In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **CHARLES CHITAT NG,** **Defendant and Appellant.**	**CAPITAL CASE** Case No. S080276

Orange County Superior Court Case No. 94ZF0195
The Honorable John J. Ryan, Judge

RESPONDENT'S BRIEF

VOLUME 2 OF 2

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2. Dr. Nievod's July 1998 declaration did not mandate a renewed competency trial

a. The declaration did not show that appellant's mental condition had deteriorated in the three months following the competency trial

"The criminal trial of a mentally incompetent person violates due process." (*Cooper v. Oklahoma* (1996) 517 U.S. 348, 354 [116 S.Ct. 1373, 134 L.Ed.2d 498], internal quotation marks omitted; accord, *People v. Blacksher*, *supra*, 52 Cal.4th at p. 797.) "[T]he standard for competence to stand trial is whether the defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and has a rational as well as factual understanding of the proceedings against him." (*Godinez v. Moran* (1993) 509 U.S. 389, 396 [113 S.Ct. 2680, 125 L.Ed.2d 321], internal quotation marks omitted; accord, Pen. Code, § 1367.)

The trial court must suspend criminal proceedings and order a competency trial "whenever the court is presented with substantial evidence of incompetence, that is, evidence that raises a reasonable or bona fide doubt concerning the defendant's competence to stand trial." (*People v. Halvorsen* (2007) 42 Cal.4th 379, 401, internal quotation marks omitted.) To raise a doubt about the defendant's competency, more than "'bizarre actions . . . or statements'" is required. (*Id.* at p. 403.) It is not enough for the defendant to espouse "'ludicrous legal positions'" or unreasonable conspiracy theories. (*Matheney v. Anderson* (7th Cir. 2004) 377 F.3d 740, 748.) "In cases finding sufficient evidence of incompetency, the [defendants] have been able to show either extremely erratic and irrational behavior during the course of the trial . . . or lengthy histories of acute psychosis and psychiatric treatment . . . ." (*Boag v. Raines* (9th Cir. 1985) 769 F.2d 1341, 1343.)

The failure to order a competency trial in such circumstances is a ground for reversal. (*People v. Halvorsen*, *supra*, 42 Cal.4th at p. 401; *Pate v. Robinson* (1966) 383 U.S. 375, 385 [86 S.Ct. 836, 15 L.Ed.2d 815].) California law and the federal Constitution use the same standard for evaluating competency. (*Halvorsen*, *supra*, 42 Cal.4th at p. 401.)

Here, appellant argues that the court erred by denying his request for a renewed competency trial on August 21, 1988. (AOB 387-390.) When the court has already held a competency trial and found the defendant competent, that finding "must be viewed as a baseline," and "a second competency hearing [is] required only on a showing of a substantial change of circumstances or new evidence casting a serious doubt on the validity of the prior finding . . . ." (*People v. Huggins* (2006) 38 Cal.4th 175, 220, internal quotation marks omitted.) "In determining whether a renewed competency hearing is necessary, the trial court may appropriately take its personal observations into account in determining whether there has been some significant change in the defendant's mental state. This is particularly true when . . . the defendant has actively participated in the trial." (*People v. Jones* (1991) 53 Cal.3d 1115, 1153; accord, *Davis v. Woodford* (9th Cir. 2004) 384 F.3d 628, 646.)

Appellate courts apply a "deferential standard" to the trial court's ruling on whether to hold a renewed competency trial, and they uphold the ruling as long as there is "substantial evidence" to support it. (*People v. Huggins*, *supra*, 38 Cal.4th at p. 220.) The fact a defense expert merely disagrees with the prior result does not demonstrate a substantial change of circumstances. (*Ibid.*)

Here, appellant argues that the court erred by denying his request for a renewed competency trial, because Dr. Nievod's July 1998 declaration constituted new evidence that cast a serious doubt on the competency finding that the court had made three months earlier. (AOB 387-390.)

Respondent disagrees, because there was substantial evidence supporting the court's ruling.

When the court denied appellant's motion for a renewed competency trial, appellant was still representing himself, so the key issue was his ability to understand the proceedings. (See *Godinez v. Moran*, *supra*, 509 U.S. at p. 396; Pen. Code, § 1367.) In considering this question, the inquiry is whether appellant "lacked a rational understanding of the roles of the judge, prosecutor . . . or jury in this case, or the purpose of the proceedings." (*People v. Halvorsen*, *supra*, 42 Cal.4th at p. 407.)

As the trial court pointed out, it was obvious appellant understood the nature of the proceedings. (5 RT 1010.) He personally filed numerous pleadings during the period between the competency trial and the hearing on his request. For example, on May 8, 1998, he filed a handwritten motion for self-representation. The motion cited case law and the daily transcripts, listed some of appellant's complaints against his attorneys, and included exhibits. (19 OCT 6677-6702.) A week later, on May 15, he filed a renewed *Faretta* motion, where he asked for a different judge, announced he would accept any attorney as his advisory counsel, and asked the court to appoint counsel to pursue a writ if it denied the motion. (19 OCT 6706-6707.)

On May 27, after the court had granted self-representation, appellant filed a handwritten request for funds to buy a new laptop computer. In the motion, he explained why his old computer was inadequate, and he estimated the cost of a new one. (19 OCT 6789-6792.) On June 9, he filed a handwritten motion for physical access to his case file. It included his handwritten declaration, signed under penalty of perjury, explaining why he needed such access. (19 OCT 6820-6823.) On June 17, he filed a handwritten motion for increased access to the telephone. He included a handwritten proposed order, which the judge signed. (20 OCT 6885-6889.)

On June 19, appellant filed a handwritten application—which he had signed eight days earlier—requesting money to employ Dr. Nievod. (5 Sealed 987.9 OCT 1580-1590.) On July 10, appellant filed a handwritten motion to continue the hearing of the motion to dismiss under section 995. (20 OCT 6924-6930.) On July 15, he filed a typewritten supplemental motion to dismiss, where he argued that the Calaveras County Justice Court had erred in 1988 by dismissing Burt and Lew. (20 OCT 6955-6964.)

On July 21—after Dr. Nievod had conducted three of his four meetings with appellant—appellant filed a handwritten letter addressed to Judge Millard, the judge who ruled on appellant's funding requests. In the letter, appellant asked to use the mental health experts whom Kelley had retained before appellant began representing himself. (6 Sealed 987.9 OCT 2009-2011; see 21 Sealed OCT 7506.) On or near that date, appellant also filed a typewritten declaration, where he identified 15 witnesses whom he wanted his investigator to interview. He also explained why he wanted most of them interviewed. (6 Sealed 987.9 OCT 2015-2019.)

On August 5, 1998—after Dr. Nievod had finished interviewing appellant—appellant filed a typewritten motion to transfer counts II through VII to San Francisco, or alternatively, to import a jury from there. (20 OCT 7003-7032.) He also filed a typewritten motion for a six-month continuance. (20 OCT 7033-7055.) In that motion, he said he needed more time to review discovery, have his investigator interview or re-interview 50 to 75 witnesses, retain a good paralegal, and review all the prior pleadings. (20 OCT 7035-7039.) Appellant also filed a typewritten motion to suppress the evidence seized from his apartment. (20 OCT 7056-7143.) Two days later, he filed a typewritten motion for discovery of impeachment evidence concerning Maurice Laberge. (21 OCT 7144-7292.)

Less than two weeks after that, on August 19, appellant filed his handwritten motion for a renewed competency trial. In it, he discussed Dr. Nievod's recent declaration and asked the court to schedule a competency trial, appoint more experts to evaluate him, and appoint separate counsel for the competency trial. (21 OCT 7500-7503.)

These numerous pleadings confirm the trial court's finding that appellant "obviously" understood the nature of the proceedings. (5 RT 1015.) And they prove that nothing had changed in the time since Dr. Sharma opined that appellant "had absolutely no trouble in understanding the nature and purpose of the proceedings." (18 Sealed OCT 6149.)

The court also evaluated appellant's competency in light of its own extensive dealings with him. Appellant represented himself during most of the period in question, and the court had engaged in extensive discussions with him on May 8 (4 RT 744-772), May 15 (4 RT 794-804, 808-815, 817-820, 827-836, 839-842, 845-849), May 27 (4 RT 881-896, 903-905, 919-926, 930-932; 4 Sealed RT 906-912), June 17 (4 RT 933-940, 943-946, 950-951; 4 Sealed RT 955-956, 960-964), and July 15 (4 RT 965-970, 973-985, 988-990), as well as on August 21 at the hearing on his motion for a renewed competency trial (5 RT 992-1016). Hence, the court's personal observations were particularly relevant, because the court had abundant opportunities—both before and after the competency trial—"to observe, and converse with" appellant. (*People v. Jones*, *supra*, 53 Cal.3d at p. 1153.)

Moreover, even by its own terms, Dr. Nievod's declaration did not indicate that a "substantial change of circumstances" had occurred since the competency trial. (See *People v. Huggins*, *supra*, 38 Cal.4th at p. 220.) To begin with, Nievod did not evaluate whether appellant's condition had changed *during the three months* between the competency trial and his interviews with appellant. Before their July 1998 meetings, Nievod had

last examined appellant almost two and one-half years earlier, in February 1996. (21 Sealed OCT 7505.) Nievod did not purport to evaluate whether appellant's condition changed between April 1998 and July 1998.

In fact, Dr. Nievod did not even find that a substantial change of circumstances had occurred since 1996. While he stated that appellant's condition had "deteriorated markedly from previous levels" (21 Sealed OCT 7507), he also stated that, in comparing his 1998 findings with his 1994 and 1996 findings, "[t]he test results and the results of my clinical interviews have been consistent throughout" (21 Sealed OCT 7506), and his current analysis showed "a continuation of the same psychological syndromes . . . ." (21 Sealed OCT 7507.)

In sum, the court acted within its discretion by finding that appellant's ability to understand the proceedings had not substantially deteriorated in the four months since the competency trial.

b. The declaration did not constitute new evidence, nor did it cast substantial doubt on appellant's ability to understand the proceedings

Besides arguing that Dr. Nievod's declaration showed a substantial change of circumstances, appellant maintains it constituted new evidence that cast a serious doubt on the court's finding at the competency trial. (AOB 390; see *People v. Huggins*, *supra*, 38 Cal.4th at p. 220.) This claim fails, first, because the report did not constitute new evidence; instead, it was a reiteration of old evidence that the court had already considered. Previously, at the hearing in Calaveras County in 1994, Dr. Nievod testified that appellant was suffering from "severe major depression." (7 Sealed CSRT 1837-1838.) He also testified that appellant suffered "severe" dependent personality disorder, which was "so pervasive as to affect all the major relationships in his life" and specifically, his relationships with Webster and Marovich. (7 Sealed CSRT 1838, 1844-1845.)

Another psychiatrist, Dr. Missett, gave similar testimony. Missett testified that appellant suffered from "strong" dependant personality disorder and "severe," "intense," and "prolonged" depression. (7 Sealed CSRT 1897-1898, 1908.) A psychologist, Douglas Liebert, testified that appellant suffered from dependent personality disorder, "major" depression, and possibly posttraumatic stress disorder. (7 Sealed CSRT 2000-2001, 2006-2008.)

For the April 1998 competency trial, the court read the prior testimony of Drs. Nievod, Missett, and Liebert. The court acknowledged that neither party was not offering this testimony at the competency trial, but it clarified that, even if the testimony were offered, it would still find appellant competent. (3 RT 697.) The court reread this testimony again in August, when appellant asked for a renewed competency trial. (5 RT 993, 995, 1005.)

Thus, Dr. Nievod's declaration did not constitute new evidence; instead, it was a restatement of his prior diagnosis, which the court had considered and rejected just three months earlier.

Further, even if Dr. Nievod's opinion were considered "new evidence," it still did not cast substantial doubt on the trial court's prior competency finding. The question before the court was whether appellant understood the nature of the proceedings, or in other words, whether he "lacked a rational understanding of the roles of the judge, prosecutor . . . or jury in this case, or the purpose of the proceedings." (*People v. Halvorsen*, *supra*, 42 Cal.4th at p. 407.) Appellant's numerous written pleadings and numerous interactions with the court—not to mention the reports of Drs. Blair and Sharma—provided overwhelming evidence that he understood. He can hardly claim otherwise, given that he "was not only able to participate in his defense but was also able to direct it." (*Roberts v. Dretke* (5th Cir. 2004) 381 F.3d 491, 498.)

Further, even taken in isolation, Dr. Nievod's declaration did not show that appellant lacked the ability to understand the proceedings. Dr. Nievod stated that appellant had

> only a basic understanding of the criminal legal process, so that he is more often than not unable to understand or, at best, partially understand the true meaning of the court's rulings; criminal procedures, motion process, legal arguments involving an analysis of [an] issue, rule, analysis, and conclusion; and the overall strategy involved in preparing a defense. Yet, Mr. Ng has constructed a scenario based on partial legal information and understanding; being propelled by his pervasive Depression, Anxiety/PTSD, Dependent, Schizoid, and Avoidant Personality feature, and his strong[ly] held belief that he will soon be put to death without a fair chance to present the reasons for his conduct on his own terms.

(21 Sealed OCT 7512-7513.)

This did not suggest that mental illness rendered appellant unable to understand the proceedings. On the contrary, Dr. Nievod conceded that appellant had a "basic understanding" of the proceedings. (21 Sealed OCT 7512.) This satisfied the requirement that the defendant understand the proceedings, which is a modest threshold. (See *People v. Blacksher*, *supra*, 52 Cal.4th at p. 851 [defendant's confusion regarding plea of not guilty by reason of insanity did not show inability to understand proceedings, because "[t]he legal subtleties implicated by [his pleas of not guilty and not guilty by reason of insanity] would confuse most laypersons"]; *People v. Taylor* (2009) 47 Cal.4th 850, 864 [defendant's attempts to defend self at guilt phase may have been "disturbingly inept" but did not cast doubt on his ability to understand the proceedings]; *People v. Halverson*, *supra*, 42 Cal.4th at p. 407; *State v. Connor* (Conn. 2009) 973 A.2d 627, 652 [competency to stand trial is a "relatively low threshold"].)

And Dr. Nievod did not suggest that mental illness prevented appellant from fully understanding the "true meaning" of the rulings,

motions, and arguments. On the contrary, according to Nievod, appellant could not understand more, because he only had a "basic" knowledge of the law—in other words because he was a layperson. (21 Sealed OCT 7512-7513.) But being a layperson is not a form of mental illness.

In sum, Dr. Nievod's declaration did not constitute new evidence or cast substantial doubt on appellant's ability to understand the proceedings. Consequently, the court properly denied appellant's August 1998 motion for a renewed competency trial.

C. The Court Did Not Err by Declining to Order a Renewed Competency Trial in October 1998

On October 8, 1998, after the court had revoked appellant's pro-per status, and juror hardship screening had begun, Kelley moved for a renewed competency trial. He explained that based on "the history of this case" and Dr. Nievod's "recent report," he believed appellant was incompetent. (7 RT 1542.) In support, Kelley cited "the most recent report of Dr. Nievod that was submitted at an in-camera hearing on the 21st of September." (*Ibid.*) Kelley was obviously referring to Nievod's declaration of August 4, 1998, because the defense did not file any report on September 21 or at any other time after the August 4 declaration.[45] (See 21 Sealed OCT 7504-7515.)

Kelley argued that Dr. Nievod's declaration analyzed and explained appellant's mental state in much more detail than Dr. Anderson had provided, and this constituted a "significant change . . . ." (7 RT 1543-1544.) The court responded that the report did not represent anything new,

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[45] Appellant did filed an additional declaration by Dr. Nievod on August 21, 1998, but that declaration, which was executed on June 16, 1998, did not offer any diagnosis. Instead, it requested permission to interview appellant unshackled, without guards present. (22 Sealed OCT 7561-7564.)

and Dr. Nievod had merely "add[ed] to what he said originally." (7 RT 1544.) The court denied the motion and said it had "no doubt, no question at all" about appellant's competency. (7 RT 1542, 1544.)

Appellant now contends the court erred by again declining to hold a renewed competency trial. He maintains that a new competency trial was required because Dr. Nievod's August 1998 declaration presented a "more thorough and current analysis" than those available at the prior competency trial. (AOB 390-391.)

Respondent disagrees. As discussed above, appellant's ability to understand the proceedings was beyond question, and Dr. Nievod's declaration did not show that a substantial change of circumstances had occurred during the three months between the competency trial and Nievod's examination of appellant. Consequently, the issue in October 1998 was whether Nievod's declaration constituted "new evidence" that cast a substantial doubt on the court's finding, in April, that appellant had the mental capacity to consult with his lawyers. (See *Godinez v. Moran*, *supra*, 509 U.S. at p. 396; *People v. Huggins*, *supra*, 38 Cal.4th at p. 220.)

And again, Dr. Nievod's declaration did not constitute *new* evidence; instead, it reiterated his earlier diagnosis—dependent personality disorder, anxiety, and depression—which the trial court had already rejected. (21 Sealed OCT 7506-7507; 7 Sealed CSRT 1837-1838, 1843-1845; 3 RT 697.) Because the declaration did not constitute new evidence, it could not trigger the need for a renewed competency trial.

Further, even if Dr. Nievod's diagnosis was "new," it still did not cast a serious doubt on the validity of the court's prior finding, because it did not address that finding. (See *People v. Huggins*, *supra*, 38 Cal.4th at p. 220.) To mandate a renewed competency trial, it not enough to present a different expert who "'merely disagrees with [the] result" of the competency trial. (*Ibid.*) Instead, such experts "should be made aware of,

and should consider, contrary opinions, especially those by neutral experts." (*People v. Kelly* (1992) 1 Cal.4th 495, 544.) They must "explain why whether or why they disagree with the court-appointed experts" whose opinions provided the bases for the prior competency finding. (*Ibid.*) In so doing, "[t]hey should explain what new evidence or substantial change in circumstances exists to cast a serious doubt on the validity of the prior finding of competency." (*Ibid.*) In other words, "[s]imply finding new experts and ignoring the past is not sufficient." (*Ibid.*)

Here, Dr. Nievod failed to "explain what new evidence or substantial change in circumstances exist[ed] to cast a serious doubt on the validity of the prior finding of competency." (*People v. Kelly*, *supra*, 1 Cal.4th at p. 544.) He did not discuss—or even acknowledge—the findings of the neutral, court-appointed experts, Drs. Blair and Sharma, who had both found appellant mentally competent. In fact, Nievod's declaration gave no indication that he even knew about Blair and Sharma's findings or the court's competency ruling. (See *ibid.* ["It is not clear whether Dr. Lewis was even aware that she was revisiting well-trodden territory"].) Accordingly, the court again ruled correctly by declining to order a renewed competency trial.

D. If the Court Erred, the Case Should Be Remanded for a Retrospective Competency Hearing

When a reviewing court finds that the trial court deprived the defendant of due process by failing to hold a competency trial, the reviewing court must reverse the conviction, but in so doing, may remand the case "for a retrospective competency hearing to determine whether the procedural error can be cured . . . ." (*People v. Ary* (2011) 51 Cal.4th 510, 520.) Likewise, when the trial court in fact held a competency trial but committed some other reversible error in the competency proceedings, the reviewing court may also remand the case for a retrospective competency

hearing. (*People v. Lightsey, supra,* 54 Cal.4th at pp. 691-692, 702, 706-707 [ordering retrospective competency hearing when trial court, after declaring doubt about defendant's competency, erroneously allowed him to represent himself in competency proceedings].)

If the reviewing court remands the case, the trial court must first determine whether a retrospective competency hearing is feasible. (*People v. Lightsey, supra,* 54 Cal.4th at p. 710; *People v. Ary, supra,* 51 Cal.4th at p. 520.) If the court finds that such a hearing is feasible and then finds that the defendant was competent, the judgment is reinstated. (*Lightsey, supra,* 54 Cal.4th at pp. 732-733; *People v. Robinson* (2007) 151 Cal.App.4th 606, 618.) In determining feasibility, the factors to consider are "(1) the passage of time, (2) the availability of contemporaneous medical evidence, including medical records and prior competency determinations, (3) any statements by the defendant in the trial record, and (4) the availability of individuals and trial witnesses, both experts and non-experts, who were in a position to interact with the defendant before and during trial." (*Ary, supra,* 51 Cal.4th at p. 520, fn. 3, internal quotation marks omitted; accord, *Lightsey, supra,* 54 Cal.4th at p. 710.)

Here, a retrospective competency hearing might be feasible. Though substantial time has passed since 1998, the record contains ample contemporaneous medical evidence and a wealth of oral and written statements by appellant. Consequently, if reversal is required, this Court should remand the case for a retrospective competency hearing.

IV. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY DECLINING TO APPOINT MICHAEL BURT AND THE SAN FRANCISCO PUBLIC DEFENDER AS APPELLANT'S TRIAL COUNSEL

Appellant contends the trial court violated his Sixth Amendment right to counsel by (1) refusing to appoint the San Francisco Public Defender as his attorney in September 1994, and (2) refusing to appoint Michael Burt as

his attorney in March 1998. (AOB 321-353.) This claim fails, first, because the Sixth Amendment does not give indigent defendants the right to choose their lawyers. Further, the trial court could not appoint the SFPD, because the SFPD did not consent to the appointment, but instead refused to accept it unless certain conditions were met, including a venue transfer out of Orange County, two years to prepare for trial, and approval by San Francisco's mayor and board of supervisors.

Appellant argues that the SFPD's appointment was required under *Harris v. Superior Court*, *supra*, 19 Cal.3d 786, but *Harris* does not support his claim. To begin with, *Harris* does not apply, because the SFPD did not consent to the appointment. Further, *Harris* is distinguishable, because there, the trial court erred by refusing to appoint two attorneys who were already deeply involved in the case, while here, the SFPD's connection to the case was more tenuous. Similarly, the trial court properly declined to appoint Burt in March 1998, because Burt did not consent to the appointment.

A. The Court Did Not Abuse Its Discretion by Declining to Appoint the SFPD in September 1994

1. Procedural history

On January 21, 1994, in response to appellant's latest *Marsden* motion, the Calaveras County Superior Court conditionally relieved Marovich and Webster, pending the appointment of new counsel after the venue transfer. (15 CSCT 5504, 5506; 7 CSRT 2148-2149, 2153, 2159.) On September 19, 1994, after the transfer, appellant and the San Francisco Public Defender jointly filed a notice of "conditional intent" to represent appellant and notice of hearing for "confirmation of representation." (1 OCT 3-18.) In this pleading, appellant asked the court to appoint the SFPD as his attorney. (1 OCT 6-15.) In part, appellant relied on *Harris v. Superior Court*, *supra*, 19 Cal.3d 786. (1 OCT 13.) The pleading asserted

that there was "a virtual guarantee" most of the counts would be transferred to San Francisco, and a substantial likelihood that all of them would. (1 OCT 14.)

The SFPD then sent the court a letter, dated September 20, 1994, enumerating its conditions for accepting the appointment. (1 OCT 137-138.) They included (1) sufficient funding; (2) a "guarantee" of sufficient time to prepare for trial; and (3) "[a] forum convenient to this office trying the case." (1 OCT 137.) The SFPD suggested San Francisco as a convenient forum. (*Ibid.*) The SFPD also explained that, under the San Francisco County Charter, any tentative agreement would require ratification by the SFPD, the San Francisco Board of Supervisors, and San Francisco's mayor. (1 OCT 138.)

In its response, the prosecution asserted that the court had discretion to appoint the SFPD, as long as the assigned attorney—presumably Michael Burt—could be ready for pretrial motions and trial within a reasonable time. (1 OCT 45, 49-50.)

On September 28, defense counsel and the SFPD filed a status report. (1 OCT 72-81.) They identified three "administrative and logistical" issues that required resolution before the SFPD could accept the appointment: (1) the procedure for compensation; (2) the procedure for providing ancillary defense funds under section 987.9; and (3) an "assurance" of at least two years to prepare for trial. (1 OCT 76-79.) They also requested a thirty-day continuance to resolve these issues. (1 OCT 80.)

On September 30, the parties made their first appearance in the Orange County court, and the court heard the motion. (1 OCT 143-144; 1 RT 20-33.) The court said it did not see a problem with the attorney compensation bills, which to that point had been reviewed and paid, and it did not understand why another 30 days were necessary to arrange a payment system for the ancillary funds. (1 RT 23.) The court also found it

"absolutely unbelievable" that Burt or any other competent capital attorney would need two additional years for trial preparation. (1 RT 24.)

After hearing argument, the court declined to appoint the SFPD. (1 RT 33; 1 OCT 144.) In part, the court explained that the "interests of justice just can't handle another delay of two or more years," and any competent death penalty attorney with the assistance of second counsel should be ready to try the case in a much shorter time. (1 OCT 31-32.) Further, the court noted, Burt and the SFPD had not consented to the appointment and wanted a transfer to San Francisco, but "that decision has been decided adversely to their position." (1 OCT 32.) Finally, even if Burt and the SFPD consented to the appointment, the mayor or the board of supervisors could still abrogate it. (1 OCT 32-33.)

2. The court lacked jurisdiction to appoint the SFPD, because sections 987.2, subdivision (g), and 987.05 precluded it

The Sixth Amendment does not give indigent defendants the right to choose their counsel, nor does our state Constitution. (*Caplin & Drysdale, Chartered v. United States* (1989) 491 U.S. 617, 624 [109 S.Ct. 2646, 105 L.Ed.2d 528]; *People v. Jones* (2004) 33 Cal.4th 234, 244.) Under state law, the appointment of counsel for indigent defendants "rests within the sound discretion of the trial court." (*People v. Horton* (1995) 11 Cal.4th 1068, 1098.) In making such appointments, trial courts must comply with section 987.2. (*People v. Ortiz* (1990) 51 Cal.3d 975, 989, fn. 5.) Section 987.2, subdivision (g) (987.2(g)) grants trial courts discretion to appoint another county's public defender as a defendant's counsel if three conditions are satisfied:

(1) The offenses in the two counties would be joinable for trial if they had taken place in only one county, or the evidence is cross-admissible;

(2) The court finds that the interests of justice and economy favor unitary representation; and

(3) The public defender of the other county consents to the appointment.

The trial court's broad discretion in selecting and appointing counsel is subject to certain limitations; for example, though an indigent defendant generally has no right to choose his lawyer, an abuse of discretion may occur if specific facts and circumstances favor appointing a particular attorney but the court fails to do so. (See *Harris*, *supra*, 19 Cal.3d 786, 797-799.)

Another statute, section 987.05, also limits the trial court's discretion in appointing counsel. Section 987.05 states that the court may only appoint an attorney who can represent that he or she will be ready for trial within the statutory time, or in unusual cases, in a reasonable time as determined by the court.

Here, section 987.2(g) precluded the trial court from appointing the SFPD. Under that statute, the court could not appoint the SFPD unless the SFPD consented. (Pen. Code, § 987.2(g)(3).) But the SFPD did not consent; instead, it told the court it would only accept the appointment under certain conditions. One such condition was "[a] forum convenient to this office trying the case." (1 OCT 137.) This obviously meant the SFPD did not consider Orange County convenient; otherwise, it had no reason to make this demand. After all, the case had just arrived in Orange County on a venue transfer, and there was no reason to anticipate another transfer. Thus, the SFPD was demanding the trial take place outside Orange County, which means it did not consent to the appointment.

Appellant argues that the SFPD did not require a different forum. He points out that the SFPD, in its letter, suggested San Francisco as a convenient forum but did not demand a transfer there. (AOB 343-344.) It

is true that the SFPD did not demand a transfer to San Francisco, but it did require a transfer to *some* other, more convenient forum: Its letter stated that one of "the terms which our office would *require*" was "3. A forum convenient to this office trying the case." (1 OCT 137, emphasis added.) Again, this obviously meant the current forum was not convenient; otherwise, there was no reason to say it.

The SFPD also required the approval of San Francisco's mayor and board of supervisors. (1 OCT 138.) And it was impossible to know whether they would approve, so for this additional reason, the SFPD did not "consent" within the meaning of section 987.2(g).

Further, the SFPD was unwilling to accept the appointment unless the court set a trial date at least two years in the future—which the court was unwilling to do. (1 OCT 79; 1 RT 31-32.) The fact the SFPD would not accept the appointment unless it could dictate the trial schedule means, again, that it did not consent to the appointment. Moreover, it means that the OCPD's appointment was also precluded by section 987.05, because the SFPD could not represent that it would be ready for trial within a reasonable time, as determined by the court.

Appellant argues that the trial court erred by refusing the SFPD's demand for two years to prepare for trial. (AOB 342-343.) This argument is irrelevant, because it does not change the fact that the SFPD failed to consent to the appointment. In any event, the court had good reason to refuse the SFPD's request for two years. By the time the court considered this motion, nine years had already passed since the murders were discovered, and three years had passed since appellant's arraignment. And appellant's new attorneys would have the benefit of all the work Webster and Marovich had already done.

Appellant further argues that the court's refusal to grant two years for trial preparation was unreasonable, because the trial did not actually begin

for another four years. (AOB 342-343.) But that is irrelevant, because a reviewing court can only find an abuse of discretion based on the evidence and arguments before the trial court when it made its ruling. (See *Rebney v. Wells Fargo Bank* (1990) 220 Cal.App.3d 1117, 1141 ["if no prejudice was evident at the time of the ruling, then there was no abuse of discretion"]; cf. *Holland v. Jackson* (2004) 542 U.S. 649, 652 [124 S.Ct. 2736, 159 L.Ed.2d 683] [on federal habeas corpus review, "whether a state court's decision was unreasonable must be assessed in light of the record the court had before it"].)

Appellant also argues that certain other capital cases in Orange County required at least two years of preparation. As support, he lists eight such cases, based on information he received from the California Appellate Project. (AOB 342, & fn. 42.) But this information cannot be considered, because it is outside the record. (*In re Carpenter*, *supra*, 9 Cal.4th at p. 646; *People v. Merriam*, *supra*, 66 Cal.2d at p. 397.) In any event, appellant's comparison with the other cases is invalid, because at the time in question, his case had *already* been pending for three years.

Appellant also argues that section 987.05 required the court to hold an "evidentiary hearing," giving the SFPD the opportunity to show that two years were necessary for trial preparation. He maintains that, if the court had ordered such a hearing, "that showing would certainly have been made." (AOB 341-345.) But that is speculation, which cannot support a claim on appeal. (*People v. Carasi*, *supra*, 44 Cal.4th at p. 1300.)

Moreover, contrary to appellant's assertion, section 987.05 did not require the court to provide an evidentiary hearing for the SFPD to substantiate its demand for two years. Section 987.05 states that the trial court can relieve counsel or impose sanctions if counsel has previously represented that he or she will be ready by a certain date, but then, without good cause, is not ready on that date. Before such sanctions are imposed,

counsel has the right to an evidentiary hearing to show why counsel was not ready by the agreed-upon date.[46] Thus, section 987.05 does not require a hearing to substantiate a time estimate that counsel gives when the trial date is set; instead, it applies when counsel is not ready *after* the allotted time has passed. The statute therefore does not apply here.

In sum, section 987.2(g) precluded the court from appointing the SFPD, because (1) the SFPD did not consent to the appointment, and (2) the court found that the appointment would not serve the interest of justice. (1 RT 31-32; see Pen. Code, § 987.2(g)(2).) Of course, even without section 987.2, the SFPD's refusal to accept the case justified the court's refusal to assign it to them; indeed, it would have been senseless to assign a case—especially one of this magnitude—to counsel who refused to accept it.

3. *Harris v. Superior Court* did not compel the court to appoint the SFPD

Appellant also argues that the court's decision was an abuse of discretion under *Harris v. Superior Court*, *supra*, 19 Cal.3d 786. (AOB 341, 345-349.) But *Harris* is inapplicable, because, as shown above, the appointment was forbidden under section 987.2, and "courts must comply with section 987.2 when appointing counsel to represent indigent criminal defendants . . . ." (*People v. Ortiz*, *supra*, 51 Cal.3d at p. 989,

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[46] The statute states, in part: "In cases where counsel, after making representations that he or she will be ready for preliminary examination or trial, and without good cause is not ready on the date set, the court may relieve counsel from the case and may impose sanctions upon counsel, including, but not limited to, finding the assigned counsel in contempt of court, imposing a fine, or denying any public funds as compensation for counsel's services. Both the prosecuting attorney and defense counsel shall have a right to present evidence and argument as to a reasonable length of time for preparation and on any reasons why counsel could not be prepared in the set time."

n. 5.) In other words, *Harris* does not provide an exception to section 987.2(g).

In any event, even if appellant could satisfy section 987.2(g), *Harris* did not mandate the SFPD's appointment, because *Harris* is distinguishable from this case. In *Harris*, the defendants, Emily and William Harris, were charged in 1976 with numerous felonies in Alameda County. When they first appeared, the court told them that they were entitled to appointed counsel because the public defender had a conflict of interest. The Harrises asked the court to appoint attorneys Leonard Weinglass and Susan Jordan, who had previously been appointed to represent them in municipal court proceedings in the same case. (*Harris*, *supra*, 19 Cal.3d at pp. 788-790.)

Weinglass and Jordan had also previously represented and assisted the defendants in related prosecutions arising out of the defendants' activities with the Symbionese Liberation Army (SLA). (*Harris*, *supra*, 19 Cal.3d at p. 797.) Specifically, Weinglass had represented Emily Harris from October 1975 to August 1976 on a multiple-count indictment in Los Angeles, stemming from the robbery of a sporting goods store. In this capacity, he represented her during a six-week trial and continued representing her and William Harris in the appeal. (*Harris*, *supra*, 19 Cal.3d at p. 797, fn. 10.)

Weinglass had been representing the Harrises almost exclusively since October 1975, and he had coordinated "facts and trial strategies" with the attorneys for eight other individuals charged with activities related to the SLA. Weinglass asserted that in the Alameda case, he would renew many of his strategies and motions from the Los Angeles case. And during the Los Angeles case, he had familiarized himself with "vast amounts of documentary material" that any attorney in the Alameda case would also need to review. Additionally, the Alameda case was likely to share many

witnesses with the Los Angeles case. (*Harris*, *supra*, 19 Cal.3d at pp. 797-798, fn. 10.)

Attorney Jordan had been appointed to represent Emily Harris in 1975 with regard to a firearm charge in federal court. She was "instrumental" in securing Weinglass's services in the Los Angeles case, and she consulted with Emily Harris throughout the nine-month pretrial period in Los Angeles. (*Harris*, *supra*, 19 Cal.3d at p. 798, fn. 10.) Emily Harris considered Jordan to have been her attorney since 1975. (*Ibid.*)

Despite the Harrises' request for Weinglass and Jordan, the court appointed two other attorneys, Ballachey and Mintz, neither of whom had known the Harrises before. (*Harris*, *supra*, 19 Cal.3d at p. 790.) The Harrises asked the court to replace Ballachey and Mintz with Weinglass and Jordan, and Ballachey and Mintz concurred. (*Id.* at pp. 790-791.) The court held a hearing and denied the request. (*Id.* at pp. 791-794.)

The Harrises subsequently filed a petition for writ of prohibition and/or mandate in this Court. (*Harris*, *supra*, 19 Cal.3d at pp. 788-789.) This Court held that the trial court abused its discretion by refusing to appoint Weinglass and Jordan. (*Id.* at p. 799.) According to this Court, the most important factor was Weinglass and Jordan's "prior representation and assistance . . . in related prosecutions arising out of [the Harrises'] alleged activities as members of the so-called Symbionese Liberation Army." (*Id.* at p. 797.) This Court explained that "[t]his experience . . . not only established a close working relationship between petitioners and Attorneys Jordan and Weinglass but also served to provide those attorneys with an extensive background in various factual and legal matters which may well become relevant in the instant proceeding—a background which any other attorney appointed to the case would necessarily be called upon to acquire." (*Id.* at p. 798.)

This Court also relied on Ballachey's and Mintz's "vigorous support" for the revocation of their own appointment. (*Harris*, *supra*, 19 Cal.3d at pp. 798.) This support was primarily based on their "relative unfamiliarity" with the facts and issues, and the necessity of expending "considerable energy and time" to achieve Weinglass's and Jordan's familiarity with the case. (*Id.* at p. 798-799.)

Harris's holding was based on "specific and unusual facts" (*People v. Lancaster* (2007) 41 Cal.4th 50, 70, fn. 5), and its standard is "an exacting one" (*Gressett v. Superior Court* (2010) 185 Cal.App.4th 114, 123). Indeed, respondent has not found any post-*Harris* case that find error under the *Harris* standard.

This case should not result in the first such decision. As mentioned above, *Harris* is inapplicable here because sections 987.2(g) and 987.05 precluded the SFPD's appointment. And even without those statutes, *Harris* is distinguishable, because in *Harris*, attorneys Weinglass and Jordan consented to the proposed appointment, while here, the SFPD did not. (See *Harris*, *supra*, 19 Cal.3d at pp. 789-790.) Further, Burt's prior representation of appellant terminated in 1988, three years before appellant was brought under this state's jurisdiction, and six years before the ruling at issue.[47] (1 CJRT 525, 530-531; 6 CJCT 1983-1984.) Burt did not represent appellant in a preliminary hearing or trial, did not examine any prosecution witnesses, and did not have the opportunity to assess their demeanor under oath. (See *Gressett v. Superior Court*, *supra*, 185 Cal.App.4th at p. 123.)

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[47] Burt did represent appellant on September 27, 1991, at appellant's first appearance after being extradited from Canada. He represented appellant for the sole purpose of that hearing and indicated he would later seek appointment as appellant's attorney, pursuant to *Harris*. (2 CJRT 533-552; 6 CJCT 2043-2044; ACJCT 28.)

Further, there was no indication Burt had devised strategies for the defense, researched pertinent legal issues, or interviewed potential witnesses. The only evidence of Burt's activities was his declaration of October 23, 1991, where he indicated that he had not read much of the discovery or reviewed it with appellant. (1 OCT 64-65, 70.) His need for two years for trial preparation also demonstrated his lack of involvement in the case. And though Burt and the SFPD were representing appellant in San Francisco on murder and attempted-murder charges, the arraignment in that case was not scheduled to take place until after the charges in the instant case were resolved. (*Ng. v. Superior Court* (1992) 4 Cal.4th 29, 32-33, 40-41.)

Thus, "nothing in the record" suggested that Burt's role in this case "was comparable to the extensive involvement of the attorneys in *Harris* in related jury trials, appeals and other proceedings." (*Gressett v. Superior Court*, *supra*, 185 Cal.App.4th at p. 123; see also *People v. Cole* (2004) 33 Cal.4th 1158, 1184, 1186-1187 [trial court did not abuse discretion by refusing to appoint attorney who represented defendant as member of alternate public defender's office and then requested appointment as private counsel].) Consequently, *Harris* was inapplicable here.

B. The Court Did Not Abuse Its Discretion by Declining to Appoint Burt in March 1998

1. Procedural History

On October 10, 1997, in response to appellant's latest *Harris* motion, the court agreed to appoint Burt as appellant's co-counsel, so long as Burt could reach a compensation agreement with Judge Millard, the "987 judge," who was responsible for funding decisions. (2 RT 398, 402; 11 OCT 3700-3701.) Burt told the court that, because of his responsibilities in the SFPD's office, he could not work full time on the case until March 1998. (2 RT 397-398.) To accommodate him, the court

continued the trial by seven months, from February 2, 1998, to September 1, 1998. (2 RT 395, 398, 400-402.)

It turned out that Burt and Judge Millard could not agree on compensation. On January 16, 1998, Burt told the trial court that he had made his best proposal, it had been rejected, and there was not "any further room to move . . . ." (2 RT 424.) Later that day, Burt spoke again with Judge Millard, but they still could not reach an agreement. (2 Sealed RT 437-438.) Afterward, Burt told the court that he had concluded his negotiations with Judge Millard, and though Judge Millard was willing to talk further, Burt had a "serious doubt" they could reach an agreement. (2 Sealed RT 443.)

The disagreement involved the method of compensation: Judge Millard offered to pay Burt a salary, at a rate of $250,000 per year, but Burt insisted on hourly compensation. (Sealed 987.5 RT 2-4.)

A week later, on January 23, 1998, Burt agreed to tell the court by February 6 whether there was any chance he could join the defense team. (2 RT 470.) Apparently, Burt did not contact the court by that date.

Six weeks after that date, on March 20, 1998, Burt told the court he was willing to "explore the possibility" of replacing Kelley as lead counsel, with the rest of the OCPD team remaining in place. (3 RT 572-573.) Burt noted that this would require another meeting with Judge Millard about compensation. (3 RT 573, 579.) Burt further indicated that if he were to replace Kelley, he did not know whether he could be ready by the scheduled trial date of September 1, and he needed time to "report back to the court" whether he could be ready. (3 RT 573-574, 579, 582-583.) Kelley said he was willing to step down in favor of Burt. (3 RT 582.)

The prosecutor said she did not oppose Burt's possible appointment, but the trial should not be delayed. (3 RT 584-584.) In response, Burt explained that he had "not been connected to this case since 1991" and

would still need to review more than 100,000 pages of discovery. (3 RT 584-585.) The court responded that Burt should not accept the appointment unless he could make a good faith estimate that he could be ready by September. (3 RT 585.) Burt replied that he could not commit to the September 1 trial date without taking additional time to consider its feasibility. (3 RT 585-586.) Burt declined to meet again with Judge Millard about compensation. (3 RT 588.) The case proceeded forward with Kelley as lead counsel.

2. There can be no abuse of discretion, because Burt did not consent to the appointment

Appellant maintains the trial court abused its discretion by refusing to appoint Burt on March 20, 1998. (AOB 349-353.) But under *Harris*, there can be no abuse of discretion unless the attorney in question is willing to accept the appointment. (See *People v. Sapp* (2003) 31 Cal.4th 240, 256 [the trial court "must take into account whether the defendant has a preexisting relationship with an attorney *willing to accept appointment*" (emphasis added)].) And here, Burt refused to accept the appointment without a satisfactory compensation arrangement, which he and the court were never able to reach. (See 2 RT 443, 448; 3 RT 570; 2 Sealed RT 443; Sealed 987.5 RT 2-4.) Further, Burt was unwilling to commit to the existing trial date of September 1, 1998—which had *already* been postponed for seven months based on the possibility he would join the defense team. (2 RT 395-402.) Thus, the court could not have abused its discretion under *Harris*, because Burt did not consent to the appointment.

Moreover, the case for Burt's appointment under *Harris* was even weaker in March 1998 than it had been in September 1994. By March 1998, nearly 13 years had passed since the discovery of the murders, 6½ years had passed since appellant first appeared in Calaveras County, and 3½ years had passed since the case arrived in Orange County. By this

point, the OCPD had already been representing appellant for about three years.[48] (See 1 OCT 144.) In contrast, by his own admission, Burt had not been connected to the case since 1991 and would need time to review more than 100,000 pages of discovery. (3 RT 584-585.) This case is thus distinguishable from *Harris*, where the most compelling reason for appointing Weinglass and Jordan was their existing knowledge of the case. (*Harris*, *supra*, 19 Cal.3d at pp. 797-798.)

3. The court had no obligation to grant Burt more time to investigate whether he could commit to the September trial date

Appellant faults the court for declining to give Burt more time to determine whether he could commit to the September 1 trial date. (AOB 350-351.) But appellant does not cite any authority requiring the court to grant more time. Instead, he argues that the court's decision was "contrary to the spirit of" section 987.05. As noted earlier, that statute provides that the court can only appoint counsel who expects to be ready for the preliminary hearing or trial within the statutory time, or in unusual cases, within a reasonable time.

As appellant points out, the statute also provides that "[t]he court may allow counsel a reasonable time to become familiar with the case in order to determine whether he or she can be ready" within the statutorily prescribed time. (Pen. Code, § 987.05.) But that is irrelevant here, because the issue was not whether Burt could be ready within the statutorily prescribed time, which had long since elapsed. (See Pen. Code, § 1049.5.)

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[48] The court appointed the OCPD as appellant's counsel in September 1994. (1 OCT 144; 1 RT 33.) Their tenure was interrupted from August 1996 to February 1997, when Gary Pohlson and George Peters represented him. (6 OCT 2058; 7 OCT 2144.)

What's more, Burt had already had an ample opportunity to determine whether he could be ready by September. Appellant had been trying to have Burt appointed since his extradition to Calaveras County in 1991. (See 2 Sealed CJCT 474(30)-474(33).) And appellant's current motion for Burt's appointment had already been pending for half a year—since September 1997. (11 OCT 3632-3633.) Indeed, in October 1997, the court had continued the trial from February 1998 to September 1998, based on the mere possibility Burt would reach an agreement with Judge Millard and join the defense team. (2 RT 395-402.) In other words, the court had already given Burt ample opportunity to determine whether he could make a good-faith commitment to the existing trial schedule.

Appellant also complains that the court (then Judge Fitzgerald) had been more solicitous of attorney Gary Pohlson, when—during Pohlson's brief tenure as appellant's lead counsel in 1996—he could not estimate when he would be ready for trial. (AOB 351-352.) But that is irrelevant to appellant's *Harris* motion in 1998. And even if it were relevant, the situations are not comparable, because Pohlson was appointed after Judge Fitzgerald's granted appellant's *Marsden* motion, so new counsel was mandatory, while Burt's appointment was discretionary. Also, by March 1998, the urgency of commencing the trial had increased, because another 19 months had passed.

In sum, the trial court did not abuse its discretion by refusing to appoint Burt in March 1998.

C. Any Error Was Harmless

An error of state law is prejudicial only if it is reasonably probable that absent the error, the trial's outcome would have been more favorable to the defendant. (Cal. Const., art. VI, § 13; *People v. Clark* (2011) 52 Cal.4th 856, 941; *People v. Watson, supra,* 46 Cal.2d at p. 836.) It is appellant's burden to show prejudice. (*People v. Johnson, supra,* 47 Cal.3d at p. 591.)

As noted above, the federal Constitution does not give indigent defendants the right to choose their attorneys. (*Caplin & Drysdale, Chartered v. United States*, *supra*, 491 U.S. at p. 624.) Thus, if the trial court abuses its discretion by failing to honor an indigent defendant's request for a specific lawyer, there is no basis for reversal unless it is reasonably probable the defendant would have achieved a more favorable result absent the error. (See *People v. Noriega* (2010) 48 Cal.4th 517, 520, 525 [error in dismissing public defender as defendant's counsel is evaluated under *Watson* standard].)

Here, appellant does not argue that it is reasonably probable the outcome would have been different if the SFPD had represented him; instead he wrongly maintains that the "harmless beyond a reasonable doubt" standard applies. (AOB 353.) Accordingly, he has not stated a claim of prejudice. In any event, there is no basis for concluding that the verdicts would have been different if Burt had represented appellant. Indeed, considering the vigorous and exhaustive defense that the OCPD presented at trial, the alleged errors were harmless beyond a reasonable doubt.

V. THE TRIAL COURT DID NOT VIOLATE APPELLANT'S RIGHT TO SELF-REPRESENTATION BY TERMINATING HIS PRO-PER STATUS AFTER FINDING THAT HE WAS USING IT FOR THE PURPOSE OF DELAY

In May 1998, three and one-half months before the scheduled trial date, the trial court granted appellant's motion for self-representation. Three months afterward, the court terminated his self-representation because he was using it for the purpose of delay. The court offered to reconsider self-representation later, but appellant never renewed his request. He now contends that by terminating his self-representation, the trial court violated his rights under the Sixth Amendment. (AOB 272-297.)

Respondent disagrees. To begin with, appellant has abandoned his claim, because he failed to renew his request for self-representation after the court invited him to do so. Moreover, even if the claim is not abandoned, it still fails, because the court did not abuse its discretion by terminating appellant's self-representation. The court did not abuse its discretion so long as there was substantial evidence supporting its finding that appellant was using self-representation for the purpose of delay. And based on appellant's actions before and during his self-representation, there was substantial evidence to support this finding.

Appellant had tried to delay the proceedings since the case began. In this endeavor, he made endless *Marsden* motions, filed civil lawsuits against his attorneys, filed a complaint against the judge, and refused to cooperate with his attorneys or with mental health experts. Appellant confirmed his strategy of delay when he advised a fellow inmate to make a *Marsden* motion in order to delay that inmate's trial.

Appellant's effort at delay continued after he began representing himself. For example, after assuring the court that, if it granted him self-representation, he was willing to work with the OCPD as his advisory counsel, he quickly turned around and moved to dismiss the OCPD—a request that, if approved, would have significantly delayed his trial. Similarly, after vehemently denying, prior to the *Faretta* grant, that he was mentally incompetent, appellant reversed himself, asserted that he *was* mentally incompetent, and—just two weeks before the scheduled trial date—requested a new competency trial, which would also have resulted in an extended delay. Consistent with these tactics, appellant repeatedly asked the court to continue the hearing on his motion to dismiss, and he sought to continue his long-delayed trial by another six months.

On the day that the court eventually terminated appellant's self-representation, after it became apparent that the proceedings were not going

the way appellant wished, he again requested new counsel and announced that he wanted to file another *Marsden* motion. He also asked to postpone five motion hearings that were scheduled for that day. As an excuse, he complained that he was tired and confused—an assertion that conflicted with the court's explicit observations of him. In short, there was substantial evidence appellant was using self-representation for the purpose of delay, so the court did not abuse its discretion by terminating his self-representation.

A. Appellant Abandoned His Claim by Declining the Court's Invitation to Renew His Request for Self-Representation

1. The history of appellant's self-representation

a. Events preceding the termination of self-representation: March 31, 1998-August 20, 1998

On March 31, 1998—after making 28 *Marsden* motions—appellant filed a motion for self-representation. (18 OCT 6444-6446.) The trial court initially deferred its ruling, because the proceedings were still suspended under section 1368. (3 RT 614.) On April 20, the court reinstated the proceedings. (3 RT 695, 703.) Appellant then reiterated his desire to have Burt replace his current attorneys. Pursuant to *Faretta v. California*, *supra*, 422 U.S. 806, he also said he wanted to represent himself if the court did not discharge his lawyers. (3 RT 703-706.)

The next day, the court denied the *Faretta* motion. The court found that appellant did not really wish to represent himself, and instead, he intended to use self-representation to get Burt appointed and obstruct and delay the proceedings. (3 RT 732-735, 737-741.)

About two weeks later, on May 8, 1998, appellant filed a new *Faretta* motion. (19 OCT 6677-6702.) In it, he accused his attorneys of using the

competency proceedings to discredit his claims against them. (19 OCT 6678; 4 RT 747.) At the hearing, he again reiterated his wish to have Burt appointed. (4 RT 749, 757, 763, 765.) He also said that any attorney whom the court appointed in Orange County would have a potential conflict of interest, because he would want his new lawyer to relitigate "jurisdiction[al] matters"—in other words, venue and vicinage—while the court, in contrast, would want new counsel to prepare for trial. (4 RT 749-750.)

The court denied the *Faretta* motion. The court found that granting self-representation would "start the circle all over again" with "fights" about appellant's advisory counsel, his investigator, and his request for Burt, and such a delay would amount to an obstruction of justice. (4 RT 767-768.)

A week later, on May 15, 1998, appellant filed another *Faretta* motion. (19 OCT 6706-6711.) In it, he said he was "willing to take anybody the court appoint[ed] as [his] advisory counsel and investigators . . . ." (19 OCT 6707, original underlining.) At the *Faretta* hearing, appellant repeated that he was willing to accept anyone as his investigator and advisory counsel. (4 RT 812-814, 819, 833, 842.)

This time, the court granted the *Faretta* motion. (4 RT 835.) The court explained that this *Faretta* motion differed from the previous two, because appellant now said that he wanted to represent himself, and that he only wanted advisory counsel to advise him, understood that Burt was not going to represent him, was willing to accept the OCPD as advisory counsel, and would try his best to work with OCPD and its investigators[49] to be ready for the September 1 trial date. (4 RT 817-820, 833-834.) The

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[49] After the *Faretta* grant, the court approved funding for appellant to have his own investigator. (Sealed OC 987.5 RT 14.)

court appointed the OCPD as advisory counsel and standby counsel. (4 RT 836.) The court cautioned appellant that it would revoke his pro-per status if he tried to delay the trial. (4 RT 844; 19 OCT 6714; see also 19 OCT 6817.)

Less than two weeks later, on May 26, 1998, the OCPD filed a motion to withdraw as advisory counsel and standby counsel. (19 OCT 6719-6752.) The next day, the court denied the motion. (19 OCT 6793; 4 RT 930-931.)

Twelve days later, on June 8, 1998, appellant filed a motion to discharge the OCPD as advisory counsel and standby counsel. (19 OCT 6799-6819.) On June 17, the court denied the motion. (20 OCT 6893; 4 RT 938, 949-950.) In its discussion, the court noted appellant's previous statements, where he had said that he would accept anyone as his advisory counsel. (4 RT 934-937.)

A month later, on July 10, 1998, appellant filed a motion to continue the hearing on the motion to dismiss the information under section 995, which had been pending since the case was in Calaveras County. (20 OCT 6924-6930.) The prosecution opposed a continuance. (20 OCT 6931-6950.) On July 15, appellant filed a supplemental motion to dismiss the information. (20 OCT 6955-6964.) On the same day, court refused to continue the hearing and also denied the motion and supplemental motion to dismiss the information. (20 OCT 6965; 4 RT 984, 988.)

On August 5, 1998, less than a month before the scheduled trial date, appellant filed a motion to transfer counts II through VII—the Dubs, Cosner, Peranteau, and Gerald charges—to San Francisco, or alternatively, to import a jury from there. (20 OCT 7003-7032.) Also that day, appellant filed a motion to continue the trial by six months, to March 1, 1999. (20 OCT 7033-7055.)

Two weeks later, on August 19, 1998, with the trial date just 13 days away, appellant filed a motion for a new competency trial under section

1368. He also asked the court to appoint new counsel for the competency proceeding. (21 OCT 7500-03, 7516-7517; 21 Sealed OCT 7504-7515.) The next day, appellant filed a handwritten request to have Dr. Nievod appointed as a mental health expert. (7 Sealed 987.9 OCT 2082-2106.)

b. The day of termination: August 21, 1998

The following day, August 21, 1998, the court held a hearing on appellant's motion for a new competency trial. (22 OCT 7565-7566.) Appellant asked to call Dr. Nievod to the stand. (5 RT 992-993, 996.) The court denied the request. (5 RT 996-997.) Appellant declared that he was not mentally competent. The court noted that appellant had not even made that claim in his motion for a new competency trial. (5 RT 997.) The court also observed that appellant would only talk to the psychiatrists or psychologists whom he wanted to talk to and refused to talk to the others. The court described this as "a game." (5 RT 998.) Appellant said he needed to talk with "conflict-free counsel." (*Ibid.*) The court replied that he should talk to his advisory counsel, Kelley and Merwin. The court then ordered a short break because it looked like appellant needed one. (*Ibid.*)

After the break, appellant again asked to have Dr. Nievod testify. Appellant now said Nievod would testify about his observations of appellant the previous night. (5 RT 998-999.) According to appellant, this would somehow show that he had been "tired and confused" when he had woken up that morning, and this would explain why he needed to postpone the numerous motions scheduled for hearing that day. (5 RT 998-1000.)

Appellant elaborated that he wanted Dr. Nievod to "verify what had happened to [him] within the last 24 hours," and that he "just [felt] tired and confused today." (5 RT 1001.) The court responded that appellant did not look tired or sound confused. (*Ibid.*) When the court asked appellant what Nievod would "enlighten [the] court about," appellant replied that he would not know until Nievod took the stand. (5 RT 1001-1002.)

The prosecutor argued that appellant was trying to manipulate and delay the proceedings. She pointed out that four motions were scheduled for hearing that day, and there were witnesses present who had traveled great distances for the hearings. (5 RT 1002.) Appellant said he felt "betrayed and deceived" by the OCPD, and this had aggravated his mental anxiety and "ability to concentrate." (5 RT 1010.) The court responded that it had been watching and listening to appellant, and there was nothing wrong with his mental ability. (*Ibid.*)

The court found that appellant's motion for a new competency trial was related to his continuance motion and to *Faretta*, and that he was not preparing for trial and was instead trying to delay it. The court added that there was no question appellant was able to rationally assist counsel or act as his own counsel. (5 RT 1014-1015.) The court denied the motion for a new competency trial and then considered the continuance motion. (5 1015-1016.) In the middle of that hearing, appellant said he wanted to submit a new *Marsden* motion. (5 RT 1040.) The court said it would consider anything appellant submitted. (5 RT 1041.)

Three times, the court asked appellant whether he wanted to continue representing himself, but he did not answer. (5 RT 1054-1055.) Appellant said that he did not know when the motions scheduled for hearing that day would be finished, and he wanted to file more pretrial motions but had no idea when he would finish them. (5 RT 1056-1057, 1063.) The court asked appellant if he could estimate how long the trial would take, and appellant replied that he was "not thinking clearly right now" and was "emotionally upset." (5 RT 1057-1058.) The court ordered a recess and said appellant should think about the court revoking his pro-per status. (5 RT 1058.)

After the recess, the court again asked appellant if he wanted to continue representing himself, and this time, he said he did. The court

again asked him when he would be ready for trial, and he said he would try to be ready in another six months. (5 RT 1062.) Appellant suggested that the court grant him a six-month continuance, and if he were not ready at that time, he would accede to representation by counsel. (5 RT 1062-1063.)

The court said it was thinking of revoking appellant's pro-per status, and it would reconsider a *Faretta* motion if he were ready to represent himself at the time of trial. (5 RT 1064.) The court observed that appellant had not put any thought into preparing for trial. (5 RT 1065.) The court also commented that appellant was engaging in "games within games within games," and observed that appellant had refused to cooperate with Webster and Marovich in Calaveras County or with Kelley in Orange County and had been insincere when he said he was willing to cooperate with the OCPD as his advisory counsel. (5 RT 1066-1067.) The court found that "you are . . . doing everything to avoid trial in the near future," and that "[w]e are at the eve of trial. . . . And you are just trying to obstruct. You are just trying to delay. And that is not allowed." (5 RT 1067-1068.)

The court thus terminated appellant's self-representation and reappointed the OCPD. (5 RT 1068-1069.) The court repeated that if appellant was "ready and able to comply with the rules of court," it would revisit the *Faretta* issue. (22 OCT 7568; 5 RT 1068-1069.) In appellant's presence, the court ordered the sheriff to let him keep his pro-per materials, because he had the option of renewing his *Faretta* motion. (5 RT 1145.)

2. By spurning the court's invitation to renew his *Faretta* request, appellant consented to representation by counsel

Appellant contends the trial court violated his right to self-representation when it terminated his self-representation. (AOB 272-297.) But appellant has abandoned this claim, because the court offered to

reconsider self-representation if appellant requested it later, but appellant never did. (See 5 RT 1064, 1068-1069.)

The Sixth Amendment gives criminal defendants the right to represent themselves. (*Faretta v. California*, *supra*, 422 U.S. at pp. 819-820.) But a defendant who has invoked the right to self-representation can abandon it by acquiescing in representation by counsel. (*People v. Butler* (2009) 47 Cal.4th 814, 825; *People v. Stanley* (2006) 39 Cal.4th 913, 933.) This can occur even after the trial court has erroneously denied a request for self-representation. (*People v. Dunkle* (2006) 39 Cal.4th 913, 909-910; *People v. Tena* (2007) 156 Cal.App.4th 598, 609-610; see also *Stanley*, *supra*, 39 Cal.4th at p. 933 [citing *Dunkle*].) When a defendant has abandoned self-representation, there can be no *Faretta* violation. (*People v. Rudd* (1998) 63 Cal.App.4th 620, 630.)

More specifically, when the trial court has deprived the defendant of self-representation but offers to reconsider the issue later, the defendant abandons any claim of *Faretta* error unless he renews his request. For example, in *People v. Tena* (*Tena*), the defendant told the court he wanted to represent himself. The court replied, "You can't." (*Tena*, *supra*, 156 Cal.App.4th at p. 605.) Three weeks later, at the preliminary hearing before a different judge, the defendant again asked to represent himself. This time, the court denied the request as untimely but told the defendant that he could renew it after the preliminary hearing. The defendant, however, never renewed his request. (*Id.* at pp. 605-606.)

On appeal, the defendant argued that the trial court violated his *Faretta* rights by denying his requests for self-representation. (*Tena*, *supra*, 156 Cal.App.4th at p. 604.) The Court of Appeal rejected this claim. The court held that the defendant had abandoned his request, because he failed to renew it after the trial court had invited him to do so, and therefore, his right to self-representation was not violated. (*Id.* at pp. 610, 612.) The

court explained the defendant "never accepted [the trial court's] invitation to renew his request . . . notwithstanding his demonstrated proclivity to speak for himself . . . ." (*Id.* at p. 610.)

The Second Circuit Court of Appeals made a similar holding in *Wilson v. Walker* (2d Cir. 2000) 204 F.3d 33. In *Wilson*, two weeks before the scheduled trial date, the defendant unequivocally asked to represent himself, but the trial court denied the request, erroneously finding that the defendant had not knowingly and voluntarily waived his right to counsel. (*Id.* at pp. 35, 37-38.) About two weeks later, the trial court appointed him a new attorney, who requested a one-week continuance to review the defendant's prior *Faretta* request. The court granted the continuance but noted that the defendant was behaving in way that would interfere with a fair and orderly trial. Ten days later, the new attorney withdrew from the case, and the court appointed another lawyer. (*Id.* at p. 36.) The court asked the defendant whether the newest lawyer's appointment was agreeable to him, and the defendant made no objection and said nothing about representing himself. There was no further discussion of self-representation during the proceedings, which ended with a conviction. (*Id.* at pp. 36-37.)

In a habeas corpus petition, the defendant claimed that the trial court had violated his Sixth Amendment rights by denying his request for self-representation. (*Wilson v. Walker*, *supra*, 204 F.3d at p. 37.) The Second Circuit, however, held that the defendant had waived his right to self-representation by failing to reassert it after the court initially denied his request. (*Id.* at p. 38.) According to the Second Circuit, after the trial court denied the defendant's request, "the question of self-representation was left open," but the defendant never reasserted his desire to represent himself. (*Id.* at pp. 38-39.) And though the trial court's remarks indicated that it "would have been disinclined" to grant a renewed request, the Second

Circuit was "unwilling to assume that a renewal of [the defendant's] request would have been 'fruitless.'" (*Id.* at p. 38.) Evoking a comparison to the instant case, the court also pointed out that the defendant's silence on self-representation stood "in stark contrast to [his] willingness to assert his perceived rights at other points during the proceedings." (*Id.* at p. 39.)

The Court of Appeal's holding in *People v. Enciso* (1972) 25 Cal.App.3d 49, is also instructive. *Enciso* was a pre-*Faretta* case that involved the right to self-representation under the state Constitution. (*Id.* at p. 55.) In *Enciso*, the defendant moved to represent himself when he pled not-guilty. (*Id.* at pp. 53-54.) The court denied the motion, finding that the defendant was not competent to represent himself. The defendant asked whether he could request self-representation again at the time of trial. The court said that the defendant could make another request, but he never did. (*Id.* at p. 54.)

On appeal, the defendant argued that the trial court violated his right to self-representation, after it originally denied his *Faretta* request, by failing to advise him of his right to self-representation and obtain his waiver of it. (*People v. Enciso*, *supra*, 25 Cal.App.3d at p. 53.) The Court of Appeal rejected this claim. According to the court, the defendant knew that he could renew his request and had ample opportunity to do so; hence, the court could "only assume" that he "elected not to represent himself," and instead "deliberately failed to renew his request for self-representation[,] knowingly and intelligently waiving said right." (*Id.* at p. 54.)

Finally, in *People v. Rudd*, the defendant requested self-representation on the day his trial was set to begin. The trial court granted the request on the condition that the defendant be ready for trial on the next court day. He was not ready the next day, so the court revoked his self-representation. He did not object. (*People v. Rudd*, *supra*, 63 Cal.App.4th at pp. 624-625, 629.) On appeal, he argued that the trial court violated his Sixth Amendment

rights by revoking his self-representation. (*Id.* at p. 625.) The Court of Appeal held that he had waived this claim and acquiesced in representation, because he did not object when the trial court revoked his self-representation. (*Id.* at pp. 628-631, cited with approval in *People v. Dunkle*, *supra*, 39 Cal.4th at p. 909; see also *Evans v. State* (Miss. 1997) 725 So.2d 613, 703-704 [reviewing court had "serious doubt" whether trial court properly terminated defendant's self-representation, but defendant waived claim of error by subsequently acquiescing in representation by counsel].)

Here, when the trial court terminated appellant's self-representation, it explicitly advised him that it was willing to reconsider the issue later. Before actually terminating self-representation, the court stated that "my suggestion is to revoke your pro per status. And if when [*sic*] we start jury trial you think you are ready to represent yourself, I will reconsider a *Faretta* motion. That is my thoughts right now." (5 RT 1064.) After some discussion, the court terminated appellant's self-representation but affirmed its willingness to reconsider the issue later. The court stated, "my initial thoughts that I gave you earlier is what is the court order[s]. Your status is revoked. If you are ready and able to comply with the rules of court, then we will revisit it." (5 RT 1068-1069.) Later that day, the court reiterated that self-representation was not foreclosed: The court said that appellant could keep his pro-per materials at the county jail, "because I gave him the option of making a renewed *Faretta* motion . . . ." (5 RT 1145.)

Hence, the court gave appellant the opportunity to renew his request for self-representation, but he never did so. Consequently, he has abandoned his *Faretta* claim, and there was no Sixth Amendment violation.

Appellant argues that the court's invitation offer to renew his request was "illusory," because it did not contemplate granting him a continuance if self-representation were restored. (AOB 296.) Appellant is incorrect, to

begin with, because he is speculating that the court would have refused to grant him a continuance. Moreover, he was not entitled to another continuance. The court granted his *Faretta* motion on May 15, 1998, so by the time the court terminated his self-representation, he had already had three months to prepare for trial. Further, if self-representation were restored, he would have even more time to prepare during jury selection, which was likely to take a substantial amount of time, and he could continue preparing the defense case during the prosecution's case-in-chief, which was also likely to take substantial time. Similarly, he could continue preparing for the penalty phase throughout the guilt phase.[50]

In addition to this time, appellant had the benefit of *six and one-half years* of investigation and trial preparation by his attorneys. And even before the *Faretta* grant, appellant himself had ample opportunity to prepare for trial: When the proceedings were in Calaveras County, he had used the law library two to three times per week, and based on his pro-per filings in Orange County, it appears he had access to research facilities there as well. (36 RT 8732-8733; 9 Sealed OCT 2927-2940, 3146-3171, 3558-3566, 3787-3797, 6163-6176; 18 OCT 6444-6446; 19 OCT 6677-6702; see *People v. Clark* (1992) 3 Cal.4th 41, 110 [trial court properly conditioned self-representation on defendant's waiver of any continuance, in part, because defendant "had been afforded research facilities for many months, so that he had a full opportunity to prepare independently for trial even while he was represented by counsel"].)

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[50] As it turned out, jury selection took five weeks, and the prosecution's case-in-chief took three weeks. (25 OCT 8459; 31 OCT 10430-10431; 33 OCT 11120; 34 OCT 11426.) All told, the defense began presenting its guilt-phase evidence 11 weeks after jury selection had commenced and its penalty-phase evidence 30 weeks after jury selection had commenced. (25 OCT 8459; 34 OCT 11499.)

Thus, the court's apparent unwillingness to continue the trial if self-representation were restored did not negate its offer to reconsider self-representation. In short, appellant has abandoned his Sixth Amendment claim, and it is not cognizable.

B. The Court Did Not Abuse Its Discretion, Because Substantial Evidence Supported the Court's Finding That Appellant Was Using Self-Representation for the Purpose of Delay

1. There is no right to self-representation when the defendant uses it for the purpose of delay

The "core of the *Faretta* right" is the defendant's right "to preserve actual control over the case he chooses to present to the jury." (*McKaskle v. Wiggins* (1984) 465 U.S. 168, 178 [104 S.Ct. 944, 79 L.Ed.2d 122].) The *Faretta* right only applies to defendants who truly want to represent themselves. (See *People v. Marshall* (1997) 15 Cal.4th 1, 23 ["one of the trial court's tasks when confronted with a motion for self-representation is to determine whether the defendant truly desires to represent himself or herself"].) A defendant who uses self-representation for the purpose of delay is not using it to present a case to a jury. Accordingly, he does not truly want to represent himself within the meaning of *Faretta*, and he has no right to self-representation.

A trial court may therefore terminate self-representation when the defendant's "deliberate dilatory or obstructive behavior threatens to subvert the core concept of a trial. . . or to compromise the court's ability to conduct a fair trial . . . ." (*People v. Carson* (2005) 35 Cal.4th 1, 8 (internal quotation marks omitted).) In other words, self-representation is subject to termination when "delay becomes the chief motive." (*State v. Madsen* (Wash. 2010) 229 P.3d 714, 719, fn. 4.)

Terminating self-representation is a "severe sanction" that "must not be imposed lightly." (*People v. Carson*, *supra*, 35 Cal.4th at p. 7.)

Nevertheless, trial courts possess "much discretion" in doing so, and "the exercise of that discretion will not be disturbed in the absence of a strong showing of clear abuse." (*People v. Welch* (1999) 20 Cal.4th 701, 735, internal quotation marks omitted.) Reviewing courts "accord due deference to the trial court's assessment of the defendant's motives and sincerity as well as the nature and context of his misconduct and its impact on the integrity of the trial . . . ." (*Carson, supra*, 35 Cal.4th at p. 12.) In determining whether a defendant is using self-representation for the purpose of disruption or delay, the court can consider events preceding the defendant's *Faretta* motion. (See *People v. Welch, supra*, 20 Cal.4th at pp. 730-731, 734-735 [trial court did not abuse discretion by denying defendant's request for self-representation based on disruptive behavior in previous court appearances].)

Here, the trial court terminated appellant's self-representation because he was using it for the purpose of delay. (5 RT 1014, 1067-1069; see also 38 OCT 12422, 12508-12515.) The court's conclusion that he was using self-representation for the purpose of delay constituted a finding of fact. (*Hirschfield v. Payne* (9th Cir. 2005) 420 F.3d 922, 927; *United States v. Mackovich* (10th Cir. 2000) 209 F.3d 1227, 1237.) On appeal, findings of fact are upheld as long as they are supported by substantial evidence. (*Haraguchi v. Superior Court* (2008) 43 Cal.4th 706, 711.) Hence, so long as there was substantial evidence that appellant was using self-representation for the purpose of delay, the court did not abuse its discretion by terminating his self-representation.

And there was substantial evidence that appellant was using his self-representation for the purpose of delay. As discussed below, this evidence stemmed from his actions before the *Faretta* grant, after the *Faretta* grant, and on the day the court terminated his self-representation.

2. By the time appellant began representing himself, he had already been conducting a long running campaign to delay his trial

At the hearing where it terminated appellant's self-representation, the court cited appellant's actions before the *Faretta* grant as part of its reason for finding that he was using self-representation for the purpose of delay. For example, while discussing appellant's motion for a renewed competency hearing, the court said it had read "the entire file," and the case had been a "circle"—a term the court frequently used to describe appellant's attempts at delay—from "day one." (5 RT 993-994; see 3 RT 733; 4 RT 767, 822-823, 984-985.) The court also said the "circle" had "started in 1991" when appellant "first opened [his] mouth" and said he wanted Burt. (5 RT 1014.)

Similarly, the court pointed out that appellant had refused to cooperate with Webster and Marovich "from the arraignment on," had objected to the OCPD's appointment, and had refused to cooperate with Kelley. (5 RT 1066.) The court also noted that appellant had gotten Kelley relieved (by Judge Fitzgerald), and then succeeded in having his new counsel dismissed and Kelley reappointed "after another tremendous amount of time and money." (5 RT 1066-1067.) The court explained that this history was "what this case has been all about," and no other case had "been this long from arraignment to the eve of trial." (5 RT 1066, 1068.) Hence, in finding that appellant was using self-representation for the purpose of delay, the court relied, in part, on appellant's actions before the *Faretta* grant.

Appellant's actions before self-representation indeed showed his persistent efforts at delay. These efforts began when appellant fled from San Francisco to Canada, after the attempted shoplifting that led to the discovery of the murders. Appellant's escape delayed this case by six years, until his extradition.

After extradition, appellant's further efforts at delay quickly became apparent. His "campaign against his various attorneys" (*People v. Clark, supra,* 3 Cal.4th at p. 97, fn. 5) began in November 1991, when he made a *Marsden* motion against Webster and Marovich at his first court appearance with them—only a day after he had first met them. (2 CJRT 795-796; 2 Sealed CJCT 633.) In that motion, appellant denounced Webster and Marovich for failing to file various motions and lawsuits, which he had requested in writing just three days before their first meeting. (2 Sealed CJCT 638-640, 642-646.) This showed that from the start, appellant was refusing to make a good faith effort to work with his lawyers to move the case forward. (See *People v. Barnett* (1998) 17 Cal.4th 1044, 1086 [where defendant filed *Marsden* motion 13 days after counsel's appointment, trial court could reasonably conclude that defendant failed to make sufficient efforts to resolve differences with counsel or give counsel sufficient time to demonstrate trustworthiness]; *People v. Crandell* (1988) 46 Cal.3d 833, 860 ["Given the early stage of the proceeding at which defendant rejected [counsel's] assistance, the trial court could reasonably conclude that defendant had not made sufficient efforts to resolve his differences with [counsel]"].)

Appellant followed this initial *Marsden* motion with twenty-eight more: eighteen in the Calaveras County Justice Court, three in the Calaveras County Superior Court, and seven in the Orange County Superior Court.[51] And the absurd complaints in these motions showed that he was not acting in good faith. For example, he complained that:

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[51] In the Calaveras County Justice Court, appellant made *Marsden* motions on November 1, 1991 (2 CJRT 795-796; 2 Sealed CJCT 637-646; ACJCT 29); November 21, 1991 (2 Sealed CJRT 912-938); January 10, 1992 (2 Sealed CJRT 1008-1017); February 7, 1992 (3 Sealed CJRT 1389-1420); February 21, 1992 (3 Sealed CJRT 1463-1490); March 20, 1992 (continued...)

- Counsel communicated with the prosecution and the court without his prior approval—as if such approval were needed—and failed to comply with his instructions, given to counsel just four days earlier, to file eighteen separate motions. (2 Sealed CJCT 652, 656-657.)
- Counsel accepted the court's appointment without first obtaining his consent. (4 Sealed CJCT 1173-1174.)
- Counsel forgot things that he told them due to their old age and possibly their alcohol and drug use. (5 Sealed CJRT 2101.)
- Counsel were allied with the prosecution. (8 Sealed CJRT 3664.)

(...continued)
(4 Sealed CJRT 1540-1567); April 17, 1992 (4 Sealed CJRT 1572-1624); April 24, 1992 (4 Sealed CJRT 1788-1793); September 10, 1992 (5 Sealed CJRT 2078-2120); September 25, 1992 (6 Sealed CJRT 2372-2405); October 2, 1992 (6 Sealed CJRT 2468-2506); October 6, 1992 (6 Sealed CJRT 2525-2555); October 7, 1992 (7 Sealed CJRT 2865-2874); October 8, 1992 (7 Sealed CJRT 2993-3011); October 9, 1992 (8 Sealed CJRT 3147-3161); October 16, 1992 (8 Sealed CJRT 3647-3707); November 3, 1992 (12 Sealed CJRT 4742-4756); November 5, 1992 (13 Sealed CJRT 5077-5186); and November 12, 1992 (15 Sealed CJRT 5676-5704).

In the Calaveras County Superior Court, appellant made *Marsden* motions on December 18, 1992 (1 Sealed CSRT 40-43); June 9, 1993 (6 Sealed CSRT 1612-1621); and July 26, 1993 (granted "conditionally" on September 8, 1993) (8 Sealed CSCT 3045-3119; 7 CSRT 1819-1820). In Orange County, appellant made *Marsden* motions on July 29, 1996 (6 Sealed OCT 2031-2032A; see 1 Sealed RT 142(2)-142(11)); August 9, 1996 (7 Sealed OCT 2091-2098; 1 Sealed RT 156(2)-156(18)); May 27, 1997 (denied June 20, 1997) (9 Sealed OCT 2927-2940; 9 OCT 2941-2942; 2 Sealed RT 334-374); September 9, 1997 (withdrawn October 10, 1997) (10 Sealed OCT 3558-3566; 2 RT 402, 405); January 16, 1998 (denied February 6, 1998) (11 Sealed OCT 3787-3797; 2 Sealed RT 426-447, 478-479); February 23, 1998 (denied March 20, 1998) (12 Sealed OCT 4029-4032A; 3 RT 565; see also 18 Sealed OCT 6163-6164); and April 17, 1998 (3 RT 615-616).

- Counsel agreed to an impossible time frame for the preliminary hearing in order to usurp the case from Burt and Lew. (15 Sealed CJRT 5686.)
- Counsel were participating in a conspiracy to deprive him of his constitutional rights. (2 CSCT 538, 541.)
- Counsel was acting as a "substitute prosecutor." (9 Sealed OCT 2935.)
- Counsel were interviewing witnesses without first obtaining his approval. (10 Sealed OCT 3559-3560.)
- Counsel intentionally gave the prosecution material that could be used to impeach him, and continued filing motions and investigating the case after he "renounced" their representation. (11 Sealed OCT 3788, 3793.)
- Counsel filed motions without Michael Burt's approval. (3 RT 615.)
- Counsel requested a competency trial in order to intimidate him and discredit his claims against them. (19 OCT 6677-6678; 4 RT 747.)

Besides making outlandish complaints, appellant tried to manufacture conflicts to compel his lawyers' dismissal. For example, in April 1992, he filed complaints in the State Bar against Webster and Marovich. He then filed *Marsden* motions where he argued Webster and Marovich should be dismissed because the complaints saddled them with a conflict of interest. (4 Sealed CJCT 1350-1352, 1367-1371; 6 Sealed CJCT 1842-1843, 1846.)

Appellant tried this ploy again as part of a broad campaign to torpedo the preliminary hearing. The preliminary hearing was scheduled for October 6, 1992. (See 15 CJCT 5342.) Webster and Marovich filed a motion to continue the hearing, but on October 2, 1992, the court denied the

motion. (15 CJRT 5330-5341; 6 CJRT 2457-2459.) Without missing a beat, appellant made a *Marsden* motion, stating "I feel compelled to make a *Marsden* motion *given the ruling*." (6 CJRT 2467, emphasis added.) In other words, appellant admittedly made the *Marsden* motion in response to the court's refusal to continue the preliminary hearing.

Not surprisingly, the court denied the *Marsden* motion. (6 Sealed CJRT 2498, 2502.). Appellant responded with a handwritten motion to disqualify the judge, Douglas Mewhinney, which he filed on October 6, the day the preliminary hearing was set to begin. (16 CJCT 5394-5414, 5417-5418; 6 Sealed CJCT 5415-5416.) On the same day, the court ordered the motion stricken. (6 CJRT 2517-2523; ACJCT 49.) Appellant immediately followed up with another *Marsden* motion, stating "*Marsden* [m]otion next. Judge." (6 CJRT 2523; see 6 Sealed CJRT 2525-2555.)

Despite appellant's efforts, the court denied the *Marsden* motion, and the preliminary hearing began as scheduled that day. Appellant continued his onslaught with additional *Marsden* motions on October 7, 8, 9, and 16. (7 Sealed CJRT 2865-2874, 2993-3011; 8 Sealed CJRT 3147-3161, 3647-3707; ACJCT 49-51.)

After the court denied these motions, appellant again tried to cook up a conflict: On October 28, Webster and Marovich informed the court that he was suing them for malpractice and seeking $1 million in damages. (10 CJRT 4345-4346, 4359.) Predictably, appellant argued that because of the lawsuit, Webster and Marovich had a conflict of interest and could not "effectuate their employment . . . ." (10 CJRT 4852.) The court described the lawsuit as an "end run" around *Marsden* and found that it constituted another effort to remove Webster and Marovich from the case. (10 CJRT 4355, 4362; see *People v. Hardy* (1992) 2 Cal.4th 86, 132-133, 138 [in filing frivolous lawsuit against his attorney, "it seems clear" that defendant

"was merely attempting to manufacture a possible conflict of interest to try and delay his trial"].)

The next day, October 29, as the preliminary hearing continued, appellant again tried to manufacture delay by making another motion to disqualify Judge Mewhinney. This time, appellant announced that he was filing a complaint against Judge Mewhinney with the Commission on Judicial Performance, and he argued that Judge Mewhinney must therefore be disqualified. Judge Mewhinney, however, disagreed and struck the motion. (10 CJRT 4383-4385.) Undeterred, appellant made additional *Marsden* motions on November 3, 5, and 12—the last day of the preliminary hearing—and in each of them, he argued that the court should dismiss Webster and Marovich because of the malpractice lawsuit. (12 Sealed CJRT 4743; 13 Sealed CJRT 5069-5071, 5080-5082, 5100, 5130-5131; 15 Sealed CJRT 5677-5678, 5681, 5697-5698.)

As the case moved into the Calaveras County Superior Court, appellant's efforts continued. At his second appearance in the CCSC, on December 18, 1992, he made another unsuccessful *Marsden* motion and again argued that his malpractice lawsuit saddled Webster and Marovich with a conflict of interest. (1 Sealed CSRT 40-43.) On the same day, however, a different judge in the CCSC stayed the lawsuit until the criminal proceedings were finished. That judge described the suit as an "attempt to affect or impact the criminal case." (1 CSRT 54.)

In May 1993, appellant informed the court that he no longer recognized Webster and Marovich as his attorneys and would no longer cooperate with them. (6 Sealed CSCT 2197.) Appellant repeated these sentiments at a *Marsden* hearing on June 19, 1993, but the court observed that he appeared to be cooperating with Webster and Marovich in the courtroom. (6 Sealed CSRT 1612, 1616-1619.)

In August 1993, Marovich informed the court that since May, appellant refused to communicate with him or Webster, and the last three times he had traveled to Folsom Prison to meet with appellant, appellant had refused to see him. (14 Sealed CSCT 4943, 4945.) In April 1994, shortly after the court selected Orange County as the new venue, appellant told the court that he was having psychiatric problems but admitted that he was refusing to see any psychiatrists or psychologists from the Department of Corrections. (16 Sealed CSCT 5719-5721.)

Appellant's attempts at delay continued after the transfer to Orange County. He filed his first *Marsden* motion in Orange County—his 23rd overall—on July 29, 1996, three days before the next scheduled court date, and just 39 days before the scheduled trial date of September 6, 1996. (6 Sealed OCT 2031-2032A; 1 RT 123-124.) On August 2, after a brief hearing, Judge Fitzgerald granted the motion, relieved the OCPD, and appointed Gary Pohlson and George Peters as appellant's lawyers.[52] (1 Sealed RT 142(3)-142(9); 6 OCT 2058.)

The prosecution then filed a motion asking the court to reconsider its ruling. (7 OCT 2061-2090.) This motion included powerful evidence that appellant had been using *Marsden* as a tool for delay. The evidence appeared in a sworn declaration by Dean Weckerle, a deputy sheriff at the Orange County Jail. Deputy Weckerle stated that, on August 1, 1996, the day before the *Marsden* hearing, he saw appellant and another inmate speaking at appellant's cell. He turned on the speaker for appellant's cell so he could hear the conversation. (7 OCT 2081.) During the conversation, appellant told the other inmate that, when the other inmate's trial date

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[52] After the prosecution filed a pleading showing appellant's long history of *Marsden* motions, Judge Fitzgerald admitted that he "had not fully appreciated all the things that that [had] gone on before . . . ." (1 RT 148; see 7 OCT 2061-2090.)

approached, he could make a *Marsden* motion so his case would have to start over again. (7 OCT 2081-2082.) Appellant also told the other inmate that, if he followed this advice, his case would extend into 1997, and he could then make a *Marsden* motion and start over again with new lawyers. Additionally, appellant advised the other inmate that he could make the public defender to do anything he wanted, and that investigators could be instructed to look into superfluous matters. (7 OCT 2082.)

This conversation demonstrated that appellant's long running *Marsden* campaign was part of an effort to delay the proceedings. Additional evidence from Deputy Weckerle reinforced this conclusion. According to Weckerle, during the six months before appellant's July 29 *Marsden* motion, appellant had never refused to participate in a visit from the defense team, but during the week preceding the motion, he refused four visits from them. (7 OCT 2082.) This further demonstrated that appellant contrived the purported conflict.

Similar evidence came from another sheriff's officer, Steve Manning. Manning declared that, according to the jail's records, appellant had never refused to see his attorneys until he did so on July 25 and 26—four days and three days, respectively, before he filed the *Marsden* motion. Further, Manning was responsible for visually monitoring the visiting rooms during attorney-inmate visits, and during appellant's many visits with the defense team, Manning had never seen him show signs of anger or hostility toward them; on the contrary, he "always seemed to have a cordial demeanor toward them." (7 OCT 2085-2087.)

The sheriff's officers thus provided compelling evidence that appellant was carrying out a campaign of delay. And appellant's efforts did not abate. A week after Judge Fitzgerald granted the *Marsden* motion, appellant reversed himself and filed a motion to relieve Pohlson and Peters and reappoint the OCPD. (7 Sealed OCT 2091-2098.) In this motion,

appellant said he could communicate effectively with Kelley.[53] (7 Sealed OCT 2095.) Judge Fitzgerald denied the motion, and its subsequent litigation resulted in a stay of the proceedings and a five-and-a-half-month delay, which finally ended in February 1997, when the Court of Appeal ordered the trial court to reinstate the OCPD as appellant's counsel. (*Ng v. Superior Court*, *supra*, 52 Cal.App.4th at p. 1023; 1 RT 155; 7 OCT 2108.)

Despite getting his wish for the OCPD's reinstatement, appellant soon recommenced his *Marsden* barrage. On May 27, 1997—just three months after the Court of Appeal had granted his request to reinstate Kelley—appellant filed a new *Marsden* motion seeking Kelley's dismissal. (9 Sealed OCT 2927-2940.) Though the "ink [was] barely dry" on the Court of Appeal's decision (9 Sealed OCT 2959), appellant called Kelley a "substitute prosecutor" and listed numerous failings by him, including assertions that he had failed perform tasks that he had, in fact, carried out, like seeking a venue change and challenging appellant's restraints. (9 Sealed OCT 2927-2940; see 2 OCT 230-290 [motion to transfer all counts to San Francisco]; 7 OCT 2294-2265 [motion to remove all shackles], 2403-2431 [motion to transfer counts II to VII to San Francisco].) That *Marsden* motion was denied on June 20, 1997. (2 Sealed RT 372.)

Appellant filed another *Marsden* motion three days before the next court date, which was September 12, 1997. (11 OCT 3631; 10 Sealed OCT 3558-3566.) Again demonstrating his intent to delay, he asked the court to order his lawyers to stop investigating the case, and he argued that counsel should not interview witnesses without his permission. (10 Sealed OCT

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[53] Two years later, appellant explained that he had been unable to work with Pohlson and Peters because they did not intend to seek Judge Fitzgerald's disqualification. (6 Sealed RT 1534.)

3559-3560, 3562-3563.) Appellant withdrew this motion only after the court (1) agreed to appoint Burt as cocounsel if Burt and the presiding judge could agree on Burt's compensation, and (2) continued the trial by seven months, from February 1998 to September 1998. (2 RT 401-402, 406.)

The *Marsden* ceasefire was fleeting: Appellant filed another *Marsden* motion on the date of the next hearing, January 16, 1998. (11 Sealed OCT 3787-3797; 2 RT 407-408.) He again criticized Kelley for continuing to file motions and investigate the case—in other words, for preparing for trial. (11 Sealed OCT 3793.) By censuring his lawyer for preparing for trial, his intent to delay the trial could not have been plainer.

The trial court denied that *Marsden* motion on February 6, 1998, and two and a half weeks later, on February 23, appellant made his next *Marsden* motion, where he again complained that Kelley and cocounsel James Merwin were continuing to file motions. (3 Sealed RT 478-479; 12 Sealed OCT 4029-4032.) The court denied that motion on March 20. (3 RT 565.)

Meanwhile, the court-appointed mental health expert, Dr. Sharma, issued his competency findings, which further indicated that appellant was engaged in a strategy of delay. Dr. Sharma found that appellant's failure to cooperate with his lawyers did not stem from mental illness, and appellant's account of his history with Burt, Webster, Marovich, Kelley, and Merwin was "clearly suggestive of a person who . . . has made a very rational decision based on his interpretation of what is best for him." (18 Sealed OCT 6150-6152.) In other words, appellant made a deliberate decision not to cooperate with his lawyers.

Appellant's calculated refusal to cooperate extended to the defense's mental health experts. Specifically, he refused to speak with three mental health experts whom Kelley had retained for the competency trial.

(19 Sealed OCT 6519-6521.) If this were not enough, appellant "flatly refused" to discuss the facts, evidence, and legal issues with his lawyers. (19 Sealed OCT 6521.)

Thus, there was abundant evidence that, by the time appellant began representing himself in May 1998, he had been carrying out a protracted, methodical campaign to delay his trial. And it did not stop with the *Faretta* grant.

3. Appellant used self-representation to continue his efforts at delay

Appellant made two unsuccessful *Faretta* motions before the court granted him self-representation. At the first *Faretta* hearing, on April 21, 1998, appellant stated that, if the court appointed the OCPD and its staff as his advisory counsel, he would refuse to work with them. (3 RT 731-732.) The court denied this motion, finding that appellant's purpose was to obstruct justice and delay the proceedings, and that appellant did not really want to represent himself. (3 RT 732-735, 740.) Appellant's unwillingness to work with the OCPD was central to this ruling: The court explained that, given appellant's unwillingness to work with the OCPD, granting self-representation would require long delays for hearings to select new advisory counsel, and for new advisory counsel to become familiar with the case and prepare for trial. (3 RT 735, 738.)

The court denied appellant's second *Faretta* motion, on May 8, for similar reasons: Appellant again said he did not want the OCPD as his advisory counsel, and the court explained that under these conditions, self-representation would "start the circle all over again," resulting in delay and an obstruction of justice. (3 RT 766-768.)

A week later, however, appellant told the court what it needed to hear: In a new *Faretta* motion, appellant emphasized that he was "willing to take anybody the court appoints as [his] advisory counsel and

investigators . . . ." (19 OCT 6707, original underlining.) He reiterated this at the *Faretta* hearing, where he said that he was willing to accept anyone as his advisory counsel and investigators, and that he would try his best to work with the OCPD and its investigators, and to be ready for trial by September 1, the scheduled trial date. (4 RT 812-814, 819, 833-834, 842.) Based on the change in appellant's position, the court granted him self-representation and appointed the OCPD as his advisory and standby counsel. (4 RT 835-836.)

But appellant soon revealed his true intentions. Just 24 days after assuring the court that he would accept the OCPD as his advisory counsel, he moved to discharge them. (19 OCT 6799-6819; see 4 RT 852.) And appellant was well aware that obtaining new advisory counsel, standby counsel, and investigators would significantly delay his trial; indeed, on the day of the *Faretta* grant, the court had opined that it would take a new attorney at least six months to determine whether he or she could even advise appellant, and the prosecutor opined that this would take six months to a year. (4 RT 822-824.) Likewise, Burt had previously stated that, if appointed, he would need to review more than 100,000 pages of material. (3 RT 584-586.) Thus, appellant knew that the appointment of new advisory counsel would significantly delay his trial, and his rapid about-face after assuming self-representation demonstrates that he was using self-representation for the purpose of delay.[54]

So does appellant's flip-flop regarding his own mental competency. In the competency proceedings that occurred shortly before the *Faretta* grant, appellant had "denied any incompetency . . . ." (AOB 384.) For

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[54] When the court revoked appellant's self-representation, it found that he had not been sincere when he said he was willing to work with the OCPD as his advisory counsel. (5 RT 1067.)

example, in appellant's *Marsden* motion of January 16, 1998, he argued that Kelley and Merwin had created a conflict of interest by "attacking [his] mental competency . . . ." (11 Sealed OCT 3787.) He also argued that Dr. Anderson's diagnosis—that he was mentally incompetent—was "unreliable or erroneous . . . ." (11 Sealed OCT 3790; see 9 Sealed OCT 3185-3186.) Similarly, at the *Marsden* hearing of February 6, appellant stated that the competency-related pleadings that Kelley and Merwin had filed were "against and "adverse to" his position. (3 Sealed RT 478.) And in his *Faretta* motion of May 8, he asserted that Kelley and Merwin "initiated and misused" the competency proceedings to discredit his claims against them. (19 OCT 6678.) Thus, before the *Faretta* grant, appellant had repeatedly and emphatically denied that he was mentally incompetent.

Appellant changed his tune after he assumed self-representation and the trial date drew near. On August 19, 1998, just 13 days before the scheduled trial date, he filed a motion for a new competency trial, and for new counsel to handle such a proceeding, and he now asserted that he was mentally incompetent. (21 OCT 7500-03, 7516-7517.) The court could reasonably conclude that appellant made this motion for the purpose of delay, because

- he had so recently insisted that he was competent;
- there was no evidence that his mental condition had deteriorated in the three months since the *Faretta* grant;
- the trial date was now imminent;
- the criminal proceedings had been suspended for two and one-half months because of the previous competency proceedings, so appellant knew that renewed competency proceedings would cause more delay;
- he asked for new counsel to represent him in the competency proceedings, and he knew that a new lawyer

would need a significant amount of time to become familiar with the case; and

- he had a long history of delaying tactics.

Thus, appellant's abrupt turnabout regarding his own mental competency constituted strong evidence that he was trying to delay his trial.

Appellant's repeated requests to continue his motion to dismiss under section 995 further supports this conclusion. When the court granted the *Faretta* motion on May 15, appellant asked for a "short continuance" of two to three weeks on the 995 motion, and he said he would be ready to argue it at that time. (4 RT 839.) The court granted him a three-week continuance, to June 5. (4 RT 840.) On May 27, appellant asked for another continuance of 10 days. (4 RT 931.) The court again accommodated him and continued the hearing to June 17. (4 RT 931-932.) On June 17, he asked for another continuance, of 30 days, and the court again agreed and continued the hearing to July 17. (4 RT 938-939, 945-946.) As that date approached, he asked for yet another continuance of two weeks, which the court finally denied. (20 OCT 6924-6930, 6965.) In light of appellant's overall efforts at delay, his repeated requests to continue the 995 hearing further demonstrate his use of self-representation to delay his trial.

So does his motion to continue the trial. After assuring the court that he would try to be ready for the September 1 trial date, he filed a motion to continue the trial by six months. (4 RT 834; 20 OCT 7033-7055.) Of course, seeking a continuance does not inherently show an intent to delay, but in the context of appellant's other actions, his request to postpone his long-delayed trial by another half-year is consistent with such an intent.

Appellant's actions on the day the court terminated his self-representation also demonstrate his efforts at delay. Appellant had five pretrial motions scheduled for hearing that day: a motion to suppress

evidence under section 1538.5 (20 OCT 7056-7143); a motion for disclosure of impeachment evidence (21 OCT 7144-7292A); the motion to transfer counts II through VII to San Francisco or import a jury from there (20 OCT 7003-7032); the motion to continue the trial (20 OCT 7033-7055); and the motion for a renewed competency hearing (21 OCT 7518-7523).

When the proceedings began that day, appellant asked to call Dr. Nievod to testify regarding his motion for a new competency trial. (5 RT 992-993, 996.) After the court denied this request and commented that appellant was trying to take the case in "circles," appellant announced that he was "not competent to proceed." (5 RT 993-994, 996-997.) This was an obvious attempt to halt the proceedings, and a ridiculous assertion given the fact that, for the past three months, he had been representing himself in court and filing his own pleadings.

After the court described appellant's behavior as a "game," appellant said he needed to speak with "conflict-free counsel"—again, a clear attempt at delay, given that appellant's advisory counsel were intimately familiar with the case, while new counsel would have required substantial time to become familiar with it. (5 RT 998.)

Now that the day's proceeding were not turning out the way appellant had hoped, he announced that he needed a postponement of all five motion hearings scheduled for that day, because he felt "tired " and "confused" after going to bed late the previous night. (5 RT 998-1001.) The court, however, observed that appellant did not look tired or sound confused. (5 RT 1001.) And given the court's familiarity with appellant, it was well qualified to make such an assessment. (See *People v. Jones*, *supra*, 53 Cal.3d at p. 1153.) Appellant's attempt to use his sudden and apparently feigned fatigue as justification to terminate the day's proceedings and postpone the five scheduled motion hearings further demonstrates his efforts at delay.

If this were not enough, after the court denied appellant's motion for a renewed competency hearing, he announced that—despite the fact he was representing himself—he wished to make yet another *Marsden* motion. (5 RT 1015, 1040.) When the court asked when his pretrial motions would be finished, he asserted that he wanted to file more motions but had no idea how long it would take. (5 RT 1056-1057.) When the court asked if he had any comments on the expected length of the trial, he fell back on the excuse that he was "not thinking clearly" and was "emotionally upset." (5 RT 1057-1058.)

Thus, there was abundant evidence appellant was using his self-representation for the purpose of delay. His actions while representing himself followed a pattern that had begun years before, and his efforts at delay continued until the moment the court terminated his self representation. In short, substantial evidence supported the trial court's finding that appellant was using self-representation for the purpose of delay, and the court did not abuse its discretion by terminating his self representation.

Appellant maintains that the trial court terminated his self-representation based, in part, on his disruptive conduct in the courtroom, and he argues that this did not justify revocation. (AOB 285-293.) But appellant is wrong, because the court did not terminate his self-representation based on disruptive behavior. The court did state that "not being able . . . and willing to abide by rules of procedure and courtroom protocol is not allowed." (5 RT 1067.) But in context, this statement was part and parcel of the court's overarching concern about delay—which is disruptive. And the court's overall discussion demonstrates that it revoked appellant's self-representation because he was using it for the purpose of delay.

For example, just before making the above-quoted remark, the court said that appellant was "doing everything to avoid trial in the near future." (*Ibid.*) Just afterward, the court stated that "No case has been this long from arraignment to the eve of trial. We are at the eve of trial. . . . And you are just trying to obstruct. You are just trying to delay. And that is not allowed." (5 RT 1068.) The court then referred to *People v. Rudd, supra,* 63 Cal.App.4th 620, where the trial court revoked the defendant's self-representation after he promised he would be ready on the scheduled trial date but failed to do so. (5 RT 1068; *Rudd, supra*, 63 Cal.App.4th at pp. 625, 632-633.) Shortly after mentioning *Rudd*, the court terminated appellant's self-representation. (5 RT 1069.) In short, the court revoked appellant's pro-per status because he was trying to delay his trial.

Appellant also argues that the "unrebutted record" establishes that he was not attempting to delay, but instead was diligently preparing for trial. (AOB 294.) But, as discussed above, there was a wealth of evidence that appellant was using his self-representation for the purpose of delay. Moreover, the question is not whether this Court agrees that appellant was trying to delay; the question is whether the trial court's finding was supported by substantial evidence. And it was.

Appellant further complains that the trial court failed to warn him that his self-representation could be revoked. (AOB 296.) But the court indeed warned him: When it granted his *Faretta* motion, it cautioned him that it would revoke his self-representation if he became disruptive or tried to delay the trial. (4 RT 844; 19 OCT 6714.) Additionally, appellant had signed a *Faretta* waiver, where he acknowledged that the court could terminate his self-representation if he misbehaved during the case or seriously disrupted his trial. (19 OCT 6817-6818.)

Further, on the day the court terminated appellant's self-representation, it warned him that it was considering doing so. It then ordered a break so

appellant and his advisory counsel could "gather [their] thoughts" and respond. (5 RT 1058-1060.) After the break ended and further discussion ensued, the court again warned appellant that it was considering terminating his self-representation, and it again invited him to respond. (5 RT 1064-1065.) In short, appellant had ample warning that the court would terminate his self-representation if he used it for the purpose of delay.

Appellant next argues that the trial court failed to consider alternatives to terminating self-representation. (AOB 296.) This is simply incorrect. As an alternative to termination, appellant asked the court to continue the trial by six months, and asserted that if he were not ready by that date, he would surrender his pro-per status. (5 RT 1063.) The court implicitly rejected this proposal when it revoked his self-representation. (See *In re Estate of Moss* (2012) 204 Cal.App.4th 521, 527, fn. 7 [by sustaining demurrer, trial court implicitly denied claim that demurrer was untimely]; *People v. Percelle* (2005) 126 Cal.App.4th 164, 176 ["In denying what the court characterized as a *Marsden* motion, the court simultaneously, albeit implicitly, denied defendant's *Faretta* request"]; Evid. Code, § 664 [it is presumed that official duty has been regularly performed].) The court thus did consider an alternative to terminating appellant's self-representation.

Moreover, the court acted well within its discretion by rejecting appellant's proposal. The trial was already long delayed: Thirteen years had passed since the murders were discovered, and nearly seven years had passed since appellant's arraignment. And the court had already postponed the trial by seven months based on the mere possibility that Burt would accept the appointment—which did not pan out. Another six-month continuance would have made the delay even more egregious. And given appellant's previous actions, the court had no reason to believe his assertion that he would surrender his pro-per status if he were not ready in another six months.

Further, respondent submits that when a defendant is using self-representation for the purpose of delay, the trial court has no duty to consider alternatives to termination. As discussed earlier, the right to self-representation only applies to defendants who truly want to represent themselves, and under *Faretta*, the right to self-representation is confined to representing oneself at trial. (*Martinez v. Court of Appeal* (2000) 528 U.S. 152, 154 [120 S.Ct 684, 145 L.Ed.2d 597]; *People v. Marshall*, *supra*, 15 Cal.4th at p. 23; see also *McKaskle v. Wiggins*, *supra*, 465 U.S. at p. 178.) A defendant who uses self-representation for the purpose of delay does not want truly want to represent himself at trial, and therefore, he is not *exercising* his right to self-representation. Likewise, a defendant who requests self-representation intending to use it for delay has not actually triggered his rights under *Faretta*. Trial courts should not be required to consider alternatives to revoking self-representation for defendants who have never truly invoked that right, or who are not actually exercising it.

In sum, substantial evidence supported the trial court's finding that appellant was using self-representation for the purpose of delay, and the court thus did not abuse its discretion by terminating his self-representation.

VI. THE TRIAL COURT DID NOT VIOLATE APPELLANT'S RIGHT TO SELF-REPRESENTATION BY INSTRUCTING THE PUBLIC DEFENDER, IN ITS ROLE AS STANDBY COUNSEL, TO CONTINUE PREPARING FOR TRIAL

When the trial court granted appellant's *Faretta* motion, it appointed the OCPD as both standby counsel and advisory counsel. Appellant now contends that the OCPD's actions as standby counsel interfered with his right to self-representation and thus violated his rights under *Faretta*. (AOB 241-272.)

Appellant is incorrect. To begin with, appellant abandoned his right to self-representation by failing to renew his request, despite the court's explicit invitation to do so. Further, the OCPD's purported interference

could not have violated appellant's right to self-representation, because he did not represent himself at trial.

In any event, the record does not support appellant's allegations of interference. Appellant maintains that conflicting instructions from himself and the OCPD caused a mental-health expert to resign, but in fact, she resigned because of a potential conflict between her work with appellant and her work with the OCPD on other cases. Appellant also asserts that the OCPD interfered by interviewing witnesses on topics that differed from those he wanted to develop, but he does not point to anything in the record showing this, nor does he explain how the OCPD's actions prevented him from interviewing witnesses the way he wanted.

A. There Can Be No Sixth Amendment Violation, Because Appellant Abandoned His Right to Self-Representation

When the trial court granted appellant's *Faretta* motion on May 15, 1998, it appointed the OCPD as his advisory and standby counsel. The OCPD objected to this arrangement. (4 RT 836.) During the colloquy, Kelley asked the court how he should proceed as standby counsel if his trial-preparation strategy differed from appellant's approach. Specifically, Kelley asked what would happen if "[w]e say as attorney of record in a standby role we think we need to go down this road and as an advisory counsel we are advising Mr. Ng we have to go down this road. He goes, 'Nope. I am the attorney of record on this case. We go down that road.'" (4 RT 837-838.)

The court responded that the OCPD should continue to prepare the way it had before the *Faretta* grant. The court said, "Go down both roads," and explained, "I foresee the same problems that you are talking about. I want you to do exactly what you have been doing, and that is putting all your resources towards trying this case in Mr. Ng's interest, and you are

going to do that as standby counsel. [¶] As advisory counsel, you are there to advise Mr. Ng." (4 RT 838.)

The court further explained that it was appointing the OCPD as standby counsel because the OCPD had already expended immense time, effort, and resources, which could not "be reproduced or redone within a reasonable period of time." (4 RT 843.) The court noted that appellant had previously initiated numerous hearings, and that if he attempted to disrupt the proceedings or delay his trial, the OCPD would be "back on the case." (4 RT 844.)

About two weeks later, on May 26, the OCPD filed a motion to withdraw as advisory and standby counsel. (19 OCT 6719-6752.) The next day, the court denied the motion. (19 OCT 6793; 4 RT 930-931.) On June 8, appellant filed his own motion to discharge the OCPD as advisory and standby counsel. (19 OCT 6799-6819.) On June 17, the court denied the motion. (20 OCT 6893; 4 RT 938, 949-950.) When the court terminated appellant's self-representation two months later, it reappointed the OCPD. (5 RT 1069.)

Appellant now argues that the trial court violated his right to self-representation by instructing the OCPD, in its role as standby counsel, to continue preparing for trial the way it thought best, not the way he thought best. According to appellant, this violated his *Faretta* rights because (1) the OCPD instructed a mental health expert, psychologist Nancy Kaser-Boyd, to proceed in a manner that differed from appellant's wishes, and this caused her to resign, and (2) the OCPD interviewed witnesses on topics that appellant did not want to develop. (AOB 265-266, 271-272.)

But like appellant's claim regarding the termination of his self-representation, this claim fails because he abandoned his right to self-representation. As discussed in Argument V, part A, *ante*, when a defendant acquiesces in representation by counsel, he abandons any claim

that the trial court improperly denied a request for self-representation or improperly terminated self-representation. In other words, "the Sixth Amendment self-representation right does not exist when a defendant prior to or during trial acquiesces in the assignment or participation of counsel in the defense." (*People v. Rudd*, *supra*, 63 Cal.App.4th at p. 631.) Because the defendant, by acquiescing in representation, abandons any claim regarding the denial or termination of self-representation, then he similarly abandonments any claim that standby counsel interfered with his self-representation. (See *Myers v. Johnson* (5th Cir. 1996) 76 F.3d 1330, 1334 ["Once a pro se defendant . . . acquiesces in substantial participation by standby counsel . . . he abandons his right to later complain that counsel interfered with his presentation of his defense"].)

Here, after the court terminated appellant's self-representation, he never renewed his request, despite the court's explicit invitation to do so, and he therefore acquiesced in representation by counsel. (See Argument V, part A, *ante*.) Because he acquiesced, he has abandoned his claim that standby counsel interfered with his right to self-representation.

B. There Can Be No Sixth Amendment Violation, Because Appellant Did Not Represent Himself at Trial

As discussed above in Argument V, under *Faretta*, the right to self-representation is limited to the right to defend oneself at trial. (*Martinez v. Court of Appeal*, *supra*, 528 U.S. at p. 154; *United States v. Hill* (7th Cir. 2001) 252 F.3d 919, 924 ["the Constitution gives defendants a right to be free of unwanted legal services at trial. And only at trial" (parentheses omitted)].) Here, appellant did not defend himself at trial, because the court had already terminated his self-representation. Because he did not defend himself at trial, the purported interference by standby counsel could not have violated his right to self-representation.

Further, as discussed earlier, appellant was not actually exercising his right to self-representation, because he was using self-representation for the purpose of delay. (See Argument V, part B, *ante*.) Because appellant was not exercising his right to self-representation, standby counsel could not have interfered with it.

C. In Any Event, the Record Does Not Support Appellant's Allegations of Interference

Appellant contends that the OCPD, as standby counsel, interfered with his self-representation. To begin with, appellant asserts that psychologist Nancy Kaser-Boyd resigned from the case because Kelley wanted to use her differently than appellant did. (AOB 263-264, 271-272.) But that was not why Kaser-Boyd resigned; instead, she told appellant that she was working with the OCPD on several *other cases*, and this conflicted with her ability to consult with appellant about his motion to remove the OCPD as his legal advisor.

Specifically, appellant had previously asked Dr. Kaser-Boyd whether she could offer her opinions about him "without fear of losing future work" from the OCPD. (25 Sealed OCT 8587.) In a letter, Kaser-Boyd replied that "it likely would be a conflict of interest for me to carry several open cases with the Orange County Public Defender's Office at the same time that I support your motion to have the Orange County Public Defender's Office removed as legal advisor for you." (*Ibid.*) Kaser-Boyd concluded that it would be better for appellant to have an expert with no potential conflict of interest, and she offered to help him find one. (*Ibid.*)

Two weeks later, in another letter, Dr. Kaser-Boyd reiterated her "firm belief" that there was a conflict between her work with appellant on his motion to remove the OCPD and her work with the OCPD on other cases. She explained that, while she believed she could work with appellant "without regard for [her] other involvements with the [OCPD],"

she thought that appellant would "always wonder" whether she was doing her best job for him, and she recommended he work with an expert, like Dr. Nievod, who did "not have dual interests." (25 Sealed OCT 8588.)

As a "second reason" for declining to assist appellant on his motion, Dr. Kaser-Boyd cited the court's ruling that appellant and the OCPD should use the same experts. (25 Sealed OCT 8588.) Kaser-Boyd considered this arrangement "untenable . . . ." (*Ibid.*)

In short, the Dr. Kaser-Boyd resigned because she detected a conflict between her work on appellant's motion to remove the OCPD and her work with the OCPD on other cases. And while she also cited the requirement that appellant and the OCPD use the same experts, that reason was secondary, and without it, she still would have resigned.

Further, even if Dr. Kaser-Boyd did resign because of conflicting instructions from the OCPD, this would not have violated appellant's right to self-representation. Standby counsel unconstitutionally interferes with a defendant's self-representation by (1) depriving the defendant of "actual control over the case he chooses to present to the jury," or (2) "destroy[ing] the jury's perception that the defendant is representing himself." (*McKaskle v. Wiggins*, *supra*, 465 U.S. at p. 178.) In this case, there could be no such violation for four reasons: First, as discussed above, appellant did not present his case to the jury; the OCPD did, and Kaser-Boyd's unavailability for a trial conducted by the *OCPD* could not have infringed on *appellant's* right to self-representation. Second, appellant has not shown that he intended to call Kaser-Boyd as a trial witness; on the contrary, her resignation pertained to her role in his motion to remove the OCPD. (25 Sealed OCT 8587.) Third, appellant has not shown that the services Dr. Kaser-Boyd was providing could not be obtained from another expert; on the contrary, Kaser-Boyd recommended five other experts as replacements. (25 Sealed OCT 8587-8589.)

And fourth, the record does not show that Dr. Kaser-Boyd was, in fact, unavailable for trial. Kelley later told the court that he was going to try to persuade an expert who had resigned—apparently Kaser-Boyd—to return to the case. (23 OCT 7596.) The record does not indicate whether he succeeded. Kaser-Boyd did not testify at trial, but that does not answer the question, because it is possible she returned to the defense's employ but was never called to testify. Further, even if the standby arrangement somehow prevented Kaser-Boyd from testifying, appellant has not shown that the defense was unable to introduce similar testimony from another expert. Indeed, at the penalty phase, the defense introduced testimony from three other mental health experts: psychiatrists Stuart Grassian and Paul Leung, and psychologist Abraham Nievod. (35 RT 8519; 37 RT 9084-9085; 38 RT 9279.)

Besides claiming that the OCPD caused Dr. Kaser-Boyd to resign, appellant also contends the OCPD interfered with his self-representation by interviewing witnesses on topics that differed from those he wanted to develop. (AOB 265.) But appellant does not cite anything in the record that supports this. He cites the Penal Code section 987.5 transcript at page 52, but nothing there supports his assertion.[55] (AOB 265; Sealed 987.5 RT 52.) Moreover, appellant does not identify the witnesses; specify what topics the OCPD interviewed them about; describe how these topics differed from the subjects he wanted to pursue; or explain how this prevented *him* from interviewing the witnesses the way he wanted. And again, even if such interference occurred, it could not have violated appellant's right to self-representation, because he abandoned that right and did not defend himself at trial.

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[55] Appellant mistakenly refers to this volume as the "987.9" transcript. (AOB 265.)

Appellant also cites several cases to support his argument, but they are distinguishable. To begin with, in most of those cases, the defendant actually represented himself at trial, while here, appellant did not. (See AOB 266-269; *Frantz v. Hazey* (9th Cir. 2008) 533 F.3d 724, 728; *Sherwood v. State* (Ind. 1999) 717 N.E.2d 131, 133-134, 136; *State v. McDonald* (Wash. 2001) 22 P.3d 791, 793.)

In another case appellant cites, *Scarbrough v. State* (Tex.Crim.App. 1989) 777 S.W.2d 83, the trial court denied the defendant's *Faretta* motion because his request was equivocal. (*Id.* at pp. 90-91, & fn. 1; see AOB 268.) The appellate court held that the trial court erred because the defendant's request was unequivocal. (*Id.* at pp. 92-94.) But that is not an issue here, so *Scarbrough* is distinguishable.

Finally, respondent notes that the court here had a compelling reason to appoint the OCPD as standby and advisory counsel, because any other choice would have resulted in an extensive delay. By the time the court granted appellant's *Faretta* motion, thirteen years already had passed since the murders were discovered, six and one-half years had passed since appellant was arraigned, and the trial date was only three and one-half months away. Appointing new lawyers as advisory or standby counsel would have aggravated this delay; as noted earlier, the court and the prosecutor had estimated that it would take a new attorney at least six months to determine whether he or she could even advise appellant, and Burt had stated that if appointed, he would need to review more than 100,000 pages of material. (3 RT 584-586; 4 RT 822-824.) And it was always possible that standby counsel would be required to try the case, so it was imperative that standby counsel be ready to proceed.

In sum, the trial court did not violate appellant's right to self-representation by instructing the OCPD, as standby counsel, to prepare for trial the way it thought best.

VII. THE TRIAL COURT DID NOT VIOLATE APPELLANT'S CONSTITUTIONAL RIGHTS BY DENYING HIS REQUEST TO CALL WITNESSES FOR HIS 31ST *MARSDEN* MOTION OR FAILING TO ORDER THE PUBLIC DEFENDER TO DISMISS HIS LEAD ATTORNEY

Appellant contends the trial court erred by denying his 31st *Marsden* motion, which he made after jury selection began. Appellant specifically argues that (1) the court erroneously denied his request to call Lewis Clapp and Abraham Nievod to testify at the *Marsden* hearing, and (2) the court should have ordered the OCPD to dismiss Kelley as his lead attorney. (AOB 297-320.)

But the court did not err. To begin with, a defendant is not entitled to call witnesses at a *Marsden* hearing, and here, the *Marsden* hearing, together with the overall record, provided the court with an ample basis for deciding appellant's motion. In addition, the record plainly refuted the motion's chief premise: that Kelley insisted on staying on the case at all costs.

Appellant has forfeited his claim that the court should have ordered the OCPD to replace Kelley, because appellant never asked the court to do so. In any event, the claim is meritless, because substitution was not required under *Marsden.*[56]

A. The Court Properly Denied Appellant's Request to Call Witnesses at the *Marsden* Hearing

1. Background: Appellant's 31st *Marsden* motion

On September 14, 1998—seven years after appellant's arraignment—the trial court swore in the first group of prospective jurors.

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[56] In appellant's argument heading, he states that trial court erred regarding his "motions" to dismiss Kelley. (AOB 297.) Despite referring to "motions" in the plural, appellant only challenges the denial of his 31st *Marsden* motion, on September 21, 1998. (AOB 304-320.)

(25 OCT 8459.) The next day, appellant filed his 31st *Marsden* motion ("*Marsden* 31"). (25 OCT 8473; 25 Sealed OCT 8461-8472.) In the motion, appellant asked to call one of his attorneys, Deputy Public Defender Lewis Clapp, as a witness at the *Marsden* hearing. (25 Sealed OCT 8461-8469.)

Appellant also made an "offer of proof" as to Clapp's testimony. According to appellant, Clapp would testify that appellant had tried to cooperate with Kelley; Kelley deferred to the jail staff's explanations of appellant's confinement conditions and disbelieved the things appellant told him about this issue; Kelley undermined appellant's trust in Burt; appellant was not using his *Marsden* motions and other complaints to delay the proceedings; appellant could trust other members of the defense team, but not if they worked under Kelley; appellant became agitated when the subject of Kelley arose; Clapp doubted appellant was mentally competent to cooperate with his attorneys if Kelley stayed on the case; Clapp believed appellant could work with attorneys who were not under Kelley's control; Kelley agreed to the September 1998 trial date knowing he could not be ready by that date; and "substantial impairments" to appellant's representation had already occurred. (25 Sealed OCT 8461-8466.)

Appellant later asked to call other witnesses for the hearing, including psychologist Abraham Nievod. (25 Sealed OCT 8506-8552, 8559-8589.) According to appellant, Dr. Nievod would testify that Kelley's interests were adverse to appellant's interests; Dr. Sharma's report was deficient; appellant's breakdown with Kelley resulted from appellant's mental state; and Kelley contacted Nievod after Nievod made his latest report, and tried to dissuade him from testifying by threatening to rescind his expert-witness retainer. (25 Sealed OCT 8559-8563.)

The *Marsden* hearing took place on September 21, 1998. (6 Sealed RT 1465-1539.) Appellant primarily argued that the breakdown was

Kelley's fault and that Kelley refused to relinquish his appointment, regardless of appellant's best interest. For example, appellant asserted that Kelley was engaging in "deception" because he did not want to be removed from the case (6 Sealed RT 1489); Kelley had instituted the competency proceedings in order to obtain "social history data" that he could use to prevent the court from removing him from the case (6 Sealed RT 1501); Kelley did not want to give the mental health experts information that supported appellant's *Marsden* claim (6 Sealed RT 1504); Kelley was "weakening" the psychological data that supported the theory that Lake was the perpetrator and appellant was not (6 Sealed RT 1505); Kelley tried to prevent the mental health experts from asserting that Kelley should be removed from the case (6 Sealed RT 1507-1508); Kelley "provoked" the conflict with appellant and was "lying his teeth off . . . ." (6 Sealed RT 1522-1523); Kelley did not want to relinquish his appointment, did not want to file a *Harris* motion, and did not want appellant to be tried in the proper vicinage and jurisdiction (6 Sealed RT 1531); and the conflict existed because Kelley wanted to keep the case in Orange County (6 Sealed RT 1535).

Appellant also admitted that before the *Faretta* grant, he had refused to meet with Dr. Nievod, because he thought Kelley would manipulate Nievod's report. (6 Sealed RT 1498.)

In response, Kelley stated that he was proceeding with the investigation despite appellant's refusal to cooperate (6 Sealed RT 1480-1481); appellant's allegations were very broad and were thus difficult to respond to (6 Sealed RT 1494); no expert had ever informed him that he was operating against appellant's best interest (*ibid.*); the experts knew about the problems between him and appellant (6 Sealed RT 1494, 1515-1517); he had an ethical obligation to inform the court that he doubted appellant's mental competency (6 Sealed RT 1502); he still believed

appellant was incompetent (6 Sealed RT 1495-1496); he had no intention of manipulating Dr. Nievod's report, and he simply wanted Nievod to evaluate appellant and report his findings (6 Sealed RT 1502); before the court granted appellant's *Faretta* motion, appellant had refused to meet with the defense's mental health experts (6 Sealed RT 1495, 1503, 1517); appellant had met with Dr. Nievod and other mental health experts after the court granted self-representation but again refused to do so after the court terminated it (6 Sealed RT 1495, 1517); the defense had carried out an extensive investigation and interviewed almost 500 people (6 Sealed RT 1496); Kelley did not insist on staying on the case under all possible circumstances (6 Sealed RT 1503); and no expert had asked him why he was not stepping down (6 Sealed RT 1513-1514).

The court refused to allow appellant to call Clapp. The court explained that much of what appellant sought to elicit was improper opinion testimony; appellant himself could tell the court about the other issues, such as his confinement conditions; and some of the issues that appellant wanted Clapp to testify about required a mental health expert. (6 Sealed RT 1518-1522.) The court also said it was not going to create a conflict between appellant's attorneys, as appellant was trying to do. (6 Sealed RT 1522.) The court did not specifically address appellant's request to call Dr. Nievod.

The court then denied the *Marsden* motion. (6 Sealed RT 1536-1537.) "[G]oing back through the entire file," the court found that appellant was trying to "manufacture a conflict and create delay." (6 Sealed RT 1536.)

2. The court was not required to hear testimony in order to adequately evaluate the *Marsden* motion

Appellant now contends the court deprived him of due process by denying his request to call Clapp and Nievod. Respondent disagrees,

because the court conduced an extensive *Marsden* hearing, which was sufficient for evaluating the motion.

The *Marsden* procedure is well-established, and as this Court has explained, it requires trial courts to give defendants a sufficient opportunity to explain their complaints:

> When a defendant seeks discharge of his appointed counsel on the basis of inadequate representation by making what is commonly referred to as a *Marsden* motion, the trial court must permit the defendant to explain the basis of his contention and to relate specific instances of counsel's inadequacy. A defendant is entitled to have appointed counsel discharged upon a showing that counsel is not providing adequate representation or that counsel and defendant have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result.

(*People v. Cole*, *supra*, 33 Cal.4th at p. 1190, internal citations and quotation marks omitted; accord, *People v. Vines* (2011) 51 Cal.4th 830, 878.) The denial of a *Marsden* motion is reviewed for abuse of discretion. (*Vines*, *supra*, 51 Cal.4th at p. 878.)

There is no California authority requiring courts to allow testimony at a *Marsden* hearing. On the contrary, "a *Marsden* hearing is not a full-blown adversarial proceeding, but an informal hearing in which the court ascertains the nature of the defendant's allegations regarding the defects in counsel's representation and decides whether the allegations have sufficient substance to warrant counsel's replacement." (*People v. Hines* (1997) 15 Cal.4th 997, 1025; accord, *People v. Gutierrez* (2009) 45 Cal.4th 789, 803.) "Once a defendant is afforded an opportunity to state his or her reasons for seeking to discharge an appointed attorney, the decision whether or not to grant a motion for substitution of counsel lies within the discretion of the trial judge." (*People v. Clark, supra,* 52 Cal.4th at p. 912). In reaching its decision, the trial court is entitled to make a credibility

determination between counsel and the defendant. (*People v. Smith* (1993) 6 Cal.4th 684, 697.)

Here, the standard *Marsden* procedure provided a sufficient basis for evaluating appellant's motion, and testimony from Clapp or Nievod was not required. This was appellant's 31st *Marsden* motion overall and his 7th before Judge Ryan. (See 2 Sealed RT 334-374, 426-447, 3 Sealed RT 478-479; 3 RT 565, 615-616; 5 RT 1297-1298; 11 Sealed OCT 3558-3566.) The hearing was two and one-half hours long, and it stretches out over seventy-three pages of reporter's transcript. (25 OCT 8591-8592; 6 Sealed RT 1465-1537.) During the hearing, appellant gave lengthy explanations of his complaints, and Kelley gave extensive responses. (6 Sealed RT 1465-1537.)

Moreover, the court did not base its ruling solely on appellant's complaints and Kelley's responses; it also cited "the entire file . . . ." (6 Sealed RT 1536.) That file included appellant's 30 previous *Marsden* motions and numerous examples of his efforts at delay, which all supported the court's finding that he propounded *Marsden* 31 for the purpose of delay. (See Argument V, part B, *ante*.)

Moreover, the record plainly refuted appellant's chief premise—that Kelley refused to relinquish his appointment under any circumstance and opposed any effort to transfer the case out of Orange County. To the contrary, the record showed that Kelley had previously filed a motion to transfer the entire case to San Francisco, and after the court denied that motion, he filed a motion to transfer six of the charges there. (2 OCT 230-509; 7 OCT 2403-2432.) In addition, Kelley had submitted a declaration supporting appellant's motion for separate counsel to litigate the *Marsden* and *Harris* motions, and in 1998, he supported a proposal to have Burt replace him as lead counsel. (9 Sealed OCT 3173-3176; 3 RT 531-534, 539-540.) Given this record, appellant's contention that Kelley was

desperately holding on to the case regardless of appellant's best interest was plainly untrue.

In short, the trial court was well equipped to evaluate appellant's *Marsden* motion based on the existing record and the long established *Marsden* procedures. And given appellant's history of delay and the plainly meritless nature of his allegations, the court had good reason to conclude that his request to call Clapp to the stand constituted an effort to create conflict between his lawyers. (6 Sealed RT 1521-1522.)

Appellant's claim is similarly meritless regarding the court's refusal to allow him to call Dr. Nievod to the stand. To begin with, appellant has forfeited this claim, because the court did not explicitly rule on his request to call Nievod, and appellant did not press for a ruling. (*People v. Braxton* (2004) 34 Cal.4th 798, 813.) In any event, the court did not need to hear Nievod's testimony, because it already possessed his most recent report, which the defense had filed one month earlier. (21 Sealed OCT 7504-7515.) Moreover, during the *Marsden* hearing, Kelley directly responded to appellant's allegation that he wanted to manipulate Dr. Nievod's findings. (6 Sealed RT 1502.) And "the court was entitled to accept counsel's explanation." (*People v. Smith*, *supra*, 6 Cal.4th at p. 697.)

Appellant cites several cases to support his assertion that he had a constitutional right to call Clapp and Nievod (AOB 314-318), but none of these cases support this conclusion. For example, in *Schell v. Witek* (9th Cir. 2000) 218 F.3d 1017, the defendant made a *Marsden* motion, but the trial court failed to inquire into it or rule on it. (*Id.* at pp. 1021, 1024.) On habeas corpus, the Ninth Circuit ordered an evidentiary hearing to determine (1) the nature and extent of the purported conflict, and (2) whether the purported conflict resulted in ineffective assistance of counsel or the constructive denial of counsel. (*Schell*, *supra*, 218 F.3d at pp. 1027-1028; see *United States v. Cronic* (1984) 466 U.S. 648, 659

[104 S.Ct. 2039, 80 L.Ed.2d 657]; *Strickland v. Washington, supra,* 466 U.S. at p. 687.) *Schell*'s holding does not apply to the instant case, because here, unlike in *Schell*, the trial court did hold a *Marsden* hearing—and a lengthy one at that.[57] (6 Sealed RT 1465-1539.)

Another case appellant cites, *United States v. Musa* (9th Cir. 2000) 220 F.3d 1096, is similar to *Schell*. In *Musa*, like in *Schell*—and unlike here—the trial court erred by failing to hold a hearing on the defendant's motion to substitute counsel. (*Id.* at pp. 1102-1103.)

Appellant also cites *People v. Stankewitz* (1982) 32 Cal.3d 80. (AOB 315-316.) In *Stankewitz*, the defendant's court-appointed attorney told the court that he doubted the defendant's competency to stand trial. Without suspending the proceedings, the court appointed a psychiatrist to examine the defendant. After examining the defendant, the psychiatrist opined that he had a mental defect that prevented him from rationally assisting his current lawyer, but he might be able to cooperate with a different lawyer. The psychiatrist explained that, because of the defendant's mental defect, he experienced delusions about his lawyer. (*Id.* at p. 88.) The trial court found that the defendant could not rationally cooperate with his current lawyer but would be able to cooperate with a different one. Despite this, the court failed to institute competency proceedings or grant the *Marsden* motion. (*Id.* at p. 89.)

On appeal, this Court found that the psychiatrist's testimony provided substantial evidence of incompetency, and the trial court erred by failing to either (1) hold a competency hearing under section 1368, or (2) grant the *Marsden* motion in the hope that a new attorney would not trigger the

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[57] The *Schell* court did make one observation that is pertinent here: It stated that there would be no basis for relief if "the conflict was of Schell's own making . . . ." (*Schell, supra,* 218 F.3d at p. 1026.)

defendant's delusions. (*People v. Stankewitz*, *supra*, 32 Cal.3d at pp. 92-94.) The instant case is distinguishable, because here, unlike in *Stankewitz*, the trial court held a competency trial under section 1368, and it found appellant mentally competent.

Finally, appellant cites *United States v. Gonzalez* (9th Cir. 1997) 113 F.3d 1026, and *United States v. Nguyen* (9th Cir. 2001) 262 F.3d 998. (AOB 316-318.) In *Gonzalez*, the defendant pled guilty under a plea agreement. Before sentencing, he asked the court to appoint new counsel. (*Gonzalez*, *supra*, 113 F.3d at pp. 1027-1028.) In his motion, he alleged that he had not wanted to plead guilty, but his lawyer coerced and physically intimidated him into doing so. At his sentencing hearing, the defendant reiterated that he wanted a new attorney, and that his attorney had forced him to plead guilty by threatening him. He also said that his probation officer had witnessed the threat. The trial court asked defense counsel whether this was true, and defense counsel denied it. The prosecution urged the court to hold a hearing on the motion, but the court simply denied it. (*Id.* at p. 1028 & fn. 1.)

On appeal, the Ninth Circuit held that the trial court had abused its discretion by failing to hold a hearing on the motion. (*Gonzalez*, *supra*, 113 F.3d at pp. 1028-1029.) According to the Ninth Circuit, the trial court's inquiry was inadequate, because the probation officer's testimony might have been dispositive. (*Id.* at p. 1028.)

Gonzalez is distinguishable, because there, the trial court did not hold a hearing on the defendant's complaint, while here, the court held an extensive in-camera hearing. Further, in *Gonzalez*, unlike here, the trial court lacked the benefit of a vast record that refuted the defendant's chief premise and included 30 prior *Marsden* motions and abundant evidence of his efforts to obstruct and delay. Additionally, the defendant in *Gonzalez* was not trying to pit one member of the defense team against another—as

appellant was trying to do here—and the trial court did not already possess a report from the witness whom the defendant wanted to call, as the court here did from Dr. Nievod. Moreover, in *Gonzalez*, the defendant's *Marsden* motion was, in effect, a challenge to the voluntariness of his plea, but no such issue existed here. And finally, Ninth Circuit authority is not controlling in California. (*People v. Camacho* (2000) 23 Cal.4th 824, 837.)

United States v. Nguyen, *supra*, 262 F.3d 998, is also distinguishable. Citing *Gonzalez*, the *Nguyen* court stated that a trial court conducting a motion to substitute counsel should question the defendant and counsel "'privately and in depth'" and should "examine available witnesses." (*Id.* at p. 1004, quoting and citing *Gonzalez*, *supra*, 159 F.3d at p. 1028.) But in *Nguyen*, the trial court failed to hold an in-depth, in-camera hearing, while here, the court did. (*Nguyen*, *supra*, 262 F.3d at pp. 1004-1005.)

Finally, the United States Supreme Court has never held that a defendant has a constitutional right to call witnesses at a *Marsden*-type motion. The court recently stated, in addressing a capital habeas petitioner's statutory right to counsel, that "courts cannot properly resolve substitution motions without probing why a defendant wants a new lawyer." (*Martel v. Clair* (2012) ___ U.S. ___ [132 S.Ct. 1276, 1288, 182 L.Ed.2d 135].) And here, the trial court spent two and one-half hours probing why appellant wanted a new lawyer, which amply satisfied the concern expressed by the high court.

In sum, the trial court did not violate appellant's constitutional rights by precluding him from calling witnesses at the *Marsden* hearing.

B. Appellant Has Forfeited His Argument That the Trial Court Erred by Failing to Order the OCPD to Replace Kelley, and in Any Event, the Claim Is Meritless, Because Substitution Was Not Required under *Marsden*

Appellant also contends the trial court erred in *Marsden* 31 by failing to order the OCPD to dismiss Kelley and replace him with another deputy public defender. (AOB 318-319.) But appellant never asked the court to do this. (25 Sealed OCT 8461-8466, 8506-8552, 8559-8589; 6 Sealed RT 1465-1539.) On the contrary, he wanted "to have the [entire] Orange County Public Defender removed." (6 Sealed RT 1511.) Appellant cannot raise new arguments on appeal, so he has forfeited this claim. (See *People v. Clark*, *supra*, 5 Cal.4th at p. 988, fn. 13; *In re Marriage of King*, *supra*, 80 Cal.App.4th at p. 116.)

In any event, the claim is meritless. The only authority for ordering a substitution was *Marsden*, so to prevail, appellant must show that the court abused its discretion under *Marsden*. But he cannot make such a showing. To begin with, a defendant cannot force a substitution with his own obstinacy; as this Court has stated, the defendant "cannot simply refuse to cooperate with his appointed attorney and thereby compel the court to remove that attorney." (*People v. Michaels* (2002) 28 Cal.4th 486, 523; accord, *People v. Smith, supra,* 6 Cal.4th at p. 697 ["a defendant may not force the substitution of counsel by his own conduct that manufactures a conflict"]; *People v. Berryman* (1993) 6 Cal.4th 1048, 1070 ["'defendant's claimed lack of trust in, or inability to get along with'" counsel is insufficient to compel substitution].)

Here, the trial court found that *Marsden* 31 constituted an attempt "to . . . manufacture conflict and create delay." (6 Sealed RT 1536.) This finding justified denying the motion. Appellant does not maintain that the finding was unsupported by substantial evidence, so his claim fails.

In any event, there was substantial evidence supporting the finding. The court based the finding on appellant's offers of proof and "the entire file"—meaning the case's entire history. (6 Sealed RT 1536) That history provided ample evidence that *Marsden* 31 constituted another attempt to delay the trial. As discussed earlier, appellant had carried out a protracted campaign of obstruction and delay from his initial appearances in Calaveras County to the termination of his self-representation, which occurred one month before *Marsden* 31. (See Argument V, part B, *ante*.)

Numerous incidents in the case's history support the conclusion that *Marsden* 31 constituted an attempt at delay, but two examples are particularly illuminating: In 2006, appellant advised another Orange County jail inmate to make a *Marsden* motion when the inmate's trial date approached, so "the whole case would have to start all over again." (7 OCT 2081-2082.) And in February 1998, the court-appointed psychiatrist, Dr. Sharma, evaluated appellant and found that his failure to cooperate with Kelley was based on "reasons unrelated to mental illness," and that appellant's explanation was "clearly suggestive of a person who not only knows his choices but also has made a very rational decision based on his interpretation of what is best for him." (18 Sealed OCT 6151-6152.) In other words, appellant made a deliberate decision not to cooperate with his lawyers.

Appellant's prior history was not the only evidence demonstrating that *Marsden* 31 constituted an attempt at delay. Further support came from the facts that (1) this was his 31st *Marsden* motion, and (2) he filed it the day after jury selection began. (See *People v. Marshall, supra,* 15 Cal.4th at p. 26 ["Defendant's asserted mental crises, occurring just when the much-delayed trial actually was to begin, support the inference that delay of the trial was one of defendant's objectives"].) Moreover, appellant based his motion on a premise that the record plainly refuted: that Kelley absolutely

refused to relinquish his appointment and insisted on keeping the case in Orange County.

Further, during the *Marsden* hearing, appellant revealed that he would have a conflict with *any* attorney who refused to follow his instructions. Specifically, the court commented that "whomever the lawyer may be, if they don't do what you want them to do, you are going to have a conflict." (6 Sealed RT 1534-1535.) Appellant then replied, "Not just what I want to do. It is what at that time I perceive to be my legal best interests." (6 Sealed RT 1534-1535.)

In other words, appellant admitted he would have a conflict with *any* lawyer who did not litigate the case the way he wanted. But this was inconsistent with the role of counsel: A lawyer's job is not to conduct the defense according to the defendant's instructions; on the contrary, "[w]hen a defendant chooses to be represented by professional counsel, that counsel is 'captain of the ship' and can make all but a few fundamental decisions for the defendant." (*People v. Carpenter* (1997) 15 Cal.4th 312, 376.) Appellant's refusal to accept this basic principle supports the trial court's finding that *Marsden* 31 constituted an attempt to delay the trial and manufacture conflict.

In sum, substantial evidence supported the trial court's finding that appellant made *Marsden* 31 with the intent to delay his trial. Consequently, the court had no duty to order any substitution, much less to order the OCPD to replace Kelley.

C. There Was No Prejudice

An error in denying a *Marsden* motion is reviewed for prejudice. (*People v. Chavez* (1980) 26 Cal.3d 334, 348-349; *Marsden*, *supra*, 2 Cal.3d at p. 126.) Here, given (1) the evidence that appellant made *Marsden* 31 for the purpose of delay, and (2) the motion's manifest lack of

merit, there is no likelihood the court would have granted the motion if Clapp and Nievod had testified.

Moreover, there is no likelihood the verdicts would have been different if the court had ordered a substitution. There was abundant evidence showing appellant's guilt for all 11 murders, and the OCPD conducted an exhaustive investigation and presented a thorough defense at the guilt and penalty phases. (See Statement of Facts, parts B, E, *ante*; Argument IX, part E(3), *post.*) Accordingly, any error in denying the motion was harmless beyond a reasonable doubt.

VIII. THE TRIAL COURT DID NOT DEPRIVE APPELLANT OF DUE PROCESS BY ORDERING HIM TO WEAR A STUN BELT

In April 1997, the defense filed a motion to have all restraints removed from appellant, who until then had been shackled in the courtroom. The trial court denied the motion but ordered the shackles replaced by an electronic stun belt. In October 1998, after jury selection had commenced, the defense filed a motion to have the stun belt removed. The court denied the motion. Appellant now contends the court deprived him of due process and a fair trial by (1) ordering him to wear the stun belt in 1997, and (2) denying his motion to remove it in 1998. According to appellant, there was no manifest need to restrain him in the courtroom.[58] (AOB 392-414.)

Appellant is incorrect, because there was abundant evidence he posed an escape risk. In the past, he had escaped from military custody in Hawaii

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[58] In his argument heading, appellant also states that he was deprived of due process by the use of a cage, which the Calaveras County courts utilized for courtroom security. (AOB 392.) His actual argument, however, only challenges the use of the stun belt in Orange County, not the use of the cage in Calaveras County. (AOB 406-414.) Consequently, he has not presented any cognizable claim regarding the cage. (*Gray v. Walker* (1910) 157 Cal. 381, 386; *Schultz v. Steinberg* (1960) 182 Cal.App.2d 134, 136-137; Cal. Rules of Court, rule 8.204(a)(1)(B).)

and absconded to the mainland; escaped to Canada after his attempted shoplifting in South San Francisco; and tried to escape from Canadian store security guards and used a gun in the effort. Additionally, he had tried to break out of his handcuffs, and he was skilled in martial arts. In any event, there was no prejudice, because appellant did not wear the stun belt while testifying, and the stun belt did not dampen his participation in the proceedings.

A. The Court Did Not Abuse Its Discretion in May 1997 by Ordering Appellant to Wear the Stun Belt Instead of Shackles

1. Procedural history

At appellant's first appearance in Orange County, on September 30, 1994, he was shackled, with his right hand free so he could write. He was also wearing a stun belt. (1 RT 10; 1 OCT 143.) The defense objected to any shackling in the courtroom. (1 RT 8-9.) The prosecutor argued that the Calaveras County courts had found a manifest need to restrain appellant because he was an escape risk. (1 RT 10.) At the defense's request, a deputy sheriff explained how the stun belt worked. (1 RT 10-11.) Judge McCartin, who briefly presided over the case after the transfer, ordered the sheriff to remove appellant's leg cuffs in court but leave the stun belt on. (1 RT 14, 18.) He also suggested holding a hearing to determine whether the stun belt was necessary. (1 RT 14-15, 18.)

On October 21, 1994, before Judge Fitzgerald, defense counsel noted that appellant's restraints had been "relaxed somewhat," and he was not wearing the stun belt. (1 RT 42-43.) On November 4, 1994, appellant appeared in court wearing "Martin chains." (1 RT 49.)

On April 22, 1997, the defense filed a motion to remove all restraints from appellant. (7 OCT 2294-2368.) The defense stated that appellant had been wearing chains during all court sessions, with only his right hand

uncuffed to let him take notes. (7 OCT 2298.) In a written response, the prosecution took no position on the motion but discussed the applicable law and the security factors relation to appellant. (8 Sealed OCT 2546-2619.) The sheriff also filed a response and argued that the court would not abuse its discretion by ordering appellant to wear restraints in the courtroom. (8 OCT 2688-2706.)

On May 9, with Judge Ryan now presiding, the court heard the motion. The defense presented testimony from Burt and Marovich, who both testified that they had never seen appellant create a disturbance in custody or in the courtroom. (2 RT 255, 258-263.) Kelley informed the court that appellant's waist chain was hurting him by "cutting into his waist," and was making it hard for him to concentrate on the proceedings. (2 RT 276.) The court likewise observed that the chain had left marks on appellant. Kelley also said there were marks on appellant's wrist. (2 RT 276-277.)

The court acknowledged that appellant was in discomfort and was not "faking it." (2 RT 277.) Counsel for the sheriff stated that appellant was a security risk and pointed out that a stun belt could be used instead of shackles. (2 RT 278-279.) The defense argued that there was no need for restraints at all, and a stun belt would be distracting. (2 RT 279-289.)

The court found a manifest need for some restraint, based on the threat of escape, and ordered appellant to wear a stun belt instead of shackles. The court noted that the stun belt would be more comfortable than shackles and would not be visible to others. (2 RT 290-291.)

2. It was not an abuse of discretion to find that appellant posed an escape risk

The trial court has "broad power to maintain courtroom security," and its decision to have a criminal defendant restrained in the courtroom is reviewed for abuse of discretion. (*People v. Virgil* (2011) 51 Cal.4th 1210,

1270.) Under state law, a defendant "cannot be subjected to physical restraints of any kind in the courtroom while in the jury's presence, unless there is a showing of a manifest need for such restraints." (*People v. Ward* (2005) 36 Cal.4th 186, 206, internal quotation marks omitted.) Similarly, under the federal Constitution, visible shackles are prohibited unless justified by an essential state interest "specific to the defendant on trial," such as courtroom security. (*Deck v. Missouri* (2005) 544 U.S. 622, 624 [125 S.Ct. 2007, 161 L.Ed.2d 953]; accord, *People v. Virgil*, *supra*, 51 Cal.4th at p. 1270.) The use of restraints *before* trial must also be supported by a showing of need, though the standard is less demanding than the "manifest need" test. (*People v. Fierro* (1991) 1 Cal.4th 173, 220 [addressing the use of shackles at preliminary hearing].) If the required showing is made, the trial court may "order the physical restraint most suitable for a particular defendant in view of the attendant circumstances." (*People v. Duran* (1976) 16 Cal.3d 282, 291.)

The use of restraints is not limited to situations where the record demonstrates that the defendant is a violent person: "Evidence of any nonconforming conduct or planned nonconforming conduct which disrupts or would disrupt the judicial process if unrestrained may warrant the imposition of reasonable restraints . . . ." (*People v. Duran*, *supra*, 16 Cal.3d at pp. 292-293, fn. 11.) A defendant's conduct in custody, whether in the present case or previous cases, can be relevant in determining whether there is a manifest need for restraint. (*People v. Allen* (1986) 42 Cal.3d 1222, 1262-1263 [discussing the restraint of a witness].) Past escapes or attempted escapes, expressed intentions to escape, and the risk of escape are all proper considerations. (*People v. Gamache* (2010) 48 Cal.4th 347, 368-370; *People v. Majors* (1998) 18 Cal.4th 385, 406; *In re Deshaun M.* (2007) 148 Cal.App.4th 1384, 1386-1387.) Additionally, though the defendant's noncustodial violence or pending capital charges

cannot by themselves justify shackling, the court can consider them together with evidence of nonconforming custodial behavior. (*People v. Hawkins* (1995) 10 Cal.4th 920, 944.)

The trial court is not required to hold a formal hearing on the need for restraints. (*People v. Howard* (2010) 51 Cal.4th 15, 28.) Thus, hearsay evidence has repeatedly been found sufficient to support a finding of manifest need. (E.g., *People v. Medina* (1995) 11 Cal.4th 694, 730-731 [representations of prosecutor sufficient]; *People v. Hawkins*, *supra*, 10 Cal.4th at p. 943 [representations of court security supervisor]; *People v. Sheldon* (1989) 48 Cal.3d 935, 945 [hearsay from informant that defendant may possess handcuff key]; *People v. Allen*, *supra*, 42 Cal.3d at pp. 1261-1264 [documents and oral account by prosecutor].) Nevertheless, the court must make an "independent determination based on facts, not rumor or innuendo," and it cannot rely solely on the judgment of jail or court-security personnel. (*Howard*, *supra*, 51 Cal.4th at p. 28.)

These principles also apply to the use of an electronic stun belt, even when it is not visible to the jury. (*People v. Virgil*, *supra*, 51 Cal.4th at p. 1270; *People v. Mar* (2002) 28 Cal.4th 1201, 1219 (*Mar*). Thus, in deciding whether to use a stun belt, the trial court can consider "'the factors that courts have traditionally relied on in gauging potential security problems and the risk of escape at trial.'" (*Virgil*, *supra*, 51 Cal.4th at p. 1270, quoting *Deck v. Missouri*, *supra*, 544 U.S. at p. 629.)

Here, the trial court did not abuse its discretion at the May 1997 hearing by ordering appellant to wear a stun belt. To begin with, appellant had a history of escape and attempted escape. Specifically, he had escaped from military custody in Hawaii after he was arrested for breaking into the Marine armory. (8 Sealed OCT 2570, 2590, 2607-2608, 2611-2612; 8 OCT 2701.) After his escape, he made his way to the mainland and

evaded capture for approximately five months. (8 Sealed OCT 2612-2613; 8 OCT 2701.)

Similarly, appellant managed to flee to Canada after being accused of shoplifting in South San Francisco. (See 33 Sealed OCT 11119.) And after he arrived in Canada, he tried to escape from store security guards when they stopped him for shoplifting. He physically resisted the guards, and during the struggle, he produced a gun and one of the guards was shot in the hand. (8 Sealed OCT 2572; 8 OCT 2693, 2697.) This incident again demonstrated appellant's readiness to escape if given the opportunity. It also showed he was willing to use deadly force.

Consistent with appellant's efforts at escape, there was evidence that on several occasions, he tried to break out of his handcuffs. In Canada, while being transported from the scene of his shoplifting arrest, he was seen "fooling" with the upper portion of his jeans, and a handcuff key was found in his pocket. Canadian authorities concluded that he was trying to retrieve the key in order to break out of his handcuffs. (8 Sealed OCT 2572; 8 OCT 2697.)

Similarly, during appellant's Canadian extradition hearing, while he was in a holding facility waiting to enter the courtroom, security personnel saw him manipulating his shackles. Upon examination, they discovered that he had spread the side of his handcuffs, so that with more time, he would have been able to free the locking device and break out of the handcuffs. (8 Sealed OCT 2573, 2596-2598.) The handcuffs were damaged, requiring the police to reshackle him with a different pair. Sergeant Ray Munro of the Royal Canadian Mounted Police (RCMP) testified that in 22 years of law enforcement experience, he had never heard of anyone else "fidgeting" with handcuffs so they had to be replaced. (8 Sealed OCT 2563, 2600.)

Appellant's interest in disabling his handcuffs continued after his extradition. At a hearing in October 1992, the Calaveras County Justice Court heard testimony regarding shackling and courtroom security. At the end of the hearing, the court found that appellant had secreted a metal envelope clasp at Folsom Prison, where he was being housed. The court did not determine what purpose appellant might use the clasp for, but it found "the fact that it was secreted to be a factor indicating its possible use as for escape. That is, there is no reason to secret something that you do not feel is useful or something that you desire to hide for some purpose." (8 Sealed CJRT 3822-3823.)

While the justice court did not make a specific finding on the clasp's purpose, at a subsequent hearing in the Calaveras County Superior Court, former San Quentin Warden James Park testified that it could be used as a handcuff key. (4 CSRT 1026.) And a prosecution investigator used the same kind of clasp to repeatedly unlock a pair of standard-issue handcuffs. (8 Sealed OCT 2618.) The clasp's possible use for escape becomes even clearer in view of appellant's possession and attempted retrieval of the handcuff key after his arrest in Canada, and his manipulation of his handcuffs during the extradition hearing.

Besides appellant's history of escape and his demonstrated interest in breaking out of handcuffs, there was evidence that he was skilled in martial arts. After his flight from military custody, naval intelligence issued a bulletin stating that he should be considered dangerous and an expert in martial arts. (8 Sealed OCT 2570-2571, 2596.) After his recapture, he told a naval investigator that he had instructed another Marine in martial arts, and he physically threatened this Marine into helping him with the armory theft. (8 Sealed OCT 2607-2608.) Specifically, appellant said, "I . . . told him that I would kick his ass. He knew of my Martial Arts ability since I

had demonstrated for him several times while instructing him." (8 Sealed OCT 2608.)

Further, when appellant was incarcerated in Canada, he possessed martial arts training books in his cell, and he also practiced martial arts there. (8 Sealed OCT 2615; 8 OCT 2694.) According to Canadian prison guards, appellant showed proficiency in martial arts "beyond that of general familiarization." (8 OCT 2694.) It was reported he had "a very substantial kick and was very agile." (8 OCT 2698.) A member of the RCMP's Special Handling Unit saw appellant working out and said he "'was able to walk down a hallway and kick the lights out on the ceiling without missing a step.'" (8 OCT 2694, 2697.)

Appellant's behavior toward his captors further supported the need for restraints. While in Canada, he "would always brush up next to his plain clothes handlers to determine whether or not they were armed." (8 OCT 2698.) After appellant's extradition, Calaveras County Sheriff's Detective Michael Walker noticed that during court appearances, appellant maintained "a constant vigil as to what's going on around him" and would "always observe and take in where security personnel are, what they are armed with, and distances between himself and them." (*Ibid.*) Further, according to Walker, appellant was "very manipulative" and would attempt to get acquainted with his immediate handlers. (*Ibid.*) Canadian prison authorities replaced his handlers with new personnel when they became too familiar with him, and the Calaveras County authorities continued this practice. (*Ibid.*)

Hence, there was abundant evidence that appellant posed an escape risk, based on his history of escape and attempted escape; his willingness to use violence to escape; his demonstrated interest in breaking out of his handcuffs; his skill in martial arts; and his behavior toward his captors.

Consequently, the trial court did not abuse its discretion by ordering him to wear the stun belt.

Appellant, however, argues that the trial court based its ruling "primarily if not solely" on the fact that six years earlier, prison authorities had discovered the envelope clasp concealed in the prison visiting booth he had been using. (AOB 406-407.) According to appellant, this did not justify using the stun belt, because the incident was six years old, and the clasp could not conclusively be linked to him. (AOB 407-408.)

But appellant misconstrues the court's reasoning. The court did not indicate that its ruling was based solely or primarily on the evidence concerning the clasp. The court gave only a brief explanation of its ruling, starting,

> I am thinking out loud. There are an awful lot of people very concerned about Mr. Ng and escapes, and there has to be some reason for that.
>
> ¶ . . . ¶
>
> He has been found with contraband relevant to a possible escape. Now, I can't ignore that. And right now I find there is a manifest [need]. If you can produce evidence to show that there isn't any, fine. But I don't see why the belt, which is available and effective, and I don't think is uncomfortable as you are making it sound, I don't see why it is not an effective restraint, and not visible to anybody. So all of the problems with restraints are addressed by the use of that belt. So that is my finding. There is a manifest need for some restraints.
>
> I don't want him shackled in my courtroom unless I have to. I think the belt will work. And I think he will be able to effectively communicate with counsel, and he won't have people looking at him like he is in chains.

(2 RT 290-291.)

Thus, the court did not indicate that it was basing its ruling solely or primarily on the clasp. The court did not purport to list all the evidence

supporting the ruling, and the fact the court specifically mentioned the clasp did not indicate it was disregarding the other evidence. Indeed, this was not a formal hearing (*People v. Howard*, *supra*, 51 Cal.4th at p. 28), and the court was not required to give a statement of reasons. Moreover, because it is presumed the trial court properly performed its duty, it is also presumed the court considered the relevant evidence in making its decision. (See Evid. Code, § 660; *People v. Gurule* (2002) 28 Cal.4th 557, 602 [presuming the trial court considered certain evidence in denying motion to suppress confession]; *People v. Weaver* (2001) 26 Cal.4th 876, 919 [same]; *In re Patterson* (1962) 58 Cal.2d 848, 853 [presuming the trial court considered probation report in declaring juvenile to be a ward of the court].)

Further, even assuming the court based its ruling solely on the clasp, and further assuming that the clasp alone failed to justify using the stun belt, the overall evidence still showed that the court's decision was correct, and "a correct decision of the trial court must be affirmed even if it is based on erroneous reasons." (*People v. Braeseke* (1979) 25 Cal.3d 691, 700, accord, *People v. Zapien* (1993) 4 Cal.4th 929, 976.)

Finally, appellant argues that the court erred because it considered the stun belt less restrictive than shackles. (AOB 408.) It is true that the court considered the stun belt less onerous than appellant's shackles: The court stated that it did not want appellant shackled; that unlike shackles, the stun belt would not be visible to others; and that appellant would be able to communicate effectively while wearing the stun belt. (2 RT 291.) It is also true that, according to *People v. Mar*, trial courts should not presume that stun belts are "always, or even generally, less onerous or less restrictive" than "more traditional security measures . . . ." (*Mar*, *supra*, 28 Cal.4th at p. 1228.) But the *Mar* court only offered this statement to provide guidance "in future trials," and the statement did not apply to trials that occurred before *Mar*. (*Id.* at pp. 1225-1226; accord, *People v. Virgil*, *supra*, 51

Cal.4th at p. 1271 ["The trial court was not required to foresee . . . the concerns detailed in" *Mar*].) Appellant's trial took place before *Mar*, so the court here did not err by considering the stun belt less onerous than chains.

Moreover, *Mar* merely said that courts should not presume that stun belts are *always* less onerous than chains. (*Mar*, *supra*, 28 Cal.4th at p. 1228.) Here, the court did not make such a presumption; instead, the court ordered appellant to wear the stun belt only after learning that his chains were hurting him. (2 RT 276-277, 290-291.) In other words, the court found the stun belt less burdensome based on appellant's particular circumstances, not on a presumption that stun belts are always less onerous. Accordingly, even if this aspect of *Mar* were retroactive, it would not clash with the ruling here.

B. The Court Did Not Abuse Its Discretion in October 1998 by Denying the Defense's Motion to Remove the Stun Belt

On October 14, 1998, while jury selection was proceeding, the defense filed a motion to remove the stun belt. (31 OCT 10213-10413.) The defense argued that (1) a stun belt distracts the wearer, can be activated unintentionally, and poses a medical risk, and (2) there was no manifest need for appellant to be restrained. (31 OCT 10238-10256.)

In a written response, the prosecution said it had nothing new to offer since the 1997 ruling. (31 OCT 10411-10412.) The Orange County Marshal also filed a response that contained no new information. (33 OCT 11002-11014.)

On October 23, the court heard the motion. Psychiatrist Stuart Grassian testified for the defense and opined that the stun belt impaired appellant's ability to pay attention in court. (12 RT 2885, 2893, 2895.) According to Dr. Grassian, appellant had a tendency toward obsessional

thinking, and when he became obsessed with a thought, he developed "tunnel vision" and could not pay sufficient attention to other things. (12 RT 2893-2895, 2897-2898.) More specifically, the stun belt made appellant feel "an enormous sense of shame" and "degradation," which "tend[ed] to flood his consciousness . . . ." (12 RT 2897-2898.) Appellant told Dr. Grassian that when he wore the stun belt, he would become preoccupied with it, and this would render him unable to speak or address "whatever he was trying to deal with at that moment."[59] (12 RT 2892.) The court responded that it had seen appellant "talk almost without stopping for 45 minutes," and it did not believe that anyone in the courtroom had perceived the effect that appellant described to Dr. Grassian. (12 RT 2893.)

Dr. Grassian further opined that shackles would affect appellant the same way as the stun belt. (12 RT 2895, 2898-2899.) He admitted, however, that he had never seen appellant in court. (12 RT 2895.)

In a written ruling, the court denied the motion. (33 Sealed OCT 11118-11119.) The court explained that

- Dr. Grassian's opinion was inconsistent with the court's observations of appellant, and it was apparent that appellant understood all the proceedings. Additionally, the court did not understand why Grassian failed to distinguish between restraint by chains and restraint by a hidden stun belt. (33 Sealed OCT 11118.)
- The evidence from the 1997 hearing supported the need for the stun belt. That evidence included appellant's escape from military custody in Hawaii; his flight to Canada after being

[59] This statement was admitted to show the basis for Dr. Grassian's opinion, not to prove the truth of the matter asserted. (12 RT 2892.)

accused of shoplifting in South San Francisco; his fight with the Canadian security guards who tried to arrest him for shoplifting; and the fact he shot one of them during the struggle. (33 Sealed OCT 11119.)

- It appeared that appellant was proficient in martial arts. (33 Sealed OCT 11119.)
- At the 1997 hearing, appellant said the chains were irritating his waist and wrists. (33 Sealed OCT 11119.)
- Documents filed since the 1997 hearing showed that (1) when appellant was imprisoned in Canada, he discussed escape with Maurice Laberge; (2) at Leavenworth prison, appellant discussed "busting out" another inmate after his release; and (3) a coworker at Dennis Moving saw appellant climb up an elevator shaft, and another coworker saw him kick the ceiling. (33 Sealed OCT 11119.)

This ruling was not an abuse of discretion. The same factors that justified the court's 1997 ruling—appellant's history of escape and attempted escape; his use of a gun in the attempted escape; his interest in breaking out of his handcuffs; his proficiency in martial arts; and his behavior toward his captors—still justified the use of the stun belt in 1998. Nothing had changed since the previous ruling. Indeed, the court now possessed evidence that appellant had discussed escape with other inmates.

Further, the court was not required to credit the testimony of Dr. Grassian, who had never seen appellant in the courtroom. In contrast, during the 17 months that appellant had been wearing the stun belt, the court had interacted with him numerous times—often at great length.[60]

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[60] Examples of such exchanges occurred on June 20, 1997 (2 Sealed RT 334-374); April 20, 1998 (3 RT 703-722); April 21, 1998 (3 RT 723-

(continued...)

This included the three-month period when appellant represented himself. The court was thus well equipped to determine whether the stun belt rendered appellant unable to pay attention in court, and it had good reason to reject Dr. Grassian's testimony. (Cf. *People v. Jones*, *supra*, 53 Cal.3d at p. 1153 ["the trial court may appropriately take its personal observations into account in determining whether there has been some significant change in the defendant's mental state"].)

In short, the court had an ample basis for continuing to find a manifest need for the stun belt.

Appellant argues that the justifications for restraining him had grown stale. Specifically, he asserts that his escapes and attempted escapes had taken place at least 13 years earlier, the reports of his martial arts skills were even older, and there was no evidence since 1991 supporting the need for the stun belt. (AOB 409.) But the justifications for considering him an escape risk had not grown obsolete. During the intervening years, appellant had been incarcerated under stringent security. The fact he did not try to escape when his captors made meticulous efforts to prevent it did not indicate that he no longer posed an escape risk. Further, appellant's multiple acts of escape and attempted escape, together with his interest in breaking out of his handcuffs, showed a predilection that was unlikely to dissipate over time.

(...continued)
741); May 8, 1998 (4 RT 744-772); May 15, 1998 (4 RT 797-849); May 27, 1998 (4 RT 881-896, 903-905, 919-926, 930-932; 4 Sealed RT 906-912); June 17, 1998 (4 RT 933-940, 943-946, 950-951; 4 Sealed RT 955-956, 960-964); July 15, 1998 (4 RT 965-970, 973-985, 988-990); August 21, 1998 (5 RT 992-1016); September 15, 1998 (6 RT 1400-1414); September 21, 1998 (6 Sealed RT 1465-1539); and October 8, 1998 (7 Sealed RT 1624-1649).

Appellant also argues that the trial court, in making its ruling, neglected to address an admission by the State of California in a pending federal lawsuit that there was no evidence he had any martial arts training or was proficient enough to be considered dangerous. (AOB 409.) Appellant's argument must be disregarded, because he does not cite anything in the record to show that the state made such a concession, or that the trial court knew about it. (*Bernard v. Hartford Fire Ins. Co.* (1991) 226 Cal.App.3d 1203, 1205; Cal. Rules of Court, rule 8.204(a)(1)(C).) In any event, even disregarding appellant's skill in martial arts, there was still abundant evidence demonstrating a manifest need for restraints.

C. There Was No Prejudice

Cases assessing prejudice from the unjustified use of a stun belt have focused on the device's effect on the defendant's demeanor while testifying. (*People v. Howard*, *supra*, 51 Cal.4th at pp. 29-30; *Mar*, *supra*, 28 Cal.4th at pp. 1223-1225; see also *People v. Virgil*, *supra*, 51 Cal.4th at p. 1271 ["because defendant did not testify, some of the concerns about psychological impacts discussed in *Mar* are inapplicable"].) Indeed, respondent has not found any California decision finding prejudice where the trial court erroneously ordered the defendant to wear a stun belt, and the defendant did not testify. Here, appellant did not wear the stun belt while testifying, so there is no basis for finding prejudice. (Orange County Record Correction RT 53-54.)

Appellant nevertheless contends there was prejudice because it is reasonably probable the stun belt compromised his ability to participate in the pretrial proceedings and the trial. (AOB 410-411.) But, as discussed in part B of this argument, *ante*, the trial court found that the stun belt did not impair appellant's ability to participate in the proceedings, and the record resoundingly supports this finding. Indeed, on one occasion when appellant was wearing the stun belt, he told the court, "I don't want to be in this

courtroom[,] you give me a 'fucking' short trial, 'fucking' judge." (7 RT 1552.) Clearly, the stun belt did not chill his participation in the proceedings.

Appellant also states that, during his testimony, he wore shackles and the court deployed extra bailiffs equipped with tasers. He maintains that the presence of bailiffs with tasers likely inhibited him the same way a stun belt would. (AOB 413.) But appellant fails to cite anything in the record showing that additional bailiffs were present, or that they were equipped with tasers. His argument therefore fails.

In any event, the record refutes appellant's assertion that there were bailiffs with tasers in the courtroom. During record correction proceedings, Judge Ryan said he did not remember whether there was a bailiff standing behind appellant when appellant testified, but if there had been, Judge Ryan would not have allowed him to have a stun gun. Judge Ryan did not think anyone else in the courtroom had a stun gun either. Prosecutor Sharlene Honnaka had similar recollections: She recalled that "there were no restraints whatsoever" on appellant when he testified, and that neither she nor her fellow prosecutor, Peter Smith, remembered any bailiff standing behind appellant or possessing a stun gun. (Orange County Record Correction RT 53-54.) Thus, the record refutes appellant's contention that there were bailiffs with tasers in the courtroom.

In any event, contrary to appellant's contention, a taser is not like a stun belt. This Court's concern with stun belts has focused on the effect that *wearing* the device has on a defendant, and the danger that the device will accidentally discharge while being worn. (*Mar*, *supra*, 28 Cal.4th at pp. 1219, 1224-1229.) Neither concern applies to a taser.

In sum, whether evaluated under the state-law standard of prejudice or the federal "harmless beyond a reasonable doubt" test (*Mar*, *supra*, 28 Cal.4th at p. 1225 & fn. 7), the purported error was harmless.

IX. THE TRIAL COURT DID NOT ERR UNDER STATE LAW OR THE FEDERAL CONSTITUTION BY ADMITTING MAURICE LABERGE'S PRIOR TESTIMONY FROM APPELLANT'S EXTRADITION HEARING

During the guilt phase, the prosecution sought to introduce a portion of deceased witness Maurice Laberge's testimony from appellant's Canadian extradition hearing. The defense objected that the testimony constituted inadmissible hearsay and violated the Sixth Amendment's confrontation clause. The trial court ruled that the testimony was admissible under the hearsay exception for prior testimony and did not violate the confrontation clause. Appellant now renews his contentions that this testimony constituted inadmissible hearsay under state law and violated his Sixth Amendment right to confrontation. (AOB 414-433.)

Respondent disagrees. The testimony was admissible under the hearsay exception for prior testimony, because Laberge was unavailable at trial, and at the extradition hearing, appellant had the right and opportunity to cross-examine him with a motive and interest similar to those he would have at trial. Further, because the testimony was admissible under the prior-testimony exception, it also satisfied the confrontation clause. In addition, nothing in the Evidence Code or the Sixth Amendment precludes the admission of prior testimony from a foreign extradition hearing. Finally, the purported error was harmless because (1) the most important part of Laberge's testimony concerned the incriminating cartoon drawings that appellant authored in Canada, and they were admissible independent of Laberge's testimony, and (2) even without Laberge's testimony, there was overpowering evidence on all the charges.

A. Appellant's Objections and the Court's Ruling

Before the prosecution began presenting evidence, the defense filed a motion to exclude the prior testimony of the Canadian jailhouse informant,

Maurice Laberge. Laberge had testified at appellant's Canadian extradition hearing but had died in an automobile accident several months before trial. (26 OCT 8668-8693; 20 RT 4761, 4834-4836.) In its motion, the defense argued that Laberge's testimony constituted inadmissible hearsay under state law and did not qualify under the hearsay exception for prior testimony. The defense further argued that the testimony would violate appellant's right to meaningful cross-examination under the Sixth Amendment. (26 OCT 8680-8687, 8691-8693.)

In response, the prosecution explained that it only sought to introduce a small portion of Laberge's prior testimony. Specifically, the prosecution was proffering Laberge's testimony about (1) four cartoon drawings that appellant had given him, and (2) Laberge's own criminal record. The prosecution offered to stipulate to the admission of evidence showing the consideration that Laberge had received for cooperating in this case and another case. It also offered to stipulate to the admissibility of any other impeaching evidence, subject to Evidence Code section 352. (28 OCT 9194.) In response to the defense's objections, the prosecution argued that the prior testimony was admissible under state and federal law. (28 OCT 9193-9201.)

After hearing argument, the court ruled that the testimony was admissible under the hearsay exception for former testimony, and that it satisfied appellant's Sixth Amendment right to confrontation. (7 RT 1611-1622; 29 OCT 9761.) The court also ruled that, even without Laberge's testimony, the cartoon drawings were admissible under the hearsay exception for admissions by a party. (7 RT 1689-1691, 1693.)

The defense later filed additional objections to certain parts of Laberge's testimony. (33 OCT 11080-11116.) The court sustained some of the objections but overruled others. (18 RT 4389-4397; 34 OCT 11314.)

The prosecution subsequently filed documents showing the consideration that Laberge had received. (34 OCT 11396-11423.)

B. The Evidence Introduced At Trial

1. Appellant's cartoon drawings and Laberge's explanations

Pursuant to the court's ruling, part of Laberge's testimony from appellant's extradition hearing was read to the jury. (See 20 RT 4756, 4762-4763.) According to this testimony, Laberge met appellant in early 1986, while they were imprisoned at Edmonton Penitentiary. (20 RT 4775.) They became acquainted in the exercise yard and also had neighboring cells. (20 RT 4776-4777.) For about four or five months, beginning in March 1986, they exercised together in the yard. (20 RT 4778-4779.) Eventually, Laberge began taking notes about their conversations. (20 RT 4780.)

Appellant's and Laberge's cells had adjoining doors, so they were able to pass things to each other. (20 RT 4777.) In this manner, appellant began sending Laberge some cartoons depicting subjects they had discussed in the yard. Laberge eventually forwarded the cartoons to his lawyer. (20 RT 4780-4781.)

One of the cartoons concerned a videotape that appellant had discussed with Laberge. Specifically, appellant told Laberge that he was very concerned about a videotape that the police discovered at Leonard Lake's property. It depicted Kathi Allen and Brenda O'Connor, two of the women appellant and Lake had imprisoned in a cell at Lake's property. (20 RT 4782-4783.) Appellant said that in the videotape, one of the women complained it was too warm, and he then "flicked" open a "butterfly" knife and cut her T-shirt. He also said he went into the shower with the women. (20 RT 4783.)

In addition, appellant told Laberge that during the incident with Allen, he stopped, cooked some rice, and ate it while Lake was "carrying on" with her. (20 RT 4783.) After telling Laberge about this incident, appellant gave him a cartoon drawing depicting it. (20 RT 4783-4784.) Three figures appear in this drawing: appellant, Lake, and a woman. The woman is on a table on her hands and knees, naked and bound at the hands and feet. Lake stands over her, raising a whip with one hand while fondling his penis with the other. He is saying, "'Oh, I love you Kathi, I really do!'" The female is saying, "'Oooch!'" A video camera sits on a tripod, aimed at the female. Appellant is standing behind the tripod, eating from a bowl and saying, "'Rice is ready. Dinner time.'" (20 RT 4757-4758, 4782, 4784; 28 RT 6841; Peo. Exh. 224.) Handwriting analysis, which the prosecution introduced independent of Laberge's testimony, revealed that the words on the drawing were written by appellant.[61] (20 RT 4900.)

Laberge further testified that appellant gave him another cartoon drawing, which depicted an office labeled as the Calaveras County "Remains claiming section." This scene takes place behind a door labeled "coroner." Three people appear in the cartoon; one, a man labeled "Boyd Stevens," is wearing a lab coat and is handing a large bag to another man. The large bag is labeled "Dubs," and Dr. Stevens says to the man, "And this bag I <u>think</u> is yours!" A question mark appears over the other man's head. Behind Dr. Stevens, a smaller bag—labeled "Bond"—is sitting on a table. The third person in the cartoon is a woman dressed in mourning, with black clothing and a veil. She is walking away and holding a bag labeled "Allen," which is smaller than the "Dubs" and "Bond" bags. (Peo.

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[61] At the appropriate time, respondent will designate the cartoon drawing for transmission to this Court. (See Cal. Rules of Court, rules 8.224, 8.634(b).)

Exh. 226, original underscoring; 20 RT 4758-4759, 4784-4785; 28 RT 6841.) Again, handwriting analysis revealed that the words were written by appellant. (20 RT 4902-4903.)

Appellant gave Laberge another cartoon depicting two men labeled "Slant"—Laberge's nickname for appellant—and "Lake." This cartoon contained four frames. In the first two frames, Slant and Lake are carrying a sleeping person on a stretcher. In the third frame, they dump this person—still sleeping—into a bonfire. In the final frame, the victim is engulfed in flames and cries, "'Ah! You mother fuckers!" Slant and Lake stand watching, and Lake laughs, "Hoo! Ha ha!" (Peo. Exh. 228; 28 RT 6841.) Appellant gave this cartoon to Laberge after discussing the procedure that he and Lake used to burn their victims. (20 RT 4785-4786.) As with the other cartoons, handwriting analysis showed the words were written by appellant. (20 RT 4906-4909.)

Appellant gave Laberge another cartoon labeled "San Quentin. . . Years Later." This cartoon depicts a prison cell, where appellant is sitting in a bed. There is a large spider web in the corner. The words "no kill no thrill!" and "no gun no fun" are written on a wall. Pictures of the victims hang on another wall. They include individuals images labeled "Carroll," "Giuletti," "Cosner," Peranteau," "Gerald," and "Allen." In addition, a picture of what looks like a couple with a baby is labeled "Dubs," while another picture of a couple with a baby is labeled "Bond's [*sic*]." (Peo. Exh. 230; 20 RT 4760-4761, 4787-4788; 28 RT 6841.) Appellant gave Laberge this cartoon "near the end" of their discussions about the people appellant had killed. (20 RT 4787.) It was meant to show appellant's life after extradition to the United States. (20 RT 4789-4790.) Handwriting analysis again demonstrated that the words were written by appellant. (20 RT 4904.)

2. Laberge's criminal history and his cooperation in this case

a. Prior convictions; participation in the witness protection program

Sergeant Ray Munro of the Royal Canadian Mounted Police testified that, after appellant's extradition hearing, Laberge entered a witness protection program. As part of the program, Laberge received $36,000 in Canadian money, paid in installments. (20 RT 4789, 4824.) His participation in the program was based on his role in two investigations: appellant's case and an unrelated murder by Daniel Gingras. (20 RT 4865.) The prosecutor in Gingras's case asked that Laberge be placed in the program. (20 RT 4865-4866.) Laberge was a jailhouse informant in Gingras's case and testified that Gingras had confessed to him. (20 RT 4858-4859.)

Laberge's criminal record was extensive and spanned a period from 1968 to 1982. He admitted having more than 40 prior criminal convictions.[62] (20 RT 4765-4770; see also 20 RT 4797.) When he testified at the extradition hearing, he was serving a 25-year sentence for kidnapping, two counts of armed robbery, three counts of unlawful confinement, and use of a firearm to commit an indictable offense. (20 RT 4763, 4770-4771.) These convictions occurred in 1982. (20 RT 4770-4771.)

According to Laberge, the 1982 convictions resulted from a plot to kidnap a store manager and force him to open the store's safe. (20 RT 4771-4772.) To carry out the plan, Laberge and a partner went to the manager's house in Lethbridge, Alberta, intending to kidnap him. When

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[62] Sergeant Munro testified that Laberge had 42 prior convictions. (20 RT 4797.)

they arrived, they encountered the manager's two sons and tied them up at gunpoint. The sons told Laberge that their parents were not home. When the manager and his wife returned home, Laberge tied up the wife and transported the manager to the store at gunpoint. At the store, Laberge forced the manager to open the safe. Laberge took money from the safe and tied up the manager. A few days later, he surrendered himself to the police. (20 RT 4772-4773.) At his trial, he took the stand and denied committing the charged crimes, but at appellant's extradition hearing, he conceded that he had committed them. (20 RT 4773-4774.)

At the extradition hearing, Laberge also testified that he had a tentative release date of February 1989. (20 RT 4774-4775.) At appellant's trial, Sergeant Munro testified that Laberge was released on "day parole" in August 1990 and full parole in 1991. (20 RT 4827, 4863.)

b. The Lethbridge crimes

At trial, the parties entered into several stipulations concerning the Lethbridge crimes. To begin with, they stipulated that Laberge broke into the "M." family's house while armed with a handgun and was convicted of several felonies as a result. (20 RT 4789.) They also stipulated that David M., 15 years old at the time of the crime, would testify that Laberge broke into the house at gunpoint; tied David and his brother up; took David to the bedroom; forced David to orally copulate him by threatening to harm his parents; and then sodomized David. (20 RT 4789-4790.)

The parties also stipulated that Robert M., David's brother, would testify that Laberge carried David into the bedroom; Laberge remained there with David for some time; David told Robert that Laberge had sexually assaulted him; and David later asked the authorities to refrain from charging Laberge with sexual assault because he did not want to testify about it. (20 RT 4790.)

Further, the parties stipulated that Laberge was not charged with sexually assaulting David; Laberge admitted to his brother and a parole officer that he had forced David to orally copulate him; Laberge admitted to four mental health professionals that he had forced David to orally copulate him and had also forcibly placed his finger in David's anus; Laberge had admitted under oath that he committed perjury regarding the Lethbridge crimes but denied sexually assaulting David; and Laberge had, under oath, denied telling anyone, including any parole officer or mental health professional, that he had sexually assaulted David. (20 RT 4789, 4791-4792.) Additionally, Sergeant Munro testified that in 1997, Laberge told him that he had always denied involvement in the sexual assault. (20 RT 4845.)

All this impeachment was presented to the jury at appellant's trial. (20 RT 4763-4775, 4789-4792, 4797-4819, 4824-4834, 4845-4846, 4848-4864.)

C. The Court Did Not Abuse Its Discretion by Ruling That Laberge's Testimony Was Admissible under the Hearsay Exception for Prior Testimony

1. The statute in question: Evidence Code Section 1291

According to the Evidence Code, "'Hearsay evidence' is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (Evid. Code, § 1200, subd. (a).) Hearsay evidence is inadmissible unless it qualifies under an exception provided by law. (Evid. Code, § 1200, subd. (b).) Evidence Code section 1291 (section 1291) provides one such exception. It allows the admission of prior testimony if (1) the witness is unavailable; (2) the evidence is being offered against a party who was also party in the earlier proceeding; and (3) that party had the right and

opportunity to cross-examine the witness, with a similar motive or interest as the party has at trial. (Evid. Code, § 1291, subd. (a)(2).)

The fact that events occurring after the first proceeding might have led counsel to alter the nature and scope of the cross-examination does not render the former testimony inadmissible, because the statute only requires a similar—not identical—motive and interest. (*People v. Alcala* (1992) 4 Cal.4th 742, 784; see also *People v. Carter* (2005) 36 Cal.4th 1114, 1173.) Likewise, the opportunity to cross-examine at the prior proceeding need not be an exact substitute for cross-examination at trial, because "the interests of justice are deemed served by a balancing of the defendant's right to effective cross-examination against the public's interest in effective prosecution." (*People v. Carter*, *supra*, 36 Cal.4th at p. 1173.) When section 1291's requirements are satisfied, the defendant's Sixth Amendment right to confrontation is also satisfied. (*Id.* at pp. 1172-1173.)

Hearsay rulings are reviewed for abuse of discretion. (*People v. Waidla* (2000) 22 Cal.4th 690, 725.) There is no abuse of discretion unless the trial court's decision was "arbitrary, capricious or patently absurd" and resulted in a manifest miscarriage of justice. (*People v. Jordan* (1986) 42 Cal.3d 308, 316.)

2. Testimony given in another country can qualify under the prior-testimony exception

a. Appellant bases his claim on new arguments, which he cannot raise on appeal

Appellant contends that Laberge's extradition-hearing testimony did not qualify under the hearsay exception for prior testimony. (AOB 421-429.) To begin with, he argues that the prior-testimony exception does not encompass testimony given in a foreign country. In support of this argument, he makes the following contentions:

(1) It is presumed that California's laws do not operate beyond California's borders. (AOB 420-421,425-426.)

(2) Section 1291 says nothing to suggest that testimony from a foreign extradition hearing proceeding can qualify under the exception, and Evidence Code sections 105 and 1290 demonstrate that it cannot. (AOB 421-423.)

(3) When the Legislature intended to include foreign matters within the scope of the Evidence Code, it did so explicitly. (AOB 423-424.)

As a threshold matter, some of these arguments are forfeited because appellant never raised them at trial. Concerning the admission of evidence, an appellant may not raise new arguments on appeal; to the contrary, appellate courts "are asked to determine whether the trial court committed error by admitting the [evidence] under the theory before the court at the time; not to readjudicate the issue of admissibility on a new and different theory." (*People v. Von Villas* (1992) 11 Cal.App.4th 175, 233; accord, *People v. Mayfield, supra,* 5 Cal.4th at p. 172 [defendant cannot raise new arguments on appeal to explain why statement was involuntary and why *Miranda* waiver was invalid]; *People v. Hill* (1992) 3 Cal.4th 959, 988-989 [defendant cannot make new argument on appeal to explain why statement was not hearsay]; see also *People v. Marks* (2003) 31 Cal.4th 197, 228 [discussing *Hill*].)

In the trial court, unlike here, appellant did not argue that

(1) there is a legal presumption that California's laws do not operate beyond California's borders;

(2) the language of the Evidence Code precludes foreign extradition-hearing testimony from being admitted under the prior-testimony exception; or

(3) when the Legislature sought to include foreign matters in the Evidence Code's provisions, it did so explicitly. (26 OCT 8680-8693; 7 RT 1611-1622.)

Appellant has thus forfeited these arguments. In any event, as discussed below, the arguments are meritless

b. A foreign proceeding need not comply with state or federal law

Appellant asserts that foreign testimony can never qualify as prior testimony under section 1291, because foreign proceedings do not necessarily comply with the requirements for admissibility under state law and the federal Constitution.[63] (AOB 420-421.) But appellant is incorrect, because under section 1291, prior testimony is subject to the *same limitations and objections* as testimony given live on the witness stand. (Evid. Code, § 1291, subds. (a)-(b).) Thus, if a defendant contends that prior testimony is inadmissible under state law or the federal Constitution, he can object on that basis, regardless of where the prior testimony came from. The mere fact that the prior testimony originated in a foreign proceeding does not vitiate these protections.

Respondent has found no California authority addressing appellant's argument, but federal case law refutes it. In *United States v. Salim* (2d Cir. 1988) 855 F.2d 944, the Second Circuit rejected a blanket rule that foreign testimony is not admissible as prior testimony. In *Salim*, federal prosecutors arranged for a witness's deposition in France. The deposition was taken pursuant to French law and procedures, under a French magistrate's supervision. (*Id.* at pp. 946-948.) The defendant was in the United States and could not be present at the deposition. The lawyers were not present in the room where the deposition took place; instead, they

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[63] Appellant raised this argument in the trial court. (7 RT 1612.)

submitted their direct and cross-examination questions to the magistrate, who then presented them to the witness. At certain intervals, the court reporter read the witness's responses to the lawyers, who could then submit further questions. (*Id.* at pp. 947-948.) At trial, portions of the deposition were read into the record, over the defendant's objection. (*Id.* at p. 948.)

On appeal, the Second Circuit held that the mere fact that the deposition was taken overseas under foreign legal procedures did not render it inadmissible under the confrontation clause or the Federal Rules of Evidence. The court explained:

> In order to obtain evidence for use in domestic trials, litigants are apt to find it increasingly necessary to conduct depositions in foreign countries. However, foreign laws do not always permit witnesses to be deposed in the manner to which American courts and lawyers are accustomed. In certain cases, the use of unconventional foreign methods of examination may exceed the limits of accepted American standards of fairness and reliability, such as underlie the confrontation clause and the rule against hearsay. Concerns of this type are addressed best on a case-by-case basis.

(*Id.* at p. 946.) The court added that

> unless the manner of examination required by the law of the host nation is so incompatible with our fundamental principles of fairness or so prone to inaccuracy or bias as to render the testimony inherently unreliable . . . . a deposition taken pursuant to letter rogatory in accordance with the law of the host nation is taken 'in compliance with law' for purposes of [the Federal Rules of Evidence].)

(*United States v. Salim*, *supra*, 855 F.2d at p. 953; accord, *United States v. Siddiqui* (11th Cir. 2000) 235 F.3d 1318, 1324 [depositions taken in Switzerland and Japan were admissible at trial]; *United States v. McKeeve* (1st Cir. 1997) 131 F.3d 1, 10 [deposition taken in Britain under British law was admissible at trial].)

If the testimony from *Salim* was admissible, then so was the testimony from appellant's extradition hearing, where the proceedings were in English, appellant and his lawyer were in the courtroom, and appellant's lawyer posed questions directly to Laberge. (28 OCT 9252, 9261, 9324.)

In sum, the fact that foreign proceedings do not entirely comply with state law and the federal Constitution does not preclude all foreign testimony from being admissible under the prior testimony exception.

c. The admission of foreign testimony does not have an extraterritorial effect

Next, appellant argues that section 1291 does not permit the admission of foreign testimony, because it is presumed that California law has no extraterritorial effect. (AOB 421-422, 425-426.) As discussed above, appellant has forfeited this argument by failing to raise it at trial, but in any event, the argument is meritless, because the admission of foreign testimony has no extraterritorial effect.

It is, in fact, presumed that California's statutes have no extraterritorial effect. (*Diamond Multimedia Systems, Inc. v. Superior Court* (1999) 19 Cal.4th 1036, 1059.) A law has extraterritorial effect when it (1) prohibits conduct occurring in another jurisdiction, or (2) provides a remedy for such conduct. (*Id.* at p. 1060, fn. 20.) But the admission of foreign testimony does not prohibit or remedy any conduct beyond California's borders, so it has no extraterritorial effect. Appellant's argument thus fails.

d. The statutory language does not exclude testimony from foreign extradition hearings

Appellant also argues that testimony from a foreign extradition hearing cannot constitute "former testimony" under the Evidence Code's definition of the term. (AOB 422-423.) As discussed above, appellant has forfeited this argument, but in any event, it is meritless.

Evidence Code section 1290 defines "former testimony." This definition includes testimony given under oath in "[a]nother *action* . . . ." (Evid. Code, § 1290, subd. (a), italics added.) Evidence Code section 105, in turn, states that the term "'[a]ction' includes a civil action and a criminal action." (Evid. Code, § 105.) Appellant argues that a foreign extradition hearing cannot constitute an "action" under this definition, because it is not civil or criminal in nature. Thus, appellant reasons, such testimony cannot qualify as former testimony under the Evidence Code.[64] (AOB 422-423.)

Appellant's interpretation of the term "action" under Evidence Code section 105 is unduly restrictive, because he misconstrues the word "includes." According to appellant, the fact that under section 105, an "[a]ction *includes* a civil action and a criminal action" means that it *excludes* any proceeding that is not strictly civil or criminal. (Evid. Code, § 105, italics added; AOB 423.)

But appellant misinterprets the word "includes." According to this Court, "'[i]ncludes' is 'ordinarily a term of enlargement rather than limitation,'" and therefore, "[t]he 'statutory definition of a thing as "including" certain things does not necessarily place thereon a meaning limited to the inclusions.'" (*Flanagan v. Flanagan* (2002) 27 Cal.4th 766, 774, quoting *Ornelas v. Randolph* (1993) 4 Cal.4th 1095, 1101, and *People v. Western Air Lines, Inc.* (1954) 42 Cal.2d 621, 639.) Thus, the fact that "action" includes civil and criminal proceedings does not mean it *excludes* proceedings that do not fit solely into either category.

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[64] Testimony from a *domestic* extradition hearing would qualify as former testimony under Evidence Code section 1290, subdivision (b). According to that provision, "former testimony" includes testimony from "[a] proceeding to determine a controversy conducted by or under the supervision of an agency that has the power to determine such a controversy and is an agency of the United States or a public entity in the United States." (Evid. Code, § 1290, subd. (b).)

Further, extradition hearings are both civil and criminal in nature, and it makes no sense to exclude them from section 1291 simply because they do not belong to either category exclusively. "An extradition proceeding is neither strictly criminal nor civil; it is a hybrid." (*Matter of Extradition of Pazienza* (S.D.N.Y. 1985) 619 F.Supp. 611, 618.) More specifically, a Canadian extradition hearing is partly criminal, because the extradition judge must determine whether there is a prima facie case supporting the foreign charges. (27 OCT 9182; *United States v. Dynar* (Can. 1997) 2 S.C.R. 462 [147 D.L.R.4th 399, 1997 CarswellOnt 1981, par. 121].) But it is also partly civil, because an adverse result for the defendant does not result in punishment; it merely results in extradition.[65]

Construing section 1291 to exclude testimony from a foreign extradition hearing because of the hearing's hybrid character does not contribute to the purpose of section 1291, which is to balance "the defendant's right to effective cross-examination against the public's interest in effective prosecution." (*People v. Zapien, supra,* 4 Cal.4th at p. 975.) Moreover, appellate courts should "avoid literal, narrow or hypertechnical meanings of words so as to give effect to the manifest objectives of the legislation which appear from the provisions considered as a whole, in light of legislative history." (*Bingham v. CTS Corp.* (1991) 231 Cal.App.3d 56, 65.) A rule that excludes foreign extradition-hearing testimony from section 1291 because extradition is both civil and criminal in nature would constitute such a "narrow or hypertechnical" interpretation, which would defeat the legislative objective behind section 1291.

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[65] Habeas corpus is also a hybrid criminal/civil proceeding. (*O'Brian v. Moore* (4th Cir. 2005) 395 F.3d 499, 505.)

e. The fact that some statutes explicitly refer to foreign matters does not suggest that Evidence Code section 1291 excludes foreign testimony

Appellant also asserts that the Legislature intended to exclude foreign testimony from consideration under section 1291, because section 1291 does not explicitly mention foreign testimony, while certain other sections of Evidence Code explicitly refer to foreign matters. (AOB 423-424.) As an example, appellant cites Evidence Code section 200, which defines "public entity" as including "*a nation*, state, county, city and county . . . or any other political subdivision or public corporation, whether *foreign* or domestic." (AOB 423, italics added; Evid. Code, § 200.) He also cites Evidence Code section 452, subdivision (f), which permits courts to take judicial notice of the laws of "foreign nations and public entities in foreign nations." (AOB 424; Evid. Code, § 452, subd. (f).) And he cites Evidence Code section 1530, which permits the authentication of official documents from foreign countries under certain circumstances. (AOB 424; Evid. Code, § 1530, subd. (a)(3).) In addition, he cites Penal Code section 686, which permits a prior foreign conviction to be used for enhancement if it would constitute a felony in California. (AOB 424-425; Pen. Code, § 668.)

But appellant cites no authority to support his argument that these scattered references to foreign nations in other statues indicate that the Legislature intended to exclude foreign testimony from section 1291. And nothing about these statutes supports this argument. Sections 1290 and 1291 are broadly worded provisions, which permit prior testimony to be admitted in certain circumstances. Evidence Code section 452, in contrast, serves a different function. It enumerates the matters that can be judicially noticed, thereby creating an exception to the bedrock requirement of our litigation system: that evidence must be introduced in court and subjected to testing by the opposing party. Hence, it is not surprising that section 452

employs great specificity in enumerating the matters that can be judicially noticed, including foreign law. But it sheds no light on section 1291.

Another statute that appellant cites, Evidence Code section 1530, explicitly refers to official documents from foreign countries. Again, given statute's subject matter, this would be expected. Section 1530 delineates the conditions for admitting official documents, both foreign and domestic. Since the conditions for admitting foreign documents differ from the conditions for admitting domestic documents, the statute necessarily refers specifically to foreign documents. (Evid. Code, § 1530, subd. (a).) But this again has no bearing on section 1291.

Evidence Code section 200 likewise does not support appellant's argument. Section 200 defined "public entity" and explicitly includes foreign governments and governmental subdivisions in this definition. But the term that section 200 defines—"public entity"—is a technical term, and unless the statute defining this term did so with specificity, it would be impossible to know what it includes. "Testimony," in contrast, is not a technical term and does not require such a specific definition.

Appellant also points to Penal Code section 686, which states that prior foreign convictions, as well as those other states, can be used to enhance a sentence if the prior crime would constitute a felony in California. (AOB 424-425.) It makes sense that this statute mentions foreign convictions, because the statute imposes a specific condition on the use of foreign convictions for enhancement: the crime must be equivalent to a felony in California. Without this condition, there would be no way of knowing whether a foreign conviction (or an out-of-state conviction) could be used for enhancement. Indeed, the underlying premise of Evidence Code 686 is that foreign convictions *are* admissible. But again, this is irrelevant to section 1291.

In short, contrary to appellant's position, foreign testimony can be admitted as prior testimony.

3. Appellant's motive and interest in cross-examining Laberge at the extradition hearing were similar to what they would have been at trial

Appellant next argues that even if testimony from a foreign extradition hearing can sometimes be admissible under section 1291, Laberge's testimony was still inadmissible, because appellant had a different motive and interest in cross-examining him at the extradition hearing than he did at trial. (AOB 427-429; see Evid. Code, § 1291, subd. (a)(2).) Appellant specifically argues that, at the extradition hearing, the government only needed to make a prima facie showing of his involvement in the charged crimes. According to appellant, Laberge's credibility was thus not an issue at the extradition hearing, as it would have been at trial. (AOB 427.)

Case law refutes this argument. The extradition hearing was comparable to a preliminary hearing, because they require the same kind of proof. At a preliminary hearing, the prosecution must produce evidence showing probable cause that the defendant committed the crimes charged. (*Garabedian v. Superior Court* (1963) 59 Cal.2d 124, 126-127.) "In other words, the evidence must establish a prima facie case." (*People v. Clark* (1967) 256 Cal.App.2d 6, 10.)

Appellant's extradition hearing required the same kind of proof. Under Canada's extradition law, the party seeking extradition must produce evidence to "justify the committal of the fugitive for trial, if the crime had been committed in Canada." (Can. Extradition Act, R.S.C. 1985, ch. E-21, § 18(b); accord, Treaty on Extradition Between the United States of America and Canada of December 3, 1971, art. 10, subd. (1), 27 U.S.T. 983, T.I.A.S. No. 8237, 1976 WL 166697, at *4 ["Extradition shall be

granted only if the evidence be found sufficient . . . to justify his committal for trial"].) In other words, the requesting state must present "evidence that demonstrates on a prima facie basis that the individual has committed acts in the foreign jurisdiction that would constitute criminal conduct in Canada." (*United States v. Dynar*, *supra*, 2 S.C.R. 462 [147 D.L.R.4th 399, 1997 CarswellOnt 1981, par. 121].)

Hence, appellant's motive and interest in cross-examining Laberge at the extradition hearing were the same as they would have been at a preliminary hearing. And under section 1291, a defendant's motive and interest in cross-examination at a preliminary hearing are similar to his motive and interest at trial. (*People v. Wharton* (1991) 53 Cal.3d 522, 590-591.) As this Court has explained:

> "Preliminary hearing testimony is presented in open court, in the presence of the defendant, at a time when the defendant is represented by counsel, in a proceeding in which the defendant has both the motive and the opportunity to cross-examine the witness, and the testimony is reported and preserved in a formal court transcript. In these circumstances the introduction of preliminary hearing testimony at trial, when the witness is legally unavailable, does not violate either the hearsay rule or the defendant's constitutional right of confrontation . . . ."

(*People v. Wharton*, *supra*, 53 Cal.3d at p. 590, internal ellipsis omitted, quoting *People v. Guerra* (1984) 37 Cal.3d 385, 427; see also *People v. Thomas* (2011) 51 Cal.4th 449, 503 [preliminary hearing held in a different proceeding against defendant 15 years before trial constituted a prior opportunity for cross-examination under section 1291].)

In short, appellant had the same motive and interest in cross-examining Laberge at the extradition hearing he would have had at a preliminary hearing. Prior testimony from a preliminary hearing satisfies section 1291's motive-and-interest requirement, so prior testimony from an extradition hearing does as well.

Appellant, however, argues that his motive and interest at the extradition hearing were not to negate a prima facie showing of guilt, but instead to demonstrate that, if he were tried in California, he would likely be convicted and sentenced to death. Therefore, he asserts, he had little motive to impeach Laberge at the extradition hearing. (AOB 427-429.) But appellant fails to support this argument with any citation to the record, so he has forfeited it. (*People v. Garcia* (2008) 161 Cal.App.4th 475, 486; *People v. Beltran* (2000) 82 Cal.App.4th 693, 697, fn. 5.)

The argument is also forfeited because appellant never raised it in the trial court. (7 RT 1611-1622; 26 OCT 8680-8693.) On the contrary, in the trial court, the defense submitted evidence *refuting* appellant's current assertion. Specifically, in its motion to exclude Laberge's testimony, the defense attached a declaration by appellant's Canadian extradition attorney, Don McLeod. (26 OCT 9032-9036.) In the declaration, McLeod stated that appellant's guilt was a "secondary" issue at the extradition hearing compared to the death-penalty question, but he also acknowledged that guilt *was an issue*—and he never asserted that his strategy was to *concede* that the government had made a prima facie showing of guilt. (26 OCT 9035.) Hence, appellant did not raise his current argument in the trial court, so he has forfeited it on appeal. (See *People v. Mayfield*, *supra*, 5 Cal.4th at p. 172; *People v. Hill*, *supra*, 3 Cal.4th at pp. 988-989; *People v. Von Villas*, *supra*, 11 Cal.App.4th at p. 233.)

And even if this argument is cognizable, it is baseless, because appellant's cross-examination of Laberge at the extradition hearing demonstrates that he indeed had a motive and interest in attacking Laberge's credibility. The cross-examination consumes approximately 165 pages of transcript. (28 OCT 9441-9607.) It addressed Laberge's criminal history in detail. (28 OCT 9441-9470.) It also included questions about Laberge's prior history as an informant (28 OCT 9472, 9505-9510, 9530-

9531); whether Laberge lied about committing uncharged sex crimes during the Lethbridge incident, for which he was convicted (28 OCT 9472-9505, 9572-9574); Laberge's access to newspapers and periodicals in prison (28 OCT 9523-9524, 9534-9538); how Laberge came into contact with appellant, and his note-taking of appellant's statements (28 OCT 9540-9542, 9544-9547); Laberge's access to documents that appellant received from his attorneys (28 OCT 9548-9551); whether Laberge was able to have documents photocopied (28 OCT 9551-9553); Laberge's contact with law enforcement to report the fact that he had information about this case (28 OCT 9590-9591, 9593-9597); and a letter of acknowledgement between Laberge and the Royal Canadian Mounted Police about his cooperation in this case and another case (28 OCT 9599-9600). Hence, appellant's cross-examination of Laberge shows that he indeed had a motive and interest in attacking Laberge's credibility at the extradition hearing.

In short, appellant had a similar motive and interest in attacking Laberge's credibility at the extradition hearing as he would have had at trial, and therefore, the admission of Laberge's extradition-hearing testimony complied with section 1291.

D. Laberge's Testimony Did Not Violate Appellant's Sixth Amendment Right to Confrontation

Appellant also contends that the admission of Laberge's prior testimony violated his Sixth Amendment right to confrontation and cross-examination. (AOB 429-431.) Under the Sixth Amendment's confrontation clause, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." (U.S. Const. amend. VI.) For testimonial hearsay to be admissible under the confrontation clause, the witness must be unavailable, and the defendant must have had a prior opportunity for cross-examination. (*Crawford v.*

Washington (2004) 541 U.S. 36, 68 [124 S.Ct. 1354, 158 L.Ed.2d 177].) "When the requirements of Evidence Code section 1291 are met, 'admitting former testimony in evidence does not violate a defendant's right of confrontation under the federal Constitution.'" (*People v. Wilson* (2005) 36 Cal.4th 309, 340, quoting *People v. Mayfield* (1997) 14 Cal.4th 668, 742.)

Here the admission of Laberge's testimony satisfied the requirements of section 1291, so it did not violate the confrontation clause. (See also *United States v. McKeeve*, *supra*, 131 F.3d at p. 10 [admission at trial of deposition testimony taken in Great Britain under British procedure did not violate confrontation clause]; *United States v. Salim*, *supra*, 855 F.2d 944, 955 [admission at trial of deposition testimony taken in France under French procedure did not violate confrontation clause]; *Prater v. State* (Ga.Ct.App. 1979) 253 S.E.2d 223, 228-229 [admission of unavailable witness's testimony from interstate extradition hearing did not violate state law or federal confrontation clause].)

E. There Was No Prejudice

1. The court would have admitted the cartoon drawings even without Laberge's testimony

Under state law, the standard of prejudice for erroneously admitted evidence is whether "the error or errors complained of resulted in a miscarriage of justice." (Evid. Code, § 353, subd. (b).) Thus, there is no prejudice unless it is reasonably probable the defendant would have achieved a more favorable result absent the error. (*People v. Watson, supra,* 46 Cal.2d at p. 836.) When evidence is admitted in violation of the confrontation clause, the error is nonprejudicial if it is harmless beyond a reasonable doubt. (*Lilly v. Virginia* (1999) 527 U.S. 116, 139-140 [119 S.Ct. 1887, 144 L.Ed.2d 117]; *People v. Jenkins* (2000) 22 Cal.4th 900, 1015-1016; see *Chapman v. California, supra,* 386 U.S. at p. 24.)

Here, the purported error was harmless, first, because the court would have admitted appellant's cartoon drawings even without Laberge's testimony. During its case-in-chief, the prosecution only introduced Laberge's prior testimony on two topics: Laberge's own criminal record and four of the cartoon drawings that appellant gave Laberge. (20 RT 4763-4789.) During the hearing on the admissibility of this evidence, the court ruled that *even without* Laberge's testimony, the four cartoon drawings—People's Exhibits 224, 226, 228, and 230—were admissible under the hearsay exception for admissions of a party. (7 RT 1690-1691; see Evid. Code, § 1220; see *Pece v. Tama Trading Co.* (1937) 22 Cal.App.2d 219, 223.) The court explained that, because the handwriting analysis showed that appellant wrote the words on the cartoon drawings, it could not "conceive of these items not going in as a form of an admission . . . . with *or without* the testimony." (7 RT 1691, italics added.)

Thus, even if the court had excluded Laberge's prior testimony, it still would have admitted the cartoon drawings. And though Laberge's testimony was helpful in explaining the drawings, they were still incriminating by themselves. For example, Exhibit 224 inculpated appellant in the murder of Kathleen Allen, because it depicts Lake preparing to whip a naked and bound woman named "Kathi," while appellant is standing behind a video camera, eating a bowl of rice. (Peo. Exh. 224.)

Indeed, the mere fact appellant authored a cartoon that mocked Allen's humiliation and torture is inculpatory, because it is difficult to believe that a wrongly-accused defendant would create such an image—and would insert *himself* in it. This cartoon also suggests that torturing victims had become so routine to appellant, and meant so little to him, that he could eat a bowl of rice while watching Lake whip Allen.

Exhibit 226, the "remains claiming section" cartoon, was also incriminating even without Laberge's testimony. This drawing mocked the fact that the remains of Allen, the Dubs family, and the Bond/O'Connor family were never identified. It also mocked their families' grief. Again, it is difficult to believe that a wrongly-accused defendant would create such an image. Further, this cartoon revealed appellant's guilty knowledge that these victims' remains were among the burnt, smashed, and comingled remains recovered in Wilseyville by Dr. Stephens and the investigators.

It is also unlikely that a wrongly-accused defendant would have authored Exhibit 230, the "San Quentin. . .Years Later" cartoon, which depicts appellant in a prison cell decorated with pictures of 11 of the 12 charged murder victims (all except Stapley), along with the slogans "no kill no thrill!" and "no gun no fun." The presence of the victims' pictures, together with these slogans, constituted a powerful admission of appellant's guilt. It also showed that he participated in the murders for "fun" and for the "thrill" of the kill. And appellant's "no gun no fun" slogan was consistent with the fact that Bond and Stapley were shot to death. (17 RT 4172-4176, 4182-4184, 4221-4223; 19 RT 4738-4739.)

Finally, the fourth cartoon drawing—where "Lake" and "Slant" throw a person into a bonfire—was highly incriminating, because a massive amount of burnt human remains were discovered at the Wilseyville property, and it was undisputed that Lake was involved in the murders. (Peo. Exh. 228; 13 RT 3132; 19 RT 4607-4608, 4664; 25 RT 6457-6458, 6513.) And again, it is inconceivable that a wrongly accused defendant would so cavalierly create an image that showed himself committing murder with another person whose guilt was beyond question. In short, even without Laberge's testimony, appellant's cartoons were still inculpatory.

2. Appellant cannot claim prejudice based on his own testimony about his admissions to Laberge, because the ruling in question did not address those admissions

In discussing prejudice, appellant argues that the prosecutor extensively cross-examined him about Laberge's testimony and the cartoon drawings. (AOB 431, citing 32 RT 7670.) The page appellant cites, however, does not contain any cross-examination; moreover, appellant fails to describe the content of this cross-examination. "It is beyond dispute that broad and conclusory assertions of prejudice are not enough; appellant must develop an argument that specifically substantiates his claim." (*People v. Cardenas* (1997) 53 Cal.App.4th 240, 248.) Here, appellant fails to substantiate his argument, so it is meritless.

Appellant further argues that, after he testified, the prosecutor gave a new closing argument, where she "emphasized Laberge's extradition testimony and appellant's apparent admissions in the course of his conversations with Laberge." (AOB 431, citing 32 RT 7726, 7763; see also AOB 432.) But appellant does not describe the content of this argument, nor does he explain how it stemmed from the alleged error, which was the court's decision—during the prosecution's case-in-chief—to admit a limited portion of Laberge's prior testimony concerning the four cartoon drawings and his own criminal history. So again, appellant's assertion of prejudice fails because it is conclusory.

Appellant's prejudice argument also fails because the court's ruling did not encompass the admissions that appellant now claims were prejudicial. Instead, the defense introduced these admissions during appellant's own testimony. Specifically, during direct examination, appellant denied confessing to Laberge that he was involved in the murders of Gerald (30 RT 7220-7221), Peranteau (30 RT 7230-7233, 7241, 7311-7312), the Dubs family (30 RT 7233-7242, 7244-7245, 7308-7310), Bond

(30 RT 7271, 7331-7334), Lonnie Jr. (30 RT 7332), O'Connor (30 RT 7300), Stapley (30 RT 7271, 7330-7331), Allen (30 RT 7298-7300), Carroll (30 RT 7307-7308), or Cosner (30 RT 7335-7336). Also on direct examination, appellant denied confessing to Laberge that he had sexually assaulted O'Connor or Allen. (30 RT 7298-7300, 7355-7356).

The ruling that appellant is now challenging did not address any of those admissions. The ruling only concerned the limited portion of Laberge's prior testimony that the prosecution had proffered, which addressed the four cartoon drawings and Laberge's own criminal record. In other words, the ruling that appellant is challenging—to admit a small portion of Laberge's prior testimony—did not cause the prejudice he is complaining about, which stemmed from his own testimony.

Finally, appellant maintains that Laberge's testimony figured prominently in the prosecutor's argument that appellant participated in the actual killings, including the murders of the two infants. (AOB 432.) But again, the challenged ruling only addressed Laberge's testimony about his own criminal record and the four cartoon drawings. It did not deal with his confessions to Laberge. Hence, the alleged prejudice did not stem from the ruling in question.

3. There was overpowering evidence of appellant's guilt for all eleven murders

As discussed below, there was abundant evidence of appellant's guilt for each of the 11 murders. Given the strength of this evidence, the alleged error was manifestly harmless.

a. Dubs

Even without the challenged evidence, the evidence implicating appellant in the Dubs murders was overwhelming: Appellant was spotted at the Dubs' apartment close to the time they disappeared. Three days later, he was again seen there. Some of the Dubs' belongings and a map to their

home were found in his apartment. And his cartoon drawings underscored his role in their murders.

More specifically, the Dubs' neighbor, Dorice Murphy, saw appellant coming down the steps from the Dubs' apartment on the day they disappeared, near the time they were last heard from—when Deborah Dubs ended her phone conversation with a friend because someone was at her door. (13 RT 3066-3067; 14 RT 3404-3405, 3413-3414, 3420-3421; 18 RT 4779-4482.) As appellant was leaving the apartment, he was carrying a suitcase.
(14 RT 3414, 3435, 3450.) Two days later, another neighbor, Barbara Speaker, saw appellant coming out of the Dubs' apartment again. This time, he was carrying a full flight bag and a full duffel bag, and he left Deborah Dubs's keys in the front door. (14 RT 3452-3456, 3491-3493, 3497, 3500-3502, 3504; 18 RT 4483-4484.) And it was undisputed that appellant was the person Speaker saw: He admitted it in his own testimony. (30 RT 7242-7243, 7406.)

Further, when the police searched appellant's apartment in June 1985, they found a map on which the Dubs' small street, Yukon Street, had been circled. (16 RT 3889-3890.) They also found two videotapes labeled in Harvey Dubs's handwriting. (13 RT 3068-3069; 14 RT 3396-3397; 16 RT 3885, 3889-3891; 17 RT 3956-3957; 18 RT 4504; 19 RT 4950; 20 RT 4886-4888.) And they found a VCR whose serial number had been removed. It was the same brand, General Electric, as a VCR that was missing from the Dubs' apartment. (17 RT 3952; 18 RT 4504-4505; see *People v. Baker* (1968) 267 Cal.App.2d 916, 919-920 [missing serial number supported finding that projector had been stolen].)

At the Wilseyville property, there was more incriminating evidence. For example, the investigators there discovered a receipt that a video store had issued to Harvey Dubs. It was dated July 24, 1985, the day before the

family disappeared. (13 RT 3179.) It was found inside a plastic bag buried underground. In addition to the receipt, this bag also contained an envelope addressed to appellant, postmarked July 24, 1985—again, the day before the family disappeared. (13 RT 3179-3181; 20 RT 4749-4750.) Further, inside the Wilseyville residence, the investigators found the Dubs' cassette player and a generator identical to one that had been missing from their apartment. (13 RT 3076-3078, 3179.)

Appellant's cartoon drawings further implicated him in the murders. As discussed earlier, a bag of remains labeled "Dubs" appeared prominently in the "remains claiming section" cartoon, and a picture of the Dubs family hung on appellant's wall in the "San Quentin . . . Years Later" cartoon. (Peo. Exhs. 226, 230.)[66]

Three more of appellant's cartoon drawings, which were introduced during appellant's own testimony, also illuminated his role in the Dubs murders. These cartoons were relevant to the murder of 16-month-old Sean Dubs—and also the murder of 12-month-old Lonnie Bond, Jr.—because they depicted appellant killing babies. In the first cartoon, appellant is holding a baby by its foot and swings it into an object, accompanied by the words "crash" and "smash." Lake and Laberge also appear in this cartoon, and a sign hanging over the scene reads, "Lake's Baby Dies School." (Peo. Exh. 245-A; 31 RT 7472-7475.) In the second cartoon, appellant is holding a baby by its legs over a wok and exclaims, "Ahi-ya! Daddie dies mommy cries baby fries!" (Peo. Exh. 245-D; 31 RT 7462-7463.) And in the third cartoon, a woman holding a baby walks up to a door labeled "Slant's Day Care." In the next frame, she walks away holding a smoldering baby on a plate. She exclaims, "Microwaived!" [*sic*], while appellant waving in the

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[66] Again, these cartoons were ruled admissible even without Laberge's testimony. (7 RT 1690-1691.)

doorway waving. (Peo. Exh. 245-B; 31 RT 7466.) By repeatedly depicting himself killing babies in these cartoons, appellant corroborated all the other evidence showing his role in the murders of Sean Dubs and Lonnie Bond, Jr. (31 RT 7449, 7451.)

In short, given the abundant evidence of appellant's guilt for the Dubs murders, any error concerning those charges was harmless.

b. Peranteau

There was also overpowering evidence that appellant was guilty of Clifford Peranteau's murder. Appellant was the link between Peranteau and the Wilseyville property. He tried to lure Peranteau there before Peranteau disappeared. After Peranteau disappeared, he tried to obtain the money that Peranteau had won in a Super Bowl betting pool at Dennis Moving. He shared the material proceeds of Peranteau's murder with Lake. And he authored a cartoon that inculpated him in Peranteau's murder.

Peranteau's murder was unquestionably connected to the Wilseyville property: Many of his possessions were discovered there, and Lake sold his motorcycle there. (13 RT 3172-3175; 16 RT 3861-3867; 17 RT 3984, 4019-4024; Peo. Exh. 172.) Moreover, shortly after Peranteau disappeared, his employer and a coworker received forged letters, purportedly from Peranteau, that had been created on the typewriter that investigators later found in the Wilseyville residence. (13 RT 3296-3297, 3360-3361; 16 RT 3748-3749, 3869-3870, 3876-3877, 3879-3881; 20 RT 4876-4877.)

Appellant worked with Peranteau at Dennis Moving and was the link between Peranteau and the Wilseyville property.[67] (16 RT 3877-3879,

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[67] The only other evidence connecting Peranteau to the Wilseyville property was appellant's testimony that he once introduced Peranteau to Lake on a streetcar. (30 RT 7206-7207.) Besides being self-serving, this testimony was dubious, because appellant gave this testimony after the prosecution had given its closing argument. During that argument, the

(continued...)

3985-3986.) And before Peranteau disappeared, appellant had been trying to lure him to Wilseyville. On one occasion, appellant came to Peranteau's apartment, showed Peranteau and Hector Salcedo a bag of marijuana, and told them that his friend had a plantation in the hills, and they could keep some marijuana if they went there to help him. (17 RT 3988-3989, 3999.) On another occasion, appellant similarly came to Peranteau's apartment and offered to take him to the hills to harvest marijuana. (17 RT 4007-4008.)

The forged letter about Peranteau's betting-pool winnings also tied appellant to the murder. Before disappearing, Peranteau had entered a Super Bowl betting pool with other Dennis Moving employees. (16 RT 3877-3879.) He was last seen on the Friday before the Super Bowl. (16 RT 3855-3856; 17 RT 3980-3985.) He ended up winning the pool. The pool was a "big thing" at Dennis Moving, and the employees talked about it after the game. (16 RT 3779, 3881-3882.) Richard Doedens, who organized the pool, subsequently received a letter bearing Peranteau's forged signature. It was postmarked in Wilseyville more than a week after the game and was typed on the typewriter later discovered in the Wilseyville residence. The letter asked Doedens to send Peranteau's winnings to a post office box in Mokelumne Hill, which was about 20 miles from Wilseyville. (13 RT 3209, 3360-3361; 16 RT 3869-3870, 3878-3880; 20 RT 4877.) This demonstrated appellant's role in Peranteau's murder, because appellant was the only person at the Wilseyville residence who could have known that Peranteau had won the betting pool, and that Doedens was the person to contact about it.

(...continued)
prosecutor had pointed out that appellant was the only link between Peranteau and the Wilseyville property. (29 RT 7056.)

In addition, the police found Peranteau's towel at appellant's hideout in Calgary and his pen and pencil set at appellant's apartment in San Francisco. (16 RT 3866-3867, 3875, 3889; 19 RT 4562-4563, 4569-4570, 4579-4584.) This showed that appellant was partaking in the proceeds of the murder. It was also consistent with the evidence that appellant and Lake plundered the other victims' property and shared the proceeds. Finally, Peranteau was pictured on appellant's prison wall in appellant's "San Quentin . . . Years Later" cartoon. (Peo. Exh. 230.)

In sum, given the overpowering evidence, any error concerning Peranteau's murder was harmless.

c. Gerald

There was also strong evidence of appellant's guilt for Jeffrey Gerald's murder. As with Peranteau, appellant was the only link between Gerald and the Wilseyville property. He lured Gerald there on the day Gerald disappeared. He was at the Wilseyville residence that day. And he created a cartoon that inculpated him in Gerald's murder.

As with Peranteau, appellant was the only connection between Gerald and the Wilseyville residence: They worked together at Dennis Moving, and there was no evidence Gerald knew Lake. (13 RT 3299; 16 RT 3745, 3877-3878.)

Moreover, on the day Gerald disappeared, he went away with appellant at appellant's bidding. Gerald's roommate, Terry Kailer, testified that at least 12 times, she had answered the phone when "Charlie Ng" or "Charlie" had called for Gerald. (17 RT 4040-4043.) "Charlie" had a distinctive accent, and, as the M-Ladies video demonstrates, so did appellant. (17 RT 4042; Peo. Exh. 22-A.) On the day Gerald disappeared, appellant phoned his apartment at least twice. (17 RT 4042-4044.) Later that day, Gerald told Kailer he had received a phone call and was going to the bus station to meet appellant for a "side job" of moving. (17 RT 4041-

4042.) Gerald also phoned his girlfriend, Sandra Krumbein, that day and told her he was at the San Francisco bus station and was going to help a friend move for $100. (17 RT 4123-4126.) Neither Kailer not Krumbein ever heard from Gerald again. (17 RT 4044, 4126-4127.)

The next day, a call was made from the Wilseyville residence to Gerald's apartment, further demonstrating the link between the Wilseyville residence and Gerald's disappearance. (16 RT 3783-3784; 17 RT 4046-4047.) Two days later, someone entered the apartment while Kailer was out and removed some of Gerald's property, including his guitar. (13 RT 3177-3178; 17 RT 4044-4045, 4116-4117, 4119-4120.) The guitar was later found inside the Wilseyville residence, while Gerald's camera and social security card were found buried in the yard. (13 RT 3176-3177; 16 RT 3843; 17 RT 4120-4122.)

Telephone records showed that appellant was at the Wilseyville residence on the day Gerald disappeared. Specifically, at 10:29 that night, a call was made from the Wilseyville residence to a number at Dennis Moving, which contained a recording that instructed the company's employees where to report for work the next day. A few minutes later, another call was made from the Wilseyville residence, this time to the home of Dennis Goza, the owner of Dennis Moving. (16 RT 3750-3751, 3781-3784; 28 RT 6835; Peo. Exh. 101.) Appellant worked the next day, so he would have needed to call the company to learn his assignment. (16 RT 3746.) Finally, in the "San Quentin... Years Later" cartoon, Gerald was pictured on appellant's prison wall along with the other victims. (Peo. Exh. 230.)

In sum, given the abundant evidence of appellant's guilt for Gerald's murder, any error concerning that count was harmless.

d. Carroll

There was also abundant evidence of appellant's guilt for Michael Carroll's murder. Appellant knew Carroll before Carroll disappeared. The M-Ladies video demonstrated that appellant and Lake had been present with Carroll while he was still alive and had buried his body a short time before the video was recorded. The video also demonstrated that appellant was Lake's partner in the plan to plunder Carroll's assets. And after Carroll's death, appellant facilitated the sale of his car.

As with the other victims, the physical evidence tied Carroll's murder to the Wilseyville property: His driver's license, ATM card, and other documents were found there, buried in a plastic container. (13 RT 3162-3163; see 13 RT 3158.) Further, it was reasonable to infer that appellant was the link between Carroll and the Wilseyville residence: He had previously phoned Carroll's house and asked to speak with him, which demonstrates that he knew Carroll before Carroll disappeared. (13 RT 3342, 3348.)

Most significantly, the M-Ladies video showed that, a day or less before Kathleen Allen was kidnapped, appellant had been with Carroll while Carroll was still alive and had then buried his body. Near the beginning of the video, in appellant's presence, Lake told Allen—Carroll's girlfriend—that if she did not agree to cooperate, "*we'll* probably put a round through your head and take you out and bury you in the same area that *we buried Mike*." (Exh. 22-A; 58 OCT 19666, italics added; 13 RT 3341.) This demonstrated that appellant was Lake's partner in the murder and had helped him dispose of the body.

Lake also told Allen about a conversation he and appellant had with Carroll. According to Lake, Carroll told them he was getting ready to drop Allen, and that she was "clinging" to him and asking him to do things he did not want. Lake then asked appellant "Today, was it today?

Yesterday?" Appellant replied, "Yesterday." (Exh. 22-A; 58 OCT 19668.) This showed that Carroll had still been alive—and in appellant and Lake's company—as recently as the previous day.

Lake also told Allen that "[i]n the last 24 hours *we've* been tired, nervous, a little high strung, perhaps. We expect you to do something about that. Believe me, *we both need it*." (Exh. 22-A; 58 OCT 19667, italics added.) Based on Lake's earlier statement about burying Carroll, it is reasonable to assume that he and appellant were "tired," "nervous," and "high strung" because they had killed and buried Carroll.

Besides demonstrating appellant's role in Carroll's murder, the video also showed that he and Lake planned to conceal Carroll's disappearance and plunder his asserts—which was consistent with their modus operandi in the other murders. Again in appellant's presence, Lake told Allen that

> you'll give *us* information on Mike in terms of his brother, bank accounts, who we need to write to make things correct. *We'll* probably have you write some letters to the guy that's storing his furniture, his step, or foster brother, whatever, telling him some bullshit story about how you and Mike have, uh, moved off to Timbucktoo, and he's got a job doing this and that and . . . basically, we want to phase Mike off, just sort of move him over the horizon , and, uh, let people know that, yeah, Mike moved off to God knows where, and we never heard from him again.

(Exh. 22-A; 58 OCT 19666-19667, italics added.)

In keeping with this plan, Carroll's stepbrother received a letter—purportedly from Allen—stating that Carroll had found a job in Lake Tahoe and had moved there with Allen, and they were going to send some friends to get their "stuff." (13 RT 3343-3346.) Lake then appeared at Carroll's house and collected Carroll's belongings. (22 RT 5414-5417.) In addition, Lake asked an acquaintance, George Blank, to repair and sell Carroll's car, and appellant then delivered the vehicle's keys to Blank. (15 RT 3583, 3586-3598, 3611-3618, 3626, 3629-3631.)

In sum, given the evidence of appellant's guilt for Carroll's murder, any error concerning that count was harmless.

e. Allen

Captured on the M-Ladies video, the evidence of appellant's involvement in Kathleen Allen's murder was overwhelming. It was undisputed that after Allen appeared in the video, she was killed at Wilseyville. (32 RT 7883; 33 RT 8055-8057.) And the video demonstrates that appellant held her captive under the threat of death, sexually abused her, and had no intention of letting her leave the property alive.

The video shows Allen inside the Wilseyville residence, bound in handcuffs. Lake warns her that if she fails to cooperate, he and appellant will shoot her in the head and bury her in the same place they had just buried Carroll. (Exh. 22-A; 58 OCT 19666.) Lake further explains that Allen must agree to be a sex slave or be killed. (Exh. 22-A; 58 OCT 19667.) He also advises her that he and appellant will use her to cover up Carroll's death by writing a letter to Carroll's family informing them that she and Carroll have moved away, and that she will help them gain access to Carroll's assets. (Exh. 22-A; OCT 19666-19667.) When Allen is forced to undress, Lake explains, "we want to see what we bought." (Exh. 22-A; 58 OCT 19669.)

As foretold in the video, Allen was forced to conceal Carroll's murder and her own disappearance. Specifically, she phoned her boss, Fred Demerest, from the Wilseyville residence and requested four weeks off. She explained that her boyfriend had found a job in the Lake Tahoe area and she wanted to accompany him there. (14 RT 3381-3382, 3384, 3387-3388; 15 RT 3781-3784; Peo. Exh. 101.) Later, Demarest received a letter, purportedly from Allen, stating that her boyfriend had found a permanent job, and she was going to stay with him. (14 RT 3388-3389.) The letter was typed on the typewriter that was later found in the Wilseyville

residence. (13 RT 3360-3361; 14 RT 3388-3389; 20 RT 4875-4876.) The use of such misinformation to conceal Allen and Carroll's murders was consistent with the prior attempts to conceal the Dubs and Peranteau murders.

Additionally, there was strong circumstantial evidence that appellant raped Allen. In the video, Lake told Allen that she must agree to "fuck for us" or be killed. (Exh. 22-A; 58 OCT 19667.) After Allen was forced to strip naked, appellant went to take a shower with her and told her that "it won't be the last time." (Exh. 21-A; 58 OCT 19670.) In the next scene, appellant lay naked on the bed and fondled Allen's buttocks with his ankle while she gave him a massage. Allen was naked except for a pair of panties, which were torn in the crotch. (Exh. 22-A; 58 OCT 19672.) And a week later, appellant told his newest captive, Brenda O'Connor, that "Both of us going [*sic*] to make sure you're clean before we fuck you." He described this as "the house rule," which indicated that he had raped previous victims, such as Allen. (Exh. 22-A; 58 OCT 19690.)

In short, Allen was imprisoned, threatened with death, and forced to strip and have sex with appellant and Lake. She was told that they had killed Carroll, and she was forced to help them conceal his murder and obtain his assets. She had extensive opportunities to observe appellant and Lake from close range, so she could have described them to the police if she had gone free. It is thus obvious that appellant never intended to let her leave Wilseyville alive. And the fact he had already participated in at least six other murders underscored his intent.

Furthermore, appellant subsequently made statements to O'Connor that implicated him in Allen's murder. For example, appellant told O'Connor, "You can cry and stuff *like the rest of them*, but it won't do you no good. We are pretty, ha, cold-hearted, so to speak." (Exh. 22-A; 58 OCT 19684, italics added.) Likewise, after appellant sliced off

O'Connor's shirt and bra, Lake asked him, "isn't [O'Connor] a little [either better or bigger] than Kathy?" Appellant replied, "Maybe a little, basically the same." Lake then responded—referring to Allen in the *past tense*—"No, Kathy's was (inaudible)." (Exh. 22-A; 58 OCT 19689.) This showed that appellant and Lake both knew Allen was dead.

In addition to the video, appellant's cartoon drawings inculpated him in Allen's murder. To review, one cartoon showed Lake whipping the naked "Kathy" while appellant ate a bowl of rice and watched; another cartoon depicted a bag containing Allen's remains at the coroner's office; and a third cartoon showed Allen's picture on appellant's San Quentin prison cell wall, together with pictures of the other victims. (Peo. Exhs. 224 [whipping], 226 ["remains claiming section"], 230 [San Quentin].)

If this were not enough, appellant's own testimony further evinced his guilt. Appellant denied being involved in Allen's murder or knowing that Lake was going to kill her (30 RT 7277, 7285, 7295, 7307), but his overall testimony was unbelievable. For example, appellant testified that Allen was the first female he helped Lake imprison (30 RT 7283), but when Lake told Allen she was going to take a shower, appellant commented, "This won't be the first time," which indicated Allen was not their first female victim. (30 RT 9283; Exh. 22-A; 58 OCT 19670.)

Further, appellant testified that he did not think Lake's threats to kill Allen were serious (31 RT 7542), but this was not credible given the evidence that he and Lake had already committed at least six murders. Appellant also testified that he never had sex or oral sex with Allen. (30 RT 7533), but this was inconsistent with (1) Lake's statement to Allen that she was going to "fuck for us"; (2) the fact appellant accompanied the naked Allen into the shower; and (3) the fact Allen gave appellant a massage while he lay naked and fondled her buttocks (Exh. 22-A; 58 OCT 19667, 19670, 19672).

Appellant also testified that he felt sorry for Allen (31 RT 7533-7534), but his behavior in the video revealed a distinct lack of sympathy. His claim of sympathy was further refuted by his statement to O'Connor, only a week later, that she could "cry and stuff like the rest of them," but it would not do her any good, because he and Lake were "pretty . . . coldhearted . . . ." (Exh. 22-A; 58 OCT 19684.)

In sum, there was abundant evidence of appellant's guilt for Allen's murder, and in view of this evidence, any error concerning that charge was harmless.

f. Bond, O'Connor, Lonnie Jr., and Stapley

(1) O'Connor

As with Allen, the evidence of appellant's guilt for O'Connor's murder was captured on the M-Ladies video and was overwhelming. There was no dispute O'Connor was killed after she appeared in the video; the only dispute was whether appellant was involved. And the M-Ladies video left no doubt he was.

As the video demonstrates, appellant did not intend to let O'Connor leave Wilseyville alive. Like Allen, O'Connor was brought to the Wilseyville residence, restrained, and told she must serve as a sex slave for appellant and Lake or be killed. (Exh. 22-A; 58 OCT 19679.) To eliminate any doubt that the threat was real, Lake pointed a handgun at O'Connor's head when she failed to undress quickly enough. (Exh. 22-A.)

Besides threatening to kill O'Connor if she refused to be raped, appellant and Lake told her that she was never going to see her family again. Specifically, Lake told her that her baby, Lonnie Jr., was going to be taken away and given to another family. (Exh. 22-A; 58 OCT 19678-19679.) Lake also said that Lonnie Jr. was "asleep, like a rock"—which implied that he was already dead. (Exh. 22-A; 58 OCT 19678.) Appellant

similarly warned O'Connor not to ask about Lonnie Jr. anymore or the infant would be "history." (Exh. 22-A; 58 OCT 19689-19690.) Lake also told O'Connor that Bond and Stapley had been "taken away . . . for the rest of their happy lives" and might already be dead. Lake further revealed that he and appellant "weren't gentle" with Bond—which confirmed that it was Lake and appellant who took Bond and Stapley away. (Exh. 22-A; 58 OCT 19679-19680, 19682.) This, of course, was consistent with appellant's own testimony that he and Lake buried Bond's and Stapley's bodies. (See 30 RT 7272-7273, 7319-7325; 31 RT 7547-7548, 7550, 7554.)

Appellant's eager participation in O'Connor's captivity and humiliation also showed his intent to kill and refuted his assertion that he meant to eventually let O'Connor go free. For example, when Lake told O'Connor that they were giving Lonnie Jr. to another family, appellant added that "It's better than the baby's dead . . . ." (Exh. 22-A; 58 OCT 19679.) And after O'Connor learned that Bond and Stapley had been taken away and asked, "Is that why you invited us over here for dinner?" appellant replied, "It's part of the game." (Exh. 22-A; 58 OCT 19679-19680.) This showed that appellant participated in planning and carrying out the murders, and it was merely a game to him.

Additionally, appellant demanded that O'Connor explain some unflattering letters she had written to Bond. (Exh. 22-A; 58 OCT 19680-19681.) He also advised her to "Just take it whatever we tell you." (Exh. 22-A; 58; OCT 19681.)

Demonstrating his initiative and zeal, appellant pulled out a knife and sliced off O'Connor's T-shirt without any prompting from Lake. He also tied up her legs and placed manacles around her ankles. (Exh. 22-A.) Further, he unfastened her bra and said, "Let's see what we're buying." This echoed Lake's words to Allen a week earlier, and it again displayed

the partnership between appellant and Lake. It also showed that, to appellant, these victims were merely objects.

Eventually, appellant sliced off the rest O'Connor's bra, and when O'Connor objected, he replied, "Nothing is yours now. You're . . . totally ours." (Exh. 22-A; 58 OCT 19684.) Before removing O'Connor's handcuffs, appellant warned her, "I'll get my weapon handy in case you try to play stupid." (Exh. 22-A; 58 OCT 19684.) And he admonished her that "You can cry and stuff like the rest of them, but it won't do you no good. We are pretty, ha, cold-hearted, so to speak." (Exh. 22-A; 58 OCT 19684.)

When O'Connor she said she was going to pass out, appellant displayed his callousness by telling her, "you can pass out, but we're going to wake you up." (Exh. 22-A; 58 OCT 19687.) When she said she might be pregnant, appellant—apparently misunderstanding her—threatened to kill Lonnie Jr., stating, "we told you what's going to happen to the baby. Just don't ask us or else it'll be history." (Exh. 22-A; 58 OCT 19689-19690.) And appellant expressed an unequivocal intent to rape O'Connor: Before they went to take a shower, he told her, "Both of us going [*sic*] to make sure you're clean before we fuck you. That's the house rule." (Exh. 22-A; 58 OCT 19690.) This comment also showed that appellant had done this before.

Thus, as with Allen, it would be absurd to believe that appellant intended to let O'Connor go after he and Lake

- imprisoned her
- told her she must serve as a sex slave or be killed
- told her that they were "coldhearted" and there had been previous victims
- told her they had violently taken Bond and Stapley away "forever," and they might already be dead

- told her they were going to give her infant son away and talked openly about killing him
- pointed a gun at her head when forcing her to strip, and
- raped her.

Moreover, the fact O'Connor was Lake's neighbor—and could thus direct the police to him if she were ever freed—made it even more farfetched that appellant intended to let her live. This is particularly incredible considering that appellant had *already* participated in numerous murders. Further, appellant drew a picture of the Bond/O'Connor family on his prison wall in the "San Quentin... Years Later" cartoon, and he included a bag of remains labeled "Bond" his "remains claiming section" cartoon. (Peo. Exhs. 226, 230.)

(2) Bond, Lonnie Jr., and Stapley

Consistent with the evidence of appellant's guilt for O'Connor's murder, there was abundant evidence of his guilt for the murders of Stapley, Bond, and Lonnie Jr. To begin with, appellant himself testified that he helped bury Bond and Stapley. (30 RT 7272-7273; 31 RT 7551-7554.) And the M-Ladies demonstrated that he and Lake had killed them. For example, Lake told O'Connor that the neighborhood did not like her and Bond, and that "We've closed you down. . . . we took you away. We took Scott [Stapley] away." (Exh. 22-A; 58 OCT 19678.) He explained that Bond and Stapley had been taken away "for the rest of their happy lives"; that he and appellant "weren't gentle" with Bond; and that Bond and Stapley might already be dead. (Exh. 22-A; 58 OCT 19679-19680, 19682.)

Moreover, Lake refused O'Connor's repeated pleas to bring Lonnie Jr. to her, and he told her that Lonnie Jr. was going to be taken away and given to another family. For his own part, appellant referred to Lonnie Jr. being "dead" and threatened that the infant would "be history" if O'Connor

kept asking about him. (Exh. 22-A; 58 OCT 19678-19679, 19689-19690.) All these remarks provided strong evidence that appellant and Lake had already killed Stapley, Bond, and Lonnie Jr. Further, appellant and Lake needed to protect themselves by killing Bond and Stapley, because otherwise, Bond and Stapley would likely have come looking for O'Connor, and might have enlisted law enforcement in the search. And appellant and Lake would not have kept Lonnie Jr. alive unless they had been willing to care for him—which is inconceivable.

In addition, Lake also said it had been a "hairy day," and that he and appellant were going to "sit back and enjoy [them]selves" after such a "hectic day . . . ." (Exh. 22-A; 58 OCT 19678 , 19682.) Based on everything appellant and Lake told O'Connor, it is reasonable to conclude that they had a "hectic" and "hairy" day because they had killed Stapley, Bond, and Lonnie Jr.

Appellant's appropriation of the victims' property further implicated him in the murders. His use of Stapley's truck is one example: Stapley's last known communication occurred on Monday, April 22, when he sent his girlfriend a card—postmarked in Wilseyville that afternoon—and wrote that he was "safe on Monday noon." (18 RT 4277-4279.) The next day, appellant had an accident while driving Stapley's truck near Interstate 5, the main highway connecting Northern and Southern California. (18 RT 4273-4274; 19 RT 4715-4717, 4720-4723.) The day after that, appellant and Lake appeared at Stapley's apartment in San Diego. They took some of Stapley's belongings, and Lake informed Stapley's girlfriend that Stapley, Bond, O'Connor, and Lonnie Jr. were all dead. (15 RT 3631; 18 RT 4281-4286; 31 RT 7542-7543.) Later, Stapley's camera was found at appellant's hideout in Calgary, and Bond's bank card was found in appellant's apartment. (16 RT 3888-3889; 18 RT 4497-4500; 19 RT 4568-4571, 4594.) Appellant's possession of these victims' property was strong

evidence of his involvement in their murders, especially given the evidence that he had already shared in the proceeds from the previous murders.

Also, a videotape found at appellant's apartment included a brief image of what appeared to be a corpse lying across a wheelbarrow, wrapped in the manner Bond and Stapley's bodies were wrapped. (13 RT 3220, 3222-3223; 14 RT 3538, 3541; 16 RT 3894.)

In sum, given the evidence showing appellant's guilt for the murders of Bond, O'Connor, Lonnie Jr. and Stapley, any error as to those charges was harmless.

X. APPELLANT'S OTHER CLAIMS REGARDING THE ERRONEOUS ADMISSION OF EVIDENCE AT THE GUILT PHASE ARE ALSO MERITLESS

Besides attacking the admission of Laberge's testimony, appellant contends the trial court made several other errors in the admission of evidence at the guilt phase. (AOB 433-441.) Respondent will address each claim separately. As discussed below, they are all meritless.

A. Appellant Has Forfeited His Claim That the Trial Court Erred by Admitting Evidence That He Phoned Michael Carroll Before Carroll's Murder, and in Any Event, the Evidence Was Admissible under the Hearsay Exception for Statements by an Opposing Party

1. Appellant forfeited this claim, because he bases it on theories he did not raise at trial

John Gouveia was Michael Carroll's foster brother. (13 RT 3339-3340.) After Carroll was discharged from the military in 1983 or 1984, he came to live with Gouveia in Milpitas. (13 RT 3340-3341.) On direct examination, the prosecutor asked Gouveia whether Carroll had ever told him that he knew appellant. Defense counsel objected based on hearsay, and the court sustained the objection. The prosecutor then asked, "Did you ever receive a phone call from someone who identified himself as Charles

Ng?" The defense again objected based on hearsay, but this time, the court overruled the objection. (13 RT 3342.)

Gouveia responded that he had received a call from someone identifying himself as "Charles Ng," who asked to speak with Carroll. (13 RT 3342.) On cross-examination, Gouveia clarified that the caller initially identified himself as "Chuck," and he asked the caller, "'Is this Charles Ng?'" The caller "laughed and replied, 'yeah. Just tell Mike I called.'" (13 RT 3348.) Gouveia did not remember the date of the call. (13 RT 3342-3343.)

Appellant contends the trial court erred by admitting Gouveia's testimony that appellant had phoned Carroll's house and asked to speak with Carroll. Appellant argues that the caller's statement identifying himself as Charles Ng was hearsay, and was not admissible under the hearsay exception for statements by an opposing party, because there was no evidence he actually was the caller. He also contends that the admission of this evidence deprived him of due process. (AOB 433-436; see Evid. Code, § 1220.)

Appellant has forfeited these arguments. At trial, he objected that the statement was hearsay, but unlike now, he did not argue that the hearsay exception for statements of an opposing party was inapplicable because there was no evidence he actually was the caller. (13 RT 3342.) Because appellant is relying on a new theory, his claim is forfeited. (Evid. Code, § 353, subd. (a); *People v. Mayfield*, *supra*, 5 Cal.4th at p. 172; *People v. Hill*, *supra*, 3 Cal.4th at pp. 988-989; *People v. Von Villas*, *supra*, 11 Cal.App.4th at p. 233.) Appellant's due process claim is also forfeited because he did not raise it at trial. (*People v. Boyette* (2002) 29 Cal.4th 381, 424.)

2. There was prima facie evidence that appellant really was the caller, because the caller identified himself as appellant

Even if appellant's claim is cognizable, it is meritless, because the out-of-court statement was admissible under the hearsay exception for statements of an opposing party. Under Evidence Code section 1220, "[e]vidence of a statement is not made inadmissible by the hearsay rule when offered against the declarant in an action to which he is a party . . . ." Of course, there must be some indication that the opposing party was, in fact, the person who made the statement: "In order that a statement may be used against a party as an admission, there must be at least prima facie proof that it was made by him . . . ." (*Lewis v. Western Truck Line* (1941) 44 Cal.App.2d 455, 465.)

Here, the caller *identified* himself as appellant. (13 RT 3342, 3348.) This constituted prima facie evidence that appellant really was the caller, so the statement was admissible under Evidence Code section 1220.

Appellant argues that there was no evidence that Gouveia, who answered the call, knew him and could recognize his voice. (AOB 434.) But this goes to the weight of Gouveia's testimony, not its admissibility, because there was still prima facie evidence that appellant was the caller.

Appellant also argues that the trial court made an inconsistent ruling when it excluded testimony by Stan Petrov, Harvey Dubs's employer. Specifically, the defense asked Petrov, on cross-examination, whether his secretary told him that she had received a phone call from someone who identified himself as "Jim Bright." (AOB 435-436; 14 RT 3398.) The court excluded Petrov's answer as hearsay. (14 RT 3398.)

But this ruling was irrelevant to the admissibility of Gouveia's testimony. In any event, there was nothing inconsistent about the ruling: The secretary's statement to Petrov was hearsay, but unlike appellant's

statement to Gouveia, it was not the statement of an opposing party, so this hearsay exception did not apply.

Appellant also relies on *O'Laskey v. Sortino* (1990) 224 Cal.App.3d 241, but *O'Laskey* sheds no light on appellant's claim. *O'Laskey* did not address the requirements for admitting the statement of an opposing party under Evidence Code section 1220; instead, it dealt with the requirements for authenticating a tape recording under Evidence Code section 1401. (*O'Laskey*, *supra*, 224 Cal.App.3d at pp. 249-250.)

As noted above, appellant also maintains that the admission of Gouveia's testimony deprived him of due process. (AOB 435.) According to the Supreme Court, the admission of evidence violates the federal due process clause only if it is "so unduly prejudicial that it renders the trial fundamentally unfair." (*Payne v. Tennessee* (1991) 501 U.S. 808, 825 [111 S.Ct. 2597, 115 L.Ed.2d 720].) It must be "of such quality as necessarily prevents a fair trial." (*Windham v. Merkle* (9th Cir. 1998) 163 F.3d 1092, 1103, internal quotation marks omitted.)

Here, appellant does not assert that the admission of Gouveia's testimony rendered the trial fundamentally unfair, and such a contention would be absurd; thus, even if appellant's due process claim is cognizable, it is still meritless.

B. The Trial Court Did Not Abuse Its Discretion by Ruling That Appellant's Statements to His Coworkers and His Possession of a Knife at Work Were Relevant

Appellant claims the trial court erred by admitting coworker Kenneth Bruce's testimony that (1) he heard appellant utter the slogans "no gun, no fun," "no kill, no thrill," and "daddy dies, mommy cries, baby fries"; (2) appellant bragged about having guns; and (3) appellant brought a double-sided knife to work. According to appellant, this evidence was irrelevant. (AOB 436-437.) Respondent disagrees: Appellant's slogans

were relevant because they appeared to refer to the murders, his statements about guns were relevant because guns were used in the murders, and his possession of the knife was relevant because it corroborated Maurice Laberge's testimony.

1. The evidence was relevant

During trial, the defense filed a motion to exclude certain testimony by Kenneth Bruce, appellant's coworker at Dennis Moving. (34 OCT 11227.) In part, the defense objected to Bruce's testimony that appellant had said, "No gun, no fun," "No kill, no thrill," and "Daddy dies, mommy cries, baby fries." The defense also objected to Bruce's testimony that appellant brought a butterfly knife to work and bragged about having guns. (34 OCT 11229.)

The court held a hearing and ruled that the evidence was relevant under Evidence Code section 210 and was not unduly prejudicial under Evidence Code section 352. (16 RT 3835-3840.) The court characterized appellant's argument under section 352 as "almost specious." (16 RT 3840.)

Bruce then testified that when he and appellant worked at Dennis Moving, he heard appellant utter the slogans "No gun, no fun," "No kill, no thrill," and "Daddy die [*sic*], mommy cry [*sic*], baby fries," and that appellant said these things more than once.[68] (16 RT 3847, 3849-3851.) Bruce further testified appellant had mentioned having guns, and he had seen appellant carrying a knife at work. (16 RT 3852.) The knife opened

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[68] Coworker Lawrence Boen likewise testified that he heard appellant say things like "No kill, no thrill," "No gun, no fun," and "Daddy dies, Mommy cries, baby fries." (17 RT 4009-4010, 4108.) Coworkers Hector Salcedo and Perry McFarland gave similar testimony. (17 RT 3979, 3987, 4097-4098, 4108, 4113.)

up and had two handles, and the blade was sharp on both sides. (16 RT 3854.)

Appellant now contends the trial court erred by admitting Bruce's testimony that (1) appellant said, "No gun, no fun," "No kill, no thrill," and "Daddy die [*sic*], mommy cry [*sic*], baby fries"; (2) appellant bragged about having guns; and (3) appellant brought the double-sided knife to work. Specifically, appellant argues that this evidence was irrelevant. (AOB 436-437.)

Relevant evidence is any evidence that has a tendency to prove or disprove any disputed fact of consequence, including a witness's credibility. (Evid. Code, § 210.) "The trial court is vested with wide discretion in determining relevance under this standard." (*People v. Kelly, supra,* 1 Cal.4th at p. 523.)

Here, the court did not abuse its discretion by admitting Bruce's testimony about appellant's slogans, because they were highly relevant. The slogans "no gun, no fun" and "no kill, no thrill" were a powerful admission that appellant participated in killing the victims for "fun" and the "thrill" of the kill. In particular, the evidence that Lonnie Bond and Scott Stapley were shot to death was consistent with appellant's "no gun, no fun" slogan. (17 RT 4172-4176, 4182-4184, 4221-4223; 19 RT 4738-4739.) And appellant's "San Quentin" cartoon—which showed these two slogans on his prison wall *together with pictures of the victims*—further linked the slogans to the murders. (Peo. Exh. 230.)

Likewise, "Daddy dies, mommy cries, baby fries" constituted a compelling admission that appellant participated in the Dubs and Bond/O'Connor killings, which both involved the murder of a father, mother, and infant. Indeed, this slogan is especially pertinent in light of the M-Ladies video, where Lake informs O'Connor that her fiancée Bond has

been taken away, and O'Connor cries for appellant and Lake to return her baby to her. (Exh. 22-A; 58 OCT 19678-19679.)

Further, the words "baby fries" demonstrated appellant's guilty knowledge that the remains of Sean Dubs and Lonnie Bond, Jr. were among the burnt, smashed, and comingled remains discovered at the Wilseyville property. And they were consistent with the evidence that the bone and tooth fragments found there included the remains of at least one infant. (18 RT 4402-4407; 19 RT 4607.) In short, the court did not abuse its discretion by ruling that "no gun, no fun," "no kill, no thrill," and "daddy dies, mommy cries, baby fries" were relevant—on the contrary, it would have been an abuse of discretion to exclude them.

Likewise, the court did not abuse its discretion by ruling that appellant's bragging about possessing guns was relevant. Its relevance was obvious, because guns were used in the murders of Bond and Stapley. And again, appellant himself connected guns to the murders by reciting the slogan "no gun, no fun" and creating a cartoon drawing that showed the words "no gun, no fun" on his prison-cell wall, together with pictures of the victims.

Finally, the court did not abuse its discretion by admitting Bruce's testimony that appellant had brought a double-sided knife to work. Appellant's possession of the knife corroborated Laberge's testimony that appellant told him that he flicked open his butterfly knife and cut a female's T-shirt after she complained that she was warm. (20 RT 4783.) Moreover, in the M-Ladies video, appellant used both sides of his knife to cut off Brenda O'Connor's bra. (Exh. 22-A.) Thus, it was not an abuse of discretion to rule that Bruce's testimony about the knife was relevant.

2. The evidence was not unduly prejudicial

It is unclear whether appellant is arguing that the trial court erred under Evidence Code section 352 by admitting Bruce's testimony; he only

states that the court erred by admitting "irrelevant" evidence. (AOB 436.) But assuming he is making such a claim, it fails.

Under section 352, all relevant evidence that has not been excluded by statute is admissible unless the trial court, in its discretion, finds that its "probative value is substantially outweighed by 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." (Evid. Code, § 352.) The prejudice referred to in section 352 applies to "evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues." (*People v. Doolin, supra,* 45 Cal.4th at p. 439, internal quotation marks omitted.) "In other words, evidence should be excluded as unduly prejudicial when it is of such nature as to inflame the emotions of the jury, motivating them to use the information, not to logically evaluate the point upon which it is relevant, but to reward or punish one side because of the jurors' emotional reaction." (*Ibid.*) A ruling under section 352 is reviewed for abuse of discretion. (*People v. Davis, supra*, 46 Cal.4th at p. 602.)

Here, the trial court did not abuse its discretion by denying appellant's challenge under section 352. The statements "no gun, no fun," "no kill, no thrill," and "daddy dies, mommy cries, baby fries," could not have been unduly prejudicial given their high probative value. (See *People v. Karis* (1988) 46 Cal.3d 612, 638 [under section 352, "prejudicial" is different from "damaging"].) And in the context of appellant's outrageous behavior on the M-Ladies video and his vile cartoon drawings—one of which included these slogans next to pictures of the victims—Bruce's testimony about the slogans was not inflammatory.

Similarly, the fact appellant bragged about having guns and showed his knife to Bruce was not the kind of evidence that would uniquely tend to

evoke an emotional bias. Indeed, the defense implicitly conceded this. During the hearing, defense counsel argued that appellant's statement about having guns was irrelevant because many people own guns and brag about them, and bragging about having a gun is different from bragging about using one. (16 RT 3837, 3839.) Counsel also argued that bringing a knife to work was not probative, because appellant worked for a moving company, where knives were a common tool. (16 RT 3839-3840.) But if gun ownership and bragging are commonplace, then there was nothing inflammatory about appellant's bragging. Likewise, if a mover would be expected to have a knife, then the evidence that appellant had one would not have biased the jury.

And again, in the context of the overall evidence, Bruce's testimony about guns and knives would not tend to evoke a unique emotional bias. The prejudicial effect of the gun and knife evidence paled in comparison to appellant's barbaric treatment of Allen and O'Connor on the M-Ladies video. Further, there was other evidence linking guns and knives to appellant. For example, in the M-Ladies video, appellant used a knife to cut off O'Connor's shirt and bra, he told Lake that the "piece" (i.e., the gun) was on the table, and he was nearby when Lake pointed the gun in Brenda O'Connor's face. Moreover, Lake told both Allen and O'Connor that if they did not cooperate, he *and appellant* would shoot them. (58 OCT 19666-19668, 19670, 19679; Peo. Exh. 22-A.) And when appellant stole the vise from the lumber store on the day the conspiracy unraveled, he placed it in a car trunk that also contained a semiautomatic weapon and a silencer. (12 RT 2976-2979, 2981-2982, 2985, 3002-3005.) Hence, given the abundance of evidence that appellant had access to guns and knives, Bruce's testimony could not have been prejudicial.

In sum, the court did not abuse its discretion by admitting Bruce's testimony.[69]

C. Appellant's Claim That the Trial Court Improperly Admitted Evidence That a VCR Was Seized from His Apartment Fails, Because It Lacks Any Basis in Law

Next, appellant contends the trial court erred by admitting evidence that the police found a VCR without a serial number in his apartment. Specifically, he argues that there was no evidence supporting the prosecution's theory that the VCR had been taken from the Dubs' apartment. (AOB 438.) This claim fails because appellant does not offer any legal basis for it, and in any event, there was abundant evidence that the VCR was taken from the Dubs' apartment.

1. There is no legal basis for the claim

After the Dubs family disappeared, the police determined that a VCR was missing from their apartment. It was a General Electric (GE) VCR, model number "IVCR." (18 RT 4504-4505.) One of the Dubs' friends testified that after the family disappeared, he inspected the apartment and noticed an empty space on a shelf where Harvey Dubs kept his VCR's and cassette tapes. Based on the lack of dust, it looked like something had been removed. (14 RT 3453, 3457.)

At trial, the prosecution proffered evidence that the police had searched appellant's home and found two GE VCR's of the same model and type as the device missing from the Dubs' apartment. One of the

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[69] It does not appear that appellant is asserting that the admission of Bruce's testimony deprived him of due process under the federal Constitution. (AOB 433-437.) But if he is making such a claim, it fails because Bruce's testimony did not render the trial fundamentally unfair. (See *Payne v. Tennessee, supra*, 501 U.S. at p. 825.)

VCR's was missing its serial number. The other, according to the prosecutor, did not belong to the Dubs family. (17 RT 3928-3929.)

Appellant objected to the evidence that the VCR's were found at his home. He based his objection on relevance, undue prejudice under Evidence Code section 352, and the federal Constitution. More specifically, he argued that it was speculation that the VCR without the serial number came from the Dubs' apartment. (17 RT 3929-3930.) The court disagreed and ruled that the evidence was relevant and was not prejudicial. (17 RT 3930.)

A police detective then testified that during the search of appellant's home, the police found two VCR's. They were both GE models, and it looked like the serial number had been removed from one of them. (16 RT 3885; 17 RT 3950-3952.) The prosecution also introduced a photo of the VCR's. (Peo. Exh. 169; 16 RT 3951; 28 RT 6840.)

On appeal, appellant again argues that the trial court erred because there was no evidence that the VCR with the missing serial number was taken from the Dubs' apartment. (AOB 438.) But appellant fails to provide any legal basis for this claim: He does not indicate whether the evidence was inadmissible because it was irrelevant, unduly prejudicial, or improper for some other reason.

Such a conclusory claim must be dismissed; as this Court has explained, "Every brief should contain a legal argument with citation of authorities on the points made. If none is furnished on a particular point, the court may treat it as waived, and pass it without consideration." (*People v. Hovarter* (2008) 44 Cal.4th 983, 1029, internal quotation marks and brackets omitted; see also Cal. Rules of Court, rule 8.204(a)(1)(B) [arguments should be supported with citation to authority].) The court should not be required to infer a basis for appellant's claim; instead, the claim should be summarily dismissed. (*Hovarter*, *supra*, at p. 1029.)

2. There was abundant evidence that the VCR came from the Dubs' apartment

In any event, it was reasonable to infer that the VCR with the missing serial number belonged to the Dubs family. A GE VCR was missing from their apartment, and the VCR in appellant's residence was a GE. (17 RT 3952; 18 RT 4504-4505.) Its serial number appeared to have been removed, which suggests it had been stolen. (17 RT 3952; see *People v. Baker, supra,* 267 Cal.App.2d at pp. 919-920 [missing serial number supported finding of probable cause that projector had been stolen].) This evidence alone supported an inference that this was the Dubs' VCR.

There was other evidence supporting this inference as well. To begin with, at appellant's residence, besides the VCR, the police found two videotapes labeled in Harvey Dubs's handwriting. (13 RT 3068-3069; 14 RT 3396-3397; 16 RT 3890-3891; 18 RT 4504; 20 RT 4886-4888.) The presence of the Dubs' videotapes strongly supported the inference that the VCR was also theirs.

In addition, the police found a map in appellant's residence, on which the Dubs' small street had been circled. (16 RT 3889-3890; 19 RT 4590). And appellant was seen leaving the Dubs' apartment on the day they disappeared, near the time they were last heard from. (13 RT 3066-3067; 14 RT 3404-3405, 3413-3414, 3420-3421; 18 RT 4779-4482.) As he walked away from their apartment, he was carrying a suitcase. (14 RT 3414, 3435, 3450.) Two days later, he was again seen leaving the apartment, this time carrying a full flight bag and a full duffel bag. (14 RT 3491-3493, 3497, 3500-3502, 3504; 18 RT 4483-4484.) The evidence that appellant was removing things from the Dubs' apartment further supported to the conclusion that the VCR in his apartment belonged to them.

Additionally, at the Wilseyville property, the police found the Dubs' cassette player, a generator identical to one missing from the Dubs'

apartment, and a receipt bearing Harvey Dubs's name. (13 RT 3076-3078, 3179.) The presence in Wilseyville of items stolen from Dubs' home also supported the conclusion that the VCR in appellant's apartment was theirs.

In sum, whatever the nature of the alleged error, there was abundant evidence that the VCR in appellant's apartment was taken from the Dubs' apartment.

D. The Trial Court Did Not Abuse Its Discretion by Admitting Evidence That the Police Found Marijuana in Appellant's Apartment, and That Appellant Invited Clifford Peranteau to a Marijuana Farm in the Hills

1. The evidence in question

During the prosecution's case-in-chief, the prosecutor proffered evidence that the police had discovered four baggies of marijuana in appellant's apartment, and it was packaged similarly to marijuana discovered at the Wilseyville property. (16 RT 3921-3923.) The defense objected based on relevance. (16 RT 3921, 3923-3924.) Initially, the court ruled that the evidence was only marginally relevant and excluded it under Evidence Code section 352. (16 RT 3924.)

Shortly afterward, the defense objected to coworker Hector Salcedo's testimony that appellant had invited Clifford Peranteau to come to the hills to harvest marijuana. (17 RT 3931.) According to the prosecution's offer of proof, appellant showed up unannounced at Peranteau's home and informed Peranteau and Salcedo that he had a friend who grew marijuana, and if they came to the property to harvest it, they could take home as much as they wanted. (17 RT 3992.)

Defense counsel objected based on relevance and undue prejudice. He argued that the evidence lacked relevance because it did not indicate whether this conversation took place near the time Peranteau disappeared, or where the marijuana field was located. (17 RT 3932-3933.) The court

overruled this objection. It found that the evidence was relevant to show that appellant intended to lure Peranteau from the Bay Area to the hills. (17 OCT 3934-3935.)

Salcedo then testified that one afternoon in December 1984 or January 1985, appellant appeared at Peranteau's apartment. (17 RT 3978, 3988, 3996, 4007.) After coming inside, appellant showed Peranteau and Salcedo a bag of marijuana and told them that his friend had a "plantation" in the hills a couple of hours away, and if they went there to help him, they could keep some marijuana for themselves. (17 RT 3989.) Salcedo also testified that Peranteau occasionally used marijuana. (17 RT 3996.)

On cross-examination, the defense initially elicited Salcedo's testimony that he was not in fact present during this conversation, and instead, Peranteau merely told him about it. (17 RT 4002-4004.) However, on redirect examination, Salcedo clarified that Peranteau originally told him about a conversation where appellant offered to take him to the hills to harvest marijuana, but later, appellant came to Peranteau's apartment and made the offer to Peranteau and Salcedo. (17 RT 4007-4008.)

Subsequently, after the defense had presented its case (but before appellant made his unexpected appearance on the witness stand), the prosecution again sought to introduce the evidence that the police had found marijuana in appellant's apartment. (28 RT 6750-6754.) This time, the court ruled that the evidence was admissible. According to the court, there was evidence that Lake grew and sold marijuana and that appellant did not smoke marijuana; hence, the evidence that several baggies were discovered in appellant's apartment was relevant to rebut the defense's theory that "whatever Lake did, he did it on his own." (28 RT 6755-6757.)

The parties then stipulated that during the search of appellant's home, the police found four baggies of marijuana. (29 RT 6972.) The baggies were admitted into evidence. (29 RT 6972-6973; Peo. Exh. 240.)

2. Appellant's invitation to Peranteau was relevant and was not unduly prejudicial

Appellant now argues that the court erred by admitting Salcedo's testimony about appellant's invitation to him and Peranteau. Appellant maintains that (1) this evidence was irrelevant because there was no "temporal nexus" between the invitation and Peranteau's disappearance, and (2) the evidence was prejudicial. (AOB 440-441.) It thus appears that appellant is claiming the trial court should have excluded the evidence based on relevance and Evidence Code section 352, both of which he raised at trial.

But the court did not abuse its discretion by overruling these objections. To begin with, contrary to appellant's contention, there was indeed a "temporal nexus" between Peranteau's disappearance and appellant's invitation to Peranteau. According to Salcedo, appellant extended this invitation in December 1984 or January 1985. Peranteau disappeared soon afterward, on January 19, 1985. (16 RT 3746, 3856, 3949; 17 RT 3978, 3982-3983, 3985, 3988-3989, 3996, 4007.) Thus, appellant extended the invitation near the time Peranteau disappeared.

Moreover, even if Salcedo had not specified when this incident occurred, it was still close enough to Peranteau's disappearance to make Salcedo's testimony relevant. Appellant started working at Dennis Moving, their common employer, on September 28, 1984, less than four months before Peranteau disappeared. (16 RT 3741, 3743.) This was recent enough to support an inference that appellant was trying to lure Peranteau to Wilseyville.

Further, nothing about this evidence was unduly prejudicial under section 352. There was nothing inherently inflammatory about the invitation, and if, as appellant claims, it was not probative, then it could not

have prejudiced appellant. In short, the trial court did not abuse its discretion by admitting Salcedo's testimony.

3. The evidence that the police found marijuana at appellant's home was relevant and was not unduly prejudicial

The trial court also acted within its discretion by admitting evidence that the police found some baggies of marijuana in appellant's apartment. This evidence was relevant, first, because it corroborated Salcedo's testimony. Specifically, Salcedo testified that when appellant invited him and Peranteau to harvest marijuana, appellant showed them a bag of marijuana. (17 RT 3989.) The fact appellant had baggies of marijuana in his home was consistent with this testimony.

Additionally, the evidence was relevant to show appellant's participation in a common enterprise with Lake. Appellant himself did not smoke marijuana (17 RT 4002), but there was considerable evidence that Lake sold it: One witness who worked for Lake at the Wilseyville property saw marijuana all over the floor of the Wilseyville residence, drying out (24 RT 5760-5761, 5764-5769, 5771-5772); another witness saw Lake at the Bond/O'Connor house dividing up three pounds of marijuana (25 RT 6182-6184; see 24 RT 5916-5917); another witness testified that Lake invited her to his ranch to pick marijuana (24 RT 5740-5741, 5747-5749; see 22 RT 5373); and another testified that Lake dropped a baggie of marijuana through her window and told her "There is more where that came from" (23 RT 5648-5649, 5650-5651; see 22 RT 5373; 26 RT 5642-5643). The defense tried to show that Lake could have committed the murders alone. Appellant's possession of four baggies of marijuana was thus relevant to show that appellant and Lake were participating in a common criminal enterprise, in which they used marijuana to lure the victims to Wilseyville.

Besides being relevant, this evidence was not unduly prejudicial. First, in a case like this, where none of the charges involved narcotics, evidence of marijuana possession does not uniquely tend to evoke an emotional bias. Moreover, where appellant was charged with 12 murders and appeared on the M-Ladies video abusing, threatening, and dehumanizing two of the victims, the emotional effect of a few baggies of marijuana was trifling. (See *People v. Morris* (1991) 53 Cal.3d 152, 214 ["defendant does not demonstrate how the jury's knowledge that he and his companions had harvested a few pounds of marijuana could have prejudiced his defense or made any difference in the verdicts rendered"].)

Additionally, marijuana was not the most important evidence discovered at appellant's home: Besides the marijuana, the police found items belonging to the Dubs family, Peranteau, and Bond. (16 RT 3875, 3888-3889, 3890-3891; see 13 RT 3068-3069; 14 RT 3396-3397; 18 RT 4504; 20 RT 4886-4888.) Appellant cannot seriously assert that the marijuana discovered at his home inflamed the jury when the police also found possessions of the murder victims there.

Additionally, this was a case where some of the *victims* were also involved with illegal drugs. Specifically, there was evidence that Bond and Stapley were manufacturing methamphetamine in Wilseyville (18 RT 4275; 25 RT 6160-6170); that Stapley used methamphetamine (18 RT 4300); and that Peranteau smoked marijuana (17 RT 3996). In this context, there was nothing inflammatory about the fact some marijuana was found in appellant's apartment.

E. There Was No Prejudice

Appellant argues that the purported errors in the admission of evidence were prejudicial because they allowed the prosecution to depict him as a person involved with drugs and weapons, and as a "criminally-

oriented character." (AOB 441.) But appellant does not cite any part of the record where the prosecution attempted to portray him as a drug user.

And it was not the marijuana or the weapons evidence that exposed appellant as a "criminally-oriented character": He demonstrated it himself in the M-Ladies video. Moreover, if appellant is correct that the gun and knife evidence was irrelevant because people often brag about having guns, and because movers always bring knives to work, then the evidence of such unremarkable behavior would not have made him look "criminally oriented." And he cannot seriously maintain that possessing some marijuana demonstrates a general character for committing murder. (See *People v. Morris, supra,* 53 Cal.3d at p. 214.)

Further, as discussed above in Argument IX, part (e)(3), there was abundant evidence showing appellant's guilt for all 11 murders. Given the strength of this evidence, the purported errors were harmless under any standard.

XI. THE TRIAL COURT DID NOT DEPRIVE APPELLANT OF DUE PROCESS AND HIS SIXTH AMENDMENT RIGHT TO PRESENT A GUILT-PHASE DEFENSE BY EXCLUDING CERTAIN EVIDENCE REGARDING LEONARD LAKE

In Claim XI, appellant challenges various rulings that excluded evidence he attempted to introduce at trial. He contends that individually and collectively, these rulings deprived him of his Sixth Amendment right to present a defense. (AOB 442-464.) Respondent disagrees. As discussed below, appellant has forfeited most of these claims because he relies on new theories of admissibility, which he failed to raise at trial. In any event, all of appellant's claims are meritless.

A. Appellant Has Forfeited His Argument Regarding Evidence That Lake's Mother Preferred His Brother over Him, and in Any Event, It Is Undisputed That This Evidence Was Inadmissible Hearsay

During the guilt phase, the defense introduced the testimony of Lake's sister, Sylvia Showalters. (21 RT 4896-4897.) Showalters testified that she and Lake had a brother, Donald Lake. (21 RT 4988.) On direct examination, defense counsel asked whether their mother ever told her that Donald was her favorite son. Showalters answered affirmatively, but the prosecutor objected based on hearsay, and the court sustained the objection. (21 RT 5003.) Appellant now contends this ruling was erroneous. According to appellant, Showalters' answer was relevant, because it would have laid a foundation for the defense's theory that Lake suffered from antisocial personality disorder. (AOB 444.)

In arguing that the trial court erred by excluding evidence, appellant is limited to theories he presented at trial; in other words, he cannot assert new reasons why the evidence should have been admitted. (Evid. Code, § 354, subd. (a); *People v. Marks*, *supra*, 31 Cal.4th at p. 228; *People v. Hill*, *supra*, 3 Cal.4th at p. 989.) Here, the defense never argued that the court should admit Showalters' testimony because it helped show that Lake had antisocial personality disorder. (21 RT 5003.) Appellant has thus forfeited this claim on appeal.

Appellant has likewise forfeited his claim that the ruling violated his Sixth Amendment right to present a defense. An appellant cannot assert that the Constitution compelled the admission of evidence unless he made that argument at trial. (*People v. Smithey* (1999) 20 Cal.4th 936, 995.) At trial, the defense did not argue that the Sixth Amendment compelled the admission of Showalters' testimony; thus, appellant cannot do so here.

Further, appellant's argument is moot. He maintains that the trial court erred because Showalters' testimony was relevant. (AOB 444.) The

court, however, did not exclude the testimony because it was irrelevant; instead, it excluded the testimony because it was inadmissible hearsay. Appellant does not challenge this hearsay ruling, nor did he do so at trial, so his claim is moot. (See *Consol etc. Corp. v. United A. etc. Workers* (1946) 27 Cal.2d 859, 865 [an issue is moot when its determination does not affect the parties' rights].)

In any event, Showalters' testimony was not relevant under appellant's theory. Appellant argues that the testimony was relevant as a foundation to show Lake had antisocial personality disorder. (AOB 444.) But it is appellant's burden to identify the facts in the record supporting his claim. (*People v. Loker* (2008) 44 Cal.4th 691, 734.) And here, appellant fails to show (1) how Showalters' statement would have demonstrated that Lake suffered from antisocial personality disorder; (2) what antisocial personality disorder is; (3) that an expert witness was available and would have testified that Lake suffered from antisocial personality disorder; and (4) how Lake's disorder was relevant to the charges against appellant. Thus, even under appellant's new theory, the proffered testimony was irrelevant.

Further, the purported error was harmless under any standard. To begin with, even if Lake suffered from antisocial personality disorder, it would not have been exculpatory. Additionally, the jury heard a plethora of evidence about Lake's life and character. Finally, there was abundant evidence of appellant's guilt for all 11 murders.

B. Appellant Has Forfeited His Argument Regarding Testimony That Lake Had a "God Complex," and in Any Event, the Claim Is Moot, and the Testimony Was Irrelevant

Karen Roedl was Lake's ex-wife. (21 RT 5027, 5038.) During direct examination, the defense asked her whether Lake had a "God complex."

The prosecutor objected based on relevance. The court sustained the objection and also ruled that the question was vague. (21 RT 5041.)

Appellant now argues that the court erred by excluding this testimony, because it "would have explained that Lake not only killed people without conscience but also felt himself able to use other people for what he viewed as his own higher purpose without letting them know what the higher purpose was or what their role in it was." (AOB 445.) According to appellant, this would have helped persuade the jury that he was merely "an unknowing and unwitting cog in Lake's grandiose and homicidal plan." (*Ibid.*)

On appeal, however, appellant cannot make an argument about relevance unless he made the same argument before the trial court. (Evid. Code, § 354, subd. (a); *People v. Morrison* (2004) 34 Cal.4th 698, 711-712.) Here, the defense did not inform the trial court that Roedl's testimony was relevant to show that he was an "unwitting cog" in Lake's plan. (21 RT 5041.) Consequently, appellant has forfeited this claim. He also forfeited his Sixth Amendment claim by failing to raise it at trial. (*People v. Smithey*, *supra*, 20 Cal.4th at p. 995; *People v. Gordon* (1990) 50 Cal.3d 1223, 1254, fn. 6.)

Moreover, besides sustaining the prosecutor's objection based on relevance, the court ruled that defense counsel's question to Roedl was vague. (21 RT 5041.) Appellant does not dispute this ruling, so his argument about relevance is moot.

In any event, the court did not abuse its discretion by ruling that the evidence was irrelevant. To begin with, there was no evidence explaining what a "God complex" is, or why it would have been relevant if Lake had one. Additionally, assuming that "God complex" is a term from psychology or psychiatry, there was no indication that Roedl was qualified

to opine whether Lake had one. (See Evid. Code, § 800; *People v. McAlpin* (1991) 53 Cal.3d 1289, 1306-1307 [discussing limitations on lay opinion].)

Further, using Roedl's testimony about Lake's "God complex" to prove Lake's conduct toward appellant would have constituted inadmissible character evidence under Evidence Code section 1101, subdivision (a). Finally, there was no prejudice, because Roedl's testimony would not have had affected the verdicts.

C. Appellant Has Forfeited His Claim Regarding His "Supplicant Posture" Toward Lake, and in Any Event, the Claim Is Moot

Defense witness Ernie Pardini lived near appellant and Lake in 1982. (23 RT 5664-5666.) At trial, Pardini testified about appellant's relationship with Lake. According to Pardini, Lake frequently reprimanded appellant and "rode him hard . . . ." (23 RT 5673.) Lake spoke to appellant in a degrading way most of the time and "ordered him around like a slave." (23 RT 5675, 5684.) Pardini considered it a verbally abusive relationship. (23 RT 5690.) Appellant seemed very timid around Lake, like he was trying to gain Lake's approval, and Pardini never heard him talk back to Lake. (23 RT 5675-5676, 5685.) Appellant also seemed very subservient and willing to do whatever Lake said. (23 RT 5685.) When Lake took target practice, appellant would be watching and listening to Lake's instructions. (23 RT 5684.) He seemed to follow Lake around. (23 RT 5686.)

On direct examination, defense counsel asked Pardini, "Did [appellant] seem like—did he seem to be afraid of Lake, if you know, or seeking his approval or—." (23 RT 5685.) Pardini responded, "I don't think it was fear. I don't really thought [*sic*] him to be afraid of Leonard or intimidated physically, but I think he really—he seemed like a lost child trying to win his father's approval." (23 RT 5685.)

The prosecutor objected to this answer because it lacked a foundation and constituted improper opinion testimony. The court replied, "It is also vague. Sustained. Stricken. The jury is ordered to disregard it." (23 RT 5685.)

Appellant now contends the court erred by sustaining this objection, because Pardini's testimony was "essential to demonstrate" that Lake had turned his "God complex" into a relationship where Lake was "the dominant father figure and appellant was the needy supplicant." This, according to appellant, demonstrated that Lake manipulated him into feeling obligated to help Lake in Lake's bizarre ventures. (AOB 445-446.) But at trial, the defense did not assert that the testimony was admissible for this reason, so appellant has forfeited his argument on appeal. Likewise, the defense did not argue that the Sixth Amendment compelled the court to admit the testimony, so appellant's constitutional argument is also forfeited. (See AOB 443; *People v. Smithey*, *supra*, 20 Cal.4th at p. 995; *People v. Gordon, supra,* 50 Cal.3d at p. 1254, fn. 6.)

Further, appellant's claim is again moot. In asserting that Pardini's testimony "was essential to demonstrate" certain things about his relationship with Lake, appellant is arguing that the court should have admitted the evidence because it was *relevant*. But the court did not rule that the evidence was irrelevant; instead, it ruled that the testimony constituted improper opinion evidence and was vague. Appellant does not challenge these rulings, so his argument about relevance is moot. Additionally, the evidence was not exculpatory. Finally, based on all the incriminating evidence, there was no prejudice.

D. The Court Did Not Abuse Its Discretion by Ruling That Evidence of Prior Methamphetamine Sales by Stapley Was Irrelevant and Was Inadmissible under Evidence Code Section 352

During the defense case, the prosecution objected to testimony by Mark De La Cruz and Richard Satterfield regarding Scott Stapley's prior narcotics-related activity. According to the defense, De La Cruz and Satterfield would testify that Stapley had been selling methamphetamine in the San Diego area. Defense counsel argued that this was relevant because it corroborated other evidence that Stapley and Bond were manufacturing methamphetamine in Wilseyville, which in turn helped establish that their methamphetamine business gave Lake a motive to kill them independent of appellant. (24 RT 5950-5952.)

The prosecutor objected that Stapley's drug activities in San Diego were irrelevant. (24 RT 5950-5951.) The court noted that there was abundant, undisputed evidence that methamphetamine was being manufactured at the Carter house, where Stapley, Bond, and O'Connor were living. (24 RT 5951, 5953.) The prosecutor confirmed that he was not disputing this. (24 RT 5953.) Defense counsel responded that, while there was ample evidence that Bond was manufacturing methamphetamine, the testimony about Stapley's activities in San Diego was necessary to show that he was also involved. (24 RT 5953-5954, 5956.) Counsel also argued that the Sixth Amendment mandated the evidence's admission. (24 RT 5955.)

The court sustained the prosecutor's objection and ruled that the evidence was irrelevant and inadmissible under Evidence Code section 352. (24 RT 5954.) The court explained that there was "no dispute as to what was going on at the Carter house," and the defense could not show that Lake or appellant knew what Stapley had been doing in San Diego. (24 RT 5956-5957.)

Here, appellant again argues that the evidence was relevant because it showed that Stapley was involved in the sale of methamphetamine at the Carter house, which, in turn, was relevant because the narcotics activity angered Lake and gave him a motive to kill Stapley independent of appellant. (AOB 446.)

Respondent disagrees. First, the trial court did not abuse its discretion by excluding this evidence as irrelevant. Under Evidence Code section 210, evidence is relevant if has "any tendency in reason to prove or disprove any *disputed fact* that is of consequence to the determination of the action." (Evid. Code, § 210 [italics added].) Here, appellant proffered the testimony about Stapley's drug sales in San Diego to prove he was manufacturing methamphetamine in Wilseyville. But, as the court pointed out, this was undisputed. For example, Stapley's girlfriend, Tori Ann Doolin, testified that Stapley was going to Wilseyville, in part, because he and Bond intended to cook methamphetamine at the cabin. (18 RT 4267, 4275, 4288.) Doolin also testified that Stapley used methamphetamine. (18 RT 4300.) Likewise, Stapley's friend, Terijo Kohler, testified that in March or April of 1985, she loaned Stapley some money, and Stapley told her that he would be able to pay her back very soon, after he made some drugs. (25 RT 6151-6152, 6158-6159.) A short time later, Kohler saw Stapley for the last time, as he was leaving San Diego with O'Connor and Lonnie Jr. (25 RT 6153-6154.)

Hence, there was no dispute Stapley was manufacturing methamphetamine in Wilseyville. The trial court thus did not abuse its discretion by ruling that the San Diego evidence was irrelevant. Likewise, the court did not abuse its discretion by excluding this evidence under Evidence Code section 352, because the evidence's relevance was substantially outweighed by the probability that it would require undue consumption of time. (Evid. Code, § 352, subd. (a).) Indeed, even if

Stapley's participation in the Wilseyville operations had been disputed, the connection between his activities in San Diego and his activities in Wilseyville was so tenuous that it justified exclusion under section 352.

Further, Stapley's methamphetamine sales in San Diego could not be used to prove his conduct in Wilseyville, because this would have constituted inadmissible character evidence, in violation of Evidence Code section 1101, subdivision (a). Finally, given the cumulative nature of this evidence and the overwhelming evidence against appellant, the alleged error was harmless.

E. The Court Did Not Abuse Its Discretion by Excluding Evidence of Antagonism Between Lake and Bond

1. Appellant fails to explain how the court erred by excluding Curtis Everett's testimony

Defense witness Curtis Everett testified about narcotics activity by Lonnie Bond. Specifically, in April 1985, Everett was present when Bond was manufacturing methamphetamine in Paso Robles. (25 RT 6162, 6164, 6169-6170.) The "cooking" was not yet complete: the next stage was going to be performed at Bond's house in Wilseyville. (25 RT 6169-6170.) While Bond was still in Paso Robles, Everett saw him pack up the glassware used for the manufacturing process and load it into a truck. (25 RT 6164-6166.)

Everett was also present when Bond spoke by phone with O'Connor. (25 RT 6174.) From what Everett could hear, things were not going well at the cabin, O'Connor was scared, and she was making the call from Lake's house because that was the only phone "up there." (25 RT 6174-6175.)

During direct examination, defense counsel asked Everett whether Bond said he was returning to Calaveras County to confront Lake. The prosecutor objected based on relevance and hearsay, and the court sustained the objection. (25 RT 6173.) Appellant now appears to argue that this

ruling was erroneous. (AOB 447.) But he does not explain *why* the ruling was erroneous, so his claim fails because it is conclusory. (See *People v. Hovarter*, *supra*, 44 Cal.4th at p. 1029; *People v. Gordon, supra,* 50 Cal.3d at p. 1244, fn. 3; Cal. Rules of Court, rule 8.204(a)(1)(B).)

In a subheading on page 446, appellant states that the court erred by excluding evidence of Bond's "mutual antagonism" with Lake. If this is the basis for appellant's claim—that Everett's testimony was relevant because it showed mutual antagonism between Bond and Lake—the argument still fails. To begin with, the defense did not argue that Everett's testimony should have been admitted to show a mutual antagonism between Bond and Lake. Appellant has thus forfeited this claim on appeal. (Evid. Code, § 354, subd. (a); *People v. Morrison*, *supra*, 34 Cal.4th at pp. 711-712.) He has also forfeited his Sixth Amendment claim by failing to raise it at trial. (25 RT 6173; *People v. Smithey*, *supra*, 20 Cal.4th at p. 995; *People v. Gordon, supra,* 50 Cal.3d 1223, 1254, fn. 6.) Moreover, appellant does not challenge the court's ruling that the evidence was inadmissible hearsay, so the issue of relevance is moot.

During direct examination, defense counsel also asked Everett whether, when Bond left Paso Robles, he told Everett that he was going to "finish it . . . ." (25 RT 6178.) The prosecutor again objected based on relevance, and the court sustained the objection. (25 RT 6178.) Appellant appears to claim this was erroneous, but again he neglects to explain why. His claim therefore fails—and is impossible to respond to—because it is conclusory. (*People v. Gordon, supra,* 50 Cal.3d at p. 1244, fn. 3.)

2. The court did not exclude Marsha Bock's testimony that Bond said he was going to Wilseyville to confront Lake

Next, appellant complains that the trial court "excluded virtually all testimony from [Marsha Bock[70]] regarding Lonnie Bond's statement that he was going to Wilseyville with his 22 caliber pistol to confront Leonard Lake for hassling Brenda O'Connor." (AOB 447.)

But the court did not exclude this testimony: On the contrary, Bock testified that Bond was at her house on April 17 and 18, 1985—four days before Bond and Stapley disappeared. (26 RT 6353.) As Bond was preparing to leave, he told Bock that he was going to Lake's house "to confront him to settle a score," because Lake was constantly saying he was going to "have Brenda," and Bond did not like this. (26 RT 6355.) In Bock's presence, Curtis Everett asked Bond whether he could "handle" Lake, and Bond replied, "'If I can't, I have my .22 with me.'"[71] (26 RT 6357.) Thus, contrary to appellant's contention, the jury indeed heard Bock's testimony that Bond was going to Wilseyville with his pistol to confront Lake. In any event, the evidence of a specific conflict between Bond and Lake did not make weaken the evidence that appellant was also involved in Bond's murder, so there was no possible prejudice.

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[70] Appellant states that the court excluded the testimony of "Martha Everett." (AOB 447.) He is apparently referring to Marsha Bock, who was Curtis Everett's wife. (See 26 RT 6350-6351.)

[71] Bock told Bond that she had a feeling something bad would happen to him in Wilseyville and she would never see him again. She begged him not to go. In response, Bond looked down at the floor and said, "'yeah.'" (26 RT 6355-6356.)

F. The Court Did Not Abuse Its Discretion by Excluding Expert Testimony Regarding the Profile of a Serial Killer

The defense also attempted to introduce the testimony of Robert Ressler. (26 RT 6376.) According to defense counsel, Ressler would testify that Lake fit the profile of a serial killer, but he had never heard of an Asian committing serial homicide. (26 RT 6377.) The court excluded this testimony as irrelevant. (26 RT 6378.)

Appellant now contends the court erred, because the defense needed Ressler "not merely to label Lake as a serial killer, but to corroborate Lake's domineering positioning toward appellant," and to show that appellant did not fit the FBI's profile of a serial killer. (AOB 448-449.)

This claim fails, first, because Ressler's testimony was irrelevant to proving Lake was a serial killer. Again, for evidence to be relevant, it must relate to a "disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) Here, it was undisputed Lake was a serial killer—indeed, the prosecution's theory was that appellant planned and committed the charged murders *with Lake*. (12 RT 2919, 2926-2927; 29 RT 6974, 6977, 6989-6990, 6993; see Evid. Code, § 210.) Hence, Ressler's testimony showing that Lake was a serial killer would have been irrelevant. Moreover, because it was undisputed Lake was a serial killer, Ressler's testimony would have necessitated undue consumption of time, making it inadmissible under Evidence Code section 352.

Appellant also argues that the court should have admitted Ressler's testimony because Ressler would have corroborated "Lake's domineering positioning toward appellant." (AOB 448-449.) But the defense did not make this argument at trial, so it is forfeited. (26 RT 6376-6379; Evid. Code, § 354, subd. (a); *People v. Morrison*, *supra*, 34 Cal.4th at pp. 711-712.) Moreover, the argument fails, because the record does not

demonstrate that Ressler would have testified about Lake's "domineering" relationship with appellant. And it is appellant's burden to demonstrate that the record supports his claim. (*People v. Sullivan* (2007) 151 Cal.App.4th 524, 549; 26 RT 6376-6379.)

Appellant further argues that the evidence was relevant because Ressler would have testified that did not know of any Asian serial killers, and this would have shown that appellant did not fit the profile of a serial killer. (AOB 448-449.) Appellant has forfeited this argument as well. At trial, defense counsel asserted that Ressler knew of no Asian serial killers, but he never asserted that Ressler would testify that appellant did not fit the profile of a serial killer. Appellant thus cannot make such a claim here. Likewise, appellant has forfeited his Sixth Amendment claim by failing to raise it at trial. (26 RT 6376-6379.)

Moreover, the fact Ressler did not know of any Asian serial killers was irrelevant. Appellant is asserting, in effect, that the mere fact he was Asian was exculpatory; however, such racial profiling is absurd, inappropriate, and not at all probative. In short, the court did not abuse its discretion by finding Ressler's testimony irrelevant. Finally, the exclusion of this testimony, even if erroneous, was harmless, because the testimony would not have affected the verdicts.

G. The Court Did Not Abuse Its Discretion by Excluding Most of the Proffered Portions of Lake's Diary

1. Procedural history

On October 9, 1998, about two weeks before opening statements, the prosecutor filed a motion to exclude certain evidence, including excerpts the defense wished to introduce from Lake's diary. The prosecution argued that this evidence was irrelevant, was hearsay, and was inadmissible under Evidence Code section 352. (29 OCT 9764-9765, 9771-9772.)

In response, the defense filed a motion to introduce evidence about Lake, including the diary excerpts. (32 OCT 10432-10438.) The defense attached a "sanitized" version of the diary. (32 OCT 10466-10655.) On October 23, the court ruled that three of the excerpts were admissible to prove Lake's plan, and the defense could quote from them in its opening statement. (12 RT 2879-2884.)

The issue of the diary arose again during the defense case, when the defense filed a motion to introduce portions of it. (34 OCT 11546-11595.) The prosecution filed a response, arguing that the entries Lake made before appellant returned to California were irrelevant. The prosecution also argued that, if any of the excerpts were admitted, then other portions should be admitted in order to provide an accurate picture of the diary's contents. (34 CT 11607-11615.)

On January 5, 1999, the court excluded appellant's proffered excerpts because they would be misleading. (26 RT 6394-6396.) Defense counsel then offered to introduce the entire diary, but the court excluded it under Evidence Code section 352, because it would consume a lot of time and was not sufficiently relevant. (26 RT 6396.) The court offered to reconsider this issue if the defense reedited the diary or proffered different excerpts. (26 RT 6398-6399.)

Two weeks later, the defense proffered a newly-edited version of the diary. (28 RT 6757.) The prosecutor objected that it was still misleading. She pointed out, for example, that the entry about Cosner's murder omitted comments by Lake that demonstrated appellant's involvement. The court ruled that this entry was inadmissible unless it included the references to appellant. (28 RT 6758.)

Defense counsel offered to remove that entry. (28 RT 6758.) He further explained that he wanted to introduce entries about the bunker, Operation Miranda, the murder of Charles Gunnar, and the targeting of a

gay man and a woman, all of which preceded appellant's return to California. (28 RT 6759.)

The court agreed to reexamine the diary. (28 RT 6761.) Defense counsel argued that it was fair to admit entries about Lake's plans and motive prior to appellant's return to California. (28 RT 6762.) The court said it was concerned about relevance and Evidence Code section 352, because Lake's plan and motive were uncontested. (28 RT 6762-6763.) The court also said it would consider admitting entries about Lake's philosophy and the two known victims whose deaths preceded appellant's arrival (Donald Lake and Charles Gunnar). (28 RT 6763.)

When the hearing resumed, defense counsel argued that the diary showed Lake "engaging" in Operation Miranda from the beginning and also demonstrated how Lake carried it out. (28 RT 6782.) The court replied that during the period in question, the Miranda plan "never really got any place," Lake was not even in Calaveras County, and the evidence was irrelevant to the charges against appellant. (*Ibid.*) The court said it would admit the paragraph where Lake said he had been harboring the Miranda fantasy for 20 years, but the diary was confusing when it "[got] into specifics that flat out don't go anywhere . . . ." (28 RT 6783-6784.) The court also noted that most of the diary's assertions were uncontested. (28 RT 6789.)

Defense counsel responded that the assertions were relevant because Operation Miranda was an ongoing project completely apart from appellant. (28 RT 6790.) The prosecutor reiterated her objection to the entire diary and further argued that, if the defense introduced portions showing that Lake had devised Operation Miranda before the charged murders, then under Evidence Code section 356, the court should also admit the entries showing that Lake was waiting for appellant to return to

California, and that when appellant returned, the plan changed. (28 RT 6795-6796.)

The court commented that, if the defense was offering the diary for Lake's state of mind, then under section 356, Lake's references to appellant were necessary to provide an accurate picture of Lake's state of mind. (28 RT 6800-6801.) The court sustained the prosecutor's objections based on section 356 and the cumulative nature of the evidence. It admitted one entry, from February 19, 1983. (28 RT 6801, 6805.)

Consistent this ruling, the defense introduced the February 19 entry, which stated:

> Awe, The Collector. Has it really been near 20 years I have carried this fantasy and Miranda? How fitting. My lovely little village in Humbolt [*sic*]. My lovely little prisoner of the future. I suppose in my way I am the same whimp [*sic*] as the hero and in my way just as crazy. [¶] I have no doubt that we whimps have been compensating for our inabilities since the dawn of history. Sad really. Still how can we die if we never live. They have to sleep sometime.

(29 RT 6969-6970; Def. Exh. 663.)

2. Most of appellant's arguments are forfeited because he failed to raise them at trial

Appellant now contends that the diary excerpts should have been admitted for the following reasons:

- They were declarations against interest under Evidence Code section 1230. (AOB 451.)
- They were independently admissible under the due process clause and *Chambers v. Mississippi* (1973) 410 U.S. 284 [93 S.Ct. 1038, 35 L.Ed.2d 297], because they had "'pervasive assurances of trustworthiness'" and were "'reliable and crucial to the defense.'" (AOB 443, 451-452.)

- They would have shown that innocent people like Beverly Lockhart and Robert Barufaldi had seemingly unremarkable encounters with Lake that were really part of Lake's plan for Operation Miranda. (AOB 455.)
- They would have shown that Lake "repeatedly bamboozled other people" without triggering their suspicion, and that Lake's modus operandi was to use other people "in his criminal scheme without telling them what their actual role was." (AOB 455, underscoring omitted.)

At trial, appellant argued that the diary entries were declarations against penal interest. But unlike now, he did not argue that (1) they were admissible under the due process clause and *Chambers v. Mississippi*; (2) they showed that other people unknowingly had encounters with Lake that were part of the Miranda plan; or (3) they showed that Lake "bamboozled" people without their knowledge and used them in his criminal scheme without disclosing their true roles. Because appellant did not make these arguments at trial, he has forfeited them on appeal. (Evid. Code, § 354, subd. (a); *People v. Marks*, *supra*, 31 Cal.4th at p. 228; *People v. Smithey*, *supra*, 20 Cal.4th at p. 995; *People v. Hill*, *supra*, 3 Cal.4th at p. 989.)

3. The court did not abuse its discretion by ruling that the excerpts the defense proffered would be misleading unless they were accompanied by the excerpts that the prosecution proffered

The defense proffered the diary to show that Lake committed the charged murders without appellant. (34 OCT 11548-11549, 11553-11557, 11563-11565.) The prosecutor argued that under Evidence Code section 356 (section 356), if the court admitted the excerpts that appellant was offering, it should admit additional excerpts that contradicted appellant's

theory. (34 OCT 11610-11615; 28 RT 6795-6796.) The trial court agreed and ruled that it would be misleading to admit the entries that the defense was proffering without also admitting the excerpts that the prosecution wanted to introduce. (28 RT 6799-6801, 6805.) The defense did not indicate that it still wished to introduce the diary entries under this condition, so the court only admitted one entry: the "philosophy" excerpt of February 19, 1983. (29 RT 6969-6970; Def. Exh. 663.)

Appellant does not contest the court's ruling under section 356. (AOB 449-452, 455-462.) His entire claim regarding the diary thus fails, because it is undisputed that the court had a valid reason for excluding it.

Moreover, even if appellant is challenging the ruling under section 356, his claim fails. Section 356 states:

> Where part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by an adverse party; when a letter is read, the answer may be given; and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing which is necessary to make it understood may also be given in evidence.

(Evid. Code, § 356.)

"The purpose of this section is to prevent the use of selected aspects of a conversation, act, declaration, or writing, so as to create a misleading impression on the subjects addressed." (*People v. Arias* (1996) 13 Cal.4th 92, 156; accord, *People v. Williams* (2006) 40 Cal.4th 287, 319.) Rulings under section 356 are reviewed for abuse of discretion. (*People v. Pride* (1992) 3 Cal.4th 195, 235.)

Here, the court did not abuse its discretion by refusing to admit the defense's proffered excerpts without the prosecution's excerpts. As noted above, the defense proffered Lake's diary to show that that Lake committed the charged murders without appellant. But it would have been misleading to admit the defense's excerpts without also admitting the prosecution's

excerpts, because the prosecution's excerpts showed that Lake intended to draw appellant into his plan—and succeeded.

To begin with, the prosecution's excerpts indicated that Lake was corresponding with appellant before appellant returned to California. Appellant returned on July 9, 1984. (30 RT 7401-7402.) Lake wrote to appellant on August 17, 1983, November 4, 1983, March 11, 1984, April 8, 1984, and April 30, 1984. (32 OCT 10564-10565, 10593, 10628, 10638, 10643.) Further, Lake mailed appellant a photo on October 20, 1983, "bought stuff" for him on November 14, 1983, and received letters from him on February 27, 1984, and April 13, 1984. (32 OCT 10587-10588, 10593, 10622, 10640.)

And the diary showed that Lake was eager to reunite with appellant. For example, on July 4, 1984, just five days before appellant returned to California, Lake wrote, "Charlie called earlier this day. I didn't talk to him. Said he wouldn't be in until Sunday or Monday. Rats!" (32 OCT 10649.) The next day, Lake wrote, "Informed Charlie is arriving 1345 Monday. Too Bad. Hoping he'd be here earlier." (32 OCT 10650.)

The diary also showed that Lake and appellant began committing crimes together soon after they reunited. On July 11, 1984, just two days after appellant returned, Lake abruptly ceased writing in the diary. This hiatus lasted for two months—a period that included the Dubs murders. (32 OCT 10652-10653.) On September 16, just six days after Lake started making entries again, he wrote, "Pulled raid on Greenfield Ranch w/ Charlie. No detection. Secured. Got two garbage bags of low grade dope. Shipped to country." (32 OCT 10653.) Thus, one of Lake's first entries after appellant's arrival showed that they were already committing crimes together.

The diary also showed that Lake was concerned about appellant's availability. On October 16, 1984, Lake wrote, "Charlie got busted

shoplifting. Sigh." The next day, Lake wrote that he was trying to gather money to bail out appellant, and he commented, "Problems, always more problems." (32 OCT 10654.)

Two days later, Lake drove to "SF to connect with Charlie." Five days later, on October 24, he wrote that appellant had called, and questions were being raised about his citizenship. He added, "He may need to jump bail and split. Went to his place and picked up some loot for cash resale." (32 OCT 10654.)

It soon became apparent why Lake was so concerned about appellant's availability: On November 1, the day before Paul Cosner disappeared, Lake wrote, "Called Beta and arranged to pay him 500 tomorrow night. To meet Charlie tomorrow noon and make plans." (32 OCT 10655.) The next day, Lake wrote, "Met Charlie. Performed op. Met resistance for the first time. Unsuccessful in obtaining credit cards or bank cards. Cancelled Charlie's running debt to me." (32 OCT 10655.) The following day, Lake wrote, "Up at 600 and cleaned site. Departed BA 0730. Dropped off Charlie. . . . Returned to country house 1630." (32 OCT 10655.) These entries demonstrate that appellant was involved in Cosner's murder, and they contradict the defense's justification for introducing the diary, which was to show that appellant was not involved in the murders.

Overall, the entries that the prosecution proffered demonstrate that Lake had planned to collaborate with appellant in committing crimes when appellant returned to California, and that they carried out this plan. It would have been misleading to admit the excerpts that the defense proffered to prove that Lake committed the murders alone without admitting the prosecution's excerpts showing the contrary. Accordingly, the trial court did not abuse its discretion under section 356.

4. The entries in question were not exculpatory

Besides the reasons discussed above, the trial court's ruling was not an abuse of discretion, because the entries in question were not exculpatory.[72]

The first entry at issue concerns defense witness Beverly Lockhart. Lockhart testified that she met Lake in 1982 or 1983. Lake introduced himself as Donald Lake. Sometime between February and April of 1984, Lake invited Lockhart to a cabin in the mountains, and he later offered to help her move. (22 RT 5405-5411.)

Appellant now contends the trial court erred by excluding a diary entry from January 1983. In that entry, Lake wrote that he "[s]nooped around" Lockhart's apartment. He also wrote, "mucho drugs" and "heavy user of men." (32 CT 11570.) Appellant maintains that this entry shows Lake's conduct toward Lockhart "as an individual who otherwise did not see any ulterior or undisclosed agenda on Lake's part." (AOB 455.)

It is unclear what appellant means or how this relates to his culpability for the charged murders. If nothing else, his argument is forfeited because the defense did not make it at trial. In any event, the fact Lake "snooped around" Lockhart's apartment was irrelevant to *appellant's* involvement in the charged murders. And contrary to appellant's assertion, the record does not demonstrate that Lockhart failed to discern Lake's "undisclosed agenda." On the contrary, neither party asked her whether she discerned it. (22 RT 5405-5413.) Additionally, Lake's behavior toward Lockhart could not be used to prove his conduct toward appellant, because this would constitute improper character evidence, in violation of Evidence Code section 1101, subdivision (a).

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[72] Respondent will only address the diary entries that appellant discusses in his brief. (See AOB 455-461.)

The next entry in question is dated February 4, 1983. Here, Lake wrote that he needed to leave the city and return to the country for security and peace of mind, and because in the country, he could find a "slope" suitable for the construction of his underground base. He also wrote that this would require a suitable house with proper slope and drainage, and a "suitable line of females to help cohabitate" the house. (AOB 456; 32 CT 10485.) Appellant contends that this statement reflected "the development of Lake's secret plan for his private kidnap chamber." (AOB 456.)

But there was already undisputed evidence of Lake's plan to build a kidnap chamber, and jury heard it from Lake's own mouth. Specifically, the jury watched Lake's "philosophy" videotape, where he explained his plan for building the bunker and his reasons for doing so. (27 RT 6669-6670; Peo. Exh. 81; 58 OCT 119694-19699.) Lake recorded the video on October 23 or 24, 1983, more than eight months before appellant returned to California. (31 OCT 10403; 24 RT 5917; 30 RT 7402.)

Moreover, in approximately November 1983, Lake told defense witness Eldena Martin that he was living in Calaveras County and building a bunker. (22 RT 5420, 5434-5436.) And witness James Southern told investigators that in 1983, he cleared the land for the bunker's cellar. (23 RT 5702-5704.)

Given the wealth of uncontested evidence about Lake's plan, this entry was irrelevant and cumulative. In any event, it was not exculpatory.

Next, appellant contends the court erred by excluding entries dated February 6 and 7, 1983. On February 6, Lake wrote that he had sent a "'Donald letter' for Mom." (32 OCT 10485; AOB 456.) The next day, he wrote that "[s]he got Don's letter." (32 OCT 10485; AOB 456.) Appellant contends that this showed Lake's "deviousness" in sending his mother forged letters from the brother he had already killed. (AOB 456.)

But the defense did not make this argument at trial, so it is forfeited. And again, this entry was cumulative to other undisputed evidence that Lake misappropriated his brother's identity. For example, the prosecution introduced evidence that after Donald disappeared, Lake's mother received a letter—ostensibly from Donald but actually from Lake—stating that he was going to Reno. (18 RT 4545-4546.) And the defense introduced evidence that Lake rented a room using Donald's name (24 RT 5867-5869; see 22 RT 5373; Def. Exh. 565A); applied to join a club using Donald's name (22 RT 5348, 5351-5354, 5356-5357); identified himself as "Donald Lake" to defense witnesses Beverly Lockhart and Kim Sarlo (22 RT 5360-5366, 5373, 5405-5406, 5411); and instructed appellant to list Donald as one of the users of a post office box (30 RT 7216).

Given the wealth of uncontested evidence that Lake was appropriating Donald's identity, the diary entry was irrelevant and cumulative. Moreover, under the rule precluding the use of character evidence to show conduct, Lake's deviousness toward his mother was not admissible to prove that he was devious toward appellant. (Evid. Code, § 1101, subd. (a).) Finally, Lake's misappropriation of his brother's name was not exculpatory, because it was irrelevant to appellant's role in the charged murders.

In the entry of March 31, 1983, Lake wrote that

> Our "land of the free" is not prepared to deal effectively with a truly free man. What can they do to one who carries cyanide pills in his pockets? When death holds no fears . . . when there is no responsibilities beyond the next meal? Society. You are being socked and you don't understand by who or why. And if you did, you are powerless against one who is not afraid to die.

(32 OCT 10505-10506, ellipsis in original.)

Appellant argues that this showed "the extent of Lake's sociopathic disorder, his willingness to pillage society without pang or remorse, and his

delusions of power." (AOB 456.) But appellant has forfeited this argument by failing to raise it at trial. Moreover, he is reading too much into this entry: What it really reflects is Lake's penchant for narcissistic drivel. And it says nothing exculpatory for appellant. In any event, Lake's character and willingness to pillage society without remorse were exhaustively demonstrated by

- his participation in the 12 charged murders;
- his participation in the uncharged murders of Donald Lake, Charles Gunnar, Randy Jacobson, Sheryl Okoro, Maurice Rock, and the unidentified "John Doe";
- his behavior in the M-Ladies video;
- his statements in the philosophy tape; and
- the parade of defense witnesses who testified about his life and character.

In the entry of May 9, 1983, Lake wrote that the previous night, he had a sexual dream and a dream about going on trial for his crimes. He also wrote "I am a dangerous person. Society would worry if they knew I existed and what I was up to." (32 OCT 10518.) Appellant argues that this entry confirmed that Lake was devoted to "dangerous criminal activities" before appellant returned to California and lacked remorse or a conscience. (AOB 547.)

Again, appellant has forfeited his argument by failing to raise it at trial. In any event, the entry said nothing new about Lake's criminal activity and lack of a conscience; instead, it showed—again—that he liked to talk about himself. Moreover, Lake's statement about his dreams was inadmissible hearsay. Finally, under Evidence Code section 1101, subdivision (a), the entry could not be used to prove specific instances of Lake's conduct.

Moreover, even if this entry showed Lake's criminal activity, it would be irrelevant, because the jury heard abundant, undisputed evidence of Lake's crimes, including the murders of his brother Donald and his friend Charles Gunnar. (13 RT 3232; 15 RT 3598; 17 RT 4239; 18 RT 4544-4545; 21 RT 5115, 5136, 5192-5193, 5198-5201; 24 RT 5912-5913.) And the entry was not necessary to prove Lake's lack of conscience, because Lake demonstrated his lack of conscience in the philosophy tape, where he discussed his plan to build a prison cell, imprison a young woman, and turn her into a sex slave. (59 OCT 19694-19697; Peo. Exh. 81A.) Indeed, in the tape, Lake acknowledged that his plan violated "all of the human rights . . . and concepts of other people's morality," but it reflected his own morality. (58 OCT 19696.) And of course, nothing demonstrated Lake's morality more starkly than the M-Ladies video.

Next, appellant maintains that the entries dated July 6, 1983, and January 8, 1984, demonstrate that Lake began building the bunker and planning Operation Miranda before appellant returned to California. (AOB 457-458.) Again, this was demonstrated by other undisputed evidence, so the diary entry was irrelevant and cumulative.

Appellant next contends that the entry of January 8, 1984, shows that he did not know about Lake's criminal scheme. (AOB 458.) This entry states that the bunker's construction would provide Lake with security, protection from nuclear fallout, and facilities for his sexual fantasies. (32 OCT 10602.) But the entry says nothing about a "criminal scheme, and it sheds no light on what appellant knew.

In an entry dated July 17, 1983, Lake wrote that he had put out some poisoned milk for cats and had also shot a kitten. (32 OCT 10542.) Appellant argues that this demonstrated Lake's sociopathic conduct. (AOB 457.) Appellant has forfeited this argument by failing to raise it at trial. In any event, Lake's statement was inadmissible hearsay. And even

if the statement demonstrated Lake's sociopathic conduct, it was still irrelevant and cumulative, because the jury heard abundant, undisputed evidence of his sociopathic conduct, including his involvement in at least 18 murders. Finally, under Evidence Code section 1101, subdivision (a), Lake's conduct toward the cats was not admissible to prove his conduct on other occasions.

In an entry dated February 29, 1984, Lake wrote that a female named Beth "might be a good candidate for Miranda." (32 OCT 10623.) Appellant argues that this was relevant to show that Lake plotted to use unsuspecting people in his criminal scheme. (AOB 458.) Appellant did not make this argument at trial, so he has forfeited it on appeal. In any event, the entry shed no light on the charged murders or Lake's relationship with appellant. And under Evidence Code section 1101, subdivision (a), it was inadmissible to prove Lake's conduct toward appellant.

In the entry of March 5, 1984, Lake wrote that he had responded to a newspaper advertisement by a gay male who wanted to perform oral copulation. According to this entry, Lake went to the man's house to "case the place" but saw nothing valuable, so he let the man orally copulate him. Lake also wrote that he might be able to "pass for" the man and would "[c]onsider a Fish like operation." (32 OCT 10625.)

Appellant contends this showed Lake's continuing schemes to "kill and prey on others." (AOB 458-459.) But it shed no light on the 12 charged murders or Lake's relationship with appellant. And Lake's schemes to kill and prey on others were amply demonstrated by the undisputed evidence that he killed Donald Lake and Charles Gunnar and assumed their identities, built the bunker to rape and enslave young women, and was involved in the 12 charged murders. Moreover, under Evidence Code section 1101, subdivision (a), this incident was not admissible to prove Lake's conduct on any other occasion.

On July 4, 1984, Lake wrote that he might try to "put the make" on a 29-year-old woman. The next day, he wrote that there was room for one victim in the backyard.[73] Appellant argued that these passages confirm Lake's predatory and manipulative approach toward other people. (AOB 459.)

Appellant has forfeited this argument by failing to raise it at trial. Moreover, he is reading too much into this entry, which merely showed that Lake was interested in having sex with the woman, and was also thinking of where to bury his victims. In any event, Lake's predatory, manipulative behavior was beyond dispute, and was amply demonstrated by the M-Ladies video, the philosophy tape, and the horde of defense witnesses who testified about him. And again, under Evidence Code section 1101, subdivision (a), the entry was not admissible to prove Lake's conduct on any other occasion.

Next, appellant discusses an entry from July 10, 1984—the day after appellant returned to California. In that entry, Lake wrote, "Started teaching Charlie to drive. He is very hesitant to get involved in my plan." (32 OCT 10652.)

Appellant claims this was exculpatory, because it showed he was reluctant to participate in Lake's criminal schemes. (AOB 459.) But the entry was not exculpatory; on the contrary, it was incriminating, because it proved that appellant *knew* about Lake's plan. Indeed, it would have contradicted appellant's own testimony, because he denied knowing anything about the charged murders and maintained that Lake alone was responsible for them. (See, e.g., 30 RT 7213, 7244-7245, 7276-7277, 7285,

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[73] Lake was referring to the back yard of a boarding house in San Francisco, where he rented a room. There was no indication that he considered the 29-year-old woman to be a potential victim (See 24 RT 5783-5788, 5790-5792, 5807; 32 OCT 10648-10650.)

7295, 7310, 7323, 7348, 7356; 31 RT 7483-7484, 7495, 7506, 7539, 7541-7542, 7546, 7558; 32 RT 7677, 7885, 7906-7907, 7912-7913.)

Appellant next discusses the entries from September 10 and 11, 1984, which followed a two-month period without any entries. On September 10, Lake wrote that this period was "best left unrecorded"; the past two months had "seen Miranda come to fruit"; he "enjoyed using" the victim, who apparently "enjoyed being used"; and the first two Pink Palace victims had helped with "money and pussy" but he was now out of money and needed a car. (32 OCT 10653.) The next day, Lake wrote that his thoughts now turned to the third Pink Palace victim, whom he labeled "PP III." (32 OCT 10653.)

Appellant now argues that this constituted a "virtual confession" to the murder of two Pink Palace residents, with a third soon to follow. (AOB 460.) Respondent agrees, but this did not make the evidence admissible. The entry was cumulative, because there was already abundant evidence that Lake was responsible for the murders of three Pink Palace residents—Sheryl Okoro, Maurice Rock, and Randy Jacobson—and his culpability was undisputed.[74]

Moreover, these entries did not exculpate appellant. To begin with, they said nothing about the charged murders. And they did not negate the possibility that appellant had participated in the imprisonment, rape, and murder of the first Operation Miranda victim, apparently Okoro, and the

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[74] The evidence implicating Lake in Jacobson's murder appears at 12 RT 3041-3042; 13 RT 3132, 3360-3361; 15 RT 3636, 3716, 3700-3702, 3704, 3712-3716; 16 RT 3800-3801, 3803; 17 RT 4219-4220; 18 RT 4501-4502; 20 RT 4877; and 24 RT 5795. The evidence implicating Lake in Okoro's murder appears at 15 RT 3650-3651; 23 RT 5586-5587, 5591-5592, 5641, 5643-5644, 5660; and 24 RT 5991-5992. The evidence implicating Lake in Rock's murder appears at 13 RT 3132, 3277; 16 RT 3823-3824; and 24 RT 5740-5746, 5755.

murder of the second Pink Palace resident, apparently Rock. (24 RT 5744-5745.) Indeed, these entries cast suspicion on appellant, because the period that was "best left unrecorded" occurred immediately after he returned to California.

In entries dated October 15 and 16, 1984, Lake wrote, "[c]oordinated with III and completed op. Pulled off with no hitch. It is routine now. Sweat, dirt but no regrets." (32 OCT 10654.) Three days later, on October 19, he wrote that he had unsuccessfully tried to find an "available P.O. Box for III." (32 OCT 10654.) Appellant now claims that (1) the October 15 entry constitutes a confession to a murder—probably of Randy Jacobson—that was "entirely single-handed," and (2) the October 19 entry reflects Lake's modus operandi of murder and identity theft. (AOB 461.)

But the October 15 entry does not indicate that Lake committed the murder alone. And even he did, it would be irrelevant to appellant's culpability for the charged murders. Moreover, there was abundant, undisputed evidence showing Lake's pattern of murder followed by identity theft, and any further evidence of it was cumulative. (See, e.g., 12 RT 3006-3009 [Stapley]; 16 RT 3800-3801, 3803 [Jacobson]; 22 RT 5348, 5351-5354, 5356-5357, 5360-5366, 5373, 5405-5406 [Donald Lake]; 23 RT 5472-5473, 5489-5490, 5586-5587, 5618, 5622-5624 [Gunnar]; 23 RT 5591-5592 [Okoro].)

Finally, even if the trial court erred by excluding the diary, the error was harmless under any standard, because the diary would not have weakened the evidence against appellant.

5. *Chambers v. Mississippi* did not compel the diary's admission

Appellant contends the proffered diary entries were independently admissible under *Chambers v. Mississippi*, *supra*, 410 U.S. 284 (*Chambers*), because they had "'pervasive assurances of trustworthiness'"

and were "'reliable and crucial to the defense.'" (AOB 443, 451-452.) As mentioned earlier, appellant has forfeited this claim by failing to raise it at trial.

In any event, the claim is meritless. To begin with, even if *Chambers* mandated the diary's admission, it would not negate the requirement, under Evidence Code section 356, that the court also admit the excerpts proffered by the prosecution. Appellant was unwilling to introduce the diary under this condition, so *Chambers* is moot.

Further, *Chambers* did not mandate the diary's admission. Under *Chambers*, it is only in rare circumstances, if at all, that due process compels the admission of hearsay evidence. In *Chambers*, the defendant was convicted of murder. (*Chambers*, *supra*, 410 U.S. at p. 285.) The defendant attempted to present three witnesses' testimony that another man, McDonald, had admitted the murder on three separate occasions. The trial court excluded this evidence on hearsay grounds, at a time when Mississippi had no hearsay exception for declarations against penal interest. (*Id.* at pp. 292, 299.)

The Supreme Court held that the exclusion of the exculpatory evidence, combined with the trial court's erroneous refusal to allow certain cross-examination of McDonald, violated the defendant's right to due process. (*Chambers*, *supra*, 410 U.S. at p. 302.) The Court specified that McDonald's admissions were originally made, and later offered at trial, under "circumstances that provided considerable assurance of their reliability." (*Id.* at p. 300.) Specifically, McDonald made three admissions, each to a close acquaintance and each shortly after the murder. Each admission was corroborated by some other evidence, the admissions were unquestionably against McDonald's interest, and McDonald was present in the courtroom under oath and available for cross-examination. (*Id.* at pp. 300-301.)

The Court emphasized that the ruling did not signal a diminution in the respect accorded states in the establishment and implementation of their own criminal trial procedures; rather, that "under the facts and circumstances of this case the rulings of the trial court deprived *Chambers* of a fair trial." (*Chambers*, *supra*, 410 U.S. at pp. 302-303.)

Here, *Chambers* did not support the diary's admission. To begin with, Chambers involved multiple erroneous evidentiary rulings, while this case does not. Moreover, unlike the declarant in *Chambers*, Lake was not in court and available for cross-examination. And in *Chambers*, the declarant directly admitted to three different friends that he had committed the charged murder. (*Chambers*, *supra*, 410 U.S. at pp. 292-293.) In contrast, Lake said nothing to exculpate appellant in the charged murders, and his diary was a statement to himself, not someone else. In short, *Chambers* did not compel the court to admit Lake's diary.

H. Appellant Has Forfeited His Claim That the Court Erred by Excluding a Video of Lake and Balazs Having Sex and Talking about Capturing Women and Children; and in Any Event, the Video Was Inadmissible

During the defense case, the defense proffered a videotape depicting Lake and Balazs having a "sadomasochistic" sexual encounter while purportedly talking about making people disappear. The defense also proffered a transcript of the conversation. (28 RT 6764-6765; 57 OCT 19654-19664.) According to defense counsel, during this encounter, which took place in 1983, Lake took out a photo album and joked with Balazs about people disappearing, including Balazs's students. (28 RT 6764-6765.) Defense counsel argued that the video and transcript were admissible because Balazs had received immunity for 18 homicides, and this evidence showed her "hands-on . . . involvement" with Lake. (28 RT 6765.)

The prosecutor objected based on relevance, hearsay, and Evidence Code section 352. (28 RT 6766, 6779.) After the court had reviewed the transcript, defense counsel clarified that he was offering the tape and transcript to show Lake's state of mind, as circumstantial evidence that he was carrying out Operation Miranda by choosing victims. (28 RT 6779-6780.) The court responded that in the video, Lake did not choose any victims. (28 RT 6781.)

The court excluded the tape and transcript. It characterized Lake's statements as "fantasies" that Lake articulated in the context of a sexual encounter with Balazs. Further, the court explained, even if Lake were seeking Balazs's help finding female victims, it would not exculpate appellant, it would invite further evidence, and it would confuse the jury. Moreover, the recording was remote in time from the charged murders, and it did not reflect any "plan," but instead showed a discussion during "an S and M exercise." (28 RT 6781.)

Appellant now contends the court erred by excluding the recording, because it showed that "Lake engaged in other criminal activity aided wittingly or unwittingly by other people." (AOB 453.) But at trial, this was not the defense's theory of admissibility; instead, as described above, the defense argued that the recording (1) showed Balazs's involvement with Lake, and (2) showed that Lake was choosing victims for Operation Miranda. (28 RT 6765, 6779-6780.) Because appellant bases his current claim on a new theory, he has forfeited it. Likewise, if he is arguing that the ruling deprived him of his Sixth Amendment right to present a defense, he has also forfeited that argument by failing to raise it at trial. (See AOB 443.)

Moreover, even if the claim is cognizable, it is meritless. To begin with, under appellant's current theory of relevance, the recording constituted inadmissible character evidence. Appellant argues that the tape

showed that Lake used Balazs to help him choose victims for Operation Miranda, and that this, in turn, showed something about Lake's subsequent behavior with appellant. (AOB 453.) But using Lake's conduct on one occasion—with Balazs—to prove his conduct on another occasion—with appellant—is prohibited by Evidence Code section 1101, subdivision (a). (AOB 452-453.) For that reason alone, the recording was inadmissible.

Further, even if the recording showed that Lake was using Balazs to "wittingly or unwittingly" help his plot, it would not prove anything about Lake's relationship with appellant or appellant's involvement in the murders. In any case, Lake and Balazs were not seriously discussing the selection of actual victims. On the contrary, as the trial court concluded, their comments were playful fantasies discussed during a sexual encounter. This is demonstrated by Balazs laughter throughout the conversation, and remarks by Balazs that the transcript describes as laughing or playful, such as "[y]ou're terrible" (57 OCT 19659), "[d]irty old man" (57 OCT 19660), and "[n]asty old pervert you, going around and stealing little kids" (57 OCT 19656-19660, 19663).

Finally, the purported error was harmless, because it is inconceivable that the recording would have altered the trial's outcome.

I. Appellant Has Forfeited His Claim Regarding the Court's Refusal to Let Him Recall Balazs to the Stand, and in Any Event, the Ruling Was Not an Abuse of Discretion

During the defense case, the defense called Balazs to the stand. (27 RT 6576.) After she was sworn in, the defense introduced, by stipulation, the terms of her immunity agreement with the prosecution. (27 RT 6577-6578.) Neither party asked Balazs any questions, and she was excused subject to recall. (27 RT 6579.)

After the defense had rested and prosecution gave its closing argument, appellant asked to testify, and the court granted his request.

After he testified, defense counsel asked to recall Balazs. Balazs was not in court, because an illness had prevented her from flying; however, counsel said she could be there the next day. (32 RT 7684.)

The prosecutor objected. He argued that the defense had already put Balazs on the stand, and she did not have any new evidence to offer. He also argued that Balazs's testimony would receive undue emphasis because it came on the heels of Ng's testimony, that it would be unfair to present another defense witness after the prosecution had already given its opening argument, and that Balazs's testimony would be a "fishing expedition" that would confuse the jury. (32 RT 7687-7688.)

Defense counsel responded that he had not originally expected appellant to testify, but appellant's testimony had "changed the complexion of the case . . . ." (32 RT 7689-7690.) He conceded that Balazs's testimony was not newly discovered, but he argued that the defense now had a new strategy because of appellant's testimony. (32 RT 7690.)

The court denied the request, primarily because Balazs had already been called to testify and did not have any newly discovered evidence to offer, and secondarily, because she was not yet available. (32 RT 7691-7692.)

Appellant contends this ruling violated his Sixth Amendment right to present a defense, because he needed Balazs to corroborate important parts of his own testimony. (AOB 453-454.) But at trial, appellant did not argue that the Sixth Amendment compelled the court to grant his request, so he has forfeited this claim on appeal. (*People v. Smithey*, *supra*, 20 Cal.4th at p. 995.)

In any event, the claim fails. The trial court's ruling on a motion to reopen a criminal case for additional evidence is reviewed for abuse of discretion. (*People v. Marshall* (1996) 13 Cal.4th 799, 836.) The factors considered on appeal "include the stage the proceedings had reached when

the motion was made, the diligence shown by the moving party in discovering the new evidence, the prospect the jury would accord it undue emphasis, and the significance of the evidence . . . ." (*Ibid.*; accord, *In re Freeman* (2006) 38 Cal.4th 630, 650.)

All these factors support the trial court's ruling here. First, as the defense conceded at trial, it did not have any *new* evidence to present. This alone justified the denial of the request. In addition, the stage of the proceedings weighed against the request: The court had already indulged appellant by letting him testify after the prosecution had delivered its closing argument. Hence, appellant already had the advantage of tailoring his testimony to the prosecutor's arguments. Permitting him to call another witness—whom he had already called to the stand once—would have aggravated this inequity.

Additionally, as the prosecutor noted, there was a danger the jury would accord Balazs's testimony undue emphasis, because it would follow appellant's testimony, and like appellant's testimony, it would stand apart from the rest of the evidence. Finally, the defense did not make any offer of proof about the content of Balazs's testimony; in fact, it explicitly declined to do so. (32 RT 7689.) Appellant thus cannot demonstrate that Balazs's testimony would have been significant, or that its exclusion was prejudicial.

In sum, the trial court did not abuse its discretion by denying the defense's request to recall Balazs.

J. These Rulings Did Not Deprive Appellant of Due Process or His Sixth Amendment Right to Present a Defense

Appellant also argues that the purported errors in the exclusion of evidence collectively deprived him of due process and his Sixth Amendment right to present a defense. (AOB 442-443.) But appellant did

not raise this claim at trial, so he has forfeited it here. (*People v. Smithey*, *supra*, 20 Cal.4th at p. 995.)

In any event, the claim is meritless. As a general matter, the application of the ordinary rules of evidence does not impermissibly infringe on a criminal defendant's right to present a defense. (*People v. Cunningham* (2001) 25 Cal.4th 926, 998; *People v. Fudge* (1994) 7 Cal.4th 1075, 1102-1103.) "Although completely excluding evidence of an accused's defense theoretically could rise to this level, excluding defense evidence on a minor or subsidiary point does not impair an accused's due process right to present a defense." (*Fudge*, *supra*, at p. 1103; accord, *Cunningham*, *supra*, at p. 999.) Even when the trial court erroneously excludes defense evidence, there is no constitutional violation when the trial court has simply "reject[ed] some evidence concerning the defense." (*Ex parte Wells* (1950) 35 Cal.2d 889, 894; accord, *Fudge*, *supra*, at p. 1103.) Instead, there must be a "refusal to allow [the defendant] to present a defense." (*Fudge*, *supra*, at p. 1103.)

Here, the challenged rulings did not deprive appellant of his right to present a defense. The defense offered the evidence to show that Lake could have committed the charged murders by himself. But there was no possible violation of appellant's right to present a defense, because the defense introduced abundant evidence to show that Lake could have committed the murders by himself. This included exhaustive evidence from numerous witnesses, including appellant, about Lake's history, his uncharged murders, his appropriation of the victims' identities and property, his thefts, his relationship with his family, his relationships with women, his obsession with photographing women, his desire to imprison a woman as a sex slave, his construction of the bunker, and his attempts to lure people to Wilseyville. (See Statement of Facts, *ante*.) Thus, at most, the challenged rulings rejected some evidence concerning the defense,

which cannot constitute a Sixth Amendment violation. Likewise, collectively and individually, the rulings did not render the trial fundamentally unfair, so they did not deprive appellant of due process. (See *Payne v. Tennessee*, *supra*, 501 U.S. at p. 825.)

K. Appellant Has Forfeited His Claim That the Court's Evidentiary Rulings Demonstrated Bias, and in Any Event, the Claim Is Meritless

Finally, appellant maintains that the combined errors in the admission and exclusion of evidence demonstrate that the trial court was biased in favor of the prosecution. (AOB 433.) But appellant has forfeited this claim by failing to object on this basis at trial. (*People v. Samuels* (2005) 36 Cal.4th 96, 114.) Moreover, the claim is meritless, because "a trial court's numerous rulings against a party—even when erroneous—do not establish a charge of judicial bias, especially when they are subject to review." (*People v. Guerra* (2006) 37 Cal.4th 1067, 1112.)

XII. The Trial Court Did Not Err By Refusing to Give Jury Instructions That the Defense Requested at the Guilt Phase

In argument XII, appellant contends the trial court erred by refusing to give three types of jury instructions that the defense requested at the guilt phase: (1) a unanimity instruction concerning the theory of liability; (2) instructions on lesser-related offenses; and (3) an instruction that the jury must find appellant not guilty of the Dubs, Cosner, Peranteau, and Gerald murders unless the vicinage requirement was satisfied. (AOB 464-470.)

Each claim is meritless. A unanimity instruction was improper, because in a murder case, the jury is not required to agree on the theory of liability, and here, there was no evidence of multiple independent acts that could have caused the victims' deaths. Instructions on lesser-related offenses were impermissible, because the prosecution did not consent to

them. And the defense's proposed instruction on vicinage was improper, first, because vicinage was not a jury issue, and second, because vicinage did not affect the court's subject-matter jurisdiction.

A. The Court Correctly Refused to Give a Unanimity Instruction, Because There Was No Requirement That the Jury Unanimously Agree on the Theory of Liability

Before the guilt-phase deliberations began, defense counsel noted that the jury would be receiving instructions on three theories of liability: direct perpetrator, coconspirator, and aider and abettor. Counsel then requested an instruction requiring the jury to unanimously agree on the theory of liability. (28 RT 6918-6919.) The court denied the request, because the jury was not required to unanimously agree on the theory of liability. (28 RT 6920.) The court then instructed the jury on direct-perpetrator liability, coconspirator liability, and aider-and-abettor liability. (See 32 OCT 12124-12128.)

Appellant now contends the trial court erred, because a unanimity instruction was required. (AOB 466-469.) Respondent disagrees: As this Court has explained, there is no requirement that the jury unanimously agree on the theory of liability for murder:

> "It is settled that as long as each juror is convinced beyond a reasonable doubt that defendant is guilty of murder as that offense is defined by statute, it need not decide unanimously by which theory he is guilty. [Citations.] More specifically, the jury need not decide unanimously whether defendant was guilty as the aider and abettor or as the direct perpetrator."

(*People v. Majors, supra,* 18 Cal.4th at p. 408, quoting *People v. Santamaria* (1994) 8 Cal.4th 903, 918-919; accord, *People v. Loker*, *supra*, 44 Cal.4th at p. 707 [jurors were not required to unanimously agree on basis for first-degree murder].)

Appellant counters that here, the defense requested an instruction requiring unanimity on the *conduct* that constituted the offense, not the

theory of liability. (AOB 466.) But appellant is incorrect, because defense counsel asked for an instruction requiring "the jury to be unanimous as to the *theory* under which they were finding an accused to be guilty . . . ." (28 RT 6919, italics added.)

In any event, there was no requirement for a unanimity instruction concerning appellant's conduct. "A requirement of jury unanimity typically applies to acts that could have been charged as separate offenses." (*People v. Maury* (2003) 30 Cal.4th 342, 422.) For example, in a prosecution for criminal threats, a unanimity instruction was required when the defendant made multiple statements, separated in time, that could have constituted criminal threats. (*People v. Melhado* (1998) 60 Cal.App.4th 1529, 1532-1536; see Pen. Code, § 422.)

Murder is different. In a murder case, a unanimity instruction has limited applicability, because the victim can only be murdered once; in other words, for any given victim, there cannot not be multiple acts that could be charged as separate murders.

It is true that a unanimity instruction might be required if the evidence shows "multiple independent acts, any of which could have led to [the victim's] death." (*People v. Maury*, *supra*, 30 Cal.4th at p. 423.) Such a scenario would be rare, and here, appellant has not identified multiple independent acts by him that could have led to the victims' deaths, nor does the record reflect such acts. And the jury was not required to determine whether appellant or Lake was the direct perpetrator, because again, unanimity on the theory of guilt is not required. (*People v. Majors*, *supra*, 18 Cal.4th at p. 408.)

Appellant also argues that the absence of a unanimity instruction violated *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435] and its progeny. (AOB 467.) He is wrong, because there is "'nothing in *Apprendi* that would require a unanimous jury verdict as to

the particular theory justifying a finding of first degree murder.'" (*People v. Morgan* (2007) 42 Cal.4th 593, 617, quoting *People v. Nakahara* (2003) 30 Cal.4th 705, 711-712.)

Finally, appellant argues that under *Schad v. Arizona* (1991) 501 U.S. 624 [111 S.Ct. 2491, 115 L.Ed.2d 555], the jury was required to unanimously determine whether he was guilty as a coconspirator, an aider and abettor, or a direct perpetrator. (AOB 468.) On the contrary, *Schad* demonstrates that no such instruction was required. In *Schad*, the defendant was convicted of first-degree murder. (501 U.S. at p. 629.) On appeal, he argued that the jury needed to unanimously determine whether his guilt was based on premeditation or felony murder. (*Id.* at p. 630.)

The Supreme Court rejected this argument. The four-justice plurality explained that the Sixth Amendment does not require unanimity on the means by which a crime was committed. (*Schad v. Arizona*, *supra*, 501 U.S. at p. 631 (plur. opn. of Souter, J).) ["We have never suggested that in returning general verdicts in such cases the jurors should be required to agree upon a single means of commission"].) In a concurring opinion, Justice Scalia agreed that such unanimity is not required:

> As the plurality observes, it has long been the general rule that when a single crime can be committed in various ways, jurors need not agree upon the mode of commission. [Citations.] That rule is not only constitutional, it is probably indispensable in a system that requires a unanimous jury verdict to convict when a woman's charred body has been found in a burned house, and there is ample evidence that the defendant set out to kill her, it would be absurd to set him free because six jurors believe he strangled her to death (and caused the fire accidentally in his hasty escape), while six others believe he left her unconscious and set the fire to kill her.

(*Id.* at pp. 649-650 (conc. opn. of Scalia, J.).) Thus, five Justices agreed that the unanimity requirement does not apply to the means of committing a crime, and *Schad* therefore refutes appellant's claim.

In sum, the trial court correctly refused to give a unanimity instruction.

B. The Court Correctly Refused to Instruct the Jury on Lesser-Related Offenses, Because the Prosecution Did Not Consent

The defense also requested instructions on several crimes that it characterized as lesser-related offenses. Specifically, defense counsel asked the court to instruct the jury that, if it rejected the murder charges, it could still find appellant guilty of the following crimes:

- accessory after the fact as to all 12 counts;
- kidnapping, false imprisonment by menace, and sexual battery as to Allen and O'Connor;[75]
- robbery as to O'Connor; and
- burglary as to each member of the Dubs family. (36 OCT 12034-12038; see also 25 OCT 8443-8446 [amended information].)

Counsel acknowledged that his request was inconsistent with *People v. Birks* (1998) 19 Cal.4th 108. But he argued that the defense theory was that appellant committed the lesser-related offenses but not the charged murders, and therefore, appellant was entitled to instructions on the lesser-related offenses. (28 RT 6924; 29 RT 6956; 36 OCT 12036-12038.) The prosecutor objected, and the court refused to give the instructions. (29 RT 6955-6957.)

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[75] The defense's written motion requested instructions on sexual battery for "Counts VII and XII." (36 OCT 12036.) Count VII pertained to Michael Carroll. (25 OCT 8455.) There was no evidence Carroll was the victim of a sexual battery, so it appears that the defense's reference to count VII was a typographical error, and it intended to refer to Kathleen Allen, the victim in count VIII.

Appellant contends that despite *Birks*, the trial court erred by failing to instruct the jury on the lesser-related offenses, because the defense's theory was that he was guilty of the lesser-related offenses but not the charged murders. (AOB 468-469.) But even if the crimes in question constituted lesser-related offenses, the trial court lacked the authority to instruct the jury on them.

In *Birks*, this Court held the trial court cannot instruct the jury on lesser-related offenses without the prosecution's consent. (*Birks*, *supra*, 19 Cal.4th at pp. 112-113, 136.) Here, the prosecutor objected to any instructions on lesser-related offenses, so the court's ruling was correct.

Appellant argues that this ruling violated his right to present his theory of the case (AOB 468), but this Court has previously rejected such an argument. According to this Court, "refusing to grant a defendant's unilateral request for instructions on a lesser related offense does not violate any constitutional due process right to present the theory of the defense case . . . ." (*People v. Taylor* (2010) 48 Cal.4th 574, 622 [internal quotation marks omitted, original ellipsis].)

Appellant relies on the Ninth Circuit's opinion in *Conde v. Henry* (9th Cir. 1999) 198 F.3d 734, but as this Court has pointed out, *Conde* involved the failure to instruct on a lesser-included offense, not a lesser-related offense. (*People v. Taylor*, *supra*, 48 Cal.4th at p. 622; see *Conde v. Henry*, *supra*, 198 F.3d at pp. 737-738; AOB 468-469.) As to lesser-related offenses, the controlling federal authority is *Hopkins v. Reeves* (1998) 524 U.S. 88 [118 S.Ct. 1895, 141 L.Ed.2d 76], which held that the Constitution does not require instructions on lesser-related offenses. (524 U.S. at pp. 96-97; *Birks*, *supra*, 19 Cal.4th at p. 124 [discussing *Hopkins*].)

Finally, appellant maintains that the defense was not asking the court to let the jury convict him of the lesser-related offenses, but was merely

requesting "jury instructions that set out the parameters of [his] culpability," from which counsel could argue that he was not guilty of the charged murders. (AOB 468.) Appellant's recollection is incorrect, because the defense specifically requested instructions that permitted the jury to convict him of the lesser-related offenses. According to the proposed instructions, if the jury did not find appellant guilty of the charged murders, "*you may nevertheless convict him* of any lesser related crime, if you are convinced beyond a reasonable doubt that the defendant is guilty of a lesser crime." (36 OCT 12035, italics added.)

Appellant has thus forfeited his claim that the court should have instructed the jury on the elements of the lesser-related offenses without allowing a verdict on them. (*People v. Clark*, *supra*, 5 Cal.4th at p. 988, fn. 13.) And even if the claim were cognizable, there was still no error, because "[t]he absence of an instruction on [the lesser-related offenses] did not prevent [appellant] from presenting his version of the events, or from arguing to the jury that he was not guilty of the capital charges, such that [the reviewing court] could conclude his trial was fundamentally unfair." (*People v. Rundle* (2008) 43 Cal.4th 76, 148.) Finally, there was no prejudice, because it is inconceivable that the verdicts would have been different if the court had instructed the jury on the lesser-related offenses.

C. The Court Correctly Refused to Instruct the Jury on Vicinage and Subject-Matter Jurisdiction, Because These Were Not Issues for the Jury

Despite the repeated denials of the defense's venue and vicinage motions, the defense requested an instruction requiring the jury to determine whether Orange County was a proper forum for the Dubs, Peranteau, Gerald, and Cosner charges. According to the proposed instruction, these counts could not be tried in Orange County—and the jury must therefore find appellant not guilty—unless a preponderance of the

evidence showed that one or more of the following had occurred in Orange County:

- The crimes were planned or committed there;
- The victims' bodies were found there;
- Evidence was found there;
- A participant was arrested there; or
- Post-crime activity occurred there. (36 OCT 12044.)

The prosecution objected to this instruction, and the trial court refused to give it. The court explained, "It's a legal issue decided several times already." (28 RT 6926.)

Appellant contends the court erred by rejecting this instruction, because the court lacked subject-matter jurisdiction over the case unless his vicinage right was satisfied. Appellant is incorrect, because a superior court in California has subject-matter jurisdiction over any felony committed in the state. (*People v. Simon*, *supra*, 25 Cal.4th at p. 1097 & fn. 8.) And even if subject-matter jurisdiction were in question, it is the court, not the jury, who makes that determination. (*People v. Betts* (2005) 34 Cal.4th 1039, 1047, 1052-1054 & fn. 10.) Thus, the court correctly rejected the instruction.

XIII. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY REFUSING TO GRANT A MISTRIAL AT THE PENALTY PHASE AFTER LEARNING THAT FOUR JURORS HAD BRIEFLY SPOKEN WITH THE PROSECUTION'S INVESTIGATOR ABOUT HIS UNUSUAL NECKTIES

During the penalty phase, the trial court learned that a prosecution investigator had spoken with some of the jurors outside the courtroom. After examining each juror and alternate about these contacts, the court excused one juror. Four of the remaining jurors had spoken briefly with the investigator. The subject was his unusual neckties. Based on these exchanges, the defense moved for a mistrial. The court denied the motion.

Appellant now contends this ruling deprived him of due process. (AOB 470-481.)

Appellant is incorrect, because the court did not abuse its discretion by denying the motion. Because the jurors' exchanges with the investigator did not address the case itself, prejudice is not presumed, and it is appellant's burden to show prejudice. He has not met this burden. Moreover, even if prejudice is presumed, the presumption has been rebutted, because the jurors' contacts with the investigator were few and fleeting and were unrelated to the case itself, and the investigator did not give any crucial or contested testimony.

A. The Hearing

1. The court's inquiry

a. Investigator Hrdlicka

On April 14, 1999, during the penalty phase, defense attorney Kelley informed the court that he had observed Juror No. 174 laughing and talking with Mitch Hrdlicka, an investigator for the Calaveras County District Attorney's Office. Hrdlicka had previously testified during the guilt phase. Kelley warned Hrdlicka that he was talking to a juror, and Hrdlicka replied, "'I am very well aware of that.'" (37 RT 8867.)

Outside the jury's presence, Hrdlicka was called to the witness stand. He immediately apologized for his behavior. He testified that he always wore unusual ties, and when the courtroom had opened that morning, Juror No. 174—who would soon be dismissed because of this incident—looked at his tie and said something about it. Hrdlicka then walked over to Juror No. 174, and she asked him where he bought his ties. (37 RT 8870.) Hrdlicka asked Juror No. 174 what kind of surgery she was having, because she was scheduled for surgery the following week. Juror No. 174 said she was having shoulder surgery. Hrdlicka himself had recently undergone

shoulder surgery, so he began discussing it with her. At that point, Kelley emerged from the elevator and warned Hrdlicka that he was talking to a juror. (37 RT 8870.)

Hrdlicka's conversation with the juror lasted for "three minutes, possibly." (37 RT 8871.) They only talked about surgery and Hrdlicka's ties and did not discuss the case. (37 RT 8872.)

b. Juror No. 174

Juror No. 174 gave the following testimony: "[A] lot" of the jurors usually looked to see what kind of tie Hrdlicka was wearing. Juror No. 174's conversation with Hrdlicka began when she commented that his ties were "neat." (37 RT 8873.) She said her fiancé might wear a tie like the one Hrdlicka had worn the previous day, which had a picture of a light bulb with a pull chain. (37 RT 8873-8874.) Hrdlicka told her where these ties might be available. (37 RT 8874.)

Juror No. 174 told Hrdlicka she was having shoulder surgery, and Hrdlicka replied that his shoulder had recently been replaced. He also mentioned that Dwight Stapley, Scott Stapley's father, had undergone two hip replacements and a knee replacement, and it took a lot of work to "come back up to speed with exercise and stuff." The conversation lasted for a few minutes, and they did not discuss the case. (37 RT 8874-8875.)

The previous day, Juror No. 174 had asked Hrdlicka about his light-bulb tie, and Hrdlicka said there was a real pull-chain on it. (37 RT 8876-8877.) That was the first time she had spoken to Hrdlicka about his ties. (37 RT 8876.)

Some of the other female jurors were also interested in Hrdlicka's ties. Sometimes, while the jurors were waiting to enter the courtroom and Hrdlicka was coming out of the elevator, he would pull back his jacket to display his tie. (37 RT 8877-8878, 8880.) During the entire trial, this had occurred "[p]robably a dozen or more" times. (37 RT 8877.) It first

occurred early in the case, when some female jurors looked at Hrdlicka's tie and asked where he got it. (37 RT 8880.) These were "very quick passing" interactions. (37 RT 8946-8947.)

When asked how many times during the guilt phase Hrdlicka had displayed his tie, Juror No. 174 initially replied that she "couldn't even hazard a guess," but she later estimated that it had occurred about 10 or 12 times. (37 RT 8880, 8951; see also 37 RT 8948.) The jurors had spoken with Hrdlicka about his ties "maybe three or four times." (37 RT 8951-8952.) On those occasions, they either complimented his tie or asked where he got it. (37 RT 8952-8953.)

When the trial began, Juror No. 174 did not know that Hrdlicka was an investigator in the case. After he testified, she realized that he was associated with the prosecution. (37 RT 8882.) She did not notice his ties any more than she noticed the lawyers' ties. The jurors had also discussed the lawyers' clothing. (37 RT 8952.) The jurors did not discuss Hrdlicka's ties during deliberations. (37 RT 8953.)

c. Juror No. 287

On the day before the hearing, juror 287 said, "unusual tie" to Hrdlicka as Hrdlicka walked past him. He did not think Hrdlicka responded. (37 RT 8886.) This was the only time he said anything to Hrdlicka about his ties. (37 RT 8888.) He did not even know Hrdlicka's name. (37 RT 8886.)

This encounter would not affect Juror No. 287's ability to be objective. (37 RT 8886-8887.) Juror No. 287 had never discussed Hrdlicka's ties with any of the other jurors and had never seen Hrdlicka open his jacket to display his tie. (37 RT 8885, 8887.)

d. Juror No. 263

Once, when Hrdlicka wore the light-bulb tie, Juror No. 263 commented that he had a "curious" tie. (37 RT 8888-8889.) At most, Hrdlicka responded with a "'thank you'" or an acknowledgement. (37 RT 8889.) On another occasion, Juror No. 263 said something to Hrdlicka about a tie with a picture of a $100 bill. (37 RT 8891.) He did not remember whether this occurred during the guilt phase or penalty phase. (37 RT 8890.) He did not characterize either encounter as a "conversation" but instead described them as "comment[s] off the cuff . . . ." (37 RT 8891.)

"[M]aybe a couple" of times, Juror No. 263 had heard other jurors refer in passing to the fact Hrdlicka wore unusual times. (37 RT 8889.) He had also heard jurors wonder aloud what kind of tie Hrdlicka would wear that day. He did not see any other jurors talk to Hrdlicka about his ties. (37 RT 8892.) From his notes, he knew that Hrdlicka's name was "Mitch," and his last name started with "H." (37 RT 8889-8890.) Nothing about Hrdlicka's ties or the encounters with Hrdlicka would influence his ability to be objective. (37 RT 8889.) The issue of Hrdlicka's ties did not affect his deliberations, and the jurors never discussed it during deliberations. (37 RT 8893.)

e. Juror No. 207

Juror No. 207 did not notice any witness wearing unusual ties, never spoke about ties with anyone, and never heard any other jurors talk about Hrdlicka's ties. (37 RT 8894-8895.)

f. Juror No. 227

Juror 227 never spoke with anyone about ties or heard any other jurors do so. (37 RT 8896-8898.) She remembered Hrdlicka's name but not what he looked like. (37 RT 8897.)

g. Juror No. 215

Juror No. 215 did not remember any the jurors talking about Hrdlicka's ties but recalled that Hrdlicka had worn a light-bulb tie the previous day. (37 RT 8898-8899, 8903.) Juror No. 215 also remembered an incident "a few months ago," in which someone, who may not have been a juror, mentioned Hrdlicka's tie, and Hrdlicka opened his jacket to display it. (37 RT 8900-8902.) Juror No. 215 did not remember whether Hrdlicka said anything in response. (37 RT 8902-8903.) This was the only time Juror No. 215 saw Hrdlicka display his tie. (37 RT 8900.) This incident did not affect Juror No. 215's ability to deliberate or serve on the jury, and no one ever mentioned it in the jury room. (37 RT 8903.)

h. Juror No. 301

Juror No. 301 once heard another juror say something to a witness who had previously testified. This occurred "maybe a couple of days ago." (37 RT 8904.) The other juror had commented, "'Oh, you have hundred dollar bills on your tie,'" and the witness replied, "'yeah, hundred dollar bills.'" This was all Juror No. 301 heard. (*Ibid.*) It would not affect his ability to be objective. (37 RT 8905.) He did not recall any other conversations where the jurors talked about ties. (37 RT 8905-8906.)

i. Juror No. 213

On the day before the hearing, Juror No. 213 and "juror number one" (Juror No. 287) said something about Hrdlicka's light-bulb tie as they "came in the gate." Someone said something about whether the light was on, and Juror No. 213 said "'[p]ull the string,'" because the tie had a small chain. She did not hear Hrdlicka give any response. (37 RT 8907.) The entire encounter took two or three seconds. (37 RT 8907-8908.)

Juror No. 213 had noticed Hrdlicka's ties before, because he wore a lot of novelty ties, and the jurors looked at them. During the guilt phase,

sometime after Hrdlicka testified, she may have approached him and asked what was on his tie, because she could not see it from a distance. It turned out that the tie had pictures of pigs. (37 RT 8909-8910.) Juror No. 213's interest in Hrdlicka's ties did not affect her objectivity at the guilt phase or the penalty phase. (37 RT 8908-8909, 8912-8913.) She also noticed a yellow tie that Kelley sometimes wore. (37 RT 8909.)

Juror No. 213 was not aware that any other jurors had spoken to Hrdlicka about his ties. (37 RT 8910.) She had probably spoken with Juror No. 287 two or three times, in passing, about Hrdlicka's ties. She had seen other jurors talk about Hrdlicka's ties no more than five times. (37 RT 8911-8912.) They were not a "big issue" among the jurors. The jurors did not discuss them during deliberations, and they did not affect her view of the case. (37 RT 8912.)

j. Juror No. 245

The day before the hearing, Juror No. 245 heard one of the other jurors say "'nice light bulb tie'" to someone. (37 RT 8914-8915.) She thought the juror making this comment was male and was Juror No. 287, but she was not sure. (37 RT 8915-8916.) She did not hear any response from the person wearing the tie. (37 RT 8915.) Previously, she had not heard any conversations about anyone's ties. (37 RT 8915-8917.)

Juror No. 245 did not know whether she could identify the person who wore the tie, or whether that person had testified. (37 RT 8917-8918.) She had not heard any of the other jurors refer to someone named "Mitch." (37 RT 8918.) The conversation that Juror No. 245 had heard the previous day would not affect her ability to be impartial. (37 RT 8915-8916.)

k. Juror No. 140

Juror No. 140 had seen Hrdlicka wearing the light-bulb tie but did not hear anyone talk about it or say anything to Hrdlicka. (37 RT 8918-8919.)

It did not affect her ability to be impartial. (37 RT 8921.) Likewise, she had never heard any other juror talking about Hrdlicka's ties or referring to Hrdlicka by his first name. (37 RT 8919-8921.)

l. Juror No. 283

Juror No. 283 did not hear any of the other jurors talk about Hrdlicka's ties or talk to Hrdlicka about his ties, and did not see Hrdlicka open his jacket to display them. (37 RT 8922-8923.) She had noticed Hrdlicka's light-bulb tie the previous day. (37 RT 8922.)

m. Juror No. 110

Juror No. 110 never saw any of the other jurors talk to a witness about his tie. (37 RT 8924.) She had noticed Hrdlicka's light-bulb tie the previous day but did not see any juror speaking to Hrdlicka about it. (37 RT 8925.) Similarly, she never heard any juror discuss Hrdlicka's ties or ask Hrdlicka to display them. (37 RT 8926-8927.)

n. Alternate Juror No. 157

On the day before the hearing, on the way into the courtroom, Alternate Juror No. 157—who would soon be seated on the jury—told Hrdlicka that she liked his light-bulb tie. (37 RT 8934-8935.) Hrdlicka did not respond. (37 RT 8935.) Another juror—number two—said, "do you have an idea," because it was a light-bulb tie. (37 RT 8935-8936.) Hrdlicka replied "[T]hank you." (37 RT 8936.) Two or three times, Alternate Juror No. 157 had heard other jurors compliment Hrdlicka on his ties. (37 RT 893, 8939.) On those occasions, Hrdlicka replied with a thank you and a smile. (37 RT 8939.) Alternate Juror No. 157 had never seen Hrdlicka open his jacket or hold up his tie to display it. (37 RT 8938-8939.) Hrdlicka's ties and the conversations about them would not affect Alternate Juror No. 157's ability to be impartial. (37 RT 8937, 8940.) The ties were not a major topic of conversation. (37 RT 8940.)

o. Alternate Juror No. 217

Alternate Juror No. 217, who was never seated on the jury, noticed Hrdlicka's light-bulb tie the previous day but did not say anything to him about it or hear any other juror do so. (37 RT 8928-8929, 8933.) Another juror asked Alternate Juror 217 whether she had seen the light-bulb tie, because Hrdlicka always wore clever ties. (37 RT 8929, 8932-8933.) The subject of Hrdlicka's ties had probably come up three times. Sometime before Christmas, Alternate Juror No. 217 had said, "cute tie" to Hrdlicka, who nodded in reply. (37 RT 8930.) She never heard any other juror ask Hrdlicka to open his jacket and display his tie. (37 RT 8931-8932.)

p. Alternate Juror No. 235

Alternate Juror No. 235, who was never seated on the jury, did not notice anyone wearing a light bulb tie and did not hear any conversations about one. (37 RT 8941-8942.) She did not recall any witness who wore unusual ties. (37 RT 8941.) The only conversations she recalled about ties concerned the lawyers. (37 RT 8942.) She never saw anyone open his jacket to display a tie. (37 RT 8942-8943.) Hrdlicka's name sounded familiar, but she could not recall who he was. (37 RT 8942.)

2. The court's ruling

After Hrdlicka and the jurors had been questioned, the defense moved for a mistrial of the penalty phase. (37 RT 8958-8959.) The court denied the motion and made the following findings:

- Hrdlicka had worn unusual ties during the trial. They were usually "obvious" and "apparent to see," because they were "flopping around on his belly." (37 RT 8966.)
- Hrdlicka committed misconduct by talking to Juror No. 174, who likewise committed misconduct by talking to Hrdlicka. (37 RT 8962, 8966.)

- It was not misconduct for the jurors to discuss Hrdlicka's ties among themselves. (37 RT 8966.)
- It was improper for the jurors to make comments to Hrdlicka about his ties, but it fell "far short of what [was] necessary for a mistrial because there [was] absolutely no prejudice . . . ." (37 RT 8966-8967.)
- Juror No. 174's conversation with Hrdlicka about Dwight Stapley's health was potentially prejudicial. (37 RT 8967.)

The court also observed that, when Juror No. 174 was being questioned, she was "tremendously vague," and her "smiling and jocular attitude in response to [defense counsel's] initial questions [was] somewhat troubling." (37 RT 8963-8964.)

Later that day, two spectators informed the court that they had heard someone at a payphone say the words "mistrial" and "that investigator from San Andreas," and they then saw Juror No. 174 emerge from the payphone area. (37 RT 8986-8987, 8990-8996.) The court and the attorneys questioned Juror No. 174 again. Juror No. 174 denied discussing this topic during her phone conversation. (37 RT 8996-9000, 9003-9008.) However, she admitted that she had mentioned Dwight Stapley's hip surgery to other jurors during lunch. (37 RT 9010-9014.) The court then questioned the three jurors and two alternates who had eaten lunch with Juror No. 174 that day. None of them recalled Juror No. 174 talking about hip surgery or anyone's surgery except her own. (37 RT 9018-9036.)

With both parties' agreement, the court excused Juror No. 174. (37 RT 9039, 9041-9042.) The court also banned Hrdlicka from the courthouse for the rest of the trial. (37 RT 9046-9047.) The court admonished the jury that Hrdlicka had committed misconduct by speaking with jurors. (37 RT 9058.)

B. There Was No Substantial Likelihood That the Jurors' Fleeting Contacts with the Investigator Biased Any of Them

1. The jurors' communications with the investigator were brief and trivial and did not concern the trial itself

Based on the jurors' momentary encounters with Hrdlicka, appellant contends the trial court erred by denying the defense's mistrial motion. (AOB 475-481.) The denial of such a motion is reviewed for abuse of discretion. (*People v. Wallace* (2008) 44 Cal.4th 1032, 1068.)

"A juror's unauthorized contact with a witness is improper." (*People v. Cowan* (2010) 50 Cal.4th 401, 507.) But a conversation between a juror and a witness, by itself, does not by itself raise a presumption of prejudice. (*Ibid.*; *People v. Woods* (1950) 35 Cal.2d 504, 512.) Instead, this presumption only arises if the conversation addressed "the matter pending before the jury . . . ." (*In re Hamilton* (1999) 20 Cal.4th 273, 305-306, internal quotation marks omitted; accord, *People v. Cobb* (1955) 45 Cal.2d 158, 161.) If the jury was not exposed to extrinsic information concerning the case, then the appellant must demonstrate prejudice "under the usual standard for ordinary trial error." (*People v. Gamache, supra,* 48 Cal.4th at p. 397.)

Here, the presumption of prejudice does not apply, because the exchanges between Hrdlicka and the jurors concerned Hrdlicka's ties, not the trial. (See 37 RT 8886, 8889, 8891, 8900-8902, 8904, 8907, 8909-8910, 8914-8915, 8934-8936, 8939.) In other words, the jurors were not exposed to any extrinsic information.[76] And given the nature and brevity

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[76] In considering appellant's claim, Juror No. 174's conversation with Hrdlicka—in which Hrdlicka mentioned Dwight Stapley's hip and knee replacements—is irrelevant, because Juror No. 174 was dismissed

(continued...)

of the conversations, "under the usual standard for ordinary trial error," it is not reasonably probable they affected the verdicts. (See *People v. Gamache, supra,* 48 Cal.4th at p. 397; *People v. Watson, supra,* 46 Cal.2d at p. 836.) Appellant's claim thus fails.

Indeed, even if—as appellant claims—the presumption of prejudice did apply, his claim would still fail, because there was no substantial likelihood that the jurors' encounters with Hrdlicka resulted in any bias.

As this Court has explained, when the presumption of prejudice applies, reviewing courts employ an objective standard in evaluating claims of juror misconduct:

> whether an individual verdict must be overturned for jury misconduct or irregularity is resolved by reference to the substantial likelihood test, an objective standard. [Citations.] Any presumption of prejudice is rebutted, and the verdict will not be disturbed, if the entire record in the particular case, including the nature of the misconduct or other event, and the surrounding circumstances, indicates there is no reasonable probability of prejudice, i.e., no substantial likelihood that one or more jurors were actually biased against the defendant.

(*In re Hamilton, supra,* 20 Cal.4th at p. 296, internal quotation marks omitted.)

Here, the jurors' encounters with Hrdlicka were entirely innocuous. Of the twelve jurors who deliberated and rendered a verdict at the penalty phase, five had never said anything to him, never interacted with him, and never seen any other juror do so. (37 RT 8894-8895 [Juror No. 207], 8896-8897 [Juror No. 227], 8918-8920 [Juror No. 140], 8922-8923 [Juror No. 283], 8924-8927 [Juror No. 110].) Thus, as to those jurors, there was no conceivable impropriety or prejudice.

(...continued)
from the jury, and she did not tell any of the other jurors about Mr. Stapley's medical history. (37 RT 8874-8875, 9018-9036; 39 OCT 12949.)

Three other jurors never spoke to Hrdlicka but merely observed brief exchanges that involved him. The first juror, Juror No. 215, heard someone—who may not have been a juror—say something about Hrdlicka's tie during the guilt phase, and in response, Hrdlicka either opened his jacket or waved his tie. (37 RT 8900-8903.)]

The second juror, Juror No. 301, heard Juror No. 174 say, "'Oh, you have hundred dollar bills on your tie'" to Hrdlicka, whom Juror No. 301 recognized as a witness. Hrdlicka replied, "yeah, hundred dollar bills," and the encounter ended. This occurred "a couple of days" before the misconduct hearing. (37 RT 8904; see 37 RT 9018.)

On the day before the hearing, the third juror, Juror No. 245, heard a male juror, possibly Juror No. 287, say "'nice light bulb tie'" to someone. (37 RT 8914-8915.) Juror No. 245 did not know who was wearing the tie or whether he had testified. (37 RT 8915, 8917-8918.)

These three jurors did not do anything improper, nor were they exposed to any extrinsic evidence. Thus, as to these jurors as well, there was no impropriety and no likelihood of bias.

The four remaining jurors did speak with Hrdlicka, but these fleeting encounters were "of such a trifling nature that [they] could not in the nature of things have been prejudicial" to appellant. (*People v. Stewart* (2004) 33 Cal.4th 425, 510.) For example, Juror No. 287 said "unusual tie" to Hrdlicka as Hrdlicka walked past him. He did not recall Hrdlicka replying and did not even know Hrdlicka's name. (37 RT 8885-8887.)

Similarly, Juror No. 213 said that on the previous day, she and Juror No. 287 ("juror number one") had said something to Hrdlicka about his light-bulb tie as they "came in the gate." Juror No. 213 then told Juror No. 287 to "'[p]ull the string,'" because there was a little chain on the tie. Juror No. 213 did not hear any response from Hrdlicka, and the encounter only lasted two or three seconds. (37 RT 8907-8908.) Earlier, during the

guilt phase, Juror No. 213 had asked Hrdlicka what was on his tie. (37 RT 8909-8910.)

Another juror, Juror No. 263, had quipped to Hrdlicka that he had a "curious tie," and Hrdlicka responded with "nothing more than a 'thank you' or an acknowledgement." (37 RT 8888-8889.) Previously, Juror No. 263 had said something to Hrdlicka about a tie that had pictures of $100 bills. (37 RT 8890.) Juror No. 263 characterized both exchanges as "off the cuff" comments. (37 RT 8891.)

The fourth juror who had a brief exchange with Hrdlicka was Alternate Juror No. 157, who was later seated on the jury after Juror No. 174's dismissal. While heading into the courtroom, Alternate Juror No. 157 told Hrdlicka that she liked his light-bulb tie. Hrdlicka did not reply. (37 RT 8934-8935.) Alternate Juror No. 157 also heard Juror No. 263 ("juror number two") say "do you have an idea'" to Hrdlicka, because the tie depicted a light bulb. Hrdlicka simply replied, "thank you." (37 RT 8935-8936; see 37 RT 8888, 8894.)

None of these encounters was substantially likely to bias the jurors, because they were brief, infrequent, and unrelated to the trial itself; thus, there was no error.

Moreover, these contacts were less serious than other encounters that this Court has deemed harmless. For example, in *People v. Miranda* (1987) 44 Cal.3d 57, the defendant's girlfriend, a frequent spectator at the trial, handed a note to a young male juror, inviting him to call her. During trial, the juror phoned the woman several times, and they talked about "going out." (*Id.* at pp. 117-118.) On appeal, this Court held that the juror's misconduct was not prejudicial. (*Miranda*, *supra*, 44 Cal.3d at pp. 117-118; see also *People v. Stewart*, *supra*, 33 Cal.4th at p. 510 [discussing *Miranda*].)

In *People v. Loker*, *supra*, 44 Cal.4th 691, a juror spoke with the murder victim's father about the father's upcoming prostate surgery and the fact they both had served in the Marines. This Court held that the conversation was improper but not prejudicial. (*Id.* at pp. 754-755.)

Here, the jurors' exchanges with Hrdlicka were less serious than the discussions in *Miranda* or *Loker*. The four jurors who spoke to Hrdlicka had one or two momentary encounters with him, in which they uttered a few words about his ties, and his response, if any, was even shorter. *Miranda*, in contrast, involved repeated conversations—not just fleeting exchanges—that raised the possibility of romance between the juror and the defendant's girlfriend. And *Loker* involved a conversation with the victim's grieving father about his surgery and the fact that he and the juror shared a background in the Marines. Thus, *Miranda* or *Loker* demonstrate that, even if the presumption of prejudice applies, it has been rebutted, because there was no substantial likelihood of prejudice.

Hrdlicka's limited role at the trial also shows that there was no prejudice. Appellant's challenge only concerns the penalty-phase verdict, and Hrdlicka did not even testify at the penalty phase. And his guilt-phase testimony was neither crucial nor disputed. On direct examination, he testified that he retrieved Peranteau's motorcycle from Oregon, and on cross-examination, he testified that Stapley's girlfriend told him that Stapley went to Wilseyville to manufacture methamphetamine. (18 RT 4340-4346.) None of this was disputed, nor was it critical to the prosecution; indeed, the defense maintained that Stapley's involvement in methamphetamine manufacturing was *exculpatory*, because it supported the theory that Lake had an independent motive to kill Stapley. (24 RT 5950-5952.)

Hrdlicka also testified—this time for the defense—about a report he wrote after interviewing Dorice Murphy, the Dubs' neighbor. In the report,

he had typed that Murphy said she saw "subjects" exiting the Dubs' home; however, he did not recall Murphy telling him that she saw more than one person, and if Murphy had used the word "subject" in the plural, he would have pursued it. (29 RT 6961-6965.) Again, this was not crucial evidence.

Appellant also argues that his convictions must be reversed because the *trial court* failed to apply the presumption of prejudice in denying his mistrial motion. (AOB 478-481.) This argument is meritless, because the presumption did not apply. And assuming it did apply, appellant has not demonstrated that the trial court failed to employ it. It is presumed that the trial court applied law correctly. (Evid. Code, § 664; *People v. Nance, supra,* 1 Cal.App.4th at p. 1456.) Appellant has not overcome this presumption. Moreover, the question on appeal is not whether the trial court failed to apply the presumption; instead, the question is whether the court abused its discretion by ultimately finding no prejudicial misconduct and denying the mistrial motion.

In sum, appellant bears to burden of showing prejudice from the jurors' exchanges with Hrdlicka, and he has not met this burden. Moreover, even of the presumption of prejudice applies, appellant's claim still fails, because there was no substantial likelihood of prejudice from the jurors' brief contacts with Hdrlicka. In short, trial court acted within its discretion by denying appellant's mistrial motion.

2. The Ninth Circuit's rule regarding the presumption of prejudice has no effect here

In arguing that the trial court abused its discretion by refusing to declare a mistrial, Respondent relies on the Ninth Circuit's decision in *Caliendo v. Warden of California Men's Colony* (9th Cir. 2004) 365 F.3d 691 (*Caliendo*). (AOB 476-478.) But *Caliendo* does not support his claim.

In *Caliendo*, a habeas corpus case, the Ninth Circuit held that, when an unauthorized communication between a juror and an outside party is

"'possibly prejudicial,'" a rebuttable presumption of prejudice applies, even if the communication does not relate to the case itself. (*Id.* at p. 697.) Further, the court held, the state court contradicted Supreme Court authority by holding that the presumption only applies when the improper communication relates to the case itself. (*Ibid.*; see 28 U.S.C. § 2254(d)(1).) *Caliendo* thus conflicts with this Court's holding that the presumption only applies when the improper communication concerns the case itself. (See, e.g., *People v. Cowan, supra,* 50 Cal.4th at p. 507; *In re Hamilton*, *supra*, 20 Cal.4th at pp. 305-306; *People v. Cobb*, *supra*, 45 Cal.2d at p. 161.) But the Ninth Circuit's holdings are not binding here, so *Caliendo* is not controlling. (*People v. Crittenden* (1994) 9 Cal.4th 83, 120, fn. 3; see 28 U.S.C. § 2254(d)(1).)

In any event, even under *Caliendo*, the presumption of prejudice would not apply here. *Caliendo* held that the presumption does not apply when the unauthorized contact is "de minimis; in other words, it only applies when the defense shows that the communication "could have influenced the verdict . . . ." (*Caliendo, supra,* 365 F.3d at p. 696.) Thus, for example, the presumption did not apply when a juror and a federal agent, who sat at the prosecution's table, exchanged casual greetings in the men's room; when a police officer, who was also a prosecution witness, drove the jurors to the crime scene; or when a sheriff acted as both the bailiff and an assistant to the prosecution. (*Id.* at pp. 696-697, citing *United States v. Day* (10th Cir. 1987) 830 F.2d 1099, 1103-1104, *Johnson v. Wainwright* (11th Cir. 1985) 778 F.2d 623, and *Helmick v. Cupp* (9th Cir. 1971) 437 F.2d 321.) Here, the jurors' contacts with Hrdlicka were so insubstantial that they could not have influenced the verdict, so even under *Caliendo*, the presumption of prejudice would not apply.

In sum, regardless of whether the presumption of prejudice applies, appellant's claim is meritless.

XIV. AFTER APPELLANT PHONED A JUROR AT HER HOME, THE TRIAL COURT DID NOT VIOLATE HIS CONSTITUTIONAL RIGHT TO PRESENCE BY EXCLUDING HIM FROM AN IN-CAMERA HEARING REGARDING THE JUROR'S POSSIBLE DISMISSAL

During the penalty phase, appellant phoned a juror at her home. After the juror reported this to the court, the court held an in-camera hearing outside appellant's presence. At the end of the hearing, the court and the attorneys agreed that the juror should remain on the jury. Appellant now contends the court violated his right to presence under the federal Constitution by excluding him from the hearing, and his death sentence should therefore be reversed. (AOB 481-493.)

As a preliminary matter, appellant is barred from making this claim, because he seeks reversal based on his own misconduct. In addition, the claim fails because appellant did not have a constitutional right to be present at the hearing. Finally, there was no prejudice, because appellant's absence from the hearing did not affect the verdicts.

A. The Claim Is Barred, Because Appellant Seeks to Benefit from His Own Wrongdoing

1. The hearing

On April 26, 1999, after a penalty-phase that had lasted a month and a half, the jury began deliberating. The jury continued deliberating for the next two days, April 27 and 28, and the proceedings then recessed until Monday, May 3. (39 OCT 13065, 13067-13068.) However, on April 30, while the trial was still in recess, Juror No. 12 phoned the bailiff and told him that she had received a phone call from someone purporting to be appellant. (40 RT 9910-9913.)

When proceedings reconvened on May 3, the court met in-camera with the defense counsel and the prosecution. (40 RT 9910-9911.) The court proposed that it and the attorneys question Juror No. 12 about the

phone call. The court also suggested that appellant be excluded from the initial hearing. The court explained, "I don't know how the juror would feel if he was present. That is my concern. And I want to find out what happened from her." Defense counsel agreed, stating, "I don't think he should be present either." The hearing thus proceeded without appellant present. (40 RT 9912.)

During questioning, Juror No. 12 reported the following: On Friday afternoon, someone had phoned her and asked, "'is this (Juror No. 12)?'" (40 RT 9915-9916.) Juror No. 12 asked who was calling, and the caller responded, "'well, I need to know if this is (Juror No. 12). Then I know.'" Juror No. 12 said, "'well, this is.'" The caller replied, "'This is Charles.'" (40 RT 9916.)

At first, Juror No. 12 thought the caller was her ex-husband, and that something was wrong with him, but she asked, "'well, who is this?'" The caller again asked, "'well, is this (Juror No. 12)?'" Juror No. 12 again asked for the caller's identity, and the caller replied, "'This is Charles.'" Juror No. 12 asked for the caller's last name, and the caller responded that he needed to know "'if this was the right (Juror No. 12).'" He then asked Juror No. 12 something like "'are you the (Juror No. 12) that is on the jury?'" (40 RT 9916.)

Juror No. 12 replied, "'is this Charles Ng?'" The caller responded, "'Oh, I am sorry. I just wanted to tell you, you are very nice.'" Juror No. 12 asked the caller how he got her number, and the caller replied that a friend had helped him. Juror No. 12 told the caller that he could not call her, and she hung up. (40 RT 9916-9917.)

Juror No. 12 did not recognize the caller as anyone she knew. The caller had a quiet voice and sounded like he had an accent, but she did not know what kind. (37 RT 9917.) She also did not know whether the caller really was appellant. (40 RT 9918.) When asked whether she could remain

objective despite the call, she said responded that the call had nothing to do with the subject of the jury's deliberations, and she could still be objective. (40 RT 9917-9919.) She agreed not to tell any of the other jurors about the call. (40 RT 9918.)

After Juror No. 12 left the courtroom, the court said it was not assuming that appellant was in fact the caller, and it asked the attorneys whether they thought Juror No. 12 should remain on the jury. Defense counsel replied that no prejudice had been shown and the jury should continue deliberating. The prosecutor agreed. (40 RT 9921.)

Juror No. 12 returned to the courtroom. The court admonished her that it would be unfair to assume that appellant made the call, and it was important she disregard the call. Juror No. 12 reiterated that she did not know whether appellant was in fact the caller, and she would not assume he was. She also reiterated she could disregard the call and would not tell anyone about it. (40 RT 9923-9924.) Finally, she agreed to inform the court if she later concluded that she could not disregard the call. (40 RT 9924.)

The in-camera session ended. (40 RT 9925.) The jury resumed deliberating, and 15 minutes later, it notified the bailiff that it had reached a verdict. (40 OCT 13235.) Back in the courtroom, with appellant again present, defense counsel informed the court that he had told appellant about the in-camera hearing. The court then advised appellant that he had not been invited to the hearing for several reasons, including that fact that the court was concerned that he "would react one way or another . . . ." The court added that all the attorneys had agreed to the proceeding. Appellant responded, "[o]ver my objection." (40 RT 9926.) The jury then entered the courtroom and delivered its verdict. (40 RT 9928; 40 OCT 13236.)

That evening, investigators from the Orange County Sheriff's Department searched appellant's cell and found Juror No. 12's home phone

number there. (43 OCT 14314-14315.) The investigation also revealed that appellant knew the jurors' names, and that Juror No. 12's phone number was listed in the phone book. (43 OCT 14321-14322.)

Phone records showed that on the day Juror No. 12 received the call, at 3:23 p.m., someone placed a three-minute call to her phone number from the "Module J vestibule" phone at the Orange County Jail. The jail's logs showed that at the same time, appellant was using that phone. (43 OCT 14327-14328.) A deputy sheriff also observed appellant using the phone at that time. (43 OCT 14329-14330.)

In appellant's subsequent motion for new trial, he argued that the trial court violated his rights under state law and the federal Constitution by excluding him from the in-camera hearing. (42 OCT 13997-14013.) In an opposition, the prosecution argued, in part, that appellant was barred from benefiting from his own wrongdoing. (43 OCT 14308-14309.) As an exhibit, the prosecution attached a copy of the sheriff's report. (43 OCT 14313-14370.)

The court denied appellant's claim. The court explained that defense counsel had waived appellant's right to presence at the conference, and further, appellant had no right to benefit from his own misconduct. (40 RT 9954-9956.)

2. Appellant cannot seek reversal based on his own misconduct

There is no question that appellant was the person who phoned Juror No. 12. The trial court made an implicit finding to this effect when, in denying his new trial motion, it rejected his claim because he had no right to benefit from his own misconduct. (40 RT 9955-9956.) On appeal, this finding is binding, so long as it is supported by substantial evidence. (See *People v. Rogers, supra,* 46 Cal.4th at p. 1157; *People v. Dykes, supra,*

46 Cal.4th at p. 751.) And there was ample evidence to support the finding; as respondent has already pointed out:

- the caller identified himself as "Charles," spoke with an accent, and did not deny being Charles Ng;
- appellant possessed Juror No. 12's telephone number in his cell;
- it was a listed number;
- appellant knew Juror No. 12's name; and
- records showed that the call emanated from the jail phone that appellant was using, during the time he was using it.

In short, appellant was indeed the person who phoned Juror No. 12.

Appellant now argues, as he did in his new trial motion, that the court violated his right to presence under the federal Constitution by excluding him from the in-camera hearing. (AOB 481-493.) However, because appellant created this problem by phoning the juror, his claim "really is a bit like the classic example of chutzpah—the person who murders his father and mother and then asks for mercy on the ground he is an orphan." (*County of Orange v. Rosales* (2002) 99 Cal.App.4th 1214, 1217, fn. 1.)

Chutzpah aside, "a defendant is not permitted to profit from his own misconduct." (*People v. Williams* (1988) 44 Cal.3d 1127, 1156; accord, *In re Hamilton*, *supra*, 20 Cal.4th at p. 305; *Williams v. Woodford* (9th Cir. 2004) 384 F.3d 567, 627; see also *People v. Slocum* (1975) 52 Cal.App.3d 867, 886 ["It is indeed ironic that he should now complain of a situation he deliberately sought to create"].) By phoning Juror No. 12, appellant was trying to sabotage a trial that was finally nearing its conclusion after seven long months. He cannot seek reversal based on the way the court addressed this misconduct, and his claim about the in-camera hearing is thus barred.

B. There Is No Constitutional Right to Be Present at a Hearing Regarding a Juror's Possible Dismissal

Assuming appellant's claim is cognizable, it is still meritless, because the trial court did not violate his right to presence. As this Court has explained, the Constitution provides a right to presence at critical stages of trial:

> A criminal defendant's right to be personally present at trial is protected by the confrontation clause of the Sixth and Fourteenth Amendments to the federal Constitution . . . . [¶] Under the Sixth Amendment's confrontation clause, a defendant has the right to be personally present at any proceeding in which his appearance is necessary to prevent "interference with [his] opportunity for effective cross-examination." (*Kentucky v. Stincer* (1987) 482 U.S. 730, 744-745, fn. 17, 107 S.Ct. 2658, 96 L.Ed.2d 631; see *People v. Cole*, *supra*, 33 Cal.4th at p. 1231.) The Fourteenth Amendment guarantees the right to be present as a matter of due process at any "stage . . . that is critical to [the] outcome" and where the defendant's "presence would contribute to the fairness of the procedure." (*Kentucky v. Stincer*, *supra*, 482 U.S. at p. 745; see *Cole*, at p. 1231.)

(*People v. Harris* (2008) 43 Cal.4th 1269, 1306, original brackets.)

But the right to presence does not encompass all proceedings within a trial; specifically, it does not grant a defendant

> the right to be personally present in chambers or at bench discussions outside the jury's presence on questions of law or other matters as to which his presence bears no reasonable, substantial relation to his opportunity to defend the charges against him.

(*Id.* at p. 1306.)

More specifically, the right to presence does not apply to in-camera hearings concerning the possible dismissal of a juror. For example, in *United States v. Gagnon* (1985) 470 U.S. 522 [105 S.Ct. 1482, 84 L.Ed.2d 486], a juror became concerned when he noticed that the defendant was sketching the jury. The court then interviewed the juror in chambers.

Defense counsel was present but not the defendant. The juror remained on the jury. (*Id.* at pp. 523-524.)

On appeal, the defendant argued that the court violated his constitutional right to presence by excluding him from the in-camera interview. (*United States v. Gagnon*, *supra*, 470 U.S. at pp. 524-525.) The Supreme Court rejected this claim, holding that the defendant's presence was not required "to ensure fundamental fairness" or a "reasonably substantial opportunity to defend against the charge." (*Id.* at p. 527, internal quotation marks and ellipsis omitted.)

Similarly, in *People v. Harris*, *supra*, 43 Cal.4th 1269, a capital case, a juror reported during the penalty phase that his father had received a death threat. The juror believed that the threat was related to the case. The defense moved to dismiss the juror. The court ultimately denied the motion, and the juror remained on the jury. (*Id.* at pp. 1299-1303.) The defendant was not present during the hearings concerning the juror's possible dismissal. (*Id.* at pp. 1299, 1310.)

On appeal, the defendant argued that his exclusion from the hearings violated his right to presence under the confrontation clause. (*People v. Harris*, *supra*, 43 Cal.4th at pp. 1306, 1310.) This Court rejected the claim. The court held the defendant "had no right to attend such confidential in-chambers discussions," and "it is settled that the removal of a juror is not a matter for which a defendant is entitled to be present."[77] (*Id.* at p. 1310.)

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[77] Federal circuit courts have reached the same conclusion. (E.g., *United States v. Peterson* (2d Cir. 2004) 385 F.3d 127, 137-138 [defendant had no constitutional right to presence at juror-misconduct hearing]; *United States v. Long* (9th Cir. 2002) 301 F.3d 1095, 1103 [no constitutional right to presence at in-chambers conference regarding possible dismissal of jurors for misconduct]; *United States v. Provenzano* (3d Cir. 1980) 620 F.2d 985, 997-998 ["It is clear that there is no constitutional right for a defendant to be present at a conference in chambers concerning dismissal of

(continued...)

In short, a defendant has no constitutional right to presence at a hearing regarding a juror's possible removal; thus, appellant had no right to be present at the hearing regarding Juror No. 12.

Appellant cites several cases to show he had a right to presence at the hearing, but none of these cases support his argument. (AOB 485-486.) For example, in *Rushen v. Spain* (1983) 464 U.S. 114 [104 S.Ct. 453, 78 L.Ed.2d 267], the Supreme Court held that the trial court's improper ex-parte communication with a juror should be evaluated for harmlessness. (464 U.S. at pp. 115-121; see AOB 485-486.) *Rushen* is irrelevant here, because this case does not involve an ex-parte communication—on the contrary, three attorneys represented appellant at the in-camera hearing. (40 RT 9910-9925.)

In another case appellant cites, *Campbell v. Wood* (9th Cir. 1994) 18 F.3d 662, the Ninth Circuit held that a capital defendant could waive his right to presence at the empanelling of the jury. (*Id.* at pp. 669-673; see AOB 486.) But unlike this case, *Campbell* did not concern the possible dismissal of a juror. Indeed, the Ninth Circuit has held that there is no constitutional right to be present at a hearing on this issue. (*United States v. Long, supra,* 301 F.3d at p. 1103.)

Appellant also relies on *Monroe v. Kuhlman* (2d Cir. 2006) 433 F.3d 236, where the jury viewed some of the trial exhibits without the court or the parties present. (*Id.* at p. 238; see AOB 486.) The state court held that the defendant had no constitutional right to be present at the viewing. On

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(...continued)
a juror"]; *United States v. Brown* (6th Cir. 1978) 571 F.2d 980, 986-987 [no right to presence at in-chambers conference regarding dismissal of juror, so long as counsel is present]; *United States v. Howell* (5th Cir. 1975) 514 F.2d 710, 714 [no constitutional right to presence at in-chambers conference with juror who reported receiving bribe offer].)

habeas corpus, the Second Circuit held that this ruling was not an unreasonable application of controlling Supreme Court authority. (*Id.* at pp. 245-257; see 28 U.S.C. § 2254(d)(1).) Having found no constitutional violation, *Monroe* says nothing to support appellant's argument.

Appellant also argues that the trial court lacked a valid reason for excluding him from the hearing, and he disputes the trial court's concern that Juror No. 12 would speak more freely if he were not present. (AOB 487-488; 40 RT 9912.) But his argument is irrelevant, because he had no constitutional right to be present at the hearing, regardless of whether the court had a good reason for excluding him. In any event, the court's belief that Juror No. 12 would speak more freely outside appellant's presence was valid. (See *United States v. Gagnon*, *supra*, 470 U.S. at p. 527 [defendant's presence at in-camera interview of juror "could have been counterproductive"]; *United States v. Bertoli* (3rd Cir. 1994) 40 F.3d 1384, 1397 ["we doubt whether the jurors would have been as comfortable discussing their conduct had [the defendant] been present"].)

Next, appellant argues that his presence was critical because he could have clarified whether he was, in fact, the person who phoned Juror No. 12. (AOB 489.) But jury tampering is a crime (Pen. Code, § 95), so it is doubtful that appellant would have waived his right against self-incrimination and admitted that he was the caller.

Moreover, appellant misses the point, because the hearing's purpose was not to ascertain whether he made the call, but instead to determine whether Juror No. 12 should remain on the jury. Indeed, at the hearing, the court emphasized that it did not yet know whether appellant was the caller. Juror 12 confirmed that she did not know either, and the court warned her that it would be unfair to assume appellant was the caller. (40 RT 9918, 9921, 9923.)

In sum, the trial court did not violate appellant's constitutional right to presence, and his claim fails.

C. Any Error Was Harmless

A violation of a defendant's constitutional right to presence is not grounds for reversal if it is harmless beyond a reasonable doubt. (*People v. Davis* (2005) 36 Cal.4th 510, 532; see *Chapman v. California, supra,* 386 U.S. at p. 24.) Here, the purported error was harmless under this standard. To begin with, appellant was the person who called Juror No. 12, so he cannot claim prejudice based on the theory that the phone call biased her; as this Court has held, a claim of improper influence on the jury can never be valid "where the *accused himself* ha[s] instigated the incident . . . ." (*In re Hamilton, supra,* 20 Cal.4th at p. 305 [original italics].)

In any event, there is no reason to suspect the jury would have chosen a life sentence if appellant had been present at the hearing, nor is there any reason to believe that appellant's absence detracted from the fairness of the proceeding. At the hearing, Juror No. 12 was questioned by the court, the prosecutor, and defense counsel. She said she could remain objective, and all the parties agreed. (40 RT 9917-9921, 9923.) There is no reason to believe anything would have been different if appellant had been there. (See *People v. Harris, supra,* 43 Cal.4th at p. 1307 ["defendant's arguments that he could have contributed to the fairness of the proceedings amount to no more than speculation"]; *People v. Johnson* (1993) 6 Cal.4th 1, 19 [it was "unduly speculative" to assume the defendant would have helped his attorney question the juror if he had been present]; *United States v. Provenzano, supra,* 620 F.2d at p. 998 ["It is fanciful for appellants to suggest post hoc that they would have demanded replacement of the offending juror had they been present at the conference"].)

In sum, the purported error was harmless beyond a reasonable doubt.

XV. THE TRIAL COURT DID NOT VIOLATE APPELLANT'S CONSTITUTIONAL RIGHT TO PRESENT EVIDENCE OF HIS OWN BEHAVIOR IN PRISON WHEN IT EXCLUDED TESTIMONY ABOUT OTHER PEOPLE'S BEHAVIOR IN PRISON

During the penalty phase, the defense presented numerous witnesses who testified that he had behaved well in custody. However, he contends the trial court violated his right to present such evidence when it precluded the defense from (1) asking a correctional officer about another inmate's misbehavior, and (2) asking another correctional officer whether he ever felt fearful while escorting other inmates. Appellant argues that this evidence was necessary to counter the notion that he only behaved well because he was shackled or in solitary confinement. (AOB 493-499.)

Appellant has forfeited this claim, because he did not argue this theory of relevance at trial. In addition, the exclusion of this testimony did not deprive appellant of his right to present mitigating evidence, because the evidence pertained to other inmates' behavior, not his own. Also, the testimony was inadmissible under state law—and thus excludable under the federal Constitution—because it was irrelevant and excludable under Evidence Code section 352, and because some of it was not based on firsthand knowledge.

Further, even if the testimony was relevant, its exclusion did not violate the Constitution, because appellant presented abundant evidence of his good behavior in custody, including his good behavior in relatively unrestrictive settings. Finally, given the overwhelming aggravating evidence and the fact appellant's good behavior in prison was undisputed, the alleged error was harmless.

A. Appellant Has Forfeited This Claim, Because He Bases It on a New Theory of Relevance and on Constitutional Grounds That He Did Not Raise at Trial

During the penalty phase, the defense called ten witnesses to testify about appellant's prior good behavior in prison. These witnesses included James Tinseth and Maurice Geddis, who were Correctional Officers at California State Prison, Sacramento (CSPS), where appellant was housed before the transfer to Orange County. Tinseth and Geddis had both accompanied appellant from CSPS to court appearances in Calaveras County. (36 RT 8690-8691, 8694, 8708-8710, 8712.)

Tinseth testified about the way appellant was shackled while traveling between the prison and the courthouse. Appellant's restraints included waist chains and leg irons. (36 RT 8693.) They also included a "Martin chain," which connected appellant's waist chain to his leg irons, and a leather strap, which extended across appellant's upper arms and was secured by a padlock. (36 RT 8692-8693.) The leather strap was called a "Corn Fed strap." It was named after another prisoner, Paul "Corn Fed" Schneider. (36 RT 8716.) Tinseth and Geddis both testified that they never had any trouble with appellant, who was always courteous and compliant. (36 RT 8694, 8702-8703, 8715-8716.)

On direct examination, defense counsel asked Geddis whether he had experienced trouble with other inmates. Geddis said he had. (36 RT 8716.) Defense counsel then asked Geddis whether Corn Fed Schneider had ever "acted out" while shackled in the Martin chains. The prosecutor objected based on relevance, and the court sustained the objection. (36 RT 8716.) Martin then testified that based on his experience with appellant, the "Corn Fed" straps were not necessary. (36 RT 8716-8717.)

Another CSPS staff member, Gerald Coleman, testified that he worked in the prison library and interacted with appellant during

appellant's visits there. (36 RT 8722-8724, 8732-8733.) In his testimony, Coleman described the security measures for appellant's visits: Before each visit, appellant would be strip-searched and placed in restraints. Correctional officers would accompany him to the library. (36 RT 8725, 8730.) While there, appellant would be locked in his work area, but the officers would remove his restraints. (36 RT 8726.) Appellant was polite and courteous with Coleman and never "acted out" or cursed at him. (36 RT 8728.) He was also compliant during the strip searches. (36 RT 8734-8735.)

Defense counsel then asked Coleman whether he had been concerned for his safety while escorting any *other* inmate. The prosecution objected based on relevance, and the court sustained the objection. (36 RT 8731-8732.) During closing argument, the prosecutor agreed that appellant had behaved well in prison but argued that this did not constitute significant mitigation. (40 RT 9793-9794.)

Appellant now contends the trial court deprived him of his right to present mitigating evidence under the Eighth and Fourteenth Amendments by excluding

(1) Geddis's testimony that Schneider had "acted out" while constrained by the Martin chains, and

(2) Coleman's testimony that he had been concerned for his safety while escorting other restrained inmates, who "'might go off, like [Schneider]'" (AOB 493-499.)

Specifically, appellant argues that this evidence was relevant, because without it, the jury might have believed that he behaved well in prison only because he was shackled or in solitary confinement. (AOB 497-498.) At trial, however, the defense did not argue that the evidence was relevant for this reason. (36 RT 8716, 8731-8732.) Appellant cannot raise new theories of relevance on appeal, so his claim is forfeited. (Evid. Code, § 354,

subd. (a); *People v. Morrison*, *supra*, 34 Cal.4th at pp. 711-712.) The claim is also forfeited because appellant bases it on the federal Constitution, but he made no constitutional argument at trial. (*People v. Smithey*, *supra*, 20 Cal.4th at p. 995; *People v. Davis* (1995) 10 Cal.4th 463, 501, fn. 1.)

B. In Any Event, the Court Did Not Violate Appellant's Right to Present Mitigating Evidence

1. The testimony did not constitute mitigating evidence, because it did not describe appellant's character or the circumstances of his crimes

Under the Eighth and Fourteenth Amendments, the sentencer in a capital trial must be allowed to consider, as mitigating evidence, "'any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers. . . .'" (*Eddings v. Oklahoma* (1982) 455 U.S. 104, 110 [102 S.Ct. 869, 71 L.Ed.2d 1], italics omitted, quoting *Lockett v. Ohio* (1978) 438 U.S. 586, 604 [98 S.Ct. 2954, 57 L.Ed.2d 973].) As part of this requirement, the court must allow the sentencer to consider evidence of the defendant's good behavior during prior custody. (*Skipper v. South Carolina*, (1986) 476 U.S. 1, 3-4 [106 S.Ct. 1669, 90 L.Ed.2d 1] (*Skipper*); *People v. Lucero* (1988) 44 Cal.3d 1006, 1027.)

This principle was not violated here. According to *Skipper*, evidence of a defendant's good behavior in custody is admissible under the requirement that the jury be allowed to consider "any aspect of a *defendant's* character or record . . . that the defendant proffers as a basis for a sentence less than death." (*Skipper*, *supra*, 476 U.S. at p. 4, italics added.) But Geddis's testimony that another inmate, Schneider, had "acted out" did not describe *appellant's* character or prior behavior. Nor did Coleman's testimony that he had worried about his safety while escorting another inmate. Thus, by excluding this evidence, the court did not violate appellant's right to present evidence of his own good behavior.

2. The evidence was irrelevant, was inadmissible under Evidence Code section 352, and lacked a proper foundation

The federal Constitution guarantees the right to present mitigating evidence at a capital trial, but this evidence is still subject to the state's rules of admissibility. (*McKoy v. North Carolina* (1990) 494 U.S. 433, 440 [110 S.Ct. 1227, 108 L.Ed.2d 369]; *Lockett v. Ohio*, *supra*, 438 U.S. at p. 604, fn. 12.) The state court thus retains the authority to exclude evidence offered by the defendant if it is irrelevant or subject to exclusion under Evidence Code section 352. (*People v. Hamilton* (2009) 45 Cal.4th 863, 922-923.)

Here, the court did not abuse its discretion by concluding that the excluded testimony was irrelevant, because Schneider's bad behavior and Coleman's fear while escorting other inmates did not describe *appellant's* character or record.

Moreover, even if this evidence bore some trace of relevance, its probative value was substantially outweighed by the danger that it would confuse the issues, mislead the jury, and unduly consume time, because it pertained to people who had no relation to the case. It was therefore inadmissible under Evidence Code section 352.

Additionally, a witness's testimony must be based on personal knowledge. (Evid. Code, § 702, subd. (a).) Here, there is no indication that Geddis actually witnessed Schneider's bad behavior. His testimony about it was therefore inadmissible.

In short, the trial court's rulings did not violate appellant's constitutional rights, because the proffered testimony was inadmissible under state law.

3. The court could not have deprived appellant of his right to present evidence of good behavior in custody, because he introduced abundant evidence of it

Ten witnesses testified about appellant's good behavior in custody, but appellant nevertheless contends the trial court deprived him of his constitutional right to present such evidence, because it sustained the prosecutor's objections to two questions. Respondent disagrees, because, even if the trial court erred by sustaining these objections, the errors did not rise to the level of a constitutional violation.

Appellant's contention is analogous to claims concerning a defendant's Sixth Amendment right to present a defense. The right to present a defense is not violated when the trial court has simply "reject[ed] some evidence concerning the defense." (*Ex parte Wells*, *supra*, 35 Cal.2d at p. 894; accord, *People v. Fudge*, *supra*, 7 Cal.4th at p. 1103.) Instead, there must be a "refusal to allow [the defendant] to present a defense." (*Fudge*, *supra*, 7 Cal.4th at p. 1103.) The same principle applies here: A defendant's Eighth Amendment rights are not violated when the court merely excludes "some" evidence of good behavior in prison; instead, there must be a broader denial of the right to present such evidence.

And here, the court did not stop appellant from introducing evidence of his good behavior in custody. On the contrary, he introduced an abundance of it. For example, Geddis testified that he never had any trouble with appellant, appellant never refused a directive from him, and appellant was always courteous and compliant. (36 RT 8715-8716.) Coleman gave similar testimony. (36 RT 8728-8730, 8734-8735.)

In addition, CSPS Correctional Officer Alene Meads testified that appellant was a "class A inmate," and she would not have resigned if all the inmates in her unit had been like him. (36 RT 8629, 8631, 8651.) Further, Meads had heard other inmates threaten appellant and direct foul language

at him, but he never responded. (36 RT 8653-8654.) Another CSPS Correctional Officer, William Conedy, testified that he escorted appellant to the library and the shower without ever having a negative incident. (36 RT 8661-8662, 8667-8668, 8673.) Conedy described appellant as well-behaved, and he never had any problem with him. (36 RT 8670-8671.) Joseph Dittman, also a CSPS Correctional Officer, similarly testified that he never saw appellant "act out," use foul language, or act violently, and he never found any weapon or contraband on him. (36 RT 8684-8686.)

Two other witnesses testified about appellant's good behavior in the Orange County Jail: James Kaku testified that appellant was quiet, polite, and respectful. (36 RT 8736-8739.) When asked whether he would describe appellant as a "'model inmate,'" Kaku replied, "Pretty much so." (36 RT 8739.) In addition, Deron Redding testified that appellant was "quiet and respectful," he never had any disciplinary problem with him, and he never saw appellant have a conflict with the jail staff or other inmates. (36 RT 8742-8744, 8747, 8752.)

Appellant also presented evidence that he had behaved well while imprisoned in Canada. John Mitchell of the Saskatchewan Penitentiary testified that he had supervised appellant when appellant worked as the editor of the prison's weekly newspaper. (38 RT 9140-9145.) While performing these duties, appellant had his own office space and was not shackled. (38 RT 9142-9143.) Appellant's job involved gathering information for the newsletter, typing it up, printing it, and having it distributed. (38 RT 9144.) According to Mitchell, appellant respected authority and was "very professional in his work." (38 RT 9150, 9152-9153.) He was always neatly dressed and well mannered, and Mitchell opined that he was a "very good inmate," and "it was a pleasure to have an inmate of his caliber . . . ." (38 RT 9149-9150, 9152-9153.)

Appellant also introduced the testimony of Anthony Casas, an expert in corrections and prison adjustment. (38 RT 9195, 9203.) Casas reviewed appellant's prison records and gave further testimony about his performance. For example, while appellant was at Leavenworth, he took college courses and received uniformly positive evaluations for job performance, some of which were "glowing . . . ." (38 RT 9212-9214, 9218-9219.) Similarly, when appellant was in "virtual solitary confinement" in Canada, he completed numerous college correspondence courses and received commendations for excellence in at least two of them. (38 RT 9229-9232.) According to Casas, it was very rare for a prisoner to complete such courses while in solitary confinement. (38 RT 9232-9233.)

Casas further opined that the CSPS officers' favorable testimony was "unusual" and "significant." (38 RT 9246.) He also pointed to a memorandum from the warden at Saskatchewan Penitentiary, which described appellant as a "model inmate . . . ." (38 RT 9234.)

Casas concluded that there was "no question" appellant had adjusted well to prison life, and that if appellant were sentenced to LWOP, he would have a good adjustment. (38 RT 9252-9253.) Rating inmates on a scale of one to ten, Casas ranked appellant as a ten. (38 RT 9254.)

In short, appellant presented abundant evidence of his good behavior in prison; consequently, the exclusion of Geddis's testimony about Schneider, and Coleman's testimony about his fear of other inmates, did not deprive appellant of his constitutional right to present such evidence.

4. The court did not prevent appellant from showing that he had behaved well in relatively unrestrictive settings

As noted above, appellant argues that the evidence of Schneider's bad behavior and Coleman's concern for his own safety was necessary because without it, the jury might have believed that he only behaved well while

shackled or in solitary confinement. (AOB 497-498.) But appellant is wrong, because the jury heard evidence that he had performed well in less restrictive settings.

For example, John Mitchell of Saskatchewan Prison explained that appellant would walk to the prison newspaper office without a guard, had his own office space, and was not guarded or shackled while working there. (38 RT 9142-9143.) Similarly, Anthony Casas testified that at Leavenworth, appellant was housed in the general population, and he received custody credits, which indicated he was behaving appropriately. (38 RT 9213, 9216.)

Moreover, the notion that appellant behaved well only because of segregation and shackles was inconsistent with CSPS Correctional Officer Meads's description of him as a "class-A inmate." (36 RT 8651.) It was also inconsistent with James Kaku's testimony that appellant was "[p]retty much" a model inmate, and with Saskatchewan warden's description of him as a model inmate. (36 RT 8739; 38 RT 9234).

In short, the excluded testimony was not necessary to counter the notion that appellant only performed well in highly restrictive settings.

C. There Was No Prejudice

When the trial court violates the federal Constitution by excluding mitigating evidence at the penalty phase, there is no basis for reversal if the error was harmless beyond a reasonable doubt.[78] (*People v. Fudge*, *supra*, 7 Cal.4th at pp. 1117-1118.) Assuming the trial court violated the Constitution here, the error was harmless under this standard. As discussed above, appellant presented abundant evidence of his good behavior in

[78] The prejudice standard for state-law error at the penalty phase is whether there is a reasonable possibility the error affected the verdict. This is equivalent to the harmless-beyond-a-reasonable-doubt standard. (*People v. Guerra*, *supra*, 37 Cal.4th at pp. 1144-1145.)

prison. Indeed, in closing argument, the prosecutor agreed: He admitted that appellant had been "an A-1 inmate" during the preceding 14 years. (40 RT 9793.)

Hence, the excluded testimony would not have altered the overall evidence showing appellant's good behavior in custody. Nor would it have mitigated his culpability for the murders of eleven people—including two entire families and two small children—or the cruelty he displayed in the M-Ladies video. In short, the alleged errors were harmless beyond a reasonable doubt.

XVI. THE TRIAL COURT DID NOT DEPRIVE APPELLANT OF DUE PROCESS AND A FAIR PENALTY TRIAL BY EXCLUDING A MARINE GUARD'S TESTIMONY ABOUT AN INCIDENT THAT HE DID NOT WITNESS

Appellant contends the trial court deprived him of due process and a fair penalty trial by excluding testimony that Marine Corps members had mistreated him while he was in custody in Hawaii. (AOB 499-505.) Appellant has forfeited this claim, because it is based on arguments he did not raise at trial. In any event, the evidence was inadmissible, because the witness had no personal knowledge of the incident.

A. The Testimony in Question

After appellant was arrested in Hawaii for the armory break-in, he escaped and fled to California, where he was later recaptured. (See 34 RT 8401-8405, 8408.) After the recapture, Marine Corps Sergeant Bradley Chapline took custody of him. During the penalty phase, the defense called Chapline as a witness. Among other things, Chapline testified that appellant was hospitalized for several months with a broken leg while he was in custody in Hawaii. (36 RT 8789, 8802.)

During direct examination, defense counsel asked Chapline whether he had ever learned that other Marine guards mistreated appellant while

appellant was hospitalized. (36 RT 8791.) The prosecutor objected that the question called for hearsay, and the court sustained the objection. (36 RT 8791-8792.) Chapline then testified that he had not seen other guards mistreat appellant, but some nurses told him about it, and appellant confirmed it. (36 RT 8792-8793.)

Defense counsel then asked, "what was the situation?" The prosecutor again objected based on hearsay, and the court sustained the objection. (36 RT 8793.) Defense counsel asked Chapline what he did in response to this incident, and Chapline said that he admonished the guards that it "better never happen again." (36 RT 8793-8794.)

During redirect examination, defense counsel again tried to ask Chapline about appellant's mistreatment by other Marines while he was hospitalized. The prosecutor objected that the question (1) called for hearsay, (2) assumed facts in evidence, and (3) called for information beyond Chapline's personal knowledge. The court sustained the objection. Defense counsel then asked, "While Charles Ng was laying in the hospital with his leg in a cast, did you observe other Marines stabbing him in the feet with needles?" The prosecutor objected because the question assumed facts not in evidence, and the court sustained the objection. (36 RT 8806.)

Soon afterward, defense counsel asked Chapline, "With regard to the actual Marines that you had to admonish who had been guarding Charles Ng, did you see those Marines stabbing Charles Ng's feet with these pins?" (36 RT 8807.) The prosecutor again objected because the question assumed facts not in evidence. Defense counsel asked to be heard. The court denied the request and explained that the question lacked a foundation, because Chapline had not observed the incident. (*Ibid.*)

After Chapline finished testifying, the court further discussed the requirement that testimony be based on the witness's own perceptions:

> It [defense counsel's question to Chapline] assumes that the latter part happened. You have to lay the foundation. Were you there during the second shift? No. If yes, what did you observe? Or, oh, I observed Marines sticking needles in his foot. That is how you get it in. You know he wasn't there or you would have got it in.

(36 RT 8808-8809.) Defense counsel responded, "Perhaps you are right, judge." (36 RT 8809.)

B. Appellant Has Forfeited This Claim, Because He Bases It on a New Theory of Relevance and on Constitutional Grounds That He Did Not Raise at Trial

Appellant now contends the trial court deprived him of due process and a fair penalty trial by excluding Chapline's testimony about appellant's "racial harassment" at the hands of other Marines. (AOB 499-505.) It appears that appellant is referring to the incident where the Marine guards purportedly stuck needles in his foot. He argues that the court should have admitted Chapline's testimony about this incident because

- it negated the aggravating effect of the armory burglary, because it showed that appellant entered the Marine Corps intending to give his best effort but suffered from racial discrimination and race-based harassment, and
- it explained why appellant later "attached himself" to Lake. (AOB 502-505).

In the trial court, however, the defense did not argue that Chapline's testimony was relevant for these reasons. (36 RT 8792-8808.) Again, appellant cannot assert new theories of relevance on appeal, so he has forfeited this claim. (Evid. Code, § 354, subd. (a); *People v. Morrison*, *supra*, 34 Cal.4th at pp. 711-712.) He has also forfeited his due process claim, because at trial, the defense did not argue that the due process clause compelled the testimony's admission. (See *People v. Smithey*, *supra*, 20 Cal.4th at p. 995.)

C. The Testimony Was Inadmissible, Because It Was Not Based on the Witness's Own Perceptions

Even if appellant's claim is cognizable, it is meritless. Appellant argues that the court should have admitted Chapline's testimony because it was relevant (AOB 502-505), but the court did not exclude the evidence based on a lack of relevance—it excluded the evidence because Chapline had no personal knowledge of it. (36 RT 8806-8809.) Appellant does not challenge this ruling, nor did he challenge it at trial; on the contrary, after the court explained that Chapline's testimony lacked the required foundation, defense counsel conceded, "Perhaps you are right, judge." (36 RT 8809.) Since it is undisputed that the court correctly excluded this evidence based on the lack of foundation, there is no basis for finding error.

In any event, the court's ruling was correct. As discussed previously, "the testimony of a witness concerning a particular matter is inadmissible unless he has personal knowledge of the matter." (Evid. Code, § 702, subd. (a).) In other words, a witness cannot testify about an event unless he perceived it with his own senses. (*People v. Lewis* (2001) 26 Cal.4th 334, 356.)

Here, Chapline testified that he "didn't personally observe" appellant's purported mistreatment by the Marine guards; instead, he heard about it from others. (36 RT 8792-8793.) Chapline's testimony was therefore inadmissible, because it was not based on his personal knowledge. Additionally, it constituted inadmissible hearsay, because Chapline would have been testifying about other people's statements to him in order to prove the truth of those statements.

D. Any Error Was Harmless

Even if the trial court had admitted Chapline's testimony, it would not have affected the outcome. To begin with, the record does not support appellant's theory of relevance, which also forms the basis for his prejudice

claim. As noted above, appellant argues that Chapline's testimony would have been mitigating, because it showed that appellant enlisted in the Marine Corps intending to give his best effort, but he experienced racial discrimination and race-based harassment. (AOB 502-505.)

This argument is unfounded, because the record does not show that appellant's purported mistreatment constituted racial harassment. Chapline did testify that tension existed between Caucasian members of the military and local Asian-American population. He also testified that some Marines did not like seeing Asian-Americans in uniform, and that appellant thought the Marine Corps was treating him unfairly because of his race. (36 RT 8804-8806.) But the record gives no indication that the mistreatment alleged here was racially motivated. Appellant speculates that race was the motive, but a finding of prejudice cannot be based on speculation. (*People v. Beardslee* (1991) 53 Cal.3d 68, 98.)

Appellant also maintains that Chapline's testimony would have explained why appellant later "attached himself" to Lake. (AOB 505). But there is no discernable connection between the guards' purported mistreatment of appellant and appellant's relationship with Lake. Moreover, appellant had already had "attached himself" to Lake in Philo, before he was recaptured and allegedly mistreated. (23 RT 5665-5666, 5692; 30 RT 7389; 31 RT 7619.)

Finally, though sticking needles in appellant's feet—if it occurred—would be deplorable, it would not mitigate appellant's culpability for the unrelated murders of eleven people. For all these reasons, the purported error was harmless beyond a reasonable doubt.

XVII. THE TRIAL COURT WAS NOT REQUIRED TO INSTRUCT THE JURY ON LINGERING DOUBT AS A MITIGATING FACTOR

At the penalty phase, the defense requested instructions on lingering doubt as a mitigating factor. Its first proposed instruction stated that the

jury's adjudication of guilt is "not infallible," and the jury can consider lingering doubt in determining the appropriate penalty. (39 OCT 13002.) The defense's second proposed instruction similarly stated that the jury could consider lingering doubt as a mitigating factor. (39 OCT 13003.) Its third proposed instruction stated that before imposing the death penalty, the jury could demand a degree of certainty higher than proof beyond reasonable doubt and could consider any lingering doubt. (39 OCT 13023.)

The prosecutor objected that appellant had no right to these instructions under federal or state law, and other instructions adequately addressed the topic. The court agreed and added that the proposed instructions did not accurately describe lingering doubt. (39 RT 9714-9716.) The court emphasized, however, that the defense could discuss lingering doubt in its closing argument. (39 RT 9716.) During the defense's closing argument, counsel thus argued that the jury should not choose the death penalty if it had any lingering doubt whether appellant was the actual killer. (40 RT 9871.)

Appellant now contends the trial court violated his rights to due process and a fair penalty trial by refusing to give the lingering-doubt instructions. (AOB 505-515.) Appellant is incorrect, because a capital defendant has no right to instructions on lingering doubt under state law or the federal Constitution. (*People v. Hartsch* (2010) 49 Cal.4th 472, 511-513, citing *Franklin v. Lynaugh* (1988) 487 U.S. 164, 172-174 [108 S.Ct. 2320, 101 L.Ed.2d 155].[79])

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[79] In *Franklin v. Lynaugh*, the plurality opinion, concurring opinion, and dissenting opinion all agreed that a capital defendant has no constitutional right to a residual-doubt instruction. (*Franklin v. Lynaugh*, *supra*, 487 U.S. at pp. 173-174 (plur. opn. of White, J.), 187-188 (conc. opn. of O'Connor, J.), 189 (dis. opn. of Stevens, J.).)

Moreover, the jury was instructed that it could consider the circumstances of the crime (Pen. Code, § 190.3, factor (a)), as well as any other circumstances that extenuated its gravity (Pen. Code, § 190.3, factor (k)), and any sympathetic or other aspect of appellant's character or record that suggested a sentence other than death. (39 CT 13105-13106.) This was broad enough to encompass any residual doubt the jurors might have entertained. (*People v. Ward, supra*, 36 Cal.4th at p. 220.)

XVIII. THE TRIAL COURT CORRECTLY REFUSED TO INSTRUCT THE JURY THAT IT COULD IMPOSE A LIFE SENTENCE EVEN IF THE AGGRAVATING FACTORS OUTWEIGHED THE MITIGATING FACTORS, AND ALSO CORRECTLY RULED THAT IT WOULD BE IMPROPER TO MAKE SUCH AN ARGUMENT TO THE JURY

The defense asked the court to instruct the jury that it could impose a life sentence even if the aggravating factors outweighed the mitigating factors. (39 CT 13000, 13026.) The prosecutor objected. (39 RT 9728-9730) The court refused to give such an instruction because controlling authority precluded it. (40 RT 9818.)

Defense counsel then asked whether the court would sustain an objection if he argued to the jury that it could choose a life sentence even if the aggravating factors substantially outweighed the mitigating factors. (40 RT 9818-9821.) The court said it would sustain such an objection. (40 RT 9821-9822.)

Appellant now contends the court deprived him of due process and a fair penalty determination by (1) refusing to give the proposed instruction, and (2) ruling that it would sustain an objection if the defense made this argument to the jury. (AOB 515-524.)

Appellant is incorrect. First, a defendant is not entitled to an instruction that the jury can choose a life sentence when the aggravating circumstances outweigh the mitigating circumstances. (*Boyde v. California*

(1990) 494 U.S. 370, 377 [110 S.Ct. 1190, 108 L.Ed.2d 316]; *People v. Morgan*, *supra*, 42 Cal.4th at pp. 625-626; *People v. Medina, supra,* 11 Cal.4th at p. 782.) Appellant's claim of instructional error thus fails.

Additionally, it would have been improper to urge the jury to choose a life sentence even if it found that the aggravating factors outweighed the mitigating factors. At the penalty phase, the jury's function is "to weigh the applicable aggravating and mitigating factors and, *on that basis*, and that basis alone, to determine whether death is an appropriate penalty." (*People v. Hendricks* (1988) 44 Cal.3d 635, 654, original italics.) The court "simply cannot tell the jury to 'weigh all the factors, but regardless of the outcome do whatever you think is appropriate.'" (*Ibid.*) This "would invite arbitrary decisions based on improper or irrelevant sentencing considerations . . . ." (*Ibid.*) Defense counsel thus had no right to argue that the jury could impose a life sentence even if the aggravating factors outweighed the mitigating factors.

XIX. JUDGES MCCARTIN, FITZGERALD, AND RYAN WERE NOT BIASED AND DID NOT COMMIT MISCONDUCT

Next, appellant contends that judicial misconduct and bias deprived him of due process and a fair trial. (AOB 524-528.) Respondent disagrees. Contrary to appellant's assertion, Judge McCartin did not secretly steer the case to Orange County, Judge Fitzgerald did not refuse to transfer the case to San Francisco based on his own wish to preside over it, and Judge Ryan's rulings did not demonstrate bias.

A. Judge McCartin

Under the state and federal Constitutions, a defendant has a due process right to an impartial trial judge. (*Arizona v. Fulminante*, *supra*, 499 U.S. at pp. 309-310; *People v. Guerra*, *supra*, 37 Cal.4th at p. 1111.) However, a court reviewing a bias challenge will presume the honesty and integrity of the adjudication. (*Withrow v. Larkin* (1975) 421 U.S. 35, 47

[95 S.Ct. 1456, 43 L.Ed.2d 712].) Further, numerous adverse rulings against a party do not establish judicial bias, "especially when they are subject to review." (*Guerra, supra*, 37 Cal. 4th at p. 1112.)

Here, appellant repeats his earlier contention that Judge McCartin committed misconduct and demonstrated bias by "covertly manipulating" the venue-selection process to direct the case to Orange County. (AOB 524-526; see AOB 167-172, 211-212.) Respondent has already addressed this claim. To review,

- Judge Curtin held an evidentiary hearing and found that Judge McCartin did not commit any misconduct;
- Judge Curtin's findings are binding on appeal because they are supported by substantial evidence; and
- The record demonstrates that Judge McCartin acted impartially and did not try to steer the case to Orange County. (See Argument I, parts D(6) and H, *ante*.)

Moreover, assuming there was misconduct or bias, there was no prejudice, because the transfer did not result in an unfair trial. (See Argument I, part B, *ante*.)

B. Judge Fitzgerald

Next, appellant contends Judge Fitzgerald was biased. (AOB 526.) Judge Fitzgerald was assigned to the case in October 1994, after the transfer to Orange County, but in February 1997, the Court of Appeal ordered him removed. (*Ng. v. Superior Court, supra*, 52 Cal.App.4th at p. 1024; 1 OCT 146) The Court of Appeal did not find that Judge Fitzgerald was biased, but instead held that the interests of justice required his removal. (*Ibid.*, citing Code Civ. Proc., § 170.1, subd. (c).) The court based its decision on two combined factors: (1) some "derogatory and apparently unfounded" statements that Judge Fitzgerald made about

appellant's trial attorney, and (2) Judge Fitzgerald's "unusual and inappropriate desire to keep the case . . . ." (*Ng*, *supra*, 52 Cal.App.4th at p. 1024.)

In reaching this decision, the Court of Appeal cited two examples of Judge Fitzgerald's "unusual" desire to keep the case. The first occurred in February 1995, at a hearing on the defense's motion to transfer the case to San Francisco. At that hearing, Judge Fitzgerald said he wanted to oversee the trial, and that based on his experience, he believed he was in a "'better posture than anyone around'" to do so. (*Id.* at p. 1023; see 1 RT 94-95.) Second, according to the Court of Appeal, Judge Fitzgerald took the unusual step of filing his own response when appellant filed a petition for writ of mandate challenging one of his rulings. (*Ng*, *supra*, 52 Cal.App.4th at pp. 1015, 1023.)

Appellant now maintains that Judge Fitzgerald's bias and desire to keep this case taints his rulings on "numerous" motions to transfer the case to San Francisco. (AOB 526.) But in fact, Judge Fitzgerald only presided over one such motion, which was filed in January 1995 and denied two months later. (2 OCT 230-290; 1 RT 111-112.)

And there is no indication Judge Fitzgerald's ruling resulted from bias. To begin with, the ruling was correct, because the transfer to Orange County was proper, and Judge Fitzgerald had no authority to transfer the case to San Francisco. (See Argument II, part D, *ante*.) This alone defeats any claim that the ruling was tainted by bias.

Moreover, the record does not demonstrate any bias that would overcome the presumption that Judge Fitzgerald acted with honesty and integrity and properly performed his duty. (See *Withrow v. Larkin, supra,* 421 U.S. at p. 47; Evid. Code, § 664.) As noted above, the Court of Appeal concluded that certain remarks by Judge Fitzgerald reflected an "unusual and inappropriate desire to keep the case . . . ." (*Ng*, *supra*, 52 Cal.App.4th

at p. 1024.) But this does not suggest that Judge Fitzgerald refused to transfer the case for that reason; furthermore, respondent respectfully submits that the Court of Appeal inaccurately construed Judge Fitzgerald's comments.

Judge Fitzgerald made the remarks during a hearing on the defense's motion to transfer the case to San Francisco. The motion was based, in part, on appellant's contention that Orange County's bankruptcy would hinder the Public Defender's efforts to represent him. (2 OCT 232-240, 269-270, 289.) At the initial hearing on the motion, Judge Fitzgerald said he was not yet ready to rule on it, because he wanted to first consult with others to determine whether funds could be obtained for the public defender. Specifically, Judge Fitzgerald intended to consult with Judge Millard—the "987 judge" who was "fiscally responsible" for this case—to determine whether it was appropriate for Judge Fitzgerald to consider a motion that was based, in part, on fiscal concerns. (1 RT 84-88, 92.)

It was in this context that Judge Fitzgerald made the comments in question:

> I want it back here to ultimately make a decision, assuming Judge Millard agrees that I'm the one that should do it. Otherwise, he can make an informal decision, notify everybody, and I'll just withdraw.
>
> Candidly, this court wants to try this case. My ego tells me that I'm in a better posture than anybody around to do it with the experience that I've had. *So I don't want my ego and my desire to try the case to get in the way of -- to be forcing this case to stay in Orange County.* So that's why I'm seeking guidance from Judge Millard.

(1 RT 94-95, italics added.)

Thus, while Judge Fitzgerald expressed an understandable interest in presiding over this notorious and complex case, he explained that he did *not* want this desire to influence his ruling, and he deliberately sought to

prevent it by first consulting with Judge Millard. Moreover, the mere fact Judge Fitzgerald wanted to keep the case does not suggest he was biased. In short, appellant has not rebutted the presumption that Judge Fitzgerald acted with honesty and integrity and properly performed his duty in denying the transfer motion. Of course, even if Judge Fitzgerald had been biased, there was no prejudice, because the transfer motion was meritless, and the choice of Orange County as the venue did not render appellant's trial unfair. (See Argument I, part B, *ante*.)

C. Judge Ryan

Finally, appellant contends that Judge Ryan was biased because he consistently ruled in favor of the prosecution. (AOB 527.) As support, appellant points to the rulings that he is challenging elsewhere in his brief concerning the admission of prosecution evidence and exclusion of defense evidence. (AOB 527; see AOB 433-464; see Arguments IX-XI, *ante*.) But appellant does not identify any place in the record where he asked Judge Ryan to recuse himself based on such bias, so he has forfeited his claim. (*People v. Seaton* (2001) 26 Cal.4th 598, 698.) And again, numerous rulings adverse to the defense do not establish bias, especially when—like here—they are subject to appellate review. (*People v. Guerra*, *supra*, 37 Cal.4th at p. 1112.)

Appellant also argues that Judge Ryan demonstrated bias because he decided that appellant was trying to delay the trial, and he therefore "stopped analyzing the legal issues that came before him, and denied appellant's requests based on that fixed view rather than on the merits of the claims." (AOB 527-528.) As his sole support for this assertion, appellant points to Judge Ryan's comment that his *Marsden* and *Harris* motions and motion for independent counsel all reflected his wish to have Michael Burt appointed as his lawyer. (AOB 528, fn. 86, citing 2 RT 462.) But this comment does not remotely suggest that Judge Ryan stopped

analyzing the issues. And it certainly does not rebut the presumption that the judge acted with honesty and integrity and properly carried out his duty. (See *Withrow v. Larkin*, *supra*, 421 U.S. at p. 47; Evid. Code, § 664.)

As further evidence of bias, appellant asserts that the Judge Ryan made pejorative comments about Kelley. (AOB 527.) Appellant himself has filled volumes of transcript with pejorative remarks about Kelley, so his argument is somewhat ironic, but in any event, it is also meritless. "A trial court commits misconduct if it persistently makes discourteous and disparaging remarks to defense counsel so as to discredit the defense or create the impression that it is allying itself with the prosecution." (*People v. Sturm* (2006) 37 Cal.4th 1218, 1233, internal quotation marks omitted.) Generally, a defendant cannot complain about such conduct on appeal unless he objected at trial. (*Id.* at p. 1237.) Here, appellant does not identify any pejorative remarks by Judge Ryan or identify their location in the record, so his contention must be disregarded. (*Mueller v. County of Los Angeles*, *supra*, 176 Cal.App.4th at p. 816, fn. 5; *City of Lincoln v. Barringer*, *supra*, 102 Cal.App.4th at p. 1239; Cal. Rules of Court, rule 8.204(a)(1)(C); cf. *Fine v. Superior Court* (2002) 97 Cal.App.4th 651, 671 ["A charge of judicial misconduct unsupported by facts constitutes a groundless attack upon the integrity of a judicial officer, and is on its face contemptuous"].)

In sum, appellant has not demonstrated that Judges McCartin, Fitzgerald, or Ryan were biased or committed misconduct.

XX. THE DEATH PENALTY STATUTE IS CONSTITUTIONAL

Next, appellant argues that several aspects of the 1978 death penalty statute violate the federal Constitution. (AOB 528-544.) As discussed below, this Court has rejected these claims in previous cases and should do so again.

A. The Statute Is Not Overbroad

In his first claim, appellant contends his death sentence is invalid because section 190.2 fails to narrow the category of murders eligible for the death penalty. (AOB 530-531.) This Court has rejected this claim. (*People v. Farley* (2009) 46 Cal.4th 1053, 1133; accord, *Karis v. Calderon* (9th Cir. 2002) 283 F.3d 1117, 1141, fn. 11.) It should do so again.

This claim also fails because appellant lacks standing to raise it. According to the Supreme Court, "a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court." (*Broadrick v. Oklahoma* (1973) 413 U.S. 601, 610 [93 S.Ct. 2908, 37 L.Ed.2d 830].) Thus, in a claim such as this, a defendant can only challenge as overbroad the factors that made him eligible for the death penalty. (*State v. Bass* (N.J. Super.Ct.Law.Div. 1983) 460 A.2d 214, 219.)

Here, appellant argues that the death penalty statute is overbroad because (1) "[v]irtually all felony-murders are ostensibly special circumstance eligible," and (2) the lying-in-wait special circumstance has been construed so broadly that it encompasses "virtually all" intentional murders. (AOB 531.) But these were not the factors that made appellant eligible for the death penalty—instead, he was eligible because he committed multiple murders. (36 OCT 12236.) He does not contend the multiple-murder special circumstance is overbroad, so his challenge fails because he lacks standing.

B. Section 190.3, Subdivision (a), Does Not Permit Arbitrary and Capricious Imposition of the Death Penalty

Section 190.3, subdivision (a), directs the sentencer to consider "the circumstances of the crime" in determining the penalty. (Pen. Code,

§ 190.3, subd. (a).) Appellant contends the death penalty is invalid because this provision, as applied, permits arbitrary and capricious imposition of death, in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. (AOB 531-533.) This Court has rejected this claim. (*People v. Hartsch*, *supra*, 49 Cal.4th at p. 516.) It should do so again.

C. The Federal Constitution Does Not Require Unanimity As to the Aggravating Factors or Proof Beyond a Reasonable Doubt That the Aggravating Factors Exist and Outweigh the Mitigating Factors

Appellant contends that aggravating factors are elements of the crime of "capital murder," and therefore, the trial court erred by failing to instruct the jury that (1) the prosecution bore the burden of proving one or more aggravating factors beyond a reasonable doubt; (2) the aggravating factors must outweigh the mitigating factors beyond a reasonable doubt; and (3) the jury must unanimously agree on the aggravating factors. (AOB 534-541.)

Appellant is incorrect: Under the federal Constitution, there is no requirement for unanimity on the aggravating factors, no requirement that the jury find the aggravating factors true beyond a reasonable doubt, and no requirement that the jury find beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating circumstances. (*People v. Hartsch*, *supra*, 49 Cal.4th at p. 515.)

D. The Court Should Not Conduct Inter-Case Proportionality Review

Appellant next contends the Court should conduct inter-case proportionality review. (AOB 540-541.) Both this Court and the United States Supreme Court have rejected this claim. (*Pulley v. Harris* (1984) 465 U.S. 37, 50-51 [104 S.Ct. 871, 79 L.Ed.2d 29]; *People v. Hartsch*, *supra*, 49 Cal.4th at p. 516.) This Court should do so again. In any event, appellant committed 11 murders, so his sentence was not disproportionate.

E. International Norms Do Not Invalidate California's Death Penalty

Appellant asserts that California's use of the death penalty as a regular form of punishment falls short of international norms of humanity and decency and violates the Eighth and Fourteenth Amendments. (AOB 541-543.) This Court has rejected this claim, holding that the death penalty is not unconstitutional "for violating international norms of the Western world, whether or not the death penalty is characterized as a regular or an extraordinary punishment . . . ." (*People v. Mills* (2010) 48 Cal.4th 158, 213, 215.) Thus here, it was appellant's treatment of the 11 victims—not his sentence—that violated international norms of humanity.

XXI. THERE WAS NO CUMULATIVE ERROR REQUIRING REVERSAL

Finally, appellant contends the cumulative effect of the purported errors requires reversal. (AOB 544.) Respondent disagrees because all of appellant's claims are meritless, and even assuming there were errors, appellant has failed to show prejudice.

Moreover, whether considered individually or cumulatively, the alleged errors could not have affected the trial's outcome. A defendant is entitled to a fair trial, not a perfect one. (*People v. Stewart*, *supra*, 33 Cal.4th at p. 522.) Appellant received a fair trial. His claim of cumulative error should therefore be rejected.

CONCLUSION

For the reasons stated, this Court should affirm appellant's convictions and sentence.

Dated: December 4, 2012

Respectfully submitted,

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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 143,999 words.

Dated: December 4, 2012

KAMALA D. HARRIS
Attorney General of California

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Charles Chitat Ng** No. **S080276**

I declare:

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

On December 6, 2012, I served the attached **RESPONDENT'S BRIEF (2 VOLUMES)** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on December 6, 2012, at Sacramento, California.

_____
Declarant

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