IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, *Plaintiff & Respondent,* *v.* **DAVID LYNN SCOTT, III,** *Defendant & Appellant.*	**CAPITAL CASE** S068863

Riverside County Superior Court No. CR48638
The Honorable WILLIAM R. BAILEY, JR., Judge

RESPONDENT'S BRIEF

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OTHER AUTHORITIES

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STATEMENT OF THE CASE

On April 2, 1993, the Riverside County Grand Jury returned an indictment charging Appellant David Lynn Scott, III, in count one with the September 12, 1992 murder of Brenda Gail Kenny (Pen. Code, § 187), committed by personally using a knife (Pen. Code, § 12022, subd. (b)). It was further alleged that the murder was committed with special circumstances, specifically that the murder occurred while Scott was engaged in the commission or attempted commission of burglary (Pen. Code, § 190.2, subd. (a)(17)(vii)), and the commission or attempted commission of rape (Pen. Code, § 190.2, subd. (a)(17)(iii)). Scott was also charged: in count two with the October 1, 1992 burglary of the home at 698 Atwood in Riverside while in personal possession of a knife (Pen. Code, §§ 459, 12022, subd. (b)); in count three with the October 1, 1992 assault with a deadly weapon, specifically a knife, by means likely to produce great bodily injury upon Colleen Cliff (Pen. Code, § 245, subd. (a)(1)); in count four with the November 3, 1992 burglary of the home at 990 Cental, No. 121, Riverside (Pen. Code, § 459); in counts five and six with the November 3, 1992 forcible rapes of Regina M. (Pen. Code, § 261, subd. (2)), and while armed with a handgun (Pen. Code, § 12022.3, subd. (a)); in count seven with the November 14, 1992 burglary of

the home at 955 Via Zapata, No. 24, Riverside (Pen. Code, § 459); in count eight with the November 14, 1992 false imprisonment of Linda Gonzales (Pen. Code, § 236); in count nine with the November 14, 1992 kidnapping of Linda Gonzales (Pen. Code, § 207, subd. (a)); in count ten with the November 16, 1992 assault with a deadly weapon, a firearm, upon Edward Buhr (Pen. Code, §§ 245, subd. (a)(2), 12022.5, subd. (a)); in count eleven with the November 16, 1992 assault with a deadly weapon, a firearm, upon Linda Pena (Pen. Code, §§ 245, subd. (a)(2), 12022.5, subd. (a)); in count twelve with of the November 16, 1992 burglary of the home at 920 Via Cartago, No. 18, Riverside, while armed with a handgun (Pen. Code, §§ 459, 12022.5, subd. (a)); in count thirteen with the November 16, 1992 false imprisonment of Regenia Griffin while armed with a handgun (Pen. Code, §§ 236, 12022.5, subd. (a)); in counts fourteen and nineteen with misdemeanor loiter (Pen. Code, § 647, subd. (g)); in counts fifteen[1] and sixteen with the December 10, 1992 forcible rapes of Julia K. (Pen. Code, § 261, subd. (2)), while armed with a handgun and sword (Pen. Code, § 12022.3, subd. (a)); in count seventeen with the December 10, 1992 burglary of the home at 25620 Santa Barbara, Moreno Valley (Pen. Code, § 459); in count eighteen with the December 10, 1992 robbery of Joseph C. (Pen. Code, § 211), while armed with a handgun and sword (Pen. Code, § 12022.3, subd. (a)); in count twenty with the January 18, 1993 attempted murder of Phillip Courtney (Pen. Code, §§ 664, 187), while armed with a handgun and a sword or knife (Pen. Code, §§ 12022.5, subd. (a), 12022, subd. (b)), causing great bodily injury (Pen. Code, § 12022.7); in count twenty-one with the January 18, 1993 assault with a deadly weapon, specifically a handgun, upon Alison Schulz (Pen. Code, §§ 245, subd. (a)(2),

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1. There are two counts numbered fifteen set forth in the indictment, one for misdemeanor loitering and the other for felony rape, but the loitering count fifteen is crossed out in the indictment. The rape count fifteen is the charge that was presented at trial and for which a verdict was returned.

12022.5, subd. (a)); and in count twenty-two with the January 18, 1993 attempted murder of Howard Long (Pen. Code, §§ 664, 187), while armed with a handgun and a sword or knife (Pen. Code, §§ 12022.5, subd. (a), 12022, subd. (b)). (1 CT 1-12.)

The grand jury presented the indictment to the trial court, who accepted it and found it to be a true bill on April 2, 1993. (1 CT 13.) On April 19, 1993, after Scott waived arraignment and was advised of his constitutional rights, he plead not guilty to the charges and denied the enhancement allegations. (2 CT 330-331.)

On March 8, 1994, Scott filed a motion to dismiss the indictment or alternatively dismiss the special circumstances pursuant to Penal Code section 995 (4 CT 930-960), which he supplemented on April 6, 1994 (4 CT 986-993). On April 8, 1994, the trial court granted the Penal Code section 995 motion as to count eleven (assault with a deadly weapon upon Linda Pena) and count fourteen (misdemeanor loitering). (4 CT 994-995, 1016-1017.)

On June 17, 1994, the prosecution filed notices of evidence to be introduced in aggravation pursuant to Penal Code section 190.3 and intention to introduce victim-impact evidence in the penalty phase. (4 CT 1073.) On July 28, 1994, the prosecution filed notice of intention to seek capital punishment. (4 CT 1076-1078.)

On September 24, 1996, Scott filed a motion to suppress his statements to police in the interview conducted on January 21, 1993, claiming the statements were fruits of Scott's illegal arrest. (8 CT 2151-2162.) On October 15, 1996, the trial court found sufficient probable cause supported Scott's arrest and denied Scott's suppression motion. (8 CT 2278-79.)

In January 1997, Scott filed a motion to suppress his "pre-*Miranda* statements." (11 CT 2992-3051, 3146; 1 Suppl. CT 50-169, 171-224.) On January 16, 1997, the trial court granted Scott's motion in part.

On September 24, 1996, Scott filed motions to quash and traverse the search warrant and suppress evidence under Penal Code section 1538.5. (8 CT 2163-2212.) On October 15, 1996, the trial court found sufficient probable cause, that Scott had not shown sufficient support to establish standing, and denied the motions. (8 CT 2277, 2280.)

Scott filed another motion to suppress evidence pursuant to Penal Code section 1538.5 on December 11, 1996. (9 CT 2507-29.) On December 26, 1996, the trial court refused to re-open the prior motion to suppress ruled upon on October 15, 1996, and even if it considered the merits of the second suppression motion, the motion was denied.

On December 12, 1996, Scott filed a motion to sever the trial of count one from the trial on all other counts. (9 CT 2532-81; 10 CT 2589, 2606, 2637-2821.) On December 30, 1996, the trial court determined there was cross-admissibility of evidence between count one and the other counts, and denied Scott's motion to sever. (10 CT 2822.)

In February 1997, after defense counsel declared a conflict of interest (12 CT 3369), which was confirmed by counsel specially appointed by the trial court, the court relieved the Public Defender's Office as counsel for Scott. (12 CT 3370-72.) On February 20, 1997, new defense counsel was appointed and appeared. (12 CT 3373-74, 3391-92.) On February 27, 1997, at the request of defense counsel, the trial court authorized appointment of a second defense counsel. (13 CT 3448-54.)

Jury selection commenced with jury voir dire on November 17, 1997. (21 CT 6128, 6169-70, 6172.) On November 19, 1997, a jury panel was chosen, but not sworn. (21 CT 6178.) On November 24, 1997, juror number six was excused due to an accident which required surgery; alternate number four was chosen to replace juror number six. Thereafter the jury was sworn and trial commenced. (21 CT 6180.)

On December 16, 1997, the trial court granted in part Scott's motion to dismiss pursuant to Penal Code section 1118.1 as to count twenty-two (attempted murder of Phillip Courtney), and struck the "willful deliberate and premeditated" allegation and fixed the degree of the offense at second degree. The prosecution amended by interlineation the arming enhancement for count twenty to read "a sword or a knife," and amend the enhancements to counts twelve and thirteen to read Penal Code section 12022.5, subdivision (a), in lieu of 12022.3, subdivision (a). (22 CT 6208-09.)

On December 17, 1997, out of the prosecutor's presence and in the presence of his counsel, the trial court addressed Scott regarding his right to testify and present evidence. Defense counsel stated they had so advised Scott, and Scott stated he understood these rights and waived them. Afterwards the prosecution rested; then the defense rested. (22 CT 6210.)

On December 18, 1997, the trial court instructed the jury, which retired to deliberate. On December 23, 1997, the jury reached verdicts on some counts. The prosecution requested the completed verdicts be recorded, and the defense objected. Pursuant to *People v. Rigney* (1961) 55 Cal.2d 236, the trial court determined it had discretion to record partial verdicts, and it recorded the jury's determination that Scott was guilt as charged in count three (Pen. Code, § 245, subd. (a)(1)), count four (Pen. Code, § 459 – 1st degree), count five (Pen. Code, § 261, subd. (2)), and found true the weapon enhancement (Pen. Code, § 12022.3, subd. (a)), count six (Pen. Code, § 261, subd. (2)), and found true the weapon enhancement (Pen. Code, § 12022.3, subd. (a)), count twelve (Pen. Code, § 459 – 1st degree), and found true the weapon enhancement (Pen. Code, § 12022.5, subd. (a)), count thirteen (Pen. Code, § 236), and found true the weapon enhancement (Pen. Code, § 12022.5), count 15 (Pen. Code, § 261, subd. (2)), and found true the weapon enhancement (Pen. Code, § 12022.3, subd. (a)), count sixteen (Pen. Code, § 261, subd. (2)), and found true the

weapon enhancement (Pen. Code, § 12022.3, subd. (a)), count seventeen (Pen. Code, § 459 – 1st degree), and count eighteen (Pen. Code, § 211 – 1st degree), and found true the weapon enhancements (Pen. Code, §§ 12022, subd. (b), 12022.5, subd. (a)). (23 CT 6221-6222.)

On January 8, 1998, the jury returned verdicts finding Scott guilty of count one (Pen. Code, § 187 – 1st degree), and found true the special circumstances that the murder was committed during a burglary or attempted burglary (Pen. Code, § 190.2, subd. (a)(17)(vii)), and in the commission or attempted commission of rape (Pen. Code, § 190.2, subd. (a)(17)(iii)). The jury also found true that: Scott personally used a deadly weapon, a knife, in the commission of the murder, count 2 (Pen. Code, § 459 – 1st degree), and found true the weapon enhancement (Pen. Code, § 12022, subd. (b)); count nineteen (Pen. Code, § 647, subd. (g)); count twenty (Pen. Code, §§ 664/187), and found true the weapon enhancements (Pen. Code, §§ 12022.5, subd. (a), 12022, subd. (b), 12022.7); and count twenty-two (Pen. Code, §§ 664/187), and found true the weapon enhancement (Pen. Code, § 12022.5). (23 CT 2699-2312.) The same day, following a deadlock on four counts, the trial court declared a mistrial as to counts seven (11/14/92 burglary), eight (false imprisonment of Linda Gonzales), nine (kidnapping of Linda Gonzales), and ten (assault with a deadly weapon of Edward Buhr). (23 CT 2699-2302.)

On January 9, 1998, the penalty-phase trial commenced. (23 CT 6473.) In November 1997, Scott moved to exclude victim-impact evidence during penalty phase. (21 CT 6145-65.) On January 15, 1998, the trial court ruled victim-impact evidence was appropriate and allowed evidence of the impact of the death of Brenda Kenny on family members with certain limitations imposed. (23 CT 6475.) The prosecution rested on January 20, 1998. (23 CT 6477-78.) The defense rested two days later on January 22,

1998. The prosecution did not present any rebuttal evidence. (23 CT 6499.) On January 28, 1998, the jury returned a death verdict. (24 CT 6532, 6534.)

Scott moved to reduce his penalty to life without the possibility of parole pursuant to Penal Code sections 190.4, subdivision (e), 1385, and 1181, subdivision (7). (24 CT 6536-43, 6544-47.) On March 19, 1998, the trial court denied Scott's motion to reduce the penalty. The same day, the trial court sentenced Scott to death on count one (murder – 1st degree), to be served consecutive to the life with the possibility of parole imposed for count twenty, plus the mid-term of four years for the Penal Code section 12022.5, subdivision (a) enhancement. The trial court stayed the sentences for the Penal Code sections 12022, subdivision (b) enhancement for count one, and the section 12022.7 enhancement for count twenty. The trial court imposed a total determinate term of 80 years and 8 months as follows: count twenty-two (Pen. Code, §§ 664/187), as the principle count, the upper term of nine years, with a consecutive four years for the Penal Code section 12022.5 enhancement; count two (Pen. Code, § 459 – 1st degree), one-third the mid-term for one year, four months, with a consecutive four months for the Penal Code section 12022, subdivision (b) enhancement to be served consecutive to count twenty-two; count three (Pen. Code, § 245, subd. (a)(1)), one-third the mid-term for one year consecutive to counts twenty-two and two; count four (Pen. Code, § 459 – 1st degree), one-third the mid-term for one year four months, consecutive to counts twenty-two, two, and three; count five[2/] (Pen. Code, § 261, subd. (2)), upper term eight years, plus the mid-term of four years for the Penal Code section 12022.3, subdivision (a), enhancement, to be served consecutive to count nineteen; count six (Pen. Code, § 261, subd. (2)), the upper term of eight years plus the mid-term of four years, for the Penal Code section 12022.3,

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2. The trial court imposed determinate sentences for the serious and aggravated sexual offenses in counts five, six, fifteen, and sixteen.

subdivision (a) enhancement, to be served consecutive to count five; count twelve (Pen. Code, § 459 – 1st degree), one third the mid-term for one year and four months, plus one-third the mid-term for the Penal Code section 12022.5, subdivision (a) enhancement for one year and four months, to be served consecutive to counts twenty-two, two, three, and four; count thirteen (Pen. Code, § 236), one third the mid-term for eight months, plus one-third the mid-term for one year and four months for the Penal Code section 12022.5, subdivision (a) enhancement, to be served consecutive to counts two, three, four, and twelve; count fifteen (Pen. Code, § 261, subd. (2)), eight years, plus the mid-term of four years for the Penal Code section 12022.3, subdivision (a) enhancement, to be served consecutive to counts five and six; count sixteen (Pen. Code, § 261, subd. (2)), upper term of eight years, plus the mid-term of four years, for the Penal Code section 12022.3, subdivision (a) enhancement, to be served consecutive to counts five, six, and fifteen; count seventeen (Pen. Code, § 459 – 1st degree), one-third the mid-term for one year, four months, to be served consecutive to count thirteen; and count eighteen (Pen. Code, § 211 – 1st degree), one-third the mid-term for one year, four months, plus one-third the mid-term for one year for the Penal Code section 12022.5, subdivision (a) enhancement, which the trial court ordered time stayed; count nineteen (Pen. Code, § 647, subd. (g)), concurrent 180 days in Riverside County jail. (24 CT 6571-6575, 6577-80; 52 RT 6934-6948.)

On March 19, 1998, the trial court found, pursuant to Penal Code section 1385, it had no authority to strike the special circumstances. In reviewing all the evidence pursuant to Penal Code section 190.3, and weighing the circumstances in aggravation and mitigation, the trial court found the aggravating circumstances outweighed the mitigating and that for his crimes Scott warranted the penalty of death. (24 CT 6581.) On March 23, 1998, the abstract of judgment was filed. (24 CT 6583-87.) The same day, the trial court

granted the prosecution's motion to dismiss counts seven through ten pursuant to Penal Code section 1385. (24 CT 6588.)

This appeal is automatically taken pursuant to Penal Code section 1293, subdivision (b).

STATEMENT OF FACTS — GUILT PHASE

Scott commenced a brutal crime spree in the Canyon Crest region of Riverside on September 12, 1992, with the murder of Brenda Gail Kenny. Months later, Scott's reign of terror ended with his capture weeks after he attempted to murder two men on January 18, 1993. In the interim, Scott burglarized six other individuals' homes, raped repeatedly two women, assaulted three others and, finally, stabbed a man and shot at another. The facts and circumstances surrounding Scott's crimes are detailed below.

BRENDA GAIL KENNY, September 12, 1992, Count One

In September 1992, Brenda Gail Kenny was a thirty-eight-year-old librarian at the Riverside Public Library, who had recently been promoted to supervisor of the circulation department. Kenny lived alone in a second-story apartment, No. 346, in the Canyon Creek Apartments at 600 Central Avenue, Riverside. (39 RT 5232-5233, 5244-5246, 5249, 5367; Exh. 31.) Kenny's downstairs neighbor was Joseph Masewicz, a senior aerospace engineer. (40 RT 5426-27.)

On Thursday, September 10, 1992, Kenny did not go to work because she was ill. That day, Kenny went to her parents' home and visited with her mother while her father was out of town on a day-long business trip. Her parents' home was five minutes by car from Kenny's apartment. Kenny's father returned home around 9:15 p.m. and visited with Kenny until she left to go home around 10:00 p.m. Although her mother invited her to stay the night,

Kenny believed she would feel better in the morning and left for her apartment. (39 RT 5245-5247.)

Around 10:00 p.m., Masewicz was in his bedroom and heard two people walk up the staircase leading to Kenny's apartment. Around 4:10 a.m., Masewicz awoke to a bang sound, like someone fell. A scream, a cry-type noise, came from Kenny's apartment. Masewicz rose and put his clothes on to go upstairs because he knew Kenny was prone to seizures. However, he soon heard footsteps across the ceiling, so he did not go upstairs. (40 RT 5428-32.)

Kenny's parents did not speak to her on Friday, assuming she had gone to work, or on Saturday, thinking she ran errands. However, Saturday night, September 12th, they received a call from Kenny's co-worker, Ruth Hunter, who expressed concern because Kenny had not shown up for work and had not called in sick. This was unusual and unlike Kenny, as she was very conscientious about work. (39 RT 5248.)

Kenny's parents went to her apartment, and her door was locked. They knocked and called out her name, but received no answer. Since they had a key, her parents let themselves in. Upon opening the door, they were met with the smell of decomposition. The sliding glass door in the living room that lead to a balcony was open. They found Kenny in her bedroom. (39 RT 5250-5252.) She was lying on the floor between her bed and a vanity, wrapped in a blue comforter. (39 RT 5255-5256.) There was no bedding or sheets on the bed. A sheet was found in the hamper. (39 RT 5265, 5394.)

An ironing board was up in Kenny's bedroom. On the ironing board was a tea bag, spoon, and keys. A cup was on the floor near the ironing board. The dresser in Kenny's bedroom had clothes hanging out of the drawers and piled on top of it. Kenny was a very neat housekeeper, and it was uncharacteristic for such items to have been left on and around the ironing board and dresser. (39 RT 5253-5255, 5377.) A knife was found on the

bedroom floor, under Kenny's right elbow. This knife matched a set of knives in a block in her kitchen. (39 RT 5375-5376.) The cord appeared to have been cut from the iron. (39 RT 5394.)

Prior to her murder, on a weekend afternoon, a thin, young Black man came to the apartment complex where Kenny lived and handed out pamphlets for his "fellowship" church in Moreno Valley. The man looked to be in his mid-twenties, was soft-spoken and less than six feet tall. (39 RT 5232-5235.) Darryl Luntao, a neighbor of Kenny's, spoke to the man handing out pamphlets for about five minutes. When Luntao saw Scott's picture in the Press-Enterprise newspaper, he recognized Scott as the young man who handed out church pamphlets at the Canyon Creek Apartment complExh. Luntao subsequently identified Scott in court as the man handing out church pamphlets in Kenny's apartment complex just prior to her murder. (39 RT 5235-5236, 5240.) A pamphlet from New Wine Church in Moreno Valley was found on the ground by Kenny's front door. (39 RT 5379-5380.)

There was a wooden fence below the living-room balcony of Kenny's apartment. On Sunday, September 13, 1992, Kenny's neighbor pointed out to investigators that there was a fresh scuff mark on the top of the wooden fence as if someone had possibly climbed on it. (39 RT 5367-5368, 5390-5392; 40 RT 5433.)

On September 16, 1992, Forensic Pathologist Robert DiTraglia performed an autopsy of Brenda Gail Kenny. (41 RT 5478-5480, 82.) The time of her death was difficult to assess due to decomposition. (41 RT 5506-5508.)

She suffered traumatic injuries, that included sharp-force injuries, cut and stab wounds, and blunt-force trauma, contusions, and bruises. Kenny suffered seven stab wounds, five to her neck, one to her chest, and one to the left side of her abdomen. She sustained a superficial cut wound to her left

cheek. Such a superficial injury may be the result of the perpetrator taunting a victim or inflicting pain versus killing the victim. The majority of cut wounds she suffered were on her palms. These cuts are characteristics of defense-type wounds when a victim attempts to defend herself from a person wielding a knife. Dr. DiTraglia opined that the majority of injuries to Kenny's palms were caused by her grabbing the blade of a knife. (41 RT 5482-5486.) Kenny had bruises on the back side of her left arm, between the shoulder and elbow. (41 RT 5487-5488.) Kenny died from multiple sharp-force injuries. (41 RT 5489-5501.) The knife recovered from under Kenny's arm could have caused her injuries, when a comparison of the stab wounds is considered in connection with the length and width of the knife blade. (41 RT 5502-5504; Exh. 61.)

COLLEEN CLIFF, October 1, 1992, Counts Two, Three

On October 1, 1992, Colleen Cliff was staying at a friend's house at 698 Atwood, Riverside, prior to her move out of state. The house was a two-story, four-bedroom house located on a cul-de-sac residential neighborhood of single-family homes. In the easternly direction from the house was open space. She was the only person staying in the downstairs guest room. (42 RT 5600-5602.)

She was awoken by someone on top of her and straddling her. She felt hands around her throat and a knife to her neck. A man wearing a ski mask and gloves was on top of her. When she first saw him she screamed. The man told her shut up or he would kill her. Instinctually she tried to scream again. The man put his hand over her mouth. After she quieted down, the man told her to stay where she was, and he left the room. The man closed the door behind him. The man came back into the room and he "seemed kind of jittery or scared." She told the man not to worry, she would be quiet. (42 RT 5602-5603, 5606.)

The man pulled her out of bed and walked her into the living room. The man had a firm hold on her right arm. He was muscular, with a slight build, and about 6'. In the living room, the man asked her her name and said he needed to know who lived in the house. She told him her name, and that she wasn't a full-time resident of the house, she was staying with her friends. The man wanted to know their names. Not wanting the man to have their last name, she told him "John." She could not get her friend Kelly's name out, when the man said there had been a terrible mistake. The man said he would put away the knife that he had been holding in his hand the entire time he was with Cliff. (42 RT 5602-5604.)

Still holding her arm, the man gave her the knife. The man said they were going to put the knife away and led her into the kitchen. The man opened a drawer and had her put the knife inside. The knife was a kitchen-type knife, larger then a steak knife. The man apologized for scaring her and explained there had been a mistake. The man explained he was a "hit man" hired to kill somebody, but he had gotten the wrong house. The man apologized again for scaring her, and said he was going to leave her alone. The man wanted her to go back to bed, go to sleep, and not call the police or he would come back and kill her. The man ran through the door to the garage, and out the garage. That was the last she saw the man. (42 RT 5605-5606.)

The man was a light-skin-tone Black man. Scott's skin color was exactly like the man's. (42 RT 5607.)

REGINA M., November 3, 1992, Counts Four, Five, Six

Regina M. lived alone in a one-bedroom apartment at 900 Central Avenue, No. 121, in the Canyon Crest region of Riverside. On November 3, 1992, she was alone, sleeping in her bed, when she heard a noise. Regina M. sat straight up and saw a man at the end of her bed, pointing a gun at her. The

man was dressed completely in black; all that showed was his eyes and the skin around them. The man told her not to move, then made her shift to the center of the bed and lie back down. The man sat on the side of the bed, still pointing the gun at her.[3/] The man told her about himself for about the next fifteen to twenty minutes. (38 RT 5110-5112, 5116.)

The man told her that he was born to a Black man and an Asian woman, either Korean or Vietnamese, during wartime. The man said his father was in the military, and that his family traveled a lot. The man told her his parents separated, then got back together. The man then asked if she was married, and she lied and said, "Yes." She believed that if the man believed someone was coming home soon, it reduced the likelihood he would do something. The man told her the reason he was there was to take care of her husband, because the husband had done something very wrong and some people had hired him as a "hit man" to take care of her husband. Regina M. asked what her imaginary husband had done, and the man said he could not tell her. The man said he was waiting for some friends to come and help him. (38 RT 5114-5115.)

The man then laid down next to her. He still had the gun and the flashlight he had obtained from under her bed. The man shone the very bright flashlight in her face. The man thought he heard a noise and jumped off the bed. He ran across the room to the doorway. He pulled a dart out of his sleeve and held it while he stood there for a few minutes. (38 RT 5115-5116.) The man came back into the bedroom, rifled her drawers, and looked through her closet. The entire time doing this, the man continued talking about her husband. At one point the man grabbed something in a drawer; he thought it

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3. The gun the man held was an automatic weapon, silver in color, that looked similar to the gun recovered from Scott's house, Exhibit 1. It was the same color and size as Scott's gun. (38 RT 5113-5114.)

was a weapon. However, he noted, "Oh. It's just potpourri." The man then asked her if she knew what he was doing there. Regina M. said, "I guess you're a burglar." The man responded, "No. I'm a ninja." The man left the bedroom, went into the kitchen, opened the refrigerator and freezer, and then came back into the bedroom. (38 RT 5117-5118.)

Still holding the gun, the man told her to get out of bed and take off her clothes. She was wearing flannel bottoms and a muscle shirt with a college logo on it. Regina M. complied and took her clothes off. The man went into her closet, found the clothes she had worn that day, a business suit with a skirt and blouse, and told her to put them on. Regina M. did as she was told. Minutes later, the man told her to take her clothes off, and she complied. The man then told her to put the clothes back on, which she did. The man took her into the closet and told her to take her clothes off. Again, she complied and took off her clothes. The man told her to sit on the floor, and she sat down with her legs straight out in front of her. The man said he did not want her to sit that way, and told her to spread her legs apart. She complied. The man wanted her to move further into the closet, but there was an ice chest stored in the closet, so she could not move any further back. When she told the man that, he told her to get up, and she did. (38 RT 5118-5119.)

The man told her, "I'm not going to hurt you," and she asked, "What do you mean?" The man said, "I would never hurt you," "I like you." Regina M. asked, "Well, don't you think what you're doing to me is hurting me?" The man responded, "Well, your definition of hurt and my definition of hurt are two different things," "My definition of hurt would be what I have to . . . would have to do to your husband," "But what you're talking about hurt, I'm not hurting you." While telling Regina M. this, the man had his gun tucked into his pants. (38 RT 5120.) The man never undressed. (38 RT 5147.)

The man pulled down the blankets and sheets on the bed. The man instructed, "Now get back in bed." She did so, and the man got on the bed with her. The man reiterated that he was not going to hurt her. He then raped her. During the rape, the man told her to kiss him, and she said no. The man grabbed her head and kissed her. While still raping her, the man rolled them over so she was on top of him. He lifted her up and down on his body. Thereafter, the man told her he wanted her to get over, and he turned her over onto her hands and knees. From behind her the man raped her again. When he finished, he made her get up off the bed, and he did the same. The man pointed to a wet spot on the sheets and said, "Do you see that?," "That's me," "I came," "You made me . . . come," "Now strip the bed." (38 RT 5119, 5121-5122, 5148.)

Regina M. stripped the bed and bundled up the sheets. At the man's instruction, she brought the sheets into the bathroom. While they were in the bathroom, the man told her to put the sheets in the bathtub and run water over them. When the sheets were saturated, the man told her to turn off the water. The man made her wipe herself with a towel so there would be no evidence. Afterwards, the man made her wash the towel. The man then told her to go back into the bedroom and put on pajamas. They laid down on the bed for a little while. (38 RT 5122, 5151.)

The man told her he was still waiting for his friends to show up and they should be there any minute. While it seemed to Regina M. like they laid on the bed forever, it was actually only about five to ten minutes. The man then took her into the living room and sat her on the couch. The man sat in a chair. The man then lectured her on household safety and how she needed to make sure all her doors and windows were locked. The man told her not to call the Riverside Police Department because they were corrupt. The man told her if she was going to call the police, to wait at least an hour after he left. The man

set her alarm for an hour. The man said that before he left, "I'm going to make this look like a burglary." The man went into her bedroom and took cups of coins, loose change. The man went to the window through which he had entered and told her he was going to put the cups of change over by the front wheel of a truck. He told her, "You can tell the . . . police department that I put them there, and then they will think it's a burglary." The man went out the window. He placed one of the cups of change behind a Camaro parked next to a truck. The man placed the other cup next to the truck. (38 RT 5123, 5126.)

The man's shoes were like nylon booties, not regular shoes, but soft-soled, sock-type slip-on shoes. The man was in his early 20's, a light-skinned Black man, 5'10" to 5'11." Regina M. described him as pretty thin for someone that tall, and estimated he weighed 140-150 pounds. Scott's skin color was the "right color." When Regina M. looked into Scott's eyes she said, "Those are the eyes that I saw." (38 RT 5126-5128, 5139.)

A sexual assault kit was taken from her when she went to the hospital. (41 RT 5575-5577.)

LINDA GONZALES, November 14, 1992, Counts Seven, Eight, Nine

In November 1992, Linda Gonzales lived in a second-story, one-bedroom apartment at 955 Via Zapata, No. 24, in the Canyon Crest area of Riverside. (38 RT 5159, 5161, 5178; Exh. 31.)

As was her habit, on the night of November 14, 1992, Gonzales fell asleep on the couch with the television on. She was wearing a long white T-shirt. Around 3:00 a.m., she was awoken by a rustling noise, and jumped off the couch when she saw a man dressed in black crouched in the kitchen window frame above the sink. When Gonzales jumped off the couch, the man said, "Don't." While she did not remember his entire sentence, Gonzales heard the man say in a low tone, "I will kill you." The man came over to her. He then

went to her front door and unlocked two of the three locks on the door. (38 RT 5159-5161, 5163, 5172-5173.)

The man went into the adjoining dining area, and looked around the table area; Gonzales had numerous things placed on the table. The man returned his attention to Gonzales and twice told her, "Stand up. I want to look at you." The man instructed her to turn off the television; however, she froze in place. The man turned off the TV, then told her, "I want you to go outside." (38 RT 5162-5163.)

The man grabbed Gonzales tightly and pushed her toward the front door that led to an outside stairwell. When the man opened the front door, a latch fell to the ground. The man asked, "What is that? What is that?" Gonzales explained it was a lock that she had put on the door. The man again told Gonzales he wanted her to go outside. As they stepped out onto the apartment's second-story landing, the man retained his tight grip on her and moved her forward. Suddenly the man put his hand over her mouth and said, "No. No. I don't want you to go outside." (38 RT 5164-5165.) The man started to pull Gonzales back into the apartment. She got his hand away from her mouth and screamed. The man put his hand back over her mouth. She again got his hand away and screamed again. After she screamed the second time, the man let her go and ran down the stairwell. Gonzales went into her apartment, put on pants, grabbed her keys, and fled to the manager's apartment. The manager called the police. (38 RT 5164-5166.)

The man was dressed all in black, with gloves on, and something covering his face. Gonzales could only see his eyes. The man held Gonzales so close that his toes touched her heels. It felt like he had on slippers. The man was a very lean, light-skinned Black man. Scott's skin looked similar in color to the intruder's. (38 RT 5162, 5167-5168.)

EDWARD BUHR, November 16, 1992, Count Ten

In November 1992, Edward Buhr lived at 600 Central, apartment No. 355, in the Canyon Creek apartment/condo complex. (38 RT 5181; Exh. 31.) Buhr's apartment was on the ground floor. On November 16, 1992, around 3:00 a.m., Buhr was awoken by an unusual sound at the window, like a cat tearing the screen. Buhr jumped out of bed, went to the window, and pulled back the curtain. The window was open; the screen had been cut. A man was bent over, about to come in the window. The man was dressed completely in black, with a stocking cap over his head and face. Only the man's cheekbones and eyes were exposed. (38 RT 5182-84.)

Buhr shouted loudly four times, "Get out of here." The man, who had an aluminum-colored gun in his hand, reached his arm through the window and said, "If you move I'll blow your fucking head off." (38 RT 5184.) The man pointed the gun at Buhr. Buhr jumped to beside the window, up against the wall. Buhr shouted to his companion, Linda Pena,[4/] to get down because the man had a gun. Buhr slid the window closed on the man's arm two or three times, and the man withdrew his arm from inside Buhr's bedroom. Buhr hollered to Pena to call 911, which she did. (38 RT 5185-5187.)

The man was either a very dark Caucasian or a fairly light-colored Black. Scott's skin color was consistent with the man's who put his arm through Buhr's bedroom window. (38 RT 5187-5188.) The gun confiscated from Scott's home (Exh. 1) looked very similar to the one the intruder pointed at Buhr. (38 RT 5185.)

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4. The indictment charged Scott with assault with a deadly weapon upon Linda Pena; however, the charge was dismissed pursuant to Penal Code section 995. (4 CT 994-995.)

REGENIA GRIFFIN, November 16, 1992, Counts Twelve, Thirteen

Regenia Griffin and her husband lived at 920 Via Cartago, apartment No. 18, in the Canyon Crest area of Riverside. Her apartment was on the second floor and overlooked the golf course. It had a patio accessible through a sliding glass door *via* the bedroom. (38 RT 5192-5193.)

On the night of November 16, 1992, Griffin left the patio sliding glass door ajar when she went to bed. The sliding-glass-door screen was locked. (38 RT 5193, 5199.) Griffin was asleep in her bedroom when around 2:00 a.m., she was awoken by the bark of her small dog. A man, dressed completely in black, with only his eyes and mouth visible, came into her bedroom through the sliding glass door holding a silver-gray colored gun in his hand. Griffin screamed and, as the man neared her bed, he told her to shut up and demanded money. Griffin said she did not have any money, but offered the man credit cards, which he refused. By this time, Griffin had gotten out of bed. The man pushed her into the bathroom in the back of her apartment. Griffin was crying. The man again told her to shut up, locked the bathroom door from inside, closed it, and left. (38 RT 5194-5195.)

Griffin stayed in the bathroom for what seemed like an eternity, but in reality was probably only minutes. When she came out, the man was gone. The screen to the patio sliding glass door had been cut. (38 RT 5199.)

Griffin estimated the man was approximately 5'8" or 5'9", he had very smooth skin, with a light complexion.[5/] The man's skin color was very similar to Scott's. (38 RT 5197-5199.) The gun the man had looked very similar to the gun recovered from Scott's house. (38 RT 5196; Exh. 1.)

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5. Griffin described herself as ethnically mixed, but primarily Black. (38 RT 5204.)

JULIA K. & JOSEPH C., December 10, 1992, Counts Fifteen, Sixteen, Seventeen, Eighteen

In December 1992, Julia K. and Joseph C. lived at 25620 Santa Barbara Street in the Moreno Valley region of Riverside. It was a two-story house. The terrain behind the house was wild hills and rocks into the distance. Since it was holiday time, they had christmas lights up. The electrical cord for the lights fed through the bedroom window, preventing it from closing completely. (37 RT 4947-4948, 4950, 5024-5026.)

On December 10, 1992, Julia K. was home alone and her fiancé, Joseph C., a paramedic, was at work. That evening, Julia K. was studying for finals on the downstairs couch with the television on, when she thought she saw something out of the corner of her eye. She looked and saw a man on the stairwell. She jumped up and ran toward the front door. As Julia K. tried to get to the door, the man grabbed her; they fought and struggled. Julia K. tried to make a ruckus and as much noise as possible in the hope someone would notice. She ripped the curtains off the window next to the door. However, she was unable to reach the alarm next to the door, because the man put a gun to her head. (37 RT 4947-49.)

Holding the gun to her head, the man ordered her to go upstairs. The gun was similar in color and shape to Exhibit 1. She went upstairs as told because she feared the man would shoot her in the head any minute. In agreeing to comply with the man's demand she go upstairs, she begged him not to hurt her. She went upstairs, with the man behind her. At the top of the stairs, she went into her bedroom. (37 RT 4951-4953.) The man had a sword on his back the entire time he was upstairs. (37 RT 4963.)

The man told Julia K. to take off her clothes. She started to take off her clothes; the man seemed frustrated and angrily ripped off her underwear. Once she was naked, the man ordered her to lie down. She lay on the bedroom

floor, between the bed and the wall. The man undid his pants, climbed on top of her, and raped her. The man got off of her, went into the adjoining bathroom, came back in and gave her a towel, and told her to clean herself. Julia K. had suffered a bloody nose during the struggle downstairs. She wiped blood off her face and left arm. She also used the towel to wipe between her legs. (37 RT 4954-4957, 4990, 4996.)

Naked, Julia K. went with the man back downstairs. They went into the den area off of the kitchen. Julia K. sat in a wooden chair, and "there was dialogue" between her and the man. At one point Julia K. "was completely shaken." She was trembling sitting in a chair with her hands over her face. The man told her to "stand up and come here." The man hugged her and assured her he was not going to hurt her. The man had his gun and the sword remained on his back when he said this. (37 RT 4957, 4960.)

At another point, the man went through the kitchen drawers and asked, "Where is your money?," "Where is the money." Julia K. described it as bizarre; the man seemed to believe he knew there was money in the house, "Like he knew something about us that we didn't know he knew." No money was in the home. (37 RT 4960-4961.)

Julia K. figured it would be dangerous for Joseph C. to come home unannounced, so she told the man she was expecting her husband. She also told him that her husband would "flip" if she answered the door naked. So the man found a pink parka jacket and gave it to her. Julia K. put it on. The man asked Julia K. questions about her husband, such as, "What kind of man is he?," "What kind of man is he?," "What does he do," "Is he a fighter." It seemed to Julia K. that the man wanted to know as much as possible about Joseph C. The man told her that he might have to kill her husband. When the automatic garage door opened, the man said, "He's home," and repeated, "I think I'm going to have to kill your husband." (37 RT 4957-4959.) Upon

hearing the garage door open, the man's mannerisms changed. The man went to the door to the garage, pulled out his sword, and held it in front of him.[6] (37 RT 4962.)

Joseph C. opened the garage door and saw Julia K. dressed only in a pink pullover sweater. She told him, "Stop. Don't move," "We're being robbed, and there's a man in the house. He's dressed like a ninja and he has [a] gun and a knife." Joseph C. froze. At her instructions, Joseph C. stepped through the door into the house, and to his right was a man dressed like a ninja holding a three-foot sword, with a gun tucked into his waistband. The man held the sword[7] to Joseph C.'s trachea. The man backed Joseph C. into the kitchen. Their dog had entered the house with Joseph C., and chaos ensued. While Julia K. tried to control the dog, the man threatened to kill the dog if she did not control the dog. Julia K. picked up the dog and put it in the garage. Things calmed down after the dog was removed. (37 RT 4964-4965, 5001, 5026-5027.)

The man had both hands on the sword he held to Joseph C.'s throat. The man told Joseph C., "Step back. Don't move." The man told Joseph C. to drop the gym bag, and he complied. The man told Joseph C. to take off his fanny pack and empty the contents onto the pool table. The man asked for money, and Joseph C. told him he only had two dollars. As told, Joseph C. gave the man his forms of identification, including his paramedic ID card and driver's license. The man placed the paramedic ID card in his pocket. (37 RT 5030-5034.)

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6. The sword the man held was similar in size and color to Exhibit 7. (37 RT 4962-63.)

7. Both swords, Exhibits 6 and 7, resembled the sword. That night, Joseph C. believed the man probably held the longer sword, Exhibit 6. (37 RT 5029.)

Julia K. went with the man and Joseph C. into the kitchen. The man instructed her to tie up Joseph C. A strange conversation occurred. The man asked Joseph C. what he did for a living, and when Joseph C. told him he was a paramedic, the man asked if he liked it. The man claimed he was a paramedic once. It was "almost like he was trying to bond" with Joseph C. The man's voice was not natural, it was low, short, and deep. He spoke slowly, in short sentences. The man said he had never come to this area before. Both Joseph C. and Julia K. asked the man questions. Finally the man angrily instructed them to stop asking questions. (37 RT 4964-4967, 5001-5003, 5035, 5038.)

The man looked for something to tie up Joseph C. He found a crate full of speaker wire in the closet next to the kitchen. The man instructed Julia K. to tie up Joseph C. Joseph C. got on this knees, and she started with his feet, tying up Joseph C. while he was still in uniform, with his work boots on. The man had his gun pointed at Joseph C. the entire time. After Julia K. finished tying up Joseph C., the man tied her up. (37 RT 4964-4967, 5035-5037.)

The man said he was going to leave through an upstairs window, and that his friends had arrived. The man went upstairs, leaving Julia K. and Joseph C. tied up in the kitchen. Upstairs, the man made a ruckus, lots of noise, like someone was pulling drawers out, knocking things over. Thereafter, it was quiet. (37 RT 4967, 5004, 5039-5040.)

Due to the silence, Julia K. and Joseph C. believed the man had left, so they worked to untie themselves. They mostly freed themselves and crawled into a corner out of view to someone outside the house. Suddenly, the ninja-dressed man ran back into the kitchen. The man told them he was not leaving, and that he would have to tie them up again. The man questioned Julia K. if she knew anyone named Celia, and Julia K. told him she had a stepsister named Celia. The man taunted Joseph C., questioning whether Joseph C. thought of

himself as fast and quick. Joseph C. asked the man to take them upstairs, put them in a closet, while the man left the house. Joseph C. said they would wait to call the police. The man asked if they thought his crimes would make the newspaper, to which they responded they did not know, but said they were willing to contact the paper and give all the details. The man ordered them upstairs. (37 RT 5040-5042.)

Once upstairs, the man moved them into the master bedroom. The man had Joseph C. take off his zipper-style boots. The man forced Joseph C. onto the closet floor face first. The man tied Joseph C.'s arms behind his back and his feet together with neckties. Placing it through Joseph C.'s bound hands and feet, the man used the dowel upon which they hung their clothes to hog-tie Joseph C. The man tied the bonds extremely tight and stuffed a pair of under-wear in Joseph C.'s mouth. The man dumped additional clothes on top of Joseph C. (37 RT 5042-45.)

The man emerged from the closet, and directed Julia K. to put a teddy on. The man guided Julia K. into the spare bedroom. Once in the spare bedroom, the man raped Julia K. two additional times. Initially, he had her lay on the ground near a futon. The man exposed his genitals and then raped her. Afterwards, the man held her head to his chest. The man left the room for a few minutes. Prior to raping her the second time, the man took off the gloves that he had worn the entire time.[8/] During this last rape, the man's mood changed. (37 RT 5004-5010, 5013-5014.)

Meanwhile in the closet, Joseph C. heard the man and Julia K. enter the spare bedroom adjacent to the closet. Joseph C. heard bumping sounds against the wall and movement on the floor of the spare bedroom. Joseph C. feared the man was raping Julia K. again, because she had told him downstairs

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8. The man's gloves were black with duct tape on the fingers similar to Exhibit 16. (37 RT 5019.)

that the man had raped her. Joseph C. was very concerned the man would take Julia K. with him when he left. Joseph C.'s hand had gone completely numb and he was in excruciating pain. Joseph C. screamed and shook. The man came into the closet, placed the gun to Joseph C.'s head, and told him to stop screaming and making noise. The man pulled the underwear from Joseph C.'s mouth and asked, "Do you understand." Joseph C. pleaded for the man to loosen his binds, and not to take Julia K. The man responded, "Don't move, or I'll shoot you," "I'll be leaving soon." (37 RT 5045-5046.) The gun was the same size, exact color, and with the same grip as Exhibit 1. (37 RT 5047.) Joseph C. heard the man return to the spare bedroom and again heard the bumping noise. (37 RT 5048.)

After he had raped her a third time, the man brought Julia K. back into the master bedroom. The man opened the closet Joseph C. was in. They discussed the man taking one of the cars to make his escape. The man quizzed Joseph C. which car got better gas mileage, if it was full of gas, and where the keys were located. Julia K. handed the man car keys. The man said his friends had dropped him off and he wondered if they were coming back for him. The man said he needed a new plan to get out. Joseph C. suggested the man lock them in the closet and make his escape. After a pause, the man decided to do that. (37 RT 5004-5006, 5048-5049.)

The man said he had something to do, but before he left he would knock on the closet door three times. The man gave them "some advice on home protection." The man said in the future they should mount their motion-detector lights a little higher so burglars could not get above them and unscrew the light bulbs. The man also advised get a meaner dog.[9/] The man provided other bits of "little helpful advice." The man said he had not previously committed any burglaries in Moreno Valley, it was his first hit in the area. The

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9. Their dog was a friendly 40-pound Labrador. (37 RT 5050.)

man said he liked it and would be back. The man said he worked "west of here" or "in Riverside." The conversation was very casual. Throughout the man spoke in a "very soft whisper," even when he told Joseph C. he was going to kill him. (37 RT 5050-5052.)

Eventually, they heard three knocks on the closet door. Julia K. freed herself and then untied Joseph C. Even after he was untied, Joseph C.'s arms were completely numb and useless. He could not use them to push himself off the ground. When he could use his arms, Joseph C. lifted Julia K. into a crawl space in the closet ceiling. Joseph C. attempted to open the closet door. The man had moved a large dresser in front of the closet door. Joseph C. was able to push the dresser out of the way and get out of the closet. Joseph C. went to the bedroom door, closed and locked it. Joseph C. looked around and verified the man was gone. He then went to the window and screamed and yelled for a neighbor. When the neighbor emerged, Joseph C. asked them to call 911. The police came and took Julia K. to the hospital. (37 RT 5050, 5055.)

Julia K. never returned to the house. About a week later, Joseph C. returned with a friend to retrieve some furniture. In the backyard on the above-ground portable redwood spa lid was writing in dirt. The writing said, "I will miss you. Love you. Lady Nin." (37 RT 5055-5057.)

On December 11, 1992, a forensic technician with Riverside County Sheriff's Office went to the crime scene and collected the towel Julia K. used to wipe herself. (37 RT 5070-5073.) The forensic technician saw what appeared to be writing on the sliding glass door in the rear of the house. The writing said, "I believe you are a great woman. I wish you mine." (37 RT 5074-5077.)

Julia K. described their assailant as dressed completely in black, like a ninja. He had a silver butterfly folding knife stuck in the sash belted at

his waist, and red topped darts in loops in the bicep area of his shirt. He had on a black hood that covered his face so that only his eyes and the skin around his eyes showed. She estimated the man was about 6' tall and weighted about 160 to 175 pounds. (37 RT 4953-4954, 5007-5008, 5011-5012, 5053-5054.) He had on "weird shoes" that looked like ninja slippers, with the big toe separated from his other toes.[10/] (37 RT 5007-5009.) He was a young man with light brown skin. Joseph C. told police he believed the man was a mixture of African-American and Asian. Scott's skin color was identical to the man's. (37 RT 5002, 5058.)

At the hospital a rape kit was gathered from Julia K. (41 RT 5574-75.)

December 18, 1992, Count Nineteen

Scott Clifford lived with his parents in a second-story condo at 1009 Via Pintada, in the Canyon Crest area of Riverside in December 1992. This was near the intersection of Via Pintada and Via Zapata.[11/] The back of Clifford's condo overlooked the Canyon Crest Country Club golf course, near the sixth tee. (39 RT 5271- 5273, 5276, 5283-5284; Exh. 31.)

On the evening of December 18, 1992, Clifford was on his condo's balcony smoking when he looked down into the dark alleyway that runs between the buildings and saw a dark figure standing in the shadows. It was unusual because Clifford had never seen anyone standing in this area that late at night before. Clifford watched the figure and realized the person was dressed completely in black, with only the area around their eyes showing. The person

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10. The man's shoes were similar to Exhibit 12. (37 RT 5019.)

11. Linda Gonzales (counts seven, eight, & nine) lived on Via Zapata. (38 RT 5159, 5161, 5178.)

looked up at Clifford, and their eyes met. The black-clad person darted into the parking-lot area which was well lit. Clifford saw the person had a sword strapped to their back, and was wearing "tabby-type boots" with a split at the toes. Clifford lost sight of the person running across Via Zapata. (39 RT 5272-5275.)

Clifford called the police, reported what he had seen, and the police arrived about five minutes later. After speaking with the police, Clifford went to bed, while the police continued to search the area. Later that night, Clifford's father was awakened by noises on the golf-course side of the condo, and he woke up Clifford. The men stayed in the condo, ready for a possible intruder. The next morning they went outside, and rocks painted red, white and blue, used on the golf course as tee markers, were on the veranda of Clifford's condo. It appeared the rocks had been thrown at the condo. (39 RT 5275-5276.)

The boots recovered from Scott's house (Exh. 12) are exactly what the black-clad, sword-carrying person Clifford saw was wearing. One of the swords recovered from Scott's house (Exh. 6) had the same laced handle as the sword strapped to the black-clad person's back. (39 RT 5275, 5277.)

In December 1992, Mike Yamada lived in the Hidden Springs Apartment complex at 5225 Pearblossom, in the Canyon Crest area.[12/] A few days before Christmas, at approximately 1:00 a.m., Yamada walked down his apartment-complex corridor when a man walked in the opposite direction toward Yamada. The man was dressed completely in black, in a "ninja uniform." The man's face was covered; only the area around his eyes was exposed. The man had a sword on his back, and its handle was exposed above the man's head. Yamada continued to walk, as did the ninja-outfitted man. They eventually walked past each other in the corridor. (34 RT 4582-84.) The

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12. This was the same apartment complex where Phillip Courtney and Howard Long lived (counts twenty, twenty-one). (34 RT 4629-31.)

sword the man carried was a samurai sword, and it looked very similar to the sword introduced as Exhibit 6. (34 RT 4585.) About a month later, Yamada learned a man (Phillip Courtney) had been assaulted in the building across and a few doors down from where Yamada saw the man in the ninja outfit. (34 RT 4586.)

PHILLIP COURTNEY, January 18, 1993, Count Twenty; ALISON SCHULZ, Count Twenty-One; HOWARD LONG, Count Twenty-Two

On January 18, 1993, Beverly Losee was in her apartment at 5200 Canyon Crest Drive in Riverside, when she heard someone knock on her door about 7:00 to 8:00 p.m. Losee went to the door and, since she did not have a peephole, she asked who it was. The person responded, "It's Eddie." Since Losee did not know anyone by the name of "Eddie," she stayed very quiet, snuck to the big window over the couch, and peeked out the curtain. Losee did not recognize the person, who was dressed all in black. For the next twenty minutes the person stayed at the door knocking, saying it was "Eddie" and demanding, "Let me in." Finally the person walked away. Losee watched the man walk away from her door. At the parking area, he turned and looked back at her apartment. Floodlights and her porch light illuminated his face. Losee identified Scott as the man knocking at her door. (34 RT 4600-4604, 4622.) Losee read in the paper that someone at the Hidden Springs apartment was assaulted. The Hidden Springs apartment complex was in Losee's neighborhood. When Losee last saw Scott, he was walking in the direction of the Hidden Springs apartment. (34 RT 4604-4606.)

On January 18, 1993, Alison Schulz and Phil Courtney lived in apartment No. 16, in the Hidden Springs Apartments at 5224 Pearblossom, in the Canyon Crest area of Riverside. The apartment complex was adjacent to open land. Their apartment was on the end of a building just next to the

open land. That night, around 9:00 p.m., Schulz and Courtney returned home from dinner. The front door to their apartment opened into the building breezeway. (34 RT 4629-4631, 4656-4662.) Courtney was ahead of Schulz. As he opened their apartment front door, a man, dressed in an all-black "martial arts costume" with a black ski mask that covered his face, grabbed Schulz. The attacker held in his hand a gun similar to Exhibit 1. Courtney spun around, and saw a man behind Schulz, holding her. Courtney rushed at and grabbed the attacker, making sure he had both of the man's hands. The black-clad man moved the gun up toward the front of Courtney's body, and Courtney moved the gun away from himself. Courtney and the man wrestled and struggled as they spun down the breezeway. Schulz hit the man with her purse and yelled, "Leave him alone." Courtney loudly yelled, "Help." The gun remained between Courtney and the man as they struggled down the breezeway. (34 RT 4632-4634, 4663-4671, 4672, 4703.)

At one point, the men spun into a window and shattered it. Courtney used his strength to bring the gun up and delivered a glancing blow to the man's face. Courtney realized the attacker had something on his back, sticking up above his head. At first Courtney thought it was a police baton, but it was similar in shape to the Exhibit 6 sword. After the window broke, Courtney felt he physically had the upper hand in the struggle. After striking the attacker, Courtney moved the man back so that he was bent backward over a planter. The planter was near the middle of the breezeway, by the elevators. Although they both still had their hands on the gun, Courtney no longer felt he was in danger of being shot. Courtney brought his knee up to hit the man in the groin; however, the man squirmed and wiggled, and Courtney was unable to connect. During this, the man freed his hands from Courtney's grasp. The men were still very close to each other; suddenly Courtney felt as if he had been punched in

the back. The attacker repeatedly stabbed Courtney in the back. (34 RT 4672, 4675-4676, 4679-4683.)

Courtney could feel air come out of his back and he realized he was not being punched, but instead being stabbed. The assailant still had the gun in his hand. The men separated, and came to be a few feet away from each other. An upstairs neighbor came into the hallway and took a stance like a policeman. (35 RT 4684-85.)

Howard Long lived in an upstairs apartment, above the breezeway where Courtney and the attacker were struggling. Long's apartment opened out to the breezeway area. Long heard a woman screaming frantically for help, saying someone was "trying to kill him." Long obtained his gun and went toward his front door. Long's wife looked out the window and told Long two men were fighting, one had a gun and was going to shoot the other. After hearing a gun fired, Long headed out of his apartment and told his wife to call 911. (36 RT 4802-4804, 4813.)

Above the breezeway, Long crouched into a firing stance with his gun, and saw men scuffling while one man struck the another in the back. Long yelled at the attacker to stop, and both the victim and attacker turned and looked up at Long. Long was 19 to 25 feet away; Long's and the attacker's eyes met. The attacker pulled the victim in front as a shield, reached around him, and fired his gun at Long. Long was not struck by the bullet because he had rolled back into his apartment when he saw the attacker use the victim as a shield. (36 RT 4804-3610.)

In the meantime, Schulz was pounding on doors in the breezeway. As Courtney moved toward Schulz, the assailant dashed down the breezeway back towards Courtney's apartment. The neighbor in apartment No. 11 opened his door. Courtney and Schulz moved toward the open door at apartment No. 11. The neighbor started to close the door, but Courtney ran into it with his

shoulder and got inside. Courtney collapsed on the living room floor. Later, paramedics arrived, treated him, and took him to the hospital. Courtney was hospitalized for thirteen days for two collapsed lungs suffered as a result of the stabbing. (35 RT 4688-4692.)

The attacker was dressed entirely in black, with his head and face covered, and only holes in the mask that revealed his eyes, mouth, and nose. The man was a light-skin-toned African-American. Scott's skin tone was similar to the attacker's, and he was similar in height and build to the attacker. (35 RT 4672-4675, 4804.) A copper-jacketed .45-caliber bullet was recovered from Long's doorframe by police. (36 RT 4826-4830, 4832- 4833.) An expert opined that the bullet extracted from Long's doorframe (Exh. 34A) was fired from the gun found at Scott's house (Exh. 1). (36 RT 4859, 4886.)

The next day, January 19, 1993, another occupant of Hidden Springs Apartment complex, Life Michael Jones, went walking in the open area just behind the complex. The open area included a dam with a reservoir. Jones routinely walked in the open area, usually three to four times a week for the past ten years. (35 RT 4752-4754.) While walking, Jones noticed some unusual shoe prints. The prints showed the big toe distinct and separated from the four other toes which were housed together. Jones saw police officers in the area and called them over to look at the prints. They found more shoe prints and followed them. The tracks lead in the direction of Central Avenue. They followed the tracks through the reservoir area to an electrical substation. There they found darts with red strands taped on them. (35 RT 4754-4758, 4778-4783; Exh. 31.)

Impressions of the shoe-print tracks were made. (36 RT 4904-4907.) Three impressions were made of the prints that showed the big toe separated from the other toes. The shoe-print expert had never seen a shoe print like it before. (36 RT 4908-4910.) Later, after Scott's arrest, the shoe-print expert

was given the tabbies shoes recovered from Scott's garage (Exh. 12). When the tabbies were compared to one of the casts made from the open area behind the Pearblossom apartment complex, they matched sufficiently that the expert opined the print track was made by that tabbie shoe. (36 RT 4911-4919.)

Additional Evidence Tying SCOTT to His Crimes

Scott turned twenty-two-years old weeks before his arrest. He was 5'11" and weighed 150 pounds. (40 RT 5468.) Scott was a member of the New Wine Church in Moreno Valley. New Wine Church had members pass out pamphlets trying to get people to come to its services. (33 RT 4403, 4408.) Scott handed out pamphlets for New Wine Church. (33 RT 4425; 39 RT 5313.)

In late 1991 and early 1992 Scott lived with Todd Wolf in an apartment in Riverside. After Wolf repeatedly requested Scott change his ways, Wolf asked Scott to move out of the apartment because Scott stayed out late. (33 RT 4402, 4407.)

Scott moved in with Wolf's neighbor, Jimmy Baker, and his roommate, David Yearicks. Baker was also a member of New Wine Church. (33 RT 4408, 4421.) Baker had to be at work at 4:00, so he awoke at 3:00 a.m. Baker would encounter Scott coming in when Baker was up or leaving for work. (33 RT 4425.)

Scott owned a silver, stainless-steel .45 gun. Exhibit 1, the gun confiscated from Scott's house, looked familiar in that it was similar in size and shape to the gun Scott had shown Baker. (33 RT 4425-4426.)

In 1992 and 1993, Scott worked at the Canyon Spring movie theater in Moreno Valley. (33 RT 4435-4436.) Within a month or two before Scott's arrest in January 1993, Scott was working at the movie theater with high-school student Matthew Texera. Texera was standing behind the snack bar speaking

with someone when, unbeknownst to Texera, Scott came up from behind and swung at him. Texera saw Scott from the corner of his eye and put his hand up to block Scott's blow. Scott had a knife in his hand and slashed the back of Texera's hand. Texera's hand bled. He went into the bathroom and washed it off. Texera reported the incident to the theater manager, Scott's girlfriend, Stephanie Compton. (33 RT 4435, 4440-4442.)

Another of Scott's co-workers, Yolanda Narez, also knew Scott from New Wine Christian Fellowship. A couple of months before Scott's arrest, Narez had a conversation with Scott while they were at work at the Canyon Springs theater. The conversation commenced casually while Narez was cleaning the popcorn machine. Scott talked about how one would get away with killing a person and hiding the evidence. Narez told him that she had never really thought about that. Scott told her he read about or studied different ways one could get away with murder. Scott spoke about killing a person, draining blood in a bathtub, and getting rid of the remaining body parts. Scott spoke about how evidence of a crime could be concealed or destroyed. (39 RT 5219-5222.)

Once Narez saw Scott at work dressed in an all-black outfit. Scott had the outfit in his backpack, and he changed at work. Another time, she saw Scott showing some silver, sharp throwing stars. The throwing stars recovered from Scott's house, Exhibit 2, were similar in shape, but different in color from the ones she had seen in Scott's possession. (39 RT 5222-5224.)

In January 1993, Scott showed up at the movie theater between 11:00 p.m. and midnight dressed in "ninja garb." (34 RT 4560-4561; 40 RT 5447.) Scott was dressed in all black; he had on a "ninja mask" that covered his face so all that showed was Scott's eyes. Scott startled a co-worker, Matthew Shreiner, until Shreiner realized the man in ninja garb standing next to Stephanie Compton was Scott. Scott had on thin cloth shoes that had

a separation for the big toe from the rest of the toes. Scott had a sword similar looking to Exhibit 6 in his belt. (34 RT 4558-4564, 4572; 39 RT 5292-5293.)

Shreiner suggested Scott play a practical joke on another co-worker, the projectionist, Ricardo Decker. Shreiner and Scott went upstairs and Shreiner entered the projection room while Scott hid. Shreiner conversed with Decker while they walked toward a couch. Scott jumped out and startled Decker. Decker hollered, dropped his books, and ran to the other side of the hallway. Decker was terrified. Shreiner calmed Decker down when he explained it was not a robbery, only a joke. Shreiner then noticed that Scott had a pistol, and in response to his question of whether it was a gun, Scott claimed it was just a BB gun. The gun looked similar to Exhibit 1. The next day after Shreiner had seen Scott in "ninja garb," he read the Press-Enterprise article dated January 20, 1993, entitled "Police Believe Stabbing Is Linked to a Series of Crimes." (34 RT 4565-4567; 40 RT 5444-5447.)

Another co-worker, Kenya Starr, saw Scott at work with a gun. Starr and Scott were "horsing around" when Starr pushed Scott. Scott said, "Whoa. Whoa," and showed Starr a grayish or chrome-colored gun similar to Exhibit 1. (41 RT 5551-5554.)

Another time, while Scott and Starr were conversing while cleaning up, Scott said, "I shouldn't-a did it. I shouldn't-a did it. She was nice. I shouldn't-a did it. I shouldn't-a killed her." Starr asked Scott what he was talking about, and Scott just repeated she was nice and he should not have killed her. Starr expressed disbelief, and Scott told him he could prove it. Out of his wallet, Scott pulled a newspaper article about the murder of the librarian. Starr did not take Scott seriously. Sometime later, Scott told Starr that he had broken into a house, tied up some people, and robbed them. Scott said the couple was not married. Scott repeatedly told Starr "that he didn't rape her, though." (41 RT 5556-5559.)

On January 19, 1993, Scott went with Compton to Big 5 Sporting Goods in Moreno Valley. Scott purchased three boxes of .45 ammunition. The Big 5 employee who sold Scott the ammunition, Justin Rowan, had gone to high school with Scott. Scott answered affirmatively when Rowan asked if Scott was going shooting. However, when Rowan asked Scott where he had been shooting, Scott did not seem to know. When Rowan asked Scott if he was shooting indoors or outdoors, Scott merely said, "Yeah." This struck Rowan as odd. (34 RT 4592-4595; 5315-5318.)

Police executed a search warrant of Scott's residence at 11832 Graham Street in Moreno Valley on January 22, 1993, the day after Scott's arrest. Scott was arrested while he and Compton were in her Mercury Topaz. (33 RT 4461-4462; 40 RT 5458, 5468.) Four other young men lived in the house with Scott: Derick Lajom, Victor Sevilla, Leo Lo, and David Yearicks. Scott shared a bedroom with Yearicks. (43 RT 5741-5745, 5755-5756.)

In a bag of Scott's laundry, in a pocket of a pair of black draw-string pants, police found a "piece of black metal with indents where you could put your hand around it, form your fingers, comes to point on both ends; not real sharp, but pointed." Also found in Scott's laundry bag: a long-sleeve black collarless cotton-material shirt, a long-sleeve black turtle-neck shirt, and a navy-blue knit cap with two eye-holes and a hole for a mouth. (40 RT 5458-5462.)

In Scott's area of the bedroom they found a piece of mail from JC Penney addressed to Regina M. (33 RT 4464; 38 RT 5130; Exh. 3.) A wallet found in the same room contained Scott's social security card, and his Riverside City and County Public library card. Additionally, the wallet contained two pictures, one of Scott and Compton, and one of Julia K and Joseph C. (33 RT 4466-4470.) The following newspaper articles were found in Scott's bedroom: "Woman is Found Stabbed to Death," referring to Brenda Gail Kenny's murder in the Press-Enterprise, dated Monday, September 14;

"Stabbing Death of Librarian Baffles Friends"; an obituary of Brenda Gail Kenny; "Police Believe Stabbing is Linked to Series of Crimes," referring to the stabbing of Phillip Courtney. The last article was found shoved behind the mattress where Scott slept. (34 RT 4535-4538.) In a briefcase the following items were found: a newspaper article with the headline "Police Seek Suspect in Rape Burglary," referring to the Moreno Valley crime involving Julia K. and Joseph C.; a paramedic card with Joseph C.'s name on it; Scott's driver's license; and Scott's transcripts from Riverside City College. (34 RT 4522-4528.) Also found in Scott's portion of the bedroom were black gloves, a black Velcro dart holder, and three black knives. (34 RT 4530-4533.)

During the same search, a .45-caliber handgun (Exh. 1) was found in a desk in the garage. Three boxes of .45 ammunition were found in a desk drawer. Also found near the desk were two swords (Exhs. 6, 7). The swords were identified as belonging to Scott. A target hung on another wall with throwing darts. A dart holder, which had Velcro straps to fit around a wrist or ankle, was found on the same wall. Darts and a little pouch in which darts could fit was found. A cardboard box found in the garage contained a pair of black booties (Exh. 12). Also found was a piece of cardboard with paint outlines that appear to match Scott's throwing stars. A bible containing paperwork was found on the desk. (34 RT 4485-4496.) The swords, handgun, darts, and booties were identified as belonging to Scott. (41 RT 5553-5555.)

Scott's girlfriend, Stephanie Compton, saw a sword, Exhibit 7, at Scott's home. She bought Scott the other sword, Exhibit 6. (39 RT 5290-5291.) Scott also owned small knives and a case. (39 RT 5319.)

Scott told people he practiced martial arts. Scott said he practiced in the hills of the Canyon Crest area which had not been developed. Scott described how he would walk to the theater from his practice, which was a four- or five-mile distance. (39 RT 5288; 40 RT 5448.)

Another time, Decker asked Scott how many fights he had been in, and if he had ever used his martial-arts abilities to defend himself. Scott responded that he had stabbed several people in his past, and had a rough upbringing. Scott made a couple of references to having stabbed people. (40 RT 5449.)

The day before the September 14, 1992 newspaper article entitled "Woman is Found Stabbed to Death" was published (which was found in a book in Scott's room), Scott told Compton about a dream. Scott did not often tell Compton about his dreams. But he did tell her that he had had the same dream a couple of times about a lady being stabbed. Scott said he dreamt he was flying, came to a window with lots of trees around, looked in the window, and saw someone being stabbed. After Compton read the article, she pointed it out to Scott, and he did not say anything about its content, but said he had read the article. (39 RT 5321-5322, 5327.) In a police interview immediately after Scott's arrest, Compton said Scott described his dream when he and Compton drove by the location where the murder had occurred. (39 RT 5364.)

Additionally, Compton told co-worker Ricardo Decker shortly after he heard of the murder of the librarian, that Scott had told her he had seen the murder while she and Scott drove past the apartment complex on Central Avenue. Scott initiated the dream discussion by telling her something terrible had happened the previous evening. Scott explained he had had a dream the night before, during which he saw the librarian, whose murder was in the newspaper, when she was being murdered. When disbelief was expressed about the dream story, Compton motioned for Scott to come over to the ticket area of the theater. (40 RT 5442-5443.)

Compton asked Scott, "Dave, didn't you have a dream about that librarian being murdered over in the apartments by Canyon Crest?" Scott nodded affirmatively, with his head going up and down. Scott did not seem

like he wanted to talk about his dream. He went back to the door to take tickets. (40 RT 5444-5445.) Also close in time to the murder, Decker saw Scott at the movie theater dressed in black. (40 RT 5446.)

In a police interview, Scott described the bedroom where he saw a woman stabbed. He also drew a diagram of the bedroom. Kenny's bedroom was set up in the manner described and diagramed by Scott. Scott drew and described a doorway going into the bathroom, similar to Kenny's. (41 RT 5534-5538; Exhs. 59, 79A.) When asked if he saw anything else in the bedroom, Scott said he saw something red, a red belt. Kenny had a red belt in her closet that was visible in the bedroom when the closet doors were open. (41 RT 5539-5541.)

Scott did not own a car. Frequently Compton gave Scott rides. She described it as "we always go to Canyon Crest a lot." Also, she took him to open areas for him to work out. Scott asked Compton to drop him off in the area near the 215 and 60 freeways where there was a lot of hills and open land. (39 RT 5339-5340, 5366.)

California Department of Justice criminalist Ricci Cooksey conducted serology screening tests on evidence. He figured out Scott's genetic profile as ABO type O, a secretor, with a PGM type of 2 plus 1 plus. This genetic profile was found in the semen stains on the towel Julia K. used to wipe herself after being raped. (42 RT 5634-5640.) Criminalist Cooksey examined the sexual assault kit gathered from Regina M. looking for semen. A semen stain on her pajama bottoms was the same as Scott's genetic profile. (42 RT 5644-5647.) Criminalist Cooksey also analyzed evidence gathered from the Kenny murder crime scene. A stain on Kenny's pants was a "neat semen stain." This is a semen stain that does not contain a significant contribution of body fluids from the victim. The profile of the semen donor to the stain on Kenny's pants was

the same as Scott's profile. Only eight percent of the general population could have left the particular stain on Kenny's pants. (42 RT 5648-5652.)

Defense

After Scott was advised of his constitutional trial rights by the trial court and his counsel, the defense rested without presenting any evidence. (45 RT 6030, 6036-6038.)

STATEMENT OF FACTS — PENALTY PHASE

Brenda Gail Kenny[13/] was 38 years old when she was murdered by Scott. She was born on January 15, 1952, in Wisconsin, where her father was a student at the University of Wisconsin. (48 RT 6411-6412, 6429, 6432, 6456-6458.) The Kennys were always a close-knit family. Throughout their lives, they enjoyed familial ties, in addition to enjoying each other's company and companionship. (48 RT 6416, 6424, 6429, 6441, 6450-6451, 6462-6463.)

When Gail was a year-and-a-half old, the Kenny family moved to Wickliffe, Ohio, where Mr. Kenny worked as a teacher for a year. This move would commence a lifetime of adventures of moving to new and interesting places including Ohio, Alaska, California, Nevada, New Mexico, and Japan because of Mr. Kenny's professional career in education. (48 RT 6411-6413, 6429.) One Alaskan town they lived in was a small community of only 37 people with no children the same age as the Kenny kids, so they usually played with just each other. (48 RT 6413-6415.)

In 1968, the Kennys moved to Riverside and settled down. By then, Gail was in tenth grade, having skipped eighth grade. While moving was fun, and the Kenny children liked each new place they lived, it took some time to

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13. The Kenny family referred to Kenny as "Gail."

adjust. This nomadic early life probably contributed to the life-long closeness of the Kenny family members. (48 RT 6416-6419.)

Gail attended Riverside Poly High School. Gail graduated in 1971, and followed her sister to Western State College in Gunnison, Colorado. While in college, her sister Mary married Robert Costello, and had a daughter, Charlene. Gail lived across the street from Mary, Robert, and Charlene, and was very involved in their lives, visiting daily. (38 RT 6420-6421, 6431-6432, 6441-6442.)

In addition to the affection they felt for Gail, her family also admired her for her wonderful qualities. Her brother Glenn viewed her as a person who looked out for, and cared about, others. While still in high school, Glenn visited Gail at Western State College. One night, as they walked down a dorm hallway, they looked in at a crowd passively watching as a passed-out girl was being groped by a boy on top of her, trying to fondle her. Individuals in the crowd merely stood and watched while this took place. Immediately upon seeing this sight, Gail rushed forward, grabbed the boy, and threw him out of the room. Gail revived the girl and took care of her through the night. (48 RT 6453.)

Mary graduated college in 1974, and moved with her family to Dallas. After Gail graduated from Western State College, she remained in Colorado and worked in the Denver area from 1977 to 1981 as an insurance underwriter. Gail left Colorado to attend the University of Pittsburgh, where she obtained a masters degree in library science in just nine months. Gail moved to Dallas, and lived with Mary, Robert, and Charlene for a while. When she eventually got her own apartment, it was in the same neighborhood. (48 RT 6421-6423, 6433, 6442-6443.)

In 1986, when Gail was 32 years old, she moved back to Riverside, and moved in with her parents. Gail was very determined to obtain

employment as a librarian. Finding such a position was difficult due to a lack of funding for libraries. While looking for a job, and living with her parents, Gail attended the University of Redlands, where she obtained a masters in business administration. Ultimately Gail was successful and she found employment as a librarian. (48 RT 6522-6423.)

This was a very happy time for Gail's parents because they enjoyed Gail for her company and closeness while she lived with them as an adult. Mr. Kenny retired in 1987, so he was able to spend a lot of time with Gail. (48 RT 6423-6424.)

Gail had a curiosity and enthusiasm that was contagious. In addition to being very close to her siblings and parents, Gail was also very close to her nieces and nephews. Her entire family missed her very much, and suffered not only from her loss, but also from the brutal, senseless manner in which she was killed. (48 RT 6426-6427, 6429, 6441, 6448-6451, 6461-6466, 6469.)

Upon hearing of Gail's death, her sister Mary and her husband Robert cut short an overseas trip, and rushed to her parents' home. After the final services for Gail were over, and her husband had returned to his job in Dallas, Mary remained with her parents for several month, living in their home. Although in her forties, at night, Mary slept in her parents' bed with them because she was afraid. Months later after she had returned home, when Robert left town on a business trip, Mary would go spend the night at a family friend's house, rather than sleep in her home alone. (48 RT 6434-6437, 6447-6448.)

Robert too suffered from fear in his home alone at night. Upon his return home after services for Gail, he walked into a dark house, and for the first time felt fear in his own home. He got a baseball bat to use, if needed, as protection. (48 RT 6443-6448.)

Gail's brother, Glenn, deeply suffered the loss of his sister. The pain was constant and severe. Although Glenn, his wife, and their four kids lived

in a small, safe community in which there had never been a murder, fear was pervasive throughout the Kenny family. Glenn was uncomfortable about leaving his children home alone, even though their oldest son, 13-year-old Shea, was certainly capable of caring for his younger siblings. (48 RT 6426-6427, 6429, 6441, 6448-6459, 6461-6466, 6469.)

Another teacher at the school Glenn worked at told him about an essay Shea had composed regarding his aunt Gail's murder. The school essay was entitled, "Flashback." In it Shea expressed the great sense of loss he feels because of his aunt Gail's murder. Glenn's second son, Kellen, was scared at witnessing the sight of his father break down and cry in such a heartfelt manner at his aunt Gail's service. (48 RT 6457-6459.)

Gail kept a journal. Her last journal entry described her close relationship with her parents. On the day of her murder, September 10, 1992, Gail wrote in her journal, "I'm very in tune with Dad. And Mom is my friend." (48 RT 6469.)

Gail's murder devastated her parents, sister, brother-in-law, brother, nieces, and nephews. Her parents found her body. Seeing her body lay on the bedroom floor with the stab wounds, and her face in death, has haunted her mother, Maxine, and it will continue to do so for the rest of Maxine's life. In Gail's death, they lost a sister, aunt, daughter, and friend. (48 RT 6461, 6469.)

Defense

The defense presented a "snapshot of time and different aspects" of Scott's life. The emphasis was on Scott's difficult childhood. (49 RT 6474.) The jury heard from: Scott's younger sister, Denise Scott; an elementary school teacher, Jeanne Weyers; a high school teacher, Frances Lenore; a neighbor,

Grace Scott[14]; a court staff psychologist, Mary Lane; a school psychologist, Elenor Kniffin; and a hospital staff psychologist, Kenneth Fineman.

Scott had a normal prenatal, neonatal, and birth history, and he reached developmental milestones within normal limits. Early on, when Scott was five or six years old, he began to receive help through the Santa Ana Unified School District. His behavior and learning problems were recognized, and assistance was provided. Scott was diagnosed with hyperkinetic disorder, which is now commonly referred to as attention deficit disorder. This caused Scott difficulty in learning the alphabet and numbers because he was unable to stay still and pay attention. This lead to Scott's placement in special-education classes. Because the Santa Ana Unified School District did not have a program for someone with his needs, he was placed in the Speech and Learning Development Center in Buena Park. (49 RT 6547-6558, 6492.)

Jeanne Weyers was a teacher and administrator at the center, and she developed a deep affinity and affection for Scott. Scott's difficulties were rooted in communication problems. When Weyers first met Scott, he was seven or eight years old. Scott remained at the center for four to five years, until he was twelve or thirteen years old. Initially, Scott was an angry, quiet, withdrawn, and troubled youth. However, by the time he left the center, Scott had progressed greatly and improved tremendously, to become what Weyers viewed as a success. Scott enjoyed math, and his favor subject was art. (49 RT 6477-6483, 6494.)

Scott was disruptive in class. Weyers saw him as very frustrated and angry, as he tore up books and materials and threw these items to the ground. This led Weyers to believe Scott was more aggressive towards objects than people. On occasion Weyers heard Scott speak about sexual intercourse and oral sex. (49 RT 6482-6483.) While Weyers remembered writing a letter to the

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14. Grace Scott was not related to Scott. (49 RT 6510.)

Human Services Agency Department in 1981 that Scott was physically aggressive with other students, she did not recall Scott bloodying a nose or giving anyone a black eye. (49 RT 6502.)

When Scott was eight years old, he was evaluated by a staff psychologist with the Court Evaluation and Guidance Unit in Orange County, due to his mother's arrest for prostitution, to aid in determination of a proper placement for Scott and his younger sister, Denise. There was an allegation that Scott's mother was guilty of having performed prostitution in front of her children. (49 RT 6529-6533, 6535.)

After Scott was removed from his mother's custody, he and his sister went to live with their aunt. Scott's mother tried to regain custody of him; however, he did not want to live with his mother. (49 RT 6479, 6483-6484, 6489-6490.) It was recommended that Scott remain with his aunt. (49 RT 6537.)

Scott was hospitalized for mental-health evaluations. Scott was evaluated by Dr. Fineman at the Huntington Intercommunity Hospital in 1978, when he was seven or eight years old. Scott was oriented during testing and scored within the range of normal on intelligence and achievement tests. Scott appeared to be struggling with primitive, impotent, aggressive, and sexual impulses, which that doctor thought might be due to having been molested or exposed to sexually-related material as a young child. The doctor saw Scott as a tenacious child, prone to get himself in trouble, who felt a lack of control over his environment. (49 RT 6563-6568.)

Dr. Fineman conducted a battery of psychological tests on Scott. He wanted Scott to remain in the hospital longer than the standard six weeks for additional screening tests. The doctor's final diagnose upon discharge was organic brain syndrome, which is a difficulty in understanding while dealing

with various situations. The doctor mentioned a second diagnosis of schizophrenia, but did not elaborate. (49 RT 6569-6570.)

Scott was hospitalized for behavior problems at other times. Teachers reported that he was assaultive toward smaller children, he ran away from school in the second grade, and he urinated on a boy. Scott's home environment was chaotic and disorganized, and he needed medication. (49 RT 6534.)

Scott's sister, Denise, held bad memories of her childhood. Denise and Scott were removed from their mother's care early on. Later in life, Denise saw their mother try and give Scott a twenty-dollar bill; however, Scott would not accept it. (50 RT 6591, 6609.)

Before leaving their mother, Denise remembered living with her mother's boyfriend, Richard Holmes, a violent alcoholic. Scott watched when, once, Holmes was watching TV and he did not feel like getting up, so he spit into Denise's mouth and told her to go in the bathroom and spit for him. Another time, Scott observed that Holmes wanted Denise to eat out of the toilet, and she refused. Later, Holmes took Scott into the bathroom kicking and screaming. Denise did not see what, if anything, happened in there. (50 RT 6591-6592, 6599-6600, 6609.)

The Department of Social Services reported that Scott had been whipped with a belt by his mother, and her boyfriend, because Scott's mother felt it was more effective to have the punishment come from a male figure. The psychologist did not see this as abusive. Scott had his head shaved once as punishment. Scott did not want to live with his mother; he was trying to disengage from her. (49 RT 6535-6563, 6544.)

Eventually they went to live with their aunt Ruth. Ruth's son Jeffrey lived there, as did her other sons and daughters on occasion. Denise lived with her aunt from age four until she left to live in a group home at age fifteen. It was not a happy time for her or Scott. (50 RT 6600-6601.) Throughout the

time Scott lived with his aunt, she would on occasion send Scott away. Once when aunt Ruth and her husband Nathaniel left, Scott stayed home to watch their black Chihuahua. When they returned, Scott said the dog had run away. However, his aunt accused him of doing something with the dog. Denise was unsure how old Scott was at the time; aunt Ruth sent him to Charter Growth Hospital over the dog incident. This was the first time Denise could remember seeing Scott cry. There was little affection in her aunt's house, including between Denise and Scott. Scott tried to stay away from his aunt's house as much as possible. (50 RT 6602-6605.)

Denise and Scott's relationship changed after he found out that she had contracted a venereal disease from being molested by her cousin Jeffrey while living at aunt Ruth's. Her aunt told her to take an entire bottle of pills, which caused Denise to get sick and throw up. Scott went to the store and bought a Sprite for her. This was significant to Denise, because Scott had never before shown any affection toward her. After that, her relationship with Scott improved. (50 RT 6606-6608.)

Scott attended Moreno Valley High School. He was in the special-education program for communicatively handicapped students. His junior-year teacher, Frances Lenore, testified. Scott always did his homework and never disturbed anyone or acted out of the ordinary, except once when he jumped out of his chair and jumped up and down. Scott received good grades, such as an A in English and a B in math. (49 RT 6517-6527.)

From 1988 to 1991, Scott was a gardener for a neighbor, Grace Scott.[15/] Grace found Scott to be very meticulous, and praised him for the good job he did. Grace found Scott funny, and never saw him act bizarrely. Scott

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15. Grace Scott was not related to David Scott. (49 RT 6510.) To avoid confusion, Respondent will refer to Grace Scott as Grace, and continue to refer to David Scott as Scott.

told Grace that her alcoholic husband did not treat her right and was abusing her. Even when Scott moved away to the other side of Moreno Valley, he would still garden for her, walking the three to five miles from his house to hers. Grace was very fond of Scott. (49 RT 6514, 6510-6513.)

Scott's mother was arrested for prostitution nine times.[16] She was also arrested for the following crimes: burglary on June 5, 1986; petty theft on November 23, 1986, January 14, 1988, and February 26, 1991; willful cruelty to child and contributing to the delinquency of a minor on April 25, 1979, and March 14, 1980; trespassing on August 18, 1980; obstruction, resisting public officer, possession of controlled substance, misuse of needle or syringe, trespass occupied property without consent on August 30, 1980; failure to provide on March 25, 1981; and using or being under the influence of a controlled substance on May 11, 1982. Scott's mother was convicted of disorderly conduct and solicitation of prostitution seven times.[17] She was also convicted of trespass on August 18, 1980, and shoplifting on February 26, 1991. (49 RT 6578-6580.)

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16. It was stipulated that Mary Scott was arrested for disorderly conduct and solicitation of prostitution (Penal Code, § 647, subd. (b)) on the following dates: July 28, 1978, October 25, 1978, May 10, 1979, June 5, 1981, November 8, 1981, November 14, 1981, September 9, 1982, December 3, 1990, and February 26, 1991. (49 RT 6578-6579.)

17. On May 10, 1979, June 5, 1979, January 5, 1981, January 30, 1982, September 9, 1982, February 13, 1984, and February 26, 1991. (49 RT 6579.)

ARGUMENT

I.

THE TRIAL COURT PROPERLY DENIED SCOTT'S MOTION TO SEVER THE MURDER CHARGE FROM THE OTHER CRIMINAL OFFENSES COMMITTED DURING HIS FOUR-MONTH CRIME SPREE

Scott claims the trial court committed reversible error in denying his motion to sever the murder charge (count one) from the other twenty-one counts in the indictment. (AOB 86-163.) Specifically, Scott contends intent was not at issue in connection with the murder charge; therefore, the other crimes were not admissible to show intent. (AOB 99-107.) Similarly, he claims there was no contested issue regarding a common plan or scheme because there was no dispute a homicide occurred; the only issue as to the murder was the identity of the perpetrator. (AOB 117-125.) Scott argues there were insufficient factual similarities shared between the murder and the non-murder counts to create cross-admissibility as to intent, common plan or scheme, or identity. (AOB 107-117, 126-129, 129-130.) Finally, Scott claims he suffered substantial prejudice from joinder of the criminal charges. (AOB 140-163.) Neither the law nor the facts support Scott's claims. The trial court properly joined the murder count, with its corresponding special circumstances, with the other charges committed during Scott's four-month crime spree.

Penal Code sections 954[18] and 954.1[19] govern joinder of criminal charges. "'The law prefers consolidation of charges.'" (*People v. Stanley* (2006) 39 Cal.4th 913, 933, quoting *People v. Ochoa* (1998) 19 Cal.4th 353, 409.) When the charged offenses are of the same class, joinder is proper under Penal Code section 954. (*People v. Manriquez* (2005) 37 Cal.4th 547, 574, citing *People v. Kraft* (2000) 23 Cal.4th 978, 1030; *People v. Harrison* (2005) 35 Cal.4th 208, 232; *People v. Bradford* (1997) 15 Cal.4th 1229, 1315.)

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18. Penal Code section 954 provides:

> "An accusatory pleading may charge two or more different offenses connected together in their commission, or different statements of the same offense or two or more different offenses of the same class of crimes or offenses, under separate counts, and if two or more accusatory pleadings are filed in such cases in the same court, the court may order them to be consolidated. The prosecution is not required to elect between the different offenses or counts set forth in the accusatory pleading, but the defendant may be convicted of any number of the offenses charged, and each offense of which the defendant is convicted must be stated in the verdict or the finding of the court; provided, that the court in which a case is triable, in the interests of justice and for good cause shown, may in its discretion order that the different offenses or counts set forth in the accusatory pleading be tried separately or divided into two or more groups and each of said groups tried separately. An acquittal of one or more counts shall not be deemed an acquittal of any other count."

19. Penal Code section 954.1 states:

> "In cases in which two or more different offenses of the same class of crimes or offenses have been charged together in the same accusatory pleading, or where two or more accusatory pleadings charging offenses of the same class of crimes or offenses have been consolidated, evidence concerning one offense or offenses need not be admissible as to the other offense or offenses before the jointly charged offenses may be tried together before the same trier of fact."

This Court has recognized that murder, attempted murder, robbery, and rape are assaultive offenses of the same class and properly joined under Penal Code section 954. (*People v. Stanley, supra*, 39 Cal.4th at p. 934; *People v. Stitely* (2005) 35 Cal.4th 514, 531; *People v. Maury* (2003) 30 Cal.4th 342, 395.) Scott never disputed that the charged offenses belonged to the same class, and therefore, joinder was statutorily permitted. (9 CT 2536.) Specifically, Scott's counsel stated:

> Defendant acknowledges that the preliminary requirements for joinder under Penal Code section 954 are here met, as the charges alleged in counts II through XXIII [*sic*] are either of the "same class" as the crime of murder or are (allegedly) "connected together in their commission" with crimes of the same class.

(*Id.*) Scott does not retreat from this concession on appeal.

A trial court's ruling on a motion to sever is reviewed for abuse of discretion. (*People v. Manriquez, supra*, 37 Cal.4th at p. 574; *People v. Bradford, supra*, 15 Cal.4th at p. 1315.) The record before the trial court at the time of its ruling on the severance motion is examined to determine whether discretion was abused. (*People v. Mendoza* (2000) 24 Cal.4th 130, 161; *People v. Price* (1991) 1 Cal.4th 324, 388.) An abuse of discretion occurs when the trial court's ruling "'falls outside the bounds of reason.'" (*People v. Carter* (2005) 36 Cal.4th 1114, 1153, quoting *People v. Osband* (1996) 13 Cal.4th 622, 666.) Since it was statutorily proper to join the charged offenses, Scott bore the burden to establish "a clear showing of potential prejudice." (*People v. Stanley, supra*, 39 Cal.4th at p. 934; *People v. Catlin* (2001) 26 Cal.4th 81, 110; *People v. Osband, supra*, at p. 666; *People v. Bean* (1988) 46 Cal.3d 919, 938.)

Here, the trial court properly denied Scott's motion to sever. The offenses were identical or of the same class. After reviewing the original pleadings, supplemental pleadings, and listening to extensive arguments of

counsel, the trial court denied severance. (9 CT 2532-2581; 10 CT 2589-2603, 2604-2606, 2610-2620; 11 RT 1811-1847; 12 RT 1912-2012.) The trial court properly found there was cross-admissibility of evidence between the offenses. (12 RT 1983-1986, 2011-2012.) The trial court explicitly found joinder was not so prejudicial as to violate Scott's due-process rights. (12 RT 2011-2012.)

> Refusal to sever may be an abuse of discretion where: (1) evidence on the crimes to be jointly tried would not be cross-admissible in separate trials; (2) certain of the charges are unusually likely to inflame the jury against the defendant; (3) a "weak" case has been joined with a "strong" case, or with another "weak" case, so that the "spillover" effect of aggregate evidence on several charges might well alter the outcome of some or all of the charges; and (4) any one of the charges carries the death penalty or joinder of them turns the matter into a capital case.

(*People v. Sandoval* (1992) 4 Cal.4th 155, 172-173; *People v. Carter*, *supra*, 36 Cal.4th at p. 1154; *People v. Memro* (1995) 11 Cal.4th 786, 849-850; *Williams v. Superior Court* (1984) 36 Cal.3d 441, 453.) This Court has clarified that these criteria are not of equal significance. (*People v. Balderas* (1985) 41 Cal.3d 144, 171-172.)

The initial assessment as to whether a combined trial was prejudicial is "to determine whether evidence on each of the joined charges would have been admissible, under Evidence Code section 1101, in separate trials on the others. If so, any inference of prejudice is dispelled." (*People v. Balderas*, *supra*, at pp. 171-172.) While cross-admissibility of evidence is sufficient to negate prejudice, it is not mandatory to allow consolidation of offenses in a single trial. (*People v. Bradford*, *supra*, 15 Cal.4th at p. 1314; Pen. Code, § 954.1.) Moreover, the absence of cross-admissibility alone is not sufficient to demonstrate prejudice. (*People v. Carter*, *supra*, at p. 1154; *People v. Bradford*, *supra*, at pp. 1314-1316; *People v. Sandoval*, *supra*, at p. 173.)

Evidence Code section 1101 determines whether evidence is cross-admissible. Evidence of other crimes is not admissible to prove the defendant is a bad person, or someone who possesses character flaws, or one who is predisposed to commit crimes. (Evid. Code, § 1101, subd. (a).) However, other-crimes evidence

> "is admissible to prove, among other things, the identity of the perpetrator of the charged crimes, the existence of a common design or plan, or the intent with which the perpetrator acted in the commission of the charged crimes."

(*People v. Catlin*, *supra*, 26 Cal.4th at p. 111, quoting *People v. Kipp* (1998) 18 Cal.4th 349, 369; *People v. Ewoldt* (1994) 7 Cal.4th 380, 401-403.) Evidence of other criminal conduct is admissible to prove identity, common design or plan, or intent if the misconduct is sufficiently similar to support a rational inference of identity, common design or plan, or intent. (*Ibid.*; Evid. Code, § 1101, subd. (b).)

On appeal, Scott attacks the trial court's ruling finding the evidence between the offenses was cross-admissible. (AOB 99-145.) However, Scott's analysis is fundamentally flawed because he fails to consider or mention the special circumstances of the murder being committed during the commission or attempted commission of burglary and/or rape. When the murder with its accompanying special circumstances is considered in connection with the other charged crimes, it is clear there was cross-admissibility of evidence.

The degree of similarity was sufficient to support the inference that it was Scott who entered Kenny's home with the intent to commit a felony, that he was the one who raped or attempted to rape her, and that he killed her. There was sufficient similarity to show that Scott's behavior was not spontaneous, isolated, or aberrant in committing the criminal acts against Kenny. Instead, Scott was stalking victims in the Canyon Crest area of

Riverside, preying on women who were home alone at night, so he could enter their homes and victimize them.

Scott burglarized the homes of Kenny, Cliff, Regina M., Gonzales, Griffin, and Julia K. while occupied, under the cover of the darkness of night. All of the women were alone in their homes, except for Cliff. When Cliff told Scott she was a house guest and the homeowners were home, he lead her into the kitchen to return the knife he had obtained from there, and left without committing any further crimes. Notably, the knife that was used to kill Kenny was obtained from her kitchen. The assailant possessed a weapon or weapons during the crimes involving all of these victims. These women were victims of crimes within a three-month period, commencing with the murder of Kenny on September 12, 1992, until the December 10, 1992 crimes involving Julia K. In all instances, the burglar entered or existed through a window or sliding glass balcony door. All of these women lived in the Canyon Crest area of Riverside, except for Julia K., who lived in nearby Moreno Valley. Several of these crimes happened within blocks of each other. (Exh. 31.)

When Scott raped Regina M. and Julia K., he withdrew prior to ejaculation, resulting in an absence of semen inside his victims' bodies. However, semen was found on their clothing. Semen was also found on Kenny's clothing. Scott ordered Regina M. and Julia K. to wipe themselves off with a towel after raping them. He also had them undress prior to the rape, and then redress after the rape. Kenny was found dressed. Scott had Regina M. strip the sheets from her bed, put the sheet in the bathtub, and run water over them. There were no sheets or bedding found on Kenny's bed. The serology characteristics of the semen left at the rape scenes of Kenny, Regina M., and Julia K. was shared by only 8% of the population, and Scott is included within that 8% of the population. (42 RT 5639-5940.)

Scott tied up Julia K. and Joseph C. with what was available in their home, speaker wire. (37 RT 4964-4967, 5035-5037.) The cord to the iron in Kenny's bedroom had been cut, supporting an inference that the cord could have been used to tie up Kenny or an attempt was made to tie her up. (39 RT 5394.)

Scott demonstrated to his victims he would use deadly force if he felt it necessary. When Gonzales jumped off her couch upon seeing the black-dressed assailant entered her home, he threatened to kill her if she moved. (38 RT 5161-5163.) When Julia K. struggled with Scott when she initially attempted to escape her home, he placed a gun to her head. (37 RT 4947-4949.) After Edward Buhr shouted at the man coming in his bedroom window, the man held the gun out and told Buhr he would blow off his head if he moved. (38 RT 5184.) Upon being informed that her husband was due to arrive home, Scott told Julia K. he might have to kill her husband. (37 RT 4957-4959.) With a gun pointed at Joseph C.'s head, Scott threatened to shoot him. (37 RT 5045-5046.) During the struggle with Phil Courtney, Scott stabbed him several times. (35 RT 4683.) When Howard Long rushed to Courtney's aid, and hollered to Scott to halt while Long had his gun pointed, Scott fired a shot at him. (36 RT 4804-10.)

Evidence from the other offenses would have been admissible in the Kenny murder count, had it been tried separately. Contrary to Scott's argument, it was not just the murder that can be considered in connection with the other-crimes evidence. Scott is also mistaken in his claim that there was no issue of intent because (1) he did not admit to being at the scene (AOB 99-107), (2) there was no issue as to common design or plan because there was no question a murder occurred, and (3) the only issue was the identity of Kenny's murderer (AOB 117-125, 129-130). Rather, the other-crimes evidence was relevant to intent, identity, or common design or plan, and must be considered

in connection with the rape and burglary special circumstances alleged in count one.

Moreover, the evidence needed to be "sufficiently similar," not identical as urged by Scott. Given that Scott was entering a number of people's homes, the dynamics of each encounter is bound to be slightly different, given human nature. Even given this variable, the crimes involving Kenny were sufficiently similar to the sexual assaults, burglaries, assaults, false imprisonments, kidnapping, robbery, and attempted murders alleged in counts two through twenty-two. The trial court correctly determined evidence from the other criminal offenses was cross-admissible. Accordingly, any inference of prejudice was dispelled. (*People v. Carter*, *supra*, 36 Cal.4th at p. 1154; *People v. Balderas*, *supra*, 41 Cal.3d at pp. 171-172.)

Even assuming *arguendo* the other-offenses evidence was not cross-admissible, the trial court's denial of Scott's motion to sever was nevertheless proper. This Court has held that cross-admissibility ordinarily dispels prejudice; the mere absence of cross-admissibility does not suffice to demonstrate prejudice. (*People v. Stitely*, *supra*, 35 Cal.4th at p. 532; *People v. Osband*, *supra*, 13 Cal.4th at p. 667; *People v. Bradford*, *supra*, 15 Cal.4th at pp. 1314-1316.) The trial court also considered the other factors articulated by this Court to assess prejudice. (11 RT 1816-1838.) Those factors are the nature of the other crimes, the relative strengths of the cases, and the availability of the death penalty. (*People v. Sandoval*, *supra*, 4 Cal.4th at pp. 172-173; *People v. Marshall* (1997) 15 Cal.4th 1, 27-28; *People v. Bradford*, *supra*, at p. 1315.) As to the last factor, there was no question the Kenny murder and special circumstances permitted the availability of capital punishment. Joining the other offenses to count one did not change this fact.

Relying on *People v. Memro*, *supra*, 11 Cal.4th 786, the trial court examined the inflammatory nature of the crimes alleged in the indictment

and compared them to each other. All of Scott's nocturnal attacks were upon vulnerable victims in or about to enter their homes. Some counts alleged rape, as was alleged in a special circumstance connected to count one. Other counts alleged burglary, again, as did a special circumstance for count one. Two counts of attempted murder were alleged. But these were not more inflammatory than the murder alleged in count one. The offenses were equally shocking and disturbing. The trial court correctly assessed the other crimes were on par with the nature of the crimes alleged in count one. (11 RT 1816-1819.)

The trial court also examined the relative strengths and weaknesses of the offenses. Scott's counsel urged that the murder count was "weak" due to a lack of eyewitness testimony, no property was taken from Kenny's home, and Scott was not found in possession of any of Kenny's property. However, the trial court understandably rejected this view and noted count one may have been stronger than some other counts. The trial court specifically cited to Scott's admissions or confessions to his co-workers and girlfriend about his dream of seeing the murdered librarian, and Scott presented newspaper articles regarding her murder when met with scepticism by his co-workers. Additionally, Scott drew for police a diagram of Kenny's bedroom and correctly described the location of items and doorways. Scott told a detective he saw something red, a red belt, in Kenny's closet, where the detective had seen a red belt that was visible from Kenny's bedroom. Scott was a student at Riverside City College, and Kenny worked as a librarian at that same city college. Scott also had a card for the Riverside City and County Public Library, another place Kenny worked as a librarian. The trial court correctly viewed the offenses in terms of relative strength and weakness as being equal. None of the other factors to be considered demonstrated prejudice to Scott from the joining of the other criminal offenses to count one.

Scott also claims joinder of the offenses violated due process under the United States Constitution. (AOB 160-163.) A defendant bears a heavy burden to demonstrate joinder of offenses rendered his trial fundamentally unfair. (*People v. Ochoa*, *supra*, 19 Cal.4th at p. 409.) The United States Supreme Court has held that "[i]mproper joinder does not, in itself, violate the Constitution. Rather, misjoinder . . . rise[s] to the level of a constitutional violation only if it results in prejudice so great as to deny a defendant his . . . right to a fair trial." (*United States v. Lane* (1986) 474 U.S. 438, 446, fn. 8 [106 S.Ct. 725, 88 L.Ed.2d 814].) While undue prejudice may arise from the joinder of strong and weak cases, the federal courts agree with this Court that cross-admissible evidence dispels any potential improper influence stemming from joinder. (*Sandoval v. Calderon* (9th Cir. 2001) 241 F.3d 765, 772, citing *Bean v. Calderon* (9th Cir. 1998) 163 F.3d 1073, 1084-1085; accord *People v. Osband*, *supra*, 13 Cal.4th at p. 666.) This Court has noted that reversal is still possible, even when the trial court's ruling was correct when made, if a defendant shows that joinder actually resulted in "gross unfairness" amounting to a denial of due process. (*People v. Ochoa*, *supra*, 19 Cal.4th at p. 409; *People v. Arias* (1996) 13 Cal.4th 92, 127.)

As set forth above, evidence of each of the criminal offenses was cross-admissible to the others. Moreover, considerable evidence supported every element of each count. The trial court instructed the jury to find and decide each special circumstance alleged and each offense charged separately. (46 RT 6176-6176, 6185-6189.) The jury was also instructed its finding as to each count was to be stated in a separate verdict. (46 RT 6185, 6223.) Thus, Scott's complaint that the trial court failed to instruct or admonish the jury to decide each count on its own merits (AOB 159) is without merit. To the extent Scott complains there was no limiting instruction, this Court has held trial courts do not have a sua sponte duty to furnish a limiting instruction on

cross-admissible evidence in a trial of multiple crimes. (*People v. Rogers* (2006) 39 Cal.4th 826, 853-854, quoting *People v. Hawkins* (1995) 10 Cal.4th 920, 942.) It is clear from the record, the jury received and followed the trial court's instructions, and considered the evidence as to the individual charges as evidenced by their inability to reach a unanimous verdict on counts seven, eight, nine, and ten. (47 RT 6292, 6297, 6306-6308; 22 CT 6221-6222; 23 RT 6239-6240, 6311-6312.)

The trial court properly denied Scott's motion to sever count one from the other twenty-one counts. The evidence of these crimes was cross-admissible to each other. Scott failed to meet his burden of showing prejudice as a result of the trial court ruling. The claim should be denied.

II.

PROBABLE CAUSE EXISTED FOR POLICE TO ARREST SCOTT; THEREFORE, NO ILLEGALITY OR TAINT ATTACHED TO HIS SUBSEQUENT STATEMENTS AS A RESULT OF HIS ARREST

Scott claims the trial court erred in finding probable cause existed to arrest him. Based on this belief, that a lack of probable cause made his arrest illegal, Scott claims his subsequent statements to police should have been suppressed as fruit of his "illegal" arrest. Scott alleges his Fourth, Fifth, and Fourteenth Amendment rights to be free from illegal search and seizure, self-incrimination, and rights to due process and a fair trial were violated by his arrest and the admission into evidence of his subsequent statements. (AOB 168-176.) Scott's fundamental premise is faulty; therefore, his conclusion is incorrect. Sufficient probable cause existed for his arrest. No illegality or taint attached to Scott's statements as a result of his arrest. Scott received adequate process and a fair trial.

On September 24, 1996, Scott filed a motion to suppress his statements, claiming he was arrested without probable cause and his statements were the fruit of that constitutional violation. Scott claimed there was insufficient information from an anonymous call to police to provide probable cause to arrest him. (8 CT 2151-2162.) Scott attached as exhibits to his motion a transcript of an anonymous phone tip received by police the morning of January 21, 1993, and a redacted two-page police report of an interview with a person who was subsequently identified as Ricardo Decker. (8 CT 2159-2162.) The prosecution filed an opposition to Scott's suppression motion on October 7, 1996, and included as an exhibit the same two-page police report attached to Scott's motion that included the redacted information, and an additional page containing information of a police interview with Terry DeLatorre. (9 CT 2304-2311.)

On October 15, 1996, the trial court held a suppression hearing, during which Riverside Police Detective Christine Keers testified. The detective confirmed she wrote the police report dated January 25, 1993, that was attached as Exhibit A to the prosecution's opposition to Scott's suppression motion. Detective Keers testified that on the date of Scott's arrest, January 21, 1993, she was familiar with the investigation into librarian Brenda Gail Kenny's death, and aware of various crimes that had been reported in the Canyon Crest area attributed to a suspect wearing dark "ninja" clothing, including tabbie boots. She was also aware of the assault on Phillip Courtney that occurred January 18, 1993. Courtney's assailant used a gun during the Courtney assault, and a throwing star, a martial-arts weapon, was recovered from this crime scene. Both Kenny and Courtney were stabbed by their assailant. The entire series of crimes involving the ninja-clothed assailant occurred in the Canyon Crest area, except for one that happened in Moreno Valley. (7 PRT 1528-1529, 1542, 1546, 1548, 1551-1553.)

On January 21, 1993, Detective Keers' partner, Detective DeVinna, received information from Detective Heredia that an anonymous phone call had been received from a citizen informant advising who he thought was responsible for these crimes, David Scott. (7 PRT 1528-1529, 1542, 1546, 1548, 1551.) Based on information from the anonymous caller that the possible suspect (Scott) worked at the Canyon Crest Theater on Day Street in Moreno Valley, Detectives Keers and DeVinna went there on January 21, 1993. At the theater, the detectives contacted manager, Terry DeLatorre, who confirmed that Scott worked there, a lot of employees were afraid of him, he had been seen dressed in black ninja clothing, with ninja throwing stars, and he had been seen jumping from rooftop to rooftop after work. She also confirmed Scott's address. DeLatorre said Scott had told her he had been chased through the hills

of Canyon Crest by members of the Riverside Police Department. (7 PRT 1540-1541, 1550.)

Detective Keers also spoke to the only other employee then at the theater, the projectionist, Ricardo Decker. Once Decker started talking, the detective recognized his voice from the anonymous tip call. When asked, Decker confirmed he made the anonymous call to the police department. (7 PRT 1542-1543.) At the time, Decker was 21 years old, appeared to be of average intelligence, answered the detective's questions in an appropriate manner, and had a command of the English language. (7 PRT 1544.)

Decker said Scott carried a knife, throwing stars, and a sword on his back. Scott told Decker he practiced martial arts and ninja activities in the hills of Canyon Crest. (7 PRT 1548-1949.)

Decker described an incident that occurred on January 17, 1993, where Scott was dressed in a ninja outfit, carrying a sword and knife, and he scared Decker. After frightening Decker, Scott said he had stabbed people before, and he always sneaks up on people. Decker said Scott owned a .45-caliber handgun. (7 PRT 1545-1546.)

Scott's girlfriend, Stephanie Compton, told Decker that Scott had held a gun to her head. Compton also told Decker that two days prior to press release of information about the death of the librarian, Scott had told her of a vision wherein he saw the librarian being stabbed. Scott told Compton this while they drove past the Canyon Crest apartment complex at 600 Central. Scott pointed to the complex and said, "A woman was murdered over there." (7 PRT 1547-1548.)

Based on the information gained from Decker and DeLatorre, the law enforcement team split up, with some waiting at the theater for Compton to show up at work, some going to Scott's residence, and others going back to

the station.[20] Subsequently, officers at Scott's Graham Street residence relayed to the detective that Scott and another individual exited the residence and were about to leave in a car. At that point, Detective Keers requested the vehicle be stopped and Scott detained. (7 PRT 1550-1551.)

Scott's counsel cross-examined Detective Keers. She was questioned about the perceived discrepancy in the source of Decker's information regarding Scott's comments of having dreamt about the killing of the librarian, as coming from Scott as stated in the phone tip or *via* Compton as stated in the interview. Detective Keers asked Decker about this, and he explained there were numerous conversations between he and Scott, and he and Compton, and Decker was not exactly sure who told him what portions. Decker explained this was the reason he said in the phone tip that Scott had provided the information. (7 PRT 1568-1574.) Decker also said that, about three weeks earlier, he and Scott had a conversation wherein Scott told him he had stabbed a few people. (7 PRT 1574-1575.) The defense did not present any witnesses at the suppression hearing. (7 PRT 1585.)

After hearing Detective Keers' testimony (7 PRT 1538-1579) and argument of counsel (7 PRT 1585-1601), the trial court found there was sufficient probable cause for police to arrest Scott on January 21, 1993. The trial court found that Decker was a citizen informant who provided information to police out of his concern for the commission of offenses by Scott over a substantial period of time. The trial court denied Scott's motion to suppress his statements. (7 PRT 1601-1604; 8 CT 2278.)

An arrest made without a warrant must be supported by probable cause. (*Kaupp v. Texas* (2003) 538 U.S. 626, 630 [123 S.Ct. 1843, 155 L.Ed.2d 814].) "Probable cause exists when the facts known to the

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20. Although told Compton was scheduled to work that afternoon, this was a mistake because it was her day off. (7 PRT 1550.)

arresting officer would persuade someone of 'reasonable caution' that the person to be arrested has committed a crime." (*People v. Celis* (2004) 33 Cal.4th 667, 673, citing *Dunaway v. New York* (1979) 442 U.S. 200, 208, fn. 9 [99 S.Ct. 2248, 60 L.Ed.2d 824].) "[P]robable cause is a fluid concept — turning on the assessment of probabilities in particular factual contexts . . . ." (*Illinois v. Gates* (1983) 462 U.S. 213, 232 [103 S.Ct. 2317, 76 L.Ed.2d 527].) As such, probable cause is incapable of a precise definition. (*Maryland v. Pringle* (2003) 540 U.S. 366, 371 [124 S.Ct. 795, 157 L.Ed.2d 769].) "'The substance of all the definitions of probable cause is a reasonable ground for belief of guilt,'" and that belief must be "particularized with respect to the person to be . . . seized." (*Ibid.*; *People v. Celis*, *supra*, at p. 673.)

The party moving for suppression bears the burden to show the police officers acted unlawfully. (*People v. Williams* (1988) 45 Cal.3d 1268, 1300, citing *Badillo v. Superior Court* (1956) 46 Cal.2d 269, 272.) As this Court has stated, "Cause to arrest exists when the facts known to the arresting officer would lead a person of ordinary care and prudence to entertain an honest and strong suspicion that the person arrested is guilty of a crime." (*People v. Price*, *supra*, 1 Cal.4th at p. 410, citing *People v. Harris* (1975) 15 Cal.3d 384, 389.) Here, given the information known to the arresting officer, a reasonable and prudent person would have had an honest and strong suspicion that Scott was guilty of criminal acts, including Brenda Gail Kenny's murder and the crimes attributed to the "ninja" rapist. Scott failed to establish that his arrest by the Riverside Police Department lacked probable cause.

The anonymous phone tip the Riverside Police Department, received the morning of January 21, 1993, provided detailed information about Scott, including his social security number, his place of employment, that he dressed in a black ninja outfit, he carried a sword, knife, and gun, that he had talked about stabbing people, and that he had been chased by police but never caught.

The tip included Scott's physical description, which matched the description provided by victims Cliff, Regina M., Griffin, Julia K., Joseph C., Courtney, and Long. It also included information about the Kenny murder, in relevant part:

> . . . when that librarian lady had gotten murdered in the Canyon Crest apartments, he had told me that he had dreamt about it or either that, or he had had an out of body experience where he actually had done the crime and I just thought he was just full of it at the time, but uh, if, I didn't, I had no idea uh if this would be related to it and when I read the article yesterday it fit the description.

(8 RT 2159.)

Contrary to Scott's assertion, the police were not relying solely on this anonymous phone tip to effectuate Scott's arrest. Rather, after receiving the detailed anonymous phone tip, detectives went to the Canyon Spring Cinema and verified with the assistant manager, DeLatorre, that Scott was employed there. DeLatorre told police she and the night manager had discussed the possibility that Scott was the ninja rapist. DeLatorre verified Scott had been seen wearing a ninja outfit, he had martial-arts stars, and Scott had said he lost one of the stars in the past few days. The loss of the throwing star coincided with the information police had, because they had recovered such an item at the crime scene where Courtney had been stabbed. (7 PRT 1540-1541, 1550; 9 CT 2309.)

Police then spoke to the only other employee then at the cinema, projectionist Ricardo Decker. Decker did not identify himself as the caller who left the anonymous tip until questioned directly by Detective Keers. Decker then repeated and expanded up the information he left in the tip. Detective Keers questioned Decker about the discrepancy between the source of Scott's dream about seeing the librarian, Kenny, being stabbed. The crucial content, that days prior to newspaper accounts being published, Scott described he had

dreamt about Kenny being stabbed, while he was driving by the Canyon Crest apartments, did not change. Decker merely clarified the source of the information about Scott's dream of seeing Kenny being stabbed came from Scott *via* Compton, not Scott directly. This clarification did not render Decker's information unreliable, nor did it undermine his credibility as being a concerned citizen reporting what he suspected was criminal conduct.

Contrary to Scott's claim that Decker's information was not verifiable, law enforcement did verify it. Decker did not give "two entirely different versions of the same incident." (AOB 173.) Rather, in leaving his anonymous phone tip, Decker attributed certain information as coming directly from Scott, when it came from Scott *via* his girlfriend, Compton. Given the information known to police at the time of his arrest, a person with ordinary care and prudence would have cause to entertain an honest and strong suspicion that Scott was guilty of a crime. The evidence supported the trial court's finding Decker was a citizen informant. Even absent this finding, Decker's information both from the anonymous phone tip and provided in the interview, plus information gained from DeLatorre, coupled with the information Detective Keers gained from having investigated and received information from the Kenny, Cliff, Regina M., Griffin, Julia K., Joseph C., Courtney and Long crime scenes, justified the trial court correctly finding that probable cause supported the arrest of Scott. Since Scott's arrest was supported by probable cause, no illegality tainted his subsequent statements to police. Therefore, the trial court properly denied Scott's motion to suppress his statements.

III.

THE TRIAL COURT PROPERLY DETERMINED POLICE ADEQUATELY ADVISED SCOTT OF HIS RIGHTS UNDER *MIRANDA*

Scott claims police "extensively interrogated" him before advising him of his constitutional rights pursuant to *Miranda v. Arizona* (1966) 384 U.S. 436 (86 S.Ct. 1602, 16 L.Ed.2d 694). Scott contends that police deliberately employed improper tactics intending to elicit incriminating statements from him prior to advising him of his *Miranda* rights. Scott argues that the police pre-warning questioning tainted the process to the extent that his post-*Miranda* incriminating statements should have been excluded. Scott claims his Fifth Amendment right against self-incrimination was violated, and the entire judgment must be reversed. (AOB 177-190.) The trial court excluded some of Scott's pre-warning statements, finding they might be potentially incriminating, and refused to exclude other statements, finding they provided biographical or booking-type information. Based on the law and the facts, the trial court properly found no constitutional violation that warranted exclusion of Scott's post-*Miranda* statements.

After Scott was arrested on January 21, 1993, he was taken to the Riverside Police Department's downtown station. Beginning at 8:15 p.m., Detectives Theuer and Heredia joined Scott. Detective Heredia commenced by telling Scott they needed some personal information which was standard when interviewing someone. (1 3rdSuppCT 149.) About 15 minutes later, Scott was advised of his rights under *Miranda* on page sixteen of the interview transcript. (1 3rdSuppCT 163.)

The majority of the first sixteen pages of the interview transcript were questions and answers concerning biographical or booking-type information. (15 RT 2409; 1 3rdSuppCT 149-163.) The trial court found that the information on pages one through six was booking information and not

incriminating. (15 RT 2412; 1 3rdSuppCT 149-153.) However, on page three, Scott was asked about nicknames and he responded, "Home Boy, . . . Brick . . . and Bruce." (1 3rdSuppCT 150.) The trial court excluded this question and answer, not because of a *Miranda* violation, but as potentially involving an Evidence Code section 352 issue. (15 RT 2412.)

The trial court then went through pages seven through sixteen and excluded all non-booking type information, potentially prejudicial information under the Evidence Code section 352 standard, and potentially incriminating responses because *Miranda* advisement had not occurred. Specifically, on page seven, the trial court found Scott's statement "martial arts" in response to an inquiry about his hobbies to be potentially incriminating and excluded it. (15 RT 2413; 1 3rdSuppCT 154.) On page eight, the types and length of time Scott spent practicing martial arts was excluded. (15 RT 2413; 1 3rdSuppCT 155.) On page nine, the trial court did not find inherently incriminating, but excluded under Evidence Code section 352, questions and answers about whether Scott practiced martial arts with his roommates. (15 RT 2413; 1 3rdSuppCT 156.) On page ten, information about military experience by Scott and his family members was tentatively excluded, more because of Evidence Code section 352 concerns then lack of *Miranda* advisement. Also excluded was information that Scott went to the Philippines with his father who was in the military and that Scott received three years of *tae kwon do* training while in the Philippines. The trial court noted that questions regarding Scott's father were probably innocuous, but could lead to potentially incriminating information and as such was excluded. (15 RT 2414-2415; 1 3rdSuppCT 157.) On page eleven, the information regarding whether Scott had been previously arrested and that his mother and stepfather had been arrested for child abuse was excluded. (15 RT 2416; 1 3rdSuppCT 158.) On page twelve, the fact Scott had received a ticket for toilet-papering a house

was excluded. (15 RT 2416; 1 3rdSuppCT 159.) On page thirteen, questions about whether Scott worked the previous night, and worked mostly at night, were excluded as potentially incriminating. (15 RT 2417; 1 3rdSuppCT 160.) The trial court excluded all of pages fourteen and fifteen because Scott discussed martial arts, his training instructor and the location where he trained, when he had lasted trained, what training consisted of, and that he liked to train at night for extended periods of time. (15 RT 2417; 1 3rdSuppCT 161-162.) A portion of page sixteen was excluded where Scott concluded his comments about the various arts within his martial-arts training.[21] (15 RT 2417; 1 3rdSuppCT 163.) The trial court refused to exclude the detective's question about how Scott felt about speaking with them and his response given just prior to the *Miranda* warnings.[22] (15 RT 2417-2418; 1 3rdSuppCT 163.)

Here, after listening to a tape recording of the initial portion of the interview (the sixteen pages of the interview transcript referred to above), the trial court found that a *Miranda* warning was given to Scott, and it was

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21. Scott explained the form of martial arts he practiced included meditation, the art of invisibility, the art of escape, the art of tools, the art of climbing, and the art of how to kill somebody. (1 3rdSupp.CT 162-163.)

22. Detective Heredia advised Scott as follows:

> Today's date is the 21st, gosh it's 8:30 . . . okay you have the right to remain silent, anything you say can and will be used against you in a court of law. You have a right to talk to a lawyer and to have him present with you while you're being questioned. If you cannot afford to hire a lawyer, one will be appointed to represent you before any questioning if you wish one. Do you understand each of these rights I've explained to you?

(1 3rdSuppCT 163.) Scott answered affirmatively. The detective then inquired, "Having these rights in mind, do you wish to talk to me?" Again, Scott answered affirmatively. (1 3rdSuppCT 164.)

adequate, sufficient, and in compliance with *Miranda v. Arizona*. (15 RT 2447.)

After being taken into custody by police, a person must be given *Miranda* warnings apprizing the person of his or her right to remain silent, that any statement may be used against the person, and that the person has the right to counsel, retained or appointed. (*Miranda*, *supra*, 384 U.S. at pp. 444-445; *Dickerson v. United States* (2000) 530 U.S. 428, 435 [120 S.Ct. 2326, 147 L.Ed.2d 405]; *People v. Boyer* (1989) 48 Cal.3d 247, 271.) Statements elicited in noncompliance of this rule may not be admitted into evidence in a criminal trial in the prosecution's case-in-chief. (*Oregon v. Elstad* (1985) 470 U.S. 298, 306-307 [105 S.Ct. 1285, 84 L.Ed.2d 222]; *People v. Bradford* (1997) 14 Cal.4th 1005, 1033.) The purpose of this rule is to reduce the risk of a coerced confession and to implement the Fifth Amendment Self-Incrimination Clause. (*Chavez v. Martinez* (2003) 538 U.S. 760, 790 [123 S.Ct. 1994, 155 L.Ed.2d 984].)

"[T]he scope of the *Miranda* suppression remedy depends on a consideration" of whether the central concerns of *Miranda* are implicated as well as the objectives of the criminal justice system. (*Missouri v. Seibert* (2004) 542 U.S. 600, 619 [124 S.Ct. 2601, 159 L.Ed.2d 643] (Kennedy, J., concurring).) The United States Supreme Court has rejected an automatic application, such as for a Fourth Amendment violation, that all "fruits" of an unlawfully obtained confession must be discarded as inherently tainted. (*Oregon v. Elstad*, *supra*, 470 U.S. at p. 307.)

The high court recognized in *Elstad* that custodial statements made prior to the delivery of *Miranda* warnings do not necessitate exclusion of any subsequent confession. There, the suspect voluntarily made incriminating statements prior to being given *Miranda* warnings. The suspect was later advised of his constitutional rights, which he waived, and executed a written

confession. The court held that "a suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite *Miranda* warnings." (*Oregon v. Elstad*, *supra*, 470 U.S. at p. 318.)

Here, Scott acknowledges that some of the pre-*Miranda* questions posed to him were booking-type questions seeking biographical information. (AOB 178.) However, Scott conclusively labels the pre-warning questions as deliberately employed improper tactics by police. (AOB 177.) The record, and a fair reading of Fifth Amendment jurisprudence, do not support Scott's claim. In *Missouri v. Seibert*, *supra*, 542 U.S. at page 604, the court examined "a police protocol for custodial interrogation that calls for giving no warnings of the rights to silence and counsel until interrogation has produced a confession," and thereafter a *Miranda* warning is provided and the suspect "covers the same ground a second time." The court held the repeated statement was inadmissible because the intentional omission of the *Miranda* warnings, accompanied by the actual coercion of questioning the suspect about the crime being investigated, undermined the suspect's ability to exercise his or her free will. (*Id.* at pp. 615-617.)

The questions posed to Scott in the initial 15 minutes of the interview were not specific to the crimes the police planned to, and did subsequently, question Scott regarding. Many of the questions were booking-type questions seeking biographical information. Other questions in the pre-warning portion were innocuous and unrelated to the criminal conduct being investigated. The remaining questions and answers which might be potentially incriminating were excluded by the trial court. Unlike *Seibert*, the police did not extensively question Scott prior to giving him his *Miranda* rights. Nor did police extract a confession from Scott, then advise him of his constitutional rights, and thereafter cover the information Scott had previously admitted. Given this,

and that the trial court excluded any potentially incriminating questions and answers, any error by the police by asking pre-warning questions was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18 [87 S.Ct. 824, 17 L.Ed.2d 705].)

The police did not violate any of Scott's constitutional rights in the fifteen minutes they spoke with him prior to advising him of his *Miranda* rights. The trial court correctly found the *Miranda* warnings were given, they were sufficient, adequate, and complied with the *Miranda v. Arizona* decision.

IV.

THE TRIAL COURT PROPERLY FOUND THAT SCOTT'S STATEMENTS TO POLICE IN THE JANUARY 21, 1993 INTERVIEW WERE VOLUNTARY

In conjunction with his claims in Arguments II and III (illegal arrest and improper pre-warning questions), Scott claims his free will was overborne by coercive police tactics when interviewed the night of January 21, 1993. Scott contends detectives posed improper questions, made promises of leniency, exploited his religious beliefs, and refused to accept his denial of involvement in the crimes being investigated. Scott claims that, due to police conduct, his statements made during the January 21st interview were not voluntary and as such violated his right to due process protected by the Fifth and Fourteenth Amendments. (AOB 190-212.) Scott is incorrect because there was no coercive conduct by detectives in interviewing Scott. The prosecution met its burden and proved Scott's statements to detectives during the January 21, 1993 interview were voluntary. Based on a review of the entire record, it is clear Scott's statements to the detectives were the product of a rational intellect and free will.

In two separate motions, Scott moved the trial court to suppress his statements made in the January 21, 1993 interview with police. In one, Scott alleged his arrest lacked probable cause and, therefore, his subsequent statements were the fruits of an illegal arrest. (8 CT 2151-2162.) In the other, Scott alleged his statements were involuntary due to "subtle psychological coercion," and improper "softening up" during pre-*Miranda* questioning. (11CT 2992-3051.) The trial court read the moving and opposing papers, the transcript of the interview, listened to tape recordings of the interview, heard detectives' testimony in a suppression hearing, and listened to the argument of counsel. (15 RT 2404-2524;16 RT 2529-2533.) Considering everything,

the trial court found Scott's statements were voluntary and not induced by promises, threats, cajoling, or any of the other allegations raised by Scott, and denied the motion to suppress. (16 RT 2530-2531.)

The Due Process clauses of the federal and state Constitutions render an involuntary statement, admission, or confession inadmissible. (U.S. Const., XIV Amend.; *Jackson v. Denno* (1964) 378 U.S. 368, 385-386 [84 S.Ct. 1774, 12 L.Ed.2d 908]; Cal. Const., art. I, §§ 7, 15; *People v. Benson* (1990) 52 Cal.3d 754, 778.) The prosecution must prove the voluntariness of a confession by a preponderance of the evidence. (*People v. Bradford*, *supra*, 14 Cal.4th at p. 1033, citing *Colorado v. Connelly* (1986) 479 U.S. 157, 168 [107 S.Ct. 515, 93 L.Ed.2d 473], and *Lego v. Twomey* (1972) 404 U.S. 477, 489 [92 S.Ct. 619, 30 L.Ed.2d 618].) Under both federal and state law, courts consider the "totality of the circumstances," taking into consideration the defendant's characteristics and the events connected to the interrogation. (*Withrow v. Williams* (1993) 507 U.S. 680, 693-694 [113 S.Ct. 1745, 123 L.Ed.2d 407]; *People v. Weaver* (2001) 26 Cal.4th 876, 919; *People v. Massie* (1998) 19 Cal.4th 550, 576.)

A due-process-violation claim based on alleged psychological coercion requires a court to determine "whether the influences brought to bear upon the accused were 'such as to overbear [the suspect's] will to resist and bring about [statements or admissions] not freely self-determined." (*Rogers v. Richmond* (1961) 365 U.S. 534, 544 [81 S.Ct. 735, 5 L.Ed.2d 760]; *Yarborough v. Alvarado* (2004) 541 U.S. 652, 667-668 [124 S.Ct. 2140, 158 L.Ed.2d 938].) Whether a "defendant's will is overborne" depends on "the characteristics of the accused" (*Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 226 [93 S.Ct. 2041, 36 L.Ed.2d 854]; *Lynumn v. Illinois* (1963) 372 U.S. 528, 534 [83 S.Ct. 917, 9 L.Ed.2d 922]), and the police officers' questions and actions connected to the interrogation. (*People v. Memro* , *supra*, 11 Cal.4th

at p. 826.) The central focus of a due-process inquiry is the alleged wrongful and coercive actions by law enforcement, and not the suspect's mental state. (*Colorado v. Connelly*, *supra*, 479 U.S. at p. 165; *People v. Guerra* (2006) 37 Cal.4th 1067, 1097.)

"Lies told by the police to a suspect under questioning can affect the voluntariness of an ensuing confession, but they are not per se sufficient to make it involuntary." (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1240; *People v. Guerra*, *supra*, 37 Cal.4th at p. 1097.) "'[M]ere advice or exhortation by the police that it would be better for the accused to tell the truth when unaccompanied by either a threat or a promise does not render a subsequent [statement or admission] involuntary.' [Citation.]" (*People v. Howard* (1988) 44 Cal.3d 375, 398.) Indeed, if the deception is not one "reasonably likely to procure an untrue statement, a finding of involuntariness is unwarranted." (*People v. Farnam* (2002) 28 Cal.4th 107, 182.) This is a case where the record is "devoid of any evidence showing a coercive climate, use of pressure tactics, or promises of help or leniency." (*Ibid.*)

Detectives Heredia and Theur commenced questioning Scott at 8:14 p.m., on January 21, 1993. (1 3rdSupp.CT 149.) At 8:30 p.m., Scott was advised of and waived his *Miranda* rights both verbally and in writing. (1 3rdSupp.CT 163-164; 5 Supp.CT 114 [Riverside Police Department Statement of Rights, including waiver, executed by Scott].) Thereafter, Scott described in more detail his martial-arts practice and training, and told police for the first time about his dream wherein he saw Brenda Gail Kenny being stabbed. The detectives questioned Scott about these subjects, in addition to whether he had dressed like a ninja and committed crimes in the Canyon Crest and Moreno Valley areas. The detectives' questions were proper and did not individually or cumulatively overcome Scott's will in his decision to freely speak with the detectives.

When interviewed, Scott was a 22-year-old "above average" college student "planning on becoming an attorney" or a teacher. (1 3Supp.RT 150, 153.) He worked at a local movie theater and had a steady girlfriend. (1 3Supp.RT 156.) Scott's age, sophistication, education, and employment experience support the concept he maintained command to freely exercise his will in deciding whether to answer the detectives' questions.

In conducting Scott's interview, the detectives acted appropriately and professionally. The record does not reveal any abusive "psychological coercion" tactics in their questioning of Scott. The detectives asked Scott pointed questions, as can be expected when police are questioning a suspect involving serious felony crimes. Throughout the interview, Scott was offered breaks and drinks, as well as received inquiries whether he needed to use the restroom. (1 3Supp.RT 70, 109, 147, 155, 159.) While Scott sobbed at one point (1 3Supp.RT 92), more often in the interview he giggled, laughed, or chuckled (1 3Supp.RT 59, 64, 107, 109, 147, 155, 194).

In asking Scott to describe his involvement in the ninja-dressed-assailant crimes, the detective requested Scott "act like a man." However, this does not amount to improper psychological coercion. The detectives implored Scott to be truthful; however, the request was not tied to threats or promises. Throughout the interview Scott remained willing to answer the detectives' questions. There were no improper police tactics or coercion during Scott's January 21, 1993 interview.

Even assuming arguendo that the trial court erred in admitting Scott's statements, the error was not prejudicial. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 306-310 [111 S.Ct. 1246, 1262-1265, 113 L.Ed.2d 302] [federal constitutional "trial error" such as admission of involuntary confession subject to harmless-error analysis of *Chapman*, *supra*, 386 U.S. 18]; *People v. Cahill*

(1993) 5 Cal.4th 478, 509-510 [California Constitution does not require stricter standard]; see *People v. Sims* (1993) 5 Cal.4th 405, 447.)

The only thing new revealed by Scott in his interview with police and admitted into evidence was that Scott observed a red belt in Kenny's closet and he confirmed he knew the layout of her bedroom by drawing a diagram of it. Other than that, the substance of Scott's interview with police was covered by other witnesses. Scott's co-workers, roommates, and girlfriend saw him with a gun, swords, knives, darts, and martial-arts throwing stars. When buying ammunition for his gun, Scott confirmed he went shooting, but was unable to identify the location where he went shooting. Scott was known to work out at night in the Canyon Crest hills for hours at a time. Scott walked the several miles from the Canyon Crest area to the movie theater where he worked in Moreno Valley. Scott dressed in an all-black ninja outfit, including tabbie boots and a hood that covered his face. Scott was seen jumping from rooftop to rooftop while so dressed. This type of clothing was recovered from Scott's laundry bag. Scott cut out and retained newspaper articles regarding Kenny's murder, the Julia K.-Joseph C. crimes, and the Phillip Courtney stabbing. Scott boasted he had been chased by Riverside police, but not caught. Scott told a co-worker he should not have killed "her" because she was nice, and then produced a newspaper article regarding Kenny's murder when met with skepticism. Scott admitted to a co-worker he had stabbed people, and cut another co-worker with a knife. When driving past the Canyon Crest apartments where Kenny lived, Scott told his girlfriend Compton that a woman had been stabbed there, days before that fact was released to the public *via* the media. There was extensive, properly admitted evidence as to the same subjects covered by Scott's statements. Accordingly, even assuming error, it was harmless beyond a reasonable doubt. (*Chapman*, *supra*, 386 U.S. at p. 34.)

The detectives' interview of Scott was not conducted in a coercive climate, no undue pressure tactics were employed, and no promises of help or leniency were offered. Based on a review and consideration of the entire record, Scott's statements made in the January 21, 1993 interview were voluntary.

V.

SCOTT NEVER ATTEMPTED TO INVOKE HIS RIGHT TO REMAIN SILENT DURING THE JANUARY 21 INTERVIEW

Scott claims he invoked his right to remain silent during the interview when he responded to a detective's request that Scott tell them what happened "that night"[23] by saying, "I don't, I don't want it, I don't wanna." (1 3rdSupp.CT 91.) Scott contends this invocation to remain silent was disregarded by the detectives. While tacitly acknowledging it was at best an equivocal assertion of his constitutional right, Scott argues that the detective should have clarified any ambiguity as to whether Scott was attempting to terminate the interview by uttering that line. Scott concludes he was prejudiced by the continued questioning by the detectives. (AOB 212-216.) Scott did not raise this ground in the trial court, and may not do so for the first time on appeal. Even if the claim is considered, it is without merit. Scott's utterance of this line was not an assertion of his right to remain silent. Scott's statements were obtained within constitutional parameters and admissible evidence.

In his two motions to suppress his statements made during the January 21, 1993 interview, Scott never alleged he attempted to invoke his right to remain silent by uttering this line. (8 CT 2151-2162; 11 CT 2992-3050.) In his second motion to suppress, Scott includes the text of this line in his motion in arguing that detectives were attempting to bully him. (11 CT 3029.) However, there is no mention he attempted to invoke his right to remain silent. Scott's failure to raise the issue before the trial court waives it. (*People v. Michaels* (2002) 28 Cal.4th 486, 511-512, citing *People v. Ray* (1996) 13 Cal.4th 313, 339.)

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23. The detective's question pertained to a generic rape allegation, without clarification or specificity as to victim or circumstance surrounding the rape. (1 3rdSupp.CT 87-91.)

Even if the claim is considered, it should be rejected because an invocation of his right to remain silent never occurred. It is clear from the circumstances Scott did not wish to terminate the interview. Ambiguous or equivocal references to an attorney do not require cessation of questioning. Rather, "the suspect must unambiguously request counsel." (*Davis v. United States* (1994) 512 U.S. 452, 459 [114 S.Ct. 2350, 129 L.Ed.2d 362].) The goal in *Davis* was to establish a "bright line" rule that would not unduly hamper the gathering of information in interrogation. (*Davis*, *supra*, 512 U.S. at p. 461.) "[T]his concern applies with equal force to the invocation of the right to remain silent . . . ." (*Coleman v. Singletary* (11th Cir. 1994) 30 F.3d 1420, 1424.) If a suspect makes an ambiguous or equivocal statement regarding his desire to cut off questioning, the police have no duty to ask clarifying questions, but may continue with the interrogation. (*Ibid.*; see also *United States v. Ramirez* (2nd Cir. 1996) 79 F.3d 298, 305 [assuming *arguendo* that parallel *Davis* standard applies to right to remain silent].) This Court has also recognized that a defendant's ambiguous comments do not amount to an invocation of the right to remain silent. (*People v. Jennings* (1988) 46 Cal.3d 963, 978-979; *People v. Silva* (1988) 45 Cal.3d 604, 629-630; *In re Joe R.* (1980) 27 Cal.3d 496, 515-516.) Since it was unclear what Scott meant in saying "I don't, I don't want it, I don't wanna," no unequivocal invocation occurred and questioning properly continued.

Scott did not invoke his right to remain silent during the interview. However, even if there was error in the admission of Scott's statements, any such error was harmless beyond a reasonable doubt. (*Arizona v. Fulminante*, *supra*, 499 U.S. at pp. 306-312; *Chapman*, *supra*, 386 U.S. at p. 24; *People v. Neal* (2003) 31 Cal.4th 63, 86; *People v. Sims*, *supra*, 5 Cal.4th at pp. 447-448.) Other overwhelming evidence supported Scott's guilt, even absent his statements to detectives.

In addition to the evidence listed above in Argument IV, and incorporated herein by reference, Scott was part of the 8% of the population who could have left the semen found on victims Kenny, Regina M., and Julia K. Additionally, Scott matched the physical description given by victims. Scott's skin was the same color, as were his eyes, as that of the ninja-dressed assailant who assaulted people in their Canyon Crest and Moreno Valley homes during the four-month period from September 1992 to January 1993. (37 RT 4953-4954, 5002, 5007-5008, 5011-5012, 5053-5054, 5058; 38 RT 5126-5128, 5139, 5162, 5167-6168, 5197-5199.) When one rape victim looked into Scott's eyes, she chillingly told the jury, "Those are the eyes that I saw." (38 RT 5126-5128, 5139.) Any error was harmless.

VI.

THE AFFIDAVIT IN SUPPORT OF THE SEARCH WARRANT PROVIDED PROBABLE CAUSE THAT SCOTT WAS THE NINJA-CLAD ASSAILANT TERRORIZING THE CANYON CREST AND MORENO VALLEY AREAS

Scott claims the affidavit in support of the search warrant authorizing a search of the Graham Street house where he lived did not provide probable cause. Scott claims that the affidavit relied solely on an uncorroborated tip by an informant whose reliability was untested. Scott contends the trial court erroneously found he did not have standing to challenge the legality of the search warrant. Scott avers the trial court erred in denying his motion to quash the search warrant and suppress the evidence recovered pursuant to it. (AOB 216-229.) The trial court properly applied Fourth Amendment law to the facts and found adequate probable cause supported the warrant. The trial court's ruling denying Scott's motion to quash the warrant and suppress evidence was correct and should be affirmed.

On September 24, 1996, Scott filed a motion to quash the search warrant and suppress evidence pursuant to Penal Code section 1538.5. In his motion, Scott asserted that the affidavit attached to the warrant did not provide probable cause, because the affidavit did not establish the citizen informant Ricardo Decker's reliability and the admissions from Scott in the affidavit were the product of his illegal arrest. (8 CT 2187-2212.) Attached as an exhibit to his motion was the warrant and the affidavit in support thereof. (8 CT 2202-2212.) The prosecution filed an opposition to the motion on October 7, 1996, claiming Scott failed to establish standing, sufficient probable cause was stated in the affidavit, and, alternatively, the good-faith exception applied. (9 CT 2289-2292.) The trial court recognized that Scott's motion was, in part, dependent on his claim that his arrest was illegal. Therefore, the trial court first

determined the legality of Scott's arrest, then decided his motion seeking to quash the search warrant.

On October 10, 1996, the trial court heard the argument of counsel concerning the motion to quash the search warrant, the opposition, and reviewed the cases cited in the parties' papers. (3 PRT 1479-1518.) Based on the motion, argument of counsel, and a review of the affidavit in support of the warrant, the trial court found the anonymous caller referred to in the affidavit was a citizen informant. The trial court further found there was sufficient information for a magistrate to determine probable cause existed for the issuance of the warrant. (3 PRT 1516, 1526-1527.) Thereafter, on October 15, 1996, the trial court conducted an evidentiary hearing to determine the legality of Scott's arrest, and heard the testimony of Detective Keers. (3 PRT 1519-1527, 1538-1578.) The trial court determined Scott's arrest was supported by probable cause and therefore legal. (3 PRT 1602.) The trial court returned to the motion to quash the search warrant, and heard additional argument. (3 PRT 1603-1635.) The trial court denied the motion to quash the search warrant and to suppress evidence pursuant to Penal Code section 1538.5. (3 PRT 1604-1605,1633-1635.) The trial court's ruling was correct.

A person must have standing to challenge a search conducted by law enforcement. A police search violates an individual's Fourth Amendment rights only if the person has a legitimate expectation of privacy in the place searched or in the property seized. (*Minnesota v. Carter* (1998) 525 U.S. 83, 88 [119 S.Ct. 469, 142 L.Ed.2d 373]; *United States v. Salvucci* (1980) 448 U.S. 83, 91-92 [100 S.Ct. 2547, 65 L.Ed.2d 619].)

> When a criminal defendant moves to suppress evidence on the ground it was seized in violation of his constitutional rights, the prosecution may contest whether the defendant is the proper party to challenge the claim of illegal police activity.

(*People v. Koury* (1989) 214 Cal.App.3d 676, 685.) What such as defendant must show is "'an actual (subjective) expectation of privacy . . .' [and that the expectation is] 'one that society is prepared to recognize as "reasonable."'" (*Smith v. Maryland* (1979) 442 U.S. 735, 740 [99 S.Ct.2577, 61 L.Ed.2d 220], quoting *Katz v. United States* (1967) 389 U.S. 347, 361 [88 S.Ct. 507, 19 L.Ed.2d 576].)

It was undisputed that Scott resided at the Graham Street house. (1 3rdSupp.CT 2202, 2211.) He lived there with at least three other people. (3 PRT 1474; 1 3rdSupp.CT 2211.) Since there were roommates who shared the house, the prosecution questioned whether, and if so, to what portions of the house, Scott had a reasonable expectation of privacy. The defense argued Scott established he had standing to challenge the search by the averment in Detective Heredia's declaration in support of the search warrant that listed the Graham Street house as Scott's residence verified through a DMV search, and Scott's statements made during the January 21, 1993 interview that he lived there. The trial court found Scott had not made a sufficient showing to establish standing. (3 PRT 1610, 1612-1620.) For purposes of determining the motions challenging the search warrant, the trial court nevertheless assumed Scott had standing (3 PRT 1610), and turned to Scott's other contention that the search warrant was not supported by probable cause.[24/]

As set forth above, "probable cause is a fluid concept — turning on the assessment of probabilities in particular factual contexts — not readily, or even usefully, reduced to a neat set of legal rules." (*Illinois v. Gates*, *supra*, 462 U.S. at p. 232.)

> In dealing with probable cause, however, as the very name implies, we deal with probabilities. These are not

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24. Scott also moved to traverse the warrant. (8 CT 2163-2186.) Scott's challenge to the trial court's denied of his motion to traverse is address herein in Argument VII.

> technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. The standard of proof is accordingly correlative to what must be proved.

(*Brinegar v. United States* (1949) 338 U.S. 160, 175 [69 S.Ct. 1302, 93 L.Ed.2d 1879].) The high court has reiterated, "it is clear that 'only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause.'" (*Illinois v. Gates*, *supra*, 462 U.S. at p. 235.)

> The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a "substantial basis for . . . conclud[ing]" that probable cause existed.

(*Illinois v. Gates*, *supra*, 462 U.S. at p. 238-239, quoting *Jones v. United States* (1960) 362 U.S. 257, 271 [80 S.Ct. 725, 4 L.Ed.2d 697].) On appeal, the reviewing court accords great deference to the magistrate's determination, and only inquires as to whether there was a substantial basis to conclude that the warrant would uncover evidence of crime. (*Illinois v. Gates*, *supra*, 462 U.S. at p. 236.) A trial court's denial of a defendant's motion to suppress is examined with deference to factual findings, but an independent review of the questions of law. (*People v. Williams*, *supra*, 45 Cal.3d at p. 1301.)

In Detective Heredia's affidavit, he informed the magistrate that he had received an anonymous phone call from a citizen who identified David Scott as the person responsible for the ninja crimes. The citizen said Scott dressed as a ninja, carried a sword, a long knife, and a gun. Scott traveled frequently on foot between the Canyon Crest area and Moreno Valley. The citizen had last seen Scott dressed in the ninja outfit on Sunday, January 17, 1993. (8 CT 2202-2212.) This was the day before the last attack by the

ninja-clad assailant. (8 CT 2210.) The citizen described Scott as "half Black, half Japanese" and 6'1" to 6'2" tall. (8 CT 2212.) This physical description matched that given by the victims, who had described their assailant as a light-skinned Black male wearing black ninja attire, carrying a sword, knife, and gun. Detective Keers contacted the citizen and learned that he was a co-worker of Scott's. The citizen was an adult, who appeared to be a responsible and credible person, and he was not a suspect or in custody. Synopses of the crimes for which Scott was a suspect were listed in the affidavit. (8 CT 2202-2212.)

The facts recited in Detective Heredia's affidavit in support of the search warrant were sufficient to justify a conclusion by the magistrate that the person who left the anonymous phone call, and later spoke with police, was a citizen informant and should be considered reliable. (See *People v. Ramey* (1976) 16 Cal.3d 263, 368-269.) The trial court correctly found that such a finding was supported by the record. (3 PRT 1516, 1526-1527.) Additionally, the detective included information gained from his interview with Scott. Scott told the detective he lived at the Graham Street house, he possessed a .45-caliber semi-automatic pistol, and he had a ninja uniform, including a hood, shirt, pants, sword, darts, and home-made throwing stars. (8 CT 2211.) The affidavit in support of the search warrant demonstrated a fair probability that contraband or evidence of a crime would be found at Scott's Graham Street house. Accordingly, probable cause supported the search warrant.

Even assuming *arguendo* probable cause was lacking, Detective Heredia had a reasonable good-faith belief in its existence. Evidence should not be suppressed unless the affidavit was so lacking in indicia of probable cause that it would be entirely unreasonable for an officer to believe such cause existed. (*United States v. Leon* (1984) 468 U.S. 897, 923 [104 S.Ct. 3405, 82 L.Ed.2d 677].) As the high court made clear, suppression of evidence should be reserved for only those "unusual cases in which exclusion will further

the purpose of the exclusionary rule," and "[i]n the ordinary case, an officer cannot be expected to question the magistrate's probable-cause determination." (*United States v. Leon*, *supra*, 468 U.S. at pp. 918, 921.) This Court has explained, "We cannot say that an objective and reasonable officer would have 'known' this affidavit failed to establish probable cause. It is plain from the affidavit that [Detective] Addoms conducted more than a mere 'bare bones' investigation." (*People v. Camarella* (1991) 54 Cal.3d 592, 606, citing *Illinois v. Gates*, *supra*, 462 U.S. at p. 239, *United States v. Leon*, *supra*, 468 U.S. at p. 926.) The same it true here.

The anonymous caller provided Scott's place of employment, social security number, and physical description. This physical description matched that provided by individuals victimized by the black-dressed ninja assailant. The citizen told police Scott dressed like a ninja, completely in black, and he had a sword, knife, and gun. This too matched the ninja assailant. Scott told the citizen that he had recently stabbed someone, and Scott knew details about the Kenny murder before they were publicized. The detective confirmed Scott's physical appearance when he interviewed him and was able to tell for himself how closely Scott resembled the ninja assailant. Scott confirmed for the detective that he owned ninja clothing, a sword, gun, darts, and throwing stars. (8 CT 2211.)

Detective Heredia submitted more than a "bare bones" affidavit. Addtionally, the Riverside police did not rely on merely the anonymous tip. Instead, they sought and received corroboration through independent police work. (See *Illinois v. Gates*, *supra*, 462 U.S. at pp. 241-242.) Detective Keers went to the movie theater the anonymous caller said Scott worked at, and confirmed that information. In so doing, the detective was able to determine the identity of the anonymous caller, and learned additional information concerning Scott. Detective Keers contacted Detective Heredia and shared the information

she learned at the movie theater. Detective Heredia then included that information in his affidavit. When Detective Heredia and the other Riverside police officers executed the search of Scott's Graham Street house, they acted under an objective good faith that sufficient probable cause was stated in the affidavit in support of the search warrant. Accordingly, Scott's argument is meritless.

VII.

DUE TO SCOTT'S FAILURE TO MAKE THE NECESSARY SHOWING, THE TRIAL COURT PROPERLY DECLINED TO CONDUCT A HEARING ON HIS MOTION TO TRAVERSE THE WARRANT

Scott claims the trial court erred in refusing to conduct a hearing on his motion to traverse the search warrant. Scott contends that he was entitled to a hearing because information was omitted from the affidavit filed in support of the search warrant. Scott alleges that the omitted information would have altered a reasonable magistrate's probable-cause determination. Scott concludes that the failure to conduct a hearing prejudiced him so that his conviction and sentence should be reversed. (AOB 230-235.) Scott failed to show that Detective Heredia's affidavit in support of the search warrant had material omissions or misstatements made either intentionally or with reckless disregard for the truth, which were relied upon by the magistrate in making the probable-cause determination. Since he failed to meet his burden, the trial court properly declined to conduct a hearing on Scott's motion to traverse the search warrant.

To mandate an evidentiary hearing, a criminal defendant must initially make a substantial preliminary showing that the affidavit in support of the search warrant contains material omissions or misstatements that were made either intentionally or with reckless disregard for the truth, and that the allegedly false statement is necessary to the finding of probable cause. The focus of this evidence is the state of mind of the affiant. (*Franks v. Delaware* (1978) 438 U.S. 154, 155-156 [98 S.Ct. 2674, 57 L.Ed.2d 667]; *People v. Hobbs* (1994) 7 Cal.4th 948, 974.) If, after a review of the search-warrant affidavit and the pleadings on a motion to traverse, the trial court finds the search-warrant affidavit was not materially false, the trial court simply reports this

conclusion and enters an order denying the motion. (*People v. Hobbs*, *supra*, 7 Cal.4th at p. 974.)

However, if the requirements are met, the trial court conducts an evidentiary hearing where the defendant must establish by a preponderance of the evidence that the false statements were made either deliberately or recklessly, and were necessary to a finding of probable cause. If the defendant prevails, the search warrant is voided and the evidence suppressed. Innocent or negligent omissions or misstatements will not defeat a warrant. (*Franks*, *supra*, 438 U.S. at pp. 154-155.) Here, Scott did not meet any of the prerequisites mandated by *Franks*.

Scott filed a motion to traverse the search warrant and to suppress evidence pursuant to Penal Code section 1538.5 on September 24, 1996. (8 CT 2163-2186.) The prosecution opposed this motion in a filing on October 15, 1996. (9 CT 2289-2292.) The trial court denied Scott's motion to traverse the warrant and suppress evidence on October 15, 1996. (3 PRT 1633-1635.)

Scott claims the material omission was that, in the anonymous phone tip, the citizen mentioned that when the librarian was murdered in Canyon Crest area, Scott had told him about a dream or out-of-body experience where Scott had actually done the crime. At the time, the anonymous caller believed that Scott was "just full of it," but reconsidered this when he read the recent article and realized Scott fit the description of the ninja-dressed assailant. Scott alleged that Detective Heredia only included some of the information relayed to him by Detective Keers, but not all of it. For instance, Detective Heredia did not include information gained by Detective Keers when she spoke with anonymous caller Ricardo Decker, who told her the source of the information regarding Scott's dream came *via* his girlfriend, Stephanie Compton, not directly from Scott. (8 CT 2163, 2165-2169, 2183.) Scott contends this was not a minor discrepancy, nor an innocent failure to include the information.

Scott claims that, had the information been included, it would have demonstrated that the anonymous caller had lied. (8 CT 2168.) Scott concludes that Detective Heredia intentionally or recklessly withheld this "important information" from the magistrate. (*Ibid.*)

Scott's underlying premise is incorrect and therefore fatal to his motion. At the time that he drafted the affidavit in support of the search warrant, Detective Heredia was completely unaware of Decker's statement regarding Scott's dream or out-of-body experience wherein he claimed to have seen the stabbing of Brenda Gail Kenny. Detective Heredia was a witness in the hearing on Scott's motion as to the voluntariness of his statements during the January 21, 1993 interview. (15 RT 2432-2437, 2454-2463, 2465-2474.) Detective Heredia testified that he did not listen to the entire voice-mail message containing the anonymous phone tip. Once the detective heard the first part of the message, he saved it, sent a copy of the message to Detective Keers, and notified his supervisor of the phone message. (15 RT 2466-2468.) Thus, Detective Heredia could not have intentionally or willfully omitted material information or inserted a knowing falsity in the affidavit, because he was unaware of these statements by Decker when he drafted the affidavit. Detective Heredia's affidavit did not contain a material omission or misstatement that was knowingly and intentionally false or made with reckless disregard for the truth, nor was the allegedly false statement necessary to the magistrate's finding of probable cause. The trial court properly found Scott failed to meet his burden to demonstrate he was entitled to a hearing on his motion to traverse the search warrant, and denied the motion.

Tellingly, in making his arguments regarding Decker's attribution of who told him about Scott's dream wherein Scott saw Kenny being stabbed to death, Scott fails to appreciate that the underlying fact is not in dispute. Scott did tell Compton, days before the fact was publicly disseminated, that

he dreamt he saw a woman stabbed to death in her bedroom at the Canyon Crest apartments. Decker's attribution of who may have told him about Scott's dream does not reflect on Decker's credibility. It is not a lie to fail to recall who may have told you about a person's dream where that person allegedly witnessed, or may have participated in, a murder. The omission was not necessary to the probable-cause determination. Moreover, even Scott does not dispute that he described this "dream" to Compton. Since Detective Heredia was unaware that in the anonymous phone-call message Decker described Scott's dream wherein he saw the librarian being stabbed, any error in omitting it from the affidavit did not prejudice Scott.

Even assuming *arguendo* there was error, it was harmless beyond a reasonable doubt. (*Chapman*, *supra*, 386 U.S. at p. 34.) As set forth in the previous two arguments, overwhelming evidence supports Scott's convictions and sentence. Respondent incorporates herein by reference the harmless-error discussions from Arguments V and VI.

VIII.

THE AFFIDAVIT IN SUPPORT OF THE SEARCH WARRANT PROVIDED PROBABLE CAUSE TO SEIZE ITEMS BELONGING TO CRIME VICTIMS REGINA M. AND JOSEPH C. RECOVERED FROM SCOTT'S HOUSE

Scott claims the affidavit and search warrant failed to state probable cause to authorize seizure of two specific items belonging to crime victims Joseph C. and Regina M. Scott contends since the victims' names were not specifically set out in the applicable crime synopses in the affidavit, the search warrant was overbroad, and these two items should have been suppressed. Scott concludes that since these two items were introduced into evidence during his trial, his conviction and sentence must be overturned. (AOB 236-241.) Scott is wrong because the items seized where sufficiently described in the search warrant, and ample probable cause was provided in the affidavit.

On December 11, 1996, Scott filed a second motion pursuant to Penal Code section 1538.5 to suppress items seized pursuant to the January 21, 1993 search warrant. In his second suppression motion, as in his first suppression motion, Scott alleged that the affidavit lacked probable cause; however, he limited the second motion to ten items seized in the execution of the warrant on January 22, 1993. (9 CT 2507-2429.) The prosecution submitted written opposition to Scott's second suppression motion, asserting it was statutorily barred, and that the issues raised could have, and should have, been brought in the first suppression motion. (10 CT 2629-2630.)

The trial court heard argument on Scott's second suppression motion on December 23 (12 RT 1782-1803) and December 26, 1996 (12 RT 1845-1907). The trial court found that previously, on October 15, 1996, it determined that sufficient probable cause supported the search warrant. The court further found that even if the issue had not been fully litigated previously, and

it was to consider the merits of the second suppression motion, the motion was denied. The court found that the affidavit sufficiently described the Joseph C. and Regina M. items, and even if it did not, the items were properly seized under the language in the search warrant that police could seize "property tending to show a felony was committed." (12 RT 1903-1907; 9 CT 2519.)

Scott's second motion for suppression of evidence pursuant to Penal Code section 1538.5 was statutorily barred, and the trial court lacked jurisdiction to decide it.

> Where a pretrial suppression motion has been fully litigated, the superior court lacks jurisdiction to entertain a second pretrial suppression motion. Penal Code section 1538.5, subdivision (h), only permits a second suppression motion at trial on the limited bases of lack of earlier opportunity or newly discovered grounds. (*People v. Nelson* (1981) 126 Cal.App.3d 978, 981-982 [179 Cal.Rptr. 195] and cases there cited; *People v. Thomas* (1983) 141 Cal.App.3d 496, 501 [190 Cal.Rptr. 408].)

(*People v. Camilleri* (1990) 220 Cal.App.3d 1199, 1203; *People v. Sotelo* (1996) 47 Cal.App.4th 264, 272-273; see *People v. Brooks* (1980) 26 Cal.3d 471, 476; *Madril v. Superior Court* (1975) 15 Cal.3d 73, 77-78; *People v. Superior Court (Green)* (1970) 10 Cal.App.3d 477, 479; see also *People v. Superior Court (Edmonds)* (1971) 4 Cal.3d 605.)

Scott's first motion to quash the search warrant and suppress evidence pursuant to Penal Code section 1538.5 was fully litigated. Scott filed his first suppression motion and supplemented it with exhibits and additional briefing. Additionally, the trial court reviewed the search warrant and affidavit, and heard extensive argument by counsel. The trial court made a clear and decisive ruling finding sufficient probable cause to support the warrant and unequivocally denied the motion. (3 PTR 1604-1605, 1633-1635.) Therefore, Scott's second motion to suppress evidence pursuant to the same statute, against the same search warrant and affidavit, was barred for lack of jurisdiction.

Assuming the trial court had jurisdiction to decide the second suppression motion, it correctly denied the motion. Scott's complaint is that there was no specific reference in the affidavit to certain items listed to be recovered in the search, *i.e.*, "a paramedic card in the name of Joseph C[]" and "any documents or articles in the name of Relina (sic) M[]."[25/] (9 CT 2516.) Scott argues that because there was no reference to Joseph C. or Regina M. in the affidavit, the search warrant was overbroad and the items should have been suppressed. (AOB 236, 238-239.)

An item to be searched for and seized pursuant to a search warrant must be described with sufficient particularity to permit the police to have reasonable suspicion the item tends to show a felony was committed. (*People v. Nicolaus* (1991) 54 Cal.3d 551, 574; *United States v. Issacs* (9th Cir. 1983) 708 F.2d 1365, 1670.) Here, there was sufficient particularity so that the police had probable cause to seize Joseph C.'s paramedic identification card and a piece of mail addressed to Regina M., both found at Scott's house.

The warrant set forth the items to be searched for and seized. These items included, but were not limited to, "property tending to show a felony was committed." (9 CT 2519.) In his affidavit in support of the search warrant, Detective Heredia initially set forth his training and experience concerning sexual-assault investigations and collection of evidence. Next, he provided the physical description of the assailant and the weapons used by the assailant in committing his crimes. (9 CT 2520-2521.) The detective included crime synopses the assailant was suspected of having committed. (9 CT 2522-2527.) One crime synopsis described a burglary and rape the assailant was alleged to have committed on November 3, 1992, at 990 Central, apartment no. 121. The

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25. It was a typographical error that Regina M.'s first name was misspelled in the affidavit in support of the search warrant. Her complete, correctly spelled last name was listed in the warrant. (9 CT 2516; 12 RT 1792.)

assailant took the victim's wallet. (9 CT 2523.) In another burglary and rape synopsis, the assailant went through the male victim's wallet, taking a picture identification. The assailant told the victims "he used to be a paramedic at one time." (9 CT 2526.) The detective stated that, based on his training and experience, "perpetrators of serial rapes keep and maintain lists, records, journals, computer records, photos, diaries and other written documents to record past and future victims." (9 CT 2529.)

When the affidavit is considered in its totality, there is sufficient nexus between the descriptions in the crime synopses and the items seized from Scott's house that belonged to crime victims Joseph C. and Regina M. Neither Joseph C. nor Regina M. had any connection to Scott or his roommates. A police officer could have reasonable suspicion in conducting the search that a paramedic identification in the name of Joseph C. and a piece of mail addressed to Regina M. was "property tending to show a felony was committed." The affidavit set forth information that Scott was suspected of having committed the crimes listed. There was sufficient nexus between the burglary/rape described in the affidavit where the assailant took the woman's wallet and the seizure of the piece of mail addressed to Regina M. Additionally, there was sufficient nexus between Joseph C.'s paramedic identification and the crime synopsis that stated the assailant took identification from the male victim's wallet and discussed being a paramedic. The affidavit in support of the search warrant described with sufficient particularity Joseph C.'s paramedic identification and Regina M.'s mail to permit a Riverside police officer to have reasonable suspicion these items tended to show Scott committed the felonies of rape and burglary. Consequently probable cause supported seizing these two items. The trial court therefore correctly denied Scott's second motion to suppress.

Even assuming *arguendo* there was not sufficient particularity to seize these two items, the good-faith exception in *Leon* applies. The affidavit showed Detective Heredia's experience and training and the investigation that had been undertaken prior to seeking the search warrant. Scott's crimes victimizing Joseph C. and Regina M. were set forth. Given the contents of the affidavit and search warrant, Riverside police detectives and officers would have had a reasonable good-faith belief in the existence of probable cause to seize Joseph C.'s paramedic identification and Regina M.'s mail in the search of Scott's Graham Street residence.

Assuming probable cause to seize these two items was lacking, and they should not have been admitted into evidence, any error was harmless beyond a reasonable doubt. (*Chapman*, *supra*, 386 U.S. at p. 24.) Overwhelming evidence, separate and apart from the recovery of Joseph C.'s paramedic card and Regina M.'s mail, supported Scott's guilt for the crimes he committed and for which he was convicted.

The jury heard the details provided by Regina M. as to the ninja-dressed man who raped her and burglarized her apartment. Scott fit the description provided by Regina M. of her assailant. Scott had the same skin color as the rapist, he was the same age, the same physical build, within the weight range, the same height, and Scott's eyes were "the eyes that [Regina M.] saw" when she looked into the rapist's eyes. (38 RT 5126-5128, 5139.) Moreover, Scott was known to dress like a ninja, and thought of himself as a ninja. This included not only Scott's ninja pants, shirt, and swords, but also his sock-type slip-on shoes. The rapist told Regina M. that he was not a burglar, but instead was a "ninja." (38 RT 5117- 5118.) Scott frequented the area where Regina M.'s apartment was located. The rapist specifically told Regina M., "I'm going to make this look like a burglary," and took some of her possessions. (38 RT 5123, 5125.) Scott's genetic profile matched the semen

left by the rapist. Scott was Asian and African-American, the same racial profile as Regina M.'s rapist's. (38 RT 5114.)

The jury heard Julia K.'s description of her rapist which also fit Scott's physical description. Scott and the rapist were both a mixture of African-American and Asian ethnicity. Scott had the same skin color as the rapist. Scott was the same age, height, and weight as the rapist. The rapist was dressed in a ninja costume and he carried swords and a gun, as did Scott. (37 RT 4964-4965, 5001-5002, 5026-5027, 5058.) Scott owned ninja slippers, with the big toe separated from the remainder of the toes, just like the rapist. (37 RT 5007-5009, 5019.) The rapist took Joseph C.'s paramedic ID card and placed it his (the rapist's) pocket. (37 RT 4964-4965, 5001, 5026-5027, 5030-34.) Scott lived in the Moreno Valley area, near where Julia K. and Joseph C. lived. The rapist said he had not committed any burglaries in the Moreno Valley area prior to burglarizing their home. (37 RT 5050-5052.) Scott's genetic profile was consistent with the genetic profile obtained from the semen found on blue towel the rapist ordered Julia K. to use to wipe herself. (37 RT 4956-4957; 42 RT 5636-5637, 5640, 5647, 5652.)

Given the overwhelming evidence that supported Scott's convictions for raping Julia K. and Regina M., and burglarizing their homes, any error in admitting evidence of the recovery of the piece of mail and paramedic card, and the items themselves, was harmless beyond a reasonable doubt.

IX.

SUFFICIENT EVIDENCE SUPPORTS THE JURY'S FINDING SCOTT MURDERED BRENDA GAIL KENNY IN THE COMMISSION OR ATTEMPTED COMMISSION OF RAPE

Scott claims there is insufficient evidence of his rape or attempted rape of Brenda Gail Kenny to support the jury's special-circumstance finding. He argues all the inferences derived from the evidence support his denial he raped or attempted to rape her. Specifically, Scott maintains there was insufficient evidence of penetration or attempted penetration. Scott also contends that his death judgment must be reversed, even though he was death-eligible based on the special circumstance that the murder was committed during the course of a burglary, because the rape conviction and rape special circumstance were considered by the jury as an aggravating factor in reaching a penalty determination. (AOB 241-248.) The evidence before the jury was clearly sufficient to establish that Scott murdered Kenny during the commission, or attempted commission, of a rape.

In assessing a challenge to the sufficiency of the evidence underlying an attempted rape, this Court does not determine the facts; rather, it examines the entire record "in the light most favorable to the judgment to determine whether it discloses substantial evidence — evidence that is reasonable, credible and of solid value — such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Guerra*, *supra*, 37 Cal.4th at p. 1129; *People v. Kraft*, *supra*, 23 Cal.4th at p. 1053; see also *Jackson v. Virginia* (1979) 443 U.S. 307, 319-320 [99 S.Ct. 2781, 61 L.Ed.2d 560]; *People v. Johnson* (1980) 26 Cal.3d 557, 578.) Further, this Court presumes in support of the judgment "the existence of every fact the trier could reasonably deduce from the evidence." (*Id.*)

The exact same standard of review on appeal applies to cases in which the prosecution relies primarily on circumstantial evidence and to special-circumstance allegations. (*People v. Guerra*, *supra*, 37 Cal.4th at p. 1129; *People v. Maury*, *supra*, 30 Cal.4th at p. 396.)

> "[I]f the circumstances reasonably justify the jury's findings, the judgment may not be reversed simply because the circumstances might also reasonably be reconciled with a contrary finding."

(*People v. Guerra*, *supra*, 37 Cal.4th at p. 1129, quoting *People v. Farnam*, *supra*, 28 Cal.4th at p. 143.) This Court does not reweigh evidence or reevaluate a witness's credibility. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.)

The prosecution is not required to establish the completion of the underlying felony in order to establish the special circumstance of rape. (*People v. Hart* (1999) 20 Cal.4th 546, 610.) After intent to rape is established, the special circumstance is applicable regardless of whether actual penetration occurred. (*People v. San Nicolas* (2004) 34 Cal.4th 614, 661.) Indeed, proof of even slight acts beyond preparation done in furtherance of the intent to rape will constitute an attempt. An attempted rape does not require some physical conduct of a distinctly and unambiguously sexual nature. (*People v. Guerra*, *supra*, 37 Cal.4th at p. 1132.)

In urging that evidence of penetration is lacking, Scott cites a lack of physical evidence. As this Court has made clear, an attempted-rape conviction or rape special circumstance can be supported by evidence from which a jury could reasonably infer an intent to rape notwithstanding absence of physical evidence the victim actually suffered a sexual assault. (*People v. Guerra*, *supra*, 37 Cal.4th at p. 1132.)

Beyond ignoring the applicable law, Scott's complaint about the lack of physical evidence also ignores the weight of the circumstantial evidence of

his intent to rape. The similarities between Kenny's murder and Scott's two surviving rape victims, Julia K. and Regina M., provides more than sufficient evidence to support the jury's rape special-circumstance finding.

Scott had demonstrated that he was willing to use physical violence to get his way with his surviving victims. Scott threatened deadly force against Julia K., in order to repeatedly rape her. (37 RT 4949, 4951, 4954-5956, 4958.) He likewise threatened deadly force against her fiancé when he arrived home during Scott's reign of terror in their home. (37 RT 4958-4959, 4962, 4964, 5027, 5030, 5043-5046.) Similarly, Scott threatened physical violence against Regina M., holding a gun to her head, in order to secure her compliance in raping her. (38 RT 5110-12, 5116.) Notably, Scott told Regina M., before raping her, "I'm not going to hurt you," and she asked, "What do you mean?" The man said, "I would never hurt you," "I like you." Regina M. asked, "Well, don't you think what you're doing to me is hurting me?" The man responded, "Well, your definition of hurt and my definition of hurt are two different things." (38 RT 5120.) Kenny had defensive wounds on her hands and arms, evidencing a violent struggle that ended with Scott repeatedly stabbing her. The jury could reasonably infer that while Kenny's ordeal ended with her being stabbed to death, the hours spent inside Kenny's apartment were not unlike those terror-filled hours that Julia K. and Regina M. endured — including being raped.

Kenny was not feeling well when she left her parents' home to return to her nearby apartment. Close in time to Kenny leaving to return home, *i.e.*, about 10 p.m., Kenny's downstairs neighbor heard two persons climbing the stairs to her apartment. It could be reasonably inferred that an ill Kenny would not have invited anyone into her apartment that evening as she returned home. The reasonable inference was that Scott had forced his way into her apartment by confronting her outside first. This inference would be consistent with

Scott's actions in confronting Alison Schulz as she was returning to her apartment around 9 p.m. one evening. (35 RT 4629-4632.0)[26]

The evidence also supports a prolonged ordeal for Kenny. Her downstairs neighbor heard a scream and a loud bang at about 4:10 a.m., *i.e.*, about six hours after hearing Kenny and another person enter her apartment the last night she was seen alive. (40 RT 5426, 5428-5432.) The jury could reasonably infer from the evidence that Kenny suffered a similar fate as Scott's two surviving rape victims, based on the similarities in what is known about those crimes.

Scott tied up other victims to maintain control of them while he spent hours in their house. He used a speaker wire, or possibly a cord, to tie up Julia K. and Joseph C. (37 RT 4966, 5035-5036, 5041.) It is reasonable to infer that Scott tied up, or attempted to tie up, Kenny during the many hours he spent in her apartment. Notably, the cord on Kenny's iron was cut up near the iron. (39 RT 5373.) This is most likely what Scott used to bind, or attempt to bind, Kenny.

Scott also ignores the explanation for the lack of physical evidence of rape that is reasonably inferred from what the jury knew about what happened to Scott's two rape victims who survived. Kenny was found in her bedroom lying on the floor between her bed and a vanity, dressed in the clothes she was in when last seen alive, and wrapped in a blue comforter. (39 RT 5250-5256.) There was no bedding or sheets on the bed. A sheet was found in the hamper. (39 RT 5265, 5394.) The fact that Kenny was clothed does not foreclose the possibility that Scott raped or attempted to rape her. Scott had both the surviving rape victims undress and then dress after he had raped them. (37 RT 5004-5010, 5013-5014; 38 RT 5118-5119, 5122, 5151.)

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26. Schulz was spared a similar ordeal to that of the other victims, because she was returning from dinner with the man with whom she shared the apartment, and he confronted Scott. (35 RT 4629-4630, 4632.)

The absence of sheets on Kenny's bed supports a reasonable inference that Scott sexually assaulted her on the bed and got rid of the sheets in order to destroy evidence. This reasonable inference is enforced by the fact that Scott had Regina M. strip the sheets from her bed and place them in the bathtub.[27] This was clearly an effort to eliminate evidence. There were no sheets on Kenny's bed.[28]

Scott also ignores the import of the fact that Scott's semen was found on Kenny's clothing. (42 RT 5650-5652.) His semen was also left on the clothing of surviving rape victim Regina M. (42 RT 5646-5647.) Scott's semen on the clothing of his victims clearly supports an intent to rape, supporting his rape special circumstance.

The absence of sperm in Kenny's body is also consistent with Scott's rape of Julia K. Specifically, Scott instructed Julia K. to use a towel to wipe herself after repeatedly raping her. (37 RT 4956-4957.) In any event, the absence of Scott's sperm inside Kenny's body is not a basis for overturning the jury's verdict based upon insufficient evidence. (*People v. Guerra*, *supra*, 37 Cal.4th at p. 1132.)

The jury clearly had ample evidence from which to draw inferences regarding the six-hour ordeal Kenny faced inside her apartment at the hands of Scott. Scott's intent to rape her is clear from the presence of his sperm on the front of her pants near the crotch area, and the marked similarities with the ordeals faced by his surviving rape victims.

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27. Julia K. was not ordered to strip the sheets from any bed, because Scott raped her on the floor of her bedroom and then raped her two more times in a spare bedroom of the home, also while she was on the floor. (37 RT 4954-5957, 4990, 4996, 5004-5010, 5013-5014.)

28. Sheets were found in her dirty-clothes hamper; however, they were not tested for biological materials. (39 RT 5394-5395.)

Moreover, even if Scott's rape special circumstance were removed from the equation, his crimes against her, as well as the aggravating circumstances of his entire crime spree, make it clear that he would not have enjoyed any different outcome in terms of his death sentence. Scott terrorized Kenny for six hours before brutally stabbing her to death in a violent struggle. He terrorized the entire community, preying upon vulnerable victims. Even ignoring evidence of his intent to rape Kenny, Scott's death penalty is well deserved.

Scott's claim should be rejected because his rape special-circumstance finding is supported by overwhelming circumstantial evidence.

X.

THE TRIAL COURT PROPERLY ALLOWED THE JURY TO LEARN THAT BALLISTICS EVIDENCE WAS IN THE POSSESSION OF A DEFENSE EXPERT, TO DISPEL ANY FALSE IMPRESSION OF EVIDENCE-TAMPERING

Scott claims the trial court erred when it allowed the jury to learn the existence and identity of a defense ballistics expert. Scott complains the jury should not have learned that the prosecution ballistics expert transferred to this defense expert Scott's gun and an expended bullet fired at Howard Long. Scott maintains the evidence was irrelevant and prejudicial because it unfairly bolstered the credibility of the prosecution's expert. Scott also contends the trial court's ruling violated the attorney work-product privilege and Scott's constitutional rights to effective counsel and a fair trial. (AOB 249-262.) Given the potentially false impression left by defense counsel's cross-examination, *i.e.*, that there was an unexplained change in the condition of the ballistics evidence between the time the prosecution expert examined it and trial, the court properly allowed the jury to learn that, during that interval, the ballistics evidence had been in the possession of another expert hired by the defense.

The prosecution ballistics expert, California Department of Justice criminalist Terry Fickies, examined the gun recovered from the garage of Scott's Graham Street house in approximately March 1993. (36 RT 4843-4845; Exh. 1.) The gun was operable, and did not malfunction when test-fired.[29] (36 RT 4848-4849.) The gun held eight bullets, seven rounds in the clip and one in the chamber. There were seven bullets in the clip when Fickies received

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29. In test-firing the gun (Exh. 1), Fickies used bullets from the boxes of ammunition recovered from Scott's house and entered into evidence as Exhibit 14. (36 RT 4851-4852.) The test-fire bullets were stored in a small box entered into evidence as Exhibit 34B. (36 RT 4856-4857.)

it. Fickies also received the boxes of ammunition recovered from the Graham Street house. Fickies noted there were seven bullets missing from one box of ammunition, and one bullet missing from another box. (36 RT 4850-4852; Exh. 14.)

Marked as Exhibit 14, the three boxes of ammunition were stored inside an envelope. Fickies identified his writing on the ammunition boxes that indicated the number of bullets missing. Normally Fickies would have expected to see his initials on the envelope containing the evidence. However, the envelope had been cut open in the area where he would have normally marked his initials. Fickies noted that part of the envelope was missing, and the missing part must have contained his initials, because his initials were not where he would normally expect them to have been marked. (36 RT 4849-4850.)

Fickies also examined an expended bullet.[30/] The expended bullet was stored in an envelope identified as Exhibit 34A. However, at trial, this envelope did not have Fickies' initials on it. Fickies' practice was to place his initials on an item he had handled. Fickies believed the bullet removed from Exhibit 34A was the expended bullet previously examined by him. As a normal custom and habit, he usually left his initials as a mark on a bullet once he had examined it. However, he was unable to see any initials on the expended bullet contained in Exhibit 34A. (36 RT 4852-4854.) At this point, Fickies testified, without objection, that it was his understanding that "defense experts" had looked at the expended bullet. (36 RT 4854.)

Fickies explained how markings are made by a weapon on a bullet. He further explained the different types of striations a gun barrel leaves on a bullet, and the process by which a ballistics expert examines the markings for

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30. This expended bullet was recovered from the doorframe of Howard Long's apartment. (36 RT 4832-4833.)

consistencies to determine if a bullet was fired by a certain gun. Based on Fickies' examination of the test-fired bullets from the gun (Exh. 1), and the expended bullet recovered from the doorframe of Long's apartment (Exh. 34A), Fickies opined that the expended bullet was fired from Scott's gun. (36 RT 4854-4861.)

During cross-examination, defense counsel asked Fickies whether he had conducted any additional tests or studies on the expended bullet or gun since April 1, 1993.[31] Fickies confirmed that he had not conducted any additional tests or examination of these items since that time. (36 RT 4865.)

Defense counsel then asked Fickies general questions regarding the gun, the expended bullet, and the test-fired bullet he examined. (36 RT 4865-4875.) More specifically, defense counsel questioned Fickies about his examination of the evidence and his opinion that the expended bullet (Exh. 34A) had been fired from the gun (Exh. 1). (36 RT 4876-4883.)

Fickies' initial report stated that the expended bullet was "probably fired" from the gun. Defense counsel inquired what had changed between the time of the initial report and his trial testimony regarding Fickies' opinion. Fickies explained about the DOJ laboratory policy that a second ballistics expert must review another expert's conclusions concerning his identification of an expended bullet coming from a specific gun. When the second firearms examiner initially reviewed Fickies' conclusions, the second examiner was not certain the expended bullet had come from Exhibit 1. However, the expended bullet and test-fired bullets were sent outside DOJ to another ballistics expert who reached the same conclusion as Fickies that "[t]here was a sufficient matching of individual characteristics, such that in my opinion the bullet was fired from the submitted revolver." This caused Fickies

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31. Fickies initially examined these items on March 17, 1993. Fickies testified before the grand jury on April 1, 1993. (36 RT 4865.)

to return to his more definitive conclusion that the expended bullet found in Howard Long's doorframe was fired from Scott's gun. (36 RT 4883-4885.)

On redirect, Fickies confirmed his opinion that the Exhibit 1 gun fired the expended bullet, Exhibit 34A. (46 RT 4886.) The prosecutor then asked if Fickies knew someone by the name of "Luke Haag." (36 RT 4887.) Defense counsel objected, and a discussion was held at sidebar. Defense counsel explained that Luke Haag was a ballistics expert hired by the defense, who was not going to be called as a witness. The prosecutor explained he was merely going to elicit who Luke Haag was from Fickies. Later the prosecutor planned to introduce evidence that the gun, expended bullet, and test-fired bullets were transferred from law enforcement to Haag. The prosecutor noted that he had not received a report from Haag, and he was not on the witness list. Defense counsel argued that by doing so, the prosecutor would create an insinuation that the defense expert's tests were consistent with the prosecution's expert's testimony. The trial court clarified that the defense was not going to call any firearms expert to testify. (36 RT 4887-4888.)

The trial court noted the matter was tied to a prior dispute wherein defense counsel originally refused to disclose the identity of his experts who received the prosecution's evidence. The prosecutor explained the issue arose after law enforcement transferred evidence to defense expert Carol Hunter, who in turn transferred the evidence to various other undisclosed defense experts. These unknown defense experts remained so because the defense refused to disclose their identities. The sole exception was the gun and expended bullet. That evidence was handed directly from a district attorney investigator to defense ballistics expert Luke Haag. The prosecutor indicated his questions to Fickies would be limited to inquiring as to Luke Haag's identity. (36 RT 4888-4889.)

The trial court found the identity of the defense ballistics expert was relevant because the court was concerned about potential inconsistencies in markings that could be used as fodder for misleading impeachment or a misleading inference of evidence tampering. The trial court inquired whether defense counsel could represent that it would not be a matter included in closing argument. Defense counsel would not make such a representation. Accordingly, the trial court confirmed the relevancy of the evidence, and indicated it would permit the prosecutor to ask Fickies the question regarding Luke Haag's identity and occupation. Defense counsel countered that the question could cause the jury to speculate as to the relevance of the evidence and as to the conclusions of the defense expert. The trial court noted that the fact the weapon was in someone's hands between the time Fickies examined it and observed the marking inside the weapon, and the time of trial, was relevant. The prosecutor added that given the fact the marking was on the weapon when Fickies had looked at it in March 1993, Luke Haag had obtained the gun in April 1995, and the cross-examination of Fickies had called into question his conclusions, the prosecution had the right to show not only that the weapon was available to the defense, but that the defense expert took possession of it, and therefore, had the opportunity to examine it. (36 RT 4889-4890.)

Defense counsel asserted that divulging that information was a comment on work product which was privileged. The trial court rejected this assertion and reminded counsel it was part of its ruling, that was affirmed by the Court of Appeals when it denied Scott's writ, rejecting his contention that the identity of defense experts is protected by the work-product privilege. The trial court overruled the objection and permitted the question. (36 RT 4890-4891.)

Back before the jury, the prosecutor asked Fickies if he knew Luke Haag, which Fickies answered affirmatively. In response to the prosecutor's

questions, Fickies said he had known Haag for approximately fifteen years, Haag was a private firearms examiner, and they both belonged to the California Association of Criminalists. (36 RT 4891-4892.)

Only relevant evidence is admissible. (Evid. Code, § 350.) Relevant evidence is evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210; *People v. Kelly* (1992) 1 Cal.4th 495, 523.) The test for relevance is whether the evidence "tends 'logically, naturally, and by reasonable inference' to establish material facts such as identity, intent, or motive." (*People v. Garceau* (1993) 6 Cal.4th 140, 177, overruled on another point in *People v. Yeoman* (2003) 31 Cal.4th 93, 117-118.) A trial court is vested with broad discretion in determining the relevance of evidence, "but lacks discretion to admit irrelevant evidence." (*People v. Benavides* (2005) 35 Cal.4th 69, 90.) A trial court's ruling on the admissibility of evidence is reviewed for abuse of discretion. (*Ibid.*; *People v. Heard* (2003) 31 Cal.4th 946, 972; Evid. Code, § 352.)

Here, the trial court properly admitted the evidence. Given that the expended bullet, test-fired bullets, and gun were not in the same condition as when Fickies last saw them when he examined them in 1993, the jury could have been left with the false impression that some how the items were tampered with while in law enforcement's custody. On direct examination, without objection, Fickies testified that a defense ballistics expert had examined the expended bullet, test-fired bullets, and gun. (36 RT 4854.) Thus, the jury was already aware that these items were in the possession of a defense ballistics expert. The jury learned that items were transferred to a named defense ballistics expert. This fact clarified any mistaken impression the jury could have been left with given Fickies' direct and cross-examination. The evidence was relevant and properly admitted.

Even assuming the evidence was not relevant, and should not have been admitted, any error was harmless. (See *People v. Watson* (1956) 46 Cal.2d 818, 836.) Contrary to Scott's claim, the jury learning the name of the defense expert did not bolster Fickies' testimony. It merely filled in information already known to the jury. The jury was already aware that the expended bullet, test-fired bullet, and gun had been in the possession of a defense ballistics expert. The expert merely had a name as opposed to an unknown defense ballistics expert. The jury learning the name of the defense ballistics expert and that he was a member of the California Association of Criminalists added nothing more to the relevant fact that he had possession of the items of evidence.

Moreover, as set forth above, overwhelming evidence supported Scott's conviction for the attempted murder of Howard Long. Scott was identified as wearing ninja-type clothing, including carrying swords, a knife, and a gun. Within days of Scott shooting at Long, Scott was seen in this ninja garb at his work-place. Scott was known to prowl during his martial-arts workouts in the area where Long was shot. Moreover, Scott was identified by other victims as wearing the same ninja clothing, and tied to three victims by serological evidence. Accordingly, even if the jury learning the identity of the defense ballistics expert was error, it was harmless.

XI.

THE TRIAL COURT PROPERLY ALLOWED EVIDENCE THAT SCOTT WAS ASKED TO LEAVE HIS PRIOR RESIDENCE BECAUSE OF HIS NOCTURNAL WAYS

Scott claims the trial court erred in allowing Todd Wolf to testify that he asked Scott to leave his residence because Scott refused to change his habit of staying out late at night. Scott contends the evidence was irrelevant, improper character evidence, and prejudicial. (AOB 263-268.) The trial court properly admitted this evidence.

Only relevant evidence is admissible. (Evid. Code, § 350.) Relevant evidence is evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210; *People v. Kelly*, *supra*, 1 Cal.4th at p. 523.) The test for relevance is whether the evidence "tends 'logically, naturally, and by reasonable inference' to establish material facts such as identity, intent, or motive." (*People v. Garceau*, *supra*, 6 Cal.4th at p. 177, overruled on another point in *People v. Yeoman*, *supra*, 31 Cal.4th at pp. 117-118.) A trial court is vested with broad discretion in determining the relevance of evidence, "but lacks discretion to admit irrelevant evidence." (*People v. Benavides*, *supra*, 35 Cal.4th at p. 90.) A trial court's ruling on the admissibility of evidence is reviewed for abuse of discretion. (*Ibid.*; *People v. Heard*, *supra*, 31 Cal.4th at p. 972.)

Similarly, a trial court has broad discretion to exclude evidence under Evidence Code section 352. That section provides that a

> court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.

(Evid. Code, § 352; see *People v. Cudjo* (1993) 6 Cal.4th 585, 609.)

> A trial court's exercise of discretion in admitting or excluding evidence is reviewable for abuse (*People v. Alvarez* (1996) 14 Cal.4th 155, 201 [58 Cal.Rptr.2d 385, 926 P.2d 365]) and will not be disturbed except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice (*People v. Jones* (1998) 17 Cal.4th 279, 304 [70 Cal.Rptr.2d 793, 949 P.2d 890]).

(*People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10.)

Scott and Wolf were both members of the New Wine Church in Moreno Valley. Wolf allowed Scott to stay in his family's apartment for about six to eleven months. Eventually, Wolf asked Scott to leave. (33 RT 4403-4404.) When the prosecutor asked why, Scott's counsel requested a sidebar. At sidebar, defense counsel objected on relevancy grounds. The prosecutor stated the evidence supported the prosecution theory that Scott was out wandering around late at night. Defense counsel argued that it occurred in the months prior to Kenny's murder and therefore was not relevant. The prosecutor said the evidence showed Scott's habit and custom in connection with the pending charges. The trial court found the evidence relevant for that purpose. (33 RT 4404-4405.) Back before the jury, Wolf explained he asked Scott to leave because he had repeatedly disregarded Wolf's request not to stay out late at night. (33 RT 4407.) This was not improper character evidence. (Evid. Code § 1101.) The trial court properly exercised its discretion to admit evidence Scott regularly stayed out late at night.

Even assuming *arguendo* error, it was harmless. The jury heard from other witnesses that it was Scott's habit and custom to stay out late. The jury heard that Scott went out late at night and practiced martial arts in the Canyon Crest hills. He worked at the movie theater at night. Even if the trial court abused its discretion in admitting the evidence, it was harmless because it was

not reasonably probable Scott would have received a more favorable result if the evidence had been excluded. (See *People v. Watson*, *supra*, 46 Cal.2d at p. 836.)

XII.

THE TRIAL COURT PROPERLY ALLOWED EVIDENCE THAT SCOTT STEALTHILY SNUCK UP ON A CO-WORKER AND SLASHED HIM WITH A KNIFE FOR SEEMINGLY NO REASON

Scott claims the trial court erred when it allowed Scott's co-worker, Matthew Texera, to testify that, about a month before Scott's January 21, 1993 arrest, when Texera was working the movie theater snack bar, Scott snuck up behind him, swung a punch at him and, in so doing, slashed him with a knife. Scott maintains the evidence was irrelevant, improper character evidence, and its admission violated his rights to a fair trial and due process. (AOB 268-272.) The evidence was relevant to matters at issue in the trial. It was not improper character evidence, and it was more probative then prejudicial. Accordingly, the trial court properly exercised its discretion in admitting this evidence.

As set forth in Argument XI, it is within the sound discretion of the trial court to determine the admissibility of evidence. Only relevant evidence is admissible. (*People v. Heard*, *supra*, 31 Cal.4th at p. 972; *People v. Alvarez* (1996) 14 Cal.4th 155, 201.) A trial court's determination to admit or exclude evidence is reviewed for abuse of discretion. A trial court's discretion is exercised in an abusive manner if it is arbitrary, capricious, or patently absurd, resulting in a manifest miscarriage of justice. (*People v. Rodriguez*, *supra*, 20 Cal.4th at pp. 9-10.) Here, the trial court properly exercised its discretion.

One of Scott's co-workers at the Canyon Spring movie theater, Matthew Texera, testified on November 24, 1997. The prosecutor asked Texera if something unusual happened between him and Scott. (33 RT 4435-4437.) Scott's counsel objected and, at a sidebar, stated the evidence was irrelevant and more prejudicial than probative. The prosecutor countered that the evidence was relevant because Scott came upon Texera stealthily, with a knife in his hand, which he swung at Texera, and cut him. The trial court found

the evidence was relevant because it showed the Scott had a familiarity with knives, and that Scott demonstrated his ability to stealthily sneak up on a person. The trial court weighted the probative value of the evidence against it potential prejudice, and found the evidence to be more probative than prejudicial. (33 RT 4438-4440.) Texera testified consistent with the prosecutor's representation that, unbeknownst to him, Scott came up behind Texera, swung at him with a knife in his hand, and cut him deep enough to draw blood. (33 RT 4440-4441.)

Scott challenges the trial court's finding that Texera's testimony showed Scott had access to a knife, because virtually everyone has access to a knife. (AOB 269.) While virtually everyone may have access to a knife, very rarely do people carry a knife around with them while they undertake their daily activities. Even more unusual is someone stealthily sneaking up on a high-school-aged co-worker, swinging at the teenager with a knife, and slashing him without any provocation. It showed that Scott was adept at carrying a knife on his person while he performed his everyday activities, including his job. It further showed that Scott was a person who was adept at moving stealthily around people. It also showed that Scott would use a knife to cut someone absent provocation. The evidence was relevant to the charged crimes executed in a stealthy manner by a man using a knife without provocation by the victims, and therefore properly admitted.

Even assuming *arguendo* error, it is not reasonably probable that Scott would have enjoyed a more favorable outcome if the challenged evidence had been excluded. (See *People v. Ayala* (2000) 23 Cal.4th 225, 271; *People v. Sakarias* (2000) 22 Cal.4th 596, 630.) Scott matched the physical description of the ninja-clad rapist-murderer. Scott owned and dressed in a black ninja costume, including a hood and tabbie boots. Scott practiced martial arts in the Canyon Crest hills. Scott owned and carried a gun, sword, and martial-arts

throwing stars. Scott was identified as being in the area just prior to the attack on Courtney. Scott possessed, was known to carry, and used a knife to stab Phillip Courtney and Gail Kenny. While driving past Kenny's apartment building, Scott told Compton about Kenny's murder, including the manner in which she was killed, and the location of her body within her apartment, at a time prior to her killing becoming public knowledge. Articles, cut from the newspaper, regarding Kenny's murder, Courtney's stabbing, and crimes involving Julia K. and Joseph C. were found in Scott's possession. Serological evidence tied Scott to the Kenny, Julia K., and Regina M. crimes. Any error was harmless.

XIII.

THE TRIAL COURT PROPERLY ALLOWED FOUR QUESTIONS TO JULIA K. ABOUT HER PRESENT MEDICAL CONDITION

Scott claims the trial court erred when it allowed the prosecutor to ask Julia K. four questions regarding her present medical condition at the outset of her testimony. Scott alleges that the questions only were designed to evoke sympathy for Julia K., were not relevant, and were prejudicial. (AOB 272-277.) The record does not support Scott's view of Julia K.'s testimony that was limited and explanatory. The trial court properly exercised its discretion in permitting this limited area of questioning.

As set forth in Arguments XI and XII, and incorporated herein by reference, the law requires the trial court to consider the probative value of evidence against it potential prejudicial impact and then exercise, in a non-abusive manner, its discretion in admitting the evidence. Here, the trial court followed the law, in that it found the probative value outweighed the potential prejudice, and properly exercised its discretion to allow four questions posed to Julia K. at the commencement of her testimony.

On December 1, 1997, during a discussion concerning scheduling, the prosecutor informed the trial court and counsel that Julia K. had given birth the day before and that the baby was in the "ICU."[32/] This caused the prosecutor to rearrange the scheduling of witnesses. (35 RT 4786-4787.) The next day, in another conversation regarding scheduling, the prosecutor told the court and counsel that Julia K. and her baby were hospitalized a few blocks

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32. Scott's assertion that baby could have been in the hospital for a "benign reason" (AOB 276) is belied by the record. Common human experience establishes that babies are not placed in an intensive care unit for a "benign reason."

from the courthouse, and that it was her desire to testify the next day because then she would not be too far from her child. (36 RT 4892-4893.)

On December 3, 1997, out of the presence of the jury, there was a discussion between counsel and the trial court regarding Julia K. Julia K. had been released from the hospital the night before. The prosecutor wanted the jury to be aware that she had just had a baby and the baby remained hospitalized. In support of this request, the prosecutor noted that Julia K. had requested that he place a special cushion on the witness seat for her to sit on. Additionally, Julia K. notified the prosecutor that she might need frequent breaks. The prosecutor believed that, given her circumstances, she might be tired, nervous, and fidgety, and he did not want the jury to misperceive her emotional and physical condition as a poor attitude toward the proceedings. The trial court inquired as to the specific questions the prosecutor intended to ask, and the prosecutor provided the prospective leading questions, to assure there would be no explanation. Scott's counsel stated he did not see the relevance that she had had a baby within the past few days, and that it was an attempt to elicit sympathy or identification between the Julia K. and the jury. The trial court found that the information was relevant to explain her demeanor, and planned to advise the jury not to have any sympathy due to her recent childbirth. (37 RT 4941-4944.)

Before the jury, the prosecutor initiated his questioning of Julia K. by asking if she had had a baby three days earlier, if she had been discharged from the hospital the night before, if the baby was still in the hospital, and if she "wanted to just get this over with this morning." Julia K. provided the single word "Yes" in response to each of these four questions. (37 RT 4946.) The prosecutor then proceeded to other lines of questioning.

Scott complains these brief four questions and answers had nothing to do with any potential discomfort Julia K. may have had from childbirth that

had occurred three days earlier, but instead was to create an "almost heroic aura" around Julia K. as she faced her assailant. (AOB 275.) Scott is incorrect that the record is silent as to any actual physical discomfort Julia K. may have been suffering at the time she testified as a result of having given birth three days earlier. Julia K. needed a "donut" cushion to sit on when she sat in the witness chair. (37 RT 4943.) Moreover, the brief preliminary questions and answers permitted by the trial court did not create any "heroic aura" for Julia K. with the jury. Any potential "heroic aura" that may have been perceived by the jury regarding Julia K. would no doubt rest with testimony relating how she endured repeated rapes and a lengthy imprisonment in her own home.

Scott further complains that the fact Julia K's baby remained in the hospital had nothing to do with any physical discomfort she may have been experiencing due to having given birth three days earlier. (AOB 275-276.) Scott's argument is unpersuasive, as it is readily apparent the fact that Julia K.'s newborn baby was in intensive care would have an impact upon her emotional state, which the jury should not be left to misconstrue as relating to her testimony against Scott.

Scott also faults the trial court for failing to instruct the jury not to have sympathy for Julia K. immediately after she testified. (AOB 274.) Scott is simply wrong that the trial court did not provide a cautionary instruction regarding the testimony from Julia K. about her recent childbirth. Immediately after her testimony, the trial court instructed the jury that:

> the Court allowed the questions by counsel of [Julia K.] concerning her giving birth to the child recently and being discharged from the hospital so that you would be aware of her present physical and emotional condition as it may bear on her ability to testify, and that you should not consider those factors concerning the birth of the child for any purpose other than that and should not give any consideration as to either sympathy for or bias against either side, the People or the defendant.

(37 RT 5022.)

Additionally, after the presentation of testimony was completed, the jury was instructed not to be influenced by, among other things, sympathy. (46 RT 6156.) The trial court also instructed the jury to take into account several factors when assessing a witness's credibility, including the witness's demeanor while testifying. (46 RT 6160-6161.) Absent proof to the contrary, and Scott has shown none, the jury is presumed to have followed the trial court's instructions. (*People v. Mickey* (1991) 54 Cal.3d 612, 689, fn. 17 ["the crucial assumption underlying our constitutional system of trial by jury is that jurors generally understand and faithfully follow instructions"]; see also *People v. Delgado* (1993) 5 Cal.4th 312, 331.)

Scott suggests there were other ways the trial court could have addressed the issue. While this may be true, it does not demonstrate that the method utilized by the trial court was improper or an abuse of discretion. The trial court properly exercised its discretion in allowing the four questions to Julia K., and its subsequent admonishment instructed the jury on how to properly utilize the information.

Even assuming *arguendo* error, it is not reasonably probable Scott would have enjoyed a more favorable outcome, absent the trial court permitting the four questions eliciting the fact that Julia K. had given birth three days earlier and that her newborn baby was in intensive care at the time of her testimony. (*People v. Watson*, *supra*, 46 Cal.3d at p. 836.) Julia K. delivered damning testimony against Scott. She provided extensive details of the bizarre and brutal experience of being held captive, at gun-point, by Scott in her home for hours and repeatedly raped, while her fiancé was restrained and threatened by Scott. She accurately described Scott as a light-skinned black man with Asian-looking eyes. (37 RT 4976-4977.) Scott was clearly not prejudiced, even assuming any error from the inquiry regarding the

circumstances under which she testified, *i.e.*, after giving birth recently and having her newborn in intensive care.

XIV.

THE TRIAL COURT'S ADMISSION OF VICTIM-IMPACT EVIDENCE DID NOT ABRIDGE SCOTT'S CONSTITUTIONAL RIGHTS TO DUE PROCESS AND A FAIR AND RELIABLE PENALTY DETERMINATION

Scott contends that his Fifth, Sixth, Eighth, and Fourteenth Amendment rights under the United States Constitution to due process and a fair and reliable penalty determination were violated when the trial court admitted evidence concerning the character of Brenda Gail Kenny and the impact upon her family, friends, and society from her murder. (AOB 278-292.) There was no error whatsoever, let alone error of a constitutional magnitude. Moreover, even assuming error, Scott was not prejudiced by the relatively brief victim-impact evidence, given the weight of the evidence in aggravation.

Victim-impact evidence is admissible during the penalty phase of a capital trial. (*Payne v. Tennessee* (1991) 501 U.S. 808, 829 [111 S.Ct. 2597, 115 L.Ed.2d 720].) Injury inflicted by the defendant, including the impact of the crime on the family of the victim, is a circumstance of the crime and is admissible under factor (a). (*People v. Johnson* (1992) 3 Cal.4th 1183, 1245.) Allowing the admission of victim-impact evidence encompasses evidence that logically shows the harms caused by the defendant. (*People v. Edwards* (1991) 54 Cal.3d 787, 835.)

The admission of victim-impact evidence, however, is not without limits. "Irrelevant information or inflammatory rhetoric that diverts the jury's attention from its proper role or invites an irrational, purely subjective response should be curtailed." (*Payne, supra*, 501 U.S. at p. 836.) Moreover, victim-impact evidence cannot be "so unduly prejudicial that it renders the trial fundamentally unfair" in contravention of a defendant's right to due process under the Fourteenth Amendment. (*Id.*, at p. 825; *People v. Brown* (2004)

33 Cal.4th 382, 396; *People v. Edwards*, *supra*, 54 Cal.3d at p. 835.) Scott complains the limitations in *Payne* were not met here because the victim-impact evidence caused the jury's emotion to overcome reason, denying him a reasoned penalty-phase determination. Nothing in the victim-impact testimony from Kenny's father, mother, sister, brother, and brother-in-law abridged Scott's constitutional rights.

Scott moved to exclude victim-impact evidence. (21 CT 6145-6165.) On January 15, 1998, the trial court heard Scott's motion to exclude evidence. (48 RT 6357-6371.) The trial court properly exercised its discretion. It permitted Kenny's relatives to testify about the impact of her loss, and excluded the other, non-family-member witnesses proposed by the prosecution. The trial court did not err in permitting five relatives of the victim to testify regarding the victim's character and the harm caused by Scott. This Court has approved of multiple witnesses testifying to victim impact. (See, *e.g.*, *People v. Boyette* (2002) 29 Cal.4th 381, 440-441, 443-444; *People v. Taylor* (2001) 26 Cal.4th 1155, 1171-1172; see John H. Blume, "Ten Years of *Payne*: Victim Impact Evidence in Capital Cases," 88 Cornell L. Rev. 257, 270 (2003) [most states allowing victim-impact evidence place no limit on the number of witnesses].) As long as victim-impact evidence is not unduly prejudicial pursuant to Evidence Code Section 352, the trial court should have discretion to admit any number of witnesses. (See *People v. Box* (2001) 23 Cal.4th 1153, 1200-1201.)

As the high court held in *Payne*:

> [A] State may properly conclude that for the jury to assess meaningfully the defendant's moral culpability and blameworthiness, it should have before it at the sentencing phase evidence of the specific harm caused by the defendant. "[T]he State has a legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in, by reminding the sentencer that just as the murderer should be considered as an individual, so too

> the victim is an individual whose death represents a unique loss to society and in particular to his family." [Citation].

(*Payne*, *supra*, 501 U.S. at p. 825.)

California law is consistent with the principles enunciated in *Payne*. As this Court has held:

> Unless it invites a purely irrational response from the jury, the devastating effect of a capital crime on loved ones and the community is relevant and admissible as a circumstance of the crime under section 190.3, factor (a).

(*People v. Lewis* (2006) 39 Cal.4th 970, 1056-1057.)

Testimony by Kenny's father, mother, brother, sister, and brother-in-law regarding the immediate and lasting effects of Scott's brutal and senseless murder was well within the parameters for appropriate victim-impact evidence. Testimony by family members about the various ways their lives were adversely affected by the victim's death is proper. (*People v. Taylor*, *supra*, 26 Cal.4th at pp. 1171-1172.) That families are aggrieved is an "obvious truism" and an "obvious and predictable" consequence of murder. (*People v. Sanders* (1995) 11 Cal.4th 475, 550.) While victim-impact evidence is obviously emotional, it is not surprising or shocking. (*Id.*)

Scott argues the jury could not "face its obligations soberly and rationally," because, not long after being called to the stand to testify, Kenny's father became emotionally overwhelmed while describing his daughter's life history. (AOB 283-284.) Scott also complains that Kenny's father testified to the scene at his daughter's apartment when he and his wife found their daughter's body. (AOB 284.) Kenny's father's testimony concerned the "immediate effects of the murder" and the "understandable human reactions" that accompanied finding his daughter brutally murdered in her own home. (*People v. Brown*, *supra*, 33 Cal.4th at pp. 397-398; *People v. Wilson* (2005) 36 Cal.4th 309, 357.)

Scott also argues that the "tortured ruminations of a grief stricken father" caused the jury to be diverted from its role in rationally evaluating the penalty-phase evidence. (AOB 284-295.) Specifically, he complains about Kenny's father testifying about how often his thoughts go to his daughter being with Scott for several hours, and the testimony of what happened to other women who were with Scott for hours. (*Id.*) Scott contends this testimony was not related to either the unique character of the victim or how much she would be missed. (AOB 284.) There was nothing improper or unduly prejudicial about Kenny's father's testimony. While emotional, there was nothing surprising or shocking about Kenny's father's grief-stricken testimony. His testimony regarding the impact of Scott's murder upon him was a tragically obvious and predictable consequence of Scott's murder of Kenny. (*People v. Sanders*, *supra*, 11 Cal.4th at p. 550.)

Scott next complains about the testimony of Kenny's sister, Mary Costello. He characterizes her testimony as "essentially repeat[ing]" Kenny's life history. He argues that her testimony was cumulative, largely irrelevant to permissibly relevant areas of inquiry, and improperly emphasized in emotional terms the collateral psychological consequences on Kenny's extended family, which invited a purely emotional response from the jury. (AOB 285-287.) As noted above, there is no requirement that only one witness be permitted to testify to the impact of the victim's murder. Specifically, he complains about Costello testifying "in detail" about how severely depressed her elderly parents became due to Kenny's murder, and how she was required to leave her own family in order to care for them. (AOB 285, citing RT 6434-6435.) She also testified about how they were so frightened by the murder, they all slept in the same bed. Moreover, once she returned to her own home and family, she was still so frightened that she could not leave her home by herself for several years. (AOB 285, citing RT 6434-6436.) She also spoke

about how she became obsessed with the safety of her own college-age daughter. (AOB 285, citing RT 6437.) Finally, Scott complains Costello related that her last conversation with her sister was about a vacation Kenny planned to take in October 1992. (AOB 285, citing RT 6437-6438.)

Scott also complains that the testimony of Costello's husband, Robert Costello, relating how he accompanied Kenny's brother, Glenn Kenny, to her apartment to attend to her business, was cumulative and irrelevant. (AOB 286.) Specifically, Robert Costello testified that Kenny's father could not bring himself to enter the apartment. He testified that there was still blood inside the apartment, and it was very difficult and emotional for Glenn Kenny. (AOB 286, citing RT 6444-6445.) He also testified to his fears for his wife and daughter based on what happened to Kenny. He testified that he keeps a baseball bat for protection, and his wife had to see a therapist. (AOB 286, citing RT 6446-6449.) The law does not require that a victim restrict their testimony to the impact upon themselves, omitting any mention of the impact upon other family members. (*People v. Panah* (2005) 35 Cal.4th 395, 495.)

Scott then complains that the testimony of Kenny's brother, Glenn Kenny, was cumulative and irrelevant. (AOB 287-288.) Kenny's brother testified about the scene at her apartment, and the effect of his sister's murder on his own three children from losing their aunt. (AOB 287, citing RT 6453-6459.) Kenny's brother testified he was afraid to go out at night, and that caused his children to be afraid. (AOB 287, citing RT 6456-6457.) Scott also contends he was denied a fair penalty determination because Kenny's brother read from an essay his son Shea wrote about his aunt's death. (AOB 287, citing RT 6458-6459.) Finally, Scott complains that Kenny's brother related how his daughter Jiselle, who had not been born at the time of the murder, nevertheless cries for her aunt. (AOB 288, citing RT 6457.) Scott argues the testimony was about the deep, psychological fears of Kenny's

extended family which "can only be described as an emotional plea to the jury" based on the inadmissible evidence of the fears of children. (AOB 288.) As discussed above, there is no requirement that a witness omit discussion of the impact upon other family members. (*People v. Panah*, *supra*, 35 Cal.4th 395, 495.)

Scott next complains about the "emotionally wrenching imagery" from Kenny's "distraught and anguished" mother, Maxine Kenny, who testified what it was like to lose a child. (AOB 288-289.) Specifically, Scott notes Kenny's mother's testimony that her daughter's face in death was an image that would haunt her for the rest of her life, and how losing a child in such a brutal and senseless way felt as though a part of her heart had been ripped out. (AOB 289, citing RT 6461-6462.) He also complains about her testimony explaining how painful it was as a parent when she found her daughter, to be helpless and unable to do anything to help her. She testified that when she found her daughter, it was as though her "own life had ended as well at that moment." (AOB 289, citing RT 6464-6465.) Kenny's mother's testimony did not surpass the limits on victim-impact evidence. To the contrary, the testimony, although emotional, was not surprising or shocking. Instead it was tragically obvious and predictable in terms of the impact upon a mother from the brutal and senseless murder of a daughter. (See *People v. Sanders*, *supra*, 11 Cal.4th at p. 550.)

Scott argues that the testimony from Kenny's parents, two siblings, and brother-in-law, was so voluminous and inflammatory as to divert the jury's attention from its proper role. (AOB 290, citing *People v. Taylor*, *supra*, 26 Cal.4th at p. 1172.) Scott contends the witnesses had to limit their testimony to the "general impact of her loss." (AOB 290.) The law does not support Scott's suggestion that only the most vague and generalized testimony is permissible. This Court has permitted testimony of the description of what the victim's mother and grandmother saw when they viewed the victim at

the mortuary, as well as a photograph of the victim's gravesite as evidence relating to the victim's death and the impact upon her family. (*People v. Harris* (2005) 37 Cal.4th 310, 351-352.)

Scott claims the prejudice from the family members' testimony was exacerbated by references and viewing photos of the victim that were "hand-picked to maximize the emotional impact." (AOB 290.) The trial court reviewed the photographs of Gail Kenny and excluded some as cumulative. (RT 6393-6403.) The trial court properly admitted the photographs of Kenny. Photos of victims while alive constitute "circumstances of the offense" and portray victims as the defendant saw them at the time of the killing. (*People v. Carpenter* (1997) 15 Cal.4th 312, 401; *People v. Cox* (1991) 53 Cal.3d 618, 688.)

Even assuming *arguendo* error in admission of victim-impact evidence, reversal is not required. Erroneous admission of victim-impact evidence is subject to a harmless-error analysis. (*People v. Johnson*, *supra*, 3 Cal.4th at p. 1246.) There is no reasonable probability that Scott would have enjoyed a more favorable outcome, absent the victim-impact evidence. (*People v. Jones* (2003) 29 Cal.4th 1229, 1264.) Moreover, any federal constitutional error would also be harmless beyond a reasonable doubt. (*Chapman*, *supra*, 386 U.S. at pp. 24-26.)

The entire presentation by Kenny's family members spanned only 59 pages of testimony in the penalty phase. In contrast, Scott's evidence in mitigation consumed 134 pages.

The trial court instructed the jury not to be swayed by prejudice against Scott. (52 RT 6849 [CALJIC No. 8.84.1].) The trial court also instructed the jury they were "free to assign whatever moral or sympathetic value you deem appropriate to each and all the various factors you are permitted

to consider." (52 RT 6853 [CALJIC No. 8.88].) The jury is presumed to have followed these instructions. (*People v. Rich* (1988) 45 Cal.3d 1036.)

The evidence in aggravation showed that among the most significant considerations in assessing penalty were the circumstances of Scott's underlying crimes.

In light of the brevity of the victim-impact evidence (59 pages), and the nature of the evidence in aggravation, it is clear the admission of the testimony did not undermine the fundamental fairness of the penalty determination. Even if the victim-impact evidence had been excluded, the outcome would have remained the same. Scott's death sentence does not rest with unduly prejudicial victim-impact evidence; rather, it rests squarely with the evidence in aggravation, including the circumstances of his senseless and brutal crimes.

XV.

CALIFORNIA'S DEATH-PENALTY LAWS ADEQUATELY NARROW THE CLASS OF MURDERERS ELIGIBLE FOR THE DEATH PENALTY

Scott complains California's death penalty violates the Eighth and Fourteenth Amendments because it fails to meaningfully narrow those murderers who are eligible for the death penalty, and it results in the death penalty being imposed randomly on a small fraction of those who are death-eligible. (AOB 294-301.) This Court has already rejected Scott's contention. (*People v. Elliot* (2005) 37 Cal.4th 453, 487; *People v. Cornwell* (2005) 37 Cal.4th 50, 102.) Scott provides no reason for this Court revisiting its decisions rejecting his claim.

Scott contends that almost all felony-murders are encompassed by special circumstances, and felony-murder includes cases involving accidental and unforeseeable deaths, or acts "committed in a panic, or under the dominion of a mental breakdown, or acts committed by others." (AOB 297.) This Court has already properly concluded that the felony-murder special circumstance provides a meaningful basis for distinguishing the few cases for which the death penalty is imposed from the many cases in which it is not. (*People v. Musselwhite*, *supra*, 17 Cal.4th at pp. 1265-1266.)

Scott also argues that special circumstances have been extended to virtually all intentional murders, based on this Court's construction of the lying-in-wait special circumstance. (AOB 297.) This Court has rejected Scott's complaint, as the lying-in-wait special circumstance provides a meaningful basis for distinguishing those few cases where the death penalty is imposed from the many cases in which it is not. (*People v. Moon* (2005) 37 Cal.4th 1, 44; *People v. Hardy* (1992) 2 Cal.4th 86, 191; *People v. Roberts* (1992) 2 Cal.4th 271, 323.)

Scott complains that since not all premeditated and deliberate murders render the perpetrator death-eligible, the fact that the perpetrator of a felony murder is death-eligible renders California's death-penalty statute arbitrary and capricious and therefore unconstitutional. (AOB 299.) Scott acknowledges this Court has rejected his contention, but complains it has done so "with very little discussion." (AOB 300.) He also complains that this Court's reliance on *Pulley v. Harris* (1984) 465 U.S. 37, 53 (104 S.Ct. 871, 79 L.Ed.2d 29), in rejecting the contention was misplaced. (AOB 300, citing *People v. Stanley* (1995) 10 Cal.4th 764, 842.) Scott provides no reason for this Court to revisit the issue.

XVI.

PENAL CODE SECTION 190.3, SUBDIVISION (a), IS NOT UNCONSTITUTIONALLY APPLIED

Scott contends that California Penal Code section 190.3, subdivision (a), is unconstitutionally applied because it permits the arbitrary and capricious imposition of the death penalty in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. (AOB 301-309.) Scott acknowledges that the constitutionality of the statute has been upheld by the United States Supreme Court in *Tuilaepa v. California* (1994) 512 U.S. 967, 987-988 (114 S.Ct. 2630, 129 L.Ed.2d 750), but complains that the statute is unconstitutional as applied. (AOB 303.) This Court has already rejected Scott's claim, and he provides no reason for this Court revisiting its prior decisions.

Scott complains that the application of the statute is arbitrary because circumstances of the crime under factor (a) have been construed as aggravating in various cases in a contradictory manner. (AOB 303.) Scott lists examples of the circumstances of crimes that he claims are contradictory. The Constitution does not require that particular circumstances of the crime be chosen as aggravating as over others to avoid transparent and irrelevant contrasts. For example, Scott complains that aggravating circumstances include the infliction of many blows and wounds upon the victim in one case, while a single execution-style wound is considered as a circumstance of the crime under factor (a) in another. (*Id.*) Scott makes the same point in the context of aggravating circumstances being based on killing in cold blood, while other cases find it aggravating that the defendant killed during a savage frenzy. (AOB 304.) There is nothing contradictory with finding multiple blows and wounds to be an aggravating circumstance of a crime in one case, and the cold-calculated execution-style nature of murder aggravating in another case. The brutality of

a savage murder is no less a valid circumstance of a crime than the calculated coldness of the more exacting murder in another. Similarly, Scott complains that in some cases the motive for the murder (*e.g.*, money, revenge, witness elimination, avoiding arrest, sexual gratification) is considered aggravating, whereas killing without any motive has also been found aggravating. (AOB 304.) Senseless violence is no less a permissible consideration in aggravation under factor (a) than motives that make the circumstances of a murder more aggravated.

Scott also contends that factor (a) is arbitrarily applied because circumstances of the crime can be considered aggravating which are inevitably present in every homicide. (AOB 306.) For example, he complains that the entire spectrum of ages of victims can be cited as a circumstance of the crime in aggravation. To illustrate his point he cites to cases where the death penalty has been imposed where the victim was a child, an adolescent, a young adult, in the prime of life, or elderly. (AOB 306.) He also cites: the method of killing (strangled, bludgeoned, stabbed, consumed by fire); motive for killing (money, eliminate witness, sexual gratification, avoid arrest, revenge, absence of motive); the time of the killing (middle of the night, late at night, early morning, or middle of the day); and location of killing (own home, public location, or remote location). (AOB 307-308.) There is nothing arbitrary and capricious about recognizing the aggravating nature based on the relative age of the victim, the method of killing, motive for killing, or location of killing, even if those various considerations are not precisely the same in each case.

Scott complains that, absent some narrowing principles to be applied to evidence in aggravation, California Penal Code section 190.3, subdivision (a), is unconstitutionally applied. (AOB 309.) Scott is wrong. As this Court has concluded, a jury's consideration of the circumstances of a crime under

factor (a) is an individualized function, not a comparative function. (*People v. Jenkins* (2000) 22 Cal.4th 900, 1052.)

XVII.

CALIFORNIA'S DEATH-PENALTY STATUTE HAS ADEQUATE SAFEGUARDS AGAINST AN ARBITRARY AND CAPRICIOUS IMPOSITION OF A DEATH SENTENCE

Scott contends that California's death-penalty statute violates his rights to due process, equal protection, and to be free from cruel and unusual punishment, guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, because it fails to provide safeguards to avoid an arbitrary and capricious imposition of the death penalty.[33/] Specifically, Scott complains the missing safeguards consist of failing to: (1) require proof beyond a reasonable doubt, or in the alternative, proof by a preponderance of the evidence, as to the imposition of a death sentence; (2) require unanimous agreement on aggravating factors; (3) require written findings regarding aggravating factors; (4) require inter-case proportionality review; (5) require instruction that unadjudicated criminal activity cannot serve as a factor in aggravation, absent the jury unanimously finding the criminal activity beyond a reasonable doubt; (6) foreclose the use of restrictive adjectives in the list of potentially mitigating factors; (7) instruct that statutory mitigating factors were relevant solely as potential mitigating factors; and (8) restrict the discretion of prosecutors to pursue the death penalty. (AOB 309-356.) Scott's contentions have already been rejected by this Court, and Scott provides no basis for this Court revisiting his assertions.

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33. At the outset of this argument, Scott perfunctorily reiterates the same complaints he raised in Arguments XV and XVI about California's death-penalty statute, *i.e.*, that the statute is unconstitutional because it fails to narrow the murders which are death-eligible offenses or those factors which are aggravating for purposes of imposing the death penalty. Accordingly, Respondent reincorporates the earlier response to Arguments XV and XVI herein, in response to Scott's repetition of those same contentions in Argument XVII.

A. The Constitution Does Not Require Penalty-Phase Determinations to Be Beyond a Reasonable Doubt

Scott contends California's death-penalty statute is unconstitutional because it does not require proof beyond a reasonable doubt or, in the alternative, proof by a preponderance of the evidence, as to the imposition of a death sentence. (AOB 310-331.) This Court has repeatedly rejected the claim that it is unconstitutional to impose a death sentence unless the jury expressly finds aggravating circumstances outweigh mitigating circumstances beyond a reasonable doubt. (*People v. Moon*, *supra*, 37 Cal.4th at p. 43; *People v. Snow* (2003) 30 Cal.4th 43, 125-127; *People v. Cox* (2003) 30 Cal.4th 916, 971; *People v. Burgener* (2003) 29 Cal.4th 833, 884, fn. 7; *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1150-1151.) Scott does not provide any reason for this Court revisiting its prior decisions rejecting his claim.

Scott relies on the opinions of the United States Supreme Court in *Apprendi v. New Jersey* (2000) 530 U.S. 466 (120 S.Ct. 2348, 147 L.Ed.2d 435), and *Ring v. Arizona* (2002) 536 U.S. 584 (122 S.Ct. 2428, 153 L.Ed.2d 556). (AOB 314-318.) These decisions do not render California's capital-punishment system unconstitutional. As this Court has already determined, *Apprendi*, *Ring*, and *Blakely* do not compel a different result. (*People v. Stitely*, *supra*, 35 Cal.4th at p. 573; *People v. Morrison* (2004) 34 Cal.4th 698, 730-731; *People v. Prieto* (2003) 30 Cal.4th 226, 262-263; *People v. Anderson* (2001) 25 Cal.4th 543, 589.) Scott has not presented any reason for this Court reexamining its prior decisions rejecting his contentions.

B. The Constitution Does Not Compel the Jury to Unanimously Agree on Factors in Aggravation

Scott complains it is "inconceivable" that a death verdict can satisfy the Eighth Amendment, yet be based on each juror finding a different set of

aggravating circumstances and voting separately on whether each juror's individual set of aggravating circumstances warrants death. (AOB 332.) This Court has already rejected Scott's contention. (*People v. Moon*, *supra*, 37 Cal.4th at p. 43; *People v. Boyette*, *supra*, 29 Cal.4th at p. 465.) Scott presents no basis for reexamining its prior decisions rejecting his contention.

C. The Constitution Does Not Require Written Findings Regarding Aggravating Factors

Scott contends his rights to due process and meaningful appellate review were denied because the jurors did not make written findings regarding the aggravating factors they relied upon in finding a death sentence to be appropriate. (AOB 340-344.) This Court has already rejected Scott's contention. (*People v. Moon*, *supra*, 37 Cal.4th at p. 43; *People v. Brown*, *supra*, 33 Cal.4th at p. 402; *People v. Nakahara* (2003) 30 Cal.4th 705, 721.) Scott provides no basis for this Court revisiting its prior decisions rejecting his claim. Accordingly, his claim should be denied.

D. The Constitution Does Not Mandate Inter-Case Proportionality Review

Scott complains his constitutional rights are being violated due to the absence of inter-case proportionality review of his death sentence. (AOB 345-350.) Inter-case proportionality review is not constitutionally required in California (*Pulley*, *supra*, 465 U.S. at pp. 51-54; *People v. Wright* (1990) 52 Cal.3d 367), and this Court has consistently declined to undertake it (*People v. Williams* (2006) 40 Cal.4th 287, 310; *People v. Dunkle* (2005) 36 Cal.4th 861, 940; *People v. Harrison*, *supra*, 35 Cal.4th at p. 261). Scott provides no basis for this Court revisiting its prior decisions rejecting his claim. Accordingly, his claim should be denied.

E. The Constitution Does Not Mandate Instruction of the Jury During the Penalty Phase That Unadjudicated Criminal Activity Cannot Serve as an Aggravating Factor, Absent the Jury Unanimously Finding the Criminal Activity Beyond a Reasonable Doubt

Scott contends the jury must be instructed that unajudicated criminal activity cannot serve as an aggravating factor, absent the jury unanimously finding the criminal activity beyond a reasonable doubt. (AOB 351-352.) This Court has already rejected Scott's contention. (*People v. Anderson*, *supra*, 25 Cal.4th at p. 590; *People v. Carpenter* (1999) 21 Cal.4th 1016, 1061; *People v. Sims*, *supra*, 5 Cal.4th at p. 462.) Scott provides no basis for this Court revisiting its prior decisions rejecting his claim. Accordingly, his claim should be denied.

F. The Constitution Does Not Foreclose the Use of Restrictive Adjectives in Listing Potentially Mitigating Factors

Scott contends California's use of restrictive adjectives in instructions listing potential mitigating factors violated his constitutional rights. (AOB 352.) This Court has already rejected Scott's contention. (*People v. Ghent* (1987) 43 Cal.3d 739, 776; *People v. Turner* (1994) 8 Cal.4th 137, 208-209; *People v. Davenport* (1995) 11 Cal.4th 1171, 1230; *People v. Jones* (1997) 15 Cal.4th 119, 190.) Scott provides no basis for this Court revisiting its prior decisions rejecting his claim. Accordingly, his claim should be denied.

G. The Constitution Does Not Require the Jury Be Instructed That Statutory Mitigating Factors Are Relevant Solely as Potential Mitigating Factors

Scott contends California's death-penalty scheme violates his constitutional rights because it does not require the jury be instructed that the statutory factors are relevant solely as potential mitigating factors. (AOB 352-

355.) This Court has already rejected Scott's contention. (*People v. Perry* (2006) 38 Cal.4th 302, 319; *People v. Elliot, supra*, 37 Cal.4th at p. 488; *People v. Brown, supra*, 33 Cal.4th at p. 402; People *v. Musselwhite, supra*, 17 Cal.4th at p. 1268.) Scott provides no basis for this Court revisiting its prior decisions rejecting his claim. Accordingly, his claim should be denied.

H. The Constitution Does Not Mandate That the Discretion of the Prosecutor to Pursue the Death Penalty Be Restricted

Scott complains California's death-penalty scheme is unconstitutional because of the discretion vested with prosecutors to determine whether to pursue the death penalty in a given case. (AOB 355.) This Court has already rejected Scott's contention. (*People v. Combs* (2004) 34 Cal.4th 821, 868.) Scott provides no basis for reexamining this Court's prior decisions rejecting his claim. Accordingly, his claim should be denied.

XVIII.

INSTRUCTION WITH CALJIC NOS. 8.84.1 AND 8.85 DID NOT RESULT IN THE JURY IMPROPERLY CONSIDERING NON-STATUTORY FACTORS IN AGGRAVATION

Scott contends he was denied his rights to due process and a reliable penalty determination because standard jury instructions CALJIC Nos. 8.84.1 and 8.85 permitted the jury to consider facts from evidence received during the entire trial, instead of limiting the jury's consideration of evidence to the specific factors defined by the Legislature. (AOB 356-360.) Scott's contention has already been rejected by this Court, and he provides no basis for this Court revisiting the issue.

The trial court instructed the jury with CALJIC No. 8.84.1 to the effect that the jury was to determine the facts from all the evidence received during the entire trial unless instructed otherwise. (52 RT 6849; 24 CT 6518.) The jury was also instructed with CALJIC No. 8.85 which informed the jury that it was to consider all the evidence received during any part of the trial in the case in determining penalty. (52 RT 6849-6853; 24 CT 6519-6522.) Scott complains that these instructions contravened the requirements of Penal Code section 190.3 which sets forth the considerations for determining penalty. (AOB 357.) He reasons that CALJIC Nos. 8.84.1 and 8.85 permitted the wholesale consideration of guilt-phase evidence which resulted in non-statutory factors in aggravation being considered by the jury. (AOB 358.) Specifically, he complains the instructions permitted the jury to improperly consider, in reaching its penalty determination, evidence that he: (1) often stayed out late at night; (2) would dress like a ninja to get attention at his place of work; (3) was alleged to have engaged in child abuse; (4) wanted to blow up planes. (AOB 357-358.) Scott contends that, at a minimum, the trial court should have reassessed the prejudice versus the probative value of the evidence adduced

during the guilt phase, before permitting the jury to consider the evidence in reaching a penalty determination. (AOB 359.) He is wrong.

As this Court has already concluded, CALJIC No. 8.84.1, directing the jury to determine facts from evidence received during the entire trial, does not unconstitutionally allow consideration of non-statutory aggravating circumstances to determine penalty. (*People v. Harris*, *supra*, 37 Cal.4th at p. 359; *People v. Taylor*, *supra*, 26 Cal.4th at p. 1180.) Similarly, this Court has concluded that CALJIC No. 8.85 is not unconstitutionally vague or arbitrary, nor renders the sentencing process unconstitutionally unreliable under the Eighth and Fourteenth Amendments. (*People v. Moon*, *supra*, 37 Cal.4th at pp. 41-42.) Accordingly, this Court should deny Scott's claim.

XIX.

THE STANDARD CALJIC JURY INSTRUCTIONS GIVEN BELOW DID NOT DENY SCOTT DUE PROCESS OR RELIABLE GUILT AND PENALTY DETERMINATIONS

Scott contends he was denied his right to due process and a reliable guilt and penalty determination when the jury was instructed with standard jury instructions on reasonable doubt, proof beyond a reasonable doubt, and circumstantial evidence as it related to proving specific intent or mental state.[34/] Specifically, he complains the jury was told in three separate instructions, in essentially identical terms, that it must accept the interpretation of the evidence that appears to be reasonable and reject the unreasonable interpretation. Scott reasons that this admonition intruded upon the requirement that he be proven guilty beyond a reasonable doubt. (AOB 360-363.) This Court has already rejected this same contention, and Scott provides no reason for this Court to revisit the matter.

Scott requested the trial court instruct the jury with the instructions about which he now complains on appeal, CALJIC Nos. 2.01, 2.02, and 2.90. (23 CT 6472A.) Accordingly, he has waived any challenge on appeal. (*People v. Medina* (1995) 11 Cal.4th 694, 764.) Even if the merits of the claim are addressed, it should be rejected.

Scott acknowledges he failed to object below to CALJIC No. 2.90 being given, but argues he is entitled to have his claim heard on appeal because his substantial rights were effected by the instructions given below. (AOB 361, fn. 62, citing Penal Code, § 1259, *People v. Hannon* (1977) 19 Cal.3d 588,

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34. Scott neglects to cite to the record below and identify the specific instructions he complains about on appeal, beyond referencing "reasonable doubt/circumstantial evidence instructions." The instructions relating to consideration of circumstantial evidence given below consisted of standard CALJIC instructions 2.01 and 2.02. (23 CT 6335-6336.)

600.) Even assuming *arguendo* that it was not incumbent upon Scott to interpose a timely and specific objection to the standard jury instructions given below, his claim fails to state a basis for relief on appeal.

This Court has rejected Scott's complaint that standard jury instructions on consideration of circumstantial evidence (CALJIC Nos. 2.01 and 2.02), which reference evidence that "appears to be reasonable," dilutes the prosecution's burden of proof beyond a reasonable doubt. (*People v. Hughes* (2002) 27 Cal.4th 287, 346-347.) Scott provides no basis for the claim being revisited. Accordingly, his claim should be denied.

XX.

CALIFORNIA'S DEATH-PENALTY SCHEME DOES NOT DENY SCOTT EQUAL PROTECTION

Scott complains that California's death-penalty scheme denies him his right to equal protection because it provides significantly fewer protections for persons facing a death sentence than are afforded those persons charged with non-capital crimes. (AOB 363-365.) Conspicuously absent from Scott's argument is any indication of the differences between capital and non-capital felony defendants upon which he relies to support his assertion of a denial of equal protection. Accordingly, Scott has failed to fairly present a discrete claim on appeal.[35/] In any event, claims of a denial of equal protection based on differences in procedures relating to capital and non-capital felony defendants have been consistently and repeatedly rejected by this Court, and Scott provides no basis for revisiting the issue in his appeal.

California's death-penalty law does not deny capital defendants equal protection simply because a different method of determining penalty is used than in non-capital cases. (*People v. Elliot*, *supra*, 37 Cal.4th at p. 488; *People v. Smith* (2005) 35 Cal.4th 334, 374.) This Court has repeatedly denied claims premised on a denial of equal protection based on capital defendants not being provided with the same sentence review afforded to felons under California's determinate sentencing law. (*People v. Rogers*, *supra*, 39 Cal.4th at p. 894; *People v. Blair* (2005) 36 Cal.4th 686, 753.) Scott's claim on appeal affords

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35. This Court has recognized that an appellant can properly raise and fairly present a routine or generic claim in a death-penalty appeal by stating the claim in a straightforward manner accompanied by a brief argument, even if the appellant does no more than: (1) identify the claim in the context of the facts; (2) note that the court has previously rejected the same or a similar claim in a prior decision; and (3) ask the court to reconsider the decision. (*People v. Schmeck* (2005) 37 Cal.4th 240, 304.)

no basis for this Court revisiting its prior decisions. Accordingly, his claim should be denied.

XXI.

SCOTT'S DEATH SENTENCE DOES NOT VIOLATE HIS RIGHTS TO DUE PROCESS AND TO BE FREE FROM CRUEL AND UNUSUAL PUNISHMENT BASED UPON INTERNATIONAL NORMS OF HUMANITY AND DECENCY

Scott complains that California's use of the death penalty violates international norms of humanity and decency and the Eighth and Fourteenth Amendments to the United States Constitution. (AOB 366-370.) As Scott acknowledges, this Court is not bound by the laws of foreign countries in administering its criminal justice system. (AOB 367.) Moreover, this Court has repeatedly rejected this same contention, and Scott provides no basis for this Court to revisit the matter.

Scott contends that the non-use of the death penalty, or its limitation to "exceptional crimes such as treason" as opposed to its use as "regular punishment," is uniform in the nations of Western Europe. (AOB 366.) Scott argues that even if capital punishment itself is not contrary to international norms of human decency, the use of the death penalty as "regular punishment for a substantial number of crimes" does violate international norms. He argues that since neither due process nor cruel and unusual punishment are static concepts, the Eighth Amendment does not permit the United States to "lag so far behind" nations in the western world. (AOB 369.) Scott interprets the United States Supreme Court's decision in *Roper v. Simmons* (2005) 543 U.S. 551 (125 S.Ct. 1183, 161 L.Ed.2d 1), precluding the death penalty for juveniles, as signaling the high court's inclination to bring this country more into line with international standards in terms of capital punishment. (AOB 369.) As this Court has already concluded, California's death-penalty law does not violate international norms in contravention of the prohibition on cruel and unusual punishment. (*People v. Perry*, *supra*, 38 Cal.4th at p. 322; *People v. Boyer*

(2006) 38 Cal.4th 412, 489-490; *People v. Dunkle*, *supra*, 36 Cal.4th at p. 940; *People v. Brown*, *supra*, 33 Cal.4th at pp. 403, 404.) Scott afford no basis for this Court reconsidering its prior decisions rejecting his claim.

XXII.

THERE WAS NO CUMULATIVE ERROR

Scott contends his judgment and sentence of death must be reversed based upon cumulative error. (AOB 370-371.) While Scott asserts numerous guilt- and penalty-phase errors, as discussed herein, Scott received a fair trial and there is no basis upon which to reverse his conviction based on error, individually or cumulatively.

Even a capital defendant is entitled to only a fair trial, not a perfect one. (*People v. Stewart* (2004) 33 Cal.4th 425, 522; *People v. Box*, *supra*, 23 Cal.4th at p. 1214.) Since every claim of error raised by Scott was either not error, or forfeited, or invited, or harmless, there is no prejudice to Scott, and thus no cumulative effect. (*People v. Kipp* (2001) 26 Cal.4th 1100, 1141.)

Assuming *arguendo* error, even viewed cumulatively, such errors would not have significantly influenced the fairness of Scott's trial or detrimentally affected the jury's determination of the appropriate penalty. (*People v. Avila* (2006) 38 Cal.4th 491, 615.) Accordingly, the entire judgment and sentence of death should be affirmed. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1038.)

CONCLUSION

Accordingly, respondent respectfully requests that the judgment be affirmed.

Dated: March 7, 2007.

Respectfully submitted,

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

DANE R. GILLETTE
Chief Assistant Attorney General

GARY W. SCHONS
Senior Assistant Attorney General

HOLLY D. WILKENS
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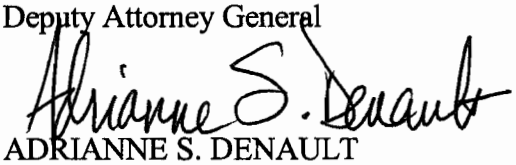

ADRIANNE S. DENAULT
Deputy Attorney General

Attorneys for Respondent

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80111141.wpd

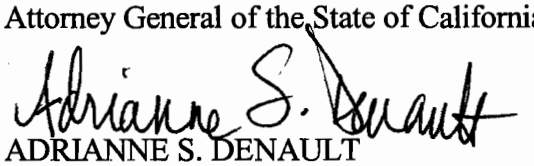
CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13-point Times New Roman font and contains 41868 words.

Dated: March 7, 2007.

Respectfully submitted,

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



ADRIANNE S. DENAULT
Deputy Attorney General

Attorneys for Respondent

DECLARATION OF SERVICE BY MAIL

I declare that I am employed in the County of San Diego, California; that I am over 18 years of age and am not a party to the within-entitled cause; that my business address is 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, California 92186-5266; and that on **March 7, 2007**, I served the attached

RESPONDENT'S BRIEF	***People v. Scott*** California Supreme Court S068863 **CAPITAL CASE**

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, for deposit in the United States Postal Service that same day in the ordinary course of business, addressed as follows:

GLEN NIEMY *(2 copies)*
ATTORNEY AT LAW
P O BOX 764
BRIDGTON ME 04009

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David Lynn Scott, III

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CLERK OF THE COURT
RIVERSIDE CO SUPERIOR COURT
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RIVERSIDE CA 92501-3704

CALIFORNIA APPELLATE PROJECT
101 SECOND ST STE 600
SAN FRANCISCO CA 94105

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed at San Diego, California, on **March 7, 2007**.

STEPHEN MCGEE
Typed Name

Signature