SUPREME COURT COPY

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In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **THOMAS BATTLE,** **Defendant and Appellant.**	**CAPITAL CASE** Case No. S119296

SUPREME COURT
FILED

DEC 17 2014

Frank A. McGuire Clerk

Deputy

San Bernardino County Superior Court Case No. FVI012605
The Honorable Eric M. Nakata, Judge

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STATEMENT OF THE CASE

On November 21, 2001, the San Bernardino District Attorney filed an information, alleging that Thomas Lee Battle murdered Andrew Demko (Pen. Code, § 187, subd. (a) -- count 1); murdered Shirley Demko (Pen. Code, § 187, subd. (a) -- count 2); committed first degree residential burglary (Pen. Code, § 459 -- count 3); committed first degree residential robbery (Pen. Code, § 211 -- count 4); kidnapped Andrew Demko (Pen. Code, § 207, subd. (a) -- count 5); and kidnapped Shirley Demko (Pen. Code, § 207, subd. (a) -- count 6). (1 CT 144–148.) It was alleged that Battle committed multiple murders within the meaning of Penal Code section 190.2, subdivision (a)(3), and that the murders alleged in counts 1 and 2 were committed during the commission of a burglary (Pen. Code, § 190.2, subd. (a)(17)(A)), a robbery (Pen. Code, § 190.2, subd. (a)(17)(G)), and kidnappings (Pen. Code, § 190.2, subd. (a)(17)(M)). (1 CT 149–151.) It was also alleged that during the commission of these offenses, Battle personally used a deadly and dangerous weapon, a knife (Pen. Code, § 12022, subd. (b)(1)). (1 CT 148.) The information further alleged that on February 14, 1995, Battle suffered a prior conviction for burglary (Pen. Code, § 459), a serious or violent felony (Pen. Code, §§ 667 & 1170.12), and that on April 15, 1997, Battle suffered a prior conviction for forgery (Pen. Code, § 470), which resulted in a prison term (Pen. Code, § 667.5, subd. (b)). (1 CT 148–149.)

On March 11, 2003, a jury trial began, and closing arguments concluded on April 7, 2003. (2 CT 437, 480.)

On April 10, 2003, the jury began its deliberations. (2 CT 589, 591–595; 3 CT 601, 604.) On April 22, 2003, the jury found Battle guilty on all counts and found true the weapon allegation and all the special circumstances. (3 CT 606–624, 632–633.) The defense and the People stipulated that the prior-offense allegations were true. (3 CT 699.)

On April 24, 2003, the penalty phase began. (3 CT 634.) On May 5, 2003, the parties presented their closing arguments and the jury was instructed. (3 CT 700.) The jury began its penalty phase deliberations that same day. (3 CT 701–703, 709, 718.) On May 9, 2003, the jury returned a verdict of death. (3 CT 718.)

On September 4, 2003, the trial court sentenced Battle to death on counts 1 and 2, and to a determinate term of a total of 30 years 4 months, for counts 3, 4, 5, and 6,[1] to be stayed pursuant to Penal Code section 654, and ordered Battle to pay victim restitution of $10,000 pursuant to Penal Code section 1202.4. (3 CT 787–788.)

STATEMENT OF FACTS

A. Guilt Phase

1. Prosecution's case

In the early morning hours of November 13, 2000, Battle broke into an elderly couple's home, bound them with zip ties, and stuffed them in the trunk of their own car. He then drove them to the desert, where he stabbed and strangled the couple to death. Over the next several days, Battle returned to their home to steal their property and to conceal their disappearance. Battle was arrested nearly two weeks later.

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[1] Specifically, the court deemed count 5 (kidnapping of Andrew Demko) to be the principal count and sentenced Battle to the upper term of 16 years and to an additional 1 year for personal use of a knife. The court stayed count 5, as well as the remaining counts, which were ordered to be served consecutively to count 5: one-third the middle term on count 6 (kidnapping of Shirley Demko), for a total of 3 years 4 months, with an additional 1 year for personal use of a knife; one-third the middle term on count 4 (residential robbery), for a total of 2 years 8 months, with an additional 4 months for personal use of a knife; the middle term of 4 years on count 3 (burglary), with an additional 1 year for personal use of a knife. The court also sentenced Battle to an additional 1 year for the prison prior.

77-year-old Andrew Demko and 72-year-old Shirley Demko had been married for 22 years. (7 RT 1612–1613.) They both used walkers and canes to get around. (7 RT 1613–1614.) Mr. Demko had lost nearly all his hearing. (7 RT 1613.) Mrs. Demko had a glass eye. (7 RT 1614.) The couple lived with their two dogs in a house in Apple Valley in San Bernardino County. (7 RT 1612–1613, 1619.)

On November 18, 2000, a man and his son were hunting in the San Bernardino desert when they found a man lying dead on the ground. (6 RT 1364, 1369–1370.) Police arrived and, with the assistance of a highway-patrol aircraft, also found the body of a dead woman about 200 yards away from the man's body. (6 RT 1373, 1375–1376.) Police later found zip ties and blood-stained duct tape in the area. (10 RT 2508–2509, 2511–2512.) The man's body was later identified as belonging to Mr. Demko and the woman's as belonging to Mrs. Demko. (9 RT 2251, 2260; 10 RT 2650.)

Mr. Demko was wearing blue pajamas, a blue bathrobe, and a single blue slipper. (6 RT 1395.) There was blood on his pajama shirt. (6 RT 1395.) The matching slipper was found in a nearby area amongst disheveled ground consistent with scuffling and dragging through the dirt. (6 RT 1421–1422.) An autopsy revealed that Mr. Demko died from strangulation and from a stab wound to the neck. (10 RT 2338.) Mr. Demko also had abrasions and bruising to the forehead, which were caused by blunt force, as well as injuries to his hands, wrists, knees, feet, and arms. (9 RT 2303–2310.) Some of the injuries appeared to have been caused by Mr. Demko's having been bound and others by his having been dragged. (9 RT 2322–2327.)

Mrs. Demko was found on her stomach. (7 RT 1432.) She was wearing pajamas with a small purple floral print. (7 RT 1432, 1456.) The ground near her body was saturated in blood. (7 RT 1432, 1434–1435, 1469.) From the waist up, Mrs. Demko's body had been eaten by wild

animals; all the flesh and muscle meat from the upper torso was missing, and there were only a few internal organs remaining inside the body cavity. (7 RT 1456; 10 RT 2353.) Mrs. Demko's right shoulder was detached and her skull was devoid of any skin. (7 RT 1456.) Mrs. Demko's hands were duct-taped together and therefore remained intact. (7 RT 1456–1457.) The cause of Mrs. Demko's death was homicidal violence of undetermined etiology. (10 RT 2352.) Because much of Mrs. Demko's body was missing, the specific mechanism of death could not be determined. (10 RT 2353.)

The Demkos' adult children, Denise Goodman and Richard Demko,[2] accompanied police to inspect the Demkos' house. (7 RT 1623.) They found a burnt cigarette; an open newspaper dated November 13, 2000; reading glasses; and a cup of coffee on the kitchen table. (7 RT 1647, 1653–1654, 1661, 1679.) Denise explained that Mr. Demko was a "creature of habit" and, ever since she was a little girl, would wake up early, read his newspaper, and drink a cup of coffee. (7 RT 1617–1618.) Seven other unwrapped newspapers were also found stacked in the dining room: six Los Angeles Times (dated November 14–19, 2000) and a Desert Dispatch (dated November 14, 2000). (7 RT 1656–1657.) In the kitchen trash can, there were also two FedEx notes, one of which was dated November 21, 2000. (7 RT 1651.) Because the Demkos' bodies were found on November 18, 2000, and these FedEx notes and newspapers were found inside the house, police deduced that someone had been in the house after the murders. (7 RT 1651.)

On November 25, 2000, a week after the Demkos' bodies were discovered, police pulled over a woman who was driving the Demkos' car,

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[2] Denise and Richard were Mr. Demko's children and Mrs. Demko's stepchildren.

a blue Mercury Sable. (7 RT 1631, 1694, 1697–1698.)[3] Following an inspection of the car, police found blood stains on the inside of the trunk lid. (7 RT 1525.) The woman told police that she had borrowed the car from Battle, who was at the home of Jessica McCune, a close friend of his. (7 RT 1697; 8 RT 1715, 1730.) Police went to McCune's home and arrested Battle. (8 RT 1797.) Following his arrest, Detectives Michael Gilliam and Derek Pacifico took Battle to the police station to begin interviewing him. (3 RT 521.)

During the course of multiple interviews,[4] Battle told several versions of what happened. In the initial interview following Battle's arrest, Battle said that he had borrowed the Demkos' car from someone else and knew nothing about the Demkos' murders. (3 CT 873, 891–892.)[5] During that same interview, he later changed his story, telling police that he went along with the burglary of the Demkos' home with four others, but had no idea they were planning to kill the Demkos and was not present for the killings themselves. (4 CT 903, 910–914, 924.) More than 24 hours later, when

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[3] She mistakenly testified that it was a Ford Taurus, but on redirect examination clarified that a Ford Taurus and a Mercury Sable look a lot alike. (4 RT 1694, 1701–1702.)

[4] A more detailed discussion of the interviews is found in Argument Section II, which addresses Battle's challenge of the interviews.

[5] The citations in this paragraph are to the transcripts of the redacted versions of the tape recordings that the jury heard. (See 8 RT 1803–1805, 1811–1812, 1900, 2004, 2012–2013; 9 RT 2077–2079.) The jury was also provided with copies of these transcripts. (See 8 RT 1805 [Exhibit 256f, at 3 CT 868–4 CT 940]; 8 RT 1900 [Exhibit 257d, at 4 CT 955–966]; 8 RT 2004 [Exhibit 258g, at 4 CT 1083–1164]; and 9 RT Exhibit 2078 [Exhibit 259h, at 5 CT 1316–1462].) The content of the recordings themselves were not transcribed.

talking to another interviewer,[6] Battle changed the story again, this time admitting that he knew there was a plan to kill the Demkos but maintaining that he was neither involved nor present when they were killed. (4 CT 1099–1104.) After the interviewer directly accused Battle of killing the Demkos, Battle admitted not only being present at the murders but also actually stabbing the Demkos himself. (4 CT 1155–1158.) He claimed, however, that he stabbed the Demkos only because one of his four cohorts ordered him at gunpoint to do so. (4 CT 1155–1158.) When the original officers interviewed Battle a final time and pointed out some inconsistencies in Battle's story about four other accomplices, Battle changed his story again. (5 CT 1390–1393.) This time, Battle said that he alone burglarized the Demkos' home, later told another man, Perry Washington, and then Washington went back by himself and killed the Demkos. (5 CT 1398–1399, 1400, 1412.) When the police did not believe that Battle was not present or involved in the actual killings, Battle changed his story a final time, this time saying that both he and Washington went back to the Demkos' house and Washington forced him at gunpoint to stab the Demkos. (5 CT 1424–1425, 1430.)

Despite all the variation in his stories, the details Battle recounted during the interviews matched the other evidence of how the burglary and murders took place. Battle accurately described where the house was located and the details of the house's interior layout, such as the location of the garage, the existence of double doors, and the location and layout of the Demkos' bedroom. (4 CT 911–917; 7 RT 1623–1651; 9 RT 2106–2107.) Battle also said that when he arrived at the house in the early morning,

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[6] This interview was part of a polygraph examination, but the recordings and transcripts were redacted so the jury was unaware of that fact.

Mr. Demko was sitting at the kitchen table reading the newspaper (5 CT 1419); this matched Denise's description of her father's daily routine and was corroborated by the open newspaper, reading glasses, and cup of coffee found on the kitchen table. (7 RT 1617, 1647, 1653–1654, 1679.) Battle also noted that Mr. Demko was hard of hearing. (4 CT 919; 7 RT 1613.) Battle further admitted that he had returned to the Demkos' home at least once to collect the newspapers and the FedEx slips from the front of the house and put them inside so that no one would detect the Demkos' disappearance. (4 CT 936–937; 7 RT 1651–1652, 1655–1657.) Additionally, the autopsy and forensic analysis were consistent with the details Battle gave about the killings: he accurately described Mr. Demko as wearing blue pajamas and a blue robe, and he noted that Mrs. Demko was wearing pajamas at the time of the murder (4 CT 931; 5 CT 1372; 6 RT 1395; 7 RT 1432); his statements that the Demkos were bound with zip ties and duct tape were consistent with the abrasions on their bodies and the discovery of zip ties and duct tape at the murder scene (5 CT 1344–1345, 1359, 1406–1408; 7 RT 1457; 10 RT 2357, 2359–2365, 2508–2509, 2511–2512); blood found inside the lid of the trunk of the car was consistent with Battle's statements that the Demkos were wounded and shoved inside it (5 CT 1357–1359; 7 RT 1525); Battle's description of the route from the Demkos' house to the desert where the killings took place was accurate (5 CT 1363–1364; 8 RT 1929–1932); and the physical evidence corroborated Battle's statements that the Demkos were strangled and stabbed with a kitchen knife. (5 CT 1365–1366, 1432; 9 RT 2253–2254, 2301–2306.)

In addition to the police interviews, other evidence linked Battle to the Demkos' murders. At the time of the murders, Battle lived less than two miles away from the Demkos in a home run by a Christian outreach program. (8 RT 1927; 11 RT 2692, 2812.) He lived there with other people, most of whom were parolees, including William Kryger, his

roommate, and Washington. (9 RT 2196, 2217; 10 RT 2439; 11 RT 2812.) Around the time of the murders, Kryger saw Battle in a black sweatsuit holding duct tape and zip ties. (10 RT 2443–2444.) When Kryger asked Battle what he was doing, Battle told him not to worry about it and then left. (10 RT 2444.) Before the murders, Battle told Matthew Hunter, one of his friends, that he was going to acquire a car and that the people from whom he would get the car would "come up missing" in the desert. (9 RT 2198–2199.) Battle also told Hunter that he could bury a body in the desert and nobody would ever find it. (9 RT 2199.) Battle told Anthony Bennett, another acquaintance, that he could get him cars "real cheap." (9 RT 2178.)

Around the day of the murders, Kryger saw Battle unloading cleaning supplies, videocassettes, and a television set from a car that matched the description the Demkos'. (7 RT 1606; 10 RT 2445–2446.) Pawn slips and fingerprints confirmed that two days after the murders, Battle pawned videocassettes. (9 RT 2237–2246, 2255–2257.) Battle told police that some of the videocassettes he pawned belonged to the Demkos. (3 CT 893–894.) Four days after the murders, Battle pawned the Demkos' television set and VCR, along with some of his own property. (9 RT 2237–2246; 12 RT 3028.) More of the Demkos' property—including a VHS cassette with Mrs. Demko's name on it, gas cards, calling cards, credit cards, a check, stereo speakers that fit the dimensions of impressions made in the Demkos' carpet—was discovered hidden both in Battle's room and at Jessica McCune's home, where police ultimately found and arrested Battle 12 days after the murders. (9 RT 2098–2099; 10 RT 2479, 2481–2488, 2513–2514, 2521.) Directly following the murders, Battle had control of the Demkos' Mercury Sable. (7 RT 1606, 1694–1697, 1701–1702; 9 RT 2199–2201, 2411; 10 RT 2445.) When friends and acquaintances asked about Battle's newly acquired property, Battle lied about it, either saying it

belonged to his sister or claiming he bought it himself. (See, e.g., 8 RT 1719–1720; 11 RT 2819.)

Anticipating Battle's defense that Washington was the actual murderer, the prosecution presented evidence that Washington was at work at the time Battle said the killings took place. (10 RT 2523–2531; 4 CT 1253.)

2. Defense

The defense maintained that Washington was the actual killer and that Battle was not involved at all in the Demkos' murders. In support of its argument, the defense sought and was granted judicial notice of Washington's prior robbery convictions (12 RT 3057–3058), elicited testimony from Kryger about a residential burglary orchestrated by Washington earlier in the same month of the Demkos' murders (10 RT 2458, 2460–2462), and had a lawyer testify that under the three strikes law, Washington would face a sentence of 25 years to life if convicted of another burglary (12 RT 2998–3000). The defense also elicited testimony from Battle's friends and acquaintances that Battle had peculiar interactions with Washington around the time of the murders: namely, that on the day of his arrest, Battle appeared to be having a telephone conversation with Washington, and it appeared that Washington was directing Battle's behavior, and Battle was afraid (9 RT 2136–2137); that whenever Battle was in the Demkos' car, Washington was also there (11 RT 2816–2836); and that Washington and Battle were seen together engaging in cryptic behavior (12 RT 2979–2989). In addition, the defense presented evidence that Washington had used some of the Demkos' property. (10 RT 2648–2660; 11 RT 2681–2689; 12 RT 3163–3164.) Finally, the defense called Johnney Prowse, Washington's former fellow inmate, who testified that Washington told him that he "got away with a couple of hot ones" for which Battle was accused. (11 RT 2839.) Prowse "believe[d]" he told law

enforcement about Washington's comments. (11 RT 2840–2844, 2845–2846.)

3. Prosecution's Rebuttal

On rebuttal, law enforcement officers testified that Prowse never told them about a fellow inmate having confessed to a crime for which someone else was being framed. (11 RT 2844; 12 RT 3005–3025.)

B. Penalty Phase

1. Prosecution's case in aggravation

In addition to relying on the facts and circumstances of the killings themselves, the prosecution presented further evidence in aggravation. The prosecutor introduced the fact that Battle was previously convicted of two prior felonies: a residential burglary on March 7, 1995 and a forgery on April 15, 1997. (15 RT 4000–4001.) The prosecution also presented evidence that Battle, while serving time for the forgery conviction, participated in a prison riot in 1999. (13 RT 3482–3492, 3500–3509.)

In addition, the prosecution called Matthew Hunter and Anthony Bennett, who had previously lived with Battle in another recovery home. (13 RT 3515, 3529.) The two testified that one night Battle got drunk and twice struck Hunter on the head with a brandy bottle, knocking him to the ground and causing lacerations. (13 RT 3517–3519.) Battle told Bennett that he did it because Hunter was hitting on his girlfriend and further elaborated that he tried to kill Hunter. (13 RT 3531–3532.)

Denise Goodman and Richard Demko testified about the loss of their father and stepmother. Denise told the jury how she was a "daddy's girl," had great memories of her father, and how he taught her she could do anything she set her mind to. (13 RT 3543.) She described the horror of learning her father and stepmother were killed and having to learn at trial about the details of how they were killed. (13 RT 3554–3557, 3571.)

Following her parents' murder, Denise became cynical and distrusting, was scared of shadows, constantly locked doors behind her, and suffered nightmares. (13 RT 3558–3560.) Richard considered his father his mentor and the biggest fan of his music career. (13 RT 3565.) His teenage daughter also loved the Demkos, and they adored her. (13 RT 3567, 3572.) Richard talked about how his parents' murder took away his sense of security and made him afraid to let his daughter ride her bike out on her own. (13 RT 3570.) He also described how hard it was to know what his parents experienced, having been put in the trunk of a car and taken out to the desert to be butchered. (13 RT 3572.)

Finally, Denise and Richard shed light on the Demkos' lives. They explained how Mr. Demko married Mrs. Demko after their mother died of a brain tumor. (13 RT 3554.) The couple traveled, golfed, watched movies, went out dancing, and enjoyed each other's company. (13 RT 3547–3552, 3566.) They had a wonderful relationship and would do anything for each other. (13 RT 3552, 3567.) The Demkos came from humble means. (13 RT 3538.) Mr. Demko was raised in a rough neighborhood in Chicago; in order to escape poverty and attain an education, he joined the armed services and served in World War II where he suffered back and ear damage in an explosion. (13 RT 3538–3540.) Mrs. Demko also had a tough childhood; her mother died in childbirth, and Mrs. Demko grew up moving between various foster care homes. (13 RT 3547, 3566.)

2. Defense's case in mitigation

As mitigating evidence, Battle introduced evidence about his early childhood and adolescence, expert psychological analysis of the effects of his upbringing, and information about prison conditions for inmates serving life without parole. (14 RT 3608–15 RT 3957; 6 CT 1649–1686.) Specifically, Battle presented the testimony of his biological father, three of his biological aunts, his biological grandmother, and two biological half

sisters. (14 RT 3618–3619, 3637–3638, 3666, 3687–3688, 3695, 3746, 3748, 3758–3759.) They testified about the conditions surrounding Battle's childhood, which involved great poverty and racism, leading to his biological mother's placing him for adoption with the Battles just before his fifth birthday. (See 14 RT 3657–3658, 3666, 3677–3678, 3681–3685, 2692.) Battle also introduced testimony from his adoptive mother, who raised him until the age of 17. (15 RT 3957; 6 CT 1649–1686 .) A psychologist, Dr. Joseph A. Lantz, testified that Battle's childhood marred him and interferes with his ability to bond with others and to develop a sense of trust and interconnectedness. (14 RT 3807–3852.) Finally, Battle elicited testimony from Anthony Casas, a former associate warden of San Quentin State Prison, who testified about the conditions for prisoners serving life without parole. (14 RT 3721–3743.)

ARGUMENT

I. THE TRIAL COURT PROPERLY DENIED BATTLE'S *BATSON/WHEELER* MOTION BECAUSE BATTLE FAILED TO MAKE THE REQUISITE PRIMA FACIE SHOWING THAT THE PROSECUTOR EXERCISED PEREMPTORY CHALLENGES BASED ON RACE

Battle contends that the trial court erred in finding that he failed to make a prima facie case that the prosecutor exercised his peremptory challenges in a racially discriminatory manner based on his challenges to Prospective Jurors J.B. and S.W. (AOB 50–117.) To the contrary, the prosecutor's excusal of these two Black[7] prospective jurors was insufficient to establish a prima facie case of racial discrimination.

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[7] Respondent describes the jurors being discussed in this argument as "Black" because the prospective jurors themselves most consistently used that term to describe their race. (See, e.g., 19 CT 5332 [S.W. -- "Black"]); 14 CT 4072 [J.B. -- "Black - Afro American"]; 14 CT 4212 [E.F. -- "Negro"]; 9 CT 2532 [J.K. -- "Black -African American"]; 13 CT

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The use of peremptory challenges to strike prospective jurors because of their race violates the right of a criminal defendant to be tried by a jury drawn from a representative cross-section of the community under article I, section 16 of the California Constitution and the right to equal protection under the United States Constitution. (*People v. Lopez* (2013) 56 Cal.4th 1028, 1048; *People v. Mills* (2010) 48 Cal.4th 158, 173; *People v. Hamilton* (2009) 45 Cal.4th 863, 898 (*Hamilton*), citing *People v. Wheeler* (1978) 22 Cal.3d 258, 276–277 (*Wheeler*), overruled in part in *Johnson v. California* (2005) 545 U.S. 162 [125 S.Ct. 2410, 162 L.Ed.2d 129] (*Johnson*); *Batson v. Kentucky* (1986) 476 U.S. 79, 88 [106 S.Ct. 1712, 90 L.Ed.2d 69] (*Batson*), overruled in part, *Powers v. Ohio* (1991) 499 U.S. 400 [111 S.Ct. 1364, 113 L.Ed.2d 411]; *People v. Davis* (2009) 46 Cal.4th 539 (*Davis*).) When a defendant believes the prosecutor's reason for exercising a peremptory challenge is based upon such discrimination, a timely *Batson/Wheeler* motion must be made. (*People v. Young* (2005) 34 Cal.4th 1149, 1172.) There is a rebuttable presumption that a peremptory challenge is being exercised properly, and the burden is on the opposing party to demonstrate impermissible discrimination. (*People v. Mills*, *supra*, 48 Cal.4th at p. 184; *People v. Bonilla* (2007) 41 Cal.4th 313, 343 (*Bonilla*).) Accordingly, the defendant carries the burden of establishing the prosecutor exercised a peremptory challenge based on group bias. (*Rice v. Collins* (2006) 546 U.S. 333, 338 [126 S.Ct. 969, 163 L.Ed.2d 824]; *Purkett v. Elem* (1995) 514 U.S. 765, 767–768 [115 S.Ct. 1769, 131 L.Ed.2d 834].)

The United States Supreme Court has reaffirmed that *Batson* states the procedure to follow in considering such a claim. (*Johnson*, *supra*, 545

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3623 [A.H. -- "Black American"]; 20 CT 5640 [M.N. -- "Black"]; 12 CT 3340 [B.A. -- "Black].)

U.S. at p. 168; see also *Snyder v. Louisiana* (2008) 552 U.S. 472, 476–477 [128 S.Ct. 1203, 170 L.Ed.2d 175].) A trial court follows a three-step procedure: *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"; *second*, if the defendant makes a prima facie case, the "burden shifts to the [prosecutor] to explain adequately the racial exclusion" by offering permissible race-neutral justifications for the strikes; and *third*, if the prosecutor offers a race-neutral explanation, the trial court then decides whether the defendant has proven purposeful discrimination. (*Johnson*, *supra*, 545 U.S. at p. 168; see also *People v. Sattiewhite* (2014) 59 Cal.4th 446, 469 (*Sattiewhite*).)

Battle's trial pre-dated the Supreme Court's decision in *Johnson*. While the trial court invoked the term "systematic exclusion" (5 RT 1128–1130), the court did not articulate the standard it applied in ruling that a prima facie case had not been made. Where the record is unclear as to whether the trial court applied the correct *Johnson* ("reasonable inference") standard, this Court independently applies that standard to determine whether the record supports an inference that the prosecutor excused a juror on a prohibited discriminatory basis.[8] (*Sattiewhite*, *supra*, 59 Cal.4th at

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[8] Battle challenges this Court's long-established practice of independent review and application of *Johnson*, *supra*, 545 U.S. 162, and asks this Court instead to remand to the trial court for further proceedings. (See AOB 61–79.) Other than general disagreement with this Court's practice, Battle offers no compelling reason for this Court to violate principles of stare decisis in order to deviate in this case from its normal practice. A remand would be appropriate only if this Court were to conclude that the trial court erroneously denied Battle's *Batson/Wheeler* motion at the first stage. Under that circumstance, the appropriate remedy is to remand the matter in order for the trial court to undertake the second- and third- stage analyses required under *Batson/Wheeler*. If, upon remand, the trial court finds that due to the passage of time, or other reasons, it

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p. 470; *People v. Davis*, *supra*, 46 Cal.4th at p. 582; *Hamilton*, *supra*, 45 Cal.4th at pp. 898–899.) Battle made no such showing.

A defendant establishes a prima facie case "by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred." (*Johnson*, *supra*, 545 U.S. at p. 170; see also *People v. Harris* (2013) 57 Cal.4th 804, 833 (*Harris*).) A prima facie showing may be made from anything in the record, including evidence that the prosecutor struck most or all of the members of an identified group, or used a disproportionate number of peremptory strikes against members of that group; that the stricken jurors share only membership in that group as a common characteristic and in all other respects were as heterogeneous as the community as a whole; that the prosecutor failed to engage the stricken jurors in more than desultory voir dire, or to ask them any questions at all; and that the defendant is a member of that group and the victims are members of the group to which the majority of the remaining jurors also belong. (*Harris*, *supra*, 57 Cal.4th at pp. 834–835.)

Without objection, the prosecutor used his fifth peremptory strike to excuse S.W., who was Black. (5 RT 1032.) The prosecutor later used his ninth peremptory challenge to excuse J.B., who was also Black. (5 RT 1099.) At a break following the prosecutor's use of his eleventh peremptory challenge, Battle's counsel made a *Batson/Wheeler* motion based primarily on the excusal of J.B. (5 RT 1123.) In support of his

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cannot adequately address or make a reliable determination; or if it finds the prosecutor exercised peremptory challenges improperly, then the matter should be set for a new trial. (*People v. Johnson* (2006) 38 Cal.4th 1096, 1103–1104.) However, as explained herein, the trial court did not abuse its discretion in denying Battle's motion given his failure to make a prima facie showing of discriminatory exercise of peremptory challenges by the prosecution.

motion, counsel argued that the prosecutor had stricken two out of the three Black jurors in the box, which was significant in light of the dearth of potential Black jurors; that he had questioned J.B. more than he had questioned the other jurors; and that, while he could not say for sure, he believed that the prosecutor earlier had asked the defense to stipulate to excuse for cause J.B. and other Black jurors based on their questionnaires alone, even though there was "absolutely no reason to do that other than racial bias." (5 RT 1123–1127.) The trial court found that the defense failed to make a prima facie showing. (5 RT 1128–1130.) Consequently, the prosecutor gave no reasons for excusing either S.W. or J.B. (5 RT 1130.)

Contrary to Battle's contentions (AOB 83–91), no clear inferences can be drawn from a statistical analysis of the prosecutor's use of peremptory challenges in this case. At the time of the *Batson/Wheeler* motion, the prosecutor had used 18.18 percent (2 out of 11) of his peremptory challenges to excuse Black jurors. (5 RT 1032, 1099, 1115, 1123.) This number is only slightly higher than the percentage of Black jurors subject to potential peremptory challenges by the prosecutor, which was 10 percent.[9] In any event, it is "impossible" to "draw an inference of

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[9] At the time of the motion, Battle said the percentage of eligible prospective Black jurors was 8.13 percent; now he says it was 7.31 percent. (AOB 84; 5 RT 1125.) Neither of these calculations is accurate because both rely on the total number of Black prospective jurors as a percentage of the total number of jurors in the venire at large. Yet the relevant inquiry is whether the prosecutor "used a disproportionate number of his peremptories against" Black prospective jurors. (See *Wheeler*, *supra*, 22 Cal.3d at p. 280.) The percentage of Black jurors available in the venire at large is therefore not the relevant baseline for judging the disproportionality of the prosecutor's use peremptory challenges; the only jurors *actually* subject to peremptory strikes were those seated in the jury box. (See 4 RT 826 [court explaining procedures for peremptory challenges].) Thus, the

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discrimination" from the fact that the prosecutor struck two of the three Black prospective jurors in the box (see *Bonilla*, *supra*, 41 Cal.4th at p. 343); indeed, as this Court has repeatedly explained, "[a]s a practical matter, the challenge of one or two jurors can rarely suggest a pattern of impermissible exclusion" such that establishes a prima facie case of discrimination. (*Harris*, *supra*, 57 Cal.4th at p. 835 [citing *Bonilla*, *supra*, 41 Cal.4th at p. 343, which cites other cases], italics omitted.) This is because the excusal of one or two jurors does not provide a sufficient sampling from which to draw any reliable inferences. (See *Harris*, at

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accurate baseline is the number of Black jurors who are subject to peremptory challenge by the prosecutor, i.e., those who were in the jury box and were actually (not just theoretically) available for the prosecution to strike, as a percentage of the total number of jurors to make it into the jury box. (See *People v. Bell* (2007) 40 Cal.4th 582, 619, fn. 4 (*Bell*) ["A more complete analysis of disproportionality compares the proportion of a party's peremptory challenges used against a group to the group's proportion in the pool of jurors *subject to peremptory challenge*"], italics added.)

The parties agree that, at the time of the *Batson/Wheeler* motion, three Black jurors (S.W., E.F., and J.B.) had made it to the jury box. By the time the prosecutor used his eleventh (and final pre-*Batson/Wheeler*-motion) peremptory challenge, a total of 37 jurors had made it into the jury box. (See 4 RT 893–5 RT 1115.) However, five (including one Black juror) had been dismissed for cause, hardship, or by stipulation and were never candidates for peremptory challenge. (See 5 RT 931 [C.W.], 981 [J.N.], 1063 [J.P.], 1064 [C.K.], 1073 [J.K.].) An additional two jurors were excused by the defense immediately after they were added to the jury box and thus the prosecutor had no opportunity to exercise a peremptory challenge against them. (See 5 RT 995 [B.P.] and 5 RT 1021 [S.H.].) This leaves 30 total prospective jurors who entered the jury box and were actually "subject to peremptory challenge" by the prosecutor. (See *Bell*, *supra*, 40 Cal.4th at p. 619 fn. 4.) Thus, rather than 6 out of 86, or even 6 out of 82, the relevant numbers are 3 out of 30—or 10 percent.

p. 870 (conc. opn. of Liu, J.) ["Given the small number of black jurors, I agree that the prosecutor's strikes of two black jurors did not amount to a pattern that conclusively raises an inference of discrimination"].)

Battle's numerical showing is especially weak evidence in light of other facts. The prosecutor did not strike those two jurors right away, but rather passed on striking them for several rounds of peremptory challenges before ultimately excusing them. (4 RT 893, 1032 [prosecutor passed on striking S.W. for four rounds of peremptories]; 4 RT 1036, 1099 [prosecutor passes on striking J.B. for three rounds of peremptories]; see *People v. Clark* (2011) 52 Cal.4th 856, 906 (*Clark*) [that prosecutor passed several rounds of peremptory challenges before finally excusing prospective African–American jurors dispelled inference of discriminatory motive].) Furthermore, at the time of the defense's *Batson/Wheeler* motion, the prosecutor had exercised more than half of his peremptory challenges but had not excused E.F., another Black prospective juror who had been in the jury box from the very beginning. (5 RT 893; see *People v. Blacksher* (2011) 52 Cal.4th 769, 802 [prosecutor's failure to challenge other jurors from racial group helps show lack of discriminatory purpose].) Indeed, it was defense counsel—not the prosecutor—who ultimately struck E.F.; and, at the time defense counsel struck E.F., the prosecutor had exercised 18 of his 20 peremptory challenges and had passed on striking him every time. (See 4 RT 893; 6 RT 1219, 1226.) Finally, any inference of discriminatory intent is further belied by the prosecutor's ready acceptance of a Black potential juror as an alternate.[10] (Cf. *Johnson, supra,*

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[10] This juror described himself as "African descendant" (8 CT 2027.) Not only did the prosecutor not strike this alternate juror, the prosecutor passed on the opportunity to exercise a peremptory challenge and affirmatively accepted the composition of the jury immediately after this alternate juror was added. (See 6 RT 1263–1266.) While Battle wishes to

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545 U.S. at p. 165 [prima facie case shown where the prosecutor removed all eligible Black prospective jurors and the resulting jury, including alternates, was all White].)

Proof of a prima facie case may be made from any information in the record available to the trial court. (*People v. Davis*, *supra*, 46 Cal.4th at p. 583.) Accordingly, this Court can consider *possible* race-neutral reasons in determining whether Battle satisfied his burden of showing a prima facie case of discriminatory purpose for exercising peremptory challenges of prospective jurors J.B. and S.W. (See *Harris*, *supra*, 57 Cal.4th at p. 835 [considering possible race-neutral reasons as part of the totality of relevant facts in evaluating whether a prima facie case was shown].) Here, the record reveals compelling race-neutral reasons for the prosecutor's excusal of both J.B. and S.W.[11] In her questionnaire, J.B. wrote that it was 'cruel' and 'inhumane' for a jury to vote for a person to be sentenced to death. (14 CT 4088.) While J.B. ultimately agreed that she could follow the law, the prosecutor was unlikely convinced given her statement during voir dire that it was "unfortunate that if it's proven that he's guilty [she has] to go along

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ascribe "limited relevance" to this Black alternate juror's inclusion (AOB 83 fn. 25), it bears noting that in a trial estimated to last nearly two months, the likelihood that an alternate would ultimately end up on the actual jury was very high. It is significant that the prosecutor—presumably aware of the likelihood one of the alternate jurors might have to serve—did not strike this Black alternate juror. Indeed, an alternate juror *did* ultimately serve after one of the seated jurors injured her back during the penalty phase. (14 RT 3577–3580.) The court chose one of the alternates, Alternate Juror No. 184, at random by having the clerk pull a name out of a "lottery box." (18 RT 3579–3581.)

[11] Battle spends virtually no space discussing S.W. in his opening brief and spent no time arguing about her in the trial court. (See generally AOB 50–117; 5 RT 1123–1131.) Because S.W. was—and is—an essential part of Battle's statistical allegation of discrimination (see AOB 84, fn. 27; 5 RT 1125), respondent discusses S.W. despite Battle's failure to do so.

with the law" rather than by how she "feels." (5 RT 1041.) Few prosecutors, if any, would keep a juror who found it "unfortunate" to have to "go along with the law." Similarly, the record shows clear race-neutral reasons to excuse S.W. During voir dire, the prosecutor asked the prospective jurors whether they had "concerns that when it actually came down to it [and] the defendant really d[id] deserve the death penalty" that they "could vote for it[.]" (5 RT 948.) S.W. answered, "I don't -- I'm not sure. I don't know. It would just be too difficult. I don't know if I could do death." (5 RT 948.) When asked further questions directly, S.W. said that she did not want to "have any part of it" and did not want to do it. (5 RT 949.) Like J.B., S.W.'s reservations about imposing the death penalty or serving on a death penalty jury were compelling race-neutral reasons for the prosecutor to seek her excusal.

S.W. is further notable because the record reveals that she should have been excused for cause and, had she been, the prosecutor never would have had to use a peremptory challenge against her. Indeed, this would have made his overall challenge rate of Black jurors directly proportionate to their percentage in the jury box. (See *People v. Jones* (2011) 51 Cal.4th 346, 362 [statistics not troubling because if the prosecutor had "had exercised one fewer challenge against African–Americans, he would have challenged them at a rate lower than their percentage on the jury"].) After S.W.'s statements about not being comfortable with the death penalty, the prosecutor challenged for cause S.W., in addition to two non-Black jurors, including a White woman named C.W. (5 RT 972–973; see also 23 CT 6480.) During voir dire, both C.W. and S.W. said they could consider both penalties as the law required. (5 RT 977–978.) S.W. wrote that she "favored the death penalty" (19 CT 6494) and C.W. said she "believe[d] in the death penalty" (23 CT 6480), but both said it would be "difficult" to vote for death and that they either did not "think" or did not "know" if they

could vote for death. (5 RT 948, 981.) In all material respects, S.W.'s views on imposing the death penalty—both in her questionnaire and during voir dire—were identical to C.W.'s. Yet the trial court excused C.W. for cause, while allowing S.W. to remain. (5 RT 981.) In fact, it appears that the trial court never ruled at all on the prosecutor's request to excuse S.W. for cause. (See 5 RT 972–981.) Significantly, had the trial court removed S.W. for cause, as it did C.W., the prosecutor would not have used a peremptory challenge to excuse her and his challenge rate of Black jurors would have been 1 out of 10, which is 10 percent—exactly equal to the percentage of Black jurors to have made it to the jury box by the time of defense's *Batson/Wheeler* challenge. (See, *ante*, at p. 16 & fn. 9.) This aspect of voir dire thus eliminates Battle's already weak statistical claim of racial discrimination.

Battle's additional allegations of racial discrimination—that the prosecutor questioned J.B. more than he did the other jurors, and that Battle believed the prosecutor had sought to stipulate to the excusal of J.B. and other Black jurors for no reason other than race (5 RT 1126–1128; AOB 92–95, 106, 110–112)—are unsupported by the evidence.

There was nothing lopsided about the prosecutor's examination of J.B. Of the five-and-a-half pages of question-and-answer between the prosecutor and J.B., much of the discussion was occupied by J.B. herself—indeed, the prosecutor and J.B. talked an equal amount, each occupying about 70 lines of the transcript. (5 RT 1038–1043.) Moreover, the majority of the discussion—more than three-fifths—occurred as a result of the prosecutor's asking J.B. about her statement in the questionnaire that a jury's voting for someone to be sentenced to death is 'cruel' and 'inhumane.' (5 RT 1040–1043; see also 14 CT 4088.) As discussed above, J.B.'s voir dire answers revealed that she was uncomfortable with the death penalty. Any additional time in questioning her was therefore justified to

determine whether J.B. was eligible to serve. Indeed, this is the very essence of voir dire. (Cf. *Harris*, *supra*, 57 Cal.4th at p. 835 [engaging jurors of a certain group in mere "desultory" voir dire, or failing to "ask them any questions at all," can support an inference of improper discrimination when the jurors are ultimately struck for no apparent basis other than race].)

Battle's further contention that the prosecutor sought to stipulate to the excusal of jurors for cause based solely on their race is meritless. Defense counsel's equivocal statement that "he [could not] say . . . for sure" but he "believe[d] that [the prosecutor] requested [him] to stipulate to [J.B.]" based on her questionnaire is hardly evidence. (5 RT 1126–1127.) In any event, J.B.'s questionnaire answer that it was 'cruel' and 'inhumane' for a jury to vote for a person to be sentenced to death, could have led the prosecutor to reasonably believe that she was unwilling to impose the death penalty and thus a candidate for stipulation for cause. (See 14 CT 4088.) Therefore, defense counsel's statement that there was "absolutely no reason to [request stipulation] other than racial bias" is belied by the record. (5 RT 1127.) The same is true of A.H., whom defense counsel also suggested (but offered no proof) that the prosecution wished to stipulate to dismiss. (5 RT 1127.) Again, even if that were so, A.H.'s answer that "[n]o matter what evidence is presented" she would "refuse to vote guilty as to murder . . . in order to keep the case from proceeding to the penalty trial," was legitimate reason enough for the prosecution to seek a stipulation to excuse her for cause. (13 CT 3638 [answering "Yes" to question #4].) Indeed, troubled by that answer, the prosecutor probed A.H. on it during his voir dire of the alternate jurors and, notably, A.H. was eventually dismissed for cause by joint stipulation. (6 RT 1241–1244, 1248.)

In an effort to bolster his claim of a prima facie showing, Battle presents various new arguments and additional facts on appeal. (AOB 81–

82, 91, 95–110, 112–117.) But because this Court independently reviews the record to determine whether Battle "produc[ed] evidence sufficient to permit the *trial judge* to draw an inference that discrimination has occurred" (*Johnson*, *supra*, 545 U.S. at p. 170, italics added), consideration of arguments and facts not "produc[ed]" in the trial court is inappropriate. (See *ibid.*) The only justification Battle provides for arguing these new claims is *Batson*'s instruction that courts consider "all relevant circumstances." (See AOB 91.) Yet "all relevant circumstances" refers only to those circumstances of which the trial judge was aware, not all circumstances one might gather in hindsight to establish a new case never presented to the trial court at all. (See *Johnson*, *supra*, 545 U.S. at p. 170 ["we assumed in *Batson* that the *trial judge* would have the benefit of all relevant circumstances"], italics added; *Batson*, *supra*, 476 U.S. at p. 96 ["the *trial court* should consider all relevant circumstances"], italics added.) Indeed, many of the facts upon which Battle relies occurred *after* he made the *Batson/Wheeler* motion, which was never renewed, and therefore under no circumstances can inform the analysis of whether Battle established a prima facie case at the time of his motion. In any event, Battle's new proffers are unavailing.

First, Battle's suggestion that his "all White" jury was somehow unfair is misleading. (See AOB 81–82.) As a threshold matter, it is well established that "a defendant has no right to a petit jury composed in whole or in part of persons of his own race" (*Batson*, *supra*, 476 U.S. at p. 85 [citations and quotations omitted]) and that "in a predictable percentage of cases the result will be a wholly unbalanced jury, usually composed exclusively of member of the majority group" (*Wheeler*, *supra*, 22 Cal.3d at p. 277). And while the fact of an all-White jury might in some cases contribute to an inference of impermissible discrimination, that inference is untenable in this case because Battle himself struck the final Black juror,

who had been in the jury box from the very beginning and whom the prosecutor had passed on excusing 18 times. (See 4 RT 893; 6 RT 1219, 1226.) It is misleading to suggest that the prosecutor caused and created an all-White jury when the creation of the all-White jury in this case was most proximately caused by Battle himself.

Second, Battle fails to support his contention that the prosecutor used more emphatic questioning against Black jurors than against other jurors with similar views about the death penalty. (AOB 95–98.) That is, while Battle alleges that the prosecutor's most intense inquiries were "disproportionately directed at African-American jurors" (AOB 97), he points only to the questioning of the Black jurors themselves and fails to contrast them at all against Battle's questioning of non-Black jurors. Without such an comparison, there is simply no way to determine disproportionality. Moreover, the inquiries Battle complains about—questions simply designed to probe whether jurors were comfortable imposing the death penalty (AOB 97)—are materially different from the seemingly irrelevant and graphic statements by the prosecutor in *Miller-El v. Cockrell* (2003) 537 U.S. 322, 344 [123 S.Ct. 322, 154 L.Ed.2d 931] (*Miller-El*), who "gave . . . explicit account[s] of the execution process" itself. Battle's analogy to *Miller-El* is thus inapposite. (See AOB 98.)

Third, Battle's characterization of the prosecutor as "eager[]" to excuse J.K. for hardship is plainly inaccurate. (See AOB 98–101.) J.K.'s hardship was unequivocal from the beginning: Serving on the jury would have made it difficult, if not impossible, for her to fulfill her nursing school obligations and could have resulted in a loss of the $1800 she had paid for that semester. (See 2 RT 79–81; 4 RT 844–847; 5 RT 1052–1060, 1074–1075; see also 25 CT 7085.) J.K. raised this hardship in open court at least four times over the course of multiple court days (2 RT 79–81; 4 RT 844–847; 5 RT 1052–1060, 1074–1075), attempted to describe it at length in her

questionnaire (9 CT 2544), and proffered a letter from her department administrator, who explained the situation in no uncertain terms (25 CT 7085). The trial court, pointing out that "[s]he's going to suffer more than any other juror that [it had] heard so far" (5 RT 1058), tried to urge the parties to stipulate to excuse J.K. The prosecutor agreed. (5 RT 1058.) To ascribe a racial motivation to the prosecutor's agreement is to engage in implausible conjecture. It was defense counsel's inexplicable and consistent refusal to stipulate to J.K.'s excusal in the face of clear hardship that was the only reason she remained in the jury venire as long as she did. (See, e.g., 5 RT 1074–1076). Defense counsel's insistence on keeping J.K. in the venire was especially puzzling because he had readily agreed to grant numerous similar—often even *less* compelling—hardship requests from other working students. (See, e.g., 2 RT 97–98, 105, 110, 115, 249, 254.) Noting that "the record is clear that the hardship on this particular juror is probably greater than any of the other ones that we've had excused for other reasons," and because it simply was not "fair" to J.K., the trial court finally felt compelled to exercise its *own* power to excuse her for good cause. (5 RT 1076–1077.) These events, which preceded the *Batson/Wheeler* motion but were not raised by defense counsel during it, simply do not assist Battle in any way in establishing that he made a prima facie showing of racial discrimination in the trial court.

Fourth, and finally, Battle points to the prosecutor's purportedly "high number of offers to stipulate" to the excusal of Black jurors for cause as probative of racially discriminatory intent with respect to his exercise of peremptory challenges. (AOB 101–117.) The alleged offers to stipulate to J.B. and A.H. were discussed above. (See, *ante*, at pp. 16 & 22.) On appeal, Battle tacks on two more examples that he did not raise in the trial court. (See AOB 106 [M.N.] & 112 [B.A.].) Neither is remarkable. M.N.'s questionnaire revealed an inability or unwillingness to impose the

death penalty. Specifically, M.N. wrote that she had a moral, philosophical, or religious objection to the death penalty and explained that "[t]he Lord God said I give life and I only I take life." (20 CT 5655.) She also said that, she "would have mercy and give him life in prison without possibility of parole." (20 CT 5657.) While M.N.'s questionnaire also contained some conflicting and neutral statements, the prosecutor's suspicion that she was unwilling to impose the death penalty was confirmed when she repeated anti-death-penalty views during voir dire, which led *defense* counsel to offer to stipulate to her excusal for cause. (5 RT 1081.) As for B.A., it was defense counsel who wished to have him excused for cause based on his peace officer status. (6 RT 1256.) When defense raised that request, the prosecutor simply said that he had earlier been willing to stipulate to B.A., but defense counsel did not want to stipulate because B.A. was Black. (6 RT 1247.) The fairest reading of the record is that the prosecutor was willing—but not eager—to stipulate because he knew that the defense presumptively would not want a peace officer on the jury. (6 RT 1246–1247.) The prosecutor was correct because the defense eventually did raise that very challenge to B.A. (6 RT 1246.) In fact, contrary to Battle's suggestion, it seems the prosecutor would have *preferred* B.A. to remain in the jury pool. The prosecutor said that he was "willing" to stipulate but that the defense eventually "agreed not to stipulate." (6 RT 1246–1247, italics added.) Battle's attempt to transform the *defense's* desire to excuse B.A. from the jury pool into evidence of the *prosecutor's* racial bias is thus unpersuasive.

In conclusion, the trial court properly denied Battle's *Batson/Wheeler* motion because Battle failed to make the requisite prima facie showing of racial discrimination. Accordingly, this Court should affirm the trial court's finding.

II. THE TRIAL COURT CORRECTLY DETERMINED THAT BATTLE'S TAPE-RECORDED STATEMENTS WERE VOLUNTARY

Battle contends that his tape-recorded statements were involuntary and thus improperly admitted at trial. This contention is meritless. There was nothing coercive about the style or content of the police interviews. Battle talked to the police willingly and, indeed, attempted to use the interviews to exculpate himself. Nevertheless, even if the police made the coercive comments he alleges, Battle's various admissions were not "causally related" to those comments. In fact, Battle himself testified at the trial court hearing on the admissibility of his statements and, while he maintained that his statements were involuntary, his reasons were entirely different from the ones he is now claiming on appeal.

Both the federal and state constitutions forbid the prosecution from introducing into evidence a defendant's involuntary confession or admission. (*People v. Linton* (2013) 56 Cal.4th 1146, 1176 (*Linton*); *Rogers v. Richmond* (1961) 365 U.S. 534, 540 [81 S.Ct. 735, 5 L.Ed.2d 760].) A defendant's statement is involuntary where it is not the product of "rational intellect and free will," but rather the result of his or her will having been "overborne" by "coercive police activity." (*Linton*, at p. 1176; *Colorado v. Connelly* (1986) 479 U.S. 157, 167 (*Connelly*).)

Whether a defendant's will was overborne is determined by the "totality of the circumstances," including "both the characteristics of the accused and the details of the interrogation." (*Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 226 [93 S.Ct. 2041, 2047, 36 L.Ed.2d 854] (*Bustamonte*); *Linton*, *supra*, 56 Cal.4th a p. 1176.) Factors may include the youth of the accused; his or her lack of education; his or her low intelligence; the lack of any advice to the accused of his constitutional rights; the length of detention; the repeated and prolonged nature of the questioning; and the use of physical punishment such as the deprivation of

food or sleep. (*Bustamonte*, at p. 218.) Other factors may include whether the statement was "extracted by threats or violence, obtained by direct or implied promises, or secured by the exertion of improper influence." (*Linton*, at p. 1176, citations omitted.) Although "coercive police activity is a necessary predicate" to finding that a confession was involuntary (*Connelly*, *supra*, 479 U.S. at p. 167), it "does not itself compel a finding that a resulting confession is involuntary." (*Linton*, at p. 1176, citations omitted.) Rather, the coercive police activity and the statement must be "causally linked" (*ibid.*, citations omitted); that is, the police inducement must be the "motivating cause" (*People v. Williams* (1997) 16 Cal.4th 635, 661 (*Williams*)) and the "proximate caus[e]" (*People v. Tully* (2012) 54 Cal.4th 952, 986 (*Tully*)) of the statement. Accordingly, where a court determines allegedly coerced statements are not "causally related" to the challenged interrogation techniques, it need not determine whether those statements were coercive. (See *People v. Scott* (2011) 52 Cal.4th 452, 480.)

On appeal, this Court conducts "an independent review of the trial court's legal determination and rel[ies] upon the trial court's findings on disputed facts if supported by substantial evidence." (*Linton*, *supra*, 56 Cal.4th at pp. 1176–1177.) Where the allegedly coercive interviews themselves were recorded, this Court may review the recordings independently. (*Id.* at p. 1177.) Finally, the erroneous admission of an involuntary confession is subject to harmless-error review under *Chapman v. California* (1967) 386 U.S. 18. (*Arizona v. Fulminante* (1991) 499 U.S. 279 [111 S.Ct. 1246, 113 L.Ed.2d 302] (*Fulminante*); *People v. Cahill* (1993) 5 Cal.4th 478, 509–510 (*Cahill*).)

When police linked Battle to the Demkos' car, they arrested him. (7 RT 1694–1697; 8 RT 1797.) Following his arrest, Detectives Michael Gilliam and Derek Pacifico took Battle to the police station to begin interviewing him. (3 RT 521.) All the interviews were recorded on

audiocassettes, except for one portion which was not recorded owing to a technical failure.[12] (3 RT 538–539, 557–558, 583–584.) The initial interview began at 1:13 a.m. in the early morning of November 26, 2000 and lasted approximately three to three-and-a-half hours. (3 RT 519; 3 CT 791.)[13] In that interview, Battle initially claimed that a person named Neal[14] had lent him the car and that he did not know that the car belonged to the victims of a murder. (3 CT 796.) Eventually Battle said that he went along with Neal and three others to burglarize the Demkos' home but had no idea of any plan to murder the Demkos. (3 CT 832–848.) According to Battle, after the burglary, the four others kidnapped the Demkos and put

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[12] The trial court relied on the unredacted versions of the audiocassettes and transcripts in determining whether Battle's confession was voluntary. The unredacted audiotapes are contained in Exhibits 256a, 256b, 257a [audio recordings of Battle, Detectives Gilliam and Pacifico]; 258a, 258b, 258c [audio recordings of Battle and Heard]; and 259a, 259b, 259c [audio recordings of Battle, Detectives Gilliam and Pacifico]. (See 3 CT 726.) The unredacted transcripts of those audio recordings are Exhibits 256c (3 CT 791–867), 257b (4 CT 941–954), 258d (4 CT 966–1081), and 259d (4 CT 1165–5 CT 1315).

[13] While it is clear the interviews began at 1:13 a.m., the interview's duration is not as precise. There were three audiocassette tapes that were used to record the interview. The first and third tapes each contained about an hour of recorded interview. (See Exhibits 256a and 256b [audio recording]; see also 3 RT 527–528 [approximately 30 minutes on Exhibit 256a, side A]; 529 [approximately 30 minutes on Exhibit 256a, side B]; 534–535 [approximately 30 minutes each on Exhibit 256b, side A and on side B].) The second tape was blank, owing to a technical failure. (3 RT 531–532.) If the second tape was the same length as the first and the third, it would be an hour (30 minutes on each side); if it was the same length as some other tapes used, it would be an hour and a half (45 minutes on each side). Detective Gilliam testified at trial that the interview lasted a "good three hours." (8 RT 1815.)

[14] As Battle notes in his opening brief (AOB 16, fn. 7), "Neal" is spelled inconsistently in the record. Since "Neal" is the spelling used in Battle's opening brief, and how the name is spelled when it first appears in the transcript (see 3 CT 796), respondent also uses that spelling.

them in the trunk of their car without his knowledge. (3 CT 848.) While in the car, Battle heard the Demkos pounding from the inside of the trunk. (3 CT 848.) This made Battle nauseous, so he asked to get out of the car to vomit. (3 CT 848–849.) The four complied but mocked Battle for being a "bitch" and drove off, leaving him behind. (3 CT 849.) Battle said he had an idea what the four might do to the Demkos, but it was not confirmed until later that day when Neal told Battle that the Demkos "ain't around no more." (3 CT 850.) Neal apologized to Battle for calling him names and offered to let him use the Demkos' car, credit cards, and checks. (3 CT 850.) Battle also told police that he went back to the Demkos' home two nights later to take a television set, a VCR, a pair of speakers, and a radio. (3 CT 860.) At the end of the interview, Battle agreed to take a polygraph examination to confirm the truth of what he had told Detectives Gilliam and Pacifico. (3 CT 864.) Battle was then taken back to jail. (3 RT 535, 570.)

More than 24 hours later, at 10:10 a.m. on the morning November 27, 2000, Detectives Gilliam and Pacifico resumed interviewing Battle. (4 CT 941.) This interview lasted less than 22 minutes. (Exhibit 257-A; 3 RT 570, 575; compare 4 CT 941 with 4 CT 966.) Battle's story remained the same. (See 4 CT 941–953.) Battle was then taken to meet with Robert Heard, the polygraph examiner. (4 CT 966.) Heard explained the polygraph examination to Battle and conducted a pretest interview beginning at around 10:25 a.m. (4 RT 600; 4 CT 966.) Early in the interview, Battle persisted in his story that he was unaware of any plan to kill the Demkos. (4 CT 975–995.) Eventually Battle admitted that he knew Neal's plan was to kill the Demkos in order to take over their house, car, and credit, but he still denied being present at the murder. (4 CT 996–997; 997 [noting the time as 11:20 a.m.].) Based on this pretest information, Heard conducted a polygraph examination of Battle, asking about various details of the crimes, including whether Battle was present when the

Demkos were killed and whether Battle committed the murders himself. (4 CT 1050–1055.) Battle denied both. (4 CT 1050–1055.) Afterwards, Heard told Battle that he knew Battle was lying based on the results of the polygraph test. (4 CT 1055 [noting time as 1:10 p.m.].) Battle then admitted that he was present when the Demkos were killed but that he was brought along at gunpoint, and that Steve, one of the other four, killed the Demkos. (4 CT 1058–1059.) After more discussion, Heard accused Battle of killing the Demkos himself. (4 CT 1073.) Battle then admitted stabbing them, claiming that he only did it because Steve threatened him at gunpoint and threatened to hurt Battle's godson. (4 CT 1073.) Heard's interview and polygraph examination of Battle lasted just over three hours. (See Exhibits 258a, 258b, and 258c [audio recordings]; see also 3 RT 598, 602, 603–604, 605 [audiocassette playing times during the admissibility hearing].)

After offering Battle lunch, Detectives Gilliam and Pacifico resumed interviewing him. (See Exhibits 259a; 4 CT 1165.) Battle repeated the story he had told Heard. (4 CT 1165–1239.) After a while, Detectives Gilliam and Pacifico pointed out several peculiarities with the story, explaining that only Battle's footprints were found at the scene and that it seemed odd that he ended up with almost all the property when, according to him, he was only a minor player in a five-person operation. (4 CT 1240–1246.) They also told him that one of the four others was in jail on the day of the murder and could not have been there. (4 CT 1242.) After that, Battle changed his story yet again. (4 CT 1248.) This time, Battle claimed he went alone to burglarize the Demkos' home. (4 CT 1248.) He was surprised to find the Demkos there and so he tied them up and left. (4 CT 1248–1249.) When Battle returned home, he told Washington what happened; and Washington went back by himself to kill the Demkos. (4 CT 1249.) In this version, Battle returned to his earlier claim that he was

not present at the murders. Up until this time, Battle had denied that Washington was involved at all. (4 RT 1070.) When pressed on the fact that he knew too much about the murders not to have been there, Battle changed his story a final time. (4 CT 1278.) This time, when Battle returned and told Perry what happened, Perry allegedly went back to the Demkos' house with Battle and forced Battle at gunpoint to kill the Demkos. (4 CT 1278–1279.) The interview ended at this point because Battle said he was tired and the detectives realized they were not getting anywhere with Battle anyway. (12 CT 1314; 4 RT 627.) This final interview with Battle lasted just under four hours. (See Exhibits 259a, 259b, and 259c [audio recordings].)

The trial court correctly determined that Battle's statements were voluntary and thus admissible at trial. In ruling on the voluntariness of Battle's admissions, the trial court listened to unredacted audio recordings of the interviews; read both parties' briefing; and heard testimony from the three law enforcement officials who interviewed Battle, as well as testimony from Battle himself. (3 RT 519–708; 4 RT 739–769; 1 CT 273–287; 2 CT 416–425.) The officers testified that during the interviews they wore plain clothes, did not carry visible weapons, and did not restrain Battle in any way (3 RT 525, 570, 574); Battle confirmed that there was no physical abuse (4 RT 688). The detectives said that Battle never requested an attorney or expressed unwillingness to talk to them. (3 RT 533, 573.)[15]

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[15] Battle testified that, during the unrecorded portion of the first interview and during unrecorded breaks, he repeatedly asked to stop the interview and to talk to an attorney. (4 RT 653, 658, 664–665, 669.) He no longer maintains that contention on appeal. In any event, in finding Battle's participation in the interviews to be voluntary, the trial court found Battle's claims were not credible. (4 RT 767, 769.) In light of the officers' contrary testimony, the trial court's finding of fact is entitled to deference on appeal. (See *Linton*, *supra*, 56 Cal.4th at pp. 1176–1177.)

This is also evident from the audio recordings, where Battle twice waived his *Miranda*[16] rights and told the police that he "want[ed] to cooperate as . . . much as [he] c[ould]." (3 CT 793–794; 4 CT 941–42.) Battle also signed a polygraph examination consent form, agreeing that he took the polygraph examination "voluntarily" and "without duress, coercion, promise of reward or immunity" and that he knew he had the right to stop the examination "at any time." (4 CT 1165-B; see also 4 CT 967–970.) The majority of the interviews—including Heard's polygraph interview, which is the main basis for Battle's claim of coercion—took place after Battle had a full day and night away from investigating police. (3 CT 791 [first interview on November 26 at 1:13 am]; 3 CT 841 [remainder of interviews began on November 27 at 10:10 am]; see also 3 RT 535, 570.) The tone of the interviews—evident by listening to the audio recordings themselves—was conversational and nonaggressive. (See Exhibits 256a, 256b, 257-A, 258a, 258b, 258c, 259a, 259b, and 259c; see also 3 RT 533–534.) In addition, as the trial court found, Battle was "cogent" and "maintain[ed] a very, very consistent tone of voice, manner of talking, [and] coherency through[out] the interviews." (4 RT 763–764.) Having listened to the recordings, and having observed Battle testify in person at the admissibility hearing itself, the trial court also found that Battle—who was 26 years old at the time of the interviews (3 RT 792)—was "a very . . . intelligent man" and a "strong young man." (3 RT 763, 764; see also *Williams*, *supra*, 16 Cal.4th at p. 659 [trial court's observations of Battle's demeanor relevant to voluntariness].) Furthermore, during the course of the interviews, Battle was offered food, drinks, and breaks. (See, e.g., 3 CT 791, 810, 826, 841; 4 CT 951–952, 1025–1026, 1056, 1072, 1165, 1260,

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

1314.) Heard's interviews and polygraph examination were not long, totaling just over three hours. (See Exhibits 258a, 258b, and 259c [audio recordings]; see also 3 RT 598, 602, 603–604, 605 [audiocassette playing times during the admissibility hearing].) In any event, the overall length of the interviews was the product of Battle's "evasive answers" and "lies" (see *Linton*, *supra*, 56 Cal.4th at p. 1178), and when Battle indicated he was tired, the police stopped interviewing him. (4 CT 1314; 4 RT 627.) In short, there was nothing coercive about the nature of the interviews.

Moreover, Battle's various incriminating statements were not true confessions, but rather incidental admissions he made while trying to exculpate himself. Indeed, by the very end of all the interviews, Battle had changed his story several times and ultimately still tried to place the blame on someone else—someone completely different from the first group of people he spent hours accusing. This Court has often found such "cooperation" to be the product of a suspect's desire to self-exculpate, rather than police coercion. (See, e.g., *People v. Williams* (2010) 49 Cal.4th 405, 444 (*Williams II*) ["defendant did not incriminate himself as a result of the officers' remarks . . . [; r]ather, defendant continued to deny responsibility in the face of the officers' assertions"]; *People v. Guerra* (2006) 37 Cal.4th 1067, 1096, disapproved on other grounds in *People v. Rundle* (2008) 43 Cal.4th 76, 151 ["The sole cause appearing in the record for defendant's cooperation during the interview was his desire to exculpate himself"]; *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 58 [defendant's "resistance, far from reflecting a will overborne by official coercion, suggests instead a still operative ability to calculate his self-interest in choosing whether to disclose or withhold information"]; *People v. Holloway* (2004) 33 Cal.4th 96, 116 (*Holloway*) [defendant initially made "limited admissions to his presence at the scene at the time of the

crime, while laying the groundwork for possible" defenses and thus was "attempting to use the interview as much as the officers"].)

Battle nonetheless argues that his various admissions were involuntary. In support of this contention, Battle relies primarily on Heard's pre-polygraph interview of Battle, arguing that during that interview Heard promised to help Battle if he confessed; assured Battle that if he acknowledged knowing of the plan to kill the Demkos, but was not involved, that he would be in less trouble; and played on Battle's fear for himself and his godson in order to get him to confess. (AOB 135–150.) None of Heard's comments was coercive.

First, Heard's statement that Battle should "stop digging" and that "once [Heard] wr[o]te [his] report [he couldn't] promise to do anything for [Battle] because if [his] boss found out that [he] promised [him] something that was untrue, [he]'d be in trouble" is not a promise of lenity as Battle contends. (4 RT 991; see also AOB 145–138.) In fact, Heard offered Battle no benefit at all—and certainly no "*particular* benefit." (*Holloway*, *supra*, 33 Cal.4th at p. 116, italics added.) This Court has routinely found that these types of comments do not amount to improper promises of lenient treatment in exchange for cooperation. (See, e.g., *People v. Carrington* (2009) 47 Cal.4th 145, 170 (*Carrington*) [officer's statement he would help defendant explain "this whole thing" did not constitute a promise of leniency in the context of the interview]; *Holloway*, at p. 116 [detectives suggestion that accidental killings and killings provided by rage could "make[] a lot of difference" fell "far short" of a promise of lenient treatment]; *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1236 (*Musselwhite*) [police statement that he "just want[ed] to show that [defendant] cooperated" was not a promise of lenity in change for cooperation].) Indeed, Heard's statement was "too brief and insubstantial to qualify as an inducement"; this is not a case where a "promise of

leniency in exchange for a confession permeated the entire interrogation." (*Musselwhite*, at pp. 1236–1237, italics and citations omitted.)

Second, Battle alleges that Heard "assur[ed]" him that "if he acknowledged knowing of the plan to kill" he would be in less trouble "so long as he was not involved in the killings." (AOB 138.) That is not what Heard said. The exchange between Heard and Battle was as follows:

> Heard: No. no. But you have to understand okay? You're in a hole. My job is just to verify that you tell me the truth.
>
> Battle: Okay.
>
> Heard: I don't care if they said something and you thought oh my God is that what they're going to do because as long as you're not involved in that, that's all that's important but the problem is that if I was to ask you on the polygraph exam see we're going to run with November thirteenth but the polygraph question is before you arrived at that house the day that this thing went down okay?
>
> Battle: Uh huh.
>
> Heard: Did you know these people were going to be killed? . . . See if you knew or suspected it was going to happen you're going to fail that . . . .

(5 CT 995–996.) Contrary to Battle's assertion, Heard did not "misleading[ly]" and "false[ly]" convey to Battle that there were no legal implication to admitting knowledge of the killings. (Cf. AOB 139–140.) As the context of the statement makes clear, Heard was simply informing Battle that if he knew about the killings, but denied it on the polygraph test, he would fail that question. (5 CT 995–996.) But even construing Heard's words as Battle does, his argument is self-defeating because any "assurance" that Battle would not be in "bigger trouble" if he "acknowledged knowing of the plan to kill, so long as he was not involved in the killings" (AOB 138) carried with it a corollary warning that if Battle *were* involved he *would* be in "bigger trouble." If Heard's comments

somehow caused Battle to admit knowing about the plan to kill, they would have also prevented him from admitting further involvement. Yet Battle eventually admitted not only that he knew of the plan to kill, but also that he was present at the killings and stabbed the victims himself. Thus, Battle clearly did not understand or rely on Heard's comments in the way he is now claiming he did.[17]

Furthermore, the statement that "as long as you're not involved in [the killings] that's all that's important" is no different from the detective's statement in *Holloway* that if the defendant's killings were accidental or the product of a drunken blackout that could "make[] a lot of difference." (*Holloway*, *supra*, 33 Cal.4th at p. 116.) In *Holloway*, this Court rejected the defendant's claim of involuntariness, explaining that the detectives "did not represent that they, the prosecutor or the court would grant [him] any particular benefit if he told them how the killings happened." (*Ibid.*) This Court explained that "[t]o the extent [the detective's] remarks implied that giving an account involving blackout or accident might help defendant avoid the death penalty, he did no more than tell defendant the benefit that might 'flow[] naturally from a truthfully and honest course of conduct' . . . for such circumstances can reduce the degree of a homicide or, at the least, serve as arguments for mitigation in the penalty decision." (*Ibid.*, quoting *People v. Jimenez* (1978) 21 Cal.3d 595, 612 (*Jimenez*).) Indeed, at most, Heard was simply urging Battle to "tell [him] the truth" (5 CT 995), a request that he repeated numerous times throughout the interview. (See, e.g., 5 CT 970, 974, 975, 976, 1028, 1045, 1056; see also *Jimenez*, at pp. 611–612, overruled on other grounds in *Cahill*, *supra*, 5 Cal.4th at p. 510, fn. 17 ["mere advice or exhortation by the police that it would be better for

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[17] Respondent addresses the lack of a causal connection at greater length *post*.

the accused to tell the truth when unaccompanied by either a threat or a promise does not render a subsequent confession involuntary"].)

This case is not like *People v. Cahill* (1994) 22 Cal.App.4th 296 (*Cahill II*), upon which Battle relies. (AOB 139–141, 147.) As this Court explained in *Holloway*, in *Cahill II*, "the interrogator gave the defendant a detailed but 'materially deceptive' account of the law of homicide." (*Holloway*, *supra*, 33 Cal.4th at p. 117, quoting *Cahill II*, at p. 315.) "In particular, the detective led the defendant to believe he could avoid a first degree murder charge, in a burglary-murder case, by admitting to an unpremeditated role in the killing." (*Holloway*, at p. 117, citing *Cahill II*, at pp. 306, 314–315.) As in *Holloway*, Heard gave Battle no such deceptive account of homicide law or misleading assurances. (*Holloway*, at p. 117.) Indeed, "[n]o specific benefit in terms of lesser charges was promised or even discussed," and Heard's general assertion that "as long as [Battle was] not involved [in the killings] that's all that's important" (4 CT 995), like the detective's comment in *Holloway*, was "perhaps optimistic" but "not materially deceptive." (*Ibid.*)

Third, Battle argues that Heard also used a "questionable" tactic when he allegedly made a "misleading suggestion that Battle's fear for himself or for his godson provided an excuse or justification." (AOB 135.) When Battle admitted that he suspected Neal and the others were going to kill the Demkos, he followed up by saying, "It's not like [he] could back out though at that time." (4 CT 996.) Battle explained, "Because if, if they tell me you know in so many words that they're basically going to do that[,] if they can do that to them[,] you know." (4 CT 996.) Heard interjected, "They can do it to you?" (4 CT 996.) Battle said, "Yeah." Heard followed up, "And your godson?" (4 CT 996.) Heard did nothing more than articulate what Battle was implying; there is nothing improper about that. And, in fact, even if Battle had not himself alluded to his fear that Neal

would harm him or his godson, it even would have been permissible for Heard to raise it as a possible explanation for Battle's actions. (*Williams II*, *supra*, 49 Cal.4th at p. 444 ["Questioning may include exchanges of information, summaries of evidence, outline of theories of events, confrontation with contradictory facts, even debate between police and suspect . . ."], citations omitted.) Further, while Heard later said that it was "very important for the detectives to know that they were going to hurt" Battle's godson, he never said why that was so and certainly did not promise—or even discuss—"a specific benefit" such as reduced punishment. (See *Holloway*, *supra*, 33 Cal.4th at p. 117.) In any event, to the extent Heard placed any emphasis on Battle's fear for his godson in the context of the story Battle was telling about Neal's coercing him to commit the burglary, this is immaterial because Battle later admitted that that entire story was a lie and that he alone burglarized the Demkos' home without Neal's involvement.[18]

Finally, even if any of Heard's comments were coercive, Battle's admissions were not "causally related" to those comments and therefore the admissions were not involuntary. (See *Linton*, *supra*, 56 Cal.4th at p.

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[18] Battle further makes a passing suggestion that Heard's statements also may have been perceived as an indirect threat that other people might harm Battle's godson if Battle did not cooperate with police. (AOB 149.) This claim is dubious. To support it, Battle points to comments *Detective Gilliam* made after Battle admitted the story about the four cohorts was a lie. (See AOB 149.) Detective Gilliam asked Battle whether Battle had considered that falsely implicating these four other people could bring harm to his godson. (See 5 CT 1258.) In context, it is clear that Detective Gilliam was pointing out the inherent contradiction in Battle's professed concern that these four people might harm his godson and the fact that Battle was now claiming to have falsely implicated them in the killings altogether. (See 5 CT 1258.) The detectives were not "[m]anipulating Battle's concern for [his godson]" and by no means was this questioning coercive. (Cf. AOB 149.)

1176.) Battle's key admissions were that he was present at the murders, that he himself stabbed the Demkos, and that he committed the burglary alone. Heard's comments, which he made while encouraging Battle to admit only that he *knew* about *Neal's* purported plan to commit the murders, could not be the "motivating" or "proximate" causes of those other admissions. (See *Williams*, *supra*, 16 Cal.4th at p. 661; *Tully*, *supra*, 54 Cal.4th at p. 986.) The first of those admissions—that Battle was actually present at the killings—came more than two hours[19] after Heard urged Battle to admit simply knowing about the plan to kill the Demkos. (See *Carrington*, *supra*, 47 Cal.4th at p. 170 [confession not prompted by police comments when defendant confessed approximately one hour after comments were made].) Indeed, the motivating cause of Battle's admissions that he was present at the murders and that he—rather than someone else—stabbed the Demkos, was Heard's post-polygraph insistence that he knew Battle was lying. (4 CT 1055–1056, 1058–1059, 1074.) And the proximate cause of Battle's admission that he alone committed the burglary was prompted by Detectives Gilliam and Pacifico's much later identification of numerous peculiarities with Battle's version of what happened, in addition to their assertion that one of the four people Battle

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[19] At around 11:20 a.m., Battle admitted that he knew Neal's plan was to kill the Demkos in order to take over their house, car, and credit, but denied being present at the murder. (4 CT 996–997; 997 [noting the time as 11:20 a.m.].) Based on this pretest information, Heard conducted a polygraph examination of Battle, asking about various details of the crimes, including whether Battle was present when the Demkos were killed and whether Battle committed the murders himself. (4 CT 1050–1055.) Battle denied both. (4 CT 1050–1055.) At around 1:10 p.m., Heard told Battle that he knew Battle was lying. (4 CT 1055 [noting time as 1:10 p.m.].) Battle later admitted that he was present when the Demkos were killed, but said Steve killed them. (4 CT 1058–1059.) Later Battle admitted to stabbing the Demkos himself. (4 CT 1073.)

claimed to be involved in the murders could not have been present. (4 CT 1240–1248.) Battle does not contend that either of those techniques was coercive. Indeed, those techniques—which proximately led to Battle's admissions in this case—represent nothing more than good police work.

Moreover, Battle's own testimony at the trial court hearing fatally undermines his claims of involuntariness now. During that hearing, Battle testified that he was drunk, scared, nervous, and extremely tired at the time of the first interview (4 RT 642, 654); that he repeatedly asked to stop the interview and to talk to an attorney during the unrecorded portion of the first interview and during the unrecorded breaks (4 RT 653, 658, 664, 665, 669); and that the police led him to believe his good friend, whom he considered to be a sister, would be arrested and lose her children if he did not cooperate (4 RT 666–667).[20] It is significant what Battle did *not* say. He did not say that he admitted anything during the interviews because Heard promised him leniency. (Compare AOB 135–150 with 4 RT 641–708.)[21] He did not say that he admitted anything because Heard assured him that mere knowledge of the killings would mean less trouble for him. (*Ibid.*) And he did not say that he admitted anything because Heard played on his fears for himself and for his godson. (*Ibid.*) Thus, beyond "there [being] no indication that [Battle] relied upon [Heard's] comments in deciding to confess" (see *Carrington*, *supra*, 47 Cal.4th at p. 172), Battle's trial court testimony makes clear that, in fact, he did not rely on those comments. Accordingly, for this additional reason, this Court should reject

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[20] The trial court rejected these arguments and Battle does not maintain them on appeal. *See*, *supra*, fn. 15.

[21] While Battle's trial counsel argued that Battle's admissions were induced by "implied promises of leniency," this was a subsidiary point and no testimony was elicited to support the necessary element that Battle made the statements because of those promises. (See 2 CT 423.)

Battle's newly created contention that Heard's comments caused him to make involuntary admissions.

In sum, Heard's comments did not overbear Battle's free will; and therefore, his various statements to police were voluntary. But even if Battle's statements were involuntary, their admission at trial was harmless beyond a reasonable doubt. (See *Fulminante*, *supra*, 499 U.S. 279; *People v. Sims* (1993) 5 Cal.4th 405, 447.) This is not a case where a defendant gave an outright confession used against him at trial; Battle never gave police an honest version of events wherein he was wholly culpable. What was useful about Battle's statements were not his admissions per se, but rather the level of detail in which he was describing the victims' home, the manner of the killings, and the location where the victims' bodies were found. Indeed, this is how the prosecutor used the audio recordings—to show that, although Battle's stories of what happened varied dramatically, the basic facts he revealed along the way match too perfectly with the other evidence for him not to have been involved. (See 12 RT 3099–3117.) What's more, the entire defense rested on the exculpatory statements Battle made during those very same interviews. (See 12 RT 3149–3229.) Without those statements, Battle's defense would have been even weaker, especially in light of the overwhelming other evidence proving he committed the crimes: his comments before the murder that he was going to acquire a car from people and that those people would end up found dead in the desert (9 RT 2198–2199); his roommate's seeing him around the time of the murders wearing all black and carrying duct tape and zip ties, which were items found at the scene of the killings, along with his refusal to tell the roommate what he was doing with those items (10 RT 2443–2444); and the numerous items of the Demkos' property found in his possession (7 RT 1694–1695, 1701–1702; 9 RT 2098–2099, 2199–2201, 2237–2246; 10 RT 2445, 2479, 2481–2488, 2513–2514, 2521); and his numerous post-murder

lies to friends and police about how he acquired the Demkos' property (8 RT 1719–1720; 11 RT 2819; 3 CT 873, 891–892). Notably, even before Heard's interview and polygraph examination, Battle had already admitted to police that he was at least involved in the burglary (4 CT 903, 910–914, 924) and had already given details about the crime that showed he was telling the truth about that (see, e.g., 4 CT 911–917 [description of interior of house], 919 [remarking that Mr. Demko was hard of hearing], 931 [description of Mr. Demko's pajamas]). For these reasons, even if Heard's comments somehow rendered Battle's subsequent statements involuntary, their admission at trial was harmless with regard to both the guilt and penalty phases.

III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION UNDER EVIDENCE CODE SECTION 352 OR VIOLATE BATTLE'S DUE PROCESS RIGHTS IN DECLINING TO MAKE ADDITIONAL REDACTIONS TO THE POLICE INTERVIEWS

Battle argues that the trial court abused its discretion and violated his right to due process in not redacting the interview recordings to omit statements he made about "pawning his swords and previously committing burglary" because those statements were unduly prejudicial. (AOB 169.) There was no abuse of discretion or denial of due process here. The relevance of Battle's brief mention of pawning swords as part of the story he was telling police about how he acquired the Demkos' television set and VCR was not outweighed by any prejudice. Battle's other statements, which fall far short of admitting having previously committed burglary, were passing comments that were similarly relevant as part of the context of the various stories he told about how the burglary in this case took place. The relevance of these statements was certainly not substantially outweighed by a danger of undue prejudice. In any event, even if the trial court's admission of these statements was contrary to Evidence Code section 352, Battle was not prejudiced as it is not reasonably probable he

would not have been convicted but for their admission. Any inference the jury could have drawn from Battle's ownership of antique swords and possible commission of prior burglaries was inconsequential in light of his admissions in the same recordings that he actually did stab the Demkos and burglarize their home.

Relevant evidence is presumed admissible. (See Evid. Code, § 351.) Nonetheless, a trial court "in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.) This Court reviews a trial court's "rulings regarding relevancy and Evidence Code section 352 under an abuse of discretion standard." (*Linton*, *supra*, 56 Cal.4th at p. 1181.)

Before trial, the court agreed that the prosecution should redact from the police interview recordings mention of Battle's "being in prison, being on parole, having priors for burglary, shooting other people, stabbing other people, [and] being an ex-con." (4 RT 782–785.) The prosecution complied. (See AOB 170 fn. 63 [summarizing the various redactions made].) Battle later moved the court to order additional redaction of a brief reference to his sword collection (3 CT 891–893) and of comments where, according to him, he implied having committed prior burglaries (4 CT 939, 5 CT 1326, 1337, 1339, 1401, 1403). (See 8 RT 1788–1792; 8 RT 1902–1909.) After hearing argument, the trial court denied Battle's motion, finding that the probative value of the statements was not substantially outweighed by the probability of undue prejudice. (See 8 RT 1792, 1906–1909.)

While Battle now appears to rely partly on Evidence Code section 1101 in his opening brief (see, e.g., AOB 176), he never objected on that basis in the trial court. Instead, his objection was founded on relevance and

Evidence Code section 352. (See, e.g., 8 RT 1791.) The trial court thus resolved the issue solely on those bases. (See 8 RT 1792, 1906–1909.) Consequently, any argument premised on Evidence Code section 1101 has been forfeited and should not be considered by this Court. (*People v. Doolin* (2009) 45 Cal.4th 390, 437 [relevance and Evidence Code section 352 objections do not preserve a claim that the trial court admitted evidence in violation of Evidence Code section 1101].)

The trial court did not abuse its discretion in denying Battle's request for the additional redactions.

Battle's mention of his "sword collection"—just two swords, a "Dragon" and an "Irish sword"—was relevant in the context of the story he was telling about how he ended up with Demkos' television and VCR. At that point in the police interviews, Battle denied any involvement at all in the burglary and the murders. (See 3 CT 892.) Battle claimed that he "was asked to get rid of the TV and VCR" and, since he was already going to pawn a few items for money, he agreed to pawn those items, too. (3 CT 893–894.) Among the items he already planned to pawn were some movies and the swords. (3 CT 893–894.) Thus, Battle mentioned the swords in the greater context of his exculpatory statements about how he ended up with the Demkos' property and this was relevant to the unfolding story of his involvement in the crimes. Moreover, any undue prejudice was minimal. The quick reference to antique swords was not used to suggest that Battle was more likely to burglarize a home and stab the residents to death with a kitchen knife (see 5 CT 1365–1366); nor was it is used to suggest that Battle had a special skill in using swords or knives.[22] Furthermore, the jury

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[22] In this way, this case is readily distinguishable from the Ninth Circuit precedent Battle cites. (See AOB 174–175, citing *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378 and *Alcala v. Woodford* (9th Cir. 2003) (continued...)

was unlikely to draw that conclusion on its own. Battle's mention of the swords took place early in the recordings and occupied only seconds in hours of interviews. Accordingly, the trial court was well within its discretion to find that the risk of undue prejudice from the statements did not substantially outweigh their probative value.

Similarly, Battle's other statements were passing comments relevant as part of Battle's early versions of how the burglary happened. While talking about the burglary, Battle said: Neal told him he looked stressed and that, "I've done it before ah I, I shouldn't sweat it [']cause he said I was looking all clammy and stuff" (4 CT 939); "I never did anything like this, especially with people. I never did anything with anybody" (5 CT 1326); "I'd never worked with a team or anything like that before . . . . I was just

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(...continued)
334 F.3d 862.) In *McKinney v. Rees*, extensive evidence was introduced about the various knives McKinney owned and his pride in his knife collection. (993 F.3d at p. 1382.) The court's problem with some of the knife evidence was that a certain knife was "indisputably no longer in McKinney's possession," but nonetheless was offered to show he owned knives at the time of the crime. (*Ibid.*) The court found that the reference to the knife "thus was evidence of another act offered to prove character and giving rise to a propensity inference, and did not tend to prove a fact of consequence offered to prove character and giving rise to a propensity inference." (*Id.* at pp. 1382–1383.) The mention of Battle's swords was neither extensive nor used independently as character evidence. Similarly, in *Alcala v. Woodford*, the prosecution admitted into evidence "two complete, unused sets of kitchen knives" in addition to testimony from the knife manufacturer's representative. (334 F.3d at pp. 886–887.) The State argued that the knife set was relevant to show that Alcala had access to or familiarity with those types of knives. (*Id.* at p. 887.) But because the knives introduced were different from the knife used in the murders in the case, and because there was no evidence that Alcala purchased those knives or ever had direct possession of them, the court found that the knives and accompanying testimony were irrelevant. (*Id.* at p. 887.) Again, Battle's brief mention of swords is incomparable to the prosecution's affirmative use of the knife evidence and testimony in *Alcala*.

used to having gloves" (5 CT 1337); "I had never . . . broken into a house with somebody that was there" (5 CT 1399); "old couples, they usually leave the back door unlocked" (5 CT 1401); and "I'm practically in tears when I get back to the house, [']cause I guess that I've never did [*sic*] anything with people in the house before" (5 CT 1403). As the trial court found, Battle never explicitly admitted having committed burglaries in the past. (See, e.g., 8 RT 1790; see also *People v. Sapp* (2003) 31 Cal.4th 240, 276 [defendant's statement, "Every time I've ever done any of these crimes, I wished I hadn't," did not suggest that he had committed murders other than those charged].) Even if one could draw from these statements an inference that Battle had committed previously committed burglaries, it hardly would be prejudicial given that the statements were made while Battle was actually *admitting* participating in the burglary in this case. Moreover, the statements were brief and, in any event, exculpatory in nature. Accordingly, the trial court did not abuse its discretion under Evidence Code section 352 in declining to redact the statements.

Even if the trial court did abuse its discretion in not ordering the redaction of these comments, reversal is not warranted because the admission of the statements did not render the trial "fundamentally unfair" (see *People v. Partida* (2005) 37 Cal.4th 428, 439, citing *Estelle v. McGuire* (1991) 502 U.S. 62, 70 [112 S.Ct. 475, 116 L.Ed.2d 385]) and any error was harmless because it was not reasonably probable that Battle would have received a more favorable results had the redactions been made (see *People v. Watson* (1956) 46 Cal.2d 818, 836). As discussed *ante*, at pp. 42–43, the evidence of guilt in this case was overwhelming; these minor references were thus inconsequential. Moreover, the putative prejudice from the statements is that the jury would believe that because Battle owned swords, he was likely to be the stabber in this case, and that because he committed prior burglaries, he must have committed the burglary in this

case. But that risk is at most minimal because Battle admitted during the interviews that he *did* burglarize the Demkos' home, and he later confessed that he *did* stab the Demkos himself. Simply put, the admission of ambiguous statements about Battle's sword ownership and potential prior burglaries are not even prejudicial—let alone a violation of due process—when Battle explicitly admitted in the same recorded interviews the very conclusions that the jury was supposedly at risk to draw.

IV. THE TRIAL COURT DID NOT ERR IN DECLINING TO GIVE A SPECIAL INSTRUCTION ON LINGERING DOUBT BECAUSE, AS THIS COURT HAS REPEATEDLY HELD, THERE IS NO REQUIREMENT TO DO SO

Battle next argues that the trial court erred in refusing to charge the jury with his proposed instruction on lingering doubt. There was no error.

This Court has "often rejected the claim that the [trial] court must instruct on lingering doubt." (*People v. Boyce* (2014) 59 Cal.4th 672, 708 (*Boyce*), citations omitted.) This is because, "[a]lthough the jurors may consider lingering doubt in reaching a penalty determination, there is no requirement under state or federal law that the court specifically instruct that they may do so." (*Ibid.*; see also *People v. Edwards* (2013) 57 Cal.4th 658, 765 (*Edwards*); *People v. Brown* (2003) 31 Cal.4th 518, 567; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1187.) Instead, the "concept of lingering doubt" is "sufficiently encompasse[d]" in CALJIC No. 8.85, factor (k), which tells the jury that it may consider "[a]ny 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 aspect of the 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." (*Boyce*, at p. 708; see also *People v. Gray* (2005) 37 Cal.4th 168, 232; *People v. Hines* (1997) 15 Cal.4th 997, 1068; *People v. Osband* (1996) 13 Cal.4th 622, 716.)

Here, Battle drafted a special instruction on lingering doubt to include in the penalty phase instructions. (See 3 CT 695 [defense's proposed instruction].) The trial court declined to include it, explaining that the defense certainly could argue lingering doubt, but the court was neither obligated nor inclined to include a separate instruction on it. (15 RT 3995–3996.) The court instructed the jury with CALJIC No. 8.85. (3 CT 662–663.) During his penalty phase opening statement, defense counsel explained that "the law allows [the jury] in the penalty phase to consider if there's any doubt, even if it's not reasonable, any lingering doubt at all about Mr. Battle's guilt." (14 RT 3586.) The prosecutor, in his penalty phase closing argument, noted that "[f]actor K . . . embrace[d the] concept [of] . . . lingering doubt," but argued that there was no lingering doubt in this case, explaining, "The defendant did it. He confessed to it. The only evidence points to him. There isn't any doubt in this case[.]" (15 RT 4030–4031.) In his closing, defense counsel acknowledged that the jurors' verdict meant they believed that Battle was guilty beyond a reasonable doubt, but asked whether they believed Battle was proven guilty "beyond a reasonable doubt but . . . not . . . beyond *all* doubt" (15 RT 4061, italics added). If so, counsel asked the jury to impose life in prison rather than the death penalty. (See 15 RT 4055, 4060–4064.) In light of the standard instructions, as well as the attorneys' arguments, the "concept [of lingering doubt] was well covered." (*Boyce*, *supra*, 59 Cal.4th at p. 709, citing *People v. Sanchez* (1995) 12 Cal.4th 1, 78.)

Faced with this Court's clear and consistent rejection of any requirement to instruct specifically on lingering doubt, Battle asks this Court to "re-examine[] and discard[]" its jurisprudence to find in his favor. (AOB 200.) All of Battle's arguments to that end are variants on the same theme: That the jury was not instructed on lingering doubt and was thus unable to give it full consideration in determining Battle's sentence. (See

AOB 200–205.) This Court has soundly rejected that contention time and time again in reiterating that CALJIC No. 8.85, factor (k) "sufficiently encompasses the concept of lingering doubt." (See *Boyce*, *supra*, 59 Cal.4th at p. 708.) Because Battle "cites no persuasive reason to revisit this conclusion" (*Edwards*, *supra*, 57 Cal.4th at p. 765), this Court should decline his invitation to do so.

V. CALJIC NO. 8.85'S STANDARD LANGUAGE REGARDING HOW A JURY IS PERMITTED TO USE A DEFENDANT'S FAMILY'S TESTIMONY AS MITIGATION EVIDENCE IS CORRECT UNDER THIS COURT'S PRECEDENT AND, MOREOVER, DOES NOT VIOLATE THE UNITED STATES CONSTITUTION

Battle argues that CALJIC No. 8.85's standard language explaining how a jury is permitted to use a defendant's family's testimony as mitigation was faulty as applied to the "unique circumstances of his case." (AOB 212–228.) According to Battle, the jury could have had difficulty understanding how to apply the instruction—which permits family-impact evidence only to the extent it "illuminates some positive quality of the defendant's background or character" (CALJIC No. 8.85, factor (k))—to testimony from Battle's estranged biological family who last saw him when he was four years old. Yet to the extent that is true, it is not because of some defect in the instruction, but rather because this testimony simply does not meet the criteria for proper mitigation evidence. Battle further contends, seemingly in the alternative, that the instruction is also facially flawed because it reflects a limitation on mitigation evidence that violates the United States Constitution. (AOB 228–234.) As he acknowledges, this Court has already rejected that very contention; it should do so again.

A. CALJIC No. 8.85's Standard Language About the Permissible Use of a Defendant's Family's Testimony Was Proper

In a death penalty case, the jury "shall determine whether the penalty shall be death or confinement in state prison for a term of life without the possibility of parole." (Pen. Code, § 190.3.) In making that determination, the jury may consideration "any matter relevant to . . . mitigation . . . including, but not limited to, . . . the defendant's character, background, history, mental condition and physical condition." (Pen. Code, § 190.3.) "[S]ympathy for a defendant's family is not a matter that a capital jury can consider in mitigation, but . . . family members may offer testimony of the impact of an execution on them if by so doing they illuminate some positive quality of the defendant's background or character." (*People v. Ochoa* (1998) 19 Cal.4th 353, 456–457 (*Ochoa*); accord, *People v. Williams* (2013) 56 Cal.4th 165, 197 (*Williams III*); *People v. Bennett* (2009) 45 Cal.4th 577, 601 (*Bennett*); *People v. Smith* (2005) 35 Cal.4th 334, 366–367 (*Smith*); *People v. Smithey* (1999) 20 Cal.4th 936, 1000 (*Smithey*).) Where the defendant offers evidence in mitigation, CALJIC No. 8.85 is drafted to reflect this Court's holding and to tell the jury, "Sympathy for the family of the defendant is not a matter that you can consider in mitigation. Evidence, if any, of the impact of an execution on family members should be disregarded unless it illuminates some positive quality of the defendant's background or character." (CALJIC No. 8.85 & Use Note.) The parallel CALCRIM instruction contains similar language to be given "[o]n request." (CALCRIM No. 763 & Bench Notes on Instructional Duty.)

During the penalty phase, Battle introduced mitigating evidence including testimony about his early childhood and adolescence, expert psychological analysis of the effects of his upbringing, and information

about prison conditions for inmates serving life without parole. (14 RT 3608–15 RT 3957; 6 CT 1649–1686.) Before the age of five, Battle lived with his biological mother in conditions of poverty and racism, which led to his biological mother's placing him for adoption with the Battles. (14 RT 3666, 3692.) Battle apparently had no recollection of his life before the adoption and did not even know he had been adopted until defense counsel found this out while investigating mitigating evidence for this case. (14 RT 3619, 3630–3631, 3753–3754.) As part of his mitigation case, Battle presented the testimony of his biological father, three of his biological aunts, his biological grandmother, and two biological half sisters. (14 RT 3618–3619, 3637–3638, 3666, 3687–3688, 3695, 3746, 3748, 3758–3759.) Battle's biological family testified about the conditions surrounding Battle's childhood before the age of five and the circumstances of the adoption. (See 14 RT 3657–3658, 3677–3678, 3681–3685.) None of them had been in contact with Battle until defense counsel sought them out in connection with this case: Battle's biological father had last seen him when he was five or six months old (14 RT 3619); Battle's biological aunts, grandmother, and sisters had last had contact with him when he was four (almost five) years old (14 RT 3638, 3666, 3689, 3695, 3753–3754, 3763).[23] Battle's biological family asked the jury to spare his life, explaining that they loved him and wanted a chance to have a relationship with him. (See, e.g., 14 RT 3601, 3664, 3700, 3756, 3769.) One of his sisters explained that she felt she "deserv[ed] a brother" and lamented that

[23] Battle attended his biological grandfather's funeral when he was eight years old. At that time, he saw some of his biological family members, but did not know who they were and did not interact with them. (14 RT 3666.) In addition, one of Battle's biological aunts attended his high school graduation, but did not make herself known to him. (14 RT 3689.)

she was finally seeing him after all these years and that it was under such bad circumstances. (14 RT 3769.)

Battle's defense counsel objected to the language in CALJIC No. 8.85 after he had presented the mitigation evidence from his family. (See 15 RT 3990–3991.) Battle argues on appeal, as he did below, that CALJIC No. 8.85, while a proper statement of this Court's precedent, prevented the jury from giving full effect to his biological family's testimony in this case. (AOB 219–224; 15 RT 3991–3992.) But contrary to Battle's contentions there is nothing "ambiguous" (AOB 212) or "confusing" (15 RT 3991) about the instruction as applied to this case.

CALJIC No. 8.85, factor (k) explains that sympathy for a defendant's family is not relevant to mitigation; the effect of a defendant's execution on his or her family is relevant only to the extent that it "illuminates some positive quality of the defendant's background or character." (See CALJIC No. 8.85; see also *Ochoa*, *supra*, 19 Cal.4th at pp. 456–457; accord, *Williams III*, *supra*, 56 Cal.4th at p. 197.) Applying this standard, the testimony of Battle's adoptive mother, who raised Battle until the age of 17, might have been useful to the jury. Indeed, before beseeching the jury not to impose the death penalty, Battle's adoptive mother testified about Battle's adolescent years, including his involvement in church, demonstrated respect for his elders, and dedication to learning and teaching karate. (15 RT 3957; 6 CT 1663–1670 .) In contrast, Battle's biological family—estranged from him for nearly his entire life—could offer very little, if any, testimony to "illuminate[] some positive quality of the defendant's background or character." As defense counsel put it, Battle's biological family members "didn't really know him because they were separated from him at a very young age" (16 RT 4161) and, as a result, they

were unable to provide any information about his positive qualities beyond the age of five.[24] Contrary to Battle's contentions, CALJIC No. 8.85's standard language was helpful in this case because it assisted the jury in understanding how properly to use the testimony of Battle's various family members. Indeed, while Battle's biological family members' natural love for Battle and their desire to resume a relationship with him after nearly a quarter century might have been facts worthy of sympathy, they did not reveal anything about Battle's character and were therefore irrelevant to mitigation. In sum, to the extent CALJIC No. 8.85, factor (k) limited the jury's use of Battle's biological family's testimony, it was correct to do so.

B. CALJIC No. 8.85's Language, Which Reflects This Court's Holding in *Ochoa*, Does Not Violate the United States Constitution

Battle also contends that CALJIC No. 8.85 violated his Eighth and Fourteenth Amendment rights by precluding the jury from considering as mitigating evidence sympathy for his family. (AOB 228–232.) As he acknowledges, this Court has rejected that very contention. (See *Williams III*, *supra*, 56 Cal.4th at pp. 197–198; *Bennett*, *supra*, 45 Cal.4th at p. 601; *Smith*, *supra*, 35 Cal.4th at pp. 366–367; *Smithey*, *supra*, 20 Cal.4th at p. 1000.) The Eighth and Fourteenth Amendments require only that state law "consider all *relevant* mitigating evidence," such as "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." (*Eddings v. Oklahoma* (1982) 455 U.S. 104, 110, 117 [102 S.Ct. 869, 71

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[24] Of course, the testimony of Battle's estranged biological family was relevant to shed light on the contemptible conditions of Battle's childhood before the age of five as part of his history and background. (See Pen. Code, § 190.3 [jury may consider "any matter relevant to . . . mitigation . . . including . . . the defendant's . . . background, history, [etc.]"].)

L.Ed.2d 1], citations omitted and italics added.) California law complies with that mandate. Under California law, a death penalty jury is to consider "any matter relevant to . . . mitigation . . . including, but not limited to, . . . the defendant's character, background, history, mental condition and physical condition." (Pen. Code, § 190.3.) Because pure sympathy for the defendant's family is not independently relevant to lessen a defendant's punishment, CALJIC No. 8.85 correctly instructs the jury not to consider it as evidence in mitigation. Accordingly, this Court should affirm the constitutionality of that instruction and reject Battle's alternative argument.

C. In Any Event, Any Error in Giving CALJIC No. 8.85's Standard Language Was Harmless

Any error in giving CALJIC No. 8.85's standard language was harmless. The nature of the crime itself—the brutal burglary, robbery, and murder of an elderly couple—combined with other aggravating factors, such as the testimony regarding the impact of the murders on the Demkos' family (factor a), Battle's prior violent offenses (factor b), and prior convictions (factor c), weighed heavily in favor of the death penalty in this case. Had the court excluded the instruction's language that told the jury that sympathy for the defendant's family was not a matter to consider in mitigation, it would have made no difference because sympathy for Battle's biological family's testimony would have been insignificant. Most of Battle's biological family's testimony was targeted at explaining the unfortunate circumstances of his upbringing before the age of five, which the jury instruction did not keep the jury from considering in mitigation. Battle's biological family's statements about loving him and wanting a relationship with him—the statements that could have evoked juror sympathy for them—were relatively brief in comparison. Finally, contrary to Battle's suggestion, the fact that the jury "did not render its death verdict quickly," does not mean that this one aspect of this one instruction about

one part of his mitigation case would have made any difference. At most it shows that the jury was conscientious and deliberative—as it should have been—in weighing evidence in reaching a penalty decision in a capital case. Even assuming error, considering the totality of the evidence in aggravation, Battle cannot show a reasonable possibility of a more favorable penalty outcome if only the jury had not been instructed with CALJIC No. 8.85 regarding sympathy for his family not constituting evidence in mitigation.

VI. CALIFORNIA'S DEATH PENALTY IS NOT UNCONSTITUTIONAL

Battle argues that various aspects of California's capital sentencing scheme are unconstitutional. (AOB 235.) While acknowledging that this Court has previously rejected his same arguments, Battle raises them to preserve the issues for federal review. (AOB 235.) Because Battle has not presented any compelling reason for this Court to revisit any of its previous rulings, it should reject these claims.

A. Penal Code Section 190.2 Is Not Impermissibly Broad

Battle claims Penal Code section 190.2, which enumerates the special circumstances, is impermissibly broad, thereby "mak[ing] almost all first degree murders eligible for the death penalty," in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the Constitution. (AOB 235–236.) This Court has consistently rejected this claim. (See *People v. Carrasco* (2014) 59 Cal.4th 924, 970 (*Carrasco*); *People v. Myles* (2012) 53 Cal.4th 1181, 1224; *People v. Zamudio* (2008) 43 Cal.4th 327, 373; *People v. Elliot* (2005) 37 Cal.4th 453, 487 (*Elliot*); *People v. Harris* (2005) 37 Cal.4th 310, 365.) Battle has not presented any reason to reconsider this issue.

B. Penal Code Section 190.3, Subdivision (a) Is Not Impermissibly Broad

Battle argues that Penal Code section 190.3, subdivision (a), allowing the jury to consider the "circumstances of the crime" as an aggravating factor, is not sufficiently limited, thereby allowing prosecutors to argue every conceivable circumstance is an aggravating factor, even those that contradict each other from case to case, thereby violating the Fifth, Sixth, Eighth, and Fourteenth Amendments to the Constitution. (AOB 236–237.) This Court has rejected this argument.

> It is not inappropriate . . . that a particular circumstance of a capital crime may be considered aggravating in one case, while a contrasting circumstance may be considered aggravating in another case. The sentencer is to consider the defendant's individual culpability; there is no constitutional requirement that the sentencer compare the defendant's culpability with the culpability of other defendants. [Citation.] The focus is upon the individual case, and the jury's discretion is broad.

(*People v. Jenkins* (2000) 22 Cal.4th 900, 1051; see also *Carrasco*, *supra*, 59 Cal.4th at p. 970; *People v. Ramos* (2004) 34 Cal.4th 494, 533; *People v. Maury* (2003) 30 Cal.4th 342, 439.) Battle has not presented any reason to reconsider this issue; therefore, his claim should be rejected.

C. The Standard Penalty Phase Instructions Do Not Impermissibly Fail to Set Forth the Appropriate Burden of Proof

Battle makes a number of claims that the death penalty statute and accompanying jury instructions fail to set forth the appropriate burden of proof. None of his contentions has merit.

1. There is no requirement that the jury find aggravating factors outweigh the mitigating factors beyond a reasonable doubt

Citing *Apprendi v. New Jersey* (2000) 530 U.S. 466, *Ring v. Arizona* (2002) 536 U.S. 584, and *Blakely v. Washington* (2004) 542 U.S. 296,

Battle argues that the jury needed to make factual findings beyond a reasonable doubt that (1) aggravating factors were present, (2) the aggravating factors outweighed the mitigating factors, and (3) the aggravating factors were so substantial as to make death the appropriate punishment, and that the failure to do so violated the United States Constitution. (AOB 238–240.) As this Court's precedent makes clear, "California's death penalty law does not violate the Sixth Amendment right to a jury trial, the Eight Amendment prohibition against cruel and unusual punishment, or the Fourteenth Amendment right to due process for failing to require proof beyond a reasonable doubt that aggravating factors exist, outweigh the mitigating factors, and render death the appropriate punishment." (*Boyce*, *supra*, 59 Cal.4th at pp. 723–724 ; citing *People v. DeHoyos* (2013) 57 Cal.4th 79, 149–150 (*DeHoyos*) and *People v. Blair* (2005) 36 Cal.4th 686, 753.) Battle has presented no reason to reconsider this issue.

2. There is no requirement to instruct on the burden of proof or its absence

Battle contends that the trial court should have instructed the jury that the State had the burden of persuasion to establish that aggravating factors existed and that they outweighed the mitigating factors, that the death penalty was appropriate, and that there was a presumption of life without parole. (AOB 240.) In the alternative, he argues that if there was no burden of proof, the court should have told the jury that. (AOB 241.) This Court has rejected all of these arguments. The trial court was not required to instruct that the prosecution bore the burden of persuasion to establish that aggravating factors existed and that they outweighed mitigating factors. (*People v. Lenart* (2004) 32 Cal.4th at 1107, 1136–1137; accord *Boyce*, *supra*, 59 Cal.4th at p. 724.) Nor was the court required to articulate the converse, i.e., that there was no burden of proof at the penalty phase.

(*People v. Streeter* (2012) 54 Cal.4th 205, 268; accord *Boyce*, *supra*, 59 Cal.4th at p. 724.) Finally, Battle was not entitled to an instruction that there is a presumption in favor of life without parole. (*People v. Arias* (1996) 13 Cal.4th 92, 190 (*Arias*); accord *Boyce*, at p. 724.) Battle has presented this Court with no reason to reconsider its holdings.

3. There is no requirement that the jury unanimously determine which aggravating factors they relied upon or that Battle engaged in prior unadjudicated criminal activity

Battle contends his rights under the Sixth, Eighth, and Fourteenth Amendments to the Constitution were violated because there is no assurance that the jury unanimously found aggravating circumstances that warranted the death penalty or that he engaged in prior criminality. (AOB 241–243.) There is no constitutional requirement that a capital jury reach unanimity on the presence of aggravating factors. (*People v. Martinez* (2009) 47 Cal.4th 399, 455; *People v. Burney* (2009) 47 Cal.4th 203, 268 (*Burney*).) Nor is there a constitutional requirement that a capital jury unanimously agree that prior criminal activity has been proven. (*Martinez*, at p. 455; *People v. Dykes* (2009) 46 Cal.4th 731, 799.) Nor was Battle's right to equal protection violated by not requiring unanimity on the presence of aggravating factors. (*People v. Cook* (2007) 40 Cal.4th 1334, 1367; *People v. Griffin* (2004) 33 Cal.4th 536, 598.) This claim should be rejected.

4. CALJIC No. 8.88 is not impermissibly vague and ambiguous for using the word "substantial"

Battle contends CALJIC No. 8.88 is impermissibly vague and ambiguous. (AOB 244.) CALJIC No. 8.88 instructs the jurors that their penalty determination depends on whether they were "persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without

parole." In particular, Battle complains that the phrase "so substantial" was impermissibly broad in violation of his rights under the Eighth and Fourteenth Amendments to the Constitution. This Court has rejected this same contention before, and should do so here. (*Carrington*, *supra*, 47 Cal.4th at p. 199; *People v. Bramit* (2009) 46 Cal.4th 1221, 1249; *People v. Breaux* (1991) 1 Cal.4th 281, 315–316 (*Breaux*).)

5. CALJIC No. 8.88 is not unconstitutional for failing to inform the jury that the central determination is whether death is the appropriate punishment

Battle contends that CALJIC No. 8.88's language instructing the jury to consider whether the circumstances "warrant[ed]" death, rather than whether death was the "appropriate" penalty, violated the Eighth and Fourteenth Amendments. (AOB 244–245.) As this Court has explained, it does not. (*Boyce*, *supra*, 59 Cal.4th at p. 724; *DeHoyos*, *supra*, 57 Cal.4th at p. 150; *People v. Rogers* (2009) 46 Cal.4th 1136, 1179.)

6. The instructions were not constitutionally deficient because they failed to inform the jurors that if mitigation outweighed aggravation, they must return a sentence of life without parole

Although the instructions informed the jury of the circumstances under which it could return a death verdict, Battle contends the instructions were deficient because they did not inform the jury of the converse—that if the mitigating circumstances outweighed the aggravating circumstances it was required to return a verdict of life without parole. (AOB 245–246.) He claims that this violates state-law principles regarding proper instructions for defense theories, as well as federal due process. These claims are meritless. (See *Carrington*, *supra*, 47 Cal.4th at p. 199; *People v. Medina* (1995) 11 Cal.4th 694, 781–782; *People v. Duncan* (1991) 53 Cal.3d 955, 978.)

7. The instructions did not impermissibly fail to inform the jury regarding the standard of proof and lack of need for unanimity as to mitigating circumstances

Battle argues that the jury instructions violated the Eighth Amendment by failing to set forth a standard of proof and by not informing the jury that unanimity did not apply to mitigating circumstances. (AOB 246–247.) This Court has repeatedly rejected this argument and should do so again. (See *People v. Loy* (2011) 52 Cal.4th 46, 78; *People v. Rogers* (2006) 39 Cal.4th 826, 897; *Breaux*, *supra*, 1 Cal.4th at pp. 314–315.)

8. There is no requirement to inform the jury that there is a presumption of life

Battle reiterates his contention that there is a presumption of life without parole and argues the trial court was constitutionally required to instruct the jury on that putative presumption. (AOB 247–248.) This Court has repeatedly rejected the argument that there is a presumption of life in the penalty phase of a capital trial that is analogous to the presumption of innocence at the guilt phase. (See *People v. Abilez* (2007) 41 Cal.4th 472, 532 (*Abilez*); *Arias*, *supra*, 13 Cal.4th 92, 51 Cal.Rptr.2d 770, 913 P.2d 980.) Battle gives no compelling reason to deviate from this Court's precedent.

D. Written Findings Are Not Constitutionally Required

Battle claims that jury's failure to make any written findings during the penalty phase violated his rights under the Sixth, Eighth, and Fourteenth Amendments to the Constitution. (AOB 248–249.) This Court has consistently rejected any claim that the jury is required to make written findings as to aggravating factors. (*DeHoyos*, *supra*, 57 Cal.4th at p. 150; accord, *People v. Parson* (2008) 44 Cal.4th 332, 370.)

E. The Instructions on Mitigating and Aggravating Factors Were Constitutional

Battle next raises a number of claims regarding the instructions on mitigating and aggravating factors. Each contention has been previously rejected by this Court, and Battle has not presented any compelling reason for this Court to revisit its holdings.

1. The use of words such as "extreme" is constitutionally permissible

Battle contends the use of words such as "extreme" and "substantial" in the list of mitigating factors (defining when mental or emotional disturbance, or the dominating influence of another, are mitigating factors) acted as barriers to the consideration of mitigation in violation of his Sixth, Eighth, and Fourteenth Amendment rights. (AOB 249.) This Court has repeatedly rejected this contention and should do so again here. (*Boyce*, *supra*, 59 Cal.4th at p. 724; *Clark*, *supra*, 52 Cal.4th at p. 1007; *People v. Beames* (2007) 40 Cal.4th 907, 934.)

2. There is no constitutional requirement to delete inapplicable sentencing factors

Battle argues his constitutional rights were violated because the trial court failed to delete inapplicable sentencing factors in CALJIC No. 8.85, which describes what factors may be considered in mitigation or aggravation. (AOB 249–250.) The trial court is not required to delete inapplicable sentencing factors. (*Burney*, *supra*, 47 Cal.4th at pp. 260–261.)

3. There is no constitutional requirement to designate which factors were mitigating

Battle says that the trial court should have advised the jury as to which factors in CALJIC No. 8.85 were solely to be used as mitigators and that the failure to do so resulted in a violation of his Eighth and Fourteenth

Amendment rights. (AOB 250–251.) As this Court has explained, CALJIC No. 8.85 is not unconstitutional for not informing the jury which factors may be used only as mitigators. (*People v. Perry* (2006) 38 Cal.4th 302, 319; *People v. Moon* (2005) 37 Cal.4th 1, 42.)

F. Intercase Proportionality Review Is Not Constitutionally Required

Battle contends the failure to conduct intercase proportionality review violates the Sixth, Eighth, and Fourteenth Amendments because the proceedings are conducted in a constitutionally arbitrary, unreviewable manner; violate equal protection; or violate due process. (AOB 251.) He is wrong. Intercase, or comparative, proportionality review is not required by the federal Constitution; and this Court has consistently declined to undertake it. (*Pulley v. Harris* (1984) 465 U.S. 37, 43-54 [104 S.Ct. 871, 79 L.Ed.2d 29]; *Boyce*, *supra*, 59 Cal.4th at p. 725; *People v. Gonzales* (2011) 51 Cal.4th 894, 957.) Intercase proportionality review is not required for due process, equal protection, the prohibition against cruel and unusual punishment, or the guarantee to a fair trial. (*People v. Murtishaw* (2011) 51 Cal.4th 574, 597; *People v. Foster* (2010) 50 Cal.4th 1301, 1368.)

G. California's Capital Sentencing Scheme Does Not Violate Equal Protection

Battle argues that California's capital sentencing scheme violates the Equal Protection Clause because it gives more procedural protections to noncapital defendants. As examples, Battle complains that, in capital cases, there is no burden of proof, the jurors need not agree on which aggravating circumstances apply, and there are no written findings. (AOB 251–252.) As this Court has repeatedly and consistently held, "the death penalty law does not deny capital defendants equal protection because it provides a different method of determining the sentence than is used in noncapital

cases." (*Elliot, supra*, 37 Cal.4th at p. 488, citations omitted; accord *People v. Dunkle* (2005) 36 Cal.4th 861, 940; *People v. Panah* (2005) 35 Cal.4th 395, 500.) This is because "capital and noncapital defendants are not similarly situated and therefore may be treated differently without violating constitutional guarantees of equal protection of the laws or due process of law." (*People v. Manriquez* (2005) 37 Cal.4th 547, 590, citations omitted.) Battle's argument is therefore meritless.

H. California's Death Penalty Law Does Not Violate International Law

Battle lastly contends that the death penalty violates international law, the Eighth and Fourteenth Amendments, and "evolving standards of decency." (AOB 252.) This Court has repeatedly rejected similar arguments and should do so again here. "International law does not prohibit a sentence of death rendered in accordance with state and federal constitutional and statutory requirements." (*People v. Hillhouse* (2002) 27 Cal.4th 469, 511; accord *Boyce, supra*, 59 Cal.4th at p. 725; *People v. Alfaro* (2007) 41 Cal.4th 1277, 1322 (*Alfaro*). Accordingly, this claim should be rejected.

VII. As There Was No Error in the Penalty Phase, There Are No Errors to Cumulate in Support of Battle's Cumulative-Error Claim

Battle contends that the combined prejudice from his two alleged penalty-phase errors, i.e., the exclusion of the lingering doubt instruction and the inclusion of CALJIC No. 8.85's standard language about the permissible use of a defendant's family's testimony, combined with the "other defects in California capital-sentencing scheme," resulted in cumulative prejudice warranting reversal of the penalty verdict. (AOB 253–255.) No error occurred; and even if error is assumed, Battle has

failed to show any prejudice, cumulative or otherwise. (*Alfaro*, *supra*, 41 Cal.4th at p. 1316; *Abilez*, *supra*, 41 Cal.4th at p. 523.)

CONCLUSION

For the foregoing reasons, respondent respectfully requests the judgment be affirmed in its entirety.

Dated: December 16, 2014

Respectfully submitted,

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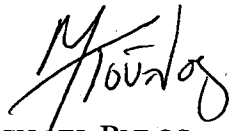

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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13-point Times New Roman font and contains 18,853 words.

Dated: December 16, 2014

KAMALA D. HARRIS
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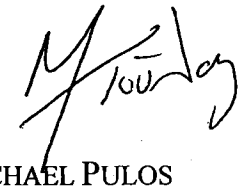

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Battle**
No.: **S119296**

I declare:

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

On December 16, 2014, I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 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 December 16, 2014, at San Diego, California.

Tammy Larson
Declarant

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