In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Respondent,** **v.** **PAUL WESLEY BAKER,** **Appellant.**	**CAPITAL CASE** Case No. S170280

Los Angeles County Superior Court Case No. LA045977
The Honorable Susan M. Speer, Judge

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

In an amended information filed by the Los Angeles County District Attorney, appellant was charged with the murder of Judy Palmer (Pen. Code,[1] § 187, subd. (a); count 1), rape of Judy Palmer (§ 261, subd. (a)(2); count 2), first degree burglary (§ 459; count 3), grand theft (§ 487, subd. (d)(1); count 4), the unlawful driving or taking of vehicle (Veh. Code, § 10851, subd. (a), count 5), forcible rape of Kathleen S. (§ 261, subd. (a)(2); count 6), sodomy by use of force of Kathleen S. (§ 286, subd. (c); count 7), sodomy by use of force of Laura M. (§ 286, subd. (c)(2); count 9), sodomy by use of force of Lorna T. (§ 286, subd. (c)(2); count 10), forcible rape of Susanne K. (§ 261, subd. (a)(2); count 11), forcible rape of Monica H. (§ 261, subd. (a)(2); count 12), sodomy by use of force of Laura M. (§ 286, subd. (c)(2); count 13), the unlawful driving or taking of vehicle (Veh. Code, § 10851, subd. (a), count 14), sexual penetration by a foreign object (§ 289, subd. (a)(1); count 15), and sodomy by use of force of Kathleen S. (§ 286.61, subd. (c); count 16). (Supp. III CT 93-107.)[2]

As to count 1, the special circumstances alleged that appellant committed the murder during a rape, burglary, and sexual penetration by a foreign object. (§ 190.2, subd. (a)(17).) As to counts 2, 6-13, 15-16, it was alleged that appellant committed the offenses against more than one victim. (§ 667.61, subd. (a), (b), & (e).) As to count 15, it was alleged that appellant committed the offense during a residential burglary. (§ 667.61, subd. (a) & (d).) (Supp. III CT 93-107.)

Appellant pleaded not guilty and denied the allegations and special circumstances. (5CT 1126.) Following a trial by jury, the jury found

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[1] All further statutory references will be to the Penal Code, unless otherwise indicated.

[2] The amended information did not contain a count 8.

appellant guilty on count 1 and found true the special circumstance that the murder was committed in the commission of a rape and burglary. On count 2, appellant was found guilty and the jury found true the allegations that the rape was committed during a first degree burglary, with the intent to commit the rape, and that there was more than one victim. Appellant was also found guilty of counts 3, 4, 5, and 14. On counts 6 and 7, appellant was found guilty and the jury found true the great bodily injury and multiple victim allegations. Finally, appellant was found guilty on counts 10 and 16, and the jury found true the multiple victim allegations. Appellant was found not guilty on counts 9, 11, 13, and 15. (6CT 1396-1410, 1427-1433; 49RT 7648-7655.)[3]

Following the penalty phase, the jury returned a verdict of death. (6CT 1504, 1506-1507; 61RT 8630-8632.)

Appellant filed a motion to set aside the verdicts and for a new trial. The trial court denied the motion and sentenced appellant to death. (36CT 9463-9480, 9483-9485; 62RT 8704-8734.)

This appeal is automatic. (§ 1239, subd. (b).)

STATEMENT OF FACTS

Judy Palmer was devoted to her family and to helping others attain sobriety. Appellant met women through Alcoholic Anonymous ("AA") and started abusive relationships with them. He would control, rape, and physically abuse these women. Judy met appellant through AA, and they began a romantic relationship. Once Judy ended the relationship with appellant, she also disappeared. Her decomposed body was later found in the desert, weighing twenty-two pounds.

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[3] Count 12 was dismissed following a motion pursuant to section 1118.1 (5CT 1265-1266; 38RT 6239-6240.)

A. Guilt Phase Evidence

1. Prosecution Evidence

a. The Disappearance of Judy Palmer

Judy Palmer had been sober for twenty-eight years. She was involved with Alcoholic Anonymous ("AA") and would dedicate a large amount of time helping others attain sobriety by attending meetings and being a sponsor. She had many friends from AA and met appellant through AA. (11RT 2117-2120.)

Tammy Gill, Judy's daughter, was very close to her mother. They would speak on the phone two times a day and see each other three to five times a week. Judy would come visit Tammy at her home and spend time with Tammy's children. Judy was very reliable and would always call if she was not going to come over. (11RT 2091-2095.)

In 2000, Judy met appellant, and they became friends. They started dating between 2001 and 2002, and he moved into her apartment shortly thereafter. Judy always kept her apartment very clean and tidy. (11RT 2095-2111.) She used to smoke cigarettes, but had quit six years before her murder. She thought cigarettes "stank" and hated the smell. She also regularly took out the trash every morning on her way to work. (11RT 2116-2117.)

Late in 2003, Judy told Tammy that she was having a hard time with appellant because she thought appellant was using drugs and sleeping around. Around that time, Judy told appellant that he needed to move out of her apartment. However, they got back together because Judy felt sorry for him and was trying to help him get sober. (11RT 2120-2123.)

Around the beginning of 2004, Robert Remp, Judy Palmer's son, had appellant install tile in his home as a way to give him work. (11RT 2041-2042.) At first Robert was going to pay him $500, but appellant needed a

tile saw. The saw was worth about $550, so they agreed to settle on the saw as payment. (11RT 2042.) Appellant, however, was upset about the transaction. As he was leaving Robert's house, he told Robert that "he could really hurt his mother." (11RT 2043.)

In March 2004, Tammy had a birthday party for Judy at her home. Tammy recalled appellant telling Judy, "I know you want to marry me." Judy simply responded, "The hell I do." She also remembered appellant telling Judy, "Why don't you tell her what I gave you for your birthday?" "Come on. Come on. Tell her what I gave you. It's pretty and it's pink." (11RT 2124-2125.) Judy simply got up, and Tammy noticed her mother was crying. (11RT 2125-2126.)

Around March 11, 2004, Judy again started having problems with appellant and wanted him out of her apartment. Judy believed he was seeing someone else and doing drugs again. Appellant, however, threatened to commit suicide if Judy did not take him back. (12RT 2186, 2302.) Later, in April 3, 2004, appellant called Tammy's house to talk to her mother, but Tammy told appellant that under no circumstances could he talk to Judy. Judy told Tammy that appellant had been showing up at her apartment and AA meetings, and was calling her at home and at work. (12RT 2187-2188.) Judy never used profanities, but at some point during the conversation she said, "I wish the asshole would leave me alone." (12RT 2189.) Judy also told a close friend that "she was afraid of [appellant] and that if anything happened to her that – to look at him, that he did it." (12RT 2158.) As of April 2014, Judy was no longer with appellant. (12RT 2158.) Judy also told a close friend about appellant breaking down her door and ripping the phone out of the wall. (12RT 2159-2160, 2175.)

During 2003 and 2004, Judy and appellant rented a storage unit together. (13RT 2331-2336.) Petitioner would come by the unit regularly

with his dog. However, he once showed up without the dog. One of the owners of the storage facility asked about the dog, and appellant replied, "She's got it and if I ever want it back, I'll probably have to kill her to get it." (13RT 2340.) On March 11, 2004, Judy came in to make a payment, and the owner asked her about appellant's statement regarding the dog. Judy started shaking and looked scared. Appellant then walked in and grabbed her by the elbow and pinched her "real hard." Judy kept looking "real scared." That was the last time any payment was made on the unit. (13RT 2340-2341.) The storage unit did not have a lock on it. (13RT 2344.) On April 17, 2004, appellant tried to get out of the storage facility at least twice that evening. (13RT 2347-2351.)

On April 5, 2004, police visited Judy's apartment regarding a domestic disturbance; she said that appellant had forced himself into the apartment and wasn't letting her inside. Once inside, the police officers arrested appellant when he pulled out a crack pipe. The officer also found a set of keys to the apartment in his underwear. Appellant was arrested and released on April 14, 2004. (17RT 2887-2892.)

At the time of his mother's death, Robert was providing her with a car, a 1999 white Ford Escort. (11RT 2044.) Appellant did not have permission to drive the car, and only Robert and Judy had the keys to the car. (11RT 2046.) On April 15, 2004, Judy called Robert to tell him the car was missing. That same day, Robert went to the police station to fill out a police report. (11RT 2046-2047) The next day, a police officer called Robert to tell him they found the car. (11RT 2048.) Robert made arrangements to meet Judy on Sunday, April 18 at 10 a.m., at the police station to pick up the car. (11RT 2049-2050)

A week before April 17, 2004, Judy told her daughter that "she was really cleaning" her apartment. (11RT 2112.) Any soiled underwear or dirty laundry was brought to Tammy to wash. Tammy gave the clean

laundry back to her on Saturday, April 17, 2004, when Judy came over to the house. (11RT 2114-2115.) On Saturday, April 17, 2004, Judy came over for dinner at Tammy's home. She was driving a white Ford pickup truck that she borrowed from her employer. (12RT 2139, 2193-2194.) Judy was parking the truck in a different location because she thought appellant had stolen the other car. (12RT 2159-2160, 2175, 2195.) At dinner, Judy was happy that the car had been found, but she was not herself. She was upset, but did not want to talk about appellant. (12RT 2196-2198.) Judy confided to a close friend that she was still afraid of appellant and did not know what to do. She was thinking of going to a motel that night because she knew appellant was out of jail. (12RT 2161, 2174.)

The following morning, Judy planned to meet her son, Robert, at the impound yard to pick up the car and then take Tammy's children to a play. After dinner, Judy wanted to head home to watch a show on the television that started at 8 p.m. (12RT 2198.) Tammy and Judy also had plans to go to Disneyland. Tammy gave Judy an envelope with $200 to pay for the tickets. Judy left after dinner wearing jeans, a t-shirt, and a tan sweater. Judy also had her glasses on when she left. (12RT 2199-2200.) That was the last time Tammy saw her mother.

Judy never showed up the next morning to meet Robert at the impound yard. (11RT 2050.) Robert picked up the car and noticed it was in good condition with no evidence the ignition had been punched. (11RT 2051.) Tammy expected a phone call from Judy in the morning, around 8:30 a.m., but she did not call. Around 9 a.m., Tammy's sister-in-law called and said Judy was not answering her home phone or cell phone, which was not like Judy. Tammy left her messages and called the AA office, but she was not there either. (12RT 2201.) Around 10 a.m., Tammy went with her husband to Judy's apartment. They noticed the truck was not

there. They knocked on door and yelled out Judy's name, but nobody answered. Before leaving, they left messages for the apartment manager. Next, they drove to the AA office, but nobody had seen Judy since the previous Friday morning. While there, Tammy got a copy of the restraining order her mother had filled out against appellant. (12RT 2202-2204.) Tammy and her husband drove to the police department around noon and told the desk officer that Judy was missing. Initially, Tammy was told she would have to wait twenty-four hours for the person to be missing to make a report, but the police officer relented and put out a bulletin for Judy, the truck, and appellant. (12RT 2204-2207.) Tammy and her husband drove and called around most of the day looking for Judy.

Later that evening, the apartment manager called Tammy back and told her to get a locksmith to open up the apartment. The locksmith noticed the door had been damaged before. They entered the apartment around 8 p.m. (12RT 2208-2209.) The first thing Tammy noticed was that the sink was empty; she thought her mother would have a few dishes in the sink. Tammy also noticed a very strong smell of Pine-sol cleaning liquid. Judy used it in the past, but it never smelled that strong. Tammy also noticed Judy's shoes were side by side and her eye glasses were on top of the table folded closed. Usually, Judy's glasses would sit on the coffee table opened up. A copy of the restraining order was under the books on the coffee table. (12RT 2210-2214.) All the lights, television, and fan were turned on. (12RT 2244.) The very next day, on Monday, Tammy started posting flyers and contacting all police departments. (12RT 2242.)

b. The Police Investigation

On April 16, 2004, Police Officer Robert Tamate was on patrol looking for stolen vehicles and happened to pass a white Ford Escort. He ran the plates and found the car was stolen. Officer Tamate made a U-turn and eventually pulled over the car, which was driven by Daniel Mengoni.

The ignition was not punched, and Mengoni told officers that he "didn't steal the car – it was Paul's car and he's over at the motel." (17RT 2916-2920, 2931-2933.) Officer Wilfredo Ortiz went to the nearby motel and found appellant in one of the rooms. Appellant had fresh scratches on his face and was taken into custody. Appellant was photographed and then released. (17RT 2940-2943, 2955-2962.)

Mengoni knew appellant since late 2003 from doing drugs together. Appellant, Mengoni, and Juan Calhoun would get together and do drugs by the side of the freeway or at a cheap motel. (13RT 2379, 2384.) On April 15, 2004, appellant called Mengoni to tell him he had a car for him to trade for drugs. The car was a white Ford Escort that had women's clothes in the trunk. Mengoni thought he would be allowed to drive it for a few days, but appellant told him he never wanted it back. (13RT 2390-2392.) Mengoni was later arrested for driving the stolen car, which he told the officers he had obtained from appellant. (13RT 2393-2395; 14RT 2451.) While in custody, he found out that the car had some involvement in a murder. After Mengoni got out of jail, he confronted appellant about having to spend time in jail. Appellant told him "not to worry about it. The charges would be dropped. Nobody would show up to court." (14RT 2397-2400.)

On April 17, 2004, Calhoun got a motel room with appellant to do drugs. They checked in around 7 p.m. However, appellant left around midnight. He came back around 5 a.m. with a few fresh scratches on his face that were not there before. (14RT 2487-2498; 15RT 2509-2511, 2516-2518; 37RT 6030-6034.) Calhoun asked appellant what happened and he responded that he had gone to his wife's house, broken in, and "he had beat the pussy up." (14RT 2498, 2500; 15RT 2756; 25RT 2512-2513, 2521-2522.) To Calhoun, it meant to have aggressive sexual intercourse with his wife. Appellant previously mentioned that he was upset and jealous because he thought his wife was "playing around" on him. (14RT 2499-

2500; 15RT 2518.) Later, Calhoun ran into appellant at a swap meet, where appellant was in a hurry trying to sell a bag of women's jewelry. (15RT 2514-2515.)

On the night of April 17, 2004, appellant showed up at the house of John Patrick Woodard in a white Ford truck. Woodard met appellant through AA, and he even did some home repair work for Woodard. Around 2003, appellant was driving a white Ford Bronco. Appellant would complain about Judy Palmer and had a lot of anger towards her because he said he was being mistreated. He would call her a "cunt." (15RT 2655-2659.) Appellant would also tell Woodard that he liked to "force" women into anal sex. (15RT 2659.)

The night of April 17, appellant did not park the truck in the usual parking spot but rather parked it so it was out of the view. Appellant wanted to sell Woodard the tool box on the truck or trade it for the tile saw he previously loaned him. After Woodard refused, appellant left. He came back within a few days, was very upset, and told Woodard he was going to be on the news. (15RT 2661-2675.) Appellant would come back often and try to get money. He no longer had the truck and was storing his belongings in a shopping cart. Appellant was still very upset and told Woodard that he was going to jump off a bridge. (15RT 2676-2678.) Woodard called his good friend, Carol Peterson, about appellant's statement that he would be on the news. Later, Carol called him and told him that "he's on the news and it's because of Judy Palmer." (16RT 2785-2788.) Woodard called the police to tell them appellant was frequenting his apartment and leaving things, including a bible that Judy had given him. (16RT 2788; 37RT 6034.)

Woodard saw the posters of Judy missing at AA meetings and thought that the truck could have been involved. The poster indicated that Judy

went missing on April 18, and Woodard remembered appellant showing up on the night of April 17 with Judy's truck. (16RT 2778-2782, 2829.)

On April 20, 2004, appellant sold Richard Stoiberg, owner of an auto repair shop and used car dealer, a used Ford Bronco for $500. At the time, appellant was very upset, depressed, and said he wanted to kill himself. He took a few things out of the car before selling it and abandoned the rest of the belongings on the lot. (17RT 2859-2871.)

On April 24, 2004, Detectives Foster Rains and Steve Park went to meet Stoiberg at his car lot. Stoiberg directed the detectives to appellant's truck and to the items he had left behind. The detectives went through the items and found papers belonging to appellant, including receipts from Home Depot and Lowe's stores, and various tax documents. All items were booked into evidence. (34RT 5667-5778; 17RT 2965-2972.)

Later, on April 27, 2004, Eugenio Edgardo, a criminalist for the police department, searched the Ford Bronco for evidence. Along with Detective Raines, they found a shovel, tools, wrench, pliers, hand vise, grinder, and documents, including an order of protection with appellant's name on it. Maps were also found folded open to the desert area just east of Los Angeles. (18RT 3109-3125; 35RT 5860-5874.)

On May 6, 2004, Detectives Rains, Park, and Edgardo went to Judy's apartment to investigate the crime scene. There was a stain under the coffee table that was not visible until the table was moved. (17RT 2988-3004.) Edgardo performed a phenolphthalein test for evidence of semen on the stain, and it tested positive. He then collected a sample by cutting out part of the rug. There was also a small stain on the wall that tested positive for blood. Another blood spot was found on the furniture facing the larger stain on the ground. Edgardo collected samples of each. No evidence of blood was found in the drain, but he collected a toothbrush and hairbrush. He later collected a pink dildo that was in the bathroom sink. (12RT 2246-

2245; 17RT 3010-3019; 18RT 3125-3139; 35RT 5875-5883; 36RT 5991-5999; 37RT 6103-6112.)

Much later, when returning to clean up the apartment, Tammy also found a crack pipe in the back of the sofa, which she turned over to Detective Rains. (12RT 2215-2217.) A quilt, which she had given her mom for Christmas, was missing from her bed. Also missing were the bed sheet and pillows, and Judy's purse. (12RT 2218-2222.)

c. The Discovery of Judy Palmer's Body

On May 11, 2004, Jason Warfield, a paramedic, was at a minimart in Palm Springs when Francisco Correa approached him. Correa led Warfield across the freeway by the railroad tracks. As he approached, Warfield could smell something rotting. He saw a decomposing body with a foam mattress around it bundled with a rope, which was partially covered under some vegetation. Warfield could see bones with partial flesh on them. He immediately called the police. (27RT 4512-4519; 28RT 4723-4732, 4859-4862.)

Palm Springs Police Department Detective Troy Castillo went to the location to investigate. He was shown the location of the body, and the coroner was called. A shopping cart with several items was also found in the area. The body had a pair of blue jeans that were unbuttoned, unzipped, and pulled down to her upper thigh. (27RT 4525-4545, 458145-90, 4603-4622.) Some of the items recovered in the desert included bedding, a blanket, towels, sheets, crocheting, and a sleeping bag from Judy's apartment. (12RT 2229-2239; 37RT 6103-6112.) Tammy also identified pictures of appellant's dog, Rudy, found in Riverside. (12RT 2240-2241.)

d. The Forensic Examination

On May 12, 2004, an autopsy was conducted by Dr. Mark McCormick of the Riverside County Sheriff Coroner's office. Garry

Wilson, a forensic technician, was also present to remove items and collect samples for testing. (29RT 4919-4945; 27RT 4623-4640.) Fingerprints lifted from the body matched those from DMV records for Judy. (29RT 4963-4975.) Judy's body was wrapped in a Native American blanket and tied together with rope. The rope was wrapped around her neck, torso, and legs of the body. She was bound in a fetal position. Judy had jeans that were unzipped and unbuttoned. She also had underwear on and a sock on one of her feet. Judy's body was largely skeletonized and decomposed with very little soft tissue left intact. All skin and muscle from her face was gone, including the eyes. Most of her brain was also absent. No organs were left in the torso. There were fractures on the small ribs that may have occurred shortly before death or around that time. Dr. McCormick could not determine cause of death because of the condition of the body. Although it was not a natural death, there was no evidence of trauma or levels of toxins from drugs. Judy could have been choked to death, stabbed to death, or received blows to her body that led to internal bleeding. The time of death could have occurred between April 17 to 18, and Judy's body could have been dumped in Palm Springs and not found until May 11. (30RT 4990-5013, 5055.)

On May 11, 2004, Alicia Lomas-Gross, a criminalist at the Department of Justice Riverside Laboratory, went to Riverside County along the Gene Autry trail where Judy's body was found. She saw evidence being collected, including a shopping cart, egg crate with some bedding, sleeping bag, plaid pattern sheets, a blanket with Native American pattern, a black plastic bag, a water bottle, and a white towel. The coroner's department was also present collecting samples that were turned over to her for analysis. (19RT 3210-3231.) The body of Judy was wrapped within some of the bedding, sleeping bag, and sheets. An unclasped bra and a piece of latex from a glove was also found at the scene.

(19RT 3231-3235.) A similar rope used to bind Judy was sold at a local Home Depot store. The Home Depot receipt was found in the dumpster at Stoiberg's lot, where appellant had abandoned some of his possessions. (35RT 5726-5738, 5757-5774, 5790-5822.)

On May 12, 2004, Lomas-Gross attended the autopsy and observed how the evidence was being collected. Judy's body weighed twenty-two pounds. Lomas-Gross analyzed the blanket, sleeping bag, pillow, ball of yarn, and found no evidence of blood or semen. On May 21, she analyzed the plastic bags found underneath the shopping cart, which were weakly positive for blood but not semen. The white pillow case was also weakly positive for blood but not semen. The paper towels also tested positive for blood. Semen, however, was found on the towel. A blanket tested positive for blood and semen. Woven gloves and socks tested positive for blood. (19RT 3235-3257, 3269, 3272-3277, 3284-3293.) A document was also found with appellant's name on it and a receipt from Pep Boys in Reseda. (19RT 3299, 3315.) A shoe, pieces of yarn, and a pocket watch tested positive for blood. A hand towel tested weakly positive for blood. (19RT 3300-3316, 3324.) Rubber gloves were also analyzed. (19RT 3263, 3327-3328.) A picture was found with the following inscription, "Judy, I will always love you, no matter what. I miss you very much. Love Paul B." (19RT 3333.) The underwear found on Judy was tested but was inconclusive and sent for further testing to Cellmark laboratory in Texas. (19RT 3358-3365.)

Theresa Pollard, a criminalist for the state Department of Justice, explained the procedures at the laboratory. Ms. Pollard explained she received Judy's fingernail clippings and a clavicle bone as a reference for analysis. (21RT 3597-3622.) DNA found underneath Judy's fingernail clippings were consistent with appellant's profile. (21RT 3627-3631.) The sperm on the blanket also matched appellant. Cigarette butts matched

appellant's DNA. Finally, the sperm on a hand towel and a dish towel matched appellant's profile. (21RT 3639-3656.)

In November 2004, Angela Zdanowski, a criminalist with the Los Angeles Police Department, sent oral swabs to DOJ Riverside Laboratory. (23RT 4064-4073.) Later, around March 2005, she tested blood-related evidence, including a rug section, which tested positive for blood and semen. A section of the couch also was positive for semen. The floor padding also tested positive for blood. The dildo was positive for sperm and vagina cells. Zdanowski sent these items to Cellmark for further testing. (23RT 4075-4091.)

Dr. Rick Staub, the director of the Cellmark laboratory in Dallas. Texas, explained that once a sample has been screened, or tested positive for blood or semen, the sample is sent to Cellmark laboratory for DNA extraction and further testing. (20RT 3424-3427, 3447-3449.) The rug section that tested positive for blood and semen was matched to appellant's DNA profile and matched the blood of Judy. (20RT 3466-3478, 3492.) The dildo/vibrator matched the profile of appellant and of Judy. The blood spot on the walls came from Judy. (20RT 3479-3497, 3536.) Finally, appellant's DNA was also found on Judy's underwear and on the latex gloves found in the desert.[4] (20RT 3498-3510, 3514-3531; see also 21RT 3657-3666.)

e. Appellant's Arrest

On May 29, 2004, Officer Michael Terrazas found appellant and held him until homicide detectives responded and took him into custody. (24RT 4185-4187.) Appellant was taken to jail and then to a local park to

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[4] Testing was done to separate Judy's DNA and appellant's DNA using Y-STR profiling, which amplified the male DNA in order to detect it. (20RT 3497-3510.)

identify his belongings stuffed into two shopping carts. Some of those items included blankets, a sleeping bag, documents with appellant's name on it, and a missing person flyer for Judy. Appellant confirmed it was his property. (28RT 4865-4900; 37RT 6022-6023.)

During May and June 2004, the white Ford pickup was cited for being illegally parked on a street because it was never moved. (33RT 5508-5522.) On June 2, 2004, the truck was impounded when it came up stolen. (16RT 2844-2850.) On June 4, 2004, the truck was searched and found to have "plant material" on the floor by the seat and at the end of the bed of the truck. (18RT 3038-3043; 36RT 6007-6012; 37RT 6028.) Dr. James Bauml, a botanist and plant taxonomist, compared the plant samples taken from the truck and samples from where Judy's body was found and determined they matched. He also testified that the plant material in the truck has never been found in the Los Angeles area. (18RT 3051-3067.)

Other items found in the truck included cigarette butts, an empty bottle, and a moving blanket. There was evidence that a tool locker or box was previously attached to the truck. (18RT 3104-3108.) Robert Martin originally loaned Judy the truck on April 15, 2004. At the time, the truck had a metal tool box with a diamond-plate finish. (12RT 2140.) Eventually the truck was returned to him. It had a lot of damage and was not drivable. There were scratches, and the tool box was missing. (12RT 2142.) The truck also had a blue moving blanket that was not in the truck originally. (12RT 2144.) The keys were never found. (12RT 2145.)

f. Other Charged Offenses

(1) Kathleen S. (Counts 6, 7, & 16)

Kathleen S. first met appellant towards the end of 1996 or beginning of 1997. She was homeless and a drug addict. Appellant, also homeless, at first seemed sweet and caring. Appellant was living in his van and offered

to let her stay with him in van. They started an intimate relationship. They both would go to meetings, but were still doing drugs and drinking alcohol. Around May 1997, they were inside the van and getting ready for bed. Appellant wanted to have anal sex, but she refused. Appellant forced himself on her, pulled her pants down, and stuck his penis in her anus. Afterward, he said he did it "to all his women." Kathleen S. did not report it because she feared being back on the street. (32RT 5390-5402.)

Later, on May 9, 1997, while in the van, Kathleen S. told appellant that she was going to leave him. She exited the van and crossed the street. Appellant caught up with her and grabbed her by the hair and threw her to the ground. Her head hit the ground. At the time, a police car was coming up the street and arrested appellant. He was convicted of misdemeanor violence against a spouse or significant other. (32RT 5403-5407.)

They later reunited at AA meetings and moved in back together. Kathleen S. got her old job back as a dog groomer and the employer even offered them his garage as a living space. They stayed in the garage while appellant helped renovate the employer's house. On June 2, 1997, they moved into the garage and went to a local bar to drink. Kathleen S. met up with an ex-boyfriend. Once she and appellant left the bar, they went back to the garage. They kept drinking and smoking marijuana. Appellant eventually started yelling at her and became jealous. Appellant grabbed Kathleen S.'s hand, put her thumb inside his mouth, and bit all the way to the bone. Her face started to swell and was in pain. Kathleen S. felt appellant pick her up and throw her in the air, hitting the garage door. She also remembered being on her stomach and appellant reaching over her. Kathleen S. felt pain her pelvic area and anal region. Appellant punched her in the stomach and told her he was going to take her to the desert and tie her up and have his friends rape and kill her. He then dragged her outside the garage and told her he was going to take her to the house and

show her what he had done. Kathleen S. felt pain in her mouth, ribs, stomach, jaw, and her eyes were swollen. She did not want to be taken to the house, so she started running. She then saw the police, who tried to restrain her. (32RT 5407-5423.)

That same night, neighbors heard barking dogs that would not let them sleep. After looking outside, they heard yelling and whimpering coming from the garage of the house directly behind theirs. They heard a female voice say "stop beating me up," and they could hear crying and an angry male voice. They decided to call 911 and waited outside for the police to arrive. (32RT 5330-5340, 5365-5375.) Officer John Dunlop responded to the call and spoke to the neighbors. As he approached the garage, he heard a large object slam against the garage door. He also heard a fist striking flesh and a woman's voice screaming to please stop. Officer Dunlop went around the corner to enter garage and saw a woman running out followed by appellant chasing her. Her face was completely swollen, her eyes shut, and there was bleeding from mouth. She was hysterical. She screamed, "Don't let him get me again. Don't let him take me to the desert." She also told the officers that he "fucked her in the ass." She told them that he had beat her up. The officers grabbed her and tried to calm her down. Appellant was reasonably calm. Kathleen S. was taken to the hospital, and appellant was taken into custody. (34RT 5621-5636; 52RT 7825-7827.)

Dr. Harold Lowder was the emergency room doctor that early morning and examined Kathleen S., who had been drinking alcohol that evening. She was disheveled and tearful, but cooperative. A sexual assault examination was performed. Kathleen S. complained of face and jaw pain. She told the doctor that she was raped by her appellant, who "punched and kicked her all over" and put his penis in her mouth, vagina, and rectum multiple times. Appellant also bit her. According to Kathleen S., he was

unable to ejaculate, which made him more angry. He also choked her. Dr. Lowder found trauma to her pelvic region and abrasions around the rectum. Dr. Lowder concluded she had been physically and sexually assaulted. (28RT 4813-4825.)

Kathleen S. did not remember anything else until she woke up in the hospital. Even then, she only remembered bits and pieces of that night. Once she recovered from her injuries, she went to a battered women's shelter and then rented a room to get her life together. (32RT 5407-5423.)

Later, on August 31, 1997, appellant showed up to the place Kathleen S. was renting. He yelled at her, so she ran into her truck and began to drive away. Appellant grabbed the car antenna and hit the windshield, cracking it. Kathleen S. was terrified he was going to hurt her again. She reported the incident to police, and appellant was convicting of vandalism. (32RT 5424-5425.)

(2) Laura M. (Counts 9 & 13)

Laura M. met appellant in 1996 through AA. They began dating through 2001. Appellant had trouble with alcohol and the law. On one occasion, she was drinking heavily and went to a hotel with appellant. Once in the room, he tied her arms and wrists to the bedposts, and forced her to have anal sex. After he left, she screamed for help. Eventually, someone came in and untied her. She called the police and reported the incident, but decided not to pursue charges because she was scared of appellant. (30RT 5060-5072.)

Sometime in 2000, appellant again forced her to have anal sex. She got out of the camper where appellant was staying and ran to an AA clubhouse nearby. She did not report this incident to the police. (30RT 5073-5075.) On January 14, 2001, they went to the beach and then back home. As she was washing the sand off in the shower, appellant pulled her out of shower, threw her on the floor, and forced himself on her and had

anal sex. He left immediately after that incident. She called police, but decided not to pursue it because she was threatened by appellant and was scared of him. (30RT 5076-5082.)

Sometime in 2000, Laura M. and appellant took a trip to Las Vegas and she jumped out of the car because appellant said something that scared her. Appellant left her stranded in Las Vegas. Other past incidents included those when appellant punched her in the face and stomach, burned her with cigarette, and stole money and items from her, including her car. (30RT 5083-5090) On April 5, 2004, out of the blue, appellant called Laura M. and told her he was not seeing Judy anymore. (30RT 5092.)

(3) Lorna T. (Counts 10)

Lorna T. met appellant in 1994 at AA meeting and they began dating. He was very nice but aggressive. While they dated, he liked pornographic movies, especially those involving anal intercourse. In December 1995, appellant attacked Laura M. in her apartment. He pinned her down on the bed, forced himself on her and had anal sex. She never reported the incident. (31RT 5220-5229, 5284.) In 1996, appellant also stole her ATM card and took money out of her account without her permission. (31RT 5284; 34RT 5596-5600.)

(4) Susanne K. (Counts 11)

In February 2001, met appellant at AA meeting. After their first date, he forced her to have sexual intercourse inside her house. She did not report the incident. (31RT 5289-5294.)

g. Uncharged Conduct

(1) Michelle W.

Michelle W. met appellant in 1982. Appellant was 20 years old and she was 17 years old. At the time, he was very strong, outgoing, and good looking. Her parents approved of appellant. They decided to move in

together, but things did not go well. Appellant had a bad temper and an alcohol problem. While they were living together, he was jealous and accused her of seeing other people behind his back. He would get angry and yell at her, and did not believe her when she denied it. On one occasion, appellant threw a vase at her, which broke on her arm and cut her. He also ripped up some things around the apartment, grabbed her by the throat, and choked her with both hands. He also spit in her face and called her ugly and stupid. (25RT 4281-4283.)

In another incident, appellant cornered Michelle W. at a hamburger stand and attacked her. He kicked her and left. She did not report the incident to the police. (25RT 4284-4287.)

Eventually, Michelle W. decided they needed to break up. She moved out of the apartment and in with her grandmother. While she was living there, appellant called her several times and wanted to reconcile, but he had already decided to move out of the state and had rented a van. While she was moving things out to the van, she could see appellant across the street staring at her. He approached and they argued. Appellant then punched her in the face and she fell, hitting her shoulder. He immediately left. She was hurt, humiliated, and horrified. (25RT 4273-4280.) He told her, "You can't leave me." (25RT 4284.)

After Michelle W. moved out of state to Wisconsin, she contacted appellant because she still loved him. She ended up moving back to California in 1985 and decided marry him. They moved to Long Beach. Appellant would still get violent when he drank. He would also use drugs, including crack cocaine. During the course of their marriage, appellant choked her three or four more times. He would also occasionally punch her in the face – about once a year. There were money problems, but the main trigger was jealousy that she was seeing someone else. They decided to

move to Rock Falls, Wisconsin where their son was born. It was peaceful for a short time, but it did not last. (25RT 4287-4293.)

Sometime in August 1989, appellant and Michelle W. decided to get lunch and have a few drinks. Her bra accidently came unhooked and appellant thought the bartender had unsnapped it. Appellant became very angry because he thought she was having an affair with the bartender. They left the bar and went home. Michelle W. was drunk and feeling sick, so she went upstairs to her bedroom. Appellant followed with baby oil. He forced himself on her and took off her clothes. She told him to stop, but he did not. She struggled, but he was very aggressive and demanding. He forcibly had sex with her and they struggled. She fell off the bed, and he grabbed her hair and banged her head on floor five or six times. They ended up back on the bed, where he sodomized her. Appellant also bit her on the back, arm, and leg. She managed to escape and ran outside to the neighbor's house. The police were called, and appellant was arrested. Nonetheless, she allowed him back in the house against the court order. The case was dismissed. (25RT 4294-4310.)

Eventually, they decided to move to Florida, where appellant's mother lived. Appellant again had trouble with alcohol and drugs and entered rehab once again. Michelle W. was an avid listener of a certain radio station and would often win prizes. On one occasion, she went to the radio station to collect a prize and found out that appellant had left rehab. He thought she was having a relationship with the radio station DJ and was very angry. Appellant yelled at her over the phone, and she was very scared. She decided to leave and go back to California with her children. Michelle W. and appellant eventually divorced. (25RT 4311-4315.)

Once again, appellant initiated contact and moved in with Michelle W. and their children. He wanted to a part of their life and establish himself. It was only supposed to be temporary, because she was dating

someone else. He eventually became angry and jealous. Appellant cornered her in the kitchen and put a lit cigarette up to her eye to scare her. He left to get some beer and found Michelle W.'s boyfriend at the apartment when he returned. Appellant picked up the boyfriend and threw him in the air. He also picked up a knife and cut the man's ear. Their children watched everything. Before the police arrived, appellant had left. Michelle W. got a restraining order from court. Appellant later called repeatedly asking for money and threatening her, which she gave him because she did not want any trouble. Eventually, appellant started dating other women, and he left Michelle W. and their children alone. (25RT 4316-4322.)

(2) Sandra B.

In 1994, Sandra B. also met appellant at AA. He was charming and outgoing. But once they started dating, his demeanor changed. They began to argue and fight more often. A few months after dating, she came home and found that appellant had moved into her place. They fought often during this time. On one occasion, he pulled the phone cord out of the wall and called her names. He moved out but was not happy about it. He threatened Sandra B. and left. She found all the letters, notes, and personal items she had given him stuffed in the toilet.

They eventually reconnected through AA. One time, Sandra B. gave appellant a ride in her car, but he became upset about an ex-boyfriend and jumped out of the car into traffic. Appellant later confronted Sandra B. and threatened her. (25RT 4427-4437.) After that, Sandra B. decided she needed to completely stop seeing appellant and get a restraining order. Appellant would show up at her apartment building, laundry room, and even at her job. He called incessantly and would leave threatening messages. He wanted to get back together, but Sandra B. refused. He told her to watch her back. He would sit next to her at AA and make her

uncomfortable. At an AA meeting, he once threw a cup of coffee and kicked her after she refused to speak with him. Even when she had a restraining order against him, appellant continued to threaten her. Appellant was eventually convicted of misdemeanor stalking and criminal threats against her. (26RT 4450-4464.)

(3) Theresa Tannatt

Theresa Tannatt met appellant in November 2003 at a "crack hotel" in Los Angeles and they did drugs together. Appellant was driving a white Ford Bronco at the time and had a small dog. They spent about a week together doing drugs. (15RT 2566-2572.) He mentioned Judy Palmer as his last romantic relationship. On several occasions, they went together to Judy's apartment for appellant to retrieve clothes. He said he could not live there because he was doing drugs again. He used the gate code to get into the apartment complex and then used a credit card to get into the door. (15RT 2573-2578.) They visited the complex about seven or eight times. Sometimes they would stay in the model apartment in the complex or do drugs in the stairwell because they were both homeless. (15RT 2580-2586.)

According to Theresa, she had sex with him voluntarily once before. One occasion, however, he tried to initiate sex but she refused. Appellant forced himself on her, pinned her shoulders down, and told her "I want it." She did not fight but she did want to have sex with him. She was disgusted and mad, and left after that encounter. (15RT 2589-2593.) Once Theresa found out that Judy was missing, her first thought was, "Oh my God, Paul." (15RT 2596.) She called the detectives that very same day and told the detectives that she had spent time with appellant and that they had gone to Judy's apartment complex. A few years later, she told the detectives that appellant had raped her. (15RT 2600-2602.)

2. Defense Evidence

Appellant did not testify at the guilt phase, or offer any affirmative defense. (44RT 6975.)

B. Penalty Phase Evidence

1. Prosecution Evidence - Victim Impact Testimony

Tammy Gill, Judy's daughter, testified that she learned so much from her mother. Tammy was born with a facial birth defect and was ridiculed, but learned to deal with it because of her mother. Even Tammy's own children learned from Judy. Tammy had a lot of respect for her mother. She was a great listener, teacher, and very fun. Judy spent a lot of time with family and grandchildren. She had the ability to make everyone feel special. Judy taught Tammy to be a strong and independent woman. She had lots of longtime friends, including some friendships over thirty and forty years long. Judy had a lot of patience, especially with people in AA. The day her mother went missing Tammy was frantic, angry, and sobbing on the ground. Tammy did not sleep for three weeks trying to find her mother. She is still angry because of the way her mother died – it is not the way Judy should have died. Everyone was angry and depressed from her ten-year old son to her brother, Robert, who was unable to work for months. Life changed dramatically. Her family moved because Judy helped decorate the house they were living in. At the time of her death, her family had planned to buy a larger house so Judy could live in it. By the time they could afford it, she was gone. Judy was her best friend. Tammy became a different person who does not trust anybody. All the good memories Tammy has of her mother end the same way – with a picture of Judy in the desert or how she was killed in her own apartment. (52RT 7877-7893.)

Robert Remp, Judy's son, was raised by a single mother. He was very loved by her. Judy was very easygoing and lighthearted. She was also a good listener, understanding, very supportive and generous – especially with grandchildren. It has been very hard on Remp's oldest daughter because Judy was like a mother to her. His daughter feels all alone. He feels like a different person who does not trust people anymore. It has become very hard to enjoy her memory because of the way she died. Robert missed Judy coming home to his house on the weekends to spend time with the grandchildren. (52RT 7843-7853.)

Maria Victoria Remp was Judy's daughter-in-law. Maria knew Judy for over twenty years at the time of her death. She dated and later married Judy's son Robert. Judy helped her with planning the wedding and paying for everything. She helped Maria pick everything out since her family was out of the country. Judy was excited to be a grandmother and spoiled all three of her children and loved spending time with them. She helped support Maria when Maria's own father died. Judy and Maria worked together at a bookstore for AA. People would come into the store looking for Judy to ask her for advice and talk to her. In return, Judy would be honest and firm. Judy was close to all grandchildren and hard on all of them. It has become very hard to think of the happy memories because of the way she died, especially hard for her husband to talk about it. Maria missed Judy very much -- especially her love and support. (52RT 7830-7840.)

Casey Gill, married to Tammy Gill, first met Judy in 1983 when he was dating Tammy. Judy was very giving and helpful. Casey felt very close to her and could talk to her about anything. Judy was always there for the family and was especially close to the grandchildren. She would come over frequently and give equal time to all of the grandchildren. Judy was interested in all of their interests. Casey missed her presence and her being

part of the family. He was angry that Judy was murdered, which has hurt everyone in the family. (52RT 7864-7873.)

Joshua Remp, Judy's grandson, testified that she always kept the family together. Holidays are hard because they are not the same without her. It was hard for him to think of Judy because of the way she died. She was always fun and liked people to be happy. (52RT 7856-7858.)

Michael Gill, Judy's grandson, testified that Judy was understanding and helpful. She was very proud of him and he of her. Judy taught him a lot about her Cherokee background. Michael was worried about his brother because he did not have the opportunity to spend much time with her since she was killed. He missed the happy times and spending time with her. (52RT 7860-7863.)

Stephen Bloch knew Judy for over twenty years through AA. She was very helpful to people trying to maintain sobriety. Judy was available at all times and was extremely well respected by everyone. She was nice, gentle and committed to help people. Bloch cried the day he found out what happened to Judy. He still misses her, and everyone in AA also misses her. (53RT 7900-7905.)

Judi Chapman met Judy through AA. Judy was a giving, understanding, dedicated and generous person. She would take time with people to help them out. According to Chapman, it is easier to accept death when it is natural, but Judy was taken away and it is hard. She missed being able to call Judy and seeing her smiling face. (53RT 7909-7911.)

Cathy Heyl also met Judy through AA. Judy helped sponsor many women and help them find peace. Judy would go on trips with the women she was sponsoring and pay for them to help them out. The way Judy responded to losing her son helped Cathy remain sober all these years. Judy loved life and was fun to be around. Cathy missed all her enthusiasm and the example of how Judy lived her life. (53RT 7913-7916.)

2. Defense Evidence

a. Testimony of Dr. Jay Adams

Dr. Jay Adams, a clinical psychologist, writes and studies about sex offenders and the relationship between early childhood abuse and later behavior. He interviewed and evaluated appellant for about three hours to determine the presence of any mitigating factors to explain his behavior and reduce his culpability. Dr. Adams also reviewed other reports prepared by clinical social workers and police detectives, and his juvenile history and mental health records. According to Dr. Adams, appellant had a history of abuse, major depression, and was dependent on drugs and alcohol. Several mental health issues included attempted suicide, hallucinations, a history of bipolar disorder, antisocial personality disorder and hostile dependency, and attachment issues. All are symptoms of abusive history in early childhood and would lead to several mental health issues. (56RT 8220-8250, 8273-8303, 8308-8331; 57RT 8341-8362, 8368-8379.)

b. Appellant's Family

Penny Gradwell, appellant's sister, testified that their biological father left when they were young. Both their mother and stepfather were heavy drinkers. Their mother was an angry drunk who would hit the children and sometimes could not stop hitting them. There was also a lot of fighting between their mother and stepfather. Appellant wet the bed until he reached his teens. He would get hit by their parents and by the older stepchildren. Their parents never supervised them or helped them with their homework. Their stepfather would inappropriately touch their mother in front of the children, and there would always be sexually explicit magazines all over the house. Different men would come to see their mother, and they were told they should not enter the bedroom. At the age

of fourteen, their mother took appellant to the police because he was incorrigible and she needed help with him. (53RT 7953-8003; 55RT 8105.)

Geraldine Russell, appellant's mother, testified that she drank alcohol while pregnant with appellant. Both appellant's biological father and stepfather were abusive and drank heavily. Appellant was very stubborn and self-sufficient as a little boy. Eventually he had trouble at school and went to counseling. Geraldine testified that appellant's stepfather would request she sleep with other men while the stepfather watched. After her husband left, Geraldine would bring other man to the house. There was always financial trouble because neither men paid child support or helped out with expenses after they left. According to Geraldine, appellant was diagnosed as emotionally unstable. (54RT 8014-8154; 55RT 8074-8101.)

June Byrd, appellant's sister, testified that their parents would drink alcohol around the house and were always fighting. The children would not get much attention other than getting hit when they were in trouble. According to June, appellant would get hit more than the other children. Their stepfather would pick them up by their neck, hold them up, and let go so they would collapse on the floor. Appellant's older brothers would also pick on appellant, who experienced seizures from time to time. Their mother would also bring men into the house while she was still with their stepfather. Appellant and the other children drank alcohol at an early age. (55RT 8110-8126; 56RT 8134-8146.)

Clyde Penglase Jr., appellant's half brother, testified that their parents drank a lot and hit the children. Appellant's stepfather was especially abusive. Clyde testified that appellant was frequently ridiculed for bedwetting. Clyde was also afraid of appellant because appellant was violent towards him. (56RT 8155-8194.)

3. Prosecution Rebuttal - Testimony of John Gaynor

John Gaynor met appellant when he was a group care counselor at a juvenile facility in 1977. Appellant was sixteen at the time. According to Mr. Gaynor, it was difficult for appellant to control his behavior even when confronted with incentives and privileges. (57RT 8458-8464.)

ARGUMENT

I. THE TRIAL COURT PROPERLY DENIED APPELLANT'S CLAIM THAT THE PROSECUTION EXERCISED PEREMPTORY CHALLENGES IN A RACIALLY DISCRIMINATORY MANNER

Appellant contends that the trial court erroneously denied his *Batson v. Kentucky* (1986) 476 U.S. 79 [106 S.Ct. 1712, 90 L.Ed.2d 69] (*Batson*) and *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*) motions. (AOB 97-122.) However, there were valid race-neutral reasons for the prosecutor's two complained-of peremptory challenges.

A. The Relevant Trial Court Proceedings

During jury voir dire, appellant's counsel made a motion pursuant to *Wheeler/Batson* as to the prosecutor's exercise of peremptory challenges to Prospective Juror Nos. 7731 and 9049.[5] The trial court denied the motion. (9RT 1726-1729, 1738-1740.)

1. The Information Provided By the Two Prospective Jurors At Issue

a. Prospective Juror No. 7731

In her 45-page questionnaire, Prospective Juror No. 7731 identified herself as a 51-year-old Black woman who was married with two children. She was an administrative assistant at a local state university with some college education. (29CT 7630-7633.) She described herself as a leader and a religious person. (29CT 7637.) As for her attitudes towards the

[5] Juror No. 9049 was a prospective alternate juror.

death penalty, she stated, "I believe in the death penalty," (29CT 7655) and was "moderately in favor of it" (29CT 7656). She also indicated that the death penalty was "worse" than life in prison because "[a] life has ended." (29CT 7657.)

During voir dire, defense counsel asked Prospective Juror No. 7731 if she had any favoritism towards life without a possibility of parole or the death penalty. She responded that, "Well, I could – can't really answer that because I don't really know what's – I haven't heard any facts. (4RT 881.) Eventually, Prospective Juror No. 7731 told defense counsel that she was open to both penalty options. (4RT 881.) The following exchange took place with the prosecutor:

> Prosecutor: Okay. I want you to imagine that you've gone through the whole trial, you've gone through the penalty phase, you considered the mitigating and aggravating circumstances and based – based upon all that you've determined that in this particular case death was an appropriate penalty. I want you to imagine that you're sitting in the jury box and look at the defendant and tell us if you would feel comfortable or that you could announce your verdict is death? Could you do that, looking at the defendant here and now?
>
> Prospective Juror No. 7731: I really don't know. I don't know if I'd be comfortable or if I'd be scared. I don't know.
>
> Prosecutor: Okay. Because you don't know, because you have those feelings, do you think it would be difficult for you to sit on a trial of this nature and impose the death penalty if you believe it is appropriate to do so based upon everything you heard?
>
> Prospective Juror No. 7731: That's a possibility.
>
> Prosecutor: Do you think it would be impossible for you to impose the death penalty because of those feelings of uncertainty?
>
> Prospective Juror No. 7731: No.
>
> Court: All right. Juror 7731, are you then open to the possibility – assuming that the defendant was convicted of

> murder with special circumstances – are you open to listening to the factors in aggravation, factors in mitigation that would present – that will be presented at the penalty phase, weigh those factors, and reach an appropriate verdict?
>
> Prospective Juror No. 7731: Yes.
>
> Court: And could that verdict be life without the possibility of parole or the death penalty?
>
> Prospective Juror No. 7731: Yes.
>
> Court: Are you open to both as possibilities?
>
> Prospective Juror No. 7731: Yes, I am.

(4RT 882-884.) Both the prosecutor and defense counsel passed for cause as to Juror No. 7731. (4RT 884.)

b. Prospective Juror No. 9049

In his 45-page questionnaire, Prospective Juror No. 9049 identified himself as a 44-year-old Black man who was married with three children. He was a paraeducator working with disabled children and had some college education. He also had some military experience serving in the Navy. (26CT 7045-7050.) He described himself as a leader and a religious person. (26CT 7052.) He previously served on two civil jury trials. (26CT 7053.) As for his attitudes towards the death penalty, he stated, "I think in some cases of extreme violence it might be necessary" (26CT 7070) and had a "neutral" opinion of it (26CT 7071). He also indicated that life in prison was worse than the death penalty because "I believe someone spending life in prison could be very difficult on the victim and their family members." (26CT 7073.) When asked, "Do you think that, depending on the circumstances of this case and the evidence to be presented in the penalty phase, if any, could you impose the death penalty?" he did not check either box but instead wrote, "Don't know." (26CT 7073.) He also explained that "to take some freedom for the rest of their life is very

difficult." (26CT 7074.) Finally, he explained that his religious organization takes a view on the death penalty, that "God is the only one to give life and take life," and he agreed with that view. (26CT 7074.) During voir dire, the following exchange took place:

> Court: You said to one of the questions that you didn't know whether you could impose the penalty in this case –
>
> Prospective Juror No. 9049: Right.
>
> Court: -- if all the charges and allegations were found to be true?
>
> Prospective Juror No. 9049: Right.
>
> Court: Why is that?
>
> Prospective Juror No. 9049: I don't think – I think that belongs to a higher authority than myself. I don't think I'm – I should be one to decide a man's life.
>
> Court: All right. You said you believe that spending life in prison could be very difficult to the victim and their families?
>
> Prospective Juror No. 9049: Right.
>
> Court: But you are still – against the death penalty?
>
> Prospective Juror No. 9049: Yes, I am.
>
> Court: You indicated in one question that "I think in some cases of extreme violence it might be necessary."
>
> Prospective Juror No. 9049: Yes.
>
> Court: But you could not impose it, is that what you are saying?
>
> Prospective Juror No. 9049: Well, it's sort of kind of a mixed feeling with it, you know. I'm kind of –
>
> Court: Do you think you could impose it in the appropriate case?
>
> Prospective Juror No. 9049: If somebody's found guilty beyond a reasonable doubt, I think maybe so, yeah.

Court: You would never be able to even make that decision unless the defendant is convicted of murder –

Prospective Juror No. 9049: Right, unless –

Court: -- with special circumstances.

Prospective Juror No. 9049: Right, exactly.

Court: You would go into a penalty phase where you would hear good evidence in favor of the defendant and perhaps negative evidence about the defendant. They're called factors of aggravation and mitigation.

Prospective Juror No. 9049: Right.

Court: After hearing all those things, you'd weigh those factors and then the jurors, each of you, would have to decide whether death or life was the more appropriate penalty?

Prospective Juror No. 9049: Right.

Court: Could you do that in this case?

Prospective Juror No. 9049: Yes, I could, ma'am.

Court: You could impose death if it were appropriate?

Prospective Juror No. 9049: If it's very appropriate.

Court: You could impose life as well?

Prospective Juror No. 9049: Right.

Court: Okay. Despite your religious view that God is the only one to give life and take life – you could still impose such a penalty if it were appropriate?

Prospective Juror No. 9049: If it was appropriate, yeah.

Court: Okay. Defense Counsel?

Defense Counsel: Very briefly. Good afternoon.

Prospective Juror No. 9049: Good afternoon.

Defense Counsel: Now, you would follow the law and all the rules that the judge gives you, correct?

Prospective Juror No. 9049: Right.

Defense Counsel: If you were chosen to be on this jury, you could – if you reached the point of reaching penalty, you could address what would be the appropriate punishment?

Prospective Juror No. 9049: Right, yes, sir.

Defense counsel: You would follow all the rules and law the judge would give you?

Prospective Juror No. 9049: Yes, sir.

Defense counsel: If you personal based on the evidence determined that it was appropriate to vote for death, you could do that?

Prospective Juror No. 9049: Yes, sir.

Defense Counsel: Okay. And your preference would not be for death, but you are open to that?

Prospective Juror No. 9049: Right, my preference wouldn't be, but I would be open to it.

Defense Counsel: And you would look to all background information – the good and the bad – and then ultimately could you make that decision?

Prospective Juror No. 9049: Exactly, right.

Defense Counsel: Thank you.

Court: Prosecutor?

Prosecutor: Thank you. Good afternoon, sir.

Prospective Juror No. 9049: Hi.

Prosecutor: As you probably know, where we're at now, there's no right or wrong answer.

Prospective Juror No. 9049: Right.

Prosecutor: You may have these personal feelings about death penalty. You understand the notion of duty. You understand the notion of civic duty serving as a juror.

Prospective Juror No. 9049: Right.

Prosecutor: But sometimes our personal feelings may be so strong that we can't be a juror on a particular case.

Prospective Juror No. 9049: Right.

Prosecutor: So let's take death penalty down to a gut level.

Prospective Juror No. 9049: Uh-huh.

Prosecutor: Assume that the defendant was found guilty of first degree murder with special circumstances.

Prospective Juror No. 9049: Right.

Prosecutor: Okay? And further assume you have gone through the penalty phase and legally it appears that death is the appropriate punishment. [¶] Could you personally set aside whatever personal feelings you might have, look at this man and tell him your verdict is death?

Prospective Juror No. 9049: If it's very appropriate, I think I could – I could, yes, ma'am.

Prosecutor: Okay. When you say if it's very appropriate – you mentioned in your questionnaire that it might be appropriate in cases of extreme violence?

Prospective Juror No. 9049: Uh-huh.

Prosecutor: In the questionnaire it described that this case is about murder committed during felonies; that is, burglary or rape.

Prospective Juror No. 9049: Right.

Prosecutor: Do you recall that?

Prospective Juror No. 9049: Yes, ma'am.

Prosecutor: And you indicated you weren't certain if you could impose the death penalty in that type of case. Is that still your response at this time?

Prospective Juror No. 9049: Well, it's sort of kind of a mixed feeling with it. But, like I said, if somebody's found guilty beyond a reasonable doubt where there's no – well, where it's really certain that he did what they convict him of, I think maybe in that case.

Prosecutor: Okay. Let me take this a little farther before I address the standard of beyond a reasonable doubt. [¶] Assume – first of all, under the law, murder committed during a felony does not require intent to kill -- [¶] May I proceed real quick?

Court: If you'll finish this area.

Prosecutor: Murder during a felony does not require intent to kill. In other words, the defendant could have killed the victim unintentionally, accidentally, by negligence. [¶] Would you refuse – after going through the penalty phase and hearing everything, would you absolutely refuse to impose death penalty if you believed the defendant did not intend to kill?

Prospective Juror No. 9049: Right. In that case, I don't think death would be merited if it's unintentional.

Prosecutor: And regardless of what else is presented as aggravating or mitigating circumstances, that factor alone would prevent you from imposing death penalty, is that would you are telling us?

Prospective Juror No. 9049: Yes, ma'am.

Prosecutor: Okay, thank you.

Court: Okay. Thank you, sir. If you'll step back in the jury room, we're going to bring you out in a few minutes. [¶] When you come back out, you'll be in the bottom row, second from this end.

Prospective Juror No. 9049: All right, thank you.

(6RT 1182-1188.)

The prosecutor challenged the juror for cause based on the fact that he could not impose the death penalty in this case. The following exchange occurred:

> Court: Again, I have a problem with a juror not being familiar with all the facts of the case, not having heard the case, not being given the full instruction under the law as to what felony murder is. I don't think I can excuse him for cause based upon that limited inquiry. I just think it would be improper. So he'll be retained.
>
> Prosecutor: Okay.
>
> Court: All right.
>
> Prosecutor: Your Honor, can we ask that in a situation like this where it would seem that a juror would find himself unable to impose the death penalty without the intent to kill, can we ask if we confront this again if you could provide a little clarity with regard to the law for the jurors so they understand?
>
> Court: I'm not willing to go ahead and read the jury instructions. I think it's going to depend on the facts as they come out. I don't think it's going to be a problem for you if they in fact believe that the murder is true, but obviously I can't predict what a juror would think. [¶] If you have some case authority for that, otherwise I think we're in dangerous territory doing that.

(6RT 1189-1190.)

2. The Peremptory Challenges, *Wheeler/Batson* Motions, and the Trial Court's Ruling

After the prosecutor exercised three peremptory challenges, the prosecutor used the fourth peremptory challenge to challenge Prospective Juror No. 7731. (9RT 1712.) Next, while picking the alternates, the prosecutor exercised the second peremptory challenge to challenge Prospective Juror No. 9049. (9RT 1726.) The following exchange took place at side bar:

> Court: Go ahead, Defense Counsel.

Defense Counsel: This is in the nature of a *Wheeler* motion. My recollection – from my recollection and observations, there are only two Black jurors in the venire and the prosecution has moved to excused the two and I believe that qualifies as a cognizable group and they should have to show good cause as to why they would do such a thing.

Court: I'm making the same observations. There were two Blacks left in the jury, one female and one male, both which have now been exercised and excused by the people, Juror No. 9049, and Juror No. 7731, who was a female. [¶] Based upon that, there are no additional black jurors left in the venire and those are the only two exercised by the people. [¶] The court is going to find a prima facie – well, before I do that, I would like the people to offer an explanation as to the excuse for these two jurors.

Prosecutor: We weren't in the position to pull out their questionnaires to get verbatim quotes about what they had said. The court's made a prima facie finding –

Court: Not yet.

Prosecutor: Each of these two African American jurors who were excused expressed extreme difficulty in imposing the death penalty, which is a race neutral reason for exercising a preemptory. [¶] The lady juror who was the People's fourth peremptory challenge, her body language was extremely unreceptive both to the prosecution and the idea of having to impose the death penalty and she expressed verbally that she's have a great deal of difficulty in doing it. [¶] With regard to the prospective alternate whom the people just kicked, I believe he wrote some extremely strong answers in his questionnaire in opposition to the death penalty. [¶] The decisional law – and I'm thinking of the case of *Ledesma*, L-e-d-e-s-m-a, and I have a series of other citations that I can give – makes it clear that the inability to impose the death penalty or even equivocation with regard to comfort in imposing the death penalty are race neutral rationales for kicking a juror. [¶] It's probably also worth stating because there's not only that's in the *Wheeler* arena, but also a related arena under the Sixth Amendment it's worth pointing out to make a full record that the defendant is a non-Hispanic Caucasian and that same description describes all of the victims. They would be what you would call Anglo-Saxons

with the exception of one woman who may be partly African American – who is a trivial witness to the case --- I believe Lorna Thompson is. Everyone else appears to be a non-Hispanic Caucasian who is associated with this case as a witness. [¶] I only point that out in case there's going to be some Sixth Amendment challenge also. [¶] And, by the way, I do apologize Your Honor, if the court needs a stronger basis for the reason for kicking these two jurors, I'd have to get out their questionnaires, which may take some moment or two, and it would have to happen in front of the jurors. If that needs to occur, perhaps we can ask the jury to step outside.

Court: The Court does find a prima facie case based upon the sheer numbers of both African American or Black jurors being excused; however, in listening to the explanations given by counsel, I presume they would be the same.

Prosecutor: Yes.

Court: They appear to be race neutral. [¶] There are no racial issues in this case that I am aware of, which doesn't necessarily defeat a *Wheeler/Batson* motion, but I find that [Prosecutor] credible, that her observations are based on race neutral reasons that are proper challenges – or proper preemptory challenges.

Prosecutor: Your Honor, once the jury has been let go, can I ask to raise this topic again and bring out their questionnaires?

Court: Yes.

Prosecutor: Thank you.

Court: You can augment the record later.

Prosecutor : Thank you.

Court: The *Wheeler/Batson* motion is denied.

(9RT 1726-1729.)

Once the jury had left the courtroom, the prosecutor further addressed her race-neutral reasons with the court in the following exchange:

Court: Did you want to augment the record with regard to the *Wheeler/Batson* motion?

Prosecutor: I would, thank you. [¶] Your Honor, the People exercised our peremptories in this way: A White female; a White female; an Hispanic female; a Black female; a White female; we passed twice; White female; Hispanic female; passed; White female; Hispanic male; we accepted the panel. [¶] With regard to alternates, it was Hispanic male; African American male; Hispanic male; White male; White male; Hispanic male. I don't know the record would otherwise have any reference to that. [¶] And with regard to the first of the People's two excusals, from ground A – and this would be our fourth peremptory challenge – the prospective juror 7731 had indicated on 12/4/07 that she would be very uncomfortable and scared to impose the death penalty. Which is – you now, the court's already ruled that that's a permissible basis for which to exercise an excusal. [¶] But she also physically manifested a very level of discomfort with being questioned about this and it also appeared that her emotional tenor during questioning went from being in support of the death penalty, which is what is written, to feeling very uncomfortable having to be the person to impose the penalty, which I would stipulate is reasonable. [¶] Occasionally, a juror will say although he supports it statutorily, for him it's an uncomfortable burden. And she was such a person when questioned in *Hovey*. She said it would be very difficult. [¶] With regard to the peremptory, an African American prospective juror, this would be our second among the alternates, from group D, juror I.D. number 9049. [¶] This person is someone who we tried to challenge for cause on 12/6. He had indicated that only God can take – can give and take life. This is actually a quotation: "God is the only one to give and take life." [¶] He thought that life without parole was worse. [¶] And in question 108 when he was asked if he could impose the death penalty, he said I don't know. [¶] And his verbal questioning was in support of that idea that he's very uncomfortable with the death penalty. [¶] And when questioned on 12/6 when he was asked about the felony-murder rule and whether he could impose the death penalty if it had been established the killing was intentional, he said he would not. [¶] And I think that if we carefully picked through the record – which won't be necessary – the court and counsel would find that we have excused, I think, every single prospective juror who stated that the would be unable to impose the death penalty under the felony-murder rule had the killing not been shown to

be intentional. So there's legal consistency there, to the best of my knowledge.

Court: The only reason I found a prima facie case was sheer numbers. There were only two African American jurors in the venire, but this is a race neutral case. There are no racial issues, to my knowledge. [¶] I do accept the People's reasons for exercising peremptories as to these two jurors as being race neutral and properly and credibly founded.

(9RT 1738-1740.)

B. The Applicable Law

Both the state and federal constitutions prohibit the use of peremptory challenges to exclude prospective jurors based on group bias – that is, bias against members of a group that are identifiable by race, ethnicity, or gender. (*J. E. B. v. Alabama ex rel. T. B.* (1994) 511 U.S. 127, 129 [114 S.Ct. 1419, 128 L.Ed.2d 89]; *People v. Hawthorne* (2009) 46 Cal.4th 67, 77; *People v. Bell* (2007) 40 Cal.4th 582 ; see also *Batson*, *supra*, 476 U.S. at p. 89; *Wheeler*, *supra*, 22 Cal.3d at pp. 276-277.) Peremptory challenges must instead be exercised to eliminate a specific "bias relating to the particular case on trial or the parties or witnesses thereto." (*Wheeler*, *supra*, 22 Cal.3d at p. 276.) The improper use of the challenges violates a criminal defendant's federal constitutional right to equal protection and state constitutional right to be tried by a jury drawn from a representative cross-section of the community. (See *Batson*, *supra*, 476 U.S. at p. 89; *Wheeler*, *supra*, 22 Cal.3d at pp. 265-266, 272; *People v. Griffin* (2004) 33 Cal.4th 536, 553; see also U.S. Const., 14th amend.; Cal. Const., art. I, § 16.)

A trial court's evaluation of a *Batson/Wheeler* motion involves three steps. (*Johnson v. California* (2005) 545 U.S. 162, 168 [125 S.Ct. 2410, 162 L.Ed.2d 129] (*Johnson*); *Miller-El v. Cockrell* (2003) 537 U.S. 322, 328-329 [123 S.Ct. 1029; 154 L.Ed.2d 931] (*Miller-El*).) First, a defendant must establish a prima facie case of purposeful discrimination. (*Miller-El*,

supra, 537 U.S. at p. 328; *Batson*, *supra*, 476 U.S. at pp. 93-95.) If a prima facie case is shown, the burden shifts to the prosecution to provide a race-neutral explanation for the strike. (*Johnson*, *supra*, 545 U.S. at p. 168; *Miller-El*, *supra*, 537 U.S. at pp. 328-329.) If the prosecution meets this burden, then the defendant must show the prosecutor's reasons were pretextual and the true reason for the strike was discriminatory. (*Ibid.*)

If a party believes the opponent is using peremptory challenges to strike jurors on the ground of group bias alone, he or she must raise the point in a timely fashion and make a prima facie case of such discrimination. (*People v. Farnam* (2008) 28 Cal.4th 107, 135; *People v. Turner* (1994) 8 Cal.4th 137, 164; *People v. Howard* (1992) 1 Cal.4th 1132, 1153-1154 (*Howard*); *Wheeler*, *supra*, 22 Cal.3d at pp. 280-281.) First, the party should make as complete a record of the circumstances as is feasible. (*Ibid.*) Second, he or she must establish that the persons excluded are members of a cognizable group within the meaning of the representative cross-section rule. Third, from all the circumstances of the case, the moving party must show a strong likelihood or reasonable inference that such persons are being challenged because of their group association. (*Ibid.*; see also *People v. Johnson* (2003) 30 Cal.4th 1302, 1306, 1313, 1318 [ruling that "strong likelihood" and "reasonable inference," as used in the third-step in *Wheeler*, mean the same thing and are consistent with the phrase "inference of discriminatory purpose" applied in *Batson*], overruled on other grounds in *Johnson*, *supra*, 545 U.S. 162.)

A prosecutor's reasons for striking a juror must be genuine, but need not be objectively reasonable. (*People v. Reynoso* (2003) 31 Cal.4th 903, 924.) "All that matters is that the prosecutor's reason for exercising the peremptory challenge is sincere and legitimate, legitimate in the sense of being nondiscriminatory." (*Ibid.*) "[A] 'legitimate reason' is not a reason that makes sense, but a reason that does not deny equal protection.

[Citations.]." (*Ibid.*, citing *Purkett v. Elem* (1995) 514 U.S 765, 769 [115 S.Ct. 1769, 131 L.Ed.2d 834].) A prosecutor is presumed under *Wheeler* to have used his or her peremptory challenges in a constitutional manner. (*People v. Alvarez* (1997) 14 Cal.4th 155, 193; *Wheeler*, *supra*, 22 Cal.3d at p. 278.)

As *Wheeler* elaborates, permissible factors for dismissing a potential juror may be less focused on the background or basic impression of a potential juror, "but more commonly involve a 'gut feeling' or the seat-of-the-pants subjectivity of prosecutors and defense attorneys alike." (*People v. Jordan* (2006) 146 Cal.App.4th 232, 255.) Peremptory challenges may be based on evidence suggestive of juror partiality ranging from "the virtually certain to the highly speculative." (*Wheeler*, *supra*, 22 Cal.3d at p. 275.)

Peremptory challenges may be based on a juror's demeanor or body language. (See *People v. Jones* (2011) 51 Cal.4th 346, 363-364 [a juror's demeanor may be a valid basis for a challenge, provided the demeanor-based reason is not pretextual].) Similarly, the manner of dress, a juror's unconventional lifestyle, a juror's experiences with crime or with law enforcement, or simply because a juror's answers on voir dire suggested potential bias may be a valid bases for a challenge. (*Wheeler*, *supra*, 22 Cal.3d at p. 275.) "[A] prosecutor may fear bias on the part of one juror . . . simply because his clothes or hair length suggest an unconventional lifestyle." (*Ibid.*) In *Purkett v. Elem*, *supra*, 514 U.S. at pp. 766, 769, the prosecutor struck a prospective juror based on his long unkempt hair and his beard. The United States Supreme Court held that the prosecutor's reasons "satisfie[d] the prosecution's step two burden of articulating a nondiscriminatory reason for the strike." The United States Supreme Court further held that the trial court's inquiry properly proceeded to the last step,

where the state court correctly found that the prosecutor was not motivated by discriminatory purpose. (*Id.* at pp. 769-770.)

A prosecutor asked to explain a challenge "must provide a clear and reasonably specific explanation of his or her legitimate reasons for exercising the challenges." (*People v. Lenix* (2008) 44 Cal.4th 602, 613 (*Lenix*), quotations and internal citations omitted.) "The justification need not support a challenge for cause, and even a 'trivial' reason, if genuine and neutral, will suffice." (*Ibid.*) In the third stage of the *Batson/Wheeler* inquiry, "'the issue comes down to whether the trial court finds the prosecutor's race-neutral explanations to be credible. Credibility can be measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy.'" The trial court may draw upon its "contemporaneous observations of the voir dire," as well as the court's "own experiences as lawyer and bench officer," and even "the common practices of the advocate and the office who employs him or her." (*Ibid.*, internal quotations and citations.)

Reviewing courts apply a deferential standard of review in considering third-stage *Batson/Wheeler* issues under the substantial evidence standard, and review such trial court determinations "with great restraint." (*Lenix*, *supra*, 44 Cal.4th at pp. 613-614, internal quotations and citations omitted.) The court presumes the prosecutor used the peremptory challenges constitutionally, and great deference is accorded "to the trial court's ability to distinguish bona fide reasons from sham excuses." (*Ibid.*) If the trial court makes a "sincere and reasoned effort to evaluate the nondiscriminatory justifications offered, its conclusions are entitled to deference on appeal." (*Ibid.*) The trial court is not required to give specific or detailed reasons for accepting the prosecutor's race-neutral reasons. (*Reynoso*, *supra*, 31 Cal.4th at pp. 919, 924.)

In determining whether the prosecutor's reasons for a peremptory challenge are pretextual, the trial court must focus on the subjective genuineness, rather than objective reasonableness, of the race-neutral reasons given. (*Reynoso*, *supra*, 31 Cal.4th at p. 924.) Even a brief reference to the prosecutor's reasons and the trial court's own observations of a challenged juror can constitute a sincere and reasoned evaluation of the credibility of the prosecutor's justifications. (*People v. Jackson* (1996) 13 Cal.4th 1164, 1197-1198; *People v. Montiel* (1993) 5 Cal.4th 877, 909.) The trial court must consider all relevant circumstances including those that are subtle, subjective, and incapable of being transcribed. (*Jackson*, *supra*, 13 Cal.4th at p. 1197.) When the prosecutor's reasons are inherently plausible and supported by the record, then the trial court need not question the prosecutor or make detailed findings. (*People v. McDermott* (2002) 28 Cal.4th 946, 980; *People v. Silva* (2001) 25 Cal.4th 345, 386.)

C. The Prosecutor Provided Legitimate Race-Neutral Reasons for Her Peremptory Challenges

As an initial matter, the fact that the prosecutor exercised peremptory challenges against two African-American prospective jurors is not indicative of an inference of discrimination. (See *People v. Bell*, *supra*, 40 Cal.4th at pp. 597-598 [no inference of discrimination when prosecutor excused two of the three African-American women on the panel]; *People v. Bonilla* (2007) 41 Cal.4th 313, 343 ["As a practical matter . . . the challenge of one or two jurors can rarely suggest a pattern of impermissible exclusion." [Citations.].) In addition, it is important to note that appellant is Caucasian and all the victims were also Caucasian. (See 9RT 1726-1729 ["defendant is a non-Hispanic Caucasian and that same description describes all of the victims"].) Even though a defendant's race clearly is not dispositive of a *Wheeler* motion, it is equally clear that the matter remains a subject of proper consideration by the court. Indeed, a

discriminatory motive is more easily inferred if the defendant and the dismissed juror or jurors are from the same group. (See, e.g., *People v. Bonilla* (2007) 41 Cal.4th 313, 343 [noting that the defendant was not the same race as the challenged jurors]; *People v. Crittenden* (1994) 9 Cal.4th 83, 115 [defendant may support a prima facie showing of group bias by showing that he himself is a member of the excluded group]; *Wheeler*, *supra*, 22 Cal.3d at pp. 280-281.)

In any event, the prosecutor's justifications were clearly valid and race-neutral. As to both of the challenged peremptory strikes, the prosecutor explained that she was challenging the prospective jurors for their reluctance of imposing the death penalty. A juror's reservations regarding the death penalty is a valid race-neutral reason for the exercise of a peremptory challenge. (*People v. Booker* (2011) 51 Cal.4th 141, 167; *People v. Lomax* (2010) 49 Cal.4th 530, 572.) This race-neutral reason was supported by the record. For example, during voir dire, as to Prospective Juror No. 7731, the prosecutor asked if the prospective juror could impose the death penalty, to which Prospective Juror No. 7731 answered, "I really don't know. I don't know if I'd be comfortable or if I'd be scared. I don't know." (4RT 883.) In addition, Prospective Juror 7731 also indicated in her questionnaire that the death penalty was "worse" than life in prison because "[a] life has ended." (29CT 7657.)

Moreover, Prospective Juror 9049 also noted in his questionnaire that he "[didn't] know" if he could impose the death penalty (26CT 7073), and that "God is the only one to give life and take life," and he agreed with that view (26CT 7074). During voir dire, the juror confirmed his doubts about imposing the death penalty stating that, "I don't think – I think that belongs to a higher authority than myself. I don't think I'm – I should be one to decide a man's life." (6RT 1183.) Although he stated he *might* be able to impose the death penalty under *some* circumstances (see 6RT 1183-1187),

Prospective Juror No. 9049 confirmed his doubts when asked if he could impose death if he believed the defendant did not intend to kill, to which he replied, "[i]n that case, I don't think death would be merited if it's unintentional." (6RT 1188.) Again, the prospective juror's reservation about the death penalty is a valid race-neutral reason for the exercise of a peremptory challenge. (See *People v. Davenport* (1995) 11 Cal.4th 1171, 1202 [a peremptory challenge against a prospective juror who expresses reservations about the death penalty is not improper].)

Therefore, the prosecutor's stated race-neutral reason for striking the challenged prospective jurors – reluctance to impose the death penalty – was not "inherently implausible." (See 9RT 1726-1729.) As this Court has stated, "[a] prospective juror's views about the death penalty are a permissible race- and group-neutral basis for exercising a peremptory challenge in a capital case." (*People v. McDermott* (2002) 28 Cal.4th 946, 970-971 [a prospective juror's views about the death penalty are a permissible race- and group-neutral basis for exercising a peremptory challenge in a capital case]; see also *People v. Smith* (2005) 35 Cal.4th 334, 347-348 [a prospective juror's doubts about the death penalty can be a legitimate, race-neutral reason to exercise a peremptory challenge]; *People v. Catlin* (2001) 26 Cal.4th 81, 116, 118 [same]; *People v. Turner*, *supra*, 8 Cal.4th at p. 171 [prosecutors may exercise peremptory challenges against "death penalty skeptics," i.e., prospective jurors who, although not excusable for cause under *Witherspoon v. Illinois* (1968) 391 U.S. 510 [88 S.Ct. 1770, 20 L.Ed.2d 776], nevertheless express reservations about the death penalty].)

In addition, as to Prospective Juror No. 7731, the prosecutor explained that "her body language was extremely unreceptive both to the prosecution and the idea of having to impose the death penalty and she expressed verbally that she's have a great deal of difficulty in doing it." (9RT 1727.)

Thus, the prosecutor's stated reason had both a semantic aspect and a demeanor aspect. That is, a prospective juror's hesitancy to impose the death penalty can be reflected in both what the prospective juror said and how she said it. (See *People v. Lenix*, *supra*, 44 Cal.4th at p. 613 ["[E]ven a 'trivial' reason, if genuine and neutral, will suffice. [Citations and internal quotes omitted.] A prospective juror may be excused based upon facial expressions, gestures, hunches, and even for arbitrary or idiosyncratic reasons."]; see also *People v. Jones*, *supra*, 51 Cal.4th at pp. 363-364 [a juror's demeanor may be a valid basis for a challenge, provided the demeanor-based reason is not pretextual].) "If the record suggests grounds upon which the prosecutor might have reasonably challenged the jurors in question," the appellate court will defer to the trial judge and affirm. (*People v. Box* (2000) 23 Cal.4th 1153, 1188 [internal quotes omitted].) Where an explanation for a peremptory challenge is based on the demeanor of a prospective juror, a judge should take into account, among other things, any observations the judge was able to make during voir dire. However, nothing in *Batson* requires that a demeanor based explanation must be rejected if the judge either did not observe, or does not recall, the prospective juror's demeanor. (*Thayer v. Haynes* (2010) 559 U.S. 43, 49 [130 S.Ct. 1171, 175 L.Ed.2d 1003] (per curiam).)

Immediately after the jury had left the courtroom, the prosecutor asked to supplement the record with her reasons in exercising the peremptories challenges. The prosecutor explained her reasons again, but now supplemented them with specific quotes from the questionnaire. (See 9RT 1738-1740.) Appellant contends that the prosecutor should not have been allowed to "[come] up with additional reasons for challenging them." (AOB 119.) To support this argument, appellant relies on *Miller-El v. Dretke*, (2005) 545 U.S. 231 [125 S.Ct. 2317, 162 L.Ed.2d 196]. (AOB 119-120.) In that case, the prosecutor stated that he struck a Black juror

because of the man's expressed opposition to capital punishment. After defense counsel pointed out that the prospective juror had not expressed that view, the prosecutor changed his position and stated that the man was excused because his brother had a criminal history. Finding that the State's new reason "reek[ed] of afterthought," the court rejected it as "implausible," and observed that the prosecutor had not asked the potential juror any questions about how his brother's history affected him "as it probably would have done if the family history had actually mattered." (*Id.* at p. 246.)

However, *Miller-El v. Dretke* does not support appellant's argument, because the prosecutor in this case did not *change* her reason for excusing the prospective jurors. She always maintained that the reason she was excusing these two jurors were because they could not impose the death penalty. She simply stated that there were responses in the questionnaires which supported her peremptory challenges and, after being allowed to review the questionnaires, cited specific responses as to both jurors which had in part led her to excuse them. This race-neutral reason was supported by the record. "When the prosecutor's stated reasons are both inherently plausible and supported by the record, the trial court need not question the prosecutor or make detailed findings. But when the prosecutor's stated reasons are either unsupported by the record, inherently implausible, or both, more is required of the trial court than a global finding that the reasons appear sufficient." (*Id.* at p. 386.) However, this Court has also stated that a trial court is not required "to make explicit and detailed findings for the record in every instance in which the court determines to credit a prosecutor's demeanor-based reasons for exercising a peremptory challenge." (*People v. Reynoso*, *supra*, 31 Cal.4th at p. 929.) On this record, there is no basis for finding the prosecutor's justifications to be pretextual.

Considering the totality of the circumstances, the trial court's acceptance of the prosecutor's explanation for challenging each of the jurors at issue, and the implicit credibility determination that necessarily underlay that acceptance, is supported by substantial evidence and thus entitled to deference. (*People v. Lenix*, *supra*, 44 Cal.4th at pp. 613-614.)

D. A Comparative Analysis Demonstrates That the Prosecutor's Justifications Were Valid and Race-Neutral

Appellant also contends, for the first time on appeal, that a comparison of the excluded jurors and the seated jurors shows that the prosecutor's stated reasons were pretextual. (AOB 120-121.) Despite problems inherent in conducting comparative analysis for the first time on appeal – including the difficulties of comparing what might be superficial similarities among prospective jurors and trying to determine why the prosecutor challenged one prospective juror and not another when no explanation was asked for or provided at trial – both the United States Supreme Court and this Court have done so on request. (See *Snyder v. Louisiana* (2008) 552 U.S 472 [128 S.Ct. 1203, 170 L.Ed.2d 175]; *Miller-El v. Dretke*, *supra*, 545 U.S. at p. 231; *People v. Jones*, *supra*, 51 Cal.4th at p. 364; *People v. Lenix*, *supra*, 44 Cal.4th at p. 622.)

This Court ruled in *Lenix*, *supra*, 44 Cal.4th at page 622, that a comparative juror analysis is appropriate on appeal. The court reasoned that, because "comparative juror analysis is but one form of circumstantial evidence that is relevant, but not necessarily dispositive, on the issue of intentional discrimination . . . evidence of comparative juror analysis must be considered in the trial court and even for the first time on appeal if relied upon by the defendant and the record is adequate to permit the urged comparisons." (*Id.* at p. 622; see *Miller-El v. Dretke*, *supra*, 545 U.S. at p. 241 [in habeas corpus context, finding that, under a comparative juror

analysis, "[i]f a prosecutor's proffered reason for striking a African-American panelist applies just as well to an otherwise-similar non African-American who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson*'s third step."].)

However, this Court explained in *Lenix* that "comparative juror evidence is most effectively considered in the trial court where the defendant can make an inclusive record, where the prosecutor can respond to the alleged similarities, and where the trial court can evaluate those arguments based on what it has seen and heard." (*Lenix*, *supra*, 44 Cal.4th at p. 624.) "Defendants who wait until appeal to argue comparative juror analysis must be mindful that such evidence will be considered in view of the deference accorded the trial court's ultimate finding of no discriminatory intent." (*Id.* at p. 624, citing *Hernandez*, *supra*, 500 U.S. at p. 365.) This Court further recognized that "appellate review is necessarily circumscribed," and noted as follows:

> The reviewing court need not consider responses by stricken panelists or seated jurors other than those identified by the defendant in the claim of disparate treatment. Further, the trial court's finding is reviewed on the record as it stands at the time the *Wheeler/Batson* ruling is made. If the defendant believes that subsequent events should be considered by the trial court, a renewed objection is required to permit appellate consideration of these subsequent developments.

(*Lenix*, *supra*, 44 Cal.4th at p. 624.)

Here, appellant contends a comparative juror analysis shows that the prosecutor's reasons were pretextual because several of the non-African-American jurors who ultimately served (Juror Nos. 1267, 1599, 1999, 3466, 6889) had similar views on the death penalty, but the prosecutor did not strike those jurors. (AOB 120-121.) Even on this cold record wherein the prosecutor did not have an opportunity to explain any differences, a review of the identified jurors' responses shows a sharp distinction. (*Lenix*, *supra*,

44 Cal.4th at p. 624 [recognizing one of the limitations of engaging in a comparative juror analysis for the first time on appeal is that "the prosecutor is never given the opportunity to explain the differences he perceived in jurors who seemingly gave similar answers"].)

For example, although appellant notes that Juror No. 1267 thought life in prison was worse than death, Juror No. 1267 also stated in the questionnaire that the "death penalty was justified if the aggravating evidence is overwhelming. I believe that the sentence of death is just if the aggravating evidence is beyond doubt true." (7CT 1714.) During voir dire, he clarified that he meant to say beyond a reasonable doubt. (4RT 918.) He also indicated that he was "strongly in favor" of the death penalty and it was imposed "about right," explaining that "because the law requires special circumstances in applying the death penalty, I feel that it is just about right." (7CT 1715, 1718.) When indicating that life in prison without the possibility of parole was worse, Juror No. 1267 noted that "to put a defendant in prison for life is to make that person suffer by not having to do his will" and that the "penalty of death must be used in some crimes." (7CT 1716-1718.) During voir dire, the prosecutor confirmed that Juror No. 1267 could impose the death penalty. (4RT 918-919.) In contrast, Prospective Juror No. 9049 was strongly against the death penalty based on religious reasons. (26CT 7074.) And Prospective Juror No. 7731 was initially "moderately in favor" of the death penalty, but later could not be sure if she could impose it. (29CT 7656; 4RT 882.)

Juror No. 1599 stated in the questionnaire that the "death penalty takes too long [to] execute and waste[s] a lot of tax payer's money." (8CT 1939.) However, during voir dire, he indicated that he could still be open minded in this case. (7RT 1358.) He indicated that he was "moderately in favor" of the death penalty and it was imposed "too infrequently," explaining that "in California, it takes a lifetime to take course of the death

penalty." (8CT 1940.) Juror No. 1599 also indicated that the death penalty was the worse punishment because "there is an end and it sounds worst." (8CT 1941.) During voir dire, he confirmed he could set aside any personal feelings and come to a verdict based on the evidence. (7RT 1363.) He also explained he would be open to either penalty. (7RT 1363-1365.)

Juror No. 1999 stated in the questionnaire that "there are no blanket statements that cover a general answer – yes I do believe in the death penalty, I voted for it, however, it must be considered on a case by case circumstance." (7CT 1669.) She also indicated that life in prison without the possibility of parole was worse for a defendant and noted that "it depends on the person, the case. Death is sometimes welcomed by the defendants. Spending the rest of your life in prison has at times driven some prisoners to insanity." (7CT 1670, 1673.) Any similarities with the two excused jurors (see AOB 121) are without merit because Juror No. 1999 specifically noted that she was "moderately in favor" of the death penalty. (7CT 1673.) Unlike Prospective Juror 7731, who was not sure if she would be comfortable imposing the death penalty, Juror No. 1999 stated that "it must be considered on a case by case circumstance." (7CT 1669.) During voir dire, Juror No. 1999 also confirmed that she could impose the death penalty in circumstances like this case. (4RT 783.)

Juror No. 3466 stated in the questionnaire regarding the death penalty that "[i]f a horrendous crime was committed against a person causing death, and was either intentional or with morbid disregard to another life, there should be this penalty in some of these cases." (7CT 1759.) He also indicated that he was "moderately in favor" of the death penalty and that it was imposed too infrequently, noting that he felt that "there are cases where someone has murdered yet get off from either mistrial or popularity." (7CT 1760.) In explaining his views on the death penalty, the juror explained, "just the fact that some crimes cannot be reconciled at all or at least not

with a lesser penalty." (7CT 1761.) Although appellant notes that Juror No. 3466's religion had a view of the death penalty (AOB 121), that view was the opposite of the views of the religions of Prospective Juror Nos. 7731 and 9049. (See 7CT 1763; 8CT 1943; 26CT 7074.) During voir dire, Juror No. 3466 confirmed he would consider both penalty options in this case, and could impose the death penalty. (7RT 1255, 1260.)

Finally, although appellant notes that Juror No. 6889 thought life in prison was worse than death (AOB 121), Juror No. 6889 also stated in the questionnaire that "under certain circumstances the death penalty is just." (7CT 1624.) He also noted he had a "neutral" opinion of the death penalty and stated that he did not know about how it was imposed because "not having personal knowledge of death penalty cases I do not feel that I can express an opinion on how the death penalty is imposed." (7CT 1625.) Juror No. 6889 indicated that life in prison without the possibility of parole was a worse punishment and noted that "sitting in prison having to think about your crimes forever and knowing you will never walk the streets again would be hard." (7CT 1628.) He also noted he would be able to choose both life in prison without the possibility of parole and death in the appropriate case. (7CT 1629-1730.) During voir dire, he indicated that he would be open to either penalty option and be able to impose the death penalty. (7RT 1339-1340.)

Importantly, all but one of the seated jurors also had prior jury experience in criminal matters that reached a verdict. (See 7CT 1606, 1697, 1652, 1742.) While Prospective Juror No. 9049 had some prior jury experience, he did not have experience with criminal trials. (26CT 7053-7054.) And Prospective Juror No. 7731 had no prior jury service experience. (29CT 7638.) Prior jury service is a race-neutral reason for exercising a peremptory challenge. (See *People v. Lewis* (2006) 39 Cal.4th 970, 1014; *People v. Reynoso* (2003) 31 Cal.4th 903, 918.) As shown by a

more complete comparison of these prospective jurors, differences on the subject of capital punishment – and their relative willingness to impose it – existed among them. Each seated juror clarified during voir dire that they would consider both penalty options and could in fact impose the death penalty. In contrast, Prospective Juror No. 7731 continued to waver about her ability to impose the death penalty and stated, "*I really don't know. I don't know if I'd be comfortable or if I'd be scared. I don't know.*" (4RT 883, emphasis added.) Similarly, Prospective Juror No. 9049 not only stated he was *against* the death penalty, he also indicated he might not be able to impose it in this case. (6RT 1183 ["Well, it's sort of a kind of a mixed feeling with it, you know. I'm kind of –"].) He later reaffirmed this notion that he did not prefer to impose the death penalty in this case when he stated, "Right, *my preference wouldn't be*, but I would be open to it." (6RT 1185, emphasis added.) Later, Prospective Juror No. 9049 confirmed he could not impose the death penalty in this case when asked if he could impose it if the defendant did not intend to kill. Specifically, he stated, "Right. In that case, *I don't think death would be merited if it's unintentional.*" (6RT 1188, emphasis added.) He confirmed that he would be prevented from imposing the death penalty under those circumstances. (6RT 1188.)

On this record, sufficient differences are apparent such that the trial court made "sincere and reasoned effort to evaluate the nondiscriminatory justifications offered" by the prosecutor. (*Lenix, supra*, 44 Cal.4th at p. 614.) Moreover, "[o]n appellate review, a voir dire answer sits on a page of transcript. In the trial court, however, advocates and trial judges watch and listen as the answer is delivered. Myriad subtle nuances may shape it, including attitude, attention, interest, body language, facial expression and eye contact." (*Id.* at p. 622.) "A transcript will show that the panelists gave similar answers; it cannot convey the different ways in which those answers

were given. Yet those differences may legitimately impact the prosecutor's decision to strike or retain the prospective juror." (*Id.* at p. 623.)

Accordingly, this Court should defer to the trial court's decision to accept the prosecutor's race-neutral explanation that she challenged the jurors primarily because of their views about the death penalty. No *Batson/Wheeler* error occurred.

II. APPELLANT HAS WAIVED ANY CLAIM OF ERROR DURING VOIR DIRE; IN ANY EVENT, THE TRIAL COURT QUESTIONED PROSPECTIVE JURORS IN AN EVENHANDED MANNER

Appellant contends that the trial court did not question the jurors in an evenhanded manner regarding their views on the death penalty. (AOB 123-152.) Any such challenge has been forfeited. In any event, the trial court properly questioned all prospective jurors.

A. The Claim is Forfeited

To the extent appellant contends the manner in which the trial court questioned the prospective jurors erroneously resulted in a jury that was prone to impose the death penalty, he forfeited any such challenge by not objecting below. A defendant ordinarily cannot obtain appellate relief based upon grounds that the trial court might have addressed had the defendant availed himself or herself of the opportunity to bring them to that court's attention. (See *People v. Harris* (2005) 37 Cal.4th 310, 330 [failure to object forfeits claim regarding adequacy of voir dire]; *People v. Seaton* (2001) 26 Cal.4th 598, 635; see also *People v. Cudjo* (1993) 6 Cal.4th 585, 627-628 [waiver of defects in death-qualifying voir dire].)

To the extent appellant is claiming that the trial court erroneously denied his challenges for cause, this claim is also forfeited. Appellant failed to exhaust all of his peremptory challenges and object to the jury as finally constituted. (9RT 1710-1722.) Therefore any such claim is forfeited. To preserve a claim of error based on denial of a challenge for

cause, a defendant must show: (1) use a peremptory challenge to remove the juror in question; (2) exhaust his or her peremptory challenges or justify the failure to do so; and (3) express dissatisfaction with the jury ultimately selected." (*People v. Virgil* (2011) 51 Cal.4th 1210, 1239-1240; *People v. Taylor* (2009) 4 Cal.4th 850, 884.)

B. The Relevant Proceedings

a. Prosecutor for-cause challenges granted

(1) Prospective Juror No. 8814

In his questionnaire, Prospective Juror No. 8814 stated that there "could be cases that deserve the death penalty." (18CT 4660.) He indicated that he had a "neutral" opinion of the death penalty and believed that life in prison without the possibility of parole was a worse penalty than death "because the person is been punished the rest of his life." (18CT 4661-4662, 4664.)

During voir dire, Prospective Juror No. 8814 indicated that he would listen to the evidence in making a decision as to the appropriate penalty. He, however, told the prosecutor and the court that he would have a hard time imposing the death penalty in this case. The juror then told defense counsel that he could possibly vote for death if he listened to all the evidence, but was uncomfortable with that penalty. After further questioning, the juror concluded that, "[m]y definite response this time is going to be no, I won't vote for the death penalty." (4RT 885-890.)

The prosecutor challenged the juror for cause and the following exchange took place:

> Prosecutor: People challenge for cause, Your Honor. Based upon his view of the death penalty at this point in time, even though he equivocated a little bit, it was obvious that by his body language, his mannerisms, that his personal opinion is he could not vote for the death penalty at this time.

Defense counsel: Your Honor, our position is he responded that he would be open, that he would have to listen. I think he tried to suggest at every response that he had not heard things, that he would want to hear that. He made it very candid that his preference would not be for death but he specifically indicated that he would be open, would listen, want to hear more information, and has not unconditionally precluded that.

Prosecutor: His final answer I would point out was he could not vote for the death penalty at this point in time.

Trial Court: After observing the defendant's demeanor, his body action, his shaking his head, despite his answers on his questionnaire, I think he's equivocated on the issue of whether he could or could not impose the death penalty, with the stronger position that he could not, that he has changed his mind and had second thoughts about the questions on the questionnaire. Therefore, I think the – it's the Court's opinion that he could not vote for the death penalty or that his views would prevent or impair his ability to perform his abilities. He is equivocating, therefore I'm going to excuse him for cause.

Defense counsel: May I make one comment for the record, Your Honor?

Trial Court: Sure.

Defense counsel: I believe that the juror did equivocate but I also believe that the juror was quite adamant and constant in his assessment where he said he'd have to hear more before he would be put in a position to be predisposed to vote for death. And so by allowing this juror to be excused for cause, what is happening is we are selecting jurors that are only predisposed for death without being given the opportunity to hear all of the evidence at penalty with respect to mitigation and aggravation before they have to make that decision. He basically indicated he wanted to hear more before he was going to make that decision.

Trial court: I don't know what more he could hear unless we put on the actual evidence. Where there are conflicting answers regarding the death penalty in *People v. Cox*, the court may assess the juror's state of mind. It is not bound solely by his statement which are taken in isolation and are equivocal. [¶] I

do find that he is anti-death penalty and could not impose it in this particular case, and he is excused.

(4RT 890-892.)

(2) Prospective Juror No. 8891

In his questionnaire, Prospective Juror No. 8891 indicated his religious principles made it difficult or impossible to sit in judgment on another person. He further explained that he had "problems with the death penalty." (18CT 4868; see also 18CT 4875-4876, 4878 ["horrendous charges – but see about feelings about the death penalty"].) In responding to a question regarding how he would deal with the conflict if the judge gave a instruction that differed from his beliefs, Juror No. 8891 explained that he "[didn't] know. I will have a hard time sentencing someone to death even if it meant countering the judge." (18CT 4871.) He also indicated that he "could not send a person to death or a long sentence based on circumstantial evidence." (18CT 4884, emphasis in original.) In responding to a question regarding his feelings about the death penalty, Prospective Juror No. 8891 indicated that he had "strong objections to death penalty." (18CT 4885.) He noted that he was "strongly against" the death penalty and elaborated that "most death penalty defendants have limited mental capacity." (18CT 4886.) Prospective Juror No. 8891 also opined that the death penalty was a worse punishment because it was the "end of life – no possibility of exoneration – many incarcerated are being proven innocent with genetics." (18CT 4888-4889.) Finally, he noted that he did not feel comfortable sitting on this case because the death penalty was a potential penalty (18CT 4888, 4891), explained he "maybe not" vote for it in this case (18CT 4890), and did not "know that [he could] be fair and impartial" (18CT 4891).

During voir dire, Prospective Juror No. 8891 told the trial court that he could not see himself voting for the death penalty because of fear

someone would be wrongfully put to death based on circumstantial and DNA evidence. (5RT 1001-1007.) He told defense counsel that he would weigh the appropriate factors and consider the death penalty in this case. (5RT 1008-1009.) However, he told the prosecutor that he would feel very guilty to impose death and preferred not to sit on this case. (5RT 1009-1001.) Outside the presence of the jury, the following exchange took place:

> Trial court: Defense counsel, challenge for cause?
>
> Defense counsel: No.
>
> Prosecutor: Yes, Your Honor.
>
> Trial court: People?
>
> Prosecutor: Despite the fact that he was able to articulate a small amount of equivocation, he has such major reservations about the death penalty that he has already decided that circumstantial evidence is a problem in this case without having any notion what the circumstantial evidence would be. And although he concedes that under some circumstances there could be adequate aggravation that he would in theory entertain the possibility of the death penalty, he appears ready to bring his own legal standard to that analysis which is the aggravating evidence would have to be absolutely mammoth by comparison in the mitigating and, furthermore, he has a conscientious objection to the death penalty that would cause him to feel profoundly guilty even if he were legally persuaded that death should be imposed.
>
> I just don't think he is appropriate for this case. He also I believe twice or maybe three times flagged himself to the Court's attention when we were not questioning him, but in prior proceedings, to announce that he'd have a problem sitting on this case. I don't know that all that made it onto the record because he didn't always identify himself.
>
> Trial court: He equivocated somewhat on the record, but his answers in the questionnaire were clearly anti death penalty. He says he has a problem with the death penalty religious – due to religious principles. He would have difficulty making a decision in this case because the defendant has limited capacity.

"Anybody who is accused of such a crime must have a limited capacity."

He said "I would have a hard time sentencing someone to death even if it meant – even if I counter – even if countering the judge and talking about following the instructions."

He indicated he has strong objections to the death penalty. He indicated the defendant is more likely to be guilty based upon the fact the death penalty is being sought here. More likely defendant to be guilty based upon the number of charges. He's strongly against the death penalty. The death penalty is imposed too often. Explained most death penalty defendants have limited mental capacity. He explained in his questionnaire that death would of course be the end of life, no possibility of exoneration. Many incarcerated are being proven innocent with genetics. Under 108, could he impose the death penalty in such a case? No.

"Would you feel comfortable sitting on this case with the potential death penalty?" No.

Again, he talked about persons charged with a death penalty case have a limited capacity, no chance of exoneration.

Under 113, "Would he refuse to vote guilty as to first degree murder, et cetera?" He put unknown. He left 114, blank, "Would you always vote guilty?" But he indicated that that wouldn't be applicable based upon his anti death penalty views.

116, "Could you vote for the death penalty if appropriate?" "Unknown. Maybe not."

"Would you always vote for death under 118?" "Unknown." I'm sorry, 118, always vote against death based upon his feelings? He said "unknown."

119, "Would you always vote for death?" No.

"Can you see yourself choosing the death penalty instead of life?" He said "Maybe not," then checked "no."

"Can you set aside your personal beliefs or views under 121 about the death penalty to render a verdict in accordance with the law?" "No."

Reason why he would prefer not to serve, "my feelings about the death penalty."

"What makes you feel you can – what makes you feel you can be fair and impartial juror in this case?" He stated, "I don't know. I can be fair and impartial. I don't know."

I'd say he waffled a bit but I don't think he truly waffled. I think he has made it abundantly clear in his questionnaire and basically to the answers to the questions that he is anti death penalty. He has great concerns that the defendant has limited capacity, therefore, may not deserve the death penalty and there is always a chance, particularly if a case is based upon circumstantial evidence, that DNA may later prove a defendant innocent and he would not want to have that guilt on his hands. And he would also require a zero percent doubt.

I am going to excuse him for case.

Defense counsel: May I be heard?

Trial court: Yes.

Defense counsel: There mere fact that this prospective juror does not have a comfort level sitting on a death penalty case is probably shared by 99.44 percent of the people who come into these proceedings.

Secondly, the mere fact that he has said that – death is probably shared by most of the people who sit in that box when they're questioned about did they think death versus life without the possibility of parole is the worst sentence one could receive.

With respect to his attitudes about the death penalty when the court inquired concerning what factors he would have to consider in terms of either voting for death or life without the possibility of parole without prompting from defense counsel, he almost mimicked the language in CAL CRIM which suggests that the only way an individual can in fact consider or vote for a death warrant is if the aggravating factors so substantially outweigh the mitigating factors. And I believe he didn't use those exact words, but a reasonable interpretation of what he said suggested that would be procedure that he would apply.

Additionally, there are no standards set forth under the code that I'm aware that directs an individual to assign a certain weight to any one factor. That's an individual decision that a juror makes. Whether or not they consider it to be aggravating or mitigating, that's up to the individual. It's not the court's determination.

The Court will in fact instruct the prospective juror to make that determination. So consequently, the responses given by this juror to the court's questioning, as well as counsel's questioning, seemed to support a conclusion that he would in fact consider death if in fact the appropriate evidence was introduced for him to make a determination. That's on the death issue.

With respect to the issue of guilt, he also indicated, yes, he could vote for guilt based upon circumstantial evidence, even though the crime charged and established would be felony murder with unintentional killing.

Those were his responses, Your Honor. Now, the Court may conclude they were waffling, but that was the response given to the Court's questioning, as well as counsel's questioning when those questions were put to him.

Under the circumstances, I see no different between this juror and some of the other jurors who come in here and said, "Well, you know, all right. I could possibly consider it even though I'm strongly in favor of the death penalty and I think it's used too infrequently and there are too many murders that get LWOP.

Trial court: People?

Prosecutor: I –

Defense counsel: Submitted.

Prosecutor: I believe you've already ruled, Your Honor. Is it necessary?

Defense counsel: No. I'm just drawing a comparison.

Prosecutor: Is it necessary for me to address the Court again on this issue?

Trial court: It's up to you.

Prosecutor: Your Honor, he managed to work in a tiny amount of equivocation that under some hypothetical universe perhaps he could impose the death penalty. But it seems clear that his mind is made up that we don't have adequate evidence, that it's not the right quality of evidence because it's circumstantial that his feelings of guilt would impair his ability to consider imposing the death penalty and, as I mentioned, he has repeatedly tried to flag this to the court's attention when he wasn't even being questioned. He is a death penalty opponent. It's simple as that.

Trial court: I tend to agree, viewing his demeanor, his affect. He was highly excited, gesturing wildly. He has a – tried to get the court's attention many times, referring to "my answer in my questionnaire, didn't you see my answers in my questionnaire?" He may have equivocated slightly under very limited circumstances and his answers to questions by counsel, but I think looking at his demeanor the way he answer, his unequivocal answers to the questionnaire, the Court is going to determine that he could not be a fair and impartial juror in this case and that his views would substantially prevent his abilities to follow the law and his oath in accordance.

He will be excused.

(5RT 1012-1018.)

(3) Prospective Juror No. 1115

In her questionnaire, Prospective Juror No. 1115 indicated that she had "mixed feelings" about the death penalty because "as the parent of the victim, it must be very hard to know their daughter's killer is alive and as the parent of the accused to know that your son must die because of what he did." (34CT 9095.) She also indicated that she was "moderately in favor" of the death penalty and given the number of charges, she believed that appellant was more likely to be guilty because "he has a pattern and repeats." (34CT 9096.) She believed that life in prison without the possibility of parole was worse than death because "death penalty is a quick death, prison without possibility of parole is a slow death." (34CT 9097-

9098.) Finally, she indicated that she would prefer not to serve on this case because she "did not want to have to live with the memories of seeing and listening all the bad things that happened," she did not know if she could be fair because she had "never been in this situation," and she might be biased against appellant because she "lost a son and [] would see him as someone's son." (34CT 9101.)

During voir dire, Prospective Juror No. 1115 indicated that she had some difficulty with the questionnaire because of her English. She also told the trial court that the charges made it difficult for her to be fair in this case and the type of allegations would disturb her. (7RT 1411-1412.) She also told the court that she would prefer not hear about the rape and reiterated that the number of charges made it more likely that appellant was guilty. (7RT 1413.) Just like in the questionnaire, Prospective Juror No. 1115 indicated that she had difficulty in this case because appellant was a young person and she had lost her son. (7RT 1414.) Defense counsel had a chance to ask this juror some questions and she confirmed that she would be able to vote for both life without the possibility of parole and death. (7RT 1415-1416.) However, when the prosecutor asked her if she could impose the death penalty, Prospective Juror No. 1115 indicated that she "really [didn't] know" if she could impose it and "because [she] lost a son, it is very difficult to make that decision." (7RT 1418-1419.) Finally, she told the prosecutor that she "probably" would be unable to determine life and death. (7RT 1419.) The trial court then had a chance to follow-up with the following exchange:

> Trial court: Do you think if the evidence warranted it and the penalty phase warranted it, could you vote for death?
>
> Prospective Juror No. 1115: Probably after listening to everything, maybe I could.

Trial court: Are you certain? You seem to be very emotional when you talk about your son and imposing the death penalty here. Would it be so emotional for you that you could not vote for death or do you think you could do it if it were appropriate?

Prospective Juror No. 1115: Probably not.

Trial court: You could not?

Prospective Juror No. 1115: Probably not.

Trial court: All right. Any follow-up?

Defense counsel: Yes, Your Honor.

Trial Court: All right.

Defense counsel: Because of the loss of your son, I know you are getting emotional when you think about death. I lost my mother. If we talk about moms, I would get emotional. [¶] Really, what we're trying to figure out is if you got to the point of voting, could you be fair to both sides, listen, and if it was appropriate, you know, vote for death if it was appropriate?

Prospective Juror No. 1115: Probably yes because I've always been a decent person. I don't like to do bad things. And if I have all the proof that, you know, he did it, then I guess I would have to follow the other voters that he deserves to – death.

Defense counsel. Okay. If you got there, you could follow the law and make that decision?

Prospective Juror No. 1115: Yes.

Defense counsel: Thank you.

Trial court: Any follow-up, [prosecutor]?

Prosecutor: If I may real quick. You obviously understand the duty, the civic duty of being a juror.

Prospective Juror No. 1115: Yes.

Prosecutor: And you understand the importance of being fair and impartial. What we're asking now is – not everybody can sit on a death penalty case because of personal feelings are just

so overwhelming they just simply cant make the decision. And that doesn't make you a good person or a bad person or an unfair person or biased. It just simply is a fact, a reality. [¶] So what it really comes down to is: Could you impose a verdict of death upon another human being if you felt it was warranted intellectually? Could you personally do that in light of all these emotions you have expressed in this courtroom? And it would be your personal choice, not what the other jurors decide, it would be your own personal choice. Could you do that?

Prospective Juror No. 1115: I guess not.

Prosecutor: Okay. When you say "I guess not" it sounds like you are wavering a little bit. And I know we're trying to ask for a black-or-white answer, a yes or no. Can you give us a true answer on that? Could you honestly consider life or death question and impose death if legally you felt it was appropriate?

Prospective Juror No. 1115: I would have to say no.

Prosecutor: Okay. Thank you.

Trial court: All right. Thank you very much. Sorry if we disturbed you. I'm going to put you back in the jury room for just a few minutes and we'll bring you out in just a couple of minutes.

Prospective Juror No. 1115: Thank you.

Trial court: People, challenge for cause – I'm sorry, defense?

Defense counsel: Defense passes.

Prosecutor: People would challenge for cause. Obviously, a woman who wants to do the right thing, but her – as the court saw, she got very emotional and tearful. And when she really came down to it, even if she felt it was appropriate, she could not personally impose the death penalty.

Trial court: I agree. We've flip-flopped her both ways in terms of saying she could impose it and she couldn't impose it. She's a very timid woman. She started crying when she talked about imposing the death penalty in that she had also lost a son. She was worried about the defendant being someone's son.

> Her answers to the questionnaire were problematic. She said that the evidence would make her sick. It would affect her blood pressure. She couldn't sleep at night. She could not – she would be very bothered by vulgar language. It would bother her blood sugar. She indicates she has mixed feelings about the death penalty. Said she was not comfortable as a death penalty juror.
>
> And under 108 asking if could impose the death penalty in this case, she put "don't know."
>
> She left a number of blanks to her answers on the questionnaire which to me indicate her ambiguity on the issue.
>
> I think she's way too emotional. Based upon the totality of the circumstances, of her answers, her final answers and body language and demeanor, I'm going to grant the people's challenge. She will be excused for cause.

(7RT 1419-1423.)

b. Defense for-cause challenges denied

(1) Prospective Juror No. 8046

In her questionnaire, Prospective Juror No. 8046 indicated that "if the defendant found guilty, I have no problem with death penalty." (14CT 3559.) But she indicated that she had a "neutral" opinion of the death penalty. (14CT 3560.) She also indicated that death was worse than life in prison without the possibility of parole. (14CT 3563.) Finally, she believed she could be fair and impartial in this case. (14CT 3565.)

During voir dire, Prospective Juror No. 8046 confirmed that her religious organization did not have a view on the death penalty. She also told the court that although her daughter was raped twenty years ago, it would not affect her role as a juror. (4RT 751-752.) Prospective Juror No. 8046 told defense counsel that if the defendant was guilty of the charges with special circumstances then he should be put to death. (4RT 753.) She reiterated that sentiment when she told the prosecutor she could not vote for

life without the possibility of parole but could vote for death if defendant was proven guilty. (4RT 753-754.) The following exchange took place with the trial court:

> Trial court: All right. Are you saying that based upon the nature of the charges that are alleged in this case that you cannot – you would not consider the possibility of life without the possibility of parole, you would only consider the death penalty?
>
> Prospective Juror No. 8046: I would consider the death penalty, yes.
>
> Trial court: Would you consider life in prison?
>
> Juror No. 8046: I think I would have to hear the whole case in order to make up my mind. I'm open to either/or. I have to hear the whole thing in order to make up my mind.
>
> Trial court: But what we're asking is if the defendant is found guilt of murder with one or more special circumstances, it would then go into the penalty. There would be factors in aggravation and factors in mitigation presented that the jury is to consider in reaching the appropriate penalty.
>
> Are you open to the possibility that you could impose a life without the possibility of parole sentence or do you think you would always impose death based upon the facts as you know them?
>
> Prospective Juror No. 8046: I'm open to life without parole.
>
> Trial court: And "open" means that you could in fact impose that verdict?
>
> Prospective Juror No. 8046: Yeah.

(4RT 754-755.) After defense counsel challenged for cause and explained that he did not think the juror could consider the possibility of life without the possibility of parole, the trial court called the juror back into the courtroom. (4RT 759-760.) The trial court again asked the juror if she could impose both penalties, and the juror assured the court that she could consider both. (4RT 760-762.) The trial court found that the juror had

been rehabilitated and found her demeanor to be sincere and without hesitation. The challenge for cause was denied. (4RT 762.)

(2) Prospective Juror No. 4061

In his questionnaire, Prospective Juror No. 4061 indicated he had a friend that was raped. (25CT 6650.) He also stated that he "believed the death penalty is to serve justice. I don't have any problems with the death penalty." (25CT 6664.) He indicated that he had a "neutral" opinion about the death penalty, and that it was imposed "about right" and explained that "it should be sentenced if there was many doubts against one person." (25CT 6665.) Prospective Juror No. 4061 indicated that life without the possibility of parole was worse because "he would suffer more in jail." (25CT 6666-6667, 6668.) He also indicated that although his religious organization had a view against the death penalty, he did not agree with it. (25CT 6668.)

Outside of the presence of the juror, defense counsel objected to Prospective Juror No. 4061 based on the questionnaire. The trial court noted that the questionnaire appeared to be neutral and appropriate, and asked for the juror to come out. (RT 763-764.) During voir dire, confirmed that he had misread a question and corrected himself by stating that he would always consider the evidence before voting guilty. (4RT 765.) He also told the trial court that he would judge a police officer by the same standards as any other witnesses. (4RT 766-767.) Defense counsel confirmed that the rape of the juror's friend would not impact the juror's ability to be impartial. (4RT 767-768.) Prospective Juror No. 4061 also stated that he would not automatically vote for death but instead would consider the evidence and circumstances. (4RT 768-769.) The prosecutor also confirmed that the juror would consider both penalty possibilities notwithstanding his religious organization's views on the death penalty. (4RT 770-771.)

After Prospective Juror No. 4061 left the courtroom, defense counsel challenged for cause. The trial court determined that the juror was open to both penalties and retained him. (4RT 772.)

(3) Prospective Juror No. 2746

In her questionnaire, Prospective Juror No. 2746 indicated that her feelings about the death penalty depended "on the situation of the case." (28CT 7430.) But she noted that she was "strongly in favor" of the death penalty and indicated that it was used "too infrequently" because "sometimes people can get away with murder in any case." (28CT 7431.) Prospective Juror No. 2746 also indicated that the death penalty was worse because "it's an instant thing." (28CT 7434.)

During voir dire, Prospective Juror No. 2746 explained that the death penalty was used too infrequently because "sometimes there are cases that crimes are proven guilty but they don't give the death penalty." (4RT 818.) However, the juror clarified that she would weigh and consider all the evidence before deciding which penalty was appropriate and would consider both options. (4RT 820-821.) The trial court found the following:

> That's what I heard and she seemed credible to me and convincing. It may have just – I don't know what her thoughts were in answers to your questions. But looking over her questionnaire, all of her answers seem to be appropriate in terms of being fair and neutral on the issue of guilt as well as penalty. So at this time I'm going to retain her.

(4RT 822-823.)

(4) Prospective Juror No. 6957

In his questionnaire, Prospective Juror No. 6957 noted regarding his feelings about the death penalty that "there is always a price for anything in the world," "always think of the consequences before doing something good or bad," and "'what goes around, comes around.'" (28CT 7610.) He also indicated that he was "moderately in favor" of the death penalty and

was imposed "about right." (28CT 7611.) Prospective Juror No. 6957 indicated that life in prison without the possibility of parole was worse because "life with no freedom is worst [*sic*] than death." (28CT 7612-7614.) Nevertheless, he indicated that he would consider both penalty options. (28CT 7615.)

During voir dire, Prospective Juror No. 6957 told defense counsel that if someone murders another person, they should always get the death penalty. (4RT 876.) However, in an exchange with the prosecutor, who explained how the penalty phase of a trial included mitigating and aggravating factors, Prospective Juror No. 6957 indicated that he would consider both penalty options, including the death penalty. (4RT 876-878.)

After the juror left the courtroom, defense counsel challenged on the basis the juror would vote for the death penalty to murderers. The prosecutor explained that Prospective Juror No. 6957 indicated he would consider both penalty options. The trial court determined that the juror was "credible" and "sincere" regarding the consideration of both penalty options. Prospective Juror No. 6957 was retained. (4RT 879-880.)

(5) Prospective Juror No. 9021

In her questionnaire, Prospective Juror No. 9021 indicated she was "in favor" of the death penalty. (29CT 7880.) She also noted that the number of charges against a defendant caused her to believe he is more likely to be guilty. She indicated she was "strongly in favor" of the death penalty and it was imposed "too infrequently" because the "death penalty takes too long to carry out – too many years to appeal, too many murderers get life." (29CT 7881.) She also explained that she had thought about the death penalty because "violent crimes in our country are too numerous." (29CT 7882.) Prospective Juror No. 9021 indicated that the death penalty was worse than life in prison without the possibility of parole because "they must meet their make and they lose their life!" and because "they fear death

and most want to live." (29CT 7882-7884.) She indicated that the State should put to death everyone who is convicted of murder, but not everyone who kills another person. (29CT 7883.)

During voir dire, Prospective Juror No. 9021 indicated that she was a victim of domestic violence, but could remain fair to the defendant. She also clarified that although she believed someone with numerous charges could likely be more guilty, she acknowledged it was human nature and could keep an open mind – look at the individual charge and weigh the facts. (5RT 986-987.) Defense counsel confirmed that the juror was not opposed to the death penalty and was in fact imposed infrequently when warranted. However, Prospective Juror No. 9021 clarified that if the death penalty was not imposed by a jury, then it was probably not warranted. The prosecutor confirmed this point when she asked the juror if she could impose the death penalty in this case, and the juror responded, "if warranted." (5RT 988-990.)

Outside of the presence of the juror, defense counsel challenged Prospective Juror No. 9021 on the basis of her responses in the questionnaire regarding the death penalty. The prosecutor explained that this juror was not a "die-hard death penalty fan" and would consider both penalty options. The trial court agreed that the juror was fair and impartial under *Witt* [*Wainwright v. Witt* (1985) 469 U.S. 412 [105 S.Ct. 844, 83 L.Ed.2d 841]] standards and did not excuse the juror. (5RT 991-992.)

(6) Prospective Juror No. 0517

In his questionnaire, Prospective Juror No. 0517 indicated she was "for it" when explaining her general feelings towards the death penalty. She also indicated she was "strongly in favor" of the death penalty and it was imposed "too infrequently" because "death row, for example, they stay there for years!" (25CT 6799-6800.) She also explained that she had previously thought about the penalty stating "eye for an eye." (25CT 6801.)

Prospective Juror No. 0517 indicated that the death penalty was worse than life without the possibility of parole because "it's final." (25CT 6803.)

During voir dire, the juror clarified that she did not mean that the death penalty is imposed too infrequently, but rather that once a person is sentenced to death that person "stay[s] in death row forever." (5RT 1043.) The juror also confirmed that she was open to both penalty options if warranted, and would need to hear all the evidence before deciding on the penalty. (5RT 1044-1046.) The prosecutor had no questions. (5RT 1046.)

Outside the presence of the juror, defense counsel objected based on her responses in the questionnaire. The prosecutor pointed out that Prospective Juror No. 0517 stated she would consider the evidence and both penalty options. The trial court agreed that the juror would not always vote for death and denied the challenge. (5RT 1047.)

(7) Prospective Juror No. 3390

In her questionnaire, Prospective Juror No. 3390 explained her general feelings towards the death penalty with the following statement: "I really think people that commit murder should get the death penalty." (26CT 7025.) She also indicated that she was "moderately in favor" of the death penalty and believed life without the possibility of parole was worse because "death is too easy let him suffer" and "they get to think about what they have done." (26CT 7026-7029.)

During voir dire, Prospective Juror No. 3390 clarified that she was open to both penalty options and would have to hear all the evidence and circumstances to decide. (6RT 1175.) While defense counsel had the juror admit she preferred the death penalty solely based on the charges, the prosecutor clarified that based on all of the evidence and mitigating evidence the juror would be open to both penalty options. (6RT 1176-1180.)

Outside the presence of the juror, defense counsel objected based on her views of the death penalty and the charges in this case. The prosecutor explained that the juror stated she would consider both penalty options. The trial court agreed that the juror was able to impose either penalty. (6RT 1180-1181.)

(8) Prospective Juror No. 1827

In his questionnaire, Prospective Juror No. 1827 indicated that he was "for use of the death penalty in a case where murder has occurred." (27CT 7115.) He also stated that he was "strongly in favor" of the death penalty but "would need to know everything about each case to form an opinion" about how the death penalty was imposed. (27CT 7116.) The juror also indicated that he had previously thought about the death penalty and explained that "[i]t is a moral question. It's in the public discourse and the news, weekly." (27CT 7117.) He also indicated that his views on the death penalty had changed over the years explaining that he "was once very liberal (anti-death penalty), but as the years move on, I've come to believe that the death penalty has a place in our society." (27CT 7118.) The juror noted that he was "not sure" if the death penalty or life without the possibility of parole was worse. (27CT 7119.)

During voir dire, Prospective Juror No. 1827 explained that it would be difficult for him to be fair given the nature of the charges and opined that rape should be punished by the death penalty. (6RT 1190.) However, the juror clarified that it would depend on the evidence and weighing the different factors to determine which penalty was appropriate. (6RT 1191-1192.) Finally, the juror explained that he would be able to have an open mind and consider both penalty options. (6RT 1192, 1195-1197.) To the prosecutor, Prospective Juror No. 1827 explained that "as a juror it would my duty to consider everything." (6RT 1196.)

Outside of the presence of the juror, defense counsel asked for him to be excused because of his view on the death penalty and his refusal to consider psychological evaluations. (6RT 1197-1198.) The prosecutor emphasized that the juror understood the concept of duty and following the law and indicated he would consider everything presented. (6RT 1198.) The trial court agreed that any ambiguity in his answers was cleared up, and denied the challenge for cause. (6RT 1198.)

(9) Prospective Juror No. 8642

In his questionnaire, Prospective Juror No. 8642 indicated that the death penalty was "appropriate in some cases" and was "strongly in favor of it." (34CT 9050-9051.) He also noted that the number of charges against the defendant made it more likely that he was guilty because "the numbers of victims and witnesses involved identifying the defendant." (34CT 9051.) The juror felt that the death penalty was imposed "about right" because he "believe[d] in the judicial system and [felt] people can decide fairly that fate." (34CT 9051.) He also noted that the death penalty was worse because "evidence could surface at a later date – death is final." (34CT 9054.)

During voir dire, Prospective Juror No. 8642 indicated that due to the past rape of his daughter and work as a firefighter, he might have trouble separating his feelings in this case. Nonetheless, he indicated that he would decide this case solely on the evidence presented. The juror also stated that he would consider both penalty options in this case. (7RT 1396-1397.) Prospective Juror No. 8642, however, told defense counsel that he might have some bias given his life experiences. (7RT 1398-1399.) The juror told the prosecutor that he would consider both penalty options and consider the defendant innocent until proven guilty. (7RT 1400-1401.) He finally told the trial court that he would follow the law and judge this case on its merits. (7RT 1402-1404.)

Outside the presence of the juror, defense counsel objected to the juror for cause because the juror kept using the word "try" in his statements to the court. The prosecutor stated that the juror could be fair and would follow the law. The trial court determined that although he "waffled," he could put aside his life experiences. (7RT 1405.)

(10) Prospective Juror No. 8964

In her questionnaire, Prospective Juror No. 8964 indicated that she "believe[d] in the death penalty," was "strongly in favor," and felt it was imposed "too infrequently." She also noted that the number of charges against defendant made it more likely that he was guilty. (35CT 9276-9277.) She also indicated that life in prison without the possibility of parole was worse because "w/death the pain is over – w/life he is reminded every day of his crime." (35CT 9280.)

During voir dire, Prospective Juror No. 8964 stated that even though her sister had experienced domestic violence, the juror believed she could remain fair and impartial. She also indicated that she would keep an open mind throughout the trial. The juror reiterated that she believed life in prison to be the harsher penalty. (8RT 1481-1483.) Prospective Juror No. 8964 told defense counsel and the prosecutor that she was open to both penalty options and would be fair and impartial in this case. (8RT 1485-1486.)

Outside the presence of the juror, defense counsel objected based on her questionnaire answers. The trial court found that although her answers were mixed, it also found that she had been sufficiently rehabilitated and would be open to either penalty option. The court denied the challenge for cause and retained her. (8RT 1490-1491.)

(11) Prospective Juror No. 4920

In her questionnaire, Prospective Juror No. 4920 indicated that "if there is no question [of] guilt, I'm all for [the death penalty]" and was "moderately in favor" of it. She also noted that the number of charges against defendant made it more likely that he was guilty because "they are similar charges." (32CT 8690-8691.) She later noted that she had "been for [the death penalty] since [she] can remember." (32CT 8692.) She also indicated that death was worse than life in prison without the possibility of parole because "it's final – I think that 'possibility of parole' may be overturned 30 years later." (32CT 8693.) In the end, the juror indicated that she "would try" to consider both penalty options in this case.

During voir dire, Prospective Juror No. 4920 indicated that she would still be fair and objective even with the graphic evidence and domestic violence circumstances of the case. (8RT 1533-1537.) Although she told defense counsel that she would vote for death at the conclusion of the penalty phase, she clarified that she was open to both penalty options. (8RT 1539-1544.)

Outside the presence of the juror, defense counsel challenged the juror for cause based on her initial inclination to vote for death, which was noted in the questionnaire. However, the court noted that her responses in court contradicted her answers in the questionnaire. The trial court denied the challenge. (8RT 1845-1847.)

(12) Prospective Juror No. 5293

In his questionnaire, Prospective Juror No. 5293 indicated that the death penalty is "a necessary alternative in capital cases" and was "moderately in favor" of it explaining that he "believe[d] the death penalty is necessary. I am confused regarding whether it will ever be used again in California." (32CT 8510-8511.) He further explained that "heinous crimes

perpetrators, if convicted, deserve heinous punishment. Cases where convicted rapists killers freed to repeat same offenses underline the need for the death penalty to my way of thinking." (32CT 8512, 8518.) He also indicated that "protest against the death penalty seem naïve to me and have hardened my opinions for the death penalty – where appropriate" and his feelings have changed because "I have come to believe that too many criminals guilty of crimes where the death penalty is an options which was not used have been freed to kill again." (32CT 8513.) Although his religion was against the death penalty, Prospective Juror No. 5293 "strongly disagree[d] [with that view] in special circumstances." (32CT 8514.) He also indicated that death was worse than life in prison without the possibility of parole because "first, isolation while waiting for the sentence to be carried out. Second, I'm not sure the legal system will always enforce 'without the possibility of parole.'" (32CT 8514.)

During voir dire, Prospective Juror No. 5293 indicated he was in favor of the death penalty, but would be open to both penalty options and could impose life without the possibility of parole. (8RT 1623-1626.)

Outside the presence of the juror, defense counsel asked that the juror be excused based on his preference for the death penalty. The prosecutor explained that he would consider each penalty option. The trial court agreed that the juror stated he could choose either penalty and retained him. (8RT 1628-1630.)

(13) Prospective Juror No. 1599

In his questionnaire, Prospective Juror No. 1599 indicated that the "death penalty takes too long to execute and waste a lot of tax payer's money" and was moderately in favor of it. He also noted that the number of charges against defendant made it more likely that he was guilty because "the scale is tipping against him." The juror also indicated that the death penalty is imposed "too infrequently" because "in California, it takes a

lifetime to take course of the death penalty." (8CT 1939-1940.) He also opined that the death penalty was worse because "there is an end and it sounds worst." (8CT 1941; but see 8CT 1943 [life in prison is worse].) Although his religion was against the death penalty, the juror did not agree with that view. (8CT 1943.)

During voir dire, Prospective Juror No. 1599 indicated that even with his views on the death penalty he could keep an open mind, stay fair, and follow the judge's instructions. (7RT 1358-1360.) He told defense counsel that "it might be correct" that this was a case that he could not be fair to the defendant. (7RT 1362.) However, to the prosecutor, Prospective Juror No. 1599 stated that he would consider both penalty options based on the evidence presented. (7RT 1363-1365.)

Outside the presence of the juror, defense counsel objected based on the fact that the juror stated he could not be fair. The prosecutor indicated that the juror was open to both penalties. The trial court stated that the juror had been sufficiently rehabilitated and cited his answers, demeanor, and body language in finding he was being fair and candid. The challenge was denied. (7RT 1365-1367.)

C. The Claim is Without Merit

This Court and the United States Supreme Court have both rejected the argument that the use of death-qualified jurors violates a defendant's state or federal constitutional rights. (*Lockhart v. McCree* (1986) 476 U.S. 162 [106 S.Ct. 1758, 90 L.Ed.2d 137] ["The death qualification process is not rendered unconstitutional by empirical studies concluding that, because it removes jurors who would automatically vote for death or for life, it results in juries biased against the defense."]; *People v. Chism* (2014) 58 Cal.4th 1266, 1286; *People v. Tully* (2012) 54 Cal.4th 952, 1066; *People v. Lenart* (2004) 32 Cal.4th 1107, 1120, *People v. Steele* (2002) 27 Cal.4th 1230, 1240, and *People v. Jackson* (1996) 13 Cal.4th 1164, 1198-1199.)

Based on the foregoing authority alone – clearly ruling that a death-qualified jury is not unconstitutional as appellant claims – appellant's claim should be rejected. (See *Lockhart, supra*, 476 U.S. at pp. 176-177; see also *People v. Mickey* (1991) 54 Cal.3d 612, 662; *People v. Kaurish* (1990) 52 Cal.3d 648, 674.)

D. The Applicable Law Regarding Voir Dire

In any event, a review of the court's voir dire of prospective jurors in question discloses no error. "Trial courts should be evenhanded in their questions to prospective jurors during the 'death-qualification' portion of voir dire, and should inquire into the jurors' attitudes both for and against the death penalty to determine whether these views will impair their ability to serve as jurors." (*People v. Clark* (2011) 52 Cal.4th 856, 903, internal quotation marks omitted.) Nonetheless, the trial court has "considerable discretion" over the number and nature of questions on voir dire about the death penalty. (*People v. Carasi* (2008) 44 Cal.4th 1263, 1286; *People v. Stitely* (2005) 35 Cal.4th 514, 540.)

Code of Civil Procedure section 223 grants the trial court broad discretion to conduct voir dire of prospective jurors.[6] (*Covarrubias v.*

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[6] Code of Civil Procedure section 223 provides:

In a criminal case, the court shall conduct the examination of prospective jurors. However, the court may permit the parties, upon a showing of good cause, to supplement the examination by such further inquiry as it deems proper, or shall itself submit to the prospective jurors upon such a showing, such additional questions by the parties as it deems proper. Voir dire of any prospective jurors shall, where practicable, occur in the presence of the other jurors in all criminal cases, including death penalty cases. [¶] Examination of prospective jurors shall be conducted only in aid of the exercise of challenges for cause. [¶] The trial court's exercise of its discretion in the manner in which voir dire is conducted shall not cause any conviction to be reversed unless the exercise of that discretion has resulted in a miscarriage of justice, as specified in Section 13 of Article VI of the California Constitution.

Superior Court (1998) 60 Cal.App.4th 1168, 1184.) The trial court has wide discretion to determine the qualifications of jurors. (*People v. Carpenter* (1997) 15 Cal. 4th 312, 358). United States Supreme Court has made clear that "the conduct of voir dire is an art, not a science," so "'[t]here is no single way to voir dire a juror.'" (*People v. Cleveland* (2004) 32 Cal.4th 704, 736-737, quoting *Mu'Min v. Virginia* (1991) 500 U.S. 415, 451 [111 S.Ct. 1899, 114 L.Ed.2d 493] (dis. opn. of Kennedy, J.).) In *Morgan v. Illinois* (1992) 504 U.S. 719 [112 S.Ct. 2222, 119 L.Ed.2d 492], at page 729, the court noted that "[t]he Constitution . . . does not dictate a catechism for voir dire, but only that the defendant be afforded an impartial jury."

To be an abuse of discretion, the trial court's conduct of voir dire "must render the defendant's trial fundamentally unfair." (*People v. Cleveland, supra*, 32 Cal.4th at p. 737; *Mu'Min v. Virginia, supra*, 500 U.S. at pp. 425-426.) "Such discretion is abused 'if the questioning is not reasonably sufficient to test the jury for bias or partiality.'" (*People v. Box, supra*, 23 Cal.4th at p. 1179, quoting *People v. Chapman* (1993) 15 Cal.App.4th 136, 141.) Moreover, the United States Supreme Court has never found a constitutional entitlement to a particular manner of voir dire. (See *Mu'Min v. Virginia, supra*, 500 U.S. at p. 424.)

In evaluating claims of judicial bias during the conduct of death-qualification voir dire, this Court has stressed that "[t]rial courts must of course 'be evenhanded in their questions to prospective jurors . . . and should inquire into the jurors' attitudes both for and against the death penalty to determine whether these views will impair their ability to serve as jurors.'" (*People v. Mills* (2010) 48 Cal.4th 158, 189; accord, *People v. Martinez* (2009) 47 Cal.4th 399, 446.) Evenhandedness is encouraged because "[i]t is entirely possible . . . that even a juror who believes that capital punishment should never be inflicted and who is irrevocably

committed to its abolition could nonetheless subordinate his personal views to what he perceived to be his duty to abide by his oath as a juror and to obey the law of the State." (*Witherspoon*, *supra*, 391 U.S. at p. 515, fn. 7; see *Lockhart v. McCree* (1986) 476 U.S. 162, 176 [106 S.Ct. 1758, 90 L.Ed.2d 137] ["It is important to remember that not all who oppose the death penalty are subject to removal for cause in capital cases; those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law."].)

Nonetheless, the trial court has "'broad discretion over the number and nature of questions about the death penalty. . . .'" (*People v. Mills*, *supra*, 48 Cal.4th at p. 189.) "[W]e cannot predicate a finding of error merely on the number of questions the court asks" death-leaning and life-leaning jurors. (*Id.* at p. 190, citing *People v. Thornton* (2007) 41 Cal.4th 391, 425.) Indeed, on appeal, "[a] reviewing court should not require a trial court's questioning of each prospective juror in the *Witherspoon-Witt* context [citations] to be similar in each case in which the court has questions, lest the court feel compelled to conduct a needlessly broad voir dire, receiving answers to questions it does not need to ask." (*People v. Thornton*, *supra*, 41 Cal.4th at p. 425; see *People v. Martinez*, *supra*, 47 Cal.4th at pp. 446-447.)

Finally, "[d]espite its importance, the adequacy of voir dire is not easily subject to appellate review. The trial judge's function at this point in the trial is not unlike that of the jurors later on in the trial. Both must reach conclusions as to impartiality and credibility by relying on their own evaluations of demeanor evidence and of responses to questions." (*People v. Holt* (1997) 15 Cal.4th 619, 661, quoting *Mu'Min v. Virginia*, *supra*, 500 U.S. at p. 424.) For these reasons, the court's manner of conducting voir dire will not be disturbed on appeal unless it renders the trial fundamentally

unfair. (*People v. Carter* (2005) 36 Cal.4th 1215, 1250; see *Mu'Min v. Virginia*, *supra*, 500 U.S. at pp. 425-426.)

E. The Trial Court Questioned Prospective Jurors In An Evenhanded Manner

Here, an examination of the voir dire conducted by the trial court in this case shows that it did not abuse its broad discretion in questioning the prospective jurors. In several cases, the prospective jurors' answers to the questionnaire indicated that they did not understand the difference between the guilt and penalty phases in a capital trial, and the requirement that they consider aggravating and mitigating factors when determining punishment. The trial court educated these jurors about the two phases of a capital trial individually and outside the presence of the other prospective jurors. After ensuring that a juror understood the process, the court then asked follow-up questions directly related to the juror's questionnaire answers. (See, e.g., 4RT 760-762, 820-821, 875-876; 765-767; 6RT 1174-1176, 1190-1192; 7RT 1357-1361, 1395-1398; 8RT 1480-1484, 1532-1538, 1542-1544, 1623.) In several cases, the juror's responses to the court's follow-up questions were different than his or her answers to the questionnaire. Indeed, it was clear in several cases that jurors had not understood the question posed in the questionnaire. After the court gave a clarifying explanation regarding a specific legal term or phase of a capital trial, often the juror would give an entirely different answer than the juror had written in the questionnaire. Finally, the trial court allowed both defense counsel and prosecutor to ask questions to each juror to determine whether they would be appropriate in serving in this case. (See, e.g., 4RT 767-773, 818-820, 876-878; 6RT 1176-1180, 1192-1197; 7RT 1361-1365, 1398-1404; 8RT 1484-1490, 1538-1542, 1623-1628.)

For example, Prospective Juror No. 8046 initially told defense counsel that she could only vote for the death penalty and not for life without the

possibility of parole. However, the court clarified with the juror that she was open to both penalty options after explaining how the penalty phase of a trial included both mitigating and aggravating factors. The trial court found that the juror had been rehabilitated and found her demeanor to be sincere and without hesitation. The challenge for cause was denied. (4RT 753-754, 762.) The same scenario played out with Prospective Juror Nos. 2746 and 6957. (4RT 820-823, 876-880.) As in *People v. Thornton* (2007) 41 Cal.4th 391, "it is evident that the court found it necessary to ask the prospective juror[s] questions to reach a decision about [them], and doing so worked no unfairness to defendant." (*Id.* at p. 422.) There is "nothing improper in the court's explaining the law to the prospective juror, nor in its failing to engage in a similar dialogue with other prospective jurors whose voir dire did not give rise to the same concerns . . . ." (*Ibid.*)

Repeatedly, when jurors were confused about the two-phase nature of the trial and other legal aspects, the trial court was well within its discretion in explaining these matters to the jurors and ascertaining whether, in light of her new understanding, they could impose either penalty option. This Court "ordinarily defer[s] to the court's determination that a prospective juror's answers require clarification" (*People v. Martinez*, *supra*, 47 Cal.4th at p. 446), and there is "nothing improper in the court's explaining the law . . ." to a prospective juror whose questionnaire responses gave rise to concerns in the court's mind. (*People v. Thornton*, *supra*, 41 Cal.4th at p. 423.) "Clearly the court found it necessary to ask [the jurors] questions to reach a decision about [them], and doing so was not unfair to defendant." (*Id.* at p. 422.)

The same is true with the remaining prospective jurors whom appellant claims the trial court improperly rehabilitated. A review of the questionnaire responses and voir dire indicates the court questioned them regarding their views on the death penalty when their written responses to

critical questions were inconsistent or appeared to the court to create a conflict or to reflect confusion or a misunderstanding of the capital trial process. For example, Prospective Juror Nos. 4920, 8964, 8642, and 9021 indicated the number of charges made it more likely that he was guilty. The court found it necessary to either to clarify, or have defense counsel and prosecutor clarify, that each juror could be fair, impartial, and vote for both penalty options. (See 4RT 754-755; 5RT 1045; 8RT 1481-1482.) Similarly, Prospective Juror Nos. 3390, 4061, 6957, and 8964, noted that life without the possibility of parole was worse than the death penalty. Each time, the trial court clarified the significance of the death penalty. As to all jurors that appellant notes that the defense for-cause challenges were denied, the trial court specifically confirmed that they could impose both penalty options. (See 4RT 760-762 [Prospective Juror No. 8046], 768-769, 772 [Prospective Juror No. 4061], 820-821 [Prospective Juror No. 2746], 876-878 [Prospective Juror No. 6957]; 5RT 988-990 [Prospective Juror No. 9021], 1044-1046 [Prospective Juror No. 0517]; 6RT 1176-1180 [Prospective Juror No. 3390], 1192, 1195-1197 [Prospective Juror No. 1827]; 7RT 1363-1365 [Prospective Juror No. 1599], 1396-1401 [Prospective Juror No. 8642]; 8RT 1485-2486 [Prospective Juror No. 8964], 1539-1544 [Prospective Juror No. 4920], 1623-1626 [Prospective Juror No. 5293].)

Moreover, as to the only juror that actually served on the jury, Prospective Juror No. 1599, the trial court stated that the juror had been sufficiently rehabilitated and cited his answers, demeanor, and body language in finding he was being fair and candid. (7RT 1365-1367.) The demeanor of a juror is an appropriate consideration for the trial court in determining whether to grant a challenge for cause. (See *Uttecht v. Brown* (2007) 551 U.S. 1, 9 [127 S.Ct. 2218, 167 L.Ed.2d 1014]; *People v. Clark* (2011) 52 Cal.4th 856, 895 ["Visible emotion and nervousness are factors a

trial court properly may consider in evaluating a juror's demeanor, which is highly relevant to a trial court's ultimate determination."]).

In sum, the record reflects the court questioned each prospective juror in a manner consistent with its assessment of that person's "individual characteristics" (*People v. Mills*, *supra*, 48 Cal.4th at p. 190) and asked questions and explained the law it felt necessary to come to a decision about the ability of the prospective juror to serve on the jury. (*People v. Thornton*, *supra*, 41 Cal.4th at pp. 422-423.) "'Unless the voir dire by a court is so inadequate that the reviewing court can say that the resulting trial was fundamentally unfair, the matter in which voir dire is conducted is not a basis for reversal.'" (*People v. Booker* 51 Cal.4th 141, 169, quoting *People v. Holt* (1997) 15 Cal.4th 619, 661.) Here, there is simply no evidence that the trial court questioned prospective juror differently based on their death penalty views. Counsel were also permitted to pose questions designed to expose jurors' biases in favor of or against the death penalty that would undermine their ability to perform their duties. Thus, "[t]he trial court's questions caused no prejudice, and therefore do not warrant reversal of defendant['s] convictions." (*People v. Champion* (1995) 9 Cal.4th 879, 909.)

F. Appellant Could Not Have Suffered Prejudice

Errors involving improper failure to grant defendant's challenge for cause is tested under the "reasonable possibility" standard, which is akin to the *Chapman* reasonable-doubt standard. (*People v. Ashmus* (1991) 54 Cal.3d 932, 965.) In order to obtain relief based on the erroneous denial of a challenge for cause, the defendant must show that the "'court's rulings affected his right to a fair and impartial jury.'" (*People v. Clark* (2011) 52 Cal.4th 856, 895, quoting *People v. Mills* (2010) 48 Cal.4th 158, 187.)

Here, all prospective jurors, except for one (Prospective Juror No. 1599), that appellant identified did not even serve on the jury. (See 9RT

1704-1733.) Thus, appellant "could not have possibly suffered prejudice as a result of the court's refusal to excuse them..." (*People v. Hillhouse* (2002) 27 Cal.4th 469, 487-488.) Where a prospective juror did not even serve on the jury, there is no merit to claim the trial court erred in failing to excuse the juror for cause, since defendant could not possibly have suffered prejudice as a result of trial court's refusal to excuse juror for cause. (*People v. Hinton* (2006) 37 Cal.4th 839, 860.)

Moreover, the fact that defense did not use all of its peremptory challenges renders any claim based on failure to excuse a juror for cause moot. (*People v. Danielson* (1992) 3 Cal.4th 691, 714, overruled on other grounds, *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069.) In any event, there is nothing to show that appellant's jury was unfair or partial in deciding his case.

Therefore, the trial court did not abuse its broad discretion in its manner of questioning prospective jurors.

III. SUBSTANTIAL EVIDENCE SUPPORTS THE TRIAL COURT'S FINDING THAT TWO PROSPECTIVE JURORS RESERVATIONS ABOUT THE DEATH PENALTY WOULD SUBSTANTIALLY IMPAIR THEIR PERFORMANCE AS JURORS

Appellant contends that the trial court erred when it excused Prospective Juror Nos. 8814 and 8891 for cause because of their feelings about the death penalty. (AOB 151-155.) However, substantial evidence supported the trial court's finding that these prospective jurors could not fairly consider the death penalty as a sentencing option.

A. The Relevant Proceedings

a. Prospective Juror No. 8814

In his questionnaire, Prospective Juror No. 8814 stated that there "could be cases that deserve the death penalty." (18CT 4660.) He indicated that he had a "neutral" opinion of the death penalty and believed

that life in prison without the possibility of parole was a worse penalty than death. (18CT 4661-4662.) He indicated that life in prison without a possibility of parole was worse "because the person is been punished the rest of his life." (18CT 4664.)

During voir dire, the following exchange took place:

Trial Court: You've indicated that life in prison without parole is a worse penalty than death. I just want you to be aware that both sides in this case consider death the more severe punishment. That's all I have for this juror. [¶] Defense counsel?

Defense counsel: A few questions, okay?

Prospective Juror No. 8814: Sure.

Defense counsel: With regard to this, you understand that in this case if you reached that phase, that you would be looking at the penalty of either death or life without the possibility of parole?

Prospective Juror No. 8814: Yes, I understand that.

Defense counsel: And you would listen to all of the evidence to be able to make a decision as to the appropriate penalty, correct?

Prospective Juror No. 8814: That's correct.

Defense counsel: And you don't have any – and with regard to that, you would listen to the defendant's background, any information about that to assist you in making that decision?

Prospective Juror No. 8814: Can you repeat that? I can't understand what you said.

Defense counsel: You would listen to any background information about this case, about the defendant, [Appellant], in making that decision, correct?

Prospective Juror No. 8814: I will be?

Defense counsel: Yeah. Would you?

Prospective Juror No. 8814: No, I don't know – I don't think so.

Defense counsel: Maybe – let me – maybe I'm asking a bad question. [¶] Would you want to know information about [appellant's] background in deciding about what sentence to impose?

Prospective Juror No. 8814: Yes, I think I would like to know about that.

Defense counsel: Okay. Thank you. I have nothing further, your honor.

Trial Court: All right, [Prosecutor].

Prosecutor: Thank you. Good afternoon.

Prospective Juror No. 8814: Good afternoon.

Prosecutor: You mentioned that you can consider the aggravating and mitigating circumstances during the penalty phase if the defendant was found guilty of first degree murder; is that correct?

Prospective Juror No. 8814: Can you ask the question again?

Prosecutor: Let me just get to the point here. Let's assume that you've gone through the trial and you've determined that the defendant was guilty of first degree murder. Let's assume that you found special circumstances to be true, and let's assume you've gone through the penalty phase and you've decided that the death penalty is the appropriate sentence in this case. I want you to imagine you're sitting in the jury box and you're looking at this defendant as he sits here today. And as you look at him, you will have to impose or admit that you are finding the verdict of death appropriate. [¶] Could you do that in this case? Could you tell a man that you're finding for the death penalty?

Prospective Juror No. 8814: I think I put on my questionnaire that I could, but this is the first time I'm in a jury and now I have second thoughts. I'm not sure.

Prosecutor: Okay. Since you're feeling that you are not sure about that, do you personally feel as you look deep down inside that it would be hard for you to impose the death penalty in a case like this?

Prospective Juror No. 8814: I think it probably would.

Prosecutor: Okay. Does that mean, then, the only penalty you would feel comfortable imposing would be life without the possibility of parole?

Prospective Juror No. 8814: That's correct.

Prosecutor: In other words, would it – death penalty is something that you could not impose at this point in time?

Prospective Juror No. 8814: At this point in time, no. I need to analyze that more and – at first I thought I could and now I having second thoughts. As I said, this is my first case. I've never been on one and it's not the same as hearing people talking about it and when it's your own decision, what you gonna do? It's just different and I will probably – in the future I may change my mind and even on this case I may change my mind on even this case. But as of right now, that's my point. I will need to – probably to make my decision, I would need to see what happened, how it happened, and all that. That may change my mind. I don't know.

Prosecutor: I know that I'm out of time. [¶] I don't know if the court wishes to inquire further?

Trial Court: Yes. [¶] Based upon your present feeling – I don't know, it may change in the future – but based on your present feeling in this case, would you always vote – if the defendant is convicted of a murder with special circumstance, would you find yourself in the position of always voting for life instead of the death penalty?

Prospective Juror No. 8814: Yes.

Trial Court: And you cannot imagine in your mind based on what you know about this case to vote for death?

Prospective Juror No. 8814: Not at this point.

Trial Court: Okay. Anyone want to follow up on that?

Defense counsel: If I might, Your Honor? [¶] Would you be willing to listen to all of the evidence and if it was appropriate vote for death?

Prospective Juror No. 8814: I [*sic*] possibly vote for death. If I listen to all the evidence and everything and how everything happened, I may change my mind and vote for the death penalty.

Defense counsel: You're uncomfortable?

Prospective Juror No. 8814: Exactly.

Defense counsel: But that doesn't mean that you wouldn't vote if it was appropriate, correct?

Prosecutor: Vague with regards to vote for what?

Defense counsel: We're asking you about that death penalty. That's what we're asking about.

Prospective Juror No. 8814: Yes.

Defense counsel: You are open to voting for death if the evidence supported that, correct?

Prospective Juror No. 8814: Yes.

Defense counsel: Thank you. Nothing further.

Prosecutor: You've kind of given us two different answers concerning the death penalty and I just want you to really look deep inside. Could you in fact vote to execute this man if legally you felt it was an appropriate penalty? Could you actually do that?

Prospective Juror No. 8814: I don't know. I just don't know.

Prosecutor: Because you don't –

Prospective Juror No. 8814: Because that will be – like I said, that will depend how everything happen, how the evidence is presented to me and what comes out of that. *But I don't think so. I don't think I could.*

Prosecutor: Because you are leaning towards "I don't think so, I don't think I can," does that mean it's more likely you would just vote for life without the possibility of –

Prospective Juror No. 8814: *My definite response this time is going to be no, I won't vote for the death penalty.*

Prosecutor: Okay. Thank you. I appreciate your candor. Thank you.

Trial court: All right. Thank you, sir. If you would step back into the jury room.

(4RT 885-890, emphasis added.)

The prosecutor challenged the juror for cause and the following exchange took place:

Prosecutor: People challenge for cause, Your Honor. Based upon his view of the death penalty at this point in time, even though he equivocated a little bit, it was obvious that by his body language, his mannerisms, that his personal opinion is he could not vote for the death penalty at this time.

Defense counsel: You Honor, our position is he responded that he would be open, that he would have to listen. I think he tried to suggest at every response that he had not heard things, that he would want to hear that. He made it very candid that his preference would not be for death but he specifically indicated that he would be open, would listen, want to hear more information, and has not unconditionally precluded that.

Prosecutor: His final answer I would point out was he could not vote for the death penalty at this point in time.

Trial Court: After observing the [juror's] demeanor, his body action, his shaking his head, despite his answers on his questionnaire, I think he's equivocated on the issue of whether he could or could not impose the death penalty, with the stronger position that he could not, that he has changed his mind and had second thoughts about the questions on the questionnaire. Therefore, I think the – it's the court's opinion that he could not vote for the death penalty or that his views would prevent or impair his ability to perform his abilities. He is equivocating, therefore I'm going to excuse him for cause.

Defense counsel: May I make one comment for the record, Your Honor?

Trial Court: Sure.

> Defense counsel: I believe that the juror did equivocate but I also believe that the juror was quite adamant and constant in his assessment where he said he'd have to hear more before he would be put in a position to be predisposed to vote for death. And so by allowing this juror to be excused for cause, what is happening is we are selecting jurors that are only predisposed for death without being given the opportunity to hear all of the evidence at penalty with respect to mitigation and aggravation before they have to make that decision. He basically indicated he wanted to hear more before he was going to make that decision.
>
> Trial court: I don't know what more he could hear unless we put on the actual evidence. Where there are conflicting answers regarding the death penalty in *People v. Cox*, the court may assess the juror's state of mind. It is not bound solely by his statement which are taken in isolation and are equivocal. [¶] I do find that he is anti-death penalty and could not impose it in this particular case, and he was excused.

(4RT 890-892.)

b. Prospective Juror No. 8891

In his questionnaire, Prospective Juror No. 8891 indicated his religious principles made it difficult or impossible to sit in judgment on another person. He further explained that he had "problems with the death penalty." (18CT 4868; see also 18CT 4875-4876, 4878 ["horrendous charges – but see about feelings about the death penalty"].) In responding to a question regarding how he would deal with the conflict if the judge gave a instruction that differed from his beliefs, Prospective Juror No. 8891 explained that he "[didn't] know. I will have a hard time sentencing someone to death even if it meant countering the judge." (18CT 4871.) He also indicated that he "could not send a person to death or a long sentence based on circumstantial evidence." (18CT 4884, emphasis in original.) In responding to a question regarding his feelings about the death penalty, Prospective Juror No. 8891 indicated that he had "strong objections to

death penalty." (18CT 4885.) He noted that he was "strongly against" the death penalty and elaborated that "most death penalty defendants have limited mental capacity." (18CT 4886.) Prospective Juror No. 8891 also opined that the death penalty was a worse punishment because it was the "end of life – no possibility of exoneration – many incarcerated are being proven innocent with genetics." (18CT 4888-4889.) Finally, he noted that he did not feel comfortable sitting on this case because the death penalty was a potential penalty (18CT 4888, 4891), explained he "maybe not" vote for it in this case (18CT 4890), and did not "know that [he could] be fair and impartial" (18CT 4891).

During voir dire, the following exchange took place:

Trial court: Have a seat anywhere, sir. [¶] Are you 8891?

Prospective Juror No. 8891: I am.

Trial court: I'm going to ask you some questions with the questionnaire. I'll remind you that your answers are under penalty of perjury as well.

Prospective Juror No. 8891: Of course.

Trial court: Okay. Having read your questionnaire, although you left some blanks, it seems.

Prospective Juror No. 8891: Ma'am, I don't think I left any blanks. It's 8891.

Trial court: You left a blank at 114, which said if you are strongly in favor of the death penalty, would you always vote guilty as to first degree murder and always find a special circumstance to be true –

Prospective Juror No. 8891: I'm sorry, ma'am. Go ahead. My apologies.

Trial court: -- in order to get to the penalty phase?

Prospective Juror No. 8891: I am not strongly in favor of the death penalty so how could I answer that question?

Trial court: Well, I presume your answer would be no.

Prospective Juror No. 8891: Could you repeat the question, ma'am?

Trial court: If you are strongly in favor of the death penalty, would you always vote guilty as to the murder and find a special circumstance to be true no matter what the evidence shows in order to get to the death penalty?

Prospective Juror No. 8891: If I were strongly in favor of the death penalty, no, I would not automatically send a defendant to the gas chamber.

Trial court: Okay. That answers that. [¶] And it seems to me in reading the rest of your questionnaire that you are strongly against the death penalty?

Prospective Juror No. 8891: Yes, ma'am. And I can explain what my feelings are about that if you'd like me to do that.

Trial court: Okay. I don't need you to do so at this time. I think I've read it in the questionnaire.

Prospective Juror No. 8891: Yes, ma'am. Well, there are other reasons in addition to what's there.

Trial court: Okay. So in view of that, can you imagine any circumstances in this case where you could return a death verdict?

Prospective Juror No. 8891: I cannot sitting here imagine a specific circumstance, but I could be persuaded. I would be open. It would take quite a bit of persuading given the irreversibility of the consequences of imposing the death penalty. Yes, I do allow for the possibility that if I heard the right things, if I were convinced of the right things, then I could impose the death penalty.

Trial court: All right. You've read what the alleged facts and charges are in this case?

Prospective Juror No. 8891: Yes, ma'am. And I notice that the questionnaire indicated most of the evidence was circumstantial, which means that if some DNA project 5 or 10 years down the

line finds the defendant not guilty, there is no recourse, you know. He is not with us anymore. So that is a good part of why I oppose the death penalty. I'm sorry. Go ahead.

Trial court: All right. So if the murder charge was based upon the circumstantial evidence –

Prospective Juror No. 8891: It would be harder for me to not feel an awful lot of guilt about imposing any sentence which might lead to the death penalty.

Trial court: All right. Would that cause you to automatically vote not guilty in order to avoid a death penalty?

Prospective Juror No. 8891: No, ma'am, it would not cause me automatically to vote not guilty.

Trial court: Okay.

Prospective Juror No. 8891: No.

Trial court: If the defendant is convicted of murder with special circumstances and you get to the penalty phase, there will be factors in aggravation, mitigation factors in favor of the defendant, factors against the defendant, and the jury looks at those evidence and weighs them and determines what is the more appropriate penalty. Do you see yourself doing that?

Prospective Juror No. 8891: I see myself weighing the two groups of facts, but in my mind there's always – and of course we haven't heard the case yet. And speaking from the beginning and not from the end, most of the evidence is circumstantial according to the questionnaire, and he cannot be exonerated 5 or 10 years down the line. And that's going to mean I'm going to have a lot harder time feeling comfortable with the guilty penalty because the penalty is irreversible and so severe.

Trial court: So would you be inclined to vote not guilty based upon that fact?

Prospective Juror No. 8891: All other factors being equal, if I were right on the borderline, I would choose not guilty.

Trial Court: Because of the circumstantial evidence problem? Is that what you –

Prospective Juror No. 8891: That's one issue. It's not the whole issue. It just makes it a lot more likely that he may be exonerated down the line a few years. You know, daily we have DNA projects finding people, you know, not guilty of what they were sent to jail for. It was only a couple years ago that – that governor of Illinois pardoned every death row inmate, I think 40-50 people because of this exact issue. It's a big issue in this day and age.

Trial court: All right. So would you be fearful that could happen in this case?

Prospective Juror No. 8891: You bet. Yes, ma'am. Fearful that he might be wrongly convicted.

Trial court: Yes.

Prospective Juror No. 8891: Yes, of course I would be more fearful. We should all be fearful with that.

Trial court: All right. With your state of mind, then, and your doubts about circumstantial evidence and DNA mistakes or finding mistakes later with DNA, would you – could you foresee yourself voting for death in that – in this instance?

Prospective Juror No. 8891: It's possible. I would have to hear the facts. It's very hard to pass judgment before I've heard the facts. The evidence would have to be absolutely irrefutable. There would have to be zero percent doubt in my mind that the man is not guilty of what he's charged with.

Trial court: All right. The standard is not zero percent doubt. The standard is beyond a reasonable doubt.

Prospective Juror No. 8891: Yes, ma'am. You know, there is another factor here which is he is accused of a number of serious crimes, but he is accused of only one murder. Unless he has got priors, which you're not going to tell us about, one murder usually doesn't equal a death penalty case. O.J. Simpson, for instance was accused of two murders. There was never any doubt that he was not going to get the death penalty. They announced that, so it doesn't quite seem fair.

Trial court: Well, it is different – it's done case by case. It's the decision done by the district attorney.

Prospective Juror No. 8891: Yes, ma'am. Okay. Defense counsel ...

Defense counsel: I just want to advise you, the standard of proof with respect to guilty is beyond a reasonable doubt. Do you understand that, sir?

Prospective Juror No. 8891: Yes, sir.

Defense counsel: Okay. With respect to penalty, that's something else. That's a weighing process that each individual juror goes through with respect to the factors in mitigation versus factors in aggravation.

Prospective Juror No. 8891: Once a guilty verdict has been brought back.

Defense counsel: Once a guilty verdict has been brought back. [¶] Now the jury is going to be determining what the appropriate penalty should be and what they do is they hear evidence with respect to factors in mitigation versus factors in aggravation.

Prospective Juror No. 8891: Yes, sir.

Defense counsel: They assign whatever weight they deem appropriate with respect to those factors.

Prospective Juror No. 8891: Yes, sir.

Defense counsel: Are you prepared to do that?

Prospective Juror No. 8891: Yes, sir.

Defense counsel: Okay. And if you were selected as a juror and you found that the factors in aggravation were greater than the factors in mitigation, would you consider a death penalty?

Prospective Juror No. 8891: That's a highly – oh, what's the right word? It's highly speculative, sir, because we haven't heard any facts yet. They – if the – if the factors for aggravation were strong enough, yes, I would.

Defense counsel: Thank you. I have no further questions.

Prospective Juror No. 8891: Yes, sir.

Trial court: Prosecutor . . .

Prosecutor: Okay. Sir, I'm trying to square what you're saying in court with what you said in your questionnaire.

Prospective Juror No. 8891: Yes, ma'am.

Prosecutor: I see in one of the questions you were asked under these circumstances you could envision yourself imposing the death penalty – this is question 108 – and you said no. You were asked whether you felt comfortable sitting on the jury and you said no. You also wrote that you have a strong objection to the death penalty.

Prospective Juror No. 8891: Well, yes, ma'am. Sorry.

Prosecutor: Okay. Can you envision yourself if you were to sit on a jury which convicted this defendant here in court – if you could look at him, please – if you sat on a jury which convicted him of first degree murder, can you envision if you weighed the factors actually announcing a death verdict and telling this defendant that you were sentencing him to death?

Prospective Juror No. 8891: I would have to be very, very convinced and the aggravating factors would have to be far in excess of the mitigating factors. But under those circumstances, if that were the case, then, yes, I could do that. But I would feel terribly guilty. You know, this isn't a burglary. This isn't six months to a year in jail, you know. I – even if a person is really convinced, I don't know that they don't carry guilt for the rest of their lives that they've sentenced a man to die.

Prosecutor: Well, so how do you feel about the burden of possibly sitting on this case? Would you prefer not to?

Prospective Juror No. 8891: I would prefer not to.

Prosecutor: Do you feel comfortable on this case?

Prospective Juror No. 8891: I think that I am going to have a hard time with my own feelings of guilt if I start to tend towards the guilty aspect. On the other hand, he is accused of some extremely serious crimes. But on the other hand, it's circumstantial evidence. Once again, we're at the beginning, we're not at the end. I haven't heard a single fact yet.

Prosecutor: Okay. Would you be able to follow the judge's instruction about how to consider the aggravating versus the mitigating, or would you need to have your own standard in which the aggravating circumstances were absolutely overwhelming with regard to the mitigating circumstances?

Prospective Juror No. 8891: I must follow the judge's instructions, otherwise we don't have a legal system.

Prosecutor: Okay. I guess I'm out of time, Your Honor.

Trial court: Okay. Thank you. Okay. Thank you, sir. We're going to put you back in the jury room for a few minutes. When you return, you'll be in seat 5 in the back row.

Prospective Juror No. 8891: Yes, ma'am.

[outside the presence of the jury]

Trial court: Defense counsel, challenge for cause?

Defense counsel: No.

Prosecutor: Yes, Your Honor.

Trial court: People?

Prosecutor: Despite the fact that he was able to articulate a small amount of equivocation, he has such major reservations about the death penalty that he has already decided that circumstantial evidence is a problem in this case without having any notion what the circumstantial evidence would be. And although he concedes that under some circumstances there could be adequate aggravation that he would in theory entertain the possibility of the death penalty, he appears ready to bring his own legal standard to that analysis which is the aggravating evidence would have to be absolutely mammoth by comparison to the mitigating and, furthermore, he has a conscientious objection to the death penalty that would cause him to feel profoundly guilty even if he were legally persuaded that death should be imposed.

I just don't think he is appropriate for this case. He also I believe twice or maybe three times flagged himself to the court's attention when we were not questioning him, but in prior

proceedings, to announce that he'd have a problem sitting on this case. I don't know that all that made it onto the record because he didn't always identify himself.

Trial court: He equivocated somewhat on the record, but his answers in the questionnaire were clearly anti death penalty. He says he has a problem with the death penalty religious – due to religious principles. He would have difficulty making a decision in this case because the defendant has limited capacity. "Anybody who is accused of such a crime must have a limited capacity."

He said "I would have a hard time sentencing someone to death even if it mean – even if I counter – even if countering the judge and talking about following the instructions."

He indicated he has strong objections to the death penalty. He indicated the defendant is more likely to be guilty based upon the fact the death penalty is being sought here. More likely defendant to be guilty based upon the number of charges. He's strongly against the death penalty. The death penalty is imposed too often. Explained most death penalty defendants have limited mental capacity. He explained in his questionnaire that death would of course be the end of life, no possibility of exoneration. Many incarcerated are being proven innocent with genetics. Under 108, could he impose the death penalty in such a case? No.

"Would you feel comfortable sitting on this case with the potential death penalty? No.

Again, he talk about persons charged with a death penalty case have a limited capacity, no chance of exoneration.

Under 113, would he refuse to vote guilty as to first degree murder, et cetera? He put unknown. He left 114, blank, "Would you always vote guilty?" But he indicated that that wouldn't be applicable based upon his anti death penalty views.

116, "Could you vote for the death penalty if appropriate?" "Unknown. Maybe not."

"Would you always vote for death under 118?" "Unknown." I'm sorry, 118, always vote against death based upon his feelings? He said "unknown."

119, "Would you always vote for death?" No.

"Can you see yourself choosing the death penalty instead of life?" He said "Maybe not," then checked "no."

"Can you set aside your personal beliefs or views under 121 about the death penalty to render a verdict in accordance with the law?" "No."

Reason why he would prefer not to serve, "my feelings about the death penalty."

"What makes you feel you can – what makes you feel you can be fair and impartial juror in this case?" He stated, "I don't know. I can be fair and impartial. I don't know."

I'd say he waffled a bit but I don't think he truly waffled. I think he has made it abundantly clear in his questionnaire and basically to the answers to the questions that he is anti death penalty. He has great concerns that the defendant has limited capacity, therefore, may not deserve the death penalty and there is always a chance, particularly if a case is based upon circumstantial evidence, that DNA may later prove a defendant innocent and he would not want to have that guilt on his hands. And he would also require a zero percent doubt.

I am going to excuse him for case.

Defense counsel: May I be heard?

Trial court: Yes.

Defense counsel: There mere fact that this prospective juror does not have a comfort level sitting on a death penalty case is probably shared by 99.44 percent of the people who come into these proceedings.

Secondly, the mere fact that he has said that – death is probably shared by most f the people who sit in that box when they're questioned about did they think death versus life without the possibility of parole is the worst sentence one could receive.

With respect to his attitudes about the death penalty when the court inquired concerning what factors he would have to consider in terms of either voting for death or life without the possibility of parole without prompting from defense counsel, he almost mimicked the language in CAL CRIM which suggests that the only way an individual can in fact consider or vote for a death warrant is if the aggravating factors so substantially outweigh the mitigating factors. And I believe he didn't use those exact words, but a reasonable interpretation of what he said suggested that would be procedure that he would apply.

Additionally, there are no standards set forth under the code that I'm aware that directs an individual to assign a certain weight to any one factor. That's an individual decision that a juror makes. Whether or not they consider it to be aggravating or mitigating, that's up to the individual. It's not the court's determination.

The Court will in fact instruct the prospective juror to make that determination. So consequently, the responses given by this juror to the court's questioning, as well as counsel's questioning, seemed to support a conclusion that he would in fact consider death if in fact the appropriate evidence was introduced for him to make a determination. That's on the death issue.

With respect to the issue of guilt, he also indicated, yes, he could vote for guilt based upon circumstantial evidence, even though the crime charged and established would be felony murder with unintentional killing.

Those were his responses, Your Honor. Now, the court may conclude they were waffling, but that was the response given to the court's questioning, as well as counsel's questioning when those questions were put to him.

Under the circumstances, I see no difference between this juror and some of the other jurors who come in here and said, "Well, you know, all right. I could possibly consider it even though I'm strongly in favor of the death penalty and I think it's used too infrequently and there are too many murders that get LWOP.

Trial court: People?

Prosecutor: I –

Defense counsel: Submitted.

Prosecutor: I believe you've already ruled, Your Honor. Is it necessary?

Defense counsel: No. I'm just drawing a comparison.

Prosecutor: Is it necessary for me to address the court again on this issue?

Trial court: It's up to you.

Prosecutor: Your Honor, he managed to work in a tiny amount of equivocation that under some hypothetical universe perhaps he could impose the death penalty. But it seems clear that his mind is made up that we don't have adequate evidence, that it's not the right quality of evidence because it's circumstantial that his feelings of guilt would impair his ability to consider imposing the death penalty and, as I mentioned, he has repeatedly tried to flag this to the court's attention when he wasn't even being questioned. He is a death penalty opponent. It's simple as that.

Trial court: I tend to agree, viewing his demeanor, his affect. He was highly excited, gesturing wildly. He has a – tried to get the court's attention many times, referring to "my answer in my questionnaire, didn't you see my answers in my questionnaire?" He may have equivocated slightly under very limited circumstances and his answers to questions by counsel, but I think looking at his demeanor the way he answer, his unequivocal answers to the questionnaire, the court is going to determine that he could not be a fair and impartial juror in this case and that his views would substantially prevent his abilities to follow the law and his oath in accordance.

He will be excused.

(5RT 1001-1018.)

B. The Applicable Law

A reviewing court reviews the record *de novo* to determine whether the trial judge had sufficient information regarding the state of mind of the prospective juror who was removed for cause to permit the trial court to

reliably determine whether prospective juror's views would prevent or substantially impair performance of duties in the case before the prospective juror. (*People v. Cook* (2007) 40 Cal.4th 1334, 1343; *People v. Stewart* (2004) 33 Cal.4th 425, 445.)

The proper standard for exclusion, for cause, of a juror based on bias with regard to the death penalty is whether the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." (*Wainwright v. Witt*, *supra*, 469 U.S. at p. 424; see also *People v. Ghent* (1987) 43 Cal.3d 739, 767 [adopting the *Witt* review standard in California].) A juror must be able to do more than simply "consider" imposing the death penalty. A juror must be able to consider imposing the death penalty *as a reasonable possibility.* (*People v. Schmeck* (2005) 37 Cal.4th 240, 262.)

This standard does not require that a juror's bias be proved with "unmistakable clarity." (*Wainwright v. Witt*, *supra*, 469 U.S. at p. 424.) To the contrary, as this Court has recognized, "frequently voir dire examination does not result in an 'unmistakably clear' response from a prospective juror, but nonetheless 'there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law. . . . [T]his is why deference must be paid to the trial judge who sees and hears the juror.'" (*People v. Ghent* (1987) 43 Cal.3d 739, 767, citing *Wainwright v. Witt*, *supra*, 469 U.S. at pp. 425-426.)

When the juror has not made conflicting or equivocal statements regarding his or her ability to impose either a death sentence or one of life in prison without the possibility of parole, the court's ruling will be upheld if supported by substantial evidence. (*People v. Pearson* (2012) 53 Cal.4th 306, 327-328.) If the prospective juror's statements are conflicting or equivocal, the court's determination of the actual state of mind is binding.

"The trial court is in the best position to determine the potential juror's true state of mind because it has observed firsthand the prospective juror's demeanor and verbal responses." (*People v. Clark* (2011) 52 Cal.4th 856, 895; see *People v. Garcia* (2011) 52 Cal.4th 706, 743; see also *Uttecht v. Brown* (2007) 551 U.S. 1, 9 [127 S.Ct. 2218, 167 L.Ed.2d 1014] ["Deference to the trial court is appropriate because it is in a position to assess the demeanor of the venire, and of the individuals who compose it, a factor of critical importance in assessing the attitude and qualifications of potential jurors."].) A reviewing court "pay[s] deference to the trial court, which was in a position to actually observe and listen to the prospective jurors. Voir dire sometimes fails to elicit an unmistakably clear answer from the juror, and there will be times 'when the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law...[T]his is why deference must be paid to the trial judge who see and hears the juror.'" (*People v. Moon* (2005) 37 Cal.4th 1, 14, quoting *People v. Griffin* (2004) 33 Cal.4th 536, 559.)

C. Substantial Evidence Supported the Trial Court's Exclusion of Prospective Juror Nos. 8814 and 8891

Here, substantial evidence supported the trial court's finding that the prospective jurors' views on the death penalty would "prevent or substantially impair" their performance. (*Wainwright v. Witt*, *supra*, 469 U.S. at p. 424.) Specifically, Prospective Juror Nos. 8814 and 8891 both clearly maintained that they could not impose the death penalty in this case. For instance, while Prospective Juror No. 8814 indicated in the questionnaire that there "could be cases that deserve the death penalty" (18CT 4660), he confirmed during voir dire that he was "having second thoughts" and was "not sure" he could find for the death penalty in this case (4RT 887). Prospective Juror 8814 continued to waver in the following exchange:

Prosecutor: In other words, would it – death penalty is something that you could not impose at this point in time?

Prospective Juror No. 8814: At this point in time, no. I need to analyze that more and – at first I thought I could and now I having second thoughts. As I said, this is my first case. I've never been on one and it's not the same as hearing people talking about it and when it's your own decision, what you gonna do? It's just different and I will probably – in the future I may change my mind and even on this case I may change my mind on even this case. But as of right now, that's my point. I will need to – probably to make my decision, I would need to see what happened, how it happened, and all that. That may change my mind. I don't know.

(4RT 887-888.)

Then, defense counsel had the opportunity to ask this juror about the death penalty:

Defense counsel: We're asking you about that death penalty. That's what we're asking about.

Prospective Juror No. 8814: Yes.

Defense counsel: You are open to voting for death if the evidence supported that, correct?

Prospective Juror No. 8814: Yes.

(4RT 889.)

However, at end of questioning, Prospective Juror No. 8814 simply stated, "[m]y definite response this time is going to be no, *I won't vote for the death penalty*." (4RT 890, emphasis added.) Given his vacillations and self-contradictions, the trial court's conclusion that he was unfit as a juror must be upheld since it is supported by substantial evidence. (See *People v. Harrison* (2005) 35 Cal.4th 224, 227-228 [court properly excused juror who said that "maybe" she could not impose the death penalty and later said it would be "very, very difficult" but that she could "probably do it"]; *People v. Haley* (2004) 34 Cal.4th 283, 307-308 [court properly excused

potential jurors who gave contradictory and ambiguous answers regarding the death penalty]; *People v. Navarette* (2003) 30 Cal.4th 458, 490 [potential juror's conflicting statements on death penalty "easily supported" trial court's decision to remove her for cause]; *People v. Jones* (2003) 29 Cal.4th 1229, 1247 [potential juror's conflicting statements made trial court's determination of the potential juror's state of mind binding on appeal]; *People v. Welch* (1999) 20 Cal.4th 701, 747 [although potential juror stated that he could impose the death penalty, his equivocal response that he did not know when death would ever be an appropriate sentence justified the trial court's dismissal of the juror for cause].)

In any event, both Prospective Juror Nos. 8814 and 8891 both revealed that they would not impose the death penalty in this case. As explained above, at end of questioning, Prospective Juror No. 8814 simply stated, "[m]y definite response this time is going to be no, *I won't vote for the death penalty*." (4RT 890, emphasis added.) Similarly, Prospective Juror No. 8891 also stated his opposition to the death penalty in both the questionnaire and during voir dire. For example, in the questionnaire, Prospective Juror No. 8891 noted that he did not feel comfortable sitting on this case because the death penalty was a potential penalty (18CT 4888, 4891), explained he "maybe [could] not" vote for it in this case (18CT 4890), and did not "know that [he could] be fair and impartial" (18CT 4891). At voir dire, Prospective Juror No. 8891 stated he was "not strongly in favor of the death penalty," "[a]ll other factors being equal, if I were right on the borderline, I would choose not guilty" rather than impose the death penalty, and stated that he "would prefer not to" sit on this case and could not "imagine a specific circumstance" where he could return a death verdict, especially based on circumstantial evidence and DNA mistakes. Prospective Juror No. 8891 elaborated and stated that, "*The evidence would have to be absolutely irrefutable. There would have to be zero percent*

doubt in my mind that the man is not guilty of what he's charged with." (5RT 1001-1018, emphasis added.) Such extreme views substantially impaired his ability to be fair, notwithstanding his equivocations to the contrary. (See *People v. Mincey* (1992) 2 Cal.4th 408, 457 [trial court was justified in excusing potential juror who stated that there were no conceivable circumstances under which she would vote for death penalty]; *People v. Wharton* (1991) 53 Cal.3d 522, 588-590 [trial court did not err in excusing potential juror who did not unequivocally rule out the possibility that he could vote for the death penalty, but his answers indicated he "was holding out only a theoretical possibility that evidence could be shown which would convince him to vote for death"].)

To the extent the jurors gave conflicting answers, the trial court resolved those differences by granting the challenge, and its determination as to the jurors' state of mind are binding. (*People v. Harrison*, *supra*, 35 Cal.4th at p. 227-228 [court properly excused juror who said that "maybe" she could not impose the death penalty and later said it would be "very, very difficult" but that she could "probably do it"]; *People v. Ayala* (2000) 24 Cal.4th 243, 275 [because the potential juror's answers were "inconsistent, but included testimony that she did not think herself capable of imposing the death penalty, we are bound by the trial court's determination that her candid self-assessment showed a substantially impaired ability to carry out her duty as a juror"].)

Specifically, the trial court discussed the jurors' demeanor in finding the dismissal for cause appropriate in this case. (See 4RT 891 ["After observing the [juror's] demeanor, his body action, his shaking of his head, despite his answers on his questionnaire, I think he's equivocated on the issue on whether he could or could not impose the death penalty"]; 5RT 1018 ["I tend to agree, viewing his demeanor, his affect. He was highly excited, gesturing wildly...but I think looking at his demeanor the way he

answered, his unequivocal answers to the questionnaire, the court is going to determine that he could not be fair and impartial juror."]) Clearly, the trial court was best suited to reach a conclusion on the prospective jurors' actual state of mind. When a juror is removed for cause based in part on the demeanor of the juror, deference to the trial court by reviewing courts is appropriate because the trial court is in a position to assess the demeanor of the venire, and of the individuals who compose it, a critical factor in assessing the attitude and qualifications of potential jurors. (*Uttecht v. Brown* (2007) 551 U.S. 1, 9-10 [127 S.Ct. 2218, 167 L.Ed.2d 1014]; see also *People v. Hamilton* (2009) 45 Cal.4th 863, 890 [when a juror supplies conflicting or equivocal responses to questions directed at their potential bias or incapacity to serve on a capital jury, the trial court, through its observation of the juror's demeanor as well as through its evaluation of the juror's verbal responses, is best suited to reach a conclusion regarding the juror's actual state of mind]; *People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1007 ["the reviewing court generally must defer to the judge who sees and hears the prospective juror, and who has the 'definite impression' that he is biased, despite a failure to express clear views"]; *People v. Stewart* (2004) 33 Cal.4th 425, 451 ["appellate courts recognize that a trial judge who observes and speaks with a prospective juror and hears that person's responses (noting, among other things, the person's tone of voice, apparent level of confidence, and demeanor) gleans valuable information that simply does not appear on the record"].)

Thus, the trial court properly granted the prosecution's motions dismissing Prospective Juror No. 8814 and 8891 for cause under the circumstances. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1320 and cases cited therein [for-cause excusal proper even though the juror could vote for death in "specified, particularly extreme cases"].)

IV. SUBSTANTIAL EVIDENCE SUPPORTS THE FINDING THAT APPELLANT RAPED JUDY PALMER

Appellant contends the evidence was insufficient to find he raped or attempted to rape Judy. (AOB 155-162.) His contention is without merit as there was substantial evidence to support the rape conviction.

A. The Applicable Law

In reviewing a challenge of the sufficiency of the evidence, this Court:

> review[s] the whole record to determine whether any rational trier of fact could have found the essential elements of the crime or special circumstances beyond a reasonable doubt. The record must disclose substantial evidence to support the verdict - i.e., 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. In applying this test, [this Court] review[s] the evidence in the light most favorable to the prosecution and presume[s] in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. Conflicts and even testimony [that] is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [This Court] resolve[s] neither credibility issues nor evidentiary conflicts; [this Court] look[s] for substantial evidence.

(*People v. Zamudio* (2008) 43 Cal.4th 327, 357 [internal citations and quotation marks omitted]; *People v. Maury* (2003) 30 Cal.4th 342, 403.)

Reversal for lack of substantial evidence is warranted only if "'upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].'" (*People v. Bolin* (1998) 18 Cal.4th 297, 331; accord *People v. Zamudio, supra*, 43 Cal.4th at p. 357.) "'Circumstantial evidence may be sufficient to connect a defendant with the crime and to prove his guilt beyond a reasonable doubt. [Citations.]'" (*People v. Thomas* (1992) 2 Cal.4th 489, 514.) Although "mere speculation cannot support a conviction" (*People v. Marshall* (1997) 15 Cal.4th 1, 34), this Court "'must

accept logical inferences that the jury might have drawn from the circumstantial evidence'" (*People v. Zamudio, supra*, 43 Cal.4th at p. 357). "'[I]t is the jury, not the appellate court that must be convinced of the defendant's guilt beyond a reasonable doubt.'" (*Id.* at pp. 357-358.) "Where the circumstances reasonably justify the trier of fact's findings, a reviewing court's conclusion the circumstances might also reasonably be reconciled with a contrary finding does not warrant the judgment's reversal." (*Id.* at p. 358.) The test used to determine the sufficiency of the evidence for a special circumstance allegation is the same as that for the substantive crime. (*People v. Mayfield* (1997) 14 Cal.4th 668, 790-791.)

Unless it describes facts or events that are physically impossible or inherently improbable, the testimony of a single witness is sufficient to support a conviction. (*People v. Young* (2005) 34 Cal.4th 1149, 1181; see also *People v. Watkins* (2012) 55 Cal.4th 999, 1019-1020 [a reviewing court does not reweigh the evidence or reevaluate a witness's credibility].)

B. There Was Substantial Evidence to Find Appellant Raped Judy Palmer

The elements of the crime of forcible rape are "an act of sexual intercourse accomplished with a person not the spouse of the perpetrator . . . [¶] . . . [¶] [w]here it is accomplished against a person's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person or another." (§ 261, subd. (a)(2).) A killing "committed in the perpetration of, or attempt to perpetrate" one of several enumerated felonies, including rape, is first degree murder. (§ 189) The rape-murder special circumstance equally applies to a murder "committed while the defendant was engaged in . . . the commission of, [or] attempted commission of" rape. (§ 190.2, subd. (a)(17)(C).)

Appellant contends there was insufficient evidence to establish he raped Judy because her body was so badly decomposed when it was found.

He specifically notes that although his sperm was found on various personal objects belonging to Judy, including her underwear, the evidence does not establish that a rape occurred. He contends in passing that his sperm could have been deposited during an earlier consensual sexual encounter with Judy. He also contends there is no evidence that Judy was alive when the rape occurred. Lastly, he claims that there was no evidence to establish his intent to rape Judy. (AOB 157-161.) However, none of these unsupported claims have merit.

Viewing the record as a whole and presuming the existence of every fact the trier of fact could reasonably deduce from the evidence (*People v. Kraft* (2000) 23 Cal.4th 978, 1053), the evidence that is reasonable and credible supports the jury's finding that appellant raped Judy.

Here, given the passage of time between Judy's disappearance and the discovery of her body, evidence of sexual trauma disappeared as the body decomposed. (See 30RT 4990-5013, 5055) The lack of this type of evidence does not undermine the finding that a rape had occurred. The evidence was simply inconclusive due to the nature of the crime scene (a desert) and the state of decomposition of Judy's body (weighing merely twenty-two pounds). (See *People v. Rundle* (2008) 43 Cal.4th 76, 139 [recognizing that the absence of evidence of a sexual assault may rebut other inferences suggesting that the perpetrator intended to have sexual contact with the victim, but holding that, in that case, the inconclusive nature of the evidence (because of the decomposition of the victim's body) concerning whether a sexual assault had occurred did not rebut such inferences]; see also *People v. McCurdy* (2014) 59 Cal.4th 1063, 1105 [given the passage of time between the victim's disappearance and the discovery of her body, evidence of sexual trauma may have disappeared as the body decomposed].)

Similarly, the absence of genital trauma does not undermine the conviction, nor does the circumstance that the victim's underpants were on her body when it was found, because physical evidence of a sexual assault is not a prerequisite to finding an intent to rape. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1130-1131 [lack of semen or absence of sexual trauma on the victim did not rebut an inference, based on the other physical evidence surrounding the attack, that the defendant entered the victim's house with an intent to rape]; see also *People v. Lee* (2011) 51 Cal.4th 620, 635 [same].)

Here, the evidence supported a reasonable inference that Judy was alive when appellant raped her. Evidence was presented that Judy's body was wrapped in a blanket and tied together with rope. The rope was wrapped around her neck, torso, and legs of the body. She was bound in a fetal position. Judy had jeans that were unzipped, unbuttoned, and pulled partially down her legs. (30RT 4990-5013, 5055.) DNA found underneath Judy's fingernail clippings was consistent with appellant's profile. (21RT 3627-3631.) The jury could reasonably conclude that appellant bound Judy to facilitate his forcible commission of sexual acts against her while she remained alive and thereafter murdered her to prevent her from identifying and inculpating him in the sexual offenses. (See, e.g., *People v. Letner and Tobin* (2010) 50 Cal.4th 99, 164 [binding of victim supported inference that defendant planned to do something in which she would not be a willing participant].) Appellant does not, and cannot, point to any evidence to the contrary. (See AOB 159.)

Any suggestion that Judy could have had consensual sexual intercourse with appellant (AOB 158) is also without merit. Evidence at trial established that Judy had ended her relationship with appellant, had a restraining order against him, and had him arrested shortly before her rape and murder. (See 12RT 2158; 17RT 2887-2892.) She repeatedly told her daughter that she wanted nothing to do with him (12RT 2189 ["I wish the

asshole would leave me alone"]) and was fearful for her life because of appellant (12RT 2158 ["she was afraid of [appellant] and that if anything happened to her that – to look at him, that he did it"]). Indeed, even appellant made several statements that established his own intentions. (See 11RT 2043 [telling Judy's son that "he could really hurt [Judy]"]; 13RT 2340 ["She's got it and if I ever want it back, I'll probably have to kill her to get it."]; 15RT 2655-2659 [calling Judy a "cunt"].) Therefore, any claim that the sexual encounter was consensual, or that appellant's sperm could have been deposited after consensual intercourse (AOB 158), is not supported by the evidence.

In addition to the evidence that the relationship had ended, there was evidence that Judy was an extremely clean person who kept her house in order and regularly did her laundry. (See 11RT 2095, 2111-2112.) There is simply no possibility that blood and semen would have been left anywhere in the Judy's apartment without having been cleaned by her in the past, especially since Judy was no longer seeing appellant and had a restraining order against him. (12RT 2202-2204.) Specifically, traces of semen were found on the rug and couch, and blood was found on the floor. (23RT 4075-4091.) The fact that the blood and semen were found in the same location negates any argument that the semen was left at an earlier time during consensual sex. Moreover, the evidence tends to establish that appellant in fact, "had beat the pussy up." (14RT 2498, 2500; 15RT 2756; 25RT 2512-2513, 2521-2522.)

Thus, the combination of the blood and semen found at Judy's apartment, the dildo with appellant's semen on it, her underpants with traces of his semen, and the presence of physical restraints on Judy's body provides substantial evidence that a forcible rape occurred in that apartment and appellant harbored the intent required. (See, e.g., 20RT 3498-3510, 3514-3531; see also 21RT 3627-3666; 23RT 4075-4091.)

Moreover, evidence that appellant had bragged about raping Judy further confirms the requisite intent. On the night of April 17, the last night Judy was seen alive, appellant had left his motel for about five hours and came back with fresh scratches on his face.[7] Calhoun asked appellant what happened, and he responded that he had gone to his wife's house, broken in, and "he had beat the pussy up." (See 14RT 2498, 2500; 15RT 2756; 25RT 2512-2513, 2521-2522.) It was entirely reasonable for the jury to infer that, having broken into Judy's house and bragging about "beating the pussy up," that appellant had forcible sex with Judy against her will. According to Calhoun, appellant had aggressive sexual intercourse with Judy. (14RT 2499-2500.)

Lastly, evidence of appellant's conduct with other women further supports a finding of the requisite intent in this case. Evidence was presented that appellant would start intimate relationships with women that would eventually lead to abusive relationships involving physical and sexual abuse, including rape and sodomy. (See 15RT 2589-2593; 25RT 4294-4310; 34RT 5621-5636; 52RT 7825-7827; see also 15RT 2659 [appellant told Woodard that he liked to "force" women into anal sex].) This pattern of conduct "provides ample evidence for a reasonable jury to find that defendant intended to rape [the victim] when he killed her." (*People v. Kelly* (2007) 42 Cal.4th 763, 789.) "The chance that defendant acted with innocent intent with [the murder victim] is sharply reduced by evidence that he committed a forcible, nonconsensual sex act upon [a different victim] a few months earlier." (*People v. Stitely* (2005) 35 Cal.4th 514, 532, citing *People v. Carpenter* (1997) 15 Cal.4th 312, 379.) A

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[7] Coincidentally, as noted earlier, DNA consistent with appellant's profile was found underneath Judy's fingernail clippings. (21RT 3627-3631.)

reasonable jury was not required to find that the one time defendant actually killed his victim was the one time he had no intent to rape. "Nothing in this case required the jury to find that [the murder victim] was an exception to the pattern . . . ." (*People v. Kelly*, *supra*, at p. 789.) Accordingly, when the evidence of the other sexual assaults is considered together with the other facts established above and his confession that he broke into his wife's house and "beat the pussy up," the evidence supporting the jury's verdict was extremely strong.

For all these reasons, there was substantial evidence to support the jury's finding that appellant raped Judy.

V. THE TRIAL COURT DID NOT ERR BY INSTRUCTING WITH THE FELONY MURDER SPECIAL CIRCUMSTANCE BASED ON THE UNDERLYING BURGLARY

Appellant contends the trial court erred by instructing the jury with the felony murder and special circumstance based on the underlying burglary. (AOB 162-171.) Appellant has forfeited this claim by failing to raise an objection below. In any event, the trial court did not err because the murder and burglary did not merge.

A. Appellant's Claim Is Forfeited

Appellant has forfeited this claim by failing to raise it below. Generally, failure to raise the issue by a timely objection below forfeits the issue for appeal. (*People v. Kennedy* (2005) 36 Cal.4th 595, 612; *People v. Scott* (1994) 9 Cal.4th 331, 356.) Here, appellant's failure to either object to the felony murder and special circumstance instruction or request clarifying language forfeits his claim on appeal. (See *People v. Valdez* (2004) 32 Cal.4th 73, 113 [failure to object to robbery-murder special circumstance instruction forfeits the issue for appeal]; *People v. Hart* (1999) 20 Cal.4th 546, 622.) In any event, his claim also fails on the merits.

B. The Merger Doctrine is Inapplicable And Thus, There Was No Instructional Error

Appellant contends his murder conviction must be reversed because the trial court instructed the jury on a legally incorrect theory of felony murder predicated on the crime of burglary. Specifically, he argues that "the felony-murder rule and the burglary-murder special circumstances do not apply to a burglary committed for the sole purpose of assaulting or killing the victim. (AOB 162, citing *People v. Seaton* (2001) 26 Cal.4th 598, 646.) However, the merger doctrine is limited to cases where the assault and murder are undertaken for the same purpose. Conversely, a sexual assault (i.e., rape, sexual penetration by a foreign object, sodomy) is not undertaken for the same purpose as the murder, but instead is based on the intent to commit the sexual offense. While appellant claims that the merger doctrine has been applied in the "sexual assault" context, he only cites the standard assault cases as support for his claim. (AOB 165-166.) Therefore, appellant's contention rests on a faulty premise and his claim fails on this basis alone.

Here, the jury was instructed with CALCRIM No. 1700, which defined burglary as an entry with the intent to "commit theft or rape or sexual penetration of a foreign object or forcible sodomy." (6CT 1383.) As such, the burglary was based on the intent to commit a theft and the sexual offenses, which were not an "integral part of the homicide and [were] not included in the offense charged." (AOB 164, citing *People v. Wilson* (1969) 1 Cal.3d 431.) Therefore, this case presents no issue concerning merger of the burglary and the homicide, where the sole purpose of the burglary is based on the intent to assault or kill the victim.

Appellant contends that the jury could not legally find the burglary-based felony murder based on his intent to sexually assault Judy. He bases this argument on the merger doctrine first adopted in *People v. Ireland*

(1969) 70 Cal.2d 522, where this Court held that "a second degree felony-murder instruction may not properly be given when it is 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.)

In 2009, this Court decided *People v. Farley* (2009) 46 Cal.4th 1053 and ruled that the merger doctrine does not apply in first degree felony murder cases. (*Id.* at pp. 1111-1122.) First degree felony murder is specifically defined in section 189 as "[a]ll murder . . . which is committed in the perpetration of, or attempt to perpetrate, arson, *rape*, carjacking, robbery, *burglary*, mayhem, kidnapping, train wrecking, or any act punishable under Section 206, 286, 288, 288a, or *289* . . . ." (Italics added.) The *Farley* court explained:

> In the context of second degree felony murder, courts must interpret section 188's reference to an "abandoned and malignant heart." [Citation.] In the context of first degree felony murder, however, there is no need for interpretation of the Legislature's clear language. Thus, the differences between the statutory bases for first and second degree felony murder support the conclusion that although this court properly may limit the breadth of second degree felony murder in a manner consistent with its interpretation of the Legislature's intent, there is no room for interpretation when the Legislature has defined first degree felony murder to include any killing 'committed in the perpetration of, or attempt to perpetrate, . . . burglary.'

(*Id.* at p. 1119.) Thus, the *Farley* court overruled *People v. Wilson* (1969) 1 Cal.3d 431, a prior case extending the merger doctrine to first degree felony murder. (*People v. Farley*, *supra*, 46 Cal.4th at pp. 1117, 1121.)

Appellant contends that *Farley* does not apply because Judy was murdered in 2004. (AOB 166, fn. 26.) However, *Farley* does not by itself preclude application of the merger doctrine to the crimes he committed in 2004, because *Farley* was decided in 2009 and overruled *Wilson* only

prospectively. (See *People v. Farley*, *supra*, 46 Cal.4th at pp. 1121-1122.) This temporal limitation is of no help to appellant because his crimes of burglary do not merge with murder pursuant to the doctrine set forth in *Ireland*. Courts have repeatedly rejected attempts to apply *Ireland*'s merger doctrine and *Wilson*'s extension of that doctrine to the felonies enumerated in section 189, including robbery, kidnapping, rape, and sexual penetration by a foreign object, as those crimes are undertaken "for a felonious purpose independent of the homicide." (See *People v. Morgan* (2007) 42 Cal.4th 593, 617 [concluding the offense of unlawful penetration of a foreign object does not "merge" with a resulting homicide within the meaning of the *Ireland* doctrine]; *People v. Burton* (1971) 6 Cal.3d 375, 388 [robbery], disapproved on other grounds by *People v. Lessie* (2010) 47 Cal.4th 1152, 1168; *People v. Escobar* (1996) 48 Cal.App.4th 999, 1012-1013 [kidnapping]; *People v. Kelso* (1976) 64 Cal.App.3d 538, 541-542 [kidnapping].) Thus, based on the clear language of section 189 and the case law rejecting application of the merger doctrine to appellant's crimes, the merger doctrine does not apply in this case.

In the alternative, appellant contends that the prosecution did not present any evidence that appellant intended to commit theft.[8] (AOB 168.) Appellant, however, is mistaken. The evidence was presented that one of appellant's purposes in entering Judy's residence was to steal. The prosecutor established that appellant had stolen items and money from women in past relationships (see 30RT 5083-5090, 31RT 5284; 34RT

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[8] In passing, appellant also claims that the jury was not instructed with theft as a basis for felony-murder. (AOB 168.) However, although theft was not listed under CALCRIM No. 521 [degrees of murder], theft was listed under CALCRIM No. 1700, which defined burglary as an entry with the intent to "commit *theft* or rape or sexual penetration of a foreign object or forcible sodomy." (6CT 1383, emphasis added.)

5596-5600), had stolen $200 from Judy the night of her murder (see 12RT 2199-2200), and had also stolen jewelry that belonged to Judy that he later tried to re-sell (see 15RT 2514-2515). This evidence sufficiently established the intent to commit the theft independent of the homicide.

In addition, as previously discussed (see Arg. IV.B., *supra*), there was overwhelming evidence that appellant entered the apartment to rape and sexually assault Judy. Where evidence of felony-murder (rape) is sufficient, and the jury finds the rape-murder special circumstance true, it is unnecessary to decide whether there was sufficient evidence of deliberation and premeditation. (*People v. Berryman* (1993) 6 Cal.4th 1048, 1086, overruled on other grounds, *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.) In any event, because burglary and murder did not merge, the trial court properly instructed the jury on two legally adequate theories for murder. Here, the burglary with intent to commit sexual offenses did not merge because the rape was undertaken for a felonious purpose independent of the homicide. There being no error, reversal is not required.

C. Any Error Was Harmless

However, even assuming error occurred, it was harmless beyond a reasonable doubt. "Instructional error regarding the elements of the offense requires reversal of the judgment unless the reviewing court concludes beyond a reasonable doubt that the error did not contribute to the verdict." (*People v. Sarun Chun, supra*, 45 Cal.4th at p. 1201; see *People v. Cross* (2008) 45 Cal.4th 58, 69-71 (conc. opn. of Baxter, J.); *People v. Swain* (1996) 12 Cal.4th 593, 607; *People v. Calderon* (2005) 129 Cal.App.4th 1301, 1306-1307 [erroneous instruction on the second degree felony-murder rule]; see also *Hedgpeth v. Pulido* (2008) 555 U.S. 57 [129 S.Ct. 530, 172 L.Ed.2d 388] [reiterating that error of this nature is subject to harmless error analysis]; *Neder v. United States* (1999) 527 U.S. 1, 15 [119 S.Ct. 1827, 144 L.Ed.2d 35] [stating the reasonable doubt test].)

Here, overwhelming evidence was presented to the jury regarding appellant's premeditation and deliberation. For example, appellant had told people he was going to hurt Judy. (See 11RT 2043 [telling Judy's son that "he could really hurt [Judy]"]; 13RT 2340 ["She's got it and if I ever want it back, I'll probably have to kill her to get it."]; 15RT 2655-2659 [calling Judy a "cunt"].) This intent was clearly communicated to Judy herself given that she believed if she ever disappeared, it was due to appellant. (12RT 2158 ["she was afraid of [appellant] and that if anything happened to her that – to look at him, that he did it"]). In addition, there was evidence that appellant had bought several items, including rope, to carry out the crime. Appellant also visited the storage facility the night of the murder. (See 13RT 2347-2351; 17RT 2965-2972; 34RT 5667-5778.) He was familiar with Judy's apartment complex and even knew how to get inside the apartment itself without a key. (15RT 2573-2578, 2580-2586.) Thus, even assuming it was error to instruct on felony murder, it did not contribute to the verdict because there was overwhelming evidence of premeditation and deliberation. Any error was harmless beyond a reasonable doubt.

For these reasons, the burglary did not merge with the murder and the trial court did not erroneously instruct the jury on felony murder.

VI. THE JURY FOUND APPELLANT GUILTY OF FIRST DEGREE MURDER ON A LEGALLY PERMISSIBLE THEORY

Appellant contends that it is impossible to determine upon which theory the jury based its guilty verdict as to the murder charge. (AOB 171-175.) However, this claim is forfeited for failure to object below. In any event, it has no merit.

A. The Relevant Proceedings

The prosecution argued to the jury that appellant committed first degree murder of Judy with special circumstances and that the murder was

committed during the commission of a burglary, rape, or sexual penetration by a foreign object. The residential burglary was based on appellant's intent to steal from and ultimately sexually assault Judy before entering the apartment. (45RT 7095, 7104-7107, 7131-7206.) The jury was instructed on felony murder, first degree murder with special circumstances that the murder was committed during the commission of a burglary, rape, or sexual penetration by a foreign object. (6CT 1343-1357.)

B. Appellant's Claim Is Forfeited

Appellant's failure to either object to the first degree murder, felony-murder and special circumstances instructions (6CT 1343-1357) or request clarifying language forfeits his claim on appeal. (*People v. Valdez*, *supra*, 32 Cal.4th at p. 113.) His claim also fails on the merits, as argued below.

C. The Jury Properly Found Appellant Guilty of Murder

As discussed in the previous argument, appellant's claim incorrectly assumes that the merger doctrine applies and thus argues here that the jury improperly found him guilty on a "legally inapplicable felony-murder theory." (AOB 174.) However, as discussed (see Arg. V.B., *supra*), the merger doctrine does not apply, and there was no error in instructing the jury with felony murder and the special circumstances based upon the underlying felony of burglary with an intent to commit a sexual assault. In other words, there was no "legal error... regarding the felony-murder theory." (AOB 171.) Therefore, appellant's argument here is also based from a faulty premise and must fail.

In any event, the jury need not unanimously agree on a theory of first degree murder. (*People v. Geir*, *supra*, 41 Cal.4th at p. 592; *People v. Scott* (1991) 229 Cal.App.3d 707, 718.) Here, "[b]ecause it is possible here to determine from the record that the jury necessarily found defendant guilty on a proper theory (*People v. Guiton* (1993) 4 Cal.4th 1116, 1130; see

People v. Sedeno (1974) 10 Cal.3d 703, 721), there is no need to characterize the claimed inadequacy as either factual or legal." (*Marshall, supra*, 15 Cal.4th at p. 38.) *Marshall*'s reasoning applies to this case: the jury found true the special circumstances allegations that defendant killed the victim during the commission of a burglary based on an intent to commit theft, rape, or sexual penetration by a foreign object.

"Because a jury must unanimously agree that a special circumstance finding is true (§ 190.2), and the jury in this case was so instructed (6CT 1353),[9] the jury's finding that defendant killed [the victim] in the course of committing [a burglary] indicates that the jury unanimously found defendant guilty of first degree murder on the valid theory that the killing occurred during the . . . commission of a [burglary]." (*Marshall, supra*, 15 Cal.4th at p. 38; accord, *People v. Kelly* (1992) 1 Cal.4th 495, 531; see also *Carpenter, supra*, 15 Cal.4th 312, 394-395 [it is unnecessary for jurors to agree unanimously on a theory of first degree murder]; *People v. Guerra* (1985) 40 Cal.3d 377, 386 [same].)

This Court has "required as part of the felony-murder doctrine that the jury find the perpetrator had the specific intent to commit one of the enumerated felonies, even where that felony is a crime such as rape. [Citations.]" (*People v. Hernandez* (1988) 47 Cal.3d 315, 346.) It also is established that the killing need not occur in the midst of the commission of

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[9] CALCRIM No. 700 provides:

If you find the defendant guilty of first degree felony murder, you must also decide whether the People have proved that one or more of the special circumstances is true. [¶] The People have the burden of proving each special circumstance beyond a reasonable doubt. If the People have not met this burden, you must find the special circumstance has not been proved. You must return a verdict form stating true or not true for each special circumstance on which you all agree. [¶] In order for you to return a finding that a special circumstance is or is not true, all 12 of you must agree. [¶] You must consider each special circumstance separately.

the felony, so long as that felony is not merely incidental to, or an afterthought to, the killing. (*Id.*, at p. 348; see *People v. Hayes* (1990) 52 Cal.3d 577, 631.)

Here, there was no evidence that appellant simply entered the apartment to kill Judy. (See *People v. Seaton* (2001) 26 Cal.4th 598, 646 [the burglary-murder special circumstance does not apply to a burglary committed for the sole purpose of killing the victim].) There was more than sufficient evidence to show appellant killed Judy while in the commission of rape. Appellant expressed to several witnesses his anger at, and hatred of, Judy. His conduct with other women also provided additional evidence to indicate that appellant had the intent to rape Judy before he entered the apartment. He also bragged to Calhoun that he had "beat the pussy up" when we returned to the hotel room. In addition, forensic evidence found in Judy's apartment also established that a sexual assault had occurred, including semen matching the DNA of appellant. The jury could reasonably have inferred from this evidence that appellant wished to injure and humiliate Judy before killing her by brutally sexually assaulting her. There is no suggestion appellant's commission of this forced sex act against Judy was merely incidental to her murder. Therefore, the jury could rationally conclude that defendant had the "independent felonious purpose" to rape Judy. (See *People v. Abilez* (2007) 41 Cal.4th 472, 511) [jury could reasonably have inferred from the evidence that defendant wished to injure and humiliate his mother by sodomizing her before killing her in retaliation for her mistreatment of him; hence the sodomy was not incidental to the murder].)

Moreover, there was sufficient evidence to show appellant killed Judy while in the commission of a burglary with the intent to steal from her. Evidence demonstrated that appellant had stolen items and money from women in past relationships (see 30RT 5083-5090, 31RT 5284; 34RT

5596-5600), had stolen $200 from Judy the night of her murder (see 12RT 2199-2200), and had also stolen jewelry that belonged to Judy that he later tried to re-sell (see 15RT 2514-2515). This evidence sufficiently established the intent to commit the theft. Appellant's possession and subsequent sale of goods stolen from the victim's home shortly after the crimes is strong circumstantial evidence that he harbored the intent when he entered her home. (*People v. Yeoman* (2003) 31 Cal.4th 93, 131.) Moreover, "[t]here is no better proof that [defendant] entered the [victim's house] with intent to commit robbery than a showing he did in fact commit robbery after his entry." (*People v. Du Bose* (1970) 10 Cal.App.3d 544, 551.) This behavior was not incidental or ancillary to the murder, but amply demonstrates an independent felonious purpose in support of the burglary with the intent to steal.

Therefore, the jury properly found appellant guilty of first degree murder on a legally permissible theory – felony murder [rape and burglary], and with premeditation and deliberation, of which there was ample evidence as well (see Arg. V.B, *supra*). (See *People v. Johnson* (1993) 6 Cal.4th 344, 389) (conviction may rest when insufficient evidence of rape-murder, but strong evidence of burglary-murder and premeditation.)

VII. THE TRIAL COURT PROPERLY ADMITTED EVIDENCE OF APPELLANT'S UNCHARGED OFFENSES

Appellant next contends the admission of evidence about his uncharged offenses against Michelle W., Sandra B., Theresa Tannant, Kathleen S., Laura M., and Lorna T. violated his constitutional rights to a fair trial and due process. He asserts this evidence should have been excluded as prejudicial. (AOB 175-201.) The claim is forfeited as to the admission pursuant to Evidence Code sections 1101, 1108, and 1109. In any event, as explained below, the trial court acted well within its discretion in admitting the challenged evidence since it was relevant to show motive

intent, common scheme or plan, lack of consent with regard to the sexual offenses, knowledge and in his attack of Judy Palmer. Moreover, appellant was not prejudiced.

A. The Relevant Proceedings

The prosecutor filed a motion to introduce evidence of uncharged crimes/acts pursuant to Evidence Code sections 1108, 1109, and 1101(b). There was no written opposition to the motion. (10RT 1816.) The trial court held an extensive hearing regarding the admissibility of uncharged offenses pursuant to Evidence Code sections 1101, subdivision (b), 1108, and 1109. The court found the uncharged acts admissible under Evidence Code sections 1101, subdivision (b), 1108, and 1109. (10RT 1818-1874.) Specifically, finding that "[appellant] ha[d] demonstrated a consistent, continuous pattern of domestic violence, sexual abuse, theft, and control against women." (10RT 1872.) It further found that the uncharged acts were "admissible to demonstrate [appellant's] propensity to engage in sexual assaults and domestic violence against Judy Palmer and the other victims named pursuant to Evidence Code 1108 and 1109." (10RT 1873.) The court also found that the evidence was admissible under section 1101(b) to prove the appellant's "motive, his intent, his common scheme or plan, lack of consent with regard to the sexual offenses, knowledge and in his attack of Judy Palmer and other named victims in the information." (10RT 1873.) Finally, the court found "the evidence [was] material, [] relevant, and its probative value outweigh[ed] any prejudicial effect on the [appellant]." (10RT 1873.) Counsel for appellant objected on "both federal and state grounds," and on the sole ground that admission of evidence would violate Evidence Code section 352. (10RT 1820, 1823-1824, 1844; see AOB 175.)

B. The Claim is Forfeited

Appellant's failure to object on specific ground of the objection has forfeited the claim on appeal as to Evidence Code sections 1101, 1108, and 1109. The record reflects that defense counsel objected to the admission of the uncharged acts on the sole ground that admission would violate Evidence Code section 352. Defense counsel did not object that the evidence was inadmissible under Evidence Code sections 1101, 1108 or 1108, and he has therefore forfeited that claim of evidentiary error on appeal. (See *People v. Abel* (2012) 53 Cal.4th 891, 924 [review of the trial court's admission of evidence is then limited to the stated ground for the objection]; *People v. Hajek and Vo* (2014) 58 Cal.4th 1144, 1208 [contention that "bad character evidence . . .was admitted in violation of Evidence Code section 1101" was forfeited by failing to object in trial court].) Assuming appellant has preserved this issue for appeal, his claim fails for the reasons below.

C. Evidence Code Sections 1108 and 1109 Are Constitutional

Initially, appellant contends that Evidence Code sections 1108[10] and 1109[11] are unconstitutional. (AOB 185-196.) However, as appellant recognizes, this Court has rejected his challenge as to section 1108. (See *People v. Falsetta* (1999) 21 Cal.4th 903, 916-917 [Evidence Code section

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[10] Evidence Code section 1108, subdivision (a) provides: "In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352."

[11] "Evidence Code section 1109 allows the introduction of evidence of [a] defendant's commission of prior acts of domestic violence in a criminal action charging [the] defendant with an offense involving domestic violence." (*People v. Poplar* (1999) 70 Cal.App.4th 1129, 1138.)

1108 governing the admission of propensity evidence of other sexual offenses does not offend due process].)

Like Evidence Code section 1108, Evidence Code section 1109 affords defendants "substantial protections" that ensure the propensity evidence will not lead to a fundamentally unfair trial. (*Falsetta, supra*, 21 Cal.4th at p. 915.) Evidence Code section 1109 is limited to evidence of the defendant's prior domestic violence, and it applies only when he is charged with committing a crime involving domestic violence. (See *id.* at p. 916.) Evidence Code section 1109 is also subject to the limitations of section 352. Under the reasoning of *Falsetta*, this limitation ensures that Evidence Code section 1109 does not violate the due process clause. (*People v. Cabrera* (2007) 152 Cal.App.4th 695, 703-704.)

D. There Was No Abuse of Discretion

Appellant contends that Michelle W.'s testimony was prejudicial because most of the violence occurred while he was married to her. In addition, he contends that evidence provided by the other witnesses only compounded the prejudice. (AOB 198-199.) Here, however, the testimony about appellant's prior acts of domestic violence was relevant to show a propensity to become violent toward women whom he was in relationships with, who were breaking off relationships with him, or threatening to report his behavior. The similarities between all the domestic violence incidents make the uncharged incidents probative of appellant's disposition to assault women with whom he had an intimate relationship when he was angry with them. (*People v. Johnson* (2010) 185 Cal.App.4th 520, 532-533.) The evidence was not substantially more prejudicial than probative under Evidence Code section 352.[12] To the contrary, it is precisely the type of

[12] Evidence Code section 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by (continued...)

evidence that Evidence Code section 1109 is designed to allow. Such evidence is always seriously damaging to the defense, but the Legislature has deemed that it also is highly probative. (*People v. Hoover* (2000) 77 Cal.App.4th 1020, 1029 [holding that in light of the fact the evidence involved the defendant's history of similar conduct against the same victim, the evidence was not unduly inflammatory].)

With respect to the evidence of uncharged sex offenses against these women, this evidence was also admissible under Evidence Code section 1108. Appellant had established a continuous pattern of sexual abuse and control against women, often that he met through AA, which eventually escalated to violent and assaultive relationships. In each of the prior offenses, appellant forced himself upon these women and raped them. Thus, the challenged evidence was relevant, at the very least, to appellant's propensity to commit sexual offenses against women. (*Story*, *supra*, 45 Cal.4th at p. 1293 ["To help determine what happened in Vickers's home the night defendant strangled her, it was particularly probative for the jury to learn of defendant's history of sexual assaults"]; *Falsetta*, *supra*, 21 Cal.4th at p. 911 ["the Legislature enacted section 1108 to expand the admissibility of disposition or propensity evidence in sex offense cases"]; *People v. Cabrera* (2007) 152 Cal.App.4th 695, 706; *People v. Garcia* (2001) 89 Cal.App.4th 1321, 1335 ["Evidence Code sections 1108 and 1109 are legislative decisions that evidence of other acts of sexual abuse or domestic violence are highly relevant"]; *People v. Yovanov* (1999) 69 Cal.App.4th 392, 405 [evidence of uncharged sex offenses is presumed admissible in sex crimes prosecutions].)

(...continued)
the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

Appellant primarily claims the propensity evidence was inadmissible under Evidence Code section 352, claiming its probative value was substantially outweighed by its prejudicial effect. (See generally *Story*, *supra*, 45 Cal.4th at pp. 1294-1295; *People v. Kelly*, *supra*, 42 Cal.4th at p. 783.) A trial court enjoys broad discretion under Evidence Code section 352 in assessing whether the probative value of prior crimes evidence is outweighed by concerns of undue prejudice, confusion, or consumption of time. (*Lewis*, *supra*, 46 Cal.4th at p. 1286; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.) In this context, "prejudicial is not synonymous with damaging, but refers instead to evidence that uniquely tends to evoke an emotional bias against defendant without regard to its relevance on material issues." (*People v. Kipp* (1998) 18 Cal.4th 349, 1121, internal quotation marks omitted.) The court may consider the nature, relevance, and possible remoteness of the evidence, the degree of certainty of its commission, the likelihood of confusing, misleading, or distracting the jurors from their main inquiry, the burden on the defendant in defending against uncharged offenses, and the possibility of admitting some but not all of the defendant's other uncharged offenses. (*Story*, *supra*, at p. 1295; *Falsetta*, *supra*, 21 Cal.4th at p. 917.)

In the instant case, the trial court acted well within its discretion in admitting the subject evidence. Evidence of the prior uncharged offenses was critical to provide the jury with an accurate picture of how appellant behaved in his relationship with women and of his propensity to sexually abuse them after he had befriended them. More specifically, evidence that appellant had a long history of sexually, mentally, and physically abusing women was highly relevant to show that he acted according to this disposition at the time of the charged offenses. Clearly, appellant was not entitled to shield the jury from his long history or pattern of sexual abuse toward these young women, whom he befriended through AA, and then

slowly, over time, revealed a more sinister side of his character when he became violent and assaulted them, or to have the jury decide the charged offenses based on a false or incomplete portrayal of his attitude and conduct toward these women. (See, e.g., *People v. Story* (2009) 45 Cal.4th 1282, 1293-1295; *Cabrera, supra*, 152 Cal.App.4th at p. 706; *People v. Poplar* (1999) 70 Cal.App.4th 1129, 1139; see also *People v. Branch* (2001) 91 Cal.App.4th 274, 282-283 ["evidence of a 'prior sexual offense is indisputably relevant in a prosecution for another sexual offense'"].)

Furthermore, the uncharged sexual offenses were sufficiently similar to the charged offenses in that they were highly probative not only to the issue of propensity but also to prove the requisite sexual intent of the offenses. (*Lewis, supra*, 46 Cal.4th at p. 1285 [degree of similarity relevant to prejudice evaluation under Evidence Code section 1108].) As summarized in the Statement of Facts, *ante*, appellant raped and sodomized each woman when they refused to have anal sex with him. Thus, evidence of rape and sexual assault was the type of propensity evidence deemed relevant under Evidence Code section 1108 and was similar enough to pass the balancing test of Evidence Code section 352. (See, e.g., *People v. Hollie* (2010) 180 Cal.App.4th 1262, 1273-1277.)

The court acted well within its discretion in admitting the evidence and finding it material, relevant, and that its probative value overweighed any prejudicial effect. (10RT 1873.) (See, e.g., *People v. Robinson* (2000) 85 Cal.App.4th 434, 444-446 [a defendant's admission relevant to a completed crime, which is made in part in the form of a threat, need not be independently admissible as proof of identity under Evidence Code section 1101, subdivision (b); and the circumstances under which the admission was made are also admissible to place the statement in context]; see *People v. Harris* (2005) 37 Cal.4th 310, 335 ["the jury is entitled to know the context in which the statements on direct examination were made"].)

While the substantial probative value of appellant's long history of sexually and physically abusing women through AA more than justified the trial court's ruling under Evidence Code section 352, the challenged evidence did not pose a significant risk of prejudice, jury confusion, or any other problem at trial. (See, e.g., *Lewis*, *supra*, 46 Cal.4th at p. 1287; *Branch*, *supra*, 91 Cal.App.4th at pp. 283-284.) In addition, none of the uncharged offenses could be considered "remote" or "stale" because these uncharged offenses were part of a continuous pattern of conduct that did not end until appellant's arrest and incarceration in the instant case. (See, e.g., *Lewis*, *supra*, at p. 1287 [sexual assaults occurred four years apart, but defendant was incarcerated for most of the intervening time]; *Wilson*, *supra*, 44 Cal.4th at p. 797 [five-year gap between uncharged and charged rapes]; see *People v. Harris* (1998) 60 Cal.App.4th 727, 739 ["'staleness' of an offense is generally relevant if and only if the defendant has led a blameless life in the interim"].)

There was no showing that the challenged evidence imposed an undue burden on the defense or that presenting the evidence unduly extended the trial. (See, e.g., *Wilson*, *supra*, 44 Cal.4th at pp. 797-798.) To the contrary, the testimony about the uncharged offenses took a very short portion of the lengthy trial and did not involve the need for additional prosecution witness to corroborate the victims or defense witnesses to impeach them. (See Statement of Facts, *ante*.) Also, the record provides no indication that the jury was confused by the introduction of the challenged evidence or that jurors wished to convict appellant for his uncharged offenses. (See, e.g., *Branch*, *supra*, 91 Cal.App.4th at p. 284.) In fact, appellant's counsel emphasized at trial the fact that the victims did not even report the assaults, for the apparent reason of persuading the jury that the prior victims were not credible and that the uncharged offenses did not happen. Ultimately, the "prejudice" presented by the challenged evidence, which showed

appellant's disposition toward the physical and sexual abuse of his young female friends or groupies, "is the type inherent in all propensity evidence and does not render the evidence inadmissible." (*People v. Soto* (1998) 64 Cal.App.4th 966, 992.) Moreover, the jury was properly instructed how to use this evidence (6CT 1360-1364), and it is presumed the jury followed those instructions. (*People v. Bennett* (2009) 45 Cal.4th 577, 612.)

Therefore, appellant has failed to show that the trial court exercised its discretion under Evidence Code sections 352, 1101, 1108, and 1109 in an arbitrary, capricious, or patently absurd manner. (See, e.g., *Lewis*, *supra*, 46 Cal.4th at pp. 1287-1288 [two sexual assaults shared many similarities]; *Story*, *supra*, 45 Cal.4th at pp. 1288, 1295 [four other sexual offenses against female acquaintances]; *Soto*, *supra*, 64 Cal.App.4th at pp. 990-992 [pattern of sexually molesting young female relatives].) And since the challenged evidence raised permissible inferences under state law, appellant's conclusory claim of a due process violation similarly lacks merit. (See *Williams v. Stewart* (9th Cir. 2006) 441 F.3d 1030, 1040; *Windham v. Merkle* (9th Cir. 1998) 163 F.3d 1092, 1103.)

E. The Alleged Error Was Harmless

In the alternative, any error herein was clearly harmless. Generally, a trial court's discretionary ruling must not be disturbed on appeal unless the defendant can show that the court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice. (*Rodrigues*, *supra*, 8 Cal.4th at p. 1124.) In turn, a miscarriage of justice should be declared only if, in light of the entire record, it is reasonably probable that a result more favorable to the defendant would have been reached in the absence of the alleged evidentiary error of the trial court. (Cal. Const., art. VI, § 13; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

As explained above, the prior crimes evidence was highly probative, was not inflammatory in comparison to the charged offenses, and was not unduly prejudicial. The jury knew appellant was presumed innocent, was thoroughly instructed on how to consider and weigh the challenged evidence, and was specifically told evidence of the uncharged offenses was not sufficient to prove the charged sex offenses and could not be considered as proof that appellant had a disposition to commit the charged offense (6CT 1360-1364). This Court must presume the jury understood the instructions and followed them, and there is nothing in the record showing otherwise. (See, e.g., *People v. Guerra*, *supra*, 37 Cal.4th at p. 1115; *People v. Mullens* (2004) 119 Cal.App.4th 648, 658-659.) In addition, the evidence supporting the convictions was overwhelming even without the prior crimes evidence. For example, the jury heard evidence of appellant's repeated threats to harm Judy, and that he bragged that he had gone to his wife's house, broken in, and "he had beat the pussy up." In addition, forensic evidence found in Judy's apartment also established that a sexual assault had occurred, including semen matching the DNA of appellant. Finally, the way Judy's body was found in the desert also allowed the jury to reasonably conclude that appellant tied and bound Judy to facilitate his forcible commission of sexual acts.

Moreover, assuming arguendo the prior acts evidence was more prejudicial than probative, any error in admitting the evidence did not armount to a due process violation. Courts have repeatedly held it is precisely the trial court's discretion to exclude evidence under Evidence Code section 352 that saves section 1109 from a due process challenge. (See, e.g., *People v. Brown*, *supra*, 77 Cal.App.4th at p. 1334.) An erroneous exercise of discretion under section 352 generally does not rise to a problem of constitutional magnitude. The "routine application of state

evidentiary law does not implicate [a] defendant's constitutional rights." (*People v. Brown* (2003) 31 Cal.4th 518, 545.)

In this case, the trial court acted well within its discretion in admitting the challenged evidence. Its determination was neither arbitrary, capricious, nor patently absurd. Its determination did not exceed the bounds of reason. Since the evidence was admitted for a permissible purpose and its exclusion was not compelled by Evidence Code section 352, appellant's due process rights were not violated. (See, e.g., *Estelle v. McGuire* (1991) 502 U.S. 62, 70 [112 S.Ct. 475, 116 L.Ed.2d 385]; *People v. Falsetta, supra*, 21 Cal.4th at pp. 912-913; *People v. Escobar* (2000) 82 Cal.App.4th 1085, 1095-1096.)

To have prevailed, appellant needed to have demonstrated that the evidence uniquely tended to evoke an emotional bias against him. (See *People v. Zepeda* (2008) 167 Cal.App.4th 25, 35.) "[P]rejudicial is not synonymous with 'damaging'" (*ibid.*), and all appellant has shown here is that the evidence presented was, at most, damaging.

Accordingly, appellant's contention lacks merit.

VIII. DR. STAUB'S TESTIMONY DID NOT VIOLATE THE CONFRONTATION CLAUSE

Appellant contends the trial court erred in admitting Dr. Staub's testimony regarding the DNA reports. He claims the trial court's error violated his due process rights and his rights to confrontation under state and federal law. (AOB 201-229.) First, appellant has waived any confrontation clause claim for failure to object on those grounds. Second, the DNA reports in question were not testimonial and therefore not subject the confrontation clause. In any event, any purported error was harmless beyond a reasonable doubt.

A. The Relevant Proceedings

Dr. Staub was called to testify regarding the DNA testing conducted at the Cellmark laboratories in Germantown, Maryland and Dallas, Texas. Although he was not the director of the laboratory in Germantown, he was the director of the laboratory in Dallas. (20RT 3425-3433.) Dr. Staub testified that he was familiar with the general policies at both of the laboratories, which he explained in detail. (20RT 3433-3437.) The following exchange took place when Dr. Staub attempted to explain the procedures followed by analysts:

> Prosecutor: Are there procedures in place which all of the analysts are instructed to follow to make sure there is no cross-contamination from one thing to the other?
>
> Defense counsel: Objection, vague as to location. Cellmark at Dallas, the facility that he is the – overseeing?
>
> Court: Sustained.
>
> Prosecutor: Did the lab in Germantown follow the same procedures with regard to the integrity of the evidence that are followed in the Dallas lab?
>
> Defense counsel: Your Honor, there will be a foundational problem as to that.
>
> Court: Can you lay a little better foundation? I know you laid some.
>
> Prosecutor: Sure.
>
> Court: Objection's sustained.
>
> Prosecutor: Doctor, how much do you know about what went on in the Germantown, Maryland lab?
>
> Dr. Staub: I know a pretty good amount.
>
> Prosecutor: Have you reviewed the case files of analysts who worked there?

Dr. Staub: Yes, I have.

Prosecutor: And were those analysts following the same sets of policies and procedures as the analysts were following in the lab in which you were working?

Defense counsel: Your Honor, same objection as to foundation as to any opinion as to any information from Germantown, Maryland.

Court: He testified he reviewed the case files. Overruled. You may answer.

Defense counsel: For the record, there will an objection as to that. Does that mean he's in a position to provide an opinion? He's not overseeing any quality control or anything as to Germantown.

Court: All right, so noted.

(20RT 3437-3438.)

Dr. Staub continued to explain in more detail the policies and procedures that the Germantown and Dallas laboratories follow, and that he had reviewed the case files from both laboratories in connection with this case. (20RT 3438-3441.) Thereafter, defense counsel requested side bar and the following exchange took place:

Court: Okay. Go ahead, [defense counsel].

Defense Counsel: Your Honor, for the record I wanted to preserve the objection with regard to this expert testifying to the Germantown, Maryland laboratory and any of their analysis. [¶] It's my position that there's a lack of foundation. There's nothing to indicate that the policies are the same, that he has any quality control overseeing with regard to that lab other tan generalizations. [¶] I know I already objection, Your Honor, but it wasn't clear whether there was a continuing objection. I want to make sure that objection is noted and that I'm covering any of the testimony with regard to the Maryland laboratory on those grounds.

Court: [Prosecutor], do you plan to have him analyze the stuff – testify as to the analysis of the things from the Germantown –

Prosecutor: I do. [¶] And he has done this many times with regards to other labs because they all follow the same policies. Essentially, they're business records.

Court: But he's not a custodian for Germantown.

[Prosecutor]: He doesn't need to be a custodian of records if he's familiar with – do you have the Evidence Code handy by any chance? I can demonstrate to you that that's not necessary to prove. [¶] If he's familiar with the records and familiar with the policies and the way in which those records are kept and he finds they're consistent with the protocol, that's adequate for business records. Custodian of records play a different role. [¶] I want to get the Evidence Code, if I might. [¶] Looking at the Evidence Code Section 1271, evidence of a writing made as a records of an act, condition or event is not made admissible by the hearsay rule when offered to prove the act, condition or event. [¶] If – item three – the custodian or other qualified witness testifies to its identity and the mode of its preparation and the sources of the information and methods and time of preparation were such as to indicate its trustworthiness. [¶] And the first two qualifications will have been met. The writings were made in the regular course of business. The writings made at or near the time of the act, condition or event. But for it to be a custodian is not necessary.

Court: Well, I guess he can testify the writing was made in the regular course of events comparing their policies and procedures with his and having reviewed their policies and procedures and casework. I guess he can testify also as to near the time of the act, condition or event based upon documentation from the records. That's the only way.

Prosecutor: And I intend to testify about his ultimate conclusions also. [¶] And if it helps the court and counsel to understand why I feel no dis-ease with doing this it's because very typically you don't get the analyst that you want either from L.A.P.D. or from Cellmark and there are people testifying all over the county on any given day that are not the Cellmark representative who did the testing but another person with a same or higher level job. [¶] And it's true that coroners testify

for other coroners all the time. If I had to, I could probably testify for another D.A. with regard to certain well-documented activities.

Court: But you are talking about he same business. We are talking about that he's from the same department, so he's much more familiar with the protocol from L.A. County as opposed to Riverside County.

Prosecutor: If you wish to have a hearing in front of the jury or even in front of the jury, that's fine. This gentleman is adequately familiar with how things are done in Germantown and has testified, if I'm not mistaken, about Germantown results in the past. It's the same company. It's akin to another building of the same company.

Court: Germantown is now defunct?

Prosecutor: I think they've closed it. I don't know the story behind that.

Court: Well, I think if she can go through each of the requirements of 1271 item by item and he can testify to same, then I think counsel's right, the testimony would come in under 1271 of the Evidence Code.

Defense Counsel: Your Honor, I would still be objecting. I think it's a different situation. [¶] This is attorney Garcia. I am still objecting, Your Honor. I think there's a difference between the labs. I don't think it's the same thing as, for example, as a coroner in Los Angeles County. That's a different situation. [¶] There's different aspects to each different lab and there are different problems with regard to quality control. As to Cellmark in Dallas, this individual can testify even though he didn't do personal analysis based on him reviewing the records there; however, as to him testifying as to laboratory conditions, any kind of problems, any type of quality control at Cellmark Maryland, it is a different situation. [¶] In my experience with Cellmark Maryland, there has been problems with quality control. Even *Brady* letters to the defense raises questions with regards to tampering. Not with tampering, with regard to quality control problems with controls. He would not be privy to any of that information. In order to prevent the defense from properly examining with regards to problems in Maryland that he would

have firsthand information. He would just be looking at conclusions from notes and would then prevent proper cross-examination with regard to that.

Court: Well, perhaps another witness you can call to establish that if this expert cannot. [¶] Again, you could create a better foundation. I'll let you go through this.

Prosecutor: Sure. Thank you.

(20RT 3442-3446.)

Thereafter, Dr. Staub testified as to the DNA testing done in this case, including procedures, policies, analyses, and results. Several DNA tests resulted in a match to the profile of appellant. (See 20RT 3466-3478, 3479-3512, 3514-3531, 3536.) The reports and related documents were admitted into evidence as business records over defense counsel's objection. (48RT 7536-7558, 7564; 48RT 7596.)

B. Appellant's Confrontation Claim Is Forfeited

First, appellant has forfeited any confrontation clause claim. (See *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305, 313, fn. 3 [129 S.Ct. 2527, 174 L.Ed.2d 314] ("*Melendez-Diaz*") ["[t]he right to confrontation may, of course, be waived, including by failing to object to the offending evidence"]; *People v. Letner* (2010) 50 Cal.4th 99, 112 Cal.Rptr.3d 746, 835 [confrontation claim, among others, forfeited by failing to raise them in the trial court]; *People v. Redd* (2010) 48 Cal.4th 691, 730 ["He did not raise an objection below based upon the confrontation clause, and therefore has forfeited this claim."]; *People v. D'Arcy* (2010) 48 Cal.4th 257, 290 [defendant forfeited confrontation clause claim by failing to object on that basis in the trial court]; *People v. Geier*, *supra*, 41 Cal.4th at pp. 609-611 [the defendant's failure to object forfeited constitutional claims; constitutional claims were not of such magnitude that an exception to the forfeiture rule was warranted]; *People v. Tafoya* (2007) 42 Cal.4th 147, 166

[defendant forfeited confrontation clause claim where he failed to raise it at trial].)

Appellant acknowledges that he did not object on the basis of *Crawford v. Washington* (2004) 541 U.S. 36 [124 S.Ct. 1354, 158 L.Ed.2d 177] or on Sixth Amendment grounds at trial. Nevertheless, he argues his failure to object should be excused. (AOB 228-229.) However, appellant's trial took place in 2008, which was *after* the *Crawford* decision in 2004, and therefore, he cannot be excused for failing to raise this claim at trial. (Cf. *People v. Harris* (2013) 57 Cal.4th 804, 840 [no forfeiture because defendant's trial in 1996 was *before* the *Crawford* decision.) While appellant's counsel objected on foundation grounds, he failed to make any objection on the basis of *Crawford.* (20RT 3437-3446.) A claimed violation of one's rights under the confrontation clauses of the state and federal Constitutions is forfeited on appeal if not raised in the trial court. (See *People v. Redd*, supra, 48 Cal.4th at p. 730; *People v. Tafoya*, supra, 42 Cal.4th at p. 166; *People v. Seijas* (2005) 36 Cal.4th 291, 301; see, e.g., *People v. Raley* (1992) 2 Cal.4th 870, 892 [a hearsay objection did not preserve a claim under the confrontation clause].) Therefore, this issue is not properly preserved for appeal.[13] In any event, his claim is without merit.

C. The Applicable Law

The confrontation clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses

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[13] To be clear, appellant's counsel only objected to Dr. Staub's testimony regarding the analysis done at the Cellmark laboratory in Germantown, Maryland. He did not object to the analysis done at the laboratory in Dallas, Texas. (20RT 3442-3446.) Therefore, any objection as to those reports from the Dallas laboratory have not been preserved for appeal.

against him." (U.S. Const. amend. VI.) The purpose of the confrontation clause is to "ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact." *Maryland v. Craig* (1990) 497 U.S. 836, 845 [110 S.Ct. 3157, 111 L.Ed.2d 666].

In *Crawford*, the United States Supreme Court held the confrontation clause bars the admission of testimonial out-of-court statements, unless the declarant is unavailable to testify and the defendant had a prior opportunity for cross-examination. (*Crawford, supra*, 541 U.S. at pp. 53-54, 59.) Only "testimonial statements" implicate the Confrontation Clause and *Crawford's* holding. (*Davis v. Washington* (2006) 547 U.S. 813, 821 [126 S.Ct. 2266, 165 L.Ed.2d 224] (*Davis*).) Although *Crawford* expressly refrained from defining the term "testimonial," it includes, at a minimum, "prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and . . . police interrogations." (*Crawford, supra*, 541 U.S. at pp. 51-52, 68-69.) "Testimony" is defined as "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." (*Id.* at p. 51.) "Affidavits" fall within the definition of "testimonial." (*Id.* at p. 52.)

In *Geier*, this Court analyzed *Crawford* and concluded that reports of DNA test results are not testimonial. (*People v. Geier* (2007) 41 Cal.4th 555, 607.) At trial, the director of the laboratory (also a Cellmark laboratory), which conducted the DNA testing, testified about the results of the testing, and further testified that the analyst who conducted the testing recorded her observations while the testing took place. (*Id.* at p. 596.) The director testified that she reviewed the testing conducted by the analyst and determined that it was according to protocol. (*Ibid.*) This Court explained that, although the DNA report was requested by a police agency, and it was reasonable to expect that the report might be used later at a criminal trial,

the DNA results admitted into evidence were not testimonial because the analyst's "observations . . . constitute[d] a contemporaneous recordation of observable events rather than the documentation of past events." (*Id.* at p. 605.) "That is, she recorded her observations regarding the receipt of the DNA samples, her preparation of the samples for analysis, and the results of that analysis as she was actually performing those tasks." (*Id.* at 605-06.) This Court found nothing "accusatory" in the analyst's "simply following Cellmarks' protocol of noting carefully each step of the DNA analysis, recording what she did with each sample received[.]" (*Id.* at p. 607.) The circumstances under which the analyst generated her notes and report, not whether they would be available for use at trial, determined whether they were testimonial. This Court thus concluded the DNA report was not testimonial within the meaning of *Crawford* and *Davis*. (*Ibid.*)

In *Melendez-Diaz*, a four-vote plurality opinion, the United States Supreme Court held that a "certificate of analysis" constitutes a testimonial statement.[14] (*Melendez-Diaz*, *supra*, 557 U.S. 305.) In that case, the defendant was charged with distributing and trafficking cocaine. Rather than offering live testimony to prove that the substance recovered by officers was cocaine, the prosecution submitted three "certificates of analysis" into evidence to show the results of the forensic analysis performed on the seized substances. The certificates reported the weight of the seized bags and stated that the bags "[h]a[ve] been examined with the following results: The substance was found to contain: Cocaine." (*Id.* at p. 2531.) The plurality held the certificates were "functionally identical to

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[14] The United States Supreme Court denied certiorari in *Geier* four days after it decided *Melendez-Diaz*. (*Geier v. California* (2009) 557 U.S. 930 [129 S.Ct. 2856, 174 L.Ed.2d 600].) "The denial of a writ of certiorari imports no expression of opinion upon the merits of the case." (*United States v. Carver* (1923) 260 U.S. 482, 490 [43 S.Ct. 181, 67 L.Ed. 361].)

live, in-court testimony, doing 'precisely what a witness does on direct examination.'" (*Id.* at p. 2532 [quoting *Davis*, 547 U.S. at p. 830].) Thus, the plurality held that "under our decision in *Crawford* the analysts' affidavits were testimonial statements, and the analysts were 'witnesses' for purposes of the Sixth Amendment." (*Ibid.*) The plurality reasoned that "[w]hether or not [the certificates] qualify as business or official records, the analysts' statements here -- prepared specifically for use at petitioner's trial -- were testimony against petitioner, and the analysts were subject to confrontation under the Sixth Amendment." (*Id.* at p. 2540.)

In *Bullcoming v. New Mexico* (2011) 564 U.S. ___ [131 S.Ct. 2705, 180 L.Ed.2d 610] ("*Bullcoming*"), a drunk driving case, the prosecution introduced a laboratory analyst's certificate showing that the defendant's blood sample contained an alcohol content above the legal limit—but the analyst who tested the blood and obtained the results did not testify. Instead, an analyst who had "neither participated in nor observed the testing" testified for the prosecution. (*Id.* at p. 2709.) The *Bullcoming* court explained that the second analyst was an inadequate substitute or surrogate for the analyst who performed the test. (*Id.* at p. 2715.) Testimony by someone who merely qualified as an expert regarding the machine used and the laboratory's procedures "could not convey what [the actual analyst] knew or observed about the events his certification concerned, *i.e.*, the particular test and testing process he employed" and could not expose "any lapses or lies on the certifying analyst's part." (Ibid.) The high court stated that, if the Sixth Amendment is violated, "no substitute procedure can cure the violation." (*Id.* at p. 2716.)

In *Williams v. Illinois* (2012) 567 U.S. __ [132 S.Ct. 2221, 183 L.Ed.2d 89] ("*Williams*"), a rape case, the Supreme Court considered a forensic DNA expert's testimony that an independent laboratory's DNA profile of semen found on the victim matched a DNA profile derived from

the suspect's blood, which was produced by the state police laboratory. The four-justice plurality opinion of Justice Alito, with Justice Thomas concurring in the judgment only, concluded that the expert's testimony did not violate the defendant's confrontation rights.[15] The plurality reasoned that the independent laboratory report, which was not admitted into evidence (*id.* at pp. 2230, 2235), was "basis evidence" to explain the expert's opinion that was not offered for its truth, and therefore did not violate the Confrontation Clause. (*Id.* at pp. 2239-2240.)

Alternatively, the plurality explained, even if the report been offered for its truth, its admission would not have violated the confrontation clause because the report was not a formalized statement made primarily to accuse a "targeted individual." (*Williams, supra*, 132 S.Ct. at pp. 2242-2244.) That is, under the "primary purpose" test, because the defendant was neither in custody nor under suspicion at that time of the DNA analysis, no one at the laboratory could have known that its profile would inculpate the defendant, thereby eliminating the prospect for fabrication and the incentive for developing an unscientific profile.[16] (*Id.* at pp. 2243-2244.) Justice

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[15] *Williams* produced no majority opinion. Indeed, the various concurring and dissenting opinions were so splintered that it is questionable whether even the plurality opinion contains any binding legal principle beyond the result. See *People v. Lopez* (2012) 55 Cal.4th 569, 592 ("*Lopez*") (dis. opn. of Liu, J.), concluding that "*Williams* is an example of a decision where the only binding aspect is its specific result" because "[n]o published lower court decision, state or federal, that has examined *Williams* has identified a single standard or common denominator commanding the support of a five-justice majority."

[16] Writing in dissent, Justice Kagan argued that Justice Alito's opinion was called "'the plurality,' because that is the conventional term for it. But in all except its disposition, his opinion is a dissent: Five Justices specifically reject every aspect of its reasoning and every paragraph of its

(continued...)

Thomas concurred on a different rationale –that the report lacked the requisite formality and solemnity to be testimonial. (*Id.* at p. 2255 (conc. opn. of Thomas, J.).)

In turn, this Court issued confrontation opinions in *Lopez, supra*, 55 Cal.4th 569, *People v. Dungo* (2012) 55 Cal.4th 608 ("*Dungo*"), and *People v. Rutterschmidt* (2012) 55 Cal.4th 650 ("*Rutterschmidt*"). The *Lopez* court explained that the federal Supreme Court's *Crawford* jurisprudence identified a two-part inquiry to determine whether a challenged statement is testimonial for confrontation clause purposes. "First, to be testimonial the out-of-court statement must have been made with some degree of formality or solemnity." (*Lopez, supra,* 55 Cal.4th at p. 581.) "Second, all nine high court justices agree that an out-of-court statement is testimonial only if its primary purpose pertains in some fashion to a criminal prosecution, but they do not agree on what the statement's primary purpose must be."[17] (*Id.* at p. 582.) "It is now settled in California that a statement is not testimonial unless both criteria are met." (*People v. Holmes* (2012) 212 Cal.App.4th 431, 438, quoting *Dungo, supra*, 55 Cal.4th at p. 619 and *Lopez, supra*, 55 Cal.4th at p. 582; see *People v. Barba* (2013) 215 Cal.App.4th 712, 714).

In *Lopez*, this Court held that admission of a laboratory report containing test results as to the defendant's blood-alcohol concentration (BAC) did not violate the defendant's right to confrontation, even though the criminalist who did the testing and authored the report did not testify. (*Lopez, supra*, 55 Cal.4th at pp. 582-585.) Neither the report nor a

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(...continued)
explication." (*Williams, supra*, 132 S.Ct. at p. 2265 (dis. opn. of Kagan, J.).)

[17] The *Lopez* court did not consider the primary purpose inquiry because "the critical portions of [the non-testifying criminalist's] report were not made with the requisite degree of formality or solemnity to be considered testimonial." (*Lopez, supra*, 55 Cal.4th at p. 582.)

notation by the non-testifying criminalist linking the defendant's name to the blood sample was made with the requisite degree of formality or solemnity to be considered testimonial under the *Crawford* line of cases. (*Ibid.*) Additionally, this Court found the admission of evidence harmless beyond a reasonable doubt because the testifying criminalist offered his independent BAC opinion as to the defendant's sample. (*Ibid.*)

The *Dungo* decision found no confrontation clause violation where a forensic pathologist testified concerning the cause of the victim's death, based on facts taken from an autopsy report prepared by a non-testifying pathologist. *Dungo* held that neither the formality component nor the primary purpose component for identifying testimonial statements was satisfied: First, the statements in the autopsy report (which was not introduced into evidence) referenced by the testifying pathologist did not include the report's conclusions as to the cause of death. Rather, the testifying pathologist offered his own independent opinion as to the cause of death, based on the non-testifying pathologist's anatomical and physiological observations as contained in the report. (*Dungo, supra*, 55 Cal.4th at pp. 618-619.) "Such observations are not testimonial in nature. (*Dungo, supra*, 55 Cal.4th at p. 619.) Second, a "criminal investigation was not the primary purpose for the autopsy report's description of the condition of [the victim's] body; it was only one of several purposes." (*Id.* at p. 621.)

Finally, in *Rutterschmidt, supra*, 55 Cal.4th at page 661, this Court did not reach the merits of the confrontation claim, finding any error harmless beyond a reasonable doubt. "In light of the overwhelming evidence against defendant Golay, exclusion of laboratory director Muto's trial testimony in question would, beyond a reasonable doubt, not have affected the outcome of Golay's trial." (*Ibid.*)

In *Holmes*, *supra*, 212 Cal.App.4th 431, the reviewing court determined that the confrontation clause did not bar testimony by:

> Three supervising criminalists . . . [who] offered opinions at trial, over defense objection, based on DNA tests that they did not personally perform. They referred to notes, DNA profiles, tables of results, typed summary sheets, and laboratory reports that were prepared by nontestifying analysts. None of these documents was executed under oath. None was admitted into evidence. Each was marked for identification and most were displayed during the testimony. Each of the experts reached his or her own conclusions based, at least in part, upon the data and profiles generated by other analysts.

(*Id.* at p. 434.)

The *Holmes* court reasoned that these documents were not testimonial because, "[t]he forensic data and reports in this case lack 'formality.' They are unsworn, uncertified records of objective fact. Unsworn statements that 'merely record objective facts' are not sufficiently formal to be testimonial." (*Id.* at p. 438.) *Holmes* concluded, "It is now settled in California that a statement is not testimonial unless both criteria [i.e., formality and primary purpose] are met. In *Lopez*, the court concluded that lack of formality alone rendered the blood-alcohol report nontestimonial regardless of its primary purpose. [Citation.]" (*Id.* at p. 438.)

Most recently, the court in *People v. Barba* (2013) 215 Cal.App.4th 712, offered a more comprehensive analysis. The court found a DNA report lacking in the requisite formality and solemnity to be considered testimonial, but, unlike *Lopez*, it did not end its analysis there. Rather, it focused most of its attention on the primary purpose of DNA testing. Echoing the views expressed in Justice Alito's opinion in *Williams*, the court found the primary purpose was not to accuse or inculpate a targeted individual but to perform tests in accordance with established protocols. (*Id.* at p. 741 ["DNA lab technicians in general perform their tasks in accordance with accepted procedures and have no idea beforehand whether

their work will exonerate or inculpate a known suspect"]; *Williams*, 132 S.Ct. at p. 2244 (plur. opn. of Alito, J.) ["when the work of a lab is divided up in such a way [that numerous technicians work on each DNA profile,] it is likely that the sole purpose of each technician is simply to perform his or her task in accordance with accepted procedures"].) Moreover, the *Barba* court observed, "defendants who question the validity of DNA test results have an additional safeguard available through their power to subpoena anyone who took part in the DNA testing process." (*Barba*, *supra*, 215 Cal.App.4th at pp. 742-743; see also *Williams*, *supra*, 132 S.Ct. at pp. 2243-2244 [same].)

D. *Geier*, *Lopez*, and Their Progeny Are Controlling

Under *Geier*, the trial court in this case properly admitted Dr. Staub's testimony regarding the DNA reports. No live testimony was offered in *Melendez-Diaz* on the composition of the seized substance. Rather, the admitted evidence consisted only of affidavits. The plurality decision in *Melendez-Diaz* emphasized that the affidavits "contained only the bare-bones statement" that the seized substance contained cocaine, and the defendant "did not know what tests the analysts performed, whether those tests were routine, and whether interpreting their results required the exercise of judgment or the use of skills that the analysts may not have possessed." (*Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2537.) That decision did not reach the issue decided in *Geier*.

The plurality's holding in *Melendez-Diaz* was limited to the determination that the "Sixth Amendment does not permit the prosecution to prove its case via ex parte out-of-court affidavits . . . ." (*Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2542, fn. omitted.) Moreover, in his concurring opinion in *Melendez-Diaz*, Justice Thomas expressed his view that testimonial evidence consisted of extrajudicial statements "'only insofar as they are contained in formalized testimonial materials, such as affidavits,

depositions, prior testimony, or confessions.' [Citations]." (*Id.* at p. 2543 [Thomas, J., concurring].) Justice Thomas joined the plurality's opinion in *Melendez-Diaz* only because "the documents at issue in this case 'are quite plainly affidavits,'" and fell within "'the core class of testimonial statements' governed by the Confrontation Clause. [Citation.]" (*Ibid.*)

"When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." (*Marks v. United States* (1977) 430 U.S. 188, 193 [97 S.Ct. 990, 51 L.Ed.2d 260].) As Justice Thomas supplied the necessary fifth and deciding vote in *Melendez-Diaz*, and concurred on grounds narrower than those put forth by the plurality, his position is controlling. (See, e.g., *Romano v. Oklahoma* (1994) 512 U.S. 1, 9 [114 S.Ct. 2004, 129 L.Ed.2d 1] [accepting Justice O'Connor's fifth and deciding vote in *Caldwell v. Mississippi* (1985) 472 U.S. 320 [105 S.Ct. 2633, 86 L.Ed.2d 231], and concurrence on grounds narrower than plurality as controlling].) Therefore, *Melendez-Diaz* did not overrule *Geier*, which is controlling in this case.

E. The Trial Court Properly Admitted Dr. Staub's Testimony Regarding the DNA Reports

"As for the practical considerations that motivated the plurality in *Williams*, . . . it makes no sense to exclude evidence of DNA reports if the technicians who conducted the tests do not testify. So long as a qualified expert who is subject to cross-examination conveys an independent opinion about the test results, then evidence about the DNA tests themselves is admissible." (*Barba, supra*, 215 Cal.App.4th at p. 742.) In his concurrence with the plurality opinion in *Williams*, Justice Breyer discussed the difficulty of determining who might be required to testify regarding DNA test results. As he observed, a dozen or more different laboratory experts

might be required for a typical DNA profile comparative analysis, each of whom may make "technical statements" during the analysis that are relied upon by other experts. (*Williams*, *supra*, 132 S.Ct. at p. 2252 (conc. opn. of Breyer, J.).) In *Melendez-Diaz*, the Supreme Court held that in order to satisfy the right to confrontation, not everyone "who laid hands on evidence must be called" as a witness. (*Melendez-Diaz*, *supra*, 557 U.S. at p. 311, fn. 1.) Nothing in the *Williams* decision indicates that this statement from *Melendez-Diaz* was in need of clarification or that it should be rejected. In the instant case, Dr. Staub testified as an expert, using the work product of a team of analysts, not all of whom were involved in this particular case. His involvement was not far removed, unlike the expert witness in *Bullcoming*. The laboratory report in this case is closely analogous to unsworn and uncertified materials that were deemed insufficiently formal to be testimonial in *Williams*, *Lopez*, *Dungo*, and *Barba*.

Applying these decisions, the DNA lab reports were not testimonial, and under the circumstances Dr. Staub described, his testimony, which was subject to cross-examination, did not violate appellant's confrontation rights. Moreover, the testimony found lacking in *Melendez-Diaz* was present in this case. Dr. Staub, the director at Cellmark, testified as to the DNA test results. Specifically describing the procedures and based on his review of the analysts' work on the samples, Dr. Staub concluded that they matched the profile of appellant. (See 20RT 3466-3478, 3479-3512, 3514-3531, 3536.) Thus, the "accusatory" conclusion was reached and conveyed by a testifying expert, not through a non-testifying analyst's laboratory notes and report. (See, e.g., 20RT 3499, 3505-3511, 3521-3537.)

Moreover, the presence of a custodian of records, who also provided expert testimony, sharply distinguishes this case from *Melendez-Diaz*, which involved only "near contemporaneous" affidavits that were prepared almost one week after the tests were performed. (*Melendez-Diaz*, *supra*,

129 S. Ct. at p. 2535.) The testimony of a qualified custodian of records in the instant case provided appellant with the opportunity to test the authenticity of the DNA test results or inquire regarding the procedures followed and the conclusion arrived upon -- an opportunity unavailable to the defendant in *Melendez-Diaz*. (See *Geier*, *supra*, 41 Cal.4th at p. 605 [stating that "contemporaneous recordation of observable events" as opposed to "documentation of past events" is not testimonial for purposes of the confrontation clause]; *People v. Beeler* (1995) 9 Cal.4th 953, 978-981 [finding the trial court did not abuse its discretion by admitting expert testimony regarding the victim's autopsy report by a pathologist who did not conduct the autopsy]; *People v. Brown* (2001) 91 Cal.App.4th 623, 653-654 [trial court properly admitted expert testimony based on non-testifying analyst's tests as reliable business records].)

Nevertheless, for a separate reason, Dr. Staub properly relied on the non-testifying analyst's report in offering his expert opinion. Expert testimony may "be premised on material that is not admitted into evidence so long as it is material of a type that is reasonably relied upon by experts in the particular field in forming their opinions." (*People v. Gardeley* (1996) 14 Cal.4th 605, 618.) "So long as this threshold requirement of reliability is satisfied, even matter that is ordinarily inadmissible can form the proper basis for an expert's opinion testimony." (*Ibid.*) "And because [California] Evidence Code section 802 allows an expert witness to 'state on direct examination the reasons for his opinion and the matter . . . upon which it is based,' an expert witness whose opinion is based on such inadmissible matter can, when testifying, describe the material that forms the basis of the opinion." (*People v. Gardeley, supra*, 14 Cal.4th at p. 618.) Therefore, Dr. Staub's testimony was properly presented to the jury.

Moreover, as in *Lopez* and *Dungo*, Dr. Staub offered his own independent opinion as to the DNA results. (See *Lopez, supra*, 55 Cal.4th

at p. 574; *Dungo, supra*, 55 Cal.4th at pp. 618-619.) Dr. Staub testified at trial that, as a reviewer and analyst at Cellmark, he was familiar with the work done by analysts. He also reviewed the entire file prior to issuance of the report. The case file contained documents related to the samples, evidence through DNA extraction, quantification, amplification, loading of samples onto the machine, actual profiles, and reports. Dr. Staub relied on this information before offering his independent expert opinion of the DNA results. (See, e.g., 20RT 3499, 3505-3511, 3521-3537.) Thus, the requirements of the confrontation clause were satisfied "by calling . . . well-qualified expert witness[es] to the stand, available for cross-examination, who could testify to the means by which the critical instrument-generated data was produced and could interpret those data for the jury, giving [their] own, independent opinion as to" the results of the DNA analysis. (*Lopez, supra*, 55 Cal.4th at p. 587 (conc. opn. of Werdegar, J.).)

Finally, appellant contends that the testimony of Dr. Staub was barred by Evidence Code section 1271,[18] the business records exception to the hearsay rule. (AOB 219-220.) However, this Court has held that an expert can properly testify to the contents of a technician's report because the report is within the business records exception to the hearsay rule as set forth in Evidence Code section 1271. (*People v. Champion* (1995) 9 Cal.4th 879, 915; see also *People v. Beeler* (1995) 9 Cal.4th 953, 978-979

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[18] The business records exception to the hearsay rule provides: "Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered to prove the act, condition, or event if: [¶] (a) The writing was made in the regular course of business; [¶] (b) The writing was made at or near the time of the act, condition, or event; [¶] (c) The custodian or other qualified witness testifies to its identity and the mode of its preparation; and [¶] (d) The sources of information and method and time of preparation were such as to indicate its trustworthiness." (Evid. Code, § 1271.)

[pathologist, who did not participate in autopsy, properly testified to contents of autopsy report under business records exception to hearsay rule]; *People v. Clark* (1992) 3 Cal.4th 41, 158 [same facts and result as in *Beeler*, but under Evid. Code, § 1280, hearsay exception for public records].)

Here, the court properly admitted the DNA report prepared by other analysts as it was subject to the business records exception to the hearsay rule. Dr. Staub testified that all criminalists in the crime lab followed the same method – a computer program – to determine population frequencies. (See 20RT 3442-3446.) Although other analysts performed the DNA profiling of the sample, Dr. Staub reviewed the work. Specifically describing the procedures and based on his review of the analysts' work on the samples, Dr. Staub concluded that they matched the profile of appellant. (See 20RT 3466-3478, 3479-3512, 3514-3531, 3536.) As such, Dr. Staub provided an adequate foundation to render the DNA report subject to the business records exception to the hearsay rule, and was thus properly admitted by the trial court.

F. Any Error Was Harmless

Even assuming Dr. Staub's reliance on DNA reports violated appellant's Sixth Amendment rights as construed by *Crawford*, any error was harmless beyond a reasonable doubt. "Confrontation [C]lause violations are subject to federal harmless-error analysis under *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705]. (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 681 [106 S.Ct. 1431, 89 L.Ed.2d 674].)" (*Geier, supra*, 41 Cal.4th at p. 608.) "The harmless error inquiry asks: 'Is it clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error?' (*Neder v. United States* (1999) 527 U.S. 1, 18 [119 S.Ct. 1827, 144 L.Ed.2d 35].)" (*Geier, supra*, 41 Cal.4th at p. 608.)

In this case, the jury was specifically instructed on experts and evaluating their opinions. (See 47RT 7462-7463.) In addition, in cross-examining Dr. Staub, appellant had the opportunity to fully inquire into the circumstances and alleged inadequacies of the testing of the DNA samples, the reports and results. (20RT 3537-3592.) As previously discussed, Dr. Staub reviewed the data from the tests and independently reached his conclusion regarding the DNA results. He testified as an expert witness, relying on machine testing and reports of other analysts in forming his opinion on the DNA samples. (See, e.g., 20RT 3499, 3505-3511, 3521-3537.) Dr. Staub's expert conclusions were thus admissible. (Evid. Code, § 801.)

In any event, evidence that appellant had bragged about raping Judy further confirmed his involvement in the crime. As previously noted, on the night of April 17, the last night Judy was seen alive, appellant had left his motel for about five hours and came back with fresh scratches on his face. Calhoun asked appellant what happened and he responded that he had gone to his wife's house, broken in, and "he had beat the pussy up." (See 14RT 2498, 2500; 15RT 2756; 25RT 2512-2513, 2521-2522.) There was also evidence that appellant had been driving Judy's car and tried to sell it. (17RT 2859-2871.) Several items owned by Judy were also found with appellant's belongings, and Judy's body was found with some of his belongings. (12RT 2240-2241; 17RT 2965-2972; 34RT 5667-5778.) In addition to the other evidence establishing appellant's guilt, there was also evidence that was admitted through the testimony of other analysts that testified at trial that established his involvement in the crime. (See e.g., 21RT 3627-3631, 3639-3666; 23RT 4075-4091.) Accordingly, any alleged confrontation clause error was harmless beyond a reasonable doubt.

IX. THE PAROLE REVOCATION FINE IS AUTHORIZED AS APPELLANT WAS ALSO SENTENCED TO A DETERMINATE TERM

Appellant contends that the parole revocation fine should be stricken because his sentence not subject to a parole period under section 1202.45 (AOB 229-233.) However, the Supreme Court has ruled in *People v. Brasure* (2008) 42 Cal.4th 1037, 1075, that such a fine does apply where, as here, a defendant is sentenced to a determinate term in addition to a sentence that does not involve parole. (See 36CT 9475-9480.) In *Brasure*, the defendant was sentenced to death and to a determinate prison term. (*People v. Brasure*, *supra*, 42 Cal.4th at p. 1075.) Similarly, here, appellant was sentenced to death and a determinate sentence of eleven years and eights months. (36CT 9475.) Therefore, appellant's parole revocation fine is authorized and his claim should be rejected.

X. APPELLANT HAS FORFEITED ANY CLAIM REGARDING THE CAT-MISTREATMENT EVIDENCE; IN ANY EVENT, ANY SUCH EVIDENCE HAD NO EFFECT ON THE PENALTY VERDICT

Appellant contends that the trial court erred by allowing the prosecution to introduce evidence of mistreatment of cats, thereby violating his constitutional rights to due process and fundamental fairness. (AOB 233-240.) Appellant has forfeited this claim by failing to object. Even if this claim had been preserved for appeal, the evidence was never admitted nor can appellant establish any alleged prejudicial error.

A. The Relevant Proceedings

During the penalty phase, the prosecutor inquired whether it would be permissible to ask one of the witness about appellant's mistreatment of animals when he was a child. Specifically, tying the tails of cats together and throwing them over a clothesline. The prosecutor explained that she believed that one of appellant's brother saw the abuse and the information

was reviewed by the defense psychologist. The court ruled that the prosecutor could inquire if appellant's brother had actually witnessed the abuse. (55RT 8068-8073.)

During the presentation of appellant's penalty phase evidence, before the prosecutor had the chance to inquire on cross-examination, appellant's counsel asked appellant's brother whether he had witnessed the animal abuse. Appellant's brother testified that he never actually saw the abuse because he ran away. (See 56RT 8177-8179.) During cross-examination, the prosecutor inquired whether he had witnessed any of the mistreatment of cats. Appellant's brother reiterated that "[he] heard stories, but [he] never actually saw anything." (56RT 8181.)

B. Appellant's Claim Is Forfeited For Failing to Object

Appellant has forfeited his claim that his constitutional rights were violated. His objection below under the Evidence Code for lack of knowledge did not preserve any constitutional objection for appellate purposes. (56RT 8180-8181.) (See, e.g., *Kennedy*, *supra*, 36 Cal.4th at p. 612 ["The appellate court's review of the trial court's admission of evidence is then limited to the stated ground for the objection"]; *Kipp*, *supra*, 26 Cal.4th at p. 1125.) In any event, he does not otherwise show the admission of insignificant evidence about possible mistreatment of animals, at a trial involving a despicable murder and numerous sexual offenses, rendered his trial fundamentally unfair or deprived him of due process. (See, e.g., *Kipp*, *supra*, at p. 1125.)

C. In Any Event, Evidence of Mistreatment of Cats Was Never Admitted

As explained above, evidence of alleged mistreatment of cats was never admitted into evidence. In fact, appellant's brother testified that he never witnessed appellant abusing any animals and initially did so in response to a question by trial counsel, not the prosecution. (56RT 8177-

8179, 8181.) In addition, defense counsel objected, and the court sustained the objection on the basis of lack of knowledge when the prosecutor attempted to inquire about the abuse. (56RT 8180-8181.) The trial court later confirmed that this evidence was not admitted because counsel objected to it and specifically noted that it would modify the jury instruction to make sure the jurors did not consider any such evidence. (56RT 8205-8207.)[19]

Even assuming some arguable error, there is no reasonable possibility the penalty verdict would have been different. (*People v. Tuilaepa* (1992) 4 Cal.4th 569, 591; *People v. Lewis* (2008) 43 Cal.4th 415, 527.) Any mention of mistreatment of cats was brief, objected to, and relatively trivial in comparison to the circumstances of the crimes and other evidence presented in aggravation. Moreover, the point was not raised in closing argument by the prosecutor. (See 59RT 8505-8532; 60RT 8543-8564.) In

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[19] The evidence of the mistreatment of animals could have been admitted under section 190.3, subdivision (b). One of the statutory factors that the jury must consider in determining penalty in a capital case is "[t]he presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence." (§ 190.3, factor (b).) To be admissible under this factor, a threat to do violent injury must violate a penal statute and must be directed against a person or persons, not against property. (*People v. Phillips* (1985) 41 Cal.3d 29, 72; *People v. Boyd* (1985) 38 Cal.3d 762, 776.) However, when the prosecution has evidence of conduct by the defendant that satisfies these statutory requirements, evidence of the surrounding circumstances is admissible to give context to the episode, even though the surrounding circumstances include other criminal activity that would not be admissible by itself. (*People v. Livaditis* (1992) 2 Cal.4th 759, 776-777; see e.g., *People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1014 [poisoning of dogs]; *People v. Sully* (1991) 53 Cal.3d 1195, 1243 [injury to animals].) Here, the prosecutor explained that the evidence was not intended to be used as an aggravating factor, but rather to impeach witnesses. (56RT 8259.) The prosecutor did not raise any of this evidence in her closing argument. (See 59RT 8505-8532; 60RT 8543-8564.)

any event, the jury heard other aggravating evidence establishing appellant's violent criminal behavior apart from the incident about which he complains. Therefore, any error in admitting the evidence was harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.)

XI. APPELLANT HAS FORFEITED ANY CLAIM REGARDING THE DENIAL OF HIS MOTION FOR MODIFICATION OF THE DEATH VERDICT; IN ANY EVENT, THE TRIAL COURT PROPERLY DENIED HIS MOTION AND FOUND THE JURY'S VERDICT WAS WARRANTED

Appellant contends that the trial court erroneously denied his motion for modification of the death verdict, and thereby violated his constitutional rights to due process and fundamental fairness. (AOB 241-244.) Appellant has forfeited any claim for failure to object. Even if this claim had been preserved for appeal, appellant has failed to establish that the trial court failed to review the aggravating and mitigating evidence in denying his motion.

A. Appellant's Claim Is Forfeited For Failing to Object

If a defendant fails to make a specific objection to the court's ruling at the modification hearing, the claim is forfeited. (See *People v. Mungia* (2008) 44 Cal.4th 1101, 1141; *People v. Zambrano* (2007) 41 Cal.4th 1082, 1183; *People v. Riel* (2000) 22 Cal.4th 1153, 1220.) This rule applies only to cases in which the modification hearing was conducted after the finality of this court's decision in *People v. Hill* (1992) 3 Cal.4th 959, 1013. (*People v. Riel*, *supra*, 22 Cal.4th at p. 1220.) As appellant's modification hearing was held post-*Hill*, the forfeiture rule applies here.

Appellant attempts to avoid the forfeiture rule by arguing it would have been futile to object. (AOB 241 n.42.) The futility exception typically arises when the court has overruled the defendant's objections in a manner that suggests any further objections would be useless. (See, e.g.,

People v. Hill (1998) 17 Cal.4th 800, 821 [judge implied defense counsel was being an obstructionist for making objections].) Since appellant did not raise a single objection to the trial court's lengthy ruling, the futility exception does not apply. Therefore, appellant's request to excuse the forfeiture rule in this instance does not apply, and he has forfeited his claim. (Cf. *People v. Abbaszadeh* (2003) 106 Cal.App.4th 642, 648 [lack of objection excused where trial judge instructed prospective jurors to lie on voir dire, thus rendering the defendant's trial fundamentally unfair].)

B. The Trial Court Properly Reweighed The Evidence, Considered The Aggravating and Mitigating Circumstances In Denying Appellant's Motion

Under section 190.4, subdivision (e), in every case in which there is a death verdict, the defendant is deemed to have made an application for modification of the verdict. In ruling on the application, the trial court reweighs the evidence, considers the aggravating and mitigating circumstances, and determines whether, in its independent judgment, the weight of the evidence supports the jury's verdict. (See *People v. Burgener* (2003) 29 Cal.4th 833, 891; *People v. Rodriguez* (1986) 42 Cal.3d 730, 793.) The court must state on the record the reasons for its findings. (§ 190.4, subd. (e).) The ruling on an automatic application to modify the death verdict must be "sufficiently articulated to assure meaningful appellate review." (*People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1064.)

The court's lengthy statement of reasons demonstrates it understood and complied with its obligation under section 190.4, subdivision (e). (See 62RT 8707-8714.) The trial court reviewed at length the circumstances of the multiple crimes, as supported by the weight of the evidence, and appellant's prior conduct. It considered those aggravating factors against appellant's mitigating factors, including his difficult family history and

mental health issues. Weighing these factors, the trial court concluded the aggravating evidence substantially outweighed the mitigating evidence and the jury's verdict was warranted. The record leaves no doubt that the trial court here conscientiously carried out its obligations under section 190.4, subdivision (e). Thus, the court's comments during the course of its extensive review of the aggravating and mitigating evidence presented at trial demonstrate there is no reasonable possibility that any error affected its ruling. (See *People v. Carter* (2005) 36 Cal.4th 1114, 1211.) For the same reason, any asserted federal constitutional error was harmless beyond a reasonable doubt. (*People v. Rogers* (2006) 39 Cal.4th 826, 911.)

XII. VICTIM IMPACT EVIDENCE NEED NOT BE LIMITED TO FACTS OR CIRCUMSTANCES KNOWN TO APPELLANT WHEN THE CRIME WAS COMMITTED

Appellant asserts that his constitutional rights were violated because the victim impact evidence was not limited to facts or circumstances known to him when he committed the crime. (AOB 245-252.) This Court has previously rejected this claim, and appellant offers nothing to distinguish his case from those previously decided. (See *People v. Carrington* (2009) 47 Cal.4th 145, 196-197 [victim impact evidence need not be limited to a single witness, individuals who witnessed the crime, or matters within the defendant's knowledge when the crime was committed]; *People v. Pollock* (2004) 32 Cal.4th 1153, 1195 [the jury may consider victim impact evidence in exercising sympathy for the victim and others affected by the crime].) Appellant's claim should be rejected.

XIII. CALIFORNIA'S DEATH PENALTY STATUTE DOES NOT VIOLATE THE UNITED STATES CONSTITUTION

Appellant raises several claims regarding the constitutionality of the death penalty law as interpreted by this Court and as applied at his trial. He maintains that many features of the death penalty law violate the federal

Constitution. (AOB 252-289.) As he himself concedes, these claims have been raised and rejected in prior capital appeals before this Court. Because appellant fails to raise anything new or significant which would cause this Court to depart from its earlier holdings, his claims should be rejected.

A. Penal Code Section 190.3, Subdivision (a), Does Not Allow for an Arbitrary Or Capricious Imposition of the Death Penalty

Appellant asserts that Penal Code section 190.3, subdivision (a), fails to adequately guide the jury's deliberations, thereby resulting in the application without any standards. (AOB 256-260.) This Court has repeatedly rejected such claims, and appellant offers nothing to distinguish his case from those previously decided. (See, e.g., *People v. Mills, supra*, 48 Cal.4th at p. 213; see also *Tuilaepa v. California* (1994) 512 U.S. 967, 971-980 [114 S.Ct. 2630, 129 L.Ed.2d 750].) Appellant's claim should also be rejected.

B. Penal Code Section 190.3's Unitary List of Aggravating and Mitigating Factors Are Constitutional

Appellant asserts that California's capital sentencing statute, with its unitary list of aggravating and mitigating factors, fails to guide the sentencer's discretion in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments and their state constitutional counterparts. (AOB 260-273.) This Court has concluded otherwise: Section 190.3 is not constitutionally infirm for not specifying which factors are aggravating and which are mitigating, for not limiting aggravation to the specified aggravating factors, or for not defining the terms "aggravation" and "mitigation." (*People v. Lee, supra*, 51 Cal.4th at p. 620; *People v. Horning* (2004) 34 Cal.4th 871, 913; *People v. Frye, supra*, 18 Cal.4th at p. 1026.) Nor do these asserted deficiencies impermissibly allow the jury to consider

mitigating evidence, or its absence, in aggravation. (*People v. Jennings* (2010) 50 Cal.4th 616, 690; *People v. Page* (2008) 44 Cal.4th 1, 61.)

Appellant further contends that section 190.3's aggravating and mitigating factors violate the Eighth Amendment's proscription against the use of vague factors in the penalty phase weighing process. (See *Stringer v. Black* (1992) 503 U.S. 222, 235 [112 S.Ct. 1130, 117 L.Ed.2d 367].) This Court previously rejected the same arguments appellant presents here: Section 190.3, factor (a), which permits consideration of the circumstances of the crime as an aggravating factor, is not impermissibly vague (AOB 252-255, 268). (*People v. Mills*, *supra*, 48 Cal.4th at pp. 213-214; *People v. Ervine* (2009) 47 Cal.4th 745, 810; see *Tuilaepa v. California*, *supra*, 512 U.S. at pp. 975-976.) Moreover, neither the use of the adjective "extreme" in "extreme mental or emotional disturbance" under factor (d), nor the absence of language explaining that these identified circumstances are mitigating rather than aggravating, renders that factor unconstitutionally vague. Nor does the same asserted deficiency invalidate factor (h), regarding impairment due to mental disease, defect, or intoxication (see AOB 264-268). (*People v. Griffin* (2004) 33 Cal.4th 536, 598-599; *People v. Kipp* (2001) 26 Cal.4th 1100, 1138; *People v. Kelly* (1990) 51 Cal.3d 931, 968-969.) Finally, factor (i), the age of the defendant at the time of the crimes, is not unconstitutionally vague merely because it may be considered as a factor in aggravation or mitigation (see AOB 261-268). (*People v. Carrington* (2009) 47 Cal.4th 145, 201-202; *People v. Lucky* (1988) 45 Cal.3d 259, 302.) Appellant acknowledges that this Court upheld the constitutionality of factors (a), (b), and (i) in *Tuilaepa v. California*. He asserts, however, that although discrete factors may appear constitutional, the combined effect of all factors renders the entire scheme unconstitutional. This Court has concluded to the contrary that section 190.3 as a whole is not impermissibly vague. (*People v. Seaton* (2001) 26 Cal.4th 598, 688;

People v. Box, supra, 23 Cal.4th at p. 1217; *People v. Williams* (1997) 16 Cal.4th 153, 267-268.)

C. California's Death Penalty Statute and Instructions Set Forth the Appropriate Burden of Proof

Appellant also contends, in several subclaims, that the death penalty statute and accompanying jury instructions failed to set forth the appropriate burden of proof. As explained below, each of these claims have previously been rejected by this court and are meritless.

First, appellant claims the instructions failed to require juror unanimity as to the aggravating factors and the death penalty statute and unconstitutionally failed to assign to the State the burden of proving beyond a reasonable doubt the existence of an aggravating factor. (AOB 270-274.) This Court has concluded that the death penalty law is not unconstitutional for failing to require that the jury be unanimous in finding the existence of an aggravating factor. (*People v. Mills, supra*, 48 Cal.4th at p. 214.) This Court has also held that the sentencing function at the penalty phase is not susceptible to a burden-of-proof qualification. (*People v. Manriquez, supra*, 37 Cal.4th at p. 589; *People v. Burgener, supra*, 29 Cal.4th at p. 885; *People v. Anderson* (2001) 25 Cal.4th 543, 601; *People v. Hawthorne* (1992) 4 Cal.4th 43, 79.) Thus, the penalty phase instructions were not deficient by failing to assign to the State the burden of proving beyond a reasonable doubt the existence of an aggravating factor. (See *People v. Morgan* (2007) 42 Cal.4th 593, 626; *People v. Brown* (2004) 33 Cal.4th 382, 401.) Nothing in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435], *Ring v. Arizona* (2002) 536 U.S. 584 [122 S.Ct. 2428, 153 L.Ed.2d 556], or *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403], impact what this Court has stated regarding the sentencing function at the penalty phase not being susceptible to a burden-of-proof quantification. This Court has expressly rejected the

argument that *Apprendi*, *Ring*, and/or *Blakely* affect California's death penalty law or otherwise justifies reconsideration of this Court's prior decisions on this point. The reasoning set forth above applies equally to appellant's claim that *Cunningham v. California* (2007) 549 U.S. 270, 293-295 [127 S.Ct. 856, 166 L.Ed.2d 856] also requires the State to prove an aggravating factor beyond a reasonable doubt. (*People v. Romero*, *supra*, 44 Cal.4th at pp. 428-429.)

Second, appellant claims the instructions failed to inform the jury that they may impose a sentence of death only if they are persuaded beyond a reasonable doubt that the aggravating factors exist and outweigh the mitigating factors and that death is the appropriate penalty. (AOB 270-274.) This Court has rejected this claim. (*People v. Mills, supra*, 48 Cal.4th at p. 214.)

Third, appellant asserts that the jury was required to base a death sentence on written findings regarding aggravating factors. (AOB 274-275.) This Court has also rejected this claim. (*People v. Mills, supra*, 48 Cal.4th at p. 214.)

Fourth, appellant claims that the death penalty statute, as interpreted by this Court, forbids inter-case proportionality review, thereby guaranteeing arbitrary, discriminatory, or disproportionate impositions of the death penalty. (AOB 275-277.) This Court has held that "[t]he federal Constitution does not require intercase proportionality review. [Citation.] The absence of disparate sentence review does not deny a defendant the constitutional right to equal protection. [Citation.]" (*People v. Romero*, supra, 44 Cal.4th at p. 429; accord, *People v. Mills, supra*, 48 Cal.4th at p. 214.)

In sum, appellant's challenges to the death penalty statute and jury instructions pertaining to the death penalty regarding the burden of proof are meritless. As such, the claim and subclaims must all be rejected.

D. California's Death Penalty Law Does Not Violate the Equal Protection Clause of the Federal Constitution

Appellant claims California's death penalty law violates the Equal Protection Clause of the federal Constitution because non-capital defendants are accorded more procedural safeguards than a capital defendant. (AOB 277-279.) However, this Court has held on numerous occasions that capital and non-capital defendants are not similarly situated and thus may be treated differently without violating equal protection principles. (*People v. Tate* (2010) 49 Cal.4th 635, 713; *People v. Manriquez*, *supra*, 37 Cal.4th at p. 590; *People v. Hinton, supra*, 37 Cal.4th at p. 912; *People v. Smith* (2005) 35 Cal.4th 334, 374; *People v. Boyette*, (2003) 29 Cal.4th 381, 465-467.) Thus, appellant's claim of an Equal Protection Clause violation is meritless and must be rejected.

E. Penal Code Section 190.2 Is Not Impermissibly Broad

Appellant asserts that Penal Code section 190.2 is constitutionally defective, as it fails to narrow the class of death eligible defendants. (AOB 279-286.) This Court has repeatedly rejected such claims, and appellant has not distinguished his case from those previously decided. (See, e.g., *People v. Mills, supra*, 48 Cal.4th at p. 213.) Appellant's claim should likewise be rejected.

In addition, appellant asserts that Penal Code sections 190-190.5 afford the prosecutor complete discretion to decide whether to seek the death penalty and is therefore unconstitutional. (AOB 286-288.) This Court has previously rejected this argument. (See, e.g., *People v. Ayala* (2000) 23 Cal.4th 225, 304.) His claim should also be rejected.

F. California's Use of the Death Penalty Does Not Fall Short of International Norms

Finally, appellant's claims that the use of the death penalty as a regular form of punishment falls short of international norms. (AOB 289-306.) This claim has been repeatedly rejected by this Court, which has stated that "'[i]nternational law does not prohibit a sentence of death rendered in accordance with state and federal constitutional and statutory requirements. [Citations.]'" (*People v. Tate, supra*, 49 Cal.4th at p. 713.) Appellant has not presented any significant or persuasive reason for this Court to reconsider its prior decisions, and the present claim must therefore be rejected.

XIV. THERE WAS NO CUMULATIVE ERROR IN EITHER THE GUILT OR PENALTY PHASE THAT REQUIRES REVERSAL

In his final claim, appellant states that the cumulative error doctrine requires reversal. (AOB 307-309.) He is mistaken. A defendant -- even one facing capital punishment -- is entitled to a *fair* trial, not a *perfect* one. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1009; *People v. Box, supra*, 23 Cal.4th at pp. 1214, 1219; cf. *People v. Marshall* (1990) 50 Cal.3d 907, 945; see *Schneble v. Florida* (1972) 405 U.S. 427, 432 [92 S.Ct. 1056, 31 L.Ed.2d 340]; see also *United States v. Hasting* (1983) 461 U.S 499, 508-509 [103 S.Ct. 1974, 76 L.Ed.2d 96] ["[G]iven the myriad safeguards provided to assure a fair trial, and taking into account the reality of the human fallibility of the participants, there can be no such thing as an error free, perfect trial, and. . .the Constitution does not guarantee such a trial"].)

Respondent has demonstrated that appellant received a fair trial. Simply stated, appellant has failed to show other ise. Whether considered individually or for their cumulative effect, any alleged errors could not have affected the outcome of the trial. (See *People v. Seaton, supra*, 26 Cal.4th at pp. 675, 691-692; *People v. Ochoa* (2001) 26 Cal.4th 398, 447, 458;

People v. Catlin, *supra*, 26 Cal.4th at p. 180.) Notwithstanding appellant's arguments to the contrary, the record contains few, if any, errors made by the trial court or prosecution, none of which were prejudicial. Moreover, as set forth in the Statement of Facts and prior arguments, the evidence of appellant's guilt was simply overwhelming. A review of the record without the speculation and interpretation offered by appellant shows that appellant received a fair and untainted trial. The Constitution requires no more. Thus, even cumulatively, any errors are insufficient to justify a reversal of the verdicts. (See *People v. Carrera* (1989) 49 Cal.3d 291, 332 [overwhelming evidence of guilt; no error affects the believability of the defendant's evidence].)

CONCLUSION

Accordingly, respondent respectfully requests that the judgment be affirmed.

Dated: May 7, 2015

Respectfully submitted,

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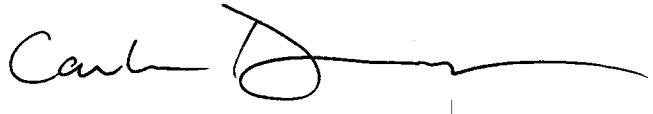

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CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S BRIEF** uses a 13 point Times New Roman font and contains 52,300 words.

Dated: May 7, 2015

KAMALA D. HARRIS
Attorney General of California

E. CARLOS DOMINGUEZ
Deputy Attorney General
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DECLARATION OF SERVICE

Case Name: **The People of the State of California v. Paul Wesley Baker**
No.: **S170280**

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

On **May 7, 2015**, I electronically submitted the attached **RESPONDENT'S BRIEF** with the California Supreme Court using the Online Form provided by the California Supreme Court.

On **May 7, 2015**, I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope in the internal mail system of the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

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On **May 7, 2015**, I caused 9 copies of the **RESPONDENT'S BRIEF** in this case to be delivered to the California Supreme Court at 350 McAllister Street, First Floor, San Francisco, CA 94102-4797 by FedEx Messenger Service; **TRACKING NUMBER 8062 7079 2620**.
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 **May 7, 2015**, at Los Angeles, California.

Lupe Zavala
Declarant

Signature

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