SUPREME COURT COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, **v.** **GABRIEL CASTANEDA,** Defendant and Appellant.	**CAPITAL CASE** S085348

San Bernardino County Superior Court No. FWV15543
The Honorable Mary E. Fuller, Judge

RESPONDENT'S BRIEF

EDMUND G. BROWN JR.
Attorney General of the State of California

DANE R. GILLETTE
Chief Assistant Attorney General

GARY W. SCHONS
Senior Assistant Attorney General

HOLLY WILKENS
Deputy Attorney General

MARVIN E. MIZELL
Deputy Attorney General
State Bar No. 190786

110 West A Street, Suite 1100
San Diego, CA 92101
P.O. Box 85266
San Diego, CA 92186-5266
Telephone: (619) 645-3040
Fax: (619) 645-2271
Email: Marvin.Mizell@doj.ca.gov

Attorneys for Plaintiff and Respondent

DEATH PENALTY

TABLE OF CONTENTS

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, **v.** **GABRIEL CASTANEDA,** Defendant and Appellant.	**CAPITAL CASE** S085348

STATEMENT OF THE CASE

On September 10, 1998, the San Bernardino County District Attorney filed an information, charging appellant, Gabriel Castaneda (Castaneda), with the first degree murder of Colleen Mary Kennedy (Pen. Code, § 187, subd. (a)) in count 1, second degree commercial burglary (Pen. Code, § 459) in count 2, kidnapping (Pen. Code, § 207, subd. (a)) in count 3, forcible rape (Pen. Code, § 261, subd. (a)(2)) in count 4, sodomy by use of force (Pen. Code, § 286, subd. (c)) in count 5, and second degree robbery (Pen. Code, § 211) in count 6. (1 CT 23-29.)

As to count 1, first degree murder, the special circumstances of burglary, kidnapping, rape and attempted rape, sodomy and attempted sodomy, and robbery and attempted robbery, were alleged pursuant to Penal Code section 190.2, subdivision (a)(17). (1 CT 25.) As to count 3, kidnapping, it was alleged, pursuant to Penal Code section 209, subdivision (a), that the victim, while being kidnapped, suffered bodily harm and death, or was intentionally confined in a manner which exposed her to a substantial likelihood of death. (1 CT 26.) As to counts 4 and 5, respectively forcible rape and sodomy by use of force, it was alleged that during those crimes Castaneda used a deadly weapon, a screwdriver, with the meaning of Penal Code section 12022.3,

subdivision (a). It was also alleged, as to counts 4 and 5, that Castaneda committed four specified circumstances for felony sex offenses within the meaning of Penal Code section 667.61, subdivisions (a), (b) and (e). (1 CT 27.)

As to counts 1, 3, 4, 5 and 6, i.e., all the charged crimes except second degree commercial burglary, it was alleged that Castaneda had two prior serious felony convictions; specifically, robbery in 1991 and first degree burglary in 1980, withing the meaning of Penal Code section 667, subdivision (a)(1). (1 CT 28.) As to all counts, it was alleged that Castaneda: (1) used a deadly and dangerous weapon, a screwdriver (Pen. Code, § 12022, subd. (b)(1)); (2) had two prior strike convictions, one for robbery in 1991 and one for first degree burglary in 1980 (Pen. Code, §§ 1170.12, subds. (a) through (d) and 667, subds. (b) through (i)); and (3) had a prison prior from a second degree burglary conviction in 1987 (Pen. Code, § 667.5, subd. (b)). (1 CT 28.)

Castaneda was arraigned on the information on September 11, 1998, and pleaded not guilty to the charges and denied the allegations. (1 CT 30-31.) The guilt phase of Castaneda's jury trial commenced with jury selection on August 30, 1999. (1 CT 171.) The jury was sworn on September 21, 1999 (1 CT 185), and the presentation of evidence began on October 4, 1999 (1 CT 194-197). On October 28, 1999, trial on the prison prior, serious felony priors and the strike priors were ordered bifurcated. (1 CT 241; 10 RT 2587-2588.) The case was submitted to the jury on November 3, 1999. (1 CT 248-249.)

The next day, November 4, 1999, as to the charged crimes, the jury found Castaneda not guilty of count 4, forcible rape.[1/] The jury found Castaneda guilty as charged in counts 1, 2, 3, 5 and 6. (1 CT 251-254; 2 CT 364, 371, 373, 376, 383, 389.) As to count 1, first degree murder, the jury

---

1. As to count 4, the jury also found Castaneda not guilty of the lesser included offense of attempted forcible rape. (1 CT 252; 2 CT 377.) The jury also found all allegations attendant to count 4 not to be true. (1 CT 252-253; 2 CT 378-382.)

found the burglary, kidnapping, sodomy and attempted sodomy, robbery and attempted robbery special circumstances to be true, and found not to be true the rape and attempted rape special circumstance. (1 CT 251-252; 2 CT 366-370.) As to count 3, kidnapping, the jury found to be true the allegation that the victim, while being kidnapped, suffered great bodily harm and death, or was intentionally confined in a manner which exposed her to substantial likelihood of death. (1 CT 252; 2 CT 375.) As to count 5, sodomy by use of force, the jury found to be true the allegation that Castaneda used a deadly weapon, a screwdriver (Pen. Code, § 12022.3, subd. (a)), and found to be true the allegation of four specified circumstances for felony sex offenses (Pen. Code, § 667.61, subds. (a), (b) and (e).) (1 CT 253.) As to all counts, except count 4, the jury found to be true the allegation that Castaneda used a dangerous and deadly weapon, a screwdriver. (Pen. Code, § 12022, subd. (b)(1)). (1 CT 251-254; 2 CT 365, 372, 374, 384, 390; 12 RT 2870-2879.)

On November 15, 1999, the penalty phase of Castaneda's jury trial commenced. (2 CT 441.) On November 16, 1999, the presentation of evidence began, and Castaneda waived his right to jury trial as to all the prior allegations. (2 CT 446-448.) On November 23, 1999, the trial court found the two prior strike allegations, the two serious felony prior allegations, and the prison prior allegation, to be true. (2 CT 493.) The penalty case was submitted to the jury on November 30, 1999. (2 CT 502.) On December 2, 1999, the jury returned a verdict of death. (2 CT 509-510.)

On January 7, 2000, the trial court denied Castaneda's motion to modify the sentence. (Pen. Code, § 190.4, subd. (e).) The same day, the trial court sentenced Castaneda to death for first degree murder with special circumstances (count 1). The trial court also sentenced Castaneda to life without the possibility for parole for kidnapping that resulted in death plus one year for the use of a deadly weapon allegation (count 3); to 75 years to life for sodomy by

use of force, with the felony sex offense allegation and the finding of two prior strike allegations, and to the upper term of 10 years for deadly weapon use allegation (Pen. Code, § 12022.3, subd. (a))[2] plus of one year for the deadly and

---

2. After Castaneda filed his opening brief, the United States Supreme Court issued its opinion in *Cunningham v. California* (2007) __ U.S.__ [127 S.Ct. 856]. In *Cunningham*, the United States Supreme Court held that California's procedure for selecting upper terms violates the defendant's Sixth and Fourteenth Amendment right to jury trial because it "assigns to the trial judge, not to the jury, authority to find the facts that expose a defendant to an elevated 'upper term' sentence." (*Cunningham, supra,* 127 S.Ct. at p. 860.)

Even though *Cunningham* generally precludes a trial court from finding facts to impose an upper term sentence, and even though *Cunningham* holds that the middle term is the statutory maximum, there was no *Cunningham* violation in this case. Under *Almendarez-Torres v. United States* (1998) 523 U.S. 224 [118 S.Ct. 1219, 140 L.Ed.2d 350], a defendant does not have a right to a jury trial for a sentence based on the fact of a prior conviction. (*Id.* at p. 246; *accord, Cunningham, supra,* 127 S.Ct. at p. 860.) Further, this *Almendarez-Torres* exception goes beyond the mere fact of a prior conviction to include matters such as the sentence imposed and the status and timing of the defendant's incarceration in relation to subsequent offenses. (See *People v. Thomas* (2001) 91 Cal.App.4th 212, 221-222 ["[c]ourts have not described *Apprendi* as requiring jury trials on matters other than the precise 'fact' of a prior conviction. Rather, courts have held that no jury trial right exists on matters involving the more broadly framed issue of 'recidivism'"], cited with approval in *People v. McGee* (2006) 38 Cal.4th 682, 700-703; see also *People v. Epps* (2001) 25 Cal.4th 19, 26; *People v. Prather* (1990) 50 Cal.3d 428, 439-440.) The jury trial right thus does not extend to an aggravating circumstance based on appellant's criminal record.

Here, the recidivism factors that Castaneda's prior convictions were of increasing seriousness (16 RT 3898), which is based on the nature of the prior convictions, and that he was on parole at the time (16 RT 3898), which is a component of his most recent prior conviction, fell within the recidivism exception and fully satisfied the jury trial requirement. Under these circumstances, the court had the authority to impose the upper term, and could properly find other aggravating circumstances in evaluating whether to impose the upper term.

In any event, error under *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435] or *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403], is subject to review under *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705]

dangerous weapon allegation (Pen. Code, § 12022, subd. (b)(1)), with the latter one year sentence stayed pursuant to Penal Code section 654 (count 5); to 25 years to life for robbery based on two prior strike allegations, plus one year for the deadly and dangerous weapon allegation (count 6); and 25 years to life for burglary based on the two prior strike allegations, plus one year for the deadly and dangerous weapon allegation (count 2). The trial court stayed the sentence on count 2 pursuant to Penal Code section 654. (3 CT 853-854,[3] 879-880; 16 RT 3896-3908.)

All of the imposed sentences were ordered to be served consecutively. In addition, the trial court imposed consecutive sentences of one year for the prison prior allegation, and five years for each prior serious felony allegation

---

(*Chapman*). (*Washington v. Recuenco* (2006) ___ U.S. ___ [126 S.Ct. 2546, 2553, 165 L.Ed.2d 466]; *People v. Sengpadychith* (2001) 26 Cal.4th 316, 327.) Likewise, since *Cunningham* is an application of *Apprendi* and *Blakely*, it should be subject to *Chapman* harmless error review. Thus, under *Chapman*, to determine whether *Cunningham* error was prejudicial, the reviewing court must determine whether the jury would have found an aggravating circumstance true beyond a reasonable doubt. (See *Chapman*, *supra*, 386 U.S. at p. 24.) Here, as shown *post* in the statement of facts, the trial court's findings of aggravating circumstances to impose the upper term that the crimes involved great violence and a high degree of cruelty, that Castaneda threatened Elizabeth Ibarra, and that Castaneda took advantage of a position of trust in that Kennedy believed he was a patient, were supported by overwhelming evidence. (16 RT 3898.) Therefore, the jury would have found each of these aggravating circumstances true beyond a reasonable doubt had they been presented. Accordingly, any *Cunningham* error was harmless because the upper term sentence would have been authorized by any one of these aggravating circumstances found by the trial court in imposing the sentence.

3. The Clerk's Transcript at pages 853-854 mistakenly states that the trial court sentenced Castaneda to the "upper" term of one year each for the deadly and dangerous weapon enhancements (Pen. Code, § 12022, subd. (b)(1)) on counts 2, 3, 5 and 6. One year is the only proscribed term in prison for a violation of that section.

for a total of ten years. The total sentence for counts 2 through 6 was life without the possibility of parole, plus two fully consecutive life terms with minimum terms of 85 and 26 years respectively, plus an additional 11 years for the prior allegations, amounting to 123 years to life. The trial court stayed the terms of counts 2 through 6 during the pendency of appeal of count 1 because it relied on the facts underlying those offenses to deny the motion to modify the death penalty. The trial court ruled the stay would become permanent when the sentence on count 1 is carried out. (3 CT 853-855, 879-880; 16 RT 3896-3908.)[4/]

GUILT PHASE STATEMENT OF FACTS

Prosecution Case-In-Chief

Events Leading Up To Castaneda's Murder Of Colleen Kennedy

In February 1998, Gina Ybarbo (Ybarbo) and George Castaneda (George), one of Castaneda's brothers, were married. (7 RT 1701.) Virginia Castaneda (Virginia) was Castaneda's girlfriend and they lived in an apartment together in Riverside. (7 RT 1546, 1702, 1732-1734.) On February 20, 1998, while driving Virginia's red Nissan Sentra (Sentra), Castaneda, George and Ybarbo were involved in a traffic accident. (7 RT 1759.) The Sentra's mirror was damaged in the accident. (7 RT 1712.)

In early March 1998, Castaneda, Virginia, and Virginia's three children, including the youngest child three and a half year old Joey, moved into

---

4. Although noted in the Clerk's Transcript, it appears in the Reporter's Transcript that the trial court may not have pronounced the sentence for the deadly and dangerous weapon allegation as to count 1. (See 3 CT 853; 16 RT 3896-3908.)

apartment in Ontario that was next door to an apartment shared by George and Ybarbo. (7 RT 1733-1735, 1767.) Ybarbo went to see an attorney after the February car accident and the attorney referred her, Castaneda and George to the medical office of Basil Vassantachart, M.D. (doctor), for treatment. (5 RT 1102-1104; 7 RT 1713.) The doctor, who specialized in family practice and preventative medicine, had a main office in Alhambra, an office in West Covina, and an office located at 9339 and 9345 Central Avenue in Montclair. (5 RT 996, 1042, 1067-1068.)

In February and March 1998, Colleen Kennedy (Kennedy) worked at the doctor's Covina office on Tuesdays, Wednesdays and Fridays, and at the doctor's Montclair office on Mondays and Thursdays. (4 RT 997-998; 5 RT 1005-1007.)[5/] Kennedy was the office manager of the clinic and she would take pulses, blood pressure, weigh patients, do insurance billing, serve as an X-ray technician and assist in some physical therapy. (4 RT 997-998; 5 RT 1043.) On Thursdays, Kennedy would arrive at the clinic around 8:30 a.m. and would work with others, including medical assistant Heidi Ramos, and the doctor. (5 RT 1007-1008; 8 RT 1990-1993.) On Mondays, Kennedy would work alone in the clinic before the doctor arrived from about 9:00 a.m. until the first patients arrived around 10:30 to 11:00 a.m. (5 RT 1007.) The back of the clinic faced Central Avenue with the front door facing the parking lot. (5 RT 1046.) Kennedy would usually keep the front door locked for safety reasons because she was alone. (5 RT 1023.) Sometimes Kennedy would take care of the patients herself before the doctor arrived. (5 RT 1128, 1143.) If Kennedy saw a patient waiting, she would open the door and invite the patient in. (5 RT 1128.)

---

5. Hereafter, the medical office located in Montclair will be referred to as the "clinic."

The clinic contained, among other things, a front office, a reception and waiting area, three examination rooms, an X-ray room, a consultation room, a laboratory room, a physical therapy room and a procedure room. (5 RT 1051-1057.) The procedure room of the clinic was used two or three times a week for examinations and minor surgery. (4 RT 955; 5 RT 1055, 1090; 8 RT 1994.) The procedure room contained a three piece hydraulic examination table, which could be maneuvered up and down and 360 degrees on its movable top part. (5 RT 1055, 1118-1120, 1137-1138.) The examination table always had a paper sheet covering it that was changed for each patient that used it. (4 RT 955-957; 5 RT 1089-1090, 1094.) The procedure room had an exterior door that was not used with a dead bolt and knob lock, a carpet floor, an "eye window," and a picture window with Venetian blinds below the eye window. (5 RT 1099, 1199.) Central Avenue, which is a major street, ran north to south on the back west side of the building directly next to the procedure room. (5 RT 1288, 1291.) There was a sidewalk next to Central Avenue, a grassy area, and a sidewalk and planter box next to the building. (5 RT 1291.)

Castaneda, George and Ybarbo arrived together at the clinic for their first appointment on Thursday, February 26, 1998. (5 RT 1141-1143; 8 RT 1997-1998.) They were there for medical evaluation due to the car accident. (5 RT 1103-1104.) Ramos, the medical assistant, called Castaneda, George and Ybarbo back to the procedure room to fill out new patient paperwork. (8 RT 1997-1998.) Ramos asked Castaneda why he was there to see the doctor and took his vital signs. (8 RT 1999-2001.) Castaneda sat on the doctor's stool while filling out the forms on a clipboard. (8 RT 1999.) Ramos did not see Castaneda sit on the examination table while she was in the procedure room, but she was not in the procedure room the entire time he was filling out the forms. (8 RT 2001, 2011.) Castaneda received an examination by the doctor in a room other than the procedure room. (5 RT 1135; 8 RT 2000.)

On Thursday, March 5, 1998, Castaneda came to the clinic again with George and Ybarbo. (5 RT 1141-1143.) The doctor evaluated Castaneda. (5 RT 1135.) Castaneda received an X-ray and physical therapy which consisted of treatment in a reclined massage chair while he was fully clothed. (5 RT 1135; 7 RT 1702-1712; 8 RT 2002-2003.) George and Ybarbo received the same physical therapy. (7 RT 1702-1712, 1727.) Kennedy set up the massage chair in an exam room on the North side of the building so they could individually receive the treatment. (5 RT 1111; 7 RT 1702-1712.)

Castaneda, George and Ybarbo came to the clinic together for the last time on Monday, March 9, 1998. (5 RT 1142-1143; 9 RT 2290.) They all again received individual physical therapy in the massage chair. (5 RT 1131, 1143.) Kennedy probably provided that physical therapy around 11:00 a.m. because the doctor remembered seeing Kennedy do the X-ray for Castaneda and George. (5 RT 1104-1105.) Ramos did not see the three of them that day. (8 RT 2004.) At some point during this time period of the treatment appointments, Castaneda made a comment to Ybarbo and George that a Hispanic nurse that worked for the doctor, not Kennedy, had put her "ass in his face." (7 RT 1702-1712, 1724, 1729.)

Castaneda, Ybarbo and George did not show up for scheduled appointments on March 12 or 16, 1998. (5 RT 1144-1145.) The missed March 16 appointment was for physical therapy at 10:00 a.m. (5 RT 1144-1145.) Near the end of March, Kennedy told Ybarbo that treatment for her, Castaneda and George could only continue if they paid for it because insurance was not paying for their treatments. Ybarbo did not appear to be angry when told this by Kennedy. (5 RT 1107-1108; 7 RT 1702-1712.)

The last time the examination table in the procedure room was used before Monday, March 30, 1998, it was in a horizontal position because the doctor had performed minor surgery on a patient to remove a cyst on Thursday,

March 26, 1998. The surgery generated blood. After the surgery was completed, the doctor and Ramos cleaned up the blood, and the doctor changed the paper sheet on the examination table. (5 RT 1138-1139; 8 RT 2006-2007.)

The Morning Of Monday March 30, 1998, When Castaneda Murdered Colleen Kennedy

During the early morning of Monday, March 30, 1998, Castaneda left his Ontario apartment in Virginia's Sentra to work at Toyo Tires, a tire distribution center, for the first time. Castaneda reported to work at Toyo Tires at 6:00 a.m. (4 RT 976-977; 7 RT 1736-1739; 8 RT 1953-1954, 1958.) Castaneda was assigned to a group of three men where one man rolled the tires and the other two men stacked the tires. (8 RT 1954.) Virginia received a ride to her job around 8:00 a.m. from Ybarbo. (7 RT 1736.)

That same morning, Kennedy and her long-time husband, Steven Kennedy (Mr. Kennedy), shared a cup of coffee in their pajamas together. Kennedy had no injuries and no complaints. (4 RT 859; 8 RT 1891-1892.) Kennedy left for work at the clinic around 7:30 to 8:00 a.m. in a Chevrolet S10 Blazer. It usually took her about 20 to 30 minutes to get to work. Mr. Kennedy later left to go to his job. (4 RT 859-862.) Their two children were at home when Mr. Kennedy left for work. (4 RT 862.)

According to the testimony of a Toyo Tires warehouse manager and employee, there was a 30 minute break around 9:00 a.m. for Toyo Tire employees, including Castaneda. (8 RT 1948, 1950, 1954.) Castaneda asked a group of Toyo Tire employees where he could get something to eat. Castaneda was told by the group that there was food at a nearby convenience store. (8 RT 1948.) Less than five minutes into the break, without telling anyone a reason or reporting any injury, Castaneda left Toyo Tires and did not return. (4 RT 976-985; 8 RT 1948-1950, 1955-1956.)

Shirley Vassantachart (Mrs. Vassantachart), the doctor's wife, was at the doctor's Alhambra office that morning. (5 RT 1014-1015.) At 9:28 a.m., Mrs. Vassantachart called Kennedy at the Clinic. Mrs. Vassantachart told Kennedy that she was faxing over an insurance company authorization form. Mrs. Vassantachart told Kennedy, who was speaking normally, that the fax was going through. Kennedy could not see the fax because the fax machine was in the utility room across the waiting room. (5 RT 1015-1017, 1019.) After about one minute of conversation, Mrs. Vassantachart was interrupted by a patient and ended the call with Kennedy. (5 RT 1018.)

A Long John Silver restaurant (restaurant) was located at 9379 Central Avenue near the clinic. (8 RT 1961, 1975; Exh. 16, photos G and H.) When the restaurant's assistant manager arrived at 9:15 a.m., there were no vehicles in the restaurant's parking lot. (8 RT 1977.) Around 9:45 a.m., a restaurant employee who had just arrived saw a maroon Sentra in the restaurant's parking lot. The employee felt this was unusual because she had never seen cars in the restaurant's parking lot in the morning except for the cars of the employees who worked there. The assistant manager and the employee both saw the Sentra in the parking lot around 10:15 a.m. The assistant manager felt it was unusual for the car to be parked there because the restaurant did not open until 11:00 a.m. (8 RT 1962-1969; Exh. 16, photos G and H.)

Between 10:15 and 10:30 a.m., Mrs. Vassantachart called the clinic, but after letting the phone ring over 10 times, Kennedy did not answer. (5 RT 1019-1021.) Mrs. Vassantachart believed that perhaps Kennedy went to get a cup of coffee. (5 RT 1022.)

Commodore Perry Childs parked his van in front of the clinic at 10:30 a.m. for his 11:00 a.m. appointment. (4 RT 892-894.) When he arrived, Kennedy's Blazer was parked in the clinic's parking lot. (4 RT 894, 908, 913, 930.) Childs did not go to the front door because he was waiting for Kennedy

to open up the clinic at 11:00 a.m as usual. (4 RT 899.) Around 10:40 a.m., Ida Oles parked her car in the clinic's parking lot. (4 RT 898, 921.) Oles, Childs' friend, got out of her car and joined Childs in his van. (4 RT 899, 909, 912.) A few minutes later, Dorothy Cruz, a patient of the doctor for 13 years, arrived in her car accompanied by her husband, Abram Cruz, who had an appointment at 11:00 a.m. (4 RT 900-901, 912-913; 5 RT 1066.) Around 10:45 a.m., after Kennedy had not let patients in the clinic as usual, Cruz checked the front door and found it locked. Cruz walked around the building to see if she and her husband could get inside, and found they could not get in. There was nothing unusual about the appearance of the building, including no broken glass. Cruz used her cell phone to call inside the clinic but there was no answer. Cruz called Mrs. Vassantachart at the Alhambra office and told her that the clinic was locked, Kennedy's car was outside and nobody was answering the door. (4 RT 915, 939-940, 960-964; 5 RT 1025.) Mrs. Vassantachart called the doctor at the West Covina office and told him what was going on. (5 RT 1025, 1066-1067.) After calling the clinic and not receiving an answer, the doctor left the West Covina office to drive to the clinic. (5 RT 1067-1068.)

The doctor arrived at the clinic about 15 to 20 minutes later, a little after 11:00 a.m., and parked by the front door. (4 RT 916, 964; 5 RT 1068.) When the doctor arrived, Cruz and her husband got out of their car and explained to the doctor what had happened. (4 RT 942-943; 5 RT 1069.) The doctor unlocked the door and walked into the clinic followed by Cruz and her husband. (4 RT 904-905, 943; 5 RT 1069, 1073.) Childs got out of his van and walked up to the open front door and Oles followed behind him. (4 RT 903, 916.) The doctor did not see Kennedy in the front office of the clinic, but saw a book lying open of the floor. (5 RT 1069.) This was unusual because

Kennedy was a very neat person. (5 RT 1072.) Nothing else was amiss in the clinic and there was no sign of forced entry. (5 RT 1124.)

The doctor proceeded to the back of the clinic and past the procedure room. (4 RT 943-945; 5 RT 1072-1073.) Because it seemed darker than usual, the doctor turned back toward the procedure room. (4 RT 964-965; 5 RT 1074, 1080-1081.) The doctor opened the procedure room door and saw Kennedy's body lying over the examination table, face down. The doctor screamed "Oh my, God," and that Kennedy had been raped and murdered. The doctor was shocked and stunned and closed the door. He then went into the procedure room and determined that Kennedy was dead. Kennedy's body was spread over the table, disrobed, and had her clothes around her ankles. The top part of the procedure table had been moved around 90 degrees. He then came out of the procedure room and told the Cruzes not to enter the procedure room. (4 RT 902, 904-905, 907-908, 917, 945-946, 962-963; 5 RT 1081-1083, 1118-1121, 1139.) The doctor answered a ringing telephone in the lab and told Mrs. Vassantachart, who was on the line, that Kennedy was dead and that he was going to call 911. (5 RT 1026, 1083.) He hung up with Mrs. Vassantachart and dialed 911. (5 RT 1083-1084.)

The Investigation Into The Murder Of Colleen Kennedy On March 30, 1998

Patrol officers arrived a few minutes after the doctor's 911 call on March 30, 1998, and told everyone to leave the clinic and wait outside. (4 RT 919, 952; 5 RT 1084; 9 RT 2228.) The patrol officers located Kennedy's body then seized the clinic and did not let anyone enter it. Once there were enough officers to safely search the interior of the clinic, the officers, along with detective Matthew Eaton of the Montclair Police Department, searched the interior of the clinic. There were no signs of forced entry. Finding no

additional people inside, the officers left the clinic and again set up a perimeter at the front door. (5 RT 1283-1284; 9 RT 2228, 2256.) Detective Roger Price of the Montclair Police Department, the lead investigator in the case, arrived at approximately 11:45 a.m. He obtained a search warrant later that day to re-enter the clinic that afternoon. (5 RT 1249, 1298; 9 RT 2228.) In the afternoon, San Bernardino County Sheriff's Department (sheriff's department) Crime Laboratory (crime lab) forensic specialists Deborah Harris and Richard Dysart[6/] entered the clinic along with Detective Eaton, who Harris gave permission to videotape[7/] the crime scene before she and Dysart collected, and took photographs of, the evidence. Later that afternoon, Kennedy's body was observed by a deputy medical examiner. (5 RT 1159-1168, 1254-1258, 1263, 1308-1377; 8 RT 1828-1842; 9 RT 2229-2230.)

Kennedy's body was lying prone across the examination table with the hands tied tightly behind the back with shoelaces. The head was hanging over one side of the examination table, the torso was on the table, and the legs were on the floor on the other side of the table. Her panties and pants were pulled down and hanging from the left ankle. There was a blouse and jacket worn on the upper torso of the body. There were no socks on the feet. A bloody tub sock used as a gag was in the mouth and tied tightly around the back of the neck with shoelaces. There was a bloody crew sock bunched up against the neck. There appeared to be multiple stab or puncture wounds around the neck, an abrasion on the chin, and the eyes were markedly congested. (5 RT 1159-1160, 1173, 1328-1330, 1343, 1358-1359, 1364-1367.) There was a crew sock

---

6. The Montclair Police Department did not have a crime lab or a forensic specialist so it utilized the sheriff department's forensic specialists and crime lab. (5 RT 1300.)

7. The videotape, Exhibit 38, was viewed by the jury. (9 RT 2241-2255.)

found on the floor with feces on it. That crew sock matched the crew sock found bunched up against the neck. (5 RT 1327, 1359, 1362.) Two white tennis shoes without laces were also found in the examination room as were blood stains on the carpet. (5 RT 1160, 1341-1342; 8 RT 1835-1836.)[8/] A sex/rape kit was performed on Kennedy's body at the crime scene. (5 RT 1224-1227, 1235, 1373-1375.) The sex kit of swabs taken from the anus, mouth and vagina would only show if a man ejaculated in Kennedy, but would not show anything if he ejaculated away from her. (5 RT 1235.) A ring of keys found by Dysart in Kennedy's pants pocket were for the interior doors of the Clinic, the keys to the outside doors were never found. (9 RT 2265-2266.) The crime scene was processed for fingerprints after Kennedy's body was removed. A partial palm print from a left hand was found on the examination table's paper sheet to the left of where the body was located. (7 RT 1685; 8 RT 1782-1796, 1883.)

When Detective Price entered the clinic after Kennedy's body had been removed from the examination table, he saw a paperback book on the floor in the front office of the clinic. When walking through the clinic, he saw that the front of the clinic was light and the procedure room was dark because the window blinds were closed. (5 RT 1283-1286.) He saw boxes had been stacked on the sill of the eye window of the procedure room. (5 RT 1098-1101, 1259-1260.) The 6'2" Detective Price surveyed the outside of the building and saw that standing on Central Avenue, he could only slightly see into the procedure room's eye window by standing in the planter box next to the building. Detective Price could not see into the larger bottom double window because there were blinds blocking any view. He noticed it would be difficult to hear inside the procedure room due to the high volume of traffic on Central

---

8. Mr. Kennedy testified Kennedy would wear, among other things, white crew socks and tennis shoes to work. (4 RT 867-868.)

Avenue. (5 RT 1288-1291.) Detective Price did not find any evidence outside.[9] (5 RT 1263; 7 RT 1677.)

At 5:30 p.m., Castaneda, driving the Sentra, picked up Virginia from work in Rancho Cucamonga. (7 RT 1737.) Around midnight, the doctor was allowed to re-enter the clinic and walked around the clinic with Detective Price to see if anything was out of place. (5 RT 1096-1097, 1127, 1259, 1262.)

The Autopsy On April 1, 1998

Dr. Frank Sheridan, a forensic pathologist and chief medical examiner for the San Bernardino County Coroner's Office, performed an autopsy on Kennedy's body at the Coroner's office in San Bernardino on April 1, 1998. (5 RT 1147-1151.) Detectives Price and Eaton, and forensic specialist Harris, attended the autopsy. (5 RT 1151, 1284, 1292, 1355; 9 RT 2233-2334.) Dr. Sheridan learned from the detectives and the deputy medical examiners report the condition the body was found in at the crime scene. (5 RT 1159-1160, 1292.) The body was still gagged with the hands tied behind the back, with those items being removed prior to the autopsy. (5 RT 1169-1171, 1293-1294.) Harris collected evidence to be forensically tested later, including, among other things, all of the socks collected at the crime scene and a blood sample from the body given to her by Dr. Sheridan. Harris also took photographs during the autopsy. (5 RT 1152-1153, 1293, 1354-1358, 1363-1370.)

Dr. Sheridan found petechial hemorraghes in the forehead and discoloration of the eyes consistent with the body being found with the head hanging face down and unsupported. There were superficial, antemortem abrasions, like scratch marks, on the forehead just below the hairline, on the

---

9. The day of the murder happened to be trash collection day, so large dumpsters by the building were emptied before law enforcement could look inside them. (5 RT 1306.)

right side of the chin accompanied by a bruise, and the right jawline. There was a postmortem or agonal (just before death) abrasion to the left side of the chin. The abrasions were not consistent with rug burn, but were consistent with Kennedy struggling while the gag was being put on. (5 RT 1172-1179.) There were antemortem abrasions to the left forearm, the shins with minor bruising, and on one thigh. (5 RT 1183.)

There was a small amount of dried feces at the anus. There was no apparent trauma to the anal region visually, so Dr. Sheridan did not perform an internal examination of the anus. (5 RT 1181-1182, 1227.) On this point, Dr. Sheridan concluded that while there was a possibility of sexual assault due to Kennedy's clothes being removed during the crime, there was no way that the autopsy findings could confirm that sexual assault occurred. (5 RT 1227-1229.) Dr. Sheridan noted he had not received the results of the sex kit when he performed the autopsy. Dr. Sheridan also concluded that injuries associated with sodomy would not be present if a person was in an agonal state or dead when inflicted. (5 RT 1196, 1228-1229, 1233-1234.)

There were 29 antemortem wounds from one side of the neck to the other and across the back which were inflicted over a short period of time due to their proximity to each other. None of the wounds were in front. The wounds ranged from superficial to deep. Fifteen of the wounds, stab wounds of various depths, were clearly consistent with a Phillip's screwdriver. The other 14 stab wounds were consistent with the same tool, but were not quite as defined because they were not as deep as the deeper 15 wounds. There were holes in the sock used as a gag so the wounds were inflicted after the gag was in place. The wounds caused a great deal of hemorrhaging in the neck. The most lethal injuries were two stab wounds that were closest to the angle of the jaw on the left side of the neck. The two stab wounds, and some of the other deep stab wounds, were inflicted with great force. The two fatal stab wounds,

which were one to two inches deep, completely severed the carotid artery and the jugular vein, the two main blood vessels, on the left side of the neck. This interrupted blood flow to the brain. Either one of the two stab wounds would have been lethal. (5 RT 1189-1195, 1198-1199, 1201-1204, 1214, 1229-1230.)

Upon internal examination, Dr. Sheridan also found a number of contusions and bruises to the scalp, with four areas of hemorrhage, indicating at least four antemortem blows to the head with a blunt object. (5 RT 1205-1207, 1231.) The head wounds could have been caused by kicking, but Dr. Sheridan could not identify the cause without certainty. (5 RT 1216.) The head wounds could have been caused by any blunt object, but it was unlikely to be caused by a fist. It is possible the blows would have disoriented Kennedy. (5 RT 1207, 1217, 1231-1232.)

Dr. Sheridan opined that the cause of death were the two stab wounds that severed the carotid and jugular vessels on the left side of the neck. It would have taken Kennedy several minutes, up to 15 minutes, to die once the carotid and jugular were severed because those vessels were still intact on the right side of the neck. She lost consciousness in five minutes or less. (5 RT 1197-1200, 1208.) Dr. Sheridan also opined that the blood soaked gag in the mouth and the blood in the deep tissues of the neck were also contributing factors in causing death because they obstructed breathing and circulation. (5 RT 1197-1200.) Whether the blood soaked gag could have caused death itself depends on how clear her nose was. The gag itself was very tight and the shoelace made it even tighter. (5 RT 1201-1202.)

On April 2, 1998, David Blackburn, a forensic laboratory technician for the sheriff's department crime lab, determined from the sex kit on Kennedy's body that there was no spermatozoa in the vagina, the anus or the mouth. (6 RT 1412-1415.)

The Montclair Police Department Calls For Assistance From The Sheriff's Department And Other Law Enforcement Agencies To Investigate Colleen Kennedy's Murder In April 1998

To assist the 56 officers and four detectives of the Montclair Police Department, almost all of whom would need to work on this case, the sheriff's department was called into the investigation. The assistance of the sheriff's department, which the Montclair Police Department would not normally call for assistance, was required because of the huge number of people who needed to be contacted. (5 RT 1249, 1293-1297; 9 RT 2232.) The Federal Bureau of Investigation (FBI) and all other law enforcement agencies were also contacted and utilized. (5 RT 1249-1251; 9 RT 2233-2234.) Price and the Montclair Police Department led the entire investigation with the Sheriff's Department assisting. (5 RT 1250, 1296; 6 RT 1460.) The doctor gave the police a list of patients, which included Castaneda's name, after receiving a subpoena. (5 RT 1101, 1296.) Patients, nearby business owners, co-employees and family members of Kennedy, high risk sex offenders and transients were interviewed. Many were palm printed and fingerprinted, and once there was DNA evidence,[10/] given blood draws. Saliva swabs were used later once it was learned they could be used instead of blood draws. About 40 saliva swabs were collected. (5 RT 1294-1297, 1304; 7 RT 1678-1685; 9 RT 2233-2234.) Detectives Price and Eaton flew in a helicopter to conduct an aerial survey of the area surrounding the crime scene. They and another detective also found that in regular morning traffic, depending on the route, the driving distance between Toyo Tires and the clinic was between 9 and 11 miles and the driving

---

10. On April 17, 1998, before Castaneda was a suspect, Sheriff's Crime lab forensic specialist Caroline Kim developed a polymerase chain reaction (PCR) DNA profile from seminal fluid found on the crew sock that had feces on it. (6 RT 1412; 8 RT 2028-2036, 2044; 9 RT 2171-2172, 2177-2179.)

time was between 19 and 21 minutes. (6 RT 1474; 9 RT 2233-2235, 2259-2260.)[11/]

After More Investigation, Castaneda Is Arrested In May 1998 For Murdering Colleen Kennedy

Most of the doctor's patients at the clinic were long term patients. The fact that Castaneda was a new patient made Detective Price look at Castaneda more as a suspect. (9 RT 2272-2273.) On May 6, 1998, around 11:40 a.m., Castaneda was interviewed by sheriff's department homicide detectives Dan Glozer and Robert Acevedo. (6 RT 1460-1461, 1487; 9 RT 2273-2275, 2286.) Detectives Glozer and Acevedo told Castaneda they were investigating Kennedy's homicide, that they were contacting all of the doctor's patients, showed Castaneda a photograph of Kennedy, and asked Castaneda if he knew anything about the murder. Castaneda said, "Yeah, I heard about her murder. She was a very nice lady. I hate to see something like that happen to her." (6 RT 1462-1463, 1473, 1477, 1487, 1493.) As a part of the investigation, they asked Castaneda, as they had asked everyone they contacted, to submit to a

---

11. Aram Madenilan, a parole agent, testified about an April 20, 1998, search of Castaneda's apartment without the jury being told Madenilan's profession to avoid prejudice to Castaneda. Madenilan initially testified he had found a Phillip's head screwdriver in the Sentra's trunk. (8 RT 2016-2018.) Detective Price subsequently testified that he was not aware of the search on April 20, 1998, and that a screwdriver had not been seized as Madenilan had testified. Price testified that after speaking with Madenilan, the latter indicated he could not recall seizing the screwdriver. (9 RT 2263-2265.) Later, during the prosecution's rebuttal case, Madenilan testified he had reviewed his notes and saw that he did not seize the screwdriver, but left it in the trunk of the Sentra. (11 RT 2604-2606.) Madenilan testified he did not know about the murder of Kennedy on April 20, 1998. (11 RT 2605.) As noted above, Castaneda was not a suspect on April 20, 1998.

George, Castaneda's brother, testified that in the past, he had seen Castaneda use a Phillip's head screwdriver as a weapon. (7 RT 1724.)

Polaroid photograph, fingerprints, palm prints, and saliva sample. (6 RT 1463.) Castaneda was cooperative and gave the detectives what they had asked for, including a palm print and a saliva sample. (6 RT 1463, 1469-1470.) That day, Detective Glozer submitted the saliva sample and palm print to the sheriff's crime lab for analysis. (6 RT 1463, 1472.)

Richard Howie, the latent fingerprint examiner (forensic specialist II) at the crime lab, did not like the palm print from Castaneda because, after analyzing it that same day, it did not have the right piece of palm so it could be compared to the palm print on the paper from the examination table. (6 RT 1473; 8 RT 1872.) After Howie told Detective Glozer his opinion of the first palm print, Detective Glozer went back that day and obtained a second palm print from Castaneda. (6 RT 1473.) By comparing the second latent palm print from Detective Glozer, with the palm print left on the paper from the examination table, Howie identified Castaneda as the person who left the left hand palm print on the paper of the examination table. (8 RT 1877-1879, 1883-1884.)

On Friday, May 8, 1998, Detectives Glozer and Acevedo transported Castaneda to the sheriff department's homicide office. (6 RT 1473.) Forensic specialist Dysart palm printed Castaneda because Howie wanted a good print of Castaneda's lower palm based on the print of the procedure room paper being of a lower palm. (6 RT 1499, 1528-1529; 8 RT 1844-1845, 1886.)[12/] Detectives Acevedo and Price interviewed Castaneda that day from around 4:30 to 6:00 p.m. (6 RT 1488, 1528, 1532-1533.) The interview was videotaped and audio taped. (6 RT 1489.) Castaneda was given, and waived, his constitutional rights. (6 RT 1488-1490.) When asked about his visits to the

---

12. Later, this third palm print from Castaneda further confirmed Howie's finding that Castaneda was the person who left the left hand palm print on the paper of the examination table. (8 RT 1880, 1883-1884.)

clinic, Castaneda said during his first appointment, he, while fully clothed, had been treated with a back massage machine by Kennedy alone. Castaneda said that during his first or second appointment, Kennedy was alone without assistance in the clinic. (6 RT 1491-1492.) When asked about when he had first heard about Kennedy's death, Castaneda changed his story from May 6 and said the first time he heard was when Detectives Acevedo and Glozer went to jail to collect his palm print. (6 RT 1495.) When Castaneda was asked about what he was doing on March 30, 1998, Castaneda said: he drove Virginia's red Nissan (Sentra) to work at Toyo Tires in Ontario. He arrived at 6:30 a.m. then he walked off the job at the first break around 8:30 a.m. because he had hurt his thumb while unloading tires. (6 RT 1496.) He drove to his cousin Gloria's house on the Interstate 10 San Bernardino Freeway and arrived there about 9:00 a.m. or 10:00 a.m. Castaneda woke up Gloria (Salazar) because she was asleep, and sat around and talked to her until around 3:30 p.m. when he left to pick up Virginia at her job at a medical center. Castaneda also said Virginia was the wife of one of Castaneda's brothers, but Castaneda was living with her. Moreover, Castaneda denied having sex with Kennedy. (6 RT 1499; 7 RT 1686.)

When the interview was over, a nurse performed a sex kit on Castaneda. (6 RT 1420-1429, 1500.) Dysart received the sex kit from Detective Acevedo. (8 RT 1842-1843.) Meanwhile, in light of Castaneda's story that he visited his cousin Gloria on the morning of the murder, Detective Price went to El Monte, and interviewed Gloria. (6 RT 1499; 7 RT 1545, 1686.)[13/]

---

13. Gloria testified that Castaneda visited her alone on what could have been a Monday on one occasion in the time period of March to April 1998. (7 RT 1544-1548, 1559.) Castaneda arrived between 11:00 a.m. and 12:00 p.m. and visited for about 20 to 30 minutes. (7 RT 1547-1549.) Castaneda did not have an injury and did not complain that his thumb hurt. (7 RT 1571-1572.) Castaneda took a girl's watch and ring out of his pocket and said, "this bitch got me mad and I took it," and, "I was going to throw it off the freeway." (7 RT

Detective Acevedo and fellow sheriff's homicide detective Michael Kleczko interviewed Castaneda on May 8, 1998, from about 7:00 to 7:45 p.m. (6 RT 1500-1501; 7 RT 1532-1533, 1652-1653.) Detective Acevedo told Castaneda, without recalling if it was true or not, that Gloria had said he did not get to her house until noon. (6 RT 1504, 1530.) Castaneda changed his story and said before he got to Gloria's house, he stopped to pick up his half-brother Louie in El Monte and he and Louie obtained some heroin from Louie's connection. Castaneda further changed his story by saying he drove on the Pomona Freeway 60 to Gloria's house and arrived about noon. (6 RT 1504-1506, 1519.) Castaneda, among other things, denied being in the clinic on March 30, 1998 and denied being involved in Kennedy's murder. (6 RT 1506-1511.)[14/]

After the May 8 interview, Castaneda called his younger sister Diana Castaneda and asked her to call Detective Kleczko so that Castaneda could tell him the truth about where he was the morning of the crime. Diana called Detective Kleczko and told him Castaneda wanted to talk about the case. (7 RT 1654, 1770-1771.) Meanwhile, on May 11, 1998, forensic scientist Kim had conducted a PCR DNA test on Castaneda's saliva swab collected by Detective Glozer on May 6,[15/]and found that Castaneda's DNA matched the sperm's DNA profile found on the sock with feces on it. (9 RT 2185, 2200.) The probability

---

1550-1551.) Gloria did not tell Detective Price this on May 8, 1998, but mentioned the ring and watch for the first time on August 17, 1999. (7 RT 1567, 1686-1687.)

14. On or about May 8, 1998, Detectives Kleczko and Price and other officers obtained a search warrant to search Castaneda's apartment. Virginia and a young boy were present but Castaneda was not. The officers removed socks from the apartment. (9 RT 2283, 2291-2297.)

15. The prosecutor apparently mis-spoke in his question and said Detective Glozer collected the saliva sample on May 3, instead on May 6. (6 RT 1463; 9 RT 2184.)

of a random match with Castaneda's DNA profile from the sock was one in nine million Caucasians, one in 524 million African Americans, and one in four million Hispanics. (9 RT 2185.)

Detective Kleczko called Castaneda around 10:45 a.m. on May 15, and audio taped the conversation. (7 RT 1654-1655, 1666.) Among other things, Castaneda said on May 8 he had not been entirely truthful about his whereabouts on March 30. Castaneda said after leaving Toyo Tires in Virginia's red Nissan Sentra, he drove to former girlfriend Elizabeth (Ibarra's) house around 9:30 a.m., left her house after using heroin with her around 11:00 a.m., then arrived at Gloria's house around noon. Castaneda said he stayed at Gloria's house until 4:30 p.m. when he went to pick up his girlfriend Virginia at her job. Castaneda said he had not seen his half-brother Louie that day. Castaneda said he had not been truthful because he was currently engaged to another girl (presumably Virginia) and was afraid she might find out about his visit to Ibarra. (7 RT 1657-1662, 1669.) Detective Kleczko confronted Castaneda with the DNA evidence linking him to the murder and a red subcompact car being seen by Long John Silver employees by the clinic on the day of the murder. (7 RT 1673, 1675.) Castaneda had no answer for the DNA results, but continued to deny involvement in the murder. (7 RT 1662-1663, 1673.) When asked, Castaneda repeatedly denied ever masturbating in the clinic. Castaneda said, "I'm not a sick pervert." (7 RT 1662-1663.)[16/] Kleczko checked jail phone records and found that Castaneda called Ibarra 11 times between May 8 and 15, 1998. (7 RT 1664-1665.)

Ibarra testified that after reviewing her records regarding March 30, 1998, Castaneda did not visit her that day. (7 RT 1584-1588.) Ibarra also testified that Castaneda called her four or five times after being arrested for the

---

16. During the prosecution's rebuttal case, Detective Price testified Castaneda was arrested for Kennedy's murder on May 15, 1998. (11 RT 2656.)

murder in a threatening manner saying he was with Ibarra at the time of the murder. Castaneda told Ibarra to "watch her back." Ibarra told Castaneda not to call anymore and put a block on her telephone. (7 RT 1584-1590.)

Ibarra also testified that sometime in early 1998, Castaneda asked her for advice concerning his sexual relationship with Virginia. Castaneda told Ibarra, as he had told her before, that he liked having anal sex with Virginia but at first Virginia did not like it because it hurt and she had bled a few times. Ibarra told Castaneda not to perform anal sex hard on Virginia and to use gel or cream so that Virginia would not be hurt. Castaneda made a face and said he liked anal sex and would continue to do it even though it hurt Virginia. Ibarra, as she had a few times before, gave Castaneda four or five packets of KY Jelly. (7 RT 1574-1575, 1595, 1626-1629.)

Virginia testified Castaneda had "normal sex" with her at this time but they did not discuss, nor have, anal sex. Virginia also testified Castaneda did not have KY Jelly or creams in his possession. (7 RT 1745, 1756-1757.)

Further Evidence Of Castaneda's Guilt After May 1998

Using restriction fragment length polymorphism (RFLP) DNA testing completed on July 16, 1998, Daniel Gregonis, a sheriff's crime lab criminalist and DNA expert, found that Castaneda's DNA from the blood sample in his sex kit matched Castaneda's DNA found from the semen on the sock that had feces on it. The probability of a random match in the general population to the DNA on the sock was less than one in six billion in any racial category. (8 RT 1900-1937, 2036-2069.)[17/]

On August 17, 1998, Detective Price went to a storage facility in Redlands, California where the doctor had stored the examination table from

---

17. Gregonis found that the sock that was "bunched up" against Kennedy's neck contained her blood. (8 RT 2057.)

the procedure room. The doctor confirmed the paper roll on the end of the bed, not the actual piece of paper that had been on the bed which had been removed, was in the same position it was in at the time of the murder. After investigating the examination table for an hour to an hour and a half, and being told by the doctor that there had to have been 12 to 15 paper sheet changes on the examination table between the time of Castaneda's last appointment on March 9, 1998, and the time of the murder on March 30, 1998, Detective Price determined Castaneda could only have left his palm print at the time of the murder. (5 RT 1090-1091; 9 RT 2276-2281, 2289-2291.)

Defense

Without reviewing any records, Detective Acevedo testified that the Toyo Tires employee said the break on March 30, 1998 was at 9:30 a.m. (10 RT 2318-2321.) Without reviewing any records, Detective Glozer testified the Toyo Tires warehouse supervisor told him the break was at 9:30 a.m. (10 RT 2322-2324.)

Ybarbo testified that soon after returning from work around 6:10 a.m. on March 30, 1998, she saw Castaneda leave for work. (10 RT 2419-2420.) Once Virginia left her apartment so that Ybarbo could give her a ride to work, Ybarbo heard Virginia tell Gabriel Jr., Castaneda's son, that she was leaving. (10 RT 2420-2421.) Ybarbo gave Virginia a ride to work at 8:00 a.m. (10 RT 2420-2421.) When Ybarbo returned home before 9:30 a.m., she saw Gabriel Jr. in Virginia's apartment. Around 9:30 a.m., Ybarbo fell asleep in her apartment. Sometime later that morning, Ybarbo heard a car pull up into the driveway. Ybarbo saw Castaneda get out of the car with Ibarra. When the car left, Ybarbo asked Gabriel Jr. if that was Castaneda in the car. Gabriel Jr. said, "Yeah." (10 RT 2421-2425, 2524.)

Gabriel Castaneda Jr. (Gabriel Jr.) testified that on a particular Monday, he saw Castaneda come into his and Virginia's apartment around 10:50 to 11:10 a.m. Castaneda stayed for about 10 to 15 minutes while a lady with black hair waited in the car. On that particular Monday, Ybarbo came to the apartment that day in the morning after Castaneda left for work. (10 RT 2523-2528.)

Virginia testified that around 6:00 a.m. on April 20, 1998, she was having sex with Castaneda in their apartment when there was banging on the door. Castaneda ejaculated, got up, cleaned himself off with either his boxers or his socks, and went to open the door. Virginia got dressed. When Castaneda opened the door, it was Castaneda's parole officer and four or five police officers. They allowed Castaneda to put on some shorts and took him to the "car."[18] While Virginia and her one child that was present sat on the living room couch, they searched the apartment for about two hours and took boxers, socks, white T-shirts and other dirty clothing items which had not been cleaned for two weeks due to problems with the washing machine. The officers also searched Virginia's car. Castaneda was arrested for violating his parole by failing to report, and based on a gun being found in the apartment on a chair in the bedroom. (10 RT 2325-2329, 2347-2348.)

Virginia further testified that her apartment was searched again, without a search warrant, during the morning of May 8, 1998. The officers took many clothes, including almost all of the socks. The clothes were dirty because the washing machine had not been fixed. (10 RT 2332-2337.) On cross-examination, Virginia denied there was a screwdriver in the apartment or her car. (10 RT 2384-2385.) Virginia also testified Castaneda got out of prison in

---

18. It is unclear whether Virginia meant that Castaneda was taken to her car or to a patrol car.

December 1997, that she started seeing him in February 1998, that they broke up at the end of May 1998. (10 RT 2397, 2410-2411.)

Louie Arroyo, Castaneda's younger (half) brother, who was a heroin addict, had been convicted of three felonies, and was confined in state prison, testified at the end of March or beginning of April 1998, he saw Castaneda and Ibarra pull up to a "dope house" in El Monte in Virginia's maroon Nissan. (10 RT 2498-2513.)

Prosecution Rebuttal

On April 20, 1998, one of Castaneda's parole officers Aram Madenilan, and another parole officer and two Ontario police officers, performed a parole search on Castaneda's apartment because he had failed to report. At the time, they did not know Castaneda may have committed a murder. After they knocked and announced their presence, Castaneda answered the door two minutes later. Castaneda was wearing a T-shirt and some pants or sweats. Virginia was in the bed, looked very ill, and was hooked up to an I.V. There was no evidence of sexual intercourse. There was a young child sleeping on the floor under a chair in the bedroom. Castaneda was put in mechanical restraints and made to sit on the couch. Virginia, who said she was having a difficult pregnancy, was asked to come sit on the couch. Virginia, obviously ill, moved slowly into the living room while rolling the I.V. The parole search lasted about 15 to 20 minutes in the apartment and another 10 to 15 minutes in the garage and car. They did not take any socks. A gun was found under some clothes on top of the chair that the child was sleeping under. Madenilan arrested Castaneda for a parole violation. (11 RT 2593-2606, 2610-2616, 2621-2630.)

Detective Price testified the Montclair police were not involved in the parole search on April 20, 1998, and that he found out about the parole search sometime after March 6, 1998. (11 RT 2655-2656.)

Ibarra testified she no longer used heroin, she had never been to Castaneda's apartment in Ontario, she had never been to that apartment complex at all, and that she had reddish blond, not dark hair, in 1998. (11 RT 2630-2638, 2652-2653.)

PENALTY PHASE STATEMENT OF FACTS

Defense[19]

Psychological And Family History Evidence

Dr. Richard Hall, Ph.D., a clinical psychologist employed by the California Rehabilitation Center in Norco, testified he had studied the four levels of confinement, levels 1 through 4, with levels 3 and 4 being maximum security. A inmate was usually housed with one or two other inmates. Maximum security is for trouble makers, such as an inmate convicted of violent crimes, fighting is quite common, and the inmate's life is completely controlled. A maximum security inmate must follow the rules or go to solitary confinement

---

19. The defense presented its evidence first during the penalty phase. As the defense stated in opening statement and later argued, it presented evidence that could have applied only to factors (d), (h) and (k) of Penal Code section 190.3. (See 12 RT 2936-2940; 16 RT 3823.) Respectively, those factors consider: (1) whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance; (2) whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, or the affects of intoxication; and (3) any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.

or receive some other form of discipline. Many maximum security inmates become "institutionalized." (12 RT 2941-2949, 2954-2960.)

Dr. Hall was hired by defense counsel to psychologically evaluate Castaneda, and in performing that evaluation, studied Castaneda's Department of Corrections[20] records to see how many rule violations Castaneda had amassed. Castaneda had a number of violations for fighting at a level 3 maximum security prison and was placed in isolation away from other inmates. (12 RT 2953-2954, 2966.) In psychologically evaluating Castaneda, Dr. Hall also evaluated Castaneda for intellectual functioning, brain damage and emotional abnormalities. Moreover, Dr. Hall studied Castaneda's family history. (12 RT 2967.)

Regarding intellectual functioning, Dr. Hall gave Castaneda an IQ test, the Wechsler Adult Intelligence Scale Revised, which includes verbal and performance sub-tests. (12 RT 2968-2969.) Castaneda's full scale IQ was 84, with a vocabulary score of 78 and a performance score on 93, placing him in the low average range for intellectual functioning. The low vocabulary score is possibly because of educational deprivation. His actual IQ might be higher. On this test, overall, Castaneda was in the normal range. Dr. Hall opined that nothing about Castaneda's IQ would prevent him from functioning in society or in the prison system. (12 RT 2970-2974.)

As to whether Castaneda had an emotional abnormality, Dr. Hall administered the Minnesota Multiphasic Personality Inventory-2 (MMPI-2) which consists of 562 true/false questions which had been revised to be cross-cultural, including Hispanics. The MMPI-2 result showed that Castaneda was in normal ranges emotionally with no evidence of psychosis or mental illness, including schizophrenia, psychotic disorder, delusional disorder, bipolar disorder and manic depressive illness. The result merely showed that Castaneda

---

20. Now called the Department of Corrections and Rehabilitation.

was a very male oriented person, or "macho," as known in Mexican American culture, and was depressed. (12 RT 2974-2980.) The depression could be as a result of being incarcerated. (12 RT 2980.) Dr. Hall did not diagnose Castaneda as far as personality is concerned, but testified Castaneda's problems would lie in the personality disorders. (12 RT 2982.) Dr. Hall opined Castaneda could survive and function in a prison setting for the rest of his life. (12 RT 2983.)

On cross-examination, Dr. Hall acknowledged a long list of minor and serious rules violations Castaneda had committed while incarcerated throughout his life. (12 RT 2988-2995, 2999-3011.) When asked by the prosecutor if Castaneda's past convictions of first and second degree burglary and robbery, the escapes, and the numerous rules violations made Castaneda a special risk prisoner, Dr. Hall answered, "Yes, it would." (12 RT 2994.) Dr. Hall acknowledged that prisons have libraries, basketball courts, craft rooms, schooling facilities, religious facilities, and full medical treatment. (12 RT 3008.) Dr. Hall testified Castaneda's brain scan showed no brain damage, that Castaneda was a stable normal person with medical or psychiatric problems, and that nothing in the testing indicated that Castaneda lacked free will. (12 RT 3015, 3020-3023.) Castaneda denied to Dr. Hall having hallucinations, illusions or delusions, said he had used PCP and marijuana in the past, said he drank alcohol, and said he had used heroin since 1982. (12 RT 3023.) Castaneda denied committing the crimes. (12 RT 3023.)

On redirect, Dr. Hall pointed out that prisoners sentenced to life without possibility of parole never get out of prison, they serve their sentences at maximums security prisons, that level 4 prisons are very dangerous places, and that it is not unusual for level 4 prisoners to commit rules violations. (12 RT 3023-3029.)

Dr. Frank Gawin, M.D., a psychopharmacologist, which is a psychiatrist who specializes in the effects of medication and drugs on the brain, was retained by defense counsel to examine Castaneda. (12 RT 3031-3036.) Specifically, Dr. Gawin's goal was to come up with a diagnosis for Castaneda and make findings as to the potential effects of long term chronic drug use by Castaneda. (12 RT 3036-3037.) To diagnose Castaneda, Dr. Gawin, who had information that Castaneda and his brothers used heroin, reviewed the reports of some of the doctors who had or would testify, and spoke with Castaneda in jail for about one hour about his history of drug usage. (12 RT 3036.)

Dr. Gawin testified Castaneda's use of alcohol and marijuana use starting at age 12 limited his capacity for further maturation. Ages 19 through 24 were the best years of Castaneda's life because he worked constructively and limited his marijuana and alcohol use. Life declined greatly for Castaneda after the age of 24 because he began to use heroin and cocaine to a lesser degree. (12 RT 3047-3050.) Heroin produces a wonderful feeling of calmness, but withdrawal from it can cause, among other things, depression and substantial nervousness and anxiety. Castaneda used heroin at a level high enough to avoid withdrawal symptoms, usually a medium amount per day costing $20 to $40. Castaneda had a panic attack at age 34 and never used cocaine again. The chronic use of heroin and cocaine change the brain itself by affecting a person's thinking and causing more depression. Although Castaneda spent most of life after age 17 in prison or other confinement, drugs are available in the prison system. (12 RT 3050-3057.) Dr. Gawin opined that Castaneda was suffering from the mental illness of heroin dependence/addiction, for a time a dependence on cocaine, and earlier on, a dependence on marijuana. Dr. Gawin opined this mental illness was in conjunction with major depressive disorder and anxiety disorder. (12 RT 3043-3047, 3058.) Castaneda denied the crime and it played no role in Dr. Gawin's diagnosis. (12 RT 3059.)

On cross-examination, Dr. Gawin testified Castaneda started using PCP at age 14 in 1974, and Castaneda's cocaine use was roughly between 1990 and 1994. (12 RT 3063.) From the time Castaneda began using heroin at age 23 or 24, whenever he was not in custody, using heroin was his most important mission of the day. (12 RT 3063-3064.) The brain changes caused by cocaine and heroin would not itself explain murdering someone, and that simplest explanation as to why Castaneda began to use cocaine and heroin is that the subculture of people he "hung around" with made it fashionable. (12 RT 3064-3067.) In regard to Dr. Gawin's testimony that ages 20 to 24, roughly during 1980 to 1984, were the most stable for Castaneda, Dr. Gawin did not deny that: (1) Castaneda pled guilty to first degree burglary in 1980 and went to the California Youth Authority (CYA); (2) Pauline Romero had Castaneda's first child immediately thereafter; (3) Castaneda escaped from CYA and was picked up for assault with a deadly weapon; (4) Castaneda began to use heroin and had a child with Lucille Gonzales in 1982; (5) Castaneda had a child with Elvira in 1983 and married her; (6) the marriage failed because both of them accused the other of seeing other people; and (7) in 1984, Castaneda started seeing and living with Ibarra, got arrested for drugs and a sawed off rifle. (12 RT 3067-3070.)

Dr. Gawin also did not deny that Castaneda: (1) was convicted of burglary in 1987; (2) escaped from county jail in February 1989; (3) violated his parole in December 1989 and was sent back to prison; (4) was released from prison in February 1990 but placed back in prison from May to July of that year for a parole violation; and (5) was convicted of armed robbery after August 28, 1991. (12 RT 3070-3071.) Dr. Gawin also acknowledged Castaneda indicated he obtained drugs in prison and jail, that he injected heroin, and that the finding of a hypothermic needle in Castaneda's cell was indicative of drug use. (12 RT 3072-3073.) Dr. Gawin testified that the irritability and extreme reactions

heroin could cause were less frequent in a "chipper," i.e. a person who used heroin on an intermittent basis. (12 RT 3073-3075.) Dr. Gawin did not know if Castaneda had used heroin from his last release from prison on December 16, 1997, until his parole arrest on April 20, 1998. (12 RT 3073-3076.) Dr. Gawin stated that addiction is a mental illness under the Diagnostic Statistical Manual IV (DSM-IV), and includes addictions to caffeine and cigarettes. (12 RT 3080-3082.)

Dr. Armando Morales, was a professor of psychiatry and biobehavioral sciences at UCLA School of Medicine, with a Ph.D in clinical social work. (12 RT 3088-3089, 3100.) Dr. Morales, an expert in Hispanic families and gangs, was retained by defense counsel to assess those issues as they related to Castaneda, including interviewing Castaneda's family to acquire a family history. (12 RT 3090-3093.) Dr. Morales interviewed Castaneda once for two and a half to three hours. (12 RT 3094, 3138.)

Dr. Morales testified that Castaneda was raised as a Mexican-American, and testified about the difference between Mexican and United States culture and Hispanic family patterns. (12 RT 3101-3110.) Dr. Morales then testified about Castaneda's family history, beginning with Castaneda's (apparently maternal) grandfather and grandmother, who respectively, were born in a rural Mexico area in 1900 and 1902 and later came to the United States to be farm workers. The former abused alcohol and died in 1977, and the latter suffered from depression and died in 1992. (12 RT 3114-3115, 3166-3167.) There was substantial alcohol abuse throughout the family. (12 RT 3137.) Dr. Morales interviewed Castaneda's mother and sister Sylvia Robles. (12 RT 3138; 14 RT 3389-3390.) Castaneda's mother came from a family of farm workers, and was raped at age 12 in Los Angeles. She ran away from home at age 14 with a man who was 19, and they had a child when she was 15 in 1956. The man was deported. She then, as a 16 year-old, got into a "marital relationship" with a

boy who was 15 in 1958. Castaneda's mother and the boy stayed together until 1966 during which time the former was a moderate to heavy drinker and the latter was a heavy drinker and womanizer. During the relationship, they had six children in 1959, 1960 (Castaneda), 1961, 1962, 1964 and 1966. All five male siblings have histories of drug abuse, juvenile and adult crimes, and incarcerations in state prison. The youngest child, Diana, and the oldest, a daughter born in 1959, had no criminal records and did not have any mental or health problems. (12 RT 3141-3143.)

Castaneda's mother's third "marital relationship" was from 1968 to 1988. She was 26 years old and he was 25 years old with a history of drug problems and incarceration in state prison.[21] They had two male children born, respectively, in 1971 and 1972. Both have histories of drug abuse, juvenile and adult criminal records, and incarcerations. (12 RT 3144.) At age 42, Castaneda's mother attempted suicide by drinking Drano and was hospitalized. (12 RT 3144.)

During these first two "marital relationships,"the partners did not have steady employment, so Castaneda's mother worked full-time at factories in the El Monte and San Gabriel Valley area as she was having children. On a daily basis, she would leave her residence in the El Monte/San Gabriel area and drop her children off to the grandparents in the La Puente area. The grandparents, were in their mid-60s, from a rural environment, and did not have any control over Castaneda and his siblings. The brothers started associating with negative peers and gangs. (12 RT 3166-3167.)

Dr. Morales opined that when a person's needs are not met in the primary family, they get involved with a gang as a substitute family. Around age 12 to 15, Castaneda was initiated into a turf-oriented Hispanic gang in the

---

21. Later testimony established this man's name as Luis Arroyo. (14 RT 3394-3395.)

La Puente area called "Happy Homes." (12 RT 3095-3096, 3163-3165.) As Castaneda's drug usage increased, he spent less time with the gang and more time with drugs. Then he fell in love around 20 to 21 years old with Elvira. Elvira's family allowed him to live with them, and, because of that positive influence, Castaneda got a job and began to disassociate himself from negative peers. Castaneda, however, became involved again with drugs and Elvira wanted nothing to do with him. (12 RT 3165.) After explaining gang behavior in greater detail, Dr. Morales opined that, based on interviews and the clinical reports of Dr. Hall and Dr. Gawin, Castaneda was suffering from recurrent major depression in partial remission and dependent personality disorder as set forth in the DSM-IV. (12 RT 3181-3182, 3211-3212.)

On cross-examination, Dr. Morales acknowledged a long list of crimes Castaneda was charged with and committed from 1979 to 1984, including a guilty plea of first degree burglary on May 5, 1980, and sentence to CYA. Dr. Morales also acknowledged that during that time period, Castaneda had escaped from CYA. (12 RT 3239-3247.)

Testimony From Castaneda's Associates, Friends And Family

Elvira Castaneda, who was 16 or 17 years old and pregnant with Castaneda's child, married Castaneda on June 8, 1982. Two days later Castaneda moved into Elvira's family's house. The baby, John Gabriel Castaneda, was born on October 8, 1983. Castaneda initially treated Elvira and the baby well, worked, and was non-violent. At her brother's wedding, Elvira jumped on Castaneda and scratched him. Castaneda responded by smacking Elvira and giving her a black eye. One time Castaneda arrived at the house high on PCP. When John Gabriel was about 11 months old, Elvira and Castaneda broke up because she found a syringe in Castaneda's pocket.

Although they broke up, Elvira never legally separated or divorced from Castaneda. (13 RT 3293-3298, 3307, 3315, 3317, 3334-3335, 3343.) When Castaneda was incarcerated, Castaneda would call and write letters to John Gabriel. (13 RT 3301-3306.) In the letters, Castaneda told John Gabriel to stay in school and avoid gangs. (13 RT 3336-3337.) Castaneda never went to John Gabriel's school or talked to his teachers. (13 RT 3330-3331.)

Leo Moreno, Elvira's father, testified about Castaneda's good behavior when he first moved in to the house but Castaneda eventually started to go "the other way" when he started associating with his brothers and relatives. (13 RT 3274-3283.)

John Gabriel, Castaneda's son, testified he had lived with his grandparents his entire life and that he was a 11th grader in high school. He recalled receiving letters and telephone calls from Castaneda when Castaneda was in prison. He saw Castaneda when Castaneda got out of prison in December 1997. He urged the jury to let his father live. (13 RT 3342-3348.)

Lucia Gonzalez testified that she and Castaneda had a child, Gabriel Castaneda, Jr., on December 3, 1981, while Castaneda was incarcerated. When Castaneda was not in custody, he would come see Gonzalez. Castaneda was affectionate toward her. The had sex, but not anal sex, and Castaneda did not strike her or force her into sexual acts. Castaneda told her one time to "turn around" for anal sex. Gonzalez refused and told Castaneda, "You've been in jail too long." Later, while in state prison, Castaneda kept in touch with Gabriel Jr. through telephone calls about every four months. Gonzalez did not receive child support for Gabriel Jr. Gonzalez allowed Gabriel Jr. to visit Castaneda for the first time in March 1998. (13 RT 3350-3358.)

On cross-examination, Gonzalez testified she ended her relationship with Castaneda in late 1981 or early 1982 when, after they had lived together for two days, he asked Gonzalez to "turn around." Gonzalez never had sex with

Castaneda again because that "turned her off." Castaneda was upset. (13 RT 3360-3364.) Castaneda had no contact with Gabriel Jr. from the time he was eight or nine until he was 16 years old. Gonzalez also testified that about one week after Castaneda was arrested in April 1998 for a parole hold, Castaneda called Gonzalez and asked for Gabriel Jr. to take blame for a gun found in Castaneda's apartment because Castaneda was on his third strike, and Gabriel Jr. had a clean record. Gabriel Jr. decided to help Castaneda by saying the gun was his. Gabriel Jr. changed his mind after being talked to by Gonzalez, her brother, and a counselor. (13 RT 3364-3365.)

Gabriel Jr. testified he did not have any contact with Castaneda, including telephone calls, for years until 1998. When he saw Castaneda in March and April 1998, Castaneda told Gabriel Jr. to stay away from gangs, go to school, and avoid the mistakes Castaneda had made. Castaneda talked Gabriel Jr. into saying the gun was his but Gabriel Jr. changed his mind after many people spoke to him. Castaneda called a couple more times about the gun. Castaneda had not called or written to Gabriel Jr. since he was arrested for the parole hold. Gabriel Jr. urged the jury to let Castaneda live so that Gabriel Jr. could get to know him better in state prison. (13 RT 3372-3377.)

Henry Arroyo, born on December 8, 1971, testified that his father, Luis Arroyo, raised him, his brother Louie, and all of his half-brothers (named Castaneda), including Castaneda. Luis Arroyo treated Castaneda like a son. Henry was 14 years old when his father began using heroin. All of the brothers belong to the Puente gang, have tattoos related to that involvement, and have spent time in state prison. Almost all of the brothers use heroin, including Henry. Henry had been to state prison three times at level 3 prisons. He described a level 3 prison as being highly controlled. Henry was currently in prison for second degree burglary. Henry had never seen Castaneda hit Ibarra or any other woman. (14 RT 3394-3409.) On cross-examination, Henry

testified that his half-sister Sylvia, the oldest sibling, was a bus driver in Los Angeles. Three of the brothers, including Henry and George, no longer used heroin. Henry also testified that when he was at Tehachapi prison, contact visits in picnic areas with your own table and private visits from wives were allowed. An inmate could also receive packages and magazines, and go to a library, church or school class. (14 RT 3410-3417.)

Louie Arroyo, Castaneda's half-brother, was born on December 20, 1970. He testified all the brothers were in the Puente gang, including Castaneda, and that they committed crimes, drank a lot of beer, had sex with many girls, and consumed drugs such as PCP, marijuana, heroin and cocaine. Louie had repeatedly been convicted of crimes and incarcerated in level 4 prisons. Louie described the regimented life in level 4 prisons, where all of the LWOP prisoners go. He said if an inmate is found with drugs, the prisoner was put in administrative segregation, known as "the hole." (14 RT 3417-3439.) On cross-examination, Louie testified he was currently in Calipatria State Prison having served 14 months of an 8 year term. He acknowledged that on September 10, 1987, he, Castaneda and Ibarra broke into a furniture store late at night to get drug money. The police drove up as Louie and Castaneda were coming out of the store with a stereo. Louie and Castaneda jumped into a Monte Carlo Ibarra was driving and the police gave chase until the Monte Carlo ran out of gas. For the burglary and evading arrest, Castaneda and Ibarra went to state prison and Louie went to juvenile hall. (14 RT 3440-3446.) On redirect, Louie testified Castaneda and Ibarra met in county jail and got along peacefully. (14 RT 3447-3449.)

Veronica Arroyo, Castaneda's 15-year-old half sister, testified that Castaneda would contact her from state prison and tell her to stay away from bad things. Castaneda went to church with her and his sister Diana starting in December 1997, then Castaneda stopped going. (14 RT 3452-3457.) On cross-

examination, Veronica explained that Virginia Castaneda is the wife of Castaneda's brother Juan Castaneda, who was out of prison now and living in the area. The family, including Diana and her sister Sylvia, were very upset with the relationship between Virginia and Castaneda. (14 RT 3458-3461.) On redirect, Veronica asked the jury not to impose the death penalty. (14 RT 3461-3462.)

Dianna, the youngest of the Castaneda's, testified she had never seen Castaneda hit any of his girlfriends. She said she opened her home to Castaneda when he got out of prison the last time and Castaneda started going to church. When Dianna found out that Castaneda was seeing Virginia, his sister-in-law, Dianna was very upset and hurt, and so was Dianna's mother. Castaneda eventually told Dianna he did not want to disrespect her house and stopped living there because he wanted to return to the "party scene." (14 RT 3469-3477.) On cross-examination, Dianna testified she was born on August 7, 1967, has three children doing well, and that she is a dietician with the County of Los Angeles Children's Services. (14 RT 3480-3482.)

Jamie Phillips, the Children's director at Calvary Assembly of God church in El Monte, testified Castaneda attended three services a week in January and February 1998. Castaneda, who had not attended the church before, was non-aggressive and attended Bible study. Castaneda quit coming in mid to late February 1998 because he had started to "hang out" with his brothers again. (13 RT 3255-3272.)

Yvonne Tovar testified she had known Castaneda for about 19 years and that she have lived two houses from the Castaneda house in Rosemead. Castaneda always treated her, and other females, with respect. (14 RT 3464-3468.)

Prosecution

Psychological Evidence

Dr. Sandra Baca, a doctor of psychology and an expert in domestic violence, testified that in her opinion, having reviewed the relationships Castaneda had with Elvira, Ibarra and Gonzalez, Castaneda was abusive, controlling and used coercive tactics during those relationships. Castaneda was economically irresponsible. He wanted the benefits of a family and a wife but he did not want the responsibility of being accountable to anyone. (15 RT 3683-3705.) Dr. Baca opined that in many ways spousal abuse and sodomy correlate. Non-consensual sodomy is done for reasons of power and control based on satisfying unmet needs. Spousal abuse is done more as a form of coercion and getting a person to do what you want. Sexual acts such as rape and sodomy are more about hating women and humiliation, and that is quite different from what some batterers would do. The majority of batterers have antisocial personality disorders. (15 RT 3706-3709.)

Dr. Baca reviewed Dr. Hall's raw material as applied to the MMPI-2. (15 RT 3711.) Dr. Baca, using an exhibit to illustrate, concluded that Dr. Hall miscalculated the MMPI-2 score by making a mathematical error. Once the error was corrected, Castaneda meets the criteria for having an antisocial personality disorder with some depressive features plus some alcohol and substance abuse. (15 RT 3711-3719.) Antisocial personality disorder is included in the DSM-IV. (15 RT 3727.) Dr. Baca agreed with Dr. Hall that Castaneda did not suffer from any psychosis, mental illness, mental defect or insanity. (15 RT 3720.) Dr. Baca opined that psychopaths and antisocials are very much in touch with reality. (15 RT 3720.) They are master manipulators. They wreak havoc in everyone's lives around them. This is a person who has a very "me, me, me," personality that bends rules, has no true feelings, and imitates what he or she see around them and uses it to his or her advantage.

The person also has an inflexible psyche that is maladaptive in dealing and coping with stress, and is significantly impaired in relationships with peers, spouses and children. (15 RT 3725-3727.) Whereas anxiety and depression can be treated, an antisocial personality disorder cannot be treated because that is the person's core, it is just who the person is. The person knows exactly what he or she is doing and ignores consequences believing he or she will not be caught. (15 RT 3732-3735.) However, not all antisocials break laws. (15 RT 3721.)

Dr. Baca opined that Castaneda never took responsibility for anything. He blamed everybody. One of the most "heinous" things was asking his 16-year-old son Gabriel to take the "rap" for a gun that was discovered at Castaneda's apartment so that Castaneda would not go to jail. Castaneda had a choice. Many people that live in drug and gang infested areas manage to live productive lives. Castaneda chose to engage in criminal behavior, nobody "forced [Castaneda] to do anything he didn't want to do." Castaneda had a choice up until he killed Kennedy, and Castaneda made the wrong choice. Castaneda had ample opportunities, but chose not to take advantage of them. Nothing interfered with Castaneda's free will to make choices. (15 RT 3735-3738.) On cross examination, Dr. Baca acknowledged that Castaneda's mother, father, and possibly genetics, could be blamed for Castaneda's antisocial personality, but stated that Castaneda still had free will to make different choices. (15 RT 3739-3740, 3754.)

Castaneda's Prior Criminal Activity Involving His Use Or Attempted Use Of Force Or Violence, Or His Express Or Implied Threat To Use Force Or Violence

Castaneda, As A Teenager, Twice Hits A Rival Gang Member With A Brick

George, Castaneda's younger brother by three years, reluctantly testified that during a gang fight when he and Castaneda were teenagers, Castaneda twice hit a rival gang member with a brick. George first thought the rival gang member was dead after Castaneda hit him with the brick. The rival gang member went to the hospital. (14 RT 3511-3517.)

George also testified that his and Castaneda's stepfather encouraged them to get "dope," "booze," and money for him. Their stepfather also drank, smoked marijuana and ingested heroin with George and Castaneda. (14 RT 3519-3520.) George went to prison for burglary from 1990 to 1993. (14 RT 3520-3521, 3526.) George, by avoiding his brothers after getting out of prison, had since stopped using heroin, found steady employment, and lived with his wife and children while avoiding incarceration. (14 RT 3506, 3520-3521.) George's brothers were angry with him for avoiding them. (14 RT 3521.)

George further testified that the family was unhappy with Castaneda for being with Virginia; Castaneda showed George the "gun" in the garage; George was told Castaneda was doing robberies in 1998; Castaneda's moniker on the street was "Gato;" and that he had never seen Castaneda be violent with a woman. (14 RT 3506-3510, 3521.)

Castaneda's Violence Against Ibarra In 1989 And 1990

Ibarra testified she met Castaneda when she was visiting a Los Angeles jail and Castaneda was in custody there in 1987. She started dating Castaneda when he was released from jail. They first stayed together at Ibarra's mother's

house but they were asked to leave because Castaneda and Ibarra's brother were in rival gangs. They went to live at Castaneda's mother's house and lived there until they went to prison. They went to prison because they committed burglary by stealing a stereo from a furniture store then evaded the police, with Ibarra driving, during a lengthy high speed chase. (15 RT 3600-3607.)

When they got out of prison, they lived together off and on at Castaneda's mother's house and at Castaneda's brother Fernando's house. After getting out of prison, the relationship between Ibarra and Castaneda was peaceful at first. When Castaneda used drugs, however, he would get mad and hit Ibarra in the face, grab her arms and hold her in a headlock, leaving bruises. When Ibarra refused to have sex with Castaneda, Castaneda, who was very sexual, became mad and five or six times forced Ibarra to have sex with him. Ibarra would tell Castaneda she did not want to be with him anymore and that she wanted to go live with her mother. Castaneda tied Ibarra up about three times to keep her from leaving the house because he knew if Ibarra left, she would not return. Castaneda tied Ibarra to his arm with string or anything else so he could feel it if she moved. Castaneda would go everywhere she went in the house, including the bathroom, the shower and the porch. If Ibarra spoke to anyone outside Castaneda would become angry and make her come inside. At one time, Ibarra ran out of Castaneda's mother's house and Castaneda chased her and caught her. After Castaneda beat up Ibarra, Castaneda's sister Sylvia called Ibarra's mother. Ibarra's brother came to get her and Castaneda had to let her go. Ibarra moved into a house away from Castaneda about one month after getting out of prison. When she moved away, Castaneda would poke his head in the windows and one time surprised Ibarra by jumping out of her closet. Ibarra was so scared she just talked to Castaneda and he stayed the night. (15 RT 3608-3614, 3638-3639.) All of Castaneda's violent behavior occurred in 1989 and 1990. (15 RT 3633.)

Ibarra went back to jail. When she was release she ran into Castaneda a few times in El Monte. She visited Castaneda in an apartment he shared with George. The last time Ibarra heard from Castaneda before the current case, Castaneda threatened Ibarra on the telephone that he was going to beat her up because she would not come by the house. However, Castaneda went to jail that night for grand theft auto. When Castaneda got out of prison again for armed robbery, Ibarra saw him in February 1998. Castaneda came over to Ibarra's house, they talked, and they used heroin together. Ibarra bought the heroin for Castaneda because he said he did not have any money and did not feel good. (15 RT 3614-3618.) Ibarra stopped using heroin on August 8, 1998. (15 RT 3640-3641.)

Olga Frontino, Ibarra's mother, testified that during the time Ibarra was living with Castaneda, Frontino saw bruises around Ibarra's neck, and around her wrists. It appeared that her neck had been squeezed. One time, when Frontino asked about the injuries, Ibarra told her that Ibarra and Castaneda got into a fight and Castaneda tried to choke her. On two occasions, Ibarra called Frontino to come pick her up from Castaneda's mother's house. Ibarra was crying. (15 RT 3644-3647.) Castaneda was always respectful toward Frontino. (15 RT 3652-3653.) On cross-examination, Frontino testified that she and her family had had problems with heroin, Castaneda tried to take the blame for the furniture store burglary, and she did not see Castaneda act violently with Ibarra when Castaneda and Ibarra lived in Frontino's house for two weeks. (15 RT 3654-3656.)

Shank And Syringe Found In Castaneda's Jail Cell On June 6, 1999

On June 6, 1999, when deputy sheriff Joe Bratten came on duty to work at the West Valley Detention Center jail, he received a "kite," meaning a note,

that an inmate name "Gato" from Puente was supposed to have a "hype kit," including a syringe, in a lotion bottle inside his cell. (14 RT 3564-3572.) Deputy Bratten knew Castaneda's moniker was Gato. (14 RT 3573.) Later that day, Deputy Bratten and Deputy Sheriff Christopher Leahy searched a cell Castaneda shared with another inmate. (14 RT 3573, 3592-3593.) Deputy Bratten searched the lotion bottle in the cell and did not find anything. Continuing the search, Deputy Bratten found a well constructed homemade handcuff key and a shank laying on the desk in plain view.[22] (14 RT 3573-3576.) Inside a deodorant container, under the usable portion of the deodorant, Deputy Bratten found a syringe without a needle wrapped in toilet paper. The needle was found later at the bottom of a soap container. (14 RT 3577-3579.) It is a felony offense for an inmate to possess a shank or a syringe. (14 RT 3579-3580.) Without being told that anything had been found, Castaneda asked what he was being, "rolled up for." (14 RT 3580-3581.) After Deputy Bratten told Castaneda about the shank and syringe, Castaneda said he had no knowledge of the items and that a previous inmate in the cell must have left them. (14 RT 3581.) Castaneda admitted that the "pencil box" the syringe and needle were found in was his. (14 RT 3582.) Deputy Bratten had never had a problem with Castaneda up until that point. (14 RT 3583.) After the cell search, Castaneda moved to another unit in the jail and had no problems. (14 RT 3595.)

On cross-examination, Deputy Bratten testified it was common for prisoners to use kites to get another inmate into trouble; it was odd the shank was in plain view because inmates knew that it was illegal; Castaneda's cell mate was written up for the shank along with Castaneda because Deputy Bratten could not tell which one of them possessed the shank or the handcuff

---

22. Deputy Leahy found another shank inside the mattress of Castaneda's cell mate. (14 RT 3594, 3596.)

key; and that it was possible for inmate to get into another inmate's cell. (14 RT 3584-3588.)

Castaneda's Felony Convictions

Armed Robbery In 1991

Daniel Hills testified that around 1:00 a.m. on August 27, 1991, he parked his pickup truck in the parking lot of a dance club in El Monte. When Hills returned to the truck later, as he was putting the key in the door, Hills was grabbed around the neck from behind and lifted up. The person told him not to turn around or he would shoot Hills. Hills felt something press against his neck but never turned to see if it was a gun. Hills never saw the person who grabbed him from behind. One or two other people then went through Hills front and back pockets and took his belongings. They also took Hills' watch. Hills was thrown to the ground face down, his hands tied behind him with a belt, had a sock and shoe take off, and the sock was shoved into his mouth. (14 RT 3545-3548.) After Hills was tied up and had the sock shoved in his mouth, they went to the truck, returned, and asked which key it was. With the sock in his mouth, Hills said, "the shiny one." Hills was kicked, and told not to be funny by the person who had told him not to turn around. Hills said, the "one that says Toyota on it." They got into the truck and drove away. Hills was able to untie himself and call the police department from the bar. Hills' valuables were not returned and his truck was totaled. (14 RT 3548-3552.)

Around 3:30 a.m. on August 28, 1991, Castaneda was discovered by a California Highway Patrol (CHP) officer in Hills' truck with a woman after the truck had collided with a car on Interstate 605 near Valley Boulevard. Castaneda and the woman were intoxicated. (14 RT 3530-3539.) Later, during an interview with another CHP officer, Castaneda said that while he had a .38 caliber gun and was "loaded" (on drugs), he, while assisted by two people, stole

a beige truck in El Monte from a "white boy." (14 RT 3560-3561.) Castaneda was tried and found guilty of the offense. (14 RT 3551, 3561.)[23/]

Burglaries In 1980 And 1987

Exhibits 63 and 65 were admitted into evidence. (15 RT 3765-3766; 2 CT 499.) Those exhibits contained documents pertaining to, respectively: (1) Castaneda's 1987 conviction for second degree burglary (2 CT 527-605); and (2) Castaneda's 1980 conviction for burglary (3 CT 689-764).

---

23. Exhibit 64, documents pertaining to Castaneda's 1991 conviction for robbery, were admitted into evidence. (15 RT 3765-3766; 2 CT 499; 3 CT 606-688.)

GUILT PHASE ARGUMENTS

I.

CASTANEDA'S RIGHTS TO PRESENCE WERE NOT VIOLATED BY HIS ABSENCE FROM TWO BENCH CONFERENCES DURING JURY VOIR DIRE

Castaneda contends his federal constitutional and state constitutional and statutory rights to presence at trial were violated when he was not present at two bench conferences during jury voir dire. (AOB 59-74.) Castaneda is mistaken. Castaneda's federal constitutional and state constitutional and statutory rights to presence were not violated by his absence at those bench conferences because they only involved questions of law in which Castaneda's presence would not have contributed to the fairness of the proceedings.

On August 30 through September 1, 1999, the trial court completed the initial screening of the prospective jury. (1 RT 198-248; 2 RT 249-477.) Jury selection resumed in open court the morning of September 20, 1999, with the parties excusing jurors based primarily, but not entirely, on a stipulated list. (3 RT 478-487.) That morning, soon after the start of the proceedings, the court asked to see counsel in the hallway outside the presence of the prospective jury. (3 RT 487.) The trial court told the prosecutor and defense counsel that the bailiff had informed the court that one of the prospective jurors told Ms. Danna, the jury coordinator, that someone had told the prospective juror that all the prospective jurors would be videotaped. (1 RT 163; 3 RT 487.) The trial court said the jury coordinator went out and checked and did not find anyone with a video camera outside the jury assembly room and Deputy Medley (the bailiff) had not seen anyone in the hallway. (3 RT 487.) The parties both said they would object if someone came in with a camera. The trial court said it did not know the identity of the prospective juror, and the jury coordinator did not get the person's name, so there was little information on the situation. Both parties

stated that they would ignore the issue as of that moment. The trial court said it would have the hallway checked again and tell counsel if it heard anything else about the issue. The hardship excusals of prospective jurors resumed in open court. (3 RT 487-488.)

Later that morning, with a panel of prospective jurors present, prospective juror Powell indicated to the trial court he wanted to be excused. When asked his circumstance by the trial court, Powell said he was concerned about his welfare because the courthouse "allows people to come in with cameras and videotapes." Powell added, "If the defendant was found guilty, I feel that there would be gang relation against me and my family." After being questioned by the trial court, Powell acknowledged being the prospective juror who had spoken to the jury coordinator. Powell also said no one had approached him, but he overheard an individual say that when people go into the courtroom, they would have his or her picture taken with a camera. The court said evidently the person taking photographs was not there for this case, but for a wedding. (3 RT 538.) After both counsel indicated there was no stipulation to excuse Powell, the prosecutor asked Powell why he believed the camera was associated with this case. Powell said he did not feel comfortable and could not be impartial because he believed Castaneda was affiliated with a gang based of the tattoos around his neck, and that he had heard "things in the past where people have been gang retaliated against, the families have been hurt in one way or another." (3 RT 538-539.) Defense counsel objected. (3 RT 539.) The prosecutor said that because he now thought the entire panel present was under a "total misperception" about the filming, perhaps the court would tell this group of the panel that there was no filming or taping involved in this case. (3 RT 539.) The parties stipulated to Powell being excused. The court then explained to the jury that the filming taking place that morning involved

a wedding and admonished the jury to disregard Powell's comments. (3 RT 540.)

Subsequently, that afternoon, during challenges for cause and peremptory challenges, defense counsel, when speaking to a prospective jury panel, began to explain in general terms the evidentiary difference between the guilt phase and the penalty phase. Defense counsel specifically stated, in regard to the penalty phase, that the jury could consider Castaneda's upbringing, the area he lived in and his education. The prosecutor asked to approach the bench. The parties had a conference in the hallway outside the presence of the prospective jury. The prosecutor objected that defense counsel was going beyond acceptable voir dire by instructing the jury on the law. Defense counsel explained he was speaking in generalities because the prospective jury would not know what he was talking about if he used the terms "aggravating" and "mitigating." The trial court sustained the prosecutor's objection. (3 RT 598-599.)

Continuing the conference, the prosecutor stated that he did not know Castaneda was not going to be present at the conference, and he "would suggest strongly that the defendant be present at all hearings, including back here in chambers." (3 RT 600.) The trial court asked for authority for that proposition because the court's position was that Castaneda did not have to be present at a bench conference. The prosecutor indicated Castaneda had not waived his presence and the court stated it was aware Castaneda had not waived his presence. The conference ended with the prosecutor saying he would attempt to find authority for his position. (3 RT 600-601.) The parties then continued with jury voir dire. (3 RT 601.)

The next morning, before continuing voir dire, the trial court stated that it appeared Castaneda did not have to be at bench conferences because the trial court had not found any dispositive law on that issue, but, out of an "abundance

of caution," would make arrangements to have Castaneda present at bench conferences unless he wished to waive his appearance. The trial court asked defense counsel what he wanted to do. (3 RT 679.) Defense counsel, stated:

> If I can inquire. [¶] Mr. Castaneda, during the course of, in particular, jury selection, on occasions we have had conferences behind the court wall here in the hallway. There are in reference to the jury issues, questions that come up, objections. For example, yesterday Mr. McDowell [the prosecutor] objected to one line of questioning. We went in behind the wall and the Court ruled in his favor and you probably noticed I changed the way I was questioning. [¶] Will you waive your right to be in those conferences during this jury selection and the jury selection only? It's your choice.

(3 RT 679-680.)

After a further brief explanation to Castaneda by defense counsel, Castaneda said he wanted to be present at the bench conferences. The trial court and prosecutor discussed the best way Castaneda could be present. The trial court said it was only presently dealing with the issue of Castaneda's presence at bench conference during jury selection, and would take up how the issue would be handled during the presentation of evidence at that time. (3 RT 680.) The parties continued with voir dire. (3 RT 681.) The parties completed voir dire and selected a jury later that afternoon. (4 RT 800.)

A criminal defendant has a right to be personally present at certain pretrial proceedings and at trial under the confrontation clause of the Sixth Amendment to the United States Constitution, the due process clause of the Fourteenth Amendment to the United States Constitution, section 15 of article I of the California Constitution, and Penal Code sections 977 and 1043. (*People v. Cole* (2004) 33 Cal.4th 1158, 1230.) Castaneda claims absence from the two bench conferences violated his right to presence as to all of the constitutional and statutory provisions above. (AOB 66.) As will be seen as each provision is discussed in turn, Castaneda is mistaken.

A. Castaneda's Right To Presence Was Not Violated Under Federal Constitutional Law

Under the Sixth Amendment's confrontation clause, a criminal defendant has a right to be present at every stage of trial in order to confront the witnesses and evidence against him. (*United States v. Gagnon* (1985) 470 U.S. 522, 526 [105 S.Ct. 1482, 84 L.Ed.2d 486]; *Illinois v. Allen* (1970) 397 U.S. 337, 338 [90 S.Ct. 1057, 25 L.Ed.2d 353]; *Rice v. Wood* (9th Cir. 1995) 44 F.3d 1396, 1400, fn. 5.) A criminal defendant does not have a right to be personally present at a particular proceeding under the Sixth Amendment's confrontation clause unless his appearance is necessary to prevent interference with his right to effectively cross-examine a witness. (*People v. Cole, supra,* 33 Cal.4th at p. 1230.) In other words, under the Sixth Amendment, a defendant has a right to be present during the taking of evidence. (*People v. Dickey* (2005) 35 Cal.4th 884, 923.)

Here, Castaneda had no right to personal presence at the bench conferences under the Sixth Amendment because the conferences took place before the presentation of testimony, and thus, had nothing to do with the taking of evidence and effective cross-examination. (See e.g. *People v. Cole, supra,* 33 Cal.4th at p. 1231.) Indeed, Castaneda makes no attempt to specifically explain how the Sixth Amendment right to presence applies to this case, but instead appears to make an argument relevant to his Fourteenth Amendment due process right to presence. (AOB 63-74.) Therefore, Castaneda's contention that his Sixth Amendment right to presence was violated by his absence from the two bench conferences is not supported by any argument or citation or authority. (See *People v. Gray* (2005) 37 Cal.4th 168, 198.)

Under the Fourteenth Amendment's due process clause, a defendant has a right to be present at trial, when not actually confronting witnesses or evidence against him, only where his presence has a reasonably substantial

relation to defending against the charge. (*Kentucky v. Stincer* (1987) 482 U.S. 730, 745 [107 S.Ct. 2658, 96 L.Ed. 2d 631]; *United States v. Gagnon*, 470 U.S. at p. 526.) In other words, a defendant has a right to be present when: (1) the proceeding is critical to the outcome of the case; and (2) the defendant's presence would contribute to the fairness of the procedure. (*Kentucky v. Stincer, supra*, 482 U.S. at p. 745; *People v. Perry* (2006) 38 Cal.4th 302, 312.) A defendant does not have a right to be present when his presence would be useless, "or the benefit but a shadow." (*Snyder v. Massachusetts* (1934) 291 U.S. 97, 105-106 [54 S.Ct. 330, 78 L.Ed. 674].) Thus, "a defendant may ordinarily be excluded from conferences on questions of law, even if those questions are critical to the outcome of the case, because the defendant's presence would not contribute to the fairness of the proceeding." (*People v. Perry, supra,* 38 Cal.4th at p. 312.) A defendant is not entitled to be present in chambers or bench discussions on questions of law because the defendant's presence would not have a substantial relation to the fullness of his opportunity to defend himself against the charges. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1357; *People v. Hardy* (1992) 2 Cal.4th 86, 178; *People v. Morris* (1991) 53 Cal.3d 152, 210.)

Here, Castaneda claims if he had been present at the first bench conference regarding an unknown prospective juror being concerned about being videotaped: (1) he could have objected to the parties not pursuing the videotape issue at that time; (2) the parties then could have pursued the issue of videotaping immediately with the jurors being called into the courtroom, and Powell could have been identified as the source of erroneous information about the videotaping; and (3) Powell could then have been questioned outside the presence of the other prospective jurors before he "contaminated" the entire jury panel. (AOB 69.) Castaneda's claim is both speculative and meritless.

At the time of the first bench conference, the trial court and parties did not know which prospective juror had a concern about videotaping, or if that prospective juror would even voice that concern in open court in front of a prospective jury panel. Since the trial court and parties did not have that information, it would have been imprudent to raise the videotaping issue with the prospective jury panel in an attempt to discover which prospective juror had the videotaping concern. To do as Castaneda suggests would have risked unnecessarily interjecting a concern about videotaping into voir dire. Had Castaneda been present, and any objection made, it would have been proper for the trial court to overrule the objection on that basis. Moreover, there is no way the trial court or the parties could have known, even if the prospective juror expressed concern about videotaping in front of the jury panel, that the prospective juror, in this case Powell, would express fear of gang retaliation. Thus, even assuming the first bench conference was a "critical" time during trial because it was during jury selection, Castaneda's due process right to presence was not violated because his presence would have been useless, and added nothing to the fairness of the proceeding or his ability to defend himself.

Castaneda next claims that had he been present at the second bench conference, regarding the prosecutor's objection to defense counsel's instructing the jury about penalty phase law, he could have assisted defense counsel by providing information about himself, such as his dysfunctional family background, that could have been used to explain the concepts of aggravation and mitigation in a way that would have avoided the prosecutor's objection. (AOB 71-72.) Again, Castaneda's claim is both speculative and lacking in merit.

First, as noted in *Bradford, Hardy* and *Morris*, Castaneda was not entitled to be present at the bench conference regarding the issue of whether defense counsel could speak to the prospective juror panel in a way that

generally instructed them about the issues they could consider in determining a penalty, because it was purely an issue of law that had to be decided by the court. The issue was not whether defense counsel was being specific enough about the issues that could be considered during the penalty phase, the issue was whether it was at all legally appropriate, during jury voir in the guilt phase, for defense counsel to be discussing the issues to be considered during the penalty phase. (3 RT 598-599.) Second, there is no way to know on the appellate record if Castaneda's presence at the bench conference would have added anything about his family background because Castaneda's argument assumes, without any support in the record, that defense counsel did not already know about Castaneda's family background when he was speaking to the jury panel. Thus, assuming arguendo the second bench conference was a "critical" time during trial because it was during jury selection, Castaneda's due process right to presence was not violated because his presence would have been useless, and added nothing to the fairness of the proceeding or his ability to defend himself.

In any event, assuming Castaneda's right to presence under the Sixth or Fourteenth Amendment was violated, the error was harmless beyond a reasonable doubt as set forth in *Chapman v. California, supra,* 386 U.S. at page 23. (*People v. Davis* (2005) 36 Cal.4th 510, 532.) First, Castaneda has failed at the outset to establish that any of the prospective jurors who were in the panel with Powell, or the prospective jurors in the panel when defense counsel was attempting to explain penalty phase law, were seated on the actual trial jury.[24] (AOB 72-74.) Second, as to the issue of Powell's statements to the jury about videotaping and his belief about gang retaliation from Castaneda, even

---

24. It is not respondent's duty to comb through the entire voir dire to determine this issue. Indeed, the "[D]efendant has the burden of demonstrating that his absence prejudiced his case or denied him a fair trial." (*People v. Bradford, supra,* 15 Cal.4th at p. 1357.)

assuming some of the prospective jurors at that time became trial jurors, the court informed the prospective jury that Castaneda had nothing to do with the videotaping, that the videotaping was related to a wedding, and to disregard all of Powell's statements. (3 RT 540.) Third, as to the issue of defense counsel instructing the jury about the issues to consider during the penalty phase, even assuming some of the prospective jurors at that time became trial jurors, defense counsel was able to inform the trial jury about mitigating and aggravating circumstances during the penalty phase. (12 RT 2936-2949; 16 RT 3821-3842.)

Fourth, again assuming some of the prospective jurors at that time became trial jurors, the evidence of Castaneda's guilt of murder was truly overwhelming. Castaneda had been a patient at the clinic and treated by Kennedy, had been in the procedure room where the murder occurred, and had a previous appointment there on Monday, March 9, 1998, and probably knew Kennedy was alone during the morning on that day of the week, and could have known that Kennedy had habit of inviting patients in at that time before the doctor arrived. (5 RT 1007, 1142-1143, 1128; 6 RT 1491-1492; 8 RT 1999; 9 RT 2290.) Castaneda left Toyo Tires shortly after 9:00 a.m. on Monday, March 30, 1998, the morning Kennedy was murdered at the clinic. (4 RT 976-985; 5 RT 1015-1019; 8 RT 1948-1950, 1955-1956.) It would have taken Castaneda about 20 minutes to drive the roughly 10 miles from Toyo Tires to the clinic. (6 RT 1474; 9 RT 2233-2235, 2259-2260.) At 9:45 a.m., a maroon Nissan similar to the one Castaneda drove was seen in a fast food restaurant's parking lot very close to the clinic. (5 RT 1019-1022; 8 RT 1962-1969, 1977.) Kennedy had to have been killed between just after 9:30 a.m. to just before 10:30 a.m. based on the testimony of the last telephone call to Kennedy at 9:28 a.m., the maroon Nissan being last seen at 10:15 a.m., and the patients

beginning to arrive around 10:30 a.m. (4 RT 892-894; 5 RT 1015-1022; 8 RT 1962-1969.)

Moreover, Kennedy was killed by two of the 29 stab wounds consistent with a Phillip's head screwdriver that severed her left carotid artery and jugular vein (5 RT 1189-1195, 1198-1199, 1201-1204, 1214, 1229-1230), and Castaneda's brother George had seen Castaneda use a Phillip's head screwdriver as a weapon in the past (7 RT 1724). Castaneda's DNA was found on the sock with feces on it at the crime scene through semen he left on that sock. (8 RT 1900-1937, 2036-2069; 9 RT 2185, 2200.) Castaneda left his partial left palm print on the paper sheet covering the examination table where Kennedy's body was found and he could not have done so at any other time but during the murder. (7 RT 1685; 8 RT 1782-1796, 1877-1880, 1883-1884.) Kennedy was missing a watch and ring when her body was discovered after the murder and Castaneda, soon after the murder, visited his cousin Gloria, took a girl's watch and ring out of his pocket and said, "this bitch got me mad and I took it," and, "I was going to throw it off the freeway." (7 RT 1544-1551, 1559.) Finally, Castaneda changed his story multiple times about his whereabouts during and after the murder during interviews with law enforcement, and threatened Ibarra because she would not say that Castaneda had visited her the morning of the murder. (6 RT 1495-1499, 1504-1506, 1519; 7 RT 1584-1590, 1657-1665.)

Therefore, even assuming Castaneda's right to presence under the Sixth or Fourteenth Amendment was violated, the error was harmless beyond a reasonable doubt.

B. Castaneda's Right To Presence Was Not Violated Under State Constitutional And Statutory Law

Under article I, section 15 of the California Constitution, similar to federal law, a criminal defendant does not have a right to be present at a chambers or bench conference that occurs outside the jury's presence on questions of law or other matters to which the defendant's presence does not have a substantial relation to the fullness of his opportunity to defend himself against the charges. (*People v. Cole, supra*, 33 Cal.4th at p. 1231.)

Here, Castaneda's state constitutional right to presence was not violated by his absence at the two bench conferences based on the same reasons discussed above as to federal constitutional law, not including the harmless error analysis.

As to Castaneda's state statutory right to presence, Penal Code sections 977 and 1043, when read together, permit a capital defendant to be absent from the courtroom only when: (1) he has been removed by the court for disruptive behavior under section 1043, subdivision (b)(1); and (2) he voluntarily waives his rights pursuant to section 977, subdivision (b)(1). (*People v. Young* (2005) 34 Cal.4th 1149, 1214.) The broad "voluntary" exception to the requirement that a felony defendant be present at trial under section 1043, subdivision (b)(1) does not apply to capital defendants. (*Ibid.*) However, under sections 977 and 1043, a criminal defendant does not have a right to presence, even absent a written waiver, where he does not have such a right under article I, section 15 of the California Constitution. (*People v. Cole, supra*, 33 Cal.4th at p. 1231.)

Here, under California statutory law, Castaneda had no right to presence at the two bench conferences because, as explained above, he had no such right under article I, section 15 of the California Constitution. Hence, Castaneda's state statutory right to presence was not violated by his absence at the two bench conferences.

Finally, if Castaneda's state constitutional or statutory right to presence was violated by his absence at the two bench conferences, the error was reversible only if it is reasonably probable that the result more have been more favorable to Castaneda in the absence of the error as set forth in *People v. Watson* (1956) 46 Cal.2d 818, 836. (*People v. Davis, supra,* 36 Cal.4th at pp. 532-533.) The error would be harmless under that standard for the same reasons the error would have been harmless beyond reasonable doubt as discussed above regarding federal constitutional error.

II.

THE TRIAL COURT PROPERLY DID NOT INSTRUCT THE JURY ON SECOND DEGREE MURDER AS A LESSER INCLUDED OFFENSE OF FIRST DEGREE MURDER

Castaneda claims his right to due process of law under the federal and state constitutions was violated when the trial court failed to instruct the jury on the lesser included offense of second degree murder. (AOB 75-103.) The trial court properly did not err in failing to instruct the jury on second degree murder because there was no substantial evidence that Castaneda committed second degree murder, as opposed to first degree murder. In any event, even assuming error, Castaneda was not prejudiced because the questions to be posed by second degree murder instructions were resolved adversely to Castaneda by other properly given instructions.

On October 28, 1999, when the parties were discussing proposed guilt phase jury instructions outside the presence of the jury, the trial court noted that the prosecution was proceeding with two theories for first degree murder; premeditation and deliberation and felony murder. (10 RT 2582-2583.) The trial court stated that if the jury found that the underlying felonies alleged for felony murder did not occur, then whether it was first degree murder would rest

on the premeditation and deliberation theory, and the jury should be instructed on second degree murder. Defense counsel said he believed the trial court was correct that second degree murder instructions should be given. (10 RT 2583-2585.) The prosecutor argued second degree murder instructions should not be given because the evidence of underlying felonies and premeditation and deliberation was strong and not refuted, and because the defense argument in the case was that Castaneda did not commit the murder. (10 RT 2584.) The trial court stated it still planned to give CALJIC Nos. 8.30 [Unpremeditated Murder of the Second Degree], 8.70 [Duty of Jury As to Degree of Murder], 8.71 [Doubt Whether First or Second Degree Murder] and 8.74 [Unanimous Agreement as to Offense–First or Second Degree Murder or Manslaughter] without reference to manslaughter. (10 RT 2585.)

On November 1, 1998, the next day of trial, the prosecutor filed a bench brief that the trial court should not instruct on second degree murder by reiterating there was insubstantial evidence of second degree murder. (1 CT 246-247.) The trial court indicated it had read the bench brief. The trial court said that when it first had considered the issue of whether to instruct on second degree murder, it had taken into account the manner in which Kennedy was killed, but had not taken into account the fact she had been gagged and bound. The trial court said that the gagging and binding added to the strength of the evidence of a first degree premeditated murder. The trial court asked defense counsel if he wanted to comment. Defense counsel submitted the issue. The trial court said that having reviewed the bench brief, it agreed with the prosecutor and would not instruct the jury on second degree murder. (11 RT 2662-2663.)

Subsequently, the trial court did not instruct the jury on second degree murder. (11 RT 2682-2717, 2832-2852; see 1 CT 255-344.) The trial court instructed the jury on first degree premeditated murder and first degree felony

murder. (11 RT 2698-2701; see 1 CT 291-295.) The prosecutor argued to the jury both first degree murder theories of premeditation and deliberation and felony murder. (11 RT 2726-2731.) Defense counsel argued there was insubstantial evidence of the underlying felonies to support felony murder (11 RT 2763-2776), and that Castaneda did not commit the murder (11 RT 2776-2800). The jury found Castaneda guilty of first degree murder on a general verdict form that did not specify upon which theory or theories the jury relied. (2 CT 364.)

Castaneda first argues the trial court failed to instruct the jury on second degree murder as a lesser included offense in regard to the prosecution's theory of deliberate and premeditated murder. (AOB 81-103.) Castaneda is wrong.

Murder is defined as an unlawful killing committed with malice aforethought. (Pen. Code, § 187, subd. (a); *People v. Robertson* (2004) 34 Cal.4th 156, 164.) Malice aforethought can be express or implied. (*Ibid.*) Malice is express, "'[W]hen there is manifested a deliberate intention unlawfully to take away the life of a fellow creature.'" (Pen. Code, § 188; *People v. Robertson, supra,* 34 Cal.4th at p. 164.) Express malice is the functional equivalent of proof of unlawful intent to kill. (*People v. Catlin* (2001) 26 Cal.4th 81, 151.) First degree murder is an unlawful killing with express malice aforethought that is willful, deliberate and premeditated. (CALJIC No. 8.20 [Deliberate and Premeditated Murder]; Pen. Code, § 189; *People v. Robertson, supra,* 34 Cal.4th at p. 164.) A verdict of deliberate and premeditated murder requires more than an intent to kill. "Deliberation" refers to careful weighing of considerations in forming a course of action. "Premeditation" means thought over in advance. (*People v. Young, supra,* 34 Cal.4th at p. 1182.) Premeditation and deliberation does not require an extended period of time, the true test is not the duration of time as much as the extent of the reflection. (*Ibid.*) The categories of evidence pertinent to finding

premeditation and deliberation are planning, motive and manner of killing. (*People v. Young, supra,* 34 Cal.4th at p. 1183.) Verdicts of first degree murder are usually sustained by this Court when there is evidence of all three categories or at least extremely strong evidence of planning or evidence of motive in conjunction with evidence of either planning or manner of killing. (*Ibid.*) The categories do not, however, represent an exhaustive list of evidence that could sustain a finding of premeditation and deliberation, and the reviewing court need not accord them any particular weight. (*Ibid.*)

Malice is implied when the killing results from an intentional act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his or her conduct endangers the life of another with conscious disregard from life. (*Ibid.)* Implied malice and intent to kill cannot coexist. (*People v. Rogers* (2006) 39 Cal.4th 826, 869.) Implied malice murder normally constitutes murder in the second degree. (*People v. Catlin, supra,* 26 Cal.4th at p. 149.) Second degree murder is an unlawful killing with malice aforethought, but without premeditation and deliberation. (Pen. Code, §§ 187, subd. (a), 189; *People v. Robertson, supra,* 34 Cal.4th at p. 164.)

Second degree murder is a lesser included offense of first degree murder. (*People v. Blair* (2005) 36 Cal.4th 686, 745.) A trial court has a sua sponte duty to instruct on a lesser included offense whenever the record contains substantial evidence from which a jury reasonably could conclude that the defendant was not guilty of the charged crime, but guilty of the lesser included offense. (*People v. Huggins* (2006) 38 Cal.4th 175, 215; *People v. Bradford, supra,* 15 Cal.4th at p. 1345.) On appeal, this Court reviews independently the question whether a trial court failed to instruct on a lesser included offense. (*People v. Waidla* (2000) 22 Cal.4th 690, 739.)

Here, the trial court properly did not instruct the jury on the lesser included offense of second degree murder because there is no substantial evidence in the record from which a jury reasonably could conclude that Castaneda was not guilty of first degree murder, but only second degree murder. The evidence clearly showed that Castaneda committed the murder with premeditation and deliberation. When Castaneda left Toyo Tires on Monday, March 30, 1998, he had to already know, from a previous appointment, that Kennedy was alone on Mondays in the clinic and he may have known that she had a habit of letting patients in early. Castaneda did not park in the clinic's parking lot but parked the Nissan Sentra in the nearby Long John Silver restaurant, which the jury could reasonably infer was to avoid detection. Castaneda had no reason to come to the clinic because he was not injured, did not have an appointment, and had to know the clinic was not open at 9:30 a.m. on Mondays, about the time he parked in the Long John Silver parking lot. After somehow gaining entry into the clinic, perhaps by Kennedy letting him in, it is almost certain Castaneda attacked Kennedy almost immediately. That conclusion is almost certain because Castaneda tied her hands, gagged her, sexually assaulted her, killed her and took her property over only about one hour, 9:30 a.m. to just before 10:30 a.m. Then Castaneda departed before 10:30 a.m. to avoid detection. All of this evidence points to the reasonable conclusion that Castaneda drove to the clinic with the intent to attack, rob, sexually assault and kill Kennedy. Indeed, it is a reasonable conclusion based on the evidence that Castaneda, before entering the clinic, planned to kill Kennedy after completing his other criminal acts because, as a recent patient of the clinic whom Kennedy had treated, Castaneda could not afford to let her live to easily identify him as the perpetrator.

Moreover, even if Castaneda did not form the intent to kill Kennedy until after he had entered the clinic, the jury could only reasonably conclude that

the murder was deliberate and premeditated based upon the manner in which Castaneda killed Kennedy. Castaneda blocked the windows in the procedure room so no one could see inside. (5 RT 1098-1101, 1259-1260, 1288-1291.) Once he had Kennedy on the examination table, he bound her hands behind her back and gagged her. Subsequently, with Kennedy defenseless due to being bound, gagged and perhaps unconscious due to blows to the head, Castaneda stabbed Kennedy with a Phillip's head screwdriver 29 times across her neck and back, including 15 deeper wounds with two of those being deep stab wounds to the left side of neck. The two stab wounds to the left side of Kennedy's neck required great force and killed her by severing the carotid artery and jugular vein and interrupting blood flow to the brain. (5 RT 1189-1195, 1198-1199, 1201-1207, 1214, 1217, 1229-1232.)

Further, Castaneda's reliance on *People v. Haley* (2004) 34 Cal.4th 283 for the proposition that the court should have instructed on second degree murder, is misplaced. (AOB 90-92.) The defendant in *Haley* testified that he strangled the murder victim only to keep her from screaming and not to keep her from reporting his burglary from police, and that she was alive when he left. The autopsy findings of the victim's neck and throat supported the defendant's testimony. (*People v. Haley, supra,* 34 Cal.4th at pp. 288, 310-312.) Here, unlike in *Haley*, Castaneda did not testify, and argued through defense counsel that he did not commit the murder. Thus, Castaneda's reliance of *Haley* is misplaced.[25/]

In sum, no reasonable jury could find from the evidence presented that Castaneda did not have to carefully weigh in advance, even over a short period

---

25. Likewise, Castaneda's reliance on *Vickers v. Ricketts* (9th Cir. 1986) 798 F.2d 369, is misplaced. (AOB 92-93.) Castaneda's reliance is misplaced because he does not explain in any detailed way how a twenty-year-old Ninth Circuit case from an Arizona murder conviction has any bearing on this Court's interpretation of California lesser included offense law.

of time, the decision to inflict the two mortal wounds on Kennedy due to the great force they required, and the defenseless position she was in.[26] The trial court properly did not instruct on second degree murder because there was insubstantial evidence that crime occurred, as opposed the first degree murder. Hence, Castaneda's right to due process was not violated.

Castaneda next argues the trial court failed to instruct the jury on second degree murder as a lesser included offense in regard to the prosecution's theory of deliberate first degree felony murder. (AOB 81-103.) Castaneda is incorrect.

Under the felony murder rule, a killing in the course of certain felonies, or in the course of attempting those felonies, such as sodomy, burglary, robbery and kidnapping, constitutes first degree murder. (Pen. Code, § 189; *People v. Robertson, supra,* 34 Cal.4th at pp. 164-165.) Second degree felony murder is an unlawful killing in the course of the commission of a felony that is inherently dangerous, and not included in the enumerated felonies in Penal Code section 189. (*Id.* at pp. 164-166.) A felony is inherently dangerous to human life if, viewed in the abstract, it cannot be committed without creating a substantial risk that someone will be killed. (*People v. Howard* (2005) 34 Cal.4th 1129, 1135) The felony murder rule eliminates the need to prove malice whether it is first or second degree felony murder. (*People v. Robertson, supra,* 34 Cal.4th at p. 165.). Felony murder does not require proof of an intent to kill, but proof only of an intent to commit the underlying felony. (*People v. Jones* (2003) 29 Cal.4th 1229, 1256.)

---

26. Castaneda states that "[T]here was no evidence that [he] even knew that damaging the carotid artery and jugular vein would contribute to a person's death." (AOB 89.) It is a matter of common knowledge that severing a person's carotid or jugular can cause that person to bleed to death. Not to mention the fact that Castaneda was adept at using a Phillip's head screwdriver as a weapon. (7 RT 1724.)

Here, as Castaneda points out (AOB 95), this Court has concluded that in the context of a first degree felony murder by poison conviction (Pen. Code, § 189) that occurred in 1984, that if there was substantial evidence to support it, a second degree felony murder instruction should be given as a lesser included offense (*People v. Blair, supra,* 36 Cal.4th at pp. 745-747). Castaneda argues that the holding in *Blair* should be extended to all felony murders, meaning second degree felony murder is always a lesser included offense of first degree felony murder. (AOB 95.) Castaneda, however, does not explain how second degree felony murder would be a lesser included offense of first degree felony murder, when, as here, the underlying felonies for first degree felony murder are kidnapping, burglary, sodomy and robbery. (AOB 95.) Indeed, because this Court has not addressed whether a defendant is entitled to instruction on second degree murder as a lesser included offense of first degree felony murder (*People v. Valdez* (2004) 32 Cal.4th 73, 114, 114, fn. 17), a trial court had no duty to instruct on second degree felony murder as a lesser included offense of first degree felony murder.

Even assuming that the second degree felony murder is a lesser included offense of first degree felony murder when the underlying felonies are kidnapping, burglary, sodomy and robbery, Castaneda's argument the trial court had a sua sponte duty to instruct on second degree felony murder based on the evidence of the underlying felonies is wrong. (AOB 98-103.) The court had no sua sponte duty to instruct on second degree felony murder because there was strong evidence of burglary, sodomy and robbery as discussed *infra*, respectively, in Arguments VIII, IX and X, and because Castaneda fails to explain how there was substantial evidence of any inherently dangerous felonies for second degree felony murder. Hence, Castaneda's right to due process was not violated.

Even assuming error, Castaneda was not prejudiced because the questions to be posed by second degree murder instructions were resolved adversely to Castaneda by other properly given instructions. The trial court instructed the jury on the special circumstances of kidnapping, burglary, sodomy and robbery during the commission of the murder, that same crimes that were the underlying felonies for first degree felony murder. (11 RT 2695-2696, 2701-2705; see 1 CT 287, 295-300.) The jury found all of those special circumstances to be true. (See 1 CT 251-252; 2 CT 366-370; 12 RT 2871-2872.) If the jury had any doubt this was a felony murder, it could have simply convicted Castaneda of first degree murder (under the premeditation theory) without special circumstances. Since the jury found with the special circumstances that Castaneda killed Kennedy in the perpetration of burglary, sodomy and robbery, it necessarily found that the killing was first degree felony murder. Thus, if the trial court erred in failing to instruct on "lesser included offense" of second degree felony murder, the error was harmless because the jury necessarily decided the factual questions posed by that omitted instruction adversely to the defendant under other properly given instructions. (*People v. Horning* (2004) 34 Cal.4th 871, 906.)

Moreover, because the jury clearly found by its special circumstance findings that this was a first degree murder under a felony murder theory, any error by the trial court in not instructing the jury on second degree murder as a lesser included offense of first degree premeditated murder was harmless under the *Watson* standard if state law error and the *Chapman* standard if federal constitutional error. (*People v. Rogers, supra,* 39 Cal.4th at pp. 867-872.) The error would be harmless because, even assuming arguendo that the premeditation first degree murder theory was factually inadequate, and therefore the jury should have been instructed on second degree non-premeditated murder, it would be clear the jury did not find Castaneda guilty

solely on the premeditation theory, but on the felony murder theory, based on its special circumstance findings. (*People v. Perez* (2005) 35 Cal.4th 1219, 1233.)

III.

THE TRIAL COURT PROPERLY DID NOT INSTRUCT THE JURY ON VOLUNTARY MANSLAUGHTER

Castaneda claims his right to due process of law under the federal and state constitutions was violated when the trial court failed to instruct the jury on voluntary manslaughter. (AOB 104-113.) The trial court properly did not instruct the jury on voluntary manslaughter because there was no substantial evidence that Castaneda committed that crime, as opposed to first degree murder.

A. Any Error In Failing To Instruct On Voluntary Manslaughter Was Invited Error

Even if a trial court has a sua sponte duty to instruct on a lesser included offense, that argument is barred on appeal if the defense attorney made a conscious, deliberate tactical choice to forego the instruction at trial. (*People v. Barton* (1995) 12 Cal.4th 186, 195, 198; *People v. Hardy, supra,* 2 Cal.4th at p. 185; *People v. Duncan* (1991) 53 Cal.3d 955, 969.) Voluntary manslaughter is a lesser included offense of murder. (*People v. Cole, supra,* 33 Cal.4th at p. 1215.)

On October 26, 1999, during the defense case, the parties discussed jury instructions outside the presence of the jury. During that time, the trial court mentioned that it had CALJIC No. 17.10 [Conviction of Lesser Included Or Lesser Related Offenses–Implied Acquittal–First] for lesser included offenses in the packet of proposed jury instructions. The trial court noted to defense

counsel that defense counsel had included attempted rape and attempted sodomy by force as lesser included crimes to rape and sodomy charged in counts 4 and 5. The court asked defense counsel if there were any other lesser included offenses. Defense counsel said, "No, I don't believe so, your Honor." (10 RT 2484.) The prosecutor said:

> And just for the record, on that particular point of the lesser includeds, Mr. Hardy [defense counsel] and I have had discussions concerning this particular point in the case on several occasions. And Mr. Hardy has indicated that this is a tactical thing on his part, and I will speculate as to what it is and I can understand what it may or may not be. But not to go into anything else, we have had discussions on this.

(10 RT 2484-2485.)

Defense counsel said nothing in response to what the prosecutor said and the court continued with other proposed jury instructions. (10 RT 2485.)

On October 28, 1999, the prosecutor and defense counsel told the court they had discussed a second degree murder instruction not being given, then defense counsel argued he had changed his mind and now wanted a second degree murder instruction (see "Background" in Argument II). (10 RT 2584-2585.)

Subsequently, the trial court did not instruct the jury on voluntary manslaughter. (11 RT 2682-2717, 2832-2852; see 1 CT 255-344.) As defense counsel requested, the trial court did instruct the jury on attempted rape and attempted sodomy by force as lesser included offenses or rape in count 4 and sodomy by force in count 5. (11 RT 2713; see 1 CT 315.)

Here, as seen above, defense counsel tactically chose not to request any lesser included offenses except for on counts 4 and 5 and second degree murder. Defense counsel did not dispute the prosecutor's statement that defense counsel was tactically choosing that course. Thus, if the trial court had a sua sponte duty to instruct the jury on voluntary manslaughter as a lesser included offense and therefore erred when it did not do so, the issue is barred

on appeal because defense counsel invited the error. In any event, as discussed below, the trial court did not have a sua sponte duty to give a voluntary manslaughter instruction as a lesser included offense based on there being insubstantial evidence that Castaneda committed that crime, as opposed to first degree murder.

B. The Trial Court Did Not Err Because There Was No Substantial Evidence Of Voluntary Manslaughter

Voluntary manslaughter is an unlawful killing committed without malice. (*People v. Rios* (2000) 23 Cal.4th 450, 460.) An unlawful killing is committed without malice, and constitutes voluntary manslaughter, if it is committed upon a "'sudden quarrel or heat of passion,'" or if it is committed in "'unreasonable self-defense'" – the unreasonable but good faith belief in having to act in self-defense. (*Ibid*; see Pen. Code, § 192, subd. (a).)

The heat of passion theory of the crime voluntary manslaughter has both a subjective and objective component, respectively, passion and provocation. (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1143; *People v. Steele* (2002) 27 Cal.4th 1230, 1252.) Passion and provocation must be affirmatively shown. (*People v. Steele, supra*, 27 Cal.4th at p. 1252.) Subjectively, the defendant must kill under an actual heat of passion. (*People v. Gutierrez, supra*, 28 Cal.4th at p. 1143; *People v. Steele, supra*, 27 Cal.4th at p. 1252.) The "passion aroused need not be anger or rage, but can be any '[v]iolent, intense, high-wrought, or enthusiastic emotion' other than revenge." (*People v. Breverman* (1998) 19 Cal.4th 142, 163; internal marks and citations omitted.) Whatever passion is inflamed, the defendant subjectively must have been under its influence at the moment he or she committed the unlawful killing or attempted to do so. (*People v. Steele, supra,* 27 Cal.4th at p. 1252.)

Objectively, no specific "provocation" is required. (*People v. Breverman, supra,* 19 Cal.4th at p. 163.) "The provocation which incites the defendant to homicidal conduct in the heat of passion must be caused by the victim [citation], or be conduct reasonably believed by the defendant to have been engaged in by the victim. [Citations.]" (*People v. Lee* (1999) 20 Cal.4th 47, 59.) The provocative conduct may be physical or verbal, and it may comprise a single incident or numerous incidents over a period of time. (*Ibid.*; *People v. Wharton* (1991) 53 Cal.3d 522, 569.) The provocation must be sufficient to cause an ordinarily reasonable person to act rashly and without deliberation under the given facts and circumstances, and from passion rather than judgment. (*People v. Gutierrez, supra,* 28 Cal.4th at p. 1143; *People v. Steele, supra,* 27 Cal. 4th at p. 1252; *People v. Koontz* (2002) 27 Cal.4th 1041, 1086.) Thus, if a person is provoked but thereafter has enough time to calm down--i.e., if so much time elapses that the inflamed passion of an average person would have cooled before the killing--then the killing is not voluntary manslaughter. (*People v. Daniels* (1991) 52 Cal.3d 815, 868.)

Because the sufficiency of provocation and adequacy of a cooling-off period are measured against objective standards, a court may determine those issues as a matter of law in deciding whether instructions are required. (*E.g., People v. Daniels, supra,* 52 Cal.3d at pp. 837, 868-869 [as a matter of law, there was sufficient time to cool down, and evidence of provocation was insufficient]; *People v. Pride* (1992) 3 Cal.4th 195, 216, 221, 250 [same]; *People v. Lujan* (2001) 92 Cal.App.4th 1389, 1414 [evidence insufficient to show provocation]; *People v. Davidson* (1969) 1 Cal.App.3d 292, 302 [as a matter of law there was time to cool down].)

On October 12, 1999, during the prosecution's case, Castaneda's cousin Gloria Salazar testified that soon after the time of the murder, Castaneda came

over to her house, took a girl's watch and ring out of his pocket and said, "[T]his bitch got me mad and I took it." (7 RT 1550-1551.)

Here, Castaneda claims his derogatory statement about victim Kennedy, "[T]his bitch got me mad and I took it" provided substantial evidence of voluntary manslaughter and therefore imposed a sua sponte duty upon the trial court to instruct on that crime. (AOB 104-113.) Castaneda's argument is unsupportable. Even assuming that Castaneda's derogatory statement could provide substantial evidence that he may have been angry at the time he murdered Kennedy, there was absolutely no evidence of any provocation by Kennedy sufficient enough to cause an ordinarily reasonable person to act rashly and without deliberation under the given facts and circumstances, and from passion rather than judgment. Not only was there absolutely no evidence to support the objective component of voluntary manslaughter, but it must be stated that it is difficult to imagine what Kennedy, a woman alone and vulnerable at the clinic, could have done to provoke "an objectively reasonable man" to force her into the procedure room, hit her in the head with a blunt object, tie her hands behind her back, gag her, pull her pants down, sodomize her, and kill her by stabbing her to death with a screwdriver. Moreover, even assuming Kennedy somehow adequately provoked Castaneda after he entered the clinic, an average person would have calmed down before killing Kennedy while tying her up and stabbing her with a screwdriver over 20 times before delivering the fatal two stabs. Put another way, Castaneda's acts were not those of an objectively average man committing voluntary manslaughter, but clearly those of a man committing premeditated first degree murder.

Also, Castaneda's reliance on *People v. Berry* (1976) 18 Cal.3d 509 to argue that the trial court should have instructed on voluntary manslaughter, is pointless. (AOB 108-110.) In *Berry*, the defendant killed his wife, and was convicted of first degree murder, after she taunted him over a period of two

weeks about her sexual involvement with another man, and sexually excited the defendant and indicated her desire to stay with him. This Court found that the trial court should have given voluntary manslaughter instructions. (*People v. Berry, supra,* 18 Cal.3d at pp. 513-515.) Castaneda states that "Similar to the manner in which the victim provoked the defendant in *People v. Berry*, the victim in this case provoked Castaneda into a violent rage." (AOB 110.) The assertion has no basis whatsoever. As discussed above, this case is the "polar opposite" of *Berry*. Unlike in *Berry*, here there was no evidence of provocation, and certainly no evidence upon which to base any reasonable inference of a pre-existing relationship analogous to that in *Berry,* any taunting, sexual or otherwise. Castaneda's reliance on *Berry* is profoundly misplaced. In sum, the trial court properly did not instruct the jury on voluntary manslaughter because there was insubstantial evidence that Castaneda committed that crime, as opposed to first degree murder. Castaneda's right to due process was not violated.

Lastly, any error by the trial court in not instructing on voluntary manslaughter was harmless, because, as explained above in Argument II, which is incorporated her by reference, the questions to be posed by instructions on voluntary manslaughter were adversely resolved to Castaneda by other properly given instructions. (*People v. Lewis* (2001) 25 Cal.4th 610, 646; *People v. Price* (1991) 1 Cal.4th 324, 464.)

IV.

IF THE TRIAL COURT ERRED BY GIVING THE JURY AN IMPLIED MALICE INSTRUCTION, THE ERROR WAS HARMLESS UNDER ANY STANDARD BASED ON OTHER INSTRUCTIONS AND THE OVERWHELMING EVIDENCE OF EXPRESS MALICE CONSTITUTING INTENT TO KILL FOR FIRST DEGREE MURDER

Castaneda contends his first degree murder conviction should be reversed because the trial court violated his state and federal constitutional rights to due process, fair trial and to avoid cruel and unusual punishment, when it erroneously gave an implied malice instruction to the jury. (AOB 112-129.) Castaneda is wrong. Castaneda's state and federal constitutional rights were not violated. If the trial court erred by giving the jury an implied malice instruction, the error was harmless under any standard based on other properly given instructions and the overwhelming evidence of express malice constituting intent to kill for first degree murder.

The parties did not discuss CALJIC No. 8.11 [Malice Aforethought–Defined]. (See 10 RT 2581.) The trial court gave CALJIC No. 8.11 to the jury in relevant part, as follows:

> Malice may be expressed or implied.
>
> Malice is express when there is manifested an intention unlawfully to kill a human being.
>
> Malice is implied when:
>
> The killing resulted from an intentional act, [¶] The natural consequences of the act are dangerous to human life, and [¶] The act was deliberately performed with knowledge of the danger to, and with conscious disregard for, human life.

(11 RT 2699; see 1 CT 292.)

As noted in Argument II, the court instructed the jury on first degree premeditated murder and first degree felony murder. (11 RT 2698-2701; see 1 CT 291-295.) The prosecutor argued to the jury both first degree murder theories of premeditation and deliberation and felony murder. (11 RT 2726-2731.) Defense counsel argued there was insubstantial evidence of the underlying felonies to support felony murder (11 RT 2763-2776), and that Castaneda did not commit the murder (11 RT 2776-2800). The jury found Castaneda guilty of first degree murder on a general verdict form that did not specify upon which theory or theories the jury relied. (2 CT 364.)

Castaneda claims that because neither premeditated murder or felony murder require implied malice, the trial court erred when it gave that instruction, particularly in regard to premeditated murder, because the jury may have convicted him of premeditated murder based an intentional act dangerous to human life with conscious disregard of the consequences rather than express malice, which is equivalent to intent to kill required for premeditated murder. Castaneda further claims that this error was prejudicial and violated his state and federal constitutional rights. (AOB 119-129.) Castaneda is wrong.

As discussed in Argument II, murder is defined as an unlawful killing committed with malice aforethought. (Pen. Code, § 187, subd. (a); *People v. Robertson, supra,* 34 Cal.4th at p. 164.) Malice aforethought can be express of implied. (*Ibid.*) Malice is express, "'[W]hen there is manifested a deliberate intention unlawfully to take away the life of a fellow creature.'" (Pen. Code, § 188; *People v. Robertson, supra,* 34 Cal.4th at p. 164.) Express malice is the functional equivalent of proof of unlawful intent to kill. (*People v. Catlin, supra,* 26 Cal.4th at p. 151.) First degree murder is an unlawful killing with express malice aforethought that is willful, deliberate and premeditated. (CALJIC No. 8.20 [Deliberate and Premeditated Murder]; Pen. Code, § 189; *People v. Robertson, supra,* 34 Cal.4th at p. 164.)

Malice is implied when the killing results from an intentional act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his or her conduct endangers the life of another with conscious disregard from life. (*Ibid.*) Implied malice and intent to kill cannot coexist. (*People v. Rogers, supra,* 39 Cal.4th at p. 869.) Implied malice murder normally constitutes murder in the second degree. (*People v. Catlin, supra,* 26 Cal.4th at p. 149.) Second degree murder is an unlawful killing with malice aforethought, but without premeditation and deliberation. (Pen. Code, §§ 187, subd. (a), 189; *People v. Robertson, supra,* 34 Cal.4th at p. 164.)

Under the felony murder rule, a killing in the course of certain felonies, or in the course of attempting those felonies, such as sodomy, burglary, robbery and kidnapping, constitutes first degree murder. (Pen. Code, § 189; *People v. Robertson, supra,* 34 Cal.4th at pp. 164-165.) The felony murder rule eliminates the need to prove malice. (*People v. Robertson* at p. 165.). Felony murder does not require proof of an intent to kill, but proof only of an intent to commit the underlying felony. (*People v. Jones, supra,* 29 Cal.4th at p. 1256.)

It is error for a trial court to give an instruction which correctly states the law but has no application to the facts of the case. (*People v. Guiton* (1993) 4 Cal.4th 1116, 1129.) When this occurs, it must be determined if there is a "reasonable likelihood" the jury understood the instructions as the defendant asserts. (*People v. Catlin, supra,* 26 Cal.4th at p. 151; *People v. Cain* (1995) 10 Cal.4th 1, 36.) To make that determination, a court should consider the specific language challenged, the instructions as a whole, the jury's findings and the arguments of counsel. (*People v. Huggins, supra,* 38 Cal.4th at p. 193; *People v Cain* at p. 36.)

Here, assuming the trial court should not have given the implied malice portion of CALJIC No. 8.11 because premeditated first degree murder requires

express malice and not implied malice, and first degree felony murder does not require implied malice, the error was harmless because there is no reasonable likelihood that the jury misunderstood the instructions as Castaneda asserts.

The trial court gave the jury CALJIC No. 8.10 [Murder-Defined],[27] which told them that a person is guilty or murder if he unlawfully kills another human being with malice aforethought or during the commission or attempted commission of burglary, kidnapping, sodomy by use of force, or robbery. The trial court then gave CALJIC No. 8.11, which, as noted above, defined express and implied malice. Next, the trial court gave the jury CALJIC No. 8.20 [Deliberate and Premeditated Murder],[28] which told the jury that first degree

---

27. The court read CALJIC No. 8.10 to the jury as follows:

> Defendant is accused in Count 1 of having committed the crime of murder, violation of Penal Code section 187. [¶] Every person who unlawfully kills a human being with malice aforethought or during the commission or attempted commission of burglary, kidnapping, rape, sodomy by use of force or robbery, all of which are felonies inherently dangerous to human life, is guilty of the crime of murder, in violation of Section 187 of the Penal Code. [¶] In order to prove this crime each of the following elements must be proved: [¶] 1. A human being was killed; [¶] 2. The killing was unlawful; and [¶] The killing was done with malice aforethought or occurred during the commission or attempted commission of burglary, kidnapping, rape, sodomy by use of force or robbery, all felonies which are inherently dangerous to human life.

(11 RT 2698-2699; see 1 CT 291.)

28. The court read CALJIC No. 8.20 to the jury, in pertinent part, as follows:

> All murder which is perpetrated by any kind of willful, deliberate and premeditated killing with express malice aforethought is murder of the first degree. [¶] . . . If you find that the killing was preceded and accompanied by a clear, deliberate

deliberate and premeditated murder requires express malice aforethought. Further, the trial court gave the jury CALJIC No. 8.21 [First Degree Felony-Murder],[29] which told the jury that felony murder did not require either express or implied malice, but a specific intent to commit burglary, kidnapping, sodomy by use of force, or robbery.

When the instructions are considered as a whole, the jury did not misunderstand that premeditated first degree murder could be committed with implied malice because CALJIC No. 8.20 unequivocally told the jury that a deliberate intent to kill and express malice were required to find premeditated

---

> intent on the part of the defendant to kill, which was the result of deliberation and premeditation, so that if must have been formed upon pre-existing reflection and not under a sudden heat of passion or other condition precluding the idea of deliberation, it is murder of the first degree. [¶] . . . To constitute a deliberate and premeditated killing, the slayer must weigh and consider the question of killing and the reasons for and against such a choice and having in mind the consequences, he decides to and does kill.

(11 RT 2700-2701; see 1 CT 293-294.)

29. The court read CALJIC No. 8.21 to the jury as follows:

> The unlawful killing of a human being, whether intentional, unintentional or accidental, which occurs during the commission or attempted commission of one or more of the following crimes or as a direct causal result of one or more of the following crimes, burglary, or kidnapping, or rape, or sodomy by use of force, or robbery, is murder of the first degree when the perpetrator had the specific intent to commit that crime. [¶] The specific intent to commit burglary, or kidnapping, or rape, or sodomy by use of force, or robbery and the commission or attempted commission of such crimes must be proven beyond a reasonable doubt.

(11 RT 2701; see 1 CT 295.)

first degree murder. Moreover, the express malice portion of CALJIC No. 8.11 explained that express malice means a manifested intention to kill. Further, during his closing argument, the prosecutor argued to the jury that for deliberate and premeditate murder, Castaneda had to intend to kill (11 RT 2726) and that "Malice aforethought is defined as intent to kill." (11 RT 2728.) The prosecutor also argued that Castaneda decided to and did intentionally kill Kennedy after sexually assaulting her because that was Castaneda's only option based on Kennedy being able to identify him. (11 RT 2730, 2752.) Thus, there is no reasonable likelihood that the jury misunderstood the instructions as Castaneda asserts as to premeditated first degree murder. Castaneda's state and federal constitutional rights were not violated.

When the instructions are considered as a whole, there is also no reasonable likelihood that the jury misunderstood the instructions as Castaneda asserts as to first degree felony murder. (AOB 129.) CALJIC No. 8.10 explained that a person was guilty or murder if he unlawfully killed another human being with malice aforethought or during the commission or attempted commission of burglary, kidnapping, sodomy by use of force, or robbery. The use of the term "or" told the jury that murder constituted an unlawful killing with malice aforethought, or, alternatively, constituted an unlawful killing during the commission of at least one of the listed crimes alone, without malice aforethought. CALJIC No. 8.21 then explained that for the unlawful killing to constitute first degree felony murder, Castaneda only had to have the specific intent to commit one or more of those crimes. Thus, from being given CALJIC Nos. 8.10 and 8.21, the jury would know that CALJIC No. 8.11, explaining malice aforethought, had no application to the question of whether Castaneda committed first degree felony murder. Further, during closing argument, the prosecutor argued to the jury that if it found beyond a reasonable doubt Castaneda committed the unlawful killing during the commission one of the

crimes, Castaneda was guilty of first degree felony murder. (11 RT 2726-2727, 2730-2731.) Hence, there is no reasonable likelihood that the jury misunderstood the instructions as Castaneda asserts as to first degree felony murder. Castaneda's state and federal constitutional rights were not violated.

In any event, any error by the court in giving the implied malice portion of CALJIC No. 8.11 was harmless beyond a reasonable doubt because there was overwhelming evidence that Castaneda unlawfully killed Kennedy with express malice, meaning intent to kill, as discussed in Argument II (discussion of premeditation evidence), which is incorporated here by reference. The error was also harmless because as discussed in Argument II, which is also incorporated here by reference, the special circumstance findings show that Castaneda's guilt of first degree murder was resolved against Castaneda under the properly given felony murder instruction.

V.

THE EVIDENCE WAS SUBSTANTIAL TO SUPPORT THE KIDNAPPING CONVICTION AND SPECIAL CIRCUMSTANCE TRUE FINDING

Castaneda contends his kidnapping conviction in count 3, the special circumstance finding of kidnapping and the felony-murder finding based on kidnapping, should be reversed because the evidence was insufficient as a matter of law to prove that he kidnapped Kennedy. (AOB 130-138.) The evidence was substantial to support the kidnapping conviction and special circumstance true finding.

The jury found Castaneda guilty as charged in count 3 of kidnapping in violation of Penal Code section 207, subdivision (a).[30] (1 CT 26; 2 CT 373.)

---

30. The jury also found to be true a sentencing allegation that Kennedy was intentionally confined and died as a result of Castaneda kidnapping her in violation of Penal Code section 209, subdivision (a). (1 CT 26; 2 CT 375; see

The jury found the alleged kidnapping special circumstance to be true. (2 CT 367.) The predicate felonies alleged in connection with the felony-murder theory were burglary, kidnapping, rape, sodomy by use of force and robbery. (1 CT 291; 11 RT 2699.) The jury found Castaneda guilty of first degree murder on a general verdict form that did not specify whether the jury arrived at that conclusion based on the theory of felony murder or the theory of premeditated murder or both. (2 CT 364.)

To determine a claim of insufficiency of the evidence in a criminal case, the entire record is reviewed to assess whether a rational trier of fact could find the defendant guilty beyond a reasonable doubt. On appeal, the evidence must be viewed in the light most favorable to the People and must presume in support of the judgment the existence of every fact that trier could reasonably deduce from the evidence. The evidence should be of reasonable, credible and solid value, but it is the exclusive province of the trial judge or jury to determine the credibility of a witness. Thus, if the verdict is supported by substantial evidence, due deference must be accorded to the trier of fact by the appellate court and the appellate court cannot substitute its evaluation of a witness's credibility for that of the fact finder. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) A defendant must affirmatively demonstrate that the evidence is insufficient. (*People v. Sanghera* (2006) 139 Cal.App.4th 1567, 1573.) The standard of review is the same in cases in which the People rely mainly on circumstantial evidence. (*People v. Snow* (2003) 30 Cal.4th 43, 66.)

Moreover, the same standard is used to review a claim that there was insufficient evidence to find true a special circumstance allegation. (*People v. Huggins, supra,* 38 Cal.4th at p. 214.)

---

16 RT 3892-3896.)

Penal Code section 207, subdivision (a),[31] codifies "simple kidnapping." (*People v. Rayford* (1994) 9 Cal.4th 1, 11-12.) Generally, to prove simple kidnapping, the prosecution must prove: (1) a person was unlawfully moved by the use or physical force or fear; (2) the movement was without the person's consent; and (3) the movement of the person was for a substantial distance. (*People v. Jones* (2003) 108 Cal.App.4th 455, 462.)

Here, Castaneda asserts there was insufficient evidence of asportation, specifically that there was insufficient evidence that Kennedy was forcibly moved, and that if Kennedy was forcibly moved, the movement was not for a substantial distance. (AOB 134-138.) As explained below, there was sufficient evidence of both forcible movement and movement for substantial distance.

The force used to move the victim can be physical or accomplished through the giving of orders which the victim feels compelled to obey because he or she fears harm or injury form the accused and such apprehension is not unreasonable under the circumstances. (*People v. Majors* (2004) 33 Cal.4th 321, 326-327.) Here, the evidence is substantial by which a rational jury could reasonably find that Castaneda forcibly moved Kennedy. Given Kennedy's practice of unlocking the door and letting a patient in if the patient arrived early, and that fact there was no sign of forced entry, a reasonable jury could conclude that Kennedy opened the door and let Castaneda into the clinic. (See 5 RT 1023, 1128, 1283-1284.) This means that Kennedy was not in the procedure room located 40 to 50 feet away in the back of the clinic when Castaneda entered the clinic. (5 RT 1056, 1073, 1074, 1286; Exh. 3.) As argued by the

---

31. Penal Code section 207, subdivision (a), provides:

> Every person who forcibly, or by any other means of instilling fear, steals or takes, or holds, detains, or arrests any person in this state, and carries the person into another country, state, or county, or into another part of the same county, is guilty of kidnapping.

prosecutor (11 RT 2744), based on the book of the floor in the front office of the clinic and the testimony that Kennedy was a neat person who would not leave a book on the floor, a reasonable jury could then conclude that at some point soon after Kennedy let Castaneda into the clinic, Castaneda used physical force or fear to move Kennedy from the front office to the procedure room. (See 5 RT 1013-1014,1069, 1072, 1285.) A reasonable jury could also conclude that Castaneda used physical force or fear to move Kennedy from the front office to the procedure room based on Castaneda's ultimate acts of binding, gagging, sodomizing and killing Kennedy.

As to a jury determining movement (asportation) of a substantial distance for simple kidnapping (and kidnapping a person under 14 years of age in violation of Penal Code section 208, subdivision (b)), when the evidence permits, a jury may consider: (1) the distance the victim was moved; (2) whether the movement increased the risk of harm above that which existed prior to the asportation; (3) whether the movement decreased the likelihood of detection; and (4) whether the movement increased the danger in the victim's foreseeable attempts to escape and the attacker's enhanced opportunity to commit additional crimes. (*People v. Martinez* (1999) 20 Cal.4th 225, 237.) However, except for the distance the victim was moved, the factors from *Martinez* set forth above do not apply retroactively to appellant because his kidnapping of Kennedy occurred before *Martinez* was decided. (*Id.* at pp. 238-240.) Before *Martinez* overruled it, the previous controlling law was set forth in *People v. Caudillo* (1978) 21 Cal.3d 562. (*Id.* at p. 237, fn. 6; and at p. 240.)

While *Caudillo* noted that section 207 does not speak in terms of movement of any specific or exact distance, *Caudillo* limited the determination of whether movement was substantial to the actual distance the perpetrator moved the victim. (*People v. Martinez, supra*, 20 Cal.4th at pp. 233, 236, 237, fn. 6.) In *Martinez*, this Court noted that under the "distance only"

consideration set forth in *Caudillo*, a movement of the victim through a house and 75 feet outside in *People v. Brown* (1974) 11 Cal.3d 784, 788-789, and a 90 foot-movement of the victim in *People v. Green* (1980) 27 Cal.3d 1, 67, constituted insufficient evidence of substantial movement to sustain a conviction of simple kidnapping. (*Id.* at pp. 233-241.) This Court then found that under the *Caudillo* standard applicable at the time as set forth in *Brown* and *Green*, defendant Martinez's acts of forcing the 13-year-old victim through several rooms in a house, across a 15 foot-porch, and 40 to 50 feet from the back of the residence before being stopped by the police, constituted insufficient evidence of asportation to support the convictions of simple kidnapping and kidnapping a child under 14 years of age. (*Id.* at pp. 229-230, 239-241.) This Court, citing Penal Code section 1181, subdivision (6) and *People v. Daly* (1992) 8 Cal.App.4th 47, 57, reduced the conviction to the lesser included offense of attempted kidnapping of a person under the age of 14 in light of the record showing that absent the prompt response of the police, defendant Martinez's movement of the victim would have exceeded the minimum asportation distance set by *Brown* and *Green*.[32/] (*Id.* at p. 241.)

As noted above, Castaneda forced Kennedy to move 40 to 50 feet from the front office to the procedure room in the clinic, which is less than the distance the victims were moved in *Brown* and *Green*. However, in regard to a kidnapping committed in 1997 and the defendant's claim that at that time simple kidnapping required a movement of more than 90 feet, this Court stated that at the time of the defendant's crime, "it was not well established that *under*

---

32. If the approximately 50 feet appellant forcefully moved Kennedy in this case was not substantial and does not support a kidnapping conviction, the evidence also does not support the crime of attempted kidnapping because appellant's movement of Kennedy would not have exceeded the minimum asportation distance set by *Brown* and *Green*. Unlike in *Caudillo* and *Daly*, appellant moved Kennedy inside an enclosed office and thus could not have moved her much farther than 50 feet.

all circumstances simple kidnapping required a movement of more than 90 feet." (*People v. Dominguez* (2006) 39 Cal.4th 1141, 1154-1155, emphasis in original.) This Court further cited its statement in *People v. Rayford, supra,* 9 Cal.4th at page 14, that "'we have resisted setting a specific number of feet as the required minimum distance [for simple kidnapping], and have further required that the movement be 'substantial in character.'" (*Id.* at p. 1155.) Thus, because there is no minimum distance required, respondent asserts there was substantial evidence from which a reasonably jury could find 40 to 50 feet sufficient movement to support a simple kidnapping conviction and kidnapping special circumstance.

VI.

THE KIDNAPPING CONVICTION AND SPECIAL CIRCUMSTANCE SHOULD BE REVERSED BECAUSE OF THE GIVING OF AN INAPPLICABLE DEFINITION OF MOVEMENT FOR A SUBSTANTIAL DISTANCE

Castaneda contends the judgment of guilt on count 3, and the special circumstance finding of kidnapping, should be reversed because the trial court instructed the jury with an erroneous definition of asportation, specifically, the definition of substantial movement in the 1999 revision of CALJIC No. 9.50 [Kidnapping–No Other Underlying Crime]. (AOB 139-148.) Castaneda is correct that the trial court erred in giving the 1999 revision of CALJIC No. 9.50[33/] because, as stated in Argument V, the substantial movement standards

---

33. The trial court instructed the jury with the 1999 revision of CALJIC No. 9.50 as follows:

> The defendant is accused in Count 3 of having committed the crime of kidnapping, a violation of section 207, subdivision (a) of the Penal Code. [¶] Every person who unlawfully and with physical force, or by any other means of instilling fear, steals, or takes or holds, detains or arrests another person and carries that

of *Martinez* are not retroactive, and thus inapplicable to Castaneda's criminal acts committed on March 30, 1998. The trial court should have given the jury the pre-1999 version of CALJIC No. 9.50,[34/] which was based on this Court's

---

person without her consent or compels any person without her consent and because of a reasonable apprehension of harm to move for a distance that is substantial in character, is guilty of the crime of kidnapping in violation of Penal Code section 207, subdivision (a).

A movement that is only for a slight or trivial distance is not substantial in character. In determining whether a distance that is more than slight or trivial is substantial in character, you should consider the totality of the circumstances attending the movement, including, but not limited to, the actual distance moved or whether the movement increased the risk of harm above that which existed prior to the movement, or decreased the likelihood of detection, or increased both the danger inherent in a victim's foreseeable attempt to escape and the attacker's enhanced opportunity to commit the additional crimes. If an associate crime is involved, the movement also must be more than that which is incidental to the commission of the other crime.

In order to prove this crime, each of the following elements must be proved: [¶] 1. A person was moved by the use of physical force or by any other means of instilling fear; [¶] 2. The movement of the other person was without her consent; and [¶] 3. The movement of the other person in distance was substantial in character. (11 RT 2707-2708; see 1 CT 305.)

34. CALJIC No. 9.50 (6th ed. 1996) provided:

[Defendant is accused [in Count[s] _____] of having committed the crime of kidnapping, a violation of section 207, subdivision (a) of the Penal Code.] [¶] Every person who unlawfully [and with physical force [or] [by any [other] means of instilling fear], steals or takes, or holds, detains, or arrests another person and carries that person without [his [her] consent and because of a reasonable apprehension of harm, to move] for a substantial distance, that is, a distance more than slight or trivial, is guilty of

decision in *Caudillo*, and did not include the more expansive *Martinez* standard of what constituted movement of a substantial distance. Also, Castaneda is correct that his failure to object to the CALJIC No. 9.50 instruction given at trial does not preclude this Court from reviewing the instruction under because his substantial rights are affected under Penal Code section 1259. (See AOB 145.)

The giving of the wrong version of CALJIC No. 9.50 implicated Castaneda's federal constitutional rights because it was a misinstruction on the element of movement of a substantial distance (*People v. Kelly* (1992) 1 Cal.4th 495, 527; *People v. Hayes* (1990) 52 Cal.3d 577, 628.) As noted in Argument V in reference to *Caudillo*, *Brown* and *Green*, it is arguable that movement of about 50 feet, as in this case, in not a substantial distance. Moreover, during closing argument, the prosecutor relied on the *Martinez* substantial movement considerations to argue that although 50 to 60 feet was not a great distance in terms of actual feet, Castaneda was guilty of kidnapping because he moved Kennedy to attack her in a position of disadvantage and where the crime would not be discovered. (11 RT 2734-2735; see AOB 147.) Hence, the trial court's

---

> the crime of kidnapping in violation of Penal Code section 207, subdivision (a).
>
> In order to prove this crime, each of the following elements must be proved: [¶] [1. a person was [unlawfully] moved by the use of physical force [, or by any other means of instilling fear];] [¶] [1. A person was [unlawfully] compelled by another person to move because of a reasonable apprehension of harm;] [¶] 2. The movement of the other person was without [his][her] consent; and [¶] 3. The movement of the other person was for a substantial distance, that is, a distance more than slight or trivial.

misinstruction was prejudicial to appellant, and not harmless beyond a reasonable doubt.

However, although the kidnapping conviction and special circumstance must be reversed because the instructional error was not harmless beyond a reasonable doubt, the error, contrary to Castaneda's brief assertion, did not violate Castaneda's right not to suffer cruel and unusual punishment. (AOB 144.) The felony murder underlying offenses and special circumstances based on sodomy, burglary, and robbery support the first degree murder conviction and eligibility for the death sentence. Further, as explained previously, there was overwhelming evidence that supported the first degree murder conviction based on premeditation and deliberation. Thus, although the kidnapping conviction and special circumstance must be reversed because the instructional error was not harmless beyond a reasonable doubt, the error, contrary to Castaneda's brief assertion, did not violate Castaneda's right not to suffer cruel and unusual punishment.

VII.

THE TRIAL COURT SHOULD HAVE INSTRUCTED THE JURY ON FALSE IMPRISONMENT AS A LESSER INCLUDED OFFENSE OF KIDNAPPING, BUT DEFENSE COUNSEL INVITED THE ERROR

Castaneda asserts his federal constitutional rights to due process, jury trial, and against cruel and unusual punishment were violated, and that his count 3 kidnapping conviction, special circumstance should be reversed, because the trial court failed to instruct the jury on the lesser included offense of false imprisonment. The trial court should have instructed the jury on false imprisonment as a lesser included offense of kidnapping, but defense counsel invited the error.

False imprisonment under Penal Code sections 236 and 237 is a lesser included offense of kidnapping. (*People v. Chacon* (1995) 37 Cal.App.4th 52, 65; *People v. Magana* (1991) 230 Cal.App.3d 1117, 1120-1121.) A trial court has a sua sponte duty to instruct on a lesser included whenever the record contains substantial evidence from which a jury reasonably could conclude that the defendant was not guilty of the charged crime, but guilty of the lesser included offense. (*People v. Huggins, supra,* 38 Cal.4th at p. 215; *People v. Bradford, supra,* 15 Cal.4th at p. 1345.) Even if a trial court had a sua sponte duty to instruct on a lesser included offense, that argument is barred on appeal if the defense attorney made a conscious, deliberate tactical choice to forego the instruction at trial. (*People v. Barton, supra,* 12 Cal.4th 186, 195, 198; *People v. Hardy, supra,* 2 Cal.4th at p. 185; *People v. Duncan, supra,* 53 Cal.3d at p. 969.)

Again, the elements of simple kidnapping are: (1) a person was unlawfully moved by the use or physical force or fear; (2) the movement was without the person's consent; and (3) the movement of the person was for a substantial distance. (*People v. Jones, supra,* 108 Cal.App.4th at p. 462.) False imprisonment is the unlawful violation of the personal liberty of another. (Pen. Code, §§ 236 and 237; *People v. Reed* (2000) 78 Cal.App.4th 274, 280.) "Personal liberty" is violated when "the victim is compelled to remain where he does not wish to remain, or to go where he does not wish to go." (*Ibid.*) Restraint of a person's freedom of movement is at the heart of false imprisonment. (*Ibid.*) The elements of felony false imprisonment are: (1) a person intentionally restrained, confined, or detained another person, compelling her to stay or go somewhere; (2) the other person did not consent to the restraint; and (3) the restraint, confinement or detention was accomplished by violence or menace. (*People v. Checketts* (1999) 71 Cal.App.4th 1190, 1194; see CALJIC No. 9.60.) On appeal, this Court reviews

independently the question whether a trial court erred in failing to instruct on a lesser included offense. (*People v. Waidla, supra,* 22 Cal.4th at p. 739.)

There is no dispute Kennedy was confined by force without consent to constitute false imprisonment by force, and as noted in Arguments V and VI in reference to *Caudillo*, *Brown* and *Green*, it is arguable whether appellant's movement of Kennedy of about 50 feet was a substantial distance to constitute kidnapping. Thus, the trial court should have sua sponte given false imprisonment as a lesser included offense of kidnapping. However, as discussed below, the trial court's error cannot be considered on appeal because defense counsel invited it.

As discussed in Argument III (failure to instruct on voluntary manslaughter), during the defense case, the parties discussed jury instructions outside the presence of the jury on October 26, 1999. During that time, the parties discussed and agreed on the necessary robbery instructions. (10 RT 2484.) The trial court then mentioned that it had CALJIC No. 17.10 [Conviction of Lesser Included Or Lesser Related Offenses–Implied Acquittal–First] for lesser included offenses in the packet of proposed jury instructions. The trial court noted to defense counsel that defense counsel had included attempted rape and attempted sodomy by force as lesser included crimes to rape and sodomy charged in counts 4 and 5. The court asked defense counsel if there were any other lesser included offenses. Defense counsel said, "No, I don't believe so, your Honor." (10 RT 2484.) The prosecutor said:

> And just for the record, on that particular point of the lesser includeds, Mr. Hardy [defense counsel] and I have had discussions concerning this particular point in the case on several occasions. And Mr. Hardy has indicated that this is a tactical thing on his part, and I will speculate as

to what it is and I can understand what it may or may not be. But not to go into anything else, we have had discussions on this.

(10 RT 2484-2485.)

Defense counsel said nothing in response to what the prosecutor said and the court continued with other proposed jury instructions. (10 RT 2485.)

Here, as seen above, defense counsel tactically chose not to request any lesser included offenses except for on counts 4 and 5 and later, second degree murder. Defense counsel did not dispute the prosecutor's statement that defense counsel was tactically choosing that course. Thus, although the trial court had a sua sponte duty to instruct the jury on false imprisonment as a lesser included offense of kidnapping, the issue is barred on appeal because defense counsel invited the error.[35]

VIII.

SUBSTANTIAL EVIDENCE SUPPORTS CASTANEDA'S BURGLARY CONVICTION AND THE BURGLARY SPECIAL CIRCUMSTANCE TRUE FINDING

Castaneda contends his burglary conviction in count 2 and the burglary special circumstance true finding should be reversed because the evidence was insufficient as a matter of law that Castaneda entered the clinic with the intent to commit a felony. (AOB 167-172.) Castaneda is wrong. To the contrary,

---

35. Castaneda claims that this Court's cases that hold there is no sua sponte duty to give a lesser included offense when the offense is alleged only as a felony in a felony murder prosecution, or alleged as a special circumstance for the death penalty, and not alleged as a separate offense, are wrong and should be overturned. (AOB 154-165.) In this case, all of the underlying felonies for felony murder and special circumstances were separately charged in the information as counts 2 through 6. Thus, Castaneda's case does not present the issue being discussed. Accordingly, this Court should decline to reach the issue as it would constitute an advisory opinion on the point. (*In re William M.* (1970) 3 Cal.3d 16, 23, fn. 14; *Lynch v. Superior Court of Los Angeles County* (1970) 1 Cal.3d 910, 912.)

there was substantial evidence from which a reasonable jury could find Castaneda guilty of burglary and find true the burglary felony murder special circumstance allegation.

At trial, the prosecutor argued that Castaneda committed burglary when he entered the clinic the day of the murder because Castaneda had the intent to take things from the clinic and attack Kennedy when he entered. The prosecutor argued this was shown by the fact Castaneda had no reason to come to the clinic the day of the murder and parked his car a short distance away from the clinic. (11 RT 2732.) Defense counsel argued there was no burglary because there was no evidence of an unlawful entry or intent to steal. (11 RT 2768-2769.) The prosecutor argued in rebuttal that burglary does not require an unlawful entry. (11 RT 2805-2806.)

The standard for substantial evidence was previously discussed in Argument V and is incorporated here by reference. Any person who enters a house or building with the intent to commit a felony or theft is guilty of the crime of burglary. (Pen. Code, § 459; *People v. Frye* (1998) 18 Cal.4th 894, 954.) Under the felony murder rule, a murder is of the first degree if committed in the perpetration of, or in the attempt to perpetrate any of certain enumerated felonies, including burglary. (Pen. Code, § 189; *People v. Hayes, supra,* 52 Cal.3d at p. 631.) A killing is committed in the perpetration of a burglary if the killing and the burglary are part of one continuous transaction. (*Ibid.*) The burglary special circumstance is assessed under the same standard. (*Ibid*; Pen. Code, § 190.2, subd. (a)(17)(G); see *People v. Coffman* (2004) 34 Cal.4th 1, 87.) Thus, a defendant is guilty of felony murder in perpetration of a burglary, and the burglary special circumstance is properly found if (1) the defendant intended to commit burglary when he killed the victim and (2) the killing and the burglary were part of one continuous transaction. (*People v. Hayes, supra,* 52 Cal.3d at p. 632.)

A person's intent when entering a building may be inferred from all of the facts and circumstances disclosed by the evidence. (*People v. Carter* (2005) 36 Cal.4th 1114, 1157; *People v. Holt* (1997) 15 Cal.4th 619, 699.) For example, in *People v. Osband* (1996) 13 Cal.4th 622, a 66-year-old woman's body was found on the floor of the her apartment. The victim had some fragments of clothing on. There was what appeared to be a pair of panties that had been either cut or ripped, where the crotch was not in its normal position. There were two stab wounds on the right side of her neck which severed the carotid artery and caused death. Many of her facial bones and her jaw bone were broken indicating a beating. There was sperm in her vagina and urethra. The bedroom had been ransacked, with drawers and clothing atop her body, papers boxes and her purse's contents on the bed, and her car keys, and wallet and television set were missing. The defendant's palm print, fingerprints, thumb prints and shoe print impressions were found at the crime scene. (*People v. Osband, supra,* 13 Cal.4th at pp. 653-655.) The jury found that the defendant committed the first degree murder during a burglary, robbery and rape, found burglary, robbery and rape special circumstance true, and found the defendant guilty of the same three crimes. (*Id.* at p. 652.) On appeal, the defendant claimed there was insufficient evidence of the above crimes underlying the first degree murder, the special circumstances and the same charged crimes. This Court found that based on the above evidence, a rational trier of fact could clearly find that the defendant perpetrated felony murder as to all three underlying felonies, committed the same crimes, and committed the special circumstance allegations. (*Id.* at pp. 691-692.) This court also found that the only reasonable conclusion the trier of fact could have reached was that the defendant intended to kill the victim. (*Id.* at p. 692.)

Here, as in *Osband*, a reasonable jury could infer from the circumstances that Castaneda entered the clinic on March 30, 1998, with the intent to commit

robbery, kidnapping, sodomy and murder. This is what the prosecutor argued. (11 RT 2732.) When Castaneda left Toyo Tires on Monday, March 30, 1998, he had to already know, from a previous appointment, that Kennedy was alone on Mondays in the clinic and probably knew that she had a habit of letting patients in early. Castaneda did not park in the clinic's parking lot but parked the Nissan Sentra in the nearby Long John Silver restaurant, which the jury could infer was to avoid detection. Castaneda had no reason to come to the clinic because he was not injured, did not have an appointment, and had to know the clinic was not open at 9:30 a.m. on Mondays, about the time he parked in the Long John Silver parking lot. After somehow gaining entry into the clinic, perhaps by Kennedy letting him in, the evidence suggests an inference that Castaneda immediately attacked her. That conclusion is strongly supported by the evidence because Castaneda tied her hands, gagged her, sexually assaulted her, killed her and took her property over a period of less than one hour, 9:30 a.m. to before 10:30 a.m. Then Castaneda departed before 10:30 a.m. to avoid detection. All of this evidence points to the reasonable conclusion that Castaneda drove to the clinic with the intent to attack, rob and sodomize Kennedy, and did so in one continuos transaction. In other words, there was substantial evidence from which a reasonable jury could find Castaneda guilty of burglary and find true the burglary special circumstance allegation.

Castaneda's claim that one of the reasons the evidence was insufficient as a matter of law to prove that he intended to commit a felony was because there was no sign of forced entry and Kennedy must have allowed him into the clinic, is unavailing. (AOB 168-169.) A person is guilty of burglary if he enters a building with felonious intent even if he enters with the owner's or occupant's consent. (*People v. Frye, supra,* 18 Cal.4th at p. 954.) Second, Castaneda's claim that it "cannot be concluded that [his] vehicle was the vehicle

in the [Long John Silver] parking lot," is erroneous. (AOB 169.) The jury could reasonably conclude the vehicle was in fact Virginia's Nissan Sentra that was used by Castaneda because the restaurant witnesses testified it was similar to that car and Castaneda had already left Toyo Tires when the witnesses saw that car around 9:45 the morning of the murder. (8 RT 1962-1969; Exh. 16, photos G and H.)

Castaneda's claim that assuming the vehicle belonged to him (actually Virginia), that single fact was insufficient to proved he intended to commit a felony because he may have planned to eat at the restaurant before or after visiting the clinic, is also meritless. (AOB 169.) Even assuming that Castaneda's explanation were a plausible one, on appeal all inferences must be drawn in support of the verdict. Castaneda's argument in one for the jury, not a court reviewing the sufficiency of the evidence on appeal. Moreover, Castaneda's explanation for parking in the restaurant's parking lot instead of the clinic's parking lot is not plausible. It was around 9:30 to 9:45 a.m. when Castaneda parked in the restaurant's parking lot. The restaurant was primarily a seafood establishment that unsurprisingly did not serve breakfast and did not open until 11:00 a.m. (8 RT 1962-1969.) The more reasonable inference is that Castaneda parked there because he was planning to commit a felony before entering the clinic and thus, did not want the Nissan Sentra to be seen in front of the clinic.

Castaneda also claims that his statement to Salazar after the murder, "the bitch made me mad," if referring to Kennedy, *established* that he did not intend to commit a felony when he entered the clinic. (AOB 169.) The statement "establishes" no such thing. First, there is no way of knowing if Castaneda formed his opinion of Kennedy before, during, or after attacking her that morning. Moreover, even if the statement meant Kennedy made him mad after entering the clinic that day, that does not mean Castaneda did not already plan

to commit a felony when he entered. Kennedy could have angered Castaneda for any number of reasons during his attack on her. Additionally, it could also have been an attempt to rationalize his behavior after the fact and been entirely untrue. Under any interpretation, the statement did not establish, let alone even suggest that Castaneda did not intend to commit a felony when he entered the clinic the day of the murder.

As discussed above, and argued by the prosecution at trial (11 RT 2732), Castaneda intended to commit a felony when he entered the clinic. However, if this Court finds that Castaneda intended to commit a felony after entering the clinic, but before entering the procedure room with Kennedy, there was still substantial evidence by which a reasonable jury could find Castaneda guilty of burglary and first degree murder under the felony murder rule with burglary as the underlying offense, and find true the burglary special circumstance allegation. (Cf. *People v. Starks* (2002) 28 Cal.4th 71, 74-88 [defendant found guilty of burglary when he entered house then formed intent to commit rape before raping victim inside her bedroom].)

In sum, there was substantial evidence by which a reasonable jury could find Castaneda guilty of burglary and find true the burglary felony murder special circumstance allegation.

IX.

SUBSTANTIAL EVIDENCE SUPPORTS CASTANEDA'S SODOMY CONVICTION AND THE SODOMY SPECIAL CIRCUMSTANCE TRUE FINDING

Castaneda contends there was insufficient evidence to support the sodomy conviction in count 5 and the sodomy special circumstance true finding, and that the conviction and true finding should therefore be vacated and the judgment of death reversed. (AOB 173-180.) In fact, there was substantial evidence from which a reasonable jury could find Castaneda guilty

of sodomy and find true the sodomy felony murder special circumstance allegation.

Based on Castaneda leaving Toyo Tires shortly after 9:00 a.m., the approximately 20 minute drive to the clinic, Kennedy's telephone call with Mrs. Vassantachart at 9:28 a.m., a car similar to the Nissan driven by Castaneda being seen at Long John Silver near the medical clinic at 9:45 a.m. and 10:15 a.m., and the patients beginning to arrive at 10:30 a.m., Castaneda had to have committed his criminal acts between around 9:30 a.m. and 10:25 a.m. (4 RT 892-894; 976-985; 5 RT 1015-1019; 8 RT 1948-1950, 1955-1956, 1962-1969.)

Kennedy's body was discovered shortly after 11:00 a.m. face down spread across the procedure room examining table, disrobed, with the lower clothing around the ankles. Also, among other things, Kennedy's hands were tied tightly behind her back and she had been gagged with a sock. (5 RT 1121, 1159-1160, 1367.) One of the socks Kennedy had been wearing, and found near her body, had feces and Castaneda's sperm on it. (5 RT 1327, 1359, 1362; 8 RT 1900-1937, 2036-2069; 9 RT 2185, 2200; Exh. 18.) When a sex kit was performed by Blackburn, a forensic laboratory technician, no sperm was found in Kennedy's mouth, vagina or anus. (5 RT 1224-1227, 1235, 1373-1375; 6 RT 1412-1415.) Dr. Sheridan, the forensic pathologist who performed the autopsy on Kennedy's body, testified that there was a small amount of dried feces at the anus, but there was no apparent trauma to the anal region. (5 RT 1181-1182, 1127.) Dr. Sheridan opined, "In other words, from my autopsy examination in this case, I have no grounds for saying that there was sodomy or indeed sexual assault at all." (5 RT 1227-1228.) However, Dr. Sheridan also opined that the absence of anal tearing does not eliminate the possibility that sodomy occurred, particularly in light of the fact that Kennedy's clothing had been removed. (5 RT 1227-1229.) Dr. Sheridan noted that injuries

associated with sodomy would not be present just before death (in agonal state) or after death. (5 RT 1195-1196, 1233-1234.)

As to the 29 stab wounds on Kennedy's neck and back, Dr. Sheridan testified that all were inflicted before death, 14 of the wounds were less deep "prodding" or puncture wounds, and 15 of the wounds were deeper and were clearly consistent with a Phillip's head screwdriver. The two forceful stab wounds that severed and left carotid artery and jugular vein would have caused death in several minutes, and no more than 15 minutes, because those vessels were still intact on the right side of the neck. It would have only taken a few minutes, five minutes or less, for Kennedy to lose consciousness once those mortal wounds were inflicted. (5 RT 1189-1192, 1198-1199, 1203-1204, 1214.)

Ibarra testified that sometime in early 1998, Castaneda asked her for advice concerning his sexual relationship with Virginia. Castaneda told Ibarra, as he had told her before, that he liked having anal sex with Virginia but at first Virginia did not like it because it hurt and she had bled a few times. Ibarra told Castaneda not to perform anal sex hard on Virginia and to use gel or cream so that Virginia would not be hurt. Castaneda made a face and said he liked anal sex and would continue to do it even though it hurt Virginia. Ibarra, as she had a few times before, gave Castaneda four or five packets of KY Jelly. (7 RT 1574-1575, 1595, 1626-1629.)

The prosecutor argued that sodomy was proved beyond a reasonable doubt on the evidence of Kennedy's body being discovered being bent over the examination table with the hands tied and the clothing removed, along with the feces found in the anal cavity, the feces found on the sock, and Ibarra's testimony about Castaneda's anal sex with Virginia. (11 RT 2738-2740.) The prosecutor also explained to the jury attempted sodomy and argued that the

evidence did not support the crime of attempted sodomy.[36] (11 RT 2740-2741.) Defense counsel argued there was no evidence of penetration to prove sodomy and whoever killed Kennedy may have "got off on the killing" by masturbating and ejaculating on her, wiping her off with a sock, and picking up some of the secretion from the anus on the sock. Defense counsel argued Kennedy may have been so terrified she lost control of her bowels and defecated. (11 RT 2774-2776.) The prosecutor argued in rebuttal that Kennedy was sodomized because there was feces on Castaneda's penis and he had to wipe it off with one of Kennedy's socks. (11 RT 2808.)

The information alleged the special circumstance of sodomy and attempted sodomy. (1 CT 25.) The court instructed the jury on sodomy by use of force and attempted sodomy by use of force.[37] (See 1 CT 308-309.) The relevant special circumstance verdict form listed both sodomy and attempted sodomy for consideration by the jury. (2 CT 369.)

The standard for substantial evidence was previously discussed in Argument V and is incorporated here by reference. In addition is should be noted here that, although it is the jury's duty to acquit a defendant if it finds the circumstantial evidence susceptible to two reasonable interpretations, one which suggest guilt and the other which suggests innocence, it is the jury, not the appellate court, that must be convinced of the defendant's guilt beyond a

---

36. It should be noted here that the prosecutor argued the evidence did not support the forcible rape charge in count 4 or the lesser included offense of attempted forcible rape. (11 RT 2735-2738.) The jury found Castaneda not guilty of forcible rape and attempted forcible rape. (See 1 CT 252; 2 CT 376-377.)

37. Castaneda was charged in count 5 with sodomy by use of force (Pen. Code, § 286, subd. (c).) (See 1 CT 27.) Understandably, based on the overwhelming evidence that force was used against Kennedy, Castaneda does not dispute that if sodomy occurred, it was by the use of force. (AOB 173-180.) Thus, the issue of force will not be addressed.

reasonable doubt. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053-1054.) It the circumstances reasonably justify the jury's findings, the judgment may not be reversed simply because the circumstances might also reasonably be reconciled with a contrary finding. (*Id.* at p. 1054.)

Sodomy is defined as the "contact between the penis of one person and the anus of another person. Any sexual penetration, however slight, is sufficient to complete the crime of sodomy." (Pen. Code, § 286, subd. (a); *People v. Farnam* (2002) 28 Cal.4th 107, 143.) To constitute sodomy, the victim must be alive at the time of penetration. (*Ibid.*) "Lack of trauma to a victim's rectum does not preclude a finding that the victim was sodomized." (*Id.* at p. 144.) If the prosecution's pathologist cannot determine clinically whether penetration occurred shortly before or after death, in the absence of any evidence suggesting that the victim's assailant intended to have sexual conduct with a corpse, the jury can reasonably infer from the evidence that the assailant engaged in sexual conduct with the victim while she was alive rather than when she was dead. (*People v. Ramirez* (1990) 50 Cal.3d 1158, 1176-1177.)

Sodomy felony murder and the sodomy special circumstance are satisfied by a defendant committing sodomy, or an attempt to commit sodomy. (Pen Code, §§ 189, 190.2, subd. (a)(17)(D); *People v. Coffman, supra,* 34 Cal.4th at pp. 88-89; *People v. Hart* (1999) 20 Cal.4th 546, 611; Cf. *People v. Kelly, supra,* 1 Cal.4th 495, 524 [rape].) A defendant commits attempted sodomy when he, reasonably or mistakenly believing that the victim is still alive, attempts to sodomize a victim. (*People v. Hart, supra,* 20 Cal.4th 546, 611; cf. *People v. Kelly, supra,* 1 Cal.4th at pp. 524-525 [rape].) A defendant also commits attempted sodomy by committing acts that fall short of actual penetration so long as the defendant has done more than mere preparation. (*People v. Coffman, supra,* 34 Cal.4th at p. 89.) An attempt goes beyond preparation where there is an intent to commit the crime and a direct ineffectual

act toward its commission. (*People v. Memro* (1985) 38 Cal.3d 658, 698.) A defendant's intent to commit the crime may be shown by his entire course of conduct during the incident in question, as well as his prior history. (*Id.* at p. 699.)

Here, Castaneda contends that there is insufficient evidence to support the sodomy conviction and the sodomy special circumstance and felony murder findings because there was insufficient evidence that he penetrated Kennedy's anus with his penis and that Kennedy was alive if sodomy occurred. (AOB 173-180.) Castaneda is mistaken. As explained below, there was substantial evidence from which a reasonable jury could find Castaneda guilty of sodomy and find true the sodomy felony murder special circumstance allegation.

Based on the evidence, a reasonable jury could find that because Castaneda positioned Kennedy prone face down over the examination table, gagged her, tied her hands behind her back, and exposed her anus by removed her lower clothing, Castaneda had the intent to sodomize Kennedy. In fact, the intent to sodomize is the only reasonable conclusion. This would become even more apparent to a reasonable jury because 14 of the stab wounds were "prodding" wounds, from which it could be inferred that Castaneda, by inflicting those 14 wounds, followed by the deeper wounds, was attempting to get Kennedy to do what he wanted; to not struggle while he sodomized her. Despite the lack of trauma to Kennedy's anus, which legally in itself does not mean sodomy did not occur, and no semen being found in Kennedy's anus, the inference that Castaneda penetrated Kennedy and completed the act of sodomy could be found in Castaneda's anal sex with Virginia, the dried feces in Kennedy's anus, the feces on the sock, and the fact Castaneda ejaculated. In short, a reasonable conclusion is after penetrating Kennedy's anus with his penis, Castaneda withdrew, ejaculated, somehow cleaned up the semen in an

attempt to avoid leaving evidence, and used the sock to wipe feces off of his penis. In wiping himself, Castaneda left a small amount of semen on the sock.

Moreover, all of the reasonable inferences above bring forth the logical conclusion that Kennedy was alive at the time she was being sodomized. This is particularly true because Kennedy, as noted above, was gagged, tied and prodded with the screwdriver. Indeed, there was no evidence that Castaneda was a necrophiliac who desired sodomy with Kennedy's dead body. The evidence that Castaneda enjoyed sodomy suggests otherwise. Further, a reasonable jury could infer that Castaneda, after prodding Kennedy 14 times and finishing his act of sodomy, stabbed Kennedy with more force 15 times, including the two mortal stab wounds, in order to kill her. Thus, there was substantial evidence from which a reasonable jury could find Castaneda guilty of sodomy and find true the sodomy felony murder special circumstance allegation.

In any event, even if Castaneda failed to penetrate Kennedy's anus, or Kennedy was dead by the time Castaneda sodomized her, Castaneda committed attempted sodomy by force because, based on the evidence discussed in the two preceding paragraphs, and discussions in Arguments II and VIII incorporated here regarding Castaneda's criminal intent when he entered the clinic, there is no doubt Castaneda had the intent to commit sodomy while Kennedy was alive. As noted above, the sodomy murder special circumstance is satisfied by a defendant committing sodomy or an attempt to commit sodomy. Thus, even if Castaneda failed to penetrate Kennedy's anus, or Kennedy was dead by the time Castaneda sodomized her, because the jury could reasonably infer that he had the intent to commit sodomy while Kennedy was alive, the sodomy felony murder special circumstance allegation true finding should be upheld.

X.

SUBSTANTIAL EVIDENCE SUPPORTS CASTANEDA'S ROBBERY CONVICTION AND THE ROBBERY SPECIAL CIRCUMSTANCE TRUE FINDING

Castaneda contends his robbery conviction and robbery special circumstance finding should be reversed because the evidence was insufficient that he took Kennedy's property or insufficient that Kennedy was alive when the property was taken. (AOB 181-190.) Castaneda is wrong. To the contrary, there was substantial evidence by which a reasonable jury could find Castaneda guilty of robbery, and find true the robbery felony murder special circumstance allegation.

Mr. Kennedy, Kennedy's husband, testified that Kennedy would usually wear a watch and one ring to work. The watch was average priced circular lady's watch and had; a dark brown or black band; a stainless steel back; a gold "bezel" in front around the glass; and a second hand used for taking pulses. Kennedy had a collection of rings and did not necessarily wear the same ring every day. (4 RT 863-864, 875-876.) To work Kennedy would also take her brown leather purse containing her makeup, identification, credit cards, money and car keys, and a black nylon satchel, containing work materials such as charts, her lunch and a book. (4 RT 866-868.) Mr. Kennedy did not know how much money Kennedy took to work with her the day of the murder. (4 RT 867.) After Kennedy's murder, Mr. Kennedy inventoried Kennedy's jewelry, and could not find the watch she normally wore to work. Also, a gold ring with a green or red stone was missing. Mr. Kennedy could not tell if the stone was red or green because he is color blind. (4 RT 864-865, 876, 878-879.) Mr. Kennedy also could not find Kennedy's purse, the contents of the purse, including credit cards, or the satchel. (4 RT 868-869.)

Mary Boyle, Kennedy's mother, testified that during the inventory, she noticed that the watch Kennedy normally wore to work, an inexpensive gold

watch with a black band, was missing. Also missing was a ring that was 14 carat gold with a small emerald that was flanked by two smaller diamonds. (8 RT 1895-1898.)

Mrs. Vassantachart, the doctor's wife, testified Kennedy would usually wear one or two rings and a watch. The watch had a simple black leather band, and the surface had a "little gold on the ring." (5 RT 1027.) Kennedy would keep her purse underneath the desk or right by the chair in the front office of the clinic. (5 RT 1029.) Kennedy carried a black "document bag" where she placed all the medical records and "super bills." (5 RT 1028-1029.) Ramos, the medical assistant, also testified Kennedy wore a simple watch and sometimes jewelry to work. (8 RT 1995-1996.)

When Kennedy's body was discovered at the clinic, no watch or ring was found on the body. (5 RT 1284-1285.) Between 11:00 a.m and noon on what may have been the day of the murder, or a day soon thereafter, Castaneda, alone, visited his cousin Gloria Salazar. Castaneda took a girl's watch and ring out of his pocket and said, "this bitch got me mad and I took it," and "I was going to throw it off the freeway." (7 RT 1545-1550, 1559.) The watch had a black band and the ring had a colored stone, which Salazar subsequently told Detective Price was a green stone. (7 RT 1555, 1566, 1686-1687.) Salazar asked for the watch and ring, and Castaneda gave them to her. (7 RT 1500-1551.) Salazar gave the watch to a man she considered her grandfather. (7 RT 1552, 1565.) Salazar took the ring to a pawn shop in El Monte and received $5 to $10 for the ring. (7 RT 1552-1553.)

Once Detective Price was told about the watch and ring by Salazar, he went to the pawn shop in an attempt to recover the ring. The pawnshop records described the ring as having a green stone, but the ring was gone. (7 RT 1554, 1687.) Detective Price retrieved the watch from Salazar's grandfather. (7 RT 1687-1689.) When he retrieved it, Salazar said it was the same watch she had

given to her grandfather and her grandfather said it was the watch Salazar had given to him. (7 RT 1688.) Detective Price identified Exhibit 19 at trial as the watch he had retrieved from the grandfather minus the wristband. (7 RT 1689.) The black wrist band was missing because it had been sent out to the sheriff's crime lab for DNA processing. (7 RT 1690.)

Regarding further identification of Exhibit 19, Salazar testified it looked like the watch she had received from Castaneda and given to her grandfather, minus the black wrist band. It also looked like that watch because the watch had a light on it too but then it stopped working. (7 RT 1555-1556.) Mr. Kennedy was uncertain if Exhibit 19 was Kennedy's watch. (4 RT 877, 889-891.) The watch looked like her watch but it was worn and "kind of beat up." (4 RT 864, 889-890.) The very bottom half of the bezel was gold similar to Kennedy's watch but the rest of the bezel was now worn and was silver. (4 RT 876, 889.) Mrs. Vassantachart testified that Exhibit 19 may be Kennedy's watch, but she was uncertain because there was no leather band and gold on the "bezel" or "ring" was worn at the bottom of the watch. (5 RT 1030-1033.) Boyle testified Exhibit 19 was "similar" to the watch Kennedy wore but she could not definitely identify Exhibit 19 as the watch she wore because that watch was brighter gold. (8 RT 1897-1899.)

The prosecutor subsequently argued that the evidence strongly indicated beyond a reasonable doubt that Castaneda robbed Kennedy of her watch, at least one ring, a purse and a satchel. (11 RT 2741-2742.) Defense counsel argued there was insufficient evidence of robbery because the watch and ring were not clearly identified, the credit cards had not been used, and Kennedy was probably dead when the items were taken. (11 RT 2771-2773.) The prosecutor argued in rebuttal that it was clear that Castaneda took Kennedy's watch and ring before she was bound based on her fingers and wrists being

swollen from being bound. The prosecutor argued the evidence showed that Kennedy was alive while being bound. (11 RT 2807.)

The standard for substantial evidence was previously discussed in Argument V and is incorporated here by reference. "'Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear.'" (Pen. Code, § 211; *People v. Huggins, supra,* 38 Cal.4th at p. 214.) A defendant is properly convicted of robbery so long as the defendant formed the intent to commit the robbery before killing the victim. (*People v. Frye, supra,* 18 Cal.4th at p. 956.) Likewise, the only intent required for the robbery murder special circumstance is the intent to commit the robbery before or during the killing. (See Pen. Code, § 190.2, subd. (a)(17)(A); *People v. Huggins* at p. 215.) When there is evidence that a defendant killed another person and at the time of the killing took substantial property from that person, the jury ordinarily may reasonably infer that the defendant killed the victim to accomplish the taking and thus committed the offense or robbery. (*People v. Bolden* (2002) 29 Cal.4th 515, 553.) Robbery is committed when a defendant, with intent to take the victim's property, renders the victim unconscious in order to take the property. (*People v. Jackson* (2005) 128 Cal.App.4th 1326, 1330; *People v. Dreas* (1984) 153 Cal.App.3d 623, 628.)

Here, Castaneda first contends there was insufficient evidence he took Kennedy's property, particularly her watch and ring. (AOB 182-186.) Castaneda is wrong. Despite the witnesses' inability to unequivocally identify Exhibit 19 as Kennedy's watch, it was logical for a reasonable jury to conclude that Exhibit 19 was in fact Kennedy's watch because: (1) Kennedy habitually wore a circular watch with a black band, gold bezel and second hand to work; (2) Castaneda, almost certainly referring to Kennedy since there is no doubt he killed her, said he took the watch from a "bitch" who "made him mad;" (3) the

watch Castaneda gave to Salazar was the same watch she gave to her grandfather and the same watch Detective Price retrieved from her grandfather and had tested by the sheriff's crime lab; (4) the watch's black band was removed when it was tested by the sheriff's crime lab thus explaining why the band was missing and the witnesses had trouble identifying it; (5) the wear on the gold bezel of the watch could be explained by the grandfather having possession of it; and (6) the watch looked similar to the one worn by Kennedy.

Likewise, a rational jury could reasonably infer that Castaneda took Kennedy's gold ring with the green stone that was missing because: (1) Kennedy wore it and/or another ring to work regularly; (2) Castaneda said he took the ring he removed from his pocket while almost certainly referring to Kennedy; (3) the ring Castaneda gave to Salazar had a green stone; and (4) pawn shop records showed that Salazar pawned a ring with a green stone.

Moreover, although the witnesses had trouble being certain Exhibit 19 was Kennedy's watch, and the ring with a green stone was never recovered, the only logical conclusion a rationale jury could draw, because Kennedy's purse and satchel also came up missing right after the murder, is that Castaneda took Kennedy's watch and ring. In other words, Kennedy's watch, ring, purse and satchel all came up missing after Castaneda murdered her. A reasonable jury could logically infer that when four of Kennedy's possessions came up missing at the time of the murder, Castaneda must have taken them from Kennedy. The only other conclusion is that not one, not two, not three, but four of her possessions went missing right after she was murdered by sheer coincidence. Obviously, that conclusion would be unreasonable and illogical.

Castaneda next contends that assuming he took Kennedy's property, there is insufficient evidence to prove that he formed the intent to take her property prior to her being unconscious or dead. (AOB 186-190.) Castaneda is mistaken. Because Castaneda killed Kennedy and took substantial property

from her at the time of the killing, namely, a watch, ring, purse and satchel, a jury could reasonably infer that Castaneda killed Kennedy to accomplish the taking and thus committed the offense of robbery. (*People v. Bolden, supra,* 29 Cal.4th at p. 553.) Also, the failure of the evidence to conclusively rule out various scenarios under which Castaneda might not be guilty of robbery does not render the evidence insufficient to support the robbery verdict (or special circumstance). (*Ibid.*)

As argued by the prosecutor, a jury could reasonably conclude that Castaneda took Kennedy's watch and ring while she was alive because Castaneda tied her hands behind her back and caused swelling in Kennedy's hands and wrists. This would lead to the reasonable conclusion that Castaneda took the ring and watch before tying Kennedy's hands and Kennedy was certainly alive at that time or there would have been no reason to tie her hands. This in turn would support the reasonable conclusion that Castaneda had the intent to rob Kennedy while she was alive and conscious and thus committed robbery even if, for example, he took Kennedy's purse and satchel or any other of her property after she was unconscious or dead.

Finally, as previous argued in Arguments II and VIII and incorporated here, the circumstantial evidence was overwhelming that Castaneda drove to and entered the clinic with the intent to attack, rob, sodomize and kill Kennedy in one continuous transaction. There was substantial evidence by which a reasonable jury could find Castaneda guilty of robbery, and find true the robbery special circumstance allegation.

XI.

THE EVIDENCE DID NOT SUPPORT INSTRUCTION OF THE JURY ON GRAND THEFT AS A LESSER INCLUDED OFFENSE OF ROBBERY

Castaneda asserts his federal and state rights to due process and to be free from cruel and punishment were violated when the court failed to instruct the jury on grand theft as a lesser included offense to robbery charged in count 6. (AOB 191-199.) The trial court did not err because there was insubstantial evidence or grand theft, as opposed to robbery.

As previously noted, the parties discussed jury instructions outside the presence of the jury on October 26, 1999. During that time, the parties discussed and agreed on the necessary robbery instructions. (10 RT 2484.) The trial court then mentioned that it had CALJIC No. 17.10 [Conviction of Lesser Included Or Lesser Related Offenses–Implied Acquittal–First] for lesser included offenses in the packet of proposed jury instructions. The trial court noted to defense counsel that defense counsel had included attempted rape and attempted sodomy by force as lesser included crimes to rape and sodomy charged in counts 4 and 5. The court asked defense counsel if there were any other lesser included offenses. Defense counsel said, "No, I don't believe so, your Honor." (10 RT 2484.) The prosecutor said:

> And just for the record, on that particular point of the lesser includes, Mr. Hardy [defense counsel] and I have had discussions concerning this particular point in the case on several occasions. And Mr. Hardy has indicated that this is a tactical thing on his part, and I will speculate as to what it is and I can understand what it may or may not be. But not to go into anything else, we have had discussions on this.

(10 RT 2484-2485.)

Defense counsel said nothing in response to what the prosecutor said and the court continued with other proposed jury instructions. (10 RT 2485.) The trial court later instructed the jury with CALJIC Nos. 9.40 [Robbery], 9.40.2

[Robbery–After Acquired Intent], 9.41 [Robbery-Fear] and 9.43 [Second Degree Robbery as a Matter of Law] and 8.21.1 [Robbery–When Still In Progress/Felony-Murder]. (See 1 CT 310-314.)

Depending on the facts, grand theft under Penal Code section 487 is a lesser included offense of robbery. (*People v. Valdez, supra,* 32 Cal.4th at p. 110; *People v. Cooksey* (2002) 95 Cal.App.4th 1407, 1411.) Even if a trial court had a sua sponte duty to instruct on a lesser included offense, that argument is barred on appeal if the defense attorney made a conscious, deliberate tactical choice to forego the instruction at trial. (*People v. Barton, supra,* 12 Cal.4th 186, 195, 198; *People v. Hardy, supra,* 2 Cal.4th at p. 185; *People v. Duncan, supra,* 53 Cal.3d at p. 969.)

Here, as noted above, defense counsel tactically chose not to request any lesser included offenses except for on counts 4 and 5 and second degree murder. Defense counsel did not dispute the prosecutor's statement that defense counsel was tactically choosing that course. Thus, if the trial court had a sua sponte duty to instruct the jury on grand theft as a lesser included offense and therefore erred when it did not do so, the issue is barred on appeal because defense counsel invited the error. In any event, as discussed below, the trial court did not have a sua sponte duty to give a grand theft instruction as a lesser included offense because there was insubstantial evidence that Castaneda committed grand theft, as opposed to robbery.

A trial court has a sua sponte duty to instruct on a lesser included offense whenever the record contains substantial evidence from which a jury reasonably could conclude that the defendant was not guilty of the charged crime, but guilty of the lesser included offense. (*People v. Huggins, surpra,* 38 Cal.4th at p. 215; *People v. Bradford, supra,* 15 Cal.4th at p. 1345.) On appeal, this Court reviews independently the question whether a trial court failed to instruct on a lesser included offense. (*People v. Waidla, supra,* 22 Cal.4th at p. 739.) If a

defendant uses force to render the victim unconscious or dead, and then forms the intent to take the victim's property and takes the property in one continuous transaction, the defendant has not committed robbery, but a crime of theft. (See *People v. Huggins, supra,* 38 Cal.4th at p. 215; *People v. Kelly, supra,* 220 Cal.3d at p. 1369; *People v. Green, supra,* 27 Cal.3d at p. 53, fn. 42; *People v. Jackson, supra* 128 Cal.App.4th at p. 1330; *People v. Dreas, supra,* 153 Cal.App.3d at p. 628; *People v. Jentry* (1977) 69 Cal.App.3d 615, 628-629; *People v. McGrath* (1976) 62 Cal.App.3d 82, 87-88.)

It is unclear when a defendant kills the victim and then forms the intent to take the property and takes the property from the person in a continuous transaction if the crime is grand theft person (Pen. Code, § 487, subd. (c)) or grand or petty theft from a dead body (Pen. Code, § 642). (See *People v. Green, supra,* 27 Cal.3d at p. 53, fn. 42; but see *People v. McGrath, supra,* 62 Cal.App.3d at pp. 87-88.) If the crime under the scenario above is grand or petty theft from a dead body, the discussion ends here because Castaneda was not entitled to that instruction being given sua sponte because it is not a lesser included offense of robbery. (*People v. Yeoman* (2003) 31 Cal.4th 93, 129.) If the crime, however, is grand theft person, then, as explained below, the trial court did not err by not giving that instruction to the jury.

In an argument related to Argument X, Castaneda contends the trial court should have instructed on grand theft as a lesser included offense of robbery because there was evidence that Kennedy was unconscious or dead before he formed the intent to steal her property. (AOB 192-195.) Castaneda is mistaken. Circumstantial evidence provides substantial evidence that Castaneda formed his intent to take Kennedy's property before her death and thus committed robbery, and there is insubstantial evidence that he formed such intent after Kennedy's death and thus committed grand theft.

Again, as stated in Arguments II and VIII, the circumstantial evidence points to the reasonable conclusion that Castaneda drove to and entered the clinic with the intent to attack, rob, sexually assault and kill Kennedy. When Castaneda left Toyo Tires on Monday, March 30, 1998, he already knew, from a previous appointment, that Kennedy was alone on Mondays in the clinic and that was probably also aware she had a habit of letting patients in early. Castaneda did not park in the clinic's parking lot but instead parked the Nissan Sentra in the nearby Long John Silver restaurant, which the jury could infer was to avoid detection. Castaneda had no reason to come to the clinic because he was not injured, did not have an appointment, and had to know the clinic was not open at 9:30 a.m. on Mondays, about the time he parked in the Long John Silver parking lot. After somehow gaining entry into the clinic, perhaps by Kennedy letting him in, the evidence supports the inference that Castaneda immediately attacked her. That conclusion is almost certain because Castaneda tied her hands, gagged her, sexually assaulted her, killed her and took her property during a time frame of less than one hour, i.e. 9:30 a.m. to just before 10:30 a.m. Castaneda departed before 10:30 a.m. to avoid detection. All of this evidence points to the reasonable conclusion that Castaneda drove to the clinic with the intent to attack, rob, sexually assault and kill Kennedy.

Further, as stated in Argument X, the evidence that Castaneda tightly tied Kennedy's hands behind her back provides strong circumstantial evidence that Castaneda removed Kennedy's ring and watch before tying her hands. This would mean Castaneda had formed the intent to take Kennedy's valuables prior to her becoming unconscious or dying. As explained in Argument X, for purposes of being guilty of robbery, it is immaterial if Castaneda took some or all of Kennedy's valuables after she was unconscious or dead so long as Castaneda formed the intent to take the valuables before she was unconscious or dead.

Moreover, as stated in Argument X, because Castaneda killed Kennedy and at the time of the killing took substantial property from her, namely, a watch, ring, purse and satchel, a jury could reasonably infer that Castaneda killed Kennedy to accomplish the taking and thus committed the offense of robbery. (*People v. Bolden, supra,* 29 Cal.4th at p. 553.) Also, the failure of the evidence to conclusively rule out various scenarios under which Castaneda might not be guilty of robbery does not render the evidence insufficient to support the robbery verdict (or special circumstance). (*Ibid.*)

Also, Castaneda is wrong that because Kennedy went unconscious five minutes after the stab wounds that severed her carotid artery and jugular vein, and died with 10 to 15 minutes of those wounds, that provides evidence that "suggested [the] robbery was an afterthought to the incident and not the reason for the murder." (AOB 195.) This claim makes no sense. How quickly Kennedy died from her mortal wounds has absolutely nothing to do with when Castaneda formed his intent to take Kennedy's valuables when, in fact, Castaneda was in the clinic for approximately one hour. As the discussion regarding sodomy in Argument IX shows, the circumstantial evidence strongly points to the fact that Castaneda prodded Kennedy with a screwdriver in an attempt to get her to comply with his act of sodomy (or attempted sodomy) and did not inflict the fatal stab wounds until after inflicting the prodding stab wounds. But this provides no answer as to when Castaneda formed his intent to take Kennedy's valuables. Thus, Castaneda is doing nothing more than speculating when he states the evidence suggest(s) [the] robbery was an afterthought to the incident and not the reason for the murder. Speculation is not a basis for a lesser included offense instruction. (*People v. Mendoza* (2000) 24 Cal.4th 130, 174.) Likewise, Castaneda's claim that his statement to Salazar after the murder that he was going to throw the watch and ring away means the "robbery was an afterthought of the murder" (AOB 195), is unavailable. Even

assuming Castaneda's statement to Salazar was true, it could be reasonably inferred that he decided to get rid of the watch and ring because possessing those items would implicate Castaneda in the murder and the other charged crimes.

In any case, if the trial court erred by not instructing the jury on grand theft as a lesser included offense of robbery, the error was harmless under the *Watson* standard if state error and under the *Chapman* beyond a reasonable doubt standard if federal error. (*People v. Sakarias* (2000) 22 Cal.4th 596, 621.) The error was harmless because the jury necessarily decided that Castaneda committed robbery, and not grand theft, by finding the robbery special circumstance to be true. The robbery special circumstance finding shows the conviction of robbery was not the result of giving the jury an "all or nothing" choice between robbery and acquittal. Even if it is assumed the jury might have convicted Castaneda of robbery despite believing Castaneda formed the intent to steal after Kennedy was dead, it cannot be assumed the jury, unconvinced a robbery had occurred, would have gone on to find true the robbery capital murder allegation (or felony murder based on robbery) simply because it was not given the option of convicting Castaneda of theft. (See *Ibid.*)

Also, any error in failing to instruct on grand theft was harmless because the court instructed the jury with the standard robbery instruction, CALJIC No. 9.40 (see 1 CT 310), and the felony-murder instruction, CALJIC No. 8.21 (see 1 CT 295), which instructed the jury that a killing which occurs during the commission or attempted commission of robbery (among other crimes), is murder of the first degree when the perpetrator had the specific intent to commit that crime. CALJIC Nos. 9.40 and 8.21 together adequately cover the issue of the time of the formation of the intent to steal. (*People v. Valdez, supra,* 32 Cal.4th at p. 112.)

Finally, Castaneda's citation of *Beck v. Alabama* (1980) 447 U.S. 625 [100 S.Ct. 2382, 65 L.Ed.2d 392] to claim a violation of his federal constitutional rights lacks merit. *Beck* has nothing to do with this case because California law regarding lesser included offenses in capital cases is not the same as the Alabama law barring lesser included offenses cited in *Beck*. (*People v. Mendoza, supra,* 31 Cal.4th at p. 130.)

XII.

SUBSTANTIAL EVIDENCE SUPPORTS THE TRUE FINDINGS TO THE SPECIAL CIRCUMSTANCE ALLEGATIONS BECAUSE CASTANEDA'S COMMISSION OF THE FELONIES WAS NOT MERELY INCIDENTAL TO THE MURDER

Castaneda asserts his state and federal right to due process was violated, and the true findings to the special circumstances should be reversed, because the evidence was insufficient to prove that he had an independent felonious purpose for committing the felonies found true as special circumstances. (AOB 200-215.) Castaneda is wrong. There was substantial evidence to support the burglary, kidnapping, sodomy and robbery special circumstance true findings because the jury could reasonably conclude that Castaneda, before entering the clinic, had a concurrent intent to attack, sodomize, rob and kill Kennedy. Therefore, Castaneda's state and federal right to due process was not violated.

A defendant convicted of first degree murder is eligible for the death penalty if the jury finds true one or more special circumstance allegations that the murder was committed while the defendant was engaged in the commission of, or the attempted commission of, among other crimes, robbery, kidnapping, sodomy or burglary. (Pen. Code, § 190.2, subds. (a)(17)(A), (B), (D) & (G).) To prove a felony murder special circumstance allegation, the prosecution must show that the defendant had an independent purpose for the commission of the

felony, meaning that the commission of the felony was not merely incidental to the murder. (*People v. Horning, supra,* 34 Cal.4th at p. 907; *People v. Green, supra,* 27 Cal.3d at pp. 61-62.) In other words, a special circumstance true finding cannot be sustained where the defendant's goal was to kill, and where the felony was committed only incidentally to the killing. (*People v. Riel* (2000) 22 Cal.4th 1153, 1201; *People v. Morris* (1988) 46 Cal.3d 1, 21.) However, concurrent intent to kill and to commit an independent felony will support a special circumstance true finding. (*People v. Bolden, supra,* 29 Cal.4th at p. 554.) Its only when the underlying felony is merely incidental to the murder that the special circumstance does not apply. (*Ibid.*)[38]

Here, as explained in previous arguments, a reasonable jury could infer from the circumstances that Castaneda entered the clinic on March 30, 1998, with the concurrent intent to commit robbery, kidnapping, sodomy and murder. This is what the prosecutor argued. (11 RT 2732.) When Castaneda left Toyo Tires on Monday, March 30, 1998, he already knew, from a previous appointment, that Kennedy was alone on Mondays in the clinic and likely knew that she had a habit of letting patients in early. Castaneda did not park in the clinic's parking lot but instead parked the Nissan Sentra in the nearby Long John Silver restaurant, which the jury could infer was to avoid detection. Castaneda had no reason to come to the clinic because he was not injured, did not have an appointment, and had to know the clinic was not open at 9:30 a.m. on Mondays, about the time he parked in the Long John Silver parking lot. After somehow gaining entry into the clinic, perhaps by Kennedy letting him in, and thereby committing the burglary special circumstance because he had a felonious intent, the evidence supports a reasonable inference that Castaneda

---

38. The independent purpose requirement distinguishes a special circumstance from a simple felony murder, which only requires a showing that the defendant killed the victim during the course of the underlying felony. (*People v. Bonin* (1989) 47 Cal.3d 808, 850.)

attacked Kennedy immediately. That conclusion is almost certain because Castaneda tied her hands, gagged her, sexually assaulted her, killed her and took her property over only about one hour, 9:30 a.m. to just before 10:30 a.m. Then Castaneda departed before 10:30 a.m. to avoid detection. All of this evidence points to the reasonable conclusion that Castaneda drove to the clinic with the intent to attack, rob and sodomize Kennedy, and did so in one continuous transaction. Indeed, it is a reasonable conclusion that Castaneda killed Kennedy to facilitate his other felonious acts, because Castaneda, as a patient of the clinic, could not afford to let Kennedy live to easily identify him as the perpetrator.

The bottom line is that on the evidence above, there is no way for a jury to reasonably conclude that Castaneda had an intent only to kill Kennedy. If that was Castaneda's sole intent, it is reasonable for a jury to conclude that Castaneda would have immediately killed Kennedy and then departed the clinic. The reasonable conclusion is that Castaneda would not have forced Kennedy into the procedure room, tied her up, gagged her, put her over the examining table, disrobed her, sexually assaulted her and taken her valuables only incidentally to his plan to kill her.

Further, Castaneda's specific claims as to the burglary, sodomy and robbery special circumstance true findings (AOB 206-213) have been raised before and have already been refuted based on the previous discussions about the evidence supporting those special circumstances, respectively, in Arguments VIII (burglary), IX (sodomy) and X (robbery), which are incorporated here by reference. However, it should be noted that Castaneda's reliance on *People v. Thompson* (1980) 27 Cal.3d 303 to claim that the robbery was incidental to the murder, is misplaced. (AOB 204, 209-210.) In *Thompson*, the defendant entered the residence of a woman and her boyfriend and told them he wanted their money. However, the defendant refused their money and the woman's

jewelry when offered. The defendant forced them to sit together on a loveseat in another room. The defendant said, "you know why I'm here and you know who sent me." The defendant then shot and killed the boyfriend, and wounded the woman. (*People v. Thompson, supra,* 27 Cal.3d at pp. 310-311.) Among other things, the defendant was found guilty of first degree murder, attempted first degree murder and burglary, and robbery and burglary special circumstances were found to be true. (*Id.* at p. 310.) This court found that based, among other things, on the defendant's statement to the victims, and his refusal of money and jewelry, the robbery special circumstance had to be reversed because the evidence did not establish an intent to commit robbery independent of an intent to kill. (*Id.* at pp. 323-325.)

Thompson is inapposite to this case. Contrary to Castaneda's claim (AOB 210-211), his statement about Kennedy's watch and ring that, "this bitch got me mad and I took it" (7 RT 1550-1551), does not in any way establish that his taking of the watch and ring was incidental to the murder. Even if a jury believed that Castaneda got angry at Kennedy while inside the clinic and then decided to take her valuables, then the jury could still reasonably conclude that Castaneda, as a patient known to Kennedy, facilitated the taking by killing Kennedy so she could not identify him.[39] So, unlike in *Thompson*, where there was evidence that clearly established that the defendant's intent was to kill the victims and any intent to rob was non-existent or at best incidental to the murder, there was no evidence in the present case that Castaneda's sole intent was to kill Kennedy and the robbery was merely incidental to the killing. Moreover, again, because Castaneda killed Kennedy and at the time of the killing took substantial property from her, namely, a watch, ring, purse and

---

39. And even if the jury believed this, the burglary count and burglary special circumstance would still be valid because based on Castaneda's intent before entering the clinic to sodomize Kennedy.

satchel, a jury could reasonably infer that Castaneda killed Kennedy to accomplish the taking and thus committed the offense of robbery (and the robbery special circumstance). (*People v. Bolden, supra,* 29 Cal.4th at p. 553.)

Hence, there was substantial evidence to support the burglary, kidnapping, sodomy and robbery special circumstance true findings because the jury could reasonably conclude that Castaneda, before entering the clinic, had a concurrent intent to kidnap, sodomize, rob and kill Kennedy.

Finally, Castaneda's claim that his state and federal due process rights were violated because an independent felonious purpose is a required element of a special circumstance finding (see AOB 213-215), should be rejected based on there being substantial evidence of an independent purpose of all the special circumstances, and based on the fact that independent felonious purpose is not an element of a special circumstance finding, but the clarification of the scope of an element. (*People v. Monterroso* (2004) 34 Cal.4th 743, 767; *People v. Cavitt* (2004) 33 Cal.4th 187, 203-204.)

XIII.

THE PROSECUTOR DID NOT COMMIT *GRIFFIN* ERROR IN ARGUMENT DURING THE GUILT AND PENALTY PHASES OF TRIAL, AND DEFENSE COUNSEL DID NOT PROVIDE INEFFECTIVE ASSISTANCE BY NOT OBJECTING ON THAT BASIS DURING THOSE ARGUMENTS

Castaneda contends the prosecutor, in argument during the guilt and penalty phases of trial, commented on his failure to testify in violation of *Griffin v. California* (1965) 380 U.S. 609, 613-615 [85 S.Ct. 1229, 14 L.Ed.2d 106], or, alternatively, defense counsel provided ineffective assistance of counsel by failing to object to those comments during those arguments. (AOB 216-227.) Respondent disagrees. The prosecutor did not commit *Griffin* error in argument during the guilt and penalty phases of trial, and defense counsel, because there

was no *Griffin* error, did not provide ineffective assistance by not objecting on that basis during those arguments.

A claim of prosecutorial misconduct, including claimed *Griffin* error, is forfeited on appeal if there was no objection and request for admonishment on that ground at trial. (*People v. Brown* (2003) 31 Cal.4th 518, 553.) Here, defense counsel did not object on the ground of *Griffin* error during either the guilt or penalty phase arguments by the prosecutor. Thus, Castaneda has forfeited his claim of *Griffin* error on appeal.

However, in an attempt to overcome that forfeiture and allow a discussion of the merits of the claimed *Griffin* error, Castaneda claims that defense counsel's failure to object to the alleged *Griffin* error constituted ineffective assistance of counsel. (AOB 221-224.) To establish a claim of ineffective assistance of counsel, a defendant must first show that counsel's representation was deficient, meaning the representation failed to meet an objective standard of professional reasonableness. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688 [104 S.Ct. 2052, 80 L.Ed.2d 674]; *People v. Frye, supra*, 18 Cal.4th at p. 979.) Additionally, a defendant must show that he was prejudiced by counsel's deficient representation, i.e., the defendant must show that absent the deficiency, there is a reasonable probability the result would have been more favorable to the defendant. (*Strickland v. Washington* at pp. 687-88; *People v. Frye* at p. 979.) If a defendant fails to establish either of the two prongs, the conviction must be upheld. (*Id.* at p. 687.) There is a strong presumption of effective assistance of counsel and a reviewing court must be highly deferential the judgment below. (*Id.* at p. 689.) Court's should avoid second-guessing counsel's decisions. (*Ibid.*)

During the prosecutor's guilt phase closing argument, he argued:

> And the victims out of desire and understandable desire -- and the witnesses out of a desire, understandable desire, to help their relative and friend, their uncle, their brother, their boyfriend, ex-boyfriend, to help him out in this situation, tried to remember things that simply were not true but that was based upon a factual incident.
>
> That is the evidence in this case. The evidence in this case is **not contradicted by any other evidence in this case**. It is very clear. It is proof beyond a reasonable doubt that the defendant committed those crime that he is charged with.

(11 RT 2759-2760, emphasis added.)

During the prosecutor's penalty phase closing argument, he argued:

> He showed not sympathy, no empathy for her whatsoever. We can only imagine what she was doing during this attack, and in spite of that input that she was giving, the cries, the sounds, he continued his attack upon her.
>
> It was unprovoked. There was nothing she could have done to have prevented this crime happening to her. There are murder situations in which the victim does things, goes into areas, antagonizes a dangerous person, and as a result, things happen to that person. That didn't happen here. That didn't happen here. She was a completely innocent person in this particular case.
>
> And finally, this particular crime, so casual, in that the defendant, it appears, simply went to that place on a fantasy that he had, a thought that he had, knocked on the door, went in, did this all in a short period of time and then casually leaves the scene. Casually leaves the scene. That's one of the horrors in this case. The two people, three people inside that restaurant where he parked the car didn't hear any squealing of tires as he left. He casually left the scene here.
>
> **We didn't hear any evidence of, you know, being struck by the horror of the crime that he had committed here, as so often you do see in other types of murder cases. In fact, this is a rather unique case in that the defendant, the crime in this particular case, has no remorse attached to it whatsoever**. Whatsoever.

(16 RT 3803-3804, emphasis added.)

Castaneda claims that the bolded comments above by the prosecutor constituted *Griffin* error. (AOB 219-221.) Here, to determine whether defense counsel's performance was deficient by failing to object, the merits of Castaneda's claimed two instances of *Griffin* error must be analyzed. Pursuant to a defendant's right to silence under the Fifth Amendment to the United States Constitution as interpreted in *Griffin v. California, supra,* 380 U.S. at p. 609, a prosecutor commits misconduct when he or she directly or indirectly comments during guilt phase closing argument upon the failure of the defendant to take the witness stand. (*People v. Carter, supra,* 36 Cal.4th at p. 1266; *People v. Boyette* (2003) 29 Cal.4th 381, 453; *People v. Hughes* (2002) 27 Cal.4th 287, 371; *People v. Lewis, supra,* 25 Cal.4th at p. 670; *People v. Frye, supra,* 18 Cal.4th at p. 255.) For example, a prosecutor commits *Griffin* error if he or she argues that certain evidence is uncontradicted or unrefuted when that evidence could not be contradicted or refuted by anyone other than the defendant testifying on his or her own behalf. (*People v. Carter* at p. 1266; *People v. Hughes* at p. 371.) However, a prosecutor does not commit *Griffin* error if he or she merely comments on the state of the evidence or on the failure of the defense to introduce material evidence or to call logical witnesses. (*People v. Carter* at p. 1266; *People v. Hughes* at p. 371.)

Similarly, under *Griffin*, a prosecutor cannot comment during penalty phase closing argument about a defendant's failure to testify. (*People v. Boyette, supra,* 29 Cal.4th at pp. 453-454.) However, so long as the prosecutor does not refer to the defendant's failure to testify during the penalty phase, the prosecutor is entitled to argue the defendant's lack of evidence of remorse. (*Id.* at p. 454; *People v. Frye, supra,* 18 Cal.4th at p. 1019.)

Here, as to the disputed portion of the prosecutor's guilt phase closing argument, it is abundantly clear that the prosecutor, when using the phrase, "not contradicted by any other evidence in this case," was not commenting directly

or indirectly on Castaneda not testifying. The prosecutor was merely commenting on the state of the evidence, meaning that there was no viable evidence that Castaneda did not commit the charged and alleged criminal acts. The fact that the prosecutor was referring to all of the evidence, and not to Castaneda not testifying, is found in the fact that the prosecutor, just before the comment, was referring to the lack of credibility of the testimony of Castaneda's relatives.

As to the disputed portion of the prosecutor's penalty phase closing argument, it is equally clear that the prosecutor again did not refer directly or indirectly to Castaneda not testifying. The prosecutor was again merely commenting on the state of the evidence by properly pointing out that there had been no evidence presented that Castaneda was remorseful about committing the murder and other criminal acts. Certainly, Castaneda was not the only person who could testify to any possible remorse he might feel about committing his criminal acts. For example, if Castaneda had told someone, such as one or more of his relatives, about the murder and other criminal acts and expressed remorse, that person could have testified to Castaneda's remorse. Since there was no *Griffin* error by the prosecutor, any such objection by defense counsel would have lacked merit. Also, such an objection would have drawn attention to the fact that Castaneda did not testify during both phases of trial. (*People v. Padilla* (1995) 12 Cal.4th 891, 948.) Therefore, defense counsel's performance was not deficient when he did not object to the two disputed comments by the prosecutor.

Further, even if a *Griffin* error objection would have been meritorious, and trial counsel's performance was deficient, defense counsel still did not provide ineffective assistance under *Strickland* because absent the deficiency, there is no reasonable probability the result would have been more favorable to the defendant during the guilt and penalty phase. As noted in Argument I, the

evidence that Castaneda committed the murder and other charged criminal acts was truly overwhelming. Also, as noted in Argument XV post, the aggravating evidence greatly outweighed the mitigating evidence during the penalty phase.[40/]

---

40. Because Castaneda forfeited his *Griffin* error claim, and the merits of that claim can only be discussed within a *Strickland* ineffective assistance of counsel context, the *Strickland* prejudice standard applies. (*People v. Mesa* (2006) 144 Cal.App.4th 1000, 1008-1009.) Had Castaneda not forfeited his *Griffin* error claim, this Court has concluded that to assess prejudice, the question would be whether it was reasonably likely that jury understood or applied the disputed comments in an improper or erroneous manner. (*People v. Brown, supra,* 31 Cal.4th at p. 553; *People v. Clair* (1992) 2 Cal.4th 629, 662-663; but see *People v. Hill* (1998) 17 Cal.4th 800, 844; *People v. Mesa, supra,* 144 Cal.App.4th at pp. 1008-1009 [*Chapman* error analysis for federal constitutional error for prosecutorial misconduct].) Brief and mild references to a defendant's failure to testify without any suggestion that an inference of guilt can be drawn therefrom, are universally found to be harmless error. (*People v. Turner* (2004) 34 Cal.4th 406, 419-420.) Thus, any error that is non-prejudicial under *Strickland* should also be harmless when the merits of the claim are considered outside of the ineffective assistance of counsel context.

PENALTY PHASE ARGUMENTS

XIV.

THE JURY PROPERLY DETERMINED CASTANEDA SHOULD RECEIVE THE DEATH PENALTY BASED ON THE EVIDENCE UNDERLYING ALL OF THE ALLEGED SPECIAL CIRCUMSTANCES, BECAUSE THAT EVIDENCE CONSTITUTED THE CIRCUMSTANCES OF THE CRIME

Castaneda claims the due process clause of the federal and state constitutions, and the federal and state prohibition against imposition of cruel and unusual punishment, requires this Court reverse one or more of the special circumstance findings. (AOB 228-240.) Respondent disagrees. Assuming at least one special circumstance was valid, the jury properly determined Castaneda should received the death penalty based on the evidence underlying all of the alleged special circumstances, because the evidence constituted the circumstances of the crime.

Again, as to count 1, first degree murder, the jury found the burglary, kidnapping, sodomy and attempted sodomy, robbery and attempted robbery special circumstances to be true, and found not to be true the rape and attempted rape special circumstance. (1 CT 251-252; 2 CT 366-370.) Pursuant to CALJIC No. 8.85 [Penalty Trial–Factors for Consideration], the trial court instructed the jury during the penalty phase that in determining which penalty to impose upon Castaneda, it may consider, among other things, the circumstances of the crime of which Castaneda was convicted in the present proceeding and the existence of any special circumstances found to be true. (12 RT 2934; see 3 CT 807.)

A single valid special circumstance finding is sufficient to determine that the defendant is eligible for the death penalty. (Pen. Code, § 190.2, subd. (a); *People v. Bittaker* (1989) 48 Cal.3d 1046, 1101.) In determining which penalty

to impose upon Castaneda, the jury may consider, among other things, the circumstances of the crime of which Castaneda was convicted in the present proceeding and the existence of any special circumstances found to be true. (Pen. Code, § 190.3, subd. (a).) The invalidation of one aggravating circumstance does not automatically require reversal of the death penalty where there are other valid aggravating factors. (*Zant v. Stephens* (1983) 462 U.S. 862, 890-891 [103 S.Ct. 2733, 77 L.Ed.2d 235].)

In *Brown v. Sanders* (2006) 546 U.S. 212 [126 S.Ct. 884, 163 L.Ed.2d 723], the Supreme Court of the United States held that an invalidated sentencing factor (whether an eligibility factor or not) will render the sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the weighing process unless one of the other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances. (*Id.* at pp. 887, 892.) Under that rule, the High Court found that the jury's consideration of invalidated burglary (Pen. Code, § 190.2, subd. (a)(17)(G)) and "heinous, atrocious and cruel" (Pen. Code, § 190.2, subd. (a)(14)) special circumstances in aggravation did not produce constitutional error because: (1) the jury properly considered valid robbery (Pen. Code, § 190.2, subd. (a)(17)(A)) and witness-killing (Pen. Code, § 190.2, subd. (a)(10)) special circumstances in aggravation, and (2) all the facts and circumstances admissible to establish the "heinous, atrocious, or cruel," and burglary-murder eligibility factors were also properly adduced as aggravating facts bearing upon the "circumstances of the crime" sentencing factor. They were properly considered whether or not they bore upon the invalidated eligibility factors. (*Brown v. Sanders* at pp. 893-894.)

Here, Castaneda claims that assuming this Court agrees that one or more of the special circumstance findings must be reversed for insufficiency of the evidence or instructional error, reversal of his death sentence is required under

Brown because the jury considered evidence it would not have otherwise considered, particularly in regard to the sodomy and kidnapping special circumstances. (AOB 233-236.) Castaneda is flatly wrong.

First, if the evidence was insufficient or there was instructional error for all the special circumstances as Castaneda claims, then all the special circumstances were wrongly found to be true. If that is the case, then there would be no need to consider *Brown* because Castaneda would not be eligible for the death penalty in the first place. Second, assuming at least one special circumstance was valid, and further assuming the other special circumstances were invalid as claimed by Castaneda, Castaneda's claim that the jury would not or should not have heard the evidence underlying the invalid special circumstances is incorrect. Castaneda's acts within about one hour of parking the car at Long John Silver, entering the clinic, moving Kennedy within the clinic by force or fear, taking her valuables, tying her up, removing her lower clothing, leaving a palm print on the examination table paper, leaving feces and sperm on a sock, and stabbing her to death with a screwdriver, were all "circumstances of the crime" that the jury could validly consider in determining the penalty of death, regardless of whether this evidence proved the special circumstances, respectively, or burglary, kidnapping, robbery and sodomy. In other words, even if all but one of the special circumstances were not supported by sufficient evidence or suffered from instructional error, the jury still could consider all of the above evidence in aggravation as circumstances of the crime as set forth in *Brown* due to the continuous course of conduct in which all of these criminal acts were committed.

Finally, Castaneda asserts that *Blakely v. Washington, supra,* 542 U.S. at page 2966, *Ring v. Arizona* (2002) 536 U.S. 584 [122 S.Ct. 2428, 153 L.Ed.2d 556], and *Apprendi v. New Jersey, supra,* 530 U.S. at page 466, compel reversal of the death judgment based on the reversal of the true findings

to the special circumstances. (AOB 236-239.) This Court should reject this argument. As this Court has found numerous times, *Blakely, Ring,* and *Apprendi* have no effect nor application to the penalty phase procedures of California's death penalty law. (*People v. Rogers, supra,* 39 Cal.4th at p. 893; *People v. Blair, supra,* 36 Cal.4th at p. 753; *People v. Davis, supra,* 36 Cal.4th at pp. 571-572; *People v. Griffin* (2004) 33 Cal.4th 536, 594-595; *People v. Martinez* (2003) 31 Cal.4th 673, 700-701.)[41/]

XV.

THE TRIAL COURT PROPERLY DID NOT ANSWER THE JURY'S QUESTION ON WHAT WOULD HAPPEN IF IT COULD NOT REACH AN UNANIMOUS DECISION AS TO CASTANEDA'S PENALTY

Castaneda contends his death judgment should be reversed because the trial court, in violation of the prohibition against cruel and unusual punishment and his right to due process of law under the state and federal constitutions, erroneously failed to instruct the jury that if it could not reach a unanimous decision, the guilt phase would not be retried. (AOB 241-258.) Castaneda failed to properly preserve this claim for appeal. In any event, Castaneda's contention is untenable. The trial court properly did not answer the jury's question on what would happen if it could not reach an unanimous decision as to Castaneda's penalty because there was no indication of a deadlock, and answering the question could have diminished the jurors' sense of duty to deliberate.

---

41. Further, *Cunningham v. California, supra,* 127 S. Ct. at p. 856, discussed in footnote 2, is essentially an extension of the principles set forth in *Apprendi, Ring, Blakely,* and *United States v. Booker* (2005) 543 U.S. 220 [125 S.Ct. 738, 160 L.Ed.2d 621], to California's determinate sentencing law. Thus *Cunningham* does not compel a different result than this Court has previously reached in interpreting these same claims.

At the outset, since Castaneda failed to object to the trial court's response to the jury's note discussed below, he has forfeited this claim on appeal. (*People v. Hughes, supra,* 27 Cal.4th at p. 402; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1193.)

Even if Castaneda has not forfeited this claim, the claim nonetheless lacks merit. This Court has repeatedly held that a trial court is not required to educated the jury as to the legal consequences of a possible deadlock, that so instructing the jury would confuse or diminish the jurors's sense of duty to deliberate and to be open to the ideas of their fellow jurors, and that the effect of a hung jury is irrelevant to the jury's deliberation of any issue before it. (*People v. Gurule* (2002) 28 Cal.4th 557, 648; *People v. Hughes, supra,* 27 Cal.4th at p. 402; *People v. Hines* (1997) 15 Cal.4th 997, 1075; *People v. Thomas* (1992) 2 Cal.4th 489, 539; *People v. Belmontes* (1988) 45 Cal.3d 744, 814; *People v. Kimble* (1988) 44 Cal.3d 480, 515.) Moreover, the Eighth Amendment does not require a trial court to give a jury an instruction as to the legal consequences of a possible deadlock. (*Jones v. United States* (1999) 527 U.S. 373, 382 [119 S.Ct. 2090, 144 L.Ed.2d 370].) Thus, Castaneda's claim should be summarily rejected.

On November 30, 1999, the jury took a recess to commence its penalty phase deliberations at 2:45 p.m. and resumed deliberations that day at 3:05 p.m. (2 CT 502.) After retiring from deliberations that evening, the jury resumed deliberations the next day, December 1, at 9:40 a.m. (2 CT 502.) Around 2:05 that afternoon, with the prosecutor and defense counsel present and outside the presence of the jury, the trial court said it had received a request from the jury. (2 CT 503; 16 RT 3861.) The jury note read:

> We want to know what happens if we cannot reach a unanimous decision? Judge makes decision? re-trial/entirely? re-trial/penalty phase only?

(2 CT 508.)

The trial court read the note to the prosecutor and defense counsel. (16 RT 3861.) The trial court relied on *People v. Hines, supra*, 15 Cal.4th at page 1075, to come to the conclusion it should send the note back to the jury with an answer that the court could not answer that question. (16 RT 3861-3862.) Defense counsel responded to the court, "That's my feeling," and a short time later, "I think that would be appropriate." (16 RT 3862.) The trial court sent the note back to the jury with the message, "The Court cannot answer these questions." (2 CT 508.) The trial court also wrote on the note, "You may recess at 3PM this afternoon." (2 CT 508.) The jury recessed its deliberations that day at 3:00 p.m. (2 CT 503.)

The next day, December 2, 1999, the jury resumed its deliberations at 9:40 a.m, and after taking a recess at 10:45 a.m., resumed deliberations at 11:00 a.m. At 11:45 a.m., the jury advised the bailiff that they had reached a verdict and the jury was recessed until 1:30 p.m. At 1:45 p.m., the jury's finding that the penalty should be death was read in court. (2 CT 509.)

Castaneda contends, the trial court, in response to the words "retrial/entirely" in the jury's note, notwithstanding the decisions of this Court that no such instruction need be given, should have instructed the jury that guilt phase would not be retried if there was a deadlock. Castaneda argues that one juror may have felt pressured to penalize Castaneda with death based on the erroneous belief that the time consuming guilt phase would have to be retried if there was a deadlock as to Castaneda's penalty. (AOB 246-247.) The fact the note in this case actually spelled out the possible results from a deadlock, including "retrial/entirely," is not distinct from the cases above from this Court that hold a possible deadlock instruction should not be given. Nothing in the record shows any basis for instructions about the possibility of the jury not reaching a verdict. The consequences of a deadlocked jury remained irrelevant

to any issues being addressed by the jury. Notwithstanding reference to possible outcomes in the jury note.

Further, Castaneda's reliance on *Simmons v. South Carolina* (1994) 512 U.S. 154 [114 S.Ct. 2187, 129 L.Ed.2d 133] and *Morris v. Woodford* (9th Cir. 2001) 273 F.3d 826 to argue that the trial court here should have given an instruction as to the legal consequences of a possible deadlock (AOB 249-251), is misplaced.

In *Simmons*, the prosecutor argued during penalty phase closing argument that the jury could and should consider the defendant's future dangerousness to society in determining whether he should receive the death penalty, and the defendant was not allowed to rebut that argument by telling the jury that if he did not receive death, he could only receive life in prison without the possibility of parole. (*Simmons v. South Carolina, supra,* 512 U.S. at pp. 157-158.) The United States Supreme Court found that the defendant's right to due process was violated because the jury reasonably and falsely may have believed during deliberations that the defendant could be released on parole if he were not executed. (*Id.* at pp. 161-162.) The High Court expressed no opinion regarding whether the result it reached as to due process was also compelled by the Eighth Amendment. (*Id.* at p. 161, fn. 4.)

Simmons is inapposite to the present case and Castaneda's right to due process was not violated because here, unlike in *Simmons*, the prosecutor did not argue to the jury during the penalty phase that it could consider Castaneda's future dangerousness to society in determining whether he should receive the death penalty. (16 RT 3796-3820.) Also, as pointed out above, Castaneda in this case, through defense counsel, did not attempt to rebut the jury note regarding the words retrial/entirely like defense counsel attempted to rebut the prosecutor's argument in *Simmons*. Indeed, defense counsel agreed with not answering the jury's question.

In *Morris*, a California capital case on federal habeas, the jury was given an erroneous written jury instruction during the penalty phase. The instruction told the jurors that if they had a reasonable doubt as to the penalty, they must give the defendant the benefit of the doubt and return a verdict fixing the penalty of life in prison *with* the possibility a parole. (*Morris v. Woodford, supra,* 273 F.3d at p. 837.) The court found that the erroneous jury instruction constituted "constitutional error" because it was reasonably likely that some are all of the jurors understood the instruction to mean that, if they could not agree unanimously on a penalty, then the defendant would receive life *with* parole. The court found this was the most logical inference in particular because the jury had asked during deliberations what would be the sentence imposed if there was a deadlock. (*Id.* at pp. 839-840.) The court then found that the constitutional error was not harmless and granted the writ. (*Id.* at p. 842.)

Morris is inapposite to the present case and there was no constitutional error because here, unlike in *Morris*, the jury was not given an erroneous jury instruction that actually told the jury that Castaneda would receive life in prison *with* the possibility of parole if he was not given the death penalty. (3 CT 788-817.) Moreover, of course, federal constitutional interpretations by the Ninth Circuit are not binding on this Court. (*People v. Williams* (1997) 16 Cal.4th 153, 190.) Thus, Castaneda's reliance on *Simmons* and *Morris* is misplaced.

Finally, in contrast to Castaneda's assertion to the contrary (AOB 255-258), any claimed federal constitutional error by the trial court in not responding the jury's question was harmless beyond a reasonable doubt. (*People v. Mickey* (1991) 54 Cal.3d 612, 682.) In mitigation, there was evidence, that Castaneda was a long time heroin addict (12 RT 3023, 3036, 3047-3057, 3063-3064, 3080-3082; 15 RT 3614-3618), and had grown up in a large Hispanic family with little parental guidance that was rife with substance abuse, gang involvement and crime (12 RT 3114-3115, 3137, 3141-

3144, 3095-3096, 3163-3165; 14 RT 3394-3409, 3417-3439, 3519-3526), was suffering from recurrent major depression and anxiety disorder (12 RT 3043-3047, 3058, 3181-3182, 3211-3212), and could function in a prison setting (12 RT 2970-2974).

However, in aggravation, there was evidence of: (1) the heinous circumstances of how Castaneda kidnapped, robbed, sodomized and killed Kennedy; (2) Castaneda stalking, tying up and assaulting Ibarra, and forcing her to have sex with him on several occasions in 1989 and 1990 (15 RT 3608-3614, 3638-3639, 3644-3653); (3) Castaneda committing armed robbery in 1991 and burglary in 1980 and 1987 (12 RT 3067-3071, 3239-3247; 14 RT 3440-3446; 3545-356; 15 RT 3600-3607); (4) Castaneda hitting a rival gang member with a brick and seriously injuring the rival when he was a teenager (14 RT 3511-3517); (6) Castaneda "smacking" Elvira at her brother's wedding and giving her a black eye (13 RT 3296, 3315); (7) Castaneda asking his son Gabriel Jr. to take criminal responsibility for Castaneda's gun to avoid the Three Strikes Law (13 RT 3364-3365); (8) Castaneda not actually having depression, but having an anti-social personality disorder with some depressive features that did not prevent Castaneda from having free choice not to be a criminal or kill Kennedy (15 RT 3711-3719, 3727, 3735-3740, 3754) and (9) a shank and syringe being found in Castaneda's jail cell on June 6, 1999 (14 RT 3564-3595).

Moreover, there was evidence, including from one of Castaneda's own experts, that Castaneda: (1) was not mentally retarded (12 RT 2968-2973); (2) was not suffering from psychosis or mental illness, including schizophrenia, psychotic disorder, delusional disorder, bipolar disorder and manic depressive illness (12 RT 2974-2980; 15 RT 3720); and (3) was not suffering from brain damage or lack of free will (12 RT 3015, 3020-3032). Finally, there was evidence that not all of Castaneda siblings had turned to gangs, drugs and

crime, or if they had, some had now ceased such behavior. (14 RT 3410-3417, 3480-3482, 3519-3521.)

As seen above, when all the penalty phase evidence is considered, the evidence in aggravation greatly outweighed the evidence in mitigation. Indeed, even Castaneda's strongest argument in mitigation regarding the dysfunctional family he grew up in was discounted greatly by the fact that not all of his siblings were criminals or if they had been criminals, some had stopped that behavior. Also, the heinous circumstances of the current crime and Castaneda's long record of violence weighed heavily in favor of the death penalty. Thus, any claimed federal constitutional error by the trial court in not responding the jury's question was harmless beyond a reasonable doubt.

XVI.

THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION TO EXCLUDE EXPERT TESTIMONY REGARDING GENETICS AND AN EXHIBIT REGARDING "GANG MEMBER DEPRESSION" DURING THE PENALTY PHASE

Castaneda contends the judgment of death should be reversed because the trial court violated his rights under the Eighth and Fourteenth Amendments, and Article I, section 17 of the California Constitution, and the state and federal due process clause, to present mitigating evidence during the penalty phase of the trial. (AOB 259-285.) To the contrary, the trial court properly exercised its discretion to exclude expert testimony regarding genetics and an exhibit regarding "gang member depression" during the penalty phase. In any event, Castaneda was not prejudiced by the trial court's ruling excluding the evidence.

A. The Trial Court Properly Limited Dr. Morales' Expert Testimony

An expert witness may testify to his or her opinion if, among other things, the opinion is based on matter (including special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to the witness at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates. (Evid. Code, § 801, subd. (b); *People v. Gardeley* (1996) 14 Cal.4th 605, 617-618.) However, any material that forms the basis of the expert's opinion must be reliable. (*Id.* at p. 618.) An expert's opinion based on matters which are not reasonably relied upon by other experts, or based speculative or conjectural factors, has no evidentiary value. (*In re Lockheed Litigation Cases* (2004) 115 Cal.App.4th 558, 563; *Jennings v. Palomar Pomerado Health Systems, Inc.* (2003) 114 Cal.App.4th 1108, 1117.) Even when the witness is qualified as an expert, he or she does not possess a carte blanche to express any opinion within the area of expertise. (*Ibid.*) Moreover, "[T]he courts have the obligation to contain expert testimony within the area of the professed expertise, and to require adequate foundation for the opinion." (*Kotla v. Regents of University of California* (2004) 115 Cal.App.4th 283; quoting *Korsak v. Atlas Hotels, Inc.* (1992) 2 Cal.App.4th 1516, 1523.)

A trial court exercises discretion when it rules on the admissibility of expert testimony under Evidence Code section 801, subdivision (b), and absent a manifest abuse of discretion that results in a miscarriage of justice, the court's determination will not be disturbed on appeal. (*People v. Robinson* (2005) 37 Cal.4th 592, 630; *People v. Ramos* (1997) 15 Cal.4th 1133, 1175; *Geffcken v. D'Andrea* (2006) 137 Cal.App.4th 1298, 1311; *In re Lockheed Litigation Cases, supra,* 115 Cal.App.4th at p. 564.)

During the penalty phase, Dr. Armando Morales, a professor of psychiatry and biobehavioral sciences at UCLA School of Medicine, with a Ph.D in clinical social work, testified for Castaneda. (12 RT 3088-3089, 3100.) Dr. Morales, an expert in Hispanic families and gangs, was retained by defense counsel to assess those issues as they related to Castaneda, including interviewing Castaneda's family to acquire a family history. (12 RT 3090-3093.) Dr. Morales interviewed Castaneda once for two and a half to three hours. (12 RT 3094, 3138.) Dr. Morales testified that Castaneda was raised as a Mexican-American, and about the difference between Mexican and United States culture and Hispanic family patterns. (12 RT 3101-3110.) Dr. Morales then testified to Castaneda's family history, beginning with Castaneda's (apparently maternal) grandfather and grandmother, who respectively, who were born in a rural Mexico area in 1900 and 1902 and later came to the United States to be farm workers. The former abused alcohol and died in 1977, and the latter suffered from depression and died in 1992. (12 RT 3114-3115.) Dr. Morales then briefly testified about two older siblings of Castaneda's mother, Castaneda's uncle born in 1917 who was reportedly an alcoholic who died in 1980, and Castaneda's aunt born in 1936 who reportedly suffered from moderate Parkinson's disease. (12 RT 3114.)

At that point, the prosecutor objected and said, "this material is irrelevant unless the foundation is established as to why aunts and uncles are somehow involved in this case." (12 RT 3115.) The trial court took the morning recess and held a hearing outside the presence of the jury. (12 RT 3115.) When asked by the trial court the relevance of the aunts and uncles, particularly if the aunts and uncles were present with Castaneda while he was growing up, defense counsel said, "It's not mere presence. It's also the biological factors of genetics. And historically with alcoholism, that flows through families. The are genetic– . . . predisposition." (12 RT 3115-3116.) After briefly discussing the issue

further, the trial court overruled the prosecutor's objection. (12 RT 3116-3117.)

Later, during the recess, still outside the presence of the jury, the trial court held an Evidence Code section 402 hearing. The prosecutor said Dr. Morales had informed him that the reason Dr. Morales was including a great aunt and great uncle[42] in the genome was because Dr. Morales believed Castaneda was affected genetically by them. The prosecutor said there was no information that Dr. Morales knew that these relatives ever had contact with Castaneda after he was born in 1960. (12 RT 3119-3120.) When examined on direct by defense counsel, and on cross-examination by the prosecutor, Dr. Morales testified that whether one was a psychiatrist, psychologist or licensed clinical social worker, family history is used to draw conclusion about patients. Dr. Morales also noted that increasingly research was showing certain genetic connections between alcoholism and drug dependence in offspring. (12 RT 3121-3122.) Later, during cross-examination, Dr. Morales acknowledged he had no specific training in the field of genetics and that he had not performed any gene testing on Castaneda or his relatives. (12 RT 3123-3125.) The trial court then inquired of Dr. Morales about Castaneda's family history and Dr. Morales' training in genetics. (12 RT 3125-3126.) Dr. Morales stated that because of the alcohol problem of Castaneda's grandfather, uncle, mother and siblings, and the family history of drug addiction, there might be a genetic basis for it. (12 RT 3126-3127.) After the trial court asked, Dr. Morales again said he had no specific training in genetics. (12 RT 3127-3128.)

After more brief discussion, the trial court ruled that Dr. Morales could not refer to genetics, but could testify to Castaneda's family history, including

---

42. It is unclear who this great uncle and great aunt were, unless the prosecutor mis-spoke when he used the term "great" and was referring to Castaneda's uncle born in 1917 and aunt born in 1936.

the aunts and uncles. (12 RT 3129-3130.) The trial court also ruled Dr. Morales could testify to the alcohol and substance abuse in Castaneda's family, but could not, due to lack of foundation, refer to the relatives as alcoholics and that any reference to alcoholism would be stricken. (12 RT 3131-3133.)

The jury returned and Dr. Morales continued with the following testimony: There was substantial alcohol abuse throughout the family. (12 RT 3133, 3137.) Dr. Morales interviewed Castaneda's mother and sister Sylvia Robles. (12 RT 3138; 14 RT 3389-3390.) Castaneda's mother came from a family of farm workers, and was raped at age 12 in Los Angeles. She ran away from home at age 14 with a man who was 19, and they had a child when she was 15 in 1956. The man was deported. She then, as a 16-year-old, got into a "marital relationship" with a boy who was 15 in 1958. Castaneda's mother and the boy stayed together until 1966 during which time the former was a moderate to heavy drinker and the latter was a heavy drinker and womanizer. During the relationship, they had children in 1959, 1960 (Castaneda), 1961, 1962, 1964 and 1966. All five male siblings have histories of drug abuse, juvenile and adult crimes, and incarcerations in state prison. The youngest child, Diana, and the oldest, a daughter born in 1959, had no criminal records and did not have any mental or health problems. (12 RT 3141-3143.)

Castaneda's mother's third "marital relationship" was from 1968 to 1988. She was 26 years old and he was 25 years old with a history of drug problems and incarceration in state prison.[43] They had two male children born, respectively, in 1971 and 1972. Both have histories of drug abuse, juvenile and adult criminal records, and incarcerations. (12 RT 3144.) At age 42, Castaneda's mother attempted suicide by drinking Drano and was hospitalized. (12 RT 3144.)

---

43. Later testimony established this man's name as Luis Arroyo. (14 RT 3394-3395.)

During these first two "marital relationships,"the partners did not have steady employment, so Castaneda's mother worked full-time at factories in the El Monte and San Gabriel Valley area as she was having children. On a daily basis, she would leave her residence in the El Monte/San Gabriel area and drop her children off to the grandparents in the La Puente area. The grandparents were in their mid-60s, from a rural environment, and did not have any control over Castaneda and his siblings. The brothers started getting into negative peers and gangs. (12 RT 3166-3167.)

When a person's needs are not met in the primary family, they get involved with a gang as a substitute family. Around age 12 to 15, Castaneda was initiated into a turf-oriented Hispanic gang in the La Puente area called "Happy Homes." (12 RT 3095-3096, 3163-3165.) As Castaneda's drug usage increased, he spent less time with the gang and more with drugs. Then he fell in love around 20 to 21 years old with Elvira. Elvira's family allowed him to live with them, and, because of that positive influence, Castaneda got a job and began to disassociate himself from negative peers. Castaneda, however, became involved again with drugs and Elvira wanted nothing to do with him. (12 RT 3165.) After explaining gang behavior in greater detail, Dr. Morales opined that, based on interviews and the clinical reports of Dr. Hall and Dr. Gawin, Castaneda was suffering from recurrent major depression in partial remission and dependent personality disorder as set forth in the DSM-IV. (12 RT 3181-3182, 3211-3212.)

Dr. Baca opined that Castaneda met the criteria for having an antisocial personality disorder with some depressive features plus some alcohol and substance abuse. (15 RT 3711-3719.) Antisocial personality disorder is included in the DSM-IV. (15 RT 3727.) Dr. Baca opined that psychopaths and antisocials are very much in touch with reality. (15 RT 3720.) They are master manipulators. They wreak havoc in everyone's lives around them. This is a

person who has a very "me, me, me," personality that bends rules, has no true feelings, and imitates what he or she see around them and uses it to his or her advantage. The person also has an inflexible psyche that is maladaptive in dealing and coping with stress, and is significantly impaired in relationships with peers, spouses and children. (15 RT 3725-3727.) Whereas anxiety and depression can be treated, an antisocial personality disorder cannot be treated because that is the person's core, it is just who the person is. The person knows exactly what he or she is doing and ignores consequences believing he or she will not be caught. (15 RT 3732-3735.)

Dr. Baca opined that Castaneda never took responsibility for anything. He blamed everybody. One of the most "heinous" things was asking his 16-year-old son Gabriel to take the "rap" for a gun that was discovered at Castaneda's apartment so that Castaneda would not go to jail. Castaneda had a choice. Many people that live in drug and gang infested areas manage to live productive lives. Castaneda chose to engage in criminal behavior, nobody "forced [Castaneda] to do anything he didn't want to do." Castaneda had a choice up until he killed Kennedy, and Castaneda made the wrong choice Castaneda had ample opportunities, but chose not to take advantage of them. Nothing interfered with Castaneda's free will to make choices. (15 RT 3735-3738.) On cross examination, Dr. Baca acknowledged that Castaneda's mother, father, and possibly genetics, could be blamed for Castaneda's antisocial personality, but stated that Castaneda still had free will to make different choices. (15 RT 3739-3740, 3754.)

Here, the trial court properly exercised its discretion when it did not allow Dr. Morales to testify to any genetic connection regarding the alcohol and substance abuse in Castaneda's extended family. Regardless of whether clinical social workers generally rely on genetic research to draw conclusions about patients, Dr. Morales admitted he had no training in genetics, nor had any

genetic testing been performed on Castaneda or Castaneda's family. Thus, no foundation had been established for Dr. Morales to offer an opinion as to any genetic connection regarding the alcohol and substance abuse in Castaneda's extended family, and its possible effect on Castaneda. Indeed, such an opinion by Dr. Morales would have been purely speculative. The issue here is not whether the trial court "erred," i.e. was right or wrong, as Castaneda argues (AOB 260-271), the issue is whether the trial court's decision was within the bounds of reason. Given Dr. Morales' non-existent genetics training and, no genetics testing having been done on Castaneda and his family, and the trial court's thorough questioning of Dr. Morales on the issue, the trial court's decision not to allow Dr. Morales to testify to genetics was not beyond the bounds of reason, but was a reasonable "judgment call" that was not an abuse of discretion.

In any event, contrary to Castaneda's claim of prejudicial federal constitutional error for excluding mitigating evidence (AOB 278-285), any error by the trial court in not allowing Dr. Morales to testify to any genetic connection regarding the alcohol and substance abuse in Castaneda's extended family, and its possible effect on Castaneda, was harmless beyond a reasonable doubt. (*People v. Smith* (2005) 35 Cal.4th 334, 368; *People v. Lucero* (1988) 44 Cal.3d 1006, 1032; see *People v. Ramos, supra,* 15 Cal.4th at pp. 1176-1178.) First, while the trial court did not allow the genetics testimony, it did allow Dr. Morales to testify to Castaneda's family history, including his the aunts and uncles, regarding the alcohol and substance abuse in the family. (12 RT 3129-3130.) This testimony, set forth in detail above, and other testimony, showed that Castaneda was a long time heroin addict (12 RT 3023, 3036, 3047-3057, 3063-3064, 3080-3082; 15 RT 3614-3618), and had grown up in a large Hispanic family with little parental guidance that was rife with substance abuse, gang involvement and crime (12 RT 3114-3115, 3137, 3141-3144, 3095-3096,

3163-3165; 14 RT 3394-3409, 3417-3439, 3519-3526). In short, the speculative reference to genetics added nothing significant to the defense in the jury's determination of the penalty, because the jury heard that Castaneda was the product of a dysfunctional and disadvantaged family background, and considered that background's possible effect on Castaneda's criminal behavior. Second, contrary to Castaneda's assertion (AOB 280), Dr. Morales' opinions about the role of genetics were not critical in light of Dr. Baca's testimony that Castaneda may have developed his antisocial personality disorder at a young age because Dr. Baca acknowledged in her testimony that Castaneda's mother, father, and possibly genetics, could be blamed for Castaneda's antisocial personality. (15 RT 3739-3740, 3754.) Third, as discussed in Argument XV, the evidence of mitigation, including Castaneda's family background, was greatly outweighed by the evidence in aggravation. Therefore, any error by the trial court in not allowing Dr. Morales to testify to the possibility of a genetic connection regarding the alcohol and substance abuse in Castaneda's extended family, and its possible effect on Castaneda, was harmless beyond a reasonable doubt.

B. The Trial Court Properly Excluded Exhibit 61 Regarding "Gang Member Depression"

Castaneda complains the trial court erred in excluding Exhibit 61, a chart that Dr. Morales used to illustrate his testimony regarding "gang member depression." The trial court did not err in excluding the exhibit, and even assuming error, Castaneda was not prejudiced because the exhibit was in advertently admitted into evidence despite the trial court's ruling.

People v. Kelly (1976) 17 Cal.3d 24 requires the proponent of expert testimony based on the application of a new scientific technique to satisfy three criteria: (1) the technique or method is sufficiently established to have gained

general acceptance in the field; (2) testimony with respect to the technique and its application is offered by a properly qualified expert; and (3) correct scientific procedures have been used in the particular case. (*People v. Leahy* (1994) 8 Cal.4th 587, 594; *People v. Wash* (1993) 6 Cal.4th 215, 242; *People v. Kelly* at p. 30; *People v. Johnson* (2006) 139 Cal.App.4th 1135, 1147.) The *Kelly/Frye* rule applies to scientific evidence and not expert medical testimony, including, for example, psychiatrist testimony regarding an unusual form of mental illness not listed in the diagnostic manual of the American Psychiatric Association. (*People v. Stoll* (1989) 49 Cal.3d 1136, 1157; *People v. McDonald* (1984) 37 Cal.3d 351, 372-373; *Roberti v. Andy's Termite & Pest Control, Inc.* (2003) 113 Cal.App.4th 893, 903.) In other words, *"Kelly/Frye* only applies to that limited class of expert testimony which is based, in whole or part, on a technique, process, or theory which is *new* to science and, even more so, to law. (*People v. Stoll* at p. 1156.) Nothing precludes *Kelly/Frye* application to a "new scientific process operating on purely psychological evidence," but, "absent some special feature which effectively blindsides the jury, expert opinion testimony is not subject to *Kelly/Frye.*" (*Id.* at pp. 1156-1157.) On appeal, the general acceptance finding under prong one of *Kelly* is a "mixed question of law and fact subject to limited de novo review." The appellate court reviews the trial court's determination with deference to any and all supportable findings of fact, and then decides as a matter of law, based on those assumptions, whether there has been general acceptance. (*Geffcken v. D'Andrea, supra,* 137 Cal.App.4th at p. 1309.)

To determine whether Castaneda had an emotional abnormality, Dr. Hall administered the MMPI-2, which consists of 562 true/false questions which had been revised to be cross-cultural, including Hispanics. Dr. Hall opined the MMPI-2 result showed that Castaneda was in normal ranges emotionally with no evidence of psychosis or mental illness, including schizophrenia, psychotic

disorder, delusional disorder, bipolar disorder and manic depressive illness. The result merely showed that Castaneda was a very male oriented person, or "macho," as known in Mexican American culture, and was depressed. (12 RT 2974-2980.) The depression could be as a result of being incarcerated. (12 RT 2980.) Dr. Hall did not diagnose Castaneda as for as personality is concerned, but testified Castaneda's problems would lie in the personality disorders. (12 RT 2982.)

Dr. Morales testified that Castaneda, like all of his brothers, was a member of "Happy Homes," a conflict turf-oriented Hispanic street gang in the La Puente area. (12 RT 3145, 3163-3164, 3172.) Soon thereafter, after the trial court overruled the prosecutor's foundation and relevance objections, Dr. Morales testified by using one of his many charts, Exhibit 58, that he had entitled "Hispanic Gang Member Psychiatric Diagnostic Categories." (12 RT 3173-3176.) In reliance on Exhibit 51, the study Dr. Morales had conducted as to the facts underlying Exhibit 51, Dr. Gawin's conclusions about Castaneda's substance abuse, and Castaneda's level of involvement with the gang and his criminal history, Dr. Morales opined that Castaneda had substance abuse dependency, mood disorder, meaning depression from time to time with sometimes major depression, and dependent personality disorder. (12 RT 3173-3181.) By using Exhibit 59, a chart entitled "DSM-IV Criteria for a Dependent Personality Disorder," Dr. Morales testified how he believed Castaneda had dependent personality disorder. (12 RT 3182-3186.) Then, by using Exhibit 60, a chart entitled "Causes of Depression," Dr. Morales, after the trial court overruled the prosecutor's foundation objection, explained the causes of depression. (12 RT 3188-3189.)

Dr. Morales then attempted to testify by using Exhibit 61, a chart entitled "DSM-IV Criteria for Depression Versus Gang Member Depression." (12 RT 3189.) The chart showed all of the DSM-IV diagnostic criteria for depression

contrasted with gang member depression. (12 RT 3190.) The prosecutor interposed an objection for foundation. (12 RT 3190.) The trial court asked defense counsel to lay a foundation where the information came from. (12 RT 3191.) Upon being asked by defense counsel where the information came from, Dr. Morales testified the information was based on his over 40 years of clinical experience working with gang members who had been suffering from various kinds of depression that were undetected by various mental health professionals because they were relying solely on the DSM-IV criteria. (12 RT 3191.) When asked by defense counsel if he had published his findings, Dr. Morales said it would be published in December 2000 in a major publication. (12 RT 3191-3192.) The prosecutor again interposed a foundation objection, and, with the trial court's permission, conducted a voir dire examination of Dr. Morales. (12 RT 3192.) Based on the prosecutor's questions, Dr. Morales testified that his findings were new and not in the DSM-IV, had been published in one article, and would be published in a chapter in December 2000. Dr. Morales also testified he had presented his findings to colleagues at the Neuropsychiatric Institute and received a positive evaluation. (12 RT 3193-3194.) The prosecutor then asked Dr. Morales if his findings had been "accepted." (12 RT 3194.) Dr. Morales said, "I have to answer yes and no." Dr. Morales repeated that he had received positive evaluations from the institute, and from gang members. (12 RT 3194-3195.) Based on the prosecutor's question, Dr. Morales testified he was a social scientist. A recess was taken. (12 RT 3195-3196.)

Back from the recess, outside the presence of the jury, the trial court asked the prosecutor if his intent was to question Dr. Morales pursuant to Kelly/Frye. (12 RT 3196.) The prosecutor responded:

> I don't think we have to go that far. I think Dr. Morales may have, in fact, a theory, but in terms of it being a scientific theory, something he can testify to in his role as an expert witness, I don't think the

foundation has been laid. If the Court feels differently, yes, we will be going into a Kelly/Frye area.

(12 RT 3196.)

Without a direct answer as to whether the parties were going into the "Kelly/Frye area," the parties argued whether the foundation had been laid for Dr. Morales to use Exhibit 61 in his testimony. (12 RT 3196-3198.) Again under questioning by the prosecutor, Dr. Morales testified he had performed the "first step' in scientific research with his findings, which would be followed by publication in professional journals and subsequent studies. (12 RT 3198.) The prosecutor stated:

For that reason, your Honor, he is attempting to add another category to the DSM-IV, gang member depression, and it's based upon the doctor's initial field research, and as a result, we feel there isn't foundation for that introduction at this point.

(12 RT 3199.)

Dr. Morales responded:

I am not trying to add a category to DSM-IV but rather to get the information in the field to those that work with gang members. At that point I get some feedback or people might initiate scientific studies like you are saying. This is the first stage. We have to begin seeing data patterns which I have done. They might say, we have tried the research and it doesn't work, or they might say, we are confirming what your initial impressions were with the particular group.

(12 RT 3199.)

To which the prosecutor replied, "And the doctor just made my support for my argument against it." (12 RT 3199.) After defense counsel argued Dr. Morales should be able to use Exhibit 61, the trial court asked Dr. Morales how he had made his findings. (12 RT 3199-3200.) Dr. Morales responded:

Based upon my years of observation of this specific population that I have specialized in, I am trying to report what I have seen as phenomena of depression in gang members to the field in general, whether it's the psychiatrist, psychologist, parole officers, probation officers, other people in the mental health field, to try to understand the behavior of

gang members. Some might subject this to rigid scientific inquiry and either confirm or totally disapprove these particular behaviors in trying to arrive at some diagnostic conclusion of depression.

(12 RT 3200.)

After this response, the trial court sustained the prosecutor's foundation objection as to Exhibit 61, but allowed defense counsel to ask Dr. Morales about his evaluation, observations, expertise and experience with gang members that he had studied regarding depression and relate that to Castaneda. (12 RT 3200.) After another brief discussion, the trial court clarified:

[I] am not going to allow him to use the chart because it does suggest, especially when he starts to explain the chart, that he. . has done some scientific studies or that scientific studies will in some way invalidate this that have not occurred yet. I will allow you to ask him about his observations of depression in gang members. I will allow you to offer, and I don't believe we have actually had this testimony yet, that he agrees with the analysis of specifically depression. He's indicated he has relied on the reviewed the documentations from Dr. Hall and Dr. Gawin. And so I will allow you to make those connections to Mr. Castaneda. But I am going to keep Exhibit 61 out.

(12 RT 3201.)

Back in the presence of the jury, Dr. Morales testified that many symptoms he observed in Castaneda were typical of depression experienced by gang members. (13 RT 3200-3201, 3209-3210.) Dr. Morales opined that based on the interviews and clinical reports, particularly those of Dr. Hall and Dr. Gawin, Castaneda was suffering from major depression recurrent in partial remission. (12 RT 3211.) Dr. Morales opined that in contrast to Castaneda's depression, which could have a biological and environmental component to it, Castaneda's dependent personality disorder did not rise to the level of mental illness. (12 RT 3212.)

Subsequently, during the prosecution's penalty phase case, Dr. Baca testified that after reviewing Dr. Hall's raw material as applied to the MMPI-2, she discovered that Dr. Hall had miscalculated the MMPI-2 score by making a

mathematical error. Dr. Baca opined that once that mathematical error was corrected, rather than major depression, Castaneda met the criteria for an antisocial personality disorder with some depressive features with some alcohol and substance abuse. (15 RT 3711-3713.)

While there was a great deal of questioning and testifying by Dr. Morales about scientific research, it is unclear whether the trial court ruled to exclude Exhibit 61 based on the *Kelly* rule[44] as not generally accepted, or based on Exhibit 61 not being the type of matter that could reasonably be relied upon by Dr. Morales in forming an opinion about whether Castaneda was suffering from depression under Evidence Code section 801, subdivision (b). Indeed, this is unclear because while the prosecutor stated that there was no need to argue *Kelly* (12 RT 3196), the trial court's exclusion of Exhibit 61 because it gave the impression that Dr. Morales had, "done some scientific studies or that scientific studies will in some way invalidate this that have not occurred yet (12 RT 3201)," may suggest a *Kelly* lack of general acceptance determination.

If the trial court excluded Exhibit 61 based on Evidence Code section 801, subdivision (b), it did not abuse its discretion in doing so because Exhibit 61 could not be reasonably relied upon by Dr. Morales because it was speculative based on it not being reliable because Dr. Morales' "Gang Member Depression" findings were not in the DSM-IV, and had not been verified by any other studies.

If the trial court excluded Exhibit 61 based on a *Kelly* determination that it had not been generally accepted, the first issue is whether Exhibit 61's "Gang Member Depression" constituted a new scientific technique under *Kelly*, or typical expert medical testimony to which *Kelly* does not apply. While *Kelly*

---

44. Now that Federal Rules of Evidence have superceded *Frye v. United States* (D.C. Cir. 1923) 293 F. 1013, the *Kelly/Frye* rule is now referred to as the *Kelly* rule. (*People v. Bolden, supra,* 29 Cal.4th at p. 545; *People v. Soto* (1999) 21 Cal.4th 512, 515, fn. 3.)

typically does not apply to purely new psychological evidence such as Dr. Morales' Exhibit 61 (see cases cited within *Roberti v. Andy's Termite & Pest Control, Inc., supra,* 113 Cal.App.4th at pp. 902-903), here *Kelly* applied to Exhibit 61 because it was going to constitute a special feature which would have effectively blindsided the jury based on "Gang Member Depression" being a completely new theory to science and law. As stated by the trial court, Exhibit 61 gave the impression that Dr. Morales had, "done some scientific studies or that scientific studies will in some way invalidate this that have not occurred yet." (12 RT 3201.) The trial court was correct that Exhibit 61's gang member depression had not been generally accepted yet because Dr. Morales had not submitted those findings for further analysis and research by other scientists. Even Dr. Morales admitted his findings were on at the "first stage" of scientific development.

However, if the trial court erred by excluding Exhibit 61 under Evidence Code section 801, subdivision (b) or under *Kelly*, and assuming Exhibit 61 was not admitted into evidence by inadvertence, the error was harmless beyond a reasonable doubt. (*People v. Lucero, supra,* 44 Cal.3d 1006, 1032; see *People v. Ramos, supra,* 15 Cal.4th at pp. 1176-1178.) First, despite excluding Exhibit 61, the trial court ruled that Dr. Morales could testify about his evaluation, observations, expertise and experience with gang members that he had studied regarding depression and relate those findings to Castaneda. (12 RT 3200-3201.) Thus, because Dr. Morales testified that many symptoms he observed in Castaneda were typical of depression experienced by gang members (13 RT 3200-3201, 3209-3210), the absence of Exhibit 61 did not prejudice Castaneda. This is particularly true because Castaneda had already presented evidence of his alleged depression with testimony and charts of "Hispanic Gang Member Psychiatric Diagnostic Categories," and "Causes of Depression." (12 RT 3173-3176, 3188-3189.) Second, the exclusion on Exhibit 61did not prejudice

Castaneda in light of Dr. Baca's later testimony that Dr. Hall made a MMPI-2 computation error that led to his incorrect finding (upon which Dr. Morales relied), that Castaneda was suffering from major depression. Indeed, Dr. Baca opined that once that error was corrected, Castaneda was not suffering from major depression, but had an antisocial personality disorder with depressive features. (15 RT 3711-3713.) Third, as discussed in Argument XV, the evidence of mitigation was greatly outweighed by the evidence in aggravation.

Finally, if the trial court erred by ruling that Exhibit 61 would be excluded from evidence, but Exhibit 61 was inadvertently admitted into evidence as the record suggests,[45] then any prejudice caused by the error would be non-existent because the jury got to consider Exhibit 61 in arriving at its penalty determination.

XVII.

CASTANEDA'S DEATH SENTENCE DOES NOT CONSTITUTE CRUEL OR UNUSUAL PUNISHMENT

Castaneda contends his death judgment should be reversed because the prohibition against imposition of cruel and unusual punishment in the Eighth and Fourteenth Amendments, and article I, section 17 of the California Constitution, prohibits his execution. (AOB 286-305.) Castaneda is mistaken. His death judgment does not constitute cruel and unusual punishment under the Eighth and Fourteenth Amendments of the United States Constitution, or under article I, section 17 of the California Constitution.

---

45. When the trial court asked if the prosecution had an objection to the admission into evidence of exhibits 59 through 62, the prosecution, probably through inadvertence, did not object to the admission into evidence of Exhibit 61. (15 RT 3764.) The trial court admitted Exhibits 59 through 62 into evidence. (15 RT 3764.)

Castaneda first asserts that his death judgment is cruel and unusual under the Eighth and Fourteenth Amendments to the United States Constitution in light of Dr. Baca's testimony that he developed antisocial personality disorder at a young age and the holdings in *Atkins v. Virginia* (2002) 536 U.S. 304 [122 S.Ct. 2242, 153 L.Ed.2d 335] and *Roper v. Simmons* (2005) 543 U.S. 551 [125 S.Ct. 1183, 161 L.Ed.2d 1]. (AOB 286-302.) In *Atkins*, the United States Supreme Court held that execution of the mentally retarded violates the Eighth and Fourteenth Amendments, and left to the states the task of developing appropriate ways to enforce that sentencing restriction. (*Atkins v. Virginia* at p. 317; *In re Hawthorne, Jr.* (2005) 35 Cal.4th 40, 44.) In *Roper*, the United States Supreme Court held that Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when there crimes were committed. (*Roper v. Simmons* at p. 551.)

This Court has rejected the contention that capital punishment per se violates the Eighth Amendment's prohibition against cruel and unusual punishment (*People v. Staten* (2000) 24 Cal.4th 434, 462), and has found that *Atkins* and *Simmons* did not alter the conclusion that capital punishment is not per se unconstitutional. (*People v. Moon* (2005) 37 Cal.4th 1, 47-48.) Moreover, *Atkins* and *Simmons* do not apply to the present case because there was no evidence that Castaneda was mentally retarded or a juvenile at the time of the murder. Indeed, the evidence adduced at the penalty phase showed that Castaneda had a low average IQ score (12 RT 2970-2974), and was born in 1960 (12 RT 3119-3120), and not a juvenile, at the time of the murder. Further, Castaneda's antisocial personality disorder is inconsistent with the underlying rationale supporting the preclusion upon executing the mentally retarded and juveniles. As Dr. Baca opined, Castaneda was an adult who had free will to control his behavior and make different choices. (15 RT 3735-3740, 3754.) Therefore, the death judgment does not constitute cruel and

unusual punishment under the Eighth and Fourteenth Amendments to the United States Constitution.

Castaneda next contends that as applied to his case, his death sentence constitutes cruel and unusual punishment under article I, section 17 of the California Constitution. (AOB 303-306.) A reviewing court determines whether a particular penalty given "is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity" thereby violating the prohibition against cruel or unusual punishment under article I, section 17 of the California Constitution. (*People v. Cole, supra,* 33 Cal.4th at p. 1235.) To do so, the reviewing court examines the circumstances of the offense, including the defendant's motive, the extent of the defendant's involvement in the crime, the manner in which the crime was committed, the consequences of the defendant's acts, the defendant's age, prior criminality and mental capabilities. (*Ibid.*)

Here, even before considering other factors, the circumstances of the offense, the extent of Castaneda's involvement, the manner in which the crime was committed and the consequences of Castaneda's acts, establish that imposition of the death judgment was not cruel or unusual. As discussed previously, Castaneda, from about 9:30 a.m. to shortly before 10:30 a.m. on March 30, 1998, attacked Kennedy, robbed her, tied her hands behind her back, removed her clothing from the waist down, sexually assaulted her while prodding her with a screwdriver, then killed her by stabbing her with the screwdriver. These brazen, callous and reprehensible acts standing alone establish that the death judgment was not cruel and unusual. Beyond the nature of his crimes, Castaneda's crimes were aggravated because he was not a young man at the time of the murder, but was almost 40 years old. Further, as noted in Argument XV, Castaneda had committing armed robbery in 1991 and burglary in 1980 and 1987. Also, Castaneda did not suffer from any form of

psychosis or mental illness such as schizophrenia, psychotic disorder, delusional disorder, bipolar disorder or manic depressive illness (12 RT 2974-2980), and Castaneda was an adult who had free will to control his behavior and not commit murder (15 RT 3735-3740, 3754). Therefore, the death judgment does not constitute cruel or unusual punishment under article I, section 17 of the California Constitution.

XVIII.

DEFENSE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO OBJECT TO THE PROSECUTOR'S EVIDENCE ABOUT CASTANEDA'S NON-VIOLENT CUSTODY ESCAPES

Castaneda asserts his death judgment should be reversed because he was denied effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments, and the California Constitution, because the jury was allowed to consider his escapes from custody as evidence during the penalty phase of trial. (AOB 306-319.) Castaneda is wrong. Defense counsel did not provide ineffective assistance of counsel when he did not object to the prosecutor's evidence of Castaneda's non-violent escapes from custody because that evidence constituted proper rebuttal of Castaneda's good character evidence.

Generally, Penal Code section 190.3 allows the prosecution, during the penalty phase, to introduce evidence in aggravation consisting of prior criminal activity by the defendant, so long as the criminal activity involved the use or attempted use of force or violence, or the express or implied threat to use force or violence, and proper notice is given. (See Pen. Code, § 190.3, factor (b); *People v. Farnam* (2002) 28 Cal.4th 107, 188.) Thus, evidence of a non-violent escape from custody cannot be used as a factor in aggravation under Penal Code section 190.3. (*People v. Boyd, supra*, 38 Cal.3d at pp. 776-777.) However, once a defense witness testifies to the defendant's good character

while in custody, it is permissible for a trial court to allow the prosecutor to cross-examine the witness about the defendant's non-violent escapes from custody and introduce other evidence of that escape to rebut the good character evidence. (*People v. Burgener* (2003) 29 Cal.4th 833, 873-874; *People v. Farnam, supra,* 28 Cal.4th at p. 187-188; see *People v. Fierro* (1991) 1 Cal.4th 173, 237; *People v. Rodriguez* (1986) 42 Cal.3d 730, 791.)

Failure to object to the introduction of evidence forfeits on appeal a claim that such evidence should not have been admitted. (Evid. Code, § 353, subd. (a).) Again, to establish a claim of ineffective assistance of counsel, a defendant must first show that counsel's representation was deficient, meaning the representation failed to meet an objective standard of professional reasonableness. (*Strickland v. Washington, supra,* 466 U.S. at pp. 687-688; *People v. Frye, supra*, 18 Cal.4th at p. 979.) Additionally, a defendant must show that he was prejudiced by counsel's deficient representation, i.e., the defendant must show that absent the deficiency, there is a reasonable probability the result would have been more favorable to the defendant. (*Id.* at pp. 687-88; *People v. Frye* at p. 979.) If a defendant fails to establish either of the two prongs, the conviction must be upheld. (*Id.* at p. 687.) There is a strong presumption of effective assistance of counsel and a reviewing court must be highly deferential the judgment below. (*Id.* at p. 689.)

Here, Castaneda realizes he has forfeited this claim regarding the escape evidence because defense counsel did not object to any of the prosecutor's cross-examinations regarding Castaneda's non-violent escapes, nor object to the brief references to three of those escapes in Exhibits 63, 64 and 65. (AOB 306.) Thus, Castaneda claims defense counsel provided ineffective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments, and the California Constitution, because the jury was allowed to consider his escapes

from custody as evidence during the penalty phase of trial. (AOB 306-319.) Castaneda is wrong.

First, defense counsel's performance was not deficient as to Dr. Hall. Dr. Hall opined that nothing about Castaneda's IQ would prevent him from functioning in society or in the prison system (12 RT 2970-2974), and that Castaneda could survive and function in a prison setting for the rest of his life (12 RT 2983). As to whether Castaneda had an emotional abnormality, Dr. Hall testified the MMPI-2 result showed that Castaneda was in normal ranges emotionally with no evidence of psychosis or mental illness, including schizophrenia, psychotic disorder, delusional disorder, bipolar disorder and manic depressive illness. The result merely showed that Castaneda was a very male oriented person, or "macho," as known in Mexican American culture, and was depressed. (12 RT 2974-2980.) The depression could be as a result of being incarcerated. (12 RT 2980.) Dr. Hall did not diagnose Castaneda as far as personality is concerned, but testified Castaneda's problems would lie in the personality disorders. (12 RT 2982.) Dr. Hall opined Castaneda could survive and function in a prison setting for the rest of his life. (12 RT 2983.)

On cross-examination by the prosecutor, Dr. Hall acknowledged a long list of minor and serious rules violations Castaneda had committed while incarcerated at different prisons throughout his life. (12 RT 2988-2993.) The prosecutor asked if the prison system tries to house the prisoner in an area they have lived or next to their family. Dr. Hall responded that was generally true. The prosecutor asked if exceptions existed for "special prisoners," meaning prisoners with extensive records or violent records. Dr. Hall responded, "Yes." (12 RT 2993-2994.) The prosecutor then asked:

> Now in Mr. Castaneda's case -- let's take this last imprisonment that occurred in August 28th, 1991, and that was for robbery. He had already suffered two prison sentences for burglary, first degree, and one for a second degree burglary, and he had three **escapes** from custody, two escapes from a CYA facility -- or two different CYA facilities, then

an escape from Los Angeles jail. And in addition to that he had been to jail four different times.

Now I take it, given that background, that background, especially the **escapes** and the offense for which he is entering, the armed robbery, that that would in fact classify him as a special risk type of prisoner?

(12 RT 2994, emphasis added.)

Dr. Hall responded, "Yes, it would." (12 RT 2994.) Later during cross-examination, Dr. Hall acknowledged the names of the CYA facilities from which Castaneda had escaped. (12 RT 3011.)

Given Dr. Hall's opinion that Castaneda could function in a prison setting for the rest of his life, it was permissible for the prosecutor to inquire on cross-examination about Castaneda's non-violent escapes from custody to rebut Dr. Hall's good character evidence. (12 RT 2994, 3011.) In other words, it was permissible to show that Castaneda in fact could not and would not function well in a prison setting for the rest of his life. Thus, because an objection to the prosecutor's escape evidence would have lacked merit, defense counsel's performance was not deficient.

Second, defense counsel's performance was not deficient as to Dr. Gawin. Dr. Gawin opined that ages 19 through 24 were the best years of Castaneda's life because he worked constructively and limited his marijuana and alcohol use. Life declined greatly for Castaneda after the age of 24 because he began to use heroin, and cocaine to a lesser degree. (12 RT 3047-3050.) On cross-examination by the prosecutor, in regard to Dr. Gawin's testimony that ages 20 to 24, roughly during 1980 to 1984, were the most stable for Castaneda, Dr. Gawin did not deny in his testimony that: (1) Castaneda pled guilty to first degree burglary in 1980 and went to the CYA; (2) Pauline Romero had Castaneda's first child immediately thereafter; (3) Castaneda **escaped** from CYA and was picked up for assault with a deadly weapon; (4) Castaneda began to use heroin and has a child with Lucille Gonzales in 1982; (5) Castaneda had

a child with Elvira in 1983 and married her; (6) the marriage failed because both of them accuse the other of seeing other people; and (7) in 1984, Castaneda started seeing and living with Ibarra, was arrested for drugs and a sawed off rifle. (12 RT 3067-3070.) Dr. Gawin also did not deny that Castaneda escaped from county jail in February 1989. (12 RT 3070-3071.)

Given Dr. Gawin's opinion, it was permissible for the prosecutor to inquire on cross-examination about Castaneda's non-law abiding acts during that time in his life to rebut Dr. Gawin's good character evidence. This time in Castaneda's life included, among many other things, an escape from CYA. (12 RT 3067-3070.) Also, there was no reason for defense counsel to object to the prosecutor's reference to Castaneda's escape from county jail in February 1989 during the cross-examination of Dr. Gawin because the reference was so brief an objection would have brought attention to it, and the jury already knew Castaneda had escaped from custody several times based on the prosecutor's proper reference to those escapes during Dr. Hall's testimony. (12 RT 3070-3071.) Thus, because an objection to the prosecutor's escape evidence would have lacked merit, defense counsel's performance was not deficient.

Third, defense counsel's performance was not deficient as to the exhibits. Before penalty phase closing arguments, the parties discussed the exhibits. Without objection, the trial court admitted into evidence, among others, Exhibits 63, 64, 65 and 76. (15 RT 3765-3766; 2 CT 499.) Those exhibits contained documents pertaining to, respectively: (1) Castaneda's 1987 conviction for second degree burglary (2 CT 527-605); (2) Castaneda's 1991 conviction for robbery (3 CT 606-688); (3) Castaneda's 1980 conviction for burglary; and (4) Castaneda's 1989 misdemeanor conviction for escape from custody (3 CT 765-787). The probation officer's report in Exhibit 63 contains very brief references to Castaneda's escape from CYA in 1980 and return to CYA in 1981. (2 CT 555; see AOB 309.) The probation officer's report in

Exhibit 64 contained very brief references to Castaneda's escape from CYA in 1980 and return in 1981, and his 1989 misdemeanor conviction for escape from custody. (3 CT 680; see AOB 310.) Exhibit 65 contained a brief reference to Castaneda at age 17 going "AWOL" from Camp Tenner and being apprehended a month and a half later. (3 CT 717; see AOB 310.)

Later, the parties further discussed Exhibit 76, documents pertaining to Castaneda's 1989 misdemeanor conviction for escape from custody. (15 RT 3776-3777; 16 RT 3790-3793.) Defense counsel argued Exhibit 76 could not be used as a factor in aggravation because the crime was a misdemeanor and non-violent. (16 RT 3792.) The prosecutor eventually argued the escapes were not evidence in support of the factors in mitigation or aggravation, but were evidence that refutes character evidence presented by Castaneda. (16 RT 3791-3792.) The trial court, citing *People v. Boyd* (1985) 38 Cal.3d 762, 776, concluded Exhibit 76 should not be admitted into evidence because that conviction was a misdemeanor and was non-violent. (16 RT 3789-3792.)

The jury had already properly heard about Castaneda's numerous escapes from custody as rebuttal evidence during the testimony of Dr. Hall and Dr. Gawin. The very brief references to Castaneda's escapes in those exhibits simply provided further proper rebuttal evidence. Thus, because an objection to the escape evidence in the exhibits would have lacked merit, defense counsel's performance was not deficient.

Further, even if trial counsel's performance was deficient in any way as to the admission of the escape evidence discussed above, the deficiency was nonetheless non-prejudicial under the *Strickland* "reasonable probability" standard.[46/] First, Castaneda cannot establish prejudice because he merely

---

46. Contrary to Castaneda's suggestion that the *Chapman* standard of prejudice should be used (AOB 317), the *Strickland* standard of prejudice should be used because the escape evidence issue is raised here within the context of an ineffective assistance of counsel claim. Moreover, even if the

assumes the jury improperly considered the escape evidence in aggravation when it determined Castaneda should receive death. (AOB 317.) There is no support in the record to support Castaneda's assumption. Claims that counsel's deficient representation was prejudicial cannot be evaluated based solely on a defendant's unsubstantiated speculation. (*People v. Bolin* (1998) 18 Cal.4th 297, 334.) Second, even assuming the jury considered the escape evidence in aggravation, defense counsel's deficient performance was not prejudicial under *Strickland.* It is not reasonably probable the penalty verdict of death would have been different because, as discussed in Argument XV, the evidence in aggravation greatly outweighed the evidence in mitigation.

Strickland standard is not used, the standard of prejudice would not be that of *Chapman*. Instead, the proper standard would be the standard for state-law error during the penalty phase of a capital trial, i.e. whether there was a "reasonable possibility" the verdict was effected by the error. (*People v. Jackson* (1996) 13 Cal.4th 1164, 1232; *People v. Gallego* (1990) 52 Cal.3d 115, 196; *People v. Brown* (1988) 46 Cal.3d 432, 447.)

XIX.

DEFENSE COUNSEL WAS NOT INEFFECTIVE BY NOT REQUESTING MODIFICATION OF CALJIC NO. 8.85 TO DELETE INAPPLICABLE MITIGATING FACTORS, AND BY NOT OBJECTING TO THE PROSECUTOR'S ARGUMENT REGARDING INAPPLICABLE MITIGATING FACTORS

Castaneda asserts the judgment of death should be reversed because: (1) the trial court failed to sua sponte modify CALJIC No. 8.85 to delete inapplicable mitigating factors; (2) the prosecutor used the inapplicability of the mitigating factors as factors in aggravation; and (3) alternatively, defense counsel rendered ineffective assistance of counsel by failing to request modification of CALJIC No. 8.85 to delete inapplicable mitigating factors and failing to object to the prosecutor's argument that the absence of mitigating factors constituted factors in aggravation. (AOB 320-337.) Castaneda is wrong. Defense counsel did not render ineffective assistance of counsel by not requesting modification of CALJIC No. 8.85 to delete inapplicable mitigating factors. Also, defense counsel did not render ineffective assistance of counsel by not objecting to the prosecutor's argument regarding inapplicable mitigating factors because the prosecutor did not argue that the inapplicable mitigating factors could be used as factors in aggravation.

At the beginning of the penalty phase, the parties agreed that before evidence was presented, the trial court would pre-instruct the jury with CALJIC No. 8.85 [Penalty Trial–Factors For Consideration]. (12 RT 2916-2918, 2932-2933.) The trial court pre-instructed the jury with CALJIC No. 8.85 as follows:

> In determining which penalty is to be imposed on the defendant, you shall consider all of the evidence which has been received during any part of the trial in this case. You shall consider, take into account and be guided by the following factors, if applicable:

(a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true.

(b) The presence or absence of criminal activity by the defendant, other than the crimes for which the defendant has been tried in the present proceedings, which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.

(c) The presence or absence of any prior felony conviction, other than the crimes for which the defendant has been tried in the present proceedings.

(d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(e) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.

(f) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct.

(g) Whether or not the defendant acted under extreme duress or under the substantial domination of another person.

(h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirement of law was impaired as a result of metal disease or defect or the effects of intoxication.

(i) The age of the defendant at the time of the crime.

(j) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

(k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime and any sympathetic or other 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. You must disregard any jury

instruction given to you in the guilt or innocence phase of this trial which conflicts with this principle.

(12 RT 2934-2935; see 3 CT 807-808.)

Defense counsel followed with his opening statement and said that factors (a), (b) and (c) were factors in aggravation for the prosecution, that mitigating factors (e), (f), (g), (i), (j) did not apply, and that there would be evidence to support mitigating factors (d), (h) and (k). (12 RT 2936-2940.)

During closing arguments of the penalty phase, the prosecutor argued that factors (e), (f), (g), (i), and (j) did not apply to the case, without stating those factors could be used in aggravation. (16 RT 3805-3809.) In regard to factor (i), Castaneda's age, the prosecutor said Castaneda's age was not mitigating, but could not be used as a factor in aggravation. (16 RT 3808-3809.) The prosecutor argued that the evidence did not support factor (d), extreme mental or emotional disturbance, because the experts agreed Castaneda did not have a mental or emotional defect or illness. (16 RT 3806.) Likewise, the prosecutor argued that the evidence did not support factor (h), impairment as a result of metal disease or defect or the effects of intoxication, because there was no evidence that Castaneda's heroin addiction played a role in the crime and the experts agreed Castaneda did not have a mental disease, mental defect or mental illness. (16 RT 3807.) The prosecutor added, "As a matter of fact, as Dr. Hall said, the defendant is, frighteningly enough, a perfectly normal person." (16 RT 3807-3808.) The prosecutor then extensively argued to refute Castaneda's mitigating evidence under factor (k) (16 RT 3809-3817), and to support the evidence supporting factors in aggravation (a), (b) and (c) (16 RT 3819-3820).

Defense counsel argued that factors (a), (b) and (c) were factors in aggravation for the prosecution, not factors in mitigation. Defense counsel said mitigating factors (e), (f), (g), and (i) and (j) did not apply to the case. Defense

counsel argued the evidence he believed supported mitigating factors (d), (h) and (k). (16 RT 3821-3842.)

The trial court again instructed the jury with CALJIC No. 8.85 after penalty phase closing arguments. (15 RT 3850-3852; see 3 CT 807-808.)

A. Defense Counsel Was Not Ineffective For Not Requesting Deletion Of Inapplicable Mitigating Factors From CALJIC No. 8.85

A request to delete inapplicable mitigating factors from CALJIC No. 8.85 would be a request for a clarifying instruction. (*People v. Ramirez* (2006) 39 Cal.4th 398, 468.) If an amplifying or clarifying instruction is not requested at trial, the issue is forfeited on appeal. (*People v. Hudson* (2006) 38 Cal.4th 1002, 1011-1012; *People v. Hart, supra,*20 Cal.4th at pp. 621-623; *People v. Bolin, supra*, 18 Cal.4th at p. 329.) Thus, the issue of whether the trial court should have deleted the inapplicable mitigating factors from CALJIC No. 8.85 has been forfeited on appeal.

However, Castaneda claims that in the alternative, defense counsel rendered ineffective assistance of counsel by not requesting the trial court to delete the inapplicable mitigating factors from CALJIC No. 8.85. Castaneda is wrong. It is proper for a trial court to give the jury CALJIC No. 8.85 without deleting inapplicable mitigating factors (*People v. Cook* (2006) 39 Cal.4th 566, 610; *People v. Perry, supra,* 38 Cal.4th at p. 319; *People v. Smith, supra,* 35 Cal.4th at pp. 368-369; *People v. Farnam, supra,* 28 Cal.4th at pp. 191-192), and doing so does not violate the federal Constitution (*People v. Ramirez, supra,* 39 Cal.4th at p. 468; *People v. Dickey, supra,* 35 Cal.4th at p. 928; *People v. Box* (2000) 23 Cal.4th 1153, 1217). Thus, defense counsel's performance was not deficient under *Strickland* for not requesting the deletion of the inapplicable mitigating factors from CALJIC No. 8.85 because the defense was not entitled to have the instruction modified.

In any event, even if defense counsel's performance was deficient, it was not prejudicial under *Strickland*. First, as shown above, defense counsel made clear to the jury during his opening statement and closing argument which mitigating factors were applicable and which were not. Second, the jury would not have applied inapplicable factors because CALJIC No. 8.85 told the jury to only be guided by "applicable" factors.[47] Third, it is not reasonably probable the penalty verdict of death would have been different because, as discussed in Argument XV, the evidence in aggravation greatly outweighed the evidence in mitigation.

B. Defense Counsel For Was Not Ineffective For Not Objecting To The Prosecutor's Argument Regarding Inapplicable Factors In Mitigation From CALJIC No. 8.85

It is improper for a prosecutor to argue that the absence of evidence of a mitigating factor permits or requires that the factor be considered in aggravation. (*People v. Davenport* (1985) 41 Cal.3d 247, 289.) Because in this post-*Davenport* trial defense counsel did not object to the prosecutor's argument on that basis regarding the inapplicable mitigating factors from CALJIC No. 8.85, Castaneda has forfeited the issue on appeal. (*People v. Hines, supra,* 15 Cal.4th at p. 997; *People v. Lucas* (1995) 12 Cal.4th 415, 491.)

However, Castaneda claims that in the alternative, defense counsel rendered ineffective assistance of counsel by failing to object to the prosecutor's argument that the absence of mitigating factors constituted factors in aggravation. Castaneda is wrong. Mere failure to object rarely establishes counsel's incompetence. (*People v Lucas, supra,* 12 Cal.4th at p. 492.)

---

47. CALJIC No. 8.88 [Penalty Trial-Concluding Instruction] also told the jury to only be guided by "applicable" factors. (15 RT 3855; see 3 CT 816.)

Moreover, a prosecutor may explain which mitigating factors are inapplicable, or argue that the evidence lacked the mitigating force the defendant claimed for it, as long as he or she does not expressly or implicitly argue that the absence of the factor could be considered in aggravation. (*People v. Hines, supra,* 15 Cal.4th at p. 1064; *People v. Clark* (1993) 5 Cal.4th 950, 1029-1030; *People v. Raley* (1992) 2 Cal.4th 870, 917.)

Here, without any express or implicit argument that the lack of a mitigating factor could be used in aggravation, the prosecutor merely explained during his closing argument that mitigating factors (e), (f), (g), (i), and (j) were inapplicable, and mitigating factors (d), (h) and (k) were in dispute. The prosecutor then argued that the evidence did not support factor (d) or factor (h). Specifically, the prosecutor's comment regarding factor (h), impairment as a result of metal disease or defect or the effects of intoxication, that "As a matter of fact, as Dr. Hall said, the defendant is, frighteningly enough, a perfectly normal person," was only about the lack of evidence to support factor (h), and not an express or implied argument that the lack of evidence supporting factor (h) meant that factor could be considered in aggravation. Indeed, the prosecutor even told the jury in regard to factor (i), age, that despite the lack of mitigating evidence on that factor, it could not be used as a factor in aggravation. Moreover, defense counsel's argument showed that he agreed with the prosecutor as to which factors were in dispute. Thus, because the prosecutor did not commit *Davenport* error, defense counsel's performance was not deficient under *Strickland* by not objecting to the prosecutor's argument regarding the inapplicable mitigating factors from CALJIC No. 8.85, because the objection would have lacked merit.

In any event, even if the prosecutor committed *Davenport* error and defense counsel's performance was deficient by not objecting, the deficiency was not prejudicial under *Strickland*. First, it must be presumed that the jury

was not misled and understood how to evaluate the absence of a particular mitigating factor, because it was instructed with CALJIC Nos. 8.85 and 8.88 to consider only those sentencing factors it deemed applicable, to weigh the statutory factors and assess whatever value it deemed appropriate to them, to reach a determination of what penalty it deemed appropriate without a process of mechanical weighing of factors, and to impose the death penalty only if each juror determined the aggravating evidence was so substantial in comparison with the mitigating circumstances it warranted death. (e.g. *People v. Lucas, supra,* 12 Cal.4th at p. 493.) Second, it is not reasonably probable the penalty verdict of death would have been different because, as discussed in Argument XV, the evidence in aggravation greatly outweighed the evidence in mitigation.

XX.

CALJIC NO. 8.88 IS CONSTITUTIONAL AND ACCURATELY DESCRIBED TO THE JURY HOW IT WAS TO WEIGH THE AGGRAVATING AND MITIGATING FACTORS

Castaneda contends his death judgment must be reversed because the trial court's giving of CALJIC No. 8.88[48] violated his federal and state

---

48. After closing arguments at the penalty phase, the trial court instructed the jury with CALJIC No. 8.88 [Penalty Trial–Concluding Instruction] in relevant part, as follows:

> The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale or the arbitrary assignment of weights to any of them. You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider. [¶] In weighing the various circumstances, you determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances. [¶] To return a judgment of death, each of you

constitutional rights because the instruction failed to convey: (1) a single mitigating factor was sufficient to conclude that he should be sentenced to life without the possibility of parole; and (2) a sentence of life without the possibility of parole could still be imposed in the absence of any mitigating facts. (AOB 338-345.) Castaneda is wrong. This Court has repeatedly rejected Castaneda's two claims and held that CALJIC No. 8.88 is constitutional, and accurately describes how each juror is to weigh the aggravating the mitigating factors. (*People v. Chatman* (2006) 38 Cal.4th 344, 410; *People v. Elliot* (2005) 37 Cal.4th 453, 488; *People v. Moon, supra,* 37 Cal.4th at pp. 42-43; *People v. Carter, supra,* 30 Cal.4th at p. 1226; *People v. Prieto* (2003) 30 Cal.4th 226, 263-264; *People v. Gurule, supra,* 28 Cal.4th at pp. 661-662; *People v. Ray* (1996) 13 Cal.4th 313, 355.) Thus, Castaneda's argument should be similarly rejected here.

In any event, if CALJIC No. 8.88 was in error as argued by Castaneda, the error was harmless under any standard based on the evidence in aggravation greatly outweighing the evidence in mitigation as discussed in Argument XV.

XXI.

THE TRIAL COURT HAD NO DUTY TO INSTRUCT THE JURY ON THE MEANING OF LIFE WITHOUT THE POSSIBILITY OF PAROLE

Castaneda, relying on *Simmons v. South Carolina, supra,* 512 U.S. 154 and *Shafer v. South Carolina* (2001) 532 U.S. 36 [121 S.Ct. 1263, 149 L.Ed.2d 178], argues that his federal constitutional rights to due process of law and

---

> must be persuaded that the aggravating circumstances are so substantial in the comparison with the mitigating circumstances that it warrants death instead of life without parole.

(15 RT 3855-3856; see 3 CT 816.)

against cruel and unusual punishment were violated when the trial court failed to sua sponte instruct the jury on the meaning of life without the possibility of parole. (AOB 346-356.) The trial court had no duty to instruct the jury on the meaning of life without the possibility of parole. This Court has rejected this argument repeatedly, even after considering *Simmons* and *Shafer*. (*People v. Moon, supra,* 37 Cal.4th at p. 43; *People v. Wilson* (2005) 36 Cal.4th 309, 352-353; *People v. Dickey, supra,* 35 Cal.4th at p. 929; *People v. Prieto, supra,* 30 Cal.4th at pp. 269-271; *People v. Jones* (1998) 17 Cal.4th 279, 314; *People v. Ashmus* (1991) 54 Cal.3d 932, 993-994; *People v. Bonin* (1988) 46 Cal.3d 659, 698.) Thus, Castaneda's argument should be similarly rejected here.

XXII.

ASSUMING CASTANEDA HAD A RIGHT TO BE PRESENT DURING DISCUSSION OF THE PENALTY PHASE INSTRUCTIONS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS AND STATE STATUTORY LAW, CASTANEDA VALIDLY WAIVED THAT RIGHT

Castaneda contends the judgment of death should be reversed because he did not validly waive his right to be present during a discussion of the penalty phase instructions in violation of his rights under the Sixth and Fourteenth Amendments, and state statutory law. (AOB 357-364.) Castaneda is wrong. Assuming Castaneda had a right to be present during the discussion of the penalty phase instructions under the Sixth and Fourteenth Amendments and state statutory law, Castaneda validly waived that right. Moreover, even assuming error, Castaneda was not prejudiced.

A criminal defendant has a right to be personally present at certain pretrial proceedings and at trial under the confrontation clause of the Sixth Amendment to the United States Constitution, the due process clause of the Fourteenth Amendment to the United States Constitution, article I of section 15

of the California Constitution, and Penal Code sections 977 and 1043. (*People v. Cole, supra,* 33 Cal.4th at p. 1230.)

A. Castaneda's Right To Presence Was Not Violated Under The Sixth And Fourteenth Amendments

Under the Sixth Amendment's confrontation clause, a criminal defendant has a right to be present at every stage of trial in order to confront the witnesses and evidence against him. (*United States v. Gagnon, supra,* 470 U.S. at p. 526; *Illinois v. Allen, supra*, 397 U.S. at p. 338; *Rice v. Wood, supra,* 44 F.3d at p. 1400, fn.5.) A criminal defendant does not have a right to be personally present at a particular proceeding under the Sixth Amendment's confrontation clause unless his appearance is necessary to prevent interference with his right to effectively cross-examine a witness. (*People v. Cole, supra,* 33 Cal.4th at p. 1230.) In other words, under the Sixth Amendment, a defendant has a right to be present during the taking of evidence. (*People v. Dickey, supra,* 35 Cal.4th 884, 923.)

Here, Castaneda had no Sixth Amendment right to personal presence at the discussion regarding penalty phase jury instructions because that discussion did not involve the taking of evidence and effective cross-examination. Indeed, Castaneda makes no attempt to specifically explain how the Sixth Amendment right to presence applies to this issue, but instead appears to make an argument relevant to his Fourteenth Amendment due process right and state statutory right to presence. (AOB 358-364.) Castaneda's Sixth Amendment right to presence was not violated by his absence from the discussion regarding penalty phase jury instructions.

Under the Fourteenth Amendment's due process clause, a defendant has a right to be present at trial, when not actually confronting witnesses or evidence against him, only where his presence has a reasonably substantial

relation to defending against the charge. (*Kentucky v. Stincer, supra,* 482 U.S. at p. 745; *United States v. Gagnon, supra,* 470 U.S. at p. 526.) In other words, a defendant has a right to be present when: (1) the proceeding is critical to the outcome of the case; and (2) the defendant's presence would contribute to the fairness of the procedure. (*Ibid*; *People v. Perry, supra,* 38 Cal.4th at p. 312.) A defendant does not have a right to be present when his presence would be useless, "or the benefit but a shadow." (*Snyder v. Massachusetts, supra,* 291 U.S. at pp. 105-06.) Thus, "a defendant may ordinarily be excluded from conferences on questions of law, even if those questions are critical to the outcome of the case, because the defendant's presence would not contribute to the fairness of the proceeding." (*People v. Perry* at p. 312.) A defendant in a capital case does not have a right to be present at an informal off the record discussion on jury instructions, or an in-chambers discussion of guilt and phase instructions, because such discussions do not bear a substantial relation do a defendant's opportunity to defend himself. (*People v. Holt, supra,* 15 Cal.4th at pp. 706, 706, fn. 29, 707; *People v. Morris, supra,* 53 Cal.3d at p. 210.) Under state and federal constitutional law, a capital defendant may validly waive his presence at critical stages of trial if the waiver is voluntary, knowing and intelligent. (*People v. Dickey, supra,* 35 Cal.4th at p. 923; *People v. Davis, supra,* 36 Cal.4th at p. 531-532.)

Here, because a defendant in a capital case does not have a right to be present at an informal off the record discussion on jury instructions, or an in-chambers discussion of guilt and penalty phase instructions, as set forth in *Morris* and *Holt*, Castaneda did not have a right to be present at the open court discussion regarding penalty phase instructions because it was a proceeding that did not bear a substantial relation do a defendant's opportunity to defend

himself.[49] Assuming Castaneda had a right to be present, Castaneda's waiver of his presence was voluntary, knowing and intelligent based on the trial court explaining to Castaneda that the penalty phase instructions used in the case were going to be discussed.

During the afternoon session on November 29, 1999, before the attorneys and trial court discussed the penalty phase exhibits, defense counsel informed the trial court that Castaneda was requesting to be excused from the upcoming discussion about the exhibits and the following planned discussion about penalty phase jury instructions. (15 RT 3762.) The attorneys and trial court completed discussion about the exhibits. (15 RT 3762-3766.) Next, when they were about to discuss the penalty phase jury instructions, the following colloquy occurred:

> [THE COURT]: . . . I have been reviewing Penal Code Sections 977 and 1043 with regard to the presence of the defendant for -- or his absence at his request. 1043 deals with the defendant's presence at trial and 977 deals with the defendant's presence otherwise. It would appear that the discussion on instructions would be covered under 977. [¶] Do either of you have any input on that issue?
>
> [MR. MCDOWELL]: My reading of the case law is that in this particular area, jury instructions, that the defendant can at his request be safely allowed not to be present at his request.
>
> [MR. HARDY]: That's my understanding too.
>
> [THE COURT]: All right. Mr. Castaneda, then your attorney has indicated that you are requesting to be excused while we go over jury instructions. Is that your request, sir?
>
> [THE DEFENDANT]: That's correct, your Honor.

---

49. For the same reason, Castaneda did not have right to be present under article I, section 15, of the state constitution. (*People v. Holt, supra,* 15 Cal.4th at pp. 706, 706, fn. 29, 707.)

[THE COURT]: Do you understand that this afternoon we are going to finalize the jury instructions that will be given tomorrow to the jury with regard to this phase?

[THE DEFENDANT]: Yes, I understand that.

[THE COURT]: And you still wish not to be present?

[THE DEFENDANT]: That's correct.

[THE COURT]: All right. The I will allow you to be excused at this time. [¶] Let's take a ten-minute recess, counsel.

(15 RT 3766-3767.)

The parties then discussed penalty phase jury instructions and completed that discussion. (15 RT 3767-3788.) Castaneda was present during the next court session. (16 RT 3789.)

Assuming Castaneda had a right to be present under the Sixth and/or Fourteenth Amendments, and further assuming his waiver was invalid, the error by the trial court was harmless beyond a reasonable doubt. (*People v. Davis, supra,* 36 Cal.4th at p. 532.) Here, there is simply nothing Castaneda's presence would have added to the penalty phase instruction discussion. The sole notable issue that arose while Castaneda was absent was about how Exhibit 76, documents pertaining to Castaneda's 1989 misdemeanor conviction for escape from custody (see 3 CT 765-787), and other escapes from custody by Castaneda, would be used in the case (15 RT 3776-3777). The prosecutor argued that the escape conviction and other escapes could be used as aggravating evidence under Penal Code section 190.3, factor (b). However, defense counsel argued that all of the escape evidence could not be used in aggravation because the escapes were non-violent. (15 RT 3776-3777.) From this, in a reprise from Argument XVIII in Castaneda's opening brief, Castaneda argues that his absence was prejudicial because had he been present, it is

reasonably likely the jury would not have considered the escape evidence in aggravation. (AOB 363-364.) Castaneda is wrong.

First, the disputed escape evidence discussed in detail in Argument XVIII of this brief, including all testimony during trial and documentary evidence in Exhibits 63, 64, 65, was admitted into evidence when Castaneda was present in the courtroom. Indeed, Castaneda left the courtroom immediately after Exhibits 63, 64 and 65 had been admitted into evidence. (15 RT 3764-3767.) Second, after the prosecutor argued that escape evidence could be used to refute Castaneda's good character evidence, Exhibit 76, which as noted above was discussed originally while Castaneda was not present in the courtroom, was not admitted into evidence. (16 RT 3789-3793.) In addition, Castaneda was present in the courtroom when the final discussion regarding Exhibit 76 occurred and when the trial court decided not to admit that exhibit into evidence. (16 RT 3789.) Thus, Castaneda was present for all escape evidence that went to the jury. Third, as stated in Argument XVIII of this brief, Castaneda's assertion that the jury actually considered Castaneda's escapes as aggravating evidence is pure speculation because nothing in the record supports that assertion. Therefore, assuming Castaneda had a right to be present under the Sixth and/or Fourteenth Amendments, and further assuming his waiver was invalid, the error by the trial court was harmless beyond a reasonable doubt because Castaneda's presence would have added nothing to the penalty phase instruction discussion.

B. Castaneda's Right To Presence Was Not Violated Under State Statutory Law Or The Error Was Harmless

As to Castaneda's state statutory right to presence, Penal Code sections 977 and 1043, when read together, permit a capital defendant to be absent from the courtroom only when: (1) he has been removed by the court for disruptive

behavior under section 1043, subdivision (b)(1); and (2) he voluntarily waives his rights pursuant to section 977, subdivision (b)(1). (*People v. Young, supra,* 34 Cal.4th at p. 1214.) However, section 977, subdivision (b)(1), the subdivision that authorizes waiver for felony defendants, expressly provides for situations where the defendant cannot waive his right to be present, including during the **taking of evidence before the trier of fact.**[50/] Moreover, the broad "voluntary" exception to the requirement that a felony defendant be present at trial under section 1043, subdivision (b)(1) does not apply to capital defendants. Thus, a trial court errors under sections 977 and 1043 by permitting a non-disruptive capital defendant to be absent **during the taking of evidence at the penalty phase**. (*Ibid*, emphasis added]; *People v. Jackson, supra,* 13 Cal.4th at p. 1210.) In other words, a capital defendant cannot voluntarily waive his rights under sections 977 and 1043 to be present at trial, i.e., during the taking of evidence. (*People v. Dickey, supra,* 35 Cal.4th at p. 923.) However, similar to the Fourteenth Amendment, under section 977, a defendant is not entitled to be personally present during proceedings which bear no reasonable, substantial relations to his opportunity to defend against the charges against him. (*People v. Holt, supra,* 15 Cal.4th at p. 706, 706, fn. 29, 707.) Under section 977, subdivision (b), a defendant must waive his right to be personally present in

---

50. At the time of Castaneda's trial in 1999, Penal Code section 977, subdivision (b)(1), in relevant part, provided:

> In all cases in which a felony is charged, the accused shall be present at the arraignment, at the time of the plea, during the preliminary hearing, during those portions of the trial when evidence is taken before the trier of fact, and at the time of the imposition of sentence. The accused shall be personally present at all other proceedings unless he or she shall, with leave of court, execute in open court, a written waiver of his or her right to be personally present, as provided in paragraph (2).

writing and file that writing with the court. (*People v. Huggins, supra,* 38 Cal.4th at p. 203; *People v. Davis, supra,* 36 Cal.4th at p. 531.) And the written waiver must be voluntary, knowing and intelligent. (*People v. Davis* at pp. 531-532.)

Here, as set forth in *Holt*, Castaneda did not have a state statutory right to be present at the discussion regarding penalty phase instructions because it bore no substantial relation to his opportunity to defend himself. (*People v. Holt, supra,* 15 Cal.4th at pp. 706, fn 29, 707.) Assuming Castaneda had a state statutory right to be present, the waiver of his right to be present was valid as to being voluntary knowing and intelligent because the trial court explained that the penalty phase instructions used in the case were going to be discussed, but was invalid under section 977, subdivision (b) because the waiver was not in writing. Although the waiver was invalid under section 977, subdivision (a), the trial court's error was harmless because there is no reasonable possibility that jury would have reached a different result had the error not occurred. (*People v. Dickey, supra,* 35 Cal.4th at p. 923.)[51] The error was harmless under that standard for the same reasons set forth above regarding harmless error under the Sixth and Fourteenth Amendments.

XXIII.

ALL OF CASTANEDA'S FREQUENTLY RAISED AND REJECTED CHALLENGES TO CALIFORNIA'S DEATH PENALTY LAW SHOULD BE REJECTED

Castaneda raises 16 different commonly raised legal constitutional challenges to California's Death Penalty Law. The 16 claims, listed briefly, are:

---

51. For state law error, the standard is "reasonable possibility" for error during the penalty phase (*People v. Dickey, supra,* 35 Cal.4th at p. 923) and *Watson's* "reasonable probability" standard for error during the guilt phase. (*People v. Davis, supra,* 36 Cal.4th at p. 532).

(1) Penal Code section 190.2 is impermissibly broad; (2) Penal Code section 190.3, factor (a), allows the arbitrary and capricious imposition of death; (3) Penal Code section 190.3 is unconstitutional under *Ring v. Arizona, supra,* 536 U.S. at p. 584 and other cases; (4) Penal Code section 190.3 is unconstitutional for failing to require unanimity as to the applicable aggravating factors; (5) any jury finding necessary for the imposition of death must be found beyond a reasonable doubt; (6) the jury must agree unanimously on the aggravating circumstances; (7) the jury must be instructed that death may only be imposed if the circumstances in aggravation outweigh those in mitigation beyond a reasonable doubt; (8) if not the beyond a reasonable doubt standard, the preponderance of the evidence standard should apply to the findings of aggravating circumstances; (9) a burden of proof is required during the penalty phase as a tie-breaking rule; (10) even if there is no burden of proof during the penalty phase, the trial court erred in failing to so instruct the jury; (11) aggravating circumstances require written findings; (12) the death penalty law is unconstitutional for failing to require intercase proportionality review; (13) the death penalty law is unconstitutional because it allows for the use of unadjudicated criminal activity; (14) Penal Code section 190.3's use of adjectives such as "extreme" and "substantial" impermissibly act as barriers to consideration of mitigating circumstances; (15) the death penalty law violates equal protection because it denies capital defendants procedural safeguards afforded to non-capital defendants; and (16) the death penalty law is unconstitutional because it violates international laws and treaties. (AOB 365-429.)

This Court rejected all 16 claims Castaneda raises here in *People v. Elliot, supra*, 37 Cal.4th at pages 487-488, and *People v. Smith, supra,* 35 Cal.4th at pages 373-375. Moreover, this Court rejected 11 of the claims even more recently in *People v. Cook, supra,* 39 Cal.4th at pages 617-620. This

Court should reject all of Castaneda's claims for the reasons set forth in *Elliot, Smith,* and *Cook.*

CONCLUSION

For the reasons stated above, respondent respectfully requests based on prejudicial instructional error, the kidnapping conviction in count 3, and the kidnapping special circumstance, be reversed, and the judgment as to guilt and penalty be affirmed in all other respects.

Dated: February 23, 2007

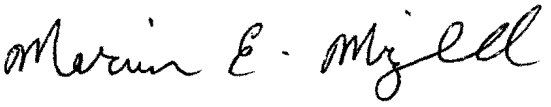
Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of the State of California

DANE R. GILLETTE
Chief Assistant Attorney General

GARY W. SCHONS
Senior Assistant Attorney General

HOLLY WILKENS
Deputy Attorney General



MARVIN E. MIZELL
Deputy Attorney General

Attorneys for Plaintiff and Respondent

SD2000XS0002
70082880.wpd

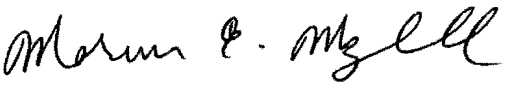
CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 56,510 words.

Dated: February 23, 2007

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of the State of California



MARVIN E. MIZELL
Deputy Attorney General

Attorneys for Plaintiff and Respondent

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **PEOPLE v. GABRIEL CASTANEDA**
Case No.: **S085348**

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 and older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On February 26, 2007, I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

John L. Staley
Law Office of John L. Staley
11770 Bernardo Plaza Court, Ste. 305
San Diego, CA 92128
(Attorney for Gabriel Castaneda, 2 Copies)

The Honorable Mary E. Fuller
Judge
c/o Appeals Section
San Bernardino County Superior Court
351 N. Arrowhead Ave.
San Bernardino, CA 92415

Michael G. Millman
Executive Director
California Appellate Project (SF)
101 Second Street, Suite 600
San Francisco, CA 94105

Michael McDowell
San Bernardino County District Attorney's Office
8303 Haven Avenue
Rancho Cucamonga, CA 91730

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 February 26, 2007, at San Diego, California.

Connie Pasquali
Declarant

Connie Pasquali
Signature

70067222.wpd