In the Supreme Court of the State of California

SUPREME COURT COPY

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

ALEX DALE THOMAS,

Defendant and Appellant.

CAPITAL CASE

Case No. S093456

Sonoma County Superior Court Case No. SCR-29622
The Honorable Wilfred Harpham, Judge

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TABLE OF CONTENTS

Page

Introduction 1

Statement of the Case 1

Statement of Facts 2

Guilt Phase 2

I. The People's Case 2

A. Montoya's scheduled conference after school 2

B. Montoya phones for a ride home 3

C. Appellant's employment as a substitute custodian 4

D. Appellant claims that he discovers a body in the shop class 5

E. Officials discover Montoya's body 7

F. Appellant's statements to the sheriff's deputies 8

G. Evidence collection and analysis 11

H. DNA evidence 13

I. Autopsy report 13

II. The Defense Case 14

III. The Prosecution's Rebuttal 17

Penalty Phase 18

I. Aggravating evidence 18

A. Prior convictions 18

B. Evidence of prior convictions and other acts of violence 18

1. Kelly Richardson Minix 18

2. Delores Thomas 19

3. Vincent McGowan 19

4. Seifeddin Khalatbary 20

5. Renaud Vann 21

TABLE OF CONTENTS
(continued)

Page

6. Samantha Mims 21
7. Daniel White 21
C. Victim impact evidence 22
II. Mitigating evidence 24
A. Mental retardation 24
B. Brain damage 24
C. Childhood trauma 25
Argument 26
I. The trial court did not erroneously excuse potential jurors 26
A. Applicable law 26
B. Analysis 27
1. Prospective Juror 6-353 28
2. Prospective Juror 6-483 30
3. Prospective Juror 74 33
4. Prospective Juror 833 36
II. The prosecution did not use its peremptory challenge in a racially discriminatory manner 39
A. Factual background 39
B. Applicable law 42
C. Legal analysis 43
III. The trial court properly denied appellant's motion to suppress under miranda 45
A. Factual background/ 46
B. Relevant law 49
C. Legal analysis 50
IV. The trial court did not err in instructing the jury with CALJIC No. 2.28 54

TABLE OF CONTENTS
(continued)

Page

A. Factual background 54

B. Relevant law 57

C. Legal anaysis 58

V. The videotape of appellant in the jail interrogation room was properly admitted 65

A. Factual background 66

B. Relevant law 67

C. Legal analysis 68

VI. There was no prosecutorial misconduct during closing argument of the guilt phase 71

A. Factual background 72

B. Relevant law 75

C. Legal analysis 75

1. Alleged Reference to Punishment 75

2. Alleged Vouching 77

VII. The trial court properly admitted photographs of appellant which depicted his appearance on the day of the murder 79

A. Factual background 79

B. Relevant law 81

C. Legal analysis 82

VIII. Cumulative error does not warrant reversal 84

IX. Defense counsel did not make a motion to present testimony of the defense investigator; accordingly, there was not error 85

A. Factual background 85

B. Argument 89

1. The Was No Motion Before the Trial Court 89

TABLE OF CONTENTS
(continued)

Page

2. Even If a Motion Was Before the Trial Court, There Was No Error 90

X. The prosecutor did not commit misconduct during closing argument 94

A. Factual background 94

B. Relevant law 97

C. Legal analysis 97

1. Argument regarding defense witnesses failure to testify 97

2. Argument regarding Vincent McGowan 100

XI. The prosecutor's argument did not violate appellant's Sixth Amendment right to confrontation 103

XII. The trial court properly admitted the preliminary hearing testimony of Ricardo Jones 104

A. Factual background 104

B. Relevant law 108

C. Legal analysis 109

1. Ricardo Jones's unavailability 109

2. Appellant's prior opportunity to cross-examine 110

XIII. Reliance on unadjudicated criminal activity 113

XIV. Evidence of appellant committing a battery and domestic violence was properly admitted under Penal Code section 190.3 113

A. Factual background 113

1. Kelly Minix battery 113

2. Delores Thomas's testimony about domestic violence attack 114

B. Relevant law 116

TABLE OF CONTENTS
(continued)

Page

C. Legal analysis 117

1. Kelly Minix battery 117

2. Delores Thomas's testimony about domestic violence attack 118

XV. The trial court properly admitted vincent mcgowan's statement identifying appellant as the man who slashed his throat 119

A. Factual background 119

B. Relevant law 120

C. Legal analysis 121

1. Spontaneous statement 121

2. Confrontation clause 122

XVI. The trial court properly admitted Gerald Franks's testimony; there was no *Miranda* violation 125

A. Factual background 125

B. Relevant law 127

C. Legal analysis 127

XVII. The trial court was not required to delete inapplicable mitigating factors 129

XVIII. California's death penalty statute is constitutional 129

A. Penal Code section 190.2 is not impermissibly broad 130

B. Penal Code section 190.3, subdivision (a) does not violate the federal constitution 130

C. California's death penalty statute contains sufficient safeguards to protect from arbitrary and capricious sentencing 130

1. Absence of reasonable doubt standard 131

2. Aggravating factors beyond a reasonable doubt 132

TABLE OF CONTENTS
(continued)

Page

3. Written jury findings 133

4. Inter-case proportionality 133

5. "Restrictive" adjectives in the list of mitigating factors 133

6. Failure to instruct that mitigating factors were relevant only as mitigators 134

D. California's death penalty statute does not violate equal protection 134

E. The use of the death penalty does not violate international law 134

XIX. The trial court properly admitted vctim impact testimony into evidence 135

A. Factual background 135

B. Relevant law 135

C. Legal analysis 136

XX. The death penalty does not constitute cruel and unusual punishment 137

XXI. There is no cumulative error 137

Conclusion 138

TABLE OF AUTHORITIES

Page

CASES

Adams v. Williams
(1972) 407 U.S. 143 52

Apprendi v. New Jersey
(2000) 530 U.S. 466 ..... 131, 132

Arizona v. Fulminanate
(1991) 499 U.S. 279 ..... 53, 128

Atkins v. Virginia
(2002) 536 U.S. 304 ..... 24, 132

Batson v. Kentucky
(1986) 476 U.S. 79 ..... 39, 42

Berkemer v. McCarty
(1984) 468 U.S. 420 49

Blakely v. Washington
(2004) 542 U.S. 246 131

Booth v. Maryland
(1987) 482 U.S. 496 135

California v. Beheler
(1983) 463 U.S. 1121 49

California v. Green
(1970) 399 U.S. 149 ..... 111, 112

Chapman v. California
(1967) 386 U.S. 18 ..... passim

County Court of Ulster County, N. Y. v. Allen
(1979) 442 U.S. 140 65

Crawford v. Washington
(2004) 541 U.S. 36 ..... passim

TABLE OF AUTHORITIES
(continued)

Page

Cunningham v. California
(2007) 549 U.S. 270 131

Davis v. Washington
(2006) 547 U.S. 813 ..... 122, 123, 124, 125

Estelle v. McGuire
(1991) 502 U.S. 62 ..... 70, 71

Hernandez v. New York
(1991) 500 U.S. 352 (plur. opn. of Kennedy, J.) 44

In re Deborah C.
(1981) 30 Cal.3d 125 128

In re Eric J.
(1979) 25 Cal.3d 522 128

In re Joseph R.
(1998) 65 Cal.App.4th 954 ..... 51, 52, 53

Izazaga v. Superior Court
(1991) 54 Cal.3d 356 57

Johnson v. California
(2005) 545 U.S. 162 ..... 42, 43

Jones v. United States
(1998) 526 U.S. 227 132

Michigan v. Lucas
(1991) 500 U.S. 145 ..... 57, 58

Miranda v. Arizona
(1966) 384 U.S. 436 ..... passim

Payne v. Tennessee
(1991) 501 U.S. 808 135

People v. Aguilera
(1996) 51 Cal.App.4th 1151 53

TABLE OF AUTHORITIES
(continued)

Page

People v. Allen
(1986) 42 Cal.3d 1222 134

People v. Alvarez
(1996) 14 Cal.4th 155 ..... 42, 121

People v. Ausbie
(2004) 20 Cal.Rptr.3d 371 117

People v. Ayala
(2000) 23 Cal.4th 225 ..... 78, 85, 89, 90

People v. Ayala
(2000) 24 Cal.4th 243 130

People v. Beivelman
(1968) 70 Cal.2d 60 93

People v. Bell
(2004) 118 Cal.App.4th 249 ..... passim

People v. Benson
(1990) 52 Cal.3d 754 78

People v. Bolton
(1979) 23 Cal.3d 208 102

People v. Bonilla
(2007) 41 Cal.4th 313 43

People v. Bonin
(1989) 47 Cal.3d 808 78

People v. Box
(2000) 23 Cal.4th 1153 116

People v. Boyd
(1985) 38 Cal.3d 762 ..... 116, 117

People v. Boyer
(1989) 48 Cal.3d 247 49

TABLE OF AUTHORITIES
(continued)

Page

People v. Boyette
(2002) 29 Cal.4th 381 .....92, 93

People v. Brenn
(2007) 152 Cal.App.4th 166 124

People v. Breverman
(1998) 19 Cal.4th 142 .....64, 113

People v. Brock
(1985) 38 Cal.3d 180 .....112, 117

People v. Bruce G.
(2002) 97 Cal.App.4th 1233 .....93, 98, 100

People v. Cabral
(2004) 121 Cal.App.4th 748 .....passim

People v. Cage
(2007) 40 Cal.4th 965 .....123, 124

People v. Cahill
(1993) 5 Cal.4th 478 53

People v. Cain
(1995) 10 Cal.4th 1 .....113, 130, 133

People v. Carey
(2007) 41 Cal.4th 109 .....68, 70, 71, 81

People v. Carpenter
(1999) 21 Cal.4th 1016 113

People v. Carter
(2005) 36 Cal.4th 1114 111

People v. Catlin
(2001) 26 Cal.4th 81 .....84, 134

People v. Champion
(1995) 9 Cal.4th 879 83

TABLE OF AUTHORITIES
(continued)

Page

People v. Clair
(1992) 2 Cal.4th 629 ..... 50, 51

People v. Cox
(1991) 53 Cal.3d 618 ..... 133, 134

People v. Crittenden
(1994) 9 Cal.4th 83 ..... 68, 81

People v. Cudjo
(1993) 6 Cal.4th 585 ..... 71, 84, 112

People v. Cummings
(1993) 4 Cal.4th 1233 110

People v. Douglas
(1995) 36 Cal.App.4th 1681 44

People v. Duncan
(1991) 53 Cal.3d 955 129

People v. Elliot
(2005) 37 Cal.4th 453 ..... 130, 134

People v. Espinoza
(1992) 3 Cal.4th 806 75

People v. Fairbank
(1997) 16 Cal.4th 1223 137

People v. Ford
(1988) 45 Cal.3d 431 ..... 98, 99

People v. Ford
(1988) 45 Cal.3d 431 99

People v. Forster
(1994) 29 Cal.App.4th 1746 52

People v. Frye
(1998) 18 Cal.4th 894 97

TABLE OF AUTHORITIES
(continued)

Page

People v. Fuentes
(1991) 54 Cal.3d 707 45

People v. Garceau
(1993) 6 Cal.4th 140 44

People v. Ghent
(1987) 43 Cal.3d 739 ..... 27, 35, 36, 37

People v. Gionis
(1995) 9 Cal.4th 1196 97

People v. Gonzalez
(1990) 51 Cal.3d 1179 99

People v. Gonzalez
(2006) 38 Cal.4th 932 93

People v. Gordon
(1990) 50 Cal.3d 1223 78

People v. Goss
(1992) 7 Cal.App.4th 702 90

People v. Gray
(2005) 37 Cal.4th 168 97

People v. Hall
(1988) 199 Cal.App.3d 914 ..... 127, 128

People v. Hall
(1983) 35 Cal.3d 161 45

People v. Hayes
(1999) 21 Cal.4th 1211 27

People v. Hill
(1998) 17 Cal.4th 800 ..... 27, 75, 97, 104

People v. Holt
(1984) 37 Cal.3d 436 77

TABLE OF AUTHORITIES
(continued)

Page

People v. *Holt*
(1997) 15 Cal.4th 619 ..... 32, 77

People v. Howard
(2008) 42 Cal.4th 1000 81

People v. Jackson
(1993) 15 Cal.App.4th 1197 58

People v. Johnson
(1950) 99 Cal.App.2d 717 97

People v. Jones
(1997) 15 Cal.4th 119 ..... passim

People v. Jones
(2003) 30 Cal.4th 1084 134

People v. Kirkes
(1952) 39 Cal.2d 719 ..... 101, 104

People v. Kirkpatrick
(1994) 7 Cal.4th 988 118

People v. Lawson
(2005) 131 Cal.App.4th 1242 ..... 58, 59, 63

People v. Leal
(2003) 105 Cal.App.4th 833 50

People v. Ledesma
(2006) 39 Cal.4th 641 ..... passim

People v. Lewis and Oliver
(2006) 39 Cal.4th 970 ..... 118, 119

People v. Lucero
(2000) 23 Cal.4th 692 133

People v. Marshall
(1990) 50 Cal.3d 907 133

TABLE OF AUTHORITIES
(continued)

Page

People v. Marshall
(1996) 13 Cal.4th 799 90

People v. Martin
(2000) 78 Cal.App.4th 1107 64

People v. Mason
(1991) 52 Cal.3d 909 116

People v. Mayfield
(1997) 14 Cal.4th 668 ..... 112, 127

People v. Mendoza
supra, 24 Cal.4th 130, 131

People v. Michaels
(2002) 28 Cal.4th 486 130

People v. Mickey
(1991) 54 Cal.3d 612 83

People v. Millwee
(1988) 18 Cal.4th 96 ..... 133, 134

People v. Moon
(2005) 37 Cal.4th 1 ..... 129, 133, 134

People v. Morales
(2001) 25 Cal.4th 34 ..... 97, 129

People v. Morrison
(2004) 34 Cal.4th 698 ..... 121, 134

People v. Navarette
(2003) 30 Cal.4th 458 135

People v. Ngaue
(1991) 229 Cal.App.3d 1115 83

People v. Nitschmann
(1995) 35 Cal.App.4th 677 127

TABLE OF AUTHORITIES
(continued)

Page

People v. Ochoa
(2001) 26 Cal.4th 398 ..... 85, 131, 132

People v. Panah
(2005) 35 Cal.4th 395 44

People v. Partida
(2005) 37 Cal.4th 428 ..... 68, 82

People v. Perry
(2006) 38 Cal.4th 302 ..... 129, 134

People v. Pollock
(2004) 32 Cal.4th 1153 ..... 136, 137

People v. Price
(1991) 1 Cal.4th 324 ..... 68, 109

People v. Raley
(1992) 2 Cal.4th 870 ..... 120, 121

People v. Ray
(1996) 13 Cal.4th 313 ..... 130, 133

People v. Reynoso
(2003) 31 Cal.4th 903 45

People v. Roberts
(1992) 2 Cal.4th 271 103

People v. Rodrigues
(1994) 8 Cal.4th 1060 ..... 68, 82

People v. Samayoa
(1997) 15 Cal.4th 795 ..... 75, 76, 112, 137

People v. Sanchez
(1995) 12 Cal.4th 1 131

People v. Sanders
(1995) 11 Cal.4th 475 ..... passim

TABLE OF AUTHORITIES
(continued)

Page

People v. Sandoval
(1992) 4 Cal.4th 155 ..... 75, 137

People v. Saracoglu
(2007) 152 Cal.App.4th 1584 122

People v. Saucedo
(2004) 121 Cal.App .4th 57, 58, 65

People v. Saunders
(1993) 5 Cal.4th 580 129

People v. Schmeck
(2005) 37 Cal.4th 240 ..... 36, 38

People v. Seaton
(2001) 26 Cal.4th 598 85

People v. Sims
(1993) 5 Cal.4th 405 ..... 68, 70

People v. Smith
(2003) 30 Cal.4th 581 112

People v. Smith
(2005) 135 Cal.App.4th 914 120

People v. Stanley
(1995) 10 Cal.4th 764 136

People v. Stevens
(2007) 41 Cal.4th 182 77

People v. Taylor
(1986) 178 Cal.App.3d 217 51

People v. Wader
(1993) 5 Cal.4th 610 134

People v. *Wash*
(1993) 6 Cal.4th 215 ..... passim

TABLE OF AUTHORITIES
(continued)

Page

People v. Watson
(1956) 46 Cal.2d 818 ..... 58, 71, 84

People v. Welch
(1999) 20 Cal.4th 701 ..... 76, 102, 103, 129

People v. Wheeler
(1978) 22 Cal.3d 258 ..... passim

People v. Whitson
(1998) 17 Cal.4th 229 127

People v. Williams
(1997) 16 Cal.4th 635 42

People v. Wilson
(2005) 36 Cal.4th 309 ..... 108, 109, 110, 111

People v. Yeoman
(2003) 31 Cal.4th 93 83

People v. Young
(2005) 34 Cal.4th 1149 98

People v. Zapien
(1993) 4 Cal.4th 929 ..... 81, 112

Pulley v. Harris
(1984) 465 U.S. 37 133

Rhode Island v. Innis
(1980) 446 U.S. 291 127

Ring v. Arizona
(2002) 536 U.S. 584 ..... 131, 132

Skipper v. South Carolina
(1986) 476 U.S. 1 91

Spencer v. Texas
(1967) 385 U.S. 554 70

TABLE OF AUTHORITIES
(continued)

Page

Taylor v. Illinois
(1988) 484 U.S. 400 58

Tuilaepa v. California
(1994) 512 U.S. 967 130

United States v. Gregory
(9th Cir. 1989) 891 F.2d 732 51

United States v. Henley
(9th Cir. 1993) 984 F.2d 1040 51

United States v. Owens
(1988) 484 U.S. 554 111

Uttecht v. Brown
(2007) __ U.S.__ [127 S.Ct. 2218] 36

Wainwright v. Witt
(1985) 469 U.S. 412 ..... passim

Walton v. Arizona
(1990) 497 U.S. 639 132

STATUTES

Code of Civil Procedure
§ 231 42

Evidence Code
§ 240 ..... 98, 108, 109, 110
§ 240, subdivision (a)(4) 109, 110
§ 352 ..... passim
§ 1240 ..... 120, 121
§ 1291 ..... passim
§ 1291, subdivision (a) 104

TABLE OF AUTHORITIES
(continued)

Page

Penal Code
§ 187 1
§ 190.2, subdivision (a)(17) 1
§ 190.3, factor (b) 113
§ 190.3 ..... passim
§ 190.3, Subdivision (a) 130
§ 190.3, subdivision (b) 117
§ 192 18
§ 211 18
§ 211 18
§ 242 117
§ 261 1
§ 664 18
§ 667.5, subdivision (b) 2
§ 667, subdivision (a) 2
§ 1054.3 57
§ 1054.5 57
§ 1202.3 18
§ 1239, subdivision (b) 2, 11, 14, 15
§ 12021 18
§ 12022 2
§ 12022.5 18
§ 12022.5 18

CONSTITUTIONAL PROVISIONS

California Constitution
Article I, § 16 39

United States Constitution
Sixth Amendment ..... passim
Eighth Amendment 137
Fourteenth Amendment 70

OTHER AUTHORITIES

CALCRIM No. 306 59

TABLE OF AUTHORITIES
(continued)

Page

CALJIC
No. 1.01 64
No. 1.02 ..... 93, 103, 104
No. 2.20 ..... 60, 62
No. 2.28 ..... passim
No. 2.90 64
No. 8.83.2 76
No. 8.85 129

INTRODUCTION

On May 16, 1997, Michelle Montoya was a senior at Rio Linda High School in Sacramento. After school ended that day, she met with her English teacher to discuss a research paper. When the meeting concluded, Montoya used a telephone in a shop classroom to call her stepfather for a ride home. When her stepfather said that he could not pick her up immediately, Montoya told him that she would find another ride home. Appellant, a substitute custodian at the school, then took the opportunity to rape and brutally murder Montoya as the two were alone in the shop classroom. Appellant bashed Montoya's head several times with a crowbar, stabbed her in numerous places throughout her body, attempted to conceal the crime, and then left her dying on the classroom floor. The rape, murder, and cover-up occurred in only 20-25 minutes. Appellant lied to police that day, denying any involvement in the attack. At trial, appellant admitted murdering Montoya, but denied raping her, claiming that the two had consensual sex. However, no evidence was presented that appellant and Montoya had a relationship or even knew one another prior to the murder. Appellant claimed that he killed Montoya because he was worried that, as a second-striker on parole, he might receive a life sentence under the Three Strikes Law for having sex with a minor.

STATEMENT OF THE CASE

On November 21, 1997, the Sacramento County District Attorney filed an information charging appellant in count 1 with murder (Pen. Code, § 187) and in count 2 with forcible rape (Pen. Code, § 261). The information further alleged the special circumstance that the murder occurred in the commission of rape. (Pen. Code, § 190.2, subd. (a)(17).) The information also alleged that appellant used a deadly weapon in the

commission of the murder (Pen. Code, § 12022, subd. (b)) and that he suffered eight prior felony convictions (19 CT 3771-3773).

On March 17, 2000, the parties stipulated to change the venue of the trial to Sonoma County. (24 CT 5014.)

On July 5, 2000, jury selection commenced. (28 CT 5633.) The jury started deliberations on August 29, 2000. The following day, the jury convicted appellant of all charges in the information and found true the special circumstance allegation. (29 CT 5946.) The trial court found all of appellant's prior convictions true. (30 CT 6171-6272.)

On October 17, 2000, the jury began deliberations in the penalty phase of the trial. (31 CT 6193.) On October 18, 2000, the jury returned a verdict of death. (31 CT 6283.)

After denying appellant's motions for a new trial and to modify the verdict (33 CT 6610, 6642), the trial court sentenced appellant to death by execution on count 1 (first degree murder), and stayed a 25 year to life term on count 2 (rape). The court also imposed consecutive terms of one year for the weapons use allegation, ten years for two prior convictions under Penal Code section 667, subdivision (a), and one year for a prior prison term under Penal Code section 667.5, subdivision (b). (33 CT 6669.)

Appellant's appeal is automatic pursuant to Penal Code section 1239, subdivision (b). (33 CT 6708.)

STATEMENT OF FACTS

Guilt Phase

I. THE PEOPLE'S CASE

A. Montoya's Scheduled Conference After School

On May 16, 1997, Rio Linda High School senior Michelle Montoya had a conference scheduled for 2:30 p.m. with her English teacher,

Catherine Morel, to discuss a research paper. (16 RT 4746-4747.) The meeting started late, around 2:50 p.m. because Morel was meeting with another parent. (16 RT 4748-4749.) At the beginning of the meeting, Montoya told Morel that she needed to make a phone call for a ride home later. Since there was no phone in her classroom, Morel offered Montoya the use of her cell phone. Montoya declined due to concern for the cost of the call, even though Morel insisted she not worry. Montoya told Morel she would make the call later. (16 RT 4750.) Morel thought the meeting went very well. Montoya was "very enthused" by their conversation about the research paper. Morel viewed Montoya as a "very happy, outgoing person," "full of life and energy," who had "lots of friends," and was "[j]ust a really happy high school senior." (16 RT 4749.) After the meeting ended, Morel again offered Montoya the use of her cell phone, but Montoya declined. Morel assumed that Montoya would use either the phone in the main office or a pay phone. After Montoya left, Morel remained in her classroom to meet with senior counselor Tony Mickela about another student. However, Morel was in a hurry to get to the school district office before it closed for the weekend at 4:00 p.m. When she left, she looked at her watch and noted the time was 3:35 p.m. (16 RT 4751, 4753, 20 RT 6005-6010.) Montoya had left Morel's classroom two or three minutes earlier, at about 3:32 or 3:33 p.m. (16 RT 4757.)

B. Montoya Phones for a Ride Home

Sometime between 3:30 and 3:45 p.m, Montoya called home and asked her stepfather, Joseph Schleeter, to pick her up at the high school. (16 RT 4776-4777.) When Schleeter told Montoya that his brother had just arrived at the house, she asked him to hurry up because it was hot.[1/]

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[1]. Schleeter reasoned that Montoya called between 3:30 p.m. and 3:45 p.m. based on the time indicated on his

(continued...)

(16 RT 4778.) Schleeter told Montoya that he first had to drop her younger siblings off at their grandfather's house to go swimming, and that it would take him about 10-15 minutes to pick her up. Montoya became frustrated, told him that she would find her own ride home, and then hung up the phone. (16 RT 4779-4780, 4784-4785.) After Schleeter dropped the younger children off at their grandfather's house, he drove to the high school, arriving there between 4:00 and 4:15pm. He parked in front of the school and waited about 10 to 15 minutes for Montoya, but she never came out to the car. (16 RT 4780, 4786-4787.)

C. Appellant's Employment as a Substitute Custodian

On the afternoon of May 16, 1997, appellant arrived at Rio Linda High School to start his shift as a substitute custodian. His first day of employment had been May 5, 1997. He had previously worked the night shift at the high school, from 2:30 p.m. to 11:00 p.m., on three other occasions. (16 RT 4862-4864.) Appellant reported to the acting lead custodian, Christine Mundy, and told her that he was working as a substitute that day. (17 RT 4938-4939.) Mundy had never met appellant. As they walked towards the custodian's office, she asked if he was familiar with the rooms he needed to clean. Appellant confirmed that he knew the route included wings K, L, H and M (ROTC building) and the trailers (T-building). (17 RT 4939-4941.)

Custodians Robert Simpkins and Faruq Shirley worked the night shift with appellant on May 16, 1997.[2/] (16 RT 4876, 17 RT 4986.)

(...continued)
brother's ATM receipt which showed that he had stopped at a Wells Fargo Bank about 15 minutes away from Schleeter's home. (16 RT 4779-4780.)

[2]. Both men had previously worked with appellant on
(continued...)

Appellant's assignment included cleaning the same route as the night before, so Simpkins assumed appellant was familiar with the process of starting the route at the H-wing and then moving to the L-wing. (16 RT 4879, 4880-4885.) When school let out at 2:30 p.m., Simpkins gave appellant a set of keys to the rooms in L-wing. (16 RT 4885-4887.)

D. Appellant Claims That He Discovers A Body in the Shop Class

Shirley saw Simpkins and appellant just before he left the custodian's office to work his route. (17 4987-4988.) He noticed that appellant was wearing a tank top, a shirt and a pair of jeans. At approximately 4:00 p.m., Shirley and Simpkins were next to the J-wing when they heard a load noise, like a door slamming, near a storage area by the F-wing. (16 RT 4887-4888, 17 RT 4989-4990.) As the men walked towards the area to investigate, they saw appellant backing out of the women's faculty bathroom. (16 RT 4888-4889, 17 RT 4991-4992.) He was bent over and wiping either his hands or the floor with paper towels. (16 RT 4889.) Simpkins thought that appellant was cleaning the staff restroom since it was a part of his route and assumed that he probably slammed the door. (16 RT 4889-4890.) However, Shirley did not see appellant's cleaning cart nearby. (17 RT 4993.)

As Shirley walked towards the custodian's office, appellant gestured and tried to say something to him. Shirley realized appellant was asking for

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(...continued)

several occasions. As acting lead custodian on the night shift, Simpkins had trained appellant. (19 RT 4876, 17 RT 4986-4987.) On his first day of work, Simpkins showed appellant where to find materials and a cleaning cart, and demonstrated the best way to clean the rooms on his route. Simpkins usually cleaned the route assigned to appellant. (16 RT 4876-4877.)

a cigarette. When Shirley told appellant that he did not smoke, appellant asked if Simpkins might have as cigarette. (17 RT 4994.) Shirley started to turn and walk away, but appellant said that he wanted to show Shirley something. (17 RT 4994-4995.) Shirley followed appellant to the ROTC room located in building M-1. Appellant asked Shirley to demonstrate how to properly clean the room. Shirley was surprised because appellant he had cleaned the room the previous day. (17 RT 4997-4998.) At that time, Shirley noticed that appellant was wearing only a tank top and jeans; the shirt he had on earlier was gone. (17 RT 4998.)

After explaining the cleaning procedure for the ROTC room, Shirley walked back towards the custodian's shop for cleaning supplies. Suddenly, he heard appellant yelling for him. Shirley continued into the custodian's shop to grab the supplies. When he exited the room, appellant was waiting at the doorway. He told Shirley to come with him to the wood shop. Shirley asked appellant what was wrong and appellant told Shirley to just come and see. Shirley followed appellant as he ran towards the general shop in L-1 and L-2. (17 RT 4999-5002.) He continued to follow appellant as he ran through the open door of L-2 (the shop office) and the next open door that lead into the wood shop in L-1. As Shirley walked into L-1 he saw appellant standing next to a dead body laying in a pool of blood on the floor. Appellant did not touch the body. When Shirley said they should get Simpkins, appellant looked at the body and then at Shirley as if to ask what should they do. (17 RT 5002-5003.)

Appellant and Shirley ran to find Simpkins. (17 RT 5004.) They located him cleaning the women's bathroom in the D-wing. As Shirley and appellant caught their breath, Shirley told Simpkins that there was a dead body in L-1. (17 RT 5005.) Simpkins immediately radioed the principal, Leo Burns, and informed him that a body had been found in L-1 and to call 911 because someone was hurt. (16 RT 4890-4891.) As appellant, Shirley,

and Simpkins walked towards towards L-1, appellant told Shirley that he had checked to see if "she" was still alive and that he had rolled the body over.[3/] (17 RT 5005.)

E. Officials Discover Montoya's Body

After Leo Burns received the call that a custodian had found a body in one of the shop classrooms, he and vice principal, Elmena Nelson, proceeded to the general shop located in L-1. On the way, they encountered appellant, Shirley, and Simpkins. (17 RT 5040, 5053-5054.) Nelson asked the custodians if they were "absolutely positive" a body had been found. At that time, Nelson noticed that appellant was wearing a tank top. One of the custodians verified that there was a body in L-1. Nelson and Burns ran towards the area. (17 RT 5041-5042.) The general shop office (L-2) was dark when they arrived, so Simpkins turned on the light. (16 RT 4894.) Burns looked from L-2 through the glass partition into the wood shop in L-1 and saw the body of a young woman on the floor. (17 RT 5054-5055.) Her throat had been cut and there was a pool of blood around her head. (16 RT 4895; 17 RT 5044, 5055.) She was dressed in sandals, jeans shorts, and a blouse; her backpack was strapped on her back. (16 RT 4895, 17 RT 5042.) Neither Burns nor Nelson recognized the body of the young victim at the time. (17 RT 5044, 5047, 5056, 5060.)

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[3]. A few days after the murder, Christine Mundy walked detectives through the route that appellant would have taken to clean the classrooms. She determined that appellant completed only 10 to 15 minutes of cleaning on May 16, 1997. (17 RT 4944-4948.) The prosecutor also played a videotape of the classrooms assigned to appellant which showed the amount of cleaning accomplished in each room. (17 RT 4964-4977; Ex. 1.)

When Burns stepped outside to call 911 on his cell phone, he observed appellant bending over and leaning with his back against the wall. Appellant's hands were on his knees and he was breathing hard. Burns noticed that appellant had on a "muscle shirt," which was not appropriate attire for a school employee. (17 RT 5055-5058.) Nelson asked the custodians if they had observed anyone in the area. Appellant said that he had seen some kids hanging around. (16 RT 4895-4896.) Nelson told the custodians to find the students. (17 RT 5045.) The custodians located a student sitting on the bleachers. (16 RT 4897.) When Nelson spoke with the student and took his name, she did not see any blood on him, so she let him leave. (16 RT 4897, 17 RT 5054.) As Nelson walked back to the shop classroom with the custodians, she asked if any of them had touched the body. Appellant told Nelson that he had touched the body. (17 RT 5007-5008, 5045-5046.)

Emergency personnel received a dispatch at 4:08 p.m. and arrived at Rio Linda High School at 4:12 p.m. They found Michelle Montoya lying face down on the floor in a puddle of blood with her backpack on. Her face and neck were covered with blood. (17 RT 5097-5098.) Montoya had lacerations to her forehead and massive injuries to the rear of her head exposing brain matter. (17 RT 5103-5104.) A puncture wound to the forehead was so severe that the EMT treating her thought it was a gunshot wound. (17 RT 5104.) At 4:14 p.m., the emergency personnel connected Montoya to an EKG and administered CPR. When Montoya's condition did not change, they transported her by ambulance to UC Davis Medical Center. (17 RT 5105.) Montoya died while in transit and was pronounced dead. (17 RT 5106-5107, 5134.)

F. Appellant's Statements to the Sheriff's Deputies

When Grant School District Police Officer Ruben Del Hoyo responded to Rio Linda High School, Principal Burns told him that

appellant had discovered a body in room L-1. (17 RT 5063, 5068.) Officer Del Hoyo entered the room and observed Montoya lying in a pool of blood with her head towards an open tool cabinet. (17 RT 5065.) She had lacerations on her throat. (17 RT 5066-5067.) Officer Del Hoyo exited the classroom and asked appellant what happened. Appellant appeared "very nervous." He continually moved around and was "sweating excessively from his forehead." Appellant told Officer Del Hoyo that he had been working in L-1 when he saw a white girl lying on the ground. When appellant turned her over, he realized she was dead, so he ran to get help. (17 RT 5068.) Appellant asked for a drink of water, so Officer Del Hoyo escorted him to the custodian's office. Appellant continued to sweat excessively. (17 RT 5069-5070.) When they returned to the shop classroom, several sheriff's deputies were at the scene. (17 RT 5070-5071.)

Appellant told Deputy Chris Wilder that he had used his shirt to wipe blood off of his hands and pants. Deputy Wilder observed small red spots on appellant's shoes and collected them as evidence. The deputy also photographed the soles of all the emergency workers' shoes to exclude them as the individual who left bloody shoe prints near the victim's body. (18 RT 5268, 5288, 5292.)

Sheriff's Detective Michael Abbot learned from another deputy that one of the custodians had seen appellant exiting a bathroom where blood was found.[4/] Detective Abbot told appellant that, because he was a witness

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[4]. Officials discovered blood in a boy's bathroom located near the G-wing of the school. It was later determined that the blood was not connected to the murder. (17 RT 4990, 5028, 5156-5157, 5162, 18 RT 5282.) Sheriff's deputies did not find any blood in the bathroom that Shirley and Simpkins had observed appellant exiting shortly before

(continued...)

to a violent crime, he needed to wait for detectives to arrive so they could question him. (18 RT 5224-5255.) Detective Abbott placed appellant in the back seat of a patrol car. (17 RT 5161-5162, 18 RT 5224-5225.) A short time later, Detective Abbott opened the rear door and asked appellant to walk to the back of the patrol vehicle so he could talk with him. (17 RT 5153.)

When Deputy Abbot told appellant that he wanted to talk about the incident, appellant said, "I'm convicted and I won't go to court about this." (17 RT 5164.) Appellant told Deputy Abbott that he was a substitute janitor and had worked at Rio Linda High School on six or seven occasions. He said that he had been working in rooms L-1 and L-2 with another janitor (Shirley), but they got separated. As appellant continued his rounds picking up garbage, he discovered the body of a young woman. (17 RT 5165.) He told Deputy Abbot that, "he walked up to where Miss Montoya was lying on the ground, and he could see there was a pool of blood around her." (17 RT 5167.) Appellant observed a cut on her neck. He described reaching down and touching her shoulder with his left hand, but claimed that he did not push or move her. Appellant said that he then "freaked out" and ran from the classroom. He stumbled and fell, causing his pants to touch a puddle of blood. (17 RT 5167-5168.) Appellant further stated that he had wiped his hands off on his shirt, which he had in his back pocket. (17 RT 5169-5170.) He also washed his hands off with water from a bottle that one of police officers had given him.

When Deputy Abbott asked appellant what position the body was in when he touched her, appellant responded, "Why, was she lying on her back?" (17 RT 5171.) Detective Abbott also asked appellant if there were

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(...continued)

the body was found. (18 RT 5230, 5262-5263.)

any weapons inside the classroom, and appellant laughed, stating, "The whole room is full of weapons." (17 RT 5172.) Appellant said the reason he went into the shop classroom was to empty the garbage cans, even though he did not have equipment for that task.[5] (17 RT 5173.) During the conversation, appellant had a "cocky attitude" and "didn't seemed phased at all."[6] (17 RT 5174.) When the interview concluded, Deputy Abbott placed appellant in the rear of the patrol car. Appellant eventually became "confrontational and defiant." (*Ibid.*) Deputy Abbott later transported appellant downtown to the Sheriff's Department. (17 RT 5175.) After being advised that he was under arrest, appellant fell asleep. (17 RT 5176.)

G. Evidence Collection and Analysis

"Low velocity" or "low energy" large drops of blood on a table saw in the back of the shop classroom were caused either by a person standing over the table and dripping blood onto it, or from slowly swinging an object with blood on it. (19 RT 5595-5596.) A crowbar hanging in a tool cabinet had a pattern of blood that indicated some of the blood drops had been wiped off. (19 RT 5598, 5600.) The victim's purse, backpack, and a Pepsi bottle were all within 10 to 15 feet of each other near the body and the large pool of blood. (19 RT 5604.) Nearby, a paper coffee cup on the corner of a large wooden table contained resin and a bloody tampon. It appeared as though the resin was already in the cup when the tampon was placed into it.

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[5]. Appellant's cleaning cart was found in the ROTC room located in classroom M-1. (17 RT 4989, 4968-4969, 4978-4979, 5020, 18 RT 5231, 5281.) A bracelet with the inscription "I heart U" was found on the cart. (17 RT 4969, 4981.)

[6]. Burns and Simpkins similarly testified that appellant did not seem "agitated" by discovering the body a young woman in a pool of blood. (16 RT 4891, 175059.)

The tampon did not contain any semen. (19 RT 5593-5594, 5609.) A tampon recovered from the victim's vagina and a sanitary napkin found in her underwear both tested positive for semen; the tampon contained "hundreds and hundreds" of spermatozoa. (1 9RT 5609-5612.)

Blood stains and human tissue smears on the front torso, right shoulder, and neck of appellant's shirt were consistent with using the shirt to wipe a bloody object. (18 RT 5269-5270, 19 RT 5625625.) Blood droplets on the back right shoulder of the shirt were caused by cast-off from swinging a bloody object over his shoulder. (19 RT 5627.) A blood pattern on appellant's shirt had a pattern of a bloody object that was linear in nature indicating a tool such as an awl or screwdriver. (19 RT 5627-5268.).

Crime scene technicians discovered blood spattering on the top of appellant's boots and blood stains in the recesses of the boots' soles. (18 RT 5273, 5288-5291; 19 RT 5558, 5616-5618.) The blood spatter differed from the pattern of a "foot stomp," such as when a shoe steps into a pool of blood. The pattern of small blood drops rose above the knee on appellant's pants and was caused by medium to high blood spray from blunt force trauma. (18 RT 5378-5381.) The blood spatter was deposited at a close proximity to the victim. (18 RT 5322, 5378; 19 RT 5619, 5621) The blood contained human tissue and a small chip of green paint that matched the paint on a bloody crowbar found in a tool cabinet at the scene. (19 RT 5620-5629.) A "transfer" blood stain was found on the front portion of appellant's boxer shorts. (18 RT 5379-5380; 19 RT 5626.) Appellant's pants and boxer shorts also contained fibers from Montoya's underwear and sanitary napkin. (19 RT 5333, 5633-5637.) Appellant's clothes did not contain pubic hair transfers. (18 RT 5368.) Appellant claimed that a scratch on the back of his hand appeared fresh because, even though he had received it the previous evening, he kept scratching it. (18 RT 5382-5383.)

Videotape footage of the crime scene showed clear shoe sole impressions in a pool of blood on the floor. (18 RT 5273, 5285-5286.) The prints tracked alongside the work tables to the tool cabinet. (19 RT 5588-5590, 5642-5645.) Photographs of appellant's boots confirmed that he made the bloody shoe prints found in the pool of blood surrounding the victim's body. (19 RT 5646-5647.)

At the jail, a hidden camera in the interview room captured videotape footage of appellant unzipping his pants and thoroughly examining his penis and pelvis on two occasions. He also raised his fingers to his nose, apparently to try and detect any odors. (18 RT 5389, 5391-5392.) Appellant refused to submit to a sexual assault examination to collect biological samples at the jail. (18 RT 5383-5384.) Therefore, he was transferred to the University of California Davis Medical Center where hospital staff collected blood and hair samples, as well as penal and mouth swabs. (18 RT 5384-5385.)

H. DNA Evidence

DNA analysis, using both the RLFP and PCR methodologies, determined that appellant was the donor of the sperm found on the tampon removed from Montoya's vagina and eliminated her boyfriend, William Wilson (16 RT 4805, 4782) as a possible donor. (17 RT 4696, 19 RT 556, 5615, 5681, 5684, 5686-5688, 5696-5697, 5717, 5720, 5722, 5724, 5729-5730.) DNA testing also indicated that Montoya's blood was on the tampon found in the coffee cup, the crowbar in the tool cabinet, and on appellant's shirt, pants, and boots. (19 RT 5690-5691, 5698-5699, 5724-5727, 5729-5730.)

I. Autopsy Report

The cause of Montoya's death was multiple traumatic injuries and blunt force trauma to her head, which caused "a large comminuted complex

fracture" through which "the brain was actually visible." (18 RT 5248, 5457-5458; 19 RT 5531.) This fracture covered the entire left side of Montoya's skull; "it obviously took a substantial amount of force to cause that sort of damage to the skull." (18 RT 5433). "Basically the skull was just shattered." (18 RT 5435.) Superficial incise wounds on her neck did not involve the large vessels, and would not have interfered with her ability to breath, although she certainly bled from the wounds inflicted. (18 RT 5249-5430.) Stab wounds covered the upper, mid and lower parts of Montoya's back. One stab fractured a rib and extended into her left lung. (18 RT 5430-5431, 5435.) Montoya sustained scratches and bruises to her forehead, and abrasions to her left breast, right hand, left shin, both feet, and the left part of her neck, shoulder, upper and mid-back. (18 RT 5433-5435.) The bruises on her hand were not the "classic" type of defensive wounds usually found on a victim. (18 RT 5434.) Montoya may have survived the lacerations and stab wounds if she had received treatment immediately, but the stab wound to her back would have eventually killed her. (18 RT 5458.) The most devastating injuries were the blunt force trauma blows to Montoya's head. Although she did not die instantly, the blows to her head caused death in a matter of minutes. (*Ibid.*)

A sexual assault examination revealed no evidence of tearing, bruising or abrasions that could be seen "with the naked eye." (18 RT 5480-5481; 19 RT 5531.) A coloposcopic examine showed a small amount of redness on the edges of the labia minora, but no evidence of other injuries. (18 RT 5481-5482; 19 RT 5532.) However, the absence of genital trauma did not necessarily indicate that no forcible rape occurred. (19 RT 5779, 5797.)

II. THE DEFENSE CASE

Appellant's defense consisted of attacking the prosecution's time line of events and arguing that Montoya engaged in consensual sex with

him. William Thrailkill, a wood shop teacher whose classroom was located in the K-wing, next door to the shop where Montoya was killed, testified that, on the day of the murder, about 16 students were in his classroom from 2:15 until 3:00 p.m. Three to four students stayed until 3:40pm. (20 RT 5974-5977.) At about 3:30 p.m., Thrailkill walked to his truck and trailer parked about 40-50 feet away from the open "roll-up"door to the shop in L-1. (20 RT 5978-5981.) It was a very hot day, so the exhaust fans were on inside the shop and all of the windows were open. (20 RT 5979.) Thrailkill left his shop classroom again around 3:45 p.m. to unhook the trailer from his truck. (20 RT 5980-5981.) While he was outside he did not see any lights on in L-1, nor did he hear any noises, such as people running around, yelling, or screaming. (20 RT 5981-5982.) The school was basically deserted at the time. (*Ibid.*) Thrailkill did not see Catherine Morel and Tony Mickela when he left the school at 3:45 p.m. (20 RT 5983-5984.) Thrailkill had been introduced to appellant earlier at that day, at about 2:20 p.m. At that time, appellant was wearing a white tank top. (20 RT 5985.)

On the day of the murder, counselor Tony Mickela visited teacher Catherine Morel in her classroom after school ended, but he did not remember the exact time. (20 RT 6004.) He saw Montoya with Morel inside the classroom. (20 RT 6005.) Mickela heard Morel offer her cell phone to Montoya a couple of times, but Montoya said that she would call for a ride later. (20 RT 6007-6008.) Although Mickela estimated that he spoke with Morel for about ten minutes after Montoya left, he had no recollection of the exact time he left the classroom. (20 RT 6008-6009.) When Mickela walked back to his office he passed classroom L-1, but did not see appellant. (20 RT 6010.)

Greg Lee was appellant's parole agent in 1997. (20 RT 6013-6014.) He did not regularly discuss the possibility of being returned to prison for

life with his three-striker parolees. (20 RT 6015-6016.) He could not recall telling appellant that he was a third-strike candidate, although he knew appellant was eligible under three strikes law if he received a new felony conviction. (20 RT 6015-6017, 6019.) Appellant, who was 33 or 34 years old at the time, told Lee that he worked on-call as a janitor at a high school. (20 RT 6020-6022; 21 RT 6156, 6158.) Lee was surprised that appellant was offered the job considering his facial tattoos. (20 RT 6023.)

Brent Turvey, an expert on crime scene reconstruction, opined that appellant and Montoya engaged in sexual intercourse inside the workshop in L-1 and not in the office in L-2. (21 RT 6124, 6133.) Based on the fact that some blood, a purse and a tampon wrapper were found near the open tool cabinets, he believed that Montoya had inserted a new tampon in that area after having sex with appellant. (21 RT 6143-6144.) When asked why a victim would undress, put a used tampon in a cup, and have sex in one location of the room, and then move to a "private" location behind the cabinet door to insert a new tampon, Turvey explained, "in my experience it's very common for someone to want privacy for that act." (21 RT 6159.)

Turvey believed that since Montoya was a healthy, strong, and confident young girl, she would not likely submit to a sexual assault, and instead, would have fought back. (21 RT 6172.) Turvey did not believe the crime scene was staged in anyway, and in his opinion the attempts to cover-up the crime were "superficial" and done in a "hasty manner". (21 RT 6173-6174.) He believed the attack was done out of rage, as opposed to trying to silence the victim, because it was apparently spontaneous and lacked planning. (21 RT 6179.) He opined that Montoya's injuries were indicative of "overkill." (21 RT 6150.) He was not aware of any injuries to Montoya which indicated forced rape. (21 RT 6187-6188.) Turvey also believed that none of Montoya's injuries were sustained during sexual activity. (21 RT 6169, 6268-6269.) He did not dismiss the possibility that

Montoya submitted to the sex act because she had been threatened with force. (21 RT 6271.)

Sherry Arndt, a nurse practitioner specializing in sexual assault examinations, reviewed the autopsy report and agreed that there were no visible injuries consistent with forced sexual contact. (21 RT 6335, 6349-6350.) She opined that if an adult male had rough, forced, unlubricated, and hasty sex while raping a young girl there would likely be some injury. (21 RT 6358.)

III. THE PROSECUTION'S REBUTTAL

Fingerprints lifted from the telephone near the workshop did not match Montoya's fingerprints. Crime scene technicians were unable to develop a latent finger print impression from a variety of objects collected at the crime scene, including an unopened soda bottle, a saw blade, the paper cup containing resin and the used tampon, a tampon wrapper and string, and the green crowbar. The physical assault on Montoya occurred in the workshop in L-1 near the table saw. Based on the shape and position of the blood surrounding the table saw, Montoya was probably standing upright when she was attacked. Sawdust or wood shavings discovered on one side of the blood soaked tampon found in the paper cup of resin, indicated that the tampon had rested on another surface covered in wood shavings before being placed in the cup; there were no shavings inside the cup. There was no evidence suggesting whether it was appellant or Montoya who placed the tampon in the paper cup. Blood spatter on the back of appellant's shirt was consistent with swinging a weapon over his shoulder and casting off blood from the weapon. The crime scene also contained evidence indicating that appellant attempted to clean the area and conceal the murder. (22 RT 6474, 6476, 6494-6495, 6498.)

Penalty Phase

I. AGGRAVATING EVIDENCE

A. Prior Convictions

Between the ages of 17 and 34, appellant sustained eight felony convictions: (1) a February 24, 1986, conviction for the voluntary manslaughter (Pen. Code, § 192) of Daniel White in Case No. A-758525 (25 RT 7565; Ex. 61); (2) a February 24, 1986, conviction for the attempted armed robbery (Pen. Code, §§ 664/211 & 12022.5) of Daniel White (25 RT 7565; Ex. 61); (3) a February 24, 1986, conviction for the armed robbery (Pen. Code, §§ 211 & 12022.5) of Renaud Vann in Case No. A-755256 (25 RT 7569, 7571; Ex. 64); (4) a February 24, 1986, conviction for the armed robbery (Pen. Code, §§ 211 & 12022.5) of Marcetta Brewster in Case No. A-755256 (25 RT 7569, 7571; Ex. 64); (5) a June 22, 1982, conviction for the armed robbery (Pen. Code, §§ 211 & 12022.5) of James Moore in Case No. A-374382 (25 RT 7560-7562; Ex. 60); (6) a June 22, 1982, conviction for felon in possession of a firearm (Pen. Code, § 12021) in Case No. A-374382 (25 RT 7560-7562; Ex. 60); (7) a June 22, 1982, conviction for the attempted armed robbery (Pen. Code, § § 664/211 & 12022.5) of Seifeddin Khalatbary in Case No. A-374766 (25 RT 7562-7563; Ex. 59); and (8) a February 4, 1980, conviction for explosion of a destructive device with intent to injure (Pen. Code, § 1202.3) in Case No. A-354612 (25 RT 7555-7560; Ex. 58). (See 28 RT 8410-8415.)

B. Evidence of Prior Convictions and Other Acts of Violence

1. Kelly Richardson Minix

Kelly Minix worked with appellant at the 49'er Truck Stop in Sacramento in 1997. Sometime early in 1997, appellant walked Minix to her car after work. Minix was in a hurry and did not want to talk to

appellant. After she got into her car, appellant leaned into the vehicle and either sucked or pinched Minix's neck against her will, leaving a bruise. Minix pushed appellant away, and he apologized. (24 RT 7167-7168, 7174.) Minix showed the bruise to a friend (24 RT 7215), but she did not tell her employer or the police about the incident (24 RT 7177). Appellant later called Minix and apologized. (24 RT 7177.) Minix's employer found out about the incident and asked her to submit a written statement in March 1997. Shortly thereafter, appellant stopped working at the truck stop. (24 RT 7180.)

2. Delores Thomas

Delores Thomas married appellant in May 1991, while he was in prison. When appellant was paroled in June 1994, he moved in with Thomas and her two children. The couple also had one daughter, who was conceived while appellant was in prison. (24 RT 7219-7221, 7231.) Thomas helped appellant get a job at the 49'er truck stop in Sacramento. (24 RT 7221, 7239-7240.) In August 1994, the couple argued, and appellant struck Thomas on the side of her nose. Due to this incident, his parole was violated, and he returned to prison. When he was released in August 1995, he moved in with Thomas for six or seven months. After appellant was arrested for murder, Thomas ended their relationship. (24 RT 7227, 7235.)

3. Vincent McGowan

On July 4, 1985, Deputy Sheriff Lee Woods was on duty at Los Angeles County jail when he heard screaming. He saw inmate Vincent McGowan holding the left side of his bleeding neck. Appellant was looking at McGowan through his cell bars, holding a toothbrush handle, and yelling, "Crippin' for real." (25 RT 7323.) McGowan told Deputy Richard Calzada that "cell nineteen, Thomas" had cut him. Appellant was

housed in cell 19. The wound to McGowan's neck was deep and required 14 stitches to close. (25 RT 7338, 7342-7343.) Deputies searched appellant's cell, but did not recover a weapon. (24 RT 7328.)

Gerald Franks of the Department of Corrections observed recent scars on McGowan's throat when he was admitted to state prison. McGowan said that appellant had cut him and that appellant was a potential enemy. Franks interviewed appellant and he verified that he had slashed McGowan's throat. (25 RT 7352-7360.)

On September 12, 2000, a few days before the penalty phase of the trial commenced, Clark Mason, a reporter for the Santa Rose Press Democrat, interviewed appellant at the county jail. Appellant said that he had slashed a man's throat while the two were in jail because the man was a snitch. Mason published appellant's statements in the newspaper the next day. (25 RT 7425-7426.)

4. Seifeddin Khalatbary

On December 12, 1981, 61 year-old Seifeddin Khalatbary, a diplomat at the Iranian Embassy in Washington D.C., was visiting his nephew, Emil Shokohi, in Marina Del Ray, California.[7/] That evening, Khalatbary borrowed Shokohi's car at about 6:00 p.m. Sometime between 4:00 and 5:00 a.m., the police called Shokohi and told him that his uncle was at a local police station. When Shokohi picked up Khalatbary, "he had a cut on his forehead and his face was all bruised and his left or right arm was not able to move and he was semi-unconscious." (25 RT 7375-7379.) When Shokohi received his car from the police about a week later, it was damaged and required repairs. Khalatbary later testified at a criminal trial

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[7]. At the time of appellant's trial, Khalatbary had passed away, so his nephew, Shokohi, testified about the incident.

related to the incident. (25 RT 7379-7381.) Appellant was convicted of attempted robbery with an arming enhancement and received a four year state prison sentence. (25 RT 7562-7564.)

5. Renaud Vann

In July 1984, appellant and another man robbed Renaud Vann, his wife, and mother-in-law, Estella Black, in South Central Los Angeles. Appellant pointed a gun at the group and demanded money. Vann gave appellant money and gave his radio to the man with appellant. (25 RT 7435-7453.) As a result of the incident, appellant pleaded guilty to armed robbery. (25 RT 7569, 7571.)

6. Samantha Mims

On November 16, 1978, 12 year-old Samantha Mims was asleep in her bed when appellant, who was 16 years-old, entered her room, lifted her out of her bed, and shot "underneath" her body. (25 RT 7533-7535.) As a result, Mims lost one kidney, her small intestine, one rib, and suffered injuries to her liver and lung. She required a colostomy and remained hospitalized for approximately one year after the attack. (25 RT 7537.)

7. Daniel White

Sometime after midnight on July 26, 1984, Ricardo Jones saw appellant approach a man in a truck on a side street off Montclair Avenue in South Central Los Angeles. (25 RT 7574.) Appellant said, "Give me the $25 or give me the rock." (25 RT 7583.) The driver argued with appellant and started to drive away. Appellant pulled out a gun and shot the driver. The truck swerved off the road, onto a lawn, and the driver fell out of the truck. (25 RT 7577-7578.) Appellant pleaded guilty to voluntary manslaughter and was sentenced to a term of 18 years and eight months in state prison. (25 RT 7571.)

C. Victim Impact Evidence

Montoya's mother, Pam Schleeter, testified about the devastating impact of the murder on her family. Montoya was the oldest of her three children. She had been a caring, loving and happy girl. The victim had been Schleeter's best friend and always helped with her younger siblings. Their family was large, and very close; many relatives lived nearby Montoya's family. The entire extended family had great difficulty returning to normal life after appellant murdered Montoya. (26 RT 7682-7690.)

On the day of the murder, Schleeter last saw Montoya she left for work. Schleeter told the victim that she loved her, and to have a good day; Schleeter never saw Montoya alive again. (26 RT 7691-7692.) Schleeter described her life since the murder:

> I don't have a life. I just wanted to die when she died. It's hard to get back your life when somebody so important is taken away from you. That's so actually I just go to work, come home do what I have to do. That's it. I'm just like a robot.

(26 RT 7694.) Schleeter had to take antidepressants to cope. For two years she slept in Montoya's bedroom, waiting for her to come home. Montoya's younger sister was still in denial about the murder and believed that Montoya was alive. Montoya's younger brother was extremely angry about the murder and had to be near his mother all the time. (26 RT 7694-7695.)

Darcie Purcell, one of Montoya's closest friends from high school, testified about the impact of the murder. Purcell had a very close relationship with Montoya, her mother, and Montoya's entire extended family. Purcell often stayed the night at Montoya's house. She loved spending time with Montoya's "loving and caring family." Purcell's boyfriend and Montoya's boyfriend were also close and the two couples often spent time together. Purcell described Montoya as "everybody's

friend," "very beautiful," and "outgoing." Montoya worked two jobs to help support her family, played soccer and powder puff football, and was involved with peer counseling at the high school. The teachers and her friends at the school loved her. The victim had been a happy, outgoing girl who was friendly with everyone. (26 RT 7698-7702.)

On the day of the murder, Purcell and Montoya planned to attend a party together. When Purcell called Montoya at home, her mother answered crying, and told Purcell that something has happened at the high school. When Purcell arrived at the school, authorities told her, and several of Montoya's other friends, that Montoya was dead. (26 RT 7702-7704.) Purcell described that moment:

> I -- I don't -- you don't even know how to feel. You're 17 years old. And, you know, life's easy. You're getting ready to graduate from college [sic] and you have this huge burden put on you.
>
> And death is very hard to deal with. I didn't know. I didn't know anything. What to do. My first reaction is just to cry. Her dad was extremely upset, throwing desks against the wall. A moment in my life I probably never forget because it's just like -- like can't -- I can't explain it.

(26 RT 7704-7705.)

Purcell could not eat, be alone or go to school after the murder. She spent her time with Montoya's family, stayed at their house, and helped them select a casket for Montoya's funeral. At the graduation ceremony a few weeks later, Purcell walked with Montoya's mother and younger siblings in her memory. Ever since the murder, Purcell felt that the high school had a "horrible aura about it" and was a "disgusting" place. She said that everyone in their high school class was affected by the murder. The school built a memorial on campus in honor of Montoya. (26 RT 7705-7706.)

II. MITIGATING EVIDENCE

A. Mental Retardation

At age eight, appellant's IQ score was 63, and at age 15 it was 58. He read at a first grade level and was diagnosed as "educable mentally retarded." (27 RT 7937, 7943, 7962.) Nell Riley, a clinical psychologist, testified that appellant scored 68 on an IQ test that she administered in 1998. The score fell between the first and second percentile of the population, which is considered abnormal and an indication of mental impairment. (27 RT 7942-7943.) Riley administered several neuropsychological tests to appellant, the results of which were consistent with his IQ scores. Appellant could not perform some of the tests because he read at the level of a 6-year-old.[8/] Riley believed that appellant suffered from dyslexia based on the results of several tests. (27 RT 7944-7953.) Based on appellant's low score in the Halstead-Reitan battery of neurological tests, Riley believed that appellant might suffer from organic brain damage. She ordered a positron emission tomography ("PET") scan which she believed, when combined with his low IQ scores, demonstrated that appellant was either born with brain damage or developed it as an infant. (27 RT 7958-7960.)

B. Brain Damage

Dr. Joseph Wu reviewed the results of appellant's PET scan. He concluded that appellant's frontal lobe was abnormal, which tends to cause problems regulating aggression. (27 RT 8066-8075.)

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[8]. Despite this evidence in the record, appellant has not asserted a claim of metal retardation based on *Atkins v. Virginia* (2002) 536 U.S. 304. Because the trial predated *Atkins*, no specific findings were made.

C. Childhood Trauma

Clinical psychologist Gretchen White prepared a psycho-social history of appellant's life based on social history records and interviews she conducted with people who knew appellant. (27 RT 8177.) White testified extensively about appellant's family history, relaying stories from the time period of his great-great grandmother's life as a slave in the South to his present family situation. Appellant's parents moved from Texas to California. He was the oldest of five children. Appellant's mother, Ida Mae, was an alcoholic. She left appellant's father in Richmond, California and moved with the children to Los Angeles where they lived on welfare in the Watts neighborhood. Appellant rarely saw his father. Ida Mae had another son with Jewel Bolden, a man who lived with appellant's family for some time. Bolden eventually took his son and left Ida Mae. She then lived with Maurice Timmons. During that time, Ida Mae drank heavily and used cocaine and crack. She also physically abused and neglected her children. At age 12, appellant joined a street gang which often stole cars. Appellant also committed petty theft, other property crimes, and crimes against people. By age 14, he was a ward of the court. Appellant spent time in group homes, juvenile hall, and the California Youth Authority. He also attended a high school for teenagers with mental and learning disabilities. Appellant sometimes stayed with his friend Ridgle. Appellant fathered a child, Antoinette Thomas, with Ridgle's sister, Nita Sims when she was 13 years-old and he was 16 years-old. Nita believed that Ida Mae physically abused Antoinette, and she observed Ida Mae beat appellant with belts. (27/28 RT 8187-8229.)

ARGUMENT

I. THE TRIAL COURT DID NOT ERRONEOUSLY EXCUSE POTENTIAL JURORS

Appellant contends the trial court erred in excusing for cause prospective jurors 6-353[9], 6-483[10], 74, and 833[11] on the ground that they indicated during voir dire that they would be unable to vote to impose the death penalty. He asserts this resulted in a violation of his rights "to an impartial jury, to due process, and a reliable determination of guilt and penalty under the Fifth, Sixth, Eighth, and Fourteenth Amendments." (AOB 41-56.) The trial court did not so err.

A. Applicable Law

The proper standard for exclusion of a juror based on bias with regard to the death penalty is whether the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." (*Wainwright v. Witt* (1985) 469 U.S.

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[9]. Appellant and the trial court refer to this juror as 6-353 (AOB 47; 15 RT 4502.) However the Clerk's Transcript references the juror as both 353 and 06-0314. (12 CT 2407.) To ensure clarity and consistency with appellant's brief, respondent will refer to the juror as 6-353.

[10]. Appellant and the trial court refer to this juror as 6-483 court (AOB 49; 15 RT 4489.) However, the Clerk's Transcript references the juror as both 367 and 06-0483. (12 CT 2515.) To ensure clarity and consistency with appellant's brief, respondent will refer to the juror as 6-483.

[11]. Appellant and the trial court refer to this juror as 833 (AOB 54; 10 RT 3046.) However, the Clerk's Transcript references the juror as both 319 and 02-0833. (11 CT 2227.) To ensure clarity and consistency with appellant's brief, respondent will refer to the juror as 833.

412, 424; see also *People v. Ghent* (1987) 43 Cal.3d 739, 767 [adopting the *Witt* review standard in California].)

This standard does not require that a juror's bias be proved with "unmistakable clarity." (*Wainwright v. Witt*, *supra*, 469 U.S. at p. 424.) To the contrary, as this Court has recognized, "frequently voir dire examination does not result in an 'unmistakably clear' response from a prospective juror, but nonetheless 'there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law. . . . [T]his is why deference must be paid to the trial judge who sees and hears the juror.'" (*People v. Ghent*, *supra*, 43 Cal.3d at p. 767, citing *Wainwright v. Witt*, *supra*, 469 U.S. at pp. 425-426.)

In applying this standard, "where equivocal or conflicting responses are elicited regarding a prospective juror's ability to impose the death penalty, the trial court's determination as to his true state of mind is binding on an appellate court." (*People v. Ghent*, *supra*, 43 Cal. 3d at p. 768; see also *People v. Jones* (1997) 15 Cal.4th 119, 164, overruled on other grounds in *People v. Hill* (1998) 17 Cal.4th 800 [same].) If there is no inconsistency, "the trial court's judgment will not be set aside if it is supported by substantial evidence." (*People v. Hayes* (1999) 21 Cal.4th 1211, 1285.)

B. Analysis

Here, as to each excused prospective juror, substantial evidence supports the trial court's finding that the juror's views on the death penalty would "prevent or substantially impair" the juror's performance. (*Wainwright v. Witt*, *supra*, 469 U.S. at p. 424.)

1. Prospective Juror 6-353

The trial court excused juror 6-353 for cause following her voir dire. (15 RT 4511.) The court's decision is supported by the juror's answers to questions both in her juror questionnaire and during voir dire. Juror 6-353 indicated on her questionnaire that she was "moderately against" the death penalty (12 CT 2420) and "strongly in favor" of the penalty of life in prison without parole (12 CT 2421). Her opinion about the death penalty had never changed. (*Id.*)

During voir dire, in response to questioning by the court, juror 6-353 stated that she "personally lean[ed] very strongly towards wishing there were not a death penalty because I think most people can achieve some form of rehabilitation or repentance." (15 RT 4502.) Within her capacity as an ordained minister, her views on the death penalty were the same. (15 RT 4505.) She further explained that she tries to change laws that she does not believe in by "talking about it or writing to some people." (15 RT 4502.) However, she stated that she would follow the rules that were given to her during the trial. (15 RT 4507.)

When the court asked whether she would be able to "philosophically, morally, intellectually" impose the death penalty if she felt that were the appropriate sentence, she responded, "I would have to get pretty close to the end of the my belief system to make that statement - - that step probably. It's not - - I don't believe it's out of the realm of possibility to decide that was the proper penalty, but it's unlikely I would get there." (15 RT 4507-4508.) She explained that imposing the death penalty was not a realistic possibility for her. (15 RT 4509.) For her to decide that was appropriate punishment, she would "have to feel that the person was so wounded and had made such bad choices that there really - - that a real sense of humanity almost didn't exist there anymore, and that he was even - - he or she even within the prison system would be a real threat

to other people. Their level of violence would be a threat to other people." (*Ibid.*)

Defense counsel did not question juror 6-353. (15 RT 4510.) During questioning by the prosecutor, she stated that her views on the death penalty were not affected by her sister who worked in the prison system. (15 RT 4510.)

Based on the totality of juror 6-353's responses in the questionnaire and during voir dire, the trial court excused her for cause. (15 RT 4511.) The court emphasized that the juror had stated "there was not probably a reasonable possibility as a matter of fact [that she could impose the death penalty]. That is the way I read it. Her total philosophy and her body language told me she's substantially impaired and prevents her from following the law and she is excused for cause." (*Ibid.*) The trial court's determination must be upheld.

Although juror 6-353 indicated that she could "follow the rules" that were given to her during the trial (16 RT 4507), her responses as a whole indicate that her long-held opposition to the death penalty, both personally and as an ordained minister, would "substantially impair" the performance of her duties as a juror. Although she felt she might decide that death was the appropriate penalty in some theoretical case (15 RT 4508), she stated that it was not a "realistic" possibility for her to impose the death penalty. (15 RT 4509.)

This juror's responses are similar to those of a prospective juror who was found to have been properly excused for cause in *People v. Jones, supra,* 15 Cal.4th 119. In *Jones*, prospective juror Beeler, like juror 6-353, stated that, in a theoretical case such as "Charles Manson" or "Jimmie Jones," he might be able to vote for the death penalty, and that he could follow the law regarding the death penalty. However, he stated that while voting for the death penalty would not be "impossible" his ability to return

a death verdict would be "impaired." (*Id.* at p. 165.) Here, as well, the trial court reasonably determined that juror 6-353's performance as a juror would be "substantially impaired" by her opinion regarding the death penalty.

2. Prospective Juror 6-483

Juror 6-483 was excused by the trial court for cause following her voir dire. (15 RT 4498.) The trial court's decision is supported by her answers to questions both in her juror questionnaire and during voir dire.

Juror 6-483 indicated on her questionnaire that she was "strongly against" the death penalty" (12 CT 2528) and "strongly in favor" of the penalty of life in prison without the possibility of parole (12 CT 2529). She also indicated that her views on the death penalty have never changed. (*Ibid.*) In response to the question: "Is there any particular reason, such as a personal experience, that you feel the way you do about the death penalty?" she wrote, "I feel there have been many innocent people sent to the gas chair [sic]." (*Ibid.*) She also indicated that she would not be able to exclude the issue of cost to the taxpayers from her penalty considerations. (12 CT 2530.) Before deciding the appropriate punishment, she wrote that she would want to know "what kind of childhood did [the defendant] have?" (*Ibid.*)

Juror 6-483 also indicated in her written responses that, given the choice between the punishments of life in prison without the possibility of parole and death, she would "always" vote for life in prison without parole, regardless of the facts and circumstances. (12 CT 2531.) Finally, she wrote that she had concerns or reservations about sitting as a juror in the case because "I would not like to go through life knowing I was responsible for someone's life." (12 CT 2532.)

When the trial court, asked juror 6-483 if anything could change her mind about her attitude towards the death penalty, she responded, "Well,

probably, you know, if I really felt that it was - - that he was guilty, you know. I mean, there was not doubt, but I wouldn't be happy about it. [¶] So - - but I am - - really don't think I would." (15 RT 4491.) The court asked if she could vote for the death penalty if she found a person guilty beyond a reasonable doubt of first degree murder with special circumstances, and the juror replied, "I think it would be life in prison." (*Ibid.*)

During questioning by defense counsel, juror 6-483 stated that she could not consider the death penalty in this case unless she heard "all the facts and everything." (15 RT 4493.) She also stated, "I think I could be fair one way or the other." (*Ibid.*) She further said that she could consider the death penalty if she thought the defendant was " really really guilty." (15 RT 4494.)

During questioning by the prosecutor, juror 6-483 expressed that she was not sure what she meant when she said the defendant would have to be "really really guilty" for her to consider the death penalty. (15 RT 4495.) She elaborated as follows:

> All I know is lately there has been a lot of DNA evidence that has gotten a lot of people off of death row because they were innocent, and the thought of, you know, - - I don't know. I don't know, to take someone's life and then find out that they were, you know, innocent would be really terrible.

(*Ibid.*)

When asked if she would hold the prosecution to a higher standard of proof because a guilty verdict would invoke a penalty phase of the case where death would be an option, she replied, "I don't think so. I don't know." (*Id.*) She also said that she could "probably" vote for death "if I felt that was necessary, [the defendant] was very bad." (15 RT 4496.) When the prosecutor asked about her repeated use of qualifying terms, such as "probably" and "I don't know," she responded that she did not

understand, and again stated, "I don't know. I would have to get used to the idea . . . ." (15 RT 4496-4497.) The prosecutor asked if she felt the State has the right to execute an individual and she said, "Yeah, I guess[,]" then explained, "But I don't know if I want to be responsible for someone's death." (15 RT 4497.) She told the prosecutor that if everyone else on the jury voted for death, and she "knew [the defendant] was really guilty" she "might go along with it." (15 RT 4497-4498.) When the prosecutor asked if she theoretically could case a vote for death, she said, "No. I probably could if I had to." (15 RT 4498.)

Based on the totality of juror 6-483's responses, the trial court ruled that "[t]he juror is substantially impaired not merely by her words but when she would shake her head no and say 'I guess', the whole body language as well I suppose. Clearly impaired." (14 RT 4498.) Accordingly, the court excused juror 6-483 for cause. (*Ibid.*)

The trial court's determination was reasonable. Juror 6-483 indicated a strong preference for life without the possibility of parole in her juror questionnaire. (12 CT 2528-2529.) In her written responses and during voir dire, she indicated that she did not want to be responsible for taking someone's life and that DNA had recently "gotten a lot of people off death row because they were innocent." (15 RT 4495, 4497.) Furthermore, voir dire of juror 6-483 elicited responses similar to those of a juror in *People* v. *Holt* (1997) 15 Cal.4th 619, 652-653, and two jurors in *People* v. *Wash* (1993) 6 Cal.4th 215, 255. Each of those jurors repeatedly insisted that they did not know if they could impose the death penalty and could not tell the court the answer to that question. In both cases, this Court concluded that the trial court properly excused the jurors for cause. (*Ibid.*) Similarly, juror 6-483 repeatedly could not answer either the trial court or the attorneys' questions about actually imposing the death penalty, and instead stated numerous times, "I don't know." (15 RT 4495-4497.)

She also continually qualified her responses by saying "probably" and "I think." (15 RT 4491, 4493, 4495-4496.) Her responses support the trial court's finding that her views on the death penalty would prevent or substantially impair her performance as a juror.

3. Prospective Juror 74

Juror 74 was excused for cause by the trial court because of her views on the death penalty and her prior unfavorable experience with the criminal justice system. (9 RT 2715-2717.) The trial court's decision is supported by her answers during voir dire. Juror 74 told the trial court that an acquaintance had been falsely prosecuted and convicted of rape. (9 RT 2602.) She believed that the district attorney had "trumped up" the case because he was running for re-election. (*Ibid.*) She also recounted a prior experience where her daughter's boyfriend was "brutally beaten by police officers" (9 RT 2603) simply because the officers recognized him and he was "very mouthy" (9 RT 2604). However, she stated that she did not "generally" feel animosity towards prosecutors (9 RT 2605-2606) or believe that all police officers are "abusers" (9 RT 2606).

When the court asked if she would be able to actually impose the punishments of death or life in prison, juror 74 responded, "I don't know." (9 RT 2610.) The court further asked if she would be able to impose the death penalty if she were convinced that death was the appropriate penalty under the law and the facts, and she stated, "I think so." (*Ibid.*)

During questioning by defense counsel, juror 74 said that she "wrote lots of letters [and] sent lots of petitions" protesting the false prosecution of her acquaintance for rape, but that she was "completely" ignored. (9 RT 2615.) She also felt that the defense attorneys in the case were not honest. (9 RT 2614.) When defense counsel asked if she could decide the current case based only the evidence she heard in court, she responded, "I think I could do that, but I also think that what happens out in the world is

important, too. And I was witness to some of these things [involving the rape case] that were reported wrongly in the paper." (9 RT 2616.)

The prosecution asked juror 74 what she meant when she said, "I think I can be fair." (9 RT 2621.) She explained, "I've never been in this position before. And I feel that I could be honest in reviewing the evidence and coming to a conclusion. But I've never been - - I don't know. I mean, I really don't know. I've not had to be - - I've never had to do this." (*Id.*) However, she later stated that she was "confident of my ability to be fair to both sides in the case. (9 RT 2622-2623.)

Juror 74 agreed with the prosecutor that she had hesitated when responding to the judge's question about personally voting for the death penalty because it was "a very heavy question." (9 RT 2623.) She said, "I would like to believe that if I truly believed someone was guilty that I have that - - I could [vote for death]. But I don't know." (*Id.*) She further stated that she has always "been on the fence" about the death penalty, but that after the Richard Allen Davis case she believed that it would be appropriate. (9 RT 2624.) When the prosecutor asked her, "Would you be reluctant to impose the death penalty simply because you personally find it to be such a grave responsibility you could never really live with yourself if you voted for the death penalty for someone?" she responded, "I don't know. [¶] I don't know how I would feel afterwards." (9 RT 2626-2627.)

The prosecutor moved to challenge juror 74 for cause based on her inability to be fair and impartial both in regards to her prior negative experiences with the criminal justice system and her substantial impairment concerning the death penalty. (9 RT 2627-2629.)

At the close of voir dire, the trial court stated, "I don't think I can grant the challenge for cause on the death penalty. And I'm not sure about the other because she was all over the place." (9 RT 2630.) The court further stated, "I have real reservations about whether or not she is capable

or willing to follow the law and I have a strong impression that she probably couldn't or wouldn't." (9 RT 2631.) The court denied the prosecution's motion to excuse juror 74 for cause. (*Ibid.*) However, the next day, the court explained:

> I was bothered by my ruling on juror number 74, and then this morning, maybe it was last night, I think it was this morning, the transcript was brought in. Everyday they bring in the transcript. I reread that transcript and . . . [¶] . . . I simply am going to reconsider my ruling and excuse that juror for cause.
>
> I am convinced that she could not faithfully or impartially apply the law or follow the evidence, and she had very strong feelings. She kind of reversed some of them along the way, and her body language was such that I had severe reservations at the time I made my ruling somewhat because she did kind of come around during I think both [defense counsel] and [the prosecutor's] questioning, but as I reread that it brought back her body language and all those things, I am convinced she could simply not be a fair, impartial juror.
>
> The Court will order her excused for cause, and the clerk is requested to notify her accordingly.

(9 RT 2715-2716.)

The trial court's determination was proper. Although, the court initially declined to excuse juror 74 for cause, after reading the transcript of her voir dire responses, the court was "'left with the definite impression that [juror 74] would be unable to faithfully and impartially apply the law.'" (*People v. Ghent*, *supra*, 43 Cal.3d at p. 767, citing *Wainwright v. Witt*, *supra*, 469 U.S. at pp. 425-426.) In addition to listening to her often equivocal responses about the death penalty, the trial court observed juror 74's demeanor, attitude, and body language, all of which convinced the court that she could not faithfully or impartially apply the law or follow the

evidence." (9 RT 2716.) The demeanor of a juror is an appropriate consideration for the trial court in determining whether to grant a challenge for cause. (*Uttecht v. Brown* (2007) __ U.S.__ [127 S.Ct. 2218, 2224, 167 LEd.2d 1014].) Moreover, juror 74 never said that she could, as a reasonable possibility, impose the death penalty. (*People v. Schmeck* (2005) 37 Cal.4th 240, 262.) Rather, she merely stated that she would try, and that she thought she might be able to impose the death penalty. And, when the prosecutor asked her directly, she hesitated "for a long time" (9 RT 2628), and simply said, "I don't know." (9 RT 2627.) When a juror provides such equivocal responses regarding her ability to impose the death penalty, "the trial court's determination as to [her] true state of mind is binding on an appellate court." (*People v. Ghent*, *supra*, 43 Cal. 3d at p. 768.) Accordingly, the trial court's decision to excuse juror 74 for cause should not be reversed.

4. Prospective Juror 833

Juror 833 was excused by the trial court for cause following her voir dire. (9 RT 3058.) The trial court's decision is supported by her answers to questions both in her juror questionnaire and during voir dire.

On her jury questionnaire, juror 833 indicated she was "strongly against" the death penalty (11 CT 2240), and "strongly in favor" of the penalty of life in prison without the possibility of parole" (11CT 2241.) She wrote that her opinion on the death penalty had never changed. (*Ibid.*) In response to the question: "Is there any particular reason, such as a personal experience, that you feel the way you do about the death penalty?" juror 833 wrote: "I am a Christian, it would be difficult for me to sentence someone to death because of my belief in the goodness of God's creation." (*Ibid.*) In response to the question: "Would anything about your religious beliefs prohibit you from sitting in judgment on another person?" she wrote: "I feel I could be objective, I'm not sure I could sentence someone to

death even if I did find them guilty." (11 CT 2242.) She circled "No" when asked if she would always vote for life in prison without the possibility of parole when given the choice between the punishments death and life in prison without the possibility of parole. (11 CT 2243.) However, she also wrote: "I'm really not sure - my feeling is that I would find it very difficult to vote for the death penalty." (*Ibid.*)

The trial court asked juror 833 if she would be capable of voting for the death penalty if she and eleven other jurors decided the appropriate penalty was death. (10 RT 3049.) She responded, "I really don't know." (*Ibid.*) The court also asked if she would have no trouble voting for life in prison without the possibility of parole, and she said, "I don't think so." (*Ibid.*) When the court asked if she was "capable as a reasonable possibility" of voting for the death penalty, she responded, " The basis [of my feeling] would be if I put myself in the position of being the person that executed or whatever the penalty is, I couldn't do that. I don't think I could do that. Do you know what I mean?" (10 RT 3050.)

Juror 833 responded to questioning by defense counsel by stating that she could "possibly" vote for death and that she would "consider it" after hearing all of the penalty phase evidence. (10 RT 3052.) When asked if she could "genuinely consider either penalty" she responded, "Yes." (10 RT 3053.)

When asked by the prosecution whether she, as a registered nurse, could administer the poison into the IV line to execute the defendant, she said, "No." (10 RT 3053-3054.) She stated that she could consider the death penalty, but that she valued life and saw her role as supporting life. (10 RT 3054.) The prosecutor asked:

> Q: Merely being able to consider the death penalty means nothing unless you could actually impose it; you could actually cast your vote, your final vote as a juror in favor of it?

Do you understand that distinction?

A: Um-hum (Affirmative)

Q: Do you think you could ever be the one who casts a vote in favor of death for another individual?

A: I don't think so.

(10 RT 3055.)

The court questioned juror 833 again, asking her if, as a reasonable possibility, could she impose the death penalty, and she responded, "I don't know. I don't know." (10 RT 3056.) Thereafter, the trial court ruled that juror 833's responses demonstrated that "she would be unable to faithfully and impartially apply the law and therefore is substantially impaired." (10 RT 3058.) Accordingly, she was excused for cause. (10 RT 3058.)

The trial court's decision was proper. Juror 833 indicated that she understood the difference between merely considering the death penalty and actually voting for it. (10 RT 3055.) Although she stated that she could consider the death penalty (10 RT 3052-3053), she said repeatedly that she "didn't think" she could actually vote for death as a reasonable possibility. (10 RT 3049-3050, 3055). She also stated several times that she "didn't know" if she was capable of imposing the death penalty. (10 RT 3049, 3056.) A juror must be able to do more than simply "consider" imposing the death penalty. A juror must be able to consider imposing the death penalty *as a reasonable possibility*. (*People v. Schmeck*, *supra*, 37 Cal.4th at p. 262, emphasis added.) It is apparent from her responses that juror 833 could not. The trial court's decision to excuse juror 833 should not be reversed.

II. THE PROSECUTION DID NOT USE ITS PEREMPTORY CHALLENGE IN A RACIALLY DISCRIMINATORY MANNER

Appellant contends that the trial court violated his right to trial by a jury drawn from a representative cross-section of the community as guaranteed by the Sixth Amendment to the United States Constitution and Article I, section 16 of the California Constitution by granting the prosecutor's peremptory challenge to exclude an African-American juror for purportedly racially motivated reasons. Appellant further asserts that the trial court's ruling violated his federal constitutional right to due process and equal protection of the laws under the Eighth and Fourteenth Amendments. (AOB 57-67.) Appellant's argument lacks merit because the record shows that the prosecution had race-neutral reasons for excusing the juror, and the trial court made findings to this effect.

A. Factual Background

After the trial court finished excusing jurors based on hardship and cause challenges, one African American juror remained in the venire, juror 550. (15 RT 4587.) The prosecutor exercised a peremptory challenge against the juror. (16 RT 4614.) Defense counsel objected under *Batson v. Kentucky* (1986) 476 U.S. 79, 89 [106 S.Ct. 1712, 90 L.Ed.2d 69] and *People v. Wheeler* (1978) 22 Cal.3d 258, 276-277. (16 RT 4615.)

In support of the defense motion, counsel argued that juror 550 was the only African-American male in the entire panel of approximately 400 people. (16 RT 4618.) The only other African-American, a woman, had previously been excused by stipulation of the parties. (16 RT 4615.) Defense counsel admitted that it was difficult to argue a pattern of exercising peremptory challenges on African-American jurors because juror 550 was the only member of that class in the panel. (16 RT 4618.) However, he stated, "I have an obligation to bring it up. I see no other way of arguing pattern or no pattern. I think it's - - I think it creates its own

pattern because of the sense he is the only one." (*Ibid.*) He argued that none of the facts revealed during voir dire constituted legitimate, race-neutral reasons for the prosecutor to exercise a peremptory challenge on juror 550. Defense counsel asserted that juror 550 (1) was not opposed to the death penalty, (2) had discussed the details of his misdemeanor conviction, (3) was a victim of violent crime because members of his family had held at gunpoint, (4) talked about a juvenile shoplifting case, and (5) was not concerned about losing income during jury service because has was living in a van on his father's property and he did not need money to survive. (16 RT 4616-4618.)

Immediately following defense counsel's argument, the following exchange occurred between the prosecutor and the trial court:

> [PROSECUTOR:] Well, first of all, the defendant has to make a prima facie showing that my exercise of the peremptory challenge on this prospective juror was done for reasons of group bias. Until there has been such a prima facie showing I don't have to state my reasons.
>
> I know the practice sometimes is in some courts the judge makes no specific finding of prima facie . . . .but nonetheless asks the district attorney to explain his reasons.
>
> If that's the procedure this Court wants to use now - -
>
> [TRIAL COURT:] I would like to use that, yes.
>
> [PROSECUTOR]: Okay.

(16 RT 4619-4620.) Thereafter, the trial court did not make any findings regarding a prima facie case. Instead, the prosecutor proceeded to explain his reasons for exercising the peremptory challenge on juror 550. (16 RT 4620-4622.)

The prosecutor said that juror 550 was irresponsible. At age 31, he had a long history of underemployment and currently lived in a van parked on his father's property. The juror said that he was unconcerned about his job not paying for jury service because money was not important to him. (16 RT 4620-4621.) The juror also relayed a story about the police laughing at his family when they were victim's of an apparent home invasion robbery. (16 RT 4621.) The prosecutor also exercised the peremptory challenge because juror 550's father was a convicted felon who had been incarcerated in San Quentin. In addition, the juror himself had numerous convictions and arrests, which he was not entirely forthcoming about during voir dire. The prosecutor learned about the extent of juror 550's criminal history only by reading his rap sheet. He had convictions for resisting a police officer, battery with serious bodily injury arising from a domestic violence incident for which he served 30 days in jail, and petty theft for which he served five days in jail. He also sustained probation violations for disturbing the peace and petty theft. (16 RT 4621-4622.) Based on this criminal history, the prosecutor did not "feel that this young man has demonstrated the kind of personal responsibility that I would like to see in a juror sitting on a capital case." (16 RT 4622.)

The trial court denied the defense's *Batson/Wheeler* motion:

> The matter of the Wheeler motion. It's real difficult because there is only one black on the panel, but I - - there is just lots of reasons I think besides being black that a challenge could be exercised, and, of course, obviously there is no pattern or systematic exclusion because we don't have enough people to create that kind of - - obviously it does no prohibit or prevent the motion on either side.
>
> The Wheeler motion is therefore denied.

(16 4630-4631.)

B. Applicable Law

Under California law, both the prosecution and defense are entitled to 20 peremptory challenges of prospective jurors in the trial of an offense punishable by death or life imprisonment. (Code Civ. Proc., § 231.) While peremptory challenges are intended to allow parties to reject a certain number of jurors for any reason at all, both the state and federal Constitutions prohibit the use of peremptory challenges to exclude prospective jurors on the basis of race or ethnicity. (*People v. Wheeler* (1978) 22 Cal.3d 258, 276-277; *Batson v. Kentucky* (1986) 476 U.S. 79, 89.)

A *Batson/Wheeler* motion initiates a three-step process. "First, the defendant must make out a prima facie case 'by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose.' [Citation.]" (*Johnson v. California* (2005) 545 U.S. 162, 168, fn. omitted.)

"Second, once the defendant has made out a prima facie case, the 'burden shifts to the State to explain adequately the racial exclusion' by offering permissible race-neutral justifications for the strikes. [Citations.]" (*Johnson v. California*, *supra*, 545 U.S. at p. 168, fn. omitted.) These reasons must relate to the particular individual jurors and to the case at issue. (*People v. Alvarez* (1996) 14 Cal.4th 155, 197.) "'But the prosecutor's explanation need not rise to the level justifying exercise of a challenge for cause.'" (*People v. Williams* (1997) 16 Cal.4th 635, 664, internal quotations omitted.) "Rather, adequate justification by the prosecutor may be no more than a 'hunch' about the prospective juror [citation], so long as it shows that the peremptory challenges were exercised for reasons other than impermissible group bias." (*Id.*) In this second step, the appellate courts "rely on the good judgment of the trial courts to distinguish bona fide reasons for such peremptories from sham

excuses belatedly contrived to avoid admitting acts of group discrimination." (*People v. Wheeler*, *supra*, 22 Cal.3d at p. 282.)

"Third, '[i]f a race-neutral explanation is tendered, the trial court must then decide . . . whether the opponent of the strike has proved purposeful racial discrimination.' [Citation.]" (*Johnson v. California*, *supra*, 545 U.S. at p. 168.)

Ordinarily, a trial court's denial of a *Batson/Wheeler* motion is reviewed deferentially, considering only whether substantial evidence supports its conclusions. (*People v. Bonilla* (2007) 41 Cal.4th 313, 341.) Where the trial court determines that a prima facie case was not made but does not articulate the standard it used in making that determination, the appellate court reviews the entire record independently to solve the legal question of whether the record supports an inference that the prosecutor excused a juror on the basis of race. (*Id.* at p. 342.)

Peremptory challenges may be based on a juror's manner of dress, a juror's unconventional lifestyle, a juror's experiences with crime or with law enforcement, or simply because a juror's answers on voir dire suggested potential bias. (*People v. Wheeler*, *supra*, 22 Cal.3d at p. 275.) Peremptory challenges may be predicated on evidence suggestive of juror partiality that ranges from "the virtually certain to the highly speculative." (*Ibid.*)

C. Legal Analysis

In this case, the trial court did not initially make a finding as to whether defense counsel had established a prima facie case "that the totality of the relevant facts gives rise to an inference of discriminatory purpose.' [Citation.]" (*Johnson v. California*, *supra*, 545 U.S. at p.168, fn. omitted.) Rather, after defense counsel presented his argument in support of a prima facie case, the prosecutor, at the direction of the court, explained his race-neutral reasons for exercising a peremptory challenge on juror 550. (16 RT

4619-4622.) Thereafter, the trial court denied appellant's motion. (16 RT 4630-4631.) As such, the question of whether defense counsel established a prima facie case is immaterial. (*Hernandez v. New York* (1991) 500 U.S. 352, 359 (plur. opn. of Kennedy, J.) ["Once a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant has made a prima facie showing becomes moot"].)

The trial court's ultimate decision to deny the *Batson/Wheeler* motion is supported by substantial evidence. The prosecutor stated that juror 550's long history of underemployment and the fact that he lived in a van on his father's property demonstrated his irresponsibility. This clearly constituted a race-neutral reason for excusing him. In addition, juror 550 relayed an experience where the police laughed at his family when they were victims of a crime. This provided another non-discriminatory reason to strike him from the jury. (*People v. Douglas* (1995) 36 Cal.App.4th 1681, 1690 [the use of peremptory challenges to exclude prospective jurors whose relatives and/or family member have had negative experiences with the criminal justice system is not unconstitutional].) The prosecutor further explained that he exercised a challenge on juror 550 because his father was a convicted felon who had spent time in state prison. A juror's father's incarceration can "serve as a valid race-neutral reason to exclude him." (*People v. Garceau* (1993) 6 Cal.4th 140, 172.) Moreover, juror 550 had suffered numerous arrests and convictions for resisting a police officer, battery with serious bodily injury, and petty theft. He also sustained probation violations for disturbing the peace and petty theft. (16 RT 4621-4622.) Based on this criminal history, the prosecutor had a valid race-neutral reason for excusing the juror. (*People v. Panah* (2005) 35 Cal.4th 395, 442; *People v. Wheeler*, *supra*, 22 Cal.3d at p. 277, fn. 18.) In sum, as

the trial court found, Juror 550's exclusion was not based on discriminatory reasons.

Lastly, appellant asserts that the trial court failed to make a "sincere and reasoned" attempt to evaluate the prosecutor's justifications because it made no effort to determine if the "reasons actually prompted the prosecutor's exercise of the particular peremptory challenge." (AOB 65 citing *People v. Hall* (1983) 35 Cal.3d 161, 167-168 and *People v. Fuentes* (1991) 54 Cal.3d 707, 720.) This argument fails because, although a trial court is required to make a "sincere and reasoned attempt to evaluate the prosecutor's explanation in light of the circumstances of the case as then known," (*People v. Hall, supra*, 35 Cal.3d at p. 167), the court is "not required to make specific or detailed comments for the record" to support its finding that a prosecutor's explanation is genuine. (*People v. Reynoso* (2003) 31 Cal.4th 903, 919.) Here, the trial court, in denying the motion, sufficiently explained its reasons for doing so, stating that there were "lots of reasons . . . besides being black that a challenge could be exercised" and that "obviously" there was no pattern or systematic exclusion of African-American jurors. (16 4630-4631.) There was no *Batson/Wheeler* error. Therefore, appellant's claim should be denied.

III. THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION TO SUPPRESS UNDER *MIRANDA*

Appellant contends the trial court erred by denying his motion to suppress pre-arrest statements he made to a detective. Specifically, he asserts that *Miranda v. Arizona* (1966) 384 U.S. 436, advisements were required because he was in custody. (AOB 68-82.) To the contrary, the record supports the trial court's finding that appellant was not in custody and therefore did not require *Miranda* advisements.

A. Factual Background[12/]

Sacramento Deputy Sheriff Mark Bearor arrived at Rio Linda High School at 4:16 p.m. on the day of the murder. He taped off the crime scene and moved people away from the area. Another officer told him that appellant had been seen exiting the bathroom shortly after Montoya's body was discovered. Upon learning this information, Deputy Bearor asked appellant to accompany him to a patrol car. Appellant willingly complied. The two men walked to the car and appellant sat in the backseat. (5 RT 1309-1315.) Deputy Bearor told appellant that he was a witness to the crime and that detectives, who were on their way to the high school, "would probably be handling the interviews of the primary witnesses and that he was going to be detained." (5 RT 1315.)

Appellant sat in the back of the locked patrol car for about 25 minutes. He was not handcuffed. (5 RT 1317, 1359.) During that time, Deputy Bearor advised communications that a subject was detained and returned to the crime scene about 40 feet from the patrol car. Approximately five additional patrol cars were parked in the area. (5 RT 1316-1317, 1326.) Detective Michael Abbott arrived at the scene at 4:15 p.m. He learned that blood had been found in the bathroom where another janitor had seen appellant washing his hands. Detective Abbott went to the bathroom and secured the area with crime scene tape. When he returned to the crime scene, the detective learned that the information was incorrect - -

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[12]. The facts are taken from the hearing on appellant's motion to suppress. When reviewing a trial court's ruling on a motion to suppress, the appellate court examines only the evidence presented at the suppression hearing and ignores additional or contrary evidence presented at trial. (*In re Arturo D.* (2002) 27 Cal.4th 60 77-78, fn.18.)

the other janitor had not seen appellant washing his hands in the bathroom. (5 RT 1350-1356.)

Detective Abbott contacted appellant in the patrol car. Appellant exited the vehicle and walked with Abbott to the rear of the car. Detective Abbott spoke with appellant for about 20 or 30 minutes and used the trunk of the patrol car as a table for writing notes of the interview. (5 RT 1359-1360, 1363.) When Detective Abbott initially asked appellant what had happened, appellant responded, "I'm a convict. I won't go to court about this." (5 RT 1361.) The detective stated that he wanted to find out what happened and that he was not there to discuss whether appellant would go to court or testify. (5 RT 1361-1362.) Appellant acted "a little" cocky and appeared as though he did not want to talk about the situation. (5 RT 1362, 1364.) He told Detective Abbot that he was a substitute janitor who had been working at the school for a few days. When he walked into one of the rooms that he had been assigned to clean, he saw Montoya's body on the ground. He ran to tell a fellow janitor, Faruq Shirley. (5 RT 1362.) Detective Abbott asked appellant about the position of Montoya's body and whether he had touched her. Appellant showed Detective Abbott that he had blood on him. (5 RT 1363.)

During the interview, appellant never stated that he did not want to talk to the detective, nor did he refuse to answer questions. (5 RT 1363-1364.) Detective Abbott did not raise his voice, threaten appellant, or search appellant during the interview. (5 RT 1364.) Appellant was never handcuffed. (5 RT 1365.) Although other patrol cars were in the area during the interview, there were no deputies present because they were interviewing other witnesses. (5 RT1365.)

After the interview, another deputy collected a shirt that appellant had been holding in his rear pants' pocket. (5 RT 1365.) Detective Abbott placed appellant in the back of the patrol car again and then interviewed

another witness. (5 RT 1366.) Appellant banged on the car window a couple times and asked some questions, but the detective did not recall the nature of the questions. Detective Abbott and another deputy eventually drove appellant to the jail for an interview. (5 RT 1367.)

Following argument from the parties, the trial court denied the motion to suppress, finding that appellant was not in custody at the time he was interviewed by Detective Abbott.

> All right. I really think that there's no real evidence there was anything like a custodial investigation or custodial interrogation. The defendant was treated like a witness. He was treated respectfully, apparently, at least that's the evidence before me. He wasn't patted down. He wasn't searched.
>
> He was -- one of the officers testified that when he asked him to go to the car he followed him to the car. That means to me at least that the officer headed for the car, the defendant followed him. He didn't take his arms and force him to his car.
>
> I just don't see any real substantive evidence that he was -- you could draw some real, I think, inferences like defense has drawn that, well, I'm a convict and, therefore, you ought to suspect me. Or this is really custody, you're locking me up. He didn't treat him that way.
>
> As to the witness not wanting to be a witness, I think there's a lot of people who don't want to be involved in these cases or any kind of a case like this.
>
> And do you then say all of them are -- who are questioned if they don't want to be involved and they try to -- some witnesses even try to get away, I suppose that's not in evidence but, treat them all as like they were suspects because they don't want to be involved or testify in a criminal case.

> I don't think there was an awful lot of any sense he was guilty and, therefore, to be immediately arrested. They were in a chaotic situation trying to investigate the thing, interrogating all the different witnesses.
>
> Then, of course, eventually somebody had to make a decision to make an arrest.
>
> The motion to exclude the evidence on the grounds of failure to *Mirandize* is denied.

(5 RT 1396-1397.)

B. Relevant Law

In *Miranda v. Arizona* (1966) 384 U.S. 436, 444 the Supreme Court held that a person questioned by police after being "taken into custody or otherwise deprived of his freedom of action in any significant way" must first "be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." When there has been no formal arrest, the custodial issue turns on "how a reasonable man in the suspect's position would have understood his situation." (*Berkemer v. McCarty* (1984) 468 U.S. 420, 442.) "[T]he ultimate inquiry is simply whether there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." (*California v. Beheler* (1983) 463 U.S. 1121, 1125.)

"[T]he most important considerations include (1) the site of the interrogation, (2) whether the investigation has focused on the subject, (3) whether the objective indicia of arrest are present, and (4) the length and form of questioning." (*People v. Boyer* (1989) 48 Cal.3d 247, 272.) "In deciding the custody issue, the totality of circumstances is relevant, and no one factor is dispositive." (*Id.* at p. 272.) "The mere presence of some

coercive elements does not necessarily create a custodial situation." (*People v. Leal* (2003) 105 Cal.App.4th 833, 847.)

The trial court's determination that *Miranda* was not applicable is reviewed as follows: "the conclusion itself is examined independently, the underlying findings are scrutinized for substantial evidence." (*People v. Clair* (1992) 2 Cal.4th 629, 678.)

C. Legal Analysis

Here, the trial court properly concluded that the investigative detention did not rise to the level of a custodial interrogation. The questioning occurred during the active investigation of recent homicide and the officers knew that appellant had discovered Montoya's body. At no time was appellant handcuffed, and the officers did not display their weapons. Deputy Bearor did not force appellant into the back of the patrol car. Rather, he asked appellant to accompany him to the vehicle, and appellant willingly complied. Deputy Bearor never told appellant that he was under arrest. Instead, he explained that appellant was a witness and that "due to the severity of the crime the detectives would probably be handling the interviews of the primary witnesses and that he was going to be detained" until the detectives arrived at the scene to question him. (5 RT 1315.) Appellant remained in the back of the locked patrol vehicle for approximately 25 minutes until Detective Abbott arrived, opened the door, and walked with him to the rear of the vehicle. Using a conversational tone of voice, Detective Abbott spoke with appellant for 20 to 30 minutes while they stood outside the vehicle.

Thus, when Detective Abbott questioned appellant, he had been released from the temporary restraint he experienced while inside the patrol vehicle.

> For *Miranda* purposes . . . the crucial consideration is the degree of coercive restraint to

> which a reasonable [person] believes he is subject *at the time of questioning*. Police officers may sufficiently attenuate an initial display of force . . . so that no *Miranda* warnings are required when questions are asked.

(*People v. Taylor* (1986) 178 Cal.App.3d 217, 230, italics in original; see also *People v. Clair* (1992) 2 Cal.4th 629, 679 and *United States v. Gregory* (9th Cir. 1989) 891 F.2d 732, 735 [mere fact that officers initially drew guns does not mean *Miranda* warnings necessary before questioning, as long as guns were returned to holster prior to the interview].) Here, any restraint imposed upon appellant as he a sat in the back of the police car was attenuated by the time the detective questioned him outside the vehicle. (Cf. *United States v. Henley* (9th Cir. 1993) 984 F.2d 1040, 1042 [suspect in custody for Miranda purposes where he had been placed in back of a police vehicle, handcuffed, and was being questioned by an FBI agent, even though the agent told him he was not under arrest].)

This case is analogous to *In re Joseph R.* (1998) 65 Cal.App.4th 954. There, an officer received a report of rock throwing by two boys. The officer spotted the boys and, with their consent, patted them down for weapons. The officer told the boys that they did not have to talk to him but that he wanted to ask them a few questions. Joseph was cuffed and placed in the back of a patrol vehicle. About five minutes later, Joseph was released from the patrol vehicle and the handcuffs were removed. Thereafter, the officer questioned him about the rock throwing incident. The entire encounter lasted about 15 to 20 minutes. Joseph was arrested about six weeks later.

The trial court concluded *Miranda* was inapplicable because Joseph was not subject to a custodial restraint when the questions were asked, and the appellate court agreed with this conclusion. In relevant part, the court explained that "'[p]olice officers may sufficiently attenuate an initial

display of force, used to effect an investigative stop, so that no *Miranda* warnings are required when questions are asked.'" (*Joseph R.*, *supra*, 65 Cal.App.4th at pp. 960-961.) The court pointed out that Joseph was cuffed and placed in the back of the patrol vehicle for only a short period of time. Furthermore, the officer questioned him after he was released from the police car and the handcuffs were removed. Also, Joseph was never told that he was under arrest and was informed that he was not under any obligation to cooperate with the officer's investigation.

Similarly here, appellant was questioned during the active investigation of a crime. He was never told that he was under arrest, he was not handcuffed, he was not questioned while inside the patrol car, and no weapons were displayed when the single detective questioned him outside the vehicle. The entire investigative process was relatively brief, lasting 55 minutes or less (25 minutes sitting in the back of the police car and 20 to 30 minutes interviewing outside the car). The length of the detention was not unreasonably protracted because police were actively investigating a recent homicide, and they knew that appellant had discovered Montoya's body. (See *People v. Forster* (1994) 29 Cal.App.4th 1746, 1754 [an "hour-plus detention" did not mandate a custody finding because it was "rationally explainable"].) As with the minor in *In re Joseph R.*, the time that appellant was restrained in the back of the police car was brief, "it seems likely he was . . . placed in the police car merely so the officer could maintain control . . . while he carried on another portion of his investigation." (*In re Joseph R.*, *supra,* 65 Cal.App.4th at p. 958; see *Adams v. Williams* (1972) 407 U.S. 143, 146 [92 S.Ct. 1921, 32 L.Ed.2d 612] [a detention for the purpose of maintaining the status quo may be reasonable depending on the circumstances].) In this case, the deputy placed appellant in the patrol car to maintain the integrity of the crime

scene and ensure that appellant was available to interview once the detective arrived.

Under the totality of the circumstances, a reasonable person in appellant's position would not have "experience[d] a restraint on his or her freedom of movement to the degree normally associated with a formal arrest. [Citations.]" (*People v. Aguilera* (1996) 51 Cal.App.4th 1151, 1161.) The record supports the trial court's determination that *Miranda* did not apply because appellant was not in custody when he made the contested statements. Thus, admission of appellant's statements to the officers was not erroneous and did not infringe any of his constitutional rights or protections. (*Joseph R., supra*, 65 Cal.App.4th at pp. 957-961.)

Finally, even if appellant were able to show that his statements were obtained in violation of *Miranda*, the erroneous admission of these statements did not prejudice him. Any error in admitting appellant's statements was harmless beyond a reasonable doubt. (*Arizona v. Fulminanate* (1991) 499 U.S. 279, 310 [improper admission of a confession is subject to harmless error analysis]; *Chapman v. California* (1967) 386 U.S. 18, 24; accord, *People v. Cahill* (1993) 5 Cal.4th 478, 509-510.)

First, the majority of appellant's statements were not incriminating. Other than briefly stating, "I am a convict. I won't go to court about this[,]" appellant completely denied responsibility for the crime. (5 RT 1361-1363.) Second, even without the statements, evidence of appellant's guilt was overwhelming. Contrary to his assertion that the prosecution's case on the rape and special circumstances charges was weak (AOB 81-82), the record unquestionably demonstrates that appellant forcibly raped Montoya. His theory that a young girl, having her menstrual cycle, on a hot day when she clearly wanted to go home from school, would consent to having sex within minutes of meeting a complete stranger nearly twice her age, and covered in facial tattoos, is wholly unbelievable. Appellant's guilt

as to the rape and special circumstance charges hinged on these facts, not on his pre-arrest statements denying responsibility to the detective. Therefore, even if the trial court improperly denied appellant's *Miranda* motion, the admission of his statements at trial is harmless in light of the overwhelming evidence of guilt.

IV. THE TRIAL COURT DID NOT ERR IN INSTRUCTING THE JURY WITH CALJIC NO. 2.28

Appellant claims the trial court erred in giving CALJIC No. 2.28 (Failure to Timely Produce Evidence) in light of criticisms of that instruction. (AOB 83-94.) Respondent disagrees. Furthermore, even if the CALJIC No. 2.28 instruction was error, despite appellant's view that this was a close case on the rape and special circumstance charges (AOB 91-94), there was no prejudice warranting a reversal of the jury's conviction.

A. Factual Background

The prosecutor objected that defense counsel failed to provided timely discovery regarding expert witness Brent Turvey. (20 RT 6050, 6324-6326.) Although Turvey's name appeared on the defense witness list, defense counsel failed to provide any information about the witness until after trial started; Turvey did not speak to the prosecutor or provide a written report prior to trial. (20 RT 6050.) The prosecutor also objected that Turvey's testimony about (1) the alleged failure of the police to adequately investigate forcible rape and (2) appellant killing in a rage, was not beyond the common knowledge of the jury such that an expert opinion would be helpful. (20 RT 6048-6049.) The court conducted a hearing outside the presence of the jury during which defense counsel and the prosecutor questioned Turvey about his qualifications. (20 RT 6053-6069.) The court denied the prosecutor's objection regarding Turvey's expertise. (20 RT 6068, 6121.) However, the court offered the prosecutor a continuance to investigate the witness. (20 RT 6068-6069.) The

prosecutor declined, indicating that he preferred to hear Turvey's direct testimony. (*Id.*) After Turvey testified on direct examination that he believed no forced rape occurred (20 RT 6124-6152, 6158-6188), the prosecutor declined the court's offer of a continuance, and instead cross-examined Turvey (20 RT 6196-6313).

The trial court decided to give CALJIC 2.28 over defense counsel's objection, finding that the prosecution had suffered prejudice:

> The instruction is in CALJIC I think for a purpose. The cases that I have read have been to the effect, generally speaking, that it was a lesser sanction than any other kind of sanction.
>
> And is a fairly -- the CALJIC doesn't say that, but as I read it I find it to be a relatively benign instruction and I do think that if things of this sort and the discovery statutes are not complied with it does, in fact, warrant something, otherwise it doesn't come -- I think the People have, in fact, been prejudiced by Mr. Turvey's late calling and the late -- I think it's fundamentally unfair, really.
>
> The witness had prepared for this case as late as -- I think his testimony was in 1998. I asked the court reporter to check this for me this morning and she tells me that the testimony actually was late '98, or early '99 he had viewed the premises and made his preparation basically.
>
> But he didn't make any report. That was his testimony as I recall. He was on the defendant's list of witnesses for at least a year according to the -- Mr. Holmes. The People tried to talk with him and he refused.
>
> Counsel said, well, if Mr. Frawley had contacted them he probably would have allowed him to talk to him. And then he changed. Mr. Holmes changed it said, well, I would have allowed it.

As I understand it the -- and if I misstate a fact then I'll have -- let counsel correct me. But, if I'm basically accurate I don't want any more discussion on it. As I understand it, it was E-mailed to Mr. Frawley sometime 2 a.m. on a Sunday morning before court would take up on Monday.

Then there was discussion, I'm not making a specific finding of bad faith, just simply unfair. It did strike me, Mr. Holmes, that you indicated that you sort of accidentally found out [Turvey] was testifying in Stockton. That means to me, at least, there had to be some communication between your office and his office or him or some way because it is very difficult to have the court attaches, but I'm not making any accusation in that regard.

In any event, the Court feels it is prejudiced, it is a proper instruction and the Court will give it.

(22 RT 6557-6559.)

The trial court later instructed the jury regarding the discovery violation pursuant to CALJIC No. 2.28 as follows:

The prosecution and the defense are required to disclose to each other before trial the evidence each intends to present at trial so as to promote the ascertainment of the truth, save court time and avoid any surprise which may arise during the course of the trial. Delay in the disclosure of evidence may deny a party an opportunity to subpoena necessary witnesses or produce evidence which may exist to rebut the noncomplying party's evidence.

Disclosures of evidence are required to be made at least 30 days in advance of trial. Any new evidence discovered within 30 days of trial must be disclosed immediately. In this case the defendant failed to timely disclose the following evidence: of Brent Turvey.

Late disclosure of the evidence was without legal justification; however, the Court has, under the law, permitted the production of this evidence during the trial.

The weight and significance of any delayed disclosure are matters for your consideration. However, you should

> consider whether the untimely disclosed evidence pertains to a fact of importance, something trivial or subject matter already established by other credible evidence.

(29 CT 5888.)

B. Relevant Law

Penal Code section 1054.3 requires the defendant and his attorney to disclose to the prosecuting attorney the names and addresses of persons who are to be called as witnesses at trial, along with any relevant statements of those persons. (Pen. Code § 1054.3, subd. (a).) Penal Code section 1054.5 provides for enforcement of the discovery requirements in criminal cases. Subdivision (b) provides that upon a showing that a party has failed to comply with discovery provisions,

> a court may make any order necessary to enforce the provisions of this chapter, including, but not limited to, immediate disclosure, contempt proceedings, delaying or prohibiting the testimony of a witness or the presentation of real evidence, continuance of the matter, or any other lawful order. Further, the court may advise the jury of any failure or refusal to disclose and of any untimely disclosure.

(Pen. Code, § 1054.5, subd. (b).) A prosecutor has a legitimate interest in having the identity and proposed testimony of defense witnesses timely disclosed prior to trial. (See *Michigan v. Lucas* (1991) 500 U.S. 145, 149-150 [111 S.Ct. 1743, 114 L.Ed.2d 205].)

The California Supreme Court has held California's "overall system of reciprocal discovery" is "constitutional[.]" (*People v. Saucedo* (2004) 121 Cal.App .4th 937, 943 citing *Izazaga v. Superior Court* (1991) 54 Cal.3d 356.) Furthermore, the United States Supreme Court has confirmed that preclusion of defense evidence (or something short of total preclusion) is a constitutional remedy that a court may use to sanction untimely disclose of defense evidence. (*People Lucas, supra,* 500 U.S. at pp. 151-153.) "Restrictions on a criminal defendant's rights to confront adverse

witnesses and to present evidence 'may not be arbitrary or disproportionate to the purposes they are designed to serve.'" (*Id.* at p. 151.) However, "probative evidence may, in certain circumstances, be precluded when a criminal defendant fails to comply with a valid discovery rule." (*Ibid.*) Indeed, "alternative sanctions would be 'adequate and appropriate in most cases.'" (*Id.* at p. 152, quoting *Taylor v. Illinois* (1988) 484 U.S. 400, 413 [108 S.Ct. 646, 98 L.Ed.2d 798].) The selection of a discovery sanction rests within the discretion of the trial court. (*People v. Jackson* (1993) 15 Cal.App.4th 1197, 1203.)

"The test for harmless error in instructing with CALJIC No. 2.28 is *People v. Watson* (1956) 46 Cal.2d 818, 836[], which asks whether it is reasonably probable appellant would have achieved a more favorable result if the court had not given the instruction." (*People v. Lawson*, (2005) 131 Cal.App.4th 1242, 1249, fn. 7.)

C. Legal Anaysis

Appellant asserts it was reversible error for the trial court to instruct jurors with CALJIC No. 2.28. Respondent disagrees. Even if the CALJIC No. 2.28 instruction was error, there was no prejudice warranting a reversal of the jury's conviction.

Appellant notes that CALJIC No. 2.28 has been criticized by several courts. (AOB 83-84; see *People v. Bell* (2004) 118 Cal.App.4th 249; *People v. Cabral* (2004) 121 Cal.App.4th 748; *People v. Saucedo*, *supra*, 121 Cal.App .4th 937.) Generally, the courts have found CALJIC No. 2.28 problematic because: (1) the instruction informs the jury that the defendant personally was responsible for the untimely disclosure of evidence when, in fact, the defendant may not have had any control over the delay; and (2) the instruction gives the jury no guidance in how to assess the harm (if any)

done by the delayed disclosure.[13/] (See *People v. Bell*, *supra,* 118 Cal.App.4th at pp. 254-257; *People v. Cabral*, *supra*, 121 Cal.App.4th at p. 752; *People v. Saucedo*, *supra*, 121 Cal.App.4th at pp. 942-943; *People v. Lawson*, *supra,* 131 Cal.App.4th at pp. 1247-1249.)

In *People v. Bell*, *supra*, 118 Cal.App.4th at p. 249, defense counsel in a murder case did not give the prosecutor reports of interviews with defense alibi witnesses until 10 days before trial. (*Id.* at p. 253.) The court found the giving of CALJIC No. 2.28 to be erroneous for four reasons: (1) it refers to "a defendant's" failure to make timely discovery, whereas the failure in that case "belonged to counsel and his investigator"; (2) it allowed the jury to infer that the prosecutor was disadvantaged by the untimely discovery without any evidence that such disadvantage actually occurred; (3) it provided the jury with insufficient guidance as to what remedy to apply if the prosecutor was disadvantaged; and (4) it did not state that untimely discovery, standing alone, is insufficient to support a verdict of guilt. (*Id.* at pp. 255-257.) The court found the error to be prejudicial because the prosecutor's case was not overwhelming, consisting essentially of the testimony of two eyewitnesses, one with a limited opportunity to see the killer and the other with credibility problems; the defendant's alibi witnesses were a critical part of his case; and, the prosecutor emphasized during argument that the witnesses should not be believed because of the untimely discovery. (*Id.* at p. 257.)

In *People v. Cabral*, *supra*, 121 Cal.App.4th at p. 748, defense counsel in a forgery case failed to timely disclose the anticipated testimony of the defendant's wife. (*Id.* at pp. 750-751.) The court agreed with the *Bell* court's analysis of the deficiencies regarding CALJIC No. 2.28. (*Id.* at

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[13]. CALJIC 2.28 has been superseded by CALCRIM No. 306.

pp. 751-752.) It found the error to be prejudicial because the wife corroborated the defendant's claim that he had a right to do what he did, and the jury could have rejected the wife's testimony as a sanction for, the untimely discovery. (*Id.* at p. 753.)

In *People v. Saucedo*, *supra*, 121 Cal.App.4th at p. 937, a defendant in a robbery case failed to disclose, until after his trial started, that his mother and sister would offer him an alibi. (*Id.* at pp. 939-940.) The court stated that CALJIC No. 2.28 is a "problematic" jury instruction that "encourages speculation and offers insufficient direction." (*Id.* at p. 942.) However, the court found the error harmless.

In this case, appellant contends CALJIC No. 2.28 required jurors to conclude that he violated a discovery rule and suggested that he committed the discovery violation without disclosing that counsel was actually at fault. (*People v. Bell*, *supra*, 118 Cal.App.4th at p. 257.) However, "CALJIC No. 2.28 does not operate as a mandatory presumption of culpability" and does not "require jurors to find any fact . . . ." (*People v. Saucedo*, *supra*, 121 Cal.App.4th at p. 941.) Appellant also claims the instruction erroneously told jurors that the late disclosure hampered the prosecution's case. But the instruction says only that a delay "*may* deny a party an opportunity" to present evidence. (CALJIC No. 2.28, emphasis added.) Appellant further notes that the instruction told jurors "to evaluate the weight and significance of a discovery violation without any guidance on how to do so . . . ." (*People v. Bell*, *supra*, 118 Cal.App.4th at p. 257) However, in this case, the trial court did not give CALJIC No. 2.28 in isolation, it also gave CALJIC No. 2.20[14/] (Believability of Witness), the witness credibility

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[14]. CALJIC No. 2.20 provides:

Every person who testifies under oath [or affirmation]

(continued...)

instruction, which provided guidance to the jury regarding how to assess Turvey's credibility in light of conflicting prosecution testimony.

Assuming, *arguendo*, that the trial court erred in giving CALJIC No. 2.28, it is not reasonably probable that a result more favorable to appellant

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(...continued)

> is a witness. You are the sole judges of the believability of a witness and the weight to be given the testimony of each witness.
>
> In determining the believability of a witness you may consider anything that has a tendency reasonably to prove or disprove the truthfulness of the testimony of the witness, including but not limited to any of the following:
>
> The extent of the opportunity or ability of the witness to see or hear or otherwise become aware of any matter about which the witness testified;
> The ability of the witness to remember or to communicate any matter about which the witness has testified;
>
> The character and quality of that testimony;
>
> The demeanor and manner of the witness while testifying;
>
> The existence or nonexistence of a bias, interest, or other motive;
>
> The existence or nonexistence of any fact testified to by the witness;
>
> The attitude of the witness toward this action or toward the giving of testimony;
>
> A statement previously made by the witness that is consistent with the testimony of the witness.
>
> (29 CT 5883.)

would have been reached had the instruction not been read to the jury. In this case, CALJIC No. 2.28 was harmless because it was "merely a vehicle for credibility challenges that would have been made even in the absence of the instruction." (*People v. Saucedo*, *supra*, 121 Cal.App.4th at p. 943.) Turvey's credibility was assailed on multiple levels. First, he opined that Montoya and appellant must have engaged in consensual sex because only Montoya would have taken the "demure" step of placing the used tampon in the cup on the work bench. Turvey's opinion was directly impeached by evidence of wood shavings on the tampon which indicated that it rested on some other surface before being placed in the cup. Second, Turvey impeached himself when he admitted not being aware of the report about the wood shavings. (21 RT 6245-6247.) Third, Turvey's credibility was also strained when he refused to admit that the tampon in the cup was consistent with appellant's other efforts to clean up the scene of the attack. Lastly, Turvey's credibility was again tested when he repeatedly insisted that none of Montoya's multiple wounds, including extensive bruising and superficial stab wounds to the back, could have been inflicted before the murder as part of the forcible rape. Turvey flatly insisted all of the wounds occurred after consensual sex despite contrary prosecution evidence that it was impossible to tell when the various injuries were inflicted. (21 RT 6270-6271.) Thus, even without CALJIC No. 2.28 ,jurors would have considered Turvey's credibility based on CALJIC No. 2.20. (*People v. Saucedo*, *supra*, 121 Cal.App.4th at p. 944.)

Furthermore, unlike the situation in *People v. Bell, supra,* 118 Cal.App.4th at p. 257, the prosecutor in this case did not "capitalize" on the jury instruction during closing argument in order to discredit the defense. To the contrary, the prosecutor did not mention the late discovery issue. In front of the jury, the prosecutor never stated or implied that appellant's belated production of discovery about Turvey prejudiced the People's case.

Far from suggesting the jury "do something" unspecified based on the discovery violation, the prosecutor simply argued the jury should discount Turvey's testimony as inherently lacking in credibility for the reasons adduced in cross-examination. (22 RT 6572, 6593, 6598, 6687-6688, 6691-6692.) Nothing in the trial court's instruction or the prosecutor's argument suggested that untimely discovery, standing alone, was sufficient to destroy the defense case.

Appellant notes that in *People v. Bell* the court held this instruction was prejudicial. However, unlike the present case, in *Bell* there was no physical evidence that the defendant was at the scene. He made no statements, and there was no evidence he knew the murder victim. The instruction focused on the late disclosure of three defense alibi witnesses who said Bell was not near the crime scene. The prosecution's case was weak. It relied on one impeached witness and another who had only a "brief opportunity to see the assailant." (*People v. Bell*, *supra*, 118 Cal.App.4th at p. 257.)

Likewise, *People v. Lawson* is distinguishable from the instant case. In *Lawson,* the late discovery led to the court's initially banning the testimony of a witness who contradicted the arresting officer, which effectively forced the defendant to testify in order to present his side of the story. (*People v. Lawson*, *supra*, 131 Cal.App.4th at p. 1246.) As a result, the defendant was impeached with his four prior convictions. (*Id.* at p. 1247.) The court later allowed the banned witness to testify, but gave CALJIC No. 2.28 to the jury. (*People v. Lawson*, *supra*, at pp. 1247, 1249.) Given these circumstances, and the fact that it was a "close case turning on witness credibility," the *Lawson* court held that the trial court's errors were not harmless. (*Id.* at p. 1249.)

Here, by contrast, this was not a close case on the rape and special circumstance charges. Appellant's defense, that he engaged in consensual

sex with Montoya, was weak. Appellant lied to the police, denying both that he raped and killed Montoya. At trial he changed his version of events and presented the defense that he had consensual sex with Montoya and then killed her. Yet, appellant's story that the young victim decided within several minutes of meeting him - - a complete stranger, nearly twice her age and covered in facial tattoos - - to willingly engage in sexual intercourse while menstruating on a hot day when she was anxious to get home at the end of the school week is highly doubtful. Appellant's account of the events was improbable and uncorroborated by any physical evidence. It is not reasonably probable that the result would be different had the court not given CALJIC No. 2.28. (*People v. Breverman* (1998) 19 Cal.4th 142, 178.)

Finally, in this case, the jury was properly instructed regarding the findings that were required in order to convict appellant. The trial court instructed on the burden of proof (CALJIC No. 2.90), and the elements of the offenses with which appellant was charged. (29 CT 5899, 5902-5911.) Nothing in CALJIC No. 2.28 can be construed to negate the prosecution's burden to establish all of the elements of the charged offenses beyond a reasonable doubt. The jury was also instructed to "[c]onsider the instructions as a whole and each in light of all the others" pursuant to CALJIC No. 1.01. (29 CT 5871.) This Court must assume that jurors are intelligent people who can understand and correlate all the instructions given. (*People v. Martin* (2000) 78 Cal.App.4th 1107, 1111.) CALJIC No. 2. 28 did not nullify any of the other instructions given in this case. The trial court did not err or abuse its discretion.

Lastly, appellant's argument that giving CALJIC No. 2.28 amounted to constitutional error is flawed. Accordingly to appellant, the instruction effectively amounted to an unconstitutional permissive inference that invited the jury to make an adverse inference of guilt based on an

unsupported judicial finding that defendant had withheld evidence. (AOB 93-94.) Defendant's reliance on *County Court of Ulster County, N. Y. v. Allen* (1979) 442 U.S. 140, is misplaced. In that decision, the Supreme Court found the Constitution did *not* invalidate New York's statutory presumption that permitted an inference of illegal possession based on the presence of a firearm in an occupant's automobile. The Supreme Court found that nonmandatory presumptions pose a significantly diminished threat of constitutional infirmity. Further, the presumption of possession was "entirely rational." (*Id.* at p. 163.)

Here, as the *People v. Saucedo* court explained, "CALJIC No. 2.28 does not operate as a mandatory presumption of culpability per se." (*People v. Saucedo, supra,* 121 Cal.App.4th at p. 941.)

> "In determining whether a challenged instruction constitutes an impermissible mandatory presumption we put ourselves in the place of the jurors and ask whether the instruction, 'both alone and in context of the overall charge, could have been understood by reasonable jurors to require them to find the presumed fact if the State proves certain predicate facts.' [Footnote.]" [Citation.] Whether considered alone or in the context of the instructions as a whole, CALJIC No. 2.28 did not require jurors to find any fact-let alone an elemental fact-if the prosecution proved other predicate facts, nor did it direct a finding on Saucedo's alibi defense.

(*Ibid.*) Accordingly, appellant's claim of federal constitutional error should be rejected.

V. THE VIDEOTAPE OF APPELLANT IN THE JAIL INTERROGATION ROOM WAS PROPERLY ADMITTED

The trial court admitted a videotape of appellant, taken in the interrogation room at the jail on the day of the murder, which depicted him removing his penis from his clothing and smelling his hands several times. Appellant argues that the trial court should have excluded the videotape

under Evidence Code section 352 because it lacked probative value and was unduly inflammatory and prejudicial. He also contends that admission of the videotape constituted a violation of his federal constitutional rights to due process and a fair trial. (AOB 96-102.) This claim lacks merit. The trial court properly ruled that the videotape was admissible because it was probative on the issue of forcible rape.

A. Factual Background

Defense counsel moved to exclude a videotape of appellant taken by a hidden camera shortly after his arrest as he sat in an interrogation room at the jail. (28 CT 5584.) The tape depicted appellant over a period of about 15 seconds unzipping his pants and using his hands to examine his penis and pelvic area at 8:22 p.m. The tape also showed appellant at 9:10 p.m. in his jail clothing. Over the course of 45 seconds, appellant unzipped his jail clothing and again inspected his pelvic area and penis with his hands. He then raised his hands to his nose several times. (Ex. 3.)

Defense counsel argued the videotape should be excluded under Evidence Code section 352 because it offered no basis to infer consciousness of guilt, that it was unduly inflammatory, and constituted impermissible character evidence. (6 RT 1630-1633.) The prosecutor argued that the videotape demonstrated consciousness of guilt and was probative on the issue of rape in that it showed appellant had sex with Montoya and was concerned that evidence of the sex act remained on his genitals. (6 RT 1635-1636.)

The trial court denied the defense motion to exclude the videotape. (6 RT 1725.) The court found that the videotape did not "resemble masturbation or something to that sort . . . . (6 RT 1644.) In making its ruling, the court stated:

> [F]irst of all, in taking the possible interpretation set forth by Mr. Holmes in his brief, it just doesn't

seem to me there is any particular - - I looked at that video, and it simply does not give any impression of a person that is being an exhibitionist, for example, knowing a camera was on; doesn't give any indication whatever that the defendant was in some manner I think taking advantage of that, of masturbating, and that just isn't in there.

So then the question really boils down again to 352; whether or not the evidence should be excluded because the probative value is substantially outweighed by the probability that its omission will necessitate - - well, undue consumption of time, creates substantial danger of undue prejudice to the defendant. It's not going to confuse the issue. It's not going to take any amount of time. So the real question is whether the probative value substantially outweighs the danger of undue prejudice to the defendant.

Any evidence that is against a defendant is certainly prejudicial in the general sense that it's evidence that goes to an issue of the case, but the kind of prejudice that it's introduced for, the sole purpose of making the defendant look bad or to be an evil person or something where there is no real issue to be proved by the evidence, that's the kind of prejudice - - I am paraphrasing - - that's the kind of prejudice I think is normally meant by the undue substantial prejudice to the defendant.

It doesn't seem to me that it's that kind. So, in other words, I think that in this case the issue of rape is certainly in issue. It has been put in issue by the defendant. So consequently the motion to exclude that will be denied. I find specifically that the probative value substantially outweighs any substantial danger of undue prejudice to the defendant.

(6 RT 1724-1725.)

B. Relevant Law

The admission of videotape evidence is governed by Evidence Code section 352. (See *People v. Sims* (1993) 5 Cal.4th 405, 452.) The question the trial court must resolve is whether the prejudicial impact of the videotape outweighs its value in assisting the jury to understand and evaluate the other evidence presented in the case. (*Ibid.*; see also *People v. Price* (1991) 1 Cal.4th 324, 441.) "Prejudicial" in this context is "evidence that uniquely tends to evoke an emotional bias against a party as an individual," and has only slight probative value. (*People v. Carey* (2007) 41 Cal.4th 109, 128; *People v. Crittenden* (1994) 9 Cal.4th 83, 134.)

A trial court's discretion in admitting a videotape "must not be disturbed on appeal except on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125.) An allegation of abuse of Evidence Code section 352 discretion in admitting allegedly prejudicial evidence is sufficient to preserve a due process argument on appeal, if the basis for the due process argument is the same evidentiary ruling. (*People v. Partida* (2005) 37 Cal.4th 428, 435-437.)

C. Legal Analysis

The trial court did not abuse its discretion under Evidence Code section 352 in finding that the probative value of the videotape was not substantially outweighed by any danger of undue prejudice, nor did the court's ruling violate appellant's federal constitutional rights.

The videotape depicting appellant handling his penis and then smelling his hands several times was highly probative on the consent issue in the rape and special circumstance charges. Appellant's primary defense was that he and Montoya engaged in consensual sex. The videotape accurately depicted appellant examining his penis and smelling his hands shortly after this act of allegedly consensual sex. Clearly, appellant was

attempting to discern if there was any evidence of intercourse on his genitals. However, if the sex truly had been consensual, as appellant maintained, he would not have been concerned if such evidence existed as it would not have been incriminating. In this context, the videotape was highly probative and supported the prosecution's theory that appellant committed forcible rape.

Appellant argues that while the videotape might have been probative of rape at the time of the court's pre-trial ruling (when appellant denied having sex with Montoya and claimed that his DNA was not on the tampon found inside Montoya), the tape was no longer relevant or probative when it was introduced during the trial because, by that time, appellant had admitted having sex with Montoya. However, appellant admitted only having consensual sex; he continued to deny forcible rape. Thus, the videotape remained relevant and probative in that it tended to show that appellant committed forcible rape because he was concerned about evidence of intercourse on his body. Accordingly, the trial court did not abuse its discretion in admitting the videotape.

Furthermore, the highly probative value of the videotape was not clearly outweighed by its prejudicial effect. Appellant asserts that the videotape constituted highly prejudicial evidence because it depicted him committing acts that some jurors might have perceived as "perverse" or "deviant." (AOB 99.) He argues that his actions of handling his penis and smelling his hands "do not lend themselves to ready explanation." (*Ibid.*) Appellant's claim lacks support. It was plainly evident that appellant was attempting to discern if any evidence of sexual activity was on his genitals. As the trial court found, the tape did not "resemble masturbation." (6 RT 1644.) The videotape was only about one minute long. Moreover, testimony describing the videotape would not have been as accurate as viewing the actual videotape. In addition, the tape was neither cumulative

of other evidence nor confusing on any issue before the jury. This was not a case where the videotape "presented a far more graphic, gruesome, and potentially prejudicial depiction than static photographs and thus, under such circumstances, should [have] be excluded from evidence." (*People v. Sims*, *supra*, 5 Cal.4th at p. 452.) Nor did the videotape constitute "evidence that uniquely tends to evoke an emotional bias against a party as an individual," and has only slight probative value. (*People v. Carey*, *supra*, 41 Cal.4th at p. 128.) In sum, the trial court did not abuse its discretion in permitting the prosecution to show the videotape to the jury.

Lastly, contrary to appellant's assertion, there was no violation of due process. Appellant contends that this Court must determine whether there was a miscarriage of justice according to the constitutional standard of *Chapman v. California* (1967) 386 U.S. 18, 24, under which reversal is required unless the error was harmless beyond reasonable doubt. (AOB 119.) Relying on *Estelle v. McGuire* (1991) 502 U.S. 62, appellant contends that the erroneous admission of prejudicial or inflammatory character evidence violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution. (AOB 118.)

In fact, the Supreme Court rejected such a contention in *Estelle v. McGuire*. (See *Estelle v. McGuire*, *supra*, 502 U.S. at p. 70, quoting *Spencer v. Texas* (1967) 385 U.S. 554, 563-564 ["'Cases in this Court have long proceeded on the premise that the Due Process Clause guarantees the fundamental elements of fairness in a criminal trial.... But it has never been thought that such cases establish this Court as a rulemaking organ for the promulgation of state rules of criminal procedure'"].) Moreover, as shown, the evidence was relevant. Because the evidence was relevant to an issue in the case, this Court "need not explore further the apparent assumption . . . that it is a violation of the due process guaranteed by the Fourteenth Amendment for evidence that is not relevant to be received in a criminal

trial." (*Estelle v. McGuire*, *supra*, 502 U.S. at p. 70; see also *People v. Carey* (2007) 41 Cal.4th 109, 126, fn. 4 ["[R]ejection, on the merits, of a claim that the trial court erred on the issue actually before that court necessarily leads to rejection of the newly applied constitutional 'gloss' as well. No separate constitutional discussion is required in such cases, and we therefore provide none"].)

The mere erroneous exercise of discretion under Evidence Code section 352 does not implicate the federal Constitution. (See *People v. Cudjo* (1993) 6 Cal.4th 585, 611.) The applicable standard of prejudice is that which is set forth in *People v. Watson* (1956) 46 Cal.2d 818, 836. (*Id.* at p. 611.) Under the *Watson* standard, error is harmless unless, after an examination of the entire cause, it appears reasonably probable that the result would have more favorable to appellant in the absence of the error. (*People v. Watson, supra,* 46 Cal.2d at p. 836.)

In this case, even if the videotape had been excluded, there is no reasonable probability that the result on the rape and special circumstance charges would have been different. There was ample evidence from which the jury could find that forcible rape occurred. Within a 20 to 25 minute time period, appellant had sex with, and then killed, Montoya. His assertion that a young girl, who did not know him, and was menstruating on a hot day where she clearly wanted to end the school week and get home, would suddenly consent to having sex with a stranger nearly twice her age and covered in facial tattoos, borders on the absurd. Setting aside the videotape, it is not reasonably probable that appellant would have received a more favorable result on the rape and special circumstance charges.

VI. THERE WAS NO PROSECUTORIAL MISCONDUCT DURING CLOSING ARGUMENT OF THE GUILT PHASE

Appellant contends that the prosecutor committed misconduct during closing argument that was incurable by the trial court's admonition to the

jury to disregard the comments. (AOB 103-110.) Specifically, he argues that the prosecutor's comments (1) improperly raised the issue of punishment during the guilt phase of the trial, and (2) implied that he personally believed death was the only appropriate punishment. Appellant's claim should be rejected because the trial court's admonitions cured any conceivable misconduct and any error was harmless.

A. Factual Background

Towards the end of his closing argument, the prosecutor said,

> The defense strategy in this case is to beat the special circumstance. If you don't find Mr. Thomas guilty of rape, they win the case.
>
> First degree murder, second degree murder, voluntary manslaughter, you will hear instructions about all those things. You can convict him of any of those crimes, but if you don't find him guilty of rape, and don't find the special circumstance to be true, that's a win for Mr. Thomas. Life in prison with the possibility of parole.

(6 RT 6602.)

A short time later, the prosecutor concluded his argument as follows:

> There is no way in logic, in reason, in common sense, that you can conclude that Michelle Montoya consented to the intercourse in this particular case.
>
> It is important that you hold Mr. Thomas responsible at the appropriate level. You have to put the right label on it.
>
> We have to call this crime what it was. It's a first degree murder and rape. Thank you.

(22 RT 6607.)

Immediately thereafter, the court adjourned for the noon recess. When the parties reconvened they discussed a jury instruction. (22 RT 6610-6614.) At that time, defense counsel objected that the prosecutor's

closing argument improperly referenced the issue of punishment (22 RT 6614).

> The argument was, if you can't find Alex Thomas guilty of rape, they win the case. He went on to say it means life with possibility of parole. And that was in regard to not finding the special circumstance.
>
> He urged them to find the special circumstance of rape to be true. And as part of the argument he stated that not to find it true, even to find premeditated murder, would mean life with possibility of parole.
>
> And we believe that that is a reference to punishment and that it is not to be considered by the jury at this stage.

(22 RT 6615.)

When the court asked the prosecutor if he was in fact arguing the issue of punishment, he replied, " I didn't tell the jury anything that they haven't been told in various forms throughout this trial. I was not arguing that they should." (22 RT 6616.) Defense counsel requested that the trial court admonish the jury with "the standard jury instructions that the Court reads that [the jury is] not to consider punishment at this phase." (22 RT 6617.)

The trial court responded,

> Basically [the prosecutor] said if you can't find -- if you can't find the defendant guilty of rape, they win. Or if you don't find him guilty of rape and you don't find special circumstance to be true then that is or this is a win for Mr. Thomas. Then he said life with the possibility of parole.
>
> As far as argument goes, it strikes me that everything up until he said, the prosecutor, Mr. Frawley said, life with the possibility of parole, was proper argument. I mean just offhand that's the way it seems to me.

> By saying life with the possibility of parole that's probably improper in that context but it's not improper in the context of motive.

(22 RT 6617-6618.)

The prosecutor maintained that his argument was proper, but stated that he did not object to the trial court admonishing the jury.

> Well, I certainly don't concede any misconduct or any error. Certainly what I intended by those remarks was not to tell the jury I didn't intend the jury consider penalty or punishment in evaluating whether he's guilty or not of the charges.
>
> The information that I referred to was information that the jury has had since the jury selection phase of the case when we explained the significance of a special circumstance. But I don't think I dwelled on it or emphasized it in any improper way.
>
> However, if the Court wants to give the instruction 18.83.2 before Mr. Holmes argues just emphasize to the jury that their consideration of the evidence at this phase should not be influenced by consideration of penalty or punishment. I have no objection to that.

(22 RT 6618-6619.)

When the jury reconvened, the trial court provided the following admonishment:

> Ladies and Gentlemen, before we start the closing argument of counsel for the defense, it's been asserted that Mr. Frawley referred to punishment in a portion of his closing argument as to how -- as a consideration as to how you should decide the issue of guilt or lack of guilt and you are instructed that in the consideration of guilt or lack of guilt the jury cannot be influenced by punishment.
>
> And I will read you formal instructions on that issue at a later time.

(22 RT 6620.)

B. Relevant Law

Prosecutorial misconduct consists of "'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.' [Citations.]" (*People v. Hill, supra*, 17 Cal.4th at p. 819; *People v. Espinoza* (1992) 3 Cal.4th 806, 820.) However, "'[a] prosecutor may vigorously argue his case, marshalling the facts and arguing inferences to be drawn therefrom.' [Citation.]" (*People v. Sandoval* (1992) 4 Cal.4th 155, 183.)

> The applicable federal and state standards regarding prosecutorial misconduct are well established. A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process. Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury. . . . Additionally, when the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.

(*People v. Samayoa* (1997) 15 Cal.4th 795, 841, citations and internal quotation marks omitted.)

C. Legal Analysis

1. Alleged Reference to Punishment

Appellant contends that the prosecutor's comment during closing argument, that "if you don't find him guilty of rape, and don't find the special circumstance to be true, that's a win for [the defendant]," improperly urged the jury to consider punishment during the guilt phase of the trial. (AOB 103-110; 22 RT 6602.) Whether or not the prosecutor's

comments constituted error is questionable. Contrary to appellant's assertion, the trial court did not explicitly find error, but rather stated, "[b]y saying life with the possibility of parole that's *probably* improper in the context . . . ." (22 RT 6618, emphasis added.) Here, the prosecutor did not argue that the jury should consider punishment during the guilt phase. Rather, as the prosecutor noted, he simply reiterated what the jury had previously learned during voir dire - - that it would only reach a penalty phase if it found that appellant was guilty of first degree murder and that the special circumstance of rape was true. (22 RT 6618-6619.) The jurors were also told during jury selection that they could not consider or discuss the subject of punishment while deliberating in the guilt phase. Thus, there is no reasonable likelihood that the prosecutor's remark misled the jury as to whether it could consider punishment during its guilt deliberations. (*People v. Samayoa* (1997) 15 Cal.4th 795, 842-843, 64.)

Even if the prosecutor committed misconduct, reversal is not required because it is not "reasonably probable that a result more favorable to the defendant would have occurred' absent the misconduct. [Citation.]." (*People v. Welch* (1999) 20 Cal.4th 701, 753.) As discussed previously, there was substantial evidence supporting the rape and special circumstance finding. The jury was not likely to acquit appellant of those charges even if the prosecutor had not made the challenged statement. Moreover, the reference to punishment was very brief when viewed in the context of the prosecutor's lengthy closing argument. In addition, the trial court immediately admonished the jury after the prosecutor's remarks that "in the consideration of guilt or lack of guilt the jury cannot be influenced by punishment." (22 RT 6620.) Finally, following closing argument, the trial court instructed the jury pursuant to CALJIC 8.83.2:

> In your deliberations the subject of penalty or punishment is not to be discussed or considered by

> you. That is a matter which must not in any way affect your verdict or affect your finding as to the special circumstance alleged in this case.

(29 CT 5914.) It is presumed the jury followed the court's admonishment and instruction. (*People v. Ledesma* (2006) 39 Cal.4th 641, 684.) When taken together, the instructions were sufficient to obviate any error by the prosecutor.

Finally, appellant's reliance on *People v. Holt* (1984) 37 Cal.3d 436, 208, to support his contention that the reference to punishment was prejudicial in not persuasive. (AOB 105-106.) As this Court noted in *People v. Stevens* (2007) 41 Cal.4th 182, 205-206, *Holt* is distinguishable.

> There, the trial court did not immediately admonish the jury following the prosecutor's remark that accepting defendant's theory would guarantee Holt a parole date. [Citation.] Rather than disapproving the argument, it said, "I wouldn't talk any more about that." [Citation.] Here, in addition to the court's immediate intervention and disapproval, the jury had already been properly informed that a penalty phase would follow only if defendant was convicted of first degree murder and a special circumstance was found true. Nothing in *Holt* indicates that the jury there had been similarly informed. Moreover, the . . . *Holt* court did not find prejudice based solely on the prosecutor's argument. Rather, it reversed for cumulative prejudice based on several errors including the objectionable argument. [Citation.]

2. Alleged Vouching

Appellant also briefly contends that the prosecutor erred when he "impliedly told the jury that he personally believed that the death penalty was the only appropriate punishment." (AOB 105.) The prosecutor stated:

> There is no way in logic, in reason, in common sense, that you can conclude that Michelle Montoya consented to the intercourse in this particular case. [¶] It is important that you

hold Mr. Thomas responsible at the appropriate level. You have to put the right label on it.

(22 RT 6607.) This claim should be rejected.

First, appellant did not object on this ground, nor did he request an admonition, contemporaneously with the now complained-of remarks during the prosecutor's closing argument. Therefore, he is precluded from raising the issue on appeal. (*People v. Ayala* (2000) 23 Cal.4th 225, 284 ["As a general rule a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion - and on the same ground - the defendant [requested] an assignment of misconduct and [also] requested that the jury be admonished to disregard the impropriety."].)

Second, to the extent appellant attempts to raise the issue, he does not set forth any argument to support his one line assertion that the comments constituted the prosecutor's personal belief regarding the appropriateness of the death penalty. (AOB 105.) Because appellant fails to support the claim with adequate argument, it should be rejected as not properly raised. (*People v. Gordon* (1990) 50 Cal.3d 1223, 1244, fn. 3 citing *People v. Bonin* (1989) 47 Cal.3d 808, 857, fn. 6.)

Lastly, even assuming appellant's claim is not waived, and is properly raised, the prosecutor's remarks did not amount to statements of personal belief as to the appropriateness of the death penalty. It is true that a prosecutor may not "vouch personally for the appropriateness of the verdict he or she urges." (*People v. Benson* (1990) 52 Cal.3d 754, 794-795.) However, when the prosecutor stated, "[i]t is important that you hold Mr. Thomas responsible at the appropriate level. You have to put the right label on it" he was simply arguing that appellant's actions satisfied the elements of forcible rape and the evidence supported that finding. "Prosecutors may argue rational inferences from evidence . . . ." (*People v. Sanders* (1995) 11 Cal.4th 475, 527.) The prosecutor's remarks did not

suggest that he was personally vouching for the appropriateness of the death penalty. Appellant's claim should be rejected.

VII. THE TRIAL COURT PROPERLY ADMITTED PHOTOGRAPHS OF APPELLANT WHICH DEPICTED HIS APPEARANCE ON THE DAY OF THE MURDER

The trial court admitted photographs of appellant taken on the day of the murder which depicted tattoos on his face. Appellant argues that the photographs were inflammatory, prejudicial and a violation of his federal constitutional rights to due process and a fair trial. (AOB 112-119.) This claim lacks merit. The trial court properly admitted the photographs because they were probative on the issue of whether Montoya consented to having sex with appellant.

A. Factual Background

After defense counsel told the jury in his opening statement that appellant's defense to the rape and special circumstance charges was that Montoya consented to sex, the prosecutor asserted that the issue of appellant's physical appearance on the day of the attack was at issue. (16 RT 4731.) The prosecutor asked permission to introduce into evidence several photographs of appellant taken on the day of the murder which depicted tattoos on his face. The tattoos included a number "107" on appellant's forehead, the initial "HCG," and small tear drops. (16 RT 53-25-5329; Exs. 18 D-I.) Defense counsel described the tattoos as gang tattoos. (16 RT 4732.) The prosecutor argued the photographs were probative on the issue of consent because they showed that, due to appellant's appearance, it was unlikely Montoya consented to sex. (16 RT 4732-4733.) The court tentatively ruled that the photographs were admissible. (16 RT 4734.)

The court later said that the photographs might be probative only on the consent issue if it were assumed that a young girl, such as Montoya,

would automatically be turned off by someone with tattoos. (16 RT 4740.) The court then stated, "I think I'm going to reverse that ruling," but allowed the parties to present further argument. (*Id.*)

The prosecutor argued that whether Montoya would either be intrigued or turned off by the tattoos was for the jury to determine. He further noted that appellant's appearance during trial, dressed in a sport coat and slacks, was entirely different from his appearance on the day of the murder, and that the jury was entitled to consider what appellant looked like on the day Montoya allegedly consented to have sex with him. The prosecutor emphasized that he would not present testimony explaining the significance of the tattoos; he merely wanted the jury to see what was visible to Montoya as she stood only inches away from appellant. (16 RT 4740-4741, 4743-4744.)

The following day, the trial court finalized its ruling, and found that the photographs were more probative that prejudicial on the consent issue. (16 RT 4859.) The court noted that based on the evidence, the defendant had only about 25 to 35 minutes to "seduce, have sex, and . . . kill [Montoya]." (*Ibid.*)

> The Court is of the opinion that the evidence that is proposed to be offered, [appellant's] appearance that day, and with the further knowledge that at least there isn't anything in any of the opening statements or any of the evidence so far that would indicate that she had any previous acquaintance with him, the Court feels that the probative value far outweighs the prejudicial value, and the proposed testimony is allowed.
>
> The Court further finds that it is not being offered - - under 352 it is not being offered as character to damage the defendant as a bad person, but really the issue of consent that comes in here is very square, and that is probative and that is an issue for both sides. They can argue however they want to.

That is the final ruling on this point.

(*Ibid.*)

The trial court then provided the jury with a limiting instruction regarding the proper use of the photographs.

> Ladies and gentlemen . . . I want to indicate to you that sometimes certain evidence is received for a very limited purpose that you can consider it for.
>
> Just before lunch you viewed Exhibits 18 D . . . through I. That can only be used on the issue of consent. In other words, what [Montoya] actually could see on the day in question. You cannot use it for any other issue or purpose other than the issue of consent. [¶] [¶] [¶] [¶] [¶] . . . Those are the photographs that you saw . . . of the defendant and the various tattoos . . . .

(18 RT 5365.)

B. Relevant Law

The admission of photographs lies within the broad discretion of the trial court under Evidence Code section 352 when a claim is made that they are unduly inflammatory. The court's exercise of its discretion will not be disturbed on appeal unless the probative value of the photographs is clearly outweighed by their prejudicial effect. [Citation.]" (*People v. Howard* (2008) 42 Cal.4th 1000, 1023.) The prejudice that section 352 is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence. (*People v. Zapien* (1993) 4 Cal.4th 929, 958.) "Prejudicial" in this context is "evidence that uniquely tends to evoke an emotional bias against a party as an individual," and has only slight probative value. (*People v. Carey* (2007) 41 Cal.4th 109, 128; *People v. Crittenden*, *supra*, 9 Cal.4th at p. 134.)

A trial court's discretion in admitting photographs "must not be disturbed on appeal except on a showing that the court exercised its

discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125.) An allegation of abuse of discretion in admitting allegedly prejudicial photographs under Evidence Code section 352 is sufficient to preserve a due process argument on appeal, if the basis for the due process argument is the same evidentiary ruling. (*People v. Partida* (2005) 37 Cal.4th 428, 435-437.)

C. Legal Analysis

The trial court did not abuse its discretion under Evidence Code section 352 in finding that the probative value of the photographs was not substantially outweighed by any danger of undue prejudice, nor did the court's ruling violate appellant's federal constitutional rights.

First, the photographs depicting appellant's appearance on the day of the murder were highly probative on the consent issue in the rape and special circumstance charges. The photographs accurately depicted appellant's appearance on the day of the attack, and tended to show that Montoya, a young girl, would not consent to sex with an unknown, older man with several tattoos on his face. Furthermore, based on the fact that the trial court could not clearly see the tattoos on appellant's face from the bench, the court determined that the jurors, who sat at an angle, thirty or forty feet from appellant, would not have a true impression of what appellant looked like when he was only inches away from Montoya on the day of the attack. (16 RT 4733.) Thus, the photographs, displaying a closer view of appellant's face, provided a true representation of how appellant appeared to Montoya. Accordingly, the trial court did not abuse its discretion in admitting the photographs.

Second, the highly probative value of the photographs was not clearly outweighed by their prejudicial effect. Appellant asserts that the photographs constituted highly prejudicial gang evidence. (AOB 115-116.)

While it is true that even if relevant, evidence of gang affiliation may be highly inflammatory and should be carefully scrutinized before it is admitted (*People v. Champion* (1995) 9 Cal.4th 879, 922), in this case, there simply was no evidence of gang affiliation. The court specifically prohibited the prosecutor from introducing gang evidence and he abided by that ruling. (16 RT 4859-4860.) Thus, there was no evidence of the significance of "107", the tear drops, or "HCG", or of any common knowledge relating to those tattoos. There simply was no testimony about appellant's possible gang affiliations or the significance of the tattoos. Appellant's assertion that the significance of the tattoos was "obvious" (AOB 112) to jurors is speculative and unsupported by the record. It is mere speculation to suggest that any juror might be so familiar with gang tattoos, gang initials, or gang posturing, that he or she might understand any gang connotations in the photographs. (*People v. Ngaue* (1991) 229 Cal.App.3d 1115, 1127 [speculative assertions are insufficient to sustain appellant's burden to show prejudice].)

Moreover, any possible prejudicial effect of the photographs was eliminated by the trial court's contemporaneous limiting instruction to the jury that the photographs could "only be used on the issue of consent. . . . You cannot use it for any other issue or purpose other than the issue of consent." (18 RT 5365.) The jury is presumed to have followed the court's instruction. (*People v. Yeoman* (2003) 31 Cal.4th 93, 139.) In this case, the record affirmatively shows that the trial court did not act arbitrarily, capriciously, or in an absurd manner, but carefully weighed prejudice against probative value over an extended period of time, and after hearing the parties argue the issue on several occasions. (See *People v. Mickey* (1991) 54 Cal.3d 612, 656.) The photographs were properly admitted.

Contrary to appellant's assertion, there was no violation of due process. Appellant contends that this Court must determine whether there

was a miscarriage of justice according to the constitutional standard of *Chapman v. California*, *supra*, 386 U.S. 18, 24, under which reversal is required unless the error was harmless beyond a reasonable doubt. (AOB 119.) However, the mere erroneous exercise of discretion under Evidence Code section 352 does not implicate the federal Constitution. (See *People v. Cudjo* (1993) 6 Cal.4th 585, 611; see also Respondent's Arg. V at pp. 61-62.) The applicable standard of prejudice is that which is set forth in *People v. Watson*, *supra*, 46 Cal.2d 818, 836. (*Id.* at p. 611.) Under the *Watson* standard, error is harmless unless, after an examination of the entire cause, it appears reasonably probable that the result would have more favorable to appellant in the absence of the error. (*People v. Watson, supra,* 46 Cal.2d at p. 836.)

In this case, even if the photographs had been excluded, there is no reasonable probability that the result on the rape and special circumstance charges would have been different. There was ample evidence from which the jury could find that forcible rape occurred. Within a 20 to 25 minute period, appellant had sex with, and then killed, Montoya. His assertion that a 17 year-old girl, who did not know him, and was having her menstrual cycle on a day where she clearly wanted to go home, would consent to having sex with a 34 year-old stranger within a minutes of meeting him borders on the absurd. Even if the jury had not seen the photographs of appellant's tattoos, it is not reasonably probable that appellant would have received a more favorable result on the rape and special circumstance charges.

VIII. CUMULATIVE ERROR DOES NOT WARRANT REVERSAL

Appellant contends the cumulative effect of the alleged errors occurring during the guilt phase require reversal of the death judgment. (AOB 120-122.) Respondent disagrees as no error occurred during the guilt phase, and to the extent there was error, appellant has failed to

demonstrate prejudice. Moreover, whether considered individually or for their cumulative effect, the alleged errors could not have affected the outcome of the trial. (*People v. Seaton* (2001) 26 Cal.4th 598, 691-692; *People v. Ochoa* (2001) 26 Cal.4th 398, 458; *People v. Catlin* (2001) 26 Cal.4th 81, 180.) A defendant is entitled to a fair trial, not a perfect one. (*People v. Box*, *supra*, 23 Cal.4th at p. 1214.) Appellant received a fair trial.

IX. DEFENSE COUNSEL DID NOT MAKE A MOTION TO PRESENT TESTIMONY OF THE DEFENSE INVESTIGATOR; ACCORDINGLY, THERE WAS NOT ERROR

Appellant contends the trial court erred when it denied his motion to call the defense investigator to testify as to why certain defense witnesses did not testify during the penalty phase. (AOB 123-125.) Specifically, appellant claims that the trial court abused its discretion by improperly excluding relevant evidence, and that the error violated his "right to a fair rebuttal of the prosecution's case for the death penalty," his right to have the jury consider all mitigating evidence, and his right to present a defense. All of these arguments lack merit.

A. Factual Background

During cross-examination of defense psychologist Dr. Gretchen White, the prosecutor asked if all of the people whom she interviewed had testified at trial.

> Q: Basically you go through the -- all this information that you acquire and you select out what it is that you're going to put in your report and testify about; isn't that correct?
>
> A: Yes, that's correct.
>
> Q: We have to rely on your good judgment to present a balanced picture?
>
> A: Yes, that's correct.

Q: Because all these other people that you're talking about the Choyce's, Roy Lee, Kelvin, all these family members of Mr. Thomas who had direct observation of what life was like growing up in the Thomas household they haven't come to court to testify, have they?

A: Well, there was some witnesses who came and testified.

Q: Right. But all the people whose accounts you are telling us about they haven't testified, have they?

A: Well, I think that I've told you accounts of a number of people who testified. Nita Sims and Patrick Ridgle.

Q: Okay.

A: Lawana.

Q: Okay. None of Mr. Thomas' cousins have testified; right?

A: I thought his cousin Lawana testified.

[PROSECUTOR]: Lawana testify?

[DEFENSE COUNSEL]: (Whereupon a nod of the head was given.)

[PROSECUTOR]: Lawana. Other than the others -- have any of the others testified?

A: Not that I know of.

Q: Okay. Mr. Thomas' brother, Kelvin, just one year younger living in Sacramento, he hasn't testified, has he?

A: Not that I know of, no.

Q: Got other brothers, too?

A: That's correct.

Q: They haven't testified. Roy Lee, he lives in Oakland?

A: The father?

Q: Yes.

A: Yes, that's correct.

(28 RT 8270-8271.)

The prosecutor also asked Dr. White about potential bias on the part of appellant's relatives and the atmosphere in which she conducted her interviews.

Q: But, did it appear to you that all of those individuals were extremely eager to provide information that they perceived as helpful to Mr. Thomas in this trial?

A: Oh, certainly. I think that they were, you know -- of course, they're very fond of him and, yes, I would feel that they are biased toward him.

Q: So you have to consider when you assess the reliability of this information you provided the motives of the people who provide the information; right?

A: Yes.

Q: And when you sit down and interview these people that's a little bit different from obtaining testimony under oath or statements under the formal circumstances of like an oath, a requirement to tell the truth; right?

A: Yes, I'm sure it is a very different atmosphere.

(28 RT 8284-8285.)

Later, after the close of defense evidence (28 RT 8367), the parties discussed jury instructions. The prosecutor requested the jury instruction regarding the failure to call all logical witnesses.

[PROSECUTOR]: I'm sure I put in the failure to call all logical witnesses instruction, but I will request that if it's not already in there.

THE COURT: Yes. And I have quite a few little things that I want to take up as we go through but I need to organize them. I've made a note here and a note there and –

[DEFENSE COUNSEL]: Your Honor, regarding the failure to call all logical witnesses we -- it was my intent to call our investigator, Tom Johnson, I think he's been here during parts of the trial but to testify perhaps at a later phase and I thought just to make a record not for any particular purpose but to make a record of what we had done to secure the attendance of these people and some of them are very ill, of course some of them are dead, and there are just a whole variety of problems with getting the witnesses to come and I'm a little bit leery of -- I'll have to look at the instruction but if that's going to be held against us --

THE COURT: No. No. I think -- no. What we're saying is that neither side is required to call all witnesses. That's the same one I read in the guilt phase.

[DEFENSE COUNSEL]: Okay.

THE COURT: What I think is being said is that was not included in his packet.

[PROSECUTOR]: Right.

THE COURT: And it ought to be.

[DEFENSE COUNSEL]: Okay.

THE COURT: No, we weren't -- I wasn't suggesting that counsel is going to be able to argue that you should have had all those people here.

[DEFENSE COUNSEL]: Maybe this would be a good time to bring up another subject that I've been

> mulling over and that is a point of law that I wanted to address in the closing argument.

(28 RT 8417-8418.)

B. Argument

1. There Was No Motion Before the Trial Court

Appellant contends that "to rebut the [prosecution's] inference [on cross-examination] that the basis for Dr. White's conclusions was untrustworthy, or that the defense was concealing unfavorable evidence," defense counsel moved to call the defense investigator to testify as to why certain witnesses did not testify at trial. (AOB 123-124.) This claim is not supported by the record. There was, in fact, no motion before the court. Rather, defense counsel merely commented on a proposed jury instruction.

After the close of defense evidence in the penalty phase (see 28 RT 8367 [defense rests]), the parties discussed jury instructions. (28 RT 8418-8419.) Within that context, the prosecutor requested the instruction on failure to call all logical witnesses. (28 RT 8417.) Defense counsel stated that he had intended to call the defense investigator "to testify perhaps at a later phase . . . just to make a record not for any particular purpose but to make a record of what we had done to secure the attendance of these people." (*Ibid.*) He then commented that he needed to look at the instruction again to determine if the failure to call the witnesses would "be held against us." (*Ibid.*) The court clarified that it was the same instruction that had been read during the guilt phase and that it simply had not yet been included in the packet of instructions for the penalty trial. (28 RT 8417.) The court further explained that it was not suggesting the prosecution would be allowed to argue that appellant "should have had all these people here." (28 RT 8418.) Defense counsel indicated that he understood, and responded, "Okay." (*Ibid.*) He then changed the topic and started

discussing another issue. (*Ibid.* ["maybe this would be a good time to bring up another subject that I've been mulling over and that is a point of law that I wanted to address in the closing argument"].) Clearly, defense counsel did not make a motion, formal or otherwise, to actually present the defense investigator's testimony, nor did the court rule on any such motion.

Even if defense counsel's general comments are interpreted as a motion, it was untimely. The defense had rested its case; the discussion about jury instructions occurred after the close of defense evidence. (29 RT 8637.) As such, anything that may have been interpreted as a defense motion should have been presented as a motion to re-open the evidentiary phase of the defense case. (*People v. Goss* (1992) 7 Cal.App.4th 702, 706 [a trial court has broad discretion to determine whether to reopen the evidentiary phase of a trial]; see also *People v. Marshall* (1996) 13 Cal.4th 799, 836.) Appellant's attempt to characterize defense counsel's comments as a motion to present evidence is neither persuasive, not supported by the record.

2. Even If a Motion Was Before the Trial Court, There Was No Error

Appellant claims that the trial court's failure to allow him to present his investigator's testimony explaining why certain defense witnesses did not testify constituted reversible error that violated his "right to a fair rebuttal of the prosecution's case for the death penalty," his right to have the jury consider all mitigating evidence, and his right to present a defense. As set forth above, respondent asserts that the trial court never made such a ruling, as there was no motion before the court. However, even if such a ruling occurred, there was no error.

First, appellant claims that he was denied his right to "fair rebuttal of the prosecution's case for the death penalty" because he wasn't allowed to rebut the prosecutor's inference that certain defense witnesses did not

testify because they had nothing favorable to say about appellant. (AOB 129-131.) Appellant is mistaken when he claims the trial court denied him the opportunity to rebut the prosecutor. The opportunity for rebuttal arose after the prosecutor cross-examined Dr. White about defense witnesses not testifying at trial. (28 RT 8270-8271, 8284-8285.) At that time, appellant could have moved to present the testimony of his defense investigator, however he chose not to do so. The time to request rebuttal was not after the close of evidence during discussions about jury instructions. (28 RT 8417-8418.) Defense counsel's failure to timely request rebuttal does not constitute constitutional error by the trial court.

Second, appellant contends that the trial court violated his right to have the jury consider all mitigating evidence because his investigator was not allowed to explain why certain defense witnesses did not testify. (AOB 131-132.) While it is true that a capital defendant has a constitutional right to present all relevant mitigating evidence at the penalty phase (*Skipper v. South Carolina* (1986) 476 U.S. 1, 4), appellant was not denied that right. He presented extensive mitigating evidence to the jury, including testimony about alleged brain damage, metal retardation, learning disabilities, and an exhaustive family history of abuse and neglect gathered by Dr. White from appellant's relatives. All of this evidence was before the jury; an explanation from appellant's defense investigator as to why certain witnesses did not testify is not mitigating evidence. The substance of those witnesses' mitigating evidence, presented through Dr. White, was before the jury.

Third, appellant claims that the trial court's exclusion of his investigator's testimony violated his right to present a defense. (AOB 133-135.) Appellant is mistaken. The information he wanted before the jury regarding his background was presented in detail. The defense investigator's testimony about why certain witnesses did not testify would

have constituted, at most, a secondary point - -it was not the substance of appellant's defense.

> "Although completely excluding evidence of an accused's defense theoretically could rise to this level, excluding defense evidence on a minor or subsidiary point does not impair an accused's due process right to present a defense. [Citation.] If the trial court misstepped, '[t]he trial court's ruling was an error of law merely; there was no refusal to allow [defendant] to present a defense, but only a rejection of some evidence concerning the defense.' [Citation.]" [Citations.]

(*People v. Boyette* (2002) 29 Cal.4th 381, 428.) Here, because the trial court did not completely exclude evidence of appellant's defense, there was no error. (*Ibid.*)

As to all of these contentions, appellant claims that the prosecutor's closing argument "provided the prejudice for this evidentiary error" when he argued (1) during closing argument that the mitigating evidence was unreliable because the jury did not hear from the "best [defense] witnesses,"(29 RT 8606), and (2) during rebuttal that if any of the witnesses "had good things to say about [appellant] . . . they would have been here" (29 RT 8678). (AOB 124-125.) Appellant is mistaken.

First, because there was no motion before the trial court, there is no error, and hence no prejudice to assess. Second, as to the first statement (jury did not hear from the "best [defense] witnesses"), appellant did not object. Third, even if prejudice is assessed, the prosecutor's comments were insignificant and brief when considered in light of the entire closing argument. Fourth, as to the second statement (if any of the witnesses "had good things to say about [appellant] . . . they would have been here"), the prosecutor argued this only during rebuttal in response to defense counsel's statements during closing argument that "[s]ometimes we subpoena witnesses that don't show, you know" (29 RT 8625) and "there are

circumstances that come up" which prevent witnesses from appearing in court (29 RT 8626). Fifth, as to both statements, the prosecutor was entitled to argue the weight that the jury should give the evidence. Sixth, the prosecutor did nothing more than argue a reasonable inference (that the witnesses had nothing favorable to say) based on the state of the evidence (lack of their testimony). (*People v. Bruce G.* (2002) 97 Cal.App.4th 1233, 1244 [prosecutor may comment on state of evidence, including nontestifying defendant's failure to proffer material evidence or witnesses to rebut prosecution's case]; *People v. Beivelman* (1968) 70 Cal.2d 60, 76-77 [prosecutor permitted to draw all reasonable inferences from evidence in his argument].) Lastly, the jury was instructed that argument of counsel was not evidence and that it must decide the case on the facts it determined to be true. (29 CT 5872; CALJIC 1.02.) It is assumed that the jury followed these instructions. (*People v. Boyette*, *supra*, 29 Cal.4th at p. 431.)

Even if the trial court abused its discretion in excluding the defense investigator's testimony, any error was harmless under both the state and federal standard. Penalty phase error is prejudicial under state law if there is a "reasonable possibility" the error affected the verdict. (*People v. Gonzalez* (2006) 38 Cal.4th 932, 961.) This standard is identical to the federal harmless beyond a reasonable doubt standard enunciated in *Chapman v. California*, *supra*, 386 U.S. at p. 24. (*People v. Gonzalez*, *supra*, 38 Cal.4th at p. 961.) In this case, appellant forcibly raped and viciously beat the young victim to death with a crowbar. The mitigating evidence of appellant's background was unlikely to overcome the heinous nature of the sexual assault and murder. Moreover, even if the defense investigator had testified as to why the defense witnesses did not appear at trial, the jury still would have heard the extensive aggravating evidence of appellant's seven prior violent felony convictions and his numerous violent

attacks on innocent victims. (See Respondent's Statement of Facts, Penalty Phase, Aggravating Evidence.) Based on these facts, there is no reasonable possibility that the penalty verdict would have been different had the jury been presented with the defense investigator's testimony.

X. THE PROSECUTOR DID NOT COMMIT MISCONDUCT DURING CLOSING ARGUMENT

Appellant contends that the prosecutor committed misconduct during closing argument when he (1) commented on appellant's failure to call certain witnesses, and (2) suggested that Vincent McGowan did not testify because he was afraid of appellant. (AOB 141-150.) These claims lack merit.

A. Factual Background

During closing argument of the penalty phase, the prosecutor explained that the defense expert, Dr. White, was allowed to rely on the hearsay statements of appellant's various relatives when forming her opinions about appellant. He argued that the jury should consider the weight accorded to such testimony, and determine its reliability.

> [Dr. White] . . . has a certain advantage that the prosecution's witnesses, that the rest of us don't have. She can talk about hearsay that comes from unreliable sources.
>
> [¶] . . . [¶]
>
> When you assess the weight that you are going to give their so-called mitigating evidence, you have to determine how reliable it is.
>
> Ladies and Gentlemen, it is not very reliable at all. You have not heard from the best witnesses on this point. You haven't heard from any of Mr. Thomas' brothers. You haven't heard from his Aunt Ruth and Uncle Leo who just live over here in Sacramento whom he lived with when he was 14 years old.

(29 RT 8605-8606.)

During defense counsel's closing argument, he suggested that many of the defense witnesses did not testify because of problems subpoenaing them and securing their attendance. "Sometimes we subpoena witnesses that don't show, you know." (29 RT 8625.) Defense counsel also told the jury "there are circumstances that come up" which prevent witnesses from appearing in court. (29 RT 8626.) The prosecutor objected to each argument on the grounds that defense counsel was arguing facts outside the record and unsupported by the evidence, but the trial court overruled the objections. (29 RT 8625-8626.)

The prosecutor argued in rebuttal that defense counsel's suggestion that additional witnesses did not testify for appellant because of an inability to secure their attendance at trial was not supported by the evidence.

> On the other hand, for Mr. Holmes to imply that there would have been other witnesses to testify on behalf of the defendant but for some inability to get them here, that simply is not true. There are ways to get witnesses before the Court.
>
> You put them under subpoena. If they don't show up, you issue a warrant for their arrest. If there were witnesses out there who had good things to say about Alex Thomas, who could provide evidence that you could consider on his behalf, they would have been here.
>
> What you can infer from their absence is they didn't care enough about Alex Thomas to be here.
>
> There is something about Alex Thomas to cause them to feel that way about him. There is something about Alex Thomas that prevented his brothers from coming in here to testify about him.

(29 RT 8677-8678.)

The prosecutor also argued that it was reasonable to infer that Vincent McGowan had refused to testify because he was afraid after

appellant slashed his throat when the two were inmates in Los Angeles County jail.

> [PROSECUTOR]: . . . Vincent McCowan didn't testify because he wouldn't; he wouldn't answer questions, and Vincent McCowan is in that rare circumstance where there is nothing we can do to make him testify.
>
> He is serving a life sentence. The judge could hold him in contempt, hold a witness in contempt. You make him stay in jail until he changes his mind. What's that going to do to Vincent McCowan?
>
> He didn't testify probably because he doesn't want to be a snitch; doesn't want to go back to prison being known to have testified against Mr. Thomas.
>
> He is afraid. And Mr. Thomas is proud of it. He is proud of the fact that he can intimidate Vincent McCowan.
>
> [DEFENSE COUNSEL]: Objection, Your Honor.
>
> [PROSECUTOR]: He boasted --
>
> [DEFENSE COUNSEL]: No evidence of that outside the record.
>
> [PROSECUTOR]: He boasted --
>
> THE COURT: The objection is overruled. If you want to know the grounds of it, I will indicate it to you.
>
> [DEFENSE COUNSEL]: Okay.
>
> [PROSECUTOR]: I am pointing out that he boasted to Mr. Mason, the reporter for the Press Democrat. That was just a couple of weeks ago. He boasted about trying to kill Vincent McCowan.

(29 RT 8676-8677.)

B. Relevant Law

Appellant must demonstrate that the prosecutor's remarks during closing argument "comprise[d] a pattern of conduct 'so egregious that it infect[ed] the trial with such unfairness as to make the conviction a denial of due process.'" (*People v. Gionis* (1995) 9 Cal.4th 1196, 1214.) Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves "'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.'" (*People v. Gray* (2005) 37 Cal.4th 168, 216, citing *People v. Hill* (1998) 17 Cal.4th 800, 819.)

> [W]hen the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.

(*People v. Morales* (2001) 25 Cal.4th 34, 44.) The range of the prosecution's argument "is properly very wide" (*People v. Johnson* (1950) 99 Cal.App.2d 717, 730), and a prosecutor may properly "interject her own view if it is based on facts of record." (*People v. Frye* (1998) 18 Cal.4th 894, 1018.)

C. Legal Analysis

1. Argument Regarding Defense Witnesses Failure to Testify

Appellant contends that the prosecutor committed misconduct when he argued that the jury could infer that several defense witnesses had not testified on appellant's behalf because they did not have anything good to say about him. (AOB 144.) Appellant did not object, and therefore has waived this issue. Even if considered on the merits, however, this claim should be rejected.

In general, a defendant may not complain on appeal of trial misconduct by a prosecutor unless the defendant timely sought an assignment of misconduct and requested that the jury be admonished to disregard the impropriety. (*People v. Young* (2005) 34 Cal.4th 1149, 1184-1185.) Appellant claims an objection would have been futile because the trial court had previously denied his motion to allow the defense investigator testify as to why certain witnesses did not appear on appellant's behalf at trial. (AOB 146.) However, as set forth in respondent's Argument XVI, the trial court did not "prevent" appellant from presenting the defense investigator's testimony; in fact, defense counsel never made such a motion, and even if his general comments are construed as a motion, it was untimely because the defense had already rested its case. (See Arg. XVI; 28 RT 8417-8418.) Further, the "refusal" to allow certain testimony is a wholly separate matter from ruling on an objection to argument relating to such a failure. Thus, appellant's failure to object to the prosecutor's argument should be deemed a waiver of this issue.

If this Court considers the issue on the merits, it must fail. The prosecutor did not commit misconduct when he only commented on appellant's failure to call several witnesses. "A prosecutor may fairly comment on the state of the evidence, including a nontestifying defendant's failure to proffer material evidence or witnesses to rebut the People's case." (*People v. Bruce G.* (2002) 97 Cal.App.4th 1233, 1244.) The prosecutor commits misconduct only when he or she comments on the defendant's failure to call a logical witness who is unavailable to testify. (*People v. Wash* (1993) 6 Cal.4th 215, 263; Evid.Code, § 240 [unavailable witness].) The witness's unavailability cannot simply be asserted by the defendant, or assumed because it is likely. (*People v. Ford* (1988) 45 Cal.3d 431, 447-448.) It is not enough that the witness might be unavailable if

subpoenaed-for example, that he might invoke a privilege or might be impossible to locate. Instead, the witness must be called and his unavailability determined by the court. (*Ibid.* [witness must be called before court can uphold claim of unavailability to prevent prosecutor's comment on failure to call witness]) Therefore,

> a witness becomes 'unavailable' ..., and thus immune from comment on his absence for that reason, only when his actual sworn assertion of the privilege has been upheld by the trial court, or the parties stipulate to his unavailability, or the defendant otherwise 'satisf[ies] the court that the witness cannot be called or that in the circumstances of the case an adverse inference should not be drawn from the failure to call [the] witness.' [Citation.]

(*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1216, fn. 9.) Unless the witness is unavailable, the prosecutor is not precluded from commenting on the defendant's failure to call the witness. (*Ibid.*; *People v. Ford*, *supra*, 45 Cal.3d at pp. 447-448.)

Here, the prosecution was entitled to comment on appellant's failure to call logical witnesses, such as appellant's brothers or other relatives, who could have offered testimony supportive of his claim that he suffered an abusive childhood. Appellant's reliance on *People v. Ford*, *supra*, 45 Cal.3d, is misplaced. (AOB 144-145.) Under *Ford*, a prosecutor commits misconduct only when he comments on a defendant's failure to call a logical witness who has been found *unavailable* to testify by the trial court. (*People v. Ford*, *supra*, 45 Cal.3d at pp. 447-448; see also *People v. Gonzalez*, *supra*, 51 Cal.3d at p. 1216, fn. 9.) Here, the trial court made no finding of unavailability as to any of appellant's witnesses, nor did defense counsel request such findings. Further, nothing in the limited "proffer" regarding the possible testimony by the defense investigator was sufficient, without more, to support such a finding. Thus, the prosecutor could

comment on appellant's "failure to proffer . . . witnesses to rebut the People's case. (*People v. Bruce G.*, *supra*, 97 Cal.App.4th at p. 1244.)

Moreover, it was defense counsel who suggested that many of the defense witnesses did not testify because of problems subpoenaing them and securing their attendance. (See 29 RT 8625 ["sometimes we subpoena witnesses that don't show, you know"]; see also 29 RT 8626 ["there are circumstances that come up" which prevent witnesses from appearing in court].) In the rebuttal portion of closing argument, the prosecutor is entitled to rebut defense counsel's arguments. It was defense counsel, not the prosecutor, who initially suggested there had been problems subpoenaing the witnesses. Therefore, the prosecutor was entitled to comment on the issue.

2. Argument Regarding Vincent McGowan

Appellant claims that the prosecutor improperly argued facts outside the evidence when he stated during rebuttal argument that Vincent McGowan probably didn't testify "because he doesn't want to be a snitch; doesn't want to go back to prison being known to have testified against Mr. Thomas. [¶] He is afraid. And Mr. Thomas is proud of it. He is proud of the fact that he can intimidate Vincent McCowan." (29 RT 8676-8677; AOB 146-149.) Appellant's argument is not supported by the record.

The prosecution presented uncontested evidence that appellant slashed McGowan's throat on July 4, 1985, when the two men were inmates in the Los Angeles County jail. (25 RT 7323-7324, 7328, 7338, 7342-7343, 7352-7360.) When McGowan was transferred to state prison, he told the intake counselor, Gerald Franks, about the attack and indicated that appellant was an enemy. (285 RT 7352-7360.) Appellant did not refute this evidence. In addition, on September 12, 2000, a few days before the penalty phase of the trial commenced, Clark Mason, a reporter for the Santa Rose Press Democrat, interviewed appellant at the county jail.

Appellant admitted that he slashed a man's throat while the two were in jail because the man was a snitch. (25 RT 7425-7426.) This evidence was also undisputed.

Based on the aforementioned evidence, it was not irrational to infer that McGowan feared appellant or that appellant was proud of the attack because he told the reporter about it 15 years after it occurred. "Prosecutors may argue rational inferences from evidence . . . ." (*People v. Sanders* (1995) 11 Cal.4th 475, 527; *People v. Kirkes* (1952) 39 Cal.2d 719 [counsel's argument must be based solely on the evidence presented to the jury, but unquestionably may address logical inferences which can be drawn from the evidence].) In any event, the trial court explicitly instructed the jury not to draw any inference from McGowan's refusal to testify.[15/]

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[15]. The trial court instructed the jury as follows:

> Now, with regard to another matter, I want to just read to you an instruction. Earlier in the phase of the trial you were allowed to observe Vincent McCowan in court. In addition to your observation of Mr. McCowan, you are also allowed to consider the fact that Mr. McCowan refused to testify concerning the occasion when he sustained the injury to his neck.
>
> In hearings outside your presence Mr. McCowan refused to answer questions even when told by me that he would be held in contempt of court.
>
> The evidence has already shown that Mr. McCowan is currently serving a life sentence in prison. As a practical matter, the Court can do nothing more to convince Mr. McCowan to testify. You cannot draw any inference from Mr. McCowan's refusal to testify.

(continued...)

Therefore, to the extent the prosecutor drew his own reasonable inference from the evidence, any impact on the jury was negated by the trial court's admonition.

Appellant cites *People v. Bolton* (1979) 23 Cal.3d 208, for the proposition that the prosecutor committed misconduct. (AOB 147-148.) In *Bolton*, the deputy district attorney twice hinted in closing argument that, but for certain rules of evidence shielding the defendant, he could show that the defendant had a record of prior convictions or a propensity for wrongful acts. (*Id.* at p. 212.) This case, however, is obviously distinguishable from *Bolton*. The prosecutor here did not use argument as a back door for placing inadmissible evidence, or even evidence that had simply not been admitted, before the jury. Furthermore, the prosecutor supplied no information to the jury during argument that was not already before the jury.

As to both of appellant's claims, even if the prosecutor committed misconduct, reversal is not required because it is not "reasonably probable that a result more favorable to the defendant would have occurred' absent the misconduct. [Citation.]." (*People v. Welch*, *supra*, 20 Cal.4th at p. 753.) As set forth previously, based on the horrific nature of the rape and murder, appellant's extensive history of violent felony convictions, and his demonstrated pattern of violent conduct against innocent victims, there was overwhelming evidence supporting the death verdict - - the jury was not likely to vote for life in prison even if the prosecutor had not made the challenged statements. Moreover, the prosecutor's references regarding appellant's failure to call witnesses and McGowan's fear of appellant were

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(...continued)

(25 RT 7581.)

very brief when viewed in the context of the prosecutor's lengthy closing argument. In addition, as to the McGowan argument, the trial court admonished jurors not to draw any inference from McGowan's failure to testify. Furthermore, the court instructed the jury that the arguments of counsel were not evidence. (29 CT 5872; CALJIC 1.02.) It is presumed the jury followed the court's admonishment and instruction. (*People v. Ledesma*, *supra*, 39 Cal.4th at p. 684.) When taken together, the instructions and admonition were sufficient to obviate any error by the prosecutor. It is not reasonably probable that a result more favorable to appellant would have occurred absent the alleged misconduct. (*People v. Welch*, *supra*, 20 Cal.4th at p. 753.)

XI. THE PROSECUTOR'S ARGUMENT DID NOT VIOLATE APPELLANT'S SIXTH AMENDMENT RIGHT TO CONFRONTATION

Appellant claims that the trial court erred in overruling defense counsel's objection to the prosecutor's argument that Vincent McGowan refused to testify because he was afraid of appellant. (AOB 152-154; 29 RT 8676-8677 ["He didn't testify probably because he doesn't want to be a snitch . . . He is afraid. And Mr. Thomas is proud of it. He is proud of the fact that he can intimidate Vincent McCowan.") He asserts this error violated his Sixth Amendment right to confrontation because the prosecutor's argument told the jury what McGowan's testimony would have been.

Although appellant attempts to frame this issue as a Sixth Amendment argument, the issue, at best, concerns the prosecutor seeking to draw a reasonable inference from the facts in evidence. The prosecutor did not say that McGowan would have testified that he was afraid of appellant. Rather, the prosecutor simply reviewed the facts about appellant slashing McGowan's throat and made the not unreasonable inference that McGowan feared appellant. (*People v. Roberts* (1992) 2 Cal.4th 271, 310 [it is true

that counsel may not testify during closing argument, but counsel may emphasize evidence properly adduced at trial]; *People v. Kirkes*, *supra*, 39 Cal.2d at p. 724 [counsel's argument may address logical inferences which can be drawn from the evidence]; *People v. Hill* (1998) 17 Cal.4th 800, 819 [the prosecutor may make fair comment on the evidence].) At most, the prosecutor adduced a reasonable inference from facts before the jury. Moreover, any error was cured when the trial court instructed the jury not to draw any inference from McGowan's refusal to testify (25 RT 7581) and that the argument of counsel did not constitute evidence (29 CT 5872; CALJIC 1.02). It is presumed the jury followed the court's admonishment and instruction. (*People v. Ledesma*, *supra*, 39 Cal.4th at p. 684.)

XII. THE TRIAL COURT PROPERLY ADMITTED THE PRELIMINARY HEARING TESTIMONY OF RICARDO JONES

Appellant asserts that the trial court erred in admitting the preliminary hearing testimony of Ricardo Jones in violation of his rights under the Sixth, Eighth, and Fourteenth Amendments. Appellant asserts that Jones should not have been declared "unavailable" by the trial court and that his preliminary hearing testimony should not have been admitted at trial. (AOB 155-167.) Both of these contentions are without merit.

A. Factual Background

Pursuant to Evidence Code section 1291[16], the prosecutor argued that Ricardo Jones was unavailable to testify and requested to read into the

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[16]. Evidence Code section 1291, subdivision (a), provides:

> Evidence of former testimony is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and: [¶] ... [¶] (2) The party against whom the former testimony is offered was a party to the action or proceeding

(continued...)

record Jones's 1985 preliminary hearing testimony. (25 RT 7573-7591.) The transcript of that testimony included evidence that sometime after midnight on July 26, 1984, Jones saw appellant approach a man in a truck on a side street off Montclair Avenue in South Central Los Angeles. (25 RT 7574.) Appellant said, "Give me the $25 or give me the rock." (25 RT 7583.) The driver argued with appellant and started to drive away. Appellant pulled out a gun and shot the driver. The truck swerved off the road, onto a lawn, and the driver fell out of the truck. (25 RT 7577-7578.) Appellant pleaded guilty to voluntary manslaughter and was sentenced to a term of 18 years and eight months in state prison. (25 RT 7571.)

To demonstrate that Jones was unavailable under Evidence Code section 1291, the prosecutor presented the testimony of Sacramento County District Attorney Investigator Mark Rall. Over the course of two months, Rall and the Riverside District Attorney's Office attempted to secure Jones's appearance at appellant's trial. On August 8, 2000, the Riverside District Attorney personally served Jones with a subpoena to appear on August 20, 2000, in Santa Rosa. Investigator Rall had previously spoken with Jones about arranging for his transportation to Santa Rosa. However, Jones failed to appear on August 20, 2000. (25 RT 7489-7490.) The Riverside County District Attorney's Office personally served Jones again with a subpoena to appear in Santa Rosa on September 6, 2000. When Jones failed to appear, the court issued a bench warrant. (25 RT 7492-7493.) On September 12, 2000, Investigator Rall contacted Investigator Lodi Clark of the Riverside County District Attorney's Office and asked

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(...continued)

> in which the testimony was given and had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he has at the hearing.

him to attempt to serve the warrant on Jones. Rall also sent Clark a packet containing Jones's photograph, his criminal history, and additional identifying information. (25 RT 7493-7494.)

Investigator Clark testified that after speaking with Investigator Rall, he checked with Riverside County probation and jail regarding Jones's whereabouts but did not receive any leads. On September 18, 2000, Investigator Clark met with Jones's sister, Rise Jones, at her house. She assured Clark that she would be able to persuade Jones to come to her house. Rise told Clark that Jones was an alcoholic and drug addict. She also advised Investigator Clark about several locations in Riverside County that Jones frequented. (25 RT 7496-7498.) Investigator Clark also asked the Riverside County Sheriff's department to contact him if Jones was arrested on the warrant. On September 19, 2000, Investigator Clark met with a patrol officer from Mead Valley who was familiar with Jones and advised him of the warrant. Based on information from the officer, Clark personally searched for Jones at several locations in the Mead Valley. On that same day, Clark met Jones's sister, Rise, at her house because Jones was suppose to be there at 3:00 p.m.. However, Jones was not at the residence. Rise told Clark that she did not know why Jones failed to appear, but that she would try to contact him. She was very cooperative and eventually located Jones on September 20, 2000. However, Jones told Rise that he did not want to get involved with the case. (25 RT 7498-7499.)

In the interim, on September 19, 2000, Investigator Clark searched several locations for Jones and gave his phone number to people who knew Jones in case they had contact with him. Clark also searched a trailer where Rise believed Jones lived. On September 20 and 21, 2000, Investigator Clark again searched several liquor stores and other locations that Jones frequented. On September 22, 2000, Rise again told Investigator Clark that

Jones refused to cooperate. He would not come to her house or speak to the authorities by telephone. That same day, and again on September 23, 2000, Investigator Clark searched for Jones. Rise and her other brother, Darrold Jones told Investigator Clark that they believed he would not be able to find Jones. Finally, Clark checked with the Riverside County Sheriff's Office again to determine if they had arrested Jones on the warrant. (25 RT 7500-7501.)

The defense argued that the prosecution failed to show Jones was unavailable (25 RT 7505), and that admission of Jones's preliminary hearing testimony violated appellant's rights under the Confrontation Clause (25 RT 7510). The trial court overruled the objections:

> THE COURT: Having served him a subpoena twice . . .[¶] Talked to the sister over and over, kind of had personal contact, having searched his haunts, I really don't think anything else could have been done.
>
> The Court will find certainly that due diligence has been shown by the district attorney for the reading of prior testimony.
>
> I think that's, what, 1290 of the Evidence Code?
>
> [THE PROSECUTOR]: Former testimony. I'm not sure of the number. In connection with --
>
> THE COURT: Section 1290.

(25 RT 7506.)

> THE COURT: . . . I think that's been held repeatedly in areas where a sufficient showing has been made that due diligence under 1290 that confrontation has been held to be satisfied.
>
> The primary purpose of this -- I didn't count the number of pages, but starting on page 23 I think it was, there was a lot of cross-examination. . . .[¶] And on 57 further cross-examination. I don't know how many pages. In other words, the defendant had

> the benefit of a lot of cross-examination. I think that's the big issue of confrontation.
>
> Anyway, you'll reserve it. You've made the objection of confrontation. And I think it has been covered.

(25 RT 7510-7511.)

B. Relevant Law

> A criminal defendant has the right under both the federal and state Constitutions to confront the witnesses against him. (U.S. Const., 6th Amend.; Cal. Const., art. I, §§ 15.) This right, however, is not absolute. The high court recently reaffirmed the long-standing exception that "[t]estimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." (*Crawford v. Washington* (2004) 541 U.S. 36, 59, 124 S.Ct. 1354, 158 L.Ed.2d 177; [Citation.].) Evidence Code section 1291 codifies this traditional exception. [Citation.] When the requirements of Evidence Code section 1291 are met, "admitting former testimony in evidence does not violate a defendant's right of confrontation under the federal Constitution. [Citations.]" [Citation.]

(*People v. Wilson* (2005) 36 Cal.4th 309, 340.)

Under Evidence Code section 1291, a witness's preliminary hearing testimony is admissible at trial under the prior testimony exception to the hearsay rule if the witness is "unavailable" to testify and the party against whom the former testimony is offered was a party at the preliminary hearing and had the right and opportunity to cross-examine the witness with an interest and motive similar to that which he or she has at trial. "Unavailable" is defined under Evidence Code section 240, to include instances where the declarant is "[a]bsent from the hearing and the court is unable to compel his or her attendance by its process" or is "[a]bsent from

the hearing and the proponent of his or her statement has exercised reasonable diligence but has been unable to procure his or her attendance by the court's process." (Evid. Code § 240, subds. (a)(4) & (5).)

> The term "reasonable diligence" or "due diligence" under Evidence Code section 240, subdivision (a)(5) "connotes persevering application, untiring efforts in good earnest, efforts of a substantial character. [Citations.]" [Citations.] Considerations relevant to this inquiry include the timeliness of the search, the importance of the proffered testimony, and whether leads of the witness's possible location were competently explored. [Citation.]

(*People v. Wilson*, *supra*, 36 Cal.4th at p. 342.) The appellate court independently reviews a trial court's due diligence determination. (*Ibid.*)

C. Legal Analysis

1. Ricardo Jones's unavailability

The trial court found Ricardo Jones "unavailable" under Evidence Code section 240, subdivision (a)(4), and admitted his preliminary hearing testimony at trial under Evidence Code section 1291. The prosecution had the burden of establishing unavailability by competent evidence. (*People* v. *Price* (1991) 1 Cal.4th 324, 424.) Here, the trial court properly found that the prosecution had met its burden based on its offer of proof that (1) Jones was personally served with subpoenas on two occasions, (2) Investigator Clark checked with Riverside County probation and jail regarding Jones's whereabouts, (3) Jones's sister and Investigator Clark arranged a time and date for Jones to meet them at her house, but Jones failed to appear, (4) Investigator Clark advised the Riverside County Sheriff's department to contact him if Jones was arrested on the warrant, (5) Investigator Clark met with a patrol officer from Mead Valley who was familiar with Jones and advised him of the warrant, and (6) on five separate dates, Investigator Clark spoke with individuals familiar with Jones and

searched various liquor stores and other locations Jones was known to frequent. The evidence overwhelmingly demonstrated that the prosecution had "exercised reasonable diligence but [was] unable to procure [Jones's] attendance by the court's process." (Evid. Code § 240, subds. (a)(5).)

Contrary to appellant's contention, the prosecutor was not required to take extensive preventative measures to secure Jones's attendance. (AOB 160-161.)

> The prosecution is not required "to keep 'periodic tabs' on every material witness in a criminal case. . . . " [Citation.] Also, the prosecution is not required, absent knowledge of a "substantial risk that this important witness would flee," to "take adequate preventative measures" to stop the witness from disappearing. [Citation.]

(*People v. Wilson*, *supra*, 36 Cal.4th at p. 342.) "That additional efforts might have been made or other lines of inquiry pursued does not affect this conclusion. [Citation.] It is enough that the People used reasonable efforts to locate the witness." (*People v. Cummings* (1993) 4 Cal.4th 1233, 1298.) Accordingly, the trial court properly concluded that the prosecution's evidence was sufficient to establish that Jones was unavailable under Evidence Code section 240, subdivision (a)(4).

2. Appellant's prior opportunity to cross-examine

Appellant also asserts that the admission of Jones's testimony violated his Confrontation Clause rights under the Sixth Amendment and *Crawford v. Washington*, *supra,* because his interest and motive in cross-examining Jones at the 1985 preliminary hearing differed from that at the penalty phase of the trial in the present case. This assertion is both factually and legally without basis.

> Both the United States Supreme Court and this court have concluded that "when a defendant has had an opportunity to cross-examine a witness at the time of

> his or her prior testimony, that testimony is deemed sufficiently reliable to satisfy the confrontation requirement [citation], regardless whether subsequent circumstances bring into question the accuracy or the completeness of the earlier testimony. [Citation.]" [Citation.] In *Crawford v. Washington,* the high court stated that a prior opportunity to cross-examine a witness was "dispositive" of the admissibility of his testimonial statements, "and not merely one of several ways to establish reliability." (*Crawford v. Washington, supra,* 541 U.S. at pp. 55-56, 124 S.Ct. 1354.)

(*People v. Wilson*, *supra*, 36 Cal.4th at p. 344; see also *California v. Green* (1970) 399 U.S. 149, 167-168 [where a defendant has had an opportunity to cross-examine a witness at the time of his or her prior testimony, that testimony is deemed sufficiently reliable to satisfy the confrontation requirement].) Further, the federal Constitution guarantees an opportunity for effective cross-examination, not a cross-examination that is as effective as a defendant might prefer. (*United States v. Owens* (1988) 484 U.S. 554, 559.)

Appellant asserts that his right to confront Jones during the penalty phase of the trial was not satisfied by defense counsel's cross-examination of Jones at the 1985 preliminary hearing because that prior attorney had "no reason to cross-examine Jones in detail about the circumstances of the crime." (AOB 164.) However, the extent of defense counsel's cross-examination at the 1985 preliminary hearing was entirely a matter of defense strategy or tactics, and "[a]s long as [appellant] was provided the opportunity for cross-examination, the admission of preliminary hearing testimony under Evidence Code section 1291 does not offend the confrontation clause of the federal Constitution simply because [appellant] did not conduct a particular form of cross-examination that in hindsight might have been more effective." (*People v. Carter* (2005) 36 Cal.4th

1114, 1173- 1174.) Moreover, defense counsel did, in fact, conduct a thorough cross-examination of Jones at the 1985 preliminary hearing. (See 25 RT 7592-7615, 7620-7626.)

In addition, appellant's interest in questioning Jones at the preliminary hearing was similar to what it would have been had Jones testified during the penalty phase of the instant trial. Jones's eyewitness account of the shooting and his identification of appellant were at issue in both cases. (See 25/26 RT 7592-7615, 26 RT 7620-7626.) Numerous cases establish that an opportunity to examine the witness under oath at the preliminary hearing about an extra-judicial statement is constitutionally sufficient. (See, e.g., *People v. Smith* (2003) 30 Cal.4th 581, 611 ["it is the opportunity and motive to cross-examine that matters, not the actual cross-examination"]; *People v. Samayoa* (1997) 15 Cal.4th 795, 849-851 ["the admission of ... testimony under Evidence Code section 1291 does not offend the confrontation clause of the federal Constitution simply because the defendant did not conduct a particular form of cross-examination that in hindsight might have been more effective"]; *People v. Mayfield* (1997) 14 Cal.4th 668, 742; *People v. Zapien* (1993) 4 Cal.4th 929, 974-975 ["As long as defendant was given the *opportunity* for effective cross-examination, the statutory requirements were satisfied; the admissibility of this evidence did not depend on whether defendant availed himself fully of that opportunity. [Citations.]"].) As such, the Sixth Amendment was satisfied. (See e.g., *California v. Green*, *supra*, 399 U.S. at pp. 165-166; *People v. Cudjo* (1993) 6 Cal.4th 585, 618; *People v. Brock* (1985) 38 Cal.3d 180, 189-190.)

Even if the trial court erred in admitting Jones's testimony from the preliminary hearing, any error was harmless beyond a reasonable doubt. (*Chapman* v. *California*, *supra*, 386 U.S. at p. 18.) Here, there was abundant evidence to support imposition of the death penalty. Even

without the Jones's preliminary hearing testimony, the jury still would have learned that appellant was convicted of voluntary manslaughter in the case. Furthermore, additional evidence of appellant's seven prior violent felony convictions, as well as his many other acts of violence, and the seriousness of the charged offense was overwhelming. Any error was harmless beyond a reasonable doubt. (*People v. Ochoa*, *supra*, 19 Cal.4th at p. 479.)

XIII. RELIANCE ON UNADJUDICATED CRIMINAL ACTIVITY

Appellant contends the use of unadjudicated criminal activity as aggravating evidence in the penalty phase violates various constitutional rights. (AOB 168-181.) The Court should reject this argument as it has in the past. (See e.g., *People v. Carpenter* (1999) 21 Cal.4th 1016, 1060-1061; *People v. Cain* (1995) 10 Cal.4th 1, 69-70.)

XIV. EVIDENCE OF APPELLANT COMMITTING A BATTERY AND DOMESTIC VIOLENCE WAS PROPERLY ADMITTED UNDER PENAL CODE SECTION 190.3

Appellant maintains that he was prejudiced by the admission of evidence at the penalty phase regarding (1) a battery he committed against Kelly Minix, and (2) statements made by his wife during her testimony about a domestic violence incident. (AOB 182-186.) The trial court did not err because the evidence was properly admitted under Penal Code section 190.3, factor (b).

A. Factual Background

1. Kelly Minix battery

Before the penalty phase began, appellant moved to exclude evidence of an unadjudicated battery he committed against his co-worker, Kelly Minix, that he believed did not amount to criminal activity which involved the use of force or violence as contemplated under Penal Code section 190.3, factor (b). Before admitting the evidence, the trial court conducted a preliminary inquiry into its admissibility. The court reviewed

Minix's statement to her employer describing the 1997 incident in which appellant stopped her in the parking lot after work before she could close her car door and forcibly kissed her neck, causing a bruise. (23 RT 6882-6883.)

> However, before I could shut and lock the door he stuck his head into my car door, grabbed onto me, and started to kiss my neck without my permission. I tried to push him away, and he wouldn't let go. I said "F", knock it off, trying to make him leave me alone. He finally stopped and started to laugh like it was a joke . . . .

(23 RT 6884.) The court further noted that a report to the police "is not necessary for 190.3(b). The question was whether or not this was a threat of force or violence and that Minix's "testimony apparently will be that it was he grabbed her and wouldn't turn her loose." (23 RT 6885.)

In denying the motion, the trial court reasoned that the incident involved a battery and the jury could hear evidence of it under Penal Code section 190.3 , factor (b):

> [S]ome people chuckle when you talk about a hickey, but this is a little bit different. She tried to get away, according to what the apparent evidence will be, and I am having to go by the offer of proof.
>
> She tried to get to her car. She got in it, but couldn't get the door closed. The defendant comes in and kisses her without permission, raises a hickey and then laughs about it and walks off, I guess, after she fights. That is more than just a hickey, I think.

(23 RT 6879-6880.)

2. Delores Thomas's testimony about domestic violence attack

During the penalty phase, appellant's ex-wife, Delores Thomas, testified about an unadjudicated 1994 domestic violence incident in which appellant punched her in the nose. Delores described the events leading up

to the attack. She and appellant had disagreed about how to handle a dispute between her children involving a VCR. After appellant removed the VCR from Delores's son's room, the situation escalated.

> And we was like arguing, and I had started saying all the things that was on my mind that's been on my mind that I accused him of fooling around with a neighbor's daughter. I accused him of fooling around with my sister, and then when I said the part about my sister he --

(24 RT 7223.) Defense counsel objected, stating that "[w]hat she is testifying to now is irrelevant to the stated aggravation factor." (*Id.*) The prosecutor responded that he was "not offering it for the truth of what she's saying, just to describe the circumstances of what happened." (*Id.*) The trial court overruled the objection. (24 RT 7224.) Delores continued her testimony describing how her comments made appellant angry and he punched her in the nose and knocked her to the ground. (24 RT 7224.)

Later, during re-direct examination, Delores described how appellant had destroyed the VCR during the domestic violence attack. (24 RT 7241.) The prosecutor than asked a question about the incident, following up on an area that defense counsel had explored during cross-examination.

> [PROSECUTOR:] Now, [defense counsel] was asking you if Mr. Thomas was upset because there was an argument going on, and your answer was more that he was just irritated with Laron; is that correct?
>
> [DELORES:] Right.
>
> [PROSECUTOR:] Did Mr. Thomas and Laron have a good relationship?
>
> [DELORES:] No.
>
> [PROSECUTOR:] Can you explain that?

> [DELORES:] Well, he -- he like called my son names that he like feel like my son -- I teach my son to respect adults, and so my son was going to give him respect either way it went, whatever. He called him "punk", "sissy", different names.

(24 RT 7241.) Defense counsel objected, arguing that Delores's testimony was "not at this point related to the VCR incident or to the statutory aggravation." (*Ibid.*) The trial court overruled the objection and Delores finished her response to the question.

> He called him names, and he made us feel like he just feel like Laron wasn't -- he called him weak. Like he made us feel like he felt like Laron was not like -- he was a sissy or something, but we knew better than that, but it's just like that's just how he was with my son.

(24 RT 7242.)

B. Relevant Law

In *People v. Boyd* (1985) 38 Cal.3d 762, 776, this Court held that Penal Code section 190.3 "expressly excludes evidence of criminal activity, except for felony convictions," when the criminal activity was not violent or did not involve a threat (express or implied) to use violence. "[W]hether a particular instance of criminal activity 'involved . . . the express or implied threat to use force or violence' (§ 190.3, factor (b)) can only be determined by looking to the facts of the particular case." (*People v. Mason* (1991) 52 Cal.3d 909, 955.) Such evidence must involve actual, attempted, or threatened force or violence against a person, and not merely to property. (*People v. Boyd*, *supra*, 38 Cal.3d 762, 776.) Although a trial court lacks discretion to exclude *all* factor (b) evidence on the ground it is inflammatory or lacking in probative value, it retains its traditional discretion to exclude specific evidence if it is misleading, cumulative, or unduly prejudicial. (*People v. Box* (2000) 23 Cal.4th 1153, 1200-1201.)

C. Legal Analysis

1. Kelly Minix battery

Appellant concedes that the Kelly Minix incident was a battery and therefore involved the use of force. However, he argues that "it is not the sort of violent criminal activity that authorizes or warrants the death penalty." (AOB 183.) Evidence that appellant, unprovoked, followed Minix to her car, grabbed her, and forced his mouth onto her neck, causing a bruise, is clearly sufficient to constitute a battery. (Pen. Code, § 242 [a battery is any willful and unlawful use of force or violence upon the person of another].) Only a slight unprivileged touching is needed to satisfy the force requirement of a criminal battery. (See *People v. Ausbie* (2004) 20 Cal.Rptr.3d 371.) Appellant's actions constituted "criminal activity by the defendant which involved the use . . . of force or violence . . . ." (Pen. Code, § 190.3, factor (b).) The trial court was justified in finding that the Minix battery involved violence.

Contrary to appellant's assertion, nothing in the holding of *People v. Boyd* (1985) 38 Cal.3d 762, either expressly or implicitly requires that the prior violent activity in and of itself be sufficient to warrant death. In *Boyd*, the offense was a non-violent escape attempt involving the removal of a grating covering an air vent. (*People v. Boyd*, *supra*, 38 Cal.3d at p. 744.) Here, as found by the trial court, appellant forcibly grabbed Minix, without her consent, and despite her protests, and assaulted her with sufficient force to leave a bruise. While not alone sufficient to warrant imposition of the death penalty, this behavior clearly falls within the parameters of Penal Code section 190.3, subdivision (b). Furthermore, contrary to appellant's contention, because the evidence was properly introduced under factor (b), there was no violation of his right to a reliable penalty determination under

the Eighth and Fourteenth Amendments to the federal Constitution. (*People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1051-1054.)

2. Delores Thomas's testimony about domestic violence attack

Appellant contends that the trial court erred in overruling his objections to Delores's testimony that (1) she accused appellant of "fooling around" with her sister and a neighbor's daughter, and (2) appellant had called her son a "punk" and a "sissy." He asserts that the testimony was irrelevant under Penal Code section 190.3, factor (b). (AOB 184-185.) The trial court did not err.

Delores's statements accusing appellant of cheating and his disparaging comments to her son was set forth within the context of her admissible testimony about the domestic violence attack. "[W]hen the prosecution has evidence of conduct by the defendant that [is admissible under section 190.3, factor (b)], evidence of the surrounding circumstances is admissible to give context to the episode, even though the surrounding circumstances include other criminal activity that would not be admissible by itself. [Citation.]" (*People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1013-1014.) Thus, while the complained of statements may not have independently constituted admissible Penal Code section 190.3, factor (b) evidence, when considered within the context of Delores's description of appellant's violent attack, the comments were admissible. Furthermore, as the trial court ruled, Delores's statements concerning her accusations of appellant's infidelity was not admitted for the truth of the matter, but rather to show her state of mind in the moments leading up to appellant's attack.

Here, the trial court properly overruled appellant's objections to this evidence. And, as set forth above, because the evidence was properly introduced under factor (b), there was no violation of appellant's right to a reliable penalty determination under the Eighth and Fourteenth

Amendments to the federal Constitution. (*People v. Lewis and Oliver*, *supra,* 39 Cal.4th 970, 1051-1054.)

XV. THE TRIAL COURT PROPERLY ADMITTED VINCENT MCGOWAN'S STATEMENT IDENTIFYING APPELLANT AS THE MAN WHO SLASHED HIS THROAT

Two deputy sheriffs testified that Vincent McGowan told them that appellant slashed McGowan's throat when the two were inmates in the Los Angeles County jail. Appellant contends the testimony constituted inadmissible hearsay which (1) did not qualify under the spontaneous statement exception to the hearsay rule, and (2) was testimonial and barred by the constitutional right to confrontation as set forth in *Crawford v. Washington*, *supra*, 541. (AOB 187-196.) These contentions lack merit.

A. Factual Background

Deputy Lee Woods and Deputy Richard Calzada testified that Vincent McGowan told them appellant slashed his throat on July 4, 1985, while the two men were inmates in the Los Angeles County jail. (25 RT 7324; 7342.) Shortly before 8:00 a.m., Deputy Woods heard a commotion and asked for Deputy Calzada's assistance. (25 RT 7338.) Deputy Woods saw appellant holding a toothbrush handle and heard him yelling, "Crippin' for real." (25 RT 7324.) A few seconds later, when Deputy Calzada arrived, he saw that McGowan was "obviously distressed." (25 RT 7341.) McGowan's throat was slashed open from his adam's apple to his ear, and bleeding. (25 RT 7338-7339.) Deputy Calzada immediately asked McGowan who attacked him, and McGowan responded, "cell nineteen, Thomas." (25 RT 7342.) Deputy Calzada unlocked McGowan's cell and escorted him to the jail hospital clinic where he received fourteen stitches to close the wound. (25 RT 7342-7343.)

Defense counsel objected that Deputy Calzada's testimony about McGowan's statement identifying appellant as the attacker constituted

inadmissible hearsay. (25 RT 7339-7340.) The trial court overruled the objection, finding that the McGowan's statement was admissible under the spontaneous declaration exception to the hearsay rule. (25 RT 7340.)

B. Relevant Law

A witness's spontaneous statement made "under the stress of excitement" about an exciting event is admissible as an exception to the hearsay rule. (*People v. Raley* (1992) 2 Cal.4th 870, 892; Evid. Code, § 1240[17].) "A spontaneous statement is one made without deliberation or reflection. [Citation.]" (*People v. Raley*, *supra*, 2 Cal.4th at p. 892.) "The requirement is for a spontaneous declaration, not an instantaneous one." (*People v. Smith* (2005) 135 Cal.App.4th 914.) "'Neither lapse of time between the event and the declarations nor the fact that the declarations were elicited by questioning deprives the statements of spontaneity, if it nevertheless appears that they were made under the stress of excitement and while the reflective powers were still in abeyance.' [Citation.]" (*People v. Ledesma* (2006) 39 Cal.4th 641, 709.) The trial court's ruling is reviewed under the abuse of discretion standard. (*Id.* at p. 894.)

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[17]. Evidence Code section 1240 provides,

> Evidence of a statement is not made inadmissible by the hearsay rule if the statement:
>
> (a) Purports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and
>
> (b) Was made spontaneously while the declarant was under the stress of excitement caused by such perception.

In *Crawford v. Washington,* the United States Supreme Court held that the confrontation clause of the Sixth Amendment bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination" (*Crawford v. Washington*, *supra*, 541 U.S. at pp. 53-54.) *Crawford* did not provide a comprehensive definition of "'testimonial,'" but explained the term "applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." (*Id.* at p. 68.)

C. Legal Analysis

1. Spontaneous Statement

As the trial court properly ruled, McGowan's statement constituted a spontaneous statement under Evidence Code section 1240. Only three to four seconds after hearing a commotion, the deputies found McGowan with a bleeding, slashed throat; McGowan was "obviously distressed." (25 RT 7338, 7341.) Deputy Calzada immediately asked McGowan what happened, and he responded, that "cell nineteen, Thomas" had cut him. (25 RT 7341-7342.) It is reasonable to infer that McGowan was still "under the stress of excitement" from the attack when he responded to Deputy Calzada's question. (*People v. Raley*, *supra,* 2 Cal.4th at pp. 892-893.)

The mere fact that McGowan made the statement in response to the deputy's question did not render the statement nonspontaneous. (See *People v. Morrison* (2004) 34 Cal.4th 698, 719 [shooting victim's response to officer's question "who did it" was admissible]; see also *People v. Alvarez* (1996) 14 Cal.4th 155, 186 [replying to questions does not necessarily negate spontaneity]; *People v. Raley*, *supra*, 2 Cal.4th at pp. 892-893 [statements do not necessarily lose their spontaneity if a witness makes them during questioning or even after a lapse of time; critical

element is the mental state of the speaker]; *People v. Saracoglu* (2007) 152 Cal.App.4th 1584 [victim's extra-judicial statement to police officer at police station was admissible in prosecution for domestic violence as a spontaneous statement because no more than 30 minutes had elapsed between the exciting event and victim's statements to officer as she was crying, shaking, and fearful].) The crucial issue is the declarant's mental state. Here, as the trial court ruled, the evidence shows McGowan was visibly distressed when the deputies encountered him only seconds after his throat was slashed. His response to Deputy Calzada's routine, non-suggestive question does not bar application of the spontaneous declaration hearsay exception. Accordingly, the trial court did not abuse its discretion by admitting McGowan's statement identifying appellant as the attacker who slashed his throat.

2. Confrontation Clause

In this case, McGowan's statement was made for the purpose of obtaining assistance from the deputies during the course of an ongoing emergency. As such, contrary to appellant's assertion, the statement was nontestimonial with in the meaning of *Crawford v. Washington*.

In *Davis v. Washington* (2006) 547 U.S. 813, the court established a framework for determining when an unavailable witness's statements are testimonial. In that case, a 911 caller abruptly ended the call without speaking. When the 911 operator returned the call, the victim explained: "'He's here jumpin' on me again.'" (*Id.* at p. 817.) The victim named the defendant and described the assault. She also told the 911 operator that the defendant had "'just r[un] out the door'" and was leaving in a car with another person. When the victim started to speak again, the 911 operator told her to "'[s]top talking and answer my questions.'" (*Id.* at 818.) The victim complied and provided information about the defendant, including his birthday, and further described the circumstances of the assault. The

Supreme Court explained that the statements were nontestimonial because they: (1) pertained to ongoing events; (2) involved an emergency situation; (3) were elicited by the investigating officers to resolve an ongoing emergency situation; and (4) were given in an informal setting. (*Id.* at p. 827.)

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

(*Id.* at p. 822.)

In *People v. Cage* (2007) 40 Cal.4th 965, 984, this Court analyzed *Davis,* and set forth the following guidelines for determining whether a witness's out of court statement is testimonial:

> First, ... the confrontation clause is concerned solely with hearsay statements that are testimonial, in that they are out-of-court analogs, in purpose and form, of the testimony given by witnesses at trial. Second, though a statement need not be sworn under oath to be testimonial, it must have occurred under circumstances that imparted, to some degree, the formality and solemnity characteristic of testimony. [Fn. omitted.] Third, the statement must have been given and taken *primarily* for the *purpose* ascribed to testimony-to establish or prove some past fact for possible use in a criminal trial. Fourth, the primary purpose for which a statement was given and taken is to be determined 'objectively,' considering all the circumstances that might reasonably bear on the intent of the participants in the conversation. [Fn. omitted.] Fifth, sufficient formality and solemnity are present when, in a nonemergency situation, one responds to questioning by law enforcement officials,

> where deliberate falsehoods might be criminal offenses. Sixth, statements elicited by law enforcement officials are not testimonial if the primary purpose in giving and receiving them is to deal with a contemporaneous emergency, rather than to produce evidence about past events for possible use at a criminal trial.

(*Ibid.*, original italics.)

In this case, McGowan's statements to the deputies were nontestimonial. His primary reasons for speaking with the deputies was to relay the details of the emergency and gain assistance. He "was not acting as a witness; [he] was not testifying. . . . No 'witness' goes into court to proclaim an emergency and seek help." (*Davis v. Washington*, *supra,* 547 U.S. at p. 2277.) None of McGowan's statements identifying appellant as the attacker had the "formality and solemnity characteristic of testimony." (*People v. Cage, supra,* 40 Cal.4th at p. 984; see *People v. Brenn* (2007) 152 Cal.App.4th 166, 178 [preliminary questions asked at the scene of a crime shortly after it has occurred do not rise to the level of an interrogation and bear no resemblance to a formal or informal police inquiry that is required for a police interrogation as that term is used in *Crawford*].) As in *Davis*, Deputy Calzada's questions directed toward the identity of the assailant were necessary, "so that the . . . officers might know whether they would be encountering a violent felon." (*Davis v. Washington*, *supra,* 547 U.S. at p. 827.)

Here, Deputy Calzada encountered a visibly distraught man with a slashed throat that was actively bleeding. The deputy asked McGowan questions to resolve the present emergency; this was not an in-depth interview. Immediately after gaining the information about appellant's identity, Deputy Calzada escorted McGowan to the infirmary where he received fourteen stitches to his neck. (25 RT 7342-7343.) Clearly, "the primary purpose of the interrogation [was] to enable police assistance to

meet an ongoing emergency. . . . [not] to establish or prove past events potentially relevant to later criminal prosecution." (*Davis v. Washington, supra*, 547 U.S. at p. 822.) Deputy Calzada did "precisely what the officer *should* have done." (*Id.* at p. 830, emphasis in original.)

Therefore, because McGowan's statement identifying appellant as his attacker was primarily elicited to further non-investigatory purposes, the statement was nontestimonial, and it did not violate appellant's Sixth Amendment rights to admit them into evidence at trial.

XVI. THE TRIAL COURT PROPERLY ADMITTED GERALD FRANKS'S TESTIMONY; THERE WAS NO *MIRANDA* VIOLATION

Appellant contends the trial court prejudicially erred when it ruled that his statements to Gerald Franks were not obtained in violation of *Miranda v. Arizona, supra*, 384 U.S. 436. The trial court did not err as there was no interrogation. Even assuming there was an interrogation, any error was harmless.

A. Factual Background

Sergeant Gerald Franks testified, in a hearing outside the presence of the jury, about a conversation he had with appellant in May 1986. At that time, Franks worked "out of class" as a correctional counselor for the Department of Corrections, rather than as a correctional officer. (24 RT 7283.) In that capacity, Franks conducted an intake interview of Vincent McGowan when he first arrived at the Department of Corrections reception center after being transported from the local county jail. (24 RT 7284-7285.) One of the "critical case factors" examined during intake interviews was whether a recently received prisoner had any enemy concerns or gang affiliations. (24 RT 7286.) McGowan told Franks that he claimed no gang affiliation,

> [h]owever, [McGowan] did relate the following enemy information. On 7/4/85 McGowan was the

> victim of a physical assault while at Los Angeles County Jail by an inmate identified as Thomas Alex CDC 51180 who slashed McGowan's throat with a razor blade. This apparently occurred due to McGowan refusing to join a Crip faction.

(24 RT 7290.) Franks observed substantial, recent scaring on McGowan's throat. (*Ibid.*)

Thereafter, Franks requested that appellant come to his office so that Franks could gather information for a cumulative summary of McGowan's safety and custody needs. Appellant arrived in Franks's office unaccompanied by any correctional officer and without shackles or restraints. (24 7289.) Appellant "somewhat reluctantly verified" that he had slashed McGowan's throat -- while appellant did not directly admit slashing McGowan's throat, he also did not deny it. (24 RT 7290-7291.) Franks did not exert any pressure on appellant to answer questions, nor did he question appellant for the purpose of developing a prosecution against appellant. (24 RT 7289.) "[I]t was a casual interview, a one on one, initial processing just for the purpose of gathering information to make a later determination for the custody needs of [McGowan]." (24 RT 7299.)

Defense counsel objected to the proposed testimony, arguing that Franks should have advised appellant of his rights pursuant to *Miranda v. Arizona*, *supra*, 384 U.S. 436, prior to asking questions. (24 RT 7306.) The trial court overruled the objection, finding that there was no interrogation.

> Well, on Miranda clearly he was not interrogated for prosecutorial reasons. [Franks] was obviously trying to determine one thing . . . which seems to me totally reasonable as an in-take counselor when he talked to Mr. McGowan.
>
> Clearly he wasn't going to prosecute him. He was trying to find out if there was some kind of danger that would require special treatment for Mr.

McGowan and/or I don't recall him saying about Mr. Thomas.

And those settings and that situation I just simply don't think Miranda applies.

(24 RT 7306.)

B. Relevant Law

A person questioned by police after being "taken into custody or otherwise deprived of his freedom of action in any significant way" must first "be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." (*Miranda v. Arizona*, *supra*, 384 U.S. at p. 444.) Interrogation is defined as a question or comment by a police officer or agent that is reasonably likely to elicit an incriminating response. (*Rhode Island v. Innis* (1980) 446 U.S. 291, 300-301 [00 S.Ct. 1682, 64 L.Ed.2d 297]; *People v. Mayfield* (1997) 14 Cal.4th 668, 733.) It is the interrogation of an investigative nature that *Miranda* protects; that protection does not extend to routine booking inquiries or the obtaining of basic identifying data required for booking and arraignment. (*People v. Hall* (1988) 199 Cal.App.3d 914, 921.)

In reviewing alleged *Miranda v. Arizona* violations, the appellate court must accept the trial court's resolution of disputed facts and inferences as well as its evaluations of credibility if substantially supported. (*People v. Whitson* (1998) 17 Cal.4th 229, 248.) Thus, "[t]he trial court's ruling on a *Miranda* issue may not be set aside by us unless it is 'palpably erroneous.' A ruling palpably erroneous is one lacking support of substantial evidence." (*People v. Nitschmann* (1995) 35 Cal.App.4th 677, 683.)

C. Legal Analysis

Franks's questioning of appellant did not constitute an interrogation requiring *Miranda* advisements for two reasons. First, Franks was not acting as a police officer when he questioned appellant. He was working "out of class" as an intake counselor for the Department of Corrections. As such, Franks conducted the interview in his capacity as counselor, not a peace officer. On this ground alone, Franks's questions did not constitute interrogation under *Miranda*. (See *In re Eric J.* (1979) 25 Cal.3d 522, 527 [private citizen is not required to advise another individual of his rights before questioning him]; *In re Deborah C.* (1981) 30 Cal.3d 125, 131 [nongovernmental security employees have been regarded as private citizens unaffected by *Miranda*].) The fact that Franks was also a sworn peace officer does not change the analysis, because Franks was acting solely in his capacity as a counselor.

Second, Franks asked appellant if he had slashed McGowan's throat to ascertain if McGowan would face safety issues while in custody. Franks did not exert pressure on appellant to answer questions, nor were the questions posed for the purpose of developing a criminal prosecution against appellant. (24 RT 7289.) Rather, the questions were part of the routine initial processing procedures designed to determine McGowan's custody needs. (24 RT 7299.) As the trial court found, Franks "wasn't going to prosecute [appellant]. He was trying to find out if there was some kind of danger that would require special treatment for Mr. McGowan." (24 RT 7306.) There simply was no "interrogation of an investigative nature." (*People v. Hall*, *supra*, 199 Cal.App.3d at p. 921.)

Appellant contends the admission of his statement about slashing McGowan's throat was prejudicial. Appellant is incorrect. Any error in admitting his statement was harmless beyond a reasonable doubt. (*Arizona v. Fulminante*, *supra*, 499 U.S. at p. 310 [improper admission of a confession is subject to harmless error analysis]; *Chapman v. California*,

supra, 386 U.S. at p. 24.) Here, even absent appellant's statement "verifying" that he had attacked McGowan, there was overwhelming evidence supporting imposition of the death penalty. Even without Franks's testimony, the jury still would have heard Deputy Woods and Deputy Calzada's testimony that McGowan told them appellant slashed his throat on July 4, 1985, while the two men were inmates in the Los Angeles County jail. (25 RT 7324; 7342.) Furthermore, the jury also would have heard of appellant's numerous violent felony convictions and his other extensive acts of violence. Thus, beyond a reasonable doubt, there was no prejudicial error.

XVII. THE TRIAL COURT WAS NOT REQUIRED TO DELETE INAPPLICABLE MITIGATING FACTORS

Appellant claims that the trial court should have deleted the inapplicable factors from CALJIC 8.85. (AOB 208-214.) This Court has previously rejected this claim, and appellant provides no persuasive reason to reconsider the issue. (*People v. Perry* (2006) 38 Cal.4th 302, 319; *People v. Moon* (2005) 37 Cal.4th 1, 42; *People v. Davenport*, *supra*, 11 Cal.4th at p. 1230; *People v. Duncan* (1991) 53 Cal.3d 955, 979.)

XVIII. CALIFORNIA'S DEATH PENALTY STATUTE IS CONSTITUTIONAL

Appellant "raises a number of . . . constitutional objections to the death penalty statute identical to those [the Court has] previously rejected." (*People v. Welch*, *supra*, 20 Cal.4th at p. 771.) To the extent appellant alleges statutory errors not objected to at trial, the issue is waived on appeal. (*People v. Saunders* (1993) 5 Cal.4th 580, 589.) Similarly, any complaints relating to instructions which were not erroneous but only incomplete are waived unless appellant requested clarifying or amplifying language. (*People v. Lewis*, *supra*, 25 Cal.4th at p. 666.) Like this Court, respondent finds it unnecessary "to rehearse or revisit" the numerous claims

previously and regularly rejected by this Court. (*People v. Ayala* (2000) 24 Cal.4th 243, 290.) For the most part respondent simply identifies appellant's complaint and notes the Court's applicable opinions.

A. Penal Code Section 190.2 Is Not Impermissibly Broad

Appellant contends that Penal Code section 190.2 does not meaningfully narrow the pool of murderers eligible for the death penalty because the numerous "categories of special-circumstance murder . . . make[] almost every murderer eligible for death." (AOB 218.) This Court has rejected the identical claim in numerous opinions. (See, e.g., *People v. Elliot* (2005) 37 Cal.4th 453, 487; *People v. Michaels* (2002) 28 Cal.4th 486, 541; *People v. Ray* (1996) 13 Cal.4th 313, 356.) Appellant offers no principled reason to depart from those decisions.

B. Penal Code Section 190.3, Subdivision (a) Does Not Violate The Federal Constitution

Penal Code section 190.3, subdivision (a) allows the jury to consider the circumstances of the crime and special circumstances in determining the appropriate penalty. While acknowledging its facial validity (see *Tuilaepa v. California* (1994) 512 U.S. 967), appellant contends the provision "has been applied in . . . a wanton and freakish manner" resulting in the arbitrary and capricious imposition of death sentences. (AOB 219.) This Court has consistently rejected identical claims. (See, e.g., *People v. Elliot*, *supra*, 37 Cal.4th at p. 487; *People v. Mendoza*, *supra*, 24 Cal.4th at p. 192; *People v. Cain* (1995) 10 Cal.4th 1, 68.) It should do so again.

C. California's Death Penalty Statute Contains Sufficient Safeguards To Protect From Arbitrary And Capricious Sentencing

Appellant alleges that a number of "safeguards" present in other death penalty statutes are missing from California's scheme and contends

that such factors are necessary to avoid arbitrary and capricious death sentences. (AOB 221-245.) His complaints are uniformly without merit.

1. Absence Of Reasonable Doubt Standard

Appellant argues the jury must be required to find beyond a reasonable doubt that aggravating factors are true and that aggravation outweighs mitigation. (AOB 223-234.) Although the Court has consistently rejected identical claims (see, e.g., *People v. Mendoza*, *supra*, 24 Cal.4th at p. 191; *People v. Sanchez* (1995) 12 Cal.4th 1, 80-81), appellant contends that *Apprendi v. New Jersey* (2000) 530 U.S. 466, *Ring v. Arizona* (2002) 536 U.S. 584, *Blakely v. Washington* (2004) 542 U.S. 246, and *Cunningham v. California* (2007) 549 U.S. 270, compel a different result. He is wrong.

Apprendi held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 490.) This Court expressly found *Apprendi* inapplicable to California's scheme in *People v. Ochoa*, *supra*, 26 Cal.4th at pp. 453-454. Once a jury convicts of first degree murder with a special circumstance "the defendant stands convicted of an offense whose maximum penalty is death." (*People v. Ochoa*, *supra*, 26 Cal.4th at p. 454.) Nothing in *Apprendi* "require[s] a jury to find beyond a reasonable doubt the applicability of a specific section 190.3 sentencing factor." (*Id.* at p. 453.) *Apprendi* has no application to California death penalty scheme, because a penalty phase verdict does not produce a sentence any greater than that already authorized by the jury's conviction with a finding beyond a reasonable doubt of at least one special circumstance. In short, the penalty verdict simply represents a choice between two previously-authorized sentences (death and life without parole), but the sentencing range is not, and cannot be, expanded at the

penalty phase. (See *Jones v. United States* (1998) 526 U.S. 227, 249 [recognition that the finding of aggravating factors in capital sentencing involves a choice between a greater and lesser penalty, not a process of raising the ceiling of the available sentencing range].)

Ochoa was based in part on *Walton v. Arizona* (1990) 497 U.S. 639, a decision expressly overruled by the Supreme Court in *Ring v. Arizona, supra*, 536 U.S. at p. 584. *Ring* is inapposite, however, for the same reasons *Apprendi* is inapplicable and does not require reconsideration of the holding in *Ochoa*.

Ring invalidated Arizona's death capital sentencing scheme because death could be imposed only after the judge, sitting as sentencer without a jury, found at least one specifically enumerated aggravating factor to be true. Because death was not the maximum penalty that could be imposed based solely on the jury's conviction of first degree murder, the aggravating factors in Arizona "operate as the 'functional equivalent of an element of a greater offense.'" (*Ring v. Arizona, supra*, 122 S.Ct. at p. 2443.) However, as explained in *Ochoa* and other decisions of this Court upon which it was based, the aggravating factors considered by the jury at sentencing do not increase the maximum potential sentence but merely provide a basis for determining which of the authorized sentences should be imposed. Appellant's effort to bring California's capital statute within the ambit of *Apprendi* and *Ring* is unavailing.

2. Aggravating Factors Beyond A Reasonable Doubt

Appellant contends that the Federal Constitution requires that the trial court instruct the jury that they could impose a penalty of death only if (1) they were persuaded beyond a reasonable doubt that aggravating factors existed, and (2) that the aggravating circumstances outweighed the mitigating beyond a reasonable doubt. (AOB 234-238.) This Court has held that the jury need not find aggravating factors proven beyond a

reasonable doubt, or find beyond a reasonable doubt that aggravating factors outweigh mitigating factors and that death is the appropriate penalty. (*People v. Cox* (1991) 53 Cal.3d 618, 692; *People v. Marshall* (1990) 50 Cal.3d 907, 934.) Appellant provides no reason to revisit those decisions.

3. Written Jury Findings

Appellant argues the jury should be required to return written findings identifying the aggravating factors supporting the death verdict. (AOB 238-241.) As he concedes, the Court has rejected identical arguments. (See, e.g., *People v. Rogers*, *supra*, 39 Cal.4th at p. 893; *People v. Lucero* (2000) 23 Cal.4th 692, 741; *People v. Osband*, *supra*, 13 Cal.4th at p. 710.) Appellant provides no basis for rejecting those cases.

4. Inter-case Proportionality

Appellant next asserts that this Court's refusal to conduct inter-case proportionality review renders California's death penalty system cruel and unusual. (AOB 241-243.) Both the United States Supreme Court (*Pulley v. Harris* (1984) 465 U.S. 37, 50-53) and this Court (see, e.g., *People v. Moon*, *supra*, 37 Cal.4th at p. 48; *People v. Millwee,* (1988) 18 Cal.4th 96, 168; *People v. Stanley*, *supra*, 10 Cal.4th at p. 842) have rejected identical claims. This Court should continue to do so.

5. "Restrictive" Adjectives In The List Of Mitigating Factors

Appellant complains that the presence, in Penal Code section 190.3, of certain "restrictive" adjectives, such as "extreme" (modifying "mental or emotional disturbance" in subdivision (d)) and "substantial" (subdivision (g)) "acted as barriers to the consideration of mitigation." (AOB 243-244.) The claim is without merit. The use of "extreme" to modify mental condition, for example, does not preclude the consideration of a lesser

condition; factor (k), the catchall provision, permits consideration of such conditions. (*People v. Elliot*, *supra*, 37 Cal.4th at p. 488; *People v. Lewis*, *supra*, 26 Cal.4th at p. 395.)

6. Failure To Instruct That Mitigating Factors Were Relevant Only As Mitigators

Appellant complains that the jury should have been instructed that certain sentencing factors can only be mitigating. (AOB 244-245.) Again, this Court has rejected identical claims and should continue to do so. (See, e.g., *People v. Moon*, *supra*, 37 Cal.4th at p. 42; *People v. Morrison*, *supra*, 34 Cal.4th at p. 730; *People v. Kipp*, *supra*, 18 Cal.4th at pp. 380-381.)

D. California's Death Penalty Statute Does Not Violate Equal Protection

Appellant claims that California's death penalty statute violates equal protection because certain procedures utilized in non-capital cases do not apply to death cases. (AOB245-248.) This Court has explicitly rejected such arguments. (See, e.g., *People v. Cox*, *supra*, 53 Cal.3d at p. 691; *People v. Allen* (1986) 42 Cal.3d 1222, 1286-1287.) Appellant's complaint should be rejected.

E. The Use Of The Death Penalty Does Not Violate International Law

Appellant contends "that the very broad death scheme in California and death's use as regular punishment violate both international law and the Eighth and Fourteenth Amendments" to the federal Constitution. (AOB 251.) This is a variation on the familiar argument that California's death penalty law does not sufficiently narrow the class of death-eligible defendants to limit that class to the most serious offenders, a contention [this Court has] rejected in numerous decisions. (See *People v. Jones*, [2003] 30 Cal.4th [1084,] 1127-1128; *People v. Wader* (1993) 5 Cal.4th 610, 669.)" (*People v. Perry*, *supra*, 38 Cal.4th at p. 322.)

XIX. THE TRIAL COURT PROPERLY ADMITTED VCTIM IMPACT TESTIMONY INTO EVIDENCE

Appellant contends that the trial court improperly allowed the prosecutor to offer the testimony of one of Montoya's high school friends as victim impact evidence during the penalty phase of the trial. (AOB 252-257.) This claim lacks merit because the victim impact evidence admitted in this case was well within the statutory and constitutional guidelines for such evidence.

A. Factual Background

Defense counsel objected to the prosecutor's plan to offer the testimony of Darcie Purcell, one of Montoya's high school friends, as victim impact evidence. (23 RT 6748.) The trial court overruled the objection, finding that Purcell's testimony would be "within the bounds of victim impact evidence as part of the circumstances of the case. Certainly in this case where it happened at school at her age graduating, et cetera." (23 RT 6879.)

B. Relevant Law

Prior to 1991, evidence of a murders impact on a victim and the victim's family and friends was not admissible in the penalty phase of a capital trial. (*Booth v. Maryland* (1987) 482 U.S. 496, 501-502.) However, the United States Supreme Court reversed itself in *Payne v. Tennessee* (1991) 501 U.S. 808, deciding that "[v]ictim impact evidence is simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question" (*id.* at p. 825) and was thus admissible evidence. "[U]nder California law, a court may permit victim-impact evidence and argument in appropriate cases at the penalty phase of a capital trial to show the circumstances of the crime." (*People v.*

Navarette (2003) 30 Cal.4th 458, 515; *People v. Stanley* (1995) 10 Cal.4th 764, 832.)

C. Legal Analysis

Appellant contends that (1) victim impact testimony should be limited to the impact of the murder on only those family members who were personally present at the scene during or immediately after the murder; (2) victim impact testimony should concern only those circumstances known or reasonably foreseeable to the defendant at the time of the murder; and (3) if section Penal Code section 190.3, factor (a) ("circumstances of the crime") is interpreted to include a broad array of victim impact evidence, it is unconstitutionally vague. (AOB 253-256.) Each of appellant's contentions has already been rejected by this Court in *People v. Pollock* (2004) 32 Cal.4th 1153.

> . . . The purpose of victim impact evidence is to demonstrate the immediate harm caused by the defendant's criminal conduct. This harm is not limited to the effect of victims' deaths on the members of their immediate family; it extends also to the suffering and loss inflicted on close personal friends. [Citations.] Defendant also contends that only persons who were present at the murder scene during or immediately after the killing can provide victim impact testimony, that such testimony can describe only circumstances known or reasonably foreseeable to the defendant at the time of the crime, and that victim impact testimony should be limited to a single witness. Defendant is mistaken. We have approved victim impact testimony from multiple witnesses who were not present at the murder scene and who described circumstances and victim characteristics unknown to the defendant. (See, e.g., *People v. Boyette* [(2002) 29 Cal.4th 381,] 440-441, 443-445.) Finally, "we reject defendant's argument that, if section 190.3, factor (a) ('circumstances of the crime') is interpreted to include a broad array of victim impact evidence, it is unconstitutionally

> vague." (*Boyette,* at p. 445, fn. 12, 127 Cal.Rptr.2d 544, 58 P.3d 391.)

(*Id.* at p. 1183.) Appellant offers no compelling reason to reconsider this Court's ruling. Accordingly, this claim should be rejected.

XX. THE DEATH PENALTY DOES NOT CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT

Appellant contends that his death sentence violates the federal constitutional ban on cruel and unusual punishment under the Eighth Amendment. (AOB 258.) This Court has rejected appellant's contention that California's use of the death penalty constitutes cruel and unusual punishment in violation of the Eighth Amendment to the federal Constitution. (*People v. Fairbank* (1997) 16 Cal.4th 1223, 1255; *People v. Samayoa* (1997) 15 Cal.4th 795, 864-865.) Appellant does not provide sufficient reasoning to revisit the issue here, and thus, his claims should be rejected.

XXI. THERE IS NO CUMULATIVE ERROR

Appellant contends that the penalty phase errors were cumulatively prejudicial and that the "several" errors deprived appellant of his opportunity to defend himself in violation of due process and the Eighth Amendment. (AOB 259-260.) As set forth above, there were no errors in the penalty phase. Thus, there is nothing to "accumulate," and there was no violation of appellant's constitutional rights. (See *People v. Sandoval, supra*, 4 Cal.4th at p. 198.)

CONCLUSION

Accordingly, respondent respectfully requests that this Court affirm the judgment.

Dated: February 26, 2009

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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 41,325 words.

Dated: February 26, 2009

EDMUND G. BROWN JR.
Attorney General of California

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Alex Dale Thomas**
No.: **S093456**

I declare:

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

On February 27, 2009, I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on February 27, 2009, at San Francisco, California.

Tan Nguyen
Declarant

Tan S. Nguyen
Signature

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