three times. (9RT 1121, 1134.)

Between 6 and 6:30 p.m., appellant called Todd, who was in his room at the Courtland Hotel. Appellant told Todd that he should go check on Epperson and that he had killed her. Appellant said he would be on death row. Todd did not believe him. (9RT 1160.) Appellant called a second time and asked Todd if he had checked on Epperson. Todd said no. Appellant said, "You should go check on Tammy. I killed her. I'm going

to be on death row. I want to clear my conscience." (9RT 1161, 1179.) Todd turned his phone off and turned it back on the next day. (9RT 1161.)

On Monday, November 13, 2000, Sims reported for work at Mobil Oil but was sent home because of a hydrogen sulfide leak. Sims went home, showered, and changed clothes. He decided to go to Hollywood to where Epperson worked to surprise her and take her to lunch. When Sims got to G & V, the business was not open. Epperson had not missed a day at work, so Sims knew something was wrong. (8RT 1054.) Sims called Todd but was not able to reach him, so Sims caught the train back to Los Angeles. (8RT 1055.)

Between 2 and 2:30 p.m., appellant called Todd again. (9RT 1161.)

About 4 or 4:30 p.m., Sims got in touch with Todd. (8RT 1055.) Sims went to the Ballington, while Ray and a Captain Thomas were on duty. Sims was crying and "freaking out." (9RT 1123-1124.) Sims said something, and Captain Thomas told Sims he had to go back outside because he had been evicted. Once a tenant was evicted, that person could not get back in, even as a guest. (9RT 1125-1126, 1128.)

Sims went to the police department on the corner of 6th and Wall Streets, which was about a half block from the Ballington. Sims told an officer what Todd had told him and asked the police to send a car to investigate at Epperson's apartment. (8RT 1057-1058.) Sims waited about 15 to 20 minutes for the police car to arrive; but since the police did not arrive, Sims went back to the police department, explained again, and again asked them to send a car. (8RT 1058.) Sims went back to the Ballington and spoke to a security guard, who did not help. (8RT 1025, 1059, 1072; 9RT 1126.)

Eventually, the police arrived. Los Angeles Police Officer Antonio Gonzalez saw Sims, who was shaken and distraught. Sims told the officers what Todd had said. (8RT 1025, 1029, 1059, 1072; 9RT 1126.) After

talking to Sims, Officer Gonzalez and Captain Thomas went to apartment A125, Epperson's apartment. The door was locked, and security did not have a key for the dead bolt lock, which had apparently been changed. Looking through the one window in the rear of the apartment, Officer Gonzalez saw the room appeared to be ransacked, with items broken, and saw Epperson lying on the floor towards the foot of her bed. (8RT 1020-1023, 1030; 9RT 1126; 10RT 1429.)

Officer Gonzalez, assisted by Captain Thomas, forced his way into the apartment by kicking the door open. (8RT 1030, 1032-1035, 1037-1038; 9RT 1141.) Officer Gonzalez saw Epperson, who was wearing a zip-up light jacket and a shirt underneath and who had a towel draped around her right leg. (10RT 1429-1430.) He requested a couple more units to respond to the crime scene. Paramedics arrived and determined Epperson had died. (8RT 1031.) When Sims saw the paramedics come out with an empty stretcher, he realized Epperson was dead. (8RT 1060.)

Later, detectives arrived, and Sims talked to them. Somebody said Epperson was dead. Sims gave the police the information from Todd and a description of appellant. (8RT 1061.) At some point, Sims was handcuffed and taken to the police station. (8RT 1031, 1063.) At the station, he was questioned. (8RT 1066-1067.)

Todd was also interviewed at the police station and told the police appellant and Epperson had broken up a couple weeks before. When Todd said they had broken up, Todd meant that Epperson had stopped talking to appellant, not that Epperson and appellant had been boyfriend and girlfriend. Their relationship had been an on and off relationship. (9RT 1170-1171, 1184.) In the interview, Todd described appellant as six feet, three or four inches tall and 280 pounds. Todd said Epperson would not see appellant but then would go back to him. (9RT 1171.)

On or about November 15, 2000, about 9 p.m., appellant was found at 1629 Pacific Coast Highway, room 209, in Harbor City, California, and Epperson's keys were found on the table next to the bed in which appellant was lying. (10RT 1451.)

(3) Blood Spatter Expert Testimony and DNA Results

On November 13, 2000, Los Angeles Police Department Criminalist Ronald John Raquel, a blood spatter expert and sexual assault case analysis expert, went to apartment A125. (10RT 1287-1289.) The apartment's front door locks were bloodstained. Raquel collected samples for prints and analysis. (10RT 1324.)

As one entered the apartment, there was a sink in the foyer and directly opposite that was the bathroom. (10RT 1289, 1355.) In the sink on the right side was an empty water bottle with bloodstains, and inside the sink were two bloody face towels. DNA analysis of a bloodstain on a washcloth showed the bloodstain matched appellant's DNA. (10RT 1355-1356, 1450.) DNA analysis of a bloodstain found on the plastic water bottle showed the bloodstain matched appellant's DNA. (10RT 1450-1451.)

There was a mirror near the sink, but no mirror in the bathroom. (10RT 1355-1356.) DNA analysis of a bloodstain found near the front door on the floor, a blood drop found further inside the doorway on the floor, and a bloodstain on the entry closet door showed the bloodstains all matched Epperson's DNA. (10RT 1450.)

As one entered through an archway, there were the living quarters. (10RT 1289.) A set of curtains decorated the archway. (10RT 1289-1290.) In the corner opposite of the sink was an entertainment center and television. (10RT 1290.) The television screen had bloodstains. (10RT

1301-1302.) A chest of drawers and a bed were in the living area. The bed was adjacent to the wall next to the window. (10RT 1290.)

Epperson's body was on the floor in the center of the living quarters, in between the bed and chest of drawers. (10RT 1291, 1375.) Epperson was wearing a blood soaked sweatshirt, whose hood was soaked with blood too, and was nude from the waist down. The soaked hood showed that Epperson's head, the source of the blood, was lying on top and had not moved. Underneath the sweatshirt, she was wearing a blouse. A towel covered her lower body. (10RT 1295-1296, 1372, 1400.) The center of the towel had a transfer pattern consistent with someone with bloody hands putting his hands on the towel. (10RT 1298, 1400, 1406.) The back part of the straps of Epperson's bra were blood soaked, which was consistent with the pattern on her sweatshirt hood. The blood on the back of her bra straps was caused by blood flow pattern, which was the blood flowing due to gravity and around an obstruction. For blood to soak into the clothing, the source of the blood had to have been stationary for a long period of time. (10RT 1371.) On the bra's right cup's inner surface, there were transfer bloodstains, which were caused when a bloody object made contact with the surface, causing blood to transfer. (10RT 1370, 1400.) DNA analysis of the bloodstain from the right inside cup of the bra showed the bloodstain matched Epperson's DNA. (10RT 1370, 1450.) Also, Epperson had a blood drop on her left ankle, a transfer stain on the inner thigh of her right leg, and a laceration on her lower leg. DNA analysis of a bloodstain from the right lateral thigh area of Epperson matched appellant's DNA. (10RT 1372, 1450.) DNA analysis of bloodstains from the left and right inner thighs of Epperson matched the DNA of appellant and Epperson, as a mixture. (10RT 1450.)

Epperson's right arm was up, and underneath her right hand was a flat head screwdriver. (10RT 1297, 1375.) The tip of the screwdriver was

bloodstained. (10RT 1349, 1395-1396.) In between her right hand and her head was a partial dental plate and a tooth. (10RT 1297, 1374-1375.) To the left of her hand was a piece of wood. (10RT 1298.) On the floor near her body were parts of a broken vase, little pieces of broken wood, and a square piece of wood. (10RT 1294, 1296-1297.) Compact discs were on the floor too. (10RT 1294-1295.) A lamp was partially under the bed, adjacent to Epperson. The heavy and hard lamp, which was a figure of a woman, was broken into many pieces and had bloodstains on the broken areas, indicating the lamp was used multiple times to strike Epperson. (10RT 1349-1352.) The cord of the lamp was wrapped around Epperson's head, and a clump of hair was stuck to the switch area of the cord. (10RT 1350.) On the bottom of the lamp's base were bloodstains and hairs, which indicated the lamp made contact with Epperson's head. (10RT 1351.) The lamp weighed at least 10 pounds. (10RT 1352.)

By Epperson's feet was a pile of clothes, including a pair of blue jeans and a pair of women's underwear. Bloodstains were on the front of both sides of the jeans. Some of the bloodstains were low velocity bloodstains, which are stains dropped due to gravity. (10RT 1344.) Near the left side belt loop was a low velocity stain, dropped through gravity, and near the waistband by the button were transfer stains, which meant something bloody made contact with the waistband and which was consistent with someone's bloody hands unbuttoning the jeans. On the rear of the jeans, at the right rear pocket and left of it and below it were pattern transfer stains, meaning that an object made the transfer pattern stains. (10RT 1345.) One of the pattern transfer stains was consistent with fingers. On the inner surface of the jeans, on the outer liner of the right pocket, was a transfer stain. (10RT 1346.) DNA analysis of the bloodstain from the pocket liner of the blue jeans matched appellant and Epperson, as a mixture. (10RT 1449-1450.) There were more blood transfer stains on the right side of the

jeans than the left. (10RT 1346-1347.) The patterns on the right side were consistent with fingers or a bloody hand. On the inside of the liner was a transfer pattern that was consistent with a pair of fingers grabbing the button as if they were unbuttoning the jeans. (10RT 1347.) The transfer blood patterns were consistent with a person lying on the ground wearing blue jeans and someone's bloody hands unbuttoning the jeans and grabbing and pushing the jeans down. (10RT 1348.) The transfer stains on Epperson's inner thighs indicated the pattern was made when a bloody object made contact with her thighs after the blue jeans were removed. (10RT 1381-1382.) In Raquel's opinion, Epperson's jeans were forcefully pulled off by someone else because of the bloody transfer pattern on the inner liner and inner surface of the pants. (10RT 1381, 1389-1392, 1406, 1411.)

Women's panties were underneath the blue jeans. Low velocity blood stains on top of the panty crotch indicated a bloody object was directly above the panties and blood fell on top of the panties. (10RT 1348-1349, 1381.) DNA analysis of the bloodstain located on the front center of Epperson's panties showed the bloodstain matched appellant's DNA. (10RT 1348-1349, 1450.) Underneath the low velocity bloodstains on the panty, at the top surface of the crotch, were transfer stains. (10RT 1404-1405.) The panties had a rip on the left side, on the top and bottom. (10RT 1349.) The rip may have been caused when the panties were being removed from Epperson. (10RT 1381, 1392-1393, 1405.)

On top of the bed were a purse with cash inside, a T-shirt, papers, a personal organizer, a driver's license, a plastic bag, a receipt, stationery, a card, and blood spatters or stains. (10RT 1299-1300, 1306, 1367-1370.) The receipt was dated November 12, 2000, 12:09, and said, "Spirit filled life B" and "West Los Angeles." (10RT 1369.) Underneath the items strewn on the bed were bloodstains on the bedspread, which were

consistent with medium velocity stains and ranged between two and six millimeters in size. (10RT 1368.) The larger stains were consistent with someone having blood on them, standing over that area, and dripping blood on the bedspread. The smaller ones were due to a bloody object being struck. (10RT 1369.) On the floor next to the bed were items that appeared to have been scattered or thrown there. (10RT 1299.)

In the bathroom, there was a rug on the floor, two bloodstained wash cloths in the center of the sink, a green bottle, and a clear plastic water bottle. (10RT 1303-1304, 1313, 1400.) On the top part of the rug were low velocity bloodstains, indicating a bloody object had been directly above and in front of the toilet, but there were no blood drops leading out from the bathroom to the runner in the foyer, on the floor of the foyer, or out in the living quarters. (10RT 1319-1320.)

The toilet tank lid was slightly ajar. (10RT 1304, 1310.) On the left side of the floor were broken, bloodstained pieces of glass near the shower. (10RT 1304, 1313.) Another piece of broken glass was in front of the waste basket. (10RT 1313.) There was also a glass lid or bottom on the floor. (10RT 1313-1314.) A red candle was on the floor just to the right of the toilet. (10RT 1313.) Also on the floor were multiple low velocity bloodstains, which are caused when blood falls to the floor from a bloodstained object. The blood drips were on the back half of the bathroom floor where the toilet was. (10RT 1314.)

A little waste basket had red stains and paper towels with bloodstains. (10RT 1305.) Also, red or brown stained paper towels were in the toilet, and the stains appeared to be bloodstains. (10RT 1304-1305.) The paper towels had dots of bloodstains in different areas, so the paper towel was either used to clean an area that had little drops of bloodstains or was used to clean an object that had little dots on it, such as a weapon or a person's injured hand. (10RT 1322.) The stain patterns on the paper towels were

consistent with someone wiping blood off his or her hands and throwing the paper towels into the toilet. (10RT 1323.) A red stain was inside the toilet. (10RT 1304.)

On the wall in between the toilet lid and shelves on the wall, there were three different bloodstains which were caused when the source of the blood went backwards or towards the wall three times. (10RT 1304, 1311.) The spatter was consistent with a person with a bleeding head injury being shaken three times so that the blood left the head and impacted the wall. (10RT 1312.) The bloodstains were cast off stains, which are stains caused when something bloody is in motion and suddenly stops, causing the blood to travel and hit an intervening surface. The stains were circular rather than elongated and had a 90-degree directionality, meaning the source of the circular stains was directly opposite where the bloodstains were. (10RT 1310, 1312.) The source of the blood would have been in between the shelves and the water tank lid directly opposite the bloodstains. The stains had different sizes, and the larger ones had excess blood, causing density zones at the bottom which were darker or denser. The smaller stains occurred first and the larger ones later, and at least three different events caused the bloodstain spatter. (10RT 1311.)

On the shower floor were three bloodstains and broken glass. If a person was in the bathroom close to the front of the toilet and was hit in the head with a heavy glass object, which then broke, and pieces of glass with blood were found in the shower, it would indicate that when the glass broke, glass fragments ended up in the shower or were on the floor and were kicked onto the shower floor. (10RT 1324-1325.)

Also in the bathroom, there were six different and separate blood transfer stains on the wall between the toilet and shower. (10RT 1304, 1306, 1315, 1318.) Some of the transfer stains were hair transfer stains, and some stains had a swipe pattern, which occurs when something bloody

makes contact with a non-bloody surface leaving an impression of that bloody object. (10RT 1316-1317.) Each of the blood transfer patterns was underneath the other. (10RT 1317-1318.) The bloodstains appeared to show that Epperson's head was being slammed against the wall, going downward. The stains were consistent with somebody with a bloody head with hair being slammed against the wall and as her knees gave out, having her head slammed against the wall as she went lower and lower. (10RT 1318.) The bottom stains had swipe patterns, which would be consistent with somebody having her head or clothing against the wall and then leaning towards the toilet. (10RT 1318-1319.)

Assuming a person was attacked in the bathroom, struck about the head causing bleeding, was hit repeatedly so the blood spattered at least three times onto the wall behind the toilet, then was slammed up against the side wall at least six times, and was picked up and carried into the living area, that scenario would produce the results in the bathroom and explain why there was no blood spatter or blood drippings in the foyer area leading from the bathroom to the living area. (10RT 1320.) Raquel did determine that the initial blood shedding events took place in the bathroom and that Epperson was picked up and transferred into the living quarters. (10RT 1320-1321.)

As one entered the living quarters, there was a closet with bifolding doors to the left of the apartment entrance. There was a series of six bloodstains on the surface of the bifold door. The stains were elongated, meaning there was a direction of travel. For the stains to impact the closet door, the doors needed to be closed and the source of the bloodstains needed to be going from the entryway to the living quarters. (10RT 1289, 1328, 1355.) Thus, when the blood shedding event took place, the doors were closed. (10RT 1329, 1398.) The bloodstains on the closet doors and around the closet came from quite a distance. (10RT 1362.) Later, the

closet doors were opened and clothes were placed at the entrance to the closet. When the clothes on the floor were lifted up, there were two bloodstains underneath the clothes. (10RT 1329, 1398.)

There were cast off stains on the curtain adorning the archway in the living quarters. (10RT 1362-1364.) The stains on the curtains probably came from the same incident as the cast off stains on the closet door. If someone had been standing near the curtains in the entryway and struck Epperson's bloody head and then thrown back his arm, it could have caused a cast off blood pattern. (10RT 1364.)

On the wall adjacent to the curtain were cast off stains. (10RT 1364.) One of the stains was caused by a different event than the stains that caused the closet and curtain stains. (10RT 1365.)

Near the television, there were two pieces of a broken flower vase. The bottom of the vase was square, and another piece formed a bowl. (10RT 1325-1326.) The third piece of the vase was at the far end of the living quarters, under papers and photographs. (10RT 1325, 1354.) Together, the vase pieces weighed 10 pounds and were of a plaster-like material. (10RT 1326, 1354.) Two of the three vase pieces had bloodstains and hair, which indicated the vase made contact with Epperson's head. (10RT 1326, 1353, 1355.)

On the left side or the south wall in the living quarters, there was a hair transfer stain. (10RT 1329.) This stain was placed after the blood transfer stains in the bathroom, after the wound on Epperson's head had produced more blood. (10RT 1330.)

In the chest of drawers in the living quarters just to the right of the entryway, the top drawer was closed, and the one below was open a tad. (10RT 1341-1342.) In the chest of drawers were a pair of socks and a T-shirt, each with bloodstains. (10RT 1341-1342, 1399.) The T-shirt stain

was a transfer stain, which could have been made with a bloody hand or finger. (10RT 1343-1344.)

Near the chest of drawers was a pedestal that supported a lamp. (10RT 1356.) The area had a medium velocity spatter pattern, which had a direction of travel going towards the pedestal. (10RT 1357.)

A wooden foot stool was broken into several pieces, after having struck an object multiple times, and pieces were found in different areas of the apartment. One piece was underneath the bed by the wall where there was a large head transfer stain. Other pieces were found near the chest of drawers, underneath magazines and papers in between the rocking chair and bed, near the bed by the lamp, and on the left side of the living quarters. (10RT 1325, 1373, 1375-1376.) The top of the foot stool was near the entertainment center. (10RT 1374.) The foot stool had been demolished. (10RT 1376.)

Near the television and rocking chair were cast off bloodstains, which are stains formed when a bloody object is in motion and suddenly stops. The stains were in a downward pattern, left to right, meaning the source of the stains was on the left side and was swinging over to the right side, causing blood to be deposited from left to right. (10RT 1358-1359.) The bloodstains went the length of the wall, opposite where Epperson was lying. (10RT 1359-1360.) The incident that left the bloodstains here was a separate incident from the other bloodstain incidents. (10RT 1360.)

On the front of the entertainment center were cast off bloodstains on the glass. (10RT 1360-1361.) These stains were from an incident different from the blood on the wall incident. (10RT 1361.)

Another wall in the living quarters also had blood spatter. The bloodstains were cast off spatters and were a separate incident from all the other blood spatters. (10RT 1365-1366.)

On the bed, a bedspread was draped over the corner closest to Epperson's head. (10RT 1342-1343.) The bloodstain pattern on the bedspread was a medium velocity spatter pattern; this type of pattern is caused when a bloody object is being hit or struck by a fist or a weapon and the stains go upward. That means the object struck Epperson's bloody head on the floor, and blood spattered upwards onto the bed cover. (10RT 1343.)

Based on Raquel's examination of the crime scene, he determined the initial blood shedding event took place in the bathroom, where Epperson's head made contact with the bathroom wall at least six times. (10RT 1379.) She was carried from the bathroom, which was shown by the lack of bloodstains on the floor between the bathroom and living quarters, into the living quarters. (10RT 1379, 1397.) The blood spatter evidence in the living area showed Epperson was struck on the head while in the bedroom area and was not struck when she was standing. (10RT 1403.) The screwdriver could have been used as a weapon to stab her in the face. (10RT 1409-1410.) The vase was used to strike Epperson many times, based on an evaluation of the different parts of the flower vase, the vase's fracture patterns, and the blood on the fracture patterns once the vase was broken. (10RT 1379, 1396.) The lamp was used multiple times to strike Epperson, based on the fact the lamp was fractured, had transfer stains on the fractured portions of the lamp, and had transfer stains on the bottom of the lamp. (10RT 1379, 1395.) Epperson was struck by the foot stool, and once it broke, the different parts were used to strike her again to break it into more pieces. Epperson was struck more times, particularly down by the corner of the bed. Several cast off patterns were in the apartment, including bloodstains underneath the clothes on the floor in front of the closet, bloodstains on the closet door when it was closed, bloodstains on the north wall where the pedestal was, bloodstains on the archway curtains, and

bloodstains on the living quarters on the right side. Transfer stains were on the clothing inside the chest of drawers. (10RT 1380.)

After Epperson was repeatedly hit, the apartment was ransacked. The third piece of the flower vase by the wall near the window had clothes and paper over it. (10RT 1380-1381.) On top of the bed, there was a medium velocity spatter pattern, and then paper and Epperson's property were placed over that. The drawers in the chest of drawers were pulled out, and some bloody objects, such as a hand, made contact with the clothes as if someone were looking for something. (10RT 1381.)

(4) The Autopsy Including DNA Results

Los Angeles County Coroner's Department Deputy Medical Examiner Dr. Yulai Wang performed an autopsy on Epperson and determined the cause of death was multiple blunt force injuries. (9RT 1218-1221.)

When brought in to the coroner's department, Epperson was wearing a gray hooded, front-zippered sweatshirt, a light blue shirt, and a pink brassiere pushed up above the breast nipples. (9RT 1240-1241; 10RT 1451.) Epperson had curly brown hair about 10 inches long, had brown eyes, and weighed 118 pounds. (9RT 1222, 1256.) A denture, which was broken into three pieces, was with the body. (9RT 1244-1245.)

Epperson had multiple blunt force injuries on her head. (9RT 1228.) In Dr. Wang's conservative estimate, Epperson suffered at least 10 blows to her head. (9RT 1251, 1255.) Any one of those blows could have been fatal. (9RT 1251-1252.) She had a fairly large laceration in her forehead with an underlying open skull fracture. That penetrating injury went through the inside of her head. (9RT 1229.) At the left side of her skull, she had a seven-inch long linear, gaping fracture extending from the front almost to the back of her head. (9RT 1237, 1240.) On the right, lower side of her skull, she had subcutaneous, subgaleal hemorrhage, which was

bleeding underneath the scalp at the right side of her head. The area covered almost the entire right side of her head. (9RT 1239-1240.) On the top of her head, Epperson had a large laceration extending from the front of the head towards the back of the head. (9RT 1238.)

On the front of her skull, Epperson had extensive fractures. One fracture measured about five by two inches. (9RT 1239.) The bones were fractured into many small pieces, so they appeared to be pointed almost like an egg shell. (9RT 1243.) The fractures to the front base of her skull were caused by blunt force trauma. (9RT 1242.) She also had a fracture at her nose and both cheek bones. (9RT 1239.)

Epperson had a large laceration at the front top of her head. She also had multiple lacerations on her forehead and face, including her eyes, nose, cheeks, and upper and lower lips. (9RT 1228-1229.) Epperson's eyes had confluent hemorrhages, which were caused by several small hemorrhages coalescing together to form a large hemorrhage. (9RT 1222-1223.) The lacerations on her upper and lower lips were both inside and outside her lips, with the laceration on her lower lip going through her lip. (9RT 1229.) She had bruises, abrasions, and lacerations to the bridge of her nose, around her cheek, and around her eyes. (9RT 1229-1230.) Epperson's face had dark red areas. From a side view, her face seemed flattened due to the underlying fracture of her facial bones. (9RT 1232-1233.) She had no upper teeth, partial lower teeth, and a broken upper denture. (9RT 1222.)

On the right side of her neck were some sharp force injuries, which were caused by glass or some other object. The wounds were not consistent with knife wounds because their shape was irregular. (9RT 1230-1231, 1245-1246.) The cuts did not sever her carotid arteries or jugular veins in her neck. Had those arteries or veins been cut, those cuts would have been quickly fatal. (9RT 1231.) Multiple pieces of broken glass were found in her body, head, hair, and clothing. (9RT 1246.)

On the left side of her neck, Epperson had a fairly large incised wound about two and one half inches long. (9RT 1231.) The wound did not go through her carotid artery or jugular vein. (9RT 1234.) Also on the left side of her head, there was a three-quarter inch laceration and a one-half inch laceration. (9RT 1231.) Epperson thus had jagged cuts to the right and left side of her throat. (9RT 1233.)

Also, Epperson's neck had bruising or hemorrhaging. (9RT 1223.) The abrasions on the back of her neck were part of the blunt force injury she suffered. (9RT 1230.) Bruising on the neck and hemorrhaging in the eyes might indicate strangulation. (9RT 1224.)

Inside the neck structure, Epperson had a focal hemorrhage on the left side of the neck underneath the skin in the soft tissue of the neck. There was no fracture of the neck organ such as the hyoid bone and the larynx. (9RT 1234.) The focal hemorrhage was consistent with pressure being put on the neck or strangulation. (9RT 1235.)

On the back of both arms and hands, Epperson had multiple bruises and abrasions. The arm and hand injuries were consistent with defensive wounds, which are injuries on the arms and hands caused when a victim tries to protect herself. On her right leg in the knee area, she also had some bruising and abrasions. (9RT 1224-1227.)

Epperson suffered injuries to her brain. (9RT 1235.) She had some hemorrhaging on the right side of the surface of the brain. Underneath the brain, she had a fairly large area of contusions at the front of the brain on the top side. (9RT 1235-1236.) At the right interior area of the brain, there was also a contusion. She also had a defused dural hemorrhage, which was a hemorrhage inside the head that was not localized in any specific area but was defused over the brain. The defused dural hemorrhage would be caused by the blunt force trauma to the head. She also had an epidural hemorrhage outside of the dura on the left side of her head. (9RT 1236.)

Epperson had vaginal injuries, including semi-circular bruises and abrasions at the back and both sides of the vaginal area. (9RT 1247-1248.) Hemorrhages were underneath the skin. (9RT 1247.) Epperson's vaginal area suffered a significant amount of trauma. Dr. Wang rarely saw as much trauma to the vaginal area in other rape examinations. (9RT 1248.) In Dr. Wang's opinion, the injuries were caused by blunt force penetration either by a penis with a lot of force or other object of similar shape and size. (9RT 1249, 1256-1257.) Vaginal aspirate, vaginal swabs, and external genital swabs from Epperson all showed sperm that matched appellant's DNA. (9RT 1259; 10RT 1450-1451.)

Dr. Wang opined Epperson's injuries were caused by a very severe beating, with use of blunt force trauma. In the 2,000 autopsies Dr. Wang had performed of persons with blunt force trauma, Dr. Wang had seen these types of injuries only in a very small number of cases. (9RT 1244.)

In Dr. Wang's opinion, the majority of the injuries were inflicted while Epperson was alive. (9RT 1249.) Dr. Wang believed 95 percent of the wounds on Epperson's body were inflicted while she was alive. When a person is alive and suffers an injury, one will see bruising and bleeding in the area. (9RT 1251.) Epperson was alive when she suffered the trauma to her vaginal area and face and when she suffered the cuts and lacerations, including those to her neck. (9RT 1249-1250.) The defensive wounds on her hands indicated she was alive and conscious. (9RT 1250.)

Toxicology reports on Epperson were negative for alcohol and drugs. (9RT 1259-1260.) Other than the facial, skull, and vaginal injuries and the blunt force trauma, Epperson was a normal, healthy person. (9RT 1260.)

b. Appellant's Prior Attacks on Women

(1) Debra Colletta

In the late 1980s and early 1990s, appellant and Debra Colletta were in a relationship as boyfriend and girlfriend for three years. (10RT 1443.)

On July 26, 1992, Colletta was at a friend's home, and appellant came to the backyard and wanted to speak with her. Colletta went to the front porch to speak to appellant. Colletta wanted the relationship to end, and appellant said he would not allow that, threatening to kill her if she broke up with him. Appellant grabbed Colletta by the throat, squeezed her throat, and dragged her to the ground. Colletta could not talk and could breathe only slightly. Appellant dragged her down the driveway and said, "You're going to die." Appellant dropped her on the driveway and kicked her in the back of the head and neck. (10RT 1443-1445.) Her body moved slightly, and her head moved upon contact. She was numb but felt the second kick, which was also in the upper neck and lower head area. (10RT 1445-1446.) Appellant was wearing metal "shoed" police boots or security boots. (10RT 1445.) Colletta thought appellant was going to kill her. (10RT 1446.) Before appellant left, he said he was going to shoot her with a shotgun, which Colletta thought he had in his truck. (10RT 1447.)

Two people helped her get back in the house. (10RT 1446-1447.) Immediately afterwards, she had problems with her neck. Also, since then, Colletta had had problems with her neck. (10RT 1447.) It was difficult for Colletta to testify, and every day for the last several years, Colletta had been in fear for her life. (10RT 1447-1448.)

(2) Betsy M.

In January 1999, Betsy M. met appellant in an Alcoholics Anonymous meeting, and subsequently, they went out to have coffee and lunch. Beginning around the second or third week after Betsy M. met appellant,

appellant was very vocal about wanting to be romantically involved. They went out on a few dates, and appellant kissed her. (10RT 1432-1433.) But by March 1999, Betsy M. tried to stay away from appellant and made her feelings known to him. (10RT 1433.)

On April 9, 1999, Betsy M. received a telephone call from appellant, who said he was afraid his parole officer was going to find a parole violation and asked her to come over and keep a teddy bear safe that his mother had given him, if he went to jail. This was a ruse. Betsy M. went to appellant's apartment. She was not planning on going inside, but she needed to use the bathroom and went inside. When she got out of the bathroom, her car keys were missing from the table where she had left them. A big chair was in front of the front door, and appellant started ranting about how she ruined his life and how he was in love with her. (10RT 1434.) Betsy M. initially started to cower. When she decided to stop cowering, appellant hit her in the face, knocking off her glasses. Betsy M. landed on the floor, and appellant climbed on top of her and choked her. Betsy M. grabbed his hands and begged him to stop. She could not breathe and felt her heart stopping. Everything went black. She did not know how much time elapsed, but when she regained consciousness, appellant was on the other side of the room, sitting with a knife. (10RT 1435-1436.)

Appellant yelled at her some more. Betsy M. was hysterical. Appellant told her to strip. He backed her into the bedroom section of his studio apartment. Appellant had a knife. Betsy M. started disrobing, but not fast enough for appellant, so he pulled at her clothes. Betsy M. stood there naked, pleading with appellant to let her go. After appellant agreed to let her go, appellant said he had to meet his parole officer and had missed the appointment. Appellant said he needed Betsy M. to tell the parole officer he was sick. Betsy M. made the call and told the parole officer that appellant was sick. (10RT 1436.)

Eventually, appellant, who still had a knife, went with Betsy M. to day care to pick up her two children, ages two and four years. Betsy M. drove. Appellant told Betsy M. that if she said or did anything that involved the police, he would kill her children in front of her and then kill her. (10RT 1437.)

Once she picked up her children, appellant insisted she take him to her apartment. Betsy M. had earlier called for her babysitter to be there and expected to have somebody waiting for her. When the babysitter was not there, appellant made a phone call to his Alcoholics Anonymous sponsor and told her to take him home, which she did. (10RT 1437, 1439.)

Initially, Betsy M. did not call the police because appellant had threatened to kill her children if she said anything. However, Betsy M. reported the incident to the police after attending the Friday night Alcoholics Anonymous meeting, where appellant had shown up to make sure his threat was visible to her. When Betsy M. arrived home, there were angry messages on her answering machine from appellant threatening her and her children. Betsy M.'s friend and her babysitter told her it would only stop if she called the police. (10RT 1438.)

When Betsy M. was interviewed by the Bakersfield Police Department, Betsy M. said that appellant became very apologetic when she went to pick up her children and that appellant also told her he did not know what had gotten into him. (10RT 1439.)

Betsy M. was very afraid when testifying at trial because appellant made loud threats against her and her children's lives if she ever spoke about what he did to her on April 9, 1999. (10RT 1433, 1438.)

2. Defense Evidence

a. Appellant's Testimony

At the time appellant testified in October 2004, he was 36 years old. Appellant had previously been convicted of residential burglary and assault with a deadly weapon, both felonies. (11RT 1487.) In prison, appellant met Todd but denied fighting anyone to protect him. (11RT 1542, 1567-1568.)

In 1998, appellant had been in the Weingart program while waiting for a transfer of his parole to Bakersfield. In 1998, his parole was transferred to Bakersfield, and he gave up plans to go to cooking school. (11RT 1490.)

Epperson was in the Stairs program for parolees who wanted to change their lives. The program provided housing, and participants attended meetings like Alcoholics Anonymous or Narcotics Anonymous. After 30 days, participants were allowed to get a job. (11RT 1487-1488.) Epperson had left the program before appellant came back to the program. (11RT 1488.)

Around 2000, appellant was taking Sinequan, a sedative which helps control paranoid feelings, Depakote, and Paxil. (11RT 1490.) At the time of his testimony, he was still taking Sinequan, Paxil, and other medications. Without the medications, appellant became paranoid and thought everybody was out to get him. He had been on these medications off and on since he was 17 years old. (11RT 1491.)

In June 2000, appellant met Epperson through Todd. (11RT 1487-1488, 1491.) Appellant had seen Epperson coming out of the 7th floor elevator at the Weingart Center; when she walked by him, Epperson "was like whoa," because Epperson was "really small" and appellant was "really big." (11RT 1488.) On the 7th floor, Epperson went to the computer lab,

which Todd ran. As Epperson talked to Todd, appellant came in the lab because he was a tutor. Appellant had "tested out" on the skills taught in the computer lab, so he was asked if he could tutor. (11RT 1489.)

In the summer of 2000, appellant and Epperson started "hanging out" with Todd and other friends. In the last weekend of July 2000, when there was a Stairs picnic, appellant and Epperson started dating. Todd was no longer in the picture, and appellant and Epperson would do most things by themselves. After the picnic, Epperson invited appellant over all the time and would call him. Appellant got a pager so Epperson could get hold of him whenever she wanted or needed him. (11RT 1492.)

Around August 17, 2000, appellant had a standing invitation to visit Epperson at her workplace, an answering service called G & V on Hollywood and Vine, without letting her know he was on the way. (11RT 1492-1493.) Appellant took gifts to Epperson at her workplace but it was not true, as Todd said, that she threw the gifts away. (11RT 1503.) On Fridays, when Epperson would do the payroll and collect money from the business for the week and take it to the bank, appellant would be with her because she did not like to carry the money alone. They would go from the business to City Bank downtown. Epperson did not have a car. (11RT 1493.)

Once, when appellant went to G & V, Paul Grano, Epperson's husband, was there and wanted to stay at her apartment. Epperson and Grano were still legally married, but appellant and Epperson called Grano her "ex." Appellant drove Grano and Epperson back to Epperson's apartment. (11RT 1496.)

Around mid-September 2000, during the MTA strike, appellant obtained a red Mitsubishi truck. (11RT 1493-1494.) Appellant sometimes gave Epperson rides to work and picked her up from work. Otherwise, Epperson dropped him off at work and then used his truck to get to her

work. (11RT 1494, 1608.) Appellant gave her the keys for his truck and a permission slip to drive his truck, in case she was pulled over by the police. (11RT 1494-1495.)

When appellant began dating Epperson, the relationship was not sexual right away. (11RT 1495.) At some point, appellant began having sex with her. (11RT 1495-1496.) They were boyfriend and girlfriend. (11RT 1552-1553.) Appellant gave Epperson a poem expressing his affection for her. (11RT 1504-1505.)

At some point, Epperson's son, Jeremy, was in county jail, and Epperson and appellant went to the jail almost every week. Appellant could not go into the jail but would put money into Jeremy's jail account so he could buy items in jail. (11RT 1505-1507.)

Epperson hired Todd at G & V, and Todd worked on Saturdays. Since Epperson had Saturdays off, appellant and Epperson spent time together. (11RT 1507.)

In Epperson's apartment, appellant put up the curtains and decorations and helped her obtain her dresser. (11RT 1501-1502.) Photographs of items on Epperson's bed showed a bear and other stuffed animals that appellant had given her. (11RT 1499-1500.) Appellant bought and installed the top lock on her door. Epperson said she was afraid of Sims. (11RT 1503.)

Appellant had known Sims from the Stairs program in 1998, before either of them had met Epperson. (11RT 1524.) Appellant had a "problem" with Sims. Appellant told the police when he was interviewed that he could not stand Sims. (11RT 1543.) He did not like Sims because of what he did to Epperson. (11RT 1544.) According to appellant, "The only battered woman I protected was Tammy Epperson from Ron Sims." (11RT 1567.) Appellant was "absolutely not" racist and not liking Sims had nothing to do with Sims being African American. (11RT 1544.)

Appellant had two tattoos on his arms that said, "White pride," and on the back of his leg calves, appellant had tattoos that said, "White anger." (11RT 1547.) Appellant got the tattoos in prison two years before his testimony. (11RT 1547-1548.) About 90 percent of the White men in prison had the "White pride" tattoo, which did not identify the wearer with a White supremacist group. "White anger" was appellant's nickname the first time he went to prison in 1988 because he was angry. Appellant had never been affiliated with any White supremacist group. (11RT 1621.) Appellant denied he was angry with Sims because he was African American and had a relationship with Epperson. (11RT 1548, 1621.) Appellant's closest friend was African American. Appellant testified, "Color means nothing to me." (11RT 1621.) Appellant had a "Tam" tattoo on his body, an abbreviation used by appellant of Epperson's name. (11RT 1622.)

One night in late September 2000, appellant drove to Malibu with Epperson, while Grano was staying at her apartment. (11RT 1496-1497.) Appellant and Epperson walked on the beach and had a place at the beach with a bench that they liked. They had sex for the first time, while on that bench. The conversation that appellant had had with Todd about not having had sex with Epperson occurred about a week before appellant and Epperson went to Malibu. (11RT 1497.) Appellant did not update Todd about their sexual encounter because Todd was a gossip. (11RT 1498.)

Right after appellant and Epperson had sex the first time, appellant stopped taking his medications because he was feeling "okay" and found it hard to maintain an erection when he was taking Paxil. (11RT 1532, 1560.) When he did not take his medications, he became violent and had blackouts. (11RT 1560.) Appellant was not "saying [that not taking his medications] was a smart decision." Appellant was an alcoholic and not

supposed to drink, but he drank "over and over and over again." (11RT 1561.)

In October 2000, the day before Epperson left on a weekend retreat sponsored by the church across from the Weingart, appellant bought a gift of a wooden sign with angels on it, since Epperson liked angels. The sign was above Epperson's bed. (11RT 1507-1509.) Epperson then went on the retreat. (11RT 1507-1508.) Epperson was fairly religious. (11RT 1507.) Appellant repeatedly talked to Epperson while she was away. When she returned, Epperson contacted appellant immediately. She paged appellant, and appellant responded and told her he would be over a half hour later. (11RT 1508.)

On a Sunday in late October 2000, appellant and Epperson went to the movies with Todd, because Todd was feeling left out since appellant and Epperson were not spending time with him. (11RT 1510-1511.) Later that day, Epperson introduced appellant to the owners of G & V when Epperson was at their house trying to hook up a computer program. (11RT 1511-1512.) Epperson and appellant were invited to dinner. (11RT 1512.)

On one day in mid-October 2000, photographs of appellant and Epperson on the beach were taken. (11RT 1628-1629.)

On Sunday, November 5, 2000, about 6:30 a.m., Epperson called appellant, and appellant said he was leaving Los Angeles for a break to get some perspective on everything. Appellant told Epperson that he expected her to put him as number one with respect to other men, partially due to Epperson's relationship with her estranged husband. Appellant said the ball was in her court, and Epperson did not respond. (11RT 1513-1514.)

On Monday, November 6, appellant drank in the morning. (11RT 1516.) He called Epperson at G & V. Epperson was angry because he had not consulted her about leaving Los Angeles. Epperson hung up on him, and appellant called back. They called back and forth and hung up on each

other. (11RT 1514.) Later, Todd answered the phone and told appellant that Epperson was out smoking with Grano. This was the only time that day that Todd answered the phone. (11RT 1515.) Later in the afternoon, about 20 or 30 minutes after appellant said he was done and was not calling Epperson anymore, the telephone rang, and appellant let the answering machine pick up the call. Epperson then paged him constantly. Appellant called her back at her workplace, and Epperson asked him to come back to the Stairs program. (11RT 1515.) Appellant told her he did not want to rejoin the program, and Epperson said she wanted him back. Appellant said he would go back to the program, they would call a truce, and they would try to work out their relationship. Appellant called the Weingart program, and they told him to come back. Appellant went back the next day. (11RT 1516.)

Around November 8 and 9, 2000, appellant saw Epperson a couple times, and they talked on the phone. (11RT 1517.)

On Saturday, November 11, 2000, Epperson paged appellant and wanted to spend the day shopping and doing other things. (11RT 1517.) They drove into the San Fernando Valley to a Wal-Mart and ate at Pollo Loco. Appellant bought her a jacket from a man near Pollo Loco. (11RT 1518-1519.) Epperson was pleased with the jacket. (11RT 1520.) Appellant also bought her a stuffed dog, which was shown in a photograph of Epperson's belongings. (11RT 1500-1501, 1517.) They went back to her apartment, and Epperson put her purchases away. Appellant then drove her to county jail to see her son. Appellant did not go in, but picked her up. They ate at a nearby Denny's and returned to her apartment. (11RT 1520.)

While at her apartment, they began to kiss or hug but were interrupted by her son calling from county jail. After Epperson and her son talked, appellant and Epperson had sex. (11RT 1521.) When he left Epperson's

apartment in the evening, they did not have plans for Sunday. (11RT 1522.)

On Sunday, November 12, 2000, appellant was still living at the Weingart and left his truck parked at the Weingart. Near the Weingart, appellant saw Epperson on the corner near the church. Appellant walked into the Weingart and saw Sims in the lobby. Sims was watching Epperson, and appellant stepped to the side to see what Sims was going to do. As soon as Epperson broke away from the person she was talking to on the other side of the street, Sims immediately ran out of the lobby and intercepted Epperson. (11RT 1522-1523.) Appellant stayed and watched. (11RT 1523.) After Sims left, Epperson went across the street to appellant and said, "Walk me home." Appellant walked her to the Ballington, and when they were in front, Epperson said, "Come in." (11RT 1524.)

About 10:45 a.m., appellant signed in with Epperson. (11RT 1525.) At some point, appellant and Epperson left for a Christian book store to get a Bible. Appellant drove, and Epperson bought a Bible. The receipt with a time of 12:09 p.m. was later found on Epperson's bed. (11RT 1525-1526, 1627-1628.) They returned to Epperson's apartment no later than 12:30 p.m., but did not sign in. Epperson was wearing jeans and tennis shoes. (11RT 1526.) Appellant and Epperson had consensual sex on the bed, while the bed was made. (11RT 1526-1527, 1533-1534, 1540.) Appellant ejaculated inside Epperson. (11RT 1553.)

After sex, Epperson went to the bathroom, and appellant was lying on the bed. The phone rang, and Epperson came back to the bed, where the phone was on top of the headboard. She answered the phone and started talking to someone about making plans to go out. (11RT 1527-1528, 1601-1602.) She was on the phone for one or two minutes and then hung up. Appellant said, "What the hell is that?" Epperson told him not to "make too much out of it." Appellant asked her if she was "screwing around," and

Epperson said that appellant did not run her life. Epperson said other men had tried to run her life but they could not and appellant was not going to either. Appellant said that he was not trying to run her life and that he thought they were trying to build something. (11RT 1528.) Appellant asked who had called, and Epperson said she would not tell him because appellant would confront the man. (11RT 1528-1529.) Appellant said, "Yeah, you're right, I will." (11RT 1529.) Appellant asked again who called, and she said it was someone who went to her church. Appellant asked what their relationship had been, and Epperson said he was a "fill in" or temporary person while she was lonely. Epperson said appellant was not good enough for her because she thought he did not believe in God. (11RT 1529.)

Epperson went back to the bathroom. (11RT 1529-1530.) Appellant started to walk towards the bathroom and said, "So this is it, huh?" Epperson said, "Yeah. It's fun while it lasted, but we're done." Appellant felt worthless and crushed. (11RT 1530.) Appellant hit Epperson in the face once in the bathroom with his fists. (11RT 1530, 1540-1541, 1598-1599, 1602.) Appellant only remembered hitting her once. (11RT 1600.) Appellant hit Epperson because he "was basically told that [he] was leaving." Appellant felt hurt, shocked, and crushed. (11RT 1602.) Appellant reacted by hitting her. (11RT 1603.) No one else was in the apartment. (11RT 1541.) Appellant could not remember what happened after hitting Epperson. (11RT 1555.) Appellant had "blanked" out a few times before. (11RT 1555-1556.) At some point, appellant saw Epperson on the ground and left. (11RT 1530-1531.)

"From all signs," appellant killed Epperson. When she was lying on the ground, he did not see her moving. When he left her, appellant did not know if Epperson was breathing, making any noise, or gurgling. (11RT

1541.) Appellant did not try to help her or see if she was alive or dead. (11RT 1542.)

Appellant testified both that after he killed Epperson he got into his truck, drove to Charles Vannoy's house, and got drunk and also that he did not remember doing so. (11RT 1561, 1607.) Vannoy was appellant's friend. Appellant was told he saw Vannoy after he killed Epperson, but appellant did not recall seeing Vannoy and giving him his truck. Appellant admitted telling the police that he had given Vannoy his truck. (11RT 1548, 1561.) Appellant was not paying Vannoy for anything, such as keeping quiet and harboring him, by giving him the truck. (11RT 1561-1562.) Appellant did not remember writing out a note for Vannoy that he had given him the truck but appellant had seen in his police interview statement that he had given Vannoy the note. (11RT 1562.) It was "possibly" true if he had said it to the police earlier and it was in a transcript and a videotape. Appellant was not lying to the police when they interviewed him and did not make up a story. (11RT 1563.)

Appellant did not recall the conversation he had with Vannoy, so he did not remember telling him that he used a candleholder to hit Epperson on the head, that he cut her twice on the side of the neck with glass, that he put a screwdriver right through the middle of her head, and that he hit her with a stool. (11RT 1618-1619.)

Appellant thought he remembered a conversation with Todd. (11RT 1533.)

Before appellant went to the motel where he was arrested on November 16, 2000, appellant visited his friends, Mike and Neida Welsh in San Pedro. He did not recall telling them or Vannoy anything. (11RT 1570.)

Then, on November 16, 2000, when appellant was at a motel, the police kicked in the door. Appellant was not lying on the bed watching a

pornographic movie. Appellant was told Epperson's keys were next to him on a table, and he was not contesting the fact he had her keys. At that time, he did not know what he had done to Epperson. He was arrested. Appellant had not told people that it was death row for him this time or that he was going to celebrate before he went back to prison. (11RT 1568-1569.)

After the police took him into custody on November 16, appellant spoke to the police and gave them "a lot of detail about [his] name, [his] height, [his] weight, [his] birth date, [he] told them phone numbers, [he] told them who to contact, [he] told them – [he] identified his parents, [his] brothers and sisters. . . . " He also told them where he graduated from high school, how he got his checks, and where he worked. (11RT 1571.) Appellant remembered some of what he told them. He did not remember whether he was given his *Miranda*[5] rights or whether he waived his right to remain silent. Appellant continued to talk to the police about what happened on Saturday when he took Epperson driving, to Wal-Mart, and so forth. (11RT 1572.) When he told the detectives he did not know where his truck was, appellant was confused. Appellant did not lie to hide anything. (11RT 1613.) Detective Larry Barr told appellant that Epperson was dead. Appellant had been uncertain up to that point. (11RT 1623.)

Appellant knew his hands were cut when he was arrested, but did not know where he got the cuts from, since he had a lot of cuts from work. (11RT 1595.) Appellant did not remember slamming Epperson's head six times against the wall. (11RT 1599.) Appellant did not remember Epperson asking if he was going to kill her, that he said yes, and that Epperson asked why he was doing this to her. Appellant was not having a

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

blackout in front of the jury as he testified. (11RT 1600.) Appellant did not recall slamming anything into Epperson's head, including glass, broken furniture, and ceramic items. (11RT 1595.)

Appellant testified Epperson's panties were not on in the first place and did not know how the bloody towel covering Epperson's groin area got there. (11RT 1603-1604.) Appellant did not know how his bloody fingerprints got on her pants. (11RT 1604-1605.)

Appellant did not notice if he had blood on his face after he saw Epperson lying on the floor. He did not recall using the mirror over the sink to look at himself or using the small towels left in the sink to wipe his hands or face. Appellant admitted his blood was on the towels. (11RT 1597.) He did not recall trying to use paper towels to stop the bleeding from his hands. He knew Epperson had paper towels in her apartment but did not know how the paper towels got in the toilet and the waste basket. Appellant did not know how the top of the toilet tank became ajar. (11RT 1598.)

Appellant did not know where Epperson's heart-shaped pendant was and did not know if she was wearing that pendant on November 12 when she went to church. Appellant did not know if he put his hands around her throat on November 12. (11RT 1554.) The day Epperson was killed, he did not go through her apartment looking for something. (11RT 1555.) Epperson's door was locked, but he did not remember locking it. (11RT 1606-1607.) He "vaguely" remembered leaving the Ballington. Appellant did not know he killed Epperson. (11RT 1533.) Appellant would only sign in and out of the Ballington when he first went in and when he left for the day, but did not sign in and out every single time he went in and out. The Ballington security people recognized him. (11RT 1522.)

When appellant hit Epperson, he was upset, hurt, and devastated. Appellant did not know anyone else was "in the picture." (11RT 1622.)

Appellant was not worried about Sims and had no idea about him. (11RT 1622, 1627.) Appellant "just lost it." (11RT 1622.) Appellant could deal with life on a daily basis, but "this" was "so far above anything else that I ever experienced." He "reacted the wrong way." (11RT 1623.) But he "did not intentionally kill Tammy Epperson." (11RT 1617.)

Appellant did not intend to kill, plan to kill, intend to disable or permanently injure her or her body or face, intend to maim or disfigure her, intend to make her suffer, and plan to inflict prolonged pain upon her. (11RT 1533.) Appellant denied raping Epperson. (11RT 1534.) Appellant could not explain how Epperson got bruising in her vaginal area. (11RT 1596.) Appellant did not use something other than his penis to penetrate her. (11RT 1597.) On the day Epperson was killed, appellant had not been drinking alcohol. (11RT 1560.)

Appellant did not constantly think about having to control himself. Appellant and Epperson had arguments but appellant did not beat or kill her during arguments. Appellant had been calm when Betsy M. and Colletta testified. (11RT 1608.)

After the incident, appellant thought about killing himself and attempted to do so. Appellant loved Epperson and thought she loved him. (11RT 1531.) Epperson was pretty and kind. They could sit in a room together and only say a few words in an hour and be content. He did not have to work so hard with her. (11RT 1521.) Appellant cared for Epperson. (11RT 1531.)

At trial, appellant denied lying to get out of the death penalty and denied lying to get placed in a mental hospital instead of prison. (11RT 1614.) Appellant's medications kept him calm and rational, but there was no "magic pill" that cures everybody. (11RT 1617.)

In a photograph in front of a McDonald's, appellant and Vannoy had their arms around Epperson. (11RT 1550-1551.) In two other photographs,

appellant was posing with Vannoy. (11RT 1552.) Vannoy had seen appellant and Epperson together many times. (11RT 1554.)

Appellant had a few violent encounters with women before. (11RT 1556.) Appellant had many girlfriends, and it was fair to say he had, over the course of time, 20 girlfriends. (11RT 1624-1626.)

Appellant had a girlfriend named Angel B., who was about 16 years old when he was 20 years old. (11RT 1624-1625.) He denied beating her because she wanted to leave him. (11RT 1557.) Instead, appellant was in a fight with her new boyfriend in a closed space, and apparently Angel B. was hit in the face. (11RT 1558.)

Appellant did kick Colletta in the bottom of her back, almost on her behind, but did not kick her on the neck. Appellant was not wearing steel-toed boots as Colletta said, and she was not trying to leave him. Instead, appellant had left her. (11RT 1558.) Appellant did not want to kill Colletta. (11RT 1565.) Appellant had a tattoo that said, "Debby," for Colletta. (11RT 1567.)

Appellant denied pulling out a knife and forcing Betsy M. to strip. (11RT 1558-1559.)

Colletta and Betsy M. had reddish-brown hair. But appellant denied that they looked like Epperson. (11RT 1564.)

Appellant was not aware he had broken his mother's back, and prior to the incident with his mother, appellant had been drinking heavily for 24 hours and "was an idiot." (11RT 1556, 1559.) Appellant remembered "doing it" but did not intend to harm her. (11RT 1559.)

Appellant denied that as to each violent incident involving his mother, sister, Colletta, and Betsy M., he told authorities that he did not remember doing what he had done. (11RT 1559.)

b. Expert Testimony on Epithelial Cells

Marc Scott Taylor, the Laboratory Director of Technical Associates Incorporated and a forensic scientist and criminalist, examined the panty liner from Epperson's panties in February 2004, and found the liner did not have epithelial cells or semen, which indicated the liner was not worn or in contact with a woman's body. There was no drainage into the liner. (11RT 1580, 1583-1584, 1585, 1588-1589.) If epithelial cells and semen had been on the liner, that would have indicated the liner had been worn subsequent to intercourse. If only epithelial cells and no semen had been found, that would have indicated the liner had been worn prior to intercourse but not after intercourse because there was no drainage of the semen into the panties. (11RT 1580.)

Squamous epithelial cells are a large, flat cell found in mucous membranes, and the lining of the inside of the mouth and the lining of the vagina are two sources where nucleated epithelial cells are found. The cells form and move to the surface and actually create the inner lining of the mouth or inner lining of the vagina. As the cells move to the surface and get old, they are sloughed off and will be found in saliva and in vaginal secretions in high numbers. They are very easily identified through a staining process and microscopic examination. (11RT 1575-1577.) Finding squamous epithelial cells gives an indication that a body fluid is present, and in conjunction with testing to look for other components of that body fluid, they can give an indication of the type of body fluid. (11RT 1577.)

No amylase was found either on the panty liner. Amylase is an enzyme found in high concentrations in saliva, but lower concentrations in vaginal secretions. (11RT 1584.)

Taylor, however, was not saying that the liner had not been worn at all. Instead, Taylor did not believe the panty liner was worn "for any

appreciable amount of time." If a person cleaned herself sufficiently, she could put on a pair of underpants and take them off, and there might not be any deposition of epithelial cells or amylase. (11RT 1589.)

Also, Taylor acknowledged a person could have gone to the bathroom, put on the panty liner, been beaten, had the panties removed, and been raped. Alternatively, the person could not have gotten the panties up in the first place. (11RT 1589-1590.)

A yellow stain on the panties was not tested for urine, but Taylor did not believe the stain was dark enough to be urine. Taylor acknowledged that when a person is beaten, the person sometimes could urinate. (11RT 1590.)

Assuming a woman went into a bathroom, put on a new panty liner, put on her panties, was beaten severely for seconds to minutes, was thrown on the ground, had her panties pulled down, and was raped by the perpetrator who ejaculated inside her, Taylor would expect there to be some transfer of epithelial cells. However, women have different types of vaginal discharges, from a little to a lot. Taylor did not know about Epperson's vaginal discharges. (11RT 1591.)

Assuming a woman struggling on the ground had her jeans removed forcibly, followed by her panties being forcibly removed, Taylor would expect to see an epithelial transfer if she had the panties on for a period of time before that. However, different women have different amounts of flow. Also, a transfer may depend on how much a woman had cleaned herself. If the panties had just been put on and then taken off, there might not be a transfer. (11RT 1592.)

The more physical activity a woman is involved in, the more vaginal secretions tend to come out of her body. If a woman was wearing the panty liner, one would expect that with physical activity there would be some deposition of vaginal secretions into the panty liner. (11RT 1584-1585.)

There was an indication of blood on the front portion of the panties where there were little stains. (11RT 1583.) Also, there was a small tear on the upper seam or waistband area on the underpants, and there was no way to tell how that tear was made. The tear could have been made by wear and tear. (11RT 1585.)

Taylor received the evidence items from the Los Angeles Police Department evidence locker about a year before he testified and returned them in the last couple weeks before he testified. The length of time evidence is kept depends on how the case progresses, and evidence is often kept for many years by his company. (11RT 1588.)

3. Rebuttal by Prosecution

c. Charles Vannoy

Charles Vannoy[6] had been in prison with appellant and got to know him a "little bit vaguely." (12RT 1701.) During the time he testified at trial, Vannoy took medications daily and was in the hospital ward. (12RT 1702.) Vannoy did not want to testify and denied knowing anything or remembering what he told the police. (12RT 1689, 1691-1693, 1696-1700, 1703; 13RT 1773.)

A redacted videotape of Vannoy's interview with the police was played for the jury. (Peo. Exh. 88A;[7] 12RT 1754, 1764.) Vannoy said he

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[6] In the 1980s, Vannoy had been convicted of child molestation and oral copulation, in violation of section 288, a crime of moral turpitude, and went to prison. (12RT 1701.) Later, he went to prison for assault with a deadly weapon. (12RT 1702.)

[7] People's Exhibit 88A is the redacted videotape, and People's Exhibit 88B is the redacted transcript of that interview. Although the evidence of Vannoy's interview was the redacted videotape (Peo. Exh. 88A), the redacted transcript (Peo. Exh. 88B) is referred to here for ease of reference. (12RT 1753.)

had been out of prison since May 2000. (Peo. Exh. 88B, p. 7.) He was taking medication for being "schizoid effect due to a personality disorder, being paranoid," was using heroin and "weed," and was seeing a psychiatrist and psychologist. (Peo. Exh. 88B, pp. 10-11.) With respect to his background, Vannoy said he used to be affiliated with the Aryan Brotherhood, a White supremacist group, but was a "dropout" who did not affiliate anymore. (Peo. Exh. 88B, p. 9.) He had numerous tattoos, including: on his arms, a gun tower with "Bell Gardens 13," a swastika, Snoopy, Bell Gardens, a clover, and a wizard; on his hands, "F.T.W." or "Fuck the World" and his initials; on his leg, "East LA"; a skeleton and "666"; and lightning bolts and "Bad Company." (Peo. Exh. 88B, pp. 11-15.)

Vannoy said he met appellant at the California Men's Colony in December 1999. (Peo. Exh. 88B, p. 16.) Around May 2000, Vannoy and appellant were released, and probably around June or July 2000, Vannoy saw appellant at the Weingart. (Peo. Exh. 88B, pp. 17-19.) Appellant was close to Todd, and Todd was friends with Epperson. (Peo. Exh. 88B, pp. 52-53.) Appellant told Vannoy that he and Epperson had been regularly having sex the preceding two weeks to a month before her murder. (Peo. Exh. 88B, pp. 40, 64.) Vannoy knew that Epperson had a Black boyfriend, and appellant did not like him. (Peo. Exh. 88B, pp. 64-65.) On November 9, 2000, appellant helped Vannoy move to his new apartment. (Peo. Exh. 88B, p. 19.)

On Sunday, November 12, 2000, just before 4 p.m., appellant called and asked if he could come over. About 4 p.m., appellant came over and was skittish. Vannoy asked what happened, and appellant said he did not want to talk about it. Appellant made some telephone calls from Vannoy's telephone to his mother, sister, someone named "Danita" in San Pedro, and "Jeff" at the Weingart to say he was leaving. Appellant said he would give

Vannoy his truck if he would give him a ride to Hollywood. (Peo. Exh. 88B, pp. 19-24, 26, 32, 42-46.)

On Monday, November 13, 2000, about 3 a.m., appellant told Vannoy, "I killed Tammy" and "I beat her to death." (Peo. Exh. 88B, p. 26.) Appellant said she had rejected him and told him she was seeing somebody else. (Peo. Exh. 88B, p. 27.) Appellant said he and Epperson had sex, and after they finished, a man called. Epperson told the man that what he was talking about sounded fun and they would have to do that. Appellant was in bed and asked who had called. They argued. Epperson said she lived her life the way she wanted. (Peo. Exh. 88B, pp. 28-29, 64, 84-85.) Appellant threw Epperson onto the bed or couch, and Epperson got up and went into the bathroom. They argued, and appellant told Epperson to sit on the toilet. Appellant hit her with a candle holder. As he was beating her, Epperson asked, "Why are you doing this?" Appellant told her, "All I wanted you to do was to love me, you know, and you wouldn't do that." (Peo. Exh. 88B, pp. 29, 38-39.) Epperson also asked, "Are you going to kill me, Troy?" Appellant said, "Yes, Tammy, I am. I am going to kill you." (Peo. Exh. 88B, pp. 39, 85.)

Back in the living area, appellant cut both sides of her neck with glass. (Peo. Exh. 88B, pp. 29-30.) Appellant said he hit her in the head with a little wooden stool and a big lamp and put a screwdriver or ice pick through the middle of her head, leaving a big hole in her forehead. (Peo. Exh. 88B, pp. 31, 33, 50-51.) Vannoy asked appellant if Epperson was alive and whether they should send help. Appellant said he had just killed somebody and Vannoy would be next if he said anything. Appellant said another murder would not matter because he was already looking at the death penalty. (Peo. Exh. 88B, pp. 33, 49.) Appellant denied raping Epperson. (Peo. Exh. 88B, p. 64.) Vannoy asked appellant about his clothes, but

appellant told him he did not need to know. (Peo. Exh. 88B, p. 41.) Appellant gave Vannoy his hat. (Peo. Exh. 88B, p. 43.)

Epperson had a "message business," and appellant found her workplace keys and took them. Appellant asked Vannoy if he wanted to make some quick money, but Vannoy declined. (Peo. Exh. 88B, pp. 34, 41, 48-49.) Appellant gave Vannoy a pink Motorola pager. (Peo. Exh. 88B, pp. 75-76.) About 3 or 4 a.m., appellant went to sleep. When appellant awoke, he ate, asked Vannoy to take him to Hollywood, and signed his truck over to Vannoy. (Peo. Exh. 88B, pp. 30, 35.)

Between 11 a.m. and 1 p.m., Vannoy dropped appellant off at Hollywood and Highland in Hollywood. (Peo. Exh. 88B, pp. 36-37.) Appellant said he was going to have fun for a couple days and then turn himself in. (Peo. Exh. 88B, pp. 46-47.) Appellant said he did not want to turn himself in by himself in Los Angeles because "they" would "fucking kill" him because the crime was vicious and the victim was female. Appellant had about $170 and gave Vannoy three twenty dollar bills. (Peo. Exh. 88B, p. 47.) Appellant was going to Hollywood to rob Epperson's workplace. (Peo. Exh. 88B, pp. 48-49.)

Vannoy told the police that he had appellant's disposable camera with photographs of appellant and Epperson from two months ago at a McDonald's. The camera had been in the truck. (Peo. Exh. 88B, pp. 62-63.) During the interview, Vannoy offered to page appellant and to try to get himself to turn himself in. (Peo. Exh. 88B, pp. 54, 65-67, 81.)

After the videotape was played, Vannoy said his recollection about his conversation with the police was not refreshed much. (13RT 1770-1771.) Vannoy "vaguely" remembered saying those things on the videotape and admitted it was "kind of apparent" he had been interviewed by the detectives. (13RT 1771-1772.) When asked if what he said in the

videotape was true, Vannoy testified, "You have it in color, yeah, I guess so." (13RT 1776.)

Vannoy testified he had learned facts about how Epperson had been murdered "on the street" before he talked to the police. (12RT 1700, 1784-1785.) Vannoy "guessed" that appellant used a stool and made the cuts to Epperson's throat using glass. (13RT 1782-1783.) However, Vannoy admitted he had never been to Epperson's apartment. (12RT 1699.)

Vannoy also testified that when appellant visited him, he had two one-half pints of Jim Beam bourbon, and appellant was very drunk when he told the stories. (13RT 1779.)

Vannoy remembered that appellant gave him the truck, that he was stopped in the truck in front of his apartment, that he was wearing appellant's hat, and that he was taken to the police station. (12RT 1697; 13RT 1774-1775, 1777.) Vannoy was on parole, and when the police took him in, he was very scared. Vannoy wanted to be cooperative so the police understood he had nothing to do with Epperson's killing. (13RT 1777.) By telling the police that appellant was thinking of burglarizing Epperson's workplace, Vannoy tried to distance himself from appellant. Vannoy made up that appellant had told him that Epperson asked if he was going to kill her and appellant said he was. (13RT 1778.) Vannoy also made up that appellant had said he was going to kill him. (13RT 1778-1779.) The pink pager was in his apartment but he did not know how it got there. (13RT 1783.) Even though Vannoy told the police information, his parole was violated, and he served a year. (13RT 1785-1786.)

d. Detective Larry Barr

On November 13, 2000, Los Angeles Police Department Detective Larry Barr, the investigating officer in this case, went to apartment A125 at the Ballington Plaza. (13RT 1792-1793.) The door had been forced open. (13RT 1793-1794.) The crime scene had been preserved. (13RT 1793.)

The whole apartment was in disarray. After taking a couple steps in and taking six Polaroid photographs, a criminalist was called. Criminalist Betsy Swanson arrived first, and then she summoned blood spatter expert Raquel. (13RT 1795-1796.) Swanson and Raquel were there about 12 hours. (13RT 1796.) Photographs were taken, and Epperson's body, which had a towel over the lower part, was removed. (13RT 1796-1797.)

Several items were booked into evidence, including the door knob and dead bolt and keys that Todd identified as belonging to Epperson's apartment door and her workplace. (13RT 1794.) Detective Barr tried the keys in the apartment dead bolt and door lock, and one key each opened the dead bolt and door lock. (13RT 1795.)

On November 15, 2000, Detective Barr received a call that officers had located appellant's red Mitsubishi truck, for which a "want" had been placed earlier in the computer system. Detective Barr responded to the location and conducted a surveillance on the vehicle. Around 8 or 8:30 a.m., Vannoy entered the driver's side of the truck, and he was detained by the police. (13RT 1797-1798.)

The day Vannoy was detained, he was interviewed by Detectives Barr and Shepard. Vannoy's interview was videotaped, but Vannoy did not know. The interview lasted about 55 minutes, and the videotape of that interview was played for the jury. Between November 13 and 15, there had been no newspaper articles on this case. (13RT 1798, 1810.) At the time Detective Barr interviewed Vannoy, he had not received Raquel's report detailing how the cuts were made to Epperson's throat and how the stool was used on Epperson and did not know the coroner had an opinion that there had been two slices to Epperson's neck, one on each side, caused by a piece of glass. (13RT 1799-1800.) Detective Barr did not know a wooden foot stool had been used to hit Epperson in the head. Detective Barr testified it was common practice not to talk to other people about the

findings at a crime scene to maintain the integrity of the crime scene and crime. He did not talk to anybody about the screwdriver found at the location. (13RT 1800.)

Vannoy told Detective Barr several things that fit the crime scene, including that: there was a candle and candle holder, and Detective Barr had seen a broken candle holder and candle lying on the floor in the bathroom; Epperson had a hole to the middle of her head, which Detective Barr observed at the crime scene; a lamp was used, and Detective Barr observed a broken lamp that appeared to have been used at the crime scene; and a screwdriver or ice pick had been used, and there was a screwdriver at the crime scene. (13RT 1802-1803.)

After Detective Barr spoke to Vannoy, Detective Barr went to Vannoy's apartment and found the pager, camera, and jacket mentioned by Vannoy. Detective Barr also found a piece of paper. (13RT 1801.)

At Vannoy's apartment, the police had hoped to tape record a call from appellant, but the recorder was not working correctly. The telephone rang while Detective Barr was there. (13RT 1803.) Vannoy answered on the speaker phone, and the caller identified himself as "Troy." Troy told Vannoy to take him off the speaker phone, which Vannoy did, and Detective Barr listened in by putting his head close to Vannoy's. (13RT 1804.) Troy gave a location, which was the Colony Motel on Pacific Coast Highway in Harbor City. Detective Barr went to the motel, as did a team of parole agents specializing in apprehending fugitive parolees. The parole agents verified appellant was in the room and kicked in the door. The agents entered the room, followed by Detective Barr. (13RT 1806-1807.) The agents took appellant off the bed and handcuffed him. Appellant was in boxer shorts and a T-shirt or tank top. A television was in the room. (13RT 1807.) A pornographic movie was on the television. (13RT 1809.) Epperson's keys were on a table next to the bed. (13RT 1809.)

Just prior to appellant's booking, photographs were taken. Appellant had numerous tiny cuts on both of his hands and a little bruising. (13RT 1810, 1812.) Appellant also had a small cut on his upper forehead. (13RT 1812.) Appellant's right calf had about a one-inch cut. (13RT 1813.)

On November 16, 2000, appellant was booked and had $150 on his person. (13RT 1810, 1813.) Appellant was advised of his *Miranda* rights, and appellant waived his rights and spoke to Detective Barr. (13RT 1809, 1813-1814.) Appellant was calm and answered questions. (13RT 1814.) Appellant said he was taking medication and had been on medications most of his life. (13RT 1816-1817.) Appellant said he had left the Stairs program at the Weingart twice. (13RT 1817.)

Concerning the events leading up to Epperson's death in her apartment, appellant said he and Epperson had spent all day Saturday, November 11, together and went to Wal-Mart. (13RT 1821-1822.) On Sunday, November 12, they went out to buy a Bible. (13RT 1822.) When they returned to her apartment, Epperson got a phone call and went to the bathroom. Appellant became upset and attacked her. (13RT 1819-1820, 1822.) Appellant said he hit Epperson a few times with his fists in the bathroom, and then she was on the floor. Appellant said he could not remember what happened after that. (13RT 1820, 1822-1823.) When Detective Shepard asked appellant if he intended to kill Epperson, appellant said no. However, Detective Barr felt appellant's real answer was when he said, "I don't know if I still realize this." (13RT 1824-1828.) Appellant tried to distance himself from Epperson's keys. (13RT 1820.) Appellant said he was the one who had changed the apartment's locks. (13RT 1822.)

Detective Barr went back to Epperson's apartment and recovered a Wal-Mart receipt dated November 11, 2000 and a religious bookstore receipt dated November 12. (13RT 1821-1822.)

When appellant testified at trial, he basically gave the same story as when he was interviewed. (13RT 1823.) However, on the stand, appellant gave elaborate testimony about what Epperson said to him, but when Detective Barr interviewed him, appellant only said Epperson got a call, words were exchanged, and Epperson said she was not doing anything wrong. (13RT 1823-1824.)

In mid-November 2000, Detective Barr went to G & V to determine if Epperson's keys would unlock the business, and they did. (13RT 1810, 1815.) There had been no burglary or evidence of a burglary there. (13RT 1815.)

B. Sanity Phase

1. Defense Evidence

a. Dr. Kyle Boone

Dr. Kyle Boone, a clinical neuropsychologist, testified that appellant's executive or problem-solving skills, reasoning, and logic were very impaired and that tests suggested appellant had some kind of brain damage or dysfunction. (15RT 2137, 2144, 2148, 2159-2160.) Dr. Boone defined neuropsychology as the objective measurement of thinking skills. Thinking skills are located in different areas of the brain, so by measuring thinking skills, one could determine which areas of the brain are not working correctly. (15RT 2137.) Dr. Boone interviewed appellant in jail and gave him objective standardized tests over a period of about three to four hours. (15RT 2137, 2139-2140, 2159, 2163.)

At the time of the interview, appellant was 35 years old. (15RT 2140-2141.) Appellant had tattoos on his arms and chest, had a red mustache and goatee, and was left handed. (15RT 2164-2615.) Dr. Boone introduced herself and said she had been sent by defense counsel to obtain objective measurements of his thinking skills. (15RT 2163.) Appellant was not

reticent, did not stop their conversation and walk away, and did not stop speaking to her and say he had a headache. Appellant was cooperative, polite, and socially appropriate. (15RT 2164.) Appellant had completed high school but stated he had barely made it through, graduated on the strength of his athletic ability, and thought he had learning disabilities. (15RT 2140-2141.)

Appellant's overall IQ was 90, and an average IQ was 90 to 109. (15RT 2141.) One component of the IQ test measured trivia or how much one learned in school, and appellant was in the 84th percentile on that test. (15RT 2192.)

Dr. Boone tested[8] appellant's basic attention, thinking or mental speed, language, visual and spacial skills, verbal memory, nonverbal memory, reading level, math level, and executive or problem-solving skills. (15RT 2143-2144.) Appellant did well on most domains. Attention was at the 75th percentile, language scores were "fine," visual and spacial scores were "pretty good," and verbal memory was excellent at the 96th percentile. (15RT 2144.) The verbal memory test showed appellant was very good at remembering words. (15RT 2145.) Appellant's thinking speed scores were "a little bit low," ranging from the 1st percentile to 48th percentile. (15RT 2146.) Thinking speed is how quickly one can do a pretty simple test. (15RT 2146-2147.) Visual memory ranged from low average to average, reading skills were above the high school level, and math skills were average. However, appellant's executive or problem-solving skills, reasoning, and logic were "very low, very impaired." (15RT 2144, 2148.) When a person is tested, he may be "entirely normal" in every area except one. (15RT 2142.)

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[8] The tests were not related to a review of the crime reports. (15RT 2140.)

Executive or problem-solving skills are related to the ability to face a problem situation and think of different strategies and figure out the best one. The skills also relate to thinking through consequences of behavior, being able to stop a behavior that is not correct or appropriate to the situation, being able to generate alternative solutions to problems, and the ability to use logic. (15RT 2148.) Dr. Boone administered six tests in the area of executive or problem-solving skills, and appellant was very low on five of six tests. (15RT 2161-2162.) For instance, on the Stroop test, in a group of 35 year olds, appellant's score was worse than 98 out of a hundred individuals. (15RT 2148-2149, 2152.) On other tests, appellant was at the 4th, 5th, and 10th percentile. (15RT 2149, 2152-2158.)

The Stroop test had three components: reading words as quickly as possible, which measures thinking speed; naming colors as quickly as possible, which measures thinking speed; and telling the color of ink and not what the word says when the word is not the color of the ink, which makes the test taker stop himself from reading. (15RT 2149-2150.) It was difficult for appellant to stop himself from reading, to stop behavior that was not appropriate to the situation. (15RT 2150, 2152.)

Appellant's performance on the trail making test, which involved sequencing of how to get from point A to point B, was "average," in the 66th percentile. (15RT 2173-2174.) Executive problem-solving skills implicate real world behavior, including the ability to plan. (15RT 2173.)

A consistent pattern of low scores on the six tests "suggests" brain dysfunction in the frontal lobes. (15RT 2158, 2161-2162.) The frontal lobes are involved in enabling flexibility and adaptability. (15RT 2150, 2152.) Individuals with frontal lobe dementia have "huge changes in personality, they become very disinhibited." (15RT 2159.)

The tests were administered in a quiet room, where appellant was not under pressure. If appellant was under stress or drinking, his ability to

function in the executive or problem-solving area would be even worse. The tests "suggested" appellant had some kind of brain damage or dysfunction and that appellant would have trouble making appropriate decisions. Also, the "highest violence scored in aggression scores are in the patients who have damage to the frontal lobes." (15RT 2159-2160.) The frontal lobes seem to inhibit violent behavior, so if frontal lobes are not working properly, violent behavior is enabled. (15RT 2160-2161.) According to Dr. Boone, appellant did not "have the same equipment that the rest of us have to make reasoned decisions about his behavior." (15RT 2171, 2182.)

Appellant's right frontal lobe was more compromised than the left. Dr. Boone's judgment about which portion of the lobe was dysfunctional was based on the way a typical brain is organized. (15RT 2171.) Dr. Boone knew Dr. Bertoldi had said the EEG showed dysfunction on the left and not right side of appellant's brain, but with appellant's left-handedness and his seizure disorder, appellant's brain dysfunction might be reversed, and then it would make sense that the detectable EEG abnormalities were on the left side. (15RT 2171-2172.) Also, five percent of left handed people have a different type of brain organization. Moreover, if appellant had childhood seizures, the seizures would tend to change the way the brain was organized. (15RT 2171.) Even if appellant's EEG were normal, appellant still had executive skills dysfunction, and his test score percentiles would not change. (15RT 2172.) However, Dr. Boone's tests did not measure brain function directly but measured thinking skills. (15RT 2172.)

Frontal lobe damage prevents a person from being able to control one's behavior. Someone could be born with frontal lobe damage.

Hypothetically, if one reported Jacksonian[9] seizures as a child at the ages of three years and seven years, that would be consistent with someone possibly having been born with frontal lobe damage. The seizures themselves do not cause the frontal lobe damage but whatever is causing the seizures is also interfering with the function of the frontal lobes. (15RT 2162.)

Appellant passed tests for malingering or the faking of cognitive symptoms, which meant he was doing his best on the testing and was not pretending to have problems in his thinking skills that did not exist. (15RT 2142-2143.) One could malinger to get out of criminal prosecution. (15RT 2190.)

Dr. Boone recommended appellant be tested for Klinefelter Syndrome DNA, because appellant reminded her of several men with Klinefelter Syndrome and thought the analysis might be useful in determining the cause for some of appellant's behavior and cognitive problems. Men with Klinefelter Syndrome have an extra X or Y chromosome, and a subset of these men have problems in executive problem-solving skills and can have socially inappropriate behavior. (15RT 2165-2166.) Studies in the 1970's showed an overrepresentation of Klinefelter Syndrome patients in prison populations, so Dr. Boone opined there did seem to be an increased risk of very socially inappropriate behavior in prison. One of out 500 men have Klinefelter Syndrome. (15RT 2166.) Dr. Boone thought appellant's very socially inappropriate behavior, his tall stature, gynecomastia or breast tissue, and problems in executive skills made her think it would be useful to get him tested. (15RT 2167.) However, unlike some men with Klinefelter

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[9] Jacksonian seizures are not grand mal epileptic seizures. (15RT 2169-2170.)

Syndrome, appellant had facial hair and his legs were not bare, and Dr. Boone did not examine his penis or genitals for evidence of Klinefelter Syndrome. (15RT 2165.)

Dr. Boone was provided with the crime report written by the District Attorney's Office, and she believed many of appellant's actions were not logical and did not make sense. However, Dr. Boone believed the prosecutor, when questioning her about a hypothetical situation similar to what happened, selectively picked out behavior by appellant that seemed logical, which included that appellant fled the scene, hid at a friend's house, got rid of his truck, made phone calls to a friend, evaded police for three days, rented a motel room, lied to the police when he was apprehended, and denied all knowledge of how he killed the victim. (15RT 2174-2175.) Dr. Boone was "not saying he has no ability to plan, but it's just at a much lower level. It's at a child like level." (15RT 2175.) The hypothetical the prosecutor related to Dr. Boone showed some "basic adaptive skills, trying to conceal a crime, hide from the police." (15RT 2179.) Dr. Boone disputed that appellant's statement to Epperson that he was going to kill her showed planning or goals. (15RT 2180.) Dr. Boone acknowledged she had not read the police reports or trial or grand jury testimony. (15RT 2179-2180.)

Dr. Boone was familiar with the DSM IV and anti-social personality disorder. (15RT 2183.) She did not know if appellant had an anti-social personality disorder. Dr. Boone opined that appellant had "cognitive dysfunction" and whether he had any other psychiatric diagnosis was unknown to her. (15RT 2183-2184.)

When questioned about the criteria for anti-social personality disorder, Dr. Boone did acknowledge that appellant had exhibited some of the criteria, including the "failure to conform to social norms with respect to lawful behavior" and "impulsivity and failure to plan ahead" which

related to his executive problem-solving skills. (15RT 2185-2187.) Appellant had cognitive difficulties but Dr. Boone did not know if he met the criteria for anti-social personality disorder. (15RT 2188.) Even if Dr. Boone knew that appellant had been diagnosed in 1994 at Patton State Hospital with anti-social personality disorder, Dr. Boone still opined that appellant had objective cognitive dysfunction. (15RT 2189.)

b. Dr. Roger Bertoldi

Dr. Roger Bertoldi, a neurologist and clinical neuropsychologist, reviewed appellant's neurological records, had an electroencephalogram (EEG) performed on appellant in jail, evaluated a quantitative EEG (QEEG) of appellant's EEG results, and interviewed and examined appellant in jail. (16RT 2219, 2233, 2245-2247, 2253, 2261-2262.) Dr. Bertoldi opined that appellant had brain dysfunction, which was consistent with episodic loss of control and temporal lobe epilepsy. (16RT 2265-2266, 2281.)

Dr. Bertoldi defined a neurologist as a physician who specializes in the nervous system and neurophysiology as further specialization in the testing of the nervous system. The neurological system includes the peripheral system, the nerves and muscles, and the central system, the spinal cord, and brain. Brain activity is measured by an EEG, which measures the electrical activity naturally given off by the brain. (16RT 2219-2220.) The brain is a commander of the nerves. (16RT 2221.)

The brain's top four millimeters, the cortex, is "very columnar," and because the brain cells are in columns, the cells project electricity, which cumulates. (16RT 2222.) Electrical activity of a normal person's brain varies developmentally, and such development is called developmental or maturational tolerance. The range of normality for electrical activity is large enough to minimize false positives for abnormality on an EEG. An

electroencephalographer does not want to label someone abnormal unnecessarily. (16RT 2223.)

The resting background rhythm of a brain is divided into frequencies on an EEG. (16RT 2223, 2225.) The brain emits a normal rhythm of about eight to ten hertz, which is called alpha. Anything faster is called beta, and anything slower is divided into theta and delta, delta being the slowest. (16RT 2224.)

Paroxysmal activity, which is separate from background rhythm, is any rhythm that arises out of the background and then recedes. If the paroxysmal activity is abnormal, one must determine whether the subject has epilepsy and the type of epilepsy. Epilepsy is more than one seizure. A seizure is when one has an abnormal portion of the brain where the electrical activity is not isolated properly and that electrical activity will either stay in that particular location or will spread. If the electrical activity spreads and depending on how it spreads, that will determine the type of seizure. (16RT 2227.) A seizure is a brain abnormality. An EEG can detect a brain abnormality if it is close enough to the cortex to measure. If the abnormality is deep within the brain, one only sees the projection of that abnormal activity upon the cortex, because deeper structures modulate the cortex. (16RT 2228.)

Some brain dysfunctions or epilepsy are known to be related to loss of control, including acts of violence. (16RT 2229-2230.) For example, in temporal lobe epilepsy, the seizure focus is in the temporal lobe, which is above and behind the ear, and the focus can spread upward towards the cortex or spread downward and into the limbic system. The limbic system is the deepest, most primitive portion of the brain and lies right on top of the brain stems. The temporal lobes wrap the limbic system, so they are close to the most primitive portion of the brain. If a seizure occurs in the limbic system, one would exhibit uncontrollable rage. (16RT 2230.) The

rage a person experiences during a seizure is "usually not goal oriented." (16RT 2287.) There are about a half dozen different types of epilepsy, not counting some additional rarer types. (16RT 2228.)

Dr. Bertoldi reviewed appellant's neurological records. (16RT 2233.) Appellant was born December 22, 1967, and records from 1970 showed appellant had two seizures when he was two years old. (16RT 2234-2235, 2242.) The seizures were focal, meaning they started in a localized area of the body, such as a twitching left leg. (16RT 2235.) The records also showed appellant had abnormal EEG activity in the left portion of his brain with "spike and wave" paroxysmal activity, which means the activity has a spike or very sharp component, and then a subsequent wave to it. That activity was particularly abnormal, because it correlated very highly with a seizure disorder. (16RT 2237.)

About one of five children can have epilepsy, meaning a child can have "abnormal discharges at one age or another." (16RT 2237-2238.) All children do not seize, and those who do seize are usually febrile, meaning the brain has not matured yet and is susceptible to abnormal electrical discharges. Febrile seizures in children usually are not treated because the brain has not finished maturing yet. (16RT 2238.) Appellant's records showed he had a "true seizure disorder" and was put on phenobarbital. (16RT 2239.)

On April 19, 1972, it appears appellant was seen by a doctor, because 1976 records referred to a 1972 "tracing" (EEG). (16RT 2242.)

Loma Linda records dated 1976, when appellant was eight years old, showed an EEG was done. (16RT 2240.) The EEG showed paroxysmal activity, meaning the activity came out of and disappeared into the background. The activity was a four to five hertz spike and wave, which was an epileptic form, a seizure and discharge. (16RT 2241.) The electroencephalographer reviewed appellant's records from when he was

two years old and found the activity had been present in both frontal lobes. (16RT 2241-2242.) The paroxysmal activity was "not normal," and appellant was having nocturnal seizures, thus confirming the presence of an epileptic form of the seizure disorder. (16RT 2242.) These abnormalities on the childhood EEGs suggested appellant had an underlying seizure disorder as a young boy and correlated with "true epilepsy" with a high degree of probability. Appellant had abnormal frontal bilateral brain activity. (16RT 2243, 2252.)

When abnormal cells spread to form a Jacksonian seizure where the seizure starts in the hand and spreads into the face or leg, that abnormality could spread into the limbic system, which could develop into loss of control or violent behavior. Appellant had a history of Jacksonian seizures. (16RT 2244.)

Dr. Bertoldi acknowledged the only seizures appellant complained of in any record were the ones when he was two and eight, including a nocturnal seizure when he was eight, but those incidents were about 30 years ago. (16RT 2274-2275.) Since that time, there had been no documentation of complaints or seizures. (16RT 2275.) Dr. Bertoldi did not know how many times in the last 30 years that appellant had had limbic seizures. (16RT 2276.) If a person had a limbic seizure, he would not remember what he did. If he did remember, he would have difficulty with detail, and memories would have some dissociative qualities. (16RT 2277.)

On February 17, 2004, Dr. Bertoldi asked the Q-Metrx company to do an EEG on appellant in jail. (16RT 2247.) Q-Metrx took the EEG on a computer and gave Dr. Bertoldi a disk. The EEG, which was 20 minutes of brain wave activity, showed a couple abnormalities, including that the brain's frontal portion showed too much slow activity. The slowing was in the same area as when he was a child. (16RT 2248-2250.) Dr. Bertoldi's

EEG findings were consistent with Dr. Boone's report concluding that appellant had frontal lobe problems. (16RT 2250-2251.)

Dr. Bertoldi also testified the EEG showed appellant had paroxysmal activity, in the theta frequency range, and was more on the left temporal region of the brain than the right. (16RT 2251.) The paroxysmal activity occurred about once a minute on average and was less specific than when appellant was a child, when doctors put him on phenobarbital. (16RT 2251, 2278.) This paroxysmal activity was consistent with interictal activity, meaning the activity occurred between seizures. (16RT 2251-2252.) Less than one out of a hundred people would have appellant's theta slowing activity as shown on his EEG. (16RT 2258-2259.) Dr. Bertoldi acknowledged theta slowing could be caused by drowsiness and that some medications also could cause slowing of the brainwaves. (16RT 2267-2268.)

If a person's rhythm is slowing in a certain area of the brain, an imaging procedure could be recommended to rule out a tumor, stroke, or infection. Dr. Bertoldi did not order a CAT scan or MRI for appellant. (16RT 2266-2267.)

Dr. Bertoldi also looked at a quantitative EEG (QEEG), in which appellant's EEG frequencies were compared to a normative data base of people of the same age and sex. (16RT 2253, 2261-2262.) To establish the data base, 2,082 people were used. (16RT 2279.) Only 120 seconds of appellant's 20-minute EEG tracing were used for the QEEG. (16RT 2256, 2278.) Dr. Bertoldi opined that the QEEG showed appellant had a frontal temporal brain dysfunction on the front and both sides of his brain. (16RT 2260-2261.) He also opined that the EEG and QEEG suggested appellant had epilepsy in the brain. (16RT 2262.)

Dr. Bertoldi learned that at various times appellant took Depakote, an anti-epileptic drug. Appellant said that before each violent episode he

stopped taking Depakote. If appellant stopped taking Depakote, the epileptic focus would no longer be suppressed and was free to spread limbically, deeper into the brain. (16RT 2262.)

Hypothetically, if a person had epilepsy or a temporal lobe brain disorder and said he could not remember what he did, that situation would be consistent with any generalized epilepsy. (16RT 2263.) Also, amnesia could be consistent with generalized epilepsy. (16RT 2263-2264.)

Temporal lobe epilepsy along with a dissociative quality is a phenomenon in which a patient describes an event as though he was watching but without the sensation that he did anything. (16RT 2264-2265.)

On April 16, 2004, Dr. Bertoldi interviewed and examined appellant in jail. Dr. Bertoldi reviewed all charts he received on appellant. Appellant's general physical examination was within normal physiological limits. (16RT 2245-2246.) However, appellant did have some gynecomastia, large mammary tissue, and other body features which suggested Klinefelter Syndrome, and genetic testing was recommended. (16RT 2246.) Appellant told Dr. Bertoldi that about twice a year he woke up in the morning and noticed his cheek had been bitten, and when he went to sleep and during sleep, he jerked or suddenly flung his leg or arm. (16RT 2246.) A person could have a night seizure and bite one's tongue or cheek. (16RT 2246-2247.) The jerking was not specific for epilepsy but was seen in myoclonic epilepsy, in which the focus results in myoclonus, a jerk. (16RT 2247.) A person who does not have overt seizures for a long time may have seizures at night while sleeping, thus making it appear the person is not having seizures. (16RT 2291.)

Dr. Bertoldi opined that appellant had brain dysfunction, based on his consideration of appellant's abnormal EEGs with spike and wave discharges as a young boy, his history of Jacksonian seizures, his physical

examination and records, and the 2004 abnormal EEG and QEEG which showed frontal temporal slowing, paroxysmal temporal slowing, and interictal activity probably from a seizure disorder. (16RT 2265, 2281.) The brain dysfunction was frontal temporal on both sides, showing the brain was not functioning properly. The dysfunction was consistent with episodic loss of control and temporal lobe epilepsy. The paroxysmal activity in the theta frequency range was more specific for temporal lobe epilepsy, whereas the computer data was more consistent with diffuse brain dysfunction anteriorly. (16RT 2265.) It was common for appellant's type of problem to spread into the limbic system, because of the major highways of tissue that link the temporal lobe and limbic system. If the brain abnormality spreads into the limbic system, extremely violent, primitive rage could occur. (16RT 2266.)

Dr. Bertoldi opined that a paroxysmal episode contributed to appellant's acts of violence against women in his life. When appellant attacked his mother and hit his sister on the head with a lead pipe, Dr. Bertoldi thought a paroxysmal episode was contributory but did not know how much. (16RT 2281.) And, assuming that about eight years ago appellant argued with his girlfriend, grabbed her around the throat, dragged her into the driveway, kicked her in the neck at least two times with steel toed boots, threatened to kill her until people dragged her away, and said he was going to shoot her, Dr. Bertoldi opined it was medically probable that paroxysmal discharge was contributory to some degree. (16RT 2282-2283.) Also, assuming appellant lured a victim to his apartment through a ruse, took her keys, threatened her, forced her to disrobe, kept her at knifepoint the whole day, yelled at her, told her to call his parole officer, and threatened to kill her and her children, Dr. Bertoldi did not believe a paroxysmal discharge caused the situation, but aspects of the situation might have been caused by it. (16RT 2285-2286.)

c. Dr. Saul Niedorf

Dr. Saul Niedorf, a child, adult, and forensic psychiatrist, interviewed appellant in jail on three occasions and reviewed numerous records. (16RT 2323-2325.) As a result of his training, experience, record review and appellant's interview, Dr. Niedorf opined that appellant suffered from and still suffered from intermittent explosive disorder (IED), a condition usually linked to brain, familial, and social dysfunction and characterized by actions which can come on suddenly without warning and are not inhibited. A typical normal person has controls to stop actions. (17RT 2327-2328.) Also, on the sanity issue, Dr. Niedorf opined that appellant did not know the nature and quality of his act and could not distinguish right from wrong at the time of the crimes. (17RT 2350-2351, 2356, 2398.)

(1) Intermittent Explosive Disorder Diagnosis

Over appellant's life, he developed the IED, which is the sudden onset of an aggressive violence, often with the character traits of "the fang and claw." In other words, people have mammalian or animal circuits where fangs and claws are instruments for aggression, and inhibitions or a cutoff are lacking. (17RT 2328-2329.) If a person has a pattern of exploiting others as part of his character traits and life history, then the person could be sociopathic. However, if the sociopathy is not primary in the person, then the exploitative behaviors are secondary to another condition. (17RT 2330.)

Dr. Niedorf testified about the Diagnostic and Statistical Manual IV (DSM), the manual of psychiatry diagnosis, and an Axis I and II diagnosis. Axis I is generally the psychiatric diagnosis, one of the 300 plus diagnoses in the DSM. Dr. Niedorf's Axis I diagnosis was that appellant had IED. (17RT 2331, 2374.) The DSM had nothing to say about the cause or etiology of disorders. (17RT 2374.)

Dr. Niedorf's IED diagnosis was based on the facts that: appellant was diagnosed at Loma Linda Medical Center when he was two years old and had treatments through his childhood and even adolescence; he had a series of terrible psychological and emotional events growing up; he had suicide attempts as a child and adolescent; his sociopathy was described at a later age in relation to his IED and very little was the sort of "pure culture of sociopathy"; and his choice of relationships, style of relating, chosen work, and behavioral qualities were not typical of an anti-social person, but were related to the IED. (17RT 2333-2334.)

Four different reports corroborated Dr. Niedorf's IED diagnosis: the Loma Linda report, Dr. Bertoldi's report, Dr. Boone's report, and Dr. Wu's report. (17RT 2339.) The information from them was evidence of organic damage, which cannot be manipulated by a person. (17RT 2392.) At Loma Linda, appellant had a positive EEG showing abnormalities when he was two years old. The EEGs were repeated through the age of seven, and appellant was treated with medicine. (17RT 2334.) Dr. Bertoldi's report results evaluating the recent EEGs corroborated the existence of the IED. The same slow waves were present, which are signs of developmental failure. (17RT 2335-2336.) Dr. Boone's tests corroborated where the damage appeared in both the EEG pictures and the PET scans by another neurologist, Dr. Wu. (17RT 2336-2337.) Dr. Boone's test showed the absence of executive functions, functions that initiate behavior or stop or inhibit behavior. Appellant's dominant side was the right side since he was left-handed. (17RT 2337.) Dr. Wu's PET scan showed areas which had low or below normal metabolic levels even during non-activities. (17RT 2338-2339.)

Other aspects of appellant's background corroborated the IED diagnosis, including his family background. Appellant's father was very abusive, and that abuse could be internalized into one's programs. (17RT

2340.) The abusive father and passive mother pattern has been researched in the psychiatric community. (17RT 2342-2343.) Patterns are laid down from societal and familial patterns. (17RT 2343.) Appellant was exposed to irrational actions, fault-finding, and punishment by his father. (17RT 2346.) Appellant's father pulled appellant out of treatment when he was young, because he did not think appellant deserved help. (17RT 2402.) Dr. Niedorf opined that appellant initially blamed himself, but later on identified with the abuser and became the abuser. (17RT 2346-2347.) One could overcome an abusive father by internalizing other inhibitory patterns that are more empathetic or spiritual, providing there is proper wiring in one's brain, proper support in your life, and proper medicines to help avoid the pathology of the IED patterns. (17RT 2341-2342.) Appellant was involved in a burglary when he was 19 years old; it did not surprise Dr. Niedorf that appellant involved himself in crimes. (17RT 2403-2405.)

Appellant's suicide attempts in childhood and adulthood also corroborated the IED diagnosis. Suicide is often the ultimate cutoff attempt of the individual who cannot control the aggression and destructiveness they feel. Because the individual cares, he tries to inhibit himself. Appellant injured or tried to injure people he loved, felt terrible, and attacked himself. (17RT 2343-2345.)

Another factor corroborated the IED diagnosis, the nature of appellant's relationships with women. He had relationships with women with children and who had difficulties managing and organizing their own lives. He took on a rescuer or caretaker relationship, but could not handle any competition from another male. That competition was a trigger for risk of losing the relationship and the rage at being deprived of that led to violence against the women. (17RT 2345.)

Appellant's history of medication also corroborated the IED diagnosis. When appellant was first treated, he was given phenobarbital, the classic

anti-Jacksonian seizure medication. In adolescence and in prison, appellant was given anti-manic, anti-rage, or anti-aggression medications. Those IED medications were mood stabilizers, which reduced arousal to a minimum so the person did not get too agitated from stimuli or too low so that one became immobilized. Appellant improved to the point he could reflect on his behavior and even describe it. The fact the medications worked and that he saw the positive effects corroborated that he had the mental illness. One such mood stabilizer was Seroquel, whose side effect was reduced sexual function or dysfunction. Depakote was also a destabilizer, which indirectly affected the level of arousal. Because appellant did not like the side effects of some of his medication, he stopped taking it, and trouble ensued. (17RT 2347-2349.) Appellant needed the medication he was prescribed and needed the security in which to take it. (17RT 2395.)

Appellant's interest in cooking also corroborated Dr. Niedorf's IED diagnosis, because appellant had attachments to feminine and maternal people and identified himself in that way to please people. Thus, when the rage against women happened, the rage was the result of mental disease rather than a hatred of women. (17RT 2349-2350.) Dr. Niedorf acknowledged appellant never kept a job longer than eight months. (17RT 2389.)

The IED includes rash, sudden, impulsive actions, usually with little provocation. (17RT 2371.) When appellant murdered Epperson, he was in an episode of IED. Dr. Niedorf believed it was uncontrollable and irresistible. (17RT 2372.) Dr. Niedorf opined that appellant did not have an irresistible impulse to kill Epperson, but the irresistible impulse was to assault her. (17RT 2372-2373.) Dr. Niedorf acknowledged there were preceding events, so it was not sudden; there was a buildup of tension and suspicion. Dr. Niedorf did not believe appellant's intention was to kill

initially, but to hurt and punish. (17RT 2372.) Even though a person may have IED, the person may, at times when IED is not occurring, know exactly he is doing. When appellant was locked up or caught on a crime, he would get depressed. (17RT 2400.)

The assaults in this case had to do with appellant's programming by a brutal father, genetics from that same father, the brain injury, and brain problems he had as an infant, toddler, child, and adolescent. The brain syndromes were treated, and his behavior improved. But, he continued to have that same injured brain. Dr. Niedorf opined "the precipitating events" did not cause the crime. (17RT 2374-2375.)

IED usually occurs when there is "an assault on the self esteem, on the core self of the person through rejection." (17RT 2377.) When appellant was rejected as a teenager for the first time by his girlfriend, appellant "whacked his sister." Appellant did not mistake his sister for his girlfriend; he knew who his sister was. Attacking his sister was similar to how he attacked himself when he could not attack someone else. (17RT 2378.)

Appellant tried to injure people he loved as a child. He shoved his mother and hurt her back, breaking her vertebrae. (17RT 2388.) The police report said she was frightened of him because he had repeatedly threatened to kill her. (17RT 2389.) Appellant's mother and sister both said they were still very fearful of appellant but loved him. Since his late teens, he had been estranged from his mother and sister. (17RT 2404.) However, appellant and his mother were close and talked on the phone more recently. (17RT 2405.)

Dr. Niedorf believed appellant's major explosions had to do with women because "they have to do with a terrible identification that he's made with the aggressor, with his father, and then in another and unconscious identification that he's made with women, with those that he

wants to identify with and cure or help or maybe help raise their kids, help restore them in some way." (17RT 2393-2394.)

Dr. Niedorf was familiar with appellant's Patton and other state prison hospital records. (17RT 2395.) In April 1993, July 1993, December 1993, and March 1994, in Patton, appellant was diagnosed with Axis I major depression with psychotic features. In March 1995, in state prison, he was diagnosed as bipolar with psychotic features. In October 1995, in prison, appellant was diagnosed with schizo-affective disorder, bipolar type. (17RT 2396.) Most bipolar people do not have an altered brain function. They have biochemical imbalances, but not structural injury or damage. In July 1996, appellant was diagnosed as schizophrenic disorder bipolar type. In 1997, at Atascadero, he was diagnosed as schizo-affective disorder bipolar type. In September 1998, appellant was diagnosed with bipolar disorder and schizophrenic disorder. In May 1999, at Wasco, appellant was diagnosed with schizophrenia and bipolar disorder. In April 2000, appellant was diagnosed with depressive disorder, seizure disorder, and major mental disorder. There was no doubt appellant had a major mental disorder. (17RT 2397.)

Dr. Niedorf read the Patton record in which appellant could only think of revenge and had hatred for those who testified against him. Appellant had hate "beaten into him from childhood on." The Patton records from March 12, 2002 to June 2002 when he was discharged showed a diagnosis of a mood disorder. (17RT 2378.) When Patton asked him about his memory and what had happened, appellant said he did not want to talk about it. (17RT 2378-2379.) Appellant had individual and group therapy, had vocational rehabilitation, and went on walks. Dr. Niedorf stated in his report that appellant felt extreme remorse, but the Patton records showed he told a social worker on March 22, 2002 that he did not murder anyone and was framed. Dr. Niedorf testified it sounded as if appellant was paranoid

and lying, not ashamed and remorseful. (17RT 2379.) Dr. Niedorf read in the Patton records that appellant was found to use a sufficient degree of restraint because he knew his behavior was linked with ground privileges. (17RT 2381-2382.) Appellant could exert control over his anger and impulses, if there was no provocation. (17RT 2382.) One of the major causes of provocation involved a woman, with whom he had a relationship, telling him that she wanted to leave him. (17RT 2382.)

Axis II was the secondary diagnosis. (17RT 2332.) Axis II depends on the person's age. A person could be initially diagnosed as having a conduct disorder, and at a later age, the diagnosis could be a personality disorder. A sociopath, a person who is doing bad for bad's sake, has an anti-social personality disorder, which is a secondary diagnosis. Most Axis II diagnoses vary depending on who is making the diagnosis and for what purpose. For instance, for insurance purposes, no doctor would select an Axis II diagnosis only, because they are not covered. (17RT 2331-2332.)

Throughout appellant's stays at Patton, state hospitals, and prisons, there had been multiple diagnoses of anti-social personality disorder on Axis II. (17RT 2398.) Dr. Niedorf acknowledged appellant may also have had anti-social personality disorder. (17RT 2383.) Appellant knew the legal system and had been to prisons and county jails. In Patton, appellant participated in mock trials to prepare him to come back to court. (17RT 2383-2384.) Dr. Niedorf was sure appellant knew how to manipulate the system. Appellant was intelligent. (17RT 2384.)

(2) Sanity Issue

Assuming the truth of the crime reports, that appellant went into a rage upon learning Epperson rejected him, that he committed horrible violence on her, and that he engaged in unpermitted sex, Dr. Niedorf opined that at the time appellant committed the crimes, appellant did not know the nature and quality of his acts and could not distinguish right from

wrong. Dr. Niedorf opined that appellant was in an altered state of consciousness. (17RT 2350-2351, 2356, 2398.) If one were in an altered state of consciousness, one would not feel the empathy or significance of the behavior. (17RT 2351.) Further, one can have a memory or recording of an event without really understanding or volitionally acting during the event. (17RT 2352.) IED is not unconsciousness though. When one has an IED episode, the rage is one that humans feel when engaged in mortal combat. A person will use whatever is at hand. (17RT 2356.)

Appellant could not distinguish right from wrong at the time of the crimes, because the area of the frontal lobes and the temporal lobes that initiate good behaviors or stop bad behaviors were not working. They were damaged and disconnected, and appellant did not have the medicine to help them work. (17RT 2356-2357.)

Even assuming that during the outburst of violence appellant had an erection, pulled down Epperson's pants, and had sex with her, appellant had previously engaged in these types of behaviors and could repeat them without initiating them voluntarily nor could he stop in the middle and say it was wrong. (17RT 2357.)

In Dr. Niedorf's opinion, appellant was insane during the commission of the crime because he had a mental illness or defect that led to these behaviors and did not have an intentional or voluntary consciousness. Consciousness is the function of the brain during alert and often intentional behaviors, but there are many behaviors that are not conscious and are learned and repeated. If there is nothing to prevent repetition, those behaviors could fire off, and a person could not be aware of them. (17RT 2358.)

Dr. Niedorf was aware appellant testified at trial. At the time of the commission of the crime, appellant was a different person than the one who testified. At the time of the crime, appellant was not able to answer

questions and able to deliberate and formulate; he was all action. (17RT 2360.)

Dr. Niedorf was familiar with Dr. Richard Romanoff, another forensic doctor. Dr. Romanoff interviewed appellant and prepared a report. (17RT 2367.) Dr. Niedorf considered Dr. Romanoff's reports, as well as reports of other doctors in reaching his conclusions. (17RT 2369-2370.) Dr. Romanoff wrote that in the Minnesota Multiphasic Personality Inventory (MMPI) II testing he found appellant was probably exaggerating, was manipulating the system, overreporting symptoms, and overreporting psychiatric symptoms. Dr. Romanoff also stated he believed appellant's 20-plus adult suicide attempts were not truly meant to end his life. Dr. Romanoff concluded the suicide attempts were used to get better housing and to move his location in prison. (17RT 2370.) Dr. Niedorf did not disagree with Dr. Romanoff, but disagreed with the purpose of the suicide attempts; there may have been secondary and positive effects from a suicide attempt, but the immediate effect was relief from internal pressure. (17RT 2370-2371.)

In appellant's testimony, his police interview, police reports, Vannoy's statement, and appellant's interviews with psychiatrists or psychologists, appellant did not say he disassociated and saw himself doing the things to Epperson. (17RT 2386-2387, 2390.)

d. Dr. William Vicary

Dr. William Vicary, a medical doctor specializing in psychiatry, evaluated appellant for competency to stand trial in 1993 for the crimes against Colletta and for the instant case in 2004. (18RT 2469-2470, 2472-2473, 2533-2534, 2571.) Dr. Vicary opined that appellant suffered from bipolar disorder, or manic-depressive illness. (18RT 2475, 2481-2482.) With respect to the sanity issue, Dr. Vicary opined that appellant knew and understood the nature and quality of his actions during the time he was with

Epperson in her apartment, but appellant was not able to distinguish right from wrong at the time of the commission of the crime. (18RT 2488-2490.)

(1) Prior Competency Evaluation and Bipolar Diagnosis

In April 1993, Dr. Vicary saw appellant by court order on the issue of whether he was competent to stand trial in the case in which Colletta was a victim. (18RT 2472-2473, 2533-2534, 2571.) Appellant had laid prostrate on the courtroom floor and said he had taken an overdose, but he had no medications in his system, which he later admitted. (18RT 2532-2533.) Dr. Vicary found him incompetent to go to court, but Drs. Markman and Sharma found him to be competent, that he was malingering, that his acts were entirely volitional, and that he was able to cooperate with his lawyer but chose not to. (18RT 2532.) Dr. Vicary wrote the competency question was a "fairly close" question and reasonable experts could arrive at different conclusions. (18RT 2541.) Dr. Vicary acknowledged appellant's actions in the courtroom were malingering. (18RT 2532-2533.) Appellant was sent to Patton State Hospital and found to be not competent to stand trial by reason of his mental illness. (18RT 2473.) At Patton, every 90 days a report was written. Appellant was treated with large doses of antipsychotic and mood stabilizing antidepressant medications. (18RT 2571.) A *Tarasoff*[10] letter was sent to warn Colletta, because appellant said she had broken his heart and he was going to kill her. (18RT 2533-2534, 2571.)

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[10] *Tarasoff v. Regents of the University of California* (1976) 17 Cal.3d 425.

A July 12, 1993 letter stated appellant was still incompetent to stand trial and was highly delusional. (18RT 2572.) Dr. Vicary acknowledged that trial delay favored the defense in general. (18RT 2542.)

In March 1994, Dr. Michael P. Maloney wrote a report regarding appellant's competency and said appellant was a questionable historian because there were discrepancies in what he related, which Dr. Vicary found as well. Appellant had a tendency to minimize and forget what he had done, which Dr. Vicary said appellant was doing at trial. (18RT 2542-2543.) Dr. Maloney said appellant's thinking process was logical and intact, he had no impairment in reality testing, he was not significantly depressed, and nothing showed he could not cooperate with his attorney. Dr. Maloney said appellant's behavior was purely volitional rather than any manifestation of a mental illness. (18RT 2543.)

On June 20, 1994, the Patton treatment team stated that it appeared appellant was not suffering from any major mental disorder, that he should be returned to court, and that any attempts to disrupt court proceedings had been volitional. (18RT 2547.)

In July 1994, Dr. Vicary examined appellant again and found him competent to stand trial. Appellant was sent back to stand trial. (18RT 2473.)

On April 29, 1997, at Atascadero State Hospital, after appellant was convicted for the crimes against Colletta, appellant's admission diagnosis was schizo-affective disorder, bipolar type, characterized by hallucinations and hearing voices. After appellant was examined, appellant did not appear to be hallucinating, and his Haldol and Artane medications were discontinued Appellant was upset about being sent back to the Department of Corrections. (18RT 2553.)

In a June 6, 1998 report by Dr. Osran, Dr. Osran said appellant did not have a severe mental disorder and he appeared to know that hearing voices

was the product of his own cognition, rather than a true hallucination in which an individual has no insight into reality. Those findings were not in Dr. Vicary's report, but Dr. Vicary tried to be faithful to Dr. Osran's report and put in the essence of the assessment and conclusions in his own report. Dr. Vicary stated in his report that Dr. Osran believed appellant had a severe personality disorder and that appellant appeared to know the voice inside his head was a product of his own cognition. (18RT 2554-2556.)

When appellant was in prison, virtually all his time was spent in various psychiatric units. Doctors evaluated him, and the majority found he had a major psychiatric disorder and treated him with "heroic" doses of very powerful toxic medications. (18RT 2573-2574.) One report from a prison doctor said appellant liked to torture cats and that he set fires as a child. (18RT 2550.)

Beginning June 2003, Dr. Vicary had interviewed appellant on five or six separate occasions at the jail for a total period of about 10 hours. (18RT 2472.) Dr. Vicary opined that appellant suffered from a major mental disorder, the "most likely diagnosis" being the same diagnosis he made in 1993, manic-depressive illness whose modern name is bipolar disorder. (18RT 2475, 2481-2482.) A person with bipolar disorder is very moody. In the manic state, a person can become very irritable, agitated, hyperactive, frenetic, stay up day after day working on projects, talk a mile a minute, and have wild ideas. In the depressive state, a person can stay in bed, refuse to get out, not shave, not brush one's teeth, feel terrible, and attempt suicide. (18RT 2482.) Appellant's disorder was more of the classic type called bipolar one, in which a person has an up and then a down period, each lasting a few weeks or months. (18RT 2483.) Bipolar disorder can be triggered by something very slight, including a very slight remark or look. (18RT 2501.)

Dr. Vicary's opinion that appellant had bipolar disorder was based on prison, state hospital, and jail records, which described appellant with terms including depression, bipolar, manic-depression, and psychosis. (18RT 2484.) One could compare the list of symptoms for bipolar disorder with the list of appellant's symptoms recorded in the jails and hospitals and also see that appellant's symptoms were repeated over and over again. (18RT 2485.) There is no relationship between intelligence and being bipolar. (18RT 2497.)

Dr. Vicary believed appellant exhibited the following symptoms for the manic episode: persistent elevated or irritable mood lasting for a period of weeks; decreased need for sleep; pressured speech; hyperactivity, including involvement in activities that have a high potential for painful consequences; financial irresponsibility; and sexual indiscretions. For the depressive episode, appellant exhibited: depressed mood most of the day or nearly every day for weeks; significant weight gain or loss; insomnia or excessive sleep; agitation or retardation (not moving), just sitting still hour after hour; feelings of worthlessness; decreased ability to think or concentrate; and recurrent suicidal ideation. (18RT 2487.)

Different mental health professionals seeing the same person sometimes have different diagnoses. (18RT 2475.) Dr. Vicary stated that if one has a major mental disorder and a behavior can be accounted for best by that major mental disorder, then all other disorders that one can have take secondary importance (18RT 2476.) For example, in this case, IED is very close to bipolar disorder, but the diagnostic manual states under IED that if the behavior can better be accounted for by bipolar disorder, one should give precedence to bipolar disorder. (18RT 2476-2477.) Also, one could have a major mental disorder and a lesser disorder, which includes personality disorders. (18RT 2478.)

Dr. Vicary did not agree with Dr. Niedorf's diagnosis that appellant only suffered from IED; Dr. Vicary opined that appellant could have both IED and bipolar disorder. The scientific literature indicated that 40 to 50 percent of people with IED also have bipolar disorder. (18RT 2477.)

Also, one could have a major mental disorder and a lesser disorder, which includes personality disorders. People with anti-social personality disorder or borderline personality disorder usually are not in the psychiatric unit of the county jail, county hospital, state prison, Patton State Hospital, and Atascadero State Hospital. (18RT 2478.)

Virtually every time appellant was incarcerated, even as a juvenile, he was transferred to a psychiatric unit and placed on anti-psychotic, antidepressant mood-stabilizing medications beginning with Thorazine and Haldol in his teenage years, continuing to the California Men's Colony East psychiatric unit, the main California hospital prison, and to Atascadero, the maximum security state hospital in California. Appellant was also in Patton State Hospital, and each time he was on extremely high doses of medication. Appellant was on 1,500 milligrams of lithium, 2,000 milligrams of Depakote, and 60 milligrams of Haldol, which is the equivalent of 3,000 milligrams of Thorazine, an amount that would "knock [a horse] to the ground." Appellant was also on Clozapine, an antipsychotic agent, which is given to less than one percent of the sickest of the sick because it can wipe out white blood cells. Without white blood cells, one has no immunity. (18RT 2479-2481.)

If Dr. Vicary gave a person what appellant currently took in jail, this person would be in a coma for three days. (18RT 2479.) If appellant were a "fake," he would have been under the influence and barely able to speak. The fact that he was alert, rational and able to communicate indicated the medications fit his illnesses and helped. Appellant's blood tests proved he took the medications. (18RT 2480-2481.)

Dr. Vicary's diagnosis of bipolar disorder was corroborated by appellant's family history. Dr. Vicary opined that there were very strong indications that other family members had bipolar disorder and related conditions. Both of appellant's paternal grandparents were alcoholics; the overlap between bipolar and alcohol and drug abuse was 60 to 70 percent. The paternal grandmother was described as hypersexual and neglectful of her children, who were taken away from her repeatedly. She probably had a major mental disorder, most likely bipolar disorder because bipolar people are hypersexual. One paternal uncle spent most of his life in a psychiatric hospital, and two paternal uncles and a cousin were alcoholic. Appellant's father was alcoholic, jealous, paranoid, irritable, and explosive to the point that he battered and beat his wife and children, even when the children were infants. (18RT 2504-2505.) Appellant's father smashed appellant against the wall when he was between a year and a half and two, which probably led appellant to develop the seizure disorder documented at Loma Linda. This seizure disorder was treated with phenobarbital for several years and now was arguably still present to some extent. About 40 to 50 percent of people with seizure disorders have some kind of mood disorder, like bipolar disorder. (18RT 2505.) Appellant's older brother was described as irritable, aggressive, assaultive, and grandiose and was probably bipolar. The younger sister disappeared in her late teens or early twenties, was on disability, suffered from depression and was treated with lithium, and probably had a major mental disorder, depression or bipolar disorder. (18RT 2506.)

Several tests were administered: Dr. Boone's neuropsychiatric test, as a result of which she found brain damage that was known about since appellant was examined as a child (18RT 2508); Dr. Bertoldi's EEG test, which was similar to the abnormal EEGs at Loma Linda when he was a child and which was abnormal too (18RT 2508); Dr. Wu's PET scan, which

showed brain damage in the frontal and temporal area of the brain and which was consistent with bipolar disorder (18RT 2509-2510); Dr. Vicary's Millon test and Dr. Mohandie's MMPI test which showed appellant had a brain disorder of a moderate to severe extent with indications of irritability, explosiveness, aggressiveness, paranoia, and problems in interpersonal relationships (18RT 2510); and a Klinefelter Syndrome DNA test, which was negative (18RT 2559).

The MMPI test results indicated an explosive disorder but also that appellant was quiet, submissive, and lacked self-confidence in dealing with others. However, with the bipolar disorder, if appellant was frustrated, insulted, or maltreated, the disorder could be triggered if he was in a very bad mental state. The bad mental state could be a result of getting off medication which appellant did for the six weeks prior to the murder, drinking alcohol which appellant did on and off before the murder, or taking drugs. (18RT 2511.)

Dr. Vicary testified the vast majority of treating and evaluating doctors had concluded appellant suffered from a genuine major mental disorder, which was treated with massive doses of dangerous anti-psychotic, mood-stabilizing, antidepressant medications. (18RT 2530.) The minority opinion was that appellant was basically just an anti-social person who became angry at times. (18RT 2484, 2529.)

Dr. Vicary acknowledged that, in most cases when someone batters and abuses or even kills his girlfriend or spouse, the person does not suffer from a major mental disorder. "That's exceptional. That's relatively rare." (18RT 2518.) Further, the most likely victim of a mentally ill person is the person closest to him. (18RT 2500.)

Dr. Vicary testified the murder was a "murder of passion, agitation and explosive outburst as [appellant] has repeatedly said over and over to

various doctors and police officers and detectives that he never planned the crime." (18RT 2512.)

Dr. Vicary acknowledged there was a sexual component to the crime; "obviously raping somebody, that has a sexual component." (18RT 2560.) Dr. Vicary also acknowledged that appellant had lied to him. (18RT 2539, 2575-2576.) Appellant lied or minimized his involvement in a 1987 burglary he committed when he was 24 years old. (18RT 2539-2540, 2579.)

(2) Sanity Issue

Based on his interview of appellant and record review, Dr. Vicary opined that appellant knew the nature and quality of his act at the time he was acting with respect to Epperson in her apartment. (18RT 2488.) Dr. Vicary had interviewed appellant about his life and this case, had looked at the crime reports, had read appellant's testimony in this case, and knew the jury had found appellant guilty of first degree murder with special circumstances of rape, torture, and mayhem. (18RT 2487-2488.) Dr. Vicary's opinion was based on appellant's own statements to the police and witnesses that he realized he was hitting Epperson and on his admissions to at least one witness that he had struck her with various items. (18RT 2489.) Nothing in Dr. Vicary's conversations with appellant from July 1993 until Dr. Vicary's testimony would lead him to believe appellant did not know he was murdering Epperson at the time. (18RT 2549.)

In Dr. Vicary's opinion, appellant understood the nature and quality of his act because he realized he was striking the victim with his fists and objects and that this could cause, given his size and her small size, grave bodily injury or death. It was "inconceivable that he did not have at some level some understanding that this attack could be fatal." (18RT 2489.)

Dr. Vicary testified that reasonable doctors could arrive at different conclusions about whether appellant knew the nature and quality of his act

and knew that Dr. Niedorf had testified that appellant did not know or understand the nature and quality of his act. (18RT 2489-2490, 2524.) It was a close case on the issue of legal insanity. (18RT 2524.)

The fact appellant testified and also made a statement to the police that he remembered hitting Epperson but did not remember anything else showed, in Dr. Vicary's opinion, that appellant had an explosive outburst, was not thinking clearly, and remembered some things but not others. There was enough of what appellant remembered and admitted to remembering to Dr. Vicary to indicate appellant had "at least some basic understanding of what he was doing and the consequences of his acts." (18RT 2490.)

However, Dr. Vicary opined that appellant was not able to distinguish right from wrong at the time of the commission of the crime. (18RT 2490.) Appellant had an explosive outburst. (18RT 2491.) When appellant attacked the victim, he was in an agitated, explosive, psychotic episode. (18RT 2492.)

Even assuming the jury found a rape occurred, that finding did not necessarily show appellant knew the difference between right and wrong and that he knew what he was doing. The finding only proved he knew enough to beat her to death and rape her but if he was in a psychotic, agitated frenzy it did not answer the question whether he knew what he was doing was wrongful. (18RT 2513.) Appellant was like a locomotive that had lost its brakes. (18RT 2513-2514.)

Assuming appellant mentioned to Vannoy that he (appellant) had told Epperson he was going to kill her, Dr. Vicary stated that it showed appellant had "some understanding of what he's doing, but it doesn't answer the question can he stop himself, can he control himself, is he thinking about right and wrong?" (18RT 2492-2493.)

As to appellant's testimony that from "all signs" it looked like he had killed Epperson, Dr. Vicary opined this testimony was consistent with someone who was trying to get out of something, because after the explosive episode, appellant calmed down somewhat and realized what he had done. Dr. Vicary thought appellant was shocked and that he did not intend to commit the crimes. (18RT 2495, 2521.) Appellant remembered what he did. At the time he testified, appellant had consciousness of guilt, that is, he was lying because he knew it was wrong. (18RT 2521.) When appellant testified, he had a grasp of right and wrong, but at the time of the killing in the middle of a bipolar episode, appellant would not have that grasp. (18RT 2497.) Appellant was only in a psychotic state while killing the victim. Appellant was in an altered mental state. (18RT 2515.)

Dr. Vicary wrote three reports regarding whether appellant knew the rightfulness or wrongfulness of his acts. (18RT 2519.) The reports were dated September 4, 2003, September 14, 2004, and November 2, 2004. (18RT 2520.) He wrote his reports using the American Law Institute standard, although the M'Naghten test is the California standard. (18RT 2525-2527, 2561-2562.)

In the September 4, 2003 report, Dr. Vicary stated appellant would qualify as having been legally insane at the time of the offense. (18RT 2564.) Appellant's appreciation of the wrongfulness of his acts at the time of the offense was compromised by his paranoia and psychotic agitation. (18RT 2566.) Dr. Vicary would not have put that in his report unless he believed appellant met the M'Naghten test. (18RT 2564.) The M'Naghten test states that a person is legally insane when by reason of mental disease or mental defect he or she was incapable of, one, knowing the nature and quality of his act, two, understanding the nature and quality of his act, or three, distinguishing right from wrong at the time of the commission of the crime. (18RT 2564-2565.) Dr. Vicary found the third factor true. (18RT

2565.) Also, the report stated appellant did appear to have had some awareness of the nature and consequences of his acts. At trial, Dr. Vicary testified appellant knew the nature and consequences of his act and that he lied about not knowing. Dr. Vicary said he changed his opinion from the report because he had become "more conservative" and had more data since preparing the initial report. (18RT 2523-2524.) Dr. Vicary included in his report some facts from defense counsel and relied on statements from appellant, even though appellant had lied to him in the past and lied to others. Dr. Vicary checked to see if appellant's statements fit with the other case data. (18RT 2550-2553.)

In the September 14, 2004 report, Dr. Vicary said appellant's ability to control his behavior and appreciate the wrongfulness of his conduct was compromised, thus meeting one of the three M'Naghten criteria. (18RT 2526-2527.)

Dr. Vicary acknowledged that whether appellant knew right from wrong at the time of his explosion was "properly in the hands of the jury because it's not a scientific medical decision, it's a moral social policy question." (18RT 2496-2497, 2519.)

Dr. Vicary did not go to the crime scene, was not given the grand jury testimony of the blood spatter expert or coroner, and did not review the interview tape of appellant or Vannoy. There was not an unlimited amount of money for Dr. Vicary to evaluate all the information when rendering his decision on whether appellant knew right from wrong. (18RT 2544-2545.)

(3) Dr. Vicary's Removal from the Superior Court Panel of Doctors and Probation

A few years before his testimony, Dr. Vicary had been removed from the superior court panel of doctors. In a 1996 murder case in which he was retained by defense counsel, Dr. Vicary made 23 deletions and changes to

his notes at the request of defense counsel, which was a violation of his ethics. (18RT 2556.) The changes were made to benefit the defense. (18RT 2556-2557.) One of the deletions was a statement made by the defendant a week before he committed the murder where he said he hated the victim and wanted the victim out of his life. As a result of making these 23 deletions and changes, the Medical Board fined Dr. Vicary and placed him on probation for three years. (18RT 2557.) Dr. Vicary was released early from probation because of exemplary behavior. (18RT 2567.)

2. Prosecution Evidence

a. Dr. David Griesemer

Dr. David Griesemer, a neurologist and neurophysiologist, interviewed appellant in jail, reviewed his medical neurological history, went over some cognitive skills with appellant, and conducted a simple neurologic examination of his head, neck, arms, and legs. Dr. Griesemer thought appellant's physical functioning was normal. (16RT 2296-2298.) Dr. Griesemer did not find anything that indicated a tendency to have epilepsy as an adult or significant frontal lobe slowing. (16RT 2307.)

Appellant told Dr. Griesemer he did not recall having had seizures as a child, although he remembered taking medication when he was little up until about age eight when it was discontinued. He also said from time to time doctors might put him back on Dilantin for a short while when they heard of his epileptic history but that he did not continue on anti-convulsant medication. He also indicated he had no recollection of having had seizures of any type since age eight. (16RT 2298.) Appellant displayed the scars where he had twice attempted suicide. Appellant also said he felt paranoid and scared of people in jail and throughout his life. (16RT 2310.)

Dr. Griesemer reviewed appellant's Department of Corrections and jail medical records. (16RT 2298-2299.) In all those records, there was no

documentation of any epileptic seizure since childhood. (16RT 2299.) Appellant had been given anti-psychotic medication, which tends to lower the seizure threshold and make seizures more likely to happen. (16RT 2310-2311.) Appellant was given Depakote, which can manage seizures, treat bipolar depression, and prevent migraines, but was not an anti-psychotic medication. (16RT 2311.)

Dr. Griesemer reviewed appellant's EEG reports from 1970 and 1976. The 1970 report reflected two nocturnal seizures, which meant the seizures began while he was sleeping, and the seizures involved the left leg, indicating they originated from the brain's right side. When appellant was examined, no neurological abnormality was found, and appellant was discharged with a phenobarbital elixir. (16RT 2299.) Dr. Griesemer opined that one could conclude appellant had at least two events in childhood that were focal in origin arising from the right side of the brain that required medication management at the time. (16RT 2300.) About half of childhood seizures will go away, because the brain begins to stabilize in terms of its chemical function and some of the inherited vulnerabilities during childhood are absent in adulthood. (16RT 2302.) It was unclear whether appellant as a child would be among the 50 percent of children who outgrow their seizures. (16RT 2300.)

Appellant's EEG reports from childhood showed abnormal epileptic discharges from the brain's left and right side. From one EEG study to the next, the predominance shifted, and that pattern tended to be seen with genetic or inherited epilepsies rather than those associated with focal structural brain abnormalities. In the 1976 EEG study, there almost seemed to be a disconnect between how dramatically abnormal the EEG was and how well appellant was doing clinically. The 1976 EEG was read as abnormal (at times during sleep the paroxysmal activity became nearly continuous), but nevertheless, the phenobarbital was discontinued and

appellant remained seizure free after that. This pattern is not inconsistent with some benign epilepsies. (16RT 2300-2301, 2307-2308.)

Dr. Griesemer looked at appellant's most recent EEG and saw some theta activity, which Dr. Bertoldi had also seen. However, they drew different conclusions about the theta activity. Dr. Bertoldi assumed that was a marker for some deep epileptic focus, and Dr. Griesemer did not make that assumption. Dr. Griesemer stated the theta activity was abnormal and subtle, which showed simply episodic or intermittent slowing, but was not an epileptic discharge. (16RT 2302-2303, 2312.) Dr. Bertoldi did not testify epileptic discharges were present on the most recent EEG, but he did speak about epileptic discharges during childhood as paroxysmal activity and then again spoke of paroxysmal activity on the most recent EEG, leaving listeners with the impression he was talking about epileptic activity, despite the lack of any. (16RT 2314.)

The focal abnormality that Dr. Bertoldi testified about was a little bit of theta activity shown more predominantly on the left side. However, the distinction should not be normal or abnormal as much as clinical relevance or irrelevance. A very generous margin exists in terms of allowing abnormalities, because many normal variations and different types of patterns can be confused with focal abnormalities. (16RT 2306.) Dr. Griesemer did not find anything that indicated a tendency to have epilepsy, found nothing that indicated a significant frontal lobe slowing, and found nothing to encourage him to look further diagnostically at appellant. Dr. Bertoldi did not pursue further diagnosis either. (16RT 2307.)

Dr. Bertoldi's testimony suggested the seizure focus or the origin of the seizure was on the surface of the brain's right side during childhood and migrated, perhaps deeply, to the left side during adulthood. Dr. Bertoldi's basis for that assumption was a little bit of slowing on the EEG on the left

side, which he called limbic seizures. Dr. Griesemer testified that typically one does not see migration of the epileptic foci. (16RT 2305-2306.)

QEEGs are used by some people at Dr. Griesemer's university for research purposes, but are not used in the diagnostic EEG laboratory. (16RT 2303.) Dr. Griesemer testified it was not considered acceptable to use the QEEG findings as the basis for a diagnosis, and the American Academy of Neurology had discouraged the use of QEEGs for diagnostic purposes. (16RT 2304, 2315.) The QEEG is of limited utility in behavioral diagnosis, because it is well accepted that there is no direct correspondence between neurophysiology and behavior. (16RT 2304.) Q-Metrx had a disclaimer that the QEEG had limitations and could not be used to predict behavior or analyze behavior and that behavior must be studied. (16RT 2304-2305, 2315.)

b. Dr. Kris Mohandie

Dr. Kris Mohandie, a psychologist, opined that appellant was sane. His diagnosis was that appellant had an anti-social personality disorder with narcissistic and borderline traits and secondarily, malingering. (18RT 2591-2594, 2605, 2608, 2614, 2651.) Dr. Mohandie opined that the best evidence of what was in appellant's mind when he murdered, tortured, raped, and maimed Epperson was what he said and what he did. (18RT 2652.)

Dr. Mohandie interviewed appellant three times, although he went to the jail five times to interview him. Twice, appellant refused to come out, later indicating he was not feeling well. Appellant also cut one interview short. (18RT 2594, 2598-2599.)

Dr. Mohandie administered objective psychological testing to appellant. He administered the MMPI II, which offers at least eight different validity indicators to assess the subject's responses or test-taking attitude, to gauge accuracy. Dr. Mohandie also administered the Structured

Interview of Reported Symptoms (SIRS) test which specifically tests for malingering, exaggerated responding, and feigning or faking. (18RT 2599.)

In addition, Dr. Mohandie reviewed medical records and psychiatric forensic reports of defense counsel's experts, looked at police reports and photographs, looked at videotapes of appellant's police interrogation interview and Vannoy's videotaped interview, reviewed some of the transcripts from appellant's trial testimony, and went to the crime scene. (18RT 2594-2595, 2598.)

Appellant's MMPI results showed an exaggerated symptom response, meaning that appellant endorsed more items of alleged problems than most psychiatric patients, which is called a "fake bad" response. Appellant had a score of 98, which was far above a typical significant finding of 70 and suggested he was extreme in responding. (18RT 2601.)

Appellant's SIRS test results showed evidence of inaccurate or feigned responding on two aspects, one was probably feigning and the other indicated feigning. Both tests showed appellant exaggerated what was wrong with him. (18RT 2601.)

Dr. Mohandie reviewed Dr. Boone's report and looked through the tests she administered. Dr. Boone did not use the MMPI or SIRS test. The Millon test which Dr. Boone used did not have the sensitive validity indicators or research on validity indicators of the MMPI. Dr. Mohandie disagreed with Dr. Vicary's testimony that the Millon was a newer, more sensitive test. (18RT 2599-2600.)

Dr. Mohandie's primary opinion was that appellant was sane. (18RT 2605, 2614.) His opinion was based on: appellant having been off his medications for six weeks prior to the murder, and the lack of objective evidence that appellant fell within the insanity definitions during that time; appellant's interviews which showed he had a very specific recollection of

all the events leading up to the exact moment of the homicide, including the number of AA meetings he had attended, all the conversations he and Epperson had, and his various actions; appellant's denial of any psychiatric symptoms such as hallucinations, false sensations, or delusional beliefs; appellant having engaged in a variety of goal-oriented and goal-directed functional behaviors to avoid detection; appellant's report of an unlikely state of amnesia for the exact moment when the homicide occurred until after he was taken into custody and had given damaging statements; and the objective psychological data derived from the MMPI, which showed exaggerated symptoms reporting, and the SIRS results, which showed appellant was feigning different symptoms. (18RT 2605-2607.) The type of amnesia appellant claimed was malingering amnesia, or faked amnesia, according to the DSM IV. (18RT 2607.) Appellant denied he had consumed any alcohol or drugs just before committing the crime. (18RT 2606.)

Dr. Mohandie's diagnosis for appellant was anti-social personality disorder with narcissistic and borderline traits and secondarily, malingering. (18RT 2608, 2651.) All seven diagnostic criteria for anti-social personality disorder fit appellant: failure to conform to social norms with respect to lawful behavior as indicated by repeatedly performing acts that are grounds for arrest, which was shown by appellant's number of arrests and convictions for acts of violence; deceitfulness as indicated by repeated lying, use of aliases or conning others for personal profit or pleasure, which was shown by appellant manipulating things for more favorable treatment in hospitals and the prison or judicial system; impulsivity or failure to plan ahead, which was shown by appellant's own acknowledgement and substantial history of being very impulsive and having angry impulses; irritability and aggressiveness as indicated by repeated physical fights or assaults, which was supported by substantial evidence; reckless disregard

for safety of self and others, which was supported by substantial information; consistent irresponsibility as indicated by repeated failures to sustain consistent work behavior or honor financial obligations, which was shown when appellant wanted to leave his job out of frustration; and lack of remorse as indicated by being indifferent to or rationalizing having hurt, mistreated or stolen from another, which was shown by appellant having had no true empathy for Epperson or the other two women who testified in the courtroom. (18RT 2609-2611.)

Appellant's description of how the crime occurred – he was angry because he perceived the victim was treating him poorly – was similar to domestic violence situations when the assailant has a constellation of anti-social personality traits and narcissism. (18RT 2608.) In domestic violence cases, the abuser commonly says he loves the woman but is control- and power-oriented, with anti-social, narcissistic, and borderline types of personality traits. (18RT 2650.)

Dr. Mohandie believed there was a sexual component to the crime because appellant raped the victim after or during commission of the crime, was able to maintain an erection while doing that, and reportedly was able to do the same in the past, which suggested "some element of a turn on for that for him." (18RT 2649.) During Dr. Mohandie's interview, appellant said the last time he had sex with Epperson was the day before and explained that was why he was so angry about her being on the telephone with another man. However, appellant testified at trial that he had had consensual sex with Epperson just before he killed her. (18RT 2650.)

Even though some doctors diagnosed appellant with a major mental disorder, Dr. Mohandie's opinion was that those diagnoses were not reliably done. (18RT 2626, 2635-2636.) Dr. Mohandie did not find mental evidence that one could reliably label appellant with a mental illness because of his tendency to exaggerate symptoms for secondary gain over a

number of years. (18RT 2602, 2622, 2626, 2628, 2643, 2651.) In addition, since Dr. Mohandie found appellant could be labeled as having an anti-social personality disorder with narcissistic and borderline traits, appellant was an unreliable source of information about what might be wrong with him. (18RT 2602.) Appellant might or might not have a major mental illness. (18RT 2622.)

Dr. Mohandie disagreed with the testimony of the defense experts that appellant had a major mental disorder and that as a result he was incapable of knowing right from wrong at the time he committed this crime. (18RT 2601-2602.) Dr. Mohandie did not see evidence that appellant suffered from a bipolar disorder such that he was a danger to himself or others. (18RT 2595.)

Appellant's behavior was not prototypical IED because appellant engaged in motivated behavior in the context of rejection and appellant's purposefulness was more than ordinarily expected in an IED situation. The DSM states that if the behavior is better accounted for by anti-social personality disorder because of the pervasiveness throughout the individual's life, then anti-social personality is the disorder. (18RT 2613-2614.) Also, Dr. Mohandie would not agree that IED was a "close cousin" of bipolar disorder as Dr. Vicary testified. (18RT 2638.)

A Patton State Hospital report dated June 7, 2002, stated appellant did not have a psychotic or major mood disorder. (18RT 2648-2649.) Dr. Mohandie's recollection of the records he reviewed was that there was a mixture of those that showed a variety of major mental disorders and those saying something else was going on. In any event, appellant was diagnosed with anti-social personality disorder in many reports. (18RT 2649.)

Even if appellant were on medication for a mental illness, one would still expect to see some evidence of the mental illness. When Dr. Mohandie interviewed appellant, he did not see any evidence of a major mental

disorder such as bipolar disorder. When Dr. Mohandie viewed appellant's interview tape, he did not see any evidence of bipolar disorder. One would expect to see symptoms during the police interview because he had been off his medication for six weeks, which encompassed the interval of the homicide as well as when he was interviewed by the detectives. (18RT 2604.) Pursuant to the DSM IV, a bipolar person can also qualify as having an anti-social personality disorder, so they are not necessarily mutually exclusive. (18RT 2611-2612.)

C. Penalty Phase

1. Prosecution Evidence

a. Epperson's Family and Friends

(1) Bette Ruiz De Esparza

Bette Ruiz De Esparza was Epperson's mother-in-law, since Epperson was married to Paul Grano, her son. (31RT 4579.) Epperson and Grano met in grade school. Epperson's mother, who had alcohol problems, left Epperson when she was a teenager, and Epperson's father was in Chicago and did not raise her. Epperson essentially came to live with Ruiz De Esparza and Grano, and Grano looked after Epperson, essentially raising her and marrying her. Ruiz De Esparza and Epperson were very close, with Ruiz De Esparza considering Epperson to be her daughter and Epperson considering Ruiz De Esparza to be her mother. (31RT 4580-4581, 4584, 4587-4588.) Epperson had a sister and a brother. (31RT 4582.)

Grano and Epperson had a son, Jeremy, and they married when Jeremy was two years old. (31RT 4588.) Jeremy had problems with drugs and was in jail. (31RT 4589-4590.) Grano and Epperson also used drugs, and both got in trouble. (31RT 4588, 4591.) Epperson went to a drug

program, but relapsed. (31RT 4589.) Grano and Epperson broke up at some point, but did not get divorced. (31RT 4591-4592, 4595.)

Epperson called Ruiz De Esparza quite often. When Ruiz De Esparza was going to have a heart operation, Epperson called and said she and Grano would be there. Epperson sounded "real positive," as if her life was going well. (31RT 4583-4584, 4593.) When Ruiz De Esparza had her heart operation, right before Epperson was killed, Grano and Epperson were there. From the time of her operation forward, Epperson said she and Grano were getting back together. (31RT 4595.) Epperson did not mention Sims and did not tell her she was going to marry him. (31RT 4592.)

Grano told Ruiz De Esparza that Epperson had been murdered, and she could not believe it because Epperson had been so positive. (31RT 4584-4585.) Grano, who was broken hearted, had Epperson's ashes. (31RT 4594.)

(2) Ruth Steward

Ruth Steward worked as a lay minister at Central City Community Church of the Nazarene on 6th and San Pedro in downtown Los Angeles' Skid Row. (28RT 4214-4215, 4223.) The Weingart was directly across the street from the church. (28RT 4223.) The Weingart had programs to help people with mental illness and anger management. (28RT 4226-4227.) The Ballington was about a block and a half away from the church and Weingart. Many people in the area lived on the streets, used drugs, drank, and were mentally ill. (28RT 4224.)

Steward had known Epperson for about a year before she was murdered, and Epperson was clean and sober the whole year. They became friends. (28RT 4214-4215, 4217.) Steward remembered Epperson's smile and that she was positive about life. Epperson worked on her drug problems, would try to overcome obstacles, and was a "success story." (28RT 4215.) Epperson tried to help others. (28RT 4225.) Epperson

prepared a poem to give to about 20 people at the church. (28RT 4217-4219.) The poem talked of faith, making changes, and God's guidance. (28RT 4219.) A couple weeks before Epperson was murdered, Steward went on a retreat with Epperson, who was happy at that time. (28RT 4220.)

The pastor told Steward that Epperson had been murdered. (28RT 4220.) The church had a memorial service for her. (28RT 4229-4221.) Steward felt Epperson's loss very deeply. (28RT 4216-4217.)

Steward did not think she would meet anyone like Epperson again because the "vibrance that radiated from Tammy was extraordinary. Words can't express the life that this young lady had." (28RT 4221.) Steward came to court to testify for Epperson and would not have come otherwise. (28RT 4222.)

b. The Murder of Tammy Epperson[11]

Timothy Todd had been in prison from 1995 to 1998 at the California Men's Colony (CMC) in San Luis Obispo and met appellant, who was also incarcerated there. (31RT 4604, 4609.) CMC was a prison for people with a physical or mental illness. (31RT 4633.) Todd was gay. (31RT 4604.) Todd, who had been a prostitute and had a drug problem at that time, was in prison for robbing two of his "johns." (31RT 4606, 4631.) Appellant offered to defend Todd against men who wanted to beat and stab him, and they became friends. At that time, Todd respected and looked up to appellant. (31RT 4604-4605.) Appellant saved his life. (31RT 4632.) While in prison, appellant did not act like he was hallucinating, act crazy, talk to him like he was hearing voices, or act uncontrollably. (31RT 4609.)

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[11] Although some of the same evidence presented in this second penalty phase was also presented in the guilt and sanity phases, the evidence is summarized again here because the second penalty phase was tried to a jury different from the one that decided guilt and sanity.

On July 24, 1998, Todd was paroled to the Weingart Center Stairs Program, a program for homeless parolees and a drug program. (31RT 4606.) Tammy Epperson was already in the program, and Todd and Epperson became the best of friends. (31RT 4607.)

In 1998 or 1999, Ronald Sims[12] and appellant were both in the Weingart program also. (32RT 4727-4728, 4739.) They did not know each other well, and Sims avoided appellant because he had tattoos on his calves and arms. (32RT 4728-4729.) Appellant left the program at some point, served time for a parole violation, and returned to the Weingart again. (31RT 4607.)

In 1999, Sims met Epperson at the Weingart. (32RT 4714-4715, 4738.) Sims had been in the program about nine or ten months before he met Epperson. (32RT 4739.) Epperson was a "real likeable person." (32RT 4737.) They started dating, and Sims was her boyfriend for a while. (32RT 4715, 4736.) Sims met both Epperson's husband and son Jeremy. According to Sims, Epperson was not going to resume her relationship with Grano. (32RT 4740.)

At some point in 2000, Epperson moved out of the Weingart into the Ballington Plaza, which was low income housing, predominantly single-room apartments. (28RT 4237; 32RT 4715, 4739-4740.) Most tenants were low income wage earners or from recovery programs, including drug and inmate rehabilitation programs. (28RT 4237-4238.) The property manager was Michael Ramakrishnan, who had been a substance abuse counselor and who lived on-site. (28RT 4237, 4240, 4248.) The Ballington had many rules, including that no drugs would be tolerated.

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[12] Sims had been convicted of the felonies of grand theft in 1996 and transporting or selling cocaine. Sims served time and was paroled. (32RT 4738.)

(28RT 4241.) The lobby entrance was at 62 South Wall Street. (28RT 4238.)

Ramakrishnan knew Epperson, who lived at the Ballington a minimum of six months. (28RT 4239, 4254.) Epperson was a good person and tenant. She took care of herself, was very immaculate, was very detail-oriented, and spoke well. Epperson liked working and even if she had a hard day, did not complain. (28RT 4239.) Ramakrishnan spoke to Epperson often, and Epperson would tell him about some of her daily events. (28RT 4249.) Epperson had an outgoing personality and talked to residents on her day off. (28RT 4242.) Epperson's apartment was well kept and very clean; she took pride in her apartment's appearance. (28RT 4248.) After Epperson moved to the Ballington, Epperson helped Sims get in by recommending him to Ramakrishnan. (28RT 4244, 4255; 32RT 4715, 4739-4740.)

Todd and appellant were tutors for math and reading on the computers at the Weingart Center. At the Weingart, appellant saw Epperson and asked Todd who she was. Appellant said he would like to go out with her and asked Todd to talk to her. (31RT 4608.) Todd talked to Epperson about appellant several times, and Epperson said she did not want to go out with anybody and had just gotten out of a relationship with Ron Sims, an African-American man. (31RT 4609-4610.) Appellant continued to ask Todd to set him up with Epperson and was very interested. Eventually, Todd talked Epperson into going out with appellant, and all three went out together three times. (31RT 4610-4611.) The first time appellant met Epperson was between May and July 2000, so appellant would have known Epperson for about six or seven months. (31RT 4637.) After those three times, Todd did not see Epperson go out with appellant, and appellant continued asking him to set him up with Epperson. Appellant offered to buy Epperson a house and car, bought stuffed animals and flowers she did

not want, and bought her food. Appellant would bring gifts to Epperson and Todd's workplace, G & V Communications, an answering service where Epperson was the manager and where she had gotten Todd a job as her secretary. Epperson disposed of the gifts when she and Todd left work. Epperson did not want anything appellant gave her. (31RT 4611-4614.)

Encounters between Sims and appellant made Sims feel that appellant disliked him for certain reasons and made Sims feel afraid. For instance, one Saturday afternoon, Epperson had a little get together at the Ballington for her support group, including Todd and appellant. As Sims sat nearby, he heard two voices in the Ballington kitchen. (32RT 4729.) Appellant intimidated Sims or made him fear for his safety. (32RT 4731.) In another incident, Sims was going through the door at the Weingart, and appellant was coming in. Appellant called Sims a "punk m.f.," and as Sims turned around and looked, appellant looked like he was getting ready to rush Sims, engaging in "intimidation movements." Sims walked to the security guard area. (32RT 4732, 4736.)

Some time after Sims moved to the Ballington, Ramakrishnan allowed Epperson to change her locks, which was an exception to the rules. (28RT 4255-4256.) Epperson gave Ramakrishnan the impression she was changing the locks because Sims was trying to get in while she was gone, possibly to steal, but she did not specifically say that. (28RT 4256, 4264-4265.) Ramakrishnan asked for a key to her apartment, and she said she would give him one. (28RT 4256.) Ramakrishnan testified it was recommended a person in the early stages of recovery not associate with drug users, to avoid going right back to using drugs. Epperson wanted to distance herself from Sims. (28RT 4245.)

After Epperson changed her locks, Sims was evicted for non-payment of rent, possibly due to drugs. (28RT 4244-4245, 4258.) Sims was "86'd" from the property. Once a tenant was evicted for non-payment of rent, the

tenant was not allowed back onto the properly from six months to two years. (28RT 4258.) After Sims was evicted, he tried twice to get in. (28RT 4259-4262.)

Through the Weingart, appellant became good friends with Neida or Gretchen Black, a Black woman. (31RT 4650-4651.) Black married a White man, and Black, her husband, appellant, and Todd were all at the Weingart and got along. (31RT 4651.)

Appellant told Todd he would never hurt him or Epperson. Appellant walked them home from the Weingart. (31RT 4617.) Also, appellant said he had been to prison for beating up men who beat up women, but that was not true. (31RT 4618.) When appellant was at the Weingart, appellant told Todd he was in a White gang. (31RT 4624-4625.)

On one evening of a weekend, Todd, Epperson, and appellant were watching a movie at Epperson's apartment, and Todd wanted to go home. Appellant begged him not to go so they could all stay there together. Appellant said he would buy him anything he wanted to eat. Todd told appellant what he wanted, appellant bought it, and they all stayed and watched the movie. When Todd was ready to go, appellant walked him home. (31RT 4612-4613.) Todd visited Epperson's apartment frequently and identified some items in it that appellant said he gave her or helped her with as being there before appellant even met her. (31RT 4615-4616.)

In a letter dated April 25, 2000, Epperson expressed her fondness for Todd and said she was proud of him because he had turned his life around, stopped using drugs, and got off parole. (31RT 4616-4617, 4637.)

When there was a bus strike, Grano gave Epperson rides to work, and appellant was very jealous of that relationship. Appellant offered his truck to Epperson to take her and Todd back and forth to work during the strike. (31RT 4623.) According to Todd, Epperson was not going to get back together with Grano. Epperson gave $400 to a lawyer to file divorce papers

so she could marry Sims. (31RT 4635.) Appellant was very jealous of anybody who was with Epperson, including Grano, Sims, and Todd. (31RT 4639.)

In October 2000, Sims started using cocaine again, and on October 14, 2000, he was evicted from the Ballington for non-payment of rent. When Sims relapsed, Sims and Epperson broke up. To get back together with Epperson, Sims had to stop using drugs, get his life back together, and go back to work. (32RT 4715-4716, 4740-4741.) After being evicted, Sims went back to the Weingart, got in a program, went back to work, started talking to Epperson again, went to Bible study because of Epperson, and starting attending church. (32RT 4716, 4742.) Sims planned on getting back together with Epperson. (32RT 4736.)

At some point, Sims and Epperson had a dispute, and Epperson was upset that he kept coming around. Epperson changed the locks on her apartment door and did not give a key to the manager. Sims did not go in her apartment when she was not there and take things. (32RT 4742-4743.)

A week or two before November 6, 2000, Todd went to the beach with appellant, who liked to go to the beach when he and Epperson had an argument. (31RT 4638.) One time, when Todd and appellant were in Malibu, appellant said Epperson reminded him of a girlfriend who had died. Epperson looked like Betsy M., whom Todd had seen waiting to testify. Appellant also said that if Sims kept pursuing Epperson, he would kill Sims. (31RT 4621.) Also, at one time, appellant said that if Sims kept coming around Epperson, he would kill both. (31RT 4622.) On many occasions, appellant told Todd that he did not like Sims and used the "N" word. (31RT 4623-4624.)

On November 6 and 7, 2000, appellant telephoned Epperson at work. Epperson was very hysterical and crying. She told appellant on the telephone not to call, but he called every few minutes. She wrote down in a

book every time he called. (31RT 4619, 4645-4646, 4651-4655.) Appellant said he was going to commit suicide. (31RT 4638, 4653.) Epperson told appellant she was going to call the police if he did not stop calling. (31RT 4619-4620.) The last time appellant called Epperson, Epperson talked to him and told him that the Stairs program would take him back. (31RT 4648-4649.) Epperson then told Todd to answer the phone, which he did. (31RT 4648.) Afterwards, Todd tried to talk to appellant about stopping the pursuit of Epperson. (31RT 4620-4621.)

At some point, appellant said he was not able to have sex with Epperson and that she was not "giving it up to him." Appellant said, "If I can't have her, nobody will. I'll kill her and myself." (31RT 4622.)

On Thursday, November 9, 2000, Todd called Epperson and told her he had relapsed, was smoking crack cocaine, and was going to take time off. Todd felt he was stuck in the middle between appellant and Epperson and smoked crack as his only way out. (31RT 4625-4626, 4639-4641.)

On Friday, November 10, 2000, Todd talked to Epperson on the telephone from home. Epperson fired him because Todd had relapsed. Todd went in to work on Friday to pick up his check, and they talked. Epperson told him to come back Monday to discuss getting his job back once he was sober. (31RT 4625-4626, 4639-4641.)

On Sunday, November 12, 2000, in the morning, Sims was supposed to attend church across from the Weingart with Epperson but was late. Instead of going in, Sims waited for her to come out. While waiting, Sims saw appellant pacing back and forth from his truck to the corner on the opposite side of the street near the church. About 10 a.m., Sims met Epperson outside the church, and appellant was still across the street. Sims told Epperson he was going to attend another church and would call when he got out. After Sims talked to Epperson for a while and got ready to leave, Sims looked at appellant, who was squatting on the corner and

looking at Sims from across the street. Sims left Epperson in front of the church, while appellant was looking. (32RT 4716-4720, 4732, 4743-4744.)

About 1 p.m., Sims came back to Los Angeles from the other church service and paged Epperson. Epperson did not call back, which was unusual. Sims waited a few minutes, went to the Ballington to ask about her, and went back to a pay phone to call her again. Sims then went back to the Ballington to ask the security guard about her. Sims could not go back into the Ballington because he had been evicted. Sims asked a man coming out of the Ballington to knock on Epperson's door, and the man went back in and came out, saying there had been no answer when he knocked on her door. (32RT 4721-4722, 4747.) When Sims was at the Ballington, he saw appellant's truck across the street. (32RT 4722-4723.) Ramakrishnan saw Sims in the lobby, became upset, threatened to call the police, and said Sims had to leave. Sims went back to the Weingart. (28RT 4259; 32RT 4723.)

Between 4 and 6 p.m., Todd received a telephone call from appellant. Appellant said, "Biggy [Todd], I killed Tammy. You'd better go check on her." (31RT 4627.) Todd told appellant that appellant was drunk and that appellant would never hurt her. (31RT 4627-4628.) Appellant replied, "No. I killed her. Go check on her." Appellant hung up, called back, and said, "Did you go check on her?" Todd told appellant that he had not and that appellant was drunk. (31RT 4628.) Appellant said, "No. I'm going to be on death row. I killed her." (31RT 4628, 4641-4642.) Appellant said he was going to Florida. Todd still did not believe appellant because appellant had said he would never hurt Epperson. (31RT 4628.) Todd thought appellant was kidding. (31RT 4641.)

On Monday, November 13, 2000, when Todd went to G & V, the business was closed. Todd thought it was unusual because Epperson made

sure the business was open. Todd tried to call Epperson's phone but got no answer. (31RT 4626-4627.)

On that Monday, Sims went to work at the Mobil Oil Refinery, but since there was a gas leak, his crew went home. (32RT 4723, 4732.) Sims went home, changed clothes, and went to Hollywood to surprise Epperson and take her to lunch. Epperson's workplace was closed, which was unusual. Sims went back to Los Angeles and called Todd, whom he finally reached later in the afternoon. (32RT 4724.) Todd told Sims about the Sunday night call from appellant, which alarmed Sims. (31RT 4628; 32RT 4724-4725.) Sims went to the police station on 6th and Wall Streets. Sims tried to explain what Todd had told him and asked for a unit to be sent to investigate at the Ballington. (32RT 4725.)

At the Ballington, Security Officer Clevers Ray came to work at 2 p.m. (29RT 4274-4275.) The sign in sheet, which had been handled by the prior security officer, showed Epperson and appellant had checked in about 10:45 a.m., and appellant signed out at 1:26 p.m. (29RT 4246-4247, 4253, 4276, 4294.) Ballington policy required that guests have a valid California identification or driver's license, and the California driver's license number on the sign in sheet matched appellant's driver's license. Also, policy required that Epperson accompany appellant into her apartment, and when appellant left, that Epperson escort him to the lobby to have him sign out. (28RT 4246-4247; 30RT 4512.) However, the sign in log was not fool proof. A person could sign in and out, but might have gone in and out a couple times. (28RT 4253.) Before this day, Ray had seen Epperson with appellant and Todd at the Ballington. (29RT 4280-4281.) Every time she saw Epperson with Todd, appellant was with them. (29RT 4281.)

Between 2 and 3 p.m., Ray saw appellant coming through the lobby, leaving the property by himself. Epperson was supposed to bring him back to the front lobby. (29RT 4275-4276, 4285.) Ray said it was possible for

appellant to sneak back in. (29RT 4294-4295.) Ray asked appellant where Epperson was, and appellant said, "She's resting." (29RT 4276, 4295.) Appellant looked calm and natural. (29RT 4276.) Appellant went out the double sliding doors. (29RT 4277.)

Sims went to the Ballington. At the security desk, Sims talked to a Captain Thomas and tried to tell him something had happened. Sims was crying. (29RT 4277-4278, 4287; 32RT 4725.) Ray was with Captain Thomas and tried to get him to do something. Captain Thomas would not let Sims in and would not check on Epperson. Sims went back to the police station and asked them to send a unit. Sims went back to the Ballington and waited. Sims was upset. (29RT 4277-4279; 32RT 4726.)

Los Angeles Police Officer Antonio Gonzalez responded with his partner to a radio call to go to the Ballington, which was about a half block from the police station. At the Ballington, Officer Gonzalez spoke to Sims, who was upset, shaking, and distraught. Officer Gonzalez also spoke to Captain Thomas, who took Officer Gonzalez to Epperson's apartment, A125. (29RT 4279, 4307-4308.) They knocked on the door but there was no answer. The keys that security had did not work, because the locks had been changed. (29RT 4308, 4314.) Officer Gonzalez looked in the lone window in the rear of the apartment and saw the apartment was in disarray. At the foot of the bed was a female, and Officer Gonzalez could see just above the shoulders to the head. He saw blood. Officer Gonzalez tried to force the door in, but was unsuccessful, so Captain Thomas helped. Captain Thomas eventually kicked the door in. (28RT 4255; 29RT 4309; 32RT 4788.)

Inside the apartment, Officer Gonzalez checked to make sure no one was hiding. The window was closed. He saw a cloth or towel over the lower part of Epperson's body. (29RT 4310-4311.)

An ambulance came, and paramedics went in, but came out with an empty gurney. Sims thought Epperson was dead, because the paramedics would have brought her out. (32RT 4734.) Finally, a police officer told Sims she was dead. Sims told the police he thought appellant had killed her and told them the information Todd had related. (32RT 4735.)

Los Angeles Police Department Detective Larry Barr went to Apartment A125, which had already been taped off. (32RT 4784-4785.) He saw Epperson's body on the floor. Her head was towards the bed, and her legs were askew with the bloody towel over her lower area. (32RT 4785-4786.) One of Epperson's eyes was open. (32RT 4789.) A serologist was requested, and Betsy Swanson responded. (32RT 4786.) Swanson requested Ronald Raquel, a blood spatter expert, come to the scene. Swanson and Raquel were there about 12 hours. (32RT 4786-4788.)

In Epperson's apartment, Detective Barr found a receipt dated November 12, 2000 at 12:09 p.m. from the West Los Angeles Christian Book Store. (32RT 4807-4808.) He also found a deposit slip for $20 dated September 9, with appellant's signature, for Epperson's son at the jail. (32RT 4808-4809.) He also found a poem from appellant, expressing his desire for Epperson, on Epperson's bed. (32RT 4809-4810.)

In the evening of November 13, Todd received a call from a girl named Angie, who told him they had just found Epperson's body. Five minutes later, the police knocked on Todd's door and took him to the police station. (31RT 4628-4629.) Todd gave them a statement. (31RT 4629.)

Todd identified Epperson's apartment and business keys. (31RT 4643-4644, 4646.) He also identified a photograph of Epperson, appellant, and Vannoy at an old style McDonald's hamburger stand. (31RT 4644-4645.)

A Detective Shepherd interviewed Sims. In his report, Detective Shepherd wrote that after Sims talked to Epperson outside the church, Sims

saw appellant, "her new boyfriend, across the street waiting for her." Detective Barr did not discuss the phrase "her new boyfriend" with Detective Shepherd. (32RT 4811-4813.) No one that Detective Barr had spoken to characterized appellant as Epperson's boyfriend. (32RT 4794.)

Detective Barr obtained information about appellant's truck and entered information into a statewide system that the truck was wanted in connection with a homicide. The truck was registered to appellant's father. (32RT 4789.)

When they were trying to locate appellant, Detective Barr received information that appellant was in San Pedro. The police went to a house, but had apparently missed appellant by an hour and a half or two hours. (32RT 4795-4796.)

On November 15, 2000, Detective Barr got a call that the truck had been located. He responded to the scene with another detective and saw appellant's red Mitsubishi truck. (32RT 4789.) Charles Vannoy approached the truck and got into the driver's side. The police detained Vannoy, and Detectives Barr and Shepherd interviewed him. (32RT 4790.) Before Detective Barr interviewed Vannoy, Raquel did not tell Detective Barr what was used on Epperson, how Epperson was beaten, or what her injuries were. (32RT 4791-4792.)

Vannoy had met appellant in the California Men's Colony prison, which housed people with psychiatric problems, and appellant helped protect him and Todd. (30RT 4474, 4491-4492, 4496-4497.) Vannoy had a swastika tattoo and a lightning bolt tattoo, which was a sign of the Aryan Brotherhood, but he said he was not affiliated with them. (30RT 4486.) Appellant had given Vannoy his truck, the red Mitsubishi Mighty Max, which was registered to appellant's father, Joseph Powell. (30RT 4491, 4514.)

In Vannoy's redacted videotaped interview,[13] which was played for the jury, Vannoy said he had been out of prison since May 2000. (Peo. Exh. 88B, p. 7; 30RT 4477-4478, 4481, 4485.) He was taking medication for being "schizoid effect due to a personality disorder, being paranoid," was using heroin and "weed," and was seeing a psychiatrist and psychologist. (Peo. Exh. 88B, pp. 10-11.) With respect to his background, Vannoy said he used to be affiliated with the Aryan Brotherhood, a White supremacist group, but was a "dropout" who did not affiliate anymore. (Peo. Exh. 88B, p. 9.) He had numerous tattoos, including: on his arms, a gun tower with "Bell Gardens 13," a swastika, Snoopy, Bell Gardens, a clover, and a wizard; on his hands, "F.T.W." or "Fuck the World" and his initials; on his leg, "East LA"; a skeleton and "666"; and lightning bolts and "Bad Company." (Peo. Exh. 88B, pp. 11-15.)

Vannoy told the police that he met appellant at the California Men's Colony in December 1999. (Peo. Exh. 88B, p. 16.) Around May 2000, Vannoy and appellant were released, and probably around June or July 2000, Vannoy saw appellant at the Weingart. (Peo. Exh. 88B, pp. 17-19.) Appellant was close to Todd, and Todd was friends with Epperson. (Peo. Exh. 88B, pp. 52-53.) Appellant told Vannoy that he and Epperson had been regularly having sex the preceding two weeks to a month before her

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[13] As in the guilt phase, Vannoy did not want to testify and denied knowing or remembering what he told the police. (30RT 4465-4469, 4493.) After the redacted videotape was played, Vannoy acknowledged he was in the tape and said his recollection of the interview was, "So, so." (30RT 4485.) When Vannoy made his statement, he was on parole for forcible oral copulation of a minor girl. (30RT 4501-4502.) After the interview, he went back to jail for assault with a deadly weapon upon a nurse in a state hospital in 2001. (30RT 4502-4504.) Although the evidence of Vannoy's interview was the redacted videotape (Peo. Exh. 88A), the redacted transcript (Peo. Exh. 88B) is referred to here for ease of reference. (30RT 4478.)

murder. (Peo. Exh. 88B, pp. 40, 64.) Vannoy knew that Epperson had a Black boyfriend, and appellant did not like him. (Peo. Exh. 88B, pp. 64-65.) On November 9, 2000, appellant helped Vannoy move to his new apartment. (Peo. Exh. 88B, p. 19.)

On Sunday, November 12, 2000, just before 4 p.m., appellant called and asked if he could come over. About 4 p.m., appellant came over and was skittish. Vannoy asked what happened, and appellant said he did not want to talk about it. Appellant made some telephone calls from Vannoy's telephone to his mother, sister, someone named "Danita" in San Pedro, and "Jeff" at the Weingart to say he was leaving. Appellant said he would give Vannoy his truck if he would give him a ride to Hollywood. (Peo. Exh. 88B, pp. 19-24, 26, 32, 42-46.)

On Monday, November 13, 2000, about 3 a.m., appellant told Vannoy, "I killed Tammy." He said, "I beat her to death." (Peo. Exh. 88B, p. 26.) Appellant said she had rejected him and told him she was seeing somebody else. (Peo. Exh. 88B, p. 27.) Appellant said he and Epperson had sex, and after they finished, a man called. Epperson told the man that what he was talking about sounded fun and they would have to do that. Appellant was in bed and asked who had called. They argued. Epperson said she lived her life the way she wanted. (Peo. Exh. 88B, pp. 28-29, 64, 84-85.) Appellant threw Epperson onto the bed or couch, and Epperson got up and went into the bathroom. They argued, and appellant told Epperson to sit on the toilet. Appellant hit her with a candle holder. As he was beating her, Epperson asked, "Why are you doing this?" Appellant told her, "All I wanted you to do was to love me, you know, and you wouldn't do that." (Peo. Exh. 88B, pp. 29, 38-39.) Epperson also asked, "Are you going to kill me, Troy?" Appellant said, "Yes, Tammy, I am. I am going to kill you." (Peo. Exh. 88B, pp. 39, 85.)

Back in the living area, appellant cut both sides of her neck with glass. (Peo. Exh. 88B, pp. 29-30.) Appellant said he hit her in the head with a little wooden stool and a big lamp and put a screwdriver or ice pick through the middle of her head, leaving a big hole in her forehead. (Peo. Exh. 88B, pp. 31, 33, 50-51.) Vannoy asked appellant if Epperson was alive and whether they should send help. Appellant said he had just killed somebody and Vannoy would be next if he said anything. Appellant said another murder would not matter because he was already looking at the death penalty. (Peo. Exh. 88B, pp. 33, 49.) Appellant denied raping Epperson. (Peo. Exh. 88B, p. 64.) Vannoy asked appellant about his clothes, but appellant told him he did not need to know. (Peo. Exh. 88B, p. 41.) Appellant gave Vannoy his hat. (Peo. Exh. 88B, p. 43.)

Epperson had a "message business," and appellant found her workplace keys and took them. Appellant asked Vannoy if he wanted to make some quick money, but Vannoy declined. (Peo. Exh. 88B, pp. 34, 41, 48-49.) Appellant gave Vannoy a pink Motorola pager. (Peo. Exh. 88B, pp. 75-76.) About 3 or 4 a.m., appellant went to sleep. When appellant awoke, he ate, asked Vannoy to take him to Hollywood, and signed his truck over to Vannoy. (Peo. Exh. 88B, pp. 30, 35.)

Between 11 a.m. and 1 p.m., Vannoy dropped appellant off at Hollywood and Highland in Hollywood. (Peo. Exh. 88B, pp. 36-37.) Appellant said he was going to have fun for a couple days and then turn himself in. (Peo. Exh. 88B, pp. 46-47.) Appellant said he did not want to turn himself in by himself in Los Angeles because “they” would "fucking kill" him because the crime was vicious and the victim was female. Appellant had about $170 and gave Vannoy three twenty dollar bills. (Peo. Exh. 88B, p. 47.) Appellant was going to Hollywood to rob Epperson's workplace. (Peo. Exh. 88B, pp. 48-49.)

Vannoy said he had appellant's disposable camera with photographs of appellant and Epperson from two months ago at a McDonald's. The camera had been in the truck. (Peo. Exh. 88B, pp. 62-63.) During the interview, Vannoy offered to page appellant and to try to get him to turn himself in. (Peo. Exh. 88B, pp. 54, 65-67, 81.)

Vannoy told the detectives he was expecting a call, so the police went to Vannoy's apartment and were going to try to get appellant to reveal his location. When appellant called, Vannoy put him on the speaker phone, but appellant told him to take him off the speaker phone. (32RT 4793.) Detective Barr put his ear next to the phone next to Vannoy's head and told Vannoy things to tell appellant so appellant would reveal his whereabouts. Appellant told Vannoy that he was in Harbor City at the Colony Motel. (32RT 4794-4795.)

On or about November 15, 2000, about 9 p.m., Detective Barr and other law enforcement officers went to the motel, and the fugitive parole team broke the door in. As they were taking appellant off the bed, Detective Barr went into the room. (30RT 4514; 32RT 4797, 4804-4805.) Appellant was wearing boxer shorts and a white T-shirt or tank top. (32RT 4797.) Appellant was watching a pornographic movie. (32RT 4797-4798, 4805-4806.) Epperson's apartment and workplace keys and a G & V Communications business card were on a table next to the bed. (30RT 4514; 32RT 4798-4799.) Appellant's hands had a number of small cuts, and his head and calf had a cut. His jeans had blood on them. (32RT 4799-4802.)

In Vannoy's apartment, Epperson's pink pager and appellant's disposable camera were found. The camera had photographs taken at McDonald's, at the beach, and on Epperson's bed. (30RT 4493-4495, 4497-4498; 32RT 4792-4793.)

Ramakrishnan was shocked by Epperson's death because it happened at the Ballington which he took pride in, because Epperson was deprived of the chance to live a full life, and because other tenants were concerned about their own safety. (28RT 4249-4251.) Epperson's death affected him greatly. (28RT 4252.)

Five years after her murder, Todd still thought of Epperson all the time and was distressed and cried. (31RT 4629-4630.)

(1) Blood Spatter Expert Testimony and DNA Results

On November 13, 2000, at 11 p.m., Los Angeles Police Department Criminalist Ronald Raquel, a blood spatter expert, went to the crime scene at the Ballington. (29RT 4322-4324, 4331-4332.) Blood spatter interpretation deals with the identification of blood patterns. When a person is hit, the first strike causes a laceration, and blood flows from the wound. A successive strike causes the flowing blood to leave the body and cause a pattern. Patterns can reveal how they were made, the sequence in which an event occurred, and what objects were nearby when blood letting events occurred. (29RT 4343-4344, 4324.)

One type of blood spatter is the impact spatter pattern, and three different types of impact spatter patterns exist: low, medium, and high velocity patterns. Low velocity impact patterns can be caused by blood dripping due to gravity, and by cast off stains, which occur when a bloody object gives off blood and that blood strikes an intervening surface. (29RT 4324, 4341.) Medium velocity impact patterns, which are associated usually with beatings, are caused when the blood source may have been beaten by a fist or weapon. (29RT 4324-4325.) High velocity impact patterns are usually caused as a result of gunshot wounds or high-powered equipment like circular saws. (29RT 4325.) Generally, the velocity level correlates to the stain size. Low velocity is in the range of a five millimeter

or larger diameter stain, medium velocity is in the range of a two to five millimeter diameter stain, and high velocity is about a tenth of a millimeter diameter stain. (29RT 4325.)

Another type of blood spatter pattern is the transfer pattern, which is a stain caused when a bloody object comes in contact with a non-bloody object. One can recognize what bloody object made the transfer pattern. (29RT 4325.)

In Epperson's apartment, the door knob and deadlock on the back of the door were bloodstained with transfer stains. (29RT 4364.) DNA from bloodstains found nearest the front door on the floor and a stain further inside the doorway matched Epperson's DNA. (30RT 4513-4514.) Just inside the doorway was a light green runner on the floor in the foyer. To the left of the foyer, which lead to the living quarters, was a closet with its doors open and a sink. In the sink and trash can near the sink were paper towels. (29RT 4364-4365.) To the right of the foyer was the bathroom. (29RT 4332-4333.)

In the bathroom, on the wall behind the toilet was a spatter pattern of cast off stains. (29RT 4339.) The stain could have been caused by shaking or pushing an already-bloody person sitting on the toilet and then suddenly stopping the shaking or pushing, causing blood to leave the person and impact the wall. The bottom blood drip on the wall showed a drip pattern, meaning the stain had excess blood which dripped down the wall due to gravity. (29RT 4342.) The water tank lid on the toilet was ajar. Bloodstained paper towels, which had the same printed pattern as those in the entryway sink, were in the toilet. (29RT 4339, 4364-4365.) Paper towels in the toilet and trash can and on the floor were consistent with a person with very bloody hands wiping his hands with paper towels and throwing them in the toilet and trash can and one towel falling on the floor. (29RT 4341.)

On the bathroom floor were broken pieces of a glass candleholder, which contained a red candle. Some pieces were bloody, and some were not. In addition to the parts on the bathroom floor, two parts were in the little foyer just outside the bathroom. (29RT 4339.) A fair amount of glass was also on the shower floor. (29RT 4339, 4351.) If a person sitting on the toilet was hit on the head with a glass candlestick holder hard enough to have it shatter so that pieces landed where Raquel found them, Raquel opined that scenario was consistent with the blood spatter in the bathroom. (29RT 4340.)

On another wall in the bathroom were six transfer patterns. (29RT 4338.) Four were hair transfer patterns, meaning that strands of bloody hair contacted the wall. (29RT 4340, 4344-4345.) One was a combination swipe pattern; a swipe is when a bloody object contacts something, and the motion reveals directionality. (29RT 4340-4341, 4345.) The bottom pattern was just a swipe pattern. (29RT 4341.)

Assuming a five-foot, two-inch woman was bludgeoned in the head and bled, the bleeding caused cast off patterns behind the toilet, she was either shaken or hit, and she had blood coming out of her face and head and blood on her hair, Raquel opined the bloodstain patterns on the wall were consistent with her head being forced against the wall at least four times causing the hair transfers onto the wall, her legs giving out, and her being hit against the wall with another part of her body moving across or making contact with the lower part of the wall, causing swipe patterns, until she was on the floor. (29RT 4346-4347; 30RT 4448.) One swipe pattern was consistent with her head being up against the wall and falling to either side. (29RT 4347.) The other swipe pattern could have been caused by her clothing or face, something with blood that could transfer. The patterns showed Epperson was physically thrown or pushed against the side of the wall six times. (29RT 4348.) Raquel opined that after Epperson was

beaten in the bathroom, she was carried to the living quarters, given the lack of bloodstains leading from the bathroom to the living quarters. (29RT 4352.)

In the living quarters, Epperson suffered multiple blows. (29RT 4363.) In the corner of the living quarters, medium velocity bloodstains showed Epperson was hit there, and the blood struck three different surfaces. (29RT 4353-4354; 30RT 4448.)

On the north side of the living quarters was a cast off blood pattern with oval and elliptical stains. The oval stains indicated the source was close to the wall, impacting it at 90 degrees. The elliptical stains indicated the source was further away from the wall, since the blood traveled at an angle. This particular cast off pattern was almost the full length of the wall, indicating a bloody object was in motion in the air, blood ejected from the bloody object to the wall when it swung back, and great force was used. (29RT 4360-4361.)

The entertainment center in the northwest corner of the living quarters had medium velocity stains, caused when a bloody object was struck and blood spattered onto the surface. This incident was separate from the one that caused the north wall stain. (29RT 4361-4362.) Also, near the television and entertainment center were cast off stains. (29RT 4362-4363.) Compact discs, which had been stacked, had been tipped over and were strewn on the floor. (29RT 4336.)

On the south wall of the living quarters was a hair transfer pattern, just west of the bed. The stain had a lot of blood when it was deposited and was much wider and thicker than the patterns in the bathroom, indicating the assault occurred first in the bathroom and continued in the living quarters because areas with more blood were areas of subsequent assaults. (29RT 4355-4357.) The last time her face or bloody hair was slammed against the wall was in the living quarters. (29RT 4355-4356.)

Epperson's body was on the floor at the corner of the bed, lying face up. (29RT 4332, 4359-4360.) Her right eye was open, and the left one could have been but there were massive injuries and a large hole below her eye. (30RT 4427.) She was nude from the waist down with a towel draped over her lower body. (29RT 4335.) She was wearing a sweatshirt on her upper body. (29RT 4381.) Her bra had large bloodstains on the inner surface, which was consistent with someone with bloody hands attempting to take off her bra while she was wearing it. (29RT 4387; 30RT 4440-4443.) DNA analysis of the bloodstain inside the bra's right cup matched Epperson's blood. The backs of the bra straps were soaked with blood, which was consistent with her lying on her back and bleeding. (29RT 4387; 30RT 4513-4514.) Epperson's left elbow was adjacent to a corner of the bed. (29RT 4335.) Underneath her wrist was a screwdriver with a bloody tip. (29RT 4371.) Near her body was a broken denture, and under her body was another part of a broken denture. (29RT 4372, 4382.)

Epperson's right and left thighs had blood smears, and DNA tests showed the stains were a mixture of appellant's and Epperson's blood. Epperson also had blood on the lower part of her leg around the knee, and in Raquel's opinion, the blood was a transfer stain of a bloody object, such as a bloody hand that made contact with her thigh and knee. (29RT 4381; 30RT 4431, 4513-4514.) From DNA analysis, it appeared appellant was bleeding from his hands. (30RT 4431.) Under Epperson's feet were women's blue jeans, and under the jeans was women's underwear. (29RT 4337, 4381-4383.) Adjacent to her right shin was a pair of socks, which had blood drops. (29RT 4337; 30RT 4438-4439.)

Epperson's jeans had bloodstains on the front of the waistband over the zipper near the button and inside the waistband too. The inside pocket liner had transfer bloodstains, which DNA results showed were a mixture of appellant's and Epperson's blood. The waistband and pocket blood

patterns were consistent with a bloody Epperson lying on her back and appellant's bloody hands unbuttoning her jeans by pulling down her zipper or opening up the pants, putting his hands inside her pants, and pushing the pants down her legs. (29RT 4383-4385; 30RT 4513-4514.) Transfer stains on the rear right pocket of the pants were consistent with a person with bloody hands pulling on, opening, or touching the pants. (29RT 4384-4385.) Spermatozoa was detected in Epperson's vaginal canal. (30RT 4435-4436.) DNA from vaginal aspirate, vaginal swabs, and external genital swabs from Epperson all showed spermatozoa which matched appellant's DNA. (30RT 4513-4514.) It was unknown when the spermatozoa was deposited. (30RT 4436.)

Epperson's panties had low velocity stains, caused when a bloody object directly above the panties drips blood onto the panties. DNA analysis on a bloodstain on the front center of Epperson's panties matched appellant's DNA. The panties also had a rip along the seams on the edge of the panties. (29RT 4386; 30RT 4513-4514.) The panties had a panty liner with no blood on it. (29RT 4437.)

On the corner of the bed were medium velocity cast off spatter patterns, with directionality, showing that Epperson was being beaten on the floor and the blood from her wounds was projected upwards onto the corner of the bed. (29RT 4359-4360.)

Around Epperson on the floor were many pieces of broken glass, broken pieces of furniture, and a broken flower vase. (29RT 4335.) A lamp was slightly underneath the bed near Epperson. (29RT 4388-4389.) The lamp, about two feet in length, was a figurine of a woman. The lamp base was cast iron and had blood on the bottom. The lamp was in broken, bloodstained pieces. (29RT 4390-4391.) When the lamp struck Epperson, pieces broke off, and the lamp was still used to strike the victim. The bloodstains on opposite ends of the lamp, with hardly any in the middle,

was consistent with the lamp being held in one hand, perhaps at the base, and the top part striking Epperson multiple times. Then, that top piece would break, and the top was held and swung while the base struck Epperson. (29RT 4391.) Near Epperson's body was a dark lamp cord. (29RT 4371-4372.)

The flower vase was very heavy and had a very heavy base. The vase was made of a hard material like marble and was broken into three pieces, which weighed a total of 10.6 pounds. Two pieces were next to the entrance to the living quarters on the left side, and the third was at the opposite end of the room underneath magazines and debris. The base of the vase had transfer stains with hair adhering to the base. The stains showed the vase was intact when it struck Epperson, forcing transfer stains onto the base, and then the vase was used more times before it broke again. (29RT 4335-4336, 4392-4394, 4397.) The pieces were consistent with someone hitting someone on the head with a lot of force. (29RT 4395.) The part of the vase underneath the magazines was bloodied, indicating the vase was initially intact, struck Epperson, and fractured; then, a piece was picked up and used to strike her and thrown across the room, where paper and magazines were thrown over it. (29RT 4396.)

A broken foot stool was demolished, and parts of it were in different corners of the room. (29RT 4370-4371, 4398-4399.) Raquel opined that the stool was used to hit Epperson when it was in one piece, and when it broke, pieces were used to strike her, breaking that part of the stool into yet smaller parts. (29RT 4371, 4398.)

On her bedspread were low velocity bloodstains, caused by blood dropping or dripping onto the bed from a blood source above the bed. On top of the stains, covering them, were scattered items, including a magazine, a blue shopping bag, a purse with United States currency, a little pocket organizer with a driver's license, and a piece of paper. (29RT 4336,

4357-4359.) A fairly large man's T-shirt with blood on it was also on the bed. (30RT 4426, 4428.)

In the dresser, Raquel found a sock with a bloodstain in the top drawer. (29RT 4354.) Raquel also opened the drawer below and found a shirt with a transfer bloodstain, which was consistent with bloody hands rifling through the drawers. (29RT 4355.)

The closet doors were opened, and clothes were on the ground in front of the doors. Raquel moved the clothes, closed the doors, and found blood on the ground, which meant that the blood was deposited when the doors were opened and clothes were taken from the closet and placed on the floor. (29RT 4365-4366.) When closed, the closet doors revealed they had cast off stains going towards the apartment's exit door and in a downward direction, meaning the blood source would have been someplace in the living quarters and was consistent with someone throwing back a bloody object. (29RT 4366-4367.) Also, DNA from a stain on the closet door matched Epperson's DNA. (30RT 4513-4514.)

On the right side of the sink near the entryway was an empty water bottle and in the sink were two face cloths with bloodstains. (29RT 4368.) The water bottle had blood on it which was consistent with someone bleeding from a cut and holding onto the bottle. (29RT 4369-4370.) DNA from blood on the plastic water bottle and a wash cloth matched appellant's DNA. (29RT 4369; 30RT 4513-4514.)

Given Raquel's findings, he opined that the five-foot, two-inch Epperson was in the bathroom sitting with the toilet seat down, she was first struck with the candlestick holder with such force that glass went flying, the glass got blood on it, there was blood spatter, appellant next either hit or shook her so cast off blood went behind the toilet seat, and the toilet tank top went ajar, he picked her up or stood her up as her blood poured and shook her so that her head hit the wall repeatedly, her knees

gave out as he was pounding her head against the wall, he hit her against the wall six times, and she crumbled to the floor, slipping sideways either on her face or back of her head, leaving a swipe pattern. (29RT 4400; 30RT 4448.) Then, appellant picked her up, took her into the bedroom area, hit her in the face or shook her so that there was a cast off pattern in the corner where the pedestal was, put her up against the wall and hit her head against it so there was a heavy pattern on the wall where blood dripped, threw her at the foot of the bed or held her over the bed so that the bedspread had drips, hit her so cast off blood went all the way to the closet doors, and hit or shook her again so blood came off her head onto the television and entertainment center and clear across the wall. (29RT 4400-4401; 30RT 4448.) Then, at some point, appellant threw her on the ground and hit her over and over in the face with the foot stool and pieces of the foot stool. (29RT 4401; 30RT 4448.) Then, appellant hit her repeatedly in the head and face with the lamp base until it broke, turned the lamp around, and hit her in the face and head. (29RT 4402; 30RT 4448.) Then with his bloody hands, he either pushed up or felt inside her bra to fondle her breast or push up her bra. (29RT 4402; 30RT 4449.) With his and her blood on his hands, he unbuttoned her jeans, reached inside, and pulled down her jeans, reaching inside so blood transferred to the waistband, outside the jeans near the button, and inside the pockets. (29RT 4402-4403.) Then, appellant handled her jeans, as shown by the fingerprints or blood transfer on the back of her jeans. His hand dripped blood on her panties, and he took her panties off. (29RT 4403.) The blood swipes on her upper thighs were consistent with him pushing open her thighs with his bloody hands. (29RT 4403; 30RT 4448.)

Epperson's right and left hands had defensive wounds, which were consistent with her putting her hands up to shield her face. Epperson had to be conscious to put her hands up in a defensive mode. (30RT 4453-4454.)

Since Epperson was only hit in the bathroom by the candlestick holder, Raquel opined that Epperson had more defensive injuries than would have been caused only by the candlestick holder. (30RT 4456-4457.) Lacerations and small cuts on her hands would be consistent with pieces of furniture, plaster from the lamp, and pieces of a lamp hitting and cutting her hands. If the defensive wounds were puncture wounds, those would be consistent with the tip of a screwdriver. (30RT 4459.)

(2) The Autopsy and DNA Results

On November 15, 2000, Los Angeles County Coroner's Department Deputy Medical Examiner Dr. Yulai Wang performed an autopsy on Epperson and determined the cause of death was multiple blunt force injuries and exsanguination or bleeding to death. (31RT 4529-4530, 4576.)

Epperson was a Caucasian female, 38 years old, 118 pounds, and five feet, four inches tall. (31RT 4550.) When Epperson was brought in, she was wearing a bra pushed above the breast nipples, a light blue shirt, and a blood-soaked gray hooded, front-zipped sweatshirt and was nude from the waist down. (30RT 4514; 31RT 4549.) A person has to be alive in order for blood to pour out of the body and soak the sweatshirt. (31RT 4549-4550.)

Epperson's major injuries were to her head, mainly in the face and the top of her head. (31RT 4530.) Epperson suffered at least 10 blows to her craniocerebral area, the skull and brain area. The 10 blows was a conservative estimate of the number of blows to the front, side, and back of her head. (31RT 4530, 4532, 4555, 4573.) Epperson was alive when she suffered those head injuries. (31RT 4555.)

Epperson had three different severe injuries to three different areas of her head. One injury was at her mid forehead, where she had a one- to one-and-three-quarter-inch open skull fracture, exposing the brain through the skull. Her forehead, nose, cheek bones, and orbit or eye socket bone were

smashed. She also had lacerations to her upper eyelid, forehead, and all over her face. She had multiple abrasions to her cheeks, nose, upper lips, lower chin, and basically, her whole face. Another injury was on the left side of her skull, where she had a long linear fracture that went to the back of her skull. This fracture was displaced and a little bit separated. A great amount of force was used to fracture the skull. Another injury was on the top of her head, where she had a five-and-one-half-inch vertical laceration of her scalp, which was caused by one blow. The laceration had abraded edges, meaning the wound edges had a kind of abrasion, not like a sharp force injury. The laceration was consistent with a heavy lamp of very hard material hitting the top of her head. Dr. Wang would expect a person to be upright when hit with the lamp, because the laceration ran from the front to the top of her head and it would difficult to receive that blow if she was lying completely on her back. The person was alive when the injury was suffered because there was bleeding into the tissue. She also had a contusion at the front part of the brain. (31RT 4530-4531, 4535-4539, 4541-4544, 4569-4570, 4575.)

In addition, externally, on the right side of her head, Epperson had a two-and-one-half-inch diameter contusion, and on the left side of her head, she had a half-inch laceration. (31RT 4531-4532.) Internally, when the scalp was removed during the autopsy, a seven-inch long, linear skull fracture running from the front to the back of the skull was revealed. (31RT 4532.) Dr. Wang found diffusive dural hemorrhages, mainly over the right cerebral hemisphere of the brain. She also had bleeding underneath the membranes covering the brain. (31RT 4545.)

In addition to the facial injuries described above, Epperson had other injuries to the front of her face caused by multiple blows. (31RT 4531.) On her left forehead above the eyebrow, she had a one-and-one-half-inch

diameter contusion abrasion with one-half and one-and-one-half-inch lacerations. (31RT 4537.)

Epperson's eyes were open when he examined her. (31RT 4575-4577.) Epperson had multiple hemorrhages in her eyes, in the conjunctiva inside the eyelids and in the sclera, the white part of the eyeball. The injuries could have been caused by blunt force trauma to her eyes. (31RT 4550-4551.) The eye hemorrhages could have also been caused by strangulation. Epperson had bleeding in the neck muscle on her left side, which would also be consistent with strangulation. (31RT 4551, 4570-4572.)

Epperson also suffered multiple sharp force injuries. (31RT 4534.) Epperson's neck had sharp force injuries to the left and right side. On the upper part of her neck at the right back, she had a gaping injury, an incised wound that cut the skin and soft tissue, but not deep enough to cut the carotid or jugular. There was bleeding. (31RT 4534, 4546-4548.) Also on the right side of her neck, she had three long, linear incised wounds and other small abrasions. (31RT 4548.) Incised wounds are caused by a sharp object longer than the stab wounds. (31RT 4534.) The incised wounds were consistent with someone taking a piece of sharp glass and cutting Epperson's neck with it. (31RT 4548-4549.)

Inside her mouth, Epperson had a bruise and lacerations to her upper and lower lips. There was bleeding. (31RT 4539.) Epperson was missing her upper palate and had a partial lower denture. When Dr. Wang received Epperson's body, an upper dental plate, which was in three pieces and appeared to be broken, was delivered to him with Epperson's body. (31RT 4540.)

To her hands and arms, Epperson had multiple contusions and abrasions. (31RT 4532-4533.) The injuries were concentrated on the back of both forearms and back of both hands. In Dr. Wang's opinion, the

injuries were defensive wounds. (31RT 4533.) She had a few small cuts on the back of her right hand, which could be caused by being struck with some object but not by a human fist. (31RT 4568.) When she suffered the bruises and abrasions to her hands, she was alive. (31RT 4555.)

To her leg, Epperson had a contusion on her right knee area and an abrasion on the right shin area. (31RT 4545-4546.)

To her vaginal area, Epperson had a severe injury including abrasions and contusions. (31RT 4558, 4560-4561.) She had bruising and abrasions at the vaginal area's posterior part, and she had three-quarter-inch and three-sixteenth-inch wide abrasions on both sides of her vaginal area, which formed a semicircle. There was blood underneath the abrasions. (31RT 4558-4559.) She also had abrasions to her labia majora in her vaginal area. (31RT 4533.) Dr. Wang only saw the type of injury Epperson suffered to her vaginal vault very rarely. In his opinion, the trauma to her vagina was inflicted while she was alive. (31RT 4565.) The injury to the vagina was consistent with being caused by a penis. (31RT 4572.) A rape kit was collected. (31RT 4555.) DNA analysis of vaginal aspirate, vaginal swabs, and external genital swabs all showed spermatozoa which matched appellant's DNA. (30RT 4513-4514.)

The rest of the autopsy showed that Epperson's chest and abdominal cavity were normal, her bony framework and muscles were normal, she had mild coronary disease in one vessel but her cardiovascular system was otherwise normal, and her respiratory system was normal. She had a small amount of bloody fluid in her trachea, which could have been caused by bleeding from inside her oral cavity aspirating down to the trachea area. (31RT 4552-4553.) Epperson's brain showed a generalized mild swelling, but not to the extent it would have depressed her respiratory system and killed her. (31RT 4553.) Her blood was negative for alcohol, barbiturates, cocaine, methamphetamine, opiates, and PCP. (31RT 4554.)

Dr. Wang opined that Epperson was alive in the bathroom, in response to a hypothetical assuming she was in the bathroom when struck in the head with a glass candle holder, her head was shaken, she was slammed up against the bathroom wall at least six times, she was still bleeding, and she was picked up and taken into the other room and was still bleeding. (31RT 4555.)

Further assuming Epperson had been struck on the top of the head with a lamp, was hit on the head and face with other different items, suffered blunt force trauma, and as the final blow was hit on the head with a huge planter causing it to break into pieces and causing the big, open fracture in the front of her head, Dr. Wang opined that Epperson was alive and bleeding during those times as well. (31RT 4556-4557.) Dr. Wang opined that Epperson was alive at the time of the rape also. (31RT 4557.) Almost all of Epperson's injuries were inflicted while she was alive. (31RT 4565.)

Dr. Wang acknowledged that one could be alive but unconscious, which is a loss of brain functioning. (31RT 4566.) Hypothetically, assuming Epperson was hit in the head in the bathroom several times, she could have lost consciousness before being hit in another room. (31RT 4567.)

c. Appellant's Prior Attacks on Women

(1) Debra Colletta and Appellant's Assault Conviction

Colletta testified she was currently "scared to death" of appellant. (31RT 4659.) There was "not a day that goes by that [she was] not in fear." (31RT 4676.)

In 1990, Colletta was about 20 or 21 years old and was in a boyfriend and girlfriend relationship with appellant. (31RT 4661.) Appellant brought her teddy bears, muffins, and flowers. (31RT 4701-4702.) In early 1990,

appellant tried to get to Colletta inside her house and pushed Colletta's mother against the doorjamb to get inside. (31RT 4666-4667, 4688.)

During a period of about four to six months, appellant committed acts of violence upon Colletta. (31RT 4664.) One of the first things appellant did was sit on her stomach and punch her in the chest several times, leaving bruises across her chest. (31RT 4664, 4686.) Then, when Colletta was at home with her 18- or 19-year-old brother and appellant and Colletta were in her room, appellant came up behind her, grabbed her by the throat, and choked her until she could not breathe. She gasped for air. (31RT 4665, 4686-4687.) The police were called, and she told them nothing happened. (31RT 4686.)

Another time, at her next door neighbor's home, around the latter part of 1990, Colletta tried to get away from appellant and get in her car, but appellant grabbed her arm and threw her down in the driveway. Since the driveway was inclined, she landed in the street. Colletta injured her knee and had two reconstructive knee surgeries. (31RT 4666, 4687-4688.)

Once, when appellant and Colletta were having an altercation at her home, appellant became angry and came after her. Colletta's brother tried to defend Colletta with a bat. Appellant grabbed the bat from her brother. (31RT 4669, 4691.)

Another time, while Colletta was babysitting her friend's twins at her own home, Colletta would not open the door to appellant, who was angry. Appellant kicked the door in, came after Colletta in her den, grabbed her by the throat off the couch, threw her on the ground, and hit her head on the concrete ground in front of the twins. (31RT 4669, 4690.)

Once in early 1991, when Colletta was speaking to a male friend in the street and appellant saw them, appellant threw her friend down on the street, grabbed Colletta by the arm, told her to get in the house, called her a "blank blank bitch," and dragged her in the house by her arm. Colletta was

afraid for her life. She thought appellant was going to beat or kill her. (31RT 4669-4670, 4692.)

Once, after Colletta and appellant returned to her house from a road trip during which he threatened to kill her, appellant threw a car's jack at her and took off down the street. However, a couple houses down, appellant decided to come back, threw her puppy in the street, and left. (31RT 4677, 4698-4699.) Colletta thought her puppy would die. (31RT 4677.)

Once around 1992, when Colletta was at appellant's friend's home, appellant was trying to force her into a bedroom in front of his friends. Appellant said "blank blank bitch" and told her to get into the bedroom. Appellant got a knife from the kitchen, forced her into the bedroom, and closed the door. Appellant wanted her to perform oral sex or have anal sex with him. Colletta would not do what he wanted, so he pushed her onto the floor. Colletta got up and ran for the car. As Colletta was driving away, appellant jumped on the hood of the car and started pounding on the windshield, breaking it. Colletta drove away. (31RT 4670-4672, 4693-4694.) Shortly afterwards, Colletta moved from Santa Clarita to Arizona to get away from appellant and because she had found out she was pregnant. Colletta was not going to have his child, and when she went to the hospital for an abortion, the fetus was starting to abort itself. (31RT 4672-4673, 4694-4698.)

In July 1992, Colletta returned to Santa Clarita. (31RT 4673.) Before she returned, Colletta called a mutual friend of appellant's and hers, and appellant got on the telephone. Appellant told her that if she was not home in a short time, he was going to start killing her family one by one, he knew where they lived, and he was going to come after her. Colletta knew he would do that. (31RT 4673-4674.)

On July 27, 1992, Colletta was at a friend's house, and the friend talked her into going out to the porch, where appellant was. Colletta wanted appellant out of her life, and she told him it was over and that he needed to go away. Appellant grabbed her by the throat, pushed her up against the screen door, and started choking her. Colletta thought she was going to die. Appellant said something to effect that she was going to die and he was going to kill her. Appellant grabbed her by the throat, pushed her up against the screen door, and started choking her. Then, appellant dragged her out to the driveway, started smashing her head on the ground, dropped her, and started kicking her in the back of the head and neck. Colletta lost consciousness. When she started regaining consciousness, people took her into the house. Appellant said he had a shotgun in his truck and was going to come back and finish her off. Colletta knew he had a shotgun. The police were called, and appellant was put in jail, but that did not make her feel less fear. Appellant was tried for this offense. (31RT 4674-4676, 4689-4690.) For this assault upon Colletta, appellant was convicted on February 6, 1995, of assault with intent to cause great bodily injury, with use of a dangerous or deadly weapon, in violation of section 245(a)(1). Appellant was sentenced to four years. (32RT 4748-4749.)

Colletta's relationship with appellant ended on July 27, 1992. During their two-and-one-half-year relationship, Colletta had to be with appellant "24-7" except when he was at work, and she had to be at home, even when they were not living together. (31RT 4683.) Colletta feared him. (31RT 4684, 4702.) Colletta told him she loved him even though she was scared to death of him, to keep herself and her family alive. Appellant proposed marriage, and she took the ring but was never going to marry him. (31RT 4684.)

Colletta knew appellant had been convicted of the rape, torture, mayhem, and murder of Epperson. (31RT 4704.) Colletta knew appellant

was going to kill somebody and that it was only a matter of time. (31RT 4706.) Appellant told Colletta the "ultimate for him would be to have somebody look in his eyes as he took their last breath and murdered them. He wanted to kill somebody." (31RT 4681.) Colletta testified that if she could have put him away longer, he would not have killed Epperson because appellant said he was going to kill. Colletta felt guilty, "[e]very day of [her] life." (31RT 4707.)

(2) Betsy M.

At one point, Betsy M. was attending 12-Step Alcoholics Anonymous (AA) meetings in Bakersfield, where she was living. (32RT 4751-4752.) At an AA meeting, Betsy M. met appellant, who said his truck was broken and was not sure how he could attend meetings. Betsy M. gave him her phone number and offered him rides. Betsy M. was separated from her husband and had two children, two and four years old. (32RT 4752.)

Betsy M. gave appellant rides to the meetings. Appellant gave her stuffed animals, cigarettes, flowers, and toys for her children and told her he had feelings for her. Betsy M. told him she liked him as a friend but she was seeing someone else. Appellant persisted. (32RT 4753.)

Betsy M. did not give appellant her home address and kept her address guarded. However, one night she ordered pizza and appellant delivered it. After that, appellant regularly came to her house. (32RT 4753.)

On March 14, 1999, Betsy M. had an asthma attack, and appellant and her children were there. Appellant took her to the hospital for a breathing treatment and took her back home. Betsy M. was very tired and fell asleep on the couch about 10 p.m. About 2 or 3 a.m., when Betsy M. awoke in her room, appellant was on top of her having sex with her. Betsy M. told him to stop, get off, and that she did not want to have sex. Appellant did not get off until he was done. Appellant said, "You wanted this. I did not rape

you." Appellant was very agitated. (32RT 4753-4756.) When appellant got off her, he paced and was agitated. Appellant ranted and raved, and Betsy M. rushed into her bathroom to get dressed. When she came out, he was more agitated, raising his voice. Her children were sleeping, and she did not want them to witness that. (32RT 4756.)

Appellant had things he found in her apartment, including condoms from when she was married, and threw them at her. (32RT 4756.) Appellant made comments about Betsy M. having sex, and he was agitated that she had condoms. Betsy M. was very frightened, tried to get him to leave, and asked him to leave. She feared for her life. (32RT 4757.) Betsy M. was five feet, four and one half inches tall, and appellant was "three times" her size; she could not make him leave if she wanted to. Betsy M. tried to calm him down, but appellant continued. (32RT 4758.)

Between 6 and 7 a.m., Betsy M.'s children awoke, and she panicked. The children came out of their bedroom and up to her, and Betsy M. pushed them behind her, trying to hide them. Appellant grabbed her by her neck and hair and tried to drag her into her bedroom. Betsy M. screamed for her four-year-old son to save her. Her son kicked appellant, who swatted him away like a fly. Betsy M. broke free, grabbed her son, and tried to get out of the apartment. She pulled the screen off her children's bedroom window and told her son to go out the window and get help. Appellant caught her son and threw him back into his room, where he landed on his bed. Betsy M. got two knives out of the kitchen, and appellant laughed at her, telling her there was nothing she could do to him with the knives. She told him that if she did not show up at the day care center with the children soon, they would call the police. She was always at the center before 8 a.m. Appellant told her she better not tell anybody anything or he would kill her and her children. She believed him. (32RT 4758-4760.)

Betsy M. went to the day care center in her car and dropped her children off. (32RT 4760-4761.) When she got back to her apartment, her front door was wide open, and appellant was gone. Betsy M. did not report the incident because appellant said he would kill her children and she believed him. (32RT 4761.)

Betsy M. did not see appellant for a couple days and thought that maybe he had gone away for good. She had someone stay with her in her apartment, her best friend or her brother. Betsy M. was afraid appellant would return. (32RT 4761.)

After that, when Betsy M. was in a grocery store, appellant walked up to her and her children. Appellant had something for them and apologized. (32RT 4761-4762.)

Betsy M. attended AA meetings and took extra precautions, such as having someone walk her to her car or getting rides from other male attendees. (32RT 4762.)

On April 4, 1999, Betsy M.'s children were with her ex-husband, who was giving her a hard time about not reporting the incident with appellant and was threatening to take custody of the children away. Betsy M. wanted to die and was going to kill herself that night. Appellant showed up that night, and Betsy M. told him to leave her alone, he had cost her enough, and she wanted to die. (32RT 4762-4763.)

On April 9, 1999, appellant called and said he had a stuffed teddy bear that his mother had given him and that he wanted her to hold onto, because he was afraid his parole officer was going to accuse him of violating parole. Appellant said he wanted to drink and used AA "trigger words" which caused her to respond to his request. that she would have responded to in the program. Betsy M. said she would come over. (32RT 4763-4764.) When she got to his apartment about 1 p.m., she had no intention of going inside, but had to use the bathroom. She went inside, and out of habit, she

put her keys on the kitchen table. When she came out of the bathroom, appellant's reclining chair was against the front door, and her keys were missing. Betsy M. went to grab the telephone to call for help, but appellant had removed the battery. Appellant screamed profanities at her and told her he loved her, he was not going to let her get away with this, and she should understand. (32RT 4764-4765, 4767.)

Betsy M. started to cower, but then decided she would go down fighting if she was going to die. She stood up to him, and appellant hit her across the face, knocking her glasses off, and took her down to the ground, where she hit her left shoulder. Appellant had his hands around her throat and was closing off her air. Betsy M. grabbed his hands, begging him to stop. Everything started to go dark, and she could feel her heart stopping. Betsy M. thought she was going to die. (32RT 4765.) Betsy M. passed out, and when she regained consciousness, she saw appellant across the room up against the wall holding his testicles, rocking back and forth. Betsy M. tried to get to her feet and tried to breathe. Appellant had a knife in his hand, dragged her into the bedroom, and told her to disrobe. When she would not disrobe fast enough for him, he pulled at her clothes. He had her strip naked, and Betsy M. thought he was going to have sex with her again. Appellant held the knife close to her throat but did not touch the skin. Appellant kept her at knifepoint naked for hours. (32RT 4766-4767.)

About 4:30 p.m., appellant told her that he missed an appointment with his parole officer and needed somebody to tell the officer he was sick. Appellant put the battery back in the phone, dialed the phone, and handed it to her. Betsy M. told the officer that she had been with appellant all day and stressed that he was very sick. After the officer said okay, Betsy M. hung up the phone. (32RT 4767-4768.) Appellant then had Betsy M. pick up her children in her car because her ex-husband would have called if she had not shown up at the day care center. She had to pick up her children at

5 p.m. Appellant insisted on going with her to pick them up, which she did. She then drove back to her apartment with appellant because she thought her best friend's brother would be there, and the brother could help. No one was at her apartment. Before she took appellant home to his apartment, appellant told her that if she went to the police, he would kill her children in front of her and then kill her. (32RT 4768-4769.)

Less than 24 hours after the incident, Betsy M. told the police, because an AA friend and her best friend's brother pushed her to call the police. She told the police she had bruises on her neck, blood in her eyes, and a big bruise on her left shoulder. (32RT 4770-4773.)

As a result of this incident, Betsy M. was diagnosed with post-traumatic stress disorder and had not been able to hold down a job because she was afraid. (32RT 4769.) The fear had been transmitted to her children. At the time of trial, her older son still tried to protect her and was overbearing and overprotective of her. Her younger son had a fear of abandonment and was afraid he could not talk to her. (32RT 4769-4770.)

2. Defense Evidence

a. Appellant's Family

The Powell family consisted of appellant's father and mother, Joe and Joyce Powell, appellant's older brother Lance and older sister Terri, and appellant's younger sister Montana.[14] (32RT 4870, 4872.)

Joyce, Terri, and Montana testified about their childhoods and family life with appellant.

(1) Joyce Powell, Appellant's Mother

Joyce Powell, appellant's mother, was born in Baltimore, Maryland and grew up in Ohio and West Virginia. (35RT 5378, 5381.) She had 11 brothers and sisters. When she was eight or nine years old, Joyce was sexually abused by her alcoholic father. After he abused her once, he tried again, and Joyce said she would tell her mother. Joyce's mother was an alcoholic too, but stopped drinking when she became ill. (35RT 5379.)

When Joyce was 15 and a half, she met Joe Powell, who was 17 and from Ohio. (35RT 5379-5380.) Joe's mother drank a lot, was not a nice person, and put her children into foster care every chance she got. Joe was raised in foster homes. (35RT 5380.)

In 1960, twenty-year-old Joe and eighteen-year-old Joyce married and lived in Ohio. (35RT 5380-5382.) Joe and Joyce's son Lance was born that year, and the next year, 1961, their daughter Terri was born. (35RT 5381.) When Lance was one year old, Lance burned his hand on the oven and started to cry. Joe spanked Lance to make him stop crying, but Lance continued to cry. (35RT 5383.) As time went on, any time Lance or Terri would cry, Joe would get upset and spank them to try to make them stop

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[14] Montana was originally named Marcia, but changed her name later in life. For consistency, she will be referred to throughout as Montana.

crying. Joyce tried to tell Joe that spanking them would not stop the crying and that he should pick them up and love them, but "it wasn't his way." Although Joe spanked Lance and Terri, their punishment was mostly verbal. (35RT 5383.)

In 1964, the four family members moved to Quartz Hill, California, which was next to Lancaster. (35RT 5380-5382.) Then, in 1965, the family moved to Barstow, California. In 1967, appellant was born, and in 1970, the youngest Powell child, Montana, was born. (35RT 5381.)

Joe first hit appellant when he was two years old. Appellant pushed down a little boy he was playing with outside. Joe picked up appellant, threw him into a pole, and asked him how it made him feel. (35RT 5383-5384.) About six months later, appellant started having seizures. After appellant fell asleep, one side of his body would jerk "really badly" and not stop. Appellant's tongue would start rolling back into his mouth. At the hospital, appellant was given phenobarbital, which brought him out of the seizure. A couple months later, appellant had another seizure and was rushed to the hospital. The doctor watched him and said appellant would not die. They took him to Loma Linda, where tests were run, and brain damage was found. (35RT 5384-5385.) Appellant was on phenobarbital until he was seven and a half, and the drug caused his teeth to become dark colored and deformed, for which appellant was teased. (35RT 5385-5386.) Appellant was a very sensitive child, very loving, and very caring. (35RT 5386.)

When appellant was between the ages of eight and ten, Joe became angry at him at the dinner table, picked him up, and threw him across the room so hard he hit the wall really hard and went behind the couch. (35RT 5387.)

When appellant was about 11 years old, Joe thought appellant and another boy were fighting, although they were just playing roughly, and Joe

kept telling appellant to beat him. Appellant would not beat the boy, so Joe kicked him all the way down and up the street. (35RT 5388.) The neighbors called the police, but Joe warned Joyce and the family not to say anything or they would pay for it. (35RT 5390.)

When appellant was 13 years old, he did not go to school because children were teasing him badly. Appellant was upset and pulled out a long butcher knife from a drawer, told Joyce he was not going to school, and told her he was going to kill himself. (35RT 5392.) Joyce talked appellant into putting the knife down and told him they would get him help and that she would call his father. When his father got home from work, he told appellant they would get him help. Appellant saw a psychologist, but the psychologist wanted to talk to Joe. When Joe went in, the psychologist told him that he was the problem, and Joe would not pay for the treatment anymore. (35RT 5393.) Joe had the money and used it to control Joyce. (35RT 5393-5394.)

The house of a neighbor, Wanda Agnew, was a "safe house" for Joyce, appellant, and Montana, since they could be safe from Joe there. (35RT 5390-5391.)

Joe was a racist, "major big time." He did not like anyone unless the person was "total White." However, appellant was not that way, because he brought Black and Hispanic friends home. (35RT 5415.)

When appellant was 14 and a half years old or 15 years old, Joe threw him out of the house while Joyce was visiting her ill mother. (35RT 5394.) When Joyce returned, she went to child protection services and asked for help. They told her there was nothing they could do for her. (35RT 5395.)

Appellant had problems with children at school because Lance shot a child with whom he had been fighting for a long time. Because of that, appellant and Montana were both teased and harassed. Joe would tell appellant to beat the children teasing him. (35RT 5397.)

Joe would abuse the children every time he came home and was angry. Joe would call the children names and tell them they were worthless. Joe would call appellant a "pantywaist." (35RT 5388.) When Joe was away working on the railroad, the family would play games and enjoy themselves, which they could not do when he was there. (35RT 5399.)

When Joe beat or kicked appellant, Joyce tried to stop Joe and tell him it was enough. Joyce would try to draw Joe's attention towards herself, and Joe would grab her and hit her. One time, Joe picked her up and threw her across the kitchen into the wall. Then, he choked her, put her down on the ground, and choked the breath out of her. (35RT 5389.) Joe's abuse of Joyce continued until appellant was about 14 or 15 years old, when Joe found a girlfriend. (35RT 5389-5390.)

One day, Joe came home and told Joyce to leave because he had a girlfriend. Joe told her that if she tried to take his house, possessions, or money, he would kill her. Joyce moved into a duplex with Montana. Appellant was about 15 and a half years old, and Joe told Joyce that appellant had told him he wanted to live with him. (35RT 5399-5400.) Joyce did not leave Joe before because she was afraid of him; he said he would take the children and raise them however he wanted, and she had no money or anyone to help her. She knew that as long as she was with her children in the family home, she could do something to keep Joe from hurting them sometimes. She did not call the police because she was afraid. (35RT 5390.) After Joyce left, Joe treated appellant worse. (35RT 5399-5400.)

Joe let appellant visit a girlfriend in San Francisco, and when appellant came back, appellant said he had been offered a job there and was going back. Appellant went back and stayed there many months. (35RT 5401.)

In late 1985, appellant was almost 18 years old and came back to southern California. Appellant visited Joyce and Montana at their duplex. (35RT 5401.) Appellant arrived at night and fell asleep on the couch. Joyce went to bed, and the next morning, as Joyce was taking a shower, Montana pounded on the door and yelled. Joyce saw that Montana had blood on her head. Montana said she did not know what happened. Joyce asked appellant, and appellant said he was upset at his girlfriend Lisa, that he had thrown a pipe at the wall, and that the pipe hit Montana. Appellant had a look "like where am I and what am I doing." (35RT 5402.) Appellant had had this look before. (35RT 5403.) Appellant tried to prevent his mother and Montana from going to the hospital and was afraid. (35RT 5402-5403.)

As a result of hitting Montana, appellant went to juvenile hall and received psychiatric treatment. When they told Joe he had to pay for a portion of the treatment, he said no and did not pay. The help stopped. (35RT 5403.)

At some point, appellant tried to get into the Navy but was discharged since he had asthma. (35RT 5404.)

On November 28, 1989, when appellant was 22 years old, he attacked Joyce at her apartment. Appellant had come back from Las Vegas with his friends, wanted money, and had been drinking. He was "real strange." Joyce said she did not have money, and appellant became angry. He had a blank look on his face and said he wanted money. Appellant picked her up and threw her across the room, where she hit a dresser and broke a vertebra in her back. A neighbor called the police because Joyce could not. (35RT 5404-5406, 5413-5414, 5419.) The look appellant had when he threw his mother was the same look he had when he tried to stop her and Montana from going to the hospital when he hit Montana. Joyce, who had been

disabled since 1988, went to the hospital, and appellant went to jail. (35RT 5406.)

Joyce testified that appellant had positive qualities. When he did not drink, appellant was a very caring and loving person. He was protective of others and a "good kid." Joyce forgave appellant for what he did to Montana and to her. Appellant called Joyce all the time. (35RT 5407.) When appellant drank, he reacted violently when a woman did not give him what he wanted. Joyce had not known appellant to behave in such a manner when he was not drinking. It would surprise her to hear there was no evidence appellant was drinking before the murder. (35RT 5416.)

Appellant had not apologized to Joyce about anything he did to Colletta, Betsy M., or Epperson. (35RT 5417-5419.) Joyce testified that when she saw appellant with Colletta, they were very loving. Once Colletta called Joyce looking for appellant, told Joyce appellant wanted to break up, and that if she could not have him, she would make sure nobody else did. (35RT 5423.) Appellant told Joyce that he attacked Colletta because she was trying to attack him and that Colletta had pulled a gun on him a few days before. (35RT 5426.) Appellant said he did not remember what he did to Epperson. (35RT 5427.)

Joyce did not see Lance because she was afraid of him, he was an angry person, and he would hurt her. Lance tried to kill his father when he was young because he hated the way he was being treated. Lance was a "mean person." (35RT 5408.) Once, Lance tried to get into Joyce's secure housing complex and threatened the manager. (35RT 5408-5409.) Lance lied. When Lance had problems with his girlfriend and was angry at her, he dragged her to his car, threw her into it, gave her a concussion, and drove her over two county lines, which caused him to be jailed. Also, Lance threatened to steal his and his girlfriend's one-year-old daughter, so a restraining order was obtained. (35RT 5409.)

Joyce last heard from Terri four years ago. Two days before Terri's fortieth birthday, Terri called her mother and said she did not want to see her anymore. (35RT 5410.)

Joyce knew that Joe gave appellant the red Mitsubishi truck and sent appellant money in jail. (35RT 5420.)

(2) Terri Powell, Appellant's Older Sister

Terri Powell, appellant's older sister, was born in Ohio and then moved with the family to Lancaster first and then Barstow. (32RT 4872.) They were a "middle class" family. (32RT 4879.)

Appellant had seizure problems when he was about two or three years old. At around midnight or 1 a.m., when appellant had a seizure, the family would rush him to the hospital with a spoon on his tongue so he would not swallow it and die. (32RT 4872.) For his seizures, appellant took phenobarbital, which turned his teeth grey and for which he was teased. (32RT 4872-4873.) Terri took appellant everywhere with her. (32RT 4873.)

When their father Joe was home, the house was tense, because there was an "internal fear" of not knowing what would happen next, of not knowing if someone would get slapped or yelled at. If Joe "was in a good mood, it would be a good day, if he was in a bad mood, it would be a bad day." (32RT 4880.)

Joe was not a good father. He verbally abused all the children, telling them they were no good and stupid and that they would never be anything. (32RT 4873.) Joe physically abused the boys, picking them up, throwing them against the wall, kicking them, slapping them, and beating them. Terri had not spoken to her father for 20 years. (32RT 4874.) When Joe was verbally abusive to the family and physically abusive to the boys, their mother Joyce "did nothing. She stood there . . . . " Terri thought Joyce was

afraid she was going to be hit so she stood back and "took it all in." (32RT 4878.)

Their younger sister, who was initially named Marcia and who changed her name to Montana, was favored by Joe, and Terri did not actually see Joe strike or hit her. Terri did not know why Montana had changed her name. (32RT 4877-4878.)

The family had good times at Christmas, when they would open presents. (32RT 4879.) Once in a while in the afternoon, when Christmas was hectic or somebody was not happy, Joe started verbally abusing the children. (32RT 4879-4880.)

Joe started physically abusing appellant in his early teens. One time, when appellant was in elementary school, Joe yelled at appellant, kicked him, and chased him up the street. (32RT 4875.) To escape the family situation, appellant could go to Agnew's house. (32RT 4900-4901.) Also, appellant had a friend named Kevin Brunner and had other places to go that were not abusive. (32RT 4901.)

Terri saw Joe abuse Lance more, picking him up and throwing him against the wall. One time, in the kitchen, when Terri was about 12, 13, or 14 years old and appellant was 8 or 9 years old, Joe picked up Lance, threw him on the ground, and kicked him. Lance was huddled in a little ball yelling for his father to stop, while their mother just stood there. Terri ran to her room and covered her head with pillows so she did not have to hear it. That incident was the worst that Terri saw, and "that happened quite a bit too." (32RT 4876.)

When Terri was 13 years old, Joe hit Terri once when she was sitting on the porch. Joe picked her up, shook her around, and pushed her through the house, while shaking and slapping her. He threw her down on her bed, shook her, and ripped her blouse, causing it to open. When Joe realized he had ripped her shirt, he stopped and walked away. Later that night, Terri

told her parents that if Joe ever touched her again they would never see her again. Terri thought her parents believed her, and Joe left her alone. (32RT 4877.)

Joe also accosted Terri in a sexual manner. While Terri washed dishes in the kitchen, Joe would come up behind her and rub up against her. Terri would tell him to get away and leave her alone. In the backyard pool with other children, Joe would try to "grab a feel of [her] breasts." (32RT 4879.) Also, Joe was verbally abusive to Terri, saying hurtful things, such as accusing her of "screwing around." (32RT 4878.)

When Terri was about 13 years old and appellant was about 7 or 8 years old, Lance, who was a freshman in high school, sat in the middle of the living room with a rifle pointed at the door. Their mother tried to talk to him. Lance was upset with their father for the abuse and was going to kill him when he walked through the door at 5 p.m. after work. Terri took the gun away from Lance and told him he was going to ruin his own life if he did this. (32RT 4881.) Terri told Lance to get himself together and calm down. (32RT 4882.)

Two years later, while Lance was still in high school, Lance took a pistol to school to kill or scare a boy who was bullying him and shot several people, injuring three of them. Lance was sent to a juvenile center. (32RT 4882-4883, 4908.) After Lance got out, he went to jail or prison for possessing a gun in a car. Since then, he had not been back in jail or prison. (32RT 4909.) Terri believed Lance should not be on the street because he was dangerous. He "pimped" out his wife, was deceitful, and was not to be trusted. (32RT 4913.)

Joe's abuse and Lance's problems affected appellant. (32RT 4883.) Appellant was told he would end up in jail like Lance, and appellant had no role model. Terri believed appellant became somewhat like Joe. (32RT 4884.)

Terri went to college at the University of California at Irvine and would drive from Irvine to Barstow to visit her family. While at college, Terri heard appellant attacked Montana with a lead pipe. (32RT 4884-4886.) Appellant told Terri he was sorry and did not remember doing it. (32RT 4910.) Also, while Terri was at college, appellant attacked their mother, pushing her against the couch and fracturing her vertebrae. (32RT 4885, 4903.) Appellant was "never actually really happy." (32RT 4886.)

While Terri was in college, Joyce called and said appellant was upset and needed to talk to her. Terri drove from Irvine to Barstow. Appellant had a gun in a little duffle bag and was upset with Joe for all the abuse and was tired of dealing with it. Terri talked to him for hours and thought he was going to harm himself or their father. (32RT 4886.) Terri told him to ignore their father's verbal abuse, but appellant was sensitive and was not able to do that. (32RT 4887.)

In the late 1990s on an Easter Sunday, Terri visited appellant at his apartment in Santa Clarita because appellant said he was very depressed, did not want to be around anymore, was hurt, and had been drinking. Terri brought appellant dinner. Appellant resisted eating, and when Terri tried to put some bread in his ear in a joking fashion, appellant got "extremely mad," jumped off the couch, and turned into "this Tazmanian devil type person." Terri knew she had to leave, and as she was going out the door, appellant came at her and pushed her down the stairs. Terri twisted her foot, and appellant screamed at her for trying to make him eat. Terri threw a can of green beans at him, missed, and jumped in her car. Appellant started beating on the hood of her car and ripped the mirror off the driver's side of her car. Terri told him to move or she would hit him. Terri drove a little way, and appellant yelled at her. Appellant was enraged and started running to her car. Terri drove away and filed a police report to force appellant to get help. Appellant agreed to get help, paid a fine, and paid the

deductible for the damage to Terri's car. (32RT 4887-4890.) Appellant apologized to Terri, who forgave him. (32RT 4911.)

When appellant was in a facility in San Bernardino, he was given medication. When he got out of jail, appellant continued taking medication for a time. When he took medication, appellant looked "kind of groggy and look[ed] just sort of drugged." At other times, appellant said he did not need the medication and did not take it. (32RT 4891.)

Terri knew about Colletta and that appellant went to prison for that incident. Appellant told Terri that Colletta was very jealous and they did not trust each other. Appellant said Colletta got pregnant and got an abortion. When Colletta told him about the abortion, appellant was very upset. Terri did not see the incident. (32RT 4892-4894.) Terri did not know about Betsy M. or Angel B. (32RT 4902.)

Terri had met Epperson and Todd when she visited appellant in downtown Los Angeles. (32RT 4907.) Terri did not know how Epperson died. (32RT 4902.) Appellant told Terri he could not have killed Epperson "because of the situation." (32RT 4911.)

Terri acknowledged that generally appellant fell in love immediately when a woman gave him attention and liked him, would give them everything, and spent money on them. (32RT 4909-4910.) However, when a woman rejected him, he became angry, hurt, and frustrated. (32RT 4894.) He slapped them around because that was what he saw as a child. (32RT 4909-4910.) Terri had met some of appellant's girlfriends and did not detect any problems. He seemed to get along with the women, and they seemed pretty normal. (32RT 4894.)

Based on a hypothetical posed by the prosecutor in which Joyce said appellant came home from Las Vegas, wanted money, became angry when he did not find cash in her purse, picked her up, and threw her, causing her

to break her back, Terri acknowledged that situation was not one in which a woman rejected him. (32RT 4903-4904.)

Terri did not talk to her father, mother, Lance, or Montana. (32RT 4895-4897.) Terri did not want them to know where she lived. (32RT 4895, 4897-4898.) Lance was "psychotic" and a liar. She did not trust him. (32RT 4897.) Terri chose to get away from her family because the little bit of happiness of having the family there for her was outweighed by the hurt her family caused her. (32RT 4896.)

However, Terri had a "pretty good relationship" with appellant, with whom she shared confidences. Terri believed appellant needed help and had "never gotten that help." (32RT 4898.) Terri thought appellant had a "big heart" and "been dealt kind of a crappy hand." Terri thought appellant was "very misdirected, very angry, [had] no way to let that anger out." (32RT 4899, 4913-4914.) Even though Terri had succeeded in the world, she believed appellant had not because he was more sensitive and unsure of himself. (32RT 4914-4915.)

Apparently, Joe gave appellant the red Mitsubishi truck. (32RT 4908.) Appellant had a very "mixed relationship" with his father. At one point, Joe tried to help appellant in Bakersfield, but help always came with conditions that he had to live up to. (32RT 4911-4912.)

(3) Montana Powell Gomez, Appellant's Younger Sister

Montana Powell Gomez, appellant's younger sister, was born in 1970 and was two and a half years younger than appellant. (35RT 5326-5327.) Lance was nine and a half years older than her, and Terri was eight and a half years older than her. (35RT 5327-5328.) Montana grew up in Barstow but now lived in Arizona. (35RT 5330.)

Montana was married and had two children. She had good days and bad days, was in therapy, and struggled every day. (35RT 5332.) She had

feelings of worthlessness. Over the years, Montana had taken anti-depressants and anxiety medications. (35RT 5333.) Montana could not work and was on disability. (35RT 5334.)

Montana's childhood was "really bad," a "nightmare." Her father was always kicking the children and putting them down. She did not talk to her father now because she could not deal with it. Her father would always tell the children they were worthless and tell the boys they were "pieces of shit." He told Montana she would be pregnant before she was 13, and she did not even know what that was at the time. She was scared all the time that her mother would be dead in the morning and that they would have no place to live because they had no friends. (35RT 5330-5332.) She was not allowed to have friends. (35RT 5335.) When their father was in the house, the house was very tense. When he left, they had fun. (35RT 5338.)

In their family, Montana was taught that Whites stay with Whites. Her father "flipped out" when Montana danced with an African-American boy in the first grade. More recently, her father "flipped out" when he found out her last name was "Gomez." (35RT 5359.)

Her father was verbally and physically abusive to the boys. He would tell the boys they were worthless and "pantywaists." She saw her father hit appellant and throw him around. (35RT 5336.) Her father would push her around a little bit but would not hit or punch her. He did throw her into a wall one time. When she was little, he would make her take down her own pants and would spank her with a belt until she bled. (35RT 5337.) Her father would hit her mother all the time from the time she could remember until her mother left when she was 14 and appellant was 16 or 17. (35RT 5335.)

When Montana was about five or six years old and Lance was about 15 and a half years old, Lance would take her to the garage and made her give him oral sex all the time. That went on for a couple years until Lance

went to jail for the first time. (35RT 5339-5340.) Montana did not tell anyone until she was in her twenties. (35RT 5340.)

When they were growing up, Montana and appellant had fun together. They would ride motorcycles in the desert, which got them away from their father. They played baseball and swam in the pool. (35RT 5343.) Appellant played in Little League and went to church. He had other friends, like Kevin Brunner. Appellant was smart. (35RT 5367.)

When appellant was young, he was very sensitive and gave Montana hugs. (35RT 5344.) Others would tease him, call him "pinky" because he had really light hair and was light-skinned, and call him "Troylet paper." He was always bigger than everybody. (35RT 5345.) When Montana was very young, some children tied appellant to a pole and were going to beat him, but Terri stopped it. (35RT 5345.)

Once when appellant was about 11 or 12 years old and the family was eating dinner, her father said appellant was chewing like a pig, picked him up, and threw him over the couch. The children did not know what to do because their father was so much bigger and they were afraid. (35RT 5337.)

Lance took a gun to school and said he was going to shoot somebody. Since she was so little, Montana did not know the details or if Lance shot someone. Montana did not talk to Lance after what he did to her. (35RT 5341-5342.) She had a daughter and did not want Lance near her family. (35RT 5342.) Appellant and Montana would get harassed at school about Lance. The children would tease them that they would be like Lance, that they were bad people, or that Lance would come shoot them. Appellant was sensitive about being teased. (35RT 5345-5346.)

When their parents separated, appellant was about 16 and a half. (35RT 5366.) Montana, who was 15 years old, lived with her mother in a

duplex. Although appellant did not live at home, he would visit Montana and try to make her feel better. (35RT 5347-5348.)

In 1985, when Montana was living with her mother, appellant went to northern California with his girlfriend's family but it was "too much" for his girlfriend. Appellant then visited his mother and Montana and was upset and hurt because he had just broken up with his girlfriend. Appellant stayed up late, and Montana went to sleep. In the morning, Montana awoke with a sensation in the back of her head. She got up and touched her head, which was covered in blood. Appellant was standing there and asked what happened. Appellant comforted her and tried to figure out what happened. Montana showed her mother the injury, and appellant tried to stop them from going to the hospital by jumping on the hood of the car. Eventually, the police came, there was a standoff, and appellant was arrested. (35RT 5348-5349, 5362-5362, 5368-5369.) Appellant had hit Montana on the back of her head with a lead pipe. Appellant "just lost it" and "just went to that place he goes to and just came and hit [her] . . . . " Appellant "had no clue what had happened." (35RT 5349.) Appellant went to juvenile hall. Appellant was seen by psychiatrists one or two times, but her father "put a stop to that as well." Their father refused to pay a portion of the treatment because he was afraid people would find out what he had done to his children. (35RT 5350.) Appellant had a problem with rejection. (35RT 5362.)

When appellant visited Montana after she had moved out, appellant had just hurt their mother, and the look on his face was like a blank, like nobody was there. It was the same look as when he had hit Montana. (35RT 5351.)

When she was younger, Montana was close with Terri, but did not see her anymore. Terri left the family because she could not take it anymore. (35RT 5342.) Montana described Terri as hardened, cold, and not loving

and did not want a relationship with her if she was that way because it was too hard for Montana. If Terri could be the way she was when they were children, Montana would love to have a relationship with her. (35RT 5373.)

Montana was close to her mother and appellant. (35RT 5343.) Montana always loved appellant and gave him unconditional love, as did their mother. (35RT 5351, 5367.) He did not mean to hurt her or her mother and just had no help dealing with his problems. (35RT 5352.)

Montana did not abuse her own son and daughter and did not mimic the behaviors she saw in her family. (35RT 5372.) She thought her mother was a wonderful role model. (35RT 5374.)

Montana changed her name from Marcia because she could not be that person anymore and did not want to have been named by her father. Years later, she found out it was very common for people in abusive families to change their names. (35RT 5340-5341.)

Appellant and Montana's son had great times together, including at Disneyland. Her son loved appellant. (35RT 5354-5355.) Montana thought appellant could be useful in prison in helping her son because he could tell him not to make bad choices. Having to tell her son that appellant was in prison would devastate her son. (35RT 5356-5357.) Appellant's positive qualities were that he loved her son unconditionally and that he was a warm, loving person. (35RT 5358.)

b. Childhood Friends and Neighbors

(1) Wanda Agnew

Wanda Agnew, who had lived in Barstow for about 52 or 53 years, had known appellant since he was born. (32RT 4845.) Appellant was a "neat pretty little blond curly haired boy." She was good friends with appellant's mother, Joyce, whom she knew from church. (32RT 4846.)

Agnew's house was known as the "safe house," because the Powell children were safe from their father there. (32RT 4847.) The children came to her house three or four times a week on occasion for 10 to 15 years. (32RT 4847, 4853.)

Joe, appellant's father, was "quick tempered." He was domineering and expected Joyce and the children to do what he said when he said it. Joyce and appellant were afraid. (32RT 4848.) Agnew saw bruises on appellant, just below his shirt edge or his leg where he might have been kicked or hit with a belt. Joyce had bruises from time to time. (32RT 4847.)

In church, appellant would sit quietly. Appellant attended Sunday school from age two to past the age of 12. (32RT 4849.) When appellant was about two years old, appellant had hit his head on an iron pole and was emotionally upset the next year or so. (32RT 4849.)

(2) Kevin Brunner

Kevin Brunner was appellant's childhood friend in Barstow, and their mothers knew each other and taught at the Barstow Christian school. (33RT 5079.) Appellant's father had a horrible reputation for having a violent temper, being mean, and just not being a real nice guy. (33RT 5081.) When appellant was a child, he was mostly passive and not aggressive by nature. Appellant had a lot of frustrations. (33RT 5087.)

When Brunner was in elementary school and appellant's brother Lance was in high school, Lance shot some people at the high school and was convicted. Brunner heard that Lance thought he needed to defend himself from gang members, and one bullet hit an innocent girl. Brunner thought it was self-defense as to the gang members, but Lance was convicted of shooting the girl. However, Brunner was not there. (33RT 5081-5082.)

Appellant and Brunner became friends in high school, when appellant was a freshman and Brunner was a sophomore. (33RT 5080.) Appellant had troubles in high school because he was a nice kid, was related to Lance which was a real negative thing, appellant's father repeatedly said he would be just like Lance, and a teacher said appellant was Lance's brother, labeling him. (33RT 5082.)

On a couple occasions, appellant cried because his father failed to show up on Friday night to spend time with him. Appellant got depressed about his circumstances, his father calling the house and arguing with his mother, the house being in disrepair, his mother being broke, and his father failing to send money. (33RT 5083.) As teenagers, Brunner and appellant had beer, and appellant cried and confided in him about his father and troubles. (33RT 5083-5084.)

At one time, appellant dated a pastor's daughter, and the pastor liked appellant, saw potential in him, and spent time with him. The pastor was a father figure. (33RT 5089.)

One time, while playing basketball and associating with some mentally handicapped children during lunchtime, Brunner was beaten by gang members when he tried to defend the mentally handicapped children from the gang members. Appellant helped Brunner to the nurse's office, and after that, appellant and Brunner played with the mentally handicapped children together and were left alone since they were large boys. (33RT 5084-5085.)

On the weekends, appellant went to church and saw Brunner. Appellant's mother thought Brunner would be a good role model for appellant, and Brunner's family opened their home to appellant. (33RT 5089.) Appellant had a solid work ethic and enjoyed spending time at Brunner's farm and doing chores. Appellant was shy in some cases and had a big heart. (33RT 5084.)

In his senior year of high school, Brunner enlisted in the Marine Corps, spent seven years in the Corps, and saw appellant a couple times. (33RT 5085-5086.) When he saw appellant at age 18 or 19, appellant had basically the same personality, but appellant had gotten in trouble and his mother was unhappy with him. (33RT 5086.) The last time Brunner saw appellant was when appellant was 18 or 19 years old. (33RT 5087.) Appellant graduated from high school. (33RT 5089.)

Brunner believed that if appellant had grown up in a loving home like Brunner's he would not be on trial. (33RT 5086.) Appellant's essential character was to be helpful, and he liked the underdog and stuck up for anybody. (33RT 5086.)

c. Appellant's Adulthood Friends

(1) Asim Askar

About 15 years before trial, Asim Askar met appellant at Askar's workplace, a Santa Clarita liquor store. (32RT 4856, 4858.) They became friends and went places together, including Las Vegas. (32RT 4857, 4864.) However, Askar had not seen appellant in the last seven years. (32RT 4861.) Appellant was always calm when around Askar. (32RT 4862.)

Askar knew Colletta, who never complained to him about appellant. They seemed like a typical couple. (32RT 4858.) At least eight years before Askar testified, Colletta had called his store, at least once. (32RT 4863-4864.) However, Askar testified there was no incident where Colletta called him at work and appellant grabbed the phone from him and threatened to kill her and her parents. (32RT 4859.)

(2) Neida Cook-Welsh

In 1998, Neida Cook-Welsh and appellant were in the Weingart Center's Stairs program for parolees. Cook-Welsh had three convictions and two parole violations for strong armed robbery, possession of a

controlled substance with an intent to sell, and possession of cocaine with usage. She served three prison terms. (33RT 5070.) Cook-Welsh used the name Gretchen Black before. (33RT 5074.)

Cook-Welsh met appellant in the dining room, when she sat at his table. They conversed and became friends. They ate together on a regular basis. (33RT 5071.) Appellant helped her with anger issues, such as when she became overly angry about someone cutting in front of her to use the microwave in the television room. Appellant told her to stop and think before acting, which she did. (33RT 5071-5072.)

She did not understand why appellant would want to be her friend and asked if she was his token "N-word." Appellant became very angry at her and told her not to let him hear her call herself that ever again. Cook-Welsh had seen appellant's tattoos, and they did not bother her. (33RT 5077.) At the Weingart, appellant got medication. (33RT 5074.)

Cook-Welsh had been out of prison seven years and drug-free for six and a half of the seven years. She was discharged from parole, married a man she met at the Weingart, and had been married for three years. She managed and ran a 36-unit apartment building in Carson City, Nevada and was about to buy their first home. (33RT 5072.)

Cook-Welsh stayed out of trouble, and appellant's friendship played a big part in that. She had never had friends before. (33RT 5072.) Appellant treated her as a person and would always have a special place in her heart. (33RT 5076.)

In 2000, appellant visited her and was real quiet. The next day, the police raided her house. (33RT 5074-5075.)

d. Expert Medical Testimony

(1) Dr. William Vicary

Psychiatrist Dr. William Vicary, who has a law degree from Harvard, evaluated appellant in 1993 for competency to stand trial for the Colletta assault and evaluated him for the instant case. (32RT 4927-4928, 4930-4931.) With respect to this case, Dr. Vicary opined that appellant suffered from a major mental disorder, bipolar disorder. (32RT 4948-4949.) In addition, appellant had a traumatic family background, brain damage, pled for treatment, showed remorse, and adjusted positively to institutionalization. (32RT 4934, 4942, 4962-4963, 4966.)

Dr. Vicary reviewed thousands of pages of documents, consisting of police reports, appellant's prison records, state hospital records, multiple prior psychiatric evaluations, a complete battery of hospital tests, and more recent tests, including EEGs, PET scans, and neuropsychological tests. He interviewed appellant approximately seven times for a total of about 14 hours and had spent over 70 hours on this case. (32RT 4929.) However, Dr. Vicary had not read the trial testimony because there was not unlimited money. (33RT 4993-4994.)

Appellant's institutional records went back to when he was a teenager at the San Bernardino County Mental Health Department, where he was hospitalized three times, treated with antipsychotic medication, and was evaluated for the court. (32RT 4932-4933.)

In 1985, in a report after appellant's pipe attack on his sister Montana, appellant was evaluated as having major depression, single episode, a major mental disorder, and having anti-social traits. (33RT 5050.) The report stated appellant assaulted staff and continued to threaten his mother and sister, saying he wanted to kill them. (33RT 5056.)

In 1993 and 1994, Dr. Vicary saw appellant for court-ordered examinations to determine if he was competent to stand trial for the Colletta assault. (32RT 4930-4931.) In a competency determination, there are two factors, one being whether the defendant understands the nature of the proceedings, and one being whether the defendant can meaningfully assist in his own defense by cooperating with his attorney in a rational way. (33RT 5001-5002.) In the Colletta case, appellant disrupted the proceedings by lying prostrate on counsel table and claiming he took an overdose, which was later found to be false. Later, while appellant was in lockup, he tried to cut his wrists. Such actions delayed the proceedings. (33RT 5003.) Appellant was sent to Patton State Hospital because Dr. Vicary and at least one other doctor said he was bipolar, agitated, paranoid, irrational, very destructive, and self-destructive. When appellant was admitted to Patton, their opinion was that appellant was bipolar. Dr. Vicary saw appellant at Patton as well. Within a year, appellant was returned to court, with a discharge diagnosis. (32RT 4930-4931; 33RT 5004.) The report stated appellant did not appear to be suffering from a severe mental disorder, he understood the court's procedures, he had the ability to cooperate with an attorney if he chose, and his current behavior and expressed symptoms were viewed as volitional and characteristic of his anti-social personality rather than a major mental illness. (33RT 5005-5006.) Appellant stood trial for the Colletta incident and went to prison. (32RT 4930-4931.)

Every state prisoner is screened, usually by a counselor, and if there is evidence the prisoner is sick, the prisoner is referred for a psychiatric evaluation. If the psychiatrist determines the prisoner is sick, the psychiatrist can start him on medication and recommend he be placed with psychiatric patients in prison. Also, a prisoner can be transferred from a state prison to Atascadero State Hospital, a maximum security facility

designed to treat prisoners who cannot be handled by the prison psychiatric units. (32RT 4931-4932.) Appellant was placed at Atascadero and treated with massive doses of tranquilizing and antidepressant medication. (32RT 4932.) One person who examined appellant in prison described him as a serial killer in the making. (33RT 4990.) Dr. Vicary disagreed with that. (33RT 4991.)

In 2002, while this case was pending, appellant was at Patton for three months since he had been declared incompetent. After Patton, appellant was in county jail for three years. In the Los Angeles County jail, appellant was in the psychiatric section. (32RT 4934.)

(a) Six Categories Explain How Appellant Came to Be the Way He Is

i) Traumatic Family Background

Based upon his review of appellant's records, other records, and conversations with appellant, Dr. Vicary testified six major categories explained how appellant came to be the way he is. First, appellant had a traumatic family background. (32RT 4934.) Appellant's fraternal grandparents were alcoholics, his paternal grandmother died from alcoholism and was described as neglectful and hypersexual, his maternal grandfather molested appellant's mother for three years when she was a little girl, a paternal uncle spent most of his life in a psychiatric hospital, and two paternal uncles and a cousin were alcoholics. Appellant's father was an alcoholic who was described as paranoid, impulsive, irritable, and explosive. Appellant's father was verbally, emotionally, and physically abusive to everybody in the family and would beat, tie up, and slam the children, primarily the boys, into the walls. Appellant's father beat Lance so badly that he fractured his ribs. Appellant's mother was beaten by his

father and could not seem to protect anybody. The neighbors described the family as one of the most violent and chaotic in the neighborhood, with constant physical and mental abuse of primarily Lance and appellant. (32RT 4938.)

Lance was described as irritable, aggressive, assaultive, grandiose, having pressured speech, alcoholic, a heroin addict, having been in jail and prison, and having a history of beating women. Terri reached the point where she took off, disappeared, and spent parts of her life on disability. Montana was diagnosed as having a serious mental disorder and was prescribed lithium, which is given to manic depressives. Apparently, Montana had the same mental disorder as appellant, their father, their brother, and their uncle. (32RT 4939.) Being physically, verbally, psychologically, or sexually traumatized as a child can be very devastating and damage one's central nervous system. (32RT 4935.) Such damage can be proven with MRIs and PET scans, which show structural changes in the brain. (32RT 4935-4936.) However, Dr. Vicary testified that having a traumatic family background was "not an excuse for anything." (32RT 4936.) Appellant tried to find love with a stable woman, but instead encountered a series of girlfriends who rejected him, making him feel rejected, betrayed, and humiliated. (33RT 4987.) Appellant did not have any positive mentors to intervene and help. (32RT 4940.) However, Dr. Vicary did acknowledge that in his report dated September 14, 2004, he stated appellant had opportunities to have good influences and role models in his life. (33RT 5035.)

ii) Brain Damage

Second, appellant had brain damage. When he was one and a half to two years old, appellant started to act differently, likely because his father had punched him or smashed his head into a wall. Appellant was described as addled, less alert, and less responsive, and shortly thereafter, he started

having seizures. (32RT 4942.) At Loma Linda, he had an EEG or brain wave test, and they found he had a seizure disorder and put him on medication (phenobarbital), which he stayed on for six years. Despite the medication, appellant continued to have seizures mostly at night. (32RT 4942-4943.) Appellant was moody and prone to rage. Testing indicated he had damage to the frontal and temporal parts of his brain, areas which control one's ability to control emotions. A neuropsychologist, Dr. Boone, concluded appellant lacked the ability to exert reason to control his behavior, and a neurologist, Dr. Bertoldi, found appellant had an episodic loss of control, difficulty with emotional stability, and aggression. (32RT 4943-4944.)

Dr. Boone tested appellant and found appellant had brain damage that could be seen on the EEG tracings and colored PET scan. (32RT 4943-4944.) Children with brain damage, mental disorders, and a traumatic family background make drawings like appellant's first grade drawings with recurrent themes of destruction and death. (32RT 4945-4947.)

Dr. Vicary agreed with Dr. Romanoff's assessment that appellant had an underlying organic impairment and "severe character or logical difficulties that were the result of forces beyond his control," which produced both mental disease and defect making it much more difficult and perhaps impossible for appellant to control himself in the course of the alleged offense. (33RT 5057-5058.) Dr. Romanoff also stated appellant had bitten his lip or inside of his mouth at night, which was consistent with someone who had had a seizure, if one believed appellant. However, Dr. Romanoff believed appellant malingered or manipulated on occasion. (33RT 5034, 5057.)

iii) Bipolar Disorder

Third, appellant had a major mental disorder, bipolar disorder. (32RT 4948-4949.) The DSM IV, the standard guideline for evaluating

psychological problems, diseases, and disorders, is an attempt to give names or labels to a group of behaviors so psychiatrists and psychologists can talk intelligently to each other, conduct research, and decide on appropriate treatment. The DSM has diagnostic criteria, but is just a guideline. Also, the DSM cautions that the diagnostic categories may not be relevant to legal conclusions or legal judgments, because it does not answer questions such as individual responsibility and volitional behavior, which are for the jury to decide. (33RT 4976-4977.)

Appellant's bipolar disorder was a major mental disorder. Dozens of doctors back to his childhood, and several institutions, including the San Bernardino County psychiatric hospital, Patton State Hospital, Atascadero State Hospital, and prison psychiatric units, diagnosed him with a major mental disorder. The current jail psychiatrists diagnosed him as having bipolar disorder, and appellant was on large doses of tranquilizing mood stabilizing medication, including 600 milligrams each day of Seroquel and lithium, which is primarily given to treat bipolar disorder. (32RT 4948-4950.) Dr. Vicary testified appellant had the classic symptoms of mania, such as staying up for days without sleeping, being euphoric, hyperactive, impulsive, grandiose, and irritable, and having racing thoughts. He also had the symptoms of depressive episodes, including sleeping days at a time, withdrawing from people, and feeling miserable to the point of suicide. At 13, appellant tried to hang himself in the garage, but the rope broke. (32RT 4951.) He tried other times to kill himself. (32RT 4952.)

Records showed appellant had a hypersensitivity to rejection. His mother rejected him and did not protect him. His girlfriends tired of him and wanted to break up, thereby hurting him. Appellant expected to be betrayed and exploded, not because of meanness but because of his illness and background. (32RT 4956.) The severity of appellant's bipolar disorder was so extreme that he actually had psychotic symptoms, meaning

appellant lost touch with reality. Appellant complained about hearing voices and had been very afraid and paranoid about others hurting or killing him. (32RT 4952.) Dr. Vicary did acknowledge that even those with the worst bipolar disorder may be in the zone between mania and depression, which is called normality, and can be like anybody else. (32RT 4954.)

Appellant knew he was sick, but every time he got out of jail or prison, he stayed on his medicine for a while, started to feel better, and figured he did not need the medicine. Then, an "inflammatory element" caused him to drink or get high and go into a downward spiral. (32RT 4958.) Appellant did tell Dr. Vicary he stopped taking Paxil because he could not get an erection while taking it. (33RT 4988.)

With respect to the Epperson murder, Dr. Vicary opined appellant's crimes were "not a premeditated, deliberated carefully thought out type of plan. This is a crime of passion, it's an explosive, irrational outburst." (32RT 4959.) There was no rational basis for this crime. Appellant had been sick ever since childhood and could explode in a rage where he lost touch with reason and rationality. (32RT 4960.)

In the sexual disorders portion of the DSM, there is a category of sadistic rapist, under sadistic paraphelia. (33RT 4988.) Paraphelia means abnormality in an individual's sexual behavior. (33RT 5039.) For sadistic rape, the object of the sexual assault is not necessarily the sex, but the victim's pain and suffering, which is pleasurable to the perpetrator. (33RT 4988.) A perpetrator can be alone with the victim for an extended period of time in which he can take his time with her. (33RT 5001.) In general, Dr. Vicary did not believe appellant fit into the category of a sexually sadistic parapheliac, but some of his behavior resembled that behavior. However, other crimes such as his attack on his mother, sister, and Colletta did not have sexual elements. (33RT 5039.) Generally, the category applied to cases where the victim was a stranger. (33RT 5039-5041.)

A report dated December 17, 1985 from the San Bernardino Department of Health, which Dr. Vicary considered when opining about appellant, stated the then-17-year-old appellant had been talking to a young Northern California woman who rejected him, just before assaulting his sister with a pipe. Appellant tried to prevent his mother from transporting his sister to the hospital by climbing on the hood of the car while in motion and causing a standoff with the police who came to arrest him. While in custody, he threatened to assault the staff and said he intended to kill his mother and sister. The report stated no evidence of psychotic symptoms existed. (33RT 4978-4979.) Appellant was diagnosed on Axis I with major depression and atypical impulse control, and on Axis II with paranoid and anti-social traits, less than the full blown anti-social personality disorder but indicating a problem with authorities. A hallmark for anti-social personality disorder is a pervasive pattern of disregard for and violation of the rights of others that begins at childhood or early adolescence and continues into adulthood. (33RT 4980.) Part of anti-social personality disorder is showing little remorse for the consequences of one's acts, providing a superficial rationalization for having hurt or mistreated someone, believing life is unfair and losers deserve to lose, blaming the victim, and minimizing the harmful consequences of one's actions. (33RT 4980-4981.) Dr. Vicary opined that 80 percent of people in prison had anti-social personality disorder. (33RT 4989.) The report stated appellant had the potential to "step outside the boundaries of society when he perceives life to be unfair to him." (33RT 4981-4982.) Similarly, in Dr. Maloney's report, appellant said voices told him to kill his sister. If appellant said he did not remember hitting her, Dr. Vicary opined that one possible inference was that he was minimizing or trying to get away with what he did. (33RT 4983.)

When appellant said he was unaware that he broke his mother's back, appellant could have been minimizing what he did or could not have been aware. (33RT 4982.) Dr. Vicary was aware appellant pushed her against dresser drawers or something that struck her back. The police were called, and appellant was arrested. He continued to say he wanted to kill his mother. (33RT 4982-4983.) Appellant told Dr. Vicary that his mother was the only person in the world whom he really loved. (33RT 4986.)

Dr. Vicary also conceded that when appellant said he did not kick Colletta in the neck but did kick her in the back almost to her butt, appellant was minimizing to some extent. (33RT 4983-4984.)

With respect to Epperson's murder, if appellant said he remembered everything up to hitting her but nothing after that, appellant was minimizing what he did to some extent. (33RT 4984-4985.) He believed appellant was lying to some extent. (33RT 4985.)

iv) Pleas for Treatment

Fourth, appellant made repeated pleas for treatment and help to various mental health professionals for 20 years. Appellant took life-threatening Clorazil and had been on massive doses of Haldol, Thorazine, lithium, and Depakote, potent drugs with serious side effects. (32RT 4962.)

v) Show of Remorse

Fifth, appellant showed remorse. Dr. Vicary believed appellant was sorry and talked about how guilty and ashamed he felt. Appellant said he knew he was responsible and did not try to "duck out of it." (32RT 4963.)

Appellant attempted suicide as a child and adult. In March 2005, he became so frustrated and depressed that he took an overdose of his medication and had his stomach pumped. (32RT 4964.) Some of appellant's suicide behavior had involved serious attempts, and other times,

the behavior was more a gesture indicating he could not take it anymore. (32RT 4968.) When appellant took pills to prevent deputies from searching his cell, the deputies found homemade weapons, bats, and shanks. (32RT 4969.) Appellant was paranoid and thought somebody was trying to kill him. (33RT 5045.)

vi) Positive Institutional Adjustment

Sixth, appellant adjusted positively to being institutionalized when on psychiatric medication. (32RT 4965.) Appellant was cooperative, got along with others, and was not a threat to anybody. (32RT 4966.) Dr. Vicary did acknowledge that having three shanks and two bats in one's cell while being closely watched was not positive institutional adjustment. (33RT 5037.)

(b) Malingering

Dr. Vicary evaluated appellant for malingering, the conscious production of false symptoms for a rational purpose. Dr. Vicary gave appellant the Structured Inventory of Malingered Symptoms (SIMS) test. In Dr. Vicary's opinion, appellant was not a malingerer, an opinion which was based on everything including the SIMS test. (33RT 5010-5014.) Dr. Vicary discounted some answers to questions because the test was one part of an overall assessment of malingering. (33RT 5013-5014, 5018.) On the psychotic scale, appellant received a two, and in general, a score greater than two meant appellant was malingering. On the neurological scale, appellant received a four, and a score greater than two was indicative of malingering. (33RT 5014.) Dr. Vicary said the scores could have been much higher, and appellant was on the margin or borderline. (33RT 5015.) Dr. Vicary conceded there were times when appellant malingered, but he was not malingering the bulk of his symptoms. (33RT 5016.) However, when appellant said he did not remember what happened after he started

beating Epperson, Dr. Vicary agreed that indicated malingering or outright lying to some extent. (33RT 5016-5017.) Also, appellant lied to Dr. Vicary regarding a prior burglary, according to the police reports. (33RT 5017.) Dr. Vicary also acknowledged that Dr. Romanoff believed appellant was a manipulator. (33RT 5034.)

(c) Dr. Vicary's Admonishment by the Medical Board

In 1993, Dr. Vicary had interview notes of a person charged with a double homicide, and at the behest of the defense attorney, he made 23 different deletions and changes to benefit the defense attorney's interpretation. (32RT 4970; 33RT 5018.) Dr. Vicary deleted that the defendant hated his parents, wanted them out of his life, and wanted to kill them. (33RT 5018-5019, 5029-5031.) Ethically, that was wrong. Dr. Vicary was admonished by the Medical Board in California, fined, and placed on probation. He was taken off the court-approved list of forensic psychiatrists. (32RT 4971-4972.) He was granted an early release from probation for exemplary behavior. (33RT 5043.)

(2) Dr. Kyle Boone

Dr. Kyle Boone, a clinical neuropsychologist, tested appellant and found he had consistent weaknesses in the area of executive or problem-solving skills, which related to planning, organization, thinking through consequences of behavior, logic, and inhibiting behavior. The results suggested appellant had some kind of organic frontal lobe brain dysfunction. (33RT 5091-5092, 5107, 5123, 5140-5141.) Dr. Boone testified a neuropsychologist objectively measured thinking skills, such as the intelligence quotient (IQ), memory, attention, and higher level problem-solving skills. (33RT 5091-5092.)

Dr. Boone saw appellant and administered standardized paper and pencil tests to him. (33RT 5094-5095.) To determine whether someone

has a psychoneurological problem, she did not need to know anything about the alleged crime or any of the subject's activities. (33RT 5094.) To compare the test taker's scores against the scores of normal people of the same age, education, and gender, she only needed to know the person's age, education, and gender. To interpret the scores, she needed to know the person's medical and educational history. (33RT 5095.) Various tests embedded in the battery specifically check for malingering. The indicators showed appellant was doing his best on the tests. (33RT 5096.) However, Dr. Boone acknowledged appellant could have malingered in other situations. (33RT 5128.)

Eight different areas of brain activity were tested: basic attention; thinking speed; language; visual-spacial skills; overall intelligence; executive or problem-solving skills, higher level skills where one has to use logic and deduce patterns; verbal memory; and nonverbal memory. (33RT 5097, 5099.)

Appellant's overall intelligence was average. (33RT 5099.) His basic attention was high average, scoring at the 75th percentile. (33RT 5100.) Appellant's verbal memory was above average, meaning that his ability to remember what people said to him was above average. (33RT 5102.) Appellant was average in language. (33RT 5101.) Appellant's visual perception or visual spacial skills was average to low average overall. (33RT 5101-5102.) Appellant's nonverbal memory, basically his memory of diagrams and the like, was generally average to low average. (33RT 5103.) Appellant's thinking speed was low average. (33RT 5100.) On the executive or problem-solving skills, appellant had a clear deficiency. (33RT 5103.) It was usual for a person to have a high score on one part of the brain test and score very poorly on another. (33RT 5103-5105.)

The executive or problem-solving skills area of the brain is most closely related to the frontal lobes of the brain. (33RT 5106.) These skills

are very important for humans to function and that is why the frontal lobes are so much larger in humans than animals. The frontal lobes are involved in planning, organization, thinking through consequences of behavior, logic, weighing risks and benefits of particular decisions, and being able to stop behavior that used to be but is no longer appropriate. The skills involve flexibility and adaptability as one interacts with the environment. If a person is low on these skills, the person will have trouble thinking through consequences of behavior, be impulsive, engage in behaviors that are not helpful in the long run, have difficulty understanding the impact of his behavior on other people, not be empathetic, and have trouble logically making plans and following through on those plans. (33RT 5107.) A person could have been born with frontal lobe problems, or those problems could have been the result of something not of their own making. (33RT 5108.)

Appellant took several tests to measure his executive or problem-solving skills. On one test, appellant scored in the second percentile, meaning 98 out of 100 people of his same age and education would score better. On other tests involving this skill, appellant scored in the percentiles ranging from less than the first percentile to the 11th to 16th percentiles. (33RT 5108.) On one Stroop test, which tests these skills, appellant scored in the second percentile. (33RT 5110.) This Stroop test in particular measured the ability to inhibit, was very predictive of impulsivity, and correlated with violence and aggression. (33RT 5116-5117, 5125-5126.) On another test involving executive or problem-solving skills, the Wisconsin card sorting test, which tests the ability to look at a problem situation, figure out an appropriate strategy, and be flexible, adaptive, and logical, appellant's scores were low, ranging from the sixth, 11th, 13th, to 16th percentile. (33RT 5118-5122.)

In all, Dr. Boone gave appellant six executive or problem-solving skill tests and concluded appellant had consistent weaknesses in this area, suggesting there might be dysfunction of the frontal lobes of his brain. (33RT 5123.) Appellant's tests suggested that he suffered from organic brain dysfunction, meaning the dysfunction was inborn and that something was not wired correctly. (33RT 5140-5141.) Dr. Boone also stated that seizures can influence the functioning of the frontal lobe. (33RT 5124.)

Also, a paper in a professional journal in 1996 found that violence was most frequent in patients who had damage or lesions in the frontal lobe of the brain. Further, two studies in a 1995 book found that if one does poorly on the executive or problem-solving skills tests, is intoxicated, and provoked, these three things are very predictive of violence. (33RT 5125.) Accepted literature in the scientific community correlates poor performance on the frontal lobe tests and aggression, the theory being that one is unable to control or stop oneself at the appropriate time. (33RT 5126.)

If a person scores low on the executive or problem-solving tests, those scores could be caused by factors other than organic brain damage or brain dysfunction. For example, depression, acute intoxication, and medications could cause some types of brain dysfunction that would lower performance. (33RT 5129.)

(3) Dr. Roger Bertoldi

Dr. Roger Bertoldi, a neurologist, reviewed appellant's records, had an EEG administered to him, conducted a quantitative EEG (QEEG) analysis, and examined him. (34RT 5157-5169, 5182, 5220-5221, 5253-5254, 5258.) Dr. Bertoldi opined that appellant had brain damage and focalized epilepsy. (34RT 5173-5175.) He diagnosed appellant with seizure focus limbic or temporal limbic disorder, which caused episodic discontrol, emotional mobility, and intermittent rage. (34RT 5194-5195, 5227-5228.) He further opined that appellant's deep focus limbic or temporal limbic

illness contributed to his criminal behavior. (34RT 5209-5210, 5247-5248.)

Dr. Bertoldi defined a neurologist as a doctor who specializes in the nervous system, which includes the brain, spinal cord, nerves, muscles, and all structures like the skin, heart, and lungs. (34RT 5152.) The brain is the central nervous system, and an EEG tests how the brain works. (34RT 5154.) An EEG can measure electrical activity in the brain, because the cortex of the brain is very columnar, with columns of negative and positive cells, and brain activity projects past the skull. The EEG image is a functional image, not an anatomical image. (34RT 5155-5156.) An EEG has two parts, the background and the paroxysmal activity. (34RT 5171.)

Dr. Bertoldi defined epilepsy as when one has an abnormal focus in the brain, which dissipates and spreads throughout the brain. (34RT 5157, 5258.) An abnormal focus is an irritable area, which discharges electricity inappropriately or intermittently for many different reasons. An inappropriate discharge of electricity could be localized and then spread. (34RT 5157-5158.) When the movement spreads to the other side of the brain, one loses consciousness. The abnormal focus spreads throughout the brain and is called a seizure. (34RT 5157, 5258.) About a third of children outgrow seizures, a third continue to have seizures, and a third are equivocal, meaning they can outgrow it and have it return later in life. (34RT 5161-5162.)

Dr. Bertoldi reviewed records on appellant. Loma Linda reports showed that appellant's mother brought him in on March 4, 1970, when he was two and a half years old. The report stated that appellant's seizure was preceded by a moan, that his left leg, left arm, and left face were jerking, that the seizure lasted 30 minutes, that he was given phenobarbital, an anti-epileptic drug, and that appellant was admitted for evaluation. The description was of a Jacksonian seizure, a rhythmic movement which

started in the periphery, in the hand and arm, and moved centrally to the face. (34RT 5157, 5159-5161, 5258.)

March 6, 1970 records showed appellant was given an EEG. The EEG showed appellant had an abnormal "spike and wave" brain discharge, a left parietal occasional atypical spike and wave complex that was noted at three cycles per second. The localization of the spiking wave showed that brain portion was abnormal or possibly an epileptic focus. (34RT 5164-5165.) March 6, 1970 records also showed appellant was given a radioencephalogram (but Dr. Bertoldi believed it was a pneumoencephalogram), which checked for tumors or large masses in the brain and was anatomical, not functional, imaging. The test did not identify a "definite abnormality." (34RT 5162-5163, 5220-5221.) As a result of his 1970 tests, appellant was given phenobarbital, which suppressed the focus so the brain portion where the spike and wave discharge emanated from would no longer propagate to involve other brain portions, thus limiting the focus to the left parietal occipital brain portion. (34RT 5165.)

January 26, 1976 records showed a Dr. Schneider gave an EEG to appellant when he was seven years and nine months old. The EEG was abnormal, mainly in the left posterior, frontal region, a place different from when appellant was two years old. The EEG showed a spike and wave of four to five hertz. A spike and wave, an abnormal discharge, is associated with a high incidence of epilepsy and with the seizure focus at the anterior brain portion. (34RT 5166.) The record showed the EEG was "highly suggestive of a focal seizure disorder," meaning the discharge was emanating from a particular location, the left frontal lobe. (34RT 5167.) The records further stated that the current EEG showed paroxysmal activity, abnormal activity arising out of and dissipating back into the background, in the left posterior frontal region rather than the right as in an April 19, 1972 EEG. The focus probably did not move from one place to

another, because the abnormality varied electrographically. (34RT 5168-5169.)

Based on appellant's 1972 to 1976 records, Dr. Bertoldi concluded "almost unequivocally that [appellant] had a seizure disorder at that time." (34RT 5169.) Appellant had signs of complex epilepsy, and the chances of outgrowing this disorder were small. (34RT 5169-5170.)

On February 17, 2004, appellant was given an EEG by Q-Metrx, as Dr. Bertoldi directed, and the EEG test results were provided to Dr. Bertoldi. (34RT 5158-5159.) The background portion of appellant's EEG pointed to structural damage, frontal or posterior. The paroxysmal activity or abnormalities that arose out of the background and went away helped determine epilepsy or seizure disorder. (34RT 5171-5172.) Dr. Bertoldi opined that the EEG's background and paroxysms were consistent with brain damage and epilepsy, which are related. Brain damage is when the brain is damaged but does not have to seize. Epilepsy is when one has an abnormal focus within the brain that spreads to involve other structures intermittently and causes a seizure. (34RT 5173-5174.) Appellant's epilepsy was focalized, not general, and focalized epilepsy is a form of brain damage. (34RT 5175.)

To confirm his opinion, Dr. Bertoldi ran a QEEG. The QEEG compared the EEG data to a database of 2,082 normative subjects, with age and sex matches and including men and women, and mapped differences to give a statistical deviation from normal. (34RT 5182, 5253-5254.) The speed of brain impulses are divided into different bands, alpha, beta, delta, and theta. Delta is less than four hertz, theta is four to seven, alpha is eight to 13, and beta is greater than 13. Hertzes are cycles per second of electrical activity. (34RT 5184-5186.) Appellant's QEEG showed "way too much" theta in the front portion of his brain, meaning that his front portion brain functioning was too slow. (34RT 5185-5186.) The QEEG

also showed abnormal delta frequency slowing in the front part of his brain. Dr. Bertoldi ruled out "artifacts," such as eye movement, sweat, and sleepiness, which would have caused delta slowing. (34RT 5188.) Appellant's brain abnormality was consistent with that seen in him as a young person, consistent with structural brain dysfunction everywhere but mainly frontal. (34RT 5189.)

The epileptic focus can be deep within the brain, as was probably in appellant's case. (34RT 5190, 5193-5194.) The limbic portion of the brain is the deepest portion of the brain. (34RT 5190.) The limbic system consists mostly of the brain stem and the deepest portion of the cerebrum and contains our primordial impulses. (34RT 5192.) If one becomes disinhibited with alcohol, the limbic structures are brought out and are those associated in scientific literature with violence. (34RT 5193.) Dr. Bertoldi opined that the limbic system contained the focus of appellant's abnormality, and that was consistent with someone who has explosions of uncontrollable rage or terrible anger. (34RT 5194-5195.) Medications could decrease the number and severity of episodes but it was very difficult to suppress a limbic focus. (34RT 5195.) Depakote was a good medication for behavioral control. (34RT 5196-5197.) However, Dr. Bertoldi acknowledged that over the past 30 years, appellant had not had any doctor or neurologist prescribe Depakote or phenobarbital for seizures. Appellant was taking Depakote, presumably to keep him calm or perhaps to prevent migraines. (34RT 5226.)

Dr. Bertoldi also acknowledged that appellant's EEG did not show any indication of epileptic wave activity. (34RT 5226.) Many people without any sort of epileptic seizures have EEG abnormalities. And, even though a person has epileptic seizures, that person does not necessarily engage in criminal behavior. (34RT 5261.)

On April 16, 2004, Dr. Bertoldi examined appellant. (34RT 5158-5159.) Appellant related that he engaged in nocturnal tongue or cheek biting, which confirmed epilepsy and the fact that he was still probably seizing. Dr. Bertoldi did not see the tongue or cheek biting and took appellant at his word on that. (33RT 5135-5136; 34RT 5209.)

Dr. Bertoldi's diagnosis of appellant was that he had seizure focus limbic or temporal limbic disorder causing episodic discontrol, emotional mobility, and intermittent rage. (34RT 5227-5228.) In making this diagnosis, Dr. Bertoldi would have preferred to have the "clinical picture" in addition to the EEG information, but when he spoke to appellant, appellant did not have a clear idea about the incidents. (34RT 5230-5231.) If appellant were able to give more details about Epperson's killing, Dr. Bertoldi's opinion might change. (34RT 5231-5232.) Also, Dr. Bertoldi based part of his opinion on Dr. Boone's opinion. If Dr. Boone was incorrect, Dr. Bertoldi might change his opinion, depending on how incorrect she was. (34RT 5235.) Further, Dr. Bertoldi reviewed psychiatric reports and had the impression nobody had said appellant was manic-depressive. (34RT 5243.)

Given appellant's childhood EEG, current EEG, Dr. Bertoldi's interview of appellant, and Dr. Bertoldi's records review, Dr. Bertoldi opined there was an organic component to appellant's behavior, to a reasonable medical certainty.[15] The organic component was located in appellant's brain, possibly in the limbic system. Dr. Bertoldi did not think

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[15] Dr. Bertoldi knew his medical opinion was not relevant unless he gave an opinion to a medical certainty, and he had never said that any of the matters he testified to were true to a medical certainty in his opinion. Instead, Dr. Bertoldi used "probable." However, Dr. Bertoldi testified he would be happy to say "to a high medical degree of certainty every time [he said] probability." (34RT 5249-5250.)

the organic component was the exclusive cause of appellant's behaviors, but was contributory. (34RT 5171, 5263.) Dr. Bertoldi opined that it was "highly probable" appellant suffered from a brain disorder which likely affected or could affect his actions, based upon the EEG. (34RT 5197.) Manic-depressiveness would not be consistent with the organic component Dr. Bertoldi saw, but an intermittent explosive disorder would be, to a high degree of medical certainty. (34RT 5266.) If one had an anti-social personality disorder, that disorder does not have an organic cause; thus, if one had an organic cause of a behavior, the disorder would be something besides anti-social personality disorder. However, one could also have an anti-social personality disorder. (34RT 5266-5267.)

Dr. Bertoldi opined that appellant's deep focus limbic or temporal limbic illness contributed to his criminal behavior, but was not suggesting a limbic seizure caused appellant to engage in all the criminal behavior in this case. Dr. Bertoldi did read a report of the Epperson crime. (34RT 5209-5210, 5247-5248.)

Dr. Bertoldi also acknowledged that appellant's attack on Betsy M. was too prolonged for it to be the result of a limbic seizure. (34RT 5210-5211.) Luring Betsy M. to his apartment and keeping her at knifepoint for four hours while having her strip and verbally terrorizing her was not consistent with limbic rage. (34RT 5283.) Dr. Bertoldi did opine that appellant's Jacksonian seizures were probably a contributing factor for his behavior, but Dr. Bertoldi had difficulty determining the degree because appellant did not recall details of these episodes. (34RT 5229-5230.) Dr. Bertoldi was not given the police reports on the Betsy M. crime. (34RT 5255.)

When appellant hit his mother, hit his sister with a pipe, and attacked Colletta, Dr. Bertoldi believed appellant was having a paroxysmal episode which was probably contributory, but he did not know how much. (34RT

5259-5260.) Dr. Bertoldi was not given the police reports on the Colletta crime. (34RT 5255.)

Dr. Bertoldi acknowledged appellant's records did not say he had an epileptic seizure before or during any of the times he broke the law and assaulted women. (34RT 5227.) Also, Dr. Bertoldi testified it was possible appellant was a malingerer. (34RT 5250.)

(4) Dr. Saul Niedorf

Dr. Saul Niedorf, a specialist in adult and child psychiatry who worked with mentally ill offenders, visited appellant in jail and reviewed records, including crime reports and doctors' reports. (35RT 5433-5434, 5437-5437.) In his opinion, appellant suffered from a major mental illness. Appellant had two major conditions, a seizure disorder and intermittent explosive disorder (IED). (35RT 5437-5438.)

(a) Appellant's History

Appellant had seizures when he was two-plus years old. The Loma Linda EEG, which recorded electrical activity of the brain, was positive, and he had subsequent positive EEGs. (35RT 5442-5443.) Appellant's brain damage did not go away, but his behavior changed from childhood through adulthood with experience. A person with brain damage that used to cause consciousness loss would not always suffer consciousness loss. (35RT 5443.)

Dr. Niedorf agreed with the statement that the biggest indicator of a child's future aggressiveness was the family situation and that the more physical punishment was meted out, the more aggressive the child would be. Appellant suffered repetitive violence from his father primarily and his brother, as well as passive abuse, meaning that the people he hoped would protect him could or did not. An abused person could identify with the abuser. (35RT 5449-5450.) When one has a propensity for aggression set

up by brain chemistry or structure and one gets programmed to respond with fear at the loss of love, that could lead to attack or injury. (35RT 5450.)

Appellant's drawings when he was six or seven years old showed he was preoccupied with fragmentation or things coming apart or blowing up, indicating emotions out of control and aggressive impulses that were poorly controlled or uncontrolled but that transferred into words or imagery. (35RT 5506.) Fragmentation was one of the most common things shown by abused children. (35RT 5507.)

When appellant was recommended for treatment and his father did not want him to accept it, Dr. Niedorf's theory was that the father did not want him to expose his own violent actions. (35RT 5450.) An aggressive person could change if treated before the teenage years conclude. (35RT 5451.)

Appellant's suicide attempts were very much part of his psychology and that of people raised like him with his mental condition. Those people felt a tremendous sense of guilt and shame at the aggression they had endured. (35RT 5451.) When one cannot express aggression outwardly, one expresses it inwardly by "acting in." In bipolarity, the depressive side made the person feel worthless and in need to harm and punish oneself. (35RT 5452.)

The 1985 doctor's report after appellant attacked his sister set forth appellant's evaluations under the DSM's Axes. Under Axis I, the primary or most important diagnosis, appellant was found to have the two mental illnesses of major depression, single episode, and atypical impulse control disorder. Atypical meant the impulse control disorder was deeper and more disturbing than someone who always got into trouble. Under Axis II, usually a descriptive elaboration of Axis I and more a quality of general personality, appellant was found to have paranoid and anti-social traits. Appellant was a seriously depressed young man who displayed unresolved

anger, distrust of authority, confusion, and poor impulse control, attempted to step outside the boundaries of society, and perceived life to be unfair. He did not have psychotic symptoms but experienced periodic suicidal ideation. Appellant did not receive treatment then. (35RT 5456-5459.)

In a 1993 report, a Dr. Hochter, who was appointed to evaluate appellant's competency to stand trial, diagnosed appellant with major mental depression with psychotic features, alcohol dependence, and anti-social personality disorder. Dr. Niedorf agreed with Dr. Hochter's diagnosis. (35RT 5460-5462.) Dr. Hochter's diagnosis was consistent with appellant's diagnoses over the years. While others had diagnosed appellant with different illnesses over the years, the diagnosis depended on what aspect of appellant was considered or seen. (35RT 5462.)

In 1993 and 1994, while appellant was in Patton state hospital, a Dr. Moreno diagnosed appellant with the major mental illness of major depression with psychotic features, alcohol abuse, and anti-social personality disorder. The depression coexisted with the anti-social personality disorder, which described appellant's lifestyle. Appellant's general assessment of functioning (GAF) level of 35 was poor, meaning appellant needed supervision, considerable observation, and structure. (35RT 5463.) Appellant was getting 20 milligrams orally twice a day, a "w[h]opper dose," of Prolixin, which was the most potent antipsychotic medicine, and Cogentin, which was used to prevent Prolixin's side effects. Appellant was also getting Sinequan, a sleep medicine which was used about 25 years ago for depression, phenobarbital, which was consistently used for epilepsy, and Dilantin, the oldest consistently used drug for epilepsy. In Dr. Niedorf's opinion, Patton was giving appellant anti-epilepsy medicine to prevent seizures. (35RT 5464-5465.)

Dr. Vicary had testified that when appellant was released from Patton he did not have an Axis I psychiatric disorder. Dr. Niedorf stated that a

psychotic person improved when treated vigorously with antipsychotic medication. At the time of trial, appellant's medications were Risperidone, an anti-psychotic medicine, and Desyrel, an antidepressant. (35RT 5465-5467.)

In an October 13, 1995 CDC report by a Dr. Benson, appellant's Axis I diagnosis was schizoaffective disorder, bipolar type. Appellant was referred for occupational therapy as a cook in prison and was being given Haldol, a very potent antipsychotic medication, Cogentin as needed for side effects, and Depakene, an anti-epilepsy medicine. Appellant was getting a lot of medicine to prevent seizures and psychosis. (35RT 5467-5468.)

An annual report on April 8, 1996 by social worker Vernon Banyard showed appellant's diagnosis was schizoaffective disorder bipolar type, a major mental illness. Appellant was being given 1,500 milligrams of Lithium, the anti-mania drug Valproic acid, Sertraline which is Zoloft, 60 milligrams of the antipsychotic Haldol, and an anti-side effect medicine given with potent anti-psychotics, Artane. Appellant was getting the maximum possible dose of all these medicines. (35RT 5468-5469.)

On August 21, 1996, appellant was transferred from Vacaville to Atascadero, a maximum security mental hospital, because he was in need of psychiatric treatment. He was treated with 30 milligrams of the antipsychotic Haldol, 1,500 milligrams of the anti-epileptic and anti-depressive bipolar-type stabilizer Depakote, 1,500 milligrams of Lithium, and the anti-depressant Prozac. (35RT 5469-5470.)

A 1997 Atascadero report showed appellant had schizoaffective disorder, bipolar type, and IED, provisional. The level of dangerousness was high, meaning the potential of IED was still present. (35RT 5470-5471.)

In a report before appellant was released from prison on April 19, 2000, Dr. Portnoff said appellant had a severe mental disorder and a parole

condition could be that he receive medication consistently. Thus, seven months before appellant killed Epperson on November 12, 2000, the prison diagnosed him with a several mental disorder. (35RT 5471.)

When appellant stopped his medication, he was at risk for committing a violent offense. Sometimes people do not want to take prescribed medications because of interference with sexual feelings, drowsiness, or preclusion of driving. (35RT 5501-5502.) Dr. Niedorf thought appellant's medications had, at times, cleared up his major mental disorder symptoms. (35RT 5501.)

In November 2000, appellant was arrested. In 2002, appellant was sent to Patton as incompetent, and his March 12, 2002 admission report showed his diagnosis was mood disorder "nos" or not specific, which was the doctor's way of saying appellant had a mental disorder but he did not want to attach a definitive label because it was going to change. The illness was a serious mental disorder. Appellant's GAF level was 40. (35RT 5472-5473, 5480-5481.)

In a June 2, 2002 report, a Dr. Kulkarni stated appellant was being returned to court with the recommendation to find him competent to stand trial. Appellant was diagnosed with IED. Appellant was given the anti-convulsant and anti-bipolar medication Depakene, the antipsychotic Seroquel, an adjunct to seizure disorder medicine (which induced sleep) Klonopin, and the anti-high blood pressure medicine (which induced a semi-sedated condition) Inderal. (35RT 5473-5474.) Dr. Niedorf opined that whomever had seen appellant thought he was psychotic but not symptomatic. (35RT 5474.) Appellant was sent back to court, with a report saying he had exaggerated his symptoms. (35RT 5486-5487.)

When Dr. Niedorf talked to appellant, Dr. Niedorf avoided talking about the crime. Most attorneys instructed Dr. Niedorf not to talk to their clients about the crime, just the mental illness. (35RT 5488-5490.)

(b) **Dr. Niedorf's Diagnosis**

Given the reports and everything Dr. Niedorf reviewed, he opined that there was "no doubt [appellant] has consistently suffered from at least one and usually two mental illnesses." (35RT 5475.) Appellant had two major conditions, a seizure disorder and IED. The seizure disorder was the brain's condition since his Loma Linda diagnosis at the age of two. That condition continued and expressed itself currently as IED. IED was a type of epilepsy in which one lost physical activity control but not consciousness, as opposed to appellant's childhood and teenage condition when he lost consciousness during seizures. (35RT 5437-5438.) Dr. Niedorf stated it would be unethical and illegal to diagnose a mental illness when a doctor knew there was no mental illness. (35RT 5505.)

Appellant's mental illness was an ongoing condition with components beginning in genetic inheritance, possibly a condition picked up in pregnancy or delivery in which the brain was injured. That condition or injury was the origin of the epileptic or seizure disorder, which could become behavioral. One behavior component was IED. Appellant's condition was one in which he started an aggressive and violent behavior and could not inhibit it. The stimulated aggression came from a threat, which could be physical, psychological, or emotional in which the person felt he lost something and could not defend himself except through aggression. Most people developed ways of inhibiting aggression but in some conditions the message was cut off. (35RT 5440-5442.) At least 15 percent of incarcerated criminals have a mental disorder, although 80 to 85 percent do not. In Dr. Niedorf's opinion, appellant was one of the 15 percent. (35RT 5439.)

Dr. Vicary's diagnosis of appellant as bipolar was not inconsistent with Dr. Niedorf's IED diagnosis. A person could be both bipolar and have IED, and both are major mental illnesses. (35RT 5438-5439.)

Dr. Niedorf did not believe appellant was a sexual sadist, because he obtained sexual gratification from non-violent ways, including ordinary sex. Sexual sadism was when a person degrades, humiliates, and harms a female and gets sexual gratification. The sexual sadist got no gratification from sexual sadism other than from the sadism itself. (35RT 5496-5497.) Assuming appellant had not had sex with Epperson but was trying to, beat her to a bloody pulp, cut her throat, and raped her, Dr. Niedorf did not believe what appellant did was for pleasure but was for revenge or some other reason rather than a sexual pattern. (35RT 5497-5498.)

Appellant's attacks on his mother, sisters, Betsy M., Colletta, and Epperson were consistent with IED. The very strong feelings of love and hate could be overwhelming triggers for actions. (35RT 5446.) Appellant was threatened by a loss of a sense of possession, significance, or meaning in some relationship, triggering uninhibited rage. When ongoing repetitive, consistent behavior occurs intermittently over time, a brain process is dysfunctional. (35RT 5447.) If a person went into a frenzy, could not stop, repeated it over and over, and had a history of violent aggressive acts where one could lose everything, that was a mental illness and not just an act of aggression. (35RT 5496.)

Assuming appellant took intelligent steps to hide and described in detail various parts of Epperson's killing, those actions of appellant's were not inconsistent with brain damage or a mental disorder. If one had IED and did not lose consciousness, one could act as anyone else, including committing a criminal act and trying to hide or disguise it. (35RT 5444.)

Dr. Niedorf believed appellant was not malingering, because he examined him, read reports, and others that Dr. Niedorf respected concluded appellant's situation was genuine or real. (35RT 5453.) Appellant perpetrated some exaggerations, but they were rare and usually done to emphasize the terrible regret or sorrow he felt. Appellant expressed

remorse to Dr. Niedorf. However, depending on whether appellant was in his manic phase or not, sometimes appellant felt his victims had it coming and should not have betrayed him; at other times, he felt it was all on him, which was the nature of the bipolar condition. (35RT 5454.)

Dr. Niedorf stated there was no treatment for anti-social personality disorder, just containment. There was very little proven treatment for personality disorders and very little medication that really worked for them. (35RT 5499-5500.)

3. Rebuttal by Prosecution

a. Expert Medical Testimony

(1) Dr. David Griesemer

In November 2004, Dr. David Griesemer,[16] who had a specialty or board certification in child neurology and clinical neurophysiology and whose primary clinical and research interest was in the area of epilepsy, examined appellant. (34RT 5287-5288, 5290.) Dr. Griesemer performed a neurological examination and also took a neurologic history. (34RT 5290.) Dr. Griesemer found that appellant had a normal neurological examination, as Dr. Bertoldi did. (34RT 5291.) However, Dr. Griesemer concluded that appellant had childhood epilepsy that went away and there was no evidence of seizure activity since childhood. (34RT 5292-5293.) Dr. Griesemer disagreed with many of Dr. Bertoldi's opinions. (34RT 5295-5301.)

In his interview, appellant told Dr. Griesemer that he recalled taking phenobarbital until he was about eight years old, having no seizure activity after that time, and being put on Dilantin for a brief period from time to

[16] Dr Griesemer was called by the prosecution out of order in the midst of the defense case. (34RT 5287-5288.)

time when physicians heard of his seizure history. (34RT 5291-5292.) Appellant had an abnormal EEG as an eight year old. (34RT 5302.)

Dr. Griesemer reviewed the Loma Linda reports and opined the "evidence strongly favors the fact that he had a childhood epilepsy that simply went away." About 50 percent of children who have seizures outgrow them. (34RT 5292-5293.) In his university practice setting where he had been for 12 years, Dr. Griesemer had probably followed 500 children patients for that 12-year period. (34RT 5294.) Also, the records showed appellant was given a radioencephalogram, not a pneumoencephalogram, as Dr. Bertoldi thought. For a radioencephalogram, a radioactive trace was injected into the vein, and radioactivity in active areas of the brain was counted. Such a procedure was not risky and at the time was the only procedure that came even close to a CAT or MRI scan. (34RT 5316.)

Dr. Griesemer also reviewed appellant's state prison and county jail medical records. Those records did not have any objective evidence of seizure activity since childhood. (34RT 5292.) The fact appellant responded to Depakote did not necessarily mean he had seizures. More psychiatrists prescribe Depakote as a mood stabilizer than neurologists prescribe it for treating epilepsy. (34RT 5317.)

Dr. Griesemer reviewed appellant's EEG from Q-Metrx and opined that the EEG tracings were mildly abnormal. Dr. Griesemer thought Dr. Bertoldi was correct in identifying some intermittent slowing, but was incorrect in the significance he attributed to that. (34RT 5294-5295.) Dr. Griesemer did not agree with Dr. Bertoldi that there was some limbic focal point or focus; Dr. Griesemer believed that was a hypothesis that remained to be proven. (34RT 5295.)

Dr. Griesemer reviewed appellant's EEG records, considered trial testimony, and opined that appellant had benign epilepsy as a child. In trial

testimony, witnesses said that when appellant was two and a half or three years old he had a couple of seizures, each involving the left side of the body and lasting up to 30 minutes. Since the left side of the body is controlled by the right side of the brain, Dr. Griesemer opined there was evidence clinically of right brain dysfunction. However, dysfunction does not equal damage; one can have temporary brain dysfunction without permanent brain damage. (34RT 5295-5296.) A childhood EEG showed "very subtle abnormalities," and the Loma Linda initial study was somewhat equivocal about calling the EEG abnormal, although Dr. Griesemer suspected it was. Later EEG studies showed a reference to a right-sided abnormality, and the 1976 EEG was administered to determine if appellant could safely be taken off medicine. That EEG was very abnormal at that time, showing both left-and right-sided abnormalities, although appellant had been seizure-free for two years. Despite the EEG, appellant was taken off phenobarbital and did fine. Dr. Bertoldi indicated correctly that benign Rolandic epilepsy in childhood began with jerking of the hand or face on one side and was associated with abnormal EEG discharges on either side. (34RT 5296.) However, Dr. Bertoldi failed to point out that there is a disconnect between how a child looks clinically with this syndrome and how a child looks electrically, particularly during drowsiness or sleep when the epileptic activity becomes very constant. The fact that appellant had abnormalities on both sides of his brain, had EEG abnormalities that increased during sleep, had abundant EEG abnormalities without having clinical seizures, and went seizure-free, all suggested appellant as a child had a benign epilepsy syndrome. With a benign epilepsy syndrome, one need not search for a deep focus and any continuity that Dr. Bertoldi would tie to the present day is broken. (34RT 5297.)

Also, children can have an abnormal EEG without also having seizures. One could have an inherited abnormal EEG pattern and have no

seizures or have just a few seizures until the brain matures between the ages of 10 and 13 years when the seizures go away. (34RT 5297.)

Dr. Bertoldi testified appellant's current EEG was consistent with a deep limbic epilepsy. However, a normal EEG is also consistent with deep limbic epilepsy or an EEG pattern that shows temporal lobe sharp waves is also consistent with deep limbic epilepsy, but neither is diagnostic of it. (34RT 5298.) A clinical diagnosis needed to be made on firm clinical grounds, as opposed to Dr. Bertoldi's clinical speculation based on an EEG-driven hypothesis. (34RT 5298-5299.)

Dr. Bertoldi concluded there must be some deep focus that projects to one area of the brain and then to others so that over time the abnormality could appear left posterior temporal, right frontal, and left posterior frontal. Dr. Griesemer did not believe that was not a credible hypothesis. Instead, Dr. Griesemer thought it was reasonable to recognize that in the immature brain, one can have epileptic discharges from several different regions and there may not be a strong correlation between the source of the seizure and the clinical manifestation of the EEG. (34RT 5299.)

Although Dr. Griesemer believed appellant had a mildly abnormal EEG because of excessive beta activity, Dr. Griesemer clarified the issue was whether that had any clinical relevance. Appellant did not have a history of seizure-like activity as an adult, based on the medical history he provided, information from family members who observed him from age eight until he left home, reports of multiple psychiatrists who evaluated him over the years, and the records of those who supervised his care while incarcerated. Appellant had been observed and evaluated many times by many people, and the history of epilepsy was not among the identified problems. (34RT 5300.)

Dr. Griesemer did not find anything epileptic about the current EEG and questioned the significance that Dr. Bertoldi placed on appellant

supposedly biting his cheek once or twice a year. Dr. Griesemer found it interesting that appellant did not bite his cheek during any of the criminal events and that the cheek-biting happens during the night. Dr. Griesemer did not think the biting was necessarily a neurological disorder. (34RT 5313.)

Dr. Bertoldi's theory of deep limbic rage was an extremely controversial area in neurology. While limbic rage may be brief, explosive, unpredictable, and uncontrollable, as Dr. Bertoldi said, as one begins to apply those commonly accepted observations to appellant's behavior, particularly in the context of criminal acts, some of the comparisons break down. Many of appellant's criminal behaviors extended over hours and involved planning that was inconsistent with a momentary explosive outburst. Dr. Griesemer also disagreed with Dr. Bertoldi's standard of recall that would allow a determination of whether someone is having a seizure during an event. Patients who have a partial or focal seizure have no recollection of anything once a seizure begins and are very confused and disoriented. They have to be told what they have done because they do not have a recollection of what they have done. (34RT 5301.) An EEG was not a good tool for assessing behavior, but was an excellent tool for assessing seizures. (34RT 5298.)

Regarding the Epperson murder, appellant did not demonstrate the normal sleepiness, drowsiness, or unresponsiveness that often lasts for a couple hours after an intense seizure. Instead, appellant took Epperson's keys, locked her apartment, and gave away his vehicle. (34RT 5306.)

Dr. Griesemer did not believe Dr. Bertoldi's opinion was correct, because: Dr. Bertoldi did not have a solid clinical history of seizures offered by appellant or any professional suggesting there were active seizures; Dr. Bertoldi correlated intermittent slowing on the EEG with executive problems and difficulty with judgment but those were not a part

of or a justification for diagnosing limbic epilepsy; and limbic epilepsy does not originate from the frontal lobe, thus indicating Dr. Bertoldi was using appellant's brain weakness incorrectly to substantiate a limbic epilepsy diagnosis. (34 RT 5315-5316.)

(2) Dr. Kris Mohandie

Dr. Kris Mohandie, a psychologist, opined that appellant malingered and had an anti-social personality disorder with prominent narcissistic and borderline traits. (36RT 5522-5526, 5534-5535.) Also, Dr. Mohandie diagnosed appellant with sexual sadism. (36RT 5540.) Dr. Mohandie had dedicated his career to understanding violence and extreme violence in particular. (36RT 5522-5526.)

Dr. Mohandie administered the MMPI II and SIRS tests to appellant, interviewed him, went to the crime scene, and reviewed medical reports by defense experts, reports back to the 1980s, trial transcripts from the last trial and this trial except for the most recent days, statements to defense investigators, the videotape and transcript of appellant's interview with detectives, a transcript of appellant's testimony, the tape and transcript of Vannoy's interview, appellant's records from Patton, Atascadero, county jail, and prison, and a report on the Betsy M. incident. (36RT 5529-5532, 5534, 5539.)

Dr. Mohandie administered the MMPI II test to appellant and interviewed him. (36RT 5529-5530.) The MMPI II was used by experts in this case and had 567 true/false questions, with nine validity indicators showing the attitude or approach of the test taker. (36RT 5528.) The test also had a number of clinical indicators measuring things like depression and a scale measuring anti-social tendencies. (36RT 5529-5530.) Appellant's MMPI indicated symptom exaggeration, at a significant elevation. (36RT 5532-5533.) One explanation for that was that appellant

had a motive to exaggerate because of the case he might be involved in. (36RT 5533.)

Appellant's SIRS test showed evidence of malingering in two ways. Results showed appellant was trying to demonstrate blatant symptoms and reached the cutoff for probably feigning at an 86.5 percent likelihood. (36RT 5531-5534.) Combining the total SIRS score with the overall test score showed appellant was over the threshold for the total SIRS score, which meant appellant was malingering or feigning. (36RT 5534.)

When appellant was interviewed after the murder by the police, appellant reported he had been off his medication for about six weeks, but there was no residual evidence during the interview of any impairment. Appellant was focused and addressed questions. There were no indications he was responding to external stimuli, such as seeing or hearing things, or that he was reading anything into the officers' intentions. However, when people go off medication, psychiatric symptoms return in two weeks. At six weeks, symptoms would have expressed themselves fairly overtly, if gross impairments happened, such as hallucinations, delusions, and paranoia. (36RT 5536-5537.)

When Dr. Mohandie interviewed appellant, appellant was very engaging and had no residual symptoms, such as blunting of affect, traces of suspiciousness, or social inhibition. (36RT 5537-5538.) Dr. Mohandie talked to appellant about the events leading up to the murder, and appellant had a perfect recall of all his actions during that time period. (36RT 5538.) Appellant claimed amnesia for the time when he first hit Epperson to when the door was kicked in at the motel when he was arrested. (36RT 5539.) Appellant told Dr. Mohandie that he was "being played for a sucker" by Epperson and was not being treated fairly. In Dr. Mohandie's dealings with anti-social personalities, a failure to accept responsibility is fairly strong. (36RT 5583-5584.)

Based on the MMPI and SIRS scores and the abundant other material he reviewed, Dr. Mohandie diagnosed appellant with Axis I malingering, which was not a mental disorder. (36RT 5534-5535.) Dr. Mohandie's Axis II diagnosis was anti-social personality disorder with prominent narcissistic and borderline traits. Anti-social personality disorder is when a person pervasively disregards society's rules and the rights of others. Narcissistic traits are when a person has a sense of entitlement, may have difficulty feeling empathy for others, and may experience feelings of grandiosity, superiority, or domination over another. Borderline traits are when a person hypersensitive to rejection has feelings of abandonment and may engage in marked impulsivity, including suicidal gestures. The objective psychological data from appellant's tests went beyond what people with true psychiatric impairments ordinarily did and lead Dr. Mohandie to the malingering conclusion. Substantial data in the records supported suspicions of malingering. (36RT 5535-5536.)

Also, Dr. Mohandie could reliably diagnose appellant with sexual sadism. Dr. Mohandie reviewed the transcripts of the prior victims' testimony and knew appellant had been convicted of rape and murder. (36RT 5540.) Appellant's rape of Epperson after he beat and cut her indicated a sexual component to the homicide and categorization as a sexual homicide, thus warranting the sexual sadism diagnosis. (36RT 5549-5550.) People involved in sexual homicides had fantasies involving the suffering of another, domination, and control and experienced arousal in response to violence and suffering by a non-consensual partner. (36RT 5548-5550.)

Dr. Mohandie could not reliably find appellant had a major mental disorder because appellant's anti-social personality disorder diagnosis included deceptiveness as a component and appellant had a tendency to malinger. (36RT 5541.) Also, appellant was usually in trouble when

evaluated, giving him reasons to exaggerate symptoms to gain more favorable treatment. (36RT 5550.) However, Dr. Mohandie testified appellant might suffer from a major mental illness. (36RT 5550, 5554.)

Dr. Mohandie disagreed with Dr. Niedorf that appellant suffered from IED, because IED was not be diagnosed when a personality disorder more accurately accounted for the behavior, according to the DSM IV. Ordinarily, IED and a personality disorder were mutually exclusive. (36RT 5542-5544.) Also, malingerers could use IED to claim they blanked out or were out of control when instead they just had anti-social personality disorder and acted aggressively voluntarily. (36RT 5544.)

Dr. Mohandie did not believe, like Dr. Bertoldi, that appellant had a limbic epileptic seizure disorder resulting in primal rage. Appellant had not had any seizures after childhood, and there was no indication of that kind of activity happening in conjunction with or related to the murder. (36RT 5544.)

Dr. Mohandie did not see underlying organic impairment, like Dr. Romanoff. One would have seen diagnoses in the prior record to that effect, but there were none. Dr. Romanoff's opinion that appellant had severe characterological difficulties amounted to a personality disorder. (36RT 5545-5546.)

Dr. Mohandie would not ever say one particular event in a person's life caused him to have a particular personality. Many factors went into the formation of personality, including how one was born, the natural personality style one had at birth, how life shaped a person, and choices made. It was an interactive process. (36RT 5547-5548.)

4. Surrebuttal by Defense

a. Dr. Richard Romanoff

Dr. Richard Romanoff, a clinical and forensic psychologist, opined that appellant had a complex set of mental disorders. (36RT 5593, 5598.) He believed appellant had an organic brain disorder, which caused appellant difficulty regulating affect and controlling his behavior. (36RT 5594, 5618-5619.) Appellant also had anti-social personality disorder and a borderline personality disorder with histrionic and narcissistic features. (36RT 5595, 5609.)

Dr. Romanoff reviewed about 2,000 to 3,000 pages of materials including arrest materials in the Epperson case, post-arrest records, probation records, medical records, Atascadero State Hospital records, Patton State Hospital psychiatric treatment records, Los Angeles County jail medical records, psychiatric treatment records, summaries of interviews conducted by the defense with appellant's family members, and reports by Drs. Vicary, Niedorf, and Mohandie. (36RT 5589-5592.) Dr. Mohandie interviewed appellant on 10 occasions for a total of about 13 or 14 hours. (36RT 5592.)

Dr. Romanoff believed appellant had a complex set of mental disorders. Dr. Romanoff did not think in terms of specific labels but thought of people as whole people. (36RT 5593, 5598.) In appellant's infancy, there was evidence of organic impairment. At age three, he had a seizure and developed a seizure disorder documented in the Loma Linda records. (36RT 5593-5594.) He had produced abnormal EEG results since then, in adolescence and in 2004 in connection with this case, which showed abnormal brain functioning. (36RT 5594.) Dr. Romanoff believed appellant had an organic brain disorder, consistent with Dr. Boone's neuropsychological testing which found evidence of frontal lobe

impairment. Some evidence suggested the organic brain disorder was present either since or shortly after birth. Appellant was "fated" to have difficulty regulating affect and controlling his behavior because of the limitations in the way his brain was operating. (36RT 5594, 5618-5619.) Appellant's family taught him impulsivity and aggression, and appellant began developing the seeds of personality disorders, such as the anti-social personality disorder that Dr. Romanoff believed appellant had as a diagnosable illness. (36RT 5595, 5609.) Dr. Romanoff also diagnosed him as having a borderline personality disorder with histrionic and narcissistic features. (36RT 5595, 5609.) In addition, appellant developed substance abuse difficulties in adolescence, including alcohol and drug abuse. (36RT 5596.) Also, a history of depression permeated his history, and suicidal activity went back to early adolescence. (36RT 5597.)

Dr. Romanoff believed factors in appellant's life shaped him and contributed to the crime, with some factors beyond his control. Those factors included: the organic-based difficulties such as the neuropsychological results showing frontal lobe damage and the abnormal EEGs; and the negative home environment. (36RT 5600-5601.) Alcohol abuse was controlled to some extent but he was at high risk to develop difficulties in life. (36RT 5601.)

If one needed to reduce appellant to a DSM diagnosis, Dr. Romanoff said appellant had IED. On many occasions over the course of a long period, appellant exploded with violence disproportional to what the reaction should have been. (36RT 5597.) Dr. Romanoff did not view appellant's murder of Epperson as related to the anti-social personality disorder because there was immediate remorse. (36RT 5597-5598.) However, Dr. Romanoff believed one could be diagnosed with IED and anti-social personality disorder at the same time, but one would have to have separate and independent justification for the IED diagnosis beyond

what was already provided by anti-social personality disorder. (36RT 5625-5626.)

Dr. Romanoff gave appellant an MMPI test, and the results suggested exaggeration, a reporting of symptoms of such a high elevation that he considered the test results invalid. (36RT 5609-5610.)

Assuming the facts of the Epperson killing, Dr. Romanoff opined appellant's actions were consistent with his overall evaluation that a complex set of problems existed. Appellant had largely lost control of his ability to regulate his actions, but that did not mean he was unaware of what he was doing. (36RT 5612-5615.) Dr. Romanoff opined that the IED or anti-social personality disorder did not cause Epperson's death. (36RT 5616.) No one diagnosis could account for what happened. (36RT 5616-5617.)

Appellant did not tell Dr. Romanoff that voices made him kill Epperson, and there was no evidence appellant was laboring under any strange delusion or hallucination when he killed her. (36RT 5610-5611.) Dr. Romanoff opined the evidence was consistent with appellant knowing it was wrong when he was killing Epperson. (36RT 5611.) Further, assuming Epperson was beaten and bleeding, appellant then raped her, and they did not have a sexual relationship, Dr. Romanoff viewed those actions as having underlying sexual deviance to the extent it was present. (36RT 5622-5623.)

Assuming family and friends testified appellant was teased, was shy and inhibited, and was big-hearted, that side of appellant was consistent with the notion that a more complex set of problems existed than simply anti-social personality disorder and malingering. (36RT 5604.) Most individuals suffering from anti-social personality disorder alone had a conduct disorder as an older child or early adolescent, a disorder where misbehaving, defiance, and aggression occurred, and appellant did not

behave in a typically anti-social-oriented fashion during that time. (36RT 5605.)

Assuming family members testified that they lived in a climate of fear and feared their father even today, that was consistent with Dr. Romanoff's diagnosis of appellant. (36RT 5605-5606.)

Dr. Romanoff thought Dr. Mohandie's diagnosis that appellant was suffering from anti-social personality and malingering and that he could not give an opinion as to whether he suffered from a mental disorder was an "insufficient diagnosis." (36RT 5592-5593.) Dr. Romanoff thought Dr. Mohandie's diagnosis omitted important and relevant pieces of appellant's psychiatric difficulties. (36RT 5593.)

ARGUMENT

I. THE PREDICATE OFFENSES OF MAYHEM AND TORTURE FOR FIRST DEGREE FELONY MURDER HAD INDEPENDENT FELONIOUS PURPOSES AND DID NOT MERGE WITH THE HOMICIDE WITHIN THE MEANING OF *PEOPLE V. IRELAND* (1969) 70 CAL.2D 522

Appellant contends that since the mayhem and torture allegations were integral to the homicide, a conviction for first degree felony murder based on those felonies violated the merger principle of *People v. Ireland* (1969) 70 Cal.2d 522. (AOB 72-84.) Specifically, appellant claims his intent to kill arose from a sudden quarrel and heat of passion and the instrumentalities used to assault Epperson were household objects, and thus, the disfiguring injuries suffered by Epperson did not prove beyond a reasonable doubt that appellant had an independent felonious purpose to torture and maim. (AOB 72-84.) Thus, appellant claims "the infliction of disfigurement and pain were integral to the homicide, not the result of an independent or concurrent intent to maim or torture." (AOB 77.) Respondent disagrees. The crimes of mayhem and torture had independent

felonious purposes and did not merge with the homicide within the meaning of *Ireland*.

In *Ireland, supra,* 70 Cal.2d 522, this Court held that a second-degree felony murder instruction may not properly be given when based upon a felony "which is an integral part of the homicide and which the evidence produced by the prosecution shows to be an offense included *in fact* within the offense charged." (*Id.* at p. 539, italics in original.) Such use of the felony murder rule was found to "effectively preclude the jury from considering the issue of malice aforethought in all cases wherein homicide has been committed as a result of a felonious assault–a category which includes the great majority of all homicides." (*Ibid.*)

The *Ireland* "merger doctrine" was "extended to first degree felony murder in *People v. Wilson* (1969) 1 Cal.3d 431, 441-442 [parallel citations omitted]." (*People v. Gonzales* (2011) 51 Cal.4th 894, 942.) In *Wilson*, the felonious purpose of the burglary was assault with a deadly weapon. (1 Cal.3d at p. 440.) This Court held that "the same bootstrapping is involved in instructing a jury that the intent to assault makes the entry burglary and that the burglary raises the homicide resulting from the assault to first degree murder without proof of malice aforethought and premeditation." (*Id.* at p. 441.)

However, in *People v. Farley* (2009) 46 Cal.4th 1053, this Court recently overruled *Wilson* and held, prospectively, that the merger doctrine has no application to first degree felony murder. (*Id.* at pp. 1121-1122.) *Farley*'s 2009 rule does not apply in the instant case, though, as it applies prospectively, and appellant committed his crimes in 2000. (See *Gonzales, supra*, 51 Cal.4th at p. 942; *Farley, supra*, at pp. 1121 ["Because, due to ex post facto concerns, an unforeseeable judicial enlargement of a criminal statute may not be applied retroactively, our overruling of *Wilson* does not

apply retroactively to defendant's case."], 1122 ["today's overruling is prospective only."].)

Prior to *Farley*, this Court had limited *Wilson* to "cases of burglary felony murder where the defendant's only felonious purpose was to assault or kill the victim." (*Gonzales, supra*, 51 Cal.4th at p. 942, citing *People v. Prince* (2007) 40 Cal.4th 1179, 1262 and *People v. Burton* (1971) 6 Cal.3d 375, 387-388.) Indeed, the merger doctrine has traditionally "not been extended to offenses other than assault." (*People v. Robertson* (2004) 34 Cal.4th 156, 170.) The rule was adopted because otherwise all assaults where the victim died would be elevated to murder. (*Ibid.*) However, the merger doctrine does not apply when the underlying felony has an independent purpose from the murder, when the felony has a "collateral and independent felonious design." (*Ibid.*, quoting *People v. Mattison* (1971) 4 Cal.3d 177, 185.)

In the instant case, the predicate crimes of mayhem and torture had independent felonious purposes which support the mayhem felony murder and torture felony murder theories in this case. Appellant was convicted of first degree murder based on several theories, including a felony murder theory with mayhem, torture, and rape as predicate felonies.[17] (12CT 2932, 2955; 14RT 2002-2003.) All murder committed in the perpetration of certain enumerated felonies, including the three here--mayhem, torture, and rape--is first degree murder. (§ 189.) The mental state required is the specific intent to commit the underlying felony. (*People v. Cavitt* (2004) 33 Cal.4th 187, 197.) Of the enumerated felonies in section 189, only burglary when the felonious purpose was an assault with a deadly weapon,

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[17] The jury was also presented with a sexual penetration by a foreign object felony murder theory, but the jury found appellant not guilty of penetration by a foreign object. (12CT 2959.)

has been held to be subject to the merger doctrine. (*Gonzales, supra*, 51 Cal.4th at p. 942 ["our preexisting jurisprudence had limited *Wilson* to cases of burglary felony murder where the defendant's only felonious purpose was to assault or kill the victim"]; see *Wilson, supra*, 1 Cal.3d at p. 440.)

Thus, as a matter of law, the merger doctrine should not be extended to mayhem and torture, which are specifically enumerated in section 189. With respect to the crime of mayhem felony murder, this Court has stated that mayhem felony murder has an "independent felonious purpose," thus removing it from the ambit of the *Ireland* merger doctrine. (*Gonzales, supra*, 51 Cal.4th at p. 943, italics in original, citing *Burton, supra,* 6 Cal.3d at p. 387.) For mayhem felony murder, a defendant "must intend to permanently disfigure the victim, which goes well beyond the merely assaultive purpose . . . . " (*Gonzales, supra*, at p. 943.) Mayhem has a purpose independent of murder–to deprive a human being of a member of his or her body, to disable, disfigure, or render the member useless, to cut or disable the tongue, to put out an eye, or to slit the nose, ear, or lip. (§ 203.) To commit mayhem, one has to go above and beyond an ordinary assault. The jury was instructed that to convict appellant of first degree felony murder based on mayhem that they must find that he had the specific intent to commit mayhem, which was defined as permanently disfiguring or disabling a human being's member of his or her body. (12CT 2932, 2935; 14RT 2002-2003, 2038-2039; CALJIC Nos. 8.21 & 9.30.)

With respect to the crime of torture felony murder, torture has a purpose independent of murder—to intend to cause cruel or extreme pain and suffering for revenge, extortion, persuasion, or for any sadistic purpose by inflicting great bodily injury. (§ 206.) As set forth above, this Court has specifically declined to extend the merger doctrine beyond those felonies in which the only underlying purpose was assault. (See *People v. Hansen*

(1994) 9 Cal.4th 300, 312 [*Ireland* doctrine not extended "beyond the context of assault, even under circumstances in which the underlying felony plausibly could be characterized as 'an integral part of' and 'included in fact within' the resulting homicide."]; see, e.g., *People v. Morgan* (2007) 42 Cal.4th 593, 617-620 [unlawful penetration with a foreign object has an independent felonious purpose, to sexually arouse, gratify, or abuse].) To commit torture, one has to go above and beyond an ordinary assault. The jury was instructed that to convict appellant of first degree felony murder based on torture that they must find he had the specific intent to commit torture, which was defined as the infliction of great bodily injury with the specific intent to cause cruel or extreme pain and suffering for the purpose of revenge or any sadistic purpose. (12CT 2932, 2936; 14RT 2002-2003, 2042-2043; CALJIC Nos. 8.21 & 9.90.)

Moreover, even assuming arguendo the merger doctrine were not inapplicable to mayhem and torture as a matter of law, the evidence herein clearly showed appellant had independent felonious purposes when he committed mayhem upon and tortured Epperson. It was clear appellant intended to disfigure and disable Epperson and to cause her cruel or extreme pain and suffering for the purpose of revenge or any sadistic purpose, as required for mayhem and torture. The nature of the beating, the extended period of time it took, the injuries inflicted, and the statements appellant made demonstrated the independent felonious purposes for the mayhem and torture predicate felonies.

Appellant repeatedly bludgeoned Epperson in several places in the apartment over a period of time and used multiple objects to beat, stab, and cut her, instead of quickly killing her. In the bathroom, appellant hit Epperson in the head with a glass candle holder causing her head to bleed, shook her three times while her head was bleeding, and slammed her head against the wall six times, as her knees buckled and she slumped to the

floor. (10RT 1304, 1306, 1311-1312, 1315, 1318, 1320, 1324-1325; Peo. Exh. 88B, pp. 29, 38-39.) In the living quarters, appellant continued to bludgeon Epperson about the head and face with a heavy vase, wooden footstool, and lamp. He cut her neck with glass in several places and stuck a screwdriver through her face. Even when an item broke, appellant used the broken pieces to continue to bludgeon Epperson. (10RT 1294, 1296-1298, 1304, 1313-1314, 1325-1326, 1349-1354, 1373, 1375-1376, 1379, 1395-1396, 1409-1410; Peo. Exh. 88B, pp. 31, 33, 50-51.) The lamp cord was wrapped around Epperson's head. (10RT 1350.) Epperson suffered, by a conservative estimate, at least 10 severe blows to her head. (9RT 1251, 1255.) Appellant's beating of Epperson was so severe that blood was splattered all over the apartment, in the bathroom and living quarters, on the walls, furniture, floor, and personal items. (10RT 1289, 1303-1305, 1313-1314, 1319-1320, 1328, 1355, 1368, 1400.) The deputy coroner had seen similar types of injuries in only a very small number of the 2,000 autopsies of persons with blunt force trauma he had done. (9RT 1244.)

Appellant focused his beating and infliction of grievous injuries on Epperson's face, head, and neck. Appellant's concentration of injuries to Epperson's face and head showed an intent to disfigure a woman who was known to be well groomed and to care about her appearance. (8RT 1010-1011, 1018.) Appellant fractured Epperson's skull in multiple places and disfigured her face. (9RT 1238-1240, 1242.) She had multiple lacerations on her forehead and face, including her eyes, nose, cheeks, and upper and lower lips. (9RT 1228-1230.) From a side view of her face, her face seemed flattened due to the underlying fracture of her facial bones. (9RT 1232-1233.) Appellant put a screwdriver through the middle of Epperson's head, leaving a big hole. (Peo. Exh. 88B, pp. 31, 33, 50-51.) Appellant struck Epperson so hard that her dental plate and a tooth came out of her mouth and broke. (9RT 1222; 10RT 1297, 1374-1375.)

Appellant carefully cut Epperson's neck to inflict cruel pain and suffering. He cut the sides of Epperson's neck with glass, but notably, without severing her carotid arteries or jugular veins, which would have caused a quicker death. (9RT 1230-1231, 1233-1234, 1245-1246; Peo. Exh. 88B, pp. 29-30.) Also, bruising on her neck and hemorrhaging in the eyes could have been the result of strangulation, which would have also inflicted cruel pain and suffering. (9RT 1224, 1235.)

Appellant also caused cruel pain and suffering when he inflicted a significant amount of trauma, including large bruises and abrasions, in Epperson's vaginal area. (9RT 1247-1248, 1259; 10RT 1450-1451.) Indeed, the deputy coroner had rarely seen as much trauma to the vaginal area in other rape examinations. (9RT 1248.)

These grievous injuries were inflicted by appellant while Epperson was alive, thereby causing cruel pain and suffering. Epperson's defensive wounds demonstrated she was alive and conscious during appellant's brutal attack. (9RT 1224-1227.) Also, the deputy coroner testified the majority of Epperson's injuries had been inflicted while she was alive. (9RT 1249.)

Appellant's statements also showed the mayhem and torture had independent felonious purposes. Appellant's statements to others showed he acted out of jealousy and revenge due to Epperson's spurning of his attentions. Before appellant murdered Epperson, appellant told Todd that he was jealous of other men being with Epperson and that if he could not have her, no one else would. (9RT 1155-1156, 1214.) After appellant murdered Epperson, appellant told Vannoy he beat Epperson out of jealousy and revenge because Epperson would not love him and was going out with another person. (Peo. Exh. 88B, pp. 29, 38-39.) Appellant also told Vannoy that Epperson asked if he was going to kill her and appellant's affirmative response indicated that he would but not without further injury and pain. (Peo. Exh. 88B, pp. 39, 85.) Appellant disfigured Epperson and

caused her cruel pain and suffering because she did not love him and he could not have her.

Further, the primary policy reason for the felony-murder doctrine is satisfied here. Once a person "has embarked upon a course of conduct for one of the enumerated felonious purposes," the Legislature determined that if a death results from the commission of the felony "it will be first degree murder, regardless of the circumstances." (*Burton, supra*, 6 Cal.3d at pp. 387-388; *Cavitt, supra*, 33 Cal.4th at pp. 187, 197.) This Court has stated numerous times that the purpose of the felony murder rule is "'to deter felons from killing negligently or accidentally by holding them strictly responsible for killings they commit. [Citation.].'" (*Burton, supra*, at p. 388.) The "deterrent purpose outweighs the normal legislative policy of examining the individual state of mind of each person causing an unlawful killing to determine whether the killing was with or without malice, deliberate or accidental, and calibrating our treatment of the person accordingly." (*Burton*, *supra*, 6 Cal.3d at p. 388; *Cavitt*, *supra*, 33 Cal.4th at p. 197.)

Nonetheless, appellant contends the mayhem and torture were not independent of the homicide. (AOB 72-81.) If this Court were to adopt his approach, a person who intended to put out a victim's eye or slit someone's tongue or who inflicted great bodily injury with the intent to cause cruel or extreme pain and suffering for the purpose of revenge or any sadistic purpose would escape a murder conviction if the victim died in the course of the mayhem or torture, clearly not a result intended by the Legislature which listed mayhem and torture as enumerated felonies in section 189. In this case, as demonstrated above, appellant's acts--in disfiguring Epperson's face, neck, and head while she was alive by repeatedly bludgeoning her with a candlestick holder, heavy plaster vase, footstool, lamp, and planter, cutting the sides of her neck with glass, sticking a screwdriver through her

face, and slamming her head against walls--had independent purposes: to deprive her of a member of her body or disable and disfigure her; and to inflict great bodily injury with the intent to cause cruel or extreme pain or suffering for revenge or a sadistic purpose. Thus, the mayhem and torture did not merge into the homicide, as a matter of law and based on the evidence presented at trial.

Mayhem and torture have independent felonious purposes, as demonstrated above, aside from assault. Just because mayhem and torture will include assaultive conduct does not mean they do not have independent felonious purposes. Armed robbery includes assaultive conduct, but is not included within the *Ireland* doctrine. (*Burton*, *supra*, 6 Cal.3d at p. 387.) Thus, because mayhem and torture have independent felonious purposes, they do not merge into the homicide and can be predicate felonies for first degree felony murder, as section 189 expressly provides. Appellant's constitutional rights were not violated. (*Morgan*, *supra,* 42 Cal.4th at pp. 93, 620 [rejecting defendant's constitutional claims of due process of law and a fair trial based on his conviction for first degree felony murder where the underlying felony (unlawful penetration with a foreign object) was held not to merge with the homicide under the *Ireland* doctrine].)

Even assuming the mayhem and torture felony murder theories were "incorrect" legal theories which permitted the jury to find guilt in violation of the merger doctrine, reversal is not mandated. "[I]f the inadequacy is legal, not merely factual, that is, when the facts do not state a crime under the applicable statute, . . . the *Green* [*People v. Green* (1980) 27 Cal.3d 1, 69] rule requiring reversal applies, absent a basis in the record to find that the verdict was actually based on a valid ground." (*People v. Guiton* (1993) 4 Cal.4th 1116, 1129; see *People v. Aguilar* (1997) 16 Cal.4th 1023, 1034.) It must be determined whether it appears "'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" (*People*

v. Harris (1994) 9 Cal.4th 407, 424, quoting *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 1283, 17 L.Ed.2d 705].) "To say that an error did not contribute to the verdict, is . . . , to find that error unimportant in relation to everything else the jury considered *on the issue in question,* as revealed in the record." (*Harris, supra,* at p. 430, quoting *Yates v. Evatt* (1991) 500 U.S. 391, 403 [111 S.Ct. 1884, 114 L.Ed.2d 432], italics added.)

Here, any assumed error arising from presenting the mayhem or torture felony murder theories to the jury was harmless beyond a reasonable doubt. The prosecution presented a rape felony murder theory to the jury as well, and the jury convicted appellant of forcible rape and found true the rape special circumstance, as acknowledged by appellant. (AOB 82; 12CT 2956, 2958.) Thus, the rape felony murder theory provided a viable basis for the jury's first degree murder verdict, irrespective of the mayhem and torture felony murder theories. Appellant does not claim the rape felony murder theory violates the *Ireland* merger doctrine. (AOB 72-84.) Instead, appellant only claims there was insufficient evidence of forcible sexual intercourse for rape, as set forth in his Argument III. (AOB 82-83.) Respondent has addressed appellant's challenge to the sufficiency of the forcible rape conviction in this brief's Argument III. In addition, the prosecution proceeded under a premeditation and deliberation theory of first degree murder, which supports the judgment below and which is addressed in this brief in Argument IV.

Further, the prosecutor clearly demarcated the theories for liability for first degree murder when she argued the case to the jury. She informed the jury about the standards for premeditated and deliberate first degree murder (13RT 1872-1873) and also explained the felony murder theory and that rape was one of the predicate felonies (13RT 1861-1864, 1873). The prosecutor's argument further supports a finding that any assumed error with respect to the presentation of the mayhem and torture felony murder

theories to the jury was harmless beyond a reasonable doubt. The claim must be rejected.

II. SUBSTANTIAL EVIDENCE SUPPORTS THE TORTURE MURDER THEORY OF FIRST DEGREE MURDER, THE TORTURE CONVICTION, AND THE TORTURE-MURDER SPECIAL CIRCUMSTANCE

Appellant contends that even if all the charged felonies are not integral to the homicide, there is insufficient evidence to support the torture murder theory of first degree murder, the torture conviction, or the torture murder special circumstance. Specifically, appellant claims there is insufficient evidence he specifically intended to inflict extreme pain for personal gain or satisfaction and that the condition of the body is insufficient to prove beyond a reasonable doubt that an assailant necessarily intended to inflict extreme or prolonged pain. (AOB 85-95.) Respondent disagrees.

In assessing a claim of insufficiency of the evidence, the reviewing court must review the whole record in the light most favorable to the judgment below to determine "whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People* v. *Johnson* (1980) 26 Cal.3d 557, 578 [parallel citations omitted].)" (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.) Further, under federal due process principles, sufficiency-of-the-evidence review "entails not the determination whether the reviewing court itself believes the evidence at trial establishes guilt beyond a reasonable doubt," but "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. (*Jackson* v. *Virginia* (1979) 443 U.S. 307, 317-320 [parallel citations omitted].)" (*Rodriguez, supra*, at p. 11.)

An appellate court's duty is not to reweigh evidence or reevaluate a witness's credibility. (*People v. Whisenhunt* (2008) 44 Cal.4th 174, 200.)

Where a jury's findings rest upon circumstantial evidence, a reviewing court must determine whether the circumstances reasonably justify those findings. That the circumstances may be reasonably reconciled with a contrary finding does not render the evidence insufficient. (*People v. Tafoya* (2007) 42 Cal.4th 147, 170.) Further, only one witness's testimony, which does not need to be corroborated, is substantial evidence and may uphold a judgment, even if the testimony is contradicted or is inconsistent or false as to other portions. (*People v. Scott* (1978) 21 Cal.3d 284, 296; see *People v. Panah* (2005) 35 Cal.4th 395, 489; Evid. Code, § 411.) "Resolution of conflicts and inconsistencies in the testimony is the exclusive province of the trier of fact." (*People v. Young* (2005) 34 Cal.4th 1149, 1181.) Only if an individual witness's testimony is physically impossible or inherently improbable will an individual witness's testimony be insufficient to sustain a conviction. (*Scott, supra*, at p. 296.) Reversal is "unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].'" (*People v. Bolin* (1998) 18 Cal.4th 297, 331, quoting *People v. Redmond* (1969) 71 Cal.2d 745, 755.)

For the torture murder theory of first degree murder pursuant to section 189, a jury must find "'(1) acts causing death that involve a high degree of probability of the victim's death; and (2) a willful, deliberate, and premeditated intent to cause extreme pain or suffering for the purpose of revenge, extortion, persuasion, or another sadistic purpose. [Citations.]'" (*People v. Jennings* (2010) 50 Cal.4th 616, 643, quoting *People v. Cook* (2006) 39 Cal.4th 566, 602; *People v. Raley* (1992) 2 Cal.4th 870, 899; *People v. Mincey* (1992) 2 Cal.4th 408, 432.) To prove the intent to inflict extreme pain, the circumstances of the crime, nature of the killing, and

condition of the victim's body may be considered. This Court, though, has "'cautioned against giving undue weight to the severity of the victim's wounds, as horrible wounds may be as consistent with a killing in the heat of passion, in an "explosion of violence," as with the intent to inflict cruel suffering.' [Citation.]" (*People v. Elliot* (2005) 37 Cal.4th 453, 467, quoting *People v. Cole* (2004) 33 Cal.4th 1158, 1213–1214.) The totality of the "brutal acts and the circumstances which led to the victim's death" can support a torture murder finding. (*Jennings, supra*, at p. 643, quoting *People v. Proctor* (1992) 4 Cal.4th 499, 530; *Mincey, supra*, at p. 433.)

For torture pursuant to section 206, the jury had to find that a person inflicted great bodily injury upon another "with the intent to cause cruel or extreme pain and suffering for the purpose of revenge, extortion, persuasion, or for any sadistic purpose." (See *People v. Aguilar* (1997) 58 Cal.App.4th 1196, 1200-1201 [section 206 not unconstitutionally vague].)

For the torture murder special circumstance pursuant to section 190.2, subdivision (a)(18), it must be proven that the "murder was intentional and involved the infliction of torture." (See *Elliott, supra*, 37 Cal.4th at p. 469; *People v. Bemore* (2000) 22 Cal.4th 809, 839; *People v. Crittenden* (1994) 9 Cal.4th 83, 140.) The intent to torture is required for the torture murder special circumstance, as well as the torture murder. (*Cole, supra*, 33 Cal.4th at p. 1194.)

In the instant case, substantial evidence supports the torture murder theory of first degree murder, the torture conviction, and the torture murder special circumstance. Since appellant's attack focuses on the alleged failure to prove an intent to cause extreme pain for the torture murder theory, the torture conviction, and the torture murder special circumstance (AOB 88), respondent will focus its response accordingly. Evidence of the nature of the beatings, the extended period of time it took, the injuries inflicted, the expert medical testimony, the expert blood spatter testimony, the

circumstances of the killing, and appellant's own statements clearly constituted substantial evidence. (See Argument I, *ante*.)

Although appellant could have quickly killed Epperson, the evidence showed he intended to cause extreme pain, given the nature of the beatings, the amount of time it took, and the injuries inflicted. As set forth in Argument I, *ante*, the evidence showed appellant beat Epperson in the bathroom and living quarters, over a period of time, with a glass candle holder, heavy vase, wooden footstool, and lamp, shook her, and slammed her head against the wall at least six times. (10RT 1304, 1306, 1311-1312, 1315, 1318, 1320, 1324-1325; Peo. Exh. 88B, pp. 29, 38-39.) Appellant also used broken pieces to further bludgeon Epperson. In addition, he stuck a screwdriver through her face and wrapped a lamp cord around her head. (10RT 1294, 1296-1298, 1304, 1313-1314, 1325-1326, 1349-1354, 1373, 1375-1376, 1379, 1395-1396, 1409-1410; Peo. Exh. 88B, pp. 31, 33, 50-51.) The beating was so severe that blood splattered all over the apartment. The blood spatter expert testified extensively about the sequence of beatings, the weapons used, and the circumstances of the killing. (10RT 1289, 1303-1305, 1313-1314, 1319-1320, 1328, 1355, 1368, 1400.)

Epperson suffered, by a conservative estimate, at least 10 severe blows to her head. (9RT 1251, 1255.) Appellant fractured Epperson's skull in multiple places and disfigured her face. (9RT 1238-1240, 1242.) She had multiple lacerations on her forehead and face, including her eyes, nose, cheeks, and upper and lower lips, and her face seemed flattened due to the underlying fracture of her facial bones. (9RT 1228-1233.) He struck Epperson so hard that her dental plate and a tooth came out of her mouth and broke. (9RT 1222; 10RT 1297, 1374-1375.) The deputy coroner had seen similar types of injuries in only a very small number of the 2,000 autopsies of persons with blunt force trauma he had done. (9RT 1244.) The nature of the wounds and the number of wounds necessarily indicated

they were inflicted over an "appreciable period of time," thus showing an intent to inflict cruel pain. (*Mincey, supra,* 2 Cal.4th at pp. 433-434.)

Of particular note, appellant carefully cut the sides of Epperson's neck, showing his intent to inflict extreme pain. He cut her neck with glass, but notably, without severing her carotid arteries or jugular veins, which would have caused a quicker death. (9RT 1230-1231, 1233-1234, 1245-1246; Peo. Exh. 88B, pp. 29-30.) Carefully cutting Epperson's neck in this manner surely demonstrated a "meticulous, controlled approach," inflicting cruel pain and suffering. (*Elliott, supra*, 37 Cal.4th at p. 467 ["The nature of these wounds strongly implies the use of controlled force designed to torture."], citing *People v. Pensinger* (1991) 52 Cal.3d 1210, 1240 ["nearly scientific air" of incision wounds provided strong evidence of intent to inflict pain]; *Proctor, supra*, 4 Cal.4th at pp. 531-532 ["wounds revealed that a relatively slow, methodical approach had been employed in their infliction, rather than their having resulted from sudden, explosive violence."].) These wounds demonstrated appellant's intent to cause cruel pain. (*Crittenden, supra,* 9 Cal.4th at p.133.) The jury could properly conclude the neck wounds "were neither accidental nor lethal in nature, and that they were inflicted *because* the victim was alive, helpless, and capable of experiencing pain." (*Bemore, supra*, 22 Cal.4th at pp. 840-841, emphasis in original.)

In addition, bruising on Epperson's neck and hemorrhaging in the eyes could have been the result of strangulation, another means by which appellant's intent to inflict extreme pain was shown. (9RT 1224, 1235.) Appellant had grabbed his female victims in the past by the throat. Colletta and Betsy M. both testified appellant grabbed them by the throat and choked them so they could not breathe. Betsy M. even passed out. (10RT 1435-1436, 1443-1445.) Certainly, appellant could have strangled

Epperson to death if his sole intent were to kill her but, instead, he chose to keep her alive and inflict extreme pain.

Appellant's intent to inflict extreme pain was also shown by the significant amount of trauma, including large bruises and abrasions, that he caused in Epperson's vaginal area. (9RT 1247-1248, 1259; 10RT 1450-1451.) Indeed, the deputy coroner had rarely seen as much trauma to the vaginal area in other rape examinations. (9RT 1248.)

Again, these grievous injuries were inflicted by appellant while Epperson was alive and conscious, further showing his intent to inflict extreme pain. (9RT 1224-1227, 1249.) Appellant had Epperson under his complete control. Evidence that Epperson was "isolated and prevented from resisting or escaping during these acts" also establishes appellant's intent to inflict cruel pain. (*Proctor, supra*, 4 Cal.4th at pp. 531-532.)

In addition to the evidence of Epperson's injuries and the expert medical and blood spatter testimony, appellant's statements to others showed his intent to cause extreme pain. Evidence showed appellant acted out of longstanding jealousy and a desire for revenge due to Epperson's alleged spurning of his attentions. He wanted to cause her extreme pain for rejecting him. Appellant told Todd that he was jealous of other men being with Epperson and that if he could not have her, no one else would. (9RT 1155-1156, 1214.) Appellant told Vannoy he beat Epperson out of jealousy and revenge because Epperson would not love him and was going out with another person. (Peo. Exh. 88B, pp. 29, 38-39.) Appellant also told Vannoy that Epperson asked if he was going to kill her and appellant's affirmative response indicated that he would but not without further injury and pain. (Peo. Exh. 88B, pp. 39, 85.)

Further, appellant's actions in monitoring Epperson after church while she was talking to Sims on the day of her murder could have been interpreted as part of the plan to seek revenge for Epperson's lack of

attention. (8RT 1047, 1065; *Elliott, supra*, 37 Cal.4th at pp. 467-468 [pre-murder events supported torture murder theory].) Appellant intended to cause Epperson cruel pain and suffering because she did not love him and he could not have her.

Also, based on the evidence that appellant had previously assaulted Colletta and Betsy M., the jury could properly infer that he had a disposition to commit another act of domestic violence and infer that he committed the instant crimes. (10RT 1425-1426 [prior assaults evidence admitted pursuant to Evidence Code section 1109]; 12CT 2928; 14RT 1987-1989; *People v. Brown* (2000) 77 Cal.App.4th 1324, 1332-1334 [evidence of prior violence against two girlfriends admitted pursuant to Evidence Code section 1109]; *People v. Johnson* (2000) 77 Cal.App.4th 410, 416 [prior acts of domestic violence admissible to show a propensity to commit the charged offenses]; see also 12CT 2850-2879.) In the Colletta incident, appellant grabbed and squeezed Colletta's throat, dragged her to the ground, and kicked her in the back of the head and neck while wearing metal shod boots. (10RT 1443-1446.) In the Betsy M. incident, appellant choked Betsy M. to unconsciousness and when she regained consciousness, made her strip at knifepoint and terrorized her. (10RT 1436.) Notably, appellant attacked both women by the throat, and the evidence also suggested he grabbed Epperson by the throat. (9RT 1224.)

Moreover, appellant's claim that Epperson may not have been conscious and presumably may not have suffered pain is without merit. (AOB 91-92.) Torture murder does not require that the victim suffer pain. "[A] defendant may be found guilty of murder by torture even if the victim is never aware of any pain." (*Elliott, supra*, 37 Cal.4th at p. 469.) Instead, the defendant must act with the intent to inflict extreme and prolonged pain (*id.* at pp. 468-469, citing *People v. Steger* (1976) 16 Cal.3d 539, 546), which was clearly shown here. Also, appellant relies on isolated bits of

evidence instead of looking at the whole record presented to the trier of fact.

Appellant's claim that evidence of the intent to inflict extreme pain was only supported by the condition of Epperson's body is without merit. (AOB 85-94.) As demonstrated above, other evidence showed appellant's intent to cause extreme pain, including the blood spatter expert's testimony about the wide-ranging splatters of blood throughout the apartment and the weapons used, appellant's statements to Todd and Vannoy about jealousy and revenge, appellant's actions in monitoring Epperson before the murder, and appellant's prior conduct in choking Colletta and Betsy M. And, in any event, the condition of Epperson's body does provide an inference of intent to torture. (*Mincey, supra*, 2 Cal.4th at p. 433.) "Intent is a state of mind which, unless established by the defendant's own statements, must be proved by the circumstances surrounding the commission of the offense [citations], which include the severity of the victim's wounds. [Citation.]" (*Proctor, supra*, 4 Cal.4th at p. 531; see also *Crittenden, supra*, 9 Cal.4th at p. 141.)

Also, the prosecutor did not give undue weight to the severity of the wounds as appellant contends. (AOB 90.) The prosecutor did argue Epperson's injuries showed torture, but she also specifically argued evidence from the blood spatter expert and appellant's statements to Vannoy rendered appellant culpable. For instance, the prosecutor argued the blood spatter expert testified appellant hit Epperson repeatedly with a wooden stool, using broken pieces to continue to hit her, and that the expert had been able to determine how and where appellant beat and injured Epperson. (13RT 1861, 1880.) The prosecutor also argued that Vannoy testified about appellant's statements in which he taunted Epperson before he killed her, indicating that he would make her suffer first. (13RT 1867,

1875.) Thus, the prosecutor argued the import of other evidence supporting an intent to inflict cruel pain.

Clearly, in this case, substantial evidence supports the torture murder theory of first degree murder, the torture conviction, and the torture murder special circumstance. (See *Gonzales, supra,* 51 Cal.4th at p. 942 [sufficient evidence of intent to inflict extreme pain for torture murder and intent to kill for torture murder special circumstance]; *Elliott, supra*, 37 Cal.4th at p. 469 [sufficient evidence of torture murder theory and torture murder special circumstance]; *Mincey, supra,* 2 Cal.4th at p. 436 [sufficient evidence of torture murder theory found based on circumstances of death, "including the number and nature of the wounds, and the length of time over which they were inflicted–and the expert testimony presented"].)

Even assuming the torture murder theory was not factually supported by the evidence, reversal of the murder conviction is not required. The jury was presented with other felony murder theories of first degree murder, based on the predicate felonies of mayhem and rape. The jury found appellant guilty of the mayhem and rape counts and found the mayhem and rape special circumstances to be true. (12CT 2956, 2958, 2960.) Thus, it is apparent the jury found the first degree felony murder theories based on mayhem and rape to be true. Thus, even assuming invalidity of the torture murder theory, the first degree murder conviction need not be reversed. (*Guiton, supra*, 4 Cal.4th at p. 1129 [reversal required under *Green*, "absent a basis in the record to find that the verdict was actually based on a valid ground," referring to *Green, supra*, 27 Cal.3d at p. 69]; see *Aguilar, supra*, 16 Cal.4th at p. 1034; see *Harris, supra*, 9 Cal.4th at p. 424.) In addition, the prosecution proceeded under a premeditation and deliberation theory of first degree murder, which supports the judgment below and which is addressed in this brief in Argument IV, *post*. Further, as set forth in Argument I, *ante*, the prosecutor clearly demarcated the theories for

liability for first degree murder when she argued the case to the jury. She informed the jury about the standards for premeditated and deliberate first degree murder (13RT 1872-1873) and also explained the felony murder theory and that mayhem and rape were predicate felonies (13RT 1861-1864, 1873). The prosecutor's argument further supports a finding that any assumed error with respect to the presentation of the torture murder theory to the jury was harmless beyond a reasonable doubt. The claim must be rejected.

III. SUBSTANTIAL EVIDENCE SUPPORTS THE RAPE CONVICTION, THE RAPE MURDER THEORY OF FIRST DEGREE FELONY MURDER, AND THE RAPE-MURDER SPECIAL CIRCUMSTANCE

Appellant contends there was insufficient evidence to convict him of rape, to support the rape murder theory of felony murder, or to support the true finding on the rape-murder special circumstance. (AOB 96-110.) Specifically, appellant claims that establishing that sexual intercourse took place and that a grievous assault took place does not prove rape beyond a reasonable doubt. He claims the evidence is consistent with his "claim of consensual intercourse followed by an assault and inconsistent with the prosecution's claim of forcible rape." (AOB 110.) Respondent disagrees.

As set forth in Argument II, *ante*, regarding the standard of review for sufficiency-of-the-evidence claims, incorporated herein by reference, the reviewing court must review the whole record in the light most favorable to the judgment below when assessing a sufficiency claim. (*Rodriguez, supra,* 20 Cal.4th at p. 11, citing *Johnson, supra,* 26 Cal.3d at p. 578 and *Jackson, supra*, 443 U.S. at pp. 317-320.)

For forcible rape pursuant to section 261, subdivision (a)(2), a jury must find the act of sexual intercourse was "accomplished against a person's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury . . . . " (See *People v. Griffin* (2004)

33 Cal.4th 1015, 1022; *People v. Maury* (2003) 30 Cal.4th 342, 403, citing *People v. Iniguez* (1994) 7 Cal.4th 847, 856.) "Force" is not specifically defined in the statute and does not have any specialized legal definition. When evaluating the evidence for the element of force, the reviewing court considers the circumstances of the case. (*Griffin, supra*, at pp. 1022-1024, 1028; *People v. Barnes* (1986) 42 Cal.3d 284, 304.) Proof of resistance is "no longer the touchstone of the element of force." (*Barnes, supra*, at p. 304; see *Griffin, supra*, at pp. 1024-1025.) Indeed, the Legislature "has never sought to circumscribe the nature or type of forcible conduct that will support a conviction of forcible rape." (*Griffin, supra*, at p. 1027.)

For the rape theory of felony murder pursuant to section 189, the murder must be committed in the perpetration of rape. (*People v. Kelly* (1992) 1 Cal.4th 495, 524 ["Felony murder includes a killing 'committed in the perpetration of . . . rape'"].)

For the rape-murder special circumstance pursuant to section 190.2, subdivision (a)(17)(C), the murder must be committed while the defendant was engaged in rape in violation of section 261. (*Kelly, supra*, 1 Cal.4th at p. 524.)

In the instant case, substantial evidence supports the rape conviction, the rape murder theory of felony murder, and the rape murder special circumstance. Appellant concedes there was evidence of sexual intercourse between Epperson and him, but "no direct evidence of rape." (AOB 102.) Since appellant's attack apparently focuses on the alleged failure to prove the element of force, respondent will focus its response accordingly. Force was shown by the injuries to Epperson's body, especially the vaginal area, the placement and condition of her clothes, the blood on her thighs and lower body, appellant's statements to others, and the evidence of prior assaults on other women.

The injuries to Epperson's body, particularly the vaginal area, demonstrated a forcible rape had occurred. Epperson had multiple severe injuries to her head, neck, and facial area, as set forth in Arguments I and II, *ante*, and had a significant amount of trauma in her vaginal area, all of which supported a finding of forcible rape. She had semi-circular bruises and abrasions at the back and both sides of the vaginal area. (9RT 1247-1248.) Indeed, Dr. Wang had rarely seen as much trauma to the vaginal area in other rape examinations. (9RT 1248.) Dr. Wang opined the injuries were caused by blunt force penetration either by a penis with a lot of force or other object of similar shape and size. (9RT 1249, 1256-1257.) Vaginal aspirate, vaginal swabs, and external genital swabs from Epperson all showed sperm which matched appellant's DNA. (9RT 1259; 10RT 1450-1451.) Dr. Wang opined Epperson was alive when she suffered the trauma to her vaginal area and face and when she suffered the cuts and lacerations, including those to her neck. (9RT 1249-1250.) The defensive wounds on her hands indicated she was alive and conscious when appellant inflicted the injuries. (9RT 1250.)

The placement and condition of Epperson's clothes and the blood on her thighs and lower body also supported a finding of forcible rape. Epperson's jeans and panties were on the ground at her feet and had been forcibly removed after she was on the floor, bloody and beaten. (10RT 1300-1301.) Bloodstains on her jeans near her waistband by the button and a pattern transfer stain consistent with fingers raised a reasonable inference that someone's bloody hands unbuttoned the jeans. (10RT 1344-1345, 1347.) On the inner surface of the jeans, on the outer liner of the right pocket, was a transfer stain with a mixture of appellant's and Epperson's DNA. (10RT 1449-1450.) The transfer blood patterns were consistent with a person lying on the ground wearing blue jeans and someone's bloody hands unbuttoning the jeans and grabbing and pushing the jeans down.

(10RT 1348.) The transfer stains on Epperson's inner thighs indicated the pattern was made when a bloody object made contact with her thighs after the blue jeans were removed. (10RT 1381-1382.) Thus, the blood on her thighs indicated appellant had spread her legs to forcibly rape her after he had already beaten and bloodied her. In blood spatter expert Raquel's opinion, Epperson's jeans were forcefully pulled off by someone else because of the bloody transfer pattern on the inner liner and inner surface of the pants. (10RT 1381, 1389-1392, 1406, 1411.) In addition, Epperson's panties had bloodstains, and appellant's DNA was found in the bloodstain on the front center of Epperson's panties. (10RT 1348-1349, 1381, 1450.) Also, the panties were ripped on the left side, on the top and bottom, and the rip could have been caused when the panties were removed from Epperson. (10RT 1349.) Epperson's brassiere was pushed up above her breast nipples. (9RT 1240-1241; 10RT 1451.) Notably, Epperson's lower body and breasts were unclothed, but her shirt and sweatshirt were still on. (9RT 1240-1241; 10RT 1451.) Thus, aside from the trauma to the vaginal area, the condition and placement of Epperson's clothes and the blood on her thighs and lower body clearly demonstrated appellant had forcibly raped her and defeated any claim of consensual sex.

Appellant's statements to others also provided evidence of forcible rape. His statements showed he wanted to have sexual relations with Epperson, had been unsuccessful, was jealous of others having sex with her, and was going to use force against her. Appellant told Todd several times that he was not having any success "getting sex" from Epperson and that if he could not have her, no one else could. (9RT 1214.) Appellant also told Todd that he was upset because Epperson was hanging around with other men, asked Todd if she was having sex with others, and made remarks indicating he was jealous of Sims. (9RT 1161, 1170, 1214.) Indeed, a short time before he murdered Epperson, appellant told Todd in

late October 2000 that he loved Epperson and said, "If I can't have her, nobody will, I'll kill her and myself." (9RT 1155-1156.) Also, appellant said Epperson reminded him a prior deceased girlfriend. (9RT 1156.)

Appellant's prior assaults on Colletta and Betsy M. also showed that he used force upon women when he believed he was not receiving desired attention. (See Argument I, *ante*.) When Colletta and Betsy M. did not want to reciprocate appellant's amorous affections and wanted to end their dating relationships, appellant attacked them. Appellant grabbed and squeezed Colletta's throat, dragged her to the ground, and kicked her in the back of the head and neck while he was wearing metal shod boots. (10RT 1443-1446.) Appellant choked Betsy M. until she lost consciousness, and when she came to, he made her strip at knifepoint and terrorized her. (10RT 1435-1436.)

Despite the substantial and indeed overwhelming evidence of forcible rape in the record, appellant selects varying bits and pieces of testimony from the prosecution's case and focuses on the defense evidence in an attempt to demonstrate insufficient evidence of forcible rape. (See AOB 99-105.) However, such an approach is contrary to the appellate standard of review for an insufficiency of the evidence claim. The evidence supporting a judgment is not rendered insufficient merely because the circumstances might be reasonably reconciled with a contrary finding. (*Tafoya, supra,* 42 Cal.4th at p. 170.) Indeed, appellant's version of the events was not credible, and the jury properly rejected it. Given the totality of the circumstances, the jury properly concluded appellant committed forcible rape. (See *Barnes, supra*, 42 Cal.3d at p. 305.) There was substantial evidence of forcible rape, the rape felony murder theory of first degree murder, and the rape-murder special circumstance.

IV. SUBSTANTIAL EVIDENCE SUPPORTS THE PREMEDITATION AND DELIBERATION THEORY OF FIRST DEGREE MURDER

Appellant contends his conviction for first degree murder must be reversed because the evidence was insufficient to prove premeditation and deliberation. He claims there was no evidence of planning and no viable evidence of motive and the manner in which Epperson was killed. (AOB 111-118.) Substantial evidence supports the premeditation and deliberation theory of first degree murder.

As set forth in Argument II, *ante*, regarding the standard of review for sufficiency-of-the-evidence claims, incorporated herein by reference, the reviewing court must review the whole record in the light most favorable to the judgment below when assessing a sufficiency claim. (*Rodriguez, supra,* 20 Cal.4th at p. 11, citing *Johnson, supra,* 26 Cal.3d at p. 578 and *Jackson, supra*, 443 U.S. at pp. 317-320.)

A deliberate and premeditated killing is murder of the first degree. (§ 189.) """Deliberation" refers to careful weighing of considerations in forming a course of action; "premeditation" means thought over in advance. [Citations.]"" (*People v. Solomon* (2010) 49 Cal.4th 792, 812, quoting *People v. Koontz* (2002) 27 Cal.4th 1041, 1080.) Deliberation and premeditation can occur in a "brief interval" and is not tested by time but by reflection. """Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly."" [Citation.]" (*Solomon, supra*, at p. 812, quoting *People v. Sanchez* (2001) 26 Cal.4th 834, 849.)

In *People v. Anderson* (1968) 70 Cal.2d 15, this Court discussed three types of evidence in premeditated murder cases--planning activity, preexisting motive, and manner of killing. (*Id.* at pp. 26-27; *Elliot, supra,* 37 Cal.4th at p. 470; *Proctor, supra,* 4 Cal.4th at p. 529.) A first degree murder conviction will be upheld when evidence of all three *Anderson* categories exists, but if not, a conviction has generally been upheld where

there is """either very strong evidence of planning, or some evidence of motive in conjunction with planning or a deliberate manner of killing." [Citations.]'" (*Proctor, supra*, at p. 529, citing *Raley, supra*, 2 Cal.4th at p. 887; *Elliot, supra*, at pp. 470-471.) However, the *Anderson* categories are not exclusive, and other types of evidence can support a finding of premeditation and deliberation. (*Solomon, supra*, 49 Cal.4th at p. 812, citing *People v. Perez* (1992) 2 Cal.4th 1117, 1125, *People v. Hovarter* (2008) 44 Cal.4th 983, 1019, and *People v. Steele* (2002) 27 Cal.4th 1230, 1249; *Proctor, supra*, at p. 829.)

In the instant case, substantial evidence supports the premeditation and deliberation theory of first degree murder. There was evidence of planning, motive, and manner of killing. With respect to planning, the evidence showed appellant's actions before, during, and after the murder constituted evidence of premeditation and deliberation. Before the murder, appellant was watching Epperson and Sims after Epperson got out of church. (8RT 1047-1049, 1065.) A jury "could have interpreted [appellant's] actions earlier during the evening of the murder as surveying the [place] for a later attack." (*Elliot, supra*, 37 Cal.4th at p. 472.) Later that day, appellant got Epperson alone in her apartment, as shown by the sign in log and forensic evidence. (8RT 1011-1014; 9 RT 1117, 1119-1121, 1131-1132, 1138; see, e.g., 10RT 1450-1451.) Then, when appellant attacked her, repeatedly beating her in the bathroom, Epperson asked if he was going to kill her, and appellant clearly said, "Yes, Tammy, I am. I am going to kill you." (Peo. Exh. 88B, pp. 39, 85.) Epperson was under his control, and appellant carried her to the living quarters where he inflicted further grievous injuries upon her. (10RT 1320-1321, 1379, 1397.) Thus, the evidence shows appellant watched Epperson earlier in the day, got her alone in her apartment, told her his plan was to kill her, and then after initially beating her, "had a significant period of time in which to

contemplate and plan her eventual death." (*Proctor, supra*, 4 Cal.4th at p. 529; see *Solomon, supra*, 49 Cal.4th at p. 816; *Pensinger, supra*, 52 Cal.3d at p. 1237 ["the total vulnerability of the victim and the evidence of a previously selected remote spot for the killing do suggest planning."].)

Further, appellant's actions after the murder showed evidence of planning. When appellant left the Ballington, he did not go to the parking lot across the street, where he often left his truck; instead, appellant went up Wall Street and left. (9RT 1140, 1142.) The jury could have inferred that appellant had not left his truck in the lot because he had planned to kill Epperson and wanted to avoid having someone see him leave Epperson's apartment.

In addition, appellant's claim that his testimony showed only a killing without "any sort of planning or careful consideration" is without merit. (AOB 114-115.) Appellant bludgeoned Epperson with a number of items, including a candle holder, lamp, footstool, and vase, stabbed her in the face with a screwdriver, and cut the sides of her neck with broken glass. The wide selection of items and the time it must have taken to select the items, use the items, use pieces of items once they broke, and use some of the items very carefully to inflict wounds suggested that appellant carefully planned his killing activities. (See *Elliot, supra,* 37 Cal.4th at p. 471 [wounds could have showed a "preconceived design to kill"]; *People v. Wharton* (1991) 53 Cal.3d 522, 547 [likely use of hammer and its removal from toolbox indicated defendant might have "planned to be in a rage."].) Moreover, that appellant used "materials that were close at hand does not preclude the inference that he thereafter considered a course of action to kill." (*Solomon, supra*, 49 Cal.4th at p. 816.) And again, even assuming the facts could be reconciled with theory that the killing was unplanned, the judgment may not be reversed if there was substantial evidence of premeditation and deliberation. (*Id.* at p. 819.)

There was also evidence of motive. The evidence showed appellant was jealous of Epperson seeing other men, was unsuccessful in his pursuit of sexual relations with her, and said he would kill her if he could not have her. Appellant told Todd that he loved Epperson, that he was upset she was hanging around with other men including Sims, and that if he could not have her, nobody would. (9RT 1155, 1161, 1170.) He also told Todd several times that he was not having any success "getting sex" from Epperson and asked Todd if Epperson was having sex with others. (9RT 1214.) In October 2000, just a short time before appellant killed Epperson, appellant said, "If I can't have her, nobody will, I'll kill her and myself." (9RT 1155-1156.) Appellant also told Vannoy that Epperson had rejected him, was seeing someone else, and that he told Epperson, "All I wanted you to do was to love me, you know, and you wouldn't do that." (Peo. Exh. 88B, pp. 27, 29, 38-39.) In addition, the jury could have believed that appellant killed Epperson to "avoid detection for the sexual and other physical abuses he had committed against her." (*Proctor, supra*, 4 Cal.4th at p. 529.)

The manner of killing also showed premeditation and deliberation. The number and severity of wounds suffered by Epperson and the wide-ranging blood spatter showed appellant had ample time for reflection, as he was using multiple items to bludgeon her, used pieces of the items after they broke, and carefully used certain items to inflict injuries which were not immediately fatal. Epperson suffered at least 10 blows to her head, as a conservative estimate. (9RT 1228, 1251, 1255.) She also had multiple injuries to her face, including lacerations on her forehead and face, including her eyes, nose, cheeks, and upper and lower lips. (9RT 1228-1229.) These injuries were caused by multiple items, including a candle holder, vase, footstool, and lamp, and when the items broke, appellant used the broken pieces to bludgeon her more. (10RT 1379-1380, 1395-1396;

Perez, supra, 2 Cal.4th at p. 1129 ["defendant had time to reflect upon his actions when the knife broke. That he went searching for another knife is indicative of a reasoned decision to kill."].) Using the broken pieces was similar to "reloading a gun or using another gun when the first one has run out of ammunition." (*Perez, supra*, at p. 1127.)

The evidence further showed appellant inflicted injuries which were not immediately fatal but were carefully placed to inflict more grievous injuries upon Epperson. Appellant stabbed Epperson in the face with a screwdriver. (10RT 1409-1410.) Appellant also carefully cut the sides of Epperson's neck with glass or some other object, without severing her carotid arteries or jugular veins, which would have been quickly fatal. (9RT 1230-1231, 1233-1234, 1245-1246.) Also, bruising on the neck and hemorrhaging in the eyes, which might have indicated strangulation, could have contributed to the manner of killing. (9RT 1224; *Solomon, supra*, 49 Cal.4th at p. 815 ["From this manner of killing, the jury reasonably could infer that defendant had time to consider the murderous nature of his actions."]; *People v. Bonillas* (1989) 48 Cal.3d 757, 792 ["Ligature strangulation is in its nature a deliberate act"]."].) Epperson's vaginal area suffered a significant amount of trauma, which was caused by blunt force penetration either by a penis with a lot of force or other object of similar shape and size. (9RT 1248-1249, 1256-1257.) The fact that Epperson also had defensive wounds on her hands and arms showed Epperson was alive during this brutal attack. (9RT 1224-1227, 1249-1250.) "These circumstances do not suggest an unreflecting explosion of violence, but rather a preconceived design to kill the victim by the particular means chosen, and to prolong her agony in the process." (*Proctor, supra,* 4 Cal.4th at p. 530.) Thus, the deputy coroner's testimony about Epperson's numerous and grievous injuries showed a manner of killing indicative of premeditation and deliberation. (*Solomon, supra*, 49 Cal.4th at p. 815

["'what the pathologist can say from a laboratory examination is more limited than what a reasonable trier of fact may find beyond any reasonable doubt, after considering the evidence as a whole.'"].)

Evidence that appellant had assaulted Colletta and Betsy M. when they did not reciprocate his attentions also showed how he conducted himself in such situations. (See Arguments I and II, *ante*.) When both women did not want to reciprocate his attentions, appellant responded by attacking both of them. (10RT 1434-1436, 1443-1445.) Also, he told Colletta, "You're going to die," and told Betsy M. he would kill her and her children. (10RT 1437, 1443-1445.)

Other evidence also showed premeditation and deliberation. Appellant's conduct after the killing, including searching dresser drawers and the closet, going through Epperson's personal belongings, ransacking her apartment, taking Epperson's keys, wiping his hands with paper towels and cloth towels, locking the apartment door when he left, and telling the security guard that Epperson was resting "would appear to be inconsistent with a state of mind that would have produced a rash, impulsive killing." (*Perez, supra*, 2 Cal.4th at p. 1128; see 9RT 1117, 1121-1123, 1138, 1132, 1136; 10RT 1299-1300, 1306, 1341-1344, 1355-1356, 1367-1370, 1380-1381, 1399, 1450.) Indeed, the security guard testified appellant seemed calm, and his demeanor was not unusual. (9RT 1122, 1135.) The evidence showed planning, motive, and manner of killing, sufficient to uphold the premeditation and deliberation theory.

Moreover, appellant's claim that he may be guilty only of second degree murder because he was "subjectively precluded from deliberating because of provocation . . . even if a reasonable person would not have been so precluded" is without merit. (AOB 117.) Provocation which may be inadequate to reduce a murder to manslaughter may nevertheless negate premeditation and deliberation, thus reducing a murder from first to second

degree. (*People v. Thomas* (1945) 25 Cal.2d 880, 903 [provocation which might be insufficient to reduce the offense to manslaughter might be adequate to raise a reasonable doubt about premeditation or deliberation, "leaving the homicide as murder of the second degree; i.e., an unlawful killing perpetrated with malice aforethought but without premeditation and deliberation"]; see *People v. Rogers* (2006) 39 Cal.4th 826, 877-878; *People v. Valentine* (1946) 28 Cal.2d 121, 132.) To reduce murder from first to second degree, the provocation must have precluded the defendant from deliberating. "This requires a determination of the defendant's subjective state." (*People v. Fitzpatrick* (1992) 2 Cal.App.4th 1285, 1295.) Instruction on the principle that "provocation inadequate to reduce a killing from murder to manslaughter nonetheless may suffice to negate premeditation and deliberation" is a pinpoint instruction and need not be given on the court's own motion. (*Rogers, supra*, at pp. 877-878; see CALJIC No. 8.73; CALCRIM No. 522.)

Here, as set forth above, the prosecution's evidence showed sufficient evidence of appellant's premeditation and deliberation in murdering Epperson. To the extent appellant's claim on appeal is one of sufficiency to prove premeditation and deliberation, the fact that appellant alleges there was countervailing evidence is of no accord in this sufficiency-of-the-evidence evaluation. (*Tafoya, supra,* 42 Cal.4th at p. 170 [that the circumstances may be reasonably reconciled with a contrary finding does not render the evidence insufficient]; *People v. Guerra* (2006) 37 Cal.4th 1067, 1129.)

Moreover, even considering appellant's subjective mental state, the evidence of provocation was not sufficient to show appellant was precluded from deliberating. In his brief, appellant simply states, without attribution or citation to any portion of the record, that the "evidence here clearly shows that [he] was subjectively under the influence of heat of passion as a

result of Ms. Epperson's demeaning language at the breakup and thus did not act with premeditation and deliberation." (AOB 117.) Appellant apparently relies on his own testimony in the defense case, in which he testified he hit Epperson once when he became jealous and offended after Epperson said that she was ending their relationship and that he had been a "fill in" or temporary while she was lonely. (11RT 1529-1530, 1540-1541, 1598-1599, 1600, 1602.) However, appellant also testified he could not remember anything after he struck Epperson once and did not know how he killed Epperson. (11RT 1533.) Appellant also denied drinking alcohol that day. (11RT 1560.) And certainly, Epperson's alleged statements to appellant would not have been sufficient provocative conduct under an objective standard to support a heat of passion claim for voluntary manslaughter. (*People v. Manriquez* (2005) 37 Cal.4th 547, 586 [no manslaughter instruction based on heat of passion simply because the victim called the defendant a "mother fucker" and taunted him]; *People v. Lee* (1999) 20 Cal.4th 47, 59; *People v. Wells* (1938) 10 Cal.2d 610, 623 [words of reproach or even a blow are insufficient to arouse heat of passion in a reasonable man], overruled in part on another ground in *People v. Holt* (1944) 25 Cal.2d 59, 87, and quoting 13 *California Jurisprudence*, p. 611.) Even considering appellant's subjective mental state, the evidence of provocation was not sufficient to have reduced the murder from first to second degree. (See *Fitzpatrick, supra,* 2 Cal.App.4th at p. 1295.)

Moreover, appellant is not entitled to have his first degree murder conviction reduced to second degree, since the jury necessarily found him guilty of felony murder. (*Guiton, supra*, 4 Cal.4th at p. 1129; see Arguments I and III, *ante*.) The mayhem, torture, and rape felony murder theories provided viable bases for the jury's first degree murder verdict, irrespective of the premeditation and deliberation theory of first degree murder. (*Ibid.*) Further, as set forth in Argument I, *ante*, the prosecutor

clearly demarcated the theories for liability for first degree murder when she argued the case to the jury, explaining the standards for first degree felony murder (13RT 1861-1864) as well as premeditated and deliberate first degree murder (13RT 1872-1873). The claim must be rejected.

V-A. THE TRIAL COURT PROPERLY ADMITTED EVIDENCE OF APPELLANT'S TATTOOS AND THE GANG EVIDENCE[18]

Appellant contends the trial court erred by refusing to exclude irrelevant evidence of his purported gang affiliation and gang tattoos in the guilt and penalty phases. (AOB 119-172.) Specifically, appellant claims the trial court erred because the evidence was irrelevant, the prosecutor committed misconduct in eliciting it, the trial court compounded the misconduct by mistakenly asserting appellant invited it, and appellant was prejudiced by the gang evidence. (AOB 146-172.) The trial court properly admitted evidence of appellant's tattoos and the gang evidence.

A. Background

Prior to selection of the guilt phase jury, the issue of gang evidence arose as the court was discussing the jury questionnaire. The prosecutor explained that there was some evidence appellant and a witness, Vannoy, were associated with the Aryan Brotherhood, appellant had "White power" tattooed on his arms, and appellant's motive to kill Epperson was based in part on the fact Epperson's ex-boyfriend, Sims, was Black and was with her on the morning appellant killed her. The prosecutor said she would ask for an Evidence Code section 402 hearing for the court to decide whether such evidence would be admissible. Defense counsel also had proposed questions about gangs on his jury questionnaire. (2RT 143-144.) In the

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[18] Appellant has two arguments in his brief enumerated as Argument V, so respondent has designated the first as "V-A." and the second as "V-B." (See AOB 119-172, 173-216.)

juror questionnaire, the prospective jurors were asked if they had an opinion about gang activity, had ever witnessed gang activity, had been affected by gang activity, had ever been acquainted with a gang member, or would automatically reject the testimony of a witness shown to be a gang member. (See, e.g., 4CT 575.)

During the prosecution's guilt phase case-in-chief, Sims testified about his relationship with Epperson and about appellant. Sims, who is African American, testified he met Epperson, who was White, in 1999 and thereafter became her boyfriend. (8RT 1041-1042.) In 2000, Epperson got Sims to move into the Ballington, and while they were both there, for a period of eight or nine months, they were in a boyfriend and girlfriend relationship. (8RT 1016, 1042-1043.) However, when Sims started using drugs again, Epperson broke up with him and told him he had to stop using drugs for them to be back together. (8RT 1023, 1043.) When Sims was evicted from the Ballington on October 14, 2000 for nonpayment of rent, Sims and Epperson were no longer boyfriend and girlfriend. (8RT 1016, 1044.)

Sims then testified that on the day of Epperson's murder, Sunday, November 12, 2000, he met Epperson outside her church at 10 a.m. and talked to her. Appellant was across the street, watching them and pacing up and down from his red truck back to the corner. (8RT 1046-1047.) The prosecutor asked Sims how he felt when he saw appellant across the street, and defense counsel unsuccessfully objected on relevancy grounds. (8RT 1048-1049.) Sims testified that he felt appellant was watching them. The prosecutor then asked Sims if he had had any prior contact with appellant. Sims testified that he had never spoken to appellant but that one time, as Sims was leaving the Weingart, appellant was going in and said to Sims, "You punk m.f." Sims turned around and looked at him, and appellant turned around like he was getting ready to charge him. Sims went out

through the door. (8RT 1049.) The prosecutor again asked Sims how he felt when he saw appellant watching them, and defense counsel objected on relevancy grounds. When the trial court overruled the objection, Sims said he felt intimidated and added that he "knew that he was like White supremacist." (8RT 1049-1050.) Defense counsel moved to strike, and the trial court sustained the objection, struck the answer, and admonished the jury to disregard the answer. (8RT 1050.) The prosecutor then asked about Sims' activities after he got out of a later church service, how he tried to contact Epperson, and how Sims had the police summoned to the Ballington to discover Epperson's body. (8RT 1050-1061.)

On cross-examination of Sims, defense counsel began by questioning him about how he knew appellant and intimated in questioning that it was odd that he had "never talked to [appellant] once" even though they had lived at the Weingart at the same time for two years. (8RT 1061-1062.) Defense counsel also questioned Sims about whether he told the police at the station that appellant had called him a "punk mother fucker," about whether he had intended to marry Epperson, and about whether Epperson had changed her locks because of him. (8RT 1061-1067.) Defense counsel also questioned Sims about whether he had told the grand jury in 2002 that appellant called him a "punk mother fucker." Realizing that Sims had indeed so testified in the grand jury proceedings (2CT 276 ["he called me a punk m.f."]), defense counsel acknowledged his mistake and concluded his cross-examination shortly thereafter. (8RT 1067-1069.)

On redirect examination, the prosecutor asked Sims again about appellant and the Weingart. Sims testified he "didn't go looking for him." (8RT 1069-1070.) Sims also testified he had given Epperson a two-carat diamond heart with a chain, which Epperson wore all the time. (8RT 1070.)

Todd then testified for the prosecution. At appellant's request, Todd introduced appellant to Epperson about four or five months before her murder, and they socialized as a group. (9RT 1151-1155, 1168.) During this time, and specifically in late October 2000, appellant told Todd he loved Epperson and said, "If I can't have her, nobody will, I'll kill her and myself." (9RT 1155-1156.) Appellant also made several remarks about Sims and told Todd he would kill that "nigger" if he kept trying to see Epperson. (9RT 1161.) Defense counsel did not object to the testimony at that time, but at a sidebar, defense counsel said he had not had any discovery on Todd's testimony that appellant had used the word "nigger." (9RT 1164-1165.) The prosecutor related that she had not heard that before from Todd, but she believed that a taped interview had statements that appellant belonged to a White supremacist group and had had problems with the group because he was with Epperson, who had been with a Black man. Defense counsel stated that he did not recall such a statement. The trial court stated that regardless of whether Todd's statement was in a written or recorded statement, that would not make the statement inadmissible. (9RT 1165.) The trial court further stated that the issue of "White supremacy and whether the defendant is adverse to people of color" had been kept out initially by the court, was now relevant because "the defense has gone into the fact that the witness [Sims], who was African[]American, was basically staying away from the defendant and they went into it . . . . " Defense counsel did not object to the trial court's recitation of the proceedings. (9RT 1166.)

On cross-examination, defense counsel asked Todd if appellant had an African-American female friend named Gretchen Black, whom he called his "sister" named "Nada," and Todd confirmed this. (9RT 1172.) Defense counsel also questioned Todd about appellant and Epperson's friendship or relationship. (9RT 1170-1180.)

The prosecutor recalled Todd and asked if appellant told him that he had had sexual relations with Epperson. Todd testified appellant told him "he wasn't having any success getting sex from Tammy." Defense counsel asked when appellant said this to Todd, and Todd testified appellant told him that several times on several occasions when they went to Malibu. Appellant would talk about his and Epperson's problems and say she was not giving him sex. Appellant said if he could not have her, no one else could, and appellant asked Todd if she was having sex with others. (9RT 1214.)

In the defense case, appellant testified at length during his direct examination about his relationship with Epperson, which included sex, and the events leading up to the time when he said he hit her once in the face but did not remember more. (11RT 1487-1540.)

On cross-examination, the prosecutor asked about appellant's relationship with Sims. Appellant said he could not stand Sims because "of what he did to her." (11RT 1543-1544.) Appellant denied being racist and testified that not liking Sims had nothing to do with Sims being African American. When the prosecutor asked about appellant's tattoos, defense counsel asked to approach the bench. (11RT 1544.) At the bench, the prosecutor stated that she was going to ask appellant about the tattoos on his arms and legs "and then mark them, not saying what they were, approach or at least give it to the bailiff and see if he can identify those as his tattoos." She stated appellant had a "White pride" tattoo on his arm and a rather large "White anger" on his leg. Defense counsel argued the tattoos were a "collateral issue," that appellant was not a member of a White supremacist group, that the record already showed appellant had Black friends, and the tattoos were "inflammatory and prejudicial." (11RT 1545.) The trial court overruled the objection, stating,

> To begin with, the defense brought this in in asking why [Sims] was not responsive to your client, and at that point I would have reversed [my] original ruling that this was too prejudicial to bring in.
>
> It made it look like Mr. Sims was avoiding your client unfairly, that he was unfriendly and aloof and in fact it appeared that the answer was that he recognized that your client did not like African Americans, but in any case, this part is directly responsive.
>
> Your client can give an excuse, but it doesn't mean it's excludable. It would go to the weight of it.

(11RT 1545-1546.)

The prosecutor then questioned appellant about his tattoos. Appellant testified that his arm tattoos said, "White pride," and the large tattoos on the back of his leg calves said, "White anger." (11 RT 1547.) Appellant testified he got the tattoos in prison two years ago. (11 RT 1547-1548.) Appellant denied that he hated Sims because he was Black and Epperson was White. (11RT 1548.) The prosecutor also questioned appellant about Vannoy and whether he was connected to the Aryan Brotherhood. Defense counsel moved to strike, the trial court sustained the objection, and defense counsel asked to approach the bench. At the bench, defense counsel objected that he had not been provided evidence that Vannoy was in the Aryan Brotherhood, that he was "connected," and that appellant had any such connection. Defense counsel asked the jury be admonished to disregard the question and answer. The prosecutor said, "Fine," and the trial court instructed the jury to disregard the question and answer. (11RT 1548-1549.)

On redirect examination of appellant, defense counsel questioned appellant about his "White pride" and "White anger" tattoos. Appellant testified that about 90 percent of the White men in prison had the "White pride" tattoo, which did not identify the wearer with any White supremacist

group. Appellant testified "White anger" was his nickname and that the first time he went to prison in 1988 he was angry. He denied being affiliated with any White supremacist group. He testified he had Black friends, including his closest friend, and denied that he was angry with Sims because he was Black. (11RT 1620-1621.) Appellant testified, "Color means nothing to me." (11RT 1621.)

In the rebuttal case, the issue of Vannoy's and Vannoy's brother's affiliation with a White supremacist group was raised. The trial court excluded as irrelevant references in Vannoy's videotaped statement that his brother was a "shot caller" for the Aryan Brotherhood while in prison. However, the trial court did allow Vannoy's statements about his own past membership in the Aryan Brotherhood. (12RT 1723-1726.) The trial court further stated that regardless of how appellant wanted to describe his own tattoos, "they tend to suggest it's far more than affiliation with Mr. Vannoy . . . . " (12RT 1725.)

Vannoy's redacted videotaped interview was then played for the jury. Vannoy said he used to be affiliated with the Aryan Brotherhood, a White supremacist group, but was a "dropout" who did not affiliate anymore. (Peo. Exh. 88B, p. 9.) He said he had numerous tattoos, including a swastika. (Peo. Exh. 88B, pp. 11-15.) Vannoy also said he knew that appellant did not like Epperson's Black boyfriend. (Peo. Exh. 88B, pp. 64-65.)

In the prosecutor's opening and rebuttal arguments at the guilt phase, she did not mention the tattoos or gang evidence. (13RT 1854-1884, 1947-1960.) Neither did the defense in its closing argument. (13RT 1886-1946.)

In the prosecutor's rebuttal argument in the first penalty phase, she argued appellant was not afraid of prison. She argued appellant was "not the man in the life boat. He's the shark. Because how else is he going to protect anybody in prison unless he's got his gang to back him and he

knows that he can protect somebody?" Defense counsel objected to the reference to the gang as not supported by the evidence, but the trial court overruled the objection. (22RT 3230.)

The trial court received notification that the penalty jury had deadlocked at 10 to 2 and also that appellant had become agitated after hearing the arguments. (22RT 3234.) The bailiff stated that appellant had become agitated over the prosecutor's statements that he belonged to any type of gang. (22RT 3238.) The trial court explained that it had overruled the defense objection to the gang argument due to appellant's tattoos which seemed "self-evident that that shows gang affiliation, and normally while in prison, you have to be involved with some affiliation with others that are going to help protect you." The court thought it was a "fair argument." (22RT 3239.)

At a hearing before retrial on the penalty phase, the defense asked to preclude evidence of appellant's gang affiliation because appellant was not a gang member and the prosecution had not provided an adequate foundation for the gang evidence. (23RT 3268-3269, 3279-3280.) The prosecutor asked whether the trial court was planning on deleting the gang questions from the jury questionnaire, and the trial court stated,

> . . . – [M]y position on it is the same as it was during the trial. When an individual has in large block prints a tattoo that says, "White power," regardless of their denials, it seems to me that's self-evident that there was, if not currently, a – not only a gang affiliation, which is less important, but an animosity toward people that are not White.
>
> The oddity here is that he had a good friend who was African American, but I think the reason I let it in was that it did tend to explain his animosity toward an African[-]American male involved in the trial and very close to the victim in the case.

(23RT 3286.) The prosecutor stated that the gang questions on the questionnaire "really cuts both ways" because if someone felt strongly about gangs, defense counsel would want to know. (23RT 3286.) The questions remained in the questionnaire. (See, e.g., 14CT 3301.)

During the second penalty phase jury selection, defense counsel raised the issue of the admissibility of the gang evidence. (24RT 3363-3364.) Defense counsel said he was concerned African-American jurors would be offended by the White power tattoo. He argued the gang evidence was not an integral part of the prosecution's case and was unnecessary. The trial court stated,

> Well, if it were true that [appellant] hated Mr. Sims, this would be a reason for it and excuse for it.
>
> There was a question asked during the previous trial in which Mr. Sims was asked about his contacts with [appellant], and there was something along the lines of we never talked in over two years that we saw each other, which seems awfully strange. It tends to suggest that either Mr. Sims has a bias or [appellant] has a bias, and the tattoos, especially not just small tattoos but large block print administered to [appellant] does tend to suggest that he has a problem with African Americans.

(24RT 3364-3365.)

Before the presentation of the penalty phase evidence, defense counsel's motion to exclude evidence of the gang tattoos was heard. (28RT 4157-4166.) Defense counsel argued it was speculation to say the killing had anything to do with race. (28RT 4163-4164.) The prosecutor explained that racial animus was the "additional spur that caused [appellant] to murder her and to torture her. . . . That was the People's theory at the time for him to go that far, to destroy her face and to torture her." (28RT 4162.) The trial court denied the defense motion, finding that a racial animus against African Americans "goes to the motivation and explosive nature of [appellant's] conduct at the time of the crime." (28RT 4166.) The

trial court stated appellant had the "White power" and "White anger" tattoos put on himself, the tattoos were permanent indicating a "declaration on his part of some attitude," and defense counsel had emphasized a bias on Sims' part against appellant and Sims staying away from appellant could be explained by the tattoos. (28RT 4157-4158.) In addition, Welsh-Cook testified that she asked appellant if she were his sole African-American friend, suggesting she "felt she was alone in his realm of friends." (28RT 4161.) The trial court also stated that the evidentiary standards were more lenient in the penalty phase and that evidence that might be inadmissible in the guilt phase could be admissible in the penalty phase. (28RT 4159.) The trial court also stated that the evidence was susceptible to the interpretation that the person who called Epperson before appellant murdered her was Sims and that appellant might have been aggravated that Epperson was interested in a Black man. The trial court acknowledged there was no specific evidence of this, however. (28RT 4159-4160.)

As part of the prosecution's penalty phase evidence, Vannoy was questioned about his tattoos, and he admitted he had a swastika tattoo and a lightning bolt tattoo, which was a symbol of the Aryan Brotherhood. Vannoy denied being affiliated with the Aryan Brotherhood. (30RT 4486.) Before the prosecutor could complete a question asking whether appellant and Vannoy belonged to something, defense counsel objected and asked to approach the bench. Defense counsel objected that there was no evidence that appellant was an Aryan Brotherhood member and that it had nothing to do with the case. The prosecutor argued appellant obtained the tattoos in prison, presumably when in prison with Vannoy and that appellant had told others he was in a White supremacist gang. (30RT 4486-4487.) The trial court sustained the defense objection as to Vannoy. (30RT 4487.)

The prosecutor then asked Vannoy if he saw any significance to his own statement during his police interview that Epperson's ex-boyfriend was

Black. Defense counsel objected and stated at a bench conference that a detective had raised the issue that the ex-boyfriend was Black, not Vannoy. The prosecutor realized her error and withdrew the question. (30RT 4488-4489.)

Just before Todd testified in the penalty phase, defense counsel raised an issue about racial animosity testimony by Todd. Defense counsel stated that Todd had testified appellant said he "would kill that nigger if he kept trying to see Tammy." Defense counsel asked the racial epithet of "nigger" not be elicited from Todd because it was more prejudicial than probative. The trial court overruled the objection, stating it showed a degree of anger and why he engaged in the violent attack on Epperson, "[t]hat he's not only angry that she was interested in somebody else, but that he was African[]American, and he didn't use that word, he used the N word instead." (31RT 4598.)

Defense counsel also objected on relevancy and undue prejudice grounds to the prosecutor eliciting testimony that appellant bragged he was in a White supremacist gang. The prosecutor stated that Todd would testify appellant told him he was in a White supremacist gang but Todd did not know which gang. The court overruled the objection, stating, "Well, it obviously is relevant to the extent if it relates to the time around the commission of the crime." The trial court further stated membership in a White supremacist gang could show he did not like Sims because he was an African-American suitor and appellant did not treat his other victims as he treated Epperson, thus explaining "the explosive anger that he shows by essentially the torture and ultimate death of Tammy." (31RT 4598-4600.)

Todd testified on direct examination that appellant told him that if Sims kept pursuing Epperson he would kill Sims. The prosecutor's question whether appellant used a racial epithet when he said this was objected to by defense counsel as irrelevant, leading, and suggestive. The

trial court sustained the objection "at this time." (31RT 4621.) Over a defense relevancy objection, Todd also testified that appellant told him in 2000 when he was at the Weingart that he was in a White gang but could not recall which one. (31RT 4624-4625.)

Sims also testified at the penalty phase. Over a defense relevancy and speculation objection, Sims testified he avoided appellant at the Weingart because appellant had tattoos on his calves and arms. (32RT 4728-4729.) Sims also testified there had been incidents between appellant and himself that made him feel appellant disliked him for certain reasons and that made Sims feel afraid. (32RT 4729.) Sims recounted the incident in which appellant called him a "punk m.f." as Sims was entering the Weingart and looked like he was getting ready to rush Sims, engaging in "intimidation movements." (32RT 4732.)

In the defense case, Cook-Welsh testified on appellant's behalf that appellant befriended her. She did not understand why he would want to be her friend and asked if she was his "token Nigger." Appellant became very angry at her and told her not to let him hear her call herself that ever again. (33RT 5076-5077.) Cook-Welsh had seen appellant's tattoos, which did not bother her. (33RT 5077.)

Appellant's younger sister, Montana, testified that their family was taught that Whites stay with Whites. Her father "flipped out" when Montana danced with an African-American boy in the first grade and "flipped out" when he found out her last name by marriage was "Gomez." (35RT 5359.)

Appellant's mother, Joyce, testified appellant's father was a racist, "major big time" and did not like anyone unless the person was "total White." However, appellant was not that way, because he brought Black and Hispanic friends home. (35RT 5415.)

In her closing argument at the second penalty phase, the prosecutor focused on the circumstances of the crime and the aggravating evidence and did not mention the tattoos or gang evidence. (37RT 5657-5695.)

In his closing argument, defense counsel argued there was no evidence of premeditation and extensively argued that the mitigation evidence weighed in favor of life without parole. (37RT 5720-5764.) Defense counsel also talked about appellant's tattoos and denied appellant was a racist. (37RT 5759-5760.)

Appellant made a motion for a new penalty phase trial, alleging as one ground that the trial court erroneously permitted the prosecutor to offer evidence of his tattoos, refer to his alleged prison gang affiliation, and refer to his alleged uses of racial epithets. He argued he did not belong to any prison gang, the tattoos and epithets were irrelevant, and Epperson's death had nothing to do with racial bias or animus. He claimed the references violated his constitutional right to a fair and reliable penalty phase. (23CT 5658.)

At the hearing on the new trial motion, the prosecutor referred to the gang tattoos, pointed out appellant had not taken the stand in the second penalty phase, and stated the tattoos had not been admitted in the second penalty phase. (38RT 5934-5935, 5937.) However, the prosecutor noted that evidence of appellant's racial animus came in through Todd's testimony that appellant had called Sims by a racial epithet and that appellant belonged to a White supremacist gang. (38RT 5934-5935.) The trial court denied the motion and rejected the issues regarding the gang tattoos. The court stated,

> . . . I think the White power designation, when somebody allows themselves to be tattooed with the words in block print, as I recall, on each leg White power, nobody is going to convince me that that doesn't show racial bias on his part, and since the victim's boyfriend was African[]American and not White, that I

> think went directly to the motivation for the viciousness of the attack, not just the attack but the viciousness of it, so for those reasons advanced by the defense and the allegation of jury misconduct, the motion for new trial and in the penalty phase is denied.

(38RT 5942.) After the denial of the motion, defense counsel clarified that appellant's tattoos said, "White anger, White pride." (38RT 5943.)

B. The Trial Court Properly Admitted Evidence of Appellant's Tattoos and The Gang Evidence

1. Waiver of Federal Constitutional Claims

Preliminarily, appellant's claim that the admission of the gang evidence was federal constitutional error should be deemed waived because he did not present it below. (AOB 171-172.) Instead, appellant only objected at trial to the evidence on non-constitutional bases. (See 8RT 1048-1049 [relevancy objection only]; 11RT 1545 [collateral, cumulative, and inflammatory objections]; 23RT 3268-3269, 3279-3280 [inadequate foundation objection]; 24RT 3363-3364 [collateral and unnecessary objection]; 28RT 4163-4164 [speculation objection]; 31RT 4598-4600 [relevancy and prejudice objection]; 31RT 4624-4625 [relevancy objection only]; 32RT 4728-4729 [relevancy and speculation objection]; *People v. Kipp* (2001) 26 Cal.4th 1100, 1122 [defendant's claim that admission of evidence violated his rights under the state and federal Constitutions waived where he did not raise such objections below]; *People v. Davis* (1995) 10 Cal.4th 463, 501, n. 1 [defendant's claims that exclusion of evidence violated the Due Process Clause of the Fourteenth Amendment and the Cruel and Unusual Punishment Clause of the Eighth Amendment waived where, at trial, he "failed to make any argument whatever based on federal constitutional provisions"].)

Appellant did reference a denial of his constitutional right to a fair and reliable penalty phase in his motion for a new penalty phase trial, which

alleged as one ground that the trial court erroneously permitted the prosecutor to offer evidence of his tattoos, refer to his alleged prison gang affiliation, and refer to his alleged uses of racial epithets. (23CT 5658.) However, appellant did not raise any specific federal constitutional objections to the evidence in a timely manner and, thus, has not preserved them for appellate purposes.

2. Appellant's Tattoo Evidence and the Gang Evidence Were Relevant

Relevant evidence is evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210; see also Evid. Code, §§ 350, 351.) "The concept of relevance is very broad [citation omitted], encompassing evidence depicting the crime scene and injuries inflicted [citation omitted], and that bearing on the defendant's account of events and state of mind." (*People v. Salcido* (2008) 44 Cal.4th 93, 147; see *People v. Champion* (1995) 9 Cal.4th 879, 922 [evidence is relevant if it tends to logically, naturally, and by reasonable inference establish material facts such as identity, intent, or motive].) A trial court has broad discretion in determining the relevancy and admissibility of evidence, including such questions as probative value and undue prejudice. (*Rodriguez, supra,* 20 Cal.4th at p. 9.) Such a discretionary ruling on the relevancy of evidence will not be reversed unless an abuse of discretion can be shown. (*People v. Rowland* (1992) 4 Cal.4th 238, 264.)

Evidence of tattoos and gang membership may be admissible at trial when relevant to the issues, which may include identity, motive or intent. (*People v. Ochoa* (2001) 26 Cal.4th 398, 438 [tattoo evidence represented "admission of defendant's conduct and a manifestation of his consciousness of guilt"]; *People v. Williams* (1997) 16 Cal.4th 153, 193 [gang evidence relevant to motive or identity]; *Champion, supra*, 9 Cal.4th at p. 922 [gang

evidence relevant to identity]; see *People v. Lindberg* (2008) 45 Cal.4th 1, 45-47 [expert testimony on White supremacist groups relevant to establish defendant's state of mind and special circumstance].)

While Evidence Code section 352 allows a trial court to exclude evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time or create substantial danger of undue prejudice, confuse the issues, or mislead the jury, "prejudicial" in this context is not synonymous with "damaging." (*People v. Coddington* (2000) 23 Cal.4th 529, 588.) Instead, "undue prejudice" involves the admission of "evidence which uniquely tends to evoke an emotional bias against the defendant as an individual *and which has very little effect on the issues*." (*People v. Gionis* (1995) 9 Cal.4th 1196, 1214, quoting *People v. Karis* (1988) 46 Cal.3d 612, 638; emphasis in original.) Ultimately, the court's exercise of discretion should not be disturbed on appeal unless the prejudicial effect of the evidence clearly outweighs its probative value. (*People v. Heard* (2003) 31 Cal.4th 946, 976; *People v. Price* (1991) 1 Cal.4th 324, 441.)

Here, the evidence of appellant's tattoos and the gang evidence were relevant and properly admitted, in the trial court's discretion. The evidence was relevant to show appellant's intent and motive in committing the crimes against Epperson, as the trial court stated. (See, e.g., 23RT 3286 [tattoos show "an animosity toward people that are not White"].) The prosecution had to show the requisite intents for mayhem, torture, rape, and murder, as set forth in Arguments I, II, III, and IV, *ante*. As the guilt phase trial evidence showed, Epperson, a White woman, had been in a romantic relationship with Sims, an African-American man, and the two remained friends, with the possibility or likelihood that they would resume their romantic relationship. (8RT 1016, 1023, 1042-1043.) Appellant, who wanted to have a relationship with Epperson, did not like Sims, told Todd

he would kill that "nigger" if he kept trying to see Epperson, and in late October 2000, said no one would have Epperson if he could not. (9RT 1155-1156, 1161.) Appellant had engaged in "intimidation tactics" with Sims at the Weingart, calling him a "punk mother fucker" and making a show of trying to charge him. (8RT 1049.) On the day he murdered Epperson, appellant watched Epperson and Sims talk outside the church and paced up and down the street and had also taken Epperson to buy a new Bible, presumably a replacement Bible for Sims, who had just lost his. (8RT 1046-1047; 13RT 1821-1822.) The evidence further showed appellant had savagely beaten and murdered Epperson and caused mayhem, tortured her, and forcibly raped her. (See Arguments I, II, III, and IV, *ante*.) It could readily be inferred that appellant was incensed at his lack of success in having a relationship with Epperson, at the fact she had had a relationship with Sims, an African-American man, and at the fact that Epperson was still friendly with that same African-American man. Appellant's tattoos and the White supremacist gang evidence were relevant to show the savage nature of the crimes was motivated at least in part by racial animus and also to prove, for example, appellant's intent to torture the victim for rejecting him in favor of an African-American man. (See *Williams, supra*, 16 Cal.4th at p. 193 [gang evidence relevant to motive or identity]; see also *Lindberg, supra*, 45 Cal.4th at p. 45 [expert evidence on White supremacist groups relevant to establish defendant's state of mind].)

Likewise, in the second penalty phase, the evidence was relevant to show appellant's intent and motive. Notably, as the prosecutor stated at the new trial motion, the more extensive evidence of appellant's tattoos and gang evidence did not come in during the second penalty phase. (38RT 5934-5935, 5937.) Evidence from Todd that appellant told him in 2000 that he was in a White gang and from Sims that he avoided appellant because of his tattoos was properly admitted. (31RT 4624-4625; 32RT

4728-4729.) As the trial court stated, the evidence was relevant since a racial animus against African[]Americans "goes to the motivation and explosive nature of [appellant's] conduct at the time of the crime." (28RT 4166.)

Moreover, even considering appellant's testimony that he hit Epperson after she received a call from another person and even assuming that caller was not Sims (see AOB 120), the tattoo and gang evidence was still relevant to appellant's intent and motive. It could still be inferred that appellant bore ill feelings about Epperson having had a romantic relationship with an African-American man and the potential that the relationship might resume, given Todd's guilt phase testimony about the racial epithet appellant used to describe Sims, appellant's attempt to intimidate Sims at the Weingart, and appellant's monitoring of Epperson and Sims on the day of her murder. A racial animus could have been festering and still been the impetus and demonstrated appellant's intent for the crimes.

Even assuming the evidence of appellant's tattoos and the gang evidence should not have been admitted, any such error was harmless. A judgment should not be reversed for erroneous admission of evidence unless the error resulted in a miscarriage of justice. (*People v. Earp* (1999) 20 Cal.4th 826, 878.) A "miscarriage of justice" should be declared only when the reviewing court, after an examination of the entire record, is of the opinion that it is reasonably probable that a result more favorable to the defendant would have been reached in the absence of the alleged error. (Cal. Const., art. VI, § 13; Evid. Code, § 353, subd. (b); *Earp, supra,* at p. 878; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

Excluding the evidence of the tattoos and gang evidence, the prosecution's case was still extremely strong and a different result would not have obtained. Appellant's racially-based intent and motive still could

have been proven by other evidence in the record, including, as set forth above, Todd's testimony that appellant used a racial epithet to describe Sims, appellant's attempt to intimidate Sims at the Weingart, and appellant's monitoring of Epperson and Sims on the day of her murder. Moreover, motive need not even be proven by the prosecution and is not an element of the crime. (12CT 251; 14RT 1990-1991; CALJIC No. 2.51.)

Furthermore, in the context of the case, evidence of appellant's tattoos and the gang evidence was but a discrete piece of the overwhelming evidence in this case showing appellant's guilt for the charged crimes. (See Arguments I, II, III, and IV, *ante*.) Indeed, the prosecutor did not mention the tattoos or gang evidence in her opening or rebuttal argument at the guilt phase (13RT 1854-1884, 1947-1960) or in her argument at the second penalty phase (37RT 5657-5695). Defense counsel did not mention the tattoos or gang evidence in his closing argument at the guilt phase (13RT 1886-1946), and only briefly mentioned appellant's tattoos in his second penalty phase argument (37RT 5759-5760). In addition, as to the penalty phase verdict, the tattoo and gang evidence was hardly inflammatory or prejudicial compared to appellant's savage and cruel killing of the victim and his history of violence toward women. Appellant cannot possibly show he would have obtained more favorable verdicts but for the alleged error.

3. Appellant's Has Forfeited His Prosecutorial Misconduct Claims by Failing to Object on Those Grounds, and In any Event, No Prosecutorial Misconduct Occurred

Appellant's claim that the prosecutor committed misconduct by eliciting testimony about his alleged racism and gang membership has been forfeited. (AOB 147-153.) A defendant cannot complain on appeal that the prosecutor's misconduct at trial unless he timely objects on grounds of prosecutorial misconduct and requests the jury be admonished to disregard the impropriety. (*Gionis, supra,* 9 Cal.4th at p. 1215; *People v. Erickson*

(1997) 57 Cal.App.4th 1391, 1403.) An exception lies where a timely objection and/or request for admonition would be futile, or if an admonition would not have cured the harm caused by the misconduct. (*People v. Hill* (1998) 17 Cal.4th 800, 820-821.) Given the failure to timely object on the ground of prosecutorial misconduct and request an admonition, the claims have been forfeited. (See 8RT 1048-1049 [relevancy objection only]; 11RT 1545 [collateral, cumulative, and inflammatory objections]; 23RT 3268-3269, 3279-3280 [inadequate foundation objection]; 24RT 3363-3364 [collateral and unnecessary objection]; 28RT 4163-4164 [speculation objection]; 31RT 4598-4600 [relevancy and prejudice objection]; 31RT 4624-4625 [relevancy objection only]; 32RT 4728-4729 [relevancy and speculation objection].)

Even assuming the claim has not been forfeited, the claim is without merit. Under the federal Constitution, a prosecutor commits misconduct only when his or her behavior "comprises a pattern of conduct so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process." (*Hill, supra*, 17 Cal.4th at p. 819.) Under state law, a prosecutor commits misconduct by using deceptive or reprehensible methods to persuade either the court or jury, even if such actions did not render the trial fundamentally unfair. (*Ibid.*) Indeed, a prosecutor has a duty to prosecute vigorously, is afforded wide latitude in arguing the case, and may make fair comment on the evidence, including reasonable inferences and deductions to be drawn therefrom. (*People v. Valencia* (2008) 43 Cal.4th 268, 284; *People v. Dickey* (2005) 35 Cal.4th 884, 915.)

In the instant case, the prosecutor did not commit misconduct. Appellant makes much of the supposed manner in which the prosecutor questioned Sims about how he felt being watched by appellant as he talked to Epperson outside the church on the day appellant murdered her. Appellant assigns blame to the prosecutor's repeated questions in this area,

which he claims caused Sims to state he felt intimidated because appellant was a White supremacist. (AOB 148-150.) The record belies any claim that the prosecutor committed misconduct in the questioning of Sims. The record shows the prosecutor was merely questioning Sims about his contacts with appellant before Epperson's murder and was not eliciting any statement about appellant's White supremacist beliefs. Sims testified appellant had previously called him a "punk m.f." and looked like he was going to charge towards him at the Weingart. The prosecutor then asked how Sims felt when appellant was watching him outside the church. (8RT 1049-1050.) Over a defense relevancy objection, Sims testified he felt intimidated and added, without prompting from the prosecutor, that he "knew that [appellant] was like White supremacist." (8RT 1049-1050.) Appellant acknowledges in his brief that the "White supremacist" statement was "volunteered" and "blurted out" by Sims, but still curiously claims prosecutorial misconduct for supposedly eliciting this statement. (AOB 148, 150.) It is apparent from the record that the prosecutor did not attempt to elicit this statement, which was stricken by the court. The jury was also admonished to disregard it. (8RT 1050.) Indeed, the prosecutor did not pursue this line of questioning, but went on to ask about Sims' later activities, how he tried to contact Epperson, and how Sims had the police summoned to the Ballington to discover Epperson's body. (8RT 1050-1061.) Moreover, there is no indication the prosecutor was aware that Sims might make the "White supremacist" statement; Sims did not make such a statement when he testified about the incident at the grand jury. (See, e.g., 2CT 276 ["he called me a punk m.f."].) No misconduct occurred. (*People v. Kennedy* (2005) 36 Cal.4th 595, 618-619 [no prosecutorial misconduct for introducing a photograph of defendant's gang and swastika tattoos and eliciting testimony about defendant's gang affiliation].)

Moreover, appellant's claim that the trial court compounded the prosecutorial misconduct by claiming the defense invited the evidence is without merit. (AOB 153-156.) As the trial court stated, the defense, on cross-examination, challenged Sims' direct examination testimony that he stayed away from appellant. Indeed, at the very outset of cross-examination, defense counsel intimated in his questioning that it was odd that Sims had "never talked to [appellant] once" even though they both lived at the Weingart at the same time for two years. (8RT 1061-1062; see 24RT 3364-3365 [trial court states it seemed "awfully strange" that appellant and Sims had not talked in two years at the Weingart].) In this manner, defense counsel raised the issue of why Sims avoided appellant, an issue different from the prosecutor's direct examination questioning of how Sims felt when appellant taunted him. The trial court stated it had initially disallowed the White supremacist evidence but found it was made relevant because "the defense has gone into the fact that the witness [Sims], who was African[]American, was basically staying away from the defendant and they went into it . . . . " (9RT 1166; see Evid. Code, § 356; *People v. Vines* (2011) 51 Cal.4th 830, 861 [in applying Evidence Code section 356, narrow lines are not drawn around the exact subject of the inquiry]; *People v. Samuels* (2005) 36 Cal.4th 96, 130 [purpose of rule of completeness is to "avoid creating a misleading impression"].) Also, notably, defense counsel did not object to the trial court's summary of the proceedings. (9RT 1166; see 8RT 1061-1067.) During the defense case, the trial court again reiterated that the defense had raised the issue of why Sims was not responsive to appellant and had "made it look like Mr. Sims was avoiding your client unfairly, that he was unfriendly and aloof" when in fact it appeared Sims recognized appellant "did not like African Americans." (11RT 1545-1546.) The trial court properly allowed the evidence.

Further, even assuming prosecutorial misconduct occurred, reversal is not warranted. Prosecutorial misconduct is cause for reversal only when it is reasonably probable that a result more favorable to the defendant would have occurred had the district attorney not committed the misconduct. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1133; *People v. Clark* (1993) 5 Cal.4th 950, 1009; *Watson, supra*, 46 Cal.2d at p. 836.) As set forth above, without evidence of the tattoos and gang evidence, the prosecution was still able to present evidence of racial animus from Todd's testimony about appellant's use of a racial epithet to describe Sims, appellant's attempt to intimidate Sims at the Weingart, and appellant's monitoring of Epperson and Sims on the day of her murder. Also, the prosecutor did not mention the tattoos or gang evidence in her opening or rebuttal argument at the guilt phase (13RT 1854-1884, 1947-1960) or in her argument at the second penalty phase (37RT 5657-5695). Moreover, as demonstrated above, the prosecution's case was still extremely strong and a different result would not have obtained. The claim must fail.

V-B. THE JURY VERDICT FINDING APPELLANT SANE SHOULD BE UPHELD

Appellant contends the verdict finding him sane must be reversed because the evidence of insanity was of such weight and quality that a jury could not reasonably reject it. He claims no rational trier of fact could have concluded he failed to prove insanity by a preponderance of the evidence. (AOB 173-216.) He claims his sanity phase evidence showed a lifetime of brain damage or dysfunction and multiple diagnoses of major mental illness, as shown by abnormal EEGs, abnormal brain function test results, and high dosages of psychiatric medications. (AOB 173, 175-190, 198-200.) Appellant further claims the prosecution did not dispute the defense evidence, but merely urged the evidence was not illustrative of brain dysfunction or mental illness, and that the prosecution's evidence only

showed appellant malingered and suffered from an anti-social personality disorder. (AOB 173-175, 190-196, 200-212.) The jury verdict finding appellant sane should be upheld.

A. Background

In the sanity phase, appellant presented evidence from four doctors, Drs. Kyle Boone, Roger Bertoldi, Saul Niedorf, and William Vicary, while the prosecution presented evidence from two doctors, Drs. David Griesemer and Kris Mohandie. For ease of reference, the doctors' most salient testimony is summarized here, but a fuller recitation of their testimony may be found in the Statement of Facts.

1. Defense Evidence

a. Dr. Kyle Boone

Dr. Kyle Boone, a clinical neuropsychologist, testified appellant's executive or problem-solving skills, reasoning, and logic were very impaired and that tests suggested appellant had some kind of brain damage or dysfunction. (15RT 2137, 2144, 2148, 2159-2160.) Dr. Boone interviewed appellant in jail and gave him objective standardized tests over a period of about three to four hours. (15RT 2137, 2139-2140, 2159, 2163.) The tests were not related to a review of the crime reports. (15RT 2140.)

Appellant's overall IQ was 90, which was within the average range. (15RT 2141.) With respect to appellant's basic attention, thinking or mental speed, language, visual and spacial skills, verbal memory, nonverbal memory, reading level, math level, and executive or problem-solving skills, appellant did well on most every domain, except in the area of executive or problem-solving skills, reasoning, and logic, which were "very low, very impaired." (15RT 2143-2144, 2148.)

Executive or problem-solving skills relate to the ability to face a problem situation, think of different strategies, and figure out the best one. The skills also relate to thinking through consequences of behavior, being able to stop a behavior that is not correct or appropriate, being able to generate alternative solutions, and the ability to use logic. (15RT 2148.) Dr. Boone administered six tests in the area of executive or problem-solving skills, and appellant was very low on five of six tests. (15RT 2161-2162.) A consistent pattern of low scores on the six tests "suggests" brain damage or dysfunction in the frontal lobes and that appellant would have trouble making appropriate decisions. (15RT 2158-2160, 2161-2162.) Also, the "highest violence scored in aggression scores are in the patients who have damage to the frontal lobes." (15RT 2159-2160.) The frontal lobes seem to inhibit violent behavior, so if the frontal lobes are not working, violent behavior is enabled. (15RT 2160-2161.) However, Dr. Boone's tests did not measure brain function directly but measured thinking skills. (15RT 2172.)

b. Dr. Roger Bertoldi

Dr. Roger Bertoldi, a neurologist and clinical neuropsychologist, opined that appellant had brain dysfunction, which was consistent with episodic loss of control and temporal lobe epilepsy. (16RT 2219, 2233, 2265-2266, 2281.) He reviewed appellant's neurological records, had an EEG performed on appellant in jail, evaluated a QEEG of appellant's EEG results, and interviewed and examined appellant in jail. (16RT 2233, 2245-2247, 2253, 2261-2262.)

Dr. Bertoldi reviewed appellant's neurological records. (16RT 2233.) Appellant's records from 1970 showed he had two focal seizures when he was two years old and that he had abnormal EEG activity in the left portion of his brain. (16RT 2234-2235, 2237, 2242.) Appellant's records showed he had a "true seizure disorder," and he was put on phenobarbital. (16RT

2239.) In 1976, when appellant was eight years old, he had another EEG, which suggested he had an underlying seizure disorder as a young boy and correlated with "true epilepsy" with a high degree of probability. Appellant had abnormal frontal bilateral brain activity. (16RT 2240, 2243, 2252.) Dr. Bertoldi acknowledged the only seizures appellant complained of in any record were the ones when he was two and eight years old, but those were about 30 years ago. (16RT 2274-2275.) Since that time, there had been no documentation of complaints or seizures. (16RT 2275.)

A 2004 EEG, taken while appellant was in jail, showed a couple abnormalities, including that the brain's frontal portion showed too much slow activity. The slowing was in the same area as when he was a child. (16RT 2247-2250.) The EEG showed paroxysmal activity which was consistent with interictal activity, meaning that the activity occurred between seizures. (16RT 2251-2252, 2278.) Dr. Bertoldi acknowledged such slowing can be caused by drowsiness and that some medications also cause slowing of the brainwaves. (16RT 2267-2268.) Although an imaging procedure could be recommended to rule out a tumor, stroke, or infection, Dr. Bertoldi did not order a CAT scan or MRI. (16RT 2266-2267.)

Dr. Bertoldi opined that the QEEG showed appellant had a frontal temporal brain dysfunction on the front and both sides of his brain. (16RT 2260-2261.) He also opined that the EEG and QEEG suggested appellant had epilepsy in the brain. (16RT 2262.)

Dr. Bertoldi learned that at various times appellant took Depakote, an anti-epileptic drug. Appellant said that before each violent episode, he stopped taking Depakote. If appellant stopped taking Depakote, the epileptic focus would no longer be suppressed and was free to spread limbically, deeper into the brain. (16RT 2262.)

On April 16, 2004, Dr. Bertoldi interviewed and examined appellant in jail. Dr. Bertoldi reviewed all charts he received on appellant. (16RT 2245-2246.) Appellant told Dr. Bertoldi that about twice a year he woke up in the morning and noticed his cheek had been bitten, and when he went to sleep and during sleep, he jerked or suddenly flung his leg or arm. (16RT 2246.) A person could have a night seizure and bite his tongue or cheek. (16RT 2246-2247.)

Dr. Bertoldi opined that appellant had brain dysfunction, based on his consideration of appellant's abnormal EEGs with spike and wave discharges as a young boy, his history of Jacksonian seizures, his physical examination and records, and the 2004 abnormal EEG and QEEG which showed frontal temporal slowing, paroxysmal temporal slowing, and interictal activity probably from a seizure disorder. (16RT 2265, 2281.) The brain dysfunction was frontal temporal on both sides, showing the brain was not functioning properly. The dysfunction was consistent with episodic loss of control and temporal lobe epilepsy. The paroxysmal activity in the theta frequency range was more specific for temporal lobe epilepsy, whereas the computer data was more consistent with diffuse brain dysfunction anteriorly. (16RT 2229-2230, 2265.) It was common for appellant's type of problem to spread into the limbic system, and if the brain abnormality spread into the limbic system, extremely violent, primitive rage could occur. (16RT 2266.)

Dr. Bertoldi opined that a paroxysmal episode contributed to appellant's acts of violence against women. Dr. Bertoldi also opined that, when appellant attacked his mother, hit his sister on the head with a lead pipe, and attacked Colletta, it was medically probable a paroxysmal discharge was contributory to some degree. (16RT 2281-2283.) However, Dr. Bertoldi did not believe a paroxysmal discharge caused the Betsy M. situation, but aspects of the situation might have been. (16RT 2285-2286.)

c. Dr. Saul Niedorf

Dr. Saul Niedorf, a child, adult, and forensic psychiatrist, opined that appellant suffered from and still suffered from IED, a condition usually linked to brain, familial, and social dysfunction and characterized by actions which can come on suddenly without warning and are not inhibited. A typical normal person has controls to stop actions. (16RT 2323-2325; 17RT 2327-2328.) On the sanity issue, Dr. Niedorf opined that appellant did not know the nature and quality of his act and could not distinguish right from wrong at the time of the crimes. (17RT 2350-2351, 2356, 2398.) Dr. Niedorf interviewed appellant in jail on three occasions and reviewed numerous records. (16RT 2323-2325.)

Dr. Niedorf's DSM Axis I diagnosis was IED, the sudden onset of an aggressive violence in which inhibitions or a cutoff were lacking. (17RT 2331, 2328-2329, 2374.) However, the DSM had nothing to say about the etiology of disorders. (17RT 2331, 2374.) Dr. Niedorf's IED diagnosis was based on appellant's childhood medical and family history, medical reports, suicide attempts as a child and adolescent, history of medication, and his choice of relationships, style of relating, chosen work, and behavioral qualities. (17RT 2333-2345, 2346-2350, 2392.)

The IED includes rash, sudden, impulsive actions, usually with little provocation. (17RT 2371.) Dr. Niedorf opined that, when appellant murdered Epperson, appellant was acting under an uncontrollable and irresistible episode of IED. (17RT 2372.) Dr. Niedorf acknowledged there were preceding events, so it was not sudden; there was a buildup of tension and suspicion. Dr. Niedorf did not believe appellant's intention was to kill initially, but to hurt and punish. (17RT 2372.) Even though a person may have IED, a person may, at times when IED is not occurring, know exactly what he is doing. (17RT 2400.) The assaults in this case had to do with appellant's programming by a brutal father, genetics from that same father,

the brain injury, and brain problems he had as an infant, toddler, child, and adolescent. The brain syndromes were treated and improved his behavior, but he continued to have that same injured brain. (17RT 2374-2375.) Dr. Niedorf acknowledged appellant may also have had anti-social personality disorder, an Axis II secondary diagnosis. (17RT 2331-2332, 2383.)

With respect to the sanity issue, assuming the truth of the crime reports, that appellant went into a rage upon learning Epperson rejected him, that he committed horrible violence on her, and that he engaged in unpermitted sex, Dr. Niedorf opined that appellant did not know the nature and quality of his act and could not distinguish right from wrong at the time he committed the crimes. Dr. Niedorf opined that appellant was in an altered state of consciousness. (17RT 2350-2351, 2356, 2398.) Appellant could not distinguish right from wrong at the time of the crimes, because the area of the frontal lobes and the temporal lobes that initiate good behaviors or stop bad behaviors was not working. The lobes were damaged and disconnected, and appellant did not have the medicine to help them work. (17RT 2356-2357.)

In Dr. Niedorf's opinion, appellant was insane during the commission of the crime because he had a mental illness or defect that led to these behaviors and did not have an intentional or voluntary consciousness. (17RT 2358.) At the time of the crime, appellant was not able to answer questions and able to deliberate, formulate, and claim his statements; he was all action. (17RT 2360.)

d. Dr. William Vicary

Dr. William Vicary, another psychiatrist, evaluated appellant for competency to stand trial in 1993 for the crimes against Colletta and for the instant case in 2004. (18RT 2469-2470, 2472-2473, 2533-2534, 2571.) Dr. Vicary opined that appellant suffered from bipolar disorder. (18RT 2475, 2481-2482.) With respect to the sanity issue, Dr. Vicary opined that

appellant knew and understood the nature and quality of his actions during the time he was with Epperson in her apartment, but appellant was not able to distinguish right from wrong at the time of the commission of the crime. (18RT 2488-2490.)

In 1993, Dr. Vicary found appellant incompetent to stand trial for the Colletta crimes, but Drs. Markman and Sharma found him to be competent, that he was malingering, that his acts were entirely volitional, and that he was able to cooperate with his lawyer but chose not to. (18RT 2472-2473, 2532-2534, 2571.) Appellant was sent to Patton State Hospital and found to be not competent to stand trial. (18RT 2473.)

After his admission to Patton, Dr. Michael P. Maloney wrote a report in March 1994 regarding appellant's competency and said appellant was a questionable historian because there were discrepancies in what he related, which Dr. Vicary found as well. (18RT 2542-2543.) Dr. Maloney said appellant's thinking process was logical and intact, he had no impairment in reality testing, he was not significantly depressed, nothing showed he could not cooperate with his attorney, and appellant's behavior was purely volitional rather than a manifestation of a mental illness. (18RT 2543.) The Patton treatment team subsequently, on June 20, 1994, stated that it appeared appellant was not suffering from any major mental disorder, that he be returned to court, and that any attempts to disrupt court proceedings were volitional. (18RT 2547.) In July 1994, Dr. Vicary examined appellant and found him competent to stand trial. Appellant was sent back to court. (18RT 2473.)

On April 29, 1997, at Atascadero State Hospital, appellant's admission diagnosis was schizo-affective disorder, bipolar type, characterized by hallucinations and hearing voices. (18RT 2553.) In a June 6, 1998 report, Dr. Osran concluded appellant did not have a severe mental disorder and appeared to know that hearing voices was the product of his own cognition,

rather than a true hallucination in which an individual has no insight into reality. (18RT 2554-2556.) When appellant was in prison, virtually all his time was spent in psychiatric units. Doctors evaluated him, and the majority found he had a major psychiatric disorder and treated him with "heroic" doses of very powerful toxic medications. (18RT 2573-2574.)

Beginning June 2003, Dr. Vicary saw appellant on five or six separate occasions in jail for a total period of about 10 hours and interviewed him. (18RT 2472.) Dr. Vicary opined that appellant suffered from a major mental disorder, the "most likely diagnosis" being the same diagnosis he made in 1993, bipolar disorder. (18RT 2475, 2481-2482.) Dr. Vicary's opinion was based on prison, state hospital, and jail records, which described appellant with terms including depression, bipolar, manic-depression, and psychosis. (18RT 2484.)

Dr. Vicary did not agree with Dr. Niedorf's diagnosis that appellant suffered from IED; Dr. Vicary opined that appellant could have both IED and bipolar disorder. The scientific literature indicated that 40 to 50 percent of people with IED also have bipolar disorder. (18RT 2477.) Different mental health professionals sometimes have different diagnoses. (18RT 2475.)

Dr. Vicary testified the vast majority of treating and evaluating doctors had concluded appellant suffered from a genuine major mental disorder, which was treated with massive doses of dangerous anti-psychotic, mood-stabilizing, antidepressant medications. (18RT 2530.) If Dr. Vicary gave a person the medication that appellant was taking currently in jail, this person would be in a coma for three days. (18RT 2479.) The minority opinion was that appellant was basically just an anti-social person who became angry at times. (18RT 2484, 2529.) Dr. Vicary testified that one could have a major mental disorder and a lesser disorder, which includes personality disorders. (18RT 2478.)

With respect to sanity, based on his interview of appellant and record review, Dr. Vicary opined that appellant knew the nature and quality of his act at the time he was acting with respect to Epperson in her apartment. (18RT 2488.) Dr. Vicary had interviewed appellant about his life and this case, had looked at the crime reports, had read appellant's testimony in this case, and knew the jury had found appellant guilty of first degree murder with special circumstances of rape, torture, and mayhem. (18RT 2487-2488.) Dr. Vicary's opinion was based on appellant's own statements to the police and witnesses that he realized he was hitting Epperson and to at least one witness that he had struck her with various items. (18RT 2489.) In Dr. Vicary's opinion, appellant understood the nature and quality of his act because he realized he was striking Epperson with his fists and objects and that this could cause, given his large size and her small size, grave bodily injury or death. It was "inconceivable that he did not have at some level some understanding that this attack could be fatal." (18RT 2489.) The fact appellant testified and also made a statement to the police that he remembered hitting Epperson but did not remember anything else showed, in Dr. Vicary's opinion, that appellant had an explosive outburst, was not thinking clearly, and remembered some things but not others. There was enough of what appellant remembered and admitted to remembering for Dr. Vicary to conclude that appellant had "at least some basic understanding of what he was doing and the consequences of his acts." (18RT 2490.)

Dr. Vicary testified that reasonable doctors could arrive at different conclusions about whether appellant knew the nature and quality of his act and knew that Dr. Niedorf had testified that appellant did not know or understand the nature and quality of his act. (18RT 2489-2490, 2524.) Dr. Vicary testified it was a close case on the issue of legal insanity. (18RT 2524.)

Dr. Vicary further opined that appellant was not able to distinguish right from wrong at the time of the commission of the crime. (18RT 2490.) When appellant attacked the victim, he had an explosive outburst and was in an agitated, explosive, psychotic episode. (18RT 2491-2492.) Even assuming the jury found a rape occurred, that finding did not necessarily show appellant knew the difference between right and wrong. The finding only proved he knew enough to beat her to death and rape her but if he was in a psychotic, agitated frenzy it did not answer the question whether he knew what he was doing was wrongful. (18RT 2513.)

When read a portion of appellant's testimony that from "all signs" it looked like he killed Epperson, Dr. Vicary opined that testimony was consistent with someone trying to get out of something, because after the explosive episode, appellant calmed down somewhat and realized what he had done. Dr. Vicary thought appellant was shocked and did not intend to commit the crimes. (18RT 2495, 2521.) When appellant testified, he had a grasp of right and wrong, but at the time of the killing in the middle of a bipolar episode, appellant would not have that grasp. (18RT 2497.) Appellant was only in a psychotic state, an altered mental state, while killing the victim. (18RT 2515.)

In his September 4, 2003 report, Dr. Vicary stated appellant would qualify as having been legally insane at the time of the offense. (18RT 2564.) He stated appellant's appreciation of the wrongfulness of his acts at the time of the offense was compromised by his paranoia and psychotic agitation. (18RT 2566.) Also, the report stated appellant did appear to have had some awareness of the nature and consequences of his acts. At trial, Dr. Vicary testified appellant knew the nature and consequences of his act and that he lied about not knowing. Dr. Vicary said he changed his opinion from the report because he had become "more conservative" and had more data since preparing the initial report. (18RT 2523-2524.) Dr.

Vicary did not go to the crime scene, was not given the grand jury testimony of the blood spatter expert or coroner, and did not review the interview tape of appellant or Vannoy. There was not an unlimited amount of money for Dr. Vicary to evaluate all the information when rendering his decision on whether appellant knew right from wrong. (18RT 2544-2545.) Dr. Vicary acknowledged that whether appellant knew right from wrong at the time of his explosion was "properly in the hands of the jury because it's not a scientific medical decision, it's a moral social policy question." (18RT 2496-2497, 2519.)

2. Prosecution Evidence

a. Dr. David Griesemer

Dr. David Griesemer, a neurologist and neurophysiologist, did not find anything indicating appellant had a tendency to have epilepsy as an adult or had significant frontal lobe slowing. (16RT 2296-2298, 2307.) Dr. Griesemer interviewed appellant in jail, reviewed his medical neurological history, went over some cognitive skills with appellant, and conducted a simple neurological examination of his head, neck, arms, and legs. (16RT 2297-2298.)

Appellant told Dr. Griesemer he did not recall having had seizures as a child, although he remembered taking medication when he was young, up until about age eight. He also said from time to time doctors might put him back on Dilantin for a short while when they heard of his epileptic history but that he did not continue on anti-convulsant medication. He also indicated he had no recollection of having had seizures of any type since age eight. (16RT 2298.) Appellant demonstrated the scars where he had twice attempted suicide. (16RT 2310.)

Dr. Griesemer reviewed appellant's prison and jail medical records. (16RT 2298-2299.) In all those records, there was no documentation of any

epileptic seizure since childhood. (16RT 2299.) Appellant had been given anti-psychotic medication, which tends to lower the seizure threshold and make seizures more likely to happen. (16RT 2310-2311.)

Dr. Griesemer reviewed appellant's EEG reports from 1970 and 1976. (16RT 2299.) Dr. Griesemer opined that one could conclude appellant had at least two seizure events in childhood that were focal in origin arising from the right side of the brain, which required medication management at the time. (16RT 2300.) Appellant's EEG reports from childhood showed abnormal epileptic discharges from the brain's left and right side. In the 1976 EEG study, there almost seemed to be a disconnect between how dramatically abnormal the EEG was and how well appellant was doing clinically. The phenobarbital was discontinued, and appellant remained seizure free after that. This pattern is not inconsistent with some benign epilepsies. (16RT 2300-2301, 2307-2308.) About half of childhood seizures will go away, because the brain begins to stabilize in terms of its chemical function and some of the inherited vulnerabilities during childhood are absent in adulthood. (16RT 2302.)

Dr. Griesemer looked at appellant's most recent EEG and saw some theta activity, which Dr. Bertoldi had also seen. However, they drew different conclusions about the theta activity. Dr. Bertoldi assumed that was a marker for some deep epileptic focus, and Dr. Griesemer did not make that assumption. Dr. Griesemer stated that the theta activity was abnormal and subtle, which showed simply episodic or intermittent slowing, but was not an epileptic discharge. (16RT 2302-2303, 2312.) Dr. Bertoldi did not testify epileptic discharges were present on the most recent EEG. (16RT 2314.) Dr. Griesemer did not find anything that indicated a tendency to have epilepsy, found nothing that indicated a significant frontal lobe slowing, and found nothing to encourage him to look further diagnostically at appellant. (16RT 2307.)

QEEGs are not used in the diagnostic EEG laboratory. (16RT 2303.) Dr. Griesemer testified it was not considered acceptable to use the QEEG findings as the basis for a diagnosis, and the American Academy of Neurology had discouraged the use of QEEGs for diagnostic purposes. (16RT 2304, 2315.) The QEEG is of limited utility in behavioral diagnosis, because it is well accepted that there is no direct correspondence between neurophysiology and behavior. (16RT 2304-2305, 2315.)

b. Dr. Kris Mohandie

Dr. Kris Mohandie, a psychologist, opined that appellant was sane. His diagnosis was that appellant had an anti-social personality disorder with narcissistic and borderline traits and secondarily, malingering. (18RT 2591-2594, 2605, 2608, 2614, 2651.)

Dr. Mohandie interviewed appellant three times, although he went to the jail five times to interview him. Twice, appellant refused to come out, later indicating he was not feeling well, and once, appellant cut the interview short. (18 RT 2594, 2598-2599.) Dr. Mohandie administered objective psychological testing to appellant, including the MMPI II and SIRS tests. (18RT 2599.) In addition, Dr. Mohandie reviewed medical records and psychiatric forensic reports of defense counsel's experts, looked at police reports and photographs, looked at videotapes of appellant's police interrogation interview and Vannoy's videotaped interview, reviewed some of the transcripts from appellant's trial testimony, and went to the crime scene. (18RT 2594-2595, 2598.)

Appellant's MMPI results showed an exaggerated symptom response, meaning that appellant endorsed more items of alleged problems than most psychiatric patients, which is called a "fake bad" response. Appellant had a score of 98, which was far above a typical significant finding of 70 and suggested he was extreme in responding. (18RT 2601.) Appellant's SIRS test results showed evidence of inaccurate or feigned responding on two

aspects, one was probably feigning and the other indicated feigning. Both tests supported that there were exaggerated reports of what was wrong with him. (18RT 2601.)

Dr. Mohandie's primary opinion was that appellant was sane. (18RT 2605, 2614.) His opinion was based on: appellant having been off his medications for six weeks prior to the murder without any objective evidence that he fell within the insanity definitions; appellant's interviews which showed he had a very specific recollection of all the events leading up to the exact moment of the homicide, including the number of AA meetings he had attended, all the conversations he had with Epperson, and his various actions; appellant's denial of any psychiatric symptoms such as hallucinations, false sensations, or delusional beliefs; appellant having engaged in a variety of goal-oriented and goal-directed functional behaviors to avoid detection; appellant's report of an unlikely state of amnesia for the exact moment when the homicide occurred until after he was taken into custody and had given damaging statements; and the objective psychological data obtained from the MMPI, which showed exaggerated symptoms reporting, and the SIRS results, which showed appellant was feigning different symptoms. (18RT 2605-2607.) The type of amnesia appellant claimed was malingering amnesia, or faked amnesia, according to the DSM IV. (18RT 2607.)

Dr. Mohandie's diagnosis for appellant was anti-social personality disorder with narcissistic and borderline traits and secondarily, malingering. (18RT 2608, 2651.) All seven diagnostic criteria for anti-social personality disorder fit appellant: failure to conform to social norms with respect to lawful behavior as indicated by repeatedly performing acts that are grounds for arrest, which was shown by appellant's number of arrests and convictions for acts of violence; deceitfulness as indicated by repeated lying, use of aliases or conning others for personal profit or pleasure, which

was shown by appellant manipulating things for more favorable treatment in hospitals and the prison or judicial system; impulsivity or failure to plan ahead, which was shown by appellant's own acknowledgement and history of being very impulsive with having angry impulses; irritability and aggressiveness as indicated by repeated physical fights or assaults, which was supported by substantial evidence; reckless disregard for safety of self and others, which was supported by substantial information; consistent irresponsibility as indicated by repeated failures to sustain consistent work behavior or honor financial obligations, which was shown when appellant wanted to leave his job out of frustration; and lack of remorse as indicated by being indifferent to or rationalizing having hurt, mistreated or stolen from another, which was shown by appellant having had no true empathy for Epperson or the other two women who testified in the courtroom. (18RT 2609-2611.)

Dr. Mohandie believed there was a sexual component to the crime because appellant raped the victim after or during commission of the beating, was able to maintain an erection while doing that, and reportedly was able to even do that in the past, which suggested "some element of a turn on for that for him." (18RT 2649.) During his interview with Dr. Mohandie, appellant said the last time he had sex with Epperson was the day before and explained that was why he was so angry about her being on the telephone with another man. However, appellant testified at trial that he had had consensual sex with Epperson just before he killed her. (18RT 2650.)

Even though some doctors diagnosed appellant with a major mental disorder, Dr. Mohandie's opinion was that those diagnoses were not reliably done. (18RT 2626, 2635-2636.) Dr. Mohandie did not find mental evidence that one could reliably label appellant with a mental illness because of his tendency to exaggerate symptoms for secondary gain over a

number of years. (18RT 2602, 2622, 2626, 2628, 2643, 2651.) In addition, since Dr. Mohandie found appellant could be labeled as having an anti-social personality disorder with narcissistic and borderline traits, appellant was an unreliable source of information about what might be wrong with him. (18RT 2602.) Appellant might or might not have a major mental illness. (18RT 2622.)

Dr. Mohandie disagreed with the testimony of the defense experts that appellant had a major mental disorder and that as a result he was incapable of knowing right from wrong at the time he committed this crime. (18RT 2601-2602.) Dr. Mohandie did not see evidence that appellant suffered from a bipolar disorder such that he was a danger to himself or others. (18RT 2595.) Also, appellant's behavior was not prototypical IED because appellant engaged in motivated behavior in the context of rejection and appellant's purposefulness was more than ordinarily expected in an IED situation. (18RT 2613-2614.)

A Patton State Hospital report dated June 7, 2002, stated appellant did not have a psychotic or major mood disorder. (18RT 2648-2649.) Dr. Mohandie's recollection of the records he reviewed was that there was a mixture of those that showed a variety of major mental disorders and those saying something else was going on. In any event, appellant was diagnosed with anti-social personality disorder in many reports. (18RT 2649.)

Even if appellant were on medication for a mental illness, one would still expect to see some evidence of the mental illness. When Dr. Mohandie interviewed appellant and reviewed appellant's police interview tape, he did not see any evidence of a major mental disorder. (18RT 2604.) A bipolar person can also qualify as having an anti-social personality disorder, so they are not necessarily mutually exclusive. (18RT 2611-2612.)

B. The Jury Verdict Finding Appellant Sane Should Be Upheld

In California, legal insanity "means that at the time the offense was committed, the defendant was incapable of knowing or understanding the nature of his act or of distinguishing right from wrong." (*People v. Hernandez* (2000) 22 Cal.4th 512, 520-521, citing § 25, subdivision (b)[19] and *Skinner, supra,* 39 Cal.3d at pp. 776–777.) This test for legal insanity is the rule in *M'Naghten's Case* (1843) 10 Clark & Fin. 200, 210, 8 Eng.Rep. 718, 722, as construed by this Court. (*Lawley, supra,* 27 Cal.4th at pp. 169-170; *Skinner, supra*, at pp. 776-777; *People v. Mejia-Lenares* (2006) 135 Cal.App.4th 1437, 1447.) The defendant has the burden to prove insanity by a preponderance of the evidence. (§ 25, subdivision (b); *Hernandez, supra,* at p. 521; *People v. Drew* (1978) 22 Cal.3d 333, 351.) A preponderance of the evidence means "evidence that has more convincing force than that opposed to it." (CALJIC No. 2.50.2; *People v. Mabini* (2001) 92 Cal.App.4th 654, 663.) Further, if the evidence is so evenly balanced that neither side of the evidence on the issue preponderates, the party with the burden of proof by a preponderance of the evidence has failed to carry its burden. (*Ibid.*)

In assessing the evidence, jurors may critically evaluate the experts' opinions, including the material the experts relied upon and the experts' reasoning. (See *Drew, supra,* 22 Cal.3d at pp. 350-351 [jury could reject psychiatric insanity opinion "on the ground that the psychiatrists did not

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[19] Section 25, subdivision (b) provides the accused must prove insanity "by a preponderance of the evidence that he or she was incapable of knowing or understanding the nature and quality of his or her act and of distinguishing right from wrong at the time of the commission of the offense." Although this section speaks in the conjunctive, the test for insanity is disjunctive. (*People v. Lawley* (2002) 27 Cal.4th 102, 169-170; *People v. Skinner* (1985) 39 Cal.3d 765, 769.)

present sufficient material and reasoning to justify that opinion"].) Indeed, jurors are "not automatically required to render a verdict which conforms to unanimous expert opinion as to a defendant's sanity." (*People v. Duckett* (1984) 162 Cal.App.3d 1115, 1119.)

> On appeal, the following standard of review applies:
>
> Because the burden was on the defense to show by a preponderance of the evidence that appellant was insane, before we can overturn trier of fact's finding to the contrary, we must find as a matter of law that the court could not reasonably reject the evidence of insanity.

(*People v. Skinner* (1986) 185 Cal.App.3d 1050, 1059; *People v. McCarthy* (1980) 110 Cal.App.3d 296, 300.) After listening to the testimony (see Statement of Facts, *ante*), the jury herein found appellant had not established by a preponderance of the evidence that he was not guilty by reason of insanity. On appeal, appellant improperly asks this Court to reevaluate the credibility of the witnesses and reweigh their testimony. The jury was entitled to give more weight to the prosecution's evidence that appellant was not legally insane at the time of the murder than to the opinion of appellant's mental health experts. (See, e.g., *Skinner*, *supra*, at p. 1060; see *Harris v. Vasquez* (9th Cir. 1991) 949 F.2d 1497, 1522 ["Differences in psychiatric opinions are evidence to be presented to the jury, which ultimately chooses among the opinions in finding the facts. Psychiatric opinions are not legal precedent that determine the guilt or innocence of the defendant."].) Ultimately, the jury's verdict must be upheld since appellant cannot show that, as a matter of law, the jury could not reasonably reject the evidence of insanity.

Only two of appellant's four witnesses, Drs. Niedorf and Vicary, testified that appellant was insane at the time of the commission of the crimes. The two doctors differed in their opinions about appellant's Axis I

diagnosis and the basis for an insanity opinion, and the jury could properly find the defense evidence was contradictory and insufficient to show insanity by a preponderance of the evidence. Dr. Niedorf diagnosed appellant as suffering from IED and testified that appellant was in an episode of IED, which was uncontrollable and irresistible, when he murdered Epperson. (17RT 2331, 2328-2329, 2372, 2374.) With respect to sanity, Dr. Niedorf opined that appellant did not know the nature and quality of his act and could not distinguish right from wrong at the time of the crimes, assuming the truth of the crime reports, that appellant went into a rage upon learning Epperson rejected him, that he committed horrible violence on her, and that he engaged in unpermitted sex. (17RT 2350-2351, 2356, 2398.) He testified appellant could not distinguish right from wrong, because the area of appellant's frontal lobes and the temporal lobes that initiate good behaviors or stop bad behaviors were damaged and disconnected, and appellant did not have the medicine to help the lobes work. (17RT 2356-2357.)

In contrast, Dr. Vicary opined that appellant suffered from bipolar disorder and disagreed with Dr. Niedorf that appellant suffered from IED. (18RT 2475, 2477, 2481-2482.) With respect to sanity, Dr. Vicary opined, also contrary to Dr. Niedorf, that appellant knew and understood the nature and quality of his actions during the crimes, because appellant realized that he was striking Epperson with his fists and other objects and that this could cause grave bodily injury or death, given his large size and her small size. Indeed, Dr. Vicary went so far as to opine that it was "inconceivable that he did not have at some level some understanding that this attack could be fatal." (18RT 2489.) Enough of what appellant remembered indicated to Dr. Vicary that appellant had "at least some basic understanding of what he was doing and the consequences of his acts." (18RT 2490.) Dr. Vicary did agree with Dr. Niedorf that appellant was not able to distinguish right from

wrong at the time of the crimes. (18RT 2488-2490.) Dr. Vicary testified that when appellant attacked Epperson, he had an explosive outburst and was in an agitated, explosive, psychotic episode. (18RT 2491-2492.) These differing opinions from appellant's own experts undercut the defense's case; Dr. Vicary, in fact, testified reasonable doctors could arrive at different conclusions about whether appellant knew the nature and quality of his act. (18RT 2475, 2489-2490, 2524.) Dr. Vicary also testified the issue of legal insanity was a "close case." (18RT 2524.) Indeed, even assuming Drs. Niedorf and Vicary were the only two doctors to testify about sanity and that the prosecution had not presented contrary sanity evidence, jurors are "not automatically required to render a verdict which conforms to unanimous expert opinion as to a defendant's sanity." (*Duckett, supra,* 162 Cal.App.3d at p. 1119.)

Moreover, the bases for and the reasoning of the doctors' opinions could have been found to be insufficient to support a preponderance of the evidence finding. Dr. Niedorf relied on interviews with appellant in jail and numerous records for his opinion that appellant suffered from IED and was insane at the time of the crimes. (See 16RT 2323-2325; 17RT 2333-2345, 2346-2350, 2392.) However, Dr. Niedorf did not question appellant about the facts of the Epperson murder, because he did not want appellant to "reject" him. (17RT 2350.) Dr. Vicary interviewed appellant in jail, reviewed numerous medical records, looked at crime reports, read appellant's testimony in this case, and knew the jury had found appellant guilty of first degree murder with special circumstances of rape, torture, and mayhem before he reached his opinions that appellant was bipolar and insane at the time of the crimes. (See 18RT 2472, 2484, 2487-2488.) However, Dr. Vicary acknowledged that he had not gone to the crime scene, was not given the grand jury testimony of the blood spatter expert or coroner, and did not review the interview tape of appellant or Vannoy.

(18RT 2544-2545.) Also, Dr. Vicary acknowledged his opinions had changed over time, after he had more data; for example, Dr. Vicary testified at trial that appellant knew the nature and consequences of his acts and lied about not knowing, but he had stated in his September 4, 2003 report that appellant only appeared to have had some awareness of the nature and consequences of his acts. (18RT 2523-2524, 2564, 2566.) The jury could have deemed that both doctors had an insufficient bases upon which to make their findings and that their reasoning, accordingly, was also flawed. (See *Drew, supra*, 22 Cal.3d at p. 351 [insufficient material and reasoning for insanity opinion].)

Indeed, the defense experts' opinions could have been discounted by the jury for other reasons as well. The jury's role was to determine whether insanity was shown by a preponderance of the evidence, and they were not bound merely by two defense experts who opined appellant was insane. As Dr. Vicary acknowledged, whether appellant knew right from wrong was "properly in the hands of the jury because it's not a scientific medical decision, it's a moral social policy question." (18RT 2496-2497, 2519.) Indeed, the jury was instructed accordingly that the phrase "right from wrong" was "used in both the legal and moral sense." (13CT 3119; 19RT 2757; CALJIC No. 4.00.) Also, the jury was instructed it could properly consider evidence of appellant's mental condition before, during, and after the crime and could consider any guilt phase evidence which it found to be relevant to the sanity issue. (13CT 3119; 19RT 2756; CALJIC No. 4.00.) In addition, the jury could have discounted Dr. Vicary's sanity opinion itself because of his past behavior in one case in which he made 23 deletions and changes to benefit the defense and which led him to being fined and placed on probation by the Medical Board. (18RT 2556-2557.)

Further, the defense's two other experts, Drs. Boone and Bertoldi, did not opine on whether appellant was insane at the time he committed his

crimes, and thus, their testimony alone could not have supported an insanity verdict. Dr. Boone, a clinical neuropsychologist, testified that appellant's executive or problem-solving skills, reasoning, and logic were very impaired and that tests suggested appellant had some kind of brain damage or dysfunction. (15RT 2137, 2144, 2148, 2159-2160.) She acknowledged the tests she administered to appellant did not measure brain function directly but only measured thinking skills. (15RT 2172.) Dr. Bertoldi, a neurologist and clinical neuropsychologist, opined that appellant had brain dysfunction, which was consistent with episodic loss of control and temporal lobe epilepsy. (16RT 2219, 2233, 2265-2266, 2281.) Mental illness "alone does not necessarily establish legal insanity." (*Kelly, supra*, 1 Cal.4th at p. 540.) Both doctors failed to link their evaluations to an opinion on insanity, and thus, their testimony could not support an insanity finding. (*Ibid.* [if mentally ill, a defendant must show the illness made him insane under *M'Naghten*]; see *Drew, supra*, 22 Cal.3d at pp. 350-351 [failure to explain why diagnoses led them to conclude appellant was insane].)

In contradiction of the defense evidence, the prosecution presented credible and weighty evidence that appellant was sane and malingered. Dr. Mohandie, a psychologist, opined that appellant was sane and that appellant had an anti-social personality disorder with narcissistic and borderline traits and secondarily, malingering. (18RT 2591-2594, 2605, 2608, 2614, 2651.) Dr. Mohandie interviewed appellant three times, even though appellant twice refused to come out and appellant cut one interview short. (18 RT 2594, 2598-2599.) Dr. Mohandie also administered objective psychological testing to appellant, including the MMPI II and SIRS tests, reviewed medical records and psychiatric forensic reports of defense counsel's experts, looked at police reports and photographs, looked at videotapes of appellant's police interrogation interview and Vannoy's

videotaped interview, reviewed some of the transcripts from appellant's trial testimony, and went to the crime scene. (18RT 2594-2595, 2598-2599.)

Dr. Mohandie's opinion that appellant was sane was based on: appellant having been off his medications for six weeks prior the murder without displaying any and objective evidence that he fell within the insanity definitions; appellant's interviews which showed he had a very specific recollection of all the events leading up to the exact moment of the homicide, including the number of AA meetings he had attended, all the conversations he and Epperson had, and his various actions; appellant's denial of any psychiatric symptoms such as hallucinations, false sensations, or delusional beliefs; appellant having engaged in a variety of goal-oriented and goal-directed functional behaviors to avoid detection; appellant's report of an unlikely state of amnesia for the exact moment when the homicide occurred until after he was taken into custody and had given damaging statements; and the objective psychological data obtained from the MMPI, which showed exaggerated symptoms reporting, and the SIRS results, which showed appellant was feigning different symptoms. (18RT 2605-2607.)

Dr. Mohandie diagnosed appellant as having an anti-social personality disorder with narcissistic and borderline traits and secondarily, malingering. (18RT 2608, 2651.) All seven diagnostic criteria for anti-social personality disorder fit appellant. (18RT 2609-2611.) Further, the type of amnesia appellant claimed was malingering amnesia, or faked amnesia, according to the DSM IV. (18RT 2607.) In addition, Dr. Mohandie believed there was a sexual component to the crime because appellant raped the victim after or during commission of the beating, was able to maintain an erection while doing that, and reportedly was able to even do that in the past, which suggested "some element of a turn on for that for him." (18RT 2649.) Even though some doctors diagnosed appellant with a major mental

disorder, Dr. Mohandie's opinion was that those diagnoses were not necessarily reliably done. (18RT 2626, 2635-2636.) He pointed out appellant had a tendency to exaggerate symptoms over time and had been manipulating the system for a number of years. (18RT 2626, 2628, 2643.)

The prosecution's other expert, Dr. Griesemer, a neurologist and neurophysiologist, refuted Dr. Bertoldi's testimony that appellant had epilepsy and frontal lobe slowing as an adult. (16RT 2296-2298, 2307.) Dr. Griesemer interviewed appellant in jail, reviewed his medical neurological history, went over some cognitive skills with appellant, and conducted a simple neurologic examination of his head, neck, arms, and legs. (16RT 2297-2298.) In all the records reviewed, there was no documentation of any epileptic seizure since childhood. (16RT 2298-2299.) Appellant's most recent EEG, which showed some theta activity, simply showed episodic or intermittent slowing but no epileptic discharges. (16RT 2302-2303, 2312.) Dr. Bertoldi did not testify epileptic discharges were present on the most recent EEG. (16RT 2314.) Dr. Griesemer did not find anything that indicated a tendency to have epilepsy, found nothing that indicated a significant frontal lobe slowing, and found nothing to encourage him to look further diagnostically at appellant. (16RT 2307.)

Given the defense evidence regarding insanity which was contradictory and based on an incomplete review of the relevant and necessary records and information and the strong evidence from the prosecution showing sanity, appellant failed to carry his burden of showing insanity by a preponderance of the evidence. (CALJIC No. 2.50.2; see 13CT 3119; 19RT 2758.) Moreover, appellant's claim that the prosecution did not dispute the defense evidence is clearly belied by the extensive sanity phase record in this case. (See Statement of Facts, Sanity Phase, *ante*; AOB 173-175, 190-196, 200-212.) The jury's verdict finding

appellant sane should be upheld, as it was supported by expert testimony and pertinent evidence about the circumstances of appellant's crimes.

Moreover, appellant's reliance on *Duckett, supra*, 162 Cal.App.3d 1115 to support his argument is misplaced. (AOB 212-214.) After reviewing the evidence, the *Duckett* court found the jury failed to "give great weight to the unanimous expert opinion that [the defendant] was insane." (162 Cal.App.3d at p. 1123.) The *Duckett* court found "there were no circumstances present that would have permitted the jury to reject the expert opinion." (*Ibid.*) In contrast, here, as set forth above, there was prosecution evidence which contradicted the defense experts' testimony that appellant was insane at the time of the crimes and the prosecution evidence provided a strong foundation for rejecting the defense evidence of insanity. Appellant's claim must be rejected.

VI. THE TRUE FINDINGS ON THE FELONY-MURDER SPECIAL CIRCUMSTANCES SHOULD BE UPHELD

Appellant contends the true findings on all of the felony-murder special circumstance allegations – murder during the commission of rape or mayhem and intentional murder involving the infliction of torture, in violation of section 190.2, subdivisions (a)(17)(C), (17)(J), and (18), respectively -- must be reversed because each predicate felony was merely incidental to the homicide and did not manifest an independent felonious purpose. (AOB 217-228.) Respondent disagrees.

A felony-murder special circumstance requires proof that the murder occurred during "the commission of the felony, not when the felony occurs during the commission of a murder." (*People v. Mendoza* (2000) 24 Cal.4th 130, 182.) The murder must be committed to advance the independent felonious purpose of the felony. (*People v. Lewis* (2008) 43 Cal.4th 415, 464-465; *People v. Horning* (2004) 34 Cal.4th 871, 907; *Mendoza, supra*, at p. 182; *Green, supra,* 27 Cal.3d at p. 61.) Further, even

if a defendant was tried upon a theory of deliberate and premeditated murder, a "concurrent intent to kill and to commit an independent felony will support a felony-murder special circumstance." (*Barnett, supra*, 17 Cal.4th at p. 1158, citing *Raley, supra*, 2 Cal.4th at p. 903; *Mendoza, supra*, at p. 183.)

To evaluate a claim of insufficient evidence, the evidence must be viewed in the light most favorable to the prosecution to determine whether any rational trier of fact could have concluded the defendant had a purpose for the felony independent from the murder. (*Mendoza, supra*, 24 Cal.4th at p. 183.) Respondent also incorporates by reference its discussion of the standard of appellate review for sufficiency claims in Argument II, *ante*.

In the instant case, the jury properly found true the special circumstance allegations of murder during the commission of rape or mayhem and intentional murder involving the infliction of torture. Since appellant does not contest the rape special circumstance here because he did so in his Argument III (see AOB 217, fn. 55), respondent will focus on the other two contested special circumstance findings based on mayhem and torture. As set forth in respondent's Argument I relating to appellant's "merger claim," which is incorporated herein by reference, the evidence supports the conclusion appellant had the intent to commit the independent felonies of mayhem and torture. Appellant committed the mayhem and torture with the intent to disable Epperson, permanently disfigure her, and cause cruel or extreme pain and suffering for revenge or any sadistic purpose.

Here, the evidence clearly showed appellant had independent felonious purposes when he committed mayhem upon and tortured Epperson, contrary to appellant's claim. As set forth in Argument I, *ante*, appellant repeatedly bludgeoned Epperson in the bathroom and living quarters with a glass candle holder, heavy vase, wooden footstool, lamp,

and broken pieces of the foregoing items. He also cut her neck with glass and stuck a screwdriver through her face. (10RT 1294-1298, 1304, 1306, 1311-1315, 1318, 1320, 1324-1326, 1349-1354, 1373, 1375-1376, 1379, 1395-1396, 1409-1410.) Epperson suffered, by a conservative estimate, at least 10 severe blows to her head. (9RT 1251, 1255.) Appellant's beating of Epperson was so severe that blood was splattered all over the apartment, in the bathroom and living quarters, on the walls, furniture, floor, and personal items. (10RT 1289, 1303-1305, 1313-1314, 1319-1320, 1328, 1355, 1368, 1400.)

Appellant inflicted grievous injuries to Epperson's head, neck, and face, fracturing her skull in multiple places and disfiguring her face. (9RT 1228-1230, 1238-1240, 1242.) He carefully cut the sides of Epperson's neck with glass, without severing her carotid arteries or jugular veins, which inflicted cruel pain and suffering. (9RT 1230-1231, 1233-1234, 1245-1246.) Also, bruising on her neck and hemorrhaging in the eyes could have been the result of strangulation. (9RT 1224, 1235.) Appellant also caused a significant amount of trauma in Epperson's vaginal area, including large bruises and abrasions. (9RT 1247-1248, 1259; 10RT 1450-1451.) These grievous injuries were inflicted by appellant while Epperson was alive. (9RT 1224-1227.) Appellant's bludgeoning and attack of Epperson occurred over a span of time and in the entire apartment, thus indicating he may have formed the intent to kill after the mayhem and torture, so they were not incidental to the murder. (See *Raley, supra*, 2 Cal.4th at p. 903 [defendant may have been undecided as to victims' fate when he brought them but brought them to his home but could have formed the intent to kill after the asportation].)

Further, appellant's independent felonious purposes for mayhem and torture were also supported by evidence that he acted out of jealousy and for revenge due to Epperson's alleged spurning of his attentions. Before

appellant murdered Epperson, appellant told Todd he was jealous of other men being with Epperson and that if he could not have her, no one else would. (9RT 1155-1156, 1214.) After appellant murdered Epperson, appellant told Vannoy he beat Epperson out of jealousy and revenge because Epperson would not love him and was going out with another person. (Peo. Exh. 88B, pp. 29, 38-39.) Appellant also told Vannoy that Epperson asked if he was going to kill her and appellant's affirmative response indicated that he would but not without further injury and pain. (Peo. Exh. 88B, pp. 39, 85.) Appellant disfigured Epperson and caused cruel pain and suffering because she did not love him and he could not have her. In other words, his intents to commit mayhem upon and torture Epperson were not merely incidental to his intent to kill her; appellant could have killed Epperson without the prolonged and savage beating and cutting. Appellant wanted Epperson to suffer before killing her. Thus, even if the intent to kill was concurrent with the intents to commit mayhem and torture, all those intents were independent of each other. (*Barnett, supra*, 17 Cal.4th at p. 1158.) The aforementioned evidence more than amply supported the mayhem and torture felony special circumstances.

In addition, there was evidence to support a finding that appellant murdered Epperson to facilitate his commission of the mayhem and torture. A jury could properly find appellant killed Epperson to escape and to prevent the crimes from coming to the attention of the authorities. The evidence showed appellant locked the door after he left Epperson's apartment, thus preventing others from possibly finding her and giving aid. (8RT 1020-1023, 1030; 9RT 1126; 10RT 1429.) He had also previously threatened Betsy M. that he would kill her if she went to the police after he assaulted her. (10RT 1437.) Killing Epperson prevented her from reporting the brutal mayhem and torture inflicted upon her. (See *Barnett, supra*, 17 Cal.4th at pp. 1158-1159 [defendant "wanted to ensure there

would be no snitching this time, especially since the instant crimes were far more serious in nature."].)

Even assuming there was insufficient evidence of the mayhem and torture murder special circumstances, the rape-murder special circumstance is still valid. (See Argument III, *ante*.) Thus, even if the jury considered one or possibly two invalid special-circumstance findings, which it clearly did not, the penalty verdict need not be set aside because of the existence of at least one remaining valid special circumstance. (See *Zant v. Stephens* (1983) 462 U.S. 862, 881 [103 S.Ct. 2733, 77 L.Ed.2d 235]; *People v. Sanders* (1990) 51 Cal.3d 471, 520-521; *People v. Silva* (1988) 45 Cal.3d 604, 632-636; *People v. Allen* (1986) 42 Cal.3d 1222, 1281-1283.)

Further assuming one or possibly two of the special circumstances should not have been considered by the penalty jury, it can be said, on this record, that the error was absolutely harmless and that there was no likelihood the jury would have reached a different penalty verdict in the absence of the alleged error. Although the prosecutor very briefly mentioned the special circumstance findings to the second penalty phase jury during her argument (see 37RT 5662-5663), the prosecutor focused on the circumstances surrounding the murder, his crimes against Colletta and Betsy M., his prior felony conviction for assault with a deadly weapon with force likely to cause great bodily injury on Colletta, his prior violent activity with his family, and his refusal to take responsibility for his actions. (37RT 5657-5662, 5663-5695.) Given the prosecutor's argument, there is simply no way the penalty jury would have been swayed or affected by the alleged invalid special-circumstance findings. (See *Sanders, supra*, 51 Cal.3d at pp. 520-521; *Silva, supra*, 45 Cal.3d at pp. 632-636.)

V. EXECUTION OF A CAPITAL DEFENDANT WHO IS MENTALLY IMPAIRED, BUT NOT MENTALLY RETARDED, IS NOT CRUEL AND UNUSUAL PUNISHMENT

Appellant contends imposing the death penalty on a mentally ill defendant violates the Fifth, Sixth, and Eighth Amendments. (AOB 229-253.) He claims that under the reasoning of *Atkins v. Virginia* (2002) 536 U.S. 304 [122 S.Ct. 2242, 153 L.Ed.2d 335] and *Roper v. Simmons* (2005) 543 U.S. 551 [125 S.Ct. 1183, 161 L.Ed.2d 1] that the death penalty is "inappropriate for severe mental illness." (AOB 245-253.) Respondent submits that execution of a capital defendant who is mentally impaired, but not mentally retarded, is not cruel and unusual punishment. And in this case, appellant's disputed evidence that he suffers from mental illness is far from sufficient to even show he should be excluded from imposition of the death penalty.

Atkins and *Roper* do not support appellant's claim that the death penalty for a mentally ill defendant is an excessive punishment, as explained by this Court in *People v. Castaneda* (2011) 51 Cal.4th 1292, 1343-1345. In *Atkins*, the United States Supreme Court held that execution of the mentally retarded violates the Eighth and Fourteenth Amendments and left to the states the task of developing appropriate ways to enforce that sentencing restriction. (*Atkins, supra,* 536 U.S. at pp. 317, 321; *In re Hawthorne* (2005) 35 Cal.4th 40, 44.) In *Roper*, the United States Supreme Court held that imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed violates the Eighth and Fourteenth Amendments. (*Roper, supra,* 543 U.S. at p. 578.)

In reaching its conclusions in *Atkins* and *Roper*, the United States Supreme Court looked to objective evidence to determine whether evolving standards of decency dictated that death is an excessive punishment and then applied its own judgment, asking whether reason existed to disagree

with the judgment of the citizenry and legislators. (*Castaneda, supra*, 51 Cal.4th at p. 1344.) With respect to the objective evidence, the high court in *Atkins* noted that "numerous states had acted to prohibit the execution of mentally retarded criminals" after the 1986 execution of a mentally retarded murderer and "no states had acted to reinstate the execution of such individuals" during that period. (*Castaneda, supra*, at p. 1344.) The United States Supreme Court concluded that "'it is fair to say that a national consensus has developed against it.'" (*Ibid.*, quoting *Atkins, supra*, at pp. 313-316, fn omitted.) Likewise, the United States Supreme Court observed in *Roper,* that the "majority of states had rejected the propriety of executing individuals who were under 18 years of age at the time they committed their criminal acts." (*Castaneda, supra*, at p. 1344.)

With respect to the application of its own judgment, asking whether reason existed to disagree with the judgment of the citizenry and legislators, the United States Supreme Court in *Atkins* "noted that mentally retarded individuals have diminished capacities to process information, to communicate, to learn from experience, to reason, to control impulses, and to understand the reactions of others." (*Castaneda, supra*, 51 Cal.4th at p. 1344, citing *Atkins, supra*, 536 U.S. at p. 318, fn. omitted.) The high court also acknowledged evidence that mentally retarded individuals "often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers." (*Ibid.*, fn. omitted.) Thus, the *Atkins* Court concluded "these deficiencies diminish [the] personal culpability of such defendants." (*Ibid.*) Given these deficiencies, the *Atkins* Court stated two reasons for excluding mentally retarded defendants from imposition of the death penalty: "(1) the justifications for the death penalty--retribution and deterrence--are not served by executing the mentally retarded, and (2) the risk of wrongful execution is enhanced by various factors, including the possibility of false confessions and their lesser ability to present evidence in

mitigation and to assist counsel." (*Ibid.*, citing *Atkins, supra*, at pp. 318-321.)

In *Roper*, likewise, the United States Supreme Court identified differences between adults and juveniles that "'demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders.'" (*Castaneda, supra*, 51 Cal.4th at p. 1345, quoting *Roper, supra*, 543 U.S. at p. 569.) The *Roper* Court found that: the juvenile's "lack of maturity and their underdeveloped sense of responsibility lead to reckless behavior," which rendered conduct less morally reprehensible; juveniles are "more susceptible to negative influences and pressures, and have less control over their environment," allowing them a "greater claim to forgiveness"; and the juvenile's "personality traits are more transitory, which '"means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character.'" (*Castaneda, supra*, at p. 1345, citing and quoting *Roper, supra*, at pp. 569-570.) Thus, "[d]ue to juveniles' diminished culpability, the case for retribution is weaker than for adult murderers." (*Ibid.*, citing *Roper, supra*, at pp. 572-573.) Also, the deterrent effect of the death penalty upon juveniles is not clear. (*Ibid.*) The *Roper* Court concluded the differences between adult and juvenile offenders "are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability" and rejected the view that juvenile status should be considered as a mitigating factor. (*Ibid.*, citing *Roper, supra*, at pp. 572-573.)

Here, appellant has failed to establish that his alleged mental illness "is analogous to mental retardation or juvenile status for purposes of imposition of the death penalty." (*Castaneda, supra*, 51 Cal.4th at p. 1345.) Appellant has not presented sufficient objective evidence to demonstrate that "society views as inappropriate" the execution of mentally ill defendants. (*Ibid.*) Appellant acknowledges that "there is no legislative

enactment which specifically prohibits the execution of the severely mentally ill." (AOB 248.) Instead, he cites an October 2003 Gallup poll, a 2006 American Bar Association resolution, and the opinions of certain mental health organizations. (AOB 248-249.) However, numerous other states have recognized that the protections afforded to those who are mentally retarded within the meaning of *Atkins* do not extend to persons who are mentally ill or suffering from some other impairment. (See, e.g., *Lewis v. State* (Ga. 2005) 620 S.E.2d 778, 786 [declining to extend *Atkins* to the mentally ill]; *Matheny v. State* (Ind. 2005) 833 N.E.2d 454, 458 [same]; *State v. Johnson* (Mo. 2006) 207 S.W.3d 24, 51 [same]; *State v. Hancock* (Oh. 2006) 840 N.E.2d 1032, 1059-1060 [same]; *Commonwealth v. Baumhammers* (Pa. 2008) 960 A.2d 59, 96-97 [same].) Likewise, some lower federal courts have observed that *Atkins* does not extend to mental illness. (See *Baird v. Davis* (7th Cir. 2004) 388 F.3d 1110, 1114-1115 [United States Supreme Court has not ruled out execution for persons with mental disorder of killing under an irresistible impulse]; see also *Shisinday v. Quarterman* (5th Cir. 2007) 511 F.3d 514, 521 [no relief on claim that *Atkins* and *Roper* should be extended to mentally ill because claim procedurally barred in federal habeas context and because claim was contrary to legal precedent].) Mental illness or impairment is not the same as mental retardation or intellectual disability, and it is not necessary to treat mental illness impairment as though it is the same. (See *Tigner v. Texas* (1940) 310 U.S. 141, 147 [60 S.Ct. 879, 84 L.Ed.2d 1124] [holding equal protection "does not require things which are different in fact or opinion to be treated in law as though they were the same"].)

Moreover, with respect to the application of the court's own judgment, it is clear that appellant's disputed evidence that he suffers from mental illness is far from sufficient to even show he should be excluded from imposition of the death penalty. As set forth in Argument V-B., *ante*, the

jury properly found appellant sane and rejected the defense evidence of insanity. Likewise, the jury rejected the penalty phase defense evidence from experts which was proffered as mitigating evidence. In the penalty phase, appellant presented evidence from the same doctors who testified in the sanity phase, Drs. Vicary, Bertoldi, Niedorf, and Boone. Dr. Vicary again testified appellant suffered from bipolar disorder, a major mental disorder. (32RT 4948-4949.) Dr. Vicary testified that six categories of information explained appellant, including a traumatic family background, brain damage, his pleas for treatment, his show of remorse, and his positive adjustment to institutionalization. (32RT 4934, 4942, 4962-4963, 4966.) With respect to brain damage, Dr. Vicary testified appellant had damage to the frontal and temporal parts of his brain, areas which control one's ability to control emotions. (32RT 4943-4944.) Dr. Boone again testified appellant had consistent weaknesses in the area of executive or problem-solving skills, which related to planning, organization, thinking through consequences of behavior, logic, and inhibiting behavior. The results suggested appellant had some kind of organic frontal lobe brain dysfunction. (33RT 5091-5092, 5107, 5123, 5140-5141.) Dr. Bertoldi again testified appellant had brain damage and focalized epilepsy. (34RT 5173-5175.) He diagnosed appellant with seizure focus limbic or temporal limbic disorder which caused episodic discontrol, emotional mobility, and intermittent rage. (34RT 5194-5195, 5227-5228.) Dr. Niedorf again opined that appellant suffered from a major mental illness. Appellant had two major conditions, a seizure disorder and IED. (35RT 5437-5438.)

Further, in rebuttal, the defense proffered the testimony of Dr. Romanoff, who opined that appellant had a complex set of mental disorders. (36RT 5593, 5598.) He believed appellant had an organic brain disorder, which caused appellant difficulty regulating affect and controlling his behavior. (36RT 5594, 5618-5619.) Appellant also had anti-social

personality disorder and a borderline personality disorder with histrionic and narcissistic features. (36RT 5595, 5609.) The jury had before it a full display of appellant's mental evidence defense and rejected it in the penalty phase, recommending a judgment of death.

To rebut the defense's expert mental testimony, the prosecution proffered the testimony of Drs. Mohandie and Griesemer. Dr. Mohandie opined that appellant malingered and had an anti-social personality disorder with prominent narcissistic and borderline traits. (36RT 5522-5526, 5534-5535.) Also, Dr. Mohandie diagnosed appellant with sexual sadism. (36RT 5540.) Indeed, Dr. Mohandie could not reliably find appellant had a major mental disorder because appellant's anti-social personality disorder diagnosis included deceptiveness as a component and appellant had a tendency to malinger. (36RT 5541.) Dr. Mohandie did not see underlying organic impairment, like Dr. Romanoff. (36RT 5545-5546.) Dr. Griesemer testified that appellant had childhood epilepsy that went away and there was no evidence of seizure activity since childhood. (34RT 5292-5293.) Dr. Griesemer also disagreed with many of Dr. Bertoldi's opinions. (34RT 5295-5301.)

Thus, to the extent the evidence only showed appellant malingered and suffered from an anti-social personality disorder, this disorder did not "diminish [his] personal culpability." (*Castaneda, supra*, 51 Cal.4th at p. 1345 [defendant's condition was anti-social personality disorder].) Further, retribution and deterrence would not be served by prohibiting the death penalty from being imposed. An individual with an anti-social personality has the "ability to charm and manipulate others, to deny responsibility, and to provide excuses for their conduct, [which] enhances rather than diminishes their capacity to avoid wrongful conviction and execution." (*Ibid.*) The "implied legislative decision not to exclude individuals with an

antisocial personality disorder from eligibility for the death penalty" should be upheld. (*Ibid.*) The claim must fail.

VIII. APPELLANT'S CLAIMS REGARDING THE DEATH PENALTY STATUTE SHOULD BE REJECTED

Appellant contends California's death penalty statute, as interpreted by this Court and applied to his trial, violates the United States Constitution. (AOB 254-291.) Although he acknowledges that challenges to most of the statute's features have been rejected (see AOB 254), he nevertheless claims: section 190.2 is impermissibly broad (AOB 256-258); section 190.3, subdivision (a), as applied allows arbitrary and capricious imposition of death (AOB 258-260); California's death penalty statute contains no safeguards to avoid arbitrary and capricious sentencing and deprives defendants of the right to a jury determination of each factual prerequisite to a sentence of death (AOB 260-285); the California sentencing scheme violates the equal protection clause of the federal Constitution by denying procedural safeguards to capital defendants which are afforded to non-capital defendants (AOB 285-288); and California's use of the death penalty as a regular form of punishment falls short of international norms of humanity and decency and violates the Eighth and Fourteenth Amendments (AOB 288-291). This Court has repeatedly rejected appellant's contentions and should do so again.

A. Section 190.2 is Not Impermissibly Broad

Appellant contends his death sentence is invalid because section 190.2 is impermissibly broad and does not perform the constitutionally required narrowing function. According to appellant, almost every murderer is eligible for the death penalty. He adds that almost all felony murders are now special circumstance cases and felony murder cases include too wide a spectrum of factual scenarios. Appellant criticizes this Court's precedent and urges this Court to reevaluate the issue and strike down the death

penalty scheme "as so all-inclusive as to guarantee the arbitrary imposition of the death penalty." (AOB 256-258.)

This Court has repeatedly rejected his contention and found section 190.2 is not impermissibly overbroad. This Court has stated, "the various special circumstances are not so numerous as to fail to perform their constitutionally required narrowing function, and the special circumstances are not unduly expansive, either on their face or as interpreted by this court." (*People v. Jones* (2012) 54 Cal.4th 1, 85; *People v. Bennett* (2009) 45 Cal.4th 577, 630, quoting *People v. San Nicolas* (2004) 34 Cal.4th 614, 677 [section 190.2 "does not contain so many special circumstances that it fails to perform the constitutionally mandated narrowing function"]; accord, *Pulley v. Harris* (1984) 465 U.S. 37, 53 [104 S.Ct. 871, 79 L.Ed.2d 29] [California's requirement of a special circumstance finding adequately "limits the death sentence to a small sub-class of capital-eligible cases"].) Appellant has not provided any valid reasons for this Court to reconsider its previous holdings. Accordingly, this contention should be rejected again. (See *Jones, supra,* at p. 85; *People v. Bacon* (2010) 50 Cal.4th 1082, 1129.)

B. Section 190.3, Subdivision (A) Does Not Allow Arbitrary and Capricious Imposition of Death

Appellant contends section 190.3, subdivision (a), the circumstances of the crime factor, violates his federal constitutional rights because "it has been applied in such a wanton and freakish manner that almost all features of every murder, even features squarely at odds with features deemed supportive of death sentences in other cases, have been characterized by prosecutors as 'aggravating' within the statute's meaning." (AOB 258; see AOB 258-260.) Appellant complains this Court has never applied a limiting construction to the circumstances of the crime factor, which allegedly "licenses indiscriminate imposition of the death penalty upon no

basis other than" the particular set of facts surrounding the murder. (AOB 260.)

This Court already rejected the very same contention in *Jones, supra*, 54 Cal.4th at pages 85 to 86. As found by this Court and the United States Supreme Court, "[s]ection 190.3, factor (a), does not, on its face or as interpreted and applied, permit the 'arbitrary and capricious' or 'wanton and freakish' imposition" of a death sentence. (*Id.* at p. 85, citing *Tuilaepa v. California* (1994) 512 U.S. 967, 976 [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"]; see also *People v. Lynch* (2010) 50 Cal.4th 693, 766; *People v. Jackson* (2009) 45 Cal.4th 662, 699-700.) There is no valid basis for this Court to reconsider its previous holding. Thus, the contention should be rejected once again. (See, e.g., *People v. Russell* (2010) 50 Cal.4th 1228, 1274; *Jennings, supra,* 50 Cal.4th at pp. 688-689.)

C. California's Death Penalty Statute Satisfies the United States Constitution

Appellant next contends our death penalty statute does not contain safeguards common to other death penalty sentencing schemes to guard against the arbitrary imposition of death, such as unanimity as to aggravating circumstances including proof beyond a reasonable doubt, jury instructions requiring proof beyond a reasonable doubt, written findings regarding aggravating factors, intercase proportionality review, disallowing the prosecution from relying on unadjudicated criminal activity in the penalty phase, disallowing use of restrictive adjectives in the list of mitigating factors, and instructing that statutory mitigating factors were relevant solely as potential mitigators. (AOB 260-185.) As stated below, this Court has repeatedly rejected appellant's laundry list of alleged

problems with our death penalty law, and appellant has not provided any new and valid reasons for this Court to revisit any of these claims.

1. Unanimous Jury Agreement as to Aggravating Factors

Appellant claims California law violates the United States Constitution by failing to require unanimous jury agreement on aggravating factors. He cites *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], and *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856] as requiring this Court to reexamine its precedent to the contrary. (AOB 262-270.) This contention has been repeatedly rejected by this Court, and appellant provides no new and valid reasons for this Court to revisit its prior holdings. Therefore, the contention must be rejected again. (*Jones, supra*, 54 Cal.4th at p. 85; *Bacon, supra*, 50 Cal.4th at p. 1129; *People v. Dykes* (2009) 46 Cal.4th 731, 799-800 [*Apprendi*, *Ring*, and *Cunningham* do not require juries to enter unanimous findings concerning aggravating factors]; *People v. Williams* (2006) 40 Cal.4th 287, 338 [*Ring* does not mandate jury unanimity as to aggravating factors].)

Appellant also asserts California prosecutors should be required to prove beyond a reasonable doubt: (1) the factors relied upon to impose a death sentence; and (2) aggravating factors outweigh mitigating factors. He criticizes this Court's reasoning that penalty phase determinations are moral and not factual functions and, thus, are not susceptible to a burden-of-proof quantification. He further criticizes this Court's ruling that *Ring, supra,* 536 U.S. 584 does not apply to our death penalty determination. According to appellant, California jurors are required to engage in fact-finding as to aggravating factors in the penalty phase, this fact-finding is part of the eligibility phase, and these factual determinations should be made

unanimously and beyond a reasonable doubt under *Ring*. (AOB 264-272.) Appellant's contention has been repeatedly rejected by this Court, and he provides no valid reasons for this Court to reconsider its prior holdings. Therefore, the contention must be rejected again. (*Jones, supra*, 54 Cal.4th at p. 86; *Russell, supra*, 50 Cal.4th at pp. 1271-1272; *Jennings, supra*, 50 Cal.4th at p. 689; *Bennett, supra*, 45 Cal.4th at p. 631; *Williams, supra*, 40 Cal.4th at pp. 337-338.)

2. Jury Instructions on Burden of Proof

Appellant maintains that the jury should have been instructed that it may impose a death sentence only if persuaded beyond a reasonable doubt that the aggravating factors exist and outweigh the mitigating factors and that death is the appropriate penalty. (AOB 273-276.) This contention has been repeatedly rejected by this Court and must be rejected again, as appellant provides no valid reasons for this Court to revisit its prior holdings. (*Russell, supra*, 50 Cal.4th at p. 1272; *Jennings, supra*, 50 Cal.4th at p. 689 ["Unlike the guilt determination, the sentencing function is inherently moral and normative, not factual . . . and hence, not susceptible to a burden-of-proof quantification"; internal quotation marks omitted]; *Salcido, supra,* 44 Cal.4th at p. 167 [*Apprendi* and its progeny do not justify reconsideration of prior rulings]; *People v. Smith* (2005) 35 Cal.4th 334, 374 ["Because no burden of proof is required at the penalty phase . . . , the law is not invalid for failing to require an instruction on burden of proof."]; accord, *Tuilaepa, supra*, 512 U.S. at p. 979 ["A capital sentencer need not be instructed how to weigh any particular fact in the capital sentencing decision"].)

3. Written Findings

Appellant further claims the failure to require written or other specific findings by the jury regarding aggravating factors deprived him of his

federal due process and Eighth Amendment rights to meaningful appellate review. He asserts an equal protection violation on the ground that non-capital defendants are provided greater protections in this context. (AOB 276-279.) Appellant's contention has been repeatedly rejected by this Court, and he provides no valid reasons for this Court to revisit its prior holdings. Thus, the contention must be rejected again. (*Jones, supra*, 54 Cal.4th at p. 86; *Russell, supra*, 50 Cal.4th at p. 1274; *Bennett, supra*, 45 Cal.4th at p. 632; *People v. Loker* (2008) 44 Cal.4th 691, 755.)

4. Intercase Proportionality Review

According to appellant, intercase proportionality review is required due to the lack of other checks on arbitrariness and the "greatly expanded" list of special circumstances. (AOB 279-281.) Appellant's contention has been repeatedly rejected by this Court, and he provides no new and valid reasons for this Court to revisit its prior holdings. The contention must be rejected again. (*Jones, supra*, 54 Cal.4th at p. 87; *Russell, supra*, 50 Cal.4th at p. 1274; *Loker, supra*, 44 Cal.4th at pp. 755-756; *Williams, supra*, 40 Cal.4th at p. 338; accord, *Pulley, supra*, 465 U.S. at pp. 50-51 [federal Constitution does not require intercase proportionality review].)

5. Unadjudicated Criminal Activity

Appellant maintains that any use of unadjudicated criminal activity by the jury during the penalty phase violates his constitutional rights, because the jury was not required to make unanimous findings beyond a reasonable doubt as to aggravating factors. (AOB 281-282.) Appellant's contention has been repeatedly rejected by this Court, and he provides no new and valid reasons for this Court to revisit its prior holdings. Therefore, the contention must be rejected again. (*Jones, supra*, 54 Cal.4th at p. 87; *People v. Nelson* (2011) 51 Cal.4th 198, 226; *Lynch, supra*, 50 Cal.4th at p. 766; *Loker, supra*, 44 Cal.4th at p. 756; *Smith, supra*, 35 Cal.4th at p. 374.)

6. Mitigating Factors List

In conclusory fashion, appellant claims the inclusion of the adjectives "extreme" and "substantial" in the list of potential mitigating factors acted as barriers to the consideration of mitigation, in violation of his federal constitutional rights.[20] (AOB 282.) Appellant's contention has been repeatedly rejected by this Court, and he provides no new and persuasive reasons for this Court to revisit its prior holdings. Accordingly, the contention must be rejected again. (*Jones, supra*, 54 Cal.4th at p. 87; *Russell, supra*, 50 Cal.4th at p. 1274; *Williams, supra*, 40 Cal.4th at p. 338; *Smith, supra*, 35 Cal.4th at p. 374.)

7. Instruction on Mitigating Factors

Appellant asserts the jury should have been instructed which of the listed sentencing factors were aggravating, which were mitigating, or which could be either mitigating or aggravating depending upon the jury's appraisal of the evidence. He speculates the jury could have aggravated his sentence based on non-aggravating factors. (AOB 282-285.) Appellant's contention has been repeatedly rejected by this Court, and he provides no persuasive reasons for this Court to revisit its prior holdings. Accordingly, the contention must be rejected again. (*Jones, supra*, 54 Cal.4th at p. 87; *People v. Booker* (2011) 51 Cal.4th 141, 196-197; *Russell, supra*, 50 Cal.4th at p. 1274; *Jennings, supra*, 50 Cal.4th at p. 690; *People v. Brady* (2010) 50 Cal.4th 547, 590; accord, *Tuilaepa, supra*, 512 U.S. at p. 979.)

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[20] CALJIC No. 8.85 told the jury to consider, among other factors, whether the murder was committed while appellant was under the influence of "extreme" mental or emotional disturbance and whether appellant committed the murder under "extreme" duress or under the "substantial" domination of another person. (23CT 5628; 37RT 5731-5783.)

D. California's Death Penalty Scheme Does Not Violate the Equal Protection of the Laws

Appellant next contends the denial of the "safeguards" set forth in his preceding arguments (i.e., proof beyond a reasonable doubt) violated the constitutional guarantee of equal protection of the laws. (AOB 285-288.) According to appellant, California provides "significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with non-capital crimes." (AOB 285.)

This Court has consistently held our death penalty law does not violate the equal protection rights of capital defendants because it provides a different method of determining the sentence for capital defendants than used in noncapital cases. (*Jones, supra*, 54 Cal.4th at p. 87; *Bennett, supra*, 45 Cal.4th at p. 632; *Smith, supra*, 35 Cal.4th at pp. 374-375.) This Court has specifically found that capital and noncapital defendants are not similarly situated and therefore "California does not deny capital defendants equal protection by providing certain procedural protections to noncapital defendants that are not provided to capital defendants." (*Jones, supra*, at p. 87; *Manriquez, supra,* 37 Cal.4th at p. 590; see also *Lynch, supra*, 50 Cal.4th at p. 767; *Loker, supra*, 44 Cal.4th at p. 756.) As in his other challenges to California's death penalty law, appellant asserts arguments that have been soundly and repeatedly rejected by this Court and does not provide any new or valid reasons for this Court to revisit its prior holdings. Thus, the contention must be rejected once again. (See, e.g., *Jennings, supra*, 50 Cal.4th at p. 690; *Brady, supra*, 50 Cal.4th at p. 590.)

E. California's Use of the Death Penalty Does Not Violate Any International Norms of Humanity and Decency

Appellant contends California's use of the death penalty as a regular form of punishment falls short of international norms of humanity and decency and violates the Eighth and Fourteenth Amendments. Although

appellant acknowledges this Court is not bound by the laws of other countries, he asks this Court to consider the customs and practices of other countries with respect to the use of the death penalty and points out that most nations of the "Western world" no longer accept the death penalty as a regular punishment for a substantial number of crimes. (AOB 288-291.)

This Court has already rejected the contention that, because our death penalty allegedly violates international norms of humanity and decency, it also violates the Eighth and Fourteenth Amendments. (*Jones, supra*, 54 Cal.4th at pp. 87-88; *Jennings, supra*, 50 Cal.4th at pp. 690-691; *Bennett, supra*, 45 Cal.4th at p. 632; *People v. Mungia* (2008) 44 Cal.4th 1101, 1143 ["California's status as being in the minority of jurisdictions worldwide that impose capital punishment, especially in contrast with the nations of Western Europe, does not violate the Eighth Amendment."]; *People v. Kelly* (2007) 42 Cal.4th 763, 801 ["a sentence of death that complies with state and federal constitutional and statutory requirements does not violate international law"]; *Cook, supra,* 39 Cal.4th at pp. 619-620 ["international law does not bar imposing a death sentence that was rendered in accord with state and federal constitutional and statutory requirements"]; *People v. Moon* (2005) 37 Cal.4th 1, 48 ["Although defendant would have us consider that the nations of Western Europe no longer have capital punishment, those nations largely had already abolished it officially or in practice by the time the United States Supreme Court, in the mid-1970's, upheld capital punishment against an Eighth Amendment challenge."].) Appellant raises arguments that have been soundly rejected by this Court in the past and does not provide any valid reason for this Court to revisit its prior holdings. Thus, the contention must be rejected once again. (See, e.g., *Russell, supra*, 50 Cal.4th at p. 1275; *Brady, supra*, 50 Cal.4th at pp. 590-591; *Loker, supra*, 44 Cal.4th at p. 756.)

IX. THE PENALTY SHOULD NOT BE REVERSED, AND THE CASE SHOULD NOT BE REMANDED

Appellant contends that if any count or special circumstance is reduced or vacated, the death penalty must be reversed and the case remanded for a new penalty phase trial. (AOB 292-294.) Respondent disagrees.

As set forth in Arguments I through VI, *ante*, there is no cause to reverse or vacate any count or special circumstance.

Further, even assuming appellant is correct that one or two of the mayhem, torture, or rape special circumstances should be vacated, there would still be a remaining valid special circumstance, as set forth in Arguments II, III and VI, *ante*. Thus, even if the jury considered one or possibly two invalid special-circumstance findings, which it clearly did not, the penalty verdict need not be set aside because of the existence of at least one remaining valid special circumstance. (See *Zant, supra,* 462 U.S. at p. 881; *Sanders, supra,* 51 Cal.3d at pp. 520-521; *Silva, supra*, 45 Cal.3d at pp. 632-636; *Allen, supra,* 42 Cal.3d at pp. 1281-1283.) Also, as demonstrated in Argument VI, *ante*, even further assuming one or two of the special circumstances should not have been considered by the penalty jury, it can be said, on this record, that the error was absolutely harmless and that there was no likelihood the jury would have reached a different penalty verdict in the absence of the alleged error. (See *Sanders, supra*, 51 Cal.3d at pp. 520-521; *Silva, supra*, 45 Cal.3d at pp. 632-636.)

Moreover, appellant's argument that a harmless error analysis with respect to the penalty phase is precluded under the United States Supreme Court decisions in *Ring, supra*, 536 U.S. 584 and *Apprendi, supra*, 530 U.S. 466 is meritless. (See AOB 293-294.) This Court has held that "[*Apprendi* and *Ring*] have no application to the penalty phase procedures of this state" (*People v. Nakahara* (2003) 30 Cal.4th 705, 721-722) and "*Ring* does not

apply to California penalty phase proceedings" (*People v. Prieto* (2003) 30 Cal.4th 226, 272). The claim must fail.

X. APPELLANT IS NOT ENTITLED TO RELIEF AS A RESULT OF THE CUMULATIVE EFFECT OF THE ALLEGED ERRORS

Appellant contends reversal is required based on the cumulative effect of errors. (AOB 295-297.) Respondent disagrees.

As demonstrated above, the claims of error are without merit. (See Arguments I through IX, *ante*.) And, since there is no error to cumulate, appellant's claim of reversible cumulative error must fail. (*People v. Avila* (2009) 46 Cal.4th 680, 718 [error was only assumed and does not amount to reversible cumulative error].)

Moreover, even assuming some error, no single error or cumulation of nonprejudicial errors warrants reversal. (See, e.g., *Russell, supra*, 50 Cal.4th at p. 1274; *Bacon, supra,* 50 Cal.4th at p. 1129.) Even a capital defendant is only entitled to a fair trial, not a perfect one. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1009.) The record shows appellant received a fair guilt, sanity, and penalty phase, and his claims of cumulative error must be rejected.

CONCLUSION

Accordingly, respondent respectfully requests the judgment of conviction and death be affirmed.

Dated: June 10, 2013

Respectfully submitted,

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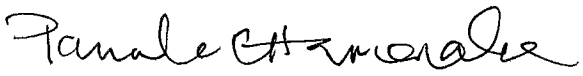

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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 90,670 words.

Dated: June 10, 2013

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: *The People of the State of California v. Troy Lincoln Powell*
Case No.: **S137730**

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.

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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 June 10, 2013, at Los Angeles, California.

J.R. Familo
Declarant


Signature

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