IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

MARTIN CARL JENNINGS,

Defendant and Appellant.

CAPITAL CASE

No. S081148

San Bernardino County Superior Court No. FVI-04195
The Honorable Rufus L. Yent, Judge

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TABLE OF CONTENTS

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

Constitutional Provisions

Statutes

TABLE OF AUTHORITIES (continued)

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THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, **v.** **MARTIN CARL JENNINGS,** Defendant and Appellant.	**CAPITAL CASE**

STATEMENT OF THE CASE

On June 7, 1996, the San Bernardino County District Attorney filed an amended information charging appellant, Martin Carl Jennings, and his wife, Michelle Jennings, with the first degree murder of their son, Arthur Jennings. (Pen. Code,[1/] §§ 187.) The information further alleged two special circumstances: murder by the administration of poison (§ 190.2, subd. (a)(19)) and murder by infliction of torture (§ 190.2, subd. (a)(18)). (1 CT 232-233.)

On April 19, 1999, the jury found appellant guilty of first degree murder. The jury found the murder by torture special circumstance true and the murder by poison special circumstance not true.[2/] (2 CT 472-475; 11 RT 3216-3220.)

On May 20, 1999, the jury recommended that appellant be sentenced to death. (3 CT 683-685; 13 RT 3525.) On July 22, 1999, the court denied appellant's new trial motion and application for modification of the judgment

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1. Unless otherwise noted, all further statutory references are to the Penal Code.

2. Michelle was found guilty of first degree murder. The poison murder special circumstance was found not true and the jury was unable to reach a verdict on the torture murder special circumstance. (2 CT 471-472, 476-477; 11 RT 3216-3220.) The court sentenced Michelle to state prison for a term of 25 years to life. (11 RT 3234.)

(§ 190.4, subd.(e)) and then sentenced appellant to death. (4 CT 875-880; 13 RT 3550, 3564, 3573-3578.)

STATEMENT OF FACTS

Appellant and his wife, Michelle, killed their five-year old son Arthur by severely abusing him, starving him, and giving him a lethal combination of the prescription drugs Vicodin and Valium and Unisom sleeping pills.

Guilt Phase Evidence

The Torture And Murder Of Arthur Jennings

Shortly after Arthur Jennings' birth on November 16, 1990, appellant and Michelle placed Arthur in the care of relatives. (9 RT 2313-2314.) The Jennings first placed Arthur with appellant's mother, but appellant's half-sister, Wilma Sharp, who lived in Browning, Montana, began taking care of Arthur a short time later when appellant's mother became terminally ill. (9 RT 2313-2314, 2322-2325.) Because Arthur was born prematurely, he had medical problems and was underweight. (9 RT 2314.) However, by the time he was five years old, most of his medical problems had been resolved. (9 RT 2315-2318; 10 RT 2471-2472, 2517; 11 RT 2661-2662.)

In November 1995, appellant telephoned Sharp and told her that they wanted Arthur back. (9 RT 2315, 2317.) He said that they had a baby, a daughter named Pearl, he had obtained employment, and the family had moved into a trailer park located on Flint Road in Apple Valley, California. (9 RT 2315, 2317, 2342; 10 RT 2435.) Sharp warned appellant that Arthur still had some problems (he could be difficult if he didn't get his way, he wet the bed, and was afraid of the dark) and said that if they had difficulty caring for Arthur that they could return him to her home in Montana. (9 RT 2318-2319.)

On November 8 or 9, 1995, Sharp and Arthur arrived in Victorville, California by bus. (9 RT 2315-2316.) It was a happy occasion. (9 RT 2316.)

Sharp stayed for 10 days during which time they went to Disneyland, to swap meets and out to eat. (9 RT 2317-2318.) When Sharp returned to Montana, Arthur was happy and healthy and weighed approximately 64 pounds. (9 RT 2316-2318; see also, 10 RT 2471-2472.) However, within a month of Sharp's departure, the Jennings' abuse of Arthur began.

In early December, Phillip and Kevin Orand visited the Jennings at their home. (11 RT 2662-2633.) When Phillip went to use the bathroom near the end of the trailer he saw Arthur sitting in his room with his legs crossed, rocking back and forth, staring straight ahead, and "making a weird noise." (11 RT 2663.) Arthur had two black eyes and a mark on his mouth. (11 RT 2663-2664.) When Phillip asked what was wrong with Arthur, appellant said that Michelle had knocked him out. (11 RT 2664.) Michelle told Kevin that she "socked the damn little brat between the eyes, knocked him out" because he had kicked her. (11 RT 2677.)

On Christmas day, a neighbor, Louis Blackwood, came to the Jennings' house for dinner, and saw that Arthur's hand was bandaged. (10 RT 2517, 2519.) When asked why, Michelle claimed Arthur had burned himself by touching the wood stove. (10 RT 2519-2520.)

In January 1996, acquaintances of the Jennings saw Arthur with numerous injuries. One described Arthur as looking "pretty beat up." (10 RT 2463.) In addition to his bandaged hand, Arthur was seen with a bruise on his face which ran all the way from his hairline down to his jawline; bandages on his head; dried blood on his face; one black eye and one eye that was seeping blood and was swollen shut. (10 RT 2463-2464, 2473, 2519.) Arthur was very quiet and looked unhappy, or, as one witness described it, he looked "whipped." (10 RT 2520.)

Arthur was also rapidly losing weight and was clearly undernourished despite the fact that the Jennings kept plenty of food in their home and that baby

Pearl was well-fed. (10 RT 2442, 2446-2447, 2453, 2464, 2473-2474, 2517-2519; 11 RT 2662.) One acquaintance was so concerned that she made a report to Child Protective Services ["CPS"]. However, CPS did not follow up on the complaint. (10 RT 2474-2478.)

On several occasions between January 6 and January 15, 1996, Michelle telephoned CPS claiming that her neighbors, the Greins, abused their son, did not feed him, and that their home was unfit for children. (11 RT 2695-2700.) During one of these telephone calls, on January 8, Michelle asked the CPS worker, Betty Hocking, if she could find an adoptive home for Arthur. (11 RT 2698.) Michelle told Hocking that Arthur had been in her home for two months and that she could not manage him. (11 RT 2698-2699.) Hocking suggested returning Arthur to Sharp but Michelle refused. (11 RT 2699.) Hocking then suggested parenting classes and therapy and advised her that the cost would be paid by appellant's insurance. (11 RT 2699.) Hocking also gave Michelle an adoption worker's phone number. (11 RT 2699.)

On January 19, 1996, the Jennings went to the CPS office, ostensibly to discuss the Greins. (11 RT 2700.) The Jennings brought Pearl with them, who appeared healthy and bonded to her parents, but they did not bring Arthur. (11 RT 2701-2703.) Michelle again asked about an adoptive home for Arthur. (11 RT 2701.) Appellant and Michelle said they could not control him and needed help caring for him. (11 RT 2701, 2703.) Hocking again suggested parenting classes and therapy and gave the Jennings some phone numbers. (11 RT 2701.) The Jennings said they still wanted to talk to an adoption worker, so Hocking also gave them that phone number again. (11 RT 2701, 2704.) As they were leaving, Michelle spontaneously asked Hocking if anyone had contacted CPS about them. (11 RT 2701.) When Hocking asked why, Michelle claimed she was worried about possible allegations by jealous neighbors. (11 RT 2701-2702.)

On the morning of February 4, 1996, Michelle went to the store at appellant's behest and purchased a package of sleeping pills. (3 CT 705; 11 RT 2769.) When she returned home, she forced Arthur to swallow two of the sleeping pills, along with some valium. (11 RT 2769-2770, 2773.) A short while later, Michelle noticed that Arthur was having difficulty with his breathing and gave him CPR. (3 CT 774; 11 RT 2773.) Michelle then left with appellant's father, Art Sr., to look at a mine shaft (where they later dumped Arthur's body). (3 CT 719, 773-774; 11 RT 2770, 2773.)

While Michelle was away, neighbor Cora Grein went to the Jennings' home. (11 RT 2682.) Appellant and Arthur were watching a movie and Grein joined them. (11 RT 2682.) Appellant told Arthur to leave the room and kissed Grein. (3 CT 779-780, 789-790, 796; 11 RT 2683.) Arthur came back out and saw them kissing and appellant ordered him to return to his bedroom. (3 CT 780, 796; 11 RT 2683.) As Arthur was walking away, appellant hit him in the back of the head with a fireplace shovel so hard that Arthur flipped over. (3 CT 780, 788-790, 796; 11 RT 2683.) Appellant then picked Arthur up and threw him on his bed. (11 RT 2683.) Arthur started crying. (11 RT 2683.) Appellant told Grein that if she said anything, she would "see the bottom of a mine shaft." (11 RT 2683.) Grein promised to keep quiet and left. (11 RT 2683.)

Within an hour, Arthur died. (3 CT 694, 788-789; 9 RT 2379-2380, 2383-2384, 2386-2387; 11 RT 2773.) The Jennings first buried Arthur's body in a shallow grave inside an old chicken coop. However, a few hours later they decided to move him because they were afraid his body would be discovered. They unearthed Arthur's body, tossed it down a nearby mine shaft and threw some old tires on top of him. (3 CT 697, 744; 9 RT 2380-2381, 2387; 10 RT 2407-2408, 2412-2413, 2418-2425.) The Jennings scrubbed blood off Arthur's bedroom walls and appellant burned Arthur's bloody sheets and clothes and put his diaper and glasses in the trash. (3 CT 715-716, 743-744, 767.)

The Police Investigation

On February 6, 1996, two days after Arthur's death, the Jennings went to the San Bernardino County sheriff's station in Apple Valley and reported Arthur missing. (9 RT 2337-2338.) Appellant said he had last seen Arthur at around 2:00 a.m., when he accompanied Arthur to the bathroom. (9 RT 2338, 2343-2344.) He claimed that they discovered Arthur was gone at 6:00 a.m. (9 RT 2338, 2343-2344.) Michelle said she thought Arthur went out through the back door, which she discovered open when she awoke. (9 RT 2344.) Appellant said Arthur left through the front door, noting that when he awoke, the chain had been removed. (9 RT 2344-2345.) The Jennings both claimed they had looked for Arthur but were unable to find him. (9 RT 2339.) A search was initiated. (9 RT 2340-2341, 2343.)

When searchers could not find Arthur or any indication of recent movement by Arthur, they became suspicious. (10 RT 2401, 2403-2404.) They began to treat the case as a homicide and brought the Jennings in for questioning. (9 RT 2379, 2383; 10 RT 2405.) In separate interviews, appellant and Michelle each admitted Arthur had been dead since February 4. (9 RT 2379-2380, 2383-2384, 2386-2387.) They each led police to Arthur's body in the mine shaft in Victorville. (9 RT 2380-2381, 2384-2387; 10 RT 2407-2408, 2412-2413, 2425-2428, 2431.) The shaft was below ground level and could not be easily seen by someone passing by. (10 RT 2408, 2427.) Arthur's naked body was 40 feet down, wrapped in a blanket which was held together by strips of terry cloth towel. (10 RT 2408-2409, 2429-2430, 2458-2459.)

On February 8, 1996, detectives conducted a joint interview of the Jennings. (11 RT 2722-2724; Ex. 132-133.[3]) During the interview, the Jennings detailed the abuse Arthur had suffered at their hands. (3 CT 693-694,

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3. Videotapes and audiotapes of the interview were played to the jury. (11 RT 2725-2728, 2730-2733.)

705-7010, 738-739, 762-763, 768-770, 793-794.) Appellant admitted to such abuse as "dragging" Arthur home, knocking him down with an elbow, pushing him in the chest, kicking him in the midsection, making him hold a wooden beam over his head and then knocking him down when he dropped the beam, and holding his hand over the stove. (3 CT 705-706, 708-715, 738-739, 762-763, 773.) Appellant also admitted that he shook Arthur very hard, making his head hit the wall during one of Arthur's "fits"[4] a couple of days before he died. (3 CT 710-711, 715.) Appellant further admitted that he put a sock in Arthur's mouth and used duct tape to cover Arthur's mouth and bind his hands. (3 CT 711-714.) Appellant claimed he did this to keep Arthur from biting his tongue or gouging himself with his fingers during his "fits." (3 CT 711-714.) Appellant also eventually admitted that he had hit Arthur in the back of the head with the fireplace shovel on the day he died.[5] (3 CT 788-790, 796, 799-790.) When asked by the detectives if he had ever tried to suffocate Arthur, he responded, "I don't know, maybe." (3 CT 764-765.)

During the interview, appellant admitted that more than once in the two weeks before Arthur's death, he and Michelle had discussed killing Arthur or "getting rid of him." (3 CT 694-695, 698-699, 725.) Michelle stated that appellant wanted to shoot Arthur in the head but she wanted to send him to live with relatives. (3 CT 701.)

The Jennings also admitted giving Arthur Valium, Vicodin and Unisom.

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4. The Jennings repeatedly referred to Arthur's "fits" during the interview. Michelle told Dr. Kaser-Boyd that Arthur would fall down and appear unconscious, although sometimes his eyes would remain open, and he would shake and bite his tongue. (11 RT 2879-2880.) Dr. Kaser-Boyd testified that in her professional opinion, these "fits" were actually epileptic seizures. (11 RT 28880.) However, the Jennings apparently believed that Arthur's seizures were temper tantrums. (11 RT 2880-2881.)

5. The detectives apparently believed at the time of the interview that this head injury was likely the cause of Arthur's death.

(3 CT 702-705, 748, 763-764; see also, 11 RT 2768-2769.) Although appellant claimed they gave Arthur the drugs to make him better, appellant also admitted that he continued to beat Arthur. (3 CT 763-764.) Appellant claimed that he did not want Arthur to die, did not mean to kill him, and that when he saw Arthur was not breathing, he tried to save Arthur's life by giving him CPR because he had a "change of heart." (3 CT 694, 710, 725-726, 748.) However, he also admitted that once Arthur saw him kissing Cora, he knew he "had to finish him off." (3 CT 793, 797.) At one point, when questioned by the detectives as to who killed Arthur, appellant stated that "I probably did" by "abusing him and [giving him] the medication. . . ." (3 CT 762-763.)

Appellant also admitted that two days before Arthur died, he had driven around the desert looking for a place to "dump the body." (3 CT 699.) Appellant claimed he learned about the mine shaft (where they eventually dumped Arthur's body) from a conversation with his father. Michelle claimed appellant had his father take her out there (on the afternoon that Arthur died) because she had never seen a mine shaft. (3 CT 718-719.)

After the Jennings were placed under arrest, police searched their home and found a loaded .32 caliber AM, Model 74 pistol, a fireplace shovel, and a plastic bag containing bottles of the prescription medications Carisoprodol, Darvocet, Ibuprofen, Vicodin, and Valium, and a box of Unisom, an over-the-counter sleeping pill. (10 RT 2452-2455, 2458-2461.) There was blood on the curtains in Arthur's bedroom, on his mattress, his bedroom door and his bedroom walls. (10 RT 2453-2454, 2489-2491, 2497.) A bloody sock was stuffed in a crack behind his mattress. (10 RT 2454, 2512.) An analysis of the blood spatter patterns revealed that the blood was the result of several separate events. (10 RT 2504-2506.)

The Autopsy

On February 13, 1996, forensic pathologist Frank Sheridan performed an autopsy on Arthur's body. (10 RT 2567, 2570.) Arthur was extremely thin for his height, weighing only 35 pounds at 3 feet, 10 inches tall. (10 RT 2571-2572.) Arthur's muscles were wasted, he had almost no body fat, and he had no food in his stomach. (10 RT 2580, 2583, 2585, 2588-2590, 2598-2599, 2606.) Arthur had acute pneumonia which resulted from a breakdown in his immune system due to emaciation and was part of an overall failure to thrive. (10 RT 2610, 2605.)

Arthur also had numerous injuries. The first set of injuries were a bruise and abrasion on the tip of Arthur's nose, bruising and a tear on the area between his nose and mouth, bruises on the inside of his lips and gums, a tear in his frenulum (the area between the gums and the outside of the mouth) and a slight bruise on the tip of Arthur's tongue. (10 RT 2573-2576.) These injuries occurred shortly before death and were most likely caused by "smothering," i.e., by someone putting their hand over Arthur's nose and mouth while Arthur struggled. (10 RT 2600, 2613-2614, 2627, 2637.)

Arthur had two scalp injuries visible upon external examination. (10 RT 2576.) One scalp injury was at least several weeks old and had been sutured by someone other than a medical professional (something appellant had earlier admitted doing). (10 RT 2576-2578, 2599-2600, 2609, 2577; see also, 3 CT 733.) The other scalp injury occurred no more than six hours before he died. (10 RT 2576-2578, 2591, 2599.) Upon internal examination, Dr. Sheridan found extensive hemorrhaging to the deeper layers of Arthur's scalp across the front of his forehead. This injury had also occurred shortly before his death but appeared to be unrelated to the other recent head injury. (10 RT 2591, 2599-2600.)

Arthur also had bleeding on the left side of his brain and hemorrhaging

around his optic nerves. (10 RT 2571-2572, 2592-2593.) Dr. Sheridan gave his opinion that these injuries were caused by violent shaking at least ten days before Arthur's death. (10 RT 2593, 2601, 2608.)

Arthur had a very severe burn on his right palm which went all the way down to his fingers. (10 RT 2580-2581.) He had been burned several weeks before his death. (10 RT 2600, 2609.)

Arthur also had abrasions in several places on his left arm, on his right elbow, and on his left buttocks. (10 RT 2582-2584, 2586.) There were "rug burn" abrasions on his left back. (10 RT 2585-2588.) Arthur had bruises on his chest, both of his shoulders, right elbow, his left arm, and on his left buttock. (10 RT 2579-2584, 2586.) An internal exam of the shoulder blade injury revealed a large hemorrhage. (10 RT 2596.) Arthur also had a scar on the back of his lower right thigh. (10 RT 2585.) All of Arthur's physical injuries had been painful. (10 RT 2576, 2578, 2614.)

Toxicology tests revealed that Arthur had three different drugs in his bloodstream. (10 RT 2602.) His blood contained 1.8 micrograms per milliliter of Unisom, .06 of Vicodin and .05 of Valium. (10 RT 2564-2565, 2602.)

Dr. Sheridan opined that the main cause of death was combined drug toxicity, with Unisom being the most lethal, Vicodin being a significant contributor, and the Valium playing a relatively minor role. (10 RT 2602-2604, 2623, 2636; see also, 10 RT 2565-2566; 11 RT 2775.) Dr. Sheridan explained that these drugs have a strong sedative effect and can produce seizures in children. (10 RT 2609, 2654.) A toxic dose causes cessation of breathing. (10 RT 2610.) For this reason, the Unisom packaging is child-resistant and the instructions on the box say, "Adult dosage, one pill. For adults only. Do not give to children under age twelve years." (10 RT 2651.)

Dr. Sheridan further testified that acute and chronic abuse and neglect were significant contributing causes of death. (10 RT 2604, 2615.) The acute

abuse consisted of Arthur's recent injuries. The chronic abuse and neglect consisted of his older injuries along with his severe malnutrition. (10 RT 2604-2606.) Another contributing factor was the "smothering" injuries. (10 RT 2613-2614.) In fact, Sheridan testified that absent the positive toxicology results, he would have concluded that smothering was the most likely cause of death. (10 RT 2618.) Dr. Sheridan explained that even without the drugs, Arthur would have died within a fairly short period of time had his circumstances not changed dramatically. He was close to death, as indicated in part from the pneumonia, which would have killed him absent medical intervention. (10 RT 2614-2615.)

Appellant's Defense

Appellant's defense was lack of specific intent to kill. Licensed clinical psychologist, Dr. Joseph Lantz, testified that appellant had limited intelligence, was severely impaired in his problem solving ability, had a personality disorder consisting of narcissism and anti-social behavior, and was abused by his parents. (11 RT 2785-2788, 2792-2795, 2821.) Appellant was angry, hostile, resentful, explosive, impulsive and difficult to deal with. (11 RT 2797.) These problems increased when he lost his job due to a back and shoulder injury. (11 RT 2809-2810.) Appellant was on pain medication for the injuries and was also a regular user of methamphetamine. (11 RT 2813-2814.)

Dr. Lantz noted that Arthur had behavioral problems which deteriorated after he was returned to his parents' care. (11 RT 2810-2811.) The Jennings responded by reverting to discipline techniques used on them. (11 RT 2817.) Dr. Lantz felt that appellant administered the medications to Arthur out of "mercy" because he thought they would help. (11 RT 2823-2824.) Dr. Lantz acknowledged that appellant lacked empathy and that neither appellant nor Michelle seemed to care about Arthur's death. (11 RT 2802.)

Michelle's Defense

Michelle's defense was lack of specific intent to kill or torture. Licensed clinical psychologist Dr. Nancy Kaser-Boyd detailed Michelle's history of rape and abuse by her father, betrayal by her sister and mother, molestation by a teacher and abuse by appellant. (11 RT 2868-2869, 2871-2873, 2895.) Dr. Kaser-Boyd testified that Michelle had a borderline IQ, was fearful, lacked insight, felt helpless, was socially isolated, had difficulty controlling her impulses, had a dependent personality disorder, had a schizoid personality disorder and was depressed. She explained that these characteristics are typical of women who have been abused and battered. (11 RT 2878-2879, 2890-2894.) Dr. Kaser-Boyd testified that Arthur was an epileptic and that Michelle did not understand his seizures so she slapped him. (11 RT 2879-2881.) Michelle did not get help for Arthur because she was afraid of losing baby Pearl. (11 RT 2880-2886.)

Michelle also introduced testimony by the adoption social worker about the anonymous phone call she made requesting adoptive placement for Arthur. (11 RT 2852-2856.) During the call, Michelle refused to give her name, did not seem to understand why Arthur would act out upon being left with people he did not know, and did not offer a clear explanation as to why she would not simply return Arthur to his aunt. (11 RT 2852-2856.) Michelle never followed through on her expressed interest in placing Arthur for adoption. (11 RT 2856.)

Prosecution Rebuttal

Sheriff's investigator Kathleen Cardwell, who interviewed Michelle and accompanied her to the mine shaft, testified that when she asked Michelle about her relationship with appellant, Michelle responded that they had an excellent relationship, they got along fine, and that appellant treated her well. (11 RT 2936.) Later, when Cardwell asked Michelle if appellant physically abused her,

Michelle said he hit her when they first married but she had threatened to leave him and he never struck or mistreated her again. (11 RT 2937.) Michelle had no visible injuries to suggest that she was the victim of spousal abuse. (11 RT 2936.)

Penalty Phase Evidence

Defense Evidence

Dr. Geraldine Stahly, a social psychologist, testified about the history of appellant's immediate family and his family of origin. Most of appellant's relatives suffered from mental illness, had low intelligence, or had criminal histories. (13 RT 3295-3312.) Appellant's mother, Pearl Jennings, had eleven children with her first husband, Raymond Foster. (13 RT 3280-3281, 3303.) The Foster children were sexually abused by their father and physically abused by their father and their mother. (13 RT 3280-3281.) Later, the children were molested and severely physically abused by their mother's second husband and appellant's father, Arthur Jennings Sr. ("Art"). (13 RT 3280-3282, 3284-3285, 3288.) Art allegedly killed one of the Foster children by smothering her with a pillow when she was six years old. (13 RT 3306-3307.) The rest of the Foster children, as well as Pearl and Art's one-week old baby, were taken away by the state in 1957. (13 RT 3281-3282, 3309-3310.) Approximately three years later, in 1960, appellant was born. (13 RT 3309.) Appellant's circumstances were somewhat different than they had been for his older siblings. Appellant was raised as an "only child." (13 RT 3282.) The family's economic circumstances were considerably better than they had been previously and the family was able to settle down in a stable environment instead of being on the road as they had been when appellant's siblings were with their mother and Art. (13 RT 3283.) Appellant's father forced him to steal, as he had appellant's brothers, but gave up because appellant was not good at it. (13 RT

3283.) Although appellant's older siblings had the perception that appellant was spoiled, "had it good" and that Pearl had become less violent, appellant reported being physically abused by both of his parents and sexually abused by his mother directly and indirectly by his father who once forced him to orally copulate Art's girlfriend. (13 RT 3283-3284, 3288-3290, 3317-3319, 3321-3322, 3326, 3337.)

Dr. Stahly gave her opinion that appellant and his siblings suffered not only from sexual and physical abuse but also emotional abuse and "moral abuse." (13 RT 3315.) Dr. Stahly discussed the various factors that put Arthur at risk for being abused when he was returned to appellant's care. (13 RT 3292-3295, 3317-3322.) She discussed how we are "children of our parents" and how they will shape our lives absent some type of outside intervention, which did not happen in appellant's case. (13 RT 3313-3317, 3320-3322, 3324-3327.) However, Dr. Stahly also acknowledged that people make decisions and choices in their lives and that the older they are, the more choices they generally have and the more responsibility they must take for their choices. (13 RT 3272-3274, 3314, 3333-3335.)

Dr. Lantz testified again during the penalty phase of the trial. In his opinion, appellant's personality development was seriously affected by the environment in which he was raised. (13 RT 3378-3388.) He also believed appellant's parenting ability and style were a product of his childhood. (13 RT 3389-3394.) He indicated he agreed with Dr. Stahly's opinion that it would take some type of intervention for someone who has been seriously damaged to turn their life around. (13 RT 3384-3385.) Dr. Lantz opined that appellant was not capable of deciding to take his son's life. (13 RT 3402-3404.)

James Park, a retired employee of the California Department of Corrections testified regarding what prison life would be like for appellant if he were sentenced to life without the possibility of parole and gave his opinion that

appellant was not likely to be a danger to anyone inside the prison. (13 RT 3358-3370.)

Prosecution Evidence[6]

Appellant's half-sister, Fransji Evans, testified that she ran away and was placed in a home for girls in 1954 because she was sexually and physically abused by her father, Raymond Foster. (13 RT 3414-3418.) She testified that her mother knew about the abuse and did nothing to stop it, but was not herself abusive. (13 RT 3416-3417.) However, her mother was cold and distant. (13 RT 3416-3417.) In 1960, Fransji visited her mother, who was pregnant with appellant, but left after Art beat and raped her. (13 RT 3418-3419.) She again visited her mother and Art for a month and a half in 1971, when appellant was eleven years old. During that time she observed that Pearl doted on appellant and treated him very well. Art was a "normal" father. (13 RT 3419-3421.) In 1972, she stayed for a month with her mother and observed that Pearl adored appellant. She never saw Art strike or punish appellant. (13 RT 3421-3423.) Beginning in 1973, she saw the family on a regular basis and observed normal parent-child relationships between appellant and his parents. (13 RT 3423-3424.)

Wilma Sharp, appellant's half-sister who raised Arthur until he was five years old, testified again during the penalty phase. She testified that she had been sexually molested by Art and that he physically abused her and all her siblings. (13 RT 3438-3439.) However, she testified that her mother did not beat the children. (13 RT 3438-3439.) Sharp testified that she was given Arthur when he was 4 ½ months old, that she loved him very much. She

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6. During the penalty phase of the trial, and apparently at appellant's request, the defense presented their evidence and arguments before the prosecution. (13 RT 3230-3233.)

explained that she had not wanted to give him back to his parents but was told she could not keep him when she sought legal advice. (13 RT 3441-3442.) She testified that when she found out about Arthur's death she was in disbelief. (13 RT 3443.) Then, when she realized it was true, she felt horrible and felt guilty because "I thought I took him back to loving parents, and I gave him back to some monsters." (13 RT 3443.)

ARGUMENT

I.

THERE IS SUBSTANTIAL EVIDENCE SUPPORTING APPELLANT'S CONVICTION FOR FIRST DEGREE MURDER

Appellant claims the evidence was insufficient to support his conviction for first degree murder. Specifically, he argues that the only theory under which he could have been convicted of first-degree murder was a torture-murder theory but that there was insufficient evidence the torture he inflicted was a proximate cause of Arthur's death. (AOB 32-41.) Appellant's contention is without merit. There was substantial evidence to support appellant's first degree murder conviction under theories of murder by poison, murder by torture or premeditated and deliberate murder.

The law governing "sufficiency of the evidence" claims is well established. (*People v. Mayfield* (1997) 14 Cal.4th 668, 790-791.) This Court must review the whole 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 -- from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 318-319 [99 S.Ct. 2781, 61 L.Ed.2d 560]; *People v. Johnson* (1980) 26 Cal.3d 557, 578.) Moreover, even if this Court finds the evidence insufficient to support one theory of guilt, it must affirm the judgment "unless a review of the entire record affirmatively demonstrates a reasonable probability that the jury in fact found the defendant guilty solely on the unsupported theory." (*People v. Perez* (2005) 35 Cal.4th 1219, 1233; *People v. Johnson* (1993) 6 Cal.4th 1, 42; *People v. Guiton* (1993) 4 Cal.4th 1116, 1130.)

A. There Is Substantial Evidence That Appellant Murdered Arthur With Poison

Appellant contends the jury could not have found him guilty of first degree murder by poison because they found the poison murder special circumstance not true. (AOB 34.) Not so. Even assuming arguendo that the jury found the poison murder special circumstances not true because it found the Jennings did not intend to kill Arthur with the pills, the jury could have found appellant guilty of first degree murder by poison under an implied malice theory.

The prosecution alleged that appellant committed murder by means of poison. (1 CT 232-233.) Section 189 provides in pertinent part, "All murder which is perpetrated by means of . . . poison . ... is murder of the first degree." Murder by poison is murder of the first degree whether malice is express or implied. (*People v. Blair* (2005) 36 Cal.4th 686, 745; *People v. Catlin* (2001) 26 Cal.4th 81, 149-150; *People v. Diaz* (1992) 3 Cal.4th 495, 568; *People v. Mattison* (1971) 4 Cal.3d 177, 182-184.) Thus, the prosecution did *not* have to establish that appellant intended to kill Arthur when he and Michelle gave him the fatal combination of pills. Instead, the jury could have found appellant guilty of first degree murder by poison if they found the Jennings had full knowledge that their conduct endangered Arthur's life, but nevertheless deliberately administered the pills with conscious disregard of that danger. (See *People v. Blair, supra,* 36 Cal.4th at p. 745.)

Here, there was substantial evidence to support appellant's first degree murder conviction under an implied malice murder by poison theory. In an interview on February 6, the day the Jennings reported Arthur missing, Michelle told Detective Glozer that on the morning of February 4 she went to the market and purchased sleeping pills, which she forced Arthur to swallow, along with 650 milligrams of Vicodin, when she returned home. (11 RT 2769-

2770, 2773.) Michelle also told Detective Glozer that in the two days before Arthur died, she gave him a total of seven or eight pills. (11 RT 2768.) She stated that she gave Arthur a combination of sleeping pills, 5 milligrams of Valium, and 650 milligrams of Vicodin. (11 RT 2768-2769.)

In the joint interview on February 8, appellant volunteered that he and Michelle both gave Arthur medication and that he told Michelle to do so, claiming he thought it would help Arthur. (3 CT 702-703, 748.) Michelle stated that she had previously lied about how many pills she gave Arthur to protect appellant. (3 CT 704-705.) Michelle said that she actually only gave Arthur a Valium and the sleeping pills "'cause Martin had [me] go to the store and get some [Unisom] to put [Arthur] to sleep."[7] (3 CT 705.) Appellant administered the other pills. (3 CT 704-705; Ex. 132.)

At trial, the jury was shown the box of Unisom sleeping pills which are in child resistant packaging. (10 RT 2451, 2460-2461, 2651; Ex. 67-68, 93.) The Unisom package contained the following pertinent warnings: "Do not take this product if presently taking any other drug without consulting your physician or pharmacist. . . .For adults only. Do not give to children under age twelve years. Keep this and all medications out of the reach of children." (10 RT 2650-2651.) The box also indicates the adult dose is one tablet daily. (10 RT 2649-2650.)

The jury was also shown the bottles of Vicodin and Valium which were in child proof prescription containers. (10 RT 2460-2461; Ex. 93.) The Vicodin and Valium were prescribed to appellant and he was aware of their sedative effect on him, a 6'4", 210 pound man. (3 CT 703-704, 793; 10 RT 2460-2461.)

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7. In the transcript of the interview, it states that Michelle said, "Martin had to go to the store . . . ." (3 CT 705.) However, what Michelle actually says is, "Martin had *me* go to the store . . . ." (Ex. 132.) Additionally, Michelle refers to Sominex brand sleeping pills but it is clear from other evidence presented during the trial that the sleeping pills were actually Unisom brand.

In fact, during the joint interview, appellant recognized that, "the prescription drugs may . . . have killed him." (3 CT 748.)

The parties stipulated that, if called at trial, toxicologist Randall C. Baselt would testify that at the time of the autopsy, Arthur's blood contained 1.8 microgram per milliliter of Doxylamine (Unisom sleeping pills), .06 of Hydrocodone (Vicodin) and .05 of Diazepam and Nordiazepam (Valium). (10 RT 2564-2565.) At Arthur's age and weight, five years old and 35 pounds, these concentrations, at face value, were sufficient to account for his death. (10 RT 2565.) The toxicologist concluded that the Unisom played the most important role and could have caused the death by itself, that the Vicodin was a significant contributor, and that the Valium played a relatively minor role. (10 RT 2565-2566, emphasis added.) The coroner, Dr. Sheridan, concurred with these conclusions and gave uncontested testimony that combined drug toxicity was the immediate cause of Arthur's death, with acute and chronic physical abuse and neglect being significant contributing causes of death. (4 CT 10 RT 1018-1019; 2602-2604, 2618; 11 RT 2775.) Dr. Sheridan explained in pertinent part:

> I listed the main cause of death as being drug toxicity. I specifically said combined drug toxicity. I'm referring to the fact there are three drugs. But of the three, Doxylamine [Unisom] is by far the most important. Because the level of that on its own is potentially fatal whereas the level of the other two on their own wouldn't even have been toxic, let alone fatal. But, as I said, because the three drugs do have a certain additive effect on the sedation side, I call the whole thing combined drug toxicity. So that was listed as the main cause of death on the death certificate.

(10 RT 2603-2604.) Dr. Sheridan later explained that all three drugs are central nervous system depressants. (10 RT 2609, 2654, 2636.) In high doses they can cause seizures and cessation of breathing, resulting in death. (10 RT 2609-2610, 2636.)

The above-cited evidence is substantial evidence from which the jury

could have found appellant guilty of murder by poison. Thus, appellant's claim in Argument I must be rejected.

B. There Is Substantial Evidence That The Torture Appellant Inflicted On Arthur Was A Proximate Cause Of His Death

Appellant contends there is insufficient evidence to support his conviction for first degree murder under a torture-murder theory. Specifically, he argues there is insufficient evidence that the torture he inflicted on Arthur caused his son's death. (AOB 34-41.) Contrary to appellant's argument, there is substantial evidence to support his first degree murder conviction under a theory of murder by torture.

In homicide cases, the prosecution must prove the defendant's conduct proximately caused the victim's death. (*People v. Briscoe* (2001) 92 Cal.App.4th 568, 583.) "Courts use traditional notions of concurrent and proximate cause in order to determine whether the killing was the result of the defendant's conduct." (*Ibid.*) "To be considered the proximate cause of the victim's death, the defendant's act must have been a substantial factor contributing to the result, rather than insignificant or merely theoretical." (*Id.*, at pp. 583- 584, citing *People v. Caldwell* (1984) 36 Cal.3d 210, 220.)

There can be more than one proximate cause of the death. (*People v. Sanchez* (2001) 26 Cal.4th 834, 847; *People v. Briscoe, supra,* 92 Cal.App.4th at p. 584.) "When the conduct of two or more persons contributes concurrently as the proximate cause of the death, the conduct of each is a proximate cause of the death if that conduct was also a substantial factor contributing to the result. A cause is concurrent if it was operative at the time of the death and acted with another cause to produce the death." (*People v. Sanchez, supra,* 26 Cal.4th at p. 847, quoting *People v. Mai* (1994) 22 Cal.App.4th 117, 123, fn. 5, disapproved on other grounds in *People v. Nguyen* (2000) 24 Cal.4th 756, 761.) As this court has explained, "it is proximate causation, not direct or actual

causation, which, together with the requisite culpable mens rea (malice), determines [a] defendant's liability for murder." (*People v. Sanchez, supra,* 26 Cal.4th at p. 845.) Indeed, "as long as the jury finds that without the criminal act the death would not have occurred when it did, it need not determine which of the concurrent causes was the principal or primary cause of death." (*People v. Catlin* (2001) 26 Cal.4th 81, 155; accord, *People v. Sanchez, supra*, 26 Cal.4th at p. 847.)

Here, appellant was charged with committing murder by means of torture. (1 CT 232-233.) Section 189 provides in pertinent part, "All murder which is perpetrated by means of . . . torture . . . is murder of the first degree." The prosecution need not establish that the defendant intended to kill the victim (*People v. Raley* (1992) 2 Cal.4th 870, 898, fn. 2), but must prove a causal relationship between the torturous acts and death. (*People v. Chatman* (2006) 38 Cal.4th 344, 392; *People v. Elliot* (2005) 37 Cal.4th 453, 467; *People v. Bemore* (2000) 22 Cal.4th 809, 842-843; *People v. Proctor* (1992) 4 Cal.4th 499, 530.) However, "[t]he acts of torture may not be segregated into their constituent elements in order to determine whether any single act by itself caused the death; rather, it is the continuum of sadistic violence that constitutes the torture." (*People v. Chatman, supra,* 38 Cal.4th at p. 393; *People v. Proctor, supra*, 4 Cal .4th at p. 530; see also, *People v. Elliot, supra,* 37 Cal.4th at p. 467.) Thus, "[t]he finding of murder-by-torture encompasses the totality of the brutal acts and the circumstances that led to the victim's death. (*Ibid.*)

In this case there was substantial evidence establishing that appellant tortured Arthur by severely physically abusing and starving him and that this torture was a proximate cause of Arthur's death.

1. Substantial, Undisputed Evidence Established That The Jennings Tortured Arthur By Starving And Severely Physically Abusing Him

Substantial, undisputed evidence in this case established that appellant tortured Arthur by starving and physically abusing him over a two month period beginning in December 1995, less than a month after Arthur was returned to his care. The evidence establishing that the Jennings tortured Arthur by starving him is as follows: Arthur's aunt testified that before she returned Arthur to the Jennings in November 1995, she took him for a physical examination at which time he was determined to weigh 64 pounds and to be in good health. (9 RT 2316.) Acquaintances of the Jennings who saw Arthur shortly after he arrived confirmed that he appeared healthy at that time. (10 RT 2471-2472, 2517; 11 RT 2661-2662.) However, within two months, by January 1996, Arthur appeared thin and undernourished despite the fact that the Jennings had plenty of food in their home. (10 RT 2442, 2446-2447, 2453, 2464, 2473-2474.) When Arthur was given food or drink, he gulped them down, suggesting he had not been fed recently. (10 RT 2474, 2518-2519.) When he died on February 4, 1996, Arthur weighed only 35 pounds. (10 RT 2571-2572.) In other words, Arthur lost nearly half of his body weight in less than three months. Dr. Sheridan, who conducted the autopsy in this case, testified that there was no medical reason for Arthur's dramatic weight loss over a short period of time. (10 RT 2605.) Dr. Sheridan further testified that Arthur was extremely thin for his height (3'10"), had almost no fat under his skin, his muscles were wasting (meaning his body broke down his muscles for energy), and he had no food in his stomach at the time of his death. (10 RT 2571-2572, 2580, 2583, 2585, 2588-2590, 2606.) Finally, Dr. Sheridan testified that Arthur had acute pneumonia as a part of his overall failure to thrive and the breakdown in his immune system from emaciation. (10 RT 2604-2605.) The jury was also able to see pictures of Arthur at the time he was returned to the

Jennings' care in November 1995 and at the time of his death only 2 ½ months later, as well as an autopsy photograph showing that he had no fat under his skin. (9 RT 2320-2321, 10 RT 2588, 2598-2599; Ex. 6, 87-88.) The foregoing constitutes substantial evidence that appellant tortured Arthur by deliberately starving him. (See also Argument V(B).)

Undisputed evidence also established the Jennings tortured Arthur by severely physically abusing him. Again, by all accounts, Arthur was happy and healthy when he was returned to his parents care in November 1995. (9 RT 2316-2318; 10 RT 2471-2472.) In the subsequent 2 ½ months, the Jennings inflicted numerous painful injuries on their son. In early December 1995, Arthur was seen sitting alone in his room, with his legs crossed, rocking back and forth, staring straight ahead, and moaning. (11 RT 2663-2664.) He had two black eyes and a mark on his mouth, injuries which Michelle admitted inflicting. (11 RT 2663-2664, 2677.) On Christmas day 1995, Arthur had a bandaged hand. (10 RT 2517, 2519-2520.) The autopsy later revealed that Arthur's hand had been very severely burned from the palm all the way down to his fingers. (10 RT 2580-2581, 2600, 2609.) Appellant inflicted this injury by holding Arthur's hand over the stove as punishment. (3 CT 738-739.)

In January 1996, Arthur was seen with various injuries including a bruise which ran all the way down his face; bandages on his head; dried blood on his face; black, bloody eyes; and an eye that was seeping blood and was swollen shut. (10 RT 2463-2464, 2473, 2519.) Arthur's injuries were so severe that they prompted one acquaintance to call CPS. (10 RT 2474-2475.) The autopsy revealed that around this time Arthur received an injury to his scalp which was sutured by someone other than a medical professional. (10 RT 2576-2578, 2599-2600, 2609, 2577.) Appellant had earlier admitted that he was the one that sutured Arthur's head wound (presumably without anesthetic). (3 CT 733.) A neighbor testified that one day she saw appellant force Arthur

to stand in the yard with a board over his head, and that appellant hit Arthur when he dropped it. (11 RT 2683-2684.) Appellant later admitted this abuse. (3 CT 708.) Around the end of January, Arthur sustained injuries which were most likely caused by violent shaking. These injuries included bleeding in the left side of his brain and hemorrhaging of the optic nerves around his eyes. (10 RT 2571-2572, 2601, 2608.) Appellant admitted repeatedly violently shaking Arthur a few days before his death. (3 CT 710-711, 715.)

On February 4, 1996, the day Arthur died, appellant hit him in the back of the head with a fireplace shovel, causing a large, gaping head wound. (3 CT 788-790, 796; 10 RT 2576-2578, 2591, 2599; 11 RT 2683-2684; Ex. 82.) On the same day, Arthur also received an injury which caused extensive hemorrhaging to the deeper layers of his scalp across the front of his forehead. (10 RT 2591, 2599-2600.) Shortly before he died, Arthur also suffered a number of injuries which, in Dr. Sheridan's opinion, were most likely caused by "smothering." (10 RT 2600, 2613-2614, 2627, 2637.) These injuries included a bruise and abrasion on the tip of Arthur's nose, bruising and a tear on the area between his nose and mouth, bruises on the inside of his lips and gums, a tear in his frenulum and a slight bruise on the tip of his tongue. (10 RT 2573-2576.) When appellant was questioned about whether he had ever tried to suffocate Arthur, he responded, "I don't know, maybe." (3 CT 764-765.)

In addition, Dr. Sheridan testified regarding numerous other injuries found on Arthur's body during the autopsy. Arthur had abrasions in several places on his left arm, on his right elbow, and on his left buttock. (10 RT 2582-2584, 2586.) He had "rug burn" abrasions on his left back. (10 RT 2585-2588.) Arthur had bruises on his chest, both of his shoulders, right elbow, his left arm, and on his left buttock. (10 RT 2579-2584, 2586, 2596.) Finally, Arthur had a scar on the back of his lower right thigh. (10 RT 2585.) Dr. Sheridan testified that all of Arthur's physical injuries had been painful. (10 RT

2576, 2578, 2614.) When interviewed, appellant admitted he had "dragged" Arthur home, knocked him down with an elbow, kicked him in the mid-section, put a sock in his mouth, and duct taped his mouth. (3 CT 705-706, 708-715, 738-739, 762-763, 773.) Appellant admitted that he was "overzealous" in his punishment of Arthur and that his abuse probably killed Arthur. (3 CT 693-694, 762-763.)

2. Substantial Undisputed Evidence Established That Appellant's Torture Of Arthur Was A Proximate Cause Of His Death

Appellant assumes for purposes of his argument that the evidence cited in the previous section established that he "tortured" Arthur. (See AOB 34, fn. 9.) However, he argues that because the Unisom sleeping pills administered by Michelle were the "main" cause of Arthur's death, and could have been fatal alone, the evidence was insufficient to show that the torture was a proximate cause of Arthur's death. (AOB 34-41.) Contrary to appellant's argument, there was substantial evidence that his torture of Arthur was a direct, concurrent cause of death.

Appellant's argument fails for several reasons. First, it fails to recognize the uncontradicted testimony of Dr. Sheridan that acute and chronic abuse and neglect were significant contributing causes of Arthur's death. (10 RT 2604, 2615; see also, 4 CT 1018-1019; 11 RT 2775; Ex. 76 [death certificate].) Dr. Sheridan explained that the acute abuse consisted of Arthur's recent injuries (those that occurred within hours of his death) while the chronic abuse and neglect consisted of his older injuries and his severe malnutrition. (10 RT 2604-2606.) Dr. Sheridan explained that Arthur would likely have died within a short period of time even without the drugs. (10 RT 2614-2615.) Dr. Sheridan explained:

> Unless this child had been turned around, in other words, treated and all the rest of it, and fed, of course, very importantly, this child would

> probably have died anyway within a fairly short period of this time. As I said, leaving the drugs out, imagining they're not present, I think this child was very near to the end of his life because of the general stage of malnutrition and so forth. And the pneumonia is even a reflection of that. Because, as I said, the immune system would be impaired. The whole body is not functioning properly. I mean, the child did have pneumonia and could have died from that, for example. The child could have died at any time around then as far as I'm concerned.

(10 RT 2614-2615.) Dr. Sheridan then again reiterated that when he gave his cause of death he did not say it was only the drugs but the entire problem which included thirteen items all working together - including the drugs, the physical injuries, and the malnutrition and general emaciation-because all these factors are working together on one child. (10 RT 2615.)

Appellant's argument also fails to recognize the torture was directly related to the pills being fatal. The Jennings did not give this combination of drugs to a healthy five year old boy but to a five year old whose body had been weakened and depleted by the torture they inflicted on him. As the prosecutor explained in closing argument, "remember the condition of this child at this time [when he was given the pills]. He's emaciated, he's starving to death, he's got injuries from head to toe." (12 RT 3059.) In addition, the fact that Arthur had bronchial pneumonia as a result of the torture could have had an affect on his ability to breathe after he was given the pills. (see 10 RT 2640-2641.) As would appellant's "smothering" of Arthur. (10 RT 2573-2576, 2600, 2613-2614, 2627, 2637.)

Furthermore, the toxicologist and Dr. Sheridan both concluded that the drugs the Jennings gave Arthur were of sufficient concentrations to account for Arthur's death *given his age and weight.* (10 RT 2565-2566.) However, had the Jennings not tortured Arthur by starving him, Arthur would not have weighed 35 pounds when he was given this combination of pills, but rather would have been almost 30 pounds heavier (or almost double his weight at the time of his death). Had the Jennings not been starving Arthur, he might also

have had some food in his stomach to help absorb the drugs.

Finally, appellant asserts a lack of causal connection based on his claim they gave the pills to Arthur to help him get better. (3 CT 702-703, 705, 748.) However, Arthur would not have needed this "help" if appellant had not abused him in the first place. Accordingly, even accepting appellant's claim at face value, the causal connection between appellant's torture of Arthur and Arthur's death remains unaffected. Moreover, the law is clear that appellant's assertion need not be taken as true since it is belied by the evidence.

Even appellant recognized at the time he was questioned by police that he had probably caused Arthur's death by the medication and all the abuse. (3 CT 762-763.) Given the overwhelming evidence of a causal link between appellant's torture of Arthur and Arthur's death, appellant's argument that there was insufficient evidence to support his first degree murder conviction by means of torture should be rejected.

Moreover, appellant's conviction for first degree murder would be supported by the evidence of premeditation and deliberation as discussed in detail in Argument III, herein. Appellant clearly had an intent to kill when he administered the drugs to Arthur and when he "smothered" a weakened and starving child. On this record, there is no question as to the sufficiency of the evidence of first degree murder.

II.

APPELLANT'S FIRST DEGREE MURDER CONVICTION IS CONSTITUTIONAL UNDER THE FIFTH, EIGHTH, AND FOURTEENTH AMENDMENTS

Appellant next contends that even if there is sufficient evidence to support his conviction for first degree murder under a torture-murder theory, the conviction violates his constitutional rights under the Fifth, Eighth, and Fourteenth Amendments. (AOB 42-44.) The jury's first degree murder verdict

did not violate any of appellant's constitutional rights.

Appellant first argues that his first degree murder conviction, making him "death eligible," in a case where he did not cause the death and the death was unintentional, is unconstitutional because it violates the principle that a state's death penalty scheme must meaningfully narrow the class of persons eligible for the death penalty. (AOB 42-43, citing *Zant v. Stephens* (1983) 462 U.S. 862 [103 S.Ct. 2733, 65 L.Ed.2d 235]; *Beck v. Alabama* (1980) 447 U.S. 625 [100 S.Ct. 2382, 65 L.Ed. 2d 392]; *Godfrey v. Georgia* (1980) 446 U.S. 420 [100 S.Ct. 1759, 64 L.Ed.2d 398]; *Lockett v. Ohio* (1978) 438 U.S. 586 [98 S.Ct. 2954, 57 L.Ed.2d 973]; *Gardner v. Florida* (1977) 430 U.S. 349 [97 S.Ct. 1197, 51 L.Ed.2d 393].) Appellant's argument ignores the overwhelming evidence discussed in the previous argument that he did cause Arthur's death.

Appellant's argument also fails to recognize that this Court has held that the imposition of the death penalty upon one who lacks the intent to kill is not cruel and unusual punishment, in violation of the Eighth Amendment. (*People v. Diaz* (1992) 3 Cal.4th 495, 569, see also, *Tison v. Arizona* (1987) 481 U.S. 137, 157-158 [107 S.Ct. 1676, 1688, 95 L.Ed.2d 127]). Finally, appellant's argument also fails to recognize that it was not only his first degree murder conviction, but the jury's true finding on the torture-murder special circumstance (which required an intent to kill), that ultimately made him eligible for the death penalty.

The United States Supreme Court has found that California's requirement of a special circumstance finding adequately "limits the death sentence to a small subclass of capital- eligible cases." (*Pulley v. Harris* (1984) 465 U.S. 37, 53 [104 S.Ct. 871, 79 L.Ed.2d 29].) This Court has specifically found that "the special circumstance of intentional murder involving the infliction of torture sufficiently channels and limits the jury's sentencing discretion consistent with Eighth Amendment principles, and meaningfully

narrows the group of persons subject to the death penalty (*People v. Barnett* (1998) 17 Cal.4th 1044, 1162-1163, citing *People v. Raley* (1992) 2 Cal.4th 870, 898, 900; *People v. Davenport* (1985) 41Cal.3d 247, internal citations omitted.) As this Court explained, torture murder is "particularly reprehensible because the defendant intends to cause cruel suffering." (*People v. Raley, supra,* 2 Cal.4th at p. 900.) Thus, appellant's argument that his first degree murder conviction violates the Fifth, Eighth, and Fourteenth Amendment "narrowing principle" must be rejected.

Appellant next argues that any construction of the evidence in this case that renders him guilty of first degree murder by torture violates the well-settled constitutional principle that prohibits punishment pursuant to vague, arbitrary, or illegitimate standards. (AOB 43-44, citing *Kolender v. Lawson* (1983) 461 U.S. 352, 357 [103 S. Ct. 1855, 75 L.Ed.2d 903, 908-909][a penal statute must define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement] and *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346 [100 S.Ct. 2227, 65 L.Ed.2d 175] [Fourteenth Amendment prohibits arbitrary deprivation of liberty by the state].) Appellant's argument is once again based on the faulty premise that the evidence established that he did not cause Arthur's death by torture. Rendering a father who starved, beat, kicked, dragged, burned, smothered and shook his son guilty of first degree murder, when these actions were concurrent causes of his son's death, does not violate the Fifth or Fourteenth Amendments. Thus, appellant's claim must be rejected.

III.

THE JURY'S TRUE FINDING ON THE TORTURE-MURDER SPECIAL CIRCUMSTANCE MUST BE UPHELD BECAUSE THERE WAS SUBSTANTIAL EVIDENCE THAT APPELLANT INTENDED TO KILL ARTHUR

Appellant contends that the torture-murder special circumstance must be reversed because there was insufficient evidence he intended to kill Arthur. (AOB 45-49) Appellant is mistaken. There was substantial evidence that he intended to kill Arthur.

The standards for reviewing a claim of insufficient evidence previously discussed in Argument I are equally applicable to a special circumstance finding. (*People v. Elliot* (2005) 37 Cal.4th 453, 466; *People v. Mayfield, supra,* 14 Cal.4th at pp. 790-791.) Thus, this Court must review the evidence in the light most favorable to the judgment to determine whether there is substantial evidence to support the jury's true finding on the torture-murder special circumstance. (*Jackson v. Virginia, supra,* 443 U.S. at pp. 318-319; *People v. Johnson, supra,* 26 Cal.3d at p. 578.)

The torture-murder special circumstance requires: 1) an intent to kill; 2) an intent to torture; and, 3) infliction of an extremely painful act upon a living victim. (Penal Code § 190.2(a)(18); *People v. Bemore* (2000) 22 Cal.4th 809, 839.) The torture-murder special circumstance applies where the death was intentional and involved infliction of torture, regardless of whether the acts constituting the torture were the cause of death. (Penal Code § 190.2(a)(18); *People v. Bemore, supra,* 22 Cal.4th at pp.842-843.)

In this case, there was substantial evidence to support the jury's finding that appellant intended to kill Arthur. First, appellant's admissions to detectives are strong evidence that he intended to kill Arthur. Appellant admitted that he and Michelle had discussed "killing" or "get[ting] rid of" Arthur, that he had

talked about shooting Arthur, and that two days before Arthur's death he had driven around the desert looking for a place to dump the body. (3 CT 694-695, 698-699, 701, 725.) In addition, on the day Arthur died, but while he was still alive, Michelle and Art went out into the desert, at appellant's behest, to look at the mineshaft where they later dumped Arthur's body. (3 CT 718-719, 773-774; 11 RT 2770, 2773.) Appellant also admitted to detectives that he knew he had to finish Arthur off when Arthur caught him kissing the neighbor (the day Arthur died). (3 CT 793, 797.) And, significantly, appellant threatened the neighbor that if she told anyone that he had hit Arthur in the head with the shovel (after Arthur saw them kissing), that she would "see the bottom of a mineshaft." (11 RT 2683.)

The evidence also established that appellant covered Michelle, Pearl, and his father under his medical insurance, but he did not add Arthur to his policy. (3 CT 739-741, 4 CT 1124; 12 RT 3084.) Appellant admitted he did not add Arthur to his medical insurance policy because he knew Arthur would not be around very long (although he claimed that was because he planned to send Arthur back to his aunt). (3 CT 731-741.) The fact that appellant did not add Arthur to his insurance also supports the inference that he did not intend to seek medical care for Arthur to prevent him from dying from his injuries.

Next, as discussed in Argument I(B)(1) and VI(B), the evidence established that the Jennings starved Arthur. Common sense tells us that if you refuse to feed a child they will die. Thus, appellant's systematic and prolonged starvation of Arthur, resulting in Arthur losing nearly half his body weight over a matter of weeks, was strong evidence of his intent to kill.

In addition, appellant inflicted a number of injuries which support the conclusion that he intended to kill Arthur because they are of the type that are likely to cause death. Most significantly, Arthur had a number of injuries which were most likely caused by "smothering." In fact, the medical examiner

indicated he would have concluded smothering was the most likely cause of death absent the positive toxicology report. (10 RT 2573-2576, 2600, 2613-2614, 2627, 2637.) Appellant also hit Arthur hard in the back of the head with a fireplace shovel, causing a large, gaping wound, for no reason other than the fact that Arthur had seen him kissing the neighbor. (3 CT 788-790, 796; 10 RT 2576-2578, 2591, 2599; 11 RT 2683-2684.) Arthur had also previously had an injury to his head which was serious enough to require sutures. (10 RT 2576-2578, 2599-2600, 2609, 2577.) Finally, appellant violently shook Arthur hard enough to cause bleeding in the left side of his brain and hemorrhaging of the optic nerves around his eyes. (3 CT 710-711, 715; 10 RT 2571-2572, 2601, 2608.)

It is also significant that a few days before Arthur died, appellant told a friend that Arthur got up in the middle of the night, ran into the desert and hid behind a bush and that he and Michelle spent three hours looking for Arthur. (9 RT 2521.) Then, after Arthur died, the Jennings went to the sheriff's station with a similar story, claiming that Arthur had run away. (9 RT 2337-2345.) This evidence supports the conclusion that appellant was planning his cover-up story before Arthur was killed.

Appellant's actions of talking about killing Arthur, looking for places to dispose of Arthur's body in the days before he died, keeping him off the family health plan, continuously inflicting serious and possibly life threatening physical injuries and systematically starving him are inconsistent with anything other than an intent to kill. The fact that appellant went to such lengths to try to cover-up Arthur's death, and was planning his cover-up story prior to Arthur's death, further supports the jury's conclusion that appellant intended to kill Arthur. In light of this evidence, this Court should reject appellant's claim.

IV.

THE JURY'S TRUE FINDING ON THE TORTURE-MURDER SPECIAL CIRCUMSTANCE IS SUPPORTED BY SUBSTANTIAL EVIDENCE THAT THE MURDER INVOLVED THE INFLICTION OF TORTURE

Appellant next contends that the torture-murder special circumstance must be reversed because there was insufficient evidence that the murder "involved the infliction of torture." (AOB 50-52) Contrary to appellant's argument, there was substantial evidence that the murder involved the infliction of torture.

As previously discussed, this Court must review the evidence in the light most favorable to the judgment to determine whether there is substantial evidence to support the jury's true finding on the torture-murder special circumstance. (*Jackson v. Virginia, supra,* 443 U.S. at pp. 318-319; *People v. Johnson, supra,* 26 Cal.3d at p. 578.)

Once again, appellant bases his argument on the faulty premise that the only relevant cause of death in this case was the Unisom sleeping pills. Appellant therefore argues that "the only rational conclusion is that Arthur's death was not shown to have been caused by the (intentional) acts of 'torture.'" (AOB 50-51.) However, unlike the finding of murder-by-torture, the torture-murder special circumstance does not require that the acts constituting the torture be the cause of death. (Penal Code § 190.2(a)(18); *People v. Bemore, supra,* 22 Cal.4th at pp.842-843.) Nevertheless, the evidence previously discussed in Argument I(B) overwhelmingly established not only that Arthur's death involved the infliction of torture but that the torture was a cause of his death. Accordingly, appellant's claim must be rejected and the finding on the torture murder special circumstance upheld.

V.

THE FACT THAT THE JURY WAS NOT REQUIRED TO FIND THAT THE TORTURE UNDERLYING THE TORTURE-MURDER SPECIAL CIRCUMSTANCE WAS THE SOLE OR PRIMARY CAUSE OF DEATH DOES NOT RENDER THE SPECIAL CIRCUMSTANCE UNCONSTITUTIONAL

Appellant contends, in his fifth argument, that the torture-murder special circumstance is unconstitutional because the acts of torture are not required to be the sole or primary cause of the victim's death. (AOB 53-59.) This Court has previously rejected appellant's argument and appellant has presented no persuasive reason for this Court to revisit the issue.

Section 190.2, subdivision (a)(18), encompasses within the torture-murder special circumstance acts of torture that would not have caused death. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1161; *People v. Crittenden* (1994) 9 Cal.4th 83, 141-142 .) This Court has held that the lack of a requirement that the acts of torture be the cause of death does not render the torture-murder special circumstance unconstitutional on the ground that it fails to adequately define or limit the class of persons eligible for the death penalty. (*People v. Bemore, supra,* 22 Cal.4th at pp. 842-843; see also, *People v. Barnett, supra,* 17 Cal.4th at p. 1161 [the torture murder special circumstance meaningfully narrows the group of persons subject to the death penalty]; *People v. Crittenden, supra*, 9 Cal.4th at pp. 141-142; *People v. Raley, supra*, 2 Cal.4th at p. 898 [the torture murder special circumstance sufficiently channels and limits the jury's sentencing discretion consistent with Eighth Amendment principles].) Section 190.2, subdivision (a)(18) is constitutional because it requires some proximity in time and space between murder and torture and renders death eligible only those first-degree murderers who intentionally performed acts which were calculated to cause extreme physical pain to the victim and which were inflicted prior to death. (*People v. Bemore, supra,* 22

Cal.4th at pp. 842-843.)

As in *Bemore*, "the instant record discloses a close connection between the torture and the murder." (*People v. Bemore, supra,* 22 Cal.4th at p. 843; see evidence discussed in Argument I(B).) Thus, appellant's argument should be rejected.

VI.

THE ADMISSION OF MICHELLE'S STATEMENT TO DR. KASER-BOYD THAT THEY WITHHELD FOOD FROM ARTHUR AS A FORM OF PUNISHMENT DID NOT VIOLATE APPELLANT'S CONFRONTATION RIGHTS UNDER *CRAWFORD* OR THE PROHIBITION AGAINST HEARSAY EVIDENCE BECAUSE THEY WERE NOT ADMITTED FOR THEIR TRUTH

Appellant contends in his sixth argument that the admission of Michelle's statement that they withheld food from Arthur as a form of discipline was error under *Crawford,*[8] violated the prohibition against hearsay evidence, and that without Michelle's statement there was insufficient evidence that he tortured Arthur by *deliberately* starving him. (AOB 61-76.) Because Michelle's statement was not admitted for its truth, but rather as a basis for the expert's opinion regarding Michelle's state of mind, its admission did not violate *Crawford* or the rules against the admission of hearsay. Moreover, there was overwhelming evidence that the Jennings' deliberately starved Arthur, apart from Michelle's statement. Thus, there was sufficient evidence to support the jury's first degree murder verdict and true finding on the torture special circumstance and any error in admitting Michelle's statement was harmless.

Nancy Kaser-Boyd, the clinical psychologist who evaluated Michelle, testified on her behalf to support her defense that she did not have the specific

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8. *Crawford v. Washington* (2004) 541 U.S. 36 [124 S.Ct. 1354, 158 L.Ed.2d 177].

intent to kill or torture Arthur. Appellant objected to the admission of any testimony about what he did or said on Sixth Amendment confrontation grounds and under the *Aranda/Bruton*[9] line of cases. (11 RT 2877.) Michelle's counsel pointed out that experts are allowed to base their opinion on hearsay and argued that this testimony was admissible because Dr. Kaser-Boyd relied on this information in forming her opinion. (11 RT 2877.) The court overruled the objection. (11 RT 2877.)

Dr. Kaser-Boyd testified that Michelle explained that appellant made her withhold food from Arthur as discipline. (11 RT 2881-2882.) Specifically, the following colloquy occurred:

> Q: Was there a point in time where withholding food from Arthur was used as a means of discipline?
>
> A: Yes.
>
> Q: And did you talk with her about that?
>
> A: Yes.
>
> Q: Did she tell you why that was done?
>
> A: Yes.
>
> Q: Why was that?
>
> A: She told me that Martin told her that hitting Arthur wasn't working and they needed to try something else, and that if they didn't feed him, maybe he would do the things that they were asking him to do.
>
> Q: And what did she do in response to what Martin Jennings told her?
>
> A: Well, she told me that sometimes she went along with that, but there were other times when she agreed to sneak him food.

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9. *People v. Aranda* (1965) 63 Cal.2d 518; *Bruton v. United States* (1968) 391 U.S. 123 [88 S.Ct. 1620, 20 L.Ed.2d 476]. *Aranda* and *Bruton* stand for the proposition "that a nontestifying codefendant's extrajudicial self-incriminating statement that inculpates the other defendant is generally unreliable and hence inadmissible as violative of that defendant's right of confrontation and cross-examination, even if a limiting instruction is given." (*People v. Anderson* (1987) 43 Cal.3d 1104, 1120-1121.)

(11 RT 2881-2882.) A short time later, Dr. Kaser-Boyd gave her opinion, based in part on her interviews with Michelle, that Michelle is fearful, feels helpless, has problems with impulse control, is socially isolated and has a dependent personality disorder. (11 RT 2890-2891.) Dr. Kaser-Boyd opined that Michelle failed to protect Arthur because she did not have a good role model and she suffered extreme abuse herself. (11 RT 2895-2896.)

A. The Admission Of Michelle's Statement As A Basis For Dr. Kaser-Boyd's Expert Opinion Did Not Violate Appellant's Confrontation Rights Under *Crawford* Or The Rules Prohibiting The Admission Of Hearsay

Appellant argues that the admission of Michelle's statements as a basis for Dr. Kaser-Boyd's opinion violated his Sixth Amendment right to confrontation, as interpreted by *Crawford v. Washington, supra,* 541 U.S. 36. (AOB 76-85.) Contrary to appellant's contention, *Crawford* does not undermine the established rule that experts can relate the information and sources upon which they rely in forming their opinions, as the information is not admitted for its truth and the expert is available for cross-examination. Thus, appellant's confrontation rights were not violated when Dr. Kaser-Boyd testified to Michelle's statement that they deliberately withheld food from Arthur as a basis for her opinion regarding Michelle's state of mind.

"The Confrontation Clause of the Sixth Amendment, made applicable to the States through the Fourteenth Amendment, provides, 'In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him.'" (*Idaho v. Wright* (1990) 497 U.S. 805, 813 [110 S.Ct. 3139, 111 L.Ed.2d 638].) It is settled law in California that experts can generally state the reasons for their opinion and the matter upon which they rely in forming that opinion, including otherwise inadmissible evidence. (Evid. Code, §§ 801, subd. (b), 802.) The United States Supreme Court's recent opinion in *Crawford v. Washington, supra*, 541 U.S. 36, does not change this

long-standing rule.

The United States Supreme Court explained in *Crawford* that the core concern of the Confrontation Clause is testimonial hearsay, which includes statements made during police interrogations and prior testimony at a preliminary hearing, before a grand jury, or at trial. (*Crawford v. Washington, supra*, 541 U.S. at pp. 50-53, 68.) The Court held that such statements are inadmissible when the declarant is unavailable unless the defendant had a prior opportunity to cross-examine. (*Id.* at p. 68.) However, the Confrontation Clause does not bar the use of testimonial statements "*for purposes other than establishing the truth of the matter asserted.*" (*Id.* at p. 59, fn. 9, emphasis added, see also, *Tennessee v. Street* (1985) 471 U.S. 409, 414 [105 S.Ct. 2078, 85 L.Ed.2d 425].) Accordingly, *Crawford* does not undermine the long-standing rule that experts can testify to their opinions on relevant matters, and relate the information and sources upon which they rely in forming those opinions. This is so for two reasons. First, the materials upon which the expert relies are not elicited for their truth but, rather, are examined to assess the weight of the expert's opinion. (*People v. Thomas* (2005) 130 Cal.App.4th 1202, 1210; *People v. Fulcher* (2006) 136 Cal.App.4th 41, 56-57; *See also Delaware v. Fensterer* (1985) 474 U.S. 15, 19 [106 S.Ct. 292, 88 L.Ed.2d 15]; *People v. Coleman* (1985) 38 Cal.3d 69, 90, 92-93.) Secondly, an expert is subject to cross-examination about his or her opinions. (*Ibid.*) Thus, even assuming arguendo that Michelle's statement to Dr. Kaser-Boyd was "testimonial," its admission as a basis for her expert opinion regarding Michelle's state of mind did not violate appellant's confrontation rights under *Crawford*.

Furthermore, Michelle's statements did not violate the prohibition against the admission of hearsay evidence as appellant contends. (AOB 86-87.) Initially, respondent notes that this issue is waived because appellant did not

object on this ground at trial. (Evid. Code, § 353; *People v. Wheeler* (1993) 4 Cal.4th 284, 300.) In any event, appellant's claim is without merit. Evidence code section 1200, subdivision (a), defines hearsay as "evidence of a statement that was made other than by a witness while testifying at the hearing and that is *offered to prove the truth of the matter stated.*" (Emphasis added.) Hearsay testimony is not admissible unless it falls within an exception, defined by law. (Evid. Code, § 1200, subd. (b).) Out-of-court statements offered to support an expert's opinion are not hearsay, because they are not offered for the truth of the matter asserted, but are offered for the purpose of assessing the value of the expert's opinion. Accordingly, Michelle's statement to Dr. Kaser-Boyd was not inadmissible hearsay.[10/]

B. There Was Overwhelming Evidence, Apart From Michelle's Statement To Dr. Kaser-Boyd, That Appellant Tortured Arthur By Deliberately Starving Him

Appellant also contends there was insufficient evidence to support his conviction for first degree murder or the special circumstance true finding based on a torture by starvation theory because Michelle's statement was the *only* evidence that they *deliberately* starved Arthur. (AOB 68-76.) Contrary to appellant's argument, there was *overwhelming,* properly admitted, circumstantial evidence, aside from Michelle's statement, that appellant tortured Arthur by deliberately starving him. Accordingly, the evidence was more than sufficient to support a finding of first degree torture-murder and the torture murder special circumstance based on a torture by starvation theory.

As previously discussed in Argument I, this Court must review the

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10. Although the jury was not instructed on the limited purpose for which this evidence was received, such an instruction was not requested, and the trial court was not required to give one sua sponte. (*People v. Ledesma* (2006) 39 Cal.4th 641, 697-698.)

evidence in the light most favorable to the judgment to determine whether there is substantial evidence to support the jury's verdict. (*Jackson v. Virginia, supra,* 443 U.S. at pp. 318-319; *People v. Johnson, supra,* 26 Cal.3d at p. 578.) The same standard applies if the verdict is supported by circumstantial evidence. (*People v. Stanley* (1995) 10 Cal.4th 764, 792-793.)

The evidence in this case showed that in only 2 ½ months Arthur lost almost half of his body weight, going from a healthy 64 pounds to an extremely unhealthy 35 pounds for his 3'10" body. (9 RT 2316; 10 RT 2571-2572, 2580, 2583, 2585, 2588-2590, 2606.) Although Arthur appeared healthy when he was *left in the Jennings care* in November, by January 1996 Arthur appeared extremely thin and undernourished. (10 RT 2464, 2471-2474, 2517; 11 RT 2661-2662.) Dr. Sheridan described the difference in Arthur's weight as "dramatic weight loss over a short period of time." (10 RT 2606.) Dr. Sheridan described Arthur as being "extremely thin," "severely emaciated" and "malnourished" at the time of his death. (10 RT 2571, 2583, 2605-2606.) Arthur had absolutely no food in his stomach at the time of his death. (10 RT 2589-2590.) Arthur had almost no fat under his skin, including in the normal storage areas where most people have a layer of fat. (10 RT 2580, 2583, 2585, 2588-2589, Ex. 88.) Arthur's extremities were so thin they had a "spindly-looking appearance." (10 RT 2580, 2583, 2585, Ex. 87.) Arthur's muscles were also wasting. (10 RT 2580, 2583, 2585, 2606.) Dr. Sheridan explained:

> when a person's starving, obviously they need the calories that they're not getting. The body needs it. So the first thing it does . . . is that the body fat is broken down to provide energy. But hand in hand with that, and especially when the body fat gets depleted, the body will start to use muscle for energy. So, in other words, it breaks down the muscle, its own muscle, to provide the energy for the body to keep growing. And so you end up with a situation like this where you see a very emaciated person with almost no fat, and the muscles have all lost a lot of their bulk. In other words they're wasted.

(10 RT 2606.)

Dr. Sheridan further explained that this would not happen in days, i.e., it would occur over time. (10 RT 2606.) Dr. Sheridan also testified that Arthur had acute pneumonia as a part of his overall failure to thrive and the breakdown in his immune system from emaciation. (10 RT 2604-2605.) All of this occurred despite the fact that the Jennings had plenty of food in their house and none of the other Jennings appeared to be deprived of food. (10 RT 2442, 2446-2447, 2453, 2518, Ex 6, 132.) There was also no medical reason that Arthur would not have been able to eat and absorb food. (10 RT 2605.) And, Arthur appeared overly eager to eat any food he was given. On Christmas eve, Arthur quickly ate two full plates of food and would have eaten more if he had been allowed. (10 RT 2518-2519.) Likewise, in January, when Arthur was given some milk to drink, he gulped it down. (10 RT 2474.) Finally, the jury was shown a picture of how thin Arthur looked at the time of his death. (10 RT 2588, Ex. 87; see also, 9 RT 2320-2321, Ex. 6.)

The foregoing constitutes substantial evidence that appellant tortured Arthur by deliberately starving him. Thus, appellant's contention that the only evidence he deliberately starved Arthur rested with Michelle's statement to Dr. Kaser-Boyd should be rejected. Additionally, appellant's complaint also ignores the fact that the prosecution's torture theory was not based only on the starvation or "neglect" but on the physical abuse as well and, as discussed in Arguments I(B) and III, the acts constituting "torture" must be viewed as a whole, not broken down into individual parts.

Based on the overwhelming evidence cited above, any error in admitting Michelle's statement into evidence was harmless under any standard. (*Chapman v. California* (1967) 386 U.S. 18 [87 S.Ct. 824, 17 L.Ed.2d 705] [harmless beyond a reasonable doubt standard applies to constitutional error]; *People v. Watson* (1956) 46 Cal.2d 818, 836 [state law error reviewed to see if it is reasonably probable a more favorable result would have been obtained

absent the error]; See also *People v. Pirwani* (2004) 119 Cal.App.4th 770, 790 [*Chapman* standard applies to *Crawford* error].) Further supporting the conclusion that any error was harmless is the fact that the defense used Michelle's statements to its advantage, arguing that appellant withheld food from Arthur in a misguided attempt at discipline and not with the intent to kill him. (12 RT 3084) In addition, the prosecutor never referred to Michelle's statement in his closing arguments. Under these circumstances, any error in admitting Michelle's statement was harmless.

Finally, appellant's argument that the judgment must be reversed because prejudicial evidence was admitted into evidence in his co-defendant's case after the trial court denied his severance motion must be rejected. (AOB 83-85.) Appellant argues that notwithstanding the merits of the judge's decision at the time it was made, the judgment must be reversed if the defendant ended up suffering gross unfairness, denying the defendant a fair trial or due process as a result of the joint trial. (AOB 84, *People v. Cleveland* (2004) 32 Cal.4th 704, 726.) For all the reasons previously stated, this is not such a case. Accordingly, appellant's claim should be rejected.

VII.

THE ADMISSION OF MICHELLE'S STATEMENTS TO DR. KASER-BOYD DID NOT DEPRIVE APPELLANT OF HIS CONFRONTATION RIGHTS UNDER *CRAWFORD* OR *ARANDA-BRUTON* AND ANY ERROR WAS HARMLESS BEYOND A REASONABLE DOUBT

Appellant contends in his eleventh argument that the admission of three additional statements Michelle made to Dr. Kaser-Boyd violated his right to confrontation under the *Aranda-Bruton* line of cases and under *Crawford*.[11/]

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11. Respondent has addressed appellant's *Crawford* and *Aranda-Bruton* claims in Argument XI in two separate arguments (respondent's Arguments VI and VII) because the analysis of whether it was error to admit Michelle's

(AOB 109-111, 116-128.) Because Michelle's statements were not admitted for their truth, but as a basis for the expert's opinion regarding Michelle's state of mind, their admission did not violate the holding in *Crawford*. Because they did not incriminate appellant with respect to the charged crime, their admission did not violate *Aranda-Bruton*. Furthermore, any error in admitting Michelle's statements was harmless beyond a reasonable doubt.

In addition to the statement about withholding food as punishment already discussed in Argument VI, appellant contends that the admission of three other statements Michelle made to Dr. Kaser-Boyd violated his confrontation rights under *Aranda-Bruton* and *Crawford*. First, appellant points to Michelle's statements to Dr. Kaser-Boyd that he had abused her in the earlier years of their relationship. (AOB 116.) Dr. Kaser-Boyd's testimony regarding appellant's abuse of Michelle was as follows:

> Q: And what did she tell you about the beginning of their relationship?
>
> A: She told me that Martin let her stay in his home. . . . . She said he was nice to her in the beginning, but after about three or four months he forced sexual attention on her and he also began to be physically violent with her.
>
> . . . .
>
> Q: How did she describe that relationship? What did they do?
>
> A: Well, during the large part of the relationship they were on the road. She told me that Martin worked as a truck driver and she would be with him on the truck. And she didn't go to school and she didn't contact her parents because she didn't want to be turned in as a runaway so she was on the truck pretty much all the time.
>
> Q: Did she tell you whether or not the abuse continued?

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statements to the expert witness into evidence is substantially different then the analysis of whether it was error to admit Michelle's statements during the joint interview into evidence. In addition, Respondent has addressed each of the *Crawford* claims in succession.

A: Yes. She said that it did.

Q: And what kind of abuse?

A: Well, physical for one thing. She talked about being hit and slapped and punched, having her hair pulled, being choked on several occasions. Being battered until the point at which she told me she no longer -- well, I will phrase that a different way. She always did what Martin said and then some of the battering eased up.

Q: Did she tell you approximately when some of the battering eased up?

A: I think within about the last two years before Arthur died.

(11 RT 2872-2874.)

Next, appellant points to Michelle's statement that he told her that Arthur's "fits" were temper tantrums. (AOB 116.) Dr. Kaser-Boyd's testimony on this subject was as follows:

Q: And [Michelle] admitted hitting Arthur, Junior, slapping him when he had fits; correct?

A: Yes. I haven't described the fits yet, but that was one problem that she didn't really understand.

Q: When you say she didn't really understand this problem about fits, what do you mean?

A: Well, she told me that Arthur had fits and that he would fall down and he would act like he was unconscious but sometimes his eyes were open. Sometimes he would shake and sometimes he would bite his tongue. ¶ With my training and experience I saw those as epileptic seizures, and I asked her, "Well, didn't you see that those were seizures?" She said no, Martin told her that he was doing that on purpose, that it was like a temper tantrum.

Q: And did she tell you based upon what Martin Jennings told her that's what she believed these to be, temper tantrums?

A: Yes.

(11 RT 2879-2880.) Finally, appellant points to Michelle's statement that he "was talking about killing Arthur, shooting him in the head." (AOB 117; 11 RT 2887.)

A. The Admission Of Michelle's Statements To Dr. Kaser-Boyd Did Not Violate Appellant's Confrontation Rights Under *Crawford*

As previously discussed in Argument VI, in *Crawford,* the Court held that testimonial statements of an unavailable declarant are inadmissible unless the defendant had a prior opportunity to cross-examine or when the testimonial statements were admitted "*for purposes other than establishing the truth of the matter asserted.*" (*Crawford v. Washington, supra*, 541 U.S. at pp. 59, fn. 9, 68.) Thus, *Crawford* does not prohibit expert witnesses from relaying information to the jury upon which they relied in forming their opinion. (*People v. Thomas, supra,* 130 Cal.App.4th at p. 1210; *See also Delaware v. Fensterer, supra,* 474 U.S. at p. 19; *People v. Coleman, supra,* 38 Cal.3d at pp. 90, 92-93.) Accordingly, the admission of Michelle's statements to Dr. Kaser-Boyd did not implicate the holding in *Crawford* because they were not admitted for their truth, but as the basis for Dr. Kaser-Boyd's opinion regarding Michelle's state of mind.

B. The Admission Of Michelle's Statements To Dr. Kaser-Boyd Did Not Violate Appellant's Confrontation Rights Under *Aranda-Bruton*

The "*Aranda-Bruton*" rule has its origins in *People v. Aranda, supra,* 63 Cal.2d 518 and *Bruton v. United States, supra,* 391 U.S. 123. In *People v. Aranda, supra,* 63 Cal.2d 518, 530-531, this Court held that when the prosecution seeks to introduce an extrajudicial statement of one defendant that implicates a codefendant, the trial court must adopt one of three procedures: (1) effectively delete direct and indirect identifications of codefendants in a joint trial; (2) sever the trials; or (3) exclude the statement if severance has been denied and effective deletion is not possible. (*People v. Song* (2004) 124

Cal.App.4th 973, 980-981.) In the absence of a holding by the United States Supreme Court, the *Aranda* court declared these rules were not constitutionally compelled, but judicially declared to implement the provisions for joint and separate trials of Penal Code section 1098. (*Id.* at p. 530.)

Three years after this Court's decision in *Aranda*, the United States Supreme Court decided *Bruton v. United States, supra*, 391 U.S. 123. In *Bruton*, the high court held that introduction of an incriminating extrajudicial statement by a codefendant violates the defendant's Sixth Amendment rights to confrontation and cross-examination, even if the jury is instructed to disregard the statement in determining the defendant's guilt or innocence. In *Richardson v. Marsh* (1987) 481 U.S. 200 [107 S.Ct. 1702, 95 L.Ed.2d 176], the Court held that application of the *Bruton* rule is limited to a co-defendant's facially incriminating confessions, not to confessions which only become incriminating when linked with evidence introduced later at trial. (See *Id.*, at pp. 206-208; *U.S. v. Sherlock* (9th Cir. 1989) 962 F.2d 1349, 1361.) With the passage of Proposition 8 in 1982, the judicially declared exclusionary rule set forth in *Aranda* was abrogated to the extent it was not compelled by the federal Constitution. (See *People v. Coffman* (2004) 34 Cal.4th 1, 44; *People v. Boyd* (1990) 222 Cal.App.3d 541, 562-563.)

In *People v. Anderson, supra,* 43 Cal.3d at pp. 1123-1125, this Court held that the admissibility of a nontestifying codefendant's incriminatory statements is not affected by the purpose for which they are introduced at trial. In so holding, this Court rejected the argument that the *Aranda-Bruton* rule applied only when the jury was faced with the task of taking the declarant codefendant's confession into account in determining the guilt of the declarant defendant but ignoring it as to the non-declarant defendant (the factual situation present in *Aranda* and *Bruton*). (*People v. Anderson, supra,* 43 Cal.3d at pp. 1123-1124.) This Court went on to reason that:

> The unreliability of a codefendant's incriminating statements is plainly not affected by the purpose for which they are introduced at trial. Nor is their impact: as we have observed, the accusation of the person who claims not only to have witnessed the defendant's act but also to have been his partner in crime--for whatever purpose it is received--is manifestly the kind of evidence that jurors cannot put out of their minds.

(*Id.*, at p. 1124.)

Accordingly, the fact that Michelle's statements to Dr. Kaser-Boyd were not admitted for their truth, but as a basis for the expert's opinion, is irrelevant to *Arnada-Bruton* analysis under this Court's decision in *Anderson*. As explained below, however, Michelle's statements did not implicate *Aranda-Bruton* because the statements did not incriminate appellant. If the statements are nevertheless found to be incriminatory, then respondent would urge this Court to reconsider its holding in *Anderson* in light of the more recent decision of this Court in *People v. Combs* (2004) 34 Cal.4th 821, and several federal court decisions, finding in various other contexts that a defendant's Sixth Amendment confrontation rights are not *implicated* when evidence is not admitted for its truth. (*Id.*, at p. 842 [in rejecting *Crawford* claim, this Court held the confrontation clause was not implicated when a co-participant's statements were admitted, not for their truth, but to supply meaning to defendant's words or conduct]; *Crawford v. Washington, supra*, 541 U.S. at pp. 59, fn. 9 ["The [Confrontation] Clause ... does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted."]; *Tennessee v. Street, supra,* 471 U.S. at p. 414 [no Confrontation Clause concerns are raised when evidence is received for a nonhearsay purpose]; *United States v. Shannon* (9th Cir. 1998) 137 F.3d 1112, 1118 (["[n]o Confrontation Clause issue is raised where the statements are not offered for the truth of the matter asserted"]); accord *United States v. Lujan* (9th Cir.1991) 936 F.2d 406, 410; *United States v. Kirk* (9th Cir. 1988) 844 F.2d 660, 663; See also, *People v. Castille* (2005) 129 Cal.App.4th 863, 878 [admission of co-

defendant's statements did violate *Aranda-Bruton* rule because they were not admitted for their truth, but to supply meaning to the defendant's responses adopting those statements].)

The scope of *Aranda-Bruton* need not be reached, however, since Michelle's statement that appellant had physically abused her earlier in their relationship and that he told her Arthur's "fits" were temper tantrums did not *incriminate* him in the crime charged. Nor did Michelle's statement that appellant discussed killing Arthur by shooting him. This statement did not incriminate appellant because Arthur was not shot and because appellant had already made this same admission in the joint interview. (3 CT 694-695, 698-699.) Accordingly, the admission of these statements did not violate the *Aranda-Bruton* rule.

C. Any Error In Admitting Michelle's Statements Was Harmless Beyond A Reasonable Doubt

In any event, even assuming it was error to admit Michelle's statements to Dr. Kaser-Boyd, the error was harmless beyond a reasonable doubt. (*People v. Song, supra,* 124 Cal.App.4th at p. 984 [*Aranda-Bruton* and *Crawford* error scrutinized under the harmless beyond a reasonable doubt standard of *Chapman v. California, supra,* 386 U.S. 18].) Michelle's statement that appellant had discussed killing Arthur by shooting him was merely cumulative of other evidence presented at trial. The jury had already heard appellant's express admission during the joint interview that he had discussed killing Arthur and that he had talked about shooting Arthur in the head. (3 CT 694-695, 698-699.)

Likewise, although appellant did not admit any specific violent acts towards Michelle in the joint interview, he had admitted that he used fear and intimidation towards Michelle to keep her quiet about his abuse of Arthur. (3 CT 794.) Then, when the detective asked "So, basically, you were abusive towards [Michelle] too," appellant responded, "I guess." (3 CT 794.)

Furthermore, whether appellant had abused Michelle in the past was irrelevant to the issue of appellant's guilt of the murder or the truth of the special circumstances. Specifically, it was irrelevant to the issues of whether he had murdered or tortured Arthur or whether he had intended to kill him. In addition, the jury had already heard about horrendous things appellant did to his five year old son, including burning his hand by holding it over the stove, punching him, violently shaking him, and hitting him in the head with a fireplace shovel. In comparison, the testimony about his alleged abuse of Michelle was relatively innocuous.

Finally, Michelle's statement that appellant told her Arthur's fits were "temper tantrums" supported appellant's defense that he was simply "disciplining" Arthur in the way he had learned from his parents, not trying to kill him. In fact, appellant's own expert, Dr. Lantz, referred to Arthur's "tantrums" when testifying in appellant's defense. Dr. Lantz testified that "Arthur, Jr. [has] tended to be a child who, if he didn't get his way, would tantrum . . . . He was always a bit of a difficult child to deal with." (11 RT 2815.) Dr. Lantz explained that Arthur's "way of getting his needs met before would be to cry, to tantrum, to do things of this nature, which in this particular environment that he was now in would most likely be about the worst possible way to deal with the circumstances." (11 RT 2816) When asked why, Dr. Lantz clarified:

> Because Martin and Michelle Jennings had absolutely no conception at all of what to do with a child with those types of needs, with that type of behavior. That's a child that needs to be picked up and loved and held and coddled and protected. But in their particular case what they did was they reverted to what they knew. If it worked with me, it will work with him. This is what parents do. You tighten up, you discipline, you -- you slap, you shout, you yell, you force the child to comply. But a child that age can't do that, in particular this child, under the circumstances that he had. So he continued to cry and tantrum. . . . And he was inconsolable.

(11 RT 2816-2817.)

Under these circumstances, and given the overwhelming evidence of appellant's guilt previously discussed in Arguments I, III, and VI, any error in admitting Michelle's statements to Dr. Kaser-Boyd was harmless beyond a reasonable doubt. (See *People v. Anderson, supra*, 43 Cal.3d at pp. 1128-1129 [*Aranda-Bruton* error will be deemed harmless if the properly admitted evidence is overwhelming, and incriminating extrajudicial statement is merely cumulative of the other evidence]; see also, *Harrington v. California* (1969) 395 U.S. 250, 254 [89 S.Ct. 1726, 23 L.Ed.2d 284].)

VIII.

THE ADMISSION OF THE VIDEOTAPED JOINT INTERVIEW DID NOT VIOLATE APPELLANT'S CONFRONTATION RIGHTS UNDER *CRAWFORD* OR *ARANDA-BRUTON*

Appellant contends in his eleventh argument that the admission of numerous statements Michelle made during their joint police interview violated his right to confrontation under the *Aranda-Bruton* line of cases and under *Crawford*. (AOB 112-128.) Because Michelle's statements were either expressly or adoptively admitted by appellant, or did not directly implicate appellant in the crime charged, their admission did not violate his confrontation rights under *Aranda-Bruton* or *Crawford*. Furthermore, any error in admitting Michelle's statements was harmless beyond a reasonable doubt.

Prior to trial, appellant filed a written motion for severance, which was opposed by the prosecution. The bases for the motions were incompatible defenses and alleged *Aranda-Bruton* problems. (1 CT 259-275, 295-298.) The prosecution opposed the motion. (1 CT 277-294.) When the motion was discussed at a June 13, 1997 status conference, the prosecutor told the court that his intent at that point was to introduce only the joint "*Aranda* interview." (1 RT 85-87.)

At a hearing held on February 6, 1998, appellant argued that the joint interview contained no adoptive admissions because appellant's "admissions" were inherently untrustworthy and that a joint trial would violate appellant's Confrontation rights under *Aranda-Bruton*. (1 RT 108-117.) The prosecutor responded that the joint interview consisted of a combination of adoptive admissions, declarations against interest and confessions, all of which were admissible. (1 RT 119-121.) The court noted, and appellant apparently conceded, that the joint interview would be admitted in any separate trial. (1 RT 112.)

At a hearing held on March 20, 1998, the trial court denied appellant's severance motion. (1 RT 147, 152; 2 CT 303.) In so doing, the court concluded that the joint interview contained both admissions and adoptive admissions, both of which were trustworthy. (1 RT 136-141, 147.)

Appellant renewed his objections at the time of trial. (11 RT 2705-2707.) The court overruled the objections, incorporating its earlier ruling. (11 RT 2708.) The prosecutor then played the entire joint interview for the jury. (11 RT 2727-2728, 2730-2733.)

A. The Admission Of Numerous Statements Made By Michelle During The Joint Interview Which Were Adopted By Appellant, Either Expressly Or By His Silence, Did Not Violate His Sixth Amendment Confrontation Rights Under Either *Crawford* or *Aranda-Bruton*

The majority of statements Michelle made during the joint interview were admissible because they were adopted by appellant. Evidence Code section 1221 provides:

> a statement offered against a party is not made inadmissible by the hearsay rule if the statement is one of which the party, with knowledge of the content thereof, has by words or other conduct manifested his adoption or his belief in its truth.

For the "adoptive admission" exception to the hearsay rule to apply, a direct

accusation in so many words is not essential. When a person makes a statement in the presence of the defendant under circumstances that would normally call for a response if the statement were untrue, the statement is admissible for the limited purpose of showing the party's reaction to it, and his silence, evasion, or equivocation may be considered as a tacit admission of the statements made in his presence. (*People v. Roldan* (2005) 35 Cal.4th 646, 710, citing *People v. Fauber* (1992) 2 Cal.4th 792, 852 and *People v. Riel* (2000) 22 Cal.4th 1153, 1189.)

This Court recently held that statements made by a co-defendant during a joint interview which are either expressly admitted by the defendant, or adoptively admitted by the defendant's silence, do not implicate the Sixth Amendment and thus do not constitute *Crawford* error. (*People v. Combs, supra,* 34 Cal.4th at pp. 841-843; see also, *People v. Roldan, supra,* 35 Cal.4th at p. 710, fn. 25.) As this Court explained, "by reason of the adoptive admissions rule, once the defendant has expressly or impliedly adopted the statements of another, the statements become his own admissions .... Being deemed the defendant's own admissions, we are no longer concerned with the veracity or credibility of the original declarant." (*Ibid.*, quoting *People v. Silva* (1988) 45 Cal.3d 604, 624.)

Likewise, *Aranda-Bruton* does not prohibit the admission of statements which have been expressly adopted by the defendant. (*People v. Castille* (2005) 129 Cal.App.4th 863, 877-878; *People v. Preston* (1973) 9 Cal.3d 308, 315 [*Aranda-Bruton* does not prohibit the admission of evidence under the adoptive admission exception to the hearsay rule].) However, in *People v. Jennings* (2003) 112 Cal.App.4th 459, 472-474, the Court of Appeal held in co-defendant Michelle's case that silence during a post-*Miranda*[12/] custodial

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

interrogation is generally interpreted to be an assertion of the right to remain silent and, thus, cannot be deemed an adoptive admission. Respondent submits that *Jennings* was wrongly decided in light of this Court's subsequent conclusion in *Combs* that a defendant can adoptively admit by their silence a co-defendant's statement made during a joint police interview. The admission of such an adoptive admission does not implicate the Sixth Amendment. (*People v. Combs, supra,* 34 Cal.4th at p. 841-843).

Here, appellant eventually expressly admitted the truth of the majority of Michelle's inculpatory statements made during the joint interview. Michelle's statements which were expressly admitted by appellant include the following: that he threatened her (3 CT 701-702, 717-718, 725, 747, 793-794); that he told her to give Arthur the medication (3 CT 702-703, 705); that he gave Arthur the prescription medications (3 CT 703-705, 748, 763); that he knocked Arthur down (3 CT 708-709); that he dragged Arthur (3 CT 705-706, 709); that he hit Arthur (3 CT 709, 762); that he pushed Arthur (3 CT 709, 773); that he punched Arthur (3 CT 707, 709, 762, 772-773); that he kicked Arthur (3 CT 708-709, 763); that he made Arthur hold a 2x4 and hit him when he dropped the board (3 CT 708-709); that he burned Arthur's hand by holding it over the stove (3 CT 708-709, 738-739, 776); that he violently shook Arthur, making his head hit the wall and that when Michelle tried to stop him, he pushed her away (3 CT 710-711, 715, 762, 772); that he put duct tape over Arthur's mouth and possibly his hands and that Michelle took the tape off (3 CT 711-714); that he put a sock in Arthur's mouth during one of his "fits" (3 CT 714); that he, not Michelle, caused the wound to Arthur's head (3 CT 695, 698, 720-723, 774, 788-801); that he did not put Arthur on their medical insurance policy because he was not going to be around long enough (3 CT 739-742); that Michelle was not home when Arthur received the head wound or when he died (3 CT 694, 730, 761, 773-774); that she didn't know that when they were driving around

the desert two days before Arthur died that they were looking for a place to dump the body (3 CT 699); that when they had discussed killing or getting rid of Arthur, Michelle said they should send him back to his aunt (3 CT 694-695, 698-699, 701, 725); and, that appellant talked about shooting Arthur (3 CT 701). (AOB 112-117.)[13/] Because each of these statements were expressly adopted by appellant's own admissions, their admission did not violate appellant's Sixth Amendment confrontation rights under either *Crawford* or *Aranda-Bruton*.

In addition, Michelle's statement that appellant had her go to the store to buy sleeping pills for Arthur (3 CT 705), should be deemed to have been adoptively admitted by appellant's silence. Appellant waived his right to remain silent at the beginning of the interview and never indicated an intention to invoke that right at any point during the interview. (3 CT 692; See e.g., *People v. Hurd* (1998) 62 Cal.App.4th 1084, 1093-1094 ["A defendant has no right to remain silent selectively. Once a defendant elects to speak after receiving a *Miranda* warning, his or her refusal to answer questions may be used for impeachment purposes absent any indication that such refusal is an invocation of *Miranda* rights."] To the contrary, until the very end of the interview, appellant continuously made new admissions. In addition, at numerous times throughout the interview, appellant clearly indicated when he did not agree with a statement made by Michelle. Under these circumstances, appellant's silence when Michelle made this statement should be deemed an adoptive admission and not an invocation of his right to remain silent.

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13. Appellant lists four pages of statement's Michelle made during the joint interview which he contends violated his confrontation rights. (AOB 112-116.) Because appellant both directly quotes and paraphrases Michelle's statements, takes them out of context, and does not cite to any specific page numbers, respondent has identified the main point of each of Michelle's statements and cited to the relevant page numbers where Michelle makes such a statement or appellant makes a relevant admission.

Accordingly, this Court should find that the admission of this statement did not violate appellant's confrontation rights under *Crawford* or *Aranda-Bruton*.

B. The Admission Of Statements Made By Michelle During The Joint Interview Which Did Not Incriminate Appellant In Arthur's Murder Did Not Violate His Sixth Amendment Confrontation Rights Under Either *Crawford* or *Aranda-Bruton*

The *Aranda-Bruton* rule rests on the belief that even a limiting instruction cannot prevent the jury from considering a co-defendant's *incriminating* statement against a non-declarant defendant. (*Richardson v. Marsh, supra,* 481 U.S. at pp. 206-207.) Moreover, application of the *Bruton* rule is limited to *facially incriminating* confessions. (See *Id.*, at p. 208; *U. S. v. Sherlock* (9th Cir. 1989) 962 F.2d 1349, 1361, cert. den.) Thus, all of a co-defendant's extrajudicial statements or confessions need not be excluded in a joint trial under *Bruton*, but only those statements that are 'powerfully incriminating' or 'clearly inculpate' the defendant. (*U.S. v. Yarbrough* (9th Cir. 1988) 852 F.2d 1522, 1537, cert den., 488 U.S. 866, [102 L.Ed.2d 140].)

Crawford also does not apply when the testimonial evidence is not a statement *against* the defendant in the first instance because a defendant's confrontation rights are not implicated when the statement does not incriminate the defendant. (cf. *People v. Fletcher* (1996) 13 Cal.4th 451, 455 [a confrontation problem arises when the out-of-court confession or admission of one defendant incriminates not only that defendant but another defendant who has been jointly charged].) A number of Michelle's statements made during the joint interview did not implicate appellant's Sixth Amendment confrontation rights because they did not directly incriminate him. Michelle's statements which were not facially incriminatory as to appellant include the following statements: 1) that she did not kill Arthur (3 CT 692, 700, 761, 763-764); 2) that she did not want to kill Arthur (3 CT 694); 3) that she did not know what happened to Arthur's head, that she was not home when his head was injured,

and that she did not hit Arthur in the head with the shovel or know that had occurred (3 CT 695-696, 698, 720-722, 730, 788-801); 4) that she did not physically abuse Arthur (3 CT 693-694, 706-708); and, 5) that she had to give Arthur CPR because he was having trouble breathing (3 CT 774). (AOB 112-117.)

Furthermore, the admission of Michelle's first four statements cited above did not violate appellant's rights under either *Aranda-Bruton* or *Crawford* because to the extent they were inculpatory by inference, they were expressly adopted by appellant. First, Michelle claimed that she did not kill Arthur (3 CT 692, 700, 761, 763-764), while appellant admitted that Michelle did not kill Arthur and he had probably killed Arthur with all the things he did, including the abuse and the medication (3 CT 700, 762-763). Second, while Michelle contended that she did not want to kill Arthur (3 CT 694), appellant confirmed that when he discussed killing Arthur with Michelle, she said they should not kill him, but should send him back to his aunt (3 CT 694-695, 698-699, 701, 725). Third, Michelle stated that she did not know what happened to Arthur's head and that she did not hit Arthur in the head with the shovel (3 CT 695-696, 698, 720-722, 730, 788-801), while appellant confessed that he hit Arthur in the head with the shovel while Michelle was gone (3 CT 788-801). Fourth, Michelle claimed that she did not physically abuse Arthur (3 CT 693-694, 706-708), while appellant eventually admitted that he caused all the bruises on Arthur and that Michelle did not "beat him" (3 CT 793-794). Finally, appellant did not dispute that Michelle had given Arthur CPR earlier in the day because he was having trouble breathing. (3 CT 774) Thus, he adoptively admitted this statement by his silence. Accordingly, appellant's claim with respect to these statements must be rejected.

C. Any Error In Admitting Michelle's Statements In The Joint Interview Into Evidence Was Harmless Beyond A Reasonable Doubt

Even assuming arguendo there was error, appellant was not prejudiced. Any error in admitting Michelle's statements into evidence was harmless beyond a reasonable doubt. First, the majority of Michelle's statements did not incriminate appellant any more than his own admissions did. Thus, these statements could not have harmed appellant's case. Second, although appellant did not expressly admit that he told Michelle to go to the store to buy Arthur sleeping pills, he admitted that he gave Arthur pills and had Michelle give Arthur medication at his direction, supposedly because he believed it would help Arthur. (3 CT 703-705, 763.) From this evidence, the jury could have reasonably inferred that it was appellant's idea to buy the sleeping pills.

Finally, the other evidence of appellant's guilt was overwhelming. As set forth in more detail in Arguments I and VI(B), several friends and acquaintances gave testimony which established that appellant tortured Arthur by systematically starving him and physically abusing him. (10 RT 2463-2464, 2472-2475, 2517-2521, 11 RT 2662-2664.) As discussed in Argument III, the evidence also established that appellant intended to kill Arthur with this torture. During the joint interview, appellant himself admitted that he probably killed Arthur with the abuse and the medication. (3 CT 762-763.) And, at trial, Dr. Sheridan testified that the causes of death were combined drug toxicity and acute and chronic abuse and neglect. (10 RT 2603-2604, 2614-2615.)

Moreover, appellant actually benefitted from the jury seeing the entire interview. If the jury had only heard testimony about appellant's admissions, it would have been much more damaging to his case because the jury would not have been able to see Michelle's behavior and her efforts to have appellant minimize her role in Arthur's abuse, death, and the cover-up of his death.

Given all of the above considerations, any error in admitting Michelle's

statements in the joint interview into evidence was harmless beyond a reasonable doubt.

IX.

THE TRIAL COURT WAS NOT REQUIRED TO INSTRUCT THE JURY WITH A MODIFIED VERSION OF CALJIC NO. 6.40 THAT ANY "AIDING AND ABETTING" AFTER MICHELLE ADMINISTERED THE SLEEPING PILLS WOULD NOT SUPPORT LIABILITY AS A PRINCIPAL IN THE MURDER

In argument seven, appellant contends the trial court erred by failing to instruct the jury with a modified version of CALJIC No. 6.40, on the *defense* of being an accessory after the fact. He argues the trial court was required to give such an instruction because there was evidence from which the jury could have found that he only aided Michelle after she killed Arthur by giving him the sleeping pills. (AOB 88-92.) The court was not required to give this instruction sua sponte because being an accessory after the fact is a criminal *offense*, not a *defense*, and because there was not substantial evidence which could have supported such a finding by the jury.

The trial court instructed the jury in this case with the standard instructions on aiding and abetting, CALJIC Nos. 3.00 and 3.01. CALJIC No. 3.00 provides:

> Persons who are involved in committing a crime are referred to as principals in that crime. Each principal, regardless of the extent or manner of participation is equally guilty. Principals include:
>
> 1. Those who directly and actively commit the act constituting the crime, or
>
> 2. Those who aid and abet the commission of the crime.

(2 CT 511.) CALJIC No. 3.01 provides:

> A person aids and abets the commission of a crime when he or she:

(1) With knowledge of the unlawful purpose of the perpetrator, and

(2) With the intent or purpose of committing or encouraging or facilitating the commission of the crime, and

(3) By act or advice aids, promotes, encourages or instigates the commission of the crime.

A person who aids and abets the commission of a crime need not be present at the scene of the crime.

Mere presence at the scene of a crime which does not itself assist the commission of the crime does not amount to aiding and abetting.

Mere knowledge that a crime is being committed and the failure to prevent it does not amount to aiding and abetting.

(2 CT 512.)

The court also instructed the jury with CALJIC No. 3.04 that "A person who by threat, menace, command or coercion, compels another to commit any crime is guilty of that crime." (2 CT 513.)

Appellant now contends for the first time that the court was also required to instruct the jury, with a modified version of CALJIC No. 6.40, that a person who aids and abets after a felony has been committed is not a principal, but is instead an accessory, and is not liable for conviction of the crime committed by the co-defendant.[14/] (AOB 88.) He argues that the instruction was required, not

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14. CALJIC No. 6.40 provides:

Defendant is accused [in Count[s] _____] of having committed the crime of being an accessory to a felony in violation of section 32 of the Penal Code.

Every person who, after a felony has been committed, harbors, conceals or aids a principal in that felony, with the specific intent that the principal may avoid or escape from arrest, trial, conviction or punishment, having knowledge that the

as an instruction on a lesser related offense,[15] but because being an accessory after the fact was a *defense* to the theory that he aided and abetted Michelle in committing Arthur's murder. (AOB 90.) Appellant's argument misses the mark. Being an accessory after the fact is not a *defense* to murder; rather, it is a theory of criminal liability based on a different *offense*. The crime of being an accessory after the fact is the standalone offense of "harbor[ing], conceal[ing], or aid[ing]" a principal after a completed felony, not a defense to the felony. (Pen. Code, § 32.[16]) And, in fact, a defendant can be convicted of both murder and accessory to murder, if the defendant aids the principal both before and after its commission. (*People v. Riley* (1993) 20 Cal.App.4th 1808,

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> principal has committed that felony or has been charged with that felony or convicted thereof, is guilty of the crime of accessory to a felony in violation of Penal Code, section 32.
>
> In order to prove this crime, each of the following elements must be proved: ¶1. A felony, namely, _____ was committed; ¶2. Defendant harbored, concealed or aided a principal in that felony with the specific intent that the principal avoid or escape [arrest] [trial] [conviction or punishment]; and ¶3. Defendant did so with knowledge that the principal [committed the felony] [was charged with having committed the felony] [was convicted of having committed the felony].

15. As appellant recognizes, the trial court could not have instructed the jury on the lesser-related offense of being an accessory after the fact without the agreement of both parties, even if it had been supported by the evidence. (*People v. Birks* (1998) 19 Cal.4th 108, 116, 136.)

16. Penal Code section 32 states:

> Every person who, after a felony has been committed, harbors, conceals or aids a principal in such felony, with the intent that said principal may avoid or escape from arrest, trial, conviction or punishment, having knowledge that said principal has committed such felony or has been charged with such felony or convicted thereof, is an accessory to such felony.

1815.)

Furthermore, appellant was not prevented from presenting such a defense to the jury. Appellant's argument that he did not aid Michelle until after the murder is simply the defense that he did not aid and abet the murder. Appellant was free to make this argument at trial and the jury could have made such a finding based on the instructions given, if it had been supported by the evidence. (See *People v. Birks, supra*, 19 Cal.4th at p. 136, fn. 19 ["nothing in our holding prevents the defendant from arguing in any case that the evidence does not support conviction of any charge properly before the jury, and that complete acquittal is therefore appropriate"]; see also *People v. Schmeck* (2005) 37 Cal.4th 240, 292 [failing to instruct on accessory after the fact does not "deprive [the defendant] of an adequate opportunity to present his defense"].) Thus, the "failure" to give an accessory instruction did not impinge on defendant's right to present a defense to murder, it simply reflected the fact the prosecutor chose not to file accessory charges.

In any event, even assuming being an accessory after the fact could be a defense to the crime of aiding and abetting a murder, the trial court was not required to give such an instruction sua sponte in the instant case. A trial court's duty to instruct sua sponte on particular defenses is limited, arising only if it appears that the defendant is relying on such a defense or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case. (*People v. Barton* (1995) 12 Cal. 4th 186, 195.)

Here, appellant did not rely on a defense that Michelle murdered Arthur and he only aided her in hiding the crime after it had been committed. Although such a theory was not entirely inconsistent with appellant's defense that he did not intend to kill Arthur when he abused him and gave him the pills, it was certainly not supported by substantial evidence. Appellant argues this

instruction was required because he "played no part in these events [giving Arthur the sleeping pills] that directly led to Arthur's death" but did aid and abet in efforts to conceal the crime and the body after Arthur died. (AOB 89.) Appellant mischaracterizes the evidence presented at trial.

The evidence overwhelmingly showed that appellant's own acts of torturing Arthur, particularly starving him, and giving him both Vicodin and Valium were significant, direct causes of Arthur's death. (See Argument I(B) and VI(B).) The evidence also established that appellant aided Michelle in giving Arthur the sleeping pills. (See Argument I(A).) During the joint interview, both appellant and Michelle agreed that it was appellant's idea to medicate Arthur (supposedly because he thought it would "help" Arthur) and Michelle stated, without contradiction by appellant, that she went to the store and bought the sleeping pills to give to Arthur because appellant told her to do so. (3 CT 702-705.) Thus, the evidence did not support a finding that appellant *only* aided Michelle *after she killed* Arthur. Accordingly, the trial court was not required to instruct the jury sua sponte that appellant was not guilty of murder if they found he only aided and abetted Michelle after Arthur's death.

Moreover, any error in failing to give such an instruction was harmless under any standard. (*Chapman v. California, supra,* 386 U.S. at p. 18; *People v. Watson, supra,* 46 Cal.2d at p. 836; *People v. Rodriguez* (1999) 69 Cal.App.4th 341, 352.) Given the evidence previously discussed, the instructions that were given to the jury, and the jury's true finding on the torture-murder special circumstance as to appellant, the jury could not possibly have based its guilty verdict on a finding that appellant only aided Michelle in covering-up the murder after it was committed. Thus, any error in failing to instruct the jury with a modified version of CALJIC No. 6.40 was harmless.

X.

THE TRIAL COURT WAS NOT REQUIRED TO INSTRUCT THE JURY SUA SPONTE WITH CALJIC NO. 3.40 ON "BUT-FOR" CAUSATION

Appellant contends in Argument IX that the trial court prejudicially erred by failing to instruct the jury sua sponte with CALJIC No. 3.40 [Cause--"But For" Test]. (AOB 100-102.) Sua sponte instruction with CALJIC No. 3.40 was not warranted by the evidence in this case and even assuming error, it was harmless.

A trial court must instruct the jury on all material issues supported by the evidence. (*People v. Flood* (1998) 18 Cal.4th 470, 502-503.) As to pertinent matters falling outside the definition of a "general principle of law governing the case," it is the "defendant's obligation to request any clarifying or amplifying instruction." (*People v. Kimble* (1988) 44 Cal.3d 480, 503.)

A. The Trial Court Was Not Required To Instruct The Jury Sua Sponte With CALJIC No. 3.40 On "But-For" Causation

Appellant now contends for the first time that in addition to instructing the jury with CALJIC No. 3.41 on concurrent causes of death, the court should also have instructed the jury pursuant to CALJIC No. 3.40 on "but-for" causation. CALJIC No. 3.40 provides in pertinent part:

> The criminal law has its own particular way of defining cause. A cause of the [death] is an act or omission that sets in motion a chain of events that produces as a direct, natural and probable consequence of the act or omission the [death] and without which the [death] would not occur.

The trial court is required to instruct the jury on "but for" causation with CALJIC No. 3.40 where only one cause of death is alleged and where the evidence shows that an independent supervening act may have brought about the death separate from the defendant's act. (*People v. Pock* (1993) 19 Cal.App.4th 1263, 1276.) It is not required where there are concurrent causes

of death. (*See People v. Sanchez* (2001) 26 Cal.4th 834, 846-847; *People v. Pock, supra,* 19 Cal.App.4th at p. 1276.) In such a case, the "substantial factor" test of causation is a more accurate standard. (See *Viner v. Sweet* (2003) 30 Cal.4th 1232, 1239-1240 ["substantial factor" test *subsumes* "but for" test; the "but for" and "substantial factor" tests usually produce the same result, but the "substantial factor" standard states a clearer rule of causation that reaches beyond the "but for" test to more accurately cover unusual situations such as where there are concurrent or "multiple sufficient" causes of an event]; see also, [*Lineaweaver v. Plant Insulation Co.* (1995) 31 Cal.App.4th 1409, 1415 "The substantial factor standard generally produces the same results in cases as does the 'but for' rule of causation which states that a defendant's conduct is a cause of the injury if the injury would not have occurred but for that conduct. The substantial factor standard has gained favor as a clearer rule of causation and one which subsumes the 'but for' test while reaching beyond it to address other situations, such as independent or concurrent causes."]; *People v. Brady* (2005) 129 Cal.App.4th 1314, 1324 [California criminal law relies on civil law principles of causation].)

Instruction with CALJIC No. 3.40 was not required in this case because the evidence did not raise a causation issue of the type that CALJIC No. 3.40 addresses. The prosecution's torture-murder theory was that the torture appellant inflicted on Arthur-consisting of severe and chronic abuse and neglect (starvation)-was an intentional, direct, substantial contributing cause of death, not that the torture appellant inflicted set in motion a chain of events which led to the giving of the fatal overdose of pills. The issue disputed by the defense was whether appellant had the specific intent to kill Arthur. (See 12 RT 3072-3073, 3075-3086, 3092-3093, 3096, 3099-3106.) To the extent that causation was an issue in the case, the question was whether appellant's torture of Arthur was a concurrent cause of his death, in other words, whether the torture was a

substantial factor contributing to Arthur's death. (*See People v. Pock, supra*, 19 Cal.App.4th at p. 1276.) The issue was not whether giving Arthur a fatal combination of pills was a foreseeable, natural and probable consequence of the torture.

The instructions on causation given in this case - CALJIC Nos. 3.41 [More Than One Cause/Concurrent Cause], 8.55 [Homicide--Cause--Defined], and 8.58 [Homicide--Unlawful Injury Accelerating Death] [17]-were responsive

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17. The jury was instructed with CALJIC No. 8.55 which provides:

> To constitute [murder] [or] [manslaughter] there must be, in addition to the death of a human being, an unlawful act which was a cause of that death.

(2 CT 549.) The jury was instructed with CALJIC No. 3.41 as follows:

> There may be more than one cause of the death. When the conduct of two or more persons contributes concurrently as a cause of the death, the conduct of each is a cause of the death if that conduct was also a substantial factor contributing to the result. A cause is concurrent if it was operative at the moment of the death and acted with another cause to produce the death. [¶] If you find that the defendant's conduct was a cause of death to another person, then it is no defense that the conduct of some other person contributed to the death.

(2 CT 550; 12 RT 3172.) And, the jury was instructed with CALJIC No. 8.58 that:

> If a person unlawfully inflicts a physical injury upon another person and that injury is a cause of the latter's death, that conduct constitutes an unlawful homicide even though the injury inflicted was not the only cause of the death. Moreover, that conduct constitutes unlawful homicide, even if: ¶ 1. The person injured had been already weakened by disease, injury, physical condition or other cause; or ¶ 2. It is probable that a person in sound physical condition injured in the same way would not have died from the injury; or ¶ 3. It is probable that the injury only hastened the death of the injured person; or ¶4. The injured person would have died soon thereafter from another cause or

to the evidence, correctly stated the law, and were fully adequate to inform the jury of the issues. There was no error in omitting CALJIC No. 3.40. (See *People v. Pock, supra,* 19 Cal.App.4th at p. 1276 [CALJIC No. 3.40 inapplicable, and hence it was not required in addition to CALJIC No. 3.41].)

B. Any Error In Failing To Instruct The Jury With CALJIC No. 3.40 Was Harmless

Moreover, "any error was harmless under any standard because here it is clear beyond a reasonable doubt that a rational jury would have found defendant guilty absent any error." (*People v. Crew* (2003) 31 Cal.4th 822, 847.) Dr. Sheridan testified without contradiction that Arthur's death was caused by the combination of pills given to Arthur by appellant and Michelle, with their abuse and neglect of Arthur being *significant contributing causes* of death. Appellant's defense did not involve causation, but his state of mind. (See *People v. Chatman* (2006) 38 Cal.4th 344, 393; also, contrast with *People v. Bernhardt* (1963) 222 Cal.App.2d 567, 590, 35 Cal.Rptr. 401, cited in the Use Note to CALJIC No. 3.40 [conflicting evidence whether victim's death was caused by post partum hemorrhage due to multiple lacerations in surgery or by an embolism for which surgeon was not responsible].) In fact, defense counsel conceded in closing argument that "they did horrible child abuse that you heard Dr. Lantz say *directly led to the child's death.* And they're guilty of that, and they should be convicted of that." (12 RT 3079.)

Appellant argues the alleged error in failing to instruct the jury with the language contained in CALJIC No. 3.40 was prejudicial because "Arthur's death as a result of an accidental overdose of sleeping pills was not in any way a direct or natural or foreseeable consequence of the 'torture.'" (AOB 96-97,

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other causes.

(CT 551; 12 RT 3173-3174.)

101-102.) Appellant's argument ignores the fact that the question was not whether Arthur's *death by an overdose of pills* was a direct, natural, and foreseeable consequence of the torture. To the contrary, the question was whether Arthur's *death* as a result of the torture was a direct or natural or foreseeable consequence of appellant's actions. Appellant's actions of smothering Arthur, hitting him in the back of the head with a fireplace shovel so hard that he went flying through the air, violently shaking him so hard that his head flopped around and banged against the wall, and starving him to such a degree that he lost nearly half of his body weight in two months unquestionably established that Arthur's death was intentional, foreseeable and a direct, natural and probable consequence of the torture.

Furthermore, even assuming appellant's interpretation of the law is correct, his argument would still fail. The evidence established that appellant, and Michelle at appellant's direction, gave Arthur prescription drugs which were prescribed to appellant (a 6'4", 210 pound man) and two times the adult dose of sleeping pills which clearly stated they were for adults only. They gave this combination of pills to a five year old boy who they had starved down to only 35 pounds, who had no food in his stomach, and whose body was in an obviously injured and weakened state as a result of appellant's physical abuse. Under these circumstances, Arthur's death by an overdose of pills *was* a foreseeable, direct, natural and probable consequence of the torture. Accordingly, any error in failing to instruct the jury sua sponte with CALJIC No. 3.40 was harmless.

XI.

THE TRIAL COURT PROPERLY AND FULLY INSTRUCTED THE JURY WITH CALJIC NO. 3.41 ON CONCURRENT CAUSES OF DEATH

Appellant contends in Argument VIII that it was error to instruct the jury

with CALJIC No. 3.41 because it was an incorrect statement of the law of causation. Appellant also contends the trial court erred by not sua sponte defining the terms "operative" and "substantial factor" (AOB 93-99). To the contrary, CALJIC No. 3.41 is a correct statement of the law and the trial court was not required to sua sponte provide amplifying instructions not warranted by the evidence or to define terms used in the instruction that do not have any technical legal meaning. Moreover, even assuming error, it was harmless.

A trial court must instruct the jury on all material issues supported by the evidence. (*People v. Flood, supra,* 18 Cal.4th at pp. 502-503.) As to pertinent matters falling outside the definition of a "general principle of law governing the case," the trial court has no duty to amplify or clarify standard CALJIC instructions unless requested by the defense. (*People v. Kimble* (1988) 44 Cal.3d 480, 503; *People v. Goodall* (1982) 131 Cal.App.3d 129, 143.) A trial court also has no sua sponte duty to "define terms that are commonly understood by those familiar with the English language, but it does have a duty to define terms that have a technical meaning peculiar to the law." (*People v. Bland* (2002) 28 Cal.4th 313, 334; *People v. Estrada* (1995) 11 Cal.4th 568, 574; *People v. Mayfield, supra,* 14 Cal.4th at p. 773.) In other words, the trial court is required to define terms for the jury "when their statutory definition differs from the meaning that might be ascribed to the same terms in common parlance." (*People v. Estrada, supra,* 11 Cal.4th at pp. 574-575, citing *People v. Richie* (1994) 28 Cal.App.4th 1347, 1360.)

The trial court instructed the jury, over defense objection,[18] pursuant to

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18. Although defense counsel objected to the instruction, he did not do so on the same grounds raised herein. (12 RT 2989-2990.) The defense proposed the jury be instructed on causation with the following instruction in place of CALJIC No. 8.55:

> To convict the defendant of [manslaughter] [murder] you must find beyond a reasonable doubt that:

CALJIC No. 3.41 as follows:

> There may be more than one cause of the death. When the conduct of two or more persons contributes concurrently as a cause of the death, the conduct of each is a cause of the death if that conduct was also a substantial factor contributing to the result. A cause is concurrent if it was operative at the moment of the death and acted with another cause to produce the death. [¶] If you find that the defendant's conduct was a cause of death to another person, then it is no defense that the conduct of some other person contributed to the death.

(2 CT 550; 12 RT 3172.)

Appellant contends that CALJIC No. 3.41 incorrectly instructed the jury on the issue of cause of death. (AOB 93.) However, a closer look at appellant's argument reveals that he is not arguing that CALJIC No. 3.41 is an *incorrect* statement of the law, but rather an *incomplete* statement of the law of causation. Specifically, he argues the court should also have instructed the jury on the definition of the terms "operative" and "substantial factor" and with language such as that found in CALJIC No. 3.40 on "but-for" causation. (AOB 93-99.) Appellant is mistaken. The trial court fully and properly instructed the jury on the issues of causation relevant to the evidence presented in this case with the standard version of CALJIC No. 3.41.

Appellant does not cite any authority for the proposition that the terms "operative" and "substantial factor" used in CALJIC No. 3.41 have a technical

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> 1. The defendant committed the act or acts required by the instructions which define the charged offense, and
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> 2. When the defendant committed the required act or acts [he][she] had the specific intent and/or mental state as required by the instructions which define the charged offense, and
>
> 3. *The act or acts or acts committed by the defendant were a cause of the [alleged] victim's death.*

(13 CT 586, emphasis added.)

legal meaning which needs to be defined for the jury or explain what definition he believes should have been given. (AOB 97-98.) The reason is clear: these terms have no special meaning "beyond the plain meaning of the terms themselves." (*People v. Albritton* (1998) 67 Cal.App.4th 647, 657; *People v. Cochran* (1998) 62 Cal.App.4th 826, 832.)

Operative is defined in the dictionary as "being in force, in effect, or in operation." (*The American Heritage Dictionary*, Second Edition, p. 871.) Substantial means "considerable in importance" and factor means "one that actively contributes to a . . . result ." (*The American Heritage Dictionary*, Second Edition, pp. 485, 1213.) Given the plain meaning of these words and the way they were used in CALJIC No. 3.41, the jury had to find that the effects of the torture were operating at the time of Arthur's death and were of considerable importance in actively contributing to Arthur's death. This was what the law required. (See Arguments I and X.)

Of course, the jury also had to find that appellant had the requisite intent. Thus, contrary to appellant's contention, the jury could not possibly have concluded that he was guilty of torture-murder based solely on the fact that injuries from the torture were still present on Arthur's body at the time of his death. (AOB 94-95, 96, 98-99.) Accordingly, the trial court was not required to sua sponte define the terms "operative" or "substantial factor" as used in CALJIC No. 3.41. (See *People v. Bland,* 28 Cal.4th 313, 337-338 [approving the use of CALJIC No. 3.41 without any indication that the court should have defined the terms "operative" or "substantial factor"]; *People v. Sanchez, supra,* 26 Cal.4th 834 [same].)

Moreover, CALJIC No. 3.41 was not an incomplete instruction on the law of causation relevant to the evidence presented in the instant case. For the reasons that were previously discussed in Argument X, the trial court was not required to instruct the jury with the language contained in CALJIC No. 3.40.

Because CALJIC No. 3.41 is a correct statement of the law, and must be given when there are concurrent causes of death, as there was in this case, the trial court properly instructed the jury with the standard version of this instruction. (See *People v. Pock, supra,* 19 Cal.App.4th at p. 1276.)

Finally, even assuming the trial court erred, the error was harmless under either the *Chapman* or the *Watson* standards. (*Chapman v. California, supra,* 386 U.S. 18; *People v. Watson, supra,* 46 Cal.2d at p. 836.) Here, the evidence overwhelmingly established that appellant tortured Arthur by starving him and physically abusing him, that as a result Arthur's body was in an emaciated and weakened state at the time he died, and that this torture of Arthur was a significant contributing cause of Arthur's death. (See Arguments I (B), and VI(B).) The evidence further established that appellant intended to kill Arthur. (See Argument IV.) Finally, there was uncontradicted evidence that Arthur's death was a direct, natural, forseeable consequence of the torture. (See Argument X.) Under these circumstance, any error in failing to define the terms "operative" and "substantial factor" for the jury was harmless. For the reasons discussed in this argument and in Argument X, any error in failing to instruct the jury with the language of CALJIC No. 3.40 in addition to CALJIC No. 3.41 was also harmless.

XII.

THE TRIAL COURT WAS NOT REQUIRED TO INSTRUCT THE JURY SUA SPONTE WITH CALJIC NO. 4.45 THAT A SEEMINGLY CRIMINAL ACT COMMITTED BY ACCIDENT OR MISFORTUNE IS NOT A CRIME

Appellant contends in his tenth argument that the trial court erred by failing to instruct sua sponte with CALJIC No. 4.45 on the "accident defense."

(AOB 103-108.) The trial court was not required to give this instruction because it was not warranted by the evidence and, in any event, any error was harmless.

As previously discussed, the trial court only has a duty to instruct, sua sponte, "on general principles of law that are commonly or closely and openly connected to the facts before the court and that are necessary for the jury's understanding of the case." (*People v. Montoya* (1994) 7 Cal.4th 1027, 1047; see also, *People v. Flood, supra,* 18 Cal.4th at pp. 502-503; *People v. Barton, supra,* 12 Cal.4th at pp. 194-198.) A court need not instruct the jury on defenses not supported by the evidence. (*People v. Beardslee* (1991) 53 Cal.3d 68, 87-88.)

Appellant contends for the first time that the trial court was required to instruct the jury with CALJIC No. 4.45[19/] because the evidence showed that Arthur's death was a "tragic accident" caused by an unintentional overdose of pills. Even assuming that appellant and Michelle intended to help Arthur, and not kill him when they gave him the fatal combination of pills, instruction with CALJIC No. 4.45 was not required. "The accident defense amounts to a claim that the defendant acted without forming the mental state necessary to make his or her actions a crime." (*People v. Lara* (1996) 44 Cal.App.4th 102, 110; see

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19. CALJIC No. 4.45, which sets forth the "accident" defense, provides:

> When a person commits an act or makes an omission through misfortune or by accident under circumstances that show [no] [neither] [criminal intent [n]or purpose,] [nor] [[criminal] negligence,] [he] [she] does not thereby commit a crime.] provides:
>
> When a person commits an act or makes an omission through misfortune or by accident under circumstances that show [no] [neither] [criminal intent [n]or purpose,] [nor] [[criminal] negligence,] [he] [she] does not thereby commit a crime.]

also, *People v. Bohana* (2000) 84 Cal.App.4th 360, 370.) The defense is available only when the alleged crime was the result of an event which happened while the defendant was engaged in a lawful act. (*People v. Gorgol* (1953) 122 Cal.App.2d 281, 308.)

In this case, the evidence did not support an accident defense. First, the defense was unavailable to appellant because he was engaged in the unlawful act of torturing Arthur at the time of his death. Second, there was no substantial evidence from which the jury could have found that Arthur's death was merely an "accident" as defined in CALJIC No. 4.45 because, at a minimum, appellant and Michelle acted with criminal negligence when they administered substances not suitable for children to 5-year-old Arthur. Accordingly, the trial court was not required to instruct the jury sua sponte with CALJIC No. 4.45.

Appellant also contends that in addition to instructing the jury with CALJIC No. 4.45, the court was required to instruct the jury with CALJIC No. 3.36 on the definition of the term "criminal negligence." (AOB 104.) However, the court *did* instruct the jury with CALJIC No. 3.36 in this case. (2 CT 545.)

Moreover, even assuming the trial court erred by not instructing with CALJIC No. 4.45, the error was not prejudicial. By finding appellant guilty of first degree murder, the jury found that appellant acted with malice. By finding the torture-murder special circumstance true, the jury found that appellant intentionally killed Arthur. The jury could not have made these findings if it believed the killing was an accident, that is, that appellant "acted without forming the mental state necessary to make his [ ] actions a crime." (*People v. Bohana, supra*, 84 Cal.App.4th at p. 370.) Even without an instruction on misfortune and accident, the jury would have known that an accidental killing could not have been done with malice or an intent to kill. Thus, the jury's

findings demonstrate that giving CALJIC No. 4.45 would not have affected the verdict. (See *People v. Maury* (2003) 30 Cal.4th 342, 422.)

XIII.

REVERSAL OF APPELLANT'S CONVICTION IS NOT REQUIRED BASED ON SUBSTANTIAL OR CUMULATIVE ERRORS OR BASED ON THE LENGTH OF JURY DELIBERATIONS

Appellant contends in his twelfth argument that this was a "close case" and the instructional errors and the errors in admitting Michelle's statements were substantial errors which had a cumulative effect that denied him his right to due process and a fair trial. (AOB 129-131.) Appellant's contention is meritless, as this was not a close case and there was neither error nor prejudice.

First, this was not a "close case" as appellant contends. As discussed previously, the evidence of appellant's guilt was overwhelming. In addition, the fact that the jury deliberated for approximately 28 hours, during which time they had the testimony of six witnesses read back to them and reviewed the three hour videotaped interview, does not indicate that this was a close case. (See 2 CT 454, 456, 458, 464, 467, 469, 471-742.) The jury had to decide the guilt of two defendants and had to determine whether two different special circumstances were true as to each defendant. In addition, the jury was unable to reach a verdict on one of the special circumstances as to Michelle. Thus, the fact that the jury deliberated for almost a week in a two defendant, capital case does not indicate that this was a "close case."

Next, for the reasons discussed in Arguments VI through VIII, the trial court properly admitted Michelle's statements in the joint interview and her statements to Dr. Kaser-Boyd into evidence. As previously discussed in Arguments IX through XII, the trial court properly instructed the jury. Accordingly, there was no error to accumulate. "If none of the claimed errors

[are] individual errors, they cannot constitute cumulative errors that somehow effected the . . . verdict." (*People v. Beeler* (1995) 9 Cal.4th 953, 994.)

In any event, even assuming that the trial court erred in some respect, appellant has not shown that he was denied his right to due process or to a fair trial. (See *People v. Kronemyer* (1987) 189 Cal.App.3d 314, 349 ["the litmus test is whether defendant received due process and a fair trial"].) A defendant is entitled to a fair trial, not a perfect one. (*People v. Mincey* (1992) 2 Cal.4th 408, 454.) Furthermore, any error had little if any significance for the reasons previously discussed with respect to each individual claim. Consequently, "[w]hether considered individually or for their 'cumulative' effect, they could not have affected the process or result to [appellant's] detriment." (*People v. Sanders* (1995) 11 Cal.4th 475, 565; see also *People v. Bunyard* (1988) 45 Cal.3d 1189, 1236 [given strong prosecution case, cumulative effect of errors did not prejudice defendant].) The evidence against appellant was overwhelming; his "cumulative prejudice" argument should be rejected.

XIV.

THE DEATH PENALTY IS NOT UNCONSTITUTIONAL IN ALL CASES

Appellant contends in Argument XIII that the death penalty is, per se, unconstitutional. (AOB 132-150.) This court has repeatedly rejected the claim that death penalty is per se unconstitutional and appellant presents no new reason to revisit this issue. (*People v. Moon* (2005) 37 Cal.4th 1, 48; *People v. Cleveland, supra,* 32 Cal.4th at p. 768; *People v. Steele* (2002) 27 Cal.4th 1230, 1269; *People v. Samayoa* (1997) 15 Cal.4th 795, 864-865.)

Appellant argues that the imposition of a death sentence violates the United States Constitution because it is arbitrary and unreliable, and it cannot comport with the requirements of fundamental fairness inasmuch as a capital sentencing determination must satisfy two irreconcilable objectives: (1) render

a sentence that is the product of closely confined limits upon sentencing discretion, and (2) render a sentence that is the product of unlimited sentencing discretion not to impose death. (AOB 132-150.) In making this argument, appellant relies in part upon Justice Blackmun's view expressed in his dissent from the Court's order denying a writ of certiorari in *Callins v. Collins* (1994) 510 U.S. 1141 [114 S.Ct. 1127, 127 L.Ed.2d 435] (Blackmun, J., dissenting) to argue that the death penalty violates the Eighth and Fourteenth Amendments. (AOB 143-145.) In *People v. Fairbanks* (1997) 16 Cal.4th 1223, 1255, this Court considered and rejected an attack upon the constitutionality of California's death penalty law that was based upon Justice Blackmun's dissenting opinion in Callins. (see also, *Tuilaepa v. California* (1994) 512 U.S. 967, 980 [114 S. Ct. 2630, 129 L.Ed.2d 750].)

In the eligibility phase of the capital sentencing process, the jury narrows the class of defendants eligible for the death penalty, through the finding of at least one special circumstance. It is in this process that the Supreme Court has stressed the need for channeling and limiting the jury's discretion to insure that the death penalty is a proportionate punishment and therefore that it is not arbitrary or capriciously applied. (*Buchanan v. Angelone* (1998) 522 U.S. 269, 275-276 [118 S.Ct. 757, 139 L.Ed.2d 702].) In the selection process, where the jury determines whether to impose a death sentence on an eligible defendant, the Supreme Court, by contrast, has emphasized the need for a broad inquiry into all relevant evidence to allow an individualized determination. (*Ibid.*, citing, among other cases, *Tuilaepa v. California, supra,* 512 U.S. at pp. 971-973.)

California's capital sentencing scheme places appropriate emphasis on each of these two processes and properly accommodates both the interests of channeling and limiting jury discretion in the determination of death eligibility, and allowing broad juror consideration of any constitutionally relevant

mitigating evidence in the selection of which defendants, among those deemed eligible, shall be sentenced to death. Accordingly, appellant's claim that the death penalty is per se unconstitutional must be rejected.

XV.

THE SELECTION OF A "DEATH-QUALIFIED" JURY IN THIS CASE WAS NOT UNCONSTITUTIONAL

Appellant contends in his fourteenth argument that the process by which a death penalty jury is selected in California violates his rights under the federal and state Constitutions to a fair and impartial jury and to a jury reflecting a fair cross-section of the community. (AOB 151-166.) These contentions have previously been rejected by this Court and should be rejected again as appellant has not offered any persuasive reason for their reconsideration.

Initially, it must be noted that the issue has been waived by appellant's failure to preserve the issue with a timely and specific objection on this ground in the trial court. In any event, appellant's claim is without merit. First, this Court has consistently and repeatedly held that the death qualification process does not result in a jury substantially more likely to convict than a non-death-qualified jury, nor does it deny a defendant an impartial jury. (*People v. Breaux* (1991) 1 Cal. 4th 281, 306, citing *People v. Melton* (1988) 44 Cal.3d 713 and *Lockhart v. McCree* (1986) 476 U.S. 162 [106 S.Ct. 1758, 90 L.Ed.2d 137]). More recently, this Court explained:

> In *People v. Jackson* (1996) 13 Cal.4th 1164, we considered the "social science evidence" the defendant there offered to show "that death-qualified juries are more prone to convict than those not thus qualified," and we concluded that such evidence does not support a constitutional prohibition of death qualification. (*Id.* at pp. 1198-1199; see also *People v. Catlin* (2001) 26 Cal.4th 81, 112 [state constitutional right to impartial jury not violated by exclusion of persons opposed to death penalty].) Defendant here concedes that his claim is "essentially the same claim" that was before us in *Jackson*. More recently, we rejected such a claim after concluding the "defendant presents no good

> reason to reconsider our ruling as to the California Constitution." (*People v. Steele* (2002) 27 Cal.4th 1230, 1243.) Defendant here has likewise failed to make a compelling case for us to revisit this issue.

(*People v. Lenart* (2004) 32 Cal.4th 1107, 1120.) The same is true in the instant case.

Second, California's jury selection process in a capital case does not deprive defendants of a jury reflecting a fair cross section of the community. The United States Supreme Court rejected such a claim in *Lockhart v. McCree, supra*, 476 U.S. 162, and this Court has also rejected the claim in numerous cases. As noted by this Court, "the high court has rejected the view that individuals who can be characterized as a group "defined solely in terms of shared attitudes toward imposing the death penalty are not a 'distinctive group'" for fair cross-section claims under the federal Constitution." (*People v. Lenart, supra*, 32 Cal.4th at pp. 1120-1121, citing *Lockhart v. McCree, supra*, 476 U.S. at p. 174.) This Court has also rejected this claim under the state Constitution. (*People v. Lenart, supra*, 32 Cal.4th at p. 1121, citing *People v. Jackson* (1996) 13 Cal.4th 1164, 1198.) Appellant offers no persuasive reason for this Court to reconsider it's holding.

XVI.

THIS COURT HAS PREVIOUSLY REJECTED APPELLANT'S NUMEROUS CHALLENGES TO CALIFORNIA'S DEATH PENALTY SCHEME

In an apparent effort to preserve his claims for federal review (see AOB 167), appellant mounts a series of separate attacks on California's death penalty law and death sentencing process. (AOB 167-224.) This Court has repeatedly rejected each of these claims. Appellant provides no persuasive reason for this Court to reconsider its previous decisions. Thus, each of appellant's claims should be rejected.

A. The Special Circumstances In Section 190.2 Are Not Overbroad, And Properly Narrow The Class Of Death Eligible Offenders

In Argument XV(B), appellant contends the failure of California's death penalty law to meaningfully distinguish those murders in which the death penalty is imposed from those in which it is not requires reversal of the death judgment. Specifically, appellant argues his death sentence is invalid because section 190.2 is impermissibly broad and fails to adequately narrow the class of persons eligible for the death penalty. (AOB 169-173.) The Supreme Court has found that California's requirement of a special circumstance finding adequately "limits the death sentence to a small subclass of capital-eligible cases." (*Pulley v. Harris, supra,* 465 U.S. at p. 53.) Likewise, this Court has repeatedly rejected, and continues to reject, the claim raised by appellant that California's death penalty law contains so many special circumstances that it fails to perform the narrowing function required under the Eighth Amendment or that the statutory categories have been construed in an unduly expansive manner. (*People v. Dunkle* (2005) 36 Cal.4th 861, 939; *People v. Frye* (1998) 18 Cal.4th 894, 1029; *People v. Arias* (1996) 13 Cal.4th 92, 186-187, and cases cited; *see also People v. Burgener* (2003) 29 Cal.4th 833, 884 ["Section 190.2, despite the number of special circumstances it includes, adequately performs its constitutionally required narrowing function."]; *People v. Ray* (1996) 13 Cal.4th 313, 356; *People v. Crittenden, supra,* 9 Cal.4th at pp. 152, 155-156; *People v. Bacigalupo* (1993) 6 Cal.4th 457, 468.) Furthermore, appellant's assertion that the voters enacted the 1978 Death Penalty Law intending to make every murderer death-eligible is incorrect. (*People v. Gray* (2005) 37 Cal.4th 168, 237, fn. 23.) Appellant's claim should be rejected.

B. Section 190.3, Subdivision (a) Is Not Impermissibly Vague

Appellant contends in Argument XV(C) that the death penalty is invalid because section 190.3, subdivision (a), as applied, allows arbitrary and

capricious imposition of death in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.[20] (AOB 173-181.) Specifically, appellant contends factor (a) has been applied in a "wanton and freakish" manner so that almost all features of every murder have been found to be "aggravating" within the meaning of the statute. (AOB 174.) The issue is without merit.

The United States Supreme Court has specifically addressed the issue of whether section 190.3, factor (a), is constitutionally vague or improper. In *Tuilaepa v. California, supra,* 512 U.S. 967, the Supreme Court commented on factor (a), stating:

> We would be hard pressed to invalidate a jury instruction that implements what we have said the law requires. In any event, this California factor instructs the jury to consider a relevant subject matter and does so in understandable terms. The circumstances of the crime are a traditional subject for consideration by the sentencer, and an instruction to consider the circumstances is neither vague nor otherwise improper under our Eighth Amendment jurisprudence.

(*Id.,* at p. 976.)

This Court has been presented with ample opportunity to revisit the issue raised by appellant since the holding in *Tuilaepa.* However, this Court has consistently rejected the claim and followed the ruling by the Supreme Court. (See, e.g., *People v. Ochoa* (1998) 19 Cal.4th 353, 478, fn. 13; *People v. Millwee* (1998) 18 Cal.4th 96, 164; *People v. Ray, supra,* 13 Cal.4th at p. 358; *People v. Arias, supra,* 13 Cal.4th at p. 187; *People v. Medina* (1995) 11 Cal.4th 785, 788.) There is no reason for this Court to revisit the issue.

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20. Section 190.3, subd. (a), states:

> In determining the penalty, the trier of fact shall take into account any of the following factors if relevant: [ ] (a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to Section 190.1.

C. The Trial Court Was Not Required To Instruct The Jury On The Burden Of Proof During The Penalty Phase

Appellant contends in Argument XV(D)(2)(A), (3)-(4) that the failure to instruct the jury on a penalty phase burden of proof violated his rights to due process, equal protection and against cruel and unusual punishment. (AOB 182-194, 200-202.) Specifically, appellant asserts that: (1) the reasonable doubt standard should have governed the penalty determination (AOB 185-194); (2) alternatively, even if the beyond a reasonable doubt standard does not apply, some burden of proof is required to establish a tie-breaking rule and ensure even-handedness (AOB 200); and (3) even if a burden of proof is not constitutionally required, the trial court erred in failing to instruct the jury to that effect (AOB 201-202). Initially, it should be noted that the trial court did instruct the jury that there was no burden of proof beyond a reasonable doubt in the penalty phase and that they were to ignore instructions given during the guilt phase of the trial. (13 RT 3257, 3502.) Thus, the jury could not possibly have believed the burden was on appellant to prove beyond a reasonable doubt that he should be sentenced to life in prison as he contends in his brief. (AOB 202.)

In any event, appellant's contentions are without merit. Unlike the determination of guilt, the sentencing function is inherently moral and normative, not functional, and thus not susceptible to any burden-of- proof qualification. (*People v. Burgener, supra*, 29 Cal. 4th at pp. 884-885; *People v. Anderson* (2001) 25 Cal.4th 543, 601; *People v. Welch* (1999) 20 Cal.4th 701, 767; *see People v. Daniels* (1991) 52 Cal.3d 815, 890; *People v. Carpenter* (1997) 15 Cal.4th 312, 417-418.) This Court has repeatedly rejected claims identical to appellant's regarding a burden of proof at the penalty phase. (*People v. Welch, supra,* 20 Cal.4th at pp. 767-768; *People v. Ochoa, supra,* 19 Cal.4th at p. 479; *People v. Snow* (2003) 30 Cal.4th 43, 126; *People v. Box*

(2000) 23 Cal.4th 1153, 1216; *People v. Carpenter, supra,* 15 Cal.4th at pp. 417-418; *People v. Dennis* (1998) 17 Cal.4th 468, 552; *People v. Holt* (1997) 15 Cal.4th 619, 683-684 ["the jury need not be persuaded beyond a reasonable doubt that death is the appropriate penalty"].) Appellant does not offer any valid reason to vary from this Court's past decisions.

Insofar as appellant contends that *Ring v. Arizona* (2002) 536 U.S. 584 [122 S.Ct. 2428, 153 L.Ed.2d 556], and *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435], compel a different conclusion (see AOB 184-185, 188-194), appellant is mistaken. These cases have been found to have no application to the penalty phase procedures of this state. (*People v. Gray, supra,* 37 Cal.4th at p. 237; *People v. Monterroso* (2004) 34 Cal.4th 743, 796; *People v. Morrison* (2004) 34 Cal.4th 698, 730; *People v. Brown* (2004) 33 Cal.4th 382, 402; *People v. Smith* (2003) 30 Cal.4th 581, 642; *People v. Prieto* (2003) 30 Cal.4th 226, 262-264, 271-272, 275.) Nor does the United States Supreme Court's recent decision in *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403] alter this conclusion. (*People v. Ward* (2005) 36 Cal.4th 186, 221.)

Appellant acknowledges that this Court has rejected the claim he raises, but invites the Court to reconsider its prior holdings. As it has done before on this issue, this Court should decline appellant's invitation. (*People v. Hines* (1997) 15 Cal.4th 997.)

D. The United States Constitution Does Not Require Unanimous, Written Findings Regarding Aggravating Factors

Appellant contends in Argument XV(D)(2)(b) and XV(D)(5), that California's death penalty sentencing procedure violates the United States Constitution because the jury was not instructed to make unanimous written findings as to which factors in aggravation had been proven. (AOB 182-185, 194-199, 202-207.) This Court has repeatedly rejected the claim that

unanimous written findings regarding aggravating factors are constitutionally required. (See *People v. Dunkle, supra,* 36 Cal.4th at p. 939*; People v. Snow, supra,* 30 Cal.4th at p. 126; *People v. Maury* (2003) 30 Cal.4th 342, 440.) The above decisions are consistent with the United States Supreme Court's pronouncement that the federal Constitution "does not require that a jury specify the aggravating factors that permit the imposition of capital punishment." (*Clemons v. Mississippi* (1990) 494 U.S. 738, 746, 750 [110 S.Ct. 144, 108 L.Ed.2d 725] citing *Hildwin v. Florida* (1989) 490 U.S. 638 [109 S.Ct. 2055, 104 L.Ed.2d 728].) Appellant's claim should be rejected.

E. The Trial Court Was Not Required To Instruct The Jury That Factors (d)-(h) and (j) Could Only Be Considered As Mitigating Factors And CALJIC No. 8.85 Properly Uses Adjectives Such As "Extreme" And "Substantial" To Describe Mitigating Factors (d) and (g)

Appellant argues in Argument XV(D)(7) that the trial court should have advised the jury which statutory factors were relevant solely as mitigating circumstances (specifically, factors (d)-(h), (j)).[21/] (AOB 207-209.) Appellant

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21. The jury was instructed with CALJIC No. 8.85, in pertinent part as follows:

> In determining which penalty is to be imposed on defendant, you shall consider all of the evidence which has been received during any part of the trial of this case, except as you may be hereafter instructed. You shall consider, take into account and be guided by the following factors, if applicable:
>
> . . .
>
> (d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.
>
> (e) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.

also contends in Argument XV (D)(6) that limiting factor (d) and (g) evidence with adjectives such as "extreme" and "substantial" violated his Fifth, Sixth, Eighth and Fourteenth Amendment rights. (AOB 207.) Appellant's claims should be rejected by this Court as it has done in the past.

This Court has repeatedly rejected appellant's claim that the trial court is required to instruct the jury as to which sentencing factors are solely mitigating. (See, e.g., *People v. Combs, supra,* 34 Cal.4th 867-686; *People v. Pollock* (2004) 32 Cal.4th 1153, 1193; *People v. Sapp* (2003) 31 Cal.4th 240, 314-315.) Federal courts have also rejected appellant's claim. (See, e.g., *Bonin*

> (f) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct.
>
> (g) Whether or not the defendant acted under extreme duress or under the substantial domination of another person.
>
> (h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or the effects of intoxication.
>
> . . . .
>
> (j) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.
>
> (k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime, and any sympathetic or other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial. You must disregard any jury instruction given to you in the guilt or innocence phase of this trial which conflicts with this principle.

(3 CT 654-655; 13 RT 3511-3514.)

v. Calderon (9th Cir. 1995) 59 F.3d 815, 848 ["cautionary words 'if applicable' warned the jury that not all of the factors would be relevant and that the absence of a factor made it inapplicable rather than an aggravating factor"]; *Williams v. Calderon* (9th Cir. 1995) 52 F.3d 1465, 1484 [failure to label aggravating and mitigating factors constitutional].) Furthermore, it is highly unlikely that the jury would think that the absence of evidence could be considered an aggravating circumstance, since CALJIC No. 8.85 told them to consider the factors only "if applicable."

In addition, it is well established that the "'[u]se of the words 'extreme' and 'substantial' in section 190.3, factors (d) and (g), does not impermissibly limit consideration of mitigating factors in violation of the federal Constitution.'" (*People v. Lewis* (2001) 26 Cal.4th 334, 395; *People v. Dunkle, supra,* 36 Cal.4th at p. 939; *People v. Monterroso, supra,* 34 Cal.4th at p. 796.) "Catchall" factor (k) allows the jury to consider any mitigating evidence not meeting the requirements of factors (d) or (g). (*People v. Welch, supra*, 20 Cal.4th at pp. 768-769; *People v. Carpenter, supra*, 15 Cal.4th at pp. 420-421.) The United States Supreme Court has agreed, finding a Pennsylvania statute, which contained similar "extreme" language and a catchall provision, fully complied with the constitutional requirement that a capital-sentencing jury be allowed to consider and give effect to all relevant mitigating evidence. (*Blystone v. Pennsylvania* (1990) 494 U.S. 299, 302, 305, 308 [110 S.Ct. 1078, 108 L.Ed.2d 255].) Accordingly, appellant's claim of error should be rejected.

F. Appellant's Right To Equal Protection Is Not Violated Because Capital And Non-capital Defendant's Are Treated Differently As They Are Not Similarly Situated

Appellant next claims in Argument XV(E) that the absence of the procedural safeguards discussed violates his right to equal protection because those safeguards are provided to non-capital defendants. (AOB 209-219.) This

Court has held many times that capital and non-capital defendants are not similarly situated and thus may be treated differently without violating equal protection principles. (*People v. Hinton* (2006) 37 Cal.4th 839, 912; *People v. Smith* (2005) 35 Cal.4th 334, 374; *People v. Morrison, supra*, 34 Cal.4th at p. 371; *People v. Brown, supra*, 33 Cal.4th at p. 402; *People v. Boyette* (2002) 29 Cal.4th 381, 465-467; *People v. Allen* (1986) 42 Cal.3d 1222, 1286-1288.) Thus, appellant's claim is without merit.

G. The Use Of The Death Penalty Does Not Violate International Norms Of Humanity And Decency

In Argument XV(F), appellant, claiming that the United States is in a small minority of countries employing the death penalty on a regular basis, argues that California's use of the death penalty violates international norms. He contends that the use of the death penalty is so contrary to the international trend against capital punishment and evolving standards of decency that California's use of capital punishment contravenes due process and Eighth Amendment considerations. (AOB 219-224.) This Court has repeatedly rejected this and similar arguments. (*People v. Martinez* (2003) 31 Cal.4th 673, 703; *People v. Ghent* (1987) 43 Cal.3d 739, 778-779.) Moreover, the use of the death penalty in California does not violate international norms where, as here, the sentence of death is rendered in accordance with state and federal constitutional and statutory requirements. (*People v. Perry* (2006) 38 Cal. 302, 322; *People v. Brown, supra,* 33 Cal.4th 382, 403-404; *People v. Hillhouse* (2002) 27 Cal.4th 469, 511; see *People v. Bolden* (2002) 29 Cal.4th 515, 567.) Appellant has presented nothing to justify departure from this solid line of precedent.

XVII.

PROSECUTORIAL DISCRETION IN CHARGING CAPITAL CRIMES DOES NOT VIOLATE THE CONSTITUTION

Appellant asserts in Argument XVI that the prosecutorial discretion to charge a crime as a capital offense violates the Eighth and Fourteenth Amendments to the United States Constitution. (AOB 225-228.) The charging discretion afforded the prosecutor does not violate constitutional principles.

In *McCleskey v. Kemp* (1987) 481 U.S. 279 [107 S.Ct. 1756, 95 L.Ed.2d 262], the Supreme Court recognized the tradition and value of prosecutorial discretion:

> the capacity of prosecutorial discretion to provide individualized justice is "firmly entrenched in American law." As we have noted, a prosecutor can decline to charge, offer a plea bargain, or decline to seek a death sentence in any particular case. Of course, "the power to be lenient [also] is the power to discriminate," but a capital punishment system that did not allow for discretionary acts"would be totally alien to our notions of criminal justice."

(*Id.*, at pp. 311- 312, internal citations omitted.)

"Absent facts to the contrary, it cannot be assumed that prosecutors will be motivated in their charging decisions by factors other than the strength of their case and the likelihood that a jury would impose the death penalty if it convicts." (*Gregg v. Georgia* (1976) 428 U.S. 153 [96 S.Ct. 2909, 49 L.Ed.2d 859] (White, J., concurring).) Therefore, this Court has upheld against constitutional challenge the prosecutorial discretion allowed by the California statutory scheme.

> Defendant acknowledges that, under California law, the individual prosecutor has complete discretion to determine whether to seek the death penalty in appropriate cases of first degree murder. Defendant asserts such prosecutorial discretion is contrary to the principled decision making mandated by the United States Supreme Court, but we have long held to the contrary. "[P]rosecutorial discretion to select those eligible cases in which the death penalty would actually be sought does not in and of itself evidence an arbitrary and capricious capital punishment

> system or offend principles of equal protection, due process, or cruel and/or unusual punishment." (*People v. Keenan* (1988) 46 Cal.3d 478, 505, citing numerous high court decisions.) Defendant offers no persuasive reason for our departing, in this case, from the previous pronouncements.

(*People v. Williams* (1997) 16 Cal.4th 153, 278.) There is no valid basis for altering this determination here. Accordingly, appellant's claim should be rejected.

XVIII.

INTERCASE PROPORTIONALITY REVIEW IS NOT REQUIRED AND INTRACASE PROPORTIONALITY REVIEW DOES NOT REQUIRE REVERSAL OF THE DEATH PENALTY IN THIS CASE

Appellant contends in Argument XVII that inter-case proportionality review is constitutionally required (AOB 229-237), that his sentence is unconstitutionally disproportionate to co-defendant Michelle's sentence of 25 years to life (AOB 236-237), and that intra-case proportionality review requires reversal of his death sentence (AOB 237-238). Each of appellant's claims should be rejected.

Appellant's first claim, that inter-case proportionality review is constitutionally required, is not well taken. Both the United States Supreme Court and this Court have rejected identical claims. (*Pulley v. Harris, supra,* 465 U.S. at pp. 50-51; *People v. Burgener, supra,* 29 Cal.4th at p. 885 ["It is settled that inter-case proportionality review is not required as a matter of due process, equal protection, fair trial, or cruel and/or unusual punishment concerns."].) Further, this Court has consistently declined to undertake such review. (*People v. Welch, supra,* 20 Cal.4th at p. 772; *People v. Majors* (1998) 18 Cal.4th 385, 432; *People v. Millwee, supra,* 18 Cal.4th at p. 168; *People v. Mayfield, supra*, 14 Cal.4th at p. 812). This Court should continue to do so.

Next, appellant's claim that his sentence is unconstitutionally

disproportionate to co-defendant Michelle's sentence must be rejected. Such review is not required. (*People v. Maury* (2000) 30 Cal.4th 342, 441-442.) In any event, a comparison of his and Michelle's sentences does not help him because there are obvious reasons why Michelle received a lesser sentence. First and foremost, appellant admitted that he was the one that inflicted the majority of the torture on Arthur. These heinous acts included severely burning his hand by holding it over the stove, making him hold a board over his head and then hitting him whenever he dropped it, putting duct tape over his mouth, punching him, kicking him, violently shaking him, and hitting him in the back of the head with a fireplace shovel. Next, it was appellant's idea to give Arthur the medication, which combined with the other abuse, killed Arthur. Finally, appellant admitted that he controlled Michelle and kept her from getting help for Arthur or reporting his death by using fear and intimidation. Under these circumstances, appellant's death sentence was not unconstitutionally disproportionate to Michelle's sentence.

Finally, appellant's claim that intra-case proportionality review requires reversal of his death sentence must be rejected. (AOB 237-238.) This Court has held that the cruel or unusual punishment clause of the California Constitution entitles a capital defendant, on request, to intracase review by this Court to determine whether the death penalty is grossly disproportionate to his personal culpability. (*People v. Hillhouse, supra*, 27 Cal.4th at p. 511; *People v. Weaver* (2001) 26 Cal. 4th 876, 989; *People v. Anderson, supra*, 25 Cal.4th at p. 602; *People v. Hines, supra*, 15 Cal.4th at p. 1078.) However, to succeed on such a claim, appellant must demonstrate that his sentence is so disproportionate to his personal culpability as to "shock the conscience" or "offend fundamental notions of human dignity." (*People v. Hughes* (2002) 27 Cal.4th 287, 406; *People v. Hines, supra*, 15 Cal.4th at p. 1078.)

Appellant's death sentence was not disproportionate to his personal

culpability. Arthur was a particularly vulnerable victim. He was a small, five year old child who was completely at the mercy of appellant, his 6'2', 210 pound father. Arthur's death was not a quick and painless one, but rather a long, drawn out, torturous one. The trial court explained the pain that appellant inflicted on Arthur:

> He held the little boy's hand . . . over an open flame of the kitchen stove causing . . .second and third degree burns. That was punishment for wetting the bed. How incredibly cruel.
>
> Mr. Jennings shook the little boy violently for purposes of discipline. Dr. Sheridan testified that both optic nerves were hemorrhaged due to the violent shaking. Dr. Sheridan testified this was unusual in a child of this age, five years, because of the extreme amount of force that has to be used. The whites of the little boy's eyes were completely red because of the internal bleeding.
>
> The defendant Mr. Jennings put duct tape over the little boy's mouth and bound his hands behind his back with duct tape to control the so-called fits that the little boy had. He even put a sock in the boy's mouth. . . .
>
> Dr. Sheridan testified that because of the injuries to the boy's lips and mouth, there was a possibility that there was an attempt[ed] smothering of the child which contributed to the boy's death.
>
> A favorite punishment that Mr. Jennings inflicted on his little son, five-year-old Arthur, was to make him hold a piece of two-by-four lumber over his head; and when it became too heavy for the little boy and the little boy dropped it, the defendant would beat his five-year-old son. ¶ Dr. Geraldine Stahley testified that this was physical and psychological abuse. It was psychological abuse because the boy would be made to feel responsible for the beating because he's the one that dropped the two-by-four piece of lumber. How incredibly cruel again.
> . . . .
>
> On or about February 4th, 1996, the defendant Mr. Jennings hit the little boy, five-year-old Arthur, over the head with a fireplace shovel. . . . .The reason, or motive, for this violence? His son, the little boy, saw the defendant Martin Jennings romantically involved with another woman.
> . . . .

> On top of all of the other abuses and insults he suffered, he was being systematically starved by the defendant Martin Jennings. . . . ¶ The little boy was actually consuming his own body to stay alive. ¶ We can all imagine what it's like to miss one or two meals. Rarely, if ever, do we go the entire day without eating. It seems to the Court that the pain of hunger can drive you mad.

(13 RT 3555-3559.) Based on this evidence, the Court aptly concluded,

> None of us . . . can understand and feel what it must have been like those last 90 days of the little boy's life in the hands of his father, the defendant Martin Jennings. These acts of physical and psychological abuse, starvation and murder, these acts of torture are so evil that they transcend the ability of language to describe them. The little boy, little five-year-old Arthur, experienced death and dying before he was ever able to experience life and living.

(13 RT 3560.) Finally, even in his death, appellant treated his son cruelly, like a piece of trash. Appellant removed Arthur's clothes and wrapped his naked body in a blanket, threw it down a mineshaft, and then threw trash on top of him. Under the circumstances present here, appellant's death sentence is not so disproportionate to his personal culpability as to "shock the conscience" or "offend fundamental notions of human dignity." Accordingly, appellant's claims should be rejected.

XIX.

THIS COURT HAS NO AUTHORITY TO MODIFY THE JUDGMENT IN THIS CASE PURSUANT TO PENAL CODE SECTIONS 1181 OR 1260 TO LIFE WITHOUT THE POSSIBILITY OF PAROLE

Appellant contends in Argument XVIII that this Court should modify his death sentence to life without the possibility of parole pursuant to Penal Code section 1181, subdivision (7)[22/] and Penal Code section 1260.[23/] (AOB 239-

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22. Penal Code section 1181, subdivision (7), states:

> When the verdict or finding is contrary to law or evidence, but in any case wherein authority is vested by statute

244.) However, this Court has held that neither section 1181, subdivision (7) nor section 1260 authorizes the reduction by this Court of a death sentence to life without the possibility of parole. (*People v. Lenart, supra,* 32 Cal.4th 1107, 1137; *People v. Hines, supra*, 15 Cal.4th at pp. 1079-1080.) In any event, even assuming the Court had such authority, it should not modify appellant's sentence for the reasons stated previously in Argument XIII. Appellant's claim should be rejected.

XX.

THE DELAY INHERENT IN THE CAPITAL APPEAL PROCESS DOES NOT MAKE APPELLANT'S DEATH SENTENCE CRUEL AND UNUSUAL PUNISHMENT

Appellant contends in Argument XIX that his death penalty verdict must be set aside because the delay inherent in the capital appeal process constitutes cruel and unusual punishment. (AOB 245-256.) It is well settled that the automatic appeal process following a judgment of death is a constitutional safeguard, not a constitutional defect. (*People v Demetrulias* (2006) 39 Cal.4th

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in the trial court or jury to recommend or determine as a part of its verdict or finding the punishment to be imposed, the court may modify such verdict or finding by imposing the lesser punishment without granting or ordering a new trial, and this power shall extend to any court to which the case may be appealed.

23. Penal Code section 1260 states:

> The court may reverse, affirm, or modify a judgment or order appealed from, or reduce the degree of the offense or attempted offense or the punishment imposed, and may set aside, affirm, or modify any or all of the proceedings subsequent to, or dependent upon, such judgment or order, and may, if proper, order a new trial and may, if proper, remand the cause to the trial court for such further proceedings as may be just under the circumstances.

1, 45; *People v. Hill* (1992) 3 Cal.4th 959, 1014, citing *Gregg v. Georgia, supra,* 428 U.S. at p. 199, (lead opn. of Stewart J.) and at p. 211 (conc. opn. of White, J.); accord, *People v. Ochoa, supra*, 19 Cal.4th at pp. 476-477.) The delay inherent in the capital appeal process assures careful review of appellant's conviction and sentence and therefore does not constitute cruel and unusual punishment.

This Court has repeatedly rejected the notion that a lengthy period of incarceration pending execution violates the Eighth Amendment, reasoning that such delay is necessary to permit careful appellate review. (*People v. Ochoa* 26 Cal.4th at p. 463; *People v. Steele, supra*, 27 Cal.4th at p. 1269; *People v. Hughes, supra*, 27 Cal.4th at p. 406; *People v. Anderson, supra*, 25 Cal.4th at p. 606; *People v. Frye, supra*, 18 Cal.4th at pp. 1030-1031; *People v. Massie* (1998) 19 Cal.4th 550, 574; *People v. Hill, supra*, 3 Cal.4th at p. 1016.) Federal courts have rejected this claim as well. (See *McKenzie v. Day* (9th Cir. 1995) 57 F.3d 1461; *White v. Johnson* (5th Cir. 1996) 79 F.3d 432.) In *McKenzie v. Day, supra*, 57 F. 3d 1461,

> the defendant sought a stay of execution on the ground that he would likely succeed on his claim that over 20 years on death row was cruel and unusual punishment. A majority of the three-judge panel concluded the claim was unlikely to succeed, and denied the stay request. (*Id.* at p. 1463.) The court determined that the cause for the delay in executing the defendant was due to the defendant's having "availed himself of procedures our law provides to ensure that executions are carried out only in appropriate circumstances." (*Id.* at p. 1467.) In the court's view, the delay was thus "a consequence of our evolving standards of decency, which prompt us to provide death row inmates with ample opportunities to contest their convictions and sentences." (*Ibid.*) As the court observed, a defendant sentenced to death need not have excessive review prior to execution, but the Constitution requires certain procedural safeguards before execution to prevent arbitrary or erroneous executions. In the court's view, the delays caused by satisfying the Eighth Amendment cannot violate it. (*Id.* at p. 1467.)

(*People v. Frye, supra*, 18 Cal.4th at pp. 1030-1031.)

The Fifth Circuit applied similar reasoning in *White v. Johnson, supra*, 79 F.3d 432, to reject the defendant's claim that inordinate delay in carrying out an execution is cruel and unusual punishment under the Eighth Amendment. Recognizing a tension between the state's interest in deterrence and swift execution and its interest in ensuring that those who are executed receive fair trials with constitutionally mandated safeguards, the court found compelling reasons for the length of time between conviction and execution. (*Id.*, at p. 439.) This Court has stated that "The reasoning of the Ninth Circuit Court of Appeals in *McKenzie v. Day* (9th Cir. 1995) 57 F.3d 1461, and of the Fifth Circuit Court of Appeals in *White v. Johnson* (5th Cir. 1996) 79 F.3d 432, persuades us that prolonged confinement prior to execution does not constitute a violation of the Eighth Amendment." (*People v. Frye, supra*, 18 Cal.4th at pp. 1030.)

As this Court has explained,"[A]n argument that one under judgment of death suffers cruel and unusual punishment by the inherent delays in resolving his appeal is untenable. If the appeal results in reversal of the death judgment, he has suffered no conceivable prejudice, while if the judgment is affirmed, the delay has prolonged his life." (*People v. Anderson, supra*, 25 Cal.4th at p. 606; see also, *People v. Hill, supra*, 3 Cal.4th at pp. 1015-1016 [noting the virtual impossibility in finding pre-execution delay cruel and unusual, since the delay will result in either reduction of the sentence or a fortunate temporary extension of life].) As the court in *McKenzie v. Day, supra*, 57 F.3d 1461, aptly observed,

> It would indeed be a mockery of justice if the delay incurred during the prosecution of claims that fail on the merits could itself accrue into a substantive claim to the very relief that had been sought and properly denied in the first place.

Appellant's cruel and unusual punishment claim is thus without merit and should be rejected here as it has been so many times before.

This Court has also specifically rejected appellant's argument that it is cruel and unusual punishment to put to death the person who he will have become many years after the crime was committed. (AOB 250-252.) This Court explained that such claims of personal growth must be made to the Governor during a clemency proceeding. (*People v. Lenart, supra,* 32 Cal.4th 1107, 1131.)

> The mere possibility defendant may someday no longer pose a threat to society is an insufficient reason for this court to revisit its prior holding that delay between sentencing and execution does not make a death sentence cruel and unusual.

(*Ibid.*) Thus, appellant's cruel and unusual punishment claim must fail.

CONCLUSION

Based on the foregoing, respondent respectfully requests that the judgment be affirmed.

Dated: October 4, 2006

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 29920 words.

Dated: October 4, 2006

Respectfully submitted,

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DECLARATION OF SERVICE

Case Name: **People v. Martin Carl Jennings** Case No. **S081148**

I declare:

I am employed in the County of San Diego, California. I am 18 years of age or over and not a party to the within entitled cause. My business address is 110 West A Street, Suite 1100, P.O. Box 85266 San Diego, California 92186-5266.

On October 4, 2006, I served one copy of the attached

RESPONDENT'S BRIEF

I served 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:

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I declare under penalty of perjury the foregoing is true and correct, and this declaration was executed at San Diego, California, on October 4, 2006.

C. PRYOR
(Typed Name)

C. Pryor
(Signature)