SUPREME COURT COPY

In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent.

v.

ROBERT MARK EDWARDS,

Defendant and Appellant.

CAPITAL CASE

Case No. S073316

SUPREME COURT
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Orange County Superior Court Case No. 93WF1180
The Honorable John J. Ryan, Judge

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DEATH PENALTY

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STATEMENT OF CASE

In an information filed on June 5, 1995, the District Attorney of Orange County charged appellant, Robert Mark Edwards (hereinafter "Edwards"), with the 1986 murder of Marjorie Deeble (count 1; Pen. Code, § 187, subd. (a) [1] and first degree residential burglary (count 2; §§ 459, 460, subd. (a), 461.1). (I CT 198.) The information further alleged the murder was committed under special circumstances, i.e., that the murder of Deeble was committed while Edwards was engaged in the commission of residential burglary (§ 190.2, subd. (a)(17)(vii)), the murder was intentional and involved the commission of torture (§ 190.2, subd. (a)(18)); and the murder was committed by Edwards who was previously convicted of the 1993 murder of Muriel Delbecq in Hawaii in 1994 (§ 190.2, subd. (a)(2)). (I CT 199.) Additionally, the information alleged, in counts 1 and 2, that the offenses were serious felonies within the meaning of section 1192.7, subdivisions (c)(1) and (18). (I CT 199.)

The trial court granted Edwards' section 995 motion and dismissed the prior murder special circumstance. (II CT 442.) Upon the prosecution's motion, the trial court also dismissed count 2 because it was outside the statute of limitations. (II CT 525.)

On October 22, 1996, a jury found Edwards guilty of first degree murder as charged in count 1. (III CT 969, 1052.) The jury also found true the burglary murder special circumstance and the murder involved the infliction of torture special circumstance. (III CT 967-969, 1052.)

Following a mistrial of the penalty phase, a new jury was impaneled and retrial of the penalty phase commenced March 3, 1998. (III CT 1118-1121, IV CT 1239-1240, 1461.) On April 16, 1998, a jury returned a

[1] Any subsequent statutory reference is to the Penal Code unless otherwise indicated.

verdict of death. (V CT 1745-1748.) On September 9, 1998, the trial court imposed a death sentence on the murder count. (V CT 1889-1896.)

Edwards filed his Opening Brief on December 28, 2006. Respondent filed its Respondent's Brief on February 28, 2008. A Reply Brief was filed on November 12, 2008. Appellant's original appellate counsel, Michael Abzug, withdrew as counsel on November 19, 2008. Quin Denvir was appointed counsel on January 9, 2009. Edwards filed a supplemental Appellant's Brief on September 14, 2010.

SUMMARY OF STATEMENT OF FACTS[2]

In May of 1986, Edwards sexually assaulted and murdered Marjorie Deeble, who was in her fifties, in her Los Alamitos home. Edwards was arrested for the murder of Deeble in 1993, after Edwards sexually assaulted and murdered 67-year-old Muriel Delbecq in her home in Maui, Hawaii in January 1993.[3] The similarities between the two murders, which included both victims having been sexually assaulted with a can of hair mousse, resulted in evidence of the Hawaii murder being introduced for the limited purposes of establishing Edwards' identity as the killer of Deeble and his intent to torture Deeble.

[2] The following is a synopsis of the facts set forth in the Respondent's Brief at pages two through 26.

[3] Edwards was convicted of the Delbecq murder in 1994.

ARGUMENTS[4]

I. EDWARDS' *WHEELER/BATSON* MOTION WAS PROPERLY DENIED

In his opening brief, Edwards argued that his state and federal constitutional rights to be tried by an impartial jury were violated by the prosecutor's discriminatory use of a peremptory challenge in contravention of *People v. Wheeler* (1978) 22 Cal.3d 258, and *Batson v. Kentucky* (1986) 476 U.S. 79 [106 S.Ct. 1712, 90 L.Ed.2d 69]. (AOB 27-36.)[5] In his Supplemental Opening Brief, Edwards contends that the trial court used the wrong standard and erred in finding that he failed to make a prima facie showing of an inference of discriminatory purpose against a cognizable group; therefore, the *Batson* error requires reversal. (SAOB 4-14.) The trial court properly denied Edwards' *Wheeler/Batson* motion.

A. Factual and Procedural Background

Prospective Juror Maxine M. filled out a juror questionnaire. (X CT 3764-3777.) After asking her a few questions, defense counsel passed on the juror for cause. (V RT 1805.) The prosecutor referred prospective juror Maxine M. to a response she made in the juror questionnaire. (V RT 1806.) Specifically, in response to question number 36 which asked prospective jurors about their general feelings regarding the death penalty,[6] prospective juror Maxine M. answered:

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[4] For the sake of consistency, Respondent uses the same numbering system employed by Edwards which is taken from the argument numbers from his Opening Brief.

[5] AOB refers to Appellant's Opening Brief, and SAOB refers to Appellant's Supplemental Opening Brief.

[6] In the juror questionnaire, prospective jurors were questioned regarding their attitudes regarding the death penalty as follows:

(continued...)

> I've thought about it on a personal level without coming to a conclusion as to whether society should or should not have the death penalty. As the law now states, we have it so therefore I am prepared to obey the law of the land. On a personal level I will continue to ponder.

(X CT 3773.) The prosecutor, referring to this response, asked Maxine M. if she had resolved the issue in her own mind since she had been at court the last few days. (V RT 1806.) Maxine M. answered, "Not really." (V RT 1806.) The prosecutor passed for cause, but used its thirteenth peremptory challenge to excuse prospective juror, Maxine M. (V RT 1806.)

(...continued)

> The Court is asking these questions regarding your feeling about the death penalty because one of the possible sentences for a person convicted of the charges the prosecution has filed is the death penalty. The other punishment is life imprisonment without the possibility of parole. Therefore, the Court must know whether you could be fair to both the prosecution and the defendant on the issue of punishment <u>if you reach that issue</u>. By asking these questions, the Court is not suggesting that you will ever need to decide this question because the Court has no way of knowing what the evidence in this case will be or whether or not you will find the defendant guilty of anything at all.
>
> In any event, and only in the event, the jury finds the defendant guilty of murder in the first degree, and that must be a finding beyond a reasonable doubt, then the jury in the same proceeding will be asked to determine the truth or falsity of the special circumstances alleged. This finding also must be based upon proof beyond a reasonable doubt.
>
> 36. What are your GENERAL FEELINGS regarding the death penalty?

(X CT 3773.)

Edwards then objected based on *Wheeler* grounds. (V RT 1807.) Edwards's counsel stated:

> Just for the record, this juror is African-American, black. There appear to be only two African-Americans in the entire panel and only one African-American woman, which is her.

(V RT 1807.) The trial court asked defense counsel what the prosecutor had done to "indicate[] that there is a strong likelihood that the only reason [Maxine M.] was excused was because she is African-American, an African-American female?" (V RT 1808.) Defense counsel noted that there were only two African-American people and only one African-American woman on the entire panel. (V RT 1808.) While the trial court recognized that under *Wheeler* and *Batson* a defendant does not have to be in the particular minority group in question, the trial court nonetheless observed that Edwards was not African-American, and nobody involved in the case was African-American. (V RT 1809.) The trial court noted that Edwards had a burden to show that there was a "strong likelihood that [the prosecutor] excused this lady because she was African-American, not because she had some reservations about the death penalty." (V RT 1809.) Defense counsel then pointed out that prospective juror Maxine M. indicated that she could be fair, and she would have an open mind at the penalty phase. (V RT 1809.) The trial court denied the *Wheeler* motion, ruling that Edwards had failed to establish a prima facie case. (V RT 1810-1811.) Specifically, the court reasoned:

> . . . I don't see anything on this record that shows that [the prosecutor] has excused this lady because of her status as an African-American. And until I get there, we don't even get into him justifying, even though the justification is clear based upon her responses in the questionnaire. [¶] I mean she has doubts about – I am finding there is no prima fascia [sic] basis. But if you got there, it is clear why he exercised his challenge.

(V RT 1810-1811.)

B. Applicable Law Regarding *Batson/Wheeler* Challenges

It is well settled that

> [a] prosecutor's use of peremptory challenges to strike prospective jurors on the basis of group bias-that is, bias against members of an identifiable group distinguished on racial, religious, ethnic, or similar grounds-violates the right of a criminal defendant to trial by a jury drawn from a representative cross-section of the community under article I, section 16 of the California Constitution. [Citations.] Such a practice also violates the defendant's right to equal protection under the Fourteenth Amendment to the United States Constitution. [Citations.]

(*People v. Hamilton* (2009) 45 Cal.4th 863, 898; see also *Batson v. Kentucky* , *supra*, 476 U.S. 79; *People v. Wheeler*, *supra*, p. 22 Cal.3d 258, 280.)

> When a defendant asserts at trial that the prosecution's use of peremptory strikes violates the federal Constitution, the following procedures and standards apply. '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. [Citations.] Third, "[i]f a race-neutral explanation is tendered, the trial court must then decide ... whether the opponent of the strike has proved purposeful racial discrimination." [Citation.]

(*People v. Cowan* (2010) 50 Cal.4th 401, 447; *Johnson v. California* (2005) 545 U.S. 162, 168, [125 S.Ct. 2410, 162 L.Ed.2d 129], fn. omitted; see also *Snyder v. Louisiana* (2008) 552 U.S. 472, 476-477, [128 S.Ct. 1203, 1207, 170 L.Ed.2d 175]; *Miller-El v. Dretke* (2005) 545 U.S. 231, 239, [125 S.Ct. 2317, 162 L.Ed.2d 196].) The identical three-step procedure applies when the challenge is brought under the California Constitution. (*People v. Salcido* (2008) 44 Cal.4th 93, 136.)

In *Wheeler, supra*, 22 Cal.3d at page 280, the California Supreme Court held that *Batson's* threshold step of showing a prima facie case required the defendant to "show a strong likelihood" of discriminatory group-bias. The United States Supreme Court in *Johnson* later held that *Wheeler's* "strong likelihood" standard was "an inappropriate yardstick by which to measure the sufficiency of a prima facie case" under *Batson*. (*Johnson v. California, supra*, 545 U.S. at p. 168.) The high court clarified that *Batson's* first step was not intended

> . . . to be so onerous that a defendant would have to persuade the judge-on the basis of all the facts, some of which are impossible for the defendant to know with certainty-that the challenge was more likely than not the product of purposeful discrimination. Instead, a defendant satisfies the requirements of *Batson's* first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred.

(*Id.* at p. 180.) "An 'inference' is generally understood to be a 'conclusion reached by considering other facts and deducing a logical consequence from them.'" (*Id.* at p. 168, fn. 4.)

In cases where the voir dire was conducted before *Johnson* and if the trial court applied the incorrect standard, deference to the trial court is not appropriate, and the appellate court must review the record independently to determine whether it supports an inference of discrimination. (*People v. Howard* (2008) 42 Cal.4th 1000, 1017; *People v. Bonilla* (2007) 41 Cal.4th 313, 341-342.)

> [W]e sustain the trial court if, upon independently reviewing the record, we conclude the totality of the relevant facts does not give rise to an inference of discriminatory purpose. [Citation.]

(*Howard, supra*, 42 Cal.4th at p. 1018.)

C. The record does not support an inference of discrimination

Here, the trial court used the "strong likelihood" standard that was accepted in California at the time of Edwards' trial in 1996, but has since been overturned by the United States Supreme Court *in Johnson, supra*, 545 U.S. at p. 168. However, an independent review of the record reveals that the totality of relevant facts does not give rise to an inference of a discriminatory purpose. (*Howard, supra*, 42 Cal.4th at p. 1018.)

The prosecutor's use of a peremptory challenge to excuse prospective juror Maxine M., who happened to be one of two African-Americans on the panel, did not establish a prima facie case of group bias. It is presumed that the prosecution constitutionally exercises its peremptory challenges. (*People v. Burgener* (2003) 29 Cal.4th 833, 864; *People v. Ayala* (2000) 24 Cal.4th 243, 260.) While the use of even a single peremptory challenge because of a prospective juror's race is improper under both *Batson* and *Wheeler* (*People v. Silva* (2001) 25 Cal.4th 345, 386), it does not follow that such a single challenge establishes the necessary inference of discriminatory purpose necessary to establish a prima facie case. (*People v. Bell* (2007) 40 Cal.4th 582, 598.) It is very difficult to establish a prima facie case of discriminatory jury selection based on the excusal of a single prospective juror, as is the situation here. (*People v. Bell, supra*, 40 Cal.4th at p. 598, fn. 3; see also *People v. Bonilla, supra*, 41 Cal.4th at p. 343.)

Edwards contends that Respondent's position in its Respondent's Brief that "one or two jurors can rarely suggest a pattern of impermissible exclusion" (RB 30), is wrong as a matter of law. (SAOB 2, fn. 1.) As stated above, the exercise of even a single challenge based on race is constitutionally proscribed. (*Bonilla, supra*, 41 Cal.4th at p. 343.) However, contrary to Edwards' assertion, this Court has specifically stated that "the existence of a discernible pattern in the use of challenges remains

a factor a court may consider when determining whether a prima facie showing has been made. The challenge of one or two jurors, standing alone, can rarely suggest a *pattern of impermissible exclusion*." (*People v. Howard, supra*, 42 Cal.4th 1000, 1018, italics added; *People v. Bell, supra*, 40 Cal.4th at p. 598.) Here, the reasonable inference is the prosecutor exercised a peremptory challenge to excuse prospective juror Maxine M. not because of her race, but because of her views on the death penalty. Therefore, the mere fact Maxine M. was excused by the prosecutor does not rise to an inference of discriminatory purpose.

Moreover, neither the facts of this case, nor the relevant actors in this case, lend themselves to a conclusion that race would be of any importance in evaluating the evidence in this case. A discriminatory motive is more easily inferred if the defendant and the dismissed juror or jurors are from the same ethnic or racial group. (See, e.g. ., *People v. Bonilla, supra*, 41 Cal.4th at p. 343 [noting defendant was not same race as challenged jurors]; *Wheeler*, *supra*, 22 Cal.3d at pp. 280-281.) Neither Edwards, nor anyone involved in the case was African-American, as the trial court observed. (V RT 1809.) Thus, this fact does not support any inference of discriminatory purpose by the prosecutor in excluding prospective juror Maxine M.

In any event, while the prosecutor was not asked to state a race neutral explanation for the challenge, the voir dire and her responses to questions in the juror questionnaire provided the prosecutor with ample grounds for reasonably challenging Maxine M.

> When a trial court denies a *Wheeler* motion without finding a prima facie case of group bias, the appellate court reviews the record of voir dire for evidence to support the trial court's ruling ... [and] affirm[s] the ruling where the record suggests grounds upon which the prosecutor might reasonably have challenged the jurors in question.

(*People v. Hoyos* (2007) 41 Cal.4th 872, 900.) When asked about her general feelings regarding the death penalty in her juror questionnaire, prospective juror Maxine M. answered:

> I've thought about it on a personal level without coming to a conclusion as to whether society should or should not have the death penalty. As the law now states, we have it so therefore I am prepared to obey the law of the land. On a personal level I will continue to ponder.

(X CT 3773.) The prosecutor, referring to this response, asked Maxine M. if she had resolved her equivocation about the death penalty. (V RT 1806.) Maxine M. answered, "Not really." (V RT 1806.) The trial court noted that it was not surprising that the prosecutor used its peremptory challenge to excuse Maxine M. because of her reservations about the death penalty. (V RT 1809-1810.) This Court has recognized that a prospective juror's feelings or scruples regarding the death penalty "are reasonably related to trial strategy and are a legitimate race-neutral reason for exercising a peremptory challenge." (*People v. Cowan, supra*, 50 Cal.4th at pp. 448-449; *Miller-El v. Cockrell, supra*, 537 U.S. at p. 339; *People v. Lewis* (2008) 43 Cal.4th 415, 472.)

In his supplemental opening brief, Edwards attempts to compare Maxine M.'s answers in her juror questionnaires with that of other prospective jurors. (SAOB 5-11.) However, this type of comparative juror analysis is inappropriate in this case. (*People v. Taylor* (2010) 48 Cal.4th 574, 644.) Like *Bonilla, supra*, 41 Cal.4th 313 and *Howard, supra*, 42 Cal.4th at p. 1019, this is a "first-stage" *Wheeler/Batson* case, in that the trial court denied Edwards' motions after concluding he had failed to make out a prima facie case. (V RT 1810-1811.) It is not a "third-stage" case, in which a trial court concludes a prima facie case has been made, solicits an explanation of the peremptory challenges from the prosecutor, and only

then determines whether defendant has carried his burden of demonstrating group bias. (*People v. Howard, supra*, 42 Cal.4th at p. 1019.)

> We have concluded that *Miller-El v. Dretke* (2005) 545 U.S. 231, 125 S.Ct. 2317, 162 L.Ed.2d 196 does not mandate comparative juror analysis in these circumstances (*Bell, supra*, 40 Cal.4th at p. 601), and thus we are not compelled to conduct a comparative analysis here. 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*, at p. 350.) Here, the trial court did note that "the justification is clear based upon her responses in the questionnaire," after specifically finding that a prima facie case had not been made and therefore "we don't even get into [the prosecutor] justifying." (V RT 1810.) Nevertheless, the trial court's statement that a justification is evident in the record does not convert a first stage *Wheeler/Batson* case into a third stage one. (*People v. Howard, supra*, 42 Cal.4th at p. 1019.) Therefore, comparative analysis is inappropriate.

In any event, as Edwards acknowledged (SAOB 9, fn. 11), the prosecutor excused white prospective jurors who, like Maxine M., were against or ambivalent toward the death penalty. (Cynthia B. (X CT 3549-3550, IV RT 1496-1497); Darlene H. (V RT 1800); David R. (VI RT 1906).) Edwards claims that a discriminatory purpose should be gleaned from the fact that the prosecutor only asked Maxine M. one cursory question, while he questioned other jurors more extensively. (SAOB 8-11.) However, the amount of questions a prosecutor asks a prospective juror does not raise an inference of racial bias. The prosecutor was able to ascertain Maxine M.'s ambivalence toward the death penalty by her response in the questionnaire and her oral response that she was still unsure how she felt about the death penalty. (*People v. Taylor, supra*, 48 Cal.4th

at p. 609; *People v. Avila, supra*, 38 Cal.4th at p. 531, [the trial court properly excused jurors based solely on their questionnaire responses where the questionnaire was expansive and detailed, and the jurors' answers were unambiguous].)

The record shows that the trial court correctly determined that Edwards failed to make a prima facie showing of a *Batson*/*Wheeler* violation, as he failed to show that "the totality of the relevant facts [gave] rise to an inference of discriminatory purpose." (*Batson, supra*, 476 U.S. at p. 94; *Johnson, supra*, 545 U.S. at p. 168.)

In the event that this Court determines that the trial court erroneously found that Edwards had not presented a prima facie case, the case should be remanded to allow the trial court to conduct the second and third steps of the *Batson* analysis. (*People v. Johnson* (2006) 38 Cal.4th 1096, 1103.) Edwards argues to the contrary, claiming that reversal is required, as the lapse of time is so great that a hearing on remand would be impossible. (SAOB 12-14.) This is speculative, however. While

> . . . . it is certainly possible that due to the passage of time or other reasons, the trial court will find that it cannot reliably determine whether the prosecutor exercised his peremptory challenges in a permissible manner. ...this circumstance does not prevent [the reviewing court] from remanding the matter for a hearing.

(*People v. Johnson, supra*, 38 Cal.4th 1096, 1103.) The trial court did not err in finding that Edwards failed to make out a prima facie showing of an inference of discriminatory purpose against a cognizable group in the prosecutor's use of a peremptory challenge to excuse prospective juror Maxine M. But assuming error, the matter should be remanded to the trial court and not reversed.

II. THE TRIAL COURT ACTED WITHIN ITS DISCRETION IN DENYING EDWARDS' MOTION TO DISMISS THE ENTIRE JURY PANEL BECAUSE OF THE COMMENTS OF PROSPECTIVE JUROR RANDY B.

In his opening brief, Edwards claimed that the trial court improperly denied his motion to dismiss the jury panel because they had allegedly been prejudiced by a prospective juror's remarks about the danger that inmates pose in prison. (AOB 37-47.) In his supplemental opening brief, Edwards repeats this assertion and also specifically argues that the record does not support respondent's claim that the trial court insured that Juror Jacqueline D. was not tainted by Randy B.'s remarks. (SAOB 15-16.) As set forth in the Respondent's Brief, the trial court acted within its discretion when it denied Edwards' motion to dismiss the entire jury panel because the jury panel was not tainted by a prospective juror stating his individual opinions based on his experience. The trial court properly admonished the jury, and the record indicates that the trial court questioned a juror who wished to comment outside the presence of other jurors.

Prospective juror Randy B. was a correctional officer at the California Youth Authority. (V RT 1699-1700.) During juror voir dire, the trial court asked Randy B. whether he could "be an objective juror in this type of case." (V RT 1699.) Randy B. answered:

> I am very fair. I can be objective, but I do work in that type of correctional facility – I am a correctional peace officer, so I see that – I know a lot of murderers. I have dealt with a lot of people who have been convicted of murders, and I have seen a lot of people who are there for, you know, they are there for death or 25 to life.
>
> And since I think I filled the questionnaire out, if you think about it, I sit at nighttime thinking about it. I deal with all these people, and I know what it is like when they are locked up and how to deal with it, and they are still – they are hard to deal with if they just have life, you know, because they are still affecting

> people. They are still – they – there are still victims inside correctional institutes and things like that and prisons.
>
> But I see there are some people that can be in for life and they are fine, you know. It is hard because I have to deal with it.
>
> The thing we just had a few weeks ago someone in for 25 to life that beat one of us officers to death.

(V RT 1700.) The trial court interrupted Randy B. and asked if the incident happened inside the California Youth Authority ("C.Y.A."), and Randy B. answered:

> Yeah, out there in Chino. So that is hard to deal with because I think that gentleman, young man, he is 24, 25, he just beat someone okay? But beat someone to death. So there is another victim he created while he was in. So it is hard to say, but I could make that decision. . . .
>
> It is, you know, I don't know what else to really say. I would have to listen to everything, hear everything. And if I am found – if the jury finds the defendant guilty or not guilty, if he is found guilty, then it would be hard not to go for the death penalty, very hard because again I see the people that are locked up. I deal with hundreds of them that are in for life, and I know what it is like in there. And I know that it is a lot easier than these people know what – you know, it is not as bad as what these people think it is.

(V RT 1701.) The trial court noted that "that is a different view." (V RT 1701.) Randy B. continued, "See, I am in there. I am locked up every day with them, and what society sees and what people –" (V RT 1702.) The trial court then cut Randy B. off and cautioned, "Let's stay to the bottom line. Can you be an objective juror in this case if you get to a penalty phase?" (V RT 1702.) Randy B. answered that he would have to listen to everything. When asked if he could conceive of voting for life without the possibility of parole in this case, Randy B. assured the court, "I would have to listen to the attorneys. I wouldn't say I would automatically jump to

conclusion. I don't jump to conclusions." (V RT 1702.) The trial court then warned:

> There is another problem. One, we're not talking about the California Youth Authority here. We are talking about other places. And it wouldn't be proper for you to educate the jurors in the jury room what it is like to be incarcerated in a state prison. I know what the Youth Authority is, okay? I am not educating the jury either. [¶] But do you understand what I am saying? You would have to keep those thoughts to yourself?

(V RT 1702.)

After further questioning by both defense counsel and the prosecutor, the prosecutor passed for cause, but defense counsel stated that the prospective juror was "substantially impaired," and would not give "any serious consideration to the defense." (V RT 1713.) The trial court disagreed, characterizing Randy B. as "hedgy" and having "a very hard time articulating." (V RT 1713.) The trial court found that Randy B. was open-minded, but the trial court did have concerns with Randy B.'s "attitudes towards inmates, and that may be for you or against you. . . . And I shut him off on purpose because I thought he was getting into an area that was not appropriate. And I didn't want to say any more on the record." (V RT 1714.)

Defense counsel then moved to excuse the entire jury venire based on Randy B.'s descriptions of his "experiences in C.Y.A. and knowing what he knows about life without the possibility of parole. . . . [Randy B.] basically said to them that LWOP isn't what these people think; I know it is not that hard." (V RT 1714.) The trial court denied the motion, reasoning:

> First of all, you have no basis upon which to base your conclusion that anybody has been tainted or even that anybody understood. I knew where he was going, and I shut him off. And then I told him that we're not talking about C.Y.A. We are talking about other places.

> And that would be a quantum leap for jurors to think that prison is like C.Y.A. Now, it is, but they don't know that. They would assume that C.Y.A. is for the kids, and that state prison is for the bad guys, and there is harsher treatment in prison, I think your conclusion is wrong. [¶] Absent some showing, which means if you want to bring it up, I will probably permit some limiting question in that regard and we can even do it one on one. I don't see a problem. I would be afraid about bringing attention to it.

(V RT 1715.) Defense counsel echoed the trial court's concern about bringing attention to the prospective juror's comments. (V RT 1715.) The trial court reiterated that it felt it had timely cut off Randy B., and its statement to the jury explained that Randy B. did not work at a state prison, but at the California Youth Authority. (V RT 1716.) The trial court denied the motion to excuse the entire jury venire, but granted the defense motion to excuse Randy B for cause. (V RT 1716.)

After working with both defense counsel and the prosecutor on the appropriate phrasing (V RT 1726-1735), the trial court admonished the jury as follows:

> This morning you may recall hearing a prospective juror Mr. B[.]. . . . You may have heard that gentleman express some of his opinions and experiences as a counselor at the California Youth Authority. [¶] The custodial facilities for minors are far different than those for adults. [¶] Mr. B[.] has no experience as a custodial officer in the adult state prison system or with adult life without possibility of parole prisoners. [¶] The purpose of incarceration in a state prison for crime is punishment. Do any of you have any question regarding Mr. B[.]'s statement? If so, please raise your hand? Anybody with a hand. Do any of you wish to comment on Mr. B[.]'s statement, please raise your hand.

(V RT 1736-1737.) The trial court noted that no hands went up with questions regarding Randy B.'s comments. However, several prospective jurors raised their hands indicating that they did not recall what Randy B.

had said. (V RT 1737.) One prospective juror Jacqueline D. indicated that she had a comment. (V RT 1737.) The following exchange took place:

> PROSPECTIVE JUROR [JACQUELINE D.]: I just wanted to comment he actually –
>
> THE COURT: Just tell me your name. ...We are going to talk to you. We are going to do it in private.

(V RT 1737.) The juror stated her name, and the court said, "Thank you. Anybody else? If anything comes to mind, just let me know when you are called forward, and we'll talk about it, but I want to talk about it in private?" (V RT 1737.) From this comment, it appears that the trial court questioned Jacqueline D. outside the presence of other prospective jurors, but it does not appear to have been reported. Finally, the trial court admonished the entire jury venire, "In any event, for those of you who may recall what Mr. B[.] said, you are to disregard his statement regarding his personal experiences." (V RT 1737.) The record does not indicate that any other juror made any other comment about Randy B.'s statements.

Edwards claims that the trial court failed to insure that Prospective Juror Jacqueline D. was not tainted by Randy B.'s comments because the absence of a transcript of any questioning of Jacqueline D. indicates that there was no such proceeding. (SAOB 16.) To the contrary, while there is no transcript of the proceedings, the record indicates that the trial court did speak to Jacqueline D. outside the presence of other prospective jurors.

Preliminarily, as set forth in the Respondent's brief, Edwards has forfeited any claim that reversal is required because the trial court did not conduct a hearing to exclude those jurors who overheard Randy B.'s remarks because the trial court gave Edwards the opportunity to conduct limited questioning, but he declined to do so because he did not want to alert the jurors to the issue if they had not overheard the comments or emphasize the issue to those jurors that had overheard the comments (V RT

1715). (See *People v. Ramos* (2004) 34 Cal.4th 494, 515. [Defendant forfeited his right to raise any error because he never asked the court to question the prospective juror privately.].)

As Edwards notes, a statutory provision that specifically prohibits off-the-record proceedings in capital cases is recognized under Penal Code section 190.9, subdivision (a), which in part declares: "In any case in which a death sentence may be imposed, all proceedings conducted in the superior court, including all conferences and proceedings, whether in open court, in conference in the courtroom, or in chambers, shall be conducted on the record with a court reporter present." (See also *People v. Freeman* (1994) 8 Cal.4th 450, 509.)

Nevertheless, the absence of a transcript of the proceeding does not mean the trial court did not conduct a discussion with Jacqueline D. about her comments regarding Randy B.'s previous statements. The trial court specifically stated on the record that it would speak to Jacqueline D. in private, presumably so as not to risk bringing further attention to Randy B.'s comments. (V RT 1737.) Nothing in the record indicates that this proceeding did not occur. Defense counsel never brought up the fact that Jacqueline D. was not questioned. Additionally, even though the record does not indicate that the trial court did, in fact, speak with Jacqueline D. privately, this Court should presume that the trial court responded appropriately and questioned the juror as it had previously indicated it would. (Evid. Code, § 664; *People v. Carter* (2003) 30 Cal.4th 1166, 1215.)

Moreover, the parties may waive the right to have a matter transcribed. (*People v. Cummings* (1993) 4 Cal.4th 1233, 1333.) While it is not clear whether Edwards did so here, "no presumption of prejudice arises from the absence of materials from the appellate record [citation], and defendant bears the burden of demonstrating that the record is

inadequate to permit meaningful appellate review." (*People v. Hinton* (2006) 37 Cal.4th 839, 919; *People v. Samayoa* (1997) 15 Cal.4th 795, 820-821.) Edwards has not discharged his burden. He does not contend that he objected to speaking to Jacqueline D. outside the presence of other jurors or that the conversation did not take place. But, even if the trial court did not speak to Jacqueline D. about her comments about Randy B.'s comments, Edwards has not demonstrated prejudice. (*People v. Hinton, supra*, 37 Cal.4th at p. 919; *People v. Carter* (2003) 30 Cal.4th 1166, 1215.) There is nothing in the record to indicate that Jacqueline D. heard the comments by Randy B. or were affected by them. She merely raised her hand to tell the court she had a comment. Edwards never made any motions that there was cause that she should be removed.

Thus, Edwards' claims should be rejected. The trial court questioned the only prospective juror who indicated a desire to comment on Randy B.'s statement, and the trial court admonished the entire panel of prospective jurors to disregard Randy B.'s comments. (V RT 1736-1737.) Jurors are presumed to have understood and followed the trial court's instructions absent evidence to the contrary. (*People v. Alexander* (2010) 49 Cal.4th 846, 915; *People v. Cox* (2003) 30 Cal.4th 916, 961; *People v. Delgado* (1993) 5 Cal.4th 312, 331.) The trial court properly acted within its discretion when it denied Edwards' motion to dismiss the entire jury panel.

III. THE TRIAL COURT PROPERLY ADMITTED EVIDENCE OF THE DELBECQ MURDER FOR THE LIMITED PURPOSE OF PROVING IDENTITY, COMMON PLAN AND SCHEME AND INTENT

In his opening brief, Edwards claimed that the trial court prejudicially erred in admitting evidence of the Hawaii murder of Delbecq during the guilt phase because there was no evidence that Deeble was sexually assaulted with a mousse can, the trial court's finding that the common

features between the two crimes were sufficiently distinctive was incorrect, and the trial court abused is discretion under Evidence Code section 352 because the evidence was more prejudicial than probative. (AOB 48-84.) Edwards similarly argues in his supplemental brief that the claimed similarities between the Deeble murder and the Delbecq murder did not justify the admission of the evidence of the latter murder in Hawaii because the similarities were "overblown," "non-existent, common and generic to many crimes or insufficiently established," and his due process rights were violated as a result. (SAOB 16-25.) This claim should be rejected, as the trial court properly exercised its discretion in admitting evidence of the Delbecq murder for the limited purpose of proving identity, intent and common scheme and plan.

As set forth more fully in Respondent's Brief pages 42 to 45, prior to trial, the prosecutor filed a motion to admit evidence of the Delbecq murder in Hawaii to prove identity, intent to kill, torture and inflict great bodily harm and common plan and scheme to intentionally inflict pain. (II CT 527-540; VI RT 1196, 1941-1942, 1200-1201.) The prosecution argued that both the Deeble murder and the Delbecq murder had the following similarities: (1) the murders occurred on Monday night, (2) the murders occurred in the victim's bedroom while the victim was in night clothes, (3) both victims had first floor apartments, (4) both victims were elderly, Caucasian and female, (5) both victims lived alone, (6) entry was made by removing screens, (7) there was no forced entry, (8) the bedrooms of both victims were ransacked, (9) jewelry was missing, (10) both victims suffered beatings to the face that resulted in fractured noses, (11) both victims were bound at the wrists and ankles with telephone cords, (12) both victims were strangled, (13) both victims were employed as realtors, (14) both victims had the initials, M.E.D., and (15) both victims were violently penetrated vaginally and rectally while alive with hair mousse cans of the same

dimensions. (II CT 529-530.) During the hearing on the admissibility of this evidence, defense counsel pointed out some differences between the Deeble and Delbecq murders such as there was indication that some pubic hair and underwear were cut off Delbecq, but not Deeble. (II RT 1201-1202.)

The trial court ruled that except for the evidence that both victims shared the same initials, were both realtors, and that their pubic hair and underwear were cut, evidence of the uncharged murder of Delbecq in Hawaii was admissible because it was relevant to the issues of identity, common plan and intent pursuant to Evidence Code section 1101. (II RT 1199-1200, 1205, 1215-1216; VI RT 1942-1943, 1950.) The trial court noted that

> As far as I.D. is concerned, I think the similarities are overwhelmingly similar, common plan and scheme. We have more in common here than we had in *Ewoldt* or probably any of the other cases cited in *Ewoldt.*

(II RT 1215.) The trial court also ruled that the evidence of the uncharged acts was more probative than prejudicial pursuant to Evidence Code section 352. (II RT 1215; VI RT 1951.)

Evidence Code "[s]ection 1101 prohibits the admission of other-crimes evidence for the purpose of showing the defendant's bad character or criminal propensity." (*People v. Catlin* (2001) 26 Cal.4th 81, 145; Evid. Code, § 1101, subd. (a).) This section, however, also authorizes the admission of other-crimes evidence against a defendant "when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident . . .) other than his or her disposition to commit such an act." (Evid. Code, § 1101, subd. (b); see also *People v. Carter* (2005) 36 Cal.4th 1114, 1147; *People v. Kipp* (1998) 18 Cal.4th 349, 369.) Like other circumstantial evidence, admissibility depends on the materiality of the fact sought to be proved, the tendency of

the other crime to prove the material fact, and the existence of some other rule requiring exclusion. (*People v. Catlin, supra*, 26 Cal.4th at p. 146

A trial court's ruling under Evidence Code section 1101 is reviewed under the deferential abuse of discretion standard, examining the evidence in the light most favorable to the court's ruling. (*People v. Gray* (2005) 37 Cal.4th 168, 202; *People v. Cole* (2004) 33 Cal.4th 1158, 1195; *People v. Catlin, supra*, 26 Cal.4th at p. 120; *People v. Lewis* (2001) 25 Cal.4th 610, 637; *People v. Kipp, supra*, 18 Cal.4th at p. 369.) Under this standard, "[a]buse may be found if the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner . . . ." (*People v. Coddington* (2000) 23 Cal.4th 529, 587-588, overruled on other grounds by *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.)

Edwards claims that the similarities between the Deeble and Delbecq murders have been "overblown, i.e., the similarities are either non-existent, common and generic to many crimes, or insufficiently established." (SAOB 17.) Edwards focuses on the dissimilarities between the two murders. It is well settled that "[f]or identity to be established, the uncharged misconduct and the charged offense must share common features that are sufficiently distinctive so as to support the inference that the same person committed both acts. [Citation.] 'The pattern and characteristics of the crimes must be so unusual and distinctive as to be like a signature.'" (*People v. Ewoldt, supra*, 7 Cal.4th at p. 403.) "'The strength of the inference in any case depends upon two factors: (1) the degree of distinctiveness of individual shared marks, and (2) the number of minimally distinctive shared marks.'" (*People v. Carter, supra*, 36 Cal.4th at p. 1148.) However, "[t]o be highly distinctive, the charged and uncharged crimes need not be mirror images of each other." (*Ibid.*)

> Although defendant notes certain differences in the circumstances surrounding the victims' deaths, the combination of fatal strangulation and placement of a young woman's body in a closed bedroom closet is both highly distinctive and suggestive that the same person perpetrated the crimes....

People v. Kipp, *supra*, 18 Cal.4th at p. 370 [charged and uncharged offenses in which defendant strangled 19-year-old women in one location, carried victims' bodies to another location and covered bodies with bedding and victims both had bruises on legs and were similarly disrobed had common features sufficient to support inference of identity]; *People v. Sully* (1991) 53 Cal.3d 1195, 1224-1225 [common characteristics of illicit sex, use of cocaine and abuse of prostitutes sufficient to support admission of other-crimes evidence on issues of identity and intent of perpetrator].) Differences in highly distinctive crimes go to the weight of the evidence not its admissibility. (*People v. Carter, supra*, 36 Cal.4th at p. 1148.)

Viewing the evidence in the light most favorable to the trial court's ruling (see *People v. Carter, supra*, 36 Cal.4th at p. 1148), Delbecq's murder shares common features with Deeble's murder that are sufficiently distinctive to support an inference that Edwards committed both acts.

As the prosecutor argued, the use of the mousse can in both the murder of Deeble in Los Alamitos and the murder of Delbecq in Maui was an "extreme similarity." (II RT 1190.) Edwards claims that the state of the vaginal area did not support the theory that there had been penetration with the mousse can. (SAOB 23.) However, the evidence presented pretrial to the trial court and at trial support an inference that Deeble's injuries to her genital area were consistent with being caused by the mousse can. In the Deeble murder case, officers found a mousse can underneath some sheets on Deeble's bed. (VI RT 2014; VII RT 2046.) Criminalist Reed discovered what appeared to be blood underneath the ridge around the top of the can. (VII RT 2046.) The cap that fit the mousse can also appeared to

have blood on it. (VII RT 2046-2047.) Reed performed a presumptive test on the can, and it was positive for the presence of blood. (VII RT 2046.) The autopsy of Deeble indicated bruises on the labia and vaginal fault. There was a hemorrhage as well as a laceration in the area of the posterior fourchette which is at the bottom of the opening of the vagina. (VII RT 2137, 2156.) Deeble's anus was dilated, and there was a tearing of the inner covering of the rectum within the dilated anus. (VII RT 2137.) Dr. Fukumoto testified that the object that caused the injuries would "not have any sharp edges." (VII RT 2138.) The mousse can found in Deeble's bedroom would "be consistent with an object that could have caused these various injuries." (VII RT 2138.) The vaginal and rectal injuries were also inflicted before Deeble died. (VII RT 2138.)

In the Delbecq murder, the mousse can was obviously used to sexually assault Delbecq, as an x-ray performed on Delbecq revealed the can protruding from the vaginal and rectal area into her abdominal cavity. (VII RT 2292, 2295.) There was bruising into the entrance of the vaginal cavity, tears through the walls of the vaginal cavity and a perforated right upper portion of the vaginal cavity. (VII RT 2295.) There was also a perforation of Delbecq's bowels into the abdominal cavity. (VII RT 2295.) Like Deeble's injuries, the injuries to Delbecq's anal and vaginal areas were caused before death. (VII RT 2297.)

Edwards points out that his expert testified that the injuries to Deeble's vagina and rectum were minor. (SAOB 21; VIII RT 2492.) While the injuries to Delbecq were greater than Deeble's injuries, the cases were similar because it was reasonable to infer from the evidence presented that a mousse can was used to sexually assault both women. The use of a mousse can is certainly "unusual and distinctive as to be like a signature." (*People v. Ewoldt, supra*, 7 Cal.4th at 403.) As this Court noted in *People v. Carter*, "to be highly distinctive, the charged and uncharged crimes need

not be mirror images of each other." (*People v. Carter, supra*, 36 Cal.4th at 1148.) The differences go to the weight of the evidence and do not preclude the prosecution from introducing the evidence. (*Ibid.*)

Moreover, in addition to the highly unusual and distinctive use of a mousse can to sexually assault both Deeble and Delbecq, the two murders shared numerous other "shared marks." For instance, both women were older Caucasian women who died from strangulation. (VII RT 2126, 2139, 2181, 2298.) Both women at some point were also bound around their wrists and ankles by ligatures. (VII RT 2036-2037, 2129, 2235.) The ligatures around Deeble's wrists were present when she was discovered. Although her ankles were not bound at the time her body was discovered, there were noticeable ligature marks around her ankles which indicated they had been bound at one time. (VII RT 2070.) Similarly, Delbecq's wrists and ankles were not bound when she was found in her bedroom. (VII RT 2219.) However, there were definite, pronounced ligature marks on her ankles and wrists when her body was discovered. (VII RT 2235.)

Another distinctive and unusual aspect of both murders was that the ligatures were fashioned from materials procured at the scene, specifically, telephone cords taken from Deeble's and Delbecq's homes, and later found at or near both women's apartments. Deeble's wrists were bound by telephone cord twisted with an electrical cord. (VII RT 2036-2037, 2053-2054.) The telephone cord had been yanked from the wall. (VII RT 2036-2037, 2053-2054.) In the Delbecq murder, pieces of telephone cord taken from Delbecq's phone were tied together and found in a pillowcase in a dumpster near her home. (VII RT 2224.) The pillowcase matched bedding at Delbecq's home, and a check in her name was found in the pillowcase. (VII RT 2213, 2224, 2227-2231.)

Both women also suffered from incise wounds or wounds caused by a sharpened instrument. (VII RT 2293.) There was an incisional wound to

Deeble's left ear drum, which was separate from the tearing of the ear drum caused by the ligature strangulation. (VII RT 2127.) Delbecq had an incise wound to her jaw and a puncture wound with a pointed object on her left chest. (VII RT 2293-2295.) Both Deeble and Delbecq also suffered fractured noses. (VII RT 2130-2131, 2298.) Both women also suffered blunt force trauma to their heads. (VII RT 2132-2133, 2293.)

Finally, the appearance of both crime scenes shared similarities. For instance, both apartments were first floor apartments. There were no signs of forced entry in either location; however, screens were removed from a window in each place. (VI RT 1992, VI RT 2003.) Both the Deeble's and Delbecq's bedrooms were ransacked, and jewelry was missing from both. (VI RT 2006, 2080; VII RT 2196, 2234.)

Edwards claims that these similarities were common or generic to other murders, burglaries and residential robberies. (SAOB 17-18.) In so doing, Edwards' view of the evidence and the law it too narrow. As this Court pointed out in *Carter*, however, "[t]o be highly distinctive, the charged and uncharged crimes need not be mirror images of each other." (*People v. Carter, supra*, 36 Cal.4th at p. 1148.) In *Carter*, there were differences in the circumstances surrounding the victims' deaths, and the murder in the other crimes evidence did not share the distinctive features of the murders charged in *Carter*. (*Ibid.*) However, this Court found the evidence was properly admitted pursuant to Evidence Code section 1101 because "the combination of fatal strangulation and placement of a young woman's body in a closed bedroom closet is both highly distinctive and suggestive that the same person perpetrated the crimes." (*Ibid.*)

Likewise, viewing the evidence in the light most favorable to the trial court's ruling, the charged and uncharged offenses displayed common features that revealed a highly distinctive pattern. Here, Edwards targeted older, Caucasian women. (VIII RT 2126, 2139, 2181, 2298.) He entered

their first floor apartments through windows from which he had removed the screen. (VI RT 1992, 2003.) Edwards ransacked each woman's apartment and took jewelry. (VI RT 2006, 2080; VII RT 2196, 2234.) Both victims were bound around their wrists and ankles by telephone cords taken from their homes. (VII RT 2036-2037, 2053-2054, 2070, 2129, 2219, 2224, 2235.) Deeble and Delbecq were both strangled to death. (VII RT 2139, 2290-2291, 2298.) There injuries were similar; both suffered incise wounds caused by a sharpened weapon, fractured noses, and blunt force trauma to their heads. (VII RT 2130-2133, 2293, 2298.) Finally, before each died, both Deeble and Delbecq suffered injuries to their vaginal and anal areas consistent with being caused by mousse cans which were later found close to Deeble's body and in Delbecq's body. The combination of all these factors displayed common features that revealed a highly distinctive pattern and suggested that the same person perpetrated the murders of both Deeble and Delbecq. (*People v. Kipp*, *supra*, 18 Cal.4th at p. 370.) The trial court did not abuse its discretion in admitting evidence of the Delbecq murder to prove identity and common plan and scheme.

IV. THE TRIAL COURT PROPERLY ADMITTED EDWARDS' 1994 CONVICTIONS FOR DELBECQ'S MURDER AND BURGLARY IN HAWAII FOR IMPEACHMENT

Edwards contended in his opening brief that his impeachment with his murder and burglary convictions violated state law and deprived him of his federal constitutional right to due process. (AOB 104-117.) Edwards similarly argues in his supplemental brief that the trial court's error in admitting evidence of his 1994 Hawaii convictions for Delbecq's murder and burglary of her apartment requires reversal. (SAOB 26-39.) Specifically, Edwards claims that the trial court failed to engage in a weighing process before ruling the murder conviction was admissible for

impeachment purposes, the probative value of the murder conviction, as a violent crime, was limited because it did not involve dishonesty, the trial court ignored the fact that the murder conviction and the present murder charge were identical, the court failed to consider the availability for impeachment of other felony convictions that were dissimilar to the murder charge, and finally, the trial court failed to consider the risk of confusion of issues. (SAOB 34-36.) Edwards' arguments should be rejected. The trial court acted within its discretion in admitting Edwards' prior Hawaii convictions for murder and burglary to impeach his credibility.

A. Factual and Procedural Background[7]

Edwards testified in his defense at trial. (IX RT 2544-2629.) Edwards testified that he was addicted to alcohol and drugs at a very young age. (IX RT 2545-2552.) He also suffered from alcoholic blackouts. (IX RT 2566.) On the night of Deeble's murder, Edwards claimed that he was selling fake LSD at a Judas Priest concert and then drank liquor and shot up heroin and cocaine later that night. (IX RT 2596-2597, 2601-2603.)

On cross-examination, the prosecutor asked Edwards if, "on March 10th of 1994 you were convicted of the murder of Muriel Delbecq in the state of Hawaii –." (IX RT 2605.) Edwards objected, moved to strike, and moved for a mistrial based on prosecutorial misconduct. (IX RT 2605.) Edwards argued that based on the trial court's prior ruling at the section 995 motion, that the prior conviction in the Hawaii case was inadmissible. (IX RT 2605.) Edwards also argued that it was prejudicial to admit evidence of his conviction in Hawaii when it came in pursuant to Evidence Code section 1101, subdivision (b), as well. (IX RT 2606.) Specifically,

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[7] The following is taken directly from Respondent's Brief at pages 61 to 63.

Edwards feared that the jury would assume that "once a guy has done a crime like this, he has – must have done the one here, too." (IX RT 2608.)

The prosecutor argued that all felony convictions can be used for impeachment purposes. The prosecutor stated, "I never heard any of limitations whatsoever brought on me. [sic] Until they put Mr. Edwards on the stand, it wasn't relevant. Once they put him on the stand, it became extremely relevant." (IX RT 2607.)

The trial court stated that it was never asked to rule on the issue. (IX RT 2606.) Specifically, the trial court stated:

> The prosecutor is being accused of misconduct. There was never a motion to prevent the prosecutor from impeaching Mr. Edwards in the event he took the stand, and that is a simple motion that is made. It is typically made, you know, before every trial.

(IX RT 2606.) The trial court, noted, however, that even if a motion had been made, it would have denied defense motion because the Hawaii convictions were "crime[s] of moral turpitude the worst type of moral turpitude. Highly relevant on credibility." (IX RT 2607.)

Edwards' defense counsel then brought up that Edwards had three other prior felonies on which he wished the court rule. (IX RT 2607.) Edwards had also suffered on March 10, 1994, in Hawaii, convictions for kidnapping, two counts of sexual assault, robbery in the first degree, and first degree burglary. (IX RT 2608-2609.) Edwards also suffered a 1988[8] conviction for felony theft of a vehicle and receiving stolen property. (IX RT 2609.) On September 1987, Edwards was convicted of possession of a firearm. (IX RT 2610.) Edwards was convicted of second degree felony burglary in August 1984. (IX RT 2610.)

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[8] The Respondent's Brief incorrectly states that this conviction occurred in 1998.

The trial court granted Edwards' motions as to the misdemeanors and found them inadmissible. (IX RT 2612.) However, the trial court denied Edwards' motion as to the murder and burglary convictions in Hawaii, reasoning:

> Here is the problem. Your client has testified, and he hasn't made himself out to be the All-American citizen who has never violated any law. He has admitted several serious violations while on the stand, so I don't know where all this prejudicial impact is coming from. I mean this is the nature of your case, and it is fine.
>
> I think that the prosecutor for impeachment purposes, should be permitted to get into the fact that he was also convicted of a burglary related to the homicide because that bears heavily on credibility grounds, even though it is a much less serious crime than murder. It is moral turpitude. And I am assuming the burglary was with intent to commit theft or robbery as well as anything else. So that is a very heavy factor in determining admissibility.
>
> Obviously it has no impact on your client's testimony. He has already testified – and I don't think these things are going to make him look that much worse than he looks already as far as living a life of crime to support a dope habit and an alcohol habit.

(IX RT 2612-2613.) The trial court also found that the crimes were not remote because Edwards had continuously been in and out of trouble from 1984, 1987, 1988, and 1994. The court stated:

> So I will permit impeachment with the auto burg in August of '84. I think the misdemeanor stuff tends -- don't really prove that much and tends to take too much time and could end up confusing the jury. And it just serves no value.
>
> The only negative or meaning in the defense favor on the murder is that it is an identical crime, but that is offset by the fact that they have already heard the 1101 (b) evidence. The test is the same. The evidence in Hawaii was very strong in that palm prints were left and there is probably going to be no attack against that. . . .

(IX RT 2613.) The trial court found admissible the murder and burglary in Hawaii and the fact of the 1984 auto burglary. (IX RT 2614.) The trial court found the 1987 and 1988 auto thefts inadmissible. (IX RT 2614.)

During cross-examination, the prosecutor then asked Edwards if he had been convicted of murder and felony burglary in Hawaii on March 10, 1994, and second degree burglary in California on August 1984. (IX RT 2616.) Edwards answered affirmatively. (IX RT 2616.)

B. The Trial Court Acted Within its Discretion in Admitting Edwards' Prior Convictions for Murder and Burglary to Impeach His Credibility

Under the California Constitution, "[a]ny prior felony conviction of any person in any criminal proceeding ... shall subsequently be used without limitation for purposes of impeachment ... in any criminal proceeding." (Cal. Const. art. I, § 28, subd. (f).) This general rule of admissibility, however, is subject to the trial court's discretion under Evidence Code section 352. (Cal. Const. art. I, § 28, subd. (d); *People v. Doolin* (2009) 45 Cal.4th 390, 443; *People v. Harris* (2005) 37 Cal.4th 310, 337; *People v. Wilkins* (2011) 191 Cal.App.4th 780; 119 Cal.Rptr.3d 691, 701.) We review a trial court's admission of prior felony convictions for impeachment for an abuse of discretion. (*People v. Hinton* (2006) 37 Cal.4th 839, 888; *People v. Harris, supra,* 37 Cal.4th at p. 337.) A trial court's exercise of its discretion to admit evidence of prior convictions for impeachment purposes will not be disturbed on appeal unless the court "exceeded the bounds of reason." (*People v. Clair* (1992) 2 Cal.4th 629, 654-655)

In exercising its discretion, the trial court must be "guided-but not bound" by the four factors identified by this Court in *People v. Beagle* (1972) 6 Cal.3d 441, 453, partially superseded by statute as stated in *People v. Castro* (1985) 38 Cal.3d 301, 306-313: (1) whether the prior conviction

reflects adversely on an individual's honesty or veracity; (2) the nearness or remoteness in time of a prior conviction; (3) whether the prior conviction is for the same or substantially similar conduct to the charged offense; and (4) what the effect will be if the defendant does not testify out of fear of being prejudiced because of the impeachment by prior convictions. (*People v. Beagle*, *supra,* 6 Cal.3d at pp. 451- 453.*)* These factors need not be rigidly followed. (*People v. Clair, supra,* 2 Cal.4th at p. 654; *People v. Mendoza, supra,* 78 Cal.App.4th at p. 925.)

Edwards argues that the trial court erred in finding that his Hawaii murder conviction was relevant as to his credibility because the crime does not involve dishonesty. (SAOB 34-35.) However, pursuant to *People v. Castro* (1985) 38 Cal .3d 301, 306, 315, a witness may be impeached with any felony conviction that necessarily involves moral turpitude, even if the immoral trait is one other than dishonesty. There can be no doubt that a conviction for murder reflects the "readiness to do evil" that defines moral turpitude. (See *Id.* at p. 314; *People v. Hinton supra,* 37 Cal.4th at p. 888 [defendant charged with multiple murder could be impeached with prior convictions for murder, attempted murder, and assault with a firearm].) Contrary to Edwards' assertions, his prior felony conviction for the murder of Delbecq involved moral turpitude and reflected adversely on his credibility.

Edwards also contends that the trial court ignored the fact that his "murder conviction and the present murder charge were identical, not just similar." (SAOB 35.) Edwards' objection that the priors ought to have been excluded as too similar to the charged crime is likewise without merit. While before passage of Proposition 8, past offenses similar or identical to the offense on trial were excluded, now the rule of exclusion on this ground is no longer inflexible. (*People v. Hinton, supra,* 37 Cal.4th at p. 888; *People v. Castro, supra*, 38 Cal.3d 312.) It is also now firmly established

that such prior felony convictions may be used for impeachment, even if they are identical in nature to the charged offense. (*People v. Hinton, supra*, 37 Cal.4th at p. 888 [prior convictions for murder, attempted murder, and firearm assault admitted in murder trial].) Rather, "'[t]he identity or similarity of current and impeaching offenses is just one factor to be considered by the trial court in exercising its discretion.' [Citation]." (*People v. Green* (1995) 34 Cal.App.4th 165, 183; see also *People v. Muldrow* (1988) 202 Cal.App.3d 636, 646-647 [no abuse of discretion in admission for impeachment of six prior felony convictions, three identical to charged offense]; *People v. Stewart* (1985) 171 Cal.App.3d 59, 65-66, [no abuse of discretion where trial court admitted evidence of four prior robbery convictions to impeach robbery defendant.].)

Here, as discussed above, murder and burglary are crimes involving moral turpitude, and thus probative of Edwards' dishonesty. The convictions were not remote in time, but occurred just two years prior to the trial in this case. Finally, it did not prevent Edwards from taking the stand to testify. The trial court did not abuse its discretion in admitting these crimes of violence. (*People v. Hinton, supra,* 37 Cal.4th at p. 888; *People v. Harris, supra,* 37 Cal.4th at p. 337.)

Next, Edwards contends that the trial court failed to consider the availability for impeachment of other felony convictions such as a 1988 conviction for auto theft and receiving stolen property and a 1994 conviction for robbery. (SAOB 35, 37.) The trial court did not abuse its discretion by admitting the 1994 convictions of murder and burglary to impeach Edwards. Impeachment with more than two prior convictions is not unusual, and multiple convictions are more probative then one. (*People v. Mendoza, supra*, 78 Cal.App.4th at p. 927.) Further, more recent prior convictions have greater probative value than remote convictions. (*People v. Beagle* (1972) 6 Cal.3d 441, 454.) Therefore the 1994 convictions would

have been the most probative. Likewise, a "series of relevant crimes is more probative of credibility than a single lapse." (*People v. Hinton, supra*, 37 Cal.4th at p. 888, citing *People v. Holt* (1984) 37 Cal.3d 436, 452.) Thus, the admission of evidence of a 1984 auto burglary and the 1994 convictions for murder and burglary was a more accurate portrayal of Edwards' criminal history and was more relevant to his credibility.

Finally, Edwards contends that the trial court did not engage in weighing the probative value of the prior convictions against its probable prejudice as required by Evidence Code section 352, and failed to consider the risk of confusion of the issues. This failure, according to Edwards, was prejudicial error that amounted to a denial of due process under the federal Constitution. (SAOB 34, 36.) Here the record shows the trial court properly weighed the evidence. A trial court's exercise of discretion under Evidence Code section 352 does not infringe upon a defendant's right to due process, unless it results in the exclusion of evidence vital to his defense. (*People v. Cornwell* (2005) 37 Cal.4th 50, 82, overruled on another point in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

In this case, the trial court did engage in weighing the probative value of the evidence against probable prejudice as required by Evidence Code section 352. That process need not be expressly articulated on the record, so long as the record affirmatively shows that the trial court weighed prejudice against probative value; and that showing may be inferred from the record. (*People v. Prince* (2007) 40 Cal.4th 1179, 1237.)

Here, the trial court found that the Hawaii convictions were crimes of moral turpitude that were relevant to Edwards' credibility and noted the very probative value of the murder and burglary convictions. (IX RT 2607, 2612-2613.) The trial court pointed out that Edwards testified, and he "hasn't made himself out to be the All-American citizen who has never violated any law. He has admitted several serious violations while on the

stand, so I don't know where all this prejudicial impact is coming from." (IX RT 2612-2613.) The trial court also noted that there was no impact on Edwards' testimony because he already testified. (IX RT 2612-2613.) Thus, there was no prejudicial impact on his decision to testify. Moreover, contrary to Edwards' assertions that the trial court failed to examine the risk of confusing the jury, the trial court, when it found various misdemeanor convictions inadmissible for impeachment, stated:

> So I will permit impeachment with the auto burg in August of '84. I think the misdemeanor stuff tends—don't really prove that much and tends to take too much time and could end up confusing the jury. And it serves no value.

(IX RT 2613.) The record shows that the trial court did, in fact, engage in the required weighing process and found that the probative value of the evidence outweighed any prejudice that would have resulted from its admission.

Finally, as the trial court pointed out (IX RT 2613), any prejudice was offset by the fact that the evidence of the Delbecq murder and burglary had already been properly presented to the jury, as discussed above. Moreover, because Edwards had already testified, the impeachment of Edwards with his prior Hawaii convictions did not affect Edwards decision to testify. Finally, it was pointed out by the trial court, Edwards did not paint himself as a saint, but rather a person with a history of criminality. Therefore, the impeachment of Edwards' with his Hawaii convictions was not prejudicial.

Thus, balancing all of the factors, the trial court acted well within its discretion in finding that Edwards' prior convictions were more probative than prejudicial under Evidence Code section 352.

C. Any Error Was Harmless And There Was No Due Process Violation

Because the "application of ordinary rules of evidence . . . does not implicate the federal Constitution," this Court has reviewed "allegations of error under the 'reasonable probability' standard of *Watson*[.]" (*People v. Marks* (2003) 31 Cal.4th 197, 227.) As noted above, the evidence of the Delbecq murder was strong and was already presented to the jury, thus any prejudice from Edwards' admission of the fact of the prior convictions was mitigated. Moreover, the jury was instructed of the limited purpose for which the evidence was admitted. (CALJIC No. 2.23[9]; III CT 933; XI RT 3119.) The jury is presumed to have abided by the court's instructions. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1014.) Thus, any error was harmless.

Edwards' claim that the court violated his federal constitutional rights (SAOB 39) has been forfeited by failing to raise them below. (*People v. Marks, supra,* 31 Cal.4th at p. 228.) In any event, because the trial court did not err in exercising its discretion under Evidence Code section 352, there could be no violation of Edwards' federal due process right. (See *People v. Abilez* (2007) 41 Cal.4th 472, 503.)

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[9] The jury was instructed as follows:

> The fact that a witness has been convicted of a felony, if such be a fact, may be considered by you only for the purpose of determining the believability of that witness. The fact of such a conviction does not necessarily destroy or impair a witness' believability. It is one of the circumstances that you may take into consideration in weighing the testimony of such a witness.

(CALJIC No. 2.23; III CT 933; XI RT 3119.)

V. THE TRIAL COURT PROPERLY EXCLUDED AS INADMISSIBLE HEARSAY EVIDENCE EDWARDS STATED THAT HE COULD NOT RECALL TWO SPECIFIC INCIDENTS

In Edwards' opening brief, he contended that the trial court improperly excluded testimony that could have circumstantially corroborated his defense that he was in an unconscious state at the time of the Deeble murder. (AOB 133-140.) Here, Edwards argues that the trial court's erroneous exclusion of testimony of two defense witnesses regarding his previous alcoholic blackouts requires reversal. (SAOB 40-43.) Edwards' claim should be rejected, as the trial court properly excluded the statements because they were inadmissible hearsay. Moreover, any error was harmless because evidence that Edwards suffered alcoholic blackouts or could not remember certain incidents after drinking heavily were nevertheless admitted.

A. Factual Background

1. Vincent Portillo

During Edwards' case, Vincent Portillo, Edwards' first cousin, testified that he lived in Maui for a month in 1991 and 1992. (IX RT 2713.) One night, Portillo spent a night of heavy drinking with Edwards and Brenda, Edwards' girlfriend at the time. (IX RT 2713.) Portillo said Brenda hit Edwards several times. Edwards blocked her hits, but could not hit her back because he was driving at the time. (IX RT 2714.) Portillo spent that night at Edwards' home. (IX RT 2715.) The next morning, Edwards did not appear to be upset with Brenda. (IX RT 2715.) The following questioning took place between Edwards' counsel and Portillo:

> Q. Now, on the following day after this incident, this just calls for what you said on the following day after this incident, did you mention the incident to Rob [Edwards]?
>
> A. Yes, I did.

Q. Now, did Mr. Edwards reply back to you that he did not recall any of it?

Mr. BRENT: Your honor, that, of course, calls for hearsay, and I would object to it.

Mr. BATES: Your honor, on that issue I would offer it not as hearsay at all but as circumstantial evidence of an alcoholic blackout and pursuant to 1250 of the Evidence Code, your honor.

Mr. BRENT: No foundation that ties into any kind of blackout.

THE COURT: Sustained.

(IX RT 2715-2716.)

2. Janice Hunt

Janice Hunt, who lived with Edwards in December 1992, also testified on behalf of the defense. (IX RT 2634-2675.) Hunt testified that Edwards was a heavy drinker, regularly drinking about 12 to 24 cans of beer in a span of three to four hours. (IX RT 2637-2638.) In December 1992, Edwards' father was killed in a plane crash. (IX RT 2638.) Thereafter, Edwards became more quiet, depressed, and he began to drink more heavily. (IX RT 2639.) According to Hunt, there were occasions where Edwards drank so heavily he actually experienced alcoholic blackouts. (IX RT 2639.)

Hunt described a time where she and Edwards went to search for his truck the morning after he had drank heavily the night before. (IX RT 2641.) Hunt was with Edwards the night before, and she saw him drinking heavily. He left in his truck. The next morning the truck was not at their home, and she and Edwards went to search for it. (IX RT 2642.)

Hunt also testified about a time when she found a bag of groceries with items that needed to be refrigerated in or near her car. (IX RT 2643-2644.) The night before Edwards had been drinking heavily, and Hunt had

asked Edwards to pick up a few items from the store. (IX RT 2644-2645.) The following colloquy took place between defense counsel and Hunt:

> Q. And did you confront Mr. Edwards with your finding?
>
> A. When I –
>
> Mr. BRENT: Objection, nonresponsive.
>
> THE COURT: Sustained.
>
> Q. BY Mr. SEVERIN: Did you tell him that you had found these things down there?
>
> A. Yes.
>
> Q. And what was his response?
>
> Mr. BRENT: Objection, calls for hearsay.
>
> Mr. SEVERIN: Your honor, it is not offered for its truth, state of mind.
>
> THE COURT: The objection is sustained.
>
> Q. BY Mr. SEVERIN: You showed Mr. Edwards the items?
>
> A. Yes.
>
> Q. How did he appear when you showed him the items?
>
> Mr. BRENT: Objection, relevance.
>
> THE COURT: Overruled.
>
> THE WITNESS: Surprised.
>
> Q. BY Mr. SEVERIN: Did you tell him where you found them?
>
> A. Yes.

(IX RT 2645-2646.)

B. Appellant's proffered statements constituted inadmissible hearsay

Evidence Code section 1250 provides in pertinent part that,

> evidence of a statement of the declarant's then existing state of mind ... is not made inadmissible by the hearsay rule when: [¶] (1) The evidence is offered to prove the declarant's state of mind ... at that time or at any other time when it is itself an issue in the action; or [¶] (2) The evidence is offered to prove or explain acts or conduct of the declarant.

(Evid.Code, §§ 1250, subd. (a).) In order for a hearsay statement to be admissible under this exception it must be a statement of the hearsay declarant's "then existing state of mind." (*Ibid.*) The trial court's evidentiary rulings are reviewed under an abuse of discretion standard. (*People v. Waidla* (2000) 22 Cal.4th 690, 717-718.) "On appeal, 'an appellate court applies the abuse of discretion standard of review to any ruling by a trial court on the admissibility of evidence....'" (*People v. Hovarter* (2008) 44 Cal.4th 983, 1007-1008.) A trial court abuses its discretion when its ruling falls outside the bounds of reason. (*People v. Benavides* (2005) 35 Cal.4th 69, 88.)

In the present case, defense counsel asked Portillo, "Did Mr. Edwards reply back to you that he did not recall any of it?" (IX RT 2715.) Counsel also asked Hunt what was Edwards' response when she told him that she found groceries near her car after a night of heavy drinking by Edwards. (IX RT 2646.) Edwards sought to admit his statements that he did not recall his girlfriend hitting him or leaving his groceries by Hunt's car. These statements were not statements of Edwards' then existing state of mind. The statements say nothing at all about Edwards' state of mind at the time the hearsay declarations were made. (*People v. Whitt* (1990) 51 Cal.3d 620, 642-643) ["exception is limited to out-of-court statements describing a relevant 'mental state' being experienced by the declarant at

the time the statements were made"]; *People v. Ortiz* (1995) 38 Cal.App.4th 377, 389 [Evidence is offered under Evidence Code section 1250 "to prove the declarant's state of mind ... at that time ...."]; 2 McCormick, Evidence (6th ed. 2006) Spontaneous Statements, p. 267 [state of mind hearsay exception provides for admissibility of only those statements of the declarant that "relate to a condition of mind or emotion existing at the time of the statement"].)

Edwards' statements did not concern his then-existing state of mind. The hearsay statements were, rather, statements of Edward's memory or belief (defendant's belief that events had occurred at some time in the past that he did not remember), which is strictly excluded from the hearsay exception under Evidence Code section 1250, subdivision (b), which states, "This section does not make admissible evidence of a statement of memory or belief to prove the fact remembered or believed." As the Law Revision Comments to this section note, the section

> does not permit a statement of memory or belief to be used to prove the fact remembered or believed. This limitation is necessary to preserve the hearsay rule. Any statement of a past event is, of course, a statement of the declarant's then existing state of mind-his memory or belief-concerning the past event. If the evidence of that state of mind-the statement of memory-were admissible to show that the fact remembered or believed actually occurred, any statement narrating a past event would be, by a process of circuitous reasoning, admissible to prove that the event occurred.

(Cal. Law Revision Com. com., West's Cal. Evid.Code (2007 ed.) foll. § 1250, p. 254.)

The statements in question here indicated that Edwards believed that events had occurred in the past that he did not remember, and were being offered to prove the truth of the matter asserted-that Edwards had suffered such memory lapses. For that reason, the statements are hearsay. Evidence

Code section 1250, subdivision (b), prohibits their admission under the state of mind exception to the hearsay rule set forth in that section.

Further, as the prosecutor argued, there was no foundation established that Edwards' memory lapse when he was drinking heavily with Portillo and Hunt were even relevant to Edwards' state of mind at a time that his state of mind was at issue in the action (i.e., at the time of the Deeble murder), as also required by Evidence Code section 1250. Edwards' statements of no memory during incidents when he lived in Hawaii in the early 1990s fail to show that Edwards had no memory on the date of Deeble's murder in May 1986. The trial court did not abuse its discretion in concluding that the statements were hearsay not subject to the state of mind exception.

C. Any error was harmless

In any event, it is not reasonably probable a result more favorable to defendant would have been reached had Edwards' statements to Portillo and Hunt been admitted to establish Edwards' state of mind. (*People v. Farley* (2006) 46 Cal.4th 1053, 1104; *People v. Watson* (1956) 46 Cal.2d 818, 836.) Edwards argues that the exclusion was prejudicial because the prosecutor argued in closing as follows:

> And so the only words, you have, the only person that knows whether or not that [sic] he had a blackout was Mr. Edwards. And you are back to the same issue, why do you believe Mr. Edwards?

(10 RT 2944; SAOB 42.) However, the prosecutor was arguing that Edwards is the only evidence that he suffered a blackout on the night of the Deeble murder. Portillo and Hunt's proffered testimony did not relate to the night of the murder, but rather, years after when he lived in Hawaii.

Moreover, despite the fact that the trial court sustained a couple of objections on hearsay grounds, evidence that Edwards suffered alcoholic

blackouts and that he did not remember certain events after consuming large amounts of alcohol were nevertheless admitted. In addition to Edwards' own testimony regarding his blackouts, Hunt testified that Edwards drank heavily, especially after the death of his father. (IX RT 2637-2639.) Hunt specifically stated that there were occasions when Edwards drank so heavily he actually experienced alcoholic blackouts. (IX RT 2639.)

Additionally, Hunt described an occasion when Edwards could not remember where he left his truck one night. (IX RT 2641-2642.) Hunt also testified that one morning, Edwards was surprised to find groceries he must have left by Hunt's car the previous night. (IX RT 2546.)

Therefore, while some objections were sustained, evidence was admitted that Edwards suffered blackouts and could not remember some incidents after drinking heavily. Thus, even if Edwards' statements to Portillo and Hunt were admissible, any error in excluding them was harmless.

VI. The Admission Of Dr. Fukumoto's Testimony And Opinion Did Not Violate Edwards' Right To Confrontation

In his supplemental opening brief, Edwards contends that the use of hearsay evidence regarding Deeble's autopsy findings violated his constitutional right to confront witnesses and requires reversal of the convictions, special circumstances findings and death sentence. (SAOB 43-63.) In his opening brief, Edwards argued that the admission of the coroner's opinion that Deeble's injuries were painful and inflicted before death violated his rights under the confrontation clause. (AOB 150-158.) Edwards' Sixth Amendment right to Confrontation was not violated by the admission into evidence of the testimony of Dr. Fukumoto which, in part, was based on a contemporaneously recorded autopsy report which qualifies

as a nontestimonial business or official record. The trial court properly permitted Dr. Fukumoto's testimony because as an expert, the pathologist properly could rely on testimonial and non-testimonial hearsay in forming his opinion. Moreover, any error was harmless beyond a reasonable doubt.

A. Factual and Procedural Background

Dr. Fukumoto is a licensed physician and surgeon specializing in pathology. (VII RT 2121.) Dr. Fukumoto served as a pathologist in the U.S. Army, and had served as Chief of Anatomical Pathology at the Orange County Medical Center. Since 1966, Dr. Fukumoto had been a doctor with the private pathology practice of Richards, Fisher, Fukumoto Medical Group, Inc., which had contracted with the Orange County Sheriff's Department to perform the autopsies in Orange County. (VI RT 2121-2122.)

Dr. Richards, who was a partner in that private practice, performed the autopsy on Deeble. He retired in 1989 or 1990. (VII RT 2122.) Dr. Richards created an autopsy report in the normal course of business. The entries in the report were made "fairly contemporaneous with the specific autopsy that is performed." (VII RT 2123.) As part of the autopsy, Dr. Richards took upwards of 100 photographs of Deeble's body, and created microscopic slides of Deeble's tissues and organs. (VII RT 2123.) Specifically, a microscopic slide was taken of Deeble's vaginal area, which Dr. Fukumoto personally examined. (VII RT 2145.) Dr. Fukumoto personally reviewed all of the photographs and slides taken during the autopsy. (VII RT 2123-2124.)

Dr. Fukumoto opined that Deeble's cause of death was asphyxiation or lack of air to the body, due to ligature strangulation. (VII RT 2139.)

Both an external and an internal examination were conducted on Deeble's body. (VII RT 2124.) An external examination revealed a deep furrow around Deeble's neck. This furrow was created by the belt ligature

that was found around her neck. (VII RT 2126.) The furrow was deep with an abrasive thickening of the skin. This indicated that there was movement or friction by the victim while the ligature was around her neck. The abrasions also showed that the victim made movements side to side while the ligature was around her neck. (VII RT 2126.) Dr. Fukumoto looked at a photograph of Deeble, as she was discovered. According to Dr. Fukumoto, the photograph showed movement while the ligature was around Deeble's neck. (VII RT 2125-2126.)

The whites of Deeble's eyes were bloody because of conjunctival hemorrhages or bleeding in the whites of the eyes. (VII RT 2127.) Deeble also suffered injuries to her ears. Blood was coming out of her left ear. An internal examination of the ears showed extensive hemorrhage in the middle ear, tearing in the right ear drum, and an incisional type injury to the left ear drum. (VII RT 2127.) The tearing of the right ear drum was consistent with having a ligature around Deeble's neck. The ear drums were torn because of massive bleeding in the middle ears. This was possibly caused by massive increase in pressure as a result of Deeble's struggle to obtain breath. Dr. Fukumoto opined that the pressure in the ear, to the extent that ear drums were torn, and the struggling with the ligature around the neck would have been extremely painful. (VII RT 2128.)

The incisional type cut to the left ear drum was separate from the damage caused by the ligature. (VII RT 2128-2129.) This cut was caused by a sharp or pointed instrument which broke the left ear drum. (VII RT 2127.) This incision would have been extremely painful. (VII RT 2129.)

A photograph which Dr. Fukumoto examined also showed ligature marks around Deeble's ankles. (VII RT 2129.) The right ankle had a deeper, more marked injury. In addition to the marks from the ligature, Deeble suffered from two lacerations on the right ankle. (VII RT 2129-2130.) Dr. Fukumoto testified that Dr. Richards described, and he agreed,

that these lacerations were consistent with the wires coming together and inflicting the injury to the ankle. (VII RT 2130.)

Deeble's face was also characterized by marked engorgement or the presence of the blood and swelling of the eyelids. (VII RT 2130, 2131.) There was marked blood vessel stasis, or stoppage of the normal flow of blood, in the neck and face area. (VII RT 2130.) Deeble's nose appeared fractured because there was a crescent area on the bridge that was consistent with a fracture. (VII RT 2130-2031.) Dr. Fukumoto personally studied the x-rays of Deeble's nose, and noticed a flattening on the bridge which may have reflected a fracture. (VII RT 2142.)

An internal examination of Deeble showed further evidence of trauma. There were numerous petechia or pinpoint hemorrhages in the scalp and muscle tissue evident in the layers between the skull and cranium. (VII RT 2132.) The subarachnoid fluid inside Deeble's skull was bloody instead of clear which indicated that trauma was inflicted to Deeble's brain because the fluid acts as a buffer for any movement of the brain. (VII RT 2133.) The dura or thick membrane between the skull and brain was filled with blood, and blood clots were forming, particularly on the right inner surface of the dura, which indicates that Deeble suffered from blunt force trauma to the area above Deeble's neck. (VII RT 2133.)

There was bleeding near the tail of the pancreas. (VII RT 2134.) Since the pancreas is surrounded by organs and the ribs, a tremendous amount of force was inflicted in that area in order to damage Deeble's pancreas. (VII RT 2135.)

Deeble also suffered various injuries to her genital area. There were bruises on the labia and the vaginal fault, and a hemorrhage and laceration in the area of the posterior fourchette. (VII RT 2137.) According to Dr. Richards' report, the anus was dilated, and there were mucosal lacerations of the rectum as well as tearing of the inner covering of the rectum within

the dilated anus. (VII RT 2137.) Dr. Fukumoto testified that the object which caused these injuries was not something with sharp edges. Dr. Fukumoto opined that the mousse can found on Deeble's bed would be consistent with an object that could have caused these various injuries. (VII RT 2138.) After studying the microscopic examination, Dr. Fukumoto also testified that the injuries to the vaginal and rectal areas were caused before death and would have been highly painful because the vaginal and rectal areas are highly vascular with a lot of blood and nerve endings in the area. (VII RT 2138.)

B. The Sixth Amendment Right to Confrontation

The Sixth Amendment to the United States Constitution guarantees a criminal defendant the right "to be confronted with the witnesses against him[.]" (U.S. Const., Amend. VI.) Under prior Sixth Amendment jurisprudence, the admissibility of an out-of-court statement depended upon its reliability. (See *Ohio v. Roberts* (1980) 448 U.S. 56, 66, [100 S.Ct. 2531, 65 L.Ed.2d 597].) But in *Crawford v. Washington* (2004) [541 U.S. 36, 158 L.Ed.2d 177], the United States Supreme Court held that under the Sixth Amendment, which guarantees a criminal defendant "'the right ... to be confronted with the witnesses against him,'" an out-of-court statement that is "testimonial" in nature cannot be admitted into evidence over the defendant's objection unless the person who made the statement is unavailable to testify at trial and the defendant had a prior opportunity for cross-examination. (*Id.* at pp. 42, 68-69.) The court declined "to spell out a comprehensive definition of 'testimonial,'" but stated that "it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." (*Id.* at p. 68.)

In *Davis v. Washington* (2006) 547 U.S. 813 [165 L.Ed.2d 224], which also included a second case, *Hammon v. Indiana*, *ibid.*, the court qualified the latter part of *Crawford*, holding that "[s]tatements are

nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." (*Id.* at p. 822.) Based on this holding, the court concluded the statement at issue in *Davis* was not testimonial, but the statements at issue in *Hammon* were. (*Davis*, at pp. 828-832.)

Justice Thomas concurred in the judgment in part and dissented in part, agreeing with the conclusion about the statement in *Davis* but disagreeing about the statement in *Hammon*. (*Id.,* at pp. 834, 842.) According to Justice Thomas, the standard the court adopted was "neither workable nor a targeted attempt to reach the abuses forbidden by the [Confrontation] Clause." (*Id.* at p. 842.) Drawing on his own concurrence in *White v. Illinois* (1992) 502 U.S. 346, 365 [116 L.Ed.2d 848, 865], Justice Thomas stated that "the plain terms of the 'testimony' definition [the court adopted in *Crawford*] necessarily require some degree of solemnity before a statement can be deemed 'testimonial,'" and "[t]his requirement of solemnity supports [his] view that the statements regulated by the Confrontation Clause must include 'extrajudicial statements ... contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.'" (*Davis v. Washington, supra*, 547 U.S. at p. 836.)

In 2009, in *Melendez-Diaz,* the United States Supreme Court faced the question of whether "affidavits reporting the results of forensic analysis which showed that material seized by the police and connected to the defendant was cocaine ... are 'testimonial,' rendering the affiants 'witnesses' subject to the defendant's right of confrontation under the Sixth

Amendment." (*Melendez-Diaz v.* Massachusetts (2009) 557 U.S. at p. ---- [129 S.Ct. 2527, 174 L.Ed.2d 314, 319].) Led by Justice Scalia, four members of the court concluded "[t]here is little doubt that the documents at issue in this case fall within the 'core class of testimonial statements.'" (*Id.* at p. 321.) Another four members disagreed, concluding "[l]aboratory analysts who conduct routine scientific tests are not the kind of conventional witnesses to whom the Confrontation Clause refers." (*Id.* at p. 350, dis. opn. of Kennedy, J.) Justice Thomas concurred with Justice Scalia's opinion, but wrote "separately to note that [he] continue[s] to adhere to [his] position that 'the Confrontation Clause is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.'" (*Id.* at p. 333.) He explained that he "join[ed] the Court's opinion in this case because the documents at issue in this case 'are quite plainly affidavits,' " and "[a]s such, they 'fall within the core class of testimonial statements' governed by the Confrontation Clause."[10] (*Ibid.*)

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[10] This Court has granted review in several cases discussing the scope of *Melendez-Diaz*. (*People v. Rutterschmidt* (2009) 176 Cal.App.4th 1047, review granted Dec. 2, 2009, S176213; *People v. Dungo* (2009) 176 Cal.App.4th 1388, review granted Dec. 2, 2009, S176886; *People v. Lopez* (2009) 177 Cal.App.4th 202, review granted Dec. 2, 2009, S177046; *People v. Gutierrez* (2009) 177 Cal.App.4th 654, review granted Dec. 2, 2009, S176620.) The United States Supreme Court has also granted certiorari in a similar case, *State v. Bullcoming* (2010) 147 N.M. 487, 226 P.3d 1, 9, cert. granted, --- U.S. ----, 131 S.Ct. 62, 177 L.Ed.2d 1152 (U.S. Sep. 28, 2010) ("Whether the Confrontation Clause permits the prosecution to introduce testimonial statements of a nontestifying forensic analyst through the in-court testimony of a supervisor or other person who did not perform or observe the laboratory analysis described in the statements.").

C. Dr. Fukumoto's Testimony was Not Testimonial Within the Meaning of *Crawford, Davis* or *Melendez-Diaz*

Autopsy reports are very different from the sworn drug analysis certificates labeled "testimonial" in *Melendez-Diaz*. An autopsy report does not fall within any of the descriptions of testimonial evidence provided by *Crawford*. It is not prior testimony at a judicial proceeding. It is not generated in response to police questioning. Rather, autopsy reports are medical records—a type of business or official records within the meaning of Evidence Code sections 1271 and 1280—that are admissible absent confrontation. Consequently, testimony regarding the autopsy report in this case did not violate Edwards' Sixth Amendment rights.

Melendez-Diaz highlighted this boundary when it emphasized that the drug certificates at issue were "testimonial" in part because Massachusetts law expressly contemplated their preparation for use as evidence at trial. (*Melendez-Diaz, supra,* 129 S.Ct. at p. 2532.) The underlying reason a document is prepared is a key criterion in determining its testimonial (or nontestimonial) status. (See also *id.* at pp. 2539-2540 ["Business and public records are generally admissible absent confrontation . . . because—having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial—they are not testimonial"].) This is a point on which the United States Supreme Court and this Court agree. (*People v. Geier* (2007) 41 Cal.4th 555, 607 [in determining whether a statement is testimonial, "the critical inquiry is not whether it might be reasonably anticipated that a statement will be used at trial but the circumstances under which the statement was made"].)[11]

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[11] In its Respondent's Brief, Respondent discusses *People v. Geier*, *supra*, 41 Cal.4th 555, at length. (RB 98-100). *Melendez-Diaz* does not overrule this Court's decision in *Geier*. In *Geier*, this Court held, that the (continued...)

The *Melendez-Diaz* Court emphasized the purpose-of-preparation principle when it observed that "medical reports created for treatment purposes . . . would not be testimonial under our decision today." (*Melendez-Diaz, supra,* 129 S.Ct. at p. 2533, fn. 2.) The court cited two state court opinions explaining that medical records are not testimonial in nature. (*Id.*, at p. 2533, fn. 2.) Both cases held that blood tests—one indicating alcohol, one indicating drugs—conducted at hospitals where impaired drivers were treated for their injuries were admissible at the subsequent trials as business records. (*Melendez-Diaz, supra,* 129 S.Ct. at p. 2533, fn. 2, citing *Baber v. State* (Fla. 2000) 775 So.2d 258, 260-262 and *State v. Garlick* (Md. 1988) 545 A.2d 27, 34-35.)

(...continued)
People's expert, a DNA laboratory director, could rely upon DNA test results done by a subordinate to formulate her opinion. This Court found that the scientific evidence at issue was non testimonial. (*Geier, supra*, 41 Cal.4th at p. 605.)

Melendez-Diaz did not undercut this Court's reasoning in *Geier*. California does not follow the procedure outlawed in *Melendez-Diaz*, i.e., introducing witness affidavits instead of live testimony. Furthermore, raw test results are not "formalized testimonial materials." Thus, *Melendez-Diaz* has no impact on *Geier* or on California's practices. Although improper introduction of forensic evidence will violate a defendant's Sixth Amendment rights, proper introduction of such evidence will not. As explained throughout this brief, *Melendez-Diaz* was concerned with a particular type of evidentiary practice, i.e., introduction of a bare-bones, after-the-fact declaration as prima facie evidence against the accused, without supporting testimony. (*Melendez-Diaz, supra*, 129 S.Ct. at pp. 2531, 2537.) *Geier*, like the present case, involved raw data, contemporaneous recordation of observable events, an expert relying on work by others, and live testimony by a witness subject to cross-examination. None of these circumstances was present in *Melendez-Diaz*; thus the high court had no occasion to consider them.

Autopsy reports are no less medical records than the hospital records discussed in *Baber* and *Garlick*, and are prepared pursuant to statutory mandates without regard to any potential criminal prosecution. Pathologists are medical doctors. To claim that autopsy reports, although written by physicians and documenting physiological conditions, are nonetheless not "medical records" would be a legal fiction.

To the contrary, California law recognizes that autopsy reports are "medical reports." Government Code section 27463, subdivision (e), requires coroners to document the cause of death in an official register "with reference or direction to the detailed medical reports upon which decision as to cause of death has been based." (See also 18 C.J.S. (2008) Coroners, § 26, p. 286 ["A coroner is a medical expert rendering expert opinion on medical questions" who makes "factual determinations concerning the manner, mode, and cause of death, as expressed in a coroner's report . . . "].)

Like medical records in other contexts, autopsy reports are prepared according to standardized medical protocols that do not change based on the potential future use of those reports. State law mandates that coroners "inquire into and determine the circumstances, manner, and cause" of many categories of death, both related to criminal activity (e.g., "gunshot, stabbing") and unrelated to criminal activity (e.g., "exposure, starvation, acute alcoholism, drug addiction, . . . sudden infant death syndrome; . . . contagious disease"). (Gov. Code, section 27491; see also Gov. Code, section 27491.41, subd. (c) [mandating an autopsy in "any case where an infant has died suddenly and unexpectedly"]; Health & Saf. Code, section 102850 [listing six circumstances of death in which the coroner must be notified, only one of which expressly involves a criminal act].) Significantly, these statutory mandates do not command, suggest, or even imply that the purpose, methods, or nature of the coroner's inquiry change

depending upon whether the "circumstances, manner, and cause" of death was related to criminal activity. (See, e.g., Gov. Code, section 27491.41, subd. (d) [infant death autopsies must be conducted using a "standardized protocol"].) This paradigm lies in stark contrast with the drug certificates at issue in *Melendez-Diaz*, which were prepared for the "sole purpose" of prosecuting the defendant. (*Melendez-Diaz, supra,* 129 S.Ct. at p. 2532.)

Accordingly, an autopsy is not performed for the purpose of contributing to subsequent criminal proceedings, any more so than an emergency room physician treats a gunshot victim for the purposes of contributing to subsequent criminal proceedings. The emergency room doctor's file does not change from a nontestimonial "medical record" to a testimonial "investigative record" based on the apparent cause of a patient's injuries.

The conclusion that a pathologist examines a body from a medical and not a law enforcement perspective is supported by additional statutory mandates that define a coroner's role independently of any law enforcement consequences the work may entail. (See e.g., 15 Cal.Jur.3d (2004) Coroners, § 15, p. 18 ["[t]he coroner must inquire into the cause of some deaths in order to prepare death certificates"]; Health and Safety Code section 102860 [coroners must document on death certificates "the disease or condition directly leading to death, antecedent causes, other significant conditions contributing to death and other medical and health section data as may be required on the certificate, and the hour and day on which death occurred"; Health & Saf. Code, §§102875 [describing contents of death certificate without reference to potential law enforcement consequences of autopsy], 102795 [coroner's obligation to certify medical and health section data on death certificates], 102800 [same].) These are statutory obligations required of medical doctors performing primary duties irrespective of their

law enforcement implications, not duties required of law enforcement investigators.

Many courts have recognized that the mode of creation of autopsy reports distinguishes them from testimonial writings prepared in anticipation of criminal proceedings. The First Circuit Court of Appeals summarized the prevalent reasoning as follows:

> An autopsy report is made in the ordinary course of business by a medical examiner who is required by law to memorialize what he or she saw and did during an autopsy. An autopsy report thus involves, in principal part, a careful and contemporaneous reporting of a series of steps taken and facts found by a medical examiner during an autopsy. Such a report is, we conclude, in the nature of a business record, and business records are expressly excluded from the reach of Crawford.

(*United States v. De La Cruz* (1st Cir. 2008) 514 F.3d 121, 133; see also *United States v. Feliz* (2d Cir. 2006) 467 F.3d 227, 236-237 [autopsy reports are kept in the course of regularly conducted business activity and are nontestimonial under *Crawford*]; *Manocchio v. Moran* (1st Cir. 1990) 919 F.2d 770, 778 [autopsy reports are business records akin to medical records, prepared routinely and contemporaneously according to "statutorily regularized procedures and established medical standards" and "in a laboratory environment by trained individuals with specialized qualifications.)

This Court stated that, in determining whether a statement is testimonial,

> the proper focus is not on the mere reasonable chance that an out-of-court statement might later be used in a criminal trial. Instead, we are concerned with statements, made with some formality which, viewed objectively, are for the primary purpose of establishing or proving facts for possible use in a criminal trial.

(*People v. Cage* (2007) 40 Cal.4th 965, 984, fn. 14, italics in original.) As discussed, the primary purpose of conducting an autopsy is to fulfill the statutory duty of generating cause of death information for death certificates, and most fundamentally involves the neutral and objective recordation of medical facts based on a medical examination without respect to criminal justice consequences.

In sum, nothing in the record in this case indicates that the autopsy report was anything other than a nontestimonial medical record. Autopsy reports are created contemporaneously with the examination, follow a standardized format, are mandated by law, and are routinely relied upon by other pathologists. According to Dr. Fukumoto, who was in the same practice as Dr. Richards, the autopsy report was created in the normal course of business. (VII RT 2123.) The entries in the report were made "fairly contemporaneously" with the autopsy performed. (VII RT 2123.) Because autopsy reports are nontestimonial business records, Dr. Fukumoto's testimony regarding the autopsy report in this case did not violate the Confrontation Clause.

D. Dr. Fukumoto, as an Expert Witness, Was Entitled to Rely on Hearsay Evidence

Regardless of the admissibility of the autopsy report itself, Dr. Fukumoto was allowed to rely on it in forming his opinion pursuant to Evidence Code section 801, subdivision (b). The presence of Dr. Fukumoto on the stand for cross-examination satisfied Edwards' confrontation rights.

An expert may base his opinion on any material, "whether or not admissible," reasonably relied upon by experts in the field in forming their opinions; and, if questioned, the expert may relate the basis on which he formed his opinion. (*People v. Gardeley* (1996) 14 Cal.4th 605, 618; *People v. Montiel* (1993) 5 Cal.4th 877, 918-919; Evid. Code, section 801.)

Such expert-opinion testimony is permissible because the expert is present and available for cross-examination. (*People v. Sisneros* (2009) 174 Cal.App.4th 142, 154; *People v. Thomas* (2005) 130 Cal.App.4th 1202, 1210.) "Hearsay in support of expert opinion is simply not the sort of testimonial hearsay the use of which *Crawford* condemned." (*People v. Sisneros, supra*, 174 Cal.App.4th at pp. 153-154; *People v. Ramirez* (2007) 153 Cal.App.4th 1422, 1427.)

California courts have long held that experts may testify based on hearsay which may itself by testimonial in nature. (E.g., *People v. Thomas, supra,* 130 Cal.App.4th at pp. 1208-1210.) And, even after *Melendez-Diaz*, courts have continued to reach the same conclusion. (E.g., *United States v. Johnson* (4th Cir. 2009) 587 F.3d 625, 634-637; *Haywood v. State* (Ga. App. 2009) 301 Ga.App. 717, 689 S.E.2d 82; *State v. Lui* (Wash. App. 2009) 153 Wash.App. 304, 221 P.3d 948; *People v. Johnson* (Ill. App. 2009) 915 N.E.2d 845, 851-854.) As the court explained in *United States v. Johnson*:

> Here . . . [the] experts [who relied on information provided by others] took the stand. Therefore, [defendant] and his co-defendants, unlike the defendant in *Melendez-Diaz*, had the opportunity to test the experts' "honesty, proficiency, and methodology" through cross-examination.

(*United States v. Johnson, supra*, 587 F.3d at p. 636, quoting *Melendez-Diaz, supra,* 129 S.Ct. at p. 2538.)

Nothing in *Melendez-Diaz* conflicts with this analysis. *Melendez-Diaz* did not hold that a defendant's confrontation rights are satisfied only if every person who provides a link in the chain of information relied upon by a testifying expert is available for cross-examination. Nor does it require that the prosecution call every person who can offer information about a forensic analysis. Rather, the Supreme Court stated that the defendant must be able to challenge the "honesty, proficiency and methodology" of the

analyst(s) who did the laboratory work in order to "weed out not only the fraudulent analyst, but the incompetent one as well." (*Melendez-Diaz, supra,* 129 S.Ct. at pp. 2537, 2538.) There is no logical reason why the Confrontation Clause is not satisfied in this regard if the witness on the witness stand possesses sufficient qualifications and knowledge about the forensic testing process and test results, about the sufficiency of the training received by the original analyst, about what tests were performed, whether those tests were routine, and the skill and judgment exercised by the testing criminalist. (*Id.* at pp. 2537-2538.)

This reading of *Melendez-Diaz* is consistent with *Crawford*'s observation that the purpose of the confrontation clause is "to ensure reliability of evidence" by exposing it to the "crucible of cross-examination." (*Crawford, supra*, 541 U.S. at p. 61.) The Confrontation Clause is satisfied if a defendant can adequately test the reliability of a scientific conclusion or result by engaging in cross-examination. The identity of the expert cross-examined is and should be beyond the purview of the Constitution. (See *United States v.* Turner (7th Cir. 2010) 591 F.3d 928, 933 ["the Sixth Amendment does not demand that a chemist or other testifying expert have done the lab work himself"].)

Dr. Fukumoto testified regarding his qualification as an expert witness, including that he is a licensed physician and surgeon specializing in pathology and was a partner in a private pathology practice which had contracted with the Orange County Sheriff's Department to perform autopsies in Orange County. (VII RT 2121-2122.) Dr. Fukumoto had 30 years of experience, and he had conducted over 12,000 autopsies and qualified as a expert on numerous occasions. (VII RT 2121.)

Once found to be qualified, an expert witnesses have two major distinctions from a percipient witnesses. First, expert witnesses do not have a requirement of personal knowledge of the matter upon which their

testimony is based. (Evidence Code section 702, subdivision (a).) Second, experts may testify in the form of an opinion, and state the basis for their opinion on direct examination. (Evidence Code section 802.)

In the present case, the autopsy report was not received into evidence, and did not "bear testimony" against Edwards. Nor did it improperly function as the equivalent of live testimony as did the affidavits at issue in *Melendez-Diaz*. Instead, the "statement" used at Edwards' trial was Dr. Fukumoto's expert opinions concerning the cause of Deeble's death, as well as her physical condition at the time of her death. In fact, throughout his testimony, Dr. Fukumoto made extensive and continuous references to the photographs, microscopic slides, and x-rays in the autopsy file, which he personally reviewed, and which allowed him to render opinions independent of—but consistent with—those of Dr. Richards. For instance, Dr. Fukumoto testified that after personally reviewing photographs, his opinion was "consistent" with Dr. Richards' finding that the scratch on Deeble's foot was a result of wires coming together. (VII RT 2130.) As a result of examining microscopic slides, Dr. Fukumoto also opined that Deeble's injuries to the vaginal and anal areas were inflicted before death. (VII RT 2138.) It was Dr. Fukumoto's professional opinion that the cause of Deeble's death was asphyxiation due to ligature strangulation, which was consistent with Dr. Richards' opinion. (VII RT 2139.)

This testimony was Dr. Fukumoto's independent opinion as an expert, based on his personal review of the autopsy report, the photographs, x-rays and slides. It was a far cry from the "bare bones" written affidavits, found inadmissible in *Melendez-Diaz*, which merely set forth the ultimate conclusion, under oath, that the tested substance contained cocaine. (*Melendez-Diaz, supra,* 129 S.Ct. at p. 2531.)

Furthermore, Edwards had ample opportunity to cross-examine Dr. Fukumoto about the autopsy results, the general procedures for performing

the autopsy, the documentation of those results, the preservation of samples, and any other autopsy issue he deemed appropriate. Indeed, defense counsel cross-examined Dr. Fukumoto at length about all of these issues at trial. (VII RT 2141-2160.) Specifically, Edwards' counsel asked Dr. Fukumoto about what he would have done differently in an autopsy in 1996 versus 1986. (VII RT 2141.) He questioned whether the x-rays indeed showed a fractured nose, and whether Dr. Fukumoto would have ordered more x-rays or made an incision into Deeble's nose to verify the fracture. (VII RT 2142-2143.) Dr. Fukumoto was just as capable of addressing issues as the original pathologist would have been, especially because (1) the autopsy report made routine and descriptive observations of the physical body with little incentive to fabricate the results, and (2) any medical examiner would not likely have an independent recollection of performing a specific autopsy, and would have had to rely upon the report to the same extent Dr. Fukumoto did. (*Geier, supra*, 4 Cal.4th at p. 602.) Dr. Fukumoto was a partner with Dr. Richards in the pathology practice of Richards, Fisher, Fukumoto Medical Group, Inc., and thus particularly capable of rendering opinions on matters of procedure, protocol, and documented facts. Edwards was thus "given a full and fair opportunity to probe and expose. . . infirmities [in testimony] through cross-examination, thereby calling to the attention of the fact finder the reasons for giving scant weight to the witness's testimony" (*Delaware v. Fensterer* (1985) 474 U.S. 15, 22 [106 S.Ct. 292, 88 L.Ed.2d 15]), and the Confrontation Clause was satisfied. (*Ibid.*)

Where, as here, another pathologist who is familiar with the original pathologist testifies at trial, the purpose behind the Confrontation Clause has been fulfilled. To the extent the witness did not personally participate in the autopsy and bases his information on work performed by others, such areas can be probed through cross-examination. (*Delaware v. Fensterer,*

supra, 474 U.S. at p. 22.) The presence of Dr. Fukumoto on the stand satisfied the Sixth Amendment by preventing a trial by affidavit found objectionable in *Melendez-Diaz.*

E. Any Error In Admitting Dr. Fukumoto's Expert Testimony Was Harmless Beyond A Reasonable Doubt

Confrontation Clause violations are subject to analysis for prejudice under the harmless beyond a reasonable doubt standard of review. (*Delaware v. Van Arsdall* (1986) 475 U.S. 673 [106 S.Ct. 1431, 89 L.Ed.2d 674.].) Even if Dr. Fukumoto's testimony should have been excluded, any error was harmless beyond a reasonable doubt because the jury was instructed that they were not bound to accept an expert opinion as conclusive, and that they may disregard the opinion if it was found to be unreasonable. (CALJIC No. 2.80 (modified); III CT 939; XI RT 3123.) Jurors are presumed to have understood and followed the trail court's instructions absent evidence to the contrary. Moreover, the evidence of Edwards' guilt was strong. Deeble was found murdered in her apartment with her hands tied around her back, her neck was in a noose, ligature marks were seen around her ankles, and a mousse can with blood on the can and the cap were found amongst Deeble's bed coverings. (VI RT 2011, 2014, 2046-2047.) Edwards dated Deeble's daughter, had been in Deeble's home on prior occasions, knew where the spare key was kept, and knew that a person could enter Deeble's apartment through a window. (VII RT 2072, 2076, 2077, 2133.) Edwards had a key to the daughter's truck, and it had been driven the night of Deeble's murder. (VII RT 2075, 2078-2079.) Evidence of the Delbecq murder, which shared many unique characteristics with the Deeble murder was presented. For instance, both were older women who were bound by the hands and ankles, strangled to death and sexually assaulted with mousse cans. Therefore, any error was harmless beyond a reasonable doubt.

VII. SERGEANT JESSEN'S TESTIMONY ON REBUTTAL WAS PROPERLY ADMITTED BECAUSE IT WAS RELEVANT TO THE SERGEANT'S STATE OF MIND

Edwards argues that the admission of hearsay evidence of a statement by laboratory personnel that a list of possible suspects had been eliminated as donors of semen at the Deeble crime scene violated his federal and state constitutional rights of confrontation. (SAOB 63-66.) Edwards similarly claimed in his opening brief that Sergeant Jessen's testimony that he focused on Edwards after he received information from lab personal was erroneously admitted. (AOB 185-192.) Contrary to Edwards' contention, no statement by laboratory personnel was actually admitted for the truth of the matter asserted. Rather, the testimony of Sergeant Jessen, the lead investigator on the Deeble murder, was properly admitted as a statement of his then existing state of mind.

One of the defense theories of the case was that the police investigation was not thorough and prematurely focused on Edwards as a suspect. For instance, Edwards asked Richard Brown, a criminalist for the Orange County Sheriff's Office Crime Lab at the time of the murder, if he compared the known standards of hair submitted by Vance Price, Tom Collison, Dale Carey, Anthony Jarc, Leonard Hirsch, Alden Olson and Paul Roy[12] with the hair found at the Deeble murder scene.[13] (IX RT 2800.)

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[12] Paul Roy was Deeble's boyfriend. (IX RT 2759, 2770.)

[13] Some unidentified head and pubic hair was found at the Deeble crime scene. Pubic hair was found on the sheet and in the shower. (VII RT 2064. 2067.) Light colored and dark colored hair was found on pillows, a lady's half slip, nightgown, and on some items of clothing found on the floor. (VII RT 2065-2066.) Head and pubic hair samples were taken from

(continued...)

Brown testified that the hair standards submitted by these individuals did not contain an adequate number of hairs to make a comparison. (IX RT 2800.) Criminalist Brown informed the law enforcement agency investigating Deeble's murder, the Los Alamitos Police Department, that an adequate sample from those individuals was never provided. (IX RT 2801.)

During rebuttal, the prosecutor called Sergeant. Jessen and had the following exchange:

> Q. BY Mr. BRENT: First of all, Sergeant Jessen, you began to focus on Mr. Edwards to the exclusion of the persons that the defense mentioned, correct?
>
> A. Correct.
>
> Mr. SEVERIN: Objection, Irrelevant.
>
> THE COURT: Overruled. [. . . .]
>
> Q. BY Mr. BRENT: And one of the reasons was, was it not, what has already come out that Mr. Edwards refused to supply you with samples of hair, saliva and blood?
>
> A. Correct.
>
> Q. Okay, Another reason, is it not true that these persons had been eliminated by DNA from providing the samples at the Deeble residence of semen and fluids, and Mr. Edwards had not been eliminated, correct:
>
> Mr. SEVERIN: Objection, No foundation, speculation.
>
> THE COURT: Sustained.

(...continued)
Edwards, Leonard Hirsch,Vance Price, Alden Olson, Paul Roy, Tom Collison, Dale Carrey and Anthony Jarc. (VI RT 2029-2032; VII RT 2068.)

(X RT 2819-2820.) A side bar conference outside the presence of the jury took place. (X RT 2820.) Defense counsel objected on grounds that the question elicited improper hearsay and speculation, and there was no basis to form the opinion as to whether the individuals had been eliminated as suspects because the prosecutor had previously indicated that no DNA evidence would be presented; therefore, an Evidence Code section 402 hearing on its admissibility was never conducted. (X RT 2821.) Defense counsel also argued that it was improper rebuttal because rebuttal was limited to only new matters brought up by defense. Finally, defense counsel claimed that the prosecutor committed misconduct and asked the court to declare a mistrial. (X RT 2822.)

The prosecutor explained that the evidence he sought did not call for hearsay because it was not being offered for the truth of the matter asserted, but rather, went to Sergeant Jessen's state of mind and to rebut the defense theory that police did not thoroughly investigate other individuals who could have left physical evidence at the crime scene. (X RT 2821.) The prosecutor argued:

> The point of the matter is, of the names that the defense read off, people who supplied the cards, fingerprint exemplars and hair samples and those matters, these persons were all eliminated. And that is why this detective did not go forward and reobtain their samples. It is the defense, 'We want to attack the police. They did a crappy job.' [¶] They didn't. It is not being offered for the truth. It is being offered for his state of mind to show he didn't do a crappy job.

(X RT 2823.)

The trial court asked the prosecutor how these other individuals were eliminated. (X RT 2827.) The prosecutor explained that they were eliminated by DNA testing on the semen stain on Deeble's thigh and other stains on the bed. Defense counsel elaborated that both Edwards and Steve

Deeble[14] were included as possible contributors to the semen stain on the thigh. However, the stain on the bed eliminated Steve Deeble, but not Edwards. (X RT 2827.) The other individuals listed by the defense were not tied into the semen stain. (X RT 2831.)

The trial court denied the motion for mistrial and ruled that the evidence that these other individuals had been ruled out as suspects or were not included in the semen samples was relevant to Sgt. Jessen's state of mind. The trial court, however, noted that evidence of DNA results was inadmissible unless the prosecutor decided to put all evidence of DNA on after the necessary foundational and admissibility hearings were conducted. (X RT 2823-2824.) The trial court stated that "I think [defense] made the witness's state of mind relevant. I think that the prosecutor should be entitled to get into that state of mind and do it without referring to the DNA." (X RT 2834.) Earlier the trial court reasoned:

> Your [sic] getting into the DNA may be beyond that. I think his state of mind as to the exclusion of the other possible suspects is relevant and can come in. There is no misconduct, if you want him to put on the DNA stuff to get out all it would show how inconclusive it was, he could do that. He is prepared to do that. So that is not misconduct. [¶] And it is relevant as to the officer's state of mind. I had assumed as much early on when the questions started coming out. I mean that is how police are. They are not going to spin wheels once they are satisfied that certain individuals could not have committed the crime. That is your case. He is allowed to rebut it. [¶] Your motion for mistrial is denied. I would stay away from the DNA unless you are going to put it on. And it is not going to prove anything. It is not going to help either side.

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[14] Steve Deeble is Marjorie Deeble's adult son who had moved out of Deeble's home and lived in the Long Beach area at the time of Deeble's murder. (VII RT 2089, 2094.)

(X RT 2823-2823.) The trial court granted Edwards' request to admonish the jury to disregard any reference that had been made to DNA. (X RT 2826, 2831.)

When the jury was called back, the trial court admonished them:

> Earlier in the trial we told you that certain evidence was being offered for a limited purpose. Well the last question by the way is stricken. The jury is ordered to disregard it. [¶] But these questions of this officer is being offered for a limited purpose, and the limited purpose is this officer's state of mind. And what that is relevant to, I think will become obvious by the questions and by any cross-examination on those questions. [¶] The letters 'DNA' were used in the last question. Don't assume or think about it. Those letters are stricken. They are meaningless as far as your duty is concerned. Is that understood? You can handle that all right?

(X RT 2837-2838.)

The prosecutor then asked Sgt. Jessen the following questions:

> Q. BY Mr. BRENT: Sgt. Jessen, isn't it true that as a result of scientific testing that this group of names the defense had mentioned as persons who had supplied inadequate samples that I asked you about before were eliminated as the donors of the various semen and fluids at the crime scene?
>
> Mr. SEVERIN: Objection, misstates the testimony, lack of foundation.
>
> THE COURT: Rephrase your question. [. . .]
>
> Q. Mr. BRENT: Isn't it true that in your mind, based upon information you had received from other people, lab personnel, that this list of people that the defense had mentioned who had provided inadequate samples were eliminated as donors of semen and fluids at the crime scene?
>
> Mr. SEVERIN: Objection, lack of foundation.
>
> THE COURT: Overruled.
>
> THE WITNESS: Yes. Excuse me. Yes.

> Q. BY Mr. BRENT: And with that and other information that you had, then you focused on Mr. Edwards back in your investigation, correct?
>
> Mr. BATES: Objection, irrelevant, vague as to time.
>
> THE COURT: Overruled.
>
> THE WITNESS: Correct.
>
> Q. BY Mr. BRENT: But it wasn't until you received a phone call from Hawaii indicating a homicide that took place over there in 1993 that you felt you had enough evidence to actually arrest Mr. Edwards, true?
>
> A. Correct.

(X RT 2838-2839.)

As set forth in Argument V., above, Evidence Code section 1250 provides in pertinent part that,

> evidence of a statement of the declarant's then existing state of mind . . . is not made inadmissible by the hearsay rule when: [¶] (1) The evidence is offered to prove the declarant's state of mind . . . at that time or at any other time when it is itself an issue in the action; or [¶] (2) The evidence is offered to prove or explain acts or conduct of the declarant.

(Evid.Code, § 1250, subd. (a).) The trial court's evidentiary rulings are reviewed under an abuse of discretion standard. (*People v. Waidla, supra*, 22 Cal.4th at pp. 717-718.)

During the defense case, the defense focused on the deficiencies in the investigation by police. For instance, Edwards' counsel questioned why samples of urine or tissue were not collected from the toilet at Deeble's apartment. (VII RT 2316.) The defense also questioned Sgt. Jessen about the poor quality of the elimination prints obtained from Steve Deeble, Tom Collison, Anthony Jarc, Leonard Hirsch, and Victoria Stephens. (IX RT 2694.) The defense then questioned Sgt. Jessen about the hair standards submitted by multiple people, but only Edwards' sample was compared

with the hair found at the crime scene at that time. (IX RT 2701.) Richard Brown testified that the hair standards submitted by Vance Price, Tom Collison, Dale Carey, Anthony Jarc, Leonard Hirsch, Alden Olson, and Paul Roy did not contain an adequate number of hairs to make a comparison with the hair found at the Deeble murder scene, and he was never provided with an adequate sample from those individuals. (IX RT 2800, 2801.) The defense attempted to show that Edwards was improperly targeted by the police after a less than thorough investigation.

On rebuttal, the prosecutor attempted to show Sgt. Jessen's then existing state of mind at the time of the investigation by asking if he believed that based upon information he had received from lab personnel, that people who had provided inadequate samples were eliminated as donors of semen and fluids at the crime scene. (X RT 2838.) Sgt. Jessen answered affirmatively that this was the reason the police then focused on Edwards in the investigation. (X RT 2838.)

The testimony was not hearsay, because it was not admitted for the truth of the matter asserted, but was rather a statement of Sgt. Jessen's then existing state of mind. (Evid. Code, § 1250, subd. (a).) Edwards claims that this argument fails because the "statement at issue here – laboratory personnel had stated that the list of people had been eliminated as donors of semen and fluids at the scene – has nothing to do with the state of mind of the declarants, i.e., the laboratory personnel." (SAOB 64.) However, no statement of the laboratory personnel was ever admitted into evidence. When the prosecutor asked the question about whether persons had been eliminated by DNA from providing samples at the Deeble home of semen and fluids, the trial court sustained the lack of foundation, speculation objection. (X RT 2819-2820.) During the second question, the prosecutor asked, "Isn't it true that as a result of scientific testing that this group...who had supplied inadequate samples...were eliminated as donors of the various

semen and fluids at the crime scene?" (X RT 2838.) The trial court again sustained the objection and told the prosecutor to rephrase the question. (X RT 2838.) Finally, the prosecutor asked, "Isn't it true that in your mind, based upon information you had received from other people, lab personnel, that this list of people that the defense had mentioned as people who had provided inadequate samples were eliminated as donors of semen and fluids at the crime scene?" (X RT 2838.) Sgt. Jessen answered, "Yes." (X RT 2838.)

Sgt. Jessen never testified about any statements by the lab personnel. And contrary to Edwards' argument, the declarant was not the lab personnel but rather, Sgt. Jessen, who testified that based on information received, he ruled out these other people, and focused on Edwards. Furthermore, as required by Evidence Code section 1250, Sgt. Jessen's state of mind, as the lead investigator in the Deeble murder, was an issue in the action and offered to explain why the investigation focused on Edwards. The police did not just target Edwards on a whim, but rather, they received information from the laboratory that the other people who had submitted inadequate hair samples could not be included as possible donors of the stains left on the bed and on Deeble's thighs.

Because Sgt. Jessen took the stand and was available for cross-examination, and because no statement of the lab personnel was actually admitted for the truth of the matter asserted, there was no Confrontation Clause violation.

Finally, it was not reasonably probable that Edwards would have received a more favorable result had Sgt. Jessen's testimony rebutting the defense that the police investigation improperly focused on Edwards been excluded. (*People v. Watson, supra*, 46 Cal.2d at p. 836.) Sgt. Jessen's testimony was itself brief. (X RT 2818-2820, 2838-2839.) The jury was instructed on the limited purpose for which the evidence was admitted. (X

RT 2837-2838.) Jurors are presumed to have understood and followed the trial court's instructions absent evidence to the contrary. (People v. Alexander, supra, 49 Cal.4th at p. 915.) Contrary to Edwards' assertions (SAOB 66), no evidence that DNA had eliminated all suspects other than Edwards was admitted into evidence. The prosecution did not attempt to present the results of scientific testing. The trial court struck the question which alluded to DNA testing and admonished the jury to disregard it. (X RT 2819-2820, 2826, 2831, 2837-2838.) Finally, the evidence of Edwards' guilt was substantial. Edwards was familiar with Deeble, as he was dating Deeble's daughter, Valentine. (VII RT 2072.) Edwards had been to Deeble's home twice, and he knew where a spare key was kept and that a person could enter Deeble's apartment through the screen window. (VII RT 2076, 2077, 2113.) There was also "bad blood" between Deeble and Edwards because of a disagreement about Valentine's truck. (VII RT 2075.) Valentine also testified that on the night of Deeble's death, someone had used Valentine's truck without her knowledge because it was not parked in the manner she had parked it the night before. (VII RT 2078-2079.) Edwards was the only other person besides Valentine who had a key to the truck. (VII RT 2075.) Moreover, evidence was also presented that Edwards murdered Delbecq in a distinctive fashion which was uniquely similar to Deeble's murder. Therefore, because Jessen's testimony was brief, the jury was properly instructed, no actual evidence of DNA was admitted, and because the substantial evidence of Edward's guilt, any error in the admission of Sergeant Jessen's rebuttal testimony was harmless.

VIII. THE TRIAL COURT WAS NOT REQUIRED TO INSTRUCT THE JURY WITH A LINGERING DOUBT INSTRUCTION

Edwards argues that the trial court erred when it refused to deliver a lingering doubt instruction. (SAOB 66-78.) The trial court properly

refused to give Edwards' proposed lingering doubt instruction because the theory was sufficiently encompassed in other instructions given in this case. In any event, any error was harmless.

Edwards requested that the jury be instructed with a special defense instruction on lingering doubt as follows:

> Although the defendant has been found guilty of murder in the first degree, and the special circumstances of torture and burglary have been found to be true, by proof beyond a reasonable doubt the jury may demand a greater degree of certainty of guilt for the imposition of the death penalty. It is appropriate to consider in mitigation any lingering doubt you may have concerning the defendant's guilt. Lingering or residual doubt is defined as that state of mind between beyond a reasonable doubt and beyond all possible doubt.

(V CT 1594, 1596, 1629; XXIV RT 6273.) The prosecutor objected to the instruction because it was confusing, and the trial court was not required to give the instruction. (XXIV RT 6274.) The trial court denied Edwards' request to instruct on lingering doubt because the theory was already covered in instructions on factor (k) and because then-recent case law indicated that the instruction was not necessary. (XXIV RT 6277.) The trial court properly refused to give the instruction on lingering doubt.

This Court has explained:

> [T]he standard CALJIC penalty phase instructions "are adequate to inform the jurors of their sentencing responsibilities in compliance with federal and state constitutional standards." [Citation.] Moreover, the general rule is that a trial court may refuse a proffered instruction if it is an incorrect statement of law, is argumentative, or is duplicative. [Citation.] Instructions should also be refused if they might confuse the jury. [Citation.]

(*People v. Gurule* (2002) 28 Cal.4th 557, 659.) "Although instructions pinpointing the theory of the defense might be appropriate, a defendant is not entitled to instructions that simply recite facts favorable to him.

[Citation.]" (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1159, original italics omitted.)

A capital defendant has no federal or state constitutional right to have the penalty phase jury instructed to consider residual lingering doubt about his or her guilt. (See, e.g., *People v. Panah* (2005) 35 Cal.4th 395, 497; *People v. Harris* (2005) 37 Cal.4th 310, 359; *People v. Slaughter* (2002) 27 Cal.4th 1187, 1218; *Oregon v. Guzek* (2006) 546 U.S. 517, 524-526 [126 S.Ct. 1226, 1231-1232, 163 L.Ed.2d 1112] [noting that the Court has never held that such a right exists]; *Franklin v. Lynaugh* (1988) 487 U.S. 164, 172-176 [108 S.Ct. 2320, 101 L.Ed.2d 155].) The lingering doubt concept is sufficiently encompassed in other instructions ordinarily given in capital cases. (*People v. Harris, supra*, 37 Cal.4th at p. 359.) For instance, an instruction on section 190.3, factor (k), is sufficiently broad to encompass any residual doubt any jurors might have entertained. (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1272; *People v. Davis* (1995) 10 Cal.4th 463, 545; *People v. Sanchez* (1995) 12 Cal.4th 1, 77-78.)

Here, the instructions provided under CALJIC Nos. 8.85 and 8.88 affirmatively required the jury to consider any mitigating circumstances, namely "any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime and any sympathetic or other aspects of a defendant's character or record that the defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial." (V CT 1647-1648, 1665-1666; CALJIC 8.85.) This was sufficient to encompass any lingering doubt the jurors might have entertained. Moreover, Edwards's trial counsel argued before the jury at closing that, in reaching an appropriate penalty, they could consider any lingering doubt with respect to defendant's guilt. (XXV RT 6457-6466.)

Finally, the particular instruction proposed by Edwards was argumentative and speculative in that it invited the jury to consider the possibility evidence exists which exculpates Edwards but was, for some reason, not presented. It would have been properly refused on this basis as well. (*People v. Gurule, supra*, 28 Cal.4th at p. 659.) Accordingly, the trial court properly refused to give Edwards' special defense instruction on lingering doubt.

Even if a lingering doubt instruction should have been given, based on the instructions given and the arguments of counsel, there is no reasonable possibility that Edwards was prejudiced from the lack of the instruction. (*People v. Carter* (2003) 30 Cal.4th 1166, 1221-1222.) As previously stated, CALJIC penalty phase instructions "are adequate to inform the jurors of their sentencing responsibilities in compliance with federal and state constitutional standards." (*People v. Gurule, supra*, 28 Cal.4th at p. 659.) The jury was instructed using CALJIC No. 8.85. (*People v. Howard* (2010) 51 Cal.4th 15; 118 Cal.Rptr.3d 678, 700 ["CALJIC No. 8.85 properly instructed the jury on its consideration of aggravating and mitigating factors."].) This was sufficient to encompass any lingering doubt the jurors might have entertained. Moreover, Edwards trial counsel argued before the jury at closing that, in reaching an appropriate penalty, they could consider any lingering doubt with respect to defendant's guilt. (XXV RT 6457-6466.) As this Court recently stated:

> We have repeatedly held that instruction on lingering doubt is not required by state law, and that the standard instructions on capital sentencing factors, together with counsel's closing argument, are sufficient to convey the lingering doubt concept to the jury. (E.g., *People v. Lewis* (2009) 46 Cal.4th 1255, 1314; *People v. Demetrulias* (2006) 39 Cal.4th 1, 42, 45; *People v. Hines* (1997) 15 Cal.4th 997, 1068.)

(*People v. Hartsch* (2010) 49 Cal.4th 472, 513; *People v. Howard, supra,* 118 Cal.Rptr.3d at p. 700.) Thus, even assuming error, it was harmless.

CONCLUSION

For the foregoing reasons, and the reasons stated in Respondent's Opening Brief, Edwards' convictions and the judgment of death should be affirmed in its entirety.

Dated: March 11, 2011

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached SUPPLEMENTAL RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 21,505 words.

Dated: March 11, 2011

KAMALA D. HARRIS
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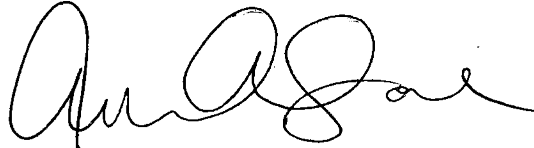

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Robert Edwards**
No.: **S073316**

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 that same day in the ordinary course of business.

On March 11, 2011, I served the attached **SUPPLEMENTAL RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on March 11, 2011, at San Diego, California.

Laura Ruiz
Declarant

Signature

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