SUPREME COURT COPY

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In the Supreme Court of the State of California

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. WARREN JUSTIN HARDY, Defendant and Appellant.	CAPITAL CASE Case No. S113421

SUPREME COURT
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The Honorable John David Lord, Judge

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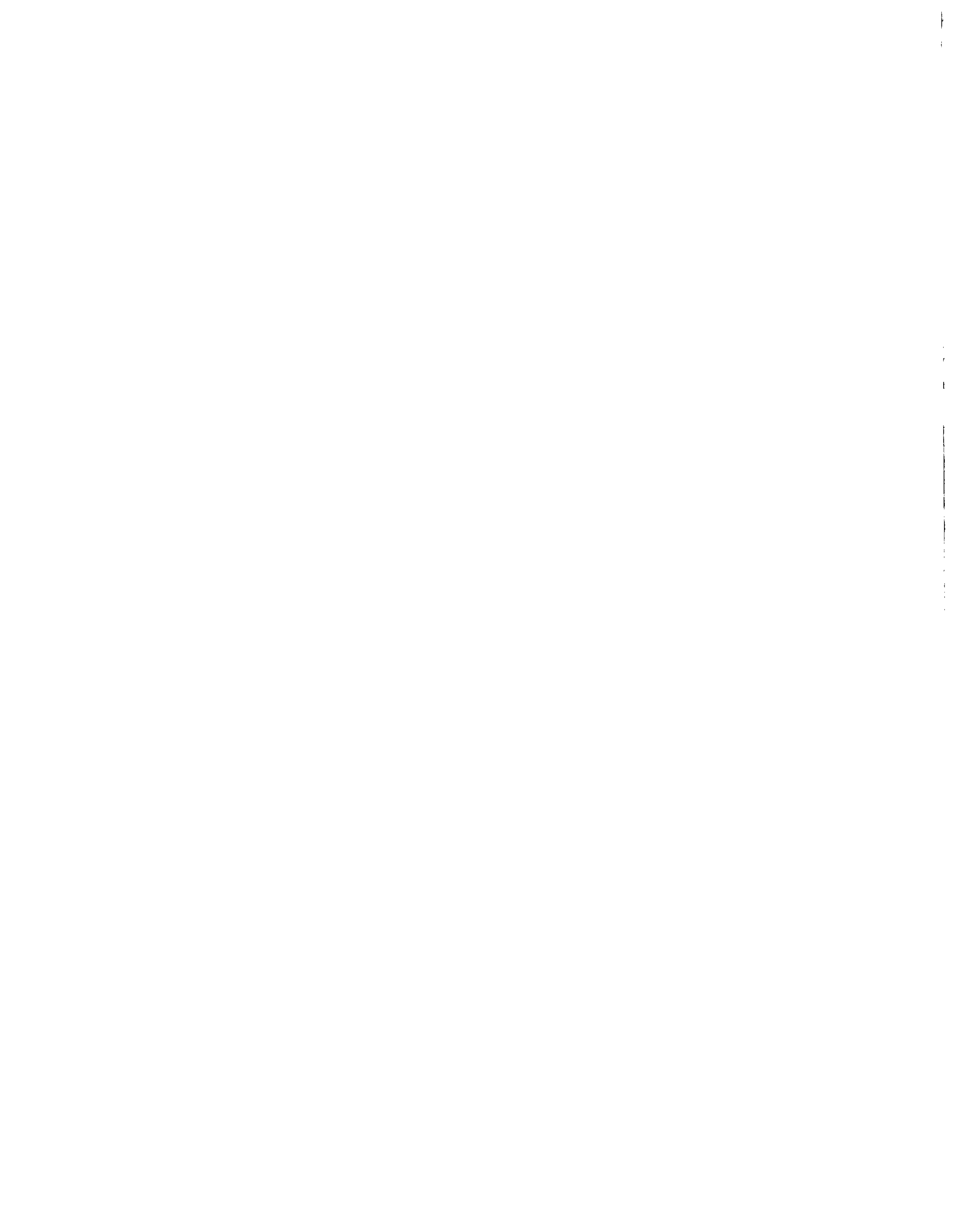
DEATH PENALTY



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STATEMENT OF THE CASE

In a second amended information filed by the Los Angeles County District Attorney, appellant[1] was charged with: murder (count 1; Pen. Code,[2] § 187, subd. (a)); second degree robbery (count 2; § 211); kidnapping to commit another crime, to wit, rape (count 3; § 209, subd. (b)(1)); forcible rape while acting in concert (count 4; § 264.1); forcible rape (count 5; § 261, subd. (a)(2)); sexual penetration by foreign object while acting in concert (count 6; §§ 289, subd. (a)(1), 264.1); sexual penetration by foreign object (count 7; § 289, subd. (a)(1)); and torture (count 8; § 206). Counts 1 through 8 were alleged as serious felonies within the meaning of section 1192.7, subdivision (c). (2CT 394-406.)

As to count 1, the following special circumstances were alleged: the murder was committed while appellant was engaged in the commission of (1) robbery (§ 190.2, subd. (a)(17)(A)); (2) kidnapping (§ 190.2, subd. (a)(17)(B)); (3) kidnapping for purposes of rape (§ 190.2, subd. (a)(17)(B)); (4) rape (§ 190.2, subd. (a)(17)(C)); and (5) rape by foreign object (§ 190.2, subd. (a)(17)(K)). It was further alleged as to count 1 that the murder was intentional and involved the infliction of torture within the meaning of section 190.2, subdivision (a)(18). (2CT 396-397.)

As to counts 4 through 7, it was further alleged that the victim was kidnapped and tortured by appellant within the meaning of section 667.61, subdivisions (a) and (d), and that appellant kidnapped the victim and used a deadly weapon (in violation of sections 12022.3 and 12022, subdivision (b)(1)) within the meaning of section 667.61, subdivisions (a), (b) and (e).

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[1] Appellant's two codefendants, Kevin Darnell Pearson and Jamelle Edward Armstrong, were severed from the instant case and tried separately. (1CT 6-13, 195-201, 214-219, 368-379; 2RT 50-51; 5RT 791-792.)

[2] Unless stated otherwise, all further statutory references are to the Penal Code.

Additionally, as to counts 3 through 7, it was alleged that appellant used a dangerous and deadly weapon, to wit, a stake/stick, within the meaning of 12022.3, subdivisions (a) and (b). Moreover, as to all the counts, the information alleged that appellant personally used a deadly and dangerous weapon, to wit, a stake/stick, within the meaning of section 12022, subdivision (b)(1). Finally, the second amended information asserted that appellant had incurred one prior serious or violent felony conviction (attempted robbery in violation of sections 664 and 211) within the meaning of section 667, subdivisions (b) through (i), and section 1170.12, subdivisions (a) through (d). (2CT 394-406.)

Appellant pleaded not guilty and denied the special allegations. (2CT 405-406; 2RT 2-4.) On October 21, 2002, the court granted the People's motion to exclude the victim's toxicology information and report, and also granted a defense motion to exclude evidence of gang affiliation. (2CT 422.) The trial court granted appellant's motion to bifurcate his prior conviction allegations. (2CT 477; 6RT 896-897.) Trial was by jury. (2CT 477-478, 481-482.) Voir dire commenced on October 31, 2002, and the jury and alternates were impaneled on November 12, 2002. (2CT 477-478; 7RT 1084; 9RT 1862-1863, 1878-1879; 10RT 1904-1905.)

The presentation of evidence on the guilt phase began on November 13, 2002. (2CT 501; 10RT 1924.) The trial court denied appellant's section 1118.1 motion for judgment of acquittal due to insufficiency of the evidence. (2CT 508; 11RT 2344.) At 11 a.m. on Tuesday, November 19, 2002, the jury began deliberations on the guilt phase. (2CT 587; 11RT 2422-2424.)

At 2:20 p.m. on Friday, November 22, 2002, the jury found appellant guilty of counts 1 through 8, and found all of the count 1 special

circumstances allegations to be true.[3] (3CT 597-607; 12RT 2527-2534.) On count 1, the jury additionally found that appellant was "[a]n Aider and Abettor and had the intent to kill or was a Major Participant and acted with reckless indifference to human life." (3CT 597.) The jury made "not true" findings on the personal use enhancements alleged in counts 2 through 5, and was unable to reach a verdict on the personal use enhancements alleged in counts 1 and 6 through 8. (3CT 597-607; 12RT 2527-2534.)

As to counts 4 through 7, the jury found to be true the allegation that the victim was kidnapped and tortured pursuant to section 667.61, subdivisions (a) and (d). (3CT 601-604; 12RT 2527-2534.) As to counts 4 and 5, the jury found to be "not true" the allegations that appellant kidnapped the victim and used a deadly weapon pursuant to section 667.61, subdivisions (a), (b) and (e), and was unable to reach a decision on those allegations with respect to counts 6 and 7. (3CT 601-604; 12RT 2529-2532.) Finally, outside the presence of the jury, appellant waived jury trial and admitted the truth of the prior conviction allegation. (3CT 607; 12RT 2537-2538.)

Jury trial in the penalty phase began on December 2, 2002. (3CT 608; 12RT 2559.) Jury deliberations began on December 10, 2002 at 9:15 a.m. (3CT 640; 14RT 3175-3177.) At 11:20 a.m. on December 11, 2002, the jury returned a verdict of death. (3CT 641, 643.)

On January 23, 2003, the court denied appellant's motion to modify the judgment of death. (3CT 692; 14RT 3195-3203.) On the same day, the

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[3] For unknown reasons, the second special circumstance allegation of kidnapping pursuant to section 190.2, subdivision (a)(17)(B), alleged in the second amended information was not listed on the verdict form. In other words, the second amended information alleged six special circumstance allegations, but the verdict form listed only five "true" findings, with the kidnapping allegation being the missing special circumstance allegation. (See 2CT 396-397; 3CT 597-598.)

trial court sentenced appellant to death on count 1. (3CT 693, 697-698.) As to the remaining counts, the trial court sentenced appellant to the middle term of three years on count 2, doubled to six years pursuant to sections 667 and 1170.12, plus five years pursuant to section 667, subdivision (a)(1), for a total determinate term of 11 years on count 2. (3CT 693.) The court stayed the sentence on count 3 pursuant to section 654. It imposed the middle term of seven years on count 4, again doubled pursuant to sections 667 and 1170.12, for a total term of 14 years on count 4. The court sentenced appellant to 25 years to life on count 5, once again doubled to 50 years to life pursuant to sections 667 and 1170.12. The court gave appellant the middle term of six years on count 6, doubled, for a total term of 12 years on count 6. The court again sentenced appellant to the middle term of six years on count 7, doubled, for a total term of 12 years. Finally, on count 8, the court imposed a term of life with the possibility of parole.[4] (14RT 3203-3206.)

The court also ordered appellant to pay a $200.00 restitution fine (§ 1202.4), and to register as a sex offender pursuant to section 290. (14RT 3215.) The court granted appellant 1,697 days of presentence custody credits, consisting of 1,476 actual days plus 221 days good time/work time. (3CT 693; 14RT 3213.)

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[4] Unfortunately, with respect to counts 2 through 8, the trial court did not clearly delineate which counts were consecutive and which counts were concurrent to one another. Rather, after pronouncing the sentence on count 7, the trial court simply stated, "The sentences will be concurrent." It then went on to sentence appellant to "an indeterminate sentence of life" on count 8. (14RT 3206.) It is unclear from the record whether the trial court meant all the sentences in counts 2 through 7 to be concurrent, or whether the court meant for the sentences on counts 6 and 7 to be concurrent to the sentence on count 5. Both the determinate and indeterminate abstracts of judgment refer to each of counts 2 through 8 as "concurrent." (3CT 699-702; see also 3CT 692-696.)

This appeal from the judgment of death is automatic. (§ 1239, subd. (b).)

STATEMENT OF FACTS

I. THE GUILT PHASE

A. Prosecution Evidence

1. The Defendants And The Victim

At the time of the instant kidnapping-robbery-rape-torture-murder, appellant was 22 years old, his half-brother Jamelle Edward Armstrong was 18 years of age, and their mutual acquaintance Kevin Darnell Pearson was 21.[5] (11RT 2238, 2250.) Armstrong was five-feet-ten inches tall, and weighed roughly 160 pounds. (11RT 2252, 2274, 2278.) Pearson was about six feet tall, and weighed approximately 175 pounds. (11RT 2252, 2278-2279.) Appellant was about five-feet-four inches tall, and weighed approximately 150 pounds. (11RT 2252, 2256.) Victim Penny Sigler was a diminutive 43-year-old woman, who stood just five-feet-four inches tall, and weighed only 113 pounds. (10RT 1952; 11RT 2238.)

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[5] Pearson and Armstrong were both identified in front of the jury during the instant trial. (11RT 2273, 2278.) Codefendant Pearson was convicted and also sentenced to death in connection with the crimes in the instant case. On appeal, this Court affirmed Pearson's guilt phase convictions, but reversed the penalty of death due to error under *Witherspoon v. Illinois* (1968) 391 U.S. 510 [88 S.Ct. 1770, 20 L.Ed.2d 776] and *Wainwright v. Witt* (1985) 469 U.S. 412 [105 S.Ct. 844, 83 L.Ed.2d 841]. The People subsequently re-tried the penalty phase, and a second jury once again recommended death on April 15, 2013. Los Angeles Superior Court Judge Tomson Ong re-sentenced Pearson to death on June 26, 2013. That case has been automatically appealed to this Court (see case number S212159). Codefendant Armstrong was also sentenced to death in a separate proceeding, and his automatic appeal is currently pending before this Court (see case number S126560).

2. The Discovery Of The Crime Scene

In 1998 and 1999, Mr. George Bark worked for Caltrans. On Tuesday, December 29, 1998,[6] Bark was working along the 405 freeway west of Long Beach Boulevard, near Wardlow Road. Bark's job was to pick up debris and repair fences along the freeway embankment. While doing so, Bark discovered Penny Sigler's battered body. (10RT 2025.) Bark felt for a pulse, but the corpse was cold. He left the body and notified his supervisor, who contacted the California Highway Patrol (CHP). (10RT 2026.)

When he found Penny's body, Bark was located at an upper area along the freeway, looking down towards a fence along a ditch. (10RT 2027.) The fence consisted of a black screen, held in place by large stakes, some of which were down on the ground. Exhibit 3A[7] looked like one of the stakes. Exhibits 3B and 3C appeared to be broken stakes. The wind sometimes broke the stakes. Bark picked up the bad ones, and replaced them with unbroken ones if necessary. (10RT 2027-2028.)

3. The Police Investigation

Detective Brian McMahon of the Long Beach Police Department (LBPD) arrived at the crime scene on December 29, 1998, at roughly 3:30 p.m. Penny's body was located near the rear of 3395 Long Beach Boulevard, a small shopping center complex, situated at the intersection of Wardlow Road where Interstate 405 passed overhead. (11RT 2221, 2223.)

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[6] The prosecutor incorrectly asked Mr. Bark to confirm that he discovered the body in January, 1999, to which Bark replied affirmatively. Actually, the evidence demonstrated that Mr. Bark discovered Penny's body on December 29, 1998. (11RT 2221, 2249-2250; see AOB 317.)

[7] All the exhibits presented at trial were introduced by the People. The defense did not introduce any exhibits.

Wardlow Road ran east to west. Long Beach Boulevard ran north to south. (11RT 2225.)

A small retaining wall ran from the drainage ditch to the sidewalk of Wardlow, separating the parking lot and stores from a small, triangular-shaped area adjacent to the sidewalk. There were a lot of leaves, debris, bushes and eucalyptus trees in the area. A chain-link fence ran along the drainage ditch and along the rear of the buildings all the way to Long Beach Boulevard. (11RT 2222-2223.) The drainage ditch from Long Beach Boulevard to Wardlow Road was about 410 feet long. (11RT 2231.) The fence was about a foot away from the back wall of the businesses. (11RT 2227.)

The chain-link fence intersected a cinder-block wall. (11RT 2223.) The fence that separated the parking lot was about six feet high. The cinder-block wall was right next to the fence, which was about three-and-one-half to four feet high. (11RT 2239.) A portion of the chain-link fence had been pulled back. A person, perhaps with some difficulty, would have been able to squeeze through the opening. (11RT 2240; Exh. 16A.) The fence was bent over in different areas along its entire length. (11RT 2240.)

There was also another fence constructed of "black mesh-like nylon type meshing," held up by wooden stakes, that was designed to keep debris from washing down the embankment. (11RT 2224.) There was quite a bit of blood and debris on the portion of that fence near Penny's body, along with drag marks nearby. (11RT 2228.) Photographs of the area taken by LBPD investigators clearly reflected Penny's body, as well as a broken wooden stake. (11RT 2224, 2226 -2229; Exhs. 16 [photo board] & 23.) Her body was roughly 150 feet south of Wardlow Road, approximately in the middle area of the businesses at that location. (11RT 2231.)

Specifically, Penny's corpse was located about 35 feet from the chain-link fence, and roughly the same distance from the lower cinder-block wall.

(11RT 2238.) Placard 27 in one of the crime scene photographs (Exh. 16H) marked the location of a shoe. (11RT 2230.) It was a very dark area, even in the late afternoon when the photographs were taken. (11RT 2231.) There were no lights in the back of the businesses. There were no street lights in that area, either on Wardlow Road or on Long Beach Boulevard. There was lighting in the parking lot that illuminated the lot, but not the back of the businesses or the embankment. (11RT 2233.)

A group of photographs captured Penny's body the way she was found. (11RT 2242; Exh. 11.) It was difficult to see her corpse because of the location, the lighting, and due to the mulch piled on top of her. (11RT 2242-2243, 2249.) Two photographs (Exhs. 23C and 23D) showed several small areas of blood splattering on the wall. There was a lot of blood on the bushes, but it was difficult to photograph. (11RT 2235-2236.) The closest blood splatter to the body was about 10 to 12 feet away. There was a large amount of splatter in the drainage area, and drag marks over the mesh fencing and through the mulch. (11RT 2247, 2249.) The splatter in the drainage ditch was about 12 feet from the body. (11RT 2228.)

Detective McMahon later located a stake on the embankment that was introduced as evidence at trial. He did not believe that it was the actual weapon used to violate Penny, but opined that it was similar to the object that may have been used in the crime. (11RT 2251.) Penny's death occurred around 11:00 p.m. to midnight on December 28, 1998. (11RT 2250.) Penny lived at 3342 Maine Avenue, about one-half to three-quarters of a mile away. (11RT 2237; 12RT 2669.)

Prior to the homicide, a shipment of 2,000 Los Angeles County food stamp coupons had been sent to the Nix check cashing store at 6583 Atlantic Boulevard, number 106, in Long Beach, California. The shipment included food stamp coupons bearing the serial number F02520550V. (10RT 2034.) Mr. Joseph O'Brien had been with Penny earlier on the night

of her death. The parties stipulated if O'Brien had been called to the stand, he would have testified that on December 29, 1998,[8] he gave Penny a ten dollar food stamp coupon book containing five and one dollar coupons to buy soda and candy. O'Brien had obtained the food stamps from the Nix check cashing store on Atlantic Boulevard in Long Beach. Penny left home between 10 and 11 p.m. That was the last time O'Brien ever saw Penny alive. (10RT 2065.)

Los Angeles Police Department (LAPD) Detective Paul Edwards assisted other detectives assigned to this case. On January 6, 1999, Detective Edwards returned to the crime scene after receiving information that Penny had food stamps on her person at the time of her death. (10RT 2050-2052.) He first went to the south side of 3395 Long Beach Boulevard (the small strip mall). Detective Edwards scoured the grounds of the small, triangular, wooded area that constituted the crime scene. He subsequently found a single white sock. (10RT 2053-2055.)

At the opposite end of the building, on the southeast side, Detective Edwards noticed a ladder leading to the roof. At the foot of the ladder, he found the cover of a food stamp coupon book. (10RT 2054-2056.) The inside cover bore the serial number F02520550V. (10RT 2057.)

The Lorena Market[9] was located at 6625 South Broadway in Los Angeles. Mr. Efrain Garcia managed the family-run business. Approximately 30 percent of the market's business was transacted using food stamps. (10RT 2035-2036.) Garcia recognized appellant from the neighborhood as a regular customer, and remembered seeing him in the

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[8] This stipulation appears to be incorrect, as the evidence demonstrated that Penny left the residence late on the evening of December 28, 1998, not December 29, 1998. (11RT 2250.)

[9] The name alternatively appears as "La Reina" market in the record. (10RT 2040.)

market between Christmas and New Year's Eve of 1998. (10RT 2043-2044, 2047.) Appellant came into the market and bought food using food stamps. (10RT 2044, 2046.)

Garcia also recognized several photographs of other individuals as customers who came to the market. The photographs Garcia recognized included those of Damion Monson, Maurice McDaniel, and codefendant Armstrong. (10RT 2047.) Garcia also viewed a photograph of codefendant Pearson. He thought that he recognized Pearson, but was not certain. (10RT 2049.)

Police officers had previously arrived at the market and had asked Garcia about food stamps. The market deposited food stamps once a month. (10RT 2037.) However, at the time, the market still had the food stamps received between December 23 and December 30, 1998. (10RT 2037-2038.) Garcia's father had retrieved the stamps from their home for the police. (10RT 2038.) Two of the food stamps bore the serial number F02520550V. (10RT 2038-2039; Exhs. 18A & 18B.) Garcia recognized his market's stamp and account number on the food stamps. (10RT 2040.)

On January 7, 1999, at 1:15 a.m., Detective Edwards executed a search warrant at appellant's residence at 335 ½ West 69th Street in Los Angeles. (10RT 2057-2058.) Detective Edwards seized a gray gym bag from the north closet of the master bedroom. Inside the bag were a brown "checked" shirt, "Nautica" blue jeans, and a green long-sleeved sweater with a blue stripe. In the same closet, Detective Edwards found a brown-rimmed hat, a white t-shirt, and a pair of "American Eagle" blue jeans. (10RT 2058.)

While searching under the bed, Detective Edwards also found a pair of black "Guess" brand shoes with an unusual circular pattern on the soles. (10RT 2058, 2062.) This same unusual pattern appeared in a photograph of a shoe print from the crime scene. (10RT 2059.) Next to the bed,

Detective Edwards found a shoe box containing a "PacBell" telephone bill in appellant's name. (10RT 2058.) Detective Edwards also found a food stamp coupon (with a different serial number from the booklet found at the crime scene) in a tin can on the television in the master bedroom. Moreover, he found several black leather jackets in the master bedroom. One leather jacket hung on the door to the bedroom, and appeared to have blood stains on it. (10RT 2059; Exh. 13A.)

Detective Edwards searched a second bedroom in the northwest corner portion of the house, which appeared to be the children's room. The room had two beds. He found a blue "Travel-Lite" gym bag underneath the pillow at the head of the bed closest to the door. The bag contained a North Carolina sweatshirt, a tan "Dickies" brand shirt, tan "Dickies" pants, a football jersey, white shirt, blue jeans, "Arizona" brand overalls, and a pair of black "Redwood" brand boots. (10RT 2059-2061, 2063.) Appellant later identified the overalls as belonging to Armstrong and the boots as belonging to Pearson. (11RT 2166-2167.) Detective Edwards also discovered an employment application in appellant's name on the television stand in the living room. (10RT 2059-2060.)

On January 7, 1999, LBPD Detective Steven Lasiter served a search warrant at Pamela and Jamelle Armstrong's residence located at 731 Redondo Avenue in Long Beach. As a result of the search, Detective Lasiter seized several items of clothing, including a shirt reflected in photographs marked as Exhibits 12D and 12H. (11RT 2211-2212.) On January 11, 1999, Detective Lasiter recovered two food stamp coupons (Exhibits 18A and 18B bearing the serial number F02520550V) from Mr. Efrain Garcia.[10] (11RT 2213-2214.)

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[10] Detective Lasiter also conducted the aforementioned photographic lineup with Mr. Garcia. (11RT 2214-2218.)

4. Appellant's Statements

LBPD Detective Steven Prell questioned appellant on January 7, 1999 at the police station. (10RT 2067.) Appellant was in custody, and was transported to the interview room, where he remained from 2:00 to 5:00 a.m.[11] At 5:10 a.m., he was advised of his constitutional rights. (11RT 2172-2173.) Detective Prell advised appellant of his rights from a standard form (Exh. 25). (10RT 2071.) Appellant wrote his name on the form, initialed each of six phrases, and signed it. (10RT 2073-2075.) Detective Prell printed his name on the form, and his partner Detective McMahon, who was present during appellant's interview, also signed it. (10RT 2075.)

At the beginning of the interview, Detective Prell and Detective McMahon introduced themselves. (10RT 2067, 2069.) The detectives normally did not tape interviews, because a visible tape recorder made people inhibited and nervous. Generally, Detective Prell interviewed people off-tape to avoid covert recording. (10RT 2069-2070.) Detective Prell told appellant that they were investigating a recent murder, but he did not initially disclose the location of the crime. (10RT 2076-2077.)

Appellant subsequently made three unrecorded statements about the murder, as well as one recorded statement. (10RT 2076, 2152; 11RT 2175.) The first and second statements were made during a single session lasting about one hour and 25 minutes. (10RT 2090.) In the first statement, appellant denied any involvement whatsoever. He said on the night of the murder, he was initially at his mother's house near Seventh and Redondo.

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[11] Detective Prell indicated that he waited to interview appellant until the completion of the search warrant activities at appellant's house. He explained that, if anything was found during the execution of the search warrant, he wanted to be able to question appellant about it during the interview. (11RT 2172.)

He then went to his friend Mr. Monte Gmur's house,[12] and finally, he took a bus back to his own residence on 69th Street in Los Angeles. (10RT 2076, 2079.) Appellant said that Gmur's house was in the area of Anaheim and Cedar in Long Beach. Detective Prell estimated that this location was two to three miles from the crime scene. (10RT 2077-2078.)

Next, according to appellant, he awoke the following day at his home. His friend "Shawn" then drove him back to his (appellant's) mother's house, where appellant picked up some clothes. Shawn then drove him to an adult bookstore in Long Beach. While at the adult bookstore, appellant bought edible panties, and Shawn bought a "dildozer." (10RT 2079-2080.) They then went to a fish market in South Central Los Angeles at 120th and Avalon, purchased some food from Burger King, and finally returned to appellant's residence on 69th Street. (10RT 2080-2081.)

Initially, appellant was not very forthcoming, so Detective Prell asked him if he had heard about a murder, or had watched the news about a woman found on the side of the freeway. (10RT 2081-2082.) By that time, there had been newscasts and newspaper articles about the murder. The newscasts were attempting to identify the woman. (10RT 2082-2083.)

Appellant then made a second unrecorded statement relating a different version of events. He said that he received a phone call at his home on 69th Street informing him about the newscasts. (10RT 2083.) His fiancé's mother, Trisha Garner, had called and notified him. After the call, appellant's fiancé turned on the television to watch the newscast. (10RT 2084-2085.)

Detective Prell then asked appellant about the clothing seized from his residence, because he wanted to identify the owners of those clothing

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[12] Mr. Gmur had a music studio inside his residence. (12RT 2655.)

items.[13] (10RT 2085.) Detective Prell asked appellant whether he owned a leather jacket. Appellant said that he owned the black leather jacket that was hanging on the door knob behind the bedroom door. Appellant said that there was just that one leather jacket and that it belonged to him. (10RT 2086.)

In this second version of events, appellant then indicated that codefendant Armstrong had borrowed that particular black leather jacket. Appellant said that, on the same day he went to the adult bookstore, he had first stopped by his mother's house and retrieved the jacket from where his half-brother Jamelle Armstrong had allegedly left it. (10RT 2087-2088.)

Detective Prell also asked appellant about shoes during this second version of events, and appellant admitted that he kept shoes at the 69th Street residence, and that he wore a size nine. Appellant claimed that the last time he was in Long Beach was on December 29, 1998, at about 7:30 p.m., after he left the adult bookstore. (10RT 2088.) This was the day after the murder. (11RT 2165.)

During the second version of events, appellant did not provide any other detailed information regarding his whereabouts on the night of the murder. (10RT 2089.) Appellant simply stated that he left Gmur's house, and then rode buses back to his house in Los Angeles. Appellant admitted that he might have the dates wrong, and that he could have been confused by one or two days. Detective Prell testified that appellant was going back and forth in his statement because he was getting the dates confused. At one point, appellant said that he was on a bus, or buses. However, he then stated that if he was identified by people as being on these buses, then those

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[13] Prior to questioning appellant, Detective Prell had searched appellant's residence on 69th Street. (10RT 2085.) An inventory of the items seized had been prepared by other officers. (10RT 2085-2086.)

witnesses were lying, because he was not on a bus that night. (10RT 2089-2090.)

Following a 15-minute break, appellant made a third unrecorded statement. Prior to this statement, Detective Prell informed appellant that the platform areas of the Los Angeles rail system had video surveillance cameras.[14] (10RT 2091.) Detective Prell also advised appellant that his brother, Jamelle Armstrong, was already in custody. (10RT 2092.)

Appellant then became visibly shaken and upset. He asked Detective Prell to prove that Armstrong was in custody, and that he would then tell the truth. Appellant wanted to see Armstrong. Instead, Detective Prell wrote the date on a piece of paper, and then he gave the paper to appellant to write down whatever he liked. (10RT 2093.) Appellant wrote, "I love you," on the piece of paper. (10RT 2094; 11RT 2245-2246; Exhs. 26 & 28.)

Detective McMahon then took the paper to Armstrong while Detective Prell remained with appellant. Detective McMahon returned with the paper and a developing "Polaroid" picture. Appellant watched the picture develop. (See 10RT 2133, 2134; Exh. 29.) He was visibly upset and crying. Appellant then said that he would tell the truth. (10RT 2095.)

Appellant subsequently began to relate his third and final version of events. Appellant described the music studio activities at Gmur's house in Long Beach. (10RT 2096.) Appellant then stated that he and Pearson went to a liquor store and bought several alcoholic beverages ("Night Train," "Thunderbird," "Cisco," and "Old English"). They mixed all the liquor together, and began drinking. (11RT 2178.)

Appellant, Armstrong, Pearson, "Chris," and a man appellant knew only as "Boulevard" then left Gmur's house at approximately 11 p.m. They

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[14] The cameras monitored the areas, but did not record. (10RT 2091-2092.)

went to the "Metro" rail platform. (10RT 2099, 2101.) Chris and Boulevard boarded southbound. Appellant, Pearson and Armstrong boarded northbound to Wardlow station in Long Beach. (10RT 2100.)

From the station, the three men walked to a bus stop. They walked east on Wardlow, on the north sidewalk, toward Long Beach Boulevard. (10RT 2101-2102.) Appellant and his two companions reached the other side of an overpass, and then noticed a White female on the south sidewalk of Wardlow. She yelled, "Fuck you, niggers," at them out of the blue. They did not provoke her. (10RT 2102-2103; 11RT 2178-2179.)

The three men then crossed the street together toward her. (10RT 2102-2103; 11RT 2179.) Appellant suspected that she made the remark because she was drunk or on drugs. (11RT 2184.) Appellant said that something just "clicked" when she made the racial slur. He indicated that he "he hears voices, but he does not know whose voice he hears." (11RT 2180.)

After crossing the street, all three men approached the woman, later identified as Penny Sigler. Appellant asked, "Who the fuck you calling a nigger?" Everyone began yelling at one another. The next thing appellant remembered was Penny being on the ground. He did not know how she ended up on the ground. (10RT 2103.)

Penny was lying on the ground on her back. Appellant removed her shoes. He began to climb up an embankment alongside the freeway. He intended to throw her shoes on top of a building, but he lost his footing and slipped. (10RT 2103-2104.) Penny was nude when she was lying on the ground on her back. The next thing appellant knew, he was down on the ground next to Penny. She was nude and bloody. Appellant did not know how Penny became bloody. He just realized that she had a bloody face. Penny asked for help in a faint voice, and extended her hand to him. (10RT 2104-2105; 11RT 2180.)

Penny used the words, "Help me." (11RT 2174.) Appellant did nothing when she asked for help. Pearson told appellant to collect the clothes, and he complied. He gathered the clothes from around Penny's body, and placed them into a brown plastic grocery bag. Appellant also collected one shoe. (10RT 2105.) The shoe was near Penny's head. (10RT 2106.)

As appellant picked up the shoe, Pearson and Armstrong jumped over a wall or fence. Appellant followed them over a wall to the other side. (10RT 2105, 2106.) The three men then crossed the street to the bus stop on Long Beach Boulevard, north of Wardlow. All three boarded bus number 60 to Los Angeles. Pearson had the bag with Penny's clothing. (10RT 2106-2107.)

While on the bus, appellant argued with another passenger. (10RT 2107, 2134.) Appellant, Pearson and Armstrong exited the bus near Florence Avenue to transfer to another bus. After they were on the second bus, appellant noticed that Pearson no longer had the bag containing Penny's clothing. All three men exited the bus at Grand, and then went to appellant's house on 69th Street.[15] (10RT 2134-2135.)

Appellant then added additional details to his third version of events. Prior to doing so, he confirmed that the initial portions of his earlier third version of events were correct, i.e., the part about Gmur's house, the portion about going to the Metrorail and Wardlow station, and finally the part about walking east on Wardlow. (10RT 2137.) Appellant also

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[15] Detectives Prell and McMahon spoke with appellant about getting a court order for dental impressions from him, as well as from Pearson and Armstrong. The detectives told appellant that a test would show whether any sex acts had occurred with the woman. Appellant denied having sex with Penny, but admitted that he bit her once on the "chest area." (10RT 2136.)

confirmed that he was on the north curb of Wardlow when Penny was on the south curb, and that she yelled the racial epithet at them. (10RT 2137-2138.)

Appellant then further explained that, after the three men had crossed the street, Penny grabbed at him, and he bit her on the left breast in self-defense. After he bit her, Penny slapped him in the face. (10RT 2137-2138.) Pearson then directed appellant and Armstrong to get Penny over the fence. (10RT 2138-2139.) Appellant repeated that he could not recall how they got Penny over the fence that ran along the freeway. (10RT 2142.)

Pearson, and perhaps Armstrong also, had ordered Penny to lie down, and she complied. (10RT 2139; 11RT 2169.) They were along the embankment on the other side of the fence. Pearson told appellant to remove Penny's shoes, and he did so. Appellant could not recall if Penny wore socks. Appellant then saw Pearson unbutton Penny's pants. Appellant turned and walked up the embankment toward the freeway while carrying the shoes. He planned to throw the shoes on top of an adjacent building. (10RT 2139.)

As appellant walked up the freeway embankment, he saw that Penny's pants were pulled down around her knees. Appellant was paying attention to several things as he was walking, and he lost his footing and slipped, possibly on a tire. When appellant slipped, he fell a bit, and dropped one of Penny's shoes. (10RT 2141-2142.) Appellant was angry about falling, i.e., "it pissed him off." (10RT 2144.)

Appellant subsequently saw Pearson on top of Penny, moving up and down in a thrusting motion. Pearson was in a push-up position over Penny. She was on her back. Pearson got up, and then ordered Penny to orally copulate him. (10RT 2142; 11RT 2188.) Detective Prell could not recall if

appellant used the word "rape." Appellant watched and estimated that Pearson had intercourse with Penny for about a minute.[16] It was after appellant fell that he saw Pearson get up and order Penny to orally copulate him. (10RT 2143.) Appellant claimed that it "was sickening to watch." (10RT 2145; 11RT 2188.) Appellant said that "he saw no injuries at that point." (10RT 2145.)

Appellant, however, continued to be angry with Penny for hitting him earlier. He subsequently went over to Penny and punched her twice in the jaw with a closed fist. (10RT 2147; 11RT 2169, 2188.) Penny was on her back, and appellant was close enough to punch her. (10RT 2146.) He used the right side of her body to support himself as he stood. (11RT 2171.)

Penny reached out with her hand and asked for help. She used profanities, saying, "You mother fuckers." Appellant did nothing to help her. He ignored Penny as he stood next to her. Appellant saw that Pearson was looking for something. (10RT 2147; 11RT 2188.) Pearson was still in the area, but appellant was not clear regarding Pearson's exact location. (10RT 2146.) Armstrong then appeared out of the dark carrying a wooden stick.[17] (10RT 2148.)

The stick was 36 inches long and an inch and one-half wide. (11RT 2189.) Armstrong gave the stick to Pearson, who then used it to hit Penny numerous times in the face. Pearson then stomped on Penny with his boots. (10RT 2148; 11RT 2189.) The "Redwood" boots in appellant's bedroom

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[16] Appellant initially said that Pearson was the only one who had intercourse with Penny, and only for a short time prior to Pearson moving her and forcing her to orally copulate him. (11RT 2191.)

[17] Appellant found a brown, plastic grocery bag in the ditch next the embankment, inside of which he placed Penny's clothing and one of her shoes. (10RT 2148-2149.)

belonged to Pearson, who wore them on the night of the murder. (11RT 2166-2167.)

Appellant climbed over the fence with Armstrong and Pearson. Appellant looked back and saw that the wooden stick Armstrong had given to Pearson was protruding from Penny's vagina. (10RT 2149.) Pearson was the last person appellant saw with the stick. (11RT 2190.) Appellant asked Armstrong to go back and get the stick. Armstrong refused. (10RT 2149.) Appellant then climbed back over the fence, went to Penny, and wrested or "jacked" the stick from her vagina. He had to twist the stick to remove it. Penny was bloody. (10RT 2150.)

Appellant made several inconsistent statements about the stick. He said that he threw the stick into the parking lot. Appellant claimed that he did so after he climbed over the fence and into the parking lot. He also said that he gave the stick to Armstrong. (10RT 2150.) Later, appellant said that he threw the stick into a dumpster. (11RT 2190.)

Appellant also said that Armstrong carried the stick while the three men walked across Long Beach Boulevard. He said that Armstrong carried the stick while Pearson carried the bag with clothes. They walked to the east side of Long Beach Boulevard. (10RT 2150.) Armstrong put the stick into a dumpster behind the businesses on the east side of Long Beach Boulevard just north of Wardlow. The three men then boarded the bus and rode to Florence, where they switched to another bus. (10RT 2151.)

Appellant said that he was wearing a short-sleeved, light brown shirt, darker brown pants, three-quarter length high, black leather shoes, and a black leather jacket. (10RT 2151.) The jacket he wore was the one that had been hanging behind the bedroom door. (10RT 2152; 11RT 2165.) The black leather shoes also were in the bedroom. (11RT 2165.)

Appellant also said he touched Penny three times: once when he bit her on the chest area, twice when he punched her in the jaw, and a third

time when he checked her pulse to see if she was breathing. (11RT 2167, 2185.) He bit her on the chest before she was on the other side of the fence. (11RT 2168.) Appellant did not remember biting her anywhere else on her body. (11RT 2185.)

After appellant completed this third unrecorded statement and added the additional details, Detective Prell asked him to record a statement. (10RT 2152.) Appellant agreed, and then gave a 44-minute long recorded statement, largely repeating his third unrecorded statement. (10RT 2152; Exh. 29.) Transcripts of the recording were provided to the jurors. (10RT 2156; Exh. 29A.) The tape recording was also played to jurors. (10RT 2159.)

Appellant said that he had trouble sleeping because of the vision of Penny's hand reaching out to him. He told no one about the incident. (11RT 2182.) He did not talk to Armstrong about it. All three men had been at appellant's house on 69th Street after the incident, and they left their clothing there. Appellant threw away his shirt and pants, but the jacket and boots Pearson wore were still at the house. (11RT 2183-2184.) Appellant began to cry. Pearson had threatened to kill appellant if he talked. (11RT 2186.)

5. The Autopsy

Dr. Raffi Djabourian, a deputy medical examiner for the Los Angeles County Coroner, had performed approximately 1,000 autopsies at the time of trial. On January 1, 1999, he performed autopsy number 98-08891 on Penny Sigler's corpse. Dr. Djabourian's procedure was to first photograph the body, and, if there were clothes present, he would then examine the clothing. Next, he performed an external examination on the autopsy table. (10RT 1924-1926.) Finally, Dr. Djabourian would then perform an internal examination to search for evidence of injury or disease, and to collect

evidence. With respect to the instant case, there were no clothes to examine during the autopsy. (10RT 1926.)

Dr. Djabourian explained the significance of several exhibits admitted at trial. Exhibits 1A through 1H consisted of photographs taken by the Coroner's Office. Exhibit 1A depicted an abrasion to the lower left thigh. Exhibit 1B depicted an abrasion to the lower back. (10RT 1927.) Exhibit 1C depicted a long linear scrape on the left arm and elbow. Exhibit 1D depicted abrasions, scrapes, bruising, and contusions to the neck. Exhibit 1E depicted an eyelid with pinpoint hemorrhages. Exhibit 1F depicted an eyelid with pinpoint hemorrhages and lacerations. Dr. Djabourian explained that a laceration, contusion, or abrasion was caused by blunt force traumatic injury. That meant that there was some kind of impact with the surface or a hard object. (10RT 1928.) Exhibit 1G depicted the back right hand with bruising at the little finger. Exhibit 1H depicted the left hand with extensive bruising, lacerations, and tearing between the webs of the fingers. (10RT 1929.)

Exhibit 2 consisted of front and back renditions of Penny's corpse, showing injuries to the right side of the face. (10RT 1930.) The injuries were to the right side of the scalp, above and at the ear, with multiple lacerations from blunt force trauma. The right ear was torn off. The left side of the face had injuries to the chin and cheeks, including some evulsions, i.e., where a part of the body gets separated from the rest. (10RT 1930.)

There was substantial bruising on the front and back of the body, including the right shoulder, left shoulder and neck. There was a bite mark on the inside of the left nipple. The right side of the abdomen had a rectangular abrasion. Both of Penny's thighs revealed substantial bruising. The left thigh had bruising, abrasions and scrapes. Both lower legs had

smaller bruises. On the right thigh above the knee, there was a lesion or bite mark, similar to the lesion or bite mark on the left breast. (10RT 1931.)

The back of the body showed bruising and abrasions to the scalp and back. There were scrapes to the upper and lower back, as well as above the left buttocks and hips. A microscopic examination revealed bleeding into the underlying tissues, suggesting that the injuries occurred around or just before the time of death. There was no indication that the bruising was from older injuries. Any hard object could have inflicted the bruises. (10RT 1932-1933.)

Exhibits 3A through 3C were identified as pieces of a wooden stake. (10RT 1933.) These exhibits were consistent with Penny's injuries, that is, with the abrasions on the abdomen, thigh, and with the linear injury to the back. (10RT 1934.) Exhibits 4A through 4J consisted of postmortem photographs of Penny. Exhibit 4A depicted the front and left side of the face with lacerations on the left cheek, forehead, scalp, mouth and chin. An abrasion to the right neck area was also visible. (10RT 1935-1936.)

Exhibit 4B was similar to 4A, except that the white bone matter was visible. Also, the upper lip was folded back to reveal tearing inside the mouth. A tooth on the left side was uneven, which was indicative of recent chipping or damage. Exhibit 4C depicted abrasions to the right neck, and light yellow areas, which were insect bites. (10RT 1936.) Exhibit 4D showed lacerations to the left face. Exhibit 4E showed the right facial area, with portions of Penny's hair shaved, revealing lacerations and bruising to the right ear, cheek and neck areas, and the torn right ear injury. Exhibit 4F depicted lacerations to the top of the scalp. Exhibit 4G depicted contusions to the top of Penny's scalp. (10RT 1937.)

Exhibit 4H, taken during the autopsy of the neck muscles, showed evidence of hemorrhaging, more prominent on the right side, with bleeding into the tissue. Dr. Djabourian dissected the neck muscles, but could not

tell if the injury was from blunt force trauma or manual strangulation. (10RT 1938.) Exhibit 4J depicted the broken cricothyroid bone, which was located under Penny's larynx. (10RT 1039.) Exhibit 5 was a rendition of the neck area, with several areas showing bruising. Some deeper muscles also showed hemorrhaging. (10RT 1943.) The thyroid and lower cartilage of the larynx sustained horn fractures and showed evidence of hemorrhaging. Lacerations to the face and head were also depicted. (10RT 1944.)

All the injuries shown in Exhibit 5 were sustained while Penny was alive. The petechia shown in Exhibit 1E was bleeding into the white of the eye. This could occur during manual strangulation, sudden heart attack or with some diseases. (10RT 1945.) The bruising to the right face could have been related to the petechia. Application of a wooden stake could have caused this injury if enough pressure were applied. Petechia was not commonly the result of a hit or strike, but it could occur in that manner. (10RT 1946.)

Exhibits 6A through 6F were photographs of the genital area before and after the autopsy. (10RT 1946-1947.) Exhibit 6A depicted bruising to both sides of the outer genitalia. Exhibit 6B depicted a laceration and some bruising to the external genitalia. Exhibit 6C depicted lacerations, abrasions and bruising to the perineum. (10RT 1947.) Exhibit 6D depicted two lacerations of the anus. Exhibit 6E was a post-autopsy photograph of the genitalia depicting areas of prominent bleeding, which was indicative of pre-death injuries. Exhibit 6F depicted the internal genitalia, including the cervix, which had a laceration and bruising. (10RT 1948.)

The vagina near the cervix showed extensive tearing with some hemorrhaging. A splinter-type object was recovered from that area. Exhibit 7 was a rendition of the external genitalia depicting lacerations and bruising. (10RT 1949-1950.) There was a laceration to the vaginal area,

and a splinter was embedded into the vaginal tissue. There were lacerations to the anus, approximately four inches from the vaginal opening. The injuries to the genitalia and anus were from a foreign object. (10RT 1951-1952.) A male penis could not have caused these injuries, except possibly in a very young child or a very elderly female. (10RT 1952.)

Exhibits 3A through 3C (pieces of a wooden stake) were consistent with the aforementioned injuries, especially with respect to Exhibits 3B and 3C, which were smaller pieces and tapered. Exhibit 3A was quite large, and Dr. Djabourian could not exclude it, but Exhibits 3B and 3C were more likely. (10RT 1952-1953.) Dr. Djabourian opined that the injuries to the genital area were pre-death due to the amount of bleeding. All the injuries occurred within a very narrow time frame. (10RT 1977-1978.)

Exhibit 8 consisted of two envelopes each containing one wooden splinter. One envelope contained a small, two-millimeter splinter, and the other envelope contained a "somewhat larger piece of wood." (10RT 1953-1955.) Dr. Djabourian recalled the smaller splinter, but he did not know precisely from where the somewhat larger splinter had been recovered. Dr. Pena had supervised Dr. Djabourian during the autopsy. It was possible that Dr. Pena had recovered the larger splinter. (10RT 1954-1955.) Dr. Djabourian was able to specifically recall only the smaller, approximately two millimeter splinter. (10RT 1956.)

Dr. Djabourian and Dr. Pena both examined the genital tissue. (10RT 1957.) Exhibit 9 was a depiction of the right, left, and front of the head. It showed multiple lacerations to the forehead, a scrape to the right side, the torn right ear, bruising, and scrapes and lacerations to the chin. (10RT 1957-1958.) The middle depiction showed the front face, head, upper chest and neck areas. There were bruises and abrasions on the right side of the neck. There were lacerations to the left side of the cheek and left temple.

The chipped left tooth was also depicted. These injuries were consistent with the pieces of the wooden stake. (10RT 1959; see also Exhibit 3.)

The third depiction captured the left side of the face with bruising to the scalp and left cheek, lacerations to the left forehead, and exposed bone on the upper left cheek. (10RT 1958-1959.) The injuries in Exhibits 7 and 9 appeared to be pre-death injuries. (10RT 1961.)

Exhibit 10 was a depiction of additional horrific injuries noted during the autopsy. The skull bone was fractured on the right side, i.e., it was pushed and broken into several pieces. (10RT 1959.) The right orbit, cheek bones and jaw were fractured and pushed inward. Several bones at the base of the skull were fractured, including a long linear fracture. (10RT 1960.) The linear fracture reflected the application of significant force to the right side of the skull. The left lobes of the back and middle brain were bruised. These bruises were consistent with an injury to the base of the skull. The injuries in Exhibit 10 also appeared to be pre-death injuries. (10RT 1961.)

Exhibit 10 depicted the injuries that constituted the cause of death. While the bleeding was relatively minimal, tremendous trauma to the brain tissue could have caused death in various ways. When the covering to the brain was torn, the brain short circuited, which prevented normal functioning. Indeed, the instant injuries would have caused the brain to stop functioning. The brain would have then been unable to send messages to the heart or lungs. This was one mechanism which explained the cause of death. (10RT 1962.)

However, in this case, several mechanisms were involved. Dr. Djabourian could not determine which of the numerous terrible injuries had actually caused Penny's death. The ultimate cause of death was multiple injuries to the head and neck areas. (10RT 1963.) The head injuries would have been fatal relatively rapidly. (10RT 1976.) Indeed, if Penny had been

hit in the head and neck with a big stick (Exh. 3), this could have rendered her unconscious, similar to a concussion, but far more severe. (10RT 1974.)

The blunt force injuries were the predominant factors causing death, but it was difficult for Dr. Djabourian to exclude manual strangulation with possible asphyxiation. While there were no finger marks on the neck, a stick could have been squeezed onto the neck, or stomping on the neck could have caused asphyxiation. (10RT 1975.) Manual strangulation did not necessarily leave fingerprints. (10RT 1976.)

Exhibits 11A through 11D depicted the right thigh area. (10RT 1963.) The lesion to the right thigh (Exh. 11D) was consistent with a bite mark. Incredibly, there were 114 total wounds: 94 of which were external, and 20 of which were internal. It was difficult for Dr. Djabourian to conclude how long Penny lived during this brutality, but death would have been relatively rapid, that is, within minutes of her injuries. (10RT 1964.)

Dr. Djabourian likewise could not determine the order of her injuries. He did not count the fractures, but there were at least 10 to the skull and one to the right rib. There were defensive wounds to the backs of the hands and forearms. There was bruising to the left little finger, and to the left hand at the knuckles, to the wrists, and to back of the left middle finger. (10RT 1965.) There were lacerations to the web between the index and ring finger, and to the web between the ring and little finger. These were defensive wounds. Other injuries to Penny's hands could have been defensive, but Dr. Djabourian could not be certain. (10RT 1966-1967.)

The defensive injuries occurred while Penny was conscious. The other injuries posed a more difficult question, i.e., as to whether they occurred during consciousness. Nothing about the other injuries demonstrated whether Penny was conscious at the time that they were inflicted. (10RT 1972.) Dr. Djabourian could determine pre-death injuries by noting the presence of bleeding, but he could not determine

consciousness. His strong opinion that some of the injuries were pre-death was based on microscopic analysis of the tissues. (10RT 1973.)

As previously noted, it was very difficult to determine which injuries occurred first, but Dr. Djabourian opined that the sexual assaults very likely occurred prior to the injuries to Penny's head. (10RT 1977-1978.) The long linear scrape (Exh. 1C) may have been scraped along the sharp portion of a fence. Other injuries were consistent with being thrown over a fence, specifically the multiple abrasions. (10RT 1967; Exh. 1B.)

The petechia (Exh. 1E) was consistent with compression to the neck by someone wearing a heavy shoe. (10RT 1968.) Any blunt force could have been painful. The two bite marks showed bleeding into the underlying tissue, which meant that they were pre-death. The bites could have been close to the time of death. (10RT 1968.) The injuries to the genitals were consistent with blunt force trauma. The genital area was sensitive, with numerous nerve endings right under the skin. Dr. Djabourian believed that these injuries would have been extremely painful. The location of the splinters would have been very painful. (10RT 1971.)

6. The DNA Evidence

Paul Colman, a criminalist with the Los Angeles County Sheriff Department's Crime Laboratory, was primarily responsible for the forensic analysis of DNA evidence. (10RT 1979-1980.) DNA was the same throughout one's life and throughout all parts of one's body. (10RT 1982.) DNA evidence had been used forensically since 1985. (10RT 1982.) Except for identical twins, everyone's DNA was unique. (10RT 1981.)

The DNA specimens of brothers shared some patterns, but were not identical. Criminalist Colman did not know when he conducted his analysis that the two samples (from appellant and Armstrong) were from half-brothers. (10RT 2013.) On March 7, 2000, Colman received four reference samples and 12 unknown samples for analysis. (10RT 1986.)

Colman analyzed samples taken from several clothing items, i.e., overalls and brown pants (Exh. 12), and from a leather jacket (Exh. 13). (10RT 1992-1993.) The parties stipulated to the chain of custody. (10RT 2031-2032.)

Criminalist Colman compared the samples from these exhibits to known samples from appellant, as well as from the other two co-defendants and Penny. (10RT 1995.) The leather jacket had a mixture of DNA, with major and minor contributors. (10RT 1995-1996.) Penny was a major contributor. Codefendant Armstrong was a possible donor for the minor types on the leather jacket. (10RT 1996.)

The brown pants contained a DNA sample that was a clear match to Penny.[18] (10RT 1999.) Colman also swabbed a bite mark on Penny and analyzed that sample. (10RT 1999-2000.) This sample revealed a mixture with contributors from two sources. Based on his scientific analysis, Colman concluded that the sample consisted of appellant's and Penny's DNA. (10RT 2000, 2006.) Based on two different methods of calculation, each based on different assumptions, Criminalist Colman concluded that the bite mark was made by appellant. The analysis demonstrated that it was 859 billion times more likely that the bite mark stain consisted of material from Penny and appellant, rather than from Penny and a random Black man. (10RT 2006-2012.)

7. The Prior Conviction Allegation

Appellant waived his constitutional rights to jury trial on the prior conviction allegation. He thereafter admitted his prior conviction on December 9, 1997, i.e., for attempted robbery (§§ 664, 211) in case number

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[18] Gary Harmor, a forensic serologist, also used DNA testing to match the stains on the brown pants, the black leather jacket, the black "Guess" shoe, and the "Redwood" boots to Penny Sigler. (2RT 2114-2122.)

NA030710. (12RT 2538.) Defense counsel joined, and agreed that there was a factual basis for appellant's admission. (12RT 2538.)

B. Defense Evidence

Appellant did not testify in his own defense. The defense did not put on any witnesses. (11RT 2267, 2280.) Indeed, during his opening statement, defense counsel stated, "We are disputing some, but, basically, we are admitting guilt in this case as to most of these charges." (10RT 1917.)

II. THE PENALTY PHASE

A. Prosecution Evidence

1. The 1996 Prior Robbery[19]

Mr. Cory Garro testified that he and his wife Grace Garro were vacationing in Long Beach, California on December 8, 1996. (12RT 2566.) The Garros went to dinner at Shoreline Village, and then walked back to their hotel along a boardwalk from Shoreline Village. As they walked, Cory Garro noticed three Black men to their left as they walked. (12RT 2566-2567.)

The three Black men came within 10 feet of the Garros, moving from their left side over to their right. Cory Garro suddenly felt a gun pressed into his chest, and one of the men demanded his wallet. Two men moved behind him and lifted his jacket to remove his wallet, while the man with the gun remained in front of him. Garro's hands were up. Grace remained to his side. (12RT 2567.) Out of the corner of his eye, Garro could see that one of the men grabbed Grace's purse, causing her to scream. The Black man who was trying to take her purse then gave up that effort, and all three

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[19] The parties stipulated to appellant's prior conviction. (12RT 2671.) Exhibit 31 was a certified copy of that conviction. (12RT 2670.)

men fled the scene. They took Garro's wallet, but were unable to take Grace's purse. (12RT 2568.)

A nearby security guard heard Grace's screams. The police arrived within a few minutes. (12RT 2568.) A short while later, Garro attended a field show-up that was about a five-minute drive from the hotel. He observed the show-up from a distance of about 47 feet, but was unable to positively identify anyone. However, early the next morning, Long Beach Police Department detectives brought him a set of photographs to view, and Garro was able to point out the person who looked like the Black man with the gun.[20] (12RT 2569-2570.)

LBPD Detective Karl Movchan received a radio dispatch call regarding the robbery just after dusk. While proceeding to the location, Detective Movchan saw a Black man running. This person matched the description of one of the suspects. (12RT 2572-2573.) Movchan was driving a black and white patrol car, which he then exited in order to confront the suspect. The suspect, who was later identified as appellant, attempted to conceal himself by hiding under a parked van. (12RT 2574.)

Appellant initially refused to cooperate with Detective Movchan, but after another officer arrived, Detective Movchan persuaded him to come out from under the van. After the witnesses were transported to his location, appellant turned to Detective Movchan and spontaneously stated, "I bet he said I wasn't the one with the gun, didn't he?" (12RT 2574, 2577.) Appellant then offered to take Detective Movchan to another suspect in exchange for leniency. (12RT 2577.)

At appellant's direction, Detective Movchan drove to a house in the western portion of Long Beach. The house was vacant. Appellant said that

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[20] This person was later identified as Reginald Wilson, appellant's accomplice during the robbery. (12RT 2583-2584.)

it was "Eddie" that they were looking for, and that maybe he had moved. (12RT 2578.) Appellant also told Detective Movchan about a man named "Chocolate," but appellant wanted a deal before saying anything more. Appellant said, "But I wasn't the one holding the gun." (12RT 2579.) He wanted to be released. Detective Movchan told appellant that he would be booked for the crimes. (12RT 2579.)

Appellant subsequently told Detective Movchan that he, Eddie and "Chocolate," i.e., Reginald Wilson, were walking near the boardwalk when Chocolate said, "Let's get some." To appellant, that meant to get some love from females, or something else that appellant failed to specify. Appellant told Detective Movchan that as long as he did not have the gun, that he would be "all right." When the accomplices told appellant to "break" after the robbery, appellant ran. Chocolate had the gun the entire time. (12RT 2581-2582.)

Appellant directed Detective Movchan to a second location, which was supposed to be Chocolate's residence. (12RT 2580, 2583.) Chocolate was not there. Garro's wallet was recovered near the robbery site by investigating officers. (12RT 2583.)

At around 2:00 a.m. on December 9, 1996, Detective Movchan went to Garro's hotel lobby to show him photographs of several suspects. (12RT 2569.) Garro identified Reginald Wilson as the man who had held the gun to his chest. (12RT 2570, 2583.) Garro's wallet was returned to him around this time, but his money was missing from the wallet. Garro's wife was shaken and hysterical, and had been affected by the robbery ever since. She was afraid to walk by herself at night, or in areas that she was unfamiliar with. (12RT 2570-2571.)

2. The 2006 Injury To Appellant's Son

On April 11, 2006, LBPD Officers Jacinto Ponce and Philip Cloughesy responded to a 911 call from appellant's residence in Long

Beach. (12RT 2586-2587, 2598.) The 911 call consisted of screaming, followed by a hang-up of the phone. (12RT 2626.) Officer Ponce had been to the residence several hours earlier, but was not sure regarding the exact time. (12RT 2587.)

When Officers Ponce and Cloughesy arrived, they discovered that the 911 call concerned a child who had been stabbed. They observed appellant on the steps of the apartment holding a Kleenex to the leg of his four or five-year old son. (12RT 2588, 2598, 2624.) Appellant repeatedly told the child to say that it was an "accident."[21] (12RT 2588, 2626.) Appellant continued to hold his son for this entire time. After the paramedics arrived, appellant would not release his son, who had to be forcibly removed from appellant's grasp. (12RT 2589.)

The boy then reported to the police that his injury was an accident. (12RT 2598, 2619.) Officer Ponce also spoke to appellant about the incident. (12RT 2589.) Appellant initially said that he had keys in his pocket, and that the keys had stabbed the child. Officer Ponce consequently believed that there should have been blood on appellant, but none was visible. (12RT 2590.) Officer Cloughesy confirmed that appellant initially said that he only had keys in his pants' pocket. (12RT 2625.)

Later in the conversation, appellant changed his story and said that his son was impaled on a knife after he (appellant) picked him up and rested him on his lap. (12RT 2592.) Appellant said that he had a knife in his front pants' pocket with the blade facing upward. When he rested his son on his lap, the boy's left thigh was stabbed by accident. (12RT 2612.) After Officer Ponce advised appellant that he had no holes in his pants,

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[21] Appellant repeated (about four times) his command to the boy to say that it was an accident. (12RT 2589.)

appellant again changed his story. (12RT 2592, 2613.) Appellant then said that he had a knife in his front pants' pocket for protection. Officer Ponce then read appellant his constitutional rights. (12RT 2592.)

Appellant then gave another, final story concerning the kitchen table. Appellant said that he and his son had fallen on the table, causing the cut to his son. (12RT 2593, 2613.) Appellant had picked up his son, lost his balance, and fallen against the table. His son then ran to the bedroom screaming, and appellant saw that the boy was bleeding. (12RT 2600, 2613.)

Appellant's son had a large cut to his leg that appeared to be a knife wound. (12RT 2590.) The cut was on the back of his thigh. It was a bleeding puncture wound, not a slice. (12RT 2594, 2596.) Officer Ponce looked for a knife. He subsequently found a knife with a five-inch blade in a kitchen drawer. It had blood and a piece of tissue on it, but had been "wiped." (12RT 2592, 2594.) The knife was a steak knife, and Officer Ponce believed that it had a serrated edge. (12RT 2596.)

Officer Ponce smelled alcohol on appellant. (12RT 2598.) Appellant's blood alcohol level tested at .10 percent, which was over the .08 legal limit for driving. (12RT 2598, 2618.) Officer Ponce inspected the knife, and also analyzed the pocket of appellant's pants. (12RT 2615.) The pocket was not sufficient to completely conceal the knife. (12RT 2615.) Officer Ponce then arrested appellant, because he believed that appellant had intentionally stabbed his own son. (12RT 2614.)

Meanwhile, Officer Cloughesy went to the hospital with appellant's son. (12RT 2627.) The boy's injury consisted of a puncture wound about two inches in diameter to the back of his leg, requiring stitches. (12RT 2628.) In the emergency room, appellant's son told Officer Cloughesy that appellant had come home and picked up some things. Appellant called the boy into the kitchen, where appellant physically lifted him up. When the

boy wrapped his legs around appellant, he felt a stabbing sensation and consequently screamed. Appellant then put him down, grabbed a tissue, and called 911. Appellant held him until the police arrived. (12RT 2629; 13RT 2821-2824.) Officer Cloughesy subsequently contacted Child Protective Services. (12RT 2630.)

Officer Gary Hodgson was a police officer with the Long Beach Police Department on April 11, 1996. (12RT 2642.) Officer Hodgson went to appellant's residence and assisted with the child cruelty investigation. He searched the residence and found a bloody knife with a five-inch blade inside a kitchen drawer. (12RT 2643-2644.)

Thomas Rodriguez was a detective with the child abuse detail of the LBPD in 1996. The day after appellant's arrest, Detective Rodriguez questioned appellant about the injury to his son. (12RT 2645, 1249.) Appellant said that it was an accident. (12RT 2651.) Appellant explained that, initially, he had been arguing with his wife or girlfriend, and was gathering items to leave the residence. (12RT 2646.) Detective Rodriguez was not certain, but he thought the woman's name was Tiyarye Felix. (12RT 2651.)

Appellant said that, at the time of the stabbing, he had asked for permission to kiss the two children. (12RT 2646.) Appellant had a knife in his pocket with the blade pointing upward. He lifted the two children, and placed them on his hips. (12RT 2647.) Appellant was standing, and he then walked into the kitchen and sat down. The knife poked appellant, causing him to shift his position. He then said goodbye, and put the children down onto the floor. His son then cried out, because his leg was cut. Appellant's wife then came into the kitchen, and they put gauze, Kleenex, and toilet paper on the wound. His wife then called 911. (12RT 2648.)

Appellant told Detective Rodriguez that he had initially lied to the police because he was scared. (12RT 2649.) Detective Rodriguez asked about the pants that appellant had been wearing at the time that his son was injured. Appellant was actually wearing the same pants, and there were no holes in them. (12RT 2649-2650.)

3. The Events Just Prior To Penny's Murder

Monte Gmur lived on Cedar Avenue in Long Beach on December 29, 1998. He had a music studio in his home, and was an acquaintance of appellant. (12RT 2652-2653, 2656.) Appellant went to Gmur's house in December, 1998 in the early evening, around 6:30 p.m. (12RT 2654, 2655.) Appellant arrived with his brother Jamelle, Kevin Pearson and another man. They wanted to work in Gmur's studio, which Gmur permitted them to do. After about 45 minutes, appellant left Gmur's house. (12RT 2655-2656.)

Appellant returned with three bottles of alcohol: "Cisco," "Thunderbird" and "Night Train." (12RT 2657, 2659.) Appellant mixed it together and drank part of it with the others. They were at Gmur's house three to four hours total. (12RT 2656.) During this time, Gmur was in another part of the house for two and one-half to three hours. He was not in the studio unless there was a sound problem. (12RT 2660.)

After three to four hours, all four men left, but then returned within about 20 minutes. They returned to make a telephone call, and asked to use Gmur's telephone. (12RT 2657.) Appellant spoke clearly, and Gmur could understand appellant's speech just fine. Appellant walked without any problems. (12RT 2658.) There were some signs of intoxication, i.e., the four men were loud, but they were not staggering. Gmur believed that they had been drinking. He saw appellant drinking, but did not know how much he drank. When the four men left, all the alcohol bottles were empty. (12RT 2660-2661.)

4. The Impact Of The Murder On Penny's Son Ted Keprta

Ted Keprta, Penny's son, testified during the penalty phase. (12RT 2662.) Exhibits 30A through 30D were four photographs that included his mother. Exhibit 30A was his parents on their wedding day. Exhibit 30B was a shot of Ted and his mother on his fifth birthday. Exhibit 30C was the family together on Thanksgiving. Exhibit 30D was a photograph of Penny and Ted in their backyard. (12RT 2663.)

Ted was 16 years old when his mother was murdered. He had just started high school. Normally, she was home every day when he returned from school. After her death, numerous holidays had passed. It was really tough without his mother. Ted was not accustomed to coming home from school to a quiet house. After school, they used to talk about his school day. After Penny's death, it was rough without her, because the house was empty. Ted had no brothers or sisters at home. He did not complete high school because he lacked the motivation to finish. (12RT 2664-2665.)

Ted still resided in the same house where he had lived with his mother. (12RT 2665.) They had lived there for about five years prior to her death. (12RT 2669.) Penny did special things for Ted at Thanksgiving and Christmas. She prepared dinners for him. Penny was not the best cook, but she always put forth an effort. (12RT 2665.) Recently, when the family celebrated Thanksgiving, Ted thought of his mother. He thought of her every Christmas, because the murder was close to the holidays. He felt angry, upset and enraged. (12RT 2670.)

Ted's mother did the best she could for Ted and his father, who also still lived in the same house. (12RT 2665.) Currently, Ted's father was home during the day. In the past, he was occasionally there when Ted got home from school, but many times he was at work. Ted always got along

better with his mother than his father. Ted could talk with his mother, but not his father. (12RT 2666.)

Ted attended his mother's funeral. It was very rough. He learned about his mother's murder when a detective knocked on their door. (12RT 2666.) Prior to his mother's murder, Ted had a job. After her death, he lost interest and quit. He had just recently begun working again, and had been working for about four months. His mother's murder was largely to blame for his prior failure to work. (12RT 2667.)

Ted planned to go to high school or earn a G.E.D. He was still emotionally impacted, i.e., sad and lonely. He and his mother shared the same birthday, which was on March 5th. On the birthdays following his mother's murder, Ted kept to himself. He said nothing, did not celebrate, and locked himself in his room. (12RT 2668.) Ted thought of his mother daily, and was very angry. He was somewhat relieved by the verdicts, but not really, because they did not bring his mother back. (12RT 2669.)

B. Defense Evidence

Appellant did not testify in his own defense. (11RT 2267-2268.)

1. Appellant's Family Life And History

Pamela Armstrong, appellant's mother, testified on his behalf. Codefendant Jamelle Armstrong was her second son. (13RT 2770.) By the time of trial, appellant was 25 and Jamelle was 22. Her sons had different fathers. Pamela was 19 when she became pregnant with appellant. She was not married to his father Henry Hardy. The couple had been together three years, but had then broken up. Pamela became jealous after discovering that Henry was having a baby with another woman. She wanted a baby as a means to get back together with Henry. (13RT 2771.) Consequently, she became pregnant on purpose. However, her plan did not work, and Henry abandoned her and appellant. (13RT 2772.)

While pregnant with appellant, Pamela had daily stress. After she told Henry about her pregnancy, he denied paternity. Pamela's mother threatened to cut appellant out of Pamela. (13RT 2790.) When appellant was born, he had birthmarks all over his body. Additionally, one of appellant's eyes turned in to the side, such that only the white of the eye was visible when he looked at someone. He had eye surgery when he was in kindergarten or elementary school, but he still had lingering problems with that eye. (13RT 2772-2773.)

Pamela married James Armstrong when appellant was one year old. Before marrying James, Pamela lived with her mother in Pasadena. Appellant was clumsy from ages two through four, but sweet and loved. (13RT 2773-2774.) He was initially a happy baby, but with James in the picture, things changed. When appellant was about two years old, James jumped on Pamela and beat her up around the Fourth of July. Pamela suffered a black eye and bruising as a result of that incident. (13RT 2775-2776.)

When appellant was older, Pamela became suspicious of James, because she found needles and a powdery substance in their home. She suspected that James was on drugs. He would not keep a job, and only worked sporadically. (13RT 2777.) Mostly, James was unemployed. James and Pamela argued constantly about money, food, and the children. Appellant was present during many of the arguments. (13RT 2777-2779.)

Appellant attended kindergarten while Pamela worked. She left at 5:00 a.m., and returned home at 5:00 or 6:00 p.m. (13RT 2778.) Other people watched appellant during this time. When appellant was four or five years old, Pamela gave birth to Jamelle, but there was no improvement in their lives. (13RT 2780.) Pamela and James continued to argue, and she drank heavily. Initially, things were good between appellant and James. Appellant and Jamelle also played together regularly. (13RT 2780-2781.)

Unfortunately, appellant had to repeat kindergarten. He had problems learning and wrote things backwards because of his eyes, i.e., one eye would see things straight and the other eye would overlook what the straight eye was seeing. Appellant had poor writing skills and the schools never corrected it. (13RT 2781.) His learning disability was not tested or investigated. (13RT 2801.) Appellant liked others and was friendly, but other people shied away from him. Nevertheless, appellant tried hard to make others his friends, which sometimes pushed them away. After his eye surgery, his clumsiness improved, but he still had learning problems. (13RT 2782.)

The two brothers got along well, but James treated the boys differently. At first, he took both boys out together, but then he began taking only Jamelle. It was like "Cinderella" when appellant was older. (13RT 2783.) It was "pure hell." They went to church because Pamela wanted something better. She was afraid that her sons would be taken away from her. (13RT 2784.) Appellant liked church, and was involved in Sunday school, choir, picnics, and plays. (13RT 2788.)

Pamela and James continued to drink and use drugs. James would break in and steal from the family. (13RT 2784.) Pamela's own drinking worsened. She was afraid of James and his physical abuse. James was like Tarzan or a roaring lion. He once bit out a chunk of Pamela's arm. (13RT 2785.) Pamela drank to inebriation weekly. There was physical abuse that still haunted her. Appellant and Armstrong were in the vicinity of the abuse. Pamela took her sons into the bedroom if she thought that abuse might occur. (13RT 2786.)

When appellant was older, he tried to intercede between James and Pamela. In fact, when appellant was about 11 and one-half years old, he told James not to hit her. (13RT 2788.) Sometimes appellant tried to hit James. Appellant turned away from James, and did not want to hang out

with him as much. Consequently, he would go outside with other kids and would always be getting in trouble. His grades, which were always bad, became worse. He increasingly stayed away from home. (13RT 2789.)

By the time appellant was 13 years old, he did not want to attend school or do what he was told around the house. (13RT 2794.) The situation between appellant and James was bad, i.e., he did not want to listen to anything that James had to say to him. Appellant was unhappy and would not listen to anything or anyone. By the age of 13, he spent his time with gang members. (13RT 2795, 2804.) Appellant attended school up to the tenth grade, but then quit. (13RT 2805.) Appellant did attend some counseling at the church, but he suddenly did not want to go any longer. (13RT 2796.)

At the age of 16, appellant ran away. He wanted to commit suicide. The police brought him back home. Appellant said that he wanted to die because no one cared about him. (13RT 2797-2799.) Pamela never sought professional help for appellant. (13RT 2802.) At the age of 19, appellant reported that, when he was 13 years old, he had been molested after a pastor had taken him home. (13RT 2796-2797.)

According to Pamela, when appellant was 19 or 20 years old, and after he had been drinking, he had a terrible argument with his girlfriend Tiyarye Felix. He was violent and called her names. Then he went into the middle of the street because he wanted to get hit by a car. (13RT 2800, 2808, 2818.) This was the only time Pamela ever saw appellant act violently. (13RT 2815.) Felix already had two children when she met appellant, and they had two more children together. Appellant loved all four children, and treated them as equals. (13RT 2813.)

On cross-examination, Pamela said that she had taught appellant right from wrong. She taught him that it was wrong to rob, rape, or kill. Appellant knew that it was wrong to commit crimes or violate the law.

(13RT 2805, 2811.) Appellant also learned right from wrong at church. (13RT 2810.) At one point, appellant wrote his mother a letter indicating that he would rather hang around with gang members than go to school. (13RT 2806.) Pamela did not allow appellant to bring gang members in the house. (13RT 2811.)

Tiyarye[22] Felix met appellant when he was 18 years old. She was a few months older than him. Felix had two sons from a prior relationship, who were three and four years old respectively when she met appellant. (13RT 2818-2819.) They had been together approximately four years prior to the instant murder. (13RT 2838.) After appellant moved in with Felix, the couple lived together in Long Beach. They had two sons together. At the time of trial, appellant's sons were five and six years old. He was a loving and caring father and treated all four boys equally. All four called appellant "Dad." (13RT 2821.) Both Felix and appellant received welfare benefits. (13RT 2838-2839.)

Felix was there when her son was stabbed. During that incident, she had fought with appellant, who had been drinking. Consequently, she told him to leave. Appellant then took their son into the kitchen to explain the situation. Felix heard a scream, and saw her son bleeding. (13RT 2822.) She talked to her son immediately, and the boy said that it was an accident. The boy said that he was on appellant's lap when the knife cut through the pants to the back of his leg. The boy's story never changed. (13RT 2823-2824.)

Felix and appellant lived together in Long Beach, and then later they resided together in Los Angeles. Appellant worked intermittently. His last job was registering voters. (13RT 2824.) When appellant was sober, he was sociable. However, when he drank, the couple argued. Appellant

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[22] "Tiyarye" is also spelled as "Tiyarie" in the record. (13RT 2818.)

would black out or pass out, and remember very little afterwards. Sometimes he was violent. He would push and shove Felix, but he did not strike her. On one occasion, the violence was so bad that Felix called appellant's probation officer. Appellant had shoved her on two or three occasions. (13RT 2825-2826, 2841.) He was never violent with the children. (13RT 2841.) Felix admitted that she had discussed her testimony with the defense attorney prior to taking the stand. (13RT 2842.)

There were continuing problems with appellant's mood and behavior. He was easygoing, except when he drank. Something "clicked" when he drank, and then he became violent. Appellant knew that he became violent when he drank, but he still drank anyway. (13RT 2832, 2840.) In November, 1998, the couple fought, and as a consequence, Felix asked appellant to stop living with her. This argument happened just prior to appellant's arrest. (13RT 2845.) Appellant moved out, but then began to visit more frequently. He often stayed until the children went to bed, and then left. (13RT 2846.)

In 1996, appellant tried to kill himself. (13RT 2834.) On that occasion, the couple had been arguing. Appellant suddenly put a cord around his neck and pulled it tight. He went to the closet and pretended to be dead. He was there about an hour. Felix finally called the paramedics after appellant repeatedly refused to get up. (13RT 2835.) Again, in 1996, after drinking heavily, appellant threatened to commit suicide. He put a gun to his head and told Felix to give his car to Jamelle. (13RT 2836.) Felix stated that the gun belonged to appellant's friend. (13RT 2852.)

On Thanksgiving Day in 1997, the couple attended a family get-together. Felix and appellant argued during this event. Felix subsequently went to the car. Appellant followed her and pushed her. He threw himself in front of the car. He wanted to go to jail. (13RT 2833.) Appellant's mother came out to get him, and Felix left the scene. (13RT 2933.)

The couple had a healthy sex life. They did nothing perverted. Felix said that appellant got along well with his half-brother Jamelle. (13RT 2827.) Felix bought appellant the jacket that he wore on the night of the murder. (13RT 2847.) According to Felix, appellant was a follower. He never led anyone except the children, who "looked up" to him. Felix met codefendant Pearson twice. Usually, she did not affiliate with appellant's friends. (13RT 2828, 2830, 2853.) Felix knew that appellant was a gang member. His gang involvement came about through his half-brother Curtis. (13RT 2828.) Appellant was known in the gang as "Little No Good." (13RT 2844.) Appellant tried unsuccessfully several times to contact his biological father. (13RT 2829.)

2. Appellant's Work And Church Activities

Albert Scales was the overseeing bishop for Victory Center Community Churches of Visions Anew Community. He was a pastor, and had known appellant since he was four or five years old. In the past, Scales saw appellant and his family two to three times a week. Appellant was a cute little kid, lots of fun and "really no problems." (13RT 2863-2864.) Appellant's family lived close to the church. Scales knew that there were drinking problems in the family when appellant was a child. (13RT 2865.) Scales counseled appellant's mother and stepfather James for over 20 years. (13RT 2866-2867.) James was unemployed. He lived on a street called the "alley," where drugs, violence and gang activity were commonplace. (13RT 2867.)

Pamela worked, but continued to drink. James was involved with drugs, and would come to church under the influence. The kids were not cared for that often. James was jealous of Pam and did not take care of appellant very well. (13RT 2868.) Spousal abuse occurred in the relationship. (13RT 2870.) On one occasion, James came to the church and pulled Pamela outside. Scales opined that "there was some violence

there," and "lots of verbal abuse, pulling on the child, that type of thing." (13RT 2872-2873.)

Appellant was one of the better behaved children in the church. When appellant was older, Scales learned that appellant was involved with gangs. Scales notified Pamela, and counseled appellant to avoid the gangs. Appellant showed Scales respect and listened to him. Scales never had one problem with him. (13RT 2869-2870.) Scales never saw appellant act in a mean-spirited manner. (13RT 2872.) However, when advised of appellant's crimes, Scales admitted that the facts underlying those crimes changed his opinion of appellant. (13RT 2880.)

Mr. James Johnson knew appellant because Johnson worked with appellant's mother Pamela. (13RT 2751-2752.) Johnson went to appellant's house for Christmas dinner. Pam was a good cook. Appellant was 12 or 13 years old when Johnson met him. Later, they became close. When appellant was 18 years old, he participated in a training program instructed by Johnson. At that time, Johnson was an instructor and job developer with the Century Community Training Program. The program found men in the neighborhood and taught them construction skills. (13RT 2752-2753, 2760.)

Appellant participated in the program and completed the course. He was different from others in the program. Appellant only did what he was told to do. He lacked initiative to complete a job. (13RT 2753.) Johnson pushed appellant, who wanted to learn, although he needed a little more help than others. However, appellant was always present when Johnson was doing a job, watching what Johnson was doing and trying to learn from him. (13RT 2754.)

Johnson continued his relationship with appellant after he completed the eight-week program. Appellant seemed to want a job because he had two children. Appellant had no car, and that made it very difficult. (13RT

2754-2755.) Johnson met appellant's wife. He obtained a refrigerator and a stove for them. Johnson had a business installing low-flow toilets. It was a small business, and appellant worked daily for Johnson for about a year in 1994 and 1995. (13RT 2755, 2758, 2761.)

Johnson either picked appellant up for work, or appellant rode the bus. (13RT 2755.) Appellant worked well. He watched other workers and learned. However, appellant never made the first move. Johnson tried to get appellant to take the initiative, but appellant was more of a follower than a leader. However, after he had been working for Johnson's company for a while, he learned the routine and would take the initiative to do things on his own. (13RT 2756.) Johnson's company subsequently went out of business. (13RT 2765.)

Johnson did not contact appellant when Johnson started a new business because the new jobs required greater skills than those possessed by appellant. Appellant was a good worker, but his only skill was installing toilets. He did not know plumbing. (13RT 2766, 2768.) Appellant had no alcohol problems on the job, but Johnson opined that he had alcoholic tendencies. (13RT 2757.)

3. Forensic Expert Testimony

Dr. Gordon Plotkin was a medical doctor who earned his B.S. and Ph.D. in biochemistry from the University of California, Los Angeles. He earned his medical degree from the University of Miami, and completed his residency in psychiatry at the University of California, Irvine. (12RT 2677-2678, 2688-2689.) Dr. Plotkin was able to work for both the prosecution and the defense in criminal cases. (12RT 2689.)

Dr. Plotkin examined Penny's medical records. (12RT 2689.) The records included a toxicology report from the medical examiner. (12RT 2690.) Dr. Plotkin had never questioned Penny or even spoken with her while she was alive. (12RT 2700.) The parties stipulated that the autopsy

report showed that Penny's blood levels included .73 micrograms per milliliter of methamphetamine, and a .22 blood alcohol content. (12RT 2690.) A methamphetamine level of .73 was not a huge amount, but it was enough to have an effect. A blood alcohol level of .22 was a significant level. (12RT 2691-2692.)

Dr. Plotkin also examined the autopsy report and Penny's medical records, which included an admission to the hospital in May, 1998. (12RT 2690.) Penny's diagnosis at the time of her admission in May, 1998 was adjustment disorder with depression. Dr. Plotkin considered Penny's symptoms, as well as other medical opinions. (12RT 2692, 2701.)

There were different levels of depression: major and dysthymia, which was a reaction to life. (12RT 2692.) The adjustment disorder was like stress. There was stress in paying property taxes, but most taxpayers did not end up in a psychiatric hospital. (12RT 2701.) In Dr. Plotkin's opinion, Penny was not adjusting in a healthy way. (12RT 2693.)

Dr. Plotkin was able to speculate regarding certain aspects of the evening of the murder. There were a host of methamphetamine and alcohol symptoms. A .22 blood alcohol content level for a chronic alcoholic could be a functional level. Someone unaccustomed to alcohol use would be stumbling at that level. (12RT 2693.) The autopsy showed that Penny's liver was normal. (12RT 2703.)

Alcohol was a central nervous system depressant. It was not a mood depressant. (12RT 2701.) The effects of alcohol typically became amplified if the user was depressed. (12RT 2706.) Methamphetamine was a stimulant and was highly addictive. (12RT 2693.) It was "180 degrees" different from alcohol, but there was no balancing effect between the two. (12RT 2702.)

Methamphetamine was similar to the caffeine in coffee, except that it was many times more potent. Over-the-counter precursors to

methamphetamine caused irritability, jitters and sleeplessness. These symptoms were multiplied by the use of methamphetamine. (12RT 2494.) A stimulant increased aggression. (12RT 2704.)

A combination of all three factors, i.e., a disorder, methamphetamine, and alcohol, could result in poor impulsivity. (12RT 2494.) After a few drinks, a person became "lubricated." For example, if a person saw someone on the street who looked peculiar, a normal person would not say anything to them. A person under the influence would, or might, comment. (12RT 2695.) Penny, being high on methamphetamine and alcohol, was probably more sedated. She could have suffered a loss of judgment. (12RT 2705.)

Dr. Plotkin did not know if Penny was sedated or aggressive on the night of her murder. He simply extrapolated based on her blood alcohol content level of .22. (12RT 2705.) Dr. Plotkin considered a hypothetical situation where Penny first saw the three young, Black defendants, and then allegedly made the racial epithet, "Fuck you niggers." Dr. Plotkin could not opine whether Penny might have said something like that if she was under the influence. He could not speculate about the methamphetamine and alcohol effects. (12RT 2695.)

However, a disorder could cause a racial epithet if a person were prone to such epithets. (12RT 2696.) Stimulation causes aggression, irritability and possibly even violence. With respect to alcohol, a person would be more likely to fight and have poor judgment. Dr. Plotkin admitted that the disorder Penny suffered in May, 1998 was not necessarily the same as any disorder she may have experienced in December, 1998. (12RT 2696-2697.)

Dr. Plotkin reviewed appellant's medical records, which did not reveal the presence of any major mental disorders. (13RT 2861.) He considered appellant's alcohol abuse in conjunction with a report that he

may have been intoxicated at the time of the murder. Dr. Plotkin also reviewed transcripts of the interviews taken on January 7, 1999, as well as the investigator notes, and other LBPD reports. (12RT 2697.) Appellant may have been impaired. Appellant's comments about missing parts of his memory were self-reported without verification. The void could have been part of an alcoholic blackout. Three bottles of alcohol could be evidence of being under the influence if one drank enough of the mixture. Dr. Plotkin opined that appellant drank only for intoxication. (12RT 2698.)

Dr. Plotkin further theorized that, on the night of the murder, appellant was intoxicated to the point that his memory was missing. He called it "twilight sleep" intoxication. The effects were the same for appellant as for Penny. Appellant's judgment could have been impaired. (12RT 2699.)

However, appellant initially remembered some details regarding the night in question, and continued to disclose more details in the later interviews. (13RT 2856-2858.) When there was a "blackout," there were no memories. The fact that additional information continued to be disclosed throughout the later interviews implied that appellant was lying. It was also possible to "float" in and out of the "blackout" state. (13RT 2858.)

Events with a strong stimulus were more likely to be remembered, such as beating the victim, or committing a rape. Events below a certain threshold could occur without memory. (13RT 2858-2859.) It was similar to surgery, i.e., as it lightened, the person awakened. (13RT 2860.)

Dr. Plotkin opined that there was a relationship between drunkenness and violence. A person who was prone to violence could misread the circumstances. (12RT 2699-2700.) Also, there were changes in impulse control. It was like pouring gas onto a fire. Amnesia was possible. (12RT 2700.) However, Dr. Plotkin indicated that the prosecutor's hypothetical,

which resembled the facts of the instant case, were inconsistent with a blackout, particularly because appellant remembered so many mundane details about that evening, such as getting on the bus. (13RT 2859-2860.)

Dr. Carl Osborn was a forensic psychologist. (13RT 2906.) He had been a therapist for 15 years, and was on the superior court panel. Dr. Osborn was contacted two years earlier to evaluate appellant for issues that could be addressed at the guilt and penalty phases. (13RT 2907-2908.) Dr. Osborn worked with appellant for about a year and one-half, for more than 40 hours, and examined him 13 times. Dr. Osborn obtained in-depth information about appellant from the date of his birth to the time of the instant murder. (13RT 2908-2909.) He had reviewed the "murder book" prepared by the prosecution team. (13RT 2910.)

Dr. Osborn had reached three conclusions regarding the instant crimes. First, the crimes were completely out of character for appellant if he had been sober. (13RT 2911, 3020.) Second, appellant had actively participated, but was dominated by the codefendants. Third, it was a crime of "passion," because appellant was intoxicated. Intoxication played a significant part in the events. (13RT 2911-2912.) Appellant had no known prior sex offenses or instances of "extreme" violence. If appellant drank, he "clicked." He pushed, shoved or became suicidal. (13RT 2954.)

Dr. Osborn theorized that, from birth through childhood, appellant was a tool used by his mother to win back his father. For example, when appellant's mother was in high school, she learned that a friend was pregnant by appellant's father. (13RT 2912.) She then decided to get pregnant also. For the father, it was merely a "fling." He refused to acknowledge appellant. Appellant's father abandoned them, joined the military, and provided nothing for them. (13RT 2913.)

Appellant had not seen his father in 20 years, until the father visited him in jail. Appellant said that his father was a "phony." According to

appellant, it was too little, too late. (13RT 2915.) Additionally, when appellant's mother was pregnant with him, his grandmother threatened her. She made accusations about who the father was, which led to shame and embarrassment for appellant's mother. About four or five months after he was born, appellant's mother allegedly attempted suicide by overdosing, and had to have her stomach pumped. (13RT 2916.)

Appellant had birth defects, i.e., his eye turned inwards and he saw everything upside down, which required corrective surgery at an early age. (13RT 2916.) He always had trouble learning. Neither his mother nor the school addressed appellant's learning difficulties. He repeated kindergarten. Everyone "failed" appellant. Although federal law required an individualized program, one was not provided for appellant. He continued to fail, and did not learn properly. (13RT 2917-2918.)

Appellant's stepfather, James Armstrong, entered appellant's life when he was about one year old. James was a poor role model. His friends were gangsters. He was a heavy drinker and drug user. Appellant's mother drank throughout her pregnancy, and drank heavily when appellant was two to three years old. It was a household of substance abusers. Appellant's mother Pamela admitted that it affected her ability to parent. James admitted that there was domestic abuse. He was physically abusive. James beat Pamela every other day over a long period of time. (13RT 2919-2920.)

During Dr. Osborn's interviews, appellant broke down and cried at least six times. The first time was when they discussed the fact that his stepfather James beat his mother. In response, Pamela was generally passive and just cried. Appellant's job was to comfort her. (13RT 2920.) Appellant became a caretaker to his mother. However, his mother generally sided with James, and appellant received the blame. This started when he was young, about the time that his mother started drinking.

Appellant had no support, which was a life long theme. Appellant believed that he was a burden that James did not want around. (13RT 2921-2922.)

Dr. Osborn only received appellant's records for the seventh grade. Appellant dropped out of school during the first term of the tenth grade. (13RT 2922.) Appellant's grades were D's and F's. He earned an A in physical education and in some sports, but academically his grades were terrible. His achievement tests were at a sixth to eighth grade level, maybe ninth. In most areas, appellant was in the lowest 20 percent. During one three year period, however, appellant received one-on-one mentoring, and consequently did very well. He earned A's. (13RT 2923.) Appellant desperately sought a role model, which was very important for a young male. (13RT 2924.)

Appellant regularly witnessed violence in his daily life. His mother and stepfather were violent. He lived in a very violent area. He saw a man gunned down in front of his house. Appellant's aunt was raped. His mother and aunt, while intoxicated, were involved in a knife fight. (13RT 2926, 2930.) James reported that the family lived in the Carmalitas project from 1989 to 1995. The children saw several killings, including police shootings. The area was a drug haven with a proliferation of weapons. This constituted the daily environment that appellant grew accustomed to in his life. (13RT 2930.)

Appellant's family experienced the effects of drug and alcohol addiction. His alcoholic maternal grandparents died from liver sclerosis. His mother Pamela became an alcoholic when appellant was two years old. James was on the streets with women shooting dope. James attempted a recovery in 1999. (13RT 2931-2932.) Alcohol dependence had genetic and social factors. The Diagnostic and Statistical Manual (DSM) recognized a familial pattern of 40 to 60 percent of variance of risk could

be explained by genetic factors. Appellant was an alcoholic. He had the genetics, as well as the environmental factors. (13RT 2932-2933.)

During his entire life, appellant never felt like he belonged anywhere. He did not fit in at home or at school. He was a small, poor student. He was picked on by others. He dressed poorly, was ashamed, and searched for a place to fit in. (13RT 2933.) At ages 12 and 13, he showed athletic talent. He was fast and played football. He also was involved in choir, and had a deep baritone voice. (13RT 2934.)

Appellant claimed that he was molested by a pastor when he was 13. The situation began as the result of a conflict between football and choir. The pastor told appellant that, if he chose choir, they would go on day trips to Disneyland. (13RT 2935.) Appellant hated being at home, and he spent several nights with the pastor, during which time the molestation occurred. Appellant's mother subsequently learned of the molestation. Appellant cried when he told Dr. Osborn about the molestation. (13RT 2936, 2939.)

Prior to the molestation, appellant had tried in good faith to find a healthy place with healthy people. After being molested, he began a downward spiral. (13RT 2941.) Appellant "hid" behind alcohol, and became involved with the Scottsdale Piru Bloods gang. This gang provided him a different type of home. Appellant had a perverse kind of worth within the gang. (13RT 2942.)

Dr. Osborn administered certain tests to appellant, and determined that his I.Q. was 83. An I.Q. of 70 represented mental retardation. Appellant was in the thirteenth percentile, which meant 87 percent of people scored higher than appellant. Consequently, people could "trick" appellant. (13RT 2943.) I.Q. testing was completely revised in 1997, with changes to the sample size and norm. Certain circumstances at the time of testing, such as sleeplessness and depression, could affect the results. (13RT 2999.)

Dr. Osborn opined that appellant was dominated by the other two defendants. (13RT 2952.) People who knew him, such as Albert Scales (the family pastor), James Johnson (appellant's former employer), and Tiyarye Felix (his girlfriend), said that appellant was a "follower." (13RT 2952.) On the street, one needed "horsepower," and appellant did not have it. (13RT 2944.)

Dr. Osborn opined and speculated at length regarding appellant's psyche. He said that appellant's urge to fit in was desperate. The gang became his only family and structure. Appellant was an "also ran," which meant that he did what he was told to do by others. The same was true with the instant offenses. (13RT 2953.) However, Dr. Osborn admitted that appellant did receive some support from his father. While he was in the service, Henry Hardy (appellant's father) sent $250.00 a month to his grandmother to assist with the expense of raising appellant. (13RT 3014-3015.)

According to Dr. Osborn, at the time of the murder, appellant was driven by emotion, not thought. He was drunk. He had been drinking all day, beginning in the morning. The racial slur was the precipitating event. When the victim yelled "nigger," it was aggressive, causing appellant to "click." If appellant had been alone, Dr. Osborn opined that there "probably" would only have been punching directed against the victim. The instant offenses were "different" from the way that appellant normally behaved. According to Dr. Osborn, appellant was not the leader during the instant crimes. (13RT 2955.)

Quite simply, gang culture prevented appellant from walking away. Appellant could not say "no" to people he perceived as being authority figures. Additionally, there was a fear factor. If one did not follow instructions in a gang, there were consequences. In prison, disobedient

people could be killed. Appellant's rage was unleashed by alcohol, and his rage could have continued throughout the murder. (13RT 2956.)

Appellant was not devoid of conscience. (13RT 2962.) He cared about people, and most strongly for children. When Dr. Osborn asked appellant about a time when he had been happy, appellant was dumbstruck and could not answer. Later, appellant said that he thought that he was happiest when his two sons were born. His sons gave him a sense of purpose. (13RT 2962-2963.)

Dr. Osborn opined that appellant had two disorders. He was dysthymic, which meant that he was "down" all of the time, and an alcoholic. The first disorder significantly depressed the person, who then struggled with life. (13RT 2947.) Appellant was quiet and withdrawn. Dr. Osborn did not recall appellant being happy about anything. Appellant had two suicide attempts during major depressive episodes. From the age of 13 or 14, appellant was constantly sad and depressed. He turned to daily alcohol use in his teens, leading to the second disorder, i.e., alcoholism. (13RT 2948.)

After leaving home, appellant drank and experimented with drugs. Marijuana made appellant paranoid. He drank from the early morning and continued throughout the day, until he vomited or passed out. Alcohol and dysthemia had a "very nasty reaction." (13RT 2949.)

Alcohol initially acted as a stimulant and made the user feel better. (13RT 2949.) However, it was also a central nervous system depressant, causing appellant to become more depressed. The individual response to alcohol varied. If a person was depressed and then drank, initially, that person felt better, but then became a lot worse. A person with dysthemia was "seriously depressed." Some dysthymics were violent. Others were not. (13RT 2950-2951.) The "clicking" sensation appellant described was

"explosive disinhibition." Alcohol was a "lubricant" that caused impulsive emotions to manifest themselves. (13RT 2951.)

On cross-examination, Dr. Osborn admitted that appellant told him that he was able to get alcohol while he was in jail. Appellant also admitted being involved in violence while incarcerated in the county jail. He had participated in a riot in the county jail the prior Summer. Additionally, appellant had been in a fight with a Hispanic inmate and bit the man on his hands and fingers. (13RT 2979-2980.)

Appellant also told Dr. Osborn that prior to the murder, he had been violent towards Tiyarye Felix. Other people had advised appellant that he became violent when he drank. (13RT 2981, 3014.) Despite that, appellant made a conscious decision to continue drinking, even while in custody. (13RT 3004.) Appellant advised Dr. Osborn that he became more involved with gangs after moving in with Tiyarye, because she liked the gang lifestyle. (13RT 3013.)

4. Appellant's Cooperation During A 1997 Murder Prosecution

In 1997, Robert Grace was a Los Angeles County Deputy District Attorney (DDA) assigned to the hardcore gang unit. (13RT 2729.) He prosecuted gang murders, including the murder case of *People v. Johnson/Amado*, case number TA037534. (13RT 2730.) In 1997, Crips gang members had stopped and boarded an MTA bus. Numerous high school students were on the bus. The high school was in a Blood neighborhood. The Crips were a rival gang. (13RT 2731-2732.)

The Crips gangsters boarded the bus to identify members of the Bloods. Suddenly, a third person fired at, and into, the bus. A high school student was killed, and her friend was wounded. The incident occurred around the same time that Bill Cosby's son was killed. (13RT 2733.) Appellant was visiting in the area at that time. There was a meeting of the

Crips, during which they discussed what to do about Bloods riding through the Crips neighborhood. Two of the defendants in the case (*People v. Johnson/Amado*) attended the meeting. The discussion was about stopping a bus, and dragging Bloods from the bus to beat or kill them. (13RT 2733-2734.)

The prosecution contacted appellant, who eventually provided information and testified. The information appellant provided was necessary to obtain conspiracy (to commit murder) convictions. (13RT 2734.) As previously noted, appellant was a Bloods gang member. Since the Bloods were the gang that the Crips were trying to eradicate, revenge could have been the motive for appellant to testify. (13RT 2741-2742.)

While witnesses in gang cases often changed their stories (13RT 2742), appellant cooperated with the prosecution, and did not recant or change his testimony. (13RT 2747.) DDA Grace was an experienced gang prosecutor. In gang prosecutions, witnesses were reluctant to testify because they feared retaliation. (13RT 2735-2736.)

Appellant was in the area when the shooting occurred. He saw a suspect running, and he was able to identify people. Due to his testimony, appellant's life was in jeopardy. (13RT 2736, 2738.) DDA Grace had been so concerned about witness safety that he had not released the names of witnesses during discovery. (13RT 2738.)

Victor Corella was an LAPD detective in the aforementioned *Johnson/Amado* case. (13RT 2975.) The information appellant provided helped lead to an arrest. Detective Corella met appellant at midnight at a location away from appellant's home. Appellant was scared for his safety, and did not want to be seen with the police. However, he provided key information in the case and went to court and testified for the prosecution. (13RT 2976.)

C. Prosecution Rebuttal

Monte Gmur was at home on December 28, 1998. (13RT 3036.) Appellant arrived at Gmur's house with Pearson and Armstrong. Gmur heard Pearson and appellant debating, including the comment, "You ask him." Appellant stood in the hallway behind Pearson. (13RT 3037-3038.) Pearson asked to use the room, saying that they wanted to put "Chris" on the block to initiate him into a gang. Gmur said "no." The men went back into the music room briefly, and then left with Chris for about 20 minutes. (13RT 3042; 14RT 3084.)

Appellant returned and asked to use Gmur's telephone, and he called "Capone." Appellant said that they had just put Chris on, that he was "cool," and that he was "Playboy." All four men then left the premises. (13RT 3043.) Gmur did not notice anything unusual about Chris. He was not injured. They were all "stupid drunk" when they left his house. (13RT 3044.)

In January 1999, Gmur reported to the police that, on the evening of the murder, appellant could carry on a conversation. He was loud and obnoxious. Gmur could understand what appellant was saying on the phone, but he was very intoxicated. At that time, Gmur would not have driven in a car with appellant as the driver; Gmur believed that he was under the influence of something. (13RT 3045-3046.)

On December 29, 1998, Mr. Terri Aitken operated the MTA bus on Route 60. This route traveled from Long Beach to downtown Los Angeles from 8:00 p.m. to 4:00 a.m. The bus stopped near Wardlow Road and Long Beach Boulevard at either 12:30 or 2 a.m. (13RT 3048.)

At that time, Aitken had given a statement to the police about a gang-related incident on the bus. He had picked up three Black male gangsters at Willow, not Wardlow. The first one argued over the fare. Aitken told that particular passenger to pay and sit. When Aitken picked up the phone to

request assistance, the others told the first one to pay. (13RT 3049.) The three men then argued amongst themselves about Crips and Bloods. (13RT 3051.) All three men exited the bus at Florence. (13RT 3049.)

Detective Brian McMahon interviewed Aitken on January 5, 1999. Aitken reported to Detective McMahon that three Black males, who had been drinking, had a dispute with a fourth male over gangs. Aitken was unable to identify any of the males from photographs. (13RT 3053, 3056.)

Detective McMahon also questioned appellant, who said the dispute was over Crips, Bloods and gang colors. Appellant did not tell Detective McMahon that he had been drinking the entire day of the incident. He said that they had gone to the liquor store after leaving Gmur's house, which was about two and one-half miles from the murder scene. (13RT 3054.) It would take about 10 minutes to walk to the bus from that location. The bus ride itself would have been about 10 or 15 minutes. Consequently, the trip would have taken 30 minutes or more. (13RT 3055.)

Detective McMahon arrested appellant on January 7, 1999. Detective McMahon interviewed appellant and recorded a statement from him. (14RT 3090.) Appellant gave Detective McMahon a litany of reasons purporting to justify his rape and torture of Penny, including an allegation that he had been molested, his problems with alcohol, and his stepfather's physical abuse of his mother. (14RT 3091.)

Millard Jackson was the pastor at First John Baptist Church in Long Beach. (14RT 3066.) Pastor Jackson knew appellant and his mother Pamela. He knew appellant between the ages of seven and 10. (14RT 3067.) After the instant murder, Pastor Jackson spoke with Pamela regarding appellant's accusations of molestation. Pamela called Pastor Jackson, and said that appellant was on the phone and wanted to speak with him. (14RT 3068, 3071-3073.)

Appellant asked Pastor Jackson, "Why did you do that to me?" Pastor Jackson was very upset by the allegation. Appellant claimed that Pastor Jackson had taken him to his house, told him to strip and bathe, and then had went to bed with him where they masturbated each other. Pastor Jackson asked appellant why he was making such allegations. Appellant then stated, "See, Mom, I told you he would lie." (14RT 3069.) Later, Pamela called Pastor Jackson and apologized, and told Pastor Jackson that her daughter wanted him to marry her.[23] (14RT 3070.)

Pastor Jackson explained that he had counseled appellant as a young teenager. (14RT 3073.) Appellant sang in the choir, and they went to Magic Mountain. Appellant spent the night with Jackson because the pastor was working with appellant. (14RT 3075.) Appellant stayed if he wanted to, and other children were also present. Appellant did not stay over very often. When he did, appellant used the spare bedroom. (14RT 3076.) Pastor Jackson was very close to appellant's family. The entire family had stayed with Pastor Jackson. (14RT 3078.) Pastor Jackson vehemently denied molesting appellant. (14RT 3081-3082.)

Sergeant Steve Newman of the Los Angeles County Sheriff's Department had worked in the gang unit for 14 years. (14RT 3083.) Sergeant Newman explained that "jumping in" was a gang initiation process. Unless he was escorted into the gang, a new member would be beaten for one to three minutes. No blood or broken bones were required. (14RT 3084.) Usually the new member went down and was kicked in the body or torso while protecting himself. (14RT 3085.)

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[23] Pastor Jackson had received a previous phone call from Pamela regarding appellant's upcoming murder trial. During that phone call, Pamela did not mention anything about molestation allegations. (14RT 3071.) Moreover, appellant told Pamela that the "molestation" occurred when he was 16 years old, rather than 13 years old. (13RT 3017.)

Appellant had the tattoo "CK," which meant Crip Killer. (13RT 2981.) The "CK" tattoo showed allegiance to the Bloods gang. It meant that the person was willing to kill Crips. (14RT 3085.) The Crips' gang color was blue; the Bloods' color of choice was red. If a Blood gang member was on a bus and saw someone wearing a blue bandana, he would be expected to challenge that person. This was a matter of gang pride. If a Blood testified against a Crip, it would be frowned upon (because a snitch was a snitch), but it might very well be tolerated. (14RT 3087.)

If a new member had been jumped into a gang, Sergeant Newman would expect to see torn clothing and dirty, tussled hair. (14RT 3088.) The new gang member would receive a gang moniker (or nickname) after being jumped into the gang. (14RT 3089.)

ARGUMENT

I. THE TRIAL COURT PROPERLY EXCUSED TWO PROSPECTIVE JURORS FOR CAUSE BECAUSE THEIR VIEWS ON THE DEATH PENALTY SUBSTANTIALLY INTERFERED WITH THEIR ABILITY TO FUNCTION AS JURORS

Appellant contends that the trial court's excusal of two prospective jurors for cause based on their views on the death penalty violated his rights to a fair trial under the Fifth, Sixth, Eighth and Fourteenth Amendments of the federal Constitution. (AOB 76-114.) Specifically, appellant argues that granting challenges for cause against prospective jurors D.D. (juror number 6840) and K.F. (juror number 4283) was error because "those jurors' views on the death penalty did not prevent, or substantially impair, [either] one of them from considering or imposing a sentence of death." (AOB 77-114.) Respondent disagrees.

A. Applicable Law

A prospective juror may be excluded if his views would prevent or substantially impair the performance of his duties as a juror in the case before the juror. (*Wainwright v. Witt* (1985) 469 U.S. 412, 424 [105 S.Ct. 844, 83 L.Ed.2d 841]; *People v. Earp* (1999) 20 Cal.4th 826, 853; *People v. Bradford* (1997) 15 Cal.4th 1229, 1318; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1140); *People v. Wader* (1993) 5 Cal.4th 610, 652-653.) A personal opposition to the death penalty or "the mere *absence* of strong, definite views about the death penalty," by itself, is not disqualifying. (*People v. Pearson* (2012) 53 Cal.4th 306, 331, italics original.)

If a juror gives conflicting or ambiguous answers to questions about his views on the death penalty, the trial court is in the best position to evaluate the juror's responses, so its determination as to the juror's true state of mind is binding on the appellate court. (*Wainwright v. Witt*, *supra*, 469 U.S. at pp. 428-429; *People v. Phillips* (2000) 22 Cal.4th 226, 234; *People v. Rodrigues*, *supra*, 8 Cal.4th at p. 1147.) "As noted in *Witt* itself, the trial judge may be left with the 'definite impression' that the person cannot faithfully and impartially apply the law even though he has not expressed his views with absolute clarity. [Citation.]" (*People v. Garcia* (2011) 52 Cal.4th 706, 743.)

Any ambiguities in the record are resolved in favor of the trial court's assessment, and the reviewing court determines whether the trial court's findings are fairly supported by the record. (*People v. Crittenden* (1994) 9 Cal.4th 83, 122; *People v. Howard* (1988) 44 Cal.3d 375, 417-428.) "When there is no inconsistency, but simply a question whether the juror's responses demonstrated a bias for or against the death penalty, the trial court's judgment will not be set aside if supported by substantial evidence. [Citation.]" (*People v. Roybal* (1998) 19 Cal.4th 481, 519.)

"'The real question is "'"whether the juror's views about capital punishment would prevent or impair the juror's ability to return a verdict of death in the case before the juror."'"' [Citations.]" (*People v. Heard* (2003) 31 Cal.4th 946, 958-959.) The erroneous granting of even a single challenge for cause necessarily has an effect on the composition of the jury. (*Gray v. Mississippi* (1987) 481 U.S. 648, 659-668 [107 S.Ct. 2045, 95 L.Ed.2d 622,]; accord *In re Anderson* (1968) 69 Cal.2d 613, 619-620 [applying reversal per se standard]; see also *People v. Pearson*, *supra*, 53 Cal.4th at pp. 327-328.)

B. The Trial Court Properly Excused Prospective Juror D.D. For Cause

The trial court used a 53-page written questionnaire with 237 questions, many of those with subparts. Pages 42 through 53, containing questions 177 through 237, exclusively concerned the death penalty. (21CT 5445-5498.) According to his juror questionnaire, prospective juror D.D. (number 6840) was a 48-year old married White male with one child and interests in politics and literature. He worked as a salesman at Ganahl Lumber in Los Alamitos. (21CT 5446, 5450.)

D.D. was born in Texas, but had lived in California for 47 years. He resided with his family in a house in Long Beach, which they had owned for nine years. (21CT 5446-5448.) D.D. was a U.C. Berkeley graduate with a degree in biology. (21CT 5452.)

D.D. considered jury duty an "awesome duty, which he had "little desire for." With respect to his prior jury service, D.D. stated that he felt like he had "caved to the majority opinion." (21CT 5454-5455.) D.D. indicated that prosecutors were "often over-zealous to convict and too willing to accept the police evidence." He based that opinion on the "rampart scandal, DNA exonerations, [and] the book "Blind Justice." (21CT 5455.) D.D. had been a member of the ACLU for four years, and

described its primary goals as "civil liberties human rights." (21CT 5456) D.D. described himself as neither a leader nor a follower, but stated in his jury questionnaire, "I do things my way." (21CT 5457.)

D.D. had a 1972 conviction for marijuana possession in his record, and he opined that the police report with respect to that incident "was largely fictional." (21CT 5462.) He stated in his jury questionnaire, "As the defendant has reason to shade the truth, so does law enforcement." D.D. also said that he would question the testimony of law enforcement officers. (21CT 5463.) With respect to his 1972 conviction, D.D. believed that he was not treated fairly by the police. He remembered the police report as being "wildly inaccurate." (21CT 5469.)

D.D. described the causes of crime as "poverty" and a "lack of hope." When asked what he thought should be done about the crime problem, D.D. answered, "rehabilitation, mentoring, jobs." He also indicated that "living as a child under violent/cruel conditions contributes to adult violence." (21CT 5471.) In response to a question about the criminal justice system, D.D. answered that "way too many people are incarcerated for victimless crimes." (21CT 5472.)

D.D. indicated that with respect to our criminal justice system, he "would initially be leaning towards the defense. I have developed a mistrust of prosecutors." (21CT 5473.) He believed that the police were clumsy or "criminal" in the O.J. Simpson case, as well as in the Rampart scandal. D.D. revealed that his father was an alcoholic during his (D.D.'s) childhood. (21CT 5473-5474.) He thought that Blacks were "often perceived as "dangerous" or "menacing" by Whites. D.D. indicated that he might be biased for Blacks because of "the disproportionate numbers of Blacks incarcerated or living in poverty." (21CT 5476.)

D.D. "abhored" the death penalty. He was "strongly against it." Recent executions of persons convicted of murder had only strengthened

his feelings against the death penalty. D.D. thought that the death penalty was used "too often." As a member of the ACLU, he opposed the death penalty. D.D. thought that the death penalty was "cruel and unusual." He held these views "strongly." (21CT 5486.)

D.D. believed that the "death penalty [was] out of step in a modern society," and that "the death penalty does nothing to deter crime and is applied unevenly." He did not support the death penalty. D.D. expressed the view that the death penalty should never be imposed. Its purpose was "revenge" and "political." Significantly, when asked whether it would be impossible for him to vote for the death penalty under any circumstances, D.D. replied, "I'm not sure." (21CT 5487.)

When asked about his philosophical views, D.D. plainly stated, "I feel the killing of any human being diminishes us all and goes against the laws of nature and man." (21CT 5488.) When asked whether he would automatically vote for life without possibility of parole, regardless of the evidence, D.D. responded, "I'm not sure." (21CT 5489.) D.D. indicated that he could not see himself rejecting life in prison without the possibility of parole and voting for the death penalty. (21CT 5490.)

D.D. was also "not sure" whether he could set aside his philosophical convictions and vote for the death penalty. (21CT 5491.) He believed that imposing a death sentence did not do any good in easing anyone's pain. Without having heard the evidence, D.D. opined that life in prison without the possibility of parole was an "appropriate punishment" for a person convicted of murder with special circumstances. (21CT 5494.) He thought that "death goes against biology" and "only the most barbaric countries on earth still impose" the death penalty. (21CT 5495.)

The *Hovey* voir dire[24] questioning of D.D. also plainly demonstrated that he could not vote to impose a death sentence, if appropriate, in the case at bar.. However, even prior to that, D.D. first tried to have himself excused from jury service. The following colloquy transpired at trial:

> PROSPECTIVE JUROR NO. 6840: 6840.
>
> THE COURT: All right. Why couldn't you stay on the case with us?
>
> PROSPECTIVE JUROR NO. 6840: I'm concerned I might not be able to finish out the trial, due to the fact that my mother-in-law has lung cancer. My wife's moving her today to Seal Beach. And I've got a six-and-a-half-year-old son, if my wife had to start taking care of her mother full-time, I'm not sure who would take care of my boy.
>
> THE COURT: Okay. All right. Well, if something happens in that arena, let us know. But I can't excuse you because something may happen.
>
> PROSPECTIVE JUROR NO. 6840: Uh-huh.

(6RT 937.)

With D.D.'s hardship request denied, appellant's defense counsel, and the court, later questioned D.D. as follows:

> THE COURT: All right. Now, the questioning today is going to be primarily focused on your ability to keep an open mind on the penalty phase. If we get to the penalty phase of the trial. There are two phases in a death penalty case. The first is the guilt phase, and if the jury finds one or more of the circumstances to be true, then we would go to the penalty phase. There are two phases [*sic*], one is the death penalty, the other is life in prison without the possibility of parole. All right?
>
> PROSPECTIVE JUROR NO. 6840: I understand.
>
> THE COURT: Can you keep an open mind on the penalty phase?

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[24] *Hovey v. Superior Court* (1980) 28 Cal.3d 1, 80.

PROSPECTIVE JUROR NO. 6840: I believe I can.

MR. YANES [DEFENSE COUNSEL]: Good morning, sir. I just have very few questions to ask you, but I want to make sure that we are clear, in terms of the way this trial would work.

The jury first hears the evidence of guilt and they decide whether my client is guilty or not guilty of the charges. If the jury finds him guilty and finds some of the things, the special circumstances to be true, some of the more horrible things involved in this case, then we go on to a second phase and that's where the jury decides the penalty.

Okay, there are only two choices once we get there and that is death or life without the possibility of parole. Are you with me?

PROSPECTIVE JUROR NO. 6840: Yes.

MR. YANES: Now, what we need to know is not what you would decide, but the fact that you could sit in that phase of the trial, listen to the evidence that will be presented and make a rational decision.

PROSPECTIVE JUROR NO. 6840: I believe I could.

MR. YANES: Okay, and what you are going to hear is aggravating evidence and mitigating evidence in other words, bad things and good things, reasons why you should give him the death penalty and reasons why you should give life without the possibility of parole.

We consider life to be the lesser. You may differ with that philosophically, but for our purposes death is the worse. Life without the possibility of parole is the lesser.

PROSPECTIVE JUROR NO. 6840: I understand.

MR. YANES: Would you be able to accept that death is worse?

PROSPECTIVE JUROR NO. 6840: Yes, I do.

MR. YANES: And you are going to hear evidence of aggravation, the factors of this aggravation. Other things he may have done in his life could be factors in aggravation. And then you will hear factors in mitigation maybe things which would cause you to have sympathy for him, things about an abusive childhood, mental issues, that sort of thing. At the end of listening to that the judge is going to tell you that if you find that the aggravating factors substantially outweigh the mitigating factors, then you can vote for death. If you don't, then you must vote for life, could you follow that?

PROSPECTIVE JUROR NO. 6840: Yes.

MR. YANES: I'm not asking you if you would enjoy it. I want to know if you could do it.

PROSPECTIVE JUROR NO. 6840: Yes, I could.

(7RT 1256-1258.)

The prosecutor and the court then questioned D.D. as follows:

MS. LOCKE-NOBLE [THE PROSECUTOR]: Thank you. In reviewing your questionnaire you indicate on question 178, "What are your general feelings regarding the death penalty?" and you say, you abhor it.

PROSPECTIVE JUROR NO. 6840: Yes.

MS. LOCKE-NOBLE: You are strongly against the death penalty?

PROSPECTIVE JUROR NO. 6840: I am.

MS. LOCKE-NOBLE: And you say the execution of persons in the past has strengthened your feelings against the death penalty?

PROSPECTIVE JUROR NO. 6840: Yes.

MS. LOCKE-NOBLE: And you feel that the death penalty is cruel and unusual?

PROSPECTIVE JUROR NO. 6840: I do.

MS. LOCKE-NOBLE: And that you hold these beliefs also very strongly?

PROSPECTIVE JUROR NO. 6840: I do.

MS. LOCKE-NOBLE: Now, what is important here is that if you cannot impose the death penalty because you feel that you have these strong convictions, then it wouldn't be fair either to the defendant or to the people of the State of California for you to sit on this jury, would it?

PROSPECTIVE JUROR NO. 6840: No, it would not.

MS. LOCKE-NOBLE: So, honestly, can you ever impose the death penalty, based on your feelings and convictions?

PROSPECTIVE JUROR NO. 6840: I'm not sure. I think I have to sit in that jury room and make that decision at the time of the deliberations.

MS. LOCKE-NOBLE: But you feel that it is barbaric?

PROSPECTIVE JUROR NO. 6840: I do.

MS. LOCKE-NOBLE: How could you impose something that is barbaric?

PROSPECTIVE JUROR NO. 6840: If it was necessary to follow the law, and the law said this was the only answer to this case, I believe I could do it.

MS. LOCKE-NOBLE: But on question 193 you state that life without the possibility of parole is the only acceptable alternative to the death penalty, isn't that how you feel?

PROSPECTIVE JUROR NO. 6840: Yes.

MS. LOCKE-NOBLE: Wouldn't it be correct to say that you would vote life without the possibility parole because you actually believe it's worse for the defendant to spend the rest of his life in prison than the death penalty?

PROSPECTIVE JUROR NO. 6840: No, I feel the death penalty is a worse fate than life in prison.

MS. LOCKE-NOBLE: And it's your opinion that not only is the death penalty out of step with modern society, it doesn't deter crime and is not applied evenly?

PROSPECTIVE JUROR NO. 6840: That is correct. I don't feel that the death penalty does anything to make our world better.

MS. LOCKE-NOBLE: And you feel its only purpose is for revenge?

PROSPECTIVE JUROR NO. 6840: I -- I -- Yes.

MS. LOCKE-NOBLE: How can you impose the death penalty?

PROSPECTIVE JUROR NO. 6840: The only way I could impose the death penalty is if it was clear-cut that the law -- the law made it very clear that the death penalty had to be imposed. I don't feel that I'm above the law. However, I hold these convictions very strongly. I think if I sat in the jury room and it became very clear there was only one answer, I believe I could impose the death penalty. I won't know that until I sit in the jury room.

MS. LOCKE-NOBLE: Okay, but there are two options here.

PROSPECTIVE JUROR NO. 6840: Uh-huh.

MS. LOCKE-NOBLE: Yes? You understand there are two options, only two options that are provided, that guilt has been determined already and that is what we are assuming in these questions.

PROSPECTIVE JUROR NO. 6840: Okay.

MS. LOCKE-NOBLE: So in your particular case because there are two options, wouldn't you always vote for life without the possibility of parole, based on your convictions?

PROSPECTIVE JUROR NO. 6840: Again, I don't feel that I would, if the law made it very clear that death was called for in this case.

MS. LOCKE-NOBLE: But the law --

PROSPECTIVE JUROR NO. 6840: And I'm maybe I don't understand the law. Is it clear-cut to when the death penalty has to be imposed or when life imprisonment --

THE COURT: No, you would be telling -- you are saying if the law was that you have to impose, the law doesn't say that you have to impose the death penalty. I won't be telling you. You will be telling me. Basically, the court will be asking what is the appropriate penalty.

PROSPECTIVE JUROR NO. 6840: So it becomes an objective decision at that point. It's not cut and dry.

MS. LOCKE-NOBLE: It's not an objective decision. It's subjective, it's a subjective decision as counsel explained there will be mitigating and aggravating factors. The court will not tell you how to weigh those factors. You, as an individual, will have to determine what weight you want to give to each of the factors. And based on the weight that you provided to each one of the factors, you have to determine if the aggravating factors substantially outweigh the mitigating factors. And that's how you would arrive at voting for death, based on your conviction. And the court is not going to tell you it's clear-cut in this circumstance. You vote for death in this circumstance you vote for life. It is subjective. Do you believe that you can impose death?

PROSPECTIVE JUROR NO. 6840: I believe -- I believe I could. It would be very difficult for me. I would have to have the almost everyone on the jury trying to convince me that it would be essential or necessary to impose death.

MS. LOCKE-NOBLE: Would you prefer not to sit as a juror in this particular case?

PROSPECTIVE JUROR NO. 6840: I would prefer not to.

MS. LOCKE-NOBLE: Is that based on your convictions?

PROSPECTIVE JUROR NO. 6840: Yes. In the questionnaire I think I made it clear that I would not like to sit on this jury.

MS. LOCKE-NOBLE: How would you feel if everyone on the jury was voting for death except you?

PROSPECTIVE JUROR NO. 6840: I would feel under intense pressure. I would do everything I could to convince the jury that death was not appropriate.

MS. LOCKE-NOBLE: And didn't that happen to you once before in terms of being on a jury?

PROSPECTIVE JUROR NO. 6840: I have been on a jury before, and the jury went against the way I wanted to go. The verdict went the against the way I wanted it to go.

MS. LOCKE-NOBLE: And you felt at that point in time you caved in to the majority?

PROSPECTIVE JUROR NO. 6840: I did. Yes, I do.

MS. LOCKE-NOBLE: And knowing that and knowing this is a much more serious situation, do you feel that you would, as a result of your previous experience, not listen to the other jurors and hold to your convictions?

PROSPECTIVE JUROR NO. 6840: I would listen to the other jurors. I would hold to my convictions and I would stand up for my convictions. I would be much more difficult to be persuaded to vote for the death penalty in this case. I think the last experience made me a stronger person towards my convictions.

MS. LOCKE-NOBLE: And is there anything -- when you go into the jury room for the penalty phase, if you are selected as a juror and when you first walk in there, would you be leaning towards life without the possibility of parole?

PROSPECTIVE JUROR NO. 6840: Yes.

(7RT 1258-1264.)

Appellant's defense counsel and the court then had the following additional questions for D.D.:

MR. YANES: In this case, you have convicted him of some of the charges or all of the charges of having taken a

woman off the street, kidnapped her, robbed her, raped her, tortured her and raped her with a foreign object, killed her. In this case when you are going to hear other evidence which could convince you beyond a reasonable doubt, okay, of the guilt of [appellant], DNA-type evidence, statements from his own mouth.

PROSPECTIVE JUROR NO. 6840: I understand that.

MR. YANES: So now you are in that state of mind when you are going into the jury room to decide to go to the penalty phase.

PROSPECTIVE JUROR NO. 6840: Correct.

MR. YANES: You know that you have been convinced overwhelmingly that he is guilty of these charges, all right? Now, you would agree that there are some cases where a person should get the death penalty, that they deserve it, wouldn't you? In order for you to say you could impose it at times, you would have to say you feel there are times when a person deserves it?

PROSPECTIVE JUROR NO. 6840: That's a hard question to answer.

MR. YANES: I'm saying in general.

THE COURT: Let me ask you was your answer to that question based on the belief that, under certain situations, the law compels you or instructs you?

PROSPECTIVE JUROR NO. 6840: That's what I was thinking. The only way I could impose the death penalty is if the law compels you to impose the death penalty. I'm talking about if it's -- if this mitigating circumstance took place and the death penalty is called for, I would to stay within the law. I would have to impose the death penalty.

MR. YANES: The only thing the judge is going to tell you, in terms of the law, is if the aggravating circumstances occurred, what the defendant did to the victim, that sort of thing, are so much worse than any good things you hear about him, then you can vote for the death penalty. That's what the court is going to tell you, but you have to then decide if those things are so much worse than the mitigating. The court doesn't tell you to

vote death. The judge says you have a choice. You have heard all the evidence. You heard the bad thing and good. Now, you decide the bad things outweigh the good things then you can vote for the death penalty. If you don't think so, then you must vote for life.

So the question is if you find that those aggravating things are so much worse would you, on your own, without the court telling you what to do, be able to vote for the death penalty?

PROSPECTIVE JUROR NO. 6840: I understand that my answer to this question is probably going to determine if I sit on this trial or not.

MR. YANES: Whether you are eligible. There is still another process we are going to eliminate people. Just answer this question if whether your are [*sic*] eligible to go on to this stage don't do it -- don't do it for that. Do it to be honest.

PROSPECTIVE JUROR NO. 6840: I'm trying to figure out. This is a huge question. Can I have a couple days to think about it?

MR. YANES: No. We need to know now, I'm sorry.

THE COURT: The fact of the law is the law would never, in a death penalty case, never tell you that you shall return the death penalty, if certain factors are here, anything like that. That's never the law. The law is simply if the aggravating factors substantially outweigh the mitigating factors then you can return a verdict of death, otherwise you can't.

If the mitigating circumstances outweigh the aggravating you wouldn't return a death verdict. If you wanted to return life without the possibility of parole you can return that period. You can return that verdict you can only. You only have the option of returning a death verdict if the aggravating factors substantially outweigh the mitigating. So knowing that would be the charge, basically, to you, would you be able to vote for the death penalty knowing the court is never going to tell you that you should or shall or anything like that?

PROSPECTIVE JUROR NO. 6840: I think I could, yes.

(7RT 1264-1267.)

The trial court then asked D.D. a few more questions:

> THE COURT: Why do you think that you can? It seemed that your convictions were pretty strongly held that you think it's a bad idea. You indicated it was for revenge. Is that appropriate for the State to impose the penalty based on revenge?
>
> PROSPECTIVE JUROR NO. 6840: Personally, I don't think so, however, if the law states one thing i would feel compelled to follow the law.
>
> THE COURT: All right. Do you understand the law will never compel jurors to vote for the death penalty?
>
> PROSPECTIVE JUROR NO. 6840: I understand that.
>
> THE COURT: Could you vote for the death penalty even if the law did not compel you to vote for the death penalty?
>
> PROSPECTIVE JUROR NO. 6840: I think if the other jurors were able to convince me to vote for the death penalty, I would do it, yes.
>
> MR. YANES: Just finally, it's not a matter – we are not asking what the other jurors would do. We are asking about you. Could you come to a conclusion, after hearing the evidence in the penalty phase, that this was a case which called for the death penalty? If all other jurors agreed with you, would you be able to do that? We are not asking if you could be convinced by the others could you make that determination which -- and say this is a case which deserves this or this is a case that doesn't deserve. It's a personal decision.
>
> PROSPECTIVE JUROR NO. 6840: I could, yes.

(7RT 1267-1268.)

Thereafter, the prosecutor challenged D.D. for cause, explaining D.D. had "hesitated numerous times" about whether he could impose the death penalty. D.D. had indicated that he would do so only if other jurors convinced him, and that he would not make his own decision. (7RT 1269.) The prosecutor further argued that D.D. abhored the death penalty, his

convictions were very strong, and, even "if the law compels him, he's asking for someone else to be the judge . . . that other people have to convince him . . . ." (7RT 1269.)

The prosecutor additionally opined that, quite simply, "He can't do it." Significantly, the prosecutor also observed that, "If the law compels him, he's asking for someone else to be the judge and he's not saying that in those words, but his body language, the hesitations his statements, that other people have to convince him have told us. Defense counsel even admitted that D.D. "want[ed] the law to give him more help." Finally, the prosecutor correctly noted that D.D. wanted two more days to think about it. (7RT 1269.)

The trial court granted the prosecutor's challenge for cause, ruling as follows:

> THE COURT: I sort of have a two-fold problem with this juror. One is based on his answers, at least initially, it certainly appeared that his views would prevent or substantially impair his performance as a juror, in accordance with the law.
>
> So it would seem at the outset, that he probably could not impose the death penalty no matter the circumstances.
>
> The second problem that I have, if he was a juror and if the jury did impose death, I'm not sure that that verdict would be worth much because he told us repeatedly if it comes back with the death verdict that means 11 people voted for death and so did he. So I don't think he will be helpful or useful to us in this case. So I'm going to grant the People's challenge for cause.

(7RT 1270.)

As previously noted, a prospective juror may be excluded if his views would prevent or "substantially impair" the performance of his duties in the case before the juror. (*Wainwright v. Witt*, *supra*, 469 U.S. at p. 424.) The United States Supreme Court, in *Uttecht v. Brown* (2007) 551 U.S. 1, 10 [127 S.Ct. 2218, 167 L.Ed.2d 1014], instructed that a reviewing court

should consider the entire voir dire when determining a *Witherspoon* issue.[25]

In the case at bar, substantial evidence supported the trial court's excusal of D.D. for cause. Moreover, since D.D. gave conflicting or ambiguous answers to several questions about his views on the death penalty, the trial court unquestionably was in the best position to evaluate D.D.'s responses. "The trial court is in the best position to determine the potential juror's true state of mind because it has observed firsthand the prospective juror's demeanor and verbal responses." (*People v. Clark* (2011) 52 Cal.4th 856, 895.) Consequently, the trial court's determination as to D.D.'s true state of mind is binding on this Court. (*Wainwright v. Witt*, *supra*, 469 U.S. at pp. 428-429; *People v. Phillips*, *supra*, 22 Cal.4th at p. 234.)

Here, the record leaves little doubt that D.D. was much more than just "substantially" impaired with respect to his ability to recommend a sentence of death. Indeed, as the prosecutor aptly noted, D.D. made it perfectly clear that, quite simply, "He can't do it." (7RT 1269.)

First, and most importantly, D.D. repeatedly expressed the view that he could only impose the death penalty if "it was clear-cut that the law – the law made it very clear that the death penalty had to be imposed." (7RT 1260.) Despite repeated efforts by the parties to explain to D.D. that the law would never "require" him to vote for death, i.e., that he would always have an option to choose life without the possibility of parole, D.D. continually defaulted to the position that he could only impose the death

[25] Appellant repeatedly relies on evidence outside the record to support his claims of error. (See, e.g., AOB 97, fn. 7; see also AOB 110, fn. 8.) Of course, such evidence cannot be considered by this Court on direct appeal. (*People v. Seaton* (2001) 26 Cal.4th 598, 464.)

penalty if the law "required" him to impose it.[26] (7RT 1260-1263, 1265-1268.)

Indeed, even after repeated and lengthy exchanges on this point, D.D. indicated that he could impose death only if all the other jurors agreed with him. (7RT 1268.) Most tellingly, when defense counsel tried to pin down D.D. on this very point, D.D. replied, "I'm trying to figure out. This is a huge question. Can I have a couple days to think about it?" (7RT 1266.) This single point alone is overwhelming evidence that D.D. was "substantially impaired," i.e., thoroughly biased against the death penalty, and unfit to serve as a juror in this capital case.

Second, with respect to question number 209 on the jury questionnaire, D.D. replied "no" when asked whether he could see himself, in the appropriate case, "rejecting life in prison without the possibility of parole and voting for the death penalty." (21CT 5490.) D.D., in the answer to this question, thus plainly stated that he could never see himself voting for the death penalty. D.D.'s inability to follow the law, standing alone, constituted substantial evidence of impairment. (See *People v. Riccardi* (2012) 54 Cal.4th 758, 780 ["Given that question No. 68 was phrased unequivocally, a prospective juror's decision to write "yes" as an answer clearly established that the prospective juror held a bias against the death penalty that "would 'prevent or substantially impair'" the performance of his or her duties as a juror even if the evidence leaned in favor of imposing death.].)

Third, when asked in writing if he could "set aside religious, social or philosophical convictions and decide the penalty based solely upon the aggravating and mitigating factors presented . . . .?," D.D.'s answer was

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[26] D.D. plainly stated, "The only way I could impose the death penalty is if the law compels you to impose the death penalty. (7RT 1265.)

equivocal at best, i.e., "Not sure," and, "I believe I can." (21CT 5491.) With respect to D.D., this equivocating type of answer permeated the entire voir dire proceedings. (See 21CT 5487, 5489-5491; 7RT 1259, 1262, 1265 ["I'm not sure," "It would be very difficult for me," & "I would prefer not to"].) D.D. plainly stated that, when he first walked into the jury room, he would be leaning towards life without the possibility of parole. (7RT 1264.)

Fourth, D.D.'s use of the specific words "cruel and unusual" plainly demonstrated that he believed, as an educated man, that the death penalty constituted cruel and unusual punishment, and therefore should not be imposed.[27] Appellant wholly fails to explain how D.D. was not "substantially impaired" when he (D.D.) believed that the imposition of death penalty would violate one of the core constitutional principles of our democracy.

Fifth, D.D. would have been a disruptive presence in the jury room, as he plainly required the other jurors to convince him of the necessity to impose the death penalty, yet he was determined not to "cave," as he had done during his prior jury service. He stated, "I would have to have the almost everyone [*sic*] on the jury trying to convince me that it would be essential or necessary to impose death. (7RT 1262-1263.)

Sixth, appellant offered two different answers on whether he was a current member of the ACLU, i.e., first stating that he had been a member for four years in the past, but then stating that he was currently a member. (21CT 5456, 5486.) He described the goal of the organization as "civil liberties" and human rights," and indicated that he "strongly" shared the group's view that the death penalty was "cruel and unusual." (*Ibid.*)

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[27] As previously noted, D.D. was highly educated, having graduated from U.C. Berkeley with a degree in biology. (21CT 5452.)

Appellant argues that "D.D.'s use of the words "cruel and unusual" cannot be interpreted to mean "constitutionally cruel and unusual" (see AOB 93-94), but such an argument is plainly specious. Appellant simply ignores the fact that D.D. strongly agreed *with the ACLU's view* that the death penalty was cruel and unusual, which was plainly constitutional in nature.

Seventh, there was ample evidence that D.D. was incurably biased in favor of the defense. He stated that he "would initially be leaning towards the defense. I have developed a mistrust of prosecutors." (21CT 5473.) D.D. admitted that he might be biased for Blacks because of the "disproportionate numbers of Blacks incarcerated or living in poverty." (21CT 5476.) D.D. stated that he "would do everything [he] could to convince the jury that death was not appropriate. (7RT 1263.) Thus, D.D. overtly admitted that he would be an advocate for appellant in the jury room during deliberations, which would obviously be highly improper.

Eighth, D.D. admitted that he "abhored" the death penalty. He was "strongly against it." (21CT 5486.) He expressed the view that it should never be imposed. Its purpose was "revenge" and "political." D.D. repeatedly responded with equivocal answers such as "I'm not sure" when asked whether it would be impossible for him to vote for the death penalty under any circumstances. (21CT 5487, 5489, 5491.) When asked whether there were times when a person deserved the death penalty, D.D. responded, "That's a hard question to answer." (7RT 1265.)

D.D. felt that "the killing of any human being diminishes us all and goes against the laws of nature and man." (21CT 5488.) He was "not sure" whether he could set aside his philosophical convictions and vote for the death penalty. (21CT 5491.) He thought that "death goes against biology" and "only the most barbaric countries on earth still impose" the death

penalty.[28] (21CT 5495.) When asked by the prosecution whether, based on his feelings and convictions, he could ever impose the death penalty, D.D. responded, "I'm not sure. I think I have to sit in that jury room and make that decision at the time of the deliberations." (7RT 1259.) In light of all the above, describing D.D. as "substantially impaired" would be an understatement to say the least.

Finally, in excusing D.D. for cause, the trial court correctly identified two insurmountable problems. First, the court stated that "based on [D.D.'s] answers, at least initially, it certainly appeared that his views would prevent, or substantially impair his performance as a juror. . . ." (7RT 1270.) As the trial court's comment inherently recognized, D.D. answers on the subject were "conflicting and ambiguous" at best. (*Ibid.*)

Second, the trial court wisely noted that if D.D. were on the jury, and it imposed the death penalty, it would not "be worth much" because it would mean only 11 other jurors "voted for death and so did he." (7RT 1270.) The trial court's second point plainly recognized that, with D.D. on the jury, any verdict of death would be worthless and immediately reversed on appeal. This is because D.D. all but plainly stated that he would only impose death if the other jurors forced him to do it. He even admitted that he had previously "caved" under pressure, and had changed his decision as a juror in a prior case to agree with the majority. D.D. opined that he was determined not to let that happen again. (21CT 5454-5455.) Thus, there was ample foundation for the trial court's conclusion that D.D. was substantially impaired. Consequently, the trial court properly excused D.D. for cause.

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[28] D.D. also tried to have himself excused from jury service due to hardship. (6RT 937.) This can also be interpreted as an attempt to avoid being placed into a position where he might have to either "hang" the jury or "cave" to the wishes of others.

Furthermore, if this Court found D.D. not to be "substantially" impaired, then the word "substantial" would cease to have any meaning, and this court would necessarily be establishing a new "totally" impaired standard.[29] Such is not the current state of the law, nor should it be, as a "totally" impaired standard would impose an insurmountable burden on the prosecution. (See *People v. Barnett* (1998) 17 Cal.4th 1044, 1144 ["A prospective juror is properly excluded if he or she is unable to conscientiously consider all of the sentencing alternatives, including the death penalty where appropriate."] quoting *People v. Rodrigues*, *supra*, 8 Cal.4th at p. 1146; *People v. Kaurish* (1990) 52 Cal.3d 648, 698-699 ["if the record of a juror's death qualification is ambiguous, the trial court's determination on substantial evidence of the juror's fitness is binding on appellate courts."].)

As noted above, any ambiguities in the record are resolved in favor of the trial court's assessment, and the reviewing court determines whether the trial court's findings are fairly supported by the record. (*People v. Crittenden*, *supra*, 9 Cal.4th at p. 122; *People v. Howard*, *supra*, 44 Cal.3d at pp. 417-428.) Here, without any doubt, there was a plethora of overt evidence plainly demonstrating that D.D.'s views on the death penalty would substantially impair the performance of his duties. D.D.'s answers during voir dire clearly established his inability to follow the court's instructions on the law concerning sentencing, and the trial court properly dismissed D.D. for cause. Appellant's claim otherwise lacks merit.

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[29] Even a "totally" impaired standard would not be determinative in this case, as D.D.'s responses on his questionnaire and during voir dire left little doubt that he was "totally" impaired.

C. The Trial Court Properly Excused Prospective Juror K.F. For Cause

According to his juror questionnaire, prospective juror K.F. (number 4283) was a 28-year old, married White male with no children. His interests included skiing, billiards and racing cars. K.F. worked as a programmer/analyst for St. Jude Medical Center, and had worked as a mechanical engineer and a teacher in the past. (20CT 5230-5234.) He was born and raised in Illinois, but had lived in Norwalk, California for the past 2 years. K.F. was a college graduate with a degree in mechanical engineering. (20CT 5232-5233, 5236.) He was a Lutheran, and described his wife as Christian. K.F. described his religion as "somewhat important" to him. (20CT 5237-5238.)

K.F. had received a traffic ticket in 1998 which he considered as "harassment" by the police officer. (20CT 5246.) He had also been to court for reckless driving and shoplifting. K.F. was actually convicted of shoplifting when he was 17 years old. (20CT 5248, 5252.) He opined that the criminal justice system was "sometimes lacking in fairness and [an] ability to be timely." K.F. described himself as "leaning to the side of [the] defense since the system is very complex and cumbersome for the defendant." (20CT 5256-5257.)

K.F. indicated that he "would dislike this case due to the charges that were listed." He also said that he "may be biased against people that commit crimes against women." (20CT 5260.) K.F. further stated, and later emphasized, that he might not be an impartial juror because he disliked "hearing about rape and other crimes against women." (20CT 5261, 5265.)

K.F. also admitted that he would have difficulty keeping an open mind until he had heard all the evidence because he tended to "try and solve problems in [his] head as [he received the] information." K.F. felt that if a

defendant did not testify in his own defense, it would impact his determination of the case because he would wonder why the defendant "did not wish to defend himself, possibly [because] he was hiding something." (20CT 5264.) K.F. said that he would feel obliged to reach a verdict merely to be part of the majority, because he would feel "pressure" if his indecision affected other jurors. (20CT 5266.)

In the portion of the questionnaire concerning K.F.'s views on the death penalty, he said that it would be difficult for him to be fair and impartial because he would "feel for the victim in a crime such as this." (20CT 5270.) K.F. answered "yes" to the question asking him if he supported the death penalty, "yet could not personally vote to impose it." He said that he "may not be able to make the final decision for the penalty." (20CT 5271.)

K.F. also answered "yes" to the question asking him whether he held any social, philosophical or religious convictions that would preclude him from imposing the death penalty. He answered that the "taking of another person's life, based on judgment, [was] difficult from [his] religious experiences and social awareness." (20CT 5272.)

K.F. checked the block that stated "cannot set aside beliefs" when asked if he could set aside his convictions and decide the penalty question based solely upon the law. He opined that he would "try to set aside [his] beliefs but [could not] say for certain [he would] be able to." (20CT 5273.) K.F. also indicated that he could not see himself rejecting life in prison without the possibility of parole and voting for the death penalty. (20CT 5274.)

K.F. also again repeated that he was biased against people who commit rape and other crimes against women. (20CT 5279.) Finally, K.F. noted on his questionnaire that, "I do not feel comfortable with the charges and I am not sure I could only consider the evidence presented when

deciding (if needed) between imprisonment and the death penalty. (20CT 5280.)

During voir dire, the following colloquy transpired between the trial court, the parties, and prospective juror number 4283:

> THE COURT: The questioning now is going to be primarily focused on whether you would be able to keep an open mind on the subject of penalty or punishment. There are two phases in a death penalty trial. The first phase would be the guilt phase, and if the jury voted guilty and if the jury found one or more of the special circumstances to be true, then we would go to the second phase.
>
> At the second phase, you would be determining the appropriate punishment. There are two possible penalties, if we get to that phase, and that is the death penalty or life in prison without the possibility of parole.
>
> All right. Do you think that you could keep an open mind and decide between those two penalties?
>
> PROSPECTIVE JUROR NO. 4283: I would try to.
>
> THE COURT: Okay. Is there some hesitancy? Do you feel like you would almost invariably vote one way or the other?
>
> PROSPECTIVE JUROR NO. 4283: Of what I've seen of the case so far, I feel strongly more about the death penalty, but–
>
> THE COURT: By what you've seen of what?
>
> PROSPECTIVE JUROR NO. 4283: Well, just what I've read about it and the way -- also some of the - the questions on that questionnaire. As I went through it, when I started looking at it, I guess I don't really feel like I have an open mind about it. I think I might already have some thoughts already about it.
>
> THE COURT: You mean the questionnaire in this case?
>
> PROSPECTIVE JUROR NO. 4283: Well, yeah. Just the way I started to look at the questionnaire and the things that was presented about the case.

THE COURT: Okay. You're not talking about reading about the case any other place?

PROSPECTIVE JUROR NO. 4283: No, not about that.

THE COURT: Well, no one is going to dispute that the facts in this case are horrific, all right? No one is going to say anything other than that.

But what we need for you to do, see, if we get to the penalty phase, you would have to weigh mitigating factors, that is, factors that are in the defendant's favor, against aggravating factors, that would be factors that are against the defendant, and you could only vote for the death penalty if the aggravating factors substantially outweigh the mitigating factors.

Now, that decision would be based on, amongst other things, on the circumstances of the crime. But we're just, today, you know, we're going to be making sure that -- you haven't firmly fixed in your mind what the penalties would be, right, because you haven't heard, actually, the evidence?

PROSPECTIVE JUROR NO. 4283: Right.

THE COURT: And you'll be able to keep an open mind, and if the aggravating factors don't substantially outweigh the mitigating factors, you would vote for life in prison, right?

PROSPECTIVE JUROR NO. 4283: Yes.

THE COURT: Okay. Questions?

MR. YANES: Good morning, sir.

PROSPECTIVE JUROR NO. 4283: Good morning.

MR. YANES: You know, we're asking you these questions as to not would you enjoy doing this or would it be something pleasant, but could you just, as a man in society, be able to do your duty to your country, basically. And so we need to know if you can do it, all right?

PROSPECTIVE JUROR NO. 4283: (no audible response)

MR. YANES: So if you got into the penalty phase of the case, my client had been convicted, all right?

PROSPECTIVE JUROR NO. 4283: Yes.

MR. YANES: Would you be able to weigh the factors and decide whether the death penalty was appropriate, or life without the possibility of parole was appropriate?

PROSPECTIVE JUROR NO. 4283: I would try to do that.

MR. YANES: Well, not try, would you be able to do it? Could you do it?

PROSPECTIVE JUROR NO. 4283: Well, just looking at like the survey, just some of the beliefs I had before this case, I don't know for sure what I would be able to do in the case.

MR. YANES: Well, we're not asking you what verdict you'd come to or result, what I'm asking you is would you be able to follow the law that the judge gives you about penalty. He's going to tell you what he just told you just now, basically, that you're going to hear evidence in the penalty phase of aggravating factors, which would be some of the horrible things that he did to this woman, things in his prior life that he did, bad things, and then you're going to hear mitigating evidence, good things he's done in his life, maybe issues for sympathy, maybe issues of mental illness or abuse when he was a kid, things to make you not want to give the death penalty.

Okay. And then you have to weigh those. And the way you have to weigh it, it isn't a test of what is equal or what's a little bit more, it's got to be the aggravating, the worse stuff, the bad stuff has to substantially outweigh the mitigating, and then and only then can you vote death, if you want to -- you still don't have to, but you can at that point.

But if the aggravating doesn't substantially outweigh the mitigating, then you must vote for life; that's the law. That's the reason I tell you.

Would you be able to follow that?

PROSPECTIVE JUROR NO. 4283: I would try to -- again, I don't know what I'd -- I think I understand what you're saying, but –

MR. YANES: You wouldn't throw your hands up and say, "I just can't follow the law?"

PROSPECTIVE JUROR NO. 4283: No. No. I would try to follow the law as much as possible.

MR. YANES: Okay. What part of that is bothering you? What is it that's making you say "try" and not "you can." What is it you're concerned about?

PROSPECTIVE JUROR NO. 4283: It's just that I've never been faced with trying to make this decision before, and I've never really thought about where my position would be –

MR. YANES: Uh-huh.

PROSPECTIVE JUROR NO. 4283: -- on the death penalty.

MR. YANES: Okay. In your questionnaire you stated that you understand the death penalty is something California should have.

PROSPECTIVE JUROR NO. 4283: (no audible response.)

MR. YANES: You're not crazy about it, but you understand that it has its purpose?

PROSPECTIVE JUROR NO. 4283: Right.

MR. YANES: Correct. And you indicated also that you could vote for it if you felt it was the appropriate case.

PROSPECTIVE JUROR NO. 4283: Right.

MR. YANES: Okay. Is that what you are telling me today?

PROSPECTIVE JUROR NO. 4283: Yes.

MR. YANES: We're not asking you if you'd do it lightly or if you'd like to do it –

PROSPECTIVE JUROR NO. 4283: No.

MR. YANES: -- Just could you do it. And this is a first time for everybody, you know, for the jurors.

PROSPECTIVE JUROR NO. 4283: Right.

MR. YANES: This is their first time doing this kind of thing, and so no one knows, exactly, what they're going to do or how they're going to react until they get into the actual situation. I guess it's like going into combat, whether you're going to run away scared or fight, until it happens. So it's like that; no one knows for sure.

But we do need to get some assurance from you that you can follow the law and that you'd be impartial, whether or not you like the death penalty or don't like it. Could you follow the law and vote for it, in the appropriate case, and vote for life, in the appropriate case?

PROSPECTIVE JUROR NO. 4283: I understand the law and I understand, I guess, the details and instructions that will be given to me. I guess I don't know. Like you're saying, I don't know what will happen when I actually try to make the decision, whether I'll just look at what is there or my personal beliefs wil –

MR. YANES: What are your personal beliefs that you're concerned about?

PROSPECTIVE JUROR NO. 4283: I guess, like I said, I was brought up in a conservative home, and I went to Lutheran High School for six years, so I'm not -- I don't -- I'm not practicing my religion now, but in the past I've had beliefs, when I was growing up and stuff like that. So it's kind of -- I guess it's kind of uncertain for me. I don't know, exactly, where I stand.

MR. YANES: What is it about your beliefs? What beliefs are there that might cause you problems? What kind of beliefs? Beliefs about what?

PROSPECTIVE JUROR NO. 4283: I'm trying to get to it.

Really, taking someone else's life or making that decision to take another person's life.

MR. YANES: All right. So what we need to know is -- let's assume that you have some religious issues or doctrine which causes you to feel that it's a problem taking someone's life, even in this kind of -- even in a legal way. We need to know if you can set that aside and be willing to consider the death penalty, when you go into the penalty phase, we need to know that you can do that.

PROSPECTIVE JUROR NO. 4283: I would try to consider it. I just don't know, at the end, what factor that would play.

MR. YANES: Sure. So what you're telling us is you think you can do it and you'd give it your best shot, but you don't know, 100 percent sure, if you can do that?

PROSPECTIVE JUROR NO. 4283: Right.

MR. YANES: OKAY. Let me give you a little bit to help you.

Let's suppose that you've heard evidence which was overwelming [*sic*] of guilt. Okay. It's not whether you're going to have any doubt, you're really not going to have a problem, you're going to have an overwelming [*sic*] conviction of physical evidence, confessions, that kind of thing.

PROSPECTIVE JUROR NO. 4283: Uh-huh.

MR. YANES: And you're going to hear horrible stuff, you're going to see horrible photos, things that were done to this woman.

And then you've got to go in there and decide life or death. Okay? Do you think that you'd be able to evaluate those things fairly, both to the prosecution and to the defense, and make a fair decision?

PROSPECTIVE JUROR NO. 4283: Again, I would try to.

MR. YANES: Okay.

PROSPECTIVE JUROR NO. 4283: Again, I don't know what will happen at the end. I mean –

MR. YANES: Right. But you can't tell me for sure?

PROSPECTIVE JUROR NO. 4283: Not for sure, because I don't know. Before this case I had never thought about these issues.

MR. YANES: But you're telling me that you think you can or you'd do your best?

PROSPECTIVE JUROR NO. 4283: I'd do my best.

MR. YANES: And you can follow the law?

PROSPECTIVE JUROR NO. 4283: Right.

MR. YANES: Okay. You say that some of the factors that you would have to know in deciding whether you could vote for death or not, would be the defendant's involvement in the crime and the things that he did, right?

PROSPECTIVE JUROR NO. 4283: Right.

MR. YANES: So if you heard things that were terrible that he did and/or horrible that he did, and you found the aggravating factors and mitigating, that you'd consider that and follow the law?

PROSPECTIVE JUROR NO. 4283: I would consider it. I guess the only concern that I have is just with everything that goes on in our legal system -- I wasn't there, I wasn't the person there. So even, I guess, in the back of my mind, I'd always worry, how do I make sure that I know for sure, you know? I mean it can't be 100 percent, it's always secondhand.

MR. YANES: Okay. Well, I agree with you that in some cases that is the case. All right? This case isn't like that.

PROSPECTIVE JUROR NO. 4283: Okay.

MR. YANES: There is going to be physical evidence, DNA evidence, confessions –

PROSPECTIVE JUROR NO. 4283: Okay.

MR. YANES: -- coming out of the mouth of my client as to what he did, and about his involvement. This is not going to be that kind of case where you go, oh, maybe the witness was lying and maybe really he wasn't there, or that kind of thing. It's not going to be that kind of case.

PROSPECTIVE JUROR NO. 4283: Uh-huh.

MR. YANES: So try to think of it in removing any doubt about the actual guilt, now we're just talking strictly about the penalty. With that removed and just thinking about penalty, would you be able to make a decision considering death or life?

PROSPECTIVE JUROR NO. 4283: Yes. If I was comfortable with that; yes.

(7RT 1308-1318.)

The prosecutor and the court then questioned K.F. about his views:

MS. LOCKE-NOBLE: You indicated that you attended Lutheran High School for six years?

PROSPECTIVE JUROR NO. 4283: Right.

MS. LOCKE-NOBLE: Although you're not practicing at this moment, you still have a lot of those beliefs; is that right?

PROSPECTIVE JUROR NO. 4283: Partially because, I guess, my parents weren't very religious, but they were very conservative. So it goes hand-in-hand, I still have some of the beliefs of -- I guess I'm not as structured as I once was.

MS. LOCKE-NOBLE: Okay. And does the Lutheran faith believe in imposing the death penalty?

They're against it, aren't they?

PROSPECTIVE JUROR NO. 4283: I think so.

MS. LOCKE-NOBLE: You know so?

PROSPECTIVE JUROR NO. 4283: Yes.

MS. LOCKE-NOBLE: Okay. Now, you've indicated several times, both on the questionnaire and here in court, that you don't know whether or not you can set aside your personal beliefs; is that correct?

PROSPECTIVE JUROR NO. 4283: Right.

MS. LOCKE-NOBLE: And part of your personal beliefs include the Lutheran faith; is that correct?

PROSPECTIVE JUROR NO. 4283: Yes.

MS. LOCKE-NOBLE: And their belief is that you cannot impose the death penalty on someone else, that that is God's right; is that correct?

PROSPECTIVE JUROR NO. 4283: Correct.

MS. LOCKE-NOBLE: And you believe that, don't you?

PROSPECTIVE JUROR NO. 4283: Yes. I mean to a certain extent.

MS. LOCKE-NOBLE: And at this point in time, you cannot say for certain that you can set aside those beliefs, while you're in the jury room; is that correct?

PROSPECTIVE JUROR NO. 4283: Yes.

MS. LOCKE-NOBLE: And would it be a fair statement to say that it would be best if you were not a juror on this case?

PROSPECTIVE JUROR NO. 4283: Yes.

(7RT 1318-1319.)

At this point, the prosecutor asked if the court wanted to hear more, but the court then asked K.F. to wait outside. (7RT 1319-1320.) Defense counsel indicated that he would just "submit it" and let the court decide the challenge. The court then excused K.F. for cause, ruling:

THE COURT: Okay. It would appear that the juror's views on capital punishment would prevent or substantially impair the performance of his duties if he was a juror, in accordance with the law. So we'll excuse that juror.

(7RT 1320.)

As the United States Supreme Court stated in *Witt*, a juror's bias need not be "proved with 'unmistakable clarity.'" (*Wainwright v. Witt*, *supra*, 469 U.S. at p. 424.) *Witt* explained the difficulty in assessing juror bias:

> [D]eterminations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism. What common sense should have realized experience has proved: many veniremen simply cannot be asked enough questions to reach the point where their bias has been made "unmistakably clear"; these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings.

(*Id.* at pp. 424-425, footnote omitted.) While the record might lack in clarity, *Witt* found that a trial judge could be "left with the definite impression" about a prospective juror's ability to faithfully apply the law. (*Id.* at pp. 425-426.)

"'The real question is '"'"whether the juror's views about capital punishment would prevent or impair the juror's ability to return a verdict of death in the case before the juror."'"' [Citations.]" (*People v. Heard*, *supra*, 31 Cal.4th at pp. 958-959.) Here, substantial evidence supported the trial court's excusal of K.F. for cause. The record leaves little doubt that K.F. was much more than just "substantially" impaired with respect to his ability to recommend a sentence of death.

Tellingly, defense counsel offered virtually no opposition to K.F.'s removal for cause. Counsel merely stated to the trial court, "I'm just going to submit it and let you decide." (7RT 1320.) Counsel did not object after the trial court dismissed K.F. for cause. Consequently, given appellant's failure to object to or even oppose the prosecutor's challenge for cause as to K.F., this Court "may consider defendant's failure to object to these excusals [] to the extent it supports [a] conclusion that the excusals were

proper." (*People v. Whalen* (2013) 56 Cal.4th 1, 46, fn. 19; see also *People v. McKinnon* (2011) 52 Cal.4th 610, 644, 650-651.)

In any event, overwhelming evidence demonstrated that K.F.'s views on capital punishment substantially impaired his ability to impose a sentence of death. First, despite repeated questioning, K.F. just kept repeating the same mantra (at least six different times) that he "would try to" when asked if he would follow the law and impose a sentence of death (if appropriate based on the evidence). (7RT 1308-1318.) When pressed by defense counsel, K.F. explained, "Well, just looking at like the survey, just some of the beliefs I had before this case, I don't know for sure what I would be able to do in the case." (7RT 1311.)

Second, K.F. repeated on at least four different occasions that he was biased against people who commit crimes against women. (20CT 5260-5261, 5265, 5270, 5279.) Given his admitted bias against appellant, and had he been seated as a juror, any subsequent conviction would have been subject to challenge. Moreover, K.F. stated that if a defendant did not testify in his own defense, it would impact his determination of the case because he would wonder why the defendant "did not wish to defend himself, possibly [because] he was hiding something." (20CT 5264.) This would have violated appellant's Fifth Amendment right to remain silent.

Third, K.F. answered "yes" to the question asking him whether he held any social, philosophical or religious convictions that would preclude him from imposing the death penalty. He answered that the "taking of another person's life, based on judgment, [was] difficult from [his] religious experiences and social awareness." (20CT 5272.) K.F. could not say for certain whether he could set aside his Lutheran beliefs and impose the death penalty on someone else. He believed that the Lutheran faith was opposed to the death penalty, and that the imposition of the death penalty was God's right alone. (7RT 1318-1319.)

Moreover, K.F. checked the block that stated "cannot set aside beliefs" when asked if he could set aside his convictions and decide the penalty question based solely upon the law. He opined that he would "try to set aside [his] beliefs but [could not] say for certain [he would] be able to." (20CT 5273.) K.F. also indicated that he could not see himself rejecting life in prison without the possibility of parole and voting for the death penalty. (20CT 5274.)

Fourth, K.F. stated that although he supported the death penalty, he could not personally vote to impose it. He said that he "may not be able to make the final decision for the penalty." (20CT 5271.) K.F. reiterated yet again that he may not be able to set aside his personal beliefs. (20CT 1318-1319.) K.F. also admitted that he would have difficulty keeping an open mind until he had heard all the evidence because he tended to "try and solve problems in [his] head as [he received the] information." (20CT 5264.) Quite simply, the following colloquy from voir dire is fatal to appellant's argument:

> MS. LOCKE-NOBLE: And at this point in time, you cannot say for certain that you can set aside those beliefs, while you're in the jury room; is that correct?
>
> PROSPECTIVE JUROR NO. 4283: Yes.
>
> MS. LOCKE-NOBLE: And would it be a fair statement to say that it would be best if you were not a juror on this case?
>
> PROSPECTIVE JUROR NO. 4283: Yes.

(7RT 1318-1319.) Given his inability to follow the law, the trial court properly excused K.F. for cause.

Additionally, to the extent K.F. gave conflicting answers, the trial court resolved those differences adversely to appellant by granting the challenge. Given K.F.'s equivocal (and often negative) statements about his views on the death penalty, in combination with the trial court's ability

to observe his demeanor, the trial court's conclusion as to his true state of mind must be upheld since it was supported by substantial evidence. (See *People v. Griffin* (2004) 33 Cal.4th 536, 558-561, disapproved on another ground in *People v. Riccardi, supra*, 54 Cal.4th at p. 824, fn. 32 [although at some point, each prospective juror "may have stated or implied that she would perform her duties as a juror," this did not prevent the trial court from finding, on the entire record, that each juror nevertheless held views that substantially impaired her ability to serve]; *People v. Welch* (1999) 20 Cal.4th 701, 747 [court permissibly excused a juror who said he did not know whether he could ever see himself feeling that death was the appropriate sentence].)

Here, the trial court properly balanced the "competing principles" that the death-qualification voir dire " 'must not be so abstract that it fails to identify those jurors whose death penalty views would prevent or substantially impair the performance of their duties in the case being tried. . . . [and] not be so specific that it requires the prospective jurors to prejudge the penalty issue based on a summary of mitigating and aggravating evidence likely to be presented.' " (*People v. Butler* (2009) 46 Cal.4th 847, 860, quoting *People v. Cash* (2002) 28 Cal.4th 703, 721-722.) The trial court further demonstrated its ability to balance these competing principles by denying the prosecution's "for cause" challenges against prospective juror numbers 6750 and 8100.[30] (7RT 1110, 1347.) Thus, the trial court clearly reflected carefully and deliberately on each of the "for cause"

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[30] Indeed, with respect to prospective juror number 6750, the trial court noted, "I think that her answers were in response to a question that wasn't asked, and that was, "Are you going to impose the death penalty?" I think that's what she was vacillating on. She didn't know if she was, because she hadn't heard the case yet." (7RT 1345.)

challenges, granting some and denying others. (7RT 1089-1100, 1325-1347.)

Therefore, K.F.'s views on the death penalty, coupled with his statements that he would not impose the death penalty due to his Lutheran faith,[31] clearly supported the trial court's conclusion that K.F.'s views towards the death penalty would substantially impair his ability to sit as a juror in this case. (See *People v. Ervin* (2000) 22 Cal.4th 48, 69-71 [exclusion proper for prospective jurors unable to impose the death penalty on the hirer in a murder-for-hire case]; *People v. Pinholster* (1992) 1 Cal.4th 865, 916-918 [exclusion proper for prospective jurors unable to impose the death penalty in felony murder cases], overruled on other grounds by *People v. Williams* (2010) 49 Cal.4th 405, 459; see also *People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1005, overruled on other grounds by *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22 ["A prospective juror who would invariably vote either for or against the death penalty because of one or more circumstances likely to be present in the case being tried, without regard to the strength of aggravating and mitigating circumstances, is therefore subject to challenge for cause, whether or not the circumstance that would be determinative for that juror has been alleged in the charging document."].)

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[31] Contrary to appellant's assertion (which attempts to introduce evidence outside the record), whether the Lutheran faith is actually opposed to the death penalty is not relevant. However, what is relevant is K.F.'s actual belief during voir dire regarding the holding of the Lutheran faith on this subject. (See AOB 97, fn. 7.) Whether K.F. was right or wrong about the dogma of the Lutheran Church is of no import.

D. In Any Event, Any Error Was Harmless

Assuming this Court were to find that either prospective juror had been erroneously excluded, the error was harmless. As the Chief Justice of this Court recently observed, in *Gray v. Mississippi*, *supra*, 481 U.S. at page 666, the United States Supreme Court examined two theories upon which harmless error analysis might be applied to a violation of the review standard created under *Witherspoon-Witt*. (*People v. Riccardi*, *supra*, 54 Cal.4th at pp. 840-846 (conc. opn. of Cantil-Sakauye, C.J.).) However, the majority in *Gray* rejected only one of those theories; that is, it rejected the contention that an erroneous *Witherspoon-Witt* exclusion had no effect on the composition of the jury.

Gray found that the exclusion necessarily had an effect on the jury composition, even if one assumed that the prosecutor in any circumstance would have exercised a peremptory challenge against the death-scrupled prospective juror. Thus, as the Chief Justice concluded in *Riccardi*, "*Gray* stands for the proposition that *Witherspoon-Witt* error is reversible per se because the error affects the composition of the panel '"as a whole"' [citations] by inscrutably altering how the peremptory challenges were exercised [citations]." (*Id.* at p. 842 (conc. opn. of Cantil-Sakauye, C.J.).)

But as the Chief Justice also noted in *Riccardi*, one year after *Gray* the high court in *Ross v. Oklahoma* (1988) 487 U.S. 81 [108 S.Ct. 2273, 101 L.Ed.2d 80], rejected the *Witherspoon-Witt* remedy as well as the rationale developed for it in *Gray*, as applied to a wrongly included pro-death juror. *Riccardi* explained that the Sixth Amendment is not implicated simply by the change in the mix of viewpoints held by jurors (be they death penalty supporters or skeptics) who are ultimately selected. (*People v. Riccardi*, *supra*, at pp. 842-844 (conc. opn. of Cantil-Sakauye, C.J.).)

Notwithstanding the Chief Justice's observations in *Riccardi*, this Court felt "compelled to follow that precedent that is most analogous to the

circumstances presented here[,]" which was *Gray*, as opposed to *Ross*. (*People v. Riccardi*, *supra*, 54 Cal.4th at pp. 845 (conc. opn. of Cantil-Sakauye, C.J.).) Respondent respectfully asks this Court to revisit this conclusion in light of the observation that in *Gray*, the State (as well as the dissent) had argued the error had *no effect* on the case. Here lies "a reasoned basis" (*id.* at p. 844 fn. 2), for the different results in these cases. The "no-effect" rationale for adopting a harmless error rule only goes so far, and allowed the *Gray* Court to reject it so long as there was some effect on the jury composition.

The state's proffered rationale therefore never required the Court to account for the nature of a *Witherspoon-Witt* violation. Here, however, the People now ask the Court to do so. The appropriateness of harmless error analysis, we submit, should take into account the "differing values" particular constitutional rights "represent and protect[.]" (*Chapman v. California* (1967) 386 U.S. 18, 44 [87 S.Ct. 824, 17 L.Ed.2d 705] (conc. opn. of Stewart, J.).)

Witherspoon protects capital defendants against the State's unilateral and unlimited authority to exclude prospective jurors based on their views on the death penalty. Accordingly, "'*Witherspoon* is not a ground for challenging any prospective juror. It is rather a limitation on the State's power to exclude . . . .' [Citation.]" (*Wainwright v. Witt*, *supra*, 469 U.S. at p. 423.) Beyond this protection is the simple misapplication of the *Witherspoon-Witt* standard because it does not grant the prosecution the unilateral and unlimited power to exclude death-scrupled jurors.

As this Court has recognized, no cognizable prejudice results simply from the absence of any viewpoint or the existence of any particular balance of viewpoints among the jurors. (*People v. Riccardi*, *supra*, 54 Cal.4th at pp. 843-844 (conc. opn. of Cantil-Sakauye, C.J.); *Lockhart v. McCree* (1986) 476 U.S. 162, 177-178 [106 S.Ct. 1758, 90 L.Ed.2d 137].)

Thus, exclusion of a juror through misapplication of the *Witherspoon-Witt* standard results in mere "technical error that should be considered harmless[.]" (*Gray v. Mississippi, supra*, 481 U.S. at p. 666.)

II. THE APPLICATION OF THE SUBSTANTIAL IMPAIRMENT STANDARD TO DETERMINE THE DEATH-QUALIFICATION OF PROSPECTIVE JURORS DID NOT VIOLATE APPELLANT'S FIFTH, SIXTH, EIGHTH OR FOURTEENTH AMENDMENT RIGHTS

Appellant argues that the substantial impairment test of *Witt* has proven inconsistent with the rationale of the decision, and fails to result in capital juries that represent the conscience of the community. (AOB 115-133.) Appellant has presented his argument in the wrong forum, and asks this Court to overrule clear precedent from the United States Supreme Court. His argument should be rejected by this Court.

Appellant claims that "[t]he substantial impairment standard, permitting prospective jurors to be excused because of their religious (or moral) opposition to the death penalty, is inconsistent with the Framers' understanding of an impartial jury, which necessarily represented community values and the community conscience."[32] (AOB 132-133.) Appellant ignores the fact that the substantial impairment standard is binding precedent from the United States Supreme Court, and cannot be overruled by this Court. Indeed, this Court has specifically noted, "Although defendant suggests that [*Pulley v. Harris* (1984) 465 U.S. 37, 104 S.Ct. 871, 79 L.Ed.2d 29] should be 'reevaluated,' the high court has

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[32] Appellant uses prospective juror number 0256 as an example, because he was Catholic and indicated that his religious beliefs would not permit him to impose the death penalty. (8RT 1387.) A detailed examination of prospective juror number 0256 is unnecessary, because appellant concedes that the substantial impairment standard applied to him. (AOB 122.)

stated that '[i]f a precedent of this Court has direct application in a case,' the lower court 'should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.' (*Rodriguez de Quijas v. Shearson/American Express, Inc.* (1989) 490 U.S. 477, 484, 109 S.Ct. 1917, 104 L.Ed.2d 526.)" (*People v. McKinzie* (2012) 54 Cal.4th 1302, 1365; see also *People v. Diaz* (2011) 51 Cal.4th 84, 101 ["that reevaluation must be undertaken by the high court itself"].) Appellant is not left without a remedy, however, as he may include the instant claim in any petition for certiorari to the United States Supreme Court. If our High Court is inclined to promulgate a new standard, then it may certainly do so.

Moreover, appellant's argument against the substantial impairment standard defies plain logic, because if the trial court seated a juror who would not impose the death penalty, then there would be little point in even litigating a penalty phase. Trial courts already strictly construe the term "substantial" in substantial impairment, and, as in the instant case, regularly deny challenges for cause. (See, e.g., 7RT 1109-1110, 1347; see also *People v. Whalen, supra*, 56 Cal.4th at p. 26.) Courts that too liberally construe the term find themselves reversed on appeal. (See, e.g., *People v. Pearson, supra*, 53 Cal.4th at pp. 327-333; see also *People v. Riccardi, supra*, 54 Cal.4th at p. 783.) Thus appellant's Fifth, Sixth, Eighth and Fourteenth Amendment rights are protected, because the "substantial impairment" standard ensures a fair and impartial jury. Appellant's claim otherwise defies logic and should be rejected.

III. THE TRIAL COURT PROPERLY DENIED APPELLANT'S *WHEELER/BATSON* MOTIONS

Appellant claims that the trial court violated his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments of the federal Constitution, as well as the representative cross-sample guarantee of the California

Constitution, by denying his *Wheeler/Batson*[33] motion. Specifically, appellant argues that the prosecutor's peremptory challenges as to prospective jurors F.G. (number 2041), D.B. (number 3747), and M.H. (number 4826), two Black males and one Black female respectively, were racially discriminatory.[34] He also argues that the trial court failed to undertake a sincere and reasonable evaluation of the prosecutor's explanations. (AOB 134-177.) Respondent disagrees.

A. Relevant Proceedings

During the selection of the primary and alternate panels, the prosecutor made nine peremptory challenges, three of which removed Black prospective jurors.[35] The prosecutor made five peremptory

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[33] *Batson v. Kentucky* (1986) 476 U.S. 79 [106 S.Ct. 1712, 90 L.Ed.2d 69]; *People v. Wheeler* (1978) 22 Cal.3d 258, overruled in part by *Johnson v. California* (2005) 545 U.S. 162 [125 S.Ct. 2410, 162 L.Ed.2d 129].

[34] As will be explained in greater detail below, this Court need only consider whether *Wheeler/Batson* error occurred as to F.G., because D.B. and M.H. could only have been seated as the third and fourth alternate jurors. Since only the first alternate juror was seated in the instant case, appellant could not have been prejudiced by any *Wheeler/Batson* error as to D.B. or M.H. (*People v. Mills* (2010) 48 Cal.4th 158, 182 ["Although it is therefore unnecessary to consider whether any *Wheeler/Batson* error occurred as to this [alternate] juror, as any error in this regard would necessarily be harmless . . . the prosecutor's reasons for challenging her, if found unsupported by the record, can - when coupled with the [other] challenges . . . be considered part of an overall and deliberate plan to remove all African-Americans from the jury in violation of his constitutional rights"]. Therefore, since the prosecutor's reasons for challenging D.B. and M.H. potentially can "be considered part of an overall and deliberate plan to remove all African-Americans from the jury," respondent will also substantiate the validity of the prosecutor's race-neutral reasons for removing D.B. and M.H.

[35] The final 12 jurors seated on the primary panel consisted of the following: Seat 1) Juror number 1938, a White male (see 3CT 708); Seat 2) Juror number 5904, a White male (see 3CT 763); Seat 3) Juror number (continued...)

challenges during the voir dire of the primary panel, and used all four of her available peremptory challenges during the voir dire of the alternate panel, which consisted of four alternates.[36] (9RT 1863-1876.) The prosecutor excused one Black male during the selection of the primary panel (prospective juror number 2041), and one Black male followed by a Black female during the selection of the alternate panel (prospective juror numbers 3747 and 4826). (9RT 1856, 1870, 1876; 14RT 3182-3184.)

(...continued)
8868, a White female (see 3CT 818); Seat 4) Juror number 4635, a White male (see 4CT 871); Seat 5) Juror number 8460, a Pacific Islander female (see 4CT 926); Seat 6) Juror number 7421, a Japanese female (see 4CT 981); Seat 7) Juror number 2052, a White female (see 4CT 1036); Seat 8) Juror number 9710, a Hispanic male (see 4CT 1089); Seat 9) Juror number 3164, a White male (see 5CT 1142); Seat 10) Juror number 7007, a White male (see 5CT 1195); Seat 11) Juror number 0057, a White female (see 5CT 1250); and Seat 12) Juror number 3388, a White male (see 5CT 1303). The final jury was thus composed of seven males and five females, of which nine were White, one was a Pacific Islander, one was Japanese, and one was Hispanic. The first alternate, juror number 2723, replaced juror number 4635 for the penalty phase, but both 2723 and 4635 were White males, so the racial composition of the jury did not change. (See 12RT 2535.) This diversity of the jury flatly refutes appellant's claim that his fate was decided by an "all White" jury. (See AOB 134.)

[36] The prosecutor made her five peremptory challenges during the selection of the primary panel in the following order: 1) Prospective juror number 6750, a White female (see 11CT 2789; 9RT 1855); 2) Prospective juror number 6242, a White female (see 7CT 1886; 9RT 1856); 3) Prospective juror number 2041, a Black male (see 11CT 2897; 9RT 1856); 4) Prospective juror number 8967, a White female (see 11CT 2842; 9RT 1858); and 5) Prospective juror number 9976, a Native-American/Mexican American female (see 10CT 2736; 9RT 1858). The prosecutor made her four peremptory challenges during the selection of the alternate panel in the following order: 1) Prospective juror number 8100, a White female (see 8CT 2204; 9RT 1863); 2) Prospective juror number 7465, a White female (see 6CT 1568; 6RT 1049; 9RT 1864); 3) Prospective juror number 3747, a Black male (see 12CT 3056; 9RT 1870; 4) Prospective juror number 4826, a Black female (see 8CT 2098; 9RT 1876).

After the prosecutor's fourth and final peremptory excusal during the selection of the alternate panel (against Black female prospective juror number 4826), defense counsel made a *Wheeler/Batson* motion.[37] (2CT 499; 9RT 1879-1885.) A detailed analysis of each juror's background and voir dire questioning is required prior to addressing the merits of the instant claim.

1. F.G. (Prospective Juror Number 2041)

According to his juror questionnaire, F.G. was a 68-year old Black male who worked as a unit supervisor for Hertz Corporation. He supervised five senior claim examiners and one claim assistant. F.G. was born in Oakland, but was raised in Oakland, Berkeley, San Francisco and Los Angeles. At the time of trial, he had been living in South Central Los Angeles for 22 months, but he had also lived in Long Beach for 13 years. (11CT 2897, 2899, 2901.)

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[37] Appellant mistakenly contends that "the prosecutor effectively used 60 percent of her peremptory challenges to remove every [B]lack person from sitting as one of the 12 jurors." (AOB 146.) Actually, the prosecutor exercised only one of five peremptory challenges, or 20 percent, against Blacks during the selection of the primary panel. (9RT 1881.) The prosecutor used two of her four peremptory challenges, or 50 percent, against Blacks during the selection of the alternate panel. (9RT 1882-1884.) Appellant also mistakenly contends that the trial court somehow applied *Wheeler/Batson* incorrectly because the challenge was made during the selection of the alternate jurors. (See AOB 134, 138-139.) The record, however, plainly demonstrates that the trial court merely made an off-hand comment musing whether *Wheeler/Batson* applied to the selection of alternate jurors, but in fact used the correct standard in rendering its decision denying appellant's motion. (9RT 1885.) In fact, the trial court did not seem to be aware that it "was unnecessary to consider whether any *Wheeler/Batson* error occurred" as to D.B. and M.H., hence if there was error, it was undoubtedly in appellant's favor. (See *People v. Mills*, *supra*, 48 Cal.4th at p. 182.)

F.G. had served as an enlisted soldier in the United States Air Force for 10 years, from 1952 to 1962. (11CT 2900.) He was prepared to serve as a juror if selected (11CT 2905), and believed that it was his duty as a citizen to do so. (11CT 2906). F.G. believed that prosecutors were "not always truthful and tend[ed] to exaggerate." (11CT 2906.) F.G. believed the same of defense counsel, and based his opinion on newspaper articles, radio broadcasts, and television media that he had read, heard or seen. (11CT 2906.) He also read the Bible in his spare time. (11CT 2910.) F.G. indicated that he had seen "a lot of investigative procedures" by watching Court TV." (11CT 2913.)

As part of his regular job duties, F.G. spoke with lawyers on a daily basis. He knew about 50 to 60 "civil and criminal defense attorneys." F.G. had appeared before "many judges" in civil matters, but knew no judges personally. (11CT 2914.) He had once been falsely accused of stealing a rental car due to a computer error by the rental agency. (11CT 2920.)

F.G. favored hiring more law enforcement personnel, and did not "believe in too many mitigating factors" because "people have choices." (11CT 2922.) He believed that the three most important problems with our criminal justice system were "misleading evidence, wrongful accusations, [and the] appeal process." (11CT 2923.) F.G. had "experienced racial prejudice while in the Air Force stationed in San Antonio, Texas in 1952." (11CT 2926.)

F.G. believed that Black Americans were "rarely" treated fairly in our country, and when asked to explain stated, "I will not explain." He stated a reluctance to sit on the jury "due to the nature of the alleged crimes." He found it "difficult to understand the killing of another human being." (11CT 2927.) The charges of murder and rape caused him to wonder whether he could be impartial. (11CT 2928.)

F.G. believed that "certain crimes deserve [the] death penalty." (11CT 2938.) He listed "multiple murder" and "kidnaping with great bodily harm" as crimes deserving of the death penalty. (11CT 2938.) F.G. "disagree[d] somewhat" with the statement that "[a]nyone who intentionally kills another person without legal justification, and not in self-defense, should receive the death penalty." (11CT 2939.)

F.G. believed that life without parole was a worse punishment for a defendant than death (11CT 2939), but believed death was the more severe punishment. (11CT 2944). He considered heinous crimes and torture as circumstances justifying the rejection of a sentence of life without the possibility of parole. (11CT 2941.)

During *Hovey* voir dire, the prosecutor asked F.G. to explain why he thought life without the possibility of parole was worse than death for a defendant. (7RT 1294.) F.G. explained that with respect to a life without the possibility of parole sentence, the defendant would have to think about the crime he had committed, and he would be locked up for life "with no possibility of getting out, it could have a trying effect on a person's mind." (7RT 1294.) He told the prosecutor that he could weigh and determine whether aggravating factors outweighed mitigating ones. (7RT 1295.)

The prosecutor asked F.G. why he had written in his questionnaire that he did not want to serve on the jury. F.G. explained, "Other than it's a big decision, is probably maybe the length of the trial. But I guess I can live with the length of the trial, as long as it's not more than 30 days." The prosecutor subsequently assured F.G. that the trial would not be more than 30 days. (7RT 1295-1296.) The court then confirmed the trial schedule, i.e., that it would be November 12 through November 22. F.G. replied that he could arrange his life to accommodate that trial schedule. (7RT 1296.)

F.G. also informed the court about pending litigation involving his employer, and the fact he was on the witness list, expecting to testify on

November 15, or November 18, in Santa Monica. He indicated that his testimony was "critical," because he signed all of the discovery and verification responses. (7RT 1296.) The court commented, "Well, fortunately, I'll have a great deal of influence with that Santa Monica court." (7RT 1297.) F.G. responded, "Okay," and the court told F.G. to remind the court if F.G. was selected to serve as a juror. (7RT 1297.)

The parties passed for cause. (7RT 1294, 1297.)

2. D.B. (Prospective Juror Number 3747)

According to his juror questionnaire, D.B. was a 33-year old Black, male manager-engineer for SBC Pacific Bell. He was born in Lynwood, California, and had been raised in Compton and Cerritos. D.B. lived in Bellflower with his six-year old daughter. (12CT 3056-3057, 3062.) He was a graduate of the Southwestern University School of Law, and was a member of the State Bar of California, as well as the Los Angeles Bar Association. D.B. had previously been employed as a clerk in a prosecutor's office, and had been a member of the Black Law Student's Association. (12CT 3062, 3066, 3071.)

D.B. enjoyed reading, and had recently read "Invisible Man," a book about the Black experience during the first half of the 20th Century. (12CT 3068.) As part of his employment, he had been on a ride-along in a police car. D.B. viewed the ride-along as "a learning tool, designed to show officer experiences." (12CT 3072.) He had a friend who worked at the LBPD, and his other friend (his 33-year-old male roommate) worked for the Immigration and Naturalization Service. (12CT 3057, 3062.)

D.B. had two personal experiences with law enforcement. One was in 1990, and he described the encounter as the "police roughed me up for no reason." He called the police department about the incident, "but was unable to get [the] badge number thus no action [was] taken." (12CT 3072.) More recently, on December 31, 1999, less than two years prior to

appellant's trial, D.B. was arrested for driving under the influence. He pled guilty in June, 2000. (12CT 3078.) D.B. believed that the outcome was "fair but extremely putative due to excessive fines." (12CT 3079.)

D.B. indicated that he had some knowledge of police procedures and methods from watching television, and from speaking with other attorneys. (12CT 3072.) He stated that he had several friends who had died as the result of running from the police or from gang activity. (12CT 3080.) When asked about the most important problems with our criminal justice system, D.B. listed "corrupt lawyers and police" as one of the problems. He also thought that "money buys justice." (12CT 3082.) D.B. further opined that the police did not arrest the suspect in the "Baretta" case due to his star status. (12CT 3083.) D.B. questioned whether the death penalty was fair, because "so many are later deemed innocent." (12CT 3096.)

During *Hovey* voir dire, the prosecutor asked D.B. several questions about his 1999 conviction for driving under the influence, for which he was still on probation at the time of appellant's trial. (8RT 1565.) The following colloquy transpired:

> MS. LOCKE-NOBLE: I believe you indicated that you had a driving under the influence.
>
> PROSPECTIVE JUROR NO. 3747: Yes, '99.
>
> MS. LOCKE-NOBLE: Are you still on probation for that?
>
> PROSPECTIVE JUROR NO. 3747: The probationary
>
> period is what, three years. That was a little less than three years, yes.
>
> MS. LOCKE-NOBLE: So you are still on probation?
>
> PROSPECTIVE JUROR NO. 3747: Yeah.
>
> MS. LOCKE-NOBLE: How is that going to affect you in determining, you had some penalties and punishments imposed upon you. How is that going to affect you?

PROSPECTIVE JUROR NO. 3747: Not at all.

(8RT 1565.)

The prosecutor also asked four questions concerning D.B.'s legal education and/or experience.

MS. LOCKE-NOBLE: And I'm not sure, in reading your questionnaire, did you finish law school? Are you in law school.

PROSPECTIVE JUROR NO. 3747: Finished law school, passed the bar.

MS. LOCKE-NOBLE: Are you practicing as a lawyer?

PROSPECTIVE JUROR NO. 3747: I'm inactive right now. I work for a corporation.

MS. LOCKE-NOBLE: Not as a lawyer?

PROSPECTIVE JUROR NO. 3747: I'm not litigating, no.

MS. LOCKE-NOBLE: And are you seeking employment with a prosecutorial agency?

PROSPECTIVE JUROR NO. 3747: Currently, no.

(8RT 1565-1566.)

The prosecutor then questioned D.B. regarding his views about sentencing as expressed in his jury questionnaire, including his written answers reflecting concerns about indigent or poor defendants on death row who later were exonerated. The following exchange took place:

MS. LOCKE-NOBLE: You indicated several concerns in your questionnaire about people who have little money and later are found innocent on death row?

PROSPECTIVE JUROR NO. 3747: Correct.

MS. LOCKE-NOBLE: Would that affect you personally, in making your decision in this case?

PROSPECTIVE JUROR NO. 3747: Not at all, just answering the question.

MS. LOCKE-NOBLE: Okay. I know there were a lot of questions. Now, as the court has indicated during, what we are talking about right now is the penalty phase. We are assuming that the defendant has been found been guilty and the special circumstances, one or more have been found true. Then we are going to present additional evidence, aggravating and mitigating factors. It is a very subjective standard. For you in order for you to impose the death penalty, the aggravating must outweigh the mitigating. You can still impose life without the possibility of parole, you understand all of that?

PROSPECTIVE JUROR NO. 3747: Yes, I understand.

MS. LOCKE-NOBLE: And it's not a counting on one side or the other. You do you understand that you don't count up the mitigating and count the aggravating and arrive at verdict. Each juror, including yourself, will have to assign a weight to each one of the factors. You may decide that this particular factors [*sic*] gets no weight, and another juror may decide that factor has a lot of weight. You don't have to agree how much weight to give to each factor nor do you have to agree this is a mitigating one, and this is aggravating. You may say this is aggravating and one may say it is mitigating. You have taken several criminal procedures classes and criminal law?

PROSPECTIVE JUROR NO. 3747: Yes.

MS. LOCKE-NOBLE: In order for you to sit and be fair and impartial as a juror, you have to set aside all that training.

PROSPECTIVE JUROR NO. 3747: No problem.

MS. LOCKE-NOBLE: And all the -- I don't know if you did any litigation while you worked for the Long Beach City Prosecutor's Office, and all the law and things you know as evidence, that's up to the judge, he's going to make those decisions.

PROSPECTIVE JUROR NO. 3747: I understand.

MS. LOCKE-NOBLE: And won't be able to tell them any of the knowledge that you have.

PROSPECTIVE JUROR NO. 3747: I promise not to do that.

MS. LOCKE-NOBLE: Okay. On Question No. 219, I'm sure you remember that one.

PROSPECTIVE JUROR NO. 3747: Oh, yeah.

MS. LOCKE-NOBLE: I'll read it to you. "Do you feel that someone convicted of murder during the commission of a robbery, torture or sexual assault during a robbery should be sent to death without the consideration of background information?" And then it says always, probably, possible, possibly, never or unsure and you checked, "never" and you explained.

PROSPECTIVE JUROR NO. 3747: Excuse me. I misread the answers. The answers weren't clear. I thought it said never unsure. I didn't see a box, "possibly."

MS. LOCKE-NOBLE: You are correct.

PROSPECTIVE JUROR NO. 3747: I know.

MS. LOCKE-NOBLE: There is a box for possible, but there is not a box for unsure.

PROSPECTIVE JUROR NO. 3747: Then possibly.

MS. LOCKE-NOBLE: And then it's really the explanation that I have question about.

PROSPECTIVE JUROR NO. 3747: Okay.

MS. LOCKE-NOBLE: You indicate mental defects may alter intent, thus making death unwarranted whether life without the possibility of parole would suffice.

PROSPECTIVE JUROR NO. 3747: Correct.

MS. LOCKE-NOBLE: What did you mean by that?

PROSPECTIVE JUROR NO. 3747: Meaning that I would have to look at the background circumstances regarding the defendant. If there was some mental defect, then life without the possibility of parole would be the most logical option.

MS. LOCKE-NOBLE: What do you consider a mental defect?

PROSPECTIVE JUROR NO. 3747: How do I define it?

MS. LOCKE-NOBLE: Yes.

PROSPECTIVE JUROR NO. 3747: I would have the [*sic*] hear the circumstances of the situation and weigh it from then with the experts and whatnot. I would define it as anything that would negate intent.

MS. LOCKE-NOBLE: Okay. Now, taking that into consideration, what you just said, that would go for the guilt phase. You would have to determine intent as the court instruction you [*sic*] for those crimes?

PROSPECTIVE JUROR NO. 3747: Right.

MS. LOCKE-NOBLE: But in determining penalty there is no intent issue.

PROSPECTIVE JUROR NO. 3747: I understand that.

MS. LOCKE-NOBLE: Okay.

PROSPECTIVE JUROR NO. 3747: Uh-huh.

MS. LOCKE-NOBLE: So we have -- the jury has already decided that he is guilty. We don't have the intent issue. Do you have a different definition for mental defect with regards to penalty issues?

PROSPECTIVE JUROR NO. 3747: No.

(8RT 1566-1569.) The parties passed for cause. (8RT 1564, 1570.)

3. M.H. (Prospective Juror Number 4826)

M.H. was a 40-year old Black female who was born and raised in Long Beach. She worked as an audit clerk in Compton for Ralphs Grocery Company, and had served for three years as an enlisted soldier in the U.S. Army in the early 1980's. (8CT 2098, 2100-2102.) A friend of hers had worked as a jailer for the Los Angeles Police Department. (8CT 2104.)

M.H. considered herself a religious person and described her Christian religion as "very important" to her. (8CT 2105-2106.) She admitted that

she found it "difficult" to judge another's guilt or innocence. M.H. explained, "given all the facts I will do my best as a jurist." (8CT 2106.) When asked whether she was a leader or a follower, M.H. replied, "I have a mind of my own I do what's best for me." (8CT 2109.) She listed "C.S.I. as one of her favorite television shows, and she also wrote, "I watch C.S.I. all the time." (8CT 2112, 2125.)

M.H. indicated that she had previously been to court for a worker's compensation settlement. (8CT 2116.) M.H. had a sister with a persistent alcohol problem. (8CT 2126.) She indicated that, when she was in the U.S. Army, she "had a First Sergeant who didn't like Blacks." (8CT 2127.) M.H. believed that the death penalty was used "randomly," and thought that a sentence of life without the possibility of parole was worse than a sentence of death. (8CT 2138, 2140.)

During *Hovey* voir dire, the prosecutor asked M.H. about her answer to question 186, where she wrote that she had "no opinion" regarding whether California should have the death penalty. (11CT 2139.) M.H. explained, "Depending on the crime, then, yes, you should. If it's a sufficient enough crime for it, yes." (7RT 1219.)

The prosecutor then asked M.H. about her stated difficulty in judging another person. MH agreed this was "based on religious or philosophical or moral reasons." (7RT 1220.) Finally, the following colloquy transpired between the prosecutor and M.H.:

> MS. LOCKE-NOBLE: I believe you indicated on your questionnaire that you want to be a jailer.
>
> PROSPECTIVE JUROR NO. 4826: No. I said at one time I put in for it. I changed my mind.
>
> MS. LOCKE-NOBLE: What caused you change your mind.

PROSPECTIVE JUROR NO. 4826: It's not something that I would like to do.

MS. LOCKE-NOBLE: What was it that caused you to change your mind.

PROSPECTIVE JUROR NO. 4826: It seemed dark.

(9RT 1865-1866) The parties passed for cause. (7RT 1207, 1221.)

4. The *Wheeler/Batson* Motion

Appellant only made one *Wheeler/Batson* motion, which he raised at the very close of the alternate panel voir dire (following the excusal of prospective juror number 4826). At the time of the motion, the primary panel had already been accepted by both parties, and both parties had already exhausted all four peremptory challenges with respect to the alternate panel. Appellant's defense counsel argued that the prosecutor improperly used peremptory challenges on the basis of race as to prospective juror numbers 2041, 3747 and 4826. (9RT 1879-1880.)

As previously noted, prospective juror number 2041 was excused by the prosecutor during the selection of the primary panel. (9RT 1856.) Prospective juror numbers 3747 and 4826 were excused by the prosecutor during the selection of the alternate panel. (9RT 1870.) However, on at least two occasions, the prosecutor accepted the alternate panel with prospective juror number 4826 remaining on the panel. (9RT 1869-1870, 1880.)

Had they not been excused, prospective juror numbers 3747 and 4826 would have been the third and fourth alternates, respectively.[38] (9RT 1869.) No alternates were seated during the guilt phase, and only one

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[38] At one point, defense counsel incorrectly claimed that prospective juror number 4826 was the second alternate. (9RT 1880.) This was observed to be incorrect by the trial court. (9RT 1885.)

alternate was seated during the penalty phase. (12RT 2535.) The excusal of prospective juror numbers 3747 and 4826 did not have had any impact on the proceedings or on the composition of the jury. The trial court specifically noted that it seated alternates in the order of selection, not randomly. (9RT 1868, 1881.)

The prosecutor noted that a prima facie case had not been established, and also volunteered race-neutral explanations for the three excusals. The trial court subsequently noted that the defense had not established a prima facie case, and, even assuming that it had, that it found the prosecutor's proffered explanations to be race-neutral. (9RT 1881-1884.) The explanations provided by the prosecutor for removing each of the three prospective jurors were as follows:

a. F.G. (Prospective Juror Number 2041)

The prosecutor excused F.G. during the selection of the primary panel, and defense counsel did not object or make a *Wheeler/Batson* motion. However, after the primary panel had been seated, and at the close of the alternate voir dire, defense counsel cited the excusal of F.G. as evidence supporting his *Wheeler/Batson* motion. He argued that F.G. was qualified to sit as a juror, that "[h]e appeared to be just a middle-of-the-road guy," and that his race was the only basis for the prosecutor's exercise of her peremptory challenge. (9RT 1880.)

The prosecutor subsequently provided numerous race-neutral reasons for her challenge of prospective juror number 2041 as follows:

> MS. LOCKE-NOBLE: Okay. On juror G-2041, he indicated on question no. 42, "police are not always truthful and tend to exaggerate."[39] He speaks to attorneys daily, and knows

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[39] Actually, the prosecutor was mistaken. Prospective juror number 2041 stated that "prosecutors" are not always truthful and tend to exaggerate, rather than "police." (11CT 2906.)

50 to 60 civil or criminal lawyers. He did not want to sit on this case. He was arrested in 1992 by the Los Angeles Sheriff's department.

And I felt that all of those things, in combination, in addition to the fact that when I was questioning him in *Hovey*, he refused to smile at me, although he smiled at the defense, all of that, to me, indicated that he would not be a good prosecutorial juror.

He also indicated that LWOP was worse for a defendant, so that's why I kicked him.

(9RT 1881-1882.)

b. D.B. (Prospective Juror Number 3747)

The prosecutor used her third alternate peremptory challenge (her third of four available peremptory challenges during the selection of the alternate panel) to excuse D.B., and defense counsel did not object under *Wheeler*. However, as previously noted, at the close of the alternate panel voir dire, defense counsel cited the excusal of D.B. as evidence supporting his *Wheeler/Batson* motion. He argued that D.B., "the attorney, he worked for a prosecutorial agency, as an attorney, so I don't understand that either." (9RT 1880.)

The prosecutor then provided a plethora of race-neutral reasons for her challenge of prospective juror number 3747 as follows:

MS. LOCKE-NOBLE: He is currently on probation for driving under the influence. He was also roughed up by the police, for no reason at all, according to his questionnaire. And I think -- I'm not sure if that's what I was looking for, I don't have it listed here, but I think he was also arrested for a 314.

But the fact that he is currently on probation, I think it's highly unusual that a prosecutor would keep somebody that's currently on probation for a criminal offense on a jury, let alone a death case.

. . . .

> No, he was not arrested for a 314, he was -- he was just on probation for the DUI and the police roughed him up for no reason. He also feels that mental defects may alter intent, thus making death unwarranted and LWOP would suffice. That's question 219.
>
> He also had great concerns about whether or not it was fair to make those with little money, while they were on death row, and later found not guilty -- I think we talked about that with him during the *Hovey* selection. Those are the reasons why I kicked him.
>
> Also, he's an attorney, and I don't normally keep attorneys on my panel. I think they have too many problems in the jury.

(9RT 1882-1883)

c. M.H. (Prospective Juror Number 4826)

The prosecutor used her fourth alternate peremptory challenge (her fourth of four available peremptory challenges during the selection of the alternate panel) to excuse M.H., and defense counsel immediately objected pursuant to *Wheeler*. Defense counsel cited the excusal of M.H. as evidence supporting his *Wheeler/Batson* motion. He argued that there was no plausible reason for removing her from the alternate panel. (9RT 18.)

The prosecutor then provided numerous race-neutral reasons for her challenge of prospective juror number 4826 as follows:

MS. LOCKE-NOBLE: I do know that one of the -- off the top of my head, without looking at the notes, I recall this particular juror watches CSI, crime scene investigation, all the time; she underlined that on her jury questionnaire. This case, as we have indicated to the court, does involve DNA, a substantial amount of DNA.

Also, some of the questions that I asked her just a few minutes ago concerning being a jailer, she indicated that it was dark and she didn't want to be involved with these type of people. I feel that she has some special knowledge with regards to what it would be like to be in jail, and that may

play a part in her decision making process. I did not want someone in that -
- with that frame of mind, i.e. that it's dark to be in jail, to be on this
particular panel.

There's only two possibilities here, and one is going to be LWOP, and one is going to be death. And if we get to the penalty phase -- and that's what I'm concerned about, mostly, with that particular juror, but let me find the rest of my notes.

She indicated that she finds it difficult to judge another. And I believe she -- okay. That she did not want to be on this panel, it would be extremely hard for her to put someone to death, and it is a sad case, on question no. 231.

(8RT 1883-1884.)

d. The Trial Court's Ruling

The trial court found that the defense had failed to make a prima facie showing of racial discrimination, but it noted that "even if the court had reached that point, the prosecution has explained race neutral reasons for excusing the jurors."[40] (9RT 1884.)

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[40] This Court has repeatedly held that, even where a trial court finds no prima facie case of racial discrimination in the prosecutor's use of a peremptory challenge, if the prosecutor states his or her reason for the peremptory challenge, and the trial court rules on the ultimate question of intentional discrimination, the issue of whether the defendant made a prima facie showing is moot. (See, e.g., *People v. McKinzie*, *supra*, 54 Cal.4th at p. 1320; *People v. Elliott* (2012) 53 Cal.4th 535, 560; *People v. Mills*, *supra*, 48 Cal.4th at p. 174; *People v. Lenix* (2008) 44 Cal.4th 602, 613, fn. 8.) Such a case is deemed a "first stage/third stage *Batson* hybrid," and it is appropriate to proceed directly to the third stage of the *Batson*/*Wheeler* analysis, determining whether substantial evidence supports the trial court's finding that the prosecutor did not engage in purposeful discrimination. (*People v. Mills*, *supra*, 48 Cal.4th at pp. 174-175; *People v. Lenix*, *supra*, 44 Cal.4th at p. 613, fn. 8.) A trial court's finding of no purposeful discrimination, which may be express or implied, is entitled to great
(continued...)

The trial court finally noted:

> And, naturally, the explanation doesn't have to be one that the court would do, if the court was still a lawyer. But the only one that was kind of out of the ordinary for the court, was as to the alternate, and I'm not even sure if there has ever been a case that addresses how *Wheeler* would apply to alternates. It's unlikely that we'll use any of the alternates in this case, and even more unlikely that we'll get to alternate no. 3.
>
> But, nonetheless, just because of the fact when I was a lawyer, just because I might not have done that, doesn't mean that the reason is not sufficient pursuant to *Wheeler*.
>
> So the *Wheeler* motion is denied.

(9RT 1884-1885.)

B. General Principles

The use of peremptory challenges to remove prospective jurors solely on the basis of their membership in a racial or other cognizable group is prohibited by the state and federal Constitutions. (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1104; see *Batson v. Kentucky*, *supra*, 476 U.S. at pp. 84-89; *People v. Wheeler*, *supra*, 22 Cal.3d at pp. 276-277.) Under *Batson*, the following three-step procedure governs review of a prosecutor's use of peremptories:

> First, the defendant must make out a prima facie case "by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose." [Citations.] Second, once the defendant has made out a prima facie case, the "burden shifts to the State to explain adequately the racial exclusion" by offering permissible race-neutral justifications for the strikes.

(...continued)
deference on appeal. (See *People v. Riccardi*, *supra*, 54 Cal.4th at pp. 786-787; *People v. Thomas* (2011) 51 Cal.4th 449, 473-474.) Here, however, the trial court expressly based its ruling on the absence of a prima facie case, and merely made an off-hand comment that the prosecutor's reasons were also race-neutral. (9RT 1884-1885.)

> [Citations.] Third, "if a race-neutral explanation is tendered, the trial court must then decide . . . whether the opponent of the strike has proved purposeful racial discrimination." [Citation.]

(*Johnson v. California*, *supra*, 545 U.S. at p. 168, internal brackets and fn. omitted, ellipsis original; *People v. Zambrano*, *supra*, 41 Cal.4th at p 1104.)

Under *Johnson*, a defendant establishes a prima facie case "by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred." (*Johnson v. California*, supra, 545 U.S. at p. 170, 125 S.Ct. 2410; see also *People v. Taylor* (2010) 48 Cal.4th 574, 614.) "[T]he ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike. [Citation.]" (*Purkett v. Elem* (1995) 514 U.S. 765, 768 [115 S.Ct. 1769, 131 L.Ed.2d 834]; see *People v. Stevens* (2007) 41 Cal.4th 182, 192.) It is presumed that a prosecutor who uses a peremptory challenge does so for a purpose other than to discriminate. (*People v. Griffin*, *supra*, 33 Cal.4th at p. 554; *People v. Wheeler*, *supra*, 22 Cal.3d at p. 278.)

C. Appellant Failed to Show A Prima Facie Case Of Discrimination As To F.G., D.B., And M.H.

A defendant establishes a prima facie case of discrimination by making a showing that "'the totality of the relevant facts gives rise to an inference of discriminatory purpose.' [Citation.]" (*Johnson v. California*, *supra*, 545 U.S. at p. 168; *People v. Howard* (2008) 42 Cal.4th 1000, 1016.) If a trial court denies a *Wheeler/Batson* motion without finding a prima facie case of discrimination, this Court reviews the record of voir dire for evidence to support the trial court's ruling, and will affirm that ruling where the record suggests non-discriminatory grounds which the prosecutor might reasonably have relied upon in challenging the stricken jurors. (*People v. Hoyos* (2007) 41 Cal.4th 872, 900.) While the reviewing court considers "the entire record before the trial court" in determining

whether a prima facie case was established, other types of relevant evidence include the following:

> "'The party may show that his opponent has struck most or all of the members of the identified group from the venire, or has used a disproportionate number of his peremptories against the group. He may also demonstrate that the jurors in question share only this one characteristic – their membership in the group – and that in all other respects they are as heterogeneous as the community as a whole. Next, the showing may be supplemented when appropriate by such circumstances as the failure of his opponent to engage these same jurors in more than desultory voir dire, or indeed to ask them any questions at all. Lastly, . . . the defendant need not be a member of the excluded group in order to complain of a violation of the representative cross-section rule; yet if he is, and especially if in addition his alleged victim is a member of the group to which the majority of the remaining jurors belong, these facts may also be called to the court's attention.' [Citation.]"

(*People v. Bonilla* (2007) 41 Cal.4th 313, 342, internal brackets omitted, ellipsis original.)

If a trial court expressly states that it does not believe that a prima facie case has been made then invites the prosecution to justify its challenges for the record on appeal, the issue of whether a prima facie case has been made is not rendered moot, and there is no implied finding of a prima facie case. (*People v. Howard*, *supra*, 42 Cal.4th at p. 1018; *People v. Welch*, *supra*, 20 Cal.4th at p. 746.) On the other hand, "[w]hen a trial court, after a *Wheeler/Batson* motion has been made, requests the prosecution to justify its peremptory challenges, then the question whether defendant has made a prima facie showing is either considered moot [citation] or a finding of a prima facie showing is considered implicit in the request [citation]." (*People v. Welch*, *supra*, 20 Cal.4th at pp. 745-746; see *People v. Lenix*, *supra*, 44 Cal.4th at p. 613, fn. 8.)

Here, the trial court plainly stated that it had not found a prima facie case, but the prosecutor volunteered to provide explanations for the record

and the trial court agreed. (9RT 1881, 1884.) As previously noted, the mere fact that the prosecutor, in the absence of a prima facie case, also explained her reasons for excusing these jurors, does not constitute an implied finding of a prima facie case. (*People v. Howard*, *supra*, 42 Cal.4th at p. 1018.) Here, the trial court's finding that the defense failed to make a prima facie case is supported by substantial evidence. The prosecutor provided numerous race-neutral explanations for each of her three peremptory challenges against Black prospective jurors.

1. F.G.

Here, the record supports the trial court's determination that appellant failed to establish a prima facie showing of discriminatory purpose as to F.G. He was the first Black prospective juror to be excused by the prosecutor. As later recounted by the prosecutor, there were still at least six other Black prospective jurors in the venire at that time.[41]

There was no "pattern" of striking jurors of a specific race, and appellant failed to prove a prima facie case of discrimination. (*People v. Bell* (2007) 40 Cal.4th 582, 597; see *People v. Davis* (2009) 46 Cal.4th 539, 583 [relevant evidence to make a prima facie showing of discriminatory

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[41] Of course, at that time, prospective juror numbers 3747, 4826 and 6169 still remained in the venire. Additionally, three more Black prospective jurors remained in the venire at the close of voir dire, i.e., prospective juror numbers 1348 (see 9CT 2363), 7281 (see 9CT 2310) and 0884 (see 13CT 3426). The prosecutor, on January 14, 2003, prior to sentencing, took the opportunity on the record to lay out several precise factual details regarding the prior *Wheeler* motion, and she identified by prospective juror number the three Blacks who remained on the venire when the parties accepted the final panel. The prosecutor also noted that defense counsel had peremptory challenges remaining, and could have used them if he was unhappy with the final composition of the jury. (14RT 3182-3184.) The prosecutor additionally identified nine Black prospective jurors from the venire who were excused for cause, i.e., prospective juror numbers 7433, 3253, 9808, 0039, 7068, 1626, 2019, 1921, and 0505. (*Ibid.*)

exercise of peremptory challenges includes a showing that "opponent has struck most or all of the members of the identified group from the venire"].) "'As a practical matter, [ ], the challenge of one or two jurors can rarely suggest a *pattern* of impermissible exclusion.'" (*People v. Bell*, *supra*, 40 Cal.4th at p. 598, quoting *People v. Harvey* (1984) 163 Cal.App.3d 90, 111, italics original; see *People v. Box* (2000) 23 Cal.4th 1153, 1188-1189 [the fact that three Black prospective jurors were challenged by the prosecutor was an insufficient basis for stating a prima facie case of discrimination].)

Further, as to all three challenges, the prospective jurors' responses in their juror questionnaires and during voir dire revealed numerous obviously race-neutral reasons for the prosecutor's challenge. (*People v. Howard* (1992) 1 Cal.4th 1132, 1155 ["If the record 'suggests grounds upon which the prosecutor might reasonably have challenged' the jurors in question, we affirm."].) As this Court has repeatedly stated, "[a] prospective juror's views about the death penalty are a permissible race and group-neutral basis for exercising a peremptory challenge in a capital case. [Citation.]" (*People v. McDermott* (2002) 28 Cal.4th 946, 970; see *People v. Booker* (2011) 51 Cal.4th 141, 167; *People v. Davenport* (1995) 11 Cal.4th 1171, 1202.)

Here, the prosecutor explained her reasons for challenging F.G. in great detail. (9RT 1881-1882.) First, the prosecutor noted that, in his questionnaire, F.G. stated that, "I believe prosecutors are not always truthful and tend to exaggerate." (11CT 2906.) The prosecutor next expressed concern about the fact that F.G. "speaks to attorneys daily, and knows 50 to 60 civil or criminal lawyers."[42] (9RT 1881.) Third, F.G., on

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[42] F.G. specifically stated "civil and criminal defense attorneys," and did not mention prosecutors, clearly indicating that he may have been biased toward the defense. (11CT 2914.)

his questionnaire, indicated that he did not want to sit as a juror on this case. Fourth, the prosecutor was alarmed by the fact that F.G. had been falsely arrested in 1992 by the Los Angeles County Sheriff's Department. (9RT 1881; see also 11CT 2919.)

Fifth, and perhaps most importantly, the prosecutor noted that when she was questioning F.G. during the *Hovey* voir dire, F.G. refused to smile at her, although he had smiled at defense counsel. (9RT 1882.) "Hostile looks from a prospective juror can themselves support a peremptory challenge." (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1125.) Finally, the prosecutor pointed out that F.G. had indicated on his questionnaire that life without parole was worse for a defendant. (11CT 2939; 9RT 1881-1882) The prosecutor stated that all of these things, in combination, indicated that "he would not be a good prosecutorial juror." (9RT 1882.)

Contrary to appellant's claim (see AOB 151-152), during voir dire, the prosecutor asked F.G. about several of her (the prosecutor's) aforementioned concerns regarding F.G.'s service as a juror. The prosecutor queried F.G. for an explanation as to why he believed life without the possibility of parole "was worse for a defendant." (7RT 1294; see 11CT 2939.) The prosecutor also asked F.G. why he did not want to sit as a juror on this case. (7RT 1295-1296.) Additionally, the subject of F.G.'s interaction with attorneys unquestionably came up during the prosecutor's questioning. F.G. indicated that he could call his "defense attorney" to have her work around his schedule. (9RT 1298.) Thus, in actuality, three of the prosecutor's stated concerns were the subject of dialogue with F.G. during his questioning by the prosecutor.

Moreover, the record reveals numerous additional race-neutral reasons why the prosecutor chose to excuse F.G. First, F.G. indicated that he had seen "a lot of investigative procedures" by watching Court TV." (11CT 2913.) Second, he believed that two of the three biggest problems

with our criminal justice system were "misleading evidence" and "wrongful accusations." (11CT 2923.) Third, F.G. indicated that he had experienced racial prejudice in the past, and stated that Blacks were "rarely" treated fairly in our country. Fourth, he refused to give an explanation for his view. (11CT 2927.) "An advocate may legitimately be concerned about a prospective juror who will not answer questions." (*People v. Howard*, *supra*, 42 Cal.4th at p. 1019.) These answers all implied that F.G. was biased in favor of the defense.

Fifth, and finally, the charges of murder and rape caused F.G. to wonder whether he could be impartial. (11CT 2928.) That answer alone, i.e., F.G.'s admission that he was biased, could have put any future conviction at risk. Therefore, because the record suggests numerous race-neutral reasons why the prosecutor might reasonably have challenged F.G., substantial evidence supports the trial court's finding of no prima facie case of discrimination. (*People v. Griffin*, *supra*, 33 Cal.4th at p. 555, fn. 5.)

2. D.B.

D.B. was only the second Black juror to be challenged by the prosecutor (in fact the first to be challenged during the selection of the alternate panel). With respect to her excusal of D.B., the prosecutor offered as primary reasons that D.B. was currently on probation, and that he had once been "roughed up" by the police without cause. The prosecutor noted that it would be "highly unusual that a prosecutor would keep somebody that's currently on probation for a criminal offense on a jury, let alone a death case. (9RT 1882.)

The prosecutor further noted that D.B. felt "that mental defects may alter intent, thus making death unwarranted and LWOP would suffice. That's question 219." (9RT 1883.) The prosecutor also observed that D.B. also had expressed concerns about indigent defendants on death row who were later exonerated. Finally, the prosecutor noted that she normally did

not keep attorneys on her juries, because they cause "too many problems." (*Ibid.*) Consequently, the record fully supports the trial court's determination that appellant failed to establish a prima facie showing of discriminatory purpose as to D.B. (See *People v. Riccardi*, *supra*, 54 Cal.4th at pp. 786-787; *People v. Thomas*, *supra*, 51 Cal.4th at pp. 473-474.)

The prosecutor also asked D.B. about several of her (the prosecutor's) aforementioned concerns regarding D.B.'s potential service as a juror. The prosecutor asked him about his conviction for driving under the influence, and queried him regarding his current status as a probationer. (8RT 1565.) The prosecutor asked D.B. about his status as an attorney, and whether he currently worked as an attorney. (8RT 1565-1566.) She also queried D.B. about his concerns regarding indigent defendants on death row. (8RT 1566.) Indeed, these were hardly unusual questions, as the *Hovey* voir dire *required* the prosecutor to ask questions about a prospective juror's views about the death penalty in the abstract. (*People v. Carasi* (2008) 44 Cal.4th 1263, 1327.) Finally, the prosecutor queried D.B. about his belief that mental defects may alter intent. (8RT 1568-1569.)

Furthermore, the record reveals numerous additional race-neutral reasons why the prosecutor chose to excuse D.B. First, D.B. indicated that he had at least one friend who had died as the result of running from the police. (12CT 3080.) Second, when asked about the most important problems with our criminal justice system, D.B. listed "corrupt lawyers and police" as one of the problems. He also thought that "money buys justice." (12CT 3082.) D.B. opined that the police did not arrest the suspect in the "Baretta" case due to his star status, and questioned whether the death penalty was fair, because "so many are later deemed innocent." (12CT 3096.) These answers all implied that F.G. was heavily biased in favor of the defense. (*People v. Taylor* (2009) 47 Cal.4th 850, 893.)

The trial court even noted as to F.G. and D.B., "And, naturally, the explanation doesn't have to be one that the court would do, if the court was still a lawyer. But the only one that was kind of out of the ordinary for the court, was as to the alternate [M.H., or prospective juror number 4826] . . . ." (9RT 1884-1885.) Thus, even the trial court, which had the ability to personally observe the jurors and listen to their answers, considered the excusals of F.G. and D.B as unremarkable.[43] Therefore, because the record suggests race-neutral reasons why the prosecutor might reasonably have challenged D.B., substantial evidence supports the trial court's finding of no prima facie case of discrimination. (*People v. Griffin*, *supra*, 33 Cal.4th at p. 555, fn. 5.)

3. M.H.

With respect to her excusal of M.H., the prosecutor listed her concerns as follows: 1) M.H. watched C.S.I. "all the time" and the instant case involved DNA evidence; 2) M.H. had special knowledge with regards to what it would be like to be in a jail, i.e., that it was "dark," and that knowledge might play a part in her decision-making process; 3) M.H. found it "difficult" to judge another and did not want to be on the panel; and 4) M.H. indicated that the case was "sad" and that it would be extremely difficult for her to put someone to death. (9RT 1883-1884.)

The prosecutor asked M.H. about several of her (the prosecutor's) aforementioned concerns regarding M.H.'s service as a juror. The prosecutor asked M.H. about her belief that the case was "sad" and the fact that she did not want to be a juror. She also queried M.H. about her difficulties in judging another, which were based on religious,

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[43] The court further noted as to M.H., "But, nonetheless, just because of the fact when I was a lawyer, just because I might not have done that, doesn't mean that the reason is not sufficient pursuant to *Wheeler*." (9RT 1885.)

philosophical or moral reasons. (7RT 1220-1221.) The prosecutor additionally asked M.H. about her belief that jail was a dark place. (9RT 1865-1866.) Thus, the prosecutor asked M.H. questions about three of the four concerns she (the prosecutor) had expressed regarding M.H.'s potential service as a juror.

Moreover, the record reveals numerous additional race-neutral reasons why the prosecutor chose to excuse M.H. First, M.H. considered herself a religious person and described her Christian religion as "very important to her. (8CT 2105-2106.) Second, when asked whether she was a leader or a follower, M.H. replied, "I have a mind of my own I do what's best for me." (8CT 2109.) Third, M.H. had a sister with a persistent alcohol problem, which the prosecutor could have reasonably believed would have led her to be sympathetic to appellant's alcohol problem. (8CT 2126.) Fourth, and finally, M.H. believed that the death penalty was used "randomly," and thought that a sentence of life without the possibility of parole was worse than a death sentence. (8CT 2138, 2140.) To be sure, it is extremely unlikely that any prosecutor would want to keep a prospective juror who described the death penalty as "random."

Therefore, the record supports the trial court's determination that appellant failed to establish a prima facie showing of discriminatory purpose as to F.G., D.B. or M.H. Indeed, M.H. was only the third Black juror to be challenged by the prosecutor during voir dire (in fact, only the second during the selection of the alternate panel). The prosecutor only used three of her nine peremptory challenges against Blacks (or 33.33%). The prosecutor used one against a Native/Mexican-American (or 11.11%), and five against Whites (or 55.55%). (6CT 1568; 8CT 2098, 2204; 7CT 1886; 10CT 2736; 11CT 2789; 2842, 2897; 12CT 3056.) That hardly constitutes a formula for racial discrimination, and the trial court's refusal to find a prima facie case was thus well-justified.

D. Even If The Trial Court Should Have Found A Prima Facie Case, Appellant's Contention Fails Because The Prosecutor's Stated Reasons Were Race Neutral

A prospective juror's feelings about the death penalty are reasonably related to trial strategy (see *Miller-el v. Cockrell* (2003) 537 U.S. 322, 339 [123 S.Ct. 1029, 154 L.Ed.2d 931]) and are a legitimate race-neutral reason for exercising a peremptory challenge (*People v. Ledesma* (2006) 39 Cal.4th 641, 678; *People v. Montiel* (1993) 5 Cal.4th 877, 910, fn. 9). Specifically, a juror's uncertainty, reservations, or skepticism about the death penalty is a race-neutral justification for a peremptory challenge. (*People v. Watson* (2008) 43 Cal.4th 652, 681; *People v. Ward* (2005) 36 Cal.4th 186, 201.)

> [E]ven when jurors have expressed neutrality on the death penalty, "neither the prosecutor nor the trial court is required to take the jurors' answers at face value." [Citation.] If other statements or attitudes of the juror suggests that the juror has "reservations or scruples" about imposing the death penalty, this demonstrated reluctance is a race-neutral reason that can justify a peremptory challenge, even if it would not be sufficient to support a challenge for cause. [Citations.]

(*People v. Lomax* (2010) 49 Cal.4th 530, 572, internal brackets omitted.) "Obvious race-neutral grounds" for peremptory challenges include considering life imprisonment as a more severe penalty than death. (*People v. Davis*, *supra*, 46 Cal.4th at p. 584.)

A juror's negative experience with the criminal justice system or a criminal conviction constitutes a valid, race-neutral reasons for a prosecutor to dismiss a potential juror from the panel. (*People v. Lomax*, *supra*, 49 Cal.4th at p. 575; accord, *People v. Garcia*, *supra*, 52 Cal.4th at p. 749 [negative contacts with criminal justice system].) A prospective juror's occupation or educational background could pose a race-neutral reason for excusing the juror. (*People v. Clark*, *supra*, 52 Cal.4th at p. 907; *People v.*

Blacksher (2011) 52 Cal.4th 769, 802; *People v. Reynoso* (2003) 31 Cal.4th 903, 924-925 [a prosecutor "can challenge a potential juror whose occupation, in the prosecutor's subjective estimation, would not render him or her the best type of juror to sit on the case for which the jury is being selected"].) As will be shown, the prosecutor's reasons for excusing each of the three prospective jurors were race-neutral as recognized by well-settled case law.

1. F.G.

Here, race-neutral grounds readily supported the prosecutor's challenge of F.G. First, F.G. believed that "prosecutors are not always truthful and tend to exaggerate." (11CT 2906.) Appellant attempts to make much of the fact that F.G. had the same opinion of defense attorneys. (See AOB 173; see also 11CT 2906.) However, the two opinions are hardly the same. The vast majority of potential jurors, or the public-at-large, might reasonably have such an opinion about defense attorneys, because their primary duty is to acquit their client. (See, e.g., *People v. Bell* (1989) 49 Cal.3d 502, 538, [argument that "it's [defense counsel's] job to throw sand in your eyes" not improper].)

However, a prosecutor's job is not to convict, but to see that justice is done. "[The prosecutor's] interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." (*Berger v. United States* (1935) 295 U.S. 78, 88 [55 S.Ct. 629, 633, 79 L.Ed. 1314].) The fact that no other seated juror had such an opinion about prosecutors is ample evidence that F.G. held a negative view of the criminal justice system, and set him apart from the other prospective jurors. Appellant argues that "[r]ather than a reason to challenge, this showed a healthy skepticism that should be valued in a juror." (AOB 173.) Appellant concedes his case, as one would have to search quite diligently to find a

prosecutor who perceived "a healthy skepticism" about prosecutors as a desired personality trait in a potential juror.

Furthermore, the fact that F.G. knew 50 or 60 attorneys and frequently interacted with the court system was a second race-neutral reason for the peremptory challenge. A prospective juror's occupation or educational background can constitute a race-neutral reason for excusing the juror. (*People v. Clark*, *supra*, 52 Cal.4th at p. 907.) As this Court has explained, "[A]n attorney could peremptorily excuse a potential juror because he or she feels the potential juror's occupation reflects *too much education*, and that a juror with that particularly high a level of education would likely be specifically biased against their witnesses, or their client's position in the case." (*People v. Reynoso*, *supra*, 31 Cal.4th at p. 925, fn. 6, italics original.)

Moreover, the fact that F.G. was *falsely* arrested by the police constituted a third race-neutral reason. This false arrest was further compounded by the fact that F.G. consequently believed that two of the three biggest problems with our criminal justice system were "misleading evidence" and "wrongful accusations." (11CT 2923; see *People v. Garcia*, *supra*, 52 Cal.4th at p. 749 [negative contacts with criminal justice system].) "A negative experience with police . . . is a gender-neutral reason for exclusion. [Citations.]" (*People v. Panah* (2005) 35 Cal.4th 395, 442.) One can hardly imagine a prosecutor keeping a juror who has stated a belief that "wrongful accusations" are one of the biggest problems with our criminal justice system.

Additionally, F.G. indicated that he had experienced racial prejudice in the past, and stated that Blacks were "rarely" treated fairly in our country. Significantly, he refused to give an explanation for this view. (11CT 2927.) "An advocate may legitimately be concerned about a prospective juror who will not answer questions." (*People v. Howard*,

supra, 42 Cal.4th at p. 1019.) This constituted a fourth race-neutral reason for the prosecutor's challenge.

Furthermore, F.G. opined that the charges of rape and murder caused him to wonder whether he could be impartial. The presence of a biased juror would have certainly placed the prosecutor's entire case in jeopardy. This constituted a fifth race-neutral reason for the peremptory challenge. (See *People v. Blair* (2005) 36 Cal.4th 686, 742, ["[t]o establish that the erroneous inclusion of a juror violated a defendant's right to a fair and impartial jury, the defendant must show either that a biased juror actually sat on the jury that imposed the death sentence . . . ."].)

Moreover, as a sixth race-neutral reason for the challenge, the prosecutor noted that when she was questioning F.G. during the *Hovey* voir dire, F.G. refused to smile at her, although he had smiled at defense counsel. (9RT 1882.) "Hostile looks from a prospective juror can themselves support a peremptory challenge." (*People v. Gutierrez*, *supra*, 28 Cal.4th 1083, 1125.) "[A] prosecutor's demeanor observations, even if not explicitly confirmed by the record, are a permissible race-neutral ground for peremptory excusal, especially when they were not disputed in the trial court." (*People v. Clark*, *supra*, 52 Cal.4th at p. 1012.) This alone provided sufficient reason for the prosecutor's challenge.

Seventh, and finally, during *Hovey* voir dire, F.G. indicated that he believed that life without the possibility of parole was worse than death for a defendant. (7RT 1294; see 11CT 2939.) "Obvious race-neutral grounds" for peremptory challenges include considering life imprisonment as a more severe penalty than death. (*People v. Davis*, *supra*, 46 Cal.4th at p. 584.) The prosecutor specifically indicated that all of the aforementioned things, in combination, indicated that F.G. "would not be a good prosecutorial juror." (9RT 1882; see *People v. DeHoyos* (2013) 57 Cal.4th 79, 106-107 ["the prosecutor expressly stated that his challenge to each of the identified

prospective jurors was based on the cumulative or combined effect of all of his expressed reasons"].)

The record amply reflects race-neutral grounds for challenging F.G. Accordingly, the trial court did not err in denying appellant's *Wheeler/Batson* motion.

2. D.B.

Similarly, race-neutral grounds supported the prosecutor's challenge of D.B. Most importantly, D.B. was on active probation, and indicated that he had once been "roughed up" by the police "for no reason." (12CT 3072.) The prosecutor noted that it would be "highly unusual that a prosecutor would keep somebody that's currently on probation for a criminal offense on a jury, let alone a death case." (9RT 1882.) D.B. also indicated that he had at least one friend who had died as a result of running from the police. (12CT 3080.)

Moreover, D.B. listed "corrupt lawyers and police" as one of the problems with our criminal justice system. He also thought that "money buys justice." (12CT 3082.) D.B. opined that the police did not arrest suspect in the "Baretta" case due to his star status, and questioned whether the death penalty was fair, because "so many are later deemed innocent." (12CT 3096.) D.B. expressed concern about indigent defendants on death row. "A prospective juror's distrust of the criminal justice system is a race-neutral basis for his excusal. [Citation.]" (*People v. Clark*, *supra*, 52 Cal.4th at p. 907.)

Also, D.B. was an attorney, and the prosecutor noted that she normally did not keep attorneys on her juries, because they cause "too many problems." (9RT 1883.) In that regard, D.B. felt "that mental defects may alter intent, thus making death unwarranted and LWOP would suffice." (9RT 1883.) This is precisely the type of "problem" that the prosecutor feared from attorneys on the jury. As previously noted, a

prospective juror's occupation or educational background can constitute a race-neutral reason for excusing the juror. (*People v. Clark*, *supra*, 52 Cal.4th at p. 907.)

The record amply reflects race-neutral grounds for challenging D.B. Accordingly, the trial court did not err in denying appellant's *Wheeler/Batson* motion.

3. M.H.

Numerous race-neutral grounds supported the prosecutor's challenge of M.H. Most importantly, M.H. found it "difficult" to judge another, described the case as "sad," and indicated that it would be extremely difficult for her to put someone to death. (9RT 1883-1884.) One can hardly imagine a prosecutor keeping someone on a jury in a capital case who finds it "difficult" to judge another. Also, M.H. considered herself a religious person and described her Christian religion as "very important to her. (8CT 2105-2106.) In response to questioning by the prosecutor, M.H. indicated that her difficulties in judging another were based on religious, philosophical or moral reasons.[44] (7RT 1220-1221.)

Moreover, M.H. believed that the death penalty was used "randomly," and thought that a sentence of life without the possibility of parole was worse than a death sentence. (8CT 2138, 2140.) These aforementioned concerns all constituted valid race-neutral reasons for excusing M.H. from the alternate panel. (7RT 1220-1221; see *People v. Hoyos*, *supra*, 41 Cal.4th at pp. 902-903 [a prospective juror's equivocation about the death

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[44] Appellant's claim that "the prosecutor, in most instances, did not even question the prospective jurors about the prosecutor's claimed areas of concern," is simply incorrect and belied by the record. (See AOB 170-171; see also 7RT 1220-121 [prospective juror number 4826]; 7RT 1294-1297 [prospective juror number 2041]; 8RT 1565-1570 [prospective juror number 3747].)

penalty and strong religious beliefs against capital punishment provide race-neutral reasons for a prosecutor's decision to exercise a peremptory challenge]; see also *People v. Pearson* (2013) 56 Cal.4th 393, 422.)

Furthermore, M.H. watched "C.S.I." all the time, and the instant case involved DNA evidence. M.H. had special knowledge about what it was like to be in jail, and described it as a "dark" place. (9RT 1865-1866, 1883-1884; see also 8CT 2125.) The prosecutor's belief that M.H. held special knowledge that might be disruptive or harmful to the People's case also constituted a race-neutral reason for the challenge. (See *People v. Landry* (1996) 49 Cal.App.4th 785, 790–791 [peremptory challenge properly based on juror's educational background and experience in psychiatry or psychology].) This was especially true in the instant case, where M.H.'s view of jail as a "dark" place might sway the other jurors to impose life without the possibility of parole as a just punishment.

Furthermore, M.H. had a sister with a persistent alcohol problem, which the prosecutor could have reasonably believed would have led her to be sympathetic toward appellant's alcohol problem. (8CT 2126.) This was particularly important in the instant case, as the prosecutor knew that appellant would rely on his alcoholism as an excuse to avoid the death penalty. M.H., given her sister's struggles, would obviously be sympathetic to that argument.

Finally, M.H. indicated that she had a mind of her own and did what was best for her. (8CT 2109.) The prosecutor could have obviously viewed that attitude as a disruptive presence in the jury room, and that also constituted a race-neutral reason for her removal. "A prospective juror may be excused based upon facial expressions, gestures, hunches, and even for arbitrary or idiosyncratic reasons." (*People v. Lenix*, *supra*, 44 Cal.4th at p. 613.)

Additionally, in *People v. Reynoso*, this Court noted:

> If the prosecutor's occupation- and demeanor-based reasons for excusing Elizabeth G. were indeed pretextual, and he was in actuality bent on removing her from the jury because of her Hispanic ancestry, his acceptance of the jury 14 times with Elizabeth G. seated in the jury box, on four such occasions with a second Hispanic prospective juror also seated on the jury, was hardly the most failsafe or effective way to effectuate that unconstitutional discriminatory intent.

(*People v. Reynoso*, *supra*, 31 Cal.4th at p. 926, footnote omitted.)

Likewise, here, the prosecutor accepted the alternate panel twice with M.H. remaining on the panel, which is hardly evidence of discriminatory intent. (See *People v. Lomax* (2010) 49 Cal.4th 530, 576 [acceptance of panel containing African–American strongly suggests that race was not a motive in the challenge].) Clearly, M.H.'s race had nothing to do with the prosecutor's peremptory challenge against her.

Therefore, the prosecutor thus provided race-neutral reasons for each of her questioned peremptory challenges, and the trial court accepted these reasons as genuine. (9RT 1884.)

> Typically, an appellate court has only a cold transcript, exhibits, and papers from the trial court's file to go on. Even when a videotape is available we cannot experience what the trial judge experienced -- the nuances, the inflections, the body language which traditionally form part of the basis on which credibility is evaluated by triers of fact. Despite technology, credibility determinations require a personal presence that a cold transcript cannot convey.

(*Abbott v. Mandiola* (1999) 70 Cal.App.4th 676, 682–683; see also *People v. Reynoso*, *supra*, 31 Cal.4th at p. 918, fn. 4.)

Here, the record amply reflects race-neutral grounds for challenging F.G., D.B., and M.H. Indeed, even defense counsel appeared to be satisfied with the prosecutor's explanations. After the prosecutor finished stating her reasons, the trial court specifically asked defense counsel if he wanted

to respond. Defense counsel simply replied, "No."[45] (9RT 1884.) As previously noted, the trial court then ruled that there was an insufficient showing to state a prima facie case and, even if such a showing had been made, "the prosecution has explained race neutral reasons for excusing the jurors." (9RT 1884.) Accordingly, the trial court did not err in denying appellant's *Wheeler/Batson* motion.

E. Comparative Juror Analysis

This Court has stated that comparative juror analysis is appropriate for the first time on appeal at the third step of the *Wheeler/Batson* test, if an appellant relies upon such an analysis on appeal and "the record is adequate to permit the urged comparisons." (*People v. Lenix*, *supra*, 44 Cal.4th at p. 622.) "The reviewing court need not consider responses by stricken panelists or seated jurors other than those identified by the defendant in the claim of disparate treatment." (*Id.* at p. 624.) In conducting such an analysis, the issue is not whether the challenged prospective jurors are similarly situated to jurors who were accepted, but whether the record shows the party exercising the peremptory challenges honestly believed the jurors were not similarly situated in legitimate respects. (*People v. Lewis* (2008) 43 Cal.4th 415, 472; *People v. Huggins* (2006) 38 Cal.4th 175, 233.)

"Trial lawyers recognize that it is a combination of factors rather than any single one which often leads to the exercise of a peremptory challenge. In addition, the particular combination or mix of jurors which a lawyer seeks may, and often does, change as certain jurors are removed or seated in the jury box." (*People v. Reynoso*, *supra*, 31 Cal.4th at p. 918; see also

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[45] Appellant argues that the trial court failed to undertake a sincere and reasonable evaluation of the prosecutor's explanations. (AOB 134-135.) However, given that defense counsel offered no opposition and apparently accepted the prosecutor's reasons, the trial court could hardly be expected to expound at length on them.

People v. Johnson (1989) 47 Cal.3d 1194, 1220-1221.) "One of the problems of comparative juror analysis not raised at trial is that the prosecutor generally has not provided, and was not asked to provide, an explanation for nonchallenges." (*People v. Jones* (2011) 51 Cal.4th 346, 365.) A comparative juror analysis is not required for the first time on appeal where the trial court finds that the defense failed to make out a prima facie case. (*People v. Bell*, *supra*, 40 Cal.4th at pp. 600-601; *People v. Bonilla*, *supra*, 41 Cal.4th at p. 350.)

As discussed above, appellant's *Wheeler/Batson* motion as to F.G., D.B. and M.H. was denied after the trial court concluded that appellant failed to make a prima facie showing of a discriminatory exercise of peremptory challenges. Thus, a comparative juror analysis as to these prospective jurors is of little value and is not required in the instant case. (*People v. Taylor*, *supra*, 48 Cal.4th at pp. 616-617 [declining to engage in comparative analysis at first-stage *Wheeler/Batson* analysis]; see also *People v. Bonilla*, *supra*, 41 Cal.4th at p. 350.)

Regardless, in the event a comparative juror analysis would somehow be helpful to this Court, such an analysis of the points raised by appellant in his opening brief plainly demonstrates that there was no disparate treatment. Appellant presents his comparative analysis by subject, rather than by individual prospective juror (see AOB 171-175), and thus respondent will do the same for ease of reference.

Appellant first argues that numerous seated jurors expressed a reluctance to serve on the jury. (AOB 172-173.) The prosecutor cited this reason (as one of many) for his excusal of F.G. and M.H. (9RT 1881, 1884.) However, the prosecutor mentioned this "reluctance" reason as to F.G. and M.H. only in passing, as a collateral concern. (See *People v. Gray* (2005) 37 Cal.4th 168, 189 ["a party may decide to excuse a prospective

juror for a variety of reasons, finding no single characteristic dispositive."].)

Moreover, F.G. was very specific about the timeline for an upcoming civil trial, where he anticipated being called as a witness (see 7RT 1296-1297), to the point where the trial court even offered to intercede with the Santa Monica court if necessary. The trial court specifically ordered F.G. to remind the court if he was selected to serve as a juror. (7RT 1294, 1297.) Clearly, this comprised more than the "reluctance" expressed by the other jurors. This constituted a "conflict," which the prosecutor could have simply sought to avoid by excusing F.G.

M.H. also expressed far more than mere reluctance. She indicated on her questionnaire that she found it difficult to judge another's guilt or innocence, and wrote that she would do her "best" as a jurist, which was hardly reassuring. (8CT 2106.) Appellant fails to identify any seated juror who indicated that he or she would have difficulty judging another due to religious, philosophical or moral reasons. (See 7RT 1220.) The closest seated juror appellant proffers is juror number 7421, who indicated that she would feel "uncomfortable" in response to the same question (question number 30). (4CT 989.)

M.H.'s argument as to juror number 7421 fails in numerous respects. First, virtually any juror would feel "uncomfortable" in a capital case, which is a far cry from finding it "difficult" to judge the guilt or innocence of another, which is the very core function of a juror. Second, contrary to appellant's argument, juror number 7421 was neither "white" nor "male." Rather, she was a Japanese female. (4CT 981.) Third, juror number 7421 was very different from M.H. in many other ways, i.e., juror 7421 did not describe her religion as "very important" to her, she did not describe life without parole as worse than death, and she did not describe jail as a "dark"

place. (4CT 988-989, 1023.) In this regard, M.H. was not similarly-situated to any of the seated jurors.

Appellant next addresses F.G.'s and D.B.'s biases against prosecutors and law enforcement, as well as their negative experiences with law enforcement. (See AOB 173.) The differences here between the excused and seated jurors are even more evident. Appellant fails to identify any other juror who, like F.G., was actually "falsely" arrested for a crime. He fails to identify any other juror who thought that prosecutors "are not always truthful and tend to exaggerate." (11CT 2906.) Indeed, it is hard to imagine any prosecutor keeping a potential juror with that opinion. As previously noted, it is one thing to have such an opinion about defense counsel, but an entirely different matter to express that opinion about prosecutors in a capital case. This was in addition to F.G.'s opinion that "misleading evidence" and "wrongful accusations" were two of the three biggest problems with our criminal justice system. (See 11CT 2923.)

Likewise, appellant fails to identify any other juror who was on active probation. Indeed, the prosecutor specifically stated as to D.B., "I think it's highly unusual that a prosecutor would keep somebody that's currently on probation for a criminal offense on a jury, let alone a death case." (9RT 1882.) Moreover, D.B. indicated that he was "roughed up" by the police "for no reason," which clearly indicated that he might be biased against law enforcement. (12CT 3072.)

Appellant does, however, point to seated juror number 4635, who *may have had* a "conviction" for driving under the influence. However, the prosecutor never cited D.B.'s conviction as a reason, or even cited a "conviction" as a reason at all. "Whatever use comparative juror analysis might have in a third-stage case for determining whether a prosecutor's proffered justifications for his strikes are pretextual, it has little or no use where the analysis does not hinge on the prosecution's actual proffered

rationales, and we thus decline to engage in a comparative analysis here." (*People v. Bonilla*, *supra*, 41 Cal.4th at p. 350.)

Here, rather, the prosecutor was concerned about the fact that D.B. was still on probation. Moreover, juror number 4635 did not hold the negative perception of the criminal justice system expressed by F.G. Indeed, he certainly had not been "roughed up" by the police "for no reason."

Furthermore, with respect to juror number 4635, it is unclear whether the prosecutor or defense counsel even realized that he *potentially* had a DUI arrest or conviction. Strikingly, neither party asked him about it during voir dire, which was highly unusual. (7RT 1278-1284.) There is little evidence in the record that either the defense or the prosecution was even aware of 4635's potential DUI arrest or conviction.

First, in response to question 78, juror number 4635 indicated that he had experienced contact with law enforcement in the past, but he unfortunately left the "type of contact" portion of the answer blank, and neither party asked him about it. (See 4CT 886.) Moreover, juror number 4635 checked "no" when asked if he had any negative experiences with law enforcement, which would seem to imply that he had never been arrested. (4CT 887.) Indeed, if he had been arrested, unlike F.G. or D.B., 4635 certainly did not hold a grudge about it.

Furthermore, when asked if he had ever been to court, juror number 4635 checked "yes" and listed "traffic ticket" as a reason, but not a DUI arrest or conviction. (See 4CT 889.) Additionally, when asked if he had ever been a defendant in a court proceeding, juror number 4635 checked "no." (4CT 893.) That alone seemed to indicate that he did not have any arrests or convictions. However, in response to question number 100, juror number 4635 replied that he had "visited" or "been inside" a jail, and he listed "drunk driving" under "Charges & Arresting Agency." (4CT 895.)

It thus seems clear from his questionnaire that juror number 4635 was simply visiting someone in jail for drunk driving. However, it is also possible that the prosecutor and defense counsel may simply have missed this potential arrest or conviction information due to the vague nature of the answers on his questionnaire. Appellant certainly did not raise this point as an issue at trial during his *Wheeler* motion, when the prosecutor could have ascertained whether juror number 4635 had been arrested or was simply visiting someone else, or alternatively explained that she (the prosecutor) had simply missed that potential DUI arrest or conviction information on his questionnaire.

Moreover, juror number 4635 had formerly been employed by the California Highway Patrol, which the prosecutor could have deemed as a favorable trait. (See 4CT 876.) He also indicated that he made charitable donations to the Long Beach Police Department. (See 4CT 881.) He checked "no" when asked if he knew anyone who had been falsely accused of a crime.

Juror number 4635 did indicate that he had witnessed a violent incident, i.e., two police "beating someone," but he did not indicate whether the person being beaten was resisting arrest, or whether the force was reasonable. (See 4CT 892.) He even indicated that he called the police about the incident, perhaps to assist the police involved in the altercation. (4CT 895.) As with the potential DUI, neither party asked juror number 4635 about it during voir dire, so the details regarding that event, whether they were favorable or unfavorable to law enforcement, are unknown. (7RT 1278-1284.) Additionally, it is unknown whether either party even noticed that information on the questionnaire.

Finally, juror number 4635 did not believe that life without the possibility of parole was worse for a defendant (see 7RT 1281), nor was he on probation. Likewise, he was not a lawyer and he did not work with

lawyers on a daily basis. Thus, juror 4635 was not even remotely similar to prospective jurors F.G. and D.B.

Next, appellant claims that seated juror number 8868 had "a friend" who was a city attorney, which according to appellant is somehow equivalent to the 50 or 60 civil and criminal defense attorneys that F.G. worked with on a daily basis. (See AOB 173-174.) Appellant compares apples and oranges, as simply knowing one attorney is hardly equivalent to working with 50 or 60 attorneys, or some number of them, on a daily basis. Such a comparison is specious.

Finally, appellant claims that alternate juror number 9343 also watched C.S.I., but he fails to mention that M.H. further indicated, "I watch C.S.I. all the time." (8CT 2125.) In fact, none of the seated jurors, unlike M.H., checked C.S.I. as the only program they watched from the list of 26 shows on the questionnaire. (*Ibid.*) M.H. was clearly fascinated by C.S.I.

Unlike M.H., juror number 9343 believed that death was worse than life without the possibility of parole, and he did not indicate that the death penalty was used "randomly." (6CT 1449; see also 8CT 2138.) Even a cursory review of these two jurors indicate that they were not substantially similar, but appellant attempts to mold them as such by pointing to the answer to a single question.

As previously noted, with respect to F.G., D.B., and M.H., the prosecutor specifically stated that, in her analysis, it was a "combination" of factors that caused her to excuse a prospective juror, rather than any one particular thing. The prosecutor aptly noted:

> And I felt that all of those things, in combination, in addition to the fact that when I was questioning him in *Hovey*, he refused to smile at me, although he smiled at the defense, all of that, to me, indicated that he would not be a good prosecutorial juror.

(9RT 1882.)

Appellant errs by repeatedly attempting to use a comparative analysis of a single factor or question as evidence of discriminatory intent. With a 53-page, 237-question jury questionnaire, respondent has little doubt that appellant could parse through the answers of the 12 seated and four alternate jurors ad nauseam and find individual answers that were similar to a few of those of the three excused Black prospective jurors. However, appellant, with his brief argument, wholly fails to demonstrate that either F.G., D.B., or M.H. were even remotely similar to any of the seated jurors.

Appellant thus fails to identify any seated juror who, as a whole, was substantially similar to any one of the three Black prospective jurors excused by a prosecutorial peremptory challenge. Accordingly, the identified jurors' responses were not comparable as a whole, or even substantially in part, and appellant's comparative juror analysis should be soundly rejected. (See *People v. Watson* (2008) 43 Cal.4th 652, 675–676 ["None of the jurors brought to our attention by defendant expressed a substantially similar combination of responses to the responses provided by L.M."].)

F. Prejudice

Respondent recognizes that *Wheeler/Batson* error is reversible per se. "The exercise of even a single challenge based on race is constitutionally proscribed." (*People v. Howard*, *supra*, 42 Cal.4th at p. 1018, fn. 10.) "To be sure, the ultimate issue to be addressed on a *Wheeler–Batson* motion "is not whether there is a pattern of systematic exclusion; rather, the issue is whether a particular prospective juror has been challenged because of group bias." (*People v. Bell*, *supra*, 40 Cal.4th at p. 598, fn. 2.)

However, these cases all refer to prospective jurors who could have been seated on the primary panel. In other words, the defendant's right to an impartial jury could not have been violated if the prospective juror could never have been seated on the jury. This Court has held that, quite simply,

if an alternate juror could never have been seated, then there could be no prejudice. (*People v. Mills*, *supra*, 48 Cal.4th at p. 182 ["L.L. was considered as an alternate juror only and, as defendant concedes, no alternate juror served in this case; the original 12 jurors tried the case to its termination. Although it is therefore unnecessary to consider whether any *Wheeler/Batson* error occurred as to this juror, as any error in this regard would necessarily be harmless . . . the prosecutor's reasons for challenging her, if found unsupported by the record, can—when coupled with the [other] challenges . . . be considered part of an overall and deliberate plan to remove all African–Americans from the jury in violation of his constitutional rights".]; see also *People v. Roldan* (2005) 35 Cal.4th 646, 703, overruled on other grounds as stated in *People v. Doolin*, *supra*, 45 Cal.4th at p. 421, fn. 22.)

Here, alternate jurors D.B. and M.H., the third and fourth alternates respectively, could never have been seated on the jury, because the trial court only used the first alternate juror during the trial, and it selected alternates in order, rather than randomly. (9RT 1868.) Thus, even if D.B. and M.H. were somehow excluded on the basis of race, there is simply no manner in which appellant could have been prejudiced, or that his right to an impartial jury could have been impacted, by their excusal. (Compare *People v. Bandhauer* (1970) 1 Cal.3d 609, 617–618, ["the error, if any, in excluding a venireman by reason of his views on capital punishment was harmless beyond a reasonable doubt where, at the time of the ruling, the regular panel of 12 jurors had been chosen, the prospective juror was under consideration solely as an alternate juror, and, as matters turned out, no alternate juror was called upon to participate in the deliberations of the jury"].)

Indeed, alternate jurors do not participate in deliberations, and they are not permitted to discuss the case prior to deliberations. (See *People v.*

Cottle (2006) 39 Cal.4th 246, 257 ["alternate jurors are treated distinctly under the code, thus supporting the conclusion that 'the jury is sworn' is a phrase relating only to the 12 trial jurors and not the alternates"].) Quite simply, there is method by which D.B. or M.H. could have impacted the verdict in any way. They had absolutely no effect on the final composition of the jury. Moreover, they could not have impacted the alternate panel in any way, because defense counsel had already used his four peremptory challenges, and the prosecutor used his last two challenges to exclude D.B. and M.H. (9RT 1870, 1876.)

Thus, because appellant's aforementioned right to an impartial jury could not have been impacted in this case, appellant could not have been prejudiced by the exclusion of D.B. or M.H. This holds true regardless of appellant's reliance on boilerplate invocations of various provisions of the state and federal Constitutions. (See *People v. Yeoman* (2003) 31 Cal.4th 93, 118 ["Defendant's unelaborated citations to the Fifth, Sixth and Eight Amendments to the United States Constitution add nothing to his argument"].)

IV. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION TO EXCLUDE THE VICTIM'S TOXICOLOGY REPORT; IN ANY EVENT, ANY ERROR WAS HARMLESS

Appellant contends that the trial court's exclusion of the victim's toxicology report violated his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution, including his rights to due process of law, a fair trial, a jury determination of the facts, confrontation, and effective assistance of counsel. He further argues that the exclusion of the toxicology report somehow violated the "prohibition against imposition of cruel and unusual punishment in the Eighth and Fourteenth Amendments and the California Constitution." (AOB 178-189.) Respondent disagrees.

A. Relevant Proceedings

Before trial, the prosecutor sought to exclude evidence of the victim's toxicology report. (6RT 868.) At the time, the defense did not anticipate offering the evidence during the guilt phase, but indicated that it would "definitely" offer the evidence during the penalty phase. (*Ibid.*) However, on November 13, 2002, immediately prior to swearing in the jury, defense counsel alerted the trial court that the defense had reconsidered the use of the victim's toxicology report during the guilt phase. (10RT 1890-1891.)

Defense counsel argued that the toxicology report corroborated appellant's confession, which included his description of the victim making racial epithets to appellant and his companions. (See, e.g., 10RT 2137.) Appellant told police the victim yelled, "Fuck you, niggers," to both him and his companions. (10RT 2102.)

Defense counsel wanted jurors to believe appellant's entire confession, including that only Pearson, rather than appellant, used the stick as a weapon.[46] (10RT 1894.) Defense counsel argued that the toxicology report corroborated appellant's confession, in that a woman "in her right mind, isn't going to say something like that." (10RT 1892.) The trial court concluded that any corroboration was minimal in comparison to the amount of time that presenting the evidence would require. (10RT 1894.) Defense counsel proposed a stipulation to the toxicology report, but the People were unwilling to stipulate during the guilt phase. (10RT 1895.)

Defense counsel then pointed out the coroner would be in court testifying for hours anyway, and he further argued that part of the autopsy report included the toxicology screening results. However, the prosecutor

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[46] Of course, as previously noted, the jury either found all of the personal use allegations not true, or was unable to reach a verdict on those allegations, rendering defense counsel's concerns moot in any event. (3CT 597-607; 12RT 2527-2534.)

countered that additional witnesses and time would still be required, because the coroner would not be able to testify as to how long the drugs had been in Penny's system. The prosecutor noted that the drugs may have largely metabolized by the time of the murder. (10RT 1895-1896.) Defense counsel continued to press the point, arguing that this additional topic would not significantly add to the time required. (10RT 1896-1897.)

Ultimately, defense counsel planned to introduce appellant's observations that the victim appeared to be under the influence by eliciting the corroborating statements that appellant made during his interrogation. (10RT 1897.) The trial court ruled that it would not preclude defense counsel from exploring this topic, but held that the toxicology report could not be admitted until the penalty phase. (10RT 1898, 1902.)

The prosecutor's opening statement acknowledged that the victim had made "some racial remarks." (10RT 1913.) Defense counsel, in his opening statement, indicated that Penny yelled out "a racial slur, something to the effect of "Fuck you, niggers." (10RT 1919.) During his cross-examination of Detective Prell, defense counsel elicited the fact that, during his confession, appellant told Detective Prell "that he thought maybe the female was drunk or on drugs." (11RT 2184.) During the penalty phase, the parties stipulated to the relevant contents of the toxicology report. (12RT 2690.)

B. The Victim's Toxicology Report Was Properly Excluded

Evidence is admissible only if it is relevant. (Evid. Code, § 350 ["No evidence is admissible except relevant evidence"].) The test of relevancy is not whether the evidence conclusively establishes a material fact; rather, evidence is relevant if it "tends, logically, naturally, or by reasonable inference to establish a material fact . . . ." (*People v. Peggese* (1980) 102 Cal.App.3d 415, 420.) Evidence leading only to speculative inferences is

irrelevant. (*People v. Kraft* (2000) 23 Cal.4th 978, 1035.) "[T]he trial court is vested with wide discretion in determining relevance and in weighing the prejudicial effect of proffered evidence against its probative value. Its rulings will not be overturned on appeal absent an abuse of that discretion." (*People v. Edwards* (1991) 54 Cal.3d 787, 817.) Thus, reversal is not required unless defendant can show that the trial court "'"exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice.'" (*People v. Rodrigues*, *supra*, 8 Cal.4th at p. 1124, quoting *People v. Jordan* (1986) 42 Cal.3d 308, 316.)

Here, Penny's toxicology report was properly excluded as irrelevant. Defense counsel's claim that evidence of Penny's intoxication would support appellant's statement to the police about her confronting his party with inflammatory racial slurs is purely speculative. A person's intoxication level has no "tendency in reason" to prove he or she is likely to utter racial slurs. (Evid. Code, § 210; see *People v. Babbitt* (1988) 45 Cal.3d 660, 681-682 ["Speculative inferences that are derived from evidence cannot be deemed to be relevant to establish the speculatively inferred fact in light of Evidence Code section 210, which requires that evidence offered to prove or disprove a disputed fact must have a tendency in reason for such purpose."].) Even if it did, the defense's proffered evidence lacked any insight into how Penny would have responded to intoxication, that is, whether Penny was more, or less, likely to have uttered inflammatory racial slurs because she was intoxicated.

In *People v. Stitely* (2005) 35 Cal.4th 514, the parties stipulated that the victim's autopsy report indicated that she was intoxicated. The defendant, however, sought to prove the victim was intoxicated under the Vehicle Code standards and to introduce expert testimony to show how a certain level of blood-alcohol level would affect people in general. (*Id.* at

pp. 548-549 & fn. 17.) The defendant planned to use evidence of intoxication to prove that the victim impulsively consented to sexual intercourse. (*Id.* at p. 549.) The *Stitely* Court held:

> The trial court properly excluded defendant's evidence on relevance grounds. [Citation.] Nothing in the offer of proof showed how [the victim's] blood-alcohol content and intoxication affected her judgment and behavior the night she was killed, or increased the chance that she did, in fact, consent to vaginal and anal intercourse. Defendant essentially wanted jurors to speculate on intoxication, inhibition, and impulse. Speculative inferences are, of course, irrelevant. [Citation.]

(*Id.* at pp. 549-550.)

Similarly, any evidence of Penny's intoxication in the toxicology report would simply have invited the jury to speculate on its effect on Penny during the evening hours of December 28, 1998. Such a speculative inference was irrelevant and properly excluded. (See *People v. Kelly* (1992) 1 Cal.4th 495, 523 [the trial court properly excluded evidence of victim's substance abuse which, "without more, would be meaningless to a jury's consideration of the victims' conduct"].)

The evidence was also irrelevant on the issue of specific intent. Contrary to defense counsel's claim (see AOB 186-188), Penny's possible intoxication had no bearing upon appellant's intent. Appellant told the police that, while he was at the crime scene, his participation was minimal and only at Pearson's direction. (10RT 2105, 2138-2139; 11RT 2169, 2417.) Indeed, appellant claimed that Pearson's rape of Penny "was sickening to watch." (10RT 2145; 11RT 2188.)

Moreover, the prosecutor never presented any evidence, or argued, that Penny *did not* make the racial remarks. Indeed, during her opening statement, the prosecutor conceded, "You will hear testimony or evidence that she made some racial remarks, and that the defendant and his companions approached her as a result of these." (10RT 1913.) Defense

counsel further noted in his opening statement, "[Appellant] tells the police that she appeared to be under the influence of drugs or alcohol at the time of this incident." (10RT 1919-1920.) During her closing argument, the prosecutor even asked the jury to believe appellant's statement that "he's the one that first attacked her." (11RT 2379.)

Moreover, for the same reasons, the evidence of Penny's intoxication had no relevance on appellant's intent to aid and abet in the underlying felonies for felony murder. (See AOB 187-188.) Accordingly, the evidence was irrelevant and properly excluded. (See *People v. Rodrigues*, *supra*, 8 Cal.4th at p. 1125 & fn. 29 ["the proffered evidence [of the victim's relationship with his brother] had little, if any, significance to the vital issues in the case against defendant" where the defense case was not based on the theory that the brother might have killed the victim and there was no evidence to support such a theory].)

Penny's toxicology report was therefore properly excluded under Evidence Code section 352[47] since the evidence was, at its very best, collaterally relevant to the unchallenged racial remarks. On the other hand, the likelihood of undue consumption of time and confusion to the jury was great. Indeed, had it been admitted, the prosecutor would have been required to call his own expert to testify as to the possible ability of the to elicit such racist remarks, and the trial would have degenerated into an lengthy irrelevant sideshow on a collateral matter of little importance. This would have been distracting and confusing to the jury. Under the circumstances, the trial court properly exercised its discretion to exclude the evidence. (10RT 1989, 1902.)

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[47] Although the trial court did not directly cite Evidence Code section 352, it did refer to the undue consumption of time that would be required to present the toxicology evidence. (10RT 1895.)

C. Any Error Was Harmless

In any event, even assuming that the trial court should have admitted Penny's toxicology report during the guilt phase, any error was clearly harmless. Initially, appellant argues that the standard of *Chapman v. California*, *supra*, 386 U.S. at page 24, should apply here because evidence of significant probative value was excluded, depriving him of various rights under the United States Constitution. (AOB 188.) However, the applicable standard in this case is that of *People v. Watson* (1956) 46 Cal.2d 818, 836, i.e., if a trial court erroneously excludes evidence, the defendant must show on appeal that it is reasonably probable he or she would have received a more favorable result had that evidence been admitted. (*Ibid.*; see *People v. Rodrigues*, *supra*, 8 Cal.4th at p. 1125.)

Further, "the application of ordinary rules of evidence like Evidence Code section 352 does not implicate the federal Constitution . . . . [Citations.]" (*People v. Marks* (2003) 31 Cal.4th 197, 227.) As this Court explained in *People v. Cunningham* (2001) 25 Cal.4th 926, while "the complete exclusion of evidence intended to establish an accused's defense may impair his or her right to due process of law, the exclusion of defense evidence on a minor or subsidiary point does not interfere with that constitutional right. [Citation.]" (*Id.* at p. 999.)

Here, as Penny's toxicology report had, at best, only slight probative value and concerned a minor or subsidiary issue, the applicable harmless error standard is the less stringent *Watson* standard. Applying the *Watson* standard, it is not reasonably probable that appellant would have received a more favorable result had Penny's toxicology report been admitted during the guilt phase. Unquestionably, there was strong evidence to support the jury's verdict. Indeed, near the beginning of his opening statement, appellant's defense counsel plainly stated:

> First of all, this is an unusual time for a defense attorney to, basically, make a concession speech, but I am, basically, conceding to you the guilt of my client as to most of these crimes and these allegations against him. We are disputing some, but, basically, we are admitting guilt in this case as to most of these charges.

(10RT 1916-1917.)[48]

Moreover, in his statement to the police, appellant admitted biting Penny on her left breast during the murder. (10RT 2137.) Appellant said that he removed Penny's shoes, intending to throw them on top of a building. (10RT 2103-2104, 2139.) Appellant, angry at Penny for striking him during the initial confrontation, at one point punched Penny twice in the jaw with a closed fist. (10RT 2147; 11RT 2169, 2188.) Penny was on her back when he positioned himself above her and punched her. (10RT 2146.) Appellant also collected Penny's clothing, and threw away the stick that one of the men had used to violate Penny. (10RT 2150; 11RT 2190.) Appellant admitted being the one who pulled the stick out of Penny's vagina. (10RT 2150.)

Furthermore, appellant's leather jacket had a mixture of DNA on it, with major and minor contributors. (10RT 1995-1996.) Penny was a major contributor. Codefendant Armstrong was a possible donor for the minor types on the leather jacket. (10RT 1996.) The brown pants contained a DNA sample that was a clear match to Penny. (10RT 1999.) Based on his scientific analysis, Criminalist Colman concluded that the bite mark sample consisted of appellant's and Penny's DNA. (10RT 2000, 2006.) Based on two different methods of calculation, each based on different assumptions,

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[48] Despite strong advisements otherwise from his counsel on the record, appellant elected to wear jail clothes starting out the trial, but then changed to civilian clothes, and finally changed back to jail blues for the penalty phase. (6RT 881, 883-884, 893, 1064; 12RT 2541-2542.)

Criminalist Colman concluded that the bite mark was made by appellant. (10RT 2006-2012.)

Additionally, the portion of appellant's statements to the police which minimized his own involvement were self-serving and not credible. From the very beginning, appellant tried to minimize his involvement in the horrific crimes against Penny. (11RT 2405, 2416-2417.) Indeed, during his interview with the police, appellant initially denied everything throughout his first two unrecorded statements. (10RT 2076, 2079, 2089.) After the police proved to him that they had already arrested Armstrong, appellant gave a different version of the events, still minimizing his own involvement, but blaming Pearson for all the decision-making that night, and for the majority of the heinous injuries inflicted upon Penny. (10RT 2145; 11RT 2188.) Although appellant claimed that he was afraid of Pearson (see 11RT 2186), there was no evidence whatsoever that he feared Pearson either before December 28, 1998, or after that date.

Appellant claims that there was "little to show" that he "premeditated the murder, or had the specific intent to inflict pain required for torture by murder." (AOB 188.) Appellant, of course, simply ignores the fact that, among other things, he helped Pearson and Armstrong get Penny over the fence, removed Penny's shoes so that she would have difficulty running away, bit Penny at least twice, punched her in the face with a closed fist at least twice, and "jacked" the stick from her vagina. (10RT 1931, 1964, 1968, 2138-2139, 2147, 2150; 11RT 2169, 2188, 2351.)

Moreover, at best, appellant stood by and watched as Pearson stomped Penny to death with his "Redwood" boots, or, at worst, he held Penny down while Pearson stomped on her. (10RT 2148; 11RT 2166-2167, 2189.) Penny's devastated corpse bearing 114 separate injuries was ample proof that appellant had the requisite specific intent. (10RT 1964.)

Quite simply, Penny was dragged, beaten, raped, stomped, bludgeoned, asphyxiated and impaled to death.

Finally, appellant fails to recognize that the jury did hear evidence that Penny uttered racial epithets, and they also heard evidence that Penny was either intoxicated or high on drugs. (11RT 2184, 2186; 10RT 2137-2138.) Defense counsel elicited the fact that appellant told Detective Prell that something just "clicked" when Penny made the racial slur. (11RT 2180.) Defense counsel, during his cross-examination of Detective Prell, also specifically elicited the fact that appellant told Detective Prell that he thought Penny "was drunk or on drugs." (11RT 2184.) In his opening brief, appellant even concedes that the "evidence was that [he] engaged with [Penny] after she yelled a racial slur at [appellant] and his companions." (AOB 228-229.) Thus, the jury heard the evidence in any event and appellant's right to present a defense was not violated. Further cumulative evidence on this collateral point would have hardly made a difference in this terrible case.

Thus, even if Penny's toxicology report had been admitted into evidence, it would have, at best, had only a slight corroborating effect on appellant's claim that the assault followed Penny's inflammatory racial slurs. Indeed, the jury sentenced appellant to death even *after* learning about the toxicology report during the penalty phase. Clearly, therefore, the toxicology report had absolutely no impact on the jury's decision-making. Under the circumstances, there is no reasonable probability or possibility that appellant would have obtained a more favorable outcome if the court had admitted Penny's toxicology report. For the same reason, any error was harmless under the more stringent *Chapman* standard as well.

V. APPELLANT HAS FAILED TO DEMONSTRATE THAT EITHER HIS FEDERAL OR STATE CONSTITUTIONAL RIGHTS WERE VIOLATED BY THE TESTIMONY OF THE DEPUTY MEDICAL EXAMINER; IN ANY EVENT, ANY ERROR WAS HARMLESS

Appellant contends that the judgment of death, and the judgment of guilt on counts 1 and 3 through 8 must be reversed because the trial court erroneously admitted testimonial hearsay by permitting Deputy Medical Examiner Dr. Djabourian to testify regarding procedures performed by other doctors. Appellant claims this testimony violated the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution, as well as Article I, Section 17, of the California Constitution. (AOB 190-218.) Appellant's claim is forfeited, and lacks merit in any event.

A. Relevant Proceedings

As previously noted, Dr. Djabourian conducted the autopsy of Penny's battered corpse, and testified for the prosecution in his role as a deputy medical examiner. During his testimony, Dr. Djabourian detailed Penny's injuries, and gave his expert opinion on the cause of death, on how quickly death occurred, and on the approximate time of death. Dr. Djabourian also opined that certain genital injuries occurred prior to several identified head injuries. He also expressed his view that the head injuries were rapidly fatal. (10RT 1971-1975, 1977-1978.) The pain Dr. Djabourian mentioned with respect to the genital area to some extent involved internal wooden splinters removed during the autopsy. (10RT 1971.)

Dr. Djabourian testified that his supervisor, Dr. Pena, assisted him during the autopsy, specifically with the removal of internal wood splinters from Penny's vagina. Additionally, another person, identified by the initials C.L.H., also assisted by cataloging the splinters removed from

Penny's vagina. (10RT 1954-1956; Exh. 8.) Dr. Djabourian also testified that the location of one splinter was near the cervix (10RT 1949), that a splinter had been embedded in the vaginal tissue (10RT 1951), that the location of the splinter would have been painful (10RT 1971), and that he did not recall removing two of the splinters. (10RT 1954-1965.)

Specifically, appellant complains about a small sliver of Dr. Djabourian's testimony with respect to Exhibit 8, which was an envelope, containing two smaller envelopes that each held wood splinters. (10RT 1954-1955.) After cutting open the envelope, Dr. Djabourian identified a "small linear speck or splinter" from one of the smaller envelopes. He had in fact recovered it from Penny's "vaginal area." (10RT 1955.)

The second small envelope contained "loose debris and . . . a somewhat larger piece of wood, appears to be a piece of a wood splinter that's recovered." (10RT 1955.) Dr. Djabourian did not recall specifically from where the items in the second envelope had been recovered. He testified, "I'm unable to determine where that was. I can read what it says on the label." (10RT 1955.) The following colloquy transpired:

> [THE PROSECUTOR:] And did you recover both of these items that came out of the package marked People's No. 8?
>
> [DR. DJABOURIAN:] There was a doctor supervising me, Dr. Pena, and it's possible he may have recovered one of these others. The only one I can recall is that smaller one that was two millimeters.
>
> Q. And was that the one you referred to People's 7 that you circled in the upper right-hand rendition?
>
> A. Yes, that's correct.
>
> Q. And on that envelope that you are referring to, is that your
>
> handwriting?
>
> A. The handwriting is Dr. Pena's.

Q. And that's the outside of the envelope?

A. Yes.

Q. Marked People's 8 and the small envelope that you recovered that indicated handwriting on it, whose handwriting is on that envelope?

A. That's not my handwriting. I don't recognize that. I recognize Dr. Pena's. It says "isolated by C.L.H." I'm not sure.

Q. Can you flip it over? I guess the writing was on the inside.

A. There are several numbers 00-129-0-6. There is possibly a date indicated 3-23-01 and initials C.L.H.

Q. And when you had the internal genitalia placed in formalin, did that go outside of the coroner's office or did that stay inside the coroner's office?

A. That was inside the coroner's office.

Q. Did someone else other than yourself do that?

A. We examined that specimen with Dr. Pena, so it was the two of us.

(10RT 1956-1957.)

B. Dr. Djabourian's Testimony Did Not Constitute Testimonial Hearsay And His Testimony Did Not Violate Appellant's Federal Or State Constitutional Rights

Relying on *Melendez–Diaz v. Massachusetts* (2009) 557 U.S. 305 [129 S.Ct. 2527, 174 L.Ed.2d 314], and *Bullcoming v. New Mexico* (2011) 564 U.S. __ [131 S.Ct. 2705, 180 L.Ed.2d 610], appellant claims that portions of Dr. Djabourian's testimony should not have been admitted because he did not actually personally perform certain portions of Penny's autopsy. As such, he contends that the admission of certain pieces of Dr. Djabourian's testimony violated his rights to jury trial and due process, to

confront witnesses, his right to the effective assistance of counsel, and was in violation of the California Constitution as well. (AOB 190-218.)

Initially, the instant claim is forfeited due to appellant's failure to object to this testimony on any ground in the trial court.[49] (*People v. Williams* (1976) 16 Cal.3d 663, 667, fn. 4 ["It is the general rule, of course, that questions relating to the admissibility of evidence will not be reviewed on appeal absent a specific and timely objection at trial on the ground sought to be urged on appeal"]; see also *People v. Maciel* (2013) 57 Cal.4th 482, 351-352.) Appellant acknowledges his failure to object, but claims his failure should be excused because the "controlling law at the time was that a pathologist could testify about the contents of an autopsy report prepared by another, unavailable pathologist without violating the Confrontation Clause." (AOB 193-194; *People v. Clark* (1992) 3 Cal.4th 41, 158, abrogation recognized by *People v. Pearson*, *supra*, 56 Cal.4th at p. 462 [*Crawford* "dramatically departed from prior confrontation clause law," was unforeseeable, and counsel's failure to object did not forfeit issue]; see also *People v. Black* (2007) 41 Cal.4th 799, 810-11.)

However, the instant case is distinguishable from both *Clark* and *Pearson* because, unlike those cases, here, Dr. Djabourian actually performed the autopsy and was present for the entire autopsy. (10RT 1925.) Appellant merely complains about Dr. Djabourian's inability to recall precisely who removed the second of two splinters from Penny's vagina, and his inability to recall the name of his assistant with the initials "C.L.H." (AOB 195-197.) Despite appellant's multiple constitutional labels, these are California Evidence Code-based chain-of-custody-type

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[49] Respondent respectfully requests that this Court specifically rule on respondent's forfeiture arguments, as such forfeitures often constitute procedural bars in later proceedings in state or federal court.

objections that implicate state law only (see AOB 208), and are completely distinguishable from the constitutional objections lodged in *Clark* and *Pearson*, where an entirely different deputy medical examiner testified, rather than the one who actually performed the autopsy. Thus, the instant claim is forfeited due to the failure to object below.

In any event, as fully briefed below, this Court rejected appellant's constitutional argument relatively recently in *People v. Dungo* (2012) 55 Cal.4th 608, 619-620.) Moreover, any error in admitting the testimony was harmless given the overwhelming evidence supporting appellant's convictions, as well as the minimal influence Dr. Djabourian's testimony on these few points even had on the instant matter.

Appellant's claim that Dr. Djabourian was not permitted to give expert opinions based on portions of the autopsy report that, despite his presence at the autopsy as the primary examiner, he may not have physically completed personally, is unavailing, as this Court recently rejected an analogous claim in *Dungo*. There, the defendant was charged with murder, and the prosecution informed the trial court that the pathologist who performed the autopsy would not be called as an expert witness. The prosecution, instead, was going to call a different forensic pathologist, even though it did not represent that the one who performed the autopsy was unavailable. The defendant objected, but the trial court overruled the objection and permitted the other pathologist to testify. (*People v. Dungo*, *supra*, 55 Cal.4th at pp. 613-614.)

At trial, the *Dungo* pathologist testified that he reviewed the autopsy report and photographs. He provided his conclusion as to the cause of death, and pointed out injuries to the victim that supported his conclusion. The pathologist did not testify as to the other pathologist's opinion regarding the cause of death. On cross-examination, the defense counsel

inquired about the testifying pathologist's views of the cause of death. (*People v. Dungo*, *supra*, 55 Cal.4th at pp. 614-615.)

The *Dungo* defendant was convicted, but prevailed on his challenge on appeal to the admission of the pathologist's testimony on the basis that it violated the Confrontation Clause. The prosecution petitioned this Court for review, and this Court granted review. It confined its inquiry on review to whether the testifying expert's testimony about objective facts known to him from the autopsy report and photographs entitled the defendant to confront and cross-examine the pathologist who conducted the autopsy. (*People v. Dungo*, *supra*, 55 Cal.4th at pp. 616-619.)

This Court answered its inquiry by holding that the testifying witness's description of objective facts of the victim's body, which he derived from the autopsy report and photographs, did not give the defendant the right to confront and cross-examine the pathologist who conducted the autopsy. This Court based its holding on it findings that the facts related to the jury were not so formal and solemn to be considered testimonial under the Sixth Amendment, and that criminal investigation was not the primary purpose of recording the facts. As such, this Court held that the Court of Appeal erred because allowing the pathologist's testimony did not violate the Confrontation Clause. (*People v. Dungo*, *supra*, 55 Cal.4th at pp. 620-621.)

This Court should equally apply its reasoning in *Dungo* to the facts here, which are far less troublesome. This case is not one in which the testifying expert was a mere conduit for forensic information prepared and analyzed by someone else. Here, Dr. Djabourian actually performed the autopsy, but simply could not remember who removed one of two splinters, or which technician had the initials "C.L.H." Dr. Djabourian's opinions in this case, thus, were reached and conveyed not on the basis of the

nontestifying pathologists' testimonial statements or findings, but through his own independent conduct of the autopsy itself.

Appellant therefore had a full opportunity to test Dr. Djabourian's opinions on cross-examination and to explore any weaknesses in his conclusions, and any discrepancies in the evidence, on which his assessments were premised. (See *People v. Dungo*, *supra*, 55 Cal.4th at pp. 620-621.) Here, Dr. Djabourian was entitled to rely on his own analysis, medical procedures and forensic reports as the basis for his expert testimony. Expert testimony may "be premised on material that is not admitted into evidence so long as it is material of a type that is reasonably relied upon by experts in the particular field in forming their opinions. [Citations.]" (*People v. Gardeley* (1996) 14 Cal.4th 605, 618.) "So long as this threshold requirement of reliability is satisfied, even matter that is ordinarily inadmissible can form the proper basis for an expert's opinion testimony. [Citations.]" (*Ibid.*)

Thus, Dr. Djabourian was allowed to give his own expert opinions about the victims' injuries and cause of death based on information or data set forth in the autopsy reports, even if he did not personally extract one of the two splinters. The facts here, therefore, are far less bothersome than those in *Dungo*, and this Court should reject the highly technical argument that the pathologist who performed each minute part of an autopsy must testify to that individual portion of it to satisfy the Confrontation Clause (and that an expert witness may not provide his independent opinion based on a review of the autopsy report and photographs). Under *Dungo*, appellant is not entitled to relief on this claim.

C. Appellant Could Not Possibly Have Been Prejudiced By Any Error in Admitting One Of Two Splinters Identified In The Autopsy Report.

In any event, assuming appellant has somehow identified a constitutional violation, any alleged error in admitting Dr. Djabourian's testimony regarding the autopsy was clearly harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 18; *People v. Davis*, *supra*, 46 Cal.4th at p. 620 [applying *Chapman* to *Crawford* claim].) The *Chapman* harmless-error inquiry requires consideration of "the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case." (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 684 [106 S.Ct. 1431, 89 L.Ed.2d 674.) As the majority stated in *Melendez-Diaz*:

> We of course express no view as to whether the error was harmless . . . . In connection with that determination, however, we disagree with the dissent's contention that only an analyst's testimony suffices to prove the fact that the substance is cocaine. Today's opinion, while insisting upon retention of the confrontation requirement, in no way alters the type of evidence (including circumstantial evidence) sufficient to sustain a conviction.

(*Melendez-Diaz v. Massachusetts*, *supra*, 557 U.S. at p. 329, fn. 14, citation, internal quotation marks, and brackets omitted.)

To the extent Dr. Djabourian's testimony regarding the removal of one of the two splinters ran afoul of the Sixth Amendment, it was not prejudicial. Dr. Djabourian's conclusions regarding the larger splinter were precisely the same as his conclusions regarding the smaller splinter, i.e., each one caused pain. (10RT 1954-1957, 1971-1972.) Additionally, the

jury obviously did not need Dr. Djabourian to tell them that jamming a wooden freeway stake up Penny's vagina would be extraordinarily painful.

Furthermore, appellant did not challenge the fact that either Pearson or Armstrong had violated Penny with the stake. Rather, his counsel attempted to explain that appellant's removal of the stake did not constitute "personal use" of a deadly weapon. (11RT 2421-2422.) As previously noted, defense counsel's argument to that effect was successful. (3CT 597-607; 12RT 2527-2534.) Appellant's statement to Detective Prell plainly acknowledged that Penny had been violated with a stake. (10RT 2150.)

Although appellant makes much of purported discrepancies regarding the removal of the second, larger splinter, whether there was one splinter or two obviously had no bearing on whether the jury could convict appellant of the instant crimes as an aider and abettor, or on any other theory. His convictions, therefore, were not established by Dr. Djabourian's testimony about the second splinter, or even by the autopsy itself for that matter. There was without question a plethora of alternative evidence substantiating the instant crimes, i.e., the semen on appellant's jacket, appellant's confession, the DNA evidence, the photographs taken by the police, the drag marks on the ground, the broken fence, the stolen food stamps, etc. (10RT 1996, 1999, 2086, 2138-2139, 2142, 2150; 11RT 2166-2167, 2188, 2211-2212, 2213-2214.) For all of the foregoing reasons, any error in admitting into evidence Dr. Djabourian's testimony regarding the removal of the second splinter was harmless beyond a reasonable doubt.[50]

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[50] Appellant argues that there was no evidence that Penny was screaming during the agonizing minutes of her murder. (AOB 217.) Suffice it to say that it is a reasonable inference from the evidence that Penny was screaming while she was being impaled through her vagina with a wooden freeway stake, or while she was being brutally raped and savaged, or while she was being viciously beaten, dragged across the
(continued...)

VI. THE TRUE FINDINGS AS TO THE PENAL CODE SECTION 190.2, SUBDIVISION (a)(17), ALLEGATIONS AND THE JUDGMENT OF DEATH SHOULD BE AFFIRMED BECAUSE APPELLANT COMMITTED EACH OF THE SPECIAL CIRCUMSTANCE FELONIES FOR AN INDEPENDENT FELONIOUS PURPOSE

Appellant contends that there "was no substantial evidence that any of the felonies [were] committed with an independent felonious purpose." (AOB 219.) He further argues that under "the *People v. Green* (1980) 27 Cal.3d 1, line of cases, the controlling law at the time of the crimes, the true findings to the felony special circumstances can be upheld only if [he] had an independent felonious purpose for committing each special circumstance felony, which was not merely incidental to the murder."[51] (AOB 219-220; see also AOB 219-244.) Appellant's claim simply ignores the record, as well as the law.

A. Relevant Proceedings

Here, the jury found the special circumstances alleged pursuant to section 190.2, subdivision (a)(17) and (18), to be true, i.e., that the murder was committed during the commission of a robbery, a kidnapping, a kidnapping for rape, a rape, and a rape by foreign object, and that the murder was intentional and involved the infliction of torture. (3CT 597-598; 12RT 2528.) As a result, appellant was eligible for the death penalty or imprisonment for life without the possibility of parole. (§ 190.2, subd. (a).)

(...continued)
ground and over a fence, or while she was being stomped to death by Pearson. (*People v. Tully* (2012) 54 Cal.4th 952, 1022.)

[51] *Green* was disapproved on another ground by *People v. Hall* (1986) 41 Cal.3d 826, 834, fn. 3.

Indeed, in the instant case, the trial court instructed the jury pursuant to CALJIC No. 8.81.17 as follows:

> To find that the [*sic*] any of the special circumstances, referred to in these instructions as murder in the commission of robbery, kidnap, kidnapping for rape, rape, or rape by a foreign object - a wooden stake, is true, it must be proved:
>
> 1. The murder was committed while [the] defendant was [engaged in] [or] [was an accomplice] in the [commission] of one or more of the following crimes: robbery, kidnap, kidnapping for rape, rape, or rape by a foreign object (a wooden stake).

(2CT 555; see *People v. D'Arcy* (2010) 48 Cal.4th 257, 297 ["a trial court has no duty to instruct on the second paragraph of CALJIC No. 8.81.17 unless the evidence supports an inference that the defendant might have intended to murder the victim without having had an independent intent to commit the specified felony"]; see also *People v. Monterroso* (2004) 34 Cal.4th 743, 767; *People v. Valdez* (2004) 32 Cal.4th 73, 113-114 [holding challenge to instruction was forfeited by defendant's failure to object or request the omitted language].)

B. General Legal Principles

"'When considering a challenge to the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence - that is, evidence that is reasonable, credible, and of solid value - from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' (*People v. Lindberg* (2008) 45 Cal.4th 1, 27 [].) '[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' (*Jackson v. Virginia* (1979) 443 U.S. 307, 318–319 []; see *People v. Staten* (2000) 24 Cal.4th

434, 460 [] ['An identical standard applies under the California Constitution.']; *People v. Cain* (1995) 10 Cal.4th 1, 39 [] [the same standard applies to the sufficiency of the evidence to sustain a special circumstance finding].)" (*People v. Lewis* (2009) 46 Cal.4th 1255, 1289–1290 [], fn. omitted [].) "Although it is the jury's duty to acquit a defendant if it finds the circumstantial evidence susceptible of two reasonable interpretations, one of which suggests guilt and the other innocence, it is the jury, not the appellate court that must be convinced of the defendant's guilt beyond a reasonable doubt. [Citation.]" (*People v. Kraft* (2000) 23 Cal.4th 978, 1053–1054 [].)

"[I]f the felony is merely incidental to achieving the murder - the murder being the defendant's primary purpose - then the special circumstance is not present, but if the defendant has an 'independent felonious purpose' (such as burglary or robbery) and commits the murder to advance that independent purpose, the special circumstance is present." (*People v. Navarette* (2003) 30 Cal.4th 458, 505; see *People v. Rountree* (2013) 56 Cal.4th 823, 854; *People v. Green*, *supra*, 27 Cal.3d at pp. 59-62; see also *People v. DePriest* (2007) 42 Cal.4th 1, 47 ["Where a person is left dead or dying in 'relative proximity' to property that was taken, and such property is later found in the defendant's possession, the jury is entitled to infer that the victim was robbed and that the defendant committed the crime"]; *People v. Maury* (2003) 30 Cal.4th 342, 402 [because property that was in the possession of the victim was missing, the jury could reasonably infer that the defendant stole the property].)

The felony-based special circumstances do not require that the defendant intend to kill. It is sufficient if the defendant is the actual killer or either intends to kill or "with reckless indifference to human life and as a major participant, aids, abets, counsels, commands, induces, solicits, requests, or assists in the commission" of the felony. (§ 190.2, subd. (d);

see *People v. Estrada* (1995) 11 Cal.4th 568, 575.) The torture-murder special circumstances requires that a murder be "intentional and involve[ ] the infliction of torture." (§ 190.2, subd. (a)(18); *People v. Whisenhunt* (2008) 44 Cal.4th 174, 202.) There must be an intent to kill, an intent to torture, and infliction of an extremely painful act on a living victim. (*People v. Bemore* (2000) 22 Cal.4th 809, 839.) "[T]he requisite torturous intent is an intent to cause cruel or extreme pain and suffering for the purpose of revenge, extortion, persuasion, or for any other sadistic purpose. A premeditated intent to inflict prolonged pain is not required." (*People v. Elliot* (2005) 37 Cal.4th 453, 479, footnote omitted.)

C. Appellant Committed Each Of The Special Circumstance Felonies For An Independent Felonious Purpose

In the case at bar, overwhelming evidence demonstrated that appellant committed each of the special circumstance felonies for an independent felonious purpose. Quite simply, there is absolutely no evidence that appellant intended to kill Penny at the moment she allegedly yelled, "Fuck you, niggers," at appellant and his companions across the street. Rather, as noted by the prosecutor, the more reasonable interpretation of the evidence was that appellant and his companions crossed the street initially intending to rob Penny, and that the crimes escalated with Penny's resistance. (11RT 2356; see *People v. Horning* (2004) 34 Cal.4th 871, 907 ["the commission of the felony was not merely incidental to an intended murder"].)

In his opening brief, appellant concedes that:

> The evidence was that [he] engaged with [Penny] after she yelled a racial slur at [appellant] and his companions. The altercation escalated from shouting to battery, and ultimately to murder. The prosecution was unable to present evidence of the order of events, except that the kidnapping followed the initial engagement, and the torture and murder likely were last in the time line.

(AOB 228-229.)

Appellant essentially concedes his case, as he impliedly acknowledges that appellant and his companions did not form the intent to kill until the very end of the encounter, when they actually killed Penny, most likely in an attempt to conceal their prior crimes. Therefore, the special circumstance felonies were committed for an independent felonious purpose, rather than just "incidental" to the murder.

Appellant argues that "the fact the food stamp cover was found closer to the body than where [Penny] first had contact with [appellant] supports the reasonable inference that the theft may have occurred later." (AOB 229.) Of course, it also supports the inference that appellant may have taken the food stamps during the initial encounter, and then tore off the cover later while he was trying to gather all the incriminating evidence for disposal. (See *People v. DePriest*, *supra*, 42 Cal.4th at pp. 46–47 [court rejected defendant's complaint that prosecution did not eliminate the possibility the defendant formed the intent to steal after he used force, finding substantial evidence he intended to steal when he accosted his victim]; *People v. Navarette*, *supra*, 30 Cal.4th at p. 499 ["one can certainly rob a living person by killing that person and then taking his or her property"].)

Robbery is "the felonious taking of personal property in the possession of another . . . and against [the person's] will, accomplished by means of force or fear." (§ 211.) "The only intent required to find the felony-murder-robbery special circumstance allegation true is the intent to commit the robbery before or during the killing." (*People v. Huggins*, *supra*, 38 Cal.4th at p. 215.) If a defendant does not harbor the intent to take another's property at the time the force or fear is applied, the taking is a theft, not a robbery. (*People v. Burney* (2009) 47 Cal.4th 203, 253.)

"[T]he special circumstance of murder during the commission of a robbery requires that the murder be committed 'in order to advance [the] independent felonious purpose' of robbery, but the special circumstance is not established when the felony is merely incidental to the murder." (*Ibid.*; see also *People v. Clark*, *supra*, 52 Cal.4th at p. 947 ["Contrary to defendant's assertion, that he may have succeeded in taking [the victim's] money only after her death does not undermine the special circumstance finding"].) Here, appellant obviously had an independent felonious purpose for the robbery, as he spent the stolen food stamps at the Lorena Market. (10RT 2044, 2046.)

With respect to the kidnapping and kidnapping for purposes of rape special circumstance allegations, the California Supreme Court has found sufficient evidence to support a kidnapping special circumstance so long as there was a concurrent purpose to commit both the murder and one of the listed felonies. (*People v. Bolden* (2002) 29 Cal.4th 515, 554, 558; *People v. Raley* (1992) 2 Cal.4th 870, 903.) That the evidence may also support another scenario does not render the evidence insufficient to support the verdict. (See *People v. Foster* (2010) 50 Cal.4th 1301, 1349; see also *People v. Brents* (2012) 53 Cal.4th 599, 610 ["A reasonable jury therefore could infer that defendant was not sure what he wanted to do with [the victim] when he drove away with her in the trunk. He wanted to think about it, and going for a drive was his way of thinking about it.']].)

Here, it was entirely reasonable for the jury to infer that appellant and his cronies were not sure what they wanted to do with Penny when they passed her over the fence and dragged her down the embankment. (See, e.g., *People v. Raley*, *supra*, 2 Cal.4th at pp. 902–903 [sufficient evidence of independent felonious purpose where defendant might not have decided victim's fate at time of kidnapping but might have formed intent to kill after asportation].) After committing the other terrible crimes, a reasonable

inference from the evidence is that the defendants then simply decided to kill her.

Likewise, with regard to the rape and rape by foreign object special circumstance allegations, appellant and his cohorts obviously removed the victim's clothes prior to the rape. (*People v. Clark*, *supra*, 52 Cal.4th at p. 947 ["the evidence supported the inference that, before the fatal assault, defendant forcibly removed [the victim's] coat and the contents of its inside pocket for the purpose of taking her money. The jury thus necessarily would have inferred that defendant's intent to rob preceded the killing"]; see also *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1263.)

Here, as in *Clark*, appellant's intent to commit the crimes, including the rape, obviously preceded the killing. There was ample evidence from Dr. Djabourian that Penny was still alive at the time that she was raped and tortured (see 10RT 1977-1978), and no evidence that appellant intended to "rape" Penny to death, thus somehow making the rape "incidental" the murder. The jury could have reasonably inferred that the defendants committed the rape and rape by foreign object for sexual gratification, which clearly constituted an independent felonious purpose.

Likewise, with regard to the torture allegation, appellant told Detective Prell that he continued to be angry with Penny for striking him during the initial part of their confrontation. (10RT 2147; 11RT 2169, 2188.) The jury could have easily inferred from this that appellant tortured Penny because he was angry at her for striking him, which constituted an independent felonious purpose, or because appellant derived sexual gratification from it, as well as the rape. Nothing more was required. (See 2RT 27-31.)

Nor does any evidence that defendant harbored concurrent intents to commit multiple crimes, such as rape and murder, render that crime, i.e., the rape, merely incidental to the murder. (*People v. Davis*, *supra*, 46

Cal.4th at p. 609 ["even if a defendant harbored the intent to kill at the outset, a concurrent intent to commit an eligible felony will support the [felony murder] special-circumstance allegation"]; accord, *People v. Abilez* (2007) 41 Cal.4th 472, 511 [evidence of the defendant's concurrent intent to take the victim's money and humiliate her established the requisite independent felonious purpose for the robbery-murder, burglary-murder and sodomy-murder special-circumstance findings].)

In *People v. Brents, supra*, 53 Cal.4th at pp. 610-611, this Court noted:

> Moreover, even if defendant intended from the beginning to kill [the victim] and even if that was his primary purpose, that point is irrelevant to our analysis. The jury only needed to find that defendant also had another concurrent objective when he kidnapped [the victim]. (See *People v. Bolden, supra*, 29 Cal.4th at p. 554, 558 []; *People v. Raley, supra*, 2 Cal.4th at p. 903 [].) If defendant intended to kill [victim], but he wanted first to drive her around in a locked trunk, thoroughly terrifying her before she actually died, then the independent purpose requirement of *People v. Green, supra*, 27 Cal.3d at pages 59 to 62 [], is satisfied. (See *People v. Raley, supra*, 2 Cal.4th at p. 903 ["Concurrent intent to kill and to commit an independent felony will support a felony-murder special circumstance. . . ."].)

This Court also noted in *Brents*:

> It is true that the jury also could have inferred defendant's version of the facts, but defendant is wrong to assert that his interpretation of the evidence is the only reasonable interpretation. Because, as discussed above, the record contains sufficient evidence to support the jury's finding of an independent purpose to kidnap [the victim], we need not set aside the kidnapping special circumstance finding on that ground. (See *People v. Raley, supra*, 2 Cal.4th at p. 903 [] [because the defendant put his victims in the trunk of his car and drove them to his home, he might not have formed the intent to kill until after the asportation]; see also *People v. Barnett* (1998) 17 Cal.4th 1044, 1158 [] [although some evidence showed that the defendant threatened to kill the victim on the day of the

> murder, the jury could infer that the defendant had not finally decided the victim's fate at the time of the asportation].)

(*People v. Brents*, *supra*, 53 Cal.4th at p. 611.)

Finally, this Court itself has noted that its own view of what the evidence shows is irrelevant. The relevant inquiry is whether, for example, it would be irrational for a jury to conclude that the defendants intended to kidnap the victim for some reason (such as to instill fear) that was in addition to and independent of his intent to murder her. (*People v. Raley*, *supra*, 2 Cal.4th at p. 902.)

In *People v. Castaneda* (2011) 51 Cal.4th 1292, this Court specifically noted:

> As explained previously, the substantial evidence supporting defendant's convictions for sodomy, robbery and burglary also supports the conclusion that those felonies were not merely incidental to an intended murder. "This behavior was not incidental or ancillary to the murder, but amply demonstrates an independent felonious purpose in support of the . . . special circumstances." (*People v. Abilez*, *supra*, 41 Cal.4th at p. 511 [].) Contrary to defendant's suggestion, *Blakely v. Washington* (2004) 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (*Blakely*), *Ring v. Arizona* (2002) 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (*Ring*), and *Apprendi v. New Jersey* (2000) 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (*Apprendi*), do not require that the jury expressly find each element of a special circumstance.

(*Id.* at p. 1327.)

Likewise, here, appellant's heavy reliance on *Blakely*, *Ring* and *Apprendi* is misplaced and adds nothing to his argument. (See AOB 220-221, 240-243; see also *People v. Taylor*, *supra*, 48 Cal.4th at pp. 628-629.) Here, quite simply, as in *People v. Davis*, *supra*, 46 Cal.4th 539, appellant and his cohorts killed the victim "to conceal the felonies [they] had already committed." (*Id.* at p. 610.) The instant claim fails.

D. Prejudice

In any event, appellant could not have been prejudiced by any error as to any one of the special circumstance findings, or even by any error as to a combination of several of them. The trial court specifically instructed the jury pursuant to CALJIC No. 8.80.1 as follows:

> If you find that a defendant was not the actual killer of a human being or if you are unable to decide whether the defendant was the actual killer or an aider and abettor or co-conspirator, you cannot find the special circumstance to be true unless you are satisfied beyond a reasonable doubt that the defendant with the intent to kill aided, abetted, counseled, commanded, induced, solicited, requested, or assisted any actor in the commission of the murder in the first degree, or with reckless indifference to human life and as a major participant, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted in the commission of one or more of the following crimes: robbery, kidnapping, kidnapping for rape, rape, rape by a foreign object, (a wooden stake), or torture pursuant to Penal Code section 190.2 subdivision (a)(17) which resulted in the death of a human being, namely Penny Keprta, also known as Penny Sigler.
>
> A defendant acts with reckless indifference to human life when that defendant knows or is aware that his acts involve a grave risk of death to an innocent human being.
>
> You must decide separately each special circumstance alleged in this case. If you cannot agree as to all of the special circumstances, but can agree to one or more of them, you must make your finding as to one or more upon which you do agree.
>
> In order to find a special circumstance alleged had in this case to be true or untrue, you must agree unanimously.

(2CT 553-554; 11RT 2314-2315.)

Thus, the jury was specifically instructed that it must decide each special circumstance allegation separately, and that it must agree unanimously. Moreover, in counts 2 through 8, the jury specifically found appellant guilty of each of the underlying crimes alleges as special

circumstances. (3CT 597-607; 12RT 2527-2534.) Thus, this is not a case where, but for the special circumstance allegations, the information would not have been presented to the jury.

Indeed, appellant acknowledges that in *Brown v. Sanders* (2006) 546 U.S. 12, 220-221 [126 S.Ct. 884, 163 L.Ed.2d 723], the Supreme Court affirmed the judgment of death, even though it set aside two of the four special circumstance allegations. The High Court noted:

> [T]he jury's consideration of the invalid eligibility factors in the weighing process did not produce constitutional error because all of the facts and circumstances admissible to establish the "heinous, atrocious, or cruel" and burglary-murder eligibility factors were also properly adduced as aggravating facts bearing upon the "circumstances of the crime" sentencing factor. They were properly considered whether or not they bore upon the invalidated eligibility factors.

(*Brown v. Sanders*, *supra*, 546 U.S. at p. 224.)

Precisely the same is true in the instant case; hence appellant could not possibly have been prejudiced, unless this court reverses all six of the special circumstance allegations. (See 3CT 623 [factor (a) – the circumstances of the crime]; see also AOB 237-238 [conceding that in *Brown v. Sanders*, "all of the facts and circumstances admissible to establish the `heinous, atrocious, or cruel' and burglary-murder eligibility factors were also properly adduced as aggravating facts bearing upon the 'circumstances of the crime' sentencing factor"].) Appellant therefore could not have been prejudiced by any error, and the instant claim is therefore unavailing.

VII. OVERWHELMING EVIDENCE SUPPORTED APPELLANT'S ROBBERY CONVICTION AND THE ROBBERY SPECIAL CIRCUMSTANCE FINDING

Appellant argues that "the evidence was insufficient as a matter of law to prove that he took the victim's property in a robbery, or took the

property while the victim was alive." (AOB 245; see also AOB 245-255.) Appellant's claim misstates the law, and simply ignores the strong evidence of guilt presented during the trial.

Respondent has already summarized the law regarding insufficiency of the evidence and robbery in the preceding argument, i.e., Argument VI, *ante*. In the interest of brevity, respondent will not restate that law here. Moreover, in Argument VI, *ante*, respondent also addressed the sufficiency of the facts substantiating the robbery special circumstance allegation. However, for ease of reference, respondent will briefly review the substantial evidence of guilt supporting appellant's robbery conviction and the true finding on the robbery special circumstance allegation.

During trial, the parties stipulated that Mr. Joseph O'Brien, had he been called as a witness, would have testified that on December 29th, 1998, between 10 p.m. and 11 p.m., he gave Penny a ten dollar food stamp coupon book, containing a single five dollar coupon and a single one dollar coupon, to buy him a soda and candy bar at the store. Mr. O'Brien had obtained the food stamps from the Nix check cashing store on Atlantic Boulevard in Long Beach. (10RT 2065.) Prior to the homicide, a shipment of 2,000 Los Angeles County food stamp coupons had been sent to the Nix check cashing store at 6583 Atlantic Boulevard, number 106, in Long Beach, California. The shipment included food stamp coupons bearing the serial number F02520550V. (10RT 2034.)

On January 6, 1999, Detective Edwards returned to the crime scene after receiving information that Penny had food stamps on her person at the time of her death. (10RT 2050-2052.) At the foot of a ladder near the crime scene, he found the cover of a food stamp coupon book. (10RT 2054-2056.) The inside cover bore the serial number F02520550V. (10RT 2057.)

Detective Lasiter recovered two food stamp coupons (Exhibits 18A [a five-dollar coupon] and 18B [a one-dollar coupon] bearing the serial number F02520550V) from Mr. Efrain Garcia, the owner of the Lorena market. (11RT 2213-2214.) Garcia recognized appellant from the neighborhood as a regular customer, and remembered seeing him in the market between Christmas and New Year's Eve of 1998. (10RT 2043-2044, 2047.) Appellant came into the market and bought food using food stamps. (10RT 2044, 2046.) Thus, there was ample evidence not only that the food stamps were taken from Penny's person, but also that appellant personally spent them for personal gain at the Lorena Market. (See *People v. Navarette*, *supra*, 30 Cal.4th at p. 499 ["one can certainly rob a living person by killing that person and then taking his or her property"].)

Appellant also alleges that there was no substantial evidence that the property was taken while Penny was still conscious or alive. (AOB 253-255.) He asserts that, even if he rendered the victim unconscious, a defendant must have formed the intent to take the victim's property prior to rendering her unconscious. (AOB 253.) However, appellant simply ignores well-settled case law that is far more apt to the facts of the instant case. (See *People v. DePriest* , *supra*, 42 Cal.4th at p. 47 ["Where a person is left dead or dying in 'relative proximity' to property that was taken, and such property is later found in the defendant's possession, the jury is entitled to infer that the victim was robbed and that the defendant committed the crime"]; *People v. Maury*, *supra*, 30 Cal.4th at p. 402 [because property that was in the possession of the victim was missing, the jury could reasonably infer that the defendant stole the property].)

Furthermore, the only case law cited by appellant in support of his novel proposition regarding consciousness involved a situation where there was no evidence that the defendant used any force or fear whatsoever on the victim. (See *People v. Russell* (1953) 118 Cal.App.2d 136, 138-139

["the additional necessary element to support a conviction of robbery, to wit, that the money or the wallet was taken by appellant through the use of force upon [the victim] rests upon nothing but speculation"].)

Appellant fails to recognize that Penny's clothes, and her food stamps, were unquestionably removed while Penny was conscious and violently resisting. Appellant told Detective Prell that Penny asked him for help *after* Pearson raped her, and *after* he (appellant) punched her twice in the face. (10RT 2146-2147; 11RT 2188.) Penny continued to resist to the very end, calling the defendants, "You mother fuckers." (10RT 2147; 11RT 2188.)

Thus, the food stamps were taken while Penny was conscious and resisting. There is virtually no evidence supporting any other theory. Moreover, as noted by the prosecutor, a reasonable inference from the evidence is that the food stamps were taken during the initial encounter, prior to Penny being kidnapped and dragged over the fence and down the embankment. (11RT 2356.) Indeed, it is an entirely reasonable inference from the evidence that Penny violently resisted from the very beginning, causing the defendants to physically overwhelm her and drag her to a safer place to perpetrate their increasingly nefarious deeds. Appellant's numerous scenarios otherwise are nothing but rank speculation, and largely unsupported by the evidence adduced at trial. (See AOB 251.)

Finally, appellant, as previously noted, obviously had an independent felonious purpose for the robbery, as the evidence demonstrated that he spent the stolen food stamps at the Lorena Market. (10RT 2044, 2046; see *People v. Clark*, *supra*, 52 Cal.4th at p. 947 ["Contrary to defendant's assertion, that he may have succeeded in taking [the victim's] money only after her death does not undermine the special circumstance finding"].) Appellant's claim is specious.

VIII. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON FELONY MURDER; IN ANY EVENT, ANY ERROR WAS HARMLESS

Appellant argues that "instructional error occurred based on modifications to pattern instruction CALJIC No. 8.21, which explained felony murder." (AOB 257; see also AOB 256-270.) He further opines that "[i]ts use was error when multiple section 189 felonies were alleged because it permitted jurors to find [appellant] guilty of murder, if jurors found the killing occurred during one listed felony, and [appellant] had the specific intent to commit another, unrelated listed felony. (AOB 258.) Appellant claims that "[u]nder California case law, when it cannot be determined from the record whether the jury based its murder verdict on a legally correct theory or a legally flawed theory, the appellate court cannot say the error is harmless and the error must be deemed prejudicial." (AOB 268.) Appellant's claims simply ignore the law and should be soundly rejected.[52]

A. Relevant Proceedings

Here, the prosecution proceeded on three different possible theories of first degree murder: 1) deliberate and premeditated; 2) felony murder; and 3) torture murder. (See, e.g., 11RT 2355-2367 [prosecutor's closing argument].) The prosecutor also argued, without objection, that:

> All persons who, either directly and actively commit the act constituting that crime talking about these up here or who with the knowledge of the unlawful purpose, of the perpetrator of the crime, and with the intent or purpose of committing encouraging or facilitating the commission of the events, aids,

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[52] As will be noted in Argument XII, *post*, the trial court improperly instructed the jury on felony murder by including torture among the list of predicate felonies, but the error was harmless. In any event, that is a different argument from the one presented in the instant claim.

> promotes, encourages or instigates by act or advice its commission are guilty of the murder in first degree.

(11RT 2365.)

The trial court properly instructed the jury on these theories. (2CT 543-544 [CALJIC No. 3.02 (aiding/abetting)], 548-549 [CALJIC No. 8.20 (deliberate / premeditated)], 550 [CALJIC No. 8.21 (felony murder)]; 551 [CALJIC No. 8.24 (torture murder)].) The jurors were also properly instructed that they need not agree on a theory of guilt. (2CT 547.) The verdicts confirmed that the jury found that appellant harbored the requisite intent for each of the underlying crimes outlined in counts 2 through 8, i.e., robbery, kidnapping to commit rape, forcible rape while acting in concert, forcible rape, sexual penetration by foreign object while acting in concert, sexual penetration by foreign object, and torture. (3CT 597-607; 12RT 2527-2534.)

B. General Legal Principles

Errors in jury instructions are questions of law which are reviewed de novo. (*People v. Cole* (2004) 33 Cal.4th 1158, 1206; *People v. Guiuan* (1998) 18 Cal.4th 588, 569-570.) "The independent or de novo standard of review is applicable in assessing whether [jury] instructions correctly state the law, and also whether instructions effectively direct a finding adverse to a defendant by removing an issue from the jury's consideration." (*People v. Posey* (2004) 32 Cal.4th 193, 218 [citations omitted].)

The trial court instructed the jury pursuant to CALJIC No. 8.21 as follows:

> The unlawful killing of a human being, whether intentional, unintentional or accidental, which occurs [during the commission of any of the following crimes: robbery, kidnap for rape, rape in concert, rape, sexual penetration by a foreign object (a wooden stake) in concert, sexual penetration by a foreign object (a wooden stake), or torture, is murder of the first degree

> when the perpetrator had the specific intent to commit that crime.
>
> The specific intent to commit any of the following crimes: robbery, kidnap for rape, rape in concert, rape, sexual penetration by a foreign object (a wooden stake) in concert, sexual penetration by a foreign object (a wooden stake), or torture and the commission of any such crime must be proved beyond a reasonable doubt.

(2CT 550; 11RT 2310-2311.) Appellant did not lodge any objection to the given version of CALJIC No. 8.21.

C. The Trial Court Properly Instructed The Jury Pursuant to CALJIC No. 8.21

Initially, appellant's claim amounts to an argument that the trial court should have, sua sponte, clarified for the jury instructions that were already correct in law. His failure to request such clarification, however, forfeits his claim on appeal. (*People v. Gutierrez* (1993) 14 Cal.App.4th 1425, 1439.) "A trial court has no sua sponte duty to revise or improve upon an accurate statement of law without a request from counsel [citation], and failure to request clarification of an otherwise correct instruction forfeits the claim of error for purposes of appeal. . . ." (*People v. Lee* (2011) 51 Cal.4th 620, 638; *People v. Virgil* (2011) 51 Cal.4th 1210, 1260.)

In any event, assuming his claim is not forfeited, in *People v. Booker*, this Court noted:

> To the extent defendant contends the trial court failed to instruct the jury that an antemortem-formed intent to commit rape or a lewd act by force is required for a first degree felony-murder conviction, we repeatedly have held that CALJIC No. 8.21,[] which the trial court read to the jury here, adequately conveys that the required intent must be formed before the murder occurred. (E.g., *People v. Jones* (2003) 29 Cal.4th 1229, 1258-1259 [].)

(*People v. Booker*, *supra*, 51 Cal.4th at pp. 180-181, footnote omitted.)

Appellant argues that "[n]owhere did the instruction tell jurors that in order to find [him] guilty under a theory of felony murder the jury had to find: (1) the killing occurred during the commission of one of the specified felonies; (2) and [appellant] had the specific intent to commit that specified felony which resulted in the victim's death. (AOB 259.) Inexplicably, appellant simply ignores the plain language of CALJIC No. 8.21, which tells the jury precisely that any unlawful killing which occurs during the commission of one of the specified crimes "is murder of the first degree when the perpetrator had *the specific intent to commit that crime.*" (2CT 550, italics added.)

Additionally, appellant simply ignores the special circumstance findings by claiming that "the jury did not find the death occurred during, or was the result of, the felony [he] specifically intended to commit . . . ." (AOB 263.) If that were true, the jury would not have returned six true findings on six special circumstance allegations.

In *People v. Taylor*, this Court specifically explained:

> To convict a defendant of first degree murder, the jury must unanimously agree that the defendant is guilty of that offense beyond a reasonable doubt. But, as we have repeatedly explained, the jury need not unanimously agree on the theory underlying the first degree murder. (*People v. Hawthorne* [(2009) 46 Cal.4th 67], 89 []; *People v. Carpenter* (1997) 15 Cal.4th 312, 394–395 [].) We have also repeatedly rejected the argument, which defendant puts forth here, that a unanimity instruction is required under *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 [], which held that the constitutional guarantees of due process and jury trial require that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (See *People v. Morgan* (2007) 42 Cal.4th 593, 617 [] [nothing in *Apprendi* requires unanimous verdict on theory of first degree murder]; *People v. Nakahara* [(2003) 30 Cal.4th 705], 712–713 [] [same].)

(*People v. Taylor*, *supra*, 48 Cal.4th at p. 626.)

Appellant concedes that:

> *People v. Cavitt* (2004) 33 Cal.4th 187, explained that a non-killer's liability for murder depends on the relationship between the target felony and the act resulting in death. For felony murder liability to attach to the non-killer "there must be a logical nexus, beyond mere coincidence of time and place, between the felony the parties were committing or attempting to commit and the act resulting in death." (*Id.* at p. 201.)

(AOB 263.)

Appellant's argument simply ignores the fact that he was convicted of each and every one of the underlying crimes, as well as all of the special circumstance allegations.[53] Indeed, appellant's argument seemingly promotes the absurd view that, since the defendants savaged Penny so badly, and since the coroner could not determine precisely when she died or what actually killed her, he could not be convicted of felony murder because the order of the crimes was not clear. (See AOB 259-263; see also 11RT 2364, 2368.) As noted above, such is hardly the state of the law.

D. Appellant Could Not Have Been Prejudiced By Any Error

Finally, even assuming that the trial court somehow erred in instructing the jury, any error was harmless, as "the factual question posed by the omitted instruction was necessarily resolved adversely to the defendant under other, properly given instructions." (*People v. Sedeno* (1974) 10 Cal.3d 703, 721, overruled in part on other grounds in *People v.*

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[53] For this reason, appellant's complicated chart proffered on page 261 of his opening brief is completely irrelevant. In short, the jury found each of the seven underlying crimes true, and each of the six special circumstance allegations to be true. (3CT 597-607; 12RT 2527-2534.) Thus, using appellant's logic, there were a total of seven times six, or 42 "possibilities," and 42 of the 42 were "proper."

Breverman (1998) 19 Cal.4th 142, 149, and disapproved on other grounds in *People v. Flannel* (1979) 25 Cal.3d 668, 684, fn. 12; see *People v. Coffman* (2004) 34 Cal.4th 1, 96.)

Appellant brazenly argues that "the evidence that [he] harbored specific intent to commit any crime at all was weak circumstantial evidence . . . ." (AOB 265.) If this were so, it is highly doubtful that appellant's defense counsel would have conceded most of his case during his opening argument. (10RT 1916.) Appellant also ignores the record by claiming that "no other evidence showed the order in which the offenses were committed . . . ." (AOB 266.) To the contrary, the physical evidence at the scene demonstrated that the kidnapping offense was committed prior to the sexual offenses, and prior to the torture offense. (11RT 2228, 2235-2236, 2247, 2249.) Quite simply, as confirmed by the jury, every theory of guilt was factually supported in the instant case.

In *Taylor*, this Court also noted:

> In any event, even had the trial court erred in not giving a unanimity instruction, the error was harmless under any standard. The jury unanimously found defendant guilty of the substantive crimes of rape, forcible oral copulation, and burglary, and it unanimously found true the associated felony-murder special-circumstance allegations. Given these verdicts and findings, the jury necessarily reached unanimous agreement that defendant committed a first degree felony murder based upon rape, forcible oral copulation, and burglary. (Cf. *People v. Hawthorne*, *supra*, 46 Cal.4th at pp. 89-90 []; *People v. Carpenter*, *supra*, 15 Cal.4th at p. 395 [].)

(*People v. Taylor*, *supra*, 48 Cal.4th at p. 626.)

This Court finally noted in *Taylor*:

> "The evidence merely present[ed] the possibility the jury may divide, or be uncertain, as to the exact way the defendant is guilty of a single discrete crime." ([*People v. Russo* (2001) 25 Cal.4th 1124], 1135 [].) Under these circumstances, juror unanimity was unnecessary. (*Ibid.*)

(*People v. Taylor*, *supra*, 48 Cal.4th at p. 628.)[54] Appellant's claim fails.

IX. THE TRIAL COURT INSTRUCTED THE JURY WITH THE CORRECT DEFINITION OF AIDING AND ABETTING LIABILITY; IN ANY EVENT, ANY ERROR WAS HARMLESS

Appellant contends that "[t]he aiding and abetting instruction impermissibly mixed and matched among the seven offenses in counts 1 through 7, and permitted the jury to find Hardy guilty of each of the seven counts without requiring any natural and probable consequence connection between his target offense and the nontarget offense that actually caused the offenses of conviction." (AOB 271; see also AOB 271-283.) Appellant's claim once again ignores well-settled case law to the contrary.

A. General Legal Principles

As in Argument VIII, *ante*, appellant contends that the alleged error arose because the pattern instruction appears to contemplate only a single target, and single non-target offense. Respondent therefore incorporates by reference the authorities cited in Argument VIII, *ante*, that demonstrate otherwise. Respondent also incorporates from Argument VIII the standard of review for instructional error.

> With regard to criminal trials, "not every ambiguity, inconsistency, or deficiency in a jury instruction rises to the level of a due process violation. The question is ' "whether the ailing instruction ... so infected the entire trial that the resulting conviction violates due process." ' [Citation.] ' "[A] single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge." ' [Citation.] If the charge as a whole is ambiguous, the question is whether there is a ' "reasonable likelihood that the jury has

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[54] Appellant even concedes that "all charged offenses occurred during a single incident, and over a relatively short period of time." (AOB 260.)

> applied the challenged instruction in a way" that violates the Constitution.' " [Citation.]

(*People v. Huggins*, *supra*, 38 Cal.4th at p. 192.)

In *People v. Prettyman* (1996) 14 Cal.4th 248, this Court summarized the natural and probable consequences doctrine as follows:

> Under California law, a person who aids and abets a confederate in the commission of a criminal act is liable not only for that crime (the target crime), but also for any other offense (nontarget crime) committed by the confederate as a "natural and probable consequence" of the crime originally aided and abetted. To convict a defendant of a nontarget crime as an accomplice under the 'natural and probable consequences' doctrine, the jury must find that, with knowledge of the perpetrator's unlawful purpose, and with the intent of committing, encouraging, or facilitating the commission of the target crime, the defendant aided, promoted, encouraged, or instigated the commission of the target crime. The jury must also find that the defendant's confederate committed an offense other than the target crime, and that the nontarget offense perpetrated by the confederate was a "natural and probable consequence" of the target crime that the defendant assisted or encouraged.

(*Id.* at p. 254.)

The trial court instructed the jury pursuant to CALJIC No. 3.02 as follows:

> One who aids and abets another in the commission of a crime [or crimes] is not only guilty of that crime or those crimes, but is also guilty of any other crime committed by a principal which is a natural and probable consequence of the crime[s] originally aided and abetted.
>
> In order to find the defendant guilty of the [*sic*] any one of the following crimes[s] of murder, or robbery, or kidnap for rape, or rape in concert, or rape, or sexual penetration/rape by a foreign object - a wooded stake in concert, or sexual penetration/rape by a foreign object – a wooden stake, as charged in Count[s] 1-8, you must be satisfied beyond a reasonable doubt that:

1. The crime or any one of the following crimes of: murder, or robbery, or kidnap for rape, or rape in concert, or rape, or sexual penetration/rape by a foreign object - a wooden stake in concert, or sexual penetration/rape by a foreign object - a wooden stake were committed;

2. That the defendant aided and abetted any one of those crime[s];

3. That a co-principal in that crime committed the [*sic*] any one of the following crimes of: murder, or robbery, or kidnap for rape, or rape in concert, or rape, or sexual penetration/rape by a foreign object - a wooden stake in concert, or sexual penetration/rape by a foreign object - a wooden stake; and

4. That any one of the following crime[s] of: murder, robbery, or kidnap for rape, or rape in concert, or rape, or sexual penetration/rape by a foreign object - a wooden stake in concert, or sexual penetration/rape by a foreign object - a wooden stake were a natural and probable consequence of the commission of any one of the crime[s] of: murder, or robbery, or kidnap for rape, or rape in concert, or rape, or sexual penetration/rape by a foreign object - a wooden stake in concert, or sexual penetration/rape by a foreign object - a wooden stake.

You are not required to unanimously agree as to which originally contemplated crime the defendant aided and abetted, so long as you are satisfied beyond a reasonable doubt and unanimously agree that the defendant aided and abetted the commission of any of the identified and defined target crimes of: murder, or robbery, or kidnap for rape, or rape in concert, or rape, or sexual penetration/rape by a foreign object - a wooden stake in concert, or sexual penetration/rape by a foreign object - a wooden stake and that any one of those crimes were a natural and probable consequence of the commission of any of the target crimes.

Whether a consequence is "natural and probable" is an objective test based not on what the defendant actually intended but on what a person of reasonable and ordinary prudence would have expected would be likely to occur. The issue is to be decided in light of all of the circumstances surrounding the incident. A "natural" consequence is one which is within the

> normal range of outcomes that may be reasonably expected to occur if nothing unusual has intervened. "Probable" means likely to happen.

(2CT 543-544.)

B. The Trial Court Instructed The Jury With The Correct Definition Of Aiding And Abetting Liability

Initially, as in Argument VIII, *ante*, appellant's claim amounts to an argument that the trial court should have, sua sponte, clarified for the jury instructions that were already correct in law. His failure to request such clarification, however, forfeits his claim on appeal. (*People v. Gutierrez*, *supra*, 14 Cal.App.4th at p. 1439.) "A trial court has no sua sponte duty to revise or improve upon an accurate statement of law without a request from counsel [citation], and failure to request clarification of an otherwise correct instruction forfeits the claim of error for purposes of appeal. . . ." (*People v. Lee*, *supra*, 51 Cal.4th at p. 638.)

In any event, assuming the instant claim is not forfeited, this Court has expressly endorsed the adequacy of CALJIC No. 3.02's explanation of the natural and probable consequences doctrine. (*People v. Richardson* (2008) 43 Cal.4th 959, 1022 ["First, we reject any challenge to the adequacy of CALJIC No. 3.02's explication of the natural and probable consequences doctrine"].) Additionally, in *People v. Coffman*, *supra*, 34 Cal.4th 1, this Court explained:

> To the extent [defendant] contends that imposition of liability for murder on an aider and abettor under this doctrine violates due process by substituting a presumption for, or otherwise excusing, proof of the required mental state, [he] is mistaken. Notably, the jury here was also instructed with CALJIC No. 3.01, advising that an aider and abettor must act with the intent of committing, encouraging or facilitating the commission of the target crime, as well as CALJIC No. 8.81.17, which required, for a true finding on the special circumstance allegations, that defendant[ ] had the specific intent to kill the

> victim. These concepts fully informed the jury of applicable principles of vicarious liability in this context.

(*Id.* at p. 107.) Likewise, here, the trial court additionally instructed the jury with CALJIC Nos. 3.01 and 8.81.17, hence there could not have been error. (2CT 542, 555.)

Moreover, appellant's argument also fails because the prosecutor in the present case, contrary to appellant's assertions, did not rely upon the natural-and-probable-consequences doctrine; rather, she repeatedly argued that the evidence established that appellant intended to commit all of the charged crimes, and intended to kill Penny. (See, e.g., 11RT 2356-2357.) "The prosecutor never argued that one defendant intended only to commit one particular crime, but that the other defendant committed a different crime, which was the natural and probable consequence of the commission of the first, thereby making both defendants guilty of the second offense." (*People v. Letner* (2010) 50 Cal.4th 99, 183-184.)

Indeed, here, the prosecutor specifically argued that, with 114 injuries, it was likely that the defendants took turns inflicting them on Penny. (11RT 2364-2365.) The prosecutor also commented that, "[Appellant's] the one that instigated this entire situation, the murder of Penny." (11RT 2365.) Although the jury found the personal use allegations to be not true, or could not reach a verdict on them, the prosecutor nevertheless *argued* that appellant personally participated in all of the crimes. (11RT 2366, 2372, 2378-2379.) Appellant errs by failing to distinguish between the prosecutors argument and the jury's verdict. Much like Argument VIII, *ante*, appellant's argument simply ignores the fact that he was convicted of

each and every one of the underlying crimes, as well as all of the special circumstance allegations.[55]

Appellant specifically told the police that he watched as Pearson raped Penny, and that, after the rape, he punched Penny in the face, not once, but twice. (10RT 2145, 2147; 11RT 2169, 2188.) The jury could have reasonably inferred that punching Penny in the face *after* the rape was far more consistent with having participated in the rape, rather than being "sickened" by it. (See 10RT 2145; 11RT 2188.) Moreover, a reasonable inference from the evidence, specifically the DNA on appellant's jacket, is that appellant also personally raped Penny. (10RT 1995-1996, 2000, 2006-2012.) This was by far the more likely scenario, i.e., the DNA and semen transferred to appellant's jacket as he laid on top of Penny raping her. The natural and probable consequences doctrine was hardly required to convict appellant of any of the instant crimes. Even if appellant did not "personally use" the stake, he certainly helped beat Penny into submission prior to her being raped/sexually penetrated by a foreign object, to wit, the stake. (10RT 2147; 11RT 2169, 2188.)

Furthermore, the prosecutor explained during her closing argument:

> So, basically, what that is saying is it is reasonable and logical that after they robbed her, they decided to rape her, and after he raped her, they raped her with a foreign object. It's a reasonable and logical and natural progression as to what was taking place that night. That's what this instruction says, a natural and foreseeable consequence and ultimately they killed her. Which was a natural, rational and probable consequence of forcing her over that fence, because once they forced her over the fence, her life was over.

(11RT 2357.)

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[55] Once again, for this reason, appellant's complicated, strained and farfetched "chain of logic" and "if A then B" examples are wholly irrelevant, if not fanciful. (See, e.g., AOB 272, 279.)

The prosecutor very specifically referred to appellant as a principal by arguing that "he" raped her, and explained that appellant directly participated in the rape by a foreign object by stating that "they" raped Penny with a foreign object. (11RT 2357.) As in *People v. Letner*, *supra*, 50 Cal.4th 99, the prosecutor here never argued that one defendant intended only to commit one particular crime, but that the other defendant committed a different crime.[56] (*Id.* at pp. 183-184; see *People v. Prettyman*, *supra*, 14 Cal.4th at p. 270.)

Similarly, this Court has previously rejected any argument that the natural and probable consequences doctrine unconstitutionally presumes malice on the part of the aider and abettor. (*People v. Garrison* (1989) 47 Cal.3d 746, 777–778; *People v. Bunyard* (1988) 45 Cal.3d 1189, 1231–1232; see also *People v. Culuko* (2000) 78 Cal.App.4th 307, 322 ["The [California] Supreme Court has repeatedly rejected the contention that an instruction on the natural and probable consequences doctrine is erroneous because it permits an aider and abettor to be found guilty of murder without malice"].)

Finally, to the extent that appellant is contending that the application of the natural-and-probable-consequences doctrine in a capital case is a violation of due process because it permits the jury to convict the defendant of the substantive charges and special circumstance allegations without a need to decide if he had the otherwise requisite intent, and would authorize a death sentence based on a vicarious negligence theory of liability in

[56] Appellant relies heavily on *People v. Kauffman* (1907) 152 Cal. 331, but *Kauffman* is inapposite. (See AOB 274-277.) Appellant concedes that "*Kauffman* was a case involving a conspiracy theory of liability for substantive crimes committed in the course of the conspiracy," which is completely distinguishable from the facts of the instant case. (See AOB 276.)

violation of the Eighth Amendment, this Court has repeatedly rejected these contentions, and should decline to revisit its prior decisions. (*People v. Richardson*, *supra*, 43 Cal.4th at p. 1021; see also *People v. Coffman*, *supra*, 34 Cal.4th at pp. 107-108 ["We agree with the [*People v. Nguyen* (1993) 21 Cal.App.4th 518, 535] court that CALJIC No. 3.02 correctly instructs the jury on the natural and probable consequences doctrine"]; *People v. Garrison* (1989) 47 Cal.3d 746, 777-778.)

C. Appellant Could Not Have Been Prejudiced By Any Error With Respect To The Definition Of Aiding And Abetting Liability

Appellant attempts to make much of the fact that the jury "found not true the allegation [he] personally used a deadly weapon on three counts. (3CT 599 [robbery], 600 [kidnap for rape], 601 [rape in concert]," as well as the forcible rape. (AOB 282; 3CT 602.) However, due to the manner in which the evidence unfolded, i.e., Armstrong did not appear with the stake until after the rape had been completed (10RT 2148), this was a perfectly reasonable finding by the jury.

The fact that the jury could not reach agreement on the remainder of the personal use allegations, i.e., as to the murder (3CT 597), rape/sexual penetration by a foreign object while acting in concert (3CT 603), rape/sexual penetration by a foreign object (3CT 604), and torture (3CT 605), simply means that all of the jurors could not agree on the personal use allegations. It does not mean that appellant did not personally use the stake as to these counts.

Nor does this mean that "the jury understood [appellant's] liability was as an aider and abettor." The evidence plainly demonstrated that the robbery, kidnap for rape and rape in concert were completed without the use of the stake by any one of the three men, but it also demonstrated that appellant personally, i.e., physically, assisted with the perpetration of each

one of these three crimes, i.e., by personally taking the food stamps, physically helping to get Penny over the fence, and by biting and punching her into submission and ultimately death.[57] (10RT 2044, 2046, 2137-2139, 2147.)

The absence of prejudice here is analogous to the absence of prejudice in *People v. Letner*, *supra*, 50 Cal.4th at page 99. In *Letner*, this Court observed:

> To point out, as defendants do, that the ambiguous instruction could have led the jury to "indulge in unguided speculation" (*Prettyman*, *supra*, 14 Cal.4th at p. 267 []) concerning the unspecified target offenses, does not establish a reasonable likelihood that the jury did so. As mentioned above, the prosecutor did not rely upon the natural-and-probable-consequences doctrine, but argued that both defendants intended to commit all of the charged offenses. (See *id.* at p. 273 [] ["[b]ecause the parties made no reference to the 'natural and probable consequences' doctrine in their arguments to the jury, it is highly unlikely that the jury relied upon that rule when it convicted defendant"].) There also is little doubt that the jury determined that each defendant intended to kill [the victim], because, as the prosecution conceded, there was no clear evidence establishing which defendant was the actual killer, and, as discussed above, the trial court's instructions required in such circumstances that in order to sustain the special circumstance allegations, the jury must find each defendant intended to kill [the victim]. Thus, the jury's true findings on the special circumstance allegations essentially negate the possibility that the jury relied upon the natural-and-probable-consequences doctrine in convicting defendants of murder, which reliance - absent such findings - otherwise would have been the most likely application of that doctrine under the circumstances of the

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[57] As previously noted, appellant was indisputably much more than an "aider and abettor" as to the robbery, as he personally took possession of and spent the food stamps. (10RT 2034, 2044, 2046, 2057; 11RT 2213-2214.) Indeed, even if one of the other men forcibly took the food stamps from Penny and immediately gave them to appellant, that too would demonstrate that appellant was the "primary actor," i.e., the leader.

> present case. In sum, there is no reasonable likelihood the jury misunderstood or misapplied the instruction.

(Id. at p. 184.)

Letner, in this regard, is virtually identical to the instant case, and outlines very clearly the absence of prejudice in the case at bar. Moreover, the arguments demonstrating the absence of prejudice in Argument VIII, *ante*, are equally applicable here. In other words, "given these verdicts and findings, the jury necessarily reached unanimous agreement that defendant committed a first degree felony murder based upon [the target crimes]." (*People v. Taylor*, *supra*, 48 Cal.4th at p. 626.) Appellant's claim otherwise is unavailing.

X. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON FIRST DEGREE MURDER, AND THE VERDICT FORM REFLECTED THE CORRECT FINDINGS OF FACT REQUIRED FOR FIRST DEGREE MURDER; IN ANY EVENT, ANY ERROR WAS HARMLESS

Appellant argues "the verdict form, combined with the jury instructions, incorrectly permitted the jury to find [him] guilty of first degree murder based on a legal theory that supports only second degree murder, and resulted in a written verdict form that fails to reflect the findings of fact required for first degree murder. . . ." (AOB 284; see also AOB 284-301.) Appellant simply ignores the given jury instructions and well-settled case law to the contrary, and his claim therefore lacks merit.

A. Relevant Background Proceedings

The verdict form for count 1, murder, first required a finding as to guilt and degree of the murder, and then subsequently, in its latter portion, required findings on the special circumstance allegations. The form presented two options for the jurors to select. Jurors were required to select as to the special circumstance allegations whether they found that appellant

was: "(A) The Actual Killer; or (B) An Aider and Abettor and had the intent to kill; or was a Major Participant and acted with reckless indifference to human life." (3CT 597.) The jury circled option B. (*Ibid.*) Option B contained two legal theories: (1) aiding and abetting; and (2) a major participant acting in reckless disregard for human life. These theories applied only to the special circumstance allegations. (*Ibid.*)

Specifically, the verdict form used for count 1 contained the following language:

> We the jury in the above-entitled action find the defendant WARREN HARDY GUILTY of the crime of MURDER, in violation of Penal Code Section 187(a), a felony, as charged in Count 1 of the information.
>
> We further find it to be Murder of the FIRST Degree. (Insert First or Second)
>
> We further find the allegation that the defendant Warren Hardy in the commission of the above offense personally used a dangerous and deadly weapon in violation of Penal Code Section 12022(b)(1) to be ________ (Insert True or Not True)
>
> We the jury in the above-entitled action find the defendant Warren Hardy was:
>
> A. The Actual Killer; or
>
> B. An Aider and Abettor and had the intent to kill; or was a Major Participant and acted with reckless indifference to human life
>
> (Circle all of either "A" or "B")
>
> We further find the allegation of the special circumstance of robbery pursuant to Penal Code Section 198.12(a)(17)(A) to be ______ (Insert True or Not True)
>
> We further find the allegation of the special circumstance of kidnapping for rape pursuant to Penal Code Section 198.12(a)(17)(B) to be ______ (Insert True or Not True)

> We Further find the allegation of the special circumstance of rape pursuant to Penal Code Section 198.12(a)(17)(B) to be ______ (Insert True or Not True)
>
> We further find the allegation of the special circumstance of rape by a foreign object pursuant to Penal Code Section 198.12(a)(17)(K) to be ______ (Insert True or Not True)
>
> We further find the allegation of the special circumstance of torture pursuant to Penal Code Section 198.12(a)(18) to be ______ (Insert True or Not True)

(3CT 597-598.)

B. General Legal Principles

When reviewing an instructional ambiguity claim, the court asks whether the jury was reasonably likely to have construed the instruction in a manner that violated the defendant's rights. (*People v. Whisenhunt*, supra, 44 Cal.4th at p. 214.) It is presumed that the jurors were intelligent and capable of understanding the instructions (*People v. Laws* (1993) 12 Cal.App.4th 786, 796), and followed the instructions as given. (*People v. Osband* (1996) 13 Cal.4th 622, 714; see *People v. Cain*, *supra*, 10 Cal.4th at p. 34 [the jury is presumed to follow the trial court's instructions].)

CALJIC 8.80.1, as given in the instant case, provided as follows:

> If you find [the] defendant in this case guilty of murder of the first degree, you must then determine if [one or more of] the following special circumstance[s]: [are] true or not true: robbery, kidnapping, kidnapping for rape, rape, rape by a foreign object (a wooden stake), or torture.
>
> The People have the burden of proving the truth of a special circumstance. If you have a reasonable doubt as to whether a special circumstance is true, you must find it to be not true.
>
> Unless an intent to kill is an element of a special circumstance, if you are satisfied beyond a reasonable doubt that the defendant actually killed a human being, you need not find

that the defendant intended to kill in order to find the special circumstance to be true.

If you find that a defendant was not the actual killer of a human being, or if you are unable to decide whether the defendant was the actual killer or an aider or abettor or co-conspirator, you cannot find the special circumstance to be true unless you are satisfied beyond a reasonable doubt that the defendant with the intent to kill [aided,] [abetted,] [counseled,] [commanded,] [induced,] [solicited,] [requested,] [or] [assisted] any actor in the commission of the murder in the first degree], or with reckless indifference to human life and as a major participant [aided,] [abetted,] [counseled,] [commanded,] [induced,] [solicited,] [requested,] [or] [assisted] in the commission of one of more of the following crimes: robbery, kidnapping, kidnapping for rape, rape, rape by a foreign object (a wooden stake), or torture pursuant to Penal Code, § 190.2 (a)(17) which resulted in the death of a human being, namely Penny Keptra also known as Penny Sigler.

A defendant acts with reckless indifference to human life when that defendant knows or is aware that [his] acts involve a grave risk of death to an innocent human being.

You must decide separately each special circumstance alleged in this case. If you cannot agree as to all of the special circumstances, but can agree as to one or more of them, you must make your finding as to the one or more upon which you do agree.

In order to find a special circumstance alleged in this case to be true or untrue, you must agree unanimously.

You will state your special finding as to whether this special circumstance is or is not true on the form that will be supplied.

C. The Trial Court Properly Instructed The Jury On First Degree Murder

Once again, appellant has forfeited the instant contention by failing to object, in this instance to the structure or wording of the verdict form in the trial court. (See *People v. Houston* (2012) 54 Cal.4th 1186, 1226-1228

["Had defendant raised a timely objection to the jury instructions and verdict forms at any of these stages of the trial on the ground that the indictment did not allege that the attempted murders were deliberate and premeditated, the court could have heard arguments on whether to permit the prosecutor to amend the indictment"].) An objection to jury verdict forms is generally deemed waived if not raised in the trial court. (*People v. Lewis* (1983) 147 Cal.App.3d 1135, 1142; *People v. Nichols* (1967) 255 Cal.App.2d 217, 224.)

In any event, assuming the instant claim is properly before this Court, appellant's argument that the verdict form was somehow a "hybrid" verdict form (because it contained both the verdict of guilt (§ 1151), and findings of fact without a judgment of guilt (§ 1152)) is simply incorrect. (See AOB 286-287.) Appellant ignores the plain language of section 1152, which provides:

> A special verdict is that by which the jury finds the facts only, leaving the judgment to the court. It must present the conclusions of fact as established by the evidence, and not the evidence to prove them, and these conclusions of fact must be so presented as that nothing remains to the court but to draw conclusions of law upon them.

Here, the verdict form clearly asked the jury to reach legal conclusions, which they did, and the form did not leave anything for the trial court "to draw conclusions of law upon them." There was simply nothing "hybrid" about the verdict form.

Furthermore, even if the count 1 verdict form is somehow deemed a hybrid form, appellant concedes that this Court, in *People v. Davis* (1995) 10 Cal.4th 463, specifically approved hybrid verdict forms, and pointedly rejected the challenge to the verdict form because the defendant could not show the form had interfered with the jury's deliberative process. (*Id.* at pp. 511-512; see also AOB 294.)

Appellant also acknowledges a holding contrary to his position in *People v. Jackson* (1996) 13 Cal.4th 1164. (See AOB 294.) In *Jackson*, the jury was provided verdict forms which required it to find the defendant guilty of premeditated murder, guilty of felony murder, guilty under both theories, or not guilty. The defendant argued that the verdict form was not authorized by statute.

This Court rejected that argument, concluding, "The verdict rendered by the jury, however, was not a special verdict; it did not present only findings of fact." (*People v. Jackson*, *supra*, 13 Cal.4th at p. 898; see also *People v. Neely* (1993) 6 Cal.4th 877, 898 [approving the use of verdict forms which required the jury to find the defendant guilty of either premeditated murder or felony murder and concluding the verdict was not a special verdict]; *People v. Webster* (1991) 54 Cal.3d 411, 446-447 [approving verdict forms for different theories of murder and stating that special findings may accompany a general verdict as long as they do not interfere with the jury's deliberative process]; *People v. Farmer* (1989) 47 Cal.3d 888, 920, abrogated on other grounds by *People v. Waidla* (2000) 22 Cal.4th 690, 724, fn. 6 ["But in a true special verdict the jury finds only the facts, leaving judgment to the court. [] Here, the jury returned a general verdict of guilt and, on the assumption it followed instructions, decided the two specific questions afterwards. The findings were thus not a special verdict"].)

Appellant again attempts to piecemeal together a convoluted, strained and illogical reading of pieces of several different jury instructions (see AOB 288-289), while ignoring the plain meaning of others, and he additionally ignores the well-settled principle that jury instructions are read as a whole, rather than from parts of an instruction or from a particular instruction. (See *People v. Castillo* (1997) 16 Cal.4th 1009, 1015-1016 ["'[T]he correctness of jury instructions is to be determined from the entire

charge of the court, not from a consideration of parts of an instruction or from a particular instruction.' [Citation.]"].) Indeed, the jury was specifically instructed pursuant to CALJIC No. 1.01 that the instructions were to be considered "as a whole and each in light of all the others." (2CT 517.)

This Court has specifically approved the verdict form at issue here in *People v. Pearson, supra*, 53 Cal.4th 306. In *Pearson*, this Court noted:

> The verdict form for the offense of murder asked the jury to make one of two findings, that defendant was "A. The Actual Killer; or [¶] B. An Aider and Abettor and had the intent to kill; or was a Major Participant and acted with reckless indifference to human life." The jury selected finding B. The jury thereby showed its reliance on an aiding and abetting theory.

(*Id.* at p. 322.) Appellant, however, simply fails to address this Court's approval of virtually identical verdict form language (as stated in a written opinion following codefendant Pearson's separate trial).

Appellant "acknowledges that [the] instruction likely would have sufficed if some other instruction, or the verdict form itself, made clear that the selection of A or B related only to special circumstances." (AOB 292.) In fact, CALJIC 8.80.1 specifically stated as much in its fourth paragraph, *ante*, and directed the jury to the verdict form at issue, thereby eliminating any possibility of error. Moreover, the very first sentence of CALJIC No. 8.80.1 states, "If you find the defendant in this case guilty of murder of the first degree, you must then determine if one of more of the following special circumstance[s]: [are] true or not true: . . . ." (2CT 553.)

Furthermore, even if there was still some inexplicable confusion, CALJIC 8.80.1 then specifically instructed in the last paragraph, "You will state your special finding as to whether this special circumstance is or is not true on the form that will be supplied." (2CT 554; see *People v. Mejia* (2012) 211 Cal.App.4th 586, 633 ["it includes the paragraph of the form

instruction, paragraph three above, defining reckless indifference to human life. This definition is applicable to aiders and abettors in felony murder cases only . . ."].)

In *People v. Pearson, supra*, this Court further noted:

> The jury was not likely to understand the simpler CALJIC No. 8.81.17 as negating or displacing CALJIC No. 8.80.1, but rather as supplementing it. As the Attorney General suggests, the two instructions, read together, outline respectively the relationship of the murder to the predicate felony (CALJIC No. 8.81.17) and the mental state required for either an actual killer or an aider and abettor in the murder (CALJIC No. 8.80.1). The instructions as a whole posed no reasonable likelihood (*People v. Kelly* (1992) 1 Cal.4th 495, 525 []) of jury confusion on the point defendant identifies.

(*People v. Pearson, supra*, 53 Cal.4th at p. 324.) Appellant's claim fails on the merits.

D. Appellant Could Not Have Been Prejudiced By Any Error With Respect To The Definition Of First Degree Murder Or With Respect To The Structure Of The Verdict Form

In any event, appellant could not have been prejudiced by any error in the count 1 standard verdict form. Indeed, at trial, the parties agreed that, to find appellant guilty of second degree murder, the jury would have to find that the murder was not "premeditated and deliberated," and that appellant did not commit any of the enumerated felonies. (12RT 2481-2483; see *People v. Mejia, supra*, 211 Cal.App.4th at p. 634 ["To the extent the jury found any of them to be aiders and abettors of the direct perpetrator or perpetrators, it found that they were aware of the perpetrator's intent to kill, intended to facilitate the desired killing, and by conduct did facilitate that purpose"]. Such a result in the instant case, given appellant's admissions and the other overwhelming evidence of guilt, was not even a remote possibility.

Moreover, appellant simply ignores the fact that the jury, during deliberations, sent the following question to the trial court, "On the "guilty" for murder verdict sheet, there is an instruction/note on the sheet to "insert first or second" related to degree. Is 2nd degree an option and if so, what is the definition." The trial court answered that question as follows:

> Murder of the second degree is the unlawful killing of a human being with malice aforethought, when the perpetrator intended unlawfully to kill a human being, but the evidence is either insufficient to prove deliberation and premeditation or the felony was not an enumerated felony.
>
> If the felony was an enumerated felony, then the murder would be first degree murder. All felonies alleged in this case are enumerated felonies. Stated another way, if you find that the evidence is insufficient to prove deliberation and premeditation, and you further find that the murder did not occur during the commission of any of the felonies listed in counts 2 through 8, then the murder would be of the second degree.
>
> If you are convinced beyond a reasonable doubt and unanimously agree that the crime of murder has been committed by a defendant, but you unanimously agree that you have a reasonable doubt whether the murder was of the first or of the second degree, you must give the defendant the benefit of that doubt and return a verdict fixing the murder as of the second degree, as well as a verdict of not guilty of murder of the first degree.

(12RT 2488-2489.)

Thus, the jury was well aware that second degree murder was an option in the instant case, but also well advised that, pursuant to CALJIC No. 8.80.1, it must find the degree of murder *prior to* determining the truth of the special circumstance allegations. (2CT 553.) Appellant's argument that the jury somehow completed the verdict form in reverse order, and

ignored the plain dictates of CALJIC No. 8.80.1, is rank speculation that is completed unsupported by the record.[58]

Finally, appellant ignores the myriad of other instructions given to the jury, i.e., CALJIC No. 8.10, Murder – Defined (2CT 545), CALJIC No. 8.21, First Degree Felony-Murder (2CT 550), CALJIC No. 8.27, First Degree Felony-Murder – Aider and Abettor (2CT 552), etc. These and other instructions made it absolutely clear that appellant could not be convicted of first degree murder based solely on a "reckless indifference to human life." Appellant's claim fails, as he could not possibly have been prejudiced by any assumed minor ambiguity in the count 1 verdict form.

XI. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON AIDING AND ABETTING LIABILITY AND TORTURE; IN ANY EVENT, ANY ERROR WAS HARMLESS

Appellant argues that the "judgment of death, and the judgment of guilt to counts 1 and 8, and the true findings on the torture allegations should be reversed because the trial court failed to instruct the jury that aiding and abetting liability and torture required specific, not general intent . . . ." (AOB 302; see also AOB 302-315.) Appellant's contentions ignore the given jury instructions and well-settled case law to the contrary, and his claims are therefore unavailing.[59]

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[58] Moreover, later in his opening brief, appellant plainly concedes that the jury "decided murder" prior to making a finding on the special circumstance allegations. (AOB 322-323.) Appellant admits that, "The first verdict form jurors had to complete was for murder. (3CT 597.) Only after jurors decided murder did they turn their attention to the special circumstances, including whether the special circumstance of torture was true. (AOB 322-323.) Given appellant's plain concession, his claim must fail.

[59] As will be noted in Argument XII, *post*, the trial court did improperly instruct the jury on torture as a predicate felony for first degree felony murder, because torture was not added to section 189's list of

(continued...)

A. Relevant Law And Background Proceedings

The standard of review for instructional error and related legal points and authorities have been well-outlined in Arguments VIII, IX and X, *ante*. In the interest of brevity, respondent will not re-state that law here.

This Court applies the "reasonable probability" test of prejudice to the court's failure to give a legally correct pinpoint instruction. (*People v. Hughes* (2002) 27 Cal.4th 287, 362–363; see 2CT 538 [CALJIC No. 3.30].) A defendant who facilitates torture as an aider and abettor – i.e., acts with the intent or purpose of committing, or of encouraging or facilitating the commission of that crime (see *People v. McCoy*, *supra*, 25 Cal.4th at pp. 1117-1118) – is equally liable as the actual torturer. (*People v. Lewis* (2004) 120 Cal.App.4th 882, 888-889.) Torture's mental state element describes a specific intent rather than general criminal intent. (*People v. Burton* (2006) 143 Cal.App.4th 447, 451–452.) However, torture does not require the defendant act with premeditation and deliberation, and it does not require that he intend to inflict prolonged pain. (*People v. Hale* (1999) 75 Cal.App.4th 94, 107.)

The jury's findings on the torture count and the torture-related special allegations consisted of the following:

> As to count 1 (murder): "We further find the allegation of special circumstances of torture pursuant to Penal Code Section 190.2(a)(18) to be TRUE (Insert True or Not True)."

(3CT 598)

> As to count 4 (forcible rape while acting in concert): "We further find the allegation that the defendant Warren Hardy in

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(...continued)
predicate felonies until after the instant murder, but that is a different issue from the one presented in the instant argument. Moreover, as will be noted later, that error was harmless.

the commission of the above offense that the following circumstances apply: . . . 2) torture, in violation of Penal Code Section 206, pursuant to Penal Code Section 667.61(a) and (d) to be TRUE (Insert True or Not True)."

(3CT 601)

As to count 5 (forcible rape): "We further find the allegation that the defendant Warren Hardy in the commission of the above offense that the following circumstances apply: . . . 2) torture, in violation of Penal Code Section 206, pursuant to Penal Code Section 667.61(a) and (d) to be TRUE (Insert True or Not True)."

(3CT 602);

As to count 6 (forcible rape/sexual penetration by a foreign object while acting in concert): "We further find the allegation that the defendant Warren Hardy in the commission of the above offense that the following circumstances apply: . . . 2) torture, in violation of Penal Code Section 206, pursuant to Penal Code Section 667.61(a) and (d) to be TRUE (Insert True or Not True)."

(3CT 603)

As to count 7 (forcible rape/sexual penetration by a foreign object): "We further find the allegation that the defendant Warren Hardy in the commission of the above offense that the following circumstances apply: . . . 2) torture, in violation of Penal Code Section 206, pursuant to Penal Code Section 667.61(a) and (d) to be TRUE (Insert True or Not True)."

(3CT 604)

As to count 8 (torture)" "We the jury in the above-entitled action find the defendant WARREN HARDY GUILTY of the crime of TORTURE, in violation of Penal Code section 206, a felony, as charged in Count 8 of the information."

(3CT 605.)

CALJIC No. 2.02, Sufficiency of Circumstantial Evidence To Prove Specific Intent Or Mental State, instructed the jury in the instant case as follows:

> The specific intent or mental state with which an act is done may be shown by the circumstances surrounding the commission of the act. However, you may not [find the defendant guilty of the crime charged in Counts 1, 2, and 3 or find the allegations pursuant to Penal Code section 667.61 (a), (b), (d), and (e) to be true, unless the proved circumstances are not only (1) consistent with the theory that the defendant had the required specific intent or mental state but (2) cannot be reconciled with any other rational conclusion.
>
> Also, if the evidence as to any specific intent or mental state permits two reasonable interpretations, one of which points to the existence of the specific intent or mental state and the other to its absence, you must adopt that interpretation which points to its absence. If, on the other hand, one interpretation of the evidence as to the specific intent or mental state appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable.

(2CT 520.)[60]

CALJIC No. 3.30, Concurrence Of Act And General Criminal Intent, instructed the jury in the case at bar as follows:

> In the crime[s] [and] unless otherwise instructed [allegation[s]] charged in Count[s] 4, 5, 6 7, and 8, namely, rape in concert, rape, sexual penetration by a foreign object (a wooden stake) in concert, sexual penetration by a foreign object – a wooden stake, or torture and the personal use of a deadly weapon – a wooden stake, there must exist a union or joint

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[60] Appellant claims that "[n]either torture in count 8, nor the special torture allegations, was [sic] included [in CALJIC No. 2.02]." (AOB 308.) Appellant inexplicably ignores the plain language of CALJIC No. 2.02 as given to the jury, which includes the section 667.61 torture allegations. (2CT 520.) What CALJIC No. 2.02 did not include was the torture charge alleged in Count 8.

> operation of act or conduct and general criminal intent. General criminal intent does not require an intent to violate the law. When a person intentionally does that which the law declares to be a crime, [he] is acting with general criminal intent, even though [he] may not know that [his] act or conduct is unlawful.

(2CT 538; 11RT 2300-2301.)

CALJIC No. 3.31, Concurrence Of Act And Specific Intent, instructed appellant's jury as follows:

> In the [crime[s]] [and] [allegation[s]] charged in Count[s] 1, 2, 3, namely, murder, robbery, or kidnap for rape, and the special allegations pursuant to Penal Code section 667.61(a), (b), (c), (d), and (e), there must exist a union or joint operation of act or conduct and a certain specific intent in the mind of the perpetrator. Unless this specific intent exists the [crimes[s] [or] [allegation] to which it relates [is not committed] [or] [is not true].
>
> [The specific intent required is included in the definition[s] of the [crime[s]] [or] [allegation[s]] set forth elsewhere in these instructions.]

(2CT 539; 11RT 2301-2302.)[61]

CALJIC No. 3.31.5, Mental State, instructed the jury as follows:

> In the crime[s] changed in Count 1, namely, murder, there must exist a union or joint operation of act or conduct and a certain mental state in the mind of the perpetrator. Unless this mental state exists the crime to which it relates is not committed.
>
> [The mental state required [is] included in the definition of the crime set forth elsewhere in these instructions.]

(2CT 540; 11RT 2302.)

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[61] CALJIC No. 3.31 did not instruct the jury incorrectly. Rather, it left merely Count 8 off the list of specific intent crimes.

B. The Trial Court Properly Instructed The Jury On Aiding And Abetting Liability And Torture

Here, the trial court properly instructed the jury on aiding and abetting, and, but for one minor nonprejudicial error (including torture within the definition of CALJIC No. 3.30), also instructed correctly on the torture substantive offense, as well as on the torture special allegations. Initially, as in Argument VIII, *ante*, appellant's claim amounts to an argument that the trial court should have, sua sponte, clarified for the jury instructions that, but for one insignificant exception, were already correct in law. His failure to request such clarification, however, forfeits his claim on appeal. (*People v. Gutierrez*, *supra*, 14 Cal.App.4th at p. 1439.)

In any event, assuming his contention is properly before this Court, appellant's claim is largely foreclosed by this Court's ruling in *People v. Pearson*, *supra*, 53 Cal.4th 306. This Court, in *Pearson*, explained at length as follows:

> The trial court instructed on the crime of torture (§ 206) through CALJIC No. 9.90, telling the jury that crime required proof that "[a] person inflicted great bodily injury" on the victim and that "[t]he person inflicting the injury did so with specific intent to cause cruel or extreme pain and suffering for the purpose of revenge, extortion, persuasion, or for any sadistic purpose." [] Defendant is correct this instruction, by itself, does not require a finding that an aider and abettor to the torture personally harbored the specific intent that the torturer cause extreme pain to the victim. The court's instruction defining aiding and abetting (CALJIC No. 3.01), however, explained that defendant was liable on that theory only if he acted "[w]ith knowledge of the unlawful purpose of the perpetrator" and "[w]ith the intent or purpose of committing or encouraging or facilitating the commission of the crime." And while the court did instruct on the natural and probable consequences extension of accomplice liability (see *People v. McCoy* (2001) 25 Cal.4th 1111, 1117 []), telling the jury defendant was guilty of certain charged offenses if they were the natural and probable consequences of a target offense in which defendant might be found complicit, torture was not among the charged offenses

> listed in this instruction. [] The combination of instructions on torture and aiding and abetting thus ensured defendant could not be found guilty of torture as an aider and abettor without proof he knew and shared the actual torturer's specific intent to inflict extreme pain and suffering on the victim. (*McCoy*, at p. 1118 [].)

(*Id.* at *pp.* 320-321, footnotes omitted.)

Furthermore, appellant's constant mantra that the jury found him guilty on an aiding and abetting theory ignores the definition of "principals" in CALJIC No. 3.00. That instruction includes within the definition of principals: "2. Those who aid and abet the [commission] of the crime." (2CT 541.) Additionally, the very next instruction, CALJIC No. 3.01, Aiding And Abetting - Defined, requires, *inter alia*, that an aider and abettor not only have "knowledge of the unlawful purpose of the perpetrator," but also that the aider and abettor have "the intent or purpose of committing or encouraging or facilitating the commission of the crime." (2CT 542; 11RT 2302-2303.) Thus the jury found appellant to be a principal with the requisite specific intent for each crime.

Moreover, as to the murder itself, the jury clearly could have found that appellant committed the first degree murder with premeditation and deliberation, even though they found that he was not the actual killer. A special instruction submitted by the People specifically informed the jury that they "need not unanimously agree on the theory of first degree murder. In other words, the jury need not agree as to whether the murder was deliberate and premeditated or if the murder was committed during the commission of one or more of the following crimes . . . ." (2CT 547; 11RT 2308.)

Additionally, CALJIC No. 8.21, First Degree Felony-Murder, specifically advised the jury that torture required specific intent as follows:

> The unlawful killing of a human being, whether intentional, unintentional or accidental, which occurs [during the

> commission of any of the following crimes: . . . or torture, is murder of the first degree when the perpetrator had the specific intent to commit that crime.
>
> The specific intent to commit any of the following crimes: . . .or torture and the commission of any such crime must be proved beyond a reasonable doubt.

(2CT 550; 11RT 2310-2311.) Thus, appellant's argument that the jury somehow convicted him of murder and torture on an aiding and abetting theory (without a finding of specific intent) simply ignores the record.

Moreover, as appellant must concede, the trial court specifically left torture off the list of crimes that could be established by the natural and probable consequences theory. Indeed, during their deliberations, the jury asked a very specific question about whether torture should be included among that list of crimes. (3CT 590.) After a lengthy debate, the parties agreed that torture would not fall among the class of crimes that could be established by the natural and probable consequences doctrine, reinforcing to the jury that torture, as stated in its definition, constituted a specific intent crime. (See 12RT 2447-2475.) This is indisputable evidence that the jury was astute enough to identify the difference between the different crimes charged in the information.

As further noted by this Court in *Pearson*:

> The instruction on first degree murder perpetrated by torture (CALJIC No. 8.24), similarly to the instruction on the offense of torture, required a finding that "[t]he perpetrator" of the murder acted with the "intent to inflict extreme and prolonged pain" on the victim (see fn. 3, ante). Again, however, the aiding and abetting instruction (CALJIC No. 3.01) supplemented this direction by explaining an aider and abettor must know of the direct perpetrator's unlawful purpose and must act with the intent of furthering the perpetrator's crime. Perhaps a juror could have read the inclusion of murder in the list of charged crimes subject to the natural and probable consequences rule as suggesting defendant could be guilty of murder by torture if he intentionally assisted Hardy or Armstrong in one of the

> listed target crimes, regardless of defendant's personal intent regarding the victim's torture, though such a convoluted interpretation of the instructions seems unlikely. In any event, such reasoning would appear consistent with the natural and probable consequences rule itself, which extends accomplice liability to the perpetrator's reasonably foreseeable crimes regardless of whether the defendant personally harbored the specific intent required for commission of the charged, nontarget offense. (See *People v. McCoy*, *supra*, 25 Cal.4th at p. 1118, fn. 1 []; *People v. Prettyman* (1996) 14 Cal.4th 248, 261 [].)

Likewise, here, appellant's "convoluted" chain-of-logic argument must necessarily fail.

C. Appellant Could Not Have Been Prejudiced By Any Error With Respect To The Aiding And Abetting Or Torture Instructions

Appellant could not have been prejudiced by the minor error in CALJIC No. 3.30, and, as previously noted, there was no error at all with respect to the aiding and abetting instructions. Fatal to appellant's argument is the fact that the trial court instructed the jury pursuant to CALJIC No. 8.81.18, Special Circumstances – Murder Involving Infliction Of Torture, as follows:

> To find that the special circumstance, referred to in these instructions as murder involving infliction of torture, is true, each of the following facts must be proved:
>
> 1. The murder was *intentional*; and
>
> 2. [*The*] *defendant intended* to inflict extreme cruel physical pain and suffering upon a living human being for the purpose of revenge, extortion, persuasion or for any sadistic purpose.

(2CT 556; 11RT 2318, italics added.)

This Court also noted in *Pearson*:

> Nor did the court err in instructing on proof of defendant's intent to inflict pain on the victim with respect to the torture-murder special circumstance. The instruction explicitly required

> a finding "defendant" intended to inflict extreme pain and suffering on the victim, precluding the jury from resting a true finding on the theory that only Hardy or Armstrong actually intended to torture [Penny].

(*People v. Pearson*, *supra*, 53 Cal.4th at p. 321.)

Moreover, CALJIC No. 3.30 specifically included the trial court's "unless otherwise instructed" language, specifically making that instruction subordinate to the other properly given torture instructions. This also served to alert the jury that they had been "otherwise instructed" as to torture. (2CT 538.) Appellant ignores this language, as well as the plethora of correct torture instructions, and seizes on one minor mistake in an avalanche of instructions to boldly claim reversible error. The law and given instructions, as noted above, dictate otherwise.

Furthermore, and most importantly, CALJIC No, 9.90, Torture, specifically instructed the jury in pertinent part that:

> In order to prove this crime, each of the following elements must be proved:
>
> 1. A person inflicted great bodily injury upon the person of another; and
>
> 2. The person inflicting the injury did so with specific intent to cause cruel or extreme pain and suffering for the purpose of revenge, extortion, persuasion, or for any sadistic purpose.

(2CT 568; 11RT 2331-2332.) Appellant concedes that the substantive instructions for the crime of torture in count 8 were correct. (AOB 312.) However, he speculates without foundation that the jury simply disregarded this plain statement of the law.

More strikingly, and analogous to the instant case, this Court in *Pearson* also noted that the prosecutor incorrectly included torture as one of the charged crimes to which the jury could apply the natural and probable consequences rule and that, in her rebuttal argument, the prosecutor

suggested the intent to cause pain, required for torture, could have been held by "defendant or his accomplices." (*People v. Pearson*, *supra*, 53 Cal.4th at p. 320, fn. 5.) Nevertheless, despite the gravity of that error, this Court found any misinformation to be harmless. (*Id.* at p. 321.)

In *Pearson*, this Court examined a closely-related issue, and noted that, even though "the torture count was also omitted from instructions on concurrence of act and specific intent," defendant Pearson could not have been prejudiced. (*Id.* at p. 326.) The *Pearson* court noted that, "the jury necessarily determined any such intoxication did not prevent defendant from forming the specific intent to permanently deprive [Penny] of her property or the specific intent to rape her, mental states the jury was instructed were required for conviction of robbery and kidnapping for rape, respectively." (*Id.* at p. 325.) The same logic is true here, i.e., the jury found the requisite specific intent for the other crimes listed above (robbery and kidnap for rape), hence it is highly unlikely that such a minor error in one instruction made any difference whatsoever.

Finally, since the jury was properly instructed on the definition of torture itself, as well as on the torture special allegations, there is absolutely no probability that the jury used the wrong standard for torture, and the minor drafting error was clearly harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 26.) Essentially, appellant points to one obscure instruction where count 8 was mistakenly left among a laundry list of crimes, and ignores at least seven other instructions which instructed the jury correctly, i.e., CALJIC Nos. 2.02, 3.00, 3.01, 3.31, 8.21, 8.81.18, and 9.90.[62] As noted above, appellant also ignores the fact that the

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[62] Indeed, appellant claims that the jury was instructed 11 times on torture. (See AOB 318-321.)

jury asked a question on this specific issue to correct the mistake as to another instruction. (3CT 590; 12RT 2447-2475.)

Consequently, appellant could not have been prejudiced under any conceivable scenario, or under either the state or federal standard of review, and his claims therefore fail. (See *People v. Jennings* (2010) 50 Cal.4th 616, 676–677 [evaluating trial court error in omitting the actus reas requirement of the torture-murder special-circumstance by assessing the instructions as a whole to determine "'if there was a reasonable likelihood the jury applied the challenged instruction in an impermissible manner'"].)

XII. THE TRIAL COURT IMPROPERLY INSTRUCTED ON TORTURE AS A PREDICATE FELONY FOR FELONY MURDER, BUT THE ERROR WAS HARMLESS

Appellant appears to be correct that the trial court improperly included torture among the predicate felonies for felony murder, but he incorrectly asserts that the error was somehow prejudicial. (AOB 316-323.) This Court has specifically addressed the precise error at issue here and found it to be harmless.

In *People v. Pearson*, *supra*, this Court noted:

> In its instructions on felony murder as a theory of first degree murder, the trial court included torture (along with robbery, kidnapping, rape, and sexual penetration by foreign object) as a possible predicate felony upon which a guilty verdict could be based. As the Attorney General concedes, this was error, as torture in violation of section 206 was not added to section 189's list of predicate felonies for first degree murder until 1999, after [Penny] Sigler's murder. (Stats.1999, ch. 694, § 1, p. 5054.)

(*Id.* at p. 319.)

However, this Court in *Pearson* went on to note that:

> We agree with the Attorney General that the error was harmless because the jury necessarily convicted defendant of first degree murder on other, proper felony-murder theories.

> The jury found true special circumstance allegations that defendant murdered [Penny] Sigler while engaged in the commission of robbery, kidnapping, rape, and foreign object rape. Because a killing in commission of any of these offenses constitutes first degree murder under section 189, it follows the jury must unanimously have found defendant guilty of first degree murder on the valid theory the killing occurred during the commission of these felonies. (See *People v. Haley* (2004) 34 Cal.4th 283, 315–316, []; *People v. Marshall* (1997) 15 Cal.4th 1, 38 [].) The erroneous instruction thus did not affect the verdict and was, on any standard of prejudice, harmless.

(*Id.* at p. 320.)

In a footnote, this Court also observed:

> Torture as a predicate for first degree felony murder is distinct from first degree murder as a killing "perpetrated by means of . . . torture" (§ 189), a theory on which the jury was also instructed. "The elements of first degree murder by torture are: '(1) acts causing death that involve a high degree of probability of the victim's death; and (2) a willful, deliberate, and premeditated intent to cause extreme pain or suffering for the purpose of revenge, extortion, persuasion, or another sadistic purpose. [Citations.]' (*People v. Cook* (2006) 39 Cal.4th 566, 602 [].) The prosecution need not establish that the defendant intended to kill the victim (*ibid.*), but must prove a causal relationship between the torturous acts and the death [citation]." (*People v. Jennings* (2010) 50 Cal.4th 616, 643 [].)

(*Id.* at p. 319, fn. 3.)

Appellant's only argument rebutting this Court's reasoning asserts that, "As explained in Argument VIII, *ante*, the standard for reversal based on factual or legal deficiencies in the prosecution's case differ. Argument VIII also demonstrated the evidence failed to establish an independent felonious purpose for any of the several felonies." (AOB 322.) However, respondent response in Argument VIII, *ante*, has demonstrated the fallacy of appellant's logic and, in the interest of brevity, respondent will not repeat that argument here.

Moreover, appellant again incorrectly claims that the verdicts definitively showed that appellant "was not armed with, and did not use a weapon, including the one used to inflict torture. Rather, jurors found [appellant] was vicariously liable." (AOB 318.) In fact, as previously noted, the jurors could not reach a verdict on the personal use allegations, which is a far cry from finding that appellant did not personally use a weapon. (3CT 597-605.)[63]

Based on the aforementioned mountain of evidence, it is certainly equally likely that the jurors found that appellant committed the first degree murder with premeditation and deliberation, as well as committing it during one of the predicate felonies for felony murder. In any event, as this court noted in *Pearson*, any error was clearly harmless.

XIII. THE TRIAL COURT WAS NOT REQUIRED TO INSTRUCT ON THE LESSER-INCLUDED OFFENSE OF THEFT; IN ANY EVENT, ANY ERROR WAS HARMLESS

Appellant argues that the "judgment of guilt to count 2, robbery, the special circumstance finding of the commission of robbery during a murder, the first-degree murder conviction, and the judgment of death, should be vacated, because the trial court failed to instruct the jury on the lesser included offense of theft . . . ." (AOB 324; see also AOB 324-351.) Appellant's claim ignores the law.[64]

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[63] As previously noted, the jurors only found the personal use allegations "not true" as to the robbery, the kidnapping for rape, the forcible rape in concert, and the forcible rape, which matched the prosecutor's ultimate theory (and appellant's statement) that Armstrong appeared out of the darkness carrying the stake *after* the rape had been completed. (10RT 2148; 3CT 599-602.)

[64] Although the trial court has a sua sponte duty to instruct as to lesser-included substantive offenses, as appellant concedes, no such duty exists as to the felony murder charge or the special circumstance

(continued...)

A. Relevant Background Proceedings

The jury found appellant guilty of robbery as charged in count 2, and found the robbery special circumstance allegation to be true. (2CT 597, 599.) The robbery count and special circumstance allegation were based on evidence which demonstrated that: 1) Penny had been given certain specific food stamp coupons on the evening of her death (10RT 2065); 2) the specific serial-numbered food stamp coupons that were in Penny's possession were used at a market frequented by appellant (10RT 2045-2049); 3) the owner of the market selected appellant's photograph from a photograph lineup and identified him as being present in the market during the period in question (10RT 2043-2047); and 4) a serial-numbered food stamp booklet cover was found lying to the rear of the building behind which Penny's battered body was ultimately discovered by Mr. Bark.[65] (10RT 2051, 2054; 11RT 2353.) The evidence further demonstrated that the food stamps were taken from Penny by force or fear while she was still alive and conscious. (10RT 2146-2147; 11RT 2188, 2352.)

The trial court instructed the jury on the elements of robbery using CALJIC No. 9.40, included robbery in the felony murder instructions using CALJIC Nos. 8.10, 8.21 and 8.27, and included robbery in the special circumstances instructions using CALJIC Nos. 8.80.1 and 8.81.17. (2CT 550-555, 558.)

(...continued)
allegations. (See AOB 337.) Thus, appellant's claim as to the felony murder charge or the special circumstance allegations are forfeited due to his failure to request such instruction in the trial court. (See *People v. Valdez*, *supra*, 32 Cal.4th at p. 110; *People v. Cash*, *supra*, 28 Cal.4th at p. 737; *People v. Miller* (1994) 28 Cal.App.4th 522, 526; see also AOB 341.)

[65] Appellant claims that the food stamp cover was paper, and easily could have been moved there by animals "over the course of that intervening week." (AOB 328.) To the contrary, it is highly unlikely that "animals" took or moved the food stamps.

The trial court specifically asked defense counsel if he desired any instructions on lesser-included offenses, and counsel declined any such instructions. Defense counsel then confirmed the prosecutor's question that he "was not asking for any as a result of tactical reasons." (11RT 2402.) Consequently, due to the lack of any evidence supporting such an instruction, as well as the lack of a request from the defense, the trial court did not instruct the jury that theft is a lesser included offense of robbery.

B. General Legal Principles

"'The trial court is obligated to instruct the jury on all general principles of law relevant to the issues raised by the evidence, whether or not the defendant makes a formal request.' [Citations.] 'That obligation encompasses instructions on lesser included offenses if there is evidence that, if accepted by the trier of fact, would absolve the defendant of guilt of the greater offense but not of the lesser.' [Citations.]" (*People v. Rogers* (2006) 39 Cal.4th 826, 866; see *People v. Breverman*, *supra*, 19 Cal.4th at p. 154 [sua sponte duty]; *People v. Flannel*, *supra*, 25 Cal.3d at p. 684 [duty upon request].) "Nevertheless, 'the existence of " any evidence, no matter how weak" will not justify instructions on a lesser included offense....' [Citation.] Such instructions are required only where there is 'substantial evidence' from which a rational jury could conclude that the defendant committed the lesser offense, and that he is not guilty of the greater offense. [Citations.]" (*People v. DePriest*, *supra*, 42 Cal.4th at p. 50.)

As previously noted, robbery is "the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." (§ 211.) In general, theft is the felonious taking, carrying, stealing, leading, or driving away of the personal property of another, or the appropriation of property, labor or money by fraudulent means. (§ 484.) "The greater

offense of robbery includes all of the elements of theft, with the additional element of a taking by force or fear. [Citation.] If the defendant does not harbor the intent to take property from the possessor at the time he applies force or fear, the taking is only a theft, not a robbery. [Citations.]" (*People v. Davis* (2005) 36 Cal.4th 510, 562.)

C. The Trial Court Was Not Required To Instruct Sua Sponte On The Lesser included Offense Of Theft; In Any Event, Appellant Could Not Have Been Prejudiced

Initially, the instant claims fails pursuant to the doctrine of invited error. As previously noted, the trial court specifically asked defense counsel if he desired any instructions on lesser-included offenses, and counsel declined any such instructions. Defense counsel then confirmed in response to a question from the prosecutor that he "was not asking for any as a result of tactical reasons." Thus, any error was "invited" by defense counsel, and the instant claim is forfeited. (11RT 2402; see *People v. Duncan* (1991) 53 Cal.3d 955, 969-70; People v. *Cooper* (1991) 53 Cal.3d 771, 827; *People v. Lara* (1994) 30 Cal.App.4th 658, 673 [waiver applies to claim of error in not instructing on lesser included offense, where defense asks that such instruction not be given as matter of trial tactics].

In any event, assuming the instant claim is properly before this Court, in *People v. Whalen, supra,* 56 Cal.4th 1, this Court was presented with a situation that is highly analogous to the instant case. In *Whalen,* this Court noted:

> Defendant argues he was entitled to a theft instruction because there was substantial evidence from which the jury could have concluded that the guns - the main proceeds of the crimes and the only proceeds to be taken by defendant personally and exchanged for drugs - were removed from the house after the victim was shot. Defendant argues the jury could have concluded that he decided to steal the guns only as an afterthought, after killing the victim. Defendant further contends the jury reasonably could have ascribed the taking of

> other items to [his codefendants] alone; accordingly, there was evidence from which the jury could have absolved him of robbery, but convicted him of theft.

(*Id.* at p. 69.)

This Court rejected appellant's claim, despite noting that "there was evidence from which the jury could have concluded defendant formed the intent to steal [certain pieces of property] after killing the victim, and therefore, as to [those pieces of property], he was guilty only of theft." (*People v. Whalen*, *supra*, 56 Cal.4th at p. 69; see *People v. Davis*, *supra*, 36 Cal.4th at p. 562 [if defendant formed the intent to steal after killing the victim, the offense is theft, not robbery].) In fact, this Court further noted that:

> there was no substantial evidence from which the jury could have ascribed responsibility for the robbery solely to [the codefendants]. To the contrary, all of the available evidence suggested defendant was a major participant in the robbery and that he personally both engaged in conduct intended to evoke fear (pointing the gun at the victim) and directed the application of force (directing [a codefendant] to tie the victim's hands) with the intent to facilitate the taking of property from the house.

(*Id.* at p. 70.)

As noted in Argument VII, *ante*, appellant fails to recognize that Penny's clothes, and more importantly her food stamps, were unquestionably removed while Penny was conscious and violently resisting. Appellant told Detective Prell that Penny asked him for help *after* Pearson raped her, and after he (appellant) punched her twice in the face. (10RT 2146-2147; 11RT 2188.) Penny continued to resist to the very end, calling the defendants, "You mother fuckers." (10RT 2147; 11RT 2188.) Appellant further concedes that "there was evidence that [he] possessed the victim's personal property after her death . . . ." (AOB 344.)

Thus, as previously noted, unless appellant is contending that Penny deposited the food stamps inside her vagina, and that he suddenly found them when he pulled the stake out of her vagina after her death, the food stamps were taken while Penny was conscious and resisting. There is virtually no evidence supporting any other theory.[66] (See *People v. Castaneda*, *supra*, 51 Cal.4th at p. 1331 [rejecting argument that instruction on lesser-included theft was warranted in a capital case]; *People v. Gray*, *supra*, 37 Cal.4th at p. 219 [no evidence had been presented by either party in this capital case from which the jury could have found only theft, rather than robbery]].)

Moreover, as noted by the prosecutor, the most reasonable inference from the evidence is that the food stamps were taken during the initial encounter, prior to Penny being kidnapped and dragged over the fence and down the embankment. (11RT 2356; see AOB 329.) The prosecutor argued, and the physical evidence and coroner's testimony demonstrated, that Penny was still alive during the forcible rape. (11RT 2349-2350, 2352.)

Additionally, instructing on theft would have been inconsistent with appellant's defense. Indeed, defense counsel had a valid tactical reason for declining such an instruction, i.e., if he argued that appellant took the food stamps after Penny was dead, that scenario would have further implicated

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[66] Of course, appellant's own statement also makes it indisputably clear that he also took Penny's clothes and her shoes while she was still alive. He specifically admitted removing her shoes while she was still conscious. (10RT 2103-2104.) The fact that appellant did not keep Penny's clothes or shoes is irrelevant. "Common law and California cases thus establish that an intent to steal will be recognized when personal property is dealt with in such a way as to create an unreasonable risk of permanent loss." (*People v. Zangari* (2001) 89 Cal.App.4th 1436, 1446; see also *People v. Kwok* (1998) 63 Cal.App.4th 1236, 1251-1252.)

appellant in the sexual penetration by foreign object, in the sexual penetration by foreign object while acting in concert, and in the torture. This is because appellant's removal of the food stamps after Penny's death would have clearly demonstrated that he personally participated in every single one of the crimes throughout the entire episode, until the three men finally fled the scene.[67]

Furthermore, the defense position was that appellant did not take or spend the food stamps at all. (10RT 2047-2049.) The defense never argued or implied, and appellant never told the investigating detectives, that the food stamp coupons were taken after Penny's death. Such a conclusion simply ignores the fact that Penny's clothes were removed while she was still alive. There was simply no evidence to support a "theft" theory.

Moreover, the jury here was not presented with an "all or nothing" choice with respect to the murder, or more specifically the felony murder. As appellant concedes, the jury had the option to convict appellant of second degree murder. (AOB 340.) The trial court specifically instructed the jury pursuant to CALJIC No. 8.30, Unpremeditated Murder of the Second Degree, and CALJIC No. 8.71, Doubt Whether First or Second Degree Murder. (2CT 584-585; 3CT 597.)

In *People v. Cunningham*, *supra*, 25 Cal.4th 926, this Court noted:

> Similarly, there is no substantial evidence to support the theory that defendant formed the intent to steal the property only after committing the murder, thus justifying an instruction on theft. (*People v. Lewis* (1990) 50 Cal.3d 262, 276–277 [].) Moreover, the trial court instructed the jury, pursuant to CALJIC No. 8.21, that an unlawful killing in which death occurred as a result of first degree robbery is first degree murder if the perpetrator had the specific intent to commit robbery. The jury

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[67] An after-acquired intent instruction is a pinpoint instruction that the trial court need not give sua sponte. (*People v. Silva* (2001) 25 Cal.4th 345, 371, citing *People v. Webster*, *supra*, 54 Cal.3d at p. 443.)

> would have known from this instruction that defendant's intent to steal had to have arisen prior to the murder. (See *People v. Lewis*, *supra*, 25 Cal.4th at pp. 647-648, fn. 6 []; see also *People v. Silva* (2001) 25 Cal.4th 345, 371-372 [].)

(*Id.* at p. 1008.)

In any event, even assuming that the trial court somehow erred by failing to instruct on the lesser-included offense of theft, appellant suffered no prejudice as a result. In *Whalen*, this Court pointedly observed:

> For similar reasons, even were we to conclude the court erred by failing to instruct the jury regarding the lesser included offense of theft, we would find the error harmless under any standard. The evidence that defendant robbed the victim by applying force and fear while [the codefendants] removed various items of property from the house was extremely strong, and defendant points to no evidence to the contrary. The prosecutor argued the robbery occurred when property was "loaded into the car while the gun [was] being held on Sherman Robbins"; defendant did not seriously contest that theory. Under these circumstances, it is not reasonably probable (*People v. Watson* (1956) 46 Cal.2d 818, 836-837 []) that the jury would have concluded defendant was guilty of theft but not also guilty of robbery, and indeed, any error was harmless beyond a reasonable doubt (see *Chapman v. California* (1967) 386 U.S. 18, 24).

(*Id.* at p. 70.)

The instant case is virtually identical, legally speaking, to *Whalen*. The evidence that appellant took the property by force or fear was extremely strong, and the prosecutor argued that the robbery occurred during the initial encounter on the street. (11RT 2356.) Appellant did not seriously contest that theory. Indeed, defense counsel did not challenge that theory at all during his closing argument. (See 11RT 2391-2401.) Under these circumstances, it is not reasonably probable (*People v. Watson*, *supra*, 46 Cal.2d at pp. 836-837) that the jury would have concluded defendant was guilty of theft, but not also guilty of robbery. Indeed, as in

Whalen, any error was unquestionably also harmless beyond a reasonable doubt (see *Chapman v. California*, *supra*, 386 U.S. at p. 24).

XIV. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON HEAT OF PASSION AND PROVOCATION; IN ANY EVENT, ANY ERROR WAS HARMLESS

Appellant argues that his murder conviction and the judgment of death must be reversed "because the instructions given by the trial court misstated the law, by failing to instruct [that] the prosecution had to prove beyond a reasonable doubt the absence of unreasonable heat of passion or provocation that rendered [him] unable to deliberate and premeditate . . . ." (AOB 352; see also AOB 352-374.) Appellant's claim ignores the given jury instructions, as well as the law.

A. Relevant Background Proceedings And General Legal Principles

The trial court, without objection, instructed the jury pursuant to CALJIC No. 8.20, in pertinent part, as follows:

> If you find that the killing was preceded and accompanied by a clear, deliberate intent on the part of the defendant to kill, which was the result of deliberation and premeditation, so that it must have been formed upon pre-existing reflection and not under a sudden heat of passion or other condition precluding the idea of deliberation, it is murder of the first degree.
>
> . . . .
>
> The true test is not the duration of time, but rather the extent of the reflection. A cold, calculated judgment and decision may be arrived at in a short period of time, but a mere unconsidered and rash impulse, even though it includes an intent to kill, is not deliberation and premeditation as will fix an unlawful killing as murder of the first degree.
>
> To constitute a deliberate and premeditated killing, the slayer must weigh and consider the question of killing and the reasons for and against such a choice and, having in mind the consequences, [he] decides to and does kill.

(2CT 548.)

Because malice has been eliminated as an element, circumstances that may serve to reduce the crime from murder to manslaughter, such as provocation or imperfect self-defense, are not relevant in the case of a felony murder. (*People v. Seaton*, *supra*, 26 Cal.4th at p. 665 []; *In re Christian S.* (1994) 7 Cal.4th 768, 773, fn. 1 []; *People v. Balderas* (1985) 41 Cal.3d 144, 197 [] [provocation and heat of passion cannot reduce a felony murder to manslaughter, because "'malice,' the mental state which otherwise distinguishes murder from voluntary manslaughter, is not an element of felony murder"]

"When the evidence points *indisputedly* to a homicide committed in the course of a felony listed in section 189 of the Penal Code, the court is justified in advising the jury that the defendant is either innocent or guilty of first degree murder." (*People v. Anderson* (2006) 141 Cal.App.4th 430, 448, italics in original; see similarly, *People v. Mendoza* (2000) 23 Cal.4th 896, 908–909; *People v. Rupp* (1953) 41 Cal.2d 371, 382 [issue of the degree of a murder can be taken from the jury only if the evidence "points indisputably" to a felony murder].)

The only mental state required for felony murder is that necessary for commission of the underlying felony. [Citation.]" (*People v. Balderas* (1985) 41 Cal.3d 144, 197.) "[U]nder the felony-murder rule, a defendant who kills in the commission of an inherently dangerous felony not enumerated in section 189 is liable for second degree murder." (*People v. Bryant* (2013) 56 Cal.4th 959, 966.)

B. The Trial Court Properly Instructed The Jury On Heat Of Passion And Provocation; In Any Event, Appellant Did Not Suffer Prejudice As The Result Of Any Error

Appellant claims that the "jury instructions given were inadequate to inform jurors of the applicable legal principles governing the case." (AOB

363.) However, if that were true, defense counsel certainly had every opportunity to request additional, clarifying instructions. He did not, and the instant claim is therefore forfeited on appeal.

Indeed, appellant concedes that, in *People v. Rogers*, *supra*, 39 Cal.4th 826, this Court held that instruction on provocation was a pinpoint instruction. (*Id.* at p. 878; see AOB 367.) "'[P]inpoint' instructions are not required to be given sua sponte and must be given only upon request." (*People v. Saille* (1991) 54 Cal.3d 1103, 1117.) Moreover, "[a] trial court has no sua sponte duty to revise or improve upon an accurate statement of law without a request from counsel [citation], and failure to request clarification of an otherwise correct instruction forfeits the claim of error for purposes of appeal. . . ." (*People v. Lee*, *supra*, 51 Cal.4th at p. 638; *People v. Virgil*, *supra*, 51 Cal.4th at p. 1260.) This instant claim is therefore forfeited.

In any event, appellant's claim also fails on the merits, as the given jury instructions adequately informed the jury of the requisite principles of law. CALJIC No. 8.20 specifically advised the jury that "[the intent to kill] must have been formed upon pre-existing reflection and not under a sudden heat of passion or other condition precluding the idea of deliberation . . . ." (2CT 548; 11RT 2309.) Indeed, appellant seems to ignore, or to have simply missed, the fact that the trial court instructed the jury pursuant to CALJIC No. 8.20 in the instant case.

In his opening brief, appellant argues:

> However, the *Rogers* jury - unlike the jury here - was, in fact, instructed with the essential principle that a "sudden heat of passion or other condition precluding the idea of deliberation" could reduce the charge from first degree murder to second. (*People v. Rogers*, *supra*, 39 Cal.4th 826 at pp. 866-867; see also CALJIC No. 8.20.)

(AOB 367-368.) Appellant concedes his case, as the jury *was instructed* pursuant to CALJIC No. 8.20 in the instant case. (2CT 548-549; 11RT 2308-2310.)

Furthermore, in *People v. Visciotti*, this Court held:

> The jury found under properly given instructions that the murder was intentional, and was committed in the perpetration of robbery, thus establishing that the killing was murder of the first degree under the felony-murder rule and section 189 without the necessity of proving malice. Any error in failing to instruct on voluntary manslaughter was harmless.

(*People v. Visciotti* (1992) 2 Cal.4th 1, 57.) Likewise, here, any discrepancy in failing to further instruct on second degree murder was harmless. Additionally, all of the enumerated felonies in the instant case were listed in section 189, hence the second degree felony murder rule was inapplicable to the case at bar in any event. (See 2CT 584.)

Appellant, however, nevertheless presses his argument, and suggests that the jury was not properly instructed on heat of passion and provocation with respect to second degree murder (rather than merely manslaughter). He does so by suggesting that the trial court did not fulfill its duty to instruct the jury on all general principles of law relevant to the issues raised by the evidence. (AOB 363-368.) However, that argument must fail, because, as noted above, the jury was properly instructed on second degree murder (2CT 584-585) and on heat of passion with respect to first degree murder via CALJIC No. 8.20. (2CT 548-549.) Moreover, appellant's defense at trial was *not* that hearing the racial slurs caused him to act under an "unreasonable" heat of passion. Rather, his defense at trial was that he participated minimally in the crimes and only at Pearson's direction. (11RT 2397-2398.)

Finally, appellant ignores the fact that the jury found that he had the requisite specific intent for robbery, kidnapping for rape, and torture. (See

2CT 539, 558, 560-561, 568; 3CT 599-600, 605.) These findings necessarily eliminated any possibility that he was acting pursuant to some "unreasonable" heat of passion in committing the murder.

In any event, appellant could not have been prejudiced by any instructional error with respect to heat of passion or provocation. This Court has specifically noted:

> We need not decide whether the trial court was required to instruct on heat-of-passion voluntary manslaughter, because any error in failing to do so was clearly harmless, even under the standard of *Chapman v. California*, *supra*, 386 U.S. at page 24, 87 S.Ct. 824, which defendant argues applies. (See *People v. Breverman* (1998) 19 Cal.4th 142, 165-166 [] [failure to instruct on court's own motion on lesser included offense in noncapital case is error of state law only].) The jury found true the special circumstance allegation that defendant killed Miller in the course of, and in order to advance, the commission or attempted commission of a robbery. The robbery-murder special-circumstance finding also dictated a finding of first degree felony murder under section 189 and the corresponding felony-murder instruction, which was properly given. The failure to instruct on one theory of voluntary manslaughter was therefore harmless, as the jury necessarily determined the killing was first degree murder, not manslaughter, under other properly given instructions. (*People v. Koontz* (2002) 27 Cal.4th 1041, 1085-1086 []; *People v. Lewis* (2001) 25 Cal.4th 610, 646 [].)

(*People v. Demetrulias* (2006) 39 Cal.4th 1, 24-25.)

Likewise, here, the jury determined that the killing was first degree murder, rather than second degree murder, "under other properly given instructions." (See *People v. Demetrulias*, *supra*, 39 Cal.4th at pp. 24-25.) Moreover, the suggestion on appellant's part that Penny's alleged use of the word "nigger" objectively could constitute the kind of provocation necessary reduce the first degree murder charge to second degree murder is specious on the facts of this case, when one considers the robbery-kidnapping-rape-sexual penetration-torturous savagery that Penny suffered prior to her death. (See *People v. Rountree* (2013) 56 Cal.4th 823, 855

["No case has ever suggested . . . that such predictable conduct by a resisting victim would constitute the kind of provocation sufficient to reduce a murder charge to voluntary manslaughter"].)

Any error was therefore harmless as "the factual question posed by the omitted instruction was necessarily resolved adversely to the defendant under other, properly given instructions." (*People v. Coffman*, *supra*, 34 Cal.4th at p. 96 ["Any error in this regard clearly was harmless in light of the jury's findings on the robbery and burglary charges and related special circumstances, including its findings of intent to kill as to each special circumstance allegation"].) Thus, appellant could not have suffered prejudice from the alleged instructional error in the instant case, and his claim therefore fails.

XV. THE TRIAL COURT DID NOT INSTRUCT THE JURY WITH AN ERRONEOUS DEFINITION OF ASPORTATION; IN ANY EVENT, ANY ERROR WAS HARMLESS

Appellant argues that his judgment of death and all the kidnapping-related counts and allegations should be reversed because the trial court instructed the jury with an erroneous definition of asportation. (AOB 375-392.) Appellant's claim is unavailing.

A. Relevant Background Proceedings And General Legal Principles

The jury found true the special circumstance allegation that appellant committed murder in the commission of a kidnapping for rape. (12RT 2528; 3CT 597.) The jury also found appellant guilty of the specific intent crime of kidnapping for rape in count 3, and found true the allegations that

appellant kidnapped the victim during the offenses charged in counts 4 though 7.[68] (12RT 2529-2532; 3CT 600-604.)

Respondent has exhaustively briefed the standard of review for instructional error in the prior arguments, *ante*, and, in the interest of brevity, will not repeat that law here. With respect to kidnapping, the asportation element for simple versus aggravated kidnapping is legally different and distinct. (*People v. Rayford* (1994) 9 Cal.4th 1, 11-12 ["At the time of the crime here, [] there existed two distinct standards of asportation for kidnapping, depending on whether the kidnapping was for robbery (aggravated kidnapping) under section 209, subdivision (b) [], or was a simple kidnapping under section 207(a)"].)

People v. Stanworth (1974) 11 Cal.3d 588, plainly established that the asportation element for simple kidnapping differs from asportation in an aggravated kidnapping. *Stanworth* explained, "where only simple kidnapping is involved, it is clear that the victim's movement cannot be evaluated in the light of a standard which makes reference to the commission of another crime." (*Id.* at p. 600.)[69] *Stanworth* explained that distance was the critical factor, and "the victim's movement must be more

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[68] Appellant incorrectly claims that the found true the special circumstance allegation that he committed murder in the commission of a kidnapping and a kidnapping for rape. (AOB 375.) Appellant is wrong. The jury did not find true the special circumstance allegation that he committed murder in the commission of a "kidnapping," it made no finding in that regard as to simple kidnapping at all. (See 2CT 371.) Rather, the jury found true the special circumstance allegation that he committed murder in the commission of a "kidnapping for rape." (12RT 2528; 3CT 597.) This distinction, as will be noted below, is highly relevant.

[69] *Stanworth* was abrogated by *People v. Martinez* (1999) 20 Cal.4th 225, but nevertheless remains relevant in the pre-1999 context for the purposes of the instant case. (See *People v. Martinez*, *supra*, 20 Cal.4th at p. 235; see also AOB 375-376.)

than slight [citation] or trivial [citation], they must be substantial in character to constitute kidnapping under section 207." (*Id.* at p. 601.)

People v. Daniels (1969) 71 Cal.2d 1119, adopted a two-part test for the asportation requirement for aggravated kidnapping (such as kidnapping for rape). *Daniels* held that aggravated kidnapping requires movement of the victim that: (1) is not merely incidental to the commission of the underlying crime, and (2) increases the risk of harm to the victim over and above that present in the commission of the underlying crime. (*Id.* at p. 1139.)

The trial court properly instructed the jury pursuant to section 667.61, subdivision (a)(2), Felony Sex Offenses, as follows:

> It is further alleged that during the offenses charged in counts 4, 5, 6, and 7, that the defendant kidnapped the victim and the movement of the victim substantially increased the risk of harm to the victim over and above the level of risk necessarily inherent in the underlying offense of rape, rape in concert, sexual penetration by a foreign object in concert, or sexual penetration by a foreign object, pursuant to Penal Code section 667.61 (a) and (d).
>
> Every person who unlawfully and with physical force or by any other means of instilling fear, steals or takes, or holds, detains or arrests another person and carries that person without her consent for a distance that is substantial in character, and the movement substantially increases the risk of harm to the victim over and above the level of risk necessarily inherent in the underlying offense, is in violation of penal code section 667.61(d)(2).
>
> A movement that is only for a slight or trivial distance is not substantial in character. In determining whether a distance that is more than slight or trivial is substantial in character, you should consider the totality of the circumstances attending to that movement, including but not limited to the actual distance moved, whether the movement increased the risk of harm above that which existed prior to the movement, decreased the likelihood of detection, or increased both the danger inherent in a victim's foreseeable attempt to escape and the attacker's

enhanced opportunity to commit additional crimes. if an associated crime is involved, the movement also must be more than that which is incidental to the commission of the other crime.

In order to prove this allegation, each of the following elements must be proved:

1. a person was unlawfully moved by the use of physical force or by any other means of instilling fear;

2. the movement of the other person was without her consent;

3. the movement of the other person was substantial in character; and

4. the movement substantially increased the risk of harm to the victim over and above the level of risk necessarily inherent in any of the underlying offenses.

If you find the defendant guilty of counts 4, 5, 6, or 7, you must determine whether the defendant kidnapped the victim, and whether the movement of the victim substantially increased the risk of harm to the victim over and above the level of risk necessarily inherent in any of the underlying offenses of rape, rape in concert, sexual penetration by a foreign object in concert, or sexual penetration by a foreign object.

The people have the burden of proving this allegation. If you have a reasonable doubt that it is true, you must find it to be not true.

Include a special finding on that question in your verdict, using a form that will be supplied for that purpose.

(2CT 572-574; 11RT 2334-2337.)

The trial court also instructed the jury pursuant to CALJIC No. 9.50, Kidnapping – No Other Underlying Crime, as follows:

Every person who unlawfully and with physical force or by any other means of instilling fear, steals or takes, or holds, detains, or arrests another person and carries that person without her consent for a distance that is substantial in character, is

guilty of the crime of kidnapping in violation of Penal Code section 207, subdivision (a).

> A movement that is only for a slight or trivial distance is not substantial in character. In determining whether a distance that is more than slight or trivial is substantial in character, you should consider the totality of the circumstances attending the movement, including, but not limited to, the actual distance moved, or whether the movement increased the risk of harm above that which existed prior to the movement, or decreased the likelihood of detection, or increased both the danger inherent in a victim's foreseeable attempt to escape and the attacker's enhanced opportunity to commit additional crimes. If an associated crime is involved, the movement also must be more than that which is incidental to the commission of the other crime.
>
> In order to prove this crime, each of the following elements must be proved:
>
> 1. A person was unlawfully moved by the use of physical force or by any other means of instilling fear;
>
> 2. The movement of the other person was without her consent; and
>
> 3. the movement of the other person in distance was substantial in character.

(2CT 559; 11RT 2321-2322.)

Finally, the trial court instructed the jury pursuant to CALJIC No. 9.54, Kidnapping To Commit Robbery And/Or Certain Sex Crimes, as follows:

> Defendant is accused in count 3 of having committed the crime of kidnapping to commit rape, a violation of section 209 subdivision (b)(1) of the Penal Code.
>
> Every person who, with the specific intent to commit rape, kidnaps any individual, is guilty of the crime of kidnapping to commit rape, in violation of Penal Code section 209 subdivision (b)(1).

The specific intent to commit rape must be present when the kidnapping commences.

Kidnapping is the unlawful movement by physical force of a person without that person's consent for a substantial distance where the movement is not merely incidental to the commission of the rape and where the movement substantially increases the risk of harm to the person moved, over and above that necessarily present in the crime of rape itself.

Brief movements to facilitate the crime of rape are incidental to the commission of the rape. On the other hand, movements to facilitate the rape that are for a substantial distance rather than brief are not incidental to the commission of the rape.

In order to prove this crime, each of the following elements must be proved:

1. A person was unlawfully moved by the use of physical force;

2. The movement of that person was caused with the specific intent to commit rape, and the person causing the movement had the required specific intent when the movement commenced;

3. The movement of the person was without that person's consent;

4. The movement of the person was for a substantial distance, that is, a distance more than slight, brief or trivial; and

5. the movement substantially increased the risk of harm to the person moved, over and above that necessarily present in the crime of rape itself.

(2CT 560-561; 11RT 2322-2324.)

B. The Trial Court Properly Instructed The Jury On The Asportation Required For Kidnapping For Rape; In Any Event, Appellant Did Not Suffer Prejudice As The Result Of Any Error

Appellant's contends that the trial court instructed the jury with an erroneous definition of asportation, and his argument is best summarized as follows:

> The trial court erroneously gave multiple instructions concerning how the jury should determine the asportation element of kidnapping. The instructions required jurors to consider "the totality of the circumstances attending the movement" when determining whether [appellant] committed kidnapping. (See e.g., 2CT 559, 573.) This was error because the offenses were committed on December 29, 1998, prior to *People v. Martinez* (1999) 20 Cal.4th 225, an opinion that overruled then controlling California law. "[B]efore *Martinez* . . . , 'the asportation standard [was] exclusively dependent on the distance involved.'" (*People v. Castaneda* (2011) 51 Cal.4th 1292, 1319.) *People v. Martinez* was decided on April 8, 1999, after Hardy committed the crimes. *Martinez* does not apply retroactively. (*People v. Castaneda*, *supra*, 51 Cal.4th at p. 1319.) Accordingly, the jury instructions for kidnapping impermissibly incorporated the additional factors allowable only after the decision in *People v. Martinez*. The instructions were therefore erroneous. Proper instructions would have allowed jurors to consider only the distance [Penny] was moved in determining kidnapping.

(AOB 375-376.)

Appellant's argument fails for one very simple reason, i.e., unlike the defendant in the *Castaneda* case, the jury here did not convict him of simple kidnapping. (*People v. Castaneda*, *supra*, 51 Cal.4th at p. 319.) Rather, they convicted him of aggravated kidnapping, i.e., kidnapping for rape and other sexual offenses. Thus, *People v. Castaneda*, as well as *People v. Martinez*, are completely inapplicable to the instant case. The case at bar is actually controlled by this Court's holding in *People v. Rayford*, *supra*, 9 Cal.4th 1, which appellant does not mention at all. This

is because *People v. Martinez* set out the standard for simple kidnapping, while *People v. Rayford* set out an entirely different standard for aggravated kidnapping, i.e., kidnapping for rape.

In *Rayford*, this Court clarified that there was no minimum number of feet to satisfy the asportation standard of aggravated kidnapping. (*Id.* at pp. 12, 22 ["Kidnapping for robbery, or aggravated kidnapping, requires movement of the victim that is not merely incidental to the commission of the robbery, and which substantially increases the risk of harm over and above that necessarily present in the crime of robbery itself"]; see also *People v. Daniels*, *supra*, 71 Cal.2d at p. 1139].) Here, appellant was not charged with simple kidnapping, and, consequently, the only relevant case law consists of those cases employing the aggravated kidnapping standard. Indeed, the trial court properly instructed the jury pursuant to CALJIC No. 9.54 in the case at bar. (2CT 560-561.) Appellant does not challenge the propriety of that instruction. (See *People v. Rayford*, *supra*, 9 Cal.4th at pp. 12-14.)

Quite simply, as noted above, the jury convicted appellant only of aggravated kidnapping, i.e., kidnapping for rape. Appellant was not convicted of simple kidnapping, although, due to the section 667.61, subdivisions (a), (b) and (e) allegations, the jury was instructed on it pursuant to CALJIC No. 9.50, Kidnapping – No Other Underlying Crime.[70] (2CT 559.) Likewise, the jury found to be true only the special circumstance allegation of kidnapping for rape and sexual penetration,

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[70] The prosecutor and defense counsel both specifically indicated that they were not seeking any lesser-included offense instructions, hence the only reason for instructing pursuant to CALJIC No, 9.50 was to define kidnapping with respect to the section 667.61, subdivisions (a), (b) and (e) allegations. (11RT 2402.) As will be noted below, the jury did not find any of these allegations to be true, hence appellant could not have been prejudiced by any assumed error with respect to that instruction.

rather than simple kidnapping. As previously noted, the second amended information alleged six special circumstance allegations, but the verdict form listed only five "true" findings, with the kidnapping allegation being the missing special circumstance allegation. (See 2CT 396-397; 3CT 597-598.) There was no special circumstance finding as to simple kidnapping at all.

Here, during her closing argument, the prosecutor specifically advised the jury that appellant was being charged with kidnapping for rape, rather than kidnapping, as follows:

> This is the definition of kidnapping. The crime that the defendant is charged with is kidnapping for rape, but i must prove these elements to you and then some additional elements for the crime of kidnapping for rape. That's why I'm explaining this to you a movement that is only a slight or trivial distance is not substantial in character. In determining whether distance is more than slight or trivial in substance or in character, you should consider the totality of the, circumstances [*sic*] everything that occurred.

(11RT 2375.) Thus, the jury could not possibly have been confused on this point. The jury was properly instructed on aggravated kidnapping, and therefore, there was no error.

Even assuming the simple kidnapping standard somehow applied to appellant's actions, he could not have been prejudiced by any error in the definition of asportation.[71] During her argument, the prosecutor

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[71] The trial court also gave the jury a special instruction with respect to the section 667.61, subdivision (a), (b) and (e), which referred to "the crime of kidnapping; as defined elsewhere in these instructions," but the jury found all the section 667.61, subdivision (a), (b) and (e), allegations to be either "not true," or was unable to reach a verdict on them, hence appellant could not have been prejudiced by any assumed error as to that instruction. (2CT 576; 3CT 601-604.) As previously noted, this also explains why CALJIC No. 9.50 was included within the instant jury instructions.

specifically argued that Penny had been moved a total of 150 feet as follows:

> Attending the movement including but not limited to the actual distance moved, 150 feet from the public lit sidewalk where there could be passersby where there could be pedestrians or in cars. Half a football field behind the closed businesses where there are no lights, where it is secluded and dark and you have the freeway above, where no one could hear what was going on and no one could see from the freeway down to where she was.

(11RT 2375.)

Appellant admits that Dr. Djabourian's testimony indicated that: "(1) the sexual assaults occurred before the head injuries (10RT 1977); and (2) some of the victim's injuries were consistent with having been thrown over a fence (10RT 1967)." (AOB 377.) He also concedes that the "area where the body was found was well off Wardlow Road where the victim first encountered [he] and his companions. (See, e.g., 11RT 2231 [victim approximately 150 feet south of Wardlow Road].)" (AOB 378.)

Appellant specifically argues that 90 feet has been found to be insufficient under the pre-*Martinez* standard. (AOB 390-391.) However, in *People v. Stender* (1975) 47 Cal.App.3d 413, 423, a *pre-Martinez* case (which was abrogated by *Martinez*), the victim was moved 200 feet, and this distance was held sufficient to support the conclusion that such movement was substantial in character rather than slight or trivial. In *People v. Thornton* (1974) 11 Cal.3d 738 (again a pre-*Martinez* case abrogated by *Martinez*), this court held that "one block" was "substantial" for this purpose. (*Id.* at p. 768.)

First, 150 feet is obviously closer to 200 feet than it is to 90 feet. Moreover, 50 yards, or 150 feet, is certainly within the general parameters of a city block. 150 feet is thus hardly "insubstantial" in character. Second, in this case, appellant and his cohorts not only kidnapped Penny

from a sidewalk and carried her off to a remote area, but they additionally dragged her behind a building, literally over a fence, and down a freeway embankment to a position of solitude and darkness, completely changing the character of her surroundings and environment. (11RT 2375.)

In *People v. Thornton*, *supra*, this Court specifically noted:

> It is clear that the asportation of the victim in each of these cases was not 'merely incidental to the commission of the robbery' and that such movement 'substantially increase(d) the risk of harm over and above that necessarily present in the crime of robbery itself.' The fact that in each case defendant chose to consummate the robbery at a location remote from the place of initial contact does not render the subsequent asportation 'merely incidental' to the crime, for it is the very fact that defendant utilized substantial asportation in the commission of the crime which renders him liable to the increased penalty of section 209 if that asportation was such that the victim's risk of harm was substantially increased thereby. Clearly, any substantial asportation which involves forcible control of the robbery victim such as that occurring in this case exposes her to grave risks of harm to which she would not have been subject had the robbery occurred at the point of initial contact.

(*Id.* at p. 768.)

Third, all that is required for simple kidnapping is that the movement be "substantial in character." (*People v. Stanworth*, *supra*, 11 Cal.3d at p. 601.) Certainly, carrying a violently-resisting Penny off 150 feet from a roadway to the rear of a building, passing her over a fence, and then dragging her down an embankment to an isolated section of the freeway constitutes a movement that was "substantial" in character. The drag marks, bent fence and blood trails are a sobering testament to this reality. (11RT 2228, 2335-2336, 2240, 2247, 2249.)

Thus, even if the pre-*Martinez* simple kidnapping standard is somehow applicable to the case at bar, appellant could not have been prejudiced by any error, and his claim therefore fails.

XVI. THE TRIAL COURT DID NOT IMPERMISSIBLY FAVOR THE PROSECUTION BY GIVING INSTRUCTIONS WHICH USED THE TERM "STAKE" RATHER THAN "STICK;" IN ANY EVENT, ANY ERROR WAS HARMLESS

Appellant argues that "the trial court impermissibly favored the prosecution by instructing 35 times using the prosecution's unduly prejudicial characterization of the foreign object . . . ." (AOB 393; see also AOB 393-402.) The instant claim is specious.

A. Appellant's Contention Is Forfeited; In Any Event, The Trial Court Properly Instructed The Jury Using The Term "Stake" Rather Than "Stick"

Appellant claims that the "trial court's use of instructions that incorporated the word 'stake' 35 times was the functional equivalent of an impermissible prosecution pinpoint instruction, and was improperly argumentative." (AOB 398.) Appellant's claim is plainly forfeited, ignores the law, and, in any event, could not possibly have been prejudicial.

Initially, the instant claim is forfeited on appeal. Not only did defense counsel not object to the word "stake" in the second amended information, he also failed to object to the prosecution's use of the term, or to its alleged presence no less than 35 times in the jury instructions. (2CT 401-402; *People v. Williams* (2013) 56 Cal.4th 630, 684 ["Defendant makes various arguments against the use of this evidence, all of which he forfeited by failing to raise them below"].)[72]

To the extent appellant argues that the court had a duty to sua sponte modify the standard pattern jury instructions, his claim is forfeited for

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[72] The trial court even advised the parties during a discussion on jury instructions, "I think when the instructions get to the sexual penetration by a foreign object and then you have, dash, a wooden stake, I'm thinking I'll just put 'a wooden stake' in parenthesis." (11RT 2281.)

failure to request modification. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 503 ["A party may not argue on appeal that an instruction correct in law was too general or incomplete, and thus needed clarification, without first requesting such clarification at trial."]; *People v. Gutierrez, supra*, 14 Cal.App.4th at p. 1439 ["If appellant sought a modification of a correct instruction it was his duty to request the modification."].)

In any event, assuming the instant claim is properly before this Court, the term "stake" was a fair and reasonable interpretation of the evidence presented at trial. Mr. Bark, the Caltrans employee who found Penny's body, specifically used the term "stakes" to describe the objects holding up the black screening material. (10RT 2027.) Defense counsel himself repeatedly used the term "stake" during his opening and closing arguments, and during the trial. (10RT 1921-1922; 11RT 2251, 2392-2396, 2398.) Dr. Djabourian used the term during his testimony without objection, as did Detective McMahon. (10RT 1934; 11RT 2227-2228.) Quite simply, the evidence introduced by the People demonstrated that the object was a "stake," not a "stick."

Additionally, as appellant concedes, the defense and Detective McMahon made it clear to the jury that the actual stake used on Penny was never recovered. (11RT 2250-2251.) Moreover, Dr. Djabourian opined that the "stakes" introduced in evidence were consistent with Penny's injuries. (10RT 1933-1934, 1952-1953.) Quite simply, the most accurate description, as noted by Mr. Bark, of the objects was the word "stakes," as they were freeway "stakes," not freeway "sticks." Appellant's claim is nonsensical and completely lacking in merit.

B. Any Error Was Harmless

Even assuming the instant claim is not forfeited and that the trial court somehow erred, appellant cannot show that it is reasonably probable that he would have received a more favorable result had the trial court used the

term “stick” rather than “stake” in its instructions to the jury. First, appellant has not proffered any case law suggesting any functional or legal difference between a “stick” versus a “stake.” Second, appellant offers absolutely no support for his speculative assertion that “[t]he multiple repetition of the word stake in the instructions conjured even more heinous crimes and a more brutal ordeal for [Penny].” (AOB 401.) Nor does he offer any support for his novel suggestion that “the word ‘stake’ is far more offensive and brutal than the word ‘stick.’” (AOB 394.)

Third, appellant concedes that “[t]he crimes were unquestionably brutal.” (AOB 400.) Thus, the use of the word “stake” versus “stick” to describe the object shoved up Penny’s vagina, while she was still alive, could hardly have made a difference. Fourth, in the instant case, during the reading of jury instructions, the trial court specifically advised the jury as follows:

> When I say "wooden stake," I put it in parenthesis in the instructions, and you'll have to read in the parenthetical nature, because there was evidence presented that that was the foreign object. A foreign object can include anything, including that, as I will instruct you.

(11RT 2300.)

Moreover, as discussed above, the evidence of appellant’s guilt was beyond overwhelming. (*Ante*, Arg. IV.C.) Under the circumstances, there is no reasonable probability that appellant would have obtained a more favorable outcome in the guilt or penalty phase if the court had sua sponte substituted the word “stick” for “stake.” For the same reason, any error was harmless under the more stringent *Chapman* standard as well. The instant claim is unavailing.

XVII. AGGRAVATING EVIDENCE REGARDING APPELLANT'S INVOLVEMENT IN A GANG-RELATED FIGHT AND SHOW OF FORCE WAS PROPERLY ADMITTED IN THE PENALTY PHASE; IN ANY EVENT ANY ERROR WAS HARMLESS

Appellant argues that the judgment of death "should be reversed because, over defense objection, the trial court admitted irrelevant non-statutory evidence in aggravation." (AOB 403; see also AOB 403-422.) He further complains that the admission of Mr. Gmur's, Detective McMahon's and Mr. Aitken's testimony about "jumping" Chris into the gang, as well as the testimony regarding the gang-related dispute on the bus, violated his rights to due process, a fair trial, and a reasonable determination of appropriate penalty. (*Ibid.*)

Specifically, appellant argues that the "evidence of the 'jumping in' was improper rebuttal, not criminal activity, irrelevant, and was nothing more than inflammatory evidence that played upon the general public's fear of criminal street gangs in a case that was not gang related." (AOB 403-404.) He also contends that there was no evidence that he used or attempted to use any force or violence against a person because Gmur did not personally witness the fight, and there was no indication that the dispute on the bus "was anything more than a verbal disagreement about gangs." (AOB 407, 416.) Respondent disagrees.

A. Relevant Proceedings

Before the penalty phase began in the instant case, defense counsel moved to exclude evidence of gang activity proffered by the prosecutor. The following colloquy transpired:

> MR. YANES [DEFENSE COUNSEL]: Your Honor, yesterday Ms. Locke-Noble indicated that she was planning on calling rebuttal witnesses, and she told me off the record that she was talking about putting on some evidence of some gang activity. And I would object to that as not being rebuttal,

because it doesn't rebut anything. We didn't put on evidence that he was not in a gang or he wasn't a gang member; in fact, we put on evidence that he was.

If that's what the rebuttal is, if that's what the evidence is, I don't think that's rebuttal.

THE COURT: Was that part of your planned rebuttal?

MS. LOCKE-NOBLE [THE PROSECUTOR]: Part of my planned rebuttal was to but [*sic*] on evidence of gang activity, and that evidence is that before he committed the crime - - and I mean the same day, a few hours before, or less - - the defendant was involved in jumping someone else into his gang. I think that shows his violent tendencies, his violent activities. I think it also shows that he is not this wholesome, loving person that the defense is trying to portray.

I think that goes to the circumstances of the crime, which I could not have brought in during the guilt phase, and I think it's appropriate to bring in at this phase, although I could not yet bring it in, until after the defense presented some of their evidence. And yesterday that's what happened.

And in order to for me to even bring that in, I had to wait for the defendant to do that, I couldn't just bring it up on my own.

THE COURT: What does it rebut?

MS. LOCKE-NOBLE: It's not rebuttal, per se, in the strict technical sense, but it goes to the circumstance in aggravation that he was involved in gang activity prior to the murder, within hours of the murder itself. And that activity was involving violence, and he continued that activity through the time that he committed this murder. And then subsequent to the murder, when he got on the bus, he also, again, was engaged in gang activity and had a verbal confrontation with a rival gang member.

So all of that shows the picture that he is not this wholesome, loving person.

And there is case law that says that the People can present this type of evidence to show this, but we can't present it until after the defense puts this in issue.

THE COURT: I'm not sure that the defense has actually presented a picture of a wholesome, loving individual.

MS. LOCKE-NOBLE: Well, they put on the board the other day that he is a loving father, that he was involved in church activities, church plays, studied the bible, all that kind of stuff.

THE COURT: Right.

MS. LOCKE-NOBLE: And that's what I'm referring to.

THE COURT: But certainly there are gang members who are loving fathers, and who go to church, and who read and study the bible. So I think being a gang member or even being involved in gang activity is contrary to being a loving father and going to church.

MS. LOCKE-NOBLE: Well, additionally, there was also evidence presented that he's a follower and not a leader. Well, in this particular case he's the one that initiated the jumping in of this person, he's the one that made the phone call to another gang member and said, "Hey, we just jumped him in and we're going to call him Playboy." So that shows that he was a leader.

It also shows that he was not acting under the dominion and control of another, but was initiating all of this activity.

THE COURT: Well - -

MS. LOCKE-NOBLE: I'm looking for a case.

THE COURT: In the presentation of the evidence yesterday, the only item that I could think of that would lend itself to rebuttal, was the follower.

MS. LOCKE-NOBLE: Okay. Well --

THE COURT: So --

MR. YANES: Well, as to that, unless counsel has some -- first of all, let me back up.

First of all, counsel could have brought this in as an aggravating factor, him being a gang member, in her case in aggravation, at the beginning of her case in aggravation, and that's when she should have done it. There was no order, no issue about that coming in, in the penalty phase. There was only a matter of that not coming in, in the guilt phase. So counsel should have done that, if this is what she wanted to do as an aggravating factor in her case in chief in the penalty phase. So I think the opportunity is lost.

And, in fact, we came out and said he is a gang member, in our part of the case. There was nothing, certainly, to rebut. Now also, unless counsel has some different information that I have about this jumping in is that after they left Mr. Gmur's house, and after they'd been drinking, Pearson comes back to Mr. Gmur's house and asked if they could use his back room to jump in Chris. So that's not my client asking to do that, it's Pearson.

He says no. He said they all left and then he doesn't see what happens. And then he says about 20 minutes later, they come back and my client asked to use the telephone, and he hears him talking on the phone to a gang member named Capone. This is Mr. Gmur overhearing this, you know, this conversation, while my client is using the phone, allegedly. And he hears my client say, "Chris is cool. Put him on." And they said, "we're going to call Chris 'Playboy.'" And that's it.

He says -- Gmur says he doesn't -- that this person, Chris, did not have any obvious injuries or anything unusual about his clothing when they came back in, to evidence any kind of violence having been done to him. And then at that point they left Mr. Gmur's house.

So there is no -- Mr. Gmur did not see any violence. There is nothing saying that my client took any kind of leadership role, other than making a phone call, telling somebody something. That goes to the weight of the evidence itself.

And so clearly that evidence does not prove what counsel wants to prove and, therefore it should not be admitted.

But even before that, this should have been put in, in the People's case in chief, in the penalty phase.

THE COURT: Miss Locke-Noble.

MS. LOCKE-NOBLE: Well, the People cannot put in evidence of bad character until the defense puts in evidence of good character. The case of People versus Fierro, F-I-E-R-R-O, 1 Cal.4th 173, specifically addresses that issue.

And in that particular case the prosecutor attempted to cross examine the defense witnesses, the defendant's mother, and I believe family friends concerning his background with regards to gang activity. There were objections to that. The court allowed the cross-examination and the prosecutor indicated that he was prepared to have several detectives from the police department to come in and testify that the defendant was, in fact, a member of a street gang.

The court indicated that once the defense has presented evidence of circumstances admissible under factor k, which is what we have in this situation, prosecution rebuttal evidence would be admissible as tending to disprove any disputed fact that is of consequence to the determination of the action.

"A defendant who introduces good character evidence widens the scope of the bad character evidence that may be introduced in rebuttal.

The theory for permitting such rebuttal evidence and argument is not that it proves a statutory aggravating factor, but that it undermines the defendant's claim that his good character weighs in favor of mercy.

Accordingly, the prosecutor, when making such a rebuttal effort is not bound by the aggravating factors or by his statutory pretrial notice of aggravating evidence." In this particular situation that's what we have.

In People versus Fierro the court further explained that the defendant offered substantial evidence and argument that he was a kind, loving contributive member of his community, regarded with affection by members and family. Once he placed his general character in issue, the prosecutor was entitled to rebut

this evidence or argument suggesting a more balanced picture of his personality.

> That's what the People intend on doing with this evidence that we want to present. The witness that they want to preclude is Monte Gmur, again, concerning the issue of jumping in a gang member just right before he committed this murder, and then having the bus driver of the bus that he was on testify to the incident that occurred on the bus and, of course, his own statements with respect to that, that he made to the police.
>
> Also, we have a gang expert to testify what "jumping in" means, and what they do when they jump in somebody, and what colors means to gang members. And those are some of the witnesses that the People intend on presenting in rebuttal, specifically with respect to the gang issue.
>
> And the People would also cite the case of People versus Jennings, at 46 Cal.3rd 963, starting at page 981, which also indicates that the People have a right to present a more balanced picture of the defendant's personality. But we can't do that until after that's put into evidence, and it wasn't put into evidence until the defendant put on his case in penalty.
>
> I couldn't present that. That would have been misconduct for me to do so, to present that in my case in chief, in the penalty portion of this trial. That would have been grounds, probably, for a mistrial. So I had to wait until counsel put that in issue. It's now been put in issue and will also be put in issue by the next witness he intends on calling.

(13RT 2886-2893.)

Defense counsel conceded that if the prosecution had evidence of appellant's involvement in a violent "jumping in," that material could have been properly introduced. However, he argued that there was no evidence that this "jumping in" was actually violent. Defense counsel opined that the prosecutor was in fact proposing the introduction of inadmissible bad acts for the purpose of inserting the specter of criminal street gangs into the trial. Counsel pointed out that defense evidence demonstrated that

appellant was a gang member, and appellant did not deny it. Consequently, according to defense counsel, there was nothing to rebut. (13RT 2894.)

The trial court, after a lengthy discussion, indicated that "if the People have that evidence, they would be able to bring it in. Because, actually, 'Just ask. Just ask' is not solely a leadership type deal, but it's not the follower, actually." (13RT 2902-2903.) The trial court admitted the evidence, finally noting that "it seems on the surface that the People have evidence to support it, so it would probably come in." (13RT 2903.)

Thereafter, the prosecution introduced evidence that appellant participated in a gang "jumping in" at Gmur's house before the charged offenses, and was involved in a gang-related, verbal argument on a bus after the offenses. Specifically, the prosecution called three rebuttal witnesses to present the testimony: Monte Gmur, Brian McMahon and Terri Aitken.

Gmur testified that appellant, Pearson and Armstrong were at Gmur's home on December 29, 1998. (13RT 3036-3037.) Gmur heard Pearson and appellant debating, including appellant's command, "You ask him." (13RT 3037-3038.) Pearson then asked to use one of Gmur's rooms, saying they wanted "to put Chris on the block" to "jump him in, make him part of their gang." Gmur refused. Appellant, Pearson, Armstrong and Chris briefly went back into the music room, and then left Gmur's residence for about 20 minutes. (13RT 3042.) When they returned to the residence, appellant used Gmur's telephone, and called "Capone." Appellant said that they had "just put Chris on," that he was "cool,' and that he was "Playboy." The men then left the premises for the evening. (13RT 3043.)

Terri Aitken, an MTA bus driver testified. He drove route 60 from Long Beach to downtown Los Angeles on December 29, 1998. He stopped near Wardlow Road and Long Beach Boulevard around 12:30 or 2:00 a.m.

(13RT 3048.) He picked up three Black male gang members at Willow, not Wardlow. The first one argued over the fare. Mr. Aitken told the man to pay, and reached for the phone as if to call for help. The other two men then told the first man to pay the fare. (13RT 2049.) Mr. Aitken testified that the three men argued amongst themselves about Crips and Bloods. (13RT 3051.) All three subsequently exited the bus at Florence. (13RT 2049.)

Detective McMahon testified slightly differently from Mr. Aitken. He had interviewed Mr. Aitken on January 5, 1999. Aitken reported to Detective McMahon that three Black males, who had been drinking, had a dispute with a fourth Black male about gangs. (13RT 3053, 3056.) Detective McMahon also questioned appellant about the incident on the bus. Appellant told McMahon that the dispute was over Crips, Bloods, and gang colors. (13RT 3054.)

B. General Legal Principles

Section 190.3, factor (b) permits the prosecutor to introduce evidence of "criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence." (§ 190.3, factor (b).) This section allows proof of violent conduct, other than the capital crime, that itself is criminal. (*People v. Anderson* (2001) 25 Cal.4th 543, 584.) Such other violent crimes are admissible regardless of when they were committed or whether they led to criminal charges or convictions, except as to acts for which the defendant was acquitted. (*Ibid.*)

> Before an individual juror may consider evidence of other violent criminal activity in aggravation, he or she must find the existence of such activity beyond a reasonable doubt. [Citation.] There is no requirement, however, that the jury as a whole unanimously find the existence of other violent criminal activity beyond a reasonable doubt before an individual juror may consider such evidence in aggravation. [Citation.]

(*People v. Griffin*, *supra*, 33 Cal.4th at p. 585.)

There must be substantial evidence of the other violent criminal conduct. Substantial evidence of other violent criminal conduct is evidence that would allow a rational trier of fact to find the existence of such activity beyond a reasonable doubt. (*People v. Rodrigues*, *supra*, 8 Cal.4th at pp. 1167-1168; *People v. Clair* (1992) 2 Cal.4th 629, 672-678.) A trial court's ruling on the admissibility of evidence of other violent criminal conduct is reviewed for abuse of discretion. (*People v. Griffin*, *supra*, 33 Cal.4th at p. 587; *People v. Ochoa* (1998) 19 Cal.4th 353, 449; *People v. Clair*, *supra*, 2 Cal.4th at p. 676.)

As this Court in *People v. Loker* (2008) 44 Cal.4th 691, explained:

> When a defendant places his character at issue during the penalty phase, the prosecution is entitled to respond with character evidence of its own. "The theory for permitting such rebuttal evidence and argument is not that it proves a statutory aggravating factor, but that it undermines defendant's claim that his good character weighs in favor of mercy." [Citation.] Once the defendant's "general character is in issue, the prosecutor is entitled to rebut with evidence or argument suggesting a more balanced picture of his personality." [Citation.] The prosecution need only have a good faith belief that the conduct or incidents about which it inquires actually took place. [Citations.]

(*Id.* at p. 729, internal brackets omitted.)

"""The admission of rebuttal evidence rests largely within the sound discretion of the trial court and will not be disturbed on appeal in the absence of 'palpable abuse.'""" (*People v. Smith* (2005) 35 Cal.4th 334, 359.) Here, the trial court properly defined "willfully" for the jury (3CT 631 [CALJIC No. 1.20]), and further instructed the jury that the other criminal activity evidence must be proved beyond a reasonable doubt. (3CT 635 [CALJIC No. 8.87].)

C. The Trial Court Properly Admitted Relevant Evidence In Aggravation

Appellant claims that "[t]he gang related evidence was improper character evidence and improper rebuttal." Appellant's contention simply ignores the record, as well as the law.

Pursuant to section 190.3, factor (b), the prosecution presented evidence that appellant was involved in a violent fight when he, along with Pearson and Armstrong, initiated "Chris" into their clique by "jumping him in" the gang. (13RT 3036-3043.) Indeed, the trial court instructed the jury, under section 190.3, factor (b), and CALJIC No. 8.85, that it could consider the following, in its penalty determination, if applicable:

> The presence or absence of criminal activity by the defendant, other than the crime[s] for which the defendant has been tried in the present proceedings, which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.

(3CT 623-624.)

Here, the "jumping in" evidence was properly admitted under section 190.3, factor (b). The evidence demonstrated that, prior to the "jumping in," appellant was at Gmur's house with Pearson, Armstrong, and Chris. At appellant's direction, Pearson asked Gmur if he could use a room to put Chris "on the block." Gmur refused. The men then briefly went into Gmur's music room, and subsequently left the premises. About 20 minutes later, appellant, Pearson, and Armstrong returned with Chris to Gmur's residence. (13RT 3042.) At some point thereafter, appellant used Gmur's telephone and called "Capone." Appellant said that they had "just put Chris on," that he was "cool," and that he was "Playboy." All of the men, except Gmur, then left the premises for the evening. (13RT 3043.)

A reasonable inference from this evidence is that appellant, Pearson and Armstrong engaged in a fight with Chris to initiate him into their gang,

and thus engaged in battery, a "willful and unlawful use of force or violence upon the person of another." (§ 242.) Moreover, "[v]oluntary mutual combat outside the rules of sport is a breach of the peace, mutual consent is no justification, and both participants are guilty of criminal assault. [Citation.]" (*People v. Lucky* (1988) 45 Cal.3d 259, 291.) Not to mention that fighting in public is a breach of the peace. (§ 415.)

Furthermore, appellant concedes that the gang expert Sergeant Newman testified that the new gang member being initiated via a "jumping in" was "usually beaten for one to three minutes."[73] (AOB 403; see also 14RT 3084-3085.) Accordingly, there was substantial evidence that would permit a rational jury to find beyond a reasonable doubt that appellant willfully used unlawful force upon another.[74] (See, e.g., *People v. Jones*, *supra*, 51 Cal.4th at p. 380 [section 190.3, factor (b), evidence properly admitted where there was "very strong circumstantial evidence of defendant's identity as one of the robbers"]); *People v. Martinez* (2003) 31 Cal.4th 673, 694 [defendant's claim that there was no "direct evidence" of his possessing the shank rejected where sufficient circumstantial evidence showed he possessed the shank].)

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[73] This refutes appellant's claim that "there was no evidence whatsoever that this 'jumping in' was violent." (AOB 409.) As noted by Sergeant Newman, a "jumping in" is violent by definition. (14RT 3084-3085.) Indeed, defense counsel even conceded that "if the prosecution has evidence of [appellant's] involvement in a violent 'jumping in,' that could have been introduced." (AOB 409; see also 13RT 2894.)

[74] Appellant claims that "Gmur testified Pearson and [appellant] were alone with Chris for about 20 minutes in Gmur's music room, then the three left together." (AOB 418.) Appellant is mistaken. Actually, Gmur testified that the men went "briefly" back into the music room, and then left the residence for about 20 minutes. (13RT 3042.) This, of course, gave Chris plenty of time to clean up from his beating prior to returning to Gmur's house.

Moreover, the disturbance on the bus certainly constituted criminal activity, because Mr. Aitken threatened to call the authorities if appellant did not pay the fare. Appellant's suggestion that the incident on the bus did not involve "an implied threat to use force or violence" because "[t]here was no indication the dispute was anything more than a verbal disagreement about gangs" is absurd. Quite frankly, "verbal disagreements about gangs" quite often, if not in nearly all cases, involve an implied threat to use force or violence, if not the actual use of violence. (AOB 416; see also 3CT 623.)

Additionally, the evidence was properly admitted under section 190.3, factor (j), i.e., "Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor." (3CT 624.) Clearly, appellant's command to Pearson, "You ask him," tended to demonstrate that appellant was the "leader," or at least an equal participant in the offenses. Moreover, it demonstrated that appellant committed the crimes with his gang cronies, which belied appellant's argument that he only played a minor role. (14RT 3159-3171.)

Indeed, the "jumping in" evidence, as well as the evidence of the gang dispute on the bus, was also admissible to rebut extensive evidence presented by the defense that appellant was a "follower," rather than a "leader." This is because appellant was clearly the "leader" in both the "jumping in" and bus incidents. However, Dr. Osborn, Albert Scales, James Johnson, and Tiyarye Felix all indicated that appellant was a "follower." (13RT 2756, 2952-2953, 2955.) Pastor Scales testified that appellant showed him respect and listened to him. Additionally, Scales indicated that he never saw appellant act in a mean-spirited manner. (13RT 2870-2872.) The evidence in question here clearly rebutted the defense evidence on these topics.

Moreover, under the circumstances, the prosecution's rebuttal evidence (that appellant participated in a gang "jumping in" initiation and involved himself in a gang confrontation on the bus) was "relevant to the jury's evaluation of the defense evidence as it bears upon the appropriateness of the death penalty." (*People v. Smith*, *supra*, 35 Cal.4th at p. 359.) Consequently, the testimony of Mr. Gmur, Detective McMahon, and Mr. Aitken was properly admitted to rebut Pamela Armstrong's (appellant's mother) and Pastor Albert Scales's testimony regarding appellant's good character. (See *People v. Fierro* (1991) 1 Cal.4th 173, 236 [defendant's mother testified that the defendant "acted in school plays and accompanied his family on picnics"].)

Appellant's mother, precisely like the *Fierro* defendant's mother, testified that, when appellant was younger, he enjoyed church, and was involved in Sunday school, choir, picnics and plays. (13RT 2788.) Pamela and Tiyarye Felix also testified that, when he was older, appellant loved all four of his children, despite the fact that two of them were not his, and he treated the four children as equals. According to Pamela and Tiyarye, appellant was a loving and caring father.[75] (13RT 2813, 2821.) The "jumping in" and bus incidents rebutted this defense evidence of appellant's good character. As appellant admits, the purpose of permitting the prosecution to present rebuttal evidence "is to provide jurors with "a more balanced picture of the defendant's personality" (*In re Ross* (1995) 10 Cal.4th 184, 208) where the defendant has introduced evidence of good character." (AOB 421.)

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[75] Thus appellant's claim that "the defense also never attempted to portray [appellant] as having stellar or even good character" is clearly false. (AOB 412.)

In any event, assuming that the trial court erred, any error in admitting the evidence (of the "jumping in" and the incident on the bus) was clearly harmless. When a trial court erroneously admits section 190.3, factor (b) evidence under state law, the penalty phase judgment will be reversed only if there is a reasonable possibility the error affected the verdict. (*People v. Brown* (1988) 46 Cal.3d 432, 446-448; *People v. Gonzalez* (2006) 38 Cal.4th 932, 961.) Here, properly admitted factor (b) evidence showed that appellant, just as he had in the murder, ganged up on one person with his cohorts and delivered a beating.[76] It also showed an implied threat to use force or violence on the bus (again in a "three-on-one" scenario) to promote the supremacy of his gang.

Additionally, the defense itself admitted evidence of appellant's gang involvement prior to the prosecutor introducing his rebuttal evidence. For example, Pamela Armstrong testified extensively about appellant's gang background. She indicated that, by the age of 13, appellant spent his time with gang members. (13RT 2795, 2804.) Ms. Felix also testified that appellant was a gang member. (13RT 2828.) Moreover, Albert Scales, the pastor, opined that appellant was involved with gangs. (13RT 2869-2870.) Finally, Dr. Osborn indicated that appellant was a Scottsdale Piru Bloods gang member and that he had a "perverse kind of worth within the gang." (13RT 2942.) Thus, this is not a case where the prosecution somehow "tainted" appellant with gang evidence because, as appellant concedes,

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[76] Indeed, defense counsel even seemed to acknowledge that the evidence could have been "properly admitted" during the prosecution's initial penalty phase case-in-chief, and seemed to be objecting only to its admission during the prosecution's rebuttal phase of the case. Thus, appellant's only real complaint was about the order of the evidence, which also demonstrates that its admission was harmless. (See 13RT 2889.)

"defense evidence showed [that appellant] was a gang member . . . ." (AOB 410.)

Further, as discussed above, appellant's case in mitigation paled in comparison to the properly admitted evidence in aggravation, particularly the circumstances of the crime. (See Statement of Facts, *ante*, § II.) Quite simply, given the savagery inflicted on Penny, as well as the nature of the other evidence introduced by the People during the penalty phase, there is no chance that relatively minimal and brief testimony regarding the "jumping in" and the incident on the bus somehow swayed the jury to impose death. (See Statement of Facts, II.A.)

Accordingly, there is no reasonable possibility that any error affected the penalty verdict. (See *People v. Martinez*, *supra*, 31 Cal.4th at p. 694-695; cf. *People v. Pinholster*, *supra*, 1 Cal.4th at p. 962 [admission of irrelevant aggravating evidence rarely reversible error]; *People v. Wright* (1990) 52 Cal.3d 367, 426-427 [same].) Indeed, appellant cannot show prejudice under any standard. Under the circumstances, appellant's claim must therefore be rejected.

XVIII. THE TRIAL COURT DID NOT IMPROPERLY PRECLUDE THE CROSS-EXAMINATION OF A PROSECUTION WITNESS; IN ANY EVENT, ANY ERROR WAS HARMLESS

Appellant contends that the trial court improperly "precluded cross-examination of a prosecution witness concerning a prior incident during which [his] son suffered a stabbing injury. (AOB 423, see also AOB 423-431.) Appellant's claim misconstrues the record and is unavailing.

A. Relevant Proceedings

The prosecution called two LBPD police officers, Officers Ponce and Cloughesy, who testified about a "911" call from appellant's home in April 1996. The officers indicated that they discovered appellant's four or five-

year-old son with a stab wound to his left thigh. On cross-examination, defense counsel sought to introduce Officer Cloughesy's testimony concerning any results from any Department of Children Services (DCS) investigation into the incident, as well as any final determination by the DCS. The trial court sustained the prosecutor's relevance objection to that testimony being elicited from Officer Cloughesy, and the defense made no attempt to legitimately introduce the evidence from a proper source. (12RT 2629-2630.)

Specifically, at the time of the incident, Officers Ponce and Cloughesy arrived at the residence to find appellant, who was 19 years old at the time, sitting on the porch holding his five-year-old son. Appellant was holding a tissue to the back of his son's left thigh, and he repeatedly told his son to say that his injury was an accident. (12RT 2588, 2624.) Appellant was under the influence of alcohol with a .10 blood alcohol content. (12RT 2617-2618.) The child was bleeding from a two-inch diameter puncture wound. (12RT 2628.) After the paramedics arrived, appellant would not release his son, who had to be forcibly removed from his grasp. (12RT 2589.)

Officer Ponce testified that appellant gave three different stories to explain the boy's injury: 1) appellant's keys, which were in appellant's pocket, had stabbed the boy (12RT 2590); 2) a knife in appellant's pocket had stabbed the boy (12RT 2592-2593); and 3) appellant and his son had fallen onto the kitchen table, and his son was cut as a result. (12RT 2613). Officer Ponce thought the explanation was inconsistent with the wound. (12RT 2617.)

Officer Cloughesy later spoke with the child at the hospital as he received medical treatment. The boy reported that he had wrapped his legs around appellant, and felt a stabbing. He screamed, and appellant put the boy down, called "911," and held a tissue to the wound. (12RT 2629.)

Officer Ponce subsequently arrested appellant, because he believed that appellant had intentionally stabbed his son. (12RT 2614.)

The following colloquy occurred during the cross-examination of Officer Cloughesy:

> Q [BY DEFENSE COUNSEL MR. YANES]: Who called 9-1-1?
>
> A [OFFICER CLOUGHESY]: The defendant.
>
> Q: Okay.
>
> A: He called 9-1-1, grabbed some Kleenex, put him on the back of his leg and held him on the front porch.
>
> Q: Until the police came?
>
> A: Until the police came.
>
> Q: Did you contact the Department of Children Services?
>
> A: Yes, I did.
>
> MS. LOCKE-NOBLE [THE PROSECUTOR]: Objection, Your Honor. Irrelevant.
>
> THE COURT: Well, that answer will stand. I'm not sure I see the relevance of anything else.
>
> Go ahead.
>
> MR. YANES: Let's venture another one, Your Honor.
>
> Q: Were you aware of their determination of what happened?
>
> MS. LOCKE-NOBLE: Objection, Your Honor. Irrelevant.
>
> THE COURT: Well, sustained.
>
> MR. YANES: I have no further questions.

(12RT 2629-2630.)

B. General Legal Principles

"The Eighth and Fourteenth Amendments require that the sentencer in a capital case not be precluded from considering any relevant mitigating evidence, that is, evidence regarding 'any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.'" (*People v. Frye* (1998) 18 Cal.4th 894, 1015, overruled in other grounds in *People v. Doolin*, *supra*, 45 Cal.4th at p. 421, fn. 22, quoting *Lockett v. Ohio* (1978) 438 U.S. 586, 604 [98 S.Ct. 2954, 57 L.Ed.2d 973].) "Nonetheless, the trial court still '"determines relevancy in the first instance and retains discretion to exclude evidence whose probative value is substantially outweighed by the probability that its admission will create substantial danger of confusing the issues or misleading the jury."'" (*People v. Williams* (2006) 40 Cal.4th 287, 320, quoting *People v. Cain*, *supra*, 10 Cal.4th at p. 64.) "[R]elevant mitigating evidence is evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value. [Citations.]" (*People v. Farley* (2009) 46 Cal.4th 1053, 1128, internal quotation marks omitted.) The court "has the authority to exclude as irrelevant evidence that does not bear on the defendant's character, record, or the circumstances of the offense. [Citation.]" (*People v. Souza* (2012) 54 Cal.4th 90, 137.)

C. The Trial Court Properly Excluded Irrelevant And Speculative Testimony Regarding The Result Of Any Investigation By the Department of Children's Services

Initially, appellant has failed to preserve his claim that the trial court erred in denying him an opportunity to present evidence regarding the result of any DCS investigation into the stabbing of his son. To preserve for appeal a claim concerning the exclusion of evidence, the proponent must reveal to the trial court "[t]he substance, purpose, and relevance of the

excluded evidence . . . by the questions asked, *an offer of proof*, or by any other means[.]" (Evid. Code, § 354, subd. (a), italics added; *People v. Anderson*, *supra*, 25 Cal.4th at p. 580; *People v. Whitt* (1990) 51 Cal.3d 620, 648.)

The trial court admitted Officer Cloughesy's testimony that he had contacted DCS. When the trial court thereafter stopped Officer Cloughesy from testifying about any potential DCS determination of what had occurred that day, defense counsel offered no argument regarding the substance, purpose or relevance of the excluded evidence. He simply stated, "I have no further questions." (12RT 2630.) Consequently, because appellant's counsel never: 1) advised the trial court that he knew that the DCS had even conducted an investigation; 2) attempted to lay a foundation for its admission; or 3) even argued that the trial court was required to admit such evidence, appellant has failed to preserve his claim on appeal. (See *People v. Lightsey* (2012) 54 Cal.4th 668, 630-631 ["we cannot hold the trial court abused its discretion in rejecting a claim that was never made"] citing *People v. Valdez*, *supra*, 32 Cal.4th at p. 109.)

Indeed, appellant has failed to affirmatively demonstrate error from the record. (*Nienhouse v. Superior Court* (1996) 42 Cal.App.4th 83, 93-94.) The source of appellant's potential knowledge of any DCS investigation was, and remains, undeveloped and unknown. Similarly, no testimony was adduced to permit the court to determine whether the DCS had even conducted an investigation, or what the outcome of that investigation was. Indeed, Officer Ponce specifically testified, "I [Officer Ponce] don't think I ever found out the truth." (12RT 2614.)

Further, where "the trial court's ruling did not foreclose defendant from presenting a defense, but 'merely rejected certain evidence concerning the defense[,]'" appellant cannot show the trial court's rulings infringed on his constitutional rights. (*People v. Vines*, *supra*, 51 Cal.4th at p. 869.)

Indeed, appellant could have alternatively called a DCS case worker as a witness, rather than try to elicit irrelevant hearsay testimony from Officer Ponce. Now, he asks this Court to reverse his judgment of death based on evidence that to this day does not even appear to exist. Quite simply, by failing to present any foundation, appellant has failed to preserve this claim on appeal, and the contention is therefore forfeited. (Evid. Code, §354; *People v. Vines* (2011) 51 Cal.4th 830, 868-869.)

In any event, assuming the instant claim is properly before this Court, defense counsel wholly failed to explain how any DCS investigation was relevant to the officer's testimony. Trial counsel was simply trying to have the jury speculate, based solely on his asking of the question, that maybe DCS conducted an investigation, and that maybe DCS determined that he did not deliberately stab his son. Indeed, appellant argues that the "only reasonable inference from the record also was that the [DCS] looked into the incident (12RT 2629 [officer contacted child protective services], and that no action was taken by authorities as a result of the incident."[77] (AOB 427.)

If that were true, then defense counsel could have submitted an offer of proof and called the DCS case worker as a witness. Even had appellant done so, testimony from a DCS case worker about the placement or non-placement of appellant's son was hardly relevant to Officer Cloughesy's criminal investigation. The trial court correctly exercised its discretion in sustaining the prosecutor's objection to speculative testimony from Officer Cloughesy about any DCS investigation. (*People v. Gonzales* (2012) 54

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[77] Appellant's entire claim is based on speculation. For example, without any support whatsoever, appellant suggests that "[i]nvestigating law enforcement and child protective services, however, at the time, most certainly reached a different conclusion." (AOB 429.) Appellant's fanciful assumptions do not constitute evidence before this Court.

Cal.4th 1234, 1260 ["Speculative inferences are, of course, irrelevant"]; see also *People v. Cash*, *supra*, 28 Cal.4th at p. 727.) Thus, there was no violation of appellant's right to present mitigating evidence.

Moreover, assuming that the trial court engaged in an Evidence Code section 352 analysis, appellant cannot show the trial court abused its discretion. As appellant never explained why the potential DCS investigation evidence was, or was not, time consuming, confusing and/or more probative than prejudicial, the trial court could have found that the potential for undue consumption of time or confusing the issues (i.e., lengthy testimony about a collateral DCS investigation) was substantial.

However, relying on Evidence Code section 356, appellant argues that the "[e]xclusion of evidence of the officer's knowledge about the results of [the or any] investigation by the Department of Child Services violated the doctrine of completeness by permitting the prosecutor to introduce only a portion of the state's evidence regarding the 1996 incident when [appellant's] son was injured." (AOB 426.) Evidence Code section 356 states, in relevant part: "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 . . . ." "By its terms [Evidence Code] section 356 allows further inquiry into otherwise inadmissible matter only, (1) *where it relates to the same subject*, and (2) it is necessary to make the already introduced conversation *understood*." (*People v. Gambos* (1970) 5 Cal.App.3d 187, 192, italics original.) Thus, the courts have excluded the additional evidence "if not relevant to the conversation already in evidence." (*Id.* at p. 193.)

Here, evidence that DCS may have conducted an investigation and made some finding was not admissible under Evidence Code section 356 because it was not relevant, i.e., it was not necessary to make any already introduced conversation understood. Indeed, it was not part of any

"conversation" at all. Nor was it part of any "act" by Officer Cloughesy, any declaration, or any writing. Evidence Code section 356 was thus wholly inapplicable to the trial court's ruling.

Appellant also claims that "the testimony from the two officers created 'a misleading impression' that [appellant] was responsible for the injury to his son in 1996." To the contrary, there was no dispute that appellant was "responsible" for the injury to his son, the only possible dispute was whether appellant was guilty of drunken gross negligence while carrying a concealed weapon during a domestic argument, or an intentional stabbing. Either scenario would have been admissible. Thus, appellant's claim fails as lacking foundation, speculative, and contrary to the law.

D. Any Error Was Harmless

"Penalty phase error is prejudicial under state law if there is a 'reasonable possibility' the error affected the verdict." (*People v. Watson*, *supra*, 43 Cal.4th at p. 693.) "This standard is identical in substance and effect to the federal harmless beyond a reasonable doubt standard enunciated in *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705]. [Citation.]" (*Ibid.*) Initially, the record here, as previously noted, does not show how Officer Cloughesy would have answered the question.[78] It is an appellant's duty to establish prejudice on appeal. (See *People v. Jones* (1964) 228 Cal.App.2d 74, 89.) Indeed, there is no reason to believe that Officer Cloughesy's response would have been any different from Officer Ponce's response, i.e., that he did not know what happened. (See 12RT 2614.)

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[78] Appellant claims that "[t]he officer knew the results of the investigation and the agency determination." (AOB 427.) Appellant proffers absolutely no support for his assertion, nor has respondent found any in the record.

Nor can appellant show that the exclusion somehow constituted a miscarriage of justice. (Cal. Const., art. VI, § 13; Evid. Code, § 354; *People v. Breverman* (1998) 19 Cal.4th 142, 173.) Even without the evidence of any DCS investigation, as appellant concedes, the "only reasonable inference from the record also was that the [DCS] looked into the incident . . . and that no action was taken by authorities as a result of the incident." (12RT 2629.) Thus, as appellant concedes, the jury must have determined that appellant was not actually convicted of a crime. Indeed, appellant's son indicated that the stabbing was an accident. (12RT 2598, 2619.)

Furthermore, as previously noted, the evidence of appellant's guilt was extremely strong in the instant case. (See *ante*, Arg. IV.C.) The properly admitted aggravating evidence in this case – specifically, the circumstances of the crime – was overwhelming, and far outweighed any mitigating evidence offered by appellant, as well as any mitigating evidence that was improperly excluded. Appellant and his cohorts savagely sexually assaulted, tortured and murdered Penny in an unusually cruel and painful manner. She sustained 114 internal and external injuries and 11 fractured bones. (10RT 1964-1965.)

Additional unspecified testimony from Officer Cloughesy leading to a conclusion that appellant had "accidentally" stabbed his son in a drunken stupor/domestic argument/rage while carrying a concealed weapon illegally would have made little, if any, difference. Moreover, as defense counsel most likely realized, exposing the full DCS investigation to the jury may very well have revealed additional damning evidence casting appellant in a negative light. Therefore, as there is no reasonable possibility that any error affected the verdict, appellant's claim should be rejected.

XIX. THE PROSECUTOR DID NOT USE INCONSISTENT THEORIES AT THE PENALTY PHASES OF THE SEPARATE TRIALS OF APPELLANT AND SEVERED CODEFENDANT KEVIN PEARSON; HOWEVER, THIS CLAIM IS NOT PROPERLY BEFORE THIS COURT BECAUSE IT RELIES ENTIRELY ON EVIDENCE OUTSIDE THE RECORD

Appellant contends that "[t]he prosecutor's use of inconsistent theories of leadership to exaggerate [his] role in the offenses and persuade the jury to select the death penalty violated [his] trial and due process rights under the Sixth and Fourteenth Amendments, and violated the Eighth Amendment prohibition against cruel and usual punishment." (AOB 433; see also AOB 432-460.) In fact, the prosecutor did not use inconsistent theories, but this claim is nor properly before this Court as it relies on evidence outside the record. Therefore, it is not in a proper posture for consideration by this Court and must be rejected.

A. Relevant Proceedings

The trials of the three codefendants were severed because each had made confessions that could not be introduced against the other two. (2RT 50-51; see also *People v. Aranda* (1965) 63 Cal.2d 518, and *Bruton v. United States* (1968) 391 U.S. 123 [88 S.Ct. 1620, 20 L.Ed.2d 476].) Appellant was tried first (judgment of death on January 23, 2003), followed by codefendant Pearson (case number S120750; judgment of death on November 19, 2003) and then codefendant Armstrong (case number S126560; judgment of death on July 16, 2004).

On August 12, 2009, in response to appellant's successful superior court effort to augment the record with materials from codefendants Pearson's and Armstrong's trials, and in response to respondent's motion seeking to vacate that augmentation, this Court issued the following order in this case: "Respondent's Motion to Vacate Superior Court's Order

Augmenting the Appellate Record with Reporter's Transcripts of Codefendant's Separate Trials, filed May 22, 2009, is granted. (See *People v. Sakarias* (2000) 22 Cal.4th 596, 635-636.) The guilt and penalty phase transcripts from the separate trials of Kevin Darnell Pearson and Jamelle Edward Armstrong are ordered stricken in their entirety from the record on appeal herein." Thus, codefendants Pearson's and Armstrong's reporter's transcripts were stricken from the record on appeal in the instant case.

Apparently not satisfied with that ruling, on June 24, 2013, appellant filed a "Motion for Judicial Notice" seeking to accomplish precisely the same thing, i.e., augment the record with "the court records in *People v. Pearson*, including the transcripts." (AOB 432, fn. 34.) Respondent filed opposition to the motion for judicial notice on July 3, 2013. Appellant filed a reply to respondent's opposition on July 15, 2013. As of the instant date, this Court has not ruled on appellant's motion. Thus, currently, the transcripts in *People v. Pearson* are not currently part of the instant record on appeal. Moreover, given this Court's prior August 12, 2009 ruling, *ante*, it is highly unlikely that this Court will grant appellant's motion for judicial notice.

B. The Prosecutor Did Not Use Inconsistent Theories At The Penalty Phases Of The Separate Trials Of Appellant And Codefendant Pearson; However, This Claim Is Not Properly Before This Court Because It Relies Entirely On Evidence Outside The Record

Appellant claims that, in the case at bar, "in the prosecutor's words, [appellant] was the leader. But later, in the penalty phase of Pearson's trial, the same prosecutor argued Pearson, not [appellant], was the leader." (AOB 438.) As previously noted, the instant claim is not properly before this Court because Pearson's reporter's transcripts are not part of the instant record on appeal. Consequently, the instant claim fails because it is largely

based on evidence outside the record. (See *People v. Marlow* (2004) 34 Cal.4th 131, 149; *People v. Seaton, supra*, 26 Cal.4th at p. 634.)

Obviously, as appellant seems to acknowledge, respondent cannot fully address the merits of this claim without determining if the prosecutor uncovered additional evidence between the dates of appellant and Pearson's trials. (AOB 456.) The only way to demonstrate that would be to present evidence outside the record on appeal. Appellant claims that, in this case, "there can be no reasonable inference that the prosecution's inconsistent theories was due to the discovery of 'new evidence.'" (AOB 457.) Appellant cannot possibly know that, since he has not deposed the prosecutor. He even concedes in his briefing that the prosecutor's unanticipated discovery of new evidence would be fatal to his claim. (See AOB 456-457.)

Appellant even acknowledges that this Court's decision in *Sakarias* "involved referee's findings that the prosecution's use of 'divergent factual theories was intentional' and other related findings." (AOB 447.) Given that admission, it is difficult to understand precisely how appellant believes that the instant issue is in the proper posture for consideration by this Court. Moreover, appellant fails to seriously address the fact that, at the time of his conviction, the prosecutor's theory painting him as the "leader" was not "inconsistent" with anything, because the other two codefendants had not been tried yet. Thus, as to this case, the prosecutor could not possibly have had a chance, or even a reason, to explain any inconsistency.

Although a discussion of the merits of this claim is not appropriate due to its procedural posture,[79] it does bear mentioning that individuals may

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[79] Appellant cites a litany of largely worthless case law, as the majority of it is not binding on this Court, or consists of vague dicta. (See AOB 441-458.) However, he acknowledges that the one case which is (continued...)

assume different "leadership" roles in any given situation. Indeed, appellant may have been the "leader" for parts of the confrontation with Penny, i.e., the initial part, and Pearson may have been the "leader" for other parts of the confrontation, i.e., the latter part. Additionally, appellant may have been the leader administratively or for planning purposes by directing the others and by taking charge of the disposal of the incriminating evidence, while Pearson may have been the physical leader on the ground, i.e., raping Penny, beating her with the stake, impaling her, etc.

Appellant's simple argument fails to recognize that there are many different potential leadership roles, and it is entirely possible that both appellant and codefendant Pearson may have been "leaders" in these differing contexts. Thus the prosecutor's alleged arguments in the two cases were hardly "inherently factually contradictory" or "irreconcilable." (See AOB 452.)

Finally, appellant fails to acknowledge that codefendant Armstrong was not alleged to be the leader, yet he was nevertheless also sentenced to death. This is strong evidence that appellant could not have been prejudiced by any inconsistent theory about the leadership roles of appellant and Pearson. Even if there were inconsistent arguments about leadership roles, given appellant's savagery toward Penny, i.e., biting her at

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(...continued)
actually binding on this Court was decided in respondent's favor. (See *Jacobs v. Scott* (1995) 513 U.S. 1067 [115 S.Ct. 711, 130 L.Ed.2d 618]; see AOB 442.) He acknowledges that the federal circuit court cases that he relies on were "later reversed by the United States Supreme Court." (AOB 443, fn. 37.) This, of course, renders them meaningless. In any event, federal circuit court cases are not binding on this Court. (*People v. Beltran* (2013) 56 Cal.4th 935, 953 ["lower federal decisional authority is neither binding nor controlling in matters involving state law"].)

least twice and punching her directly in the face at least twice, appellant could not possibly have been prejudiced in any event. However, since the instant claim is not properly before this Court, it should be rejected on that procedural basis.

XX. THERE WAS NO CUMULATIVE ERROR

Appellant contends that the cumulative effect of errors during the guilt and penalty phases requires reversal of the death verdict. (AOB 461-463.) Respondent disagrees because there was only two minor errors here, both involving the jury instructions on torture (including torture within CALJIC No. 3.30 [Arg. XI, *ante*] and improperly instructing the jury on torture as a predicate felony for first degree felony murder [Arg. XII, *ante*]) and, with respect to these minor errors, appellant has failed to demonstrate prejudice.

Moreover, whether considered individually or for their cumulative effect, the alleged errors could not have affected the outcome of the trial. (See *People v. Seaton* , *supra*, 26 Cal.4th at pp. 675, 691-692; *People v. Ochoa* (2001) 26 Cal.4th 398, 447, 458, abrogated on another point in *People v. Prieto* (2003) 30 Cal.4th 226, 263, fn. 14; *People v. Catlin* (2001) 26 Cal.4th 81, 180.) Even a capital defendant is entitled only to a fair trial, not a perfect one. (*People v. Cunningham*, *supra*, 25 Cal.4th at p. 1009; *People v. Box*, *supra*, 23 Cal.4th at pp. 1214, 1219.) The record shows appellant received a fair trial. His claims of cumulative error should, therefore, be rejected.

XXI. CALIFORNIA'S DEATH PENALTY STATUTE IS CONSTITUTIONAL AND FULLY CONGRUENT WITH THE STATE AND FEDERAL CONSTITUTIONS

Appellant contends that "[m]any features of California's capital sentencing scheme, alone or in combination with each other, violate the United States Constitution." (AOB 464.) He further states that "[b]ecause

previous challenges to most of these features have been rejected by this Court, these arguments are presented in an abbreviated fashion for the purpose of alerting this Court to the nature of each component claim and its federal constitutional grounds." (*Ibid.*; see *People v. Schmeck* (2005) 37 Cal.4th 240, 303-304.) Likewise, because this Court does not require extensive briefing on routine challenges to California's capital punishment scheme, respondent will present abbreviated arguments with respect to each of appellant's 13 claims.

Appellant also asks this Court to "consider the defects in the California scheme, 'in context' and collectively, to hold that the cumulative operation of the scheme is unconstitutional." (AOB 466.) However, because there are no "defects" in California's death penalty statute, i.e., no error, the cumulative operation of the scheme is therefore constitutional.

A. The California Death Penalty Statute Is Not Impermissibly Broad

Appellant first argues that California's death penalty statute violates the Constitution because it is impermissibly broad. (AOB 466-467.) Respondent disagrees.

Appellant argues that "nearly every murder in California permits a prosecutor to seek the death penalty." (AOB 467.) The defendant in *People v. Crittenden, supra*, 9 Cal.4th 83, made a similar argument: "In particular, defendant contends that the categories of murder subjecting a defendant to eligibility for the death penalty have been expanded to the extent that the death penalty law does not perform the mandated narrowing function. This development, defendant asserts, is reflective of an original unconstitutional purpose, harbored by the proponents of the law, to apply the death penalty in every case of murder." (*Id.* at p. 154.) This Court held in *Crittenden*, "[e]ven taking into account this statutory expansion,

however, we believe the death-eligibility component of California's capital punishment law does not exceed constitutional bounds." (*Id.* at p. 156.)

Similarly, this Court has repeatedly held, "California's death penalty law, which permits capital punishment for many first degree murders, including unintentional felony murders, is not overly broad. [Citations.]" (*People v. Elliott*, *supra*, 53 Cal.4th at p. 593.) Appellant provides no reason for this Court to depart from its prior holding.

B. The Categories Of Special Circumstances Described In Section 190.2 Effectively And Meaningfully Narrow The Class Of First Degree Murderers Who May Receive The Death Penalty

Appellant contends that "California's capital sentencing scheme does not meaningfully narrow the pool of murderers eligible for the death penalty." (AOB 468-469.) Appellant's claim lacks merit.

This Court has consistently rejected the claim that the California death penalty statute fails to narrow, in a constitutionally acceptable manner, the class of persons eligible for the death penalty. "California's statutory special circumstances (§ 190.2, subds. (a)(1)-(22)) are not so numerous or inclusive as to fail to narrow the class of murderers eligible for the death penalty. [Citation.]" (*People v. Yeoman*, supra, 31 Cal.4th at p. 165.) "The special circumstances listed in section 190.2 adequately narrow the class of murders for which the death penalty may be imposed. [Citation.]" (*People v. Snow* (2003) 30 Cal.4th 43, 125.) "The statute (§ 190.2) does not impose overbroad death eligibility, either because of the sheer number and scope of special circumstances which define a capital murder, or because the statute permits capital exposure for an unintentional felony murder. [Citations.]" (*People v. Anderson*, *supra*, 25 Cal.4th at p. 601; see, e.g., *People v. Marks*, *supra*, 31 Cal.4th at p. 237; *People v. Box*, *supra*, 23 Cal.4th at p. 1217; *People v. Ochoa*, *supra*, 19 Cal.4th at p. 479; see also *People v. Bacigalupo* (1993) 6 Cal.4th 457, 468.)

C. Section 190.3, Subdivision (a), As Applied Does Not Allow For Arbitrary And Capricious Imposition Of Death

Appellant contends that California's death penalty statute is invalid because section 190.3, subdivision (a), as applied, allows arbitrary and capricious imposition of death in violation of various rights under the federal Constitution. (AOB 469-472.) Respondent disagrees.

This Court has repeatedly rejected this claim. (*People v. Brady* (2010) 50 Cal.4th 547, 590 ["Section 190.3, factor (a), whether considered on its face or as applied, does not allow for arbitrary and capricious imposition of the death penalty"]; *People v. Hovarter* (2008) 44 Cal.4th 983, 1029; *People v. Brown* (2004) 33 Cal.4th 382, 401.) Appellant offers no reason for this Court to depart from its prior holdings. (See *People v. Brown* (2004) 33 Cal.4th 382, 401.)

D. CALJIC No. 8.88's Use Of "So Substantial" Language To Describe Aggravating Circumstances Warranting A Verdict Of Death Is Not Impermissibly Vague

Appellant argues that the trial court's use of CALJIC No. 8.88 violated his constitutional rights because it creates a standard that is "vague and directionless" by the use of its "so substantial" phrase, which creates a "risk of arbitrary and capricious sentencing." (AOB 472-473.) To the extent appellant did not request the specific modifications alleged here, he has waived his claim on appeal. (*People v. Daya* (1994) 29 Cal.App.4th 697, 714 ["defendant is not entitled to remain mute at trial and scream foul on appeal for the court's failure to expand, modify, and refine standardized jury instructions"].) In any event, as appellant recognizes, CALJIC No. 8.88 has been found to be constitutional (*People v. Moon* (2005) 37 Cal.4th 1, 41-42; *People v. Crew* (2003) 31 Cal.4th 822, 858), and this Court has rejected appellant's challenge to this standard instruction (*People v. Breaux* (1991) 1 Cal.4th 281, 316, fn. 14; *People v. Ochoa*, *supra*, 26 Cal.4th at p.

452, abrogated on another point by *People v. Prieto*, *supra*, 30 Cal.4th at p. 263, fn. 14). (See AOB 473.)

Indeed, the language of CALJIC No. 8.88 is not unconstitutionally vague; it adequately conveys the weighing process and is consistent with section 190.3. (*People v. Chatman* (2006) 38 Cal.4th 344, 409; *People v. Smith*, *supra*, 35 Cal.4th at p. 370.) The "so substantial" language does not create a presumption for death or a risk of arbitrary and capricious sentencing. (*People v. Salcido* (2008) 44 Cal.4th 93, 163; *People v. Maury*, *supra*, 30 Cal.4th at p. 440.) Rather, it properly admonishes the jury "to determine whether the balance of aggravation and mitigation makes death the appropriate penalty." (*People v. Arias* (1996) 13 Cal.4th 92, 171.) "The statutory language referring to aggravating and mitigating circumstances is not vague or ambiguous. [Citations.]" (*People v. Salcido*, *supra*, 44 Cal.4th at p. 164.) Appellant has not provided any reason for this Court to depart from its past decisions. Accordingly, his claim must be rejected.

E. The Use of Restrictive Adjectives in Mitigating Factors Is Proper

Appellant argues that the use of adjectives such as "extreme" and "substantial in the list of potential mitigating factors acted as a barrier to the consideration of mitigation in violation of Fifth, Sixth, Eighth, and Fourteenth Amendments. (AOB 473.) Respondent disagrees. "Including in the list of potential mitigating factors adjectives such as 'extreme' (§ 190.3, factors (d), (g)) and 'substantial' (*id.* factor (g)) does not erect an impermissible barrier to the jury's consideration of mitigating evidence. [Citation.]" (*People v. Valdez* (2012) 55 Cal.4th 82, 180; *People v. Fuiava* (2012) 53 Cal.4th 622, 732; *People v. Elliott*, *supra*, 53 Cal.4th at p. 594; *People v. Letner*, supra, 50 Cal.4th at p. 208; *People v. Avila* (2006) 38 Cal.4th 491, 614.)

F. The Trial Court Was Not Required to Instruct that Statutory Mitigating Factors Were Relevant Solely As Potential Mitigators

Appellant contends that the trial court's failure to instruct that statutory mitigating factors were relevant solely as potential mitigators precluded a fair, reliable, and evenhanded administration of the capital sanction. (AOB 474-476.) Respondent disagrees. "A trial court is not required to delete inapplicable sentencing factors or to instruct that statutory mitigating factors are relevant solely as potential mitigators. [Citation.]" (*People v. Streeter* (2012) 54 Cal.4th 205, 268; *People v. Wilson* (2008) 43 Cal.4th 1, 32; see also *People v. Morrison* (2004) 34 Cal 4th 698, 730 ["instruction to the jury to consider 'whether or not' certain mitigating factors were present did not impermissibly invite the jury to aggravate the sentence upon the basis of nonexistent or irrational aggravating factors"] .)

G. The Jury Is Not Required to Find Beyond a Reasonable Doubt That Aggravating Factors Exist, That They Outweigh the Mitigating Factors, or That Death Is the Appropriate Sentence

Appellant argues that the jury must be required to find beyond a reasonable doubt that aggravating factors exist, that the aggravating factors outweigh the mitigating factors, and that death is the appropriate penalty. (AOB 477-480.) As this Court explained in *People v. Demetrulias*, *supra*, 39 Cal.4th 1, California's death penalty statute does not require instruction on the burden of proof at the penalty phase and "'is not invalid for failing to require . . . (2) proof of all aggravating factors beyond a reasonable doubt, (3) findings that aggravation outweighs mitigation beyond a reasonable doubt, or (4) findings that death is the appropriate penalty beyond a reasonable doubt.' [Citation.]" (*Id.* at p. 43; accord *People v. Rogers*, *supra*, 39 Cal.4th at p. 893; *People v. Blair*, *supra*, 36 Cal.4th at p. 753;

People v. Davis, *supra*, 36 Cal.4th at p. 571; *People v. Brown*, *supra*, 33 Cal.4th at p. 402.) Unanimity is required only as to the appropriate penalty. (*People v. Stanley* (2006) 39 Cal.4th 913, 963; *People v. Anderson*, *supra*, 25 Cal.4th at p. 590.)

Appellant contends that *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856], *Blakely v. Washington*, *supra*, 542 U.S. at 296, and *Ring v. Arizona*, *supra*, 536 U.S. 584, require that the aggravating factors be found beyond a reasonable doubt by a unanimous jury. (AOB 477-480.) This claim should be rejected. *Ring* is inapplicable to the penalty phase of California's capital murder trials because "once a defendant has been convicted of first degree murder and one or more special circumstances have been found true under California's death penalty statute, the statutory maximum penalty is already set at death. [Citation.]" (*People v. Stanley*, *supra*, 39 Cal.4th at p. 964.) Thus, "'[A]ny finding of aggravating factors during the penalty phase does not "increase the penalty for a crime beyond the prescribed statutory maximum" [citation], [and] *Ring* imposes no new constitutional requirements on California's penalty phase proceedings.' [Citations.]" (*Ibid.*, internal brackets omitted.)

Appellant also argues that the jury must be required to find beyond a reasonable doubt that aggravating factors outweigh the mitigating factors. (AOB 478-479.) As this Court, however, explained, "neither the cruel and unusual punishment clause of the Eighth Amendment, nor the due process clause of the Fourteenth Amendment, requires a jury to find beyond a reasonable doubt that aggravating circumstances exist or that aggravating circumstances outweigh mitigating circumstances or that death is the appropriate penalty. [Citations.]" (*People v. Blair*, *supra*, 36 Cal.4th at p. 753.) Furthermore, "the trial court need not and should not instruct the jury as to any burden of proof or persuasion at the penalty phase. [Citations.]"

(*Ibid.*; accord *People v. Demetrulias*, *supra*, 39 Cal.4th at p. 43; *People v. Gray*, *supra*, 37 Cal.4th at p. 236; *People v. Wilson* (2005) 36 Cal.4th 309, 360.)

As this Court stated in *People v. Hovarter*, *supra*, 44 Cal.4th 983:

> That "twenty-five states require that any factors relied on to impose death in a penalty phase must be proven beyond a reasonable doubt," as defendant contends, does not erode our confidence in the constitutionality of this state's death penalty law. "A capital sentencer need not be instructed how to weigh any particular fact in the capital sentencing decision." [Citation.]

(*Id.* at p. 1029, internal brackets omitted.)

Accordingly, appellant's claim should be rejected. (See *People v. Loker*, *supra*, 44 Cal.4th at p. 755.)

H. The Jury Is Not Required To Unanimously Agree On Aggravating Factors

Appellant contends that his rights under the Sixth, Eighth, and Fourteenth Amendments are violated because California's capital sentencing scheme does not require the jury to agree unanimously on aggravating factors. (AOB 480-482.) Respondent disagrees.

This Court has repeatedly held that neither the federal nor the state Constitution requires the jury to agree unanimously as to aggravating factors. (*People v. Famalaro* (2011) 52 Cal.4th 1, 44; *People v. Osband*, *supra*, 13 Cal.4th at p. 710; see *People v. Valdez*, *supra*, 55 Cal.4th at p. 179 ["The trial court need not instruct jurors that . . . their findings regarding aggravating factors must be unanimous"].) Nor do these decisions have to be reexamined in light of *Blakely v. Washington*, *supra*, 542 U.S. at page 296, and *Cunningham v. California*, *supra*, 549 U.S. at page 270, because this Court has held that these recent decisions in the United States Supreme Court "interpreting the Sixth Amendment's jury trial guarantee [citations] have not altered our conclusions in this regard.

[Citations.]" (*People v. Whisenhunt*, *supra*, 44 Cal.4th at p. 227; see *People v. Bivert* (2011) 52 Cal.4th 96, 124; *People v. Stevens*, *supra*, 41 Cal.4th at p. 212.) Appellant offers no reason for this Court to depart from its prior holding. (See *People v. Taylor* (1990) 52 Cal.3d 719, 749 ["unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard"].)

I. The Trial Court Does Not Have The Duty To Instruct On Any Burden Of Proof At The Penalty Phase

Appellant argues that the trial court's failure to instruct the jury on any burden of proof in the penalty phase violated his rights under the federal Constitution. (AOB 482-483.) Respondent disagrees. Indeed, as this Court in *People v. Collins* (2010) 49 Cal.4th 175, stated:

> It is settled that "the trial court need not and should not instruct the jury as to *any* burden of proof or persuasion at the penalty phase." [Citation.] "The death penalty law is not unconstitutional for failing to impose a burden of proof - whether beyond a reasonable doubt or by a preponderance of the evidence - as to the existence of aggravating circumstances, the greater weight of aggravating circumstances over mitigating circumstances, or the appropriateness of a death sentence." [Citation.]

(*Id.* at p. 261, italics original.)

As noted above, this Court has repeatedly rejected claims identical to appellant's claim regarding a burden of proof at the penalty phase. (*People v. Collins*, *supra*, 49 Cal.4th at p. 261; *People v. Redd* (2000) 48 Cal.4th 691, 757; *People v. Carrington* (2009) 47 Cal.4th 145, 200.) Appellant offers no reason for this Court to depart from its prior holding. (See *People v. Lenart* (2004) 32 Cal.4th 1107, 1136-1137; see also *People v. Arias*, *supra*, 13 Cal.4th at p. 190.)

J. There Is No Requirement Or Necessity For The Instructions To Inform The Jurors That If They Determined That Mitigation Outweighed Aggravation, They Were Required To Return A Sentence Of Life Without The Possibility Of Parole

Appellant contends that, because section 190.3 directs a jury to impose a sentence of life imprisonment without parole when the mitigating circumstances outweigh the aggravating circumstances, CALJIC No. 8.88 must inform the jury accordingly, rather than just informing the jurors that of the circumstances that permit a rendition of a death verdict, i.e., when the aggravating circumstances outweigh the mitigating circumstances . (AOB 483-484.) Respondent disagrees.

This Court has repeatedly rejected this claim. (*People v. Duncan*, *supra*, 53 Cal.3d at p. 978; see also *People v. Kipp* (1998) 18 Cal.4th 349, 381 ["We have determined that the trial court need not expressly instruct the jury that a sentence of life imprisonment without parole is mandatory if the aggravating circumstances do not outweigh those in mitigation"].) Appellant offers no reason for this Court to depart from its prior holding.

K. The Jury Is Not Required To Make Written Findings Of Aggravating Factors

Appellant argues that the jury must make written findings of aggravating factors. (AOB 485-488.) Respondent disagrees. The jury is not required to make written findings regarding aggravating factors. (*People v. Stevens*, *supra*, 41 Cal.4th at p. 212; *People v. Rogers*, *supra*, 39 Cal.4th at p. 893; *People v. Blair*, *supra*, 36 Cal.4th at p. 754; *People v. Davis*, *supra*, 36 Cal.4th at p. 571; *People v. Griffin*, *supra*, 33 Cal.4th at pp. 593-594; *People v. Rodriguez* (1986) 42 Cal.3d 730, 777-778.) This Court has repeatedly held that the absence of written findings by the sentencer does not render the 1978 death penalty scheme unconstitutional.

(*People v. Fauber* (1992) 2 Cal.4th 792, 859; *People v. Rogers*, *supra*, 39 Cal.4th at p. 893.)

L. Intercase Proportionality Review Is Not Required

Appellant contends that intercase proportionality review is required in capital sentencing. (AOB 488-490.) Respondent disagrees. "Comparative intercase proportionality review by the trial or appellate courts is not constitutionally required. [Citations.]" (*People v. Snow*, *supra*, 30 Cal.4th at p. 126; accord *People v. Stevens*, *supra*, 41 Cal.4th at p. 212; *People v. Demetrulias*, *supra*, 39 Cal.4th at p. 44; *People v. Gray*, *supra*, 37 Cal.4th at p. 237; *People v. Blair*, *supra*, 36 Cal.4th at p. 753; *People v. Stitely*, *supra*, 35 Cal.4th at p. 574.)

M. The Use Of The Death Penalty Does Not Violate International Law And/Or The Constitution

Appellant contends that use of the death penalty as a regular form of punishment violates international law and the Eighth and Fourteenth Amendments. (AOB 490-492.) Respondent disagrees. As this Court stated in *People v. Hillhouse*, *supra*, 27 Cal.4th at page 511, "had defendant shown prejudicial error under domestic law, we would have set aside the judgment on that basis, without recourse to international law. [¶] . . . International law does not prohibit a sentence of death rendered in accordance with state and federal constitutional and statutory requirements. [Citations.]" (See also *People v. Foster* (2010) 50 Cal.4th 1301, 1368; *People v. Loker*, *supra*, 44 Cal.4th at p. 756; *People v. Harris* (2008) 43 Cal.4th 1269, 1323; *People v. Vieira* (2005) 35 Cal.4th 264, 305.)

CONCLUSION

For the stated reasons, respondent respectfully asks that the judgment be affirmed.

Dated: October 29, 2013

Respectfully submitted,

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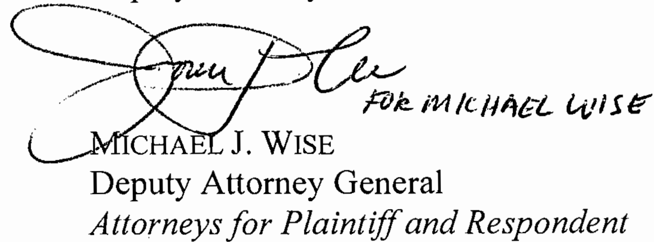

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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13-point Times New Roman font and contains 82,006 words.

Dated: October 29, 2013

KAMALA D. HARRIS
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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Warren Justin Hardy** No.: **S113421**

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 October 29, 2013, I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, 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 October 29, 2013, at Los Angeles, California.

J. Villegas
Declarant

Signature

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