SUPREME COURT COPY COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, **v.** **ROYAL CLARK,** Defendant and Appellant.	**CAPITAL CASE** S045078

Fresno County Superior Court No. 446252-9
The Honorable John E. Fitch, Judge

RESPONDENT'S BRIEF

DEATH PENALTY

BILL LOCKYER
Attorney General of the State of California

ROBERT R. ANDERSON
Chief Assistant Attorney General

MARY JO GRAVES
Senior Assistant Attorney General

ERIC CHRISTOFFERSEN
Deputy Attorney General

KATHLEEN A. McKENNA
Deputy Attorney General

WILLIAM K. KIM
Deputy Attorney General
State Bar No. 207818

2550 Mariposa Mall, Room 5090
Fresno, CA 93721
Telephone: (559) 477-1675
Fax: (559) 445-5106

Attorneys for 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 CONTENTS (continued)

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 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)

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)

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

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, **v.** **ROYAL CLARK,** Defendant and Appellant.	**CAPITAL CASE** S045078

STATEMENT OF THE CASE

On September 19, 1991, the Fresno County District Attorney filed an information charging appellant with: count 1 - murder of Billie Jo Laurie Farkas (Pen. Code, § 187);[1/] count 2 - attempted rape of Billie Jo Laurie Farkas (§§ 664/261(2)); count 3 - rape of Billie Jo Laurie Farkas (§ 261(2)); count 4 - robbery of Billie Jo Laurie Farkas (§§ 211/212.5, subd. (b)); count 5 - assault upon Angie Higgins by force likely to produce great bodily injury (§ 245(a)(1)); count 6 - false imprisonment of Angie Higgins (§ 236); count 7 - robbery of Angie Higgins (§ 211/212.5, subd. (b)); count 8 - kidnapping of Angie Higgins (§ 207, subd. (a)); and count 9 - attempted murder of Angie Higgins (§§ 664/187). Enhancement allegations included, as to counts 1, 4, and 8, personal use of a deadly weapon (§ 12022, subd. (b)); and as to counts 4 and 8, intentional infliction of great bodily injury (§ 12022.7). The District Attorney sought the death penalty on the murder count (CT 473), alleging the following special circumstances: murder was committed during the commission of attempted rape (§ 190.2, subd. (a)(17)(C)); murder was

---

1. All statutory references hereinafter are to the Penal Code unless otherwise indicated.

committed during the commission of robbery (§ 190.2, subd. (a)(17)(A)); and murder was committed for the purpose of preventing the victim's testimony in criminal proceeding (§ 190.2, subd. (a)(10)). (CT 339-343.)[2/]

On September 25, 1991, appellant entered not guilty pleas to all counts and denied all special allegations. (CT 347; 9/25/91 RT 3-5.)

On November 15, 1991, appellant moved under section 995 to dismiss the special circumstance allegations and counts 2, 3, and 4. (CT 348-362.) On January 29, 1992, the court denied the motion as to the special circumstance allegations and counts 2 and 4. The court granted the motion as to count 3.[3/] (CT 378-441; RT 126-128.)

On June 4, 1993, against his attorney's advice, appellant entered an additional plea of not guilty by reason of insanity. (CT 502-503; 5/24/03 RT 38-57; 6/4/03 RT 58-70.)

On June 10, 1993, expressing doubt about appellant's competence to stand trial, the court suspended criminal proceedings and initiated competency

---

2. "CT" refers to the Clerk's Transcripts On Appeal, consisting of seven volumes; "I SCT" refers to the Supplemental Clerk's Transcripts On Appeal #1, consisting of five volumes; "II SCT" refers to the Supplemental Clerk's Transcripts On Appeal #2, consisting of eleven volumes; "III SCT" refers to the Supplemental Clerk's Transcripts On Appeal #3, consisting of a single volume; "IV SCT" refers to the Supplemental Clerk's Transcripts On Appeal #4, consisting of a single volume; "V SCT" refers to the Supplemental Clerk's Transcripts On Appeal #5, consisting of two volumes; "VI SCT" refers to the Supplemental Clerk's Transcripts On Appeal #6, consisting of thirty-two volumes; "VII SCT" refers to the Supplemental Clerk's Transcripts On Appeal #7, consisting of a single volume; "RT" refers to the Reporter's Transcripts On Appeal, consisting of eighty-four volumes. Supplemental Reporter's Transcripts On Appeal for specific proceedings can be identified by the numeric date followed by "RT" – e.g., "9/25/01 RT" refers to the Reporter's Transcripts On Appeal for the September 25, 2001, proceedings.

3. The counts were thereafter renumbered accordingly. (RT 136-137; see CT 339-343.)

proceedings. (CT 506-508.) Despite the opinion of two court-appointed mental health experts that appellant was competent to stand trial, appellant insisted on a jury trial on the competency issue. (RT 66-67; see CT 1805-1813, 1819-1824.) On July 12, 1993, the jury trial to determine whether appellant was competent to stand trial, began. (CT 516.) On July 23, 1993, the jury found appellant to be mentally competent to stand trial. (CT 568.)

On August 31, 1993, guilt phase of the trial commenced with jury selection. (CT 574.) On January 4, 1994, the jury returned guilty verdicts on all counts and true findings on all enhancements and special circumstances alleged in the information. (CT 1086-1094; RT 9404-9439.)

On January 12, 1994, sanity phase of the trial began with the same jury. (CT 1097.) On January 20, 1994, the jury returned their verdict, finding appellant to have been sane during the commission of the offenses. (CT 1107-1111, 1113-1120; RT 9947-9960.)

On October 25, 1994, penalty phase of the trial began with the same jury. (CT 1480.) On November 29, 1994, the jury found that the aggravating factors substantially outweighed the mitigating factors, and that a sentence of death was warranted. The jury selected death as the appropriate sentence. (CT 1518-1519; RT 12044-12046.)

On February 3, 1995, the court denied appellant's motions for new trials on guilt and penalty (§ 1181) and for modification of jury's penalty verdict (§ 190.4). The court then sentenced appellant to death on count 1, and stayed the imposition of sentence on the remaining counts pending appeal. (CT 1755, 1796-1798; RT 12104-12121.)

Appellant's appeal is automatic. (§ 1239, subd. (b).)[4/]

---

4. The trial took about four years to complete, from the initial arraignment (January 30, 1991) to pronouncement of death (February 3, 1995).

STATEMENT OF FACTS

Guilt Phase

Appellant and Donna Kellogg (hereinafter "Donna") lived together as husband and wife. Donna's cousin was then 14-year-old Billie Jo Laurie Farkas (hereinafter "Laurie"). (RT 3561-3562, 4898, 4900-4906, 6763.) Appellant was interested in Laurie sexually. Appellant visited the Farkas residence often – three or four times a week – even when Laurie's parents were not around. (RT 3595, 5300-5302.) He took Laurie to and from school,[5/] took her to lunch, and taught her how to drive. (RT 5302, 5799-5802.) He engaged in conversations of a sexual nature with Laurie. He asked Laurie if she was a virgin, how far she had gone with guys, and if she considered having older, more experienced boyfriends – even suggesting himself as that older, experienced boyfriend. He also commented to Laurie on the tight-fitting clothing she wore. (RT 3611-3614.)

On a Saturday afternoon, January 26, 1991, Laurie and her then 15-year-old friend Angie Higgins (hereinafter "Angie") helped Laurie's older sister, Angelique, get ready for the winter formal Angelique was attending that night. After Angelique left, Laurie and Angie made plans to go to the movies for the evening. (RT 3539, 3559, 3592-3593, 4962-4963.)

That evening, after Angelique had left for the winter formal, appellant went to the Farkas residence. (RT 3559-3560, 3593.) He spoke with Laurie and asked her if she wanted to go "cruising" with him that night. Laurie told him that she and Angie were going to go see a movie later at the Festival Theater on Blackstone Avenue. (RT 4963-4968.)

---

5. Laurie's aunt, Helene Painter, testified that appellant paid a "big amount" of attention to Laurie. Appellant had called Painter and asked for the location of Laurie's school, so he could pick her up from school and bring her home. (RT 5301-5302.)

Around 8:15 p.m., Laurie's father drove Laurie and Angie to the movie theater. (RT 3563-3564, 3634-3635.) Ten or fifteen minutes later, appellant left the Farkas' residence. (RT 3564.) Upon arriving at the theater, the girls got out of the car and went to check the times for the movie they wished to see. Seeing that they were a half-hour late, they decided to wait for the next show. In the meantime, they decided to get something to eat. As they walked along Blackstone Avenue, appellant pulled up in his car. He rolled down the passenger side window and told the girls to get inside the car. The girls got into the car. (RT 4969-4974.)

Appellant drove to a nearby McDonald's. After parking the car, he asked Laurie to buy him something to eat. Laurie rebuffed, "Buy yourself something to eat. You've got your own money." Appellant responded that he did not have any money. The girls then went inside and appellant followed. (RT 4975-4977, 5137-5138.)

Angie had ten dollars. She ordered a milkshake that cost a dollar and twelve cents. She paid for the item and received $8.88 in change. She put the change into her left side pocket. Laurie had seven dollars. She ordered a milkshake and large fries. Laurie paid for those items and put the change into the front right side pocket of her jeans, which were tight-fitting (RT 5919). Appellant stood near the door, waiting and watching the girls. (RT 3540, 4977-4978.)

After the girls made their purchases, they went back to the car and appellant drove off. Appellant said that he knew a place where people were "kicking back" and that he wanted to go talk to them. He drove to Roeding Park. Noticing a police vehicle, appellant told the girls to roll up the window. Appellant drove around the park for about 20 minutes but did not see anyone that he knew. Laurie told appellant that she wanted to go back to the movies; she explained that she had to be back at the movies to call her mother at 10:00

p.m. It was a little after 9:00 p.m. Appellant replied that he knew of another place where people were getting together. He explained that he needed to talk to someone and that it would not take very long. Laurie and Angie said, "Fine." (RT 4978-4986.)

Appellant drove onto Highway 99 and got off at the Herndon Avenue exit. He then pulled into a Texaco gas station and bought gas. (RT 5172-5173, 5870-5871.)

After leaving the gas station, appellant drove to the Lost Lake recreation area, located along the San Joaquin River, below Friant Dam.[6] He drove through a long, windy road. The road came to a dead end at a picnic area. The area appeared to be deserted. Noting that there was no one in the area, the girls said, "Let's go back." Appellant told the girls that he had to go to the bathroom. He turned the car around and drove to the nearest bathroom, where appellant stopped the car. However, seeing a parked car there, he said, "I don't like this – I don't trust this car." So he continued to drive down the road. (RT 4988-4990.)

At the next bathroom, appellant pulled over and parked about ten steps from the bathroom. Appellant got out of the car and walked into the men's bathroom. Laurie and Angie stayed in the car. A few minutes later, Laurie moved to the driver's seat and began to drive the car around the parking lot. Though there was toilet paper in the bathroom (RT 5213-5224), appellant repeatedly screamed, "Bring something so I can wipe my ass with." The girls ignored him. Appellant yelled some more. The girls drove to the back side of the bathroom. Appellant yelled, "Bring me my keys. Stop messing with my car." (RT 4990-5000.)

The girls rummaged through the car and found blue paper towels.

---

6. Donna's father had overheard appellant talking to a friend about bringing young women to Lost Lake. (RT 3982-3983.)

Laurie got out of the car and walked toward the bathroom. Angie stayed inside the car, sitting on the passenger side. As soon as Laurie entered the bathroom, Angie heard her scream and say, "Roy, where are you?" Angie then heard Laurie repeatedly say, "Roy, stop" and "Roy, leave me alone." Laurie's cries of aversion and protest became screams and calls for Angie. (RT 5000-5002.)

Angie got out of the car and walked cautiously toward the bathroom. Angie could hear "scuffling." Then there was silence. Angie took her shoe off, thinking she would defend herself with her shoe. As she continued walking to the bathroom, Angie said, "Roy, leave her alone. Don't do this." Angie entered the building. Through the curved doorway to the bathroom, she saw Laurie and appellant. Laurie was lying face down on the floor, motionless. Appellant was sitting on the back of his legs, right in front of Laurie. Laurie's head was between appellant's legs. (RT 5003-5005, 5022-5024.)

Seeing this, Angie repeated, "Roy, leave her alone." She reached for and grabbed Laurie's foot and started to pull. Laurie's shoe fell off. Then Angie grabbed both of Laurie's legs. (RT 5005-5006.)

Appellant jumped up from where he was sitting and knocked Angie to the ground. With his hands, appellant started choking Angie. Angie resisted. Appellant repeatedly slammed her head into the ground with his knee. Angie was bleeding. Gradually, Angie's resistance waned. Appellant then released Angie and walked out of the bathroom. Angie crawled over to Laurie and shook her a little bit. Laurie awoke. (RT 5006-5009.)

Appellant returned to the bathroom with a small flashlight. He shone the flashlight around the floor. Blood was splattered on the floor. Rings, earrings, a written note, pull tabs from soda cans, and Laurie's coat were scattered on the ground. Laurie picked up her coat and put it on. She picked up the other items as well. Appellant then left the bathroom. (RT 5018-5024.)

The girls were frightened. They talked about what they would tell their

parents. They also talked about telling appellant that they would tell their parents they got into a fight at the movies. (RT 5024-5026.)

Appellant returned to the bathroom. He hugged Laurie and told her he was sorry. Along with the flashlight, he brought a container filled with water. He poured water on the spots on the floor where blood was visible. He tried to rinse the blood off the floor. (RT 5026-5027, 5175.)

Laurie was worried. She had to get back and call her parents. Appellant shone the flashlight on his watch and told Laurie it was 10:10 p.m. To ease appellant's fears, Laurie told him that they would tell their parents they got into a fight. Appellant replied, "No, I don't trust you. You'll tell like you did the last time." He rinsed the blood off the floor and cleaned the bathroom. Appellant then left the bathroom again. (RT 5027-5029, 5139-5140.)

Appellant returned to the bathroom with a rope. He tied Angie's hands behind her back and put her by the entryway, against the wall. He told Laurie to shut up, but Laurie continued to cry. Appellant then turned to Angie and told her to make Laurie shut up or he would hurt her again. Laurie continued to cry. Appellant pulled Laurie away to the back of the bathroom. He put his hand around the back of Laurie's neck and tried to kiss her. Laurie pulled away and said that she was having her period. Appellant became upset. He got up and walked toward the exit of the bathroom. He stood at the exit, pointed at Angie, and said, "Is she?" Laurie said, "Yes." He then walked out of the bathroom. (RT 5029-5033, 5142.)

When appellant came back into the bathroom, he said that he needed to get water to clean Angie. He then tied Angie to the toilet and told Laurie to go with him to look for some water. Laurie, sitting in front of and holding onto Angie's leg, said she did not want to go with appellant. He became angry and said, "Well, you're coming with me." Laurie did not budge. Appellant's demeanor changed; he said to Laurie, "You don't trust me." Angie finally said,

"Just go with him." Laurie then left with appellant. Angie remained tied to the toilet. (RT 5036-5037, 5144.)

Laurie and appellant walked around to the women's bathroom, on the other side of the building. Angie heard water running and voices coming from the other side of the wall. Laurie screamed and said several times, "Roy, don't." Laurie then said, "Leave me alone." Then Laurie started calling for Angie. Angie heard Laurie crying; then she heard Laurie gasping for air. The gasping sound went on for awhile. Then there was silence. (RT 5037-5041, 5144.)

Appellant then called out for Angie. After a few calls, Angie answered him. Appellant came into the bathroom and told Angie that Laurie had run away. He said he was going to go look for Laurie. Angie, still tied to the toilet, heard footsteps and then a car door shut. Angie called out for appellant. He answered. She said, "Well, I heard a car door." He replied, "Well, that was me. I just went looking for her." (RT 5041-5044, 5144-5145.)

Appellant walked into the bathroom. He said that he could not find Laurie and that he was going to leave her there. He then untied Angie from the toilet; her hands, however, remained tied behind her back. He wiped blood off of Angie's face. (RT 5044, 5081-5082, 5146.)

Appellant directed Angie to get into the car, which was now parked in front of the bathroom. He put Angie in the front seat and wiped blood off her face. Angie looked at the clock, which read 11:11 p.m. Appellant then got into the car. He reached to the back seat, grabbed Laurie's coat, and then laid it over Angie. Appellant then asked Angie if she would have sex with him. She said no, that she was waiting for someone special. He responded, "See, both of you don't trust me." (RT 5082-5085, 5146-5147, 5188.)

Appellant started the car. Explaining that he was looking for Laurie, he drove back to the dead end again. Not seeing Laurie, he said he was going to

leave Laurie at the park. He then drove back up to the exit of Lost Lake recreation area. (RT 5085-5087, 5147.)

By the park's exit, there was a pay phone. Appellant stopped the car. He said he was going to call Laurie's mother, but he did not have any change. Angie said that she had change in her pocket. Appellant reached into her pocket and took her money – change and dollar bills. He put the dollar bills in the coin compartment in the car. (RT 5087-5088.)

With the change in hand, appellant got out of the car and went to the pay phone. He put money in and started to dial but then hung up. He came back to the car. He told Angie that he did not know what to say to Laurie's mother and that he was just going to take Angie to Laurie's house. He then started the car and drove, getting on the freeway. (RT 5088-5090.)

Appellant passed the turnoff to Laurie's house. Angie told him he missed the exit to Laurie's house. He explained that he decided not to take her to Laurie's house because he did not know what to say to Laurie's mother. Instead, he told Angie that he was going to take her to Donna's house and get her cleaned up there. Appellant continued driving. A little while later, Angie – who had been to Donna's house once before – asked, "Haven't you missed the turnoff to go to Donna's house?" He replied no, that Donna had moved to Selma. Appellant continued driving. (RT 5090-5092.)

Eventually, they reached Selma. Appellant got off the freeway. Angie asked how much further they had to go. Appellant replied, "It's just a little bit further." Upon reaching and driving around a residential area, appellant told Angie that he was not going to take her to Donna's house because Donna would kick him out. He said he would take her back to Laurie's house instead. (RT 5093-5094.)

It was almost 1:00 a.m. Before getting on the freeway, appellant stopped at a gas station. He took the paper money in the coin compartment and

got out of the car. Shortly thereafter, he got back into the car and drove onto the freeway. But instead of heading north to Laurie's house, he continued to head south. Angie told appellant that they were still going the same direction as before. Appellant then turned around and drove north on the freeway. Once again, he passed the freeway exit to Laurie's house. Angie told appellant he missed the exit. He replied that he was going to go look for Laurie. (RT 5094-5097.)

Appellant got off the freeway at the Herndon Avenue exit. Appellant became increasingly paranoid, thinking that someone was following him. He pulled over and got out of the car. (RT 5097-5100, 5148.)

Appellant then drove to a rural area in southwest Fresno. Angie kept asking him if he was lost. He eventually admitted he was lost. After driving awhile longer, he pulled over near Chateau Fresno, between Muscat and Central. (RT 5097-5099.)

It was after 2:00 a.m. Appellant said he was looking for a map. He had Angie hold a lighter so he could see the inside of the car. (Angie had been able to loosen the rope and untie her hands. Seeing that appellant noticed, Angie said, "I untied myself." She then asked, "What do you want me to do with the rope?" Appellant, placing the rope between himself and Angie, replied, "Keep it up here just in case.") Appellant could not find a map inside the car. He said there might be a map in the trunk. As he was ready to exit the car, he told Angie to get out of the car and hold the lighter so he could see. Angie got out of the car and walked to the back of the car, to the side of the trunk. She held the lighter. With a vinyl insulated electrical cord in hand, appellant came up behind Angie and choked her to the point of unconsciousness. (RT 3799-3809, 3921, 3996-3998, 5097-5104, 5131-5132, 5137, 5148-5149, 5240.) Appellant left her body on the side of the road. He got into his car, turned the headlights on, and sped off. (RT 3799-3801.)

By the roadside of Avenue 9, about 100 feet from the Road 35 intersection, between 1:00 a.m. and 1:30 a.m., Laurie's body was found with a hemp twine around her neck. (RT 3658-3665, 3693-3694, 3706, 3726, 3739, 3751, 3787, 3795, 4794-4796.)

Laurie's bra was found to have been pushed above her breasts. (RT 3739-3740.) Angie's blood was found in the interior of Laurie's blouse, having originated in the interior. (RT 4604-4609.) The blood that stained Laurie's bra was transferred while the bra was in a folded configuration, and tailed off in concentration as it moved upwards and outwards. (RT 4647-4648.) There was no money in Laurie's pants pocket. (RT 3786.) An examination of Laurie showed a laceration above the right eyebrow. Laurie's head, particularly her face, was full of petechial hemorrhages. The whites of her eyes showed a "flare of hemorrhage" or sceleral hemorrhage. There was blood in the area of her nose, which was not broken. A frothy sanguineous material was found in the pharynx in the back of the mouth, above the ligature abrasions. There were no hemorrhages in the neck muscles; no fractures of the cartilage of the larynx; no fractures in the hyoid bone, commonly known as the wishbone. Laurie's injuries indicated death by ligature strangulation with the ligature applied tightly enough over a significant time period to obstruct her airway and interfere with the blood going to the brain by collapsing the arterial vessels. Transverse lines and ligature abrasions were observed on Laurie's neck, indicating a struggle. There were also hemorrhages, up to three inches, on the surface of her skull. Laurie's injuries appeared to have been caused before her death by blunt blows – perhaps a head striking concrete floor. (RT 5336-5371.)

Angie was found with her pants unbuttoned and soaked in urine. (RT 3812, 3856, 3867, 3898, 5227.) She was taken to Valley Medical Center. An examination of Angie showed marks around her neck. She had abrasions and bruises on her face, neck, ankles, hips, and wrists. She also had bruising behind

her ears. Her eyes, face, and scalp were swollen. The whites of her eyes, or sclera, were completely red, filled with blood as a result of hemorrhaging (blood leaving its normal confines of the vessels into the surrounding tissues). Her face and scalp had many tiny purplish-red marks, called petechiae, which is hemorrhaging of the capillary blood vessels within the skin. (RT 5232-5239, 5260-5268, 5277-5282.) These injuries indicated ligature strangulation with significant and dangerous pressure applied to the ligature. (RT 5246-5248, 5252-5253, 5289-5290.)

On January 27, 2001, appellant was arrested. The clothing he was then wearing – including, black gym shorts and white boxer shorts with a semen stain – were taken to be tested for forensic evidence. (RT 3959-3961, 4442, 4510-4511, 5543-5547.) There were eight cents in appellant's clothing. There was no money in his wallet. (RT 3936, 5599-5600.)

Defense

Appellant did not deny hitting Angie. (RT 5898.) Appellant did not deny killing Laurie. (RT 5897, 5956.) He denied taking her money (RT 5919-5921) and trying to rape her (RT 5897-5898, 5919). Appellant testified, giving accounts of his life and what he remembered that night. (RT 5710-5825, 5839-6307, 6480-7034.) Consistent with appellant's history and results from neurological tests, the defense experts diagnosed appellant as suffering from organic personality syndrome[7] ("OPS") with feature of rage reaction. (RT

---

7. Organic Personality Syndrome ("OPS") can be found in the chapter titled "Mental Disorders Due to a General Medical Condition" of the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision ("DSM-IV-TR"):

> 310.1 Personality Change Due to a General Medical Condition Diagnostic Features
>
> The essential feature of a Personality Change Due to a General Medical Condition is a persistent personality disturbance

7301, 7551, 7639-7640.) Based on appellant's account of what happened that night, the defense experts theorized that appellant suffered a rage reaction with a high probability of seizures, rendering his brain "unconscious" and remaining "unconscious" until the following morning. (RT 6433, 6461, 7528-7532, 7535, 7539-7542, 7549-7550, 7554, 9021-9025.)

Appellant's History

Appellant was born on February 13, 1962, in Baton Rouge, Louisiana. He was the third of four children – an older brother Larry, a younger sister Kim,

---

> that is judged to be due to the direct physiological effects of a general medical condition. The personality disturbance represents a change from the individual's previous characteristic personality pattern. In children, this condition may be manifested as a marked deviation from normal development rather than as a change in a stable personality pattern (Criterion A). There must be evidence from the history, physical examination, or laboratory findings that the personality change is the direct physiological consequence of a general medical condition (Criterion B). The diagnosis is not given if the disturbance is better accounted for by another mental disorder (Criterion C). The diagnosis is not given if the disturbance occurs exclusively during the course of a delirium (Criterion D). The disturbance must also cause clinically significant distress or impairment in social, occupational, or other important areas of functioning (Criterion E).
>
> Common manifestations of the personality change include affective instability, poor impulse control, outbursts of aggression or rage grossly out of proportion to any precipitating psychosocial stressor, marked apathy, suspiciousness, or paranoid ideation. The phenomenology of the change is indicated using the subtypes listed below. An individual with the disorder is often characterized by others as "not himself [or herself]." . . . .

The clinical presentation in a given individual may depend on the nature and localization of the pathological process. For example, injury to the frontal lobes may yield such symptoms as lack of judgment or foresight, facetiousness, disinhibition, and euphoria. . . . .

and a younger brother Ezra. (RT 5711, 5713, 6381-6382.)

In 1965, his father left the family. That same year, appellant's mother moved the family to San Francisco. About two years later, the family moved to Los Angeles. (RT 5711-5712, 6381-6382.)

Appellant's mother was on welfare and the family lived in a one-bedroom house. (RT 5722, 6382.) The neighborhood they lived in was unsafe. (RT 6382.) Appellant testified that there were a lot of gangs in the area where he grew up. He had problems with different gang members chasing him and beating him up. (RT 5961.)

In the fourth grade, when he was about 10 years old, appellant was accidentally hit in the head with a baseball bat, rendering him unconscious and leaving a scar about three-fourths of an inch above his left eyebrow. He was taken to the hospital and received stitches for the cut. (RT 5714, 6382-6833, 6672-6678.)

In the fifth grade, when he was about 11 years old, appellant stole a car – his first criminal behavior. (RT 6383, 7185, 7422.) He also began running away from home, sometimes for long periods of time. (RT 5984.)

In 1975, when he was about 13 years old, appellant recalled becoming angry at his family members and throwing hot water at them. Appellant was sent to the Los Angeles County-University of Southern California ("LAC-USC") Medical Center. He told a clinical psychologist at LAC-USC that he hated his family and thought they were jealous of him. Appellant testified that he recalled becoming angry, but did not recall the "specifics" of what "actually happened." He was released from LAC-USC after two weeks. (RT 5714-5721.)

On October 19, 1976, when appellant was about 14 years old, he locked

his mother and brother Larry out of the house.[8] Appellant threw a bottle at his brother Larry, striking him in the head. Larry eventually got into the house through a second story window and opened the door for his mother. His mother entered the house and saw appellant brandishing a butcher knife at her. When his mother approached him, appellant jumped out a second-story window and ran to some bushes. He hid there until the police arrived. When the police tried to apprehend him, he told them to shoot him. Following this incident, appellant was sent to LAC-USC and released after a couple of weeks. Appellant testified that when he went into LAC-USC, he recalled feeling anger and hatred, but did not remember exactly what happened. (RT 5722-5726, 5957-5972, 6069-6072, 6086-6090, 6093-6097, 6153-6156, 6383-6384, 7584, 7589-7590; I SCT 435, 450.)

Appellant testified that while at LAC-USC, he had a seizure. (RT 5949-5950, 5977-5978.) Appellant's mother was under the impression that appellant was committed to LAC-USC for observation of seizure activity. When she learned otherwise, she sought to remove appellant from LAC-USC. (RT 5978, 6445-6447, 7406-7410.)

Appellant told staff people at LAC-USC that he wanted to live with his father. (RT 6096-6097.) Arrangements were made for appellant to live with his father in San Francisco.[9] Appellant flew to San Francisco. He stayed with

---

8. Prior to that day, appellant had learned of his parents' impending divorce. He said it caused him to become anxious and angry – where would he go? What would happen? Appellant began acting out his anger. Appellant began fighting with the neighborhood children. (RT 5961-5963, 6069-6079, 6086-6090.)

9. Appellant testified that if he had a choice prior to the LAC-USC commitment, he would have chosen to live with his father. As a youngster, appellant ran away from home numerous times and for long periods of time. Sometimes, he traveled to San Francisco and stayed with his father. (RT 5982-5985, 6007-6008, 6407, 6665-6667.)

his father for a couple of months, and attended junior high school in San Francisco. He went back to Los Angeles because, according to appellant, he was not doing well in school and his father thought he was too much of a problem. (RT 6097-6102, 6128-6129, 6177-6179.)

Appellant went to San Francisco for a second time. He finished junior high school there. He did not stay with his father; he stayed with the mother of his half-brother and half-sister. When he graduated, his mother moved to San Francisco for a short period of time. (RT 6178-6185.) In July 1977, appellant was sent to Juvenile Hall after he struck a neighbor with her phone when she repeatedly asked him to get off the phone because he was using the phone too long. (RT 6181-6183, 6408-6410, 6453-6454, 6679-6681.) In August 1977, appellant and his mother returned to Los Angeles. (RT 6185-6186.)

In December 1977, a neighbor spoke to appellant's mother. The neighbor accused one of appellant's brothers of stealing her son's bicycle. Appellant and his brother knew who actually stole the bicycle and tried to tell their mother, but she would not listen. According to appellant, his mother was getting ready to purchase a new bicycle for this woman's son. Appellant was angry. He went into the house, locked all the doors, and lit the sheets – which were being used as curtains – on fire. Appellant testified that his intention then was to commit suicide. Appellant further testified that his memory of what happened was unclear during his period of anger. Following this incident, he was sent to LAC-USC and was released after a couple of weeks. He failed to follow through with the recommended outpatient psychiatric treatment because he did not feel he had a mental health problem. (RT 5726-5728, 5737-5738, 5991-5992, 5995-5996, 6193, 6385-6386; I SCT 496, 503.)

In January 1978, appellant recalled his sister and her friend making a lot of noise one morning when he was lying on the couch trying to get some sleep. He asked them to be quiet. They began teasing him, calling him names. He

then locked them in a room and took the doorknob off the door. He poured gasoline on the door and set it on fire, trying to burn them. He recalled being angry. He was arrested and taken to Juvenile Hall. Not wanting to stay in Juvenile Hall, appellant threatened and feigned a suicide attempt in order to get himself transferred to LAC-USC. A few weeks later, in February 1978, he was voluntarily committed to Camarillo State Hospital. (RT 5728-5732, 6018-6023, 6036-6037, 6222-6229, 6239-6256, 6272-6291, 6387-6388, 6394-6396, 7415-7416, 7425-7426; I SCT 553.) Appellant testified that when he set fire to the room with his sister and her friend inside, things went black (RT 5896) and he woke up the next morning with a funny feeling (RT 5905, 6036).

During his stay at the Camarillo Hospital, appellant had difficulty with his peers. (RT 6407, 6495-6504.) In one instance, he fondled a female peer during class and continued to fondle her even after being told to stop. (RT 6403-6407, 7429-7430.) In another instance, appellant was verbally disruptive in class. Noticing the teacher pick up the phone, he approached her and prevented her from making the call. (RT 7429-7431, 7453-7457.) Due to the difficulties, appellant was moved to a control area, more heavily monitored and with less interaction with his peers. (RT 6407.) At some point during his stay at Camarillo, he tried hanging himself with a sheet. He was then placed on daily suicide watch.[10/] (RT 5738, 5938, 5997, 6396, 6481-6487.)

Appellant was on a six-month program at Camarillo Hospital. He was discharged eleven months later, in January 1979, despite failing to complete all six levels of the program. He returned to Los Angeles, and lived with his

---

10. Appellant testified there were other instances of suicidal ideation, but no suicide attempt. Appellant noted that while in Juvenile Hall, he cut his wrist with a comb and wrote on the wall with his blood. He did not consider this to have been a suicide attempt. (RT 5990-5991.) Appellant also said that while at LAC-USC in December 1977, he told counselors that he did not feel life was worth living, that he felt he should die, and that he was going to hang himself. He was placed on suicide watch. (RT 6012.)

mother. After discharge, appellant went a couple of times to an outpatient psychiatric treatment facility. (RT 5753-5754, 6033-6034, 6038-6039, 6397, 6543-6545.)

In March 1979, two months after his discharge from Camarillo Hospital, appellant was again arrested and taken to Juvenile Hall. He again threatened suicide and was sent to LAC-USC. (RT 6547-6554.)

In late 1980 or early 1981, appellant got on a train, heading to New Orleans, Louisiana, to visit relatives. He never made it to Louisiana. He committed robbery on the train while passing through Texas. (RT 5935, 6408, 6556-6559.) While awaiting trial, his counsel requested an evaluation to determine competence or sanity at the time of the incident. Appellant was sent to Rusk Hospital, where he mentioned to the evaluating psychologist that he had a seizure in 1978. (RT 7298, 7394-7410.) In June 1981, appellant pled guilty to robbery in Texas. (RT 5754-5755, 6654-6655.)

After being discharged from the Texas prison system in June 1983, appellant returned to Los Angeles. He stayed with his mother for a short period of time. However, he was unable to get along with her boyfriend and comply with her house rules. Instead of living with his mother, he lied about his age and lived at runaway shelters for youths. He stayed in the shelters for about three months. They helped him get a job with the California Conservation Corps. He worked there from November 1983 to January 1984. (RT 5756-5757, 6039, 6411, 6594-6598, 7416, 7466-7467.)

In early 1984, appellant moved into a garage converted to living space. Sometimes, appellant's girlfriend at the time, 16-year-old Theresa "Carrie" Parks, would stay with appellant in the garage. Appellant admitted burglarizing other garages, stealing tools, and selling the tools for money to get something to eat. (RT 5758-5760, 5777, 6412, 6599-6601, 6625-6626.) He also admitted pleading guilty to joy-riding in December 1984. (RT 5760-5761, 5777, 6602-

6608.) During this time, appellant was living on welfare of approximately $260 a month. (RT 5761.)

Appellant and Carrie had a "stormy" relationship. In February 1985, appellant and Carrie got into a fight. As they left school grounds, he pulled her down to the ground by her hair and then hit her face with his fist. He then ran away. The next day, he went to San Francisco and stayed there until April 1985. He returned to Los Angeles in May 1985, and appellant and Carrie got into another argument. He grabbed her around her neck, leaving bruises on her. Her family intervened and separated them. Four days later, appellant was arrested and charged with battery for both incidents. (RT 5778-5779, 5780-5782, 6413, 6608-6624.) Though Dr. Berg testified that appellant had independent memory of the details of getting angry and hitting Carrie, appellant testified only remembering getting mad and losing control but nothing else. (RT 5780-5782, 6413.)

On or around November 18, 1985, appellant pled guilty to robbery in California. (RT 5765, 6627-6628.) He was released in 1986. (RT 6630-6631.) He went to live in a halfway house in Inglewood, California. He stayed there for about three months. They got him a job as a clerk at a warehouse. He held the job for a couple of months. He had difficulty holding jobs.[11/] He then went to Long Beach, going back on welfare. (RT 5765-5767.)

In 1986, he met Donna. They began living together at her parents' house in Long Beach. A couple of months later, appellant, Donna, and Donna's family moved to Fresno. (RT 5768, 6417.) About a year later, they had their first child together, Royal Jr. In 1989, appellant and Donna moved to another residence. Donna's sister, Tina Edmonds, lived with them as well.

---

11. Appellant testified that when he was not in custody, mental health facility or prison, he worked as a laborer – e.g., security guard, pizza delivery, and fast food restaurants. The longest he had held a job was about six months. (RT 5944, 6053-6054, 6411-6412, 6632.)

Appellant testified that he loved Donna, and that they had a good relationship. (RT 5669-5770.)

In 1989, appellant would occasionally travel to Long Beach to play football in Los Angeles. Appellant played semi-professional football for the Los Angeles Mustangs. A professional football team, the San Diego Chargers, had been in contact with the Mustangs, and expressed interest in having appellant play professional football. (RT 5771, 6419-6420, 6699-6701.) However, in October or November of 1990, appellant sustained a career-ending injury, tearing ligaments in his right shoulder. (RT 5773, 5787-5788, 6419, 6703-6706.)

Within 18 months of January 1991, appellant's younger brother Ezra was shot and killed, and his older brother Larry was stabbed and killed. Appellant testified that the death of Ezra "messed [him] up real bad." (RT 5773-5776, 6422-6425.) At one point, appellant testified, he was going to jump in front of a car. (RT 5939.)

After his younger brother Ezra passed away, appellant's second son was born. Appellant named him Ezra after his brother. (RT 5776, 6424.) Appellant and Donna had another child, Jewels, on February 22, 1991.[12/] (RT 5777, 6425-6426.)

Appellant's Account Of The Events Of Saturday And Early Morning Sunday

Appellant recounted the events of that Saturday, January 26, 1991, and early morning Sunday. On Saturday morning, appellant was at home with Donna and the kids (his stepson, Royal Jr., and Ezra). (RT 5784, 6731-6734.) He ate breakfast, played with the kids, and played some video games that

---

12. In addition to the four children with Donna, appellant had fathered two daughters from previous relationship(s). (RT 5946.)

morning. (RT 5790, 6735.) Appellant noted that he and Donna were then on welfare, the Aid to Families With Dependent Children (AFDC) program. (RT 5785.)

Early afternoon, between 12 and 1 p.m., appellant drove to Romain Park and played basketball for a couple of hours. When the park closed, around 5:00 p.m., he returned home. He stayed with Donna and played with the kids for about an hour. (RT 5790-5795, 6736-6742.)

Later that evening, about 7:00 p.m., appellant drove to Donna's parents' house and dropped off a VCR. The next place he went was a school, where he watched his friend play basketball, for about 20 or 30 minutes. (RT 5807, 6745-6750.)

Afterwards, he went to the Farkas' residence. A lot of people were there. He talked with Laurie in the living room, then in her bedroom. Laurie was in the bathroom, doing her hair and putting on lipstick. Appellant asked her what she was doing that evening. Laurie said she and Angie were going to the movies. Appellant asked her if she wanted to go "cruising." According to appellant, Laurie said yes. Then appellant asked her to ask Angie. Appellant said that he did not think Angie wanted to go "cruising." There was no plan to meet the girls that evening. Appellant then went back into the living room and spoke with Laurie's parents. He talked to people for about 20 minutes to half an hour, and then he left. (RT 5807-5811, 5813-5814, 6427, 6742, 6750-6758.)

He drove to a bowling alley, Blackstone Bowl. He had a little under five dollars in change. He walked around the bowling alley; but not seeing anyone he knew, he did not bowl. Instead, he played a couple of video games. Then he left. (RT 5816-5817, 6427, 6758-6760, 6767-6768.)

Driving on Blackstone, appellant saw Laurie and Angie walking on the opposite side of the street. He made a U-turn and drove up beside them. He pulled over, reached over and unlocked the door. The girls opened the door

and got into the car. (RT 5820-5823, 6427-6428, 6778-6779.)

Appellant turned into a parking lot, and slowly drove toward McDonald's. The girls went inside. He stayed in the car. But three to five minutes later, needing to go to the bathroom, he got out and went inside. When he entered, the girls were standing in line. Seeing there were many people waiting in line to use the bathroom, appellant waited for the girls and then they walked to the car together. (RT 5847-5857, 6428, 6784-6787.)

Appellant drove back out onto Blackstone and made a U-turn. They passed anti-war protestors on the corner of Blackstone and Shaw. They yelled at the protestors; appellant also honked his car horn. Appellant then drove past the protestors. He mentioned to the girls that sometimes people would "hang out" at Roeding Park. He drove to the park. Not seeing anyone, he exited the park. (RT 5859-5868, 6428, 6788-6791.)

Appellant got onto Highway 99 and exited on Herndon Avenue. He pulled into a Texaco gas station and bought about two dollars worth of gas. He got back into the car and told the girls about going to Lost Lake to meet friends. He then continued on Herndon Avenue, heading east. When he reached Blackstone, he made a left turn and continued onto Friant. (RT 5868-5878, 6428, 6790-6795.)

Appellant turned into Lost Lake Park. He noted a police officer at the turnoff giving a car a citation. Appellant continued driving to the picnic area, at a dead-end. Seeing no one there, he turned around and was going to look for a bathroom. (RT 5879-5883, 6428, 6796.)

Upon approaching a restroom, appellant saw a car parked there. He said to the girls, "I ain't trust that car." He drove to the next restroom and pulled up alongside the building. He told the girls that he was going to use the bathroom. He then got out of the car and went inside the restroom. (RT 5883-5887, 6428-6429, 6796-6798, 6842.)

Appellant sat on and used the toilet. He checked the container for toilet paper, but there was none. He then called for the girls to "bring [him] something so [he] can wipe [his] ass with it." After calling the girls, he heard them laughing and giggling while driving his car. Appellant felt helpless and became very upset. He told the girls to bring him the keys to his car and to stop driving his car. (RT 5887-5892, 6055, 6429-6430, 6799-6803, 6818-6820, 6827-6831.)

Appellant got up off the toilet. He was fixing his clothes when Laurie walked into the restroom. Appellant testified that when Laurie first walked into the bathroom, she laughed and had a little smirk on her face. He exploded in anger and attacked her. He jumped on her, and started hitting and choking her. (RT 5892-5894, 5943, 6431-6432, 6804-6808, 6821-6823, 6827-6831, 6853-6854, 7000-7006.)

Less than a minute later, Angie walked into the restroom. Laurie was on the ground, unconscious. From his knees, appellant lunged at Angie. He hit her face with his fist and against the ground, and then choked her. Appellant testified that he did not know what happened next; that "everything just went blank." He had no recollection of stopping his attack of Angie. (RT 5894-5896, 5898-5899, 6432-6433, 6808-6812, 6823-6825, 6827-6831.)

Appellant's memory was limited and patchy. The next thing appellant remembered was dragging Laurie. But he had no recollection of taking her to the women's side of the restroom, strangling her to death with a hemp twine, and putting her body in the trunk of his car. The next thing appellant remembered was being at a phone booth. He then recalled driving in dark and foggy conditions with Angie in the car. The next thing he remembered was being home. But he had no recollection of getting home. (RT 5896, 5899-5903, 6433-6434, 6811-6818, 6832-6834, 7516-7528.)

Appellant remembered he went to sleep. When he awoke the next

morning, he did not remember what had happened the night before. But he did have a kind of a funny feeling that "something wasn't right." (RT 5903-5905, 6434-6435, 6835-6836, 6858, 6948.)

Appellant testified that on that night, he was wearing dirty white briefs, black cotton gym shorts, blue Levi's jeans, and black sweat pants. He fell asleep in these clothes. He testified that he was neither wearing black Raiders shorts, nor the Levi jeans that night. (RT 5906-5909.)

Appellant awoke the next morning around 9:00 a.m. Later, Donna told him to change because she was washing laundry that day. He removed the clothes he wore the previous night and changed into a pair of white boxers, black Raiders shorts, and blue jeans. He then went outside and charged the car battery. He was putting the laundry in the car when the police arrived and arrested him. (RT 5906, 5910-5917, 5924-5926, 6860-6862.)

Luria-Nebraska Neurological Battery And qEEG Scans

Psychologist Dr. Paul Berg was retained by the defense to evaluate appellant. (RT 6367.) He administered five screening tests for brain abnormalities[13/] on appellant; the results on all five tests were negative for any abnormality. However, after reviewing appellant's psychiatric history and interviewing appellant, Dr. Berg suspected neurological damage. He asked psychologist Dr. Ronald McKinzey to determine whether or not there was an organic factor to appellant's mental status. (RT 6318-6320, 6401-6402, 6445-6449, 7283-7284, 7318-7330.)

Dr. McKinzey administered the Luria-Nebraska neuropsychological

---

13. Dr. Berg administered the Reys Memory test, the screening test for the Luria-Nebraska Neuropsychological battery, the sentence completion tests Trails A and B, and the Raven IQ test (standard progressive matrices). (RT 6371-6373.)

battery, which samples 269 bits of behavior to see how well appellant's brain was functioning. (RT 6321-6322.) Dr. McKinzey conjectured that appellant's brain was dysfunctional in the frontal and temporal lobes. (RT 6328-6334, 7244-7245.) He dismissed the suggestion that cultural factors and learning disabilities could account for some of the results. (RT 7155-7158, 7187.)

Dr. McKinzey explained, "The frontal lobe is the control portion." (RT 6330.) Hence, individuals with frontal lobe damage may exhibit poor judgment, poor control of impulses and emotion, unreliability, and overall immaturity. (RT 6334, 7228-7229.) Having been informed of appellant's history, Dr. McKinzey stated that "the diagnosis of organic personality syndrome . . . ha[d] to be considered." (RT 6335.)

To confirm his conjecture of frontal and temporal lobe dysfunction, Dr. McKinzey asked neurologist Dr. Sateesh Apte to administer a quantitative electroencephalograph ("qEEG") – consisting of an electroencephalogram ("EEG") and "brain mapping" – which picks up and maps the brain's electrical activity, and then generates a computerized analysis of the brain's functionality. (RT 6338-6341, 7041-7046.) Dr. Apte administered the qEEG on appellant and found "organic brain damage." Appellant's frontal and temporal lobes were moderately to severely dysfunctional. (RT 7080, 7087, 7093-7095, 7119, 7702-7704, 7713-7714, 7725-7729, 7773-7774, 7797-7798; I SCT 1298-1337.) Dr. Apte explained that the temporal lobe controls the primitive emotions and desires – e.g., rage, fear, hunger, and sex. Individuals with temporal lobe damage may have difficulty controlling such emotions as rage and fear. In addition, temporal lobe damage may impair one's indexing of memory – causing the inability to keep a chain of events in a sequential order in memory. (RT 7064-7065, 7082.)

Dr. Apte also found evidence highly suggestive of seizure diathesis, i.e., electrical vulnerability to seizures. Dr. Apte opined that it was more probable

than not that appellant suffered from seizure activity. (RT 7070-7072, 7096-7100, 7106, 7205, 7705-7708, 7731-7735, 7798.) Dr. Apte further opined that appellant suffered from complex-partial seizures at times. (RT 7106.)

Dr. McKinzey, having had the opportunity to review Dr. Apte's report, testified that the results of the qEEG "confirmed" his conjecture that appellant's frontal and temporal lobes were dysfunctional. Dr. McKinzey explained that frontal and temporal lobe dysfunction is consistent with OPS, which was his recommended diagnosis. (RT 7123-7131.)

Defense Expert's Diagnosis And Theory Of What Happened To Appellant That Night

Having reviewed appellant's history and the reports of Dr. Apte and Dr. McKinzey, Dr. Berg diagnosed appellant as suffering from OPS with a feature of rage reaction. (RT 7301, 7551, 7639-7640.)

First, appellant's history was consistent with the diagnosis. When appellant was in the fourth grade, about 10 years of age, he suffered a head injury. He was accidentally hit in the head with a baseball bat and rendered unconscious. (RT 5714, 6382-6833, 6672-6678.) The examining doctors opined the head injury directly resulted in appellant's personality change. He became unstable with poor impulse control. He began running away from home (RT 5984) and committing criminal acts (car theft in the fifth grade [RT 6383, 7185, 7422] and arson [RT 5726-5728, 5737-5738, 5728-5732; I SCT 496, 553]). As seen in the incidents that had him sent to LAC-USC, appellant's outbursts of aggression and anger were grossly out of proportion to any precipitating stressor. (RT 6382-6383, 6446, 7160, 7227-7228, 7574-7578.)

Second, the results of the Luria-Nebraska neuropsychological battery and the qEEG showed brain dysfunction, consistent with the OPS diagnosis. Appellant's brain was dysfunctional in the frontal and temporal lobes. (RT

6328-6335, 6464, 7080, 7087, 7093-7095, 7119, 7244-7245, 7536, 7702-7704, 7713-7714, 7725-7729, 7773-7774, 7797-7798, 8975.) Dysfunction in these areas of the brain is consistent with rage reaction. (RT 6449-6466, 8959-8960.)

In Dr. Berg's words:

> [Appellant] has brain impairment which is consistent with the kinds of behavior he's shown ever since he was 13 or 14 years old, 1976, and which recurrently comes up when he's in situations in which he's emotionally overstimulated and he can't handle it and he can't control himself. He loses control.

(RT 6451.)

In Dr. Berg's opinion, on the night of January 26, 1991, appellant's brain was overstimulated, leading to rage reaction. Prior to January 26, 1991, appellant had been subject to an unusual number of very significant stressors: the shoulder injury and concomitant dashed hopes of a professional football career; concerns about another child to a welfare family; and the deaths of his brothers Larry[14/] and Ezra (the death of Ezra particularly weighed on appellant's mind). (RT 6418-6427, 6460-6461, 7535.) Aside from these preexisting stressors, the immediate and precipitating stressor that night was his belief that the girls were laughing at him and teasing him while driving his car and ignoring his calls to bring paper to him in the bathroom. Consistent with appellant's history of being susceptible to provocation by females about his masculinity and pride, appellant felt humiliated, confused, helpless, and increasingly angry and irritated. (RT 6433, 6461, 7535, 7554) When appellant was pulling his pants up and fixing his clothes, Laurie walked into the restroom with what he perceived as a smirk on her face. Appellant then "exploded," attacking Laurie. According to Dr. Berg, "this [was] when [appellant's] anger accelerated into . . . enraged." (RT 7522.) Then when Angie walked into the

---

14. Dr. Berg added that appellant's nephew Maurice, Larry's son, was killed soon after Larry was killed. (RT 6425.)

restroom, appellant lunged at her and attacked her.

Appellant claimed to have lost his memory during the attack on Angie. (RT 6811-6812.) Dr. Berg opined that the memory loss was due to rage reaction,[15] with or without seizure, which rendered appellant's brain "unconscious."[16] (RT 7529-7537, 7564, 7627-7628, 7656.) Dr. Berg explained in these terms:

> What there is that [appellant] has an impaired brain. . . . With that impaired brain, if you put in too much stimulation like with any machine, particularly a machine that's defective, if you put too much in, it blows and it stops functioning. That's what happened to him.

(RT 7566, 7537.) Though amnesia is not a criterion of OPS, Dr. McKinzey opined that "amnesia for rage explosions is frequently seen." (RT 7163-7166, 8991-8992.)

Dr. Berg opined that it was highly probable that appellant had a seizure that night. (RT 7528-7532.) Dr. Apte had noted that rage can be a triggering mechanism for seizures (RT 7101-7103, 7873), and found evidence highly suggestive of seizure diathesis – i.e., electrical vulnerability to seizures – in appellant's brain (RT 7070-7072, 7096-7100, 7106, 7205, 7705-7708, 7731-7735, 7798). Dr. Apte opined that appellant had suffered from complex-partial seizures at times. (RT 7106.) Furthermore, the "funny feeling" appellant experienced the following morning was consistent with having had seizures. (RT 7108-7115.)

Appellant would have had the seizure when he was attacking Angie – the point in time he lost memory. (RT 7530.) Dr. Berg noted, "by definition,

---

15. Dr. Berg opined that appellant's rage reaction started when Laurie walked into the restroom (RT 7566) and became full-blown when he attacked Angie (RT 7627) – the point in time he lost memory (RT 7633).

16. Dr. Berg also used the term "unplugged" to describe appellant's brain during the rage reaction. (RT 7564, 7631-7632.)

people during seizures are not aware of the seizure or what they're doing." (RT 7548.) Dr. Apte stated, "one of the hallmarks of a seizure is amnesia for the event." (RT 7778, 7102-7106.)

Status seizures[17] or secondary seizures[18] could account for appellant's prolonged periods of memory loss and patchy memory. During a seizure, appellant's brain would not be able to store any memory. His few vague patchy recollections of that night would have been from him regaining consciousness in-between (interictal stage) or after (postictal stage) seizures. (RT 7108-7117, 7548-7549, 7871-7873, 8965-8966, 8997-8998, 9024.)

Appellant could have performed complex behaviors during complex-partial seizures. (RT 7102-7115, 7871.) Dr. Berg explained that though appellant's brain was "unconscious," appellant would be on "automatic pilot." (RT 7539-7542.) Once appellant entered the "twilight stage of the postictal state [after seizure]," purposeful[19] activity can then occur.[20] (RT 9021-9025.)

Dr. Berg further testified that, though more likely than not, appellant had seizures that night, his opinion would remain the same even if appellant did not have seizures. (RT 7549-7550.) Dr. Berg opined that

> [appellant] was experiencing a rage reaction sufficient for him to not be aware of what he was doing, to consider it, to think about

---

17. In status seizures, the second and follow-up seizures start before the first seizure ends (RT 7116, 7871); recurrent seizures in one time segment (RT 7655).

18. In secondary seizures, the second or follow-up seizures start after the first seizure ends. (RT 7116.)

19. Dr. Berg defined "purposeful" to mean that the individual has a particular target in mind. (RT 9023.)

20. Dr. Apte's view differed. He testified that complex, purposeful behavior can occur during complex-partial seizures as well as in-between (inter-ictal stage) and after (post-ictal stage) seizures. (RT 7105-7106, 8965-8966.)

> the alternatives, to do all those things people normally do when they're aware of their behavior.

(RT 7531.) To explain how, in the absence of seizures, appellant's brain could remain "unconscious" throughout the night and perform complex purposeful behaviors, Dr. Berg stated:

> [T]he very activities that are going on in those hours are themselves so enormous and so horrible and so emotional and so stimulating that they can keep that person – perpetuate that person, if you will, in that state of not being able to know what's going on.

(RT 7554.) Dr. Berg also suggested – but expressly did not diagnose – appellant as having psychogenic fugue.[21/] (RT 7545-7551.)

Rebuttal

Prosecution experts disputed defense experts' diagnosis that appellant suffered from OPS and their explanation that appellant's behavior and patchy memory were due to a rage reaction with a high probability of seizures, rending his brain "unconscious." The prosecution experts diagnosed appellant as suffering from antisocial personality disorder[22/] ("APD"), meaning that

---

21. "Fugue" is defined as:

> a state of psychological amnesia during which the subject seems to behave in a conscious and rational way, although upon return to normal consciousness he cannot remember the period of time nor what he did during it; temporary flight from reality.

(Webster's New World Dict. (3d college ed. 1988) p. 544.)

22. The diagnostic features of Antisocial Personality Disorder ("APD") as defined in the DSM-IV-TR, pp. 701-703:

> The essential feature of Antisocial Personality Disorder is a pervasive pattern of disregard for, and violation of, the rights of others that begins in childhood or early adolescence and continues into adulthood. This pattern has also been referred to as psychopathy, sociopathy, or dyssocial personality disorder. Because deceit and manipulation are central features of

Antisocial Personality Disorder, it may be especially helpful to integrate information acquired from systematic clinical assessment with information collected from collateral sources.

For this diagnosis to be given, the individual must be at least age 18 years (Criterion B) and must have had a history of some symptoms of Conduct Disorder before age 15 years (Criterion C). Conduct Disorder involves a repetitive and persistent pattern norms or rules are violated. The specific behaviors characteristic of Conduct Disorder fall into one of four categories: aggression to people and animals, destruction of property, deceitfulness or theft, or serious violation of rules. . . .

The pattern of antisocial behavior continues into adulthood. Individuals with Antisocial Personality Disorder fail to conform to social norms with respect to lawful behavior (Criterion A1). They may repeatedly perform acts that are grounds for arrest (whether they are arrested or not), such as destroying property, harassing others, stealing, or pursuing illegal occupations. Persons with this disorder disregard the wishes, rights, or feelings of others. They are frequently deceitful and manipulative in order to gain personal profit or pleasure (e.g., to obtain money, sex, or power) (Criterion A2). They may repeatedly lie, use an alias, con others, or malinger. A pattern of impulsivity may be manifested by a failure to plan ahead (Criterion A3). Decisions are made on the spur of the moment, without forethought, and without consideration for the consequences to self or others; this may lead to sudden changes of jobs, residences, or relationships. Individuals with Antisocial Personality Disorder tend to be irritable and aggressive and may repeatedly get into physical fights or commit acts of physical assault (including spouse beating or child beating) (Criterion A4). Aggressive acts that are required to defend oneself or someone else are not considered to be evidence for this item. These individuals also display a reckless disregard for the safety of themselves or others (Criterion A5). This may be evidenced in their driving behavior (recurrent speeding, driving while intoxicated, multiple accidents). They may engage in sexual behavior or substance use that has a high risk for harmful consequences. They may neglect or fail to care for a child in a way that puts the child in danger.

Individuals with Antisocial Personality Disorder also tend to be consistently and extremely irresponsible (Criterion A6).

appellant willfully and deliberately engaged in such behavior. The prosecution then presented the testimony of lay witnesses to support the prosecution experts' APD diagnosis and to undermine the foundation of defense experts' opinion.

The prosecution experts argued that brain dysfunction – a necessary element of an OPS diagnosis – had not been demonstrated. First, nothing in appellant's medical records suggested OPS. The angry outbursts seen in appellant's history did not have an organic basis. Those incidents were related to retaliation after being denied something he wanted, to being teased, or to something happening in his life that he did not want to happen. (RT 8289-8292.) Second, though getting hit in the head with a baseball bat can produce brain dysfunction, particularly if the blow resulted in a loss of consciousness for

---

> Irresponsible work behavior may be indicated by significant periods of unemployment despite available job opportunities, or by abandonment of several jobs without a realistic plan for getting another job. There may also be a pattern of repeated absences from work that are not explained by illness either in themselves or in their family. Financial irresponsibility is indicated by acts such as defaulting on debts, failing to provide child support, or failing to support other dependents on a regular basis. Individuals with Antisocial Personality Disorder show little remorse for the consequences of their acts (Criterion A7). They may be indifferent to, or provide a superficial rationalization for, having hurt, mistreated, or stolen from someone (e.g., "life's unfair," "losers deserve to lose," or "he had it coming anyway"). These individuals may blame the victims for being foolish, helpless, or deserving their fate; they may minimize the harmful consequences of their actions; or they may simply indicate complete indifference. They generally fail to compensate or make amends for their behavior. They may believe that everyone is out to "help number one" and that one should stop at nothing to avoid being pushed around.
>
> The antisocial behavior must not occur exclusively during the course of Schizophrenia or a Manic Episode (Criterion D).

several minutes, the degree of dysfunction – if any – would be mild. (RT 7974-7975, 8109.)

Third, neither the Luria-Nebraska Neurological battery nor the qEEG are reliable in diagnosing brain dysfunction. Psychometric testing, such as the Luria-Nebraska Neurological battery, cannot in all cases distinguish between minor brain dysfunction and educational deficits or other social environmental factors. (RT 8119-8120, 8208-8209.) The qEEG is not reliable to distinguish normal and abnormal because of the high rate of false positives (RT 7915-7918, 7937, 8120-8121) and the lack of a standard qEEG "normal" database (RT 7944-7946).

Fourth, the prosecution experts disputed the defense experts' readings of the results of the Luria-Nebraska Neurological battery, EEG, and qEEG. The results of the Luria-Nebraska Neurological battery could have easily been reflective of appellant's limited educational background, not necessarily indicative of brain injury. (RT 7993-8023, 8292.) Dr. Apte's conclusion of brain dysfunction was disputed. The prosecution experts challenged Dr. Apte's reading of appellant's EEG, specifically the identification of "artifacts" (extraneous measurements such as blinking) and selection of epochs for analysis by the qEEG. Appellant's EEG was that of a normal awakened adult. (RT 7892-7913, 7938-7945, 8115.) Dr. Goodin also challenged the reliability of Dr. Apte's statistical analysis of appellant's qEEG results. (RT 7918-7937.) Under Dr. Apte's analysis, "almost everybody in [the] normal population will have some abnormality on [his/her] qEEG." (RT 7934.)

The prosecution experts then stated that there was no evidence that appellant suffered from epilepsy. The likelihood of post-traumatic epilepsy from being struck in the head with a bat would be less than one percent – considerably less than one percent – in the absence of intercranial bleeding or

depressed skull fracture. (RT 8108.) Appellant's EEG contained no epileptic form activity. (RT 7947.)

Even if appellant suffered from OPS, his behavior that night was inconsistent with or could not be explained by rage reaction associated with OPS. The duration of an OPS rage reaction is generally very brief, unless the individual is continually provoked. (RT 7977-7979, 7989, 8219, 8250, 8289.) Thus, though the initial attacks on Laurie and Angie could be characterized as being part of a rage reaction, none of the behaviors after would be characteristic of rage reaction. The provocation, if any, had stopped after he left the bathroom. The fact that appellant involved himself with other tasks – e.g., coming back to the bathroom with water to clean up – shows he was no longer acting impulsively, out of control. (RT 7991, 8287-8289.) What then transpired was a complex and goal-directed sequence of behaviors that was carried out within a period of approximately four hours. Such behaviors are not consistent with the flare-ups associated with OPS rage reaction. (RT 8250, 8259-8260.) Further, amnesia is not a feature of OPS rage reaction. (RT 7987, 8043, 8217, 8250-8251.)

Furthermore, even if appellant suffered from epilepsy, appellant's behavior that night was inconsistent with and could not be explained by seizure activity. First, seizures are short in duration – two or three minutes, not hours. (RT 7952-7953, 8054, 8105-8106.) Seizure activity that lasts for a prolonged period of time, i.e., repetitive seizures, are expected to occur only in individuals whose epilepsy had been poorly controlled. Appellant, who for years, did not, if ever, have seizures would not fall into that category. (RT 8105-8106.) Second, during a complex-partial seizure and in the postictal stage, the individual would not be able to engage in sustained, complex, purposeful, and goal-directed behavior, such as conversing with another, trying to wash away evidence, or telling the time. (RT 8033-8034, 8039-8040, 8106-8107, 8253-

8256, 8302-8307, 8317-8318, 8367-8369.) To be sure, the individual can carry out "automatic" behavior such as walking and running a comb through one's hair; however, such behaviors tend to be unvaried and repetitive, not goal-directed and purposeful. (RT 8034-8035.) Further, instances of aggressive behavior are rare during complex-partial seizures. (RT 8032-8034, 8104, 8253.) If aggressive behavior occurs, it is random and aimless, not purposeful and goal-directed. (RT 7951-7953, 8031-8032.)

Based on appellant's history, medical records, and Angie's account of appellant's behavior that night, the prosecution experts' diagnosed appellant as suffering from APD. (RT 8256-8259, 8293-8301, 8338.) "[APD] features are considered to be willful, deliberate, volitional types of behavior that one chooses to engage in." (RT 9259.) In other words, appellant willfully and deliberately engaged in the described behavior that night.

The prosecution then presented the testimony of lay witnesses to support the prosecution experts' APD diagnosis and to undermine the foundation of defense experts' opinion, appellant's credibility.

The lay witnesses testified about appellant's irresponsibility. Appellant's only source of income was Donna. He never expressed unhappiness at being unemployed, never expressed a desire to find a job,[23] never looked in the classified section of the newspaper for jobs, never completed a job application, would sleep until noon or 1:00 p.m., and would hardly ever be home during the evening hours. (RT 8741-8742, 8754, 8775-8777, 8846-8847.)

The lay witnesses testified that appellant did not have a bad temper. Appellant was never observed to be physically violent. He would never "fly off the handle" even when provoked with name calling. Donna testified that

---

23. According to Michael Hall, appellant's friend, appellant had mentioned applying for work at a near-by factory. (RT 8846.)

appellant's most common response to argument was to laugh at her and walk out the room. (RT 8736-8740, 8783-8785, 8817-8818, 8839-8841.)

The lay witnesses were unaware that appellant had a shoulder injury that prevented him from playing football. (RT 8746-8748, 8778-8780, 8832.) They also testified that appellant had grieved and recovered from the death of his brother Ezra. (RT 8756-8757, 8821-8823, 8843-8845.)

Donna testified that she was getting ready to do the laundry on January 27. However, she did not ask appellant for the clothing he was then wearing. Appellant did not give her the clothing he was then wearing to go in the laundry. (RT 8735.)

Michael Hall, appellant's friend, recalled telling appellant, in late August 1990, that he needed to stay away from Laurie's house. Appellant replied, "I know she wants me." Hall warned appellant, "That's Donna's cousin. You've got to be crazy. She's only 14." Appellant replied, "So what? I don't care." (RT 8849-8852.)

Sanity Phase

Dr. Paul Berg was the sole witness for the defense in the sanity phase. Dr. Berg opined that appellant was sane up to the point he attacked Angie and suffered a memory loss. (RT 9526-9529, 9550, 9554.) Thereafter, for the next four to six hours, appellant's mental state was such that he could neither understand the nature and quality of his actions, nor distinguish right from wrong. (RT 9529-9531, 9554-9555, 9594.) Appellant remained legally insane at the time he attempted to murder Angie. However, Dr. Berg confessed, the longer in time one went from the attack on Angie, the less confident he was of his opinion of appellant's insanity. Though not one- hundred percent sure, Dr. Berg stated he was over fifty-percent sure of appellant's insanity as the night

progressed. (RT 9529-9530, 9552-9553.) Appellant regained his sanity when he arrived home. (RT 9551.)

Dr. Berg reiterated his opinion in the guilt phase: appellant's brain was "unconscious" as a result of rage reaction with or without seizures at the time of the crimes. (RT 9554.) Dr. Berg stressed that he was not equating unconsciousness with insanity. (RT 9574.) He explained that unconsciousness was not the cause of appellant's insanity:

> [Appellant's] rage was so enormous and so beyond what we normally even think of as anger or rage that he would not at that time understand and know and appreciate . . . what he was doing or know the difference between right and wrong at that time.

(RT 9575.)

Prosecution

The prosecution experts testified that appellant was not legally insane at the time of the crimes. They stated that appellant did not suffer from a major mental disease or disorder, e.g. schizophrenia. (RT 9651-9652, 9672.) They diagnosed appellant as suffering from a personality disorder not otherwise specified with feature of antisocial behavior. (RT 9672-9673, 9726-9727.) Such a mental disorder, as clear from appellant's described behavior that night, would not result in the loss of cognitive capacity to appreciate the nature and quality of one's acts or to know the difference between right and wrong. (RT 9647, 9729-9736, 9770-9771.)

Penalty Phase

1980 Texas Aggravated Robbery

On November 25, 1980, about 4:00 a.m., while traveling through Texas, the railroad conductor found an elderly man riding the train slumped in his chair

with his throat slit and blood all over his shirt and jacket. (RT 10980-10996.) The elderly man told the conductor, "A black man cut my throat and took my wallet." (RT 11015.)

The conductor went to look for the robber. He found a commode locked. He unlocked the restroom and a young black man, later identified as appellant, stepped out. There were drops of blood on appellant's shoe. (RT 11017-11042.)

There was about $700 in the elderly man's wallet, though no money was found on appellant. (RT 11040.) The blood on appellant's shoe and the victim's jacket were tested. (RT 11075.)

Appellant pled guilty to aggravated robbery in Texas. (RT 11095-11097; I SCT 1250-1260.)

1981 Texas Prison Incident

On September 2, 1981, David Atwood and appellant were fellow inmates in the prison in Brazoria, Texas. (RT 11237-11239.)

Atwood was sitting in his cell rolling a cigarette. Appellant was housed in the next cell. Appellant starting banging on the wall dividing their cells. He demanded a cigarette from Atwood, stating, "Say boy. Give me a cigarette." Atwood did not respond. Appellant started to bang on the wall again, demanding a cigarette and calling Atwood names like "bitch" and "whore." Atwood responded, "I don't have a cigarette." Atwood then added, "Let me say I don't have a cigarette to spare is what I mean, and all the name callin' is unnecessary." Appellant then replied, "Weak boy, I'll take your cigarettes if you don't give me a cigarette." Appellant threatened Atwood, "When the door swing, you swing." (RT 11239-11248.)

At supper time, the doors to the cells were opened. Atwood ran out of his cell. Atwood turned and saw appellant standing next to him. Atwood

looked at him and said, "What's up? What are you gonna do?" Appellant replied, "Go on about your business, boy." Atwood turned to walk away. As he was turning, appellant punched him on the left side of his mouth, splitting his lip open. Atwood fell to the floor. Atwood then grabbed appellant's feet and pulled them out from under him. A scuffle then ensued. Prison security personnel broke up the fight. (RT 11248-11257.)

1982 Texas Prison Incident

In April 1982, Edward Manual Salazar, Jr. and appellant were fellow inmates in the Texas State prison in Brazoria, Texas. (RT 11110-11112.)

Appellant got into a scuffle with Salazar. Appellant cut in front of Salazar in the chow line. Salazar had his hand on the rail. Appellant, as he made his way through the line, knocked Salazar's hand off the rail. Salazar was angry; he shoved appellant. Appellant turned around, looked at Salazar, and said, "We'll deal with this later, motherfucker." (RT 11113-11115; 11135-11136.)

A few days later, appellant and Salazar were in trade school, learning to join cast iron fittings. Appellant and Salazar were paired into a group. Appellant, having been in that trade school class before, was instructing Salazar. Appellant told Salazar to get a cup of cold water and put it into a pot full of hot lead. As Salazar was about to pour the water into the pot, another inmate warned him that pouring the water into the lead could cause the hot lead to blow up in his face. Salazar was angry. He threw the water and fitting to the side. As Salazar was about to stand up, appellant struck Salazar in the center of the head with a ball-peen hammer, knocking Salazar to the ground and splitting his scalp. (RT 11116-11123.) As Salazar walked out of the infirmary, appellant laughed at him. (RT 11146.)

1985 California Robbery

During the early morning hours of July 27, 1985, Manuel Gutierrez was driving home, after leaving a nightclub and dropping off his friend. Feeling tired and dizzy, and being by himself, he pulled off onto a side street to rest. He fell asleep in the driver's seat, with the doors unlocked and windows down. He was awakened by a man poking a knife against his throat. That man was later identified as appellant. An accomplice was in the back seat. (RT 11155-11161, 11169-11170.)

Appellant told Gutierrez, "Don't move, mother fucker, and give me your wallet." Gutierrez gave his wallet to appellant. Gutierrez then tried to wrestle the knife out appellant's hand and get out of the car. Gutierrez was able to get out of the car. Appellant went around to the front of the car. The accomplice in the back seat was at the back of the car. Appellant wrestled Gutierrez to the ground. During the struggle, appellant yanked a gold chain off Gutierrez's neck. The accomplice struck Gutierrez on the back of the head with an object. Appellant and his accomplice then fled in Gutierrez's car. (RT 11155-11170.)

Appellant pled guilty to robbery. (RT 11189-11202; I SCT 1261-1265.)

1985 Assault On Theresa "Carrie" Parks

On February 25, 1985, Officer Michael Dugan was dispatched to a Long Beach residence. He made contact with 16-year-old Carrie Parks. He observed a fat lip, a lump over her right eye, and an abrasion to her left arm. Officer Dugan took Parks' statement and wrote a report. A complaint or warrant was then issued. (RT 11228-11234.)

Defense

Clinical psychologist Dr. Gretchen White testified for the defense. (RT 11314.) Based on appellant's psychiatric records and interviews with appellant and people who knew him, Dr. White opined:

> [Appellant] was raised in a dangerous and destructive environment by a parent who was ineffective in guiding him and protecting him throughout his life, and that had a significant effect on his ability to develop normal and adequate self-esteem, impulse control, and aspirations.

(RT 11435.) Testimony of family members – Richelle Lynn Clark (RT 11593-11627), Shirley Mae Fomai (RT 11627-11647), Jessie Sampson (RT 11647-11668), Latelle Joseph Barton (RT 11669-11679), Tina Edmonds (RT 11771-11775), Daisy Clark (RT 11775-11819) – were presented in support of Dr. White's opinion and to plead for appellant's life.

Appellant and his siblings grew up in a poverty stricken, drug ridden, crime infested, and ultimately destructive neighborhood. Appellant, though born in Louisiana, was primarily raised in the Los Angeles area. From age three to age nine, appellant lived in a poor but relatively safe neighborhood. Then, appellant's mother, Daisy Clark (hereinafter "Daisy") decided to move to another neighborhood, much worse than the neighborhood he was living in before. Appellant spoke of being continually frightened. The neighborhood was full of gangs and ridden with violence. Daisy had been mugged twice. Appellant's sister Kim was "jumped on" or assaulted by a group of kids when she was in elementary school. (RT 11333-11336.)

Appellant did not succumb to the violent and destructive "subculture." He did not become involved in gangs as his sister Kim had done; nor did he become involved with guns and drugs as his younger brother Ezra had done. Rather, despite pressure to join a gang, appellant joined the Explorer Scouts and

a "Big Brothers" program associated with the police department.[24] While living with his father in the San Francisco Bay Area, appellant was involved with the ROTC. He played the trombone. (RT 11336-11337, 11373.) Appellant was described as a "real bright kid . . . more advanced than the rest of the students." (RT 11529, 11659, 11767-11769, 11798-11799.) Daisy recalled that appellant was very affectionate toward her:

> [Appellant] was the only one that broke a weed to bring me as a flower. [¶] . . . He used to bring me flowers. [¶] . . . He was just a little boy . . . . He was no older than five. . . . [¶] He would hug and kiss me, and I would pick him up because he made [me] happy.

(RT 11799.)

Daisy was, in Dr. White's words, "an ineffective mother." Though she truly cared for her children, Daisy was unable to provide the discipline, structure, protection, guidance, and nurturance that the children needed. (RT 11340-11344.) Daisy was a poor, single mother.[25] She had five children.[26] She was working a lot and did not have the time to take care of the children, often leaving them unattended. She had trouble taking care of herself.[27]

---

24. Appellant had quit the Explorer Scouts because word got out in the neighborhood that he was involved in the program. Gang members made fun of him, let him know that he better not be with cops, and threatened to "jump" him. Appellant was afraid. (RT 11722.)

25. Daisy described an abusive and turbulent – to put it mildly – relationship with Royal Clark, Sr. (RT 11782-11794.)

26. Daisy had a fifth child, Andre Sampson, fathered by Russell Sampson. (RT 11405.)

27. Appellant spoke of instances where Daisy was easily taken advantage of by people in the neighborhood – e.g., a neighbor accused one of appellant's brothers of stealing a bicycle, and Daisy said she would get the money and replace the bicycle. (RT 11343-11344.) In another instance, when appellant was sent to San Francisco to live with his father, Daisy left a fairly good living situation and went to San Francisco to join appellant.

Ashamed of her poverty, feeling not as worthy as other members of her family, and ultimately resentful, Daisy had a tendency to isolate herself and her children, despite having family members wanting to "extend a hand" to her children.[28] (RT 11340-11341, 11395, 11398-11399, 11650-11652, 11778-11782.) Daisy was very defensive about people criticizing the way she disciplined her children. (RT 11393, 11652-11654.) "[W]hat that resulted in was basically kids who were raising themselves." (RT 11341.) Daisy was described as having a "Jekyll and Hyde" personality. (RT 11396.) At times she was inappropriately harsh and unprotective of the children.[29] Other times, she was inappropriately indulgent with the children.[30] (RT 11342.)

From an early age, appellant often ran away from home with his brothers. They usually stayed with Shirley Mae Fomai (hereinafter "Shirley"), mother of appellant's half-siblings Ricky and Richelle. There, they were able to be with their father, Royal Clark, Sr. (hereinafter "Bobby"). However, Daisy would bring the children home or send money to have them sent home. Shirley

---

Consequently, she lost her government subsidized housing and all her belongings. (RT 11391.)

28. For instance, Daisy's sister, Jessie Sampson invited Daisy and her children over for the holidays. Daisy replied, "Well, you know, we don't have as much as you people have. I don't think that I want the children to see that." (RT 11395.)

29. For instance, Daisy locked them out of the house when she went to work; in the neighborhood they lived in, this was a frightening experience. (RT 11342, 11652.) Daisy was also described as quick to slap the children or hit them with extension cords. (RT 11392-11393, 11652-11654.)

30. For instance, if Daisy was cooking chicken for dinner and the children said, "We don't want chicken; we want pork chops," it would not be unusual for Daisy to put down the children, go out to the store, buy something else they wanted, and cook it for them. (RT 11342.)

felt she was able to exercise control over Daisy's children and thought they behaved well. (RT 11339-11340, 11423-11424, 11595-11596, 11797-11798.)

Dr. White explained that being raised in a violent and destructive neighborhood by an ineffective parent had profound effects on appellant's psychological development, causing lack of coping skills, poor impulse control, and low self-esteem. (RT 11347, 11435.) Appellant had paranoid tendencies and was quick to perceive that people were putting him down or making fun of him. He was particularly susceptible to being teased. (RT 11374-11377, 11583-11587.) By age 13, appellant was admitted to a psychiatric hospital. (RT 11345.) Dr. White testified that instead of treating appellant's problems as individual pathology, the emphasis should have been on the family dynamics, perhaps to providing social workers or programs to assist and support Daisy. (RT 11345-11346.)

Genetics was raised as a possible contributing factor to appellant's psychology and behavior. Daisy had a tendency to faint or lose awareness for brief periods of time.[31/] Her medical records indicate she had frequent episodes of fainting when under psychological stress. (RT 11386-11391, 11537-11539, 11551-11553, 11620-11621, 11644-11646, 11665.) Appellant's brother Larry was also described to be, at times, "spacey"; that is, he "wouldn't quite know what was going on." (RT 11389.) Dr. White diagnosed appellant as suffering from dissociative amnesia, a disorder in which the individual may not be able

---

31. Daisy would pin personal information on her children's clothing in the event that she had a fainting spell and someone needed to send the children home or know where they belonged. On Halloween of 1973, she brought her baby Andre into the pediatric department in the hospital and fainted three times. At Larry's funeral, Daisy hyperventilated and passed out. In January 1991, she was observed to be very disoriented at work and to have urinated in her hands. On the morning of Richelle and Shirley's testimony, Daisy talked to appellant on the telephone and became so hysterical that paramedics had to be summoned. Daisy also had many car accidents. (RT 11620-11621, 11644-11646, 11754-11755.)

to recall a traumatic event. (RT 11379-11382, 11687-11688.) Gatha Lee, a neighbor of Daisy, recalled times when appellant walked by, did not acknowledge her, and seemed to be unaware of what was going on. (RT 11394, 11754.)

To emphasize the environmental factors that affected appellant's psychological development and intimate the possible genetic factor, Dr. White compared the children raised by Daisy and children raised by Shirley, all of whom were fathered by Bobby. Appellant's brothers Ezra and Larry both died violent deaths.[32/] Appellant's sister Kim had a substance abuse problem, and was involved in criminal activity.[33/] On the other hand, appellant's half-siblings Ricky and Richelle, Shirley's children, were doing well.[34/] Bobby discouraged Ricky and Richelle from associating with appellant, Ezra, Larry, and Kim. (RT 11403-11424, 11436, 11595-11618, 11629-11643.)

Dr. White emphasized the more recent stressors that had significant impacts on appellant's psychological functioning. (RT 11361-11365.) First, the violent death of his brother Ezra was a profound loss to appellant.

---

32. Ezra had been armed with a .38-caliber handgun with which he had tried to shoot someone who shot and killed him with a shotgun. Analysis of Ezra's blood revealed the presence of ethyl alcohol and cocaine metabolites. Larry, a transvestite and homosexual, was dressed up as a woman and picked up a younger man, taking him to his house. The man started to run when he learned Larry was a man. Larry picked up a knife and stabbed him. A scuffle ensued in which that man stabbed and killed Larry. (RT 11368-11369, 11536.)

33. At the time of trial, she was on probation for forged checks. Kim portrayed herself as a gang member who was quick to use physical violence with people.

34. Richelle was employed by an insurance company. She had no substance abuse problems or arrests. (RT 11407.) Ricky had been a successful college football player. He was then active in a church and working at a school, temporary position, as a counselor. He had no substance abuse problems or arrests. (RT 11408.)

Appellant was extremely close to Ezra. Second, about ten months later, his brother Larry was violently stabbed to death. (RT 11366-11370.) Third, appellant suffered an injury that ended his football career. His self-esteem was centered solely on this aspiration, realistic or unrealistic. (RT 11421-11422.) Lacking adequate self-esteem and coping skills,[35] appellant was unable to handle the feelings and resolve the grief. (RT 11426-11427.)

Dr. White used the analogy of the "Oakland fire" to explain appellant's history and behavior that night:

> [T]o use the analogy of the Oakland fire . . . . You need a spark. I think the spark was what [appellant] perceived as teasing or a smirk. But a spark doesn't burn down 3,000 houses. You need an accumulation of fuel. And I think the accumulation of fuel was what happened over the lifetime, a sense of humiliation, a sense of fear, a sense of rejection, a sense of hopelessness, a sense of helplessness. Then you need something like the fire to get the spark . . . going with the – going with the fuel that you have there. And I think that the wind was something like poor impulse control, the inability to manage his feelings until they erupted.

(RT 11730-11731.)

---

35. Dr. White spoke of having "something to fall back on." (RT 11426-11427.) Dr. White testified about appellant's positive demeanor and his sense of achievement when he talked about his experience at the California Conservation Camp, which was a program that took youths and taught them how to prevent fires and floods. (RT 11402.)

ARGUMENT

I.

THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE ROBBERY CONVICTIONS

Appellant argues that the evidence was insufficient to support the robbery convictions. (AOB 59-63.)[36] Not so. There was sufficient evidence to support the robbery convictions.

This Court has set forth the standard of review when sufficiency of the evidence is raised on appeal:

> It is the prosecution's burden in a criminal case to prove every element of a crime beyond a reasonable doubt. To determine whether the prosecution has introduced sufficient evidence to meet this burden, courts apply the "substantial evidence" test. Under this standard, the court "must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence – that is, evidence which is reasonable, credible, and of solid value – such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." The focus of the substantial evidence test is on the whole record of evidence presented to the trier of fact, rather than on "isolated bits of evidence."

(*People v. Cuevas* (1995) 12 Cal.4th 252, 260 [internal citations and italics omitted].) This standard of review is the same in cases where the prosecution relies primarily on circumstantial evidence. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1329; *People v. Stanley* (1995) 10 Cal.4th 764, 792-793; *People v. Bean* (1988) 46 Cal.3d 919, 932.)

> [T]his inquiry does not require a [reviewing] court to ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt. Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

---

36. "AOB" refers to Appellant's Opening Brief.

(*People v. Trevino* (1985) 39 Cal.3d 667, 695 [italics omitted].)

Robbery is defined as:

> the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear.

(§ 211.) The jury was instructed on the elements of robbery:

> In order to prove [the crime of robbery], each of the five following elements must be proved:
>
> 1. A person had possession of property of some value however slight,
>
> 2. Such property was taken from such person or from her immediate presence,
>
> 3. Such property was taken against the will of such person,
>
> 4. The taking was accomplished either by force, violence, fear or intimidation, and
>
> 5. Such property was taken with the specific intent permanently to deprive such person of the property, and such specific intent must occur before or during the application of force or fear.

(CT 992-993 [CALJIC No. 9.40].)

Under the foregoing standard, appellant's insufficiency of the evidence claim fails.

A. There Was Sufficient Evidence To Support The Robbery Of Angie

Appellant acknowledges that in the case of Angie, there was a "taking." He argues, however, that the taking was not accomplished by "force or fear" and without the requisite specific intent to steal. (AOB 62.) His arguments are untenable. With the intent to permanently deprive her or her property, appellant, using the fear inherent in the surrounding circumstances, reached into Angie's pocket and took all of her money.

The "force or fear" element has been satisfied here. Appellant claims the taking occurred "*by invitation*," not by "force or fear." (AOB 62.) Respondent concedes that the taking was not accomplished by force. As appellant correctly notes, he "did not beat Angie or bind her with the concurrent intent of taking anything of value." (AOB 62.) Nonetheless, the taking was accomplished by utilizing fear inherent in the surrounding circumstances.

"Fear" is defined as either:

> 1. The fear of an unlawful injury to the person or property of the person robbed, or of any relative of his or member of his family; or,
>
> 2. The fear of an immediate and unlawful injury to the person or property of anyone in the company of the person robbed at the time of the robbery.

(§ 212; CT 994 [CALJIC No. 9.41].) "[N]either resistance by the victim nor threats by the perpetrator are necessary elements of robbery." (*People v. Mungia* (1991) 234 Cal.App.3d 1703, 1708.) "[T]here must be evidence from which it can be inferred that the victim was in fact afraid, and that such fear allowed the crime to be accomplished." (*Id.* at p. 1709, fn. 2.) "Actual fear may be inferred from the circumstances, and need not be testified to explicitly by the victim." (*People v. Cuevas* (2001) 89 Cal.App.4th 689, 698.)

Here, the fear inherent in the attendant circumstances allowed appellant to take all of Angie's money. Appellant had beaten Angie. Angie was aware that appellant assaulted Laurie, and was told that Laurie ran away. While driving in a remote isolated area with Angie's hands bound, appellant told Angie that he wanted to call Laurie's mother but he did not have change for the pay phone. Hoping she would be discovered, Angie offered the change in her pocket to appellant. Appellant then reached into Angie's pocket and took *all* her money. (See RT 5087-5088.) It is plausible that Angie "invited" – i.e., consented to – the taking of the coin change in her pocket for the pay phone. But it is implausible that Angie consented to appellant taking *all* her money.

Given the circumstances, Angie understandably was very fearful and did not protest or resist to having all her money taken. However, it is reasonable to infer that appellant used the fear inherent in the surrounding circumstances to accomplish the taking. (Cf. *People v. Prieto* (1993) 15 Cal.App.4th 210, 215 [finding that the taking was accomplished by fear where victim's purse was in the possession of another person and defendant forcefully wrested purse from this other person, causing the victim, a few feet away, to be fearful and shocked and, thus, victim was less inclined or able than she otherwise would have been to prevent defendant from taking her purse]; *People v. Brew* (1991) 2 Cal.App.4th 99, 104 [finding that taking was accomplished by fear where defendant, who is considerably larger in size than victim, approached victim's register and, in the absence of a counter or any kind of barrier, stood "real close" to victim; defendant, with noticeable alcohol breath, proceeded to make a bogus purchase causing victim to open the cash register drawer; as victim started to put defendant's money in the drawer, defendant, without saying anything, interjected himself physically between victim and the cash register drawer causing victim to step back in fear; defendant then took the money in the register]; but cf. *People v. Welsh* (1936) 7 Cal.2d 209, 212 [Defendant threw the victim into his car, drove away, told her he wanted sex, and while driving reached over, took her purse, removed cigarettes, and returned her purse. Held: no robbery (of the cigarettes).].)

In characterizing the taking to have been invitational, appellant is arguing that he lacked the requisite intent to steal. (AOB 62.) Not so. Here, the requisite intent for the robbery of Angie was met.

Robbery requires the specific intent to steal, i.e., to permanently deprive the owner of his/her property. (*People v. Butler* (1967) 65 Cal.2d 569, 572-573, disapproved on other grounds in *People v. Tufunga* (1999) 21 Cal.4th 935, 956.) Hearing that appellant did not have change to make a call from a

pay phone, Angie told him that she had change in her pocket. Aware that Angie had money for the movies (RT 3540, 4977-4978), appellant reached into her pocket and took *all* of her money, coins and paper money. He put the paper money in the coin compartment in the car. He went outside, put the coins into the pay phone and started to dial and then hung up. Presumably, the coins were returned. When he got back into the car, he did not return the coins and paper money to Angie. He kept all the money. (RT 5087-5088.)

Appellant had no intention of returning the money. Later in Selma, appellant stopped at a gas station. He feared detection; he told Angie to "lie low so no one would see [her]." He risked exposing himself to capture with a kidnapped girl in his car because his car was low on fuel. He took the paper money, got out of the car, and bought gas and maybe food there. (RT 5094-5097.) Clearly appellant did not intend to return the money; he kept and used Angie's money. Viewed in the light most favorable to the verdict, one can reasonably infer that when appellant took all of Angie's money, he had the intent to permanently deprive her of the money. (Cf. *People v. Davis* (1998) 19 Cal.4th 301, 312 [explaining that an intent to return property under tenuous and illusory circumstances is tantamount to an intent to permanently deprive the victim of his or her property].)

Appellant further argues that he "did not beat Angie or bind her with the concurrent intent of taking anything of value." (AOB 62.) Not so. Under the robbery statute, the element of fear is distinct and separate from – not a mere component of or subsumed within – the element of force. (See, e.g., *People v. Flynn* (2000) 77 Cal.App.4th 766, 771- 773 [where prosecution did not argue and trial court did not instruct sufficient force for robbery, appellate court reviewed sufficiency of evidence of fear that arose after initial taking]; *People v. Prieto, supra,* 15 Cal.App.4th at p. 215 ["Since appellant used no force against [victim], the question becomes was fear used."].) Though lacking

actual or threatened force at the time property was taken, to require a victim who reasonably feared her assailant to actively resist the taking would be absurd and dangerous. Thus here, respondent submits there was a concurrence of intent and act. Angie was understandably fearful. Appellant had brutally beaten her, and she was aware – at the very least – that he had assaulted her friend. After having been assaulted, appellant tied her up and drove her around isolated remote areas. Utilizing the fear inherent in the attendant circumstances, he reached into her pocket and took *all* of her money. Angie, in fear, did not protest or resist. (Cf. *People v. Prieto, supra,* 15 Cal.App.4th at p. 215; *People v. Brew, supra,* 2 Cal.App.4th at p. 104; but cf. *People v. Welsh, supra,* 7 Cal.2d at p. 212.)

B. The Evidence Was Sufficient To Support The Robbery Of Laurie

Appellant argues that there was no evidence that he took Laurie's money. He further argues that if the evidence was sufficient to support a taking, the requisite intent to steal arose as "an afterthought to the killing." (AOB 60-61.) Respondent disagrees. It can be reasonably inferred that appellant took Laurie's money. There is substantial evidence that appellant had an intent to steal Laurie's money prior to the killing.

A "taking" of Laurie's money by appellant can be reasonably inferred. Appellant knew that Laurie had money for the movies. (RT 4963-4968.) He also knew she had money remaining from her purchase at McDonald's. (RT 4977-4978.) Laurie put the change into the front right-hand side pocket of her jeans. (RT 4977-4978.) Laurie's jeans were tight-fitting. (RT 5919.) The money would have not have easily fallen out during a scuffle.[37] From the

---

37. Appellant's trial counsel sought to dissuade the jury from believing that Laurie put the money in her jeans pocket. Counsel suggested the money

evidence, Laurie's body was on the road only briefly before being discovered. (See RT 3658-3665, 3693-3694, 5097-5100, 5148.) Laurie's jeans pockets contained a bus token but no money.[38] (RT 4298, 4472-4473.) The evidence indicates that appellant was the only person with the opportunity to take the money; there was no evidence that someone else actually took the money. Thus, though he only had eight cents on him at the time of arrest (RT 5599-5600), one can reasonably infer that appellant reached into Laurie's jeans pocket and took the money out. (Cf. *People v. Fields* (1965) 235 Cal.App.2d 1, 4 ["The fact that the stolen property was not found in defendant's possession does not preclude his [robbery] conviction."].)

There was substantial evidence showing appellant formed the requisite intent to steal prior to the killing. Robbery requires the specific intent to steal, i.e., to permanently deprive the owner of his/her property. (*People v. Butler, supra,* 65 Cal.2d at pp. 572-573, disapproved on other grounds in *People v. Tufunga, supra,* 21 Cal.4th at p. 956.) "[T]he evidence must show that the requisite intent to steal arose either before or during the commission of the act of force." (*People v. Kipp* (2001) 26 Cal.4th 1100, 1128.) "[I]f the intent arose only after the use of force against the victim, the taking will at most constitute a theft." (*People v. Marshall* (1997) 15 Cal.4th 1, 34.) The intent to steal "need not be directly proved but may be inferred from all of the circumstances of the case." (*People v. Hall* (1967) 253 Cal.App.2d 1051, 1054.)

First, appellant was aware that Laurie had money. He knew she was going to the movies. (RT 4963-4968.) He also knew she had money remaining

---

was in her jacket. (RT 9151-9152.) The jury apparently rejected the suggestion.

38. Though Laurie had on her finger rings, a watch, and a bus token (RT 3583, 3713, 5018-5024), these items were not of value to appellant. Appellant testified that he only needed money for gas. (RT 5786.)

from her purchase at McDonald's. (RT 4977-4978.) Second, at McDonald's, appellant expressed a desire for Laurie's money. Despite having money of his own at the time[39] (RT 5816), appellant asked Laurie to buy him something to eat (RT 4975-4977, 5137-5138). Apparently, appellant had not eaten yet that night. However, to realize his plan of taking Laurie to Lost Lake Park and having sex with her there, appellant needed to keep his money for gas. His car was then low on gas. (RT 5792-5793, 5795, 5815-5816.) Third, appellant spent nearly all of the money Donna had given him that night. After leaving the Farkas residence, he spent about a dollar playing video games at a bowling alley. (RT 5817.) At Texaco, off Herndon Avenue and Route 99, he bought a little over two dollars worth of gas. (RT 5871.) Fourth, every dollar mattered to appellant. He testified that he needed money only for gas (RT 5786), and that he would only put about two dollars worth of gas each time (RT 5793). Also, not having eaten yet that night (RT 4975-4977), he was presumably hungry; and he did not have much money remaining. Fifth, appellant betrayed his intent to steal inside the bathroom at Lost Lake Park. The evidence showed that appellant took off Laurie's coat and the contents of the inside coat pocket were scattered on the bathroom floor. (RT 5018-5024.) The deputy district attorney, in his response to appellant's section 1118.1 motion, noted that the inside pocket of Laurie's coat is not a "gaping pocket but one with a restricting elastic." (CT 735.) The jury can thus reasonably infer that the scattering of the contents of the coat pocket was not an unintended consequence of the struggle between Laurie and appellant. In other words, appellant consciously and purposefully removed the contents of the inside coat pocket, looking for Laurie's money . Sixth, any doubt that the amount – though small – furnished a motive for robbery was dispelled when later that night, appellant reached into

---

39. Appellant testified that he had a little under five dollars in change – coins – that night. (RT 5816.)

Angie's pocket and took all of her money – $8.88. (RT 5087-5088.) At a gas station in Selma, he took Angie's – and Laurie's – money and purchased gas and maybe food there. (RT 5094-5097.) Respondent submits that the evidence was sufficient to establish that appellant formed the intent to steal prior to the killing. (Cf. *People v. Palmore* (2000) 79 Cal.App.4th 1290, 1298.)

Respondent is aware that "[t]he wrongful intent and the act of force or fear 'must concur in the sense that the act must be motivated by the intent.'" (*People v. Marshall, supra,* 15 Cal.4th at p. 34.) Here, there was a concurrence of act and intent. First, Laurie had money inside the pocket of her jeans pocket. (But cf. *People v. Morris* (1988) 46 Cal.3d 1, 20 [no evidence that any personal property was in victim's possession at time of murder], overruled on other grounds in *In re Sassounian* (1995) 9 Cal.4th 535, 543-544, fn. 5.) Second, appellant was aware that Laurie had money and had expressed interest in Laurie's money. (But cf. *Rodriguez v. Superior Court* (1984) 159 Cal.App.3d 821, 823-827 [evidence which showed that rape victim left her purse in defendant's car when he allegedly forced her out to rape her and that he drove off with purse after rape, but which did not show that defendant had shown interest in purse or that victim brought it to his attention, was insufficient to support order holding defendant to answer for robbery].) Third, appellant forcefully took Laurie's coat off and removed the contents of the inside coat pocket. Removal of the contents of Laurie's inside coat pocket was an act motivated by appellant's intent to steal – he was looking for Laurie's money. Because appellant removed the contents of the coat pocket, the jury was not left to speculate whether any of the forceful acts that resulted in the removal of Laurie's coat and rendered her temporarily unconscious were motivated by an intent to steal. To put another way, the jury was not left to speculate whether the taking was accomplished by force or fear or as an afterthought to the killing. Because appellant removed the contents of the coat pocket, the jury reasonably

inferred that the force used in his attempt to rape Laurie – taking the coat off of Laurie and rendering her temporarily unconscious – was also force for robbery. (*People v. Shadden* (2001) 93 Cal.App.4th 164, 170-171 [explaining that "[w]here a defendant begins a sexual assault, aware that the victim has property and takes it, the jury may infer the defendant intended to commit both rape and robbery . . . [o]r it may infer that the force used for the sexual offense was also force for robbery"]; cf. *People v. Holt* (1997) 15 Cal.4th 619, 671, 690.) Furthermore, one can harbor two separate criminal intents simultaneously. (See, e.g., *People v. Holt, supra,* 15 Cal.4th at pp. 671, 690.) Thus, though the evidence did not show when appellant took Laurie's money, there was sufficient evidence upon which the jury could reasonably infer that appellant took her money by means of force or fear, rather than as an "afterthought to the killing."

While other inferences also might be drawn from the evidence, it was for the jury to draw them. The "function on appeal is not to reweigh or reinterpret the evidence but simply to determine whether there is sufficient evidence in the record to warrant the inference of guilt drawn by the trier of fact." (*People v. Perry* (1972) 7 Cal.3d 756, 785, overruled in part on other grounds, by *People v. Green* (1980) 27 Cal.3d 1, 28.) Accordingly, appellant's insufficiency of the evidence claims as to the robbery convictions should be rejected.

II.

THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE ROBBERY-MURDER SPECIAL CIRCUMSTANCE

Appellant argues that the evidence was insufficient to support the robbery-murder special circumstance finding (§ 190.2, subd. (a)(17)(A)). (AOB 64-65.) Not so.

Section 190.2, subdivision (a)(17)(A), provides:

> (a) The penalty for a defendant who is found guilty of murder in the first degree is death or imprisonment in the state prison for life without the possibility of parole if one or more of the following special circumstances has been found under Section 190.4 to be true:
>
> . . . . . .
>
> (17) The murder was committed while the defendant was engaged in, or was an accomplice in, the commission of, attempted commission of, or the immediate flight after committing, or attempt to commit, the following felonies:
>
> (A) Robbery in violation of Section 211 or 212.5.

This Court has stated:

> A felony-murder special circumstance, . . . may be alleged when the murder occurs during the commission of the felony, not when the felony occurs during the commission of a murder. Thus, 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, that is, the commission of the felony was not merely incidental to an intended murder.

(*People v. Mendoza* (2000) 24 Cal.4th 130, 182 [internal citations omitted]; see *People v. Clark* (1990) 50 Cal.3d 583, 608.)

> [T]he focus is on the relationship between the underlying felony and the killing and whether the felony is merely incidental to the killing, an afterthought. [Citations.]

(*People v. Hernandez* (1988) 47 Cal.3d 315, 348.) "[C]ircumstantial evidence may support a first degree robbery-murder finding, or a robbery-murder special circumstance." (*People v. Marks* (2003) 31 Cal.4th 197, 231.)

As explained in Argument I, the jury could reasonably infer that appellant harbored the intent to steal and acted in furtherance of this felonious intent prior to strangling Laurie to death. Appellant asked the girls to buy him something to eat because he did not have much money. He also needed money to get gas for his car. He stopped at gas stations twice during the course of driving the victims over a wide area of town, because, by his own admission, he never put more than two dollars of gas in the car at any time. While in the bathroom, appellant took off Laurie's coat and scattered its contents, looking for and taking Laurie's money. There was substantial evidence to support the robbery conviction and robbery-murder special circumstance finding. That appellant possibly did not succeed in finding and taking Laurie's money until after the strangulation does not dictate a contrary result. (Cf. *People v. Koontz* (2002) 27 Cal.4th 1041, 1078-1080 [evidence that defendant entertained intent to steal before shooting victim was sufficient to support robbery-murder special circumstance]; *People v. Frye* (1998) 18 Cal.4th 894, 954-956 [robbery-murder special circumstance finding supported by substantial evidence that defendant entered victims' cabin with intent to steal].) The robbery here thus cannot be deemed incidental to the murder. (But cf. *People v. Marshall, supra,* 15 Cal.4th at p. 40-41 [robbery merely incidental to murder where defendant took from victim a letter written to her by a grocery store because he wanted the letter as a token of the rape and killing]; *People v. Green, supra,* 27 Cal.3d at p. 61 [robbery merely incidental to murder where taking of victim's purse, clothing, and rings, was apparently to hinder identification of the victim], overruled on other grounds in *People v. Hall* (1986) 41 Cal.3d 826, 834, fn. 3, and *People v. Martinez* (1999) 20 Cal.4th 225, 241.)

Accordingly, appellant's insufficiency of the evidence claim as to the robbery-murder special circumstance finding should be rejected.

III.

THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE ATTEMPTED RAPE CONVICTION

Appellant argues that the evidence was insufficient to support the attempted rape conviction. (AOB 66-75.) Not so. There was substantial evidence that appellant had the intent to force Laurie to have sex with him and that he acted in furtherance of this intention.

This Court has set forth the standard of review when sufficiency of the evidence is raised on appeal:

> It is the prosecution's burden in a criminal case to prove every element of a crime beyond a reasonable doubt. To determine whether the prosecution has introduced sufficient evidence to meet this burden, courts apply the "substantial evidence" test. Under this standard, the court "must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence – that is, evidence which is reasonable, credible, and of solid value – such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." The focus of the substantial evidence test is on the whole record of evidence presented to the trier of fact, rather than on "isolated bits of evidence."

(*People v. Cuevas, supra,* 12 Cal.4th at p. 260 [internal citations and italics omitted].) This standard of review is the same in cases where the prosecution relies primarily on circumstantial evidence. (*People v. Bradford, supra,* 15 Cal.4th at p. 1329; *People v. Stanley, supra,* 10 Cal.4th at pp. 792-793; *People v. Bean, supra,* 46 Cal.3d at p. 932.)

Section 261 defines "rape":

> (a) Rape is an act of sexual intercourse accomplished with a person not the spouse of the perpetrator, under any of the following circumstances:
>
> . . . . . .

> (2) Where it is accomplished against a person's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person or another.

Section 664 provides:

> Every person who attempts to commit any crime, but fails, or is prevented or intercepted in its perpetration, shall be punished where no provision is made by law for the punishment of those attempts . . . .

According to this Court,

> An attempt to commit a crime has two elements: the intent to commit the crime and a direct ineffectual act done toward its commission. The act must not be mere preparation but must be a direct movement after the preparation that would have accomplished the crime if not frustrated by extraneous circumstances.

(*People v. Carpenter* (1997) 15 Cal.4th 312, 387 [internal citation omitted].)

> Whenever the design of a person to commit a crime is clearly shown, slight acts done in furtherance of that design will constitute an attempt, and the courts should not destroy the practical and common-sense administration of the law with subtleties as to what constitutes preparation and what constitutes an act done toward the commission of a crime.

(*People v. Memro* (1985) 38 Cal.3d 658, 698 [internal quotations and citations omitted]; see *People v. Dillon* (1983) 34 Cal.3d 441, 455 [approving line of cases focusing on the accused's intent rather than on the degree to which the acts go beyond "mere preparation"].)

> The crime of attempted rape "is complete if there is a concurrence of the intent to commit such crime with a direct, although ineffectual, act towards its commission," providing the efforts of the accused "reach far enough towards the accomplishment of the desired result to amount to the commencement of the consummation." To constitute such an attempt it is not necessary "that the act done should be the last proximate one for the completion of the offense," or that there be any penetration whatever.

(*People v. Thomas* (1958) 164 Cal.App.2d 571, 574 [internal citations omitted].)

Here, there was substantial evidence to support the attempted rape conviction.

Prior to January 26, 1991, appellant displayed sexual interest in Laurie. Appellant called and talked with Laurie. (RT 8848.) He visited the Farkas residence often, even when Laurie's parents were not around. (RT 3595, 5300-5302, 5800.) Appellant took Laurie to and from school,[40] took her to lunch, and taught her how to drive. (RT 5302, 5801-5804.) He engaged in conversations of a sexual nature with Laurie. He asked Laurie if she was a virgin, how far she had gone with men, and if she considered having older, more experienced boyfriends – even suggesting himself to be that older experienced boyfriend. He also commented to Laurie on the tight fitting clothing she wore. (RT 3611-3614.) In one specific instance, sometime in late August or September of 1990, appellant was getting ready to go to the Farkas' residence. Appellant's friend, Michael Hall, told him, "You need to stay out from there." (RT 8849, 8851.) Appellant replied, "She wants me. I know she wants me." (RT 8850.) Hall warned appellant, "That's Donna's cousin. You've got to be crazy. She's only 14." Appellant replied, "So what? I don't care." (RT 8850-8852.)

Appellant's conduct during the evening of January 26, 1991, revealed his intention to pursue sexual activity with Laurie that night. While Laurie was getting ready to go out, appellant went in her bedroom and bathroom, and spoke with Laurie about wanting to go "cruising" with her. (RT 4964, 5809-5810.) Laurie told appellant that she and Angie were going to watch a movie

---

40. Laurie's aunt, Helene Painter, testified that appellant paid a "big amount" of attention to Laurie. Appellant called Ms. Painter and asked for the location of Laurie's school, so he could pick her up from school and bring her home. (RT 5301-5302.)

at the Festival Theater on Blackstone. (RT 4965-4966, 5810.) Around 8:15 p.m., Laurie's father drove them to the movie theater. (RT 3634.) Aware of the girls' plan to watch a movie, appellant decided to try to find the girls after the movie was over and take them to Lost Lake where he knew he could be alone with Laurie. About ten or fifteen minutes after Laurie and Angie left for the movie theater, appellant left the Farkas residence (RT 3564, 5814) and went directly to the bowling alley on Blackstone, near the theater, and played a couple of video games (RT 5814-5817). Appellant left the bowling alley but stayed in the area, waiting for Laurie and Angie to get out of the movie theater. Appellant found the girls, who were walking along Blackstone, because they were late for the movie. (RT 3650-3654, 4970-4971.) Appellant pulled up in his car and the girls got in. (RT 4973-4974.)

It was too early to take the girls to Lost Lake since other people might be present.[41] So, to kill time, appellant took the girls to McDonald's restaurant and to Roeding Park – which is in the opposite direction of Lost Lake – falsely telling the girls that he knew people who would be "kicking back" there. Appellant used more time to stop and get gas. From the gas station, appellant drove to a remote region in Lost Lake Park. Not surprisingly, there were no people "kicking back," or "partying" by the time he arrived there at about 9:30 p.m. (RT 4975-4989.)

Now that the girls were at Lost Lake, appellant sought to get Laurie alone with him to have sex with her. Appellant told the girls he needed to go to the bathroom. His plan had to be put on hold initially at the first bathroom. The area was lighted and a car was parked there. Telling the girls, "I don't like this – I don't trust this car," appellant drove onto the next bathroom. (RT 4989-4991.)

---

41. Appellant had brought other women to Lost Lake Park before to engage in sexual activity. (RT 3982-3983.)

Then under the ruse of needing toilet paper, he lured Laurie into a pitch-black bathroom in the deserted park Appellant undoubtedly began to make sexual advances toward Laurie, because Angie heard Laurie repeatedly say, "Roy, stop" and "Roy, leave me alone." Apparently, these spurned sexual advances became forceful and assaultive because appellant took off Laurie's jacket and then Laurie's words of protest became screams and calls for Angie. (RT 5000-5002, 6853-6854.) Appellant was using force to realize his intent of having sex with Laurie. Clearly, his acts were the "commencement of consummation."

When Angie approached the bathroom, she heard "scuffling" on the floor and then silence. Appellant had subdued Laurie's resistance, rendering her unconscious. Angie went inside the bathroom and saw Laurie lying face down, motionless, with her head between appellant's legs. Angie grabbed Laurie's legs and tried to pull her away from appellant. Seeing his plan falter, appellant reacted immediately. He jumped up and knocked Angie to the ground. Then he choked her and repeatedly slammed her head into the ground. (RT 5003-5009, 5022-5024.)

The evidence stated so far is sufficient to support the attempted rape conviction. Appellant's plan – to get Laurie alone and have sex, if not consensually then forcibly – was thwarted by Laurie's resistance and Angie's interference. The jury reasonably concluded appellant's use of force in taking off Laurie's jacket and subduing her resistance would have resulted in sexual intercourse had it not been for Angie's timely interference. (Cf. *People v. Thomas, supra*, 164 Cal.App.2d at pp. 574-575 ["the record fully supports the conclusion that his advances, mistreatment, struggle to get Mrs. Fielder down in the seat, and other misconduct would have resulted in [defendant] having sexual intercourse with her had it not been for her resistance and the timely interruption"]; *People v. Memro, supra*, 38 Cal.3d at pp. 698-699 [inferring

appellant's intent and plan to "commit lewd conduct once a willing participant came along" from the "arrangement" of lights, and the presence of pornographic materials and other paraphernalia in the apartment; holding that the acts of inviting and accompanying the boy up to the apartment, and of ushering the boy into the bedroom to watch the strobe lights and staying close by, constituted "actual commencement of his plan" and were therefore sufficient to support an attempted lewd and lascivious act conviction; and explaining "but for [the boy's] abrupt decision to leave the apartment, it is likely that these steps would have resulted in a completed violation of section 288"].)

The events following the assault on Angie further support the inference that appellant intended to force Laurie to have sex with him. To prevent Angie from further interfering while he continued his efforts to have sex with Laurie, appellant tied Angie's hands behind her back and placed her by the entrance, against the wall. Laurie was crying and upset. Appellant told her to shut up, and then said to her, "You don't trust me." (RT 5144.) Appellant then pulled Laurie to the back of the bathroom. He put his hand around the back of her neck and tried to kiss her a couple of times. (RT 5143.) Laurie kept trying to pull away and repeatedly told him that she was menstruating. Appellant became upset and unsettled; but he was determined to be sexually gratified. He tied Angie to a toilet to prevent her escape. He told Laurie to come with him to get water to clean up Angie. Laurie clung fearfully to Angie's leg, refusing to go. (RT 5030-5035.) Appellant was finally able to force Laurie to go to the women's bathroom on the other side of the building. (RT 5035-5036.)

Inside the women's bathroom, appellant tried to force Laurie to comply with his demand for sexual intercourse. He again removed Laurie's coat.[42/] The

---

42. In the men's bathroom, appellant took off Laurie's coat off of her. After his assault on Angie, appellant left the bathroom. He came back into the

jury reasonably concluded that during this time, appellant reached underneath Laurie's blouse and pushed her bra up, leaving her bare-chested. Laurie's bra was pushed up above her breasts when her body was discovered. (RT 3739-3740.) The stains of Angie's blood on Laurie's blouse originated from inside the blouse. (RT 4604-4609.) Appellant's hands had Angie's blood on them because he beat up Angie in the men's bathroom. As apparent from the blood stains on Laurie's bra, appellant reached underneath Laurie's blouse and pushed her bra upward because the blood stains tailed off in concentration as it moved upward and outward.[43] (RT 4647-4648.) The blood stains on

---

men's bathroom with a flashlight and shone it around. Laurie then picked up her coat and put it back on. (RT-5018, 5024.) Later, he untied Angie from the toilet plumbing and put her inside the car. He then reached into the back of the car and put Laurie's coat over Angie. (RT-5082, 5085, 5146-5147.)

43. Relying on *People v. Craig* (1957) 49 Cal.2d 313, appellant argues that "the condition of [Laurie's] clothing [shirt partially disturbed and bra pushed up over the breasts] had little probative value to prove an attempted rape." (AOB 70.) In *Craig*, though the victim's nightgown and panties were torn open exposing the front of her body, her legs were apart, and defendant had said several days earlier that he would like "a little loving," there remained no certain evidence of rape. There was instead, this Court held, only evidence he had intentionally "beat up a woman," strangled her, and dragged the body some 20 to 25 feet. (*Id.* at pp. 315-317.)

Here, unlike *Craig*, the condition of Laurie's clothing cannot be attributed to her body being dragged. Stains of Angie's blood were found in the interior of Laurie's blouse, having originated in the interior. (RT 4604-4609.) The blood that stained Laurie's bra was transferred while the bra was in a folded configuration (RT 4647), and tailed off in concentration as it moved upwards and outwards (RT 4647-4648). To be sure, appellant remembered dragging Laurie's body. According to his testimony, he held her upper body and dragged her along, with her heels touching the ground. (RT 5899-5900, 6813-6817.) In any event, given Laurie's size (RT 5336 [5'1½", estimated 110 to 115 lbs.]) and appellant's strength and size (RT 5945 [6'0", estimated 185 to 195 lbs.]), Laurie's torso would not be in contact with the ground. For the displacement of the bra to have been the result of being dragged along the ground, appellant would have had to been down at the ground, literally, dragging her along. Furthermore, the blood stain would have tailed off in

Laurie's bra further shows that the bra was crumpled or folded by the upward movement of appellant's hand. (RT 4604-4609.) Laurie's resistance continued. She screamed, "Roy, don't. Roy, don't. Leave me alone." She then started calling for Angie. Angie heard scuffling sounds on the floor and gasps for air. (RT 5038-5040.) The fact appellant did not complete the act of intercourse did not alter the fact he attempted to rape Laurie. (Cf. *People v. Maury* (2003) 30 Cal.4th 342, 400 [explaining that if there is evidence of assault to commit rape and evidence of acts attendant to the execution of that intent, the abandonment of that intent before consummation of the act will not erase the felonious nature of the assault].) With Laurie screaming and calling for Angie, appellant, perhaps angry or perhaps fearful of detection and distrustful of Laurie's assurance of silence, decided then to kill her. Perhaps also Laurie's continuous resistance had spawned a vengeful anger within him desiring to punish her – to kill her – for not acquiescing to his demand for sexual intercourse. (Cf. *People v. Marshall, supra,* 15 Cal.4th at pp. 36-37 [holding there was sufficient evidence to support attempted rape conviction where the victim's body was found dead with her underwear and pants pulled down in an abandoned apartment building; a month earlier, while assaulting and dragging another victim toward same building, defendant told that victim he was going to rape and kill her; the existence of a struggle was evidenced by the abrasions on her neck, face, and arms, and the abrasions on his elbow and injury to hand, and the bloodstains on his sweatshirt consistent with the victim's blood type; the victim's screams, the gag found in her mouth, and the

---

concentration downwards. In addition, unlike *Craig*, Angie heard the encounters between Laurie and appellant, bolstering the inference of appellant's sexual intent. (Cf. *People v. Miller* (1962) 57 Cal.2d 821, 827 [noting that, unlike *Craig*, a witness heard part of the encounter between the victim and her assailant – "a woman's voice calling faintly for help, a man's voice saying 'hush,' and a fast, unusual moving around"].)

pathologist's testimony that she was strangled]; *People v. Craig* (1994) 25 Cal.App.4th 1593, 1600-1601 [holding there was sufficient evidence of defendant's specific intent to accomplish an act of sexual intercourse where defendant, who had followed the victim home, grabbed her by the hair, pushed her into the driver's seat of her car, told her not to look at him, and then shoved his hand up inside her sweater or shirt, placing his hand against her chest and touching her breasts]; *People v. Bradley* (1993) 15 Cal.App.4th 1144, 1154-1155 [holding there was sufficient evidence of defendant's intent to rape where he grabbed the victim's arm, forced her to hang up a public telephone, and holding tightly to her arm, led her to a dark dumpster enclosure area; the victim, who was 16 years old at the time, attempted to scream, but was unable due to fright; in the enclosed area, defendant kissed her neck, tried to kiss her on the mouth, moved his free hand under her shirt to fondle her breasts while touching skin not covered by her bra, and then moved his free hand under her shorts, targeting her vaginal area; during this time, he was pressing the front of his body with his erection against her back], disapproved on other grounds in *People v. Rayford* (1994) 9 Cal.4th 1, 21.)

Relying primarily on *People v. Raley* (1992) 2 Cal.4th 870, appellant argues that though he made sexual overtures, there was no evidence tending to show that he sought to engage in sexual intercourse. (AOB 71, 74.) In *Raley*, this Court found the evidence of forcible oral copulation on the surviving victim, along with evidence the defendant told the girls they would be released after they "fool[ed] around" with him for five minutes was insufficient to sustain a conviction for attempted oral copulation by force on the deceased victim. (*People v. Raley, supra,* 2 Cal.4th at pp. 890-891.) First, the court stated the "fool around" statement was, by itself, insufficient to infer an intent to commit forcible oral copulation. (*Ibid.*) Though the circumstances indicated a sexual attack on the deceased victim, the nature of the sexual assault remained

unknown and speculative. Second, even assuming one can infer an intent to commit forcible oral copulation from the "fool around" statement, there was no evidence of a direct but ineffectual act done toward its commission. (See *People v. Craig, supra,* 25 Cal.App.4th at pp. 1600-1601 [explaining and distinguishing *Raley*].) There was no evidence as to what occurred between the defendant and the deceased victim while out of the presence of the surviving victim; there was no physical evidence of an attempted oral copulation. Without knowing what the defendant apparently did or tried to do to the deceased victim, the *Raley* jury could only speculate on whether his conduct was consistent or inconsistent with an attempt to accomplish forcible oral copulation. (*People v. Raley, supra,* 2 Cal.4th at pp. 890-891.)

Raley is factually distinguishable and therefore not controlling. Here, in contrast, appellant's statements betrayed his intent to have intercourse with Laurie that night. First, appellant had told his friend, Michael Hall, that Laurie "wanted" him (RT 8850-8852). (Cf. *People v. Craig, supra,* 25 Cal.App.4th at p. 1600 [explaining that "'I want you' can be interpreted as stating a desire for intercourse"].) When warned of her youth and relationship to his common-law wife, appellant obstinately replied, "So what? I don't care." (RT 8850-8852.) Second, appellant had asked Laurie if she was a virgin and if she considered having older, more experienced boyfriends – even suggesting himself to be that older experienced boyfriend. (RT 3611-3614.) Third, failing to achieve his goal of having sex with Laurie, appellant put Angie in his car and asked her, "Will you do it?" (Cf. *People v. Craig, supra,* 25 Cal.App.4th at p. 1600 [noting that "while . . . susceptible of more than one meaning, the phrase 'do it' is frequently employed as an euphemism for other terms connoting an act of sexual intercourse"].) Angie interpreted the question to mean whether she would have sexual intercourse with him. (RT 5084-5085.) When Angie said no, appellant responded, "See, *both of you* don't trust me." (RT 5084-5085,

5188, italics added.) Read in conjunction with appellant's earlier statement to Laurie, "You don't trust me" (RT 5144), appellant seemingly admitted that he also wanted to "do it" – have penile-vaginal intercourse – with Laurie. Fourth, appellant became upset when Laurie told him that she was menstruating. (RT 5031-5033.) Finally, appellant ejaculated onto a pair of gym shorts he was wearing that night. (RT 5542-5543.)

Moreover, appellant's conduct that night was consistent with his intent to have forcible sex with Laurie. Appellant drove 14-year-old Laurie to a remote area of Lost Lake Park and lured her into a pitch-black bathroom. She was heard saying "No" and "Stop it, Roy.". He pulled her to the back of the bathroom, put his hand around her neck, and tried to kiss her. He reached underneath her blouse, pushed her bra up, leaving her bare-chested. His repeated, continuous efforts revealed his intent to accomplish an act of sexual intercourse. The fact he did not complete the intended rape does not eliminate his intent to commit rape or the evidence of his actions in furtherance of the attempted rape. There was substantial evidence of appellant's intent to commit rape; evidence of his conduct during that night was consistent with this intent. (Cf. *People v. Craig, supra,* 25 Cal.App.4th at pp. 1600-1601 [distinguishing *Raley*].) While other inferences also might be drawn from the evidence, it was for the jury to draw them. (*People v. Perry, supra,* 7 Cal.3d at p. 785 [stating that "function on appeal is not to reweigh or reinterpret the evidence but simply to determine whether there is sufficient evidence in the record to warrant the inference of guilt drawn by the trier of fact"], overruled in part on other grounds, *People v. Green, supra,* 27 Cal.3d at p. 28.)

Appellant seemingly is also drawing the distinction between spurned sexual overtures/killing and attempted rape/killing, and arguing that the evidence was sufficient to only support the former factual scenario. In his words:

> Angie's testimony establishes little more than Roy's sexual interest in the girls and violent assaults. (AOB 71.)
>
> . . . . . .
>
> [T]he testimony of the surviving victim, Angie, describes forcible sexual overtures directed toward Laurie, but nothing more. . . . [Appellant] apparently used violent force against Laurie, but there is no evidence that force was applied to accomplish a sexual act of any sort, much less an act of sexual intercourse . . . .. (AOB 74.)[44/]

His argument fails because the appellate issue of sufficiency of the evidence does not open a forum to reargue the evidence. (*People v. Perry, supra,* 7 Cal.3d at p. 785.) Whether Laurie spurned appellant's "forcible sexual overtures" and then he killed her – or whether appellant had the intent to force

---

44. Appellant had made sexual overtures to Angie. He had asked Angie if she would have sex with him. She said no, that she was waiting for someone special. Appellant desisted. Before strangling Angie, appellant did not engage in any further effort to force sexual activity upon Angie. (RT 5084-5085.) This is a rejected sexual advance/killing scenario. (Cf. *People v. Craig, supra,* 49 Cal.2d at pp. 315-317.)

Respondent submits this "*forcible* sexual overtures"/killing scenario for Laurie is untenable. (AOB 74, italics added.) Seemingly appellant acknowledges there is evidence of use of force and fear to gain compliance or acquiescence. Laurie was fearful; circumstances were such that appellant must have been aware of Laurie's fear. Laurie was a teenage girl in a pitch-black bathroom in a remote area of Lost Lake Park with a man twice her size and strength who was making unrelenting sexual advances toward her. She resisted, screaming and calling for Angie. When Angie interfered, appellant beat Angie brutally. Appellant then forced Laurie to the women's bathroom and continued his sexual advances there. Laurie's resistance persisted. Appellant then killed Laurie. The fact that, though appellant could of, he did not overpower Laurie and have sexual intercourse is irrelevant. He had the intent to force Laurie to have sexual intercourse with him and he acted in furtherance of this intention. But his acts were ineffectual; Laurie continually resisted. What happened to Laurie was distinct from what happened to Angie. What happened to Laurie is more analogous to an accused pointing a gun at the victim and telling her he wants to rape her; when she resists, he then kills her. (Cf. *People v. Carpenter, supra,* 15 Cal.4th at pp. 387-388; see also *People v. Memro, supra,* 38 Cal.3d at pp. 698-699.)

Laurie to have sex with him, acted in furtherance of this intention, but failed to accomplish his plan to have sex with Laurie, and then killed her – was a question of fact for the jury to decide.

As shown earlier, there was substantial evidence to support the inference that appellant had the intent to force Laurie to have sex with him and acted in furtherance of this intention. In the cases cited by appellant – *People v. Craig, supra,* 49 Cal.2d at pp. 315-317;[45] *People v. Granados* (1957) 49 Cal.2d 490, 496-497;[46] *People v. Anderson* (1968) 70 Cal.2d 15, 34-35[47] – the conditions

---

45. In *Craig*, the defendant, earlier in the evening, had expressed his general desire to "have a little loving," and he subsequently quarreled with a woman in a bar (not the victim) who refused to dance with him. Later that night, he attacked and killed the victim by strangling her and by beating her 20 to 80 times. The victim's body was found in a service station, lying beneath a jacked-up automobile. She had apparently been dragged across the ground about 25 feet, and two nearby cars were spattered with blood. She was wearing a raincoat over a nightgown and panties. Her raincoat had been ripped open, and her nightgown and panties were likewise torn so that the "front part of the body was exposed." (*People v. Craig, supra,* 49 Cal.2d at p. 316.) Her panties were torn open and were "under her." (*Ibid.*) She was found lying on her back with her legs slightly spread, and had suffered multiple contusions and lacerations of her face, breasts, neck and lower abdomen. (*Ibid.*)

A divided Court (four to three) held that because of the lack of evidence of the defendant's specific intent to commit rape, such as blood on the fly of his trousers or any other evidence that a sexual act or attempt took place, felony-murder-rape charges could not be sustained and, accordingly, the court modified the judgment to second degree murder. (The court had also found the evidence insufficient to show a premeditated murder.) The majority stressed that although the defendant's clothing was generally spattered with blood, no blood was found on the front of his trousers, fly or undershorts, making it unlikely a sex act was accomplished or even attempted. The open position of the victim's legs "loses significance when it is recalled that the body had been dragged some 20 to 25 feet." (*People v. Craig, supra,* 49 Cal.2d at p. 319.)

46. In *Granados*, this Court considered the sufficiency of the evidence to support a first degree felony-murder conviction based on the theory that the defendant had murdered his 13-year-old step-daughter during the perpetration or attempted perpetration of violating section 288 (lewd and lascivious act upon

of the victims' bodies (unclothed or partially unclothed) and statements made by the defendants prior to the encounter suggested some sexual motive in the killings; but no evidence was adduced to establish the defendants' sexual intent during the encounters, leaving the juries to speculate. (See *People v. Hernandez, supra,* 47 Cal.3d at p. 347; *People v. Johnson* (1993) 6 Cal.4th 1, 40-42.) Here, however, inferring appellant's intent to force Laurie to have sexual intercourse with him was based on the evidence, not speculation – e.g., Laurie telling appellant to "stop" and "leave [her] alone," her displaced bra that cannot be attributed to being dragged on the ground, and her blouse stained

---

a child under 14 years of age). There was evidence that defendant asked decedent prior to the time of killing her whether she was a virgin. When her dead body was found lying on the floor, her private parts were exposed – the apron she was wearing came down below her private parts, but that the skirt she was wearing was considerably above them. There were no lacerations or contusions on the victims private parts and a microscopic examination disclosed no spermatozoa. This Court held that there was no evidence in support of the People's theory that defendant killed in the course of committing a child molestation. (*People v. Granados, supra,* 49 Cal.2d at p. 497.)

47. In *Anderson*, the defendant had repeatedly stabbed the 10-year-old female victim. More than 60 wounds were inflicted, extending over her entire body, including vaginal lacerations. No evidence of spermatozoa was found. The victim's naked body was found under a pile of boxes and blankets; her bloodstained and shredded dress was found under her bed. The crotch had been ripped out of her blood-soaked panties. Only defendant's socks and shorts were bloodstained, suggesting he was only partly clothed during the attack. (*People v. Anderson, supra,* 70 Cal.2d at pp. 20-22.) Relying on *People v. Craig, supra,* 49 Cal.2d 313, a divided court (four to three) modified a first degree murder judgment to second degree murder, holding that the foregoing evidence was insufficient to sustain a finding of the defendant's specific intent to commit a lewd act under section 288, as required to invoke the felony-murder doctrine. (*People v. Anderson, supra,* 70 Cal.2d at pp. 34-36.) The *Anderson* majority concluded that insufficient evidence was introduced to show the defendant's sexual intent; the location of the victim's wounds bore little relevance to that issue. (See *id.* at p. 35.) The Court also found the evidence was insufficient to establish premeditated murder. (See *id.* at pp. 24-34.)

with Angie's blood originating from the interior and tailing in intensity as the blood moved upwards and outwards. The circumstances, though subject to different interpretations, are consistent with the finding that appellant attempted to rape Laurie.

> [The substantial evidence] inquiry does not require a [reviewing] court to ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt. Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

(*People v. Trevino, supra*, 39 Cal.3d at p. 695; italics omitted.) This Court should thus defer to the jury's finding and uphold appellant's attempted rape conviction.

Accordingly, appellant's claim of insufficient evidence to support the attempted rape conviction should be rejected.

IV.

THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE ATTEMPTED RAPE-MURDER SPECIAL CIRCUMSTANCE

Appellant argues that the evidence was insufficient to support the attempted rape-murder special circumstance (§ 190.2, subd. (a)(17)(C)). (AOB 76-77.) Not so. The evidence was sufficient to support the attempted rape-murder special circumstance.

Section 190.2, subdivision (a)(17)(C), provides:

> (a) The penalty for a defendant who is found guilty of murder in the first degree is death or imprisonment in the state prison for life without the possibility of parole if one or more of the following special circumstances has been found under Section 190.4 to be true:
>
> . . . . . .
>
> (17) The murder was committed while the defendant was engaged in, or was an accomplice in, the commission of, attempted commission of, or the immediate flight after committing, or attempt to commit, the following felonies:
>
> . . . . . .
>
> (C) Rape in violation of Section 261.

This Court has stated:

> A felony-murder special circumstance . . . may be alleged when the murder occurs during the commission of the felony, not when the felony occurs during the commission of a murder. Thus, 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, that is, the commission of the felony was not merely incidental to an intended murder.

(*People v. Mendoza, supra,* 24 Cal.4th at p. 182 [internal citations omitted]; see *People v. Clark, supra,* 50 Cal.3d at p. 608.)

> [T]he focus is on the relationship between the underlying felony and the killing and whether the felony is merely incidental to the killing, an afterthought.

(*People v. Hernandez, supra,* 47 Cal.3d at p. 348.) "[D]etermining whether a killing had occurred in the commission of a felony is not 'a matter of semantics or simple chronology.'" (*People v. Hernandez, supra,* 47 Cal.3d at p. 348, quoting *People v. Green, supra,* 27 Cal.3d at p. 60, abrogated on another ground in *People v. Martinez, supra,* 20 Cal.4th at pp. 234-235.)

> There is no requirement of a strict "causal" (e.g., *People v. Ainsworth* (1988) 45 Cal.3d 984, 1016) or "temporal" (e.g., *People v. Hernandez, supra,* 47 Cal.3d at p. 348) relationship between the "felony" and the "murder." All that is demanded is that the two "are parts of one continuous transaction." (E.g., *People v. Ainsworth, supra,* 45 Cal.3d at p. 1016; see, e.g., *People v. Hernandez, supra,* 47 Cal.3d at p. 348.)

(*People v. Berryman* (1993) 6 Cal.4th 1048, 1085, overruled on another ground in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.)

Appellant argues:

> [E]ven if the evidence as a whole is sufficient to prove that [he] used force or fear in an attempt to make Laurie engage in an act of intercourse against her will, it does not follow that the special-circumstance finding must be affirmed. [¶] There was insufficient evidence presented to establish the requisite concurrence of wrongful intent to have intercourse and the act of killing. [Citation omitted.] If there was any attempt to engage in an act of intercourse . . . , it must have been in the bathroom, before [he] was informed that the victim was menstruating. After that, there is no evidence of any further attempt to have intercourse with Laurie. Hence, the murder may arguably have been committed while [he] was engaged in the commission of some other offense or attempted offense, but there is no credible evidence of solid value that it was committed while [he] still engaged in ineffectual acts which had the purpose of accomplishing an act of intercourse, or preventing Laurie from reporting the attempt.

(AOB 76.) This Court has previously rejected appellant's argument, noting its absurdity in *People v. Hernandez, supra,* 47 Cal.3d at page 348. In *Hernandez,* the court stated,

> Defendant's strict construction of the temporal relationship between the rape or sodomy and the killing would preclude a felony-murder conviction or special circumstance in any case save where the victim died in the very midst of the sexual assault.

(See *People v. Guzman* (1988) 45 Cal.3d 915, 949-951, overruled on another ground in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.)

Here, under appellant's interpretation of the evidence, the evidence would still be sufficient to support the attempted rape-murder special circumstance. Appellant clearly drove Laurie to a remote region of Lost Lake Park with the intent to rape her. Having this independent purpose aside from killing Laurie, the attempted rape of Laurie cannot be deemed incidental to the murder. (See *People v. Clark, supra,* 50 Cal.3d at p. 608; cf. *People v. Wright* (1990) 52 Cal.3d 367, 416-417 [upholding rape-murder special circumstance where the evidence showed that after defendant raped the victim, he realized she could identify him since he lived just down the street from her, and therefore killed her to prevent her identification of him as her assailant]; *People v. Carpenter, supra*, 15 Cal.4th at pp. 344-346, 387-388 [upholding attempted rape-murder special circumstance where the evidence showed that defendant pointed a gun at the victim and told her, "I want to rape you;" when she refused and resisted, he shot and killed her; and explaining that the evidence "strongly suggests that his primary motivation was rape, not murder, or at least that the rape was an 'independent purpose'"].) Moreover, the murder occurred at the same location soon following the attempted rape. Given the proximity in time and space, the attempted rape had not terminated until appellant killed Laurie – which was what happened – or he fled to some other place she could not identify for law enforcement. (Cf. *People v. Guzman, supra,* 45 Cal.3d at p. 951 [upholding rape-murder special circumstance and explaining the "jury could have determined the rape had not terminated so long as the victim had not been disposed of or confined" and that "the record shows that the murder

occurred almost immediately following the rape, . . . at the same location, and with no intervening flight"], overruled on another ground in *Price v. Superior Court, supra,* 25 Cal.4th at p. 1069, fn. 13; *People v. Cain* (1995) 10 Cal.4th 1, 46 [holding that the rape was not merely incidental to the murder because a rational jury could have concluded that defendant intended to rape the victim in addition to stealing from her and her husband, and that the murders were committed to advance the other felonies and to conceal defendant's identity as the perpetrator].) Clearly, appellant had not reached a "place of temporary safety" after the attempted rape "ended" and before the murder. (See *People v. Portillo* (2003) 107 Cal.App.4th 834, 842-844; *People v. Alvarado* (2001) 87 Cal.App.4th 178, 191-192; *People v. Bodely* (1995) 32 Cal.App.4th 311, 313-314.)

Regardless, there was substantial evidence that appellant's forceful efforts to have sexual intercourse with Laurie continued into the women's bathroom. As explained in Argument III, the evidence shows that while in the women's bathroom, appellant removed Laurie's coat again, reached underneath her blouse and pushed her bra up, leaving her bare-chested. Laurie's resistance continued. She screamed, "Roy, don't. Roy, don't. Leave me alone." She then started calling for Angie. Angie heard scuffling sounds on the floor and gasps for air. Undoubtedly, this is the point at which appellant strangled Laurie to death. (Cf. *People v. Marshall, supra,* 15 Cal.4th at p. 37 [holding that the evidence supporting the inference of an ineffectual attack directed toward sexual intercourse, combined with the victim's screams, the gag found in her mouth, and the pathologist's testimony that she was strangled, "are an ample basis upon which a rational trier of fact could find that defendant killed the victim while engaged in the attempt to perpetrate a forcible rape"].)

The court properly instructed the jury on the attempted rape-murder special circumstance. (CT 857, 961, 974, 988-991.) To be sure, the jury

expressed some confusion, asking the court: "What constitutes the beginning and completion of an act of attempted rape? (As per count number one special.)" (RT 9395.) However, the jury ultimately found the attempted rape-murder special circumstance to be true. (CT 1086, 1088.) The evidence amply supports the finding that the murder occurred while appellant was "engaged in the commission" of an attempted rape. The jury could rationally find, given the proximity in time and space, the attempted rape had not terminated until appellant killed Laurie – which was what happened – or fled to some other place she could not identify for law enforcement. (Cf. *People v. Guzman, supra*, 45 Cal.3d at p. 951.)

Accordingly, appellant's claim of insufficient evidence to support the attempted rape-murder special circumstance should be rejected.

V.

THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE WITNESS-KILLING SPECIAL CIRCUMSTANCE

Appellant argues that the evidence was insufficient to support the witness-killing special circumstance (§ 190.2, subd. (a)(10)). (AOB 78-81.) Not so. The evidence was sufficient to support the witness-killing special circumstance.

Section 190.2, subdivision (a)(10), provides:

> (a) The penalty for a defendant who is found guilty of murder in the first degree is death or imprisonment in the state prison for life without the possibility of parole if one or more of the following special circumstances has been found under Section 190.4 to be true:
>
> . . . . . .
>
> (10) The victim was a witness to a crime who was intentionally killed for the purpose of preventing his or her testimony in any criminal or juvenile proceeding, and the killing was not committed during the commission or attempted commission, of the crime to which he or she was a witness; or the victim was a witness to a crime and was intentionally killed in retaliation for his or her testimony in any criminal or juvenile proceeding.

The elements of the witness-killing special circumstance are:

> (1) a victim who has witnessed a crime prior to, and separate from, the killing; (2) the killing was intentional; and (3) the purpose of the killing was to prevent the victim from testifying about the crime he or she had witnessed.

(*People v. Stanley, supra,* 10 Cal.4th at p. 801 [internal citation omitted].) The crime witnessed cannot be deemed "prior to and separate from" the killing when both are part of "the same continuous criminal transaction." (*People v. Beardslee* (1991) 53 Cal.3d 68, 95 [internal citations and quotations omitted].)

Here, there was ample evidence to support the witness-killing special circumstance. Appellant drove Laurie to Lost Lake, planning to isolate her and

then have sex, consensual sex, with her. Appellant's intention and efforts to engage in sexual activity with Laurie were frustrated by Laurie's resistance and Angie's interference. Angie walked into the men's bathroom and saw Laurie lying motionless with her head between appellant's legs. She grabbed Laurie's legs, trying to pull her away. Seeing his plan falter, appellant jumped up and knocked Angie to the ground. He then choked her and repeatedly slammed her head into the floor. When Angie's resistance waned, appellant ceased choking and beating her. He went to the car and got a flashlight; he returned to the bathroom to assess the extent of Angie's injuries and the evidence of the assault. He then walked back to the car and got a container. He returned to the bathroom, filled the container with water from the urinal and tried to rinse the blood off the floor, revealing his intention to avoid detection. But the most damning evidence would be Laurie and Angie. Despite Laurie's plea that they would make up a story, appellant said he did not trust her, recalling a prior incident of betrayal. (RT 5140-5141.) After tying Angie to the toilet plumbing with a rope, appellant told Laurie to go with him to look for some water. When Laurie refused, appellant once again noted that she did not trust him. Laurie went with appellant to the women's bathroom on the other side. Appellant had another rope on him for Laurie. When Laurie spurned appellant's further efforts to engage in sexual activity, he strangled her to death.[48/] It can be

---

48. While appellant had another motive in killing Laurie (to punish Laurie for not having sexual intercourse with him), it is clear from the evidence that a purpose for the killing was to prevent Laurie from testifying in an anticipated criminal proceeding. (*People v. Stanley, supra*, 10 Cal.4th at p. 801 ["If the defendant intentionally kills a would-be witness for the purpose of preventing the victim from testifying in a criminal proceeding, it is not a defense to the special circumstance allegation that he had another purpose as well."]; *People v. Sanders* (1990) 51 Cal.3d 471, 519 [explaining that the witness-killing special circumstance does not require the jury to find that but for the intent, or the sole intent, to prevent the victim from testifying, the victim would not have been killed.].) One can harbor two separate criminal intents

reasonably inferred that, at some point prior to going into the women's bathroom, appellant brought another rope with him because he had decided that Laurie must be killed – not only because of what she might reveal about what he had done to her, but also because of what she had seen concerning Angie. This inference is bolstered by the emergency room doctor's testimony that, during the sexual assault examination, when asked whether she had been threatened to be harmed in any way, Angie responded that the person who injured her would kill them if not quiet. (RT 5243-5245.) Moreover, the fact that appellant dumped the bodies of Laurie and Angie at separate locations far away from Lost Lake and each other further suggests that appellant sought to remove any connection between Angie, Laurie, and Lost Lake. (Cf. *People v. Sanders, supra,* 51 Cal.3d at p. 520; *People v. Almaraz* (1985) 173 Cal.App.3d 304, 316-317.)

Appellant relies upon *People v. Silva* (1988) 45 Cal.3d 604 and argues same continuous criminal transaction. In *Silva*, this Court found that the two victims – one male, the other female – were murdered in the same continuous criminal transaction which began with a plan to kidnap, rob, rape the female, and then kill both the victims. The prosecution's argument that one of the victims witnessed the robbery of the other victim, and therefore had to be killed, was rejected. In so concluding, this Court stressed:

> Lacking evidence that the murder was not simply part of the same continuous criminal transaction, we must set aside the witness-murder special-circumstance finding.

(*People v. Silva, supra,* 45 Cal.3d at p. 631.)

---

simultaneously. (See, e.g., *People v. Holt, supra,* 15 Cal.4th at pp. 671, 690.)

Silva is distinguishable from the case at hand; and neither is *People v. Benson* (1990) 52 Cal.3d 754 availing to appellant.[49/] Here, instead of a continuous criminal transaction following a predesigned plan as in *Silva*, the reasonable inference here was that appellant's criminal conduct ceased, he reevaluated his situation, and then decided to kill Laurie.[50/] Initially, appellant drove Laurie to Lost Lake, planning to isolate her and then have sex, consensual sex, with her. It must be stressed that in bringing the girls to Lost Lake Park, appellant had no intention of hurting either of them. His plan was frustrated by Laurie's resistance and Angie's interference. He lost control and brutally beat Angie. His criminal conduct then ceased. Appellant then walked back and forth between his car and the bathroom, assessing the evidence of what had just happened and trying to remove the evidence. His course of conduct now changed. He believed then it was necessary to kill the girls in order to silence them. Though the girls promised that they would make up a story, he was not dissuaded. He said to Laurie, "No, I don't trust you. You'll tell like you did the last time." Having made the decision to kill, the girls became mere "things" which may be used to gratify his lust and greed, and ultimately disposed.

The circumstances here are more akin to *People v. Almaraz, supra*, 173 Cal.App.3d at pp. 316-317 and *People v. Sanders, supra,* 51 Cal.3d at p. 520. In *Almaraz*, the court found substantial evidence to support the jury's finding

---

49. In *Benson*, the defendant considered and decided, after murdering the mother and while he continued to molest her children, that he needed to kill the children to silence them, "to protect [his] freedom." Therefore, the crime witnessed could not be deemed "prior to and separate from" the killing because the intent to kill to prevent testimony arose during the continuing criminal transaction. (*People v. Benson, supra,* 52 Cal.3d at pp. 766-768, 785.) Here, the criminal conduct ceased and then appellant formed the intent to kill.

50. According to Angie, appellant left the bathroom about four times. (RT 5186.)

that a person by the name of Collier was murdered to prevent him from testifying in a criminal prosecution for the killing of another person named Tokumoto. The *Almaraz* court explained:

> Appellant knew that Collier and Walker had accompanied Tokumoto to the apartment. After Tokumoto was shot by Robert Almaraz, no medical help was sought for Tokumoto, and appellant ordered Sagmeister to close the drapes and clean up the blood, thus showing an intention to avoid detection. Appellant took Collier's and Walker's wallets at gunpoint, thus removing their tangible identification and showing that he planned to kill them from the time they left the apartment with his intended victims' hands and mouths taped. Giving directions to the driver, appellant said, "You know where the cemetery is," by which he meant a vacant lot, further showing an intention to kill the two men. Collier was killed by three shots from behind, apparently without a struggle and while bound. Despite the shooting of their friend Tokumoto, neither Walker nor Collier was threatening any of the apartment's occupants, thus ruling out a threatened fight as a motive. The only plausible interpretation of the evidence supports the special circumstance finding that Collier was killed to prevent his testimony with respect to the murder of Tokumoto.

(*People v. Almaraz, supra*, 173 Cal.App.3d at pp. 316-317.) In so ruling, the court rejected the argument that Collier was killed during the commission of the crime to which he was a witness, the killing of Tokumoto, finding that

> *a new and separate criminal intent was formed* when appellant, after some time had elapsed since Tokumoto's shooting, first approached Walker and Collier and set in motion additional subsequent events that led to Collier's assassination.

(*Id.* at p. 317 [italics added].)

In *Sanders*, this Court held there was substantial evidence that defendant intended to kill the victims due to their ability to identify him as the perpetrator of an earlier robbery attempt on the victims. This Court explained that the evidence showed that shortly after the botched robbery attempt on the victims, defendant expressed concern that the victims could identify him. Defendant then sought an accomplice, "who owed him a favor." A few days later,

defendant and his accomplice went to the victims' apartment, bound and blindfolded the victims, moved them to separate rooms, and struck each savagely on the back of the head. (*People v. Sanders, supra,* 51 Cal.3d at p. 520.)

Contrary to appellant's contention, whether the crime witnessed and the killing are part of the "same continuous criminal transaction" is not exclusively dependent on the number of days or hours that have passed. Temporal parameters are not controlling. (Cf. *People v. Sanders, supra,* 51 Cal.3d at p. 520 [two days in between the botched robbery attempt and the killing of the victims; holding that there was substantial evidence to support true finding on witness-killing special circumstance], with *People v. Benson, supra,* 52 Cal.3d at p. 785 [two days in between the murders of the mother and two of her children; holding that the these murders were "integral parts of a single continuous criminal transaction against the entire family"] and *People v. Silva, supra*, 45 Cal.3d at p. 631 [about five days in which a series of crimes were committed against, and culminating in the murders of, the two victims; finding this series of crimes to have been "of the same continuous criminal transaction"].) This Court has directed attention to the evidence presented at trial, rather than to abstract concepts of time and continuity. (See, e.g., *People v. Sanders, supra,* 51 Cal.3d at p. 520 [see above]; *People v. Silva, supra,* 45 Cal.3d at p. 631 [see above]; see also *People v. Almaraz, supra*, 173 Cal.App.3d at pp. 316-317 [see above].) Thus, whether the crime witnessed is "prior to and separate from" the killing or is part of "the same continuous criminal transaction" as the killing is, respondent submits, a totality of the circumstances inquiry. The totality of the circumstances inquiry is less arbitrary and much more fact intensive and context specific. Time would be a single factor for consideration; it would not be the controlling factor.

As explained earlier, the jury's finding of witness-killing was fully supported by the evidence presented and reasonable in thought. The assault on Angie was "prior to and separate from" the killing of Laurie. Laurie was a witness to the brutal beating. Appellant intentionally killed Laurie to prevent her from talking. This Court should defer to the jury's finding. The

> function of appeal is not to reweigh or reinterpret the evidence but simply to determine whether there is sufficient evidence in the record to warrant the inference of guilt drawn by the trier of fact.

(*People v. Perry, supra,* 7 Cal.3d at p. 785, overruled in part on other grounds, *People v. Green, supra,* 27 Cal.3d at p. 28.)

Accordingly, appellant's claim of insufficient evidence to support the jury's true finding on the witness-killing special circumstance should be rejected.

VI.

THE JUDGMENT OF DEATH NEED NOT BE REVERSED BECAUSE ALL CONVICTIONS AND SPECIAL CIRCUMSTANCE FINDINGS WERE SUPPORTED BY SUBSTANTIAL EVIDENCE

Appellant argues that the death judgment must be reversed if any one of the special circumstance findings, the robbery or attempted rape convictions, are reversed. (AOB 82-83.) Not so. As explained earlier, all of the convictions and special circumstance findings were supported by substantial evidence. Even if any one of appellant's special circumstance findings require reversal, the judgment of death need not be reversed.

The United States Supreme Court has upheld a death penalty judgment despite invalidation of one of several aggravating circumstances (*Zant v. Stephens* (1983) 462 U.S. 862, 881), and this Court is in accord (see, e.g., *People v. Silva, supra,* 45 Cal.3d at pp. 632- 636 [affirming despite the jury's consideration of invalid special-circumstance findings]).

First, no single special circumstance was the sole basis for conducting the penalty proceedings. The jury separately found three valid special circumstance finding. (Cf. *People v. Allen* (1986) 42 Cal.3d 1222, 1281-1283 [holding that jury consideration of eight excessive special-circumstance findings was harmless in light of the fact that three valid special-circumstance findings remained]; but cf. *People v. Anderson* (1985) 38 Cal.3d 58, 61 [holding that invalid special circumstance finding was the sole basis for conducting that proceeding, and thus the verdict as to penalty was unsupported as a matter of law and must likewise be set aside].) Second, the prosecutor did not urge the jury to impose the death penalty because of the number or nature of special circumstances found. The prosecutor stressed the callousness and brutality shown in the strangulations of the girls and his prior robbery and

assault convictions. (Cf. *People v. Silva, supra,* 45 Cal.3d at pp. 632-634; *People v. Sanders, supra,* 51 Cal.3d at pp. 520-521.) The death judgment was reliable. Accordingly, appellant's claim here should be rejected.

VII.

THE COURT DID NOT ABUSE ITS DISCRETION IN DENYING APPELLANT'S SEPTEMBER 29, 1993 AND OCTOBER 8, 1993 *MARSDEN* MOTIONS

Appellant argues that "[his] Sixth Amendment right to counsel was violated by the trial court's refusal to grant the *Marsden*[51] motions brought on September 29th and October 8th, 1993." (AOB 107-111.) Not so. The court did not abuse its discretion in denying appellant's *Marsden* motions.

A. The Record

On September 29, 1993, appellant told the court: "I'd like another attorney." (RT 2847.) The court then held a hearing, in which appellant expressed his dissatisfaction with his lead defense attorney, Barbara O'Neill.

Appellant felt Ms. O'Neill was not fighting for his best interests. He was troubled by Ms. O'Neill urging him to offer to plead guilty in exchange for a sentence of life without parole. He opposed such a plea. He feared that Ms. O'Neill had the mind set that the jury would find the special circumstances alleged to be true and that his attorney would not fight the special circumstances alleged with vigor and zeal. (RT 2848-2863.)

Ms. O'Neill confirmed that she and Ms. Martinez, appellant's second attorney, had urged appellant to offer to plead guilty in exchange for a sentence of life without parole. However, when appellant expressed his absolute opposition to such a plea, the subject was dropped. (RT 2850-2851.)

Appellant further complained of lack of communication with counsel. He stated that he was not aware of Ms. O'Neill's strategies or witnesses that she planned to call in the guilt phase. He indicated that he was only aware of the

---

51. *People v. Marsden* (1970) 2 Cal.3d 118 (hereinafter "*Marsden*").

witnesses for the penalty phase. (RT 2848-2849.) In response to a court query, appellant indicated that he was able to work with co-counsel Ms. Martinez on a "fairly friendly basis," that he communicated with Ms. Martinez well. (RT 2862-2863.)

Ms. O'Neill acknowledged that most of the witnesses were for the penalty phase. She explained that there were few guilt phase witnesses because the defense guilt phase strategy was to convince the jury that the killing was not first degree premeditated murder and did not occur during, or for the purpose of, any of the special circumstances alleged. She noted defense efforts to have the alleged special circumstances dismissed. She told the court that for two and a half years, she had been trying to convince appellant to testify, but he absolutely refused to do so. (RT 2853-2855.)

Ms. O'Neill opined that part of the communication problem was attributable to appellant's mental illness. She characterized appellant as paranoid and related to the court that appellant had told some of the mental health experts who testified at his competency (§ 1368) trial that she was trying to poison him. Appellant admitted having expressed such sentiments. Ms. O'Neill assured the court that appellant was her client and "the defense team [would] do everything [they] possibly can do for him." (RT 2856-2857.)

The court denied appellant's request for new counsel, explaining:

> I have known your chief counsel, Ms. O'Neill, for a number of years. She's a highly experienced defense attorney who always fights for her client with the utmost vigor. I've never seen her let down on a constant fight for a client.
>
> Her coming to you and suggesting a way to settle the case does not mean she's not fighting for you. You really haven't probably had a chance – well, you have on the 1368 hearing. You saw her in court. You've seen that she does and can fight for you.
>
> To offer a settlement is – when her appraisal of the case is that you stand in danger of going to death row is a duty of an

> attorney. That doesn't mean she doesn't believe she can't fight for your case or she thinks that you're [a] goner or a loser.
>
> She's saying for settlement for compromise would you consider this. And if you say no, that's okay. It does not mean she doesn't believe in you. It might mean her assessment of the case is that your case is weak and there is a good chance of you getting the death penalty.
>
> I think you have been informed as much as possible as can be of the strategies, and you are aware of whatever witnesses she appears to need for the case. And let me say furthermore that during the brief period that she's been in contact with me on your behalf on this case she's done nothing but strive to win every single legal point, every evidentiary point that's possible.
>
> I think she's doing a really excellent job for you. And I'm going to at this time deny your request.

(RT 2857-2858.)

Appellant was given the opportunity to voice additional complaints with Ms. O'Neill at a second *Marsden* hearing held that same date. (RT 3022-3043.)

Appellant stressed that Ms. O'Neill disagreed with his plea of not guilty by reason of insanity. He felt that she would not help him on that defense. (RT 3022-3023.) Ms. O'Neill acknowledged that she disagreed with the plea of not guilty by reason of insanity. She noted the lack of evidence to support such a defense: none of the eight mental health experts who had examined appellant found him insane, and only one had found him incompetent to stand trial based upon his delusions about his public defender. Ms. O'Neill indicated that she was trying to find a mental health expert who would come in and testify for appellant on the insanity issue. (RT 3029-3031, 3033.)

Appellant expressed concern that Ms. O'Neill had daughters about the same age as the victims. (RT 3023.) Ms. O'Neill responded, "[M]y personal life never interferes with my professional one." (RT 3031.) She then added:

> Personally, for the record, I don't believe in the death penalty. And I will do anything legally and morally I can do to make sure [appellant] doesn't receive the death penalty. Whether I have children or not has nothing to do with this case.

(RT 3031-3032.)

Appellant claimed that Ms. O'Neill had given him "bad publicity," referring to a newspaper article that stated Ms. O'Neill said appellant was a "sick man." (RT 3023.) Ms. O'Neill was unfamiliar with the newspaper article. The court noted an inaccuracy, a misquote, in a recent newspaper article. Ms. O'Neill then remarked that since appellant insisted on pleading not guilty by reason of insanity, having prospective jurors think that he was not mentally sound would be to his benefit. (RT 3032-3033.)

Appellant also said that he could not communicate with Ms. O'Neill because he did not trust her. His distrust of her had led to sleep deprivation and nightmares. (RT 3024.) Ms. O'Neill noted that by that time, appellant had been her client for almost three years. She asserted that during that time she visited appellant in jail about 70 times, and spent hours and hours of communication. She informed the court that sometimes they communicated very well for hours and other times there would be no communication due to appellant's paranoid suspicions that she was working for the District Attorney's Office. (RT 3034-3035.)

Again, in response to a court query, appellant indicated that he was able to talk to co-counsel Ms. Martinez on a "very relaxed, easy basis." (RT 3024.) Ms. Martinez told the court that she did not have any problem communicating with appellant. (RT 3035-3036.)

The court again denied appellant's request for new counsel. (RT 3042-3043.)

On October 8, 1993, Ms. O'Neill advised the court that appellant wanted to make another motion to discharge counsel. This time, appellant asked the court to appoint independent counsel for the purpose of assisting him in seeking the discharge and substitution of counsel. (RT 3343-3344.) The court denied the motion. (RT 3345-3346.)

Another *Marsden* hearing was held later that date. (RT 3465.) This time, appellant asked to discharge both Ms. O'Neill and Ms. Martinez. He stated that Ms. Martinez was not qualified to serve as co-counsel and reiterated his inability to communicate with Ms. O'Neill. (RT 3467-3468.)

Ms. Martinez explained the amount and type of work she had been doing in preparation for this case. She further indicated she had no problem communicating with appellant. (RT 3471-3474.) Appellant lashed out, "I don't want these bitches for my attorneys." (RT 3474-3746.)

Ms. O'Neill informed the court that she and appellant were able to communicate for over two years; however, recently he had become more and more paranoid. (RT 3476.) Ms. O'Neill told the court that appellant had "a problem with women," that he would not be happy with any female attorney. Appellant admitted that was so. (RT 3478-3479.) Ms. O'Neill brought to the court's attention a letter from appellant's treating psychologist, Dr. Seymour, warning her and Ms. Martinez of potential danger posed by the dynamics of two women lawyers being in control of appellant's case. (RT 3481-3482.) Ms. O'Neill then explained that the breakdown in communication started when, in appellant's opinion, she had the "audacity" to suggest an offer of a guilty plea for life without parole. Ms. O'Neill stated that she "heavily leaned" on appellant to so offer and plead. (RT 3483-3484.) Ms. O'Neill averred that appellant knew everything there was to know about defense strategy. Appellant categorically refused to testify, despite efforts of counsel and the treating psychologist to convince him otherwise. Ms. O'Neill advised the court that appellant would become very upset during discussions and interviews concerning the penalty phase – as if he was betrayed. (RT 3484-3489.)

The court urged appellant to "break down and start communicating more with Barbara O'Neill, even if it's to argue with her and fight with her." (RT 3491.) The court again asked, and Ms. Martinez responded, that she had been

communicating everything appellant said to Ms. O'Neill and vice versa. (RT 3491-3492.) The court denied appellant's *Marsden* motion, finding that "[he] [was] represented by competent counsel who [had] [his] best interests at heart and [were] willing to work like slaves to try to win this case." (RT 3492.)

B. Discussion

Appellant argues that the court should have granted his September 29, 1993 and October 8, 1993 *Marsden* motions, upon learning of his deteriorating mental health – distrust and paranoia – which broke down, irreconcilably, the attorney-client relationship. (AOB 108.) Not so. The court's denial of appellant's request for discharge and substitution of counsel was not unreasonable.

> A defendant is entitled to have appointed counsel discharged upon a showing that counsel is not providing adequate representation or that counsel and defendant have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result.

(*People v. Jones* (2003) 29 Cal.4th 1229, 1244-1245.) In ruling on such a motion, the court should not rely solely on courtroom observations, but must consider any "'specific examples of counsel's inadequate representation that the defendant wishes to enumerate.'" (*People v. Horton* (1995) 11 Cal.4th at 1068, 1102, quoting *People v. Webster* (1991) 54 Cal.3d 411, 435; *People v. Marsden, supra*, 2 Cal.3d at p. 124.) After considering any specific complaints raised by the defendant, the decision on whether to grant substitution is a matter of judicial discretion. (*People v. Memro* (1995) 11 Cal.4th 786, 857.)

> Denial of the motion is not an abuse of discretion unless the defendant has shown that a failure to replace the appointed attorney would "substantially impair" the defendant's right to assistance of counsel.

(*People v. Horton, supra*, 11 Cal.4th at p. 1102 [internal quotations omitted].) In other words, if the defendant fails to make a "substantial showing" that he is likely to receive "constitutionally inadequate representation" unless substitution occurs, it is not an abuse of discretion to deny the motion. (*People v. Crandell, supra*, 46 Cal.3d at p. 859.)

Appellant's claim of lack of trust and confidence in, and inability to get along with, Ms. O'Neill were insufficient grounds for the discharge and substitution of counsel. (See *People v. Memro, supra*, 11 Cal.4th at p. 857 ["[I]f a defendant's claimed lack of trust in, or inability to get along with, an appointed attorney were sufficient to compel appointment of substitute counsel, defendants effectively would have a veto power over any appointment and by a process of elimination could obtain appointment of their preferred attorneys, which is certainly not the law."]; *People v. Bills* (1995) 38 Cal.App.4th 953, 961 ["The defendant must give specific examples of counsel's inadequacies, and cannot rest upon mere failure to get along with or have confidence in counsel."].) Appellant did not establish below, and is not arguing on appeal, that Ms. O'Neill or Ms. Martinez were incompetent or inadequate. As apparent from the record, the trial court painstakingly listened to, evaluated, and addressed appellant's complaints and concerns – none of which amounted to incompetence or ineffective assistance. Displeasure with his counsels' advice to offer a guilty plea for life without parole was not a valid basis to request substitution. (*People v. Brown* (1986) 177 Cal.App.3d 537, 549 ["counsel's duty of investigation and research on behalf of a criminal defendant includes the duty to investigate and pursue possible dispositions by way of plea . . . . pursuing a favorable plea bargain may be a wiser course than pursuing legal impediments to prosecution"].) His fears of a passive and apathetic representation – i.e., perceived betrayal – were unfounded. Ms. O'Neill and Ms. Martinez were competent and acting in appellant's best interest.

Appellant is arguing here that his distrust of and lack of confidence in his appointed attorneys resulted in a lack of communication between him and them, breaking down the attorney-client relationship irreconcilably. Respondent recognizes that

> to compel one charged with [a] grievous crime to undergo a trial with the assistance of an attorney with whom he has become embroiled in irreconcilable conflict is to deprive him of the effective assistance of any counsel whatsoever. [Citations.]

(*People v. Stankewitz* (1982) 32 Cal.3d 80, 94, fn. omitted [*Stankewitz I*], quoting *Brown v. Craven* (9th Cir. 1970) 424 F.2d 1166, 1170.) Here, due to tactical disagreements, appellant feared that Ms. O'Neill would not be fighting for his best interests. He lost confidence and trust in Ms. O'Neill, and ceased communications with Ms. O'Neill. The tactical disagreements by themselves do not constitute an irreconcilable conflict. (*People v. Welch* (1999) 20 Cal.4th 701, 728-729 ["A defendant does not have the right to present a defense of his own choosing, but merely the right to an adequate and competent defense. Tactical disagreements between the defendant and his attorney do not by themselves constitute an 'irreconcilable conflict.'"].)

> A disagreement concerning tactics is . . . insufficient to compel the discharge of appointed counsel, unless it signals a complete breakdown in the attorney-client relationship.

(*People v. Crandell, supra,* 46 Cal.3d at pp. 859-860, overruled on other grounds in *People v. Crayton* (2002) 28 Cal.4th 346, 365.) Focusing on the record on which the ruling was made – not to subsequent matters – the lack of communication can reasonably be attributed to appellant's intransigence and failure to cooperate. (Cf. *People v. Kaiser* (1980) 113 Cal.App.3d 754, 761 ["[W]hatever breakdown occurred between appellant and his counsel was caused by appellant's intransigence and failure to cooperate. Such a showing is insufficient to support a motion to substitute counsel."]; see also *People v. Smith* (1993) 6 Cal.4th 684, 696 ["[A] defendant may not force the substitution

of counsel by his own conduct that manufactures a conflict."].) Though there seemed to have been a breakdown in communication between appellant and Ms. O'Neill, the cause of the breakdown was his choice to cease communications with her. In the related and interdependent issue of competency, three mental health experts found, and a jury agreed, that appellant was able to assist counsel in the conduct of a defense in a rational manner (§ 1367). (CT 532; IV RT 832-835.) So despite appellant's alleged distrust and paranoia,[52/] he was able to communicate with Ms. Martinez in an easy, relaxed manner. (See *People v. Crandell. supra*, 46 Cal.3d at p. 860 ["A trial court is not required to conclude that an irreconcilable conflict exists if the defendant has not made a sustained good faith effort to work out any disagreements with counsel and has not given counsel a fair opportunity to demonstrate trustworthiness."].) On the record at the time the ruling was made, to say that appellant's choice lacked volition – i.e., overwhelmed by distrust and paranoia – is to reduce appellant to nothing but a victim of past and present circumstances, and thereby deny him his human capacity for freedom and responsibleness. The record amply supports the conclusion that the lack of communication was caused by appellant's intransigence and failure to cooperate. In short, the conflict here, lack of communication, was not irreconcilable. To put it another way, the lack of communication was not due to a fundamental breakdown in the attorney-client relationship, but was merely indicative of appellant's decision to be uncooperative. (Cf. *People v. Lucky* (1988) 45 Cal.3d 259, 282-283 [rejecting three instances asserted by defendant

---

52. Respondent emphasizes here that, from what Ms. O'Neill told the court, appellant's treating psychologist did not say the dynamics of having two female attorneys in control of appellant's case would result in refusal to communicate. Dr. Seymour warned of rage and aggression, based upon past incidences where appellant felt a sense of humiliation and loss of control to women, and reacted overly aggressive. (RT 3482-3483.)

as reflection of a breakdown in the attorney-client relationship: (1) defendant had decided to take the stand in his own behalf, against the advice of counsel; (2) defendant acted in a very bizarre manner during certain guilt phase proceedings when he would determine that things were not "going his way" (two psychiatrists examined defendant, evaluated his competency to stand trial, and concluded that he was voluntarily feigning mental illness); and (3) defendant refused to cooperate with defense counsel in any type of psychological defense which might have involved evidence of prior drug abuse].) The trial court thus did not abuse its discretion in denying appellant's *Marsden* motions made on September 29 and October 8, 1993. (Cf. *People v. Shoals* (1992) 8 Cal.App.4th 475, 496 [trial court properly denied defendant's motion for substitution and counsel's motion for withdrawal, where defendant complained of counsel urging him to accept plea bargain and counsel argued, "[Defendant's] confidence in me has eroded to such a point that he doesn't feel he's able to fully cooperate with me. Because of that, I can't fully prepare his defense and go forward with it. And in that case, he would be denied effective assistance of counsel . . . ."].)

The cases cited by appellant in support of his contention, *Stankewitz I, supra,* 32 Cal.3d 80 and *People v. Stankewitz* (1990) 51 Cal.3d 72 [*Stankewitz II*], do not demand a contrary conclusion. In *Stankewitz I,* this Court reversed the judgment from defendant's first trial on the ground that the trial court improperly failed to afford defendant a competency hearing. The court appointed psychiatrist testified that defendant could not rationally assist his public defender due to paranoid delusions of a conspiracy between the prosecutor and his public defender. (*Stankewitz I, supra,* 32 Cal.3d at pp. 91-94.) In so holding, this Court observed that a timely substitution of attorneys might well have obviated the need for a competency hearing: "In the particular circumstances of this case, a substitution of counsel might have avoided

altogether the necessity for ordering a full competency hearing." (*Id.* at p. 93.) In *Stankewitz II*, this Court held that the trial court properly considered defendant's motion for substitution of counsel before proceeding with the competency hearing. This Court approved the trial court's decision to relieve defendant's public defender and appoint private counsel, and thereby rendered the issue of competency moot. (*Stankewitz II, supra,* 51 Cal.3d at pp. 88-89.)

Here, as in the *Stankewitz* cases, the competency and substitution of counsel issues are interdependent. If appellant suffered from a mental disorder rendering him unable to assist counsel in the conduct of a defense in a rational manner, then the conflict – the lack of communication – between appellant and counsel would have been irreconcilable. On the record on which the rulings were made, appellant was competent and the conflict was not irreconcilable.[53/] Appellant simply chose not to communicate with his counsel.

The trial court's rulings were reasonable. Accordingly, appellant's claim should be rejected.

---

53. What differs between the case at hand and the *Stankewitz* cases is how the trial court initially viewed the conflict between counsel and defendant. In *Stankewitz I,* the trial court "chose to cast the issue in terms of whether there should be a substitution of counsel," based upon the court appointed psychiatrist's testimony that defendant "might well be able to rationally assist a counsel appointed by the court from the private bar." (*Stankewitz I, supra,* 32 Cal.3d at p. 92.) Though agreeing that appellant "could not cooperate in a rational manner with the Public Defender," the trial court denied the substitution motion, leaving defendant with a counsel whom he was unable to rationally assist, according to the court appointed psychiatrist. (*Ibid.*) In the case at hand, the trial court cast the issue in terms of whether appellant was competent to stand trial. Appellant was found competent. On the record on which the rulings were made, appellant's conflict – lack of communication – with his trial counsels was not irreconcilable.

VIII.

TRIAL PROPERLY RESUMED AFTER THE COURT APPOINTED INDEPENDENT COUNSEL TO REPRESENT APPELLANT ON A *MARSDEN* MOTION AND WHILE WAITING FOR APPELLANT'S *MARSDEN* MOTION; THE COURT DID NOT ERR IN APPOINTING AN INDEPENDENT ATTORNEY TO REPRESENT APPELLANT FOR PURPOSES OF A *MARSDEN* MOTION

Appellant assigns error to the taking of testimony while his *Marsden* motion was pending, and the appointment of an independent attorney to represent him for purposes of the *Marsden* motion. (AOB 112-116.) His arguments are untenable. There was no *Marsden* motion pending. The independent counsel was appointed to represent him in anticipation of a *Marsden* motion. Trial properly resumed with the taking of witness testimony before appellant's *Marsden* motion was renewed. Secondly, the court did not err in appointing an independent attorney to represent appellant for purposes of the *Marsden* motion.

A. The Court Properly Took Witness Testimony While Waiting In Anticipation For Appellant's *Marsden* Motion

Appellant argues that it was error to continue taking witness testimony while his *Marsden* motions were pending. The record does not support appellant's characterization. There was no *Marsden* motion pending. The court appointed an independent counsel to represent appellant on a *Marsden* motion. Trial resumed and the court properly took witness testimony while waiting for appellant's *Marsden* motion.

1. The Record

On October 12, 1993, appellant renewed his *Marsden* motion. When the court asked on what ground, appellant asked the court to "reconsider appointing

independent counsel to assist [him]." (RT 3498.) The court denied appellant's *Marsden* motion, explaining that appellant failed to articulate new and different ground for substitution of counsel and that the grounds raised earlier lacked merit. (*Ibid.*)

Ms. O'Neill then told the court that she and Ms. Martinez had visited appellant for about an hour. She informed the court:

> [Appellant] will not communicate with us at this point, either Ms. Martinez or myself. He feels that we're not working in his best interests and that his life is at stake, and of course it is, and that he wants a male attorney.

(RT 3499.) She indicated that had she realized appellant's problem with women, she would have taken steps to have a male attorney either assist her or take over the case. (*Ibid.*)

Later that day, after opening statements and testimony by two prosecution witnesses, the court took up the matter of appellant's conflict with his female counsels. The court granted appellant's request to appoint independent counsel to represent him on a *Marsden* motion – "to make sure every possible point will be brought forth that legally can be brought forth on [his] behalf." The court warned appellant against having "false hopes" because no meritorious ground for substitution of counsel had been articulated. (RT 3575-3577.) Trial then resumed with the examination of witnesses.

On October 13, 1993, an attorney from Barker and Associates appeared and accepted the appointment. (RT 3777-3778.)

On October 14, 1993, appellant sought to continue the trial until he had a chance to consult with the independent counsel regarding his *Marsden* motion. The court denied his request, explaining:

> We're going to go ahead with the proceedings because you have not shown any grounds upon which I would substitute attorneys at this time. Furthermore, your motion comes in a very, very untimely fashion for a case of this complexity and magnitude.

(RT 3884.)

On October 15, 1993, appellant reiterated his request to continue the trial until his conflict with his attorneys was resolved. Again, the court denied his request. (RT 4037-4038.) Later that day, appellant requested that he "be handcuffed." He told the court:

> I want to be handcuffed because I don't want to do nothing stupid and get myself in a lot of trouble. And I feel I'm under a lot of pressure and I don't feel like I'm being represented right, and I don't want to go off on my attorneys and hurt them.

(RT 4091.) Appellant was then handcuffed. (RT 4092.)

On October 19, 1993, the independent counsel filed a written "Motion to Relieve Court Appointed Counsel." (CT 655-658; RT 4359.) The court then held a *Marsden* hearing.

2. Discussion

Respondent does not disagree that "a *Marsden* motion must 'be resolved on the merits before the case goes forward' (*Schell v. Witek* (9th Cir. 2000) 218 F.3d 1017, 1025)." (AOB 113-114; see *Stankewitz II, supra*, 51 Cal.3d at p. 88 [stating that the court "may and indeed must promptly consider a motion for substitution of counsel when the right to effective assistance 'would be substantially impaired' if his request were ignored"]; see also *People v. Welch, supra,* 20 Cal.4th at p. 728 ["When a defendant seeks to discharge appointed counsel and substitute another attorney, and asserts inadequate representation, the trial court must permit the defendant to explain the basis of his contention and to relate specific instances of the attorney's inadequate performance."] As is clear from the record, between October 12, 1993 and October 19, 1993, there was no pending – i.e., unresolved – *Marsden* motion.

On October 12, 1993, appellant brought his fifth *Marsden* motion. The court immediately denied the motion, explaining that appellant failed to articulate a new and different ground for substitution of counsel and that the

grounds raised earlier lacked merit. (RT 3498.) Later that day, as a precautionary measure, the court granted appellant's request to appoint independent counsel to represent him on a *Marsden* motion. There was no *Marsden* motion pending. Earlier that day, the court had denied his groundless *Marsden* motion. (Cf. *People v. Freeman* (1994) 8 Cal.4th 450, 480-482 [holding that, assuming defendant's petition for writ of habeas corpus was a proper motion to substitute counsel, the court did not err in denying defendant's request to substitute counsel without holding a full hearing because defendant, leaving blank the question asking him to state "the facts which support each of the grounds," did not state an adequate basis for substitution of counsel]; *People v. Miranda* (1987) 44 Cal.3d 57, 77 [concluding that the court acted within its discretion in denying defendant's *Marsden* motion because "[d]efendant failed to offer any factual or concrete grounds for his dissatisfaction"], abrogated on other grounds in *People v. Marshall* (1990) 50 Cal.3d 907, 933, fn. 4.) The *Marsden* motion, to be filed by the independent counsel on behalf of appellant, had not been made yet. Trial then properly resumed. (Cf. *People v. Majors* (1998) 18 Cal.4th 385, 411-413 [holding that there was no basis, on the record, for defendant's claim that the trial court should have heard his *Marsden* motion prior to the penalty phase for the simple reason that the motion had not yet been made].)

B. The Trial Court Did Not Err In Appointing An Independent Attorney To Represent Appellant For Purposes Of A *Marsden* Motion

The trial court was not required to appoint independent counsel to represent appellant for purposes of a *Marsden* motion.[54/]

---

54. (See *People v. Barnett* (1998) 17 Cal.4th 1044, 1112 ["Although a defendant may seek and obtain (upon a proper showing) substitute counsel at any stage of the proceeding in trial court (citation), a defendant is not entitled to simultaneous representation by two attorneys, one of whom is challenging

Nonetheless here, responding to appellant's request, the trial court, as a precautionary measure, decided to appoint independent counsel to represent appellant for purposes of a *Marsden* motion. To do so was not error. (Cf. *People v. Stanley, supra,* 10 Cal.4th at pp. 803-807 [In the penalty phase of a capital murder prosecution in which the trial court ordered a competency hearing, the trial court did not err in appointing a third attorney to represent defendant's view that he was, in fact, competent. In permitting defense counsel to present the case for incompetence in the belief it was in defendant's best interest, the trial court did not deprive defendant of due process or the effective assistance of counsel by acting further to protect defendant's interest by appointing an additional attorney to represent defendant's personal point of

---

the other's competence (citation)."]; *People v. Hines* (1997) 15 Cal.4th 997, 1024-1025 ["Appointment of independent counsel to assist a defendant in making a *Marsden* motion is likely to cause unnecessary delay, and may damage the attorney-client relationship in those cases in which the trial court ultimately concludes that the motion should be denied. We see no need for trial courts to appoint independent counsel to assist defendants making such motions."]; *People v. Horton, supra,* 11 Cal.4th at p. 1104 [holding that the court did not err in failing to appoint independent counsel to represent defendant at the *Marsden* hearing because defendant "failed to establish even a colorable claim of ineffective representation"]; *People v. Memro, supra,* 11 Cal.4th at p. 859 ["[D]efendant cites no authority requiring such an appointment, and indeed the rule is to the contrary. (Citation.) What our decisions have consistently required is that the court listen to and evaluate a defendant's claim that counsel are failing to perform adequately. The court did so, and defendant was entitled to no more."]; *People v. Daniels* (1991) 52 Cal.3d 815, 848 [holding that trial court did not abuse its discretion in failing to appoint independent counsel to represent defendant on *Marsden* motion "because defendant offered no grounds, other than his distrust of all counsel except [one], to suggest that present counsel were incompetent"]; *People v. Douglas* (1990) 50 Cal.3d 468, 521 [holding that trial court did not abuse its discretion in denying defendant's motion, prepared by his trial counsel on his behalf, "for appointment of independent counsel for *Marsden* evaluation," pursuant to *Keenan v. Superior Court* (1982) 31 Cal.3d 424, 430], abrogated on other grounds in *People v. Marshall, supra,* 50 Cal.3d at p. 933, fn. 4.)

view. A defendant in a competency proceeding has not only the right not to be tried for a criminal offense when he or she is incompetent, but an equally important interest in not being sent to a mental institution with his or her criminal case unresolved, if he or she is competent, and the appointment of the third attorney served that interest].) This Court has acknowledged that "some courts have appointed independent counsel to press a *Marsden* claim." (*People v. Memro, supra*, 11 Cal.4th at pp. 858-859, citing *People v. Hardy* (1992) 2 Cal.4th 86, 132.)

The concern, damage to the attorney-client relationship in the event that the trial court ultimately concluded that the *Marsden* motion should be denied, was not present. As the independent counsel indicated, the basis for the *Marsden* motion was "not so much ineffective assistance of counsel, but a total breakdown of communications which may substantially impair [appellant's] right of assistance of counsel." (RT 4361.) In light of the nature of appellant's *Marsden* motion – irreconcilable breakdown of attorney-client relationship – the independent counsel was "merely . . . act[ing] as a conduit for [appellant] to articulate his complaints to [the] court." (RT 4360.) The independent counsel was not challenging the competency or effectiveness of Ms. O'Neill and Ms. Martinez. The independent counsel stressed that he was "not familiar with the facts of the case." (*Ibid.*) The independent counsel was not examining the manner in which Ms. O'Neill and Ms. Martinez had conducted the trial and arguing they were incompetent or ineffective, and thereby "adding fuel to the fire," so to speak, to an already damaged – but not irreconcilably damaged – attorney-client relationship.[55/]

---

55. Again, respondent is not contesting that there had been a breakdown of the attorney-client relationship. Respondent is arguing that the breakdown was not irreconcilable because appellant was choosing to be uncooperative. (See Argument VII.)

Furthermore, the appointment of an independent counsel caused minimal delay. Trial resumed during that week. Within a week of appointment of independent counsel, the *Marsden* motion was filed and a hearing on it held.

Accordingly, appellant's claim should be rejected.

IX.

THE COURT DID NOT ABUSE ITS DISCRETION IN DENYING APPELLANT'S OCTOBER 19, 1993 *MARSDEN* MOTION

Appellant argues that the court erred in denying his October 12, 1993 *Marsden* motion. (AOB 117-121.) Not so. Appellant presumably is referring to his October 19, 1993 *Marsden* motion.[56] The court did not abuse its discretion in denying appellant's October 19, 1993 *Marsden* motion. The record supports the court's conclusion that appellant's inability to communicate with Ms. O'Neill and Ms. Martinez was "contrived."

A. The Record

On October 19, 1993, the independent counsel filed a written "Motion to Relieve Court Appointed Counsel." (CT 655-658; RT 4359.) The court then held a *Marsden* hearing.

The independent counsel explained the basis for the *Marsden* motion:

> [I]t does not appear to be so much that his counsel are not effective; it appears to be the fact that he feels that there's a total breakdown in communication between him and his counsel.

(RT 4361.) The independent counsel noted appellant's difficulty in dealing with females. (*Ibid.*) He set forth the allegations supporting appellant's motion:

---

56. As explained in Argument VIII, on October 12, 1993, appellant brought his fifth *Marsden* motion. The court immediately and properly denied the motion, explaining that appellant failed to articulate a new and different ground for substitution of counsel and that the grounds raised earlier lacked merit. (RT 3498.) Later that day, as a precautionary measure, the court granted appellant's request to appoint independent counsel to represent him on a *Marsden* motion. (RT 3575-3577.) On October 19, 1993, the independent counsel filed a written "Motion to Relieve Court Appointed Counsel." (CT 655-658; RT 4359.)

[Appellant] cannot communicate with counsel O'Neill; that when they attempt to communicate, an argument ensues. He claims that Ms. O'Neill ignores him and walks away from him when he speaks.

When he attempts to communicate with Ms. Martinez, he feels that that's ineffective because she's not lead counsel on the case and does not possess perhaps the information that Ms. O'Neill does.

I've set forth two specific examples that he indicates that he doesn't know what the defense strategy or tactics are regarding defending against the alleged special circumstances. He appears to be in the dark whether any experts will be called on his behalf to testify. And, apparently, is of the opinion that there has been insufficient contact with him preceding trial. According to him, his last jail visit was October 11th of this year, which lasted an hour, and before that he had not been seen by counsel since mid-August this year.

(RT 4363.) An attorney assisting the independent counsel told the court:

[Appellant's] mind is entirely occupied with his hatred or his fear, his dislike and disgust and disdain of his attorneys. He does not feel he trusts his attorneys enough to impart with them matters which he believes would be helpful in his defense. And he feels, on the same token, his attorneys are not providing him with all the information he needs and not explaining trial strategy; are not discussing with him tactics even in a broad way.

When he tries to articulate his concerns to them, they turn around and walk away or ignore him, he claims in the case of attorney O'Neill. As far as attorney Martinez, he feels that his attempts to talk with her are fruitless because, in that she's not the lead counsel, he feels she cannot communicate to him really what the actual position of the attorneys are and that she does not really have a decision making function on the attorney team.

[Appellant] showed me some paper where he's written on, like a thousand times, "I hate my attorneys. I hate my attorneys. I hate my attorneys." I'm not a psychologist, but I feel it contains a portion where it strongly affects him emotionally and mentally.

[Appellant] has made an allegation that one of the attorneys – again this is hearsay and this is something [appellant] may have to follow up on, that one of the attorneys suggested that if he hits one of them it would create a conflict between them.

(RT 4364-4365.)

The court asked Ms. O'Neill and Ms. Martinez to respond to appellant's complaints. (RT 4368.) Each of appellant's complaints were addressed. (RT 4388.)

Ms. Martinez told the court that appellant got the idea to hit defense counsel to create a conflict between them from a conversation she and appellant had. Ms. Martinez explained that appellant had been insisting daily on seeking new attorneys. She explained to appellant that at that time there was no basis for the court to grant a *Marsden* motion. She assured him that she and Ms. O'Neill were doing all they could. Ms. Martinez then gave different examples of times a *Marsden* motion had been granted, one of which was where the defendant struck defense counsel. Ms. Martinez stressed that she never suggested that appellant do that. (RT 4369-4370.)

Ms. O'Neill addressed the alleged lack of communication. She explained that she and appellant "had an almost three-year relationship." (RT 4372.) She felt that the first two years, they "communicated very well." (*Ibid.*) However, the communication had deteriorated over the last eight months. According to Ms. O'Neill,

> [t]he more we try to talk to him about the case and about possibly making an offer to the D.A. to avoid the death penalty, the more he dislikes us and the more he doesn't want to talk to us.

(RT 4372.) She informed the court, "the biggest breakdown came . . . when we seriously tried to talk to him about making an offer to the District Attorney." (RT 4372-4373.) Ms. O'Neill acknowledged that she and Ms. Martinez had made few jail visits in the last few months because such visits were pointless and futile. Also, because of the competency trial and jury voir dire, they saw appellant almost every day; if there was something appellant wanted to say or discuss to them, he could have done so. (RT 4386.)

Ms. O'Neill opined that "part of the problem is . . . [appellant] is really mentally ill." (RT 4374.) She noted the paranoid delusion he expressed to Dr. George Woods, a psychiatrist who evaluated him for competence to stand trial, that she was poisoning his food at the jail. (RT 4372.) She reiterated the mental health expert's opinion that appellant was incompetent to stand trial "because of his inability to communicate with counsel because of his paranoia over women." (RT 4380.) She noted that appellant's treating psychologist, Dr. Seymour, felt appellant "would be better suited with male attorneys; that he could communicate with men better." (RT 4373.) She remarked, "[Appellant] would be much better served by a male attorney." (RT 4378.) Ms. O'Neill suggested:

> [M]aybe the thing to do would be to appoint a male attorney who has had capital experience to interview him every day for two weeks and see if we can get something out of him.

(RT 4383.)

The court commented:

> I see two problems with this approach. One, I don't have any evidence or facts before me that he is refusing to communicate with you because you're women. I have statements and suppositions that is the reason, but I don't have any evidence of that.
>
> Perhaps if you were both men, we would be at this very same position at this very time because you had done the unpardonable – and I've seen this happen before – that you had talked settlement. And men, women, it doesn't matter. I've seen that happen to defense counsel time and time again. That conversation is automatically followed by a *Marsden*. I've seen that occur on any number of occasions.
>
> The other thing I'm concerned with: Is this an appropriate ground[], his intense paranoid dislike of women? Similarly, I guess if I had a defendant who was white and he had an intense paranoid dislike of black or Afro-American people and that was the person, and the person appoint[ed] to [him] was Afro-American, should his paranoia, his intense racial hatred be

> permitted to be a ground to excuse the attorney and substitute, say, a white person.
>
> And even though it's, as you say, not grounded in rational – not grounded in rational thinking but rather is grounded more in your view, and, of course, both admit you're not psychiatrists, but grounded more in mental illness, perhaps this intense dislike based upon race or gender or religion is a – could be called a mental illness.
>
> It is such a meaningless way to got to – to construct your judgment upon, so, you know, I'm open if you feel that your ability to fully represent this defendant could be somehow better through change of co-counsel, and that there would be no – no hitch whatsoever in the presentation of your defense. That's up to the two of you. But based on the circumstances that I've just outlined, I am not going to replace you and give him a couple of men.

(RT 4383-4385.)

Ms. O'Neill asked to have the *Marsden* hearing continued so she could consult with Dr. Seymour and other attorneys in her office. The court granted the continuance request. Trial resumed. (RT 4385-4389.)

A second in camera hearing was held later that day. The court noted for the record that the court had asked Ms. O'Neill and Ms. Martinez to look into the possibility of getting an expert to testify on the *Marsden* matter, and the feasibility of replacing Ms. Martinez with a male deputy public defender. (RT 4516.)

The next day, October 20, 1993, at an in camera hearing, Ms. O'Neill told the court that the Public Defender's Office would neither replace Ms. Martinez with a male deputy public defender, nor add another deputy public defender – male – to the defense team. (RT 4589, 4591.) The court proposed the appointment of a male attorney, outside of the Public Defender's Office, who would serve as an "intermediary" between appellant and his female attorneys. (RT 4592.) The court stressed:

> [W]hat evidence I have of his inability to speak stemming from a psychosis or anything like that is strictly hearsay. But I'm

trying to lean over backwards and consider every conceivable possibility to break down this communication barrier at this time.

(RT 4593.)

Later that day, the court ruled on the *Marsden* motion:

> Now I have addressed this matter on the *Marsden* a number of times before, and in great detail. And I think I'm almost beginning to bore myself. But just for the sake of making it clear and explicit, I find, [appellant], that your defense counsel[s] are consistently effective. And every day they prove that to me even more and more. There's no doubt in my mind that you're well-represented in this case, even though you don't think so.
>
> I find that they are consistently trying in every way they know how to communicate with you. I find that the lack of communication is due to your willful failure to want to communicate with them. Maybe you have these reasons like you say that they're trying to poison you or things like that. But I find it's ultimately volitional on your part. I have no testimony from any psychiatrist or psychologist or any evidence that this is some uncontrollable or irresistible impulse on your part.
>
> I'll tell you, frankly, I am more and convinced every day that this – that your inability to communicate is contrived. And I'll tell you why I say that. For instance, today, I came in and there's Ms. O'Neill leaning over the table with Ms. Martinez beside her and you're talking just back and forth just fine. Yesterday I came in and I noticed that you and Ms. Martinez were gabbing back and forth. I noticed that during the proceedings you talk to the only one sitting next to you, of course, Ms. Martinez. You talk to Ms. Martinez. I've even heard you point out things that they overlooked. I've heard you do that and then I see you sometimes passing notes and Ms. Martinez will grab that note and pass it on to Ms. O'Neill.
>
> I find that your grounds are simply without merit. However, I think on the grounds that this is a capital case and trying to, in my – to use everything within my power to try to make it easier for you to communicate, [appellant], with your defense counsel, who I'm not going to relieve, I am willing to appoint a third attorney, as a male, if that means you can talk easier and communicate better with a man than you can for a woman for your own reasons, whatever, I'm not going to quarrel

> with you on that, if you tell me that will make things easier, fine, I'll believe it, to serve as an intermediary who will not be – I want it to be an attorney simply because I want somebody who knows what is relevant and what isn't. But they're certainly not going to replace or take the place of the two able counsel you have now. I'm willing to do that. And I think I expressed that once before on the record. But I know that you may want to discuss that matter with counsel. I would need their input and there's no way for them to know about that until I've made my rulings and I have made my rulings.

(RT 4703-4705.) Ms. O'Neill and appellant both agreed to having a male attorney appointed, to facilitate communications. (RT 4705-4707.)

B. Discussion

The record supports the court's finding that appellant's inability to communicate was "contrived." The court did not err in denying the *Marsden* motion because appellant did not show he was entitled to replace his appointed counsel.

Appellant had been upset with his counsel. Tactical disagreements[57] gave rise to a sense of betrayal, distrust, and ultimately doubts and suspicions as to his counsel's intentions and effectiveness. Appellant chose then to be

---

57. Appellant disagreed with his counsels' strategies. Against the advice of counsels, appellant chose to plead not guilty by reason of insanity. (RT 3022-3023, 3029-3031, 3033.) Against the advice of counsels, appellant was at that time refusing to take the stand and testify in his own defense. (RT 2853-2855.) His counsels urged him to offer to plead guilty in exchange for a sentence of life without parole: However, he was absolutely opposed to such a plea. Ms. O'Neill explained, "[Appellant] doesn't like to talk about the penalty phase, because he feels any time we talk about it, we've already given up on the guilt phase. And he feels he's not guilty of the specials. So he thinks we should never get to the penalty phase." (RT 4376.) Ms. O'Neill said, "The more we try to talk to him about the case and about possibly making an offer to the D.A. to avoid the death penalty, the more he dislikes us and the more he doesn't want to talk to us." (RT 4372.)

uncooperative, to not communicate with his attorneys. (Cf. *People v. Kaiser, supra,* 113 Cal.App.3d at p. 761 ["[W]hatever breakdown occurred between appellant and his counsel was caused by appellant's intransigence and failure to cooperate. Such a showing is insufficient to support a motion to substitute counsel."]; see also *People v. Smith, supra,* 6 Cal.4th at p. 696 ["[A] defendant may not force the substitution of counsel by his own conduct that manufactures a conflict."].)

The record shows that, at that time, appellant and Ms. O'Neill had an attorney-client relationship for about three years. During most of the three years, appellant did not have a problem with her gender. According to Ms. O'Neill, they communicated "very well" for about two years. (RT 4372.) Apparently, he did not have a problem with Ms. Martinez. The independent counsel did not argue that appellant could not communicate with Ms. Martinez. The independent counsel stated that appellant felt talking to Ms. Martinez was "ineffective" or "fruitless" because she was not the lead counsel. (RT 4363, 4365.) As the court observed, appellant could communicate with Ms. O'Neill and Ms. Martinez when he wanted to do so. (RT 4704, 3024, 3035-3036, 3491-3492.) On the related and interdependent issue of competency, three mental health experts found, and a jury agreed, that appellant was able – should

he want to – to assist counsel in the conduct of a defense in a rational manner.[58/] (CT 532; IV RT 832-835.)

From experience, the court surmised that had his attorneys been male, appellant would have reacted in the same fashion to recommendations of pleading guilty in exchange for life without parole. Appellant just as likely would have become upset about what he perceived as betrayal, become paranoid as to their intentions, become uncooperative, and would have sought substitution of counsel. (RT 4383-4384.) The independent counsel also put forth the possibility that appellant was merely a recalcitrant defendant in full possession of his faculties who decides he is not going to communicate with his attorney. (RT 4380-4381.)

On this record, to explain appellant's uncooperativeness as a product of mental illness or mental disorder – and thus lacking volition – is specious. Such an explanation reduces appellant to nothing but a victim of past and present circumstances, and thereby denies him his human capacity for freedom

---

58. Respondent acknowledges that one mental health expert, Dr. Woods, found appellant suffered from major depressive disorder with psychotic features and that it was so severe that it prevented him from being able to rationally assist his attorneys. (II RT 261-265, 272, 288.) Dr. Woods opined that appellant's inability to assist his attorneys was not a volitional choice but was the effect of being overwhelmed by his psychosis and paranoid delusions. (II RT 288-290.) Dr. Woods did not believe that appellant was malingering. (II RT 245-247, 252-257.)

And appellant's treating psychologist Dr. Seymour, according to Ms. O'Neill's representations to the court, did not say the dynamics of having two female attorneys in control of appellant's case would result in refusal to communicate. Dr. Seymour warned of rage and aggression, based upon past incidences where appellant felt a sense of humiliation and loss of control to women, and reacted overly aggressive. (RT 3482-3483.) However, respondent acknowledges that Ms. O'Neill later told the court that Dr. Seymour felt appellant "would be better suited with male attorneys; that he could communicate with men better." (RT 4373.) Respondent stresses that the court asked defense counsels to have an expert testify on the *Marsden* matter. (RT 4516.) But no mental health expert testified on the *Marsden* matter.

and responsibleness. (Cf. *People v. Lucky, supra,* 45 Cal.3d at pp. 282-283 [three instances asserted by defendant as reflection of a breakdown in the attorney-client relationship – (1) defendant had decided to take the stand in his own behalf, against the advice of counsel; (2) defendant acted in a very bizarre manner during certain guilt phase proceedings when he would determine that things were not "going his way" (two psychiatrists examined defendant, evaluated his competency to stand trial, and concluded that he was voluntarily feigning mental illness); (3) defendant refused to cooperate with defense counsel in any type of psychological defense which might have involved evidence of prior drug abuse – were not evidence of a fundamental breakdown in the attorney-client relationship but merely indicative of defendant's decision to be uncooperative].)

With the benefit of hindsight, one can discern appellant's efforts to manipulate the situation. After learning Ms. O'Neill had cancer, appellant stated he wished to wait for Ms. O'Neill's recovery and return from surgery and treatment because he wanted Ms. O'Neill as lead counsel. He said he did not want Ms. Martinez or Mr. Kinney as lead counsel. (RT 10464-10465.)

The court was thus well within reason to conclude that appellant's inability to communicate with Ms. O'Neill and Ms. Martinez was "contrived." (Cf. *People v. Shoals, supra,* 8 Cal.App.4th at p. 496 [trial court properly denied defendant's motion for substitution and counsel's motion for withdrawal, where defendant complained of counsel urging him to accept plea bargain and counsel argued, "[defendant's] confidence in me has eroded to such a point that he doesn't feel he's able to fully cooperate with me. Because of that, I can't fully prepare his defense and go forward with it. And in that case, he would be denied effective assistance of counsel . . . ."].)

Accordingly, appellant's claim should be rejected.

X.

THE COURT PROPERLY APPOINTED ERNEST KINNEY TO SERVE AS A "FACILITATOR OF COMMUNICATION" BETWEEN APPELLANT AND HIS FEMALE DEPUTY PUBLIC DEFENDERS

Appellant argues that the court erred in appointing Ernest Kinney to serve as a "facilitator of communication" between appellant and his female deputy public defenders. (AOB 122-127.) Not so. The court properly appointed Ernest Kinney to serve as a "facilitator of communication."

A. The Record

At the in camera hearing held on October 20, 1993, the court suggested and both Ms. O'Neill and appellant agreed to having a male attorney appointed, to facilitate communications. (RT 4592-4593, 4705-4707.)

On October 21, 1993, the court noted for the record that attorney Ernest Kinney would talk to appellant over the weekend. (RT 4786.)

On October 25, 1993, the court appointed Mr. Kinney to serve as "special counsel," having "absolutely no responsibility for any part of the defense except to facilitate communications between defense counsel and [appellant]." (RT 4790.)

On November 1, 1993, the prosecutor filed a written "Objection to Dual Representation of Defendant and Apparent Conflict Among Defense Lawyers." (II SCT 1849-1850.) Mr. Kinney noted,

> After coming on when the court – when I was appointed by the court to facilitate communication, it has been successful and it has worked well with [appellant] and working with the other attorneys.

(RT 5521.) Mr. Kinney then requested,

> [B]ased on the possibility that [appellant] may take the stand, and based on the possibility of calling psychiatric doctors, I'm requesting, when we come to that phase of the case, that I would become a regular attorney of record.

(*Ibid.*) He informed the court, "I have read the whole trial transcript. I've been here for all of Angie's testimony." (*Ibid.*)

On November 8, 1993, an in camera hearing was held. The court asked appellant:

> THE COURT: . . . [¶] [Appellant], how do you feel about Mr. Kinney and how things are working out?
>
> [APPELLANT]: Things are working out fine.
>
> THE COURT: Are you able to get along with him and communicate with him?
>
> [APPELLANT]: Yes.
>
> THE COURT: Good. All right. I'm glad to hear that. I don't know if you know that Mr. Kinney is a very well-known, reputable attorney in this town. He's very experienced. [¶] Anything you want to bring to my attention, [appellant]? Are things okay?
>
> [APPELLANT]: Everything is fine.

(RT 5579.) The court then addressed Mr. Kinney's request:

> I understand, . . . Mr. Kinney, that you would wish, upon the termination of the District Attorney's case, to come in, not just for the limited role of facilitator of communications, but as a full-fledged third attorney for the defense. . . . [¶] Is it your desire, then, and the desire of your co-counsel that you come on as a full-fledged part of the defense team, of course, subject to the leadership of Ms. O'Neill?

(RT 5581-5582.) Mr. Kinney responded:

> Yes. And the case is getting ready to close. Subject to the close and us beginning our case, I would make this request to come on as co-counsel. Of course, Barbara O'Neill being lead counsel. Part of the reason is, in working with [appellant] and talking to him, he desires that I ask him questions on the stand. Also, all day yesterday, [appellant] and I met with a psychiatrist, Dr. Berg, all day. And we have another – that was about six hours. And we have another meeting later in the week. It probably would be that I would question him when he's on the stand and also call

> Dr. Berg. That would be my primary focus. I would request to come on as co-counsel subject to lead counsel's final authority.

(RT 5582.) Ms. O'Neill, Ms. Martinez, and appellant all argued that Mr. Kinney should come on as co-counsel. (RT 5582-5583.) The court so ordered. (RT 5583.)

B. Discussion

Appellant writes: "If the communication between [appellant] and his attorneys had not broken down, there would have been no need to appoint a third, male attorney to facilitate communication." (AOB 122.) Again, respondent is not contesting that there had been a breakdown in communication between appellant and the deputy public defenders. Appellant had disagreed with his counsels' strategies, particularly counsels' efforts to persuade him to offer a guilty plea in exchange for a sentence of life without parole. He became doubtful and distrustful of his counsels' intentions and effectiveness. Appellant then *chose* to be uncooperative, to not communicate with his female attorneys. In other words, respondent is arguing that the breakdown of the attorney-client relationship was not irreconcilable. (See Argument VII.)

Appointing a person to facilitate communication can be, and has been, properly utilized. (Cf. *People v. Tamayo* (Ill. 1978) 383 N.E.2d 227, 229 ["The judge also remarked that in his view defendant was knowingly refusing to cooperate with his attorney. He admonished the defendant to begin confiding in counsel, and he appointed a Spanish-speaking co-counsel to facilitate communication."]; *In re Sara D.* (2001) 87 Cal.App.4th 661, 667 [in dependency cases, the "attorney may find it difficult to communicate with the client" and "determine that in order to protect the client's rights, a guardian ad litem should be appointed"]; *State v. Davenport* (N.J. 2003) 827 A.2d 1063, 1071 ["Standby counsel may be appointed to provide the defendant with advice

and assistance and to facilitate communications with the court."].) Mr. Kinney was not a "watchdog" over Ms. O'Neill and Ms. Martinez. He was appointed to facilitate communication. His role facilitated the attorney-client relationship. (RT 5579.) For example, Ms. Martinez told the court:

> [T]he main thing we were trying to arrive at is getting [appellant] to agree to take the stand. And as the court knows from various *Marsdens*, he absolutely was refusing to even consider this suggestion. And it wasn't until Mr. Kinney came on board that [appellant] finally agreed that might be a good idea.

(RT 5580-5581.) Ms. O'Neill added, "[W]e asked Mr. Kinney . . . to spend most of his time trying to convince [appellant] to testify. And he has succeeded and we're delighted." (RT 5581.)

The fact that Mr. Kinney gradually assumed a more active role – eventually being designated co-counsel – is by itself of no consequence. Having a third attorney to assist in appellant's defense inured to the benefit of appellant. (Cf. *People v. Clemmons* (1990) 224 Cal.App.3d 1500, 1503-1506 [defendant, represented by two attorneys on two informations consolidated for trial, "reaped the benefit of having two attorneys present at trial representing his interests"].) The court made clear that Ms. O'Neill was lead counsel and Mr. Kinney was co-counsel. (RT 5573-5574; see also RT 10289 [court stating, "I have to look to somebody in case there is a division of opinion"].) Having Mr. Kinney serve as co-counsel did not violate appellant's constitutional right to effective assistance of counsel.

Accordingly, appellant's claim should be rejected.

XI.

THE COURT DID NOT ERR IN REINSTATING MS. O'NEILL; THE COURT DID NOT ABUSE ITS DISCRETION IN DENYING APPELLANT'S MARCH 25, 1994 *MARSDEN* MOTION; THERE WAS NO MARCH 25, 1994 MOTION FOR MISTRIAL

Appellant argues that the court erred in reinstating Ms. O'Neill after the Public Defender's declaration of a conflict stemming from its representation of James Anthony Scott, and in denying his March 25, 1994, motions to discharge counsel and for a new trial. (AOB 128-139.) Not so. First, the court did not err in reinstating Ms. O'Neill because counsel for the Public Defender's Office stated that there was no declarable conflict of interest in light of the prosecutor's decision to not call Mr. Scott as a penalty phase witness and to not present any evidence of the October 15, 1992, altercation between Mr. Scott and appellant. Second, the court did not abuse its discretion in denying appellant's March 25, 1994, *Marsden* motion. Third, there was no March 25, 1994, motion for mistrial.

A. The Court Did Not Err In Reinstating Ms. O'Neill

1. The Record

On January 20, 1994, a week after learning of the prosecution's intent to call Anthony James Scott as a penalty phase witness regarding an altercation between him and appellant in jail on October 15, 1992, Ms. O'Neill informed the court that the Public Defender's Office would have to declare a conflict. (RT 9977-9979, 9981.) Ms. O'Neill later informed the court that if the prosecution intended to use the October 15, 1992, incident in the penalty phase, then she and Ms. Martinez would have to declare a conflict. (RT 10004-10007.) According to Ms. O'Neill, Ms. Martinez represented Mr. Scott on that matter and there was a conviction. (RT 9981.) Mr. Scott was at the time being

represented by another deputy public defender on a related violation of probation case. (RT 10029.)

The prosecutor told the court that his decision to call Mr. Scott to testify or to present evidence concerning or the October 15, 1992, incident, would be contingent on the court's view on the conflict. (RT 9985-9986, 10019.) The court expressed views similar to defense counsel:

> The Court does find that with respect to our number one, that is, the incident of October 15th, where there was an alleged battery pursuant to Penal Code Section – in violation of Penal Code section 242, upon Anthony James Scott and involving potential witnesses Porter and Belcher, that there is an actual conflict now existing with respect to that incident and the Public Defender's Office. Therefore, if [prosecutor], as is his right, of course, would intend to use that particular incident in any way, then counsel, because of the conflict, defense counsel from the Public Defender's Office would be excused.

(RT 10034-10035; see also RT 9978-9985, 10006-10007, 10030-10034.) The prosecutor asked for clarification, "Are you saying witness or incident?" (RT 10035.) The court clarified, "I'm saying incident," and explained,

> I understand counsel would conflict because they could not even allow the incident to be portrayed when they have conflicted ability to take the edge off that incident to show it as perhaps not involving the aggression that might be presented by the D.A.

(*Ibid.*) The prosecutor then said that he decided not to present any evidence regarding the October 15, 1992, incident. (RT 10040.)

On January 24, 1994, the Public Defender's Office declared a conflict and requested the appointment of private counsel for appellant. (RT 10042; CT 1112.) Charles Dreiling, Assistant Public Defender, was present at the hearing. The court inquired as to the nature of the conflict. Mr. Dreiling refused to disclose the nature of the conflict. Citing *Uhl v. Municipal Court*,[59] Mr.

---

59. *Uhl v. Municipal Court* (1974) 37 Cal.App.3d 526.

Dreiling argued that the court did not have the power to inquire into the reasons for the conflict. (RT 10044-10046, 10062-10064.)

On January 25, 1994, after further discussion of case law, again the court inquired as to, and Mr. Dreiling refused to disclose, the nature of the conflict. (RT 10076-10077.) The court then ruled:

> The Court finds that the rule suggested by the defense in this case that the Court has no power to inquire into the reasons for the declaration of conflict is a rule that is antithetical to a proper court proceeding. Immediately there comes to mind the fact that if the Court is unable to inquire, then in the situation where defense counsel in good faith but mistakenly declare a conflict, the Court is powerless to ferret out the mistake and deal with it.
>
> Also, there immediately comes to mind the fact that if under the rule as suggested by defense if the conflict is easily taken care of or eliminated, the Court is powerless to inquire of the nature of the conflict and to eliminate the problem like we did earlier in this case where defense counsel did tell us what the nature of the conflict was, namely, a certain witness and that was easily taken care of simply by [the prosecutor] saying that witness would not be called nor would the incident be set forth in the evidence.
>
> Of course, such a rule is also a temptation to less scrupulous counsel than we have in the Public Defender's Office to perhaps, at the end of a case where they're feeling badly about the results, to create a mistrial.
>
> I think the rule has to be that after the trial commences, after double jeopardy attaches, the Court has to have some power to inquire into the reasons for the conflict for the declaration of conflict. That can be done, as it was in this case, in camera.

(RT 10078-10079.) The court then found Mr. Dreiling in direct contempt of the court and ordered him remanded into custody. The court stayed execution of the order to allow Mr. Dreiling to petition for extraordinary relief. (RT

10079-10081; CT 1128-1131.) The court appointed Mr. Kinney chief trial attorney.[60] (RT 10081-10082.)

On January 27, 1994, Mr. Dreiling petitioned the Fifth District Court of Appeal for relief from the court's contempt order. (II SCT 631-734.) On January 28, 1994, the Court of Appeal summarily denied the petition. (II SCT 735.)

On January 31, 1994, Mr. Dreiling asked the court to reconsider its prior ruling, clarifying that "the conflict arose due to a privileged and confidential communication as a result of attorney/client privilege" – "confidential communication that occurred between investigators in our office, investigators on this case to the best of my knowledge, and both of the clients that we represent in this case." (RT 10131-10134, 10152-10153.) The court asked Mr. Dreiling,

> [W]ithout disclosing one iota of that information, do you feel there's something that [the prosecutor] could do, like not calling a certain witness or not presenting certain evidence that would cure it so that – so you'd no longer have that conflict?

(RT 10134-10135.) Mr. Dreiling replied, "I don't believe so . . . . The source of the additional conflict is the confidential communications themselves. I see no possible cure for it." (RT 10135.) Mr. Dreiling's position would not differ if the confidential communication were to have been divulged in camera. (RT 10138-10139.)

The court nonetheless held an in camera hearing "to see if more information is forthcoming on this matter." (RT 10164.) Counsels for Mr.

---

60. The court had also discharged the Public Defender's Office on January 25, 1994, but later vacated the order on January 27, 2994. (RT 10081-10082, 10096-10097; see also CT 1123-1125 [Prosecution's "Request for Reconsideration" regarding court's order relieving the Fresno County Public Defender as Chief Defense Attorney for appellant].) The Public Defender's Office stated that they were unable to accept the appointment due to the conflict. (RT 10184.)

Dreiling represented to the court that "failure to call [Mr. Scott] as a witness would deprive [appellant] of a potential defense in this case" and reiterated that the Public Defender's Office represented Mr. Scott "currently as to a felony matter presently pending before [Fresno County Superior Court]." (RT 10166-10167.) The court requested disclosure of the information – an offer of proof as to Mr. Scott's testimony – beneficial to appellant's defense. Mr. Dreiling's counsels stated that they could not comply, contending that such information was protected by the attorney-client privilege. (RT 10167-10171, 10181.) The court ruled that it would not modify its contempt order. The order remained in full force and effect. (RT 10172-10173; see CT 1143-1148.) The court again stayed execution of the order to allow Mr. Dreiling to petition for extraordinary relief. (RT 10182; CT 1139.)

On February 1, 1994, the court ordered Mr. Dreiling to have Ms. O'Neill and Ms. Martinez resume "full and active representation of [appellant]." Mr. Dreiling replied that he could not comply with the order because of a conflict. (RT 10208-10210.) The court found that the Public Defender's Office did not have a conflict which prevented it from representing appellant. (RT 10205-10207.) The court found Mr. Dreiling in direct contempt and ordered him remanded into custody. (RT 10210-10211.) This contempt order was filed on February 2, 1994. (CT 1143-1148.) The court again stayed execution of the order to allow Mr. Dreiling to petition for extraordinary relief. (RT 10211.)

On February 3, 1994, Mr. Dreiling again petitioned the Fifth District Court of Appeal for relief from the contempt order. (II SCT 736-1066.) On February 7, 1994, the Court of Appeal denied the petition. (CT 1152-1153, 1289-1291; II SCT 1075-1076.) On February 8, 1994, counsels for Mr. Dreiling requested, and the court granted, a further stay on the execution of the contempt order to allow them to petition this Court for review. (RT 10228, 10232; CT 1155.)

On February 15, 1994, Mr. Dreiling petitioned this Court for review. (II SCT 1526-1574.) On February 24, 1994, this Court ordered the trial court

> to show cause before the Court of Appeal . . . why the contempt order dated February 2, 1994, should not be set aside and why the Fresno County Public Defender should not be permitted to declare a conflict of interest and be relieved as counsel . . ..

(II SCT 1586.) On March 18, 1994, the Court of Appeal issued its opinion, finding, among other things, that the trial court's request for further inquiry was proper. (CT 1158-1181; II SCT 1750-1773.)

On March 25, 1994, counsel for Mr. Dreiling stated "there [was] no declarable conflict at this time," in light of the prosecutor's decision to not call Mr. Scott as a penalty phase witness and not present any evidence of the October 14, 1992, incident. (RT 10246-10249.) He further indicated that Ms. Martinez had represented Mr. Scott when she was involved in this case, and she would be removed from this case to avoid the appearance of conflict.[61] (RT 10249.) The court then purged the contempt order after the Public Defender's Office stated that Ms. O'Neill would resume representation of appellant. (RT 10260; CT 1185.)

2. Discussion

Appellant argues:

> Counsels' good faith representations to the court, coupled with the evidence in the record and the posture of the trial, were sufficient as a matter of law to establish that the Public Defender's representation would compromise [appellant's] constitutional right to counsel free from any conflict of interest affecting counsel's performance.

(AOB 132.) Appellant's argument is unclear. Counsel for the Public Defender's Office stated that there was no declarable conflict of interest, in

---

61. The court later reappointed Ms. Martinez, ordering her to resume representation of appellant. (RT 10332-10333.)

light of the prosecutor's decision to not call Mr. Scott as a penalty phase witness and not present any evidence of the October 15, 1992, altercation between Mr. Scott and appellant. (RT 10246-10249.) Ms. O'Neill was then reinstated as chief counsel and resumed representation of appellant. (RT 10260.) Therefore, appellant's argument is apparently moot. (Cf. *People v. Carpenter, supra,* 15 Cal.4th at pp. 374-375 [holding that claim that trial court erred in not appointing independent counsel to advise defendant concerning deputy public defender's conflict of interest was moot, where deputy public defender no longer represented capital murder defendant].)

From what respondent can gather, appellant possibly is arguing that the prosecutor's decision, to not call Mr. Scott as a penalty phase witness and to not present any evidence of the October 15, 1992, incident, did not remove the conflict, and that the trial court lacked the authority to inquire into the nature of the conflict and thus should have relieved the Public Defender's Office as counsel for appellant. This was what appellant argued below. The Court of Appeal correctly rejected his arguments. (CT 1158-1181; II SCT 1750-1773.)

> The determination whether to grant or deny a motion by an attorney to withdraw is within the sound discretion of the trial court and will be reversed on appeal only on a clear showing of abuse of discretion.

(*People v. Sanchez* (1995) 12 Cal.4th 1, 37.)

Here, after learning of the prosecutor's intention to call Mr. Scott as a penalty phase witness and use the October 15, 1992, incident, the Public Defender's Office declared, and the trial court properly found, an actual conflict of interest in the Public Defender's continued representation of appellant. (RT 9977-10040; see II SCT 1759; cf. *Leversen v. Superior Court* (1983) 34 Cal.3d 530, 538-540.) The prosecutor, not wanting to jeopardize the penalty phase, decided not to call Mr. Scott or to use the incident. Seemingly, the conflict for the Public Defender's Office was thus removed. (See RT 10034-10040; CT

1167-1168; II SCT 1759-1760; cf. *People v. Dancer* (1996) 45 Cal.App.4th 1677, 1686-1687 ["[W]e reject defendant's rigid view that all conflicts are disabling and that the Constitution invariably requires a change of counsel whenever any sort of conflict is declared. . . . [T]here are conflicts whose potential impact is extremely focused and limited and there are alternative remedies short of replacing counsel that can fully protect a defendant's constitutional right."], overruled on other grounds in *People v. Hammon* (1997) 15 Cal.4th 1117, 1123.)

When the Assistant Public Defender, Mr. Dreiling, appeared the following day and declared a conflict, the court inquired about the nature of the conflict. The trial court had the authority and the duty to inquire into the nature of the conflict.

> When the trial court knows, or reasonably should know, of the possibility of a conflict of interest on the part of defense counsel, it is required to make inquiry into the matter. It is immaterial how the court learns, or is put on notice, of the possible conflict, or whether the issue is raised by the prosecution or by the defense. [¶] The trial court is obligated not merely to inquire but also to act in response to what its inquiry discovers. In fulfilling its obligation, it may, of course, make arrangements for representation by conflict-free counsel. Conversely, it may decline to take any action at all if it determines that the risk of a conflict is too remote.

(*People v. Bonin* (1989) 47 Cal.3d 808, 836-837 [citations omitted].) After learning of the conflict, the trial court may hold further hearings to consider possible remedies.[62] (*People v. Clark* (1993) 5 Cal.4th 950, 1001-1002 [prior

---

62. The *Leversen v. Superior Court, supra,* 34 Cal.3d 530, and *Uhl v. Municipal Court, supra,* 37 Cal.App.3d 526, decisions do not set forth a contrary procedure.

> . . . *Uhl* does not abrogate the court's duty of inquiry or the attorney's obligation to provide information about the conflict. It simply limits the range of inquiry to prevent the required disclosure of communications that are confidential but

representation, in his private capacity, of a prosecution witness by the Public Defender representing defendant did not constitute a conflict of interest that deprived defendant of his right to effective assistance of counsel because counsel terminated his representation of witness, refrained from disclosing to co-counsel any confidential information about the witness, and arranged for co-counsel to conduct the cross-examination of the witness].)

Mr. Dreiling's blanket assertion, that the conflict arose out of confidential communication protected by the attorney-client privilege, was not enough to insulate his office from the court's inquiry. (Cf. *Manfredi & Levine v. Superior Court* (1998) 66 Cal.App.4th 1128, 1135-1136 ["Manfredi merely told the court it received unsolicited and confidential information which prevented it from providing further representation to the Barles. The court was no better informed of the facts by Manfredi's independent counsel who concurred with its evaluation of the conflict and its effect upon Manfredi's ethical duty."].) Representation by Mr. Dreiling's counsel that "failure to call [Mr. Scott] as a witness would deprive [appellant] of a potential defense in this case" (RT 10166-10167) was likewise insufficient. As the Court of Appeal noted:

> [P]etitioner did not describe the nature of the October 15th incident. Such a description could have come from facts known to [appellant], arrest reports or other matters of public record. Petitioner's failure deprived the trial court of an adequate context in which to evaluate the claimed conflict of interest.
>
> . . . . . .
>
> This court emphasizes that nothing in this opinion constitutes a determination on the propriety of the trial court's

---

> form the factual basis of the conflict. The trial court still has a duty to explore the conflict, and counsel has a corresponding duty to respond, and to describe the general nature, as fully as possible but within the confines of privilege.

(*Aceves v. Superior Court* (1996) 51 Cal.App.4th 584, 592-593; see also *Manfredi & Levine v. Superior Court, supra,* 66 Cal.App.4th at p. 1134.)

> directions to disclose confidential information in camera. The trial court deemed purged the contempt for refusing that directive. Nor is it clear that such a disclosure is necessary. As noted in this opinion, petitioner has not exhausted his remedy or presenting nonconfidential information to the trial court.

(CT 1167-1168, 1180; II SCT 1759-1760, 1772.) The trial court was not required to accept the representation of Mr. Dreiling and his counsels in a vacuum. Though "great weight [should] be accorded trial counsel's assertion of a conflict of interest" (*Leversen v. Superior Court, supra,* 34 Cal.3d at pp. 537-538), the trial court need not "accept a sweeping claim of conflict and 'rubber stamp' counsel's request to withdraw" (*Aceves v. Superior Court, supra,* 51 Cal.App.4th at p. 592). Thus, the trial court was not required to relieve the Public Defender's Office upon blanket assertions and unsubstantiated representations of conflict.

In short, the trial court did not abuse its discretion in reinstating Deputy Public Defender O'Neill to represent appellant.

B. The Court Did Not Abuse Its Discretion In Denying Appellant's March 25, 1994, *Marsden* Motion; There Was No March 25, 1994 Motion For Mistrial

1. The Record

On March 25, 1994, appellant moved to discharge all of his then current attorneys:

> I'd like to say that I didn't want the Public Defender, the office, to represent me because I feel they abandon[ed] me. . . . Even though Mr. Kinney, like, he's been here, but he wasn't here at the beginning. I want new attorneys. I'd like to have new attorneys.

(RT 10273.) The court then held an in camera hearing, in which appellant expressed similar sentiments. The court denied his *Marsden* motion, explaining:

> With respect to the Public Defender abandoning you, I feel that that, [appellant], is not the case. What they did is felt –

> they apparently felt there was some kind of conflict when the D.A. came up with this Scott incident in jail. Attorneys are under an obligation to declare a conflict when they feel, in good faith, that it is a conflict. I would not agree with your reasoning. If – and, accordingly, I would not relieve them as your attorneys because of any alleged abandonment.
>
> I would, under no circumstances, eliminate Mr. Kinney as your attorney. I feel that he has performed more than adequately. He's been a really outstanding advocate for your position. It's true that he wasn't here from the start, but that didn't stop him from presenting evidence and arguing on your behalf in a very professional manner. So I don't intend to eliminate him on account of the fact he was not here from the start. We do have complete transcripts and he's able to review those from the start.
>
> So the result of those two rulings, [appellant], is that I will not give you new attorneys; that we're gong to continue the case with Ms. O'Neill and Mr. Kinney.

(RT 10281-10282.)

2. Discussion

> A defendant is entitled to have appointed counsel discharged upon a showing that counsel is not providing adequate representation or that counsel and defendant have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result.

(*People v. Jones, supra,* 29 Cal.4th at pp. 1244-1245.) After considering any specific complaints raised by the defendant, the decision whether to grant substitution is a matter of judicial discretion. (*People v. Memro, supra,* 11 Cal.4th at p. 857.)

Here, appellant made no mention of a conflict with either of his appointed counsel. Ms. O'Neill and the Public Defender's Office provided more than adequate representation by. The declaration of conflict and the litigation over the contempt citations were undertaken to promote the best interests of appellant and to ensure his constitutional right to effective counsel, free of conflicting loyalties. Appellant could have waived his right to conflict-

free counsel. (*People v. Cox* (2003) 30 Cal.4th 916, 949 ["[A] defendant may properly waive his right to the assistance of an attorney unhindered by a conflict of interest."].) However, as the Court of Appeal noted: "[Appellant] refused to waive any conflict of interest and affirmatively requested to be represented by counsel who was free of any conflict of interest." (CT 1179; II SCT 1771.) Ms. O'Neill and the Public Defender's Office did not abandon appellant.

The court also correctly retained Mr. Kinney as appellant's trial counsel. The trial court explained that he would "have complete transcripts and he [would be] able to review those from the start." (RT 10282.) Furthermore, Mr. Kinney acknowledged the facts in the case were primarily based on Angie's testimony. Mr. Kinney was present for all of Angie's testimony. (RT 5521 ["I have read the whole trial transcript. I've been here for all of Angie's testimony. And I've, in depth, been following it."].) Mr. Kinney was also present for Michael Hall's testimony. (CT 792-793.) A cursory review of the minutes show that Mr. Kinney was present for almost every witness testimony after his appointment. In short, the trial court did not abuse its discretion in denying appellant's March 25, 1994, *Marsden* motion.

Appellant further argues that his March 25, 1994, motion for mistrial should have been granted. (AOB 137-139.) There was no March 25, 1994, motion for mistrial. Mr. Kinney did verbally convey a motion for mistrial on the grounds of prejudicial delay, alleged grant of *Marsden* motion in appointing him "facilitator of communication," and lack of continuity in representation. (RT 10261-10263.) However, Mr. Kinney acknowledged that he was second counsel, that he had not discussed the motion with lead counsel, and that he did not have the authority to make such a motion.[63] (RT 10263-10264.)

---

63. Appellant did file a written motion for mistrial on May 25, 1994, raising similar arguments. (CT 1244-1261.) The court denied the motion. (CT 1425-1426; RT 10383-10404.) Appellant argues that the court erred in denying his May 25, 1994, motion for mistrial in the next argument, XII. Consequently,

Accordingly, appellant's claim should be rejected.

---

respondent will not address appellant's claim of error as to the mistrial motion in this argument.

XII.

THE COURT DID NOT ERR IN DENYING APPELLANT'S MAY 25, 1994 MOTION FOR MISTRIAL AND IN APPOINTING MR. KINNEY LEAD COUNSEL AFTER MS. O'NEILL DEVELOPED CANCER

Appellant argues that the court erred in denying his May 25, 1994, motions for mistrial and in appointing Mr. Kinney lead counsel after Ms. O'Neill developed cancer. (AOB 140-152.) Not so. The court did not err in denying appellant's May 25, 1994, motions for mistrial and in appointing Mr. Kinney lead counsel after Ms. O'Neill developed cancer.

A. The Record

On May 25, 1994, appellant filed a motion for mistrial on the grounds that the appointment of Mr. Kinney as a "facilitator of communication" was in essence granting of a *Marsden* motion (CT 1244-1251) and that the delay between the sanity phase and the penalty phase prejudiced him (CT 1252-1261).

In a letter dated June 6, 1994, Ms. O'Neill informed the court that she had been diagnosed with cancer. (CT 1391; see RT 10373-10378.) In a letter dated June 9, 1994, Mr. Kinney had submitted a letter indicating that he would not be able to assume the role of lead counsel in appellant's case, explaining that he had not been continuously present during the guilt phase, that he suffered from high blood pressure and was adjusting to new blood pressure medication, and that he was constantly concerned about his son who had been recently admitted to the hospital. (CT 1392.) In a letter dated June 14, 1994, Ms. O'Neill informed the court that she underwent surgery and the diagnosis of cancer was confirmed. She indicated that because further surgery or other forms of treatment would be required, she would absent from work for

approximately two to three months. (II SCT 1890.) Mr. Kinney later submitted another letter from his medical doctor, dated June 16, 1994, advising the court that Mr. Kinney was on medication for hypertension and "[h]is blood pressure [was] not yet under control" and that "[h]e should avoid being involved in trials at least until August 1, 1994." (II SCT 1943.)

On June 17, 1994, the court heard and denied appellant's motion for mistrial. (RT 10383-10404.) Over objections by Mr. Kinney and appellant (RT 10464-10465), the court relieved Ms. O'Neill as counsel and designated Mr. Kinney as lead counsel conditioned on the status of his health and Ms. Martinez as co-counsel (RT 10477, 10480, 10483-10484).

B. Discussion

1. The Court Did Not Abuse Its Discretion In Denying Appellant's May 25, 1994, Motions For Mistrial

On appeal, this Court reviews a ruling denying a motion for mistrial for an abuse of discretion. (*People v. Ayala* (2000) 24 Cal.4th 243, 283-284.) As this Court has explained: "A motion for mistrial presupposes error plus incurable prejudice." (*People v. Gatlin* (1989) 209 Cal.App.3d 31, 38.)

> "Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions."

(*People v. Lucero* (2000) 23 Cal.4th 692, 714.) A court abuses its discretion "when its determination is arbitrary or capricious or exceeds the bounds of reason, all of the circumstances being considered." (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1121.) "[A] motion for mistrial should be granted only when a party's chances of receiving a fair trial have been irreparably damaged." (*People v. Ayala, supra,* 24 Cal.4th at p. 284 [internal quotations and citation omitted].)

Here, the court did not abuse its discretion in denying appellant's May 25, 1994, motion for mistrial.

First, as explained in arguments VII, IX, and XII, the appointment of Mr. Kinney was not de facto a grant of appellant's *Marsden* motion. Respondent does not dispute there was a breakdown in communication between appellant and deputy public defenders O'Neill and Martinez. Appellant chose to be uncooperative, to not communicate with his attorneys. To reiterate, the conflict therefore was not irreconcilable. The court properly denied appellant's *Marsden* motions. The court did not discharge and substitute appellant's deputy public defenders. The court tried to ease communication between appellant and his attorneys by appointing Mr. Kinney. The court added a third attorney to facilitate communications. When Mr. Kinney was designated co-counsel, the court made clear that Ms. O'Neill was lead counsel. (RT 5573-5574.)

Second, as will be explained in argument XXV, there was good cause for the delay between the guilt and penalty phases of the trial. The length of the delay – four months at the time of the filing of the motion – does not by itself raise a presumption of prejudice.

2. The Court Did Not Err In Appointing Mr. Kinney Lead Counsel After Ms. O'Neill Developed Cancer

Appellant next argues that the court erred in appointing Mr. Kinney lead counsel after Ms. O'Neill developed cancer. (AOB 142-152.) He provides reasons why Mr. Kinney would be ineffective as lead counsel. He does not, however, seem to be arguing ineffective assistance of counsel.[64/] Appellant

---

64. As appellant acknowledges (AOB 149), an ineffective assistance of counsel claim should generally be raised in a petition for writ of habeas corpus, not on direct appeal, because the reasons for trial counsel's actions were not all clearly set forth in the appellate record. (*People v. Pope* (1979) 23 Cal.3d 412,

seems to be arguing that the court knew or had reason to know that Mr. Kinney would be ineffective as lead counsel because "Mr. Kinney was . . . severely handicapped in arguing credibility of witnesses in the penalty phase, by virtue of his absence during most of the guilt-phase witnesses." (AOB 146.)

Appellant's claim is untenable. Mr. Kinney was present for all of Angie's testimony. (RT 5521 ["I have read the whole trial transcript. I've been here for all of Angie's testimony. And I've, in depth, been following it."].) Mr. Kinney was also present for all of prosecution's rebuttal witnesses, including Michael Hall's testimony (CT 792-793). Moreover, though Ms. O'Neill had been relieved, Ms. Martinez remained co-counsel on appellant's defense team. Ms. Martinez was present during all evidentiary phases of the trial. She was therefore available to assist Mr. Kinney in challenging the credibility of witnesses. Thus, the court's decision to appoint Mr. Kinney lead counsel did not violate appellant's constitutional right to effective assistance of counsel.

Appellant's reliance upon *People v. Manson* (1976) 61 Cal.App.3d 102,[65/] and *People v. Gibbs* (1986) 177 Cal.App.3d 763,[66/] is misplaced. (AOB

426-427, fn.17; *People v. Diaz* (1992) 3 Cal.4th 495, 557-558.)

65. In *Manson*, the defendant's attorney disappeared after both sides had rested but before the jury was instructed or closing arguments were made. The trial court appointed another counsel – the fourth – for the defendant. The appellate court there concluded the defendant was denied the effective assistance of counsel because her trial counsel was not available to present her argument to the jury and her new attorney could not assume a meaningful adversary posture – could not effectively argue the issue of credibility – because he had been absent from all trial proceedings. (*People v. Manson, supra*, 61 Cal.App.3d at pp. 197-203.)

66. In *Gibbs*, the defendant's counsel developed a conflict of interest during trial and sought to be relieved. The trial court denied his motion, but stayed the trial while he sought appellate relief. Eighteen months later, this Court issued a writ of mandate directing the trial court to grant counsel's motion to be relieved. The trial court did so and appointed a new attorney to represent the defendant. The trial court, at that time, invited a motion for

138, 144-145.) *Manson* and *Gibbs* are distinguishable from the case at hand. First, unlike *Manson* and *Gibbs*, co-counsel Ms. Martinez was present for all witness testimonies. Second, Mr. Kinney was present for most of the guilt phase and all of Angie's testimony. Third, the lay witnesses who testified before Angie hereby set the background for Angie's testimony as to what happened that night. At issue was appellant's mental state; credibility of these background witnesses was not a crucial issue. The prosecution and defense were in little dispute about the circumstances of the crimes themselves. For instance, many of the background witnesses testified about appellant's frequent visits to the Farkas' residence and the amount of time he spent with, and attention he paid toward, Laurie. Appellant did not dispute that he frequently visited the Farkas residence and that he paid a lot of attention to Laurie. (RT 5300-5302, 5799-5802.) The prosecution and defense argued over how these facts should be construed. For instance, did appellant visit the Farkas residence so frequently and spend so much time with Laurie because she was a sister/friend to him or because he had a sexual interest in her? The prosecution claimed he had a sexual interest in Laurie. Appellant claimed that Laurie was like a sister/friend to him. (RT 5799-5802.) Thus, appellant was not challenging the credibility of the witness in the prosecution's case-in-chief. Instead, the parties disagreement went to the interpretation of the witness testimony, not its truthfulness.

---

mistrial. The defendant opted to proceed with the trial. The defendant however later changed his mind and moved for mistrial. The trial court denied the mistrial motion. The appellate court held that it was error to deny defendant's motion for mistrial because defendant was denied a "continuity of representation" with new counsel forced to argue a case he had not heard before a jury he had not selected. (*People v. Gibbs, supra,* 177 Cal.App.3d at pp. 765-768.)

In short, the court did not err in appointing Mr. Kinney lead counsel after Ms. O'Neill developed cancer. Accordingly, appellant's claim should be rejected.

XIII.

THE PROSECUTOR'S FAILURE TO DISCLOSE VENUS FARKAS' MISDEMEANOR WELFARE FRAUD CONVICTION DID NOT VIOLATE APPELLANT'S CONSTITUTIONAL RIGHT TO DUE PROCESS UNDER *BRADY V. MARYLAND* (1963) 373 U.S. 83

Appellant argues that the prosecution's failure to disclose Venus Farkas' misdemeanor welfare fraud conviction violated his constitutional right to due process. (AOB 153-163.) He is mistaken. The prosecution's failure to disclose Mrs. Farkas' misdemeanor conviction did not amount to a constitutional violation.

A. Background

On October 19, 1994, appellant's trial counsels brought to the court's attention that the Public Defender's Office had a conflict of interest in the representation of appellant. The Public Defender's Office had represented Venus Farkas in a welfare fraud prosecution during the early stages of appellant's criminal prosecution. A written notice and statement of conflict of interest was filed the following day. (RT 10543-10546, 10928; CT 1437-1457.)

According to court records, Venus Farkas was arraigned on June 16, 1991. The matter was continued to July 17, 1991, so Mrs. Farkas could obtain private counsel. On July 17, 1991, Mrs. Farkas appeared in court with counsel from the Public Defender's Office. At which time, Mrs. Farkas pled guilty to welfare fraud, and the court granted probation for a three-year term. (RT 10928; CT 1437-1457.) Mrs. Farkas was a prosecution witness, testifying at the guilt phase on October 12, 1993. (RT 3556.)

On October 21, 1994, appellant moved for a new trial on the ground that the prosecutor's failure to disclose Mrs. Farkas' misdemeanor conviction violated his rights under the due process and confrontation clause. (CT 1467-1473.) Following a contested evidentiary hearing, the trial court denied appellant's motion for a new trial, finding that the prosecution did not suppress Mrs. Farkas' misdemeanor welfare fraud conviction. (RT 10925-10926.) The trial court further found no ineffective assistance of counsel and no conflict of interest existed should Mrs. Farkas be called as a witness in the penalty phase. (RT 10923, 10925-10943.)

B. Discussion

Under the due process clause, an accused is entitled to any evidence that is favorable to him and material to guilt or punishment. (*Brady v. Maryland* (1963) 373 U.S. 83, 87 [holding that "the suppression by the prosecution of evidence favorable to an accused . . . violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution"].) The duty to disclose such evidence encompasses impeachment evidence as well as exculpatory evidence. (*United States v. Bagley* (1985) 473 U.S. 667, 676.) That duty exists regardless of whether there has been a request for such evidence, and irrespective of whether the suppression was intentional or inadvertent. (*United States v. Agurs* (1976) 427 U.S. 97, 110.) Such evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." (*United States v. Bagley, supra*, 473 U.S. at p. 682.) The United States Court has explained:

> [T]he term "*Brady* violation" is sometimes used to refer to any breach of the broad obligation to disclose exculpatory evidence – that is, to any suppression of so-called "*Brady* material" – although, strictly speaking, there is never a real "*Brady* violation" unless the nondisclosure was so serious that there is a

> reasonable probability that the suppressed evidence would have produced a different verdict. There are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.

(*Strickler v. Greene* (1999) 527 U.S. 263, 281-282, fn. omitted.)

Respondent concedes that the prosecution had a constitutional duty to disclose Mrs. Farkas' misdemeanor welfare fraud conviction, because it would have been admissible for impeachment under *People v. Wheeler* (1992) 4 Cal.4th 284, 295-299, and failed to do so. Respondent further acknowledges that the prosecution's obligation to turn over such favorable impeachment evidence in the first instance stood independent of defense's knowledge. (AOB 159; *Banks v. Reynolds* (10th Cir. 1995) 54 F.3d 1508, 1517.) However, appellant was not prejudiced, i.e., the evidence was immaterial.

Appellant must demonstrate that the suppressed evidence is "material." (*United States v. Bagley, supra,* 473 U.S. at p. 678.) "Materiality" is assessed collectively, not item by item. (*Kyles v. Whitley* (1995) 514 U.S. 419, 436.) A reasonable "possibility" that the suppressed evidence might have produced a different result is insufficient to satisfy the defendant's burden to establish a "reasonable *probability* of a different result." (*Strickler v. Greene, supra,* 527 U.S. at p. 291 [italics in original].)

> [T]he materiality inquiry is not just a matter of determining whether, after discounting the inculpatory evidence in light of the undisclosed evidence, the remaining evidence is sufficient to support the jury's conclusions. Rather, the question is whether "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict."

(*Id.* at p. 290 [internal citations omitted], citing *Kyles v. Whitley, supra,* 514 U.S. at pp. 434-435.)

Here, Mrs. Farkas provided some general information about Laurie – her age, friendship with Angie, school attended. She said Laurie and Angie were planning to see a movie that evening. (RT 3556-3558.) The prosecution elicited testimony from Mrs. Farkas about the frequency of appellant's visits to her home and the amount and kind of attention appellant paid toward Laurie. (RT 3558-3563.) Mrs. Farkas further testified about the unusualness of appellant leaving her home early that night. (RT 3564-3566.) Defense counsel elicited testimony from Mrs. Farkas regarding the amount of money Laurie had that night. (RT 3583.)

Mrs. Farkas was not a key prosecution witness. Mrs. Farkas' testimony was not the only evidence of appellant's sexual interest in Laurie, nor the only evidence as to Laurie having money on her that night. Many prosecution witnesses testified about the frequency of appellant's visits to the Farkas residence, and about the amount and kind of attention appellant paid toward Laurie. Appellant did not dispute that he frequently visited the Farkas residence and that he paid a lot of attention to Laurie. He claimed Laurie was like a sister to him. (RT 5799-5802.) Mrs. Farkas testified that she did not find anything unusual about the relationship between Laurie and appellant, prior to January 26, 1991. (RT 3582.) The evidence establishing appellant's sexual interest in Laurie went far beyond the multitude of prosecution witnesses testifying about the frequency of appellant's visits and attention appellant paid to Laurie. Michael Hall, appellant's friend, had told appellant that he needed to stay out from Laurie's house. To which appellant replied, "I know she wants me." Hall warned appellant, "That's Donna's cousin. You've got to be crazy. She's only 14." Appellant replied, "So what? I don't care." (RT 8849-8852.) As for the amount of money Laurie had on her that night, Angie had also testified that Laurie had seven dollars. (RT 4977-4978.) Thus, the absence of Mrs. Farkas' misdemeanor welfare fraud conviction does not undermine confidence in the

outcome of the trial and is therefore immaterial under *Brady*. (Cf. *United States v. Petrillo* (2d Cir. 1987) 821 F.2d 85, 90 [explaining that evidence of impeachment is material if the witness whose testimony is attacked "supplied the only evidence linking the defendant(s) to the crime"]; *United States v. Avellino* (2d Cir. 1998) 136 F.3d 249, 256 ["In general, evidence whose function is impeachment may be considered to be material where the witness in question supplied the only evidence linking the defendant to the crime."]; see, e.g., *United States v. Walters* (2001) 269 F.3d 1207, 1214-1217.)

Accordingly, appellant's *Brady* violation claim should be rejected.

XIV.

THE PROSECUTION'S FAILURE TO DISCLOSE VENUS FARKAS' MISDEMEANOR WELFARE FRAUD CONVICTION DID NOT DEPRIVE APPELLANT OF HIS CONSTITUTIONAL RIGHTS UNDER THE CONFRONTATION AND COMPULSORY PROCESS CLAUSES

Appellant argues that the prosecution's failure to disclose Venus Farkas' misdemeanor welfare fraud conviction deprived him of his constitutional rights under the confrontation and compulsory clauses. (AOB 164-173.) He is mistaken.

The Sixth Amendment of the United States Constitution protects both the right of confrontation and the right of compulsory process: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; [and] to have compulsory process for obtaining witnesses in his favor." Both clauses are made obligatory on the States by the Fourteenth Amendment. (*Pointer v. Texas* (1965) 380 U.S. 400, 403-406 [confrontation clause]; *Washington v. Texas* (1967) 388 U.S. 14, 17-19 [compulsory process clause].)

Arguing violation of Sixth Amendment rights to confrontation and compulsory process here is a misconception of the issue. The matter of concern here – the prosecution's failure to disclose Mrs. Farkas' misdemeanor welfare fraud conviction – did not involve any direct restriction on the scope of cross-examination (e.g., *Davis v. Alaska* (1974) 415 U.S. 308, 316-320 [court's refusal to allow defendant to impeach the credibility of a key prosecution witness by cross-examination directed at possible bias deriving from the witness' probationary status as a juvenile delinquent, despite conflict with a State's asserted interest in preserving the confidentiality of juvenile adjudications of delinquency, violated the confrontation clause]; *Delaware v.*

Van Arsdall (1986) 475 U.S. 673, 679 [holding that trial court's ruling prohibiting defendant's cross-examination into the possibility that a witness was biased as a result of state's dismissal of his pending public drunkenness charge violated defendant's rights secured by the confrontation clause]), nor did it result in direct preclusion of material and favorable evidence (e.g., *Crane v. Kentucky* (1986) 476 U.S. 683, 688-691 [holding that exclusion of testimony at trial concerning circumstances of defendant's confession, on ground that the testimony pertained solely to issue of voluntariness resolved against defendant in pretrial ruling, deprived him of a fair trial]; *Taylor v. Illinois* (1988) 484 U.S. 400, 407-415 [explaining that the compulsory process clause may, in appropriate cases, be violated by the imposition of a discovery sanction that entirely excludes the testimony of a material defense witness; however, the compulsory process clause does not create an absolute bar to preclusion of the testimony of a defense witness for violating a discovery rule].)

Here, the defense was free to cross-examine the witnesses on any relevant subject. The defense was free to present material and favorable evidence. The constitutional error, if any, was the prosecution's failure to assist the defense by disclosing information that might have been helpful in conducting the cross-examination. Such suppression of evidence amounts to a constitutional violation only if it deprives the defendant of a fair trial, i.e., only if the evidence is material in the sense that its suppression undermines confidence in the outcome of the trial. (See *Strickler v. Greene, supra*, 527 U.S. at p. 291; *Kyles v. Whitley, supra,* 514 U.S. at pp. 434-436.) Appellant's claim of violation of his Sixth Amendment rights to confrontation and compulsory process is without support. (Cf. *United States v. Nobles* (1975) 422 U.S. 225, 241 [explaining that defendant's argument that the court's ruling, conditioning the admissibility of impeachment testimony by defense witness upon production of investigative report prepared by the witness, deprived him

of the Sixth Amendment rights to compulsory process and cross-examination "misconceives the issue"]; rejecting defendant's contention that the ruling violated his Sixth Amendment right to compulsory process and cross-examination]; *United States v. Bagley, supra*, 473 U.S. at pp. 674-678 [explaining that Court of Appeals's holding – government's failure to disclose *Brady* information that defendant could have used to conduct an effective cross-examination impaired defendant's Sixth Amendment right to confront adverse witnesses – was inconsistent with Supreme Court precedents; and holding that government's failure to assist defense by disclosing information that might have been helpful in conducting cross-examination amounts to constitutional violation only if it deprives defendant of fair trial, i.e., only if evidence is material in the sense that its suppression undermines confidence in outcome of trial].) As respondent explained in Argument XIII, Mrs. Farkas' misdemeanor conviction was not material to the resolution of appellant's case; i.e., it was not reasonably probable that, had the evidence been disclosed to the defense, the result of the trial would have been different. Furthermore, nothing in this Court's opinions cited by appellant (*People v. Gurule* (2002) 28 Cal.4th 557, 593 [holding, in a capital murder prosecution, trial court's failure during discovery to grant defendant full access to the psychiatric records of defendant's accomplice, who was the prosecution's primary witness against defendant, did not violate defendant's right of confrontation]; *Alvarado v. Superior Court (Lopez)* (2000) 23 Cal.4th 1121, 1146, 1151-1152 [holding, in a prosecution of two inmates for the murder of another inmate, trial court erred in granting, on the ground of the protection of witnesses, the prosecutor's request to permanently withhold from defendants and their counsel disclosure of the identities and photographs of three other inmates who had witnessed events related to the charged offense]) changes the analysis here.

Assuming the failure to disclose Mrs. Farkas' misdemeanor welfare fraud conviction violated appellant's Sixth Amendment rights to confrontation and compulsory process, such an error would have been harmless beyond a reasonable doubt. (*Delaware v. Van Arsdall, supra,* 475 U.S. at p. 684 [holding that the constitutionally improper denial of a defendant's opportunity to impeach a witness for bias, like other Confrontation Clause errors, is subject to *Chapman v. California* (1967) 386 U.S. 18, 24 harmless-error analysis]; see also *Crane v. Kentucky, supra,* 476 U.S. at pp. 690-691.) Even if Mrs. Farkas' testimony was discredited, in light of the overwhelming evidence of appellant's guilt, the outcome of the trial would not have been affected.

Accordingly, appellant' claim of violation of his constitutional rights to confrontation and compulsory process should be rejected.

XV.

THE OFFICE OF THE FRESNO COUNTY PUBLIC DEFENDER'S REPRESENTATION OF MRS. FARKAS DID NOT CONSTITUTE AN ACTUAL, NOR PRESENT A POTENTIAL, CONFLICT OF INTEREST IN THE DEPUTY PUBLIC DEFENDERS MARTINEZ'S AND O'NEILL'S REPRESENTATION OF APPELLANT

Appellant argues that the Office of the Fresno County Public Defender's representation of Mrs. Farkas in the welfare fraud prosecution constituted an actual conflict of interest in the deputy public defenders Martinez's and O'Neill's representation of him. (AOB 174-179.) Not so. The Office of the Public Defender's representation of Mrs. Farkas did not constitute an actual, nor present a potential, conflict of interest in Ms. O'Neill's and Ms. Martinez's representation of appellant.

A. Background

On October 19, 1994, appellant's trial counsels brought to the court's attention that the Public Defender's Office had a conflict of interest in the representation of appellant. The Public Defender's Office had represented Venus Farkas in a welfare fraud prosecution during the early stages of appellant's criminal prosecution. A written notice and statement of conflict of interest was filed the following day. (RT 10543-10546, 10928; CT 1437-1457.)

According to court records, Venus Farkas was arraigned on June 16, 1991. The matter was continued to July 17, 1991, so Mrs. Farkas could obtain private counsel. On July 17, 1991, Mrs. Farkas appeared in court with counsel from the Public Defender's Office. At which time, Mrs. Farkas pled guilty to welfare fraud, and the court granted probation for a three-year term. (RT 10928;

CT 1437-1457.) Mrs. Farkas was a prosecution witness at appellant's trial, testifying at the guilt phase on October 12, 1993. (RT 3556.)

On October 21, 1994, appellant moved for a new trial on the ground that the prosecutor's failure to disclose Mrs. Farkas' misdemeanor conviction violated his rights under the due process and confrontation clause. (CT 1467-1473.) The trial court held an evidentiary hearing (RT 10763-10890), during which Mr. Kinney confirmed that the Public Defender's Office had declared a conflict of interest (RT 10847). The trial court found no ineffective assistance of counsel and no conflict of interest existed should Mrs. Farkas be called as a witness in the penalty phase. (RT 10923, 10925-10943.) The court also denied appellant's motion for a new trial, finding that the prosecution did not suppress Mrs. Farkas' misdemeanor welfare fraud conviction. (RT 10925-10926.)

B. Discussion

> A criminal defendant's right to effective assistance of counsel, guaranteed by both the state and federal Constitutions, includes the right to representation free from conflicts of interest. [Citations.]

(*People v. Sanchez, supra,* 12 Cal.4th at p. 45.)

> Conflicts of interest may arise in various factual settings. Broadly, they "embrace all situations in which an attorney's loyalty to, or efforts on behalf of, a client are threatened by his responsibilities to another client or a third person or by his own interests." [Citation.]

(*People v. Jones* (1991) 53 Cal.3d 1115, 1134.)

> To establish a violation of the right to unconflicted counsel under the federal Constitution, "a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." [Citation.] To establish a violation of the same right under our state Constitution, a defendant need only show that the record supports an "informed speculation" that counsel's representation of the defendant was adversely affected by the claimed conflict of interest. [Citations.]

(*People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1009.)

> To obtain relief on appeal, the defendant must establish the existence of an actual conflict that adversely affected counsel's performance.

(*People v. Lawley* (2002) 27 Cal.4th 102, 146, citing *People v. Bonin, supra,* 47 Cal.3d at pp. 837-838.)

> [A] potential conflict may require reversal if the record supports "an informed speculation" that appellant's right to effective representation was prejudicially affected. [Citation.]

(*People v. Belmontes* (1988) 45 Cal.3d 744, 776.)

Here, appellant has not shown that an actual, or potential, conflict existed that adversely affected his trial counsel's performance. Neither Ms. Martinez nor Ms. O'Neill represented Mrs. Farkas in the welfare fraud prosecution. Mrs. Farkas was represented by another attorney in the Public Defender's Office; that attorney was not involved in the defense of appellant in the present matter. Neither Ms. Martinez nor Ms. O'Neill had knowledge, actual or imputed, of any confidential information relating to the representation of Mrs. Farkas. (RT 10923, 10929; see *United States v. Weiner* (9th Cir. 1978) 578 F.2d 757, 767 [explaining that knowledge is not imputed to other attorneys in a government agency].)

> [I]f the attorney possesses no such confidential information, courts have routinely held that no actual or potential conflict of interest exists.

(*People v. Cox, supra,* 30 Cal.4th at p. 949.) Appellant makes no claim that even if his trial counsels had known of Mrs. Farkas' misdemeanor conviction, they could not effectively cross-examine Mrs. Farkas as to her testimony in the current case. Nor does appellant assert that his trial counsels possessed confidential information acquired during the former representation, which would impair the defense's ability to attack Mrs. Farkas' credibility had they called Mrs. Farkas as a witness in the penalty phase. Furthermore, when Mrs.

Farkas took the stand in this case, she had already pled guilty to the welfare fraud charge. And by the time Ms. Martinez learned of Mrs. Farkas' conviction, her three-year probation had terminated. The circumstances here fall far short of an "informed speculation grounded in a factual basis that can be found in the record." (*People v. Cox, supra,* 30 Cal.4th at pp. 950-951 [holding that no actual or potential conflict of interest existed for defense counsel with regard to prosecution witness who had been previously represented by a member of counsel's firm, where counsel had no confidential information regarding witness stemming from his firm's prior representation of him]; cf. *People v. Lawley, supra,* 27 Cal.4th at pp. 144-146 [upholding trial court's ruling that no conflict existed, given that advisory counsel possessed no confidential information stemming from his prior representation of a prosecution witness in several factually unrelated cases]; *People v. Clark, supra,* 5 Cal.4th at pp. 1000-1002 [holding no conflict of interest existed for the public defender with regard to the prior representation of three prosecution witnesses by the public defender's office where he possessed no confidential information relating to the witnesses, and neither the public defender nor the public defender's office was representing any of the witnesses at the time of their cross-examination]; *People v. Belmontes, supra,* 45 Cal.3d at pp. 774-777 [holding no actual or potential conflict of interest for defendant's counsel with regard to codefendant's prior representation by defense counsel's law firm where defendant's counsel had no personal contact with codefendant, attorney who had handled codefendant's prior case was in private practice at another location, file on that case had been destroyed, and defendant's attorney exploited codefendant's prior criminal record in presenting defendant's defense at trial]; *People v. Pennington* (1991) 228 Cal.App.3d 959, 965-966 [concluding that defendant was provided conflict-free representation at the preliminary hearing on the basis of trial court's finding that deputy public

defender was unaware that a prosecution witness had previously been represented by the public defender's office during the time he represented defendant].)

The rule requiring automatic reversal where a trial court continues conflicted representation over a timely objection, as articulated in *Holloway v. Arkansas* (1978) 435 U.S. 475, 488, does not apply here. Ms. Martinez and Ms. O'Neill did not have an actual or potential conflict of interest in their representation of appellant. Accordingly, appellant's conflict of interest claim should be rejected.

XVI.

THE CUMULATIVE EFFECT OF THE CLAIMED ERRORS IN ARGUMENTS VII-XV DID NOT VIOLATE APPELLANT'S RIGHTS TO DUE PROCESS OR TO A RELIABLE DEATH JUDGMENT, BECAUSE NO PREJUDICIAL ERRORS OCCURRED

Appellant argues that the cumulative effect of errors asserted in arguments VII through XV requires reversal of the judgment. (AOB 180-183.) Not so. As respondent explained in arguments VII through XV, there was no prejudicial error. "If none of the claimed errors were individual errors, they cannot constitute cumulative errors . . . ." (*People v. Beeler* (1995) 9 Cal.4th 953, 954; see also *United States v. Haili* (9th Cir. 1971) 443 F.2d 1295, 1299 ["any number of 'almost errors,' if not 'errors,' cannot constitute error"].) Accordingly, appellant's cumulative effect of errors argument should be rejected. He has not shown he suffered a deprivation of his right to due process of law or that the death penalty was imposed in error as a result of the alleged errors.

XVII.

AT THE TIME OF TRIAL, SUBDIVISION (A) OF SECTION 1122 HAD NOT BEEN ADDED; THE COURT PROPERLY INSTRUCTED THE JURY TO AVOID, AND NOT BE INFLUENCED BY, NEWSPAPER COVERAGE OF THE TRIAL; IN ANY EVENT, APPELLANT HAS FAILED TO SHOW THAT HIS CONSTITUTIONAL RIGHT TO DUE PROCESS – "A JURY CAPABLE AND WILLING TO DECIDE THE CASE SOLELY ON THE EVIDENCE BEFORE IT" – WAS VIOLATED, THAT ANY JUROR READ NEWSPAPER ACCOUNTS OF THE TRIAL

Appellant argues that the court failed to admonish the jury in compliance with section 1122 prior to the start of the trial, violating his right to due process. (AOB 202-209.) Not so. At the time of trial, subdivision (a) of section 1122 had not been added. In any event, appellant has failed to show that his constitutional right to due process, "a jury capable and willing to decide the case solely on the evidence before it" (*Smith v. Phillips* (1982) 455 U.S. 209, 217), was violated, or that any juror read newspaper accounts of the trial.

Appellant argues that the court's admonition did not comply with statutory requirements. (AOB 202.) Appellant's basis for error is that the jurors "were not told of any prohibition against watching television, listening to the radio, or reading accounts of [his] trial in the press." (AOB 203, underline in original; § 1122, subd. (a).) He is mistaken.

At the time of trial, section 1122 provided:

> The jury shall also, at each adjournment of the court before the submission of the cause to the jury, whether permitted to separate or kept in charge of officers, be admonished by the court that it is their duty not to converse among themselves or with anyone else on any subject connected with the trial, or to

form or express any opinion thereon until the cause is finally submitted to them.

(Stats.1969, ch. 520, § 2, p. 1131.) Subsequent to the trial in this case, section 1122 was amended to designate the existing text as subdivision (b) and to add subdivision (a), as follows:

> After the jury has been sworn and before the people's opening address, the court shall instruct the jury generally concerning its basic functions, duties, and conduct. The instructions shall include, among other matters, admonitions that the jurors shall not converse among themselves, or with anyone else, on any subject connected with the trial; that they shall not read or listen to any accounts or discussions of the case reported by newspapers or other news media; that they shall not visit or view the premises or place where the offense or offenses charged were allegedly committed or any other premises or place involved in the case; that prior to, and within 90 days of, discharge, they shall not request, accept, agree to accept, or discuss with any person receiving or accepting, any payment or benefit in consideration for supplying any information concerning the trial; and that they shall promptly report to the court any incident within their knowledge involving an attempt by any person to improperly influence any member of the jury.

(§ 1122, as amended by Stats.1994, ch. 869, § 4, pp. 4404-4405.)

In the case at hand, after the jurors were sworn in, the trial court instructed them:

> [Y]ou are required, as jurors, to decide all questions of fact in this case from the evidence received here in the trial and not from any other source.
>
> What I'm telling you now is the most common cause for what they call a mistrial. We have to start the whole thing all over again with another jury panel because one of the jurors decides that they might want to take a picture of something involved. In other words, they go outside the courtroom for evidence or they want to go by and look at something. In fact, they had a famous case where a juror caused a mistrial in a murder case that went on for several months and he went out and saw this particular site and it had changed since he saw it and

then he came back and told the other jurors about it and it was a mistrial.

The main thing to do – there's a good rule of thumb when you get out of here, forget about this case. Don't let it hang in your thoughts. Just turn to your business of watering and planting flowers and vegetables and whatever you do for hobbies.

You have to decide only from the evidence received in the trial. Obviously, you must never discuss the case with any other person. You'll run into a problem today because the person that – your loved ones or friends will be excited that you're on this jury. You'll just find that naturally. And the first thing they want to do is talk all about it. I recommend a fairly standard response that I understand works pretty well and, that is, you say, "Well, look. I'm under oath not to say anything about the case until it's over with. I'll tell you what, as soon as it's over with, I will tell you everything about it. I promise you I will. But I just can't talk to you during the trial about it. I'll tell you what? If you see anything in the newspaper or anything, can you clip it out for me? I can't read anything during the case."

. . . . . .

You must never discuss the case with any other person. Here's an important thing. You must not form or express any opinion. You know what I mean by express. But form means private thoughts. You've got your mind made up about this, you know, before you listen, before you – you close your mind and that's not the kind of folks you jurors are. We know you're the cream of the crop out of some 700 warrants that have gone out. We need people that maintain an open mind until they hear both sides. That's what we want you to do. So don't be forming any opinions.

Believe it or not, you'll have a chance to discuss it with the other jurors when the case is over and you'll like that. That's a good opportunity. And you'll benefit from their thinking.

Naturally, it goes without saying, you must never, ever, ever make any independent investigation if you hear about an address or something like that, or got out. That means don't be looking up law or consider or discuss facts as to which there is no evidence. You must never, on your own, visit the scene, conduct experiments, consult reference works like the encyclopedia or law books or dictionaries to try to find things out. Whatever is needed for you will be provided, literally

> everything in this courtroom. You must never consult persons for additional information.

(RT 3331-3335.) Clearly, the court was in compliance with section 1122 as provided at the time of the trial. In addition, the court explicitly noted for the jurors that they were not permitted to read about the case when it instructed them they could have friends save newspaper articles about the case to discuss after its conclusion. The court told the panel they should tell friends, "I can't read anything during the case."

Furthermore, the court had asked all the prospective jurors gathered for general voir dire, "whether anybody has heard anything more about his case either through the newspaper or talking to somebody other than what I told you about . . . ." (RT 3053.) The court then stated to them, "I am going to ask you not to read any newspaper accounts of this trial." (RT 3054.) The court also noted the inaccuracy of newspaper accounts of the trial:

> Believe me, you know, the articles in the newspaper are fine and they have their place, but they aren't ever 100 percent accurate. I've just never seen that. Sometimes I read an article about a case in my court and I look at it and say, "That happened in my court? I can't believe it." And it didn't happen. Okay.

(RT 3333-3334.) After the jury was sworn, the trial court instructed the jurors: "[Y]ou are required, as jurors, to decide all questions of fact in this case from the evidence received here in the trial and not from any other source." The trial court did admonish the jurors to avoid, and not be influenced by, newspaper coverage of the trial. (Cf. *People v. Ladd* (1982) 129 Cal.App.3d 257, 263-264 [holding that trial court's admonishment to jury before suppression hearing to consider only evidence presented in court was broad enough to cover defendant's concern over jury's exposure to outside sources of evidence even though court declined to tell jury specifically not to watch television broadcasts or to read newspaper articles regarding case].)

In essence, appellant's argument is that an admonition specifically prohibiting the jurors from watching television, listening to radio, or reading newspaper accounts of the trial, is constitutionally required. (See AOB 206-207.) Respondent is unaware of such a specific constitutional requirement. Appellant does have a constitutional right to due process and a fair trial. "Due process means a jury capable and willing to decide the case solely on the evidence before it . . . ." (*Smith v. Phillips, supra,* 455 U.S. at p. 217, quoted in *In re Carpenter* (1995) 9 Cal.4th 634, 648.) "The right of unbiased and unprejudiced jurors is an inseparable and inalienable part of the right to trial by jury guaranteed by the Constitution." (*In re Hitchings* (1993) 6 Cal.4th 97, 110.) Effective use of voir dire presumably ensures such a panel of jurors. (Cf. *United States v. Abbott Laboratories* (4th Cir. 1974) 505 F.2d 565, 571 ["No case of which we are aware, nor any to which we have been referred, holds that, without resort to the traditional means of effective protection of a defendant's right to a fair trial, i.e., voir dire, change of venue, continuance, pretrial publicity has been so inflammatory and prejudicial that a fair trial is absolutely precluded and an indictment should be dismissed without an initial attempt, by the use of one or more of the procedures mentioned, to see if an impartial jury can be impanelled."].)

Here, the jurors were told at least twice not to read newspaper accounts of the trial. Further, appellant has failed to show prejudice. That is, he has not shown his rights to due process and fair trial were affected – i.e., a juror incapable or unwilling to decide the case solely on the evidence before him/her, or a biased juror. (*People v. Linden* (1959) 52 Cal.2d 1, 28 ["Failure to give the statutory admonition is not ground for reversal where . . . no prejudice appears."].) Appellant's bases for prejudice are articles printed in the Fresno Bee. (AOB 204-205; see *Appellant's Motion For Judicial Notice*, served July 30, 2003.) Though "[i]t is misconduct for a juror to read newspaper accounts

of a case on which he is sitting" (*People v. Lambright* (1964) 61 Cal.2d 482, 485), appellant does not allege that any juror read the articles. The trial court here did not expressly authorize the jurors to read newspaper accounts of the trial. (Cf. *People v. Lambright, supra,* 61 Cal.2d at pp. 485, 487 [Instruction that jurors had right to read articles about trial or obtain extrajudicial evidence by radio or television was improper, and prejudicial effect was not removed by general admonition to jury not to consider such evidence in their deliberations.].) "[This Court] must presume that jurors generally follow instructions to avoid media coverage, and to disregard coverage that they happen to hear or see." (*NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 Cal.4th 1178, 1223.) Though "the presumption that admonitions and instructions are adequate may be rebutted by the exceptionally prejudicial nature of evidence to be received outside the presence of the jury and the potential intensity of media coverage" (*id.* at p. 1224), appellant does not set forth the intensive and extremely prejudicial media coverage involving him or this case. Thus, absent a showing that a juror actually violated the admonition or that the media coverage was intensive and extremely prejudicial to the case at hand, prejudice – a biased juror or a juror incapable or unwilling to decide the case solely on the evidence before him/her – is not presumed. (*People v. Morales* (1989) 48 Cal.3d 527, 565; *People v. Heishman* (1988) 45 Cal.3d 147, 175; see also *People v. Honeycutt* (1977) 20 Cal.3d 150, 156; compare *People v. Terry* (1970) 2 Cal.3d 362, 397 ["Juanelda does not allege that any juror read this article, and we must presume they did not."], overruled on another ground in *People v. Carpenter, supra,* 15 Cal.4th at pp. 381-382; *People v. Hawkins* (1968) 268 Cal.App.2d 99, 104-105 ["Absent any showing that the jurors read the article, it must be presumed that they followed the trial court's admonition not to read any material relating to the instant case."]; *Halko v. Anderson* (1965) 244 F.Supp. 696, 701-703 [defendant's constitutional guarantees were not

transgressed by failure of court, without a request, to warn jurors in defendant's second trial for driving while intoxicated not to read newspaper accounts of trial, which were not inflammatory, where judge carefully admonished jury on numerous occasions that they should not discuss case with anyone nor permit anyone to discuss case with them] with *People v. Nesler* (1997) 16 Cal.4th 561, 579-580 [juror's receipt of information from woman in bar constituted misconduct which raised presumption of prejudice]; *People v. Lucas* (1995) 12 Cal.4th 415, 486 [same re: juror's inadvertent receipt of information from person in hallway outside courtroom]; *People v. Zapien* (1993) 4 Cal.4th 929, 994 [same re: juror's inadvertent exposure to television news report].)

Accordingly, appellant's claim should be rejected.

XVIII.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING APPELLANT'S MOTION TO POLL THE JURY ABOUT ADVERSE PUBLICITY DURING THE GUILT PHASE OF THE TRIAL; THE COURT'S DUTY TO INQUIRE THE JURORS NEVER AROSE DURING THE GUILT PHASE

Appellant argues that the court erred in denying his motion to poll the jury about adverse publicity during the guilt phase of the trial. (AOB 210-219.) Not so. The trial court did not abuse its discretion in denying appellant's motion to poll the jury about adverse publicity during the guilt phase of the trial. Appellant, during the guilt phase, made no mention to the court of what he now claims was "highly inflammatory media coverage." Consequently, the trial court's duty to inquire never arose during the guilt phase.

During a status conference held on January 7, 1994, appellant noted adverse publicity and requested a separate jury for the sanity and penalty phases. (RT 9452-9458.) The court denied appellant's motion for a separate jury, explaining: "I think we still have a fair and impartial jury; that I have no evidence that they are – put it this way, that they're other than fair and impartial." (RT 9463.) Appellant then asked to have the jury polled "to see if anyone has already decided what the verdict is going to be in the other two phases." (RT 9463-9464.) The court summarily denied the motion, stating:

> I see no reason to again voir dire the jury on something that we've actually spent more time on that particular aspect of the case than any other in our general voir dire at the beginning. I think we have an unusual group of highly intelligent people and I'm going to proceed with them without polling.

(RT 9464.)

Appellant's claim that the court erred in denying his motion to poll the jury has been waived. Appellant moved below for a polling of the jury "to see

if anyone has already decided what the verdict is going to be in the other two phases," after the guilty verdict was returned and before the sanity phase commenced. The bases for the request was the ongoing publicity surrounding the Polly Klaas kidnaping-murder, Kimber Reynolds robbery-murder, and the "Three Strikes and You're Out" initiative. (RT 9463-9464.) Appellant now on appeal says the motion to poll the jury was "to screen for possible exposure to adverse publicity," apparently during the guilt phase. (AOB 211.) Absent a timely and specific objection on the ground appellant now asserts on appeal, his contention must be deemed waived. (See *In re Avena* (1996) 12 Cal.4th 694, 721; *People v. Hill* (1992) 3 Cal.4th 959, 994-995; *People v. Mitcham* (1992) 1 Cal.4th 1027, 1044.) Specificity is required to enable the court to make an informed ruling on the motion or objection, and to enable the opposing party to address the motion or objection. (*People v. Crittenden* (1994) 9 Cal.4th 83, 126.)

Regardless, the basis for appellant's argument on appeal lacks merit. The trial court's duty to inquire never arose. The trial court's duty to inquire arises when the defendant alerts the court to facts suggestive of potential misconduct. (*People v. Ray* (1996) 13 Cal.4th 313, 343; see also *People v. DeSantis* (1992) 2 Cal.4th 1198, 1234.) During the guilt phase, appellant made no mention to the court of what he now claims were "highly inflammatory media coverage." Appellant's request to have the jurors polled was made after the guilty verdicts were returned and before the sanity phase commenced. (RT 9463-9464.) Absent mention – timely mention – of the "highly inflammatory media coverage," the trial court's duty to inquire never arose.[67] (Cf. *People v. Adcox*

---

67. Respondent is not suggesting that the court's duty to inquire arises whenever any adverse publicity – regardless of how remote and speculative the prejudice may be to the case – is brought to its attention. (Cf. *People v. Ray, supra,* 13 Cal.4th at p. 343 ["The court does not abuse its discretion simply because it fails to investigate any and all new information obtained about a juror

(1988) 47 Cal.3d 207, 252-254 [rejecting claim that the trial court erred in failing to voir dire the jury sua sponte on their exposure to certain newspaper articles which surfaced during trial]; *People v. Espinoza* (1992) 3 Cal.4th 806, 821 ["Counsel's mere speculation that the juror *might* have been sleeping, which was insufficient to apprise the trial court that good cause to discharge might exist, did not obligate the court to conduct any further inquiry."].)

Furthermore, the jury was properly admonished and appellant did not produce evidence that any of the jurors failed to heed the admonition.

> Failure to conduct a hearing sufficient to determine whether good cause to discharge the juror exists is an abuse of discretion subject to appellate review.

(*People v. Burgener* (1986) 41 Cal.3d 505, 520, overruled on another ground by *People v. Reyes* (1998) 19 Cal.4th 743, 756.)

> In a case where the jury is correctly admonished not to receive newspaper or other extrajudicial reports of the trial, it may be a proper exercise of discretion for the trial court to refuse to poll the jury regarding any specific news media account of the trial. [Citations.] In such a situation it may be presumed in the absence of a showing of misconduct that the jury heeded the court's admonition. [Citations.]

(*People v. Lambright, supra,* 61 Cal.2d at pp. 486-487.) As explained in argument XVII, the trial court did admonish the jurors to avoid, and not be influenced by, newspaper coverage of the trial. Also, after the jurors were sworn in, the trial court's first instruction to them was: "[Y]ou are required, as jurors, to decide all questions of fact in this case from the evidence received here in the trial and not from any other source." (RT 3331.) Furthermore, the court twice specificially told the jurors to not read accounts of the trial. "[This

---

during trial. [¶] [A] hearing is required only where the court possesses information which, if proven to be true, would constitute 'good cause' to doubt a juror's ability to perform his duties and would justify his removal from the case."].) Respondent is simply stating that appellant failed to make any mention of the "highly inflammatory media coverage" during the guilt phase.

Court] must presume that jurors generally follow instructions to avoid media coverage, and to disregard coverage that they happen to hear or see." (*NBC Subsidiary (KNBC-TV), Inc. v. Superior Court*, *supra*, 20 Cal.4th at p. 1223.) Though "the presumption that admonitions and instructions are adequate may be rebutted by the exceptionally prejudicial nature of evidence to be received outside the presence of the jury and the potential intensity of media coverage" (*id.* at p. 1224), the alleged "highly inflammatory" publicity did not involve appellant or this case. Absent evidence that any of the jurors failed to heed the admonition or that the media coverage was intensive and extremely prejudicial to the case at hand, the trial court properly exercised its discretion in denying appellant's motion to poll the jury about adverse publicity during the guilt phase. (Cf. *People v. Lanphear* (1980) 26 Cal.3d 814, 836 [in prosecution for first degree murder, trial court did not abuse its discretion in refusing to poll jurors as to whether they had been aware of newspaper article which during the trial reported the alleged conspiracy to kill State's chief witness inasmuch as there was no evidence that any of jurors failed to heed court's admonishments for them not to read papers], judg. vacated and cause remanded *sub nom. California v. Lanphear* (1980) 449 U.S. 810, sub. opn. *People v. Lanphear* (1980) 28 Cal.3d 463; *People v. Gates* (1987) 43 Cal.3d 1168, 1198-1199 [denial of request to re-voir dire jury, after guilt phase verdicts were rendered, regarding publicity about other crimes and criticism of criminal justice system was not error because cause for concern was "entirely speculative"]; *People v. Melton* (1988) 44 Cal.3d 713, 748-750 [denial of request to voir dire jury panel, prior to penalty phase of capital murder prosecution, regarding their observation of recent television movie dramatizing an execution was not error where movie made no reference to defendant's case, and there was no evidence that it presented unbalanced, inflammatory, or overly casual view of death penalty in

general].) Moreover, appellant cannot request the jurors be polled, based on mere speculation, so that "good cause" may be discovered.

> Voir dire is not to be reopened on speculation that good cause to impanel a new jury may thereby be discovered; rather, a showing of good cause is a prerequisite to reopening. [Citation.]

(*People v. Fauber* (1992) 2 Cal.4th 792, 846; accord, *People v. Bradford, supra*, 15 Cal.4th at p. 1354; *People v. Williams* (1997) 16 Cal.4th 153, 229.)

Accordingly, appellant's claim should be rejected.

XIX.

AT THE TIME OF THE SANITY PHASE, SUBDIVISION (A) OF SECTION 1122 HAD NOT BEEN ADDED; THE COURT PROPERLY ADMONISHED THE JURY; IN ANY EVENT, APPELLANT HAS FAILED TO SHOW THAT HIS CONSTITUTIONAL RIGHT TO DUE PROCESS – "A JURY CAPABLE AND WILLING TO DECIDE THE CASE SOLELY ON THE EVIDENCE BEFORE IT" – WAS VIOLATED, THAT ANY JUROR READ NEWSPAPER ACCOUNTS OF THE TRIAL

Appellant argues that the trial court failed to comply with section 1122 prior to the commencement of the sanity phase, violating his right to due process. (AOB 220.) Not so. At the commencement of the sanity phase, subdivision (a) of section 1122 was not in effect. Appellant has failed to show that his constitutional right to due process – "a jury capable and willing to decide the case solely on the evidence before it" (*Smith v. Phillips, supra,* 455 U.S. at p. 217) – was violated, that any juror read newspaper accounts of the trial.

First, the underlying assumption of appellant's argument is that subdivision (a) of section 1122 requires the general instructions concerning the jury's basic functions, duties, and conduct be given before each and every phase of a capital trial. Respondent disagrees. Respondent submits that, as a matter of judicial economy and in light of subdivision (b)'s required admonition at "each" adjournment, subdivision (a) requires the general instructions be given once after the jurors are sworn in and before the opening statement in the guilt phase.

Second, for the reasons stated in argument XVII, the trial court was in compliance with section 1122 as provided at the time of the sanity phase. Third,

before the sanity phase commenced, the trial court did explicitly instruct the jurors to avoid media coverage of the trial:

> There will be probably a fair amount of publicity concerning your verdicts. I will specifically order you not to read anything about this case in the newspaper. If you're watching your favorite news program at night and this matter comes on, I just ask you to leave the room during that particular time. No doubt there will be some commenting about the case and that's really not for your ears at this time, please.

(RT 9441.) It is unlikely that the jurors understood the prohibition to be limited to news coverage and commentary regarding the guilty verdicts. The trial court, as explained in argument XVII, had earlier admonished the jurors to avoid, and not be influenced by, newspaper coverage of the trial.

Fourth, following opening statements in the sanity phase, the court instructed the jury:

> You're admonished not to discuss the matter amongst yourselves nor form or express any opinion on the subject matter. I want to point out, when you were deliberating, remember you were free to talk about the case. Now we're back to the old admonitions all over again, and we'll wait until the case is completely finished before you start talking with each other again.

(RT 9485.) Even if this Court is of the view that section 1122, subdivision (a), requires the general instructions concerning the jury's basic functions, duties, and conduct be given before opening statements in every phase of a capital trial, the trial court's failure to so instruct before opening statements in the sanity phase is technical error not requiring reversal. (Cf. *People v. French* (1939) 12 Cal.2d 720, 764-765 [after return of verdict of guilty but before trial on issue of not guilty by reason of insanity, failure of court to admonish jurors before excusing them for four days recess was mere technical error not requiring reversal of conviction], overruled on other grounds in *People v. Valentine* (1946) 28 Cal.2d 121, 144.)

Finally, appellant has failed to show prejudice. He has not shown that his rights to due process and to a fair trial were affected – i.e., that his jury panel included a juror incapable or unwilling to decide the case solely on the evidence before him/her, or a biased juror. (*People v. Linden, supra,* 52 Cal.2d at p. 28.) Appellant does not allege that any of the jurors read any adverse newspaper article. The trial court here did not expressly authorize the jurors to read newspaper accounts of the trial. (Cf. *People v. Lambright, supra,* 61 Cal.2d at pp. 485, 487.) "[This Court] must presume that jurors generally follow instructions to avoid media coverage, and to disregard coverage that they happen to hear or see." (*NBC Subsidiary (KNBC-TV), Inc. v. Superior Court, supra*, 20 Cal.4th at p. 1223.) Though "the presumption that admonitions and instructions are adequate may be rebutted by the exceptionally prejudicial nature of evidence to be received outside the presence of the jury and the potential intensity of media coverage" (*id.* at p. 1224), the alleged "highly inflammatory" publicity did not involve appellant or this case. Thus, absent a showing that a juror actually violated the admonition or that the media coverage was intensive and extremely prejudicial to the case at hand, prejudice caused by a biased juror or a juror incapable or unwilling to decide the case solely on the evidence before him/her is not presumed. (*People v. Morales, supra,* 48 Cal.3d at p. 565; *People v. Heishman, supra,* 45 Cal.3d at p. 175; see also *People v. Honeycutt, supra,* 20 Cal.3d at p. 156.)

Accordingly, appellant's claim should be rejected.

XX.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING APPELLANT'S REQUEST FOR A NEW JURY TO HEAR THE SANITY AND PENALTY PHASES

Appellant argues that the trial court abused its discretion in denying his request for a new jury to hear the sanity and penalty phases because of "prejudicial media coverage during the guilt phase trial." (AOB 221-227.) Not so. Absent a showing that the adverse publicity rendered the jury unable to perform its function, the trial court properly exercised its discretion in denying appellant's request for a new jury to hear the sanity and penalty phases. Contrary to appellant's claims, he has not shown his jury could not be fair as a "demonstrable reality."

During a status conference held on January 7, 1994, appellant, noting adverse publicity, requested a separate jury for the sanity and penalty phases. (RT 9452-9458.) The court denied appellant's motion for a separate jury, explaining: "I think we still have a fair and impartial jury; that I have no evidence that they are – put it this way, that they're other than fair and impartial." (RT 9463.)

Section 190.4, subdivision (c), states in part:

> If the trier of fact which convicted the defendant of a crime for which he may be subject to the death penalty was a jury, the same jury shall consider any plea of not guilty by reason of insanity pursuant to Section 1026, the truth of any special circumstances which may be alleged, and the penalty to be applied, unless for good cause shown the court discharges that jury in which case a new jury shall be drawn.

"This statute reflects the long-standing legislative preference for a single jury to determine both guilt and penalty." (*People v. Bradford, supra,* 15 Cal.4th at p. 1353 [internal quotations omitted].)

> Good cause to discharge the guilt phase jury and to impanel a new one must be based on facts that appear in the record as a demonstrable reality showing the jury's inability to perform its function.

(*People v. Earp* (1999) 20 Cal.4th 826, 891 [internal quotations omitted].)

> The appropriate standard of review when considering a trial court's denial of a separate jury under section 190.4 is the abuse of discretion standard. [Citation.]

(*People v. Weaver* (2001) 26 Cal.4th 876, 947.)

Here, appellant argues that "the guilt phase jury, poisoned by overwhelmingly adverse midtrial publicity, could no longer be fair." (AOB 221.) His argument is speculative. "More than the speculation or desire of defense counsel is necessary to establish good cause to discharge the jury." (*People v. Bradford, supra*, 15 Cal.4th at p. 1353.) Absent a "demonstrable reality" showing that the adverse publicity rendered the jury unable to perform its function, the trial court did not abuse its discretion in denying appellant's request for a new jury to hear the sanity and penalty phases. (Cf. *People v. Gates, supra,* 43 Cal.3d at pp. 1198-1199 [denial of request to re-voir dire jury, after guilt phase verdicts were rendered, regarding publicity about other crimes and criticism of criminal justice system was not error because cause for concern was "entirely speculative"]; *People v. Melton, supra,* 44 Cal.3d at pp. 748-750 [denial of request to voir dire jury panel, prior to penalty phase of capital murder prosecution, regarding their observation of recent television movie dramatizing an execution was not error where movie made no reference to defendant's case, and there was no evidence that it presented unbalanced, inflammatory, or overly casual view of death penalty in general].) Moreover, appellant cannot request the jurors be polled, based on mere speculation, in an attempt to discover "good cause."

> Voir dire is not to be reopened on speculation that good cause to impanel a new jury may thereby be discovered; rather, a showing of good cause is a prerequisite to reopening. [Citation.]

(*People v. Fauber*, *supra*, 2 Cal.4th at p. 846; accord, *People v. Bradford, supra*, 15 Cal.4th at p. 1354; *People v. Williams, supra,* 16 Cal.4th at p. 229.)

As for the "inordinate delay" between the sanity and penalty phases (AOB 223-225), absent a showing that the adverse publicity rendered the jury unable to perform its function, the delay by itself was an insufficient ground for impaneling a new jury. (See *People v. Taylor* (2001) 26 Cal.4th 1155, 1169-1170 ["And the delay in commencing the penalty phase, by itself, would be an insufficient ground for impaneling a new jury, as mere delay would not necessarily impair the jury's ability to perform its function in determining the appropriate penalty for defendant. Nothing in the record suggests defendant was actually prejudiced by the delay."].) Furthermore, the trial court could not have anticipated such a delay at the time appellant moved for a separate jury. (Cf. *People v. Earp, supra,* 20 Cal.4th at pp. 891-892 [refusal to impanel new jury for penalty phase of capital murder prosecution, after witness was allegedly so discredited by prosecutor at guilt phase that defendant could not call her as his character witness at penalty phase, was not error, where defendant made no offer of proof in trial court regarding substance of witness' proposed testimony].) This Court should review the trial court's ruling based on the record before, and the facts known to, the court at the time of its ruling. (Cf. *People v. Welch, supra,* 20 Cal.4th at p. 739 [reviewing the correctness of the trial court's ruling on competency to stand trial based on evidence before court at the time ruling was made, and not by reference to evidence produced at a later date]; *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1120 [Reviewing court examines the record before the trial court at the time of its ruling to determine whether the court abused its discretion in denying a severance motion.].)

Accordingly, appellant's claim should be rejected.

XXI.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING APPELLANT'S REQUEST TO POLL THE JURY ABOUT PREJUDICIAL NEWS COVERAGE PRIOR TO THE SANITY PHASE

Appellant argues that the trial court erred in denying his request to poll the jury about prejudicial news coverage prior to the sanity phase. (AOB 228-230.) Not so. The trial court did not abuse its discretion in denying appellant's motion to poll the jury about prejudicial news coverage prior to the sanity phase.

As respondent noted in argument XVIII, on January 7, 1994, appellant requested a separate jury for the sanity and penalty phases, arguing that the ongoing publicity surrounding the Polly Klaas kidnaping-murder, Kimber Reynolds robbery-murder, and the "Three Strikes and You're Out" initiative made it virtually impossible for him to receive a fair trial – at least with the jury then empaneled. (RT 9452-9458.) The court denied appellant's motion for a separate jury, explaining: "I think we still have a fair and impartial jury; that I have no evidence that they are – put it this way, that they're other than fair and impartial." (RT 9463.) Appellant then asked to have the jury polled "to see if anyone has already decided what the verdict is going to be in the other two phases." (RT 9463-9464.) The court summarily denied the motion, stating:

> I see no reason to again voir dire the jury on something that we've actually spent more time on that particular aspect of the case than any other in our general voir dire at the beginning. I think we have an unusual group of highly intelligent people and I'm going to proceed with them without polling.

(RT 9464.)

> Failure to conduct a hearing sufficient to determine whether good cause to discharge the juror exists is an abuse of discretion subject to appellate review.

(*People v. Burgener, supra,* 41 Cal.3d at p. 520], overruled on another ground by *People v. Reyes, supra,* 19 Cal.4th at p. 756.)

> In a case where the jury is correctly admonished not to receive newspaper or other extrajudicial reports of the trial, it may be a proper exercise of discretion for the trial court to refuse to poll the jury regarding any specific news media account of the trial. [Citations.] In such a situation it may be presumed in the absence of a showing of misconduct that the jury heeded the court's admonition. [Citations.]

(*People v. Lambright, supra,* 61 Cal.2d at pp. 486-487.)

Here, denying appellant's motion to poll the jury about prejudicial news coverage prior to the sanity phase was not an abuse of the court's discretion. First, the jury was properly admonished. As explained in argument XVII, the trial court did admonish the jurors to avoid, and not be influenced by, newspaper coverage of the trial. Also, after the jurors were sworn in, the first thing trial court instructed them: "[Y]ou are required, as jurors, to decide all questions of fact in this case from the evidence received here in the trial and not from any other source." (RT 3331.) Before the sanity phase commenced, the trial court did explicitly instruct the jurors to avoid media coverage of the trial:

> There will be probably a fair amount of publicity concerning your verdicts. I will specifically order you not to read anything about this case in the newspaper. If you're watching your favorite news program at night and this matter comes on, I just ask you to leave the room during that particular time. No doubt there will be some commenting about the case and that's really not for your ears at this time, please.

(RT 9441.) Second, appellant neither produced evidence that any of the jurors failed to heed the admonition, nor did he show that the media coverage was intensive and extremely prejudicial to the case at hand. It is presumed that "jurors generally follow instructions to avoid media coverage, and to disregard coverage that they happen to hear or see." (*NBC Subsidiary (KNBC-TV), Inc. v. Superior Court, supra,* 20 Cal.4th at p. 1223.) Though "the presumption that

admonitions and instructions are adequate may be rebutted by the exceptionally prejudicial nature of evidence to be received outside the presence of the jury and the potential intensity of media coverage" (*id.* at p. 1224), appellant does not show that the intensive and extremely prejudicial media coverage involved him or his case. Absent such showing, the trial court properly exercised its discretion in denying appellant's motion to poll or voir dire the jury about the ongoing publicity surrounding the Polly Klaas kidnaping-murder, Kimber Reynolds robbery-murder, and the "Three Strikes and You're Out" initiative. (Cf. *People v. Lanphear, supra,* 26 Cal.3d at p. 836 [in prosecution for first degree murder, trial court did not abuse its discretion in refusing to poll jurors as to whether they had been aware of newspaper article which during the trial reported the alleged conspiracy to kill State's chief witness inasmuch as there was no evidence that any of jurors failed to heed court's admonishments for them not to read papers]; *People v. Gates, supra,* 43 Cal.3d at pp. 1198-1199 [denial of request to re-voir dire jury, after guilt phase verdicts were rendered, regarding publicity about other crimes and criticism of criminal justice system was not error because cause for concern was "entirely speculative"]; *People v. Melton, supra,* 44 Cal.3d at pp. 748-750 [denial of request to voir dire jury panel, prior to penalty phase of capital murder prosecution, regarding their observation of recent television movie dramatizing an execution was not error where movie made no reference to defendant's case, and there was no evidence that it presented unbalanced, inflammatory, or overly casual view of death penalty in general].) Moreover, as respondent has already noted, appellant cannot request the jurors be polled based on mere speculation that "good cause" may be discovered.

> Voir dire is not to be reopened on speculation that good cause to impanel a new jury may thereby be discovered; rather, a showing of good cause is a prerequisite to reopening. [Citation.]

(*People v. Fauber*, *supra*, 2 Cal.4th at p. 846; accord, *People v. Bradford, supra*, 15 Cal.4th at p. 1354; *People v. Williams*, *supra*, 16 Cal.4th at p. 229.)

Accordingly, appellant's claim should be rejected.

XXII.

THE COURT DID NOT HAVE THE DUTY TO INQUIRE AS TO POSSIBLE JUROR BIAS OR MISCONDUCT; THE COURT, IN REFUSING TO PRESERVE THE NOTEBOOK PAGE, DID NOT DEPRIVE APPELLANT OF DUE PROCESS OR OTHERWISE DENY HIM A FAIR TRIAL; ANY CAUSE FOR CONCERN ARISING FROM THE WRITING IN THE JUROR'S NOTEBOOK, LIKE THE ADVERSE PUBLICITY, WAS ENTIRELY SPECULATIVE – INSUFFICIENT TO TRIGGER THE COURT'S DUTY TO VOIR DIRE OR POLL THE JURY; THE COURT'S QUESTIONING OF THE JUROR WAS ADEQUATE

Appellant raises several claims surrounding the content of a page observed by defense counsel in an open juror notebook. He argues that the trial court erred in refusing to preserve the notebook page, refusing to poll the jurors, and in failing to conduct adequate questioning of the juror. (AOB 231-237.) His arguments lack merit. First, the trial court did not have the duty to inquire as to possible juror bias or misconduct. Second, the trial court, in refusing to preserve the notebook page, did not deprive appellant of due process or otherwise deny him a fair trial. Third, appellant's claim on polling the jurors was waived. Regardless, any cause for concern arising from the writing in the juror's notebook, like the adverse publicity, was entirely speculative – insufficient to trigger the trial court's duty to voir dire or poll the jury. Finally, the trial court's questioning of the juror was adequate.

A. The Record

On January 12, 1994, opening statements in the sanity phase were made. Just before the presentation of witness testimony, Mr. Kinney called the court's attention to a juror's notebook that had been left open on the juror's chair. Mr. Kinney saw the written contents of the opened page. (RT 9519-9520, 9614.)

Later, before adjourning for the day, Mr. Kinney advised the court that the juror – identified as Juror Schmidt – had written, something to the effect of, "Was he aware of his crimes? Yes." (RT 9614-9615.) Mr. Kinney pointed out that no sanity phase evidence had been presented and then asked the court to voir dire Juror Schmidt to determine whether she had prejudged the sanity issue. (RT 9615.) Ms. O'Neill added that the juror's writing had a tendency to show that some jurors may have prejudged the case and therefore the earlier motion to poll the jurors should have been granted. (RT 9616-9617.) Mr. Kinney asked to have the juror's notebook "put on the record." (RT 9618, 9625-9626.) The court refused, stating: "I'm not going to put a juror's notes in the record. I have absolutely – it's contrary to every privacy interest that we offer to the jurors." (RT 9625.) The court then took the matter under submission and adjourned for the day. (RT 9626.)

The following day, appellant moved for a mistrial on the ground that the jury was not fair and impartial. (RT 9630.) Mr. Kinney again asked that the juror's notebook "be preserved for the record." (RT 9630-9631.) The prosecutor argued that the alleged juror misconduct was speculative and thus the court need not voir dire the juror. (RT 9631-9633.)

Though the court concluded that "under these circumstances [it] ha[d] no duty to call [the juror] and examine her," the court decided to call the juror in and question her. (RT 9633.) The following colloquy took place between the court and juror:

> THE COURT: [¶] . . . With regard to [appellant's] insanity phase, do you feel you have a completely open mind on that and you'll listen to both sides and decide based upon the evidence?
>
> [JUROR]: Yes.
>
> THE COURT: Okay. In other words, I just want to make sure. Do you feel you would have – that your mind would be closed because of something you've already heard, in other

words, or do you feel when it comes to this phase you would have an open mind.

[JUROR]: Well, I think in trying not to think about it, like you said, not to when I came back, in not thinking about it at home, which you said not to think about it at home, so I didn't think about it at home.

THE COURT: Good.

[JUROR]: And when I came back in here and we have to start this fresh, I don't think it's a terribly easy thing to do to make a separation. I think I've had to [make] a conscious decision to make it separate.

THE COURT: Good for you.

[JUROR]: So I'm doing my very best to do that.

THE COURT: Right. And if we should get to the third phase – and I'm not saying we will because maybe this phase will end it all. If we get to the third phase, I think you would make that same conscious effort to have a totally open mind. Is that correct?

[JUROR]: Uh-huh.

THE COURT: Good. And so if you were seated, say, in a position of the defendant here and all, you didn't want to win necessarily, but you wanted a fair trial, would people of your state of mind give him a fair trial?

[JUROR]: Yes.

THE COURT: Okay. Good. I want to thank you very much.

(RT 9635-9636.) After the juror left the courtroom, the court denied appellant's motion for a mistrial. (RT 9637.)

Ms. O'Neill objected to the sufficiency of the court's voir dire of the juror and renewed appellant's motion for a mistrial:

[T]he defense is not satisfied with the questioning that went forward. I think the questions were phrased in such a way to make [the juror], of course, feel very comfortable, as I understand the Court would want to do, but they were of literally no value to find out her true feelings about anything.

I think they were leading and totally – the answers suggested itself in the questions. And I don't mean any disrespect to the Court. I'm just telling the Court how the defense feels about the questioning that has just been done of this

juror. It was in essence really of no value. And we are renewing our motion for a mistrial.

(RT 9637.) The court again denied the mistrial motion, this time explaining:

> I'm convinced that there's no reason whatsoever at this time to suspect other than you have a fair and impartial jury, a jury that we spent hours questioning here at the beginning of the trial, carefully selected out of I guess it was some 800 original notices that went out on this case. And I'm convinced in my own mind at this point that you have a good jury.

(RT 9637-9638.)

Mr. Kinney then renewed his request to have the juror's notebook preserved for appeal. (RT 9638.) The court again denied the request, explaining:

> Counsel, as pointed out, it could mean what you say. On the other hand, it well could mean it could be a just a simple summation of [the prosecutor's] argument. "Was he sane at the time of the commission of the acts? Yes." And we know in terms of timing that it very well and most probably is some – some writing reflecting the opening statements. So, again, I refuse to have the jurors' personal notes xeroxed.
>
> The record will just to have reflect, Mr. Kinney, what you've said that you saw. Frankly, I have no reason to doubt the accuracy of what you saw. And – and I in making this decision to talk to [the juror], why that's – I have always assumed that you were accurate in describing what you saw. As to the meaning of it we may have a vast difference. I think the meaning is very speculative.

(RT 9638-9639.)

B. Discussion

1. The Court's Duty To Inquire As To The Possibility Of Prejudgment Of Case Did Not Arise

The trial court correctly ruled that it had no duty to call in the juror and examine her. (RT 9633.)

"For a juror to prejudge the case is serious misconduct." (*Clemens v. Regents of University of California* (1971) 20 Cal.App.3d 356, 361.) Section 1089 states in pertinent part:

> If at any time, whether before or after the final submission of the case to the jury, a juror dies or becomes ill, or upon other good cause shown to the court is found to be unable to perform his or her duty, . . . the court may order the juror to be discharged . . ..

This Court has explained:

> The decision whether to investigate the possibility of juror bias, incompetence, or misconduct – like the ultimate decision to retain or discharge a juror – rests within the sound discretion of the trial court. The court does not abuse its discretion simply because it fails to investigate any and all new information obtained about a juror during trial. [¶] As our cases make clear, a hearing is required only where the court possesses information which, if proven to be true, would constitute "good cause" to doubt a juror's ability to perform his duties and would justify his removal from the case.

(*People v. Ray, supra,* 13 Cal.4th at p. 343 [internal citations omitted].)

Here, the evidence of juror bias – prejudgment of case – was highly speculative. As the trial court indicated, the juror may have simply summarized the prosecutor's argument. (RT 9638.) "Bias in a juror may not be presumed." (*People v. Williams, supra,* 16 Cal.4th at p. 232.) Such speculative evidence of juror bias is not enough to trigger the trial court's duty to inquire. (Cf. *People v. Davis* (1995) 10 Cal.4th 463, 546-548 [no hearing required absent evidence that foreman's note was the product of improper discussion among jurors]; *People v. Kaurish* (1990) 52 Cal.3d 648, 694 [no hearing required absent evidence juror's derogatory remark reflected bias against the defense as opposed to impatience with the proceedings]; *People v. Espinoza, supra,* 3 Cal.4th at p. 821 [no hearing required absent evidence juror was actually asleep during trial]; *People v. Adcox, supra,* 47 Cal.3d at pp. 252-253 [no hearing

required absent evidence jurors actually read newspaper articles about the case].)

2. The Trial Court's Refusal To Preserve The Notebook Page Did Not Deprive Appellant Of Due Process Or Otherwise Deny Him A Fair Trial.

Appellant argues that the court erred in refusing to preserve the notebook page: "[i]n effect, the trial court intentionally caused the destruction of an important piece of evidence demonstrating that Juror Schmidt prejudged the case." (AOB 233.) Not so. The trial court assumed Mr. Kinney's description of what he saw was accurate. The notebook page had little – if any – value in showing juror bias.

Appellant likens the circumstances here to *People v. Zapien, supra,* 4 Cal.4th at pp. 963-966. In *Zapien*, the deputy district attorney prosecuting the case and the lead investigator assigned to the case discovered in a county vehicle a sealed envelope with the name of the assistant public defender assigned to the defendant's case on the envelope. The deputy district attorney told the detective to listen to the tape and tell him if anything relevant was on the tape. The detective refused and disposed of the tape without listening to it. The tape turned out to have been made by the defending attorney and contained his thoughts about the strengths and weaknesses of the case. It had been transcribed before he left the tape in the county vehicle, and he retained the transcription. (*People v. Zapien, supra*, 4 Cal.4th at p. 963.)

This Court in *Zapien* found the rules announced in *California v. Trombetta* (1984) 467 U.S. 479, 488-489,[68] and *Arizona v. Youngblood* (1988)

---

68. The High Court in *Trombetta* held:

> Whatever duty the Constitution imposes on the States to preserve evidence, that duty must be limited to evidence that might be expected to play

488 U.S. 51, 58,[69] in the context of destruction of exculpatory evidence, "appl[ies] with equal force to the destruction of evidence of official wrongdoing." (*People v. Zapien, supra*, 4 Cal.4th at p. 964.) This Court stated: "It was beyond dispute that it was highly improper for [the lead investigator] to discard the envelope . . . ." (*Ibid.*) This Court, however, rejected the defendant's contention that "the trial court was required, as a sanction for [the lead investigator's] destruction of the envelope and the cassette tape, to find that [the lead investigator] and [the deputy district attorney] had listened to the recording." (*Ibid.*) The defendant urged that "had the envelope and the cassette tape it contained been preserved, they could have been tested to determine whether the envelope had been opened and the tape recording had been played." (*Ibid.*) Explaining that "the destruction of the contents of the tape recording did not lessen defendant's ability to challenge [the lead investigator's] testimony that the prosecution did not listen to the tape," this Court concluded that "the destruction of the contents of the tape recording affords no basis for imposition of the sanction that the trial court be required to reject [the lead investigator's] testimony and find that the prosecution listened to the tape recording." (*Id.* at pp. 964-965.)

> a significant role in the suspect's defense. To meet this standard of constitutional materiality, evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.

(*California v. Trombetta, supra,* 467 U.S. at pp. 488-489 [internal citation omitted].)

69. The High Court in *Youngblood* held that "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." (*Arizona v. Youngblood, supra,* 488 U.S. at p. 58.)

Here, the notebook page itself had little – if any – value in showing juror bias. The trial court had assumed Mr. Kinney was "accurate in describing what [he] saw." (RT 9639.) The failure to preserve the notebook page did not lessen appellant's ability to argue juror bias. Appellant fails to explain how he was harmed by the court's refusal to preserve the notebook page. Perhaps this Court is of the view that the better practice would have been to preserve the notebook page. Regardless, under the circumstances presented here, similar to *Zapien*, the failure to preserve the notebook page did not deprive appellant of due process or otherwise deny him a fair trial.

3. Appellant Did Not Ask To Have The Jurors Polled Below And Thus Waiving The Issue On Appeal; Regardless, Any Cause For Concern Arising From The Writing In The Juror's Notebook, Like The Adverse Publicity, Was Entirely Speculative – Insufficient To Trigger The Trial Court's Duty To Voir Dire Or Poll The Jury

Appellant next argues that the trial court erred in failing to poll the jurors because "the notebook entry observed by Mr. Kinney constituted further evidence to bolster" his earlier claim that the "pervasive anti-crime sentiment" and adverse midtrial publicity had "rendered fair sanity and penalty trials nearly impossible without a new jury." (AOB 234.) Appellant's claim here has been waived. Regardless, failing to poll the jurors would not have been an abuse of the court's discretion.

During the discussion on whether Juror Schmidt should have been called in and examined, the defense never expressly requested to have the jurors polled. To be sure, Ms. O'Neill had remarked that Juror Schmidt's writing had a tendency to show that some jurors may have prejudged the case and therefore the earlier motion to poll the jurors should have been granted. (RT 9616-9617.) She later asked for a mistrial on the ground that "this jury cannot continue in

this case to be fair and impartial." (RT 9630.) However, after questioning Juror Schmidt and denying the motion for mistrial, the court asked Ms. O'Neill,

> I don't know was that the – or did you paint that with a broader brush? Were you asking for a mistrial altogether based upon something else or was it what I thought?"

(RT 9637.) Ms. O'Neill replied, "It's what the Court thought . . . ." (*Ibid.*) Absent a request to poll the jurors below, appellant cannot claim on appeal that his right to due process was violated because the trial court erred in failing to poll the jurors. (*People v. Esayian* (2003) 112 Cal.App.4th 1031, 1042 ["Failure to raise a constitutional issue at trial constitutes a waiver of the issue on appeal."])

Regardless, appellant's present claim fails on the merits. As explained in respondent's arguments XVIII and XXI, denying appellant's motion to poll the jury was not an abuse of the court's discretion because the jury was properly admonished and appellant did not produce evidence that any of the jurors failed to heed the admonitions. Any cause for concern arising from the writing in Juror Schmidt's notebook, like the adverse publicity, was entirely speculative. Such speculation is not enough to trigger the trial court's duty to voir dire or poll the jury. (Cf. *People v. Lanphear, supra,* 26 Cal.3d at p. 836; *People v. Gates, supra,* 43 Cal.3d at pp. 1198-1199; *People v. Melton, supra,* 44 Cal.3d at pp. 748-750; *People v. Davis, supra,* 10 Cal.4th at pp. 546-548; *People v. Kaurish, supra,* 52 Cal.3d at p. 694; *People v. Espinoza, supra,* 3 Cal.4th at p. 821; *People v. Adcox, supra,* 47 Cal.3d at pp. 252-253.)

4. The Trial Court's Questioning Of Juror Schmidt Was Adequate

"For a juror to prejudge the case is serious misconduct." (*Clemens v. Regents of University of California, supra,* 20 Cal.App.3d at p. 361.)

> When a trial court is put on notice that good cause to discharge a juror may exist, "it is the court's duty to make

> whatever inquiry is reasonably necessary to determine if the juror should be discharged and failure to make this inquiry must be regarded as error."

(*People v. Farnam* (2002) 28 Cal.4th 107, 141 [citations omitted].)

> The court's discretion in deciding whether to discharge a juror encompasses the discretion to decide what specific procedures to employ including whether to conduct a hearing or detailed inquiry.

(*People v. Beeler, supra,* 9 Cal.4th at p. 989.)

> "Failure to conduct a hearing sufficient to determine whether good cause to discharge the juror exists is an abuse of discretion subject to appellate review. [Citations.]"

(*People v. Adcox, supra,* 47 Cal.3d at p. 253 [citation omitted]; see also *Siverthorne v. United States* (1968) 400 F.2d 627, 638 ["Appellate courts will not interfere with the manner in which the trial court conducted the voir dire examination unless there has been a clear abuse of discretion."].) "[F]ailure to conduct a sufficient inquiry is ordinarily viewed as an abuse of discretion, rather than as constitutional error." (*People v. Pinholster* (1992) 1 Cal.4th 865, 928.)

Here, the trial court's inquiry of Juror Schmidt – whether she remained open minded, and willing to listen to both sides and decide based upon the evidence – was sufficient. (Cf. *People v. Pinholster, supra,* 1 Cal.4th at pp. 927-928 [finding trial court's inquiry sufficient where court determined which jurors had read the article, asked them if their impartiality were impaired, and admonished them to disregard the article, and also admonished the rest of the jury not to read the article and to disregard any mention of it; rejecting defendant's argument that the court's failure to question each juror privately regarding the impact of an article on the prosecutor violated defendant's rights to a fair trial and a reliable determination of penalty by an unbiased adjudicator]; but cf. *People v. McNeal* (1979) 90 Cal.App.3d 830, 835-840 [finding trial court's cursory inquiry – asking the juror whether she could

deliberate fairly and impartially, and set aside information possibly acquired outside the courtroom and judge the case on the evidence – inadequate where juror commented that she had "too much to lose" and that she could not vote guilty when she did not believe it and foreman noted that juror might be in possession of outside information concerning the case].)

Appellant, in arguing inadequacy of the court's inquiry, stresses that "[a] juror's own opinion of his or her impartiality is not controlling." (AOB 235; *People v. McNeal, supra,* 90 Cal.App.3d at p. 838 ["It is not enough for the juror alone to evaluate the facts and conclude that they do not interfere with his or her impartiality."].) It is for the court, not the juror him/herself, to determine whether the juror's impartiality has been compromised. (See § 1089; *People v. Cleveland* (2001) 25 Cal.4th 466, 478 ["The decision whether to investigate the possibility of juror bias, incompetence, or misconduct – like the ultimate decision to retain or discharge a juror – rests within the sound discretion of the trial court."].) Here, in denying appellant's motion for mistrial, the trial court impliedly determined Juror Schmidt remained impartial. The trial court went beyond Juror Schmidt's own opinion of her impartiality. The court observed and noted that "[juror] Schmidt ha[d] been a very attentive juror." (See *People v. Beeler, supra,* 9 Cal.4th at p. 989 [stating "the trial court was in the best position to observe the juror's demeanor"].)

In a further effort to show the court's inquiry was inadequate, appellant stresses that "the juror said she was doing her best, but admitted she was having some difficulty starting anew with an open mind." (AOB 235.) The court's inquiry was, in fact, adequate. Juror Schmidt had just sat through weeks of testimony and deliberated on appellant's capacity to form the requisite specific intents. The defense evidence in the sanity phase, as Mr. Kinney explained in his opening statements, "[is] basically going to be much of the same information that you've heard . . . . [y]ou basically heard much of the case . . .

." (RT 9475.) Although a more direct and detailed inquiry may perhaps had been preferable, it was not required under the circumstances here. (Cf. *People v. Beeler, supra,* 9 Cal.4th at pp. 989-990.) There was no concrete evidence, only pure speculation, that Juror Schmidt had prejudged the case. Absent concrete evidence of bias or misconduct, the trial court did not abuse its discretion in not conducting a more detailed inquiry.[70] (Cf. *People v. Lambright, supra,* 61 Cal.2d at pp. 486-487; *People v. Lanphear, supra,* 26 Cal.3d at p. 836.)

Accordingly, appellant's claims surrounding alleged juror misconduct should be rejected.

---

70. Appellant's reliance on *United States v. Thompson* (10th Cir. 1990) 908 F.2d 648, 650 and *Silverthorne v. United States, supra,* 400 F.2d. at pp. 640-644 is misplaced. In both *Thompson* and *Silverthorne*, more detailed inquiries were required because there were highly prejudicial newspaper articles appearing during the trial and concrete evidence to support the allegations of juror misconduct. (*United States v. Thompson, supra*, 908 F.2d at p. 650 [explaining that defendant's motion to voir dire the jury contained allegations that jurors were seen reading the same newspaper that eventually carried the highly prejudicial article concerning issue of guilt during the week of trial]; *Silverthorne v. United States, supra,* 400 F.2d. at pp. 640-644 [explaining that there was adverse publicity accruing during course of trial and that in view of action of jurors in reading newspapers in jury room during trial, court had no recourse but to lay aside ordinary assumption that jurors obey court's directives to avoid contact with publicity concerning trial and to attribute little if any weight to court's repetitive admonitions that jury should read or hear nothing about case].)

XXIII.

THE COURT PROPERLY ADMONISHED THE JURY AFTER THE SANITY PHASE VERDICTS WERE RETURNED; IN ANY EVENT, APPELLANT HAS FAILED TO SHOW THAT HIS CONSTITUTIONAL RIGHT TO DUE PROCESS – "A JURY CAPABLE AND WILLING TO DECIDE THE CASE SOLELY ON THE EVIDENCE BEFORE IT" – WAS VIOLATED

Appellant argues that the court failed to comply with sections 1121[71] and 1122 before allowing separation of the jury after the sanity phase concluded and before the penalty phase began, violating his right to due process. (AOB 238-239.) He is mistaken.

First, for the reasons stated in Argument XVII, the trial court was in compliance with section 1122 as the statute was written when the sanity phase concluded. Second, the trial court, as explained in Argument XVII, had earlier admonished the jurors to avoid, and not be influenced by, newspaper coverage of the trial. After the jury was sworn, the trial court instructed the jurors, among other things: "[Y]ou are required, as jurors, to decide all questions of fact in this case from the evidence received here in the trial and not from any other source." (Cf. *People v. Ladd, supra,* 129 Cal.App.3d at pp. 263-264 [Trial court's admonishment to jury before suppression hearing to consider only evidence presented in court was broad enough to cover defendant's concern over jury's exposure to outside sources of evidence even though court did not tell jury specifically not to watch television broadcasts or to read newspaper

---

71. Section 1121 provides in part:
The jurors sworn to try an action may, in the discretion of the court, be permitted to separate or be kept in charge of a proper officer. Where the jurors are permitted to separate, the court shall properly admonish them.

articles regarding case.].) Third, on January 20, 1994, before the jurors departed after returning their verdicts in the sanity phase, the court instructed them:

> The admonishments apply not to discuss the matter amongst yourselves or anybody else, or form or express any opinion on the subject matter to anybody. [¶] Watch out for news. We have – there will be something in the newspaper about your verdict and also on TV. Please avoid reading or watching it.

(RT 9961.)

Respondent acknowledges that when the jurors briefly reconvened on January 27, 1994, the court did not specifically admonish them to avoid exposure to publicity during the break in the proceedings. The court explained to Mr. Kinney: "I've told [the jurors] so many times about not watching the TV and the press." (RT 10126.) However, the court did give the "usual admonishments" to the jurors: "You are admonished not to discuss the matter amongst each other or anyone else, or form or express any opinion on the subject matter." (*Ibid.*) As explained in Argument XVII, respondent is unaware of a constitutional requirement that an admonition specifically prohibiting the jurors from watching television coverage or reading newspaper accounts of the trial be given. Appellant has constitutional rights to due process and a fair trial, which includes an unbiased "jury capable and willing to decide the case solely on the evidence before it . . . ." (*Smith v. Phillips, supra,* 455 U.S. at p. 217, quoted in *In re Carpenter, supra,* 9 Cal.4th at p. 648; *In re Hitchings, supra,* 6 Cal.4th at p. 110.) Given that the trial court was in compliance with section 1122 as provided at the time, absent evidence otherwise, appellant's constitutional rights to due process and a fair trial were presumably not violated. (See *People v. Linden, supra,* 52 Cal.2d at p. 28; see also *People v. Lambright, supra,* 61 Cal.2d at pp. 486-487.)

Appellant has failed to show prejudice by showing that his rights to due process and fair trial were affected. That is, he has not demonstrated that any

juror was incapable or unwilling to decide the case solely on the evidence before him/her or was biased. (*People v. Linden, supra,* 52 Cal.2d at p. 28 ["Failure to give the statutory admonition [§ 1122] is not ground for reversal where . . . no prejudice appears."]; *People v. Santamaria* (1991) 229 Cal.App.3d 269, 279-280 [no presumption of prejudice from every post-submission separation of the jury, and defendant seeking reversal because the jury has been separated must establish prejudice].) Appellant does not allege that any of the jurors read any adverse newspaper article. The court here did not expressly authorize the jurors to read newspaper accounts or watch television coverage of the trial. (Cf. *People v. Lambright, supra,* 61 Cal.2d at pp. 485, 487.) The jurors were properly admonished. It is presumed that "jurors generally follow instructions to avoid media coverage, and to disregard coverage that they happen to hear or see." (*NBC Subsidiary (KNBC-TV), Inc. v. Superior Court, supra,* 20 Cal.4th at p. 1223.) Though

> the presumption that admonitions and instructions are adequate may be rebutted by the exceptionally prejudicial nature of evidence to be received outside the presence of the jury and the potential intensity of media coverage

(*Id.* at p. 1224), appellant makes no mention, in this argument, of any prejudicial television coverage or newspaper account of the trial. Thus, absent a showing that a juror actually violated the admonition or that the media coverage was intensive and extremely prejudicial to the case at hand, prejudice is not presumed. (*People v. Morales, supra,* 48 Cal.3d at p. 565; *People v. Heishman, supra,* 45 Cal.3d at p. 175; see also *People v. Honeycutt, supra,* 20 Cal.3d at p. 156; see, e.g., *Halko v. Anderson, supra,* 244 F.Supp. at pp. 701-703.)

Accordingly, appellant's claim should be rejected.

XXIV.

BECAUSE THE COURT DID NOT HAVE THE DUTY TO POLL OR VOIR DIRE THE JURORS, QUESTIONING THE JURORS IN A GENERAL MANNER COULD NOT HAVE BEEN AN ABUSE OF THE COURT'S DISCRETION

Appellant argues that the trial court failed to conduct an adequate polling of the jury regarding prejudicial midtrial publicity prior to the penalty phase. (AOB 240-243.) Not so. Because the court did not have the duty to poll or voir dire the jurors, questioning the jurors in a general manner could not have been an abuse of the court's discretion.

A. The Record

On October 4, 1994, about eight and a half months after the sanity phase concluded, the jury reconvened. Before the jury was brought in, the court proposed the procedure to be employed in assuring the impartiality and fairness of the jurors. Among other things, the court explained:

> I want to ask them if they've been able to keep their promises not to discuss the merits of the case amongst themselves or anybody else, form or express any opinion on the subject matter. . . . I'm going to ask it as a group question.

(RT 10521.) Mr. Kinney, now lead counsel, stated: "I feel the suggestions of the Court are appropriate. I have no problem with that procedure. (RT 10523.) Mr. Kinney raised the possibility of prejudicial media coverage:

> I don't know if it's important or not, but I know there have been articles in the media both regarding Mr. – the D.A. in other cases and myself in other cases. In fact, the one that you are handling now with rather substantial coverage. And I don't know they relate to this case unless by any of those articles they thought either one of us was a jerk or a good guy or whatever. I'm throwing it out that there has been coverage on both of us on

> other cases of somewhat of a substantial nature, and I for what it's worth throw that out.

(RT 10524.) The court addressed the defense's concern:

> I can do that very simply by saying is there anything that you've read in the paper about any of the attorneys or the judge or anything else that makes it difficult for you to be fair and impartial in this case.

(RT 10524-10525.) The prosecutor asked the court "to query the jury on the subject of media coverage . . . in a general or generic sense" – "without focusing on any particular aspect or person or personality." (RT 10525.) The court reiterated its proposed query. The prosecutor explained:

> My request was to . . . not even be that specific, your inquiry. That it simply be anything that they may have seen or read as far as any sort of media coverage that would affect them.

(RT 10525-10526.) Mr. Kinney expressed the thought that "the court's suggestion was rather general." (RT 10526.) The court noted: "I'll make up my mind. I'm not sure what I'm going to do." (RT 10526.)

> The jury was then brought in. The court asked the jurors collectively: I feel it's sufficient to ask you as a group whether or not there's anything that you've seen or read in any media coverage concerning I guess anything that would make it difficult for you to be a fair and impartial juror in this upcoming penalty phase? By that I mean a phase to determine only whether or not the death penalty shall be imposed.

(RT 10527.) There was no audible response. The court noted for the record: "Okay. Indication, not. In fact, I've had eye contact with all jurors and they've [all] indicated by a shake of the head that they do not feel so." (*Ibid.*) The court then asked:

> I would ask you as a group, have you all been able to keep the promises that you've given to me to not discuss the case amongst yourselves or with anybody else or form or express any opinion on the subject matter with the exception of course of having to discuss this case and its – and the scheduling with your family and some friends maybe or employers, fellow employees. That

> – I know you've had to do that. Aside from that, have you all been able to keep your promises in this case?

(RT 10527-10528.) Again, there was no audible response. The court noted for the record: "Okay. Good. Each juror has given me eye contact and indicated affirmative as to that question." (RT 10528.)

B. Discussion

Appellant argues: "The collective questioning of jurors was too general to satisfy the requirements of the Sixth and Fourteenth Amendments . . . ." (AOB 241.) Not so. "[F]ailure to conduct a sufficient inquiry is ordinarily viewed as an abuse of discretion, rather than as constitutional error." (*People v. Pinholster, supra,* 1 Cal.4th at p. 928.)

> The court's discretion in deciding whether to discharge a juror encompasses the discretion to decide what specific procedures to employ including whether to conduct a hearing or detailed inquiry.

(*People v. Beeler, supra,* 9 Cal.4th at p. 989.) Here, the trial court did not abuse its discretion in questioning the jurors in a general manner.

The jury was properly admonished, as explained in the earlier arguments. It is presumed that "jurors generally follow instructions to avoid media coverage, and to disregard coverage that they happen to hear or see." (*NBC Subsidiary (KNBC-TV), Inc. v. Superior Court, supra,* 20 Cal.4th at p. 1223.)

> [T]he presumption that admonitions and instructions are adequate may be rebutted by the exceptionally prejudicial nature of evidence to be received outside the presence of the jury and the potential intensity of media coverage.

(*Id.* at p. 1224.) However, the newspaper articles, including a January 21, 1994, Fresno Bee article covering the sanity verdict (see *Appellant's Motion For Judicial Notice*) and three Fresno Bee articles about the Public Defender's efforts to withdraw from the case (CT 1259-1261), cannot be said to have been

intensive or "exceptionally prejudicial." The length of the hiatus – here about nine months – does not, by itself, raise a presumption that jurors were exposed to improper material and thereby obviating the need for a specific showing of misconduct. (Cf. *People v. Stanley, supra,* 10 Cal.4th at p. 836; *People v. Erno* (1925) 195 Cal. 272, 282-283.) Absent a showing that a juror actually violated the admonition or that the media coverage was intensive and extremely prejudicial to the case at hand, juror prejudice is not presumed. Because appellant has failed to show prejudice here, a polling of the jury was not required under the circumstances. (See *People v. Stanley, supra,* 10 Cal.4th at pp. 836-837 [three-month delay of penalty phase caused by trial on issue of defendant's competency did not require re-voir dire of jury to determine if jurors had been exposed to extraneous information about case, where trial court admonished jury prior to hearing to avoid discussing case, forming or expressing any opinion on it, or reading or listening to anything connected with case appearing in news media]; cf. *People v. Lambright, supra,* 61 Cal.2d at pp. 486-487; *People v. Lanphear, supra,* 26 Cal.3d at p. 836; *People v. Gates, supra,* 43 Cal.3d 1168, 1198-1199; *People v. Melton, supra,* 44 Cal.3d at pp. 748-750.) Given that the court did not have the duty to poll or voir dire the jurors, by extension, questioning the jurors in a general manner cannot be an abuse of the trial court's discretion.[72/]

---

72. Again, as explained earlier, appellant's reliance on *United States v. Thompson, supra,* 908 F.2d at p. 650 and *Silverthorne v. United States, supra,* 400 F.2d. at pp. 640-644 is misplaced. In both *Thompson* and *Silverthorne*, more detailed inquiries were required because there were highly prejudicial newspaper articles appearing during the trial and concrete evidence to support the allegations of juror misconduct – i.e., that jurors read the articles. (See Argument XXII.)

It is difficult to assess the prejudicial effect, if any, arising from the general query instead of the initially proposed query.[73] This is so particularly because the newspaper articles did not relate to this case and Mr. Kinney acknowledged as much[74] and further, there was no defense objection after the query was asked. Furthermore, insofar as appellant is arguing that a query more detailed and specific than the query initially proposed by the court was required, such a claim should be deemed waived. Mr. Kinney agreed to the initially proposed query. (Cf. *People v. Bolin* (1998) 18 Cal.4th 297, 326 [Any claim of error in trial court's instruction concerning attempts to suppress evidence as circumstantial evidence of consciousness of guilt was waived on appeal of murder convictions, where defense counsel agreed at the time the court discussed jury instructions that evidence supported that instruction and did not object to court's proposed wording.].)

Accordingly, appellant's claim should be rejected.

---

73. The trial court proposed the query:

> Anything any of you have read in favor about the attorneys, about any cases that they might have tried, about me or anything else or heard on television or seen on television that would make it difficult to be fair and impartial. If so, please raise your hand and we'll talk to you about it.

(RT 10525.)

74. Mr. Kinney stated, 'I don't know [the newspaper articles] relate to this case unless by any of those articles they thought either one of us was a jerk or a good guy or whatever," and a lack of defense objection after the query was asked. (RT 10524.)

XXV.

THERE WERE LEGITIMATE REASONS FOR THE DELAY BETWEEN THE GUILT AND PENALTY PHASES; THE LENGTH OF THE DELAY DOES NOT BY ITSELF RAISE A PRESUMPTION OF PREJUDICE

Appellant argues that the death penalty must be reversed because of the delay between the guilt and penalty phases of the trial. (AOB 244-252.) He is mistaken. There were legitimate reasons for the delay between the guilt and penalty phases of the trial. Appellant's stated basis for reversal, the length of the delay, does not by itself raise a presumption of prejudice.

"What constitutes good cause for the delay of a criminal trial is a matter that lies within the discretion of the trial court." (*People v. Johnson* (1980) 26 Cal.3d 557, 570.) "Under this rule, appellate review of such postponements is for abuse of discretion." (*Stroud v. Superior Court* (2000) 23 Cal.4th 952, 968.)

> Although most cases exploring what constitutes good cause involve continuances requested by a party, the good cause requirement is equally applicable to a midtrial continuance or delay occasioned by the trial court itself. Just as the court cannot grant a party's motion to continue without a showing of good cause, it cannot order a continuance on its own motion without good cause.

(*People v. Santamaria, supra,* 229 Cal.App.3d at p. 277.) This Court has noted general principles "[i]n reviewing trial courts' exercise of [section 1382] discretion":

> The courts agree, for example, that delay caused by the conduct of the defendant constitutes good cause to deny his motion to dismiss. Delay for defendant's benefit also constitutes good cause. Finally, delay arising from unforeseen circumstances, such as the unexpected illness or unavailability of counsel or witnesses constitutes good cause to avoid dismissal. Delay attributable to the fault of the prosecution, on the other hand,

> does not constitute good cause. Neither does delay caused by improper court administration.

(*People v. Johnson, supra,* 26 Cal.3d at p. 570.)

Appellant relies on *People v. Santamaria, supra,* 229 Cal.App.3d 269. In *Santamaria*, the Court of Appeal held that the trial court's recess order of eleven days during jury deliberations violated the defendant's right to due process. In so holding, the court noted that the trial court did not specify the reason for the recess, and there was no indication of any exceptional circumstances which warranted the adjournment. (*Id.* at pp. 276-283.)

Santamaria is distinguishable from the case at hand. Here, there was good cause for the delay between the guilt and penalty phases of the trial.

First, the delay between January 4, 1994 to June 6, 1994 was caused by defense efforts to promote the best interests of appellant. Appellant had pled not guilty by reason of insanity; from January 12, 1994 to January 20, 1994, the sanity phase was held. The delay from January 24, 1994 to March 25, 1994, as appellant notes,

> resulted from the public defender's declaration of a conflict, and pursuit of appellate court litigation over contempt citations against Assistant Public Defender Dreiling, and the public defender's right to withdraw from the case.

(AOB 250.) The Public Defender's declaration of conflict and appellate litigation over the contempt citations constitute good cause because such efforts were to promote the best interests of appellant, to ensure his constitutional right to effective counsel free of conflicting loyalties. As the Fifth District Court of Appeal explained:

> On January 27, 1994, the trial court vacated its order removing Ms. O'Neill and Ms. Martinez as [appellant's] attorneys and ordered them to continue to represent [appellant]. [Appellant] refused to waive any conflict of interest and affirmatively requested to be represented by counsel who was free of any conflict of interest. The filing of the writ petitions from the

> underlying action thus inured to [appellant's] benefit as well as petitioner [Mr. Dreiling]. This court concludes that petitioner [Mr. Dreiling] was pursuing these challenges in part on behalf of [appellant] who is therefore responsible for any delays caused by the litigation of these issues.

(CT 1179-1180; II SCT 1771-1772.) Between March 25, 1994 to June 6, 1994, aside from administrative matters, defense counsels filed motions for mistrial, for disqualification of the trial judge, and to dismiss the special circumstances. These motions were also made for the benefit of appellant. (Cf. *People v. Rutkowsky* (1975) 53 Cal.App.3d 1069, 1072 [one-day delay occasioned was caused by defendant's filing of a Code Civ. Proc., § 170.6, affidavit to disqualify the judge of the court to which the cause was transferred for trial]; *People v. Tahtinen* (1958) 50 Cal.2d 127, 131 [delay caused by filing of motion to set aside the information].)

Second, the court had told the jurors that it would work around the jurors' schedules. (RT 10118-10120.) On May 13, 1994, the court set the penalty phase for June 27, 1994. (CT 1187-1188.) On May 27, 1994, the court informed counsels that one of the jurors was going to be on vacation through July 4, 1994. The court reset the trial for July 5, 1994. (RT 10359-10360; CT 1269.) On June 17, 1994, due to unforeseen and exceptional circumstances discussed below, the court reset the trial for September 13, 1994. (CT 1426; RT 10492-10493.) On June 30, 1994, the court informed counsels that two jurors who are teachers were unhappy about the trial date because it was at the beginning of the school year, and that another juror had a pre-planned, pre-paid vacation from September 21, 1994 to October 3, 1994. The trial was then reset for October 4, 1994. (RT 10498-10499; CT 1427.) Accommodating the schedules of the jurors was good cause for continuance. (Cf. *People v. Johnson* (1993) 19 Cal.App.4th 778, 793 [holding that trial court did not abuse its discretion by adjourning jury deliberations for winter holidays pursuant to prior agreement of all parties in murder prosecution; distinguishing *Santamaria* on

the ground that "the very purpose of the break was to accommodate the travel plans of the jurors, not merely the travel plans of the trial judge"]; *Hamilton v. Vasquez* (9th Cir. 1994) 17 F.3d 1149, 1159 [holding that defendant had failed to show his trial was rendered unfair where, after two and one-half days of jury deliberations, the court recessed the trial early for the winter holidays because at least one juror could not deliberate the week immediately preceding Christmas], overruled on another ground by *Calderon v. Coleman* (1998) 525 U.S. 141, 146-147.) Delays from juror scheduling conflicts do not amount to coercion on the jury's deliberative process – particularly when the jury was not in deliberations. (Cf. *Romo v. Southern Pac. Transportation Co.* (1977) 71 Cal.App.3d 909, 915-916 [On appeal from a verdict for defendant in an action for damages suffered by a motorist in a railroad crossing accident, plaintiff could not complain of jury prejudice allegedly resulting from the trial court's telling the jurors that they would have only one day to deliberate, where the trial had extended a week beyond its expected conclusion, primarily due to plaintiff's furnishing an overly optimistic time estimate, where plaintiff's affidavits in support of a motion for new trial failed to allege jury misconduct due to the time constraints, and where the fact the jury returned with a verdict after only one hour, when they had an entire afternoon for additional deliberations, indicated there had been no misconduct]; but cf. *Key v. People* (Colo. 1994) 865 P.2d 822, 825-827 [holding that the ex parte scheduling conference held by the trial judge with the jurors during their deliberations constituted a critical stage of the criminal prosecution and therefore absence of defense counsel violated defendant's Sixth Amendment rights; and explaining that the error was not harmless because the evidence against defendant was not "so overwhelming" and that the "record clearly reveals that because of scheduling difficulties, at least two jurors . . . had substantial incentives to arrive at a verdict by the end of the first afternoon of deliberations"].)

Third, the delay from June 4, 1994 to October 25, 1994 primarily resulted from the court relieving Ms. O'Neill as counsel due to medical reasons and appointing Mr. Kinney as lead counsel. On June 6, 1994, Ms. O'Neill informed the court that she had been diagnosed with cancer. (CT 1391; RT 10373-10378.) On June 14, 1994, Ms. O'Neill informed the court that she underwent surgery and the diagnosis of cancer was confirmed. She indicated that because further surgery or other forms of treatment would be required, she would absent from work for approximately two to three months. (II SCT 1890.) Mr. Kinney had submitted a letter indicating that he would not be able to assume the role of lead counsel in appellant's case, explaining that he had not been continuously present during the guilt phase, that he suffered from high blood pressure and was adjusting to new blood pressure medication, and that he was constantly concerned about his son who had been recently admitted to the hospital. (CT 1392.) Mr. Kinney later submitted another letter from his medical doctor, advising the court that "[h]is blood pressure [was] not yet under control" and that "[h]e should avoid being involved in trials at least until August 1, 1994." (II SCT 1943.) On June 17, 1994, over objections by Mr. Kinney and appellant (RT 10464-10465), the court relieved Ms. O'Neill as counsel and designated Mr. Kinney as lead counsel conditioned on the status of his health and Ms. Martinez as co-counsel (RT 10477, 10480, 10483-10484).[75] The trial was then reset for September 13, 1994.[76] (CT 1426;

---

75. At the June 17, 1994 hearing, appellant stated that he wanted Ms. O'Neill as lead counsel. He said he did not want Ms. Martinez or Mr. Kinney as lead counsel. (RT 10464-10465.) The court then asked appellant if he was waiving his right to a speedy trial:

> Apparently in requesting that we have Barbara O'Neill back, there is a waiver on the part and certainly implied waiver of a request for a speedy trial which somewhat flies in the face of a – of the prior motion where he was complaining of the fact he didn't have a speedy trial, because not only would we wait two to three months just to see if Barbara O'Neill was healthy enough

to come back, but what if the answer was no at that time? Well, then we would have to wait another two or three months. . . . So apparently there is no concern about a speedy trial. Is that correct?

(RT 10469-10470.) Ms. Martinez responded, "That's correct"; appellant responded, "Yeah." (RT 10470.) This Court has stated:

> [A criminal defendant] may not demand a speedy trial and demand adequate representation, and, by the simple expedient of refusing to cooperate with his attorney, force a trial court to choose between the two demands, in the hope that a reviewing court will find that the trial court has made the wrong choice. "We cannot tolerate such bad faith and we are not constitutionally required to do so. [Citations.]"

(*People v. Floyd* (1970) 1 Cal.3d 694, 707.)

76. As noted earlier, to accommodate the jurors' schedules, the trial date of September 13, 1994 was vacated and reset for October 4, 1994. (RT 10498-10499; CT 1427.) At the September 23, 1994 status hearing, due to a time conflict with another of Mr. Kinney's cases, the court pushed the trial date to October 25, 1994. (CT 1434; RT 10509.) Appellant expressly waived his constitutional right to a speedy trial:

> THE COURT: . . . Mr. Clark, you've heard what I've had to say and you've listened to the discussion here in court; is that correct?
>
> [APPELLANT]: Yes.
>
> THE COURT: You understand you have a right to a speedy trial; is that correct?
>
> [APPELLANT]: Yes.
>
> THE COURT: And are you waiving any rights you may have at this time to force this matter to trial at a date earlier than the Phillips hearing starting on October 18th? Are you giving up those rights?
>
> [APPELLANT]: Yes.
>
> THE COURT: And you're asking that the court use its best efforts to attempt to start the case – your case on the dates indicated; is that correct?
>
> [APPELLANT]: Yes.
>
> THE COURT: And nobody has made any promises to you to get you to do this; is that correct?
>
> [APPELLANT]: Yes.
>
> THE COURT: Nobody has made any promises or threats

RT 10492-10493.) "[A]n unforeseen or exceptional circumstance such as illness of counsel . . . constitutes good cause for a continuance." (*People v. Superior Court (Alexander)* (1995) 31 Cal.App.4th 1119, 1135.)

There having been good cause for the delay between the guilt and penalty phases, the court did not abuse its discretion in continuing the trial date and prejudice should not be presumed from the length of the delay. (Cf. *People v. Santamaria, supra,* 229 Cal.App.3d at pp. 277-279 [defendant's right to expeditious disposition was violated when trial court suspended capital jury deliberations for 11 days; the trial court did not specify the reason for the recess; record disclosed no administrative duties, congested calendar, or any other exceptional circumstances; lengthy delay substantially increased the risk of juror taint; there appeared no indication of effort to appoint substitute judge to monitor jury deliberations during original judge's absence].) As noted in the previous argument, the length of the hiatus – here about nine months – does not, by itself, raise a presumption that jurors were exposed to improper material and thereby obviating the need for a specific showing of misconduct. (Cf. *People v. Taylor, supra,* 26 Cal.4th at p. 1170 ["And the delay in commencing the penalty phase, by itself, would be an insufficient ground for impaneling a new jury, as mere delay would not necessarily impair the jury's ability to perform its function in determining the appropriate penalty for defendant. Nothing in the record suggests defendant was actually prejudiced by the delay."]; *People v. Stanley, supra,* 10 Cal.4th at p. 836 [three-month delay of penalty phase caused by trial on issue of defendant's competency did not

---

to any loved one to get you to do that; is that correct?

[APPELLANT]: Yes.

THE COURT: You join in any constitutional or statutory waiver of rights; is that right, Mr. Kinney?

MR. KINNEY: Yes.

(RT 10509-10510.)

require re-voir dire of jury to determine if jurors had been exposed to extraneous information about case, where trial court admonished jury prior to hearing to avoid discussing case, forming or expressing any opinion on it, or reading or listening to anything connected with case appearing in news media]; *People v. Erno, supra,* 195 Cal. at pp. 282-283 [speculation that jury might have been exposed to undue influence from press insufficient to satisfy defendant's burden to show prejudice from 10-day adjournment before submission; nothing in record shows how continuance resulted in detriment to defendant or prevented a fair trial].) Furthermore, when the penalty phase commenced, the jurors, in response to the court's inquiry, indicated that they abided by the court's instructions and admonitions during the hiatus. (RT 10528.) Thus, absent a showing that a juror actually violated the admonition or that the media coverage was intensive and extremely prejudicial to the case at hand, prejudice caused by a biased juror or a juror incapable or unwilling to decide the case solely on the evidence before him/her should not be presumed.

As for faded or confused memory, this Court has rejected the argument that "the lapse of time between the guilt and penalty phases impaired the jurors' memories or otherwise undermined the reliability of their deliberations." (*People v. Hawthorne* (1992) 4 Cal.4th 43, 74 [holding that trial court's failure to reiterate generic guilt phase instructions at the penalty phase was not prejudicial error].) Furthermore, appellant's trial counsels could refresh the jurors' memories by reviewing in detail the guilt phase evidence. (See *People v. Padilla* (1995) 11 Cal.4th 891, 951 [noting defendant's ineffective assistance of counsel argument that given the delay of an entire year between the guilt and penalty phases of the trial, "it was all the more incumbent on trial counsel to refresh the jurors' memories by reviewing in detail the guilt phase evidence

supporting residual doubts as to defendant's guilt"], overruled on another ground in *People v. Hill, supra,* 17 Cal.4th at p. 823, fn. 1.)

Prejudice, predisposition to return a death judgment, is not presumed from a delay. Accordingly, appellant's claim should be rejected.

XXVI.

THE COURT DID NOT ABUSE ITS DISCRETION IN NOT POLLING THE JURORS ABOUT LOSS OF MEMORY DURING THE DELAY BETWEEN THE GUILT AND PENALTY PHASES

Appellant argues that the court erred in refusing to poll the jurors about their loss of memory during the delay between the guilt and penalty phases of trial. (AOB 253-254; CT 1322-1326.) Not so. The basis for appellant's motion to poll the jury was speculative. As explained in argument XXV, there was good cause for the delay between the guilt and penalty phases. Therefore, the trial court did not abuse its discretion in continuing the trial; and prejudice caused by way of jurors' faded or confused memories should not be presumed from the length of the delay. Speculation is not enough to trigger the trial court's duty to inquire. The court did not abuse its discretion in not polling the jurors about loss of memory during the delay.

This Court has explained:

> The decision whether to investigate the possibility of juror bias, incompetence, or misconduct – like the ultimate decision to retain or discharge a juror – rests within the sound discretion of the trial court. The court does not abuse its discretion simply because it fails to investigate any and all new information obtained about a juror during trial. [¶] As our cases make clear, a hearing is required only where the court possesses information which, if proven to be true, would constitute "good cause" to doubt a juror's ability to perform his duties and would justify his removal from the case.

(*People v. Ray, supra,* 13 Cal.4th at p. 343 [internal citations omitted].)

> The court's discretion in deciding whether to discharge a juror encompasses the discretion to decide what specific procedures to employ including whether to conduct a hearing or detailed inquiry.

(*People v. Beeler, supra,* 9 Cal.4th at p. 989.)

> As to a faded memory, this Court has rejected the argument that the lapse of time between the guilt and penalty phases impaired the jurors' memories or otherwise undermined the reliability of their deliberations.

(*People v. Hawthorne, supra,* 4 Cal.4th at p. 74 [holding that trial court's failure to reiterate generic guilt phase instructions at the penalty phase was not prejudicial error].) Furthermore, appellant's trial counsels could refresh the jurors' memories by reviewing in detail the guilt phase evidence. (See *People v. Padilla, supra,* 11 Cal.4th at p. 951 [noting defendant's ineffective assistance of counsel argument that given the delay of an entire year between the guilt and penalty phases of the trial, "it was all the more incumbent on trial counsel to refresh the jurors' memories by reviewing in detail the guilt phase evidence supporting residual doubts as to defendant's guilt"], overruled on another ground in *People v. Hill, supra,* 17 Cal.4th at p. 823, fn. 1.)

As to a confused memory, the jury was properly admonished as explained in the earlier arguments. The length of the hiatus – here about nine months – does not, by itself, raise a presumption that jurors were exposed to improper material and thereby obviating the need for a specific showing of misconduct. (Cf. *People v. Taylor, supra,* 26 Cal.4th at p. 1170; *People v. Stanley, supra,* 10 Cal.4th at p. 836; *People v. Erno, supra,* 195 Cal. at pp. 282-283.) Absent a showing that a juror actually violated the admonition or that the media coverage was intensive and extremely prejudicial to the case at hand, prejudice – a confused memory due to post-event information acquired from other sources – should not be presumed.

The basis for appellant's motion to poll the jury was speculative. Speculation is not enough to trigger the trial court's duty to inquire. (Cf. *People v. Davis, supra,* 10 Cal.4th at pp. 546-548; *People v. Kaurish, supra,* 52 Cal.3d at p. 694; *People v. Espinoza, supra,* 3 Cal.4th at p. 821; *People v. Adcox, supra,* 47 Cal.3d at pp. 252-253.) Moreover, appellant cannot request

the jurors be polled based on mere speculation that "good cause" may be discovered.

> Voir dire is not to be reopened on speculation that good cause to impanel a new jury may thereby be discovered; rather, a showing of good cause is a prerequisite to reopening. [Citation.]

(*People v. Fauber, supra,* 2 Cal.4th at p. 846; accord, *People v. Bradford, supra*, 15 Cal.4th at p. 1354; *People v. Williams, supra,* 16 Cal.4th at p. 229.) The court therefore did not abuse its discretion in not polling the jurors about their loss of memory during the delay between the guilt and penalty phases of the trial.

Accordingly, appellant's claim should be rejected.

XXVII.

THE CUMULATIVE EFFECT OF THE CLAIMED ERRORS IN ARGUMENTS XVII-XXVII DID NOT VIOLATE APPELLANT'S RIGHTS TO DUE PROCESS OR TO A RELIABLE DEATH JUDGMENT, BECAUSE NO PREJUDICIAL ERRORS OCCURRED

Appellant argues that the cumulative effect of errors asserted in Arguments XVII-XXVII requires reversal of the judgment. (AOB 255-258.) Not so. As respondent explained in Arguments XVII-XXVII, there was no prejudicial error. "If none of the claimed errors were individual errors, they cannot constitute cumulative errors . . . ." (*People v. Beeler, supra,* 9 Cal.4th at p. 954; see also *United States v. Haili, suspra,* 443 F.2d at p. 1299 ["any number of 'almost errors,' if not 'errors,' cannot constitute error"].) Accordingly, appellant's argument advancing the theory that he was deprived of due process of law due to the "cumulative effect of [the] errors" (AOB 258) must be rejected.

XXVIII.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN GRANTING THE PROSECUTOR'S CHALLENGES FOR CAUSE OF PROSPECTIVE JURORS L. COSTA, A. KELLER, AND P. YOUNG; FURTHERMORE, THE TRIAL COURT DID NOT ENGAGE IN A DISCRIMINATORY PATTERN OF RULINGS ON CHALLENGES FOR CAUSE FAVORING THE PROSECUTION

Appellant argues that the trial court erroneously granted the prosecutor's challenges for cause of three prospective jurors. (AOB 299-312.) Not so. Two of the three challenged prospective jurors gave equivocal and conflicting statements regarding their ability to impose a death verdict, and the third could not set aside his subjective views and personal feelings and perform his jury duties in accordance with the court's instructions and the juror's oath. The trial court properly found that they would be unable to faithfully and impartially apply the law in this case. This Court should thus defer to the trial court's rulings.

A. General Standard And Principles

> A prospective juror may be challenged for cause based upon his or her views regarding capital punishment only if those views would "'prevent or substantially impair'" the performance of the juror's duties as defined by the court's instructions and the juror's oath.

(*People v. Cunningham* (2001) 25 Cal.4th 926, 975; see *Wainwright v. Witt* (1985) 469 U.S. 412, 424 (hereinafter "*Witt*"); *People v. Crittenden, supra,* 9 Cal.4th at p. 121; *People v. Mincey* (1992) 2 Cal.4th 408, 456.)

> Whether the contention is, . . ., that the trial court erred in excluding prospective jurors who exhibited an anti-death bias, or erred in failing to exclude prospective jurors who exhibited a pro-death bias, the same standard has been held to apply. [Citations.]

(*People v. Bradford, supra,* 15 Cal.4th at p. 1318; see *Morgan v. Illinois* (1992) 504 U.S. 719, 726-728.

> A prospective juror is properly excluded if he or she is unable to conscientiously consider all of the sentencing alternatives, including the death penalty where appropriate. [Citation.] [Citation.]

(*People v. Cunningham, supra,* 25 Cal.4th at p. 975 [internal quotations omitted.].) More specifically, the proper inquiry is "whether the juror's views about capital punishment would prevent or impair the juror's ability to return a verdict of death in the case before the juror." (*People v. Ochoa* (2001) 26 Cal.4th 398, 431 [internal citations, quotations and emphasis omitted]; see also *People v. Kirkpatrick, supra,* 7 Cal.4th at p. 1005 ["A prospective juror who would invariably vote either for or against the death penalty because of one or more circumstances likely to be present in the case being tried, without regard to the strength of aggravating and mitigating circumstances, is therefore subject to challenge for cause, whether or not the circumstance that would be determinative for that juror has been alleged in the charging document."].)

> On appeal, [this Court] will uphold the trial court's ruling if it is fairly supported by the record, accepting as binding the trial court's determination as to the prospective juror's true state of mind when the prospective juror has made statements that are conflicting or ambiguous. [Citations.] [Citation.]

(*People v. Cunningham, supra,* 25 Cal.4th at p. 975 [internal quotations omitted.].)

B. Discussion

1. The Trial Court Did Not Abuse Its Discretion In Granting The Prosecutor's Challenges For Cause Of Prospective Jurors L. Costa, A. Keller, And P. Young

Appellant claims that the court erred in granting three prosecution challenges for cause made to prospective jurors L. Costa, A. Keller, and P.

Young. The record is clear that two of the prospective jurors gave equivocal and conflicting statements regarding their ability to impose a death verdict, and the third could not set aside his subjective views and personal feelings and perform his jury duties in accordance with the court's instructions and the juror's oath. The trial court thoroughly examined the prospective jurors and conscientiously considered their responses. (Cf. *Szuchon v. Lehman* (3d Cir. 2001) 273 F.3d 299, 329-330 [holding that the limited questioning – ceased after prospective juror responded that he did not believe in capital punishment – provided no evidence upon which a reasonable inference can be drawn that prospective juror's view have prevented or substantially impaired his ability to apply the law]; *United States v. Chanthadara* (10th Cir. 2000) 230 F.3d 1237, 1271-1272 [holding that the trial court's removal for cause of prospective juror solely on basis of her written responses was error because her written responses were ambiguous and the court failed to "clarify prior to excusing her for cause that she opposed the death penalty to a degree which would have made it impossible for her to follow the law"].) The jurors' responses support the trial court's findings that they would be unable to faithfully and impartially apply the law in this case. Applying the foregoing principles, this Court should uphold the trial court's rulings, deferring to the trial court's determinations of the prospective jurors' true state of mind.

a. Prospective Juror L. Costa

Mr. Costa's responses concerning his ability to impose the death penalty were conflicting and equivocal. He had indicated on the jury questionnaire that he was "not really for" the death penalty but he could "consider it." (VI SCT 1654.) When the prosecutor asked him on voir dire whether a case involving murder during the attempted commission of rape would ever be serious enough to warrant the death penalty, he responded, "Yeah, it would." (RT 646.) The prosecutor followed up by asking:

> In a real situation where you're the person making the sentencing decision, . . . do you believe that you could ever be the one, as a juror, to actually cast the vote to impose the death penalty on another human being?

(*Ibid.*) To which, Mr. Costa responded, "I probably could." (*Ibid.*) The prosecutor then inquired, "[W]hen you say it as you have, 'I probably could,' does that mean that you have a doubt that you could?" Mr. Costa admitted, "I probably would have a doubt." (RT 648.) The prosecutor asked for clarification. Mr. Costa explained:

> It's just that, man, like I said, the life of a human being is at my hands and it would scare me, you know. But I know in some cases it has, you know, the death penalty has to be enforced sometimes. But it just scares me when I've got to be – if I've got to be the one to do it, you know.

(RT 649.) When the prosecutor sought a definite answer as to whether he would have the ability to make the decision to impose the death penalty, Mr. Costa once again stated, "if all the evidence probably – you know, I probably could." (RT 649-650.) The trial court then interjected, asking:

> Let's say . . . you have decided in your own mind that under the law and the facts the death penalty is appropriate. Okay? Now, assuming that, do you think your personal beliefs then would get in the way of you voting for the death penalty?

(RT 650.) Again, Mr. Costa expressed doubt: "Before I came in here – now I'm not so sure. My beliefs? Like I said –." (*Ibid.*) Urging a definite response, the court rephrased its inquiry, asking whether he had the ability to temporarily set aside his personal beliefs and perform his duties as a juror. (RT 650-651.) Mr. Costa then stated unequivocally, "Yeah." (RT 651.) The court and the prosecutor followed up with questions seeking assurances of his ability to do so. To all questions, Mr. Costa responded in the affirmative unequivocally.

The trial court found Mr. Costa's responses conflicting and equivocal, explaining that Mr. Costa's "answers, towards the end of our examination,. . .

became more certain . . . that he could apply the death penalty as opposed to how he answered initially." The court felt that he and the prosecutor may, "albeit inadvertently, . . . have put some pressure on [Mr. Costa] to answer in a certain way."[77] Then noting its observation that Mr. Costa was visibly "upset," "nervous," and "emotional," the court determined that Mr. Costa's equivocal responses indicated a definite bias against the death penalty "when this comes to him personally being involved" and that Mr. Costa "would find it difficult, if not impossible, to impartially apply the law."[78] (RT 654-655.) There is no requirement that a prospective juror's bias against the death penalty be proven with unmistakable clarity. (See *Wainwright v. Witt, supra*, 469 U.S. at pp. 424-426.) Given prospective juror Costa's conflicting and equivocal responses, this Court should defer to the trial court's determination of his true state of mind. (Cf. *People v. Bolden* (2002) 29 Cal.4th 515, 535-536 [upholding trial court's removal for cause of prospective juror who was

---

77. Contrary to what appellant argues, Mr. Costa's use of the phrase "I probably could" did not render his responses ambiguous or equivocal. Appellant likens Mr. Costa's "I probably could" to a prospective juror's "I think I could" in *Gray v. Mississippi* (1987) 481 U.S. 648, 654, fn. 5 [noting and accepting state court's determination that the prospective juror had scruples about the death penalty, was qualified to be seated nonetheless, but was erroneously excluded]. (AOB 301.) Unlike the prosecutor and prospective juror in *Gray*, the prosecutor here sought clarification of what Mr. Costa meant by "I probably could" and Mr. Costa admitted that he "probably would have a doubt" as to his ability to impose the death penalty.

78. Contrary to what appellant argues, the court may consider the prospective juror's demeanor where conflicting or ambiguous answers were given on voir dire. This Court has stated:

> Even where voir dire fails to elicit a clear answer, the trial court will sometimes be left with the "definite impression" that a prospective juror cannot be impartial based upon the juror's demeanor or tone.

(*People v. Millwee* (1998) 18 Cal.4th 96, 146, citing *Wainwright v. Witt, supra,* 469 U.S. at p. 426.)

philosophically opposed to the death penalty but said "I think I could" consider both penalties]; *People v. Crittenden, supra,* 9 Cal.4th at pp. 117-119 [noting trial court denied the prosecutor's for-cause challenge to prospective juror, who did not believe in the death penalty but said "I think I could" if she heard facts and circumstances that warranted it].)

b. Prospective Juror A. Keller

Mrs. Keller philosophically believed in the death penalty. (VI SCT 4771; RT 2165.) She was however equivocal and conflicted as to whether she herself could impose the death penalty. (See RT 2166-2168, 2169-2170, 2172-2181.) When questioned about her ability to cast a vote to impose the death penalty, she responded "I think I could" and "I think so," and added she would feel discomfort or find it difficult in so doing. Initially her responses seemed to suggest that she could set aside her feelings of unease and impose the death penalty should she feel the evidence and law warrant it. (RT 2170-2171.) But upon further questioning, she would be unable to set those feelings aside and could find herself unable to impose the death penalty because of those feelings. (RT 2178-2181.) Rather than quote the entire voir dire of Mrs. Keller, the following questions and answers should suffice:

> THE COURT: Well, I understand you have some personal beliefs that would make it difficult for you to be the one to make that vote. And by that I mean for the death penalty. What we have to know now is: Are you going to be able to set those aside? To the best of your knowledge, can you set those aside or not?
>
> PROSPECTIVE JUROR KELLER: I probably would not. I would probably not set them aside.
>
> THE COURT: All right. Am I correct in assuming as far as you're concerned now those beliefs would substantially impair your ability to ever select the death penalty in a case?
>
> PROSPECTIVE JUROR KELLER: Yeah. Which is wrong because I believe in it.

THE COURT: . . . Do I understand that you're saying that those views would substantially impair your ability to vote for the death penalty?

PROSPECTIVE JUROR KELLER: It might. Yeah.

(RT 2180-2181.)

Mrs. Keller's conflicting and equivocal responses left the trial court with "the definite impression that she [would] be unable to truthfully and impartially apply the law and vote for the death penalty." (RT 2183.) The court then found that "her views on capital punishment would either prevent or substantially impair her ability to vote for the death penalty." (*Ibid.*) Given prospective juror Keller's conflicting and equivocal responses, this Court should defer to the trial court's determination of her true state of mind. (Cf. *People v. Bolden, supra,* 29 Cal.4th at pp. 535-536; *People v. Cooper* (1991) 53 Cal.3d 771, 809-810 [holding that trial court properly excluded for cause in capital murder prosecution one prospective juror who stated that he could not and would not decide whether a man should die and another juror who stated that he would never vote for the death penalty].)

c. Prospective Juror P. Young

One can readily perceive some of the conflicting and contradictory values and interests that the death penalty engenders for Mr. Young in his written responses. Mr. Young had death penalty scruples. He stated that the death penalty is "too serious to be 'automatic.'" (VI SCT 9374.) For Mr. Young, vengeance is not an appropriate consideration. To question #85, asking for his general feelings on the death penalty, he said: "I am not a vengeful, vindictive person, and strive to be understanding and compassionate." (VI SCT 9373.) To question #94, asking whether he believed in the adage "an eye for an eye," he checked "no" and paraphrased Gandhi, "An eye for an eye and a tooth for a tooth will leave us all blind and toothless." (VI SCT 9376.) He felt the "only reason someone should be killed by the state is if it brings a greater

good," giving as an example the Clarence Ray Allen case. (VI SCT 9373.) He acknowledged that "society must be assured of safety" (VI SCT 9375) and then offered "life incarceration, completely incommunicado" as a "better" or "equally good" alternative. (VI SCT 9373, 9375.)

Respondent acknowledges that is a conscientious person with death penalty scruples is not, by itself, a proper basis for challenge. (*Witherspoon v. Illinois* (1968) 391 U.S. 510, 522 [holding that "a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction"].) The question was whether Mr. Young would be able to temporarily set aside his subjective views and personal feelings (whatever they may be) and perform his jury duties in accordance with the court's instructions and the juror's oath. (See *People v. Ochoa, supra,* 26 Cal.4th at p. 431.) As apparent from his written and oral responses, he could not; at best he was equivocal and conflicted. To question #95, asking whether he held any religious or philosophical principle that would affect his ability to impose death as a judgment in this case, he checked "Yes" and explained, "Of course! What person could decide a question of this magnitude without profound examination of one's thoughts?" (VI SCT 9376.) To question #100, asking whether he could set aside his own personal feelings regarding what he thought the law should be regarding the death penalty and follow the law as the court instructed, he checked "No" and commented, "Anybody who answers yes to this is a liar. When people are arguing in the jury room, it's very heavily based on personal feelings regardless of what they say." (VI SCT 9379.) To question #104, asking whether he had any reason to think he may not be completely fair and impartial in this case, he responded with another rhetorical question, "What's impartial in today's society?," and then commented, "We don't live in a vacuum. I will do my best

to be fair." (VI SCT 9380.) During oral voir dire, Mr. Young orally iterated his written views that "the only way the death penalty being applicable in today's society and modern world would be – take Clarence Ray Allen's case" (RT 2151), and that a person's feelings and prejudices cannot be set aside and will enter into deliberations (RT 2153-2156).

Mr. Young did not say he could not follow the law as the court instructed, and he did say he would do his best to be fair. However, as the trial court found, Mr. Young was clear that he could not set aside his subjective views and personal feelings as a juror. (RT 2158-2159.) This Court and the United States Supreme Court have endeavored to develop rules that would provide for fairness and reasonable consistency in the imposition of the death penalty. One such rule is that the prospective juror's views on capital punishment should not "prevent or substantially impair" the performance of jury duties as defined by the court's instructions and the juror's oath. (*Wainwright v. Witt, supra,* 469 U.S. at p. 424.) Contrary to Mr. Young's cynicism – without going into a discourse – one can transcend his/her personal feelings and subjective views and fulfill his/her duties. The trial court must be confident that the juror will fulfill his/her role. Otherwise, the capital case sentencing scheme would degenerate into mere arbitrariness, threatening the legitimate purpose and use of the death penalty in society. The court therefore could not entrust Mr. Young – or anyone else who could not set aside his/her personal feelings and subjective views – with the task and discretion to decide whether a person should live or die. This Court should uphold the trial court's ruling on the prosecution's challenge for cause of Mr. Young. (Cf. *Lockett v. Ohio* (1978) 438 U.S. 586, 596 [holding that it was proper to exclude jurors who made it unmistakably clear they could not be trusted to "abide by existing law" and "to follow conscientiously the instructions" of the trial judge].)

2. Forgoing Deferential Review Is Contrary To *Wainwright v. Witt*; In Any Event, The Trial Court Did Not Engage In A Discriminatory Pattern Of Rulings On Challenges For Cause Favoring The Prosecution

Citing to a footnote in *Ross v. Oklahoma* (1988) 487 U.S. 81, 90, appellant argues that deferential review is not warranted here because the trial court engaged in a discriminatory pattern of rulings on challenges for cause favoring the prosecution.[79] (AOB 305-309.) The cited footnote in *Ross v. Oklahoma* reads:

> No claim is made here that the trial court repeatedly and deliberately misapplied the law in order to force petitioner to use his peremptory challenges to correct these errors.

(*Id.* at p. 90, fn. 5.) His argument lacks merit. The remedy appellant requests – forgoing deferential review – is contrary to *Witt*. In any event, the trial court did not apply the standard enunciated in *Witt* in an un-evenhanded manner, favoring the prosecution.

To respondent's knowledge, there is no California court decision holding that the remedy is to forgo deferential review where it is shown the trial court engaged in a discriminatory pattern of rulings on challenges for cause. Forgoing deferential review is contrary to *Witt*. This Court has stated:

---

79. Appellant is seemingly arguing judicial bias resulting in a violation of his constitutional right to an impartial jury and the concomitant right to a fair trial. Such a claim should be deemed waived. Appellant had requested to dismiss the venire panel due to "erroneous exclusion of life prone jurors and erroneous inclusion of pro death jurors" and start the *Hovey* process with a new venire panel. However, he did not raise an objection of judicial bias. (RT 3014-3019.) Absent such a specific objection, appellant's claim here – insofar as he is arguing judicial bias resulting in a violation of his constitutional right to an impartial jury and the concomitant right to a fair trial – has not been preserved for review. (Cf. *People v. Hines, supra,* 15 Cal.4th at pp. 1040-1041; *People v. Downey* (2000) 82 Cal.App.4th 899, 910.)

> When . . . a prospective juror has both equivocated and taken (at some point) a clear stand, the wisdom of entrusting the ruling on the challenge for cause to the trial court becomes clear. This is the point of the holding in *Witt*, in which the court noted: "What common sense should have realized experience has proved: many veniremen simply cannot be asked enough questions to reach the point where the bias has been made 'unmistakably clear'; these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings. Despite this lack of clarity in the printed record, however, there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law. . . . [T]his is why deference must be paid to the trial judge who sees and hears the juror."

(*People v. Coleman* (1988) 46 Cal.3d 749, 768, fn. 10, quoting *Wainwright v. Witt, supra*, 469 U.S. at pp. 424-426.) If appellant shows that the trial court engaged in a discriminatory pattern of rulings on the challenges for cause favoring the prosecution, then the proper remedy would be to reverse appellant's death sentence because appellant essentially would have shown that the venire and thus the jury was stacked with death prone individuals. (Cf. *Gray v. Mississippi, supra,* 481 U.S. at pp. 666-667; *Davis v. Georgia* (1976) 429 U.S. 122, 123.)

Regardless, the record does not support appellant's contention, which is based on comparison of the responses of Mr. Costa, Mrs. Keller, and Mr. Young to the responses of six venire members, whom the defense challenged but the court denied. As will be discussed in greater detail in the next argument, these six venire members' responses clearly indicated they could set aside their personal opinions and feelings, view the evidence, follow the court's instructions on the law, and seriously consider life without parole as an appropriate punishment. Though some of the prospective jurors' responses were conflicting and equivocal, the trial judge made the determination as to whether the prospective jurors would be able to faithfully and impartially apply

the law. The trial judge exercised his discretion in a fair and reasonable manner as to these six venire members. This Court has said:

> [W]hen the state of mind of the trial judge appears to be adverse to one of the parties but is based upon actual observance of the witnesses and the evidence given during the trial of an action, it does not amount to that prejudice against a litigant which disqualifies him in the trial of the action. It is his duty to consider and pass upon the evidence produced before him, and when the evidence is in conflict, to resolve that conflict in favor of the party whose evidence outweighs that of the opposing party. The opinion thus formed, being the result of a judicial hearing, does not amount to [improper] bias and prejudice . . .

(*Kreling v. Superior Court* (1944) 25 Cal.2d 305, 312; cf. *Moulton Niguel Water Dist. v. Colombo* (2003) 111 Cal.App.4th 1210, 1219-1220 [holding that trial judge was not subject to disqualification for bias because his statements, including historical overview of constitutional rights and his exhortation to the jurors to consider parties on "a level playing field," were innocent and appropriate when viewed in context].) Viewed in the broader context, the trial court did not engage in a discriminatory pattern of rulings on challenges for cause. By respondent's count, the prosecutor challenged thirty-two prospective jurors for cause; the trial court granted twenty-four of those challenges. The defense challenged fifty-six prospective jurors for cause; the trial court denied ten of those challenges. For instance, prospective juror C. Barnes' responses indicated a predisposition and initial bias to life without parole, unless "persuaded" to choose the death penalty. (RT 481-482.) Despite such responses, the trial court denied the prosecutor's challenge for cause, explaining that Ms. Barnes was "very clear" that "she would set aside those personal views and follow the law." (RT 488.) Prospective juror R. Masters had strong beliefs against the death, commenting "I do not believe capital punishment has a place in an enlightened society" in the written questionnaire (VI SCT 5915; RT 1590-1591) and expressing during oral voir dire a desire to see the death penalty

eliminated from society (RT 1590). Despite such responses, the trial court denied the prosecutor's challenge for cause, explaining that "in the end she clearly indicated that any conscious thoughts that she had or bias or disposition would be set aside and she could follow the law of the state of California." (RT 1600.) Respondent will not mention in detail every instance where the trial court denied the prosecutor's challenge for cause. The foregoing two examples should suffice to demonstrate that appellant's judicial bias claim lacks merit. (Cf. *People v. Jenkins* (2000) 22 Cal.4th 900, 989-990 [holding that the record does not support defendant's claim that the trial court failed to apply the standard enunciated in *Wainwright v. Witt* in an evenhanded manner].)

Accordingly, appellant's claim of improper granting of prosecutor's challenges for cause of three prospective jurors should be rejected.

XXIX.

THE TRIAL COURT DID NOT ERR IN DENYING DEFENSE CHALLENGES FOR CAUSE TO EIGHT PROSPECTIVE JURORS; APPELLANT'S CONSTITUTIONAL RIGHT TO A FAIR AND IMPARTIAL JURY WAS NOT AFFECTED BECAUSE NONE OF THE PROSPECTIVE JURORS APPELLANT FOUND OBJECTIONABLE SAT ON HIS JURY; FURTHERMORE, THE TRIAL COURT DID NOT ENGAGE IN A DISCRIMINATORY PATTERN OF RULINGS ON CHALLENGES FOR CAUSE FAVORING THE PROSECUTION

Appellant raises several arguments. First, he argues that the trial court erred in denying defense challenges for cause to eight prospective jurors. Second, he asks that deferential review not be applied because the trial court engaged in a discriminatory pattern of rulings on challenges for cause favoring the prosecution. Third, he argues that the trial court improperly restricted voir dire of Mr. Madden. Fourth, he claims his constitutional right to a fair and impartial jury was affected. Finally, he argues that even if prejudice cannot be shown, reversal should be automatic because the trial court engaged in a discriminatory pattern of rulings on challenges for cause favoring the prosecution. (AOB 313-339.) His contentions lack merit. First, the eight prospective jurors clearly indicated they could set aside their personal opinions and feelings, view the evidence, follow the court's instructions on the law, and seriously consider life without parole as an appropriate punishment. Second, forgoing deferential review is contrary to *Witt*. Third, the trial court did not prevent defense counsel from making reasonable inquiry into the fitness of Mr. Madden to serve on the jury. Fourth, appellant's constitutional right to a fair and impartial jury was not violated because none of the prospective jurors whom defense found objectionable actually sat on his jury. Finally, a harmless error analysis applies to a trial court's erroneous failure to excuse a juror for

cause; reversal is not automatic because the record does not support appellant's contention that the trial court engaged in a discriminatory pattern of rulings favoring the prosecution.

A. The Trial Court Did Not Abuse Its Discretion In Denying Defense Challenges For Cause To Prospective Jurors S. Fletcher, M. Kolstad, D. Madden, M. Lopez, S. Lopez, C. Wiginton, V. Donovan, And L. McDaniel

The trial court did not abuse its discretion in denying eight defense challenges for cause to prospective jurors S. Fletcher, M. Kolstad, D. Madden, M. Lopez, S. Lopez, C. Wiginton, V. Donovan, and L. McDaniel. The record shows that these prospective jurors, despite demonstrating a preference – sometimes a strong and intense preference – for the use of the death penalty and disfavoring life without parole as punishment, clearly indicated that they could set aside their personal opinions and feelings, view the evidence, follow the court's instructions on the law, weigh mitigating circumstances, and seriously consider life without parole as an appropriate punishment. Applying the general principles stated in the previous argument,[80] this Court should uphold the trial court's rulings, deferring to the trial court's determinations of the prospective jurors' true state of mind. (Cf. *People v. McDermott* (2002) 28 Cal.4th 946, 982 [evidence was sufficient to support finding that prospective juror's views on death penalty would not prevent or substantially impair the performance of her duties as a juror, and thus supported denial of murder defendant's motion to strike for cause, although juror said she favored the death

---

80. The same standard and principles stated in the previous argument applies here. (*People v. Bradford, supra*, 15 Cal.4th at p. 1318 ["Whether the contention is, . . ., that the trial court erred in excluding prospective jurors who exhibited an anti-death bias, or erred in failing to exclude prospective jurors who exhibited a pro-death bias, the same standard has been held to apply."]; see *Morgan v. Illinois, supra*, 504 U.S. at pp. 726-728.)

penalty; juror also said she would keep an open mind and would consider life without possibility of parole at the penalty phase]; *People v. Farnam, supra,* 28 Cal.4th at pp. 133-134 [prospective juror who made remarks suggesting that he would automatically vote for the death penalty did not have to be excused for cause, where he also said he would not always vote for death penalty over sentence of life imprisonment without the possibility of parole, he would do his best to keep an open mind, and he thought defendant would have a fair chance of showing he ought not get the death penalty]; *United States v. Ortiz* (8th Cir. 2002) 315 F.3d 873, 892-895 [trial court did not abuse its discretion in failing to strike particular venire persons for cause at defendants' trial for murder on basis of their views on capital punishment; each potential juror ultimately stated that he or she could consider life imprisonment without parole as possible punishment, and that he or she could follow procedure as instructed by court]; *Sallahdin v. Gibson* (10th Cir. 2002) 275 F.3d 1211, 1224-1225 [trial court's refusal to excuse for cause juror in capital murder prosecution who stated he would not consider any penalty other than death for intentional murder, did not deprive defendant of a fair and impartial jury where the juror unequivocally stated he would follow the instructions, would consider all punishments, and would base his decision on the evidence].)

Appellant's reliance on *People v. Boyette* (2002) 29 Cal.4th 381, 416-418 and *United States v. Nelson* (2d Cir. 2002) 277 F.3d 164, 199-202 are misplaced. In *Boyette* and *Nelson*, this Court and the Second Circuit Court of Appeals found that the trial court had abused its discretion in denying the defense challenge for cause. The responses of the prospective jurors there were markedly different from the responses of the eight prospective jurors here. In *Boyette*, the challenged prospective juror stated he was strongly in favor of the death penalty, indicated that he would apply a higher standard to a life sentence than to one of death, that an offender who killed more than one victim should

automatically receive the death penalty, and admitted he would not follow an instruction to assume that a sentence of life in prison with no possibility of parole meant the prisoner would never be released. (*People v. Boyette, supra,* 29 Cal.4th at pp. 417-418.) In *Nelson*, the juror "expressed grave doubts about his ability to be objective concerning the case." Although the juror said he "would like to think" of himself as objective and able to give the defendants a fair trial, he "[h]onestly . . . [didn't] know" whether he could do so." When the trial court asked him once again whether he could set aside his personal feelings and give the defendants a fair trial, the juror responded, "I don't know. I honestly don't know." (*United States v. Nelson, supra,* 277 F.3d at pp. 199-202.) Here, using the language in *Nelson*, "the prospective panelist's protestation of a purge of preconception is positive, not pallid." (*Id.* at p. 202, quoting *Bailey v. Bd. of County Comm'rs* (11th Cir. 1992) 956 F.2d 1112, 1127 and *United States v. Nell* (5th Cir. 1976) 526 F.2d 1223, 1230.)

1. Prospective Juror S. Fletcher

Ms. Fletcher, in general, favored the use of the death penalty and disfavored life without parole as punishment. For instance, she felt that the death penalty should be automatic for premeditated murders (VI SCT 2832; RT 929) and that the punishment of life imprisonment without the possibility of parole was "very costly for the taxpayers" (VI SCT 2833). However, Ms. Fletcher's views on the use of the death penalty were not as resolute and much more uncertain than appellant suggests. To question #92, asking whether she felt the death sentence is imposed too often, too seldom, or randomly, Ms. Fletcher did not check any of the provided answers; instead she explained, "Each case is different. You don't know what should have happened unless you know all the facts." (RT 934; VI SCT 2833.) When asked whether the death penalty should always be imposed for a person guilty of first-degree murder with a special circumstance, she responded, "Not always." (RT 932-

933.) Ultimately, Ms. Fletcher clearly indicated that she could set aside her feelings on the death penalty and follow the court's instructions. (RT 926-927.) For instance, in response to defense counsel's question, Ms. Fletcher stated she would not vote for death to save taxpayers' money and would consider life without possibility of parole as punishment. (RT 930-931.) Ms. Fletcher's responses clearly support the trial court's finding that "her views on capital punishment would not prevent and would not substantially impair the performance of her duties as a juror in accordance with [the court's] instructions on the law and her oath." (RT 939.) This Court should defer to the trial court's ruling on Ms. Fletcher. (Cf. *People v. Jenkins, supra,* 22 Cal. 4th at p. 989 [challenge for cause to allegedly "death-prone" prospective juror in capital murder case was properly denied, where juror stated that he would have to hear penalty phase evidence before determining penalty, believed defendant's background was relevant to penalty, would not impose punishment of death simply because of special circumstance of murder of police officer, and would consider voting for life term and would need to hear penalty phase evidence before determining penalty]; *People v. McDermott, supra,* 28 Cal.4th at p. 982 [see above]; *People v. Farnam, supra,* 28 Cal.4th at pp. 133-134 [see above]; *Sallahdin v. Gibson, supra,* 275 F.3d at pp. 1224-1225 [see above].)

2. Prospective Juror M. Kolstad

In her written responses, Ms. Kolstad expressed strong emotions and views favoring the use – automatic use under certain circumstances – of the death penalty. Moral outrage and outcries for vengeance are common initial human reactions to crimes such as murder. Ms. Kolstad certainly did not disavow such emotions and views. However, Ms. Kolstad's outrage gave way to reflection and reason. Despite her intense and seemingly dogmatic responses, Ms. Kolstad recognized – like most conscientious people – some of the moral and ethical conflicts that arise concerning the use of the death

penalty. Though she believed in the adage "an eye for an eye," she did not believe the state should impose the death penalty on everyone who, for whatever reason, kills another human being. She used euthanasia and the Ellie Nesler case as examples. (VI SCT 4812-4813.)

Ms. Kolstad was a conscientious person. She was fully aware that her role as a juror would require her to set aside her general views and feelings on the death penalty. During oral voir dire, Ms. Kolstad repeatedly expressed the need to know the facts before voting on the punishment. (RT 1413-1419.) She told the court that she could perform her jury duties in accordance with the court's instructions and the juror's oath. (RT 1405-1412, 1429-1430.) She indicated clearly that she could be fair and sensible as a juror despite her personal views and feelings on the death penalty. (RT 1415-1416.) She would listen to the evidence and weigh the mitigating circumstances (RT 1423-1425), and consider life without possibility of parole as the appropriate punishment (RT 1413-1414). The trial court properly found that "[Ms. Kolstad's] views on capital punishment would not prevent or substantially impair the performance of her duty as a juror in accordance with [the court's] instructions on the law and her oath." (RT 1431.) This Court should defer to the trial court's ruling on Ms. Kolstad. (Cf. *People v. Weaver, supra,* 26 Cal.4th at p. 911-912 [denial of for-cause challenges in capital murder prosecution to two prospective jurors who initially expressed view that they would automatically vote for the death penalty was not abuse of discretion, where prospective jurors retracted that rigid position when informed of penalty phase process and professed a willingness and ability to follow the trial court's instructions to weigh all the evidence before coming to a penalty decision]; *People v. Farnam, supra,* 28 Cal. 4th at pp. 133-134 [see above]; *Sallahdin v. Gibson, supra,* 275 F.3d at pp. 1224-1225 [see above].)

3. Prospective Juror D. Madden

Mr. Madden had a strong pro-death penalty stance. He was very open and candid about his views. The trial court described him to have been "extremely opinionated." (RT 1551.) For instance, he commented that the death penalty should be automatic for any crime of violence and added that "there should be one and only one automatic appeal which can only be overturned by the governor." (RT 1535-1536; VI SCT 5607.) He wrote that life without the possibility of parole was "free room and board, free medical, dental, conjugal visits, recreation rooms and exercise facilities all at public expense." (RT 1536-1537; VI SCT 5609.) He also wrote that psychiatric and psychological testimony is "a lawyer's ace in the hole to get his client back to the street." (RT 1544.) He indicated during oral voir dire that he would give credence to the opinion of a court-appointed mental health expert, not defense or prosecution hired mental health experts. (RT 1544-1546.)

However, Mr. Madden drew a clear distinction between his opinions and his ability to follow the court's instructions on the law. (RT 1551.) He wrote, in response to question #100, which asked whether he could set aside his personal feelings regarding what he thought the law should be regarding the death penalty and follow the law as the court instructs: "Though I strongly believe in the death penalty, I am also an unswerving supporter of law in general." (VI SCT 5613.) He told the court during oral voir dire:

> I believe I could set aside [my personal views on the death penalty] because I just have great respect for the law. Even though the state of California might not allow that kind of finding, I'm going to rule on the case by the evidence presented and by whatever guidelines are issued. So I really believe I could dissociate myself from that. Bottom line.

(RT 1533.) When questioned by defense counsel, Mr. Madden told her that he could consider life without possibility of parole as an appropriate punishment if after hearing the evidence, the evidence showed that such a punishment was

appropriate. (RT 1537-1538, 1542.) He added that he would have to know the term without possibility of parole was genuine. To which defense counsel asked, "If the Court instructed you that life without possibility of parole does mean that . . . a person will never get out, can you set aside any beliefs you have that that's not true and follow that instruction?" Mr. Madden replied, "I think I'm a fair enough and conscientious enough person to do that." (RT 1537-1538.) When questioned by the prosecutor, Mr. Madden said: "I have such respect for the law and what goes on in the pursuit of justice that I really think I could be fair about that." (RT 1542.) As for his views on psychiatric and psychological testimony, the trial court rehabilitated Mr. Madden. The court asked Mr. Madden, if there were no court-appointed psychologists testimony, could he consider and weigh the prosecution and defense mental health experts "fairly and objectively." (RT 1546-1547.) Mr. Madden answered, "I think I could." (RT 1547.)

The trial court found no reason to believe Mr. Madden's views on capital punishment would prevent or substantially impair the performance of his duties as a juror in accordance with the court's instructions and the juror's oath. (RT 1551-1552.) This Court should defer to the trial court's ruling on Mr. Madden. (Cf. *Miniel v. Cockrell* (5th Cir. 2003) 339 F.3d 331, 339-340 [juror's statements, during voir dire, which indicated that he held a strong personal preference for the death penalty as a punishment for those convicted of capital murder did not evince bias in favor of death penalty so as to deny defendant his right to an impartial jury, where juror's statements also indicated that he understood the difference between his personal feelings and what state law provided]; *People v. Farnam, supra,* 28 Cal.4th at pp. 133-134 [see above]; *People v. Weaver, supra,* 26 Cal.4th at pp. 911-912 [see above].)

4. Prospective Juror M. Lopez

Ms. Lopez clearly favored the use of the death penalty. However, she presented a bit of a conundrum. For instance, she answered on the written questionnaire that she believed the state should impose the death penalty on everyone who, for whatever reason, kills another human being. (VI SCT 5383.) During oral voir dire, she said, "[F]or some cases. I should have wrote 'for some cases' you know, there could be some, you know, leniency on some." Defense counsel sought clarification, asking "Do you think that everyone who kills another person should get the death penalty?" Ms. Lopez replied, "Depending on the situation." (RT 2659.)

Regardless of her personal views, at issue was whether Ms. Lopez could set aside her personal views and feelings aside and follow the court's instructions on the law. As the trial court explained, Ms. Lopez's responses were "ambivalent" and "outright conflicting." (RT 2673.) In the written questionnaire, Ms. Lopez answered "yes" to question #100, which asked "Could you set aside your own personal feelings regarding what you think the law should be regarding the death penalty and follow the law as the court instructs you?" Then she commented, "I know what I feel, that if it is right or wrong if the death penalty is needed or not." (VI SCT 5385.) During oral voir dire, Ms. Lopez told the court that there was no reason why she could not vote for either life without possibility of parole or the death penalty, whichever direction the evidence and law pointed. (RT 2655-2656.) When asked by defense counsel whether she could set aside her feelings, Ms. Lopez said, "No. I think I go by my feelings." Defense counsel repeated, "You couldn't set them aside? Is that what you're saying?" Ms. Lopez replied, "Um, no. If I feel something real strong, no, I wouldn't set them aside." (RT 2661.) When asked whether she thought the death penalty should always be imposed for first-degree murder during an attempted rape, Ms. Lopez replied, "Oh, gosh. Yes."

(RT 2661.) When questioned by the prosecutor, Ms. Lopez stated that her mind was not made up, that she would have to hear all the evidence before voting for the death penalty in a murder during the commission of an attempted rape case. (RT 2663-2664, 2666.) Then she indicated that she could set aside her personal beliefs and consider both death and life without parole as possible punishments and choose one based on the evidence. (RT 2665-2666.) Confused, defense counsel asked Ms. Lopez again whether she could set aside her personal feelings and follow the law as the court instructs. Ms. Lopez emphatically said, "Yes." (RT 2668.)

Ms. Lopez's responses were equivocal and conflicting. However, ultimately, she indicated she could set aside her personal feelings and follow the law as the court instructs. The trial court, though empathizing with defense counsel, determined that Ms. Lopez's views would not prevent or substantially impair the performance of her duties as a juror in accordance with the court's instructions and the juror's oath. (RT 2673-2674.) This Court should defer to the trial court's finding. (Cf. *People v. Farnam, supra,* 28 Cal. 4th at pp. 133-134; *United States v. Ortiz, supra,* 315 F.3d at pp. 892-895; *Sallahdin v. Gibson, supra,* 275 F.3d at pp. 1224-1225.)

5. Prospective Juror S. Lopez

Mr. Lopez, like the other prospective jurors discussed earlier, expressed moral outrage and support for the death penalty in murder cases. (RT 2678-2680.) He acknowledged his initial reaction would be to impose the death penalty. (RT 2681.) He was not, however, fixated on the death penalty. Like most conscientious people, Mr. Lopez harbored some moral and ethical conflicts about the imposition of the death penalty. For instance, he believed in the adage "an eye for an eye" but at the same time, he did not believe that the death penalty should ever be automatic. (RT 2686-2689.) He explained that he would "have to listen to all the facts to see what really . . . happened" (RT

2679) and then consider the appropriate punishment (RT 2681). Mr. Lopez said he would be able to set aside his personal feelings on the appropriateness of the death penalty and follow the court's instructions. (RT 2680-2682.) He explained that his personal feelings were not so strong as to interfere with his ability to be fair and impartial. (RT 2679, 2687-2688.) The trial court found Mr. Lopez to have been "honest and forthright about his ability to set aside his personal feelings." (RT 2690-2691.) This Court should defer to the trial court's rulings. (Cf. *People v. McDermott, supra,* 28 Cal.4th at p. 982; *People v. Farnam, supra,* 28 Cal.4th at pp. 133-134; *United States v. Ortiz, supra,* 315 F.3d at pp. 892-895; *Sallahdin v. Gibson, supra,* 275 F.3d at pp. 1224-1225.)

6. Prospective Juror C. Wiginton

Appellant skews the responses of Ms. Wiginton. Though Ms. Wiginton said she believed in the death penalty (RT 9145) and thought life without parole was expensive (RT 9147), she did not feel the death penalty should be automatic (RT 9146) and she did not believe in the adage "an eye for an eye" (RT 9148). When asked whether she could not consider life without parole if chosen to be juror, Ms. Wiginton responded:

> No. I think that sometimes life in prison is a correct punishment. It depends on the evidence in the case and what the defendant and the public, how they're going to be better served. It just depends. I would have to hear evidence. But, yeah, it's expensive.

(RT 2104.) She reiterated that she could set aside her personal views and consider life without parole as an option. (*Ibid.*) The record clearly supports the trial court's ruling. (Cf. *People v. McDermott, supra,* 28 Cal.4th at p. 982; *People v. Jenkins, supra,* 22 Cal.4th at p. 989.) As for possible bias arising from having two daughters, ages 12 and 15, Ms. Wiginton was clear that she would not be biased against the defense because there were child victims of similar age in this case. (RT 2102-2103, 2105-2106.) As for having formed

the opinion that, if the newspaper accounts of the crimes were true, "the ultimate awful crime" had been committed (RT 2105), Ms. Wiginton is a sentient being. Having read about the crime does not imply bias. There was no indication that she was biased against the defense because of the media coverage. (RT 2107-2108.) As for her nervousness, she explained that she was nervous because she was there with all these people watching her. (RT 2106.) Appellant's contention as to Ms. Wiginton is unfounded.

7. Prospective Juror V. Donovan

Mr. Donovan approved of the death penalty and believed too many people got away with murder. (VI SCT 2185-2186.) He further expressed the view that the death penalty should not be automatic except for premeditated murder. (VI SCT 2186.) Yet, Mr. Donovan clearly indicated that he could set aside his personal feelings and follow the law as the court instructed. (RT 795; VI SCT 2191.)

At one point during oral voir dire Mr. Donovan equivocated. When defense counsel asked whether he leaned toward the death penalty or to life without parole for someone convicted of first-degree murder with one or more special circumstances found true, Mr. Donovan responded, "Well, I'll go with what the judge instructs us." (RT 801.) Unsatisfied with the response, defense counsel told him that the appropriate judgment would be his judgment and then asked whether he could ever vote for life without parole for someone convicted of first-degree murder with one or more special circumstances found true. Mr. Donovan said, "I doubt it very much." (RT 801-802.) The court rehabilitated Mr. Donovan, asking:

> [I]f I told you that you're to vote for one or the other, either life without possibility of parole or death, both are to receive your equal, fair consideration, could you set aside your personal feelings and follow that instruction?

Mr. Donovan responded, "Yes, sir." (RT 802.) The court sought assurance: "Or do you think you might find it difficult, if not impossible, to set aside your personal feelings." Mr. Donovan reiterated that he could set aside his feelings." (RT 803.)

The trial court found Mr. Donovan's responses somewhat conflicting and equivocal – "capable of multiple inferences." (RT 807.) The court was of the impression that Mr. Donovan would be able to "faithfully and impartially apply the law." (*Ibid.*) The court then found that "his personal views on capital punishment would not prevent or substantially impair his performance as his duty as a juror in accordance with [the court's] instructions on the law and his oath." (*Ibid.*) This Court should defer to the trial court's ruling. (Cf. *People v. Farnam, supra,* 28 Cal.4th at pp. 133-134; *People v. Weaver, supra,* 26 Cal.4th at pp. 911-912; *United States v. Ortiz, supra,* 315 F.3d at pp. 892-895; *Sallahdin v. Gibson, supra,* 275 F.3d at pp. 1224-1225.)

8. Prospective Juror L. McDaniel

Reverend McDaniel favored the use of the death penalty for "the protection of law abiding citizens and the maintaining of a civilized society." (VI SCT 5988; see also RT 1623.) In response to question #99(b), he wrote in part, "I strongly support the death penalty." (VI SCT 5993.) He commented, "The shame of America is that we have not enforced the death penalty." (VI SCT 5990; RT 1622-1623.) Reverend McDaniel disfavored life without parole. He doubted whether life without parole is a good alternative in most cases. (VI SCT 5990; RT 1620-1622.) He stated that, as a principle, he was predisposed to the death penalty for certain crimes (VI SCT 5988; RT 1627-1628) and automatic death penalty for "the most serious of premeditated murder" (VI SCT 5989). He stated what he believed the law on the death penalty ought to be: that the defense would need to show "extenuating circumstances" as to why the death penalty should not be imposed for someone found guilty of first-degree

murder and one or more special circumstances found true. (RT 1621-1622, 1624.) He straightforwardly acknowledged his "strong leaning toward[] the death penalty." (RT 1622.) In addition, he expressed doubts about the value of psychological and psychiatric testimony in court; though earlier, he wrote that some psychiatry or psychology, "depending on qualifications and approach, can be very valuable." (VI SCT 5980-5981.)

Regardless of his personal views, Reverend McDaniel clearly indicated that he could set aside his feelings and views on what the law should be regarding the death penalty, and vote based on a fair and objective evaluation of the evidence and the court's instructions on the law. He indicated so on the written questionnaire and reiterated so during oral voir dire. (VI SCT 5994; RT 1615, 1624-1626.) In response to question #95, he commented: "As a juror my guide would be the laws of the State of California regardless of my personal beliefs." (VI SCT 5991.) He recognized, "I have to operate within the framework of the law." (RT 1616.) In response to whether he was so disposed to the death penalty that he could not consider life without parole, Reverend McDaniel responded, "[W]e all have to look at the extenuating circumstances and judge accordingly." (RT 1624.) Reverend McDaniel stated that he could consider both possible sentences, life without parole as well as the death penalty. (RT 1627.) Furthermore, following a few questions by the prosecutor, Reverend McDaniel retracted his assumption that the defense would bear the burden of showing extenuating circumstances as to why the death penalty should not be imposed:

> The explanation that you gave there as to all the evidence being presented, I guess I was just assuming that it would be the defense that would be presenting the evidence, but it would be the total evidence presented by both sides.

(*Ibid.*)

The trial court was of the impression that:

> [Reverend McDaniel] is very genuinely would do his very best to follow the instructions of the Court and follow his oath as a juror and that his views on capital punishment, some of these other subjects, burden of proof would – certainly would I don't think impair his performance as a juror at all, his duty as a juror in accordance with my instructions or his oath.

(RT 1632-1633.) This Court should defer to the trial court's finding. (Cf. *People v. Farnam, supra,* 28 Cal. 4th at pp. 133-134; *People v. Weaver, supra,* 26 Cal.4th at pp. 911-912; *Miniel v. Cockrell, supra,* 339 F.3d at pp. 339-340; *United States v. Ortiz, supra,* 315 F.3d at pp. 892-895; *Sallahdin v. Gibson, supra,* 275 F.3d at pp. 1224-1225.)

B. Forgoing Deferential Review Is Contrary To *Wainwright v. Witt*; In Any Event, The Trial Court Did Not Engage In A Discriminatory Pattern Of Rulings On Challenges For Cause Favoring The Prosecution

As explained in the previous argument, forgoing deferential review is contrary to *Wainwright v. Witt, supra,* 469 U.S. at pp. 424-426. (See *People v. Coleman, supra,* 46 Cal.3d at p. 768.) In any event, the record does not support appellant's contention that the trial court applied the standard enunciated in *Witt* in an un-evenhanded manner favoring the prosecution. (Cf. *People v. Jenkins, supra,* 22 Cal.4th at pp. 989-990.)

C. The Trial Court Did Not Improperly Restrict Voir Dire Of Mr. Madden

Appellant also argues that the trial court improperly restricted voir dire of Mr. Madden. (AOB 329-331.) Not so. The trial court did not prevent defense counsel from making reasonable inquiry into the fitness of Mr. Madden to serve on the jury. Regardless, even if the trial court erred, appellant's constitutional right to a fair and impartial jury was not affected because Mr. Madden did not sit on his jury.

Defense counsel had posed the following question to Mr. Madden: "If you heard evidence about someone having some prior bad acts or prior convictions in their life would that automatically make you vote for the death penalty every time?" The prosecutor objected on the ground that the question called for "a judgment on assumed facts." The trial court sustained the objection, noting that defense counsel had pointed out that "both aggravating and mitigating circumstances will be presented." The trial court then asked Mr. Madden whether there was "anything" that he was aware of then that "might trigger [him] to just automatically vote" for the death penalty. (RT 1539.)

"[P]art of the guarantee of a defendant's right to an impartial jury is an adequate voir dire to identify unqualified jurors." (*Morgan v. Illinois, supra,* 504 U.S. at p. 729.) "[T]he trial court has "'considerable discretion . . . to contain voir dire within reasonable limits.'" (*People v. Jenkins, supra,* 22 Cal.4th at p. 990, quoting *People v. Williams* (1981) 29 Cal.3d 392, 408.) "This discretion extends to the process of death-qualification voir dire established by . . . *Wainwright v. Witt, supra.*" (*People v. Jenkins, supra,* 22 Cal.4th at p. 990, citing *People v. Ramos* (1997) 15 Cal.4th 1133, 1158.)

Death qualification voir dire seeks to determine the views of the prospective jurors about capital punishment in the abstract, without regard to the evidence produced at trial – to determine whether the prospective juror would vote for or against the death penalty without regard to evidence produced at trial. (*People v. Davenport* (1995) 11 Cal.4th 1171, 1203-1204; *People v. Medina* (1995) 11 Cal.4th 694, 746; *People v. Clark, supra,* 50 Cal.3d at pp. 596-597.) Death qualification voir dire

> must not be so abstract that it fails to identify those jurors whose death penalty views would prevent or substantially impair the performance of their duties as jurors in the case being tried.

(*People v. Cash* (2002) 28 Cal.4th 703, 721.)

> On the other hand, it must not be so specific that it requires the prospective jurors to prejudge the penalty issue based on a summary of the mitigating and aggravating evidence likely to be presented. [Citation.]

(*Id.* at pp. 721-722) "In deciding where to strike the balance in a particular case, trial courts have considerable discretion." (*Id.* at p. 722.) "To be an abuse of discretion, the trial court's failure to ask questions 'must render the defendant's trial fundamentally unfair.'" (*People v. Cleveland* (2004) 32 Cal.4th 704, 737, quoting *Mu'Min v. Virginia* (1991) 500 U.S. 415, 425-426.) "'Such discretion is abused if the questioning is not reasonably sufficient to test the jury for bias or partiality.'" (*People v. Cleveland, supra,* at p. 737, quoting *People v. Box* (2000) 23 Cal.4th 1153, 1179.)

Here, by asking whether he would automatically vote for the death penalty if evidence of a prior conviction or bad act was presented, defense counsel sought from Mr. Madden an advisory opinion based on a preview of a particular evidence in aggravation.

> [D]eath qualifying voir dire should focus on juror attitudes toward the death penalty in the abstract, and should not be used to seek a prejudgment of the facts to be presented at the trial.m [Citation.]

(*People v. Pinholster, supra,* 1 Cal.4th at p. 915.) "'It is not a proper object of voir dire to obtain a juror's advisory opinion based on a preview of the evidence.'" (*People v. Sanders* (1995) 11 Cal.4th 475, 539, quoting *People v. Mason* (1991) 52 Cal.3d 909, 940 [finding no abuse of discretion by the trial court in denying defendant's request to summarize the facts of the prosecution case and to ask each juror based on the summary whether he or she would automatically vote for death]; e.g., *People v. Jenkins, supra,* 22 Cal.4th at pp. 990-991 [not error to refuse to allow counsel to ask juror given "detailed account of the facts" in the case if she "would impose" death penalty].) Many persons who are qualified to sit as jurors in a capital case, if presented with a

violent habitual offender in a murder case, would conclude that they would likely, if not automatically, vote for death.

Death qualification voir dire "is directed to whether, without knowing the specifics of the case, the juror has an 'open mind' on the penalty determination." (*People v. Clark, supra,* 50 Cal.3d at p. 597.) The court's question – whether there was anything that he was aware of that might trigger an automatic vote for death or life without parole – struck a good balance between being overly abstract and being too specific. It was not so abstract as to have been of no significance in determining whether Mr. Madden's death penalty views would prevent or substantially impair the performance as a juror in this case. (Cf. *People v. Jenkins, supra,* 22 Cal.4th at p. 991 ["Because any question concerning a prospective juror's attitude toward the concept of free will is highly philosophical, it was within the trial court's discretion to conclude such a question would not be fruitful for the purpose of death-qualification voir dire."].) It was not so specific as to have called for a prejudgment of the fact and penalty. The trial court did not abuse its discretion in restricting voir dire of Mr. Madden. (Cf. *People v. Sanders, supra,* 11 Cal.4th at pp. 538-539 [concluding that the trial court properly exercised its discretion to disallow the proposed case-specific hypothetical questions].)

The trial court did not prevent defense counsel "from making *reasonable* inquiry into the fitness of [Mr. Madden] to serve on the jury." (*People v. Wright, supra,* 52 Cal.3d at p. 419 [italics in original].) Mr. Madden had indicated that he favored the death penalty for "habitual offenders of lesser crimes." (VI SCT 5607.) He wrote that the death penalty should be automatic for any crime of violence. (VI SCT 5608.) During voir dire, Mr. Madden said that habitual thief who committed crimes of violence should receive the death penalty. (RT 1535.) Defense counsel then asked Mr. Madden whether he could set aside his personal views and feelings, hear the evidence, follow the

court's instructions on the law, and seriously consider life without parole as an appropriate punishment. Mr. Madden responded in the affirmative. (RT 1537-1538.) Defense counsel also asked Mr. Madden whether he thought a person convicted of first-degree murder during the commission of an attempted rape or a robbery should receive the death penalty. (RT 1540.) Defense counsel was not prevented from attempting to show that Mr. Madden harbored a specific bias that would cause him to vote for the death penalty without regard to mitigating evidence or the court's instructions. (Cf. *People v. Sanders, supra,* 11 Cal.4th at pp. 538-539.)

The voir dire of Mr. Madden is markedly different from the voir dire of the juror in *People v. Cash, supra*. There, the trial court prohibited defense counsel from inquiring there were "any particular crimes" or "any facts" that would cause that juror "automatically to vote for the death penalty." Defense counsel in *Cash* wanted to determine whether prospective jurors could return a verdict of life without parole for a defendant who had killed more than one person, without revealing that defendant had killed his grandparents. The trial court precluded mention of any general fact or circumstance not expressly pleaded in the information. (*People v. Cash, supra*, 28 Cal.4th at pp. 719-723.) Here, Mr. Madden had already indicated that he thought that the death penalty should invariably and automatically be imposed on habitual thieves who commit violent crimes. But he made clear that he could set aside his personal views and feelings, hear the evidence, follow the court's instructions on the law, and seriously consider life without parole as an appropriate punishment. Mr. Madden expressed a specific bias but clearly indicated that such a bias would not cause him to vote for the death penalty without regard to mitigating evidence or the court's instructions.

Regardless, appellant was not prejudiced. Even if the trial court erred, appellant's constitutional right to a fair and impartial jury was not affected

because Mr. Madden did not sit on his jury. (*People v. Ramos, supra,* 15 Cal.4th at p. 1157.)

D. Respondent Does Not Contest That The Issue, Whether The Trial Court Prejudicially Erred In Denying Defense Challenges For Cause To The Eight Prospective Jurors, Has Been Preserved For Review

This Court has stated:

> [I]n order to demonstrate that his or her right to a fair and impartial trial was affected by any error in the trial court's refusal to sustain the defendant's challenges for cause, a defendant must have employed a peremptory challenge to excuse the juror or jurors in question, exhausted the defendant's peremptory challenges or justified the failure to do so, and communicated to the trial court the defendant's dissatisfaction with the jury ultimately selected.

(*People v. Cunningham, supra*, 25 Cal.4th at p. 976.)

Here, the defense had expressed dissatisfaction with the *Hovey* qualified venire panel (RT 3014-3019) and with the jury panel constituted (RT 3221, 3296-3298). The defense had used 19 of its 20 peremptory challenges. During voir dire, defense counsel used peremptory challenges to remove five of the eight prospective jurors: V. Donovan (RT 3145), S. Lopez (RT 3145), D. Madden (RT 3145), L. McDaniel (RT 3146), and C. Wiginton (RT 3181-3182, 3186). Defense counsel expressed dissatisfaction with the 12 jurors selected and explained that she chose not to use the defense's remaining peremptory challenge because the next juror in line was M. Lopez. (RT 3296-3297.) Defense counsel asked for more peremptory challenges; the court denied the defense's request. (RT 3297.) For the selection of alternate jurors, the defense was provided three additional peremptory challenges. The defense used two of the three peremptory challenges to remove M. Lopez and S. Fletcher. (RT 3308-3309.)

There was more than a speculative possibility that the 12th juror would have been objectionable to the defense if the remaining peremptory challenge had been used. M. Lopez was the next juror in line. Thus, the issue, whether the trial court prejudicially erred in denying defense challenges for cause to the eight prospective jurors, should be deemed preserved for review. (Cf. *People v. Danielson* (1992) 3 Cal.4th 691, 713-714 [rejecting defendant's argument that he might have ended up with a juror who was even more unfavorable if he had exercised his peremptory challenge to exclude a particular juror, and stating, "But the fact remains that counsel expressed satisfaction with the jury selected . . ., without using his remaining peremptory challenge and without requesting additional challenges. [¶] . . . [¶] . . . [B]y expressing his satisfaction with the jury without exhausting such challenges or requesting additional challenges, defendant waived his right to complain about the court's failure to excuse [a particular juror] for cause."]; *People v. Johnson* (1992) 3 Cal.4th 1183, 1211 [rejecting defendant's contention that he should not have been required to exhaust his peremptory challenges because he knew, when the 12th juror was chosen, that there were at least 5 remaining people on the panel who were objectionable to him]; *People v. Osband* (1996) 13 Cal.4th 622, 670 [rejecting defendant's justification, "that someone worse for the defense might be called and he had to hedge against that possibility," for failing to exhaust his peremptory challenges].)

E. Even If The Trial Court Erred In Denying Any Or All Of Defense Challenges For Cause To The Seven Prospective Jurors, Appellant Was Not Prejudiced Because None Of The Prospective Jurors Whom Defense Found Objectionable Actually Sat On His Jury; In Other Words, Appellant's Constitutional Right To A Fair And Impartial Jury Was Not Violated

Appellant argues that the alleged errors in denying defense challenges of cause to the seven prospective jurors violated his constitutional right to a fair

and impartial jury. (AOB 333-337.) His claim is untenable. Even if the trial court erred in denying any or all of defense challenges for cause to the seven prospective jurors, appellant was not prejudiced because none of the prospective jurors whom defense found objectionable actually sat on his jury.

"Any claim that the jury was not impartial . . . must focus not on [the juror who was excused], but on the jurors who ultimately sat." (*Ross v. Oklahoma, supra,* 487 U.S. at p. 86.) None of the eleven prospective jurors – including the seven here – whom the court denied defense challenges to, sat on appellant's jury. Appellant used six of its twenty peremptory challenges to remove prospective jurors objectionable to him. Appellant used two of its three peremptory challenges to remove prospective alternate jurors objectionable to him. The defense, during voir dire, never suggested any of the 12 sitting jurors was not impartial. Thus, appellant's constitutional right to a fair and impartial was not violated. (Cf. *People v. Weaver, supra,* 26 Cal.4th at p. 913.)

Appellant's contention that "[i]n effect, [he] received only fourteen peremptory challenges of the guaranteed twenty," does not affect the prejudice analysis.

> [P]eremptory challenges are not of constitutional dimension. They are a means to achieve the end of an impartial jury. So long as the jury that sits is impartial, the fact that the defendant had to use a peremptory challenge to achieve that result does not mean the Sixth Amendment was violated.

(*Ross v. Oklahoma, supra,* 487 U.S. at p. 88 [internal citations omitted]; accord *United States v. Martinez-Salazar* (2000) 528 U.S. 304, 313-314.) This Court has stated:

> It is well settled that even if the trial court erred in denying a defendant's motion to remove a juror for cause, that error will be considered harmless if [n]one of the prospective jurors whom defendant found objectionable actually sat on his jury. [Citations.] [W]e reject the notion that the loss of a peremptory challenge constitutes a violation of the constitutional right to an impartial jury. [Citation.] [Citations.]

(*People v. Boyette, supra*, 29 Cal.4th at p. 419 [internal quotations omitted.].)

F. Automatic Reversal Is Not Applicable Here Because The Record Does Not Support Appellant's Contention That The Trial Court Engaged In A Discriminatory Pattern Of Rulings On Challenges For Cause Favoring The Prosecution

Appellant argues that even if prejudice cannot be shown, reversal of the guilt, sanity, and penalty phase judgments should be automatic because

> the record as a whole shows that the trial court repeatedly and deliberately misapplied the law, and forced the accused to use peremptory challenges to correct the court's errors.

(AOB 337-339.) Respondent agrees that if appellant can show that the trial court engaged in a discriminatory pattern of rulings on the challenges for cause favoring the prosecution, then the proper remedy would be to reverse appellant's death sentence – not the guilt and sanity verdicts. Essentially, appellant would have shown that the venire and thus, the jury, was stacked with death prone individuals. (Cf. *Gray v. Mississippi, supra*, 481 U.S. at pp. 666-667; *Davis v. Georgia, supra,* 429 U.S. at p. 123.) However though, as explained in the previous argument, the record does not support such a contention. Absent such a showing, a harmless error analysis applies to a trial court's erroneous failure to excuse a juror for cause, even though the failure to remove that juror for cause may have resulted in a jury panel different from that which would have otherwise decided the case. (*Ross v. Oklahoma, supra,* 487 U.S. at pp. 86-87.)

Accordingly, appellant's entire argument should be rejected.

XXX.

A PRIMA FACIE CLAIM UNDER *BATSON/WHEELER* HAD NOT BEEN MADE; THE PROSECUTOR'S PROFFERED RACE-NEUTRAL REASONS ARE NEITHER CONTRADICTED BY THE RECORD NOR INHERENTLY IMPLAUSIBLE AND THUS THE TRIAL COURT NEED NOT QUESTION THE PROSECUTOR OR MAKE DETAILED FINDINGS; COMPARATIVE JUROR ANALYSIS IN THE *BATSON/WHEELER* CONTEXT "FOR THE FIRST TIME ON APPEAL" IS INAPPROPRIATE

Appellant argues that the prosecutor used his peremptory challenges to remove potential jurors on the basis of race, violating his constitutional right to a fair and impartial jury and the concomitant right to a fair trial. (AOB 340-366.) He is mistaken. Appellant failed to make a prima facie showing of group bias. Even if a prima facie case had been made, the prosecutor's proffered race-neutral reasons were neither contradicted by the record nor inherently implausible; and thus the trial court need not question the prosecutor or make detailed findings. Employing comparative juror analysis in the *Batson/Wheeler* context for the first time on appeal is inappropriate.

A. The Record

The prosecutor used peremptory challenges to excuse four Black panelists: S. Blue (RT 3159), J. Johnson (RT 3159), A. Mitchell (RT 3209), and T. Cato (RT 3293). Appellant twice moved for a new jury panel under *Batson v. Kentucky* (1986) 476 U.S. 79 and *People v. Wheeler* (1978) 22 Cal.3d 258, arguing that the prosecutor's use of peremptory challenges to excuse these potential jurors were racially motivated.

The first *Batson/Wheeler* motion was made after prospective jurors S. Blue, J. Johnson, and A. Mitchell were excused. (RT 3159, 3209-3210.) The basis for the motion, defense counsel explained, was that the prosecutor

excused three of the four Black panelists before the court that day. Defense counsel felt that the only reason the prosecutor excused these prospective jurors was because of their race – they are Black and appellant is Black. (RT 3211-3212, 3214-3215.) In response, the prosecutor argued that a prima facie case, that prospective jurors were being excluded based on race, had not been made. He stated that the panel originally had six Blacks, including M. Perry who was excused on defense motion for substantial impairment of ability to remain fair and impartial on the issue of insanity (RT 3091-3095); J. Fifer, who defense and prosecution stipulated should be excused due to a sleep disorder (RT 3103-3106); and J. Cregar, who remained a panelist (RT 3213). (RT 3212-3214.) The trial court took judicial notice that Blacks comprised about five percent of the Fresno County population in the 1990 census; which counted 33,423 Blacks out of a total population of 490,000. The court commented that "we have been fortunate on this particular panel to have a great number of Afro-American folks." (RT 3215-3216.) The trial court then ruled:

> I found no particular racial bias with [the prosecutor's] challenges. I count that he has made 15 challenges thus far, and out of those he did exercise a challenge against three Black potential jurors. He certainly has passed and has not exercised the challenge against Mrs. Cregar, but I don't find the prima facie case has been met in this case, namely, that he has excused people on racial grounds.

(RT 3216.) The court then asked the prosecutor to set forth reasons for the peremptory challenges of the Black panelists, in the event "there is a higher authority" that disagrees with the finding of no prima facie case. (RT 3216-3217.) The prosecutor then explained:

> Potential Juror Johnson . . . was a person who at one point in her life told us she did not believe in the death penalty. And that is one thing that I considered. In addition to that is the fact that she is a person that has been referred to by yourself, here in the courtroom, as judge and she's identified herself as an Administrative Law Judge. And it is my personal view that no

such person should be part of a jury of 12 persons drawn from the community to reach a legal judgment and decision because of the extreme potential for that person to, whether it be consciously or unconsciously, control the deliberative process. Persons – the other 11 people can look to that person to explain the instructions. "Tell us what this is all about." I just don't think that . . . if I've got a peremptory, that I'm ever going to let a judge of any sort be a juror on a case that I'm trying.

. . . . . .

On the basis of [Ms. Blue's] answer in the questionnaire that's part of the record and her responses here today, I had a concern about that, about given the serious nature of the charges and her sometimes articulation of a belief that if somebody goes out and just kills, there's got to be something wrong with that person in their mind from the fact of killing someone –

. . . . . .

Mr. Mitchell was someone who both times that he – was it three times? I don't remember if he was in on hardship. But both times I listened to Mr. Mitchell speak. And at the time that I talked with him during the private questioning, I was impressed with Mr. Mitchell – he negatively impressed me as a person that I wanted a juror from – just from his demeanor and – but more importantly than that, his – what he said during the individual questioning when he spoke about his belief that – and these were my words, not his, but we talked about his concept back and forth, that in a courtroom that jurors could be hoodwinked by the advocates in the case. And that troubled me because of the serious nature of the charges and the nature of the possible sentence, should we reach that part of the case, and it troubled me not only as it might bear on what I might ask Mr. Mitchell to find, but also as it might impact on what anybody would ask him to find if he's got lurking in the back of his mind a belief that somehow, even though he is sitting as one of 12 and listening to evidence and judging the credibility of witnesses, that he could be hoodwinked, he could be led to believe something that was not true. It gave me cause to be concerned about his ultimate ability to make a decision that he could live with.

(RT 3218-3220.) The court then restated that the *Batson/Wheeler* motion was denied. (RT 3220.)

The *Batson/Wheeler* motion was renewed after prospective juror T. Cato was excused. (RT 3291.) Defense counsel noted, and the trial court agreed, that Mr. Cato "obviously appeared" to be Black. Defense counsel further indicated that Mr. Cato was "the only Afro-American who ha[d] come up since [the] last [*Batson/Wheeler*] motion." (RT 3293.) The prosecutor made no comment. The trial court again found that no prima facie case had been made. The court also again asked the prosecutor to state his reasons for excusing Mr. Cato, in the event that the higher courts disagreed with the finding of no prima facie case. The prosecutor explained:

> Mr. Cato is someone who much like Dr. Gonzales and much like Mr. Bickley has specific training and experience in issues that bear on this case, and on that basis alone it's my view in representing my client that if I have a peremptory challenge to use that I will, that a jury is in the same way that it is not to be in my view controlled by any one personality from a particular relevant profession as –
>
> . . . .
>
> As I mentioned concerning the judge yesterday and as I would mention concerning the doctor today and Mr. Bickley also.
>
> . . . .
>
> Mr. Cato's questionnaire revealed what I understood to be some advanced academic work, even in the area of psychology and counseling.
>
> And in addition to that similar to Mr. Cordova and his nonwork good works as in the sense of ministering to the people in the jail and the sense of Mr. Cato being involved in certain kinds of social programs, I was concerned about the degree of sensitivity that a juror such as that might have when asked or when appeals were made to that person's sensitivities concerning social factors, environmental factors of the defendant.
>
> And, also, regardless of the view that Mr. Cato would take of whether he could work something out or not he initially brought to the Court's attention something that was important to him, the opportunity for promotional advancement that he expressed would be important to his career and that people in this area were behind him on, and he felt that right now was a time he could avail himself of that.

> And all of those factors taken together caused me to exercise a peremptory on Mr. Cato.

(RT 3294-3296.) The trial court restated that the *Batson/Wheeler* motion was denied. (RT 3296.)

B. Discussion

> [T]he use of peremptory challenges to remove prospective jurors solely on the basis of a presumed group bias based on membership in a racial group violates both the state and federal Constitutions.

(*People v. Turner* (1994) 8 Cal.4th 137, 164; *People v. Wheeler, supra,* 22 Cal.3d at pp. 276-277; *Batson v. Kentucky, supra,* 476 U.S. at p. 89.)

> Group bias is a presumption that jurors are biased merely because they are members of an identifiable group, distinguished on grounds such as race, religion, ethnicity, or gender.

(*People v. Garceau* (1993) 6 Cal.4th 140, 170.)

> If a party believes an opponent is improperly using peremptory challenges for a discriminatory purpose, that party must make a timely objection and a prima facie showing that the jurors are being excluded on the basis of group bias.

(*People v. Crittenden, supra,* 9 Cal.4th at p. 115 [internal quotations and citations omitted].)

> To establish a prima facie case, the moving party should first make as complete a record as possible; second, the moving party must establish that the persons excluded are members of a cognizable group; and third, the moving party must show a strong likelihood that such persons are being challenged because of group association.

(*People v. Crittenden, supra,* 9 Cal.4th at p. 115 [internal quotations and citations omitted].)

If the trial court finds that the defendant has established a prima facie case, "the burden shifts to the prosecution to provide 'a race-neutral explanation

related to the particular case to be tried' for the peremptory challenge." (*People v. Turner, supra,* 8 Cal.4th at p. 164 [internal citations omitted].)

> The party seeking to justify a suspect excusal need only offer a genuine, reasonably specific, race or group-neutral explanation related to the particular case being tried.

(*People v. Arias* (1996) 13 Cal.4th 92, 136.) "Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." (*Hernandez v. New York* (1991) 500 U.S. 352, 360 (plur. opn. of Kennedy, J.).) The proffered race-neutral explanation need not be "persuasive, or even plausible." (*Purkett v. Elem* (1995) 514 U.S. 765, 768 [holding that prosecutor's proffered explanation for peremptory challenge of black male, that juror had long, unkempt hair, a moustache and a beard, was race-neutral and satisfied prosecution's burden of articulating nondiscriminatory reason for the strike].)

> [T]he explanation need not be sufficient to justify a challenge for cause. Jurors may be excused based on "hunches" and even "arbitrary" exclusion is permissible, so long as the reasons are not based on impermissible group bias.

(*People v. Turner, supra*, 8 Cal.4th at p. 165; internal citations omitted.)

Once the proponent of the challenge has satisfied this burden of production, the trial court must then decide whether the opponent of the challenge has proved purposeful racial discrimination. (*Purkett v. Elem, supra,* 514 U.S. at pp. 767-768; *Hernandez v. New York, supra,* 500 U.S. at pp. 358-359.) The trial court must make

> a sincere and reasoned attempt to evaluate the prosecutor's explanation in light of the circumstances of the case as then known, his knowledge of trial techniques, and his observations of the manner in which the prosecutor has examined members of the venire and has exercised challenges for cause or peremptorily.

(*People v. Johnson* (1989) 47 Cal.3d 1194, 1216.) At this step, "implausible or fantastic justifications may (and probably will) be found to be pretexts for

purposeful discrimination." (*Purkett v. Elem, supra,* 514 U.S. 765, 768-769.) "[A] 'legitimate reason' is not a reason that makes sense, but a reason that does not deny equal protection." (*Purkett v. Elem, supra,* 514 U.S. at p. 769 [citation omitted].)

> The proper focus of a *Batson/Wheeler* inquiry . . . is on the subjective genuineness of the race-neutral reasons given for the peremptory challenge, not on the objective reasonableness of those reasons.

(*People v. Reynoso* (2003) 31 Cal.4th 903, 924.)

This Court reviews a trial court's determination regarding the genuineness and legitimacy of a prosecutor's justifications for exercising peremptory challenges "with great restraint." (*People v. Ervin* (2000) 22 Cal.4th 48, 74 [internal quotations and citation omitted].) "[T]here is a general presumption that a party exercising a peremptory challenge is doing so on a constitutionally permissible ground." (*People v. Reynoso, supra,* 31 Cal.4th at p. 908 [internal quotations and citation omitted]; *People v. Clair* (1992) 2 Cal.4th 629, 652.) "Great deference" is given "to the trial court's ability to distinguish bona fide reasons for the exercise from sham excuses." (*People v. Hayes* (1999) 21 Cal.4th 1211, 1284-1285; see *People v. Wheeler, supra,* 22 Cal.3d at p. 282; *Batson v. Kentucky, supra,* 476 U.S. at p. 98, fn. 21.)

> So long as the trial court makes a sincere and reasoned effort to evaluate the nondiscriminatory justifications offered, its conclusions are entitled to deference on appeal.

(*People v. Burgener* (2003) 29 Cal.4th 833, 863-864.)

1. Appellant Failed To Show A Strong Likelihood, Or A Reasonable Inference, That Potential Jurors Johnson, Blue, Mitchell, And Cato Were Challenged Because Of Their Race

Here, the defense had not made a prima facie case under *Batson/Wheeler*. This Court reviews a trial court's finding of no prima facie

case "with considerable deference." (*People v. Johnson* (2003) 30 Cal.4th 1302, 1325; *Tolbert v. Page* (9th Cir. 1999) 182 F.3d 677, 689-690.)

> When a trial court denies a *Wheeler* motion because it finds no prima facie case of group bias was established, the reviewing court considers the entire record of voir dire. If the record suggests grounds upon which the prosecutor might reasonably have challenged the jurors in question, we affirm.

(*People v. Davenport, supra,* 11 Cal.4th at p. 1200; *People v. Howard* (1992) 1 Cal.4th 1132, 1153-1155.)[81]

At trial, defense counsel's sole basis for the *Batson/Wheeler* motion was that the prosecutor used peremptory challenges to excuse four of the seven Black venire members. (RT 3211-3212, 3214-3215, 3292-3294.) Defense had failed to establish a strong likelihood, or a reasonable inference, that these persons were being challenged because of their race. (Cf. *People v. Turner, supra,* 8 Cal.4th at p. 167 [no prima facie case made where "the only bases for

---

81. Appellant argues that this Court should review de novo the prima facie case issue because

> [a]t the time of [his] trial, . . . the California courts were still applying the unconstitutionally relaxed standard of scrutiny established by . . . *People v. Bernard* (1994) 27 Cal.App.4th 458, 465, overruled by *People v. Box, supra,* 23 Cal.4th at p. 1188, fn. 7.

(AOB 343-344; see, e.g., *Cooperwood v. Cambra* (2001) 245 F.3d 1042, 1047.) This Court has stated: "a 'strong likelihood' means a 'reasonable inference.'" (*People v. Box, supra,* 23 Cal.4th at p. 1188, fn. 7; accord, *People v. Johnson, supra,* 30 Cal.4th at pp. 1314-1317; *People v. McGee* (2002) 104 Cal.App.4th 559, 568.) *Box* "disapprove[d] *Bernard* to the extent it is inconsistent with" *Wheeler*, and thus announced that *Wheeler* and *Batson* have always been in alignment. *Box* merely clarified the language used in *Wheeler*. "The clarified law is merely a statement of what the law has always been." (*Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232, 243.) Regardless, jury selection in this case took place in 1993, before the *Bernard* decision was filed on August 3, 1994. Prior to *Bernard*, at least another District Court of Appeal had held that the "strong likelihood" showing under *Wheeler* and the "reasonable inference" showing under *Batson* were the same. (*People v. Fuller* (1982) 136 Cal.App.3d 403, 423.)

establishing a prima facie case cited by defense counsel were that all of the challenged prospective jurors were Black and either had indicated that they could be fair and impartial or in fact favored the prosecution"]; *People v. Box, supra,* 23 Cal.4th at pp. 1188-1189 [insufficient showing for prima facie case where only basis for establishing a prima facie case cited by defense counsel was that the prospective jurors – like defendant – were Black]; *People v. Arias, supra,* 13 Cal.4th at p. 136, fn. 15 [no prima case made where "defendant merely indicated the number and order of minority excusals and compared the number of such excusals against the representation of such minority groups in the entire venire"]; *People v. Farnam, supra,* 28 Cal.4th at pp. 136-137 [no prima facie showing where the only stated bases were (1) four of the first five peremptory challenges were against Blacks, and (2) a small minority of the panel members were Black]; *People v. Rousseau* (1982) 129 Cal.App.3d 526, 536-537 [defense counsel's statement that "there were only two [B]lacks on the whole panel, and they were both challenged by the district attorney" fails to establish a prima facie case].)[82/]

The record suggests valid race-neutral grounds upon which the prosecutor might reasonably have challenged the jurors in question. First, the prosecutor might reasonably have challenged Ms. Johnson based on her

---

82. In conjunction with his argument for de novo review, appellant notes the statistical disparity of peremptory challenges between Blacks and others in this case. He then relies on *Miller-El v. Cockrell* (2003) 537 U.S. 322 in further arguing that the record shows a reasonable inference that the prosecutor was using peremptory challenges on the basis of race. (AOB 344-346.) *Miller-El* is inapposite here. As this Court explained, the high court in *Miller-El*

> did not cite the statistical evidence to show that it alone necessarily established a prima facie case, but only to support the overall conclusion that the merits of the habeas corpus petition were sufficiently debatable that the federal appellate court should have permitted an appeal.

(*People v. Johnson, supra,* 30 Cal.4th at pp. 1327-1328.)

occupation. Ms. Johnson was an administrative law judge. (VI SCT 4518.) There was thus a strong likelihood that other jurors would look to her for guidance or that she would control the deliberative process. "Excluding jurors because of their profession . . . is wholly within the prosecutor's prerogative." (*United States v. Thompson* (9th Cir.1987) 827 F.2d 1254, 1260; cf. *People v. Trevino* (1997) 55 Cal.App.4th 396, 411 ["it could be hypothesized the People were exercising their challenges based on a belief those members who had some connection with providing [health] care or social services would not be sympathetic to their case"]; *People v. Barber* (1988) 200 Cal.App.3d 378, 394 [juror properly challenged based on the prosecutor's belief that kindergarten teachers are often liberal and not prosecution oriented]; *People v. Granillo* (1987) 197 Cal.App.3d 110, 120, fn. 2 ["Many prosecutors believe various professional people are unacceptable because they may be too demanding or they look for certainty."].) In addition to her occupation, the prosecutor might reasonably have challenged Ms. Johnson based on her expressed reluctance about the death penalty. She acknowledged that when she was in college, about 20 years ago, she was against the death penalty. (RT 1344; VI SCT 4544.) Since then, she had formed the opinion that she was not against capital punishment (RT 1344), stating that the death penalty "is necessary in some instances" (VI SCT 4543). (*People v. McDermott, supra,* 28 Cal.4th at pp. 971-972 [prosecutor's peremptory challenge against prospective juror was based on death penalty views and not on race where although juror stated that he thought death penalty was necessary in some cases to protect society, juror stated he doubted he could impose death penalty if he did not think that a defendant would kill again, and there was little evidence that defendant would kill again if sentenced to life in prison as she had no history of violence and had hired others to commit murder]; *People v. Mendoza, supra,* 24 Cal.4th at pp. 169-170; *People v. Pinholster, supra,* 1 Cal.4th at p. 913.)

Second, the prosecutor might reasonably have challenged Ms. Blue based on her response to whether there is such a thing as "mental illness." Ms. Blue wrote:

> [I]f someone goes out and commit a crime or what-have-you and they wasn't born mentally ill, I feel it's got be something wrong with them in their mind because you just don't go out and kill someone.

(VI SCT 659; RT 3139-3142; cf. *People v. Gutierrez, supra,* 28 Cal.4th at p. 1124 [no impropriety where prospective juror indicated during voir dire that he might rely too heavily on expert testimony of psychologists and that he could not vote for the death penalty if a psychologist concluded that defendant had a mental problem affecting his conduct].) Ms. Blue had also taken college courses in psychology (VI SCT 658; RT 518). (Cf. *People v. Landry* (1996) 49 Cal.App.4th 785, 790-791 [prosecutor noted that prospective juror had educational background in psychology or psychiatry and he had "very bad experiences" with such jurors].) Also, the prosecutor might reasonably have challenged Ms. Blue based on her ambivalence about the death penalty (VI SCT 667) and uncertainty about her ability to actually vote for the death penalty (RT 521-522). (Cf. *People v. Catlin* (2001) 26 Cal.4th 81, 118.)

Third, the prosecutor might reasonably have challenged Mr. Mitchell based on his apparent suspicion of "corruption." Mr. Mitchell had no problem with the death penalty as long as there was no "corruption." (VI SCT 6140.) He explained that anyone could be "hoodwinked" by corrupt attorneys. (RT 1665.) Despite not having a problem with the death penalty, Mr. Mitchell essentially expressed a distrust of the legal system in its ability to ensure that innocent people are not executed. (Cf. *People v. Johnson, supra,* 47 Cal.3d at pp. 1217-1218 [no impropriety where potential juror "did not relate to the prosecutor and seemed not to trust him"]; *People v. Pride* (1992) 3 Cal.4th 195, 230 [no impropriety where two prospective jurors said during voir dire they had

"strong doubts" about or "generally opposed" death penalty because of distrust of legal system or concern that innocent person might be executed].) Mr. Mitchell further indicated that he had taken college courses on psychology and counseling. (VI SCT 6131.) He expressed reservations about the value of psychological or psychiatric testimony, stating that such testimony may be manipulated – "corrupted" – to appear adequate and correct. (VI SCT 6133; RT 1663-1665.) The prosecutor could reasonably infer that Mr. Mitchell had his own views on the psychology and behavior of the accused and would not properly consider and weigh the psychological and psychiatric testimony of the defense and prosecution experts. (Cf. *People v. Landry, supra,* 49 Cal.App.4th at pp. 790-791.)

Fourth, the prosecutor might reasonably have challenged Mr. Cato. Mr. Cato was a licensed pastoral counselor. (VI SCT 1097, 1113a-1114.) He had ministered and counseled "street people" at the Poverello House, a nonprofit organization serving the hungry and homeless. (RT 3287-3288.) The prosecutor could readily perceive Mr. Cato's degree of sensitivity and sympathy to social and environmental factors that the defense would raise. (Cf. *People v. Landry, supra,* 49 Cal.App.4th at pp. 790-791 [prospective juror's educational background in psychiatry or psychology and her employment at youth services agency were legitimate, race-neutral reasons for peremptory challenge]; *People v. Barber, supra,* 200 Cal.App.3d at p. 394 [see above]; see also *People v. Howard, supra,* 1 Cal.4th at p. 1155 [prospective juror's medical training and degree in sociology were legitimate race-neutral reasons for peremptory challenge].) Mr. Cato also mentioned that he had been chosen for a manager position in the company he worked for, which would require him to go to Los Angeles for 15 weeks beginning the first of November (RT 3239-3240). (*People v. Jenkins, supra,* 22 Cal.4th at p. 994 [no prima facie case made where prosecutor explained that he feared prospective juror would be torn

by conflicting loyalties to employment and court, because prospective juror anticipated difficulty shielding himself from outside information due to his employment as a newspaper reporter, and faced employment hardship or detriment to his career if he was required to serve].) This Court should thus uphold the trial court's no prima facie case finding. (Cf. *People v. Johnson, supra*, 30 Cal.4th at pp. 1325-1328.) Because the trial court properly concluded no prima facie case was made, this Court need not consider the prosecutor's proffered race-neutral reasons. (*People v. Turner, supra,* 8 Cal.4th at p. 167 ["once an appellate court concludes that the trial court properly determined that no prima facie case was made it need not review the adequacy of counsel's justifications, if any, for the peremptory challenges"].)

2. Even If A Prima Facie Case Had Been Made, The Prosecutor's Proffered Race-Neutral Reasons Are Neither Contradicted By The Record Nor Inherently Implausible And Thus The Trial Court Need Not Question The Prosecutor Or Make Detailed Findings

Appellant argues that "the trial court failed to fulfill its duty to determine whether the defense had established purposeful discrimination." (AOB 347-349.) Not so. The prosecutor's reasons are neither contradicted by the record nor inherently implausible. The trial court thus need not question the prosecutor or make detailed findings.

"If a race-neutral explanation is tendered, the trial court must then decide whether the opponent of the strike has proved purposeful racial discrimination." (*People v. Silva* (2001) 25 Cal.4th 345, 384.)

> This demands of the trial judge a sincere and reasoned attempt to evaluate the prosecutor's explanation in light of the circumstances of the case as then known, his knowledge of trial techniques, and his observations of the manner in which the prosecutor has examined members of the venire and has exercised challenges for cause or peremptorily . . . .

(*People v. Hall* (1983) 35 Cal.3d 161, 167-168.)

> [A] truly "reasoned attempt" to evaluate the prosecutor's explanations requires the court to address the challenged jurors individually to determine whether any one of them has been improperly excluded. In that process, the trial court must determine not only that a valid reason existed but also that the reason actually prompted the prosecutor's exercise of the particular peremptory challenge.

(*People v. Fuentes* (1991) 54 Cal.3d 707, 720 [internal citation omitted].)

> Preferably, in ruling on a *Wheeler* motion, the trial court should state expressly its determination as to the adequacy of the justification proffered with respect to each peremptory challenge.

(*People v. Sims* (1993) 5 Cal.4th 405, 431; see also *People v. Fuentes, supra,* 54 Cal.3d at p. 716, fn. 5.)

> Although we generally accord great deference to the trial court's ruling that a particular reason is genuine, we do so only when the trial court has made a sincere and reasoned attempt to evaluate each stated reason as applied to each challenged juror. *When the prosecutor's stated reasons are both inherently plausible and supported by the record, the trial court need not question the prosecutor or make detailed findings. But when the prosecutor's stated reasons are either unsupported by the record, inherently implausible, or both, more is required of the trial court than a global finding that the reasons appear sufficient.*

(*People v. Silva, supra,* 25 Cal.4th at pp. 385-386 [italics added].)

> Where . . . the trial court is fully apprised of the nature of the defense challenge to the prosecutor's exercise of a particular peremptory challenge, where the prosecutor's reasons for excusing the juror are neither contradicted by the record nor inherently implausible, and where nothing in the record is in conflict with the usual presumptions to be drawn, i.e., that all peremptory challenges have been exercised in a constitutional manner, and that the trial court has properly made a sincere and reasoned evaluation of the prosecutor's reasons for exercising his peremptory challenges, then those presumptions may be relied upon, and a *Batson/Wheeler* motion denied, notwithstanding that the record does not contain detailed findings regarding the reasons for the exercise of each such peremptory challenge.

(*People v. Reynoso, supra,* 31 Cal.4th at pp. 929-930.)

Here, the prosecutor satisfied his burden of providing race-neutral explanations for the challenges to the four Black panelists. (See RT 3218-3220, 3294-3296.) Appellant does not argue otherwise. The trial court was then required to evaluate the sincerity and legitimacy of the prosecutor's proffered reasons in light of "all the circumstances of the case" and determine whether defense had proven purposeful discrimination.

The prosecutor's explanations are neither contradicted by the record nor inherently implausible. "[J]ustification for a peremptory challenge need not rise to grounds for a challenge for cause." (*People v. Martin* (1998) 64 Cal.App.4th 378, 384.) Ms. Johnson was an administrative law judge (VI SCT 4518) who had expressed reservations about the death penalty (RT 1344; VI SCT 4543-4544). "Excluding jurors because of their profession . . . is wholly within the prosecutor's prerogative." (*United States v. Thompson, supra,* 827 F.2d at p. 1260; cf. *People v. Trevino, supra,* 55 Cal.App.4th at p. 411; *People v. Barber, supra,* 200 Cal.App.3d at p. 394; *People v. Granillo, supra,* 197 Cal.App.3d at p. 120, fn. 2; *People v. Pinholster, supra,* 1 Cal.4th at p. 913; *People v. Mendoza, supra,* 24 Cal.4th at pp. 169-170.) Ms. Blue had written in response to whether there is such a thing as "mental illness":

> [I]f someone goes out and commit a crime or what-have-you and they wasn't born mentally ill, I feel it's got be something wrong with them in their mind because you just don't go out and kill someone.

(VI SCT 659; RT 3139-3142.) Such a response revealed an inclination to presume the presence of a mental illness – and thus a greater likelihood to find insanity – if appellant was convicted of murder. (Cf. *People v. Gutierrez, supra,* 28 Cal.4th at p. 1124.) Mr. Mitchell's responses and demeanor troubled the prosecutor. As explained earlier, despite not having a problem with the death penalty, Mr. Mitchell essentially expressed a distrust of the legal system

in its ability to ensure that innocent people are not executed. His expressed suspicions of manipulation and "corruption" – of being "hoodwinked" – raised doubts about his desirability as a juror and his ability to make the life or death decision. (Cf. *People v. Johnson, supra,* 47 Cal.3d at pp. 1217-1218; *People v. Pride, supra,* 3 Cal.4th at p. 230.) Mr. Cato was a licensed pastoral counselor, who ministered and counseled "street people." Besides Mr. Cato's specific training and experience in issues relevant to this case, the prosecutor readily perceived the greater degree of sensitivity and sympathy Mr. Cato would harbor to social and environmental factors that the defense would raise. (Cf. *People v. Landry, supra,* 49 Cal.App.4th at pp. 790-791; *People v. Barber, supra,* 200 Cal.App.3d at p. 394; see also *People v. Howard, supra,* 1 Cal.4th at p. 1155.) The prosecutor also noted Mr. Cato's promotion, which would have required him to go to Los Angeles for 15 weeks beginning the first of November. (*People v. Jenkins, supra,* 22 Cal.4th at p. 994.)

Since the court asked the prosecutor to proffer race-neutral reasons, the court impliedly must have found the reasons credible and legitimate. There is nothing in the record indicating that the trial court did not make a sincere and reasoned effort to evaluate the credibility and legitimacy of the prosecutor's explanations. (*People v. Arias, supra*, 13 Cal.4th at p. 137; *People v. Montiel* (1993) 5 Cal.4th 877, 910; but cf. *People v. Hall, supra,* 35 Cal.3d at p. 169 [trial court indicated hostility to the *Wheeler* holding, stating "a peremptory challenge is a peremptory challenge, otherwise, it's meaningless," and completely abdicated its responsibility under *Wheeler*, expressing the view that "group bias is shown only when a prosecutor declares an intent to exclude all members of an ethnic group from the jury"].) Because the prosecutor's explanations are neither contradicted by the record nor inherently implausible, the trial court was not required to question the prosecutor and make explicit and detailed findings. (But cf. *People v. Silva, supra*, 25 Cal.4th at pp. 376-377,

385 [concluding that because the prosecutor gave reasons that misrepresented the record of voir dire, by quoting a misleading portion of a prospective juror's answers concerning the death penalty, "the trial court erred in failing to point out the inconsistencies and to ask probing questions"], *People v. Turner, supra,* 42 Cal.3d at pp. 727-728 [explaining that "the prosecutor's explanations were either implausible or suggestive of bias and therefore 'demanded further inquiry on the part of the trial court,' followed by a 'sincere and reasoned' effort by the court to evaluate their genuineness and sufficiency in light of all the circumstances of the trial"].) It should be presumed that the trial court discharged its duty to make a sincere and reasoned effort to evaluate the credibility and legitimacy of the prosecutor's race-neutral explanations. (*People v. Reynoso, supra,* 31 Cal.4th at pp. 929-930; see also *Roffinella v. Sherinian* (1986) 179 Cal.App.3d 230, 236 ["Where no statement of decision is requested, it must be presumed that the trial court found facts necessary to support the judgment."]; *Denham v. Superior Court* (1970) 2 Cal.3d 557, 564 ["A judgment or order of the lower court is presumed correct. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown."].) This Court should thus defer to and uphold the trial court's ruling. (Cf. *People v. Reynoso, supra,* 31 Cal.4th at pp. 909-913, 929-930.)

3. This Court Has Rejected Employing Comparative Juror Analysis In The *Batson/Wheeler* Context "For The First Time On Appeal"

Appellant, trying to show purposeful discrimination, asks this Court to engage in a comparative analysis of the jurors' responses. (AOB 349-365.) This Court has recently addressed and rejected employing comparative juror

analysis in the *Batson/Wheeler* context for the first time on appeal.[83] (*People v. Johnson, supra,* 30 Cal.4th at pp. 1318-1325; see also *People v. Jackson* (1996) 13 Cal.4th 1164, 1195.)

> After thorough consideration of both our own precedents and federal authority, including *Miller-El v. Cockrell* (2003) 537 U.S. 322, we held in *Johnson* [30 Cal.4th 1302] "that engaging in comparative juror analysis *for the first time on appeal* is unreliable and inconsistent with the deference reviewing courts necessarily give to trial courts...." Although the trial court and the objecting party may rely at trial on comparative juror analysis in evaluating whether a prima facie case has been established and whether the prosecutor's proffered reasons are legitimate and genuine, in the absence of any reliance upon comparative juror analysis in the trial court it is inappropriate for a reviewing court to second-guess *Wheeler-Batson* rulings on that basis.

(*People v. Heard* (2003) 31 Cal.4th 946, 971.)

> "[U]se of a comparison analysis to evaluate the bona fides of the prosecutor's stated reasons for peremptory challenges does not properly take into account the variety of factors and considerations that go into a lawyer's decision to select certain jurors while challenging others that appear to be similar. Trial lawyers recognize that it is a combination of factors rather than any single one which often leads to the exercise of a peremptory challenge. In addition, the particular combination or mix of jurors which a lawyer seeks may, and often does, change as certain jurors are removed or seated in the jury box." We found it apparent "that the very dynamics of the jury selection process make it difficult, if not impossible, on a cold record, to evaluate

---

83. Respondent acknowledges that the Ninth Circuit Court of Appeals does engage in a comparative analysis when reviewing a claim of *Batson* error. (*McClain v. Prunty* (2000) 217 F.3d 1209, 1220-1221 ["A comparative analysis of jurors struck and those remaining is a well-established tool for exploring the possibility that facially race-neutral reasons are a pretext for discrimination."], quoting *Turner v. Marshall* (9th Cir. 1997) 121 F.3d 1248, 1251; *United States v. Chinchilla* (9th Cir. 1989) 874 F.2d 695, 697-699 [holding that an appellate court may overturn the finding of the trial court where a comparison between the answers given by prospective jurors who were struck and those who were not fatally undermines the prosecutor's credibility].)

> or compare the peremptory challenge of one juror with the retention of another juror which on paper appears to be substantially similar. [Attempting] to make such an analysis of the prosecutor's use of his peremptory challenges is highly speculative and less reliable than the determination made by the trial judge who witnessed the process by which the defendant's jury was selected. It is therefore with good reason that we and the United States Supreme Court give great deference to the trial court's determination that the use of peremptory challenges was not for an improper or class bias purpose."

(*People v. Johnson, supra,* 30 Cal.4th at p. 1319, citing and explaining *People v. Johnson, supra*, 47 Cal.3d at pp. 1220-1221.)

Appellant's reliance on *Miller-El v. Cockrell, supra,* 537 U.S. at p. 322 is misplaced. In *Miller-El,* the high court held that reasonable jurists could have debated whether prosecution's use of peremptory strikes against African-American prospective jurors was result of purposeful discrimination, and thus petitioner was entitled to certificate of appealability. "Nothing in *Miller-El* . . . suggests that a reviewing court must engage in comparative juror analysis *for the first time on appeal.*" (*People v. Johnson, supra,* 30 Cal.4th at p. 1322 [italics in original].)

Here, neither the trial court nor defense counsel engaged in a comparative juror analysis. Appellant cannot now raise a comparative analysis claim on appeal. (Cf. *People v. Heard, supra,* 31 Cal.4th at p. 971.) This Court should not attempt its own comparative juror analysis for the first time on appeal. (*People v. Johnson, supra,* 30 Cal.4th at p. 1325.)

4. Should This Court Find That The Trial Court Failed To Determine Whether Defense Proved Purposeful Discrimination, The Judgment Should Be Reversed

Assuming arguendo this Court finds that the prosecutor used peremptory challenges to remove potential jurors on the basis of race, the judgment must

be reversed. (*People v. Wheeler, supra,* 22 Cal.3d at p. 283.) Should this Court find that trial court erred in finding no prima facie case of group bias in the prosecutor's exercise of peremptory challenges and that it erred when it failed to determine whether defense proved purposeful determination, the judgment should be reversed. A limited remand for a further hearing on the validity of the prosecution's peremptory would not be appropriate given the time that has passed since jury voir dire was conducted in this case – 11 years. (Cf. *People v. Snow* (1987) 44 Cal.3d 216, 226-227; *People v. Allen* (2004) 115 Cal.App.4th 542, 553; *People v. Williams* (2000) 78 Cal.App.4th 1118, 1125; but cf. *People v. Gore* (1993) 18 Cal.App.4th 692, 706 [limited remand appropriate because case was a death penalty case, and therefore it was "likely counsel and the court paid close attention to and are more likely to remember the specifics of voir dire as opposed to less serious cases"].)

However, for the reasons stated above, respondent submits appellant's *Batson/Wheeler* claim lacks merit. Accordingly, this Court should reject appellant's *Batson/Wheeler* claim.

XXXI.

THE CUMULATIVE EFFECT OF THE CLAIMED ERRORS IN ARGUMENTS XVIII-XXX DID NOT DEPRIVE APPELLANT OF DUE PROCESS, AN IMPARTIAL JURY, AND A FAIR TRIAL, BECAUSE NO PREJUDICIAL ERRORS OCCURRED

Appellant argues that the cumulative effect of errors arising from the trial court's "skewed handling of jury voir dire" require reversal per se. (AOB 367-371.) His argument is untenable.

As respondent explained in Arguments XXVIII through XXX, there was no prejudicial error during jury voir dire. "If none of the claimed errors were individual errors, they cannot constitute cumulative errors . . . ." (*People v. Beeler, supra,* 9 Cal.4th at p. 954; see also *United States v. Haili, supra,* 443 F.2d at p. 1299 ["any number of 'almost errors,' if not 'errors,' cannot constitute error"].)

Respondent acknowledges that appellant's death sentence must be reversed if the trial court erred in removing a venire member in violation of *Witt* (*Gray v. Mississippi, supra,* 481 U.S. at pp. 666-667; *Davis v. Georgia, supra,* 429 U.S. at p. 123), or if the trial court engaged in a discriminatory pattern of rulings on for-cause challenges favoring the prosecution (*Ross v. Oklahoma, supra,* 487 U.S. at p. 90, fn. 5). Respondent further acknowledges that appellant's convictions and death sentence must be reversed if this Court should find that the prosecutor used peremptory challenges to remove potential jurors on the basis of race, or that trial court erred in finding no prima facie case made and failed to determine whether defense proved purposeful determination. (*People v. Wheeler, supra,* 22 Cal.3d at p. 283.) However, no such error occurred in this case.

The only possible cumulative error analysis arises from the trial court's denials of defense motions to excuse jurors for cause. Respondent reiterates that harmless error analysis applies in that context. (*Ross v. Oklahoma, supra,* 487 U.S. at pp. 86-87.) Again however, appellant could not have been prejudiced: that is, his constitutional right to a fair and impartial jury was not affected. None of the prospective jurors whom defense found objectionable actually sat on his jury. (*People v. Boyette, supra*, 29 Cal.4th at p. 419; *People v. Weaver, supra*, 26 Cal.4th at p. 913.) Thus, he is unable to demonstrate prejudice.

Accordingly, appellant's cumulative error claim should be rejected.

XXXII.

APPELLANT WAS NOT EXCLUDED FROM ANY PROCEEDING WHICH BORE A REASONABLY SUBSTANTIAL RELATION TO THE FULLNESS OF HIS OPPORTUNITY TO DEFEND AGAINST THE CHARGES

Appellant argues that the judgment must be reversed because his exclusion from unreported proceedings, held at the bench or outside the courtroom in the hallway, violated his right to be personally present at all critical stages of the trial. (AOB 376-388.) Not so. Appellant was not excluded from any proceeding which bore a reasonably substantial relation to the fullness of his opportunity to defend against the charges.

There were about 180 unreported proceedings held at the bench or outside the courtroom in the hallway.[84/] (VII SCT 151-229.) About ten instances could not be settled for the appellate record. As appellant notes, "this . . . was largely the result of a policy of the trial court." (AOB 372.) Prior to commencement of jury selection, the trial court explained its policy:

---

84. The "Orders Concerning Settlement Of Unreported Proceedings" provides:

> 1. In the context of describing unreported proceedings, when the court reporter in reporter's transcripts refers to a conference at the "side bench" or "side bar," this normally refers to a discussion held at a location outside the courtroom, in the hallway.
>
> 2. In the context of describing unreported proceedings, when the court reporter in reporter's transcripts refers to a conference or discussion "at the bench," this refers to a discussion inside the courtroom, outside the hearing of the jury or the appellant, at the judge's bench.

(VII SCT 228-229.)

> I do not permit speaking objections in front of the jury. I'm rather strict about that. [¶] The only objections you can make are two-word objections such as "objection, hearsay; objection, leading," et cetera. I guess "lack of foundation" requires more than one word. And no arguments are permitted in the presence of the jury. And if you wish to deal with – then I rule. I'll just rule on the objection. [¶] And if you feel that I've ruled incorrectly, then ask for a side bench. We'll go outside and have a side bench. In this court it's impossible to – well, not impossible but very difficult to drag a reporter in and out, so we usually confer. And if we don't reach an agreement, then we'll put the matter on the record. [¶] Side bench is properly used to argue with the judge if you feel his rulings on evidentiary matters are incorrect and properly used to warn the court and perhaps opposing counsel of a mistrial that you have a feeling is coming around the corner. You have lived with this case a long time. I haven't. I don't know anything about this. [¶] And if you feel that we're treading into dangerous waters, that's an appropriate use of side bench. It's not appropriate to use side bench to make objections. The reasons, all objections must be made on the record in the presence of the jury or unless we're having a proceeding outside the presence of the jury, but they have to be made on the record.

(RT 120-121.)

A defendant has federal (U.S. Const., 6th & 14th Amends.) and state (Cal. Const., art. I, § 15) constitutional rights, and a statutory right (§§ 977, 1043), to be present at any stage of the criminal proceedings "that is critical to its outcome if his presence would contribute to the fairness of the procedure." (*Kentucky v. Stincer* (1987) 482 U.S. 730, 745; *People v. Bradford, supra,* 15 Cal.4th at p. 1357; *People v. Waidla* (2000) 22 Cal.4th 690, 741-742; *People v. Ochoa, supra,* 26 Cal.4th at pp. 433-436.) "[A] defendant does not have a right to be present at every hearing held in the course of a trial." (*People v. Price* (1991) 1 Cal.4th 324, 407.) There is no entitlement to be present at proceedings at which defendant's presence "does not bear a reasonably substantial relation to the fullness of his opportunity to defend against the charge." (*People v. Bradford, supra,* 15 Cal.4th at p. 1357; *United States v.*

Gagnon (1985) 470 U.S. 522, 526-527.) It is defendant's burden to demonstrate that his absence prejudiced his case or denied him a fair trial. (*People v. Bradford, supra,* 15 Cal.4th at p. 1357.)

A. Appellant Did Not Expressly Waive His Right To Be Personally Present In The Unreported Proceedings

"[A]s a matter of both federal and state constitutional law, . . . a capital defendant may validly waive presence at critical stages of the trial." (*People v. Price, supra,* 1 Cal.4th at p. 405.) Appellant had indicated that he felt his counsels had distanced themselves from him, and that he was unaware of what was going on at sidebars and bench conferences. (RT 4362-4363.) However, appellant has not pointed to any time during the proceedings, nor does respondent recall in the record, appellant asking to participate in the sidebars and bench conferences. Regardless, respondent acknowledges that, except for the conference on guilt-phase jury instructions, appellant did not expressly waive his right to be personally present at the unreported proceedings.

B. Appellant Was Not Excluded From Any Proceeding Which Bore A Reasonably Substantial Relation To The Fullness Of His Opportunity To Defend Against The Charges

> [T]he defendant's absence from various court proceedings, "*even without waiver*, may be declared nonprejudicial in situations where his presence does not bear a 'reasonably substantial relation to the fullness of his opportunity to defend against the charge.'" [Citation.]

(*People v. Johnson, supra,* 6 Cal.4th at p. 18.)

Here, appellant acknowledges that at the bench and side bar conferences from which he was absent, the matters discussed included

> administrative and scheduling matters, jury instructional and exhibit conferences, issues pertaining to the selection of the jury, and substantive arguments supporting or opposing objections or legal positions advanced by either party.

(AOB 379-380.) He further acknowledges that "[h]e was not absent during proceedings when witnesses were testifying before a jury." (AOB 380.) He argues:

> The fact that off-the-record proceedings in [his] absence generally involved discussions of legal matters held outside the presence of the jury does not, as a matter of law, mean that [he] was *not* absent during any "critical" phases of the trial, or that his state and federal due process and confrontation rights were not compromised.

(AOB 381.) The bases for his argument seem to be "the sheer volume of proceedings from which he was excluded" combined with "the impossibility of settlement of several significant unreported proceedings held in [his] absence" while there was a "significant breakdown of [his] relationship with public defenders Barbara O'Neill and Margarita Martinez, and the absence of Ernest Kinney, . . . during legally significant unreported proceedings." (AOB 382-386.)

Appellant has failed to demonstrate prejudice. First, appellant apparently recognizes that he was not entitled to be personally present at bench or side bar discussions on administrative housekeeping matters or questions of law. (AOB 380-381; *People v. Waidla, supra,* 22 Cal.4th at pp. 741-742; *People v. Holt, supra,* 15 Cal.4th at p. 707; *People v. Dennis* (1998) 17 Cal.4th 468, 538-539; *People v. Hardy, supra,* 2 Cal.4th at p. 178; *People v. Wharton* (1991) 53 Cal.3d 522, 602-603; *People v. Morris* (1991) 53 Cal.3d 152, 210, disapproved on another ground in *People v. Stansbury* (1995) 9 Cal.4th. 824, 830, fn.1.) So, if appellant was not entitled to be personally present at those proceedings because "his presence on these occasions does not bear a reasonable relation to his ability to defend against the charges" (*People v. Dennis, supra,* 17 Cal.4th at pp. 538-539), then "the sheer volume of proceedings from which he was excluded" would not establish prejudice. (Cf. *People v. Pinholster, supra,* 1 Cal.4th at pp. 920-922 [holding, in a capital

homicide case, that failure to report 133 sidebar conferences was not a "substantial" portion of the record "in that it affects the ability of the reviewing court to conduct a meaningful review and the ability of the defendant to properly perfect his appeal"]; *People v. Arias, supra,* 13 Cal.4th at p. 158-159 [rejecting the argument that sheer number of unreported matters gives rise to "cumulative" harm].)

Second, appellant's argument, that his absence from unreported proceedings unable to be settled was prejudicial because of a "breakdown" of the attorney-client relationship, is untenable. The issue of prejudice here, whether his presence at the unreported proceedings bore "a reasonably substantial relation to the fullness of his opportunity to defend against the charge" (*People v. Johnson, supra,* 6 Cal.4th at p. 18), must be viewed and determined apart from the circumstances surrounding the "breakdown" of appellant's relationship with the public defenders. Whether any constitutional right was allegedly violated from the "breakdown" of the attorney-client relationship is an issue separate and distinct from the issue of prejudice here. If his presence at the unreported proceedings bore "a reasonably substantial relation to the fullness of his opportunity to defend against the charges," then his absence was prejudicial regardless of whether there as a "breakdown" in the attorney-client relationship. To sustain appellant's argument would necessarily mean that the deputy public defenders abandoned their role and duty to be advocates for appellant, to zealously represent him within the bounds of the law. No such neglect of duty appears in the record and should not be presumed. (See *People v. Lyons* (1962) 204 Cal.App.2d 364, 368 ["It is presumed that an attorney has been faithful to the best interests of his client."]; *People v. Holt, supra,* 15 Cal.4th at p. 703 ["The Sixth Amendment guarantees competent representation by counsel for criminal defendants, [and reviewing courts] presume that counsel rendered adequate assistance and exercised reasonable

professional judgment in making significant trial decisions."], citing *Strickland v. Washington* (1984) 466 U.S. 668, 690.) Represented by competent counsel, appellant was not entitled to be personally present at side bar discussions on administrative housekeeping matters or questions of law.

Third, appellant, referring to the circumstances surrounding the "breakdown" of the attorney-client relationship, argues that the unavailability of a verbatim transcript or a settled record of the unreported proceedings prejudiced him because "he cannot 'suggest how his presence would have had any impact on matters discussed at . . . the proceedings.'" (AOB 383, quoting *People v. Holt, supra,* 15 Cal.4th at p. 707.) This Court should not presume that the "unreported proceedings for which a settled statement is not available differed in nature from those for which a settled statement is available." (*People v. Holt, supra,* 15 Cal.4th at p. 708.) As this Court said in *People v. Johnson, supra,* 6 Cal.4th at p. 19, "[t]he point seems unduly speculative . . . ." (Cf. *People v. Ochoa* [noting defendant admitted "the impossibility of knowing what sudden impressions and unaccountable prejudices he might have formed," and rejecting claim of prejudice based on "undue speculation," "[b]ecause there must be a 'reasonably substantial relation' to defendant's ability to defend himself, and not a mere 'shadow' benefit"]; *People v. Holt, supra*, 15 Cal.4th at p. 708 [finding inadequacy of record to permit meaningful appellate review not shown where nine of twenty-eight unreported proceedings were unsettled].)

C. Appellant's Absence From The Unreported Proceedings Did Not Constitute Structural Error

Appellant argues that his absence from the unreported proceedings was structural error. Specifically, he contends "the error is 'structural' and reversible *per se* because [appellant's] fundamental right to counsel, as well as his right to personal presence, was impaired." (AOB 386-388.) First, as explained above, whether his constitutional right to effective assistance of

counsel was violated is distinct and separate from whether his right to personal presence was violated. Second, the sheer number of unreported proceedings from which he was absent does not establish prejudice because, as explained above, he was not entitled to be personally present at those proceedings. Thus, viewed as a whole, appellant has failed to demonstrate prejudicial error requiring reversal. (Cf. *People v. Beeler, supra*, 9 Cal.4th at p. 954 ["If none of the claimed errors were individual errors, they cannot constitute cumulative errors . . . ."].)

Accordingly, appellant's right to personal presence at unreported proceedings should be rejected.

XXXIII.

THE RECORD IS ADEQUATE TO PERMIT MEANINGFUL APPELLATE REVIEW

Appellant argues that the judgment must be reversed because the trial court violated section 190.9, creating an inadequate record to permit meaningful appellate review. (AOB 389-393.) Not so. Respondent acknowledges that not all proceedings were conducted on the record with a court reporter present, in violation of section 190.9. However, appellant has not shown that the record is inadequate to permit meaningful appellate review.

A. Respondent Concedes That Not All Proceedings Were Conducted On The Record With A Court Reporter Present, In Violation Of Section 190.9

"A defendant in a criminal case is entitled to an appellate record adequate to permit 'meaningful appellate review.'" (*People v. Seaton* (2001) 26 Cal.4th 598, 699, quoting *People v. Scott* (1997) 15 Cal.4th 1188, 1203.)

> Under the Fourteenth Amendment, the record of the proceedings must be sufficient to permit adequate and effective appellate review. Under the Eighth Amendment, the record must be sufficient to ensure that there is no substantial risk the death sentence has been arbitrarily imposed.

(*People v. Howard, supra,* 1 Cal.4th at p. 1166 [internal citations omitted].) Section 190.9, subdivision (a)(1), reads in part:

> In any case in which a death sentence may be imposed, all proceedings conducted in the superior court, including all conferences and proceedings, whether in open court, in conference in the courtroom, or in chambers, shall be conducted on the record with a court reporter present. The court reporter shall prepare and certify a daily transcript of all proceedings . . .

> An incomplete record is a violation of section 190.9, which requires that all proceedings in a capital case be conducted on the record with a reporter present and transcriptions prepared.

(*People v. Frye, supra,* 18 Cal.4th at p. 941.) Respondent does not dispute that section 190.9's requirement was not met in this case. As this Court emphasized: "It is important that trial courts 'meticulously comply with Penal Code section 190.9, and place all proceedings on the record.'" (*People v. Seaton, supra*, 26 Cal.4th at p. 700, quoting *People v. Freeman, supra,* 8 Cal.4th at p. 511.)

B. Appellant Has Not Shown That The Record Is Inadequate To Permit Meaningful Appellate Review

"The record on appeal is inadequate . . . only if the complained-of deficiency is prejudicial to the defendant's ability to prosecute his appeal." (*People v. Alvarez* (1996) 14 Cal.4th 155, 196, fn. 8.)

> Although section 190.9 is mandatory, a violation of its provisions does not require reversal of a conviction unless the defendant can show that "the appellate record is not adequate to permit meaningful appellate review."

(*People v. Frye, supra,* 18 Cal.4th at p. 941, quoting *People v. Cummings* (1993) 4 Cal.4th 1233, 1334; see also *United States v. Wilson* (1994) 16 F.3d 1027, 1031.) "[I]t is defendant's burden to show that deficiencies in the record are prejudicial." (*People v. Howard, supra,* 1 Cal.4th at p. 1165.)

> The test is whether in light of all the circumstances it appears that the lost portion is substantial in that it affects the ability of the reviewing court to conduct a meaningful review and the ability of the defendant to properly perfect his appeal.

(*People v. Pinholster, supra*, 1 Cal.4th at p. 921 [internal quotations omitted.].)

> [I]f the record does permit the reviewing court to pass on the questions raised on appeal, the defendant has not been prejudiced by an incomplete record.

(*People v. Frye, supra,* 18 Cal.4th at p. 941.) "Where the trial record can be reconstructed by other methods, the defendant must proceed with those alternatives. [Citation.]" (*Ibid.*)

Here, appellant has utterly failed to show that the record is inadequate to permit meaningful appellate review. He notes that "a number of unreported proceedings were incapable of settlement," and that "for many unreported proceedings, the best that could be accomplished was to determine the general subject matter discussed, but not the text of specific statements, arguments or objections by the parties." (AOB 391.) Appellant does not explain how the unreported proceedings – many of which were reconstructed and some of which remained unsettled – rendered the record inadequate for a meaningful review of the issues he raises on appeal. Resolution of his claims is not dependent on a verbatim transcription. He does not suggest otherwise. (Cf. *People v. Hawthorne, supra,* 4 Cal.4th at pp. 66-67; *People v. Frye, supra,* 18 Cal.4th at p. 941; *People v. Holt, supra*, 15 Cal.4th at p. 708.)

Appellant's main contention seems to be that the lack of a settled record and verbatim transcription impaired his constitutional right to effective assistance of trial counsel, as to Mr. Kinney, and of appellate counsel. (AOB 391-393.) Appellant's general contention is untenable. Prejudice is not presumed where not all proceedings were conducted on the record with a court reporter present in violation of section 190.9. (See *People v. Holt, supra,* 15 Cal.4th at p. 708 ["The omission is not a structural defect or a denial of due process."]; see, e.g., *People v. Pinholster, supra,* 1 Cal.4th at pp. 920-922 [in a capital homicide case, failure to report 133 sidebar conferences was not a "substantial" portion of the record].) The defendant ultimately bears the burden of showing that the record is inadequate to permit meaningful appellate review. (*People v. Howard, supra,* 1 Cal.4th at p. 1165.) Consequently, presuming ineffectiveness of appellate counsel would be contrary to the case law

interpreting section 190.9. (Cf. *People v. Scott* (1972) 23 Cal.App.3d 80, 84 [rejecting defendant's contention that whenever a defendant, through no fault of his own, is denied a full and complete trial transcript, he is deprived of his constitutional right to an effective appeal]; *United States ex rel. Grundset v. Franzen* (7th Cir. 1982) 675 F.2d 870, 876 [holding that neither petitioner's right to appeal nor his right to effective assistance of counsel on appeal was abrogated by failure of State of Illinois to provide verbatim transcript of misdemeanor guilty plea proceeding].)

Absent such a presumption, appellant bears the burden of showing how the lack of a verbatim transcript would render his counsel, either trial or appellate, ineffective. (*In re Neeley* (1993) 6 Cal.4th 901, 908-909, citing *Strickland v. Washington, supra,* 466 U.S. at p. 687.) Asking how the lack of a verbatim transcript rendered appellate counsel ineffective is simply another way of asking how the record is not adequate to permit meaningful appellate review. (See, e.g., *People v. Apalatequi* (1978) 82 Cal.App.3d 970, 973 [reporter's notes of arguments of counsel lost; settled statement inadequate to raise prosecutorial misconduct argument].) Appellant has failed to make such a showing. As for the effect of unreported conferences on trial counsel Mr. Kinney, again any prejudice is speculative and lacks concreteness. Regarding the provisions of section 190.9, appellant does not explain how a lack of verbatim transcription of the unreported and unsettled proceedings prejudiced him at trial. Ms. O'Neill and Ms. Martinez were available to reconstruct trial proceedings and witness testimonies for Mr. Kinney. Mr. Kinney had imputed, if not actual, knowledge of the proceedings and testimonies. (Cf. *McKethan v. Texas Farm Bureau* (5th Cir. 1993) 996 F.2d 734, 740, fn. 14 ["that another lawyer in counsel's firm may have prepared and submitted the pretrial order is immaterial; obviously, that knowledge is imputed to him"].)

Accordingly, appellant's inadequacy of the record claim should be rejected.

XXXIV.

THE CUMULATIVE EFFECT OF THE CLAIMED ERRORS IN ARGUMENTS XXXII-XXXIII DID NOT VIOLATE APPELLANT'S RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL, TO DUE PROCESS, OR TO A RELIABLE DEATH JUDGMENT, BECAUSE NO PREJUDICIAL ERRORS OCCURRED

Appellant argues that the entire judgment must be reversed due to the cumulative effect of errors arising from an inadequate record to permit meaningful appellate review, in violation of section 190.9, and due to his exclusion from unreported proceedings in violation of his right to be personally present at all critical stages of the trial. (AOB 395-396.) Not so. As respondent explained in Arguments XXXII and XXXIII, there was no prejudicial error. Appellant was not excluded from any proceeding which impacted his ability to defend himself; and the record is adequate to permit meaningful appellate review. "If none of the claimed errors were individual errors, they cannot constitute cumulative errors . . .." (*People v. Beeler, supra,* 9 Cal.4th at p. 954; see also *United States v. Haili, supra,* 443 F.2d at p. 1299 ["any number of 'almost errors,' if not 'errors,' cannot constitute error"].) Accordingly, appellant's cumulative effect of errors argument should be rejected.

XXXV.

THE COURT DID NOT ABUSE ITS DISCRETION IN DENYING APPELLANT'S MOTION FOR MISTRIAL ON THE GROUND OF A *DOYLE* VIOLATION

Appellant argues that the court erred in denying his motion for mistrial on the ground the prosecution violated *Doyle v. Ohio* (1976) 426 U.S. 610 (hereinafter "*Doyle*"). (AOB 397-400.) Not so. The trial court did not abuse its discretion in concluding that any prejudicial effect arising from Detective Souza's testimony, about appellant's lack of reaction and lack of inquiry upon being arrested and advised of the charges, was cured by an admonition to the jury to disregard the testimony and not to draw an inference of guilt from it.

A. The Record

The prosecutor's asked Detective John Souza about an interview with appellant:

Q At approximately 4:10 p.m. that afternoon, did you have another contact with [appellant]?

A Yes.

Q And where was that?

A Fresno County Sheriff's Department detective interview room.

Q At the time was there any other person there besides yourself and [appellant]?

A Detective Ybarra.

Q Can you tell – first of all, tell us, yes or no, if there was any statement made by either you or Detective Ybarra about the juveniles, Angie Higgins or Laurie Farkas, and was that statement made in the presence of [appellant]?

. . . . . .

A Yes, there was.

. . . . . .

Q And the statement that was made in the presence of [appellant] concerning the two juvenile girls was what?

A We were doing an investigation in reference to the two girls, naming the girls, Laurie Farkas and Angie Higgins.

Q At that point in time when you made that statement, was there mention of any charge or anything that had happened to those two individuals?
A No. Other than there was an investigation.
Q At that time that that was spoken in [appellant's] presence, did he do or say anything concerning those two named individuals?
A He indicated he knew them.
Q Subsequently, meaning at any point thereafter, was [appellant] informed of the specific nature of a charge or charges that he was being placed in custody for?
A Yes, he was.

. . . . . .

Q Could you explain, as best you recollect, what charge or charges you informed [appellant] that he was being placed under arrest for?
A Yes. We – I advised him that he was under arrest for murder and attempted murder.

(RT 3938-3940.) The prosecutor continued:

Q At the time that you made that statement to [appellant], did you notice any change in his demeanor?
A There was no reaction and no inquiry who he allegedly murdered.
Q Excuse me, Detective. Then are you saying that when you mentioned those charges that you did not say anything about who he was being arrested for murdering or attempting to murder?
A That's correct.
Q Subsequent to that, was [appellant] booked into the Fresno County Jail?
A Yes, he was.

(RT 3940-3941.)

Appellant's trial counsel then informed the court that defense had a motion. (RT 3941.) The court excused the jurors and witnesses for lunch. Appellant's trial counsel moved for a mistrial, arguing that the prosecutor improperly elicited testimony regarding appellant's silence subsequent to being advised of his *Miranda* rights. (RT 3943-3944, 3946-3947.)

The court agreed that detective Souza's "no reaction and no inquiry" testimony was improper:

> I'm concerned that when one invokes their right to silence as one has the right to do, that then there is, instead of comment about the lack of a verbal response, some attempt made to infer that by reason of a verbal response the person – by reason of the silence, the person then, by inference, would inculpate themselves in the sense that, well, he should have inquired who was murdered, who was attempted to be murdered. That is what any reasonable person would do under the circumstances. In other words, it's the adoptive admission philosophy. And I think Miranda would cover both, that once the Miranda rights are invoked, that you may neither go forward with a lack of an admission or comment upon the fact that, of course, they invoked their rights. . . . [¶] In other words, there may be an adoptive admission inferred here by lack of response when lack of response is exactly what he has a right to do. And it seems to me that we've caught it early enough that I can instruct the jury – well, I want to go a little bit further. [¶] Furthermore, even if it was sought to make an adoptive admission out of this, I find it to be – the probative value to be rather weak in this case because just a moment before, we were talking about the two girls who were involved. And it would be natural to assume that when you're talking about charges of murder and attempted murder, you would know that it referred to the people that you're talking about just a moment before. [¶] So I don't find much probative value at all, even if one is going towards the theory of adoptive admission. And, therefore, on 352 grounds it should be excluded because of the prejudicial value involving the Miranda rights exceeds any probative – slight probative value it would have.

(RT 3950-3951.) The court denied the motion for mistrial, however, explaining:

> I believe that [the prosecutor's] question was asked in good faith; that he did, in fact, ask for only the demeanor. He went no further than that. Indeed, there was a follow-up question and I won't deny that. But the question was answered in a way that went beyond [the prosecutor's] question, that is the damaging part of it. [¶] I find in this case with a matter of this magnitude that there will not be any violation of due process or need to have a mistrial provided, when the jury gets back, I will immediately

> admonish them concerning – striking that part of the record about his lack of response to being advised of the charges. They're to strike it all together.

(RT 3951.) The court clarified that its ruling was based on due process considerations, "on whether or not [appellant] should be granted a mistrial because of an unfair trial at this point." (RT 3952.)

The court later admonished the jury:

> I just want to let you know about something that happened just before the lunch hour. And you may recall that Detective Souza had responded that there was – when [appellant] here was advised of the charges involved, not the name of the victims but the charges involved, there was no verbal – in effect no verbal response by him, the inference being that maybe there should have been had you not already know, right? [¶] And I want to say to you that that evidence of no verbal response is to be stricken by – is now stricken by the Court, and that any such inference such as the one I mentioned is not to be made. In other words, his silence is appropriate at that point.

(RT 3958.)

B. Discussion

"[A] motion for mistrial should be granted only when a party's chances of receiving a fair trial have been irreparably damaged." (*People v. Ayala, supra,* 24 Cal.4th at p. 284 [internal quotations and citation omitted].) "A mistrial should be granted if the court is apprised of prejudice that it judges incurable by admonition or instruction." (*People v. Lucero, supra,* 23 Cal.4th at p. 713 [internal quotations and citation omitted].)

> Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions.

(*People v. Lucero, supra,* 23 Cal.4th at p. 714.) On appeal, this Court reviews a ruling denying a motion for mistrial for abuse of discretion. (*People v. Ayala, supra,* 24 Cal.4th at pp. 283-284.) A court abuses its discretion "when its

determination is arbitrary or capricious or exceeds the bounds of reason, all of the circumstances being considered." (*People v. Carbajal, supra,* 10 Cal.4th at p. 1121.)

This Court has summarized the rule of *Doyle*:

> [I]t is fundamentally unfair, and a deprivation of due process, to promise an arrested person that his silence will not be used against him, and then to breach that promise by using silence to impeach his trial testimony.

(*People v. Hughes* (2002) 27 Cal.4th 287, 332.) Whether references to a defendant's silence violate his Fifth Amendment privilege against self-incrimination and Fourteenth Amendment right to due process is reviewed de novo. (*United States v. Pino-Noriega* (9th Cir. 1999) 189 F.3d 1089, 1098.)

Out of the presence of the jury, appellant's trial counsel read Detective Souza's report which indicated that appellant was advised of his *Miranda* rights and he invoked his right to remain silent. (RT 3943.) Having received the "implicit assurances" of *Miranda* warnings, appellant's silence or lack of reaction cannot be used against him at trial. The prosecutor's questions elicited responses that called attention to appellant's lack of reaction and inquiry, insinuating that appellant was conscious of his guilt because an innocent person – and perhaps also challenging appellant's claim of memory loss – would not have remained silent. The detective's "no reaction and no inquiry" testimony violated appellant's right to remain silent. (Cf. *United States v. Elkins* (1st Cir. 1985) 774 F.2d 530, 538 [holding that officer's testimony that defendants showed no surprise when placed under arrest and read their *Miranda* rights constituted impermissible comment on defendants' right to remain silent]; *Wainwright v. Greenfield* (1986) 474 U.S. 284, 292-295 [holding that prosecutor's use of defendant's postarrest, post-*Miranda* warnings silence as evidence of sanity violated *Doyle*].) Characterizing appellant's lack of reaction and inquiry here as "demeanor" evidence would exalt form over substance.

"*Doyle* cannot be avoided simply by treating testimony as to a defendant's non-responsiveness after receiving *Miranda* warnings as 'demeanor' evidence." (*United States v. Elkins, supra,* 774 F.2d at pp. 537-538.)

> To hold otherwise would circumvent the constitutional protection against self-incrimination: introducing evidence at trial that the defendant remained silent in the face of incriminating evidence would violate the Fifth Amendment, but describing what a defendant looked like in remaining silent would not.

(*United States v. Velarde-Gomez* (9th Cir. 2001) 269 F.3d 1023, 1032.)[85/]

Though the prosecutor's questions elicited an improper reference to appellant's silence, the trial court did not abuse its discretion in denying appellant's motion for mistrial. The trial court properly concluded that any prejudicial effect arising from the reference to appellant's silence could be cured by an admonition to the jury to disregard it and not to draw an inference of guilt from it.

> It is not an abuse of discretion when a trial court denies a motion for mistrial after being satisfied that no injustice has resulted or will result from the occurrences of which complaint is made . . ..

(*People v. Gray* (1998) 66 Cal.App.4th 973, 986 [internal quotations and citation omitted]; see *Illinois v. Somerville* (1973) 410 U.S. 458, 461-462 [noting the trial court's broad discretion in ruling on mistrial motions].) This was an isolated reference to appellant's silence or non-responsiveness. Defense immediately objected. The court then instructed the jury to disregard the reference to appellant's silence and not to draw an inference of guilt from it.

---

85. As the Eleventh Circuit United States Court of Appeals wrote:

> [I]f the government's position was accepted, we might force future defendants into the unenviable predicament of expressing their innocence nonverbally through flailing arms, shaking heads, furtive glances or the like, lest the government draw negative inferences from a defendant's passive silence.

(*United States v. Rivera* (11th Cir. 1991) 944 F.2d 1563, 1569.)

During closing argument, the prosecutor made no mention of appellant's lack of reaction or lack of inquiry upon being advised of the charges. The error should thus be deemed cured.

> Juries often hear unsolicited and inadmissible comments and in order for trials to proceed without constant mistrial, it is axiomatic the prejudicial effect of these comments may be corrected by judicial admonishment; absent evidence to the contrary the error is deemed cured.

(*People v. Martin* (1983) 150 Cal.App.3d 148, 163 [holding that any prejudice arising from prosecution witness' emotional outburst at trial in which she told defendant he was guilty was cured by admonishment to disregard remark and not use remark for any purpose]; cf. *People v. Seiterle* (1963) 59 Cal.2d 703, 708, 711.)

Assuming the *Doyle* error was not cured, it was harmless beyond a reasonable doubt. (See *Brecht v. Abrahamson* (1993) 507 U.S. 619, 629-630 [holding that *Doyle* error is "trial error" subject to harmless error review under *Chapman v. California, supra,* U.S. 18]; accord, *United States v. Kallin* (9th Cir. 1995) 50 F.3d 689, 693.) Here, the error was harmless beyond a reasonable doubt.

First, the prejudicial effect of the prosecutor's reference to appellant's silence during police interview was lessened when appellant testified about his initial encounter with the police at his home. He testified that he was shocked when the police first approached him around 12 p.m. at his home, informed him of an investigation into the disappearance of Angie and Laurie, and then handcuffed him. (RT 3906, 5924-5927.) Through this initial encounter with the police, appellant countered the consciousness of guilt inference the prosecution sought to draw from his silence at the 4:10 p.m. police interview. Appellant was shocked when first approached, informed of the investigation, and then handcuffed. There was no reason then for appellant to have been

shocked about the accusations of murder and attempted murder later in the day.[86]

Second, at the 4:10 p.m. interview, the detective informed appellant about the investigation involving Laurie and Angie, and that he was being charged with murder and attempted murder. The detective did not accuse appellant of robbery – for example, asking him about the money unaccounted for from Laurie's pocket. The prejudicial effect – inference of appellant's consciousness of guilt – was primarily limited to the murder and attempted murder counts.[87] There was overwhelming evidence of appellant's guilt as to the murder of Laurie and attempted murder of Angie. Identity was not at issue. It was undisputed that appellant was the person who killed Laurie and almost

---

86. In addition, respondent notes that appellant's trial counsel made a reference to appellant's silence during his initial encounter with the police:

Q Now, you've told the jury that you remember now beating up the girls and then it kind of fades. But at that time, as the officer came up to you, did you remember that you had beaten them both up the night before?

A Not right then and there, no.

(RT 5927.)

87. To be sure, appellant's silence may have served to attack his credibility as well as suggest consciousness of guilt. Appellant admitted beating and choking Laurie and Angie out of rage, but said he then lost his memory of subsequent events. Appellant's credibility was of little – if any – consequence, not in any way intertwined with the issue of guilt. The primary issue during the guilt phase, whether appellant had the requisite criminal intents that night, was not dependent on his credibility. Memory loss is not a defense to crime. His main defense, organic personality syndrome with rage reaction and with or without seizures which induced memory loss, had been severely undermined by the testimonial evidence – in particular Angie's – and the physical and forensic evidence. Though not inconsistent with his defense, his partial – i.e., selective – memory loss further weakened his defense because he was unable to dispute the evidence showing that over a span of five/six hours, he engaged in organized, goal-directed behavior evincing the requisite criminal intents. His OPS rage reaction defense, under the circumstances, seems like a hollow – certainly untenable – plea of innocence.

killed Angie. In short, the overwhelming evidence of appellant's guilt coupled with the court's admonishment to the jury rendered the error harmless. (Cf. *Ahlswede v. Wolff* (9th Cir. 1983) 720 F.2d 1108, 1110 [holding *Doyle* error – prosecutor elicited testimony that defendant did not respond when asked about how two blood-stained $50 bills in his wallet became stained – was harmless in light of overwhelming evidence of defendant's guilt coupled with the court having struck the reference to defendant's silence and admonished the jury accordingly].)

Appellant's claim of error in denying his motion for mistrial should be rejected.

XXXVI.

THE COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING EVIDENCE OF A SEMEN STAIN FOUND ON BOXER SHORTS APPELLANT WAS WEARING AT TIME OF ARREST; EVEN IF THE COURT SO ERRED, THE ERROR WAS HARMLESS

Appellant argues that the court abused its discretion in admitting evidence of a semen stain found on the boxer shorts he was wearing at the time of arrest. (AOB 401-406.) Not so. The court did not abuse its discretion in admitting the evidence. Even if the court so erred, the error was harmless.

A semen stain, of a sufficient quantity to have been the result of ejaculation caused by sexual arousal, was found on the boxer shorts appellant was wearing at the time of arrest. (RT 4442, 4510-4511, 5543-5547.) Over defense objections, the court admitted this evidence. (RT 5548, 5556-5557.)

Evidence Code section 210 defines relevancy:

> "Relevant evidence" means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.

"The trial court has broad discretion to determine the relevance of evidence." (*People v. Gurule, supra,* 28 Cal.4th at p. 614.) "[An appellate court] examines for abuse of discretion a decision on admissibility that turns on the relevance of the evidence in question." (*People v. Waidla, supra,* 22 Cal.4th at pp. 717-718.) Under the abuse of discretion standard, where

> a discretionary power is inherently or by express statute vested in the trial judge, his or her exercise of that wide discretion must not be disturbed on appeal *except* on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice.

(*People v. Jordan* (1986) 42 Cal.3d 308, 316 [emphasis in original].)

Here, appellant was charged with, among other things, the attempted rape of Laurie. An element of attempted rape is the intent to have sexual intercourse with the victim. Appellant's sexual interest in Laurie and his state of sexual arousal were therefore relevant, having the tendency to prove appellant's intent to have sexual intercourse with her that night. Though there was other evidence of appellant's sexual interest in Laurie, "evidence does not become irrelevant solely because it is cumulative of other evidence." (*People v. Smithey* (1999) 20 Cal.4th 936, 974.) Given that the boxer shorts belonged to him, one can reasonably presume that the semen stain was from him. Appellant was wearing the boxer shorts when he was arrested around noon. (RT 3959-3961.) The evidence showed that appellant could not have returned home until around 3:30 a.m. earlier that morning. Given the relatively small window of time, one can reasonably presume that he was wearing the boxer shorts the night before.[88] Under these circumstances, the court cannot be said to have abused its discretion in admitting the semen stain evidence. (Cf. *People v. Vallez* (1978) 80 Cal.App.3d 46, 56 [Expert testimony that semen stains on victim's nightgown were from a man with type A blood was relevant and admissible, in prosecution of defendant who had type A blood, even though 40 percent of world's population has type A blood]; but cf. *Patterson v. State* (Tex.App.-Austin 2002) 96 S.W.3d 427, 433 [holding that probative value of evidence of another man's semen discovered on comforter allegedly belonging to victim of aggravated sexual assault was outweighed by danger of unfair prejudice, and thus, evidence was inadmissible as evidence of an alternative perpetrator, where proximity of comforter to the assaults was

---

88. Though appellant claimed that he had changed the clothes he had been wearing that Saturday night because Donna was doing the laundry that Sunday morning (RT 5910-5913, 6860-6861), Donna testified that she did not ask for, and appellant did not give her, the clothes he was then wearing for laundry (RT 8735).

unknown, the age of the comforter's semen stain was unknown, and whether assailant ejaculated during assault was unknown].)

Even if the court abused its discretion in admitting evidence of the semen stain on appellant's boxer shorts, the error was harmless. Even absent the semen stain on appellant's boxer shorts, there was abundant evidence showing appellant's sexual interest in Laurie and his attempted rape of Laurie. (See Argument III.) Furthermore, the prosecutor made no mention of the semen stain on appellant's boxer shorts in his closing remarks. It is, thus, not reasonably probable that appellant would have obtained a more favorable outcome had the semen stain evidence not been admitted. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

Accordingly, appellant's evidentiary claim should be rejected.

XXXVII.

THE COURT PROPERLY FOUND TESTIMONY REGARDING WHEN HE LAST HAD SEXUAL INTERCOURSE WITH DONNA KELLOGG, OR ANY OTHER WOMAN, TO HAVE BEEN RELEVANT; REGARDLESS, ANY ERROR IN ADMITTING SUCH TESTIMONY WAS HARMLESS

Appellant argues that he was prejudiced by the admission of testimony regarding when he last had sexual intercourse with Donna. (AOB 407-408.) Respondent disagrees. Appellant's lack of sexual relations with Donna or any other woman gave greater significance to the semen stain found on his boxer shorts, having the tendency to show that the stain occurred during or around the time of the murder of Laurie. Regardless, any error in admitting testimony of when appellant last had sexual intercourse was harmless.

A. The Record

The prosecutor asked Donna: "As of that Saturday night can you tell us when it was that you last had sexual relations with [appellant]?" Appellant's trial counsel objected on the ground of relevance. The court overruled the objection. Donna then answered: "If I remember, a couple weeks before then." The prosecutor sought clarification: "And when I say 'sexual relations,' does that mean in your mind an act of sexual intercourse?" Donna replied, "Yes." (RT 4909-4910.)

The prosecutor continued, asking:

> At the time, meaning that Saturday night that I've been asking you questions about, so far as you knew was [appellant] having sexual relations with any other person?

Donna replied, "Not that I knew of." Appellant's trial counsel objected on the ground of lack of personal knowledge. The court sustained the objection,

striking the answer and instructing the jury to disregard the answer. The prosecutor then asked:

> Ms. Kellogg, in January of 1991, thinking about to that time, had [appellant] at any time around that date of January of 1991 admitted to you that he had had sex with any other person.

Donna answered, "No." The prosecutor followed up with: "Had you seen him to be involved with any other person?" Donna again answered, "No." (RT 4910.)

The prosecutor asked Donna whether she recalled testifying earlier that she had sexual relations with appellant about two weeks before that Saturday night. Donna responded: "I don't really remember, but I believe." The prosecutor showed Donna Detective Caudle's report. After she looked at the report, the prosecutor asked her whether it helped her remember when she and appellant last had sexual relations "before that Saturday night." Donna responded, "It doesn't click." She acknowledged that it would have been easier to recall when she last had sexual relations with appellant on the date when the police came to the house than three years later. (RT 4916-4917.)

Later, Detective Caudle testified:

> I asked her approximately how long it had been since they last had sex, and she indicated they last had sex approximately two weeks prior to his arrest.

(RT 5554.) This testimony was received over appellant's trial counsel's objection that Detective Caudle's testimony was cumulative and was not a prior inconsistent statement. (RT 5557-5558; CT 694, 703-704.)

B. Discussion

Evidence Code section 350 provides: "No evidence is admissible except relevant evidence." Evidence Code section 210 defines "relevant evidence" as:

> evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to

> prove or disprove any disputed fact that is of consequence to the determination of the action.

The test of relevance is whether the evidence tends "logically, naturally, and by reasonable inference" to establish material facts such as identity, intent, or motive. (*People v. Daniels, supra,* 52 Cal.3d at p. 856.) "The trial court has broad discretion in determining the relevance of evidence, but lacks discretion to admit irrelevant evidence." (*People v. Heard, supra,* 31 Cal.4th at p. 973.) "[An appellate court] examines for abuse of discretion a decision on admissibility that turns on the relevance of the evidence in question." (*People v. Waidla, supra,* 22 Cal.4th at pp. 717-718.)

Relying upon a Michigan case, *People v. Flanagan* (Mich.Ct.App. 1983) 342 N.W.2d 609,[89/] appellant argues that whether he

---

89. In *Flanagan*, the Michigan Court of Appeals held that it was error to permit prosecution to inquire into the defendant's marital relations on the theory that men who are deprived of sexual intercourse for a period of time are more likely to commit rape. (*People v. Flanagan, supra*, 342 N.W.2d at pp. 612-613.) The *Flanagan* court noted that the Michigan Supreme Court had spoken on this issue in *People v. Travis* (Mich. 1929) 224 N.W. 329 ("*Travis*") and quoted from the opinion:

> In admitting this testimony and limiting it to a time prior to the arrest, the jury was given to understand that a man who had not had sexual intercourse for a considerable period of time would be more inclined to commit rape than one whose sexual desires had been regularly satisfied. It was on this theory that the prosecuting attorney brought out the testimony and apparently on this theory the court admitted it as evidence which the jury might weigh against the defendant in determining his guilt. The prejudicial effect of this testimony would more plainly appear in the case of an unmarried defendant called upon to answer a charge of rape. His virtue and continence would be used against him. The jury was required to determine the truth of the story told by the girl or that related by the defendant. Against the probability of the truth of the defendant's story, which was a complete denial of the charge, they were allowed to consider the fact that he had not had sexual intercourse with his wife for four years. The harmful effect of this testimony was emphasized by the prosecuting

> recently enjoyed consensual sex with Donna or any *other* person had no tendency in reason to prove or disprove the charge of attempted rape, or the attempted rape-murder special circumstance allegation.

(AOB 408.)

Whether the rationale of *People v. Flanagan* is correct is irrelevant in this case because the disputed evidence was admissible on a theory other than the "frustrated libido" theory rejected in *Flanagan*. Here, the prosecution experts, though able to conclude that the semen stain – found on the boxer shorts that appellant was wearing that night (see Argument XXXVI) – was the result of sexual arousal, were unable to date the age of the stain (RT 5548-5549). Evidence of appellant's lack of sexual relations with Donna or some other woman had the tendency to show that appellant's boxer shorts was not stained during any recent sexual encounter with Donna or some other woman, and thereby making it more probable that the stain occurred during or around the time of the murder of Laurie. Appellant's lack of sexual relations therefore gave greater significance to the semen stain on his boxer shorts. This inference, unlike the inference of greater likelihood to commit rape, was not drawn in a vacuum and not based on unfounded misconceptions and speculation. This Court should thus defer to the trial court's ruling.

Regardless, even if the court erred in admitting the evidence, the error was harmless. (See, e.g., *People v. Pitts* (1990) 223 Cal.App.3d 1547, 1555.) Evidence of having been deprived of sexual intercourse with Donna or any other woman for a two-week period had no, or little, probative value. Referring this Court back to Respondent's Argument III, there was ample, strong evidence of appellant's sexual interest in Laurie prior to this two-week period

---

> attorney in again referring to it in his argument to the jury. For this error the judgment should be reversed.

(*People v. Flanagan, supra,* 342 N.W.2d at p. 613; see also *People v. Sterling* (Mich.Ct.App. 1986) 397 N.W.2d 182, 232-233.)

and attempted rape of Laurie on the night of January 26, 1991. Appellant's lust and pursuit for Laurie dated back to the summer of 1990. Appellant's attempted rape of Laurie was not a random, impulsive act to satisfy a biological need. (Cf. *People v. Flanagan, supra*, 342 N.W.2d at p. 613 ["We cannot help but be convinced beyond doubt that any error due to the admission of the testimony was harmless when we look at the overwhelming evidence of guilt."].) Furthermore, appellant was asked and testified that the last time he had sexual relations with Donna was a week or two prior to January 27, 1991 – a short period of time in comparison to the four years in *Travis*. He further testified that he was not having any particular sexual problems or thoughts on that day. (RT 5814-5815.) Also, unlike *Travis*, the prosecutor here did not mention in his closing argument the two-week period when appellant did not have sexual intercourse with Donna. (Cf. *People v. Flanagan, supra,* 342 N.W.2d at p. 613 [finding the error harmless beyond a reasonable doubt because, in part, defendant answered he had no marital problems prior to the alleged sexual assaults and that his marital problems began when he was accused of the assaults, and the prosecutor did not raise the issue again at trial or in closing argument; and distinguishing *Travis* on the basis that the defendant there had not had sexual intercourse with his wife for four years and that fact was emphasized by the prosecutor by referring to it in closing argument].) It was not reasonably probable that appellant would have obtained a more favorable outcome had the error not occurred. (*People v. Watson, supra,* 46 Cal.2d at p. 836.)

Accordingly, appellant's evidentiary error claim should be rejected.

XXXVIII.

THE COURT PROPERLY ADMITTED DR. FISHER'S TESTIMONY THAT ANGIE SAID THAT THE PERSON WHO INFLICTED HER INJURIES HAD THREATENED TO KILL HER; REGARDLESS, ANY ERROR IN ADMITTING THE TESTIMONY WAS HARMLESS

Appellant argues that he was prejudiced by improperly admitted testimony of Angie telling Dr. Fisher that the person who inflicted her injuries threatened to kill her. (AOB 409-415.) Not so. The court properly admitted Dr. Fisher's testimony concerning Angie's statement made during the sexual assault examination. Regardless, any error in admitting the testimony was harmless.

A. Background

At the exhibit conference, appellant's trial counsel moved, on the ground of double hearsay, to exclude testimony by emergency room doctor Ann Fisher that she recorded Angie's statement, made during the sexual assault exam, that the person who caused her injuries had threatened to kill her and Laurie if they were not quiet. The prosecutor argued that the evidence was admissible under the hearsay exception for past recollection recorded (Evid. Code, § 1237). It was brought to the court's attention that neither Angie nor the doctor had present recollection of what was said during the examination. Dr. Fisher simply recorded Angie's statement at the time she said it. The trial court indicated the statement would be admissible so long as the proper foundation was established. (RT 3443-3450.)

At trial, appellant's trial counsel renewed the double hearsay objection to Dr. Fisher's testimony. The court again overruled the defense objection, finding Angie's statement to be admissible under the hearsay exceptions for

past recollection recorded (Evid. Code, § 1237) and spontaneous statement (Evid. Code, § 1240). (RT 5239-5243.) Dr. Fisher then testified:

> I asked [Angie] if she had been threatened, threatened to be harmed in any way. [¶] She told me that the person who injured her would kill them if not quiet.

(RT 5244.) The doctor testified that she then recorded Angie's response. (*Ibid.*)

B. Discussion

In light of the recent United States Supreme Court decision in *Crawford v. Washington* (2004) __ U.S. __, 124 S.Ct. 1354, before reaching the evidentiary issue of the admissibility of Angie's statement to Dr. Fisher under the Evidence Code, the preliminary constitutional issue of the application of the Confrontation Clause of the Sixth Amendment to Angie's statement must be addressed. The *Crawford* Court held that under the Confrontation Clause, out-of-court *testimonial* statements are admissible only when the declarant is unavailable and there has been a prior opportunity for cross-examination of that declarant. (*Crawford v. Washington, supra*, 124 S.Ct. at p. 1369.) The High Court explained:

> Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of "reliability."

(*Id.* at p. 1370 [questioning whether *White v. Illinois* (1992) 502 U.S. 346 – which held that the Confrontation Clause does not require, before admitting testimony under the "spontaneous declaration" and "medical examination" exceptions to the hearsay rule, the prosecution to produce the declarant at trial or the court to find the declarant unavailable – survives its decision].) So, as to testimonial statements, the *Crawford* Court abrogated its prior decision in *Ohio v. Roberts* (1980) 448 U.S. 56, 66, in which the Court held that the

Confrontation Clause does not bar admission of an unavailable witness's statement if the statement bears "adequate 'indicia of reliability'" – meaning the evidence falls within a "firmly rooted hearsay exception" or bears "particularized guarantees of trustworthiness." (*Id.* at p. 1369.) The *Roberts* test remains intact as to nontestimonial statements:

> Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law – as does *Roberts*, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether. Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.

(*Id.* at 1374.)

The initial issue therefore is whether Angie's statements to Dr. Fisher were "testimonial" and consequently inadmissible under the Confrontation Clause because Angie was available at trial and there had been no prior opportunity to cross-examine Angie about her statement to Dr. Fisher. Though the *Crawford* decision did not "spell out a comprehensive definition of 'testimonial,'" it identified three possible abstract interpretations of "testimonial":

> "ex parte in-court testimony or its functional equivalent – that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially" . . .; "extrajudicial statements . . . contained in formalized testimonial materials such as affidavits, depositions, prior testimony, or confessions, . . .; "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial," . . . .

(*Crawford v. Washington, supra,* 124 S.Ct. at p. 1364, italics omitted.)

Here, Angie's statement to Dr. Fisher was nontestimonial; put another way, *Crawford* does not apply. Angie's statement was made in the hospital

emergency room to a medical doctor seeking to treat her, not to a government official acting to advance a criminal investigation or prosecution. Her statement to Dr. Fisher was not the equivalent of responses in a custodial examination, pretrial hearing, or any formalized setting to obtain "testimony." (See *Crawford v. Washington, supra,* 124 S.Ct. at p. 1364 [noting the dictionary definition of "testimony:" "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact"].) Angie was not contemplating about being a witness in future legal proceedings. Her statement was made under the stress of the assault, battery, kidnap, and attempted murder – not from, or without, reflection and deliberation. "[T]he very concept of an 'excited utterance' is such that it is difficult to perceive how such a statement could ever be 'testimonial.'" (*Fowler v. State* (Ind.Ct.App. 2004) 809 N.E.2d 960, 964; cf. *People v. Moscat* (N.Y.Crim.Ct. 2004) 777 N.Y.S.2d 875 [9-1-1 call made by domestic assault complainant who was unavailable to testify at trial was not "testimonial" as would bar its admission into evidence under Confrontation Clause because the call was undertaken by complainant seeking protection and could be seen as part of criminal incident itself rather than prosecution that was to follow, and such call would typically not involve a person who is contemplating being a witness in future legal proceedings].)

Having determined that Angie's statement to Dr. Fisher was nontestimonial, the admissibility of the statement turns on whether it bears "adequate 'indicia of reliability'" – i.e., whether it falls within a "firmly rooted hearsay exception" or bears "particularized guarantees of trustworthiness."

1. Angie's Statement To Dr. Fisher Fell Within The Firmly Rooted Hearsay Exception For Spontaneous Statement

Evidence Code section 1200 provides:

> (a) "Hearsay evidence" is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated.
>
> (b) Except as provided by law, hearsay evidence is inadmissible.
>
> (c) This section shall be known and may be cited as the hearsay rule.

A firmly rooted exception to the hearsay rule is the spontaneous statement – otherwise known as an "excited utterance." Evidence Code section 1240 provides:

> Evidence of a statement is not made inadmissible by the hearsay rule if the statement:
>
> (a) Purports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and
>
> (b) Was made spontaneously while the declarant was under the stress of excitement caused by such perception.

The requirements for this exception are: (1) there must be an occurrence startling enough to produce nervous excitement and render the utterance spontaneous and unreflecting; (2) the utterance must be made before there has been time to contrive and misrepresent, while the nervous excitement still dominates and the reflective powers are still in abeyance; and (3) the utterance must relate to the circumstance of the occurrence preceding it. (*People v. Poggi* (1988) 45 Cal.3d 306, 318.)

> The crucial element in determining whether a declaration is sufficiently reliable to be admissible under this exception to the hearsay rule is . . . not the nature of the statement but the mental state of the speaker. The nature of the utterance – how long it was made after the startling incident and whether the speaker blurted it out, for example – may be important, but solely as an indicator of the mental state of the declarant. . . . [U]ltimately each fact pattern must be considered on its own merits, and the trial court is vested with reasonable discretion in the matter.

(*People v. Roybal* (1998) 19 Cal.4th 481, 516 [internal quotations and citation omitted]; see also *People v. Trimble* (1992) 5 Cal.App.4th 1225, 1234.) "'Spontaneous' does not mean that the statement must be made at the time of

the incident, but rather in circumstances such that the statement is made without reflection." (*People v. Hughey* (1987) 194 Cal.App.3d 1383, 1388.) "The decision whether to admit a statement as a spontaneous utterance lies within the discretion of the trial court." (*People v. Hines, supra,* 15 Cal.4th at p. 1034, fn. 4 [internal quotations and citation omitted].) This Court reviews the admission of a spontaneous declaration for an abuse of discretion. (*People v. Gutierrez* (2000) 78 Cal.App.4th 170, 180.) Under the abuse of discretion standard, where

> a discretionary power is inherently or by express statute vested in the trial judge, his or her exercise of that wide discretion must not be disturbed on appeal *except* on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice.

(*People v. Jordan, supra,* 42 Cal.3d at p. 316 [italics in original].)

Here, between 10 p.m. and 3 a.m., Angie was beaten, kidnaped, and strangled to the point of unconsciousness – near death. (RT 5133, 5137, 5139-5140.) Around 3 a.m., Angie was found lying on Chateau Fresno Road, barely conscious. (RT 3806-3809.) When police officers arrived around 3:30 a.m., an observer described Angie as seeming as if she "really wasn't there," as if she had been "drugged." (RT 3813.) The next thing Angie recalled, after trying to get the thing that felt like a rope off her neck, was being in an ambulance hearing voices asking for her name and trying to communicate with her. (RT 5133, 5189-5191.) According to Dr. Fisher's report, Angie arrived at the hospital emergency room around 4:40 a.m. (II SCT 424.) Dr. Fisher testified about Angie's emotional state:

> Q . . . [¶] When you first treated Angie [], when you first looked at her in the emergency room, . . . [¶] Tell us what, if anything, you can about her emotional state at that time?
>
> A She was somewhat agitated at times, a bit sleepy, but would respond immediately to us, but was somewhat agitated and anxious appearing.

Q Can you describe to us what you mean when you say agitated and sleepy, but then you could arouse her – give us an example what would happen.

A Well, she would be somewhat restless. She would lay quietly for a time, and then with minimal stimulation, us talking to her, she would become anxious and move around on the gurney and those sorts of things.

Q When you spoke – did you attempt to speak with Angie []?

A Yes.

Q And when you spoke with her, did she respond to you in any way?

A Yes, she did. She answered questions and did the things we asked her to do.

Q All right. And when you would put a question to her, did you notice anything different about the manner in which she would respond compared to other persons you've seen who have not been patients in the emergency room?

A Her response was not a normal conversational-type response. She would answer questions, but we could tell this was making her anxious to have us talking to her. It wasn't a normal conversational-type answers.

Q And did you say something about noticing that she was sleepy?

A At times she would be sleepy, but then she would respond to us when we would ask her to do something or talk to her. If we left her alone, she frequently would become sleepy.

Q In order to arouse her, it was something that you or someone else had to do was bring her back from drifting off to sleep?

A Yes.

THE COURT: Is that due to drugs you gave her or just her condition?

[DR. FISHER]: We didn't give her any drugs at that time.

(RT 5230-5231.) Dr. Fisher said that she saw Angie at 4:50 a.m. and completed the form at about 9:45 a.m., which meant the questions Angie specifically answered would have been asked before 9:45 a.m. (RT 5242-5243.) Angie testified that, other than in the ambulance, she did not recall any other places where people tried to ask her questions. (RT 5157-5158.)

Looking at the emergency room records did not refresh Angie's memory. (RT 5158-5159.)

Under these circumstances, the court could reasonably find that during the time of questioning, Angie remained under the emotional distress caused by the events of that night, and hence her statement was spontaneous. The crucial element is the mental state of the declarant. (See *People v. Roybal, supra,* 19 Cal.4th at p. 516; *People v. Trimble, supra,* 5 Cal.App.4th at p. 1234.) Angie was in a remote, isolated area during the middle of the night. She was beaten and bleeding profusely. She was alone for hours in a car with the man that had beaten her and murdered her friend. She was then strangled to the point of unconsciousness, near death. When she arrived in the emergency room, she was sleepy but remained agitated and distraught, undoubtedly due to the events of the night. Though several hours had passed between the strangulation and questioning by Dr. Fisher, Angie had been unconscious or barely conscious for most of, if not the entire time period. (Cf. *People v. Raley, supra,* 2 Cal.4th at pp. 893-894 [traumatic head injury, bled for 18 hours, and unconscious for part of this period]; *State v. Bass* (N.J. Ct.App. 1987) 535 A.2d 1, 9-10 [statement by five-year-old eyewitness to brother's murder was "spontaneous and contemporaneous" though given in hospital six hours later].) The seriousness of the physical injuries sustained and the resultant emotional state severely limited Angie's capacity to reflect and deliberately fabricate. On the stand, when asked if she recalled anyone else asking her questions other than in the ambulance, Angie answered she could not recall. (RT 5157-5158.) Her inability to recall suggests that, in the emergency room, she was responding to the doctor's questions under circumstances of physical and emotional distress and shock, rather than reflection and deliberation. (Cf. *People v. Francis* (1982) 129 Cal.App.3d 241, 254 [noting that victim's "badly wounded condition and profuse bleeding suggest he was talking under circumstances of

physical and emotional stress and shock, rather than reflection"].) From Dr. Fisher's testimony concerning Angie's emotional state, it cannot be disputed that, when Angie made the statement, she was still very much under the emotional distress and shock of the events of that night. (Cf. *People v. Farmer* (1989) 47 Cal.3d 888, 904-905 [noting that victim was "distraught and in severe pain"], overruled on another ground in *People v. Waidla, supra,* 22 Cal.4th at p. 724, fn. 6; *People v. Jones* (1984) 155 Cal.App.3d 653, 661-662 [holding that statement made by burn victim to treating physician to effect that defendant poured gasoline over him, which was made 30-40 minutes after his injury while he appeared calm but "dazed" and after he had been given a painkiller, was admissible as a spontaneous declaration].) Thus, the court could reasonably find Angie's statement to Dr. Fisher was a spontaneous or excited utterance. (Cf. *People v. Raley, supra,* 2 Cal.4th at pp. 893-894 [explaining that though the sexual attack of which declarant spoke had occurred some hours before her statements, her physical condition – suffered a traumatic head injury, bled for 18 hours, unconscious for part of this period, "was not far from death" – was such as would inhibit deliberation]; *People v. Washington* (1969) 71 Cal.2d 1170, 1176-1177 [upholding trial court's findings that, though over an hour after attack, victim did not have power to reflect on his answers to questions asked by the emergency room nurse where victim was unconscious for most of the time between the beating and the nurse's questions and had suffered brain damage and was having difficulty breathing].)

Even if appellant argues, Angie's statement was unreliable because significant time for reflection had passed and the seriousness of the injuries sustained raised questions regarding the accuracy of Angie's recollections (AOB 411); this goes to the weight of the statement, not to the admissibility.

> Admission under a firmly rooted hearsay exception satisfies the constitutional requirement of reliability because of the weight accorded longstanding judicial and legislative experience in

> assessing the trustworthiness of certain types of out-of-court statements.

(*Idaho v. Wright* (1990) 497 U.S. 805, 817; cf. *People v. Martinez* (2000) 22 Cal.4th 106, 132 [holding that testimony as to acceptability, accuracy, maintenance, and reliability of computer hardware and software is not prerequisite to admission of computer records]; cf. *People v. Brown* (1973) 35 Cal.App.3d 317, 323-324 [delays in making statements under "fresh complaint doctrine" affect weight rather than admissibility]; see also *United States v. Catabran* (9th Cir. 1988) 836 F.2d 453, 458 [questions "as to the accuracy of [computer] printouts, whether resulting from incorrect data entry or the operation of the computer program, as with inaccuracies in any other type of business records, [affect] only the weight of the printouts, not their admissibility"].) "The hearsay exception for spontaneous declarations is among those 'firmly rooted' exceptions that carry sufficient indicia of reliability to satisfy the Sixth Amendment's confrontation clause." (*White v. Illinois, supra,* 502 U.S. at p. 355, fn. 8.)

> "For the purpose of the spontaneous utterance exception to the hearsay rule, an utterance is spontaneous if it is made under the influence of an exciting event and before the declarant has had time to contrive or fabricate the remark, and thus it has sufficient indicia of reliability." (Citation omitted.) [¶] Of course, the substance of the declarant's excited utterance may be controverted by other evidence. For example, it may be contradicted by the testimony of other eyewitnesses; it may be refuted by forensic evidence; or, as here, it may be contradicted by the declarant herself. (Citation omitted.) Such contrary evidence goes to the weight to be given the spontaneous utterance by the finder of fact, not to its admissibility. The defendant's suggestion that the judge has independent discretion to determine whether, in light of other evidence, the utterance is "reliable" would effectively require the judge to hear the entirety of the other proposed trial evidence and would have the judge usurp the fact finder's function and decide whether the spontaneous utterance was outweighed by more credible, reliable evidence. The judge's broad discretion to determine whether the

> prerequisites for the spontaneous utterance exception have been satisfied does not suggest such a broad ranging inquiry into the weight to be given to the spontaneous utterance. Rather, admissibility is determined solely by reference to the requirements of the exception itself.

(*Commonwealth v. King* (Mass. 2002) 763 N.E.2d 1071, 1075-1076; e.g., *Commonwealth v. Napolitano* (Mass.Ct.App. 1997) 678 N.E.2d 447, 449-451 [where victim's excited utterances met tests for admissibility, judge did not err in admitting them despite victim's later recantation]; cf. *People v. Fratello* (N.Y.Ct.App. 1998) 706 N.E.2d 1173, 92 N.Y.2d 565, 572-574 [excited utterance, the only evidence of identification, held sufficient to support conviction despite recantation at trial].) The requirements of the spontaneous statement exception were satisfied here. A statement that meets these requirement are deemed sufficiently trustworthy because of the lack of opportunity or an inhibited capacity for reflection and deliberate fabrication. (*Rufo v. Simpson* (2001) 86 Cal.App.4th 573, 590-591.) The court here was satisfied that the stress and excitement of the events of that night remained and dominated when Angie was questioned in the emergency room. The court's determination was well within reason.

2. Appellant Has Not Preserved The Issue Of Whether Angie Testified That Her Statement Made To Emergency Room Personnel Was A True Statement

Another exception to the hearsay rule is the past recollection recorded. Evidence Code section 1237 provides:

> (a) Evidence of a statement previously made by a witness is not made inadmissible by the hearsay rule if the statement would have been admissible if made by him while testifying, the statement concerns a matter as to which the witness has insufficient present recollection to enable him to testify fully and accurately, and the statement is contained in a writing which:

(1) Was made at a time when the fact recorded in the writing actually occurred or was fresh in the witness' memory;

(2) Was made (i) by the witness himself or under his direction or (ii) by some other person for the purpose of recording the witness' statement at the time it was made;

(3) Is offered after the witness testifies that the statement he made was a true statement of such fact; and

(4) Is offered after the writing is authenticated as an accurate record of the statement.

The Assembly Committee on Judiciary commented:

> . . . Section 1237 permits testimony of the person who recorded the statement to be used to establish that the writing is a correct record of the statement. *Sufficient assurance of the trustworthiness of the statement is provided if the declarant is available to testify that he made a true statement and if the person who recorded the statement is available to testify that he accurately recorded the statement.*

(Italics added.)

Here, appellant contends that Angie was unable to testify that all statements made to emergency room personnel were true statements. (AOB 412.) Thus, a foundational requirement – Evidence Code section 1237, subdivision (a), subsection (3) – for admissibility was not laid below. Appellant failed to preserve this issue for appeal.

The California Supreme Court explained:

> [A] judgment will not be reversed on the ground that evidence has been admitted erroneously, "unless there appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion. . . ." Specificity is required both to enable the court to make an informed ruling on the motion or objection and to enable the party proffering the evidence to cure the defect in the evidence.

(*People v. Crittenden, supra,* 9 Cal.4th at p. 126 [internal quotations and citations omitted].) As is clear from the record, appellant argued that the prosecution failed to meet its burden as to subsection (1), not subsection (3).

(See RT 5240-5242.)[90] The court's ruling specified subdivision (a)(1), not (a)(3). (RT 5243.) Absent a timely and specific objection on the ground appellant now asserts on appeal, his contention must be deemed waived. (See *In re Avena, supra,* 12 Cal.4th at p. 721; *People v. Hill, supra,* 3 Cal.4th at p. 994-995; *People v. Mitcham, supra,* 1 Cal.4th at p. 1044.)

If this Court finds that appellant has not waived the issue he now asserts on appeal, respondent disagrees that the foundation required for past recollection recorded should be deemed not to have been met.

Evidence Code section 1237 "recognizes that time universally erodes human memory." However, Evidence Code section 1237 does not allow previously recorded statements to be admitted absent the declarant attesting to the veracity of her statement. (*People v. Shirley* (1982) 31 Cal.3d 18, 33, fn. 16

---

90. The record reads:

> [PROSECUTOR]: Your Honor, under [Evidence Code section] 1237 and, I believe, 1240, I would be offering a particular statement by [Angie] recited by the doctor.
>
> THE COURT: Very well.
>
> [DEFENSE COUNSEL]: We would object, Your Honor. Hearsay. And we feel he hasn't met his burden.
>
> THE COURT: All right. For the record, you object to it under 1237?
>
> [DEFENSE COUNSEL]: That's correct.
>
> THE COURT: And the burden has not been met to a particular subsection, counsel?
>
> [DEFENSE COUNSEL]: Yes. And that is under [1]237(a)(1).
>
> The COURT: All right.
>
> [DEFENSE COUNSEL]: And we believe that it does not qualify under [1]240.

(RT 5240-5241.) After a sidebar, indicating that it needed to reconsider the foundational basis, the court asked:

> Excuse me, Doctor. Whether it was still fresh in the recollection, in the memory. Would you proceed with that? I'm concerned with 1237. [¶] . . . (a)(1).

(RT 5242.)

["A prior statement is admissible as past recollection recorded only if, inter alia, the witness testifies that it was true."].) If otherwise, section 1237 would eliminate the defendant's right to confrontation – a declarant who can neither remember making the statement nor the circumstances surrounding the making of the statement, and no sufficient assurance that the statement is reliable and trustworthy. (See *People v. Simmons* (1981) 123 Cal.App.3d 677, 682.)

Respondent is mindful that Angie could not recall – even after looking at the emergency room record – whether there were other places where people tried to question her. (RT 5133, 5157-5159.) Angie could not recall Dr. Fisher's questioning in the emergency room, and therefore could not attest to the veracity of her statement. Respondent acknowledges that under a mechanistic application of Evidence Code section 1237, Angie's statement should thus not have been admitted into evidence. (Cf. *People v. Simmons, supra,* 123 Cal.App.3d at pp. 679-682; *People v. Shirley, supra,* 31 Cal.3d at p. 33, fn. 16; *People v. Blair* (1979) 25 Cal.3d 640, 664; *People v. Parks* (1971) 4 Cal.3d 955, 960.) However, here, Angie testified that she recalled being in an ambulance with people asking her questions. She remembered trying to communicate with those people, and trying to tell them accurately what had happened. But more importantly, her statement fell squarely within the "excited utterance" exception to the hearsay rule. The "excited utterance" is "among those 'firmly rooted' exceptions that carry sufficient indicia of reliability to satisfy the Sixth Amendment's confrontation clause." (*White v. Illinois, supra,* 502 U.S. at p. 355, fn. 8.) Appellant's right to confrontation would not be compromised by the admission of Angie's statement. Appellant could challenge the reliability of the statement, arguing that significant time for reflection had passed and the seriousness of the injuries sustained raised questions regarding the accuracy of Angie's recollections. (Cf. *Chambers v. Mississippi* (1973) 410 U.S. 284, 298-302.)

3. Regardless, Any Error In Admitting Angie's Statement Was Harmless

Regardless, any error in admitting Angie's statement that appellant threatened her was harmless under any standard of review for harmless error. (*People v. Watson, supra,* 46 Cal.2d at pp. 836-837; *Chapman v. California, supra,* 386 U.S. at p. 24.) Appellant contends that "the hearsay threat constituted a pre-offense statement expressing the intent to commit murder." (AOB 415.) Even without Angie's statement, there was overwhelming evidence of appellant's intent to commit murder.

> [I]f the properly admitted evidence is overwhelming and the incriminating extrajudicial statement is merely cumulative of other direct evidence, the error will be deemed harmless.

(*People v. Martinez* (2003) 113 Cal.App.4th 400, 410 [internal quotations and citation omitted].) Appellant drove the girls to a remote, isolated area. He lured Laurie into a pitch-black bathroom and sought to have sex with her forcibly. When Angie entered the bathroom, he knocked her to the ground, choked her, and repeatedly slammed her head into the ground. Appellant was worried; he wanted to silence the girls. After strangling Laurie to death, he put Angie in his car and drove for hours, trying to decide how to dispose of Angie without being detected. At some point, he stopped and strangled Angie, undoubtedly trying to kill her. (Cf. *People v. Martinez, supra*, 113 Cal.App.4th at p. 410; *People v. Schmaus* (2003) 109 Cal.App.4th 846, 860.)

Accordingly, appellant's claim of improper admission of hearsay evidence should be rejected.

XXXIX.

APPELLANT WAS NOT PREJUDICED BY DR. JACK SHARON'S TESTIMONY THAT ANGIE WAS REFERRED FOR PSYCHIATRIC CONSULTATION BECAUSE SHE WAS A RISK FOR POST-TRAUMATIC STRESS DISORDER

Appellant argues that he was prejudiced by Dr. Jack Sharon's testimony that Angie was referred for psychiatric consultation because she was a risk for post-traumatic stress disorder ("PTSD"). (AOB 416-418.) Not so. Dr. Sharon's testimony was relevant, having the tendency to show that the emotional and physical injuries appellant inflicted upon Angie were so severe that she was immediately evaluated to be at risk for PTSD. In any event, appellant was not prejudiced by this single brief reference to PTSD.

A. The Record

Dr. Jack Sharon, a resident physician at Valley Medical Center, was involved in the treatment of Angie. After listening to Dr. Sharon's observations and evaluation of Angie's injuries, the prosecutor asked the doctor whether he suggested or ordered "any follow-up consultations." (RT 5267.) Dr Sharon responded: "From looking through the notes I do recall consulting the psychiatric surgeon or psychiatric service, I'm sorry, as well as the neurosurgical service." (*Ibid.*) The prosecutor asked the doctor why a neurosurgical service consultation was requested; and the doctor responded. The prosecutor then asked the doctor the purpose for requesting a psychiatric consultation. (*Ibid.*) Appellant's trial objected on the ground of relevance; the court overruled the objection. (*Ibid.*) Dr. Sharon then explained:

> Due to the mechanism of her injury, it was felt that she would be at risk for what's commonly known as post-traumatic stress disorder and things of that nature. And we believed that early

> psychiatric involvement would be very beneficial to her in the long run.

(RT 5267-5268.)

B. Discussion

"[A]ll relevant evidence is admissible." (Evid. Code, § 351.) Evidence Code section 210 defines relevancy:

> "Relevant evidence" means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.

"The trial court has broad discretion to determine the relevance of evidence." (*People v. Gurule, supra,* 28 Cal.4th at p. 614.) Under the abuse of discretion standard, where

> a discretionary power is inherently or by express statute vested in the trial judge, his or her exercise of that wide discretion must not be disturbed on appeal *except* on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice.
>
> [Citations.]

(*People v. Jordan, supra,* 42 Cal.3d at p. 316 [emphasis in original].)

Here, the court was well within the bounds of reason for allowing Dr. Sharon to explain why he requested a psychiatric consultation for Angie. The information alleged, among other things, assault upon Angie by force likely to produce great bodily injury (§ 245(a)(1)), personal use of a deadly weapon (§ 12022, subd. (b)), and intentional infliction of great bodily injury (§ 12022.7). Dr. Sharon's testimony was relevant, having the tendency to show that the bodily injuries appellant inflicted upon Angie were so severe that she was immediately determined to be at risk for PTSD.[91/] The doctor's assessment that

---

91. As appellant notes in his opening brief, PTSD is described in the Diagnostic and Statistical manual of Mental Disorders (4th Ed. hardcover) Text

Angie was at risk for PTSD may be as potent as the doctor's observations and evaluations of Angie's physical injuries in showing the severity of the injuries appellant inflicted upon Angie. The prosecutor must be allowed to tell "a colorful story with descriptive richness." (*Old Chief v. United States* (1997) 519 U.S. 172, 186-189.) Furthermore, having mentioned the request for psychiatric consultation, the doctor should be allowed to explain the reason for such a request. Jurors are human beings. The doctor had explained why a neurosurgical service consultation was requested. The jurors would be puzzled by and curious about why a psychiatric consultation was requested. The jury may draw unwarranted negative inferences if their curiosity was not satisfied. (*Ibid.*)

In any event, appellant was not prejudiced by this single quick reference to PTSD. Dr. Sharon went into detail about Angie's injuries – e.g., bruises, hemorrhages, brain swelling, and fracture at the base of the skull. (RT 5259-5268.) Photographs taken of Angie and her injuries were shown to the jury. (RT 4006-4010.) Respondent submits that lay people are aware that the trauma of an assault causing severe bodily injuries may have harmful effects on the victim's psyche.

Accordingly, appellant's claim should be rejected.

Revision ("DSM IV-TR"):

> The essential feature of Posttraumatic Stress Disorder is the development of characteristic symptoms following exposure to an extreme traumatic stressor involving direct personal experience of an event that involves actual or threatened death or threatened death or serious injury, or other threat to one's physical integrity; or witnessing an event that involves death, injury, or a threat to the physical integrity of another person; or learning about unexpected or violent death, serious harm, or threat of death or injury experienced by a family member or other close associate.

(DSM IV-TR, p. 463.)

XL.

THE COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING TESTIMONY THAT APPELLANT'S ONLY SOURCE OF INCOME WAS WHATEVER DONNA GAVE HIM OF HER $700 PER MONTH INCOME; REGARDLESS, APPELLANT WAS NOT PREJUDICED BY THE ADMISSION OF SUCH TESTIMONY

Appellant argues that he was prejudiced by the admission of testimony that his only source of income was whatever money Donna gave him of her $700 per month income. (AOB 419-421.) Respondent disagrees. The court did not abuse its discretion in admitting the testimony. Regardless, the error was harmless.

A. The Record

During the case-in-chief, the prosecutor asked Donna:

> Q In January of 1991, can you tell us how [appellant] was employed? What kind of work was he doing?
> A He didn't work.
> Q And can you tell us how – what was the means of support that [appellant] had at that time?

(RT 4900.) Appellant's trial counsel objected on the ground of relevance. The court sustained the objection. The prosecutor then asked to be heard. The court dismissed the jury and the following colloquy took place:

> [PROSECUTOR]: Your Honor, because of the robbery charges in the case and the special allegation vis-a-vis robbery, working or nonworking status of [appellant] and his means and the degree to which he had support at the time to our position are relevant matters.
> THE COURT: Need for money?
> [PROSECUTOR]: Yes, sir.
> [DEFENSE COUNSEL]: Your Honor, I feel it's totally irrelevant. I suspect she's going to state AFDC. I think AFDC,

Aid to Families with Dependent Children, it's totally prejudicial. There is nothing – she's already testified he didn't have a job. And I think that's enough. The money [prosecutor's] talking about is a couple dollars change from a McDonald's meal, so I think it's totally and highly prejudicial.

THE COURT: Tell you what, [prosecutor], would it suffice for your purposes to show, as you have, that he's not employed, number one, and, number two, she's not employed? It seems that the source of the money for their living is then no consequence unless you want to eliminate whether they were receiving any money from relatives.

[PROSECUTOR]: That's my point, Your Honor.

THE COURT: You can do that by asking that rather than getting into the fact this is a welfare family and some of the overtures that sometimes has in terms of emotional impact. In other words, nobody is giving them money. He's not employed. She's not employed. That's enough I think.

[PROSECUTOR]: I understand your point, Judge. And my question is: Would the Court consider – would the Court allow that the quantity and source, meaning not necessarily the government, but that if there is a dollar quantity in the budget per month, then that the source of it would be from Ms. Kellogg?

THE COURT: That could be stated like 600 a month, 800 a month, whatever.

[PROSECUTOR]: That was her income that was so far as she knew his only income.

THE COURT: Well, you turned that around a little bit. I was going to go along with you. I think it's probably relevant in the robbery to state the quantity of the income, yes.

[PROSECUTOR]: That it was hers and not his.

THE COURT: And that was hers, yes. That's correct. That's I think appropriate. So we'll leave out the part of AFDC then, welfare. Fair enough.

(RT 4901-4902.)

The jury was re-assembled and examination of Donna continued:

Q In January of 1991 can you tell us, yes or no, if you had any income?

A Yes.

Q Could you estimate the amount of income you had per month at that time?

A Approximately $700.

Q And concerning [appellant], did he have any source of income besides what you might give him at this time?
A No.

(RT 4906.)

B. Discussion

Evidence Code section 350 provides: "No evidence is admissible except relevant evidence." Evidence Code section 210 defines "relevant evidence" as:

> evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.

The test of relevance is whether the evidence tends "logically, naturally, and by reasonable inference" to establish material facts such as identity, intent, or motive. (*People v. Daniels, supra*, 52 Cal.3d at p. 856.) "The trial court has broad discretion in determining the relevance of evidence, but lacks discretion to admit irrelevant evidence." (*People v. Heard, supra,* 31 Cal.4th at p. 973.) "[An appellate court] examines for abuse of discretion a decision on admissibility that turns on the relevance of the evidence in question." (*People v. Waidla, supra,* 22 Cal.4th at pp. 717-718.)

> Generally, evidence of a defendant's poverty or indebtedness is inadmissible to establish a motive to commit robbery or theft, because reliance on poverty alone as evidence of motive is deemed unfair to the defendant, and the probative value of such evidence is considered outweighed by the risk of prejudice.

(*People v. McDermott, supra,* 28 Cal.4th at p. 999 [internal quotations and citation omitted].)

> The rationale for the rule excluding evidence of a defendant's poverty or indebtedness to demonstrate motive is that the practical result of [admission] would be to put a poor person under so much unfair suspicion and at such a relative

> disadvantage that for reasons of fairness this argument has seldom been countenanced as evidence of the graver crimes, particularly of violence.

(*People v. Hogan* (1982) 31 Cal.3d 815, 854 [internal quotations and citation omitted], disapproved on other grounds in *People v. Cooper, supra,* 53 Cal.3d at p. 836.)

> Evidence of poverty or indebtedness is admissible, however, in a variety of circumstances, such as to refute a defendant's claim that he did not commit the robbery because he did not need the money, or to eliminate other possible explanations for a defendant's sudden wealth after a theft offense.

(*People v. Edelbacher* (1989) 47 Cal.3d 983, 1024 [internal quotations and citations omitted]; see also *United States v. Saniti* (9th Cir. 1979) 604 F.2d 603, 604 ["evidence that tends to show that a defendant is living beyond his means is probative value in a case involving a crime resulting in financial gain"].)

Here, the court did not abuse its discretion in admitting testimony that appellant's only source of income was whatever Donna gave him of her $700 per month income, during the prosecution's case-in-chief. The testimony was not to establish poverty as the motive for taking the girls' money. The so-called poverty evidence was to show that appellant had no or little money at the time he picked up the girls. Appellant's lack of money was significant in that he needed money that night to put gas in his car so he could drive the girls around and then drive to remote areas to dispose of their bodies. Respondent stresses the distinction between the relevance inquiry and unduly prejudicial inquiry.

Defense counsel had objected, saying "the money . . . is a couple of dollars, change from a McDonald's meal, so I think it's totally and highly prejudicial." (RT 4901.) However, that is precisely why it was important for the prosecutor to establish that appellant would have little or no money when he picked up the girls.

Regardless, any error in admitting the testimony during the prosecution's case-in-chief was harmless. First, appellant testified that he was currently on welfare and not really having need for money:

> Q Okay. Now, as you lived in this house, did you have any particular job on that date?
> A No. I was on welfare.
> Q And this is January [1991]. And I believe you said your injury was a few months before?
> A Yes.
> Q And on welfare. What kind of welfare, if you know?
> A I was on AFDC along with Donna.
> Q So there's you and the kids on aid?
> A Yeah.
> Q Okay. And about how much money was coming in at about that time a month?
> A I couldn't be exactly sure. Donna took care of all that.
> Q She handled the money?
> A Yes.
> Q Did it come once a month or twice a month?
> A Twice a month.
> Q When the money came, would she handle how it was spent or would you disperse it between you?
> A She handled all that.
> Q Okay. And at or about that time, if you needed money, where would you get money?
> A She gave it to me. I actually never had a need for money.
> Q Tell the jury what you mean you didn't really have a need for money.
> A Because I didn't have like – because what I needed was, like, at home or – the only thing I'd say would be for gas. At the time I smoked cigarettes and she always made sure I had cigarettes, you know. All I did was, like, go play basketball or – there was no need, you know. I didn't have no, like, high standard of living.

(RT 5785-5786.) Second, there were many instances where appellant testified having been on and off of welfare (see RT 5756-5767), begging for food (RT

5755), stealing and robbing from others for food (RT 5759-5760, 6031-6032, 6041), and having theft and robbery convictions (RT 5755, 5764-5765, 6418). Third, the prosecutor made no mention of appellant's poverty or lack of employment in his closing remarks. Fourth, evidence of appellant's lack of employment and Donna being his only source of income was admissible and presented in rebuttal to support the prosecution experts' diagnosis of antisocial personality disorder. (RT 8266-8267, 8704-8705, 8741-8743, 8775-8777.) Finally, while this poverty evidence would contribute to the finding that appellant took Laurie's money, it would be of little assistance to the fact-finders in determining whether the requisite intent to steal arose before or after Laurie's death. When the requisite intent arose was the critical issue, not whether there was a taking. (See Arguments I & II.) Under these circumstances, it is not reasonably probable that appellant would have obtained a more favorable outcome had the poverty evidence not been admitted. (*People v. Watson, supra,* 46 Cal.2d at p. 836.)

Accordingly, appellant's evidentiary error claim should be rejected.

XLI.

THE COURT PROPERLY ADMITTED EVIDENCE OF APPELLANT'S FAILURE TO PROVIDE CHILD SUPPORT AND LACK OF INTEREST IN OBTAINING EMPLOYMENT; REGARDLESS, ANY ERROR WAS HARMLESS

Over defense objection, the court admitted lay rebuttal testimony of appellant's lack of employment, lack of interest in finding employment, and failure to provide child support, to support the prosecution experts' Anti-Social Personality Disorder ("APD') diagnosis. (RT 8063, 8123, 8156, 8160, 8167-8169, 8267, 8241, 8705.) Appellant argues that the court erred in admitting such evidence. (AOB 422-427.) Not so. The court properly admitted the lay rebuttal testimony to bolster the prosecution experts' APD diagnosis and the resulting inference that appellant willfully and deliberately engaged in the described behavior that night, and to undermine the foundation of defense experts' opinion, i.e., appellant's credibility.

"[A]ll relevant evidence is admissible." (Evid. Code, § 351.) Evidence Code section 210 defines relevancy:

> "Relevant evidence" means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.

"The trial court has broad discretion to determine the relevance of evidence." (*People v. Gurule, supra,* 28 Cal.4th at p. 614.)

> The admission of evidence in rebuttal is a matter left to the sound discretion of the trial court. The court's decision in this regard will not be disturbed on appeal in the absence of palpable abuse.

(*People v. Hart* (1999) 20 Cal.4th 546, 653 [internal citation and quotations omitted].)

Here, the court properly admitted the lay rebuttal testimony.

The offered lay rebuttal testimony was relevant to a disputed fact of consequence, whether appellant was capable of possessing the requisite criminal intents on that night. The defense experts diagnosed appellant to suffer from Organic Personality Syndrome ("OPS') and opined that on that night he suffered a rage reaction with a high probability of seizure activity, rendering his brain "unconscious" during and for hours following the attack on Angie. (RT 6451, 7529-7537, 7564, 7627-7628, 7656.) The prosecution experts countered that neither brain dysfunction – a necessary element for OPS – nor epilepsy had been demonstrated (RT 7947, 7974-7975, 7892-7913, 7938-7945, 7993-8023, 8108-8109), and diagnosed appellant to suffer from APD (RT 8256-8259, 8293-8301, 8338, 8702-8703). "[APD] features . . . are considered to be willful, deliberate, volitional types of behavior that one chooses to engage in." (RT 9259.) Dr. Thackrey set forth the criteria for APD:

> [T]he antisocial personality disorder has a pattern of irresponsible and antisocial behavior that begins in one's childhood or adolescence and it continues into adulthood. During one's childhood or adolescence, specifically before age 15, one must have a history of conduct disorder. Among the features that are required are at least three such as school truancy, running away from home, physical cruelty to animals, deliberate fire setting, lying, stealing, those features. [¶] After age 15 one has to have in one's present behavior or history things such as not sustaining consistent work behavior, that is, being unemployed for a significant period of time when one could, presumably, be seeking work; abandoning jobs without any particular plan to find a new job; failing to conform to social norms with regard to lawful behavior, such as stealing or pursuing an illegal occupation. Another feature is failure to provide financial support for one's children; failing to plan ahead for one's life, such as traveling from place to place without any particular idea where one's going to go; not having a fixed address for a month or so; and lacking genuine remorse or regret for what one's done.

(RT 8257-8258.) Appellant's lack of employment and lack of desire to find employment were among the criteria for APD. Hence, lay testimony was

admissible to bolster the prosecution experts' diagnosis and the resulting inference that appellant willfully and deliberately engaged in the described behavior that night. (Cf. *People v. Daniels, supra,* 52 Cal.3d at pp. 881-882.)

Furthermore, the lay rebuttal testimony was admissible to challenge the foundation of defense experts' opinion, i.e., appellant's credibility. Dr. Berg testified:

> [A]t another point in the interview I asked [appellant] – he told me he loved Donna Kellogg. You had two kids with her. You were raising a third one. Why is it you didn't marry her?
>
> And he told me: "I loved her, but I felt I wasn't good enough for her. I didn't have anything to feel good about myself. *I wasn't in a career. I wasn't earning money.* I had nothing special. And I felt that when I got the chance to work out and try out and able to become a member of the National Football League team that I would finally have it made, that I would be worthwhile to her. I could marry her. And all those people that used to walk around and look at me and say 'You're nothing,' they couldn't say that anymore."

(RT 6420-6421, italics added.) Dr. Berg added that another stressor affecting appellant's psychological functioning was Donna's pregnancy, and the fact he was responsible for another child in a welfare family. (RT 6425-6426, 6460-6461.)

The lay rebuttal testimony would show Dr. Berg's mistaken impression of appellant. The lack of money was not a stressor affecting appellant; he did not have a job by choice, and had no interest in getting a job. (See RT 8123-8126, 8133.) The lay rebuttal testimony would weaken Dr. Berg's opinion concerning the overstimulation of appellant's brain, and hence his opinion about appellant's brain suffering a rage reaction. (*Lockheed Litigation Cases* (2004) 115 Cal.App.4th 558, 563 ["The value of opinion evidence rests not in the conclusion reached but in the factors considered and the reasoning employed."]; *People v. Sundlee* (1977) 70 Cal.App.3d 477, 484-485

[explaining that the strength or weakness of the experts' assumptions affects the weight of their opinions].)

Appellant stresses that "[t]he diagnosis of antisocial personality disorder was not disputed by the defense or defense experts," and that "defense counsel even offered to stipulate that [appellant] suffered from antisocial personality disorder" [RT 8705]." (AOB 424-425.) Though defense expert Dr. Berg's diagnostic impression of appellant included APD,[92] the prosecution experts' diagnosis of APD was not cumulative.

Evidence Code section 352 provides that, even if the evidence is relevant,

> [t]he court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.

Appellate courts "apply the deferential abuse of discretion standard when reviewing a trial court's ruling under Evidence Code section 352." (*People v. Kipp, supra,* 26 Cal.4th at p. 1121.)

> Under Evidence Code section 352, the trial court enjoys broad discretion in assessing whether the probative value of particular evidence is outweighed by concerns of undue prejudice, confusion or consumption of time. [Citation.]

(*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.)

APD is a diagnosis of behavior. (RT 7309-7313, 7428.) APD and OPS are not mutually exclusive diagnoses. (RT 7428-7429, 8242.) However, the defense's and prosecution's emphases, and thus the perception of appellant that they were attempting to present to the jury, differed. The defense, in diagnosing appellant with APD, emphasized an organic element to appellant's antisocial

---

92. Dr. Berg did not actually diagnose appellant with APD. He diagnosed appellant with a "personality disorder not otherwise specified," which included antisocial personality. (RT 7662-7664.)

behavior: that appellant suffered from OPS and individuals suffering from OPS could exhibit antisocial behavior. (RT 7664.) The prosecution, in diagnosing appellant with APD, emphasized the rational, willful, and deliberate choices guiding appellant's described behavior that night (RT 8259) and prior antisocial behavior (RT 8289-8292, 8337-8342). The prosecution expert Dr. Thackrey emphasized:

> [T]he features of antisocial personality disorder are considered to be willful, deliberate, volitional types of behavior that one chooses to engage in. People with antisocial personality disorder are in no way precluded from organizing their behavior, being goal-directed, sustaining behavior over long periods of time, any of the things that anybody else could presumably do.

(RT 8259.) One may be more inclined to believe that on that night appellant was "unconscious" – that some of his antisocial behavior can be attributed to OPS. Or, on the other hand, one may believe that on that night appellant was fully conscious and continuing a long pattern of antisocial behavior. The court did not abuse its discretion in finding the lay rebuttal testimony relevant and not cumulative. (Cf. *People v. Bolin, supra,* 18 Cal.4th at p. 322.)

Appellant further argues that

> [e]ven if relevant, this excessive rebuttal evidence of [his] antisocial personality characteristics should have been excluded on motion of the defense pursuant to Evid. Code, § 352.

(AOB 425.) Not so. The prosecution cannot be limited to presenting an opinion when it had testimonial evidence from percipient witnesses to support such an opinion. (Cf. *People v. Ventura* (1991) 1 Cal.App.4th 1515, 1519; see also *Owings v. Industrial Accident Comm.* (1948) 31 Cal.2d 689, 692; *People v. Sundlee, supra,* 70 Cal.App.3d at pp. 484-485.) Appellant stresses that there was ample evidence to establish the APD criterion of "failure to sustain consistent work behavior or honor financial obligations" without placing undue emphasis on his bad character. (AOB 425-426.) Appellant had testified about his lack of consistent employment. When he was not in custody, mental health

facility or prison, he was on welfare or worked as a laborer – e.g., security guard, pizza delivery, and fast food restaurants; and the longest he had held a job was about six months. (RT 5757, 5761, 5766-5767, 5785, 5944, 6053-6054, 6411-6412, 6632.) The defense depicted appellant in a sympathetic light: an individual with brain dysfunction and therefore had immense psychological difficulties in dealing with the stresses of joblessness, poverty, and humiliation. The prosecution must be permitted to introduce evidence showing that his lack of employment was due to his irresponsible behavior, a lack of motivation and interest in finding employment. (Cf. *Old Chief v. United States*, *supra*, 519 U.S. at pp. 186-189 [explaining that "the prosecution is entitled to prove its case by evidence of its own choice"; that the court cannot permit defendant to "stipulate or admit his way out of full evidentiary force of case as the government chooses to present it"].)

Regardless, any error in admitting the lay rebuttal testimony was harmless. (See, e.g., *People v. Boyette, supra,* 29 Cal.4th at p. 424.) Appellant stresses that the rebuttal evidence placed undue emphasis on his "bad" character. (AOB 425-427.) First, the lay rebuttal testimony was relevant, supporting the prosecution experts' diagnosis and undermining the foundation of the defense expert's opinion. The fact that the jury may reach their verdict on an improper basis is not enough to show that the evidence should have been excluded as unduly prejudicial. (Cf. *People v. Alvarez, supra,* 14 Cal.4th at pp. 214-215 [explaining that the fact that evidence might be used by jurors to draw a forbidden inference is not enough to show that it should have been excluded as unduly prejudicial].) Second, because appellant's behavior that night was goal-directed, rational, interactive, and extended rather than brief and disoriented, the defense expert's opinion – that appellant suffered an OPS rage reaction with the high probability of seizure activity, rendering his brain "unconscious" – was highly improbable. It is not reasonably probable that

appellant would have obtained a more favorable outcome even if the lay rebuttal evidence had been excluded. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836.)

Accordingly, appellant's evidentiary error claim should be rejected.

XLII.

THE COURT DID NOT ADMIT AND THE PROSECUTION DID NOT INTRODUCE REBUTTAL EVIDENCE OF APPELLANT'S INFIDELITY TO DONNA

Appellant argues that the court prejudicially erred in admitting rebuttal evidence that he had sex with other women when he testified that he and Donna lived together as if husband and wife. (AOB 428-432.) Respondent is unaware of the court admitting or the prosecution introducing such rebuttal evidence.

The prosecution had sought to introduce rebuttal evidence that appellant had made sexual overtures to Tina Edmonds and "chased" women while involved with Donna. The defense moved to exclude under Evidence Code section 352. After some discussions, the prosecution withdrew its request for admission of evidence that appellant had made sexual overtures to Tina Edmonds while involved with Donna. The court granted defense motion as to evidence that appellant "chased" women while involved with Donna. (RT 7791-7793, 8064, 8066, 8133-8137, 8160.) The court did reconsider its ruling, admitting only evidence that appellant did not work, did not look for work, and did not pay child support, to support the prosecution experts' APD diagnosis. (RT 8267, 8704-8705.) The court did not allow evidence of appellant's infidelity to Donna. Except for appellant's sexual interest in Laurie (RT 8849-8852), the lay rebuttal witnesses made no mention of appellant's infidelity to Donna.

To be sure, Dr. Missett did note that appellant "carr[ied] on . . . repeated affairs, both with older and younger women at a time he was involved in a relationship with Donna . . . ." (RT 8338.) This was in response to appellant's trial counsel asking for appellant's antisocial activities from around 1986 to 1991. On the stand, appellant had admitted to having sexual relations with two other women during his relationship with Donna. (RT 6686-6687, 7009-7011.)

Dr. Missett can and should explain that he relied upon appellant's admission in reaching a psychological diagnosis of APD.

> The value of opinion evidence rests not in the conclusion reached but in the factors considered and the reasoning employed. Where an expert bases his conclusion upon assumptions which are not supported by the record, upon matters which are not reasonably relied upon by other experts, or upon factors which are speculative, remote or conjectural, then his conclusion has no evidentiary value.

(*Lockheed Litigation Cases, supra,* 115 Cal.App.4th at p. 563, internal citations and quotations omitted.)

Perhaps appellant is arguing that the court should not have allowed the District Attorney to question and impeach appellant regarding his infidelity to Donna. If so, such an argument fails. "A prosecutor is permitted wide scope in the cross-examination of a criminal defendant who elects to take the stand." (*People v. Gutierrez, supra,* 28 Cal.4th at p. 1147.) The admission by appellant that he "slept around" was obtained during cross-examination, not in the prosecutor's rebuttal.

> In the field of cross- examination affecting the credibility of a witness, the court is given a wide discretion . . ., "unless it can be seen that the evidence is without any weight whatever in determining the issue, the action of the court in receiving it will not be reversed."

(*People v. Wissenfeld* (1951) 36 Cal.2d 758, 765-766.) The credibility and weight of appellant's testimony was vital in this case. The court cannot be said to have abused its discretion in allowing the prosecutor's questions impeaching appellant's credibility.

Accordingly, appellant's evidentiary error claim should be rejected.

XLIII.

THE COURT DID NOT ABUSE ITS DISCRETION IN PERMITTING IMPEACHMENT WITH TWO FELONY ROBBERY CONVICTIONS, TWO MISDEMEANOR CONDUCTS, AND EXTRAJUDICIAL STATEMENTS SHOWING DISHONESTY AND MANIPULATION

Appellant argues that the court abused its discretion in permitting impeachment with two felony robbery convictions, two instances of misdemeanor conduct, and extrajudicial statements showing dishonesty and manipulation. (AOB 433-440.) Appellant is wrong. The court did not abuse its discretion.

Felony Robbery Convictions. The court permitted impeachment with appellant's two felony robbery convictions: a 1985 California robbery conviction and a 1980 Texas robbery conviction. The court explained its ruling:

> They both involve acts of dishonesty as well as moral turpitude. I am aware and the point is well-taken that they are the same as the crimes that are alleged in this case, and, hence, there is a prejudicial value in the sense that they may be used by inference to say that he is the type of person that robs. However, I do find the probative value, even keeping that in mind of those, exceeds the prejudicial effect.

(RT 5683.)

Evidence Code section 788 provides:

> For the purpose of attacking the credibility of a witness, it may be shown by the examination of the witness or by the record of the judgment that he has been convicted of a felony.

This Court, in *People v. Castro* (1985) 38 Cal.3d 301, 316, set forth a two-part analysis for a trial court to follow in determining whether a prior felony is admissible for impeachment purposes. The trial court must first determine

relevance, i.e., whether the prior conviction involves "moral turpitude." If so, then the court must exercise its discretion under Evidence Code section 352 in deciding whether to admit or exclude the prior. (*People v. Brown* (1985) 169 Cal.App.3d 800, 804.) In exercising its discretion, the court should consider: (1) whether the prior conviction reflects on honesty and integrity; (2) whether it is near or remote in time; (3) whether it was suffered for the same or substantially similar conduct for which the accused is on trial; and (4) what effect would the admission have on defendant's desire to testify. (See *People v. Beagle* (1972) 6 Cal.3d 441, 452-453; *People v. Foreman* (1985) 174 Cal.App.3d 175, 181.) Appellate courts "apply the deferential abuse of discretion standard when reviewing a trial court's ruling under Evidence Code section 352." (*People v. Kipp, supra,* 26 Cal.4th at p. 1121.)

The court correctly noted that robbery is a crime of moral turpitude, which reflects upon a person's honesty and integrity. (See *People v. Brown, supra,* 169 Cal.App.3d at pp. 805-806; *People v. Collins* (1986) 42 Cal.3d 378, 395; *People v. Turner* (1990) 50 Cal.3d 668, 705.) The court soundly found the probative value substantially outweighed any prejudicial effect or undue consumption of time. (RT 5683.) In exercising its discretion, the court specifically considered the greater possibility of prejudice because the prior convictions were for crimes identical to the crime for which he was then charged – robbery. It is not improper, in appropriate situations, to impeach with an identical prior. (*People v. Castro* (1986) 186 Cal.App.3d 1211, 1216-1217 [explaining that "[t]he identity or similarity of current and impeaching offenses is just one factor to be considered by the trial court in exercising its discretion" and upholding trial court's exercise of discretion to allow impeachment with five identical prior convictions]; see, e.g., *People v. Johnson* (1991) 233 Cal.App.3d 425, 458-459 [murder defendant impeached with prior murder conviction]; *People v. Muldrow* (1988) 202 Cal.App.3d 636, 646-647 [burglary

defendant impeached with prior burglary convictions]; *People v. Lewis* (1987) 191 Cal.App.3d 1288, 1297-1298 [rape defendant impeached with prior rape convictions].) In addition, the court kept any prejudicial effect to a minimum by not allowing the prosecution to inquire into the circumstances of these robberies (RT 5708). (Cf. *People v. Mickle* (1991) 54 Cal.3d 140, 172 [no abuse of discretion in the admission of a "sanitized" lewd conduct felony conviction for impeachment, where the jury was not told the nature of the offense].) Moreover, appellant's 1980 robbery conviction cannot be said to have been remote in time because he had not led a legally blameless life since 1980. (Cf. *People v. Massey* (1987) 192 Cal.App.3d 819, 825.) Thus, the court cannot be said to have abused its discretion in permitting impeachment with appellant's two felony robbery convictions. (Cf. *People v. Stewart* (1985) 171 Cal.App.3d 59, 65-66 [three prior robbery convictions admissible to impeach robbery defendant].)

Misdemeanor Conduct. The court permitted impeachment with two instances of misdemeanor conduct: a 1984 misdemeanor burglary and a 1984 misdemeanor vehicle theft. The court found that the probative value exceeded any undue prejudicial effect, explaining that the two acts were near in time and theft-related offenses which reflect upon appellant's honesty. (RT 5692.)

A defendant who testifies may be impeached with prior misdemeanor conduct involving moral turpitude. (See *People v. Wheeler, supra,* 4 Cal.4th at p. 295 [concluding "if past criminal conduct amounting to a misdemeanor has some logical bearing upon the veracity of a witness in a criminal proceeding, that conduct is admissible, subject to trial court discretion, as 'relevant' evidence"].) As a prerequisite to determining the admissibility of past misconduct for impeachment, the trial court must decide if the particular conduct involves moral turpitude. (*Id.* at p. 296.) The trial court retains

discretion under Evidence Code section 352 to exclude any such conduct when its probative value is outweighed by the risk of undue prejudice. (*Ibid.*)

Here, burglary with larcenous intent and vehicle theft are crimes of moral turpitude, reflecting upon appellant's veracity – hence, relevant evidence. (*People v. Collins, supra,* 42 Cal.3d at p. 395 [burglary]; *People v. Muldrow, supra,* 202 Cal.App.3d at pp. 644-645 [burglary]; *People v. Green* (1995) 34 Cal.App.4th 182-183 [auto theft]; *People v. Hunt* (1985) 169 Cal.App.3d 668, 675 [auto theft].) These 1984 misdemeanor conducts were not remote in time, particularly in light of appellant's subsequent 1985 robbery conviction. (Cf. *People v. Muldrow, supra,* 202 Cal.App.3d at p. 647; *People v. Massey, supra,* 192 Cal.App.3d at p. 825.) Moreover, burglary and vehicle theft were not similar to the crimes which appellant was charged. Thus, the court did not abuse its discretion in allowing impeachment with appellant's two misdemeanor conducts.

Extrajudicial Statements. The court did not abuse its discretion in permitting impeachment with three extrajudicial statements made by appellant showing dishonesty and manipulation: (1) around 1980, telling a psychologist in Rusk Hospital, Texas, that he traveled around robbing people, and riding the trains and flying on planes without paying fare (RT 5665, 5679, 5684-5686); (2) January 13, 1978, threatening suicide and feigning a suicide attempt to secure a release from Juvenile Hall to LAC-USC (RT 5664-5665); and (3) September 9, 1983, making untruthful statements to gain admission to LAC-USC for food and shelter (RT 5666, 5679, 5691-5692).

Specific instances of a witness' conduct are admissible if relevant to the credibility of a witness and subject to Evidence Code section 352. (See *People v. Harris* (1989) 47 Cal.3d 1047, 1080-1083; *People v. Mickle, supra,* 54 Cal.3d at p. 168; see, e.g., *People v. Stern* (2003) 111 Cal.App.4th 283, 298-300.) Appellate courts review the admissibility of uncharged misconduct under

the deferential abuse of discretion standard. (*People v. Stern, supra,* 111 Cal.App.4th at p 298.)

Here, all three extrajudicial statements involved dishonesty and manipulation. All three statements involved mental health institutional settings. The defense experts portrayed appellant to have a dysfunctional brain, which has tremendous difficulty in handling emotionally stressful situations. The defense experts based their testimony, in part, on appellant's account of what happened to him that night. These three extrajudicial statements would tend to cast doubt on the truthfulness of appellant's statements to his mental health experts. In addition, these statements were part of a continuous history of rational decisions to engage in dishonest, manipulative, and sometimes criminal behavior. The court cannot be said to have abused its discretion.

Appellant mischaracterizes the court's ruling as "unbridled impeachment." (AOB 437.) The court excluded appellant's juvenile adjudications (RT 5683) and his two batteries (RT 5692-5693). Overall, the court exercised its discretion soundly, allowing relevant evidence reflecting upon appellant's veracity while preventing the trial from "degenerating into nitpicking wars of attrition over collateral credibility issues" (*People v. Wheeler, supra*, 4 Cal.4th at p. 296).

In any event, even if this Court finds that the trial court abused its discretion in admitting the extrajudicial statements and the misdemeanor conducts, the error was harmless.[93] (*People v. Watson, supra,* 46 Cal.2d at p. 836.) Appellant's described behavior that night effectively impeached his mental defense. The evidence of appellant's guilt as to the non-robbery convictions and special circumstance was overwhelming and unaffected by the

---

93. Should this Court find abuse of discretion in allowing impeachment with appellant's felony robbery convictions, respondent would concede prejudice requiring reversal of appellant's robbery convictions.

impeachment evidence of misdemeanor conducts and the extrajudicial statements. Thus, with the exception of the robbery convictions, it was not reasonably probable that a result more favorable to appellant would have resulted had the impeachment evidence of misdemeanor conducts and extrajudicial statements been excluded. (Cf. *People v. Partner* (1986) 180 Cal.App.3d 178, 187; *People v. Hughes* (1975) 50 Cal.App.3d 749, 754.)

Accordingly, appellant's claim of abuse of discretion as to allowance of impeachment evidence should be rejected.

XLIV.

NO ARGUMENT

No Argument XLIV could be found in appellant's opening brief. (See AOB 433-441.)

XLV.

APPELLANT WAS NOT PREJUDICED BY THE OMISSION OF CALJIC NO. 2.71.7

Appellant argues that the court prejudicially erred in failing to sua sponte instruct the jury with CALJIC No. 2.71.7.[94] (AOB 441-443.) Regardless of whether the court so erred,[95] appellant was not prejudiced by the omission of CALJIC No. 2.71.7 because the court gave CALJIC No. 2.71.[96] (See *People*

---

94. CALJIC No. 2.71.7, though apparently requested by the prosecution, was among the instructions "Not Given" contained in the Clerk's Transcripts. (See CT 810, 1056.) CALJIC No. 2.71.7 provides:

> Evidence has been received from which you may find that an oral statement of [intent] [plan] [motive] [design] was made by the defendant before the offense with which [he] [she] is charged was committed. [¶] It is for you to decide whether such a statement was made by [a] [the] defendant. [¶] Evidence of an oral statement ought to be viewed with caution.

(CT 1056.)

95. Respondent makes no comment here as to whether the statements noted by appellant in his opening brief (AOB 441-442) are the sort of statements that require the cautionary instruction CALJIC No. 2.71.7. (See *People v. Carpenter, supra,* 15 Cal.4th at pp. 392-393, 426-431 (conc. opn. of Baxter, J.).)

96. CALJIC No. 2.71 provides:

> An admission is a statement made by the defendant other than at his trial which does not by itself acknowledge his guilt of the crimes for which such defendant is on trial, but which statement tends to prove his guilt when considered with the rest of the evidence. [¶] You are the exclusive judges as to whether the defendant made an admission, and if so, whether such statement is true in whole or in part. If you should find that the defendant did not make the statement, you must reject it. If you find that it is true in whole or in part, you may consider that part which you find to be true. [¶] Evidence of an oral admission of the defendant which tends to prove guilt should be viewed with caution.

(CT 848, 952; RT 9322.)

v. Lang (1989) 49 Cal.3d 991, 1021.) Moreover, the court fully instructed the jury on judging the credibility of a witness (CT 941-957 [CALJIC Nos. 2.11, 2.13, 2.20, 2.21.1, 2.21.2, 2.22, 2.23, 2.29, 2.81, 2.82, and 2.83]). (Cf. *People v. Carpenter, supra,* 15 Cal.4th at p. 393; *People v. Shoals, supra,* 8 Cal.App.4th at p. 499.) Further, even without appellant's preoffense statements, there were ample circumstantial and physical evidence of appellant's intent to have sex with Laurie that night. It is thus not reasonably probable that the jury would have reached a result more favorable to appellant had CALJIC No. 2.71.7 been given. (Cf. *People v. Blankenship* (1970) 7 Cal.App.3d 305, 311-313 [holding that the court's failure to give a cautionary instruction concerning defendant's alleged oral admission was not prejudicial, where, without defendant's admission, there was ample circumstantial evidence of defendant's motive and conduct to connect defendant with the commission of the crime, and it was not reasonably probable that a result more favorable to defendant would have been reached in the absence of the claimed error].) Accordingly, appellant's instructional error claim should be rejected.

XLVI.

APPELLANT'S CLAIM OF INADEQUATE DEFINITION OF "SEXUAL INTERCOURSE" HAS BEEN WAIVED; EVEN IF NOT WAIVED, THE JURY WOULD NOT HAVE MISUNDERSTOOD "SEXUAL INTERCOURSE" TO ENCOMPASS FORMS OF SEXUAL CONDUCT OTHER THAN PENILE-VAGINAL INTERCOURSE; EVEN IF THE DEFINITION WAS INADEQUATE, THE ERROR WOULD HAVE BEEN HARMLESS

Appellant argues that the attempted rape conviction and attempted rape-murder special circumstance must be reversed because the court failed to adequately define the term "sexual intercourse." (AOB 444-448.) He is mistaken.

The court instructed the jurors on the crime of rape, in part:

> Every person who engages in an act of sexual intercourse with a female person who is not the spouse of the perpetrator accomplished against such person's will by means of force, violence, or fear of immediate and unlawful bodily injury to such person is guilty of the crime of rape . . . .
>
> In order to prove such crime, each of the following elements must be proved:
>
> 1. A male and female person engage in an act of sexual intercourse;
>
> . . . . . .
>
> Any sexual penetration, however slight, constitutes engaging in an act of sexual intercourse. Proof of ejaculation is not required.

(RT 9339-9340; CT 988-989.)

Appellant's claim should be deemed waived.

> A party may not argue on appeal that an instruction correct in law was too general or incomplete, and thus needed clarification, without first requesting such clarification at trial.

(*People v. Hillhouse* (2002) 27 Cal.4th 469, 503.) Appellant is not – cannot be – arguing that the instruction given was incorrect. The instruction given did not omit or withdraw an element from the jury's determination. "Sexual intercourse" is a term of ordinary meaning. (*People v. Holt, supra*, 15 Cal.4th at p. 676.) "Sexual intercourse" is the term used in the statutory language. (*People v. Estrada* (1995) 11 Cal.4th 568, 574 ["The language of a statute defining a crime or defense is generally an appropriate and desirable basis for an instruction, and is ordinarily sufficient when the defendant fails to request amplification. If the jury would have no difficulty in understanding the statute without guidance, the court need do no more than instruct in statutory language"]; see, e.g., *People v. Robinson* (1968) 266 Cal.App.2d 261, 268 ["Where . . . the trial court has fully and adequately instructed the jury on the elements of the offense, and has couched such instructions in the terms of the applicable code section, defendant cannot on appeal complain of the court's failure to define words of ordinary meaning where no request for such instruction was made"].) Rather, he is arguing that the instruction was inadequate for not clarifying the definition of "sexual intercourse." Yet he neither objected to the instruction as given nor requested a clarifying instruction below, an omission which bars appellate review of the issue. (Cf. *People v. Maury, supra,* 30 Cal.4th at p. 426; *People v. Hardy, supra,* 2 Cal.4th at p. 153; *People v. Anderson* (1966) 64 Cal.2d 633, 639.)

Even if not waived, appellant's claim fails. Appellant's claim is essentially that the term "sexual intercourse" is ambiguous and therefore subject to an erroneous understanding. The standard of review for ambiguous instructions is "whether there is a reasonable likelihood that the jury misunderstood and misapplied the instruction." (*People v. Smithey, supra,* 20 Cal.4th at p. 963; see *Boyde v. California* (1990) 494 U.S. 370, 380-381; see

also *Estelle v. McGuire* (1991) 502 U.S. 62, 72 & fn. 4; *People v. Clair, supra,* 2 Cal.4th at pp. 662-663.)

> [T]he correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction.

(*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1248 [internal quotations and citations omitted].) Here, the instruction given was adequate; no reasonable likelihood appears that the jury misunderstood or misapplied the instruction given.

First, "sexual intercourse" is a term of ordinary meaning. (*People v. Holt, supra,* 15 Cal.4th at pp. 675-676.)

> The rule to be applied in determining whether the meaning of a statute is adequately conveyed by its express terms is well established. When a word or phrase is commonly understood by those familiar with the English language and is not used in a technical sense peculiar to the law, the court is not required to give an instruction as to its meaning in the absence of a request. A word or phrase having a technical, legal meaning requiring clarification by the court is one that has a definition that differs from its nonlegal meaning. Thus, . . . , terms are held to require clarification by the trial court when their statutory definition differs from the meaning that might be ascribed to the same terms in common parlance.

(*People v. Estrada, supra,* 11 Cal.4th at pp. 574-575 [internal quotations and citations omitted].) This Court has heard arguments similar to the argument appellant raises here. In *Holt*, the defendant contended that

> because "intercourse" does not have a common meaning and is a technical term, the failure of the court to define "sexual intercourse" resulted in a failure to instruct on all elements of the offense of rape.

(*People v. Holt, supra,* 15 Cal.4th at p. 675.) This Court began its analysis in the following fashion: "We disagree with defendant that 'sexual intercourse' is a technical term with various meanings and might be misunderstood when used in a definition of rape." (*Id.* at p. 676.) Any confusion as to the meaning of the

term "sexual intercourse" arises not in its meaning in common parlance, but in its legal meaning. In common parlance, sexual intercourse is still understood to mean vaginal intercourse. (See, e.g., *State v. Bewley* (Mo.Ct.App. 2002) 68 S.W.3d 613, 617 [Victim testified that defendant "had sexual intercourse with me. Where they put their penis in my vagina."]; *Morris v. State* (Ga.Ct.App. 1997) 488 S.E.2d 685, 687 [Victim stated: "'Jimmy Morris has had sexual intercourse with me several times. When I say sexual intercourse, I mean that he stuck his penis in my vagina.'"]; *People v. Vargas* (1988) 206 Cal.App.3d 831, 850 ["When testifying that defendant had sexual intercourse with her, [victim] clearly understood and meant that defendant placed his penis in her vagina."], disapproved on another ground in *People v. Jones* (1990) 51 Cal.3d 294, 299-300; *Davis v. State* (Miss. 1981) 406 So.2d 795, 800 [Victim testified that after pulling a pillowcase over her head, the defendant "'turned me over and forced me to have sexual intercourse. What I mean by sexual intercourse is he forced his penis into my vagina.'"]; Webster's New World Dict. (3d college ed. 1988) p. 1230 ["a joining of the sexual organs of a male and a female human being, in which the erect penis of the male is inserted into the vagina of the female . . . ."].)[97/]

Second, bolstering this common understanding of "sexual intercourse" is the court's instruction that an element of the crime of rape is that "[a] *male and female person engage* in an act of sexual intercourse." (RT 9339-9340; CT

---

97. Although some jurisdictions may have or be seeking to expand the legal meaning of "sexual intercourse," those efforts have not affected its common meaning. (See, e.g., Mich. Stat., § 750.520a; Conn. Gen. Stat., § 53a-65.) Instead, by providing the phrase "sexual intercourse" with a technical meaning that does not comport with its common meaning, those jurisdictions may now be required to provide additional instructions as to the meaning of "sexual intercourse." However, California has not tampered with the legal meaning of "sexual intercourse" and hence no conflict between common understanding and technical meaning exists.

988-989 [italics added].) Moreover, nothing in the prosecutor's closing arguments (RT 9055-9061) suggested to the jurors that they should interpret "sexual intercourse" to include forms of sexual conduct other than penile-vaginal intercourse. (Cf. *People v. Hughes, supra,* 27 Cal.4th at p. 380; *People v. Avena* (1996) 13 Cal.4th 394, 417-418.)

Even if the instruction was inadequate, the error would have been harmless. (*People v. Watson, supra,* 46 Cal.2d at p. 836.) Appellant's statements and conduct betrayed his intent to have penile-vaginal intercourse with Laurie that night. For instance, appellant's concern that Laurie was menstruating revealed his intent to have penile-vaginal intercourse. (See Argument III.) It was not reasonably probable that had a clarifying instruction been given, a result more favorable to appellant would have resulted. (Cf. *People v. Clem* (1980) 104 Cal.App.3d 337, 344-345 [holding that in the face of the overwhelming evidence of defendant's guilt, including defendant's admissions, there is no reasonable probability that a result more favorable to defendant would have been reached had the instruction on flight not been given].)

Accordingly, appellant's instructional error claim should be rejected.

XLVII.

APPELLANT'S PROSECUTORIAL MISCONDUCT CLAIM HAS BEEN WAIVED; IN ANY EVENT, THE PROSECUTOR'S CLOSING REMARKS WERE WITHIN THE LIMITS OF PROPER VIGOROUS ARGUMENT AND NOT UNDULY PREJUDICIAL

Appellant argues that the prosecutor committed prejudicial misconduct during closing argument of the guilt phase, attacking the integrity of the defense counsel and defense expert witnesses. (AOB 449-453.) Having failed to raise the objection below, appellant has waived the issue on appeal. In any event, he is mistaken. Read in context, the prosecutor's closing remarks were not improper.

A. The Record

During closing argument of the guilt phase, the prosecutor made the following statements:

> The question is not whether or not those things happened. The question is what was in his mind at the time these crimes were committed.
>
> As you were jurors in this case you saw that the case went on for some time with two lawyers representing [appellant], and then as the case progressed there was a third lawyer. And I'd submit to you that there may be a dramatic effect from your seeing that there's a third lawyer that enters the trial what might seem to you to be at the last minute and bringing with him three witnesses who say that they can see the truth about [appellant] where no one else has ever been able to see it before.
>
> But I'd ask you to remember that essentially what you've been told is exactly the same thing that you were told by Ms. O'Neill in the opening statement of this case. And what that is – in other words, before the arrival of Mr. Kinney, before the arrival of what might seem to be the last minute these other doctors, what you were told essentially was he doesn't remember.

That's what she told [] you. That's what you've heard. It's not something necessarily new.

Also, you know, the fact that you hear claims about [appellant's] mental makeup for the first time in the defense case is really it's only way that it ever happens in a criminal trial. Prosecution puts on evidence about the crimes, and only the defense can place [appellant's] mental state in issue. Until a special mental issue is raised by the defense during the trial a person can only sit and wait and see what if anything occurs.

And, I submit to you, that in a case where the evidence regarding the crimes is fairly clear that it's not uncommon that a mental defense of some sort is attempted to be made out. But, at [any] rate, until the specifics are known the prosecution can't really know what kind of qualifications its expert should have until the defense has actually introduced them to it, what their case is.

And, as you've seen from the evidence, it's not really until they actually placed [the] mental state in issue, called their witnesses that [appellant] is even available to the prosecution for examination. And, as you've seen from the evidence, that even then he can still refuse to be examined.

Now, you shouldn't confuse the earlier exams that you heard from the evidence, the exams for competency and insanity, with what I'm talking about now, because, as you've learned from the evidence, those exams were specific. They were on specific issues that had regarding things that developed during the progress of the case. And, as you've learned, the parties had certain rights to request doctors to learn what the opinions of those doctors were on those particular issues.

That's a different kind of issue as you learn the people – the persons were examined on those matters alone. Additionally, you learned through the evidence that there were several doctors besides the three that testified here in the defense case that the defense had examine[d] [appellant], one of which you heard Dr. Seymour, who you learned through the evidence that he had been seeing [appellant] for months. And unlike Dr. Terrell, Dr. Seymour's name was [not] even on the witness list.

So, please, don't get the impression what they've been urging at you was sort of like a dramatic 11th hour discovery. Really what it is, I'd submit to you, an 11th hour packaging of a not uncommon defense by doctors from out of town which are what [appellant] had been asking for.

(RT 9082-9084.)

B. Discussion

"An objection to instances of prosecutorial misconduct is necessary to preserve the claim for appeal." (*People v. Coddington* (2000) 23 Cal.4th 529, 595, overruled on other grounds in *Price v. Superior Court, supra,* 25 Cal.4th at p. 1069.) This Court explained:

> A defendant who does not object and seek an admonition to disregard improper statements or argument by the prosecutor is deemed to have waived any error unless the harm caused could not have been corrected by appropriate instructions. Because we do not expect the trial court to recognize and correct all possible or arguable misconduct on its own motion defendant bears the responsibility to seek an admonition if he believes the prosecutor has overstepped the bounds of proper comment, argument, or inquiry.

(*People v. Coddington, supra,* 23 Cal.4th at p. 595 [internal quotations and citations omitted].) On appeal, for the first time, appellant argues that the prosecutor improperly attacked the integrity of the defense counsel and defense expert witnesses. Having failed to raise the objection below, appellant has waived the issue on appeal. Furthermore, to the extent that prosecutor's remarks could have been construed as an attack on the integrity of the defense counsel and defense expert witnesses, the effects of such an attack could have been cured by an appropriate admonition to the jury had an objection been timely made. (Cf. *People v. Bemore* (2000) 22 Cal.4th 809, 845-846; *People v. Fierro* (1991) 1 Cal.4th 173, 211; *People v. Miller* (1990) 50 Cal.3d 954, 1001; *People v. Williams* (1996) 46 Cal.App.4th 1767, 1781; *People v. Crawford* (1967) 253 Cal.App.2d 524, 534.)

Apart from appellant's failure to object below, the prosecutor's remarks were well within the proper bounds of vigorous argument.

This Court has set forth the well established "applicable federal and state standards regarding prosecutorial misconduct":

> A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process. Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.

(*People v. Hill, supra,* 17 Cal.4th at p. 819 [internal quotations and citations omitted].)

Appellant provides this single brief instance which he contends was an improper attack on the integrity of defense counsel and defense expert witnesses. This single brief instance did not amount to "a pattern of conduct so egregious that it infect[ed] the trial with such unfairness" as to deny appellant's federal constitutional right to due process of law. (*Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-644; *People v. Espinoza, supra,* 3 Cal.4th at p. 820 ["The prosecutor's behavior, though on occasion rude and intemperate, did not comprise a pattern of egregious misbehavior making the trial fundamentally unfair. In this lengthy trial, the prosecutor's lapses from courteous demeanor were occasional rather than systematic and pervasive."].) The prosecutor's remarks did not manipulate or misstate the evidence. No specific right enumerated in the Bill of Rights was prejudiced or implicated by the prosecutor's remarks, such as the right to counsel in *Argersinger v. Hamlin* (1972) 407 U.S. 25, or such as the privilege against compulsory self-incrimination in *Griffin v. California* (1965) 380 U.S. 609. (Cf. *Darden v. Wainwright* (1986) 477 U.S. 168, 181-182.)

Nor did the prosecutor's remarks constitute misconduct under state law. "A prosecutor commits misconduct if he or she attacks the integrity of defense counsel, or casts aspersions on defense counsel." (*People v. Hill, supra,* 17

Cal.4th at p. 832; e.g., *People v. Bain* (1971) 5 Cal.3d 839, 847 ["The unsupported implication by the prosecutor that defense counsel fabricated a defense constitutes misconduct."].) Isolating certain parts of the prosecutor's closing remarks, appellant provides a skewed interpretation of the prosecutor's remarks:

> The unmistakable import of [the prosecutor's] argument was to imply that the defense had at the last minute procured a third attorney to manufacture a fraudulent mental health defense using doctors from out of town, because the attorneys from the public defender's office had been unable, or perhaps unwilling, to produce local expert witnesses willing to bend the truth.

(AOB 451.) Read in context, the prosecutor's remarks were not improper. The prosecutor was arguing to the jury that they should not get caught up in the drama of a third attorney with three out-of-area expert witnesses coming to defend appellant in the middle of the prosecution's case-in-chief and presenting a new defense theory with highly technical evidence of appellant's brain dysfunction.[98/] The prosecutor, concerned with what Respondent will call the "Perry Mason/Ben Matlock" effect (in essence, where something new is brought up in the middle of the trial, leaves everyone flabbergasted and the

---

98. Respondent notes here one particular theatric. After reviewing appellant's psychiatric history, Dr. Berg suspected neurological damage. Dr. Berg asked Dr. McKinzey to administer neurological tests on appellant. Dr. McKinzey administered the Luria-Nebraska battery on appellant. Dr. McKinzey suspected frontal and temporal lobe damage, which would be consistent with organic personality syndrome. (RT 6332-6337.) When asked whether if there is a test that could objectively verify – or impliedly, discredit – his conjecture, Dr. McKinzey noted the BEAM, which picks up and maps the electrical activity of the brain. (RT 6338.) At the time of their testimony, Dr. Berg and Dr. McKinzey were waiting for the results of the BEAM. (RT 6340-6342.) When Dr. Apte took the stand, he went through the results of the BEAM and opined that the results showed appellant's frontal and temporal lobes were dysfunctional. (RT 7087, 7093, 7095.) Dr. Berg and Dr. McKinzey then got back on the stand and testified that the results of the BEAM "confirmed" their conjectures. (RT 7123-7131.)

prosecution looking foolish, and exonerates the accused). Therefore, he warned the jury to resist conferring any weight to the defense experts' opinions and the defense's theory on the basis of the seemingly shocking last minute – eleventh hour – discovery, and stressed that "[appellant's] mental state is not in issue unless and until the defense puts it in issue"[99] (RT 9100). The prosecutor did not suggest any defense improprieties. He focused on the defense evidence and circumstances surrounding the presentation of the evidence. He asked the jury to rationally and critically evaluate the defense evidence – to resist conferring any weight based on shock value to such evidence. (Cf. *People v. Crawford, supra,* 253 Cal.App.2d at p. 534 [reference by the prosecutor to defendant's alibi defense in a robbery prosecution as a "Perry Mason type case" was not misconduct]; but cf. *People v. Lindsey* (1988) 205 Cal.App.3d 112, 115-118 [holding the prosecutor committed prejudicial misconduct during closing argument by condemning defense counsel for failing to reveal an alibi defense before trial].[100]) The prosecutor's remarks were well within the limits of proper

---

99. Appellant quoted two sections of the prosecutor's closing argument in his opening brief. Between the two sections were these remarks:

> Also, you know, the fact that you hear claims about [appellant's] mental makeup for the first time in the defense case is really it's only way that it ever happens in a criminal trial. Prosecution puts on evidence about the crimes, and only the defense can place [appellant's] mental state in issue. Until a special mental issue is raised by the defense during the trial a person can only sit and wait and see what if anything occurs.

(RT 9083.)

100. In *Lindsey*, the defense counsel had said in her closing argument that she had become "a little snippy" at times during the trial because "I am representing somebody that is innocent." The prosecutor responded:

> "Well, it makes me angry as an officer of the court that this man who is innocent, according to her words, has sat in jail since February 4th, went through a Preliminary Examination when the alibi was there all the time and this man was in jail and this woman allowed him to sit in jail without coming to the District

vigorous argument. (Cf. *People v. Frye, supra,* 18 Cal.4th at pp. 977-978 [no misconduct where prosecutor accused counsel of making an "irresponsible" third party culpability claim]; *People v. Medina, supra,* 11 Cal.4th at p. 759 [no misconduct where prosecutor said counsel can "twist [and] poke [and] try to draw some speculation, try to get you to buy something"].) In no way did the prosecutor malign defense counsel or the defense experts.

Finally, even assuming the prosecutor's remarks were improper, appellant has not demonstrated prejudice. To prevail on a claim of prosecutorial misconduct based on remarks to the jury, the defendant must show "a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion." (*People v. Cunningham, supra,* 25 Cal.4th at p. 1001 [internal citations and quotations omitted].)

> In conducting this inquiry, we "do not lightly infer" that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements."

(*People v. Frye, supra,* 18 Cal.4th at p. 970.) Read in context, the jury would not have understood the prosecutor's remarks to be personal attacks on the integrity of the defense counsel or the defense expert witnesses. As explained above, the prosecutor simply asked the jury to rationally and critically evaluate the defense evidence. Moreover, the jury, having been properly instructed by the court, would have based their verdict on the evidence, not on any alleged defense chicanery. (*People v. Clair, supra,* 2 Cal.4th at p. 662, fn. 8 ["presume[d] that jurors treat the court's instructions as a statement of the law

---

> Attorney's Office, without coming to the Police Department saying, listen, we've got proof--Mrs. Lindsey--that this man didn't do the crime. Where was this information until today? It's inconceivable. It goes against common sense, and it is unreasonable to believe that another officer of the court would allow her innocent client to sit in jail for five months and not say anything to anyone."

(*People v. Lindsey, supra,* 205 Cal.App.3d at p. 115-116.)

by a judge, and the prosecutor's comments as words spoken by an advocate in an attempt to persuade"]; *People v. Sanchez* (2001) 26 Cal.4th 834, 852 ["Jurors are presumed able to understand and correlate instructions and are further presumed to have followed the court's instructions."].)

Accordingly, appellant's prosecutorial misconduct claim should be rejected.

XLVIII.

APPELLANT'S CLAIM THAT TRIAL COURT PREJUDICIALLY ERRED BY ALLOWING HIM TO PLEAD NOT GUILTY BY REASON OF INSANITY OVER DEFENSE COUNSELS' OBJECTION IS MOOT; IN ANY EVENT, THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING APPELLANT TO DO SO

Appellant argues that the trial court prejudicially erred by allowing him to plead not guilty by reason of insanity. (AOB 454-460.) Not so. First, appellant's claim is moot. Regardless, the trial court did not abuse its discretion in permitting appellant to so plead.

In May 1993, despite the lack of evidence of insanity and against the advice of counsel, appellant insisted on entering an additional plea of not guilty by reason of insanity ("NGI"). (5/20/93 RT 25-26; 5/24/93 RT 38-43.) On June 4, 1993, following numerous discussions and a confidential psychiatric evaluation, the trial court permitted appellant to enter the plea of NGI. (6/4/93 RT 55-62.) On January 12, 1994, the sanity phase of the trial began. (CT 1097.) Dr. Berg testified on behalf of the defense, explaining his opinion that appellant was legally insane after attacking Angie and suffering a memory loss. (RT 9526-9531.) On January 20, 1994, the jury returned and found appellant to have been sane during the commission of the offenses. (CT 1107-1111, 1113-1120; RT 9947-9960.) Now on appeal, appellant claims that the trial court erred in allowing him to plead NGI despite the lack of evidence to support such a plea and over the objection of defense counsel.

First, appellant's claim here should be deemed moot.

> An appellate court will not review questions which are moot and which are only of academic importance. It will not undertake to determine abstract questions of law at the request of a party who shows that no substantial rights can be affected by the decision either way. [Citation.]

(*Keefer v. Keefer* (1939) 31 Cal.App.2d 335, 337.) Where there are no prejudicial collateral consequences that a successful appeal could ameliorate, the appeal should be dismissed as moot. (See *People v. Lindsey* (1971) 20 Cal.App.3d 742, 744; e.g., *People v. Kerwin* (1972) 23 Cal.App.3d 466, 473; see also *Sibron v New York* (1968) 392 U.S. 40, 57-58.) Here, appellant speculates as to the prejudice that arose from the trial court's decision to allow appellant to plead not guilty by reason of insanity. Such speculation is due, primarily, to the "academic" nature of the issue raised. Psychologist Dr. Paul Berg evaluated and found appellant to have been temporarily insane at the time of the offenses, and testified to that effect at trial. Respondent acknowledges that the issue appellant raises here is likely to recur, especially in capital cases. (*Vernon v. State* (2004) 116 Cal.App.4th 114, 121, fn. 4 ["mootness exception for an issue of public interest that is likely to recur"].) However, due to the speculative nature of the prejudice – if any – this Court should, having discretion, decline to address the merits of the issue. Though the viability of the insanity defense was questionable, there was apparently substantial evidence to support such a plea. In light of appellant's theory of defense at trial, the damaging findings of mental health experts would have been disclosed and available to the prosecution regardless. In essence, though appellant made a conscious and well-informed choice to plead NGI at the time, appellant is now putting the onus on the court to decide which defense was most viable. Appellant had a personal right to decide how to plead, regardless of tactical considerations. (See *People v. Medina* (1990) 51 Cal.3d 870, 899-900; *People v. Gauze* (1975) 15 Cal.3d 709, 717-718.) The freedom to choose must come with responsibility for the consequences of the choice.

If the issue is not moot, this Court should uphold the trial court's decision to permit appellant to enter the plea of NGI.

> [T]he decision to plead, or to change or withdraw a plea, is a matter lying within the defendant's, rather than his counsel's,

> ultimate control, *regardless of tactical considerations.* [Citations.]

(*People v. Medina, supra,* 51 Cal.3d at pp. 899-900, italics added.) Appellant notes this Court's holding in *Gauze*, that a competent defendant cannot be compelled by counsel to present an insanity defense. (*People v. Gauze, supra,* 15 Cal.3d at pp. 717-718.) Appellant acknowledges that this Court held in *Medina* that a competent defendant cannot be compelled to abandon an insanity defense "merely because counsel disagrees with the tactics of that decision." (*People v. Medina, supra,* 51 Cal.3d at p. 900.) This Court has said:

> We recognize . . ., that a defendant's right to insist that a defense be presented at the initial phase of the trial will inevitably impinge on defense counsel's handling of the case. Such impingement on defense counsel's actions, however, results any time a defendant chooses to exercise a personal right – such as the right to testify or the right to trial by jury – over counsel's contrary advice. Numerous decisions explain that, in such a situation, the attorney's obligation is simply to provide the best representation that he can *under the circumstances.* [Citations.] Further, the authorities also establish that when a defendant insists on a course of action despite his counsel's contrary warning and advice, he may not later complain that his counsel provided ineffective assistance by complying with his wishes. [Citations.]

(*People v. Frierson* (1985) 39 Cal.3d 803, 816-817, italics in original, fns. omitted.) As clear from the record, appellant was competent and well-informed of the consequences of a NGI plea; he does not argue otherwise here. Appellant's trial counsel was ethically bound to follow appellant's wish. (See *Alvord v. Wainwright* (11th Cir. 1984) 725 F.2d 1282, 1288, cert. den. 469 U.S. 956, 959-960 (dis. opn. of Marshall, J.).) In short, the trial court lacked the discretion to deny appellant's request to enter a NGI plea on the basis that his counsel disagreed with the tactics or wisdom of his decision.

Appellant seeks to distinguish *Medina* and *Gauze* on the ground that a defendant has "no constitutional right to insist on a defense for which counsel

had found no credible evidentiary support." (AOB 457.) Respondent acknowledges that a defendant's right to decide how to plead is not absolute – overriding any and all interest in fair and efficient administration of justice. This Court has explained:

> It is true that in our system of justice the decision as to how to plead to a criminal charge is personal to the defendant: because the life, liberty or property at stake is his, so also is the choice of plea. [Citation.] But it is no less true that the Legislature has the power to regulate, in the public interest, the manner in which that choice is exercised. Thus it is the legislative prerogative to specify which pleas the defendant may elect to enter (Pen.Code, § 1016), when he may do so (*id.*, § 1003), where and how he must plead (*id.*, §1017), and what the effects are of making or not making certain pleas.

(*People v. Chadd* (1981) 28 Cal.3d 739, 747-748, fns. omitted.) Section 1016 provides:

> There are six kinds of pleas to an indictment or an information, or to a complaint charging a misdemeanor or infraction:
>
> . . . . . .
>
> 6. Not guilty by reason of insanity.
>
> . . . A defendant who does not plead not guilty by reason of insanity shall be conclusively presumed to have been sane at the time of the commission of the offense charged; provided, that the court may for good cause shown allow a change of plea at any time before the commencement of the trial. . . .

(See, e.g., *People v. Merkouris* (1956) 46 Cal.2d 540, 554-555 [trial court abused its discretion in permitting defendant personally to withdraw his plea of NGI where defense counsel desired to proceed on the plea of NGI and the fact that a doubt existed as to defendant's competence to stand trial]; *People v. Nolan* (1932) 126 Cal.App. 623, 630-632 [trial court did not abuse its discretion in denying defendant's motions for leave to add plea of NGI where two motions were made without any supporting facts and the third after murder trial had commenced].) Case law allows a defendant to change his plea to NGI

after the commencement of trial where good cause is shown. (*People v. Hagerman* (1985) 164 Cal.App.3d 967, 976.)

Here, the trial court did not abuse its discretion in permitting appellant to plead NGI. Appellant's request to enter a NGI plea was made before commencement of trial. (Cf. *People v. Hagerman, supra,* 164 Cal.App.3d at p. 977 [holding that a motion to enter a plea of NGI is not timely when first made after the rendition of a jury verdict].) Appellant was competent to make, and insistent of, such a decision. The trial court and appellant's counsels informed him of the consequences of such a plea. Appellant was facing the possibility of the death penalty. The trial court cannot be said to have abused its discretion in permitting appellant to plead NGI. Contrary to what appellant suggests, the trial court need not consider whether there is evidence to support such a plea. (*People v. Lutman* (1980) 104 Cal.App.3d 64, 67-68 [holding that section 1016 does not require a defendant to demonstrate the merits of his insanity claim before being allowed to enter such a plea because to do so would force the defendant to abandon his constitutional privilege against self-incrimination in order to exercise his right to plead NGI].) Presumably, a defendant's counsel and the trial court would advise the defendant of the consequences and viability of a NGI plea. The defendant then can make a well-informed decision as to whether to so plead.[101/]

---

101. Respondent is unable to determine the relevance of the unreported Colorado opinion appellant cites in support of his argument. Respondent believes appellant is citing to *People v. Roadcap*, 2003 Colo. App. LEXIS 206 – not *People v. Anderson*, 2003 Colo. App. LEXIS 626. Assuming this to be correct, *Roadcap* held that the trial court correctly ruled that the expert testimony defendant sought to introduce concerning his mental condition triggered a Colorado statute requiring notice and compulsory examination. The *Roadcap* Court further held that the trial court's ruling did not preclude his theory of self-defense, but only required defendant to comply with the statute if he chose to pursue it.

Regardless, even if the court abused its discretion in permitting appellant to plead NGI, the error was harmless. As explained earlier, though the viability of the insanity defense was questionable, there was apparently substantial evidence to support such a plea. Dr. Berg testified that appellant was legally insane after attacking Angie. And in light of appellant's theory of defense at trial, the damaging findings of mental health experts would have been disclosed and available to the prosecution regardless.

Accordingly, appellant's claim here should be rejected.

XLIX.

THE COURT PROPERLY REFUSED A CLARIFYING INSTRUCTION AT THE SANITY PHASE THAT THE TERM "MENTAL ILLNESS" COULD INCLUDE ALL MENTAL CONDITIONS WHICH PRODUCED THE REQUISITE EFFECTS

Appellant argues that the trial court erred by refusing a special defense instruction at the sanity phase that the term "mental illness" could include any combination of mental conditions which produced the requisite effects. (AOB 461-462.) Not so. The court properly refused the requested clarifying instruction.

Appellant's trial counsels requested the following clarifying instruction: "The terms 'mental disease' and 'mental defect' include all mental conditions which produce the requisite effects." (RT 9831; see *People v. Medina, supra,* 51 Cal.3d at pp. 900-901.) The court refused to give this clarifying instruction, finding it unnecessary. The jury was properly instructed at the sanity phase.[102/]

---

102. The court instructed the jury, in part:

> . . . You must now determine whether [appellant] was legally sane or legally insane at the time of the commission of each of these crimes. This is the only issue for you to determine in this proceedings.
>
> You may consider evidence of his mental condition before, during and after the time of the commission of the crime as tending to show [appellant's] mental condition at the time the crime was committed.
>
> Mental illness or mental abnormality, in whatever form either may appear, are not necessarily the same as legal insanity. A person may be mentally ill or mentally abnormal and yet not be legally insane.
>
> A person is legally insane when by reason of mental disease or mental defect he was incapable of knowing or understanding the nature and quality of the facts – of his acts, or incapable of distinguishing right from wrong at the time of the commission of the crime.

Appellant does not argue otherwise. When the jury is properly instructed, the court need not restate legal principles in another manner. (*People v. Anderson, supra,* 64 Cal.2d at p. 641; *People v. Frye* (1985) 166 Cal.App.3d 941, 951-952.)

Here, the court properly refused the requested clarifying instruction. The court's insanity instructions did not limit "mental disease" or "mental defect" to OPS, but allowed the jury to consider any

> evidence of [appellant's] mental condition before, during and after the time of the commission of the crime as tending to show [his] mental condition at the time the crime was committed.

(RT 9926.) The import of this instruction is that "mental disease" and "mental defect" includes any and all mental conditions that produce the requisite effect. Appellant's requested clarifying instruction would have been repetitive and merely a restatement of the legal principles. (Cf. *In re Conservatorship of Walker* (1987) 196 Cal.App.3d 1082, 1099-1100 [denying request for instruction stating symptoms of a mental disorder (i.e., psychosis, bizarre behavior, delusions, hallucinations) are not sufficient to justify a finding of grave disability, unless because of the symptoms the person cannot provide for his basic personal needs, where the jury was instructed in accord with statutory language that "gravely disabled" means a condition in which a person, as a result of a mental disorder, is unable to provide for his basic personal needs for food, clothing, or shelter].) Furthermore, in light of the court's insanity instructions, no reasonable juror would believe an insanity finding could be based on a single mental illness but not a combination of mental conditions that

---

> The term "wrong" as used in the sanity trial means the violation of generally accepted standards of moral obligations.
>
> [Appellant] has the burden of proving his legal insanity at the time of the commission of the crimes by a preponderance of the evidence.

(RT 9926; CALJIC No. 4.00.)

produce the requisite effect. (Cf. *People v. Kelly* (1992) 1 Cal.4th 495, 535-536 [rejecting contention that reference to a "mental disease or mental defect" in the instruction prevented jury from considering the effects of both in combination because no reasonable juror would believe an insanity finding could be based upon a mental defect or upon a mental disease, but not both].) For the same reasons, appellant could not have suffered any prejudice from the court's refusal to given his requested clarifying instruction. (Cf. *People v. Kelly, supra,* 1 Cal.4th at pp. 535-536.)[103/]

Accordingly, appellant's claim here should be rejected.

---

103. Respondent notes that the clarifying instruction appellant's trial counsel requested and his appellate counsel's translation of it differs. At the insanity trial, his counsels had requested the clarifying instruction that "'mental disease' or 'mental defect' includes *all* mental conditions which produce the requisite effects." (RT 9831, italics added.) On appeal, his counsel writes that the requested clarifying instruction stated "*any combination of* mental conditions which produced the requisite effects." (AOB 461 [italics added].) Further, appellant's defense theory on appeal differs somewhat from his defense theory at trial. At trial, Dr. Berg opined:

> [Appellant's] rage was so enormous and so beyond what we normally even think of as anger or rage that he would not at that time understand and know and appreciate . . . what he was doing or know the difference between right and wrong at that time.

(RT 9575.) On appeal, appellant's defense theory is that "a panoply of mental defects and disorders rendered him temporarily insane at the moment of his offenses." (AOB 462.) Regardless, no reasonable juror would believe an insanity finding could be based on a single mental illness but not a combination of mental conditions that produce the requisite effect. (Cf. *People v. Kelly, supra,* 1 Cal.4th at pp. 535-536.)

L.

THE COURT, IN THE COMPETENCY TRIAL, PROPERLY ADMITTED EVIDENCE OF APPELLANT PLEADING NOT GUILTY BY REASON OF INSANITY AGAINST HIS ATTORNEYS' ADVICE, OF APPELLANT WANTING TO PLEAD GUILTY TO THE CHARGES BUT WAS REFUSED THE OPPORTUNITY TO DO SO, AND OF APPELLANT THREATENING TO DISRUPT COURT PROCEEDINGS IF THE MEDIA AND THE VICTIMS' FAMILY MEMBERS WERE PRESENT IN THE COURTROOM

Appellant argues that the court admitted irrelevant and unduly prejudicial evidence in the competency trial. Specifically, appellant complains of evidence (1) that he pleaded not guilty by reason of insanity against his attorneys' advice, (2) that he wanted to plead guilty to the charges but was refused the opportunity to do so, and (3) that he threatened to disrupt court proceedings if the media and the victims' family members were present in the courtroom. (AOB 463- 469.) His argument is untenable. The court was well within the bounds of reason in admitting the evidence, finding them to be relevant and not unduly prejudicial.

A. The Record

On June 7, 1993, during pretrial proceedings, the court observed:

> . . . I can't help but notice the demeanor of [appellant] this morning: head hung down. He hasn't moved from that position since I was in earlier when you were in Judge Creede's court, Mr. Cooper. He really hasn't budged too much from that position. And, to me, that means usually that there's somebody that's in a state of depression and very withdrawn. When I see that, I'm no psychiatrist, I don't know when people are pretending to be that way or whether they really do feel that way.

(RT 6.) The court then inquired of defense counsels:

> In light of this obvious demeanor, I'm wondering whether that would ever provoke an examination to make sure that he's able to stand trial, ... [¶] And so, Ms. Martinez and Ms. O'Neill, is he communicating with you? Is he cooperating with you? Is he able to cooperate to the extent that you can adequately prepare for his defense?

(RT 6-7.) Appellant's lead trial counsel opined that appellant was not currently "1368," but acknowledged that the competency issue may come up as the trial progressed. (RT 7-8.)

On June 8, 1993, at a meeting called by the court, Judge Fitch shared with the parties a copy of a handwritten note that the bailiff, Randall Haw, had given him. The note recorded statements appellant made to Deputy Haw during transport to jail. (RT 22-24.)

On June 10, 1993, appellant refused to dress for court and requested that his presence be waived. His trial counsel stated she would not waive his presence. Appellant became disruptive. A newspaper reporter then came into the courtroom; appellant stood up and ranted on about not wanting to be in the courtroom. The newspaper reporter left the courtroom and appellant sat down. Appellant's trial counsel informed the court that she felt that appellant may not be able to assist counsel and that the court might consider "1368" proceedings. She asked that the prosecutor not be present in the courtroom while the court and defense discuss "1368" proceedings. An in camera discussion then was held between the court and defense counsel. After, in open court with the prosecutor present, the court – on its own motion – expressed doubt as to appellant's mental competence, suspended criminal proceedings, and appointed two mental health experts to evaluate appellant pursuant to Penal Code sections 1368 and 1369. (CT 507-508; RT 30-65.)

Both doctors appointed found appellant competent to stand trial. (RT 66; see CT 1805-1813, 1819-1824.) However, appellant insisted on a jury trial

on the competency issue. (RT 66-67.) On July 12, 1993, the jury trial to determine whether appellant was competent to stand trial, began. (CT 516.)

The sole witness testifying for the defense at trial was psychiatrist George Woods, Jr. Dr. Woods personally interviewed appellant, spoke with the psychotherapist then seeing appellant, and reviewed documents relating to appellant's psychiatric history. His diagnostic impression was that appellant was suffering from a major depressive disorder with psychotic features. (II RT 229-230, 233-242.) With regards to the depressive disorder, appellant described feelings of hopelessness and worthlessness including intermittent thoughts of suicide (II RT 248-250), sleeping irregularities (II RT 247-248), and a decreased appetite resulting in a 15-pound weight loss (II RT 247). With regards to the psychosis, appellant described hearing Laurie cry (auditory hallucinations) and at times trying to force his fingers into his ears to stop the crying (II RT 271). He reported thinking that his food was poisoned (II RT 248-249) and that everyone had turned against him (II RT 251-252, 265), including his counsel, the judges, some of the jail staff, (paranoid delusions). Dr. Woods believed that appellant understood the nature of the criminal proceedings but concluded that he was not competent at the time to stand trial because his mental disorder was so severe that it prevented him from being able to rationally assist his attorneys. (II RT 261-265, 272, 288.) Dr. Woods opined that this was not a volitional choice but was the effect of being overwhelmed by his psychosis and paranoid delusions. (II RT 288-290.) Dr. Woods did not believe that appellant was malingering. (II RT 245-247, 252-257.)

Three mental health experts testified at trial for the prosecution: psychiatrist Charles A. Davis; psychologist Frank D. Powell; and psychologist Richard B. King.

Dr. Davis found appellant's demeanor to be "friendly, outgoing, cooperative" at the time of the interview, but observed appellant during the

court proceedings to be "withdrawn, quiet, head down, looking as if he [did] not appreciate being here." (II RT 399-400.) Dr. Davis was impressed with appellant's responses on intelligence tests and results on ability to focus tests. (II RT 432-434.) Consequently, Dr. Davis was not of the view that appellant's auditory hallucination was of such magnitude as to intrude on reality. (II RT 428-430.) Dr. Davis' diagnostic impression of appellant was that he suffered from a severe personality disorder and mild depression (understandable and appropriate under the circumstances). (II RT 445.) Dr. Davis was of the view that appellant was malingering – a manipulation rather than true paranoid delusion. (II RT 439.) Dr. Davis concluded that appellant was competent to stand trial (II RT 397) – particularly, able to assist his attorney in a rational manner "if he wishes to do so" (II RT 449, 493).

Dr. Powell found appellant's demeanor to be friendly and cooperative, smiling frequently at the time of the interview, but observed appellant during the court proceedings to be "somewhat withdrawn or uninterested." (III RT 555-556, 564.) Dr. Powell found appellant to be intelligent and focused (III RT 563, 569); the auditory hallucination appellant complained of was not so persistent and intrusive as to cause him to lose contact with reality (III RT 574-576). Dr. Powell's diagnostic impression of appellant was that he was suffering from a delusional disorder, persecutory type. (III RT 577-578, 585.) Dr. Powell did not believe appellant was malingering. (III RT 595-596.) Dr. Powell concluded that appellant was competent to stand trial – able to understand the nature, purpose, and consequences of the proceedings against him, and particularly, "capable of assisting his attorney should he so desire, and if they can help him get beyond his suspicions." (III RT 579; CT 1824.)

Dr. King found appellant to be "alert and quite aware of the purpose of [the] interview, and able to form thought and relate those [thoughts] in a meaningful way." (III RT 649.) Dr. King opined that appellant was competent

to stand trial. Dr. King explained that appellant was not psychotic at the time, that he understood the charges against him and the consequences if he was to be found guilty, and that he seemed "very capable of organizing his thoughts around his ability to defend himself." (III RT 654-655.) Dr. King acknowledged that appellant showed a

> "mild degree of paranoia" that was "consistent with both psychosis as well as an individual charged with such crimes that must be very careful about what he says lest his words be used against him."

(III RT 666.)

As further evidence of appellant's competence, the prosecution offered the testimony of lay witnesses. (See III RT 672-747.) To rebut Dr. Woods' opinion that appellant was suffering from a major depressive disorder as evidenced by – in part – a loss of appetite for the last seven months resulting in a weight loss of about 15 pounds, Jean Schoonmaker, the custodian of records at the jail infirmary, testified that appellant weighed 198 pounds on July 1, 1992, and 204½ pounds on July 14, 1993.[104/] (III RT 721-724.) A number of lay witnesses described their observations of appellant at the Fresno County Jail. They testified that appellant routinely ate his meals without expressing any fear of poisoning, that he was comfortable socializing with other inmates and the correctional staff, that he neither complained of auditory hallucinations nor stuck his fingers into his ears, that he understood questions asked and directions given and responded and acted appropriately, and that he did not appear depressed or agitated – nor any noticeable weight loss. (III RT 672-747.)

Two lay witnesses whose testimonies appellant complains of were court reporter Rudy Garcia and deputy sheriff Randall Haw. At the competency trial,

---

104. It was stipulated that on the morning of July 22, 1993, appellant weighed 196¼ pounds with all his clothes on. (IV RT 771-772; I SCT 24-25.)

appellant's trial counsel had objected to their testimonies on the ground of relevance. (III RT 519-521.)

The prosecutor explained the relevance of Garcia's testimony:

> Rudy Garcia, Your Honor, is a court reporter for Judge Nunez. On June 4th of this year [1993], which I submit to the Court is a time close to the time of these proceedings, there were – there was a record of what occurred in Judge Nunez' department wherein [appellant] made statements, participated in the proceedings. I have a transcript, a copy of which I have provided to the defense, and the first eight pages of that transcript are what I propose or what I would endeavor to introduce into evidence in this trial.
>
> And I would submit for the Court's review those eight pages. My representation as to what would be in there would be information concerning [appellant's] demeanor at a time close to these proceedings, [appellant's] understanding of court proceedings, his participation therein, and in fact, his own –

(III RT 523-524.) The court interrupted and asked appellant's trial counsel whether she had seen the transcript. Appellant's trial counsel said that she had a copy and that she was also present at the June 4, 1993, proceedings. The court then inquired: "As to time, duration and place, the fact that Counsel's – how can you object? What's the basis of your objection to the transcript of Rudy Garcia, I mean –" (III RT 524.) Appellant's trial counsel replied:

> It's totally irrelevant to these proceedings whether [appellant] can at times appear normal when he's not in front of the jury when the witness's parents aren't in the audience.

(*Ibid.*) The court overruled the objection, explaining:

> I'm going to overrule the objection on that ground. It seems to me it's clearly relevant in light of [appellant's] demeanor here in court and what's occurred and the testimony of Dr. Woods. I think it's clearly proper rebuttal evidence.

(*Ibid.*)

The prosecutor explained the relevance of Deputy Haw's testimony:

> As to Randall Haw, the observations or the opportunity to make observations by Randall Haw would be June 7, 1993, and on at

least one occasion thereafter where this person engaged [appellant] in conversation, [appellant] himself engaged this witness in conversation, and so that is the – and that this person is a court bailiff and accompanied [appellant] back and forth to court and that part of this bailiff's habit and practice is to purposely engage in-custody defendants in conversation in order to assess their mood, attitude and demeanor. And he did that and has his observations and opinions concerning this defendant.

(III RT 524-525.) Appellant's trial counsel objected, stating:

> [I]t appears that Mr. Haw and [appellant] were engaged in a conversation. Again, that is not an issue that was brought up by the defense, and since we're the ones that are the moving party in this case, the burden is on us, of course Dr. Woods, who was our only witness, testified that at times, [appellant] can appear to be normal. I think what [the prosecutor] is trying to do by putting this witness on is to show that at times, [appellant] is normal. Well, we've already admitted that. That's not in contention. That's not at issue. The issue is when he's confronted with a courtroom situation, when he's confronted with having to talk to his attorneys, can he cooperate, can he assist counsel? This has nothing to do with it. It's a 352 issue and it's a relevancy issue, because you know you could probably find 200 people who could say, "I saw him walking down the street, he was normal to me." A lot of people in this courtroom could probably say that at some time or other. It's totally irrelevant to these proceedings.

(III RT 526-527.) The court disagreed, stating that "[i]t's proper rebuttal." (III RT 527.)

Garcia testified that he was the court reporter in Judge Ralph Nunez's courtroom on June 4, 1993, during proceedings involving appellant. (III RT 619.) Garcia prepared a transcript of the June 4, 1993, proceedings involving appellant. (III RT 619-620.) A partial transcript – the open court portion – of the proceedings, transcribed by Garcia, was entered into evidence. (III RT 620.) Garcia then read into evidence the partial transcript:

> THE COURT: People versus Royal Clark, case number 446252-9.

[DEFENSE COUNSEL]: Barbara O'Neill and Margarita Martinez for [appellant]. He's present in court.

[PROSECUTOR]: Dennis Cooper for the People.

[DEFENSE COUNSEL]: Your Honor, I believe this was on for the limited purpose of seeing if [appellant's] request to enter a not guilty by reason of insanity plea was going to be granted. We do not wish to enter that plea.

THE COURT: Is that true, [appellant]?

[APPELLANT]: No, I want to enter it.

[DEFENSE COUNSEL]: Your Honor, can we have an in-camera then on the issue? I'm sorry, it will take two minutes.

THE COURT: Okay. Well, let me ask [prosecutor] to please step out and we'll stay in-camera. And I'm going to ask everybody else not connected with this case at least step outside the courtroom.

(Only the attorneys and the Court staff remaining.)

THE COURT: Again call the case of the People versus Royal Clark, case number 446252-9.

[DEFENSE COUNSEL]: [Appellant] is present in custody with Margarita Martinez and Barbara Beatie representing him, Your Honor.

THE COURT: Mr. Cooper is here on behalf of the People.

[PROSECUTOR]: Yes.

THE COURT: Did you want to have any further discussions with your client in-camera.

[DEFENSE COUNSEL]: No. And I did talk to [appellant] earlier before the Court called this case in the interview room and his feelings are still the same as they were this morning. He feels against counsel's advice he would like to enter an NGI plea at this time. I feel [appellant], even though it is against our advice and I am representing against it, should be able to do what he wants to do.

THE COURT: [Appellant], let me have you stand up here, sir.

[Appellant], I went over the notes that I had concerning this question, and again, sir, I'm satisfied that you have a right to enter a not guilty by reason of insanity plea if that is your wish, and you may do that even against the advice of counsel. We've got – excuse me. We've gone over the reasons that may not be a wise decision on your part. You have been made aware that the reports of the doctors will not be confidential. So, if there's any

information in those reports that is useful to the district attorney, the district attorney will be able to use that against you in your trial. Your not guilty plea is really of no avail to you, sir, until such time as you are convicted of the underlying case, that's the murder case, if you are. And you've been made aware of the consequences of that plea.

If you are found guilty and the jury subsequently determines that in fact you were insane at the time that the offense was committed, you could be committed to a state mental hospital for the rest of your life.

Probably the greatest interest to you would be the fact that information contained in any report prepared by one of the doctors that the court appoints would be made available to the district attorney. Again, I repeat, sir, it would not be a confidential examination, either one.

I think you ought to follow the advice of your counsel, but whatever decision you make, sir, is what the court is going to do. If you want to enter the not guilty by reason of insanity plea, you will be permitted to do that.

[APPELLANT]: That's what I want to do.

THE COURT: That's what you want to do?

[APPELLANT]: Yep. I want to specify, I'm not saying I'm insane now, I'm talking about as far as the time the crime was committed. That's what I'm pleading for.

[DEFENSE COUNSEL]: I did explain to [appellant] that's exactly what a not guilty by reason of insanity plea is.

[APPELLANT]: That's what I want to do.

THE COURT: I repeat to you, sir, that the results of those examinations will not be confidential. The district attorney will get a copy of those reports. If there's anything in those reports that is useful to the district attorney, he's free to use that information against you. And I can assure you, sir, that he will use it against you.

[APPELLANT]: All right.

THE COURT: And your attorneys don't think it's a good idea.

[APPELLANT]: I got nothing else to lose.

THE COURT: Pardon?

[APPELLANT]: I got nothing to lose. The guy is trying to kill me anyway.

THE COURT: What I'm saying, sir, you may give him some ammunition to do just that.

[APPELLANT]: I ain't got nothing to lose.

THE COURT: I don't know that, [appellant]. I'm telling you –

[APPELLANT]: I would like what the doctor I talk to – what was his name?

[DEFENSE COUNSEL]: I talked to Dr. Terrell.

[APPELLANT]: I would like [to] be examined by some other doctor.

THE COURT: That's what I would do, sir.

[APPELLANT]: That's not in his same office.

THE COURT: I would appoint another doctor, sir.

[APPELLANT]: Preferably not in Fresno.

THE COURT: [Appellant], is there anything else about the not guilty by reason of insanity plea that you think you need to talk – discuss with the Court or with your attorneys? Counsel, I assume you've gone over in great detail with him – excuse me, I know you've talked to him.

[DEFENSE COUNSEL]: We have, Your Honor. This has been ongoing for some weeks. I want to make it clear, though, we're entering two pleas, not guilty and not guilty by reason of insanity.

THE COURT: That's exactly it.

[DEFENSE COUNSEL]: Thank you.

THE COURT: [Appellant], do you need some – do you need more time to think about this? Again, I repeat, I think you ought to follow the advice of counsel, but if you choose not to do so, it's your right to enter a not guilty plea by reason of insanity plea.

[APPELLANT]: That's all I ask.

THE COURT: Okay. He has already entered a not guilty plea, correct?

[DEFENSE COUNSEL]: Yes.

THE COURT: All right. Defendant's request for leave to plead not guilty by reason of insanity, in addition to the not guilty plea, is granted.

[Appellant], at this time, are you entering a not guilty by reason of insanity plea in addition to the not guilty plea that you have previously entered in this case.

[DEFENSE COUNSEL]: You have to answer him.

[APPELLANT]: What?

[DEFENSE COUNSEL]: You have to answer the Judge.

THE COURT: Are you entering, sir, a not guilty by reason of insanity plea at this time?

[APPELLANT]: Yes, as far as the time the crime was committed, yes.

THE COURT: That's what the issue would be about, sir.

[APPELLANT]: Yes.

(III RT 621-628.)

Following Garcia's testimony, the court admonished the jury:

> I [] want to advise the jury that the transcript testimony read by Mr. Garcia, the witness just before Mr. King, was received by the court only as it relates, if at all and as you determine, on the issue in this case, that is the present state of [appellant's] mental competence. You are, as you've been told numerous times, not to consider the guilt or innocence of [appellant] of the underlying crimes.

(III RT 632.)

Deputy Haw testified that he was a deputy sheriff assigned to the court services unit as a bailiff. (IV RT 761-762.) On June 7, 1993, Deputy Haw was assigned to Judge Fitch's courtroom. (IV RT 763.) As he was bringing appellant into the courtroom for pretrial proceedings, he spoke briefly with appellant. He found appellant responsive to the conversation and the responses to have been appropriate to the subject and questions asked. (IV RT 765-766.) When the proceedings concluded for the day and Deputy Haw was about to take appellant back to the jail, appellant mentioned to Deputy Haw that he did not want to come back to court anymore. Appellant said that he would refuse to dress out for court, and that if there were any news media or [victims'] family members in the courtroom, he would be disruptive. (IV RT 766.) Deputy Haw also heard appellant say he wanted to plead guilty but his attorney said he could not. (IV RT 768.) Deputy Haw recorded appellant's statements in a note, which was given to Judge Fitch and entered into evidence at the competency trial. (IV RT 767.)

On July 23, 1993, the jury found appellant competent to stand trial. (CT 532; IV RT 832-835.)

B. Discussion

Penal Code section 1367, subdivision (a), provides:

> A person cannot be tried or adjudged to punishment while that person is mentally incompetent. A defendant is mentally incompetent . . . if, as a result of mental disorder or developmental disability, the defendant is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner.

Appellant argues that the testimonies of Deputy Haw and Garcia were irrelevant rebuttal evidence, stating that the only contested issue was whether he had the ability to assist counsel in a rational manner – that "it was conceded that he was capable of understanding court proceedings." (AOB 466.) His argument is untenable. The court was well within the bounds of reason in determining the testimonies of Deputy Haw and Garcia to be relevant and not unduly prejudicial.

"[A]ll relevant evidence is admissible." (Evid. Code, § 351.) Evidence Code section 210 defines relevancy:

> "Relevant evidence" means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.

"The trial court has broad discretion to determine the relevance of evidence." (*People v. Gurule, supra,* 28 Cal.4th at p. 614.)

> The admission of evidence in rebuttal is a matter left to the sound discretion of the trial court. The court's decision in this regard will not be disturbed on appeal in the absence of palpable abuse.

(*People v. Hart, supra,* 20 Cal.4th at p. 653 [internal citation and quotations omitted].) Under the abuse of discretion standard, where

> a discretionary power is inherently or by express statute vested in the trial judge, his or her exercise of that wide discretion must not be disturbed on appeal *except* on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice.

(*People v. Jordan, supra,* 42 Cal.3d at p. 316 [emphasis in original].)

The prosecution's theory, in rebuttal to Dr. Woods' opinion that appellant was too paranoid and psychotic to assist his counsel in a rational manner, was that appellant was unwilling – not unable – to cooperate with and assist his counsel. Read in conjunction with the experts' opinions and the lay witness testimonies, the evidence complained of – appellant pleading NGI against his attorneys' advice, and him wanting to plead guilty to the charges but his attorney would not allow him to do so – were relevant in demonstrating that appellant was capable of participating in the conduct of a defense in an intelligent and rational manner (he even drew the distinction between sane presently but insane at the time of the crimes), but was entangled in a difference of opinions with his attorneys as to the course of defense. (Cf. *People v. Superior Court (Campbell)* (1975) 51 Cal.App.3d 459, 464 [explaining that test to determine defendant's competency to stand trial is the competency to cooperate, rather than the fact of cooperation or lack thereof; other procedures, under other provisions of the law, apply if defendant becomes too obstreperous or too uncooperative]; *People v. Johnson* (1978) 77 Cal.App.3d 866, 869-871 [finding of incompetence to stand trial solely on evidence of defendant's refusal to cooperate with counsel would have been unwarranted].) As for Deputy Haw's testimony that appellant threatened to disrupt court proceedings if the media or the victims' family members were present, this was relevant in demonstrating that appellant, an intelligent person familiar with criminal proceedings, could and would manipulate a situation – undermining Dr. Woods' opinion and supporting Dr. Davis' opinion that appellant was malingering. (Cf. *People v. Kurbegovic* (1982) 138 Cal.App.3d 731, 751-755

[evidence of defendant's intelligence, adeptness at fooling people, and his expressed motive to be found incompetent was sufficient to support finding that defendant was competent to stand trial].)

Second, the testimonies of the lay witnesses undermined the defense expert's opinion and bolstered the credibility of the prosecution experts' opinion that appellant was able, but unwilling, to assist his counsel in a rational manner. All the mental health experts testified that their opinions were based – primarily if not solely – on what appellant told them. (See, e.g., III RT 657.) "[T]he value of an expert's opinion is dependent upon its factual basis." (*Owings v. Industrial Accident Comm., supra,* 31 Cal.2d at p. 692.) The strength of the experts' assumptions – here, the truthfulness and accuracy of what appellant told them – affects the weight of their opinions. (*People v. Sundlee, supra,* 70 Cal.App.3d at pp. 484-485.) Appellant's trial counsel was adamant that appellant not waive his presence and leave the courtroom because his demeanor was important to the presentation of the defense case. (RT 46-47; II RT 505.) Appellant sat in the courtroom, noticeably quiet and withdrawn – perhaps wanting his demeanor to convey that he was depressed and dejected. The prosecutor must be allowed to introduce evidence, through Deputy Haw, Garcia, and other lay witnesses, showing appellant's generally social and cooperative demeanor, his intelligence, sophistication, ability to participate and function rationally in the courtroom, and willingness to malinger and manipulate a situation.[105] (Cf. *Old Chief v. United States, supra,* 519 U.S. at

---

105. At the guilt phase of the trial, in response to an evidentiary issue, the court gave the following example and analysis:

> [I]n certain circumstances the prosecution certainly should be able to challenge the facts upon which an opinion rests. And let me give you a hypothetical and I think you might all agree. Let's say you have a criminal case such as this and the expert renders some very devastating opinion for the defense, in favor of the defense, but it's based on only one fact, and, that is, that

pp. 186-189 [explaining that "the prosecution is entitled to prove its case by evidence of its own choice, or, more exactly, that a criminal defendant may not stipulate or admit his way out of the full evidentiary force of the case as the Government chooses to present it"].)

Appellant further argues that the evidence was unduly prejudicial. (AOB 467-469.) Evidence Code section 352 provides that even if the proffered evidence is relevant,

> [t]he court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.
>
> Under Evidence Code section 352, the trial court enjoys broad discretion in assessing whether the probative value of particular

---

> the defendant told him, . . . "When I walked across the street, the light was green. I was lawful and doing the correct thing." So the expert renders his opinion.
>
> [T]hen I instruct the jury, "Ladies and gentlemen, it doesn't matter whether or not he walked across the street at all. What matters is that this was what was said." It seems kind of out of context in that situation, but, otherwise, how, without that admonition and limiting admonition, how do we get into evidence at all what – you know through the defense case what the defendant said out-of-court, unless we say it's not for the truth of the matter asserted.
>
> And in that case, is the – would the prosecution be precluded from putting on a witness, a percipient witness that says, "Look, I was standing on the corner and I saw him go against the red light. He walked against the red light." That would be absurd to preclude the prosecution from doing that, from saying, "Therefore, that being untrue, ladies and gentlemen, the whole opinion of the defendant's expert falls apart, as you can see."
>
> . . . But it is absurd, I think we would all agree, to prevent prosecution from being entitled to challenge that fact.

(RT 8156-8157.)

> evidence is outweighed by concerns of undue prejudice, confusion or consumption of time.

(*People v. Rodrigues, supra,* 8 Cal.4th at p. 1124.) Under the abuse of discretion standard, where

> a discretionary power is inherently or by express statute vested in the trial judge, his or her exercise of that wide discretion must not be disturbed on appeal *except* on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice.

(*People v. Jordan, supra,* 42 Cal.3d at p. 316 [emphasis in original].) Appellate courts "apply the deferential abuse of discretion standard when reviewing a trial court's ruling under Evidence Code section 352." (*People v. Kipp, supra,* 26 Cal.4th at p. 1121.)

Appellant contends that the probative value of the evidence, namely, his offer to plead guilty and his entry of NGI plea against counsels' advice, was substantially outweighed by their "great potential to inflame, and to confuse the jury about the issues." (AOB 466-468.) First, the fact that the jury may reach their verdict on an improper basis is not enough to show that the evidence should have been excluded as unduly prejudicial. (Cf. *People v. Alvarez, supra,* 14 Cal.4th at pp. 214-215 [explaining that the fact that evidence might be used by jurors to draw a forbidden inference is not enough to show that it should have been excluded as unduly prejudicial].) The court told the jury many times that "the only issue to be determined in this case . . . is the present mental competence of [appellant]." (See, e.g., II RT 390.) After Garcia testified, the court admonished the jury not to consider the guilt or innocence of appellant of the underlying crimes, that the sole issue in this case is the "present state of the defendant's mental competence" (III RT 632). (Cf. *People v. Alvarez, supra,* 14 Cal.4th at p. 215, fns. 18 & 19.) The court then again, following closing arguments, instructed the jury:

> In this proceeding you must decide whether the defendant is mentally competent to be tried for a criminal offense. This is not a criminal proceeding, and the innocence or guilt of the defendant of the criminal charge against him is not involved nor is the question of his legal insanity at the time of the commission of the offense involved.

(CT 552 [CALJIC No. 4.10]; IV RT 819.)[106/] Absent a contrary showing, the jurors are presumed to have understood and followed the trial court's instructions (*People v. Welch, supra,* 20 Cal.4th at p. 773), correcting the prejudicial effect, if any, of the evidence (*People v. Martin, supra,* 150 Cal.App.3d at pp. 162-163). Given the trial court's broad discretion, this Court should defer to the trial court's implied determination that the potential prejudice did not outweigh the probative value of the evidence.

Appellant argues that the evidence was "wholly unnecessary" because alternative means existed to establish whether appellant's demeanor comported with the experts' opinions, and because of the numerous other lay witnesses' testimonies regarding appellant's demeanor and "apparent ability to function normally in the courtroom and in the jailhouse setting." (AOB 466, 468.) As the United States Supreme Court explained:

> the prosecution is entitled to prove its case by evidence of its own choice . . . a criminal defendant may not stipulate or admit his way out of the full evidentiary force of the case as the Government chooses to present it.

(*Old Chief v. United States, supra,* 519 U.S. at pp. 186-187.) Moreover, as explained above, appellant's trial counsel was adamant that appellant not waive

---

106. Furthermore, during closing remarks, appellant's trial counsel told the jury:

> We're not asking you to let [appellant] walk out of here. We are asking you and we are asking you and asking you to have him able to cooperate with counsel, which he can't do because he is incompetent at this time to do so. Doesn't mean he forever will be. That's what is happening with this man today.

(IV RT 810-811.)

his presence and leave the courtroom because his courtroom demeanor was important to the presentation of the defense case. Appellant sat in the courtroom, noticeably quiet and withdrawn – wanting the jury to observe his depressed and dejected demeanor. The prosecutor must be allowed to introduce evidence showing appellant's generally social and cooperative demeanor, his intelligence, sophistication, ability to participate and function rationally in the courtroom, and willingness to malinger and manipulate the situation. The testimony of Deputy Haw and Garcia, along with the other lay witnesses, would necessarily undermine the defense expert's opinion and bolster the credibility of the prosecution experts' opinions. All the mental health experts testified that in reaching their opinions, they relied in part on what appellant told them. (II RT 228-229, 398-407; III RT 557-562, 638-650.) An expert's opinion is only as strong or weak as the foundation upon which it rests. (*Owings v. Industrial Accident Comm., supra,* 31 Cal.2d at p. 692; *People v. Sundlee, supra,* 70 Cal.App.3d at pp. 484-485.)

Any error in the admission or exclusion of evidence following an exercise of discretion under Evidence Code section 352 is tested for prejudice under the harmless error test set forth in *People v. Watson, supra,* 46 Cal.2d at pp. 836-837. (*People v. Cudjo* (1993) 6 Cal.4th 585, 611; *People v. Alcalà* (1992) 4 Cal.4th 742, 790-791.) Here, it is not reasonably probable that appellant would have obtained a more favorable outcome even if the testimonies of Garcia and Deputy Haw had been excluded.

First, this Court should be confident that the jurors did not reach their verdict on an improper basis: i.e., based on their consideration of appellant's guilt or innocence of the underlying crimes. As explained earlier, any error in the admission of the testimony of Deputy Haw and Garcia was deemed cured when the court admonished the jurors not to consider the guilt or innocence of appellant of the underlying crimes in determining the sole issue in this case of

"present state of the defendant's mental competence." (Cf. *People v. Martin, supra,* 150 Cal.App.3d at pp. 162-163[107]; see also *People v. Sanchez, supra,* 26 Cal.4th at p. 852 ["Jurors are presumed able to understand and correlate instructions and are further presumed to have followed the court's instructions."].)

Second, there was overwhelming evidence showing appellant was competent to stand trial because he was able to assist counsel in the conduct of a defense in a rational manner. Three of the four testifying mental health experts found appellant competent to stand trial. (Cf. *People v. Frye, supra,* 18 Cal.4th at p. 1004 [Two of the three court-appointed experts who testified at the competency hearing found defendant competent to stand trial. Deputy Haws, who had first met defendant shortly after his arrival at the county jail and saw defendant every day during the competency trial, observed no significant changes in defendant's behavior or ability to communicate following the jury's guilty verdicts.].) These three mental health experts found appellant's demeanor to be alert, friendly, outgoing, and cooperative. Putting aside Deputy Haw and Garcia, the observations of numerous other lay witnesses supported the experts' opinions. They testified that appellant did not appear depressed or

---

107. In *Martin,* a prosecution witness during trial had an emotional outburst in which she told defendant he was guilty. The court questioned each juror individually to determine whether this unsolicited remark would effect their ability to unemotionally and independently evaluate the case. The court was satisfied each juror could ignore the remark and admonished the jury against using the remark for any purpose. The appellate court held:

> Absent any evidence to the contrary, we assume the jury was able to follow the trial court's admonition and disregard the statement. Juries often hear unsolicited and inadmissible comments and in order for trials to proceed without constant mistrial, it is axiomatic the prejudicial effect of these comments may be corrected by judicial admonishment; absent evidence to the contrary the error is deemed cured.

(*People v. Martin, supra,* 150 Cal.App.3d at p. 163 [citations omitted.].)

agitated; that he was comfortable socializing with other inmates and the jail correctional staff; and that he understood questions asked and directions given, responding and acting appropriately. (Cf. *People v. Marshall, supra,* 15 Cal.4th at p. 31 [stating "the jury did not have to accept the opinion of experts" because "[t]o hold otherwise would be in effect to substitute a trial by 'experts' for a trial by jury"].) To be sure, appellant may have appeared mildly depressed (II RT 423) and may have exhibited some anxiety when talking about the night of the crimes (III RT 566); but in appellant's situation, these moods or conditions were understandable and appropriate. The experts further found appellant to be focused, intelligent, and communicative, providing rational and well thought out responses. (Cf. *People v. Hightower* (1996) 41 Cal.App.4th 1108, 1112 [noting that defendant's "responses and conduct during the examinations appeared rational and well thought out," and explaining that defendant's "disruptive behavior in the courtroom and disputes with defense counsel . . . . demonstrates an unwillingness to cooperate with defense counsel but does not constitute proof of mental incompetence"].) As Dr. Davis explained, if appellant was able to cooperate, concentrate, and communicate intelligently with him, then he would be able do so with his attorneys as well. (II RT 493.) Appellant indeed was able to cooperate and communicate with his attorneys.[108/] Correctional Officers at the Fresno County Jail testified that

---

108. Appellant may at times have been suspicious of his attorneys, but this does not mean appellant had a mental disorder that rendered him unable to assist counsel in the conduct of a defense in a rational manner. As Dr. Davis explained: "[P]eople are entitled to have some paranoid thinking without declaring them mentally ill to begin with." (II RT 447.) Dr. Powell explained that it is not uncommon for defendants who have been in jail for any period of time to be suspicious of their attorneys about

> "a whole variety of things" – e.g., "suspicious that the attorneys weren't returning their calls, wouldn't come to see them, wouldn't take their directions, wouldn't follow through, wouldn't call certain witnesses that they felt were important,

appellant saw his attorneys when they visited. (III RT 673-674, 729-730.) Dr. King testified that "[i]nitially, [appellant] stated that he wanted to talk to his attorney before answering a lot of [] questions." (III RT 643.) During a recess, Dr. Davis observed appellant conversing and relating to his attorneys. (II RT 447-448.) Appellant himself told Dr. Davis that his relationship with his attorneys was "all right, I guess." (II RT 403, 439.) In short, even without the testimony of Deputy Haw and Garcia, the evidence showed overwhelmingly that appellant was able to cooperate with and assist his attorneys.[109] (Cf. *People v. Johnson, supra,* 77 Cal.App.3d at pp. 869-871 [see above]; *People v. Superior Court (Campbell), supra,* 51 Cal.App.3d at p. 464 [see above].) Appellant was competent to stand trial.

His abuse of discretion claim should therefore be rejected.

---

wouldn't develop the case adequately, wouldn't do their homework."

(III RT 581-584.)

109. As apparent from appellant's testimony at the guilty phase of trial, it was not that he was unable to cooperate with and assist his female counsels; appellant simply did not want female attorneys defending him. (See RT 5941, 6724-6725, 6933-6934.)

LI.

THE EX PARTE COMMUNICATIONS BETWEEN THE COURT AND JURORS DID NOT CONSTITUTE A CRITICAL STAGE OF CRIMINAL PROSECUTION; REGARDLESS, THE EX PARTE COMMUNICATIONS WERE HARMLESS BEYOND A REASONABLE DOUBT

Appellant argues that ex parte communications between the court and jurors violated his right to be present and to have counsel at all critical stages of a criminal prosecution. (AOB 470-479.) Respondent disagrees. The ex parte communications between the court and jurors here did not constitute a critical stage of criminal prosecution. Regardless, the ex parte communications were harmless beyond a reasonable doubt.

A. The Record

On January 27, 1994, in the presence of the prosecutor and defense counsels, the trial court advised the jurors that the penalty phase would begin "no later than May 1st." The court further told the jurors that it would work around the jurors' schedules (e.g., vacation plans). (RT 10118-10119.)

On March 8, 1994, Judge Fitch sent a letter to the prosecutor and defense counsels, asking whether they had any objections or suggestions to an enclosed proposed letter to the jurors reminding them that the case was still pending. (CT 1328, 1335, 1337.) On March 10, 1994, the attorney representing the Public Defender's Office in the contempt matter objected in a reply letter, stating that the out of court communication with the jurors "seems wholly inappropriate." (I SCT 29, 35; RT 10352-10353.) The proposed letter was mailed out to the jurors on March 16, 1994. (CT 1328.)

On May 13, 1994, a status hearing was held in court with all parties present. A date of June 27, 1994 was agreed upon as the starting date of the

penalty phase. (RT 10343-10358.) A letter advising the jurors of the new proposed trial date and asking them to inform the judge's clerk whether the new date was satisfactory was sent out on May 16, 1994. (CT 1328-1329, 1339.)

On May 24, 1994, defense counsel Ms. O'Neill faxed a letter to Judge Fitch informing him that she was aware that he had personally talked to a juror. Counsel requested a meeting on the record to discuss the issue. (CT 1329, 1341.) In response, that same day, Judge Fitch sent a letter to the prosecutor and all defense counsels, describing his ex parte contacts with Jurors Gosland and Schmidt on May 17, 1994. (CT 1343-1344; RT 10408-10409.)

On May 27, 1994, Judge Fitch sent another letter to the prosecutor and defense counsels, describing his ex parte contact with Juror DeBeaord. (CT 1346.)

On June 3, 1994, appellant filed a motion for mistrial on the ground of improper communication between judge and jury. (CT 1327-1347.) On June 17, 1994, the court acknowledged that such ex parte communications should not take place. However, the court denied the motion for mistrial, finding that "no harm was done." (RT 10411-10412.)

B. Discussion

Respondent agrees that the ex parte communications were improper. However, respondent disagrees with appellant's view that the ex parte communications here constituted a critical stage in the criminal prosecution.

In support of his argument, appellant cites a Colorado Supreme Court case, *Key v. People, supra,* 865 P.2d at p. 822. There, the Colorado Supreme Court held that the ex parte scheduling conference held by the trial judge with the jurors during their deliberations constituted a critical stage of the criminal prosecution. (*Id.* at p. 825.) This holding was fact-based. The scheduling conference was called during jury deliberations. Though an impromptu conference with the jurors during their deliberations would not necessarily

constitute a critical stage in the criminal prosecution, the Colorado Supreme Court found that "under the facts of this case," the ex parte scheduling conference "presented a substantial risk to the defendant's right to a fair trial." (*Ibid.*) The Court there explained:

> The record clearly reveals that because of scheduling difficulties, at least two jurors . . . had substantial incentives to arrive at a verdict by the end of the first afternoon of deliberations. . . . [¶] Such scheduling pressures created a risk of coercion on the jury's deliberative process. . . . The presence of counsel is essential in such circumstances to gauge, for example, the reactions of the jurors and to preserve any objections or to move for a mistrial if it should appear that the proposed schedule would infringe upon the defendant's right to a fair trial.

(*Id.* at pp. 825-826.)

Key is not controlling here and distinguishable. Here, the jurors were not in deliberations. The ex parte communications, solely about scheduling, did not present a substantial – not minimal – risk to appellant's right to a fair trial. There was no indication that the court was "forc[ing] this case to judgment without regard for the fairness of the proceedings" or that the jurors would have been unable to be attentive, fair, and impartial during the penalty phase. (Cf. *Rushen v. Spain* (1983) 464 U.S. 114, 122-126 (conc. opn. of Stevens, J.) [noting the state court's conclusion that the jury was impartial and Justice Marshall's showing of a reasonable doubt as to Juror Fagan's impartiality].) Certainly, "the trial court should not entertain, let alone initiate, communications with individual jurors except in open court, with prior notification to counsel." (*People v. Wright, supra,* 52 Cal.3d at p. 401.) However, respondent submits such technical improprieties as here should not amount to a violation of constitutional proportions.

Regardless of whether the ex parte communications constituted a critical stage in the criminal prosecution, any error was harmless beyond a reasonable doubt. This Court has observed:

> [T]here is scarcely a lengthy trial in which one or more jurors do not have occasion to speak to the trial judge about something, whether it relates to a matter of personal comfort or to some aspect of the trial. The . . . conclusion that an unrecorded *ex parte* communication between trial judge and juror can never be harmless error ignores these day-to-day realities of courtroom life and undermines society's interest in the administration of criminal justice. Although such communications violate a defendant's right to be present, and represented by counsel, at all critical stages of his trial, and thus constitute federal constitutional error, reversal is not required where the error can be demonstrated harmless beyond a reasonable doubt.

(*People v. Delgado* (1993) 5 Cal.4th 312, 330 [internal quotations and citations omitted].)

Here, the ex parte communications were solely about scheduling. Judge Fitch explained that when Juror Gosland called, he was the only one present in chambers to answer the phone. In a conversation lasting no more than 10 to 15 seconds, Juror Gosland said the times set for trial would be fine for her. (RT 10408; CT 1343.) As for Juror Schmidt, she called and left a message regarding her unavailability due to a previously planned vacation. The message was left with a temporary clerk in Judge Fitch's chambers, who had no knowledge of the case. Judge Fitch returned Juror Schmidt's call within minutes, asking her if there was any possibility of rearranging her vacation. Told she could not change her plans, Judge Fitch thanked her for the information and told her that the court would contact her later. Again, the phone conversation was exceedingly short, lasting only 15 to 30 seconds. (RT 10408-10409; CT 1343.) When Juror DeBeaord called around 11:40 a.m., Judge Fitch was the only person available to answer the phone. Judge Fitch had excused his clerk early for lunch due to a medical emergency. Juror DeBeaord stated he had a problem to tell him. Judge Fitch told Juror DeBeaord to call his clerk at 1:30 p.m., that he could not talk with him, and that the commencement date for the penalty phase had changed to July 6th. Juror

DeBeaord said he would call his clerk the following week. (RT 10409; CT 1346.) There was nothing in the record to suggest the jurors would have been unable or unwilling to be attentive, deliberate, fair, and impartial during the penalty phase.[110/] Any error arising from the ex parte communications was harmless beyond a reasonable doubt. (Cf. *People v. Pride, supra,* 3 Cal.4th at p. 263 [finding no prejudice even though the trial court may have improperly entertained ex parte conversation with juror about his employment and wrote a letter to his employer stressing need for juror's participation]; *People v. Wright, supra,* 52 Cal.3d at pp. 402-403 [finding mid-trial sidebar conference between judge and juror about potential financial hardship to have been improper but harmless beyond a reasonable doubt].)

Appellant was entitled to a fair trial – not a perfect one. (*People v. Cunningham, supra,* 25 Cal.4th at p. 1009.) Accordingly, appellant's improper ex parte communication claim should be rejected.

---

110. The situation here is markedly different from *Key*. There, the jury began deliberations right before the holidays, Friday, December 21, 1990. Three hours into deliberations, the trial court held a scheduling conference with the jurors in the courtroom, outside the presence of all counsel and defendants. The court then discussed availability of the jurors to reconvene for deliberations Monday morning. During the discussion, Juror "A" said he would be leaving town the following morning on vacation and would not return until December 31st. Juror "B" then informed the judge that she was getting married on January 1, 1991; after which she would depart for a two-week honeymoon. The judge then suggested December 31st, to which Juror "A" said he was not sure if he would be back in time from vacation to reconvene for deliberations. The judge did not inform either prosecution or defense counsel of these ex parte communications. Before the end of the day, the jurors returned to the courtroom and delivered its verdicts. (*Key v. People, supra,* 865 P.2d at pp. 823-824.)

LII.

THE COURT PROPERLY ADMITTED HEARSAY TESTIMONY TO SHOW THE PRIOR TEXAS ROBBERY INVOLVED VIOLENT CRIMINAL ACTIVITY

Appellant argues that the court improperly admitted hearsay testimony that the now deceased victim of appellant's 1980 Texas robbery had said, "A black man cut my throat and took my wallet." (AOB 480-486.) Not so. The court properly admitted the hearsay testimony.

The prosecution introduced evidence relating to appellant's prior robbery conviction in Texas. To show the robbery involved use of force or violence (§ 190.3, subd. (b)), the prosecution proffered a witness – the train conductor, now retired, who testified that the deceased victim told him, "A black man cut my throat and took my wallet." (RT 11002.) Over defense objections, the court admitted the statement under the spontaneous statement exception to the hearsay rule. (RT 11002-11004.)

First, as discussed in Argument XXXVIII, in light of the recent United States Supreme Court decision in *Crawford v. Washington, supra*, before reaching the evidentiary issue of the admissibility of the deceased victim's statement under the Evidence Code, the preliminary constitutional issue of the application of the Confrontation Clause of the Sixth Amendment to the statement must be addressed. The issue is whether the deceased victim's statement to the train conductor was "testimonial" and consequently inadmissible under the Confrontation Clause because there had been no prior opportunity to cross-examine the deceased victim regarding his statement to the train conductor.

Here, the deceased victim's statement to the train conductor was nontestimonial. Therefore, *Crawford* does not apply. The deceased victim had his throat slit and his money taken. His statement was made to a train

conductor looking for the assailant, not to a government official acting to advance a criminal investigation or prosecution. His statement to the train conductor was not the equivalent of responses in a custodial examination, pretrial hearing, or any formalized setting designed to obtain "testimony." (See *Crawford v. Washington, supra,* 124 S.Ct. at p. 1364 [noting the dictionary definition of "testimony": "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact"].) The deceased victim was not contemplating being a witness in future legal proceedings. His statement was made under the stress of having had his throat slit and his money taken – without, reflection and deliberation. "[T]he very concept of an 'excited utterance' is such that it is difficult to perceive how such a statement could ever be 'testimonial.'" (*Fowler v. State, supra,* 809 N.E.2d at p. 964; cf. *People v. Moscat, supra,* 777 N.Y.S.2d 875.)

Having determined that the deceased victim's statement is nontestimonial, the admissibility of the statement turns on whether it bears "adequate 'indicia of reliability'" – i.e., falls within a "firmly rooted hearsay exception" or bears "particularized guarantees of trustworthiness."

A firmly rooted exception to the hearsay rule is the spontaneous statement – otherwise known as "excited utterance." Evidence Code section 1240 provides:

> Evidence of a statement is not made inadmissible by the hearsay rule if the statement:
>
> (a) Purports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and
>
> (b) Was made spontaneously while the declarant was under the stress of excitement caused by such perception.

The requirements for this exception are: (1) there must be an occurrence startling enough to produce nervous excitement and render the utterance spontaneous and unreflecting; (2) the utterance must be made before there has been time to contrive and misrepresent, while the nervous excitement still

dominates and the reflective powers are still in abeyance; and (3) the utterance must relate to the circumstance of the occurrence preceding it. (*People v. Poggi, supra,* 45 Cal.3d at p. 318.)

> The crucial element in determining whether a declaration is sufficiently reliable to be admissible under this exception to the hearsay rule is . . . not the nature of the statement but the mental state of the speaker. The nature of the utterance--how long it was made after the startling incident and whether the speaker blurted it out, for example--may be important, but solely as an indicator of the mental state of the declarant. . . . [U]ltimately each fact pattern must be considered on its own merits, and the trial court is vested with reasonable discretion in the matter.

(*People v. Roybal, supra,* 19 Cal.4th at p. 516 [internal quotations and citation omitted]; see also *People v. Trimble, supra,* 5 Cal.App.4th at p. 1234.) "'Spontaneous' does not mean that the statement be made at the time of the incident, but rather in circumstances such that the statement is made without reflection." (*People v. Hughey, supra,* 194 Cal.App.3d at p. 1388.) "The decision whether to admit a statement as a spontaneous utterance lies within the discretion of the trial court." (*People v. Hines, supra,* 15 Cal.4th at p. 1034, fn. 4 [internal quotations and citation omitted].) This Court reviews the admission of a spontaneous declaration for an abuse of discretion. (*People v. Gutierrez, supra,* 78 Cal.App.4th at p. 180.)

Here, the trial court properly admitted the deceased victim's statement under the "excited utterance" exception to the hearsay rule. The retired train conductor testified that he found the elderly victim slumped in his chair with his throat slit and blood all over his shirt and jacket. (RT 10980-10996.) The conductor went to look for the robber. Finding a commode locked, he instructed the brakeman to check if that commode remained locked. The conductor then returned to the elderly victim, within 15 minutes of the incident, to attend to his injuries. The elderly victim then said, "A black man cut my throat and took my wallet." (RT 11015.) Under these circumstances, the trial

court was well within the bounds of reason to conclude that when the elderly victim made the statement, he remained under the emotional distress caused by having had his throat cut and his money taken, and hence his statement was spontaneous. (Cf. *People v. Gutierrez, supra,* 78 Cal.App.4th at pp. 180-181 [holding that piece of paper with license plate number written by declarant a few minutes after witnessing a robbery at knifepoint was spontaneous statement]; *People v. Jones, supra,* 155 Cal.App.3d at pp. 661-662 [holding that statement made by burn victim to treating physician to effect that defendant poured gasoline over him, which was made 30-40 minutes after his injury while he appeared calm but "dazed" and after he had been given a painkiller, was admissible as a spontaneous declaration].)

Appellant further argues that the hearsay testimony should have been excluded pursuant to Evidence Code section 352. (AOB 484-486.) Not so. Respondent concurs that the evidence was cumulative because the record established that appellant pled guilty to aggravated robbery under Texas law (RT 11095-11097; I SCT 1250-1260) and a robbery is aggravated under Texas law if the defendant "causes serious bodily injury to another or uses or exhibits a deadly weapon" (CT 1630). As appellant acknowledges, the introduction of the section 969b packet would have been thus sufficient to establish that the Texas robbery involved the use of force and violence (§ 190.3, subd. (b)). Appellant had in fact offered to stipulate to the fact of the aggravated robbery conviction. (RT 10966-10968.) However, the court need not – and should not – exclude evidence simply because the defendant offers to stipulate to such a fact. The United States Supreme Court has explained:

> [T]he prosecution is entitled to prove its case by evidence of its own choice, or, more exactly, that a criminal defendant may not stipulate or admit his way out of full evidentiary force of case as the government chooses to present it.

(*Old Chief v. United States, supra,* 519 U.S. at pp. 186-187.) For example, in *Parr v. United States* (5th Cir. 1958) 255 F.2d 86, the Fifth Circuit held that, in prosecution for conspiring to transport in interstate commerce lewd and obscene motion picture film, the jury was properly permitted to view the film even though defendant admitted that the film was lewd and obscene. Thus, the trial court here cannot be said to have abused its discretion in admitting the hearsay testimony over defense objection under Evidence Code section 352.

Regardless, even if the court abused its discretion in admitting the hearsay testimony, the error was harmless. (*People v. Watson, supra,* 46 Cal.2d at pp. 836-837; *Chapman v. California, supra,* 386 U.S. at p. 24.) The retired train conductor testified that he had found the elderly victim slumped in his chair with his throat slit and blood all over his shirt and jacket. (RT 10980-10996.) When the conductor went to look for the robber, he found a restroom locked. Later, he unlocked the restroom and a young black man, later identified as appellant, stepped out. There were drops of blood on appellant's shoe. (RT 11017-11042.) The blood on the shoe and jacket were tested. (RT 11075.) Appellant pled guilty to aggravated robbery in Texas. (RT 11095-11097; I SCT 1250-1260.) The jury instructions at the penalty phase made clear, "[t]he robbery is aggravated if, in committing a robbery, he causes serious bodily injury to another or uses or exhibits a deadly weapon." (CT 1630.) This was a crime that involved force and violence.

Accordingly, appellant's claim of inadmissible hearsay should be rejected.

LIII.

THE COURT DID NOT ABUSE ITS DISCRETION IN DENYING APPELLANT'S MOTIONS FOR NEW TRIAL AND REDUCTION OF THE PENALTY

Appellant argues that the court erred in denying his motions for new trial and reduction of the penalty following the jury's selection of death as the appropriate sentence. (AOB 487-492.) Not so. The court did not abuse its discretion in denying appellant's motions for new trial and reduction of the penalty.

A. The Record

The jury found that the aggravating factors substantially outweighed the mitigating factors, and that a sentence of death was warranted. The jury selected death as the appropriate sentence. (CT 1519; RT 12044.) Appellant then filed motions for a new trial (CT 1731-1753) and to reduce penalty to life without the possibility of parole (CT 1725-1730).

On February 3, 1995, at the sentencing hearing, the court denied appellant's motion for a new trial:

> The court has independently reviewed and reweighed the evidence. And the court finds that the evidence and law supports the verdicts and findings, and further finds there is sufficient credible evidence to sustain the verdicts and findings in this case. This court does specifically decline to reduce or modify the verdict or findings of the jury and denies the motion for a new trial.
>
> Specifically, the court does wish to state that Count One and the three special circumstances are supported by sufficient credible evidence and that evidence does support the verdict and findings.
>
> This court, in addition, finds there were no prejudicial errors of law and that [appellant] was afforded a fair trial and due process of law.

The court will now address [appellant's] request for a new trial for the penalty phase only. The court did not comply with the request of [appellant] to individually voir dire each juror upon the – or at the beginning of the penalty phase, nor did it ask the particular questions proposed by [appellant] because the court felt that they were inappropriate. However, the court did conduct what it believes to be a thorough, adequate and proper questioning of the jury as a whole. In that respect see volume 71, pages 10526 to 10538.

Now, even though the usual admonishments to the jury inadvertently were not given upon discharge of the jury after the insanity phase, this court would find that that was not prejudicial to [appellant] for two reasons. First, because it can be reasonably inferred that the jury was well aware of the admonitions due to the continuous repetitions of those admonitions each noon and each evening throughout the prior lengthy guilty and insanity trials.

The second reason, as a result of the jury's response to the court's questioning upon the commencement of the penalty phase, it is clear that the jury did not in fact violate the admonition. In that respect see volume 71, page 10528, line 6 and 7.

[Appellant] here in court today and in the brief expressed his grave concern about the delay of this case. This was a delay from approximately January 20th, 1994, when the jury gave their finding of sanity, until approximately October 25th, 1994, when the penalty phase commenced. Now, that's a delay of roughly nine months. This particular concern was highlighted by the defense in the language of *People versus Santamaria*, 229 Cal.App.3d 269 at page 278.

The *Santamaria* case says that perhaps the jurors forgot their admonitions. However, because of this court's questioning of the jurors on that very point at the outset of the penalty phase, I believe it clearly does not appear that the jurors discussed this case with outsiders.

However, [appellant] argues that at this very critical point in the proceedings the jury's memory of the evidence must be lost or at least dulled. [Appellant] points out that it is no answer to say that this loss inured to the prejudice of both the People and [appellant]. My instruction number 8.84.1 commands the jury to consider all of the evidence in the entire case except as otherwise instructed. And, certainly, it follows that the jury's failure to

follow this instruction would be fatal to a fair trial. If the delay made it impossible or difficult for them to follow this instruction, that would be fatal to a fair trial.

[Appellant] argues that if in fact there is a substantial loss of memory of material facts due to an improper delay, the result must be unacceptable, whether it inures to the disadvantage of the People or [appellant], or both, that is, [appellant] argues, the result is substandard and cannot pass due process muster.

The court's response to [appellant's] argument is as follows. One, such loss of memory should not and cannot be presumed as a matter of law.

Second, defense counsel has unlimited opportunity to refresh the jury's recollection of facts in his closing argument and, in fact, did so. Let us imagine, for example, that there's a death penalty case that takes a year or more than a year to try and that trial is uninterrupted. Would not the same argument be made as to loss of memory and perhaps with even greater force because of bombarding the jurors with numerous additional facts? Again, the answer is that the closing arguments are used to refresh the jury's recollection.

Third, the record will reveal that the delays in this case, aside from the health problems of defense counsel and the unavailability of jurors, was not caused by the prosecution or by this court, but by several writs taken to the appellate and Supreme Court by defense counsel of the Public Defender's Office. Now, [appellant] argues that he individually had no control over his attorney's actions when they sought these writs and that he was abandoned and that it is he, not his attorneys, who will suffer the prejudice, namely, death. To divorce [appellant] himself from the decisions of his attorneys, barring ineffective assistance of counsel, can never be allowed. Otherwise, a defendant in almost any case need only express his separate disagreement to every decision of this attorneys in order to create a possible basis for error.

The attorney's actions are those of the defendant in the eyes of the law unless as mentioned there is ineffective assistance of counsel. In such a case, of course, the decision of counsel is at odds with the welfare of the client.

[Appellant] in this case has not argued ineffective assistance of counsel. True, the writs were denied by the various reviewing courts. Nevertheless, I do not find that the Public Defense attorneys were ineffective because they pursued writs

that were denied and even because the pursuit of those writs resulted in a delay. Therefore, since this court has not found ineffective assistance of counsel in the pursuit of the writs, this choice is deemed the decision and choice of [appellant] himself and he cannot claim prejudice as a result of his own actions.

Thus, the motions for a new trial are denied.

(RT 12080-12084.)

The court also denied appellant's motion to reduce the death penalty to life without the possibility of parole:

As to count one, the court imposes the death penalty. After independent review, I find the aggravating circumstances in this case are so substantial in comparison with the mitigating circumstances that the death penalty is warranted. That is, the aggravating circumstances not only outweigh the mitigating circumstances, but also the death penalty is warranted. I will, as required by law, review my reasons for the decision.

I have considered the circumstances pursuant to Penal Code section 190.4(e) in ruling upon the application for modification of the verdict and findings by [appellant]. I have independently reviewed the evidence. I have considered and taken into account and was guided by the aggravating and mitigating circumstances as they are set forth in Penal Code section 190.3. I hereby make a determination that the jury's findings and verdicts are supported by law and the weight of the evidence presented. I further independently determine that the aggravating circumstance outweigh the mitigating circumstances, and in addition thereto, that the death penalty is warranted and that such penalty is supported by law and the evidence.

As to factor (a), the court has considered the circumstances of the crime of which [appellant] was convicted, namely, Count One, murder in the first degree and the existence of the three special circumstances found to be true pursuant to section 190.2(a)(17)(iii), attempted rape; section 190.2(a)(17)(i), robbery; and section 190.2(a)(10), witness killing, all of which were found to be true pursuant to section 190.1.

I find that the murder of Laurie Farkas was cruel and vicious. She pleaded, "Roy, no. Roy, stop," but no mercy was shown. Her killing was not instant or painless. Instead, it was by strangulation preceded by fear and horror in a remote and isolated corner of rural Fresno on a cold winter's night. A rope

was wrapped around her neck. Standing next to her, [appellant] wrapped it three times and tied it and he squeezed the life out of her. He overcame her with his great superior strength. She was, after all, only 14 years of age. She was young, petite and attractive, and she had the full promise of life ahead. She didn't even deserve to be hurt much less killed. She had done nothing to [appellant] that would remotely justify such a death. In fact, she looked up to him. They were friends and he was teaching her how to drive. Only an hour before her death she was happy, full of the joy of life and cruising Blackstone with her friend Angie and with [appellant] just like any other teenager. An hour later in a cold public lavatory, separated by a cement wall from Angie, she was killed and for no reason whatsoever except [appellant's] own private demons had pushed the situation beyond the point of no return. I find the most powerful of those demons was [appellant's] lust for sex with Laurie.

Perhaps it could be argued the violence was not beyond the point of no return, but it would have been a return with two badly hurt and terrified girls who had been the victims of felonious attacks. And this was not acceptable to [appellant], who well knew the consequences of the violation of law. Instead, he decided to and did kill Laurie. He then tried his best to kill Angie. And having successfully, he thought, killed the two girls and having dumped them on a remote country road, he returned home to sleep.

[Appellant's] lust for sex with Laurie, though unacceptable, is understandable. She was young and attractive. But his crude attempts to achieve this in a public bathroom under the guise of needing paper to wipe his defecation and then his hitting her is revolting and despicable conduct. But [appellant's] demon of lust, blind to ordinary human sensibility, held sway in that small cement bathroom, even up to Laurie's death, even before there was the scuffling and choking sounds, the last sounds of Laurie before her death, once again we hear the plaintive plea, "Royal, please stop."

Going back a bit, when Angie cautiously entered the bathroom to find out what was happening to her friend, she was viciously attached by [appellant]. This attack may seem unexplainable, but it is not unlike a situation where an animal would attack an intruder upon its prey it seeks to devour. Angie intruded; she was attacked. But paradoxically it was this attack that sealed Laurie's fate. It was sealed by the attack on Angie.

Laurie became a witness, because upon recovery from unconsciousness, she could see what [appellant] had done to Angie. Laurie must be killed not only because of what she might reveal about what [appellant] had done to her, but also because of what she had seen concerning Angie. The need to kill them as witnesses was apparent even to Angie and Laurie and they actually discussed that situation realizing their probable fate. But [appellant] was not to be dissuaded and thereafter he took elaborate, purposeful steps to kill them both. The killing of Laurie to prevent her from testifying about the vicious attack on Angie and herself, provided a clear motive for the murder.

Although the horrifying circumstances of Laurie's killing and the special circumstances involving a witness killing and attempted rape were of substantial significance to this court in determining whether or not the death penalty is appropriate, no weight was given by this court to the robbery special circumstances.

Factor (b): I have considered certain criminal activity by [appellant] which involved the use of force and violence other than that alleged in the information.

One incident involved David Atwood, a fellow prisoner, in Texas in 1982. This involved a hectoring of a small and slightly-built man, a, quote, weak boy, end quote. [Appellant] by comparison was large and strong. [Appellant] gave Atwood reason to let his guard down and then [appellant] sucker punched him.

Of significance was the incident involving Edward Salazar, a fellow Texas inmate, in April 1982. After a minor incident in the chow line of little significance, [appellant] used his seniority in the plumbing shop to try to trick Mr. Salazar into pouring cold water onto molten lead. Mr. Salazar was warned by a fellow inmate at the last moment. And as Mr. Salazar rose presumably to attack [appellant], [appellant] hit Mr. Salazar in the head with a hammer causing a severe injury to Mr. Salazar's scalp.

As to his treatment of women, there was the battery of Carrie Parks in Long Beach in February and May of 1985. There was an argument, he hit her and he pulled her hair.

In these cases and in the case of the killing of Laurie Farkas, the court notes how the situation escalates from one involving no violence to one involving violence, the violence continues until [appellant] is stopped or his needs are satisfied.

Factor (c): The court considered the fact that [appellant] suffered two prior felony convictions, one in June 1981 for aggravated robbery of Roy Chaney in Texas, and on in 1985 in Long Beach, California, for the robbery of Manuel Gutierrez.

Moving back now to factor (b), in October 1980, we glimpse for the first time the cold-blooded cruelty of which [appellant] is capable. We visualize with Conductor Bradley the elderly Mr. Chaney slumped in the lounge car on an Amtrak between Los Angeles and New Orleans covered with blood with his throat cut so that it flapped open. Seven hundred dollars of Mr. Chaney's money is missing.

Whether or not [appellant] is in prison, this court concludes that people are not safe around him. When they have something he wants such as sex or money or when he wants simply to humiliate someone, he is willing to use violence to that end, even great violence.

As to factor (d), the court finds the murder of Laurie Farkas was not committed while [appellant] was under the influence of extreme mental or emotional disturbance, rather, the court finds that the murder was almost without passion, it was cold-blooded, cruel and calculated and intentional. Up until the time he entered the bathroom at Lost Lake, there was nothing bothering him. In fact, it clearly appears he was having a good time escorting the girls around town. While in the bathroom, indeed, [appellant] may have been aggravated and frustrated or his pride wounded because the girls were using his car and wouldn't satisfy his demands for a means to wipe his defecation in a timely manner. If [appellant] becomes enraged as a result of such trivial events, indeed this court finds that this would not be a factor in mitigation, but a factor that makes [appellant] an extremely dangerous person, that is, even the slightest affront can trigger great violence. But after the initial attack on the girls there was the calm and deliberate tying up of Angie, the removal of blood, the deliberate taking of Laurie into the adjoining bathroom and then the purposeful wrapping of the rope three times around the neck of Laurie and tying it. This was not done under an extreme mental or emotional disturbance.

As to the initial attacks on the girls, a credible explanation the court finds is that it resulted from Laurie's unwillingness to engage in sex and thereafter Angie's intrusion before the act could be completed. This court does not find that rape was incidental – excuse me, that attempted rape was incidental in this

matter, rather, it was a major factor. This court does not find the trip to the bathroom within a remote part on a cold winter's night was accidental, rather, it was done with the intent to isolate the girls from other people. If Laurie was not willing to have sex, he would have it against her will even if he had to beat her into submission and would be far away from help and unseen by others. This court does not find factor (c) to be mitigating.

Under factor (e), Laurie was not a participant in the homicidal conduct nor did she consent.

Under factor (f), the offense was not committed under circumstances which [appellant] believed, reasonably or otherwise, to be a moral justification or extenuation of his conduct.

Under factor (g), [appellant] did not act under duress or the dominion of another person.

Also, I find that at the time of the murder, [appellant's] capacity to appreciate the criminality of his conduct was not impaired and his capacity to conform his conduct to the requirement of law was not impaired as a result of a mental disease or defect. I find that when he was a youth he was indeed hit by a bat on the heat. I find that he had, in all probability, organic brain damage. I find that he underwent mental treatments as a youth. I find that it is entirely possible he had and has now amnesia about the events of January 26th, 1991.

As to the events of that evening, however, I find the opinions of Dr. Thackery and Missett to be the more credible, namely, [appellant] was intent upon carrying out his own goals regardless of the rights of Angie and Laurie.

Even though [appellant] may have been afflicted with organic personality syndrome or a personality disorder not otherwise specified, or a hair trigger rage reaction, this does not gainsay the finding of this court that [appellant] on that evening conducted himself in a serious and purposeful manner, interacting rationally with his environment, and except for the initial attack on Laurie and Angie, acted in a calm manner.

Even as to the initial attack, I find he was not acting in a state of seizure or partial epilepsy so that his ability to appreciate what he was doing and why he was doing it was impaired. In fact, it was the appreciation of the criminality of his initial attack on Laurie and Angie that provided a reason to kill Laurie and previous to that to try to conceal his crimes by rinsing the blood away.

As to his ability to conform, we know from his stepmother, his wife and other witnesses that indeed he can conform his conduct and has the ability to conform his conduct to the requirements of law and the expectations of society when he so chooses.

Of particular importance, on the very evening in question prior to his attack upon these girls, his behavior did not violate any law. In fact, it had the veneer of being entirely appropriate even though it was to lure the girls into isolation. Even the luring of the girls into isolation showed appreciation for the criminality of the desired act, namely, having sex with a minor or minors. His behavior was organized, his conversation was appropriate, he interacted with his environment in a rational manner, he made decision and acted upon them. He got a container, rinsed blood, got lights, got rope and tools. He tied up Angie to the plumbing. He said he was sorry. He made excuses about having Laurie go with him leaving Angie alone. I do not find that he was impaired in any manner as a result of mental disease or defect when he took Laurie aside and strangled her to death. Factor (h) was not a mitigating factor to this court.

Under factor (i), he was age 29 on January 26th, 1991. He was almost 30. He was not a youth. He as not unused to the ways of the world. He had robbed people; he'd gone to prison. Obviously, he was far too old to be seeking the sexual favors of a 14-year-old. But was convinced that Laurie wanted him, he even said so. He intended to leave her – excuse me, he intended to have her regardless of the substantial age difference.

Under factor (j), there was not an accomplice to the offense. [Appellant's] participation in the commission of the offense was not relatively minor.

Under factor (k), we have results, which, on balance, are a substantial mitigating factor. [Appellant] had a miserable childhood with a mother who could not protect him. Perhaps the only bright light in his young life was the occasional time he could spend with his stepmother. His father all but disowned him and his father encouraged his stepsiblings to avoid him. He grew up in poverty under the constant threat of violence. I cannot say that society or government offered any real help to [appellant]. He was confined several times for mental treatment. He was hit on the head with a bat, age 10, and probably suffered organic brain damage. He'd begun to run away from home at the age of 10, riding the rails. Genetics and the rearing by Daisy

played a significant part in his life. Daisy was given to seizures. His brothers came to tragic ends. His sister is a gang member and a drug addict. On the other hand, his half-siblings have never been in trouble with the law. I presume if you take a human being, like any animal, and hit and kick it enough that you create a living being filled with rage. And although that rage may be under control most of the time, it must simmer beneath the surface. And if you make the wrong move or do something to trigger it, that rage will surely result in violence.

In the eyes of this court, [appellant's] expression of remorse was problematical. Whether it springs from the regret of being caught or whether it is a sincere regret for killing his friend whose family took him in, I really cannot be certain. It was expressed by [appellant] by crying on the witness stand, but it was crying without tears. I had the funny feeling that he was acting. But, on the other hand, how does one present that situation with any veracity when it has been thought of and mulled about alone in his cell so often.

Another certainly mitigating factor must be his behavior in this court, which, except for some initial problems, was courteous at all times. He's a human being that can well interact with others. He has almost a boyish, childish sense of humor. But I am certain of this, that applying the facts of this case to the law of this state, the aggravating factors do outweigh the mitigating factors and [appellant] must be sentenced to death for his killing of Laurie Farkas.

(RT 12109-12121.)

B. Discussion

Section 1181, subdivisions 6 and 7, provides:

When a verdict has been rendered or a finding made against the defendant, the court may, upon his application, grant a new trial, in the following cases only:

. . . . . .

6. When the verdict or finding is contrary to law or evidence, but if the evidence shows the defendant to be not guilty of the degree of the crime of which he was convicted, but guilty of a lesser degree thereof, or of a lesser crime included therein, the court may modify the verdict, finding or judgment accordingly

without granting or ordering a new trial, and this power shall extend to any court to which the cause may be appealed;

7. When the verdict or finding is contrary to law or evidence, but in any case wherein authority is vested by statute in the trial court or jury to recommend or determine as a part of its verdict or finding the punishment to be imposed, the court may modify such verdict or finding by imposing the lesser punishment without granting or ordering a new trial, and this power shall extend to any court to which the case may be appealed.

In ruling upon a motion for a new trial, the trial court is required to independently weigh the evidence, but an appellate court will not modify or set aside the verdict if there is any substantial evidence to support it.

(*People v. Drake* (1992) 6 Cal.App.4th 92, 98, quoting *People v. Serrato* (1973) 9 Cal.3d 753, 761.) "The determination of a motion for new trial rests so completely within the trial court's discretion that its action will not be disturbed unless manifest and unmistakable abuse of discretion clearly appears." (*People v. Delgado, supra,* 5 Cal.4th at p. 328 [citations omitted].) "[T]here is a strong presumption that it properly exercised that discretion." (*People v. Davis, supra,* 10 Cal.4th at p. 524.)

Section 190.4, subdivision (e), provides:

In every case in which the trier of fact has returned a verdict or finding imposing the death penalty, the defendant shall be deemed to have made an application for modification of such verdict or finding pursuant to Subdivision 7 of Section 11[81]. In ruling on the application, the judge shall review the evidence, consider, take into account, and be guided by the aggravating and mitigating circumstances referred to in Section 190.3, and shall make a determination as to whether the jury's findings and verdicts that the aggravating circumstances outweigh the mitigating circumstances are contrary to law or the evidence presented. The judge shall state on the record the reasons for his findings. [¶] The judge shall set forth the reasons for his ruling on the application and direct that they be entered on the Clerk's minutes. The denial of the modification of the death penalty verdict pursuant to subdivision (7) of Section 1181 shall be

> reviewed on the defendant's automatic appeal pursuant to subdivision (b) of Section 1239. . . .
>
> In reviewing defendant's automatic section 190.4, subdivision (e) motion, the trial judge's function is not to make an independent and de novo penalty determination, but rather to independently reweigh the evidence of aggravating and mitigating circumstances and then to determine whether, in the judge's independent judgment, the weight of the evidence supports the jury verdict.

(*People v. Ochoa, supra,* 26 Cal.4th at p. 459 [internal citation omitted].) On appeal, the trial court's ruling is subject to independent review. (*People v. Memro, supra,* 11 Cal.4th at p. 884.)

> [W]hen [this Court] conduct[s] such scrutiny, we simply review the trial court's determination after independently considering the record; we do not make a de novo determination of penalty.

(*People v. Samayoa* (1997) 15 Cal.4th 795, 859 [internal quotations omitted]; *People v. Hines, supra,* 15 Cal.4th at p. 1080 ["our role is to review the trial court's ruling on a defendant's modification motion for error, rather than to independently evaluate whether the evidence shows that the defendant's sentence of death is appropriate"].)

1. The Court Did Not Abuse Its Discretion In Denying Appellant's Motions For New Trial And Reduction Of Penalty Based On Insufficiency Of Evidence To Support The Jury Findings And Verdicts

Concerning appellant's motion for new trial, the trial court stated that it "independently reviewed and reweighed the evidence." (RT 12075.) The court articulated and applied the correct standard of review. The court's conclusion, that the evidence was sufficient to sustain the jury findings and verdicts (RT 12080, 12109), is supported by the record, as explained in Arguments I through VI. Furthermore, Venus Farkas' testimony was not the only evidence of appellant's sexual interest in Laurie, nor the only evidence as to Laurie having

money on her that night, as explained in Argument XIII. The court thus did not abuse its discretion in denying appellant's motion for a new trial on ground of insufficiency of the evidence. (Cf. *People v. Lewis* (2001) 26 Cal.4th 334, 365-368.)

As to appellant's motion for reduction of penalty, the trial court independently reviewed and reweighed the evidence of aggravating and mitigating circumstances. The court articulated and applied the correct standard of review. The court determined that the jury's findings and verdicts were "supported by law and weight of the evidence presented," and that "the aggravating circumstances in this case are so substantial in comparison with the mitigating circumstances that the death penalty is warranted," and that "such penalty is supported by law and the evidence." (RT 12109.) The court's determination is supported by the record as explained in Arguments I through VI. The court was thorough and meticulous in its review of the evidence of aggravating and mitigating circumstances; appellant does not argue otherwise. The court thus did not abuse its discretion in denying appellant's motion for reduction of penalty. (Cf. *People v. Adcox, supra,* 47 Cal.3d at p. 273 ["We have previously determined that the evidence amply supported the jury's verdict of willful, premeditated and deliberate first degree murder. . . . So too did it support the trial court's parallel finding in ruling on the application for modification of sentence."].)

2. The Court Did Not Abuse Its Discretion In Denying Appellant's Motion For New Trial Based On The Delay Between The Sanity And Penalty Phases Of The Trial

As explained in Arguments XVII through XXVII, particularly Arguments XXV and XXVI, the court had properly instructed the jurors[111/] and the length of the delay did not by itself raise a presumption of prejudice[112/] – a confused or faded memory. The court thus did not abuse its discretion in denying appellant's motion for new trial based on the delay between the sanity and penalty phases of the trial.

Accordingly, appellant's claim should be rejected.

---

111. Appellant emphasizes the court's acknowledgment that "the usual admonishments to the jury inadvertently were not given upon discharge of the jury after the insanity phase . . . ." (RT 12081.) Aside from the lack of prejudice to appellant as explained by the court (RT 12081), the court did give the usual admonishments to the jurors when they briefly reconvened on January 27, 1994, as stated in Argument XXIII (RT 10126).

112. In an effort to demonstrate faded or confused memory, appellant notes a newspaper article in which the jury foreperson was quoted as saying that the death penalty had been selected because appellant had "shown no remorse." Specifically, the foreperson told the press: "Even with the overwhelming evidence, . . . he didn't say he was sorry." (ABO 491.) Appellant then refers to "numerous places in the record of the guilt phase . . . in which [he] had testified, and expressed great sorrow and remorse for his role in the crimes." (*Ibid.*) In the pages cited – RT 5799, 5897, 5929, 5922, 6061-6062, 6993 – appellant never once said he was sorry. Appellant repeated that he "loved" Laurie. Mr. Kinney construed appellant's testimony to have been remorse. However, appellant's testimony, read in context, showed that he was arguing that he would not have intentionally killed Laurie because he "loved" her. He was not apologizing for killing Laurie.

LIV.

THE CUMULATIVE EFFECT OF ERRORS IN THE GUILT AND PENALTY PHASES DOES NOT REQUIRE REVERSAL OF THE GUILT AND PENALTY DETERMINATIONS

Appellant argues that the cumulative effect of errors in the guilt and penalty phases requires reversal of the judgment. (AOB 493-497.) Not so. Respondent had conceded only one occurrence of error in the guilt phase and submits there was no error in the penalty phase. (See Arguments XXXV [prosecutor's questions elicited an improper reference to appellant's silence.] The prejudicial effect from the improper reference to appellant's silence was minute and limited – if not cured. (See Argument XXXV.) In light of the strong aggravating circumstances (particularly the facts of this case and the facts of appellant's prior criminal convictions) and the minute and limited prejudicial effect of the single error, the "cumulative" impact of this error does not require reversal of the guilt and penalty determinations. (Cf. *People v. Malone* (1988) 47 Cal.3d 1, 56 [holding that cumulative effect of evidentiary and instructional errors in capital murder prosecution did not warrant reversal where, in light of aggravating evidence, there was no reasonable possibility of a more favorable penalty verdict in absence of errors]; *People v. Alcala, supra,* 4 Cal.4th at p. 800 [finding cumulative impact of alleged evidentiary errors did not require reversal].) Accordingly, appellant's claim should be rejected.

LV.

SECTION 190.3, SUBDIVISION (A), DOES NOT ALLOW FOR ARBITRARY AND CAPRICIOUS IMPOSITION OF THE DEATH PENALTY

Appellant argues that section 190.3, subdivision (a), as applied, violates the Fifth, Sixth, Eight, and Fourteenth Amendments of the United States Constitution. (AOB 499-505.) Though acknowledging facial validity (*Tuilaepa v. California* (1994) 512 U.S. 967, 987-988), appellant contends that the statutory provision "has been used in ways so arbitrary and contradictory as to violate both the federal guarantee of due process of law and the Eighth Amendment." (AOB 500.) Section 190.3, subdivision (a), has withstood constitutional challenges substantially identical to those challenges appellant raises here. (See *People v. Jenkins, supra,* 22 Cal.4th at pp. 1050-1053; *People v. Lewis, supra,* 26 Cal.4th at pp. 394-395; *People v. Maury, supra,* 30 Cal.4th at p. 439.) This Court should reject appellant's constitutional challenges here to section 190.3, subdivision (a).

LVI.

APPLICATION OF CALIFORNIA'S DEATH PENALTY STATUTE DOES NOT RESULT IN ARBITRARY AND CAPRICIOUS SENTENCING

Appellant argues that California's death penalty statute contains no safeguards to avoid arbitrary and capricious sentencing, and therefore violates the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. (AOB 506-538.) In support of his argument, he raises seven claims This Court has considered and rejected each of the claims.

A. The Jury Is Not Required To (1) Be Unanimous As To Aggravating Factors; (2) Find One Or More Aggravating Factors Beyond A Reasonable Doubt; (3) Find The Aggravating Factors Outweighed The Mitigating Factors Beyond A Reasonable Doubt; And (4) Find That Death Is The Appropriate Sentence

Appellant argues the jury must be required to find beyond a reasonable doubt that one or more aggravating factors existed, and that aggravation outweighed mitigation. (AOB 507-516.) Although the Court has consistently rejected identical claims (see, e.g., *People v. Koontz, supra,* 27 Cal.4th at p. 1095; *People v. Kipp, supra,* 26 Cal.4th at p. 1137; *People v. Barnett, supra,* 17 Cal.4th at p. 1178; *People v. Holt, supra,* 15 Cal.4th at p. 684), appellant contends that *Apprendi v. New Jersey* (2000) 530 U.S. 466 ("*Apprendi*") and *Ring v. Arizona* (2002) 536 U.S. 584 ("*Ring*") compel a different result. This Court has considered the effect of *Apprendi* and *Ring* on California's death penalty sentencing scheme, and found that "those cases do not affect California's death penalty law." (*People v. Smith* (2003) 30 Cal.4th 581, 642; see *People v. Prieto* (2003) 30 Cal.4th 226, 262-264, 275; *People v. Snow* (2003) 30 Cal.4th 43, 125-126, fn. 32; see also *People v. Danks* (2004) 32 Cal.4th 269, 316.)

Appellant further argues that jury unanimity with respect to aggravating factors is required. (AOB 516-521.) This Court has considered and rejected his claim of jury unanimity. (See *People v. Medina, supra,* 11 Cal.4th at p. 782; *People v. Pride, supra,* 3 Cal.4th at p. 268; *People v. Kipp* (1998) 18 Cal.4th 349, 381.) His reliance on *Ring* is unavailing. (See *People v. Danks, supra,* 32 Cal.4th at p. 316.)

B. Even If Beyond A Reasonable Doubt Standard Of Proof Is Not Constitutionally Required, The Trial Court Is Not Required To Instruct The Jury On A Burden Of Proof, At Least By A Preponderance Of The Evidence

In the alternative, appellant argues that even if the beyond a reasonable doubt standard of proof is not constitutionally required, the trial court is required to instruct the jury on a burden of proof or persuasion at least by a preponderance of the evidence. (AOB 521-523.) Appellant acknowledges that "this Court has held that a burden of persuasion is inappropriate given the normative nature of the determinations to be made in the penalty phase." (AOB 522; see *People v. Daniels, supra,* 52 Cal.3d at p. 890.) This Court has considered and rejected his claim. (*People v. Steele* (2002) 27 Cal.4th 1230, 1259; *People v. Carpenter, supra,* 15 Cal.4th at pp. 417-418; *People v. Hayes* (1990) 52 Cal.3d 577, 643.) "The Constitution does not require the jury be instructed as to any burden of proof in selecting the penalty to be imposed." (*People v. Jenkins, supra,* 22 Cal.4th at pp. 1053-1054.) The sentencing function in capital cases is "inherently moral and normative, not factual." (*People v. Rodriguez* (1986) 42 Cal.3d 730, 779.) Because of this, instructions associated with the usual fact-finding process were not necessary. (*People v. Carpenter, supra,* 15 Cal.4th at pp. 417-418.)

C. The Trial Court Is Not Required To Instruct The Jury That Neither Party Bears The Burden Of Proof Or Persuasion

Appellant further argues that even if it was proper for the trial court to refrain from specifying any burden of proof or persuasion, the court prejudicially erred by failing to articulate to the jury that there is no such burden. (AOB 523-524.) This Court has considered and rejected a similar issue. (*People v. Mendoza, supra,* 24 Cal.4th at p. 191 [holding that trial court is not required to instruct the jury that neither party bears the burden of persuasion on whether death or life without possibility of parole is the appropriate sentence].)

The trial court in the instant case gave the core penalty phase instruction (CALJIC No. 8.88) which directed the jury to "weigh" the applicable factors in aggravation and mitigation, and determine the "appropriate" penalty under the totality of the circumstances. That instruction specifically told the jury that in order to return a judgment of death, each juror had to be persuaded that the aggravating circumstances were "so substantial" in comparison with the mitigating circumstances that death instead of life without parole was warranted. (CT 1650-1652.)

As stated by this Court in *People v. Millwee, supra,* 18 Cal.4th at p. 162 through 163, that instruction adequately describes "when the balance of factors warrants the more serious penalty." The words "so substantial" clearly convey "the importance of the jury's decision and emphasize that a high degree of certainty is required for a death verdict." (*People v. Jackson, supra,* 13 Cal.4th at pp. 1242-1244.) Given the moral and normative nature of sentencing in capital cases, nothing more is required.

D. Written Findings And Reasons By The Jury Are Not Constitutionally Required

Appellant argues that written findings and reasons by the jury are constitutionally required. (AOB 524-527.) Again, this Court has considered

and rejected his claim. (*People v. Hughes, supra,* 27 Cal.4th at p. 405; *People v. Kraft* (2000) 23 Cal.4th 978, 1078; *People v. Sanchez, supra,* 12 Cal.4th at p. 82; *People v. Davenport, supra,* 11 Cal.4th at p. 1232; *People v. Turner, supra,* 8 Cal.4th at p. 209.)

E. Inter-Case Proportionality Review Is Not Constitutionally Required

Appellant next claims the California death penalty sentencing scheme is unconstitutional because it does not provide for inter-case proportionality review. (AOB 527-531.) This Court has repeatedly rejected a claim that inter-case proportionality review is constitutionally required. (*People v. Boyette, supra*, 29 Cal.4th at p. 467; *People v. Lawley, supra,* 27 Cal.4th at p. 169; *People v. Ochoa, supra,* 26 Cal.4th at p. 458; *People v. Weaver, supra,* 26 Cal.4th at p. 992; *People v. Kraft, supra*, 23 Cal.4th at p. 1078; *People v. Carpenter, supra*, 21 Cal.4th at p. 1064; *People v. Marshall* (1996) 13 Cal.4th 799, 865-866; *People v. Arias, supra,* 13 Cal.4th at pp. 192-193; *People v. Stanley, supra,* 10 Cal.4th at p. 842; *People v. Allen, supra,* 42 Cal.3d at pp. 1285-1288.) The United States Supreme Court has also held that inter-case proportionality review is not constitutionally required under the Eighth Amendment as applicable to the states through the Fourteenth Amendment. (*Pulley v. Harris* (1984) 465 U.S. 37, 44, 50-51.)

F. The Prosecution May Rely On Unadjudicated Criminal Activity In The Penalty Phase; The Jury Need Not Find Such Criminal Activity Unanimously Beyond A Reasonable Doubt

Appellant first claims that the prosecution may not rely on unadjudicated criminal activity, and further that if it is used it must be found unanimously beyond a reasonable doubt. (AOB 531-534.) This Court has repeatedly rejected the claim that the sentencing jury may not consider unadjudicated prior criminal activity. (*People v. Jenkins, supra,* 22 Cal.4th at p. 1054; *People v.*

Carpenter, *supra*, 21 Cal.4th at p. 1061; *People v. Barnett*, *supra*, 17 Cal.4th at p. 1178; *People v. Balderas* (1985) 41 Cal.3d 144, 204-205.) *Ring* and *Apprendi* do not require the jury to find any aggravating factor unanimously beyond a reasonable doubt. (*People v. Snow*, *supra*, 30 Cal.4th at pp. 125-126, fn. 32; *People v. Prieto*, *supra*, 30 Cal.4th at p. 265; see also *People v. Danks*, *supra*, 32 Cal.4th at p. 316.)

G. The Use Of Restrictive Adjectives In The List Of Potential Mitigating Factors Do Not Act As Barriers To The Jurors' Consideration Of Mitigation

Appellant claims that use of adjectives such as "extreme" in factors (d) and (g) and "substantial" in factor (g) acts as a barrier to the consideration of mitigation. (AOB 534-535.) This Court has considered and rejected this claim. (*People v. Burgener*, *supra*, 29 Cal.4th at p. 885; *People v. Turner*, *supra*, 8 Cal.4th at pp. 208-209; *People v. Arias*, *supra*, 13 Cal.4th at pp. 188-189; *People v. Stanley*, *supra*, 10 Cal.4th at p. 842; *People v. Visciotti* (1992) 2 Cal.4th 1, 73-75; *People v. Adcox*, *supra*, 47 Cal.3d at p. 270.)

H. The Trial Court Is Not Required To Instruct The Jury As To Which Of The Listed Sentencing Factors Were Aggravating, Which Were Mitigating, Or Which Could Be Either Aggravating Or Mitigating

Appellant argues that the trial court is required to instruct the jury as to which of the listed sentencing factors it may consider as aggravating factors, which it may consider as mitigating factors, and which factors could be either aggravating or mitigating. (AOB 535-538.) This claim has been consistently rejected by this Court. (*People v. Farnam*, *supra*, 28 Cal.4th at p. 191 ["the trial court had no obligation to advise the jury which statutory factors are relevant solely as mitigating circumstances and which are relevant solely as aggravating"]; *People v. Carpenter*, *supra*, 15 Cal.4th at p. 420; *People v. Davenport*, *supra*, 11 Cal.4th at p. 1229; see also *Tuilaepa v. California*, *supra*,

512 U.S. at p. 979 ["A capital sentencer need not be instructed how to weigh any particular fact in the capital sentencing decision"].)

Appellant's claims under the Sixth, Eighth, and Fourteenth Amendments should be rejected.

LVII.

APPLICATION OF CALIFORNIA DEATH PENALTY STATUTE DOES NOT RESULT IN A VIOLATION OF EQUAL PROTECTION

Appellant further argues that California's death penalty statute violates the constitutional guarantee of equal protection of the laws because certain procedures, such as disparate sentence and inter-case proportionality review, utilized in non-capital cases do not apply to capital defendants. (AOB 538-546.) Appellant's claims are without merit. This Court has considered and rejected these arguments. (See, e.g., *People v. Boyette*, *supra*, 29 Cal.4th at p. 465-467; *People v. Cox* (1991) 53 Cal.3d 618, 691; *People v. Allen, supra,* 42 Cal.3d at pp. 1286-1288; *People v. Ramos, supra,* 15 Cal.4th at p. 1182.)

Application of California's death penalty statute does not result in a violation of equal protection.

LVIII.

CALIFORNIA'S USE OF THE DEATH PENALTY DOES NOT VIOLATE INTERNATIONAL LAW OR THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

Appellant contends California's use of the death penalty as a regular form of punishment violates international norms of humanity and decency and violates the federal constitutional ban on cruel and unusual punishment under the Eighth and Fourteenth Amendments. (AOB 546-551.) Appellant's claim should be rejected, because this Court has previously held that international law does not compel the elimination of capital punishment in California. (*People v. Snow* (2003) 30 Cal.4th 43, 127; see *People v. Ghent* (1987) 43 Cal.3d 739, 778-779; see also *Buell v. Mitchell* (6th Cir. 2001) 274 F.3d 337, 370-376.) This Court also has rejected the contention that California's use of the death penalty constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution. (See *People v. Boyette, supra,* 29 Cal.4th at pp. 465-466; *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255; *People v. Samayoa, supra,* 15 Cal.4th at pp. 864-865.)

California's use of the death penalty does not violate international law, nor constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.

CONCLUSION

Accordingly, respondent respectfully requests that the judgment be affirmed.

Dated: July 21, 2004

Respectfully submitted,

BILL LOCKYER
Attorney General of the State of California

ROBERT R. ANDERSON
Chief Assistant Attorney General

MARY JO GRAVES
Senior Assistant Attorney General

ERIC CHRISTOFFERSEN
Deputy Attorney General

KATHLEEN A. McKENNA
Deputy Attorney General

WILLIAM K. KIM
Deputy Attorney General

Attorneys for Respondent

WKK:lg
FR1995XS0002
7/16/04

CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 125429 words.

Dated: July 21, 2004

Respectfully submitted,

BILL LOCKYER
Attorney General of the State of California

WILLIAM K. KIM
Deputy Attorney General

Attorneys for Respondent

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***People v. Clark*** No.: **S045078**

I declare:

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

On July 23, 2004, 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 2550 Mariposa Mall, Room 5090, Fresno, California 93721, addressed as follows:

MELISSA HILL
Attorney at Law
P.O. Box 2758
Corrales, NM 87048
(TWO COPIES)

representing appellant CLARK

DENNIS COOPER
District Attorney's Office
County of Fresno
2220 Tulare Street, Suite 1000
Fresno, CA 93721

California Appellate Project
Attn: Michael Millman
101 Second Street, Suite 600
San Francisco, CA 94105

Fresno County Superior Court
Attn: Clerk, Criminal Division
1100 Van Ness Avenue #402
Courthouse, Room 401
Fresno, CA 93721

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 July 23, 2004, at Fresno, California.

Lynda Gonzales
Declarant

Lynda Gonzales
Signature